FILED

OCT 03 2008

CLERK

AO91 (Rev. 12/03) Criminal Complaint

UNITED STATES DISTRICT COURT

DISTRICT OF South Dakota

UNITED STATES OF AMERICA
V.

John Graham a/k/a John Boy Patton

(Name and Address of Defendant)

CRIMINAL COMPLAINT

Case Number: 08-MJ-26

I, the undersigned complainant state that the following is true and correct to the best of my knowledge and belief. On or about 12/12/1975 (Date) in Jackson and/or Washabaugh County, in the _____ District of South Dakota defendant(s) did,

(Track Statutory Language of Offense)

See Attachment A

in violation of Title 18 United States Code, Section(s) U.S.C. 1111, 1153, 1152 and 2.

I further state that I am a(n) FBI Special Agent (Official Title) and that this complaint is based on the following facts:

Continued on the attached sheet and made a part of this complaint: ☑ Yes ☐ No

Michael L. McRoden

Signature of Complainant

Michael L. McRoden, FBI Special Agent

Printed Name of Complainant

Sworn to before me and signed in my presence,

10-3-08

Date

at Rapid City, SD

City State

_____

Name of Judge Title of Judge

Richard H. Battey USDJ.

Signature of Judge

Attachment A

COUNT I

On or about the 12th day of December, 1975, near Wanblee, and elsewhere, in Indian Country, in the District of South Dakota, the defendant, John Graham, a/k/a John Boy Patton, an Indian, willfully, deliberately, and maliciously, with premeditation and malice aforethought, did unlawfully kill and aid and abet the unlawful killing of Annie Mae Aquash, a/k/a Annie Mae Pictou, an Indian or other person, by shooting her with a firearm, in violation of 18 U.S.C. §§ 1111, 1153, and 2.

COUNT II

On or about the 12th day of December, 1975, near Wanblee, and elsewhere, in Indian Country, in the District of South Dakota, the defendant, John Graham, a/k/a John Boy Patton, willfully, deliberately, and maliciously, with premeditation and malice aforethought, did unlawfully kill and aid and abet in the unlawful killing of Annie Mae Aquash, a/k/a Annie Mae Pictou, an Indian, by shooting her with a firearm, in violation of 18 U.S.C. §§ 1111, 1152, and 2.

COUNT III

On or about the 12th day of December, 1975, near Wanblee, and elsewhere, in Indian Country, in the District of South Dakota, the defendant, John Graham, a/k/a John Boy Patton, did unlawfully kill and aid and abet an Indian, to-wit: Fritz Arlo Looking Cloud, Theda Rose Clarke, and Richard Marshall, in the unlawful killing of Annie Mae Aquash, a/k/a Annie Mae Pictou, an Indian or other person, by shooting her with a firearm, in violation of 18 U.S.C. §§ 1111, 1153 and 2.

AFFIDAVIT

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF PENNINGTON)

I, Michael L. McRoden, having been sworn, do hereby state and depose as follows:

1. That I am a Special Agent with the Federal Bureau of Investigation (FBI) and have been so employed for the past 21 years. I am assigned to the Rapid City, South Dakota, FBI office. My duties include, but are not limited to, the investigation of homicides occurring on the Pine Ridge Indian Reservation. I am a graduate of the FBI Academy and since then have attended numerous training sessions regarding the techniques used in investigating homicides.

2. That as part of my duties I have reviewed the case file which includes, among other things, witness statements and physical evidence regarding the murder of Anna Mae Aquash on or about December 12, 1975. This includes, but is not limited to, the following statements:

a. Arlo Looking Cloud's statement to Bureau of Indian Affairs Investigator Robert Ecoffey on March 27, 2003, and to others, wherein he states that in Denver, at Troy Lynn Yellow Wood's residence, Annie Mae Aquash, a/k/a Annie Mae Pictou, a/k/a Anna Mae Aquash, a/k/a Anna Mae Pictou, was abducted. Her hands were tied by Defendant John Graham, a/k/a John Boy Patton, and she was removed against her will and taken to Rapid City by Arlo Looking Cloud, John Graham and Theda Clarke. That Aquash continued to be held against her will by Graham and other aiders and abettors in Rapid City and ultimately taken against her will to the Rosebud and Pine Ridge Indian Reservations. That Graham ultimately killed Aquash by shooting her

in the back of the head as she prayed. Her body was found on February 24, 1976.

b. Defendant Graham's interview with cooperating witness on February 11, 2001, wherein Graham admits presence with Aquash and other aiders and abettors at the time and locations including Yellow Wood's in Denver, Bills Means' on Rosebud Indian Reservation and Pine Ridge;

c. Defendant Graham's interview by Anna Maria Tremonti of November 8, 2002, wherein Graham admitted driving Aquash from Denver to Pine Ridge during the time in question;

d. Frank Dillon's interview by Detective Abe Alonzo on May 20, 1998, wherein Dillon states that Graham admitted to him that Graham raped and shot Aquash;

e. Defendant Graham' further statements to cooperating witness on February 11, 2001, and to Investigator Ecoffey on April 21, 1994, wherein Graham admitted making statements to Al Gates regarding Graham's involvement with the death of Aquash;

f. Theda Clarke's statements to another cooperating witness of July 25, 2000, wherein in the context of discussing Aquash as an informant Theda made the following statement: "Yeah, that's why we did it and it wasn't ever going to happen again.";

g. Richard Marshall's statements to cooperating witness wherein the context of discussing the murder weapon and a note requesting to get ride of this "baggage," he confirmed: "Back in the day, when you was asked to do

something, somebody asked you for something, you didn't ask too many questions.";

h. That numerous witnesses, including Looking Cloud and Clarke, have confirmed that Aquash was murdered based upon the belief that she was a government informant.

3. That Defendant Graham has publicly stated his status as a Southern Tutchone Indian and his actions include affiliation with and acceptance by, among others, the Oglala Sioux Tribe which include practicing both spiritually and ceremonially with Indian medicine men and their assistants, participating in sun dance rituals, and is otherwise a recognized Indian. To the extent it is determined that Graham is not an Indian, the evidence in this case demonstrates that Graham aided and abetted, among other Indians, Looking Cloud, Clarke and Marshall, in the unlawful premediated killing of Aquash.

4. Furthermore, Aquash is a member of the Mi'kmaq tribe and her actions include affiliation with and acceptance by, among others, the Oglala Sioux Tribe which include practicing both spiritually and ceremonially with Indian medicine men and their assistants, participating in sun dance rituals and is otherwise a recognized Indian.

5. That based upon among other matters, the belief and accusations that Aquash was an informant, Graham and other aiders and abettors willfully, deliberately, and maliciously, with premeditation and malice aforethought, unlawfully killed Aquash.

6. That on or about February 24, 1976, Aquash's body was found by Roger Amiotte on his ranch on Indian trust land located within the exterior boundaries of the Pine Ridge Indian Reservation. This location has been reaffirmed by Looking Cloud as to where Graham shot Aquash in the back of the head while she was praying.

Dated: 10-3-08

MICHAEL L. MCRODEN, Special Agent
Federal Bureau of Investigation

SUBSCRIBED and SWORN to before me this 1st day of October, 2008.

District Judge

ORDER

Based on the foregoing, it is hereby found that probable cause exists for the issuance of a warrant for the arrest of the above-named offenders, and it is hereby

ORDERED, that such warrants be issued.

Dated this 30 day of October, 2008.

District Judge

FILED
AUG 20 2008
CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

VINE RICHARD MARSHALL a/k/a
RICHARD VINE MARSHALL a/k/a
DICK MARSHALL,

Defendant.

CR 08-50079

INDICTMENT

FIRST DEGREE MURDER

(18 U.S.C. §§ 1111, 1153 and 2)

The Grand Jury charges:

On or about the 12th day of December, 1975, near Wanblee and in Allen, in Indian Country, in the District of South Dakota, the defendant, Vine Richard Marshall, a/k/a Richard Vine Marshall, a/k/a Dick Marshall, an Indian, willfully, deliberately, maliciously and with premeditation and malice aforethought, did aid and abet in the unlawful killing of Annie Mae Aquash, a/k/a Annie Mae Pictou, wherein she was shot with a firearm, in violation of 18 U.S.C. §§ 1111, 1153 and 2.

A TRUE BILL:

FOREMAN

MARTY J. JACKLEY
UNITED STATES ATTORNEY

By:

FILED
DEC 20 2008
CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

VINE RICHARD MARSHALL a/k/a
RICHARD VINE MARSHALL a/k/a
DICK MARSHALL,

Defendant.

CR 08-50079

MOTION TO SEAL CASE

Comes now the United States of America, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and pursuant to Federal Rule of Criminal Procedure 6(e)(4), respectfully prays the Court to issue an order sealing the case in the above-entitled matter, and as grounds therefor states as follows:

Federal Rule of Criminal Procedure 6(e)(4) provides in pertinent part: "The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial."

The Eighth Circuit Court of Appeals has confirmed that "[a] magistrate to whom an indictment is timely returned may direct that it be sealed." *United States v. Lakin*, 875 F.2d 168, 170 (8th Cir. 1989). In *Lakin*, the Court cites with approval a series of cases holding that "the magistrate may grant the government's motion to seal an indictment for any legitimate prosecutorial need." *Id.* (Emphasis added.)

Chief among the reasons deemed sufficient is the necessity of taking the defendant into custody. *United States v. Richard*, 943 F.2d 115, 119 (1st Cir. 1991); *United States v. Srulowitz*, 819

F.2d 37, 40 (2d Cir. 1987). *Accord, Lakin*, 875 F.2d at 170 (holding that "reasons other than taking the defendant into custody may support the sealing of an indictment.") (Citations omitted).

Other grounds found sufficient in various circuits include:

1. The need for time to gather additional evidence. *Lakin*, 875 F.2d at 170;

2. Concern for pretrial publicity before all the defendants are notified. *United States v. Sharpe*, 995 F.2d 49, 52 (5th Cir. 1993); *Richard*, 943 F.2d at 119;

3. To facilitate the cooperation of co-conspirators and to preclude the disclosure of their identities, protecting them from undue influence. *United States v. Ramey*, 791 F.2d 317, 318 (4th Cir. 1986);

4. To permit the filing of additional charges. *United States v. Edwards*, 777 F.2d 644, 648 (11th Cir. 1985); and

5. To accommodate counsel for a defendant. *Sharpe*, 995 F.2d at 52 (in conjunction with other grounds).

In this matter, the United States submits that the following factors justify sealing the case pending the arrest of the defendant or further order of the Court:

1. The District Court for the District of South Dakota utilizes the PACER electronic filing system.

2. When PACER was first employed in this district, only counsel of record in a criminal proceeding could access the filings in that case through the PACER system.

3. Recently, the District Court Clerk changed the system to allow any person with PACER authority to access filings in a criminal case.

These facts go directly to the concern for pretrial publicity prior to the defendant being notified. Pretrial publicity of indictments creates a real risk of the flight of defendants prior to arrest. More importantly, the safety of the agents involved in serving arrest warrants on defendants is severely compromised when defendants are made aware of the indictments prior to arrest.

Due to the seriousness of the crime, there is concern in protecting the safety of any witnesses who have or who may provide information regarding the circumstances surrounding the murder of the victim.

WHEREFORE, the United States prays that this Court seal the case until the defendant is brought before the court for an initial appearance in this matter, and that it further seal this Motion and the Order to seal.

Dated this 20th day of August, 2008.

MARTY J. JACKLEY
United States Attorney

ROBERT A. MANDEL
Assistant United States Attorney
515 9th Street #201
Rapid City, SD 57701
(605)342-7822

Criminal Initial Appearance/Arraignment Form

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA - WESTERN DIVISION

JUDGE -VERONICA L. DUFFY — TAPE RECORDED
Date - October 3, 2008 — CR. 08-mj-26

United States of America — Marty Jackley
For Government

vs.

John Graham a/k/a John Boy Patton — John Murphy
For Defendant

Age: Education:

MINUTES

(X) **INITIAL APPEARANCE** on
- (X) Complaint -
  Mr. Murphy makes statement as to preliminary hearing.
  Mr. Jackley makes statement as to preliminary hearing.
  Court sets a preliminary hearing for 10/17/2008 at 9 a.m.
- () Indictment
- () Information
- () Superseding Indictment or Information
- () Petition to Revoke Supervised Release/Probation

(X) Defendant Advised of Rights
(X) Appointment of Counsel John Murphy
() **ARRAIGNMENT**
- () Not Guilty to
- () Guilty to

() **JUVENILE INITIAL APPEARANCE/ARRAIGNMENT**
- () Denial to
- () Admission to

Maximum Penalty:

() **BOND**
() **CUSTODY**

(X) **DETENTION HEARING**
Mr. Jackley moves for detention of the defendant.
Mr. Murphy moves for release of the defendant.
Court will set an evidentiary hearing on 10/10/2008 at 9 a.m.
Court will issue a temporary detention order until the evidentiary hearing is held as to defendant's release.

() **TRIAL**

() **JUDGMENT**

() **Next Hearing Date**

Time 2:13 p.m. to 2:28 p.m. — Courtroom Deputy: BH

FILED
AUG 20 2008
CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

VINE RICHARD MARSHALL a/k/a
RICHARD VINE MARSHALL a/k/a
DICK MARSHALL,

Defendant.

CR 08-50079

ORDER SEALING CASE

Upon motion of the United States and good cause having been shown, it is hereby

ORDERED, pursuant to Federal Rule of Criminal Procedure 6(e)(4), that the case in the above-entitled matter be sealed until such time as the defendant charged therein is brought before this or any other court of competent jurisdiction for initial appearance upon said Indictment, or until it is otherwise ordered unsealed.

IT IS FURTHER ORDERED that this Order and the United States' Motion to Seal are sealed until the case is unsealed by operation of the defendant's initial appearance or otherwise ordered unsealed.

Dated this 20th day of August, 2008.

BY THE COURT:

Veronica L. Duffy

VERONICA L. DUFFY
United States Magistrate Judge

FILED
OCT 03 2008
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN GRAHAM, a/k/a JOHN BOY PATTON, Defendant.	)	CR. 08-MJ-26 ORDER FOR TEMPORARY DETENTION

This matter came before the court for an initial appearance on a complaint in the above matter on Friday, October 3, 2008. The defendant, John Graham, appeared in person and by his counsel, John Murphy. The United States appeared by United States Attorney Marty Jackley and Assistant United States Attorney Robert Mandel.

In accordance with the Bail Reform Act, 18 U.S.C. §3142(f), Mr. Graham moved for a five-day continuance of the detention hearing in this case. Upon a showing of good cause, it is hereby ORDERED that Mr. Graham shall be detained until his detention hearing, which is scheduled for October 10, 2008, at 9:00 a.m.

Dated October 3, 2008.

BY THE COURT:

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

CJA 20 APPOINTMENT OF AND AUTHORITY TO PAY COURT APPOINTED COUNSEL

FILED
OCT 06 2008
CLERK

1. CIR./DIST./DIV. CODE	2. PERSON REPRESENTED	VOUCHER NUMBER
SDX	Graham, John	

3. MAG. DKT./DEF. NUMBER	4. DIST. DKT./DEF. NUMBER	5. APPEALS DKT./DEF. NUMBER	6. OTHER DKT. NUMBER
5:08-000026-001			

7. IN CASE/MATTER OF (Case Name)	8. PAYMENT CATEGORY	9. TYPE PERSON REPRESENTED	10. REPRESENTATION TYPE (See Instructions)
U.S. v. Graham	Felony	Adult Defendant	Criminal Case

11. OFFENSE(S) CHARGED (Cite U.S. Code, Title & Section) If more than one offense, list (up to five) major offenses charged, according to severity of offense.
1) 18 1111.F -- MURDER, FIRST DEGREE

12. ATTORNEY'S NAME (First Name, M.I., Last Name, including any suffix) AND MAILING ADDRESS
MURPHY, JOHN R.
328 E. New York Street
Suite 1
RAPID CITY SD 57701

Telephone Number: (605) 343-2909

14. NAME AND MAILING ADDRESS OF LAW FIRM (only provide per instructions)
Murphy Law Office, PC
328 E. New York Street
Suite 1
Rapid City SD 57701

13. COURT ORDER
☒ O Appointing Counsel ☐ C Co-Counsel
☐ F Subs For Federal Defender ☐ R Subs For Retained Attorney
☐ P Subs For Panel Attorney ☐ Y Standby Counsel
Prior Attorney's Name: _____
Appointment Date: _____
☐ Because the above-named person represented has testified under oath or has otherwise satisfied this court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney whose name appears in Item 12 is appointed to represent this person in this case, or
☐ Other (See Instructions)

Signature of Presiding Judicial Officer or By Order of the Court
Date of Order: 10/03/2008
Nunc Pro Tunc Date: 10-6-08

Repayment or partial repayment ordered from the person represented for this service at time of appointment. ☐ YES ☐ NO

CLAIM FOR SERVICES AND EXPENSES				FOR COURT USE ONLY		
CATEGORIES (Attach itemization of services with dates)	HOURS CLAIMED	TOTAL AMOUNT CLAIMED	MATH/TECH ADJUSTED HOURS	MATH/TECH ADJUSTED AMOUNT	ADDITIONAL REVIEW	
15. In Court	a. Arraignment and/or Plea					
	b. Bail and Detention Hearings					
	c. Motion Hearings					
	d. Trial					
	e. Sentencing Hearings					
	f. Revocation Hearings					
	g. Appeals Court					
	h. Other (Specify on additional sheets)					
	(Rate per hour = $) TOTALS:					
16. Out of Court	a. Interviews and Conferences					
	b. Obtaining and reviewing records					
	c. Legal research and brief writing					
	d. Travel time					
	e. Investigative and Other work (Specify on additional sheets)					
	(Rate per hour = $) TOTALS:					
17.	Travel Expenses (lodging, parking, meals, mileage, etc.)					
18.	Other Expenses (other than expert, transcripts, etc.)					
	GRAND TOTALS (CLAIMED AND ADJUSTED):					

19. CERTIFICATION OF ATTORNEY/PAYEE FOR THE PERIOD OF SERVICE
FROM _____ TO _____

20. APPOINTMENT TERMINATION DATE IF OTHER THAN CASE COMPLETION

21. CASE DISPOSITION

22. CLAIM STATUS ☐ Final Payment ☐ Interim Payment Number _____ ☐ Supplemental Payment
Have you previously applied to the court for compensation and/or remimbursement for this case? ☐ YES ☐ NO If yes, were you paid? ☐ YES ☐ NO
Other than from the court, have you, or to your knowledge has anyone else, received payment (compensation or anything or value) from any other source in connection with this representation? ☐ YES ☐ NO If yes, give details on additional sheets.
I swear or affirm the truth or correctness of the above statements.

Signature of Attorney: _____ Date: _____

APPROVED FOR PAYMENT -- COURT USE ONLY

23. IN COURT COMP.	24. OUT OF COURT COMP.	25. TRAVEL EXPENSES	26. OTHER EXPENSES	27. TOTAL AMT. APPR / CERT
28. SIGNATURE OF THE PRESIDING JUDICIAL OFFICER			DATE	28a. JUDGE / MAG. JUDGE CODE
29. IN COURT COMP.	30. OUT OF COURT COMP.	31. TRAVEL EXPENSES	32. OTHER EXPENSES	33. TOTAL AMT. APPROVED
34. SIGNATURE OF CHIEF JUDGE, COURT OF APPEALS (OR DELEGATE) Payment approved in excess of the statutory threshold amount.			DATE	34a. JUDGE CODE

CJA 21 AUTHORIZATION AND VOUCHER FOR EXPERT AND OTHER SERVICES (Rev. 1/06)

1. CIR./DIST./ DIV. CODE	2. PERSON REPRESENTED	VOUCHER NUMBER
SDX	Graham, John J.	

3. MAG. DKT./DEF. NUMBER	4. DIST. DKT./DEF. NUMBER	5. APPEALS DKT./DEF. NUMBER	6. OTHER DKT. NUMBER
5:08-000026-001			

7. IN CASE/MATTER OF *(Case Name)*	8. PAYMENT CATEGORY	9. TYPE PERSON REPRESENTED	10. REPRESENTATION TYPE *(See Instructions)*
U.S. v. Graham	☑ Felony ☐ Misdemeanor ☐ Appeal ☐ Petty Offense ☐ Other	☑ Adult Defendant ☐ Juvenile Defendant ☐ Other ☐ Appellant ☐ Appellee	Criminal Case

11. OFFENSE(S) CHARGED (Cite U.S. Code, Title & Section) *If more than one offense, list (up to five) major offenses charged, according to severity of offense.*
1) 18 1111.F -- MURDER, FIRST DEGREE

REQUEST AND AUTHORIZATION FOR EXPERT SERVICES

12. ATTORNEY'S STATEMENT

As the attorney for the person represented, who is named above, I hereby affirm that the services requested are necessary for adequate representation. I hereby request:

☑ Authorization to obtain the service. Estimated Compensation and Expenses: $ 1,600.00 OR

☐ Approval of services already obtained to be paid for by the United States pursuant to the Criminal Justice Act. *(Note: Prior authorization should be obtained for services in excess of $500, excluding expenses)*

Signature of Attorney _____ Date _____

☑ Panel Attorney ☐ Retained Attorney ☐ Pro-Se ☐ Legal Organization

ATTORNEY'S NAME *(First Name, M.I., Last Name, including any suffix)*, AND MAILING ADDRESS

John R. Murphy,
328 E. New York Street, Suite 1, Rapid City, SD 57701

Telephone Number: (605) 343-2909

13. DESCRIPTION OF AND JUSTIFICATION FOR SERVICES *(See Instructions)*

To Provide an Adequate Defense

15. COURT ORDER

Financial eligibility of the person represented having been established to the Court's satisfaction, the authorization requested in Item 12 is hereby granted.

Signature of Presiding Judge or By Order of the Court

Date of Order _____ Nunc Pro Tunc Date _____

Repayment or partial repayment ordered from the person represented for this service at time of authorization.

☐ YES ☑ NO

14. TYPE OF SERVICE PROVIDER

01 ☑ Investigator	15 ☐ Other Medical		
02 ☐ Interpreter/Translator	16 ☐ Voice/Audio Analyst		
03 ☐ Psychologist	17 ☐ Hair/Fiber Expert		
04 ☐ Psychiatrist	18 ☐ Computer (Hardware/ Software/Systems)		
05 ☐ Polygraph			
06 ☐ Documents Examiner	19 ☐ Paralegal Services		
07 ☐ Fingerprint Analyst	20 ☐ Legal Analyst/Consultant		
08 ☐ Accountant	21 ☐ Jury Consultant		
09 ☐ CALR (Westlaw/Lexis, etc.)	22 ☐ Mitigation Specialist		
10 ☐ Chemist/Toxicologist	23 ☐ Duplication Services *(See Instructions)*		
11 ☐ Ballistics			
13 ☐ Weapons/Firearms/Explosive Expert	24 ☐ Other *(Specify)*		
14 ☐ Pathologist/Medical Examiner			

CLAIM FOR SERVICES AND EXPENSES

16. SERVICES AND EXPENSES *(Attach itemization of services with dates)*	AMOUNT CLAIMED	FOR COURT USE ONLY: MATH/TECHNICAL ADJUSTED AMOUNT	FOR COURT USE ONLY: ADDITIONAL REVIEW
a. Compensation			
b. Travel Expenses *(lodging, parking, meals, mileage, etc.)*			
c. Other Expenses			
GRAND TOTALS (CLAIMED AND ADJUSTED):	$0.00	$0.00	

17. PAYEE'S NAME AND MAILING ADDRESS

TIN: _____

Telephone Number: _____

CLAIMANT'S CERTIFICATION FOR PERIOD OF SERVICE FROM _____ TO _____

CLAIM STATUS ☐ Final Payment ☐ Interim Payment Number _____ ☐ Supplemental Payment

I hereby certify that the above claim is for services rendered and is correct, and that I have not sought or received payment *(compensation or anything of value)* from any other source for these services.

Signature of Claimant/Payee _____ Date _____

18. CERTIFICATION OF ATTORNEY I hereby certify that the services were rendered for this case.

Signature of Attorney _____ Date _____

APPROVED FOR PAYMENT — COURT USE ONLY

19. TOTAL COMPENSATION	20. TRAVEL EXPENSES	21. OTHER EXPENSES	22. TOTAL AMOUNT APPROVED/CERTIFIED
			$0.00

23 ☐ Either the cost *(excluding expenses)* of these services does not exceed $500, or prior authorization was obtained.

☐ Prior authorization was not obtained, but in the interest of justice the Court finds that timely procurement of these necessary services could not await prior authorization, even though the cost *(excluding expenses)* exceeds $500.

Signature of Presiding Judge _____ Date _____ Judge Code _____

24. TOTAL COMPENSATION	25. TRAVEL EXPENSES	26. OTHER EXPENSES	27. TOTAL AMOUNT APPROVED
			$0.00

28. PAYMENT APPROVED IN EXCESS OF THE STATUTORY THRESHOLD UNDER 18 U.S.C. § 3006A(e)(3)

Signature of Chief Judge, Court of Appeals (or Delegate) _____ Date _____ Judge Code _____

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall, Defendant.	)))))))))))	CR. 08-50079-01 ORDER OF RECUSAL

Pursuant to 28 U.S.C. § 455(a), this court hereby recuses itself from hearing or determining any proceeding in the above matter.

Dated August 21, 2008.

BY THE COURT:

/s/ *Karen E. Schreier*
KAREN E. SCHREIER
CHIEF JUDGE

AO 442 (Rev. 10/03) Warrant for Arrest

UNITED STATES DISTRICT COURT

FILED

OCT 06 2008

CLERK

District of

UNITED STATES OF AMERICA
V.

WARRANT FOR ARREST

John Graham, a/k/a John Boy Patton

Case Number: 08-MJ-26

To: The United States Marshal
and any Authorized United States Officer

YOU ARE HEREBY COMMANDED to arrest John Graham a/k/a John Boy Patton
Name

and bring him or her forthwith to the nearest magistrate judge to answer a(n)

☐ Indictment ☐ Information ☒ Complaint ☐ Order of court ☐ Probation Violation Petition ☐ Supervised Release Violation Petition ☐ Violation Notice

charging him or her with (brief description of offense)

in the unlawful killing of Annie Mae Aquash, a/k/a Annie Mae Pictou

in violation of Title 18 United States Code, Section(s) 1111, 1153, 1152 and 2

Sandra Thielen
Name of Issuing Officer

Sandra Thielen
Signature of Issuing Officer

Deputy Clerk
Title of Issuing Officer

10/3/08 Rapid City, South Dakota
Date and Location

RETURN

This warrant was received and executed with the arrest of the above-named defendant at Penn. Co Jail, RC, SD.

DATE RECEIVED	NAME AND TITLE OF ARRESTING OFFICER	SIGNATURE OF ARRESTING OFFICER
10-03-08	Paul C. Thielen	
DATE OF ARREST	DUSM RSD	
10-03-08		

FILED
AUG 22 2008
CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER
VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendant.	*	

Because of the recusal of Chief Judge Karen E. Schreier,

IT IS ORDERED:

1. That the Honorable Lawrence L. Piersol, United States District Judge, United States District Court for the District of South Dakota, will handle all further proceedings in this matter.

Dated this 22nd day of August, 2008.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: Colleen Schulte
DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

VERONICA L. DUFFY, U.S. MAGISTRATE JUDGE, PRESIDING

Sandie Thielen, Deputy Clerk
Jane Rager, PTSO

August 26, 2008
Court Time: 2:04 p.m. to 2:18 p.m.

CR:08-50059-001

United States of America	*	Robert A. Mandel
For Government	*	
vs.	*	
Vine Richard Marshall, a/k/a Richard Vine Marshall, a/k/a Dick Marshall	*	Robin L. Zephier
For Defendant	*	

✔..... **INITIAL APPEARANCE AND ARRAIGNMENT**
✔ Indictment ☐ Information ☐ Complaint
✔..... Date of Federal arrest/custody: 8/25/08
✔..... Dfdt advised of the pending charges
✔..... Maximum Penalty
Count I: Mandatory life imprisonment
☐..... Financial Affidavit executed and filed
☐..... Counsel appointed:
✔..... Dfdt advised of constitutional and statutory rights
☐..... Dfdt waives preliminary hearing
✔..... Dfdt arraigned and enters plea of Not Guilty to Count I
☐..... Bond set ☐ PR ☐ Third Party ☐ Cash ☐ Surety ☐ 10%
✔..... Order of Temporary Detention Pending Detention Hearing to be held on 8/29/08 at 10:00 a.m.

☐..... **BOND REVIEW HEARING**
☐..... Date of Federal arrest/custody:
☐..... Court motion to revoke
☐..... Order of Detention Pending Trial
☐..... Bond Reinstated

☐..... **MOTION OR PETITION TO REVOKE HEARING**
☐..... Date of Federal arrest/custody:
☐..... Dfdt first appearance
☐..... Dfdt advised of Charges and Rights
☐..... Counsel appointed
☐..... Order of Detention Pending Trial
☐..... Probable Cause Hearing

☐..... **MATERIAL WITNESS PROCEEDINGS**
☐..... Date of Federal arrest/custody:
☐..... Counsel appointed
☐..... Material Witness REMANDED TO CUSTODY
☐..... Bond set ☐ **PR** ☐ **Third Party** ☐ **Cash** ☐ **Surety** ☐ **10%**

☐..... **RULE 5 REMOVAL PROCEEDINGS**
☐..... Waiver of ☐ **Preliminary Hrg** ☐ **Waiver of Rule 5/Rules 32 Hrg** ☐ **Waiver Identity Hrg**
☐..... Waiver of detention hearing held
☐..... Identity/Removal hearing set
☐..... Dfdt ORDERED REMOVED to Originating District
☐..... Bond set ☐ **PR** ☐ **Third Party** ☐ **Cash** ☐ **Surety** ☐ **10%**

☐..... **PRELIMINARY HEARING PROCEEDINGS**
☐..... Court finds Probable Cause and the matter is bound over to U.S. District Court

☐..... **ORAL ORDER for ISSUANCE OF BENCH WARRANT**

☐..... **REMARKS:**

FILED
AUG 26 2008
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL, aka RICHARD VINE MARSHALL, aka DICK MARSHALL, Defendant.	CR. 08-50079 TEMPORARY DETENTION ORDER

This matter came before the court for an initial appearance and arraignment on an indictment in the above matter on Tuesday, August 26, 2008. The defendant, Vine Marshall, appeared in person and by his counsel. The government appeared by the Assistant United States Attorney.

In accordance with the Bail Reform Act, 18 U.S.C. §3142(f), Mr. Marshall moved for a continuance of the detention hearing in this case. Upon a showing of good cause, it is hereby

ORDERED that Mr. Marshall shall be detained until his detention hearing is held before this court on Friday, August 29, 2008, at 10:00 a.m.

Dated August 26, 2008.

BY THE COURT:

Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

CJA 20 APPOINTMENT OF AND AUTHORITY TO PAY COURT APPOINTED COUNSEL

1. CIR./DIST./DIV. CODE	2. PERSON REPRESENTED	VOUCHER NUMBER
SDX	Marshall, Vine	

3. MAG. DKT./DEF. NUMBER	4. DIST. DKT./DEF. NUMBER	5. APPEALS DKT./DEF. NUMBER	6. OTHER DKT. NUMBER
	5:08-050079-001		

7. IN CASE/MATTER OF (Case Name)	8. PAYMENT CATEGORY	9. TYPE PERSON REPRESENTED	10. REPRESENTATION TYPE (See Instructions)
U.S. v. Marshall	Felony	Adult Defendant	Criminal Case

FILED
AUG 26 2008
CLERK

11. OFFENSE(S) CHARGED (Cite U.S. Code, Title & Section) If more than one offense, list (up to five) major offenses charged, according to severity of offense.
1) 18 1111.F -- MURDER, FIRST DEGREE

12. ATTORNEY'S NAME (First Name, M.I., Last Name, including any suffix) AND MAILING ADDRESS
Hanna, Dana
816 Sixth Street
P. O. Box 3080
Rapid City SD 57709-3080

Telephone Number: (605) 791-1832

14. NAME AND MAILING ADDRESS OF LAW FIRM (only provide per instructions)

13. COURT ORDER
☒ O Appointing Counsel
☐ F Subs For Federal Defender
☐ P Subs For Panel Attorney
☐ C Co-Counsel
☐ R Subs For Retained Attorney
☐ Y Standby Counsel

Prior Attorney's Name: _____
Appointment Date: _____

☐ Because the above-named person represented has testified under oath or has otherwise satisfied this court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney whose name appears in Item 12 is appointed to represent this person in this case, or

☐ Other (See Instructions)

Signature of Presiding Judicial Officer or By Order of the Court

08/26/2008
Date of Order

Nunc Pro Tunc Date

Repayment or partial repayment ordered from the person represented for this service at time of appointment. ☐ YES ☐ NO

CLAIM FOR SERVICES AND EXPENSES — FOR COURT USE ONLY

	CATEGORIES (Attach itemization of services with dates)	HOURS CLAIMED	TOTAL AMOUNT CLAIMED	MATH/TECH ADJUSTED HOURS	MATH/TECH ADJUSTED AMOUNT	ADDITIONAL REVIEW
15. In Court	a. Arraignment and/or Plea					
	b. Bail and Detention Hearings					
	c. Motion Hearings					
	d. Trial					
	e. Sentencing Hearings					
	f. Revocation Hearings					
	g. Appeals Court					
	h. Other (Specify on additional sheets)					
	(Rate per hour = $) TOTALS:					
16. Out of Court	a. Interviews and Conferences					
	b. Obtaining and reviewing records					
	c. Legal research and brief writing					
	d. Travel time					
	e. Investigative and Other work (Specify on additional sheets)					
	(Rate per hour = $) TOTALS:					
17.	Travel Expenses (lodging, parking, meals, mileage, etc.)					
18.	Other Expenses (other than expert, transcripts, etc.)					
	GRAND TOTALS (CLAIMED AND ADJUSTED):					

19. CERTIFICATION OF ATTORNEY/PAYEE FOR THE PERIOD OF SERVICE	20. APPOINTMENT TERMINATION DATE IF OTHER THAN CASE COMPLETION	21. CASE DISPOSITION
FROM _____ TO _____		

22. CLAIM STATUS ☐ Final Payment ☐ Interim Payment Number _____ ☐ Supplemental Payment
Have you previously applied to the court for compensation and/or reimbursement for this case? ☐ YES ☐ NO If yes, were you paid? ☐ YES ☐ NO
Other than from the court, have you, or to your knowledge has anyone else, received payment (compensation or anything or value) from any other source in connection with this representation? ☐ YES ☐ NO If yes, give details on additional sheets.
I swear or affirm the truth or correctness of the above statements.

Signature of Attorney: _____ Date: _____

APPROVED FOR PAYMENT — COURT USE ONLY

23. IN COURT COMP.	24. OUT OF COURT COMP.	25. TRAVEL EXPENSES	26. OTHER EXPENSES	27. TOTAL AMT. APPR / CERT
28. SIGNATURE OF THE PRESIDING JUDICIAL OFFICER			DATE	28a. JUDGE / MAG. JUDGE CODE
29. IN COURT COMP.	30. OUT OF COURT COMP.	31. TRAVEL EXPENSES	32. OTHER EXPENSES	33. TOTAL AMT. APPROVED
34. SIGNATURE OF CHIEF JUDGE, COURT OF APPEALS (OR DELEGATE) Payment approved in excess of the statutory threshold amount.			DATE	34a. JUDGE CODE

CJA 21 AUTHORIZATION AND VOUCHER FOR EXPERT AND OTHER SERVICES (Rev. 1/06)

1. CIR./DIST./DIV. CODE	2. PERSON REPRESENTED	VOUCHER NUMBER
	Marshall, Vine	

3. MAG. DKT./DEF. NUMBER	4. DIST. DKT./DEF. NUMBER	5. APPEALS DKT./DEF. NUMBER	6. OTHER DKT. NUMBER
	5:08-050079-001		

7. IN CASE/MATTER OF *(Case Name)*	8. PAYMENT CATEGORY	9. TYPE PERSON REPRESENTED	10. REPRESENTATION TYPE
U.S. v. Marshall	☑ Felony ☐ Petty Offense ☐ Misdemeanor ☐ Other ☐ Appeal	☑ Adult Defendant ☐ Appellant ☐ Juvenile Defendant ☐ Appellee ☐ Other	*(See Instructions)*

11. OFFENSE(S) CHARGED (Cite U.S. Code, Title & Section) *If more than one offense, list (up to five) major offenses charged, according to severity of offense.*
18 1111.F -- MURDER, FIRST DEGREE

REQUEST AND AUTHORIZATION FOR EXPERT SERVICES

12. ATTORNEY'S STATEMENT
As the attorney for the person represented, who is named above, I hereby affirm that the services requested are necessary for adequate representation. I hereby request:
☐ Authorization to obtain the service. Estimated Compensation and Expenses: $ 1,600.00 OR
☐ Approval of services already obtained to be paid for by the United States pursuant to the Criminal Justice Act. *(Note: Prior authorization should be obtained for services in excess of $500, excluding expenses)*

Signature of Attorney _____ Date _____

☑ Panel Attorney ☐ Retained Attorney ☐ Pro-Se ☐ Legal Organization

ATTORNEY'S NAME *(First Name, M.I., Last Name, including any suffix)*, AND MAILING ADDRESS

Dana Hanna, 816 Sixth Street, P.O. Box 3080
Rapid City, SD 57709-3080

Telephone Number: (605) 791-1832

13. DESCRIPTION OF AND JUSTIFICATION FOR SERVICES *(See Instructions)*
To provide an adequate defense.

15. COURT ORDER
Financial eligibility of the person represented having been established to the Court's satisfaction, the authorization requested in Item 12 is hereby granted.

Signature of Presiding Judge or By Order of the Court

Date of Order _____ Nunc Pro Tunc Date _____

Repayment or partial repayment ordered from the person represented for this service at time of authorization.
☐ YES ☑ NO

14. TYPE OF SERVICE PROVIDER

01	☑	Investigator	15	☐	Other Medical
02	☐	Interpreter/Translator	16	☐	Voice/Audio Analyst
03	☐	Psychologist	17	☐	Hair/Fiber Expert
04	☐	Psychiatrist	18	☐	Computer (Hardware/ Software/Systems)
05	☐	Polygraph			
06	☐	Documents Examiner	19	☐	Paralegal Services
07	☐	Fingerprint Analyst	20	☐	Legal Analyst/Consultant
08	☐	Accountant	21	☐	Jury Consultant
09	☐	CALR (Westlaw/Lexis, etc.)	22	☐	Mitigation Specialist
10	☐	Chemist/Toxicologist	23	☐	Duplication Services *(See Instructions)*
11	☐	Ballistics			
13	☐	Weapons/Firearms/Explosive Expert	24	☐	Other *(Specify)*
14	☐	Pathologist/Medical Examiner			

CLAIM FOR SERVICES AND EXPENSES / FOR COURT USE ONLY

16. SERVICES AND EXPENSES *(Attach itemization of services with dates)*	AMOUNT CLAIMED	MATH/TECHNICAL ADJUSTED AMOUNT	ADDITIONAL REVIEW
a. Compensation			
b. Travel Expenses *(lodging, parking, meals, mileage, etc.)*			
c. Other Expenses			
GRAND TOTALS (CLAIMED AND ADJUSTED):	$0.00	$0.00	

17. PAYEE'S NAME AND MAILING ADDRESS

TIN: _____

Telephone Number: _____

CLAIMANT'S CERTIFICATION FOR PERIOD OF SERVICE FROM _____ TO _____

CLAIM STATUS ☐ Final Payment ☐ Interim Payment Number _____ ☐ Supplemental Payment

I hereby certify that the above claim is for services rendered and is correct, and that I have not sought or received payment *(compensation or anything of value)* from any other source for these services.

Signature of Claimant/Payee _____ Date _____

18. CERTIFICATION OF ATTORNEY I hereby certify that the services were rendered for this case.

Signature of Attorney _____ Date _____

APPROVED FOR PAYMENT — COURT USE ONLY

19. TOTAL COMPENSATION	20. TRAVEL EXPENSES	21. OTHER EXPENSES	22. TOTAL AMOUNT APPROVED/CERTIFIED
			$0.00

23 ☐ Either the cost *(excluding expenses)* of these services does not exceed $500, or prior authorization was obtained.
☐ Prior authorization was not obtained, but in the interest of justice the Court finds that timely procurement of these necessary services could not await prior authorization, even though the cost *(excluding expenses)* exceeds $500.

Signature of Presiding Judge _____ Date _____ Judge Code _____

24. TOTAL COMPENSATION	25. TRAVEL EXPENSES	26. OTHER EXPENSES	27. TOTAL AMOUNT APPROVED
			$0.00

28. PAYMENT APPROVED IN EXCESS OF THE STATUTORY THRESHOLD UNDER 18 U.S.C. § 3006A(e)(3)

Signature of Chief Judge, Court of Appeals (or Delegate) _____ Date _____ Judge Code _____

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL, a.k.a. RICHARD VINE MARSHALL, a.k.a. DICK MARSHALL, Defendant.	Case No. CR 08-50079 NOTICE OF APPEARANCE

I, Dana L. Hanna, an attorney licensed to practice in this Court, hereby give notice of my appearance as attorney for the Defendant Vine Richard Marshall in the above-captioned case. Please send all filings and correspondence to me at the address listed below.

Dated this 27th day of August, 2008.

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Notice of Appearance was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

Dated this 27th day of August, 2008.

/s/ *Dana L. Hanna*
Dana L. Hanna

FILED
AUG 28 2008
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER FIXING DATES
VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendant.	*	

An initial appearance and arraignment on an Indictment was held on August 26, 2008, with the Plaintiff appearing by Robert A. Mandel, Assistant United States Attorney, and the Defendant Vine Richard Marshall, a/k/a Richard Vine Marshall, a/k/a Dick Marshall, appearing in person and with his attorney, Robin L. Zephier; and

It appearing necessary that the court fix motion and trial dates in order to comply with the Speedy Trial Act, 18 U.S.C. § 3161,

IT IS ORDERED:

1. That the following general discovery rules shall apply to this case:

A. Upon request of the Defendant, the Plaintiff shall forthwith comply with Rule 16(a)(1)(A), (B), (C) and (D).

B. If the Defendant requests disclosure under Rule 16(a), such Defendant shall, upon request of the Plaintiff, forthwith comply with Rule 16(b).

C. The Plaintiff shall forthwith disclose to the Defendant any exculpatory material discoverable under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

D. Any written statements of Plaintiff's witnesses discoverable

under the Jencks Act, 18 U.S.C. § 3500, shall be furnished to the Defendant on the Friday preceding trial.

2. That all discovery motions as to Defendant herein be filed and served on or before August 29, 2008; that opposing counsel respond thereto on or before September 3, 2008.

3. That all other motions as to Defendant herein be filed and served on or before September 9, 2008; that opposing counsel respond thereto on or before September 16, 2008; and that a hearing, if necessary, will be held on Tuesday, September 23, 2008, at 1:30 P.M., in Rapid City, South Dakota, before Magistrate Judge Veronica Duffy; and the Court will not consider a stock motion for leave to file further motions, however, the Court will consider a motion filed by a party after the deadline if the party can show good cause as to why the motion was late filed.

4. That September 25, 2008, is hereby set as the deadline for submission to the Court of any proposed plea agreements.

5. That all motions in limine shall be in writing and filed, together with proposed instructions, with the Court ten (10) working days before trial.

6. That the jury trial herein shall commence in Rapid City, South Dakota, on Tuesday, October 28, 2008, with counsel to be present for motions in limine at 9:00 A.M., and with the jury to report at 9:30 A.M.

7. That the dates herein may be modified upon good cause shown.

Dated this 28th day of August, 2008.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: _____
DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

VERONICA L. DUFFY, U.S. MAGISTRATE JUDGE, PRESIDING

Sandie Thielen, Deputy Clerk
Jane Rager, PTSO

August 29, 2008
Court Time: 10:01 a.m. to 10:08 a.m.

CR:08-50079

United States of America	*	Robert A. Mandel
For Government	*	
vs.	*	
Vine Richard Marshall, a/k/a Richard Vine Marshall, a/k/a Dick Marshall	*	Dana Hanna
For Defendant	*	

✔..... **DETENTION HEARING**
☐ Indictment ☐ Information ☐ Complaint
☐..... Date of Federal arrest/custody:
☐..... Dfdt advised of the pending charges
Maximum Penalty
☐..... Financial Affidavit executed and filed
☐..... Counsel appointed:
☐..... Dfdt advised of constitutional and statutory rights
☐..... Dfdt waives preliminary hearing
☐..... Dfdt arraigned and enters plea of Not Guilty to Count I
☐..... Bond set ☐ PR ☐ Third Party ☐ Cash ☐ Surety ☐ 10%
✔..... Order of Detention

☐..... **BOND REVIEW HEARING**
☐..... Date of Federal arrest/custody:
☐..... Court motion to revoke
☐..... Order of Detention Pending Trial
☐..... Bond Reinstated

☐..... **MOTION OR PETITION TO REVOKE HEARING**
☐..... Date of Federal arrest/custody:
☐..... Dfdt first appearance
☐..... Dfdt advised of Charges and Rights
☐..... Counsel appointed
☐..... Order of Detention Pending Trial
☐..... Probable Cause Hearing

☐..... **MATERIAL WITNESS PROCEEDINGS**
☐..... Date of Federal arrest/custody:
☐..... Counsel appointed
☐..... Material Witness REMANDED TO CUSTODY
☐..... Bond set ☐ **PR** ☐ **Third Party** ☐ **Cash** ☐ **Surety** ☐ **10%**

☐..... **RULE 5 REMOVAL PROCEEDINGS**
☐..... Waiver of ☐ **Preliminary Hrg** ☐ **Waiver of Rule 5/Rules 32 Hrg** ☐ **Waiver Identity Hrg**
☐..... Waiver of detention hearing held
☐..... Identity/Removal hearing set
☐..... Dfdt ORDERED REMOVED to Originating District
☐..... Bond set ☐ **PR** ☐ **Third Party** ☐ **Cash** ☐ **Surety** ☐ **10%**

☐..... **PRELIMINARY HEARING PROCEEDINGS**
☐..... Court finds Probable Cause and the matter is bound over to U.S. District Court

☐..... **ORAL ORDER for ISSUANCE OF BENCH WARRANT**

☐..... **REMARKS:**

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL, aka RICHARD VINE MARSHALL, aka DICK MARSHALL, Defendant.	)))))))))))	CR. 08-50079 DETENTION ORDER

This matter came before the court for an initial appearance and arraignment on an Indictment in the above matter on Tuesday, August 26, 2008. The defendant, Vine Marshall, appeared in person and by his counsel. The United States appeared by Assistant United States Attorney Robert Mandel.

The government moved for detention pursuant to the Bail Reform Act, 18 U.S.C. § 3142. At Mr. Marshall's request, the detention hearing in this case was continued to August 29, 2008. A hearing was held on that date in accordance with §3142(f) of the Bail Reform Act.

No presumption of detention applies in this case. See 18 U.S.C. § 3142(e). In order to sustain a motion for detention, the government must establish that there is no condition or combination of conditions which could

be imposed in connection with pretrial release that would (a) reasonably insure the defendant's presence for court proceedings; or (b) reasonably insure the safety of any other person or the community. See 18 U.S.C. § 3142(f). Risk of flight must be established by a preponderance of the evidence; danger to the community or to any other person must be established by clear and convincing evidence. Id.

The Bail Reform Act requires the court to consider the following factors in determining whether there are conditions of release that will reasonably assure the appearance of the defendant and the safety of any other person and the community:

1. the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

2. the weight of the evidence against the person;

3. the history and characteristics of the person, including--

    a. the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

    b. whether at the time of the current offense or arrest, the person was on probation, parole, or other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State or local law; and

4. the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

See 18 U.S.C. § 3142(g). The court concludes that the following facts require the detention of the defendant pending trial in this case.

Part I - Findings of Fact

(1) There is a serious risk that the defendant will not appear.

(2) There is a serious risk that the defendant will endanger the safety of another person or the community.

Part II - Written Statement of Reasons for Detention

The court finds that the proffer submitted by the government at the hearing establishes that the defendant is charged in the Indictment with First Degree Murder, in violation of 18 U.S.C. §§ 1111, 1153, and 2. Probable cause exists to believe the defendant committed the offense with which he is charged because a grand jury has issued the indictment. This alleged crime is a crime of violence. In addition, the alleged crime involved the use of a firearm. The maximum penalty for this offense in the event of conviction is life imprisonment. Other than the fact of the indictment and the bare allegations contained in that indictment as stated above, no other information is known concerning the weight of the evidence against Mr. Marshall in this case.

Mr. Marshall declined to be interviewed by pretrial services prior to the hearing, as is his right. However, because no interview was conducted, no

information was submitted to the court regarding Mr. Marshall's financial circumstances, his history of drug or alcohol abuse, family ties, or physical or mental condition.

Mr. Marshall has one prior criminal conviction from 1976 in the state of South Dakota for murder, for which he received a sentence of life imprisonment, which was later commuted to a term of 99 years by then-Governor William Janklow. He was paroled on this charge in 1984, violated parole, and was reincarcerated in 1989. He was paroled again in 1993, again violated the conditions of his parole, and again was reincarcerated in the same year. He was paroled a third time in 2000 and is currently on parole on this charge, despite a subsequent tribal arrest for driving while intoxicated and the issuance of a 30-day protection order against defendant and in favor of defendant's girlfriend.

Mr. Marshall is not employed on a regular basis. He does have ties to the western South Dakota community dating back at least to the mid-1970s.

Based on the above findings, I find by clear and convincing evidence that there is no condition or combination of conditions of release that will assure the presence of the defendant at further proceedings in this matter or ensure the safety of any person or the community.

Part III - Directions Regarding Detention

The defendant is committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. The defendant shall be afforded a reasonableopportunity for private consultation with defense counsel. On order of a court of the United States or on request of any attorney for the Government, the person in charge of the corrections facility shall deliver the defendant to the United States marshal for the purpose of an appearance in connection with a court proceeding.

NOTICE OF RIGHT TO APPEAL

Mr. Marshall has the right to appeal the court's detention order to the district court having original jurisdiction over the offense, which appeal shall be determined promptly. See 18 U.S.C. § 3145(b).

Dated August 29, 2008.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL, a.k.a. RICHARD VINE MARSHALL, a.k.a. DICK MARSHALL, Defendant.	Case No. CR 08-50079 MOTION FOR CONTINUANCE AND EXTENSION OF ALL DEADLINES

NOW COMES Defendant Richard Marshall, by and through his attorney, Dana L. Hanna, and hereby moves the Court to enter an order granting a continuance of the trial and an extension of deadlines in this case. As grounds for this motion, Dana L. Hanna, an attorney licensed to practice law before this Court, hereby affirms:

1. I am the attorney for Defendant Richard Marshall, and I make these affirmations on the basis of personal knowledge, in support of the Defendant's motion for continuance.

2. The Court has ordered a trial and case progression schedule in this case. First motions are due tomorrow, September 9th, 2008 and the trial is presently scheduled for October 28, 2008.

3. In this case, Defendant Richard Marshall is accused of aiding and abetting a murder that took place 33 years ago. I have been informed by the prosecutor in this case, Mr. Robert Mandel, that there are some six thousand pages of documents in potential discovery materials. I have received less than fifty pages in discovery materials.

4. There is a great deal of investigation to do and I can not accomplish the goal of

providing effective representation to Mr. Marshall in accordance with the schedule now in effect. I require an extension of all deadlines and a continuance of the trial for at least four months beyond those dates which are presently scheduled.

5. I have conferred with my client on this matter. He agrees and consents with my request for a continuance and an extension of deadlines and he has signed a document attesting to that fact, which will be manually filed and served today.

WHEREFORE Defendant Richard Marshall respectfully requests the Court to continue his trial and to extend all deadlines in this case for at least four months beyond the current trial date and extension deadlines.

Dated this 8th day of September, 2008.

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Motion for Continuance and Extension of All Deadlines was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

Dated this 8th day of September, 2008.

/s/ *Dana L. Hanna*
Dana L. Hanna

FILED
SEP 08 2008
CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL, a.k.a. RICHARD VINE MARSHALL, a.k.a. DICK MARSHALL, Defendant.	Case No. CR 08-50079 WAIVER OF SPEEDY TRIAL RIGHTS

COMES NOW Defendant Richard Marshall and hereby affirms:

1. I understand that my counsel, Dana L. Hanna, has filed a motion to continue the trial and to extend all deadlines in my case.

2. I have been informed or my right to a speedy trial as well as my other statutory and constitutional rights. I understand my statutory and constitutional rights.

3. I have no objection to a continuance in this matter.

4. I consent to a continuance of my case and do so voluntary, knowingly, and intelligently.

5. If the Court grants the continuance, I waive my speedy trial rights from the date of the Court's order to the date of the next scheduled trial date.

Dated this 8TH day of September, 2008.

Richard Marshall
Richard Marshall, Defendant

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Waiver of Speedy Trial Rights on the other party in this case by mailing the same to the addresses listed below:

Marty J. Jackley
United States Attorney
PO Box 2638
Sioux Falls, SD 57101

Robert Mandel
Assistant United States Attorney
515 Ninth Street, #201
Rapid City, SD 57701

Dated this 8 day of September, 2008.

Dana L. Hanna

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendant.

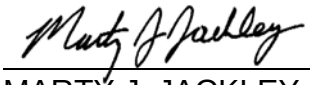
CR08-50079

UNITED STATES' RESPONSE TO DEFENDANT'S MOTION FOR CONTINUANCE OF DEADLINES

COMES NOW the United States by and through United States Attorney Marty J. Jackley and Assistant US Attorney Robert A. Mandel, and respectfully advises this Court that it does not object to a reasonable continuance of deadlines for Defendant Richard Marshall.

Date: September 12, 2008

MARTY J. JACKLEY
United States Attorney



MARTY J. JACKLEY
ROBERT A. MANDEL
Assistant United States Attorney
PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330
fax: 605.330.4405

CERTIFICATE OF SERVICE

The undersigned hereby certifies on September 12, 2008, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

Dana Hanna

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Facsimile at
- ☐ Federal Express
- ☒ Electronic Case Filing

Marty J. Jackley
United States Attorney

This document was filed electronically.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff,

vs.

VINE RICHARD MARSHALL a/k/a
RICHARD VINE MARSHALL a/k/a
DICK MARSHALL,

Defendant.

CR 08-50079

GOVERNMENT'S REQUEST
FOR NOTICE OF ALIBI DEFENSE

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 files and serves the Government's Request for Notice of Alibi Defense pursuant to Fed. R. Crim. P. 12.1(a) to include the following within ten (10) days absent further order of the court:

(A) each specific place where the defendant claims to have been at the time of the alleged offense; and

(B) the name, address, and telephone number of each alibi witness on whom the defendant intends to rely.

The United States is requesting that Defendant, Vine Richard Marshall, a/k/a Richard Vine Marshall, a/k/a Dick Marshall, provide notification of any alibi defense for which he intends to present evidence as to the offense of aiding and

abetting in the first degree murder of Anna Mae Aquash as charged in the Indictment filed August 20, 2008, and more specifically that:

On or about the early morning hours of December 12, 1975, at his residence in Allen, South Dakota, house #363, Richard Marshall knowingly aided and abetted Defendant John Graham, Theda Clarke and Arlo Looking Cloud in the first degree murder of Anna Mae Aquash by, including but not limited to, providing consultation and exchange of the "baggage note," as well as providing the .32 caliber revolver and shells to murder Anna Mae Aquash.

Respectfully submitted this 23rd day of September, 2008.

/s/ Marty J. Jackley

MARTY J. JACKLEY
United States Attorney
ROBERT A. MANDEL
Assistant United States Attorney
PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2310
FAX: 605.330.4405
Marty.J.Jackley@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of September, 2008, I served by electronic transmission, a true and correct copy of the foregoing Government's Request for Notice of Alibi Defense on:

Dana Hanna
Attorney at Law

/s/ Marty J. Jackley

Marty J. Jackley

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
SEP 24 2008
CLERK

****

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER
VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendant.	*	

****

Counsel for Defendant has filed a Motion for Continuance, Doc. 17, requesting the Court to continue the dates currently in force for filing motions, the motion hearing, the plea deadline and jury trial for a period of at least four (4) months, and the Government has no objection to a reasonable continuance of deadlines, and after consideration of the file in this matter, the Court finds that failure to grant the continuance would deny counsel the reasonable time necessary for effective preparation, taking into account the exercise of due diligence and further that failure to grant the continuance would deny the public interest in bringing this case to trial in an orderly fashion. Further, the Court finds that the ends of justice served by continuing this trial outweigh the best interests of the public and the Defendant in a speedy trial. For all of those reasons as well as those set forth in the Motion,

IT IS ORDERED:

1. That Defendant's Motion for Continuance, Doc. 17, is granted.

2. That all other motions as to Defendant be filed and served on or before December 22, 2008; that opposing counsel respond thereto on or before January 5, 2009; and that a hearing thereon will be held before The Honorable Veronica Duffy, in Rapid City, South Dakota, on Tuesday, January 13, 2009, at 9:00 A.M.; and the Court will not consider a stock motion for leave to file further motions, however, the Court will consider a

motion filed by a party after the deadline if the party can show good cause as to why the motion was late filed.

3. That January 21, 2009, is hereby set as the deadline for submission to the Court of any proposed plea agreement.

4. That all motions in limine shall be in writing and filed, together with proposed instructions, with the Court ten (10) working days before trial.

5. That the jury trial herein for Defendant shall commence in Sioux Falls, South Dakota, on Tuesday, February 24, 2009, with counsel to be present for motions in limine at 9:00 A.M., and with the jury to report at 9:30 A.M.

6. That the period of delay resulting from such continuance is excluded in computing the time within which the trial of the offense for the Defendant must commence, as the Court finds that the ends of justice served by taking such action outweigh the best interests of the public and the Defendant in a speedy trial. 18 U.S.C. § 3161(h)(8)(A).

Dated this 24th day of September, 2008.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: Shelly Marquardt
DEPUTY

FILED
OCT 06 2008
CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

VINE RICHARD MARSHALL
a/k/a RICHARD VINE MARSHALL
a/k/a DICK MARSHALL,

Defendant.

CR08-50079

STIPULATION AND ORDER

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the above-named defendant and counsel for the United States of America that the Court may enter the following Order concerning the handling and disposition of discovery materials turned over to the defense.

MARTY J. JACKLEY
United States Attorney

10-1-08
Date

325 South First Avenue, Suite 300
Sioux Falls, SD 57104
(605) 330-4400

26 September 2008
Date

DANA HANNA
Attorney for Defendant

ORDER

Upon the foregoing Stipulation and for good cause shown,

IT IS HEREBY ORDERED that any discovery materials, including but not limited to statements and summaries of interviews of witnesses furnished by the prosecution to the defense, shall not be used by the defendant or his/her attorney for any other purpose other than in direct relationship to this case and no further disclosure should be made of these items. Defense counsel shall not photocopy the materials, shall keep the items furnished in his/her possession, and the materials shall not be given to the defendant or anyone else without the Court's permission. Defense counsel may allow the defendant to read the discovery materials but only in the presence of defense counsel.

IT IS FURTHER ORDERED that said documents shall be immediately returned to attorneys for the United States of America upon disposition of the case.

Dated this ____ day of ~~September~~ October, 2008.

BY THE COURT:

United States District Court Judge

FILED
OCT 0 6 2008

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	AMENDED ORDER
VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendant.	*	

Counsel for Defendant has filed a Motion for Continuance, Doc. 17, requesting the Court to continue the dates currently in force for filing motions, the motion hearing, the plea deadline and jury trial for a period of at least four (4) months, and the Government has no objection to a reasonable continuance of deadlines, and after consideration of the file in this matter, the Court finds that failure to grant the continuance would deny counsel the reasonable time necessary for effective preparation, taking into account the exercise of due diligence and further that failure to grant the continuance would deny the public interest in bringing this case to trial in an orderly fashion. Further, the Court finds that the ends of justice served by continuing this trial outweigh the best interests of the public and the Defendant in a speedy trial. For all of those reasons as well as those set forth in the Motion,

IT IS ORDERED:

1. That Defendant's Motion for Continuance, Doc. 17, is granted.

2. That all other motions as to Defendant be filed and served on or before December 22, 2008; that opposing counsel respond thereto on or before January 5, 2009; and that a hearing thereon will be held before The Honorable Veronica Duffy, in Rapid City, South Dakota, on Tuesday, January 13, 2009, at 9:00 A.M.; and the Court will not consider a stock motion for leave to file further motions, however, the Court will consider a

motion filed by a party after the deadline if the party can show good cause as to why the motion was late filed.

3. That January 21, 2009, is hereby set as the deadline for submission to the Court of any proposed plea agreement.

4. That all motions in limine shall be in writing and filed, together with proposed instructions, with the Court ten (10) working days before trial.

5. That the jury trial herein for Defendant shall commence in Rapid City, South Dakota, on Tuesday, February 24, 2009, with counsel to be present for motions in limine at 9:00 A.M., and with the jury to report at 9:30 A.M.

6. That the period of delay resulting from such continuance is excluded in computing the time within which the trial of the offense for the Defendant must commence, as the Court finds that the ends of justice served by taking such action outweigh the best interests of the public and the Defendant in a speedy trial. 18 U.S.C. § 3161(h)(8)(A).

Dated this 6th day of October, 2008.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: _____
DEPUTY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
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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

SUPERSEDING INDICTMENT

FIRST DEGREE MURDER

(18 U.S.C. §§ 1111, 1153, 1152 and 2)

The Grand Jury charges:

COUNT I

On or about the 12th day of December, 1975, near Wanblee, Allen, and elsewhere, in Indian Country, in the District of South Dakota, the defendants, John Graham, a/k/a John Boy Patton, an Indian, and Vine Richard Marshall, a/k/a Richard Vine Marshall, a/k/a Dick Marshall, an Indian, willfully, deliberately, and maliciously, with premeditation and malice aforethought, did unlawfully kill and aid and abet the unlawful killing of Annie Mae Aquash, a/k/a Annie Mae Pictou, an Indian or other person, by shooting her with a firearm, in violation of 18 U.S.C. §§ 1111, 1153, and 2.

COUNT II

On or about the 12th day of December, 1975, near Wanblee, Allen, and elsewhere, in Indian Country, in the District of South Dakota, the defendant, John Graham, a/k/a John Boy Patton, willfully, deliberately, and maliciously, with premeditation and malice aforethought, did unlawfully kill and aid and abet in the unlawful killing of Annie Mae Aquash, a/k/a Annie Mae Pictou, an Indian, by shooting her with a firearm, in violation of 18 U.S.C. §§ 1111, 1152, and 2.

COUNT III

On or about the 12th day of December, 1975, near Wanblee, Allen, and elsewhere, in Indian Country, in the District of South Dakota, the defendant, John Graham, a/k/a John Boy Patton, did unlawfully kill and aid and abet an Indian, to-wit: Fritz Arlo Looking Cloud, Theda Rose Clarke, and Richard Marshall, in the unlawful killing of Annie Mae Aquash, a/k/a Annie Mae Pictou, an Indian or other person, by shooting her with a firearm, in violation of 18 U.S.C. §§ 1111, 1153 and 2.

A TRUE BILL:

Betty Tolden
FOREMAN

MARTY J. JACKLEY
UNITED STATES ATTORNEY

By: Marty J. Jackley

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

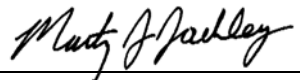
CR08-50079

MOTION FOR EXPEDITED TRIAL DATE

COMES NOW the United States, through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully moves this Honorable Court to schedule an expedited jury trial date for November or December 2008. This Motion is necessitated due to the age of the case, the preparations that have been made for trial, and that both Defendants remain in pre-trial custody.

Date: October 7, 2008

MARTY J. JACKLEY
United States Attorney



MARTY J. JACKLEY
ROBERT A. MANDEL
Assistant United States Attorney
PO Box 2638
Sioux Falls, SD 57101-2638
Phone: 605.357.2330
Fax: 605.330.4405

CERTIFICATE OF SERVICE

The undersigned hereby certifies on October 7, 2008, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Facsimile at
- ☐ Federal Express
- ☒ Electronic Case Filing

Marty J. Jackley
United States Attorney

This document was filed electronically.

FILED
OCT 0 7 2008
CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

VINE RICHARD MARSHALL
a/k/a RICHARD VINE MARSHALL
a/k/a DICK MARSHALL,

Defendant.

CR08-50079

STIPULATION AND ORDER

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the above-named defendant and counsel for the United States of America that the Court may enter the following Order concerning the handling and disposition of discovery materials turned over to the defense.

MARTY J. JACKLEY
United States Attorney

10-1-08
Date

325 South First Avenue, Suite 300
Sioux Falls, SD 57104
(605) 330-4400

26 September 2008
Date

DANA HANNA
Attorney for Defendant

ORDER

Upon the foregoing Stipulation and for good cause shown,

IT IS HEREBY ORDERED that any discovery materials, including but not limited to statements and summaries of interviews of witnesses furnished by the prosecution to the defense, shall not be used by the defendant or his/her attorney for any other purpose other than in direct relationship to this case and no further disclosure should be made of these items. Defense counsel shall not photocopy the materials, shall keep the items furnished in his/her possession, and the materials shall not be given to the defendant or anyone else without the Court's permission. Defense counsel may allow the defendant to read the discovery materials but only in the presence of defense counsel.

IT IS FURTHER ORDERED that said documents shall be immediately returned to attorneys for the United States of America upon disposition of the case.

Dated this 7th day of ~~September~~ October, 2008.

BY THE COURT:

United States District Court Judge

FILED
OCT 0 8 2008
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER
JOHN GRAHAM, a/k/a John Boy Patton; and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendant.	*	

Yesterday the Government moved for an expedited trial date in the trial of both John Graham, a/k/a John Boy Patton, and Vine Richard Marshall, a/k/a Richard Vine Marshall, a/k/a Dick Marshall. In his September 8, 2008, Motion for Continuance and Extension of all Deadlines, Defendant Marshall's lawyer had indicated that he had only received less than fifty pages in discovery materials out of what was supposed to be some six thousand pages of documents in potential discovery materials. Accordingly, the Court moved Mr. Marshall's trial date to February 24, 2009. The Court could schedule the trial of Mr. Graham and Mr. Marshall for December 9, 2008. The Court does not know what discovery has been made available to the counsel for Defendant Marshall since September 8, 2008, but for purposes of scheduling, the Court would like to hear by Tuesday, October 14, 2008, from counsel for the Government, counsel for Mr. Graham, and counsel for Mr. Marshall regarding whether or not, with expedited discovery, everyone can be ready for trial on December 9, 2008. Accordingly,

IT IS ORDERED:

1. That by Tuesday, October 14, 2008, counsel for the Government, counsel for Mr. Graham, and counsel for Mr. Marshall shall advise the Court regarding whether or not, with expedited discovery, everyone can be ready for trial on

December 9, 2008.

Dated this 8th day of October, 2008.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: Linda M. Ziegler
DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

UNITED STATES' SCHEDULING RESPONSE

COMES NOW the United States, through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully files its response to the Court's Order of October 8, 2008, regarding scheduling. The United States believes all significant discovery has been provided to Defendant Marshall in the above-entitled matter as follows:

1. On or about September 2, 2008, initial discovery specific to Defendant Richard Marshall, including some Jencks material, was provided.

2. On or about September 22, 2008, Defendant Marshall's statements under Fed. R. Crim. P. 16(a)(1)(B) were produced to Defendant Marshall. United States Attorney Marty Jackley, AUSA Robert Mandel, and defense attorney Dana Hanna listened to the tape-recorded statement of Defendant Marshall regarding

the Aquash matter. Handwritten notes associated with Defendant Marshall's statements have further been disclosed.

3. On or about October 6, 2008, all discovery documentation previously provided to Defendant Graham was provided electronically to Defendant Marshall consistent with the anticipated discovery Order of the Court on October 7, 2008. The United States has further made the case physical evidence available to both Defendants for inspection at a mutually convenient time.

Accordingly, it is the United States' position that it is in compliance with Rule 16 and Brady. The United States respectfully requests and advises that it is prepared to move forward with the jury trial for both Defendants on December 9, 2008.

Date: October 8, 2008

MARTY J. JACKLEY
United States Attorney



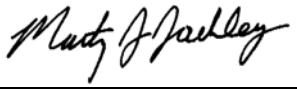
MARTY J. JACKLEY
ROBERT A. MANDEL
Assistant United States Attorney
PO Box 2638
Sioux Falls, SD 57101-2638
Phone: 605.357.2330
Fax: 605.330.4405

CERTIFICATE OF SERVICE

The undersigned hereby certifies on October 8, 2008, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana L. Hanna

☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Facsimile at
☐ Federal Express
☒ Electronic Case Filing



Marty J. Jackley
United States Attorney

This document was filed electronically.

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)))))))))))	CRIM. NO. 08-50079-01 DEFENDANT'S GRAHAM'S RESPONSE TO SCHEDULING ORDER

Defendant John Graham submits his response to the Court's Order dated October 8, 2008. Mr. Graham does not believe this case can be ready for trial on or before December 9, 2008, for the following reasons:

1. The primary concern Defendant Graham has with the December 9th trial date is whether it provides enough trial days to resolve the case before the Christmas holiday. Starting trial on December 9, 2008, gives 8 trial days before the Christmas holiday week begins. Many jurors will be leaving for the holiday on Saturday, December 20, 2008, or have plans at home for the holiday. If the trial goes into the Christmas holiday week, jurors may feel rushed to reach a verdict prior to the holiday beginning. This is not fair to any party involved in the case, and it would prejudice Mr. Graham. It is

reasonable to believe the trial will take more than 8 court days. The case against Mr. Graham is now more complicated than it was before: Two new charges have been added, and each has new proof elements. This will result in more testimony from the government, and more witnesses from the defense, including the possibility of expert testimony. It was going to be difficult to get the single count indictment tried in 8 days; it will be much more difficult to get a three count indictment tried in that time frame. Moreover, if both defendants are tried together, it appears inconceivable that the case could get tried without running into the problems associated with having jurors deliberate over a holiday.

2. Approximately six weeks ago, a grand jury was convened specifically for the purposes of indicting Mr. Marshall. It is counsel's understanding that the grand jury heard statements allegedly made by Mr. Marshall to third parties that inculpated himself and Mr. Graham. Defendant Graham has not had access to any discovery related to that grand jury proceeding. And, Defendant Graham has not had access to any evidence presented to the grand jury that was convened last week that led to the new charges presently pending against him. Without knowing when the government intends to provide this information to Mr. Graham, and without knowing how

voluminous the new grand jury materials are, it is difficult for Mr. Graham to determine how much additional time he will need to review and investigate the new materials compiled by the government. If any new, substantive factual matters are raised in the discovery, Defendant Graham will need adequate time to investigate the matters. This may make trial by December 9, 2008, difficult to accomplish.

3. Once Mr. Graham receives this discovery, he will be in a better position to assess whether substantive confrontation clause issues are implicated by a joint trial. If Mr. Marshall made statements that incriminated himself and Mr. Graham, and if the government plans to introduce this evidence at trial, this would raise Bruton and severance issues. These would need to be addressed by way of pretrial motion, memorandum, response and reply, and perhaps even a hearing on redactions. This may substantially delay the case, especially if the government does not immediately produce discovery. Mr. Graham will need adequate time to read all the discovery, identify Bruton issues, brief the issues, and then wait for the government's response and the court's determination of the issue. This may mean substantive decisions about joint or single trials are not made until close to the December 9, 2008, proposed trial date.

4. There are a number of significant pretrial issues that need to be resolved prior to trial. From counsel's initial review of the new indictment, it appears that some of the same issues that led to dismissal in Mr. Graham's prior case still exist in this case. As with the Bruton issue, these matters will also need to briefed and addressed prior to trial. This may make getting the case to trial by December 9, 2008, difficult.

5. Because the government filed the superceding indictment in a new file, all of the motions filed previously will now need to be re-filed under the new case number, and new jury instructions will need to be prepared to encompass the new charges. This will add some delay to the case, especially if any matters need to be referred back to the magistrate for consideration.

Dated October 9, 2008.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated by electronic delivery:

MARTY JACKLEY
UNITED STATES ATTORNEY
P O BOX 3303
SIOUX FALLS SD 57101

ROBERT MANDEL
ASSISTANT US ATTORNEY
515 9th STREET #201
RAPID CITY SD 57701

Dated October 9, 2008.

/s/ John R. Murphy
John R. Murphy

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

UNITED STATES' REPLY TO DEFENDANT GRAHAM'S RESPONSE TO SCHEDULING ORDER

COMES NOW the United States, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully files its Reply to Defendant Graham's Response to the Court's Order of October 8, 2008:

1. The United States believes that there is sufficient time to try the case before the Christmas holiday. The United States anticipates its case-in-chief to take approximately four days, based upon the identification of approximately twenty-nine witnesses.

2. As the Court is aware, Fed. R. Crim. P. 6 governs grand jury proceedings and this particular instance of misinformation on Marshall's statements presents an example of the dangerousness of speculation as to such

proceedings. Defendant Graham has repeatedly been advised verbally and in writing that it is a longstanding practice in this District to provide Jencks Act/grand jury material the Friday before trial. This general practice is utilized in the interest of witnesses' protection, and is more beneficial to defense than a strict application of 18 U.S.C. § 3500's requirement which mandates disclosure only after the witness' direct examination. Based upon recent information brought to the attention of the United States Attorney with specific reference to witness safety issues, the United States Attorney may request additional assurances before any Jencks Act/grand jury material is provided in this case prior to the witnesses' direct testimony.[1]

3. As for the discovery concerns associated with Defendant Marshall's statements, on January 28, 2008, Defendant Graham was provided the taped statements, and has further been provided the handwritten notes associated with Marshall's statements. In addition, Marshall's statements were specifically addressed in the United States' Trial Memorandum Re: Crawford filed on September 23, 2008, in preparation for the trial scheduled to begin on October 6, 2008. The United States does not believe that statements made by either Defendant give rise to any Bruton issues, and to the extent either Defendant

[1]To the extent the Court desires to review the witness safety material, the United States Attorney requests to do the same *in camera*.

believes otherwise, there is ample opportunity to address any redaction issues prior to December 9, 2008.

4 & 5. Defendant Graham has filed his pre-trial motions, the United States has responded, and in many instances, Defendant Graham has filed his reply memoranda. With respect to Defendant Graham, jury instructions have already been filed, including the United States' instruction 10, with element four specifically addressing the matters outlined in the Superseding Indictment with respect to "Indian status." In short, but for the indictment sufficiency issue in relation to "Indian status," this matter was ready for trial to commence on October 6, 2008. To the extent any of the previous motion practice pertains to Defendant Marshall, there exists ample time for him to file responses by a December 9, 2008, trial date.

Date: October 9, 2008

MARTY J. JACKLEY
United States Attorney



MARTY J. JACKLEY
ROBERT A. MANDEL
Assistant United States Attorney
PO Box 2638
Sioux Falls, SD 57101-2638
Phone: 605.357.2330
Fax: 605.330.4405

CERTIFICATE OF SERVICE

The undersigned hereby certifies on October 9, 2008, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana L. Hanna

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Facsimile at
- ☐ Federal Express
- ☒ Electronic Case Filing

Marty J. Jackley
United States Attorney

This document was filed electronically.

FILED

OCT 10 2008

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	CRIM. NO. 08-50078 9-01 DEFENDANT'S CONSENT TO WAIVE DETENTION HEARING

Defendant John Graham states as follows:

1. He is aware that the Court has scheduled a detention hearing for October 10, 2008.

3. He consents to waive the detention hearing and proceed with the arraignment as scheduled.

Subscribed and sworn this 8 day of Oct., 2008.

John Graham

Subscribed and sworn to before me this 8 day of October, 2008.

Notary Public-South Dakota

My commission expires: 05-06-14

(SEAL)

SEAL ERIN E. DUCHENEAUX NOTARY PUBLIC State of South Dakota SEAL

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

VERONICA L. DUFFY, U.S. MAGISTRATE JUDGE, PRESIDING

Sandie Thielen, Deputy Clerk
Jane Rager, PTSO

October 10, 2008
Court Time: 8:30 a.m. to 8:40 a.m.

CR:08-50079

United States of America,	*	Robert A. Mandel
For Government,	*	
vs.	*	
JOHN GRAHAM	*	John R. Murphy
a/k/a John Boy Patton; and	*	
VINE RICHARD MARSHALL,	*	Dana Hanna
a/k/a Richard Vine Marshall,	*	
a/k/a Dick Marshall,	*	
For Defendants.	*	

✔..... **INITIAL APPEARANCE AND ARRAIGNMENT OF JOHN GRAHAM**
✔ Superseding Indictment ☐ Information ☐ Complaint
✔..... Date of Federal arrest/custody: 10/07/08
✔..... Dfdt advised of the pending charges
✔..... Maximum Penalty
Counts I, 2 and 3: Mandatory life imprisonment
☐..... Financial Affidavit executed and filed
✔..... Counsel reappointed: John R. Murphy
✔..... Dfdt advised of constitutional and statutory rights
✔..... Dfdt arraigned and enters plea of Not Guilty to Counts I, 2 and 3
☐..... Bond set ☐ PR ☐ Third Party ☐ Cash ☐ Surety ☐ 10%
✔..... Order of Detention Pending Trial

✔..... **INITIAL APPEARANCE AND ARRAIGNMENT OF VINE RICHARD MARSHALL**
✔ Superseding Indictment ☐ Information ☐ Complaint
✔..... Date of Federal arrest/custody: 10/07/08
✔..... Dfdt advised of the pending charges
✔..... Maximum Penalty
Count I: Mandatory life imprisonment
☐..... Financial Affidavit executed and filed
✔..... Counsel reappointed: Dana Hanna
✔..... Dfdt advised of constitutional and statutory rights
✔..... Dfdt arraigned and enters plea of Not Guilty to Count I
☐..... Bond set ☐ PR ☐ Third Party ☐ Cash ☐ Surety ☐ 10%
✔..... Order of Detention Pending Trial

☐..... **BOND REVIEW HEARING**
☐..... Date of Federal arrest/custody:
☐..... Court motion to revoke
☐..... Order of Detention Pending Trial
☐..... Bond Reinstated

☐..... **MOTION OR PETITION TO REVOKE HEARING**
☐..... Date of Federal arrest/custody:
☐..... Dfdt first appearance
☐..... Dfdt advised of Charges and Rights
☐..... Counsel appointed
☐..... Order of Detention Pending Trial
☐..... Probable Cause Hearing

☐..... **MATERIAL WITNESS PROCEEDINGS**
☐..... Date of Federal arrest/custody:
☐..... Counsel appointed
☐..... Material Witness REMANDED TO CUSTODY
☐..... Bond set ☐ **PR** ☐ **Third Party** ☐ **Cash** ☐ **Surety** ☐ **10%**

☐..... **RULE 5 REMOVAL PROCEEDINGS**
☐..... Waiver of ☐ **Preliminary Hrg** ☐ **Waiver of Rule 5/Rules 32 Hrg** ☐ **Waiver Identity Hrg**
☐..... Waiver of detention hearing held
☐..... Identity/Removal hearing set
☐..... Dfdt ORDERED REMOVED to Originating District
☐..... Bond set ☐ **PR** ☐ **Third Party** ☐ **Cash** ☐ **Surety** ☐ **10%**

☐..... **PRELIMINARY HEARING PROCEEDINGS**
☐..... Court finds Probable Cause and the matter is bound over to U.S. District Court

☐..... **ORAL ORDER for ISSUANCE OF BENCH WARRANT**

☐..... **REMARKS:**

FILED
OCT 10 2008
CLERK

United States District Court

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN GRAHAM,
a/k/a JOHN BOY PATTON,

Defendant

CASE NO.: CR. 08-50079

ORDER OF DETENTION

This matter came before the court for an initial appearance and arraignment on a Superseding Indictment in the above matter on Friday, October 10, 2008. The defendant, John Graham, appeared in person and by his counsel, John R. Murphy. The United States appeared by Assistant United States Attorney, Robert Mandel. Previously, the defendant had made an appearance on a complaint in this same matter on October 3, 2008, and requested a detention hearing, which was scheduled for October 10, 2008, as well.

However, on the date of the scheduled detention hearing, Mr. Graham waived his right to contest his continued detention and to seek an evidentiary hearing. The court accepts Mr. Graham's waiver. This waiver is without prejudice to Mr. Graham's ability to seek release under the Bail Reform Act at any point in the future.

Based upon the facts and circumstances outlined in the court's original detention order in this matter in CR 03-50020, Docket 181, the court hereby ORDERS that Mr. Graham continue to remain detained.

Directions Regarding Detention

The defendant is committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. The defendant shall be afforded a reasonable opportunity for private consultation with defense counsel. On order of a court of the United States or on request of any attorney for the Government, the person in charge of the corrections facility shall deliver the defendant to the United States marshal for the purpose of an appearance in connection with a court proceeding.

NOTICE OF RIGHT TO APPEAL

Mr. Graham has the right to appeal the court's detention order to the district court having original jurisdiction over the offense, which appeal shall be determined promptly. See 18 U.S.C. § 3145(b).

Dated: October 10, 2008

By the court:

Veronica L. Duffy
United States Magistrate Judge

FILED
OCT 10 2008
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL a/k/a RICHARD VINE MARSHALL a/k/a DICK MARSHALL, Defendant.	)	CR. 08-50079 ORDER CONTINUING DETENTION

On August 26, 2008, the defendant, Vine Richard Marshall, appeared before the court for an initial appearance and arraignment on an indictment. A detention hearing was requested and held on August 29, 2008, at which point a detention order was entered. On October 10, 2008, Mr. Marshall appeared before the court for an initial appearance and arraignment on a superseding indictment. No new evidence or argument was presented on the issue of detention. Therefore, it is hereby

ORDERED that the previously-entered order detaining Mr. Marshall [Docket 16] shall be continued in full force and effect.

Dated October 10, 2008.

BY THE COURT:

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

GOVERNMENT'S REQUEST FOR NOTICE OF ALIBI DEFENSE TO DEFENDANT VINE RICHARD MARSHALL

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 files and serves the Government's Request for Notice of Alibi Defense pursuant to Fed. R. Crim. P. 12.1(a) to include the following within ten (10) days absent further order of the court:

(A) each specific place where the defendant claims to have been at the time of the alleged offense; and

(B) the name, address, and telephone number of each alibi witness on whom the defendant intends to rely.

The United States is requesting that Defendant, Vine Richard Marshall aka Richard Vine Marshall aka Dick Marshall, provide notification of any alibi defense for which he intends to present evidence as to the offense of aiding and abetting

in the first degree murder of Anna Mae Aquash as charged in the Superseding Indictment filed October 7, 2008, and more specifically that:

On or about the early morning hours of December 12, 1975, at his residence in Allen, South Dakota, house #363, Richard Marshall knowingly aided and abetted Defendant John Graham, Theda Clarke and Arlo Looking Cloud in the first degree murder of Anna Mae Aquash by, including but not limited to, providing consultation and exchange of the "baggage note," as well as providing the .32 caliber revolver and shells to murder Anna Mae Aquash.

Date: October 10, 2008

MARTY J. JACKLEY
United States Attorney
ROBERT A MANDEL
Assistant United States Attorney
PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2310
Fax: 605.330.4405
Marty.J.Jackley@usdoj.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies on October 10, 2008, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana L. Hanna

☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Facsimile at
☐ Federal Express
☒ Electronic Case Filing

Marty J. Jackley
United States Attorney

This document was filed electronically.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

GOVERNMENT'S REQUEST FOR NOTICE OF ALIBI DEFENSE TO DEFENDANT JOHN GRAHAM

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 files and serves the Government's Request for Notice of Alibi Defense pursuant to Fed. R. Crim. P. 12.1(a) to include the following within ten (10) days absent further order of the Court:

(A) each specific place where the defendant claims to have been at the time of the alleged offense; and
(B) the name, address, and telephone number of each alibi witness on whom the defendant intends to rely.

The Government is requesting that Defendant John Graham provide notification of any alibi defense for which he intends to present evidence as to

the first degree murder of Anna Mae Aquash as charged in the Superseding Indictment filed October 7, 2008, wherein:

1. On or about the early morning hours of December 12, 1975, at Defendant Richard Marshall's residence in Allen, South Dakota, house #363, Defendant Marshall provided Defendant Graham, and other aiders and abettors, consultation and exchange of the "baggage note," as well as providing the .32 caliber revolver and shells to murder Anna Mae Aquash.

2. Thereafter, during the early morning hours of December 12, 1975, Defendant John Graham traveled with Anna Mae Aquash, Co-Defendant Arlo Looking Cloud, and Theda Clarke to the murder scene and discovered location of the body of Anna Mae Aquash at the Roger Amiotte ranch, approximately three miles north on Highway 73 from the intersection of Highways 44 and 73 (as more fully depicted in photographs contained in the trial exhibits 1-6, 8, and 15 of Co-Defendant Arlo Looking Cloud). At this location, Defendant John Graham did commit aid and abet in the first degree murder of Anna Mae Aquash.

Date: October 10, 2008

MARTY J. JACKLEY
United States Attorney
ROBERT A MANDEL
Assistant United States Attorney
PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2310
Fax: 605.330.4405
Marty.J.Jackley@usdoj.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies on October 9, 2008, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana L. Hanna

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Facsimile at
- ☐ Federal Express
- ☒ Electronic Case Filing

Marty J. Jackley
United States Attorney

This document was filed electronically.

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S RESPONSE IN OPPOSITION TO GOVERNMENT'S MOTION TO EXPEDITE TRIAL

NOW COMES Defendant Richard Marshall, by and through his attorney, Dana L. Hanna, and hereby opposes the government's motion to expedite his trial. Defendant Marshall opposes the government's motion on the grounds that if his trial were advanced from its presently scheduled trial date, he would be deprived of his constitutional rights to present a defense and to effective assistance of counsel.

In support of the Defendant's opposition to the government's motion, Dana L. Hanna, attorney for the Defendant, hereby affirms:

1. On August 20, 2008, Richard Marshall was charged with aiding and abetting a murder that occurred 33 years ago, in 1975. He was arrested on August 25, 2008 and arraigned the next day. On August 28, 2008, the Court entered an order fixing dates [Doc. 14] and scheduled trial for October 28, 2008.

2. On September 8, 2008, Richard Marshall, through undersigned counsel, filed a motion

to continue the trial and other deadlines for four months [Doc. 17].

3. On September 23, 2008, the Honorable Veronica L. Duffy, United States Magistrate Judge, granted the Defendant's motion for continuance and based her ruling, in part, on a finding that "failure to grant the continuance would deny counsel the reasonable time necessary for effective preparation" [Doc. 23]. The Court continued the trial of Richard Marshall to February 24th, 2009.

4. On October 7th, 2008, the government filed a superseding indictment that joined the case of Richard Marshall with that of Defendant John Graham. On the same day, the government filed a motion to expedite the Defendants' jury trial, and asked the Court to advance Richard Marshall's trial from February 24th, 2009 to November or December 2008.

5. The trial Court directed defense counsel to inform the Court by October 14th, 2008 if they would be able to try this case on December 9th, 2008.

6. Counsel for Defendant Marshall hereby states unequivocally and without reservation that it is his considered professional judgment that it would be impossible for him to prepare an adequate defense and be prepared to try this case on December 9th, 2008 or at any time before the presently scheduled trial date of February 24th, 2008.

7. The government has taken 33 years to investigate this case. Now, Defendant Richard Marshall requires more than three months to investigate the facts and history of this case and to prepare his defense. The government provided defense counsel with approximately five thousand pages on disc on or about October 6th, 2008. It is impossible, in the judgement of defense counsel, to read, review, and analyze the discovery documents, review them with Richard Marshall, investigate facts and interview witnesses, and prepare his defense by

December 9th, 2008, or at any time before the presently scheduled trial date.

8. Defense counsel has an ethical obligation to conduct his own independent investigation of this case. I cannot and will not rely solely on the government's investigation and the discovery documents provided to me last week. I intend to seek other discovery than that which has been provided to me. I intend to interview witnesses, some of which are out of state. I intend to obtain and review case files and court documents related to the history of various individuals in the American Indian Movement in the 1970s, which were brought out in testimony in the trial of the *United States v. Arlo Looking Cloud*. I also intend to file motions and legal briefs that will require extensive legal research and writing, including a motion to dismiss the indictment on the grounds that Richard Marshall's ability to present a defense has been irrevocably prejudiced by the passage of 33 years between the crime charged and the indictment and a motion to sever Richard Marshall's trial from that of Defendant Graham on the grounds that Richard Marshall's defense is irreconcilably in conflict with that of Defendant Graham. Given the facts, issues, and history of this case, it would be impossible for me to adequately investigate the facts in this case, research and prepare briefs on the legal issues, read and analyze all the discovery, and prepare this case for trial in two months, or at any time before February 24th, 2008.

9. Moreover, in addition to the professional duty I owe to Richard Marshall and to this Court in this case, I have professional obligations to other clients and other courts. I am scheduled to begin a criminal trial on October 28th, 2008, United States vs. Barrera, before the Honorable Charles B. Kornmann in United States District Court in Pierre, South Dakota. I also represent the lead defendant in a multi-defendant drug conspiracy case, United States vs. Vigil, et

al., that is scheduled to begin trial before the Honorable Karen E. Schreier, Chief Judge of the United States District Court, on December 9th, 2008.

10. The government has submitted no evidence, and can submit no evidence, to controvert the Magistrate Judge's finding that a denial of defendant's request for a continuance to February 24, 2009 would deny counsel for Richard Marshall the reasonable time necessary for effective preparation [Doc. 23].

11. In summary, if this Court were to grant the government's motion to expedite the trial in this case, it is my legal opinion that Richard Marshall would be deprived of his constitutional right to effective counsel and his constitutional right to present a defense.

WHEREFORE, Defendant Richard Marshall opposes the government's motion to advance his trial date from February 24th, 2009 to December 9th, 2008 or to any other date prior to the scheduled trial date and respectfully urges the Court to deny the government's motion.

Dated this 14th day of October, 2008.

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Response in Opposition to Government's Motion to Expedite Trial was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 14th day of October, 2008.

/s/ *Dana L. Hanna*
Dana L. Hanna

FILED
OCT 16 2008
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER FIXING DATES
JOHN GRAHAM, a/k/a John Boy Patton; and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendant.	*	

Initial appearances and arraignments on a Superseding Indictment were held on October 10, 2008, with the Plaintiff appearing by Robert A. Mandel, Assistant United States Attorney, and the Defendant John Graham, a/k/a John Boy Patton, appearing in person and with his attorney, John R. Murphy; and the Defendant Vine Richard Marshall, a/k/a Richard Vine Marshall, a/k/a Dick Marshall, appearing in person and with his attorney, Dana Hanna; and

It appearing necessary that the court fix motion and trial dates in order to comply with the Speedy Trial Act, 18 U.S.C. § 3161, and

Pending before the Court is the Government's Motion to Expedite, Doc. 30, and after consideration of the Motion, together with the file in this matter,

IT IS ORDERED:

1. That the Government's Motion to Expedite, Doc. 30, is denied.

2. That all other motions as to both Defendants be filed and served on or before December 22, 2008; that opposing counsel respond thereto on or before January 5, 2009; and that a hearing thereon will be held before The Honorable Veronica Duffy, in Rapid City, South Dakota, on Tuesday, January 13, 2009, at 9:00 A.M.; and the Court will not consider a stock motion for leave to file further motions, however, the Court will consider a

motion filed by a party after the deadline if the party can show good cause as to why the motion was late filed.

3. That January 21, 2009, is hereby set as the deadline for submission to the Court of any proposed plea agreement.

4. That all motions in limine shall be in writing and filed, together with proposed instructions, with the Court ten (10) working days before trial.

5. That the jury trial herein for Defendants shall commence in Rapid City, South Dakota, on Tuesday, February 24, 2009, with counsel to be present for motions in limine at 9:00 A.M., and with the jury to report at 9:30 A.M.

6. That the period of delay resulting from such continuance is excluded in computing the time within which the trial of the offense for the Defendants must commence, as the Court finds that the ends of justice served by taking such action outweigh the best interests of the public and the Defendants in a speedy trial. 18 U.S.C. § 3161(h)(8)(A).

Dated this 16th day of October, 2008.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: Jackie Weisenkeimer
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION FOR ACCESS TO JUROR QUESTIONNAIRES

Defendant John Graham moves this Court for its Order giving permission for John R. Murphy to review copies of juror questionnaires submitted by the prospective jury panels in the above-referenced matter for the purpose of preparing for trial. Defendant asks that access to these questionnaires be granted to him as soon as they have been compiled by the Clerk of Court.

Dated October 21, 2008.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

MARTY J. JACKLEY	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
ROBERT A. MANDEL	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
DANA HANNA	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing

Dated October 21, 2008.

/s/ John R. Murphy
John R. Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S ADMINISTRATIVE MOTIONS

MOTION FOR CELLULAR TELEPHONE ACCESS

Defendant John Graham, through his attorney, John R. Murphy, moves this Court for its Order allowing counsel to have a cellular telephone on his person at all times during the trial in the above-referenced matter. Counsel agrees to have the cellular telephone turned off at all times while in the courtroom.

This relief is requested because defense does not have the benefit of an office in the federal building as the United States Attorney does, and therefore, has no access to an outside telephone line to manage trial affairs during the trial. Also, counsel for the defense is a sole-practitioner and needs to have access to a private line in the event that an office emergency arises.

MOTION TO EXCLUDE THE GOVERNMENT AND ANY LAW ENFORCEMENT OFFICERS FROM COMMUNICATION WITH DEFENSE WITNESSES

Defendant John Graham, through his attorney, John R. Murphy, moves this Court for its Order excluding the government and any law enforcement officials from entering the defense witness room or communicating with defense witnesses while in the defense room, or otherwise intimidating or threatening defense witnesses during the course of the trial in this matter.

REQUEST FOR PERMISSION FOR PARTIES OTHER THAN DEFENSE COUNSEL TO BE SEATED AT COUNSEL TABLE DURING JURY SELECTION

Defendant John Graham, through his attorney, John R. Murphy, respectfully requests the Court's permission for his paralegal, Erin Ducheneaux and Attorney Robert Van Norman to be seated at defense counsel's table, or in the alternative, to be seated inside the bar behind counsel table, during jury selection. Mr. Murphy anticipates that Ms. Ducheneaux will be seated with him throughout the trial, and Mr. Van Norman may be present for the purpose of assisting counsel and Mr. Graham with jury selection.

Dated October 21, 2008.

/s/ John R. Murphy
John R. Murphy
328 E. New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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	☐	Facsimile at
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DANA HANNA	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing

Dated October 21, 2008.

/s/ John R. Murphy

John R. Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)	CRIM. NO. 08-50079-01 MOTION TO ALLOW DEFENDANT TO WEAR STREET CLOTHES AND BE FREE FROM SHACKLES DURING TRIAL

Defendant John Graham, through his attorney, John R. Murphy, moves this Court for its Order allowing him to appear in his own clothes and be free from shackles during the trial in this matter. Defendant will be irreparably prejudiced if he is required to appear at trial in prison garb and shackles. This will detract from the presumption of innocence and will serve as improper character evidence against Defendant.

Dated October 21, 2008.

/s/ John R. Murphy

John R. Murphy
328 E. New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

MARTY J. JACKLEY	☐	U.S. Mail, postage prepaid
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DANA HANNA	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing

Dated October 21, 2008.

/s/ John R. Murphy
John R. Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
OCT 22 2008
CLERK

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 Defendant.	)	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION TO SEAL

Defendant, John Graham, through his attorney, John R. Murphy, moves this Court for its Order sealing Defendant John Graham's *Ex Parte* Motion for Authorization of Paralegal based on the nature of the request.

Dated October 20, 2008.

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

MARTY J. JACKLEY

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
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- ☐ Facsimile at
- ☒ Electronic Case Filing

ROBERT A. MANDEL

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile at
- ☒ Electronic Case Filing

DANA HANNA

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile at
- ☒ Electronic Case Filing

Dated October 21, 2008.

John R. Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION TO DISMISS COUNT III IN INDICTMENT

Defendant John Graham, pursuant to Fed.R.Crim.P. 12(b) moves to dismiss count 3 in the superceding indictment. Mr. Graham asserts this court lacks jurisdiction over count 3 of the indictment. Alternatively, Mr. Graham asserts that count 3 fails to state a charge.

This motion is based on the Memorandum in Support of Motion to Dismiss, incorporated herein by reference.

Dated October 23, 2008.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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	☐	Hand Delivery
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Dated October 23, 2008.

/s/ John R. Murphy
John R. Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COUNT 3

Count 3 of the superceding indictment (Doc. 28) filed on October 7, 2008, should be dismissed. Count 3 should be dismissed because the court lacks jurisdiction over the offense and because count 3 fails to state a charge. Fed.R.Crim.P. 12.

LACK OF JURISDICTION:

Count 3 alleges that John Graham aided and abetted Fritz Arlo Looking Cloud, Theda Rose Clarke, and Richard Marshall in the killing of Annie Mae Aquash. Looking Cloud, Clarke, Marshall and Aquash are alleged to be Indians in count 3. Graham is not. Count 3 alleges violations of 18 U.S.C. 2, 1111, and 1153.

Under the plain, unequivocal language of 18 U.S.C., 1153, Mr. Graham must be an Indian as that term is defined under federal criminal law for the court to have jurisdiction over him under that statute. 18 U.S.C. 1153. Mr. Graham is not an Indian as that term is defined under federal criminal law.

To determine whether a person is "Indian" under federal criminal law, the threshold inquiry is whether that person is a member of a federally recognized Indian tribe. In re Duane Garvis, 402 F.Supp.2d 1219, 1224 (E.D.Wa. 2004) (citing William C. Canby, American Indian Law, 4th. Ed. 2004, pp. 8-10; LaPier v. McCormick, 986 F.2d 303, 305 (9th Cir. 1993); State v. Sebastian, 243 Conn. 115, 701 A.2d 13 (1997); United States v. Antoine, 318 F.3d 919 (9th St. Cir. 2003); United States v. Heath, 509 F.2d 16, 19 (9th Cir. 1974)). Enrollment is not required, but membership in a federally recognized tribe is the primary evidence of being an Indian. Id. Defendants who are affiliated with Indian groups not recognized by the United States government are not Indian for criminal jurisdiction purposes. Id.

If a person is not enrolled, the government must then show that the person received benefits extended by the federal government exclusively to Indians based on their status as Indians. See United States v. Lawrence, 51 F.3d 150, 152-53 (8th Cir. 1995) (inquiry into whether defendant was eligible to receive benefits

from the United States Indian Health Service or through the Johnson O'Malley Act, and considered whether child in question was subject to coverage under the Indian Child Welfare Act); United States v. Bruce, 394 F.3d 1215, 1225 (9th Cir. 2005) (looking to whether person was recognized in some fashion by United States Secretary of the Interior in absence of formal enrollment in federally recognized tribe).

The importance of formal recognition by the United States government for an Indian tribe as it relates to determining whether a person is an "Indian" is highlighted in cases involving "terminated" tribes. Persons affiliated with tribes that have had their federal recognition terminated are not "Indians" within the meaning of 18 U.S.C. 1153. United States v. Antelope, 430 U.S. 641 (1977); St. Cloud v. United States, 702 F.Supp. 1456 (D.S.D. 1988). Historically, when Indian tribes living in the United States migrated to Canada, the United States' relationship with the tribes ceased to exist because no further special trust relationship existed between the two entities. See New York Indians v. United States, 40 Cl.Ct. 498, 1904 WL 879 (Cl.Ct. 1904).

In this case, there are certain facts that are not reasonably subject to dispute. Neither John Graham nor Anna Mae Pictou Aquash are or ever were members of or enrolled in any tribe recognized by the United States government. Neither were

non-enrolled members either. There is nothing in the record to support the notion that either held themselves out to be members of any federally recognized United States tribe. The undisputed facts contained within discovery provided by the government is that both were consistently recognized by their peers and the United States government as Canadian citizens and persons affiliated with indigenous Canadian tribal "bands."

Therefore, based on these undisputable facts, the court lacks jurisdiction under the charged statute, 18 U.S.C. 1153. And, the government cannot place this case under federal jurisdiction by now alleging a violation of 18 U.S.C. 1152, as that statute is also not applicable to the case because Aquash does not meet the definition of Indian under federal criminal law.

The government alleges that because Looking Cloud, Clarke and Marshall are Indians, jurisdiction exists over Mr. Graham pursuant to 18 U.S.C. 2. There is nothing in the plain, unequivocal language of either 18 U.S.C. 2 or 1153 that supports the government's position. Jurisdiction over a non-Indian is not created by either statute merely because the non-Indian is alleged to have aided and abetted Indians.

The analysis in United States v. Torres, 733 F.2d 449 (7th Cir. 1984), contradicts the government's premise and its analysis supports Mr. Graham's

motion to dismiss. In that case, three persons were alleged to have conspired to commit murder and kidnaping in regard to a non-Indian victim. Id. at 453. The murder charge was prosecuted under 18 U.S.C. 1153, and the kidnaping charge was prosecuted under 18 U.S.C. 1152. The crime occurred in Indian country. Id. However, only two of the accused were Indians. The non-Indian potential defendant was not charged in federal court. Id. at 454, n.1. The court, in noting that the non-Indian defendant was not federally prosecuted in that case, cited to both 18 U.S.C. 1152 & 1153 as the reason. Moreover, in its discussion of the case, the court stated unequivocally that crimes committed by non-Indians against non-Indians in Indian country are not subject to federal jurisdiction. Id. at 454, n. 4 (under 18 U.S.C. § 1152, "crimes committed by non-Indians against non-Indians, in Indian country, are subject to state jurisdiction.") (citing United States v. McBratney, 104 U.S. 621, 26 L.Ed. 869 (1881), and New York ex rel. Ray v. Martin, 326 U.S. 496, 66 S.Ct. 307, 90 L.Ed. 261 (1946)).

The government has ignored the plain language of the statutes and the long history of United States Supreme Court precedent on point. Instead, the government asserts that 18 U.S.C. 2 provides this court with jurisdiction over the matter. That is misplaced. All that statute does is make aiders and abetters subject to the same punishment as principles. It does not remove or otherwise modify any

proof or jurisdictional pre-requisites set forth in 18 U.S.C. 1152 or 1153.

In United States v. White Horse, 316 F.3d 769 (8th Cir.), cert. denied, 540 U.S. 844 (2003), the Eighth Circuit held that the "Indian" recognition matter was a proof issue, not a jurisdictional issue. However, that case is distinguishable in several important regards. Further, its holding appears to contradict existing United States Supreme Court case law on point.

First, in that case, the issue of Indian recognition was not raised at trial. The matter was raised on appeal and reviewed for plain error. The court declined to find plain error. Therefore, the standard of review was different than in the present case.

Second, that case involved facts opposite to those presented in Mr. Graham's case. In that case, the defendant was charged under 18 U.S.C. 1152. He argued on appeal that he was an Indian. This was dispositive of the issue as the court found that if he was an Indian, he would fall within the parameters of 18 U.S.C. 1153. Id. at 772. Thus, the court found the charging error to be harmless because he was subject to federal jurisdiction under either 18 U.S.C. 1152 or 1153.

This is the opposite situation presented in Mr. Graham's case. Neither Mr. Graham nor Ms. Aquash were "Indians" at the time of the alleged offense. Thus,

neither statute subjects Mr. Graham to the court's jurisdiction. Under 18 U.S.C. 1152, one of them must be Indian to invoke the court's jurisdiction, and under 18 U.S.C. 1153, Mr. Graham must be Indian to invoke the court's jurisdiction. Neither condition exists. Accordingly, Mr. Graham asks for dismissal of count 3 in the superceding indictment.

FAILURE TO STATE A CHARGE

Count 3 of the superceding indictment fails to state an offense. Count 3 fails to set forth an essential element of the 18 U.S.C. 1153, specifically, that Mr. Graham is an Indian. The failure to set forth every essential element in the indictment, and to present every essential element in the charge to the grand jury, violates Mr. Graham's Fifth and Sixth Amendment rights.

A defendant's Indian status is an essential element of 18 U.S.C. 1153. United States v. Pemberton, 405 F.3d 656, 659 (8th Cir. 2005); United States v. Prentiss, 273 F.3d 1277 (10th Cir. 2001). The failure to allege an essential element violates a defendant's Fifth Amendment right to a grand jury indictment because the grand jury was never asked to make a probable cause determination in regard to that element. Hamling v. United States, 418 U.S. 87 (1974); United States v. Williams, 429 F.3d 767, 775 (8th Cir. 2005). The failure to set forth all essential elements in an indictment also violates a defendant's Fifth and Sixth Amendment

rights. A defendant has the right to be fully informed of the nature of the charges, to be put on sufficient notice of the conduct alleged so that he can prepare a defense, and, the right to have an indictment of sufficient factual clarity so that he can assert bar to future prosecution. U.S. Const. Amend. V & VI; United States v. Zanagger, 848 F.2d 923, 925 (8th Cir. 1988); United States v. Spinner, 180 F.3d 514, 516 (3rd Cir. 1999). The defects in count 3 cannot be cured by amendment or additions. Williams, supra; United States v. Opsta, 659 F.2d 848, 850 (8th Cir. 1981).

Therefore, because count 3 fails to state an offense, it should be dismissed.

CONCLUSION

This court lacks jurisdiction over count 3 of the superceding indictment. And, count 3 is defective for failing to state a charge. Therefore, count 3 of the indictment should be dismissed.

Dated October 23, 2008.

/s/ John R. Murphy
John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

MARTY J. JACKLEY	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
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	☐	Facsimile at
	☒	Electronic Case Filing
ROBERT A. MANDEL	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
DANA HANNA	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing

Dated October 23, 2008.

/s/ John R. Murphy
John R. Murphy

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

FILED
OCT 24 2008
CLERK

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN J. GRAHAM, aka JOHN BOY PATTON, Defendant.	)	CR. 08-50079-01 *EX PARTE* ORDER GRANTING MOTION TO SEAL

Defendant John Graham has filed a motion seeking to seal his motion for authorization of a paralegal. Good cause appearing, it is hereby

ORDERED that Mr. Graham's motion to seal [Docket 48] his motion for authorization of a paralegal is granted.

Dated October 24, 2008.

BY THE COURT:

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

RESPONSE TO DEFENDANT GRAHAM'S ADMINISTRATIVE MOTIONS

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant US Attorney Robert A. Mandel and files its Response to Defendant Graham's Administrative Motions:

I. Motion for Cellular Phone Access

The United States does not object to Defendant's attorney's request for cellular phone access. Defendant's request seems consistent with the Court's Standing Order of September 24, 2008 (¶4) allowance of cellular devices.

II. Motion to Exclude the Government and Any Law Enforcement Officers from Communication with Defense Witnesses

The United States respectfully objects to Defendant Graham's request. First, this Motion constitutes an inappropriate attempt to exert ownership over particular witnesses and their testimony. It is anticipated that several witnesses may receive trial subpoenas from both the United States and defense in this matter. Second, Defendant Graham

does not have the right to silence witnesses. Whether or not a witness wishes to speak to law enforcement authorities is the witness' individual right. Third, in the event a witness feels intimidated or threatened by anyone, they have the right to notify either the Court or the United States Attorney and to have the matter appropriately addressed. Accordingly, the United States respectfully requests Defendant Graham's Motion be denied.

III. Request Permission for Parties Other than Defense Counsel to be Seated at Defense Table

The United States does not object to Attorney Robert Van Norman being seated at defense counsel's table as a member in good standing of both our state and federal bar associations. The United States recognizes the long-standing practice requirement in the Western Division that only parties and members in good standing of the bar association may be seated at counsel's table. However, the United States will defer to the Court and does not take opposition to defense counsel's request with respect to his assistant.

Date: October 28, 2008

MARTY J. JACKLEY
United States Attorney



PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on October 28, 2008, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy

- ☐ U.S. Mail, postage prepaid
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Marty J. Jackley
United States Attorney

This document has been filed electronically.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

RESPONSE TO DEFENDANT'S MOTION TO ALLOW DEFENDANT TO WEAR STREET CLOTHES AND TO BE FREE FROM SHACKLES DURING TRIAL

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant US Attorney Robert A. Mandel and files its Response to Defendant's Motion to Allow Defendant to Wear Street Clothes and to Be Free From Shackles During Trial. The United States does not object to Defendant's request as long as he is not disruptive of the proceedings in this matter.

Date: October 28, 2008

MARTY J. JACKLEY
United States Attorney



PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on October 28, 2008, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

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Marty J. Jackley
United States Attorney

This document has been filed electronically.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

RESPONSE TO DEFENDANT'S MOTION TO ALLOW DEFENDANT TO WEAR STREET CLOTHES AND TO BE FREE FROM SHACKLES DURING TRIAL

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Date: October 28, 2008

MARTY J. JACKLEY
United States Attorney



PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

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Marty J. Jackley
United States Attorney

This document has been filed electronically.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

RESPONSE TO DEFENDANT'S MOTION FOR ACCESS TO JUROR QUESTIONNAIRES

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant US Attorney Robert A. Mandel and files its Response to Defendant Graham's Motion for Access to Juror Questionnaires. The United States does not object to the parties having equal access to juror questionnaires should the Court deem it appropriate in this matter.

Date: October 28, 2008

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on October 28, 2008, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy

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Marty J. Jackley
United States Attorney

This document has been filed electronically.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN GRAHAM, aka JOHN BOY PATTON, and VINE RICHARD MARSHALL, aka RICHARD VINE MARSHALL, aka DICK MARSHALL, Defendants.	)	CR. 08-50079-01, -02 ORDER ON DEFENDANT'S MOTION FOR ACCESS TO JUROR QUESTIONNAIRES

Defendant John Graham has filed a motion seeking an order from the court granting him permission to receive copies of the juror questionnaires submitted by the prospective jury panels in this matter for the purpose of preparing for trial. [Docket 45]. Mr. Graham would like access to these questionnaires as soon as the Clerk of Court has compiled them.

The government has responded that it does not object to Mr. Graham's motion, but seeks equal access to the questionnaires "a reasonable time prior to trial." The district court, the Honorable Lawrence Piersol, referred Mr. Graham's motion to this court for determination pursuant to 28 U.S.C. § 636(b)(1)(A).

Good cause appearing, it is hereby

ORDERED that the office of the Clerk of Court notify the government, Mr. Graham, and Mr. Marshall as soon as the juror questionnaires for the jury panel(s) that will be called in this matter are available. All parties may review these questionnaires when they are soonest available in the Clerk's Office or in adjacent quarters in the federal building.

NOTICE OF RIGHT TO APPEAL

Pursuant to 28 U.S.C. § 636(b)(1)(A), any party may seek reconsideration of this order before the district court upon a showing that the order is clearly erroneous or contrary to law. The parties have ten (10) days after service of this order to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. See Fed. R. Crim. P. 58(g)(2). Failure to file timely objections will result in the waiver of the right to appeal questions of fact. Objections must be timely and specific in order to require review by the district court.

Dated October 29, 2008.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN GRAHAM, aka JOHN BOY PATTON, and VINE RICHARD MARSHALL, aka RICHARD VINE MARSHALL, aka DICK MARSHALL, Defendants.	)	CR. 08-50079-01, -02 ORDER ON DEFENDANT'S MOTION TO WEAR STREET CLOTHES AND BE FREE FROM SHACKLES DURING TRIAL

Defendant John Graham moves the court to allow him to appear in his own clothing and to be unshackled during the trial scheduled in his case. See Docket 47. The government does not resist Mr. Graham's motion so long as Mr. Graham refrains from disruptive behavior during the trial. The district court, the Honorable Lawrence Piersol, referred Mr. Graham's motion to this court for determination pursuant to 28 U.S.C. § 636(b)(1)(A). Good cause appearing, it is hereby

ORDERED that Mr. Graham's motion to wear civilian clothing and to be unshackled [Docket 47] is granted. Both Mr. Graham and Mr. Marshall shall be allowed to wear their own clothing as trial and to appear before the jury without

shackles. The government, or the court *sua sponte,* may revisit this order if it becomes necessary to maintaining order at the trial.

NOTICE OF RIGHT TO APPEAL

Pursuant to 28 U.S.C. § 636(b)(1)(A), any party may seek reconsideration of this order before the district court upon a showing that the order is clearly erroneous or contrary to law. The parties have ten (10) days after service of this order to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. See Fed. R. Crim. P. 58(g)(2). Failure to file timely objections will result in the waiver of the right to appeal questions of fact. Objections must be timely and specific in order to require review by the district court.

Dated October 29, 2008.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN GRAHAM, aka JOHN BOY PATTON, and VINE RICHARD MARSHALL, aka RICHARD VINE MARSHALL, aka DICK MARSHALL, Defendants.	)	CR. 08-50079-01, -02 ORDER ON DEFENDANT'S ADMINISTRATIVE MOTIONS

INTRODUCTION

Defendant John Graham moves the court for rulings on various administrative matters relating to the conduct of trial. See Docket 46. The district court, the Honorable Lawrence Piersol, referred Mr. Graham's motion to this court for determination pursuant to 28 U.S.C. § 636(b)(1)(A). Each separate topic raised by Mr. Graham will be addressed in turn.

DISCUSSION

A. MOTION FOR CELLULAR TELEPHONE ACCESS

Mr. Graham's counsel requests that he be allowed to have a cellular telephone on his person during the trial. The government does not object to this request so long as Mr. Graham's counsel's use of his telephone complies

with the Standing Order of the District of South Dakota, issued September 24, 2008. Paragraph 4 of that standing order provides, in pertinent part, as follows:

> Cellular phones and portable devices that contain cellular phones will be permitted in all courthouses in the United States District Court for South Dakota. Cellular devices must be turned off or in silent mode when taken into courtrooms. Individuals who take such devices into courtrooms may be asked by court security personnel to demonstrate that the device is either turned off or in silent mode. Use of any camera feature inside the courthouse is prohibited unless specifically authorized.

Good cause appearing, it is hereby

ORDERED that Mr. Graham's motion to be allowed to have a cellular phone with him during the trial is granted. The government counsel, and counsel for both Mr. Graham and Mr. Marshall shall be allowed to have cellular telephones with them during trial so long as they are in compliance with the Standing Order noted above.

B. MOTION TO EXCLUDE THE GOVERNMENT AND ANY LAW ENFORCEMENT OFFICERS FROM COMMUNICATION WITH DEFENSE WITNESSES

Mr. Graham moves for an order excluding the government and any law enforcement officials from entering the defense witness room or communicating with defense witnesses while in the defense room, or otherwise intimidating or threatening defense witnesses during the course of the trial in this matter. The government objects to this motion, noting that many of the witnesses in this case will be subpoenaed by both the government and one or both defendants. In addition, the government notes that no witness is compelled to speak to

either party. Finally, the government notes that any complaints about harassment or intimidation may be brought before the court and dealt with contemporaneously rather than prophylactically in a pretrial order.

No evidence has been presented to the court from which the court may conclude that the government has acted improperly toward any witness. Accordingly, the court hereby

DENIES Mr. Graham's order in this regard. Any party is free to contact witnesses whose testimony will be presented at trial, and any witness is free to refuse to speak to any party. All parties shall exercise courtesy when dealing with witnesses. If any witness has a complaint about harassment or intimidation from any party, that witness should bring his or her complaint before the court immediately and it will be dealt with accordingly at such time.

C. MOTION TO HAVE PARTIES OTHER THAN DEFENSE COUNSEL SEATED AT COUNSEL TABLE DURING JURY SELECTION

Finally, Mr. Graham's counsel seeks the court's permission to have another lawyer not appointed to represent Mr. Graham, Mr. Robert Van Norman, seated at counsel table with him during the jury selection portion of the trial only. Mr. Van Norman is admitted to practice before this court and is a member in good standing of this court's bar.

Mr. Graham also requests that his counsel's paralegal, Erin Ducheneaux, be allowed to sit with him during the entire trial. Alternatively, Mr. Graham's counsel seeks to have Mr. Van Norman and Ms. Ducheneaux seated inside the

bar behind counsel table. The government does not object to this request, but questions whether it is in violation of established practice in the Western Division.

The District of South Dakota has already addressed this issue. Standing Order No. 93-15, issued November 15, 1993, provides as follows:

> Only counsel of record . . . clients, or case representatives shall be permitted to sit at counsel table in the courtroom. No other persons, including legal interns, paralegals, or other office staff of an attorney, shall be permitted to sit at counsel table except by prior permission of the Court.

Although the request made by Mr. Graham's counsel is contrary to Standing Order No. 93-15, the standing order itself allows of exception "by prior permission of the Court."

The court takes note of the fact that the discovery in this case is voluminous and that both Mr. Graham's counsel and Mr. Marshall's counsel are solo practitioners. In addition, the government has found it expedient to have two lawyers representing it in this case, presumably because of the effort it will require to marshal the evidence during the trial. Accordingly, the court finds that good cause exists for the request that Mr. Graham's counsel's paralegal be allowed to sit with him at counsel table during the trial to assist in the location and presentation of exhibits and witnesses, and hereby

ORDERS that both Mr. Graham and Mr. Marshall shall be allowed to have their paralegals seated with their counsel at defense counsel's table throughout the trial.

The basis for Mr. Graham's request to have attorney Van Norman seated with him at counsel table is less evident as Mr. Graham does not elaborate on why Mr. Van Norman's presence is needed. However, Mr. Graham's request as to Mr. Van Norman is also more limited in that he only requests his presence during jury selection. The court finds that Mr. Van Norman could assist Mr. Graham's counsel with a minimum of disruption by sitting inside the bar, but not at counsel table itself, and only during jury selection. Accordingly, it is

ORDERED that Mr. Van Norman may assist Mr. Graham's counsel during jury selection from inside the bar. Any similar request by Mr. Marshall for a single additional lawyer, duly admitted and in good standing with this court, to assist him from inside the bar is also hereby granted. Mr. Marshall shall notify the court at the pretrial conference in this matter of the identity of any such lawyer he intends to have seated inside the bar to assist him during jury selection.

CONCLUSION

Mr. Graham's motion as to administrative matters [Docket 46] is granted in part and denied in part as described more fully above.

NOTICE OF RIGHT TO APPEAL

Pursuant to 28 U.S.C. § 636(b)(1)(A), any party may seek reconsideration of this order before the district court upon a showing that the order is clearly erroneous or contrary to law. The parties have ten (10) days after service of this order to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. See Fed. R. Crim. P. 58(g)(2). Failure to file timely objections will result in the waiver of the right to appeal questions of fact. Objections must be timely and specific in order to require review by the district court.

Dated October 29, 2008.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka
JOHN BOY PATTON, and
VINE RICHARD MARSHALL aka
RICHARD VINE MARSHALL aka
DICK MARSHALL,

Defendants.

CR08-50079-01

UNITED STATES' MEMORANDUM OPPOSING DEFENDANT'S MOTION TO DISMISS INDICTMENT

This matter is before the Court upon the Motion of Defendant John Graham ("Graham") to Dismiss Count 3 of the Superseding Indictment filed on October 7, 2008 (DE 28). The United States opposes the Motion and respectfully submits this Response.

I. INTRODUCTION

On October 23, 2008, Graham filed a Motion to Dismiss pursuant to Fed. R. Crim. P. 12(b) asserting that this Court lacks jurisdiction over Count 3 that alleges, among other things, Graham aided and abetted specifically identified Indians in the first degree murder of Anna Mae Aquash aka Annie Mae Pictou (Aquash) in Indian Country, in violation of 18 U.S.C. §§ 1153, 1111, and 2.

Graham also claims Count 3 fails to state a charge. As demonstrated herein, this Court has jurisdiction over the Superseding Indictment that expressly alleges Defendant aided and abetted Indians who were principals in the killing occurring in Indian Country. See generally 18 U.S.C. §§ 1153 and 2.[1]

II. 18 U.S.C. § 2 – AIDING AND ABETTING

The United States intends to prove that Defendant Graham aided and abetted several Oglala Sioux enrolled members including, among others, former co-Defendant Arlo Looking Cloud (Looking Cloud), current co-Defendant Richard Marshall (Marshall), and principal Theda Clarke (Clarke) in the murder of Anna Mae Aquash. In this regard, 18 U.S.C. § 2 specifically provides as follows:

> (a) Whoever commits an offense again the United States or aids, acts, counsels, commands, induces or procures its commission, is punishable as a principal; and
>
> (b) Whoever willfully causes an act to be done **which if directly performed by him or another** would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2 (emphasis added).

As the Eighth Circuit has instructed, "to be guilty of aiding and abetting is to be guilty as if one were a principal of the underlying offense." United States v. Roan Eagle, 867 F.2d 436, 445 (8th Cir. 1989). "A person may be held

[1]In addition to Count 3, the Superseding Indictment in this case charges Graham is an Indian citing 18 U.S.C. § 1153, and alternatively alleging Anna Mae Aquash was an Indian and citing 18 U.S.C. § 1152. Graham has not challenged the sufficiency of those two counts.

responsible as a principal under 18 U.S.C. § 2(b) for causing another to do an act which would not have been criminal if directly performed by that other person." See United States v. Kelley, 395 F.2d 727, 729 (7th Cir. 1968) *(*citations omitted).

The broad scope of § 2(b) is buttressed by the fact that in 1951, Congress amended § 2(b) to read "which if directly performed by him or another." See United States v. Lester, 363 F.2d 68, 73 (6th Cir. 1966) (citing 65 Stat. 717 (1951)). "The Congressional purpose in enacting this amendment was 'to . . . make certain the intent to punish (persons embraced within § 2) . . . , regardless of the fact that they may be incapable of committing the specific violation.'" Id. (citing 1951 U.S. Code Cong. Service, pp. 2578, 2583). Therefore, under 18 U.S.C. § 2(b), an accused may be convicted as a causer, even though not legally capable of personally committing the act forbidden by a federal statute. See Lester, 363 F.2d at 73.[2]

The evidence presented in this case will demonstrate that the murder of Aquash was committed by, and included, at least three enrolled members of the Oglala Sioux Tribe (Looking Cloud, Clarke, and Marshall) who were aided and

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[2]Graham's reliance upon United States v. Torres, 733 F.2d 449 (7th Cir. 1984) is misplaced because it is not an aiding and abetting case. The Torres panel simply observed in footnote that a non-Indian member of a conspiracy to commit murder in Indian Country was not prosecuted with his Indian co-conspirators. The court did not, however, consider or analyze the question of whether the non-Indian co-conspirator could have been either charged or tried under an aider and abetter theory. Furthermore, unlike § 2, the offense of conspiracy to commit murder, 18 U.S.C. § 1117, contains a situs requirement and is not a statute of general applicability.

abetted by Defendant Graham. The criminal venture in which Defendant Graham participated is the murder of Aquash in Indian Country in violation of 18 U.S.C. § 1111, 1153, and 2. See United States v. Sorrells,145 F.3d 744, 753 (5th Cir. 1998) (the criminal venture with which the defendant must "participate" and "associate" here is the use or carrying of a firearm in relation to the drug offense).

18 U.S.C. § 2 is applicable to the entire criminal code. See United States v. Rector, 538 F.2d 223, 225 (8th Cir. 1976) (citations omitted). In fact, application of 18 U.S.C. § 2 to the Major Crimes Act analysis fulfills the underlying purpose of the Major Crimes Act: **"The purpose of this bill is to ensure equal treatment for Indian and non-Indian offenders who commit certain offenses in Indian country."** See 1976 U.S.C.C.A.N. 1125 (emphasis added).

Indeed, a failure to find federal jurisdiction would give rise to unequal treatment of parties to a single transaction on the impermissible premise of race. Under modern application of Defendant Graham's theory, an Indian aider and abettor in the first degree murder of a non-Indian on Pine Ridge Indian Reservation would face life imprisonment. See 18 U.S.C. §§ 1111, 2, and 3598. His non-Indian companion that aided and abetted in the commission of this first degree murder would face death in South Dakota state court. SDCL §§ 22-16-12; 22-6-1(1). Neither Congress in the Major Crimes Act legislation contemplated such race-based unequal treatment, nor should this Court accept Defendant Graham's invitation. See 1976 U.S.C.C.A.N. 1125.

Applying § 2 in this case is consistent with two other jurisdictional principles gleaned from the case law – (1) jurisdiction pursuant to § 1153 over lesser included, but unlisted, offenses; and (2) Indian Country jurisdiction through the application of 18 U.S.C. § 3. See United States v. Yankton, 168 F.3d 1096, 1097-98 (8th Cir. 1999) (federal jurisdiction for accessory after the fact pursuant to 18 U.S.C. § 3); Felicia v. United States, 495 F.2d 353, 355 (8th Cir. 1974) (federal jurisdiction in the context of lesser included offenses); United States v. Walkingeagle, 974 F.2d 551, 553 (4th Cir. 1992) (under the Major Crimes Act, a federal court has jurisdiction over a non-enumerated offense if, as a matter of federal trial procedure, the court is permitted to instruct the jury on a lesser included, non-enumerated offense).

Simply put, an elementary application of the plain and unambiguous text of § 2, along with the weight of controlling decisional law leads to only one result – Graham may be held criminally liable as a principal if a jury determines he aided and abetted an Indian in Aquash's murder. Graham's effort to avoid this result is based upon a claim that the jurisdictional elements of § 1153 must be satisfied before he can be subjected to liability under an aider and abettor theory. However, he cites no authority for this proposition, and the argument is contrary to the fundamental premise of § 2 which contemplates that a person may be held liable as a principal even if he could not have been convicted of the underlying

offense. The presence of a "jurisdictional" element in the underlying offense does not defeat the application of this principle.

For instance, where the interstate nature of an offense is necessary to the invocation of federal criminal jurisdiction, a defendant may be guilty of aiding and abetting in the offense even in the absence of evidence that he "knowingly participated in the use of . . . interstate facilities." See United States v. Sigalow, 812 F.2d 783 (2d Cir. 1987) (affirming defendant's conviction for aiding and abetting Travel Act [18 U.S.C. § 1952] violation without evidence he had knowledge of use of the mails). The Sixth Circuit's decision relied, in part, upon the principle that a defendant can be "convicted as an aider and abettor without proof that he participated in each and every element of the offense[]" – including jurisdictional elements:

> **[i]n a case where jurisdiction depends upon the interstate nature of the criminal activity . . . [18 U.S.C. § 2] considerably eases the prosecutor's burden. Because of section 2, he does not have to show the interstate nature of each defendant's activity, but rather that the scheme had substantial interstate connections. . . .**

Sigalow, 812 F.2d at 785 (emphasis added) (quoting United States v. Ryan, 548 F.2d 782, 786 (9th Cir. 1976)); see also United States v. Weaver, 290 F.3d 1166, 1174 (9th Cir. 2002) (affirming the "equity skimming" convictions for two defendants who did not satisfy the jurisdictional element of at least two transactions but who aided and abetted others who did satisfy the element).

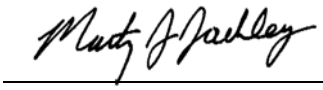
In another compelling example, the Sixth Circuit has also affirmed the convictions of two private citizens for aiding and abetting in a conspiracy to deprive a victim of his civil rights. Lester, 363 F.2d at 69. Although the defendants, themselves, could not act under color of law, they could be convicted of aiding and abetting in a conspiracy with police officers to do so – even where the police officers were acquitted. Lester, 363 F.2d at 73-74.

These cases support a literal interpretation of the plain and unambiguous provision of § 2. They are also consistent with the well-settled rule that "where a statute provides that an accessory may be prosecuted and convicted as for a substantive felony the crime is cognizable in any court having jurisdiction over the principal." Hoss v. United States, 232 F. 328, 335 (8th Cir. 1916); see also Eley v. United States, 117 F.2d 526, 528 (6th Cir. 1941) (citing Hoss).

III. CONCLUSION

The murder of Anna Mae Aquash is undisputedly a federal crime – a fact confirmed by Looking Cloud's federal conviction and its affirmance by the Eighth Circuit Court of Appeals. United States v. Looking Cloud, 419 F.3d 781 (8th Cir. 2005). Under the unambiguous and generally applicable provisions of § 2, any person who aided and abetted in this federal crime is guilty as a principal without regard to their status as an Indian. The United States respectfully requests that the Court deny Graham's Motion to Dismiss Count 3.

Date: October 29, 2008



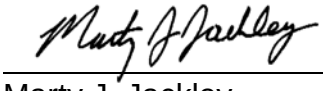
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Marty J. Jackley

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IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)	CRIM. NO. 08-50079-01 DEFENDANT'S REPLY TO GOVERNMENT'S MEMORANDUM OPPOSING MOTION TO DISMISS

Defendant Graham moved to dismiss Count 3 of the superceding indictment because the court lacks jurisdiction over the charge and because the charge fails to state an offense. The government has responded in opposition. The government's response, however, fails to cite any authority for the proposition that count 3 states an offense.

Both of these issues were previously litigated in United States v. Graham, File No. CR 03-50020-02. The court previously ruled that the government failed to properly charge a violation of 18 U.S.C. 1153 by failing to allege that Graham was an Indian.

In this case, count 3 of the superceding indictment again alleges a violation of 18 U.S.C. 1153 without alleging that Graham was an Indian. The government

has repeated the error previously identified by the court.

In its response, the government has not identified any authority for its position that count 3 properly charges a federal crime. By failing to present any authority, the government has tacitly conceded the issue.

The government's failure to cite any authority should be deemed a waiver of its claim that count 3 is valid. Cf. United States v. Lester, 283 Fed.Appx. 421, 423 (8th Cir. 2008) ("The argument section also cites no case law. Undeveloped issues perfunctorily averred to in an appellate brief are waived.") (citing United States v. McAdory, 501 F.3d 868, 870 n. 3 (8th Cir.2007). The court should find the claim waived to prevent subsequent litigation in this case on that issue.

It appears the government is trying to set this matter up for successive prosecutions. By making an unsupported objection, the government ensures dismissal of count 3. However, unless the court specifies otherwise, that dismissal will be without prejudice.

The government is trying to reserve count 3 in the event Graham is acquitted on counts 1 and 2. If acquittal occurs, the government is likely to bring count 3 back before a grand jury, correct the deficiency, then seek trial of Graham on that count. This should not be permitted. It is a bad faith action by the government to prolong this litigation and give it multiple attempts at conviction.

It would offend Graham's right to trial, right to be free from double jeopardy, and offend the principles of fairness and finality safeguarded by the Bill of Rights.

Accordingly, Graham asks that the court dismiss count 3 of the indictment with prejudice. This is justified based on the government's failure to cite any authority for its position that the claim is valid, and the government's deliberate decision to recharge a facially invalid offense. See United States v. McKinney, 395 F.3d 837, 842 (8th Cir. 2005) (dismissal with prejudice appropriate when government acts in bad faith).

Dated October 29, 2008.

/s/ John R. Murphy

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The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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Dated October 29, 2008.

/s/ John R. Murphy
John R. Murphy

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

UNITED STATES' TRIAL MEMORANDUM RE: CRAWFORD

COMES NOW the United States by and through United States Attorney Marty J. Jackley and Assistant US Attorney Robert A. Mandel and files its Trial Memorandum Re: Crawford and the admissibility of certain statements.

It is anticipated that testimony will be introduced regarding certain statements of co-Defendant Fritz Arlo Looking Cloud and alleged principal Theda Clarke, including, but not necessarily limited to, the following:[1]

1. Conversation between Defendant Looking Cloud, cooperating witness Maverick, and Troy Lynn Yellow Wood (see Looking Cloud jury TT 150-51, GRAHAM 01810-02067).

[1]During trial, other similar type conversations may become relevant and admissible under the same legal analysis set forth herein. In a similar filing in United States v. Graham, CR 03-50020, the United States had included certain statements by Richard Marshall. Based upon the Superseding Indictment's party joinder, Richard Marshall's statements are admissible as admissions pursuant to Fed. R. Evid. 801(d)(2).

2. Telephonic conversation between Defendant Looking Cloud and Denise Maloney (see Looking Cloud TT 295-98).

3. Conversation between cooperating witness Maverick and alleged principal Theda Clarke on July 25, 2000, where in the context of discussing Anna Mae as an informant, Theda made statements against interest including: "Yeah, that's why we did it and it wasn't ever going to happen again." (see Summary of Clark Meeting 01-22, p. 21, GRAHAM04430).

Pursuant to Crawford v. Washington, 541 U.S. 36 (2004), testimonial statements are not admissible unless the witness testifies and is subject to cross-examination. Id. at 51-52. Statements that are not offered for the truth of the matter asserted are non-testimonial and therefore not excluded by Crawford. See United States v. Rodriguez, 484 F.3d 1006, 1013-14 (8th Cir. 2007) (quoting Crawford, 541 U.S. at 59 n.9 ("The [Confrontation] clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."). Certain matters contained within the above referenced various statements constitute "non-hearsay" in that they qualify as: verbal acts/words with independent legal significance and relevance; verbal objects distinguishing two different items; and circumstantial evidence of the state of mind. See Fed. R. Evid. 801(c).

To the extent a statement constitutes hearsay, Crawford further distinguishes between a formal statement to law enforcement and a casual statement made to an acquaintance or confidant. Crawford, 541 U.S. at 51. See also United States v. Hyles, 521 F.3d 946 (8th Cir. 2008). The focus is whether the declarant reasonably believes "that the statement would be available for use

at a later trial." See Crawford, 541 U.S. at 51-52; United States v. Lee, 374 F.3d 637, 644-45 (8th Cir. 2004) (holding confession to be non-testimonial).[2] It is the United States' position that the above-referenced statements are non-testimonial in that in each instance the declarant did not reasonably believe the statements would be used at a trial.

It is well settled that statements made to informants and cooperating witnesses are non-testimonial for Confrontation Clause purposes. See United States v. Udeozor, 515 F.3d 260, 270 (4th Cir. 2008); United States v. Watson, 525 F.3d 583, 589 (7th Cir. 2008) ("A statement unwittingly made to a confidential informant and recorded by the government is not 'testimonial' for the Confrontation Clause purposes."); United States v. Toliver, 454 F.3d 660, 664 (7th Cir. 2006); United States v. Underwood, 446 F.3d 1340, 1347-48 (11th Cir. 2006); United States v. Hendricks, 395 F.3d 173, 182-84 (3d Cir. 2005); United States v. Saget, 377 F.3d 223, 229-30 (2d Cir. 2004). Statements made to

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[2]See United States v. Summers, 414 F.3d 1285, 1302 (10th Cir. 2005) ("common nucleus' present in the formulations which the court considered centers on the reasonable expectations of the declarant"); United States v. Udeozor, 515 F.3d 260, 268 (4th Cir. 2008) (whether a reasonable person in the declarant's position would have expected his statements to be used at trial – that is, whether the declarant would have expected or intended to "bear witness" against another in a later proceeding"); United States v. Maher, 454 F.3d 13, 21 (1st Cir. 2006) ("an objectively reasonable person in [the declarant's] shoes would understand that the statement would be used in prosecuting" the defendant); United States v. Watson, 525 F.3d 583, 589 (7th Cir. 2008) (citing Summers "proper focus is on whether *declarant* would believe statement would later be used as evidence"); United States v. Hinton, 423 F.3d 355, 360 (3rd Cir. 2005); United States v. Saget, 377 F.3d 223, 228 (2d Cir. 2004); United States v. Cromer, 389 F.3d 662, 675 (6th Cir. 2004).

informants and cooperating witnesses are considered non-testimonial based upon the rationale that the declarant does not know or "believe that the statement would be used later at trial." See Crawford, 541 U.S. at 51-52. To the extent the statements at issue constitute hearsay, they are non-testimonial statements that fall within the hearsay exception of statements against interest under Fed. R. Evid. 804(b)(3).[3]

The Eighth Circuit has developed a three-prong test for admission of an inculpatory statement under Rule 804(b)(3): (1) the declarant is unavailable as a witness; (2) the statement must so far tend to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true; and (3) corroborating circumstances clearly indicate the trustworthiness of the statement.[4] United

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[3]Fed. R. Evid. 804(b)(3) 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, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

[4]Fed. R. Evid. 804(b)(3) only requires the first two prongs for inculpatory statements. The Eighth Circuit subsequently applied the third prong to both exculpatory and inculpatory statements through a Confrontation Clause analysis. See United States v. Riley, 647 F.2d 1377, 1383 n.7 (8th Cir. 1981). Because the Confrontation Clause does not apply to non-testimonial statements, arguably the third prong should not be applied to inculpatory statements. See Davis v.

(continued...)

States v. Hazelett, 32 F.3d 1313, 1316 (8th Cir. 1994); United States v. Keltner, 147 F.3d 662, 670 (8th Cir. 1998). With respect to the statements at issue, all three elements are satisfied. See United States v. Manfre, 368 F.3d 832, 841-42 (8th Cir. 2004) (admitting a statement against interest by another person implicated in the same crime).

The Seventh Circuit in allowing an accomplice's statement to be admitted under the statement against interest exception recognized:

> So long as the incriminating and inculpatory portions of a statement are closely related, if the circumstances surrounding the portion of a declarant's statement inculpating another are such that the court determines that the inculpatory portion of the statement is just as trustworthy as the portion of the statement directly incriminating the declarant, there is no need to excise or sever the inculpatory portion of the statement.

United States v. Hamilton, 19 F.3d 350, 356 (7th Cir. 1994). See also United States v. Saget, 377 F.3d 223, 230 (2d Cir. 2004) (A "'statement incriminating both the declarant and the defendant may possess adequate reliability if . . . the statement was made to a person whom the declarant believes is an ally,' and the circumstances indicate that those portions of the statement that inculpates the defendant are no less reliable than the self-inculpatory parts of the statement.") (quoting United States v. Sasso, 59 F.3d 341 (2d Cir. 1995)); United States v. Watson, 525 F.3d 583, 588 (7th Cir. 2008)("Blaming one's self and someone else

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[4](...continued)
Washington, 547 U.S. 813 (2006) (Confrontation Clause does not apply to non-testimonial statements).

does not necessarily reduce a statement's trustworthiness."); United States v. Westry, 524 F.3d 1198,1215 (11th Cir. 2008).

Accordingly, the statements at issue are non-testimonial in that they are being admitted for non-hearsay purposes or otherwise constitute non-testimonial statements or conversation by declarants that did not reasonably believe the statement would later be used at trial. The statements are admissible under the statements against interest exception pursuant to Rule 804(b)(3).

Date: November 4, 2008

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL, Defendants.	CR08-50079 **UNITED STATES' NOTICE OF *RES GESTAE* EVIDENCE, OR IN THE ALTERNATIVE, RULE 404(b) EVIDENCE**

COMES NOW the United States of America, through its attorneys, US Attorney Marty J. Jackley and Assistant US Attorney Robert A. Mandel, to provide notice of the United States' intention to submit evidence in its case-in-chief at trial regarding the victim's abduction by several aiders and abettors, which further encompassed Defendant John Graham's aggravated sexual abuse of the victim. It is the United States' position that said evidence is admissible under the theory of *res gestae*, or in the alternative, Fed. R. Evid. 404(b).

The United States anticipates presenting evidence at trial that Defendant Graham and others abducted the victim from Troy Lynn Yellow Wood's residence in Denver, Colorado. The abduction included tying the victim's hands with rope and placing her in the hatch trunk area of Theda Clarke's red Ford Pinto by which

they took her to Rapid City. That while standing guard over her in Thelma Rios' Knollwood apartment, Defendant Graham committed aggravated sexual abuse on the victim. That throughout various times of the abduction, including travel to Rosebud and Pine Ridge Reservation communities, the victim was placed in the hatch trunk area of Clarke's Pinto and otherwise held against her will. An integral component of the abduction and captivity took place at Defendant Marshall's residence wherein Aquash continued to be held against her will during which time Defendant Marshall provided Defendant Graham and other aiders and abettors' consultation, the murder weapon, and shells.

The following discovery has been disclosed to support the United States' contentions of the sexual abuse allegation:

1. Defendant Graham's own admissions to witness Frank Dillon as set forth in the following interview with law enforcement:

Alonzo: John Boy told you he was the shooter?

Dillon: Yeah.

Alonzo: Did John Boy mention what type of weapon was used?

Dillon: It was a thirty-eight I think. It was a pistol. (Long pause) He also told me that she started praying before it happened. That he had raped her.

Alonzo: John Boy said that Anna Mae was praying?

Dillon: Before he shot her in the head.

Alonzo: And he had raped her?

Dillon: He had raped her previously (sic).

Alonzo: Did he say when?

Dillon: Not exactly when, but . . . I don't know if maybe it was the same night or the night before, I don't know.

See Frank Dillon interview of May 20, 1998, at p. 98 (GRAHAM 04631).

2. Evidence through other witnesses of Defendant Graham's sexual assault on Anna Mae Aquash. See generally transcript of Defendant Looking Cloud's statement dated December 16, 2006, at p. 89 (GRAHAM 01682); transcript of John Trudell dated February 9, 2001, at pp. 10-12 (GRAHAM 02406-2408); sentencing hearing transcript of Defendant Looking Cloud dated April 23, 2004, at pp. 3-7.

3. The autopsy which notes the presence of strong acid phosphatase of the vaginal contents. The presence of strong acid phosphatase does constitute evidence in support of the allegation of a sexual encounter as described in Defendant Graham's own admissions, and other witnesses' statements. See Brown autopsy, February 25, 1976 (GRAHAM 00258-00261).

When evidence is admitted under *res gestae* theory, Rule 404(b) is not implicated. See United States v. Riebold, 135 F.3d 1226, 1229 (8th Cir. 1998) (*citing* United States v. LeCompte, 108 F.3d 948, 952 (8th Cir. 1997)). Under the theory of *res gestae*, evidence falling within any one following categories is admissible when the activity: (1) is so blended or connected, with the one on trial as that proof of one incidentally involves the others; (2) explains the circumstance thereof; or (3) tends logically to prove any element of the crimes charges. See

United States v. Honken, 378 F. Supp. 2d 928, 940-41 (N.D. Iowa 2004) (*citing* Riebold, 135 F.3d at 1229; United States v. Forcelle, 86 F.3d 838, 841 (8th Cir. 1996); United States v. Holliman, 291 F.3d 498, 502 (8th Cir. 2002); United States v. Roberts, 253 F.3d 1131, 1134-35 (8th Cir. 2001) (other citations omitted)).

It is the United States' position that the abduction, including the aggravated sexual assault of the victim, squarely fits all of the three admissible categories of *res gestae* evidence. This *res gestae* is so blended and connected with the aiding and abetting in the first degree murder charge as that proof of one incidentally involves the other with respect to the victim's captivity from Denver to Rapid City, and to Rosebud and Pine Ridge. The victim would not have been sexually assaulted were she not held captive, which was, in turn, directly related to and was a part of her murder. It explains the circumstance surrounding her murder and provides additional motive. It further tends logically to prove premeditation and malice aforethought, necessary elements of this offense. It is further evidence of the victim's state of mind as affected by the ordeal of her sexual assault, including providing further explanation with respect to her submissiveness at Defendant Marshall's residence.

Evidence of Graham's, Marshall's, and other aiders and abettors' contact immediately before, during, and after the murder is admissible as part and parcel of the entire transaction and is indicative of intent to commit and ultimately carry

through with committing and aiding and abetting in first degree murder. See Wilkerson v. United States, 342 F.2d 807, 812-13 (8th Cir. 1965) (admissibility of acts indicating the force used to keep his victims under control and to carry out his ultimate purpose).

In the alternative, based upon the very nature of this evidence, it is further admissible pursuant to Fed. R. Evid. 404(b) in that it demonstrates proof of motive, opportunity, intent, preparation, plan, knowledge, and identity. See generally, United States v. Jourdain, 433 F.3d 652, 659 (8th Cir. 2006). The significant probative value of both Defendants' and other aiders and abettors' actions with the victim outweighs any dangers of unfair prejudice. See Fed. R. Evid. 403.

In a similar setting, the Eleventh Circuit Court of Appeals affirmed a lower court's admission of rape evidence in a murder case. See Thomas v. Jones, 891 F.2d 1500, 1504 (11th Cir. 1990). Defense counsel had submitted a motion in limine to preclude introduction of any evidence showing that the victim had been raped, since the defendant was not charged with the rape. Id. at 1504. At trial, the state introduced evidence that on the night the victim was killed, defendant had stated that he was going out to pick up girls. Id. The state further introduced evidence of semen stains found on the upholstery of the victim's car and pubic hair found in the victim's coat. Id. During closing arguments in both the guilt and sentencing stages of trial, the prosecutor suggested that the victim had been

sexually abused before she was killed. Id. The evidence and statements regarding abuse of the victim were determined to have probative value in demonstrating defendant's motive and intent to kill. Id. at 1505. See also Lipscomb v. Estelle, 507 F.2d 708, 709 (5th Cir. 1975) ("the rape and the murder were so inseparably interwoven with the robbery as to be a part of the same transaction and admissible as *res gestae*."); United States v. Bettelyoun, 892 F.2d 744, 745-46 (8th Cir. 1989) (defendant's evening of terror including assault on separate victim admissible in murder as an integral part of the operative facts of the crime charged).

As duly noted by the Eighth Circuit Court of Appeals, "[a] jury is entitled to know the circumstances and background of a criminal charge. It cannot be expected to make its decision in a void-without knowledge of the time, place, and circumstances of the acts which form the basis of the charge." See United States v. Fleck, 413 F.3d 883, 890 (8th Cir. 2005) (*quoting* United States v. Moore, 735 F.2d 289, 292 (8th Cir. 1984)). The jury is entitled to hear evidence of the abduction, captivity, and sexual abuse of Anna Mae Aquash, which is an integral part of this case and explains the circumstances of the murder.

Date: November 4, 2008

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on November 4, 2008, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

- ☐ U.S. Mail, postage prepaid
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Marty J. Jackley
United States Attorney

This document has been filed electronically.

FILED
NOV 18 2008
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IN THE UNITED STATES DISTRICT COURT
FOR THE 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 Defendant.	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION TO SEAL

Defendant, John Graham, through his attorney, John R. Murphy, moves this Court for its Order sealing Defendant John Graham's *Ex Parte* Motion for Authorization Interim Billing and Waiver of Maximum Amounts based on the nature of the request.

Dated November 17, 2008.

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

FILED
NOV 18 2008
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE 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 Defendant.	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION TO SEAL

Defendant, John Graham, through his attorney, John R. Murphy, moves this Court for its Order sealing Defendant John Graham's *Ex Parte* Motion for Interim Billing and Waiver of Maximum Amounts (Paralegal) based on the nature of the request.

Dated November 17, 2008.

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S MOTION FOR IN-CAMERA INSPECTION AND DISCLOSURE OF PRE-SENTENCE INVESTIGATION REPORT

NOW COMES Defendant Richard Marshall, by and through his attorney Dana L. Hanna, and hereby moves the Court to order the disclosure of government witness Arlo Looking Cloud's Pre-Sentence Investigation Report to counsel for Defendant Marshall. The Defendant submits that he is entitled to disclosure of Looking Cloud's Pre-Sentence Investigation, pursuant to his right to fundamental fairness and due process of law, because the report contains evidence that will impeach the credibility of the government's key witness. The Defendant moves for an in-camera inspection of the Pre-Sentence Investigation Report by the Court to determine whether the contents of the report constitute evidence that Defendant Richard Marshall can use to impeach the credibility of his accuser, Arlo Looking Cloud, in trial.

In support of this motion, Dana L. Hanna, attorney for Defendant Richard Marshall, hereby affirms:

1. In this case, the government accuses Richard Marshall of having aided and abetted

Arlo Looking Cloud and Co-Defendant John Graham in the murder of Anna Mae Aquash on or about December 12, 1975. On information and belief, the source of which is the discovery provided to me by the government, the government's evidence against Richard Marshall is based almost entirely on the testimony of cooperating government witness and convicted murderer Arlo Looking Cloud.

2. In 2004, Arlo Looking Cloud was convicted of first degree murder in the killing of Anna Mae Aquash. Looking Cloud was sentenced before this Court to life imprisonment for his crime. In 2008, four years into his life sentence, Arlo Looking Cloud agreed to become a cooperating witness for the government in this case. In his interviews with government investigators, Looking Cloud made an accusation that he had never made before in all his previous statements to investigators: he accused Richard Marshall of having given a gun to Theda Clark, Looking Cloud's unindicted co-conspirator in this case. Thereafter, the government sought and obtained an indictment against Richard Marshall, in August 2008.

3. I have reviewed some 5,000 pages of discovery material, including Grand Jury testimony, trial testimony in Looking Cloud's trial, FBI investigative reports, and transcripts of interviews with witnesses. Based upon my review of the discovery that has been provided to Defendant Marshall, I can state categorically that the credibility of Arlo Looking Cloud and his credibility will be the fundamental issue for the jury to decide in the case against Richard Marshall. Therefore, any evidence that can be used to impeach and discredit Looking Cloud's honesty or reliability as a witness is exculpatory and favorable evidence for Richard Marshall, and he is entitled to its disclosure pursuant to his constitutional guarantee of fundamental fairness under the Due Process Clause. *Brady v. Maryland*, 373 US 83 (1963).

4. On information and belief, based on standard procedure and practice, prior to his sentencing, Looking Cloud met with United States Probation Officer Holloway and made statements to the Probation Officer concerning his prior criminal history, his decades-long history of drug and alcohol abuse, and his treatment and hospitalization for mental disorders. In addition, he may have spoken about his involvement in the kidnapping and murder of Anna Mae Aquash.

5. I have good reason to believe, and I do in fact believe, that the Pre-Sentence Investigation Report that was prepared by the United State Probation Office and provided to the Court at the time of Looking Cloud's sentencing contains valuable and important information and evidence that Defendant Marshall can use to impeach the credibility of his accuser, Arlo Looking Cloud.

6. Arlo Looking Cloud was sentenced on April 23, 2004 by the Honorable Lawrence Piersol, United States District Court Judge. At his sentencing, Looking Cloud was represented by attorney Terry Gilbert of Cleveland, Ohio. The government was represented by Assistant United States Attorney Robert Mandel. The transcript of the sentencing is to be at document #151 in Looking Cloud's Court file.

7. At the sentencing (beginning on page 15, line 2), Mr. Gilbert informed the Court that he had serious concerns about Arlo Looking Cloud's mental condition. He stated that the Pre-Sentence Investigation Report makes reference to "some serious problems that go back all the way for a number of decades. In addition to the history of drug abuse, which I will go into in a moment, there is evidence of thought process, that the seizure disorders, and post-traumatic stress, and references to–this is in paragraph 51–and references to treatment at various hospitals

that none of these records had been obtained." Mr. Gilbert then made reference to the fact that previous counsel had requested a mental health evaluation for Looking Cloud in an ex parte affidavit in which he too had evidently questioned Looking Cloud's mental health condition. Attorney Gilbert then went on to inform the Court that he personally did attest that in his communications with Looking Cloud, he observed "problems here that affect his judgement, that affect his memory, that affect his perception." He expressed his opinion that Looking Cloud was "clearly mentally deficient." He went on to inform the Court that Looking Cloud had informed him that he had been abusing drugs "since he was a boy"; that he had injected hallucinogenic drugs, including LSD, peyote, and mescaline for ten years through the 1970s; that he had injected methamphetamine intravenously; that he shot heroin intravenously; that he took pills; that he smoked crack; that he smoked marijuana; that he abused alcohol; and he was in and out of jail for substance abuse related criminal activity. Mr. Gilbert requested a mental examination of his client prior to sentencing, which was denied.

8. Having reviewed Pre-Sentence Investigation Reports in other cases, I am familiar with the general format of those reports and the practice and procedure of the U.S. Probation Office in preparing Pre-Sentence Investigation Reports. The Pre-Sentence Investigation Reports contain histories of the Defendant's criminal activity, his convictions, his account of the crime, and his drug and alcohol history.

9. Although the government has provided me with an FBI sheet showing dozens of arrests and criminal cases of Arlo Looking Cloud, the records that have been provided to me do not clearly indicate to me the disposition, the convictions, or the sentences. Looking Cloud's convictions are potentially valuable impeachment evidence under Rule 609 of the Federal Rules

of Evidence and they are contained within the Pre-Sentence Investigation Report.

10. The Pre-Sentence Investigation Report contains a history of Looking Cloud's hospitalization for drug abuse and mental disorders. Such evidence can be used to impeach him and it can lead to other investigative resources, e.g. hospital records.

11. For these reasons, it is my professional judgment that the disclosure of the Pre-Sentence Investigation Report of Arlo Looking Cloud is necessary for me to prepare an effective defense and provide effective counsel to Richard Marshall, and the impeachment evidence in the Pre-Sentence Investigation Report is particularly necessary for me to effectively cross-examine Richard Marshall's main accuser. The Pre-Sentence Investigation Report not only contains evidence that can be used to attack Looking Cloud's credibility, and his ability to remember, perceive, and testify accurately and truthfully; it also contains information that I can use to further my investigation and which will lead to other evidence that I can use to attack the credibility of the government's witness at trial.

WHEREFORE Defendant Richard Marshall moves the Court to conduct an in-camera review of the Pre-Sentence Report to determine whether it should be provided to the Defendant as *Brady* material, and to order the disclosure of the Pre-Sentence Investigation Report of Arlo Looking Cloud to counsel for Richard Marshall.

Dated this 20th day of November, 2008.

VINE RICHARD MARSHALL, Defendant

(Signature Block on Next Page)

BY: /s/ *Dana L. Hanna*
Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Motion for In-Camera Inspection and Disclosure of Pre-Sentence Investigation Report was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 20th day of November, 2008.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR IN-CAMERA INSPECTION AND DISCLOSURE OF PRE-SENTENCE INVESTIGATION REPORT

Disclosure of a Pre-Sentence Investigation Report of a cooperating government witness to the Defendant is required if the report constitutes impeachment material under Brady v. Maryland. In this case, Defendant Richard Marshall's right to due process of law, fundamental fairness, and his right to confront his accuser overrides any interest that the government or Arlo Looking Cloud may have in keeping his Pre-Sentence Investigation Report confidential. If a defendant requests disclosure of a cooperating witness's Pre-Sentence Investigation Report and shows a reasonable likelihood that such report will contain impeachment material that can be used to attack the credibility of a cooperating witness, the Court should conduct an in-camera inspection of the PSR, and if the Court finds that the Pre-Sentence Investigation Report contains impeachment material, then the Court should order disclosure. United States vs. DeVore, 839 F.2d 1330 (8th Cir. 1988).

Pre-Sentence Investigation Reports, their content and the circumstances under which they

may be disclosed are governed by Rule 32 of Federal Rules of Criminal Procedure. The Rule is silent regarding the disclosure of such reports to third persons.

In the interests of insuring the free flow of information so that the District Court has a complete set of facts in fashioning an appropriate sentence, Pre-Sentence Investigation Report are generally not made public. However, they should be disclosed to defendants if the defendant can demonstrate that disclosure is required to meet the ends of justice. United States vs. McKnight, 771 F.2d 388 (8th Cir. 1986). Here, Defendant Marshall is not relying on speculation, but rather can point to evidence in the record that indicates that Looking Cloud's Pre-Sentence Investigation Report contains evidence relevant to his mental ability to perceive, to remember, and to comprehend reality. Moreover, the report contains an accurate and comprehensive history of Looking Cloud's criminal convictions, which is impeachment material for Richard Marshall. There is evidence in the report of Looking Cloud's mental inability and his long, chronic history of drug and alcohol abuse, which also goes to his memory and ability to perceive and communicate facts accurately. The Defendant has shown that the interest sof justice require the Court to conduct an in-camera examination of Looking Cloud's Pre-Sentence Investigation Report and to disclose all information within that report to counsel for Defendant Richard Marshall.

Dated this 20th day of November, 2008.

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Memorandum of Law in Support of Motion for In-Camera Inspection and Disclosure of Pre-Sentence Investigation Report was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 20th day of November, 2008.

/s/ *Dana L. Hanna*
Dana L. Hanna

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff,	)	CRIM. NO. 08-50079-01
vs.	)	DEFENDANT GRAHAM'S MOTION FOR SEPARATE TRIALS
JOHN GRAHAM, a/k/a JOHN BOY PATTON and VINE RICHARD MARSHALL, a/k/a RICHARD VINE MARSHALL, a/k/a DICK MARSHALL Defendant.	)	

Defendant, John Graham, through his attorney, John R. Murphy, moves this Court for its Order allowing Mr. Graham to be tried separately from co-defendant Vine Richard Marshall. This motion is made pursuant to Fed.R.Crim.P. 14 and is based on the facts, authority and arguments set forth in his Memorandum in Support of Motion for Separate Trials, on file herein.

Dated November 21, 2008.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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	☐	Facsimile at
	☒	Electronic Case Filing

Dated November 21, 2008.

/s/ John R. Murphy
John R. Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MEMORANDUM IN SUPPORT OF MOTION FOR SEPARATE TRIALS

Defendant John Graham submits the following in support of his request for a separate trial from the trial of Vine Richard Marshall:

FACTS

Defendant Graham is charged with Vine Richard Marshall with committing first degree murder. It is Defendant's Graham's information and belief based on the representation of Marshall's attorney that Marshall does not intend to testify if jointly tried with Mr. Graham. An affidavit to this effect will be filed by Marshall's counsel at a later date.

At trial, the government intends to admit statements allegedly made by Marshall to Serle Chapman, a paid witness acting on the government's behalf to accumulate information against members of AIM. These statements, which were

made approximately 30 years after Aquash was murdered, inculpate both Graham and Marshall. Though Chapman recorded several conversations with Marshall, the statements the government seeks to admit were not recorded.

The unrecorded, jointly inculpatory statements the government seeks to admit through Chapman are: Graham, Theda Clark, Fritz Arlo Looking Cloud, and Anna Mae Aquash came to his home in December of 1975; one among them gave Marshall a note about keeping "the baggage," presumably referring to Aquash; when Marshall refused to keep Aquash at his house, someone in the group asked him for directions to Rosebud; and, in response to a compound inquiry about rumors in the Indian community that Marshall provided the gun that was used to kill Aquash, or whether the note referenced a gun, Marshall said "[b]ack in the day when you was asked to do something, somebody asked you for something, you didn't ask too many questions." Graham Doc. 4870.

ARGUMENT

A two-step analysis is used to determine whether joinder of defendants is proper. United States v. Darden, 70 F.3d 1507, 1526-27 (8th Cir. 1995). First, the court must determine whether the defendants were properly joined on the indictment under Fed.R.Crim.P. 8(b). If the offenses were properly joined under Fed.R.Crim.P. 8(b), then, pursuant to Fed.R.Crim.P. 14, the court must determine

whether joinder will result in undue prejudice to one of the defendants. United States v. Flores, 362 F.3d 1030, 1039-1041 (8th Cir. 2004); Darden, supra, 70 F.3d at 1526-27.

Graham is not disputing the joinder of the defendants on the indictment under Fed.R.Crim.P. 8(b). Instead, he asserts that undue prejudice would result to him if his case is tried with Marshall's.

To prevail, Graham must show the prejudice to him from joint trials is severe or compelling. Flores, supra. This standard can be met when joint trials would result in a violation of one defendant's Sixth Amendment right to confrontation. See Bruton v. United States, 391 U.S. 123, 126 (1968). This standard can be met if a joint trial would result in evidence being admitted against both defendants that would otherwise only be admissible against one defendant if separate trials were granted. Flores, supra, at 1040 ("This high standard could be met when evidence that would be inadmissible against one defendant if he were tried alone is admitted against his codefendant, . . . "). And, this standard can be met where the jointly charged defendants present mutually exclusive defenses. "Mutually antagonistic defenses exist when the jury must disbelieve the core of one defense in order to believe the core of the other." Flores, supra (citing Hood v. Helling, 141 F.3d 892, 896 (8th Cir. 1997)).

A. Joint Trials Will Result in a Violation of Graham's Right to Confrontation:

If joint trials are ordered, and if Marshall's statements to Chapman are admitted, Graham's right to confrontation under the Sixth Amendment will be violated. Bruton v. United States, 391 U.S. 123, 126 (1968). It is counsel's information and belief that Marshall will not testify if he and Graham are jointly tried. And, the government has asserted that it will be trying to admit Marshall's alleged statements to Chapman at this joint trial. Therefore, joint trials will violate Graham's right to confrontation.

A curative or limiting instruction will not overcome the confrontation clause violation. As stated in Bruton, curative or limiting instructions are not sufficient to cure a confrontation clause violation when "powerfully incriminating extrajudicial statements" are "deliberately spread before the jury in a joint trial." Id. at 135-36.

In this case, Marshall's alleged statements are powerfully incriminating. Marshall's statements directly inculpate Graham by placing him at the scene, with a note that contains kidnaping instructions, and places a weapon in his hands or the hands of one of his alleged accomplices. There is no possible way in which a limiting instruction could cure the prejudice to Graham if he is tried jointly and this statement is admitted against Marshall.

Graham has no independent means of challenging the statement. Because Marshall is not going to testify, Graham will not be able to confront him to challenge the veracity of his statement. And, because Marshall is not going to testify, and because he has the right to remain silent, Graham is unable to compel Marshall to testify so that he could deny that the statement was ever made.

Redaction is not a feasible method of addressing the confrontation issue presented in this case. Redaction can not take the place of severance if the redacted statement still creates an inevitable association between the defendant and co-defendant. See U.S. v. Van Hemelryck, 945 F.2d 1493, 1503 (11th Cir. 1991); U.S. v. Petit, 841 F.2d 1546, 155 (11th Cir. 1988).

For redaction to cure a confrontation clause challenge, the redaction must remove all references to the other defendant's existence. See Richardson v. Marsh, 481 U.S. 200, 211 (1987). Redactions that simply replace a co-defendant's name with a blank space or with the word "deleted" are not sufficient to cure the confrontation clause problems cited in Bruton. In such cases, the identity of the omitted person is understood by the jury when the jury looks to the defense table and sees both defendant and co-defendant seated together:

> A juror who does not know the law and who therefore wonders to whom the blank might refer need only lift his eyes to Jones, sitting at counsel table, to find what will seem the obvious answer, at least if the juror hears the

> judge's instruction not to consider the confession as evidence against Jones, for that instruction will provide an obvious reason for the blank. A more sophisticated juror, wondering if the blank refers to someone else, might also wonder how, if it did, the prosecutor could argue that the confession is reliable, for the prosecutor has been arguing that Jones, not someone else, helped Smith commit the crime.

Gray v. Maryland, 118 U.S. 1151, 1155 (1998).

Therefore, Graham must be granted a separate trial to preserve his right to confrontation under the Sixth Amendment.

B. Joint Trials Would Lead to Inadmissible Evidence Being Admitted Against Graham:

Marshall's alleged statements to Chapman would not be admissible against Graham if he was tried alone. They are not admissions by Graham. They are not admissions that he adopted. And, Marshall's statements don't fall within the co-conspirator exclusion from the hearsay rule: They were not made during the course of or in furtherance of a conspiracy, but were descriptive statements made decades after the alleged crime. See e.g. United States v. Mitchell, 31 F.3d 628, 631-32 (8th Cir. 1994).

Therefore, Graham and Marshall should not be tried jointly. At a joint trial, Graham would not be able to prevent inadmissible statements that inculpate him from being admitted. For the reasons set forth in section A, supra, curative

instructions or redactions would not be a sufficient remedy to cure the prejudice caused by the situation.

C. The Defendants Will Present Mutually Exclusive Defenses:

The core of Marshall's defense is that he was not aware of any plan to kill Aquash when he met with Graham, Clark and Looking Cloud. And, he will argue that he never provided the group with any assistance in carrying out their plan. The core of Graham's defense is that this alleged "baggage" meeting did not occur. The jury must disbelieve Marshall's defense in order to believe Graham's, and vice versa. Thus, joint trials should not be ordered. Flores, supra, at 1040 (citing Hood v. Helling, 141 F.3d 892, 896 (8th Cir. 1997)).

Dated November 21, 2008.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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Dated November 21, 2008.

/s/ John R. Murphy
John R. Murphy

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN GRAHAM, aka JOHN BOY PATTON, and VINE RICHARD MARSHALL, aka RICHARD VINE MARSHALL, aka DICK MARSHALL, Defendants.	)	CR. 08-50079-01, -02 ORDER ON DEFENDANT GRAHAM'S MOTION TO SEVER

Defendant John Graham has filed a motion based on Fed. R. Crim. P. 14 and Bruton v. United States, 391 U.S. 123 (1968), seeking to sever his trial from that of co-defendant Vine Richard Marshall's trial. [Docket 75]. The district court, the Honorable Lawrence Piersol, referred Mr. Graham's motion to this court for determination pursuant to 28 U.S.C. § 636(b)(1)(A).

The government has not yet responded to Mr. Graham's motion. Rule 14(b) of the Federal Rules of Criminal Procedure allows the court to require the government to submit the pertinent statements of defendants to the court for *in camera* inspection when ruling on a motion to sever under Rule 14.

Accordingly, it is hereby

ORDERED that the government shall deliver to the court for *in camera* inspection any defendant's statement that the government intends to use as evidence. These statements shall not be filed with the clerk, but shall be delivered to the court when the government files its response to Mr. Graham's motion.

NOTICE OF RIGHT TO APPEAL

Pursuant to 28 U.S.C. § 636(b)(1)(A), any party may seek reconsideration of this order before the district court upon a showing that the order is clearly erroneous or contrary to law. The parties have ten (10) days after service of this order to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. See Fed. R. Crim. P. 58(g)(2). Failure to file timely objections will result in the waiver of the right to appeal questions of fact. Objections must be timely and specific in order to require review by the district court.

Dated November 24, 2008.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE 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 Defendant.	)))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION FOR DISCLOSURE OF PRE-SENTENCE INVESTIGATION REPORT

Defendant John Graham moves this Court for its Order requiring the United States Probation to disclose to him those portions of Arlo Fritz Looking Cloud's pre-sentence investigation report (PSR) in which Mr. Looking Cloud's mental health history, chemical dependency history, or any other fact or circumstance bearing on Mr. Looking Cloud's ability to perceive or recall events, is discussed. Alternatively, Mr. Graham seeks in camera review of Mr. Looking Cloud's PSR to determine those portions of the PSR subject to disclosure because they pertain to Mr, Looking Cloud's mental health history, chemical dependency history, or any other fact or circumstance bearing on Mr. Looking Cloud's ability to perceive or recall events. This motion is based on the attached memorandum in support.

Dated November 24, 2008.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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Dated November 24, 2008.

/s/ John R. Murphy
John R. Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE 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 Defendant.	))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MEMORANDUM IN SUPPORT OF MOTION FOR DISCLOSURE OF PRE-SENTENCE INVESTIGATION REPORT

Defendant John Graham has moved this Court for its Order requiring the United States Probation to disclose to him those portions of Arlo Fritz Looking Cloud's pre-sentence investigation report (PSR) in which Mr. Looking Cloud's mental health history, chemical dependency history, or any other fact or circumstance bearing on Mr. Looking Cloud's ability to perceive or recall events, is discussed. Defendant has alternatively asked the Court to conduct an in camera review of Mr. Looking Cloud's PSR and disclose all portions of that report in which these matters are referenced or discussed.

FACTS

Defendant incorporates herein the statement of facts and citations to the sentencing record contained within Defendant Marshall's Motion for In-Camera

Inspection and Disclosure of Pre-Sentence Investigation Report.

ARGUMENT AND AUTHORITY

The requirements of Brady v. Maryland, 373 U.S. 83, 87 (1963), are well established: Brady requires the government to disclose exculpatory and impeachment evidence to the accused. United States v. Conroy, 424 F.3d 833, 837 (8th Cir. 2005). This includes facts contained within a PSR that are exculpatory or may serve as impeachment evidence. See United States v. McGee, 408 F.3d 966, 974 (7th Cir. 2005); United States v. Strifler, 851 F.2d 1197, 1201 (9th Cir.1988) ("A defendant is entitled to material in a probation file that bears on the credibility of a significant witness in the case."); United States v. Figurski, 545 F.2d 389, 391-92 (4th Cir. 1976) (exculpatory evidence within a PSR must be disclosed to co-defendant; impeachment evidence within a PSR must be disclosed if there is a reasonable likelihood it will affect fact finder).

Mr. Looking Cloud is a material witness. His credibility will be placed before the jury. Any evidence that raises substantial questions about his ability to accurately perceive and recall events should be disclosed to the defense. Cf. United States v. Lindstrom, 698 F.2d 1154, 1163-64 (6th Cir. 1983) (defendants should not have been limited in cross-examination of government witness based on witness's mental health history as this went directly to credibility and bias).

Therefore, all information within Mr. Looking Cloud's PSR relating to facts and circumstances bearing on his ability to perceive or recall events should be disclosed to Mr. Graham.

Dated November 24, 2008.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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DANA HANNA

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
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- ☒ Electronic Case Filing

Dated November 24, 2008.

/s/ John R. Murphy
John R. Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)	CRIM. NO. 08-50079-01 **SUPPLEMENT TO** DEFENDANT GRAHAM'S MEMORANDUM IN SUPPORT OF MOTION FOR SEPARATE TRIALS

Defendant John Graham supplements his previously filed Memorandum in Support of Motion for Separate Trials with additional facts, authority and argument.

SUMMARY

In Graham's previously filed memorandum, he focused primarily on a confrontation clause issue that was raised if the government was allowed to admit Vine Richard Marshall's statement to Serle Chapman concerning the alleged "baggage note" and Marshall's "back in the day" response. Graham focused on this particular statement because the government had previously identified it as one it was seeking to admit against Graham. File CR03-50020-02 (Government's Trial Memorandum Re: Crawford, Doc. 306).

In the present file, the government has submitted another Trial Memorandum Re: Crawford. File CR08-50079-01 (Doc. 64). That memorandum does not directly address which statements by Marshall it is seeking to admit at a joint trial involving Graham. Upon re-reading this document, specifically note 1, Graham has become concerned that the government intends to try to admit a broad range of statements by Marshall that implicate Graham.

At present, Graham is only aware of statements made by Marshall to Serle Chapman and Robert Ecoffey. However, the principles and arguments set forth below will apply to any other statements Marshall made to other persons.

It is Graham's concern that the government has in its possession other alleged admissions by Marshall to third parties, but that these materials have not been disclosed to the defense pursuant to the Jencks Act. Graham asks that the government be required to disclose all such statements by Marshall to the court so that the court can determine the extent of the Bruton and/or Crawford issues created if the defendant's are jointly tried.

SUPPLEMENTAL FACTS

Defendant Graham previously discussed an unrecorded conversation between co-defendant Vine Richard Marshall and informant Serle Chapman. In addition to that alleged statement, Marshall has made other statements to Ecoffey

and Chapman. During those conversations, Marshall told Chapman and/or Ecoffey that Graham, Fritz Arlo Looking Cloud, and Theda Clarke brought Aquash to his home in December of 1975. See Graham Doc. 04408, Graham Doc, 04569, Graham Doc. 04868, Graham Doc. 04870, Graham Doc. 03858-03862, and Chapman/Graham audio tape. Marshall may have acknowledged that Aquash did not appear to be there voluntarily, and he may have admitted there was a note involved: Assertions have been made by Ecoffey and Chapman as to these purported admission but they were not recorded. See Graham Doc. 04408, Graham Doc, 04569, Graham Doc. 04868, Graham Doc. 04870, Graham Doc. 03858-03862, and Chapman/Graham audio tape. And, he stated that he was asked to keep Aquash at his home, but that he refused to do so. See Graham Doc. 04408, Graham Doc, 04569, Graham Doc. 04868, Graham Doc. 04870, Graham Doc. 03858-03862, and Chapman/Graham audio tape. Chapman's interview occurred in 2000 (exact date unknown, Graham Doc. 01934); Ecoffey's occurred in December of 2003. Graham Doc. 04408.

Graham has repeatedly told law enforcement, Chapman, and others, that he never went inside Marshall's home. He has also denied that Aquash was traveling with him against her will. E.g. Graham Doc. 00955-00956

ARGUMENT

A. MARSHALL'S STATEMENTS TO CHAPMAN VIOLATE BRUTON

Marshall's statements to Chapman and Ecoffey should not be admitted at Graham's trial. If Graham and Marshall are tried together, and the government is allowed to admit these statements, Graham's right to confrontation will be violated. Bruton v. United States, 391 U.S. 123, 126 (1968).

"Bruton is grounded on the Sixth Amendment right to confrontation and prohibits the admission of an out-of-court confession by a nontestifying defendant implicating a co-defendant by name in the crime." United States v. High Elk, 442 F.3d 622, 625 (8th Cir. 2006). The admission of Marshall's statements to Chapman in a joint trial would violate the principles set forth in Bruton and High Elk.

Marshall's statements were made out of court. Marshall is Graham's co-defendant. Marshall will not be testifying. And, Marshall's statements directly inculpate Graham in the kidnaping and murder of Aquash: Marshall places Graham inside his house, with Aquash, against her will, and in possession of a note that suggests a plan to hold or kill her. Marshall's statements also directly contradict Graham's assertions that he was never in Marshall's house.

Accordingly, Marshall's statements to Chapman should not be admitted at a joint trial involving Graham. Because the government has not elected to proceed

without this testimony, Graham's motion for separate trials should be granted.

B. MARSHALL'S STATEMENTS TO ECOFFEY VIOLATE CRAWFORD

Crawford v. Washington, 541 U.S. 36 (2004), bars the introduction of testimonial hearsay in criminal trials unless the declarant is unavailable and the defendant had a prior opportunity to cross examine the declarant. Id. at 68. Testimonial statements are those made by a declarant "in anticipation of or with an eye towards a criminal prosecution." United States v. Tolliver, 454 F.3d 660, 664-65 (8th Cir. 2006). Testimonial statements include those made to known law enforcement officers in which past events are described. See Davis v. Washington, 547 U.S. 813, 825 (2006) (statements made unwittingly to a government informant are nontestimonial); Tolliver, supra, at 665 (statements recounting past events are testimonial whereas statements relaying present-tense happenings are not).

Marshall's statements to Ecoffey are inadmissible in a trial involving Graham. Marshall's statements were not made to a lay person. Instead, they were made to a known law enforcement officer. Ecoffey was not acting undercover or as an informant. He identified himself to Marshall, and advised Marshall that he was specifically investigating the murder of Aquash. See Davis, supra.

Marshall's statements to Ecoffey were not made at a preliminary stage in the case. He spoke with Marshall in December of 2003. Graham Doc. 04408. This was after Marshall had testified before the Looking Cloud Grand Jury in January of 2003 (Graham Doc. 03853), and after Looking Cloud was indicted in April of 2003. Marshall was clearly aware of the existence of a criminal investigation and that the information he was relaying pertained to matters of legal import as he had already been questioned about these matters before the grand jury.

Marshall's statements were not descriptions of present-tense happenings. Instead, Marshall was asked to recount past events that had happened 30 years earlier. See Tolliver, supra.

Marshall's statements to Ecoffey should not be admitted against Graham. To do so would violate the principles set forth in Crawford, supra. If the government wants to admit those statements against Marshall, then Graham should be granted a separate trial.

Dated November 26, 2008.

/s/ John R. Murphy

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(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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Dated November 26, 2008.

/s/ John R. Murphy
John R. Murphy

FILED

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CLERK

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 AFFIDAVIT OF COUNSEL

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF PENNINGTON)

I, Dana L. Hanna, being duly sworn, hereby affirm:

1. I am the attorney for Defendant Richard Marshall, and I make these affirmations so that they may be considered by the Court in deciding the motion for separate trials that has been filed by Co-Defendant John Graham, a.k.a. John Boy Patton. I feel obligated to advise the Court and the other parties that, based on the discovery that has been provided to me, it is my legal opinion that the defenses of Richard Marshall and his Co-Defendant John Graham are irreconcilable and directly in conflict, and that if the Defendants are compelled to be tried together in a joint trial, then in the course of presenting evidence that is necessary for the defense of Richard Marshall, there is a very substantial likelihood that such evidence will result in a denial of the Co-Defendant Graham's Sixth Amendment right to confront his accusers.

2. Richard Marshall is accused by the government of aiding and abetting Arlo Looking Cloud, Theda Clark, and Co-Defendant John Graham, a.k.a. John Boy Patton, in the murder of Anna Mae Aquash on or about December 12, 1975. Arlo Looking Cloud has already been convicted of first degree murder in the killing of Anna Mae Aquash and is serving a life sentence

for his crime. Based on the discovery provided to me by the government and my discussions with the United States Attorney, I am aware that the main government witness in the trial of Richard Marshall will be Arlo Looking Cloud, who is expected to testify that one night 33 years ago he, along with Co-Defendant John Graham, Theda Clark, and Anna Mae Aquash, went to the home of Richard Marshall and his wife Cleo in Allen, South Dakota, and that while he, Graham, and Clarke were in the bedroom of the Marshall home, Richard Marshall gave a gun and a box of shells to Theda Clark. On the basis of that accusation by Looking Cloud, the government accuses Richard Marshall of aiding and abetting Graham, Looking Cloud, and Clark in the murder of Anna Mae Aquash. At trial, Defendant Richard Marshall, through counsel, will deny and dispute Looking Cloud's accusation that he provided Theda Clark with a gun. Looking Cloud's credibility will be the critical issue for the jury to decide in the trial of Richard Marshall.

3. At trial, Defendant Richard Marshall, through counsel, will introduce into evidence a videotaped interview of Arlo Looking Cloud being questioned on March 27, 2003 by Robert Ecoffey, Director of Law Enforcement Services for the Bureau of Indian Affairs, and Detective Abe Alonzo of the Denver Police Department, shortly after they arrested Looking Cloud for the murder of Anna Mae Aquash. The videotaped interview lasted approximately one hour. In that interview, Looking Cloud admitted to Ecoffey that he, Graham, and Theda Clark kidnaped Anna Mae Aquash in Denver, Colorado and drove her to Rapid City, South Dakota, then to Rosebud, and from Rosebud to the spot near Wanblee where Graham shot and killed her. However, in response to repeated questions and factual assertions from Ecoffey, Looking Cloud repeatedly denied having any memory of having stopped at the home of Richard and Cleo Marshall at any time during the journey from Denver to the spot where Anna Mae Aquash was shot and killed. In that videotaped interview, Ecoffey can be seen and heard making factual statements to Arlo Looking Cloud in which he informed Looking Cloud that Richard Marshall and his wife Cleo had both told Ecoffey that John Graham, Looking Cloud, Theda Clark, and Aquash had stopped at the Marshall house in Allen, that "they"–meaning John Graham, a.k.a. "John Boy" Patton, Looking Cloud and Clark–had tried to get the Marshalls to keep Anna Mae Aquash at their house, that Richard Marshall had refused to do so, and that Graham, Looking Cloud, Clark and Anna Mae Aquash then left the Marshall home. In the interview, neither Ecoffey nor Looking

Cloud said anything about Richard Marshall providing anyone with a gun, but Ecoffey did tell Looking Cloud that Richard Marshall had made statements to him that inculpated John Graham, Clark, and Looking Cloud in the murder of Aquash by putting them together at the Marshalls' house in Allen, before they drove on to Rosebud and then to the spot in the Badlands where, according to the prosecution, Graham killed her.

4. The following is an excerpt from the transcript of Looking Cloud's videotaped confession [page 28:20-30:24]. The questions are from federal investigator Robert Ecoffey. The answers are from Arlo Looking Cloud.

Q. * * * * Arlo, I know for a fact that on your way from Rapid City that you made another stop, and that you stopped at – you stopped in (inaudible)[1] South Dakota, that you stopped at Dick Marshal and Cleo Marshal's house. Do you remember stopping there?

A. No.

Q. Okay. You don't remember stopping there?

A. No.

Q. Cause I know – I know for a fact that you stopped there, *cause both Dick and Cleo are – are telling me that you, John Boy, and Theda stopped there, and that you had Anna Me, and that somebody had a note, and that you went into – you went into their house, you knocked on the door, they answered the door, you went into their house, and at that point in time, Theda said, Hey, we brought some baggage we got to take care of, and that – at that point in time she had a note from someone, and that you, John Boy, and her went into the bedroom with Dick Marshal, and Cleo stayed – Cleo stayed sitting out on the couch with Anna Mae, and that you guys went in there, and you had a conversation about this note. You wanted to leave – you want to leave Anna Mae there, but Dick and Cleo said No, that you couldn't leave her there.* Do you remember that happening?

---

[1] Allen, South Dakota

A. No, I don't remember that part. I don't know.

Q. Do you know a Dick Marshal?

A. I – yeah, I met him.

Q. You met Dick. How about his wife, Cleo?

A. Yeah, but not – maybe once.

Q. Do you remember stopping at their house?

A. No.

Q. Do you remember going into the bedroom with them and Theda having a conversation with Dick about keeping her there?

A. No.

Q. And she had a note from someone?

A. Huh-uh.

Q. I want you to think about this real hard, Arlo, because *this is what they're telling me.* This is coming from Cleo. She said she sat out there, she said she fed you guys, she said she gave Anna Mae a change of clothes. She said you went in – she says you, you, John Boy, Theda, and Dick went into the bedroom and had a conversation. And then Dick came out and told her, she said, They want to keep – they want to keep her here, they want us to keep her here, that they had a note from somebody, that they wanted him to take care of this baggage.

And Cleo said, No, we got kids here, we're not gonna get involved. So then Dick went back into the bedroom and you guys came out, and she fed Anna Mae some soup, she changed clothes, and you guys came out, and then you took her and you left again. Do you remember stopping there?

A. No, I don't remember.

Q. You need – I need you to be – I need you to be truthful, Arlo.

A. I don't remember right now, I don't remember that, I thought we just went straight to Rosebud.

[Italics added .]

4. Based on the discovery I have received, particularly an investigative report by Robert Ecoffey, I anticipate that the government will call Robert Ecoffey to testify as a witness, and that Ecoffey will testify that the statements he attributed to Richard Marshall in his interview of Arlo Looking Cloud on March 27, 2003 were made to him in an investigatory interview he conducted with Richard Marshall. In that interview, Ecoffey was seeking information from Marshall about the involvement in the kidnaping and murder of Anna Mae Aquash.

5. Based on the discovery provided to me by the government, the out of court statements that Ecoffey states that Richard Marshall made to him about John Graham coming to his home with Aquash, Clark, and Looking Cloud are in direct conflict with exculpatory statements made by John Graham to Ecoffey and BIA investigator Mitch Pourier, in an interview they did with John Graham in White Horse, Yukon Territory, Canada on April 21, 1994. [GRAHAM discovery materials, page 0955.]

6. On information and belief, based on discovery and information provided to me by the government, at trial, the government will call as a witness a writer and tour guide named Serle Chapman, who worked as a secret government informant in this case, using the code name "Sierra." In cooperation with the FBI, Chapman interviewed people who had been involved in the American Indian Movement (AIM) under the pretext of writing a book about the history of AIM, for the actual purpose of providing the information he obtained from the subjects of his interviews to the FBI. The government intends to offer the testimony of Serle Chapman that he had an unrecorded telephone conversation with Richard Marshall some years ago, and that during that conversation, Richard Marshall confirmed to him that John Graham, a.k.a. John Boy Patton, Arlo Looking Cloud, Theda Clark, and Anna Mae Aquash, came to his home in Allen one night, and that they–Graham, Looking Cloud, and Clark–asked him to keep Aquash there at his house and Richard Marshall refused to do so. On information and belief, Serle Chapman would also testify that in that conversation Richard Marshall made a statement to him, something to the effect that "back in the day," when people asked other people to do something, people generally did not ask too many questions. The government has given notice that it will seek to offer Chapman's testimony regarding Richard Marshall's out of court declarations about John Graham, Looking Cloud and Clark, as well as the "back in the day" statement, as evidence

against both Richard Marshall and John Graham. It is my understanding that the government will contend that the alleged "back in the day" statement is admissible against Marshall as an adoptive admission that he provided a gun to Theda Clark in the presence of John Graham. Defendant Marshall disputes the truth and accuracy of Chapman's testimony, the legal conclusions to be drawn from it, and the admissibility of such testimony under the Federal Rules of Evidence. Defendant Marshall will seek a pre-trial ruling as to the admissibility of Chapman's testimony on those alleged statements. If the court were to rule that such testimony by Chapman would be admissible in a joint trial, it would constitute an inculpatory, out-of-court accusation against John Graham made by Richard Marshall.

7. In view of what I judge to be the weakness of the government's case against Richard Marshall, at this time I consider it to be extremely unlikely that I will advise my client to testify in his trial. Based on all the facts and circumstances, including my opinion as to the legal insufficiency of the government's case, it is in my judgment extremely unlikely that my client will give testimony in his trial.

Dated this 26th day of November, 2008.

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

Subscribed and sworn to before me on this 26th day of November, 2008



Notary Public

My Commission Expires: 3-7-14

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Affidavit of Counsel on the other parties in this case by mailing the same to the addresses listed below:

Marty J. Jackley
United States Attorney
PO Box 2638
Sioux Falls, SD 57101

Robert Mandel
Assistant United States Attorney
515 Ninth Street, #201
Rapid City, SD 57701

John Murphy
Murphy Law Office
328 E. New York St., #1
Rapid City, SD 57701

Dated this 26th day of November, 2008.

Dana L. Hanna

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION IN LIMINE REGARDING ADOPTIVE ADMISSIONS

The government asserts that Defendant Graham has remained silent in the face of accusations by others that he has committed the crime charged. The government claims this silence is an adoptive admission by Graham of the declarant's statement, and that the jury should be instructed that it is evidence of Graham's guilt. The government has not put forward any information as to the adoptive admissions through silence that it seeks to admit or have the jury instructed on. This has prevented the court from making any preliminary finding as to admissibility. Therefore, Graham moves this court to prohibit the introduction or elicitation of such evidence until such time as the government makes a sufficient, out of court showing in regard to foundation to enable the court to make a preliminary determination as to admissibility.

In Graham's previous file, the government stated its intent to admit evidence of Graham's silence or failure to object in the face of an accusation. CR 03-50020, Doc. 285, Proposed Instruction No. 6. The government asked that the jury be instructed that such silence was an admission of guilt by Graham. CR 03-50020, Doc. 285, Proposed Instruction No. 6.

The government did not make a preliminary showing of admissibility in that file prior to dismissal of the case. In the present case, the government has not made any preliminary showing of admissibility in regard to Graham's alleged silence in the face of an accusation.

Such silence in the face of an accusation is not admissible unless the court has had an opportunity to make preliminary findings as to "whether the circumstances of the statement and its making were such as promptingly to call for a reply by the accused in the situation . . ." Arpan v. United States, 260 F.2d 649, 655 (8th Cir. 1958). This is a function of the court, not the jury. Id.

Similarly, the jury should not be instructed as to the admissibility and utilization of silence. The 8th Circuit Pattern Instructions, §4.14, Notes on Use #1, discourage the submission of jury instructions on this point. The drafters stated that such an instruction should only be given upon the defendant's request, which reflects the reluctance to embrace the admission and utilization of such evidence.

8th Circuit Pattern Instructions, §4.14, Notes on Use #1.

The government has not made any preliminary offering in regard to this matter. The government has not identified the declarants, the statements or the circumstances of the statements it seeks to admit. Therefore, the court cannot meet its duty under Arpan to make a preliminary determination of admissibility.

In the absence of such an offering by the government, and in the absence of such a finding by the court, the government should be prohibited from introducing or eliciting any evidence on this point. There is a substantial risk of irreparable harm to the defendant if this kind of evidence is put before the jury prior to a preliminary ruling by the court. Arpan, supra (reversible error created when government put forth alleged adoptive admission without first establishing for the court the foundation for admissibility).

Dated December 1, 2008.

/s/ John R. Murphy

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328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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Dated December 1, 2008.

/s/ John R. Murphy
John R. Murphy

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN J. GRAHAM aka
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 DEFENDANTS' MOTION FOR DISCOVERY OF PRESENTENCE REPORT OF FRITZ ARLO LOOKING CLOUD

COMES NOW the United States, by and through United States Attorney Marty J. Jackley, and Assistant United States Attorney Robert A. Mandel, and respectfully files this response to defendants' motion for discovery of presentence report of Fritz Arlo Looking Cloud and states as follows:

Defendants Graham and Marshall both seek production of Fritz Arlo Looking Cloud's presentence report (PSR) for *in camera* review by the court and ultimately seek access of the PSR as Brady v. Maryland, 373 US 83 (1963), material in this case. The United States has no objection to the court conducting an *in camera* review of this document, but does resist providing this document to

the defendants, primarily on the grounds of the confidentiality of PSRs and the fact that it reveals no Brady material which the defendants are unaware, and Brady therefore does not require that it be provided.

1. Defendant Marshall makes numerous claims in seeking the PSR. He makes it clear that he is aware of issues regarding the mental condition of Looking Cloud, as well as his awareness of drug use by him. He further points out that he has previously been made aware of Looking Cloud's criminal history. He feels that the PSR would provide more information regarding all of these matters.

2. Defendant Graham seeks portions of the PSR which relate to mental health history, chemical dependency history or anything relating to the ability to perceive or recall events.

3. In Brady v. Maryland, 373 US 83 (1963), the prosecution is charged with the responsibility of making the defense aware of exculpatory evidence of which they are unaware. In the case of Brady, the evidence was a confession. In the instant case, no material is present in the PSR which the defendants are not aware of which can be used for impeachment purposes. The PSR is not a piece of evidence such as a confession. The question to resolve would be different if the PSR contained Brady material that the defense was unaware of, but that is not the case here. The defendants are aware of this impeachment material, and the PSR will not provide any further material information.

4. One of the things that enters into the balancing test as to whether the PSR should be disclosed is the fact that the PSR is, by its nature, a confidential document which is only disclosed to the court, the subject of the report, and the prosecution. This is due to a number of reasons, one of which is to encourage the disclosure of information in an accurate and honest manner by the defendant. As a matter of policy, the court should be highly protective of the secrecy of these reports.

5. The rule of Brady is also a very important concept on the other side of this balancing test. In this case, however, it is the position of the United States that the requirements have been complied with in that the defendants are already aware of all the potential areas of impeachment that would be disclosed by providing them with this report. Provision of the PSR would therefore be inappropriate under the facts of this case.

Accordingly, the United States asks that defendants' motions for disclosure of Fritz Arlo Looking Cloud's PSR be denied.

Respectfully submitted this 2nd day of December, 2008.

/s/ Robert A. Mandel

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of December, 2008, I served by electronic transmission, a true and correct copy of the foregoing on:

John R. Murphy
Attorney at Law

Dana Hanna
Attorney at Law

/s/ Robert A. Mandel

Robert A. Mandel

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN J. GRAHAM, aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL, Defendants.	)	CR. 08-50079 ORDER ON DEFENDANTS' MOTIONS TO COMPEL DISCLOSURE OF ARLO LOOKING CLOUD'S PRESENTENCE REPORT

INTRODUCTION

This matter is before the court pursuant to a superceding indictment charging the defendants, John Graham and Richard Marshall, with first degree murder, in violation of 18 U.S.C. §§ 2, 1111, 1152, and 1153. Both Mr. Graham and Mr. Marshall have filed motions seeking an order from the court compelling the government to provide to defense counsel portions of the presentence report ("PSR") of codefendant Arlo Looking Cloud. Mr. Graham seeks those portions of the Looking Cloud PSR in which Mr. Looking Cloud's mental health history, chemical dependency history, or any other fact or circumstance bearing on Looking Cloud's ability to perceive or recall events is

discussed. [Docket 78]. Mr. Marshall seeks any part of the PSR that Mr. Marshall may use to impeach Looking Cloud's credibility. [Docket 73].

The government is not adverse to providing the Looking Cloud PSR to the court for *in camera* inspection, but resists production of any part of the PSR to defense counsel. Although the government recognizes that it could be required to produce any Brady[1] material contained in the Looking Cloud PSR, it asserts that there is no Brady material in that document.

The government has responded that it will agree to provide Mr. Looking Cloud's PSR to the court for *in camera* review, with the express reservation that only exculpatory material from that report be divulged to Mr. Graham. The district court, the Honorable Lawrence Piersol, referred Mr. Graham's motion to this court for determination pursuant to 28 U.S.C. § 636(b)(1)(A), and Chief Judge Karen Schreier's standing order dated June 11, 2007.

FACTS

The facts, insofar as they are relevant to the pending motion, are as follows. In 2003, Arlo Looking Cloud and John Graham were indicted as codefendants in the 1975 death of Annie Mae Pictou/Aquash. The superseding indictment charged both men with first degree murder and aiding and abetting first degree murder.

[1]Brady v. Maryland, 373 U.S. 83 (1963).

Mr. Looking Cloud was apprehended in 2003. He pleaded not guilty and was tried before a jury in February 2004. Mr. Looking Cloud did not testify at his trial, although several witnesses testified to out of court statements made by Mr. Looking Cloud about the murder. The jury convicted Mr. Looking Cloud of first degree murder or aiding and abetting first degree murder on February 6, 2004.

Mr. Graham made his initial appearance on the Looking Cloud-Graham indictment in December 2007. Thereafter, Mr. Graham made a motion for discovery of the Looking Cloud PSR. This court reviewed that document *in camera* and determined that certain portions of the PSR may be discoverable if Looking Cloud testified at trial, but not discoverable if Looking Cloud did not testify. Since it was not apparent at the time the motion was made whether Looking Cloud would be called as a witness, the court denied Mr. Graham's motion without prejudice to his ability to renew the motion if and when it was determined that Looking Cloud would be a witness at the trial.

On August 20, 2008, Richard Marshall was separately indicted for the death of Ms. Aquash under the above-numbered caption. Mr. Marshall was also charged with first degree murder and aiding and abetting first degree murder.

The 2003 indictment against Mr. Graham was then dismissed by the court due to an infirmity in the indictment. Thereafter, a superseding

indictment was filed in this case number, charging Mr. Graham and Mr. Marshall jointly with first degree murder and aiding and abetting first degree murder. Mr. Graham and Mr. Marshall are scheduled to be tried on the charges against them on February 24, 2009. Arlo Looking Cloud is expected to testify at that trial on behalf of the government.

DISCUSSION

Federal Rule of Criminal Procedure 32 addresses disclosure of the PSR, but does not itself authorize or prohibit disclosure. Instead, Rule 32(e) provides that the probation officer who prepares a PSR must give the report to the defendant who is the subject of the report. See Fed. R. Crim. P. 32(e)(2). As to third parties, the rule simply states that the district court may, through local rule or order, "direct the probation officer not to disclose to anyone other than the court the [probation] officer's recommendation on the sentence." See Fed. R. Crim. P. 32(e)(3). The District of South Dakota recently adopted local rules of criminal procedure. See D.S.D. LR 1.1 -58.1. Under our local rules, PSRs may not be disclosed by the United States Probation Office except by permission of a federal judge of the district where the records are maintained. See D.S.D. LR 32.1(B)(1). These rules do not answer the question of *when* a judge might order such records to be disclosed.

The United States Supreme Court, ruling on the discoverability of a PSR under the Freedom of Information Act, stated that "the courts have been very reluctant to give *third parties* access to the presentence investigation report

prepared for some other individual . . . [in part due to] fear that disclosure of the reports will have a chilling effect on the willingness of various individuals to contribute information that will be incorporated into the report" and in part "to protect the confidentiality of the information contained in the report." United States v. Julian, 486 U.S. 1, 12 (1988) (emphasis in original) (citing United States v. McKnight, 771 F.2d 388, 390 (8th Cir. 1985); United States v. Anderson, 724 F.2d 596, 598 (7th Cir. 1984); United States v. Charmer Industries, Inc., 711 F.2d 1164, 1173-1174 (2d Cir. 1983); United States v. Martinello, 556 F.2d 1215, 1216 (5th Cir. 1977); Hancock Brothers, Inc. v. Jones, 293 F. Supp. 1229 (ND Cal. 1968)). For this reason, the Court noted, courts have "typically required some showing of special need before they will allow a third party to obtain a copy of a presentence report." Julian, 486 U.S. at 12.

In United States v. DeVore, 839 F.2d 1330, 1332-1333 (8th Cir. 1988), the defendant moved to discover a co-defendant's PSR who had pleaded guilty just prior to trial. The district court reviewed the codefendant's PSR *in camera* and ruled that DeVore could discover that portion of the PSR in which the codefendant described the robbery with which DeVore and he were charged. Id. On appeal, DeVore argued that it was error for the district court to have failed to state on the record that the undisclosed portions of the codefendant's PSR

contained no impeachment material. Id. The Eighth Circuit rejected this argument and affirmed the district court's handling of the matter. Id.

In United States v. McKnight, 771 F.2d 388, 390 (8th Cir. 1985), the Eighth Circuit held generally that "presentence reports are not public and should not be disclosed to third persons absent a demonstration that disclosure is required to meet the ends of justice." In that case, the defendants had given statements of their net worth to the probation officer who then, in turn, included that information in the PSR. Id. at 389. During the sentencing hearing, the district court read that portion of the PSR into the record during open court. Id.

The defendants objected on the basis that they had revealed their net worth to the probation officer in confidence and they asked that the district court's statement be stricken from the record. Id. The defendants' objection was overruled. Id. In order to effectuate a condition of sentence requiring the defendants to make payments to minority shareholders of a bank, the district court directed that a transcript of the sentencing hearing be prepared and given to the minority shareholders. Id. at 390. Defendants objected to this and the district court overruled their objection. Id.

In ruling on the appeal, the Eighth Circuit noted that the entire PSR had not been disclosed to third parties; rather, certain *facts* contained in the report were disclosed. Id. The Eighth Circuit held that it was appropriate for the court

to discuss these facts in open court before relying on the facts for the purpose of imposing sentence. Id. at 391. Hence, the court held that the district court had not abused its discretion in making these facts public at the sentencing hearing. Id. at 391-392.

In United States v. McGee, 408 F.3d 966, 974 (7th Cir. 2005), the court held that the Jenks Act, 18 U.S.C. § 3500, did not require routine disclosure of PSRs to third parties following the testimony of a witness who was the subject of a PSR. However, the court pointed out that, to the extent that "a defendant suspects that a presentence report contains Brady[2] material, he may request that the district court conduct an *in camera* review of the report to determine if his suspicions are warranted." Id. (citing United States v. Anderson, 724 F.2d 596, 598 (7th Cir. 1984)). Dissemination of those portions of a PSR containing Brady material, without disclosure of the entire report, is sufficient to protect a defendant's rights. Id.

In United States v. Figurski, 545 F.2d 389, 391 (4th Cir. 1976), the Fourth Circuit addressed the issue of disclosure of a PSR to a third party. The court initially noted that PSRs are generally confidential, and that this confidentiality should not be lifted unless it is required in order to meet the ends of justice. Id. However, the court noted that a witness's credibility in a criminal trial is an important issue, especially where that witness is a partner in crime with the

[2]Brady v. Maryland, 373 U.S. 83 (1963).

defendant. Id. Under such circumstances, the witness will often shade the truth "to curry favorable treatment" instead of being premised on an overriding concern for the truth. Id. The Figurski court concluded that material in a PSR that is exculpatory to the defendant must be disclosed. Id. Where the material in a PSR is relevant to impeachment only, however, "disclosure is required only when there is a reasonable likelihood of affecting the trier of fact." Id. at 591-592. The suggested procedure for distinguishing between exculpatory material and impeachment material, and what information should be disclosed, was for the district court to examine the PSR *in camera* and disclose only those portions of the report that meet either test set forth by the court. Id. See also Anderson, 724 F.2d at 598.

The Second Circuit requires that a party seeking disclosure of a PSR first make "a threshold showing of a good faith belief that a co-defendant's PSR contains exculpatory evidence not available elsewhere." United States v. Molina, 356 F.3d 269, 274 (2d Cir. 2004).

Give the above authorities, the government's concession is well-placed that the defendants are entitled to Brady material–that is, exculpatory material–contained in the Looking Cloud PSR. However, the government fails to acknowledge the rule that impeachment evidence falls under Brady when the reliability of a given witness may be determinative of a defendant's guilt or innocence. Giglio v. United States, 405 U.S. 150, 154 (1972).

Here, Mr. Looking Cloud may very well be a pivotal witness in the government's case. The court concludes that Looking Cloud's reliability as a witness may indeed be determinative of the guilt or innocence of Mr. Graham and Mr. Marshall. Therefore, the court concludes that Mr. Graham and Mr. Marshall are entitled to portions of the Looking Cloud PSR that are relative to impeachment of Mr. Looking Cloud. Giglio, 405 U.S. at 154; Figurski, 545 F.2d at 591-592. Having already reviewed the Looking Cloud PSR in the context of Mr. Graham's earlier motion in his 2003 case, the court will forego the step of examining that document again *in camera*.[3]

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the government shall provide to defense counsel those portions of Mr. Looking Cloud's presentence report that constitute impeachment material. This shall include, but is not limited to, those portions of the PSR that describe Mr. Looking Cloud's criminal history, mental health history, substance abuse history, and any other fact that bears on Mr. Looking Cloud's ability to

[3]The court's earlier review of the PSR revealed that Mr. Looking Cloud declined to make any statement about the facts of the offense during his PSR interview with the United States Probation Office. The description of the offense conduct in the PSR came from the trial transcript, which is already available to defense counsel. Accordingly, the court does not address the discoverability of any portion of the PSR in which Looking Cloud described his or his co-defendants' role in the offense, because there is no such description from Looking Cloud in the PSR.

perceive and/or recall events. In order to limit the disclosure of Mr. Looking Cloud's PSR, it is further

ORDERED that counsel for Mr. Graham and Mr. Marshall shall not disclose the contents of any portion of the Looking Cloud PSR to any other person, shall not make any copies or duplicates of the documents provided to them pursuant to this order, shall not use the documents for cross-examination at trial of any witness except Mr. Looking Cloud, and shall immediately return to the government any documents provided to them pursuant to this order upon the conclusion of Mr. Looking Cloud's testimony at trial.

NOTICE OF RIGHT TO APPEAL

Pursuant to 28 U.S.C. § 636(b)(1)(A), any party may seek reconsideration of this order before the district court upon a showing that the order is clearly erroneous or contrary to law. The parties have ten (10) days after service of this order to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. See Fed. R. Crim. P. 58(g)(2). Failure to file timely objections will result in the waiver of the right to appeal questions of fact. Objections must be timely and specific in order to require review by the district court.

Dated December 3, 2008.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)))))))))))	CRIM. NO. 08-50079-01 DEFENDANT'S GRAHAM'S RESPONSE TO GOVERNMENT'S TRIAL MEMORANDUM REGARDING CRAWFORD

In its Trial Memorandum Regarding Crawford, File Document 64, the government seeks to admit four specific statements against Graham. Govt. Trial Memo 1-2. The government also argues for admission of other "similar type conversations" without referencing any specific statement or declarant. Govt. Trial Memo n. 1.

The four specific statements the government seeks to admit are: (1) statements made by Fritz Arlo Looking Cloud to Darlene "Kamook" Nichols and Troy Lynn Yellow Wood; (2) statements made by Looking Cloud to Denise Maloney; (3) statements by Theda Clarke to Nichols; and, (4) statements by Vine Richard Marshall to Serle Chapman.

In support of admission, the government asserts that the statements are not hearsay under Fed.R.Evid. 801(c), not hearsay under Fed.R.Evid.801(d), or are admissible hearsay statements under Fed.R.Evid. 804(b)(3).

Each of these statements and the reasons why they are not admissible are discussed separately below.

A. LOOKING CLOUD'S STATEMENTS TO NICHOLS AND YELLOW WOOD:

1. LOOKING CLOUD'S INTERVIEW

On December 16, 2000, Looking Cloud was secretly recorded having a conversation with Nichols and Yellow Wood. Graham Doc. 01593.[1] Nichols was a "reimbursed" informant working for the government. It is unclear as to whether Yellow Wood was also working for the government at this time.

The recorded conversation that the government wants to admit as a "statement" filled nine (9) audio tapes. The unofficial, single spaced transcript of the conversation is 257 pages long. The government's Trial Memorandum fails to specify any particular part of that statement it seeks to admit.

The conversation begins while Nichols and Yellow Wood are waiting for

[1]The government has incorrectly cited the document as Graham 01810. That is a Bates number, and is not consistent with the Graham document numbering system provided to defense counsel by the government for referencing the discovery materials. The Bates numbers are not used consistently throughout the discovery.

Looking Cloud to be released from jail. Graham Doc. 01595. The government has not disclosed what charges Looking Cloud was in custody for. The nature of the charges may have an impact on the court's reliability analysis, especially if the charges related to drug or alcohol use. Further, no information has been provided as to whether Looking Cloud was intoxicated or under the influence of drugs when he was apprehended.

Within the first few minutes of conversation, Looking Cloud states, "they had me on Tranzine 'til, 'til this morning. They took the Tranzine off of me. . . Aah, its like a depressant like. It knocks you out. Yeah, it just knocks you out. . . Tranzine shots they gave me." Graham Doc. 01597-98. Looking Cloud goes on to say that he slept for three days as a result of the shots. Graham Doc. 01599. Looking Cloud also states that he was given other drugs in addition to Tranzine and that he was hung over as a result. Graham Doc. 01624. He states that he took some pill that morning, and that it was still "foggin" his mind during the conversation. Graham Doc. 01636-37. He states that they gave him the pills every three hours while in jail. Graham Doc. 01637. Nichols, the government's informant, even jokes about the effect of the pills on Looking Cloud's mind. Graham Doc. 10643.

The references to intravenously admitted depressants or tranquilizers, and the repeated dosages of pills that impair his ability to think, bears on the reliability of Looking Cloud's statements. First, it raises the issue as to why he needed to be sedated Second, the issue is raised as to what effects the drugs had on Looking Cloud's ability to accurately perceive and recall events.

During the conversations, references are made to Looking Cloud's substance abuse issues. Yellow Wood and Nichols discuss his alcohol abuse. Graham Doc. 01608. Looking Cloud separates from Yellow Wood and Nichols during an early portion of the conversation to go to a store to buy cigarettes. Upon his return, he states that he has a bottle of "Red Dog." Graham Doc. 01611. Though Yellow Wood and Nichols perceive this as a joke, Looking Cloud reiterates the assertion. Graham Doc. 01611. Looking Cloud then states that he has difficulty remembering past events. Graham Doc. 01598 ("[L]ately people's been tryin' to tell me, do you remember this? And I'm like . . . sometimes I do, and sometimes I don't.").

During this extended conversation, Looking Cloud's recollections are not his own and are not offered in a narrative fashion. Nichols and Yellow Wood assert approximately ten (10) pages of facts to Looking Cloud prior to getting affirmative responses from Looking Cloud, and even then his responses are often

vague and ambiguous. Graham Doc. 01664-73. Nichols and Yellow Wood consistently spoon feed Looking Cloud with the "facts" of the case and speak for pages without any input from him. Graham Doc. 01664-74. For instance, Looking Cloud states he doesn't know where Bill Means lives. Graham Doc. 01688. Nichols then tells Looking cloud that he was told to drive to Means' house, to which Looking Cloud merely responds, "Oh, yeah." Graham Doc. 01688. Similarly, Looking Cloud never mentions or suggests that he was asked to guard Aquash's room until being told he did this. Graham Doc. 01676. This dynamic continues itself throughout the conversation.

In addition to providing Looking Cloud with the story, Nichols and Yellow Wood assist Looking Cloud in deflecting blame from himself by implicating Graham. Looking Cloud tells Nichols whether she can tell others that they have spoken, Graham Doc. 01749, 01761, and states that by the next time they speak he'll be able to get his story straight. Graham Doc. 01761 ("We didn't get things across, but next time we will. 'Cause right now, I'm [unintelligible]."). Yellow Wood then advises Looking Cloud to have someone present with him when he speaks to law enforcement "so that you don't somehow implicate yourself into something ugly." Graham Doc. 01768. When Looking Cloud asks who he should implicate, Nichols expressly tells him only to implicate Graham. Graham Doc.

01761-62 (Looking Cloud: "How many people should I implicate? Huh?" Nichols: "Only John Boy.").

Yellow Wood goes on to suggest that Looking Cloud should implicate Graham to get back at him. Graham Doc. 01762. This dialog appears to be a response to Nichols telling Looking Cloud that Graham had stated Looking Cloud had committed the murder. Graham Doc. 01710, 01748. Nichols had lied to Looking Cloud and told him Graham had "totally blamed" Looking Cloud for the murder. Graham Doc. 01710. Graham had not made any such statements. This gave Looking Cloud a motive to fabricate an allegation in response. When Looking Cloud asked Nichols who to implicate, Nichols told him that the only person he should implicate was Graham because in the end it would boil down to "you're (sic) word against his." Graham Doc. 01761-62.

Even when Looking Cloud is told what the facts are and what he supposedly did, Looking Cloud's responses are vague and ambiguous. Nichols tells Looking Cloud, "I know that you guys drove and this, this is what I hear. Okay, they drove [Aquash] to South Dakota. They drove her." Graham Doc. 01674. Looking Cloud is then asked whether they drove straight to Rapid City, to which he responds "Yeah, I think we drove it straight." Graham Doc. 01674. But, when he is asked for further detail, he states, "I don't even remember now." Graham Doc.

01674. When describing the events that allegedly led to Aquash's death, Looking Cloud is vague and Nichols is the primary source of the facts. Looking Cloud never discusses or mentions Aquash being brought to a cliff or being shot. That information is all provided by Nichols, to which Looking Cloud responds in an ambiguous fashion to Nichols' compound questions. Graham Doc. 01701 (repeated use of "I think" in response to assertions of fact); 01703 (no response to assertions of fact other than an inaudible but alleged sigh).

The government has evidence in its possession that establishes the unreliability of Looking Cloud's statements. Looking Cloud was polygraphed twice by the FBI. Graham Doc. 01883, 01885. During the second polygraph, Looking Cloud stated he did not shoot Aquash. The polygrapher determined that his negative response was deceptive. Graham Doc. 01885.[2] Thus, the government has reason to believe that Looking Cloud, not Graham, shot Aquash, and that Looking Cloud's statement to Nichols and Yellow Wood is unreliable.

2. THE INTERVIEW IS HEARSAY

The government generically asserts that Looking Cloud's statements to Nichols and Yellow Wood are not hearsay under Fed.R.Evid. 801(c) because they

[2]The first polygraph is discussed in Section B, as it relates to a later version of facts given by Looking Cloud. At that time, Looking Cloud had claimed not to have been present when Aquash was shot. The polygraph results were inconclusive.

are verbal acts with independent legal significance and relevance, verbal objects distinguishing two different items, and circumstantial evidence of state of mind. Though the interview lasted hours and is over 250 pages long, the government has failed to identify a single statement contained therein that could conceivably fit the definition of a verbal act, a verbal object, or be admissible as state of mind evidence.

The verbal act doctrine is not applicable to this case. That doctrine applies when the making of the statement itself (as opposed to the truth of the statement) affects the legal rights of the parties or is a circumstance bearing on the rights of the parties. Mueller v. Abdnor, 972 F.2d 931, 937 (8th Cir. 1992). Instances of verbal acts include statements creating rights or obligations under contract, or statements relating to the execution of a will. There were no statements made by Looking Cloud during this conversation that constitute verbal acts.

The government also asserts that Looking Cloud's statements are admissible as non-hearsay verbal objects distinguishing two different items. Govt. Trial Memo p. 2. This is not a valid or recognized basis for admitting an out of court statement. Graham has been unable to find any case recognizing such an exception to the rule against hearsay.

The government asserts that Looking Cloud's statements are admissible as

non hearsay because they are circumstantial evidence "of the state of mind." Govt. Trial Memo p. 2. Out of court statements may be admissible under Fed.R.Evid. 801(c) if they are merely illustrative of the declarant's present state of mind or show the effect a statement has had on someone who heard it. United States v. Thiel, 619 F.2d 778, 781 (8th Cir. 1980); McClure v. State, 575 S.W.2d 564 (Tex.Crim.App. 1979). Examples include statements offered to show poor relations between parties, statements bearing on whether a party acted in good faith, or statements that show a party had notice or knowledge of an issue where such notice or knowledge is relevant. See United States v. Cline, 570 F.2d 731, 734 (8th Cir. 1978); Bush v. Dictaphone Corp., 161 F.3d 363-366-67 (6th Cir. 1998); Smedra v. Stanek, 187 F.2d 892 (10th Cir. 1951).

This exemption to the rule defining hearsay does not relate to Looking Cloud's statements to Yellow Wood or Nichols. Out of court statements by Looking Cloud as to his state of mind are not relevant or admissible in the prosecution against Graham. How Looking Cloud reacted when he was told something by Nichols or Yellow Wood, or what Looking Cloud claimed his state of mind was during any point in time, is not admissible against Graham.

3. THE STATEMENTS ARE NOT ADMISSIBLE UNDER 804(b)(3):

The government argues in the alternative that Looking Cloud's statements

to Nichols and Yellow Wood are admissible as statements against interest. The government has not established a bases for admissibility under this exception to the rule against hearsay.

The government has not met its burden of proving that Looking Cloud is unavailable as a witness. United States v. Hazelette, 32 F.3d 1313, 1316 (8th Cir. 1994); United States v. Fuentes-Galindo, 929 F.2d 1507, 1510 (10th Cir. 1991). Looking Cloud has not been shown to be unavailable. He has lost at trial and on appeal, and therefore he has lost his right to remain silent. United States v. Duchi, 944 F.2d 391 (8th Cir. 1991). If he retains his right to remain silent based on fear of future prosecution, the government can grant him immunity and compel his testimony. United States v. Velasquez, 141 F.3d 1280, 1282 (8th Cir. 1998).

The government has not met its burden of proving Looking Cloud's reliability. The statements against interest exception is not a firmly rooted exception to the rule against hearsay. Lilly v. Virginia, 527 U.S. 116, 134 (1999). Therefore, for Looking Cloud's statements to be admissible under the statements against interest exception, the government must show particularized guarantees of trustworthiness so compelling that adversarial testing would add little to the statement's reliability. Id. This is an extremely high standard of reliability as the

admission of this kind of hearsay directly infringes upon Graham's Sixth Amendment right to confrontation.

Looking Cloud's statements does not meet this standard. First, the statements are not truly against Looking Cloud's interests. It is clear from his statements that he is trying to implicate others in the crime while exculpating himself. Looking Cloud's whole version of events is based on the premise that he was an unwitting bystander who had no knowledge of the plan and was surprised when the killing occurred. And, Yellow Wood and Nichols facilitate him in constructing a story that implicates Graham and exculpates himself.

Second, Looking Cloud's motive to fabricate is clear. He is told that Graham has implicated him, and he is trying to turn this situation around against Graham. This raises substantial doubts about the reliability of the statements. Looking Cloud is fashioning a defense not describing facts.

Third, there are circumstantial issues showing the lack of reliability in the statement. Looking Cloud is under the influence of heavy medications for unknown mental conditions. He repeatedly acknowledges that those drugs are affecting his mind at the time the statements are being made. He repeatedly asserts that his recollections of events are poor and he demonstrates an inability to recall events with clarity or specificity.

Fourth, most of Looking Cloud's statements are not the product of his own independent recollection. Instead, Nichols and Yellow Wood provide him with most of the facts. Looking Cloud merely passively restates or affirms their assertions of fact. In many instances, Looking Cloud's responses to Nichols' and Yellow Wood's assertions of fact are so vague or ambiguous as to render them meaningless. Further, since Yellow Wood and Nichols often present compound questions or compound statements of fact to Looking Cloud, there is a substantial question as to what he is responding to when he appears to affirm a point.

Fifth, the polygraph results should be taken into account when making an admissibility determination in this case. The government wants to admit Looking Cloud's statement to Nichols and Yellow Wood that Graham shot Aquash. Looking Cloud failed a government conducted polygraph on this specific issue. The government can't discount the value of the polygraph in bearing on Looking Cloud's reliability: The government picked the polygrapher from among its own ranks and made passage of the polygraph a condition of Looking Cloud's immunity agreement. This directly attacks the government's position that Looking Cloud's statement is reliable.

In a case of such significance, and with Graham's right to confrontation being placed in peril, the Court should err on the side of excluding out of court

statements such as this. The risk or prejudicial harm to Graham is so significant that the Court should not allow the government to try this case through attenuated, tainted evidence. Therefore, Graham asks that the government be precluded from introducing these out of court statements.

B. LOOKING CLOUD'S STATEMENTS TO MALONEY:

1. LOOKING CLOUD'S PHONE CALL

Denise Pictou Maloney, Aquash's daughter, testified at Looking Cloud's trial that Looking Cloud called her in April of 2002. The call was instigated by a reporter, Paul DeMain, through Richard Two Elk, who knew Looking Cloud. The conversation between Looking Cloud and Maloney was not recorded.

According to Maloney, Looking Cloud said that he was with Aquash, Graham, and Clarke when the traveled from Denver to Rapid City to Rosebud. JT 296-97. Looking Cloud told her that when they arrived at some unknown location, Clarke told him to stay in the car while she, Graham, and Aquash walked over a hill. JT 297. He heard a gun shot, and Graham and Clarke returned without Aquash. JT 297. Looking Cloud stated he wasn't present when Aquash was shot. JT 297. He claimed he did not know that Aquash was going to be shot, but instead thought they were going to scare her. JT 297.

This version of events directly contradicts the version of events given by Looking Cloud in his statement to Nichols and Yellow Wood. In that statement, he alleged Clarke stayed at the car while he, Aquash and Graham walked to a cliff where Graham shot her. Graham Doc. 1694, 1701-04.

Looking Cloud had previously been polygraphed twice about his role in Aquash's death. Graham Doc. 01883, 01885. During the first polygraph, Looking Cloud denied seeing Aquash get shot. The results of the polygraph were inconclusive. Graham Doc. 01883.

2. LOOKING CLOUD'S PHONE CALL IS NOT NON-HEARSAY

None of the purported bases for admission under Fed.R.Evid.801(c) apply to Looking Cloud's statements to Maloney. Looking Cloud's statements exculpating himself and blaming the crime on Graham and Clarke are not verbal acts or objects. They do not have a legal significance apart from their content. See Section A(2), supra. Further, they are not admissible as state of mind evidence. See Section A(2), supra. Looking Cloud's state of mind is irrelevant to a determination of guilt in Graham's case.

3. LOOKING CLOUD'S PHONE CALL IS NOT ADMISSIBLE UNDER 804(b)(3)

For many of the same reasons outlined in Section A, supra, Looking

Cloud's statements to Maloney are not admissible as statements against interest in regard to Graham.

First, the government has not made a showing that Looking Cloud is unavailable. United States v. Fuentes-Galindo, 929 F.2d 1507, 1510 (10th Cir. 1991).

Second, this statement directly contradicts Looking Cloud's other statements. This demonstrates the substantial confrontation clause issue presented when out of court statements are admitted, and the lack of reliability of Looking Cloud's statements. This is a prime example of why declarants should be subjected to cross-examination as opposed to having their out of court statements admitted.

Looking Cloud's two conflicting statements cannot both be true. The Court is not in a position to determine which of the statements, if either, is more reliable. The government shouldn't be allowed to pick from among the conflicting out of court statements to find one that best fits its theory of the case.

Out of court statements should not be admitted unless they are so reliable that adversarial testing would be of little value. Lilly v. Virginia, 527 U.S. 116, 134 (1999). When one witness has given multiple, mutually exclusive versions of events on a key issue, adversarial testing is a necessity. Looking Cloud should be

subjected to cross-examination so that the contradictions in his statements are presented in full fashion to the jury. Therefore, his statements to Maloney or to Nichols and Yellow Wood should not be admitted.

Third, Looking Cloud's statements are not statements against his interest to such an extent that they are inherently reliable. The primary factual statement made by Looking Cloud to Maloney was that he was not present when Aquash was killed and that he did not know she was going to be killed. This is a purely exculpatory statement designed to shift attention from him and to place it upon Graham and Clarke. It is the kind of self-serving exculpatory evidence that would not be admissible without corroboration if offered by a defendant due to its inherent unreliability. Fed.R.Evid. 804(b)(3). It would be fundamentally unfair and be an affront to the confrontation clause to allow the government to introduce this kind of out of court statement against Graham when Graham could not admit the same kind of testimony if it assisted in his own defense.

Because Looking Cloud's statements are not non-hearsay, and they are not admissible as hearsay statements against interest, they should not be admitted against Graham at trial.

C. MARSHALL'S STATEMENTS TO CHAPMAN:

The third set of out of court statements the government seeks to admit are

Vine Richard Marshall's alleged statements to Serle Chapman. The inadmissibility of these statements against Graham was also addressed in Graham's Memorandum in Support of Motion for Separate Trials, File Doc. 76.

1. ALLEGED STATEMENTS

Serle Chapman was a "reimbursed" witness posing as a journalist who acted on the government's behalf to accumulate information against members of AIM. He conducted dozens of recorded interviews with Graham, Marshall and others. Oddly, all of the incriminating statements he allegedly obtained from Graham and Marshall occurred when his recorder was off.

According to Chapman, Marshall told him in an unrecorded conversation that Graham, Theda Clarke, Fritz Arlo Looking Cloud, and Anna Mae Aquash came to his home in December of 1975. One of them gave Marshall a note about keeping "the baggage," presumably referring to Aquash. When Marshall refused to keep Aquash at his house, someone in the group asked him for directions to Rosebud. Then, when Chapman put forth a compound set of facts about rumors in the Indian community that Marshall had provided the gun used to kill Aquash, or whether the baggage note referenced a gun, Marshall allegedly responded "[b]ack in the day when you was asked to do something, somebody asked you for something, you didn't ask too many questions." Graham Doc. 04870.

2. MARSHALL'S STATEMENTS ARE NOT NON-HEARSAY

None of Marshall's alleged statements constitute non-hearsay statements under Fed.R.Evid. 801(c). There is no verbal act, verbal object or state of mind component to any of Marshall's alleged declarations.

The government also suggests that Marshall's statements may be admissible under Fed.R.Evid. 801(d). The only potential basis for admission would be under Fed.R.Evid. 801(d)(2), admissions by party-opponent. That rule only allows the statement to be admitted against the declarant. It cannot be admitted against a non-declarant if the declarant does not testify without violating the Sixth Amendment's confrontation guarantee. See infra.

3. MARSHALL'S STATEMENTS ARE NOT ADMISSIBLE AGAINST GRAHAM

Graham's right to confrontation will be violated if Marshall's jointly inculpatory statements are admitted against him. Marshall, through his counsel, has asserted that Marshall is not likely to testify if the defendants are jointly tried. File Doc. 81. Therefore, Graham will not have the ability to confront the declarant, Marshall. This will violate Graham's right to confrontation. Bruton v. United States, 391 U.S. 123, 126 (1968).

A curative or limiting instruction will not overcome the confrontation clause violation due to the powerfully incriminating nature of the alleged statements. Id. at 135-36. Redaction is not a feasible method of addressing the confrontation issue presented in this case because an inevitable association between Graham and Marshall will still be suggested. See Richardson v. Marsh, 481 U.S. 200, 211 (1987); U.S. v. Van Hemelryck, 945 F.2d 1493, 1503 (11th Cir. 1991); U.S. v. Petit, 841 F.2d 1546, 155 (11th Cir. 1988).

D. CONCLUSION

The government is trying to obtain convictions through out of court statements. Rather than specify in a meaningful manner how these statements are admissible, the government has set forth a laundry list of possible grounds for admission (verbal acts, verbal objects, state of mind, statements against interest).

A close review of the statements and the rules for admission of out of court statements reveals that none of these purported bases for admission are valid. Admission of these statements would not only violate the rule against hearsay, but Graham's right to confrontation. It would also violate his right to trial, as the evidence that the government seeks to introduce is so unreliable that admitting it would call into question the fundamental fairness of the process. For these reasons, Graham asks that the court issue its ruling excluding the statements

identified by the government, and the unidentified statements that the government claims are of a similar nature.

Dated December 5, 2008.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

MARTY J. JACKLEY	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
ROBERT A. MANDEL	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
DANA HANNA	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing

Dated December 5, 2008.

/s/ John R. Murphy
John R. Murphy

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S MOTION TO SEVER TRIALS

NOW COMES defendant Richard Marshall, by and through counsel, pursuant to Rule 14 of the Federal Rules of Criminal Procedure, and hereby moves the Court to order a severance of trials for defendant Marshall and co-defendant John Graham. Defendant Marshall makes this motion on the grounds that his right to a fair trial will be substantially prejudiced if he is compelled to be tried in a joint trial with the co-defendant.

In support of the motion, Dana L. Hanna, attorney for defendant Richard Marshall, hereby affirms:

1. I n this case, the government's case against Richard Marshall consists chiefly of the testimony of cooperating government witness Arlo Looking Cloud, who has been convicted of murder in the killing of Anna Mae Aquash. After his conviction and his life sentence, Looking Cloud told federal investigators that defendant Richard Marshall gave a handgun to the individuals whom are accused of having aided and abetted one another in the murder of Anna

Mae Aquash in December 1975–Arlo Looking Cloud, Theda Clark, and co-defendant John Graham. Defendant Richard Marshall has pleaded not guilty. Looking Cloud has told investigators that he was present when Anna Mae Aquash was killed and that he witnessed John Graham shoot her in the head. The trial of both defendants Graham and Marshall is scheduled to begin on February 24, 2009.

2. On information and belief, which is based on the discovery provided to me by the government, the government will offer testimony from two witnesses–cooperating witness Serle Chapman and federal investigator Robert Ecoffey–that defendant Richard Marshall made statements to them that would tend to inculpate the co-defendant John Graham in the kidnapping and murder of Anna Mae Aquash. Chapman and Ecoffey are both expected to testify that Richard Marshall told each of them that John Graham, Theda Clark, and Arlo Looking Cloud came to his house in Allen, South Dakota sometime in or around December 1975 with Anna Mae Aquash and that they tried to persuade Richard Marshall to keep Anna Mae Aquash at his house and he refused, and that Graham, Looking Cloud, and Clark then left Marshall and his home, after asking for directions to Rosebud. Defendant Marshall's out of court statements are directly in conflict with statements made by co-defendant Graham to federal investigators and witnesses.

3. It is anticipated that these statements by defendant Marshall would be offered as evidence against co-defendant Graham as statements against interest under FRE Rule 804(b)(3).[1] If such statements are introduced into evidence, under FRE Rule 806, co-defendant Graham would be permitted to offer evidence attacking the credibility of defendant Richard Marshall "by

[1] Defendant Marshall has filed a motion *in limine* to preclude the government from introducing the testimony of Serle Chapman as to the alleged statements which he claims were made to him by the defendant.

any evidence which would be admissible for those purposes if declarant had testified as a witness." This would allow the co-defendant to adduce prejudicial evidence against Richard Marshall that the government would not be allowed to adduce in a trial if Richard Marshall does not testify.

4. The defenses of Richard Marshall and John Graham are mutually antagonistic and directly in conflict: defense counsel for Richard Marshall will argue to the jury that evidence which inculpates John Graham exculpates Richard Marshall.

5. Moreover, the government intends to offer evidence of uncharged bad acts and crimes against Graham, including rape, as well as extensive evidence about violent acts and crimes perpetrated by other members of the American Indian Movement in order to prove Graham's motive. Much of the evidence that the government will offer against co-defendant Graham to prove motive and *res gestae* would be not admissible against Marshall in a trial and regardless of judicial instructions to the jury, such evidence is likely to be extremely and unfairly prejudicial to Richard Marshall.

6. Out of court statements made by co-defendant Graham, which are likely to be offered into evidence, could be misinterpreted by a jury as inculpatory to the defendant by inference. If Graham does not testify, defendant Marshall will be denied the right to cross-examine an accuser.

7. For these and all the reasons set forth in the defendant's memorandum of law in support of this motion, defendant Richard Marshall would suffer substantial prejudice to his right to a fair trial and be denied his right to confrontation if he is compelled to defend himself in the same trial with the co-defendant John Graham, a.k.a. John Boy Patton.

WHEREFORE, defendant Richard Marshall moves the Court to order a severance of trials.

Dated this 8th day of December, 2008.

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*
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CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Memorandum of Law in Support of Motion to Sever Trials was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 8th day of December, 2008.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SEVER TRIALS

In this case, the government seeks to prove that in December 1975, co-defendant Graham, along with cooperating witness Arlo Looking Cloud and unindicted coconspirator Theda Clark, abducted and kidnaped Anna Mae Aquash in Denver, Colorado, and drove her to Rapid City; that Graham raped Aquash in Rapid City; that the three took Aquash to Rosebud, South Dakota, and out to the Badlands near Wanblee, where John Graham, assisted by Clark and Looking Cloud, shot and killed her.

As to Richard Marshall, the government's theory is that Graham, Looking Cloud, and Theda Clark, along with Aquash, stopped at the home of Richard Marshall in Allen, South Dakota, after they left Rapid City, and asked Marshall to keep Aquash there at his home and that Marshall refused. The government's entire prosecution against Richard Marshall is based on Looking Cloud's claim, which he evidently made for the first time in 2008, that he saw Richard Marshall gave Theda Clark a handgun and a box of shells in the presence of John Graham.

The government's theory is that Graham, Looking Cloud, and Clark murdered Aquash because they and other members of AIM suspected that Aquash was a government informant.

In statements made to federal investigators and witnesses, John Graham has stated that he drove her from Denver to the Pine Ridge Reservation to help her hide from the FBI, and that he left her at a "safe house" somewhere on the Pine Ridge Reservation. Graham said he did not know whose house it was and he did not go into any house that night with Anna Mae Aquash.

According to government witnesses Robert Ecoffey and Serle Chapman, defendant Richard Marshall told them that Graham, Looking Cloud and Clark, showed up at his house in Allen, South Dakota, on the Pine Ridge reservation, with Anna Mae Aquash and asked him to keep her there, and after he refused to do so, they left, after asking for directions to Rosebud.

Both in terms of the defendants' conflicting out of court statements and in terms of theories of defense, the defenses of Marshall and Graham are mutually antagonistic and directly in conflict.

To impeach Looking Cloud's testimony, Richard Marshall will offer into evidence a videotape of an interrogation of Arlo Looking Cloud, in which federal investigator Robert Ecoffey tells Arlo Looking Cloud that defendant Richard Marshall and his wife both told him that John Graham, Looking Cloud, and Clark brought Anna Mae Aquash to his home and asked him to keep her there, and after he refused to do so, Graham, Looking Cloud and Clark left the Marshall home around midnight with Aquash. It is the government's theory that Graham shot and killed her some hours later that same night or in the early hours of the morning.

Marshall's out of court statement, as related by Ecoffey, inculpates John Graham in the murder of Anna Mae Aquash. Therefore, for confrontation right purposes, Marshall would be an

accuser of the co-defendant whom Graham will not be able to cross-examine, if Marshall chooses not to testify.[1] Nevertheless, Graham could seek to impeach defendant Marshall's credibility under Rule 806, even with evidence that would not be admissible if it were offered by the prosecution.

Moreover, in the trial of co-defendant John Graham, the government will undoubtedly introduce a great deal of evidence concerning crimes and violent activity committed by various factions and members of the American Indian Movement during the 1970s to prove Graham's motive for murder, just as it did in the trial of the government's chief witness Arlo Looking Cloud. In United States vs. Looking Cloud, 419 F.3d 781 (8th Cir. 2005), Looking Cloud argued that such evidence was unduly prejudicial, since he himself had not participated in the violent drama, such as the Wounded Knee occupation or the killings of two FBI agents, that made up much of the government's evidence. The 8th Circuit Court of Appeals recognized the such evidence had the potential to cause unfair prejudice to the defendant's right to a fair trial, but ruled that such evidence was relevant and admissible, chiefly to prove the defendant's motive. The prosecution's theory was that defendant Looking Cloud, along with Graham and Clark, kidnaped and murdered Anna Mae Aquash because they suspected her of being a government informant against individuals involved with AIM. There was evidence in Looking Cloud's trial that Looking Cloud and his two accomplices were all told that Aquash was an informer for the federal government. The government will offer the same theory and the same evidence to prove Graham's motive to kill. Thus again, in a joint trial, extremely prejudicial

[1] Based on these facts and the law as set forth in the Crawford and Bruton cases, defendant Marshall agrees with and joins the co-defendant's legal argument that if the two defendants are tried together, co-defendant Graham will be denied his right to confrontation.

evidence that would probably be inadmissible against Richard Marshall will be introduced in the trial of co-defendant Graham. Such evidence is likely to cause unfair prejudice to Richard Marshall's right to a fair trial since it will have the effect of moving the jury to find guilt by association and judicial instructions will not be able to cure that real danger.

Further, the government intends to offer evidence of uncharged crimes against Graham that would have no probative value with regard to the government's case against Richard Marshall. The government has given notice of its intent to offer evidence that co-defendant John Graham raped Anna Mae Aquash in Rapid City. Although such evidence has no relevance or probative value as to the case against Richard Marshall, such evidence is so inherently prejudicial that there is a very real danger that the jury will erroneously allow that evidence to affect their decision regarding the case of Richard Marshall. Again, such evidence presents a substantial likelihood of spill over prejudice and a verdict based on guilt by association, rather than the law and evidence, if the two defendants are tried together.

For reasons of economy, there is a preference in the federal system for joint trials of defendants who are indicted together. Richardson v. Marsh, 481 US 200, 107 S.Ct. 1702, 95 Law Ed. 2d 176 (1987). However, Rule 14 of the Federal Rules of Criminal Procedure provides: "if it appears that a defendant or the government is prejudiced by a joinder of ... defendants ... for trial together, the Court may order an election or separate trials of counts, grant a severance of defendants, or provide other relief justice requires."

Courts of Appeals frequently have expressed the views that "mutually antagonistic" or irreconcilable defenses may be so prejudicial in some circumstances as to mandate severance. See: United States vs. Benton, 852 F.2d 1456, 1469 (6th Cir.) *cert denied* 488 US 993 (1988);

United States v. Keck, 773 F.2d 759, 765 (7th Cir. 1985); United States vs. Smith, 788 F.2d 663, 668 (10th Cir. 1986); United States vs. MagDaniel-Mora, 746 F.2d 715, 718 (11th Cir. 1984); United States vs. Berkowitz, 662 F.2d 1127, 1133-1134 (5th Cir. 1981); United States vs. Haldeman, 181 US. App. D. C. 254, 294-295, 559 F.2d 31, 71-72 (1976) *cert. denied*, 431 US 933 (1977). However, in Zafiro vs. United States, 506 US 534, 113 S.Ct. 933 (1993), the Supreme Court declined to adopt a bright line rule that would mandate severance whenever co-defendants have conflicting defenses; the Court ruled that mutually antagonistic defenses are not unduly prejudicial *per se.* The Court stated that when defendants properly have been joined under Rule 8(b), the District Court should grant a severance only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence.

The issue here, then, is whether there is a serious risk that a joint trial would compromise a specific trial right of defendant Richard Marshall or prevent the jury from making a reliable judgment about guilt or innocence.

Evidence is "unfairly prejudicial" if it tends to encourage the jury to find guilt from improper reasoning; whether there is unfair prejudice in the evidence depends on whether there was a undue tendency to suggest decision on an improper basis, such as guilt by association. . United States vs. Looking Cloud, 419 F.3d 781 (8th Cir. 2005).

Here, in a joint trial with the co-defendant, evidence of AIM-related violent crimes is likely to become a "pervasive theme" in the trial. United States vs. Johnson, 28 F.3d 1487 at 1197-98 (8th Cir. 1994). Such evidence will have a tendency to encourage the jury to base its verdict on guilt by association. See: United States vs. Sills, 120 F.3d 17 at 920 (8th Cir. 1997).

The danger of guilt by association and unfair prejudice is compounded by the evidence that the government will adduce of the co-defendant's alleged sexual assault of the victim. Added to which is the danger that the co-defendant will be able to use FRE Rule 806 to seek to impeach the defendant's out of court declarations about Graham, even though the defendant does not testify and the government would be prohibited from doing so.

The Supreme Court ruled in Zafiro that mutually antagonistic defenses are not *per se* so prejudicial as to require a severance, and left the question of severance to the sound discretion of the trial court. However, as Justice Stevens observed in his concurring opinion, in a case where there is a genuine antagonism between defenses, "joinder may well be highly prejudicial, particularly when the prosecutor's own case in chief is marginal and the decisive evidence of guilt is left to be provided by a co-defendant." Zafiro, 506 US at page 543.

Here, the government's case against Richard Marshall is marginal at best, since it is based almost totally on the testimony of Fritz Arlo Looking Cloud, convicted murderer of Anna Mae Aquash, whose testimony is motivated chiefly by his desire not to die in prison. Therefore, any error that tended to prejudice Richard Marshall's right to a fair trial could not be deemed harmless. This would be a different case if the government's case against defendant Marshall was strong, but here, in the interests of justice, the court should not allow the government to lighten its burden of proof against this defendant by trying Richard Marshall in a joint trial in which irrelevant but highly prejudicial evidence will inevitably spill over onto him, a trial in which the defendants will be in conflict with each other and not just against the government. In this case, the Court should find there is a substantial danger of unfair prejudice for the defendants in a joint trial and should exercise its discretion under Rule 14 to order separate trials

for the defendants.

Dated this 8th day of December, 2008.

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*
Dana L. Hanna
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CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Memorandum of Law in Support of Motion to Sever Trials was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 8th day of December, 2008.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S MOTION FOR PRE-TRIAL HEARING; MOTION IN LIMINE #1

NOW COMES Defendant Richard Marshall, by and through his attorney Dana L. Hanna, and pursuant to Rule 104 (a) and (c) of the Federal Rules of Evidence, hereby moves the Court to order that a pre-trial hearing be held so that the Court may determine whether statements made by government witness Serle Chapman and statements which Chapman attributes to Defendant Marshall are admissible as adoptive admissions under Rule 801 (d)(2)(B) of the Federal Rules of Evidence. Defendant Marshall moves the Court to preclude the government from offering such statements as evidence in the trial as they are inadmissible under Rule 801(d)(2)(B). Moreover, such evidence is irrelevant and unfairly prejudicial; whatever minimal relevance it might have is clearly outweighed by the substantial danger of unfair prejudice.

In support of this motion, Dana L. Hanna, attorney for Defendant Marshall, hereby affirms:

1. The government intends to offer a statement attributed to Richard Marshall by government witness Serle Chapman as an admission of the Defendant. According to Chapman, in an unrecorded telephone conversation he had with Richard Marshall several years ago, Richard Marshall made a statement to the effect that "back in day" in the 1970s, when people asked other people to do things, people generally did not ask too many questions. The

government contends that this statement and Chapman's out of court declarations are admissible as admissions by a party opponent under 801(d)(2)(B): a statement of which a party has manifested an adoption or belief in its truth.

2. On information and belief, the government contends–and the Defendant denies--that Defendant Marshall's alleged "back in the day..." statement constitutes an admission that he gave a gun to co-defendant John Graham, Theda Clark, and Arlo Looking Cloud when they, along with Anna Mae Aquash, went to Richard Marshall's home in Allen, South Dakota in December 1975. 3. Defendant Richard Marshall, through counsel, has requested the government to provide the Defendant with specific detailed information as to the statement by Serle Chapman which the government alleges was adopted by Richard Marshall. The Defendant has not yet received from the government a response to that request; the Defendant has not received any formal, definitive notice as to what statement by Chapman the government contends Richard Marshall adopted.

4. Defendant Richard Marshall denies making any statement to Chapman that would constitute an admission under Rule 801(d)(2)(B).

WHEREFORE Defendant Marshall moves the Court to order an evidentiary hearing to determine preliminary questions of fact, to rule that the out of court statements of Serle Chapman and the purported statements of Richard Marshall are inadmissible under Rules 801(d)(2)(B), 403, and 404 of the Federal Rules of Evidence, and to preclude the government from adducing such testimony in trial.

Dated this 8th day of December, 2008.

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
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(605) 791-1832
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CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Motion for Pre-Trial Hearing; Motion in Limine #1 was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
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John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 8th day of December, 2008.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRE-TRIAL HEARING ON MOTION IN LIMINE #1

BACKGROUND FACTS

Serle Chapman is a writer who worked as a cooperating witness for the government during the investigation in this case. Under the pretext of writing a book on the history of the American Indian Movement (AIM), he interviewed dozens of American Indians who were involved in the Movement in the 1970s, and then turned over the tape recordings of his interviews and other information to the FBI. One of the people Chapman interviewed during the course of his work as a secret agent for the government was defendant Richard Marshall. Chapman did two interviews with Marshall in 2001. Both interviews were tape recorded. Chapman claims that he also had an unrecorded telephone conversation with Richard Marshall, evidently after the interviews, and that during that unrecorded telephone conversation, in response to a statement or a question from Chapman, Marshall said: "Back in the day, when you was asked to do something, when somebody asked you to do something, you didn't ask too many questions."

Based on one page of Chapman's handwritten notes, it appears that Serle Chapman would testify that he had a telephone conversation with defendant Richard Marshall some seven years ago; that he asked Richard Marshall if Theda Clark, John Graham, Arlo Looking Cloud, and

Anna Mae Aquash came to his home one night 33 years ago; that Chapman told Richard Marshall that he had heard a rumor that Marshall gave one of them a gun; that he asked Marshall about whether there was a note that said anything about a gun; and that at some point in the conversation, Marshall said that "back in the day" when somebody asked you to do something or asked you for something, one did not ask too many questions.

In trial, the government intends to offer this testimony from Chapman as evidence against the accused on the theory that it was an admission by Marshall under Rule 801(d)(2) of the Federal Rules of Evidence. Specifically, the government is expected to argue that the statement about "Back in the day..." should be admitted under FRE 801(d)(2)(B) as an adoptive admission by Marshall, whereby he allegedly acquiesced in or expressed an agreement with an accusatory statement made to him by Chapman.[1] The government contends that alleged statement by the accused was intended by the defendant as an admission that he gave a gun to John Graham, Theda Clark, and Arlo Looking Cloud.

Defendant Marshall challenges the admissibility of such evidence under FRE Rules 801(d)(2)(B), 402, and 403. Defendant Marshall contends that Serle Chapman's testimony as to his recollection of the details of a telephone conversation that he says took place seven years ago is not credible, nor is it sufficient as a matter of law to establish an evidentiary foundation for the admission of such testimony under Rule 801(d)(2)(B). Defendant Richard Marshall requests the Court to enter an order scheduling a pre-trial hearing so that the court can make preliminary findings of fact under Rule 104 and to determine whether the evidence proffered by the government is admissible against the defendant as an adoptive admission under FRE Rule 801(d)(2)(B).

ISSUE TO BE DECIDED

If Chapman's testimony is credited by the Court, the issue to be decided by the court in determining whether Chapman's testimony as to Marshall's out of court statement is admissible is: in making a statement that back in the day, one did not ask too many questions when someone

[1] The government has given notice that it intends to offer the same testimony regarding Richard Marshall's alleged out of court statements to Chapman against co-defendant John Graham as a statement against interest under FRE Rule 804(b)(3).

asked you to do something, Richard Marshall thereby manifested an adoption or belief in the truth of Chapman's statement concerning a rumor that Richard Marshall had given a gun to one of the group that consisted of Theda Clark, John Graham, and Arlo Looking Cloud.

LEGAL ARGUMENT

I

THE GOVERNMENT MUST ESTABLISH THE ADMISSIBILITY OF THE DEFENDANT'S PURPORTED ADOPTIVE ADMISSION IN A PRE-TRIAL HEARING BEFORE THE COURT.

Rule 801(d)(2)(B) of the Federal Rules of Evidence provides that a statement is an admission by a party-opponent and as such, is not hearsay if:

> The statement is offered against a party and is .... a statement of which the party has manifested an adoption or belief in its truth.

Here, the government is not seeking to prove the truth of the facts asserted in the statement made by of Richard Marshall; rather, it is seeking to prove that by making that statement about "back in the day...," Richard Marshall was adopting or agreeing with a statement that was made by Serle Chapman, which preceded Marshall's statement. The government is not offering the defendant's statement for the purpose of proving the facts asserted in his statement that back in the day, when people asked people to do something, people did not ask too many questions. Instead, the government is seeking to prove the truth of the statement by Serle Chapman that referred to a rumor that the killers got a gun from Richard Marshall.

Serle Chapman's statement, coupled with Richard Marshall's alleged response to that statement, is being offered to show that Richard Marshall manifested a belief in the truth of Chapman's statement. Therefore, if this were to be admissible, it would not be admissible as "the party's own statement" under 801(d)(2)(A). Rather, it is being offered under 801(d)(2)(B) as "a statement of which the party has manifested an adoption or belief in its truth."

Therefore, to be admissible as evidence in trial, the government must first prove to the Court by a preponderance of the evidence that Richard Marshall's alleged statement to Chapman was in fact a statement that manifested an adoption or belief in the truth of a statement made by

Chapman. In ruling on whether a statement made by a defendant is admissible as an adoptive admission under Rule 801(d)(2)(B), the Court should make the admissibility determination under Rule 104(b), as to whether there is sufficient evidence of a statement's admissibility as an adopted admission to allow it to be offered to the jury as an adopted admission. See: 2 McCormick, Evidence, §§ 261-262.

First, the Court must make a determination as to preliminary factual questions; if admitted, the jury then decides whether the defendant acquiesced in the statement. United States vs. Sears, 663 F.2d 986 (9th Cir. 1981). To make those factual determinations, the trial court must conduct a hearing outside the presence of a jury. Securities Exchange Commission, 531 F.2d 39 (2nd Cir. 1976); United States vs. Kilbourne, 559 F.2d 12 63 (4th Cir. 1977).

To establish admissibility, the proponent of the statement has the burden of showing (1) that the defendant heard, understood and acquiesced in the statement and (2) that the defendant's response was intended by him as an adoption of truth of the statement. The proponent must prove those facts by a preponderance of the evidence, to establish foundation and admissibility. Ordinarily, it is for jury to decide, in light of all surrounding facts and circumstances, whether the accused actually heard and understood a statement, which tended to incriminate him, which was made in his presence, and which he did not deny, when such statement is introduced in a criminal prosecution; but the question whether the circumstances of the statement and its making were such as to call for a reply by the accused in the situation is a preliminary question for the court. United States v. Arpan, 260 F.2d 649, 654-656 (8th Cir. 1958).

Rule 104 (a) provides that preliminary questions concerning the admissibility of evidence shall be determined by the Court.

Rule 104 (c) provides: "Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests."

For all practical purposes, this would be a hearing on the admissibility of a statement which the government contends is a confession: the government contends–and the defendant denies–that the defendant's alleged statement to Chapman was an admission that he gave a gun to the co-defendant John Graham, Theda Clark, or to Arlo Looking Cloud. Since the alleged

statement is being offered by the government as a confession, one that was made to a cooperating witness who was acting as a government agent, under Rule 104 (c), the hearing on the admissibility of such purported confession must be held outside the presence of the jury.

Before the Court can rule on the admissibility of the purported adopted admission under Rule 801(d)(2)(B), the court has to make preliminary findings of fact as to these questions:

(1) What was the out of court statement made by Serle Chapman to Richard Marshall?

(2) What was Richard Marshall's response to Chapman's statement(s), if any?

(3) Did Richard Marshall say or do something that clearly "manifested an adoption or belief in [the] truth" of Chapman's statement?

These preliminary questions of fact must be determined by the Court and they can only be determined after a pre-trial evidentiary hearing in which the witness Serle Chapman would testify as to the facts of his alleged conversation with Richard Marshall.

In a hearing before the Court, the government would have the burden of proving preliminary facts and establishing admissibility of the defendant's statements.

Adoption by a defendant of another person's statement may constitute an incriminating admission. United States v. Metcalf, 430 F.2d 1197 (8th Cir. 1970). However, a defendant's response or silence in the face of a statement by another person should be held to be an adoptive admission only if it appears that the accused understood and unambiguously assented to those statements. United States vs. Cappola, 526 F.2d 763 (10th Cir. 1975).

In U.S. v. Lilley, 581 F.2d 182 (8th Cir. 1978), the Court stated that when an accusatory statement is made in the defendant's presence and hearing, and he understands it and has an opportunity to deny it, the statement and his failure to deny are admissible against him. See: United States v. Ojala, 544 F.2d 940, 946 (8th Cir. 1976), United States v. Moore, 522 F.2d 1068 (9th Cir. 1976).

Therefore, the Court has to make a factual determination as to whether someone (here, Chapman) made an "accusatory statement" to the defendant. If there was an accusatory statement, the next question would be whether the defendant response (or lack of response) evidenced a clear and unambiguous intent to agree with or acquiesce in the accusatory statement.

In making that determination, the Court should look to the context of the entire

conversation, not just the words in isolation. Thus, in United States vs. Lilley, 581 F.2d 182 (8th Cir. 1978), the 8th Circuit Court of Appeals held that the defendant's failure to expressly deny a government agent's statement did not amount to an admission by silence or adoption when the defendant's written statement given to the government agent contradicted the accusatory statement in every material detail. If the statement itself is inherently ambiguous, it is not an adoptive admission. United States vs. Hove, 52 F.3d 223 (9th Cir. 1995). In Hove, the officer's questioning of the defendant did not constitute an accusation. Therefore, the defendant's response to the question was not an adoption of an accusatory statement. The Court held it was error to allow the testimony to come in as an adoptive admission.

Surrounding circumstances must be examined to determine whether there was an intent to adopt the statement that is fairly reflected in some significantly identifiable way so as to demonstrate clearly the party's belief or the intentional adoption of that information. White Industries, Inc. v. Cessna Aircraft Co., 611 F.Supp. 1049 (Western District of Missouri, 1995).

United States vs. Disbrow, 768 F.2d 976 (8th Cir. 1985) gives the trial court guidance as to the government's burden of proof in establishing admissibility. The Court of Appeals stated in Disbrow that Lilley requires that the accusatory statement must be made in the defendant's presence, that the defendant must understand it, and that the defendant must have an opportunity to deny it. Here then, to establish admissibility, the government must prove by a preponderance of the evidence that Chapman made an accusatory statement, in the defendant's presence, that the Defendant heard and understood the statement to be an accusation, and that he had an opportunity to deny it. The Defendant Richard Marshall contends that the government cannot meet that burden of proof.

The Defendant submits that even Chapman's testimony were to be credited by the Court, as a matter of law, Richard Marshall's statements could not constitute an adoptive admission under FRE 801(b)(2)(B). The defendant is entitled to have the Court make preliminary findings of fact on the question of admissibility pursuant to FRE Rule 104 and to rule on the admissibility of such testimony in a pre-trial hearing.

Dated this 8th day of December, 2008.

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*
Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
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CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Memorandum of Law in Support of Motion in Limine #1 was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 8th day of December, 2008.

/s/ *Dana L. Hanna*
Dana L. Hanna

IN THE UNITED STATES DISTRICT COURT
FOR THE 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 Defendant.	)))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION TO COMPEL DISCLOSURE OF DEFENDANT'S STATEMENTS

Pursuant to Federal Rule of Criminal Procedure 16, Defendant John Graham moves this Court for its Order requiring the government to immediately comply with Rule 16. Specifically, Mr. Graham asks that this Court order the government to immediately provide him with complete, un-redacted copies of every written or recorded statement made by him that is within the government's custody, or that the government knows of or could know of through the exercise of due diligence. Fed.R.Crim.P. 16(a)(1)(B)(I). This motion is based on the arguments and authority set forth below.

Federal Rule of Criminal Procedure 16(a)(1)(B)(I) is unequivocal. It mandates that, upon a defendant's request, the government disclose all relevant written or recorded statements by the defendant if the statement is within the

government's possession, custody or control. The government is also mandated to disclose all relevant written or recorded statements by the defendant if the attorney for the government knows, or through due diligence could know, that the statement exists.

Numerous written and recorded press interviews with Mr. Graham are alleged to exist. Since September of 2008, the government has stated its intention of admitting at trial all or parts of these interviews. Mr. Graham has repeatedly requested production of these alleged interviews, and has specified that he wants the exact version of the interview that the government seeks to admit.

This request was made because there are various versions of Mr. Graham's alleged statements circulating in the public domain. Portions of alleged interviews have been redacted and reconstituted in various publications. Mr. Graham needed to know which version of the alleged statements that the government was going to admit at trial through the witness who allegedly received the statement. The government knows which version they are relying on as the real version, as it is their witnesses who will be introducing the statements at trial.

Immediately prior to trial in the previous Graham murder case, File 03-50020, the government said it was in the process of compiling all of the interviews and that it would disclose them to defense counsel. On or about October 1, 2008,

the government allowed the defense to view one interview with Mr. Graham that the government had redacted, and one internet video that it planned to redact. The government claimed that it was not able to release the other interviews with Mr. Graham at that time as it had not reviewed and/or compiled them. The government said it would have them ready for the defense by October 3, 2008, the last court day before trial.

The government did not produce the materials on October 3, 2008. The government stated that it was awaiting the Court's decision on Graham's motion to dismiss prior to releasing the materials. Once the matter was dismissed, the government refused to provide the materials, even though the government immediately re-filed the charges on the same date as they were dismissed.

Mr. Graham has twice requested production of these materials since Graham was indicted in this file. On October 14, 2008, in a letter addressed and sent to both of the government's attorneys, Mr. Graham specifically asked for all of Mr. Graham's oral, written and/or recorded statements subject to disclosure under Fed.R.Crim.P. 16(a)(1)(A) and (B). On November 24, 2008, in a letter addressed and sent to both of the government's attorneys, Mr. Graham again specifically requested Mr. Graham's statements. In that letter, Mr. Graham referenced the case history set forth above, and asked for immediate production of the un-redacted

version of all interviews or statements allegedly made by him. The government has not responded.

There is no basis for further delay in producing these materials. This case was first indicted in 2003. It has been investigated for thirty years. It was on the eve of trial two months ago. There is no valid legal or factual basis for the government's persistent delay in producing these obviously discoverable materials.

Therefore, Mr. Graham asks that this Court order that the government immediately provide him with copies of complete, un-redacted versions of every written, recorded or oral statement that is subject to disclosure under Fed.R.Crim.P. 16. The government should not be permitted to provide its redacted versions of the interviews. Mr. Graham has a right to know the complete contents of the interview so he can place statements introduced by the government in context. Moreover, Rule 16 does not give the government the discretion to provide only excerpts of statements.

Dated December 9, 2008.

/s/ John R. Murphy

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The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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Dated December 9, 2008.

/s/ John R. Murphy
John R. Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE 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 Defendant.	))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION TO JOIN DEFENDANT MARSHALL'S MOTION FOR PRETRIAL HEARING AND MOTION IN LIMINE #1

Defendant Vine Richard Marshall filed his Motion for Pretrial Hearing and Motion in Limine #1 on December 8, 2008. File Doc. 89. Defendant Graham moves to join those motions, and to supplement the basis for granting the relief requested and to supplement his own motion for separate trials, File Doc. 75.

The government intends to admit an unrecorded statement allegedly made by Defendant Marshall to informant Chapman as an adoptive admission under Fed.R.Evid. 801(d)(2)(B). The substance of the alleged adoptive admission is that Marshall provided a gun to Graham, Clarke and Looking Cloud to kill Aquash.

Because Marshall's statement is a "powerfully incriminating statement" against Graham, Graham's confrontation clause rights under the Sixth Amendment are implicated if it is admitted. Bruton v. United States, 391 U.S. 123, 135-36

(1968). The confrontation clause violation cannot be cured because Marshall's alleged adoptive admission is not independently admissible against Graham. See United States v. Flores, 362 F.3d 1030, 1039-1041 (8th Cir. 2004) (defendant's confrontation rights violated when evidence admitted in joint trial that would not be admissible against him in separate trial).

The government's theory of admissibility is based in Fed.R.Evid. 801(d)(2)(B). That rule only permits the admission of statements by a party-opponent to be admitted against that party. In this case, if the statement is an adoptive admission, it is Marshall's adoptive admission. It can only be admitted against him under Rule 801.

The government has tried to simultaneously claim that Marshall's statement is simultaneously non-hearsay and hearsay. Rule 801 applies to non-hearsay evidence; it does not define exceptions to the rule against hearsay. See United States v. Davis, 457 F.3d 817, 825 (8th Cir. 2006) (Rule 801 creates exemptions to hearsay definition). Rule 804 applies to hearsay statements that are excepted from exclusion because they are against interest. The government cannot claim, as it has been trying to do in this case, that Marshall's statement is a non-hearsay admission under Rule 801, and that Marshall's statement is simultaneously a

hearsay statement against his own interest that can be admitted against Graham under Rule 804.

If the statement is admissible, it is only admissible as an adoptive admission against Marshall. It that situation, it cannot be admitted against Graham because it would violate his right to confrontation. Bruton, supra. Because redaction and curative instructions will not cure the confrontation clause issues, see Richardson v. Marsh, 481 U.S. 200, 211 (1987), Gray v. Maryland, 118 U.S. 1151, 1155 (1998), Graham's trial from Marshall's should be severed if the government persists in its attempt to admit the statement against Marshall.

Dated December 9, 2008.

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The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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John R. Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE 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 Defendant.	)))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S DECLARATION IN SUPPORT OF MOTION TO COMPEL

Pursuant to D.S.D. Crim. LR 16.1, defense counsel for Defendant John Graham submits the following declaration in support of his Motion to Compel Disclosure of Defendant's Statements, File Doc. 91:

1. Defense counsel has twice, in writing, requested disclosure of Mr. Graham's statements. In this file, those requests were made on October 14, 2008, and November 24, 2008, in letters addressed to both government attorneys. Mr. Graham had made a previous written request in Graham's previous file, File No. 03-50020.

2. The written requests were made to both government attorneys because the government requested early on in Mr. Graham's previous case that all discovery communications go to both attorneys. The written requests were

sent by U.S. Mail because the government's attorney advised defense counsel that they would not accept any discovery requests by e-mail.

3. Defense counsel has had several phone conferences with the government about disclosure of Mr. Graham's statements. Those conversations occurred in September and October of 2008.

4. Defense counsel met personally with both government attorneys on or about October 1, 2008, at the United States Attorney's Office in Rapid City, during which time disclosure of the statements was discussed. At that time, Mr. Graham's counsel was advised that he would receive the statements before October 6, 2008. This was at the time Mr. Graham's prior file was pending and immediately before dismissal and refiling of charges.

Dated December 10, 2008.

/s/ John R. Murphy

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/s/ John R. Murphy
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IN THE UNITED STATES DISTRICT COURT
FOR THE 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 Defendant.	)))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION FOR ADDITIONAL PEREMPTORY CHALLENGES

Pursuant to D.S.D. Crim. LR 24.1, Defendant John Graham requests additional peremptory challenges during jury selection.

Pursuant to Fed.R.Crim.P. 24(b)(2), if both defendants are tried together they will share ten (10) peremptory challenges during jury selection. That is an insufficient number of peremptory challenges in this case.

This case has been followed by the public and covered by the media extensively. The crime alleged has been the subject of several books, many newspaper articles, widespread internet coverage, several television shows and at least two movies. There has already been one trial in this case, United States v. Fritz Arlo Looking Cloud, that was tried in this community and received substantial press and public attention.

Matters of great local notoriety will be presented during trial. The occupation of Wounded Knee, the killing of two FBI agents, the Custer County Courthouse riots, the bombings at Mount Rushmore, and other infamous incidents will be presented to the jury. Potential jurors are likely to have strong reactions to any case or any person involved in these incidents.

Both defendants and the decedent are alleged to have been members in the American Indian Movement (A.I.M.). That organization that is viewed unfavorably by many in the community. Further, references to A.I.M. membership is likely to cause jurors to be predisposed against the defendants.

The defendants are not aligned in interest. See File Docs. 75, 81, and 87. Because they have separate and inconsistent theories of defense, they will not be sharing or pooling peremptory challenges. Instead, they will each be utilizing half of the peremptory challenges allotted.

Both defendants face a mandatory life sentence if convicted.

The amount of pretrial publicity, the past history of political and social unrest surrounding this case, the negative associations created by A.I.M. membership, and the inconsistent defense theories, all strongly suggest a need for more peremptory challenges. Defendant Graham asks that each defendant be entitled to fifteen (15) peremptory challenges.

Dated December 10, 2008.

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Dated December 10, 2008.

/s/ John R. Murphy
John R. Murphy

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL, Defendants.	CR08-50079 **UNITED STATES' MEMORANDUM IN OPPOSITION TO DEFENDANTS GRAHAM AND MARSHALL'S MOTIONS FOR SEVERANCE**

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant US Attorney Robert A. Mandel and respectfully files its Memorandum in Opposition to Defendants Graham and Marshall's Motions for Severance.

I. PROCEDURAL HISTORY

On or about October 7, 2008, the Grand Jury issued its Indictment charging Defendants Graham and Marshall with aiding and abetting in the first degree murder of Annie Mae Aquash. On November 21, 2008, Defendant Graham filed a motion for separate trials. On November 24, 2008, this Court issued an Order for the United States to submit the pertinent statements that the United States intends to use as evidence of Defendants to the Court for *in camera* inspection. On November 26, 2008, Defendant

Graham filed a supplement to his Memorandum. On November 28, 2008, Defendant Marshall filed an Affidavit of counsel in support of Motion to Sever. Thereafter, on December 8, 2008, Defendant Marshall filed a Motion to Sever Trials. For the reasons stated below, the United States resists the severance and files this response to collectively address the above-referenced Motions.

II. FACTUAL BACKGROUND

The Superseding Indictment alleges that Defendants John Graham and Dick Marshall did unlawfully kill and aid and abet in the unlawful killing of Annie Mae Aquash by shooting her with a firearm in violation of 18 U.S.C. §§ 1111, 1153, and 2. At trial the United States intends to generally prove that in December 1975, Defendant John Graham, Arlo Looking Cloud, and Theda Clarke abducted Annie Mae Aquash from a residence in Denver, Colorado. The abduction included tying the victim's hands with rope and placing her in the hatchback area of Theda Clarke's red Ford Pinto by which they took her to Rapid City. Throughout the various times of the abduction, including travel to Rosebud and Pine Ridge Reservation communities, the victim was placed in the hatchback area of Clarke's Pinto and otherwise held against her will.

An integral component of the abduction took place at Defendant Marshall's residence wherein Annie Mae Aquash continued to be held against her will, during which time Defendant Marshall further provided Defendant Graham and other aiders and abettors consultation, the murder weapon, and shells. Thereafter, Defendant

Graham, utilizing the weapon and shells provided by Defendant Marshall, shot Annie Mae Aquash in the back of the head while she was praying.

III. DEFENDANTS' STATEMENTS

The United States may introduce the below statements during trial[1]:

A. DEFENDANT DICK MARSHALL'S STATEMENTS

1. Statement of Defendant Marshall to cooperating witness[2] dated July 27, 2001. See Exhibit 1. Specifically, at p.10 Defendant Marshall confirms Annie Mae's presence at his home during the time in question without reference to Defendant Graham.

2. Statement of Defendant Marshall to cooperating witness wherein Defendant Marshall describes Annie Mae as possibly being tied up and further indicating that she didn't want to be there. See Exhibit 2.

3. Statement of Defendant Marshall to cooperating witness discussing the baggage note, the .32-caliber weapon, and the response of "back in the day when you was asked to do something, somebody asked you for something, you didn't ask too many questions." See Exhibit 3.

4. Statement of Defendant Marshall to Robert Ecoffey dated December 26, 2003, wherein Marshall discusses the visit by Theda Clarke, Annie Mae Aquash, and "two other young guys" with no direct reference to John Graham. See Exhibit 4.

5. Grand jury transcript of Dick Marshall on January 15, 2003 (for impeachment purposes of Dick Marshall only). See Exhibit 5.

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[1]The United States does reserve the right to introduce additional statements by Defendants should there exist an evidentiary basis that does not otherwise offend Defendants' Constitutional rights, namely statements that are in the public domain.

[2]The identities of various cooperating witnesses have been provided to defense counsel. The United States appreciates the Court's use of pseudonyms and other efforts to protect the identities of innocent parties and kindly requests defense counsel to exercise better discretion in this respect. See generally, Court's Order on Defendant's Motion to Compel, DE 263, CR03-50020-02.

B. DEFENDANT JOHN GRAHAM'S STATEMENTS

1. Defendant Graham's statement to cooperating witness dated February 11, 2001, at the Holiday Inn Hotel & Suites on Howe Street, Vancouver, Canada, discussing the abduction and murder. See Exhibit 6.

2. Defendant Graham's statement to Robert Ecoffey and Criminal Investigator Mitch Pourier dated April 21, 1994 (numerous verbal and physical acts of admission with no reference to Defendant Marshall, i.e., "when Graham was answering the question if he killed Annie Mae or knew who killed her, his legs were shaking so badly that the picnic table we were sitting on was rocking.") See Exhibit 7.

3. Defendant Graham's statement in Fifth Estate interview, scene #2, November 8, 2000, Exhibit 8, namely the following excerpt:

GRAHAM: No, she was not kidnapped from Denver. We left Denver together.

TREMONTI: Just the two of you?

GRAHAM: Well, that's all I'm going to say on that. Like if other people want to put themselves there, let them put themselves there.

4. Defendant Graham's statement of October 18, 2006, filmed by Native Youth Movement, Vancouver, British Columbia, Exhibit 9, namely the following excerpt:

Question: When's the last time that you saw her?

Graham: When I drove her from Denver to Pine Ridge and she asked me to drive, drive with her and travel with her and when I dropped her off at a safe house in Pine Ridge. That's the last time I seen her. Um, since the, I guess, there has been a lot of speculation, a lot of rumors as to what happened or what could have happened.

III. ARGUMENTS AND AUTHORITIES

A. JOINDER

Under the provisions of Rule 8(b) of the Federal Rules of Criminal Procedure, two or more defendants may be charged in the same indictment "if they are alleged to have participated in the same act or transaction or the same series of acts or transactions constituting an offense or offenses." Fed. R. Crim. P. 8(b). Rule 8(b) "is to be liberally construed in favor of *joinder*." United States v. Jones, 880 F.2d 55, 62 (8th Cir. 1989) (cited in United States v. Gravatt, 280 F.3d 1189, 1191 (8th Cir. 2002) (emphasis added)); see also United States v. Warfield, 97 F.3d 1014, 1018-19 (8th Cir. 1996) (Rule 8 is "to be given a liberal construction in favor of joining the trial of several defendants").

"Generally, the propriety of the joinder must appear on the face of the indictment." United States v. Andrade, 788 F.2d 521, 529 (8th Cir. 1986). The United States Supreme Court has indicated there is a strong preference for joint trials of defendants who are indicted together. Zafiro v. United States, 506 U.S. 534 (1993); United States v. Noe, 411 F.3d 878, 886 (8th Cir. 2005). Joint trials play a vital role in the criminal justice system. Richardson v. Marsh, 481 U.S. 200 (1987). The court in Marsh recognized that joint trials promote judicial efficiency and serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts. Richardson, 481 U.S. at 210. "Persons . . . jointly indicted on similar evidence from the *same or related events* should be tried together, even if each defendant did not participate in or was not

charged with each offense." Gravatt, 280 F.3d at 1191 (citing Jones, 880 F.2d at 62-63) (emphasis added).

In this matter, Defendant Graham and Defendant Marshall's conduct are directly "related events." Gravatt, 280 F.3d at 1191. An integral component of the abduction took place at Defendant Marshall's residence wherein Aquash continued to be held against her will during which time Defendant Marshall provided Defendant Graham and other aiders and abettors consultation, the murder weapon, and the shells. Defendant Graham is not disputing the joinder of the Defendants on the Indictment under Fed. R. Crim. P. 8(b). See Defendant Graham's Memorandum in Support of Motion for Separate Trials (DE 76, p.3). Defendant Marshall appears to ultimately conclude that the Defendants have been properly joined under Rule 8(b). See Defendant Marshall's Memorandum of Law in Support of Motion to Sever Trials at p. 5.

B. SEVERANCE

The gravamen of Defendant Graham's concerns on a joint trial relate to Defendant Marshall's statements and alleged Bruton violations. The gravamen of Defendant Marshall's concerns relate to the danger of guilt by association given the evidence relating to Defendant Graham; that the government's case against Defendant Marshall is not as convincing; and there appear to be inconsistent defenses. See Defendant Marshall's Memorandum of Law in Support of Motion at pp. 4-5. Defendants have failed to demonstrate sufficient prejudice by the joinder and otherwise overcome the substantial public interest in joint trials. See United States v. Frazier, 280

F.3d 835, 844 (8th Cir. 2002) (defendant's burden of proof); United States v. Flores, 362 F.3d 1030 (8th Cir. 2004) (defendant must affirmatively demonstrate a joint trial will result in "severe or compelling" prejudice to defendant's right to a fair trial).

The kind of prejudice the Defendants must show is not constituted by merely claiming they would have a better chance for acquittal in a separate trial. United States v. Boone, 437 F.3d 829, 837 (8th Cir. 2006). Likewise, a disparity in the weight of the evidence between co-defendants is not sufficient grounds for severance. United States v. Hively, 437 F.3d 752, 765 (8th Cir. 2006). "Severance is never warranted simply because the evidence against one defendant is more damaging than that against another. . . ." Id. (citing United States v. Pecina, 956 F.2d 186, 188 (8th Cir. 1992)).

The test in this circuit is both strict and fairly clear:

> Where multiple defendants are charged in the same indictment, there is a preference for a joint trial unless the party moving to sever can show that the benefits are outweighed by a clear likelihood of prejudice. Such a likelihood may be demonstrated by showing either that the jury cannot be expected to compartmentalize the evidence with respect to different defendants due to a prejudicial spillover effect between the cases against them, or that one defendant's defense conflicts with that of another and that the jury is likely to infer from this conflict alone that both are guilty.

Boone, 437 F.3d at 837; see also, United States v. Mickelson, 378 F.3d 810 (8th Cir. 2004).

From the onset, Defendant Graham's reliance upon non-testimonial statements to non-law enforcement individuals fails to support his Confrontation Clause analysis. The Eighth Circuit Court of Appeals recently expounded upon this very issue in a case

from the Western Division of South Dakota. In United States v. Spotted Elk, 2008 WL 4999125 (8th Cir. 2008), the Eighth Circuit instructed:

> In the years since Bruton, the Supreme Court has clarified the scope of the Confrontation Clause in Crawford v. Washington, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), Davis v. Washington, 547 U.S. 813, 821-22, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), and Giles v. California, – U.S. —, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008). **It is now clear that the Confrontation Clause does not apply to non-testimonial statements by an out-of-court declarant.** Davis, 547 U.S. at 823-26, 126 S.Ct. 2266; Whorton v. Bockting, 549 U.S. 406, 127 S.Ct. 1173, 1183, 167 L.Ed.2d 1 (2007) (citations omitted).

Spotted Elk, 2008 WL 4999125 at *16 (emphasis added).

As more fully set forth in the United States' Trial Memorandum Re: Crawford, Crawford distinguishes between a formal statement to law enforcement and a casual statement made to an acquaintance or confidant. Crawford, 541 U.S. at 51. See also United States v. Hyles, 521 F.3d 946 (8th Cir. 2008). The focus is whether the *declarant* reasonably believes "that the statement would be available for use at a later trial." See Crawford, 541 U.S. at 51-52; United States v. Lee, 374 F.3d 637, 644-45 (8th Cir. 2004) (holding confession to be non-testimonial).

It is well-settled that statements made to informants and cooperating witnesses are non-testimonial for Confrontation Clause purposes. See United States v. Udeozor, 515 F.3d 260, 270 (4th Cir. 2008); United States v. Watson, 525 F.3d 583, 589 (7th Cir. 2008) ("A statement unwittingly made to a confidential informant and recorded by the government is not 'testimonial' for the Confrontation Clause purposes."); United States v. Toliver, 454 F.3d 660, 664 (7th Cir. 2006); United States v. Underwood, 446 F.3d 1340,

1347-48 (11th Cir. 2006); United States v. Hendricks, 395 F.3d 173, 182-84 (3d Cir. 2005); United States v. Saget, 377 F.3d 223, 229-30 (2d Cir. 2004). Statements made to informants and cooperating witnesses are considered non-testimonial based upon the rationale that the declarant does not know or "believe that the statement would be used later at trial." See Crawford, 541 U.S. at 51-52. Defendant Graham and Defendant Marshall's statements to the cooperating witnesses, and Defendant Graham's additional statements to journalists are non-testimonial statements for which the Confrontation Clause analysis does not apply. Said statements are respectively admissible as party opponent admissions under Fed. R. Evid. 801(d)(2) and within the hearsay exception of statements against interest under Fed. R. Evid. 804(b)(3).

As for both Defendant Graham and Marshall's statements to law enforcement, neither sufficiently implicate the other or otherwise give rise to a clear likelihood of prejudice. To the contrary, Defendant Graham's statements go out of the way to avoid discussing what fully transpired at Defendant Marshall's residence for good reason. Similarly, Defendant Marshall indicates that Theda Clarke and "two dudes" accompanied Aquash. There has clearly been no sufficient showing of "severe" or "compelling" prejudice to sever the properly joined Defendants in this matter. Neither Defendant Graham nor Marshall's statements place responsibility for the murder on the other. See Hollins v. Dep't of Corr., State of Iowa, 969 F.2d 606 (8th Cir. 1992) ("neither Brown nor Hollins made any serious attempt to place responsibility for the murder on the other"). Indeed, nothing contained within statements to law enforcement require a

redaction and there has been no showing that the risk of any minimal prejudice posed by a joint trial could not be cured by careful and thorough jury instructions. See Mickelson, 378 F.3d at 818.

Defendant Marshall's concerns of guilt by association with Graham and minimization of the evidence against him similarly do not create the necessary prejudice and otherwise justify severance. Defendant Graham's sexual assault of Annie Mae Aquash during the abduction is relevant and admissible with respect to Defendant Marshall and what transpired at his residence. It explains the circumstances surrounding Annie Mae's murder and tends to logically prove elements of the offense. It is further evidence of the victim's state of mind and explanation with respect to her submissiveness at Defendant Marshall's residence. It provides further explanation as to why additional clothing was provided to the victim at Defendant Marshall's residence. See Exhibit 1, taped statement of Defendant Marshall dated July 27, 2001, at p.10 ("I think she gave Annie Mae some clothes"). In the alternative, any potential spill over concerns may be corrected by a limiting instruction to the jury with respect to Defendant Marshall.

Defendant Marshall's contention that he is entitled to severance based upon the weakness of the United States' case is defective with challenging the weight as opposed to the admissibility of evidence and statements. Defendant Marshall conveniently fails to recognize his own admissions against interest, coupled with the additional witness discovery that has been provided to him, including eyewitness accounts from other

than Graham, Looking Cloud or Dick Marshall. Eyewitness accounts include "[i]t was about 11:30 p.m. when Theda Clarke, Arlo Looking Cloud, John Boy Graham, and Annie Mae Aquash came to [the Marshall] residence." See Graham 04854. "Dick and the three others went into the bedroom and shut the door." See Graham 04854. "Annie Mae was being held against her will and that she wasn't free to go." See Graham 04854. "Theda had a handwritten note from someone asking Dick if he could take care of this baggage." See Graham 04854. "Theda, Arlo, and John Boy took Annie Mae and left. . . . it wasn't too much longer after that is when Annie Mae was found dead." Id.

In any event, a defendant seeking severance of trial must show something more than the fact his chances for acquittal would have been better had he been tried separately. See United States v. Henneberry, 719 F.2d 949 (8th Cir. 1983). Severance should not be granted simply because the evidence against one defendant is stronger, or because one defendant *believes* that his chances for acquittal would be better in a separate trial. See United States v. Davidson, 122 F.3d 531, 538-39 (8th Cir. 1997) (citations omitted) (aiding and abetting case).

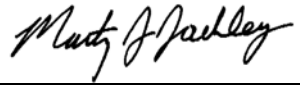
IV. CONCLUSION

The Defendants in this matter are properly joined under the provisions of Rule 8(b) of the Federal Rules of Criminal Procedure. The Defendants have not affirmatively demonstrated that a joint trial will prejudice their right to a fair trial. The Defendants' reliance on non-testimonial statements to cooperating witnesses is legally flawed. Defendants' remaining testimonial statements do not sufficiently implicate one another

or create the necessary prejudice to give rise to Constitutional implications that prevent a fair trial. Defendant Marshall's further claims of guilt by association and opinions of the strength of the United States' case given all the evidence further fails to meet the Defendants' burden to support severance. Therefore, the Defendants' Motion to Sever should be denied.

Date: December 12, 2008

MARTY J. JACKLEY
United States Attorney



PO Box 2638
Sioux Falls, SD 57101-2638
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CERTIFICATE OF SERVICE

The undersigned hereby certifies on December 12, 2008, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Facsimile at
- ☐ Federal Express
- ☒ Electronic Case Filing



Marty J. Jackley
United States Attorney

This document has been filed electronically.

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S MOTION TO DISMISS DUE TO PRE-ACCUSATORY DELAY

NOW COMES Defendant Richard Marshall, by and through his attorney Dana L. Hanna, and pursuant to the Due Process Clause of the Fifth Amendment, hereby moves the Court to dismiss the indictment on the grounds that the delay of 33 years between the crime charged and the initiation of the prosecution has irrevocably prejudiced his ability to present a defense.

In support of this motion, attorney Dana L. Hanna, hereby affirms:

1. The government has accused Richard Marshall of first degree murder on the theory that he aided and abetted John Graham, Theda Clarke, and cooperating government witness Arlo Looking Cloud in the murder of Anna Mae Aquash in December 1975. The government indicted Richard Marshall in 2008--33 years after the crime charged in the indictment.

2. It is the government's theory that on or about December 12, 1975, Graham, Looking Cloud, Clarke, and Anna Mae Aquash went to the home of Defendant Richard Marshall and his wife Cleo in Allen, South Dakota; that someone in that party asked Richard Marshall to keep Anna Mae Aquash at his home; that Defendant Marshall refused to do so; that later that night, Graham, assisted by Looking Cloud and Clarke, shot and killed Aquash; and that Richard Marshall gave a gun to Theda Clarke while she was at his home on or around December 12, 1975. The government's theory is based on the testimony of Arlo Looking Cloud.

3. Defendant Marshall's ex-wife, Cleo Gates, testified in the trial of Arlo Looking Cloud that to her knowledge, there were no guns of any kind in her house on the night that Clarke, Graham and Looking Cloud came to her house in Allen with Aquash.

4. Defendant Marshall can present evidence that in December 1975, he was free on bond in a pending felony case; that as a condition of his bond, he was not allowed to possess any firearms; that the firearms that had been in his house in Allen, which consisted of a rifle and a shotgun, were taken to the home of his mother, Cora Galligo, and stepfather, Joseph Galligo in the spring of 1975. Therefore, if they were available to testify, Cora and Joseph Galligo would have corroborated the testimony of Cleo Gates that there were no firearms of any kind in the Marshall home in December 1975.

5. Joseph Galligo died in the early 1980s and Cora Galligo died in 1992. Therefore, as a result of the pre-indictment delay of 33 years between 1975 and 2008, the Defendant has been deprived of two critical witnesses who would have given testimony that contradicts the testimony of cooperating government witness, Arlo Looking Cloud.

6. Furthermore, in an evidentiary hearing, Defendant Marshall anticipates that he can show actual prejudice and loss of favorable evidence caused by the deterioration of memory of witnesses.

7. In a tape-recorded interview of Looking Cloud by law enforcement officers in November 1994, Looking Cloud was asked when was the first time he saw or knew that John Graham possessed a handgun on December 12, 1975. He was asked specifically if the first time he became aware that there was a gun was when Graham pulled it out of his pocket and shot Aquash. Looking Cloud began to answer that question, saying he thought is was "after...." However, in the middle of his answer, the tape ended and his full answer was unrecorded. On information and belief, Looking Cloud's answer was inconsistent with his recent claim that he saw Defendant Marshall gave a gun to Theda Clarke in his house in Allen. However, the individuals who were present at that interview 14 years ago are unlikely to recall Looking Cloud's answer. This deprives the Defendant of evidence that would go directly to impeach Looking Cloud's trial testimony on the critical question of fact in the Defendant's case. That evidence has been lost to the Defendant as a result of delay by the government in bringing this

indictment.

8. Moreover, the defendant contends that he can adduce evidence in a hearing to show that the government chose to delay before seeking an indictment in reckless disregard of the inevitable prejudice that such delay would cause the defendant. By its reckless failure to charge the Defendant until 2008, 33 years after the crime, the government has gained an unfair strategic advantage over the Defendant; and the Defendant's ability to defend against this charge has been irrevocably prejudiced by the passage of more than three decades.

WHEREFORE Defendant Marshall moves the Court to order a pre-trial hearing in which the Defendant will have an opportunity to prove actual prejudice to his constitutional right to present a defense; the Defendant moves the Court to make findings of fact based on the evidence presented in such a hearing; and the Defendant moves the Court to enter an order dismissing the Indictment against Richard Marshall with prejudice.

Dated this 15th day of December, 2008.

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
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CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Motion to Dismiss Due to Pre-Accusatory Delay was electronically served upon the other parties in this case via the electronic mail addresses listed below:

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Dated this 15th day of December, 2008.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS DUE TO PRE-ACCUSATORY DELAY

BACKGROUND SUMMARY

In 2004, the government indicted Arlo Looking Cloud and John Graham for the murder of Anna Mae Aquash. The government has never sought an indictment against Theda Clarke, who is alleged to have directed Looking Cloud and Graham in the killing of Aquash and to have driven the victim to her place of execution in December 1975. Looking Cloud was convicted of murder and sentenced to life in prison in 2004. In the summer of 2008, after his conviction had been affirmed by the Court of Appeals, Looking Cloud entered into a cooperation agreement with the government. In 2008, Looking Cloud told law enforcement investigators that he saw Richard Marshall give a handgun to Theda Clarke in the bedroom of his home in Allen, South Dakota in December 1975. Based on Looking Cloud's accusation, the government contends Richard Marshall aided and abetted Looking Cloud, Clarke and Graham in the murder of Aquash. Prosecutors sought an indictment against Richard Marshall for first degree murder in the summer of 2008–33 years after the crime charged.

Defendant Marshall submits that in an evidentiary hearing, he can establish that the pre-indictment delay of more than three decades has caused actual and substantial impairment of his ability to present a defense and that reckless delay by the government has resulted in an unfair

strategic advantage over the Defendant.

Marshall moves to dismiss on the grounds that he has been denied his constitutional right to fundamental fairness and due process of law by the pre-accusation delay of a third of a century between crime and indictment.

I

THE CONSTITUTION PROVIDES FOR PROTECTION AGAINST PREJUDICIAL PRE-ACCUSATORY DELAY

The Fifth Amendment's Due Process Clause protects a defendant from unreasonable pre-indictment delay. United States v. Marion, 404 US 307, 92 S.Ct. 455 (1971); United States v. Gladney, 474 F.3d 1027 (8th Cir. 2007).

If a pre-accusation delay by the government has harmed the defendant by impairing his ability to defend himself against the charge, he may move for a dismissal on the grounds that he has been denied the fundamental fairness that is the essential guarantee of the Due Process clause. Courts have held that to prevail on such a claim, a defendant must show that he has suffered actual prejudice from the delay and that the prosecution intentionally or recklessly delayed the indictment for strategic advantage or to harass the defendant. United States v. Taylor, 603 F.2d 732, 735 (8th Cir. 1979). In Taylor, Gladney, and all the other cases in which the Eighth Circuit Court of Appeals has considered this issue, the crimes charged were crimes that had a statute of limitations and the Court based its ruling on its legal determination that the statute of limitations, rather than the Due Process Clause, was the primary source of protection of citizens from overly stale prosecutions.

The seminal case on the right of a defendant for dismissal as a result of pre-indictment delay is United States v. Lovasco, 431 US 783, 97 S.Ct. 2044 (1977). In that case, the Court considered the circumstances in which the Constitution requires that an indictment be dismissed because of delay between the commission of the offense and the initiation of a prosecution.

In Lovasco, the Court reversed a dismissal of an indictment charging illegal firearms crimes where there had been 18 months of pre-indictment delay. In its decision, the Court re-affirmed the law set forth in United States v. Marion, 404 US 307, 92 S.Ct. 455 (1971), that because statutes of limitations provide "the primary guarantee, against bringing overly stale

criminal charges", Marion at 320, the Due Process Clause has a limited role in protecting the defendant against oppressive delay. The Court stated that "Marion makes clear that proof of prejudice is a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reason for the delay as well as the prejudice to the accused." 97 S.Ct. at 2048-49.

Due Process would be violated where pre-accusatory delay causes real prejudice to the defendant's ability to defend against the accusation and the government has delayed the indictment to gain a tactical advantage over the accused. Due Process would also be violated where there is prejudice and the government's delay was in reckless disregard for the risk of prejudice caused by delay. In Lovasco, the Court quoted with approval a concession made by the government: "A due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense." Lovasco, footnote 17; see also United States v. Jackson, 446 F.3d 847 (8th Cir. 2006).

The Court of Appeals for the Eighth Circuit has held that to prove a violation of the Due Process Clause's protection against pre-indictment delay, the defendant must establish that (1) the delay resulted in actual and substantial prejudice to the presentation of the defense and (2) the government intentionally delayed his indictment either to gain a tactical advantage or to harass him. United States v. Haskell, 468 F.3d 1064 (8th Cir. 2006). The defendant has the burden of establishing actual, as opposed to speculative, prejudice; to prove actual prejudice, a defendant must specifically identify witnesses or documents lost during delay properly attributable to the government. Sturdy at 453. If the defendant establishes actual prejudice, the Court will then inquire into the government's reason for the delay. United States v. Sturdy, 207 F.3d 448 (8th Cir. 2000).

The Lovasco case did not impose a burden on the defendant to prove that the government intentionally delayed the prosecution for tactical advantage; only that the Court should inquire into the reasons for the delay in bringing charges, if the defendant proves delay caused prejudice.

II

DEFENDANT CAN ESTABLISH PRE-ACCUSATORY DELAY HAS CAUSED SUBSTANTIAL PREJUDICE TO HIS ABILITY TO PRESENT A DEFENSE AND TO CONFRONT HIS ACCUSERS.

As a result of 33 years of pre-indictment delay, defendant Marshall has lost two witnesses who could have directly supported the testimony given by Richard Marshall's ex-wife in Arlo Looking Cloud's trial: that there were no guns in the Marshalls' home in Allen on the night that Theda Clarke, Arlo Looking Cloud and John Graham went to their home with Anna Mae Aquash.

If the government had brought this accusation within the first 17 years after the crime, before the witness died in 1992, defendant Marshall's mother Cora Galligo would have testified that the defendant had a strong motive *not* to have any firearms in his home: he was out on bond on a state court felony case, and as a condition of his release, he was prohibited from having any firearms in his possession or in his home; that the defendant's stepfather, Joseph Galligo, took possession of all firearms in Richard Marshall's home–a rifle and a shotgun–in the spring of 1975 to comply with the Court's bond conditions; and that there were no guns in the Marshall home in December 1975. Joseph Galligo, who died in the early 1980s, would have testified to the same facts.

The government's case, for all practical purposes, rests entirely on the credibility of a cooperating witness, Arlo Looking Cloud, who is serving a life sentence for Aquash's murder. Looking Cloud has other credibility issues: he has a lifelong history of drug abuse, alcohol abuse and chronic criminality, and he gave numerous prior accounts of his crime that are inconsistent with the one he is now telling the government. Given the inherent problems with Looking Cloud's credibility, the testimony of these two witnesses, Cora and Joseph Galligo, could well have established a reasonable doubt as to the veracity of Arlo Looking Cloud's claim that he saw the defendant hand a gun and a box of shells to Theda Clarke in his home in December 1975. Given the factual context of the case, the prejudice caused to the accused by the loss of these witnesses' testimony is real and substantial.

Moreover, the defendant should be given an opportunity to offer proof in a hearing of

specific instances wherein he has lost potentially exculpatory evidence as a result of the inevitable deterioration of witnesses' memories. For example, Looking Cloud was interviewed in the presence of his attorney by law enforcement officers in November, 1994 about the kidnapping and murder of Aquash. One of the questioners asked him when he first became aware that someone had a gun; he was specifically asked if the first time he knew that someone had a gun or saw the gun was when Graham pulled it out and shot Aquash. Looking Cloud answered the question: he started to say he thought it was "after..."–then the tape recording stopped, interrupting his answer, and the rest of his answer was not recorded. There were about six witnesses present during that interview, and in all likelihood, none of them will remember the answer that Looking Cloud gave to that question 14 years ago. If, as seems clear from the context and language of the question and his partial answer, Looking Cloud answered the question by saying that the first time he saw a gun that night was "after" Graham pulled it out and shot Aquash, then his prior statement completely contradicts his claim that he saw Richard Marshall give a gun to Theda Clarke earlier that night.

Defendant Marshall contends that he can present evidence that the delay of a third of a century between the crime and the initiation of the prosecution, and the natural and foreseeable deterioration of memory, has resulted in loss of testimony about critical statements, conversations and events, and that as a result, the defendant has lost valuable exculpatory evidence that could have seriously impeached and discredited the testimony that would be given by prosecution witnesses, particularly Arlo Looking Cloud.

The defendant can put forth evidence that sometime during the last seven last years, at least one critical witness who would discredit Looking Cloud became unavailable as a witness, due to the infirmities of age: Theda Clarke.

In a hearing, Richard Marshall can demonstrate with concrete and definitive proof that the government's 33 year delay in bringing an accusation against him has irrevocably impaired his right and his ability to present evidence to defend himself against the government's accusation.

III

THE GOVERNMENT'S DELAY OF 33 YEARS EVIDENCED A RECKLESS DISREGARD FOR THE LIKELIHOOD OF IRREPARABLE PREJUDICE TO THE DEFENDANT'S ABILITY TO DEFEND HIMSELF AGAINST THE CHARGE

The cases cited stand for the proposition that when a defendant is indicted before an applicable statute of limitations has run, to prevail on a motion to dismiss for pre-indictment delay, a defendant must prove two things: (1) prejudice and (2) either intentional bad faith or reckless disregard by the government of a foreseeable risk of substantial prejudice.

Here, the defendant submits that he can adduce evidence in a hearing to show actual prejudice and reckless disregard for a foreseeable risk of prejudice caused by pre-indictment delay, which has resulted in giving the government an unfair tactical advantage over the defendant.

The defendant can offer evidence that prosecution witness Serle Chapman acted as a cooperating witness during the investigation of this case. In 2001, Chapman, while operating under a pretext that he was researching a book on the American Indian Movement (AIM), interviewed many American Indians, including Richard Marshall, who had been involved with the Movement in the 1970s. Unbeknownst to the Indian people he was interviewing, Chapman was gathering evidence for the FBI on the Aquash killing and other matters, turning over his tape-recordings and notes of his interviews to federal investigators.

Chapman maintains that some 7 years ago he had an unrecorded telephone conversation with Richard Marshall and that Marshall made a statement to him which the government contends would be admissible as an adoptive admission under FRE Rule 801(d)(2)(B). See: Defendant's Motion in Limine #1.[1] If in fact Chapman made this information known to the government 7 years ago, then the government waited for 7 years to act on the evidence of Chapman.

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[1] Richard Marshall denies and contests both the facts that are alleged by Chapman and the legal argument of the government that he made any statement to Chapman that would be an admission under FRE Rule 801(d)(2)(B), and has moved the Court for a hearing on the admissibility of such evidence. See: Motion in Limine #1.

Similarly, the government knew in 2001 that Theda Clarke, who was then in her 70s, claimed to be in the early stages of Alzheimer's disease. Yet the government waited for seven years to indict Richard Marshall, by which time Clarke was no longer available as a witness to contest the accusation made by Looking Cloud that the defendant Marshall gave her a gun on a December night 33 years ago.

That delay by the government in initiating a prosecution would constitute reckless disregard for the inevitable prejudice to the accused that would result from pre-indictment delay, which would satisfy the second prong for dismissal under Lovasco and its progeny.

Richard Marshall can prove both that pre-accusatory delay impaired his ability to defend against the charge and that the delay by the government evidenced a reckless disregard for the inevitable prejudice that such delay would cause.

IV

IN A MURDER CASE WHERE THERE HAS BEEN A PRE-ACCUSATORY DELAY OF 33 YEARS, DUE PROCESS WOULD REQUIRE DISMISSAL IF THE DEFENDANT CAN SHOW THAT THE DELAY CAUSED SUBSTANTIAL PREJUDICE TO HIS ABILITY TO PRESENT A DEFENSE, REGARDLESS OF WHETHER THERE IS GOVERNMENTAL BAD FAITH.

In the cases cited herein, the indictments were brought within the period prescribed by a statute of limitations, and the courts applied a two-pronged test to determine if defendants were denied due process. Under that test, in order to prevail, a defendant must prove both (1) prejudice and (2) either governmental intent to delay the prosecution to gain a tactical advantage or recklessness. See: United States v. Jackson, 446 F.3d 847 (8th Cir. 2006).

The defendant submits that the test to be applied in this case should be different because this case is a murder case. Because the charge is murder, this case is distinguished from practically all the appellate cases on pre-indictment delay because here there is no statute of limitations to protect the defendant from an overly stale criminal prosecution. While it may be reasonable and just to require a defendant to meet an extraordinary burden of proof to show he has been denied fundamental fairness by pre-accusatory delay in a case where the government

brought the charge within the time allowed by a statute of limitations, it is neither just nor reasonable to put that same burden of proof on a defendant who is charged with a crime that has no statute of limitations–particularly in a case where the government brings its accusation against the defendant a third of a century after the crime was committed.

As the Supreme Court stated in Marion and Lovasco and as the Court of Appeals stated in United States v. Jackson, 446 F.3d 847 (8th Cir. 2006), a defendant who moves for dismissal of an indictment for pre-indictment delay has a high hurdle to overcome in terms of burden of proof precisely because the main protection that the law provides against unfair pre-accusatory delay is the applicable statute of limitations. With only one exception, which will be addressed herein below, all of reported appellate cases cited in this memorandum in which the courts required the defendant to prove both prejudice and governmental bad faith involve criminal charges other than murder; in those cases there was an applicable statute of limitations and the prosecutions were initiated before the applicable statute of limitations ran. In all these cases, the Due Process Clause played a "limited role" precisely because a statute of limitations was available to protect defendants from the inherent unfairness of having to defend against a criminal case that was initiated years, or even decades, after the crime.

That is not the case here. Here, where the accusation is first degree murder, the most serious crime the government can charge, one where there is a mandatory sentence of life imprisonment on conviction, the accused has no protection from a statute of limitations.

The United States Supreme Court stated in Stogner v. California, 539 U.S. 607, 615-616, 123 S.Ct. 2446 (2003) that "a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict." (Citing: United States v. Marion, 404 US 307, 322, 92 S.Ct. 455 (1971)). "And that judgment typically rests, in large part, upon evidentiary concerns--for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable." (Citing United States v. Kubrick, 444 US 111, 117, 100 S.Ct.352 (1979)). "Indeed, this Court once described statutes of limitations as creating 'a presumption that renders proof unnecessary.'"

A statute of limitations creates an irrebuttable legal presumption that a defendant's ability to defend against the charge has been irrevocably prejudiced after a certain period of time.

If this defendant had been charged with kidnapping or aggravated assault or attempted murder or any crime less serious than murder, the law would presume as a proven fact that the defendant could not be fairly called upon to defend against the accusation because of the passage of time and the inevitable damage to one's ability to defend against a charge that is caused by the passage of time. But because this is a murder case, the defendant has no such protection. The Due Process Clause, with its guarantee of fundamental fairness, is the defendant's only source of protection from untimely prosecutions for murder.

The defendant's right to fundamental fairness requires that Due Process must play a greater role in protecting the defendant who is charged with murder than it would in those cases where there is a statute of limitations–especially here, where the prosecution was initiated 33 years after the crime.

At this stage of his research, counsel has found only one reported federal appellate decision in which a convicted defendant appealed a murder conviction on grounds of pre-indictment delay. The case is also the only reported federal appellate decision that counsel has found to date that involves a pre-indictment delay of more than 3 decades. In United States v. Avants, 367 F.3d 433 (5th Cir. 2004), the defendant was prosecuted for murder in federal court 34 years after the crime. In his appeal, he raised the issue of pre-indictment delay and appealed the trial court's finding of fact that there was no improper government motive in delaying the prosecution. The Court of Appeals followed established precedent in that circuit and ruled that the defendant had the burden of proving improper governmental motive for the delay, and affirmed the trial court's finding of fact that there had been sufficient proof put forth to support a finding that the government had intentionally delayed the prosecution for a tactical reason. The Fifth Circuit Court of Appeals rejected defendant's argument that neither Due Process nor Lovasco required the defendant to prove improper governmental motive for the delay.

In that Fifth Circuit case, there is nothing in the decision to indicate that the appellant Avants raised an argument that Due Process requires that murder indictments should be subjected to a different and less onerous test because of the absence of any statute of limitations. Moreover, Avants is distinguishable from the facts in this case because the defendant in Avants was actually tried and acquitted of the murder in state court some thirty years earlier and within

the state's statute of limitations period, so much of the evidence was preserved and was presented at a time when the crime was recent.

Because of the fundamental legal difference between murder and crimes where a prosecution must be commenced within a time prescribed by a statute of limitations, this case is distinguishable from all Eighth Circuit cases that address Due Process challenges to pre-indictment delay. No reported Eighth Circuit appellate decision has ruled that a defendant who is indicted for murder, who is not protected by a statute of limitations, must carry the same burden of proof that defendants who are protected by statutes of limitations must carry. Therefore, defendant Richard Marshall submits that this Court is not constrained to follow Eighth Circuit precedent that sets forth the two-pronged test that has been applied in non-murder cases.

As far as counsel has yet been able to determine, this is a case of first impression, in that no federal court, and certainly not the Eighth Circuit of Appeals, has decided this specific legal question: in a murder case, where there is no statute of limitations, does the defendant who moves to dismiss the indictment on grounds of pre-accusatory delay bear the same burden of proof that he would have to bear in a case where there is a statute of limitations to protect him against overly stale prosecutions; or, if the defendant can prove actual prejudice, should the Court then balance the prejudice caused by delay against the government's reasons for delay, without requiring the defendant to prove improper prosecutorial motive?

Defendant Richard Marshall respectfully submits that in a murder case which is initiated more than three decades after the crime, the test and burden of proof should be different than those that apply in cases where the crime charged has a statute of limitations to protect the accused. Defendant Marshall submits that if the defendant accused of murder meets the first burden he is required to meet by Lovasco, by showing actual and substantial prejudice caused by pre-accusatory delay, then the Court should balance the prejudice caused by the delay against the government's reasons for the delay; and unless the government can prove by a preponderance of the evidence that its reasons for delaying the initiation of prosecution are so compelling that they outweigh the prejudice to the defendant, then Due Process would require dismissal, without requiring the defendant to prove bad faith by the government.

The defendant submits that in a murder case where there is no statute of limitations, the proper test should be the one set forth by the Fourth Circuit Court of Appeals in Howell v. Barker, 904 F.2d 889 (4th Cir. 1990). In that case, the Fourth Circuit Court of Appeals ruled that if a defendant proves prejudice, he is not required to also prove governmental bad faith; instead, the Court should then make a balancing determination and the issue to be decided should be whether the defendant has been deprived of fundamental fairness. Howell v. Baker was not a murder case and the crime charged–robbery–did have an applicable statute of limitations to protect the defendant from prejudice caused by prosecutorial delay, so the reasoning of the Court in Howell v. Barker is even more compelling in a case where the indictment charges murder and there is no statute of limitations:–

"[I]n both *Lovasco* and *Marion,* the Supreme Court made it clear that the administration of justice, vis-a-vis a defendant's right to a fair trial, necessitated a case-by-case inquiry based on the circumstances of each case. Rather than establishing a black-letter test for determining unconstitutional preindictment delay, the Court examined the facts in conjunction with the basic due process inquiry: 'whether the action complained of ... violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions' ... and which define 'the community's sense of fair play and decency.'' . . . .

"Applying these principles of due process to the case at hand, we cannot agree with the position taken by the State of North Carolina and those other circuits which have held that a defendant, in addition to establishing prejudice, must also prove improper prosecutorial motive before securing a due process violation. Taking this position to its logical conclusion would mean that no matter how egregious the prejudice to a defendant, and no matter how long the preindictment delay, if a defendant cannot prove improper prosecutorial motive, then no due process violation has occurred. This conclusion, on its face, would violate fundamental conceptions of justice, as well as the community's sense of fair play. Moreover, this conclusion does not contemplate the difficulty defendants either have encountered or will encounter in attempting to prove improper prosecutorial motive.

"The better position, and the one previously taken by this Circuit in *United States v. Automated Medical Laboratories, supra,* is to put the burden on the defendant to prove actual prejudice. Assuming the defendant can establish actual prejudice, then the court must balance the defendant's prejudice against the government's justification for delay. *Automated Medical Laboratories,* 770 F.2d at 403-04. "The basic inquiry then becomes whether the government's action in prosecuting after substantial delay violates 'fundamental conceptions of justice' or 'the community's sense of fair play and decency.' " *Id.* at 404 (citations omitted)."

The Ninth Circuit Court of Appeals also rejects the strict two-pronged prejudice and bad faith test in favor of a balancing test if the defendant shows actual prejudice. United States v.

Ross, 123 F.3d 1181 (9th Cir. 1997).

In cases where the government's power to prosecute is constrained by a statute of limitations, the rationale for the test that places a heavy burden on the defendant to prove both prejudice and improper governmental motive is that the statute of limitations is the primary source of protecting the defendant from the unfairness caused by overly stale prosecutions. In a murder case, that rationale disappears. In a murder case, the Court should adopt the test set forth in Howell v. Barker. Here, if defendant Marshall can prove that the government's 33 year delay in bringing a prosecution against him has caused actual substantial prejudice to his ability to present his defense, then the only issue for this Court to decide should be whether the government's action in prosecuting this defendant 33 years after the crime charged in the indictment violates fundamental conceptions of justice or the community's sense of fair play and decency.

Moreover, with regard to the defendant's burden of proving prejudice, in the particular factual and evidentiary context of this case, where the government's case and the defense would turn on the memory of witnesses as to events that are alleged to have occurred and words that are alleged to have been spoken one night 33 years ago, the Court should *presume* prejudice to the accused's ability to defend against the charge and should then put the burden on the government to show why it is not fundamentally unjust to bring a murder prosecution against this defendant a third of a century after the crime.

CONCLUSION

The Defendant requests an evidentiary hearing in which he will have the opportunity to prove that pre-indictment delay has caused actual and substantial prejudice to his constitutional rights to present a defense and to confront his accusers, and to adduce evidence in support of his motion to dismiss. The Court should order an evidentiary hearing in which the court would make findings of fact, and if the Court finds that the Defendant's ability to defend himself against the charge of murder has been substantially prejudiced by pre-indictment delay, and concludes as a matter of law that the defendant has been denied fundamental fairness, then this Court should dismiss the indictment against Richard Marshall with prejudice.

Dated this 15th day of December, 2008.

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
HANNA LAW OFFICE
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com
Attorney for Defendant Richard Marshall

CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Memorandum of Law in Support of Motion to Dismiss Due to Pre-Accusatory Delay was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 15th day of December, 2008.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079-01

UNITED STATES' SUPPLEMENT TO MEMORANDUM OPPOSING DEFENDANT'S MOTION TO DISMISS COUNT III OF INDICTMENT

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant US Attorney Robert A. Mandel and respectfully supplements the United States' Memorandum Opposing Defendant's Motion to Dismiss Count III of Indictment filed on October 29, 2008, with the following two documents issued by the Canadian Indian Registrar and attached as Exhibits A and B:

1. Certificate of authenticity of official records re: Johnnie Graham, issued on November 7, 2008, by the Indian Registrar Allan Tallman.

2. Certificate of authenticity of official records of Annie May Maloney issued on November 7, 2008 by Indian Registrar Allan Tallman.

These Certificates further support federal jurisdiction over an offense that involves and affects enrolled members of a federally-recognized Indian tribe (Looking Cloud/Marshall/Clarke) and involves and affects registered North American Indians

who are affiliated[1] with a federally-recognized tribe (Aquash and Graham's affiliation with the Oglala Sioux). Graham, through aiding and abetting Indians (Looking Cloud/Marshall/Clarke) in the murder of Annie Mae Aquash in Indian Country, committed acts involving and affecting Indians giving rise to federal jurisdiction under §§1153 and 2. See New York ex rel. Ray v. Martin, 326 U.S. 496, 500 (1946) (recognizing that United States v. McBratney, 104 U.S. 621 (1881), applies to "crimes between whites and whites which do not affect Indians") (emphasis added); United States v. Goings, 527 F.2d 183, 185 (8th Cir. 1975) (stating that McBratney held that "state courts have exclusive jurisdiction of offenses committed solely between non-Indians on Indian reservations") (emphasis added).

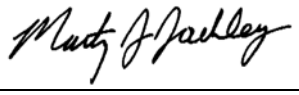
In conclusion, the present case is not a murder committed solely between non-Indians and jurisdiction for Defendant Graham's aiding and abetting in the murder of Annie Mae Aquash as alleged in Count III of the Indictment properly remains with this Court.

---

[1] An Indian for purposes of §§ 1152 and 1153 requires evidence that: (1) he/she is an Indian in the racial sense; and (2) he/she is enrolled or affiliated with a tribe that is recognized by the United States and is individually subject to United States jurisdiction. LaPier v. McCormick, 986 F.2d 303, 305-06 (9th Cir. 1993) (emphasis added); United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1976); *Ex Parte Pero*, 99 F.2d 28, 31 (7th Cir. 1938); St. Cloud v. United States, 702 F. Supp. 1456, 1461 (DSD 1988); see also State v. Daniels, 16 P.3d 650, 653-54 (Wash. App. 2001) (applying test and noting, "Mr. Daniels has clearly established that he is an Indian in the racial sense; his Canadian nationality does not divest him of his racial identity.").

Date: December 16, 2008

MARTY J. JACKLEY
United States Attorney



PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on December 16, 2008, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Facsimile at
- ☐ Federal Express
- ☒ Electronic Case Filing



Marty J. Jackley
United States Attorney

This document has been filed electronically.

CERTIFICATE OF AUTHENTICITY OF OFFICIAL RECORDS

I, **Allan Tallman**, attest that my position with the
(Name)
Government of Canada is **Indian Registrar** and that in that position I am authorized by the laws of Canada to attest that the documents attached hereto and described below:

(1) are true copies of official records that are authorized by the laws of Canada to be recorded or filed in **the Department of Indian Affairs, Office of the Indian Registrar**, which is a government office or agency.

(2) set forth matters that are authorized by the laws of Canada to be reported and recorded or filed.

Description of Documents:

(1) Registered Indian Record dated October 23, 2008 confirming that Johnnie Graham, date of birth, August 13, 1955 is currently registered as an Indian under section 6(1)(c) of the *Indian Act* as registration number 493-00294-01, with band membership in the Champagne Indian Band which is located in Yukon Territory, Canada. Please note that this record confirms that Mr. Graham was issued a wallet-sized identity card, known as a Certificate of Indian Status, on July 10, 1995 by the Yukon Regional Office of DIAND, bearing card registration number 461194, but we do not retain a copy of that document.

(Signature)

(Seal)

November 7, 2008
(Date)

CERTIFICATE OF AUTHENTICITY OF OFFICIAL RECORDS

I, **Allan Tallman**, attest that my position with the
(Name)
Government of Canada is **Indian Registrar** and that in that position I am authorized by the laws of Canada to attest that the documents attached hereto and described below:

(1) are true copies of official records that are authorized by the laws of Canada to be recorded or filed in **the Department of Indian Affairs, Office of the Indian Registrar**, which is a government office or agency.

(2) set forth matters that are authorized by the laws of Canada to be reported and recorded or filed.

Description of Documents:

(1) Registered Indian Record dated October 23, 2008 confirming that Annie May Maloney (birth name Pictou) date of birth, March 27, 1945, who died on February 25, 1976 was registered as an Indian under section 6(1)(a) of the *Indian Act* as registration number 025-00498-01, with band membership in the Shubenacadie Indian Band which is located in Nova Scotia, Canada. Please note that this record indicates that there is no record of Ms. Maloney having been issued a wallet-sized identity card, known as a Certificate of Indian Status.

(Signature)

(Seal)

November 7, 2008
(Date)

Date: December 18, 2008

MARTY J. JACKLEY
United States Attorney



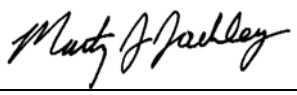
PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on December 18, 2008, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

- ☐ U.S. Mail, postage prepaid
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- ☐ Facsimile at
- ☐ Federal Express
- ☒ Electronic Case Filing



Marty J. Jackley
United States Attorney

This document has been filed electronically.

U.S. Department of Justice

Marty J. Jackley
United States Attorney
District of South Dakota

515 Ninth Street, Room 201
Rapid City, South Dakota 57701

(605)342-7822
FAX:(605)342-1108

January 15, 2008

John Murphy
Attorney at Law
328 E. New York #1
Rapid City, SD 57701

RE: United States v. John Graham

Dear John:

Enclosed as discovery in the above-entitled matter are a CD containing the trial and sentencing hearing transcripts and a CD containing discovery documents 1-1311. I am also enclosing instructions on how to access these documents through IPRO, our electronic discovery software program. I anticipate providing you with another CD with approximately 3,200 additional documents within the next few days.

If you have any questions, please don't hesitate to contact me.

Best regards,

MARTY J. JACKLEY
United States Attorney
By:

ROBERT A. MANDEL
Assistant U.S. Attorney

RAM/lc
Encs.

011

US ATTY RAPID CITY

03/10/08 10:53 FAX 605 342 1108

U.S. Department of Justice

Marty J. Jackley
United States Attorney
District of South Dakota

515 Ninth Street, Room 201
Rapid City, South Dakota 57701

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RE: United States v. John Graham

Dear John:

Enclosed as additional discovery in the above-entitled matter is a DVD containing discovery documents 1312-4263.

If you have any questions, please don't hesitate to contact me.

Best regards,

MARTY J. JACKLEY
United States Attorney
By:

ROBERT A. MANDEL
Assistant U.S. Attorney

RAM/lc
Enc.

03/10/08 10:53 FAX 605 342 1108 US ATTY RAPID CITY 009

U.S. Department of Justice

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February 28, 2008

John Murphy
Attorney at Law
328 E. New York #1
Rapid City, SD 57701

RE: United States v. John Graham

Dear John:

Enclosed as additional discovery in the above-entitled matter is a CD containing documents 4264-4865. If you have any questions, please don't hesitate to contact me.

Best regards,

MARTY J. JACKLEY
United States Attorney
By:

ROBERT A. MANDEL
Assistant U.S. Attorney

RAM/lc
Encs.

U.S. Department of Justice

Marty J. Jackley
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District of South Dakota

Post Office Box 2638
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September 23, 2008

John R. Murphy
Attorney at Law
328 E. New York Street #1
Rapid City, SD 57701

RE: United States v. Graham

Dear John:

I am enclosing additional discovery in relation to statements and admissions pursuant to Fed. R. Crim. P. 16(a). While I believe you already have been provided some of this information, out of an abundance of caution, it is being provided at this time:

1. Transcript of interview of Defendant from Native Youth Movement, Vancouver, BC;

2. Transcript of Anna Maria Tremonti-CTV, Fifth Estate, on November 8, 2000; and

3. Transcript of Defendant's interview by Antoinette Nora Claypoole on March 30-31, 2004.

John, I am requesting that a foundation stipulation be entered with respect to Mrs. Claypoole's interview and request that you please advise us as to your position with respect to the same. The DVDs of the interviews for items 1 and 2 are available at the U.S. Attorney's Office for viewing, if you so desire.

To the extent that you have any questions whatsoever, please do not hesitate to contact me. I would again remind you that the United States has requested rule 16(b) disclosure.

Sincerely,

MARTY J. JACKLEY
United States Attorney

MJJ/lc
Encs.
cc: AUSA Robert Mandel

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT GRAHAM'S MOTION TO COMPEL DISCOVERY

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant US Attorney Robert A. Mandel and respectfully files this Memorandum in Opposition to Defendant Graham's Motion to Compel Disclosure of Defendant's statements.

The United States does not dispute that Defendant Graham is legally entitled to oral, written, or recorded statements made by him as set forth in Fed. R. Crim. P. 16(a)(1)(A) and (B). However, all of Defendant's statements in their entirety that the United States has in its possession or control have been produced in accordance with Rule 16.

The disconnect appears to be that Defendant Graham believes he is entitled to have the United States further identify the exact excerpts of his statements it intends to

introduce at trial. While this is not a requirement of Rule 16(a), for purposes of trial efficiency, the United States intended to provide Defendant Graham the excerpts during the previous October trial exhibit exchange process that it would likely seek to introduce. In any event, Defendant Graham has, in part, accomplished his discovery request of identifying specific excerpts through his severance motion.[1]

The United States produced Defendant Graham's statements as follows:

1. January 15, January 18, and February 28, 2008, discovery responses providing documents 1-4865. Defendant Graham's statements to law enforcement, cooperating witnesses, and other public domain-type statements were provided, including the following 01139; 01159-01189; 01140-01147; 01188 -01189; and 04721-04727. See Exhibits 1-3.

2. September 23, 2008, correspondence from US Attorney Jackley to ensure, out of an abundance of caution, that the listed public domain interviews were provided to Defendant in their entirety. See Exhibit 4. As identified in Defendant Graham's filings, Defendant Graham's counsel was invited to the US Attorney's Office to review this public domain information and to attempt to reach a stipulation on admissibility and as to excerpts of statements to be used at trial. The United States has identified, at least preliminarily, the excerpts it intends to use in its case-in-chief at trial in its response to Defendant Graham's severance motion.

To the extent Defendant Graham does not have any of this documentation for whatever reason, the United States has no objection to providing it again. Accordingly, Defendant Graham's Motion to Compel should be denied in full.

[1]The United States has reserved the right to utilize additional statements of Defendant Graham, that have been produced, for impeachment and other proper evidentiary grounds.

Date: December 18, 2008

MARTY J. JACKLEY
United States Attorney



PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on December 18, 2008, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
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Marty J. Jackley
United States Attorney

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U.S. Department of Justice

Marty J. Jackley
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District of South Dakota

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January 15, 2008

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RAM/lc
Encs.

011

US ATTY RAPID CITY

03/10/08 10:53 FAX 605 342 1108

U.S. Department of Justice

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February 28, 2008

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Post Office Box 2638
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September 23, 2008

John R. Murphy
Attorney at Law
328 E. New York Street #1
Rapid City, SD 57701

RE: United States v. Graham

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Sincerely,

MARTY J. JACKLEY
United States Attorney

MJJ/lc
Encs.
cc: AUSA Robert Mandel

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S TRIAL MEMORANDUM REGARDING STATEMENTS AGAINST INTEREST AND REQUEST FOR HEARING ON ADMISSIBILITY

INTRODUCTION

In this case, and in Defendant Graham's previous file, CR 03-50020, the government has stated that it intends to admit at trial against Graham out of court statements made by co-defendant Vine Richard Marshall, co-defendant Fritz Arlo Looking Cloud, and un-indicted alleged accomplice, Theda Clarke. See File No. 08-50079, Docs. 64, 65, 95; File No. 03-50020, Docs. 303, 305, 307, 313, 314. The government has also stated that it intends to offer other, unspecified out of court statements against Graham. See File No. 08-50079, Doc. 64, note 1; File No. 03-50020, Doc. 303, note 1. The government states these statements, though not made by Graham, are admissible against him under the "statements against interest" exception to the rule against hearsay, Fed.R.Evid. 804(b)(3).

Mr. Graham has previously challenged the admissibility of some of these statements, particularly on confrontation clause grounds. File 08-50079, Doc. 76, 86. And, Mr. Graham has previously argued that separate trials should be granted if the government wants to admit Marshall's jointly inculpatory statements against Marshall at trial. File 08-50079, Doc. 76.

In this trial memorandum, Graham outlines general legal principles regarding the admissibility of statements under Fed.R.Evid. 804(b)(3). As set forth below, Graham asserts that because the statements the government seeks to admit contain collateral matters or are not exclusively self-inculpatory, they are inadmissible against him.

Graham has raised this matter prior to trial for several reasons. As set forth below, the admissibility analysis places several burdens on the Court. Prior to admitting statements against interest, the Court must excise the collateral and/or jointly inculpatory portions of a statement, and isolate the directly self-inculpatory portions. This is in addition to the other foundational findings the Court must make under the rule, such as determining that the declarant is unavailable and that the statement has particularized guarantees of trustworthiness. Further, the Court must consider the Bruton and Crawford issues previously raised by Mr. Graham in regard to admission of these statements.

REQUEST FOR HEARING

A pretrial hearing is warranted in regard to these matters. Fed.R.Evid. 104(c). The statements are confessions under Fed.R.Evid. 104(c) because the government asserts the statements are directly contrary to the declarants' penal interests. Therefore, these are not matters that can be resolved in the presence of the jury at trial. Fed.R.Evid. 104(c). A pretrial hearing would resolve many of the questions regarding admissibility.

LEGAL PRINCIPLES TO BE APPLIED

Prior to 1994, considerable debate existed as to what statements were admissible under Fed.R.Evid. 804(b)(3). Williamson v. United States, 512 U.S. 594, 611-12 (1994) At issue was whether the term "statement" included whole conversations or statements which included collateral matters, jointly inculpatory statements, or partially exculpatory assertions. Or, whether it should be construed narrowly to only include directly inculpatory portions of conversations and not collateral matters or matters that directed blame elsewhere or tended to exculpate the declarant. See generally Williamson v. United States, 512 U.S. 594 (1994) (plurality opinion, O'Connor, J., all justices concurring in the judgment, four separate opinions written).

Those issues were resolved in Williamson v. United States, 512 U.S. 594 (1994). Williamson held that Fed.R.Evid. 804(b)(3) should be construed narrowly so that collateral matters, non-self-inculpatory statements, and statements that are partially inculpatory but partially exculpatory, are inadmissible. Id. at 599-600 (O'Connor, J., writing for the Court), 606 (Scalia, J., concurring), 607 (Ginsburg, J., Blackmun, J., Stevens, J., and Souter, J., concurring). As Justice O'Connor wrote:

> Although the text of the Rule does not directly resolve the matter, the principle behind the Rule, so far as it is discernible from the text, points clearly to the narrower reading. Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. This notion simply does not extend to the broader definition of "statement." The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.
>
> * * *
>
> And when part of the confession is actually self-exculpatory, the generalization on which Rule 804(b)(3) is founded becomes even less applicable. Self-exculpatory statements are exactly the ones which people are most likely to make even when they are false; and mere proximity to other, self-inculpatory, statements does not increase the plausibility of the self-exculpatory statements.
>
> * * *
>
> The fact that a statement is self-inculpatory does make it more reliable; but

> the fact that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement's reliability. We see no reason why collateral statements, even ones that are neutral as to interest, should be treated any differently from other hearsay statements that are generally excluded.
>
> * * *
>
> In our view, the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. The district court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else.

Williamson, supra, 599-601.

And, as Justice Scalia wrote:

> I quite agree with the Court that a reading of the term "statement" to connote an extended declaration (and which would thereby allow both self-inculpatory and non-self-inculpatory parts of a declaration to be admitted so long as the declaration in the aggregate was sufficiently inculpatory) is unsupportable.

Williamson, supra, (Scalia, J., concurring), 606.

And, as Justice Ginsbach wrote:

> I agree with the Court that Federal Rule of Evidence 804(b)(3) excepts from the general rule that hearsay statements are inadmissible only 'those declarations or remarks within [a narrative] that are individually self-inculpatory.' As the Court explains, the exception for statements against penal interest 'does not allow admission of non-self-inculpatory statements,

> even if they are made within a broader narrative that is generally self-inculpatory.

Williamson, supra, 607 (Ginsbach, J., concurring, Blackmun, J., Stevens, J., and Souter, J., joining) (emphasis added). See United States v. Mendoza, 85 F.3d 1347, 1351-1352 (8th Cir. 1996) (citing Williamson and stating that portions of inculpatory statements "that pose no risk to the declarants are not particularly reliable; they are just garden variety hearsay.").

Based on these principles, courts must distinguish between individually self-inculpatory portions of a statement and those that contain either collateral matters, non-self-inculpatory matters, jointly inculpatory matters, or matters that shift blame to other persons. Williamson, supra; Mendoza, supra (citations omitted). The government has made no effort to do this in this case.

Instead, the government proposes to introduce statements by Looking Cloud where he claims to be an unwitting bystander when Aquash was killed, and an unwilling accomplice to her kidnaping and rape. The government proposes to introduce Marshall's statements that Graham, Clarke and Looking Cloud brought Aquash to his house, against her will, and that he refused to assist them other than to give directions. The government proposes to introduce vague, jointly inculpatory statements by Marshall about how AIM conducted itself "back in the

day" and unspecific, jointly inculpatory statements by Clarke about "we [persons unknown] weren't going to let it [event unknown] happen again." And, the government intends to admit other out of court statements that it alleges are similar but which it has yet to identify.

Prior to admitting any of these statements, the Court must take out the collateral, exculpatory and the jointly inculpatory portions, and isolate the directly self-inculpatory portions. This is in addition to the other foundational findings required under the rule, such as finding the unavailability of the declarant and particularized guarantees of trustworthiness. Further, the Court must consider the Bruton and Crawford issues previously raised by Mr. Graham in regard to admission of these statements.

Accordingly, Mr. Graham asks the Court to prohibit admission of any of these statements until such time as an admissibility hearing has been conducted.

Dated December 19, 2008.

/s/ John R. Murphy

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CERTIFICATE OF SERVICE

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Dated December 19, 2008.

/s/ John R. Murphy
John R. Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S REPLY BRIEF REGARDING MOTION FOR SEPARATE TRIALS

Defendant John Graham has requested a separate trial from the trial of Vine Richard Marshall. In support of that motion, Mr. Graham set forth several bases for separate trials. File Doc. 76.

First, Graham alleged his right to confrontation would be violated if jointly inculpatory statements by Marshall were introduced at a trial involving Graham. Marshall's statements to law enforcement and others directly inculpate Graham by placing him in Marshall's house, with Aquash, at a time when the government alleges she had been kidnaped.

Second, Graham alleged that separate trials are necessary because a joint trial would lead to inadmissible evidence being introduced against Graham. File Doc. 76. Graham has further elaborated on this issue in his Trial Memorandum

Regarding Statements Against Interest, File Doc. 101.

Marshall has also moved for separate trials. File Docs. 87. Marshall has stated that he is not going to testify at trial, and that he intends to introduce Looking Cloud's video taped interview with Robert Ecoffey in his own defense. In that interview, Ecoffey summarizes statements made by Marshall to him that inculpate Graham. Because Marshall is not going to testify at trial, Graham will not be able to confront the declarant about inculpatory statements that Marshall plans to introduce.

CONFRONTATION ISSUE

In its opposition brief, the government has attempted to circumvent the confrontation clause issue by claiming that the statements it seeks to introduce don't actually inculpate Graham. File Doc. 95, p. 3. The basis for this assertion is that because Graham is not directly identified by name by Marshall, there are no confrontation clause issues.

The government intends to introduce Marshall's statements that Aquash was at his home, against her will, possibly tied up, and that she was brought there by Theda Clarke and two other young guys. File Doc. 95 at p. 3. The fact that Marshall does not name Graham specifically in these statements does not remedy the confrontation clause problem.

The United States Supreme Court addressed this issue in Gray v. Maryland, 118 U.S. 1151, 1155 (1998). In that case, the issue was whether redacting a defendant's name from a co-defendant's jointly inculpatory out of court statement cured the confrontation clause violation. The Court held that the absence of an actual name did not cure the issue because, in light of the facts of the case, the jury would still understand that the un-named person was the defendant. Id. The Court noted that because the prosecution in that case was arguing that the defendant and co-defendant jointly participated in the crime, the jurors would only have to look to counsel table to figure out the identity of the un-named person.

In this case, the absence of Graham's name will not protect him from being identified as one of the "two young guys" identified by Marshall to Ecoffey. Opposition Brief, File Doc. 95, p. 3, ¶ 4. This statement to law enforcement was testimonial in nature. As such, it is subject to a confrontation clause analysis. Crawford v. Washington, 541 U.S. 36, 53 (2004).

This statement placed in the context of the case will give rise to the inevitable conclusion by the jury that Graham and Looking Cloud were the two other young guys with Clarke. In every pleading submitted by the government where the facts are summarized, the government has claimed that Clarke, Looking Cloud, Graham and Marshall were the participants in this crime. Clarke is a

woman and Marshall is the declarant, leaving only Graham and Looking Cloud left, both of whom happened to be young at the time of the alleged crime.

The government's contention that Marshall's statements to Ecoffey doesn't sufficiently implicate Graham to trigger a confrontation clause issue is erroneous. File Doc. 95 p. 9. The only two males associated with Aquash's kidnaping are Graham and Looking Cloud. Both were young at the time. Both were seen previously with Clarke. To say that Marshall's statements to Ecoffey doesn't implicate Graham, when the jury will know Looking Cloud has been convicted and will see Graham sitting next to Marshall, ignores the reality of the case.

INADMISSIBLE EVIDENCE ISSUE

The government's opposition brief fails to address Graham's argument that joint trials would lead to inadmissible evidence being admitted against Graham. Graham urges the court not to discount the importance of this concern.

This issue has previously been briefed in Graham's motion for separate trials, File Doc. 76, p. 6, and in his Trial Memorandum Regarding Statements Against Interest, File Doc. 101. Graham's position will be briefly restated below.

The government intends to introduce Marshall's statements to Chapman and/or Nichols that Aquash brought by others to his home, against her will, possibly bound at the time. Gov. Opposition (File Doc. 95), p. 3, ¶ 1-2. During

those conversations, there are repeated references by the interviewers that the persons who brought Aquash to his home were Clarke, Looking Cloud and Graham. Similarly, in Ecoffey's interview of Looking Cloud, which Marshall intends to admit, there are repeated statements by Ecoffey that Marshall and others have told him that it was Clarke, Looking Cloud and Graham that brought Aquash to Marshall's home.

When discussing the matter with Chapman and/or Nichols, Marshall attempts to exculpate himself by saying that he had nothing to do with her abduction, did not know what was intended for Aquash, and that he refused to participate in holding her or otherwise assisting her alleged captors. Instead, he claims to have sent them away, with Aquash, after having provided her with clothes and coffee.

The government intends to offer these statements against Marshall to show that Aquash was at his house with Clarke, Graham and Looking Cloud. This establishes Marshall's opportunity to give them the gun that was used to kill Aquash. And, Marshall's alleged statement to Chapman about what AIM members did "back in the day," Govt. Opposition Brief, File Doc. 95, p. 3, ¶ 3, establishes motive.

Under Fed.R.Evid. 801(d)(2), Marshall's statements are admissible only against him, not Graham. They are either direct statements by him, or adoptive admissions. Rule 801 does not provide for one party's statements to be admissible against another unless the statements were made by co-conspirators during the course of and in furtherance of a conspiracy, which is not applicable in this case.

Marshall's statements are also not admissible against Graham as statements against interest. Fed.R.Evid. 804(b)(3). Marshall's statements are either directly exculpatory statements as to Marshall, or partially inculpatory, partially exculpatory statements as to Marshall that inculpate Graham and deflect blame to AIM. See Williamson v. United States, 512 U.S. 594, 599, 606-07 (1994) (plurality opinion) (six justices concurring that Fed.R.Evid. 804(b)(3) should be construed narrowly so that collateral matters, non-self-inculpatory statements, and statements that are partially inculpatory but partially exculpatory, are inadmissible).

One statement that the government has repeatedly stated it intends to admit demonstrates the admissibility issues in this case. The government intends to admit Marshall's "back in the day" comment. Govt. Opposition Brief, File Doc. 95, p. 3, ¶ 3. According to Chapman, he advised Marshall that there were rumors in the Indian community that there was a baggage note presented to him regarding

Aquash, or that he, Marshall, had provided the gun used to kill Aquash. In response to this compound and ambiguous assertion, Marshall allegedly responded something to the effect that back in the day you didn't ask too many questions.

The government claims that this "back in the day" comment is an adoptive admission by Marshall of Chapman's statements. It is far from clear what Marshall would be adopting: the statement that rumors existed in the Indian community about a baggage note, the statement that rumors existed in the Indian community that he provided a gun, that there was a baggage note, or, that there was a gun? Regardless, only Marshall can attest to whether he made the comment, and what he meant by his response.

As to Graham, the hearsay issues are many. First, it is not Marshall's statement that is being admitted. Rather, it is Marshall's adoption of Chapman's statement through his "back in the day" comment that is being admitted. Chapman's statements aren't admissible under Rule 801 except to the extent that they relate directly to Marshall's adoption thereof. Marshall's adoptive statements are not admissible against Graham under Rule 801 as that rule only permits the statements to be used against the declarant. Rule 804(b)(3) doesn't permit Marshall's non-incriminatory statement that purportedly adopts Chapman's re-statement of hearsay comments within the Indian community to be admitted as a

statement against interest in regard to Graham.

The government has entirely avoided discussing these relevant, material issues that were raised in Graham's motion for separate trials. Separate trials should be granted in this case based on the combined arguments set forth in Graham's and Marshall's motions and supporting briefs.

Dated December 19, 2008.

/s/ John R. Murphy

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff,	)	CRIM. NO. 08-50079-01
vs.	)	DEFENDANT GRAHAM'S MOTION IN LIMINE RE: RES GESTAE EVIDENCE
JOHN GRAHAM, a/k/a JOHN BOY PATTON and VINE RICHARD MARSHALL, a/k/a RICHARD VINE MARSHALL, a/k/a DICK MARSHALL, Defendants.	)	

The government has provided notice of its intent to admit evidence "regarding the victim's abduction which encompassed Defendant John Graham's aggravated sexual abuse of the victim." Govt.'s Notice of Res Gestae Evidence (Doc. 65) (hereinafter "Govt. Notice"). Specifically, the government intends to admit evidence that Anna Mae Pictou Aquash was raped by John Graham in Rapid City, South Dakota. The government contends this evidence is admissible under the res gestae theory, or, alternatively, as "other acts" evidence under Fed.R.Evid. 404(b).

Mr. Graham moves this Court for its Order in Limine prohibiting the government from introducing or eliciting any evidence pertaining to the alleged rape of Ms. Aquash. The government should be precluded from introducing or

eliciting this evidence because it is not probative, is unfairly prejudicial, and is not admissible under the res gestae theory or as an other act under Fed.R.Evid. 404(b).

A. THE EVIDENCE IS NOT PROBATIVE BUT IS HIGHLY PREJUDICIAL

Whether the rape allegation evidence is characterized as an other act under Fed.R.Evid. 404(b) or under the res gestae theory, the evidence must still be screened for admissibility under Fed.R.Evid. 403. United States v. Petary, 857 F.2d 458, 462 (8th Cir. 1988) (res gestae and 404(b) evidence must be screened under Fed.R.Evid. 403 "to ensure that its probative value is not outweighed by its prejudicial value."). In this case, the proposed evidence has little or no probative value.

The government has consistently asserted that Aquash was killed because AIM suspected she was an informant. The government has not argued, and no evidence supports the notion, that Aquash was killed to eliminate her as a witness to her own rape. The government has consistently maintained that the order to kill Aquash did not come until after she was allegedly raped, and that the order came from someone other than Graham. Thus, the rape allegation has no probative value: Whether Aquash was raped does not make any element of the charged offense more likely.

The rape allegation is not reliable, further negating its probative value. No forensic evidence supports the notion that she was raped. The only forensic evidence in existence, Dr. Brown's autopsy, showed signs of sexual activity but no signs of forcible or traumatic sexual assault.

The government relies primarily upon the statements of Frank Dillon to support its contention that Graham raped Aquash. Govt. Notice, File Doc. 65, pp. 2-3. The government has failed to disclose several key facts related to Mr. Dillon and his statements. First, Dillon stated under oath to the grand jury that he was "pretty drunk" during his conversation with Graham regarding Aquash. Graham Doc. 00652, 00654. Second, Dillon told the grand jury that statements allegedly given by him to law enforcement about his knowledge of the case were not true, and that he had not made the statements attributed to him. Graham Doc. 00653-00655. Third, in regard to the rape allegation, the only sworn testimony given by Dillon on that point contradicts the government's assertion that Graham admitted that to him. Dillon told the grand jury that his knowledge of the rape allegation came from the autopsy and what another witness thought might have happened. Graham Doc. 00657-58. Dillon never told the grand jury that Graham had told him he had raped Aquash.

Last, the government has not asserted that it will call Dillon as a witness. It is defense counsel's understanding and information that Dillon is not competent to testify and that the government may not be able to locate him. If Dillon is not going to be a witness, then the government should be absolutely prohibited from making any reference to the rape allegation until such time as the court has determined the admissibility of other evidence to be introduced at trial on this point. At present, the primary support for the government's notice is Dillon's alleged statements.

The rape allegation would be highly prejudicial to Graham. No cautionary or limiting instruction can prevent the spillover effect on the jury. The government's real reason for making this allegation is to destroy Mr. Graham's character and to impute to him a propensity to commit crimes against women. Such propensity and bad character evidence is not admissible. Fed.R.Evid. 404(a) & 608.

B. THE EVIDENCE IS NOT ADMISSIBLE AS RES GESTAE

Evidence of the alleged rape is not admissible under the res gestae theory. The case law on point, including the case law cited by the government, establishes that this theory of admissibility is narrow in scope, cautiously applied, and only

applicable where proof of the other act is inseparable from proof of the crime charged.

The government cites United States v. Forcelle, 86 F.3d 838 (8th Cir. 1996), in support of its position. Govt. Notice p. 4. This case does not support the government's position in this case.

In Forcelle, a defendant's conviction was reversed because the district court improperly admitted other acts evidence under the res gestae theory. The analysis in Forcelle began with the proposition that evidence of uncharged crimes is not admissible against a defendant. Id. at 841 (citation omitted). The Court went on to explain that admissibility under the res gestae theory is premised on the notion that the other act is "an integral part of the immediate context of the crime charged." Id. (citation omitted).

The facts in Forcelle demonstrate how even closely related facts are not admissible under the res gestae theory unless proof of the other acts directly proves the crimes charge. Forcelle was charged with stealing money from his employer (through a mail fraud scheme) so that he could build a summer house and buy a car chassis. Id. at 840. At trial, the government was allowed to admit evidence that Forcelle had also stolen platinum from his employer, and had his

employer improperly pay for repairs to his primary residence. Id.

The appellate court held that this evidence should not have been admitted as res gestae or 404(b) evidence. Id. at 842. The Court held that the proof of the other acts did not incidentally prove the charges related to the summer home and car chassis. Id. at 842. The Court concluded by noting that "[t]he evidence about the platinum is evidence showing a discrete example of Forcelle's mis-appropriation of company resources, and provides no additional context for the crimes charged." Id. at 842.

The relationship between the other acts and the crimes charged in Forcelle was much closer than the rape allegation is related to the murder charge in Graham's case. Both involved stealing from the same employer for the same purposes (housing and cars) during the same time frame. Still, in Forcelle, the Court found that relationship too attenuated to be admitted.

In this case, the allegation that Aquash was raped by Mr. Graham does not incidentally prove that Graham murdered Aquash. The rape allegation is a discrete allegation of an entirely separate, uncharged criminal act allegedly committed by Mr. Graham. It is factually and legally the same scenario presented in Forcelle. Accordingly, the evidence should be excluded.

The same narrow, cautious approach to res gestae evidence is demonstrated in other cases cited by the government in its notice. In United States v. Reibold, 135 F.3d 1226 (8th Cir. 1998), Govt. Notice p. 3-4, the defendant in a fraud case had been convicted and served time twice in the past for fraud. The district court allowed the government to introduce evidence of these prior fraud convictions in a pending fraud prosecution involving the same kind of scheme. This decision was upheld by the Court of Appeals, but the Court expressly declined to adopt a broad policy of admissibility in such circumstances. Id. at 1229.

The Court upheld the admission because the facts in the past and present cases were "very similar," and because the past convictions were pivotal to an issue in dispute: whether Reibold had obtained money by false pretenses. Id. The evidence of his prior convictions was admitted because investors had asked Reibold whether he had a criminal background, and Reibold had lied and denied a prior record. "Thus, Reibold's concealment of his prior convictions was an important part of the scheme; otherwise, investors would have been hard to come by." Id. It was Reibold's lying about his convictions that satisfied the false pretense element of the charged crime.

United States v. Honken, 378 F.Supp.2d 928 (N.D.Iowa 2004), Govt. Notice p. 4, further supports the proposition that evidence should only be admitted as res

gestae after a direct, causal connection is made between the other acts and the crimes charged. Honken was charged with murdering people involved in his drug distribution activities. Id. at 934-37. He had been convicted of drug distribution in the past, and had other pending drug charges at the time of the murder prosecution. The indictment specifically charged that the murder charges were directly related to Honken's drug dealing activities, and that the victims were drug dealing associates he wished to silence. Id. at 934-37. Evidence from his prior drug dealing case was admitted as res gestae. A direct link had been established. The past drug conviction, and Honken's own statements during sentencing, established his connection to the victims in the present case and his motive for wanting them silenced in his pending drug case. Id. at 941-42.

In United States v. Holliman, 291 F.3d 498 (8th Cir. 1996), Govt. Notice p. 4, the defendant was charged with conspiracy to transport stolen vehicles. The Court held that evidence from co-conspirators about specific vehicles that were stolen was admissible as res gestae. The connection between the underlying act and the crime charged was obvious and direct:

> The testimony of the co-conspirators concerned the very crime, conspiracy to transport stolen vehicles, for which Holliman was standing trial. The evidence of other vehicles stolen by the conspiracy was admissible under the doctrine of res gestae, as this evidence was sufficiently connected to the charged crimes that it tended logically to prove elements of these crimes.

Id. at 502.

The same kind of causal relationship existed in United States v. Roberts, 253 F.3d 1131 (8th Cir. 2001), also cited by the government. In that case, prior bank robberies were admitted in a pending bank robbery case because, in the prior robberies the defendant had coached an accomplice on how to commit a bank robbery, which was how the pending robbery was in fact committed. Id. at 1134-35. The similarity in offenses and the relationship they had to each other was clear, and warranted admission under the res gestae theory.

The government seeks to have this Court take a more expansive view on the admissibility of evidence under the res gestae theory. The government cites Wilkerson v. United States, 342 F.2d 807 (8th Cir. 1965), for the proposition that Mr. Graham's contact immediately before, during and after the murder is admissible as part and parcel of the entire transaction and of his intent to commit the murder. Govt. Notice pp. 4-5. This is not what Wilkerson holds.

Wilkerson involves a Mann Act prosecution for the interstate transportation of prostitutes. The Court's analysis is specifically limited to Mann Act cases, particularly the specific requirement that an intent to transport prostitutes in interstate commence be proven. Id. at 813. Moreover, the court notes that the

defense failed to object to the evidence at trial, and actually elicited some of the offending acts through its own examination. Id. at 812-13. The acts of violence (beating of prostitutes) in Wilkerson were directly and causally related to the intent requirement at issue under the Mann Act, and were admitted for that purpose.

The res gestae theory does not support the government's position in this case. Like in Forcelle, supra, 86 F.3d at 841, the uncharged conduct alleged in Mr. Graham's case is not an integral part of the immediate context of the crime charged. Instead, the rape allegation refers to a discrete event isolated from the crime charged. Unlike the circumstances in Reibold, supra, 135 F.3d at 1229, the crimes alleged are not similar, there is no causal relationship between the other acts and the pending charges, and the rape allegation does not prove an element of the crime charged. Id. Similarly, unlike the facts in Honken, supra, 378 F.Supp.2d at 934, and Holliman, supra, 291 F.3d at 502, there is no direct cause and effect relationship between the other act and the charged conduct.

There is an insufficient nexus between the unproven, uncharged rape allegation and the murder charge. Because of that, the res gestae theory does not support admission of the evidence.

C. THE EVIDENCE IS NOT ADMISSIBLE AS OTHER ACTS

The government has proposed as an alternate theory of admissibility that the rape allegation constitutes an admissible other act under Fed.R.Evid. 404(b). The government's claim is perfunctory and fails to set forth any specifics of its claim that the evidence is admissible under this rule. Govt. Notice pp. 5-7. Instead, the government merely sets forth a laundry list of potential theories of admissibility under the rule. Govt. Notice p. 5.

Other acts evidence is admissible under Rule 404(b) if it is 1) relevant to a material issue raised at trial, 2) similar in kind and close in time to the crime charged, 3) supported by sufficient evidence to support a jury finding the defendant committed the other act, and 4) its probative value is not substantially outweighed by its prejudicial value. United States v. Johnson, 439 F.3d 884, 887 (8th Cir. 2006) (citation omitted). It is not admissible to prove a defendant's propensity to commit the kind of criminal act charged in an indictment, even when the same general subject matter is at issue. Id. (reversing child pornography conviction where court admitted evidence defendant possessed stories about child rape).

In the present case, the proposed evidence fails to meet the minimum standards for admissibility under Rule 404(b). First, the evidence is not relevant to a material issue in dispute in this case. The issue before the jury is whether John Graham murdered or aided others in murdering Aquash. He is not charged with rape, and he is not charged with felony murder. The government has never alleged that the murder occurred during a rape or as a result thereof. In fact, the government's consistent theory of the case has been that at some point after the rape allegedly occurred, AIM leaders ordered the execution of Aquash because she was an informant. There is no material connection between the charge pending against Mr. Graham, the government's theory of prosecution, and the rape allegation.

Second, there is no similarity between the crime charged and the other act alleged. According to the government's pleading, Graham allegedly raped Aquash in an empty apartment in Rapid City before Aquash was transported to the Pine Ridge and Rosebud reservations. This allegation of a discrete event has no correlation to the politically motivated and orchestrated killing alleged by the government.

Third, no credible evidence produced so far supports a jury finding that Mr. Graham raped Ms. Aquash. The forensic evidence is inconclusive in that it

suggests sexual activity occurred but finds no evidence of force or trauma. The only testimony on point comes from a witness who has repeatedly contradicted himself on key matters, and who did not report Graham's alleged confession during his grand jury testimony.

Fourth, as set forth in the first section of this pleading, the probative value of this evidence is substantially outweighed by its prejudicial effect. Since rape is not charged and proof of rape is not an element of the charged offense, the primary value of this evidence would be to create a mini-trial within the trial as to Mr. Graham's character and propensities. Beginning with jury selection, the issue of a rape allegation would become a focal point of the case. Many jurors' reactions to such an accusation, based on their own experiences or the experiences of people close to them, may prevent them from fairly sitting in judgment in this case. The highly inflammatory and emotional nature of a rape allegation would make curative or limiting instructions meaningless.

For these reasons, Mr. Graham asks this Court to issue its Order prohibiting the government from introducing or eliciting any evidence pertaining to the rape allegation.

Dated December 19, 2008.

/s/ John R. Murphy

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IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION IN LIMINE REGARDING FEDERAL RULE OF EVIDENCE 801(c) AND STATE OF MIND HEARSAY

Defendant John Graham moves this Court for its Order prohibiting the government from introducing hearsay testimony under the theory that it is not being offered for the truth of the matter asserted, Fed.R.Evid. 801 (c), or under the state of mind exception to the rule against hearsay, Fed.R.Evid. 803(3), in the presence of the jury until an out of court ruling as to admissibility has been obtained.

A. FACTS AND PROCEDURAL HISTORY

At Arlo Looking Cloud's trial (CR #03-50020), the government was allowed to introduce evidence from witnesses who said they heard others state that Anna Mae Pictou Aquash had been accused of being an informant by members of the American Indian Movement's (AIM), or that Aquash herself had stated that

she had been accused of being an informant by members of AIM. Some witnesses were allowed to testify as to "rumors" in the AIM community that Aquash had been accused of being an informant. For instance, testimony was received that Leonard Peltier had held a gun to Aquash's head and accused her of being an informant, and that Leonard Crow Dog had removed Aquash from his property because he suspected her to be an informant.

Looking Cloud objected at trial on hearsay grounds. At the time of Looking Cloud's trial (February 3, 2004), the United States Supreme Court had not issued its ruling in Crawford v. Washington, 541 U.S. 36 (March 8, 2004). When the Eighth Circuit Court of Appeals reviewed this issue, it did not review the matter under the confrontation clause. United States v. Looking Cloud, 419 F.3d 781, 787-88 (8th Cir. 2005). Further, at trial, when the Court admitted the evidence under the state of mind exception to the rule against hearsay, Looking Cloud did not object to that basis for admission.

In light of the heightened awareness of the value of confrontation established in Crawford, and based on the benefit of hindsight available at this juncture as to the facts of the case and the government's theory of admissibility, the kind of testimony described above should not be admitted at Mr. Graham's trial. To do so will violate the confrontation clause and the rule against hearsay.

B. THE TESTIMONY IS OFFERED FOR THE TRUTH OF THE MATTER ASSERTED

When considering whether evidence is non-hearsay under Fed.R.Evid. 801(c), the analysis begins with identifying the matter being asserted. In Looking Cloud's trial, witnesses were allowed to testify that they heard from some other person that Aquash had been accused of being informant. The accusation at issue – that Aquash was an informant – was not made by the testifying witness. None of them claimed to have accused Aquash of being an informant.

Therefore, the operative fact being asserted was that Aquash had been accused of being an informant. The matter being asserted was not whether Aquash was actually an informant. This is a key distinction in the analysis of this issue.

The government's contention was that these accusations weren't being offered to prove that Aquash was an informant. Whether Aquash was an informant is irrelevant. The government's theory is that Aquash was killed because she was accused of being an informant by AIM. The government has repeatedly asserted that she wasn't an informant. Thus, the fact the government seeks to prove is the accusation, not whether Aquash was actually an informant.

Understood in that light, the testimony (that Aquash was accused of being an informant) was hearsay because it was being offered to prove a material fact

(that an accusation had been made). Oftentimes, the testimony admitted at Looking Cloud's trial was double hearsay. The testifying witness said they heard from others that other persons had accused Aquash of being an informant. The matter being asserted throughout, whether through single or double hearsay, was the fact of the accusation.

This kind of evidence should not be admitted at Mr. Graham's trial. Admitting this evidence will violate Mr. Graham's right to confrontation and his right to not be convicted upon hearsay.

C. THE TESTIMONY IS NOT ADMISSIBLE STATE OF MIND EVIDENCE

At Looking Cloud's trial, the Court also admitted the testimony on the alternate ground that it was admissible under the state of mind exception to the rule against hearsay. Fed.R.Evid. 803(3). The court admitted testimony that Aquash had been accused of being an informant as going to Aquash's state of mind that she feared AIM. Looking Cloud did not specifically object at trial to this basis for admission.

Fed.R.Evid. 803(3) only permits the admission of evidence that goes to the declarant's state of mind. And, the exception is expressly limited to admission of evidence to prove the declarant's thoughts and feelings, not to prove an act committed by someone else. Fed.R.Evid. 803.

In Shepard v. United States, 290 U.S. 96 (1933), a unanimous Supreme Court reversed a murder conviction and held testimony not admissible under the state of mind exception. The facts and analysis in Shepard are applicable to this case.

In Shepard, the government offered evidence that Shepard's wife told her nurse that she thought her husband had poisoned her. The appellate court held that this evidence was admissible as going to the wife's state of mind in that it contradicted the defense assertion that the wife was suicidal.

In reversing the court of appeals, Justice Cardozo outlined the limitations on the state of mind exception. He cautioned that if testimony of past acts committed by other parties was admitted under the state of mind exception, it "would be an end, or nearly that, to the rule against hearsay . . ." Id. at 105. Cardozo went on to state:

> [The government] did not use the declarations by Mrs. Shepard to prove her present thoughts and feelings, or even her thoughts and feelings in times past. It used the declarations as proof of an act committed by some one else, as evidence that she was dying of poison given by her husband. This fact, if fact it was, the government was free to prove, but not by hearsay declarations.
>
> * * *
>
> The testimony now questioned faced backward and not forward. This at least it did in its most obvious implications. What is even more important, it spoke to a past act, and, more than that, to an act by some one not the speaker. Other tendency, if it had any, was a filament too fine to be

disentangled by a jury.

Id. at 105-06 (citations omitted) (emphasis added).

The theory of admissibility discredited in Shepard is the same theory of admissibility presented by the government in this case. In Shepard the government admitted past acts against the decedent (poisoning); in this case the government intends to admit past acts against Aquash (threats). The acts were allegedly committed by a third party (in Shepard, the husband; in the present case, by Peltier, Crow Dog, etc.), but introduced at trial through a third party (the nurse in Shepard; through Nichols and others in this case).

This kind of evidence should not be admitted in Mr. Graham's trial as it does not meet the basic foundational requirements for the state of mind exception to the rule against hearsay. Accordingly, to preserve Mr. Graham's right to confrontation and his rights under Fed.R.Evid. 802 (exclusion of hearsay), Mr. Graham asks for an order that prohibits the government from introducing this kind of evidence until the matter has been addressed and ruled upon by the Court outside the presence of the jury.

C. THIS ISSUE SHOULD BE RESOLVED PRETRIAL

It is not sufficient to wait until the government attempts to elicit the

evidence to address the matter. Justice Cardozo correctly identified the likely, irreparable prejudice that will result from this approach:

> The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.

Shepard, supra, at 104.

Therefore, the government should be required to present this evidence outside of the presence of the jury before delving into these areas. Mr. Graham would be irreparably prejudiced if the government were to be able to present the issue to the jury, even if the objection were sustained or the testimony stricken.

Dated December 19, 2008.

/s/ John R. Murphy

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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Dated December 19, 2008.

/s/ John R. Murphy
John R. Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff, vs. JOHN GRAHAM, a/k/a JOHN BOY PATTON, VINE RICHARD MARSHALL, a/k/a RICHARD VINE MARSHALL, a/k/a DICK MARSHALL, Defendants.	)))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION IN LIMINE REGARDING STATEMENTS TO MEDICINE MAN

Defendant John Graham moves this Court for its Order prohibiting the government from introducing or eliciting any evidence of statements Mr. Graham allegedly made to any medicine man or spiritual leader, or Mr. Graham's response to law enforcement officers or witnesses/informants when questioned about those alleged statements to the medicine man. These discussions are privileged under the priest-penitent privilege, and the admission of these statements would violate that privilege, the confrontation clause, and the rule against hearsay.

A. BACKGROUND

Al Gates was a recognized spiritual leader and counselor in the Indian community. He practiced the "Indian religion" (his description) from 1944 to the time of his death in 2003. Graham Doc. 03667. Robert Ecoffey, a member of the

Oglala Sioux Tribe and a law enforcement officer, who has investigated this case for approximately thirty years, has repeatedly described Gates as a "spiritual leader" for people involved in the American Indian Movement. Graham Doc. 00927-28; Graham Doc. 00951. Ecoffey has identified Gates as someone to whom AIM members went for prayer and guidance. Graham Doc. 00927-28; Graham Doc. 00951.

Mr. Gates professed to have had conversations with Mr. Graham during a time when Graham was seeking spiritual guidance. Without Graham's permission or waiver, Gates relayed the contents of those alleged conversations with law enforcement. Law enforcement then relayed those conversations to Serle Chapman, a "reimbursed witness" working with the FBI to collect evidence against members of AIM. Graham was then confronted by law enforcement and Chapman on separate occasions about Gates' accusations, and Graham responded.

Al Gates is now dead. His version of events has never been subject to cross-examination. It is Graham's statements to Gates, and Graham's responses to law enforcement and Chapman about his statements to Gates, that are the subject of this motion.

B. PRIVILEGE PREVENTS ADMISSION OF THIS EVIDENCE

"The priest-penitent privilege recognizes the human need to disclose to a

spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return." Trammel v. United States, 445 U.S. 40, 51 (1980). Any statements allegedly made by Graham to Gates, are absolutely protected by privilege. Trammel, supra. Though Gates may have violated the privilege, Graham did not waive privilege and he should remain protected by it.

C. ADMISSION WOULD VIOLATE THE CONFRONTATION CLAUSE

Gates' statements are also inadmissible because admission would violate Graham's right to confrontation. Gates made his statements to law enforcement and the grand jury. They are, therefore, testimonial. Crawford v. Washington, 541 U.S. 36, 53-54 (2004). Gates' statements were not subject to cross-examination, and he cannot now be examined. Therefore, these statements are not admissible. Id.

D. PUBLIC POLICY FAVORS EXCLUSION

The government should not be allowed to admit Graham's alleged statements to Gates, either directly or through Graham's responses thereto when confronted with the statements. The priest-penitent privilege is absolute and the interests that it promotes are more important than any benefit to the government in introducing this evidence. Similarly, Graham's right to confrontation is more

important than any benefit derived by the government in introducing any portion of Graham's alleged conversations with Gates, or his responses to questions concerning these conversations. Mr. Graham would be substantially prejudiced and important rights would be infringed if the government is allowed to reference this topic in any manner.

The government seeks to establish a dangerous precedent in this case. The government obtained privileged information without a waiver. It then communicated that information to law enforcement and to Chapman, a lay person with no claim of right to this information and no legal obligation to keep it confidential. In fact, at all times relevant to this action, the government knew that Chapman was a journalist who was writing a book about the matter at the same time he was being reimbursed as a government witness.

Once law enforcement and Chapman had the information, they tried to elicit responses from Mr. Graham by telling him that his confidential communications were no longer private. Both Chapman and law enforcement deliberately itemized Gates' statements to Graham to let him know the extent of Gates' breach.

If the government is allowed to circumvent privilege by releasing confidential information to third parties, who then confront the privilege holder in order to seek confirmation, the value of the privilege disappears. The government

should not be encouraged to employ these tactics in order to obtain evidence. The only party in a position to stop this abuse is the court, and the remedy is to prevent the government from introducing any of the three statements set forth above.

E. ADMISSION OF PARTICULAR STATEMENTS BY GATES

In Graham's previous case, the government identified three statements that it argued should be admissible. File CR 03-50020, File Doc. 305. A review of those statements shows them to be inadmissible.

1. STATEMENT TO CHAPMAN:

The government intends to admit a statement allegedly made by Graham to "reimbursed witness" Chapman. The government states that Mr. Graham confirmed with Chapman that "he was having a hard time with what he had done Anna Mae, wherein he went into the mountains around Denver and had a ceremony." CR 03-50020, File Doc. 305, pp. 1-2, ¶ 2. The government failed to provide the court with the facts surrounding that alleged statement that demonstrate why the privilege should not be set aside to permit admission of this evidence.

Mr. Graham participated in a lengthy recorded interview with Chapman. The single-spaced transcript of that recorded interview is over 30 pages. The statement identified by the government, however, allegedly occurred when the

tape recorder was turned off. Graham Doc. 00977. In fact, all of the alleged inculpatory statements that Chapman claims Graham made supposedly occurred when the tape recorder was inexplicably turned off.

The section of the transcript where Mr. Gates is discussed is identified as being part of a "Notated conversation before restarting the tape recorder." Graham Doc. 00977. Assuming arguendo that the conversation occurred, the conversation does not contain the admission claimed by the government.

Chapman tells Graham what he believes Mr. Graham told Mr. Gates. Chapman himself does not have first hand knowledge of this conversation and did not learn this information from Gates. Chapman's involvement began in 2000, and he states during the interview that Gates is in a sanitarium for Alzheimer's disease at that time. Graham Doc. 00977. Chapman is simply restating hearsay information he received from the government attorneys or law enforcement agents about statements allegedly made by Gates in 1994.

In response to two compound recitations of the alleged facts by Chapman, Mr. Graham is responds with the ambiguous phrase "Uh huh." Graham Doc. 00977. Chapman does not ask Mr. Graham any questions about these recitations of fact, and does not ask him to confirm anything. Thus, Mr. Graham's responses are not confirmatory of anything. Graham Doc. 00977. When Mr. Graham tries to

respond by saying, “Well, you know . . .”, he is cut off by Chapman, who then begins describing a completely different issue involving Vernon Bellecourt. Graham Doc. 00977-78.

The government has misled the court as to the contents of this alleged admission and omitted key facts as to its veracity and reliability. To allow this unrecorded, unreliable, ambiguous, and misleading statement into evidence would violate Mr. Graham’s priest-penitent privilege. He was not asked a question, and he was cut off before he could respond. Even if the “notated” transcript of this unrecorded conversation is accurate, there is nothing in it that suggests any waiver of the privilege.

Moreover, with absolutely no way for Mr. Graham to confront the alleged declarant, Mr. Graham’s right to fair trial and confrontation are violated. Graham’s responses are not casual statements. He was presented with information obtained from Gates in a testimonial scenario (discussions with law enforcement and the grand jury), and he has never had the opportunity to confront the declarant. In a case of such magnitude, the court should not permit the government to seek a conviction on this evidence as it doesn’t pass basic thresholds of reliability for admission.

2. GRAND JURY TESTIMONY:

The government also intends to introduce at trial grand jury testimony by Al Gates in 1994, in which he alleges that John Graham told him he was present when Aquash was killed. CR 03-50020, File Doc. 305, pp. 1-2, ¶ 1. That statement should not be admitted.

Mr. Gates' statements were testimonial in nature, but never subjected to confrontation. He is now dead so the details of the conversation will never be examined. Crawford, supra. To admit these statements would violate Graham's right to confrontation.

Further, in addition to being privileged information obtained without a waiver from Mr. Graham, Gates' testimony is so unreliable that it should not be admitted. Mr. Gates never placed Mr. Graham at the scene of the crime until the government proposed this to him in a leading question. Graham Doc. 03671 ("And during this conversation that you had with John Boy, did he tell you that he was present when Anna Mae was killed?"). In response, Gates never testified that Mr. Graham had actually said he was present. Instead, Gates responded, "Yeah, yeah, he was present." Graham Doc. 03671. It appears that Gates formed the opinion that Mr. Graham was present, but he does not actually say that Mr. Graham told him this. Without Mr. Gates being subjected to cross-examination,

Mr. Graham will have no way of questioning Mr. Gates as to whether this was an assumption he had made or whether it was an actual statement made. Further, there is no indication anywhere in the grand jury transcript that Mr. Graham ever waived his right to privilege.

3. STATEMENTS TO LAW ENFORCEMENT:

The government also intends to admit an alleged admission by Mr. Graham to law enforcement officers as to why he sought guidance from Mr. Gates. CR 03-50020, File Doc. 305, p. 2, ¶ 3. The document referred to by the government (Graham Doc. 00951), states that, in an unrecorded interview with a law enforcement agent, the agent summarized a multitude of facts from an alleged conversation between Mr. Graham and Mr. Gates. Mr. Graham is not questioned about the truth of any particular fact contained in the summary. Graham Doc. 00951. Mr. Graham's only response to the entire factual recitation is a solitary "yeah." Graham Doc. 00951.

Assuming that the law enforcement report is accurate, it does not establish an admissible statement or a waiver of privilege. Mr. Graham's response was not an admission, but an ambiguous response to a narrative that included a number of alleged facts. For instance, according to the law enforcement summary, Mr. Graham might have been responding to the assertion of fact that he visited with

Mr. Gates or that he felt bad about what happened to Ms. Aquash. Graham Doc. 00951. Nothing in Mr. Graham's limited response constitutes a waiver of privilege or a willingness to divulge confidential information.

There is nothing to indicate the reliability or veracity of the statement because the source of the information can no longer be questioned. It is a statement of questionable probative value. Admission of it, like the preceding two alleged statements, would be highly prejudicial to Mr. Graham, and would violate his right to fair trial and confrontation if admitted.

F. NON-HEARSAY GROUNDS FOR ADMISSION

The government also seeks admission of Mr. Gates' grand jury testimony for impeachment purposes or to explain the propriety of the police investigation of this matter. Both asserted "non-hearsay" grounds are without merit.

The impeachment justification for admission of the evidence is not supported by law. A witness's prior statement may be used to impeach that witness under Fed.R.Evid. 613. In this case, Gates' prior statements could be used to impeach Gates, not Graham. Gates made statements to law enforcement implicating Graham in the crime. Gates is the declarant, not Graham. Gates is not available as a witness or subject to cross-examination, which implicates the confrontation clause. Thus, Graham can't be impeached by a law enforcement

officer or other witness testifying as to what Gates told them that Graham had told him.

The notion that Gates' statements or Graham's responses are necessary to explain the course of the investigation is a fiction created by the government to justify the admission of inadmissible evidence. There is no context in which the government would need to recite a lengthy string of facts improperly divulged by Gates in 1994 during the course of confidential communications in order to explain their investigation of this case.

G. THE PRIVILEGE EXISTS AND WAS NOT WAIVED

The government's next assertion is that Mr. Graham has failed to establish the existence of the privilege, or demonstrate that it has not been waived. CR 03-50020, File Doc. 305.

Mr. Graham has affirmatively claimed privilege. To support his claim, he cited the government's own documents to establish that Mr. Gates was a medicine man who provided spiritual guidance to people. The government has not put forth anything suggesting the privilege was waived.

Implicit in Mr. Graham's motion in limine is the assertion that any communication he may have had with Mr. Gates was confidential. The value of protecting the sanctity of such communications between members of the clergy

and their parishioners is well recognized and should not be violated unless compelling reasons exist.

For all of the reasons set forth above, the government should be prohibited from introducing any evidence related to Graham's alleged statements to Gates.

Dated December 19, 2008.

/s/ John R. Murphy

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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Dated December 19, 2008.

/s/ John R. Murphy
John R. Murphy

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079-01

UNITED STATES' MEMORANDUM IN OPPOSITION TO DEFENDANT GRAHAM'S MOTION FOR ADDITIONAL PEREMPTORY CHALLENGES, OR IN THE ALTERNATIVE, REQUEST FOR SAME ADDITIONAL PEREMPTORY CHALLENGES

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant US Attorney Robert A. Mandel and respectfully submits its Memorandum in Opposition to Defendant Graham's Motion for Additional Peremptory Challenges, or in the Alternative, Request for Same Additional Peremptory Challenges. Defendant Graham has failed to set forth a sufficient rationale to displace this District's longstanding customary procedure for conducting jury peremptory challenges set forth in Fed. R. Crim. P. 24(b). The United States believes the Court will, through voir dire combined with for cause challenges, address Defendant's concerns and seat a fair and impartial jury.

It is well-settled that:

> It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case . . . . It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

See United States v. Blom, 242 F.3d 799, 805 (8th Cir. 201) (quoting Irvin v. Dowd, 366 U.S. 717 (1961)).

The United States recognizes that increasing the number of peremptory challenges may be an appropriate means for the Court to counteract the problem of pretrial publicity. See United States v. Johnson, 403 F. Supp. 2d 721, 777-78 (N.D. Ia. 2005) (citing United States v. Blom, 242 F.3d 799 (8th Cir. 2001)). However, Defendant has waived this issue by Defendant's creation of the very pretrial publicity he voices concern about through his various public interviews, website, and pretrial filings. See www.grahamdefenseorg.com (John Graham Defense Committee); Defendant Graham's Fifth Estate interview of November 8, 2000; Graham's *Indian Country Today* interview of February 20, 2004; Graham's Antoinette Claypoole interview of March 30-31, 2004; Defendant Graham's Native Youth Movement interview of October 18, 2006; Defendant Graham's Motion to Compel Discovery naming cooperating witnesses (CR03-50020, DE 250); and Marshall's Affidavit of Counsel in Support of Severance (CR08-50079, DE 81).

To the extent the Court increases the number of peremptory challenges, as a matter of fairness in light of the fact that pretrial publicity would burden both parties,

the United States is requesting the Court grant both parties the same number of additional peremptory challenges. See Blom, 242 F.3d at 804; Johnson, 403 F. Supp. 2d at 777-78.

Date: December 19, 2008

MARTY J. JACKLEY
United States Attorney



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CERTIFICATE OF SERVICE

The undersigned hereby certifies on December 19, 2008, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

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Marty J. Jackley
United States Attorney

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UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SEVER TRIALS

Defendant Richard Marshall's undersigned counsel represents to the Court that Richard Marshall's theory of defense and the evidence he will present in support of that theory of defense will be mutually antagonistic with that of the co-defendant. Counsel requests an *in camera* hearing before the Court in which counsel will have an opportunity to disclose his theory of defense and to show the Court in specific detail how the defense will argue that evidence which the government will offer to prove the guilt of co-defendant John Graham is evidence that is exculpatory for Richard Marshall, thereby making the defenses mutually antagonistic and creating a high risk of prejudice to one or both co-defendants in a joint trial.

Mutually antagonistic defenses exist when the jury must disbelieve the core of one defense in order to believe the core of the other. United States v. Flores, 362 F.3d 1030, 1040 (8th Cir. 2006), citing Hood v. Helling, 141 F.3d 892, 896 (8th Cir. 1997).

Although "[m]utually antagonistic defenses are not prejudicial *per se,*" Zafiro v. United

States, 506 US 534, 538, 113 S.Ct. 933 (1993), a defendant is entitled to a severance if he can show a "serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Id at 539.

"This high standard could be met when evidence that would be inadmissible against one defendant if he were tried alone is admitted against his co-defendant, when many defendants are tried in a complex case with "markedly different degrees" of culpability, or when a joint trial denies a defendant exculpatory evidence that would be available if he was tried alone." Flores, at 1041.

Although a defendant moving for severance does not prove likelihood of prejudice merely by showing that there are mutually antagonistic defenses, the danger of real prejudice is more likely in a case where the defenses are mutually antagonistic. "Joinder is problematic in cases involving mutually antagonistic defenses because it may operate to reduce the burden on the prosecutor, in two general ways. First, joinder may introduce what is in effect a second prosecutor into a case, by turning each co-defendant into each other's most forceful adversary. Second, joinder may invite a jury confronted with two defendants, at least one of whom is almost certainly guilty, to convict the defendant who appears the most guilty of the two regardless of whether the prosecutor has proven guilt beyond a reasonable doubt as to that particular defendant." Zahiro, at 543- 544 (J. Stevens, concurring).

Here, the co-defendants have mutually antagonistic defenses that have the potential to put the co-defendants in essentially adversarial roles against each other. Defendant Marshall does not intend to dispute the government's contention that Theda Clarke, Anna Mae Aquash, co-

defendant John Graham, and Arlo Looking Cloud went to his home in Allen one night some three decades ago. Nor will he dispute the government's contention that Marshall was asked by someone in the Graham/Looking Cloud/Clarke party if he would keep Anna Mae Aquash at his home; and he will not dispute the government's evidence that he refused to do so. Richard Marshall does deny and dispute the government's contention that Richard Marshall gave a gun to Clarke, Graham or Looking Cloud.

Based on his prior statements, it is anticipated that co-defendant John Graham's theory of defense will be that Anna Mae Aquash was a fugitive, hiding from the FBI; that he drove her, at her request, from Denver to South Dakota; and at her request, he took her to a "safe house" on the Pine Ridge reservation and left her there.

Graham's out of court statements to that effect, viewed in light of the evidence that he and Aquash, along with Clarke and Looking Cloud, went to the Marshall home on the Pine Ridge reservation, constitute accusatory and highly prejudicial evidence against Richard Marshall. The government has given notice that it will offer Graham's out of court statements into evidence. If Graham does not testify, Richard Marshall will be deprived of his right to confront his accuser. This evidence would not be admissible against Marshall in a joint trial. The out of court statements by Graham would result in a denial of the right to confrontation under Bruton, 391 US 123 (1968), and is the type of evidence that constitutes prejudice under Zafiro.

I

DEFENDANT WOULD SUFFER SERIOUS PREJUDICE IN A JOINT TRIAL FROM THE ADMISSION OF EVIDENCE THAT WILL BE ADMITTED AGAINST THE CO-DEFENDANT BUT WHICH WOULD BE INADMISSIBLE AGAINST HIM.

There is a serious risk that defendant Marshall would suffer serious prejudice in a joint

trial because highly prejudicial evidence that would be inadmissable against him is likely to be admitted against co-defendant Graham. This constitutes grounds for severance under Zafiro and Flores.

The government's evidence is that while in Rapid City, before going to the Pine Ridge reservation and the Rosebud reservation, co-defendant Graham raped Aquash. The government has no evidence that Richard Marshall ever had any knowledge of the co-defendant's alleged rape of Aquash. Therefore, the evidence of sexual assault that the government seeks to offer against co-defendant Graham either as *res gestae* evidence or other crimes evidence under Rule 404(b) would have no relevancy to the question of Richard Marshall's guilt; any hypothetical minimal probative value it might have with regard to Marshall would be substantially outweighed by the clear danger of prejudice that such highly emotional evidence would present, and therefore evidence of the co-defendant's alleged rape would be inadmissible against Marshall under Rule 403.

The defendants are not charged with conspiracy. Therefore, there will be a great deal of other evidence that the government will offer to prove Graham's guilt that will not be admissible against Marshall.

This is the rare case in which the foreseeable danger of undue prejudice caused by sensational and prejudicial evidence that would be admissible only against a co-defendant should result in severance. As in United States v. Baker, 98 F.3d 330 (8th Cir. 1996), this is a case in which severance should be granted because there is a serious risk that the evidence of a co-defendant's guilt in a joint trial would prevent the jury from making a reliable judgment about Richard Marshall's guilt or innocence. This is so because extremely serious and sensational

evidence, including but not limited to evidence of the co-defendant's rape of the victim, that would not be admissible against Marshall if he were tried alone will be introduced against co-defendant Graham. See: Baker, at 335.

In addition, it is foreseeable that the government will argue in trial that Graham's out of court admissions that he took Anna Mae Aquash to a "safe house" on the Pine Ridge reservation was a reference by Graham to the Marshall home in Allen, which is located on the Pine Ridge reservation. Even without the government's arguing the point, the jury could make such an inference from Graham's out of court statement and the other evidence, and could infer that Graham's statements could be taken to mean that the defendant Marshall's home was a "safe house" where fugitives who were involved in AIM could hide or find assistance. This is a highly prejudicial inculpatory accusation against defendant Marshall. As in Baker, the co-defendant's admission would constitute an out of court accusation that, considered with the evidence that Graham and Aquash did go to Richard Marshall's home, the government would argue, or the jury could infer, constituted inculpatory evidence against Richard Marshall–specifically, evidence of motive and criminal predisposition. Under the rules of evidence, however, Graham's statements, which would be an admission by a party under Rule 801, would only be admissible against Graham. It would not be admissible if Marshall was tried alone. This is analogous to the situation in United States v. Baker, 98 F.3d at 335:

"In addition, Wheeler's inculpatory statement to the FBI was evidence that was probative of Baker's guilt (Wheeler's statement does not incriminate Baker on its face but arguably does so only when linked to other evidence) but was technically admissible only against Wheeler."

As in Baker, the substantial risk of prejudice from the spillover effect of evidence that is only

admissible against the co-defendant is too high to be cured by less drastic measures, such as jury instructions.

II

THERE IS A SERIOUS RISK OF UNDUE PREJUDICE TO DEFENDANT MARSHALL IN A JOINT TRIAL DUE TO THE MARKEDLY DIFFERENT DEGREES OF THE CO-DEFENDANTS' ALLEGED CULPABILITY.

Moreover, there is certainly a great disparity as to evidence of culpability in the government's cases against the two defendants. The government alleges that co-defendant Graham actively took part in kidnaping and abducting the victim in Denver, Colorado; that he held the victim tied up in a car for several hours as he and his accomplices drove her from Denver to South Dakota; that he raped her while they held her prisoner; and that he participated in a meeting in Rosebud where the decision was made to kill Aquash; after which, Graham personally executed her. The evidence comes from a number of sources, including the admissions of Arlo Looking Cloud, alleged out of court admissions by Theda Clarke, and several statements from Graham admitting that he was with Anna Mae Aquash and drove her from Denver to the Pine Ridge reservation. On the other hand, the evidence that the government relies on to prove its case against Marshall comes almost exclusively from Arlo Looking Cloud and it consists of a claim made by Looking Cloud to federal investigators that he saw Richard Marshall hand a gun and shells to Theda Clarke during a brief stop along the way at Marshall's house in Allen.

The markedly different degrees of alleged culpability in the government's cases against John Graham and Richard Marshall constitute further grounds for a severance under Zafiro and Flores.

CONCLUSION

The record before the Court demonstrates a serious risk that a joint trial would compromise the right of defendant Richard Marshall to a fair trial and would prevent the jury from making a reliable judgment about his guilt or innocence. Therefore, the court should exercise its sound judicial discretion to order a severance of trials.

Dated this 22nd day of December, 2008.

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*
Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
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(605) 791-1832
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CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Reply Memorandum of Law in Support of Motion to Sever Trials was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 22nd day of December, 2008.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S MOTION TO DISMISS FOR SELECTIVE PROSECUTION

NOW COMES Defendant Richard Marshall, by and through his attorney Dana L. Hanna, pursuant to his constitutional right to equal protection of the law, and hereby moves the Court to dismiss the indictment on the grounds of selective prosecution.

In support of the motion, Dana L. Hanna, attorney for the defendant, hereby affirms:

1. I am make these affirmations on the basis of information and belief based on the discovery materials provided by the government and upon the trial record of the case of United States vs. Arlo Looking Cloud.

2. It is the theory of the prosecution that defendant Richard Marshall aided and abetted Theda Clarke, John Graham, and Arlo Looking Cloud in the murder of Anna Mae Aquash in December 1975. The government indicted and has convicted Arlo Looking Cloud of murder. The government indicted John Graham and Richard Marshall and their trials are pending. The government has never sought an indictment against Theda Clarke, in spite of compelling evidence of her guilt.

3. The government's theory is that Theda Clarke was an active participant in the abduction and murder Aquash. The evidence of Clarke's guilt is far more compelling than the evidence the government intends to offer against Richard Marshall. In fact, the government has

given notice of its intent to offer the testimony of a cooperating witness, who will testify that Theda Clarke admitted to her that she, Graham, and Looking Cloud killed Aquash because they believed her to be a government informant.

4. According to the testimony of the government's cooperating witness, Arlo Looking Cloud, and other witnesses, Clarke was the organizer and driving force of the group that kidnapped and killed Aquash.

5. Theda Clarke is not being prosecuted in spite of strong evidence of her guilt and greater culpability in the crime. Richard Marshall submits that the government's decision to prosecute Richard Marshall and to not prosecute Theda Clarke is disparate treatment and selective prosecution. If there is any basis for the government's decision to prosecute Richard Marshall and to forego prosecution of Theda Clarke, it would appear to be an arbitrary classification based on age. The defendant submits that the government's decision to prosecute Richard Marshall and to forego prosecution of Theda Clarke deprives him of his constitutional right to equal protection of the law and that the defendant should be given an opportunity to prove selective prosecution in a pre-trial hearing.

WHEREFORE defendant Richard Marshall moves the Court to dismiss the indictment with prejudice, and for an evidentiary hearing on this motion.

Dated this 22nd day of December, 2008.

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
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CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Motion to Dismiss for Selective Prosecution was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 22nd day of December, 2008.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FOR SELECTIVE PROSECUTION

Defendant Richard Marshall moves to dismiss on the grounds that he has been denied equal protection of the laws as a result of selective prosecution. He contends that he has been singled out for prosecution while another who is similarly situated, Theda Clarke, is not being prosecuted and that the decision to prosecute him is based on impermissible bases and motives–age and his exercise of a constitutional right.

In order to make out a *prima facie* case of selective prosecution, the defendant must show that he was singled out for prosecution while others similarly situated were not prosecuted for similar conduct; and that the decision to prosecute was based on an impermissible motive such as race, religion, or an attempt by the defendant to secure other constitutional rights. United States v. Kelley, 152 F3d 881, 885-886 (8th Cir. 1998).

The burden of showing selective or vindictive prosecution is on the defendant. Kelley, at 885. The defendant's burden is a heavy one, and because the courts afford broad discretion to

prosecuting authorities, courts require a showing of intentional and purposeful discrimination. United States v. Matter, 818 F.2d 653, 654-655 (8th Cir. 1987).

Whether to hold an evidentiary hearing on a pre-trial motion to dismiss an indictment is a matter within the trial court's discretion. United States v. Aanarud, 893 F.2d 956, 960-961 (8th Cir.); *cert. denied* 498 US 822 (1990).

I

THE DEFENDANT MARSHALL HAS BEEN SINGLED OUT FOR PROSECUTION WHILE ANOTHER PERSON WHO IS ALLEGED TO HAVE AIDED AND ABETTED IN THE MURDER OF ANNA MAE AQUASH IS NOT BEING PROSECUTED.

The defendant asks the Court to take judicial notice of the trial record in the case of United States v. Arlo Looking Cloud and the official court record in this case.

According to Looking Cloud's testimony and the testimony of other witnesses, and according to the government's statements in trial and in this record of this case, in December 1975, Theda Clarke, Arlo Looking Cloud, and John Graham abducted Anna Mae Aquash in Denver, drove her to South Dakota and aided and abetter one another in her execution by gunshot on the Pine Ridge reservation near Wanblee. The government's theory of prosecution with regard to defendant Richard Marshall is that Richard Marshall gave a handgun to Theda Clarke and that handgun was the weapon the John Graham used to kill Aquash. The main prosecution witness against the defendant is Arlo Looking Cloud, who has consistently portrayed Theda Clarke as the dominating force who directed him and Graham in the abduction and murder of Aquash.

In 2001, a cooperating government witness, Darlene Nichols, a.k.a. Kamook Banks, tape-recorded a conversation she had with Theda Clarke about events surrounding the death of

Aquash. It appears from the transcript of that recording, Clarke was cogent, aware, and communicative during the conversation. The cooperating witness has asserted to the government prosecutors and agents that at some point in the conversation that was not recorded, Clarke admitted that she, Graham and Looking Cloud killed Aquash and that they did so because Aquash was believed to be providing information to government law enforcement agents.

In 2003, the government indicted Arlo Looking Cloud and John Graham for the murder of Aquash. The government did not seek an indictment against Theda Clarke. In 2004, the government tried and convicted Arlo Looking Cloud on the theory that he and Theda Clarke aided and abetted John Graham in murdering Anna Mae Aquash. During the trial, although there was testimony that Clarke, Graham, Looking Cloud and Aquash went to the home of Richard Marshall, it was not the government's theory that Richard Marshall gave anyone a gun or that he aided and abetted in the murder.

In 2008, the government again presented evidence to a new grand jury. Arlo Looking Cloud had by then entered into an agreement to cooperate with the government. The government communicated to attorney Charles Abourezk, then counsel for Richard Marshall, that prosecutors sought the cooperation of Richard Marshall and offered him use immunity if he would cooperate by giving an interview to the government concerning Anna Mae Aquash. Marshall declined to do so, exercising his constitutional rights.

The government sought and obtained an indictment for murder against Richard Marshall. The government has never sought an indictment against Theda Clarke. The government is not prosecuting her, even though it is the government's theory that she was the ringleader of the group of accomplices that abducted and killed Anna Mae Aquash.

II

THE DECISION TO SINGLE OUT RICHARD MARSHALL FOR PROSECUTION, WHILE NOT PROSECUTING THEDA CLARKE, IS BASED ON CONSTITUTIONALLY IMPERMISSIBLE REASONS.

The government has never filed any document known to the defendant in which they seek to explain or justify the decision to prosecute this defendant, on the testimony of convicted murderer and cooperating witness Arlo Looking Cloud, while the same evidence and much more, if credited by a jury, would prove the far greater culpability of Theda Clarke.

On information and belief, Clarke is in a rest home, and she is now more than eighty years of age; if age is the classification for allowing her to be un-prosecuted for murder, defendant Marshall (age 58) submits that the relative ages of the defendant and Theda Clarke is an arbitrary and impermissible basis on which to base the government's disparate treatment of two individuals who are similarly situated, in terms of the government's theory of prosecution. The decision to prosecute Marshall and not prosecute Clarke is even more irrational, given the fact that the government's evidence against Clarke is far stronger that the case against Richard Marshall and according to the government's own theory and evidence, Theda Clarke is far more culpable than any of the three defendants who have been indicted, with the possible exception of the alleged shooter, since she was the one whom the government contends led and directed Looking Cloud and Graham in the abduction and murder of the Anna Mae Aquash.

Moreover, based on the facts and circumstances that would be adduced in evidence in a hearing, the defendant would show that it is a reasonable inference from the circumstances that the decision to prosecute Marshall, and not Clarke, was motivated at least in part by the defendant's exercise of rights guaranteed to him by the Constitution.

Therefore, this Court should exercise its discretion and grant the defendant an opportunity to put forth evidence in a pre-trial hearing to prove his claim of selective prosecution, and if he does so, the court should dismiss the indictment against him.

Dated this 22nd day of December, 2008

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Reply Memorandum of Law in Support of Motion to Dismiss for Selective Prosecution was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 22nd day of December, 2008.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S MOTION FOR PRODUCTION OF HANDWRITTEN NOTES

NOW COMES Defendant Richard Marshall, by and through his attorney Dana L. Hanna, pursuant to his constitutional rights to due process of law and the right to present evidence in his defense, and hereby moves the Court to order the government to disclose all handwritten notes and writings of all government agents who were present at the interview of Arlo Looking Cloud in the United States Attorney's Office in Denver, Colorado on November 17, 1994. Defendant Marshall makes this motion on the grounds that the evidence requested constitutes exculpatory impeachment evidence, and such evidence is not available through any other source.

In support of this motion, Dana L. Hanna, attorney for the Defendant, hereby affirms:

1. I make this motion on the basis of information and belief, the sources of which are pages 1859-1882 in the Graham discovery materials that have been provided to me by the government.

2. On November 17, 1994, in the office of the United States Attorney in Denver, Colorado under a grant of use immunity, Arlo Looking Cloud answered questions about the kidnapping and murder of Anna Mae Aquash that were presented to him by government agents. Present at the interview/proffer session were Robert Eccofey, FBI Agent James Graf, Deputy Marshal Rick Ianucci, BIA Federal Investigator Mitchell Pourier, and attorney for Looking

Cloud, Henry Mulvihill, and at least one other person whose identity is not known to defense counsel.

3. Arlo Looking Cloud told the investigators that he had participated in taking Anna Mae Aquash from Denver, Colorado to South Dakota and that he was present, along with Theda Clarke, when John Graham shot and killed Anna Mae Aquash. Looking Cloud repeatedly denied having any knowledge that Graham or Clarke intended to kill Anna Mae Aquash before she was actually shot.

4. Looking Cloud is now a cooperating witness for the prosecution, and he is expected to testify that sometime before Anna Mae Aquash was murdered that he, Graham, and Clarke went to the home of Richard Marshall and his then wife, Cleo, in Allen, South Dakota; and that while there, he observed Richard Marshall hand a gun to Theda Clarke. It is the government's theory that that was the gun that Graham used to kill Anna Mae Aquash.

5. According to the transcript prepared by the government, during his interview in Denver in 1994, Looking Cloud was asked this question by FBI Agent Graf: "Uh, do you remember, uh, at what point, uh, you first became aware that John Boy had that gun? Was it when he pulled it out to shoot her or did you know he had it before that?" On the transcript, it shows that Looking Cloud gave an answer, in which he started to say "Uh, I think when after (TAPE ENDS–END TAPE NUMBER ONE)." When transcription of tape number two begins, it makes no reference to Looking Cloud's answer to the previously quoted question. However, from the context and the words of his partial answer, it appears that Looking Cloud's answer was that the first time he saw anyone with a gun that night was when Graham shot Anna Mae Aquash. If he did give such an answer, it is directly contradictory to accusatory statements he has made and will testify to regarding Richard Marshall having given a gun to Theda Clarke. It is impeachment evidence on a critical contested fact.

6. In a letter dated November 10, 2008, I made a specific request to United States Attorneys prosecuting this case for copies of the handwritten notes of those who were present at Looking Cloud's interview. In a response letter from Robert Mandel, the government declined to provide those notes to me.

7. Looking Cloud's full answer to that particular question was not recorded in any

agent's investigative reports that have been provided to me. Therefore, the only written source of such potential exculpatory information would be the handwritten notes of those present.

WHEREFORE the Defendant moves the Court to order the government to seek the handwritten notes and any other writings prepared by any person who was present at the interview of Arlo Looking Cloud on November 17, 1994, to acquire such handwritten notes and writings, and to disclose them to defense counsel, or in the alternative, to produce them to the Court for an in-camera inspection, and if the Court determines that there is exculpatory impeachment evidence contained in the notes, to disclose such notes to defense counsel.

Dated this 22nd day of December, 2008.

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
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CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Motion for Production of Handwritten Notes was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 22nd day of December, 2008.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRODUCTION OF HANDWRITTEN NOTES

Defendant Richard Marshall moves the Court to order the government to disclose the handwritten notes of all government agents and persons present who during a proffer session interview of Arlo Looking Cloud at the office of the United States Attorney in Denver, Colorado in 1994. Defendant Marshall submits that such notes are likely to contain evidence that will impeach the trial testimony of Arlo Looking Cloud on a critical contested fact.

Arlo Looking Cloud told investigators in 2008 that defendant Richard Marshall gave a gun to Theda Clarke at his home in Allen, South Dakota in December 1975. The defense will offer evidence to show that Looking Cloud's testimony on this point is a self-serving recent fabrication that is directly in conflict with his earlier accounts of the events involving the abduction and murder of Anna Mae Aquash, including that account he gave to federal investigators in 1994.

In the tape-recorded proffer session in 1994, FBI Agent Graf asked Looking Cloud when

he became aware that Patton had a gun, if it was when he pulled it out to shoot Aquash or at some earlier time. Before Looking Cloud's complete answer could be recorded, the tape ended after Looking Cloud had begun to answer the question by saying he thought it was "after...." Judging from the question, the partial answer, and the context of the entire interview, it is more than likely that Looking Cloud answered the question by saying he did not know that Graham or anyone was armed with a gun until after Graham pulled it out to shoot Aquash. Obviously, if that was his answer, the defendant is entitled to disclosure of that evidence as exculpatory impeachment evidence. Brady v. Maryland, 373 US 83 (1963).

Generally, handwritten notes of law enforcement agents notes are not discoverable if the contents of the notes are summarized and written up into a formal investigative report. U.S. v. Leisure, 844 F.2d 1347, (8th Cir. 1988); Hayes v. U.S., 329 F.2d 209 (8th Cir. 1964); U.S. v.Greatwalker, 356 F.3d 908, (8th Cir. 2004).

However, the factual situation here is unique. It is distinguishable from the cases cited by this fact: although the rest of the interview was transcribed, Looking Cloud's full answer was not transcribed or written in any investigative report. (There is also an audio recording of the session, which counsel has heard and listened to. One can hear that the recording was interrupted before Looking Cloud finished his answer, as is reflected in the transcription.) The notes are the only possible written source of this evidence as to Looking Cloud's entire answer.

If they denote Looking Cloud's answer to Agent Graf's question, the handwritten notes are likely to contain impeachment evidence on a critical contested question of fact: if Looking Cloud told investigators in 1994 that he had never seen the gun that killed Anna Mae Aquash before Graham actually pulled it out and shot her, then it directly impeaches the account that he

began giving federal investigators in 2008 that he saw Richard Marshall hand a pistol to Theda Clarke in the presence of John Graham.

Therefore the defendant is entitled to disclosure of such notes pursuant to the Due Process Clause, under Brady v. Maryland and its progeny. In the alternative, the government should be ordered to gather the notes of all who were present, and present them to the court for an in camera inspection to determine whether said notes contain impeachment evidence for the defendant.

Dated this 22nd day of December, 2008.

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*
Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
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CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Memorandum of Law in Support of Motion for Production of Handwritten Notes was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 22nd day of December, 2008.

/s/ *Dana L. Hanna*
Dana L. Hanna

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff,	)	CRIM. NO. 08-50079-01
vs.	)	DEFENDANT GRAHAM'S
	)	MOTION TO THE COURT
JOHN GRAHAM, a/k/a	)	TO TAKE NOTICE OF EXHIBITS
JOHN BOY PATTON,	)	FILED IN CR #03-50020-02
VINE RICHARD MARSHALL, a/k/a	)	
RICHARD VINE MARSHALL, a/k/a	)	
DICK MARSHALL, Defendants.	)	

Defendant John Graham moves the court to take judicial notice the documents set forth below which were previously filed in File No. CR 03-50020-02. Fed.R.Evid. 102 permits the court to apply the rules to eliminate unjustifiable expense. In order to reduce the volume of the present file and to reduce copying costs, and because these documents have already been filed once, Mr. Graham asks that the court to take notice of their existence and incorporate them into the present file as follows:

Pleading	Document
Motion in Limine Regarding Statements to Medicine Man	Graham00745 Graham00951 Graham00977 Graham03671 Graham03668

Several of the documents relate to grand jury testimony or other confidential matters and were filed under seal in File No. CR 03-50020-02 and should not be made public.

Dated December 23, 2008.

/s/ John R. Murphy
John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

MARTY J. JACKLEY	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
ROBERT A. MANDEL	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
DANA HANNA	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing

Dated December 23, 2008.

/s/ John R. Murphy
John R. Murphy

FILED
DEC 23 2008
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE 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 Defendant.	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION TO SEAL

Defendant, John Graham, through his attorney, John R. Murphy, moves this Court for its Order sealing Exhibit A related to Defendant Graham's Motion in Limine Re: *Res Gestae* Evidence (Court Doc. 103). This motion is made for the reason that the exhibits consist of documents provided to the defense in discovery and should not be made available to the public.

Dated December 23, 2008.

/s/ John R. Murphy
John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☐	Electronic Case Filing

Dated December 23, 2008.

/s/ John R. Murphy
John R. Murphy

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN GRAHAM, aka JOHN BOY PATTON, and VINE RICHARD MARSHALL, aka RICHARD VINE MARSHALL, aka DICK MARSHALL, Defendants.	)	CR. 08-50079-01, -02 ORDER ON DEFENDANTS' MOTIONS TO SEVER

INTRODUCTION

Defendant John Graham has filed a motion seeking an order from the court severing his trial from that of co-defendant Vine Richard Marshall's trial. [Docket 75]. Defendant Richard Marhshall has also filed a motion to sever his trial from that of Mr. Graham's. [Docket No. 87]. The government resists these motions. The district court, the Honorable Lawrence Piersol, referred the motions to this court for determination pursuant to 28 U.S.C. § 636(b)(1)(A).

FACTS

The facts, insofar as they are pertinent to the pending motion, are as follows. Count one of the superseding indictment charges Mr. Graham and Mr. Marshall jointly with the unlawful killing and with aiding and abetting the

killing of Annie Mae Aquash with a firearm, asserting that both defendants are Indians and that Ms. Aquash is also an Indian, in violation of 18 U.S.C. §§ 2, 1111, and 1153.

Count two charges Mr. Graham alone with killing Annie Mae Aquash "willfully, deliberately, and maliciously, with premeditation and malice aforethought," in violation of 18 U.S.C. §§ 2, 1111, and 1152. Count two alleges that Ms. Aquash is an Indian, but does not allege that Mr. Graham is an Indian.

Count three alleges that Mr. Graham killed, and aided and abetted other Indians in killing Ms. Aquash, in violation of 18 U.S.C. §§ 2, 1111, and 1153. The Indians Mr. Graham is alleged to have aided and abetted in count three are Fritz Arlo Looking Cloud, Theda Rose Clarke, and co-defendant Mr. Marshall. Count three does not allege that Mr. Graham is an Indian. Count three is currently the subject of a motion to dismiss by Mr. Graham.

The defendants are currently scheduled to be tried in a joint jury trial beginning February 24, 2009. The government's theory of the case, as asserted by the defendants, is that Mr. Graham and Mr. Marshall acted on orders from decision-makers within the American Indian Movement ("AIM"), to murder Ms. Aquash due to the suspicion that she was a government informant working against AIM. The government alleges that Mr. Marshall provided the firearm and ammunition used to commit the murder and that Mr. Graham carried out the actual murder. Both defendants seek separate trials.

DISCUSSION

A. Severance Under Rule 14(a) Generally

Rules 8(b) and 14 of the Federal Rules of Criminal Procedure address the propriety of joinder of defendants in a single indictment. If joinder of defendants is not proper under Rule 8(b), severance becomes mandatory. Even if severance is not mandated by Rule 8(b), the court has discretion to grant severance under Rule 14 if joinder of the defendants appears to prejudice a defendant or the government. United States v. Davis, 534 F.3d 903, 916 (8th Cir. 2008). However, once it is determined that defendants are properly joined under Rule 8(b), "[t]he presumption against severing properly joined cases [under Rule 14] is strong." United States v. Ruiz, 412 F.3d 871, 886 (8th Cir. 2005). The preference for joint trials is in order to give "the jury the best perspective on all of the evidence and therefore increase[ ] the likelihood of a correct outcome." United States v. Flores, 362 F.3d 1030, 1039 (8th Cir. 2004) (quoting United States v. Darden, 70 F.3d 1507, 1528 (8th Cir. 1995)). In addition, courts recognize that joint trials conserve scarce time and resources. United States v. Hively, 437 F.3d 752, 765 (8th Cir. 2006). "Under Fed. R. Crim. P. 14(a), the issue of severance is entrusted to the sound discretion of the trial judge." Id. at 765 (internal citation omitted).

Mr. Graham concedes that he and Mr. Marshall are properly joined under Fed. R. Crim. P. 8(b) and does not seek severance pursuant to that rule. Mr. Marshall similarly raises no argument that joinder under Rule 8(b) is

improper in this case. Rather, the defendants' motions seek severance on the basis of Fed. R. Crim. P. 14(a). A defendant who seeks severance under Rule 14 must show "real prejudice." Davis, 534 F.3d at 916. "Real prejudice" consists in showing (1) that the moving defendant's defense "is irreconcilable with that of his co-defendant or (2) the jury will be unable to compartmentalize the evidence as it relates to the separate defendants." Id. at 916-917 (quoting United States v. Mickelson, 378 F.3d 810, 817-818 (8th Cir. 2004)).

"Severance is not required merely because evidence that is admissible only against some defendants may be damaging to others, . . ." Mickelson, 378 F.3d at 818. "Nor is it enough for a defendant to claim, . . . that he needed a separate trial in order to call a co-defendant as a witness. He must show that it is likely his co-defendant actually would have testified and that this testimony would have been exculpatory." Id. (citing United States v. Delpit, 94 F.3d 1134, 1143-1144 (8th Cir. 1996)). "Generally, the risk that a joint trial will prejudice one or more of the defendants 'is best cured by careful and thorough jury instructions.' " Davis, 534 F.3d at 916-917 (quoting Mickelson, 378 F.3d at 818; and citing Zafiro, 506 U.S. at 537).

Mr. Graham raises three arguments in favor of severance under Rule 14: (1) that his confrontation rights under the Sixth Amendment will be violated by a joint trial because statements of co-defendant Richard Marshall which are inculpatory to both defendants will be admitted at trial and Mr. Marshall is not

expected to testify;[1] (2) that evidence that would otherwise be inadmissible at Mr. Graham's trial, i.e. Mr. Marshall's inculpatory statements, would be admissible at a joint trial; and (3) that Mr. Graham and Mr. Marshall will present mutually exclusive or antagonistic defenses.

Mr. Marshall argues that he should be granted a separate trial because (1) evidence that will be admissible against Mr. Graham in a joint trial would be inadmissible against Mr. Marshall in a separate trial; and (2) that Mr. Marshall will experience "spill-over" prejudice due to the fact that the government's case against Mr. Graham is much stronger than the government's case against Mr. Marshall. Each argument will be discussed in turn.

B. Severance Under Bruton

1. Supreme Court Cases

The prow of Mr. Graham's argument in favor of severance is that his confrontation rights will be violated by the admission into evidence of out-of-court statements by Mr. Marshall that inculpate Mr. Graham. Mr. Graham assumes that Mr. Marshall will not testify, an assumption that seems warranted under the current state of the pleadings in this case. See footnote 1, supra.

[1]Mr. Marshall agrees that Mr. Graham's right to confrontation of his accusers would be violated by a joint trial in which statements of Mr. Marshall are admitted which inculpate Mr. Graham. Implicit in this agreement by Mr. Marshall is a tacit admission that Mr. Marshall does not intend to testify at trial. Otherwise, Mr. Graham's confrontation rights would not be implicated.

The United States Supreme Court established in Bruton v. United States, 391 U.S. 123 (1968), that a defendant's confrontation rights under the Sixth Amendment are violated by the admission of a non-testifying codefendant's confession that implicates the defendant. Id. at 137.[2] In Bruton, Bruton and a co-defendant, Evans, were tried together for armed postal robbery. Id. at 124-125. A confession by Evans inculpating both Evans and Bruton was admitted at the trial. Id. at 125-126. Evans never testified and the jury was instructed that it was not to consider Evans' confession in determining whether Bruton was guilty. Id. Despite the limiting instruction, Bruton argued that the introduction of Evans' confession violated his confrontation rights under the Sixth Amendment. Id. The Court agreed and reversed for a new trial. Id. at 136-137.

The Supreme Court declined to further extend Bruton in Richardson v. Marsh, 481 U.S. 200 (1987). In that case, the Court held that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession that was redacted to eliminate the defendant's name and any other reference to the defendant's existence. Id. at 211.

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[2]The pertinent portion of the Sixth Amendment reads as follows: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him;" See U.S. Const. amend. VI. The Supreme Court has held that the right of confrontation includes the right to cross-examine witnesses. See Pointer v. Texas, 380 U.S. 400, 404, 406-407 (1965).

Marsh and a co-defendant, Williams, were tried together for murder and assault, over Marsh's objection to a joint trial. Id. at 202. The victim of the assault testified at trial, identifying Marsh and Williams as the murderers and her assailants. Id. Williams had confessed after his arrest and his statement was also introduced at trial, with all reference to Marsh redacted. Id. at 203-204. Williams' confession largely corroborated the victim's testimony. Id. Williams did not testify at the trial and the district court instructed the jury that they were not to use Williams' confession in any way against Marsh. Id. at 204. Marsh herself then testified and placed herself at the scene of the crime, testifying that she had no forewarning that Williams was going to commit any crime. Id. at 204. Marsh was convicted of two counts of felony murder. Id. at 205.

The Court began by noting that "a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant." Id. at 207. The Court also acknowledged that the situation in Bruton was an exception to this general rule where the nontestifying codefendant's confession expressly implicated the defendant. Id. at 208. Under these circumstances, the "powerfully incriminating" confession could not fail to infect the confrontation rights of the nonconfessing codefendant. Id.

The Court distinguished Bruton, however, from the facts in Marsh's case because in Marsh's case, the redacted confession did not implicate Marsh at all, but only became incriminating when linked with other admissible evidence introduced at trial, namely Marsh's own testimony and that of the assault victim. Id. The fact that the confession itself did not incriminate Marsh, coupled with the court's limiting instruction to the jury not to consider Williams' confession in any way as to Marsh, made this case different. Id. The Court held that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." Id. at 211.

In a subsequent case, the Court had reason to refine its position as to Bruton and Richardson. See Gray v. Maryland, 523 U.S. 185 (1998). In Gray, Gray and a co-defendant, Bell, were indicted for murder and tried jointly. Id. at 188. Bell's confession was admitted at trial in a redacted version in which Gray's name was removed and the word "deleted" or "deletion" was substituted. Id. at 188-189. After Bell's confession was read into the record by a detective, the prosecutor asked, "after [Bell] gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?" Id. The detective responded "yes." Id. at 189. Other witnesses testified at trial indicating that both Bell and Gray were involved in the murder. Id. Bell never testified,

although Gray testified, denying any involvement. Id. The trial court instructed the jury that it should consider Bell's confession only against Bell and not as any evidence against Gray. Id. Both defendants were convicted. Id. Gray argued that the admission of Bell's confession violated his confrontation rights under Bruton. Id.

The Court agreed. Id. at 197. Distinguishing Richardson, where the confession was redacted to remove all reference to Marsh and all indication that anyone other than the confessor and a third party had participated in the crime, the confession in Gray, even though it was redacted, clearly indicated the participation of another person, though that person remained unnamed. Id. at 191-192. The Court stated that, "Redactions that simply replace a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration, however, leave statements that, considered as a class, so closely resemble Bruton's unredacted statements that, in our view, the law must require the same result." Id. at 192.

As an example, the Court examined the confession introduced at Gray's trial: "Question: Who was in the group that beat [the victim]? Answer: Me, deleted, deleted, and a few other guys." Id. at 196. Although this redaction of the codefendant's statement created Bruton problems, the Court suggested an alternative redaction of the same statement that would not be problematic: "Question: Who was in the group that beat [the victim]? Answer: Me and a few

other guys." Id. The goal is to edit the statement so that not only are all incriminating remarks of the nonconfessing codefendant removed, but to do so in a way so that the statement does not obviously appear to have been redacted. Id. (citing Richardson, 481 U.S. at 203).

Although not dealing with the issue of severance, the United States Supreme Court decided Crawford v. Washington, 541 U.S. 36 (2004), after the Gray decision. The Crawford decision further interprets the Confrontation Clause, holding that "out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable." Crawford, 541 U.S. at 36.

The Crawford decision addressed the issue of whether out-of-court hearsay statements made by an unavailable witness, rather than a co-defendant as in Bruton, were admissible at trial. Crawford, 541 U.S. 36. The facts of Crawford were as follows. Petitioner Michael Crawford stabbed a man who allegedly attempted to rape his wife, Sylvia Crawford. Id. at 38. At trial, Mrs. Crawford did not testify because of the state marital privilege, thereby making her an unavailable witness. Id. at 40. Under state law, a spouse's out-of-court statements were admissible under a hearsay exception. Id. Thus, the state sought to introduce into evidence out-of-court, tape-recorded statements Mrs. Crawford made to the police describing the events leading up to the

assault and the assault itself. Id. Because of Mrs. Crawford's involvement in the assault, the state relied upon the hearsay exception for statements against penal interest. Id.

The trial court allowed Mrs. Crawford's out-of-court statements to be played to the jury, relying on the rule in Ohio v. Roberts, 448 U.S. 56 (1980). Crawford, 541 U.S. at 40. In Roberts, statements made by an unavailable witness against a criminal defendant were admissible at trial if the statements bore " 'adequate indicia of reliability,' " that is, statements "must either fall within a 'firmly rooted hearsay exception' or bear 'particularized guarantees of trustworthiness.' " Id. (quoting Roberts, 448 U.S. at 66). The trial court in Crawford admitted Mrs. Crawford's out-of court statements on the latter ground. Crawford, 541 U.S. at 40. Mr. Crawford objected on the grounds that admitting these statements violated his "federal constitutional right to be confronted with the witnesses against him." Id. (internal quotations omitted).

On appeal, the Supreme Court rejected the reliability test articulated in Roberts, holding that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Id. at 68-69. The Crawford Court held that "out-of court statements by witnesses that are testimonial are barred, under the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of

whether such statements are deemed reliable by the court." Id. at 36 (emphasis added).

A key consideration in Crawford is whether the out-of-court statements are testimonial. The constitutional protections of the Confrontation Clause afforded to a defendant only apply when witnesses against him " 'bear testimony.' " Id. at 51. " 'Testimony,' in turn is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " Id. (quoting 2 N. Webster, An American Dictionary of the English Language (1828)). Although the Court in Crawford did not provide an exhaustive list of statements that are deemed testimonial, it stated that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." Crawford, 541 U.S. at 68. Although the Court did not comprehensively define "testimonial," it stated that evidence is testimonial when "made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial." Id. at 51.

The Supreme Court again interpreted the confrontation clause in Davis v. Washington, distinguishing between testimonial and nontestimonial statements in the context of police interrogations. Davis v. Washington, 547 U.S. 813, 817 (2006). The Davis Court held as follows:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the

> primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later prosecution.

Id. at 822. The Davis Court made clear that most testimonial statements will involve formal statements, like sworn testimony in a prior judicial proceeding or formal deposition under oath. Id. at 825-826. The Court also stated that some statements are "clearly nontestimonial," like statements made unwittingly to a government informant or statements from one prisoner to another. Id. at 825. See also United States v. Watson, 525 F.3d 583, 589 (7th Cir. 2008) (holding that statements made unwittingly to a confidential informant and recorded by the government are not "testimonial") (citing United States v. Underwood, 446 F.3d 1340, 1347-1348 (11th Cir. 2006); United States v. Hendricks, 395 F.3d 173, 182-184 (3d Cir. 2005); United States v. Saget, 377 F.3d 223, 229-230 (2d Cir. 2004)).

The Davis Court also distinguished between interrogations "solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator" and interrogations intended to "describe current circumstances requiring police assistance." Davis, 547 U.S. at 826-827. The former were characterized by the Court as "testimonial," while the latter were characterized as "nontestimonial." Id.

Comparing the statement of Crawford's wife in Crawford, with the 911 caller in Davis, the Court distinguished them on three grounds: (1) the Crawford statement was describing past events some hours after the events had occurred while the Davis statement was describing events as they were actually happening; (2) the declarant in Davis was facing an ongoing emergency for which help was being sought and the wife in Crawford was not; and (3) the nature of what was asked and answered during the statement in Davis made clear that the elicited statements were necessary to resolve the present emergency, whereas the questions in Crawford were asked to learn what had happened in the past. Id. at 827.

2. Eighth Circuit Cases

The Eighth Circuit has had several occasions to apply Bruton, Richardson, Gray, and Crawford. In United States v. Edwards, 159 F.3d 1117 (8th Cir. 1998), cert. denied, 528 U.S. 825 (1999), five defendants were tried together for aiding and abetting an arson which resulted in the deaths of six firefighters. Id. at 1121-1122. During the seven years between the arson and the indictment of the defendants, all five defendants had made incriminating statements to some 59 other witnesses. Id. at 1124. None of the defendants testified at trial. Id. The district court admitted the incriminatory statements and addressed the Bruton problem by replacing inculpatory references to other co-defendants with neutral pronouns such as "we," "they," "someone," and "others." Id. The court instructed the jury that it was to consider each out-of-

court statement only against the person who made the statement and not against any of the four other co-defendants. Id. The Eighth Circuit held that this approach did not violate the defendants' confrontation rights under Bruton. Id. at 1124-1128.

The defendants argued that the use of the pronouns violated the rule announced in Gray as the jury could have understood the pronouns to refer to the defendants. Id. at 1125. The Eighth Circuit held that the district court's approach complied with the rule announced in Gray because the statement in Gray used the word "deleted" and thus emphasized the fact that the statement had been redacted, while in Edwards, the use of the neutral pronouns did not draw attention to the redaction. Id. at 1126. Also, the court noted that the trial included a large cast of characters from the defendants' neighborhood who were connected to the defendants in various ways and that some of the statements inculpated non-parties to the case. Id. Thus, the court held that these facts weakened any association the jury might have been wont to draw between the use of the pronouns and the guilt of any non-declarant defendant. Id. Finally, the court noted that the redaction favored by the Gray Court, "me and a few other guys" had the same effect as the redactions in Edwards where pronouns were used. Id.

In United States v. Williams, 429 F.3d 767 (8th Cir. 2005), the Eighth Circuit considered the admission of a co-defendant's confession in a joint trial

for conspiring to distribute marijuana and crack cocaine. Id. at 769-770, 772-775. The court stated that, "[i]n assessing whether a case falls within the Bruton rule as in Gray or outside it as in Marsh, the Supreme Court looks at whether the context is one in which the risk is too great that the jury will not or cannot follow the cautionary instruction to consider the statement solely against the declarant." Id. at 773 (citing Gray, 523 U.S. at 190-191).

In Williams' case, the nondeclarant defendant's name was mentioned more than forty times in the co-defendant's statement. Id. The statement was redacted by replacing the nondeclarant's name with the pronoun "someone" over forty times. Id. In this example, the court opined that the method of redaction of the statement "made it obvious that a name had been redacted." Id. at 774. "The replacements were not seamlessly woven into the narrative as in [United States v.] Logan, [210 F.3d 820 (8th Cir. 2000) (*en banc*)], and the neutral pronoun 'someone' may have lost its anonymity by sheer repetition. It may well have been clear to the jury that the statement had obviously been redacted and that the 'someone' of the statement was" the nondeclarant co-defendant. Id.[3] See also, United States v. Heppner, 519 F.3d 744, 751-752 (8th Cir. 2008) (rejecting Bruton argument where statement was redacted to remove nondeclarant's name and any language that could be construed as a reference

[3]The Williams court ultimately affirmed the defendant's conviction despite the suggestion that his confrontation rights might have been violated because the error, if any, was deemed harmless. See Williams, 429 F.3d at 774.

to him and the district court instructed the jury to consider the confession only against the declarant defendant).

In an Eighth Circuit case interpreting Crawford, but not Bruton, the court further clarified the characteristics of testimonial statements. United States v. Bordeaux, 400 F.3d 548 (8th Cir. 2005). In Bordeaux, government officials referred a child victim of sexual abuse to a center for evaluation. Bordeaux, 400 F.3d at 554. A forensic interviewer questioned the child even before she had been examined by a physician. Id. The interview was taped, and two copies were made, one of which was provided to the police. Id.

The court found that the hearsay statements of the victim were testimonial because the interview was the equivalent of a police interrogation. Id. at 556. The court reasoned that "[a] police interrogation is formal (*i.e.*, it comprises more than a series of offhand comments-it has the form of an interview), involves the government, and has a law enforcement purpose." Id. The court stated that "the evidence requires the conclusion that the purpose [of the interview] was to collect information for law enforcement." Id. " That [the victim's] statements may have also had a medical purpose does not change the fact that they were testimonial, because Crawford does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial." Id.

The Eighth Circuit reached the opposite conclusion in another case also interpreting Crawford, but not Bruton. See United States v. Clemons, 461 F.3d

1057 (8th Cir. 2006). The court held in Clemons that statements made by a shooting victim in response to a police officer's questions were nontestimonial because "[t]he circumstances, viewed objectively, indicate that the primary purpose of [the officer's] questions was to enable him to assess the situation and to meet the needs of the victim." Clemmons, 461 F.3d at 1060-1061 (citing Davis, 547 U.S. at 822). The Eighth Circuit has also held that casual remarks made to an acquaintance do not constitute a formal, testimonial statement and, thus, fall outside the protection of the confrontation clause under Crawford. See also United States v. Hyles, 521 F.3d 946, 959-960 (8th Cir. 2008) (holding Crawford inapplicable to statements made to defendant by one third party that defendant had hired to kill a witness); United States v. Lee, 374 F.3d 637, 645 (8th Cir. 2004) (co-defendant's confession to his mother was nontestimonial because statement was made over a year before the mother had any contact with law enforcement and was prompted when mother observed evidence of crime in co-defendant's possession).

In another case decided just four months ago, the Eighth Circuit considered whether two defendants' Bruton rights were violated when the prosecutor, during closing argument, used a display that showed both defendants' redacted statements side by side on a large screen and the prosecutor proceeded to point out the similarities between the two statements. United States v. Davis, 534 F.3d 903, 914-916 (8th Cir. 2008). Although the

defendants did not take issue with the method of redacting each of their statements nor with the district court's limiting instructions to the jury about using each statement only against the declarant defendant, nevertheless they argued on appeal that the prosecutors use of the statements in closing in the manner in which he did invited the jury to use the statements improperly against the non-declarant defendants. Id. at 915. Because the defendants had not objected during the prosecutor's closing argument, the Eighth Circuit would reverse only "under exceptional circumstances." Id. at 916.

Predictably, given the standard of review, the Eighth Circuit affirmed, but made a point of indicating that it did "not condone the manner in which the prosecutor utilized the previously undisclosed demonstrative aid, . . .". Id. 916-917. In affirming, however, the court noted that neither statement referred to the other defendant or to any other person directly and, therefore, "the admission of the statements was not an obvious error under Richardson." Id. at 915.

Finally, the Eighth Circuit has just had occasion to address the intersection between Bruton and Crawford in United States v. Spotted Elk, 548 F.3d 641 (8th Cir. 2008). In Spotted Elk, five co-defendants, including Colin Spotted Elk and Geraldine Blue Bird, were tried together on a charge of conspiracy to distribute cocaine and other related charges. Id. at 646-647. Eleven other co-defendants did not proceed to trial, but rather entered guilty

pleas. Id. at 647, 647 n.2, and 646-650. At trial, evidence was introduced of an out-of-court statement of Blue Bird's that implicated Spotted Elk. Id. at 662. A third co-defendant, Dawnee Frogg, who did not go to trial, testified that Blue Bird had made the statement to Frogg. Id. Although Frogg testified, Blue Bird did not. Id. Spotted Elk argued that the introduction of Blue Bird's out-of-court statement implicating him violated his confrontation rights under Bruton. Id.

The Eighth Circuit held that Crawford had further clarified the scope of the confrontation clause discussed in Bruton. Id. The court held that, after Crawford, "[i]t is now clear that the Confrontation Clause does not apply to non-testimonial statements by an out-of-court declarant." Id. (citing Davis, 547 U.S. at 822; United States v. Singh, 494 F.3d 653, 658-659 (8th Cir.), cert. denied, 128 S. Ct. 528 (2007) (holding that co-conspirators' statements in furtherance of the conspiracy were not testimonial under Crawford)). Because Blue Bird's out-of-court statements were made to co-defendant Frogg, the court held that the statements were not testimonial and, hence, did not fall within the purview of the Sixth Amendment's confrontation clause. Id.

There is some question as to how to interpret the holding of the Eighth Circuit in Spotted Elk. On the one hand, the court's decision might be interpreted sweepingly to mean that all statements made to persons other than

police are "nontestimonial."[4] However, this is contrary to the court's holding in Bordeaux, in which the court concluded that statements made to a person other than the police were "testimonial." Bordeaux, 400 F.3d at 556.

Furthermore, a footnote by the Davis Court cautions against such a sweeping and undiscerning analysis. In that footnote, the Court stated that:

> Our holding refers to interrogations because, as explained below, the statements in the cases presently before us are the products of interrogations–which in some circumstances tend to generate testimonial responses. ***This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial.*** The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation. . . . And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.

Davis, 547 U.S. at 822 n.1 (emphasis supplied).

Taken together, all of the above case law should be interpreted to mean that Bruton applies only when the out-of-court statement sought to be admitted

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[4]The Spotted Elk court had, previous to the discussion of the Bruton issue, embarked on an extended discussion of the admissibility of statements of co-conspirators under Fed. R. Evid. 801(d)(2)(E). Spotted Elk, No. 07-1914, 2008 WL 4999125 at *15. The court found that the twenty challenged statements were properly admitted by the district court pursuant to Rule 801(d)(2)(E). Id. Therefore, the truncated discussion on the Bruton issue may simply be an indication by the court that statements of co-conspirators that fit within the definitional exclusion from hearsay under Rule 801(d)(2)(E) are categorically nontestimonial under Crawford and Bruton. Id. at *28-30. See also United States v. Lee, 374 F.3d 637, 644 (8th Cir. 2004) (statements by a conconspirator in furtherance of the conspiracy are not testimonial in nature under Crawford).

is "testimonial" and the declarant will not be testifying. Out-of-court statements are "testimonial" when they are the product of a formal interview, the government was involved in obtaining the statement, and the government had a law enforcement purpose. Bordeaux, 400 F.3d at 556. As in Bordeaux, this may encompass persons who elicit statements from a targeted person at the behest of the government, even though the eliciter of the statement is not a government agent himself. Id. Statements are also testimonial when they are describing past events for the purpose of providing evidence to convict someone of a crime. Davis, 547 at 826-827. However, as indicated by the Davis Court, it does not include statements made unwittingly to confidential informants or fellow prisoners. Davis, 547 U.S. at 825. It now remains to apply Bruton, Crawford, and their progeny to the statements at issue in this case.

3. Application of the Law to the Statements Proffered in this Case

Prior to ruling on the instant motion, the court directed the government to submit to the court *in camera* any out-of-court statements of either defendant that it intended to introduce at trial. See Fed. R. Crim. P. 14(b); Docket No. 77. The government submitted nine separate statements by Mr. Graham and Mr. Marshall. Reviewing those statements, they can be categorized into three general types: (1) statements made unwittingly to witnesses who were cooperating with the government; (2) statements to members of the media; and

(3) statements made directly to police or other clearly official government actors. Each type of statement will be analyzed separately.[5]

a. Statements unwittingly made to cooperating witnesses

One category of statements at issue are statements unwittingly made by both defendants to cooperating government witnesses, two of which are known by the code names of "Maverick" and "Sierra." The Davis Court characterized statements unwittingly made by a defendant to a government informant as "clearly nontestimonial." Davis, 547 U.S. at 825. The Davis Court cited in support of this assertion the case of Bourjaily v. United States, 483 U.S. 171 (1987). The Bourjaily case concerned the proper procedure for the admissibility of a co-conspirator's statements in furtherance of the conspiracy under Fed. R. Evid. 801(d)(2). Id. at 173. The co-conspirator statement at issue was made by a co-defendant to an informant who was working for the FBI. Id. 173-174.[6]

Since Crawford was decided, at least four courts of appeals have directly addressed the issue of whether a statement made by a defendant unwittingly to a government informant is "testimonial." All four courts have held that such statements are *not* testimonial. See United States v. Watson, 525 F.3d 583, 589

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[5]The nine statements are being filed under seal concurrently with this opinion so as to facilitate appellate review of the decision made in this opinion should any party wish to pursue such review.

[6]The petitioner in Bourjaily raised a Confrontation Clause argument which the Court addressed, but that issue was resolved under the old Ohio v. Roberts framework instead of Crawford, so that portion of the Bourjaily opinion is not helpful to the resolution of the issues in this case.

(7th Cir. 2008); United States v. Underwood, 446 F.3d 1340, 1347-1348 (11th Cir. 2006); United States v. Hendricks, 395 F.3d 173, 182-184 (3d Cir. 2005); United States v. Saget, 377 F.3d 223, 229-230 (2d Cir. 2004). The Eighth Circuit has apparently not yet addressed this precise issue.[7]

The Third Circuit, in Hendricks, shed some light on its holding. Although the confidential informant clearly is acting on behalf of the government when he elicits the defendant's statement and the evidence is clearly intended to be used for the prosecution of the defendant (as the court observed, obtaining evidence for use in prosecution is the *raison d'etre* for the informant's actions), whether the statement is "testimonial" is to be judged from the standpoint of *the declarant*–here, the defendant–not from the standpoint of the informant. Hendricks, 395 F.3d at 182-183. Thus, although arguably the *informant's own statements* within the conversation may be excluded as "testimonial" because he *is* aware that the statement has a formal purpose, the damaging admissions

[7]In United States v. Rodriguez, 484 F.3d 1006 (8th Cir. 2007), Rodriguez argued on appeal that the admission at his trial of a cooperating witness's account of a conversation she had had with Rodriguez, which implicated Rodriguez, violated his Confrontation Clause rights. Id. at 1013-1014. The court did not address whether Rodriguez's statement to the cooperating witness or the cooperating witness's own statement were "testimonial." Id. Instead, the court held that the statement had not been introduced to prove the truth of the matter asserted and, therefore, the Confrontation Clause was not implicated. Id. Furthermore, the cooperating witness testified, thereby avoiding Confrontation Clause issues. Id.

made by the defendant may not be so excluded.[8] Id. For the statement to be "testimonial," the ***declarant himself*** must expect that the statement will be used as evidence in a later formal proceeding. Id. See also United States v. Udezor, 515 F.3d 260, 268-269 (4th Cir. 2008) (holding that whether an out-of-court statement is "testimonial" must be judged from the point of view of the declarant at the time the statement was made) (citing the following cases for the same proposition: United States v. Maher, 454 F.3d 13, 21 (1st Cir. 2006); United States v. Ellis, 460 F.3d 920, 926 (7th Cir. 2006); United States v. Summers, 414 F.3d 1287, 1302 (10th Cir. 2005); United States v. Hinton, 423 F.3d 355, 360 (3d Cir. 2005); Saget, 377 F.3d at 228)).

This court concludes that the Eighth Circuit would follow the four circuits which have addressed this issue thus far and hold that statements made unwittingly by a defendant to a confidential informant or, in this case, a cooperating witness, are not "testimonial" under Crawford. Judging from the point of view of Mr. Marshall and Mr. Graham, the defendant-declarants in this case had no expectation at the time they made these statements to cooperating witnesses that they were formal statements which might be used as evidence in a later proceeding. Accordingly, they do not trigger the protections of the

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[8]For an analysis of the admissibility of *the informant's* statement in a conversation with the defendant, see United States v. McGee, 529 F.3d 691, 697-698 (6th Cir. 2008) (police officer's testimony containing a hearsay statement from the informant that "Zookie" was in fact the defendant, McGee, was barred by the Confrontation Clause under Crawford).

Confrontation Clause under Crawford or Bruton. Davis, 547 U.S. at 825; Spotted Elk, 548 F.3d at 662; Watson, 525 F.3d at 589.

b. Interviews with the media

Two statements by Mr. Graham can be categorized as interviews with the media. On November 8, 2000, Mr. Graham made a recorded statement in an interview with "Fifth Estate," and again on October 18, 2006, Mr. Graham made recorded statements to "Native Youth Movement." The government breezily asserts that Mr. Graham's statements to journalists are non-testimonial statements to which Confrontation Clause protections do not apply, but the government cites no authority which supports this factual variation on the Crawford analysis. Research by the court has not revealed any published decision in which a court has analyzed whether a statement made to a journalist is "testimonial" under Crawford.

The two statements that Mr. Graham made in this category differ in the context in which they were made in this regard: the statement made in 2000 was *prior* to the first indictment charging anyone with a crime in connection with Ms. Aquash's death; the statement in 2006 was made *after* the 2003 indictment was filed charging Mr. Graham and Looking Cloud with murder.

As to the first statement, Crawford teaches that a statement must be a "solemn declaration or affirmation made for the purpose of establishing or proving some fact" in order to be considered "testimonial." Crawford 541 U.S. at 51. Statements are testimonial where they are given under circumstances

that lead the declarant to believe that "the statements would be available for use at a later trial." Id. at 51. The context of the statement given by Mr. Graham to the "Fifth Estate" as well as its timing leads the court to conclude that the statement was not testimonial.

The "Fifth Estate" interview did not involve the government or a government actor and there was no apparent government purpose for the statement. Furthermore, the timing of the statement is informative. In 2000, the murder of Ms. Aquash was a quarter of a century old and no one had ever been charged with that crime. At the time he gave the statement, then, Mr. Graham or any reasonable person in his place would probably not have expected the statement to be used as evidence at a later trial.

The 2006 statement is not so easily analyzed, however. In 2006, at the time Mr. Graham made his statement to "Native Youth Movement," he had already been indicted along with Looking Cloud for the murder of Ms. Aquash.[9] Also, Mr. Graham knew that his statement was being recorded. Thus, the possibility that his statement might be used as evidence at a later trial against him had to have been very real to Mr. Graham at the time he was making the statement.

The 2006 statement lacks, however, any government purpose, government agent, or government involvement. Bordeaux, 400 F.3d at 556.

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[9]Mr. Graham was in Canada at the time, resisting the efforts of the United States to extradite him in order to try him on the murder charge.

The court notes that nothing in Crawford or Davis requires that a statement involve the government in order to be "testimonial." See Davis, 547 U.S. at 825-826; Crawford, 541 U.S. at 51-68. The Davis Court focused on statements that were "formal" in the sense that they were not conversational and statements that focused on establishing past facts as evidence of a crime as opposed to describing present circumstances. Davis, 547 U.S. at 825-826. In fact, the Davis Court seemed at pains to hold open the possibility of a statement nevertheless being considered "testimonial" in the absence of government questioning. Id. at 822 n.1.

However, the Bordeaux case in the Eighth Circuit emphasized the fact that although the person to whom the statement was being made was not a government actor, that person was nevertheless knowingly furthering a government investigative purpose. Bordeaux, 400 F.3d at 556. Regardless of whether either the "Fifth Estate" statement or the "Native Youth Movement" statement involved a government purpose, the court concludes ultimately that Bruton is not implicated by these statements as neither statement by Mr. Graham inculpates Mr. Marshall in any way. Graham neither refers to Marshall directly, nor refers to his existence in the involvement in the murder of Ms. Aquash. For these reasons, the court denies the motions to sever based on this category of statements.

c. Grand jury testimony and law enforcement interrogation

The last category of statements concerned in this case are Mr. Marshall's testimony before the grand jury and statements given by both defendants to Robert Ecoffey, a law enforcement officer, at different times and locations. Under Crawford and its progeny, these are clearly "testimonial" statements which trigger the protections of the confrontation clause. Crawford, 541 U.S. at 68.

Although Mr. Graham's statement to Mr. Ecoffey is "testimonial," it does not implicate Mr. Marshall. Mr. Marshall is not mentioned by name, nor is his participation suggested in any way. The statement makes reference to dropping Ms. Aquash off at a "safe house," but this house is never identified as Mr. Marshall's home, either by name, location, or description. The evidence appears to be that, although Ms. Aquash might have visited Mr. Marshall's home, she did not stay there, so Graham's statement would not have indicated that he had dropped Aquash off at Marshall's home. But even if the "safe house" mentioned by Mr. Graham in his statement can be linked to Mr. Marshall's home by referring to other evidence, that does not create a Bruton problem. See Richardson, 481 U.S. at 208-211 (an out-of-court statement that does not implicate the non-declarant co-defendant, but which becomes incriminating when linked with other admissible evidence introduced at trial, does not violate Bruton).

Mr. Marshall's statement to Mr. Ecoffey is also "testimonial." It does not name Mr. Graham, but indicates that late one night a car load of people showed up at Marshall's house. The people included Theda Clark and Ms. Aquash and "two young guys" who Marshall could not or did not name. Even when Ecoffey asked Marshall if the names "Arlo Looking Cloud" and "John Boy Graham" "rang a bell," Marshall still said he could not remember the names of the "two young guys." Although this statement *may* pose a Bruton problem if introduced as it is now written, it can easily be redacted to make sure that it is not interpreted by the jury to refer to Graham. For example, if Marshall's statement is changed to state that Clark, Aquash, and "some other people" or "others" who Marshall could not name came to his house, the jury could not reasonably interpret Marshall's statement to inculpate Graham. This is particularly true here where in all likelihood there will be a whole host of other actors discussed at the trial. See Edwards, 159 F.3d at 1125-1126 (replacing nondeclarant defendant's name with neutral pronouns eliminated Bruton problem and did not run afoul of the Gray decision because the evidence at trial included information about a number of actors from defendants' neighborhood in addition to information about the defendants themselves).

Mr. Marshall's grand jury testimony is also "testimonial," but--as when Marshall spoke to Ecoffey–Marshall never named Mr. Graham in his testimony. However, Marshall's responses, taken together with the prosecutor's questions,

probably fairly squarely implicate Mr. Graham. The question becomes, then, whether Mr. Marshall's testimony can be redacted so as to remove all reference to Mr. Graham or even Mr. Graham's existence. The court is confident that, with the guidance provided by the case law discussed above, Mr. Marshall's grand jury testimony can be redacted in such a manner as to remove all reference to Mr. Graham and to his existence. The majority of the redaction in this case will be redacting the prosecutor's question, rather than Marshall's answer. A properly redacted statement, as well as a contemporaneous limiting instruction from the district court telling the jury to consider Mr. Marshall's testimony only as against Mr. Marshall, will serve to address any Bruton problems inherent in Mr. Marshall's grand jury testimony.

The court also addresses one final statement not submitted to the court by the government, but instead submitted to the court by Mr. Marshall. It is a "testimonial" statement of Mr. Ecoffey in an interview with Mr. Looking Cloud *after* Looking Cloud had been indicted by the grand jury for Ms. Aquash's murder. In that interview, Ecoffey tries to get Looking Cloud to admit to having been with Theda Clark, Mr. Graham, and Ms. Aquash at Dick and Cleo Marshall's house. Looking Cloud denies having stopped at Marshall's house. In the face of Looking Cloud's denial, Ecoffey states, "[c]ause I know–I know for a fact that you stopped there, cause both Dick and Cleo–are telling me that you, [Graham], and Theda stopped there, and that you had Anna Mae, . . ."

Of course, having just reviewed Marshall's statement to Ecoffey, *Marshall never told Ecoffey* that Looking Cloud or Graham were at Marshall's house. Despite Ecoffey's persistent attempts, Marshall would not or could not identify either Looking Cloud or Marshall among those who came to his house–a story he repeated when he appeared in front of the grand jury.

One may wonder, then, if *Marshall* never told Ecoffey that Graham was at his house, why would Marshall himself wish to introduce Ecoffey's erroneous statement to the contrary during the Looking Cloud interview? The answer is unclear. Nevertheless, Marshall asserts that Ecoffey's erroneous statement during the Looking Cloud interview directly contradicts the exculpatory statements Mr. Graham made to Ecoffey. An erroneous statement by a third party about a co-defendant's out-of-court statement does not create a Bruton conflict. However, in an abundance of caution, the court holds that the Ecoffey–Looking Cloud interview, if it is to be introduced as evidence at trial, must be edited to redact Ecoffey's erroneous attribution of the statement to Marshall.[10] For example, the statement can be redacted to read, "[c]ause I know–I know for a fact that you stopped there, cause Cleo–is telling me that you. . ."

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[10]In his interview with Looking Cloud, Ecoffey may have been referring to what Marshall told cooperating witnesses, which differed from what Marshall told Ecoffey directly. However, the court has already determined that Marshall's statements to cooperating witnesses are not "testimonial" and, thus, do not raise a Bruton problem.

In order that the district court may timely review the efficacy of the redacted versions of these statements, the court will require *any party* wishing to introduce one of these testimonial statements at trial to submit the redacted version of the statement to the district court a minimum of 15 days before the start of trial.

Finally, the court notes that merely because the court has reached the conclusion that the statements at issue in this case are nontestimonial, or if testimonial, are capable of redaction so as to eliminate a Bruton problem, does not end the inquiry as to their admissibility. It simply removes one basis for objecting to the admission of the statements, that basis being the Confrontation Clause of the Sixth Amendment. The proponent of any statement must still be prepared to meet objections to admissibility of these statements on other grounds.

d. Cautionary Note

Even where out-of-court statements are properly redacted and the court properly instructs the jury not to consider the statement against the non-declarant co-defendant, the prosecutor can still create Bruton error by emphasizing or implying that the statement incriminates the non-declarant defendant or otherwise linking the non-declarant defendant to the out-of-court statement. See Gray, 523 U.S. at 193-194; Richardson, 481 U.S. at 211; Davis, 534 F.3d at 915 (citing United States v. Long, 900 F.2d 1270, 1280 (8th Cir. 1990)). This is the have-your-cake-and-eat-it-too scenario whereby the

government submits a redacted statement that complies with Bruton, but then cannot resist attempting to use the redacted evidence to tie in the non-declarant co-defendant anyway. See e.g. Gray, 523 U.S. at 188-189 (after introducing redacted statement of Bell from which Gray's name had been deleted, prosecutor then asked the detective if Bell's statement enabled the detective to arrest Gray); Davis, 534 F.3d 915-917 (holding up two redacted statements side-by-side during closing argument and drawing attention to their similarities).

Such actions create reversible error. Id. In such a case, the district court may still have to examine the Bruton issue at the close of the case if the prosecution raises this issue through its conduct at the trial, despite the submission of redacted statements to the jury and the court's limiting instructions to the jury. Id.

C. Severance Due to Other Prejudice

Aside from the Bruton issue, Mr. Graham seeks severance because he alleges that evidence would be admitted at a joint trial that would not be admissible in a trial of Mr. Graham alone. However, the only evidence discussed by Mr. Graham are Mr. Marshall's inculpatory statements, already discussed above. This argument raises no new specter of prejudice other than that dispensed with above.

The only new argument presented by Mr. Graham is that Mr. Marshall's out of court statements do not fit within the definitional exclusion from hearsay

for statements of coconspirators. Whether Mr. Marshall's statements fit within the definitional exclusion from hearsay found at Fed. R. Evid. 801(d)(2)(E) is a matter that must be raised as a motion *in limine* prior to trial, or by objection at trial. It is not concerned with whether to grant severance other than through the confrontation clause issue already discussed.[11]

Mr. Graham and Mr. Marshall both argue that a joint trial will be prejudicial because Mr. Graham and Mr. Marshall will be presenting incompatible defenses. Specifically, they allege that Mr. Marshall's defense will be that Marshall was not aware of any plan to kill Ms. Aquash at the time Marshall met with Graham, Clark and Looking Cloud and, moreover, that he did not provide the group with any assistance in carrying out the murder plan. Mr. Graham, on the other hand, intends to defend by denying that any meeting ever took place that involved Mr. Graham in attendance. Thus, according to the defendants, the jury would have to reject Marshall's defense in order to believe Graham's defense and vice versa.

Once joint trials are determined to be proper under Rule 8, as discussed above, the burden to demonstrate prejudice sufficient to warrant severance is a heavy one. Flores, 362 F.3d at 1039-1040. The movant must demonstrate severe or compelling prejudice. Id. at 1039 (citing United States v. Pherigo, 327

[11]In any case, whether Mr. Marshall's statement is admissible is not determined alone by the applicability of Rule 801(d)(2)(E). There are other exceptions to the hearsay rule which might very well come into play.

F.3d 690, 693 (8th Cir.), cert. denied, 539 U.S. 969 (2003)). " 'The mere fact that one defendant tries to shift blame to another defendant does not mandate separate trials,' . . . as a co-defendant frequently attempts to ' " 'point the finger' to shift the blame, or to save himself at the expense of the other." ' " Flores, 362 F.3d at 1039-1040 (quoting United States v. Basile, 109 F.3d 1304-1309-1310 (8th Cir. 1997) (quoting United States v. Delpit, 94 F.3d 1134, 1143 (8th Cir. 1996)); United States v. Mason, 982 F.2d 325, 328 (8th Cir. 1993) (quoting United States v. Johnson, 944, F.2d 396, 403 (8th Cir. 1991))). Just because a defendant's chances for acquittal are better in a separate trial is insufficient reason to justify severance of otherwise properly joined defendants. Flores, 362 F.3d at 1040 (citing Delpit, 94 F.3d at 1143).

There is no reason to believe that Mr. Graham and Mr. Marshall's defenses are mutually antagonistic. The jury may well conclude that the meeting, if it did occur, did not include Mr. Graham. Furthermore, the jury may conclude, without prejudice to Mr. Graham, that Mr. Marshall did not provide any assistance toward the murder of Ms. Aquash, whether the meeting took place or not. And Mr. Marshall's defense actually *helps* Mr. Graham in this sense: if the jury believes that the meeting took place, but that Mr. Marshall was not aware of any plan to murder Ms. Aquash, as he is apparently going to assert, then it stands to reason that the jury would conclude that no discussion of murdering Ms. Aquash was engaged in by

anyone at the meeting. Such a conclusion on the part of the jury would necessarily include a conclusion that *Mr. Graham* did not discuss murdering Ms. Aquash during the meeting either. See Hood v. Helling, 141 F.3d 892, 896 (8th Cir. 1997) (mutually antagonistic defenses exist only where, in order to believe the core of one defendant's defense, the jury must necessarily disbelieve the core of the other defendant's defense).

Even if Graham and Marshall's defenses *are* mutually antagonistic, Mr. Graham is not automatically entitled to severance. Flores, 362 F.3d at 1040. Mr. Graham still has to show a "serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Id. (quoting Zafiro, 506 U.S. at 539). This requires a showing that "evidence that would be inadmissible against one defendant if he were tried alone is admitted against his co-defendant, when many defendants are tried in a complex case with 'markedly different degrees' of culpability, . . . when a joint trial denies a defendant exculpatory evidence that would be available if he was tried alone. . . . [or] if there is a danger that the jury will unjustifiably infer that [the conflict in defenses] *alone demonstrates that both are guilty.*" ' " Flores, at 1040 (quoting Zafiro, 506 U.S. at 539; Basile, 109 F.3d at 1310 (quoting Delpit, 94 F.3d at 1143) (emphasis in Delpit)). In the final analysis, the court must assess whether "the jury will associate the guilt of one defendant to another defendant

or will be confused." Flores, 362 F.3d at 1041 (quoting United States v. Andrus, 775 F.2d 825, 849 (7th Cir. 1985)).

In Basile, the court held that, even assuming the defendants' defenses were "mutally antagonistic," nevertheless the defendants had not shown the kind of severe or compelling prejudice necessary to justify severance because the defendants could not show that each of their defenses was "irreconcilable with that of the co-defendant or that the jury was unable to compartmentalize the evidence." Basile, 109 F.3d at 1310. This was true even though one defendant's theory of the case was that a third party had stolen a car and killed the victim, while the other defendant admitted to stealing the car, but denied killing the victim. Id. at 1309.

Mr. Marshall raises the separate argument that evidence of the American Indian Movement ("AIM"), in particular association with that movement and acts of violence perpetrated by that movement, would be admissible against Mr. Graham, but not admissible against Mr. Marshall. Therefore, Mr. Marshall argues that the prospect of AIM evidence being admitted at a joint trial will prejudice him.

Evidence of AIM activities and associations was introduced at the trial of co-defendant Arlo Looking Cloud, an evidentiary issue that was raised in Looking Cloud's direct appeal to the Eighth Circuit. See United States v. Looking Cloud, 419 F.3d 781, 785-787 (8th Cir. 2005). Much of the AIM

evidence at Looking Cloud's trial was admitted without any objection by Looking Cloud. Id. Accordingly, much of the admission of AIM evidence was reviewed on appeal on a plain-error standard of review. Id. The Eighth Circuit's decision that the admission of such evidence was not plain error, or an abuse of discretion as to that evidence which Looking Cloud did object to, does not mandate the admission of such evidence in the Graham-Marshall trial. Id. Contrary to Mr. Marshall's assertion otherwise, whether AIM evidence will be admitted at the Graham-Marshall trial is a decision still committed to the district court's discretion, and is not a foregone conclusion.

Furthermore, Mr. Marshall never explains *why* evidence pertaining to AIM would be admissible against Mr. Graham and not against himself. In holding that it was not plain error or an abuse of discretion to admit the AIM evidence at Looking Cloud's trial, the Eighth Circuit held that evidence of a defendant's affiliation with a movement and the actions of the movement are relevant to show motive and opportunity. Id. *If* AIM evidence would be admissible to prove Mr. Graham's motive and opportunity, it would seem to be similarly admissible to prove Mr. Marshall's motive and opportunity.[12] Mr. Marshall has not made out a case for severance on the basis of his argument regarding AIM evidence.

[12]It is unclear whether Mr. Marshall was a "member" of AIM in any formal sense, but in his own words in his statements he certainly self-identified as an AIM sympathizer who attended many AIM rallies and events.

Mr. Marshall also argues that the government's case against him is not strong and, accordingly, he will be subject to spill-over prejudice by reason of being tried with Mr. Graham, who faces a stronger case against him. In particular, Mr. Marshall points to evidence under Fed. R. Evid. 404(b) that will be admissible against Mr. Graham and would not be admissible in a trial of Mr. Marshall alone. Mr. Marshall's characterization of the government's case against him as "marginal at best," is predicated on the fact that the government's case against Marshall rests "almost totally on the testimony of Fritz Arlo Looking Cloud."

Again, Mr. Marshall does not explain *why* the court should conclude that the government's case against him is "marginal" simply because it is based on the eye-witness testimony of a person who has been convicted of participating in the same crime with which Mr. Marshall is charged. However, assuming that the degree of culpability, or the strength of the government's case, is indeed disparate as between Graham and Marshall, that fact alone does not warrant severance, particularly when both defendants are charged with participating in the same criminal act. Hively, 437 F.3d at 765 (stating that, "[s]everance is never warranted simply because the evidence against one defendant is more damaging than that against another, . . ."") (citing United States v. Pecina, 956 F.2d 186, 188 (8th Cir. 1992)). Instead, the defendant seeking severance must

show that the jury cannot reasonably be expected to compartmentalize the evidence. Id.

In Hively, two lawyers who were partners in the same law firm were tried together. Id. at 765-766. Unsavory evidence of extortion was admitted at trial as to one of the defendants, but that evidence was not applicable to the defendant who had sought severance. Id. On appeal, the Eighth Circuit affirmed the district court's decision to try the defendants together, noting that no abuse of discretion had occurred. Id. at 766.

In United States v. Pecina, a defendant in a drug conspiracy case argued that he should be tried separately because the most of the evidence pertained to his co-defendant and not to him. United States v. Pecina, 956 F.2d 186, 188 (8th Cir. 1992). The Eighth Circuit affirmed the district court's decision to hold a joint trial, noting that "[d]isparity in the weight of the evidence as between the two parties does not entitle one to severance." Id. (citing United States v. Singer, 732 F.2d 631, 635 (8th Cir. 1984)).

In Delpit, seven defendants were tried together on, *inter alia*, drug conspiracy charges, which did not apply as to one defendant, and a murder-for-hire charge that did not apply to two of the defendants. Delpit, 94 F.3d at 1142-1143. The court held that trial of the two defendants who were not involved in the murder-for-hire scheme along with the defendants who were involved in the scheme was not an abuse of discretion. Id. The court observed

that, "[i]t doesn't matter that Larry Thomas and Jai Jones had nothing to do with the murder-for-hire plot, or that Delpit was not indicted for the drug conspiracy. . . . when violence is part of the conspiracy's *modus operandi*, 'charges stemming from that violence are properly joined with the conspiracy charges, even if not all members of the conspiracy participated in the violence.'" Id. at 1143. The Delpit court specifically rejected the argument of one self-described "minor player" defendant that he was prejudiced by the "spillover taint of the murder-for-hire charges" which did not pertain to him. Id.

Here, the impetus for a joint trial is even more weighty than in a drug conspiracy case. In a drug conspiracy case, the co-defendants may be held to answer for wide-ranging, often unrelated acts of the conspiracy as to which a particular member of the conspiracy may not even have been aware. Instead, in this case, Mr. Graham and Mr. Marshall are charged with committing or aiding and abetting in the commission of the same crime: the murder of Annie Mae Aquash.

Neither defendant has alleged enough, without more, to demonstrate the kind of "severe" or "compelling" prejudice necessary to warrant severance under Rule 14(a). Specifically, the court concludes that the two defendants' defenses are not mutually antagonistic and that there is no basis to believe that the jury cannot or will not compartmentalize the evidence against each defendant or that

the jury will become confused. Accordingly, the court denies the motion on grounds of inadmissible evidence or incompatible defenses.

CONCLUSION

Based on the foregoing discussion, it is hereby

ORDERED that John Graham's motion for separate trials [Docket No. 75], is denied. It is further

ORDERED that Richard Marshall's motion for separate trials [Docket No. 87] is denied. It is further

ORDERED that any party wishing to introduce at trial a testimonial out-of-court statement of either defendant that inculpates the other defendant, whether the statement is in the form of a writing, an audio recording, or a video recording, shall redact such statement to eliminate all reference to the other defendant and to his existence in accordance with this opinion and shall submit its proposed redacted statement to the district court for review no later than 15 working days prior to the start of trial in this case.

NOTICE OF RIGHT TO APPEAL

Pursuant to 28 U.S.C. § 636(b)(1)(A), any party may seek reconsideration of this order before the district court upon a showing that the order is clearly erroneous or contrary to law. The parties have ten (10) days after service of this order to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. See Fed. R. Crim. P. 58(g)(2).

Failure to file timely objections will result in the waiver of the right to appeal questions of fact. Objections must be timely and specific in order to require review by the district court.

Dated December 27, 2008.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
DEC 30 2008
CLERK

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079-02

MOTION TO SEAL EXHIBIT 1 TO UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT MARSHALL'S MOTION FOR PRODUCTION OF HANDWRITTEN NOTES

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant US Attorney Robert A. Mandel and respectfully prays the Court to issue an Order sealing Exhibit 1 to the United States' Response in Opposition to Defendant Marshall's Motion for Production of Handwritten Notes in the above-captioned matter, and as grounds therefor states as follows:

Exhibit 1 to the Response is correspondence from defense counsel that includes his comments and impressions regarding witnesses and evidence.

WHEREFORE, the United States prays that this Court seal Exhibit 1 to the United States Response in Opposition to Defendant Marshall's Motion for Production of Handwritten Notes.

Date: December 30, 2008

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on December 30, 2008, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Facsimile at
- ☐ Federal Express
- ☐ Electronic Case Filing

Marty J. Jackley
United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079-02

ORDER SEALING EXHIBIT 1 TO UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT MARSHALL'S MOTION FOR PRODUCTION OF HANDWRITTEN NOTES

Upon Motion of the United States and good cause having been shown, it is hereby

ORDERED, that Exhibit 1 to the United States' Response in Opposition to Defendant Marshall's Motion for Production of Handwritten Notes in the above-entitled matter be sealed until it is ordered unsealed.

Dated this _____ day of _____.

BY THE COURT:

_____
Veronica L. Duffy
Magistrate Judge

FILED
DEC 30 2008

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079-02

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT MARSHALL'S MOTION FOR PRODUCTION OF HANDWRITTEN NOTES

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant US Attorney Robert A. Mandel and respectfully files its Response in Opposition to Defendant Marshall's Motion for Production of Handwritten Notes.

On December 22, 2008, Defendant Marshall filed a Motion for Production of Handwritten Notes. Specifically, he is requesting the Court order the United States to disclose all handwritten notes and writings "prepared by any person who was present at the interview" of Arlo Looking Cloud in the United States Attorney's Office in Denver, Colorado, on November 17, 1994. The United States is requesting Defendant Marshall's motion be denied based upon the following grounds:

1. Lack of good faith efforts under D. S.D. Crim. LR 16.1.

2. Overly broad discovery request contrary to case precedent and inappropriately including the handwritten notes of attorneys for both the United States and Arlo Looking Cloud contrary to Fed. R. Crim. P. 16(a)(2).

3. Mootness based upon the United States' willingness to provide handwritten notes that are found to exist with exception of attorneys, to either the Court for in camera review or to the Defendant.

From the onset, it should be noted that these Defendants have collectively made approximately seventy-five specific discovery requests. See generally United States' Response to Defendant Graham's Motion to Compel Discovery (CR03-50020, DE 254 at ¶2; Marshall discovery requests of November 11, 2008; November 24, 2008; and December 18, 2008). Many of the requests have sought information that had already been provided to Defendants in original discovery, or sought discovery contrary to clearly established Eighth Circuit precedent. The United States has presented approximately 5,000 pages of discovery, including many transcripts of tape recordings, and either provided audio copies or made available all recordings at a time convenient at the United States Attorney's Office. The Defendants have provided no discovery pursuant to their obligations under Fed. R. Crim. P. 16(b).

D.S.D. Crim. LR 16.1 requires a party filing a motion concerning a discovery dispute to file a separate declaration describing the good faith efforts of the parties to solve the dispute. As outlined in the attached Exhibit 1, correspondence of Defendant Marshall's counsel, the United States, by and through AUSA Mandel requested more specific information regarding the handwritten note request. See Exhibit 1. This information was not received from Defendant Marshall until December 22, 2008, as

identified on Exhibit 1. That is the same date Defendant Marshall filed his Motion to Compel. Accordingly, Defendant Marshall's motion should be denied consistent with D.S.D. Crim. LR 16.1.

Alternatively, as specifically recognized by Defendant Marshall, "handwritten notes of law enforcement agents' notes [sic] are not discoverable if the contents of the notes are summarized and written up into a formal investigation report." See Defendant Marshall's Memorandum at p.2 (citations omitted). To be sure, neither the Jencks Act, 18 U.S.C. § 3500, nor the doctrine of Brady v. Maryland, 373 U.S. 83 (1963), require police officers to retain their original investigative notes. See United States v. Kuykendall, 633 F.2d 118, 119 (8th Cir. 1980). There exists no duty upon law enforcement officers to retain their rough, handwritten notes after the contents have been incorporated into more formal reports and the reports are checked for accuracy, especially when the notes have been destroyed in good faith. Id. at 119.

As specifically set forth in counsel's correspondence at Exhibit 1, the United States has produced both the actual recording of the interview, and the actual transcript of the interview. Defendant Marshall has also been provided a summary report of Deputy US Marshal Rick Ianucci. Id. It is the United States' position that it has produced all required under Fed. R. Crim. P. 16, Jencks, and Brady in relation to this request. However, the United States is in the process of requesting any other handwritten notes from agents that may exist from this interview, and will provide any such notes to either the Court for in camera review or defense counsel. The United

States should not be required to provide either AUSA notes or Arlo Looking Cloud's attorney's notes as requested by Defendant Marshall if any do exist. Furthermore, it is the United States' intent to only present handwritten notes that may exist without additional commentary as suggested in Defendant Marshall's request. See Exhibit 1.

Accordingly, the United States is respectfully requesting that this Court deny Defendant Marshall's Motion to Compel based upon D.S.D. Crim. LR 16.1 requirements, the overly broad nature of the request which is contrary to legal precedent, and the mootness brought about by the United States' response.

Date: December 30, 2008

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on December 30, 2008, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Facsimile at
- ☐ Federal Express
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Marty J. Jackley
United States Attorney

FILED

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CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079-02

ORDER SEALING EXHIBIT 1 TO UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT MARSHALL'S MOTION FOR PRODUCTION OF HANDWRITTEN NOTES

Upon Motion of the United States and good cause having been shown, it is hereby

ORDERED, that Exhibit 1 to the United States' Response in Opposition to Defendant Marshall's Motion for Production of Handwritten Notes in the above-entitled matter be sealed until it is ordered unsealed.

Dated this 31 day of December, 2008

BY THE COURT:

Veronica L. Duffy
Magistrate Judge

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN GRAHAM, aka JOHN BOY PATTON, and VINE RICHARD MARSHALL, aka RICHARD VINE MARSHALL, aka DICK MARSHALL, Defendants.	)	CR. 08-50079-01, -02 ORDER ON DEFENDANT MARSHALL'S MOTION FOR PRODUCTION OF HANDWRITTEN NOTES

Defendant Richard Marshall has filed a motion seeking an order compelling the government to provide directly to him, or to the court for *in camera* inspection, the handwritten notes of persons present during an interview of Arlo Looking Cloud in Denver, Colorado, on November 17, 1994.

The government has filed a response to the motion indicating its willingness to submit any such notes of non-lawyers present at the interview to the court for *in camera* inspection.

Accordingly, it is hereby

ORDERED that the government shall deliver to the court for *in camera* inspection any hand-written notes of persons present at Arlo Looking Cloud's November 17, 1994, interview other than the hand-written notes of lawyers for

any party. Lawyers' notes need not be produced. The government shall produce the indicated documents to the court no later than 5:00 p.m. MST on January 5, 2009.

NOTICE OF RIGHT TO APPEAL

Pursuant to 28 U.S.C. § 636(b)(1)(A), any party may seek reconsideration of this order before the district court upon a showing that the order is clearly erroneous or contrary to law. The parties have ten (10) days after service of this order to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. See Fed. R. Crim. P. 58(g)(2). Failure to file timely objections will result in the waiver of the right to appeal questions of fact. Objections must be timely and specific in order to require review by the district court.

Dated December 31, 2008.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

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

GOVERNMENT'S RESPONSE TO DEFENDANT MARSHALL'S MOTION FOR PRE-TRIAL HEARING; MOTION IN LIMINE #1

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 #1 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, including the provision of the murder weapon, Marshall said, “Back in the day, when you was asked to do something, somebody asked you for something, you didn’t ask too many questions.” 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 as well as Rules 403 and 404. 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 those that were made by the defendant. 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 was adopted by the defendant, but the position of

the United States is that this question is not even properly before the court at this time.

4. Defendant also challenges the credibility of the cooperating witness. 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. He also denies making any statement to the cooperating witness that would constitute an admission. That is also a question for the jury to resolve and does not bear on the admissibility of the statement.

Accordingly, defendant Marshall's motion should be in all respects denied.

Respectfully submitted this 31st day of December, 2008.

/s/ Robert A. Mandel

ROBERT A. MANDEL
Assistant United States Attorney
515 9th Street #201
Rapid City, SD 57701
605.342..7822
FAX: 605.342.1108
Robert.Mandel@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of December, 2008, 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 #1 on:

Dana Hanna
Attorney at Law

John Murphy
Attorney at law

/s/ Marty J. Jackley

Marty J. Jackley

IN THE UNITED STATES DISTRICT COURT
FOR THE 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 Defendant.	))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S OBJECTION TO ORDER ON DEFENDANTS' MOTIONS TO SEVER

Defendant, John Graham, through his attorney, John R. Murphy, objects to the Court's Order on Defendant's Motions to Sever, File Doc. 116. These objections are filed pursuant to 28 U.S.C. 636(b)(1). Defendant Graham specifically objects as follows:

1. The confrontation clause protections provided to the accused under Bruton v. United States, 391 U.S. 123 (1968), should be treated distinctly from the confrontation clause analysis set forth in Crawford v. Washington, 541 U.S. 36 (2004). Bruton remains good law and its application to the present case mandates severance. United States v. Spotted Elk, 548 F.3d 641 (8th Cir. 2008), improperly blurs the distinction between the two analyses of out of court statements made in Bruton and Crawford. Further, Spotted Elk was

based on statements admissible under the co-conspirator exemption to the rule against hearsay and, thus, are not subject to a strict confrontation clause analysis. Spotted Elk does not support a determination in this case that severance is not warranted.

2. Redaction as suggested by the court will not cure the confrontation clause problems previously identified by Mr. Graham in his severance pleadings. The facts and inferences that will be produced at trial, the fact that Graham and Marshall will be the only two persons on trial, and the fact that the jury will be well aware of Looking Cloud's previous conviction, will all lead to an inevitable recognition by the jury that one of the persons referenced by Marshall in his statements was Graham.

3. Notwithstanding the holding in Crawford, supra, Graham asserts that all out of court statements by a non-testifying co-defendant raise confrontation clause problems for any other defendant implicated by the statement. Marshall's alleged statements to any other person that implicate Graham violate Graham's right to confrontation because Graham will never have the opportunity to confront the alleged declarant, Marshall. Graham will never be able to elicit from Marshall basic information such as whether the statement was in fact made, what context the statement was made in, and

what was meant by the statement. In this light, whether the statement was "testimonial" or "non-testimonial" does not alter the fact that Graham will not be able to confront the declarant. The testimonial/non-testimonial distinction drawn in Crawford is a distinction not recognized by the plain language of the Sixth Amendment.

4. Graham incorporates herein all of the arguments made previously in his Motion for Separate Trials, File Doc. 75, Memorandum in Support of Motion for Separate Trials, File Doc. 76, and Defendant Graham's Reply Brief Regarding Motion for Separate Trials, File Doc. 102, as a basis for objection to the court's Order.

Dated December 31, 2008.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

MARTY J. JACKLEY	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
ROBERT A. MANDEL	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
DANA HANNA	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing

Dated December 31, 2008.

/s/ John R. Murphy
John R. Murphy

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
DEC 31 2008
CLERK

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079-02

MOTION TO SEAL EXHIBIT 1 TO UNITED STATES' MEMORANDUM IN OPPOSITION TO DEFENDANT MARSHALL'S MOTION TO DISMISS DUE TO PRE-ACCUSATORY DELAY

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant US Attorney Robert A. Mandel and respectfully prays the Court to issue an Order sealing Exhibit 1 to the United States' Memorandum in Opposition to Defendant Marshall's Motion to Dismiss Due to Pre-accusatory Delay in the above-captioned matter, and as grounds therefor states as follows:

Exhibit 1 to the Memorandum in Opposition is a transcript of grand jury testimony.

WHEREFORE, the United States prays that this Court seal Exhibit 1 to the United States' Memorandum in Opposition to Defendant Marshall's Motion to Dismiss Due to Pre-accusatory Delay.

Date: December 31, 2008

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on December 31, 2008, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

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Dana Hanna

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Marty J. Jackley
United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079-02

ORDER SEALING EXHIBIT 1 TO UNITED STATES' MEMORANDUM IN OPPOSITION TO DEFENDANT MARSHALL'S MOTION TO DISMISS DUE TO PRE-ACCUSATORY DELAY

Upon Motion of the United States and good cause having been shown, it is hereby

ORDERED, that Exhibit 1 to the United States' Memorandum in Opposition to Defendant Marshall's Motion to Dismiss Due to Pre-accusatory Delay in the above-entitled matter be sealed until it is ordered unsealed.

Dated this _____ day of _____.

BY THE COURT:

_____
Veronica L. Duffy
Magistrate Judge

FILED
DEC 31 2008
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

UNITED STATES' MEMORANDUM IN OPPOSITION TO DEFENDANT MARSHALL'S MOTION TO DISMISS DUE TO PRE-ACCUSATORY DELAY

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant US Attorney Robert A. Mandel and hereby files the United States' Memorandum in Opposition to Defendant Marshall's Motion to Dismiss Due to Pre-Accusatory Delay. The United States is requesting denial of Defendant Marshall's motion based upon the Defendant's failure to meet his burden that: (1) any delay resulted in actual and substantial prejudice to the presentation of the defense; and (2) the United States intentionally delayed his indictment either to gain a tactical advantage or to harass him. Defendant has failed to set forth sufficient evidence to support the necessity for further hearing on this matter.

On August 20, 2008, Defendant Marshall was indicted by the grand jury for aiding and abetting in the unlawful killing of Anna Mae Aquash on or about the 12th

day of December, 1975, in violation of 18 U.S.C. §§ 1111, 1153, and 2. On October 7, 2008, the grand jury issued a superseding indictment joining Co-Defendants Graham and Marshall for the unlawful killing of Anna Mae Aquash.

An indictment for any offense punishable by death, which includes § 1111, may be brought at any time without limitation. See 18 U.S.C. § 3281; Coon v. United States, 411 F.2d 422, 423 (8th Cir. 1969). A statute of limitations standing alone does not fully define a defendant's rights with respect to events occurring prior to indictment in that the Due Process Clause has a limited role to play in protecting against only the most oppressive delay. See United States v. Lovasco, 431 U.S. 783, 788-89 (1977); United States v. Gladney, 474 F.3d 1027, 1030-31 (8th Cir. 2007); United States v. Haskell, 468 F.3d 1064, 1070 (8th Cir. 2006); United States v. Sturdy, 207 F.3d 448, 452 (8th Cir. 2000); United States v. Taylor, 603 F.2d 732, 735 (8th Cir. 1979).

Procedures and burdens associated with examining a claim of pre-indictment delay are strict and clear in this circuit:

> The Fifth Amendment's Due Process Clause protects a criminal defendant against unreasonable pre-indictment delay. Id. To prove a violation of his due process rights, [defendant] must establish the delay resulted in actual and substantial prejudice to the presentation of the defense and the government intentionally delayed [defendant's] indictment either to gain a tactical advantage or to harass him. Id. The court will inquire into the reasons for delay *only* where actual prejudice has been established. United States v. Sturdy, 207 F.2d 448, 452 (8th Cir. 2000). To establish actual prejudice, a defendant must identify witnesses or documents lost during the delay period. Id. However, actual prejudice cannot be established by defendant's speculative or conclusory claims of possible prejudice as a result of the passage of time. Id. The defendant carries the burden to show the lost testimony or information is not available through other means. Id.

See Gladney, 474 F.3d at 1030-31.

Defendant has failed to meet his necessary burden to demonstrate either actual prejudice or inappropriate intentional delay by the United States.

I. NO ACTUAL AND SUBSTANTIAL PREJUDICE

The gravamen of Defendant Marshall's claim for actual and substantial prejudice is based upon: (1) the loss of Defendant Marshall's mother, Cora Gallego, and stepfather, Joseph Gallego, who would testify the Defendant had a strong motive not to have any firearms in his home; (2) Arlo Looking Cloud's taped interview of November 17, 1994; and (3) Theda Clarke's infirmities due to age. See Marshall Memorandum in Support of Motion to Dismiss at p.4-5 (DE 97).

As for Defendant's mother and stepfather, Defendant Marshall significantly fails to claim or set forth any evidence that either were present at Dick Marshall's residence the evening he provided the gun, shells, and counsel to Graham, Clarke, and Looking Cloud. Defendant Marshall's claim that he had a strong motive not to have any firearms in his home does not carry his burden to show that information is not available through other means. See United States v. Sturdy, 207 F.3d at 452 (it is not sufficient for defendant to make speculative or conclusory claims of possible prejudice as a result of the passage of time). See also United States v. Brockman, 183 F.3d 891, 895 (8th Cir. 1999). Indeed, it does not require Defendant Marshall's mother nor stepfather to establish what Defendant's bond conditions were in his other murder case, and perhaps more importantly, whether Defendant Marshall breached these bond conditions.

On March 1, 1975, Dick Marshall shot and killed Martin Montileaux at the Scenic Bar. See State v. Marshall, 264 N.W. 2d 911, 914-15 (SD 1978). A jury convicted Dick Marshall of premeditated murder, which was affirmed by the South Dakota Supreme Court. Id. On or about December 12, 1975, the date of Defendant Marshall's alleged conduct associated with the death of Anna Mae Aquash, he was on pre-trial release awaiting his trial for the Montileaux murder. Defendant Marshall represents in his motion that apparently to satisfy a part of his pretrial release conditions, firearms in his residence consisting of a rifle and a shotgun, were taken to his mother and stepfather's residence. See Defendant Marshall's Memorandum, p.4.

The first flaw in Defendant Marshall's argument is that the murder weapon in this instance was a .32-caliber revolver, as opposed to a rifle or shotgun. He further fails to make mention of the additional rifles and revolvers in his possession during the high speed chase in the Montileaux matter on March 1, 1975. This included an H&R .32-caliber revolver, released from custody on or about June 1, 1975, approximately six months prior to Dick Marshall's conduct associated with the murder of Anna Mae Aquash. See id.; Graham discovery 04963. This, in combination with the significant fact that neither Defendant Marshall's mother nor his stepfather were at his residence on or about December 12, 1975, wherein it is alleged he provided the .32-caliber murder weapon, shells, and counsel, militates heavily against any prejudice.

Similarly, Defendant Marshall's concerns associated with Arlo Looking Cloud's interview of November 17, 1994, ring hollow. First, Defendant Marshall has the ability

to subpoena Arlo Looking Cloud at trial. Furthermore, Defendant Marshall has been provided the actual recording of the interview, a transcript of the interview, as well as all reports associated with the 1994 interview currently in the United States' control.

In relation to Theda Clarke, Defendant Marshall has been provided the report of the July 25, 2000, conversation between cooperating witness Maverick and Theda Clarke. In the context of discussing Anna Mae as an informant, Clarke made statements against interest, including: "yeah, that's why we did it and it wasn't ever going to happen again." See summary of Clarke meeting 01-22P21, Graham 04430. Defendant Marshall has been provided the name of the cooperating witness and has every right to subpoena said witness for trial or to otherwise cross-exam the cooperating witness to the extent the witness testifies at trial.

Defendant has failed to meet his burden to demonstrate actual and substantial prejudice obviating the need to inquire further into the reasons for delay. See Sturdy, 207 F.3d at 452 ("the court will inquire into the reasons for delay only where actual prejudice has been established").

II. NO INAPPROPRIATE INTENTIONAL DELAY

It is well-settled in this circuit that the appropriate standard once actual and substantial prejudice is established by the defense is that the government intentionally delayed the indictment either to gain a tactical advantage or to harass the defendant. See Gladney, 474 F.3d at 1030; Haskell, 468 F.3d at 1070; Sturdy, 207 F.3d at 452; and Brockman, 183 F.3d at 895. The United States is cognizant that in United States v.

Jackson, 446 F.3d 847 (8th Cir. 2006), the Eighth Circuit recognized that the Supreme Court has suggested *in dicta* that the state of mind prong might be satisfied if the government delay was "in reckless disregard of its probable prejudice impact upon the defendant's ability to defend against the charges." Id. at 849-50 *2 (*quoting* United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) In U.S. Currency, 461 U.S. 555, 563 (1983)). As demonstrated below, under either the intentional or reckless analysis, Defendant has failed to meet this high burden.

For important and obvious reasons, prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish a suspect's guilt beyond a reasonable doubt. See Lovasco, 431 U.S. at 791. To artificially impose such a duty "'would have a deleterious affect upon both the rights of the accused and upon the ability of society to protect itself.'" Id. (*quoting* United States v. Ewell, 383 U.S. 116, 120 (1966)). "From the perspective of law enforcement officials, a requirement of immediate prosecution upon probable cause is equally unacceptable because it could make obtaining proof of guilty beyond a reasonable doubt impossible by causing potentially fruitful sources of information to evaporate before they are fully exploited." Lovasco, 431 U.S. at 791-92. As further recognized by the Eighth Circuit, investigative delay has consistently been held reasonable and in accordance with due process. See Taylor, 603 F.2d at 735 (other citations omitted).

The gravamen of Defendant Marshall's claim of intentional bad faith or reckless disregard by the United States centers around a cooperating witness and Theda Clarke.

See Defendant Marshall Memorandum, p.6-7. Defendant Marshall once again conveniently ignores other significant and incriminating evidence associated with his conduct. See generally United States' Opposition to Severance, p.10 (Defendant Marshall's failure to recognize his own admissions against interest, coupled with additional witness discovery that has been provided, including eyewitness accounts from other individuals than Graham, Looking Cloud, or Dick Marshall).

Defendant Marshall made at least two significant statements to the cooperating witness on separate occasions. On July 27, 2001, Defendant Marshall, among other matters, confirmed Anna Mae's presence at his home during the time in question. See Exhibit 1 to the United States' Opposition to Severance. Defendant Marshall has this recording, as well as the complete transcript. Furthermore, Defendant Marshall is entitled to subpoena and/or cross-examine the cooperating witness associated with his statements. Defendant Marshall and the cooperating witness had a follow-up conversation for which Defendant has been provided the cooperating witnesses' handwritten notes. They discuss the baggage note, the .32-caliber weapon, and Defendant Marshall provides the response of "back in the day when you was asked to do something, somebody asked you for something, you didn't ask too many questions." See Exhibit 3, United States' Opposition to Severance. Again, Defendant Marshall has the ability to subpoena the cooperating witness or cross-examine the cooperating witness regarding these statements.

Defendant Marshall's arguments relating to Theda Clarke again fail to establish either intentional or reckless delay. Defendant Marshall has the opportunity to subpoena or cross-examine the cooperating witness regarding Clarke's statements to the cooperating witness. Furthermore, Defendant Marshall has failed to establish a point in time for which he believes Theda Clarke would have been available and equally important, how her availability would in any way assist in his defense.

Finally, to further demonstrate that the investigative delay in this matter was in good faith, the United States is submitting under seal the grand jury testimony from August 20, 2008 (Graham 0487-04899).

III. CONCLUSION

The Defendant has failed to establish that any delay has resulted in actual and substantial prejudice to the presentation of the defense. At best, Defendant has set forth speculative or conclusory claims and has failed to show that any material lost testimony or information is not available through other means. Because Defendant has failed to establish actual and substantial prejudice, the United States is entitled to denial of Defendant Marshall's motion without further analysis.

Furthermore, the Defendant has failed to sufficiently establish the United States either intentionally or recklessly delayed the indictment to either gain a tactical advantage or to harass the Defendant. Any delay was appropriately investigative in nature.

Date: December 31, 2008

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on December 31, 2008, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

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Marty J. Jackley
United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079-02

UNITED STATES' MEMORANDUM OPPOSING DEFENDANT MARSHALL'S MOTION TO DISMISS FOR SELECTIVE PROSECUTION

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and AUSA Robert A. Mandel and respectfully submits its Memorandum Opposing Defendant Marshall's Motion to Dismiss for Selective Prosecution. The United States is requesting denial of Defendant Marshall's motion in its entirety based upon Defendant's failure to meet his burden. Specifically, Defendant Marshall has failed to establish he has been singled out for prosecution while others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted. He has also failed to demonstrate that his prosecution is based upon an impermissible ground, such as race, religion, or his exercise of his First Amendment right to free speech.

I. DISCUSSION

Procedures and burdens associated with examining a claim of selective prosecution are rigorous and clear in this circuit:

> To establish the essential elements of a prima facie case of selective discrimination, a defendant must first demonstrate that he has been singled out for prosecution while others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted. Second, the defendant must demonstrate that the government's discriminatory selection of him for prosecution was based upon an impermissible ground, such as race, religion or his exercise of his first amendment right to free speech.

United States v. Catlett, 584 F.2d 864, 866 (8th Cir. 1978); United States v. Swanson, 509 F.2d 1205, 1208-09 (8th Cir. 1975); United States v. Eklund, 733 F.2d 1287, 1289-90 (8th Cir. 1984) (applying the Catlett two-part test); United States v. Perry, 152 F.3d 900, 903 (8th Cir. 1998) (recognizing the justifications for a "rigorous standard" for the elements of a selective prosecution claim).

The gravamen of Defendant Marshall's selective prosecution claim is premised upon "[T]he government has never sought an indictment against Theda Clarke, in spite of compelling evidence of her guilt" which "would appear to be an arbitrary classification based on age." See Defendant Marshall's Motion to Dismiss for Selective Prosecution, p.1-2. Defendant has failed to make a preliminary or threshold showing of the essential elements of the selective prosecution defense. See United States v. Jacob, 781 F.2d 643, 647 (8th Cir. 1986).

First, Defendant has not shown that he has been singled out for prosecution while others similarly situated have not been prosecuted for similar conduct. To date, three individuals involved in the criminal venture of Anna Mae Aquash's murder have been indicted. Arlo Looking Cloud has been charged and his conviction has been affirmed by the Eighth Circuit Court of Appeals. See United States v. Looking Cloud, 419 F.3d 781 (8th Cir. 2005). Defendant John Graham has been indicted and is scheduled to stand trial with Defendant Marshall beginning February 24, 2009.

Defendant Marshall's renewed attempts to claim that either Clarke's or Graham's guilt is more compelling than the evidence the government intends to offer against Defendant Marshall fails to satisfy his rigorous burden. This self-serving claim, however, overlooks significant incriminating evidence associated with his conduct. See generally United States' Opposition to Severance, p.10 (Defendant Marshall's failure to recognize his own admissions against interest, coupled with additional witness discovery that has been provided, including eyewitness accounts from other individuals than Graham, Looking Cloud, or Dick Marshall); United States' Memorandum Opposing Defendant's Motion to Dismiss Due to Pre-Accusatory Delay at p.3-4 (evidence of Defendant's firearms and related conduct).

Defendant has similarly failed to set forth a *prima facie* case for discriminatory selection of him for prosecution based upon an impermissible ground, such as race, religion, or his exercise of his First Amendment right to free speech. Specifically, the Defendant's claim that the United States' decision to prosecution Marshall and to forego

prosecution of Clarke "would appear to be an arbitrary classification based on age" is both legally and factually inaccurate. Defendant Marshall appears to set forth a reverse age discrimination claim, that he was apparently indicted due to his relative youthfulness and has failed to demonstrate that his prosecution is based upon an impermissible classification. See generally 29 U.S.C. § 621 et seq. (Age Discrimination in Employment Act of 1967); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (holding age classifications not violating the Equal Protection Clause). In any event, two other members of the joint criminal venture of similar age to Defendant Marshall, John Graham and Arlo Looking Cloud, have been charged for their aiding and abetting and conduct associated with this criminal venture.

II. CONCLUSION

Defendant has failed to establish the essential elements of a *prima facie* case of selective prosecution warranting dismissal of Defendant's motion in its entirety. Defendant has not sufficiently shown that he was singled out for prosecution while others similarly situated have not been prosecuted particularly in light of the prosecution of both Graham and Looking Cloud. Similarly, he has not sufficiently set forth evidence that the government's selection of him for prosecution was discriminatory and based upon an impermissible ground, such as race, religion, or exercise of the First Amendment right to free speech.

Date: January 2, 2009

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on January 2, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Facsimile at
- ☐ Federal Express
- ☒ Electronic Case Filing

Marty J. Jackley
United States Attorney

This document has been filed electronically.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

UNITED STATES' RESPONSE TO DEFENDANT GRAHAM'S OBJECTION TO ORDER ON DEFENDANT'S MOTION TO SEVER

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and AUSA Robert A. Mandel and respectfully submits its Response to Defendant Graham's Objection to Order on Defendant's Motion to Sever. Pursuant to 28 U.S.C. § 636(b)(1)(A), Defendant has failed to demonstrate that the Magistrate Judge's Order on Severance is clearly erroneous or contrary to law. The Magistrate Judge properly applied the law of this circuit as established in United States v. Spotted Elk, 548 F.3d 641 (8th Cir. 2008). Indeed, the United States Supreme Court has made it clear that the Confrontation Clause does not apply to non-testimonial statements by an out-of-court declarant. See Davis v. Washington, 547 U.S. 813, 823-26 (2004); Whorton v. Bockting, 549 U.S. 406 (2007).

The Magistrate Court's decision properly determined that the statements at issue to both the cooperating witness and the media are non-testimonial and do not trigger the protections of the Confrontation Clause under either Crawford or Bruton. See Davis, 547 U.S. at 825; Spotted Elk, 548 F.3d at 662; United States v. Watson, 525 F.3d 583, 589 (7th Cir. 2008).

Finally, Defendant Marshall's grand jury testimony and the respective Defendants' statements to law enforcement officers neither sufficiently implicate one another or otherwise give rise to a clear likelihood of prejudice. Neither Defendant Graham nor Marshall's statements place sufficient responsibility for the murder on the other. See Hollins v. Dep't of Corr., State of Iowa, 969 F.2d 606 (8th Cir. 1992). Both defendants have failed to demonstrate that the risk of any minimal prejudice posed by a joint trial could not be cured by careful and thorough jury instructions, or limited redaction at trial in the event this Court deems it appropriate. See United States v. Mickelson, 378 F.3d 810, 818 (8th Cir. 2004). Accordingly, the United States respectfully requests this Court deny Defendants' requests for severance.

Date: January 2, 2009

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on January 2, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
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- ☐ Federal Express
- ☒ Electronic Case Filing

Marty J. Jackley
United States Attorney

This document has been filed electronically.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN GRAHAM, aka JOHN BOY PATTON, and VINE RICHARD MARSHALL, aka RICHARD VINE MARSHALL, aka DICK MARSHALL, Defendants.	)	CR. 08-50079-01, -02 ORDER ON DEFENDANT JOHN GRAHAM'S MOTION TO COMPEL PRODUCTION OF STATEMENTS

Defendant John Graham moved the court for an order compelling the government to produce certain statements of his pursuant to Fed. R. Crim. P. 16–specifically to identify which of several versions of particular statements would be offered as evidence at trial. See Docket 91. Although the government resists the motion, it does so on the basis that the statements were identified in conjunction with the government's response to both defendants' motions to sever. Mr. Graham has notified the court that, following receipt of several documents from the government, this motion is now moot. Accordingly, it is hereby

ORDERED that Mr. Graham's motion to compel the government to produce statements [Docket 91] is denied as moot.

NOTICE OF RIGHT TO APPEAL

Pursuant to 28 U.S.C. § 636(b)(1)(A), any party may seek reconsideration of this order before the district court upon a showing that the order is clearly erroneous or contrary to law. The parties have ten (10) days after service of this order to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. See Fed. R. Crim. P. 58(g)(2). Failure to file timely objections will result in the waiver of the right to appeal questions of fact. Objections must be timely and specific in order to require review by the district court.

Dated January 5, 2009.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

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

GOVERNMENT'S RESPONSE TO COURT'S ORDER ON DEFENDANT MARSHALL'S MOTION FOR PRODUCTION OF HANDWRITTEN NOTES

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 the Court's Order on Defendant Marshall's Motion for Production of Handwritten Notes as follows:

The United States has contacted each of the non-lawyer individuals present at the Fritz Arlo Looking Cloud interview conducted on November 17, 1994. None of these individuals has any recollection of any notes being taken at that interview, which was tape recorded, nor does any of these individuals have any notes from the interview. The individuals contacted were James Graf, Robert Ecoffey, Mitch Pourier, Rick Iannucci, and Abe Alonzo. Accordingly, the

United States has not delivered to the court for *in camera* inspection any hand-written notes since none are known to exist.

Respectfully submitted this 6th day of January, 2009.

/s/ Robert A. Mandel

ROBERT A. MANDEL
Assistant United States Attorney
515 9th Street #201
Rapid City, SD 57701
605.342..7822
FAX: 605.342.1108
Robert.Mandel@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of January, 2009, I served by electronic transmission, a true and correct copy of the foregoing Government's Response to Court's Order on Defendant Marshall's Motion for Production of Handwritten Notes on:

Dana Hanna
Attorney at Law

John Murphy
Attorney at law

/s/ Robert A. Mandel

Robert A. Mandel

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN GRAHAM, aka JOHN BOY PATTON, and VINE RICHARD MARSHALL, aka RICHARD VINE MARSHALL, aka DICK MARSHALL, Defendants.	)	CR. 08-50079-01, -02 ORDER ON DEFENDANT MARSHALL'S MOTION FOR PRODUCTION OF HANDWRITTEN NOTES [Docket 110]

Defendant Richard Marshall filed a motion seeking an order compelling the government to provide directly to him, or to the court for *in camera* inspection, the handwritten notes of persons present during an interview of Arlo Looking Cloud in Denver, Colorado, on November 17, 1994. The motion was necessitated because, although the interview of Mr. Looking Cloud was tape-recorded, and the tape recording as well as a transcript of the tape was provided to defendants in discovery, part of an answer Mr. Looking Cloud gave to an important question was not recorded because the tape came to an end.

The government responded to Mr. Marshall's motion indicating its willingness to submit any such notes of non-lawyers present at the interview to the court for *in camera* inspection. The court then issued an order directing the

government to submit any hand-written notes to the court by January 5, 2009, for *in camera* review.

The government did not submit any notes to the court. Instead, the government filed a written response indicating that it had contacted the non-lawyers present at the interview and inquired about the existence of any hand-written notes. Specifically, the government contacted James Graf, Robert Ecoffey, Mitch Pourier, Rick Iannucci, and Abe Alonzo, all of whom indicated to the government that they do not recall taking, have no, and are not aware of any hand-written notes from the interview. Accordingly, it is hereby

ORDERED that Mr. Marshall's motion to compel the production of hand-written notes from the November 17, 1994, law enforcement interview of Arlo Looking Cloud [Docket No. 110] is denied as moot because there are no such notes of any non-lawyers in existence.

As to the notes from any lawyers, those notes would presumably be protected by attorney-client privilege or the work product doctrine. If Mr. Marshall believes that he can demonstrate grounds for obtaining attorney notes, this order is without prejudice to his ability to refile this motion and make whatever showing is necessary to obtain notes from any attorney in attendance at the interview. Any subsequent motion on this subject should first demonstrate the existence of any attorney notes, identifying who took such

notes and who currently possess the notes. The motion should also specifically address the attorney-client privilege and work product doctrine.

NOTICE OF RIGHT TO APPEAL

Pursuant to 28 U.S.C. § 636(b)(1)(A), any party may seek reconsideration of this order before the district court upon a showing that the order is clearly erroneous or contrary to law. The parties have ten (10) days after service of this order to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. See Fed. R. Crim. P. 58(g)(2). Failure to file timely objections will result in the waiver of the right to appeal questions of fact. Objections must be timely and specific in order to require review by the district court.

Dated January 7, 2009.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S MOTION IN LIMINE #2

NOW COMES defendant Richard Marshall, by and through his attorney Dana L. Hanna, and pursuant to Federal Rules of Evidence 104 and 801(d)(2)(B), hereby moves the Court to preclude the government from offering certain testimony from prosecution witness Serle Chapman. Defendant Marshall further moves the Court to order a pre-trial hearing in which the Court will determine questions of foundation and admissibility. Grounds for the motion are that the government cannot satisfy the foundational requirements of FRE Rule 801(d)(2)(B), and that Chapman's testimony as to his own statements to the defendant would be inadmissible hearsay.

In support of this motion, Dana L. Hanna, attorney for the defendant, hereby affirms:

1. The government has given notice that it intends to offer a statement made by Serle Chapman and an alleged response by Richard Marshall as admissions of the defendant under Rule 801. Chapman, who was acting as a government informant, conducted an interview with Richard Marshall in 2001. The government contends that Chapman made a statement to defendant Marshall, in which Chapman asserted that a woman nicknamed "Choach" claimed that she had seen Anna Mae Aquash tied up at the home of Richard Marshall, and that Marshall replied to that statement by saying that "'Choach' got it right."

2. Richard Marshall unequivocally denies making any such statement to Chapman.

3. The government evidently intends to offer, through Chapman, Richard Marshall's alleged statement as an adoptive admission of Chapman's statement under Rule 801(d)(2)(B). The defendant is entitled to challenge the admissibility of these statements in an evidentiary hearing, outside the presence of the jury, in which the government would have the burden of establishing the facts, foundation, and admissibility of such evidence.

WHEREFORE the defendant moves the Court to schedule a pre-trial hearing to make preliminary findings of fact and to determine whether the government's proffer satisfies the evidentiary foundational requirements of Rule 801(d)(2)(B), and if the government fails to meet its burden, to enter an order precluding the government from offering such evidence at trial.

Dated this 7th day of January, 2009.

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing Motion in Limine #2 was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 7th day of January, 2009.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 DEFENDANT MARSHALL'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION IN LIMINE #2

The statement that Chapman claims was made to him by Richard Marshall in 2001–"Choach got it right"–is clearly being offered as an adoptive admission under Rule 801(d)(2)(B). Richard Marshall's alleged statement would be offered to show that he adopted or acquiesced in the statement made by Chapman to him–to-wit, that "Choach" told Chapman Anna Mae Aquash was tied up.

Whenever the government seeks to offer a purported adoptive admission under Rule 801(d)(2)(B), the defendant has a right to a pre-trial hearing before the Court in which the government has the burden of establishing that a particular statement was made by an out of court declarant, that the defendant heard and understood the statement; and that the defendant did or said something that manifested his belief in the truth of the statement. Whether all the elements necessary to give a response (or lack of response) to a statement the capacity to be admitted as an implied or adoptive statement are preliminary questions for the Court. Arpan v. United States, 260 F.2d 649, at 654. United States v. Carter, 760 F.2d 1579-1580 (11th Cir. 1985). See: Committee Comments on Jury Instruction 4.14, Model Criminal Jury Instructions for the District Court of the Eighth Circuit; 2 McCormick, Evidence §§ 261-262.

In a pre-trial hearing, which would be held under Rule 104, the Court would be the finder

of fact as to the witness's credibility and the relevant facts, and would rule on the legal question of admissibility of the evidence. The government would have the burden of proof for purposes of establishing admissibility. See: Arpan, above.

Therefore, this Court should order a pre-trial evidentiary hearing in this matter to determine the facts and rule on the question of whether or not a statement attributed by a government witness to Richard Marshall qualifies as an adoptive admission under Rule 801(d)(2)(B) of the Federal Rules of Evidence.

Dated this 7th day of January, 2008.

VINE RICHARD MARSHALL, Defendant

BY: */s/ Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Memorandum of Law in Support of Motion in Limine #2 upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
robert.mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 7th day of January, 2008.

/s/ Dana L. Hanna
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 DEFENDANT RICHARD MARSHALL'S OBJECTIONS TO ORDER ON DEFENDANTS' MOTIONS TO SEVER

Defendant Richard Marshall, through his attorney, Dana L. Hanna, objects to the Court's order on the defendant's Motion to Sever (Doc. 116). These objections are filed pursuant to 28 USC 636 (b)(1). Defendant Marshall specifically objects as follows:

1. Both defendants Graham and Marshall filed motions to sever their trials. The Magistrate Judge denied their motions. In its order, the Court ordered that certain evidence that would be offered by defendant Marshall should be redacted in order to prevent any possible Crawford or Bruton violations that would deprive defendant Graham of his right to confrontation. In addition to any objections previously raised by defendant Marshall in his memorandum of law in support of his motion for severance, his fundamental objection to the Court's order is that it prevents defendant Marshall from offering evidence that is favorable and exculpatory for him in order to prevent prejudice to co-defendant Graham.

2. In the trial, government witness Robert Ecoffey will testify that he was a federal law enforcement officer in 2003 conducting an investigation into the murder of Anna Mae Aquash; that on December 26, 2003, Ecoffey interviewed Richard Marshall; and that Richard Marshall freely and voluntarily told Ecoffey that when he was living with his ex-wife, Cleo Gates, in Allen, South Dakota, Theda Clarke, Anna Mae Aquash, "and two other young guys" whose

names he could not remember stopped at his home. In the Court order (p. 30), the Court states: "Although this statement *may* pose a Bruton problem if introduced as it is now written, it can easily be redacted to make sure that it is not interpreted by the jury to refer to Graham. For example, if Marshall's statement is changed to state that Clarke, Aquash, and 'some other people' or 'others' who Marshall could not name came to his house, the jury could not reasonably interpret Marshall's statement to inculpate Graham." For similar reasons, the Court also ordered redaction of a videotaped interview of Arlo Looking Cloud containing Ecoffey's statements of a purported out of court declaration by Richard Marshall (p. 32).

3. Defendant Richard Marshall intends to offer into evidence at trial a videotape of an interview of Arlo Looking Cloud in which he made statements to Robert Ecoffey shortly after his arrest in this case. The interview is approximately an hour long. In it, Looking Cloud makes a number of admissions concerning his participation, along with Theda Clarke and John Graham, in the taking of Anna Mae Aquash from Denver, Colorado to Rapid City, South Dakota and on to her eventual place of execution in the Badlands of South Dakota near Wanblee. In his statement, Looking Cloud makes no reference to anyone getting a gun from Marshall or anyone else. He makes no reference to stopping at the Marshall home in Allen, South Dakota. After Looking Cloud went through the events, including his presence at the execution of Anna Mae Aquash, Looking Cloud was questioned specifically by Ecoffey if he, Clarke, Graham, and Aquash had stopped at Richard Marshall's house in Allen, South Dakota. Looking Cloud repeatedly denied it and stated that he had no memory of stopping at the Marshall home. Ecoffey persisted and stated: "Cause I know–I know for a fact that you stopped there, cause both Dick and Cleo, are telling me that you, John Boy, and Theda stopped there, and that you had Anna Mae...." Looking Cloud continued to deny any memory of stopping at Richard Marshall's home with Aquash in spite of Ecoffey's insistence that he knew for a fact that he had made such a stop because Dick and Cleo Marshall had both told him so.

4. In its order, the Court correctly stated that Ecoffey's own investigative report of his interview with Marshall establishes that Richard Marshall never told Ecoffey that either Looking Cloud or Graham were at Marshall's house, only that "two young guys" were with Theda Clarke and Anna Mae Aquash. The Court also correctly recognized that Marshall's statements to

Ecoffey, whatever the statements were, were testimonial under Crawford. However, the Court ruled that if the Ecoffey-Looking Cloud interview is to be introduced at trial by defendant Marshall, it must be edited to redact Ecoffey's attribution of the statement to Richard Marshall; instead of allowing the jury to hear Ecoffey informing Looking Cloud that Dick and Cleo Marshall had both told him that Looking Cloud had stopped at their house with Clarke and Graham, and that they had asked Richard Marshall to keep Aquash there at his home, the statement would be changed to say that only Cleo Marshall had given that information to Ecoffey.

4. Defendant Marshall objects to that ruling because it deprives the defendant of important exculpatory evidence–evidence that goes directly to Arlo Looking Cloud's motive to falsely accuse Richard Marshall. Ecoffey's statement to Looking Cloud that Richard Marshall had accused him of being present with Anna Mae Aquash at his house in Allen, and that they had asked him to keep her there in his home, gives Looking Cloud a motive to make a false accusation implicating Marshall. Regardless of whatever the true facts were as to Marshall's statements to Ecoffey, in the interview Ecoffey told Looking Cloud that Richard Marshall made statements to Ecoffey that implicated Arlo Looking Cloud in the kidnapping and possibly the murder of Anna Mae Aquash. This information, whether it was true or not, would give Looking Cloud personal motive to pay Richard Marshall back by making a false accusation against him.

5. Furthermore, the defendant intends to cross-examine Looking Cloud on this point to prove motive to lie. Ecoffey's statement regarding what Marshall allegedly told him cannot be redacted in Richard Marshall's trial without denying Richard Marshall a powerful piece of evidence that he can use to attack the credibility of his main accuser and the government's case against him. The Sixth Amendment guarantees a defendant an opportunity for effective cross-examination of witnesses, including inquiry into motivation and bias. U.S. v. Beckman, 222 F.3d 512 (8th Cir. 2000).

6. Redaction of the videotaped evidence also deprives defendant Marshall of evidence that can be used to impeach the credibility of Robert Ecoffey and to attack the integrity of the investigation itself. In its unredacted true form, the videotaped interview between Ecoffey and Looking Cloud can be used to argue that Ecoffey lied to Arlo Looking Cloud when he said that

Richard Marshall made certain statements to him about Arlo Looking Cloud. His statement to Looking Cloud in which he tells Looking Cloud about statements allegedly made by Richard Marshall shows that Ecoffey either knowingly lied to a suspect in order to provoke an admission, or that he simply was negligent and unaware of the facts in his case. Either way, the statement can be used to attack the credibility and reliability of Robert Ecoffey. Moreover, even if Ecoffey's misstatement of the facts was erroneous as opposed to intentionally false, it can be used to attack the professionalism and integrity of the investigation itself. See: Kyles v. Whitley, 514 US 419 (1995).

7. If counsel for Richard Marshall is constrained in his cross-examination or in his presentation of evidence from exploring the full facts as to what Richard Marshall actually told federal investigators, Marshall would be deprived of evidence that is favorable to him. The defendant can argue that he freely and voluntarily gave information to federal law enforcement officers, thereby showing he had nothing to hide and no involvement in Graham and Looking Cloud's crimes. If defendant Marshall told Ecoffey that two young guys went to his house, then that is what the defendant should be able to adduce in his defense rather than "some other people," which could be interpreted by the jury as a deliberate attempt to refrain from giving details to a law enforcement officer in order to protect the "other people."

8. Defendant Richard Marshall objects to the magistrate's order, because if it is adopted, the result would be to deprive Richard Marshall of exculpatory evidence for his defense and of his right to cross-examine Looking Cloud on his motive to lie. The only solution to the Bruton and Crawford problems in this case is to sever the trials of the defendants.

Dated this 7th day of January, 2009.

VINE RICHARD MARSHALL, Defendant

BY: */s/ Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Objections to Order on Defendants' Motions to Sever on the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
robert.mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 7th day of January, 2009.

/s/ Dana L. Hanna
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 REQUEST PURSUANT TO 404(b)

The above-named Defendant, by and through his attorney, Dana L. Hanna, pursuant to the provisions of FED. R. EVID. 404(b), requests that the United States Attorney provide the undersigned with the general nature of any and all such evidence covered by this Rule sufficiently in advance of trial so that the Defendant can adequately prepare to defend against any such information. The Defendant requests that such information be provided no less than thirty days before trial.

Dated this 8th day of January, 2009.

VINE RICHARD MARSHALL, Defendant

BY: */s/ Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Request Pursuant to 404(b) on the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
robert.mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 8th day of January, 2008.

/s/ Dana L. Hanna
Dana L. Hanna

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S REQUEST PURSUANT TO 404(b)

Defendant John Graham, through his attorney, John R. Murphy, pursuant to the provisions of Fed. R. Evid. 404(b), requests that the U.S. Attorney provide the undersigned with the general nature of any and all such evidence covered by this Rule sufficiently in advance of trial so that Defendant can adequately prepare to defend against any such information. Defendant requests that such information be provided no less than fourteen (14) calendar days before trial.

Dated January 8, 2009.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

MARTY J. JACKLEY	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
ROBERT A. MANDEL	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
DANA HANNA	☐	U.S. Mail, postage prepaid
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Dated January 8, 2009.

/s/ John R. Murphy
John R. Murphy

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UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 MOTION FOR CONTINUANCE

NOW COMES defendant Richard Marshall, by and through attorney Dana L. Hanna, and hereby moves the Court to order a continuance of the trial and an extension of all deadlines in the trial schedule. Grounds for this motion are that more time for trial preparation is required in order to provide the defendant with his constitutional right to effective assistance of counsel.

In support of this motion, Dana L. Hanna, an attorney licensed to practice before this Honorable Court, hereby affirms:

1. I am court-appointed counsel for defendant Richard Marshall. Defendant Marshall was indicted approximately four and a half months ago, on August 20th, 2008. Trial in this matter is presently scheduled for February 24th, 2009.

2. This is a complex and unique case, involving extensive pre-trial preparation, investigation, and research on questions of law. The crime charged in the indictment occurred 33 years ago in 1975. The government has provided me with over 5,000 pages of discovery relating to the investigation into the murder of Anna Mae Aquash. The discovery includes investigative reports, interviews of witnesses, confidential informants' conversations with witnesses, transcripts of taped conversations, and Grand Jury testimony, compiled over a period of more than three decades. I have completed the reading the documents myself, but I have not completed

the process of reviewing all the discovery documents with my client Mr. Marshall.

3. At trial, in addition to presentation of evidence that relates directly to the killing of Anna Mae Aquash, it is foreseeable that the government will also seek to offer extensive evidence concerning violent events in the history of the American Indian Movement, as it did in the trial of Arlo Looking Cloud. In Looking Cloud's trial, for the purpose of proving motive and background, the government presented evidence about the murder of two FBI agents on the Pine Ridge Reservation on June 26, 1975, the 71-day occupation of the village of Wounded Knee in 1973, the arrest and prosecution on federal fire arms charges of Anna Mae Aquash, Kamook Banks a.k.a. Darlene Nichols and others in Oregon in November 1975 and other violent episodes, beyond the facts directly related to the murder of Anna Mae Aquash in December 1975. Although such evidence will not relate directly to Richard Marshall, since it is entirely foreseeable that the government will offer such evidence in the defendant's trial, the defendant must be prepared to confront that evidence.

4. The government has failed and refused to provide requested discovery of records and information related to the aforementioned "background" evidence regarding American Indian Movement activities, even though such evidence will likely to form an important part of the government's evidence in this trial, and even though government witnesses, including Darlene Nichols Ecoffey, a.k.a. Kamook Banks, participated directly in those events.

5. Based upon my investigation and analysis of the facts, I believe that a thorough understanding of the involvement of Anna Mae Aquash and other witnesses who will be testifying in this case in the AIM-related events of 1975, events that are likely to be the subject matter of testimony in Richard Marshall's trial, is essential to the defense of Richard Marshall. To cite one important example, I believe that the facts concerning the arrest and prosecution of Anna Mae Aquash, Kamook Banks, Leonard Peltier, Dennis Banks, and others on federal firearms and explosives charges in Oregon in November 1975 are directly relevant to factual issues in the murder of Anna Mae Aquash, and therefore, evidence relating to the Oregon prosecution and other federal prosecutions of AIM members in 1975 is important and necessary to the presentation of Richard Marshall's defense.

6. I have requested the government to provide me with all court records, writings and

information in the government's possession concerning the case of United States v. Loud Hawk, et al., the case in the District of Oregon that began in 1975, in which Anna Mae Aquash, government witness Kamook Banks (now Darlene Nichols Ecoffey) and others were indicted. I have also requested the government to provide me with records concerning the 1975 federal prosecution of government witness Kamook Banks a.k.a. Darlene Nichols Ecoffey on federal explosives charges in Kansas, also from 1975. Both those requests for production were refused by the government. I have made an independent attempt to get court records on that case from the Clerk of the Court of the United States District Court in Oregon. I have been informed that the court file cannot be located. I intend to prepare a motion for a subpoena duces tecum to seek the court file. I have a good faith reason to believe and do in fact believe that the court file is necessary for the preparation and presentation of Richard Marshall's defense in this trial.

7. More than 100 audio cassette tapes have been prepared by the government or its informants in the investigation of this case. Most of the tapes recorded conversations were recorded by cooperating witnesses in this case and many are tapes of conversations with witnesses and potential witnesses in this case. The subject matter of many of the conversations deals directly with the subject matter of evidence in this case. I have transcripts of some, but not all, of the conversations, but I have only been given a few tapes or compact discs of the conversations or interviews. I need to listen to the tapes to determine whether they contain information or evidence that is useful to defendant Marshall in his trial. Copies of those tapes (approximately 109 of them) were made by the government and provided to John Murphy, attorney for co-defendant John Graham. However, when I requested the government to make copies of those same tapes and provide them to me, that request was refused; the government will only allow me to hear the tapes at the office of the United States Attorney. I intend to make a motion to compel the government to provide me with copies of the tapes, which I believe are necessary to my client's defense.

8. I am in the process of preparing make motions to compel the government to provide me with Brady and Giglio material that I have requested, and which I believe the defendant is entitled to have, and which the government has refused or failed to disclose.

9. I require more time to locate and interview witnesses, gather records, subpoena

evidence, research legal issues and to investigate the case. I require more than the six weeks that are left between now and February 24 to prepare for the trial. Accordingly, I am requesting a continuance of two months.

10. I have conferred with my client Richard Marshall on this matter. He agrees with and consents to this request for a continuance and he has personally signed a waiver of his speedy trial rights, which is being filed along with this motion.

WHEREFORE defendant Richard Marshall respectfully requests the Court to continue his trial and to extend all deadlines in this case for at least two months beyond the current trial date and to extend the case schedule accordingly.

Dated this 7th day of January, 2009.

VINE RICHARD MARSHALL, Defendant

BY: _____

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby that I have served a true and correct copy of the foregoing Motion for Continuance on the other parties in this case by mailing the same, postage prepaid, the attorneys of record at the addresses listed below:

Marty J. Jackley
United States Attorney
PO Box 2638
Sioux Falls, SD 57101

Robert Mandel
Assistant United States Attorney
515 Ninth Street, #201
Rapid City, SD 57701

John Murphy
Murphy Law Office
328 E. New York St., #1
Rapid City, SD 57701

Dated this 7th day of January, 2009.

Dana L. Hanna

FILED
JAN 12 2009
CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL, a.k.a. RICHARD VINE MARSHALL, a.k.a. DICK MARSHALL, Defendant.	Case No. CR 08-50079 WAIVER OF SPEEDY TRIAL RIGHTS

COMES NOW Defendant Richard Marshall and hereby affirms:

1. I understand that my counsel, Dana L. Hanna, has filed a motion to continue the trial and to extend all deadlines in my case.

2. I have been informed or my right to a speedy trial as well as my other statutory and constitutional rights. I understand my statutory and constitutional rights.

3. I have no objection to a continuance in this matter.

4. I consent to a continuance of my case and do so voluntary, knowingly, and intelligently.

5. If the Court grants the continuance, I waive my speedy trial rights from the date of the Court's order to the date of the next scheduled trial date.

Dated this 7 day of January, 2009.

Richard Marshall
Richard Marshall, Defendant

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Waiver of Speedy Trial Rights on the other parties in this case by mailing the same to attorneys of record at the addresses listed below:

Marty J. Jackley
United States Attorney
PO Box 2638
Sioux Falls, SD 57101

Robert Mandel
Assistant United States Attorney
515 Ninth Street, #201
Rapid City, SD 57701

John Murphy
Murphy Law Office
328 E. New York St., #1
Rapid City, SD 57701

Dated this 9th day of January, 2009.

Dana L. Hanna

Defendant's Proposed Jury Instruction No. 1

In Count I of the Indictment, John Graham is alleged to be "an Indian." The government must prove beyond a reasonable doubt that Mr. Graham is an Indian for him to be guilty of the offense. If the government does not prove to you by evidence beyond a reasonable doubt that Mr. Graham is an Indian, it is your duty to find him not guilty of the offense.

To determine whether Mr. Graham is an Indian requires that the government proves two things to you beyond a reasonable doubt.

1. The government must prove beyond a reasonable doubt is that Mr. Graham has "Indian blood." To have Indian blood means to have some blood from an American Indian tribe, within the United States of America, and that the tribe has an existing recognized relationship with the United States government. If Mr. Graham only has blood from a Canadian Indian tribe, or some other country other than the United States of America, he does not have Indian blood as that term is used in this case.

2. The government must also prove beyond a reasonable doubt that Mr. Graham is legally recognized as an Indian. To be recognized as an Indian, a person must be enrolled in or affiliated with an American Indian tribe located in the United States that is formally recognized by the United States government. It is not required that Mr. Graham be enrolled in a federally recognized tribe to be "recognized as an Indian." It is important for you to note that social or spiritual involvement with members of a federally recognized tribe alone is not sufficient to find that Mr. Graham is "recognized as an Indian."

   Recognition requires that the government prove that Mr. Graham have some Indian blood, that the tribe from which he received his Indian blood is recognized by the United States government, and that he was enrolled in, recognized by or affiliated with that tribe.

If you find that the government has not proven beyond a reasonable doubt that Mr. Graham has "Indian blood" or is not recognized as an Indian, it is your duty to find Mr. Graham not guilty of Count I.

Defendant's Proposed Jury Instruction No. 2

In Count II of the Indictment, Annie Mae Aquash a/k/a Annie Mae Pictou is alleged to be "an Indian." The government must prove beyond a reasonable doubt that Ms. Aquash was an Indian for Mr. Graham to be guilty of the offense. If the government does not prove to you by evidence beyond a reasonable doubt that Ms. Aquash was an Indian, it is your duty to find Mr. Graham not guilty of the offense.

To determine whether Ms. Aquash is an Indian, the government must prove two things to you beyond a reasonable doubt. Both things must be proven to you beyond a reasonable doubt for you to find that Ms. Aquash is an Indian.

1. The government must prove beyond a reasonable doubt is that Mr. Graham has "Indian blood." To have Indian blood means to have some blood from an American Indian tribe, within the United States of America, and that the tribe has an existing recognized relationship with the United States government. If Ms. Aquash only has blood from a Canadian Indian tribe, or some other country other than the United States of America, she does not have Indian blood as that term is used in this case.

2. The government must also prove beyond a reasonable doubt that Ms. Aquash is legally recognized as an Indian. To be recognized as an Indian, a person must be enrolled in or affiliated with an American Indian tribe located in the United States that is formally recognized by the United States government. It is not required that Ms. Aquash be enrolled in a federally recognized tribe to be "recognized as an Indian." It is important for you to note, however, that social or spiritual involvement with members of a federally recognized tribe alone is not sufficient to find that Ms. Aquash is "recognized as an Indian."

   Recognition requires that the government prove that Ms. Aquash have some Indian blood, that the tribe from which she received her Indian blood is recognized by the United States government, and that she was enrolled in, recognized by or affiliated with that tribe.

If you find that the government has not proven beyond a reasonable doubt that Ms. Aquash has "Indian blood" or is not recognized as an Indian, it is your duty to find Mr. Graham not guilty of Count II.

FILED
JAN 13 2009

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	
	*	ORDER
JOHN GRAHAM, a/k/a John Boy Patton; and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

Pending before the Court is Defendant Richard Marshall's Motion for Continuance, Doc. 143. The Court has reviewed Defendant Marshall's Motion for a Continuance. The United States and Defendant John Graham shall respond to the request for a continuance no later than next Monday, January 19, 2009. Accordingly,

IT IS ORDERED:

1. That the United States of America and Defendant John Graham shall each file their position regarding Defendant Marshall's Motion for Continuance, with that filing to be received by the Court not later than Monday, January 19, 2009.

Dated this 13th day of January, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: _____
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)	CRIM. NO. 08-50079-01

MEMORANDUM IN SUPPORT OF PROPOSED JURY INSTRUCTIONS AND RENEWED MOTION FOR DISMISSAL

In support of Defendant Graham's proposed jury instruction regarding his and Aquash's status as Indians, and the government's burden of proof in regard thereto, Graham submits the following memorandum.

I. AUTHORITY IN SUPPORT OF PROPOSED INSTRUCTIONS

A two part test is used to determine whether a defendant or a victim are "Indians" as that term is used in 18 U.S.C. 1152 and 1153. The statutes themselves do not define the term.

First, the defendant or victim must be found to have "Indian blood." Second, the defendant or victim must be recognized as being Indian. United

States v. Antelope, 430 U.S. 641 (1977); In re Duane Garvis, 402 F.Supp.2d 1219, 1224 (E.D.Wa. 2004); United States v. Lawrence, 51 F.3d 150 (8th Cir. 1995).

A. THE INDIAN BLOOD REQUIREMENT

In its broadest sense, the term "Indian blood" refers to a recognition that a particular person's ancestors lived in America prior to the arrival of the Europeans. Canby, American Indian Law, 3rd Ed., p. 8. In the context of federal criminal law, when determining whether a person should be subject to federal or state jurisdiction, the definition of Indian blood is much narrower. See infra. The Canadian Indian blood that he and Aquash have does not fall within the definitions of Indian blood as that term is used in 18 U.S.C. 1152 and 1153.

1. LEGAL AND HISTORICAL CONTEXT

Neither "Indian" nor "Indian blood" are defined by statute. However, a long line of cases dating back to United States v. McBratney, 104 U.S. 621 (1882), instruct us as to how these terms are to be defined.

The term "Indian" and its component parts, such as "Indian blood," must be defined in a manner that recognizes and reflects the unique relationship between the United States government and some Indian tribes located within its borders. See Morton v. Mancari, 417 U.S. 535, 553 n. 24 (1974). These terms are not used to describe racial or ethnic origin; rather, these terms are to be defined through an

understanding of their distinct political and legal effect. See Mancari, 417 U.S. at 552-53 & n. 24 (1974).[1] See also United States v. Antelope, 430 U.S. 641, 643 & n. 2, 4 (1977) (citing United States v. McBratney, 104 U.S. 621 (1882)).

The term Indian in federal laws (whether that is in the employment law context or for the purposes of establishing federal criminal jurisdiction), and by extension component terms within that definition such as Indian blood, means an indigenous person who has an existing constitutional relationship with the United States government that stems from the commerce clause and/or the treaty power clause, and who is in a guardian-ward relationship with the United States. Alaska Assoc. General Contractors of America, Inc. V. Pierce, 694 F.2d 1162, 1167-68 (9th Cir. 1982) (citing Mancari, supra, and Antelope, supra). Thus, the terms Indian and Indian blood as they are used in the context of 18 U.S.C. 1152 and 1153 must be applied only to those indigenous persons who have an existing constitutional relationship with the United States government that stems from the commerce clause and/or the treaty power clause, and who are wards of the United States as a result of that relationship. See Antelope, supra, at 642-45.

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[1]Throughout this litigation and Graham's previous case, the government has attempted to frame this issue as one involving race based equal protection issues. Though that makes for interesting press, it is an approach that has been uniformly rejected by all courts addressing this issue. See Antelope, supra, at 645-47.

United States v. Antelope, 430 U.S. 641 (1977), is the primary case defining the term Indian for the purposes of establishing federal criminal jurisdiction under 18 U.S.C. 1152 and 1153. In that case, the Supreme Court stated that the principles articulated in Mancari for defining terms relating to Indians applied to federal prosecutions under these statutes. Id. The Antelope Court made clear that the definition of Indian under federal criminal law is to be based on the political and constitutional relationship between the United States and Indian tribes, and not upon racial or ethnic origin:

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

Id. at 645 (citations omitted).

In Antelope, the defendants were enrolled members of a federally recognized Indian tribe in the United States, the Coer d'Alene tribe. They were charged under 18 U.S.C. 1153 (the Major Crimes Act) with the murder and burglary of an non-Indian on the Coer d'Alene reservation. Id. at 642-43.

The defendants argued that the Major Crimes Act created an impermissible race-based classification structure by making it only applicable to Indians. Id. at

645. In rejecting that contention, the Court discussed the unique historical and constitutional relationship between the United States government and Indians, and defined the term Indian in 18 U.S.C. 1153 within that context. Id. at 647-48. Thus, because the defendants in that case were members of a federally recognized Indian tribe, and not because they were ethnically Indian, they were subject to federal prosecution under 18 U.S.C. 1153.

To illustrate the significance of an on-going legal and political relationship between tribes and the federal government to the definition of Indian, the Antelope Court discussed United States v. Heath, 509 F.2d 16, 19 (9th Cir. 1974). Antelope, supra, at n. 7. Heath was ethnically and racially an Indian. His tribe was located inside the United States. His tribe had once been federally recognized by the United States government. But, prior to the time Heath was charged with a crime, his tribe lost its federal recognition.

Even though the defendant was an Indian "anthropologically," he was deemed not an Indian for federal criminal jurisdictional purposes. Antelope, supra, at 647, n. 7. Notwithstanding his ethnically Indian blood, that blood did not come from a lineage that had an existing constitutional relationship with the United States. The Court held that a defendant loses his status as an Indian for criminal jurisdictional purposes when "his unique status vis-a-vis the Federal

Government no longer exists." Antelope, supra, at 647, n. 7.

This discussion in Antelope is vital to Graham's case. The government asserts that Graham and Aquash are Indian. To be Indian requires a finding that one has Indian blood. Therefore, the government must be asserting that the Canadian Indian blood possessed by Graham and Aquash is Indian blood as that term is used in federal criminal law.

That position ignores the well articulated principles enunciated by the Supreme Court that the term Indian must be defined in legal and political terms, not racial terms. Graham and Aquash may be ethnically Native American, as are the Mayans from Mexico and the Kalaallit from Greenland, as all can trace their origin to descendants who lived in the Americas prior to the arrival of the Europeans. But, the Canadian Indians, the Mayans, and the Kalaallit do not share a unique, existing constitutional relationship with the United States government. Therefore, their blood, though ethnically Native American or Indian, is not Indian blood.

To understand the flaw in the government's reasoning, one only need to ask the following question: How could the Supreme Court affirm that Heath – an American Indian, from a tribe within the United States, that was once formally

recognized by the United States government – had his Indian status extinguished when the political relationship ended, yet hold that a Canadian Indian from a band not in the United States and that has never had formal recognition by the government, was an Indian? It couldn't. The flaw in the government's position is that it fails to recognize the difference between Canadian Indians and American Indians, it fails to understand that the analysis begins with a defendant or victim's tribe of origin, and it doesn't account for the necessity of an on-going political relationship with the government for a person to be Indian. See infra.

2. INDIAN BLOOD MEANS BLOOD FROM RECOGNIZED AMERICAN INDIAN TRIBES, NOT CANADIAN INDIAN BANDS OR OTHER FOREIGN TRIBES

According to the government, a Canadian Indian's blood stands on equal footing with the blood of American Indians from federally recognized tribes. There is no other conclusion that can be drawn from the government's argument. The government concedes that neither Graham nor Aquash has any American Indian blood. But, the government contends that they have the "Indian blood" required for a determination that they are Indian under 18 U.S.C. 1152 and 1153.

Thus, the government must believe that Canadian Indian blood is no different than blood ties to federally recognized Indian tribes within the United

States for the purpose of defining who is an Indian under these criminal statutes. This analysis, by necessity, must be based on racial or anthropological grounds: it must be premised on the notion that ethnically Canadian Indians and American Indians are the same. However, this kind of racial or ethnic analysis has been repeatedly determined to be inappropriate when defining the term Indian for the purposes of federal criminal jurisdiction. Whether Canadian Indians and American Indians are ethnically similar, as the government contends, is irrelevant to this analysis. LaPier v. McCormick, 986 F.2d 303, 306 (9th Cir. 1993) (cited by Canby, supra) (ethnic and racial distinctions are not relevant to political and legal analysis required to determine whether one is an Indian). The inquiry should be whether Canadian Indians enjoy a special constitutional and political relationship with the United States government that places them in a guardian-ward status. This, they clearly do not. The legal and political distinction between Canadian and American Indians has been recognized for many years in many courts.

Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935 (Ct.Cl. 1974), involved land claims based on legislation from 1905. The government was attempting to defeat an Indian tribe's claim to aboriginal title to land in North Dakota. The government argued that because, at the time of the legislation, the land was frequently occupied by Canadian Chippewa Indians, the

land could not be considered the land of the American Chippewa Indians. Id. at 944. The government expressly acknowledged a legal distinction between members of the same ethnic tribe based on which side of the border they primarily resided on. Id.

In finding against the government, the court recognized the legal significance of the distinction between American Chippewas and Canadian Chippewas. Id. It held that because there was proof that sufficient numbers of American Chippewas lived in the territory in question, they could claim aboriginal title thereto, notwithstanding the periodic presence of Canadian Chippewas. Id. ("[W]e cannot say that the Commission lacked substantial support for holding (as we think it did) that American Chippewa full and mixed bloods, rather than Canadian mixed bloods, exercised sufficient dominion over the award area.").

Similarly, in Akins v. United States, 407 F.Supp. 748 (Cust. Ct. 1976), aff'd, 551 F.2d 1222 (Cust. & Patent App. Ct. 1977), the court drew a distinction between Canadian Indians and American Indians. Id. at 752-53. It also dispensed with another argument raised by the government in this case. The government has argued in Graham's case that the existence of the Jay Treaty of 1790, which allowed free passage across the U.S.-Canadian border for Indians, demonstrates that no distinction should be drawn between Canadian Indians and American

Indians. In Akins, a similar argument was made and rejected. The court noted that the Jay Treaty of 1790 had been abrogated in 1812 and has never been reinstated, which terminated the general ability of free crossing except as permitted by specific statute. Id. With this abrogation, so goes the fiction alleged by the government in Graham's case that ethnic Indians on both sides of the border are entitled to uniform recognition under the federal criminal laws of the United States.

The distinction between Canadian and American Indians was also recognized in Alaska Assoc. General Contractors of America, Inc. V. Pierce, 694 F.2d 1162 (9th Cir. 1982). That case involved Alaskan Natives. Id. at n. 10.

In attempting to define the term Alaskan Natives, the court noted that the same construct for defining Indian under federal law applied to Alaskan Natives. Specifically, the court noted that the definition was to be derived from the special political relationship between Alaskan Native groups and the United States government, not on racial or ethnic grounds. Id. at 1167-68 & n. 10. The court referred to numerous federal statutes that helped define who was an Alaskan Native. Id. Those statutes uniformly describe a political relationship with the United States when defining who is and isn't an Alaskan Native. For instance, the person must be a citizen of the United States, or have descended from persons who

lived in Alaska when the territory was acquired from Russia, or, in the case of Canadians, have been in Alaska since 1939. Id. at n. 10. Though the statutes discussed in that case are not at issue in this case, the principles are similar: For an indigenous person to be recognized under federal law as an Indian, they must have a long standing physical and political relationship with the United States government.

4. THE INDIAN BLOOD ANALYSIS LOOKS TO THE TRIBE OF ORIGIN, NOT THE PLACE OF AFFILIATION OR THE LOCUS OF THE CRIME

In addition to disregarding the political relationship with the United States government necessary for a person to be considered an Indian, and in addition to disregarding the recognized legal differences between Canadian and American Indians, the government has disregarded a key element to the analysis of whether Graham and Aquash are Indian: an identification of the "tribe in question." Specifically, the government wants this Court to focus on Graham and Aquash's activities once they came to the United States to determine whether they were Indians under federal law. Instead, the focus should remain on the tribe from which they got their Indian blood.

LaPier v. McCormick, 986 F.2d 303 (9th Cir. 1993) (cited by Canby, supra,

in both 3rd and 4th eds.), is important because it instructs us where to look when determining whether a person has Indian blood. This superficially seems like an obvious point, but as demonstrated in Graham's case, it is a point that can be clouded by other issues.

Consider that in Graham's case the government's theory boils down to the following: The defendant and the victim are Canadian Indians. They come from tribes that are not within the United States. Their tribes are not recognized by the United States government. The United States government is not responsible as a guardian to these tribes' members. Nonetheless, tribal members are "Indian" under 18 U.S.C. 1152 and 1153 because they came to the United States and, for a relatively short period of time, affiliated socially or spiritually with members of a federally recognized Indian tribe in the United States.

In order to make this case, the government's objective has been and will be to orient the Court toward what Graham and Aquash did in the United States, rather than from where they came. Under LaPier, the focus should remain on Canada, not the United States.

In LaPier, the defendant claimed enrollment in the Little Shell Band of Chippewas. That tribe is not federally recognized. Id. at 306. He was charged

with committing murder under 18 U.S.C. 1153 on the Blackfeet reservation in Montana, a federally recognized tribe.

The court found that LaPier was not Indian for federal criminal jurisdiction purposes.[2] When determining whether LaPier was Indian under 18 U.S.C. 1153, it was irrelevant to the court that LaPier was ethnically or racially an Indian through his affiliation with the Chippewas. Id. at 306. Similarly, the fact that the crime occurred on a federally recognized reservation did not factor into the analysis. Id. at 306. And, the court's analysis was not concerned with whom LaPier affiliated while on the Blackfeet reservation.

Instead, the court looked to where LaPier came from -- his tribe of origin -- to determine whether he sat in a unique relationship with the government by virtue of his affiliation with that tribe:

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[2]As with Lawrence and other decisions discussed above, the court held that the determination as to whether the defendant was an Indian was a jurisdictional matter:

> Because the crime occurred on an Indian reservation, LaPier's legal status as an Indian (or non-Indian) determines jurisdiction. If LaPier is legally an Indian, the federal court would have jurisdiction, 18 U.S.C. § 1153 (1988), but if he is not, the Montana state courts would have exclusive jurisdiction, because the victim was a non-Indian.

Id. at 304 (citing United States v. McBratney, 104 U.S. 621 (1882), and United States v. Wheeler, 435 U.S. 313, 325 n. 21 (1978). See also State v. Sebastian, 243 Conn. 115, 701 A.2d 13 (1997); United States v. Bruce, 394 F.3d 1215, 1218 (9th Cir. 2005); United States v. Dodge, 538 F.2d 770 (8th Cir. 1976).

> It is therefore the existence of the special relationship between the federal government and the tribe in question that determines whether to subject the individual Indians affiliated with that tribe to exclusive federal jurisdiction for crimes committed in Indian country.

Id. LaPier's tribe was the "tribe in question," not the Blackfeet tribe. LaPier's tribe, like the tribe in Heath, supra, had no existing legal relationship with the United States government. Therefore, LaPier was not an Indian and not subject to federal prosecution. Id. See State v. Sebastian, 243 Conn. 115, 701 A.2d 13 (1997) (discussion of distinctions between racial and political tribal affiliations). Accord State v. Daniels, 16 P.3d 650, 654 (Wash.App. Div. 3 2001) (Canadian Indian may have Indian blood but not be Indian for federal criminal jurisdictional purposes because he is not "enrolled or affiliated with a tribe that is recognized by the United States and is individually subject to United States jurisdiction.").

The government has referred to Ex Parte Pero, 99 F.2d 28 (7th Cir. 1938), cert. denied, 306 U.S. 643 (1939), for proposition that members of Canadian Indian bands, such as Aquash and Graham, can be Indians for the purposes of federal criminal laws such as 18 U.S.C. 1152 & 1153. Pero is cited in footnote 7 of the Antelope decision. In dicta, the Antelope Court left open the possibility that "nonenrolled" Indians might fall within the purview of the term Indian in 18 U.S.C. 1152 & 1153, but specifically declined to address that issue. Antelope,

supra, at n. 7.

The dicta in Antelope regarding Pero occurs within the same discussion of the Heath decision, and whether a nonenrolled person can ever be an Indian. The dicta does not in any manner suggest an expansion of the term "Indian" or "Indian blood" to include Canadian, Mexican or other indigenous Native Americans.

Further, the actual holding in Pero does not support the government's expansive view that the terms "Indian" and "Indian blood" apply to Canadian Indians and Canadian Indian blood. Consistent with the earlier decision in McBratney, supra, and as a precursor to the later decisions in Mancari and Antelope, Pero affirms that the focus of our inquiry should remain on whether a person comes from an Indian tribe that has a recognized political relationship with the United States government.

In Pero, both Pero and Moore, defendants in a murder case, claimed they were Indian and, thus, subject to federal, not state, prosecution. The Seventh Circuit Court of Appeals agreed.

In regard to the Indian blood issue, it was acknowledged that at the time of the crime neither defendant was an enrolled member in a federally recognized Indian tribe. Id. At 30-32. However, in finding the defendants Indian under

federal criminal law, the court relied heavily on the fact that each defendant had extensive blood connections with federally recognized Indian tribes in the United States. Id.

Defendant Moore, the court noted, was the child of full blood mother and half-blood father from the St. Croix Band of Lake Superior Chippewas, a federally recognized tribe in Wisconsin. Pero, supra, at 30-32 & n.13. Moore, his parents, and his relatives, all resided on the St.Croix's federally recognized reservation, and the court noted that Moore could be a member of that tribe (although not enrolled). Id. at 31.

The court emphasized that it was Moore's blood tie to a tribe with a recognized relationship with the United States government that was dispositive:

> Of special significance for the present question is the treaty relating to the Chippewas of Lake Superior (of which Moore is a member if he is an Indian), in which the mixed-bloods were expressly mentioned, and it was recognized therein that a mixed-blood could be a member of the Chippewas.

Pero, 99 F.2d at 31. Additionally, the court noted that but for circumstances outside his control, both Moore and his mother would have been enrolled in this recognized tribe. Id. at 32.

The court's analysis for defendant Pero was based on the General Allotment

Act, specifically whether he held his tribal land in patent trust or fee simple at the time of the crime charged. Finding that Pero had not been granted the land in fee simple at the time of the crime charged, and, thus, was still in a guardian-ward relationship with the United States, the court found him to be an Indian under 18 U.S.C. 1153. Id. at 29, 32-35.

The Pero court's analysis focused on the existing constitutional, treaty and guardian-ward relationship between the alleged Indian, his tribe of origin, and the federal government. Id. at 31-32. Nothing in this decision suggests that the term Indian should apply to Canadian Indians, or that the concept of Indian blood refers to anything but blood ties with federally recognized Indian tribal members.

The reference to Pero in Antelope was in regard to nonenrolled Indians. Neither defendant in Pero was enrolled. However, the tribes to which they were affiliated through blood were federally recognized and had an on-going relationship with the United States government.

Thus, the dicta in Antelope and the holding in Pero do not suggest a dramatic revision of the definition of Indian or Indian blood to include members of tribes from foreign countries that have no constitutional relationship with the United States. Instead, that dicta and the Pero holding merely suggest that a

person who lacks formal enrollment in a federally recognized American Indian tribe, but who has sufficient blood ties to that tribe, may be considered to have Indian blood under 18 U.S.C. 1152 and 1153. These cases do not expand federal criminal jurisdiction to include Canadian Indians.

In re Duane Garvis, 402 F.Supp.2d 1219, 1224 (E.D.Wa. 2004), further supports Graham's assertion that the term "Indian blood" can only be defined to include American Indian blood. Garvis does not support the government's contention that Canadians such as Graham and Aquash are Indians under 18 U.S.C. 1152 & 1153 because they have Canadian Indian blood and spent time with American Indians in the United States.

The defendant in Garvis was being prosecuted in tribal court. He claimed he was Indian, and should be tried in federal court.[3] Id. at 1120-21. Garvis was not enrolled in a federally recognized tribe, so the court had to determine whether he had Indian blood. The court noted that Garvis had Indian blood from four (4) federally recognized Indian tribes within the United States: the Colville, the Yankton Sioux, the Santee Sioux, and the Kootenai. Id. at 1221; 67 Fed.Reg. 134,

[3]Garvis's case involved the term Indian in 25 U.S.C. 1301(2). That term, however, defines an Indian as someone who would be considered an Indian under 18 U.S.C. 1153. To make this determination, the court had to determine whether Garvis would be an Indian under 18 U.S.C. 1153, making it applicable to this case.

pp. 46327-33 (list of federally recognized tribes as of 2002) (Colville, #56; Kootenai, #130; Santee, #261; and, Yankton, #329).

It was this fact that was essential to the court's determination that Garvis had the requisite "Indian blood" for federal jurisdiction under 18 U.S.C. 1153:

> In this case, it is not disputed that Mr. Garvis does in fact have Indian blood, although that quantum is limited. His maximum Indian blood in any federally recognized Indian Tribe is 1/16th. Cumulating the Indian blood of his biological father and mother, Garvis' total Indian blood from all tribes would appear to be 6/32nds.

Id. at 1225.[4] See also United States v. Lawrence, 51 F.3d 150 (8th Cir. 1995) (victim's Indian blood from the federally recognized Oglala Sioux Tribe sufficient to find she had Indian blood). [5]

These cases orient our analysis of Graham's case. The first determination we must make is whether Graham and Aquash have Indian blood. When deciding

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[4]The court's computation of blood from federally recognized tribes appears to be in error. All of the tribes identified in the decision are federally recognized. The total blood from federally recognized tribes appears to be at least 1/8th. The appellate court did not dispute the findings of the lower court that Garvis had at least 1/8th blood from federally recognized tribes. It is unclear where the 1/16th 6/32nds numbers came from. In any regard, all of the tribes identified were American Indian tribes, in the United States, with federal recognition.

[5]Notwithstanding this finding, the victim was determined not to be Indian based on her lack of Indian recognition.

whether Graham or Aquash had Indian blood, we must determine where they got their blood from. Specifically, we must ask whether their blood comes from an American Indian tribe with an on-going constitutional relationship with the United States government that renders the government and tribe to be guardian and ward. If not, they do not have Indian blood and are not an Indian. Any activities by Graham or Aquash once in the United States are irrelevant to this inquiry, as is the issue of whether they are ethnically Native American.

Accordingly, in this case, if this is a proof matter for the jury, the jury should be instructed that absent a showing beyond a reasonable doubt that Graham and Aquash have blood ties to an American Indian tribe within the United States that had a recognized relationship with the United States government at the time the crime was committed, the jury must acquit Graham of the crimes charged.

B. INDIAN RECOGNITION

The second step of the analysis, whether Graham and Aquash were recognized as Indians, is closely related to the first step. As a result, many of the same principles and cases are discussed, infra.

1. LEGAL AND POLITICAL CONTEXT

United States v. McBratney, 104 U.S. 621 (1882), Morton v. Mancari, 417

U.S. 535 (1974), and United States v. Antelope, 430 U.S. 641 (1977), make clear that there is no racial or ethnic component to the determination of whether a person is recognized as an Indian. The concept of Indian recognition is derived solely from the unique relationship that exists between the United States government and some Indian tribes (and their members) within its territory. Mancari, 417 U.S. at 552-53 & n. 24; Antelope, 430 U.S. at 643 & n. 2, 4; Alaska Assoc. General Contractors of America, Inc. V. Pierce, 694 F.2d 1162, 1167-68 (9th Cir. 1982).

Placing the definition of Indian within this context immediately narrows its applications to a particular sub-set of the wider group of people that claim to be ethnically Indian. Antelope, supra, (Indian is not an ethnic classification but a political relationship). Accordingly, the Major Crimes Act and 18 U.S.C. 1152 are recognized as statutes of limited application that are not applicable to those who are not legally defined as being Indian. Id. at 643-44, n. 2 & 4 (citing United States v. McBratney, 104 U.S. 621 (1882)).

The government has failed to identify any significant legal authority for the proposition that the term Indian, or the concept of Indian recognition, applies to Canadian Indians or others who do not originate from an American Indian tribe that has some form of a politically or legally recognized relationship with the

United States government. Antelope and its progeny do not support the government's position that the term Indian can be stretched so wide as to encompass indigenous people from foreign countries who associate with Indians inside the United States.

Illustrative of the need for federal recognition of a person's tribe for that person to be recognized as an Indian is the discussion in Antelope related to terminated tribes. The Antelope Court stated that the defendants in that case were enrolled members of the Coeur d'Alene tribe, and, thus, were Indians under 18 U.S.C. 1153. The Court opined that had the defendants been emancipated from the tribe, or had they been members of a tribe that had lost federal recognition, they would not have been subject to prosecution under the Major Crimes Act. Id. at 647 n. 7 (citing Heath, supra). This underscores the fundamental need for a person's tribe to have an on-going relationship with the United States government for the person to be recognized as an Indian.

2. THE GOVERNMENT'S RELIANCE ON "AFFILIATION" IS MISPLACED

To overcome the lack of an ongoing constitutional or guardian-ward relationship between Aquash and Graham's bands and the United States government, the government has asserted that their mere "affiliation" with

enrolled members of the Oglala Sioux Tribe is sufficient to make Graham subject to prosecution under 18 U.S.C. 1152 and 1153. File 03-50020, File Doc. 319, p. 6 ("Both Defendant Graham and Anna Mae Aquash were further affiliated with, among others, the Oglala Sioux Tribe.").

The government's argument is premised upon the holding in State v. Daniels, 16 P.3d 650 (Wash.App. Div. 3,2001). Because of this, a detailed review of Daniels is necessary.

Daniels is of little precedential value in this case. It is a state court decision from an intermediate court of appeals that has not been reviewed by the Washington State Supreme Court. See A Citizen's Guide to Washington's Courts, http://www.courts.wa.gov/newsinfo/resources/?fa=newsinfo_jury.brochure_guide &altMenu=Citi. The holding in regard to affiliation does not appear to have been adopted by any other court, state or federal.

The facts and subject matter in Daniels do not make it applicable to the present case. It is not a case involving a dispute between state and federal jurisdiction under 18 U.S.C. 1152 or 1153. Rather, it is a dispute over whether a minor criminal offense should be handled in tribal or state court. Id. at 652-53.

And, the facts were left unresolved as to whether the defendant was a

descendant of a tribe recognized by the United States government. Id. The case was not decided on the factual merits of a jurisdictional claim, but rather on whether the defendant had met his burden under state court precedent for putting the jurisdictional defense before the court. Id. It is the burden shifting aspects of the case for which it is routinely cited, not its impact on federal criminal law.

The conclusions reached in Daniels are largely unsupported, but to the extent they have legal and factual support, they support Graham's position. In Daniels, the court claims there are two prongs to determining whether a person is an Indian. First, whether the person is racially an Indian. Second, whether he is "enrolled in or affiliated with" a tribe that is recognized by the United States government. Id. at 654.

The Daniels court summarily concludes that because the defendant had some Canadian Indian blood, he was racially an Indian. Id. at 654. The court cites no authority whatsoever for this position. The analysis is perfunctory, and does not refer to the Indian blood issue or the holdings in Mancari and Antelope that require that such determinations be made with reference to the political and legal history of federal Indian relations.

The government relies on the analysis in Daniels in regard to the second

prong to assert that mere affiliation with members of a federally recognized Indian tribe makes one "recognized" as an Indian. Daniels does not stand for that proposition. Id. At 654.

In Daniels, the defendant did have Canadian Indian blood. However, he also claimed to have American Indian blood. He claimed he was part of Sitting Bull's band that fled from the United States to Canada. He also claimed to be Chippewa, Mississippi Sioux, Aberdeen, and Devil's Lake Sioux. The Daniel's court "affiliation" analysis was whether the defendant could show a blood relationship with any federally recognized Indian tribe, not whether he socialized with members of a federally recognized tribe:

> But the fact that Mr. Daniels is an Indian in the racial sense does not establish federal jurisdiction; he must also show a sufficient connection with a tribe recognized by the United States. A proper starting point for making that determination is to consult the BIA's list of federally recognized tribes published in the Federal Register. At the relevant time, the BIA list appeared at 63 Fed.Reg. 71941 (1998).
>
> Mr. Daniels claims to be part Chippewa and "Mississippi Sioux." He further claims his grandparents belonged to the "Aberdeen Band." The BIA list of tribes contains numerous Chippewa tribal entities, none of which Mr. Daniels has identified as the specific band with which he claims an affiliation. Of the many listed Sioux entities, none of them are called "Mississippi Sioux." The list contains no reference to the "Aberdeen Band."
>
> Mr. Daniels' argument is merely supported by Garry Standing's written

> statement that he believed Tom Standing was "registered" at the Devils Lake Sioux Tribe. The federally recognized Spirit Lake Tribe, located in North Dakota, was formally known as the Devils Lake Sioux Tribe. Thus, at most, the record shows by hearsay that Mr. Daniels' grandfather may have been enrolled in or affiliated with a recognized American tribe. Even if true, that does not mean Mr. Daniels is affiliated with the tribe for purposes of jurisdiction. Mr. Daniels has not shown the Spirit Lake Tribe recognizes him as a member. He does not claim membership in the Spirit Lake Tribe or received any membership benefits from it. Mr. Daniels has not even alleged setting foot there.
>
> Mr. Daniels has also alleged that the Colville Tribe has recognized him as an Indian and has provided him with services and privileges because he is an Indian. But Mr. Daniels has not produced any evidence to substantiate his claim. There is no documentation in the record connecting Mr. Daniels to the Colville Tribe. No one from the tribe testified as to Mr. Daniels' interaction with or acceptance by the Colvilles. Mr. Daniels testified that he lived on the reservation for merely a month.

Id. at 654-55. (emphasis added).

To the extent that Daniels stands for any principle relevant to this case, it stands for the principle that even a person with Canadian Indian blood must establish a blood tie to a federally recognized Indian tribe in order to be Indian. Nothing in Daniels suggests that mere social affiliation would be sufficient to make a person an Indian. And, the discussion of tribal recognition of Daniels is instructive. Note, the Daniels court did not suggest that social acceptance by a tribal member would be sufficient to make a person an Indian. Rather, formal recognition by an Indian tribe (i.e. the tribal government) would be required at

minimum. Id. Thus, the court's references to recognition by the Devil's Lake or Colville tribes as being necessary for a person to be an Indian.

Accordingly, if this Court were to adopt Daniels as being of precedential value, a jury instruction would be warranted that required a showing of some blood tie to an American Indian tribe, and formal recognition of a person's Indian status by a recognized tribe, as pre-requisites to a finding by the jury that a defendant is an Indian.

Graham asserts, however, that Daniels should not guide this Court's analysis of what constitutes Indian recognition. To weaken the definition of the term Indian to include persons such as Graham and Aquash would be to weaken "the solemn commitment of the Government toward the Indians" that is affirmed when that term is applied only to those with a special relationship with the United States. See Mancari, 417 U.S. at 553 (citation omitted). Under the broad view of Daniels that is promoted by the government, any indigenous person who socially affiliates with members of a federally recognized tribe could be an Indian, regardless of whether they have any blood ties to that tribe, or whether that tribe has given the person some official recognition.

The blanket assertion in Daniels that Canadian Indians are Indians for the

purposes of federal criminal jurisdiction is not supported by the cases cited above, such as Allery, supra, Akins, supra, and Turtle Mountain, supra, that have recognized the distinction between Canadian and American Indians. It is instructive that in a case that otherwise makes ample use of authority, the Daniels court did not cite to a single case for the proposition that Canadian Indian blood is sufficient to meet the Indian blood requirement.

When confined to its facts Daniels is not too dissimilar from the analysis in Pero and other cases. In Pero, the court was faced with two ethnic Indians that had substantial blood ties to members of a federally recognized Indian tribe, lived on the reservation, owned land on the reservation, and had family members that lived and had blood ties to the reservation. Pero, 99 F.2d at 31. Though not members, they were substantially affiliated with the tribe through their blood connection with that federally recognized tribe. Understood in that context, which accords the legal and political dynamic that must be respected per Mancari and Antelope, affiliation makes sense. It is another way of saying a person with substantial blood ties to a federally recognized tribe and who has substantial other connections is not automatically excluded from the definition of Indian based on their lack of enrollment.

This understanding of Indian is also consistent with United States v.

Lawrence, 51 F.3d 150 (8th Cir. 1995), a case from South Dakota. In that case, which was prosecuted under 18 U.S.C. 1152, the victim was not enrolled but had sufficient blood quantum to be enrolled in the Oglala Sioux Tribe. Id. at 151. She was not an enrolled member. She was found to have Indian blood based on her blood tie to a federally recognized tribe. Id. at 153. But, she was deemed not to be an Indian because she was not recognized by that tribe or the government. Id. She had no formally recognized affiliation with the tribe and was not an Indian, regardless of her Indian blood. Id. The Lawrence, Pero and Daniels decisions can be read together to stand for the following proposition: To be recognized as an Indian, one must be able to trace their blood to a federally recognized tribe, and, if there is not enough blood quantum to become enrolled, one must show a strong recognition by or affiliation with that tribe, not mere social affiliation or acceptance by some tribal members.

In In re Duane Garvis, 402 F.Supp.2d 1219, 1224 (E.D.Wa. 2004), the issue at hand was whether the defendant met the definition of Indian under 18 U.S.C. 1153. The defendant in Garvis was not enrolled in a federally recognized tribe. He had some blood from federally recognized tribes, however. Id. at 1221; 67 Fed.Reg. 134, pp. 46327-33 (list of federally recognized tribes: Colville is #56; Kootenai is #130; Santee is #261; and, Yankton is #329).

The defendant in that case attempted to make himself "an Indian" for federal criminal jurisdictional purposes based on the same kind of affiliation arguments advanced by the government in Graham's case. The court dispensed with the affiliation arguments as not being supported by law. Id. at 1225-26. The court focused on whether Garvis was eligible for enrollment in a federally recognized tribe to determine whether he was recognized as an Indian. Id. The court emphasized the importance of this inquiry based on the need for a constitutional relationship between an Indian and the United States government for jurisdiction to vest. Id. at 1225.

The affiliation evidence presented by Garvis was significant: he was married to a tribal member, was "assimilated" into Indian culture, had worked on the reservation for 5 years, lived on the reservation for 19 months, and had received some benefits from the tribe and federal government reserved for Indians. However, this evidence was deemed of little value "in view of his limited blood quantum and his lack of enrollment, or eligibility for enrollment in any Indian Tribe." Id. at 1226.

Garvis has much greater precedential value than Daniels, and is factually and legally on point. It should be the guide post for this Court's analysis of what the government must prove to the jury, and what the jury instructions should

include, regarding the Indian recognition issue. Garvis does nothing to expand the definition of Indian or the concept of Indian recognition to include social affiliation by Canadian Indians with members of federally recognized tribes. It should be noted that the often recited "St. Cloud" factors for determining Indian recognition place social recognition as the least important factor in determining Indian recognition. Lawrence, supra (citing St. Cloud v. United States, 702 F.Supp. 1456 (D.S.D. 1988)).

The LaPier decision, supra, lends further support to Graham's assertion that, when courts such as Daniels refer to affiliation, they are referring to a blood tie with a recognized tribe that doesn't quite meet enrollment criteria. See analysis of Pero, Lawrence and Daniels, supra. LaPier is cited repeatedly in Daniels, as well as by Canby and other commentators.

In LaPier, 986 F.2d 303 (9th Cir. 1993), the facts were similar to those presented in Graham's case. The defendant was from one tribe, but was alleged to have committed a crime on another reservation. The reservation where the crime occurred was federally recognized. However, when doing its Indian recognition analysis, the LaPier court did not look to that reservation to see if LaPier was sufficiently affiliated with it to be Indian. Rather, the court said the analysis goes back to the defendant's (or victim's) tribe of origin: that is the "tribe in question"

for determining whether someone is enrolled in or affiliated with a federally recognized tribe. Id. at 306. In that context the court stated, "[a] defendant whose only claim of membership or affiliation is with an Indian group that is not a federally acknowledged Indian tribe cannot be an Indian for criminal jurisdiction purposes." Id.

In the present case, Graham and Aquash do not come from Pine Ridge. The tribes in question for the recognition analysis is not the Oglala Sioux Tribe, but rather their Canadian bands. Because these bands do not have an existing constitutional relationship with the United States government, their affiliation or membership therewith is not sufficient to make them Indians under 18 U.S.C. 1152 and 1153.

Accordingly, in regard to the Indian recognition prong, the Court's jury instructions should make plain to the jury that for Aquash or Graham to be considered Indian, it is not sufficient that the government show that they were affiliated with members of a federally recognized tribe within the United States. Instead, the government must prove beyond a reasonable doubt that Graham and Aquash were members of or affiliated by blood tie with a tribe that is federally recognized by the United States government, and recognized by that tribe as being Indian.

CONCLUSION

The government has no authority for its position that persons such as Graham or Aquash are Indians under 18 U.S.C. 1152 or 1153. There is no meaningful authority for the position that Canadian blood alone is sufficient for a finding of Indian blood. All cases that have addressed the issue have looked for blood from a federally recognized Indian tribe to find that a defendant or a victim was an Indian under these statutes.

The government also has no authority to support its position that persons such as Graham and Aquash that have no blood ties to any tribe recognized by the United States can be considered "recognized as Indian." Indian recognition requires some blood tie to a federally recognized tribe, even if it doesn't meet the criteria for enrollment, and some formal recognition by that tribe as to one's Indian status. Mere social acceptance by tribal members from a tribe other than one's own does not make one an Indian.

The jury instructions in this case must set forth these principles and the government's burden clearly so that the jury understands what kind of evidence is insufficient for a finding of guilt in this case.

Dated January 12, 2009.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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DANA HANNA	☐	U.S. Mail, postage prepaid
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	☐	Facsimile at
	☒	Electronic Case Filing

Dated January 12, 2009.

/s/ John R. Murphy
John R. Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION TO DISMISS ALL COUNTS OF INDICTMENT

John Graham, defendant, moves to dismiss all three counts in the Superceding Indictment in this case. Mr. Graham has previously filed a motion to dismiss in regard to Count III on the grounds that it fails to state a charge. File Doc. 49. In that motion and supporting memorandum, Graham also alleged that the Court did not have jurisdiction over the matter. In this motion, Graham expands his jurisdictional challenge to include all three counts in the Superceding Indictment. This motion is based on the facts, authority and arguments set forth in his Memorandum in Support of Motion to Dismiss all Counts of Indictment, on file herein.

Dated January 12, 2009.

/s/ John R. Murphy
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CERTIFICATE OF SERVICE

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/s/ John R. Murphy
John R. Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
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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.	)	CRIM. NO. 08-50079-01

MEMORANDUM IN SUPPORT OF PROPOSED JURY INSTRUCTIONS

In support of Defendant Graham's proposed jury instruction regarding his and Aquash's status as Indians, and the government's burden of proof in regard thereto, Graham submits the following memorandum.

I. AUTHORITY IN SUPPORT OF PROPOSED INSTRUCTIONS

A two part test is used to determine whether a defendant or a victim are "Indians" as that term is used in 18 U.S.C. 1152 and 1153. The statutes themselves do not define the term.

First, the defendant or victim must be found to have "Indian blood." Second, the defendant or victim must be recognized as being Indian. United States v. Antelope, 430 U.S. 641 (1977); In re Duane Garvis, 402 F.Supp.2d 1219,

1224 (E.D.Wa. 2004); United States v. Lawrence, 51 F.3d 150 (8th Cir. 1995).

A. THE INDIAN BLOOD REQUIREMENT

In its broadest sense, the term "Indian blood" refers to a recognition that a particular person's ancestors lived in America prior to the arrival of the Europeans. Canby, American Indian Law, 3rd Ed., p. 8. In the context of federal criminal law, when determining whether a person should be subject to federal or state jurisdiction, the definition of Indian blood is much narrower. See infra. The Canadian Indian blood that he and Aquash have does not fall within the definitions of Indian blood as that term is used in 18 U.S.C. 1152 and 1153.

1. LEGAL AND HISTORICAL CONTEXT

Neither "Indian" nor "Indian blood" are defined by statute. However, a long line of cases dating back to United States v. McBratney, 104 U.S. 621 (1882), instruct us as to how these terms are to be defined.

The term "Indian" and its component parts, such as "Indian blood," must be defined in a manner that recognizes and reflects the unique relationship between the United States government and some Indian tribes located within its borders. See Morton v. Mancari, 417 U.S. 535, 553 n. 24 (1974). These terms are not used to describe racial or ethnic origin; rather, these terms are to be defined through an understanding of their distinct political and legal effect. See Mancari, 417 U.S. at

552-53 & n. 24 (1974).[1] See also United States v. Antelope, 430 U.S. 641, 643 & n. 2, 4 (1977) (citing United States v. McBratney, 104 U.S. 621 (1882)).

The term Indian in federal laws (whether that is in the employment law context or for the purposes of establishing federal criminal jurisdiction), and by extension component terms within that definition such as Indian blood, means an indigenous person who has an existing constitutional relationship with the United States government that stems from the commerce clause and/or the treaty power clause, and who is in a guardian-ward relationship with the United States. Alaska Assoc. General Contractors of America, Inc. V. Pierce, 694 F.2d 1162, 1167-68 (9th Cir. 1982) (citing Mancari, supra, and Antelope, supra). Thus, the terms Indian and Indian blood as they are used in the context of 18 U.S.C. 1152 and 1153 must be applied only to those indigenous persons who have an existing constitutional relationship with the United States government that stems from the commerce clause and/or the treaty power clause, and who are wards of the United States as a result of that relationship. See Antelope, supra, at 642-45.

United States v. Antelope, 430 U.S. 641 (1977), is the primary case defining

[1]Throughout this litigation and Graham's previous case, the government has attempted to frame this issue as one involving race based equal protection issues. Though that makes for interesting press, it is an approach that has been uniformly rejected by all courts addressing this issue. See Antelope, supra, at 645-47.

the term Indian for the purposes of establishing federal criminal jurisdiction under 18 U.S.C. 1152 and 1153. In that case, the Supreme Court stated that the principles articulated in Mancari for defining terms relating to Indians applied to federal prosecutions under these statutes. Id. The Antelope Court made clear that the definition of Indian under federal criminal law is to be based on the political and constitutional relationship between the United States and Indian tribes, and not upon racial or ethnic origin:

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

Id. at 645 (citations omitted).

In Antelope, the defendants were enrolled members of a federally recognized Indian tribe in the United States, the Coer d'Alene tribe. They were charged under 18 U.S.C. 1153 (the Major Crimes Act) with the murder and burglary of an non-Indian on the Coer d'Alene reservation. Id. at 642-43.

The defendants argued that the Major Crimes Act created an impermissible race-based classification structure by making it only applicable to Indians. Id. at 645. In rejecting that contention, the Court discussed the unique historical and

constitutional relationship between the United States government and Indians, and defined the term Indian in 18 U.S.C. 1153 within that context. Id. at 647-48. Thus, because the defendants in that case were members of a federally recognized Indian tribe, and not because they were ethnically Indian, they were subject to federal prosecution under 18 U.S.C. 1153.

To illustrate the significance of an on-going legal and political relationship between tribes and the federal government to the definition of Indian, the Antelope Court discussed United States v. Heath, 509 F.2d 16, 19 (9th Cir. 1974). Antelope, supra, at n. 7. Heath was ethnically and racially an Indian. His tribe was located inside the United States. His tribe had once been federally recognized by the United States government. But, prior to the time Heath was charged with a crime, his tribe lost its federal recognition.

Even though the defendant was an Indian "anthropologically," he was deemed not an Indian for federal criminal jurisdictional purposes. Antelope, supra, at 647, n. 7. Notwithstanding his ethnically Indian blood, that blood did not come from a lineage that had an existing constitutional relationship with the United States. The Court held that a defendant loses his status as an Indian for criminal jurisdictional purposes when "his unique status vis-a-vis the Federal Government no longer exists." Antelope, supra, at 647, n. 7.

This discussion in Antelope is vital to Graham's case. The government asserts that Graham and Aquash are Indian. To be Indian requires a finding that one has Indian blood. Therefore, the government must be asserting that the Canadian Indian blood possessed by Graham and Aquash is Indian blood as that term is used in federal criminal law.

That position ignores the well articulated principles enunciated by the Supreme Court that the term Indian must be defined in legal and political terms, not racial terms. Graham and Aquash may be ethnically Native American, as are the Mayans from Mexico and the Kalaallit from Greenland, as all can trace their origin to descendants who lived in the Americas prior to the arrival of the Europeans. But, the Canadian Indians, the Mayans, and the Kalaallit do not share a unique, existing constitutional relationship with the United States government. Therefore, their blood, though ethnically Native American or Indian, is not Indian blood.

To understand the flaw in the government's reasoning, one only need to ask the following question: How could the Supreme Court affirm that Heath – an American Indian, from a tribe within the United States, that was once formally recognized by the United States government – had his Indian status extinguished when the political relationship ended, yet hold that a Canadian Indian from a band

not in the United States and that has never had formal recognition by the government, was an Indian? It couldn't. The flaw in the government's position is that it fails to recognize the difference between Canadian Indians and American Indians, it fails to understand that the analysis begins with a defendant or victim's tribe of origin, and it doesn't account for the necessity of an on-going political relationship with the government for a person to be Indian. See infra.

2. INDIAN BLOOD MEANS BLOOD FROM RECOGNIZED AMERICAN INDIAN TRIBES, NOT CANADIAN INDIAN BANDS OR OTHER FOREIGN TRIBES

According to the government, a Canadian Indian's blood stands on equal footing with the blood of American Indians from federally recognized tribes. There is no other conclusion that can be drawn from the government's argument. The government concedes that neither Graham nor Aquash has any American Indian blood. But, the government contends that they have the "Indian blood" required for a determination that they are Indian under 18 U.S.C. 1152 and 1153.

Thus, the government must believe that Canadian Indian blood is no different than blood ties to federally recognized Indian tribes within the United States for the purpose of defining who is an Indian under these criminal statutes. This analysis, by necessity, must be based on racial or anthropological grounds: it

must be premised on the notion that ethnically Canadian Indians and American Indians are the same. However, this kind of racial or ethnic analysis has been repeatedly determined to be inappropriate when defining the term Indian for the purposes of federal criminal jurisdiction. Whether Canadian Indians and American Indians are ethnically similar, as the government contends, is irrelevant to this analysis. LaPier v. McCormick, 986 F.2d 303, 306 (9th Cir. 1993) (cited by Canby, supra) (ethnic and racial distinctions are not relevant to political and legal analysis required to determine whether one is an Indian). The inquiry should be whether Canadian Indians enjoy a special constitutional and political relationship with the United States government that places them in a guardian-ward status. This, they clearly do not. The legal and political distinction between Canadian and American Indians has been recognized for many years in many courts.

Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935 (Ct.Cl. 1974), involved land claims based on legislation from 1905. The government was attempting to defeat an Indian tribe's claim to aboriginal title to land in North Dakota. The government argued that because, at the time of the legislation, the land was frequently occupied by Canadian Chippewa Indians, the land could not be considered the land of the American Chippewa Indians. Id. at 944. The government expressly acknowledged a legal distinction between

members of the same ethnic tribe based on which side of the border they primarily resided on. Id.

In finding against the government, the court recognized the legal significance of the distinction between American Chippewas and Canadian Chippewas. Id. It held that because there was proof that sufficient numbers of American Chippewas lived in the territory in question, they could claim aboriginal title thereto, notwithstanding the periodic presence of Canadian Chippewas. Id. ("[W]e cannot say that the Commission lacked substantial support for holding (as we think it did) that American Chippewa full and mixed bloods, rather than Canadian mixed bloods, exercised sufficient dominion over the award area.").

Similarly, in Akins v. United States, 407 F.Supp. 748 (Cust. Ct. 1976), aff'd, 551 F.2d 1222 (Cust. & Patent App. Ct. 1977), the court drew a distinction between Canadian Indians and American Indians. Id. at 752-53. It also dispensed with another argument raised by the government in this case. The government has argued in Graham's case that the existence of the Jay Treaty of 1790, which allowed free passage across the U.S.-Canadian border for Indians, demonstrates that no distinction should be drawn between Canadian Indians and American Indians. In Akins, a similar argument was made and rejected. The court noted that the Jay Treaty of 1790 had been abrogated in 1812 and has never been

reinstated, which terminated the general ability of free crossing except as permitted by specific statute. Id. With this abrogation, so goes the fiction alleged by the government in Graham's case that ethnic Indians on both sides of the border are entitled to uniform recognition under the federal criminal laws of the United States.

The distinction between Canadian and American Indians was also recognized in Alaska Assoc. General Contractors of America, Inc. V. Pierce, 694 F.2d 1162 (9th Cir. 1982). That case involved Alaskan Natives. Id. at n. 10.

In attempting to define the term Alaskan Natives, the court noted that the same construct for defining Indian under federal law applied to Alaskan Natives. Specifically, the court noted that the definition was to be derived from the special political relationship between Alaskan Native groups and the United States government, not on racial or ethnic grounds. Id. at 1167-68 & n. 10. The court referred to numerous federal statutes that helped define who was an Alaskan Native. Id. Those statutes uniformly describe a political relationship with the United States when defining who is and isn't an Alaskan Native. For instance, the person must be a citizen of the United States, or have descended from persons who lived in Alaska when the territory was acquired from Russia, or, in the case of Canadians, have been in Alaska since 1939. Id. at n. 10. Though the statutes

discussed in that case are not at issue in this case, the principles are similar: For an indigenous person to be recognized under federal law as an Indian, they must have a long standing physical and political relationship with the United States government.

4. THE INDIAN BLOOD ANALYSIS LOOKS TO THE TRIBE OF ORIGIN, NOT THE PLACE OF AFFILIATION OR THE LOCUS OF THE CRIME

In addition to disregarding the political relationship with the United States government necessary for a person to be considered an Indian, and in addition to disregarding the recognized legal differences between Canadian and American Indians, the government has disregarded a key element to the analysis of whether Graham and Aquash are Indian: an identification of the "tribe in question." Specifically, the government wants this Court to focus on Graham and Aquash's activities once they came to the United States to determine whether they were Indians under federal law. Instead, the focus should remain on the tribe from which they got their Indian blood.

LaPier v. McCormick, 986 F.2d 303 (9th Cir. 1993) (cited by Canby, supra, in both 3rd and 4th eds.), is important because it instructs us where to look when determining whether a person has Indian blood. This superficially seems like an

obvious point, but as demonstrated in Graham's case, it is a point that can be clouded by other issues.

Consider that in Graham's case the government's theory boils down to the following: The defendant and the victim are Canadian Indians. They come from tribes that are not within the United States. Their tribes are not recognized by the United States government. The United States government is not responsible as a guardian to these tribes' members. Nonetheless, tribal members are "Indian" under 18 U.S.C. 1152 and 1153 because they came to the United States and, for a relatively short period of time, affiliated socially or spiritually with members of a federally recognized Indian tribe in the United States.

In order to make this case, the government's objective has been and will be to orient the Court toward what Graham and Aquash did in the United States, rather than from where they came. Under LaPier, the focus should remain on Canada, not the United States.

In LaPier, the defendant claimed enrollment in the Little Shell Band of Chippewas. That tribe is not federally recognized. Id. at 306. He was charged with committing murder under 18 U.S.C. 1153 on the Blackfeet reservation in Montana, a federally recognized tribe.

The court found that LaPier was not Indian for federal criminal jurisdiction purposes.[2] When determining whether LaPier was Indian under 18 U.S.C. 1153, it was irrelevant to the court that LaPier was ethnically or racially an Indian through his affiliation with the Chippewas. Id. at 306. Similarly, the fact that the crime occurred on a federally recognized reservation did not factor into the analysis. Id. at 306. And, the court's analysis was not concerned with whom LaPier affiliated while on the Blackfeet reservation.

Instead, the court looked to where LaPier came from -- his tribe of origin -- to determine whether he sat in a unique relationship with the government by virtue of his affiliation with that tribe:

> It is therefore the existence of the special relationship between the federal government and the tribe in question that determines whether to subject the individual Indians affiliated with that tribe to exclusive federal jurisdiction

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[2]As with Lawrence and other decisions discussed above, the court held that the determination as to whether the defendant was an Indian was a jurisdictional matter:

> Because the crime occurred on an Indian reservation, LaPier's legal status as an Indian (or non-Indian) determines jurisdiction. If LaPier is legally an Indian, the federal court would have jurisdiction, 18 U.S.C. § 1153 (1988), but if he is not, the Montana state courts would have exclusive jurisdiction, because the victim was a non-Indian.

Id. at 304 (citing United States v. McBratney, 104 U.S. 621 (1882), and United States v. Wheeler, 435 U.S. 313, 325 n. 21 (1978). See also State v. Sebastian, 243 Conn. 115, 701 A.2d 13 (1997); United States v. Bruce, 394 F.3d 1215, 1218 (9th Cir. 2005); United States v. Dodge, 538 F.2d 770 (8th Cir. 1976).

for crimes committed in Indian country.

Id. LaPier's tribe was the "tribe in question," not the Blackfeet tribe. LaPier's tribe, like the tribe in Heath, supra, had no existing legal relationship with the United States government. Therefore, LaPier was not an Indian and not subject to federal prosecution. Id. See State v. Sebastian, 243 Conn. 115, 701 A.2d 13 (1997) (discussion of distinctions between racial and political tribal affiliations). Accord State v. Daniels, 16 P.3d 650, 654 (Wash.App. Div. 3 2001) (Canadian Indian may have Indian blood but not be Indian for federal criminal jurisdictional purposes because he is not "enrolled or affiliated with a tribe that is recognized by the United States and is individually subject to United States jurisdiction.").

The government has referred to Ex Parte Pero, 99 F.2d 28 (7th Cir. 1938), cert. denied, 306 U.S. 643 (1939), for proposition that members of Canadian Indian bands, such as Aquash and Graham, can be Indians for the purposes of federal criminal laws such as 18 U.S.C. 1152 & 1153. Pero is cited in footnote 7 of the Antelope decision. In dicta, the Antelope Court left open the possibility that "nonenrolled" Indians might fall within the purview of the term Indian in 18 U.S.C. 1152 & 1153, but specifically declined to address that issue. Antelope, supra, at n. 7.

The dicta in Antelope regarding Pero occurs within the same discussion of the Heath decision, and whether a nonenrolled person can ever be an Indian. The dicta does not in any manner suggest an expansion of the term "Indian" or "Indian blood" to include Canadian, Mexican or other indigenous Native Americans.

Further, the actual holding in Pero does not support the government's expansive view that the terms "Indian" and "Indian blood" apply to Canadian Indians and Canadian Indian blood. Consistent with the earlier decision in McBratney, supra, and as a precursor to the later decisions in Mancari and Antelope, Pero affirms that the focus of our inquiry should remain on whether a person comes from an Indian tribe that has a recognized political relationship with the United States government.

In Pero, both Pero and Moore, defendants in a murder case, claimed they were Indian and, thus, subject to federal, not state, prosecution. The Seventh Circuit Court of Appeals agreed.

In regard to the Indian blood issue, it was acknowledged that at the time of the crime neither defendant was an enrolled member in a federally recognized Indian tribe. Id. At 30-32. However, in finding the defendants Indian under federal criminal law, the court relied heavily on the fact that each defendant had

extensive blood connections with federally recognized Indian tribes in the United States. Id.

Defendant Moore, the court noted, was the child of full blood mother and half-blood father from the St. Croix Band of Lake Superior Chippewas, a federally recognized tribe in Wisconsin. Pero, supra, at 30-32 & n.13. Moore, his parents, and his relatives, all resided on the St.Croix's federally recognized reservation, and the court noted that Moore could be a member of that tribe (although not enrolled). Id. at 31.

The court emphasized that it was Moore's blood tie to a tribe with a recognized relationship with the United States government that was dispositive:

> Of special significance for the present question is the treaty relating to the Chippewas of Lake Superior (of which Moore is a member if he is an Indian), in which the mixed-bloods were expressly mentioned, and it was recognized therein that a mixed-blood could be a member of the Chippewas.

Pero, 99 F.2d at 31. Additionally, the court noted that but for circumstances outside his control, both Moore and his mother would have been enrolled in this recognized tribe. Id. at 32.

The court's analysis for defendant Pero was based on the General Allotment Act, specifically whether he held his tribal land in patent trust or fee simple at the

time of the crime charged. Finding that Pero had not been granted the land in fee simple at the time of the crime charged, and, thus, was still in a guardian-ward relationship with the United States, the court found him to be an Indian under 18 U.S.C. 1153. Id. at 29, 32-35.

The Pero court's analysis focused on the existing constitutional, treaty and guardian-ward relationship between the alleged Indian, his tribe of origin, and the federal government. Id. at 31-32. Nothing in this decision suggests that the term Indian should apply to Canadian Indians, or that the concept of Indian blood refers to anything but blood ties with federally recognized Indian tribal members.

The reference to Pero in Antelope was in regard to nonenrolled Indians. Neither defendant in Pero was enrolled. However, the tribes to which they were affiliated through blood were federally recognized and had an on-going relationship with the United States government.

Thus, the dicta in Antelope and the holding in Pero do not suggest a dramatic revision of the definition of Indian or Indian blood to include members of tribes from foreign countries that have no constitutional relationship with the United States. Instead, that dicta and the Pero holding merely suggest that a person who lacks formal enrollment in a federally recognized American Indian

tribe, but who has sufficient blood ties to that tribe, may be considered to have Indian blood under 18 U.S.C. 1152 and 1153. These cases do not expand federal criminal jurisdiction to include Canadian Indians.

In re Duane Garvis, 402 F.Supp.2d 1219, 1224 (E.D.Wa. 2004), further supports Graham's assertion that the term "Indian blood" can only be defined to include American Indian blood. Garvis does not support the government's contention that Canadians such as Graham and Aquash are Indians under 18 U.S.C. 1152 & 1153 because they have Canadian Indian blood and spent time with American Indians in the United States.

The defendant in Garvis was being prosecuted in tribal court. He claimed he was Indian, and should be tried in federal court.[3] Id. at 1120-21. Garvis was not enrolled in a federally recognized tribe, so the court had to determine whether he had Indian blood. The court noted that Garvis had Indian blood from four (4) federally recognized Indian tribes within the United States: the Colville, the Yankton Sioux, the Santee Sioux, and the Kootenai. Id. at 1221; 67 Fed.Reg. 134, pp. 46327-33 (list of federally recognized tribes as of 2002) (Colville, #56;

[3]Garvis's case involved the term Indian in 25 U.S.C. 1301(2). That term, however, defines an Indian as someone who would be considered an Indian under 18 U.S.C. 1153. To make this determination, the court had to determine whether Garvis would be an Indian under 18 U.S.C. 1153, making it applicable to this case.

Kootenai, #130; Santee, #261; and, Yankton, #329).

It was this fact that was essential to the court's determination that Garvis had the requisite "Indian blood" for federal jurisdiction under 18 U.S.C. 1153:

> In this case, it is not disputed that Mr. Garvis does in fact have Indian blood, although that quantum is limited. His maximum Indian blood in any federally recognized Indian Tribe is 1/16th. Cumulating the Indian blood of his biological father and mother, Garvis' total Indian blood from all tribes would appear to be 6/32nds.

Id. at 1225.[4] See also United States v. Lawrence, 51 F.3d 150 (8th Cir. 1995) (victim's Indian blood from the federally recognized Oglala Sioux Tribe sufficient to find she had Indian blood). [5]

These cases orient our analysis of Graham's case. The first determination we must make is whether Graham and Aquash have Indian blood. When deciding whether Graham or Aquash had Indian blood, we must determine where they got

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[4]The court's computation of blood from federally recognized tribes appears to be in error. All of the tribes identified in the decision are federally recognized. The total blood from federally recognized tribes appears to be at least 1/8th. The appellate court did not dispute the findings of the lower court that Garvis had at least 1/8th blood from federally recognized tribes. It is unclear where the 1/16th 6/32nds numbers came from. In any regard, all of the tribes identified were American Indian tribes, in the United States, with federal recognition.

[5]Notwithstanding this finding, the victim was determined not to be Indian based on her lack of Indian recognition.

their blood from. Specifically, we must ask whether their blood comes from an American Indian tribe with an on-going constitutional relationship with the United States government that renders the government and tribe to be guardian and ward. If not, they do not have Indian blood and are not an Indian. Any activities by Graham or Aquash once in the United States are irrelevant to this inquiry, as is the issue of whether they are ethnically Native American.

Accordingly, in this case, if this is a proof matter for the jury, the jury should be instructed that absent a showing beyond a reasonable doubt that Graham and Aquash have blood ties to an American Indian tribe within the United States that had a recognized relationship with the United States government at the time the crime was committed, the jury must acquit Graham of the crimes charged.

B. INDIAN RECOGNITION

The second step of the analysis, whether Graham and Aquash were recognized as Indians, is closely related to the first step. As a result, many of the same principles and cases are discussed, infra.

1. LEGAL AND POLITICAL CONTEXT

United States v. McBratney, 104 U.S. 621 (1882), Morton v. Mancari, 417 U.S. 535 (1974), and United States v. Antelope, 430 U.S. 641 (1977), make clear

that there is no racial or ethnic component to the determination of whether a person is recognized as an Indian. The concept of Indian recognition is derived solely from the unique relationship that exists between the United States government and some Indian tribes (and their members) within its territory. Mancari, 417 U.S. at 552-53 & n. 24; Antelope, 430 U.S. at 643 & n. 2, 4; Alaska Assoc. General Contractors of America, Inc. V. Pierce, 694 F.2d 1162, 1167-68 (9th Cir. 1982).

Placing the definition of Indian within this context immediately narrows its applications to a particular sub-set of the wider group of people that claim to be ethnically Indian. Antelope, supra, (Indian is not an ethnic classification but a political relationship). Accordingly, the Major Crimes Act and 18 U.S.C. 1152 are recognized as statutes of limited application that are not applicable to those who are not legally defined as being Indian. Id. at 643-44, n. 2 & 4 (citing United States v. McBratney, 104 U.S. 621 (1882)).

The government has failed to identify any significant legal authority for the proposition that the term Indian, or the concept of Indian recognition, applies to Canadian Indians or others who do not originate from an American Indian tribe that has some form of a politically or legally recognized relationship with the United States government. Antelope and its progeny do not support the

government's position that the term Indian can be stretched so wide as to encompass indigenous people from foreign countries who associate with Indians inside the United States.

Illustrative of the need for federal recognition of a person's tribe for that person to be recognized as an Indian is the discussion in Antelope related to terminated tribes. The Antelope Court stated that the defendants in that case were enrolled members of the Coeur d'Alene tribe, and, thus, were Indians under 18 U.S.C. 1153. The Court opined that had the defendants been emancipated from the tribe, or had they been members of a tribe that had lost federal recognition, they would not have been subject to prosecution under the Major Crimes Act. Id. at 647 n. 7 (citing Heath, supra). This underscores the fundamental need for a person's tribe to have an on-going relationship with the United States government for the person to be recognized as an Indian.

2. THE GOVERNMENT'S RELIANCE ON "AFFILIATION" IS MISPLACED

To overcome the lack of an ongoing constitutional or guardian-ward relationship between Aquash and Graham's bands and the United States government, the government has asserted that their mere "affiliation" with enrolled members of the Oglala Sioux Tribe is sufficient to make Graham subject

to prosecution under 18 U.S.C. 1152 and 1153. File 03-50020, File Doc. 319, p. 6 ("Both Defendant Graham and Anna Mae Aquash were further affiliated with, among others, the Oglala Sioux Tribe.").

The government's argument is premised upon the holding in State v. Daniels, 16 P.3d 650 (Wash.App. Div. 3,2001). Because of this, a detailed review of Daniels is necessary.

Daniels is of little precedential value in this case. It is a state court decision from an intermediate court of appeals that has not been reviewed by the Washington State Supreme Court. See A Citizen's Guide to Washington's Courts, http://www.courts.wa.gov/newsinfo/resources/?fa=newsinfo_jury.brochure_guide &altMenu=Citi. The holding in regard to affiliation does not appear to have been adopted by any other court, state or federal.

The facts and subject matter in Daniels do not make it applicable to the present case. It is not a case involving a dispute between state and federal jurisdiction under 18 U.S.C. 1152 or 1153. Rather, it is a dispute over whether a minor criminal offense should be handled in tribal or state court. Id. at 652-53.

And, the facts were left unresolved as to whether the defendant was a descendant of a tribe recognized by the United States government. Id. The case

was not decided on the factual merits of a jurisdictional claim, but rather on whether the defendant had met his burden under state court precedent for putting the jurisdictional defense before the court. Id. It is the burden shifting aspects of the case for which it is routinely cited, not its impact on federal criminal law.

The conclusions reached in Daniels are largely unsupported, but to the extent they have legal and factual support, they support Graham's position. In Daniels, the court claims there are two prongs to determining whether a person is an Indian. First, whether the person is racially an Indian. Second, whether he is "enrolled in or affiliated with" a tribe that is recognized by the United States government. Id. at 654.

The Daniels court summarily concludes that because the defendant had some Canadian Indian blood, he was racially an Indian. Id. at 654. The court cites no authority whatsoever for this position. The analysis is perfunctory, and does not refer to the Indian blood issue or the holdings in Mancari and Antelope that require that such determinations be made with reference to the political and legal history of federal Indian relations.

The government relies on the analysis in Daniels in regard to the second prong to assert that mere affiliation with members of a federally recognized Indian

tribe makes one "recognized" as an Indian. Daniels does not stand for that proposition. Id. At 654.

In Daniels, the defendant did have Canadian Indian blood. However, he also claimed to have American Indian blood. He claimed he was part of Sitting Bull's band that fled from the United States to Canada. He also claimed to be Chippewa, Mississippi Sioux, Aberdeen, and Devil's Lake Sioux. The Daniel's court "affiliation" analysis was whether the defendant could show a blood relationship with any federally recognized Indian tribe, not whether he socialized with members of a federally recognized tribe:

> But the fact that Mr. Daniels is an Indian in the racial sense does not establish federal jurisdiction; he must also show a sufficient connection with a tribe recognized by the United States. A proper starting point for making that determination is to consult the BIA's list of federally recognized tribes published in the Federal Register. At the relevant time, the BIA list appeared at 63 Fed.Reg. 71941 (1998).
>
> Mr. Daniels claims to be part Chippewa and "Mississippi Sioux." He further claims his grandparents belonged to the "Aberdeen Band." The BIA list of tribes contains numerous Chippewa tribal entities, none of which Mr. Daniels has identified as the specific band with which he claims an affiliation. Of the many listed Sioux entities, none of them are called "Mississippi Sioux." The list contains no reference to the "Aberdeen Band."
>
> Mr. Daniels' argument is merely supported by Garry Standing's written statement that he believed Tom Standing was "registered" at the Devils Lake Sioux Tribe. The federally recognized Spirit Lake Tribe, located in

> North Dakota, was formally known as the Devils Lake Sioux Tribe. Thus, at most, the record shows by hearsay that Mr. Daniels' grandfather may have been enrolled in or affiliated with a recognized American tribe. Even if true, that does not mean Mr. Daniels is affiliated with the tribe for purposes of jurisdiction. Mr. Daniels has not shown the Spirit Lake Tribe recognizes him as a member. He does not claim membership in the Spirit Lake Tribe or received any membership benefits from it. Mr. Daniels has not even alleged setting foot there.
>
> Mr. Daniels has also alleged that the Colville Tribe has recognized him as an Indian and has provided him with services and privileges because he is an Indian. But Mr. Daniels has not produced any evidence to substantiate his claim. There is no documentation in the record connecting Mr. Daniels to the Colville Tribe. No one from the tribe testified as to Mr. Daniels' interaction with or acceptance by the Colvilles. Mr. Daniels testified that he lived on the reservation for merely a month.

Id. at 654-55. (emphasis added).

To the extent that Daniels stands for any principle relevant to this case, it stands for the principle that even a person with Canadian Indian blood must establish a blood tie to a federally recognized Indian tribe in order to be Indian. Nothing in Daniels suggests that mere social affiliation would be sufficient to make a person an Indian. And, the discussion of tribal recognition of Daniels is instructive. Note, the Daniels court did not suggest that social acceptance by a tribal member would be sufficient to make a person an Indian. Rather, formal recognition by an Indian tribe (i.e. the tribal government) would be required at minimum. Id. Thus, the court's references to recognition by the Devil's Lake or

Colville tribes as being necessary for a person to be an Indian.

Accordingly, if this Court were to adopt Daniels as being of precedential value, a jury instruction would be warranted that required a showing of some blood tie to an American Indian tribe, and formal recognition of a person's Indian status by a recognized tribe, as pre-requisites to a finding by the jury that a defendant is an Indian.

Graham asserts, however, that Daniels should not guide this Court's analysis of what constitutes Indian recognition. To weaken the definition of the term Indian to include persons such as Graham and Aquash would be to weaken "the solemn commitment of the Government toward the Indians" that is affirmed when that term is applied only to those with a special relationship with the United States. See Mancari, 417 U.S. at 553 (citation omitted). Under the broad view of Daniels that is promoted by the government, any indigenous person who socially affiliates with members of a federally recognized tribe could be an Indian, regardless of whether they have any blood ties to that tribe, or whether that tribe has given the person some official recognition.

The blanket assertion in Daniels that Canadian Indians are Indians for the purposes of federal criminal jurisdiction is not supported by the cases cited above,

such as Allery, supra, Akins, supra, and Turtle Mountain, supra, that have recognized the distinction between Canadian and American Indians. It is instructive that in a case that otherwise makes ample use of authority, the Daniels court did not cite to a single case for the proposition that Canadian Indian blood is sufficient to meet the Indian blood requirement.

When confined to its facts Daniels is not too dissimilar from the analysis in Pero and other cases. In Pero, the court was faced with two ethnic Indians that had substantial blood ties to members of a federally recognized Indian tribe, lived on the reservation, owned land on the reservation, and had family members that lived and had blood ties to the reservation. Pero, 99 F.2d at 31. Though not members, they were substantially affiliated with the tribe through their blood connection with that federally recognized tribe. Understood in that context, which accords the legal and political dynamic that must be respected per Mancari and Antelope, affiliation makes sense. It is another way of saying a person with substantial blood ties to a federally recognized tribe and who has substantial other connections is not automatically excluded from the definition of Indian based on their lack of enrollment.

This understanding of Indian is also consistent with United States v. Lawrence, 51 F.3d 150 (8th Cir. 1995), a case from South Dakota. In that case,

which was prosecuted under 18 U.S.C. 1152, the victim was not enrolled but had sufficient blood quantum to be enrolled in the Oglala Sioux Tribe. Id. at 151. She was not an enrolled member. She was found to have Indian blood based on her blood tie to a federally recognized tribe. Id. at 153. But, she was deemed not to be an Indian because she was not recognized by that tribe or the government. Id. She had no formally recognized affiliation with the tribe and was not an Indian, regardless of her Indian blood. Id. The Lawrence, Pero and Daniels decisions can be read together to stand for the following proposition: To be recognized as an Indian, one must be able to trace their blood to a federally recognized tribe, and, if there is not enough blood quantum to become enrolled, one must show a strong recognition by or affiliation with that tribe, not mere social affiliation or acceptance by some tribal members.

In In re Duane Garvis, 402 F.Supp.2d 1219, 1224 (E.D.Wa. 2004), the issue at hand was whether the defendant met the definition of Indian under 18 U.S.C. 1153. The defendant in Garvis was not enrolled in a federally recognized tribe. He had some blood from federally recognized tribes, however. Id. at 1221; 67 Fed.Reg. 134, pp. 46327-33 (list of federally recognized tribes: Colville is #56; Kootenai is #130; Santee is #261; and, Yankton is #329).

The defendant in that case attempted to make himself "an Indian" for

federal criminal jurisdictional purposes based on the same kind of affiliation arguments advanced by the government in Graham's case. The court dispensed with the affiliation arguments as not being supported by law. Id. at 1225-26. The court focused on whether Garvis was eligible for enrollment in a federally recognized tribe to determine whether he was recognized as an Indian. Id. The court emphasized the importance of this inquiry based on the need for a constitutional relationship between an Indian and the United States government for jurisdiction to vest. Id. at 1225.

The affiliation evidence presented by Garvis was significant: he was married to a tribal member, was "assimilated" into Indian culture, had worked on the reservation for 5 years, lived on the reservation for 19 months, and had received some benefits from the tribe and federal government reserved for Indians. However, this evidence was deemed of little value "in view of his limited blood quantum and his lack of enrollment, or eligibility for enrollment in any Indian Tribe." Id. at 1226.

Garvis has much greater precedential value than Daniels, and is factually and legally on point. It should be the guide post for this Court's analysis of what the government must prove to the jury, and what the jury instructions should include, regarding the Indian recognition issue. Garvis does nothing to expand the

definition of Indian or the concept of Indian recognition to include social affiliation by Canadian Indians with members of federally recognized tribes. It should be noted that the often recited "St. Cloud" factors for determining Indian recognition place social recognition as the least important factor in determining Indian recognition. Lawrence, supra (citing St. Cloud v. United States, 702 F.Supp. 1456 (D.S.D. 1988)).

The LaPier decision, supra, lends further support to Graham's assertion that, when courts such as Daniels refer to affiliation, they are referring to a blood tie with a recognized tribe that doesn't quite meet enrollment criteria. See analysis of Pero, Lawrence and Daniels, supra. LaPier is cited repeatedly in Daniels, as well as by Canby and other commentators.

In LaPier, 986 F.2d 303 (9th Cir. 1993), the facts were similar to those presented in Graham's case. The defendant was from one tribe, but was alleged to have committed a crime on another reservation. The reservation where the crime occurred was federally recognized. However, when doing its Indian recognition analysis, the LaPier court did not look to that reservation to see if LaPier was sufficiently affiliated with it to be Indian. Rather, the court said the analysis goes back to the defendant's (or victim's) tribe of origin: that is the "tribe in question" for determining whether someone is enrolled in or affiliated with a federally

recognized tribe. Id. at 306. In that context the court stated, "[a] defendant whose only claim of membership or affiliation is with an Indian group that is not a federally acknowledged Indian tribe cannot be an Indian for criminal jurisdiction purposes." Id.

In the present case, Graham and Aquash do not come from Pine Ridge. The tribes in question for the recognition analysis is not the Oglala Sioux Tribe, but rather their Canadian bands. Because these bands do not have an existing constitutional relationship with the United States government, their affiliation or membership therewith is not sufficient to make them Indians under 18 U.S.C. 1152 and 1153.

Accordingly, in regard to the Indian recognition prong, the Court's jury instructions should make plain to the jury that for Aquash or Graham to be considered Indian, it is not sufficient that the government show that they were affiliated with members of a federally recognized tribe within the United States. Instead, the government must prove beyond a reasonable doubt that Graham and Aquash were members of or affiliated by blood tie with a tribe that is federally recognized by the United States government, and recognized by that tribe as being Indian.

CONCLUSION

The government has no authority for its position that persons such as Graham or Aquash are Indians under 18 U.S.C. 1152 or 1153. There is no meaningful authority for the position that Canadian blood alone is sufficient for a finding of Indian blood. All cases that have addressed the issue have looked for blood from a federally recognized Indian tribe to find that a defendant or a victim was an Indian under these statutes.

The government also has no authority to support its position that persons such as Graham and Aquash that have no blood ties to any tribe recognized by the United States can be considered "recognized as Indian." Indian recognition requires some blood tie to a federally recognized tribe, even if it doesn't meet the criteria for enrollment, and some formal recognition by that tribe as to one's Indian status. Mere social acceptance by tribal members from a tribe other than one's own does not make one an Indian.

The jury instructions in this case must set forth these principles and the government's burden clearly so that the jury understands what kind of evidence is insufficient for a finding of guilt in this case.

Dated January 13, 2009.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
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(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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Dated January 13, 2009.

/s/ John R. Murphy
John R. Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION TO DISMISS ALL COUNTS OF INDICTMENT

John Graham, defendant, moves to dismiss all three counts in the Superceding Indictment in this case. Mr. Graham has previously filed a motion to dismiss in regard to Count III on the grounds that it fails to state a charge. File Doc. 49. In that motion and supporting memorandum, Graham also alleged that the Court did not have jurisdiction over the matter. In this motion, Graham expands his jurisdictional challenge to include all three counts in the Superceding Indictment. This motion is based on the facts, authority and arguments set forth in his Memorandum in Support of Motion to Dismiss all Counts of Indictment, on file herein.

Dated January 12, 2009.

/s/ John R. Murphy
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The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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Dated January 12, 2009.

/s/ John R. Murphy
John R. Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS ALL COUNTS OF INDICTMENT

In support of his motion to dismiss all counts, File Doc. 152, Defendant John Graham asserts the following.

FACTS

Graham is charged with three counts of first degree murder. Jurisdiction is premised upon 18 U.S.C. 1111, 1152 and 1153.

In Count I, which is brought pursuant to 18 U.S.C. 1153, Graham is alleged to be an Indian.

In Count II, which is brought pursuant to 18 U.S.C. 1152, the victim, Aquash, is alleged to be an Indian, but Graham is not.

In Count III, which is brought pursuant to 18 U.S.C. 1153, Graham, the accused, is not alleged to be an Indian, but Aquash, the victim, is alleged to be an

Indian.

An element of the charge of 18 U.S.C. 1153 is that the defendant be an Indian. An element of the charge of 18 U.S.C. 1152 is that either the defendant of the victim must be an Indian.

In Graham's previous file, 03-50020, the Court dismissed the Superceding Indictment because the government failed to describe a public offense. File Doc. 327. Specifically, because the charge was brought pursuant to 18 U.S.C. 1153, and because it did not allege that Graham was an Indian, it failed to state an essential element of the offense. Counsel for the government has conceded in an action presently pending before the Eighth Circuit Court of Appeals that the dismissed charge in File 03-50020 is essentially the same charge as that in Count III of the Superceding Indictment in this file.

This Court, in File 03-50020, held that whether a defendant or a victim is an "Indian" under 18 U.S.C. 1152 and 1153 is not a jurisdictional issue. File 03-50020, File Doc. 327. Rather, it is a proof issue for the jury. In light of that ruling, Defendant Graham in this file has submitted proposed jury instructions and supporting legal authority setting forth the proof requirements that must be met by the government regarding Graham and Aquash's status as Indians. File Doc. 147 & 151.

Graham, however, contends that the issue of whether Aquash and Graham were Indians is a jurisdictional issue, and, accordingly moves this Court for dismissal based on the lack of jurisdiction.

ARGUMENT AND AUTHORITY

The Court is well versed in the issues presented in this case, as evidenced by its previous rulings in the 2003 file regarding dismissal of that case. Rather than present an exhaustive memorandum detailing why dismissal is appropriate, Graham sets forth herein his position and a list of cases supporting his contention.

Graham asserts that his status as an Indian under 18 U.S.C. 1153, and Aquash's status as an Indian under 18 U.S.C.1152, are jurisdictional questions that must be decided as a matter of law by the Court. These are not proof matters for the jury. In support of this, Graham relies on the following:

1. United States v. Lawrence, 51 F.3d 150, 151 (8th Cir. 1995) ("[T]he present case calls for a conclusion as to whether a particular person qualifies as an "Indian" for purposes of federal criminal jurisdiction. While many subsidiary facts may go into this determination, we believe that ultimately the determination of Indian or non-Indian status is a conclusion of law.").

2. LaPier v. McCormick, 986 F.2d 303, 304 (9th Cir. 1993) (cited by Canby, American Indian Law, 3rd & 4th Eds, p. 8) ("Because the crime occurred on

an Indian reservation, LaPier's legal status as an Indian (or non-Indian) determines jurisdiction. If LaPier is legally an Indian, the federal court would have jurisdiction, 18 U.S.C. § 1153 (1988), but if he is not, the Montana state courts would have exclusive jurisdiction, because the victim was a non-Indian.") (citing United States v. McBratney, 104 U.S. 621 (1882), and United States v. Wheeler, 435 U.S. 313 (1978)).

3. State v. Sebastian, 243 Conn. 115, 701 A.2d 13, 34-35 (1997) (extensive analysis throughout of jurisdictional nature of Indian status determination) (extensive analysis of and reliance upon LaPier, supra) ("Accordingly, the issue of whether the defendant is an Indian for purposes of establishing federal criminal jurisdiction, as opposed to standing under the Non-Intercourse Act, implicates a political question best left to the federal acknowledgment process performed by the BIA. In the absence of actual proof that the federal government has acknowledged the defendant's tribe and, therefore, that he is an Indian, we conclude that the state's exercise of criminal jurisdiction over the defendant was not preempted by the Indian Civil Rights Act.").

4. United States v. Bruce, 394 F.3d 1215, 1218, 1221-2218 (9th Cir. 2005)

(district court's determination of Indian status is a mixed question of law and fact that is reviewed de novo, and 18 U.S.C. 1152 and 1153 create a complex jurisdictional structure for determining whether crimes in Indian country should be prosecuted by states, tribes or the federal government).

5. United States v. Heath, 509 F.2d 16, 19 (9th Cir. 1974) (cited by United States v. Antelope, 430 U.S. 641, n. 7 (1977)) ("While anthropologically a Klamath Indian even after the Termination Act obviously remains an Indian, his unique status vis-a-vis the Federal Government no longer exists. Pursuant to 25 U.S.C. s 564q, Klamath Indians are subjected to state laws and are to be dealt with by the law no differently than any other citizen of a state. We conclude accordingly that 18 U.S.C. s 1153 cannot serve to confer Federal jurisdiction with respect to crimes committed by terminated Klamath Indians.").

6. In re Duane Garvis, 402 F.Supp.2d 1219, 1224 (E.D.Wa. 2004) ("18 United States Code § 1153, commonly referred to as the Major Crimes Act, provides for federal jurisdiction over 14 enumerated crimes committed by "Indians" within "the Indian country". Section 1153 contains no definition of "Indian," and the determination of whether a person is an "Indian" has been left to the courts. The court decisions setting forth considerations in

defining "Indian" for jurisdictional as opposed to racial classification are therefore instructive.").

7. Canby, American Indian Law, 3rd Ed. p. 8 ("For many federal jurisdictional purposes, it is not enough that the individual be regarded as an Indian by his or her community; the person must considered a member of a federally recognized tribe.") (citing to LaPier and Sebastian, supra).

8. United States v. McBratney, 104 U.S. 621 (1882) (deciding as a jurisdictional matter that United States District Court did not have jurisdiction to decide case involving murder of a non-Indian by a non-Indian in Indian country).

9. United States v. Antelope, 430 U.S. 641, 643-648 (1977) (Indian determination under 18 U.S.C. 1153 is a non-race based determination that vests federal courts with jurisdiction over persons sharing a unique political relationship with the United States).

10. State v. Daniels, 16 P.3d 650, 654 (Wash.App. Div. 3 2001) (analysis of Indian status pertains to whether tribe or state can exercise jurisdiction over the matter).

11. Ex Parte Pero, 99 F.2d 28, 31 (7th Cir. 1938), cert. denied, 306 U.S. 643

(1939) ("We are convinced that the overwhelming weight of authority, both judicial and statutory, requires the conclusion that a child of an Indian mother and half-blood father, where both parents are recognized as Indians and maintain tribal relations, who himself lives on the reservation and maintains tribal relations and is recognized as an Indian, is to be considered an Indian within the protection of the federal guardian-ward relationship and within the meaning of 'Indian' as used in the jurisdictional statute [18 U.S.C. 1153] in question.").

12. United States v. Torres, 773 F.2d 449, 454 (7th Cir. 1984 ("In order to prosecute under 18 U.S.C. 1152, the government must prove as a jurisdictional prerequisite, that the crime was in violation of a federal enclave law, and that crime occurred between an Indian and a non-Indian within Indian country.").

The import of the above-summarized cases is that there is a 100 year history of consistently treating the Indian status determination as a jurisdictional matter. Graham recognizes the Court's previous reliance on United States v. Pemberton, 405 F.3d 656 (8th Cir. 2005), and United States v. White Horse, 316 F.3d 769 (8th Cir. 2003). He asserts that those cases, which are premised in United States v. Cotton, 535 U.S. 625 (2002), incorrectly decided the matter.

Graham has challenged the indictment based on its alleged defects, as was the case in Pemberton and Cotton. However, he also challenges this Court's jurisdiction based on a more structural or foundational basis.

As set forth more fully in Graham's Memorandum in Support of Proposed Jury Instructions, case law for over 100 years has recognized the unique and fundamental distinctions between prosecutions involving Indians under 18 U.S.C. 1152 and 1153 and other cases. The sole basis for federal jurisdiction over crimes in Indian country is derived from the unique constitutional relationship between the United States government and some Indian tribes (and their members). United States v. McBratney, 104 U.S. 621 (1882); Morton v. Mancari, 417 U.S. 535 (1974); United States v. Antelope, 430 U.S. 641 (1977).

But for this unique legal relationship, jurisdiction over crimes in Indian country would rest with tribes or states. The defendant or victim's status as an Indian is the fundamental jurisdictional prerequisite necessary to determine whether a tribe, a state or the federal government will decide a dispute. Torres, supra.

Cases like White Horse and Pemberton, supra, have extended the language in Cotton and Hugi v. United States, 164 F.3d 378, 380 (7th Cir. 1999) (the

beginning and end of the jurisdictional inquiry is 18 U.S.C. 3231), to an area of law where it is inapplicable. Those cases involved proof that an item moved in interstate commerce, Hugi, or proof as to the quantity of drugs alleged, Cotton. These kind of determinations are different in kind and significance than establishing that a particular person has Indian blood and is a member of a quasi-sovereign nation that has a direct constitutional relationship with the United States government. The issue os Indian status implicates issues of sovereignty, treaty rights, and an ongoing constitutional relationship. The holdings in Cotton and Hugi are not applicable to concepts such as these.

For an ethnic Indian, the determination that he is legally an Indian under federal criminal law may mean the difference between: (a) being prosecuted by the government with whom it shares a guardian-ward relationship; (b) being prosecuted by a state with whom his tribe may have long standing historical animosities and be in competition with in regard to its relationship with the federal government; or, (c) being prosecuted by his own tribe from whom he claims first identity.

A close reading of these decisions reflects a certain ambivalence by the Pemberton and White Horse Courts as to the power of their own reasoning. In Pemberton, the Court left open the possibility that the defendant was correct in

asserting Indian status was a jurisdictional matter, and stated that, if he was, there were alternative grounds to uphold the decision:

> Even if Pemberton's characterization of § 1153(a) as jurisdictional is correct, it is well settled "[i]n order for a defendant who has pleaded guilty to sustain a challenge to the district court's jurisdiction, he must establish that the face of the indictment failed to charge a federal offense." Here, he does not challenge the sufficiency of the indictment, and it is apparent the indictment charged all the necessary elements, including his Indian status under § 1153(a). While a guilty plea does not confer jurisdiction, "[a] guilty plea admits factual allegations in the indictment that form the basis for federal jurisdiction," We conclude his guilty plea was sufficient to establish the factual predicate necessary for the district court to find he was an Indian under § 1153(a).

Pemberton, supra at 659 (citations omitted).

Similarly, in White Horse, the procedural history and findings of the Court suggest that had the issue been properly presented, the matter would have been decided differently. The defendant in White Horse did not appear to have raised his jurisdictional or sufficiency arguments at the district court level. Id. at 772. The appellate court had no record to work from as to whether White Horse was an Indian. Id.

The jurisdictional challenge raised by White Horse was that the indictment should have alleged that he was not an Indian. He wanted the indictment to allege what he was not as opposed to what he was. This requirement does not appear to

be mandated by the plain language of the statute under which he was prosecuted, 18 U.S.C. 1152. Id. There is no fundamental requirement in 18 U.S.C. 1152 that the defendant not be an Indian. The statute applies if either the defendant or the victim is Indian and if the crime occurred in Indian country. Presumptively, if an indictment fails to declare one an Indian, it is alleging one is not, which, in White Horse's case, would place him within the jurisdiction of 18 U.S.C. 1152.

More problematic for White Horse was the Court's recognition that the issue was of no consequence jurisdictionally. Id. There was no consequence because regardless of White Horse's Indian status, he would remain in the same tribunal regardless of the error. The victim's status as an Indian was not challenged. Thus, if White Horse was an Indian as he alleged for the first time on appeal, the federal court had jurisdiction under 18 U.S.C. 1153. Id. at 772-73. If White Horse was not an Indian but the victim was, the federal court had jurisdiction under 18 U.S.C. 1152. Id. Under these circumstances, the Court could not find plain error.

In Graham's case, there is a substantial consequence. If, as he has alleged, neither he or Aquash are Indian, then this Court does not have jurisdiction, and another sovereign will have to decide the matter.

Accordingly, Graham asks that this Court dismiss all three counts as lacking in jurisdiction because, as a matter of law, neither he or Aquash are Indians. Or, he asks that further evidentiary hearings be held on the jurisdictional determination as to the Indian blood and Indian recognition issues addressed in Graham's Memorandum in Support of Proposed Jury Instructions.

Dated January 13, 2009.

/s/ John R. Murphy

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(605) 342-2909

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The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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Dated January 13, 2009.

/s/ John R. Murphy
John R. Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff, vs. JOHN GRAHAM, a/k/a JOHN BOY PATTON, VINE RICHARD MARSHALL, a/k/a RICHARD VINE MARSHALL, a/k/a DICK MARSHALL, Defendants.	)	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S PROPOSED JURY INSTRUCTIONS

Attorney for Plaintiff: Marty J. Jackley, United States Attorney
Robert A. Mandel, Assistant United States Attorney
515 9th Street, 2nd Floor
Rapid City, SD 57701
605-342-7822

Attorney for Defendant: John R. Murphy
328 E. New York Street
Suite 1
Rapid City, SD 57701
605-342-2909

Defendant John Graham files his proposed jury instructions.

Dated January 13, 2009.

/s/ John R. Murphy

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Dated January 14, 2009.

/s/ John R. Murphy
John R. Murphy

Defendant's Proposed Jury Instruction No. 1

In Count I of the Indictment, John Graham is alleged to be "an Indian." The government must prove beyond a reasonable doubt that Mr. Graham is an Indian for him to be guilty of the offense. If the government does not prove to you by evidence beyond a reasonable doubt that Mr. Graham is an Indian, it is your duty to find him not guilty of the offense.

To determine whether Mr. Graham is an Indian requires that the government proves two things to you beyond a reasonable doubt.

1. The government must prove beyond a reasonable doubt is that Mr. Graham has "Indian blood." To have Indian blood means to have some blood from an American Indian tribe, within the United States of America, and that the tribe has an existing recognized relationship with the United States government. If Mr. Graham only has blood from a Canadian Indian tribe, or some other country other than the United States of America, he does not have Indian blood as that term is used in this case.

2. The government must also prove beyond a reasonable doubt that Mr. Graham is legally recognized as an Indian. To be recognized as an Indian, a person must be enrolled in or affiliated with an American Indian tribe located in the United States that is formally recognized by the United States government. It is not required that Mr. Graham be enrolled in a federally recognized tribe to be "recognized as an Indian." It is important for you to note that social or spiritual involvement with members of a federally recognized tribe alone is not sufficient to find that Mr. Graham is "recognized as an Indian."

   Recognition requires that the government prove that Mr. Graham have some Indian blood, that the tribe from which he received his Indian blood is recognized by the United States government, and that he was enrolled in, recognized by or affiliated with that tribe.

If you find that the government has not proven beyond a reasonable doubt that Mr. Graham has "Indian blood" or is not recognized as an Indian, it is your duty to find Mr. Graham not guilty of Count I.

Defendant's Proposed Jury Instruction No. 2

In Count II of the Indictment, Annie Mae Aquash a/k/a Annie Mae Pictou is alleged to be "an Indian." The government must prove beyond a reasonable doubt that Ms. Aquash was an Indian for Mr. Graham to be guilty of the offense. If the government does not prove to you by evidence beyond a reasonable doubt that Ms. Aquash was an Indian, it is your duty to find Mr. Graham not guilty of the offense.

To determine whether Ms. Aquash is an Indian, the government must prove two things to you beyond a reasonable doubt. Both things must be proven to you beyond a reasonable doubt for you to find that Ms. Aquash is an Indian.

1. The government must prove beyond a reasonable doubt is that Mr. Graham has "Indian blood." To have Indian blood means to have some blood from an American Indian tribe, within the United States of America, and that the tribe has an existing recognized relationship with the United States government. If Ms. Aquash only has blood from a Canadian Indian tribe, or some other country other than the United States of America, she does not have Indian blood as that term is used in this case.

2. The government must also prove beyond a reasonable doubt that Ms. Aquash is legally recognized as an Indian. To be recognized as an Indian, a person must be enrolled in or affiliated with an American Indian tribe located in the United States that is formally recognized by the United States government. It is not required that Ms. Aquash be enrolled in a federally recognized tribe to be "recognized as an Indian." It is important for you to note, however, that social or spiritual involvement with members of a federally recognized tribe alone is not sufficient to find that Ms. Aquash is "recognized as an Indian."

   Recognition requires that the government prove that Ms. Aquash have some Indian blood, that the tribe from which she received her Indian blood is recognized by the United States government, and that she was enrolled in, recognized by or affiliated with that tribe.

If you find that the government has not proven beyond a reasonable doubt that Ms. Aquash has "Indian blood" or is not recognized as an Indian, it is your duty to find Mr. Graham not guilty of Count II.

IN THE UNITED STATES DISTRICT COURT
FOR THE 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 Defendant.	)))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S RESPONSE TO MOTION TO CONTINUE

Defendant John Graham does not object to Defendant Marshall's Motion to Continue. Mr. Graham understands Mr. Marshall's need to be completely prepared for trial, and he notes the relatively short period of time since Mr. Marshall was indicted. He also notes that Mr. Marshall's ability to prepare a defense has been hampered by the government's decision not to provide him with copies of the 109 audio taped interviews in this case, many of which pertain directly to the government's case, and which contain valuable impeachment and exculpatory evidence.

Mr. Graham has executed a waiver of speedy trial act compliance, which is filed separately from this response.

Dated January 16, 2009.

/s/ John R. Murphy

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(605) 342-2909

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Dated January 16, 2009.

/s/ John R. Murphy
John R. Murphy

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079-01

UNITED STATES' MEMORANDUM IN OPPOSITION TO DEFENDANT MARSHALL'S MOTION FOR CONTINUANCE

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and AUSA Robert A. Mandel and respectfully files its Memorandum in Opposition to Defendant Marshall's Motion for Continuance.

On August 20, 2008, Defendant Dick Marshall was indicted for aiding and abetting in the unlawful killing of Anna Mae Aquash pursuant to 18 U.S.C. §§ 1111, 1153, and 2. On September 9, 2008, Defendant Marshall filed a Motion for Continuance of the October 28, 2008, trial date citing the need for additional time to review discovery and conduct an investigation. On October 7, 2008, a Superseding Indictment was issued by the Grand Jury. At the same time, the United States filed a Motion for Expedited Trial Date necessitated by

the age of the case, the preparations that had been made for trial, and that both Defendants remain in pretrial custody.

On October 8, 2008, this Court issued an Order requesting all counsel to advise it of their readiness for a December 9, 2008, trial. On that same date the United States advised the Court of its readiness, and of the discovery it had provided to Defendant Marshall on September 2, 2008, September 22, 2008, and October 6, 2008. The United States further advised that all physical evidence was available to both Defendants for inspection at a mutually convenient time. On October 14, 2008, Defendant Marshall responded in opposition to an expedited trial, citing again the need to review discovery and conduct his investigation. On October 16, 2008, this Court scheduled the trial in this matter to commence February 24, 2009.

On January 9, 2009, Defendant Marshall once again filed a Motion for Continuance citing the need for an investigation and to listen to witness tapes. Based upon Defendant Marshall's failure to demonstrate a sufficient basis for a continuance, combined with compelling witness reasons, the United States is requesting denial of Defendant Marshall's motion and to commence trial on February 24, 2009.

The initial discovery specific to Defendant Marshall was produced on September 2, 2008, and September 22, 2008. Substantially all discovery documentation previously provided to Defendant Graham was provided to Defendant Marshall, in electronic format on October 6, 2008. Defendant

Marshall's Motion indicates he anticipates filing additional discovery motions as a basis for continuance. Any such motion, however, would be well-beyond the December 22, 2008, deadline established by the Court's Order of October 16, 2008, and would lack proper justification. It should be noted that these Defendants have collectively made approximately seventy-five specific discovery requests. See generally United States' Response to Defendant Graham's Motion to Compel Discovery (CR03-50020, DE 254 at ¶2; Marshall discovery requests of November 11, 2008; November 24, 2008; and December 18, 2008). Many of the requests have sought information that had already been provided to Defendants in original discovery, or sought discovery contrary to clearly established Eighth Circuit precedent.

Defendant's concerns associated with not receiving copies of all tapes of conversations also does not necessitate a continuance. These tapes have been produced and available for Defendant to review since the Court's discovery order of October 7, 2008. Defendant Marshall has not been provided copies of all of the taped conversations based in part upon continuing concerns raised by Defendant Graham that copying of tapes results in reduced quality. See Exhibit 1 (Defendant Graham's correspondence of December 31, 2008) and Exhibit 2 (the United States' response dated January 8, 2009). Furthermore, Defendant Marshall has been provided what transcripts of the taped conversations in the United States' possession.

Further delays raise serious witness safety concerns brought about by the motion practice of this case. Specific and detailed information has been set forth concerning two cooperating witnesses. See Defendant Graham's Motion to Compel Discovery and Memorandum in Support of Motion (CR03-50020, DE 250, 250-2 and 251). Similar type challenges have arisen with respect to Arlo Looking Cloud and Theda Clarke. See Defendant Graham's Motion and Memorandum for PSR (Looking Cloud) (DE 73 and 74); Defendant Marshall's Motion and Memorandum to Dismiss for Selective Prosecution (Theda Clarke) (DE 108 and 109); and Defendant Marshall's Affidavit of Counsel (DE 81). Defendant Marshall has recently created a MySpace account directly naming and targeting a potential witness. See Richard V. Dick Marshall Defense Committee (Exhibit 3). Additional serious witness safety concerns arise in the documents attached as Exhibits 4 and 5.[1] See Defendant Graham's Motion to Compel Discovery (CR03-50020, DE 250, 250-2, and 251).

Accordingly, the United States believes that Defendant Marshall has had sufficient time to review the discovery provided and conduct the investigation he deems necessary to present an adequate defense and that trial is necessitated based upon continuing concerns for witnesses in this case. The United States believes it is entitled in the interest of justice to commence trial on all three counts of the Indictment on February 24, 2009.

---

[1]Exhibits 4 and 5 are being provided for in camera review only and not to the Defendants in that they involve a separate ongoing criminal investigation.

Date: January 16, 2009

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on January 16, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Facsimile at
☐ Federal Express
☒ Electronic Case Filing

Marty J. Jackley
United States Attorney

This document has been filed electronically.

MURPHY LAW OFFICE, P.C.
JOHN R. MURPHY - ATTORNEY AT LAW
ERIN E. DUCHENEAUX - LEGAL ASSISTANT

AT THE HISTORIC FEIGEL HOUSE
328 E. NEW YORK STREET, SUITE 1
RAPID CITY, SD 57701

PHONE: (605) 342-2909 FAX: (605) 343-9760 E-MAIL: jmurphysd@hotmail.com www.murphylawoffice.org

December 31, 2008

Marty J. Jackley
United States Attorney
P.O. Box 3303
Sioux Falls, SD 57101

RECEIVED
JAN 02 2009
United States Attorney
Sioux Falls, SD

Robert Mandel
Assistant United States Attorney
515 9th Street, Room 201
Rapid City, SD 57701

RE: United States v. John Graham; File No. 08-50079-01

Dear Mr. Jackley and Mr. Mandel:

I am in receipt of an audio tape labeled, "198A-MP-47472; 1 of 1; DATE UNKNOWN; COPY." The exterior of the tape does not indicate who the parties on the tape are that are speaking. The tape is inaudible. Please produce an audible version of the tape and indicate who the parties are that are speaking. Thank you.

Sincerely,

John R. Murphy

Cc: Client

EXHIBIT 1

U.S. Department of Justice

Marty J. Jackley
United States Attorney
District of South Dakota

515 Ninth Street, Room 201
Rapid City, South Dakota 57701

(605)342-7822
FAX:(605)342-1108

January 8, 2009

John R. Murphy
Attorney at Law
328 E. New York St. #1
Rapid City, SD 57701

RE: United States v. John Graham

Dear John:

I am returning the tape you sent to us on January 6, 2009 as per our discussion. This tape is a recording of [redacted]. I was not able to detect any audibility problems with this tape on our player of any significant nature and it is no different from the copy we have. If you are still unable to hear it on your equipment, you can bring it over here and we can play it for you on ours.

Best regards,

MARTY J. JACKLEY
United States Attorney
By:

ROBERT A. MANDEL
Assistant U.S. Attorney

RAM/lc
Enc.
cc: Marty Jackley

EXHIBIT 2

Richard V. Dick Marshall Defense Committee

Standing for Honesty & Equity of a Common Man

The **Richard V. Dick Marshall Defense Committee** is a newly founded Committee which purposes is to reveal the truth, seek justice and support the innocence of Richard "Dick" Marshall who is accused of aiding and abetting the murder of Anna Mae Pictou Aquash of 1975.

Dick is a Common Man who had been living in the Thunder Valley SD area before his incarceration. He is a person who people in the community could lean on for guidance and direction in their lives, he lived our traditional values by providing his wisdom to those seeking guidance and generosisty to those who were in need. He had dreams and ideas on how to access sustainability for the Lakota people and to improve the economics and environment of the Pine Ridge Indian Reservation, he is a man of vision for our Lakota youth. However, in August 2008 unexpectedly he was taken from those he loved and charged for a crime that he professes innocense, therefore it is the Defense Committee's charge to ***Standing for Honesty & Equity of a Common Man.***

The future intent of the Committee is to provide updated information on Dick's legal status to his supporters through his newly Defense Committee website, emails and other public relations materials. To rally supporters together and discuss future strategies of support: support letters, fund raising events, public relations, and moral support on behalf of our friend Dick.

The Defense Committee is interesting in talking with or cooresponding with people who have been interviewed by Serle L. Chapman or know how to contact Serle L. Chapman. Please contact Dick's attorney if you been interviewed, know someone who has been interviewed or have contact information for Mr. Chapman, Attorney Dana Hanna at dhanna@midconetwork.com or by phone (605) 791-1832

The Richard V. Dick Marshall Defense Committee is seeking support on his behalf, letters of support can be sent directly to Dick at: Richard Vine Marshall Pennington County Jail 307 Saint Joseph St. Rapid City SD 57701 or to the **Richard Dick Marshall Defense Committee** at HCR 49 Box 113 Porcupine SD 57772.

EXHIBIT 3

If you are interested in becoming a member of this worthwhile cause, please contact us by phone, mail or web coorespondence through the webiste:

Contact Information:
Richard V. Dick Marshall Defense Committee
HCR 49 Box 113
Porcupine SD 57772
605-441-9051 cell
supportrichardickmarshall@live.com - email
www.myspace.com/richarddickmarshall - website

Send e-mail faster without improving your typing skills. **Get your Hotmail® account.**

FILED
JAN 2 0 2009
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	CRIM. NO. 08-50079-01
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.	

DEFENDANT'S WAIVER OF SPEEDY TRIAL ACT COMPLIANCE

Defendant John Graham states as follows:

1. He is aware of his right to a trial within seventy (70) days of his arraignment, pursuant to 18 U.S.C. 3161(c)(1) and 18 U.S.C. 3163(b)(1).

2. He is aware that the Court has issued its Standing Order to comply with these statutes.

3. He is aware that counsel for defendant Richard Marshall has moved to continue the dates set forth in the Court's Standing Order by sixty (60) days.

4. He consents to the joinder to the motion to continue.

5. He agrees that additional time is needed for him to request and review new

discovery materials and confer with his counsel prior to trial.

Subscribed and sworn this 16 day of Jan, 2009.

John Graham

John Graham

Subscribed and sworn to before me this 16 day of Jan, 2009.

Notary Public-South Dakota

(SEAL) ERIN E. DUCHENEAUX NOTARY PUBLIC State of South Dakota SEAL

My commission expires: 05-06-14

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 DEFENDANT MARSHALL'S MOTION TO COMPEL DISCOVERY

NOW COMES defendant Richard Marshall, by and through his attorney, Dana L. Hanna, and hereby moves the Court to order the government to disclose to the defendant all records, investigative reports, witness statements, court records and transcripts in the government's possession concerning the arrest and prosecution of defendants Anna Mae Aquash, Kamook Banks, a.k.a. Darlene Nichols, Dennis Banks, Leonard Peltier, Russell Redner, and Kenneth Loud Hawk in the United States District Court, District of Oregon, 1975. Grounds for the motion are that the evidence and information contains favorable evidence for the defendant.

In support of this motion, Dana L. Hanna, attorney for defendant Richard Marshall, hereby affirms:

1. I am court-appointed counsel for defendant Richard Marshall. I have been provided with approximately five thousands pages of discovery by the government, and in addition I have conducted my own investigation into the facts of this case. I make the following affirmations upon information and belief, the source of which are the discovery that has been provided to me, official court records, and my own investigation.

2. Defendant Richard Marshall is accused of aiding and abetting co-defendant John Graham, Arlo Looking Cloud, and Theda Clarke in the murder of Anna Mae Aquash, in

December 1975. It is the government's theory that Anna Mae Aquash was murdered because she was suspected of cooperating with law enforcement officials in the investigation and prosecution of one or more individuals in the American Indian Movement (AIM).

3. On November 24, 1975, near Ontario, Oregon, Anna Mae Aquash, cooperating witness Kamook Banks, a.k.a. Darlene Nichols, Dennis Banks, Leonard Peltier, Russell Redner, and Kenneth Loud Hawk were traveling in two vehicles transporting explosives and fire arms. Dennis Banks, Kamook Banks, Anna Mae Aquash, and Leonard Peltier were all fugitives from justice who were being sought by federal and state law enforcement officers. Dennis Banks had been convicted of riot in state court in South Dakota and had failed to appear at his sentencing. Kamook Banks had been indicted on firearms and explosives charges in federal court in Kansas. She had failed to appear for a court appearance and a warrant had been issued for her arrest. Leonard Peltier was wanted as a suspect in the murder of FBI Agents Coler and Williams, who were shot to death on the Pine Ridge Indian Reservation on June 26, 1975. Anna Mae Aquash had been arrested at Crow Dog's Paradise on the Rosebud Reservation in September 1975 and had been indicted on federal firearms and explosives charges. She had failed to appear for a court appearance in Pierre and a warrant had been issued for her arrest. The vehicles in which the fugitives were traveling were stopped by an Oregon Highway Patrolman. After firing shots at the patrolman, Dennis Banks and Leonard Peltier escaped. Kamook Banks, Anna Mae Aquash, Russell Redner, and Kenneth Loud Hawk were arrested and taken into custody. Soon thereafter, Dennis Banks, Leonard Peltier (both still at large), Kamook Banks, Anna Mae Aquash, Russell Redner, and Kenneth Loud Hawk were all indicted on federal explosives and firearm charges.

4. Shortly after their indictment, the defendants were provided with an affidavit in support of a search warrant. From the affidavit, they learned that two individuals, who were identified as "Informant A" and "Informant B" had provided detailed information to federal law enforcement authorities as to the vehicles that were being driven by the defendants, the identities of the defendants, and the fact that the defendants were transporting explosives and illegal firearms. The affidavit stated that both Informants A and B had provided information to law enforcement authorities regarding illegal activities of AIM on dozens of previous occasions and had been serving as informants for some time.

5. There was a general fear among the defendants in the Oregon case and their supporters in AIM that either Informant A or Informant B, or both, were either very close to the defendants or actually one of the defendants. Suspicion fell upon people close to Dennis Banks and Leonard Peltier, including Anna Mae Aquash.

6. Less than thirty days after Anna Mae Aquash and her co-defendants were arrested in Oregon, and a few weeks after it was learned that Informants A and B had given information to federal authorities, Anna Mae Aquash was murdered.

7. Based upon these facts and other facts that have become known to me during my investigation, there is a sound evidentiary basis to support the argument that Anna Mae Aquash's murder was directly related to her arrest in 1975 and prosecution as a defendant in the case of United States v. Loud Hawk, et al.,75-CR-296-RE, in the United States District Court for the District of Oregon; and that Anna Mae Aquash was murdered because she was suspected of being one of the informants who were referred to in the affidavit for a search warrant.

8. On information and belief, the investigators' reports and other materials requested from the Loud Hawk case contain evidence relevant to the question of motive, as well as evidence that can be used to impeach the credibility of government witnesses and the professionalism of the investigation that led to the indictment of defendant Richard Marshall. Moreover, there is a substantial likelihood that the evidence and information contained in these records would provide further sources of investigative information.

9. I have previously made a specific written request for this evidence and these materials to government prosecutors and my request was refused. I have attempted to acquire court records from the Clerk of the United States District Court in Oregon and was informed that the Court file could not be located. Police reports cannot be subpoenaed under F.R.Cr.Pro. Rule 17. Therefore, the only source of this evidence that is presently available to me is the United States Attorney's office.

WHEREFORE the defendant moves the Court to order the government to provide the defendant forthwith with all records in the government's possession concerning the arrest, prosecution, and investigation of Anna Mae Aquash and her co-defendants in the case of United States v. Loud Hawk, et al., including but not limited to state and federal investigators' reports,

court records and transcripts, witness interviews, and particularly any defendants' statements, reports, or records that refer to Anna Mae Aquash, Kamook Banks, Dennis Banks, or Leonard Peltier.

Dated this 20th day of January, 2009.

VINE RICHARD MARSHALL, Defendant

BY: */s/ Dana L. Hanna*
Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Motion to Compel Discovery upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
robert.mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 20th day of January, 2008.

/s/ Dana L. Hanna
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 DEFENDANT MARSHALL'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO COMPEL DISCOVERY

Defendant Richard Marshall seeks an order from the Court directing the government to locate and produce investigative reports, records, and court documents relating to the federal prosecution of Anna Mae Aquash, Dennis Banks, Kamook Banks, Leonard Peltier, Russell Redner, and Kenneth Loud Hawk in the United States District Court for the District of Oregon in 1975, in the case of United States v. Loud Hawk, et al., 75-CR-296-RE. Defendant Marshall represents that such materials would provide evidence that the prosecution of Aquash and her co-defendants is directly relevant to Aquash's murder: information relating to the Oregon prosecution provides evidence of a motive for Aquash's killing. Defendant Marshall also represents that he has sought this material through other means, including making a request of the United States Attorney, and has been unsuccessful.

The Supreme Court held in Brady v. Maryland, 373 US 87, 83 S.Ct. 1194 (1963), that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The Supreme Court stated in Kyles v. Whitley, 514 US 419, 115 S.Ct. 1555 (1995), that evidence which can be used attack the reliability of the investigation itself and which can be used

to discredit the caliber of the investigation is Brady material which the government has a duty to disclose. See: Kyles v. Whitley, 115 S. Ct. At 1571-1572.

Here, the information requested will provide evidence that will allow the defendant to argue that the government has essentially failed to conduct a professional investigation into the murder of Anna Mae Aquash, and that obvious investigative leads have been ignored, resulting in the indictment of an innocent man. The prosecution of Anna Mae Aquash and her co-defendants provides evidence of motive that has been ignored or misunderstood by the government. The facts and legal history relating to the Loud Hawk case, including the government's use of informants who were part of the American Indian Movement, is relevant to defendant Marshall's theory of defense and favorable for the defendant.

The United States Attorney's office in South Dakota may not physically have these files in their office, but that is of no matter. In order to comply with Brady, the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf, including other government agencies and investigators. Strickler v. Greene, 527 US 265, 281, 119 S.Ct. 1936 (1999); Kyles v. Whitley, 514 US at 437, 115 S.Ct. 1555.

If they contain any evidence that is favorable to the defendant as to the issue of guilt or impeachment purposes, the government has a duty to acquire records and information that is in the possession of other government agencies, including other United States Attorneys' offices and to disclose that information to the defendant so that he may use it in the preparation and presentation of his defense. In this case the government is likely to present evidence, as they did in the trial of Arlo Looking Cloud, of the arrest and prosecution of Anna Mae Aquash, Leonard Peltier, Kamook Banks, and others in Oregon in 1975.

Defendant Marshall has a constitutional right to be able to confront that evidence and to use it to present his theory of defense. This evidence is relevant to the motive of the murder of Anna Mae Aquash and lack of motive for this defendant; therefore it is favorable Brady evidence and the government has an obligation to disclose it to the defendant. This Court should order the government to do so.

Dated this 20th day of January, 2009.

(Signature Block on Next Page)

VINE RICHARD MARSHALL, Defendant

BY: */s/ Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Memorandum of Law in Support of Motion to Compel Discovery upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
robert.mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 20th day of January, 2008.

/s/ Dana L. Hanna
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 DEFENDANT MARSHALL'S MOTION FOR DISCLOSURE AND PRODUCTION OF EVIDENCE

NOW COMES defendant Richard Marshall, by and through counsel, and hereby moves the Court to order the government to produce and provide to the defendant copies of all tape recordings of witnesses in this case, including but not limited to all tape recorded conversations with any cooperating witness or potential witness in this case. The defendant makes this motion on the grounds that these tapes are necessary to prepare an effective defense at trial.

In support of this motion, Dana L. Hanna, attorney for defendant Marshall, hereby affirms:

1. On information and belief, the government has in its possession over 100 tapes of recorded conversations made by cooperating witnesses in this case. Many of the tapes involve recordings of conversations with other witnesses and potential witnesses. These tape recordings were made by, and record statements by cooperating witnesses who will testify in the trial.

2. I have previously requested these tapes in writing and in telephone conversations with the government prosecutor and I have been told that I cannot have copies of those tapes, and that if I wanted to hear them, I would have to make arrangements to hear them at the United States Attorney's office. There are probably 100 hours of taped conversations. I have received transcripts of some of the tapes. The vast majority of those tapes have not been transcribed.

3. On January 18, 2009, I heard for the first time the tape recording of a conversation secretly recorded by "Kamook" Darlene Nichols in July 2001 with Cleo Gates, the defendant's ex-wife. Cleo Gates was a government witness in the trial of Arlo Looking Cloud and she is expected to be a government witness in the trial of Richard Marshall. In Looking Cloud's trial, she testified that Arlo Looking Cloud, co-defendant Graham, Theda Clarke, and Anna Mae Aquash went to the home of her and defendant Marshall one night in 1975 and she testified to what transpired during their visit. The events discussed are the very essence of the government's case regarding Richard Marshall and I have never been provided with either that tape nor a transcript of that tape by the government. I borrowed that tape from counsel for the co-defendant.

4. The government has provided these tapes to the co-defendant's attorney. It is impractical and burdensome for me to have to listen to 100 hours of tapes at the United States Attorney's office. Moreover, I need to review the transcripts of some of the tapes that were made for accuracy. It may very well be necessary to seek electronic enhancement of some of the more important tapes, and I may offer some of the tape recordings as evidence.

5. These tapes are necessary for me to prepare an effective defense at trial. They contain Jencks Act material and if the government has not provided the tapes before trial, the government will have an obligation to provide them to me after these witnesses have testified. Therefore, it is economic for the Court in terms of time to order the government to provide me with those tapes before trial and not during trial.

WHEREFORE the defendant moves the Court to direct the government to provide the defendant with copies of all taped recorded conversations involving witnesses or potential witnesses in this case to the defendant forthwith.

Dated this 20th day of January, 2009.

VINE RICHARD MARSHALL, Defendant

BY: */s/ Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080, Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Motion for Disclosure and Production of Evidence upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
robert.mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 20th day of January, 2008.

/s/ Dana L. Hanna
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 DEFENDANT MARSHALL'S REPLY TO GOVERNMENT'S MEMORANDUM IN OPPOSITION TO MOTION FOR CONTINUANCE

NOW COMES Defendant Richard Marshall, by and through his attorney, Dana L. Hanna, and hereby replies to the government's memorandum in opposition to the defendant's motion for continuance to correct certain factual errors in the government's memorandum.

The government's memorandum in opposition to the defendant's motion for continuance (doc. 158) puts forth lack of necessity and witness security as grounds to oppose the motion for continuance.

First, it is factually incorrect that defendant Marshall has been provided with transcripts of the taped conversations in the United States Attorney's possession, as asserted on page 3 of the government's memorandum. It is accurate to say that the government has provided transcripts of some of the taped conversations in its possession. However, most of the taped conversations in the government's possession have not even been transcribed. These tapes were made by government witnesses. There are over 100 tapes. The government has declined defendant Marshall's request to provide those tapes to him, even though tapes were provided to counsel for co-defendant Graham. The vast majority of these tapes were made by government cooperating witnesses whom it pleases the government to refer to as "Maverick" and "Sierra." One of these witnesses, was a government witness in Arlo Looking Cloud's trial four years ago,

and therefore, any suggestion that her identity has been "outed" by defendant Marshall is frivolous. The government identified her as a cooperating witness for the prosecution in Looking Cloud's trial four years before Richard Marshall was even indicted.

The defendant has moved the Court to direct the government to provide defendant Marshall with copies of all of the tapes that have been provided to the co-defendant. Defense counsel must listen to these tapes to prepare for trial. Counsel for defendant Marshall recently borrowed a tape of a conversation between Darlene "Kamook" Nichols-Ecoffey and Cleo Gates from the attorney for the co-defendant. This conversation was secretly recorded by Darlene "Kamook" Nichols-Ecoffey in July 2001 when she went to the home of Cleo Gates and recorded a conversation in which they discussed the very details of the subject matter of Cleo Gates' testimony in this case. In that conversation, the two government witnesses discussed the night that Arlo Looking Cloud, Anna Mae Aquash, Theda Clarke, and co-defendant Graham arrived at the home of Richard Marshall and Cleo Gates, who was then Marshall's wife. This tape has never been provided to defendant Marshall in discovery. It is clearly Jencks Act material and is potential impeachment evidence.

It is now obvious that defense counsel for Marshall will have to listen to all of the tapes to determine whether they contain information or evidence, particularly statements by government witnesses, that is favorable to Richard Marshall

Finally, the government contends that witness security is a reason to deny a continuance. The government contends that defendant Marshall has identified and "targeted" a cooperating witness on a website. There is no merit to that accusation. Richard Marshall did not start a website. Friends and supporters of Richard Marshall in the Pine Ridge community started a website to gather support and resources for his defense. Defendant Marshall, who has been incarcerated since his indictment, had no direct involvement in the establishment of the website. As can be seen from the government's exhibit, it is not accurate to say that the website identified or targeted a potential witness. The website simply states that any individual who has information or who was interviewed by Serle Chapman should contact Mr. Marshall's attorney, giving my name and contact information. It is absolutely within the defendant's right to gather information regarding any potential witness, however, there is nothing on the website itself that

identifies Chapman as a witness or otherwise gives any information about him at all. The government's attempt to create an atmosphere of fear as grounds to oppose providing the defendant with sufficient time to prepare a defense is without merit.

In this case, the defendant needs more time than four and a half months to investigate, gather evidence, and prepare for trial. Therefore, the motion for continuance should be granted.

Dated this 20th day of January, 2009.

VINE RICHARD MARSHALL, Defendant

BY: */s/ Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Reply to Government's Memorandum in Opposition to Motion for Continuance upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
robert.mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 20th day of January, 2008.

/s/ Dana L. Hanna
Dana L. Hanna

FILED
JAN 20 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

UNITED STATES' MOTION FOR *IN CAMERA* REVIEW

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and AUSA Robert A. Mandel and respectfully submits its Motion for In Camera Review.

The United States submits copies of Exhibits 4 and 5 to the United States' Memorandum in Opposition to the Defendant's Motion for Continuance for *in camera* review in that said information involves a separate, ongoing criminal investigation. The United States believes this information is pertinent to the Court's consideration with respect to any further trial delays, and does not feel the defense is entitled to this evidence under Federal Rule of Evidence 16, Brady v. Maryland, or the Jencks Act, but is presenting this information to the Court for final determination of the discoverability of this material.

Date: January 20, 2009

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on January 20, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Facsimile at
☐ Federal Express
☐ Electronic Case Filing

Marty J. Jackley
United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff,	)	CRIM. NO. 08-50079-01
vs.	)	DEFENDANT GRAHAM'S
	)	OBJECTION TO SUBMISSION
JOHN GRAHAM, a/k/a JOHN BOY PATTON and VINE RICHARD MARSHALL, a/k/a) RICHARD VINE MARSHALL, a/k/a) DICK MARSHALL Defendant.	)	OF IN CAMERA MATERIALS

Defendant, John Graham, through his attorney, John R. Murphy, objects to the government's ex parte filing of exhibits 4 & 5 in support of its opposition to Defendant Marshall's motion to continue. File Doc. 158, n. 1.

The government has not made a sufficient showing that there is a basis for filing documents for in camera review by the Court. The government has not sought a protective order that could address both defense counsel's need to be informed as to the materials supposedly supporting the government's opposition and the government's desire to have certain matters kept confidential. The government has not provided any legal authority supporting the procedures it is utilizing in this case. At minimum, prior to submitting these secret documents to

the Court, the government should have sought permission to do so and given the defense an opportunity to respond.

The government makes generic assertions about "witness safety concerns" as being sufficient to deny Marshall's request for a continuance. The concerns addressed in its Opposition relate to two witnesses who have deliberately put themselves at the epicenter of this case.

One of these witnesses has made it well known that he is writing a book about this matter, and the other has testified in the Looking Cloud case. Their involvement in this case has been well known and well publicized for several years, predating Mr. Graham's deportation or Mr. Marshall's indictment. Further, they have not been shy about expressing their views on the matter and continue to post matters relating to this case. E.g. "It's murderers who make headlines and devastate families" by Serle Chapman (links to Aquash case added in 2008) (http://indiancountrynews.net/index2.php?option=com_content&do_pdf=1&id=46).

Moreover, the government has taken inconsistent positions on these witnesses in order to meet its needs. The government criticizes the defense from identifying the witnesses by name, citing their need to remain confidential. Yet, when the witnesses were identified by defense counsel as confidential informants,

the government claimed they were merely concerned citizens being reimbursed for their expenses. And the witnesses themselves have not maintained any sense of meaningful secrecy about their conduct. They openly advised subjects that they were recording interviews with them about AIM and Aquash. Interviews were conducted in public places such as local restaurants. And, subjects were often notified that their information was going to be published in a book.

Graham's concern is that the government will attempt to persuade the Court to deny Marshall's request for a continuance based on false allegations. The government had consistently made the inflammatory allegations against the defendants. For instance, the government has alleged that Graham raped Aquash as a means of persuasion. In a recent filing by the government before the Eighth Circuit Court of Appeals, the government stated this untested allegation in its statement of facts. It was an allegation not relevant to any issue before the Court. And, though referenced as a fact, the source cited by the government supporting it was one of its own pleadings, not sworn testimony.

Graham has a right to have his counsel review all such materials and either attempt to dispute them, disprove them, or put them in their proper context. The

methods used by the government in this case are not fair, and the secrecy does nothing to instill confidence in the integrity of the proceeding.

Dated January 20, 2009.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

MARTY J. JACKLEY	☐	U.S. Mail, postage prepaid
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DANA HANNA	☐	U.S. Mail, postage prepaid
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	☐	Facsimile at
	☒	Electronic Case Filing

Dated January 20, 2009.

/s/ John R. Murphy
John R. Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE 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 Defendant.	)))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION TO SUPPLEMENT RECORD

Defendant John Graham moves this Court to allow him to supplement his previously filed Motion to Dismiss Count III in Indictment (File Doc. 49) and Motion to Dismiss All Counts of Indictment (File Doc. 152). Specifically, Mr. Graham asks that the Court consider United States v. Norquay, 905 F.2d 1157, 1162 (8th Cir. 1990) when addressing these motions. This case supports the arguments made by Mr. Graham in those pleadings, specifically: (1) that the determination as to a defendant's status is a jurisdictional inquiry, not a proof matter; and, (2) that a non-Indian accomplice is not subject to the federal court's jurisdiction under 18 U.S.C. §§ 1152 or 1153 even if his Indian co-accomplice is subject to federal prosecution.

Mr. Graham also asks the Court to consider the arguments and authority set forth in the Appellee's Brief filed in United States v. Graham, Appeal No. 08-3580, which contains a complete discussion of the jurisdictional and accomplice liability issues raised in the motions to dismiss pending in this file.

Dated January 21, 2009.

/s/ John R. Murphy

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328 East New York Street, Suite 1
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(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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	☐	Hand Delivery
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	☐	Facsimile at
	☒	Electronic Case Filing

Dated January 21, 2009.

/s/ John R. Murphy
John R. Murphy

FILED
JAN 22 2009
CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER GRANTING MOTION FOR CONTINUANCE
JOHN GRAHAM, a/k/a/ John Boy Patton, VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendant.	*	

Pending before the Court is Defendant Marshall's Motion for Continuance. (Doc. 143.) For the following reasons, the motion will be granted.

BACKGROUND

In 2003, Defendant Graham was indicted with co-defendant Arlo Looking Cloud for the murder of Anna Mae Aquash. Looking Cloud was convicted of First Degree Murder after a jury trial in 2004. After lengthy proceedings in Canada, Defendant Graham was extradited to the United States and was arrested on the 2003 Superseding Indictment on December 6, 2007. In October, 2008, the Court dismissed the 2003 Superseding Indictment against Graham because it failed to allege Graham's Indian status, which is an essential element of an offense under 18 U.S.C. § 1153.

On August 20, 2008, Marshall was indicted for the first time for aiding and abetting the unlawful killing of Anna Mae Aquash pursuant to 18 U.S.C. §§ 1111, 1153, and 2. The jury trial was set for October 28, 2008. On September 9, 2008, Marshall filed a motion to continue. That motion to continue was granted on September 24, 2008, and Marshall's trial was scheduled to commence on February 24, 2009.

A Superseding Indictment was issued by the grand jury on October 7, 2008, charging Graham and Marshall as co-defendants in the murder of Annie Mae Aquash. By Order issued on October 16, 2008, the trial on the 2008 Superseding Indictment was scheduled for February 24, 2009, the same date that the Court had earlier scheduled Marshall's trial to begin.

On January 12, 2009, Defendant Marshall filed the pending motion to continue the trial and to extend all deadlines in the Court's Scheduling Order. Counsel for Marshall asserts that he needs more time for trial preparation in order to provide Marshall with his constitutional right to effective assistance of counsel. Counsel notes that the crime charged in the indictment occurred 33 years ago in 1975. The government has provided him with over 5,000 pages of discovery relating to the investigation into the murder of Anna Mae Aquash. Counsel has read all of the documents, but has not reviewed all of them with Marshall. Counsel for Marshall believes that events related to the American Indian Movement in 1975 are likely to be the subject matter of testimony in Marshall's trial, and that a thorough understanding of those events is essential to his defense. His requests for this type of information from the government have been refused. Furthermore, counsel intends to make motions to compel the government to provide him with copies of more than 100 audio cassette tapes prepared by the government or its informants in the investigation of this case, as well as to compel production of *Brady* and *Giglio* material the government has failed or refused to disclose. Finally, counsel asserts that he needs more than the remaining six weeks until trial in order to locate and interview witnesses, gather records, subpoena evidence, research legal issues and investigate the case. Marshall signed a waiver of his speedy trial rights.

Co-defendant Graham says he has no objection in light of the short period of time since Marshall was indicted. Graham adds that Marshall's ability to prepare a defense "has been hampered by the government's decision not to provide him with copies of the 109 audio taped interviews in this case." Graham has also executed a waiver of speedy trial act compliance.

The government objects to the continuance, citing witness safety concerns and stating that the audio tapes of witness interviews are available for Marshall's counsel to review at the office of the United States Attorney.

DISCUSSION

"District courts are afforded broad discretion when ruling on requests for continuances." *United States v. Vesey*, 330 F.3d 1070, 1072 (8th Cir. 2003). The Eighth Circuit considers five factors to determine whether a continuance is warranted:

> (1) the nature of the case and whether the parties have been allowed adequate timing for trial preparation; (2) the diligence of the party requesting the continuance; (3) the conduct of the opposing party and whether a lack of cooperation has contributed to the need for a continuance; (4) the effect of the continuance and whether a delay will seriously disadvantage either party; and (5) the asserted need for the continuance, with weight to be given to sudden exigencies and unforeseen circumstances.

United States v. Yockel, 320 F.3d 818, 827 (8th Cir.2003) (quoting *United States v. Issaghoolian*, 42 F.3d 1175, 1177-78 (8th Cir.1994)). The Court will address each of these five factors.

First, the Court agrees with counsel for Marshall that this case presents complex legal and factual issues. The crime involves multiple defendants and allegedly occurred as part of a wide-ranging conspiracy arising out of the AIM movement in the 1970's. The Court is aware that Marshall's counsel is a sole practitioner. The scheduled trial date is six months after Marshall's indictment. Under these circumstances, six months is not enough time for trial preparation. Counsel is still undertaking discovery and investigation.

Second, there is no evidence or allegation that counsel has failed to be diligent in his trial preparation efforts.

Third, although there have been disputes over whether Marshall is entitled to copies of the 109 audiotapes of witness interviews, the Court does not believe that the government's conduct has contributed in any significant way to the need for a continuance.

Fourth, despite the government's claims in regard to witness safety concerns, including *ex parte* exhibits 4 and 5 submitted in support of its opposition to Marshall's motion to continue,[1] the Court finds that a continuance will not seriously disadvantage the government.

Finally, the Court has determined that counsel's assertion that he needs more time to prepare for trial is credible, and that there is a compelling need for additional time. Accordingly,

IT IS ORDERED:

1. That Defendant Marshall's Motion For Continuance, doc. 143, is granted, and a new Scheduling Order will be issued by the Court.

2. That the government's Motion for *In Camera* Review, doc. 164, is granted, and Defendant Graham's Objection to Submission of *In Camera* Materials, doc. 165, is denied.

Dated this 22nd day of January, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: _____
DEPUTY

[1]Exhibits 4 and 5 submitted for *in camera* inspection in support of the government's opposition to Marshall's motion to continue are not discoverable material. Accordingly, the government's Motion for *In Camera* Review of these documents, doc. 164, will be granted, and Defendant Graham's Objection to Submission of *In Camera* Materials, doc. 165, will be denied.

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 DEFENDANT MARSHALL'S NOTICE OF INTENT TO OFFER STATEMENTS BY U.S. ATTORNEY AS ADMISSIONS BY A PARTY-OPPONENT AND MEMORANDUM OF LAW

Defendant Richard Marshall, by and through undersigned counsel, hereby gives notice to the government of his intent to offer into evidence statements made by the United States Attorney in the trial of *USA v. Arlo Looking Cloud, CR 03-50020,* and in the appeal of that case to the United States Court of Appeals for the Eighth Circuit, No.04-2173, as admissions by a party-opponent under Rule 801(d)(2)(B)(C) and (D) of the Federal Rules of Evidence (FRE). This memorandum of law will set forth the evidentiary basis for the admission of such statements.

Factual Background

In 2003, the government indicted Arlo Looking Cloud and co-defendant John Graham, charging them with first degree murder in the killing of Anna Mae Aquash in December 1975. In 2004, the government convicted Arlo Looking Cloud of murder in a jury trial. This Court imposed a mandatory life sentence. Looking Cloud appealed his conviction to the Court of Appeals for the Eighth Circuit. In 2005, that Court affirmed his conviction in United States v. Looking Cloud, 419 F.3d 781 (8th Cir. 2005).

In 2008, Arlo Looking Cloud agreed to cooperate with the government and testified before the grand jury. As a result of his testimony, the grand jury returned an indictment against

defendant Richard Marshall, charging him with first degree murder for aiding and abetting Looking Cloud and his accomplices in the murder of Aquash.

The principal witness for the prosecution in its case against Richard Marshall is Arlo Looking Cloud, who in 2008, for the first time since he began discussing Aquash's murder with law enforcement officials in 1994, told federal authorities that 33 years ago, he saw Richard Marshall hand a gun and a box of shells to Theda Clarke in the bedroom of Marshall's home in Allen, South Dakota.

The government's theory, which is based on the testimony of Looking Cloud, is that Richard "Dick" Marshall aided and abetted co-defendant John Graham, Arlo Looking Cloud and Theda Clarke in the murder of Anna Mae Aquash by providing the killers with the murder weapon. Defendant Richard Marshall contends that Looking Cloud's testimony that Marshall gave Clarke and her confederates a gun is false, motivated by Looking Cloud's desire for the government's assistance in securing him release from prison.

The credibility of Arlo Looking Cloud will be the major issue for the jury in the trial of Richard Marshall.

In the trial of Arlo Looking Cloud and in the government's appellate brief for the Court of Appeals in Looking Cloud's appeal, the United States Attorney made clear and unequivocal factual statements that are directly contrary to the factual claims they will be making in the trial of Richard Marshall, which facts go to critical contested factual issues in the case. These statements by the United States Attorney, which will be set forth herein, are admissible as admissions by a party-opponent under Rule 801(d)(2)(B)(C) and (D).

THE GOVERNMENT'S ADMISSIONS

1.

In the Trial Of Arlo Looking Cloud and in Looking Cloud's Appeal to the Court of Appeals, the United States Attorney Told the Jury and the Court of Appeals that Arlo Looking Cloud Provided the Gun to John Graham that Was Used to Murder Anna Mae Aquash.

The government now contends that Marshall aided and abetted in the murder of Aquash by providing the murder weapon to the killers. That is not what the government contended in the

trial of Arlo Looking Cloud, in February 2004. In Looking Cloud's trial, the government offered the testimony of Richard Two Elk, who testified that he was a friend of Looking Cloud and that on about six different occasions, Looking Cloud had confessed to him that he and Graham led Anna Mae Aquash out to a cliff in the Badlands, and that he–Arlo Looking Cloud–gave the murder gun to John Graham, just before Graham executed her. [Looking Cloud trial transcript, 354:2-19; 355: 17-25.]

> A: What he told me was that he gave the gun to John Boy, and John Boy went off with Anna Mae, and that she had started to pray or to begin the process for prayer when John Boy just put the gun to her head and pulled the trigger.
>
> [354: 16-19.]

In his summation, the United States Attorney made reference to that testimony, telling the jury that Looking Cloud had repeatedly told Two Elk that he, Looking Cloud, had handed the murder weapon to Graham just moments before Aquash was shot. [Prosecutor's summation, page 17: 22-25].

Nor is the government's latest version of the facts as to who provided the murder weapon to the shooter the same story that the government told the Court of Appeals.

When Looking Cloud appealed his conviction to the Court of Appeals for the Eighth Circuit, he argued that the evidence was insufficient to prove his guilt–specifically, the element of the crime requiring defendant's prior knowledge that Graham was going to kill Aquash. In the government's appellate brief, which was submitted on behalf of the United States Attorney James E. McMahon and signed by AUSA Robert A. Mandel, the government's attorneys made clear and unequivocal statements of fact to the Court that Arlo Looking Cloud had provided the murder weapon to Graham.

> "Near dawn, Aquash was then transported to a location on the Pine Ridge Indian Reservation approximately three miles north of the junction of South Dakota Highways 73 and 44. The vehicle was stopped by the side of the road and Aquash, still tied up, was forced by Looking Cloud and Graham to walk to the edge of a cliff. T 415-16, Ex. 45. She again begged for her life and spoke of her two young daughters. T 278, 280, 406. She

began to pray. T 354. **Looking Cloud handed a revolver to John Graham.** T 354. [1] Aquash was shot once in the back of the head carrying out the execution which Looking Cloud, Graham, and Clarke had been assigned."

[Bold face emphasis added.]
[USA brief, page 10.]

The government's brief made reference to Looking Cloud's admissions to Two Elk that he had provided the murder weapon for the execution, as particularly inculpatory evidence of Looking Cloud's active and knowing involvement in the murder.

"Far more inculpatory in that regard were statements he made to Richard Two Elk and John Trudell in which he admitted that Aquash was begging for her life while they waited in the car at Rosebud and the statement to Two Elk that Looking Cloud provided the gun that was used to kill Aquash." [USA brief, page 19].

Again:

"Looking Cloud and Graham forced Aquash to the edge of the cliff where she again begged for her life, at which time, according to admissions made by Looking Cloud, he provided a revolver to Graham who shot Aquash in the back of the head." [USA brief, page 24.]

In its opinion affirming Looking Cloud's conviction, the Court of Appeals relied on that evidence: "Two Elk testified that Looking Cloud told him he handed a gun to Graham and nodded at him. Aquash knelt to the ground, possibly to pray, and Graham held the gun to the back of her head and pulled the trigger." United States v. Looking Cloud, 419 F.3d 781 (8th Cir. 2005), at 790.

Four years ago, the government's prosecutors told a jury, a trial court, and a Court of Appeals that Arlo Looking Cloud provided the murder weapon to the killer of Anna Mae Aquash. Now, they intend to tell a jury that they should believe Arlo Looking Cloud when he says that it was not him who gave the murder gun to the killer, it was Richard Marshall.

The testimony that the government will offer from Arlo Looking Cloud in the trial of Richard Marshall is directly in conflict with the statements federal prosecutors made to the jury

[1] T 354 refers to the trial testimony of Richard Two Elk.

in Looking Cloud's trial and the statements federal prosecutors made to the United States Court of Appeals for the Eighth Circuit. The United States Attorney's prior statements are admissions of a party-opponent under FRE 801(d)(2)(B)(C) and (D).

2.

In the Trial of Arlo Looking Cloud, the United States Attorney Told the Jury that Looking Cloud Made it a Habit and Practice to Lie to Whomever He was Speaking to about his Involvement in the Murder of Aquash; Those Statements by the United States Attorney Are Admissions By the Government Going Directly to the Fundamental Question of Fact for the Jury in Defendant Marshall's Trial.

In Looking Cloud's trial, the main issue presented by the defense was a question of intent: whether Looking Cloud had prior knowledge that Graham and Clarke intended to murder Aquash. The government offered several out of court statements by Looking Cloud to prove his knowledge and intent. In his defense at trial, and in many of the out of court statements made by Looking Cloud, the defendant tried to assert that he did not know that his companions were going to kill Aquash until Graham actually shot her. The government's entire case in the trial was largely directed to proving that Looking Cloud had repeatedly lied to whomever he was speaking to when he claimed no prior knowledge of the plan to kill.

The government's attorney made this factual assertion as to the credibility of Arlo Looking Cloud and his history of lying about his involvement in Aquash's murder in the government's summation:

> "You see, he [Arlo Looking Cloud] tells whatever story he thinks is going to sound best to whoever he is telling it to."
>
> [USA summation, page 20.]

In the trial of Richard Marshall, Looking Cloud's credibility will be the fundamental question of fact for the jury to determine. The government will argue that Looking Cloud should be believed because he is a truthful witness. That is not what the government's lawyers told the jury and the Court in Looking Cloud's trial. Their prior statements are directly in conflict with the statements they will make to the jury in Marshall's trial. The United States Attorney's prior

statements in trial about Looking Cloud's method, habit and practice of telling self-serving lies to avoid his own culpability are admissions by the government that go directly to contradict the government's newfound faith in the credibility of their key witness.

3.

In the Trial and the Appeal of Arlo Looking Cloud, the United States Attorney Repeatedly and Consistently Told the Jury and the Court of Appeals that Graham, Clarke, Looking Cloud and Aquash Left Rapid City, Then Later Stopped at Marshall's house in Allen, and from Allen, They Drove to a House in Rosebud.

In the Looking Cloud trial, the government prosecutor told the jury that in December 1975, John Graham, Arlo Looking Cloud, and Theda Clarke abducted Anna Mae Aquash in Denver, Colorado and drove her in Theda Clarke's Pinto to Rapid City, South Dakota, where she was questioned to find out whether she had cooperated with federal law enforcement officers. In opening statements and summation, the United States Attorney consistently presented these facts as to the sequence of the killers' journey: when Looking Cloud and his accomplices, along with Aquash, left Rapid City, they drove south through the Pine Ridge Reservation, where they made a brief stop at the home of defendant Marshall and his then-wife Cleo, in Allen, South Dakota; that after the four left Allen, they then drove east, to a house in Rosebud community on the Rosebud Reservation; Looking Cloud, Graham, Clarke and Aquash then drove from Rosebud to a spot off Highway 73, near Wanblee, where Graham shot Aquash in the back of the head with a .32 caliber pistol.

In its appellate brief to the Court of Appeals, the government again stated that the route that was taken by Looking Cloud and his accomplices in the Pinto was from Rapid City to Allen to Rosebud to the spot off Highway 73 where they killed their victim. [USA brief, pages 23-24.]

On information and belief, based on the discovery provided to the defendant, in the trial of Richard Marshall, the government will offer a different version of facts than the one it presented in the trial and appeal of Looking Cloud. In Marshall's trial, the government will present testimony from Arlo Looking Cloud that he and his accomplices did not drive Aquash from Rapid City to Allen to Rosebud to the place of execution; rather, Looking Cloud will now testify, and the government will argue, that after they left Rapid City, they drove east to the house

in Rosebud, and from Rosebud, they then drove back west and stopped in the Marshalls' home in Allen, and from Allen, they drove Aquash to the cliff near Wanblee where they killed her.

This change of facts is necessary if the government is going to convict Marshall. All the evidence supports the inference that it was when they were in Rosebud that someone gave Looking Cloud, Clarke and Graham an assignment to kill Aquash (see the trial testimony of John Trudell); and that Looking Cloud, Graham and Clarke formed the actual intent to murder Aquash while they were at the house in Rosebud. Therefore, if they stopped first at Allen, before they went to Rosebud, they had not yet decided to kill Aquash when they were at Richard Marshall's house. Marshall could not have shared an intent or premeditation to do murder because Looking Cloud, Clarke and Graham had not formed that specific criminal intent when they stopped at the Marshall home. If they stopped at Richard Marshall's home in Allen *before* they drove to Rosebud, then they stopped there before they had formed an intent to kill Aquash and defendant Richard Marshall could not be guilty of aiding and abetting murder, since he would have lacked the specific intent and premeditation necessary to make him guilty of murder. Thus, the government's convenient change in the facts of their case:–if Looking Cloud and his accomplices drove first to Rosebud, then to Allen, the killers could already have formed an intent and a plan to kill Aquash when they arrived at Marshall's home in Allen. Therefore, the question of whether Looking Cloud and his accomplices stopped first in Allen and from there drove to Rosebud or whether they drove first to Rosebud and then to Allen will be a critical question of fact for the jury to decide in Richard Marshall's trial.

In opening statements and summation in Looking Cloud's trial, the United States Attorney repeatedly, clearly, and unequivocally stated that this was the sequence of stops made by Looking Cloud, Clarke, Graham and Aquash:

> "When they left that house [in Rapid City], the defendant [Looking Cloud], Mr. Graham, Theda Clarke again took Anna Mae, they put her back in the little red Pinto, again bound, tied up. The defendant was now driving and they headed south toward the Pine Ridge Indian reservation. They first went to a small town, Allen, South Dakota, on the Pine Ridge reservation..... They showed up at the house of Cleo and Dick Marshall... Dick Marshall said to his wife they want us to keep her here for a while. Cleo said I don't like the looks of this, no way. So the defendant, Mr. Graham, Theda Clarke take Anna Mae, put her back in the car again and now they are on their way to Rosebud. They stop at a

house in Rosebud in the wee hours of the morning...."

[USA opening statement: pages 10:12: 11:5.]

[See also: USA summation: pages 13, 14, 27, 32, 52, 55.]

In its appellate brief to the Court of Appeals, the government again clearly and unequivocally stated that the sequence of stops on Anna Mae Aquash's last journey was Rapid City, to Allen, and from Allen to Rosebud, and from Rosebud to the murder scene near Wanblee. [USA brief, pages 9-10; 23-24.]

These factual statements by the government's attorneys are directly in conflict with the version of facts that Looking Cloud and the government will present in the trial of Richard Marshall. In order to have the evidence conform to the prosecution's theory of guilt, the facts that will be put forward by the government have changed from the time of Looking Cloud's trial. If the trial is a quest for the truth, the jury has a right to know that and the defendant has a right to introduce evidence that will allow the jury to know that.

Defendant Marshall intends to offer these prior statements of fact that the United States Attorneys made to the Looking Cloud jury and to the Court of Appeals as admissions made by a party-opponent.

LEGAL ARGUMENT

ADMISSIONS BY AN AUTHORIZED REPRESENTATIVE OF A PARTY-OPPONENT

FRE Rule 801(d) provides, in relevant part:

> **(d) Statements which are not hearsay.** A statement is not hearsay if-
> ***
> **(2) Admission by party-opponent.** The statement is offered against a party and is
> ***
> (B) a statement of which the party has manifested an adoption or belief in its truth, or
> (C) a statement by a person authorized by the party to make a statement concerning the subject, or
> (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship. . .

I.

STATEMENTS MADE BY A UNITED STATES ATTORNEY IN A PRIOR TRIAL AND IN A LEGAL MEMORANDUM TO THE COURT OF APPEALS ARE ADMISSIBLE IN A LATER TRIAL AS ADMISSIONS OF A PARTY-OPPONENT.

Statements by a party's attorney are admissible against the party as admissions, if the statements are with the scope of the attorney's representation. United States v. Ojala, 544 F.2d 940, 945-946, 1 Fed.R.Evid.Serv.413 (8th Cir. 1976); United States v. McKeon, 738 F.2d 26, 15 Fed.R.Evid.Serv 1409 (2d Cir. 1984); United States v. Blood, 806 F.2d 1218, 22 Fed.R.Evid.Serv. 156 (4th Cir. 1986); Williams v. Union Carbide Corporation, 790 F.2d 552, 20 Fed.R.Evid.Serv. 964 (6th Cir. 1986). See, generally: Admissibility as `Not Hearsay' of Statements by Party's Attorney under FRE 801(d)(2)(C) and 801(d)(2)(D), 117 ALR Fed. 599. See also: United States v. Rice, 449 F.3d 887 (8th Cir. 2006), (testimony recounting the statements made by defendant's loan counsel are admissions by an agent of a party opponent under FRE Rule 801(d)(2)(C) and (B)).

This proposition extends to statements made by a party's attorney during a trial in opening statements and final arguments to a jury. See: United States v McKeon, above. More than a hundred years ago, the United States Supreme Court acknowledged the binding effect of an attorney's unambiguous statement of fact in an opening statement. Oscanyan v. Arms Co., 103 US 261, 263 , 26 L.Ed. 539 (1880). The Court of Appeals for the Eighth Circuit ruled that the same principle applies in criminal trials almost 80 years ago, in Dick v. United States, 40 F.2d 609, 611 (8th Cir. 1930), when that Court held that a statement made by defense counsel in opening statement was a binding admission by the defendant.

Counsel's opening statement or closing argument may be used in a later trial as an admission by a party under 801(d)(2)(C). United States v. Martin, 773 F.2d 579 (4th Cir. 1985); United States v McKeon, above.

The government is a party-opponent for purposes of FRE Rule 801(d)(2) in a criminal case; therefore, statements made by a federal prosecutor in legal briefs or memoranda to the court can be introduced into evidence by a defendant as admissions by a party-opponent.

United States v. Kattar, 840 F.2d 118 (1st Cir. 1988). See also: United States v. Morgan, 581 F.2d 933 (CADC 1978)(where government's attorneys had indicated their belief in a sworn affidavit to a judicial officer that they believed certain statements were trustworthy, government could not later sustain an objection to those statements on the grounds that they were hearsay; rather, they were admissible as adoptive admissions of belief by the government); United States v. Bakshinian, 65 F.Supp.2d 1104, 1109 (CD Cal.).

Moreover, a statement that is admitted as an admission by a party-opponent need not be against the interest of the party when made. Auto-Owners' Ins. Co. v. Jensen, 667 F.2d 714, 722 (8th Cir., 1981).

Here, the government, by and through United States Attorneys acting in the course of their representation of the government, in a case concerning the same facts in the same alleged crime as that of which defendant Marshall is accused, have made clear and unequivocal factual statements to a jury and to a court that are directly relevant to critical issues in this case. Those statements are statements for which the government's attorneys have manifested and adopted a belief in their truth; they are statements made by attorneys who were authorized to speak for the government concerning the facts of the murder of Anna Mae Aquash; and they are statements made by an authorized attorney-agent of the United States concerning a matter within the scope of the attorney's employment, made during and in the course of the attorney's representation of the government.

Therefore, these statements made by the government's attorneys in the trial and appeal of Arlo Looking Cloud are admissible as admissions by a party opponent under FRE Rule 801(d)(2)(B)(C) and (D).

Dated this 27th day of January, 2009.

VINE RICHARD MARSHALL, Defendant

BY: */s/ Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Notice of Intent to Offer Statements by U.S. Attorney as Admissions by a Party-Opponent and Memorandum of Law upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
robert.mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 27th day of January, 2008.

/s/ Dana L. Hanna
Dana L. Hanna

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

ROBERT A. MANDEL
Assistant United States Attorney
515 9th Street #201
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Robert.Mandel@usdoj.gov

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

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

GOVERNMENT'S RESPONSE TO DEFENDANT MARSHALL'S MOTION FOR DISCLOSURE AND PRODUCTION OF EVIDENCE

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 Disclosure and Production of Evidence and states as follows:

1. Regarding any recordings of statements of the defendant, Fed. R. Crim. P. 16 provides that the United States is required to make it "available for inspection [or] copying." The United States has made these tapes available for defense counsel to listen to in the U. S. Attorney's Office. Defense counsel has not done so. The rule does not require that the United States make a copy of these tapes for defense counsel. While the United States did have an extra set

of copies that were given to co-defendant's counsel, the United States is not required to create another set. Defendant Marshall has not been provided copies of all of the taped conversations based in part upon continuing concerns raised by Defendant Graham that copy of tapes results in reduced quality. See Exhibit 1 (Defendant Graham's correspondence of December 31, 2008) and Exhibit 2 (the United States' response dated January 8, 2009). The United States notes from defendant's pleading that he did on one occasion borrow one of the copies of a tape from co-defendant's counsel to listen to. As long as the Court's order regarding discovery is complied with, the United States does not object to any arrangements between defense counsel to work out an arrangement whereby they can both listen to those copies of the tapes.

2. Regarding any other recordings in the possession of the United States, again there is no legal obligation for the United States to make copies for the defendant. Again, these tapes are available for defense counsel to listen to but he has not done so. Again, the United States does not object to an arrangement between defense counsel.

3. While it is the position of the United States that while a number of the tapes referred to by the defendant are probably not even discoverable under federal law, nonetheless, all are being made available to defense counsel to listen to in the U. S. Attorney's Office. If defense counsel chooses to copy these tapes, the United States is agreeable to working out arrangements if proper procedures and assurances are put in place to protect sensitive discovery

materials. The United States is not required to make copies of these tapes for the defendant under any rule or law and therefore resists the defendant's motion in its entirety.

Respectfully submitted this 30th day of January, 2009.

/s/ Robert A. Mandel

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th 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 Disclosure and Production of Evidence on:

Dana Hanna
Attorney at Law

John Murphy
Attorney at law

/s/ Robert A. Mandel

Robert A. Mandel

MURPHY LAW OFFICE, P.C.
JOHN R. MURPHY - ATTORNEY AT LAW
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December 31, 2008

Marty J. Jackley
United States Attorney
P.O. Box 3303
Sioux Falls, SD 57101

RECEIVED
JAN 02 2009
United States Attorney
Sioux Falls, SD

Robert Mandel
Assistant United States Attorney
515 9th Street, Room 201
Rapid City, SD 57701

RE: United States v. John Graham; File No. 08-50079-01

Dear Mr. Jackley and Mr. Mandel:

I am in receipt of an audio tape labeled, "198A-MP-47472; 1 of 1; DATE UNKNOWN; COPY." The exterior of the tape does not indicate who the parties on the tape are that are speaking. The tape is inaudible. Please produce an audible version of the tape and indicate who the parties are that are speaking. Thank you.

Sincerely,

John R. Murphy

Cc: Client

EXHIBIT 1

U.S. Department of Justice

Marty J. Jackley
United States Attorney
District of South Dakota

515 Ninth Street, Room 201
Rapid City, South Dakota 57701

(605)342-7822
FAX:(605)342-1108

January 8, 2009

John R. Murphy
Attorney at Law
328 E. New York St. #1
Rapid City, SD 57701

RE: United States v. John Graham

Dear John:

I am returning the tape you sent to us on January 6, 2009 as per our discussion. This tape is a recording of [redacted]. I was not able to detect any audibility problems with this tape on our player of any significant nature and it is no different from the copy we have. If you are still unable to hear it on your equipment, you can bring it over here and we can play it for you on ours.

Best regards,

MARTY J. JACKLEY
United States Attorney
By:

ROBERT A. MANDEL
Assistant U.S. Attorney

RAM/lc
Enc.
cc: Marty Jackley

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S REPLY TO GOVERNMENT'S RESPONSE FOR DISCLOSURE AND PRODUCTION OF EVIDENCE

John R. Murphy, defense counsel for John Graham replies to the Government's Response to Defendant Marshall's Motion for Disclosure and Production of Evidence (File Doc. 170).

In recent pleadings, the government has claimed that its decision not to provide copies of audio tapes to Mr. Marshall is supported by a letter I wrote to the government on December 31, 2008. File Doc. 170, Exhibit 1. The government asserts that my letter supports its assertion that copying the tapes for Mr. Marshall may lead to the tapes becoming inaudible. File Doc. 170, p. 2.

My letter to the government was poorly drafted. And, it is being used out of context by the government to justify not providing Mr. Marshall with copies of the audio tapes.

In my letter to the government, I said that one tape was "inaudible." That was not the proper way to describe the tape. The audio quality of the tape is fine. This is verified by Mr. Mandel's responsive letter dated January 8, 2009. File Doc. 170, Exhibit 2. However, the tape was not labeled, and there was no indication of who made the tape, who was being recorded, and when the tape was made. File Doc. 170, Exhibit 1. Of the several people recorded on the tape, none appeared to be connected with this case.

The government knows that the audio quality of the tape was fine. File Doc. 170, Exhibit 2. There is no basis for its continuing assertion that its refusal to provide Mr. Marshall with audio tapes is based "upon continuing concerns raised by Defendant Graham that copy of tapes (sic) results in reduced quality." File Doc. 170, p. 2.

Defense counsel wants to make sure that the Court does not resolve Mr. Marshall's motion for production of these tapes based on the government's misrepresentation that copying the tapes is likely to lead to audibility problems when such has not been the case in the past. Defense counsel regrets any

confusion caused by his imprudent use of the word "inaudible" in his letter to the government, as that was not an accurate way to describe the situation.

Dated January 30, 2009.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

MARTY J. JACKLEY	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
ROBERT A. MANDEL	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
DANA HANNA	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing

Dated January 30, 2009.

/s/ John R. Murphy
John R. Murphy

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 DEFENDANT MARSHALL'S MOTION TO DISMISS FOR DENIAL OF DUE PROCESS

NOW COMES defendant Richard Marshall, by and through his attorney, Dana L. Hanna, and hereby moves this Court to dismiss the indictment on the grounds that the government's use of inherently contradictory evidence and factual theories in the trial of Arlo Looking Cloud and the prosecution of Richard Marshall for the same crime violates the Due Process Clause.

In support of this motion, Dana L. Hanna, counsel for defendant Richard Marshall, hereby affirms:

1. I make these affirmations on the basis of information and belief, the sources of which include, but are not limited to, the grand jury testimony of Arlo Looking Cloud [Exhibit 1, filed under seal]; the FBI form 302 report of the proffer interview of Arlo Looking Cloud on August 19, 2008 [Exhibit 2, filed under seal]; the official transcript of the trial testimony in the trial of Arlo Looking Cloud in this Court, February 2004; the government's appellate brief in the appeal of Arlo Looking Cloud before the Court of Appeals for the Eighth Circuit; and the discovery provided to the defendant by the government.

2. Based on the aforesaid sources, I have good reason to believe and affirm, and I do in fact believe and affirm, that the evidence and factual theory of prosecution that the government has put forward and will put forward in its prosecution of Richard Marshall is directly and

irreconcilably inconsistent with the evidence and factual theory of prosecution that the government put forward to prove the guilt of Arlo Looking for the same crime in his trial and appeal.

3. An irreconcilable conflict exists between the evidence and factual theories presented by the government in Looking Cloud's trial and the evidence and the factual theory the government has and will put forward in its case against Richard Marshall: in order to prove its factual theory of prosecution against Richard Marshall, the government will necessarily have to disprove and discredit testimony, evidence, and the factual theory it presented to the jury and the Court of Appeals to prove Arlo Looking Cloud's guilt.

4. In February 2004, in a jury trial before this Honorable Court, the government convicted Arlo Looking Cloud of aiding and abetting the murder of Anna Mae Aquash. The government offered the testimony of Richard Two Elk, who testified that Looking Cloud had admitted to him on several occasions that he, Looking Cloud, had given the murder weapon–a revolver–to John Graham at the scene of the murder and that Graham then shot Aquash in the head. Looking Cloud was sentenced to life imprisonment. [Transcript, *United States v. Looking Cloud* trial, pages 354 *et seq*.]

5. In Looking Cloud's appeal, in its brief and in oral argument, the government represented to the United States Court of Appeals for the Eighth Circuit as a proven fact that "Looking Cloud handed a revolver to John Graham**."** [Government's brief, page 10]. Looking Cloud's conviction was affirmed. United States v. Looking Cloud, 419 F.3d 781 (8th Cir. 2005).

6. In August 2008, the government presented the testimony of Arlo Looking Cloud to a grand jury and secured an indictment against Richard Marshall. It is now the theory of the prosecution that it was Richard Marshall–and not Arlo Looking Cloud–who provided the gun that was used to murder Aquash.

7. In order to prove that factual theory in the trial of Richard Marshall, the government intends to offer the testimony of Arlo Looking Cloud, who will attempt to shift the blame from himself onto Richard Marshall for committing the very act–providing the murder weapon–that the government told Looking Cloud's jury and the Court of Appeals that Arlo Looking Cloud

had committed.

8. On this and other questions of contested fact, the evidence and factual theories that the government intends to put forward in its trial against Richard Marshall are directly in irreconcilable conflict with the evidence and factual theories that it presented to the jury to convict Arlo Looking Cloud for the same crime.

9. Pursuant to Eighth Circuit precedent and the legal authority set forth in the memorandum of law in support of this motion, the government's use of inconsistent evidence and factual theories of prosecution in two trials to convict two defendants of the same crime violates defendant Marshall's right to fundamental fairness and due process of law.

WHEREFORE defendant Richard Marshall moves this Court to dismiss the indictment.

Dated this 4th day of February, 2009.

VINE RICHARD MARSHALL, Defendant

BY: */s/ Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Motion to Dismiss for Denial of Due Process upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
robert.mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 4th day of February, 2009.

/s/ Dana L. Hanna
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 DEFENDANT MARSHALL'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS FOR DENIAL OF DUE PROCESS

Summary of Material Facts and Argument

Defendant Richard Marshall moves the Court to dismiss the indictment against him on the grounds that the government's use of irreconcilable and inherently contradictory prosecutorial theories and evidence is so fundamentally unfair that it violates the defendant's right to due process.

In February 2004, in a jury trial, the government convicted Arlo Looking Cloud of first degree murder in the killing of Anna Mae Aquash. In that trial the government presented evidence in the form of admissions made by Looking Cloud that while Aquash was begging for her life on a cliff in the badlands, Looking Cloud gave a pistol to John Graham and nodded to him, then Graham used that pistol to execute Aquash.

In 2005, when Looking Cloud appealed his conviction to the United States Court of Appeals for the Eighth Circuit, in the government's brief and in oral argument, the government clearly and unequivocally affirmed to that Court that Arlo Looking Cloud had provided the murder weapon that John Graham used to shoot Aquash.

Three years after his conviction was affirmed, Looking Cloud became a government witness. In August 2008, he gave testimony to a grand jury inculpating Richard Marshall in the

murder of Anna Mae Aquash. Looking Cloud's grand jury testimony radically and directly contradicted evidence and the factual theory that the government used in Looking Cloud's trial to prove Looking Cloud's guilt. After hearing Looking Cloud's testimony, the grand jury returned an indictment against Richard Marshall charging him with aiding and abetting the murder of Anna Mae Aquash.

Now, to convict Richard Marshall, the government intends to put forward evidence and a factual theory that is radically inconsistent with the evidence and factual theory it presented in Looking Cloud's trial:–the government will have Arlo Looking Cloud testify that he did not give a revolver to John Graham and that he did not supply the murder weapon for the killing; Looking Cloud will seek to shift culpability for providing murder weapon away from him and onto Richard Marshall. The government intends to put forward a factual theory, based on Looking Cloud's testimony, that the defendant Richard Marshall gave a handgun to Theda Clarke when Looking Cloud and his accomplices, along with Aquash, stopped at Richard Marshall's house in Allen, South Dakota, and it is the government's theory that the handgun that Marshall allegedly gave Clarke was used by Graham to murder Aquash.

The government seeks to obtain a conviction against Richard Marshall by putting forth testimony and factual theories that cannot possibly be true unless the testimony and factual theories that government prosecutors presented to the jury in Looking Cloud's trial were false. Therefore, "an inconsistency ... exist[s] at the core of the prosecutor's cases against the defendants for the same crime", and that violates Due Process. Smith v. Groose, 205 F.3d 1045, 1052 (8th Cir. 2000), *cert. denied* 531 US 985, 121 S.Ct. 441 (2000).

Factual Background

1.

In the Trial of Arlo Looking Cloud, the Government Presented Evidence that Arlo Looking Cloud Gave John Graham the Revolver that He Used to Kill Aquash.

In the trial of Arlo Looking Cloud, the United States Attorney presented evidence to the jury that Arlo Looking Cloud handed the gun to John Graham that Graham used to murder Anna Mae Aquash. Richard Two Elk testified that Looking Cloud had admitted to him that he–Arlo

Looking Cloud–had provided the shooter with the murder weapon.

Q. What did he tell you happened when they stopped?

A. That they got out of the vehicle and–

Q. Let me stop you there a minute. You said they got out of the vehicle, who are you talking about?

A. John Boy and Arlo and Anna Mae.

Q. Go ahead then?

A. That they had gotten out of the vehicle and they were going to go off the side of the road, and Arlo gave the gun to John Boy and nodded to him, and John Boy went off with Anna Mae.

Q. You said that Arlo gave the gun to John Boy?

A. That's what he told me.

Q. When they were out at the site where Anna Mae was killed?

A. Yes.

Q. And then he told you what happened after that?

A: What he told me was that he gave the gun to John Boy, and John Boy went off with Anna Mae, and that she had started to pray or to begin the process for prayer when John Boy just put the gun to her head and pulled the trigger.

[*USA v. Looking Cloud*, trial transcript, Two Elk testimony, 353:25 - 354: 19.]
See also: Two Elk testimony, trial transcript, 355: 17-25.

In his summation the prosecutor referred to the evidence that Looking Cloud had admitted to Two Elk that he had handed the murder weapon to Graham immediately before Graham shot her. [Trial transcript, prosecutor's summation, page 17: 22-25.]

2.

In Looking Cloud's Appeal, the Government Clearly and Unequivocally Affirmed to the United States Court of Appeals That Arlo Looking Cloud Provided the Revolver That His Accomplice Used to Kill Anna Mae Aquash.

After Looking Cloud was found guilty and this Court sentenced him to life imprisonment, Looking Cloud appealed his conviction to the Court of Appeals for the Eighth Circuit.

In its brief to the Court of Appeals, the government represented as a proven fact that Arlo Looking Cloud had provided the murder weapon to Graham.

> "Near dawn, Aquash was then transported to a location on the Pine Ridge Indian Reservation approximately three miles north of the junction of South Dakota Highways 73 and 44. The vehicle was stopped by the side of the road and Aquash, still tied up, was forced by Looking Cloud and Graham to walk to the edge of a cliff. T 415-16, Ex. 45. She again begged for her life and spoke of her two young daughters. T 278, 280, 406. She began to pray. T 354. **Looking Cloud handed a revolver to John Graham.** T 354. [1] Aquash was shot once in the back of the head carrying out the execution which Looking Cloud, Graham, and Clarke had been assigned."
>
> [Government's appellate brief, *United States of America, Appellee v. Fritz Arlo Looking Cloud, Appellant*, No. 04-2173, page 10.]
> [Emphasis added.]

In its brief, as it had in trial, the government again pointed to Looking Cloud's admissions to Two Elk as proof that Looking Cloud had provided the murder weapon to Graham.

> "Far more inculpatory in that regard were statements he made to Richard Two Elk and John Trudell in which he admitted that Aquash was begging for her life while they waited

[1] T 354 refers to Richard Two Elk's testimony.

in the car at Rosebud **and the statement to Two Elk that Looking Cloud provided the gun that was used to kill Aquash**."

[Government's appellate brief, *United States of America, Appellee v. Fritz Arlo Looking Cloud, Appellant*, No. 04-2173, page 19.]
[Emphasis added.]

The government positively affirmed to the Court of Appeals that Looking Cloud gave Graham the gun that he used to murder Aquash:

"Looking Cloud and Graham forced Aquash to the edge of the cliff where she again begged for her life, at which time, **according to admissions made by Looking Cloud, he provided a revolver to Graham who shot Aquash in the back of the head**."

[Government's appellate brief *United States of America, Appellee v. Fritz Arlo Looking Cloud, Appellant*, No. 04-2173, page 24.]
[Emphasis added.]

Again, in the government's oral argument to the Court of Appeals, Assistant United States Attorney Robert A. Mandel referred the court to the evidence that Looking Cloud had given the murder weapon to Graham. [*United States of America, Appellee v. Fritz Arlo Looking Cloud, Appellant*, No. 04-2173, oral argument, at www.ca8.uscourts.gov/oralargs/oaFrame.html].

In its opinion affirming Looking Cloud's conviction, the United States Court of Appeals for the Eighth Circuit relied on that evidence and on the government's representation of those specific facts: "Two Elk testified that Looking Cloud told him he handed a gun to Graham and nodded at him. Aquash knelt to the ground, possibly to pray, and Graham held the gun to the back of her head and pulled the trigger." United States v. Looking Cloud, 419 F.3d 781(8th Cir. 2005), at 790.

3.

In the Trial of Arlo Looking Cloud and in His Appeal, the Government Put Forward Evidence and the Factual Theory that after Looking Cloud, Graham, Clarke and Aquash Left Rapid City, They Drove to the Marshall Home in Allen, and From Allen to a House in Rosebud, and from Rosebud They Drove to the Site Near Wanblee Where They Killed Her.

The question of whether Looking Cloud, Clarke, Graham and Aquash stopped first in Allen and from there drove to Rosebud or whether they drove first to Rosebud and then to Allen is a critical question of fact in determining Richard Marshall's guilt or innocence.

In opening statements and summation in the Looking Cloud trial, the United States Attorney consistently and unequivocally told the jury that after Looking Cloud, Graham, Clarke and Aquash left Rapid City, they drove to the Pine Ridge Reservation; there, they made a brief stop around midnight at the home of Richard Marshall in Allen, South Dakota; after they left the Marshall home in Allen, they drove east to the Rosebud Reservation, and stopped at a house in Rosebud community; and after they left Rosebud, Looking Cloud, Graham, Clarke and Aquash then drove to a spot in the Badlands near Wanblee, where Aquash was shot and killed.

> "When they left that house [in Rapid City], the defendant [Looking Cloud], Mr. Graham, Theda Clarke again took Anna Mae, they put her back in the little red Pinto, again bound, tied up. The defendant was now driving and they headed south toward the Pine Ridge Indian reservation. They first went to a small town, Allen, South Dakota, on the Pine Ridge reservation..... They showed up at the house of Cleo and Dick Marshall... Dick Marshall said to his wife they want us to keep her here for a while. Cleo said I don't like the looks of this, no way. So the defendant, Mr. Graham, Theda Clarke take Anna Mae, put her back in the car again and now they are on their way to Rosebud. They stop at a house in Rosebud in the wee hours of the morning...."
>
> [Government's opening statement: pages 10:12 - 11:5.]
> See also: Government's summation: pages 13, 14, 27, 32, 52, 55.

In its appellate brief to the Court of Appeals, the government again clearly put forward a factual theory, based on the evidence presented in trial, that after Looking Cloud, Clarke, Graham and Aquash left Rapid City, they drove to Allen; from Allen they then drove to Rosebud, and from Rosebud, they drove to the spot off Highway 73 where Looking Cloud aided his accomplices in the murder of their victim. [Government's appellate brief, pages 9-10; 23-24].

In the evidence presented by prosecutors and in the prosecution's theory of the facts, the government consistently told both the jury and the Court of Appeals that Looking Cloud and his accomplices, along with Aquash, stopped at Richard Marshall's home in Allen *before* they drove to Rosebud–that is, *before* they were directed to kill Aquash.

4.

It is The Government Demonstrated Intent to Use Inherently Irreconcilable and Inconsistent Evidence and Factual Theories to Convict Arlo Looking Cloud and Richard Marshall for the Same Crime in Separate Trials.

It is absolutely clear from the discovery provided to the defendant, including the grand jury testimony of Arlo Looking Cloud, and from statements and documents submitted to this Court by government prosecutors that the government intends to use evidence and to present a factual theory in its case against Richard Marshall that would be in direct and irreconcilable conflict with evidence, testimony and the factual theory that the government presented to the jury and to the Court of Appeals to prove the guilt of Arlo Looking Cloud.

Before this Court, in Looking Cloud's trial, and before the United States Court of Appeals for the Eighth Circuit in his appeal, the government presented evidence and made factual statements to the jury and the court that it was Arlo Looking Cloud who provided the shooter with the gun that he used to kill Anna Mae Aquash. Now, after both the jury and the Court of Appeals accepted and relied upon the government's evidence and argument, the government intends to offer the testimony of none other than Arlo Looking Cloud to try to convince another jury that it was not Looking Cloud who provided the murder weapon that was used to kill Anna Mae Aquash–rather, it was Richard Marshall. [See: Exhibit 1, Grand jury testimony of Arlo Looking Cloud; Exhibit 2, FBI 302 report of Looking Cloud interview].

Furthermore, in order to support the government's new theory that it was Richard Marshall and not Arlo Looking Cloud who provided the gun for the murder, the government intends to use testimony from Looking Cloud to present a new and contradictory factual theory as to the timing and sequence of the stops made by Looking Cloud and his accomplices as they drove Anna Mae Aquash from Rapid City to the spot in the Badlands where they killed her. In so doing, the government intends to offer testimony from Arlo Looking Cloud to disprove evidence and the theory of guilt that the government used to convict Looking Cloud in his trial. The government is going to put Looking Cloud on the witness stand to testify that he and his accomplices did *not* drive Aquash from Rapid City to Allen to Rosebud to the place of execution, as the government argued to Looking Cloud's jury and to the Court of Appeals. It is clear from Exhibit 1 and Exhibit 2, that in a trial of Richard Marshall, Looking Cloud will testify, and the government will argue, that after Looking Cloud, Graham, Clarke and Aquash left Rapid City, they drove to the house in Rosebud, and from Rosebud, they then drove back west to the Marshalls' home in Allen, and after they left Allen, they drove Aquash out to the cliff near Wanblee . [See: Exhibit 1, Grand jury testimony of Arlo Looking Cloud; Exhibit 2, FBI 302 report of Looking Cloud interview]. In other words, contrary to the theory presented in Looking Cloud's trial and appeal, the government's factual theory and evidence in Marshall's trial will be that they drove to Allen *after* they left Rosebud.

This change of facts as to the timing and sequence of stops is of crucial evidentiary significance as to Marshall's guilt or innocence–specifically, as to the elements of premeditation and intent to murder.

From the record now before the court, it is clear that in order to prove the government's new and revised factual theories, both as to who provided the murder weapon and as to the sequence of stops made by Looking Cloud and his accomplices, government prosecutors will have to effectively *disprove* evidence and the factual theory they presented to the jury to convict Arlo Looking Cloud. Furthermore, they will have to disprove the truth of their own statements to the Court of Appeals.

LEGAL ARGUMENT

I.

The Government's Use of Inherently Contradictory Evidence and Factual Theories in the Prosecutions of Arlo Looking Cloud and Richard Marshall for the Same Murder Violates Due Process.

It is settled law in the Eighth Circuit that a prosecutor's use of inconsistent, irreconcilable factual theories of guilt in two separate trials to convict two defendants charged with participating in the same crime is a violation of due process.

In Smith v. Groose, 205 F.3d 1045 (8th Cir. 2000), the Court of Appeals for the Eighth Circuit ruled that the Due Process Clause prohibits prosecutors from putting forth inherently factually contradictory theories to convict two defendants of the same murder in separate trials. The Court of Appeals overturned Smith's felony murder conviction and held that the prosecution's use of inconsistent prosecutorial theories in two separate trials of two separate defendants violated Smith's due process rights in a way that rendered his conviction fundamentally unfair.

Smith was charged with felony murder. The murder victims, Mr. and Mrs. Chambers, were stabbed to death in their home during a burglary and robbery. Smith and three accomplices, including Bowman and Lytle, went to burglarize the Chambers' home, when they found that another group of criminals, including Cunningham, were already in the process of burglarizing the home. After some discussion, both groups decided to proceed with the burglary and share in the proceeds.

Smith's defense at trial was that Cunningham had murdered the victim before Smith and his accomplices entered the home, and therefore he was not guilty of felony murder . In support of that theory of defense, in Smith's trial, evidence was introduced of a statement made by Lytle that soon after he and the Smith burglars had entered the Chambers' home, he saw the body of Mr. Chambers and heard Cunningham admit that "we took care of it." The prosecutor offered another post-arrest statement that Lytle had made to police to impeach Lytle's trial testimony and to argue that Bowman (another one of Smith's burglary crew) was the one who had stabbed Chambers, thus making Smith guilty of felony murder. The jury evidently accepted the prosecutor's theory

of the facts and found Smith guilty of felony murder.

After Smith was convicted, the State tried Cunningham for Chambers' murder. In Cunningham's trial, the prosecutor (who was the same prosecutor who had prosecuted Smith) argued that it was Cunningham who had stabbed and murdered the victims. Lytle testified for the prosecution and gave testimony consistent with his statement that was used in Smith's trial, that Cunningham had admitted the killing to him, but this time the State did not impeach Lytle's testimony with his prior statement to police that Bowman had done the stabbing. Cunningham was convicted of murder.

In Smith's trial, the prosecutor presented evidence and argued that Bowman had killed the victim and in Cunningham's trial, the prosecutor presented evidence and argued that Cunningham had killed the victim.

The issue to be decided was "whether the Due Process Clause forbids a state from using inconsistent, irreconcilable theories to secure convictions against two or more defendants in prosecutions for the same offenses arising out of the same event." Smith v. Groose, at 1049.

The first question in the court's analysis was whether the factual theories presented by the prosecution in the two trials were actually inconsistent. The Court determined that they were. When trying Smith, the State asserted that Lytle's post-arrest statement to the police was the truth and that Bowman had killed the victims after Smith's group entered the house. Later, when trying Cunningham, the State contended that Cunningham killed the victims, that Lytle's testimony that Cunningham admitted the killing was the truth, and the prosecutor did not introduce Lytle's prior inconsistent statement to police. The court found that the prosecutors' theories in the two trials were inconsistent because "[i]n short, what the State claimed to be true in Smith's case it rejected in Cunningham's case, and vice versa." [At 1050].

After finding that the theories presented by the State in the two trials were inconsistent, the Court held that this manipulation of the evidence by the prosecution deprived Smith of due process and rendered his trial fundamentally unfair. The Court ruled that "the use of inherently factually contradictory theories violates the principles of due process." Smith v. Groose, at 1052**.** The Court of Appeals did not rule that prosecutors must present precisely the same evidence and theories in trials for different defendants. "To violate due process, an inconsistency must exist at

the core of the prosecutor's cases against defendants for the same crime." *Id*, at 1052.

In United States v. Paul, 217 F.3d 989 (8th Cir. 2000), the Court affirmed the legal principal of Smith v. Groose, but since it found no inconsistency of factual theories or evidence, the Court ruled there was no due process violation. Distinguishing the facts in Paul from the facts in Smith v. Groose, the Court of Appeals ruled that the prosecution theories in Paul's case were not factually inconsistent or irreconcilable. In arriving at that decision, the Court pointed out that Paul only argued that the prosecutor made inconsistent arguments at the two trials, but could not point to the use of evidence at Paul's trial that was factually inconsistent and irreconcilable from the evidence at the co-defendant's trial.

Similarly, in Clay v. Bowersox, 367 F.3d 993 (8th Cir. 2004), the Court of Appeals again affirmed the principal of Smith v. Groose , but found that the prosecutor had not relied on inconsistent factual theories or evidence. The Court of Appeals again made a distinction between alternative legal theories and inconsistent factual theories based conflicting evidence. Although a prosecutor can argue alternative *legal* theories of culpability in separate trials without violating due process, if a prosecutor argues two irreconcilable *factual* theories or offers irreconcilable evidence at two trials, the use of inconsistent evidence and inconsistent factual theories in two trials of two defendants violates due process. In Clay v. Bowersox the Court distinguished the facts from the facts of Smith v. Groose and Thompson v. Calderon, 120 F.3d 1045, 1059 (9th Cir. 1997) (en banc), *vacated on other grounds*, 523 US 538, 118 S.Ct. 1489 (1998), by pointing out there was no showing that inconsistent *evidence* was presented in the two trials.

Other Circuit Courts have also ruled that a prosecutor's presentation of inconsistent theories and evidence to convict separate defendants at separate trials deprives the defendants of fundamental fairness and violates due process.

In Thompson v. Calderon, above, which was cited in Smith v. Groose, the Ninth Circuit Court ruled that a prosecutor who seeks to convict two defendants at separate trials by offering inconsistent theories and facts regarding the same crime violates due process.

In Stumpf v. Mitchell, 367 F.3d 594 (6th Cir. 2004), the Sixth Circuit came to the same conclusion and set aside the appellant's guilty plea in a murder case. In Bradshaw v. Stumpf, 545 U.S. 175, 125 S.Ct. 2398 (2005), without deciding the issue of whether the prosecutor's theories

were inconsistent, the Supreme Court reversed the Sixth Circuit's decision to set aside the appellant's guilty plea , on the grounds that the prosecutor's use of an allegedly inconsistent theory in a co-defendant's trial that occurred after Bradshaw had pled guilty did not affect the knowing, voluntary and intelligent nature of the defendant's plea of guilty; however, the Supreme Court remanded the case for a determination as to whether the prosecutor had violated due process by the use of inconsistent theories of guilt that affected the death penalty decision in sentencing.

In United States v. Higgs, 353 F.3d 281 at 326, (4th Cir. 2003), citing the Eighth Circuit's decisions in Smith v. Groose and United States v. Paul, the Fourth Circuit Court of Appeals affirmed the principle that the Due Process Clause prohibits the government from presenting mutually inconsistent theories of the same case against different defendants if an inconsistency exists at the core of prosecutor's cases against the defendants for the same crime or where the evidence used at the two trials if "factually inconsistent and irreconcilable," citing Paul, 217 F.3d at 998.

The Fifth Circuit has also addressed the issue of inconsistent prosecutorial theories within the context of judicial and collateral estoppel. Nichols v. Scott, 69 F.3d 1255, 1268-72 (5th Cir. 1995).

Another case standing for the same principal is In Re Sakarias, 35 Cal. 4th at 155-156, 25 Cal. Rptr. 3d 265, 106 P.3d 931, in which the Supreme Court of California held that "fundamental fairness does not permit the People, without a good faith justification, to attribute to two defendants, in separate trials, a criminal act only one defendant could have committed."

In this case, the first issue for the court to decide is whether the evidence and the factual theories that the government used to convict Arlo Looking Cloud are irreconcilable and inconsistent with the evidence and factual theories that the government seeks to use to try to convict Richard Marshall. If the answer to that question is in the affirmative, the defendant has established a violation of due process.

Here, it is already clear from the evidence in the record that an irreconcilable inconsistency exists between the evidence and factual theory that the government used to convict Arlo Looking Cloud and the evidence and factual theory the government is using to try to convict Richard

Marshall, and that the inconsistency exists at the very core of the government's cases against the two defendants.

In order to convict Richard Marshall, government prosecutors will have to effectively *disprove* the evidence and the theory they presented to convict Arlo Looking Cloud. Specifically, to convince a jury that Looking Cloud's most recent self-serving story is true, government prosecutors will have to effectively discredit the testimony and evidence of prosecution witnesses, including Richard Two Elk, whose testimony they have previously offered to the court to prove Arlo Looking Cloud's guilt. This inherent contradiction in evidence alone establishes that the government seeks to use evidence and a factual theory to convict Marshall that is inherently contradictory to and irreconcilable with the evidence and factual theory it used to convict Arlo Looking Cloud. As in Smith v. Groose, what the government claimed to be true in Looking Cloud's case–that Looking Cloud gave John Graham the murder weapon–it rejects in Marshall's case. If the court allows the government to proceed with a trial of Richard Marshall, the government, either expressly or implicitly, will necessarily have to discredit the very evidence and the factual theory its prosecutors presented to the jury in Looking Cloud's trial and to the Court of Appeals for the Eighth Circuit in his appeal.

If the evidence the government presented in Looking Cloud's trial is true–that Looking Cloud provided the shooter with the murder weapon in the last moments of Aquash's life–then Richard Marshall is innocent. Marshall cannot be guilty, unless the evidence and theory presented by the government to prove Looking Cloud's guilt is proven false. The evidence and factual theory presented by the government to prove Looking Cloud's guilt and the evidence and factual theory presented by the government to prove Marshall's guilt are inconsistent and contradictory "at the core of the prosecution's cases against defendants for the same crime." Smith v. Groose at 1052.

In a trial, in order to prove its factual theory of Marshall's guilt, which it will present through the testimony of Arlo Looking Cloud, the government will seek to prove that its theory in the first trial was wrong and the evidence it presented to the jury was false. The government now contends, and Looking Cloud will testify, that Arlo Looking Cloud did not provide the murder weapon for the killing of Aquash, and instead of Looking Cloud providing the gun for the killing,

that Richard Marshall did that. That theory and that testimony can only be true if Richard Two Elk's testimony in Looking Cloud's trial was false. Whether expressly or implicitly, in order to convict Marshall, the government will have to discredit the testimony of a government witness it relied on to prove Looking Cloud's guilt and disprove the factual theory it presented in Looking Cloud's trial.

On this point, it is noteworthy that the government has not filed any legal papers that affirm or even suggest that the testimony of Two Elk or any other prosecution witness in the Looking Cloud trial was false, or any affidavits or other documents that would call into question the reliability of any of the evidence presented against Looking Cloud. If they have good reason to believe that Looking Cloud was convicted on the basis of false evidence, the government's prosecutors have a clear ethical duty to move to vacate his conviction. The fact that they have not done so would seem to prove that the government has no reliable evidence that any witness in Looking Cloud's trial gave false or unreliable testimony. The government has not filed any petition to vacate or modify Looking Cloud's conviction or his sentence, based on any newly discovered evidence of false testimony by any witnesses, nor has the government represented to any court that Looking Cloud was denied fundamental fairness in his trial or that there is any legal or factual reason to question the reliability of the verdict of guilt. [2]

The government's purported justification for its about-face in its theories is that three years after his murder conviction was affirmed, Arlo Looking Cloud told federal prosecutors that they were wrong: he did not do what they said he did; he did not provide the murder weapon, Richard Marshall did that. Evidently, Looking Cloud's self-serving post-conviction statements to

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[2] If the government's case against Richard Marshall is allowed to go forward, it is entirely foreseeable that, soon after Marshall's trial, whatever the verdict, a petition to vacate Looking Cloud's conviction will be made by Looking Cloud's attorneys, who will cite *Smith v. Groose* to argue that Looking Cloud was denied due process and his conviction should be overturned. Although it is not undersigned counsel's responsibility to make legal arguments concerning the rights of Arlo Looking Cloud, it is evidently necessary to point out to the government that if it proceeds to trial against Richard Marshall on a theory that conflicts with the theory it presented in its prosecution of Looking Cloud, in addition to denying fundamental fairness and due process to Richard Marshall, *the government's use of contradictory theories will place the conviction of Arlo Looking Cloud in legal jeopardy*. If this case goes to trial, the government's prosecution of Richard Marshall will provide Looking Cloud with a sound legal basis to move to vacate his conviction on the grounds that *he* was denied due process by the government's use of a conflicting theory of prosecution in the trial of Marshall. *Smith v. Groose,* after all, was a case in which the defendant who went on trial *first* got his conviction overturned as a result of the prosecutor's use of an inherently contradictory theory to convict another defendant in a trial that took place *after* Smith's conviction.

prosecutors are not reliable enough to persuade the government to move to set aside Looking Cloud's conviction, but they are enough to indict and try Richard Marshall for murder.

In this case, the conflict between the government's two factual theories could hardly be more obvious and irreconcilable. In Looking Cloud's trial, the government offered evidence to prove that Arlo Looking Cloud provided the gun that was used to murder Anna Mae Aquash. Now, the government intends to go before another jury and argue that Arlo Looking Cloud did *not* provide the murder weapon for the execution of Anna Mae Aquash; it was Richard Marshall who provided the murder weapon; and we know that because Arlo Looking Cloud says so.

Furthermore, consistent with its apparent rejection of evidence it has previously relied on and represented as true to a jury and to a Court of Appeals, in a trial of Richard Marshall, the government would adduce testimony from Arlo Looking Cloud that Looking Cloud and his accomplices stopped at Marshall's house *after* they stopped in Rosebud. In both the trial and the appeal of Looking Cloud's case, government prosecutors repeatedly and unequivocally presented evidence and a factual theory that Looking Cloud and his accomplices took Aquash first to the Marshall home in Allen, and after they left the Marshall home, they drove to Rosebud. For the reasons discussed above, this proposed change in the government's evidence goes directly to the question of Marshall's guilt or innocence. In order to prove their new theory of the facts on this critical point in a trial against Marshall, although they may not want the jury to know it, the government's prosecutors will effectively be seeking to discredit and disprove the very same evidence, testimony, and factual theory they have put forward as true and trustworthy to a jury and to a United States Court of Appeals.

As was true in the prosecution of Smith in Smith v. Groose, the question of timing and the sequence of events in this case is crucial. The government presented evidence from John Trudell in Looking Cloud's trial that some un-identified co-conspirator or co-conspirators gave Theda Clarke and her accomplices an assignment to kill Aquash when they were at the house in Rosebud. It is a reasonable inference from the evidence that Looking Cloud, Graham and Clarke formed the actual intent to murder Aquash *while they were at the house in Rosebud or shortly*

thereafter.[3] Therefore, if they stopped at Marshall's home in Allen *before* they went to Rosebud, then neither Clarke, Graham, or Looking Cloud had yet formed any intent to kill Aquash when they were at Richard Marshall's house. That decision had not yet been made, that order had not yet been given, before they went to Rosebud. Therefore, Marshall could not have formed or shared a premeditated intent to murder Aquash with Looking Cloud, Clarke and Graham, if they stopped at Richard Marshall's home in Allen *before* they drove to Rosebud.

Here, as in the *Smith* case, what the government's prosecutors claimed to be true in Arlo Looking Cloud's case, they reject in Marshall's case, and vice versa. On the all important question of who provided the gun that was used to kill Aquash, what the government claimed to be true in Looking Cloud's case–it was Looking Cloud who gave Graham the gun–the government now rejects in Marshall's case. What the government rejected in Looking Cloud's trial–the defendant's argument that Two Elk's testimony as to Looking Cloud's admissions was unreliable–the government now, implicitly or otherwise, necessarily advocates as being the truth. On the critical issue of timing, what the government claimed was true in Looking Cloud's trial–that Looking Cloud and his accomplices drove Aquash to Rosebud *after* they left Marshall's home in Allen–they reject in Marshall's case.

Here, the conflict between the government's evidence and theories is even more dramatic than the one presented in Smith v. Groose. In this case, the government seeks to offer the testimony of Fritz Arlo Looking Cloud to prove that Richard Marshall committed the very act that the government has previously attributed *to the government's witness himself*–supplying the murder weapon.

On the basis of the evidence in the record as it now stands, the conclusion is inescapable that an irreconcilable inconsistency exists "at the core" of the prosecutor's evidence and factual theories in its cases against Looking Cloud and Marshall.

Once that determination is made by the Court, pursuant to the authority of the Eight Circuit Court of Appeals' holding in Smith v. Groose, the Court must rule that the government's use of inconsistent theories and evidence in this case violates the Due Process Clause of the Fifth

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[3] See the trial testimony of John Trudell, on Looking Cloud's admissions to him. *United States v. Looking Cloud* trial transcript, pages 380-401.

Amendment to the United States Constitution.

CONCLUSION

What Justice Clark stated in his concurring opinion in Drake v. Kemp, 762 F.2d 1449, 1479 (11th Cir. 1985)(en banc)(decided on other grounds), is equally applicable to the facts of this case and equally true: "The prosecutor's . . . flip flopping of theories of the offense was inherently unfair. Under the peculiar facts of this case the actions by the prosecutor violate the fundamental fairness essential to the very concept of justice."

The Court should enter an order dismissing the indictment against defendant Richard Marshall.

Dated this 4th day of February, 2009.

VINE RICHARD MARSHALL, Defendant

BY: */s/ Dana L. Hanna*

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Memorandum of Law in Support of Motion to Dismiss for Denial of Due Process upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
robert.mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 4th day of February, 2009.

/s/ Dana L. Hanna
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-5007[illegible] FILED FEB 04 2009 CLERK DEFENDANT MARSHALL'S MOTION TO FILE EXHIBITS UNDER SEAL

NOW COMES Defendant Richard Marshall, by and through his attorney, Dana L. Hanna, and hereby moves the Court to file the attached exhibits in support of his Motion to Dismiss for Denial of Due Process [doc. 172] under seal.

Grounds for this motion are that the two attached exhibits [Exhibits 1 and 2] have been provided to Defendant Marshall by the government as discovery materials and, pursuant to the Court's Order, are not to be made part of the public record.

WHEREFORE Defendant Marshall moves the Court to file the attached exhibits in support of his Motion to Dismiss for Denial of Due Process under seal.

Dated this 4th day of February, 2009.

RICHARD MARSHALL, Defendant

BY: 

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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

GOVERNMENT'S RESPONSE TO DEFENDANT MARSHALL'S MOTION TO COMPEL DISCOVERY

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 to Compel Discovery and resists it in its entirety as follows.

Defendant seeks essentially all information in any United States file pertaining to the District of Oregon prosecution captioned *United States v. Loud Hawk, et al*, 75-CR-296-RE. That case relates to the 1975 Oregon shootout in which a number of individuals, including Leonard Peltier and Annie Mae Aquash, the victim in this case, were present in a motor home that was apprehended by the Oregon Highway Patrol.

Defendant Marshall, in seeking this information, relies primarily on *Brady v. Maryland,* 373 US 87 (1963) and *Kyles v. Whitley*, 514 US 419, (1995). There is no evidence in the Oregon prosecution which constitutes *Brady* material and *Kyles v. Whitley* does not authorize an abstract attack regarding the conduct of the investigation which authorizes discovery in every case pursued by the United States.

Federal Rule 16(a)(1)(E) reads, in part,

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:
> (i) the item is material to preparing the defense;
> (ii) the government intends to use the item in its case-in-chief at trial; or
> (iii) the item was obtained from or belongs to the defendant.

Fed. R. Crim. P. 16(a)(1)(E).

Discovery matters are committed to the sound discretion of the district court. *United States v. Banks*, 494 F.3d 684-85 (8th Cir. 2007)(citing *United States v. Woosley*, 761 F.2d 445 (8th Cir. 1985)). Before determining whether the requested information is material to the defense, it is important to consider what the phrase "the defense" means. In an earlier version of this Rule (then Rule 16(a)(1)(C)), the phrase "material to preparing the defense" was set out in a slightly, but immaterially, different manner as "material to the preparation of the defendant's defense." *See*, *United States v. Armstrong*, 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed. 2d 687 (1996). In *Armstrong*, the Supreme Court analyzed the

phrase "defendant's defense." The Court wrote the phrase "means the defendant's response to the Government's case-in-chief." *Armstrong*, 517 U.S. at 462. The Court explained this meant material "which refute[s] the Government's arguments that the defendant committed the crime charged." *Armstrong*, 517 U.S. at 462. The Court found that Rule 16(a)(1)(C) was designed as a "shield" enabling challenges to the argument in favor of guilt because "[i]f 'defense' means an argument in response to the prosecution's case-in-chief, there is a perceptible symmetry between documents 'material to the preparation of the defendant's defense' and, in the very next phrase, documents 'intended for use by the government as evidence in chief at the trial.'" *Armstrong*, 517 U.S. at 462.

Here, the United States does not intend to submit evidence from the case in relation to the Oregon incident.[1] Therefore, the requested evidence is not remotely relevant to refuting the government's case-in-chief. The requested information was not obtained from nor did it belong to the Defendant(s). The information is not "material to preparing the defense."

The United States is unable to find an Eighth Circuit case explicitly defining "material" in this context. Other circuits, however, have defined "material" as requiring the defendant to show that the pretrial disclosure of the material would enable the defendant to substantially alter the quantum of proof in his favor. *See,*

[1] The government will, however, seek admission of evidence Leonard Peltier admitted he shot FBI Special Agents Coler and Williams in 1975. This information was not a part of the evidence in the Oregon case. It is only offered as to its bearing regarding the belief that Ms. Aquash could have provided information relative to the shootings.

United States v. Ross, 511 F.2d 757, 762-63 (5th Cir. 1975); *United States v. Marshall*, 532 F.2d 1279, 1285 (9th Cir. 1976); *United States v. Orzechowski*, 547 F.2d 978, 984-85 (7th Cir. 1976); *United States v. Holloway*, 971 F.2d 675, 679-80 (11th Cir. 1992); *United States v. Stevens*, 985 F.2d 1175, 1180 (2nd Cir. 1993); *United States v. Marshall*, 132 F.3d 63, 68 (D.C. Cir. 1998); *see, also, United States v. Schembari*, 484 F.2d 931, 935 (4th Cir. 1973).

Defendant Marshall has failed to demonstrate that the material he is requesting would either enable Defendant to substantially alter the quantum of proof in his favor, or that the material is even remotely relevant to his defense. Defendant claims that Aquash was suspected of being one of the informants who gave information to the federal authorities and was murdered approximately thirty days after the incident in Oregon occurred. Assuming *arguendo* that Defendant is accurate in that regard, that in no way makes the file from the Oregon case discoverable.

Defendant Marshall wishes to engage in a fishing expedition to cause a search through the extensive files that relate to that prosecution. The requested information is not *Brady* material. Defendant is already aware that there could be a motive for the murder of the victim related to the erroneous belief that she was an informant.

The United States would entertain a stipulation with Defendant that Aquash was murdered, in part, based upon the erroneous belief that she was a government informant. The file from Oregon would disclose nothing further

relevant to that issue and contains no material which should be subject to discovery in this case.

Accordingly, the Defendant's motion should be in all respects denied.

Respectfully submitted this 6th day of February, 2009.

/s/ Marty J. Jackley

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FAX: 605.330.4410

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 2009, I served by electronic transmission, a true and correct copy of the foregoing Government's Response to Defendant Marshall's Motion to Compel Discovery on:

Dana Hanna
Attorney at Law

John Murphy
Attorney at law

/s/ Marty J. Jackley

Marty J. Jackley

FILED
FEB 12 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

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UNITED STATES OF AMERICA,	*	CR 08-50079-02
Plaintiff,	*	
vs.	*	
	*	ORDER
JOHN GRAHAM, a/k/a John Boy Patton; and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

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Pending before the Court is Defendant Marshall's Motion to File Exhibits Under Seal, Doc. 174, and after consideration of the Motion, together with the exhibits and the file,

IT IS ORDERED:

1. That Defendant Marshall's Motion to File Exhibits Under Seal, Doc. 174, is granted.

2. That Exhibits 1 and 2 submitted to the Court as exhibits to Defendant Marshall's Motion to Dismiss, Doc. 172, shall be filed under seal until further Order of the Court.

Dated this 12th day of February, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST;
JOSEPH HAAS, CLERK
BY: Colleen Schulte
DEPUTY

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 DEFENDANT MARSHALL'S REPLY TO THE GOVERNMENT'S RESPONSE TO MOTION TO COMPEL DISCOVERY

NOW COMES defendant Richard Marshall, by and through his attorney, Dana L. Hanna, and hereby replies to the government's response to the defendant's motion to compel discovery (doc. 175).

The defendant requested an order for discovery of documents pertaining to the prosecution of Anna Mae Aquash, Kamook Banks, Dennis Banks, Leonard Peltier, and others in the case of United States vs. Loud Hawk, et al, 75-CR-296-RE, in the United States District of Oregon. The government opposes the defendant's motion for discovery on the grounds that the requested material is not relevant to the defendant's argument in response to the prosecution's case in chief. The government argues that the requested evidence is not discoverable because it does not "refute the government's arguments that the defendant committed the crime charged." United States v. Armstrong, 517 US 456 at 462, 116 S.Ct. 1480 (1996).

The government recognizes that under Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure, a defendant may examine documents material to his defense, but the government contends that these documents are not material to Richard Marshall's defense. The defendant represents and argues that the documents contained in the files and reports concerning the Oregon prosecution are in fact material to his defense, that they go to the question of whether in fact the defendant committed the crime charged. The defendant represents that the documents

and information in the Oregon file can and will be used to refute the government's argument that the defendant committed the crime charged. The defendant requires these documents for the purpose of discovering and presenting evidence that the defendant will use to respond to the government's case in chief.

The defendant should not be required to explain his theory of defense in detail to the government. The defendant sets forth his theory as to how this evidence is relevant to refute the charge against him in the defendant's *ex parte* application for a subpoena, which is being filed along with this reply.

The defendant also points out that under Brady v. Maryland, and its progeny, any evidence that can be used to impeach the credibility of a prosecution witness is Brady material.

One of the defendants in United States v. Loud Hawk, et al is a government witness in this case. Kamook Banks, a.k.a. Darlene Nichols-Eccofey, was arrested and indicted in the Loud Hawk case in 1975. She is a government witness who will testify in the government's case in chief, as she did in the Looking Cloud trial, that she, her then-husband Dennis Banks, Leonard Peltier, and Anna Mae Aquash, and the other defendants were all prosecuted on federal explosives and firearms charges, after their arrest on November 14, 1975. Evidence contained in the government's files, reports, and records concerning her prosecution in Oregon is clearly evidence that the defendant can use to impeach her.

The Court should grant the defendant's motion to compel discovery of the records and documents in the case of United States vs. Loud Hawk, et al.

Dated this 17th day of February, 2009.

VINE RICHARD MARSHALL, Defendant

BY: */s/ Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of Defendant Marshall's foregoing Reply to the Government's Response to Motion to Compel Discovery upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
robert.mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 17th day of February, 2008.

/s/ Dana L. Hanna
Dana L. Hanna

FILED
FEB 19 2009
CLERK

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 MOTION TO SEAL EX PARTE AFFIDAVIT AND APPLICATION FOR AN ORDER FOR THE ISSUANCE OF A SUBPOENA DUCES TECUM

NOW COMES Defendant Richard Marshall, by and through his attorney, Dana L. Hanna, and hereby moves the Court to file the attached Ex Parte Affidavit and Application for an Order for the Issuance of a Subpoena *Duces Tecum* under seal.

Pursuant to Local Criminal Rule 47.1(3), counsel represents that there are good reasons for sealing this documents: it is an ex parte application for a subpoena, filed pursuant to Rule 17 of the Federal Rules of Criminal Procedure; it contains the defendant's theory of defense at trial, which the government is not entitled to know prior to trial and premature disclosure of the defense theory would be prejudicial to the defendant. No alternatives to sealing would provide sufficient protection.

WHEREFORE Defendant Marshall moves the Court to file the attached Affidavit and Application for an Order for the Issuance of a Subpoena *Duces Tecum* under seal.

Dated this 18th day of February, 2009.

RICHARD MARSHALL, Defendant

BY: Dana L. Hanna

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080, Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL, aka RICHARD VINE MARSHALL, aka DICK MARSHALL, Defendant.	)	CR. 08-50079-01, -02 ORDER ON DEFENDANT MARSHALL'S MOTION FOR DISCLOSURE & PRODUCTION OF EVIDENCE

Pending before the court is defendant Richard Marshall's motion for disclosure and production of evidence. [Docket 162]. The government has in its possession audio tapes of recorded conversations. The government previously provided copies of these tapes to defendant John Graham, but now refuses to provide copies to Mr. Marshall, instead requiring Mr. Marshall's counsel to listen to the tapes at the government's offices. The government states that it will allow Mr. Marshall's counsel to make copies of the tapes himself, but the government will not make and provide the copies itself. Mr. Marshall is currently detained in federal custody, so it is not possible for him to accompany his counsel to the federal building to listen to the tapes in question.

Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure requires the government to "permit the defendant to inspect and to copy or photograph

books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is in within the government's possess, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial . . ." See Fed. R. Crim. P. 16(a)(1)(E). The government's assertion that it must allow defendant to copy, but that the government is not required to copy discovery itself, is borne out by Rule 16.

Accordingly, it is hereby

ORDERED that the government shall immediately turn over all the tapes in question to Mr. Marshall's counsel so that he may make copies of the tapes. Mr. Marshall's counsel shall have possession of the tapes for up to six weeks in order to accomplish the copying, at which time the original tapes shall be returned to the government. Counsel's cost for such copying shall be included on his CJA voucher and he shall be reimbursed for the same. Alternatively, if the government reconsiders its position and agrees to make copies of the tapes itself, the government must make such copies and deliver them to Mr. Marshall within 10 days from the date of this order.

Dated February 24, 2009.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

FILED
FEB 24 2009
CLERK

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL, a/k/a RICHARD VINE MARSHALL, a/k/a DICK MARSHALL, Defendant.	)	CR. 08-50079-02 ORDER

Defendant Vine Richard Marshall moves the court for an order sealing both an *ex parte* affidavit and an application for a subpoena duces tecum. See Docket 178. Mr. Marshall contends that these documents reflect his theory of defense, which the government is not entitled to know prior to trial. Good cause appearing, it is hereby

ORDERED that Mr. Marshall's motion to seal the *ex parte* affidavit and application for an order for the issuance of a subpoena duces tecum [Docket 178] is granted. The Clerk of Courts shall file these documents under seal.

Dated February 23, 2009.

BY THE COURT:

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 DEFENDANT MARSHALL'S MOTION FOR BILL OF PARTICULARS

NOW COMES defendant Richard Marshall, through his attorney, Dana L. Hanna, pursuant to Crim.R.12(b)(3)(E) and 7(f), and moves the Court to order the government to file a bill of particulars as follows:

1. The date and location when and where the defendant is alleged to have committed some act or acts that aided and abetted the murder of Anna Mae Aquash.

2. The names of those known persons with whom it is alleged that the defendant acted to aid and abet in the murder of Anna Mae Aquash.

3. Does the government contend that Richard Marshall shot and killed Anna Mae Aquash? If not, what does the government contend that Marshall did or said that aided and/or abetted another or others to kill Aquash? List the specific acts of the defendant and/or words spoken by the defendant that allegedly aided and/or abetted one or more other persons in the murder of Anna Mae Aquash.[1]

[1] Definitions: To "aid" is to help, assist, support, promote the course of accomplishment of, help in advancing or bring about. To "abet" is to encourage, counsel, incite and instigate the commission of a crime. Fryer v. Nix, 775 F.2d 979 (8th Cir 1985).

4. If it is the government's contention that defendant Marshall aided and abetted the murder of Aquash by providing "consultation," describe the specific circumstances of said consultation–i.e. who said what to whom?

5. Who does the government contend actually shot Anna Mae Aquash, and how did Richard Marshall allegedly aid or abet that particular person in the murder of Aquash?

Dated this 26th day of February, 2009.

VINE RICHARD MARSHALL, Defendant

BY: */s/ Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Motion for Bill of Particulars upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
robert.mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 26th day of February, 2008.

/s/ Dana L. Hanna
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 DEFENDANT MARSHALL'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR BILL OF PARTICULARS

Federal Rule of Criminal Procedure 7(f) states:

"The Court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment, or at such time as the Court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires."

"A bill of particulars serves to inform the defendant of the nature of the charge against him with sufficient precision to enable him to prepare for trial [and] to avoid or minimize the danger of surprise at trial." United States v. Hernandez, 299 F.3d 984, 989-990 (8th Cir. 2002), *cert. denied*, 537 US 1134 (2000).

The Due Process Clause gives the defendant the right to formal notice of the accusation the government is making against the defendant and that formal accusation must contain sufficient factual particulars to allow the defendant to prepare a defense against the accusation.

Since the indictment itself does not provide sufficient information, the government should be required to give constitutionally sufficient formal notice in a bill of particulars. This will also allow the court to evaluate defendant's pending motion to dismiss the indictment for violation of due process based on the government's inconsistent theories of prosecution.

Here, the indictment is too vague and indefinite to advise the defendant of the particulars of the accusation being made against him by the government. It is not sufficient to either allow the defendant to prepare a defense or to prevent unfair surprise at trial. Each of the requested particulars seeks information that is necessary to prepare his defense.

Therefore, this Court should order the government to file a bill of particulars.

Dated this 26th day of February, 2009.

VINE RICHARD MARSHALL, Defendant

BY: */s/ Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Memorandum of Law in Support of Motion for Bill of Particulars upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
robert.mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 26th day of February, 2008.

/s/ Dana L. Hanna
Dana L. Hanna

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
FEB 27 2009

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER FOR TRIAL
JOHN GRAHAM, a/k/a John Boy Patton; and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendant.	*	

The Court by its Order Granting Motion for Continuance, Doc. 167, continued the trial in this matter. After consideration of the file,

IT IS ORDERED:

1. That all other motions as to both Defendants be filed and served on or before March 23, 2009; that opposing counsel respond thereto on or before March 30, 2009; and that a hearing on all non-dispositive motions will be held before The Honorable Veronica Duffy, in Rapid City, South Dakota, on April 7, 2009, at 9:00 A.M.; and the Court will not consider a stock motion for leave to file further motions, however, the Court will consider a motion filed by a party after the deadline if the party can show good cause as to why the motion was late filed.

2. That April 14, 2009, is hereby set as the deadline for submission to the Court of any proposed plea agreement.

3. That all motions in limine shall be in writing and filed, together with proposed instructions, with the Court ten (10) working days before trial.

4. That the jury trial herein for Defendants shall commence in Rapid City, South Dakota, on Tuesday, May 12, 2009, with counsel to be present for motions in limine at 9:00 A.M., and with the jury to report at 9:30 A.M.

5. That the period of delay resulting from such continuance is excluded in computing the time within which the trial of the offense for the Defendants must commence, as the Court finds that the ends of justice served by taking such action outweigh the best interests of the public and the Defendants in a speedy trial. 18 U.S.C. § 3161(h)(8)(A).

Dated this 27th day of February, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: _____
DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

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

Defendants.

CR08-50079

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT MARSHALL'S MOTION FOR BILL OF PARTICULARS

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, to respectfully request this Court deny Defendant Marshall's Motion for Bill of Particulars based upon both legal and factual grounds.

It is well established in this circuit that:

> [a] bill of particulars serves to inform the defendant of the nature of the charge against him with sufficient precision to enable the defendant to prepare for trial, to avoid or minimize the danger of surprise at trial, and to enable the defendant to plead acquittal or conviction in bar of another prosecution for the same offense when the indictment is too vague and indefinite.

United States v. Agard, 531 F. Supp. 2d 1072, 1073-74 (D. N.D. 2008)(citing United States v. Hernandez, 299 F.3d 984, 989-90 (8th Cir. 2002)). Defendant Marshall's Indictment is neither vague nor indefinite. The Indictment is legally

sufficient in that it contains all the essential elements of the offense charged, fairly informs both Defendants of the charges against them for which they must defend, and alleges sufficient information to allow both Defendants to plead a conviction or acquittal as a bar to subsequent prosecution. See United States v. Wessels, 12 F.3d 746, 750 (8th Cir. 1993)(citing United States v. Young, 618 F.2d 1281, 1286 (8th Cir. 1980)).

It is well-settled that "a bill of particulars may not be used as a discovery tool or to obtain detailed disclosure of the government's evidence and theories." See Wessels, 12 F.3d at 750; Agard, 531 F. Supp. 2d at 1074. Standing alone, the Indictment contains sufficient information and detail to warrant denial of Defendant's request for a Bill of Particulars. Moreover, a further examination of the case pleadings and discovery provided to both Defendants clearly proves the Defendant's request is unsupportable.

On October 10, 2008, both Defendants Graham and Marshall were served with the United States' Request for Notice of Alibi Defense. Defendant Marshall's Alibi Notice provides, among other matters, as follows:

> On or about the early morning hours of December 12, 1975, at his residence in Allen, South Dakota, house #363, Richard Marshall knowingly aided and abetted Defendant John Graham, Theda Clarke and Arlo Looking Cloud in the first degree murder of Anna Mae Aquash by, including but not limited to, providing consultation and exchange of the "baggage note," as well as providing the .32 caliber revolver and shells to murder Anna Mae Aquash.

See United States' Request for Notice of Alibi Defense to Defendant Marshall, DE 40. See also, United States' Request of Alibi Defense to Defendant John Graham, DE 41.

The pleadings further set forth as follows:

> Eyewitness accounts include "[i]t was about 11:30 p.m. when Theda Clarke, Arlo Looking Cloud, John Boy Graham, and Annie Mae Aquash came to [the Marshall] residence." See Graham 04854. "Dick and the three others went into the bedroom and shut the door." See Graham 04854. "Annie Mae was being held against her will and that she wasn't free to go." See Graham 04854. "Theda had a handwritten note from someone asking Dick if he could take care of this baggage." See Graham 04854. "Theda, Arlo, and John Boy took Annie Mae and left. . . . it wasn't too much longer after that is when Annie Mae was found dead."

See United States' Memorandum in Opposition to Defendants Graham and Marshall's Motions for Severance, p.10-11, DE 95.

Through additional discovery, both Defendants Graham and Marshall have been provided additional witness accounts of the stop at Dick Marshall's residence during which Anna Mae Aquash was held against her will. See Graham discovery 04885-04888. This material also describes Dick Marshall's consultation with Theda Clarke and of his supplying both the gun and shells used to murder Anna Mae Aquash. Id.

In addition, Defendant Marshall's statements and the associated witness notes have also been disclosed, including: (1) Defendant Marshall's confirmation of Anna Mae Aquash's presence at his home during the time in question; (2) Defendant Marshall's description of Anna Mae Aquash as possibly

being tied up and acknowledgment that she didn't want to be there; and (3) Defendant Marshall's discussion on the "baggage note," the .32-caliber handgun, and his response of "back in the day when you was asked to do something, somebody asked you for something, you didn't ask too many questions." See DE 95, Exh. 1-4.

Interestingly, Defendant Marshall's submissions to the Court appear to have sufficient information and detail regarding the United States' case with respect to claims he has advanced in his previous pleadings. With specificity, he sets forth claims that he could not have aided and abetted in Anna Mae Aquash's murder due to his pre-trial release conditions in place for his role in the murder of Martin Montileaux. See Defendant Marshall's Motion to Dismiss Due to Pre-Accusatory Delay, DE 125; see also State v. Marshall, 264 N.W. 2d 911 (SD 1978)(jury conviction for Dick Marshall's pre-meditated murder of Montileaux). Although his elaborate pre-trial bond claims fail for various reasons, the shortcomings are neither cured by nor based upon the need for a

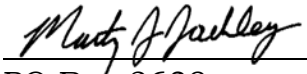
Bill of Particulars.[1] See United States' Memorandum in Opposition to Defendant Marshall's Motion to Dismiss Due to Pre-Accusatory Delay, DE 125.

In conclusion, Defendant Marshall has failed to prove the legal or factual basis to support his request for a Bill of Particulars. Furthermore, any such potential justification is overcome by the pleadings and discovery provided to Defendant Marshall at this time. See generally, United States v. Fleming, 8 F.3d 1264, 1265 (8th Cir. 1993) (stating that there was no need for a bill of particulars where, despite a question as to the conduct complained of in the indictment, the defendant learned of the facts alleged by the government during an evidentiary hearing). The United States requests that Defendant Marshall's Motion for a Bill of Particulars be denied in full. See generally, Wessels, 12 F.3d at 750.

[1] On or about December 12, 1975, the date of Defendant Marshall's alleged conduct associated with the death of Annie Mae Aquash, he was on pre-trial release awaiting his trial for the Montileaux murder. Defendant Marshall has represented in his Motion to Dismiss Due to Pre-Accusatory Delay that apparently to satisfy a part of his pre-trial release conditions, firearms in his residence, consisting of a rifle and a shotgun, were taken into his mother and step-father's residence. See Defendant Marshall's Memorandum to Dismiss Due to Pre-Accusatory Delay, p.4. An obvious flaw in Defendant Marshall's argument is that the alleged murder weapon in this instance was a .32-caliber handgun, as opposed to a rifle or shotgun.

Dated and electronically filed this 12th day of March 2009.

MARTY J. JACKLEY
United States Attorney



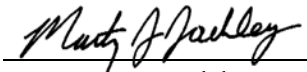
PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on March 12, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Facsimile at
- ☐ Federal Express
- ☒ Electronic Case Filing



Marty J. Jackley
United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
MAR 12 2009
CLERK

UNITED STATES OF AMERICA, Plaintiff,	CRIM. NO. 08-50079-01
vs.	DEFENDANT GRAHAM'S MOTION TO SEAL
JOHN GRAHAM, a/k/a JOHN BOY PATTON and VINE RICHARD MARSHALL, a/k/a) RICHARD VINE MARSHALL, a/k/a) DICK MARSHALL. Defendants.	

Defendant requests that Defendant Graham's *Ex Parte* Motion for Issuance of Subpoenas, as well as the Court's order relating to that motion, and all returns/proofs/affidavits of service generated in connection with the service of these documents, be placed under seal. Further, Defendant asks that the U.S. Marshall's Service be instructed not to discuss the names of any witness served, nor the content of this motion, with any party.

The basis for this request is that the determination as to which witnesses to subpoena is attorney work product that should be protected. There is no alternative procedure available to the defense that would protect its work product.

Respectfully submitted March 11, 2009.

John R. Murphy: Counsel for Defendant
328 E. New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN GRAHAM, aka JOHN BOY PATTON, and VINE RICHARD MARSHALL, aka RICHARD VINE MARSHALL, aka DICK MARSHALL, Defendants.	)	CR. 08-50079 ORDER DENYING DEFENDANT MARSHALL'S MOTION FOR A BILL OF PARTICULARS

INTRODUCTION

Defendant Richard Marshall has filed a motion for a bill of particulars pursuant to Fed. R. Crim. P. 7(f). See Docket No. 184. The government resists the motion. This motion was referred to this magistrate judge for decision pursuant to 28 U.S.C. § 636(b)(1)(A).

FACTS

The facts, insofar as they bear on the pending motion, are as follows. Count one of the superseding indictment charges Mr. Graham and Mr. Marshall jointly with the unlawful killing and with aiding and abetting the killing of Annie Mae Aquash with a firearm, asserting that both defendants are

Indians and that Ms. Aquash is also an Indian, in violation of 18 U.S.C. §§ 2, 1111, and 1153.

Count two charges Mr. Graham alone with killing Annie Mae Aquash "willfully, deliberately, and maliciously, with premeditation and malice aforethought," in violation of 18 U.S.C. §§ 2, 1111, and 1152. Count two alleges that Ms. Aquash is an Indian, but does not allege that Mr. Graham is an Indian.

Count three alleges that Mr. Graham killed, and aided and abetted other Indians in killing Ms. Aquash, in violation of 18 U.S.C. §§ 2, 1111, and 1153. The Indians Mr. Graham is alleged to have aided and abetted in count three are Fritz Arlo Looking Cloud, Theda Rose Clarke, and co-defendant Mr. Marshall. Count three does not allege that Mr. Graham is an Indian. Count three is currently the subject of a motion to dismiss by Mr. Graham.

The defendants are currently scheduled to be tried in a joint jury trial beginning May 12, 2009. The government's theory of the case, as shown by numerous pleadings on various legal issues, is that Mr. Graham and Mr. Marshall acted on orders from decision-makers within the American Indian Movement ("AIM"), to murder Ms. Aquash due to the suspicion that she was a government informant working against AIM. The government alleges that Mr. Marshall provided the firearm and ammunition used to commit the murder and that Mr. Graham carried out the actual murder.

Mr. Marshall now moves for a bill of particulars. The government resists Mr. Marshall's motion, asserting that, between the details recited in the indictment, the voluminous discovery provided to Mr. Marshall, and pleadings filed by the government in this case, Mr. Marshall can adequately prepare his defense and not be prejudicially surprised at trial.

DISCUSSION

A. The Law Relating to a Bill of Particulars

Rule 7 of the Federal Rules of Criminal Procedure provides as follows with regard to a bill of particulars:

> **(f) Bill of Particulars**. The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 10 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.

See Fed. R. Crim. P. 7(f).

"A bill of particulars is a formal written statement by the prosecutor providing details of the charges against the defendant. Its functions are to give the defendant notice of the essential facts supporting the crimes alleged in the indictment or information, and also to avoid prejudicial surprise to the defense at trial." 1 Charles A. Wright and Andrew D. Leipold, Fed. Practice & Procedure: Criminal, § 129, 656 (4th ed. 2008). See also United States v. Shepard, 462 F.3d 847, 860 (8th cir. 2006); United States v. Hernandez, 299 F.3d 984, 989-990 (8th Cir. 2002), cert. denied, 537 U.S. 1134 (2003). A bill of particulars can also serve to allow the defendant to plead his acquittal or

conviction in order to bar a subsequent prosecution for the same offense where the indictment is vague or indefinite. Hernandez, 299 F.3d at 990-991.

In order to obtain a bill of particulars, a defendant must demonstrate that the document is necessary to adequately prepare his case or to avoid prejudicial surprise at trial. 1 Fed. Practice & Procedure: Criminal, § 129 at 658. Whether a motion for a bill of particulars should be granted depends on how complex the crime charged is, how much discovery has been provided by the government, how clear the indictment is, and other sources of information otherwise available to a defendant to inform himself of the nature of the government's case against him. Id. at 659; United States v. Rodriguez, 380 F. Supp. 2d 1041, 1057 (D.N.D. 2005). Whether to grant a motion for a bill of particulars is entrusted to the trial court's discretion. Id. at 660. A bill of particulars is not a discovery device and will not be granted if the prosecution has provided the desired information through pretrial discovery or in some other acceptable manner. Id. at 663-664; United States v. Wessels, 12 F.3d 746, 750 (8th Cir. 1993); United States v. Hester, 917 F.2d 1083, 1084 (8th Cir. 1990).

In United States v. Adcock, 558 F.2d 397, 400-401 (8th Cir. 1977), the defendant was part of a bribery scheme involving the distribution of liquor. He was charged with violation of income tax laws for failing to declare the income he received as bribes and for filing false tax returns that omitted that income.

Id. The Eighth Circuit affirmed the district court's denial of defendant's request for a bill of particulars because the government "had informed the defendant of the sources of unreported income, both during the prosecution and pre-prosecution years" and the indictment in the case "set forth in factual terms the elements of the offenses charged." Id. at 405-406. The Eighth Circuit concluded that the information provided was sufficient to allow the defendant to prepare for trial and to defend against double-jeopardy. Id.

In an Eighth Circuit case involving charges of kidnapping, the district court's denial of the defendant's request for a bill of particulars was affirmed on appeal where the indictment informed the defendant of the time and place of the wrongdoing, the acts alleged to have resulted in a violation of the laws of the United States, . . . the manner in which the act occurred", gave the names of the persons who were alleged to have been kidnapped, alleged the city and state from which they were taken, and the city and state to which they were brought. See United States v. Key, 717 F.2d 1206, 1210 (8th Cir. 1983).

In a bribery case involving obtaining mortgages, the district court denied defendants' motion for a bill of particulars in most respects, but granted the defendants' motion to obtain the names of those who paid money to the defendants, as alleged in the overt acts. United States v. McCarthy, 292 F. Supp. 937, 940-941 (S.D.N.Y. 1968).

Likewise, in United States v. Dean, 266 F. Supp. 159, 160 (D.C.N.Y. 1966), the court in a bribery case granted the defendants' motion for a bill of particulars as to four categories of information: (1) the approximate date and time of day when the defendant received the bribe; (2) the person who gave the defendant the bribe; (3) the place where the defendant received the bribe; and (4) whether the payment was made by cash or check or both.

In a more recent bribery case, the government was not required to provide a bill of particulars where the detailed indictment and the discovery provided by the government together sufficiently apprised the defendants of the transmissions and transfers of funds, including dates, times, and amounts of such transfers, which formed the basis of the charges against the defendants. United States v. Chalmers, 410 F. Supp. 2d 278, 284-286 (S.D.N.Y. 2006).

The district court in United States v. Giffen, 379 F. Supp. 2d 337, 346-347 (S.D.N.Y. 2004), also denied a motion for a bill of particulars where the indictment was detailed, alleging a series of acts, identifying some co-conspirators, and describing the alleged bribing scheme, including specific dates, locations, and monetary amounts. Together with the discovery the government had provided, the court held that the defendants were sufficiently apprised of the charges against them so as to enable them to adequately prepare for trial and to avoid unfair surprise. Id.

In United States v. Fleming, 8 F.3d 1264 (8th Cir. 1993), the district court denied the defendant's motion for a bill of particulars. Id. at 1265. The defendant had been charged with being a felon in possession of a firearm on October 12, but there were two separate times on the same day (one early in the morning, the other in the afternoon) during which witnesses alleged having seen Fleming with a gun. Id. Fleming asserted that it was error for the district court to have denied his motion for the bill of particulars where the indictment did not indicate which factual incident was being charged and whether he was being accused of having the same gun in both incidents. Id. The Eighth Circuit affirmed the district court's ruling, characterizing the defendant's appeal on this issue as "specious" because the defendant clearly understood through testimony offered at an evidentiary hearing prior to trial what the basis of the government's charge against him was. Id. at 1265-1266. Thus, although the indictment itself may not have provided the defendant with the necessary clarification, other information provided by the government to the defendant made clear the basis of the government's allegations. Id.

In United States v. Lupino, 171 F. Supp. 648 (D. Minn. 1958), the defendant was charged with being a fugitive felon for fleeing to South Carolina to avoid prosecution for murder and kidnapping in Hennepin County, Minnesota. Id. at 648-649. At a hearing, the government attorney supplied the location of the alleged murder and the identity of the murder victim. Id. at

650. Stating that it was not necessary for the government to provide "all of the facts which the defendant wants, or which he may think desirable," the court denied the defendant's motion because he had been provided with all the information necessary to be apprised of the essential facts in support of the crime with which he was charged. Id.

B. Application of the Law to Mr. Marshall's Motion

1. Timeliness

Rule 7(f) provides that motions for a bill of particulars shall be made within 10 days of the defendant's arraignment or anytime thereafter if the court permits. Mr. Marshall's motion for a bill of particulars was not made within the 10-day time frame set forth in Rule 7(f). However, Rule 7(f) itself gives the court discretion to allow motions to be made outside the 10-day time period. Noteably, unlike many other rules setting forth time frames during which a motion shall be made, Rule 7(f) does not require the moving party to demonstrate "good cause" or "excusable neglect" before a motion outside the 10-day period may be entertained by the court. Furthermore, the court notes that this case involves the disclosure of thousands of pages of documents, most of which did not reach Mr. Marshall within 10 days of his arraignment, as evidenced by motions to extend the deadlines in this case by both parties. Therefore, the court hereby grants Mr. Marshall permission to make his motion outside the 10 days set forth in Rule 7(f).

2. Merits

The superseding indictment in this case is certainly "bare bones." In count one, both defendants are alleged to have killed and to have aided and abetted the unlawful killing of Annie Mae Aquash by shooting her with a firearm with premeditation and malice aforethought on December 12, 1975. Count one alleges that Graham, Marshall, and Aquash are all Indians. The indictment does not allege which of the defendants had the gun, or whether both had a firearm, and which one "pulled the trigger" or if both did. Counts two and three charge only co-defendant John Graham.

If the indictment were all the information that the government had provided to Mr. Marshall, his motion for a bill of particulars might be well-placed. However, mountains of other information has been provided.

By Mr. Marshall's own estimation, he has been the recipient of over 5,000 pages of documents in discovery in this case. See Docket 143. In addition, the parties have thoroughly briefed the severance of trials of the two defendants, several theories for dismissal of the indictment, the potential of an alibi defense, and numerous evidentiary issues anticipated to be presented at trial. These documents filed by the government spell out in great detail the basis of the government's prosecution against Mr. Marshall. In addition, in response to the current motion, the government again reiterated its factual basis and theory for the prosecution of Mr. Marshall.

Mr. Marshall seeks in his motion a statement of the date and location where Mr. Marshall is alleged to have committed some act that aided and abetted the murder of Ms. Aquash. As is evident from the government's discovery and pleadings, the government alleges that Mr. Marshall provided a firearm and ammunition to Mr. Graham, through Theda Clark, that Graham then is alleged to have used to kill Ms. Aquash. Mr. Marshall is alleged to have provided these items at his own home at approximately 11:30 p.m. the night before Ms. Aquash's murder. The names of the persons Mr. Marshall is alleged to have aided and abetted is provided in the indictment itself: Arlo Looking Cloud, Theda Clark, and co-defendant Graham.

The information that the government has provided is clearly sufficient to allow Mr. Marshall to defend himself at trial and to protect himself from a subsequent prosecution for the same crime. See 1 Fed. Practice & Procedure: Criminal, § 129, at 656; Shepard, 462 F.3d at 860; Hernandez, 299 F.3d at 989-990. It does not matter that the information was provided through vehicles outside the indictment itself, so long as it was provided. 1 Fed. Practice & Procedure: Criminal, § 129, at 663-664; Wessels, 12 F.3d at 750; Fleming, 8 F.3d at 1265-1266; Hester, 917 F.2d at 1084; Lupino, 171 F. Supp. at 648-650. Accordingly, the court denies Mr. Marshall's motion for a bill of particulars.

CONCLUSION

Based on the foregoing discussion, it is hereby

ORDERED that Mr. Marshall's motion for a bill of particulars [Docket 184] is denied.

NOTICE OF RIGHT TO APPEAL

Pursuant to 28 U.S.C. § 636(b)(1)(A), any party may seek reconsideration of this order before the district court upon a showing that the order is clearly erroneous or contrary to law. The parties have ten (10) days after service of this order to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. See Fed. R. Crim. P. 58(g)(2). Failure to file timely objections will result in the waiver of the right to appeal questions of fact. Objections must be timely and specific in order to require review by the district court.

Dated March 13, 2009.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

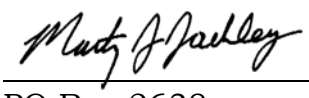
NOTICE OF EXPERT WITNESS

COMES NOW the United States of America, through its attorneys, United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, to provide notice, pursuant to Fed. R. Crim. P. 16(a)(1)(E), to the Defendants of the United States' intention to call an expert witness at trial.

NAME:	Evan Hodge, Ballistics Expert, FBI, Retired
SUMMARY:	The witness will testify concerning the type of firearm and the condition/ caliber of the bullet recovered during the autopsy of Anna Mae Pictou Aquash.
QUALIFICATIONS:	The witness' qualifications are outlined in his testimony from the trial of Fritz Arlo Looking Cloud previously provided to the Defendants as discovery.

Dated and electronically filed this 13th day of March 2009.

MARTY J. JACKLEY
United States Attorney



PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on March 13, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

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Marty J. Jackley
United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, CR08-50079

Plaintiff,

v. **NOTICE OF EXPERT WITNESS**

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

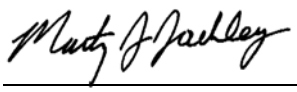
Defendants.

COMES NOW the United States of America, through its attorneys, United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, to provide notice, pursuant to Fed. R. Crim. P. 16(a)(1)(E), to the Defendants of the United States' intention to call an expert witness at trial.

NAME:	Kimberly Edwards Fingerprint Expert, FBI
SUMMARY:	The witness will testify concerning the fingerprint comparison and match for the victim.
QUALIFICATIONS:	The witness' qualifications are outlined in her testimony from the trial of Fritz Arlo Looking Cloud previously provided to the Defendants as discovery.

Dated and electronically filed this 13th day of March 2009.

MARTY J. JACKLEY
United States Attorney



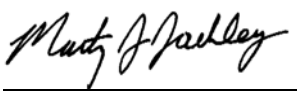
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Marty J. Jackley
United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, CR08-50079

Plaintiff,

v. **NOTICE OF EXPERT WITNESS**

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

COMES NOW the United States of America, through its attorneys, United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, to provide notice, pursuant to Fed. R. Crim. P. 16(a)(1)(E), to the Defendants of the United States' intention to call an expert witness at trial.

NAME: Dr. Garry Peterson, Forensic Pathologist, Hennepin County, Minneapolis, MN

SUMMARY: The witness will testify concerning his findings in the course of an autopsy he conducted of Anna Mae Pictou Aquash. His testimony will indicate that the victim received a gunshot wound to her head. He will also give expert testimony regarding the presence of phosphatase in her vagina. He will testify as to what, in his professional opinion, was the cause of death. The substance of the witness' testimony is contained in an autopsy report previously provided to the Defendants.

QUALIFICATIONS: The witness' curriculum vitae has previously been provided to the Defendants.

Dated and electronically filed this 16th day of March 2009.

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on March 16, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

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Marty J. Jackley
United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079-02

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT MARSHALL'S NOTICE OF INTENT TO OFFER STATEMENTS OF COUNSEL

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully files its Response in Opposition to Defendant Marshall's Notice of Intent to Offer Statements of Counsel, based upon both legal and factual grounds.

It is a basic premise of law that statements of counsel are not evidence. See United States v. Smith, 508 F.3d 861, 865 (8th Cir. 2007); United States v. Gray, 369 F.3d 1024, 1028 (8th Cir. 2004); United States v. Stevens, 918 F.2d 1383, 1386 (8th Cir. 1990). The preliminary instruction universally provided to juries set forth in Eighth Circuit Pattern Jury Instruction 1.03 directly addresses this important legal concept:

> I have mentioned the word "evidence." "Evidence" includes the testimony of witnesses, documents and other things received as exhibits, any facts that have been stipulated — that is, formally agreed to by the parties, and any facts that have been judicially noticed — that is, facts which I say you may, but are not required to, accept as true, even without evidence.
>
> Certain things are not evidence. I shall list those things for you now:
>
> **1. Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence . . . .**

Eighth Circuit Pattern Jury Instructions, 1.03, Ed. 2007 (emphasis added). As a matter of law, Defendant Marshall's invitation to expand the realm of evidence to include statements, arguments, and comments by lawyers should be declined.

The facts of this case further demonstrate the longstanding rationale for the definition of evidence in a trial. Defendant Marshall has made considerable representations with respect to his factual background that may or may not be borne out at trial through witness testimony and exhibits. At least with respect to the discovery that has been disclosed and provided to both Defendants, Defendant Marshall conveniently leaves out or fails to recognize several witness accounts, along with his very own admissions. See generally, United States' Memorandum in Opposition to Defendants Graham and Marshall's Motion for Severance, p.10-11, DE 95 (referencing additional witness accounts of Defendant Marshall's conduct); Graham discovery 04885-04888 (additional

witness accounts of Defendant Marshall's conduct); and, DE 95, Exhibits 1-4 (Marshall's statements and associated witness notes).

Defendant Marshall's attempts to create a factual discrepancy by mixing aider and abettor conduct at Defendant Marshall's residence with aider and abettor conduct at the bluff scene of Aquash's murder rings hollow. The conduct in both locations is certainly blended and an integral part of the criminal venture to murder Aquash. At his residence, Defendant Marshall provided the means, including the revolver, shells, and consultation, for other aiders and abettors to continue the criminal venture on to the bluff where Aquash was murdered. The United States has never alleged, nor does the law require, Defendant Marshall to have participated in each and every element of the offense. 18 U.S.C. § 2; United States v. Sigalow, 812 F.2d 783, 785 (2d Cir. 1987). Liability for the actions of a principal requires only that the defendant knowingly associated with the criminal venture and participated in a material respect. United States v. Stands, 105 F.3d 1565, 1577 (8th Cir. 1997)(quoting United States v. Dunlap, 28 F.3d 823, 826 (8th Cir. 1994)).

It is for these reasons that the "evidence" the jury ultimately considers should include the testimony of witnesses, documents and other things received as exhibits, any facts that have been stipulated, and any facts that have been judicially noticed. See Eighth Circuit Criminal Pattern Jury Instructions, 1.03.

Accordingly, the United States respectfully requests that this Court deny Defendant Marshall's request based upon both legal and factual grounds.

Dated and electronically filed this 16th day of March 2009.

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on March 16, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

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Marty J. Jackley
United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL, Defendants.	CR08-50079 **UNITED STATES' NOTICE OF *RES GESTAE* EVIDENCE, OR IN THE ALTERNATIVE, FED. R. EVID. RULE 404(b) RE: MONTILEAUX INCIDENT**

COMES NOW the United States of America, through its attorneys, United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, to provide notice of the United States' intention to submit evidence in its case-in-chief at trial regarding facts and circumstances involving the Martin Montileaux shooting. It is the United States' position that said evidence is admissible under the theory of *res gestae*, or in the alternative, Fed. R. Evid. 404(b).

I. FACTUAL BACKGROUND

The following evidence concerning the Montileaux incident is an integral part of both Defendant Marshall's and Defendant Graham's criminal venture in the murder of Anna Mae Aquash: (1) the .32-caliber revolver involved in the Montileaux matter; (2) the existence of Defendant Marshall's pending murder

charge in the Montileaux matter on December 12, 1975; and (3) Defendant Marshall's conviction for the premeditated murder of Montileaux.

On March 1, 1975, Defendant Marshall shot and killed Martin Montileaux with a .22-caliber handgun at the Scenic Bar. See State v. Marshall, 264 N.W. 2d 911, 914-15 (S.D. 1978). Following the high speed chase that ensued after the Montileaux shooting, officers seized several rifles and revolvers in Defendant Marshall's possession. See Graham 04962-04965. Included among these firearms was an H&R .32-caliber revolver, serial number 55938. Id. This revolver was subsequently released from police custody on or about June 1, 1975, approximately six months prior to Defendant Marshall's conduct in the Aquash murder. Id.

On or about the early morning hours of December 12, 1975, Defendant Graham, Arlo Looking Cloud, and Theda Clarke brought Anna Mae Aquash to Defendant Marshall's residence in Allen, South Dakota, house #363. See Graham 04854; DE 95; Exhibits 1-4 (Defendant Marshall's statements). Aquash was being held against her will. See Graham 04854; DE 95, Exh. 2 (Defendant Marshall's statement). Defendant Marshall took Defendant Graham, Looking Cloud, and Clarke into his bedroom in which he provided consultation, including the exchange of a handwritten note from Theda Clarke asking if he could take care of this "baggage." See Graham 04886-04888. See DE 95, Exh. 3, 4 (Defendant Marshall's statements). Thereafter, Defendant Marshall provided Clarke, Looking Cloud, and Defendant Graham with a .32-

caliber revolver and shells to further the criminal venture. See Graham 04886-04888; DE 95, Exh. 3 (Defendant Marshall's statement).

Defendant Marshall's possession of the .32-caliber revolver during the Montileaux incident, and the gun's release from police custody on June 1, 1975, tends to logically prove he had the opportunity to provide the weapon during the Aquash criminal venture. Furthermore, Defendant Marshall's pending murder charge in Montileaux was material to several aiders and abettors in developing and carrying out the plan and scheme to murder Aquash. It further affected Defendant Marshall's ultimate role which did not include serving as the triggerman in the murder of Aquash. It is anticipated that additional evidence will be introduced at trial regarding the role of the Montileaux matter at the Marshall residence the evening Aquash was present, forming the basis for actions taken by the criminal venture that night.

II. *RES GESTAE*

When evidence is admitted under a *res gestae* theory, Rule 404(b) is not implicated. See United States v. Riebold, 135 F.3d 1226, 1229 (8th Cir. 1998) (citing United States v. LeCompte, 108 F.3d 948, 952 (8th Cir. 1997)). Under the theory of *res gestae*, evidence falling within one of the following categories is admissible when the activity: (1) is so blended or connected, with the one on trial that proof of one incidentally involves the others; (2) explains the circumstance thereof; or (3) tends logically to prove any element of the crime charged. See United States v. Honken, 378 F. Supp. 2d 928, 940-41 (N.D.

Iowa 2004) (citing Riebold, 135 F.3d at 1229; United States v. Forcelle, 86 F.3d 838, 841 (8th Cir. 1996); United States v. Holliman, 291 F.3d 498, 502 (8th Cir. 2002); United States v. Roberts, 253 F.3d 1131, 1134-35 (8th Cir. 2001) (other citations omitted)).

The Montileaux evidence, including the charges pending against Defendant Marshall on or about December 12, 1975, squarely fits all three admissible categories of *res gestae* evidence. This *res gestae* evidence of the Montileaux matter is so blended and connected with the aiding and abetting in the first degree murder of Aquash that proof of one incidentally involves the other with respect to Defendant Marshall's involvement and ultimate role in the murder of Aquash. It explains the circumstances surrounding the activities occurring at Defendant Marshall's residence on the evening of Aquash's murder, including why Defendant Marshall was offered and accepted a role into the criminal venture to murder Aquash. It further defined Defendant Marshall's role and ability to provide the .32-caliber revolver and shells, and logically tends to show why he did not serve as the triggerman in Aquash's murder. It further tends logically to prove the intent element of the offense, encompassing knowledge of what was occurring, the state of mind of the individuals involved, and intent to act. Accordingly, the Montileaux matter is admissible as part and parcel of the entire transaction of both Defendants Graham and Marshall and shows intent to commit and ultimately carry through with aiding and abetting in first degree murder.

III. RULE 404(b)

In the alternative, based upon the very nature of this evidence, it is further admissible pursuant to Fed. R. Evid. 404(b) in that it shows proof of opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident. See generally, United States v. Jourdain, 433 F.3d 652, 659 (8th Cir. 2006).

To properly admit Rule 404(b) evidence for purposes other than to prove a propensity, it must (1) be relevant to a material issue raised at trial, (2) be similar in kind and close in time to the crime charged, (3) be supported by sufficient evidence to support a finding by a jury that the defendant committed the other act, and (4) not have a prejudicial value that substantially outweighs its probative value. See, United States v. Kern, 12 F.3d 122, 124-25 (8th Cir. 1993) (other citations omitted).

Defendant Marshall's possession of the .32-caliber revolver during the Montileaux incident is relevant with respect to his alleged conduct of providing a .32-caliber revolver and .32-caliber shells to co-Defendant Graham and co-participants Arlo Looking Cloud and Theda Clarke on the evening of Aquash's murder. It tends to logically prove he had the opportunity to provide such a weapon during the criminal venture. Moreover, Defendant Marshall's pending murder charge for the Montileaux matter was material to several aiders and abettors in developing and carrying out the plan and scheme to murder

Aquash. It further affected Defendant Marshall's ultimate role that did not include serving as the triggerman in the murder of Aquash.

The Montileaux matter is clearly similar in kind and close in time to the crime charged. It occurred on or about March 1, 1975. Aquash was murdered on or about December 12, 1975. Furthermore, both instances involve a similar scheme and modus operandi of the victim being shot with a small caliber handgun in the back of the head/neck while facing away from the perpetrator.

The Montileaux shooting is supported by sufficient evidence, including a jury convicting Defendant Marshall of premeditated murder, which was affirmed by the South Dakota Supreme Court. See State v. Marshall, 264 N.W. 2d 911 (S.D. 1978). Defendant Marshall's possession of the .32-caliber revolver is well-documented with photographs and reports. See Graham 04962-04965. The Montileaux matter is a well-documented criminal case, including the existence of pending charges against Defendant Marshall in the Montileaux murder case on December 12, 1975.

Given the integral role of the Montileaux shooting, any limited prejudicial effect does not outweigh its significant probative value. To the extent either Graham or Marshall has concerns about any limited prejudicial effect, they may be cured by proper limiting instructions associated with this evidence. As duly noted by the Eighth Circuit Court of Appeals, "[a] jury is entitled to know the circumstances and background of a criminal charge. It cannot be expected to make its decision in a void-without knowledge of the time, place, and

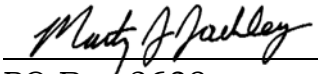
circumstances of the acts which form the basis of the charge." See United States v. Fleck, 413 F.3d 883, 890 (8th Cir. 2005) (quoting United States v. Moore, 735 F.2d 289, 292 (8th Cir. 1984)).

IV. CONCLUSION

The jury is entitled to hear evidence regarding the .32-caliber revolver seized from Defendant Marshall in the Montileaux matter and ultimately released from police custody on or about June 1, 1975, approximately six months prior to Defendant Marshall's conduct associated with the murder of Anna Mae Aquash. The jury is further entitled to hear the role the Montileaux matter played in both the planning and scheming of the criminal venture, and the ultimate roles carried out by Defendants Marshall and Graham in the Aquash murder.

Dated and electronically filed this 17th day of March 2009.

MARTY J. JACKLEY
United States Attorney



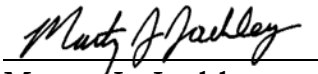
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605.357.2330

CERTIFICATE OF SERVICE

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Marty J. Jackley
United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079-01

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT MARSHALL'S MOTION TO DISMISS FOR DENIAL OF DUE PROCESS

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully files its Response in Opposition to Defendant Marshall's Motion to Dismiss for Denial of Due Process based upon both legal and factual grounds.

Defendant Marshall has made considerable representations with respect to his factual background that may or may not be borne out at trial through witness testimony and exhibits. With respect to the discovery disclosed and provided to both Defendants, Defendant Marshall conveniently leaves out or fails to recognize several witnesses' accounts, along with his very own admissions. See generally, United States' Memorandum in Opposition to Defendants Marshall and Graham's Motion for Severance, p.10-11; DE 95

(referencing additional witness accounts of Defendant Marshall's conduct); Graham 04885-04888 (additional witnesses' accounts of Defendant Marshall's conduct); DE 95, Exh. 1-4 (Defendant Marshall's statements and associated witness notes).

Defendant Marshall's further attempt to create a factual discrepancy by mixing aider and abettor conduct at Defendant Marshall's residence with aider and abettor conduct at the bluff scene of Aquash's murder rings hollow. The conduct in both locations is certainly blended and an integral part of the criminal venture to murder Aquash. At his residence, Defendant Marshall provided aid to the criminal venture, including the revolver, shells, and consultation. See DE 95, Exh. 1-4 (Defendant Marshall's statements); Graham 04962-04965; Graham 04886-04888. Thereafter, other aiders and abettors, namely co-Defendant Graham and co-participants Arlo Looking Cloud and Theda Clarke, continued the criminal venture at the bluff where Aquash was murdered. See Graham 04893-04895; United States v. Looking Cloud, 419 F.3d 781, 875 (8th Cir. 2005) ("Looking Cloud and Graham marched Aquash up a hill and Graham shot her at the top of the cliff").

The United States has not alleged, nor does the law require, Defendant Marshall to have participated in each and every element of the offense. 18 U.S.C. § 2; United States v. Sigalow, 812 F.2d 783, 785 (2d Cir. 1987). Liability for the actions of a principal requires only that the defendant knowingly associated with the criminal venture and participated in a material

respect. United States v. Stands, 105 F.3d 1565, 1577 (8th Cir. 1997)(quoting United States v. Dunlap, 28 F.3d 823, 826 (8th Cir. 1994)).

With respect to Defendant Marshall, there exists no material factual discrepancy nor inherently contradictory evidence giving rise to due process violations. Consequently, Defendant Marshall's failure to identify inherently contradictory evidence warrants denial of his motion. Defendant Marshall's reliance on the Smith decision is misplaced. Smith v. Groose, 205 F.3d 1045, 1047-51 (8th Cir. 2000). In Smith, Smith, Bowman, Lytle, and Dixon set out to burglarize the Chambers' house. Id. at 1047. When the foursome arrived, a burglary was in progress by the Cunningham party. Id. The foursome approached Cunningham, who agreed to allow them to enter the house and steal what remained. Id. It is from this point that the serious factual discrepancy existed in the Smith case. Id.

At the Smith trial, the state convicted Smith on the theory that the Chamberses were murdered while the Smith foursome was present during the robbery. Id. at 1047-48. Specifically, that Bowman was the killer and Smith was, therefore, guilty of felony murder, armed criminal action, and robbery, because the murders occurred while he was in the house committing the burglary. Id. at 1048.

After the Smith conviction, the state indicted Cunningham for the murders. Id. At Cunningham's trial, the state relied upon a wholly inconsistent theory that the Chamberses were already dead when the Smith

foursome arrived. Id. Cunningham was ultimately convicted of two counts of first degree murder. Accordingly, the state's murder convictions based upon inconsistent and diametrically opposed testimony was determined to violate Smith's due process rights. Id.

To apply the factual scenario from Smith, it would require a claim that Defendant Marshall provided the murder weapon, shells, and consultation *after* Aquash had already been murdered. See, Smith, 205 F.3d at 1047-51. To be sure, neither in the Looking Cloud case nor in the Marshall prosecution does there exist such a claim. See Looking Cloud, 419 F.3d at 785; DE 95, Exh. 1-4 (Defendant Marshall's statements). Rather, Defendant Marshall provided the .32-caliber revolver and shells while Aquash was present and alive at his residence, albeit held against her will. See Graham 04886-04888; DE 95, Exh. 1-4 (Defendant Marshall's statements). Thereafter, the other aiders and abettors, including Defendant Graham, used Defendant Marshall's .32-caliber revolver and shells to murder Aquash. Looking Cloud, 419 F.3d at 785; Graham 04886-04888.

"To violate due process, an inconsistency must exist at the core of the prosecutor's cases against defendants for the same crime...." See Clay v. Bowersox, 367 F.3d 993, 1004 (8th Cir. 2004) (recognizing the significance that petitioner's only showing of inconsistent theories was a purported "from the prosecutor's closing argument as opposed to evidence.") (citing Smith v. Groose, 205 F.3d 1045, 1052 (8th Cir. 2000)). Defendant Marshall's attempt to

create a factual discrepancy by mixing aider and abettor conduct at Defendant Marshall's residence with aider and abettor conduct at the bluff scene of Aquash's murder fails to give rise to due process concerns.

The United States respectfully requests this Court deny Defendant Marshall's Motion to Dismiss for denial of due process.

Dated and electronically filed this 19th day of March 2009.

MARTY J. JACKLEY
United States Attorney
Marty J Jackley
PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on March 19, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Facsimile at
- ☐ Federal Express
- ☒ Electronic Case Filing

Marty J Jackley
Marty J. Jackley

FILED
MAR 23 2009
CLERK

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S RESPONSE IN OPPOSITION TO GOVERNMENT'S NOTICE OF *RES GESTAE* / RULE 404(B) EVIDENCE; AND MOTION IN LIMINE

NOW COMES defendant Richard Marshall, by and through his attorney, Dana L. Hanna, and hereby responds in opposition to the government's Notice of *Res Gestae* Evidence or in the Alternative Federal Rule of Evidence 404(b) Regarding Montileaux Incident [doc. #201] and with respect thereto, pursuant to Federal Rules of Evidence 403 and 404(b), the defendant moves for an order *in limine* precluding the government from offering or eliciting any evidence in trial regarding defendant's prior offense. Grounds for the motion *in limine* are that evidence concerning the defendant's prior offense is not *res gestae* evidence because the facts of the defendant's prior offense have absolutely no connection or relevance to the killing of Anna Mae Aquash on December 12, 1975; and that evidence of the defendant's prior offense is inadmissible under FRE Rule 404(b) because it has no probative value or relevance to any issue of fact in this case, it is extremely prejudicial, and it is only being offered in an attempt to prove the defendant's propensity to commit the crime charged.

The factual assertions made by the government in its filing are erroneous and untrue; such mis-statements of fact were made in reckless disregard of easily discoverable and available facts about the defendant's prior offense that are contained in the Court records and trial transcript of that case. The trial transcript from Richard Marshall's 1976 trial disproves beyond all doubt the factual assertions made by the government.

The government claims that Marshall possessed a .32 caliber revolver when he was arrested on March 1, 1975, but that law enforcement personnel returned that .32 caliber revolver to one Rosalie Janis on June 1, 1975. The government makes the latter claim on the basis of a receipt showing that the Sheriff's department gave "one 1968 Ford automobile ... and entire contents that were seized at the time of the arrest of Russell Means & Richard Marshall" to one Rosalie Janis on June 1, 1975 [Exhibit 'A']. The receipt makes no mention of guns. On the basis of those purported facts, the government argues that that .32 caliber revolver that was seized on March 1, 1975 *might possibly have been* the same .32 caliber revolver that John Graham used to shoot Anna Mae Aquash on December 12, 1975.

The government has obviously made these claims–which have now been reported and distorted in the local media and national wire services[1] –without ever having read the official court transcripts in the Montileaux case. Had federal prosecutors made any investigation of the facts in the public record before making extremely prejudicial mis-statements of fact to the court, they would have known that the official court reporter's trial transcript in the case of *State of*

[1] The lead sentence in the story that went out over the Associated Press wire service on March 19, 2009, and which was repeated that day on the air as news on both Rapid City television stations, KELO and KEVN, and their internet web sites was: "Federal prosecutors say the handgun used to kill a Canadian woman in 1975 was the same revolver taken from one of the two men charged with being an accessory to her murder." The story went on to say: "Prosecutors say Marshall had a .32-caliber pistol in his possession when he was arrested for shooting Montileaux, and that was the gun used to kill Aquash."

South Dakota v. Richard Marshall disproves the government's factual assertions beyond all doubt. The .32 caliber handgun that was seized by State Patrolmen from a car in which Richard Marshall and seven other people were riding on March 1, 1975 could not possibly have been the weapon that was used to kill Anna Mae Aquash and that was then buried in December 1975, because the .32 caliber revolver that was seized on March 1, 1975 was held as evidence in police custody at all times after it was seized until it was offered into evidence as State's Exhibit 8 at Richard Marshall's trial on April 2, 1976.

I

THE COURT RECORDS OF THE TRIAL OF STATE V. MARSHALL CONCLUSIVELY DISPROVE THE GOVERNMENT'S CLAIM THAT DEFENDANT MARSHALL POSSESSED A HANDGUN ON MARCH 1, 1975 THAT MIGHT HAVE BEEN THE WEAPON THAT WAS USED TO KILL ANNA MAE AQUASH ON DECEMBER 12, 1975.

In the trial and appeal in the case of United States v. Arlo Looking Cloud, the government offered evidence and argued that on or about December 12, 1975, Arlo Looking Cloud and John Graham led Anna Mae Aquash out to a cliff in the Badlands, that Looking Cloud gave a handgun to John Graham, that Graham shot Aquash in the head with that handgun, and that Arlo Looking Cloud and Graham then buried the gun under a bridge not far from the murder scene. The gun has never been recovered. Forensic evidence indicates that the bullet recovered from the body of the victim was fired by a .32 caliber handgun.

On information and belief, in the trial of Richard Marshall, Arlo Looking Cloud, now a government witness, will testify that he did not give a handgun to Graham, but he saw Richard Marshall give a handgun and box of shells to Theda Clarke at his home in Allen, South Dakota earlier that night that Aquash was killed.

Now the government wants to introduce evidence that Richard Marshall shot Martin Montileaux in a bar in Scenic, South Dakota on March 1, 1975, that when he was arrested he possessed a .32 caliber revolver which was seized by law enforcement, and that the gun was returned to one Rosalie Janis on June 1, 1975; therefore, the government argues, that .32 revolver might somehow have then been given to Richard Marshall, and so it might have been the weapon that was used to murder Aquash and that was buried in the Badlands on December 12, 1975. Based on those "facts" and imaginative speculations, the government contends that evidence regarding the defendant Richard Marshall's prior offense is an "integral part" of the defendant's and the co-defendant's alleged involvement in the killing of Anna Mae Aquash, primarily because "Defendant Marshall's possession of the .32 caliber revolver during the Montileaux incident, and the gun's release from custody on June 1, 1975, tends to logically prove he had the opportunity to provide the weapon during the Aquash criminal venture" [Government's Notice, Page 3].

The government's application to introduce this evidence must be denied because the facts the government puts forward to support its application are not facts: they are mis-statements of facts.

First, the government's assertion that on March 1, 1975, Richard Marshall had "possession" of a .32 caliber revolver that was "involved in the Montileaux matter" is misleading and inaccurate. According to the evidence presented in trial by the State, a .32 handgun and four other firearms were found in a car that neither belonged to nor was driven by defendant Marshall, in which Richard Marshall had been one of 8 passengers. There was and is no evidence that Richard Marshall ever personally possessed that .32 handgun or that he knew

that it was in the car. It was found under a seat.

More importantly, the government's factual assertion that the .32 revolver that was seized as evidence by police on March 1, 1975 was for some inexplicable reason "released from police custody" to someone named Rosalie Janis on June 1, 1975 is demonstrably false. The .32 caliber revolver that was taken as evidence from a 1968 Ford on March 1, 1975 could not have been the weapon that killed Anna Mae Aquash in December 1975 because that handgun was kept in police custody as evidence at all times from when it was seized and logged as evidence on March 1, 1975 through the trial of Richard Marshall in April 1976. It could not have been the gun that was used to kill Aquash and which was then buried in December 1975 because State prosecutors produced it in the courtroom and offered it as an exhibit in the trial on April 2, 1976.

These facts concerning the case entitled *State of South Dakota vs. Richard Marshall* and the evidence presented in the trial of the case are to be found in the official court reporter's certified copy of the trial transcript, excerpts from which are referenced herein by page and line and attached hereto as exhibits. That transcript has been part of the public record and available since 1976.

The trial of defendant Richard Marshall began on April 1, 1976.[2] The evidence in the case showed that an American Indian male named Martin Montileaux was shot under the chin with a single bullet fired almost straight on from a .22 caliber gun in the men's room at a bar in Scenic, South Dakota on March 1, 1975. Mr. Montileaux died of pneumonia, following complications caused by the shooting injury, in a hospital some two or three weeks later.

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[2] Richard Marshall's co-defendant was Russell Means. The trials were severed. Richard Marshall was out of jail on bond and had been for some months when his trial began. Means went on trial some time after Marshall's trial and conviction. Means was acquitted.

Merlyn Muir, a South Dakota State Highway Patrolman, testified that on the night of March 1, 1975, he pursued a Ford car going west on Highway 44, at speeds that varied between 40 and 80 miles per hour, from Farmingdale to where it stopped 2 miles east of Rapid City. The passengers were ordered out of the car. There were eight passengers in the car–three men and five women. The Ford was being driven by David Clifford and the other two males, who were passengers, were Richard Marshall and Russell Means. Richard Marshall was neither the owner or the driver of the car. One of the five women in the car was his wife [Trial transcript, *State v. Richard Marshall*, Vol. V, pages 16-26, attached hereto as "EXHIBIT 'B']."

After all 8 passengers exited the car, law enforcement officers recovered five guns from the vehicle–two rifles from the backseat and three pistols: a .357 Strum Ruger, a .22 revolver and an H&R .32 caliber revolver. The .32 caliber revolver was found under the right front seat of the vehicle [Transcript, Vol. V, pg. 29]. All five weapons were taken into police custody on March 2, 1975, where they remained until they were produced in the courtroom and offered as evidence at the trial of Richard Marshall on April 2, 1976. The .32 caliber revolver that was found under the seat was examined and identified by Trooper Muir in the courtroom as the same .32 revolver he had taken from the car on March 1, 1975. It was marked "State's Exhibit 8" for identification [Transcript, Vol. V, pg. 29, lines 3- 8]. The State later offered State's Exhibit 8 into evidence [Transcript, Vol. V, pg. 77]. It was not received, since it played no part in the shooting of Montileaux.

Therefore, the .32 caliber revolver that the government contends was "released from police custody" on June 1, 1975 was in fact continually in police custody from the time it was seized on March 2, 1975 until April 2, 1976 when the prosecution identified it as "State's Exhibit

#8" in Richard Marshall's trial. Obviously, it could not have been the gun that was used to kill Anna Mae Aquash on December 12, 1975.

The evidence of the defendant's prior offense therefore does not play any part, let alone an integral part, in the killing of Aquash and it is not admissible as *res gestae* evidence.

II

OFFICIAL COURT RECORDS OF THE TRIAL OF STATE V. MARSHALL CONCLUSIVELY DISPROVE THE GOVERNMENT'S CLAIM THAT DEFENDANT MARSHALL'S PRIOR OFFENSE IS SIMILAR IN KIND TO THE CRIME CHARGED IN THE INDICTMENT AND IS THEREFORE ADMISSIBLE UNDER RULE 404(B) TO PROVE MODUS OPERANDI.

The government contends that evidence regarding the shooting of Montileaux is relevant and admissible as Rule 404(b) evidence because "both instances involve a similar scheme and *modus operandi* of the victim being shot with a small caliber handgun in the back of the head/neck while facing away from the perpetrator" [Transcript, Vol. V, pg. 6].

This too is a reckless mis-statement of fact that the government should have known is not true, but which was evidently made without reviewing the official court records of the case or the actual evidence presented at trial. The trial transcript of *State v. Richard Marshall*, Volume IV, pages 2-31, attached hereto as EXHIBIT 'C', records the following facts and evidence.

In defendant's 1975 trial, Dr. Edward James, a neurosurgeon who treated Montileaux in the hospital, testified that Mr. Montileaux had a spinal cord injury from the bullet and he died of complications, including pneumonia, that were caused by the gun shot injury about two or three weeks after the shooting.

The entrance wound was at the top of the Adam's apple, under the chin, and it passed to

the decedent's left at a slight angle of 10-15 degrees from the horizontal. The shot, which was fired from the front, was not straight on, but it was almost straight-on, [Transcript, Volume IV, pg. 46-47], at a range that could not have been closer than three feet [Transcript, Vol. IV, pg. 47, line 16-25]. The bullet went in a downward direction from the entrance wound near the chin to where it lodged in the shoulder. The bullet entered under the chin above the Adam's apple, struck the spinal cord, and lodged in the shoulder.

The bullet was fired by an individual who was evidently standing in front of Montileaux, facing him.

Therefore, the government's assertion that "both instances involve a similar scheme and *modus operandi* of the victim being shot with a small caliber handgun in the back of the head/neck while facing away from the perpetrator" is simply not true.

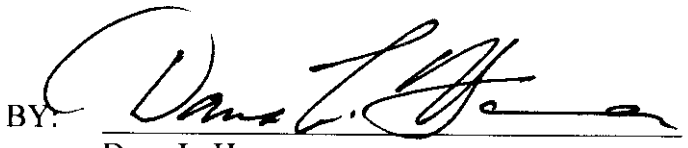
Moreover, the circumstances of the two incidents are obviously dissimilar. In the Aquash case, the government contends, and Richard Marshall denies, that he aided and abetted others in the killing of Aquash by giving them a gun. It is an uncontested fact in this case, which the government admits, that Richard Marshall was not even present when Anna Mae Aquash was shot, execution style, on a cliff in the Badlands. The government's claim that the circumstances of the defendant's spontaneous and unplanned alcohol-fueled barroom shooting in Scenic show a common "similar scheme and modus operandi" with the kidnaping and execution of Aquash, at which Marshall was not present, lacks any foundation in fact or law.

WHEREFORE, the defendant respectfully requests the Court to deny the government's application to allow it to introduce evidence of defendant's prior offense in the trial in this case and he further moves the court to enter an order *in limine* directing the government to refrain

from offering such evidence or making any reference to such evidence by its prosecutors or through its witnesses in the trial.

Dated this 20th day of March, 2009.

VINE RICHARD MARSHALL, Defendant

BY: 

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

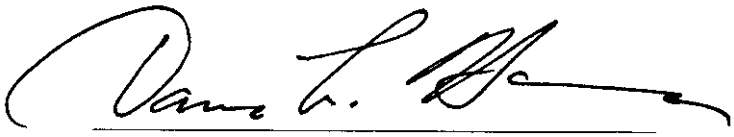
I hereby that I have served a true and correct copy of the foregoing RESPONSE IN OPPOSITION TO GOVERNMENT'S NOTICE OF *RES GESTAE* / RULE 404(B) EVIDENCE; AND MOTION IN LIMINE on the other parties in this case by mailing the same, postage prepaid, the attorneys of record at the addresses listed below:

Marty J. Jackley
United States Attorney
PO Box 2638
Sioux Falls, SD 57101

Robert Mandel
Assistant United States Attorney
515 Ninth Street, #201
Rapid City, SD 57701

John Murphy
Murphy Law Office
328 E. New York St., #1
Rapid City, SD 57701

Dated this 20th day of March, 2009.



Dana L. Hanna

RECEIPT Date 1 June 19 75 4181

Received From Clerk - U.S. Sheriffs Dept. 745-0163-2079

Address One 1968 White Ford Convertible, Color Red interior Contents that were Seized Dollars & Cents

For Arrest of Russell Means & Richard Marshall.

ACCOUNT			HOW PAID		
AMT. OF ACCOUNT			CASH		
AMT. PAID			CHECK		
BALANCE DUE			MONEY ORDER		

By Rosalie Jones

BK808 Rediform

Exhibit A

STATE OF SOUTH DAKOTA)
)SS.
COUNTY OF PENNINGTON)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
Plaintiff,

-vs-

RICHARD MARSHALL,
Defendant.

JURY TRIAL

Volume V

BEFORE: Honorable Marshall Young
Circuit Court Judge
Seventh Judicial Circuit
Pennington County Courthouse
Rapid City, South Dakota

APPEARANCES: Jack Klauck
States Attorney
Pennington County Courthouse
Rapid City, South Dakota
Representing the State of
South Dakota

Laurence Zastrow
Public Defender
519 Kansas City
Rapid City, South Dakota

-and-

John S. Connolly of
Connolly and Heffernan Ltd.
Attorneys at Law
100 McColl Building
St. Paul, Minnesota
Representing the Defendant,
Richard Marshall

Exhibit B

TIME AND PLACE: Courtroom
Pennington County Courthouse
Rapid City, South Dakota
April 2, 1976, at the hour of
9:30 a.m.

COURT REPORTER: Kathy L. Davis
Official Court Reporter
Pennington County Courthouse
Rapid City, South Dakota

INDEX OF EXHIBITS

PLAINTIFF'S EXHIBITS	Marked	Offered	Received
Exhibit No. 1		82	83
Exhibit No. 2		77	78
Exhibit No. 4		81	82
Exhibit No. 5		81	82
Exhibit No. 6		82	83
Exhibit No. 7	16	77	78
Exhibit No. 8	16	77	
Exhibit No. 9	16	77	
Exhibit No. 10	16	77	
Exhibit No. 11	16	77	
Exhibit No. 12	126	127	128
Exhibit No. 13	127	127	128

MR. KLAUCK: No, Your Honor.

MR. ZASTROW: No, Your Honor.

THE COURT: All right. Mr. Klauck you may proceed and call your next witness.

MR. KLAUCK: State calls Merlyn Muir.

(State's Exhibits 7, 8, 9, 10 and 11 marked for identification.)

MERLYN MUIR,

called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. KLAUCK:

Q Would you state your full name and occupation?

A Merlyn Muir, South Dakota Highway Patrolman.

Q For how long have you been so employed?

A About fourteen and a half years.

Q Were you so employed on March 1st, 1975?

A Yes, I was.

Q Were you working on the night of March 1st, 1975?

A Yes, sir.

Q Now, at approximately midnight or shortly thereafter, can you tell me where you were on the night of March 1st/2nd, 1975?

A I was right here in town in the city limits.

Q Were you in a patrol vehicle?

A Yes, I was.

Q Would you tell me briefly, how that vehicle was equipped?

A My particular vehicle?

Q Yes, or highway patrol vehicles in general.

A In reference to what? What do you mean?

Q Lighting and so forth.

A They are all equipped with what we call a bar light, which is a red light that covers the entire -- it goes across the whole car -- siren, public address system.

Q Okay. Now officer, sometime around that time, did you receive any radio traffic in regard to a shooting incident in Scenic, South Dakota?

A Yes, sir.

MR. ZASTROW: I would object to the form of questions, particular when the States Attorney is adding a lot of things into the question. I don't think it's foundational at all.

THE COUPT: At this point, it's still foundational. Objection overruled.

BY MR. KLAUCK:

Q All right, Officer, where did that radio traffic emanate?

A First traffic I heard was from the county jail.

Q Were you alone at that time?

A Yes, I was.

Q What was that traffic?

MR. ZASTROW: Object as hearsay.

MR. KLAUCK: Your Honor, the State is submitting radio traffic to show probably cause for the officer's subsequent actions.

THE COURT: Gentlemen, approach the bench, please.

(Off the record discussion held at the bench between counsel and the Court, outside the hearing of the jury.)

THE COURT: Objection sustained.

BY MR. KLAUCK:

Q Now, Officer, as a result of this radio traffic, what did you do?

A I got into another patrol car with another officer.

Q Okay, and where were you at that time?

A At the Highway Patrol Office here in Rapid City.

Q Who was the other officer?

A Officer Dean Fish.

Q Did you go in his vehicle?

A Yes, sir.

Q And is his vehicle equipped as yours is?

A Exactly.

Q What did you do then?

A We patrolled east on Highway 44 out of Rapid City.

Q All right. And how far east did you patrol?
A We got to a point approximately twenty miles east of Rapid City.
Q Did you stop at that time?
A Yes, sir.
Q Where did you stop?
A On an approach road, kind of off on a shoulder near Farmingdale, South Dakota.
Q In which direction was your vehicle facing?
A We were facing in kind of a northwesterly direction.
Q At that time, did you make a determination as to what you were going to do?
A Yes.
Q What was that?
A We were going to stop some vehicles that were coming our direction.
Q Did there come a time when you stopped a vehicle?
A Yes, sir.
Q Could you describe the vehicle?
A This was one we stopped. It was a new Ford station-wagon.
Q Did you allow that vehicle to proceed?
A Yes, we did.
Q During this time, were you in radio contact with other law enforcement units?

A Yes, sir.

Q Which units were they?

MR. ZASTROW: Your Honor, I would object as hearsay, also.

THE COURT: Overruled. He may answer.

A The one unit that we were most frequently in contact with was Sheriff Mel Larson.

Q All right. Did there come a time when you saw Sheriff Mel Larson?

A Yes, sir.

Q Where was that?

A At that point that I've described and he was headed west on Highway 44.

Q All right. Were there any other vehicles near Sheriff Larson's unit when you saw him?

A Yes, there was.

Q What type of vehicle was that?

A There were two other vehicles. One was a dark colored Buick Riviera and a light colored '68 Ford convertible.

Q Where was Sheriff Larson?

A Behind the two vehicles when I first saw him.

Q What kind of a unit was he driving?

A He was driving the county four-wheel drive Dodge pickup.

Q Did he have any -- or was he using any of his lighting

system on that vehicle?
A Yes, he was.
Q What was he using?
A He had a regular clear white spotlight and a red top light and they were both on.
Q At that point, was he behind the Buick?
A Yes, at that point, he was behind both of the vehicles when I first observed him.
Q Then, what did you observe him do?
A Then he passed the first car, the Buick, and got in between them -- actually, behind the Ford.
Q Had they passed you when you observed that?
A They were passing about this time.
Q Were you in radio contact with him at this time?
A Yes, sir.
Q What did you and Officer Fish do at that time?
A We pulled out and went in pursuit of this Ford that he was behind with our red light and siren on.
Q Okay. Now, for how long a period of time did you pursue this vehicle?
A Approximately fifteen minutes.
Q Can you tell me approximately what distance you covered during this pursuit?
A Somewhere in the neighborhood of seventeen miles.
Q And your pursuit commenced then at Farmingdale?

A Just this side of Farmingdale?

Q Where did it conclude?

A At a point approximately two miles east of Rapid City on Highway 44.

Q Would you describe the nature of the pursuit during this time and this distance?

MR. ZASTROW: Object to the form of the question. It's vague and open ended.

THE COURT: Objection sustained.

BY MR. KLAUCK:

Q Officer, you positioned yourself behind Sheriff Larson, is that correct?

A No, we passed the Sheriff.

Q Where were you positioned then?

A Directly behind the Ford.

Q Were you attempting to stop the Ford?

A Yes, we were.

Q How did you do that?

A With red light and siren.

Q Now, is this your revolving light?

A Yes. There are two revolving lights and a steady red light to the front on these lights.

Q Can you describe how this vehicle that you were pursuing was driven?

A Yes. It was driven in a very erratic manner.

Q Could you be more specific?

A Speeds varied from forty miles an hour to eighty miles an hour. The vehicle was off on both shoulders of the road between when we first got behind it and when it was eventually stopped.

Q Did you ever attempt to pass that vehicle?

A No, we didn't

Q Officer, there came a time when the vehicle was stopped, is that correct?

A Yes.

Q Where did that occur?

A Approximately two miles east on Highway 44.

Q Was that on the highway?

A Yes, adjacent to Highway 44 on an approach road between the highway. Actually, the vehicle stopped on a railroad track.

Q Had the vehicle left the highway at any time?

A Yes, it had.

Q Where did it go when it left the highway?

A Just prior to its stopping, it turned off the highway to the north and went through a small trailer court, through some type of a wooden fence and back out on the highway headed back east.

Q All right. Did it stop at that time?

A It pulled off onto the approach road, headed south, and

then stopped on the railroad tracks.

Q Do you know what caused it to stop?

A Well, initially, it was hit by Sheriff Larson's pickup and then it hung up on the railroad tracks as it attempted to cross the tracks.

Q Now, during the pursuit, were you able to see how many people were in the car?

A No, not exactly.

Q Could you tell if there were more than one?

A Yes, I could tell there were several people in the vehicle.

Q Could you determine whether they were men or women?

A Not at this point, no sir.

Q Now, after the vehicle had stopped, where was your unit?

A Our unit was on the south shoulder of Highway 44, facing east, a little to the rear and to the west of the stopped vehicle.

Q All right. What did you do when the vehicle stopped?

A I immediately got out of the patrol car.

Q All right. Did you see what Officer Fish did?

A Yes.

Q What did he do?

A He put his public address system on and talked over the address system. He told the occupants of the vehicle to get out with their hands up and they were under arrest.

Q Where were you at that time?

A I was down in the ditch, immediately west of the vehicle and to the south of the patrol car.

Q Did the occupants exit the vehicle?

A Yes, they did.

Q Can you tell me how many people exited?

A Yes, there were eight.

Q Were these men and women?

A Yes, sir.

Q Do you know how many men there were?

A Three men, five young women.

Q Were you able to identify any of the men?

A Yes, sir.

Q Who were they?

A The men were Richard Marshall, Russell Means and David Clifford.

Q Were you able to determine -- strike that.

Was this a two-door or four-door vehicle?

A Two-door.

Q Were you able to determine from which door the Defendant exited?

A Yes, sir.

Q Which door?

A The right side.

Q And Russell Means?

A Right side.
Q And Davy Clifford?
A Left side.
Q Were you able to determine who the driver had been?
A Not at this point, I wasn't.
Q Now, Officer, did you note the wearing apparel of the Defendant, Richard Marshall, or Russell Means?
A No, sir, I didn't.
Q Did you note their grooming?
A No, sir.
Q Now, is Richard Marshall present in the courtroom?
A Yes, he is.
Q Would you point to him, please?
A First gentleman on this side of the table. (Indicating.)

MR. KLAUCK: The record should reflect the witness has pointed to the Defendant.

BY MR. KLAUCK:
Q Now, after these individuals exited the vehicle, what did you do?
A After they went to the rear of the car towards the sheriff's pickup, I went over to the vehicle.
Q What did you do at that time?
A I went over the vehicle to secure it and then I looked into the vehicle.
Q What, if anything, did you see when you looked in?

A Guns, mainly.

Q All right. Could you tell me where these guns were when you saw them?

A There were two rifles on the back seat, one of the pistols on the front seat and one of the pistols was lying on the rear floorboard and I hadn't yet seen the other one at this point.

Q Were those items visible to you when you looked into the car?

A The two rifles and one pistol were readily visible, yes.

Q All right, and how many weapons did you find in total?

A Five.

Q All right, and what, if anything, did you do with those weapons?

A I took them out of the vehicle. I checked them to see if they were loaded. I checked serial numbers and wrote them down.

Q Can you describe these weapons for me?

A Yes, I can. The two shoulder weapons were rifles. One was a 30-30 caliber Winchester, lever action, a 30 caliber M-1 Carbine, a 357 Strum Ruger, a 22 Long Rifle revolver and a H & R 32 caliber revolver.

Q Now, Officer, did you inspect these weapons to determine if they were loaded?

A Yes, I did.

Q What did you find?

A They all five were loaded.

Q Were they all fully loaded?

A With the exception of the 22, yes, sir.

Q Now, the 22 -- by that, you mean the 22 pistol?

A Yes.

Q What did you find when you examined that weapon?

A It had five leaded rounds and one in the case in the cylinder.

Q Now, Officer, did you smell of the barrels of any of those weapons to determine if they had been recently fired?

A No, I didn't.

Q I'll show you what's been marked as State's Exhibit 7. Would you examine that, please, and identify it for me, if you can?

A Yes, sir. This is the 22 long rifle, single action revolver that I found in this vehicle.

Q Where did you find that?

A This weapon was laying on the floor, the rear floor, behind the passenger side seat on the floorboard.

Q Is that the weapon that had five loaded cartridges and one in the case of the cylinder?

A Yes, it is.

Q What did you do with that weapon after you examined it?

A After recording serial numbers, et cetera, I turned all these weapons over to Deputy Sheriff Duane Plucker.

Q State's Exhibit No. 8, would you examine it and can you identify that?

A Yes, I can.

Q Would you do so?

A This is the 32 revolver that I found under the right front seat of this vehicle.

Q After you examined that weapon, what did you do with it?

A I also turned this over to Deputy Sheriff Plucker.

Q That weapon was fully loaded?

A Yes, sir.

Q State's Exhibit 9, would you identify that for me, if you can?

A Yes, sir. This is a 357 Ruger revolver which I found on the front seat of this vehicle.

Q Did you also turn that weapon over to Deputy Sheriff Plucker?

A Yes, I did.

Q Was that fully loaded?

A Yes, sir.

Q And State's Exhibit 10?

A Yes, this is a 30 caliber Carbine I found on the rear seat of this vehicle. I turned it over to Deputy Sheriff Plucker, also.

Q Was that fully loaded?
A Yes, sir.
Q How many rounds did those contain, do you know?
A It depends on the magazine in them. They can have either a fifteen or thirty round clip.
Q Did you check the clip on that weapon?
A Yes, sir.
Q Did you determine how many rounds it contained?
A I don't remember counting it. I know there were rounds in the magazine or clip.
Q All right. State's Exhibit 11.
A This is a 30-30 caliber Winchester, lever action, that I found on the rear seat of this vehicle.
Q That was fully loaded?
A Yes, sir.
Q Did you turn that rifle over to Deputy Sheriff Plucker?
A Yes, I did.
Q How many rounds did that contain?
A I don't recall.
Q Now, Officer, do those exhibits appear to be in substantially the same condition now as when you last observed them?
A Yes, they do.
Q After the individuals were arrested, did you see what happened to them?

A After they left the scene, no. I had no further contact with them.

Q Did you speak with any of the individuals who came out of the car?

A No, sir.

MR. KLAUCK: Thank you. That's all.

THE COURT: You may cross examine.

CROSS EXAMINATION BY MR. ZASTROW:

Q Officer Muir, I believe you stated that you stopped a stationwagon?

A Yes, sir.

Q Did you talk to anyone in the stationwagon?

A No, I didn't. Officer Fish did.

Q Did you get out of your vehicle?

A Yes, sir.

Q Did you look into the stationwagon at all?

A No, I didn't even approach the vehicle.

Q What were the names of the people that were driving that vehicle?

A I don't have that information.

Q Did you get the license number?

A We called it in. It would be on tape, but I don't have it with me.

Q That's how it was returned to you?

A Right.

Q Did you put markings on there, did you say, on the container?

A Yes, my call sign is on the container.

MR. KLAUCK: Thank you. That's all.

THE COURT: You may cross examine.

MR. ZASTROW: I have no questions, Your Honor.

THE COURT: You're cautioned not to discuss your testimony with any other witness. You may be excused. Thank you.

(Witness excused.)

MR. KLAUCK: Your Honor, the State would move into evidence State's Exhibits Nos. 2, 10 and 11.

THE COURT: Which one is 2?

MR. KLAUCK: 2 is the bullet. The State would move into evidence 7, 8, 9, 10 and 11.

MR. CONNOLLY: May we take a look at these exhibits?

THE COURT: Yes, you may.

(Off the record discussion.)

STATE OF SOUTH DAKOTA)
) SS:
COUNTY OF PENNINGTON)

CERTIFICATE

This is to certify that I, Kathy L. Venekamp Davis, Court Reporter in the above-named county and state, took the proceedings of the foregoing matter and the foregoing pages 1 - 184 inclusive, are a true and correct transcript of my stenotype notes.

Dated at Rapid City, South Dakota, this 5th day of ~~April~~ May, 1976.

Court Reporter

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF PENNINGTON)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
Plaintiff,
-vs-
RICHARD MARSHALL,
Defendant.

JURY TRIAL

Volume IV

BEFORE: Honorable Marshall Young
Circuit Court Judge
Seventh Judicial Circuit
Pennington County Courthouse
Rapid City, South Dakota

APPEARANCES: Jack Klauck
States Attorney
Pennington County Courthouse
Rapid City, South Dakota
Representing the State of South Dakota

Laurence Zastrow
Public Defender
519 Kansas City
Rapid City, South Dakota

-and-

John S. Connolly of
Connolly and Heffernan Ltd.
Attorneys at Law
100 McColl Building
St. Paul, Minnesota
Representing the Defendant, Richard Marshall

Exhibit C

TIME AND PLACE:	Courtroom Pennington County Courthouse Rapid City, South Dakota April 1, 1976 at the hour of 9:00 a.m.
COURT REPORTER:	Kathy L. Davis Official Court Reporter Pennington County Courthouse Rapid City, South Dakota

You will be given an instruction later about circumstantial evidence. I submit that the prosecution does not even have credible circumstantial evidence and we will establish it, through our testimony, if they don't submit witnesses.

Thank you.

THE COURT: Gentlemen, the witnesses have been sequestered. Has each side made sure their witnesses are not in the courtroom?

MR. ZASTROW: There are none that we are aware of.

THE COURT: Is anybody in the courtroom that's been subpoenaed to testify?

All right. The State may proceed and call its first witness.

MR. KLAUCK: The State calls Dr. James.

DR. EDWARD JAMES,

called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. KLAUCK:

Q Doctor, would you state your full name and occupation, please?

A Edward James, neurosurgery.

Q All right, Doctor, and where do you practice neurosurgery?

A Rapid City, South Dakota.
Q For how long have you practiced neurosurgery in Rapid City?
A Three years.
Q Just briefly, what is neurosurgery?
A It's a practice of medicine directed towards surgical diseases, treatment of diseases of the nervous system.
Q Would you state your educational background?
A Yes. I went to medical school at the University of Saskatchewan at Canada. I interned at Michigan. I took a year of general surgery training at the University of Iowa and I took my post graduate surgical training at the University of Iowa.
Q Are you licensed to practice medicine in South Dakota?
A I am.
Q Are you licensed to practice medicine in other parts of the country?
A I am not.
Q In any other country?
A In Canada.
Q Doctor, as a neurosurgeon, do you belong to any particular societies or boards?
A No, I do not belong to the American Board of Neurosurgery. I have a fellowship in the College of Surgeons in Canada in neurosurgery.

Q All right. I want to direct your attention to the early morning hours of March 2nd, 1975, and ask if you had an occasion to examine an Indian man at that time?

A I did.

Q And where did this examination take place?

A The emergency room, St. John's Hospital, or Rapid City Regional East, as it's known now.

Q Would you describe this individual as you observed him that morning?

A Yes. The patient was in the emergency room. He was responsive, in the sense that he was able to verbalize and follow commands. He had a wound in his neck, in the front part of his neck, to the right side of the midline. There was very little bleeding from the wound. The patient spoke in a whisper, in a very hoarse voice. He was unable to move his lower extremities at all and his upper extremities only in parts. He had loss of sensation corresponding with the injury to the spinal cord, which he'd sustained, resulting in loss of function from the standpoint of movement and sensation below the level of the spinal cord injury.

Q All right. And what, if any, remedial measures were taken, Doctor?

A There were no remedial measures to be taken. The patient had sustained a complete injury to the cervical

spinal cord, resulting in loss of all function below the level of the injury.

Q Now, how were you able to determine that this injury occurred to the spinal cord?

A Well, by the examination -- the fact that there was no function below the C-6 level of the spinal cord -- that is the lower cervical spine level -- and also, x-ray evaluation tended to substantiate the level of injury.

Q What, if anything, did the examination reveal?

A X-ray examination revealed a metallic fragment lodged in the muscles at the back of the neck/shoulder area on the left and there were small metallic fragments overlying the spine in the midline, indicating that a missile had passed from the entrance wound in the right front of the neck, across the midline and into the back of the musculature.

Q Doctor, could you point to where the missile entered the body?

A Approximately this level. (Witness indicating.)

Q All right, could you point to where the missile was lodged in the body?

A Would be back in here. (Witness indicating.)

Q All right. Did that then penetrate or sever the spinal cord?

A Yes.
Q Now, Doctor, after your initial observation on the morning of March 2nd, when did you next observe the deceased?
A The following day.
Q Would you describe his condition at that time?
A His condition was relatively unchanged. He remained completely paralyzed below the level of the spinal cord injury. He was conscious and verbalizing. He had had an episode on that morning of respiratory arrest. In other words, he had sort of spontaneously ceased to breathe and required some resuscitative efforts. He had come around from that and was breathing adequately at that time.
Q Now, is a respiratory failure consistent with this type of injury?
A Yes, it is.
Q All right. Now, Doctor, how many times did you observe him -- I believe that would have been March 3rd, is that correct?
A Yes.
Q The following day?
A No, that would be March 2nd.
Q The same day?
A Yes, because he came home early in the morning.

Q And did you observe him on March 3rd?
A Yes.
Q Would you describe his condition as you recall it at this time?
A The patient was much the same, the difference being he developed a considerable temperature elevation. There was no change in his neurologic state, which would be as expected.
Q What, if anything, did you do to help him in his condition?
A Well, the main treatment for this sort of problem is what you would call supportive care, in a sense that you treat him with suctioning, turning, skin care, antibiotics, intravenous medication, assisting his ventilation by what is called intermittent positive pressure breathing, which is a technique to inflate his lungs at intervals.
Q To what extent was he paralyzed at that time?
A The same extent, in that he had no function below the level of the spinal cord injury.
Q Now, Doctor, did you then observe him on March 4th again?
A Yes.
Q Just briefly, what was his condition at that time?
A There was no essential change, aside from a persisting temperature elevation and secretions. There was no neurologic change.

Q Was he given any antibiotics at that time?

A Yes, antibiotics were continued four times a day.

Q Would you describe to the jury the condition of the deceased, Martin Montileaux, during the remainder of the time he was in the hospital?

A He had additional problems. He had some disorientation, confusion, which was episodic. He continued to run an elevated temperature, a spiking temperature, of course, indicative of the infection. He showed no signs of neurologic improvement, which would be anticipated because of the type of injury. In addition, he began to show bleeding from the gastrointestinal tract, presumably the stomach. I would say that's essentially what occurred and he showed no neurologic improvement, as I stated and he continued to run an elevated temperature and showed signs of bleeding from his stomach. He showed deterioration in his course and he expired in the early morning of the 7th of March, I believe.

Q Doctor, these conditions that you have indicated, are those consistent with this type of injury?

A Yes, the injury to the spinal cord in the neck results in paralysis in functioning below the level of the injury, which means essentially, that it paralyzes his legs completely, his arms in parts, depending on the

level of the spinal cord injury. It also paralyzes his chest musculature, so it interferes rather markedly with his ability to breathe.

Q Doctor, had any consideration been given to removing this missile that was lodged in his back shoulder there?

A No, it would serve no purpose to remove the bullet from the musculature.

Q Based upon your education and your experience and your care of the deceased, Martin Montileaux, do you have an opinion, based upon a reasonable medical certainty, as to what caused his death?

A Yes, I do.

Q Would you state that opinion?

A Well, in my opinion, the patient died as a result of a missile injury to the spinal cord, resulting in what is called quadriplegic, with a series of complications that follow this type of injury; namely, respiratory problems, gastrointestinal bleeding -- and eventually, they succumb from such causes.

Q Those causes resulted from the missile injury?

A Yes, indirectly.

Q Now, Doctor, you stated that the deceased could verbalize. Did you, at any time during your period of care, discuss with him what happened?

A No, I did not.

MR. ZASTROW: Excuse me, Your Honor.

THE COURT: Do you want to approach the bench?

(Off the record discussion held at the bench between counsel and the Court, outside the hearing of the jury.)

THE COURT: Ladies and gentlemen, there has been a stipulation entered into by both parties and when things are stipulated to, that means they are to be taken by you as true and correct without the necessity of offering evidence to that effect.

As I understand, the stipulation is as follows: That both the State and the defense stipulate that the decedent's name is Martin Montileaux, that this is the same gentleman who was treated by Dr. James and Martin Montileaux is the individual that is deceased as a result of this incident.

Is that the stipulation?

MR. CONNOLLY: That's correct.

MR. ZASTROW: Yes, Your Honor.

MR. KLAUCK: Yes, Your Honor.

THE COURT: Is there anything further that I may have left out?

MR. KLAUCK: The individual

that was treated by Dr. James.

THE COURT: Yes, is Martin Montileaux, so you can take that as being proven even though we don't go through the testimony to prove it.

You may proceed.

MR. KLAUCK: That's all. Thank you.

THE COURT: You may cross examine.

CROSS EXAMINATION BY MR. ZASTROW:

Q Dr. James, you indicated and you pointed at your back where the major piece of the missile was lodged. Now, I wonder if I take off my jacket and I stand here, if you could point to my back exactly where that was.

A Well, right about in this area. (Witness indicating.)

Q Right there?

THE COURT: Maybe you can describe that for the record, so we know in words where that is.

A Sort of at the base of the neck and shoulder area on the left side.

THE COURT: Thank you.

BY MR. ZASTROW:

Q Before you go, Doctor, you indicated that the spinal cord was severed, is that correct?

A Yes.

Q I believe you referred to C-6 level or something like that?

A Yes.

Q Can you locate that on my neck and demonstrate to the jury where that would be?

A Well, the C-6 vertebra is about right there. (Witness indicating.)

Q How many vertebrae are there in the neck, Doctor?

A Seven.

Q So this would be next to the last vertebra, is that correct?

A Sort of between the sixth and seventh vertebrae.

Q Doctor, now, as I understand it, the entrance wound is just under the chin?

A Little lower down than that.

Q About right there?

A Approximately.

Q About maybe three quarters or an inch from the base of Mr. Montileaux's chin?

A Well, the thyroid cartilage, the Adam's apple here -- it would be right across from that to the right side.

Q Except it was on the right side, right?

A Yes.

Q So the direction of travel was from here to here, is

that correct?

A Well, it's a little more horizontal than that, I would say. I think the neck wound was lower down than you're pointing. It wasn't up here or down here. It was down here. (Witness indicating.)

Q I see. How much lower? How far from the chin was it, as you recall?

A Well, I don't relate it to the chin because everybody's chin length is different. I would relate it to the Adam's apple or thyroid cartilage and it was about opposite the lower edge of that.

Q Okay. It was going in a downward direction from the entrance wound to where it lodged in the shoulder?

A Yes, there was some inferior angulation.

Q Of necessity, if the bullet is going to end up where you indicated, is that correct, that being the muscle of the upper shoulder?

A The bullet ended up there, yes, but whether that was because it was deflected off bone or what, I don't really know.

Q You couldn't make that determination?

A No, I could tell there was metallic fragments at the level where it struck the spine and there was a wound here and there was a major portion of the missile back there.

Q Okay. Did you make any determination of the height of Mr. Montileaux when you examined him?

A No, I didn't. He wasn't a tall man. I would say 5'6" or something like that.

Q Five foot, six?

A Or five foot, eight, I would guess.

Q Could you give me your best estimate of his weight?

A Well, I would think 160 pounds or something like that. I'm not sure.

Q So the man that you saw, you would guess between five foot, six and five foot, eight and 160 pounds?

A Just a guess. The man is obviously on a stretcher. I never saw him upright or facing me. I didn't have a better estimate of how tall he was. I just don't know.

Q In your course of treatment, you did not feel that that was important at all?

A As to how tall he was?

Q Yes.

A No.

Q Now, were any blood samples to be taken for the purpose of any transfusions or anything like that?

A No.

Q You did not. Was he ever given any blood?

A No.

Q That was never required during the course of his

treatment in the hospital?

A It was not.

Q Okay. So as far as you know, was there ever a blood sample taken?

A Yes, I'm sure there was because the emergency room staff would routinely draw routine blood for determining his white blood count, his hemoglobin level and this sort of thing.

Q Did you ever have a blood alcohol count taken?

A No, I did not.

Q Did anyone in law enforcement ever request it?

A Not from me.

Q Not from you?

A No.

Q Now, when you examined Mr. Montileaux in the hospital, were you the first doctor to see him?

A No, I was not.

Q Who was the first doctor to see him?

A I would presume whoever was working in the emergency room.

Q Did you ever discuss with him Mr. Montileaux's condition?

A I'm sure I did when I arrived.

Q Do you have anything in your records or any recollection of who that doctor was?

A None.

Q Now, when you arrived and examined Mr. Montileaux at the hospital the first evening, what was the condition of the wound? Had it been cleaned?

A Well, yes, superficially, and the wound was small -- a puncture type wound with some discoloration around the edges.

Q Okay. Now, do you know what tattooing is in reference to a gunshot?

A I think I know what you're referring to, sort of, what I probably would call a powder burn sort of thing, is that what you mean?

Q I believe tattooing is the imbedding of unburned powder in his skin, which would be imbedded in the skin.

A Yes.

Q That would not be removed by a superficial cleaning, would it?

A That's correct.

Q Did you make any examination to determine whether there was any tattooing?

A No, I did not in a specific sense. The wound margins were discolored, but what the discoloration was due to I don't have direct knowledge.

Q Tattooing would be something entirely different than discoloration, would it not, or don't you know?

A Well, it's not my field of expertise, let's put it that

way.

Q You did not make any determination of whether there were any powder burns around the wound?

A No, not directly.

Q Okay, and have you had any training at all in forensic medicine which would give you a knowledge of how to determine from the type of wound the distance from which the missile would have been fired?

A No, I haven't any training or any knowledge.

Q Okay.

MR. ZASTROW: I have no further questions.

MR. KLAUCK: Gentlemen, do you want to approach the bench?

(Off the record discussion held at the bench between counsel and the Court, outside the hearing of the jury.)

(State's Exhibit 1 marked for identification.)

REDIRECT EXAMINATION BY MR. KLAUCK:

Q Doctor, let me show you what's been marked as State's Exhibit No. 1 and would you tell me what that exhibit depicts, if you can?

A Well, it depicts a picture of a man's neck with a wound in front of it.

Q All right, and does it appear to you that that wound is consistent or similar to the wound that was suffered by Martin Montileaux?

A Yes, I would say it is.

Q Now you can't see the face of Martin Montileaux, so you can't say that is Martin Montileaux, but would you say that's identical with the one you examined?

A Well, it looks like it's roughly the same sort of thing, yes.

MR. KLAUCK: Okay, thank you. That's all.

THE COURT: Any recross?

RECROSS EXAMINATION BY MR. ZASTROW:

Q Doctor, this photograph that you observed, you can't identify that as being Martin Montileaux or being the wound that Martin Montileaux had?

A That's correct.

Q Okay, now, this particular photograph would indicate that the wound is right up close to the chin?

A Yeah, but you can make the wound as close to the chin as you want by flexing your head or extending it. It would change.

Q Do you think that is any accurate reflection of where the wound actually is?

A I think that what I was trying to say is that there is

no way you can determine the location of the wound by the position of the chin. It's much more sensible to refer it to a fixed structure in the midline.

Q I see. From this photograph, can you do that?

A Not really.

MR. ZASTROW: Okay, fine.

THE COURT: Anything further, Mr. Klauck?

MR. KLAUCK: No, your honor.

THE COURT: Thank you, Doctor. You may be excused.

(Witness excused.)

MR. KLAUCK: State calls Dr. Kelley.

DR. DONALD H. KELLEY,

called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. KLAUCK:

Q Doctor, would you state your full name and occupation, please?

A Donald Howard Kelley. I'm a pathologist.

Q Would you tell the jury what pathology consists of?

A It's a specialty of medicine which consists of determining the cause of disease by examination of tissue and by biochemical testing.

STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
COUNTY OF PENNINGTON)

This is to certify that I, Kathy L. Venekamp Davis, Court Reporter in the above-named county and state, took the proceedings of the foregoing matter and the foregoing pages 1 - 180 inclusive, are a true and correct transcript of my stenotype notes.

Dated at Rapid City, South Dakota, this 5th day of ~~April~~ May, 1976.

Court Reporter

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079-01

UNITED STATES' RESPONSE TO DEFENDANT MARSHALL'S OBJECTION TO ORDER ON DEFENDANTS' MOTION TO SEVER

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and AUSA Robert A. Mandel, and respectfully submits its Response to Defendant Marshall's Objection to Order on Defendant's Motion to Sever. Pursuant to 28 U.S.C. § 636(b)(1)(A), Defendant has failed to demonstrate that the Magistrate Judge's Order on Severance is clearly erroneous or contrary to law. The Magistrate Judge properly applied the law of this circuit as established in United States v. Spotted Elk, 548 F.3d 641 (8th Cir. 2008). Indeed, the United States Supreme Court has made it clear that the Confrontation Clause does not apply to non-testimonial statements by an out-of-court declarant. See Davis v. Washington, 547 U.S. 813, 823-26 (2006); Whorton v. Bockting, 549 U.S. 406 (2007).

The Magistrate Court's decision properly determined that the statements at issue to both the cooperating witness and the media are non-testimonial and do not trigger the protections of the Confrontation Clause under either Crawford or Bruton. See, Davis, 547 U.S. at 825; Spotted Elk, 548 F.3d at 662; United States v. Watson, 525 F.3d 583, 589 (7th Cir. 2008).

Furthermore, Defendant Marshall's grand jury testimony and the respective Defendants' statements to law enforcement officers neither sufficiently implicate one another nor otherwise give rise to a clear likelihood of prejudice. Neither Defendant Graham's nor Defendant Marshall's statements place sufficient responsibility for the murder on the other. See Hollins v. Dep't of Corr., State of Iowa, 969 F.2d 606 (8th Cir. 1992).

Defendant Marshall's additional claims associated with potential redactions of his own statements are misplaced. Defendant Marshall first raises issue with respect to the following paragraph contained within Investigator Ecoffey's interview report of December 26, 2003:

> Marshall said he couldn't remember the exact date, but late one night a carload of people pulled up to his residence in Allen, South Dakota. He was married to Cleo Marshall at the time, living in Allen Housing. Marshall said someone knocked on the door and got him out of bed. Marshall said it was Theda Clarke, Anna Mae Aquash, and two other young guys....

See, United States' Response to Defendants' Motions for Severance, DE 95, Exh. 4 (Defendant Marshall's statement to Ecoffey).

The Magistrate Court's Order clearly and correctly recognized that this statement did not specifically identify Defendant Graham. See Magistrate Court's Order, p.30. To the extent there was a concern, the Magistrate Judge went on to state "although this statement *may* pose a Bruton problem if introduced as it is now written, it can easily be redacted to make sure that it is not interpreted by the jury to refer to Graham." Id. (*original*). The Magistrate Judge's use of the word *may* is significant.

Indeed, as recognized earlier in the Magistrate's Order, an out-of-court statement that does not implicate the non-declarant co-defendant, but becomes incriminating when linked with other admissible evidence introduced at trial, does not violate Bruton. See, Magistrate Court's Order, p.9 (citing Richardson v. Marsh, 481 U.S. 200, 208-11 (1987)). The United States anticipates that once this Court is able to assess the additional witness testimony and evidence, Defendant Marshall's reference to "two other young guys" would be incriminating only after referring to other evidence. It ultimately will, therefore, not create a Bruton problem, nor require redactions. See, Richardson, 481 U.S. at 208-11.

Defendant Marshall voices similar concerns with respect to potential redactions in the Ecoffey/Looking Cloud interview in which Ecoffey indicates to Looking Cloud:

> Because I know, I know for a fact that you stopped there, because both Dick and Cleo, are telling me that you, John Boy, and Theda stopped there, and that you had Annie Mae …

The Magistrate Court makes the interesting observation, "One may wonder, then, if *Marshall* never told Ecoffey that Graham was at his house, why would Marshall himself wish to introduce Ecoffey's erroneous statement to the contrary during the Looking Cloud interview? The answer is unclear." See, Magistrate Court's Order, p.32. In any event, as further recognized by the Magistrate Court, a potentially erroneous statement by a third party about a co-defendant's out-of-court statement does not create a Bruton problem. Id. However, the Magistrate Court indicated "in an abundance of caution" the Court holds that if the Ecoffey/Looking Cloud interview is to be introduced as evidence at trial, it must be edited to redact any erroneous attributions to Marshall. Id. To the extent the interview tape is admitted into evidence, the United States does not object to redacting out the reference to "Dick." Despite Defendant Marshall's assertions, redacting Dick's name from the interviewer's statement does not remove exculpatory evidence.

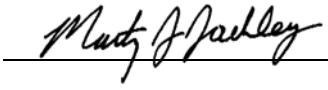
In the alternative, the Magistrate Court further recognized that Ecoffey may have been referring to what Marshall told other cooperating witnesses. See Magistrate Court's Order, n.10. If the evidence at trial demonstrates as much, to the extent Marshall ultimately introduces the Ecoffey/Looking Cloud interview, the United States does not object to a redaction or entering into a stipulation which includes insertion of the properly identified witness. As duly recognized by the Magistrate Court, "Marshall's statements to cooperating witnesses are not 'testimonial' and, thus, do not raise a Bruton problem." Id.

Accordingly, the United States submits that the Magistrate Court properly determined that the statements at issue to both the cooperating witness and the media are non-testimonial and do not trigger the protections of the Confrontation Clause under either Crawford or Bruton. The Magistrate Court properly determined that Defendant Marshall's grand jury testimony and the respective statements to law enforcement officers neither sufficiently implicate one another nor otherwise give rise to a clear likelihood of prejudice.

The United States further submits that once this Court is able to assess the trial evidence, it will not be necessary to redact Defendant Marshall's reference to "two other young guys." This statement does not specifically identify Defendant Graham, and an out-of-court statement that does not implicate the non-declarant co-defendant, but becomes incriminating when linked to other admissible evidence introduced at trial, does not violate Bruton. Richardson, 481 U.S. at 208-11. Finally, any potentially erroneous statement during the Looking Cloud interview can be easily redacted to exclude reference to "Dick" without depriving Marshall of any exculpatory evidence. Any additional concerns can be addressed with a proper limiting instruction to the jury. Id.

Dated and electronically filed this 23rd day of March 2009.

MARTY J. JACKLEY
United States Attorney



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CERTIFICATE OF SERVICE

The undersigned hereby certifies on March 23, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

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Marty J. Jackley
United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

UNITED STATES' RESPONSE OPPOSING DEFENDANT GRAHAM'S MOTION TO DISMISS ALL COUNTS OF INDICTMENT

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully files its Response Opposing Defendant Graham's Motion to Dismiss All Counts of Indictment.

Defendant Graham's attempt to equate a defendant's Indian status under 18 U.S.C. § 1153 with federal criminal jurisdiction has been expressly rejected by the Eighth Circuit Court of Appeals. See, United States v. Pemberton, 405 F.3d 656, 659 (8th Cir. 2005); United States v. White Horse, 316 F.3d 769, 772 (8th Cir. 2003). Defendant Graham's unproductive effort to skirt these holdings underscores that Defendant Graham's Indian status is not jurisdictionally significant nor does it affect his criminal liability as an aider and abettor.

First, it is a well-established precedent in this circuit that a "dispute over [a defendant's] status as an Indian or non-Indian, while relevant to the matter of proof at trial d[oes] not deprive the district court of jurisdiction." Pemberton, 405 F.3d at 659 (citing White Horse, 316 F.3d at 772).[1] "[T]he matter of jurisdiction has to do only with 'the court's statutory or constitutional *power* to adjudicate the case.'" Id. (quoting United States v. Cotton, 535 U.S. 625, 630 (2002)) (original emphasis). In this regard, "[s]ubject matter jurisdiction in every federal criminal prosecution comes from 18 U.S.C. § 3231 . . . That's the beginning and the end of the 'jurisdictional' inquiry." Id. (quoting Hugi v. United States, 164 F.3d 378, 380 (7th Cir. 1999)).

As a matter of law, any dispute over Defendant Graham's or Anna Mae Aquash's Indian status[2] does not deprive this District Court of federal criminal

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[1]Graham claims the jurisdictional holdings of White Horse and Pemberton are limited because they involved plain error review. In neither case, however, did the courts provide exposition of the applicable jurisdictional principles within the context of the plain error doctrine. Instead, it was only after determining that jurisdiction was not implicated that the plain error standard was applied. For instance, in White Horse, the panel considered and rejected the defendant's forfeited claim that there was insufficient evidence of his "non-Indian status" to affirm his conviction. The Pemberton court determined, alternatively, that the defendant's jurisdictional argument was unsustainable for the additional reason that he had not challenged the sufficiency of the indictment which alleged his Indian status. See also, United States v. Cotton, 535 U.S. 625, 629-31 (2002) (considering the defendant's forfeited error after concluding that omissions in the indictment were not jurisdictional, noting that such an argument "can never be forfeited or waived[]").

[2]Defendant Graham's most recent attempt through proposed jury instructions to significantly limit the scope and definition of "Indian" to, among

jurisdiction. Pemberton, 405 F.3d at 659. Therefore, Defendant Graham is properly charged in Counts I (18 U.S.C. § 1153) and II (18 U.S.C. § 1152). See, White Horse, 315 F.3d at 772 (complimentary nature of §§ 1152 and 1153); United States v. Driver, 945 F.2d 1410, 1414-15 (8th Cir. 1991) ("alternate counts ensured that the district court would have jurisdiction to convict Driver of assault, whether he was an Indian or non-Indian").

Secondly, criminal liability of aiders and abettors as alleged in Count III of the Indictment is also supported by the fact that a defendant's Indian status is not a jurisdictional requisite to federal criminal jurisdiction. The federal aider and abettor statute, 18 U.S.C. § 2, is neither dependent upon Indian

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other matters, specifically exclude "Canadian Indian tribe" runs contrary to the Constitution, statute, treaty, and case authority. It is well-settled that one may be an Indian for purposes of §§ 1152 and 1153 if there is evidence that: (1) he/she is an Indian in the racial sense; and (2) he/she is enrolled or affiliated with a tribe that is recognized by the United States and is individually subject to United States' jurisdiction. In fact, Defendant's attempt to employ overly restrictive interpretations on Indian status case authorities has been specifically rejected. State v. Daniels, 16 P.3d 650, 653-54 (104 Wash. App. 271) (engaging in an in-depth analysis of federal authorities and the two Rogers' prongs). See, United States v. Rogers, 45 U.S. 567 (1846); St. Cloud v. United States, 702 F. Supp.1456 (D.S.D. 1988); LaPier v. McCormick, 986 F.2d 303 (9th Cir. 1993); United States v. Heath, 509 F.2d 16 (9th Cir. 1974); United States v. Broncheau, 597 F.2d 1260 (9th Cir. 1976).

The United States anticipates that the evidence at trial will demonstrate that Graham is an Indian in the racial sense based in part upon his own admissions and upon the Certificate of Authenticity of Official Records establishing Defendant Graham is a registered member of the Champagne Indian Band which is located in Yukon Territory, Canada. The United States anticipates that the evidence at trial will further demonstrate Defendant Graham's affiliation with, among others, the Oglala Sioux Tribe.

status of the defendant, nor the situs of the underlying offense. See, United States v. Rector, 538 F.2d 223, 225 (8th Cir. 1976) (18 U.S.C. § 2 is applicable to the entire criminal code) (citations omitted); see also, United States v. Dodge, 538 F.2d 770, 776 (8th Cir. 1976) (both Indians and non-Indians can be liable for conspiring together to impede law enforcement officials operating in Indian country because 18 U.S.C. §§ 3231 and 371 are statutes of general applicability).

A defendant can be convicted under an aider and abettor theory "without proof he participated in each and every element of the offense." United States v. Sigalow, 812 F.2d 783, 785 (2d Cir. 1987).[3] This is true even where the defendant does not satisfy the "jurisdictional" elements of an offense. Id. at 785-86; see also, United States v. Beck, 250 F.3d 1163, 1165-66 (8th Cir. 2001) ("jurisdictional" elements such as an interstate nexus in an arson prosecution are not truly jurisdictional because they do not affect a court's constitutional or statutory power to adjudicate a case).

In fact, the text of § 2 and its legislative history specifically contemplate the inability to convict an aider and abettor of the underlying offense. By

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[3]Graham's further efforts to avoid the application of 18 U.S.C. § 2 by relying on evidence that he was the person who actually shot Aquash is inconsistent with the modern view of principals and accessories. Every state and the federal government have "expressly abrogated the distinction" between principals and aiders and abettors which includes accessories before the fact, but not accessories after the fact. Gonzales v. Duenas-Alvaraz, 549 U.S. 183, 189-90 (2007) (citation omitted).

imposing criminal liability for those who cause an act to be done that would be a violation of federal law "if directly performed by him or another[,]" Congress extended § 2's reach to aiders and abettors who could not be convicted of the underlying offense – a fact confirmed in the 1951 amendment's legislative history:

> This section is intended to clarify and make certain the intent to punish aiders and abettors regardless of the fact they may be incapable of committing the specific violation they are charged to have aided and abetted.

United States v. Standefer, 610 F.2d 1076, 1085 (3d Cir. 1979) (en banc) (citing S.Rep. No. 1020, 82nd Cong. 1st Sess.); United States v. Ruffin, 613 F.2d 408, 414 (2d Cir. 1979) ("If there were any question about Congress' intent to enlarge the scope of 18 U.S.C. [§] 2 it was removed by the Senate Report accompanying the proposed amendment. . .").

The principle that Indian country offenses involving non-Indians are state court matters is based upon the premise that these crimes do not affect Indians. See, United States v. McBratney, 104 U.S. 621, 624 (1881) (murder of non-Indian by another non-Indian in Indian country with "no question . . . as to the punishment of crimes committed by or against Indians . . ."); see also, New York ex rel. Ray v. Martin, 326 U.S. 496, 500 (1946) (suggesting McBratney applies to "crimes between whites and whites which do not affect Indians"); United States v. Goings, 527 F.2d 183, 185 (8th Cir. 1975) (McBratney held that "state courts have exclusive jurisdiction of offenses

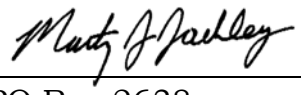
committed *solely between non-Indians* on Indian reservation") (emphasis added). Graham overlooks this critical limitation upon the McBratney line of cases in relation to the Aquash murder. To be sure, several enrolled Oglala Sioux members, including Looking Cloud, Defendant Marshall, and Theda Clarke, were an integral part of the criminal venture to murder Aquash. He also fails to acknowledge that none of the cases invoking McBratney analyze the propriety of extending liability to a non-Indian who aids and abets an Indian in committing a § 1153 offense in Indian country.

It is the law of this circuit that the dispute over Defendant Graham's Indian status does not deprive this District Court of jurisdiction with respect to any of the three counts contained in the Indictment. Proper resolution of Defendant Graham's Motion to Dismiss Count III does not turn upon principles of jurisdiction nor a dispute over Defendant's status as an Indian, but rather the application of the plain and unambiguous provisions of 18 U.S.C. § 2. Indeed, under the particular facts of this case, the Indian status element necessary for the underlying federal murder charge has been unequivocally established with the federal conviction of Defendant Graham's Indian co-Defendant, Fritz Arlo Looking Cloud. See, United States v. Looking Cloud, 419 F.3d 781 (8th Cir. 2005). The United States respectfully requests that Defendant Graham's Motion to Dismiss all counts of the Indictment be denied.

Dated and electronically filed this 25th day of March 2009.

MARTY J. JACKLEY

United States Attorney



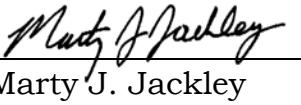
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CERTIFICATE OF SERVICE

The undersigned hereby certifies on March 25, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

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Dana Hanna

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Marty J. Jackley
United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff,	)	CRIM. NO. 08-50079-01
vs.	)	DEFENDANT GRAHAM'S SECOND SET OF PROPOSED JURY INSTRUCTIONS
JOHN GRAHAM, a/k/a JOHN BOY PATTON, VINE RICHARD MARSHALL, a/k/a RICHARD VINE MARSHALL, a/k/a DICK MARSHALL, Defendants.	)	

Attorney for Plaintiff: Marty J. Jackley, United States Attorney
Robert A. Mandel, Assistant United States Attorney
515 9th Street, 2nd Floor
Rapid City, SD 57701
605-342-7822

Attorney for Defendant: John R. Murphy
328 E. New York Street
Suite 1
Rapid City, SD 57701
605-342-2909

Defendant John Graham files his proposed jury instructions numbered 3 through 6.

Dated March 26, 2009.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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Dated March 26, 2009.

/s/ John R. Murphy
John R. Murphy

Defendant's Proposed Jury Instruction No. 3

Character Witnesses

The defendant has presented the testimony of witnesses who stated that the defendant has the character of a peaceful and honest man. If you believe this evidence, you may use it along with all the other evidence in deciding whether the government has persuaded you beyond a reasonable doubt that the defendant is guilty.

Do not be surprised that a person may tell you his opinion of the defendant, but does not tell you about specific acts that he or she may know of where the defendant exhibited those traits. The law does not allow testimony about specific acts of peacefulness or honesty.

The law occasionally allows character witnesses to be asked whether they know specific things about the defendant. Those questions were asked only to help you decide if the witness really knew the defendant's character for peacefulness and honesty. The information developed by the prosecutor on that subject may not be used by you for any other purpose. Remember, what is stated in a question is not evidence and should not be assumed to be true. That the defendant may have committed an act on a different occasion is not evidence that he committed the crime charged in this case.

Source:

Eighth Circuit Model Instruction 2.10 (modified and merged with Potuto, Saltzburg & Perlman, Federal Criminal Jury Instruction, Second Ed., § 3.37)

Defendant's Proposed Instruction No. 4

Mention of Previous Trial

During this trial there have been references to a prior trial involving a person named Arlo Looking Cloud. That trial has no bearing on this case. You must decide whether the defendant is guilty or not guilty on the basis of the evidence presented to you here and disregard what you may have heard about the other case.

Source:

Potuto, Saltzburg & Perlman, Federal Criminal Jury Instruction, Second Ed., § 3.36 (modified)

Defendant's Proposed Jury Instruction No. 5

Testimony of Immunized Witness

You have heard evidence that _____ has (made a plea agreement, received a promise from the government, received immunity, will obtain a benefit from the government such as _____). His/her testimony was received in evidence and may be considered by you. You may give his/her testimony such weight as you think it deserves. Whether or not his/her testimony may have been influenced by the (agreement, benefit, promise) is for you to determine.

The witness's guilty plea cannot be considered by you as any evidence of this defendant's guilt. The witness's guilty plea can be considered by you only for the purpose of determining how much, if at all, to rely upon the witness's testimony.

Source: Eighth Circuit Pattern Instruction 4.04 (modified and abbreviated)

Defendant's Proposed Instruction No. 6

Testimony of Accomplice

You have heard testimony from Arlo Looking Cloud who stated that he participated in the crime charged against the defendant. His testimony was received in evidence and may be considered by you. You may give his testimony such weight as you think it deserves. Whether or not his testimony may have been influenced by his desire to please the government or to strike a good bargain with the government about his own situation is for you to determine.

Source: Eighth Circuit Pattern Instruction 4.05

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION IN LIMINE REGARDING MEDIA INTERVIEWS

Defendant John Graham moves this Court for its Order prohibiting the government from introducing at trial video taped programs relating to the death of Anna Mae Pictou Aquash. In addition to this request, Mr. Graham asks that the government be ordered to provide the Court and counsel with the exact versions of these programs it intends to admit at trial so that more specific objections can be made prior to trial. And, Mr. Graham asks that the government be required to produce the complete, un-redacted video recording of Mr. Graham's interviews with the broadcasters that created these programs. The factual and legal basis for these requests are set forth below.

SUMMARY OF FACTS

On October 2, 2008, immediately prior to the trial that was supposed to

begin on October 6, 2008, the government informed Graham's counsel that it intended to offer at trial three media programs about John Graham. These recordings included a Canadian television news show called "The Fifth Estate," an internet video interview that was broadcast on MySpace by a group called "Native Youth," and a Canadian television news show on the Canadian Television (CTV) network called "First Story." It appears these shows were made in 2003 or in the years thereafter as matters related to the charges filed against Mr. Graham in April of 2003 are referenced.

These broadcasts contain interviews with a number of people and include narration by named and un-named commentators. They also contain footage and photographic montages of Ms. Aquash, the crime scene, various AIM leaders and AIM activities.

These broadcasts also contain selected statements by John Graham, but do not include the entire, un-redacted version of Mr. Graham's statements or responses to the interviewers' questions. The government is aware that one of its own witnesses, John Trudell, has complained that the producers of the Fifth Estate program interviewed him for a lengthy period of time, then selectively edited his statements in such a way that they were presented out of context and in a manner that distorted what he had intended to say. Graham Doc. 02536-37.

And, these broadcasts include conversations with Mr. Graham about subjects outside the scope of the charges in this case. Mr. Graham is asked to discuss his political views and his feelings about political figures. For instance, in the Native Youth interview, there is a protracted discussion about Governor Janklow that does not relate to the crime charged.

Mr. Graham, through his counsel, has repeatedly requested that the government provide him with the redacted versions of these broadcasts that the government intends to use at trial. To date, redacted versions have not been provided to him, even though they were supposed to be provided to him in advance of the October 6, 2008 trial. And, Mr. Graham has not been provided with the un-redacted footage of Mr. Graham's interviews with these interviewers, from which portions were selected for broadcast.

SUMMARY OF LAW

A. REQUEST FOR IMMEDIATE PRODUCTION OF TRIAL VERSION OF BROADCASTS:

Mr. Graham is not able to specifically object to the introduction of the media broadcasts at this time because the government has not specifically identified which portions of the interviews it intends to offer. Therefore, Mr. Graham's first request for relief is that the government immediately provide to the

Court and counsel the exact versions of these interviews it intends to offer at trial so that specific objections can be made and the record preserved prior to trial.

This is not something that should wait until trial. As set forth below, these videos contain much hearsay and irrelevant or inadmissible material. Mr. Graham should be provided an opportunity prior to trial to make specific objections to the portions of the broadcasts that the government actually believes are admissible. And, the Court should have the opportunity prior to trial to review the tapes and consider Graham's specific objections. The government has already acknowledged it is not seeking admission of the complete television programs and that it has already or will be redacting the recordings for trial. The government should be required to present these materials to Mr. Graham's counsel immediately so that the matter can be addressed in a timely and orderly fashion.

B. THE BROADCASTS CONTAIN HEARSAY AND INADMISSIBLE EVIDENCE:

Mr. Graham objects to the narration, commentary, video montages, and all other portions of the broadcasts that are not actual recordings of Mr. Graham's statements.

The broadcasts contain interviews with other persons, narration of alleged events, and commentary by reporters. This evidence is hearsay. It is not

admissible under any rule of evidence, and it should be redacted completely from the broadcasts.

The broadcasts also contain photographic montages and video footage of various people and events related to the American Indian Movement and Ms. Aquash. There are no references made as to the source or authenticity of any of the materials depicted.

These government should be prohibited from introducing these segments of the broadcasts. There is no possible means by which Mr. Graham could meaningfully challenge the authenticity of any image depicted. Moreover, these images are not relevant to any issue before the jury. Instead, these images would be introduced by the government to create bias against Mr. Graham based on his alleged affiliation with the American Indian Movement, and to create sympathy for Ms. Aquash and her family. Because the images are not relevant and would only serve to create bias and sympathy, the government should be prohibited from introducing these portions of the broadcasts. Fed.R.Evid. 401, 402 & 403.

The broadcasts also contain segments of interviews with Mr. Graham where he discusses his present political beliefs and opinions about specific elected officials, such as former governor Janklow. These statements by Mr. Graham should be excluded from presentation to the jury. They are not relevant or

probative on any issue before the jury. Fed.R.Evid. 401 & 402. Further, the government's sole purpose of admitting the statements would be to bias members of the jury who do not share Mr. Graham's political beliefs against him. This is not a valid purpose of the admission of evidence. Fed.R.Evid. 403.

C. THE GOVERNMENT SHOULD BE REQUIRED TO DISCLOSE THE COMPLETE FOOTAGE OF MR. GRAHAM'S INTERVIEWS WITH THE BROADCASTERS:

The broadcasts at issue in this case are not entirely comprised of unedited footage of an interview with John Graham. Rather, selected statements are introduced, in some instances without any indication of what question is being responded to by Mr. Graham. These purported statements should be viewed with skepticism because, as discussed above, one of the government's own witnesses has already complained that statements he made to the producers of the Fifth Estate were presented out of context and edited in such a way as to distort their meaning.

Fed.R.Evid. 106 states in full:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

If the government is going to be permitted to introduce any portion of a broadcast interview with Mr. Graham, it should be required to produce the entire unedited footage of the interview with Mr. Graham. The government apparently has access to this material through its relationship with the producers of these programs, which, presumably, will be used to lay the foundation for admission of the evidence. Mr. Graham does not have such access as he has no authority to subpoena witnesses or evidence from Canada. Therefore, the government should be required to present this material to defense counsel so that the greater context of Mr. Graham's statements can be introduced to the jury pursuant to Fed.R.Evid. 106.

Alternatively, if the government does not have access to the unedited footage or the producers of the programs, then the selected "sound bites" contained in these broadcasts should not be admitted at trial. In addition to the authentication and foundation issues that would exist if the raw interview footage and/or the producers of the program are not available for examination by the defense, Mr. Graham would be severely prejudiced if edited comments made by him were admitted at trial. He would have no way of proving that a comment selected for publication by the broadcaster was in response to a misleading question or taken out of context when edited into the program.

CONCLUSION:

Mr. Graham asks this Court to require the government to immediately produce its "trial ready" versions of these video taped interviews so that Mr. Graham can make specific objections to the contents thereof and the Court can review the materials prior to trial. And, he asks that all statements by persons other than Mr. Graham in the programs be redacted as these statements, narration or commentary constitute inadmissible hearsay. Further, he asks that all footage and montages and other visual depictions contained in the programs be redacted as they are irrelevant and prejudicial. Last, he asks that the government be ordered to produce the raw footage of Mr. Graham's interviews for these broadcast programs be produced for his review so that he can introduce them at trial if necessary to fairly explain or put in context statements introduced by the government.

Dated March 26, 2009.

/s/ John R. Murphy

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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Dated March 26, 2009.

/s/ John R. Murphy
John R. Murphy

FILED
MAR 26 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079-01

UNITED STATES' MEMORANDUM OPPOSING DEFENDANT GRAHAM'S MOTION IN LIMINE RE: STATEMENTS TO MEDICINE MAN

COMES NOW the United States, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully files this Memorandum in Opposition to Defendant Graham's Motion in Limine Re: Statements to Medicine Man Al Gates. Gates was an Oglala Sioux spiritual leader and medicine man who is now deceased.

I. INTRODUCTION

The United States has disclosed the following evidence associated with Defendant Graham's statements relevant to the disposition of Defendant Graham's Motion:

1. Defendant Graham's statement of February 11, 2001, to cooperating witness Sierra confirming that Defendant Graham had gone to see Al Gates and that he was having a hard time with what he had done to Anna Mae Aquash, wherein he went into the

mountains around Denver and had a ceremony (see Defendant John Graham's statement of February 11, 2001; GRAHAM01175) (attached as Exhibit 1).

2. Defendant Graham's statement to law enforcement wherein he made further admissions about what happened to Anna Mae Aquash. He wanted to know what he could do in a spiritual way to make up for it, and that he wanted Al Gates to perform a ceremony for him (see Ecoffey interview of John Graham April 21, 1994, GRAHAM01142) (attached as Exhibit 2). [1]

3. Al Gates' testimony of August 16, 1994, that John Graham admitted to Gates that Graham was present when Anna Mae Aquash was killed and expressed concerns regarding her killing (see Transcript, p. 54-61; GRAHAM03668-75) (attached as Exhibit 3, filed under seal).

This evidence is relevant and admissible with respect to: (a) items 1 and 2 are non-hearsay admissions by Defendant Graham about his involvement and actions with the criminal venture to murder Aquash pursuant to Rule 801(d)(2); and (2) items 1 through 3 address Defendant Graham's Indian status – tribal recognition and ceremonial practices. Defendant Graham's attempt to limit evidence regarding his direct statements fail by application of basic evidentiary principles. Defendant Graham's additional claim that the United States is misleading the Court is neither accurate nor productive in resolution of these issues. The above-referenced evidence associated with Defendant Graham's separate admissions to law enforcement, a cooperating witness, and

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[1]The report further indicates during this discussion that "Graham appeared to become upset about the information he heard, as he raised his cigarette to his lips, they were trembling and his hands was shaking." (GRAHAM01142).

to Al Gates are specifically cited above and attached hereto as exhibits. Defendant Graham's lengthy concerns about the statements at best address the weight of the evidence as opposed to its admissibility.

II. DEFENDANT GRAHAM'S STATEMENTS TO WITNESS AND LAW ENFORCEMENT – FED. R. EVID. 801(d)(2)

Defendant Graham's statements to both cooperating witness Sierra and law enforcement constitute direct non-hearsay admissions by Defendant Graham. Accordingly, such statements are admissible pursuant to Fed. R. Evid. 801(d)(2). They are non-hearsay statements by Defendant Graham, not Al Gates, and are, therefore, not excluded by Crawford. See, United States v. Rodriguez, 484 F.3d 1006, 1013-14 (8th Cir. 2007) (quoting Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004)).

III. DEFENDANT GRAHAM'S STATEMENTS TO AL GATES

The United States only intends to introduce Defendant Graham's statements to Al Gates for impeachment/non-hearsay purposes. This may include for purposes of explaining the reasons for or propriety of a police investigation in the context of questioning. See, United States v. Malik, 345 F.3d 999, 1001 (8th Cir. 2003) (citing United States v. Davis, 154 F.3d 772, 778 (8th Cir. 1998)). Defendant Graham's position that "[t]he notion that Gates' statements or Graham's responses are necessary to explain the course of the investigation is a fiction created by the government to justify the admission of inadmissible evidence" rings hollow given both Defendant

Graham's and Defendant Marshall's well-rehearsed attacks on this investigation. Furthermore, no assertion of a privilege should "endow the person who testifies with a license to commit perjury." United States v. Wong, 431 U.S. 174, 179 (1977) (quoting Glickstein v. United States, 222 U.S. 139, 142 (1911)); Nix v. Whiteside, 475 U.S. 157, 163 (1986). Accordingly, the United States respectfully requests this Court reserve ruling on the admissibility of Defendant Graham's statements to Al Gates until it has the opportunity to hear the trial evidence and positions taken by the Defendants.

IV. FED. R. EVID. 501 – EVIDENTIARY PRIVILEGE

It is the United States' position that if the Court does not deem Defendant Graham's statements admissible pursuant to Fed. R. Evid. 801(d)(2), Defendant Graham has failed to establish the existence of a privilege that has not otherwise been waived.

Rule 501 of the Federal Rules of Evidence governs the applicability of evidentiary privileges in criminal cases and provides in part as follows:

> Except as otherwise required . . . , the privilege of a witness, [or] person . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Congress adopted Rule 501 after rejecting nine proposed rules concerning discrete privileges that had been adopted by the Supreme Court after study by the Advisory Committee. See, Trammel v. United States, 445 U.S. 40, 45-51 (1980), the Supreme Court acknowledged, *in dicta*, the existence

of a "priest penitent" privilege. Id. at 45, 51. In this regard, Congress sought to advance the view that the recognition of a privilege based upon a confidential relationship and other privileges should be determined "on a case-by-case basis." Id. at 47 (quoting 120 Cong. Rec. 40891 (1974)).

The Eighth Circuit Court of Appeals does not appear to have had occasion to expound upon the existence of either the "priest penitent" or "medicine man" privilege or the prerequisite to assert the privilege. As a general matter, *Wigmore on Evidence* (McNaughton rev. 1961) sets forth the following four fundamental prerequisites for a privilege against the disclosure of communications:

1. The communications must originate in a *confidence* that they will not be disclosed.

2. This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

3. The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*

4. The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Wigmore at § 2285. In re Grand Jury Investigation, 918 F.2d 374, 384 (3rd Cir. 1990). The defendant, as the party who asserts the privilege, has a burden of

proving its existence and applicability. See, In re Grand Jury Investigation, 918 F.2d at 385.[2]

The United States does not dispute that Defendant Graham practiced both spiritually and ceremonially with Lakota medicine men, participated in Sundance rituals, and is otherwise an accepted and "recognized" Indian. See, United States v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976) (emphasis on importance of individual having held themselves out to be Indian). However, Defendant Graham has failed to demonstrate the confidentiality of his admissions to Al Gates due in part to both parties' very disclosure of the information conveyed. This disclosure by Defendant Graham further constitutes a waiver of any privileged communication. See generally, PaineWebber Group v. Zinsmeyer Trusts P'ship, 187 F.3d 988, 992 (8th Cir. 1999) (waiver of attorney/client privilege by voluntary disclosure of privileged communications, and application to all communications on the same subject matter); United States v. Webb, 615 F.2d 828 (9th Cir. 1980) (court found that prisoner's confession to crime in presence of a minister and security officer was

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[2]The "very purpose of the criminal justice system is that of investigating, charging, trying, convicting and sentencing those who have committed offenses legislatively determinated to be violative of the rights of persons and property." In re Grand Jury Proceedings of John Doe, 842 F.2d 244, 246 (10th Cir. 1988) (citations omitted). Accordingly, "the search for truth in society's quest to administer justice creates a strong presumption against testimonial privileges because they result in the suppression of competent evidence." Id.

not confidential and declined to reach the question whether clergy communication privilege applies in federal proceedings); State v. Guthrie, 2001 SD 61 ¶¶ 69-72, 627 N.W. 2d 410 426-27.[3] See also, State v. Gray, 891 So.2d 1260, 1265 (La. 2005).

Accordingly, Defendant Graham's statements to both cooperating witness Sierra and law enforcement are non-hearsay admissions pursuant to Fed. R. Evid. 801(d)(2). The United States requests this Court reserve ruling on the statements of Defendant Graham to Al Gates until such time as this Court may assess the trial evidence and Defendants' positions. Furthermore, Defendant Graham has failed to satisfy his burden of demonstrating a privilege that has not been waived by both his and Al Gates' disclosures.

Dated this 26th day of March 2009.

MARTY J. JACKLEY
United States Attorney

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Sioux Falls, SD 57101-2638
605.357.2330

[3]The citation to the South Dakota Supreme Court's Guthrie decision is intended to be illustrative of the waiver principles for the clergy privilege. The existence and the applicability of testimonial privileges in federal criminal prosecutions is a matter of federal common law. United States v. Espino, 317 F.3d 788, 795 (8th Cir. 2003).

CERTIFICATE OF SERVICE

The undersigned hereby certifies on March 26, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Facsimile at
☐ Federal Express
☐ Electronic Case Filing

Marty J. Jackley

John Graham: Hmm.

CW: But it's not what people think it is. You know it's not that watertight 'he isn't going to end up in the shit' [redacted]uation. But there's something about Arlo and that is, you know; Arlo likes everybody to think that he's a [redacted]mplete fucking waster and that his brain's pouring out of his ears because he's taken so many drugs and had so many drinks, but Arlo can be quite lucid when he's not drunk; and that's why I'm just putting to you what I've heard from him because in fairness that's all that I can do in the situation that we're in; bearing in mind that what we are talking about and the sensitivity of what we're talking about. As I said to you before we started, some of this isn't going to go into a book or whatever, otherwise Vern wouldn't have sent me up here and we wouldn't be sat here visiting like this; and there's things that I'm telling you that I wouldn't tell you, you know, under a different set of circumstances.

John Graham: Well, if they can get this err, thing going on me you know the way they have been; they got the whole Movement divided over it down south it sounds like; you know, everybody's still taking sides and err . . .

CW: Well it's like this you know; Russ and all of his group are just over there – and Russ is turning it into a sideshow, the whole thing. Russ doesn't really give a shit about it. ***(Side 1 of the tape runs out).***

Notated conversation before restarting the tape recorder:

CW: There's an old man you knew back then who's not very well and you should think about going to see him.

John Graham: Who's that?

[redacted]V: Al Gates.

John Graham: Hmm.

CW: I believe he's in a sanitarium and he's got Alzheimer's or something like that.

John Graham: Oh.

CW: I know what he told. I know that you went to see him right after all of this happened because you were having a hard time with it; a hard time with what you did to Annie Mae; and that you went into the mountains around Denver and he held ceremony for you.

John Graham: Uh huh.

CW: You told him about it in there. In there, in a sacred manner, he told you what they said and what you should do; that you'd never be free from her and her murder unless you faced it. He told you, you wouldn't be free of it until you told the truth.

John Graham: Uh huh.

CW: I thought I should tell you that I knew that. You know I know what went down there don't you, because of [redacted] the people I know?

John Graham: Well, you know . . .

EXHIBIT 1

At 3:30 PM, Constable Miller, Marshal Ecoff y and C.I. Pourier, went to the Whitehorse airport and picked up SA Graf.

Since JOHN GRAHAM had refused in the past to cooperate with the F.B.I. and R.C.M.P., it was decided that Marshal Ecoffey and C.I. Pourier would approach him.

At approximately 4:30 PM we all returned to the Westmark Hotel, at which time JOHN GRAHAM climbed down the ladder from the roof and started walking up the alley. Marshal Ecoffey and C.I. Pourier approached GRAHAM. Marshal Ecoffey reached out and shook GRAHAM'S hand introducing himself and C.I. Pourier as Law Enforcement Officer's from Pine Ridge, South Dakota.

Ecoffey told GRAHAM that we would like to talk to him concerning recent information regarding the murder of ANNA MAE AQUASH.

Ecoffey told GRAHAM that we weren't there to arrest him, that we had no authority in Canada.

GRAHAM asked Ecoffey; "How do you know about me?" Marshal Ecoffey told GRAHAM that he had learned about him through an old Lakota man by the name of AL GATES. Ecoffey told GRAHAM that GATES had been a spiritual leader for the American Indian Movement in the mid-1970's in Denver, Colorado.

Ecoffey told GRAHAM that GATES had come forward with information that JOHN GRAHAM, also known as JOHN BOY PATTON, who was a young man at the time came to him shortly after the death of ANNA MAE AQUASH. That GATES had told us that you "GRAHAM" told him, that you had felt real bad about what had happened to ANNA MAE AQUASH, and that you wanted to know what you could do in a spiritual way to make up for it, and that you wanted GATES t perform a ceremony for him. GRAHAM then responded by nodding his head and said, "yeh". GRAHAM appeared to become upset about the information he heard, as he raised his cigarette to his lips, they were trembling and his hand was shaking. Ecoffey told GRAHAM that other information had been learned, that CORKY GONZALES, a leader for the Chicano Movement, Crusade for Justice in Denver, Colorad during the mid-1970's, had been in a meeting where discussions had been held concerning what to do with ANNA MAE AQUASH, as it was felt that she was an informant. That GONZALES had made the statement, "you know what we do with informants we take them out in the hills and kill them".

Shortly after this, a brown colored station wagon pulled up to the curb. A female driving the vehicle had previously been identified to us as GRAHAM'S common-law-wife VIOLA PAPAQUASH. GRAHAM told us, that he would talk to us, but he would not talk to the F.B.I., as he did not trust them.

EXHIBIT 2

FILED
MAR 26 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

MOTION TO SEAL EXHIBIT 3 UNITED STATES' MEMORANDUM OPPOSING DEFENDANT GRAHAM'S MOTION IN LIMINE RE: STATEMENTS TO MEDICINE MAN

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant US Attorney Robert A. Mandel, and respectfully prays the Court to issue an Order sealing Exhibit 3 to its Memorandum Opposing Defendant Graham's Motion in Limine Re: Statements to Medicine Man in the above-captioned matter, and as grounds therefor states as follows:

Exhibit 3 is a copy of a grand jury transcript.

WHEREFORE, the United States prays that this Court seal Exhibit 3 to its Memorandum Opposing Defendant Graham's Motion in Limine Re: Statements to Medicine Man.

Dated this 26th day of March 2009.

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on March 26, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

- ☒ U.S. Mail, postage prepaid
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- ☐ Federal Express
- ☐ Electronic Case Filing

Marty J. Jackley

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

ORDER TO SEAL EXHIBIT 3 TO THE UNITED STATES' MEMORANDUM OPPOSING DEFENDANT GRAHAM'S MOTION IN LIMINE RE: STATEMENTS TO MEDICINE MAN

Upon Motion of the United States and good cause having been shown, it is hereby

ORDERED, that Exhibit 3 to the United States' Memorandum Opposing Defendant Graham's Motion In Limine Re: Statements to Medicine Man in the above-entitled matter be sealed until it is ordered unsealed.

Dated this _____ day of_____, 2009.

BY THE COURT:

Lawrence L. Piersol
US District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
MAR 27 2009
CLERK

UNITED STATES OF AMERICA, Plaintiff,	)	CRIM. NO. 08-50079-01
vs.	)	DEFENDANT GRAHAM'S MOTION TO SEAL
JOHN GRAHAM, a/k/a JOHN BOY PATTON and VINE RICHARD MARSHALL, a/k/a) RICHARD VINE MARSHALL, a/k/a) DICK MARSHALL. Defendants.	)	

Defendant requests that Defendant Graham's *Ex Parte* Motion for Issuance of Subpoena Duces Tecum, as well as the Court's order relating to that motion, and the return/proof/affidavit of service generated in connection with the service of this document, be placed under seal. Further, Defendant asks that the U.S. Marshall's Service be instructed not to discuss the names of any witness served, nor the content of this motion, with any party.

The basis for this request is that the determination as to which witnesses to subpoena is attorney work product that should be protected. There is no alternative procedure available to the defense that would protect its work product.

Respectfully submitted March 26, 2009.

John R. Murphy: Counsel for Defendant
328 E. New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079-01

UNITED STATES' MEMORANDUM OPPOSING DEFENDANT GRAHAM'S MOTION IN LIMINE RE: FED. R. EVID. 801(c) AND STATE OF MIND HEARSAY

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully files this Memorandum Opposing Defendant Graham's Motion in Limine Regarding Fed. R. Evid. 801(c) and State of Mind Hearsay.

The Defendant is requesting the Court to exclude evidence associated with accusations that Annie Mae Aquash was an informant, including the following:

1. Testimony that Leonard Peltier had held a gun to Aquash's head and accused her of being an informant.

2. Leonard Crow Dog's removal of Aquash from his property because he suspected her of being an informant.

Defendant Graham's theory to exclude witness testimony surrounding informant accusations has been specifically rejected in United States v. Looking Cloud, 419 F.3d 781, 786-90 (8th Cir. 2005). The anticipated witness testimony surrounding informant accusations constitutes non-hearsay admissible pursuant to Fed. R. Evid. 801(c). Id. In admitting this same evidence during the Looking Cloud trial, this Court properly relied upon United States v. Malick, 345 F.3d 999, 1001 (8th Cir. 2003) and United States v. Amahia, 825 F.2d 177, 181 (8th Cir. 1987) (cited in Looking Cloud, 419 F.3d at 787-88).

The Looking Cloud court recognized that "the murder of Aquash could only be explained within the context of the American Indian Movement and its activities." Id. at 786. Specific events depicting a violent conflict between the Movement and the federal government showed why the Movement would be enraged if one of its members turned against it to become a government informant. Id. at 787. The Looking Cloud court recognized that "an out-of-court statement is not hearsay if it is not offered for the truth of the matter asserted." Id. (citing Fed. R. Evid. 801(c)). The court went on to opine that "evidence that Aquash was rumored to be an informant was probative of Looking Cloud's motive to kill her." Id. The same holds true with respect to the motives of the aiders and abettors – Defendants Graham and Marshall.

The Eighth Circuit provided this further rationale in its affirmance of this District Court's admission of the evidence:

> Here, the evidence that Aquash was rumored to be an informant was not offered for the truth of the matter asserted. It was not important for the jury to determine whether Aquash was actually an informant. Rather, the rumors' value was in helping the jury understand Looking Cloud's alleged motive for killing her. It only mattered whether Looking Cloud had heard or believed that Aquash was an informant, not whether she was an informant. The informant rumors were therefore not hearsay and irrelevant to Looking Cloud's guilt. The informant rumors helped the jury understand the context and circumstances of the murder.

Id. at 788.

Under the same analysis, Leonard Peltier's act of holding a gun to Aquash's head and accusing her of being an informant constitutes non-hearsay under Rule 801(c). This incident is further relevant and admissible to show the effect it had on Aquash and to further explain why Aquash took certain actions. See, Looking Cloud, 419 F.3d at 787-88; Amahia, 825 F.2d at 181. This may include, but is not limited to, an explanation as to why Aquash did not perceive a more immediate threat from Defendant Graham and other aiders and abettors when taken from Denver and forced to face informant accusations at the Wounded Knee Legal Defense Offense Committee (WKLDOC). Peltier's actions could give rise to a false sense of security that her abductors may not carry through with the threatening conduct, or that when provided the opportunity she could convince her accusers that she was not an informant.

Similarly, Leonard Crow Dog's removal of Aquash from his property constitutes admissible non-hearsay under Rule 801(c) when considering the effect it had on those who heard or otherwise witnessed it, whether or not it

was true that Annie Mae Aquash was an informant. See, Looking Cloud, 419 F.3d at 788; Malik, 345 F.3d at 1001.

To the extent that certain statements are ultimately determined to be hearsay, they further fall within varying exceptions, including Fed. R. Evid. 804(b)(3) on statements against interest. For example, Leonard Peltier's description of the shooting of an FBI agent to, among others, Kamook Nichols and Annie Mae Aquash, wherein he said "the motherfucker was begging for his life, but I shot him anyway." (See, Looking Cloud JT 145). Leonard Peltier is unavailable for trial; its reliability is evidenced from his conviction; and it certainly was against his interest. See, United States v. Hazelett, 32 F.3d 1313, 1316 (8th Cir. 1994). It provides further significant legal relevance for including, but not limited to, a further motive or explanation as to why Annie Mae Aquash was murdered by the criminal venture.

Other statements fall within the hearsay exceptions under Rule 803(1) (present sense impressions) and 803(3) (then existing mental, emotional, or physical condition). Such statements include, but are not limited to, matters occurring at Troy Lynn Yellow Wood's residence in Denver, Thelma Rios' residence in Rapid City, and WKLDOC. Furthermore, other potential statements may fall within the residual exception of Fed. R. Evid. 807 in that the statement is to be offered as evidence of a material fact; it is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and the general purposes of

the rules of evidence and the interests of justice will be best served by admission of the statement into evidence.

Defendant's reliance upon the Crawford and the Shepard decisions to exclude the informant-related statements is misplaced. As more fully established in the United States' Trial Memorandum on Crawford, non-hearsay under Rule 801(c) is not impacted by Crawford. See, United States v. Rodriguez, 484 F.3d 1006, 1013-14 (8th Cir. 2007) (citations omitted). Furthermore, the statements Defendant Graham is referring to are non-testimonial and are not formal statements to law enforcement. See Crawford v. Washington, 541 U.S. 36 (2004); see also, United States v. Hyles, 521 F.3d 946 (8th Cir. 2008).

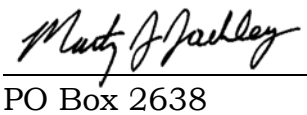
Defendant's reliance upon Shepard v. United States, 290 U.S. 96 (1933) is misdirected based upon the above Fed. R. Evid. 801(c) analysis, and the fact that the United States is not seeking to introduce any such statements for the limited purpose of "a statement of memory or belief to prove the fact remembered or believed." See, Shepard, 290 U.S. at 105-06; Looking Cloud, 419 F.3d at 787-88; Malik, 345 F.3d at 101; Amahia, 825 F.2d at 181.

Accordingly, the United States respectfully requests this Court deny Defendant Graham's Motion in Limine Re: Fed. R. Evid. 801(c) and State of Mind Hearsay.

Dated and electronically filed this 27th day of March 2009.

MARTY J. JACKLEY

United States Attorney



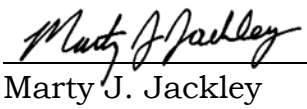
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CERTIFICATE OF SERVICE

The undersigned hereby certifies on March 27, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
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Marty J. Jackley
United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079-01

UNITED STATES MEMORANDUM OPPOSING DEFENDANT GRAHAM'S MOTION IN LIMINE RE: GRAHAM'S MEDIA INTERVIEWS

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully files its Memorandum Opposing Defendant Graham's Motion in Limine Re: Graham's Media Interviews based upon both legal and factual grounds.

On or about December 9, 2008, Defendant Graham filed his Motion to Compel Disclosure of Defendants' Statements [DE 91] presenting the same and similar arguments. On December 18, 2008, the United States filed a detailed Response in Opposition to Defendant Graham's Motion to Compel Discovery demonstrating full compliance with Fed. R. Crim. P. 16. Based upon Defendant Graham's own concession of the mootness of his discovery motion, the Magistrate Court denied Defendant Graham's Motion to Compel the United

States to produce statements. See DE 129. The attempts to limit or exclude Defendant Graham's non-testimonial statements to the media were further raised in severance motions and denied by the Magistrate Court's Severance Order. See, Magistrate Court Order, DE 116, pp.26-28 (b. Interviews with Media). Defendant Graham now seeks to reintroduce his positions to limit his own media interviews in the present motion practice forum.

Both Defendant Marshall's statements and Defendant Graham's statements presently known to the United States and within its possession and control have been disclosed, including within the United States' Memorandum in Opposition to Defendant Graham's and Marshall's Motion for Severance and supplemental filings. See DE 95. Prior to the October 2008 trial date, Defendant Graham's counsel was invited to the United States Attorney's Office to review the public domain information and to attempt to reach a stipulation on admissibility of excerpts of the statements to be used at trial.[1]

Significantly, Defendant Graham's interviews with the media constitute non-testimonial statements probative of his actions and involvement in the Aquash murder. See, Fed. R. Evid. 801(d)(2). It is further anticipated that independent evidence at trial will demonstrate Defendant Graham sought to

[1]See correspondence of September 23, 2008, from US Attorney Jackley to ensure, out of an abundance of caution, that the listed public domain interviews were provided to Defendants in their entirety. See Exh. A attached hereto.

take advantage of the media to create false alibis with respect to his involvement in the Aquash murder.

The United States has preliminarily identified excerpts it intends to use during its case-in-chief at trial of Defendant Graham's interviews with media sources.[2] One previously identified excerpt is from Defendant Graham's statement in Fifth Estate interview, scene #2, November 8, 2000, Exhibit 8 to DE 95, namely:

GRAHAM:	No, she was not kidnapped from Denver. We left Denver together.
TREMONTI:	Just the two of you?
GRAHAM:	Well, that's all I'm going to say on that. Like if other people want to put themselves there, let them put themselves there.

DE 95, Exh. 8.

In the event Defendant Graham does not wish to stipulate that he is referring to Annie Mae Aquash, it is the Untied States' position that additional statements from the interview will need to be included.

With respect to Defendant Graham's statement of October 18, 2006, filmed by Native Youth Movement, Vancouver, British Columbia, Exh. 9 to DE 95, the United States will exclude Defendant Graham's references to our former

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[2]Throughout its filings, the United States has been cautious to reserve the right to utilize additional statements of Defendant Graham, that have been produced, for impeachment and other proper evidentiary grounds. See, DE91, fn.1.

governor. See Exh. B (proposed redaction). Defendant Graham's other statements contained therein go directly to his involvement in the criminal venture including the following excerpt:

> Question: When's the last time that you saw her?
>
> Graham: When I drove her from Denver to Pine Ridge and she asked me to drive, drive with her and travel with her and when I dropped her off at a safe house in Pine Ridge. That's the last time I seen her. Um, since the, I guess, there has been a lot of speculation, a lot of rumors as to what happened or what could have happened.

DE 95, Exh. 9; Exh. B (redacted).

In this media interview, Defendant Graham made statements that are further probative to the issue of his Indian status, included among these are Graham's claims that "Indian people" cannot receive a fair trial in South Dakota made in the context of discussing his own Indictment. Id. In addition, Graham refers to the American Indian Movement and its "insistence on **our** sovereignty. **Our** rights to **our** lands, **our** resources, and **our** rights to protect what's rightfully **ours**." Id. (emphasis added). In the event Defendant Graham wishes to stipulate to his Indian status, the United States would agree further redactions of his statement may be warranted. The interview contains additional statements by Defendant Graham pertaining to the issue relating to his avoidance and flight from authorities. Id.

The United States only intends to introduce the video segments of the direct statements of Defendant Graham. To the extent Defendant Graham

would like to stipulate to certain redactions, in addition to references to our former governor, the United States remains willing to further discuss the same. Otherwise, it remains the United States' position that it has disclosed all of Defendant Graham's statements; his interviews on video are probative and admissible pursuant to Fed. R. Evid. 801(d)(2).

Accordingly, the United States respectfully requests that Defendant Graham's Motion in Limine Re: Graham's Media Interviews be denied.

Dated and electronically filed this 30th day of March 2009.

MARTY J. JACKLEY
United States Attorney

Marty J Jackley

PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on March 30, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Facsimile at
- ☐ Federal Express
- ☒ Electronic Case Filing

Marty J Jackley

Marty J. Jackley

U.S. Department of Justice

Marty J. Jackley
United States Attorney
District of South Dakota

Post Office Box 2638
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(605)357.2330
FAX:(605)33.4405

September 23, 2008

John R. Murphy
Attorney at Law
328 E. New York Street #1
Rapid City, SD 57701

RE: United States v. Graham

Dear John:

I am enclosing additional discovery in relation to statements and admissions pursuant to Fed. R. Crim. P. 16(a). While I believe you already have been provided some of this information, out of an abundance of caution, it is being provided at this time:

1. Transcript of interview of Defendant from Native Youth Movement, Vancouver, BC;

2. Transcript of Anna Maria Tremonti-CTV, Fifth Estate, on November 8, 2000; and

3. Transcript of Defendant's interview by Antoinette Nora Claypoole on March 30-31, 2004.

John, I am requesting that a foundation stipulation be entered with respect to Mrs. Claypoole's interview and request that you please advise us as to your position with respect to the same. The DVDs of the interviews for items 1 and 2 are available at the U.S. Attorney's Office for viewing, if you so desire.

To the extent that you have any questions whatsoever, please do not hesitate to contact me. I would again remind you that the United States has requested rule 16(b) disclosure.

Sincerely,

MARTY J. JACKLEY
United States Attorney

MJJ/lc
Encs.
cc: AUSA Robert Mandel

Exhibit A

00:00:06 Exclusive John Graham Interview from myspace.com,
00:00:08 http://myspacetv.com/index.cfm?fuseaction=vids.individual&
00:00:10 videoid=3144354
00:00:12 Added on October 18, 2006, by Peacepipe Films
00:00:14 Filmed by Native Youth Movement Vancouver BC
00:00:16 Graham: It was 1985. I guess I moved up to the Yukon
00:00:20 with my family and there .. Well, my family
00:00:22 became my movement. I began, ah, you
00:00:25 know, I didn't bring my children up and, ah, to
00:00:28 do that properly I had to let down a lot of my
00:00:32 political activities I guess and concentrate on,
00:00:36 on bringing my children up.
00:00:46 Graham: Question's asked what have I been doing since
00:00:51 last March, uh, when South Dakota federal
00:00:55 indictments have been, have been laid against,
00:00:58 ah, myself and Arlo Looking Cloud in, uh, the
00:01:02 murder of Anna Mae Aquash. Um, I just, while
00:01:10 these indictments came out in March, I first
00:01:12 heard about them coming home from work one
00:01:14 day. Uh, I was told that the media, CBC, or
00:01:20 CTV, or different media stations were waiting
00:01:24 at my apartment for me to get home. I guess,
00:01:27 so I never went home. Ah, went to a friend's. I
00:01:31 realized, uh, from the news that night that, it
00:01:34 was quite possible that I was being indicted for
00:01:37 the murder of Anna Mae. So, from March until
00:01:41 December, I, ah, I avoided, uh, I avoided the
00:01:47 media. I avoided, uh, uh, I guess, uh, the police. I
00:01:54 wasn't on the run. I wasn't on the lam. I
00:01:57 wasn't hiding. I was pretty, I always out in the
00:02:00 open. I've always worked through all this time.
00:02:04 Um, but I was avoiding the media because the
00:02:09 media had been, had been dogging me over
00:02:10 this for years. And, uh, everything that has been
00:02:15 coming out over the media to date, uh, just
00:02:19 refuses to, uh, deal with all the facts, deal with all
00:02:22 the truths around this case. Instead they want
00:02:25 to, uh, continue, uh, uh, continue ongoing
00:02:31 disinformation campaign that the US federal
00:02:34 government has been waging against AIM, uh,
00:02:38 going back into the early 70's. So, uh, bringing it
00:02:43 up to December. Uh, December 1st, I was arrested
00:02:49 in East Vancouver by, uh, Vancouver City Police. I
00:02:54 was, uh, walking through a park when I heard my
00:02:58 name being called, um, by a person, Kelly
00:03:03 White, who works in the community, uh, claims to

Exhibt B

00:03:06 be a representative of Leonard, uh, does a
00:03:10 radio show on coop radio. She has made it a
00:03:15 personal vendetta of her's to see me in prison
00:03:18 or to see me killed. Um, case or
00:03:23 anything at all she can try to put on me I
00:03:28 guess. But anyway, she came running up to
00:03:31 me with the police in tow and, ah, kinda, right
00:03:37 up, you know, in my face and said yes, there
00:03:39 he is. That's John Graham.
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00:05:50 Question: When did they first bring up, ah, the murder of
00:05:53 Anna Mae Aquash? Like . . . (unaudible)
00:05:56 Graham: To me, they first brought it up to me, I think it
00:05:58 was in 1988 when the FBI came to my home
00:06:01 up in the Yukon, and, ah, said that they wanted
00:06:05 to, ah, talk about this, at that time it was a 12-
00:06:08 year-old case, ah, Anna Mae Aquash,

Redacted

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Redacted

00:07:48 Question: When's the last time that you saw her?
00:07:50 Graham: When I drove her from Denver to Pine Ridge.
00:07:52 And she asked me to drive, drive with her and travel
00:07:54 with her and when I dropped her off at a safe
00:07:58 house in Pine Ridge. That's the last time I
00:08:00 seen her. Um, since then, I guess, there has
00:08:06 been a lot of speculation, a lot of rumors as to
00:08:08 what happened or what could have happened
00:08:09 to her, um.
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Redacted

00:10:55 Question: So that's pretty much the situation, most of the
00:10:57 . . . .
00:10:58 Graham: I don't think the situation has changed in South
00:11:00 Dakota at all, the attitude or the mentality
00:11:03 toward, toward Indian people and I, ah, I
00:11:07 believe that a fair trial in South Dakota is
00:11:09 impossible, totally impossible. They don't
00:11:12 know the meaning of the word fairness,
00:11:15 equality under the law. They don't know, ah that meaning.
00:11:17 There's a lot of things being done that the, ah,
00:11:21 um, by people in the community. People who
00:11:24 have been put into key places, ah, in the
00:11:26 community, as far as, ah, in the, in, ah,
00:11:31 powerful places in media. Um, people
00:11:36 throughout the States and in Canada here,
00:11:40 operating, ah, with the federal, with the feds in
00:11:45 an ongoing continuous disinformation
00:11:48 campaigning against AIM, against Leonard
00:11:50 Peltier. Ah, against myself and Arlo. Um,
00:11:55 hopefully, you know, their ideas is that, you
00:11:57 know to, as you rub out the American Indian
00:11:59 Movement, our ideas, our thoughts, our
00:12:02 feelings, um, our insistence on our sovereignty.
00:12:08 Um, they want to a, they want to, um, stop any kind of
00:12:14 appeal Leonard might have for his parole. Ah,
00:12:18 anytime a campaign starts going for Leonard
00:12:22 for his clemency campaign or his parole
00:12:23 campaign. Ah, the people in the state of South
00:12:26 Dakota, the FBI are actively, have been
00:12:30 actively lobbying to keep Leonard in prison and
00:12:33 not to let, not to allow him a parole date; ah, not to,
00:12:36 allow him a fair, fair hearing. And they've been
00:12:39 managing to do this all the way through the
00:12:41 Peltier case. And, uh, they, gonna, they are
00:12:46 continuing this campaign with, uh, presently,
00:12:49 uh, through, uh, through Indian newspapers in
00:12:53 the States, ah, through radio programs, uh, TV
00:12:56 programs, uh, media outlets. They're active,
00:13:00 very active on the Internet. Uh, under different
00:13:04 names, um, slandering anybody involved with
00:13:08 AIM, uh, anybody particularly myself and Arlo.
00:13:12 Um, they've, ah, created, um, um, in ah, trying
00:13:21 to generate hate toward Leonard, or toward
00:13:24 Arlo and myself in this case and um, by doing
00:13:28 this while they're not doing the community any
00:13:31 good. They're not doing the family any good;

00:13:33 they're not doing this case any good. Ah, we
00:13:36 wanna get to the bottom of this as much as
00:13:38 anybody. But we can't do that by, uh, you
00:13:42 know, half-truths, innuendos, speculation,
00:13:45 rumors, ah, that doesn't, that, that doesn't get
00:13:49 to the truth. So, these people that are out
00:13:52 there, like the Paul DeMains, Richard Two Elk,
00:13:54 Kelly White, uh, there's a few others, that have
00:13:58 been running the rumor mill for the feds around
00:14:01 this case and people who are exposed to this
00:14:05 type of a media, uh, I just would like to ask
00:14:08 them to keep an open mind; keep an open
00:14:11 heart about it, about what they are hearing;
00:14:13 about what they are seeing and, uh, through
00:14:17 facts, not rumors. I hope that people can
00:14:20 come to their own, own, um, decision as to
00:14:24 what they believe is right and wrong, what they
00:14:27 believe to be truths and what they believe to be
00:14:28 rumors. And, uh, divide them so that we can
00:14:33 get to the bottom of this. They're hoping, I
00:14:38 think, to, uh, to clear themselves in this whole
00:14:41 Anna Mae murder issue. They're hoping to
00:14:46 weld the door shut, maybe, on Leonard, to
00:14:48 stop any of his, any more of his like, parole
00:14:51 campaigns, uh, any, uh, possibility of a
00:14:55 clemency campaign. Ah, I think we come very
00:14:58 close to getting Leonard out during the Clinton-
00:15:01 era and, uh, I think they got really threatened
00:15:05 by that. They wanna stop the whole idea of
00:15:08 AIM, our insistence on our sovereignty. Our
00:15:12 rights to our lands, our resources, and our
00:15:14 rights to protect what's rightfully our's. That
00:15:19 insistence within AIM, they, that's what they
00:15:23 want to stop and that's what I believe that, you
00:15:25 know, that they are hoping that they can
00:15:27 squash all three, maybe by setting me up,
00:15:31 setting Arlo up, as a scapegoat in this charge.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL, aka RICHARD VINE MARSHALL, aka DICK MARSHALL, Defendant.	)	CR. 08-50079-01, -02 ORDER ON DEFENDANT MARSHALL'S MOTION TO COMPEL DISCOVERY

Pending before the court is defendant Richard Marshall's motion seeking an order compelling the government to produce all records, investigative reports, witness statements, court records and transcripts in the government's possession that relate to the case of United States v. Loud Hawk, 75-CR-296-RE (D. Or. 1975). [Docket 160]. The government resists the motion, arguing that the material is not required discovery under either Brady v. Maryland, or under Rule 16.

Under Fed. R. Crim. P. 16 and 18 U.S.C. § 3500, the government is required only to give the defendant copies of the defendant's own statements. As to statements by other witnesses, the government is required to provide copies of those statements only after the witness testifies upon direct examination. See Fed. R. Crim. P. 26.2. Thus, if the government in fact has copies of witness statements from the Loud Hawk file, those statements would

not be subject to compelled discovery at this stage of the litigation.

The Due Process Clause of the Fifth Amendment requires the government to disclose to the accused favorable evidence that is material to guilt or punishment and not otherwise available to the defendant. See United States v. Bagley, 473 U.S. 667, 678 (1985); Brady v. Maryland, 373 U.S. 83, 87 (1963). To prove a violation, the defendant must show that the evidence was both favorable and material, and that the government suppressed the evidence. United States v. Barraza-Cazares, 465 F.3d 327, 333 (8th Cir. 2006). The government has suppressed evidence when it was otherwise unavailable to the defendant, and the prosecution failed to disclose the evidence in time for the defendant to use it. Id. at 334.

The court finds that the defendant's argument as to the compelled discovery of the Loud Hawk file is too attenuated at this point to support a motion to compel. The court notes that some of the information Mr. Marshall seeks is already in his hands, as evidenced by the reference to the affidavit in support of the search warrant discussed in Mr. Marshall's brief. Also, the court has confirmed that the records from the Loud Hawk case are publicly available through the District of Oregon. Thus, there are other avenues through which defendant may obtain the Loud Hawk file materials. Bagley, 473 U.S. 678; Barraza-Cazares, 465 F.3d at 334 (Brady violation is shown when the materials were not otherwise available to defendant through other

sources). Accordingly, the court will require Mr. Marshall to exhaust other avenues for obtaining the Loud Hawk file. If those other avenues prove unsatisfactory, this order is without prejudice to Mr. Marshall's ability to renew his motion to compel at a later date. It is therefor

ORDERED that Mr. Marshall's motion to compel [docket 160] is hereby denied.

Dated March 31, 2009.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 MOTION TO EXTEND TIME FOR FILING

NOW COMES Defendant Richard Marshall, by and through his attorney Dana L. Hanna, and hereby moves the Court for permission to file a motion to compel discovery of Brady material. The grounds for this motion are as follows:

1. In the Courts last scheduling order, the clerk ordered the defendants to file their motions (other than motions in limine) by March 23, 2009.

2. I was unable to file the motion to compel discovery of Brady material by that date for the following reasons: On March 23, 2009 a blizzard struck Rapid City and Western South Dakota. I had planned to complete this motion and file it that day, but because I live out in the Black Hills my wife and I had to leave Rapid City at noon in order to get home before the blizzard struck. The courthouse in Rapid City was also closed later that day due to the weather. I was not able to leave my house until the afternoon of March 25, 2009. Due to other previously scheduled court matters and obligations, I was unable to finish the motion to compel discovery of

Brady materials on this day. I worked on the motion most of the day March 26, 2009, but I had to leave that afternoon to travel to Aberdeen, SD for sentencing in the trial of *United States v. Dominic Barrera* that was scheduled for March 27, 2009. On March 30, 2009 another blizzard struck the Black Hills area and I was unable to leave my house, today is the first day that I am able to complete and file this motion.

This is a motion to compel disclosure of Brady material. The Government is obligated to disclose Brady material even without a request, therefore there is no prejudice in filing this motion late.

WHEREFORE the defendant moves the Court to allow defendant to file his motion to compel disclosure of Brady material.

Dated this 31st day of March, 2009.

VINE RICHARD MARSHALL, Defendant

BY: */s/ Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Motion to Extend Time for Filing was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 31st day of March, 2009.

/s/ *Dana L. Hanna*

Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S MOTION TO COMPEL DISCLOSURE OF FAVORABLE BRADY AND GIGLIO IMPEACHMENT MATERIAL

NOW COMES the Defendant Richard Marshall, by and through his attorney Dana L. Hanna, pursuant to his constitutional right to due process of law and his right to confront his accusers, and hereby moves the Court to order the government to search for, gather, and disclose to the defendant the following exculpatory and favorable Brady and Giglio material:

(1) any and all information and evidence relating to any inducements, rewards, agreements or expectations of government witness Arlo Looking Cloud, whereby he may hope for or expect some benefit from his cooperation with and testimony for the government;

(2) Arlo Looking Cloud's Bureau of Prisons central inmate file, including all records relating to treatment, diagnosis, or testing for psychiatric, psychological, or mental disorders;

(3) any and all information and evidence contained in any records of the Bureau of Indian Affairs (BIA), the U.S. Marshall's Service or any federal agency relating to any investigation,

complaints or sanctions concerning alleged misconduct, unprofessional conduct, or breach of ethical standards related to the personal relationship between federal investigator Robert Eccoffey and the government's cooperating informant known as "Maverick" during the course of the investigation of the murder of Anna Mae Aquash.

In the alternative, defendant moves for an in camera inspection of such materials by the Court to determine if they contain information that could be used by the defendant to impeach the credibility of any witness or to attack the government's investigation of the case.

In support of this motion, Dana L. Hanna, attorney for the Defendant Richard Marshall, hereby affirms:

1. I make these affirmations on information and belief, the sources of which are the discovery materials provided to me, the communications I have had with government attorneys and my own investigation into the facts of the case.

2. I have previously communicated with counsel for the government and have made written requests for all the materials I am requesting in this motion. The government has declined to provide me with these materials and information. Therefore, I have made good faith but unsuccessful efforts to acquire this material, all of which I believe to be exculpatory within the meaning of Brady v. Maryland, before asking this Court to order the government to acquire and disclose this information to me.

3. The defendant makes these requests pursuant his due process right to disclosure of any impeachment evidence, which includes information relating to any agreement between the government and a prosecution witness, or information concerning any hope or expectation of any possible benefit that a prosecution witness may have. Here, the government's main prosecution

witness is Arlo Looking Cloud, who is presently serving a life sentence for his involvement in the murder of Anna Mae Aquash. The government claims that Looking Cloud has not been given any agreement, promise, inducement, nor does he enjoy any hope or expectation of possible benefit as a result of his cooperation and testimony. That claim is not credible. Every witness who is serving a sentence and who testifies for the government expects to get something in return for his cooperation: that is why they testify. The government's claim that Looking Cloud has not been given some reason to expect something of benefit in return for his cooperation and testimony is simply not so contrary to the practices of the government in its dealings with cooperating convicted criminals that it cannot be an accurate statement of fact.

4. Arlo Looking Cloud, although he is serving a federal sentence, has been removed from Bureau of Prisons custody by the government. Thus, he is already enjoying a benefit from his cooperation. Moreover, as is set forth more fully in Defendant's Motion to Dismiss for Denial of Due Process and the memorandum of law in support of that motion [see: documents 172 and 173], Arlo Looking Cloud enjoys a reasonable hope or expectation of having his conviction set aside as a result of his cooperation and testimony with the government.

5. A federal prisoner's Bureau of Prisons central file contains information about that prisoner's criminal history, his diagnoses and treatments for psychiatric and mental disorders, his drug addiction history and treatment, and many other facts of potential. On information and belief, based on his Pre-sentence investigation report, Arlo Looking Cloud's central inmate file contains information related to his treatment and diagnoses for mental disorders, chronic drug abuse and alcohol addiction, as well as other facts and information that can be used to impeach his credibility as a witness.

6. On information and belief, based on my own investigation of the facts and conversations I have had with knowledgeable sources of information, while Robert Ecoffey was a federal investigator with the BIA, supervising and conducting the investigation of the murder of Anna Mae Aquash, he was responsible for supervising the activities of a female cooperating informant, who was given the code-name "Maverick", and while he was supervising the investigation of the Aquash murder, he entered into an intimate and professionally improper and unethical personal relationship with that informant. Intimate personal relationships between law enforcement investigators and their cooperating informants are universally considered unprofessional and unethical conduct by federal law enforcement officials, and is considered to be a violation of the BIA Law Enforcement Code of Ethics because they are likely to undermine the objectivity of the investigator and the integrity of the investigation. "Maverick" has a felony criminal record and deep involvement in the events leading to the murder of Anna Mae Aquash; she participated in crimes with Aquash and other individuals who were close to her in the American Indian Movement. On information and belief, the personal relationship between Eccofey and "Maverick" may have been one of the reasons for Ecoffey's demotion from Director of BIA Law Enforcement Services to Deputy Director in 2004. Had that relationship been known by federal law enforcement authorities, it certainly would have called for investigation and reprimands. Both Ecoffey and "Maverick" are government witnesses in the trial of Marshall and Graham. The defendant seeks all information, including any evidence of any internal investigation or sanctions directed against Ecoffey, related to the improper relationship between a supervising investigator and a cooperating informant in this case to impeach the credibility of Ecoffey and the integrity of the government's investigation of the facts of this case.

WHEREFORE, the defendant Richard Marshall moves the Court to order the government to search for, gather and disclose the above-requested information and evidence to the defendant forthwith; or, in the alternative, to produce such materials for in camera inspection by the court to allow the court to determine if such materials contain information that may be favorable and useful to the defendant.

DATED: MARCH 31, 2009

RICHARD MARSHALL, defendant

By:

/s/ Dana L. Hanna

Dana L. Hanna
HANNA LAW OFFICE
PO Box 3080
816 Sixth Street
Rapid City, SD 57709

CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Defendant Marshall's Motion to Compel Disclosure of Favorable Brady and Giglio Impeachment Material was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham

jmurphysd@hotmail.com

Dated this 31st day of March, 2009.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 MEMORANDUM OF LAW FOR DEFENDANT MARSHALL'S MOTION TO COMPEL DISCLOSURE OF FAVORABLE BRADY AND GIGLIO IMPEACHMENT MATERIAL

The defendant moves for an order compelling the government to gather and disclose all information and evidence relating to (1) any agreements between the government and its key witness Arlo Looking Cloud or expectations of benefit that Looking Cloud may have, (2) any impeachment evidence in Looking Cloud's central inmate file with the Bureau of Prisons, and (3) any investigation or sanction of then- Bureau of Indian Affairs federal investigator Robert Ecoffey for an improper personal relationship with cooperating informant "Maverick" during the investigation in this case. Defendant asks for disclosure to the defendant, or in the alternative, for disclosure to the Court for an in camera inspection by the Court to determine what, if any, information or evidence should be disclosed to the defense.

Brady v. Maryland, 373 US 83 (1963) and United States v. Bagley, 473 US 667 (1985) stand for the proposition that the Due Process Clause imposes a constitutional obligation on the

government to disclose to the accused any information that could be used to impeach the credibility of a government witness. In Brady, the Supreme Court held that suppression, by the prosecution, of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

In this case, which involves a charge of murder, Arlo Looking Cloud is the key government witness against the defendant, Richard Marshall. The government's witness is serving a life sentence. He was serving his sentence in a federal penitentiary until he was removed from Bureau of Prisons custody, by the government, after he agreed to be a witness in this case. Every inmate in Bureau of Prisons custody has a central inmate file that contains information about his medical and mental history, his disciplinary record in prison, his criminal history and associations, special treatment or security he may have received as an informant, etc.

Any evidence or information relating to Arlo Looking Cloud's psychiatric disorders or treatment, his activities as an informant in this or other cases, the reasons why he is not presently in a federal prison, or any other information that can be used to impeach him that is contained in the Bureau of Prison's central inmate file on Looking Cloud, is Brady material and the government has a duty to disclose it to the defendant.

"In order to comply with *Brady*, . . . the individual prosecution has a duty to learn of any favorable evidence known to the others acting on the government's behalf." Strickler v. Greene, 527 US 263, 281 (1999). Here, that duty imposes on the government an obligation to acquire and disclose the witness's central inmate file.

The government has an affirmative duty to inquire and investigate as to whether a

cooperating witness has any expectation of receiving a benefit from his testimony, whether that expectation or hope comes from an express agreement or not, and to disclose any such information to the defendant. Here, the government has claimed that Arlo Looking Cloud has not been made any promises and has not been given any reason to expect a benefit from his cooperation. That claim is incredible: Looking Cloud has already received a benefit by being removed from federal prison. The government should be ordered by the Court to provide full disclosure regarding every benefit their witness has received and has reason to expect that he may receive in the future.

In Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 (1972), the Supreme Court held that non-disclosure of a promise of benefit made to a government witness, even though that promise was not communicated to the Assistant United States Attorney who tried the case, would constitute a violation of due process, requiring a new trial.

In Reutter v. Solem, 888 F.2d 578 (8th Cir. 1989), there was no express promise made by the government to the prosecution's cooperating witness; there was no proof of any actual "deal". However, the cooperating witness had a commutation of sentence petition filed and a hearing was scheduled for the witness after the defendant's trial, and the witness therefore had reason to hope for or expect favorable treatment at that hearing as a result of his cooperation and testimony. His pending petition for commutation of sentence and the future parole board hearing was known to the government's prosecutor, but that information was not disclosed to the defendant Reutter. In Reutter's trial, the government argued that the cooperating witness had no reason to expect anything in return for his testimony. Reutter was convicted. The Court of Appeals for the Eighth Circuit reversed the conviction of the defendant because the government

had not disclosed that its witness had reason to expect or hope for a favorable decision by the parole board, even though he had received no actual promise of a benefit by the government.

If Arlo Looking Cloud has been given any reason to expect, anticipate or hope for any favorable treatment or reward from the government–including, but not limited to, a letter from the government or a recommendation when he becomes eligible for parole or when he moves for a re-sentencing or other relief–then the government has a duty to disclose that information to the defendant, whether express agreements have been entered into or not.

In this case, a male federal investigator entered into an intimate personal relationship with a female cooperating witness during the course of the investigation.

If there has been any investigation or sanction involved in the professionally improper and unethical personal relationship between a federal investigator and the cooperating informant he was charged with supervising, then that is information that goes to discredit both the investigator-witness and the integrity and professionalism of the investigation itself, and all information and records pertaining to any such misconduct is Brady material under Kyles v. Whitley, 514 US 419 (1995).

In Kyles v. Whitley, the Supreme Court overturned a conviction for murder on the basis of the prosecutor's failure to disclose Brady material about statements made by a witness called "Beanie". In Part IV-B of Justice Souter's opinion for the court, he wrote that if the material had been disclosed to the defense, "the defense could have examined the police to good effect on their knowledge of Beanie's statements *and so have attacked the reliability of the investigation* ..." [Emphasis added.]. The Court quoted Bowen v. Maynard, 799 F.2d 593 , 613 (10th Cir.1986): "A common trial tactic of defense lawyers is to discredit the caliber of the

investigation or the decision to charge the defendant, and we may consider such use in assessing a possible Brady violation."

On reliable information which I have received during the course of my investigation into the facts of this case, prosecution witness Robert Ecoffey, former U.S. Marshall and then Director of Law Enforcement Services for the Bureau of Indian Affairs (BIA), while he was charged with investigative and supervisory responsibilities in the investigation into the murder of Anna Mae Aquash, entered into an ongoing personal and intimate relationship with a female cooperating witness in this case–known by the code name "Maverick"–and that their intimate relationship violated rules and policies of the Bureau of Indian Affairs prohibiting such relationships. Such relationships are considered professional misconduct by law enforcement agencies, including the BIA, because they can and do compromise the objectivity of the investigator and the integrity of the investigation. Based on those facts, it is reasonable to inquire whether Ecoffey's demotion in 2004 from Director of Law Enforcement Services for BIA to Deputy Director was a sanction related to misconduct related to this case. If his personnel file and other BIA records, including Internal Affairs records, contain evidence that can be used to impeach both his credibility and the government's investigation in this case, then the government has a duty to disclose it to the defense.

Therefore, the Court should grant the defendant's motion to compel discovery.

DATED: March 31, 2009

Respectfully submitted,

/s/ Dana L. Hanna

Dana L. Hanna
HANNA LAW OFFICE
PO Box 3080
816 Sixth Street
Rapid City, South Dakota 57709
(605) 791- 1832
Attorney for defendant Richard Marshall

CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Memorandum of Law for Defendant Marshall's Motion to Compel Disclosure of Favorable Brady and Giglio Impeachment Material was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 26th day of November, 2008.

/s/ *Dana L. Hanna*

Dana L. Hanna

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S REPLY BRIEF REGARDING MOTION IN LIMINE RE: STATEMENTS TO MEDICINE MAN

Defendant John Graham replies to the government's Memorandum Opposing Defendant Graham's Motion in Limine Re: Statements to Medicine Man [hereinafter "Memorandum"], filed March 26, 2009.

In its Memorandum, the government mis-characterizes important facts pertinent to the issues before the Court. If one were to read the government's Memorandum without looking at the underlying facts, one would conclude that Mr. Graham affirmatively made a number of statements and admissions about his spiritual involvement with Al Gates that both waived his privilege and incriminated himself. A cursory look at the underlying facts shows that this is not the case, and that the government has mis-characterized what was said and the context of the conversations in order to persuade the Court that Graham's

privilege was waived and his statements are admissible.

First, Graham did not waive his privilege or make admissions to Chapman as alleged by the government in enumerated paragraph 1 of its Memorandum. The facts pertinent to this issue are contained in the government's Exhibit 1.

Chapman recorded an interview with Graham. Chapman stopped the recording on his own, not at Graham's request. When the recorder was off, Chapman claims that he told Graham that he (Chapman) knew what Gates had told others. He then summarizes what he had been told Gates had alleged. He does not ask Graham to confirm or deny the summary. Graham's entire response to Chapman was, according to Chapman, "Uh huh." Immediately thereafter, when Graham begins to try to give a more substantive explanation ("Well, you know . . ."), but Graham is cut off by Chapman and not allowed to continue responding.[1]

Statements such as "Uh huh" are used commonly as non-substantive responses. "Uh huh" has no content itself other than to acknowledge that one has been spoken to. Taken in its proper context, Graham's ambiguous response is

[1]The government only provided one page of Chapman's 30 page interview with Graham. In Graham's previous file, 03-50020, Graham submitted the transcript of the interview as a sealed exhibit to his Reply to Government's Response to Motion in Limine Regarding Medicine Man Privilege. That exhibit shows that when Graham tried to begin addressing the comments made by Chapman, Chapman began discussing an entirely unrelated matter.

nothing more than a generic acknowledgment of the fact that Chapman said something to him.

Alternatively, Graham's response was specific to Chapman's declarative statement that he had been told something about Gates. Chapman does not ask Graham whether this information was true or false. There is no responsive assertion made by Graham indicating the truth of Chapman's summary. And, the assertions recited by Chapman were not of such a direct and inflammatory nature that the failure to deny them would constitute an admission by silence.

Most importantly, nothing Graham said in response to Chapman could be construed as a waiver of privilege. Consider the structure of the government's position. On the one hand, because Graham said nothing of a factual or specific nature to Chapman, the government is asserting that Graham's mere acknowledgment of Chapman constitutes an adoptive admission. On the other hand, the government is trying to claim that Graham's response was specific enough to constitute a complete abandonment of his claim to keep his communications with Gates confidential. There is nothing factually to support the notion that anything said by Graham constitutes a waiver of privilege.

Second, the government has similarly mis-characterized Graham's alleged statements to Ecoffey. In its Memorandum, the government suggests that Graham

made admissions to Ecoffey and openly discussed his activities with Gates. Memorandum at enumerated paragraph 2. This is a mis-characterization of the whole context of the discussion.

As demonstrated in the government's Exhibit 2, law enforcement approached Graham in Canada and set forth a litany of facts, accusations and information. Graham's sole response to this litany was "yeh." Like "Uh huh," this response was nothing more than an ambiguous, non-committal, non-substantive acknowledgment that Graham had been spoken to. It is neither an adoptive admission, admission by silence, nor a waiver of privilege.

Third, in regard to Gates' grand jury testimony, the government's purported basis for admission is not legally defensible. There is no question that Gates' testimony before the grand jury was testimonial, and that the admission thereof implicates the confrontation clause. Absent confrontation, there is no basis for believing the statements are reliable, and the reliability and veracity of the statements cannot be tested. The government asserts that Gates' grand jury testimony is admissible to "explain the reasons for or propriety of a police investigation in the context of questioning." Memorandum p. 3. This assertion has no substance. Moreover, a closer review of Gates' actual grand jury testimony shows that much of what he attested to were his impressions of Graham, not actual

statements made to him by Graham. See Govt. Exhibit 3 (sealed). Thus, even in the context of impeachment, Gates' beliefs or impressions as to Graham's culpability or presence would not be admissible.

Last, the government contends that Graham has failed to establish the existence of a privilege that has not been waived. That is not accurate. Graham has repeatedly asserted the privilege, and has provided documentary evidence in this file and his previous file showing that the government's own information establishes that Gates was recognized as a spiritual leader with whom people would consult on spiritual matters. Gates' sworn grand jury testimony is more than sufficient to establish the requisite relationship between Graham and Gates for the privilege to vest. And, there is nothing indicating that Graham ever waived the privilege.

Gates breached the privilege. The government has aggravated this breach by communicating confidential matters obtained by the grand jury to law enforcement and Chapman. The privilege should have been respected by Gates and the government. It wasn't. The privilege should now be protected by the

Court to lessen the damage done thus far in protecting the relationship between a spiritual leader and a person seeking spiritual counsel.

Dated March 31, 2009.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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ROBERT A. MANDEL	☐	U.S. Mail, postage prepaid
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	☐	Facsimile at
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DANA HANNA	☐	U.S. Mail, postage prepaid
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	☐	Facsimile at
	☒	Electronic Case Filing

Dated March 31, 2009.

/s/ John R. Murphy
John R. Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff,	)	CRIM. NO. 08-50079-01
vs.	)	DEFENDANT GRAHAM'S THIRD SET OF PROPOSED JURY INSTRUCTIONS
JOHN GRAHAM, a/k/a JOHN BOY PATTON, VINE RICHARD MARSHALL, a/k/a RICHARD VINE MARSHALL, a/k/a DICK MARSHALL, Defendants.	)	

Attorney for Plaintiff: Marty J. Jackley, United States Attorney
Robert A. Mandel, Assistant United States Attorney
515 9th Street, 2nd Floor
Rapid City, SD 57701
605-342-7822

Attorney for Defendant: John R. Murphy
328 E. New York Street
Suite 1
Rapid City, SD 57701
605-342-2909

Defendant John Graham files his proposed jury instruction number 7.

Dated March 31, 2009.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

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	☐	Facsimile at
	☒	Electronic Case Filing

Dated March 31, 2009.

/s/ John R. Murphy
John R. Murphy

Defendant's Proposed Jury Instruction No. ____

During this trial, you have been told that defendant John Graham allegedly made statements to various people. You must determine whether Mr. Graham actually made these statements, and, if so, how much weight you should give them.

You have also heard evidence that the witnesses to these statements, specifically Serle Chapman and Robert Ecoffey, did not record their conversations with Mr. Graham although they had the ability to do so. You have heard evidence that Mr. Chapman deliberately turned off his recording device, and that Mr. Ecoffey never utilized a recording device although such devices are generally available to law enforcement officers for recording such interviews.

When deciding whether Mr. Graham made the alleged statements, you may take into consideration the fact that the witnesses failed to record the interviews. You may also take this fact into consideration when determining whether the conversation occurred as the witness relayed it, or whether the witnesses could be mistaken as to their recollection of Mr. Graham's exact words on the dates in question.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
APR 0 2 2009
CLERK

UNITED STATES OF AMERICA,	*	CR 08-50079-01
Plaintiff,	*	
vs.	*	
	*	ORDER
JOHN GRAHAM, a/k/a John Boy Patton; and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

Pending before the Court is Defendant Graham's Motion to Seal, Doc. 113, requesting the Court to seal Exhibit A related to Defendant Graham's Motion in Limine Re: *Res Gestae* Evidence, and after consideration of the motion, together with the file in this matter,

IT IS ORDERED:

1. That Defendant Graham's Motion to Seal, Doc. 113, is granted

2. That Exhibit A related to Defendant Graham's Motion in Limine Re: *Res Gestae* Evidence (Court Doc. 103) shall be sealed until further Order of this Court.

Dated this 2nd day of April, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: Jackie Meyerhuber
DEPUTY

FILED
APR 0 2 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

****

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER
JOHN GRAHAM, a/k/a John Boy Patton; and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendant.	*	

****

Pending before the Court is Defendant Marshall's Motion to Extend Time for Filing, Doc. 215, requesting an extension for filing the Motion to Compel, Doc. 216, filed on the same date as the Motion to Extend. Good cause appearing,

IT IS ORDERED:

1. That Defendant Marshall's Motion to Extend Time for Filing, Doc. 215, is granted, and the Motion to Compel Disclosure, Doc. 216, will be considered to be timely filed.

Dated this 2nd day of April, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: Jackie Meyerhuber
DEPUTY

FILED
APR 0 2 2009
CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079-01
Plaintiff,	*	
vs.	*	ORDER REGARDING PRETRIAL MOTIONS
JOHN GRAHAM, a/k/a/ John Boy Patton, VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendant.	*	

Pending before the Court is Defendant Graham's Motion to the Court to Take Notice of Exhibits Filed in CR 03-50020. (Doc. 112.)

Defendant Graham was indicted in 2003 with co-defendant Arlo Looking Cloud. Looking Cloud was convicted of First Degree Murder after a jury trial in 2004. After lengthy proceedings in Canada, Defendant Graham was extradited to the United States and was arrested on the 2003 Superseding Indictment on December 6, 2007. In September, 2008, Defendant Graham filed a number of pretrial motions, including a motion to dismiss the superseding indictment. The Court dismissed the superseding indictment against Graham because it failed to allege Graham's Indian status, which is an essential element of an offense under 18 U.S.C. § 1153. Defendant Graham was re-indicted in 2008, and the trial is scheduled to commence in May, 2009.

In Defendant Graham's Motion to the Court to Take Notice of Exhibits filed in the 2003 case, Graham asks the Court to incorporate into the present case a motion in limine and some exhibits filed in the 2003 case because they have already been filed once. Counsel does not refer to the

docket number of the pleadings he desires the Court to consider. The Court understands and appreciates counsel's desire to reduce the volume of the present file and to reduce copying costs. The electronic system of filing documents, however, should allow counsel to easily file the documents in the present case without an inordinate amount of time or expense. Re-filing of any motions that counsel desires the Court to consider in the present case will be more efficient than having the Court sort through the large volume of materials filed in the 2003 case in order to locate the specific information referred to by counsel, enabling the Court to spend more time on the substantive aspects of the case. Accordingly,

IT IS ORDERED:

1. That Defendant Graham's Motion to the Court to Take Notice of Exhibits Filed in CR 03-50020, doc. 112, is denied.

2. That all motions and other pleadings the parties want the Court to consider in this case shall be filed in this case.

Dated this 2nd day of April, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: DEPUTY

FILED
APR 0 2 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079-02
Plaintiff,	*	
vs.	*	
	*	ORDER
JOHN GRAHAM, a/k/a John Boy Patton; and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

Pending before the Court is the Government's Motion to Seal Exhibit 3 to Memorandum Opposing Defendant Graham's Motion in Limine re: Statements to Medicine Man, Doc. 209, and after consideration of the Motion, together with the file,

IT IS ORDERED:

1. That Government's Motion to Seal Exhibit 3 to Memorandum Opposing Defendant Graham's Motion in Limine re: Statements to Medicine Man, Doc. 209, is granted.

2. That the Government's Exhibit 3 to Memorandum Opposing Defendant Graham's Motion in Limine re: Statements to Medicine Man, shall be filed under seal until further Order of the Court.

Dated this 2nd day of April, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST;
JOSEPH HAAS, CLERK

BY: Jackie Vosendiemer
DEPUTY

FILED
APR 0 2 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079-01
Plaintiff,	*	
vs.	*	ORDER
JOHN GRAHAM, a/k/a John Boy Patton; and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

Pending before the Court is Defendant Graham's Motion to Seal, Doc. 211, requesting the Court to seal Defendant Graham's *Ex Parte* Motion for Issuance of Subpoena Duces Tecum, the Court's Order relating to that Motion, and the return of service be placed under seal, and after consideration of the motion, together with the file in this matter,

IT IS ORDERED:

1. That Defendant Graham's Motion to Seal, Doc. 211, is granted

2. That Defendant Graham's *Ex Parte* Motion for Issuance of Subpoena Duces Tecum, the Order Granting the Subpoena Duces Tecum, and the Subpoena and return of service, shall be sealed until further Order of this Court.

Dated this 2nd day of April, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: Jackie Nesenkeimer
DEPUTY

FILED
APR 02 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079-01
Plaintiff,	*	
vs.	*	
	*	ORDER
JOHN GRAHAM, a/k/a John Boy Patton; and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

Pending before the Court is Defendant Graham's Motion to Seal, Doc. 195, requesting the Court to seal Defendant Graham's *Ex Parte* Motion for Issuance of Trial Subpoenas, and after consideration of the motion, together with the file in this matter,

IT IS ORDERED:

1. That Defendant Graham's Motion to Seal, Doc. 195, is granted

2. That Defendant Graham's *Ex Parte* Motion for Issuance of Trial Subpoenas, the Order Granting Trial Subpoenas, and the Subpoenas, shall be sealed until further Order of this Court.

Dated this 2nd day of April, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: _____
DEPUTY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
APR 0 2 2009
CLERK

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.	Case No. 08-50079 MOTION TO SEAL EX PARTE AFFIDAVIT AND APPLICATION FOR AN ORDER FOR THE ISSUANCE OF SUBPOENAS

NOW COMES Defendant Richard Marshall, by and through his attorney, Dana L. Hanna, and hereby moves the Court to file the attached Ex Parte Affidavit and Application for an Order for the Issuance of Subpoenas under seal.

Counsel for Defendant Marshall represents that there are good reasons for sealing this document: it is an ex parte application for subpoenas, filed pursuant to Rule 17 of the Federal Rules of Criminal Procedure.

WHEREFORE Defendant Marshall moves the Court to file the attached Affidavit and Application for an Order for the Issuance of Subpoenas under seal.

Dated this 2nd day of April, 2009.

RICHARD MARSHALL, Defendant

BY: Dana L. Hanna

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080, Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

FILED
APR 0 3 2009

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079-01

UNITED STATES' MOTION TO SEAL EXHIBITS 1 THROUGH 3 OF THE MEMORANDUM OPPOSING DEFENDANT MARSHALL'S MOTION TO COMPEL DISCLOSURE OF GIGLIO AND BRADY IMPEACHMENT MATERIAL

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully prays the Court to issue an Order sealing Exhibits 1, 2, and 3 to its Memorandum Opposing Defendant Marshall's Motion to Compel Disclosure of Giglio and Brady Impeachment Material in the above-captioned matter, and as grounds therefore states that said exhibits contain correspondence of counsel and sensitive discovery materials in relation to potential witnesses.

Dated this 3 day of April, 2009.

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on the 3rd day of April, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

x U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Facsimile at
☐ Federal Express
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Marty J. Jackley
United States Attorney

FILED
APR 0 3 2009

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079-01

UNITED STATES' MOTION FOR *IN CAMERA* REVIEW

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully submits its Motion for In Camera Review.

The United States submits a copy of Exhibit 4 to the United States' Memorandum Opposing Defendant Marshall's Motion to Compel Disclosure of Giglio and Brady Impeachment Material for *in camera* review in that said information is of confidential nature and not subject to disclosure under Rule 16 or as impeachment evidence under Fed. R. Crim. P. 609.

Dated this 3 day of April, 2009.

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on the 3rd day of April, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

x U.S. Mail, postage prepaid
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☐ Federal Express
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Marty J. Jackley
United States Attorney

FILED
APR 06 2009
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE 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 Defendant.	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION TO SUPPLEMENT RECORD

Defendant John Graham moves this Court to allow him to supplement his previously filed Motion in Limine Regarding Statements to Medicine Man (File Doc. 105) Specifically, Mr. Graham asks that the Court consider Exhibits A-E, filed under seal, when addressing this motion. Exhibits A-E were previously filed in United States v. Fritz Arlo Looking Cloud, et al., CR #03-50020 and are now being re-filed in the above-captioned matter pursuant to this Court's Order Regarding Pretrial Motions, Docket No. 223.

Dated April 3, 2009

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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Dated April 3, 2009

/s/ John R. Murphy
John R. Murphy

FILED
APR 06 2009
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	CRIM. NO. 08-50079-01
vs.	DEFENDANT GRAHAM'S MOTION TO SEAL
JOHN GRAHAM, a/k/a JOHN BOY PATTON and VINE RICHARD MARSHALL, a/k/a) RICHARD VINE MARSHALL, a/k/a) DICK MARSHALL. Defendants.	

Defendant, John Graham, through his attorney, John R. Murphy, moves this Court for its Order sealing Exhibits A-E related to Defendant Graham's Motion in Limine Regarding Statements to Medicine Man (Court Doc. 105). This motion is made for the reason that the exhibits consist of documents provided to the defense in discovery and should not be made available to the public.

Dated April 3, 2009.

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

MARTY J. JACKLEY	☒	U.S. Mail, postage prepaid
	☐	Hand Delivery
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	☐	Electronic Case Filing
ROBERT A. MANDEL	☒	U.S. Mail, postage prepaid
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DANA HANNA	☒	U.S. Mail, postage prepaid
	☐	Hand Delivery
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Dated April 3, 2009.

John R. Murphy

FILED
APR 0 6 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

MOTION TO SEAL EXHIBIT E TO UNITED STATES' REPLY TO DEFENDANT MARSHALL'S OPPOSITION TO UNITED STATES' NOTICE OF *RES GESTAE* EVIDENCE, OR IN THE ALTERNATIVE, RULE 404(b) RE: MONTILEAUX INCIDENT

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant US Attorney Robert A. Mandel, and respectfully prays the Court to issue an Order sealing Exhibit E to its Reply to Defendant Marshall's Opposition to United States' Notice of *Res Gestae* Evidence, or in the Alternative, Rule 404(b) Re: Montileaux Incident in the above-captioned matter, and as grounds therefor states as follows:

Exhibit E should be sealed to protect the witnesses contained within the statement.

WHEREFORE, the United States prays that this Court seal Exhibit E to its Reply to Defendant Marshall's Opposition to United States' Notice of *Res Gestae* Evidence, or in the Alternative, Rule 404(b) Re: Montileaux Incident.

Dated this 6th day of April 2009.

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on April 6, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

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Marty J. Jackley

FILED
APR 06 2009

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	
	*	ORDER
JOHN GRAHAM, a/k/a John Boy Patton; and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

Upon Motion of Defendant John Graham and good cause having been shown, it is hereby

ORDERED that Defendant John Graham's Motion to Seal (Doc. 246) is GRANTED and Exhibits A through E attached to his Motion to Supplement Record (Doc. 245) shall be filed under seal. It is further

ORDERED that Defendant John Graham's Motion to Supplement Record (Doc. 245) is GRANTED.

Dated this 6th day of April, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: Jackie Weinheimer
DEPUTY

FILED
APR 03 2009

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079-01

UNITED STATES' MEMORANDUM OPPOSING DEFENDANT MARSHALL'S MOTION TO COMPEL DISCLOSURE OF GIGLIO AND BRADY IMPEACHMENT MATERIAL

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully files its Memorandum Opposing Defendant Marshall's Motion to Compel Disclosure of Giglio and Brady Impeachment Material.

The gravamen of Defendant Marshall's discovery requests that are forming the subject of this Motion were made on November 24, 2008 (Exh. 1) and responded to by the United States on December 22, 2008 (Exh. 2).[1]

[1]These Defendants have collectively made approaching 100 specific discovery requests commonly repetitive in nature, duplicative and seeking matters that have already been disclosed. See generally, United States' Memorandum in Opposition to Defendant Marshall's Motion for Continuance, DE 158; United States' Response to Defendant Graham's Motion to Compel

As demonstrated herein, Defendant Marshall's discovery requests genuinely lack factual credibility and a supporting record. The United States has received no discovery from either Defendants Marshall or Graham pursuant to their obligations under Fed. R. Crim. P. 16(b) and 26.2, including any discovery that would provide further support or a factual basis for such representations. The United States further specifically responds to the three discovery matters set forth in Defendant Marshall's Motion as follows:

1. Arlo Looking Cloud Agreements

Defendant Marshall's misconceptions are borne out by Exhibit 1 and the attached correspondence of the United States Attorney Marty J. Jackley dated August 8, 2008. Accordingly, Defendant Marshall's request to compel should be denied.

2. Arlo Looking Cloud Discovery

The United States has disclosed all Rule 16 and Brady v. Maryland, 373 U.S. 83 (1963) material to these Defendants. This includes Defendant Looking Cloud's redacted presentence report. See Exh. 3. With respect to any Bureau of Prisons Central Inmate files, Defendant Marshall has failed to demonstrate a factual basis to meet his obligation to support this request, nor has he submitted any legal precedent requiring such disclosures.

Discovery (CR03-50020, DE 254, ¶2; Marshall discovery request of November 11, 2008; November 24, 2008; December 18, 2008, and March 26, 2009).

3. Law Enforcement Officers

With respect to law enforcement officers, including Robert Ecoffey, it is the United States' position that all discoverable Giglio v. United States, 405 U.S. 150 (1972) and other proper impeachment evidence has been disclosed.

Defendant Marshall specifically alleges with respect to a former United States Marshal that "a female cooperating informant, who was given the code-name 'Maverick', and while he was supervising the investigation of the Aquash murder, he entered into an intimate and professionally improper and unethical personal relationship with that informant." See DE 216, ¶6. Based upon the inaccuracy and the nature of this representation, the United States believes it appropriate to require Defendant Marshall to file a supporting record with the Court forming the basis for his representation. Furthermore, Defendant Marshall has presented no Rule 16(b) or Rule 26.2, discovery to the United States regarding or supporting such a claim.

With respect to criminal records of potential witnesses, the United States has and will agree to the longstanding practice in this District to provide the defense with any criminal records of its testifying witnesses that may be properly used for impeachment purposes under the provisions of Fed. R. Crim. 609. In regard to the specific representations made by Defendant Marshall regarding a cooperating witness, the United States is submitting Exhibit 4 for

an *in camera* review to demonstrate there exists no discoverable impeachment evidence under Fed. R. Crim. P. 609.

Accordingly, the United States respectfully requests that all of Defendant Marshall's requests be denied based upon his failure to demonstrate a factual or legal basis in support thereof.

Dated and filed this 3 day of April, 2009.

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on the 3rd day of April, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

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☒ Electronic Case Filing

Marty J. Jackley
United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
APR 06 2009
CLERK

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	
	*	ORDER
JOHN GRAHAM, a/k/a John Boy Patton; and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

Upon Motion of the United States and good cause having been shown, it is hereby

ORDERED that the United States' Motion to Seal (Doc. 243) Exhibits 1 through 3 of the Memorandum Opposing Defendant Marshall's Motion to Compel Disclosure of *Giglio* and *Brady* Impeachment Material (Doc. 243) is GRANTED and Exhibits 1 through 3 shall be filed under seal.

Dated this 6th day of April, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: DEPUTY

FILED
APR 06 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

ORDER TO SEAL EXHIBIT E TO UNITED STATES' REPLY TO DEFENDANT MARSHALL'S OPPOSITION TO UNITED STATES' NOTICE OF *RES GESTAE* EVIDENCE, OR IN THE ALTERNATIVE, RULE 404(b) RE: MONTILEAUX INCIDENT

Upon Motion of the United States and good cause having been shown, it is hereby

ORDERED, that Exhibit E to its Reply to Defendant Marshall's Opposition to United States' Notice of *Res Gestae* Evidence, or in the Alternative, Rule 404(b) Re: Montileaux Incident in the above-entitled matter be sealed until it is ordered unsealed.

Dated this 6th day of April, 2009.

BY THE COURT:

Lawrence L. Piersol
US District Court Judge

FILED
APR 0 6 2009

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079-01

UNITED STATES' REPLY TO DEFENDANT MARSHALL'S OPPOSITION TO UNITED STATES' NOTICE OF *RES GESTAE* EVIDENCE, OR IN THE ALTERNATIVE, RULE 404(b) RE: MONTILEAUX INCIDENT

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully files its Reply to Defendant Marshall's Opposition to United States' Notice of *Res Gestae* or in the alternative, Rule 404(b) Evidence Re: Montileaux Incident.

I. INTRODUCTION

On March 17, 2009, the United States provided its Notice of *Res Gestae* and Rule 404(b) Evidence Regarding the Montileaux Incident. On March 20, 2009, Defendant Marshall filed his Response in Opposition to the United States' Notice.

The United States' Notice identified the following categories of evidence concerning the Montileaux incident admissible in relation to the criminal venture to murder Annie Mae Aquash: (1) the fact that a .32-caliber revolver was involved in the Montileaux matter; (2) the fact that Defendant Marshall had a pending murder charge in the Montileaux matter on December 12, 1975; and (3) Defendant Marshall's conviction for the premeditated murder of Montileaux. As further demonstrated herein, all three areas of evidence are admissible as *res gestae*, or pursuant to Fed. R. Evid. 404(b).

II. FACTUAL BACKGROUND

As presented in its Notice, the United States anticipates the evidence at trial will generally demonstrate that on or about the early morning hours of December 12, 1975, Defendant John Graham, Arlo Looking Cloud, and Theda Clarke brought Annie Mae Aquash to Defendant Marshall's residence in Allen, South Dakota, house #363. See Graham 04854; DE 95; Exh. 1-4 (Defendant Marshall's statements). Aquash was being held against her will. See Graham 04854; DE 95, Exh. 2 (Defendant Marshall's statement). Defendant Marshall took Defendant Graham, Looking Cloud, and Clarke into his bedroom in which he provided consultation, including the exchange of a handwritten note presented by Clarke asking if he could take care of this "baggage." See Graham 04886-04888. See DE 95, Exh. 3, 4 (Defendant Marshall's statements). Thereafter, Defendant Marshall provided Clarke, Looking Cloud, and Defendant

Graham with a .32-caliber revolver and shells to further the criminal venture. See Graham 04886-04888; DE 95, Exh. 3 (Defendant Marshall's statement).

III. DISCUSSION

The gravamen of Defendant Marshall's response is limited to the .32-caliber revolver and the neck area of victim Montileaux's injury. Significantly, the *intrinsic evidence* concerning "the existence of Defendant Marshall's pending murder charge in the Montileaux matter on December 12, 1975," has not been controverted. Indeed, the existence of Defendant Marshall's pending murder charge in Montileaux was material to several aiders and abettors in developing and carrying out the plan and scheme to murder Aquash. It further affected the role Defendant Marshall ultimately played on December 12, 1975, since it prompted him to not serve as a triggerman in the murder of Aquash.

Accordingly, the existence of Defendant Marshall's pending murder charge in the Montileaux matter on December 12, 1975, and its effect on the criminal venture to murder Aquash is intrinsic and admissible in the prosecution of both Defendant Marshall and Graham. See United States v. Swinton, 75 F.3d 374, 378 (8th Cir. 1996) ("[W]here evidence of other crimes is so blended or connected with the ones on trial as that proof of one incidently involves the others; or explains the circumstances; or tends logically to prove any element of the crime charged, it is admissible as an integral part of the immediate context of the crime charged"). The remainder of this response will

accordingly focus on the Montileaux conviction and H&R .32 caliber revolver evidence.

Defendant Marshall's attempt to draw inconsistencies in relation to the possible whereabouts of the Montileaux H&R .32-caliber revolver on December 12, 1975, fails to provide a legal justification for exclusion. First, despite Defendant Marshall's claims, on March 1, 1975, the evidence demonstrates that Defendant Marshall was as a matter of law in possession of an H&R .32-caliber revolver and ammunition. Following the high-speed chase that ensued after the Montileaux shooting, the officers seized several weapons from the vehicle in which Defendant Marshall was a passenger. See Graham 04962-65; Exh. A, Vol. V, p.29. Specifically, the H&R .32 revolver was found under the *right, front seat* of this vehicle. Exh. A, Vol. V, p.29. At the conclusion of the high-speed chase, Defendant Marshall exited from the *right side* of this vehicle. Exh. A, Vol. V, p.25. Under federal law, knowing possession can be actual or constructive, as well as sole or joint. See United States v. Piwowar, 492 F.3d 953, 955 (8th Cir. 2007) (United States v. Guenther, 470 F.3d 745, 747 (8th Cir. 2006)). Constructive possession of a firearm is established if the possessor had control over the place where the firearm was located, or control, ownership, or dominion over the firearm itself. Id.

Second, the Montileaux evidence receipt of June 1, 1975, clearly provides that the 1968 white Ford convertible was released, along with the "entire

contents that were seized at the time of the arrest of Russell Means and Richard Marshall." See Graham 04964, Exh. C (evidence receipt). While the .22-caliber revolver used by Defendant Marshall to shoot Montileaux was submitted to the FBI laboratory for testing, there is no record that custody of the H&R .32 revolver was transferred for any testing. See Exh. D, Report of Federal Bureau of Investigation dated March 27, 1975. There is no further known record after June 1, 1975, of the location of this .32 caliber weapon in the sheriff's investigation file. The South Dakota Division of Criminal Investigation's [DCI] lab has no evidence that the H&R .32 revolver was ever presented to DCI for reference collection, destruction, or forfeiture. See generally, SDCL § 23A-37-13. There is similarly no known record of this firearm with the Bureau of Alcohol, Tobacco, and Firearms. No H&R .32-caliber revolver was received into evidence at the actual Montileaux trial.

Furthermore, there exists a separate witness' account of Marshall's possession of a gun shortly after his pretrial release on Montileaux. See Exh. E, witness statement dated March 22, 1976. Specifically, the witness stated: "Dick stood up and we went out and came back and he had a gun with him it was a black one, and he told Webster, 'You know' he said, 'this girl here knows alot about things that I have done, and if some day she decides to turn against me, and everybody is going to know what kind of guy that I am and the things that I did.'" Id. at p.4.

In any event, the admissibility of the Montileaux H&R .32-caliber evidence in the Aquash murder case does not require a showing by a preponderance that the weapons were the exact same. The H&R .32-caliber in Defendant Marshall's possession during the Montileaux incident was, at a minimum, similar in kind and tends to logically prove intent, knowledge, and absence of mistake or accident. See Fed. R. Evid. 404(b). The factors used to determine the admissibility of Rule 404(b) evidence are: (1) relevant to a material issue raised at trial, (2) similar in kind and close in time to the crime charged, (3) supported by sufficient evidence to support a finding by a jury that the defendant committed the other act, and (4) not have a prejudicial value that substantially outweighs its probative value. See United States v. Kern, 12 F.3d 122, 124-25 (8th Cir. 1993) (other citations omitted).

It is worthy to note that Defendant Marshall limits his focus upon the "similar in kind" factor in his Rule 404(b) analysis. As demonstrated below, all four factors are satisfied with respect to both Marshall's Montileaux conviction and possession of the Montileaux H&R .32 caliber revolver.

A. Relevant to Material Issue

The evidence regarding the H&R .32-caliber revolver is relevant and material to logically prove intent, knowledge, and absence of mistake or accident. Defendant Marshall's conviction for the murder is relevant and material to logically prove intent, knowledge, plan, scheme, and absence of

mistake or accident. See Rule 404(b). It has been the longstanding practice of the Eighth Circuit to construe Rule 404(b) as a rule of inclusion. See United States v. Kirk, 528 F.3d 1102, 1108 (8th Cir. 2008) (citations omitted).

Evidence of Defendant Marshall's prior acts in relation to the Montileaux .32-caliber revolver and the ensuing conviction is admissible based in part upon Defendant Marshall's failure to express with sufficient clarity a decision to not dispute state of mind. See United States v. Thomas, 58 F.3d 1318, 1321-22 (8th Cir. 1995) ("evidence of prior bad acts is admissible unless a defendant expresses with sufficient clarity a decision not to dispute state of mind"). This is borne out in Defendant Marshall's vast pretrial filings. With respect to his Motion to Dismiss Due to Pre-Accusatory Delay, he sets forth the claim that he could not have had firearms in his possession or in his home on the night of Aquash's murder based upon the bond conditions of the pending Montileaux murder case. See Defendant Marshall's Motion to Dismiss Due to Pre-Accusatory Delay, DE 97, p.4.

Consistent therewith, Defendant Marshall's own statements, at a minimum, place Aquash, Clarke, and "two other young guys" at his residence with him the evening in question. See Defendant Graham's Memorandum in Support of Motion for Separate Trials, DE 80, Exh. 3. See also, DE 80, Exh. 1 (statement of Defendant Marshall dated July 27, 2001, confirming Aquash's presence at his home during the time in question); DE 80, Exh. 3 (Defendant

Marshall discussing the "baggage" note, the .32-caliber weapon, and providing the response of "back in the day when you was asked to do something, somebody asks you for something, you didn't ask too many questions"); DE 80, Exh. 2 (Defendant Marshall describing Aquash as possibly being tied up and further indicating that she did not want to be there). To be sure, "'A defendant denies both knowledge and intent when he asserts the 'mere presence' defense, that he was present, but did not know the presence of illegal [activity].'" See United States v. Strong, 415 F.3d 902, 905 (8th Cir. 2005) (quoting United States v. Tomberlin, 130 F.3d 1318, 1320 (8th Cir. 1997); United States v. Hawthorne, 235 F.3d 400, 404 (8th Cir. 2000) (holding defendant's mere presence defense put his knowledge and intent at issue)).

Evidence that a defendant possessed a firearm on a previous occasion can be relevant to show knowledge and intent, irrespective of whether they are the same firearm. See generally United States v. Walker, 470 F.3d 1271, 1274 (8th Cir. 2006); United States v. Lucas, 521 F.3d 861, 865 (8th Cir. 2008) ("evidence that Lucas possessed a firearm on a previous occasion is also relevant to show knowledge and intent"); United States v. Johnson, 535 F.3d 892, 897 (separate Glock firearm evidence was relevant to defendant's knowing possession of a separate Raven Arms handgun which was at issue at trial); Strong, 415 F.3d at 905 (citing United States v. Jernigan, 341 F.3d 1273, 1281 (11th Cir. 2003) ("the case law in this and other circuits establishes clearly the

logical connection between a convicted felon's knowing possession of a firearm at one time and his knowledge that a firearm is present at a subsequent time (or, put differently, that his possession at the subsequent time is not mistaken or accidental)."). Defendant Marshall's claims and denials in relation to possession and ownership of firearms in the Aquash murder further underscores the relevance and probative value of Defendant Marshall's possession of the .32 H&R revolver during the Montileaux incident.

Despite Defendant Marshall's contentions, "When admitted to show intent, the prior acts need not be duplicates, but must be sufficiently similar to support an inference of criminal intent." See Lucas, 521 F.3d at 866 (quoting United States v. Walker, 470 F.3d 1271, 1274 (8th Cir. 2006) (other citations omitted)). Since at least at this stage in the proceedings Defendant Marshall has put knowledge and intent at issue, both the Montileaux conviction and his possession of an H&R .32-caliber firearm are admissible to prove, among others, knowledge and intent, or absence of mistake. See United States v. Lucas, 499 F.3d 769, 781 (8th Cir. 2007); United States v. Love, 419 F.3d 825, 828 (8th Cir. 2005); United States v. Foster, 344 F.3d 799, 801 (8th Cir. 2003).

B. Similar in Kind and Close in Time to the Crime Charged

The Montileaux murder is indisputably close in time to the Aquash murder, with only nine months separating the two murders. While the Eighth Circuit has generally voiced concern to uphold admissions of evidence of prior

acts occurring more than thirteen years prior to the charges, it has approved admissions of prior convictions under Rule 404(b) that were sixteen, eighteen, and twenty years apart. See generally, Walker, 470 F.3d at 1275 (citing Strong, 415 F.3d at 905).

The United States has demonstrated at a minimum, the H&R .32 caliber revolver in Marshall's possession in Montileaux was "similar in kind" to the .32 caliber revolver he possessed nine months later and provided to further the criminal venture to murder Aquash. The similarities further include the .32 caliber ammunition also in his possession in both criminal ventures.

Defendant Marshall's further claim that the Montileaux murder is not similar in kind because "the bullet was fired by an individual who was evidently standing in front of Montileaux, facing him" is misplaced. First, both the Aquash and Montileaux murders involved premeditation, a scheme and modus operandi of a victim being shot with a small caliber handgun in the head/neck regions. Both shootings involve an unarmed victim with no evidence of a struggle.

Evidence at the Montileaux trial was introduced that Montileaux's neck wound was in the front part to the right side of the mid-line. See Exh. B, Vol. IV, p.16. The bullet was found in the left base of Montileaux's neck. Id. at p.37. Furthermore, the bathroom he was shot in was only approximately 4' x 6'. Id. at p.71. As recounted by Montileaux's own words: "No, I started to

take a pee, so then he poked me in the back, I said 'hello' and was going to talk and then I saw this guy shoot me." See Exh. F, statement of Martin Montileaux dated March 5, 1975. Indeed, there exists probative and strong similarities between two premeditated murders involving the use of small revolvers on unarmed victims with no evidence of any struggle.

C. Supported by Sufficient Evidence

The Montileaux shooting is supported by sufficient evidence, including a jury convicting Defendant Marshall of premeditated murder, which was affirmed by the South Dakota Supreme Court. See State v. Marshall, 264, N.W. 2d 911 (S.D. 1978). Defendant Marshall's possession of the H&R .32-caliber revolver is well-documented with photographs and reports, as well as testimony from his trial. See Graham04962-65.

D. Probative Value of Montileaux Evidence Not Substantially Outweighed by any Prejudicial Effect

Defendant Marshall's ultimate conviction for the Montileaux matter and his possession of the H&R .32 caliber revolver has significant probative value that is not substantially outweighed by any prejudicial effect. Indeed, any unfair prejudice can be sufficiently diminished by proper limiting instruction. Lucas, 521 F.3d at 866.

IV. CONCLUSION

The United States has sufficiently demonstrated that the jury is entitled to hear the effect the Montileaux pending charge played in both the planning and scheming of the Aquash criminal venture, and the ultimate roles carried out by Defendants Marshall and Graham in the Aquash murder. The jury is further entitled to hear of Defendant Marshall's ultimate conviction for the materially similar murders only nine months apart. Both murders involved a scheme of unarmed victims being shot with small caliber handguns in the head/neck regions without any evidence of a struggle. Similarly, in light of Defendant Marshall's lack of sufficient clarity on state of mind, his possession of a .32-caliber revolver during the Montileaux matter is probative and admissible to show intent, knowledge, and absence of accident or mistake.

Dated and electronically filed this 6th day of April 2009.

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on April 6, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Facsimile at
☐ Federal Express
Electronic Case Filing

Marty J. Jackley

11906

STATE OF SOUTH DAKOTA)
)SS.
COUNTY OF PENNINGTON)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
Plaintiff,
-vs-
RICHARD MARSHALL,
Defendant.

JURY TRIAL

Volume V

12982

BEFORE: Honorable Marshall Young
Circuit Court Judge
Seventh Judicial Circuit
Pennington County Courthouse
Rapid City, South Dakota

APPEARANCES: Jack Klauck
States Attorney
Pennington County Courthouse
Rapid City, South Dakota
Representing the State of
South Dakota

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

OCT 15 1980

Clerk

Laurence Zastrow
Public Defender
519 Kansas City
Rapid City, South Dakota

-and-

John S. Connolly of
Connolly and Heffernan Ltd.
Attorneys at Law
100 McColl Building
St. Paul, Minnesota
Representing the Defendant,
Richard Marshall

Exhibit A

Q Where were you at that time?
A I was down in the ditch, immediately west of the vehicle and to the south of the patrol car.
Q Did the occupants exit the vehicle?
A Yes, they did.
Q Can you tell me how many people exited?
A Yes, there were eight.
Q Were these men and women?
A Yes, sir.
Q Do you know how many men there were?
A Three men, five young women.
Q Were you able to identify any of the men?
A Yes, sir.
Q Who were they?
A The men were Richard Marshall, Russell Means and David Clifford.
Q Were you able to determine -- strike that.
Was this a two-door or four-door vehicle?
A Two-door.
Q Were you able to determine from which door the Defendant exited?
A Yes, sir.
Q Which door?
A The right side.
Q And Russell Means?

A After recording serial numbers, et cetera, I turned all these weapons over to Deputy Sheriff Duane Plucker.

Q State's Exhibit No. 8, would you examine it and can you identify that?

A Yes, I can.

Q Would you do so?

A This is the 32 revolver that I found under the right front seat of this vehicle.

Q After you examined that weapon, what did you do with it?

A I also turned this over to Deputy Sheriff Plucker.

Q That weapon was fully loaded?

A Yes, sir.

Q State's Exhibit 9, would you identify that for me, if you can?

A Yes, sir. This is a 357 Ruger revolver which I found on the front seat of this vehicle.

Q Did you also turn that weapon over to Deputy Sheriff Plucker?

A Yes, I did.

Q Was that fully loaded?

A Yes, sir.

Q And State's Exhibit 10?

A Yes, this is a 30 caliber Carbine I found on the rear seat of this vehicle. I turned it over to Deputy Sheriff Plucker, also.

11906

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF PENNINGTON)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

-vs-

RICHARD MARSHALL,

Defendant.

JURY TRIAL

Volume IV

12982

BEFORE: Honorable Marshall Young
Circuit Court Judge
Seventh Judicial Circuit
Pennington County Courthouse
Rapid City, South Dakota

APPEARANCES:

Jack Klauck
States Attorney
Pennington County Courthouse
Rapid City, South Dakota
Representing the State of South Dakota

Laurence Zastrow
Public Defender
519 Kansas City
Rapid City, South Dakota

-and-

John S. Connolly of
Connolly and Heffernan Ltd.
Attorneys at Law
100 McColl Building
St. Paul, Minnesota
Representing the Defendant, Richard Marshall

SUPREME COURT
STATE OF SOUTH DAKOTA
F I L E D

OCT 15 1980

Clerk

Exhibit B

Q All right. I want to direct your attention to the early morning hours of March 2nd, 1975, and ask if you had an occasion to examine an Indian man at that time?

A I did.

Q And where did this examination take place?

A The emergency room, St. John's Hospital, or Rapid City Regional East, as it's known now.

Q Would you describe this individual as you observed him that morning?

A Yes. The patient was in the emergency room. He was responsive, in the sense that he was able to verbalize and follow commands. He had a wound in his neck, in the front part of his neck, to the right side of the midline. There was very little bleeding from the wound. The patient spoke in a whisper, in a very hoarse voice. He was unable to move his lower extremities at all and his upper extremities only in parts. He had loss of sensation corresponding with the injury to the spinal cord, which he'd sustained, resulting in loss of function from the standpoint of movement and sensation below the level of the spinal cord injury.

Q All right. And what, if any, remedial measures were taken, Doctor?

A There were no remedial measures to be taken. The patient had sustained a complete injury to the cervical

that.

MR. CONNOLLY: There's no question.

THE COURT: Mr. Klauck, you should proceed with your next question.

BY MR. KLAUCK:

Q Doctor, did you remove any missiles from the body of the deceased?

A I did.

Q Where did you find this missile?

A I found a metallic object that was in the left base of the neck.

MR. KLAUCK: Your Honor, I have no further questions, other than I'd like to recall him if necessary.

THE COURT: Mr. Klauck, as I understand it, you've completed your direct examination with the exception of the identification of an exhibit?

MR. KLAUCK: That's correct, Your Honor.

THE COURT: You may proceed.

MR. KLAUCK: Excuse me, Your Honor. I have one other question.

THE COURT: Proceed.

BY MR. KLAUCK:

Q What did he do?

A He went to the bathroom and looked at Martin and spoke to him. At that time, he had come conscious.

Q Now, when Don Phillips spoke to Martin in the bathroom, were you present there in the bathroom?

A I was. I wasn't in the bathroom, because that's awful small, you know.

Q Yes. How big is that bathroom?

A Oh, gee, I forget now. I measured that, too. It's small. It seems to me it's about four by six, something like that. I could be wrong on that. I know it's small. It's big enough for its purpose, you know.

Q Now, who else was in the bathroom when you were standing there and Don Phillips was there?

A Don Phillips leaned down and questioned Martin and Twyla -- she was there, too. All the time after everybody left, she was administering or trying to administer first aid to Martin, you know -- covering him with blankets, put things under his head.

Q Did you hear what Don Phillips said to Martin?

MR. CONNOLLY: Object, Your Honor. I understand Mr. Phillips is under subpoena. It's hearsay. Anything Phillips said to Martin would be hearsay. I understand he'll be available to testify.

THE COURT: Objection sustained.

RECEIPT Date 1 June 19 75 4181

Received From Clerk of Sheriffs Dept. 745-0165-2079

~~Address~~ One 1968 white Ford Convertible, Serial

Red Cotton Sheets that were seized as Evidence of

For Arrest of Russell Nelms & Robert Marshall.

ACCOUNT			HOW PAID		
AMT. OF ACCOUNT			CASH		
AMT. PAID			CHECK		
BALANCE DUE			MONEY ORDER		

By Rosalie Jones

BK608 Rediform

Exhibit C

7-1a (Rev. 11-26-74)

REPORT
of the

FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C. 20535

To: Sheriff of Pennington County
Rapid City, South Dakota 57701

March 27, 1975
AIRMAIL

Attention: Mr. Duane Plucker
Deputy Sheriff

FBI FILE NO. 95-199535

LAB. NO. PC-L6649 MT

YOUR NO.

Re: RUSSELL MEANS AND RICHARD MARSHALL, SUSPECTS;
MARTIN MONTILEAUX, VICTIM;
MURDER

Examination requested by: Addressee

Reference: Letter 3/10/75

Examination requested: Firearms - Fingerprint

Specimens:

Q1 Bullet
Q2 Cartridge case

K1 .22 caliber German revolver, Serial Number 151899

Result of examination:

Specimen Q1 is a .22 Long Rifle caliber lead bullet. Due to extensive surface mutilation, it was not possible to determine the general rifling characteristics of the weapon from which it was fired. The only area on the Q1 bullet which bears sufficient individual microscopic marks of value for comparison purposes is referred to as the "sheared" area which is caused by cylinder misalignment. Although test bullets obtained from the K1 revolver exhibit

This examination has been made with the understanding that the evidence is connected with an official investigation of a criminal matter and that the Laboratory report will be used for official purposes only, related to the investigation or a subsequent criminal prosecution. Authorization cannot be granted for the use of the Laboratory report in connection with a civil proceeding.

Clarence M. Kelley
Director

(Over)

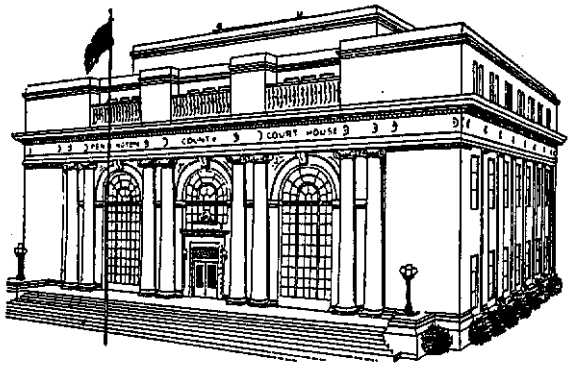
Exhibit D

shearing due to cylinder misalignment, no conclusion could be reached as to whether or not Q1 had been fired from K1. It should be noted that consecutive test bullets from K1 could not be identified with each other due to the changing nature of the individual microscopic marks left in the "sheared" area.

The Q2 cartridge case was identified as having been fired in the K1 revolver.

You are being separately advised regarding the results of the requested latent fingerprint examination.

Specimens Q1, Q2 and K1 are being returned to your office under separate cover by registered mail.



Pennington County

SHERIFF'S DEPARTMENT

RAPID CITY, SOUTH DAKOTA 57701

March 10, 1975

Federal Bureau of Investigation
U. S. Department of Justice
FBI Laboratory
Washington, DC 20537

Re: Suspect: Russell Means and Richard Marshall
Victim: Martin Montileaux
Offense: Murder

Gentlemen:

The evidence described below is being forwarded under separate cover for examination by the FBI Laboratory.

This evidence is being submitted in connection with an official investigation of a criminal matter. It was not, nor will it be, subjected to the same type of technical examination by other experts.

Sincerely,

MEL LARSON, SHERIFF
Pennington County Courthouse
Rapid City, SD 57701

Duane Plucker, Deputy Sheriff

Description of evidence:

1. Item identified as A-4, being a German made six-shot revolver, serial number 151399;
2. Item identified as A-9, one (1) spent round;
3. Item identified as A-10, that being projectile removed from the deceased, one Martin Montileaux.

Examination requested:

Request ballistics test of evidence marked A-4 and A-10 to determine if projectile was from evidence marked A-4;

Request firing pin indentation mark on the one spent round on evidence marked A-9 to be checked in comparison with evidence marked A-4;

Request that Item identified as A-4 to be printed and compared with the FBI file number latent prints of Russell Means, FBI No. 877277C and Richard Marshall, FBI No. 114289N9.

Statement of Facts:

On the early morning hours of March 2, 1975, a Martin Montileaux was feloniously shot in the neck. This office is presently holding two suspects, number 1, Russell Means, number 2, Richard Marshall. On March 7, 1975, one Martin Montileaux expired from the above named gunshot wound in the neck. This office is presently investigating murder charges against both the above named subjects.

Enclosures (3)
Registered Mail

DEP/cjm

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

March 14, 1975

AIRMAIL

In Reply, Please Refer to
File No. PC-L6649 MT

To: Sheriff of Pennington County
Attention: Mr. Duane Plucker
Deputy Sheriff
Rapid City, South Dakota 57701

Re: RUSSELL MEANS AND RICHARD MARSHALL,
SUSPECTS;
MARTIN MONTILEAUX, VICTIM;
MURDER

From: Director, Federal Bureau of Investigation

The FBI Laboratory has received the evidence which you sent for examination in connection with the above-entitled case. A Laboratory report will be sent to you after the examination has been completed.

The examination is being made with the understanding that the evidence is connected with an official investigation of a criminal matter and that the Laboratory report will be used for official purposes only, related to the investigation or a subsequent criminal prosecution. Authorization cannot be granted for the use of the Laboratory report in connection with a civil proceeding.

If any developments occur in this case such as dismissal of charges or guilty pleas which would eliminate the necessity for conducting the requested examinations, please advise the FBI Laboratory immediately.

1-336 (Rev. 7-16-73)

FEDERAL BUREAU OF INVESTIGATION

Washington, D. C. 20537

REPORT

of the

IDENTIFICATION DIVISION

LATENT FINGERPRINT SECTION

YOUR FILE NO.
FBI FILE NO.
LATENT CASE NO. B-7667

March 26, 1975

AIRMAIL

TO: Mr. Melvin Larson
Sheriff of Pennington County
Rapid City, South Dakota 57701

Attention: Mr. Duane Plucker
Deputy Sheriff

RE: RUSSELL MEANS;
RICHARD MARSHALL;
MARTIN MONTILEAUX - VICTIM
PENNINGTON COUNTY, SOUTH DAKOTA
MURDER

REFERENCE: Letter March 10, 1975
EXAMINATION REQUESTED BY: Addressee
SPECIMENS: .22 caliber German revolver, serial #151899, K1

No latent prints of value for identification purposes appear or were developed on the specimen.

The results of the laboratory examinations and the disposition of the items submitted in connection with this case, are being set forth in a separate report.

Clarence M. Kelley, Director

THIS REPORT IS FURNISHED FOR OFFICIAL USE ONLY

STATEMENT FROM MARTIN MONTILEAUX

Date typed: 3/11/75
By: Carolyn McClain

TAPED: 3/5/75, Approximately 11:20 A.M.

Re: Shooting at the Scenic Bar
Date: 3/2/75
Victim: Martin Montileaux

Don Phillips, Deputy Sheriff

Q. Martin, can you talk so we can hear in this thing?

A. What is this for, what is this for?

Q. This is just for my records so that each time that I talk to you, as you improve a little bit I just keep a record of it so that I don't forget cause I don't want to keep coming up here and asking the same questions all the time, is this okay with you?

A. I ain't going to sign anything.

Q. You're what?

A. Ain't going to sign no papers.

Q. You're not going to say no more?

A. I ain't going to sign them.

Q. No, you don't have to sign any papers, and we'll wait until you're out of the hospital or whatever before we ever ask you to sign anything or testify in court, is that okay?

A. Yeah, yeah.

Q. Now, last time I was up here, you were telling me that you don't, you didn't know the fellow that shot you?

A. No.

Q. Had you ever seen him before?

A. No, I never did.

Q. Okay, and you said Russell was, had come in the bathroom with the other guy?

A. They were in there already.

Q. They what?

A. They were in there.

Q. Who wasn't in there?

A. They were in there.

Q. They were just in there?

A. Yeah, both of them.

Exhibit F

Q. Did Russell say anything to you?

A. No, I started to take a pee, so then he poked me in the back, I said hello and was going to talk and then I saw this guy shoot me.

Q. Well did, did Russell hold you or say anything?

A. No, huh-uh, huh-uh, he didn't say othing.

Q. He didn't.

A. Huh-uh.

Q. Did the other guy say anything?

A. I don't know, he just stood there, I was drunk then, too.

Q. Uh-huh, but...

A. They were both drunk.

Q. They were drunk?

A. Yeah, everybody was drunk.

Q. Okay, but, they didnt' say any, did either one of them say any words at all?

A. No they just, just hello there, I said where are you guys going, just started conversation and started talking and then that's when that guy shot me.

Q. And Russell didn't say anything to you?

A. Oh, yeah, just, we didn't, we didn't, we didn't even hardly get to talk.

Q. And you, did you say anything to Russell?

A. Yeah, just hello.

Q. What did you say, I didn't hear that.

A. I said hello.

Q. Just hello?

A. Yeah, I said where are you guys going.

Q. Uh-huh, did you, did you know Russell quite well or.

A. No, this is the first time that I talked to him

Q. Okay.

WITNESSES: _____ Martin Montileaux

cjm

_____ Don Phillips, Deputy Sheriff

FILED
APR 07 2009
CLERK

UNITED STATES DISTRICT COURT
FOR THE 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.

Case No. 08-50079

MOTION TO SEAL EX PARTE MOTION FOR THE ISSUANCE OF SUBPOENA

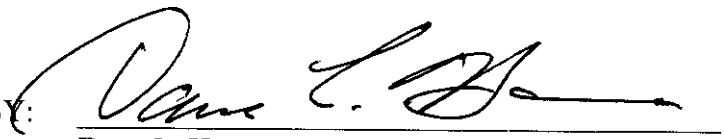
NOW COMES Defendant Richard Marshall, by and through his attorney, Dana L. Hanna, and hereby moves the Court to file the attached Motion for an Order for the Issuance of the Subpoena under seal.

Counsel for Defendant Richard Marshall represents that there are good reasons for sealing this document: it is an ex parte application for a subpoena, filed pursuant to Rule 17 of the Federal Rules of Criminal Procedure.

WHEREFORE Defendant Marshall moves the Court to file the attached Motion for an Order for the Issuance of Subpoena under seal.

Dated this 6th day of April, 2009.

RICHARD VINE MARSHALL, Defendant

BY: 

Dana L. Hanna
Attorney for Defendant Marshal
PO Box 3080, Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

UNITED STATES DISTRICT COURT
THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL, a.k.a. RICHARD VINE MARSHALL, a.k.a. DICK MARSHALL, Defendant.	Case No. CR 08-50079 DEFENDANT MARSHALL'S APPLICATION FOR PRETRIAL RELEASE ON CONDITIONS

NOW COMES the Defendant Richard Marshall, by and through his attorney Dana L. Hanna, and pursuant to the Bail Reform Act, 18 USC § 3142, hereby moves the Court to order that the Defendant be released from custody pending trial, subject to conditions.

On August 29, 2008, the Defendant appeared before the Court with undersigned counsel for the first time and did not oppose the government's motion for detention because defense counsel had received no discovery and was not then prepared to address the facts of the case. The court, without objection from Defendant, entered an order of detention.

Defendant Marshall is now prepared to address the issue of pretrial release in a hearing. He respectfully submits that the evidence and information that will be submitted in a hearing will show there are conditions which the Court can impose that will reasonably assure the safety of the community and the appearance of the Defendant as required, and that Defendant Marshall is entitled to pretrial release on conditions, pursuant to the Bail Reform Act.

LEGAL ARGUMENT

I.

THE BAIL REFORM ACT FAVORS PRETRIAL RELEASE.

The Bail Reform Act provides that a defendant shall be released from pre-trial custody, either on his personal recognizance or an unsecured appearance bond, or on conditions, unless "the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any person and the community". 18 USC § 3142 (e).

In this case, pursuant to the Bail Reform Act, there is a presumption in favor of pretrial release. If the government opposes release, the burden is on the government to either prove that the Defendant, if released, poses a danger to a person or to the community at large or that he is unlikely to appear in court when ordered to do so. The government's burden of proof is one of clear and convincing evidence to prove dangerousness; to prove probability of flight risk, the standard is preponderance of the evidence. United States v. Orta, 760 F.2d 887 (8th Cir. 1985) (en banc).

It was the intent of Congress, in enacting the Bail Reform Act, that "[p]retrial detention is to be the exception rather than the rule," and therefore "[t]he statute favors release over detention for the majority of accused persons." United States v. Holloway, 781 F.2d 124, 125 (8th Cir. 1986)(citing S. Rep. No. 225, 98th Cong., 1st Sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182.) The passage of the pretrial detention provision of the 1984 Act did not signal a congressional intent to incarcerate wholesale the category of accused persons awaiting trial. Rather, Congress was demonstrating its concern about 'a small but identifiable group of

particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons.' The legislative history stresses that '[t]he decision to provide for pretrial detention is in no way a derogation of the importance of the defendant's interest in remaining at liberty prior to trial. *It is anticipated that* [pretrial release] *will continue to be appropriate for the majority of Federal defendants.*' United States v. Orta, 760 F.2d 887, (8th Cir. 1985) (*en banc*) (citations and ellipses omitted; emphasis and brackets in original) (citing Senate Report at 6-7).

1.

Because the Statutory Presumptions in Favor of Detention Are Not Applicable in This Case, There is a Statutory Presumption in Favor of Pretrial Release.

Under specific and limited circumstances, the Bail Reform Act creates two rebuttable presumptions whereby it is presumed that no conditions can reasonably assure the safety of the community or the appearance of the defendant. The statute puts the burden of producing evidence to overcome the presumption on the defendant, although the burden of proof remains on the government. Neither statutory presumption in favor of detention is applicable in this case.

The previous violator presumption in § 3142 (e) creates a rebuttable presumption in favor of detention if a defendant has been convicted of a federal offense listed in Section 3142(f)(1), if that prior offense was committed while defendant was on release pending trial. That presumption does not apply here for two reasons: first, Defendant's prior offense, which occurred on March 1, 1975, was not committed while he was awaiting trial on any charge and, secondly, a period of more than five years has elapsed since his release from imprisonment in 2000 for that offense.

See: § 3142 (e)(3).

The second rebuttable presumption applies if the indictment charges that the defendant committed a drug offense that is punishable by ten or more years in prison, or if he is charged under 18 USC § 924 (c) for possession of a firearm in the commission of a crime of violence or a drug offense, or 18 USC § 956 (a), or 18 USC § 2332 (b)(terrorism), or an offense involving a minor. Here, the indictment does not charge the Defendant with any of those crimes. Since there is no formal charge of a violation of any of the statutes identified in 3142 (e), the presumption does not arise. United States v. Chimurenga, 760 F.2d 400, 405 (2d Cir. 1985)(the presumption cannot arise unless the defendant is charged in a complaint or indictment with a violation of §924 (c), even if there is probable cause that a defendant appearing before the court on other charges also committed an uncharged firearm offense.)

Therefore, the statutory presumption in favor of detention is not applicable in this case; instead, there is a statutory presumption in favor of pretrial release, on conditions, and the burden of overcoming that presumption is on the government–by clear and convincing evidence of dangerousness or by a preponderance of evidence of flight risk.

The language of § 3142 (c) is mandatory: the "judicial officer shall order the pretrial release of the person..." unless the government proves by clear and convincing evidence that he poses a danger to a person or to the community, or if it proves by a preponderance of evidence that he is unlikely to appear in court as required, regardless of conditions.

"Clear and convincing evidence" means that a particular defendant poses a real and not merely a theoretical danger to others. See, e.g. United States v. Patriarca, 948 F.2d 749 , 792(1st Cir. 1991) (alleged former Mafia boss released because "although *in theory* a Mafia Boss was an

intimidating and highly dangerous character, the Government had not demonstrated that *this Boss* posed a significant danger, or at least not a danger that could not be overcome given appropriate conditions.") [Emphasis in the original]. Moreover, in the Bail Reform Act, the words "reasonably assure" do not mean "guarantee". United States v. Orta, 760 F.2d 887, 891-892 (8th Cir. 1985)(en banc).

In assessing the evidence with regard to dangerousness, the question is not what risk would be presented if the defendant were as free as an ordinary citizen, but rather what risk he would pose under the most restrictive conditions available to the court–including 24 hour electronic surveillance, searches and breath tests without probable cause–and, in this case, parole supervision. See: United States v. Aileman, 165 F.R.D. 571, 580 (N.D.Cal. 1996).

2.

This Court Can and Should Consider the Factors Set Forth in the Bail Reform Act To Determine If There Are Conditions the Court Can Impose that Will Reasonably Assure The Safety of the Community and the Defendant's Appearance in Court.

Pursuant to § 3142 (g), this court must consider various factors in determining whether there are conditions of release that will reasonably assure the appearance of the Defendant as required and the safety of any person and the community.

1. The Nature and Circumstance of the Offense Charged.

The indictment charges the Defendant with one count of aiding and abetting murder. The government's theory is that on December 12, 1975, around midnight, Arlo Looking Cloud, John Graham, Theda Clarke, and Anna Mae Aquash came to the home of Richard and Cleo in Allen, South Dakota; that Theda Clarke asked Marshall to keep Anna Mae Aquash, who was then a wanted federal fugitive, in his house and that Richard Marshall refused. Convicted murderer and

cooperating government witness, Arlo Looking Cloud, has accused Richard Marshall of giving Theda Clarke a handgun and a box of bullets in his bedroom. Aquash, Looking Cloud, Graham and Clarke then left Marshall and his home; and that later that night, John Graham shot and killed Anna Mae Aquash in a field on the Pine Ridge reservation, about ten miles from Wanblee.

There is no allegation by the government that the Defendant was present at the murder of Anna Mae Aquash or that he himself personally committed an act of violence.

The Defendant does not deny that Looking Cloud, Aquash, Clarke, and Graham came to his home. He does deny that he had any reason to believe that Aquash was being held against her will. He denies giving Clarke, Graham, or Looking Cloud a gun. And he denies intentionally doing anything to aid Looking Cloud and his accomplices in bringing about the murder of Anna Mae Aquash.

2. The Weight of the Evidence Against the Defendant.

The evidence that the government has to put forward to prove its theory that Richard Marshall gave a gun to Clarke is based almost entirely on the testimony of Arlo Looking Cloud, who is serving a life sentence for the murder of Aquash, and the jury's determination of his credibility or lack of credibility is likely to be the deciding issue in the trial. Looking Cloud is a lifelong chronic alcoholic, drug addict and street criminal. He first made his accusation against Marshall to law enforcement in August 2008, when he told the FBI and the US Attorneys that while he was at the Marshall home 33 years earlier, he went into Richard Marshall's bedroom and saw Richard Marshall hand Theda Clarke a piece of paper, a handgun, and a box of shells. According to Looking Cloud's statements to the FBI, he heard no discussion about Anna Mae Aquash.

That story conflicts with every other recorded account Looking Cloud gave of the abduction and killing of Aquash since 1988. It conflicts with stories he told fellow AIM members John Trudell, Richard Two Elk, Troy Lynn Yellow Wood, and Kamook Banks, and it conflicts with the accounts he gave to Robert Ecoffey and other federal law enforcement officers in 1994, when he made a proffer statement at the US Attorney's office in Denver, and 2003, after his arrest. In none of those prior statements, made over a period of 15 years to friends and to law enforcement, did Looking Cloud ever mention being at Richard Marshall's home in Allen or claim that Richard Marshall had any involvement in Aquash's killing.

There is no evidence in the discovery materials that Looking Cloud ever mentioned Richard Marshall until August 2008, when he was seeking to make a cooperation agreement with the government. In fact, in a video-recorded statement made in 2003 to BIA Law Enforcement Director Robert Ecoffey after his arrest, Looking Cloud repeatedly denied Ecoffey's attempts to get him to say he had stopped at Richard Marshall's house. He had no memory of stopping there or doing or seeing any of the things he now says he saw and did at Marshall's house 33 years ago.

In the trial of Arlo Looking Cloud, the government adduced evidence, through its own witnesses in its own case, that it was Arlo Looking Cloud who gave John Graham the gun he used to kill Aquash, after they both marched her out to the killing ground [see: testimony of Richard Two Elk]; the government also adduced evidence from its own witness that there were no guns in the home of Richard and Cleo Marshall on the night that Clarke, Looking Cloud, Graham and Aquash came to their home [see: testimony of Cleo Gates].

There is no physical evidence to corroborate Looking Cloud's story about Richard

Marshall. The government has no other witnesses who were at the Marshall home that night who corroborate Looking Cloud's claim that Marshall gave Clarke a gun. The only purported corroboration of Looking Cloud's story about the gun is the testimony of Serle Chapman, a confidential informant who received 69,000 dollars from the government; according to the government, Chapman would testify that he had an unrecorded telephone conversation with Richard Marshall 8 years ago, and that in that conversation Marshall made a statement to the effect that when people in the movement asked other people in the movement to do something, one did not generally ask too many questions. The government characterizes that statement as an admission by the Defendant. The Defendant denies making any such statement and contests its admissibility under the Federal Rules of Evidence. Even if the court determines it is admissible, this alleged statement is so inherently ambiguous that it has little, if any, probative value or relevance at all and certainly does not constitute credible corroboration for Looking Cloud's testimony against Richard Marshall.

Moreover, at trial, the Defendant will offer into evidence the statements made by the US Attorneys in the Looking Cloud trial, and in his appeal, that directly conflict with and contradict the arguments and evidence they now seek to offer to convict Richard Marshall. In both the trial and appeal of Looking Cloud, the government's attorneys offered evidence and argued that *Arlo Looking Cloud* provided the murder weapon to Graham at the scene of the murder; those statements of the government's lawyers will be offered into evidence by the defense as admissions by a party-opponent. Simply stated, five years ago, the US Attorneys told a jury that Arlo Looking Cloud did what they are now using Arlo Looking Cloud to say that Richard Marshall did–provide the murder weapon for the purpose of killing Aquash; they will also have

to tell the jury that Looking Cloud did *not* do what they offered evidence to prove that he did in Looking Cloud's own trial–give Graham a gun. Given the fact that the government will be trying to tell a radically different story to the jury that will hear Marshall's case than the one it told to the jury that convicted Arlo Looking Cloud, the government's case against Marshall has no credibility and cannot persuade any rational, fair minded jury.

The weakness of the prosecution's case against Richard Marshall makes a conviction very unlikely. This factor weighs heavily in favor of the Defendant's pretrial release.

3. The History and Characteristics of the Defendant.

Richard Marshall is 58 years of age. The last time he was convicted of a crime was 33 years ago.

His home for his entire life has been in South Dakota. He lives on the Pine Ridge reservation with Devona Pourier. He is an enrolled member of the Oglala Sioux Tribe. The reservation is, and always has been, his home and permanent domicile. He graduated from Todd County High School in Mission, South Dakota in 1969. He is a carpenter and construction worker by trade. He comes from a traditional Lakota background: he is a fluent Lakota speaker.

Richard Marshall was convicted of murder after trial in 1976 and was sentenced to life in state prison. It was an alcohol-fueled shooting in a bar in Scenic, South Dakota. Prior to trial, the Court released him on cash bond. He never failed to appear in court and bond was returned to the surety after trial. In prison, Marshall was made a trustee. He was allowed to live outside the prison walls, even though he was serving a life sentence. He never abused the trust of the prison authorities who allowed a prisoner serving a life sentence to live outside the walls of the prison.

In part due to the fact that he was a model prisoner, after Richard had served 9 years of

his sentence, Governor William Janklow commuted his sentence from life imprisonment to a term of 99 years, which allowed Marshall to be released shortly thereafter on parole. He is now on lifetime parole. As a result, he is supervised by State Parole Officer, Brian Green of Rapid City.

Since his release on parole, he has twice violated the conditions of his parole by drinking alcohol and was returned to prison. Neither violation involved the commission of any crime. He has been out of prison almost ten years and has lived on the Pine Ridge reservation since 2001. He lives in a committed relationship with a lady, Devona Pourier, who has no criminal record. As can be seen from respected tribal leaders and citizens attesting to his character, Marshall is now a sober, respected member of the tribal community.

He has been steadily employed in construction type jobs for several years and he has been promised employment as a laborer with Puckett Drywall Company in Rapid City if he is released.

The last time he was convicted of a crime was his conviction in 1976.

4. The Nature and Seriousness of the Danger to Any Person or the Community

There is no credible evidence that would support a finding of clear and convincing proof that the Defendant poses a danger to any person or to the community. Counsel is not aware of any accusation or evidence of any act or threat of violence by Richard Marshall since his conviction in 1976.

At his initial detention hearing, the Prosecutor made reference to the fact that a woman with whom the Defendant had once had a relationship applied to State Court for an ex parte order of protection. However, upon investigation, there is no evidence at all of dangerousness: the

complainant in that case stated in her application for such order that Marshall had never used violence or threatened any violence against her. She wanted to break up with him, and according to her, he would not leave her alone. The court ordered an ex parte order which was served on the Defendant. He then ceased all contact with the complainant, in lawful obedience to the Court's order, and the complainant had the order dismissed. My investigator, Stan Zakinski, has interviewed this woman and she re-affirmed to him that Richard Marshall never threatened her with violence or committed any act of violence against her; she states that she feels no fear from Richard Marshall and has no fear of him if he is released by this Court.

He does not now pose any danger to either the community at large or to any individual person.

II.

THERE ARE CONDITIONS THAT THE COURT CAN IMPOSE THAT CAN REASONABLY ASSURE THE SAFETY OF ALL PERSONS AND THE COMMUNITY, AS WELL AS RICHARD MARSHALL'S APPEARANCE AT ALL COURT PROCEEDINGS.

In making this determination, the Court must ask whether this Defendant poses a real danger, as opposed to a theoretical danger, to any person or the community at large, in view of the specific conditions that the Court can impose to monitor and control his actions, his whereabouts, and his life while on pretrial release. Moreover, the law only requires reasonable assurance–not a guarantee. See: United States v. Orta, above, 760 F.2d at 891-892. If it were otherwise, no person would ever be allowed pretrial release and detention would be the rule, rather than the exception to the rule.

The Defendant respectfully submits that the following conditions would reasonably assure the Court that the Defendant will not pose a real danger to any person or the community while he is living at home on pretrial release, pursuant to § 3142 (c), and that he will appear at all court appearances as ordered.

1. The Defendant will report by phone daily, and in person weekly, both to his State Parole Officer and to the US Probation Officer, and will comply with all the terms of his parole supervision, including the requirements that the Defendant not commit any state, federal or local criminal offenses and that he abstain from alcohol. The Defendant's prior offense, and his two previous parole violations, were both alcohol related. Therefore, abstinence from alcohol and any non-prescribed drug is absolutely a requirement for his parole and will be a condition of his pretrial release. The State Parole Officer and his US Pretrial Release Officer shall have the right to do random searches and give breath or chemical tests without probable cause, at his or her pleasure. This monitoring will give the Court reasonable assurance that Defendant will not violate any law while on pretrial release.

2. The Defendant will be ordered to refrain from having any personal contact with any witness in this case. The Court can be supplied with a list of potential witnesses by the government.

3. That he remain in the custody of Devona Pourier while he is not working, and that he be in the custody of his employer, Rusty Puckett, while he is working at his job.

4. That Devona Pourier, Rusty Puckett, and his Parole Officer each be ordered to assume supervision of the Ddefendant and to report any violation of a release condition to the Court.

5. That he maintain employment with Puckett Dry Wall, 920 ½ E. Chicago Street, Rapid

City, SD.

6. That he abide by specific restrictions that prohibit him from leaving the Pine Ridge reservation without permission of his US Probation Officer, except to travel to Rapid City on work or case-related business–e.g., to meet with his attorney, his State Parole Officer, his U.S. Pretrial Services Officer, or to appear in court. Any exceptions to this condition would have to be approved beforehand by the Court or the US Pretrial Services Officer.

7. That he appear personally each day of his pretrial release and report to the Oglala Sioux Tribal police department in Kyle, SD, and take a breath test, if requested, to determine whether there is alcohol in his blood.

8. That he submit to 24 hour a day electronic monitoring by means of a so-called electronic ankle bracelet.

9. Make all court appearances, and meetings with the US Probation Officer and his State Parole Officer, as ordered.

10. And abide by and comply with any other conditions the Court deems appropriate, reasonable, and necessary.

WHEREFORE, the Defendant Richard Marshall moves the Court to order the pretrial release of Richard Marshall on the conditions set forth herein and on any other conditions deemed appropriate, necessary and reasonable by the Court.

Dated: April 8, 2008

RICHARD MARSHALL, defendant

By:

/s/ Dana L. Hanna

Dana L. Hanna
HANNA LAW OFFICE
PO Box 3080
816 Sixth Street
Rapid City, SD 57709
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Defendant Marshall's Application for Pretrial Release on Conditions was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 8th day of April, 2009.

/s/ *Dana L. Hanna*
Dana L. Hanna

FILED
APR 0 8 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

UNITED STATES' MOTION FOR *IN CAMERA* REVIEW OF MEDICAL RECORD MATERIALS

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and AUSA Robert A. Mandel and respectfully submits its Motion for *In Camera* Review of Witness Medical Records.

On April 2, 2009, Defendant John Graham made a written discovery request in relation to this witness. The United States anticipates subpoenaing this witness for trial in the above-entitled case. To the extent this witness would become unavailable by either exercising the witness' Fifth Amendment privilege against self-incrimination, or by way of medical-related issues, the United States has previously identified

the non-testimonial statements against interest it intends to introduce. Based upon the foregoing, the United States considers this evidence to be discoverable under Brady v. Maryland, 373 U.S. 83 (1963). See generally, United States v. Skorniak, 59 F.3d 750, 755-56 (8th Cir. 1995) (placing significance when records are in government's possession).

To the extent the Court deems these medical records discoverable, based upon patient privacy issues[1] the United States is respectfully requesting an order to disclose to include any limitations on such a disclosure to Defendants Graham and Marshall.

Date: April 8, 2009

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on April 8, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

[1]The United States recognizes an individual's right to privacy in avoiding disclosure of medical records, as well as the federal policy of protecting the privacy of a patient's medical records. See generally, Whalen v. Roe, 429 U.S. 589, 599-600 nn.23 & 24 (1977).

John R. Murphy
Dana Hanna

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Marty J. Jackley

FILED
APR 0 8 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

UNITED STATES' MOTION FOR *IN CAMERA* REVIEW OF WITNESS MATERIALS

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and AUSA Robert A. Mandel and respectfully submits its Motion for *In Camera* Review of Witness Materials.

On April 2, 2009, Defendant John Graham made a written discovery request specifically identifying potential Witness A. Attached for *in camera* review is the information pertaining to that specific and identified Witness A. See Attachment A. Defendant Graham asserts that Witness A's information may be discoverable as exculpatory or impeachment evidence in relation to Witness B. Witness B's information was previously submitted to the Court during closed hearings and is resubmitted for reference as Attachment B.

Attachment B has previously been disclosed to both Defendants Marshall and Graham.

The United States has compared Attachments A and B and does not believe Witness A's information is discoverable as either exculpatory or impeachment evidence. Based upon the very nature of Witness A's statements and responses, said Witness A information does not constitute evidence favorable to either Defendant Graham or Marshall. Brady v. Maryland, 373 U.S. 83 (1963); Fed. R. Evid. 16(a).

Based upon unique circumstances of this information and the specific claims made by Defendant Graham, the United States is providing the Court the information of Witness A for an *in camera* review, and an ultimate determination that Attachment A is not discoverable. In the alternative, to the extent the Court orders disclosure, the United States respectfully requests these matters be subject to a specific order of strict confidentiality.

Date: April 8, 2009

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on April 8, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

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Dana Hanna

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Marty J. Jackley

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL, aka RICHARD VINE MARSHALL, aka DICK MARSHALL, Defendant.	))))))))))	CR. 08-50079-02 DETENTION ORDER

This matter came before the court on a motion to reconsider bond by the defendant, Vine Richard Marshall. A hearing was held on the motion on Monday, April 13, 2009. The defendant, Mr. Marshall, appeared in person and by his counsel, Dana Hanna. The United States appeared by Assistant United States Attorney Robert Mandel and United States Attorney Marty Jackley.

The government moved for detention pursuant to the Bail Reform Act, 18 U.S.C. § 3142. No presumption of detention applies in this case. See 18 U.S.C. § 3142(e). In order to sustain a motion for detention, the government must establish that there is no condition or combination of conditions which could be imposed in connection with pretrial release that would (a) reasonably insure the defendant's presence for court proceedings; or (b) reasonably insure the safety of any other person or the community. See 18 U.S.C. § 3142(f). Risk of flight must be established by a preponderance of the evidence; danger to the

community or to any other person must be established by clear and convincing evidence. Id.

The Bail Reform Act requires the court to consider the following factors in determining whether there are conditions of release that will reasonably assure the appearance of the defendant and the safety of any other person and the community:

1. the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

2. the weight of the evidence against the person;

3. the history and characteristics of the person, including--

    a. the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

    b. whether at the time of the current offense or arrest, the person was on probation, parole, or other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State or local law; and

4. the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

See 18 U.S.C. § 3142(g). In accordance with the Bail Reform Act, 18 U.S.C. §3142(f), a detention hearing has been held. The court concludes that the following facts require the detention of the defendant pending trial in this case.

Part I - Findings of Fact

(1) There is a serious risk that the defendant will not appear.

(2) There is a serious risk that the defendant will endanger the safety of another person or the community.

Part II - Written Statement of Reasons for Detention

The court finds that the credible testimony and information submitted at the hearing establishes that the defendant is charged in the superseding indictment with the first degree murder of Anna Mae Aquash, and aiding and abetting that first degree murder, in violation of 18 U.S.C. §§ 1111, 1152, 1153, and 2. The defendant is presumed innocent. However, probable cause exists to believe the defendant committed the offense with which he is charged because a grand jury has issued the superseding indictment. This alleged crime is a crime of violence. In addition, the alleged crime involved the use of a firearm. The mandatory penalty for this offense in the event of conviction is life imprisonment.

Mr. Marshall was previously convicted of a state offense of murder in 1976 arising out of the death of Martin Montileaux in March, 1975.

Mr. Marshall states in his brief that this offense involved the use of alcohol. Mr. Marshall was sentenced by the state court to a term of life imprisonment for this offense. Later, the governor of the state of South Dakota commuted Mr. Marshall's sentence to a term of imprisonment for 99 years, allowing Mr. Marshall to be paroled. He violated parole twice and was twice sent back to serve additional terms of imprisonment. Both parole violations were related to the use of alcohol.

At the time the murder of Ms. Aquash was alleged to have been committed by Mr. Marshall in December, 1975, Mr. Marshall was out on pretrial release in the Montileaux case. At the time of Mr. Marshall's arrest for the murder of Ms. Aquash, he was still on parole in the Montileaux matter.

As demonstrated by recitation of the facts relating to the Montileaux matter, Mr. Marshall has an apparent history of substance abuse. Mr. Marshall has received treatment for substance abuse twice, once upon his initial incarceration following the Montilleaux conviction, and a second time in 1989 following one of his parole violations. Mr. Marshall also indicates that he attended 12-step meetings while on parole, though the dates of attendance were not specified. Mr. Marshall has not presented a current substance abuse

evaluation to the court to indicate whether Mr. Marshall has a current substance abuse problem or whether treatment is now indicated.

Prior to his arrest in this case in August, 2008, Mr. Marshall had no steady job. He does have ties to the Pine Ridge Indian Reservation where he has lived for extended periods of time. He has also lived for unspecified periods of time in North Dakota, Minnesota, Wyoming, Montana, New Mexico, and Colorado. Furthermore, Mr. Marshall represents that he has an offer of employment with a local construction company if he is released.

The penalty in this case, if Mr. Marshall is convicted, is mandatory life imprisonment with no possibility of parole. Although the Bail Reform Act does not provide that this potential penalty gives rise to any legal presumption, the court finds that it provides substantial incentive to flee, especially for a person in Mr. Marshall's circumstance who has prior experience with lengthy incarceration.

Finally, both sides argue strenuously that the weight of the evidence favors them. The entrenchment of the parties in their own particular view of the evidence is understandable, given the fact that the jury trial in this case looms less than one month away. The court is very familiar with both parties' views of the evidence, having read the parties' briefs on their motions to sever,

the pending motions to dismiss, motions to compel discovery, and the motions *in limine*. In addition, the court is familiar with the entirety of the trial transcript in United States v. Looking Cloud, CR. 03-50020. The court finds that the factor of the weight of the evidence favors neither party. The evidence is capable of argument either way and that is why a jury will ultimately decide the weight of the evidence in this case. There are sufficient other factors, and those factors are sufficiently weighty, to convince the court that the Mr. Marshall should be detained in custody under the Bail Reform Act.

Part III - Directions Regarding Detention

The defendant is committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. The defendant shall be afforded a reasonable opportunity for private consultation with defense counsel. On order of a court of the United States or on request of any attorney for the government, the person in charge of the corrections facility shall deliver the defendant to the United States marshal for the purpose of an appearance in connection with a court proceeding.

NOTICE OF RIGHT TO APPEAL

Mr. Marshall has the right to appeal the court's detention order to the district court having original jurisdiction over the offense, which appeal shall be determined promptly. See 18 U.S.C. § 3145(b).

Dated April 13, 2009.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

VERONICA L. DUFFY, U.S. MAGISTRATE JUDGE, PRESIDING

Jeana Holso, Deputy Clerk
Shirley L'Esperance, US Probation officer
April 13, 2009

Judy Thompson, Court Reporter
Recording:
Court Time: 1:30 pm to 2:29 p.m.

CR. 08-50079-02

United States of America,	*	Marty Jackley & Bob Mandel
Plaintiff,	*	
vs.	*	
Vine Richard Marshall, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	Dana Hanna
Defendant.	*	

FILED
APR 13 2009
CLERK

Enter proceedings regarding Defendant Marshall's Application for Pretrial Release with Conditions [255] before the Honorable Veronica L. Duffy, U.S. Magistrate Judge, presiding

The Court notes the presence of counsel and the defendant in the courtroom.

Mr. Hanna indicates he wishes to supplement his motion for pretrial release and offers certain letters Enter ORDER receiving letters.

Myron Pourier affirmed as witness on behalf of the defendant
Direct examination by Mr. Hanna
Cross examination by Mr. Jackley

Brian Green affirmed as witness on behalf of the government
Direct examination by Mr. Jackley
Cross examination by Mr. Hanna
Re-direct examination by Mr. Jackley
Re-cross examination by Mr. Hanna

Mr. Jackley moves certain documents into evidence and moves the Court to seal Exhibit #3.

Enter ORDER sealing exhibit # 3

Mr. Hanna, on behalf defendant argues in support of his motion for release on pretrial release

Mr. Jackley, on behalf of the government, replies in opposition

Mr. Hanna, on behalf of the defendant, responds

The Court sets forth its findings and enters ORDER denying the motion for pretrial release

The Court informs the defendant of his right to appeal this decision to Judge Piersol

Court in Recess

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

FILED

APR 13 2009

CLERK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

VINE RICHARD MARSHALL, A/K/A
RICHARD VINE MARSHALL, A/K/A
DICK MARSHALL,

Defendant.

CR. 08-50079-02

JOINT EXHIBIT LIST

Plff No.	Dfdt No.	Witness	Description	Off.	Obj.	Rec.	Ref.	Date Filed
1		B. Green	Report of SD Parole Violations	G	N	X		04/13/09
2			Statement by Myrtle Poor Bear	G	N	X		04/13/09
3			***SEALED * *Statements of Dick Marshall * * SEALED***	G	N	X		04/13/09
4								
	101		Lettes from Myron Pourier, Rusty Puckett, Devona Pourier, Phillip Grood Crow and Document with 147 signatures as to Richard Marshall's reputation in the community	D	N	X		04/13/09

R: Relevancy
H: Hearsay
N: None

A: Authenticity
O: Other (specify)

FILED
APR 20 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER
JOHN GRAHAM, a/k/a John Boy Patton; and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

Pending before the Court is the Government's Motion for *In Camera* Review of Witness Materials, Doc. 257. The Court has conducted an *In Camera* review of Exhibits A and B. Exhibit A does not have to be disclosed to the defense as it does not contain evidence favorable to either Defendant Graham or Defendant Marshall. There is no evidence that is either impeachment evidence or exculpatory evidence that would help either Defendant. Exhibit B has previously been furnished to both Defendants. Accordingly,

IT IS ORDERED:

1. That Government's Motion for *In Camera* Review of Witness Materials, Doc. 257, is granted.

2. That Exhibit A will not be furnished to the two Defendants.

3. That Exhibit B will not be furnished to the two Defendants as it has previously been furnished to both Defendants.

Dated this 20th day of April, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: _____
DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
APR 21 2009
CLERK

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

UNITED STATES' SUPPLEMENT TO MOTION FOR *IN CAMERA* REVIEW OF WITNESS MATERIALS

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and AUSA Robert A. Mandel and respectfully submits its supplemental document to its Motion for *In Camera* Review of Witness Materials.

On April 8, 2009, the United States filed documentation pertaining to Witness A and Witness B. To further supplement that filing, the United States submits Witness C information attached hereto as Attachment C. It is well-settled that Brady does not require the government to disclose neutral, irrelevant, speculative, or inculpatory evidence, nor evidence available to the defense from other sources. See generally, United States v. Sumner, 171 F.3d 636, 637 (8th Cir. 1999); United States v. Brady, 373 U.S. 83, 87 (1963)(United

States' obligation to disclose favorable evidence is limited to evidence that is material to the defendant's guilt).

Based upon the very nature of Witness C's statements and responses, the United States does not believe Witness C's information to be discoverable, at least at this time. In the alternative, to the extent the Court orders disclosure, the United States respectfully requests these materials be subject to a specific order of strict confidentiality.

Date: April 21, 2009

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330

CERTIFICATE OF SERVICE

The undersigned hereby certifies on April 21, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

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Marty J. Jackley

IN THE UNITED STATES DISTRICT COURT
FOR THE 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 Defendant.	)))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION TO COMPEL DISCLOSURE OF LENIENCY AGREEMENTS

Pursuant to Federal Rule of Criminal Procedure 16, Defendant John Graham moves this Court for its Order requiring the government to immediately comply with Rule 16. Specifically, Mr. Graham asks that this Court order the government to immediately provide him with all records, documents, or a written summation of oral discussions, pertaining to any offers of leniency, immunity, plea bargains, preferential treatment, non-prosecution agreements, or any other benefit extended to Theda Nelson a/k/a Theda Clark a/k/a Theda Clarke as a result of her involvement in this case. Graham also asks that the government be ordered to provide him with all records, documents, or a written summation of oral discussions, pertaining to discussions between the government and Nelson a/k/a Clark a/k/a Clarke or her counsel which may give rise to an expectation by Nelson

a/k/a Clark a/k/a Clarke of leniency, immunity, non-prosecution, or preferential treatment.

Dated April 21, 2009.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

MARTY J. JACKLEY	☐	U.S. Mail, postage prepaid
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	☒	Electronic Case Filing
ROBERT A. MANDEL	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
DANA HANNA	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing

Dated April 21, 2009.

/s/ John R. Murphy
John R. Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE 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 Defendant.	)	CRIM. NO. 08-50079-01 MEMORANDUM IN SUPPORT OF DEFENDANT GRAHAM'S MOTION TO COMPEL DISCLOSURE OF LENIENCY AGREEMENTS

In support of Defendant Graham's Motion to Compel Disclosure of Leniency Agreements, Mr. Graham offers the following:

SUMMARY OF FACTS

On April 15, 2009, Graham's counsel was informally notified that Theda Nelson a/k/a Theda Clarke a/k/a Theda Clarke had been appointed counsel in this case. On April 20, 2009, Graham was formally notified of this fact through a letter from Nelson's a/k/a Clark's a/k/a Clarke's counsel. The government has designated Nelson a/k/a Clark a/k/a Clarke as a material witness in its case against Graham and Marshall.

The government has claimed that Nelson a/k/a Clark a/k/a Clarke aided and abetted in the first degree murder of Aquash, subjecting her to a mandatory life

without parole sentence if convicted. Nelson a/k/a Clark a/k/a Clarke is alleged to have been the "ring leader" in this case. The government has consistently alleged that Nelson a/k/a Clark a/k/a Clarke directed that Aquash be held in Denver, that Aquash be tied up and brought to South Dakota, and that Aquash be taken to Pine Ridge in the winter of 1975. The government has alleged that Nelson a/k/a Clark a/k/a Clarke went from house to house on the Pine Ridge and Rosebud reservations getting instructions and a weapon, and that she directed Graham and Looking Cloud to kill Aquash.

The government has not disclosed to defense counsel as single page of discovery related to any plea agreements, immunity agreements, or any other form of leniency agreements offered or extended to Nelson a/k/a Clark a/k/a Clarke. The government has further not provided to defense counsel any information relating to oral discussions between it and Nelson a/k/a Clark a/k/a Clarke or her counsel regarding potential leniency, preferential treatment, or immunity.

SUMMARY OF LAW

The government has a duty to disclose all documents within its possession or control if the documents are material to preparation of a defendant's defense. Fed.R.Crim.P. 16(a)(1)(E)(i). The government also has a duty to disclose all evidence known to it, or which could be known to it through the exercise of due

diligence, that relates to the reliability or credibility of its witnesses. United States v. Bagley, 473 U.S. 667, 676-77 (1984). The failure to disclose a leniency agreement or a promise by the government to a witness violates a defendant's right to due process and may warrant vacating a conviction. Giglio v. United States, 405 U.S. 150, 154-55 (1972)).

In this case, the government should be required to immediately provide to the defense the actual records reflecting the communication of a leniency or immunity offer made to Nelson a/k/a Clark a/k/a Clarke, or a summation of an oral agreement extended to her or her counsel. It is vital that the defense be provided this information immediately as there are only three weeks remaining prior to trial.

Dated April 21, 2009.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

MARTY J. JACKLEY	☐	U.S. Mail, postage prepaid
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DANA HANNA	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing

Dated April 21, 2009.

/s/ John R. Murphy
John R. Murphy

FILED
APR 23 2009
CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER REGARDING MOTIONS TO SEVER
JOHN GRAHAM, a/k/a John Boy Patton, and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

Count one of the superseding indictment in this case charges Defendants jointly with the unlawful killing and with aiding and abetting the killing of Annie Mae Aquash in violation of 18 U.S.C. §§ 2, 1111, and 1153. Defendants filed motions seeking separate trials under Rule 14(a) of the Federal Rules of Criminal Procedure. (Docs. 75 and 87.) The motions were referred to the Honorable Veronica L. Duffy, United States Magistrate Judge. The Magistrate's Order was filed on December 27, 2008. (Doc. 116.) The Magistrate denied the motions for separate trials and ordered that any party wishing to introduce at trial a testimonial out-of-court statement of either defendant that inculpates the other defendant to submit a proposed redacted statement to this Court not later than 15 days prior to the start of the trial in this case. Defendants filed objections, seeking reconsideration of the Magistrate's Order. (Docs. 123 and 134.) Pursuant to 28 U.S.C. § 636(b)(1)(A), this Court may only reconsider any pretrial matter under subparagraph (A) where it has been shown that the Magistrate's order is clearly erroneous or contrary to law. *See* 28 U.S.C. § 636(b)(1)(A). In her Order of December 27, 2008, Judge Duffy articulates her reasoning for denying the motions to sever, and carefully assesses the law and its application to the facts of the case. Considering the entire record, the Court concludes that Judge Duffy's Order is not clearly erroneous or contrary to law.

Marshall objected specifically to two redactions ordered by Judge Duffy. First is the December 26, 2003, interview of Defendant Marshall by Robert Ecoffey. The statement of the interview does not name Defendant Graham, but indicates that late one night a car load of people showed up at Marshall's house. The people included Theda Clark and Ms. Aquash and "two young guys" who Marshall could not or did not name. This Court finds that the statement poses a *Bruton* problem if introduced as it is written because everyone at the trial may know who the "two young guys" were. The Court agrees with Judge Duffy that, if admitted at trial, the statement should be redacted to make sure it is not interpreted by the jury to refer to Graham. "Others" should be substituted for "two young guys" to avoid the more specific reference. The Court rejects Marshall's argument that this redaction would be interpreted by the jury as a deliberate attempt by him to refrain from giving details to a law enforcement officer in order to protect the "others."

Marshall also objects to Judge Duffy's order that a videotaped interview of Arlo Looking Cloud by Robert Ecoffey be redacted to remove the name "Dick," in reference to a purported out-of-court statement by Richard ("Dick") Marshall to Robert Ecoffey. In the videotaped interview of Looking Cloud, Ecoffey tries to get Looking Cloud to admit to having been with Theda Clark, Mr. Graham and Ms. Aquash at Dick and Cleo Marshall's house. Looking Cloud denies having stopped at Marshall's house. In the face of Looking Cloud's denial, Ecoffey states, "[c]ause I know-I know for a fact that you stopped there, cause both Dick and Cleo-are telling me that you, [Graham], and Theda stopped there, and that you had Anna Mae, . . ." Marshall adamantly denies ever telling Ecoffey that Looking Cloud or Graham were at Marshall's house; this denial is supported by Marshall's own statement to Ecoffey discussed in the previous paragraph of this Order. Judge Duffy stated that it was unclear to her why Marshall would wish to introduce Ecoffey's erroneous statement to Looking Cloud, and she recommended redacting Marshall's name "in an abundance of caution." In his objections to Judge Duffy's order, Marshall explains that Ecoffey's statement to Looking Cloud that Marshall had accused him of being present with Ms. Aquash gives Looking Cloud a motive to make a false accusation implicating Marshall, and that it can be used to argue that Ecoffey lied to Looking Cloud. The government does not object to the redaction and offers to change the statement made by Ecoffey, but Marshall wants his name to remain in the videotape. He

contends that any other ruling would deprive him of exculpatory evidence. The Court sees no reason to deny Marshall's request. Accordingly,

IT IS ORDERED:

1. That Magistrate Duffy's Order is not clearly erroneous or contrary to law and Defendants are not entitled to separate trials.

2. That Defendants' objections to the Magistrate's Order on Defendants' Motions to Sever are overruled (docs. 123 and 134), with the exception of Marshall's objection regarding the interview of Arlo Looking Cloud by Robert Ecoffey: The redaction suggested by Judge Duffy on page 32 of her Order (doc. 116) need not be made.

3. That, as ordered by Judge Duffy, any party wishing to introduce at trial a testimonial out-of-court statement (with the exception noted above in paragraph 2) of either defendant that inculpates the other defendant, shall redact such statement to eliminate all reference to the other defendant and to his existence in accordance with Judge Duffy's opinion, and shall submit its proposed redacted statement to this Court for review not later than 10 working days prior to the start of the trial in this case.

Dated this 23rd day of April, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK
BY: Colleen Schulte
DEPUTY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED

APR 22 2009

CLERK

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.	Case No. 08-50079 MOTION TO SEAL EX PARTE MOTION AND AFFIRMATION FOR THE ISSUANCE OF A SUBPOENA PURSUANT TO RULE 17 (C) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

NOW COMES Defendant Richard Marshall, by and through his attorney, Dana L. Hanna, and hereby moves the Court to file the attached Ex Parte Motion and Affirmation for the Issuance of a Subpoena Pursuant to Rule 17(C) of the Federal Rules of Criminal Procedure under seal.

Pursuant to Local Criminal Rule 47.1(3), counsel represents that there are good reasons for sealing this documents: it is an ex parte application for a subpoena, filed pursuant to Rule 17 of the Federal Rules of Criminal Procedure. No alternatives to sealing would provide sufficient protection.

WHEREFORE Defendant Marshall moves the Court to file the attached Defendant's Ex Parte Motion and Affirmation for the Issuance of a Subpoena Pursuant to Rule 17(C) of the Federal Rules of Criminal Procedure under seal.

Dated this 22nd day of April, 2009.

RICHARD MARSHALL, Defendant

BY: Dana L. Hanna /ss

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080, Rapid City, SD 57709
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UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL, a/k/a RICHARD VINE MARSHALL, a/k/a DICK MARSHALL, Defendant.	)	CR. 08-50079-02 ORDER

Defendant Vine Richard Marshall has moved the court for an order compelling the government to provide discovery of three categories of documents: (1) agreements or understandings between the government and Arlo Looking Cloud about any benefit Mr. Looking Cloud may receive from the government in return for his testimony in Mr. Marshall's trial; (2) Arlo Looking Cloud's Bureau of Prisons central inmate file; and (3) any records from the Bureau of Indian Affairs, the United States Marshals Service, or any federal agency relating to any investigation, complaints, or sanctions concerning alleged misconduct, unprofessional conduct, or breach of ethical standards related to the personal relationship between federal investigator Robert Eccoffey and the government's cooperating witness known as "Maverick." See Docket 216. In the alternative, Mr. Marshall seeks an order requiring the government to provide these three categories of documents to the court for *in camera* inspection.

The government resists Mr. Marshall's motion. In response to category number three, the government provided Maverick's criminal history to the court for *in camera* inspection. This appears unresponsive. Mr. Marshall asked for documents concerning any complaint or investigation into the relationship between Eccoffey and Maverick, not Maverick's criminal history.

Based solely on the arguments made by the parties, the court cannot ascertain whether the three categories of documents sought by Mr. Marshall may contain Brady or Giglio material.[1] See United States v. Garcia, ___ F.3d ___, 2009 WL 996826, *4 (8th Cir. April 15, 2009). Accordingly, it is hereby

ORDERED that the government shall provide to the court *in camera* any documents in its possession in relation to the three categories of documents sought by Mr. Marshall. This shall be done no later than noon, MDT on May 1, 2009.

Dated April 24, 2009.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

[1] Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972).

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' COMPLIANCE WITH COURT'S DISCOVERY ORDER

Comes now the United States of America by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully files its Compliance With Court's Discovery Order.

On April 24, 2009, the Magistrate Court ordered the United States to provide *in camera* any documents in its possession in relation to the three categories of documents sought by defendant Marshall in his discovery motion (Docket #216).

I. Arlo Looking Cloud Agreements.

All information pertaining to this request is contained as Exhibit 1 to the United States' Memorandum Opposing Defendant Marshall's Motion, namely the

attached correspondence of United States Attorney Marty J. Jackley dated August 8, 2008.

II. Arlo Looking Cloud Discovery.

The United States does not have in its possession, nor has it reviewed, any Bureau of Prisons Central Inmate Files with respect to Arlo Looking Cloud. The defendant has been provided the redacted presentence report for Looking Cloud.

III. Ecoffey and Maverick Impeachment Evidence.

In relation to the defendant's discovery request and continued attempted character attacks on witness Maverick through his pleadings,[1] the United States has submitted to the Court Maverick's criminal history for *in camera* review. This demonstrates there exists no proper discoverable impeachment evidence under Fed. R. Evid. 609 with respect to this witness. *See United States v. Pippenger*, 552 F. Supp. 2d 990, 997-98 (D.S.D. 2008) (requiring disclosure of impeaching and exculpatory witness materials "subject to the limitations of Fed. R. Evid. 609.").

As for the relationship between the former United States Marshal and witness Maverick, the United States does not have any evidence in its possession relating to any investigation, complaints, or sanctions concerning any alleged misconduct. The United States again renews its request that based upon the nature of these representations by the defendant, that the defendant be required to file a supporting record with the Court forming the basis for his

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[1] *See* defendant Marshall's Motion to Compel at p. 4 (Docket 216).

representations on this matter. Consistent therewith, defendant Marshall has presented no Rule 16(b) or Rule 26.2 discovery to the United States to support any of these allegations and claims.

Respectfully submitted this 27th day of April, 2009.

/s/ Marty J. Jackley

MARTY J. JACKLEY
United States Attorney
ROBERT A. MANDEL
Assistant United States Attorney
PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2310
FAX: 605.330.4405
Marty.J.Jackley@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of April, 2009, I served by electronic transmission, a true and correct copy of the foregoing United States' Compliance With Court's Discovery Order on:

Dana Hanna
Attorney at Law

John Murphy
Attorney at law

/s/ Marty J. Jackley

Marty J. Jackley

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff,	)	CRIM. NO. 08-50079-01
vs.	)	DEFENDANT GRAHAM'S MOTION IN LIMINE REGARDING GRAND JURY TESTIMONY
JOHN GRAHAM, a/k/a JOHN BOY PATTON, VINE RICHARD MARSHALL, a/k/a RICHARD VINE MARSHALL, a/k/a DICK MARSHALL, Defendants.	)	

Defendant John Graham moves this Court for its Order prohibiting the government from introducing any evidence obtained during grand jury proceedings that occurred after the indictment of Vine Richard Marshall and John Graham for the offenses charged in this file. This motion is based on the summary of facts and law set forth below.

SUMMARY OF FACTS

It is Defendant Graham's information and belief that since he and Vine Richard Marshall were indicted on October 7, 2008, the government has continued to run grand juries to build its case against Graham and Marshall. The government has confirmed that it has continued to convene grand juries subsequent to the issuance of the superceding indictment in this case. No

additional defendants have been charged by these recently convened grand juries.

The government has not provided Graham with any transcripts from these recently convened grand juries. Therefore, Graham cannot make a specific objection to any particular testimony or information that was obtained therefrom. Because the Court has set a filing deadline for motions in limine, Graham files this motion at this time, and intends to supplement it orally and/or in writing once the government provides him with materials obtained from the recent grand juries.

SUMMARY OF LAW

A grand jury should not be convened if its dominant or primary purpose is to gather evidence strengthening the government's case against a defendant that has already been indicted. U.S. v. Wadlington. 233 F.3d 1067, 1073 -1074 (8th Cir. 2000); United States v. Puckett, 147 F.3d 765, 770 (8th Cir. 1998). Grand juries should be directed at new offenses. Id.

Materials obtained from a post-indictment grand jury are only admissible against an indicted defendant if those materials were collateral to the focus of the grand jury and obtained during the investigation of other crimes. See U.S. v. Wadlington. 233 F.3d 1067, 1073 -1074 (8th Cir. 2000); United States v. Sellaro, 514 F.2d 114, 122 (8th Cir.1973). To show that evidence relating to pending case was collateral to grand jury purpose, the government should be required to show

that, as a result of the grand jury, new charges were brought or new defendants were charged. See U.S. v. Wadlington. 233 F.3d 1067, 1073 -1074 (8th Cir. 2000).

In this case, no new charges have been brought against Graham or Marshall, and no new defendants have been indicted. It appears that the focus of the recent grand juries was the same crime allegedly committed by Graham and Marshall. Therefore, the government should not be allowed to introduce or admit any evidence or testimony obtained as a result of the recently conducted grand jury proceedings.

Dated April 28, 2009.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

MARTY J. JACKLEY	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
ROBERT A. MANDEL	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
DANA HANNA	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing

Dated April 28, 2009.

/s/ John R. Murphy
John R. Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff, vs. JOHN GRAHAM, a/k/a JOHN BOY PATTON, VINE RICHARD MARSHALL, a/k/a RICHARD VINE MARSHALL, a/k/a DICK MARSHALL, Defendants.	)	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION IN LIMINE REGARDING USE OF "KILLS" TO DESCRIBE BILL MEANS

Defendant John Graham moves this Court for its Order prohibiting the government from referring to Bill Means as "Kills" during the trial in this case. Bill Means is likely to be a subject of extensive discussion during the trial in this case. It is counsel's understanding that, as a child, Bill Means got the nickname "Kills" based on association he had with another young man whose proper name was Willis Kills.

Mr. Graham anticipates that the government will try to refer to Bill Means as "Kills" and the house where AIM members allegedly met to discuss Aquash's fate as "Kills' house."

There is no legal or factual basis for the government to refer to Mr. Means or his home through the use of this nickname. The nickname has no relevance to

any fact of consequence in this case. Fed.R.Evid. 401. The admission of this evidence during a murder trial would be highly prejudicial and inflammatory and may lead the jury to prejudicially speculate that Bill Means was a known killer or otherwise had violent tendencies. Fed.R.Evid. 403.

Accordingly, the government should be ordered to refer to Mr. Means by his proper name and not this nickname.

Dated April 28, 2009.

/s/ John R. Murphy

John R. Murphy
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Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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DANA HANNA	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing

Dated April 28, 2009.

/s/ John R. Murphy
John R. Murphy

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL, a/k/a RICHARD VINE MARSHALL, a/k/a DICK MARSHALL, Defendant.	)	CR. 08-50079-02 ORDER DENYING DEFENDANT MARSHALL'S MOTION TO COMPEL [216] AND GRANTING GOVERNMENT'S MOTION FOR IN CAMERA INSPECTION [244]

INTRODUCTION

Defendant Vine Richard Marshall has moved the court for an order compelling the government to provide discovery of three categories of documents: (1) agreements or understandings between the government and Arlo Looking Cloud about any benefit Mr. Looking Cloud may receive from the government in return for his testimony in Mr. Marshall's trial; (2) Arlo Looking Cloud's Bureau of Prisons central inmate file; and (3) any records from the Bureau of Indian Affairs, the United States Marshals Service, or any federal agency relating to any investigation, complaints, or sanctions concerning alleged misconduct, unprofessional conduct, or breach of ethical standards related to the personal relationship between federal investigator Robert Eccoffey and the government's cooperating witness known as "Maverick." See Docket 216. In the alternative, Mr. Marshall seeks an order

requiring the government to provide these three categories of documents to the court for *in camera* inspection.

The government resists Mr. Marshall's motion. In response to category number three, the government provided Maverick's criminal history to the court for *in camera* inspection. Docket 244. Because the court was unable to ascertain whether the three categories of materials requested by Mr. Marshall contained Brady or Giglio material, the court issued an order requiring the government to submit the documents to the court for *in camera* review.[1] See United States v. Garcia, ___ F.3d ___, 2009 WL 996826, *4 (8th Cir. April 15, 2009).

Instead, the government filed a response stating: (1) that all documents relating to any agreement between the government and Arlo Looking Cloud concerning Mr. Looking Cloud's testimony have already been disclosed; (2) that the government does not have in its possession, nor has it reviewed, Mr. Looking Cloud's central inmate file; and (3) that the government has no evidence in its possession relating to any investigation, complaint, or sanctions concerning any alleged misconduct between the former United States Marshal and witness Maverick.

[1]Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972).

DISCUSSION

Evidence which is in the possession of police, though unknown to the prosecutor, may form the basis for a Brady violation. Youngblood v. West Virginia, 126 S. Ct. 2188, 2190 (2006) (citing Kyles v. Whitley, 514 U.S. 419, 438 (1995)). Thus, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles, 514 U.S. at 437.

On the other hand, the government has no duty to seek out and provide discovery of evidence in the hands of third parties, even other government agencies, if those agencies are not acting on behalf of the government in the case. Id. See also United States v. Skorniak, 59 F.3d 750, 755-756 (8th Cir. 1995) (medical records); United States v. Dunn, 851 F.2d 1099, 1101 (8th Cir. 1988) (report written by a state child protection worker); United States v. Riley, 657 F.2d 1377, 1386 (8th Cir. 1981) (hospital records).

The court first notes that the government does not resist Mr. Marshall's motion for documents that reflect the agreement between it and Mr. Looking Cloud as to any benefit Mr. Looking Cloud hopes to gain by testifying at Mr. Marshall's trial. Instead, the government's position is that it has already provided Mr. Marshall with all responsive documents to this request. Accordingly, the court denies this request by Mr. Marshall as moot. According to the government's representation to the court, there simply are no other documents responsive to this request.

As to Mr. Marshall's request for Looking Cloud's central inmate file, that record would appear to be in the hands of the Bureau of Prisons ("BOP"). There is no suggestion that the BOP is acting on the government's behalf in this case in a role analogous to the police. The BOP is typically not a law enforcement investigatory agency, but rather fulfills a custodial role. In addition, the type of information Mr. Marshall seeks in Looking Cloud's central inmate file, information about substance abuse treatment or history or other avenues of cross-examination, has already been provided to Mr. Marshall through the discovery of a portion of Looking Cloud's presentence investigation report, which the court reviewed *in camera* before ordering the government to provide that document to defendants. Accordingly, the court finds that the government has no duty to seek out Looking Cloud's BOP central inmate file if it does not already have that document and, accordingly, no duty to provide it in discovery to Mr. Marshall. Kyles, 514 U.S. at 437. Mr. Marshall's request for an order compelling discovery of Looking Cloud's central inmate file is therefore denied.

The records pertaining to the relationship between Mr. Ecoffey and Maverick, and any disciplinary action arising from the existence of that relationship, is somewhat different. These records would be expected to be in the hands of the Bureau of Indian Affairs ("BIA"), Mr. Ecoffey's employer. The BIA, and Mr. Ecoffey as a BIA agent, played a key investigatory role in this case, assisting the United States Attorney's Office. However, the documents

Mr. Marshall requests are not evidence of the crime with which he is charged, either inculpatory or exculpatory. Rather, the evidence Mr. Marshall seeks may or may not reflect on the credibility of the two witnesses, Maverick and Mr. Ecoffey. Furthermore, the key fact which has the possibility of reflecting on the credibility of the witnesses is the fact of the relationship itself, not any action that may have been taken by Mr. Ecoffey's employer when faced with evidence of the relationship at some later date. Clearly, Mr. Marshall and his lawyer are already apprised of the fact of the relationship itself and can cross-examine regarding that issue.

The Due Process Clause of the Fifth Amendment requires the government to disclose to the accused favorable evidence that is material to guilt or punishment and not otherwise available to the defendant. See United States v. Bagley, 473 U.S. 667, 678 (1985); Brady v. Maryland, 373 U.S. 83, 87 (1963). To prove a violation, the defendant must show that the evidence was both favorable and material, and that the government suppressed the evidence. United States v. Barraza-Cazares, 465 F.3d 327, 333 (8th Cir. 2006). The government has suppressed evidence when it was otherwise unavailable to the defendant, and the prosecution failed to disclose the evidence in time for the defendant to use it. Id. at 334. When Brady evidence is available to the defendant through other avenues, there is no Fifth Amendment violation if the prosecution fails to disclose the evidence. Bagley, 473 U.S. 678; Barraza-Cazares, 465 F.3d at 334 (Brady violation is shown only when the materials

were not otherwise available to defendant through other sources). Impeachment evidence falls under Brady when the reliability of a given witness may be determinative of a defendant's guilt or innocence. Giglio v. United States, 405 U.S. 150, 154 (1972).

Courts have rejected generalized demands for discovery of police personnel files absent some articulable reason for seeking such documents. See United States v. Lafayette, 983 F.2d 1102, 1106 (D.C. Cir. 1993); United States v. Andrus, 775 F.2d 825, 843 (7th Cir. 1985). However, such is not the case here, since Mr. Marshall seeks specifically-articulated information.

In United States v. Vue, 13 F.3d 1206 (8th Cir. 1994), the defendants argued on appeal that the trial court erred in denying their motion to compel the prosecution to obtain and disclose any information possessed by the Immigration and Naturalization Service relating to the existence of Ai and Bee Vang. Id. at 1208. A key issue in the Vues' defense was whether the Vangs really existed. Id. Thus, the Vues argued that the government's failure to seek out, obtain, and disclose the INS information that they argued would confirm the existence of the Vangs was a Brady violation. Id. The Eighth Circuit held that the Vues were required to show that the INS information was material to their defense before a Brady violation would be found. Id. "Materiality" in this context required a showing that, had the evidence been available, there was a reasonable probability that the outcome would have been different. Id. The

court concluded that the Vues had failed to establish the materiality of the INS documents relative to the Vangs. Id. at 1208-1209.

In United States v. Graham, 83 F.3d 1466 (D.C. Cir.), cert. denied, 519 U.S. 1132 (1996), the prosecution had withheld a deposition of a key witness showing that he had participated in several drug-related murders and gave deceptive responses on a polygraph asking about the involvement of others in the murders. Id. at 1473. The defendants argued that this constituted Brady and Giglio material that they would have used to impeach the witness. Id. There was no Brady violation, the court held, because the witness admitted on direct examination to the substance of the information contained in the deposition and the polygraph. Id. at 1473-1474. Thus, the court held that the additional information withheld by the prosecution would not have significantly aided defendant's impeachment of the witness. Id.

There is no question as to the importance of the testimony of Mr. Ecoffey and Maverick at Mr. Marshall's upcoming trial. The testimony adduced at Mr. Looking Cloud's trial revealed that it was Mr. Ecoffey, working tirelessly and seemingly single-handedly, at times, through the last three decades that resulted finally in the indictment of Mr. Marshall, Mr. Looking Cloud, and John Graham. Maverick, too, played a key role in assisting Mr. Ecoffey by obtaining information under cover as an "insider" of the American Indian Movement. Thus, the reliability of Mr. Ecoffey and Maverick may be determinative of Mr. Marshall's guilt or innocence.

However, the fact that reflects on the reliability of their testimony–the assertion that they formed a romantic relationship while investigating this crime and so, perhaps, were not objective or neutral–is a fact already known to Mr. Marshall through other avenues, as evidenced by his assertions in the instant motion. Whether Mr. Ecoffey's *employer* learned of the asserted relationship and what, if any, actions it took upon learning that information does not reflect further on Mr. Ecoffey's or Maverick's reliability as witnesses. The employer's knowledge and actions are simply not material under Brady. Vue, 13 F.3d at 1208-1209. Furthermore, the key facts are already known to Mr. Marshall, so documentation of the employer's knowledge of the fact of the relationship would not increase the efficacy of Mr. Marshall's ability to impeach on this evidence. Graham, 83 F.3d at 1473-1474. Accordingly, the court denies Mr. Marshall's motion to compel the government to obtain from the BIA these requested documents and disclose them to him.[2]

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[2]The court notes that it is in the anomalous position of deciding what Mr. Ecoffey's personnel file contains without having seen that file. Numerous courts have imposed on prosecutors the independent duty to review testifying police personnel files for Brady materials and to disclose anything in those files that is material to the defense once the defense makes a request for Brady materials from testifying police witnesses. See United States v. Dent, 149 F.3d 180, 191 (3d Cir. 1998); United States v. Henthorn, 931 F.2d 29, 30-31 (9th Cir. 1991). Here, the government asserts that it does not have in its possession Mr. Ecoffey's personnel file. The failure of a prosecutor to review testifying police personnel files for Brady materials, or to direct the custodian of such files to conduct such a review, has been held to be reversible error. Henthorn, 931 F.2d at 31. Accordingly, the prudent course for the government would be to either conduct such a review itself, or to direct the custodian of the files to conduct such a review and to ensure that the fact of the review is of record in this case. If no Brady materials are contained therein, such a review is

One final matter is raised by the government's supplying to the court, *in camera*, the criminal record of Maverick. See Docket 244. The government contends that this information is not admissible under Fed. R. Evid. 609 as impeachment, and, thus, that the government has no duty to provide this document to Mr. Marshall. Rule 609 provides, in pertinent part, as follows:

> **(a) General rule.**--For the purpose of attacking the character for truthfulness of a witness,
>
> (1) evidence that a witness . . . has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, . . and
>
> (2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.
>
> **(b) Time limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

See Fed. R. Evid. 609(a) and (b).

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sufficient. If the government has any doubt as to the materiality of documents in Mr. Ecoffey's personnel file, it may submit the same to the court for *in camera* review.

Maverick's record reveals charged offenses more than 10 years old. Those offenses do not appear to fall within the category of offenses described in part (a)(2) of Fed. R. Evid. 609. Additionally, the document provided to the court *in camera* is ambiguous as to what the disposition of Maverick's charges were, and whether the charges resulted in a "conviction" within the meaning of Rule 609.

The issue before the court presently is the *discoverability* of Maverick's record, ***not*** the *admissibility* at trial of the fact of a conviction, if any. If, in fact, Maverick was convicted of any of the crimes evidenced by the record provided to the court, the fact that the convictions are more than 10 years old does not necessarily preclude their admissibility. Rather, the defendants could give the government pretrial notice of their intent to use the evidence pursuant to Rule 609(b). The trial court then has the discretion to decide to admit the evidence, notwithstanding the fact that the conviction is more than 10 years old. See Fed. R. Evid. 609(b). However, defendants would be deprived of the opportunity to argue this issue and provide the requisite pretrial notice absent discovery of the operative facts contained in Maverick's record. Accordingly, the court holds that the government should immediately disclose Maverick's record to both defendants.

CONCLUSION

Based on the foregoing discussion, the court hereby

ORDERS that Mr. Marshall's motion to compel evidence of any agreements between the government and Arlo Looking Cloud is denied as moot, based upon the government's representation that all such documents have been provided to defendants already. [Docket 216]. It is further

ORDERED that Mr. Marshall's motion to compel production of Arlo Looking Cloud's central inmate file from the Bureau of Prisons is denied. [Docket 216]. It is further

ORDERED that Mr. Marshall's motion to compel production of documents from the Bureau of Indian Affairs or any other federal agency regarding the relationship, if any, between Mr. Ecoffey and Maverick is denied. [Docket 216]. It is further

ORDERED that the government's motion for *in camera* review of Maverick's record is granted. [Docket 244]. The government shall immediately produce to both defendants Maverick's criminal record as previously provided to the court *in camera*.

NOTICE OF RIGHT TO APPEAL

Pursuant to 28 U.S.C. § 636(b)(1)(A), any party may seek reconsideration of this order before the district court upon a showing that the order is clearly erroneous or contrary to law. The parties have ten (10) days after service of

this order to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. See Fed. R. Crim. P. 58(g)(2). Failure to file timely objections will result in the waiver of the right to appeal questions of fact. Objections must be timely and specific in order to require review by the district court.

Dated April 29, 2009.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

FILED
APR 29 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER
JOHN GRAHAM, a/k/a/ John Boy Patton, VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

Pending before the Court is Marshall's Motion in Limine #2, Doc. 132. The Court will hold a hearing under Rule 104 of the Federal Rules of Evidence on the admission claimed by the United States pursuant to Federal Rule of Evidence 801(d)(2)(A) and 804(b)(3). This is pursuant to Defendant Marshall's Motion in Limine #2, Doc. 132, and the Response of the United States, Doc. 169. Accordingly,

IT IS ORDERED:

1. That on Tuesday, May 5, 2009, at 1:00 P.M., mountain daylight time, in the Magistrate Courtroom on the second floor of the Federal Courthouse in Rapid City, South Dakota, the Court will hold a hearing on Marshall's Motion in Limine #2 .

Dated this 29th day of April, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: _____
DEPUTY

FILED
APR 29 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER
JOHN GRAHAM, a/k/a/ John Boy Patton, VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

Defendant Graham filed a Motion in Limine Regarding Media Interviews on March 26, 2009. (Doc. 207). The United States responded with its resistance in Doc. 213. It appears from the response of the United States that it will not be offering certain evidence that would be extraneous to the issues in this case. Further, it appears that the United States has indicated what it will offer. The Motion in Limine is denied regarding the statements of Defendant Graham which the United States has indicated it will offer. Whether or not what is to be offered will be admitted will depend upon other matters at trial including foundation for admission. Accordingly,

IT IS ORDERED:

1. That Defendant Graham's Motion in Limine Regarding Media Interviews, Doc. 207, is denied.

Dated this 29th day of April, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: _____
DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

UNITED STATES' COMPLIANCE WITH ORDER DENYING SEVERANCE

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully files the redacted statement of Defendant Marshall pursuant to the Court's Order of April 23, 2009. With respect to Defendant Marshall's statement of December 26, 2003, the United States has substituted the word "others." The redacted version is attached hereto as Exhibit 1.

Dated and electronically filed this 29th day of April 2009.

MARTY J. JACKLEY
United States Attorney

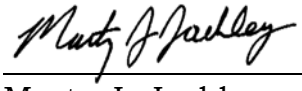
PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2330
Fax: 605.330.4405
Marty.J.Jackley@usdoj.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies on April 29, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Facsimile at
- ☐ Federal Express
- ☒ Electronic Case Filing



Marty J. Jackley

Investigative Report: Anna Mae Aquash Murder Investigation.

The following report pertains to an interview which was conducted with Mr. Dick Marshall on December 26, 2003 in front of the Oglala Sioux Tribal Housing Office in Pine Ridge South Dakota. Interview was conducted by Robert D. Ecoffey, Office of Law Enforcement Services BIA.

Director Ecoffey observed Mr. Dick Marshall coming out of the Oglala Sioux Tribal Housing Office in Pine Ridge, South Dakota. Director Ecoffey pulled up in front of the office at which time Mr. Marshall approached my vehicle.

Marshall got into the passenger side of my vehicle and said hello. Director Ecoffey told Marshall that he was still investigating the murder of Anna Mae Aquash. Director Ecoffey told Marshal information was provided going back several years to when he was married to Cleo and living in Allen, South Dakota.

Director Ecoffey told Marshall information received was that Theda Clark and others had took Anna Mae Aquash to his residence late one night and asked him if he would keep her at his residence.

Marshall said he couldn't remember the exact date, but late one night a car load of people pulled up to his residence in Allen, South Dakota. He was married to Cleo Marshall at the time living in Allen Housing. Marshall said someone knocked on the door and got him out of bed. Marshall said it was Theda Clarke, Anna Mae Aquash, and two others.

Marshall said he knew Theda but he didn't know Anna Mae until they introduced her. Marshall said all he had known of Anna Mae, was that she was in Wounded Knee. Marshall said he couldn't remember the other names. Ecoffey asked Marshall if Arlo Looking Cloud or John Boy Graham rang a bell. Marshall said no he still couldn't remember.

Marshall said Cleo talked to Anna Mae and if he remembered right, she fed all of them. Marshall was asked if he remembered a note, given to him by Theda saying something like "Can you take care of this baggage?"The note referred to Anna Mae. Dick said he couldn't remember a note.

Ecoffey told Marshall Cleo had cooperated with him and she had said that he"Dick," Theda, Arlo and John Boy went into the bedroom and shut the door. After a short while Dick came out and asked her to go into the kitchen. While in the kitchen, Cleo said, you told her Theda gave you a note saying something about taking care of this baggage referring to Anna Mae and they wanted you to keep Anna Mae tied up in your basement.

Cleo told you no because you had kids in the house and she didn't want you to have any part in it. You then went back into the bedroom and came out a short time later with Theda, Arlo and John Boy.
Dick said he couldn't remember the details but if Cleo said this, then it is probably what had

Exhibit 1

happened. Dick said Theda, and the two others took Anna Mae and left.

Dick said he would think about it and if he remembered any of the details he would call Director Ecoffey.

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)	CRIM. NO. 08-50079-01 SUPPLEMENT TO MEMORANDUM IN SUPPORT OF PROPOSED JURY INSTRUCTIONS

Defendant Graham filed proposed jury instructions, Doc. 154, and a supporting memorandum, Doc. 151. In those instructions, Graham asks the Court to instruct the jury that the terms "Indian" and "Indian blood" refer to persons who have blood ties to Indian tribes inside the United States that are recognized by the United States government and with whom the United States shares a guardian-ward relationship. In those instructions, Graham asks the Court to instruct the jury that if it finds that Graham or Aquash do not have direct blood ties to an American Indian tribe located within the United States and with whom the United States government has a guardian-ward relationship, then the jury is obligated to find Graham not guilty of Counts I and II as they are charged in the superceding indictment.

In further support of Graham's position, Graham cites to Federal Rule of Criminal Procedure 6(I). This rule narrowly and deliberately defines the term "Indian Tribe" to only include Indian tribes "recognized by the Secretary of the Interior on a list published in the Federal Register under 25 U.S.C. § 479a-1."

This rule is consistent with, and reinforces the, arguments made by Graham in support of his proposed jury instructions. It supports Graham's argument that the terms used in 18 U.S.C. §§ 1152 & 1153 are to be defined narrowly and held only applicable to American Indians from Indian tribes within the United States and which are recognized by the federal government.

Graham did not previously cite to Fed.R.Crim.P. 6(I). His counsel came across the provision when researching another issue and brought it to the Court's attention on the same day as he became aware of the authority.

Dated April 29, 2009.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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	☐	Facsimile at
	☒	Electronic Case Filing
DANA HANNA	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing

Dated April 29, 2009.

/s/ John R. Murphy
John R. Murphy

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
APR 28 2009
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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.	Case No. 08-50079 NOTICE OF EXPERT WITNESS

NOW COMES the Defendant Richard Marshall, by and through his attorney, Dana L. Hanna, to provide notice pursuant to Federal Rule of Criminal Procedures 16(a) (1)(E) to the government of the defendant's intention to call an expert witness at trial.

Name: Chris Hutton, Professor of Law, University of South Dakota School of Law.

Summary of testimony: This witness will testify as to her opinion that the evidence presented in this trial, compared with the evidence and factual prosecutorial theory in the trial of Arlo Looking Cloud, will provide the witness, Looking Cloud, with legal grounds for a viable motion to challenge his conviction pursuant to the case law in the 8th Circuit Court of Appeals. The witness will also testify concerning the possible application of Rule 35 of the Federal Rules of Criminal Procedure for a reduction of Looking Cloud's sentence after this trial.

Qualifications of the witness are set forth in the attached summary of her qualifications.

Dated this 29th day of April, 2009.

RICHARD MARSHALL, Defendant

By 

Dana L. Hanna
PO Box 3080
816 Sixth Street
Rapid City, SD 57709
605-791-1832
Attorney for Defendant Marshall

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Notice of Expert Witness on the other party in this case by mailing the same, postage prepaid, to the attorney of record, addressed as follows:

Robert Mandel
US Attorney's Office
515 Ninth Street #201
Rapid City, SD 57701

Dated this 29th day of April, 2009.

Dana L. Hanna

The University of South Dakota
Extraordinary.

weather @ the U. 53 °

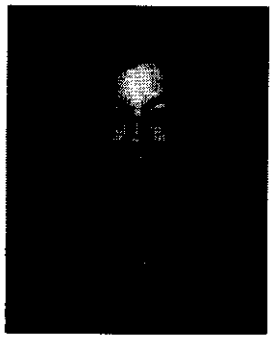
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University of South Dakota School of Law Faculty



The University of South Dakota
School of Law
414 East Clark Street
Vermillion, SD 57069

Phone: (605) 677-5361
Room: 203

Email

Publications

2008 Belbas-Larson Award Winner

Chris Hutton
Professor of Law

Chris Hutton teaches Criminal Law and Procedure, Evidence and Advanced Criminal Procedure at The University of South Dakota School of Law. She publishes the *South Dakota Criminal Law and Procedure Review* annually and edits the treatise, *South Dakota Evidence* by John Larson. Professor Hutton's publications include commentary on the death penalty, evidence issues in criminal trials, retroactivity, and standards of review. She provides annual training for the state judges of the Unified Judicial System, has testified before the South Dakota Criminal Code Revision Commission, and has also spoken about search and seizure and federal sentencing.

The Innocence Project of South Dakota is based at USD School of Law. Professor Hutton supervises law students who volunteer to investigate claims of innocence raised by inmates in the South Dakota State Penitentiary. Approximately forty students are involved in IPSD, which requires review of trial records, interviews with inmates and counsel, and evaluation of evidence used to obtain the conviction. Volunteer attorneys and IPSD's student officers are instrumental in the success of the project.

Professor Hutton is engaged in additional service work, including membership on the ABA Standing Committee on Armed Forces Law, the State Bar Committee for the Active Participation of Women in the Bar, and the Board of Bar Commissioners for the South Dakota Bar (2004-07). She serves as faculty advisor to USD Law's Women in Law. Professor Hutton has maintained her interest in providing legal services for low income people by participating as a board member for Access to Justice (a partnership of the State Bar and legal services programs to increase access to legal services for low income people) and Dakota Plains Legal Services. She has been a commentator for newspaper, radio and TV on issues of interest in Criminal Law, including the death penalty and other high-profile criminal cases.

A.B., St. Joseph's College
J.D., Washburn University
LL.M., Harvard University

Bar Member: South Dakota, Kansas

Courses: Criminal Law
Criminal Procedure
Advanced Criminal Procedure
Evidence

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UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER ON MOTION TO DISMISS DUE TO PRE-ACCUSATORY DELAY
JOHN GRAHAM, a/k/a John Boy Patton, and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

Pending before the Court is Defendant Marshall's Motion to Dismiss Due to Pre-Accusatory Delay. (Doc. 96.) Marshall's motion stems from a delay of 33 years from the time of Annie Mae Aquash's murder in 1975 and his indictment in 2008.

The parties agree that the Eighth Circuit has a two-prong test for determining whether a defendant's Fifth Amendment Due Process rights have been violated by pre-indictment delay: (1) the defendant must show the delay resulted in actual and substantial prejudice to the presentation of the defense, and (2) the defendant must establish that the government intentionally delayed the indictment either to gain a tactical advantage or to harass the defendant.[1] *United States v. Gladney*, 474 F.3d 1027, 1030 (8th Cir. 2007). The court will inquire into the reasons for delay only where actual prejudice has been established. *See id.* at 1030-31. To establish actual prejudice, a defendant must identify witnesses or documents lost during the delay period. *Id.* at 1031. Actual prejudice

[1]The Eighth Circuit recognized that the Supreme Court suggested in *dicta* that the second prong might be satisfied if the government delay was "in reckless disregard of its probable prejudice impact upon the defendant's ability to defend against the charges." *United States v. Jackson*, 446 F.3d 847, 849-50 (8th Cir. 2006).

cannot be established by defendant's speculative or conclusory claims of possible prejudice as a result of the passage of time. *Id.* The defendant carries the burden to show the lost testimony or information is not available through other means. *Id.*

Defendant Marshall argues that a different, more lenient, test and burden of proof should apply in this case because there is no statute of limitations for murder and he was not indicted until more than three decades after the crime. He notes that there are no Eighth Circuit cases supporting his argument, but claims that is because the Eighth Circuit has not yet addressed pre-indictment delay in a murder case. Marshall urges this Court to follow the Fourth Circuit and Ninth Circuit which have ruled that if a defendant proves prejudice he is not required to prove improper prosecutorial motive; instead, the Court should balance the defendant's prejudice against the government's justification for the delay. *See Howell v. Baker*, 904 F.2d 889 (4th Cir. 1990); *United States v. Ross*, 123 F.3d 1181 (9th Cir. 1997). These are not murder cases, but Marshall asserts the reasoning of the Fourth and Ninth Circuits is even more compelling in a murder case with no statute of limitations. The Court will apply the Eighth Circuit's two-part test set forth above. Murder is the most serious of crimes and that is a reason there is no statute of limitations on murder. Given the seriousness of feloniously taking the life of another person, there is no good reason to have a lesser burden for the dismissal of a murder charge due to the passage of time before the charge is brought. A lesser test would run contrary to why there is no statute of limitations for murder.

The Court's view of Defendant Marshall's claim as to what Arlo Looking Cloud did say or might have said in the missing part of his taped interview of November 17, 1994 is supposition. Likewise, what Richard Marshall's now deceased parents knew of whether or not he had an easily hidden revolver in his house on December 12, 1975 is supposition, and a hearing will not produce anything further on that point. Richard Marshall's motivation for not having a gun in his house could be established in other ways without his parents' testimony. Finally, Theda Clark does have infirmities due to her advanced age, but there is no showing that she would have been of any assistance at any time to Marshall's defense. The opposite is apparently true, as it appears the United States is calling her as a witness for the prosecution.

Defendant has failed to demonstrate actual and substantial prejudice and, therefore, the Court need not inquire into the government's reasons for delay. The Court notes, however, that there is no evidence that the government either intentionally or recklessly delayed the indictment to either gain a tactical advantage or to harass Defendant Marshall. In 2004, this Court presided over the trial of Arlo Looking Cloud. The testimony of Robert Ecoffey indicated that he first became involved in the investigation of Annie Mae Aquash's murder in 1984 when Ecoffey accompanied the FBI to Denver to help interview witnesses. The FBI asked for Ecoffey's assistance because of his expertise in dealing with Indian people and in investigating homicides. Witnesses were not cooperating and nothing came of the investigation in 1984. Ecoffey testified that he continued to review the evidence in the case. A break occurred In June of 1993 when a woman contacted Ecoffey with the name of a witness who might cooperate and provide information about Ms. Aquash's murder. On June 18, 1993, that witness contacted Ecoffey. On September 6, 1994, Ecoffey had his first interview with Looking Cloud at the Denver County Jail in Denver, Colorado. Looking Cloud denied knowing anything about the murder. Looking Cloud began cooperating with Ecoffey in 1995, even taking him to the murder scene. Looking Cloud, however, did not tell Ecoffey or anyone else about the alleged stop at the Marshall residence in Allen, South Dakota, to get the murder weapon. Looking Cloud provided that information when he testified before the grand jury in August, 2008. [2] At Looking Cloud's trial, Darlene ("Kamook") Nichols testified that she decided to cooperate with the government and she contacted the FBI. The exact time she started cooperating is not clear, but she testified that she recorded a conversation with her ex-husband, Dennis Banks, in 2002. Based on all of this information, it is the Court's view that the government did not intentionally or recklessly delay the indictment of Marshall to either gain a tactical advantage or to harass him.

For all of these reasons, an evidentiary hearing is not necessary to decide Defendant Marshall's Motion to Dismiss Due to Pre-Accusatory Delay. The Court will, however, allow the parties to present argument on the Motion prior to issuing a ruling. Accordingly,

---

[2]At the Looking Cloud trial in 2004, Marshall's wife, Cleo, testified that Looking Cloud, Graham, Clark and Aquash all had stopped at the Marshall's residence after midnight one night in December, 1975. Cleo sat with Ms. Aquash while Graham, Clark and Looking Cloud talked with Marshall in the bedroom. She denied that Marshall had a gun in the bedroom.

IT IS ORDERED that the Court will hearing argument but will not accept evidence on Defendant's Motion to Dismiss Due to Pre-Accusatory Delay on Tuesday, May 5, 2009 at 1:00 p.m. (Mountain Time), at the federal courthouse in Rapid City, South Dakota.

Dated this 29th day of April, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: Summer Wahlstrom
DEPUTY

FILED
APR 28 2009
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	CRIM. NO. 08-50079-01
vs.	DEFENDANT GRAHAM'S MOTION TO SEAL
JOHN GRAHAM, a/k/a JOHN BOY PATTON and VINE RICHARD MARSHALL, a/k/a) RICHARD VINE MARSHALL, a/k/a) DICK MARSHALL. Defendants.	

Defendant, John Graham, through his attorney, John R. Murphy, moves this Court for its Order sealing Defendant's Motion to Compel Un-redacted Copy of Grand Jury Transcript and attached Exhibit "A." This motion is made for the following reasons:

1. The Motion references specific grand jury testimony that should not be made available to the public; and
2. The exhibit consists of documents provided to the defense in discovery and should not be made available to the public.

Dated April 29, 2009.

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

MARTY J. JACKLEY
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DANA HANNA
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- ☐ Electronic Case Filing

Dated April 29, 2009.

John R. Murphy

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UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER ON MOTIONS TO DISMISS INDICTMENT
JOHN GRAHAM, a/k/a John Boy Patton, and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

Pending before the Court are Defendant Graham's Motion to Dismiss Count III of the Indictment, doc. 49, and Defendant Graham's Motion to Dismiss All Counts of Indictment, doc. 152. Count I of the Superseding Indictment in this case charges Defendants jointly with the unlawful killing and with aiding and abetting the killing of Annie Mae Aquash, asserting that both defendants are Indians and that Ms. Aquash is also an Indian, in violation of 18 U.S.C. §§ 2, 1111, and 1153. Count II charges Graham alone with killing Ms. Aquash in violation of 18 U.S.C. §§ 2, 1111, and 1152. Count II alleges that Ms. Aquash is an Indian, but does not allege that Graham is an Indian. Count III alleges that Graham killed, and aided and abetted other Indians in killing Ms. Aquash in violation of 18 U.S.C. §§ 2, 1111, and 1153. Count III does not allege that Graham is an Indian. An element of the charge of 18 U.S.C. § 1153 is that the defendant is an Indian. An element of the charge of 18 U.S.C. § 1152 is that either the defendant or the victim must be an Indian.

In Graham's previous file, 03-50020, the Court dismissed the one-count Superseding Indictment because the government failed to allege that Graham was an Indian, an essential element of the charge under 18 U.S.C. § 1153. Following dismissal of the Superseding Indictment in 03-

50020, the government re-indicted Defendant Graham in this case. Count III of the Superseding Indictment in the present case is substantially the same as the count dismissed in 03-50020. It does not allege one of the essential elements of an offense under 18 U.S.C. § 1153: that defendant Graham is an Indian. The government again argues that charging Defendant Graham in Count III with aiding and abetting under 18 U.S.C. § 2 is enough to charge him with a federal offense under 18 U.S.C. § 1153, even if Graham is not an Indian, because he aided and abetted Indians in the murder. There is no authority for this proposition and the Court rejects it. The Motion to Dismiss Count III of the Superseding Indictment will be granted. The reasoning of the Court on this same point was more fully set forth in the Memorandum Opinion and Order Dismissing Indictment in CR 03-50020, and that Order is incorporated by reference into this Order.

Defendant Graham argues that neither he nor Ms. Aquash qualify as an "Indian" under 18 U.S.C. §§ 1152 and 1153, and that the Superseding Indictment in this case must be dismissed for lack of federal criminal jurisdiction over him. The Eighth Circuit has held that whether a defendant or a victim are "Indians" under 18 U.S.C. §§ 1152 and 1153 is not jurisdictional issue but rather is a matter of proof at trial. *See United States v. Pemberton*, 405 F.3d 656, 659 (8th Cir. 2005); *United States v. White Horse*, 316 F.3d 769, 772 (8th Cir. 2003). The Eighth Circuit in *White Horse* and *Pemberton* rejected the defendants' arguments that their Indian status was relevant to subject matter jurisdiction. That comports with the established law that a facially valid indictment is not subject to a challenge that it is based on incompetent or unreliable evidence. *See United States v. Williams*, 504 U.S. 36, 54-55 (1992); *United States v. Todd*, 446 F.3d 1062, 1068 (10th Cir. 2006) ("On a motion to dismiss an indictment, the question is not whether the government has presented sufficient evidence to support the charge, but solely whether the allegations in the indictment, if true, are sufficient to establish a violation of the charged offense. For the most part, that question does not involve any examination of the evidence.") (citations omitted). Count I of the Superseding Indictment alleges the essential elements of a charge under 18 U.S.C. § 1153, including that both defendants are Indians and that Ms. Aquash is an Indian. Count II charges Graham with a violation of 18 U.S.C. § 1152, and includes the Indian status element. Accordingly, Counts I and II of the Superseding Indictment are facially valid, do state an offense, and they will not be dismissed.

The charging statutes do not define "Indian," and federal courts use a two part test to determine whether a defendant or a victim are "Indians" as that term is used in 18 U.S.C. §§ 1152 and 1153. First, the defendant or victim must be found to have "some Indian blood." Second, the defendant or victim must be recognized as being Indian. *United States v. Rogers*, 45 U.S. 567 (1846); *see also United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir. 1995) (11/128ths Oglala Sioux Indian satisfied the first prong of the *Rogers'* test of some Indian blood, but the second "recognition" prong was not met so dismissal of indictment was affirmed); *United States v. Dodge*, 538 F.2d 770, 786-87 (8th Cir. 1976) (one-fourth Indian blood meets the first prong of the *Rogers'* test that the person has some Indian blood); *Sully v. United States*, 195 F. 113, 117 (8th Cir. 1912) (one-eighth Indian blood enough for Indian status); *Venzina v. United States*, 245 F. 411, 420 (8th Cir. 1917) (one-quarter to three-eights Indian blood enough for Indian status).[1]

As first articulated in *St. Cloud v. United States*, 702 F. Supp. 1456, 1461 (D.S.D. 1988), there are four factors which the courts have developed to assist with the application of the second prong of the *Rogers'* test. *See, e.g., Lawrence*, 51 F. 3d at 152. Those factors, which have been considered in declining order of importance, are: (1) tribal enrollment; (2) government recognition formally and informally through receipt of assistance reserved only to Indians; (3) enjoyment of the benefits of tribal affiliation; and (4) social recognition as an Indian through residence on a reservation and participation in Indian social life. *Id.* This Court does not view those four factors as being all inclusive nor that the four factors, especially after the first factor, are necessarily in a descending order of importance. The government anticipates that the evidence at trial with regard

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[1]All of these cases involve American Indian blood. It appears that the government has no evidence that Graham or Aquash have any quantum of American Indian blood. The Court agrees with Graham that "Indian blood" must be defined in a manner that recognizes the unique relationship between the United States government and Indian tribes located within its borders. The blood of Canadian Indians such as Graham and Aquash, though ethnically Indian, is not Indian blood as that term is used in 18 U.S.C. §§ 1152 and 1153. Rather, Indian blood means blood from recognized American Indian tribes. A person could be an enrolled member of a Canadian tribe and also have a quantum or some American Indian blood. There is no suggestion, let alone evidence, in the record that such is the case with either Defendant Graham or Ms. Aquash. It may be troublesome, but this lack of evidence regarding an element of the offense does not provide a basis for the Court to dismiss the Superseding Indictment at this time because the Eighth Circuit has held that the dispute over Indian status is a matter of proof at trial rather than a jurisdictional matter.

to the second prong of the *Rogers'* test will demonstrate the affiliation of Graham and Aquash with, among others, the Oglala Sioux Tribe.

However, the record shows that both Defendant Graham and the victim, Ms. Aquash, are and were enrolled members of different Canadian Indian tribes and there is no showing that they neither have nor had any American Indian blood. If the proof at trial is no different, then that means Graham's motion to dismiss Counts I and II will have to be granted for failure to prove of an element of Counts I and II.[2] Then the only governmental entity that could try Mr. Graham would be the State of South Dakota. *See United States v. McBratney*, 104 U.S. 621, 624 (1881)(Congress did not assume jurisdiction over crimes committed within Indian country by non-Indians against other non-Indians in 18 U.S.C. § 1152 and therefore the states have jurisdiction over these offenses).

If the Indian status issue was still considered to be jurisdictional, as it was in *United States v. Lawrence*, 51 F.3d 150, 151 (8th Cir. 1995)("[T]he present case calls for a conclusion as to whether a particular person qualifies as an 'Indian' for purposes of federal jurisdiction. While many subsidiary facts may go into this determination, we believe that ultimately the determination of Indian or non-Indian status is a conclusion of law."); *United States v. Driver*, 945 F.2d 1410, 1412 (8th Cir. 1991) ("For jurisdictional purposes, section 1152 confers jurisdiction with respect to crimes committed on Indian lands, except those committed by Indians, and section 1153(a) establishes jurisdiction with respect to certain crimes . . . committed by Indians."); *United States v. Norquay*, 905 F.2d 1157, 1162 (8th Cir. 1990)("Defendant is correct that his non-Indian accomplice is outside the reach of federal jurisdiction because the victim of the burglary was also a non-Indian."); and *United States v. Dodge*, 538 F.2d 770, 776 (8th Cir. 1976) (reversing conviction of defendant Fleury, a non-Indian, for burglary against a non-Indian on the reservation for lack of jurisdiction under 18 U.S.C. § 1152), then this issue could be ruled upon prior to trial as a matter of law. Instead, under

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[2]Considering the likelihood that the charges against Graham in Counts I and II of the Superseding Indictment will need to be dismissed at trial, counsel should be prepared on next Tuesday afternoon to argue whether or not the decision to deny a severance of the trials should be revisited, with the trial of Richard Marshall to proceed first.

the later authority of *Pemberton* and *White Horse*, this Court does have subject matter jurisdiction and Indian status is an element of the offense and a matter of proof at trial. Accordingly,

IT IS ORDERED:

1. That Defendant Graham's Motion to Dismiss Count III of the Indictment, doc. 49, is granted.

2. That Defendant Graham's Motion to Dismiss All Counts of Indictment, doc. 152, is denied.

3. That argument on the Motion to Sever will commence at 1:00 P.M. (Mountain Daylight Time) on Tuesday, May 5, 2009, at the 2nd floor courtroom of the Federal Courthouse in Rapid City, South Dakota.

Dated this 29th day of April, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY Jackie Nemechek
DEPUTY

FILED
APR 29 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

****

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER
JOHN GRAHAM, a/k/a John Boy Patton; and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

****

Pending before the Court is Defendant Graham's Motion for Additional Peremptory Challenges, Doc. 94. After consideration of the Motion, two alternate jurors will be empaneled, thereby giving the United States seven (7) peremptory challenges and the defense jointly eleven (11) peremptory challenges. In view of the pre-trial publicity, most of which was not created by the defense, and also in view of the previous cases, the defense is jointly allowed two (2) additional challenges for a total of thirteen (13) joint peremptory challenges. Accordingly,

IT IS ORDERED:

1. That two alternate jurors will be empaneled.

2. That the United States will have seven (7) peremptory challenges.

3. That the defense is jointly allowed two additional challenges for a total of thirteen (13) joint peremptory challenges.

Dated this 29th day of April, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: _____
DEPUTY

FILED
APR 29 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER
JOHN GRAHAM, a/k/a/ John Boy Patton, VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

Pending before the Court is Defendant's Marshall's Motion to Dismiss for Selective Prosecution, Doc. 108. Defendant Marshall has failed to make a *prima facie* case that he has been the target of a selective prosecution. Both Graham and Looking Cloud have been vigorously prosecuted with those two Defendants having the strongest cases against them as being the two who allegedly marched the victim to the site of her execution and carried out the execution. Richard Marshall was indicted later and there appears to be strong evidence against him although not as strong as that against Looking Cloud and Graham. There is evidence against Theda Clarke but the evidence in this case and the Looking Cloud case is that Theda Clarke is in her 80s and has been in a nursing home for some time. The documents that the Court reviewed in camera in this case before they were, pursuant to the Court's Order, turned over to the defense in the present case indicated that Theda Clarke suffers and has suffered for some time from a significant amount of health problems. It appears that Theda Clarke is an American Indian, as are Arlo Looking Cloud and Richard Marshall. John Graham is a Canadian Indian. The three male Defendants are similar in age, not in nursing homes, and apparently with no serious health problems.

There has been no showing of any impermissible motive in bringing this case against Richard Marshall. There is no adequate showing that the bringing of the charges was because of race, religion, age, or as a result of Richard Marshall asserting his constitutional rights. There is a

claim that Richard Marshall was charged because he would not cooperate with the United States. There is nothing to support that claim other than his apparently being asked to cooperate and his being charged after he refused to cooperate. That is no showing of "intentional and purposeful discrimination" by the prosecution. *U.S. v. Kelley*, 152 F. 3d 881, 886 (8th Cir. 1998). When these crimes were originally charged in 2003 against Defendants Graham and Looking Cloud, there apparently was not adequate evidence to charge Richard Marshall. It was only after Mr. Looking Cloud was convicted in 2004 and then some time after that when he began cooperating with the United States that it appears there was enough evidence to charge Richard Marshall. It appears that the same is true of Theda Clarke, but by the time Mr. Looking Cloud was cooperating, Theda Clarke's health had deteriorated to the point where, coupled with her age from a trial tactic point of view it reduced the strength of the case against her.

It is not selective prosecution for the prosecution to charge those who, all things considered, they have a better chance of convicting. That appears to be the case here as opposed to the Defendant showing any impermissible motive for the prosecution of Richard Marshall. Accordingly,

IT IS ORDERED:

1. That Defendant Marshall's Motion to Dismiss for Selective Prosecution, Doc. 108, is denied.

Dated this 29th day of April, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: Summer Wahpat
DEPUTY

FILED
APR 29 2009
CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER ON MOTION TO DISMISS FOR DENIAL OF DUE PROCESS
JOHN GRAHAM, a/k/a John Boy Patton, and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

Pending before the Court is Defendant Marshall's Motion to Dismiss For Denial of Due Process. (Doc. 172.) Marshall believes that evidence and the factual theories the government will rely upon in the prosecution of Marshall are inconsistent with the evidence and factual theories the government used to prove the guilt of Arlo Looking Cloud for the same crime in his trial and appeal.

Marshall first points to evidence presented by the government in the Looking Cloud trial that Looking Cloud handed the gun to John Graham at the scene of the murder immediately before Graham shot Annie Mae Aquash. This is not inconsistent with evidence that, earlier in the evening, the group stopped at Marshall's house and Marshall gave them the gun. The evidence about who handed the gun to whom at two different places and two different times is not irreconcilable or inconsistent. In other words, Marshall could have handed the gun to someone at his house, and later Looking Cloud could have handed the gun to Graham at the murder scene. Any inconsistencies about the sequence of stops made before the murder, *i.e.*, whether the group drove from Rapid City to Allen to Rosebud, or from Rapid City to Rosebud to Allen, can be the subject of cross-examination and would not violate Marshall's due process rights. Marshall asserts it is a reasonable

inference that Looking Cloud, Graham and Clark formed the intent to murder Aquash while they were at the house in Rosebud. Therefore, if they stopped at Marshall's house in Allen before they went to Rosebud, then the intent to kill was not present when they were at Marshall's home. It is true that inferences can be drawn, but it certainly is not clear when or where the decision was made to kill Ms. Aquash. Inferences may be drawn that the decision was made before they even left Denver, or while they were in Rapid City.

These alleged "inconsistencies" are not comparable to the case relied on by Marshall, *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000). In the trial of the defendant in *Smith*, the prosecutor had used a statement made by a witness on December 2, 1983, to the effect that the victims were killed only after the defendant's group entered the house, thus implicating the defendant in the murder. But in the trial of a co-defendant, the State used the same witness's contradictory statement from November 30, 1983, to the effect that the victims were murdered before the defendant's group entered the house, thus implicating the co-defendant in the murder. *Id.* at 1050. Thus, "what the State claimed to be true in Smith's case it rejected in [the co-defendant's] case, and vice versa," so that the State had argued successfully in two separate cases that the murders occurred at two different times. *Id.* The Eighth Circuit ruled that the statements were "not factually consistent, nor could Smith have been convicted of felony murder under both theories." *Id.* at 1051. The Court noted that this was not a case of a witness changing his testimony at trial, but a case of the prosecutor choosing to use only those statements by the witness in each defendant's trial that would lead to a conviction of that defendant. *Id.* The Eighth Circuit explained that prosecutors need not present precisely the same evidence and theories in trials for different defendants, and that only inherently factually contradictory theories violate the principles of due process.

The anticipated evidence in this case does not involve inherently factually contradictory theories or prosecutorial inconsistencies. Evidence that Marshall gave the gun to Graham and Looking Cloud at his house in Allen does not foreclose the possibility that Looking Cloud handed the gun to Graham at the murder scene. The jury can decide the credibility of Looking Cloud's statements regarding the sequence of stops made along the way to the murder scene. Accordingly,

IT IS ORDERED that Defendant Marshall's Motion to Dismiss For Denial of Due Process, doc. 172, is denied.

Dated this 29th day of April, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: Summer Wahlford
DEPUTY

FILED
APR 30 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079-01
Plaintiff,	*	
vs.	*	ORDER
JOHN GRAHAM, a/k/a/ John Boy Patton, VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

Pending before the Court is Defendant Graham's Motion to Seal, Doc. 303, requesting Defendant's Motion to Compel Un-redacted Copy of Grand Jury Transcript and attached Exhibit "A" be sealed. After consideration of the Motion,

IT IS ORDERED:

1. That Defendant Graham's Motion to Seal, Doc. 303, is granted, and Defendant's Motion to Compel Un-redacted Copy of Grand Jury Transcript and attached Exhibit "A" shall be sealed by the Clerk until further Order of the Court.

Dated this 30th day of April, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: Jackie Nesenkeimer
DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

FILED
APR 30 2009

UNITED STATES OF AMERICA,	*	CR. 08-50079-02
Plaintiff,	*	
- vs -	*	MEMORANDUM OPINION AND ORDER RE: DEFENDANT MARSHALL'S NOTICE OF INTENT TO OFFER STATEMENTS OF GOVERNMENT COUNSEL
JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,	*	
Defendants.	*	

Defendant Marshall has given notice of his intent to offer into evidence statements made by the former United States Attorney in the trial of *United States v. Arlo Looking Cloud*, CR 03-50020, and in the appeal of that case to the United States Court of Appeals for the Eighth Circuit, No.04-2173. Doc. 168. Defendant Marshall contends these statements are admissible as admissions by a party-opponent under Rule 801(d)(2)(B)(C) and (D) of the Federal Rules of Evidence.[1] The United States has challenged the admissibility of these statements and has requested that this Court hold that the statements are inadmissible. Doc. 200. For the reasons set forth in this Memorandum Opinion the Court is holding that the statements of the prosecutors in the former trial and appeal are inadmissible.

DISCUSSION

Defendant Marshall relies upon cases that hold that statements by a defendant's attorney are

[1]FED. R. EVID. 801(d)(2)(B)(C) and (D) provide:

> A statement is not hearsay if ... The statement is offered against a party and is ... (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.

admissible against the party as admissions, if the statements are with the scope of the attorney's representation. *See United States v. McKeon*, 738 F.2d 26 (2d Cir. 1984); *United States v. Ojala*, 544 F.2d 940, 945-946 (8th Cir. 1976);*Dick v. United States*, 40 F.2d 609, 611 (8th Cir. 1930). However, even in those instance where argument and statements of defense counsel have been held admissible as an admission by a party-opponent, the trial court had to have found: 1. that the prior argument or statement involves assertion of fact inconsistent with similar assertions in the subsequent trial; 2. that such inconsistency is clear and of quality which obviates any need for the trier of fact to explore other events at the prior trial; 3. that the statements of counsel were such as to be the equivalent of testimonial statements by defendant; and 4. that the inference the prosecution was seeking to draw from the inconsistency is a fair one and that honest explanation for the inconsistency does not exist. *See United States v. McKeon*, 738 F.2d at 33. In addition to the concerns inherent in the above requirements, the court in *McKeon* observed that the " use of prior jury argument must be circumscribed in order to avoid trenching upon other important policies" such as the consumption of substantial time to pursue marginal matter that divert from the real issues and the injection of otherwise inadmissible and prejudicial evidence. 738 F.2d at 32.

Historically, statements made by prosecutors and other government agents could not be used against the Government in a criminal prosecution based on the common-law principle that no individual should be able to bind the sovereign. *See* 5 WEINSTEIN'S FEDERAL EVIDENCE § 8-1.33[3] (2d ed. 2008). Even if the Court follows the line of cases that have applied FED. R. EVID. 801(d)(2)(D) in dealing with statements made by government attorneys, the Court in admitting such statements against the Government as a litigant, must determine that the statements meet the following criteria:

> First, "the district court must be satisfied that the prior argument involves an assertion of fact inconsistent with similar assertions in a subsequent trial." Second, the court must determine "that the statements of counsel were such as to be the equivalent of testimonial statements" made by the client. Last, the district court must determine by a preponderance of the evidence that the inference that the proponent of the statements wishes to draw "is a fair one and that an innocent explanation for the inconsistency does not exist."

United States v. Ford, 435 F.3d 204, 215 (2d Cir. 2006) (quoting *United States v. Salerno*, 937 F.2d 797, 811 (2d Cir.1991), and *United States v. McKeon*, 738 F.2d 26, 33 (2d Cir.1984)).

Statements Regarding Providing the Murder Weapon

Much argument is made by Defendant Marshall that the United States has changed position in that at the Looking Cloud trial the murder weapon was provided by Looking Cloud, while now the United States claims that Richard Marshall provided the murder weapon and that the positions are totally inconsistent. As everyone knows, Looking Cloud was tried before this Court. The positions on this matter are not inconsistent and will not be viewed by this Court as inconsistent. Defendant Marshall is mixing conduct in providing the murder weapon and ammunition at the Marshall residence with the handing of the murder weapon to Graham at the site of the shooting of Anna Mae Aquash.

Defendant Marshall has not met the first prong for admissibility of the former prosecutor's argument regarding providing the murder weapon in that this Court is not satisfied that the prior argument involves an assertion of fact inconsistent with evidence that will likely be submitted in the upcoming trial. Defendant Marshall will not be allowed to introduce the prosecutors' arguments in the former trial and appeal on this matter at the upcoming trial.

Statements Regarding Looking Cloud's Credibility

Defendant Marshall proposes to introduce statements made by the former prosecutor in argument in the Looking Cloud trial that Arlo Looking Cloud had a history of lying about his involvement in Anna Mae Aquash's murder. However, "advocacy as to the credibility of witness" has been held to not meet the first two criteria for admission of statements made by government attorneys. See *United States v. Ford*, 435 F.3d at 215. Furthermore, these type of statements are "problematic" under FED. R. EVID. 403. *See* 5 WEINSTEIN'S FEDERAL EVIDENCE § 8-1.33[3] n. 24. For these reasons, Defendant Marshall will not be allowed to introduce the prosecutors' arguments in the former trial and appeal regarding Arlo Looking Cloud's credibility at the upcoming trial.

Sequence of the Murderers' Journey

Defendant Marshall argues that the discovery provided to him discloses that the Government will present testimony from Arlo Looking Cloud that will present a different sequence of travel in taking Aquash to the site of the murder than was presented by the prosecutors in their argument and

briefing in the Looking Cloud trial. Arlo Looking Cloud did not testify at his trial and the Government did not then have the benefit of his full cooperation on this matter. Given the change of circumstances since the first trial it would be unfair to attribute any inconsistencies in the details of the journey to the murder scene as an unethical modification of the theory of the prosecution's case. In addition, the Government correctly argues that this Court instructs on the basic premise of law that statements of counsel are not evidence. *See United States v. Smith*, 508 F.3d 861, 865 (8th Cir. 2007); Eighth Circuit Pattern Jury Instructions, 1.03, Ed. 2007. Allowing the evidence Defendant Marshall seeks to introduce would cause confusion to the jury and is not warranted by the facts of this case.

The Court advises, however, that statements by witnesses in the Looking Cloud trial are evidence and can be used for witness impeachment in the upcoming trial where the prior trial statements are otherwise proper impeachment. Counsel should bear in mind that "[i]mpeachment evidence addresses credibility and is distinct from substantive guilt evidence." *United States v. Wilson*, 930 F.2d 616, 619 (8th Cir. 1991). Accordingly,

> IT IS ORDERED that the United State's request to prohibit the admission of the statements set forth in Defendant Marshal's Notice of Intent to offer into evidence statements made by the former United States Attorney in the trial and appeal in *United States v. Arlo Looking Cloud*, is granted.

Dated this 30th day of April, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: (SEAL) DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT GRAHAM'S MOTION TO COMPEL DISCLOSURE OF LENIENCY AGREEMENTS WITH THEDA CLARKE

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully files its Response in Opposition to Defendant Graham's Motion to Compel Disclosure of Leniency Agreements with Theda Clarke. At this time, the United States has neither offered nor reached any immunity or non-prosecution agreements with Theda Clarke in relation to her role in the Aquash murder case. At this time, Theda Clarke has not been indicted, and the United States has neither offered nor reached any agreement regarding leniency, plea bargains, or preferential treatment.

Accordingly, Defendant Graham's Motion to Compel Disclosure of Leniency Agreements with Theda Clarke should be denied.

Dated and electronically filed this 30th day of April 2009.

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
Phone: 605.357.2330
Fax: 605.330.4405
Marty.J.Jackley@usdoj.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies on April 30, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna
Michaele Hofmann

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Facsimile at
- ☐ Federal Express
- ☒ Electronic Case Filing

Marty J. Jackley

FILED
APR 30 2009

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER
JOHN GRAHAM, a/k/a/ John Boy Patton, VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

Pending before the Court is the United States' Supplement to Motion for *In Camera* Review of Witness Materials, Doc. 269. The Court has reviewed the testimony of Witness C in camera. The Court does not find Witness C's testimony to be discoverable at this time. Accordingly,

IT IS ORDERED:

1. That the United States' Motion for *In Camera* Review of Witness Materials, Doc. 269, is granted, and the testimony of Witness C is not discoverable at this time.

Dated this 29th day of April, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: Jackie Meyerhoffer
DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079-01

UNITED STATES' RESPONSE OPPOSING DEFENDANT GRAHAM'S MOTION IN LIMINE RE: GRAND JURY TESTIMONY

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully files its Response Opposing Defendant Graham's Motion in Limine Re: Grand Jury Testimony.

Defendant Graham's filing is another misguided attempt by the Defendants to seek discovery for which they are not entitled through motion practice. This prosecution is the result of a lengthy investigation that commenced on February 24, 1976, after the discovery of Annie Mae Aquash's body. The investigation of the rape and execution-style murder of Annie Mae Aquash remains open for the purpose of holding all aiders and abettors accountable for their actions in the criminal venture.

The good faith basis of this continuing investigation to hold members of the criminal venture accountable for the death of Annie Mae Aquash is supported with the grand jury's Indictment of Defendant Dick Marshall on August 20, 2008, as well as the Superseding Indictment issued by the grand jury for both John Graham and Dick Marshall on October 7, 2008.

Defendant Graham has failed to state an appropriate objection to the grand jury pursuant to Fed. R. Crim. P. 6(b). Furthermore, there is clearly no evidence that any post-Indictment grand jury [October 7, 2008] was convened for the sole or dominant purpose to gather evidence strengthening the United States' case against either Defendant Graham or Marshall. United States v. Wadlington, 233 F.3d 1067, 1073-74 (8th Cir. 2000). It is a fundamental principle of law that any collateral fruits from bona fide inquiries before a grand jury may be utilized by the government where the purpose of the grand jury proceeding is directed to other offenses and parties. Id. (quoting United States v. Sellaro, 514 F.2d 114, 122 (8th Cir. 1973)). To this end, the United States is submitting Exhibit A, *in camera*, which includes all post-Indictment grand jury materials.

Accordingly, the United States respectfully requests denial of Defendant Graham's Motion in Limine Re: Grand Jury Testimony.

Dated and electronically filed this 30th day of April 2009.

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
Phone: 605.357.2330
Fax: 605.330.4405
Marty.J.Jackley@usdoj.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies on April 30, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Facsimile at
- ☐ Federal Express
- ☒ Electronic Case Filing

Marty J. Jackley

FILED
APR 30 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

UNITED STATES' MOTION FOR *IN CAMERA* REVIEW

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and AUSA Robert A. Mandel and respectfully submits its Motion for In Camera Review.

The United States submits copies of Exhibit A to the United States' Response Opposing Defendant Graham's Motion in Limine Re: Grand Jury Testimony for *in camera* review in that said information is grand jury material of an ongoing criminal investigation. The United States believes this information is pertinent to the Court's consideration, and the defense is not entitled to this evidence under Federal Rule of Evidence 16, Brady v. Maryland, or the Jencks Act.

Date: April 30, 2009

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
Phone: 605.357.2330
Fax: 605.330.4405
Marty.J.Jackley@usdoj.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies on April 30, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Facsimile at
- ☐ Federal Express
- ☐ Electronic Case Filing

Marty J. Jackley

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S RESPONSE TO ORDER ON MOTIONS TO DISMISS INDICTMENT

Defendant John Graham responds to the Court's Order on Motions to Dismiss Indictment (Doc. 304) as follows:

In footnote 2 of the Court's Order, the Court contemplates the possibility that the defendants' trials be separated and that Defendant Marshall's case be tried first. Doc. 304, p. 4, n. 2.

Defendant Graham respectfully submits that he is ready and prepared for trial on May 12, 2009. His witnesses have been subpoenaed are are ready to proceed. Graham has been subject to pretrial incarceration in the United States since December of 2007, was subject to pre-extradition incarceration in Canada for five months before that, and was subject to pre-extradition home confinement for over a year before that.

If the defendants' trials are going to be separated, Graham asks that his case be tried on May 12, 2009. If the defendants' trials are not going to be separated, he asks that the trials proceed as planned on May 12, 2009.

Dated April 30, 2009.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

MARTY J. JACKLEY	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
ROBERT A. MANDEL	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
DANA HANNA	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing

Dated April 30, 2009.

/s/ John R. Murphy
John R. Murphy

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

GOVERNMENT'S RESPONSE TO DEFENDANT GRAHAM'S MOTION TO COMPEL UNREDACTED GRAND JURY TRANSCRIPT

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 Graham's Motion to Compel Unredacted Grand Jury Transcript as follows:

1. No testimony of Arlo Looking Cloud or statements of the prosecution made in the presence of Arlo Looking Cloud were redacted from the 2004 Grand Jury transcript provided to defendants. The only parts redacted were discussions between the prosecutor and the grand jury when the witness was not present. These are not in any fashion discoverable.

2. The United presents to the Court, for *in camera* review, both the redacted and unredacted copies of the transcript.

Accordingly, the Defendant's motion should be in all respects denied.

Respectfully submitted this 30th day of April, 2009.

/s/ Robert A. Mandel

ROBERT A. MANDEL
Assistant United States Attorney
515 9th Street #201
Rapid City, SD 57701
605.342..7822
FAX: 605.342.1108
Robert.Mandel@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April, 2009, I served by electronic transmission, a true and correct copy of the foregoing Government's Response to Defendant Graham's Motion to Compel Unredacted Grand Jury Transcript on:

Dana Hanna
Attorney at Law

John Murphy
Attorney at law

/s/ Robert A. Mandel

Robert A. Mandel

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT GRAHAM'S MOTION IN LIMINE RE: USE OF "KILLS" TO DESCRIBE BILL MEANS

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully files its Response in Opposition to Defendant Graham's Motion in Limine Re: Use of "Kills" to Describe Bill Means.

The United States anticipates that numerous witnesses will testify regarding the activities of the criminal venture to murder Annie Mae Aquash that occurred at Bill Means' residence. It is further anticipated that numerous witnesses will identify and recognize the residence as "Kills" residence. Accordingly, the nickname has independent

identification value and relevance to this case. Furthermore, if the nickname "Kills" is truly only in relation to the association he had with another young man whose name was Willis Kills, then this would not constitute overly prejudicial evidence.[1]

Because many witnesses identify and recognize the residence as the "Kills" residence, the United States believes that it has probative value that is not substantially outweighed by the danger of any unfair prejudice.

Dated and electronically filed this 30th day of April 2009.

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
Phone: 605.357.2330
Fax: 605.330.4405
Marty.J.Jackley@usdoj.gov

[1]The United States does anticipate that contrary evidence regarding this matter may be introduced based in part upon witnesses claiming privilege with respect to the "Kills" name.

CERTIFICATE OF SERVICE

The undersigned hereby certifies on April 30, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Facsimile at
- ☐ Federal Express
- ☒ Electronic Case Filing



Marty J. Jackley

USCA 8 No. _____

United States District Court
for the District of South Dakota

FILED
APR 30 2009
CLERK

NOTICE OF APPEAL

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN GRAHAM,
a/k/a John Boy Patton,

Defendant.

CR08-50079-01
District Court Docket Number

Lawrence L. Piersol
District Court Judge

Notice is hereby given that the Plaintiff, United States of America, appeals to the United States Court of Appeals for the Eighth Circuit from the District Court's Order on Motions to Dismiss Indictment, entered in this action on April 29, 2009.

Dated this 30th day of April, 2009.

MARTY J. JACKLEY
United States Attorney
P.O. Box 2638
Sioux Falls, SD 57101-2638
Telephone: (605)330-4400
Facsimile: (605)330-4410
E-Mail: mjackley@usdoj.gov

TRANSCRIPT ORDER FORM TO BE COMPLETED BY ATTORNEY FOR APPELLANT	
☐ Please prepare a transcript of: ☐ Pre-trial proceedings ☐ Testimony or ☐ Portions thereof ☐ Sentencing ☐ Post-Trial Proceedings ☐ Other (specify)	☒ I am not ordering a transcript because: ☐ Previously filed ☒ Other (specify) No hearing was held on motion.

INFORMATION SHEET
TO BE COMPLETED BY ATTORNEY FOR APPELLANT

1. Defendant's address: Unknown; represented by John R. Murphy
Attorney at Law
328 E. New York St. #1
Rapid City, SD 57701

2. Date of Verdict: n/a (appeal of the Order on Motions to Dismiss Indictment, entered in this action on April 29, 2009)

Offenses: Ct. 1: First degree murder in violation of 18 U.S.C. §§ 1111, 1153, and 2
Ct. 2: First degree murder in violation of 18 U.S.C. §§ 1111, 1152, and 2
Ct. 3: First degree murder in violation of 18 U.S.C. §§ 1111, 1153, and 2

Trial Testimony - Number of Days: n/a Bail Status: detained

3. Sentence and Date Imposed: n/a

4. Appeal Challenging: District Court's Order on Motions to Dismiss Indictment, entered in this action on April 29, 2009.

5. Date Trial Transcript ordered by Counsel or District Court: No hearing was held on Defendant's motion.

Stenographer in Charge: n/a

6. Trial Counsel was: ■Appointed □Retained

Does Defendant's financial status warrant appointment of counsel on appeal? Unknown

7. Assistant U.S. Attorney Name and Phone Number:
Marty J. Jackley, U.S. Attorney (605)357-2310
Robert Mandel, Assistant U.S. Attorney (605)343-2101
Mark E. Salter, Assistant U.S. Attorney (605)357-2360

COURT REPORTER ACKNOWLEDGMENT

_____ _____ _____
Date Order Received Estimated Completion Date Est. Number of Pages

_____ _____
Court Reporter's Signature Date

United States District Court

District of South Dakota

Office of the Clerk
Room 128, Federal Building
400 S. Phillips Ave.
Sioux Falls, SD 57104-6851

Joseph Haas
Clerk of Court

Telephone
(605) 330-6600

April 30, 2009

NOTICE TO ALL COUNSEL:

Re: CR08-50079-01 USA v. John Graham, a/k/a John Boy Patton

A Notice of Appeal has been filed in the above case. If you receive electronic notice of filing, you were able to view the notice and related documents through PACER one time, at no cost.

If you are still receiving notice of entry through the U.S. Mail, enclosed is a copy of the notice of appeal and docket sheet.

Information regarding criminal appeals may be found on the website for the Eighth Circuit Court of Appeals at www.ca8.uscourts.gov.

Please be advised that should you wish to supplement the record on appeal, that must be done forthwith to facilitate preparation of the Clerk's Record on appeal by our office. If you have any questions regarding this, please contact our office at the above listed telephone number, or contact the Clerk, U.S. Court of Appeals at (651) 848-1300.

U. S. COURT OF APPEALS - EIGHTH CIRCUIT
APPELLANT'S FORM A
Appeal Information Form
To be filed with the Notice of Appeal

Appeal Docket No.

FILED
APR 3 0 2009
CLERK

STYLE OF CASE:	
United States of America Appellant. vs.	COUNSEL: NAME, ADDRESS, AND TELEPHONE NUMBER Marty J. Jackley United States Attorney P.O. Box 2638 Sioux Falls, SD 57101-2638 (605)357-2310 Mark E. Salter Assistant U.S. Attorney P.O. Box 2638 Sioux Falls, SD 57101-2638 (605)357-2310 Robert L. Mandel Assistant United States Attorney 515 9th St., Suite 201 Rapid City, SD 57701 (605)342-2101
JOHN GRAHAM, a/k/a John Boy Patton Appellee.	COUNSEL: NAME, ADDRESS, AND TELEPHONE NUMBER John R. Murphy Attorney at Law 328 E. New York St. #1 Rapid City, SD 57701 (605)342-2909

LIST ISSUES ON APPEAL: (For administrative purposes.) You may indicate that this also serves as your statement of issues under FRAP 10(b)(3) -- (X) Yes (__) No

Whether the district court erred in its Order on Motions to Dismiss Indictment.

FOR LEAD COUNSEL ONLY:
I have not discussed settlement possibilities on appeal with my client.
This appeal is not amenable to settlement.

Submitted by: _____
Signature of Lead Counsel Date

U. S. COURT OF APPEALS - EIGHTH CIRCUIT

Appeal Docket No. _____

APPELLEE'S FORM B
Appeal Information Form

CASE NAME (Underline name of Appellee):

United States v. John Graham

IS THE ALIGNMENT OF PARTIES, NAMES, ADDRESSES, AND TELEPHONE NUMBERS CORRECT ON APPELLANT'S FORM A? () Yes () No
If no, list corrections below.

FOR LEAD COUNSEL ONLY:
I have/have not discussed settlement possibilities on appeal with my client.
This appeal is/is not amenable to settlement.

NAME, ADDRESS, AND TELEPHONE NUMBER OF LEAD COUNSEL:

Submitted by: _____

Date: _____

Copy 1 - Send to Appellant
Copies 2 & 3 - Send to Clerk, Eighth Circuit Court of Appeals
Copy 4 - Retain

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
APR 30 2009

UNITED STATES OF AMERICA, CR08-50079-01

Plaintiff, CERTIFICATE OF SERVICE

vs.

JOHN GRAHAM,
a/k/a John Boy Patton,

Defendant.

The undersigned hereby certifies that on this 30th day of April, 2009, true and correct copies of the

1. Notice of Appeal
2. Appellant's Form A
3. Appellee's Form B

in the above-captioned matter were served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy – via first class mail, postage prepaid
Attorney at Law
328 E. New York St. #1
Rapid City, SD 57701

MARTY J. JACKLEY
United States Attorney
P.O. Box 2638
Sioux Falls, SD 57101-2638
Telephone: (605)330-4400
Facsimile: (605)330-4410
E-Mail: marty.jackley@usdoj.gov

United States District Court

District of South Dakota

Office of the Clerk
Room 128, Federal Building
400 S. Phillips Ave.
Sioux Falls, SD 57104-6851

Joseph Haas
Clerk of Court

Telephone
(605) 330-6600

April 30, 2009

TRANSMITTAL OF NOTICE OF APPEAL IN A CRIMINAL CASE
(Prepare a separate Transmittal Form for each defendant.)

1. **Case Number & Title:** CR08-40079-01 & 02 USA v. John Graham, a/k/a John Boy Patton & Vine Richard Marshall, a/k/a Richard Vine Marshall, a/ka/ Dick Marshall

2. **Defendant/Appellee:** John Graham, a/k/a John Boy Patton

Is Defendant incarcerated?: yes, Pennington County Jail

3. **Date Notice of Appeal filed:** 04/30/2009

4. **Document being appealed and document number:** #304 Order granting motion to dismiss Count 3 of Indictment; denying motion to dismiss all counts

5. **Sentence imposed:** n/a case has not gone to trial yet

Charges: Count 1 - 18 USC 1111, 1153 & 2 First Degree Murder & Aid & Abet
Count 2 - 18 USC 1111, 1152 & 2 First Degree Murder & Aid & Abet

6. **Co-Defendant(s):** Vine Richard Marshall

Co-Defendant Case Nos.: CR08-40079-02

Have any Co-Defendants filed a Notice of Appeal?: no

7. **Date of Plea/Verdict:** n/a - case set for trial 5/12/2009

8. **Date Transcript ordered:** n/a

9. **Court Reporter:** n/a

10. **Assistant U.S. Attorney:**

Marty Jackley
United States Attorney
PO Box 2638
Sioux Falls, SD 57101-2638

Robert Mandel
Asst. U.S. Attorney
PO Box 2638
Sioux Falls, SD
57101-2638

11. **Defense Counsel:** John Richard Murphy
328 E. New York St., Suite 1
Rapid City, SD 57701
(605) 342-2909

Was Defense Counsel appointed/retained?: appointed

Is there any reason why Defense Counsel should not be appointed on appeal? no

12. **Has the filing fee been paid?:** no - ifp continued from District Court

13. **Is there a pending motion for IFP:** no - ifp continued from District Court

14. **Are there any other pending motions?** yes

If yes, list pending motions and document numbers:
#92 - Motion for Joinder to Defendant Marshall's Motion for pretrial hearing and motion in limine
#166 - Motion for Order to Supplement Record
#270 - Motion to Compel Disclosure of Leniency Agreements
#313 - Sealed Motion to Compel Un-Redacted Grand Jury Transcript
#319 - Motion for In-camera review re: Exhibit A to USA's Response Opposing Defendant Graham's Motion in Limine re: Grand Jury Testimony
(These are the pending motions for defendant Graham who has filed this notice of appeal. There are other pending motions filed by co-defendant Marshall.)

15. **Additional comments:** This case is set to begin for trial May 12, 2009 and is a highly publicized case being watched closely by the press. This defendant was previously charged in CR03-50020, USA v. Fritz Arlo Looking Cloud & John J. Graham. Charges against defendant Graham were dismissed and the Government filed a notice of appeal in that case on 10/31/2008. That appeal has not yet been mandated. Your case number is 08-3580.

JOSEPH A. HAAS, CLERK

BY: */s/ Jackie Meisenheimer*
Jackie Meisenheimer
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION FOR SEVERANCE OF COUNTS AND OBJECTION TO STAY OF PROCEEDINGS

Based on the Court's Order on Motions to Dismiss Indictment, Doc. 304, and the government's Notice of Appeal of that Order, Doc. 323, Defendant Graham moves this Court to sever counts one and two from count three of the superceding indictment. He asks this Court not to stay trial on the matter and to allow him to proceed to trial on counts one and two on May 12, 2009.

SUMMARY OF FACTS

Graham has been in federal custody since December of 2007. He does not consent to any further delay in these proceedings. He is ready to have his case tried on May 12, 2009.

Graham is charged with Marshall in a three count indictment. The Court has recently dismissed the third count in that indictment. Doc. 304.

The Court has not ruled on whether it will dismiss counts one and two of the indictment at this time. Doc. 304. The Court has expressly held that this issue is not ripe for dismissal and must be decided at trial as a factual issue. Doc. 304.

The government has appealed this Court's Order. Doc. 323. The only final decision subject to review in that Order is the dismissal of count three. Doc. 304.

The government was not required to file its notice of appeal at this time. It could have waited until after Graham's trial, which was set to be completed well within the time frame allowed for appeals to commence. Had the government reserved action, and had the Court dismissed counts one and two at the conclusion of the government's case, the dismissal of all three counts would be ripe for appellate review. As it stands now, the government, through its own conduct, has created a situation where successive appeals are likely.

Graham is asking the Court to sever counts one and two from count three. This will dramatically lessen the delays in this case and the time Mr. Graham has to stay in custody pending resolution of the matter. Graham opposes any general stay in the proceedings in regard to counts one and two as this will cause substantial delay in the process.

ARGUMENT

If offenses are properly joined, the Court should order separate trials where

the defendant is exposed to prejudice by joinder of the offenses. Fed.R.Crim.P. 14; United States v. Darden, 70 F.3d 1507, 1526-27 (8th Cir.), reh'g denied, cert. denied, Hopkins v. United States, 116 S.Ct. 2567(1995).

At this juncture, the government can only appeal the dismissal of the third count. The other two counts are not affected by the appeal and are ready for trial.

By taking an appeal at this time, the government is squandering resources and needlessly delaying this action. Graham is prejudiced by this as he is sitting in custody and has been sitting approximately two years.

It is reasonable to assume the following scenario will unfold in this case:

If the Court of Appeals affirms the dismissal of count three, the entire case will be remanded back to the district court for resolution of counts one and two. By this time, several months will have elapsed. Once the case is remanded back, Graham's motion to dismiss counts one and two will still be pending. The case will then proceed to trial. After trial, provided that no evidence of American Indian blood has been introduced, this Court will grant a judgment of acquittal on those two counts. The government will then appeal that decision. Many more months will elapse before a ruling is issued. Graham will have sat in custody for close to three years by that time.

Much less delay will occur if this Court denies the government's request for a stay of proceedings and grants his request to have counts one and two severed from count three. If this occurs, trial will go ahead as planned on May 12, 2009. In all likelihood, if the government fails to meet its burden and the charges are dismissed, the trial will be done in a week. The government can then appeal the dismissal of counts one and two. That appeal will be pending almost simultaneously with the appeal already filed in regard to count three. There won't be successive appeals as it appears there will be if a stay of trial is granted.

The government will not be prejudiced by being required to proceed forward in this manner. It will be the most expeditious use of time and resources. The government has stated it has been ready for trial for over a year. Graham is ready for trial. Marshall has not moved to continue the trial. All witnesses are subpoenaed. The case should move forward notwithstanding the government's decision to file a notice of appeal prior to the trial commencing. Graham should

not be prejudiced by being denied his right to a speedy trial because of the government's tactical decision to appeal count three at this time.

Dated May 1, 2009.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

MARTY J. JACKLEY	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
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	☐	Facsimile at
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ROBERT A. MANDEL	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
DANA HANNA	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing

Dated May 1, 2009.

/s/ John R. Murphy

John R. Murphy

United States District Court

District of South Dakota

Office of the Clerk
Room 128, Federal Building
400 S. Phillips Ave.
Sioux Falls, SD 57104-6851

Joseph Haas
Clerk of Court

Telephone
(605) 330-6600

May 1, 2009

AMENDED TRANSMITTAL OF NOTICE OF APPEAL IN A CRIMINAL CASE
(Prepare a separate Transmittal Form for each defendant.)

1. **Case Number & Title:** CR08-50079-01 & 02 USA v. John Graham, a/k/a John Boy Patton & Vine Richard Marshall, a/k/a Richard Vine Marshall, a/ka/ Dick Marshall

2. **Defendant/Appellee:** John Graham, a/k/a John Boy Patton

   Is Defendant incarcerated?: yes, Pennington County Jail

3. **Date Notice of Appeal filed:** 04/30/2009

4. **Document being appealed and document number:** #304 Order granting motion to dismiss Count 3 of Indictment; denying motion to dismiss all counts

5. **Sentence imposed:** n/a case has not gone to trial yet

   Charges: Counts 1& 3 - 18 USC 1111, 1153 & 2 First Degree Murder & Aid & Abet
   Count 2 - 18 USC 1111, 1152 & 2 First Degree Murder & Aid & Abet

6. **Co-Defendant(s):** Vine Richard Marshall

   Co-Defendant Case Nos.: CR08-50079-02

   Have any Co-Defendants filed a Notice of Appeal?: no

7. **Date of Plea/Verdict:** n/a - case set for trial 5/12/2009

8. **Date Transcript ordered:** n/a

9. **Court Reporter:** n/a

10. **Assistant U.S. Attorney:**

Marty Jackley	Robert Mandel
United States Attorney	Asst. U.S. Attorney
PO Box 2638	PO Box 2638
Sioux Falls, SD 57101-2638	Sioux Falls, SD

11. **Defense Counsel:** John Richard Murphy
328 E. New York St., Suite 1
Rapid City, SD 57701
(605) 342-2909

Was Defense Counsel appointed/retained?: appointed

Is there any reason why Defense Counsel should not be appointed on appeal? no

12. **Has the filing fee been paid?:** n/a - Government appealed

13. **Is there a pending motion for IFP:** n/a - Government appealed

14. **Are there any other pending motions?** yes

If yes, list pending motions and document numbers:
#92 - Motion for Joinder to Defendant Marshall's Motion for pretrial hearing and motion in limine
#166 - Motion for Order to Supplement Record
#270 - Motion to Compel Disclosure of Leniency Agreements
#313 - Sealed Motion to Compel Un-Redacted Grand Jury Transcript
#319 - Motion for In-camera review re: Exhibit A to USA's Response Opposing Defendant Graham's Motion in Limine re: Grand Jury Testimony
(These are the pending motions related to defendant Graham. There are other pending motions related to co-defendant Marshall.)

15. **Additional comments:** This case is set to begin for trial May 12, 2009 and is a highly publicized case being watched closely by the press. This defendant was previously charged in CR03-50020, USA v. Fritz Arlo Looking Cloud & John J. Graham. Charges against defendant Graham were dismissed and the Government filed a notice of appeal in that case on 10/31/2008. That appeal has not yet been mandated. Your case number is 08-3580.

JOSEPH A. HAAS, CLERK

BY: */s/ Jackie Meisenheimer*
Jackie Meisenheimer
Deputy Clerk

U.S. Department of Justice

Marty J. Jackley
United States Attorney
District of South Dakota

515 Ninth Street, Room 201 *(605)342-7822*
Rapid City, South Dakota 57701 *FAX:(605)342-1108*

May 1, 2009

Honorable Lawrence L. Piersol
U.S. District Judge
400 S. Phillips Avenue
Sioux Falls, SD 57104

RE: United States v. John Graham et al.

Dear Judge Piersol:

Consistent with the Government's Response to Defendant Graham's Motion to Compel Unredacted Grand Jury Transcript (DE 321), enclosed for *in camera* review are both the redacted and unredacted October 19, 2004, grand jury transcripts of Arlo Looking Cloud.

If you have any questions, please do not hesitate to contact me.

Thank you.

Sincerely,

MARTY J. JACKLEY
UNITED STATES ATTORNEY
By:

ROBERT A. MANDEL
Assistant U.S. Attorney

RAM/lc
Encs.
c: John Murphy
Dana Hanna

FILED
MAY 0 1 2009
CLERK

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 ORDER REGARDING NOTICE OF APPEAL AND MOTION TO SEVER

The government has filed a Notice of Appeal of this Court's Order on Motions to Dismiss Indictment. (Doc. 323.) In light of its rulings in the Order on Motions to Dismiss Indictment (doc. 304), the Court intended to hear argument from the parties at the hearing on Tuesday regarding whether or not the decision to deny a severance of the trials should be revisited. Because the government has filed a Notice of Appeal challenging this Court's order dismissing Count III of the Superseding Indictment, the Court will ask the parties to brief the following issues:

1. Does the Court have authority to reconsider defendant Marshall's motion to sever? The Court refers the parties to the unpublished decision of *United States v. Weber*, 1997 WL 61442 (W.D.Mo. 1997).
2. If the Court concludes there is authority to reconsider its prior decision regarding the motion to sever, should the Court hold separate trials of the defendants in this case and proceed with the trial of defendant Marshall?

Accordingly,

IT IS ORDERED:

1. That on or before noon on Monday, May 4, 2009, the parties shall serve and file briefs on the above issues.

2. A hearing will be held on these issues at 1:00 p.m. on Tuesday, May 5, 2009 at 1:00 p.m. (Mountain Daylight Time) in the Magistrate Judge's courtroom in the Federal Courthouse in Rapid City, South Dakota.

Dated this 1st day of May, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: _____
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)))))))))))	Case No. 08-50079 DEFENDANT MARSHALL'S PROPOSED JURY INSTRUCTIONS

Attorney for Plaintiff: Marty J. Jackley, United States Attorney
Robert A. Mandel, Assistant United States Attorney
515 9th Street, 2nd Floor
Rapid City, SD 57701
605-342-7822

Attorney for Defendant: Dana L. Hanna
PO Box 3080
816 Sixth Street
Rapid City, SD 57701
605-791-1832

Defendant Richard Marshall files his proposed jury instructions.

Dated May 1, 2009

*/s/ Dana L. Hanna*_____

Dana L. Hanna
PO Box 3080
816 Sixth Street
Rapid City, SD 57701
605-791-1832

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of Defendant Marshall's foregoing Proposed Jury Instructions upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
robert.mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 1st day of May, 2009.

/s/ Dana L. Hanna
Dana L. Hanna

DEFENDANT'S PROPOSED JURY INSTRUCTION-NO. 1

FALSE IN ONE / PERJURY

If a person is shown to have knowingly testified falsely concerning any important or material matter, you obviously have a right to distrust the testimony of such an individual concerning other matters. You may reject all of the testimony of that witness or give it such weight or credibility as you may think it deserves.

The testimony of an admitted perjurer should always be considered with caution and weighed with great care.

Authority:

U.S. v. Walker
97 F.3d 253
C.A.8 (Mo.),1996.

DEFENDANT'S PROPOSED JURY INSTRUCTIONS-NO. 2

The prior statements of the government's attorneys may be used to prove the truth of the matters asserted by the government's attorneys in their prior statements.

_____

FRE 801 (d)(2)(c).

DEFENDANT'S PROPOSED JURY INSTRUCTION-NO. 3

ADMISSIONS BY A PARTY'S AUTHORIZED AGENT-GOVERNMENT ATTORNEYS

You have heard testimony that in the trial of Fritz Arlo Looking Cloud and in that witness's appeal to the U.S. Court of Appeals, attorneys for the government made certain statements about the evidence that the government argued to prove Fritz Arlo Looking Cloud's guilt in the murder of Anna Mae Aquash.

The attorneys for the government are authorized by the government to make statements concerning the facts and evidence in this matter. The government is a party in this case

Although the statements made by attorneys in this trial are not evidence, statements made by attorneys in a prior trial or in a court may be considered by you as evidence.

Authority: FRE 801 (d)(2)(b)(c) and (d);
U.S. v. Martin, 773 F.2d 579 (4th Cir. 1985);
U.S. v. Kattar, 840 F.2d 118 (1st Cir. 1988)

DEFENDANT'S PROPOSED JURY INSTRUCTION-NO. 4

TRANSCRIPT OF TAPE RECORDED CONVERSATION

You have heard tape recordings of conversations that are in evidence, and you were provided with a type written transcript of the tape recordings. Those transcripts also undertake to identify the speakers engaged in the conversation.

You were permitted to have the transcript for the limited purpose of helping you follow the conversation as you listen to the tape recording, and also to help you keep track of the speakers. Differences in meaning between what you hear in the recordings and read in the transcript may be caused by such things as the inflection in a speaker's voice. It is what you hear, however, and not what you read, that is the evidence.

You are specifically instructed that whether the transcript correctly or incorrectly reflects the conversation or the identity of the speakers is entirely for you to decide based upon what you have heard here about the preparation of the transcript, and upon your own examination of the transcript in relation to what you hear on the tape recording. If you decide that the transcript is in any respect incorrect or unreliable, you should disregard it to that extent.

DEFENDANT'S PROPOSED JURY INSTRUCTION-NO. 5

TESTIMONY OF INFORMANTS

You have heard evidence that Serle Chapman and Darlene Nichols-Ecoffey have an arrangement with the Government under which they were paid by the Government and received monetary benefits for providing information to the Government. Their testimony was received in evidence and may be considered by you.

You may give their testimony such weight as you think it deserves. Whether or not their information or testimony may have been influenced by such payments and receiving monetary benefits is for you to determine.

DEFENDANT'S PROPOSED JURY INSTRUCTION-NO. 6

EVIDENCE ADMITTED AGAINST ONLY ONE DEFENDANT

As you know, there are two defendants on trial here: John Graham and Richard Marshall. Each Defendant is entitled to have his case decided solely on the evidence which applies to him. Some of the evidence in this case is limited under the rules of evidence to one of the defendants, and cannot be considered against the other. You must not consider that evidence when you are deciding if the government has proved, beyond a reasonable doubt, its case against the other defendant.

DEFENDANT'S PROPOSED JURY INSTRUCTION-NO. 7

STATEMENT OF ONE DEFENDANT IN MULTI-DEFENDANT TRIAL

You may consider that statements of Defendants John Graham and Richard Marshall to law enforcement only in the case against the defendant who made that statement and not against the other defendant. What that means is that you may consider a defendant's statement to law enforcement in the case against him and for that purpose rely on it as much or as little as you think proper, but you may not consider or discuss that statement in any way when you are deciding if the Government has proved, beyond a reasonable doubt, its case against the other defendant.

DEFENDANT'S PROPOSED JURY INSTRUCTION-NO. 8

STATEMENT BY THE DEFENDANT

You have heard testimony that Richard Marshall made a statement to Robert Ecoffey. It is for you to decide:

First, whether Richard Marshall made the statement and

Second, if so, how much weight you should give to it.

In making these two decisions you should consider all of the evidence, including the circumstances under which the statement may have been made.

DEFENDANT'S PROPOSED JURY INSTRUCTION-NO. 9

IMPEACHMENT

In Preliminary Instruction No. ___, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be "impeached" or discredited and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness's present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you my consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

You have heard evidence that some witnesses have been convicted of a crime. You many use that evidence only to help you decide whether or not to believe those witnesses and how much weight to give their testimony.

Similarly, you have heard evidence that the witness Fritz Arlo Looking Cloud has been convicted and found guilty to a charge that is alleged to have arisen out of the same events for which the defendants are now on trial. You cannot consider that witness's guilt as any evidence of the guilt of the defendant. Rather, you can consider that witness's guilt only for the purpose of determining how much, if at all, to rely upon his testimony.

You should treat the testimony of certain witnesses with greater caution and care than that of other witnesses:

1. You have heard testimony from Fritz Arlo Looking Cloud stating that he participated in the crime charged against the defendant. His testimony was received in evidence and may be considered by you. You may give his testimony such weight as you think it deserves. Whether or not his testimony may have been influenced by his desire to please the Government or to strike a good bargain with the Government about his own situation is for you to determine.

2. You have heard evidence that Fritz Arlo Looking Cloud is testifying with the hope of receiving a reduction in his sentence in return for his cooperation with the government in this case. If the prosecutor handling such a witness's case believes the witness has provided "substantial assistance," the prosecutor can file a motion to reduce the witness's sentence. The judge has no power to reduce a sentence for such witness for substantial assistance unless the U.S. attorney files a motion requesting such a reduction. If the motion for reduction of sentence for substantial assistance is filed by the U.S. attorney, then it is up to the judge to decide whether to reduce the sentence of that witness at all, and if so how much to reduce it. You may give the testimony of Fritz Arlo Looking Cloud such weight as you think it deserves. Whether or not the testimony of the government witness may have been influenced by the witness's hope of receiving a reduction in sentence is for you to decide.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness's testimony whatever weight you think it deserves or give it no weight at all.

DEFENDANT'S PROPOSED JURY INSTRUCTION-NO. 10

ADMITTED PERJURER

You have heard evidence that Fritz Arlo Looking Cloud knowingly gave perjured testimony-that is, he gave false testimony under oath. I charge you that you should treat the testimony of a witness who has given perjured testimony with greater caution and care than that of other witnesses, particularly that testimony which is not corroborated by other reliable evidence or testimony from other witnesses.

Authority: *U.S. v. Walker*, 97 F.3d 253 (8th Cir. 1996)

DEFENDANT'S PROPOSED JURY INSTRUCTION-NO. 11

TESTIMONY OF ACCOMPLICE

You have heard testimony from witness Fritz Arlo Looking Cloud who stated that he participated in the crime charged against the defendant. You may give his testimony such weight as you think it deserves. Whether or not his testimony may have been influenced by his desire to please the government or to strike a good bargain with the government about his own situation is for you to determine. You should, however, consider his testimony with greater caution and care than that of an ordinary witness.

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S RESPONSE TO ORDER

In response to the Court's Order Regarding Notice of Appeal and Motion to Sever, Doc. 331, Defendant Graham states the following:

RELIEF REQUESTED

Graham asks this Court to sever counts one and two from count three and allow him to proceed with trial on May 12, 2009. Graham asks that he be permitted to go to trial on May 12, 2009, regardless of whether his case is severed from that of Vine Richard Marshall's case.

THE COURT HAS CONTINUING JURISDICTION TO
ADDRESS MOTIONS FOR SEVERANCE OF COUNTS AND DEFENDANTS

District courts only lose jurisdiction over an entire case if the government is appealing a final judgment. United States v. Weber, 1997 WL 61442 (W.D. Mo.)

(citing Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 378-79 (1985), for the proposition that trial courts lose jurisdiction when an appeal is taken from a final judgement). A final judgment is one that "disposes of all the issues in a case and brings it to an end." Weber, supra (citing Abney v. United States, 431 U.S. 651 (1977)).

If the government takes an interlocutory appeal, the district court only loses jurisdiction to decide matters related directly to the precise issue being appealed. See Weber, supra (citing Britton v. Co-op Banking Group, 466 U.S. 648, 667 n. 42 (1984), for the proposition that "[w]here a party appeals an interlocutory order, the trial court only loses jurisdiction as to the precise issue appealed.").

In this case, the government has taken an interlocutory appeal. The notice of appeal is drafted broadly as an appeal of this Court's entire order. Doc. 323. In reality, the only issue subject to appellate review at this time is the dismissal of count three. The Court made no final or appealable decisions in that order. Doc. 304. The government cannot, in good faith, argue that the Court's statements in that order as to the likelihood of dismissal of counts one and two at trial constitute an appealable judgment or order.

Under the law cited above, this Court has only lost jurisdiction to resolve matters directly related to the dismissal of count three. Count three does not

implicate Defendant Marshall. He is not charged in that count. Therefore, this Court has jurisdiction to address both Graham and Marshall's motions for separate trials. Docs. 75 & 87.

Similarly, under the law cited above, this Court has jurisdiction to address Defendant Graham's motion for severance of counts. Doc. 328. The precise issue presented in that motion is whether Graham can go ahead to trial on counts one and two while count three is on appeal. Doc. 328. That determination is not affected by the government's appeal as to the propriety of the dismissal of count three. And, that determination does not call for any determination of fact or law that relates to the propriety of the dismissal of count three.

Accordingly, Graham believes that this Court has the continuing jurisdiction to address the motions for separate trials and motion to sever counts. Graham renews his request to have the counts pending against him severed. Graham takes no position on whether he and Marshall should be tried together at this juncture as he is prepared to go ahead to trial on May 12, 2009 either way.

Dated May 1, 2009.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

MARTY J. JACKLEY	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
ROBERT A. MANDEL	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
DANA HANNA	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing

Dated May 1, 2009.

/s/ John R. Murphy

John R. Murphy

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CRIMINAL APPEAL BRIEFING SCHEDULE

Appeal No. 09-2009 United States v. John Graham

Date: May 01, 2009

Briefing in criminal appeals is governed by Eighth Circuit's Plan to Expedite Criminal Appeals. Counsel should also review the provisions of Eighth Circuit Rule 27C.

APPEAL REQUIREMENTS

1. Criminal appeals proceed on a clerk's record, which is prepared by the clerk of the district court under Section III(A)(1)(b) of the Plan. If counsel wish to supplement the standard record with additional materials, you should contact the district court clerk immediately. In the alternative, counsel may prepare a supplemental appendix to be filed with the brief.

2. Review Section III(A)(1)(a) of the Plan concerning preparation of the transcript. If the appeal is proceeding in forma pauperis, please complete and file CJA Form 24 with the district court.

3. If you were retained for the district court proceedings and the defendant is unable to bear the cost of the appeal, a motion for leave to proceed in forma pauperis should be filed with the district court. Counsel cannot be appointed and a transcript cannot be provided at government expense unless the defendant obtains IFP status.

4. As this case was tried in three days or less, the court reporter shall file the transcript within 20 days of the date of this schedule.

5. Review "Briefing Checklist" and "Pointers on Preparing Briefs" at: www.ca8.uscourts.gov/newcoa/appealInfo.htm . Please note appellant's brief must include a copy of the Judgment and Commitment Order in the Addendum.

6. The government must file a single brief in multiple-defendant appeals.

GENERAL INFORMATION

The following filing dates are established for the appeals. Dates are only extended upon the filing of a timely motion establishing good cause. An order extending the time for filing a brief also extends the filing date for the responding or replying party's brief. Filing dates can also be accelerated if a party files it's brief before the due date. Please refer to FRAP 25, FRAP 26 and FRAP 31 for provisions governing filing and service. You may find the Federal and Eighth Circuit rules, as well as practice aids, at: www.ca8.uscourts.gov/newcoa/publs/publs.htm

FILING DATES:

Clerk's Record **05/20/2009**

Appellant's Brief (with addendum). **06/03/2009**
(United States of America)

Appellee's Brief. . . . . .**21 days from service of Appellant's Brief**

Appellant's Reply Brief . . . . . **7 days from service of Appellee's Brief**

ALL BRIEFS AND APPENDICES SHOULD BE FILED WITH THE ST. LOUIS OFFICE

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

May 01, 2009

Mr. Marty J. Jackley
U.S. ATTORNEY'S OFFICE
District of South Dakota
P.O. Box 2638
Sioux Falls, SD 57101-2638

RE: 09-2009 United States v. John Graham

Dear Mr. Jackley:

The district court has transmitted the government's notice of appeal in this criminal matter, and we have docketed it under the caption and case number shown above. Please include the caption and the case number on all correspondence or pleadings submitted to the court. Counsel in the case must supply the clerk with an Appearance Form. Counsel may download or fill out an Appearance Form on the "Forms" page on our web site at www.ca8.uscourts.gov.

The court has established an appeal briefing schedule for the case, a copy of which will be forwarded under separate notice of docket activity. Please review the schedule and note the key filing dates. You should also review Federal Rules of Appellate Procedure 28 and 32, as well as Eighth Circuit Rules 28A and 32A. Useful information about briefing and the record on appeal can be found at these links:

www.ca8.uscourts.gov/newcoa/notes/redactcr-egov.pdf
www.ca8.uscourts.gov/newcoa/forms/crbrchk.pdf
www.ca8.uscourts.gov/newcoa/forms/crrecord.pdf

If a transcript will be required for the appeal, you should immediately contact the official court reporter and order the transcript. Appellee must order his or her own copy of the transcript, either by preparing a CJA Form 24 or by contacting the reporter and making arrangements for payment. CJA Form 24 is available on the "Forms" page of the web site referenced above.

The court has directed the clerk's office to monitor and enforce compliance with the briefing schedule. Failure to meet the briefing deadlines will result in the issuance of an order to show cause. Requests for extensions of time must be filed on a timely basis and should establish good cause. Overlength briefs are strongly discouraged. Permission to file an overlength brief must be sought 7 days in advance of the due date. See Eighth Circuit Rule 28A(h). Please note the provisions of Eighth Circuit Rule 32A governing briefs and reply briefs responding to multiple briefs.

On June 1, 2007, the Eighth Circuit implemented the appellate version of CM/ECF. Electronic filing is now mandatory for attorneys and voluntary for pro se litigants proceeding without an attorney. Information about electronic filing can be found at www.ca8.uscourts.gov/files/cmecfstandingorder.pdf. In order to become an authorized Eighth Circuit filer, you must register with the PACER Service Center at https://pacer.psc.uscourts.gov/psco/cgi-bin/cmecf/ea-regform.pl. Questions about CM/ECF may be addressed to the Clerk's office.

If you have any questions about the schedule or procedures for the case, please contact our office.

Michael E. Gans
Clerk of Court

CYZ

Enclosure(s)

cc: Mr. John Graham
Mr. Joseph A. Haas
Mr. Robert A Mandel
Mr. John R. Murphy

District Court/Agency Case Number(s): 5:08-cr-50079-LLP-1

Caption For Case Number: 09-2009

United States of America,

Plaintiff - Appellant

v.

John Graham,
also known as John Boy Patten,

Defendant - Appellee

Addresses For Case Participants: 09-2009

Mr. Marty J. Jackley
U.S. ATTORNEY'S OFFICE
District of South Dakota
P.O. Box 2638
Sioux Falls, SD 57101-2638

Mr. John Graham
PENNINGTON COUNTY JAIL
307 St. Joseph Street
Rapid City, SD 57701

Mr. Joseph A. Haas
U.S. DISTRICT COURT
District of South Dakota
P.O. Box 6080
302 U.S. Courthouse
Rapid City, SD 57709-0000

Mr. Robert A Mandel
U.S. ATTORNEY'S OFFICE
515 Ninth Street
Rapid City, SD 57701-0000

Mr. John R. Murphy
Suite 1
328 E. New York Street
Rapid City, SD 57701-0000

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

UNITED STATES' BRIEF REGARDING NOTICE OF APPEAL AND MOTION TO SEVER

In its May 1, 2009, Order Regarding Notice of Appeal and Motion to Sever, the Court directed the parties to submit briefs addressing whether it had authority to revisit Defendant Marshall's earlier severance motion, and, if so, whether the Court should proceed with a separate trial for Defendant Marshall. Pursuant to the Court's Order, the United States respectfully submits this response.

1. DOES THE COURT HAVE AUTHORITY TO RECONSIDER DEFENDANT MARSHALL'S MOTION TO SEVER?

It appears as though the Court does have the authority to reconsider Defendant Marshall's Motion to Sever. The United States' Notice of Appeal of the Court's determination of Defendant Graham's Motions to Dismiss did not involve Defendant Marshall, and, though the United States was unable to find

an Eighth Circuit Court of Appeals decision on point, it appears as though the Court is not divested of jurisdiction with respect to Marshall.

2. IF THE COURT CONCLUDES THERE IS AUTHORITY TO RECONSIDER ITS PRIOR DECISION REGARDING THE MOTION TO SEVER, SHOULD THE COURT HOLD SEPARATE TRIALS OF THE DEFENDANTS IN THIS CASE AND PROCEED WITH THE TRIAL OF DEFENDANT MARSHALL?

The Court should not proceed with a separate trial of Defendant Marshall. Defendant Marshall and the United States intend to submit a joint motion for a sixty day continuance of the trial and of the determination of any severance issues. The joint motion indicates, at least at this time, that neither Defendant Marshall nor the United States believe a separate trial is necessary. Piecemeal litigation in this matter at this time will not serve the interests of justice or judicial economy, and there exist no speedy trial issues.

Dated and electronically filed this 4th day of May 2009.

MARTY J. JACKLEY
United States Attorney

/s/ Marty J. Jackley

PO Box 2638
Sioux Falls, SD 57101-2638
Phone: 605.357.2330
Fax: 605.330.4405
Marty.J.Jackley@usdoj.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies on May 4, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Facsimile at
- ☐ Federal Express
- ☒ Electronic Case Filing

/s/ Marty J. Jackley

Marty J. Jackley

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.	)	CR08-50079 **MOTION TO QUASH SUBPOENA OF THEDA CLARK**

COMES NOW, Theda Clarke, by and through her attorney of record, Michaele Sanders Hofmann, and hereby respectfully moves this Court, pursuant to Federal Rules of Evidence 403, 601 and 602, to enter an Order quashing the subpoena of Theda Clark in the trial of the above-referenced matter.

This Motion is made and filed based on the official court file, the accompanying legal memorandum, and the affidavits of Dr. Jerry L. McLain, M.D., Jaynelle Hinnegan, R.N., and Michaele Sanders Hofmann.

Dated this 4th day of May, 2009.

/s/ Michaele Sanders Hofmann

Michaele Sanders Hofmann
Attorney for Theda Clarke
Costello, Porter, Hill, Heisterkamp,
Bushnell & Carpenter, LLP
704 St. Joseph Street
P.O. Box 290
Rapid City, SD 57709-0290
Telephone: (605) 343-2410
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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.	)	CR08-50079 **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of May, 2009, a true and correct copy of the **MOTION TO QUASH SUBPOENA OF THEDA CLARK** was served upon the following persons, by placing the same in the service indicated, addressed as follows:

Marty Jackley United States Attorney United States Courthouse 515 Ninth Street Rapid City, SD 57701	[ ] [ ] [ ] [ ] [X]	U.S. Mail Hand Delivery Facsimile Federal Express Electronic Case Filing
John R. Murphy Murphy Law Office 328 East New York Street, # 1 Rapid City, SD 57701	[ ] [ ] [ ] [ ] [X]	U.S. Mail Hand Delivery Facsimile Federal Express Electronic Case Filing
Dana Hanna Hanna Law Office P.O. Box 3080 Rapid City, SD 57709	[ ] [ ] [ ] [ ] [X]	U.S. Mail Hand Delivery Facsimile Federal Express Electronic Case Filing

Respectfully submitted,

By: ***/s/ Michaele Sanders Hofmann***
Michaele Sanders Hofmann

Attorney for Theda Clarke
Costello, Porter, Hill, Heisterkamp,
Bushnell & Carpenter, LLP
704 St. Joseph Street
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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.	)	CR08-50079 **AFFIDAVIT OF DR. JERRY L. MCLAIN, M.D.**

Dr. Jerry L. McLain, M.D., being first duly sworn, deposes and states:

1. I am a Board Certified Family Medicine physician.

2. I have been employed as a physician by the Chadron Medical Clinic since 1991.

3. Theda Clarke has been a patient of mine since at least the year 2000 to the present.

4. Theda Clarke suffered a stroke in 2002.

5. Theda Clarke currently suffers from the late effects of a cerebral vascular accident (stroke), dementia, diabetes, hypertension, hyperlipidemia, anxiety, depression, and arthritis.

6. Theda Clarke is currently on the following medications: dilatin (seizure), zocor (cholesterol), celexa (anti-depressant), and remeron (anti-depressant/anxiety).

7. A possible side effect of the medications prescribed to Theda Clarke is memory impairment.

8. Theda Clarke was previously prescribed risperdal for agitation and behavior

problems. As Ms. Clarke's condition is stable, I discontinued the risperdal on April 21st for a trial period.

9. Theda Clarke suffers from multi-faceted dementia. My medical opinion is that Theda Clarke's dementia is caused from her advanced age, high blood pressure, diabetes and stroke in 2002.

10. As a result of her dementia, Theda Clarke's long term and short term memory is significantly impaired.

11. My medical opinion is that as a result of her dementia, Theda Clarke is not able to give meaningful testimony in this case.

12. The transportation of Theda Clarke from Crawford, Nebraska to Rapid City, South Dakota, poses a risk for falling. Ms. Clarke is currently wheelchair bound.

13. Theda Clarke suffers from "sundowning." As Ms. Clarke tires, her confusion will increase.

Dated this 30 day of April, 2009.

JM McLain, M.D.
Dr. Jerry L. McLain, M.D.

STATE OF NEBRASKA)
)ss
COUNTY OF DAWES)

Subscribed and sworn to before me this 30th day of April, 2009.

STATE OF NEBRASKA GENERAL NOTARY
TERESA J. LANDRETH
MY COMMISSION EXPIRES
February 7, 2013
(SEAL)

Teresa J. Landreth
Notary Public
My Commission Expires: 02-07-2013

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.	)	CR08-50079 **MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENA OF THEDA CLARK**

Theda Clarke has been subpoened as a material witness by the United States in the trial of John Graham and Vine Richard Marshall. She has been ordered to appear at the U.S. Courthouse in Rapid City, South Dakota, on May 12, 2009 at 9:00 a.m. Ms. Clarke is incompetent to testify in this matter.

Ms. Clarke is 84 years old. She suffers from the late effects of a cerebral vascular accident (stroke), dementia, diabetes, hypertension, hyperlipidemia, anxiety, depression and arthritis. Both her long term and short term memory are significantly impaired. Her medications include: dilatin (seizure), zocor (cholesterol), celexa (anti-depressant), and remeron (anti-depressant/anxiety). These medications may also impair her memory. Ms. Clarke is currently wheelchair bound and her transportation to Rapid City poses a risk of falling. Ms. Clarke further suffers from "sundowning." As Ms. Clarke tires, her confusion will increase. See attached Affidavit of John McClain M.D. and clinical notes of Ann Brost, M.A. attached to Court Document 256.

In addition, Ms. Clarke is uncommunicative. She distrusts strangers, including Court appointed counsel. If compelled to appear as a witness in this case, it is believed she will not

respond to questions posed by counsel or the Court. Counsel will invoke Ms. Clarke's Fifth Amendment privilege against self-incrimination on her behalf. See attached Affidavit of Michaele Sanders Hofmann.

THEDA CLARK IS INCOMPETENT TO TESTIFY

Theda Clarke is incompetent to testify. She lacks the capacity to remember and recount the alleged events upon which the Government bases its case against the Defendants.

Fed R. Evid. 601 provides in part that "[e]very person is competent to be a witness except as otherwise provided in these rules." As a general rule, the competence of a witness depends upon an ability to observe, *to remember*, to communicate and to understand the nature of an oath and the duty it imposes to tell the truth. U.S. v. Michael Bloome, 733 F. Supp. 545, 546-547 (Dist Ct. N.Y. 1991). Pursuant to Fed. R. Evid. 104, the competency of a witness to testify is for the Court to decide.[1]

The Government seeks testimony concerning events which led to the death of Anna Mae Aquash in 1975. As stated *supra*, Ms. Clarke is 84 years old and confined to a wheel chair. She suffers from the late effects of a cerebral vascular accident (stroke), dementia, diabetes, hypertension, hyperlipidemia, anxiety, depression and arthritis. *Both her long term and short term memory are significantly impaired.* Her medications include: dilatin (seizure), zocor (cholesterol), celexa (anti-depressant), and remeron (anti-depressant/anxiety). These medications may also impair her memory. As a result of Ms. Clarke's dementia and memory impairment she cannot give meaningful testimony and is incompetent to testify. See Affidavit of Dr. John McClain M.D. and

[1]The trial court's decision as to competency will only be reversed for an abuse of discretion. U.S. v. Peyro, 786 F.2d 826, 830 (8th Cir. 1986).

clinical notes of Ann Brost, M.A. attached to Court Document 256.

As a result of her dementia and memory impairment, Theda Clarke also lacks the personal knowledge required under Fed. R. Evid. 602. Fed R. Evid. 602 provides in part that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

In the present case, the Government alleges that Ms. Clarke was an active participant in the kidnapping and murder of Ms. Aquash. However, as a result of her dementia, Ms. Clarke's memory of the alleged events is so impaired that the Government cannot establish the requisite personal knowledge required of a witness under Rule 602.

In addition, as a result of her dementia, the probative value of any testimony by Ms. Clarke is substantially outweighed by the danger of misleading the jury. Pursuant to Fed. R. Evid. 403, Ms. Clarke's testimony should be precluded.

INVOCATION OF FIFTH AMENDMENT PRIVILEGE

Testimony by Theda Clarke could be used by the Government to prosecute Ms. Clarke for federal crimes. U.S. Attorney Marty J. Jackley has stated that Ms. Clarke may be indicted in the future for the murder of Anna Mae Aquash. Ms. Clarke will refuse to testify in this matter and Counsel will invoke Theda Clarke's Fifth Amendment privilege against self-incrimination. Therefore, the subpoena requiring Ms. Clarke's presence before this Honorable Court on May 12, 2009, should be quashed.

When a witness invokes the Fifth Amendment privilege against self-incrimination, the Court typically questions the witness outside the presence of the jury in order to determine the

validity of the claimed privilege.[2] However, a witness' attendance should not be compelled where he may reasonably invoke his Fifth Amendment privilege against self-incrimination as grounds for refusing to answer essentially all relevant questions. U.S. v. Sawyer, 2006 LEXIS 52351 (E.D. CA).

In the present case, there is little doubt that Ms. Clarke's Fifth Amendment privilege against self-incrimination is proper. As stated *supra*, the Government alleges that Ms. Clarke was an active participant in the kidnapping and murder of Ms. Aquash. The Government has also represented that it may indict Ms. Clarke for Ms. Aquash's murder. As a result, Ms. Clarke may reasonably invoke the Fifth Amendment privilege against self-incrimination as grounds for refusing to answer essentially all relevant questions and should not be compelled to appear.

Furthermore, Ms. Clarke is uncommunicative and distrusts strangers, including her Court appointed counsel. If compelled to appear as a witness in this case, it is believed she will not respond to questions posed by counsel or the Court. Thus, Counsel will necessarily invoke Theda Clarke's Fifth Amendment privilege against self-incrimination on Ms. Clarke's behalf. See attached Affidavit of Michaele Sanders Hofmann.

The subpoena also subjects Ms. Clarke and Ponderosa Villa to undue burden. Ms. Clarke is currently a resident of Ponderosa Villa. Ponderosa Villa is a nursing home located in Crawford, Nebraska. Ms. Clarke is currently wheelchair bound and takes several medications. The transportation of Ms. Clarke pursuant to the subpoena will require that she be attended by a

[2]"To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." U.S. v. Bowling, 239 F.3d 973 (8th Cir.).

nursing assistant for mobility and toileting and a registered nurse for the dispensing of medications. Arrangements will also need to be made for the overnight stay of Ms. Clarke and the medical staff as she physically cannot tolerate travel to and from Rapid City, South Dakota and Crawford, Nebraska in a single day. Counsel notes that the subpoena requires Ms. Clarke to travel 120 miles from Crawford, Nebraska to Rapid City, South Dakota. See attached Affidavit of Jaynelle Hinnegan, R.N.

CONCLUSION

Theda Clark is incompetent to testify under Fed. R. Evid. 601. In addition, as a result of significant impairment of both her long and short term memory, she lacks personal knowledge as required by Fed. R. Evid. 602, and any probative value of Ms. Clarke's testimony would be outweighed by the danger of misleading the jury pursuant to Fed. Rule Evid. 403. Finally, Counsel will invoke Ms. Clarke's Fifth Amendment privilege against self-incrimination and the transportation of Ms. Clarke to Rapid City, S.D. is unduly burdensome.

Therefore, it is respectfully requested that this Honorable Court quash the subpoena of Theda Clarke.

Dated this 4th day of May, 2009.

Respectfully submitted,

/s/ Michaele Sanders Hofmann

Michaele Sanders Hofmann
Attorney for Theda Clarke
Costello, Porter, Hill, Heisterkamp,
Bushnell & Carpenter, LLP
704 St. Joseph Street
P.O. Box 290
Rapid City, SD 57709-0290
Telephone: (605) 343-2410

Facsimile: (605) 343-4262
Email: mhofmann@costelloporter.com

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of May, 2009, a true and correct copy of the **MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENA OF THEDA CLARK** were served upon the following persons, by placing the same in the service indicated, addressed as follows:

Marty Jackley United States Attorney United States Courthouse 515 Ninth Street Rapid City, SD 57701	[ ] [ ] [ ] [ ] [X]	U.S. Mail Hand Delivery Facsimile Federal Express Electronic Case Filing
John R. Murphy Murphy Law Office 328 East New York Street, # 1 Rapid City, SD 57701	[ ] [ ] [ ] [ ] [X]	U.S. Mail Hand Delivery Facsimile Federal Express Electronic Case Filing
Dana Hanna Hanna Law Office P.O. Box 3080 Rapid City, SD 57709	[ ] [ ] [ ] [ ] [X]	U.S. Mail Hand Delivery Facsimile Federal Express Electronic Case Filing

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

By: ***/s/ Michaele Sanders Hofmann***

Michaele Sanders Hofmann
Attorney for Theda Clarke
Costello, Porter, Hill, Heisterkamp,
Bushnell & Carpenter, LLP
704 St. Joseph Street
P.O. Box 290
Rapid City, SD 57709-0290
Telephone: (605) 343-2410
Facsimile: (605) 343-4262
Email: mhofmann@costelloporter.com

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.	CR08-50079 **AFFIDAVIT OF JAYNELLE HINNEGAN, R.N.**

I, Jaynelle Hinnegan, R.N., being first duly sworn, deposes and states:

1. I am a Registered Nurse and the Director of Nursing at Ponderosa Villa Nursing Home ("Ponderosa Villa").

2. I have been employed with Ponderosa Villa as a Registered Nurse since November 2007 and as the Director of Nursing since March 2008.

3. Theda Clarke has been a resident of Ponderosa Villa since May 17, 2004, to the present.

4. Theda Clarke is currently prescribed numerous medications, including: dilatin (seizure), zocor (cholesterol), celexa (anti-depressant), and remeron (anti-depressant/anxiety).

5. The transportation of Theda Clarke from Crawford, Nebraska to Rapid City, South Dakota would be unduly burdensome.

6. Ms. Clarke is currently wheelchair bound as she suffers from paralysis on the left side of her body.

7. A Nurse's Assistant would be necessary for the mobility and toileting of Theda

Clarke.

8. A Registered Nurse would also be necessary for the dispensing of Theda Clarke's medications.

9. The distance from Crawford, Nebraska to Rapid City, South Dakota is 120 miles one-way.

10. Arrangements would need to be made for the overnight stay of Theda Clarke and the medical staff, as Ms. Clarke cannot tolerate travel to and from Rapid City, South Dakota and Crawford, Nebraska in a single day.

Dated this 4th day of May, 2009.

Jaynelle Hinnegan, R.N.

STATE OF NEBRASKA)
)ss
COUNTY OF DAWES)

Subscribed and sworn to before me this 4th day of May, 2009.

GENERAL NOTARY - State of Nebraska
RALENE J. SUCHOR
My Comm. Exp. April 19, 2010

(SEAL)

Notary Public
My Commission Expires: 4-19-2010

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.	)	CR08-50079 **AFFIDAVIT OF MICHAELE SANDERS HOFMANN**

I, Michaele Sanders Hofman, being first duly sworn, deposes and states:

1. I have been appointed by this Honorable Court to represent Theda Clarke as a material witness in the above-referenced action.

2. I met with Theda Clarke on Wednesday April 29, 2009.

3. Ms. Clarke is uncommunicative.

4. It is my belief that if compelled to appear as a material witness in this matter Ms. Clarke will refuse to speak.

5. Counsel intends to invoke Theda Clarke's Fifth Amendment privilege against self-incrimination on Ms. Clarke's behalf.

Dated this 4th day of May, 2009.

/s/
Michaele Sanders Hofmann

STATE OF SOUTH DAKOTA)
)ss
COUNTY OF PENNINGTON)

Subscribed and sworn to before me this 4th day of May, 2009.

Notary Public
My Commission Expires: 7-26-2013

(SEAL)
MCKENZIE DAVIS
Notary Public
SOUTH DAKOTA

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.	)	CR08-50079 **MOTION TO SEAL MEMORANDUM FILED IN SUPPORT OF MOTION TO QUASH SUBPOENA OF THEDA CLARK AND ATTACHED AFFIDAVITS**

COMES NOW, Theda Clarke, by and through her CJA appointed attorney of record, Michaele Sanders Hofmann, and moves this Honorable Court for its Order to Seal the Memorandum filed in support of the Motion to Quash Subpoena of Theda Clarke dated May 4, 2009, and attached Affidavits (Doc. 339), in and for the reason that said memorandum and affidavits contain confidential information.

Dated this 5th day of May, 2009.

Respectfully submitted,

/s/ Michaele Sanders Hofmann

Michaele Sanders Hofmann
Attorney for Theda Clarke
Costello, Porter, Hill, Heisterkamp,
Bushnell & Carpenter, LLP
704 St. Joseph Street
P.O. Box 290
Rapid City, SD 57709-0290
Telephone: (605) 343-2410
Facsimile: (605) 343-4262
Email: mhofmann@costelloporter.com

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May, 2009, a true and correct copy of the **MOTION TO SEAL THE MEMORANDUM FILED IN SUPPORT OF MOTION TO QUASH SUBPOENA OF THEDA CLARK AND ATTACHED AFFIDAVITS** were served upon the following persons, by placing the same in the service indicated, addressed as follows:

Marty Jackley	[ ]	U.S. Mail
United States Attorney	[ ]	Hand Delivery
United States Courthouse	[ ]	Facsimile
515 Ninth Street	[ ]	Federal Express
Rapid City, SD 57701	[X]	Electronic Case Filing
John R. Murphy	[ ]	U.S. Mail
Murphy Law Office	[ ]	Hand Delivery
328 East New York Street, # 1	[ ]	Facsimile
Rapid City, SD 57701	[ ]	Federal Express
	[X]	Electronic Case Filing
Dana Hanna	[ ]	U.S. Mail
Hanna Law Office	[ ]	Hand Delivery
P.O. Box 3080	[ ]	Facsimile
Rapid City, SD 57709	[ ]	Federal Express
	[X]	Electronic Case Filing

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

By: ***/s/ Michaele Sanders Hofmann***

Michaele Sanders Hofmann
Attorney for Theda Clarke
Costello, Porter, Hill, Heisterkamp,
Bushnell & Carpenter, LLP
704 St. Joseph Street
P.O. Box 290
Rapid City, SD 57709-0290
Telephone: (605) 343-2410
Facsimile: (605) 343-4262
Email: mhofmann@costelloporter.com

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

JOINT MOTION/STIPULATION TO CONTINUE

COMES NOW the United States of America, through its attorneys, Marty J. Jackley, United States Attorney, and Dana Hanna, counsel for the above-captioned defendant, Vine Richard Marshall aka Dick Marshall, to jointly move for, and stipulate to, a continuance of the above-entitled matter now set for trial May 12, 2009, for a period of sixty days.

Pending before the Eighth Circuit Court of Appeals is the United States' appeal of this Court's Order dismissing the 2003 Indictment against Defendant John Graham. A Notice of Appeal of this Court's decision dismissing Count III of the Indictment against Defendant Graham in the 2008 Indictment was filed by the United States on April 30, 2009. It is the United States' intent to move the appellate court to consolidate the two appeals and have the appeal be immediately determined based upon the arguments and authorities that have been submitted.

Under all of the circumstances, the United States and Defendant Marshall hereby jointly move for, and stipulate to, a continuance of the trial of the above-entitled matter for a period of sixty days in the interest of avoiding piecemeal litigation. Thereafter, if necessary, the parties request the right to revisit the severance issue and hereby preserve all respective arguments with respect thereto.

The parties stipulate that the period of continuance is excludable for speedy trial purposes pursuant to 18 U.S.C. §§ 3161(h)(7)(A) (ends of justice outweigh the best interests of the public and the defendant in a speedy trial).

Dated this 5th day of May 2009.

_____
MARTY J. JACKLEY
United States Attorney

/s/ Dana L. Hanna
DANA HANNA
Attorney for Defendant Marshall

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of Defendant Marshall's foregoing Joint Motion/Stipulation to Continue upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
robert.mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 5th day of May, 2009.

/s/ Dana L. Hanna
Dana L. Hanna

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

JOINT MOTION/STIPULATION TO CONTINUE

COMES NOW the United States of America, through its attorneys, Marty J. Jackley, United States Attorney, and Dana Hanna, counsel for the above-captioned defendant, Vine Richard Marshall aka Dick Marshall, to jointly move for, and stipulate to, a continuance of the above-entitled matter now set for trial May 12, 2009, for a period of sixty days.

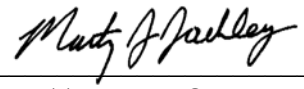
Pending before the Eighth Circuit Court of Appeals is the United States' appeal of this Court's Order dismissing the 2003 Indictment against Defendant John Graham. A Notice of Appeal of this Court's decision dismissing Count III of the Indictment against Defendant Graham in the 2008 Indictment was filed by the United States on April 30, 2009. It is the United States' intent to move the appellate court to consolidate the two appeals and have the appeal be

immediately determined based upon the arguments and authorities that have been submitted.

Under all of the circumstances, the United States and Defendant Marshall hereby jointly move for, and stipulate to, a continuance of the trial of the above-entitled matter for a period of sixty days in the interest of avoiding piecemeal litigation. Thereafter, if necessary, the parties request the right to revisit the severance issue and hereby preserve all respective arguments with respect thereto.

The parties stipulate that the period of continuance is excludable for speedy trial purposes pursuant to 18 U.S.C. §§ 3161(h)(7)(A) (ends of justice outweigh the best interests of the public and the defendant in a speedy trial).

Dated this _5th____ day of May 2009.



MARTY J. JACKLEY
United States Attorney

DANA HANNA
Attorney for Defendant Marshall

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN GRAHAM, aka JOHN BOY PATTON, Defendant.	))))))))))	CR. 03-50020-02 ORDER DENYING DEFENDANT'S MOTION TO COMPEL GOVERNMENT TO DISCLOSE LENIENCY AGREEMENTS

Defendant John Graham filed a motion seeking an order compelling the government to disclose the existence of any leniency or immunity agreements between the government and Theda Clarke, also known as Theda Nelson. [Docket 270]. The government has designated Ms. Clarke as a witness in its case against both Mr. Graham and his co-defendant Richard Marshall.

The government filed a response indicating that it has entered into no agreements with Ms. Clarke regarding her testimony and has not made any offers to Ms. Clarke regarding immunity or non-prosecution in return for her testimony. Docket 315. Accordingly, good cause appearing, it is hereby

ORDERED that Mr. Graham's motion to compel [270] is denied. It is further

ORDERED that, should the government enter into any such agreements with Ms. Clarke between now and the time of Mr. Graham's trial, the government is ordered to provide copies of any documents memorializing that agreement to Mr. Graham and his counsel.

NOTICE OF RIGHT TO APPEAL

Pursuant to 28 U.S.C. § 636(b)(1)(A), any party may seek reconsideration of this order before the district court upon a showing that the order is clearly erroneous or contrary to law. The parties have ten (10) days after service of this order to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. See Fed. R. Crim. P. 58(g)(2). Failure to file timely objections will result in the waiver of the right to appeal questions of fact. Objections must be timely and specific in order to require review by the district court.

Dated May 6, 2009.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

FILED
MAY 06 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER GRANTING CONTINUANCE
JOHN GRAHAM, a/k/a John Boy Patton, and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

Pending before the Court is the joint motion of the government and defendant Marshall for a continuance of the trial now set for May 12, 2009. In accordance with the Court's oral rulings at the hearing on Tuesday, May 5, 2009,

IT IS ORDERED:

1. That the joint motion to continue is granted. (Docs. 341 and 342.)

2. That the trial now scheduled for May 12, 2009 is continued until the Eighth Circuit rules on the related appeal or appeals, at which time the Court will set a new date for trial.

Dated this 6th day of May, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK
BY: Jackie Meyerhoffer
DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

JUDGE: Lawrence L. Piersol
CASE NO. CR08-50079

REPORTER: Carolyn Harkins
DATE: May 5, 2009

CASE	COUNSEL
United States of America, Plaintiff, vs.	Marty Jackley Robert Mandel
John Graham a/k/a John Boy Patton, and Vine Richard Marshall, a/k/a Richard Vine Marshall, a/k/a Dick Marshall, Defendant.	John Murphy

---

TIME:

1:07 Enter MOTIONS HEARING before the Hon. Lawrence L. Piersol, United States District Judge, presiding.

Enter ORDER granting the motion to seal document Memorandum In Support of Motion to Quash and Attached Affidavits by Theda Clark, document #340.

Court makes statement as to the motions to sever re: status of the proceedings, status of defendant Marshall and the victim being American Indians, government's notices of appeal and consolidations of those appeals as to all counts, joint motion and stipulation for continuance of defendant Marshall and the government, and requests further argument by counsel.

Mr. Murphy makes statement on behalf defendant Graham, and is ready to go to trial on May 12 on whatever counts remain.

Mr. Jackley makes statement on behalf government.

Mr. Hanna makes statement on behalf defendant Marshall and requests a continuance of 60 days.

Court informs counsel there will not be an order for severance at this time, and the Court will grant a continuance as requested by defendant Marshall and the government but not limited to 60 days. If the Eighth Circuit Court of Appeals rules in less than 60 days, the Court will set a new trial date; but as soon as the Eighth Circuit rules, the Court will set a trial date.

Mr. Jackley makes additional statement as to these issues.

Mr. Hanna makes additional statement.

Court inquires about arguing the motions in limine today.

Mr. Hanna requests arguing the motion in limine #2 at this hearing.

Court will allow argument as to motion in limine #2.

Mr. Hanna makes statement on behalf defendant Marshall.

Mr. Jackley makes statement on behalf government.

Mr. Hanna makes additional statement on behalf defendant Marshall.

Mr. Jackley offers transcript of taped statement.

Mr. Hanna makes statement as to the tape and the transcript.

Exhibits will be received in this manner:
Exhibit #1 - tape provided by Mr. Hanna
Exhibit #2 - transcript of taped statement provided by government
Exhibit #2A - Handwritten notes - Chapman provided by government
Exhibit #3 - Mr. Hanna will provide to the Court an enhanced copy of the tape (exhibit #1), which will be marked as exhibit #3

Mr. Hanna makes statement as to Chapman's handwritten notes.

Court inquires of counsel if Mr. Chapman had a tape recorder on the table when he did the interview or was he wired.

Mr. Hanna makes statement on behalf Marshall.

2:37 In recess.

2:52 Motions Hearing resumes.

Mr. Jackley provides a handwritten statement to the Court.

Mr. Hanna makes statement as to handwritten statement on behalf Marshall.

Mr. Jackley makes statement as to handwritten statement on behalf government.

Court inquires if there is anything further to submit as to motion in limine #2.
Nothing further by counsel.

Mr. Jackley makes statement as to whether Mr. Chapman was wired and informs the Court he may have had a hidden tape recorder.

Court inquires further.

Mr. Jackley makes additional statement.

Mr. Jackley makes statement as to statement of Mr. Goings/Means, and will provide a redacted copy of the transcript to Court and counsel.

Mr. Jackley offers another handwritten note of Mr. Chapman from an interview with Mr. Marshall.

Court will receive this exhibit and it is marked exhibit #4.

Mr. Hanna makes statement on behalf defendant Marshall.

As to Motion in Limine #1, the Court will not rule on that motion at this time, but will have a separate hearing where Mr. Chapman will be required to testify.

Mr. Murphy makes statement as to Motion in Limine #1, and also requests a hearing on behalf Graham.

Mr. Hanna makes additional statement.

3:13 Court adjourned.

BH
Courtroom Deputy

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

United States of America, Plaintiff, vs. John Graham and Richard Vine Marshall, Defendants.	))))))))))	CR08-50079 MOTIONS HEARING JOINT EXHIBIT LIST

Plff No.	Dfdt No.	Witness	Description	Off.	Obj.	Rec.	Ref.	Date Filed
	1		Tape	D2		X		5/5/09
2			Transcript of tape	P		X		5/5/09
2A			Handwritten notes - Chapman	P		X		5/5/09
	3		(Enhanced tape to be marked when provided to the Court by defense counsel)					
4			Handwritten notes - Chapman	P		X		5/5/09

R: Relevancy
H: Hearsay
N: None

A: Authenticity
O: Other (specify)

FILED

MAY 08 2009

CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

JOINT MOTION/STIPULATION TO CONTINUE

COMES NOW the United States of America, through its attorneys, Marty J. Jackley, United States Attorney, and Dana Hanna, counsel for the above-captioned defendant, Vine Richard Marshall aka Dick Marshall, to jointly move for, and stipulate to, a continuance of the above-entitled matter now set for trial May 12, 2009, for a period of sixty days.

Pending before the Eighth Circuit Court of Appeals is the United States' appeal of this Court's Order dismissing the 2003 Indictment against Defendant John Graham. A Notice of Appeal of this Court's decision dismissing Count III of the Indictment against Defendant Graham in the 2008 Indictment was filed by the United States on April 30, 2009. It is the United States' intent to move the appellate court to consolidate the two appeals and have the appeal be

immediately determined based upon the arguments and authorities that have been submitted.

Under all of the circumstances, the United States and Defendant Marshall hereby jointly move for, and stipulate to, a continuance of the trial of the above-entitled matter for a period of sixty days in the interest of avoiding piecemeal litigation. Thereafter, if necessary, the parties request the right to revisit the severance issue and hereby preserve all respective arguments with respect thereto.

The parties stipulate that the period of continuance is excludable for speedy trial purposes pursuant to 18 U.S.C. §§ 3161(h)(7)(A) (ends of justice outweigh the best interests of the public and the defendant in a speedy trial).

Dated this 5th day of May 2009.

MARTY J. JACKLEY
United States Attorney

DANA HANNA
Attorney for Defendant Marshall

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Joint Motion/Stipulation to Continue on the other parties in this case by mailing the same to attorneys of record at the addresses listed below:

Marty J. Jackley
United States Attorney
PO Box 2638
Sioux Falls, SD 57101

Robert Mandel
Assistant United States Attorney
515 Ninth Street, #201
Rapid City, SD 57701

John Murphy
Murphy Law Office
328 E. New York St., #1
Rapid City, SD 57701

Dated this 6th day of May, 2009.

Dana L. Hanna

IN THE UNITED STATES DISTRICT COURT
FOR THE 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 Defendant.	)))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION TO FILE MOTIONS PAST FILING DEADLINE

Defendant John Graham moves this Court for its Order permitting him to file motions past the motions filing date set in the Court's last scheduling order. Doc. 187.

At this juncture it is unclear whether Defendant Graham will be tried with Defendant Marshall. If he is not, Graham anticipates filing additional pretrial motions and motions in limine regarding statements Marshall allegedly made to government witnesses Chapman and Looking Cloud. Additional jury instructions may also be warranted if Graham and Marshall are not tried together.

Therefore, Graham asks that he be permitted to continue filing pretrial motions, motions in limine, and proposed jury instructions should a need arise.

Alternatively, he asks that new deadlines be set for the filing of pretrial motions, motions in limine, and jury instructions.

Dated May 11, 2009.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

MARTY J. JACKLEY	☐	U.S. Mail, postage prepaid
ROBERT A. MANDEL	☐	Hand Delivery
DANA HANNA	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing

Dated May 11, 2009.

/s/ John R. Murphy
John R. Murphy

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 MOTION FOR LEAVE TO FILE FURTHER MOTIONS

NOW COMES Defendant Richard Marshall, by and through his attorney, Dana L. Hanna, and hereby moves the Court for leave to file further motions in this case. In support of the motion, Dana L. Hanna, attorney for the defendant, hereby affirms:

1. The trial date in this case had been scheduled for May 12th, 2009. On May 5th, 2009, the Court ordered that the trial be continued indefinitely until after the Eighth Circuit Court of Appeals rules on the government's pending interlocutory appeal.

2. In order to provide effective assistance of counsel, defense counsel wishes to file additional motions in this case. Since there is no scheduled trial date, in the interest of justice, the defendant should be allowed to file further motions as the need arises.

WHEREFORE, the defendant moves for leave to file additional motions pending a new scheduling order by the Court.

Dated this 11th day of May, 2009

RICHARD MARSHALL, Defendant

By

/s/ Dana L. Hanna
Dana L. Hanna
PO Box 3080
816 Sixth Street
Rapid City, SD 57709
605-791-1832
Attorney for Defendant Marshall

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of Defendant Marshall's foregoing Motion for Leave to File Further Motions upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
robert.mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 11th day of May, 2009.

/s/ Dana L. Hanna
Dana L. Hanna

FILED
MAY 11 2009
CLERK

UNITED STATES DISTRICT COURT
FOR THE 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

MOTION TO SEAL

Comes now the United States of America, by and through its United States Attorney, Marty J. Jackley, and Assistant United States Attorney, Robert A. Mandel, and moves the Court for an Order to Seal the United States' Compliance With Court's Order To Compel Unredacted Grand Jury Transcript, as it contains sensitive information concerning grand jury.

WHEREFORE, the United States requests that the United States' Compliance With Court's Order To Compel Unredacted Grand Jury Transcript be sealed.

Dated this 11 day of May, 2009.

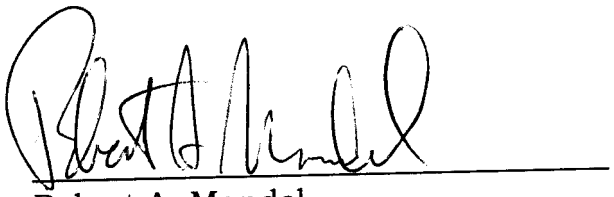
ROBERT A. MANDEL
Assistant United States Attorney
515 9th Street #201
Rapid City, SD 57701
605-342-7822
Robert.Mandel@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of May,2009, I served by first-class mail, postage prepaid, a true and correct copy of the foregoing United States' Motion to Seal on the following:

John R. Murphy
Attorney at Law
328 E. New York #1
Rapid City, SD 57701

Dana Hanna
Attorney at Law
816 Sixth Street
Rapid City, SD 57701



Robert A. Mandel

FILED

MAY 11 2009

CLERK

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

ORDER TO SEAL

This matter having come before the Court and the Court being fully advised in the premises, does hereby

ORDER that the United States' Compliance With Court's Order to Compel Unredacted Grand Jury Material shall be sealed as it contains sensitive grand jury information.

Dated this 11th day of May, 2009.

BY THE COURT:

Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

FILED
MAY 13 2009
CLERK

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S TRANSCRIPT OF TAPE

NOW COMES Defendant Richard Marshall, by and through his attorney Dana L. Hanna, and hereby submits Defendant's transcript of a tape recording that has been previously admitted into evidence as Exhibit # 1 in the motions hearing held May 5th, 2009. See: Exhibit List: document # 350. The Defendant's transcript is attached hereto.

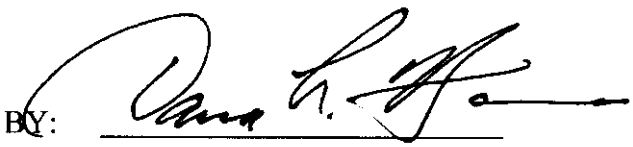
In the Defendant's transcript (which should be marked Exhibit # 5), corrections and differences between the Defendant's transcript of the tape and the Government's transcript (Exhibit # 2) are distinguished in the Defendant's transcript by bold face type.

There are numbers, bold faced and underlined, throughout the transcript. These show the time in the conversation where statements were made-e.g., 24:10 denotes that the statement was made 24 minutes and 10 seconds into the recording.

In addition, along with this corrected transcript, in a separate filing, the Defendant is filing with the Court an enhanced recording of Exhibit # 1, a compact disc of a tape-recorded conversation that took place on July 27, 2001 between defendant Richard Marshall and government witness Serle Chapman. This enhanced tape recording is exhibit # 3 in the record of the motions hearing.

Dated this 13th day of May, 2009.

VINE RICHARD MARSHALL, Defendant

BY: 

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

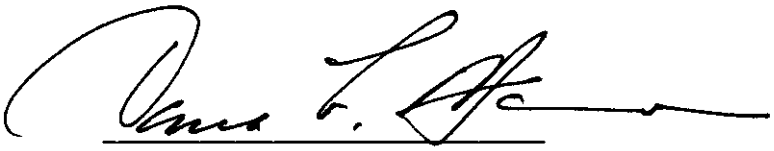
CERTIFICATE OF SERVICE

I hereby that I have served a true and correct copy of the foregoing Defendant Marshall's Transcript of Tape on the other parties in this case by mailing the same, postage prepaid, the attorneys of record at the addresses listed below:

Marty J. Jackley, United States Attorney and
Robert Mandel, Assistant United States Attorney
515 Ninth Street, #201
Rapid City, SD 57701

John Murphy
Murphy Law Office
328 E. New York St., #1
Rapid City, SD 57701

Dated this 13th day of May, 2009.



Dana L. Hanna

This is Serle Chapman. It is Friday, 27th of July, 2001, about to visit with Dick Marshall in regard to the murder of Anna Mae Pictou Aquash at the Alex Johnson Hotel, Room 918.

SC: Good timing (inaudible)... Eh, excellent timing, how's it going buddy.

DM: All right.

SC: Good to see you again.

SC: You too.

DM: Yeah I had to **be at the** Sundance.

SC: Uh.

DM: (inaudible).

SC: (inaudible).

DM: (inaudible).

SC: **Where did you dance?**

DM: **What's that?**

SC: **Whose place?**

DM: Rick Two **Dogs**.

SC: Oh

DM: I like going to his Sundance. Pretty strong . . . right.

SC: Yeah. Yeah . . . (inaudible) **Wilmer**'s got **his** going on.

DM: Yeah, I thought I'd stop in on the way, way back, way back home tonight..

SC: (inaudible).
DM: (inaudible).

SC: All I said was go the other one. (Inaudible). All three (inaudible)?

DM: **So**. When'd 'ya get to town?

SC: Ah, geez, ah, couple of days back.

DM: Oh, is that right?

SC: Yeah, the only contact I have for you is like through Karen Testerman remember that? That, ah, that lady, at her address. I know that she got that magazine, you know (inaudible) at her address (inaudible) . . .

DM: . . . . she finally got a better address . . .there were a lot of things that she didn't get back to me. She even stole my address **book.**

SC: Oh, really?

DM: I had a falling out with her, I guess. She was worse than my parole officer, man (laughs) (inaudible). Who was calling, **where I was**, how long I was going to be there, how come I didn't come back and all that. I couldn't put up with that.

SC: I've been trying to find out where in the hell you were and then I thought. . . I remembered Black **Hawk**.

DM: Really?(inaudible) yeah, (inaudible) Black **Hawk**.

SC: Yeah, Black **Hawk**, so I thought I'd give that a try and then I thought, well, I don't wanna get into any difficulty you know, but if I called you at that place and then I talked to that lady and, that answered the phone there . . .

DM: Yeah.

SC: And she said ah, no, it'll be fine. Get some privacy in here a little bit.

DM: Is this the **book you were talking about**?

SC: Yeah, that's for you anyways.

DM: Oh, really? **"Of Earth and Elders."**

SC: **Now**, let's try this.
DM: You know **what** , I seen this in an ad someplace (Inaudible).

SC: Oh, really?

DM: Yeah.

SC: God damn, security or what? Huh?

DM: (laughter)..

SC: Ah, shit. Yeah, that's the last one I did.

DM: Is that right?

SC: Yeah.

DM: Yeah, I seen this in an ad someplace.

SC: So I wanted to give you that . . .

DM: Thanks, man, I appreciate that.

SC: . . . while I was here and . . .

DM: (inaudible).

SC: Want a drink of this stuff?

DM: What's that?

SC: Want a drink?

DM: Yeah, I'm dying of thirst. I just got off work. I **had to run here and there.**

SC: Ah, find a, something (inaudible) . . . Yeah I was gonna send it to that address, but I'm kinda glad I didn't then.

DM: Yeah, good thing you didn't. But, ah, I got news for you too. I'm moving out of this town.

SC: Oh, really?

DM: My parole officer gave me the green light to go ahead and move back down home to Pine Ridge.

SC: Oh, all right.

DM: And I just recently got married here, June 2nd.

SC: Well, I kinda found that out.

DM: Did 'ya?

SC: Yeah. Can't remember that lady's name now but, uh, Brewer, maybe?

DM: **Yeah. Yeah**. The lady's name is Frieda Brewer.

SC: **(Inaudible.)** Is she up here or down?

DM: She's from down there.

SC: No, I'm kinda glad that we got . . .

DM: . . . . (inaudible) out there and (inaudible) already. Yeah, I requested to move back about 3 months ago. But what it boiled down to was that parole officer out of Winner, South Dakota, that oversees the state parolees on the Rosebud and Pine Ridge Reservations. Yeah, I her before when I was out twice on parole. Both times I messed up. They kinda had it in for me, you know.

SC: You must be anxious to get back down there?

DM: Yeah. Gotta better paying job and my wife lives down there plus I own land down there. So, I'm gonna build myself a log home on my land.

SC: I mean I tried to contact you, too, at Hope Lodge.

DM: **Yeah?**

SC: But they weren't real

DM: Cooperative, huh? Yeah. The people that work up there, the staff, are just as dysfunctional as the patients, I think. I go up there for AA meetings sometimes **and pour water for the sweats.**

SC: Uh, I said something up there, as far as I knew you, you like helped out up

there?

DM: Yeah.

SC: Boy, man, they were rude. Because I thought well maybe they don't know who you are or . . .

DM: Uh, uh.

SC: . . . . something, you, know, and I said well, **he was here**, and I says well, I **knew that he helped out at ceremonies** and she said he's not here, and I went, whoa . . .

DM: Really?

SC: Yeah.

DM: Hey.

SC: A couple of times.

DM: Yeah.

SC: You, know, but, uh, . . . I wanted to check a few things out with you because since we met I spoke to a number of other people and that's why I don't wanna do this as an interview, **as part of the interview.**

DM: **Uh huh.**

SC: But you appreciate it from my point of view, writing this thing. I don't, I gotta tell it like it is. But, there, ah, may be one or two things that I don't necessarily need to include, if you see what I'm saying. And, but I need to know what, what the deal is in order to do that, so that I can figure out a way of doing it without screwing anybody over, but still telling the truth of the matter. So .

DM: Um.

SC: Um, that interview that we have already done, do you remember Sarah, you met Sarah at that time?

DM: Um, um.

SC: She's actually getting the transcripts out now so if you can give me an address before we split today and I can get it mailed on down to you.

DM: Good.

SC: And . . .

DM: And this you are gonna let me proofread . . .

SC: Oh yeah.

DM: . . . . add to or . . . .

SC: Yeah, delete or take away or whatever. So, I'll just mail it to you and then either we can meet up and you can give me it back with your changes, or just mail it back to me.

DM: Give me your address and I'll give you mine. Where's your . . .
SC: Okay.

DM: . . . . pen and . . . .Yeah, I'm pretty fortunate that the, the parole officer here in town and Joe Hawk out of Winner, guess, ah, Hawk had, ah, told, ah, my significant other, my new wife, **and** her relative, that, um, **in a roundabout way** I guess, uh, Hawk had told, uh Brian Robb, my parole officer here in town, he says, uh, I gotta let you know, he says, your client, **Richard** Marshall, he said, he's got a lot of political pull. And that's, **I got a buddy that's a** state senator out of Rosebud, **named Paul Valandra.**

SC: Um, um.

DM: I, at one time here, about four months back, had told him, I asked him, I said hey, I might be needing your help and he said what's going on. So I said, I got two parole officers jacking me around. I said, uh, I wanna move home and they're running me around. I said let me check things out, I said June, from June 15th I'd be out a whole year, I said. After June 15th, I said **I'll** contact you. Nothing happened so I just said **OK**. I didn't contact him but, uh, he and Sharon must've **did** something, he and Sharon must've did something cuz, uh, he told me that the, that they're not talking to you like they are supposed to. You want to go to a better paying job, you wanna be with your wife, want to move home to your own rez. He said let me know and I said ... **manage... (inaudible).**

SC: Ah.

DM: (inaudible) my buddy Paul Valandra must have mentioned

SC: I seem to remember when we were talking about it. You said something like you couldn't go down to the rez for a year or . . .

DM: June 15th it's a full year. **Another** reason I wanna get outta this town. I hate this traffic. I'm kinda like a wide open area kinda guy . . .

SC: Um.

DM: . . . . you know.

DM: Plus I'm tired of running into a lot of ex-cons and, uh, finding out, somehow, my phone number, calling me up and asking me why (inaudible) I kind of like to stick to myself.

SC: Um, um.

DM: (inaudible).

SC: You're better off down there than up here.

DM: Mm Hmm. Can't imagine not . . . . (inaudible)

SC: Um, um.

DM: Today's my last day of work at the Visionary Lodging .

SC: Why?

DM: I've been there over a year.

SC: If I'd had my coffee there I'd never of found you probably.

DM: **No, it's a hard place to find me**... (inaudible) **out to Black Hawk.**

SC: Well, I used to live in Black Hawk **(inaudible)**

DM: Oh, yeah. But,

SC: But since I've seen you last, um, I've been on the road nearly all the time.

DM: Um, um.

SC: Cuz I've got another book that's coming out like November...
DM: Um, um.

SC: ... and I'll be finishing that up before doing this AIM project. So I actually moved out of Black Hawk.

DM: Um, um.

SC: So I've **got no fixed abode** over here at **present** and I'm just in and out of hotels and stuff. I've got two tours to do in like four weeks time.

DM: Really?

SC: Yeah, over Washington state, Idaho, and Oregon that way up, Montana a little bit.

DM: Um, um.

SC: Just busy, this is why I needed to, and I've written stuff down here **to clarify**. When we were visiting last, we didn't talk very much about Anna Mae...

DM: Um, um.

SC: ... if you remember that. We talked about other stuff, **Montileaux** and all this shit. Well, since that time, I've talked to a few other people and this is why I don't wanna do this, like **a** book interview kind of deal. And I can only tell you what it is that other people have said and then you can tell me what you remember about it. Um in February I went up to Vancouver. I interviewed John Graham, who shot Anna Mae in the head...

[***14:29***]

SC: I was with him for a long time, went through the sequence of events **and all that**, it was Vernon who set this interview up and that's how I got to go and see him. I've discussed all this with Vernon and I know a lot of this shit that went on and all the rest of it, **and I said to him** you know, to do her justice, you know, I, I need to be finding out the full detail and then putting the scenario in as to what happened and, you know, without **shafting anybody in this process.** Anyway, to make a long story short, he told me that

when they brought her up from Denver, up to Rapid City to Thelma **and all this** , as it went down, that after they had her at Thelma's, that Arlo drove across **the** Pine Ridge and across to the Rosebud and he said they stopped at two houses on the way. The last house they stopped at was Kills's place and he said they stopped at your house on the way to Kills's house.

DM: Um.

SC: Then I talked to Arlo himself you know, Arlo's in a pretty bad way.

DM: Arlo?

SC: Looking Cloud. He was **a kid then**, they were both **kids then**. He said pretty much the same thing other than **he added that**, and how he knows this, I mean, I, I'm assuming either his memory is good or his memory is bad, one or the other. He said the same thing though, that he drove and all that, they stopped at two houses and he said words to the effect of that when **then** they stopped in your place, something about that you, or, you or Cleo weren't happy about it, you know, weren't thrilled about it, or whatever, them showing up then. Choach. You know Choach.

[***16:26***]

DM: Choach? Yeah, yeah, her name is, uh...Arlene... **She's a Means now.**

SC: Was it Goings?

DM: She was Arlene Goings, Arlene "Choach" Goings. Yeah, she married that Dennis Means.

SC: Yeah. Well, I visited with her about it and she was saying **that** she saw Annie Mae **in all of this sequence** and she said she was **taking** Dusty and Lena, you know **Navajo Lynn** over to Sioux City, Iowa, to Cheryl **Decora's**, Lorelei's sister's place, over there. It was at night and she stopped up at your place and that Theda, Arlo, and John Boy were there and that they had Annie Mae there, too. And she said she thought Regina Brave was there also. Now way back, I remember a conversation I had with June Little, or it may have been **(inaudible)** about stuff and he mentioned that as well, but I hadn't given that very much credibility at that stage just because of the way that **June can be**. But now these other people have said it. So I need to ask you what you remember about it, you know that, that event. **That if you remember that night or what.**

[***17:42***]

DM: That was 19-, what?

SC: '75 it would have been. December **thereof**. Mid or early December. Russ was on trial in Sioux Falls. Now you see why I'm not doing **this as an**...

DM: Um, um.

SC: ... interview **or anything.**

DM: Did you visit Cleo yet?

SC: Unh Unh.

DM: You should visit her.

SC: I don't know where...

DM: She lives in Manderson.

SC: Okay.

DM: And she works at, ah, the school there. She's a finance officer. But at the time I was married to her.

SC: Um, um.

DM: We were **legally** married and we lived in **the Allen housing** and, uh, I can't **remember clearly who** all came that time, but, uh, we had company I remember and Anna Mae was with them. That's the first time I ever laid eyes on Anna Mae, ever met her and, uh, I didn't really visit with her. I just visited with, uh, can't remember **who I**, there were some dudes there. It happened so damn long ago I can't remember who's who. **(Inaudible).** But, I remember, huh, Cleo was like that. She always **fed** company. She didn't bother asking if you were hungry. When you come, she automatically cooked and started feeding people, setting places, you know, getting coffee, and huh, I think she did give Anna Mae some clothes. That's about all I can remember of that. You might want to talk to Cleo 'cause she was my wife then.

[***19:19***]

SC: Um, um.

DM: You know. She was a solid woman.
SC: **She's from Manderson.**
DM: Manderson.
SC: If I was to tell her that you told me that I should talk to her...
DM: Yeah.
SC: ...she'd talk to me?
DM: Um, um.

SC: And, uh...

DM: Cuz she'd probably remember more than I would 'cuz I was probably hazed out cuz I was smoking too **much peji** then.

SC: Huh, huh. But that's, that's what these guys have said and like the first time when I heard it I was like, but then when they kinda repeated the same thing, you know the three people, that before they took her to Kills' house they stopped off at your **house. But** nobody in the telling of it like made out to me that you had any involvement in it.

DM: Um.

SC: It was just like they stopped there.

DM: Yeah. Yeah, we always had company and they went on.

SC: For whatever the hell reason they stopped there, they just stopped there.

DM: That's because we was ah, movement members then **and** people would always stop in, you know.

SC: Yeah. But Choach, um, part of what she said was it seemed clear to her that looking at Annie Mae, that, uh, she wasn't there willingly. That these other three had like, brought her along, and she was like, she didn't have a choice but **to** be there.

DM: Hm.

SC: Kinda how she described that...

DM: Hm.

[20:43]

SC: ... and so I don't know if you remember that particularly...

DM: **Hm.**

SC: ...or, or whether Cleo would remember **that.**

DM: I, I suggest you talk to Cleo too.

SC: And because, she actually, she said that, ah, that as she recalled it, it seemed that Annie Mae was like, you know, that her hands were tied **or** something like that, on that occasion. And Christ it's only, it's gonna be a few hours after that they took her to Kills' house.

DM: **Hm..**
SC: ... and then up to Wanblee, **where Amiotte is,** and popped her, you know.

DM: Yeah, **I myself**, I'd like to know what the hell happened to her and why they did it, cuz, that's, that's about the only time I've ever seen her in my whole career. **I remember hearing about all the strong** things I heard that she's done. I've always had a lot respect for her coming all the way from her home country of Nova Scotia to help out **down** at Wounded Knee.

SC: Yeah. When we did that last interview that was one of the things that I respected about you was that if I asked you a question, you always answered it. And, I don't know these guys real well...

DM: **Um hm.**

SC: ... you know, and we've only met a couple of times, but I trust you to tell me the way that it is...

DM: **Hm.**

SC: ... the way that it was.

DM: **Um, hm.**

SC: Now this guy, John Boy, he's just a total fucking **wreck,** you know, because he did it, and he tells me at one point he says, uh, he says I'm not gonna say I'm not...

DM: **What is** John Boy's **last name**?

SC: Graham

DM: Graham?

SC: He was from up there too. Canada.

DM: Oh, yeah?

SC: His hair ain't real dark, its kinda darker than mine, but it's not **like** black, more dark brown.

DM: Oh yeah?

SC: Yeah.

DM: Um. So he's a Canadian skin?

SC: Yeah.

DM: Is he?

SC: He's Southern **Tchlone.**

DM: Huh?

SC: Southern T'Chone is the nation.

DM: Um.

SC: But, that was kinda (inaudible)...

DM: **I'm gonna have some more water.**

SC: **Sure. Finish it off.**

DM: That was from that sawdust. I work with sawdust all day, man. I gotta rinse my eyes out every day. We wear safety glasses but it still gets in, you know, so I use that Bausch & Lomb eye rinse.

SC: Um, um.

DM: Cuz if I don't, it feel like mud. Yeah, so I didn't care if you had talked to Cleo. She **works at Manderson.**

SC: Uh, um. She **works** at the school.

DM: Um, **hm....** Do you know Dave Clifford?

SC: I don't know him. I know of him.

DM: Um, **hm**. That's his sister. Dave used to be my brother-in-law.

SC: **Um, hm.**

SC: **But** this just bothered me...

DM: **Um, hm.**

SC: ... you, know, and it wasn't something I could put in a **fax to you** ....or

DM: **Um, hm.**

SC: ... anything like that. In the context of what we're **doing** with this book **I need to know,** you know to get it straight.

DM: Um, **hm.**

SC: But at the same time I **need to know what like not** , you know, to drop in there...

DM: Um, **hm.**

SC: ~~king~~ **of thing**. These three, Theda, Arlo, and John Boy, Christ everybody knows. Shit, everywhere I go, everybody know about this. **You talk to people, right** off the bat, you know.

DM: Hum.

SC: People have got stories about it. They might not have talked about it, for however many years. But it's like when, when they know that you've talked to them and (inaudible), they know that you're not bullshittin' them and people say what it is...

DM: **Hm.**

SC: ... and I'm thinking, you know what my impression is, everybody's fuckin' sick of it, **they're sick of living with it.**

DM: Um.

SC: ... and it's like people are getting to that point now where, it's like, what the fuck are we **kept this shit quiet** for, you know, because it was nothing to do with **us**. They did it and now you've said about Annie Mae then and as I recall you said it about her when we talked last, she was a strong person. This person didn't deserve to be taken out...

DM: **Right.**

SC: ... fuckin' wasted.

DM: Um, **hm.**

SC: You, know. So people, I think, ah, you know they're kinda scared and, in a way, **to** talk about it, but, then again I think they wanna, it's like a cleansing almost, you know, well, shit, this is it, it's all over. And that's why I wanted to ask you...

DM: Um, **hm.**

SC: ... you know, within that context but I didn't wanna do it like we did the interview

DM: Um, **hm.**

SC: **Yeah.**

DM: Yeah, that happened so long ago. A lot of that happened so long, its kinda, I hafta admit I'm gettin' old, man I'll be 51 come September, trying to stay at fifty but I (inaudible)... goin' over the side man. It's cool though. I've been told you hit **50 and over**, you become **a**, start getting elderly **status. Yeah, it's healing up. Must have really tore it good**. I mean, **this really tore this up. I keep 'em covered so I won't get dust in there.** *

SC: Yeah.

DM: **The ones** in the back **are healing** pretty good **and dry**. *

[25:49]

* Here Richard Marshall is referring to the piercing wounds in his chest and back that he received in the Sundance ceremony that he referred to on Page 1.

SC: Yeah... **But yeah** that would have been December 1975, so twenty, twenty-five and a half years ago.
DM: That's a long time.
SC: Yeah.
DM: But, uh, like I say, you know, tell Cleo that ah, I asked her to talk to you and see if she can't remember. **We were married then.**

SC: Uh, hm. . **But** you just, you remember this **is** the only time that you ever seen Annie Mae.

DM: **The only time**.

SC: When those three guys showed up with her at **your place**, which is like what Choach and them...
DM: Um, **hm**.
SC: ... have said. So they were telling it right. [1] ***[26:33]***

DM: **(Mm.)** [2] But like I say I can't remember who those guys were you know because they were youngsters, there were a lot of people in and out of my **camp**.
SC: Um.
DM: A lot of people come to visit me and Cleo.
SC: Um, um.
DM: And we were about the, like uh, one of the strongest AIM families there in Allen at the time. **A lot of** the shit went down they'd come to me and Cleo for help, you know, groceries, when they need a ride, and hauling wood for the elderly and...

SC: **But** you reckon that Cleo gave Annie Mae some clothes or ...

DM: I think she did.

SC: or gave them some clothes for her or...

DM: I don't know about that. She, she said she **was gonna give** some clothes to somebody but, it might have been Anna Mae, but, but uh, it happened so long ago, I think, you

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[1] The government's transcript has "..., so they were telling it right?" It is evident in the recording, from the pause before that sentence and from the lack of a rising inflection of his voice, that this sentence is a declarative statement of a fact or, more precisely, the declarant's conclusion or belief. It is not a question.

[2] Here, the government's transcript has: "Yeah." It is not at all clear from the tape whether Dick Marshall said anything at all before "But like I say..." He certainly did not say "Yeah. "On the tape-recording, if Marshall made any noise or audible response at all to that previous statement by Chapman, it was, at most, a barely audible "Mm".

know, I think it'd be good **if** you talk to her.

SC: Yeah, I will.

DM: If you go to Manderson and inquire around they tell you where she lives. She lives **out in White Horse Creek** near her folks.

SC: Does she have a phone, do you know?

DM: Ah, she might be, yeah.

SC: I, I . . .

DM: Her married name then, now, is, ah, her husband's last name, Gates, G-A-T-E-S. Cleo Gates. Cleo Clifford Gates.

SC: Yeah, I'll try **and** call her ahead of time rather than just show up.

DM: Um, um.

SC: You know, hopefully she'll remember . . . .

DM: Um, um.

SC: . . . that night.

DM: Um.

SC: You know. And from what you can remember, how did, how did, Annie Mae look? **Or is that like...?**

DM: Man, I can't remember.

SC: 'Cuz according to Choach, she said that she just kinda went in your place and she was just kinda there. You know. And she said she seemed to be, you know, like her hands were tied up .

DM: Um.

SC: . . . . Or something or other.

DM: Um.

SC: I don't think she's a bullshitter either I . . .

DM: Um, um. . . and Choach, she's kinda like a (inaudible) observer . . .

SC: Yeah. I mean there's no, there's no doubt in my mind at all, you know that it was like Arlo and John Boy who with Theda took her. **Flat out said it themselves.**

DM: Um.

SC: You know, but, from my mind what I've talked to people, they **weren't prominent** at all **in the movement. They were just kids**. You know, like twenty years **old**, but, and shit like that **they** get dragged into. Dragged into all of that. What do you, what about, what do you know of, Theda, what **did** you know about her? She seems like fuckin' . . . (inaudible). Theda is seventy years old now. Christ

DM: **To me** back then that she was a loud, boisterous woman. Like, when she was around, she wanted all the attention. **That kind of person**. She **lived over to Ogalala.**

SC: Um, um.

DM: **And, uh, I lived** over in Allen. I really didn't **want to** pay much attention to her. She came around, she talked so loud like she wanted everybody to know she was there at that time.

SC: Ah, ah.

DM: I really didn't care for her.

SC: Well, that's probably why they brought her to your house then, you know. She wanted, ah, wanted people to know that, hey, it's part of her show, (inaudible) she knew there'd be people at her place.

DM: Um.

SC: I mean, this, this is some whacked out shit to me.

DM: Um, um.

SC: Uh, doin' that to somebody.

DM: Um, um.

know. **It's** fuckin; bad.

DM: Um, um.

SC: That whole deal. Yeah, somebody else always visited like this I wanted to ask you about, that David Hill, you know, or remember him? DePalma?

DM: I can't remember David Hill, ah, that I **ever** even met him back in the day.

SC: **Guy** from Oklahoma.

DM: Um. I've heard of him.

SC: Yeah, he's fuckin' nuts too.

DM: Um.

SC: I interviewed him at least, about all sorts of shit you know, not just this. Real deceptive kind of a . . .

DM: Hm.

SC: . . . guy. You know, not to be trusted at all and ah, I kinda found out that he was right in the middle of this shit.

DM: Hm.

SC: You know, he kinda orchestrated it, what was going to happen to this girl.

DM: Um.

SC: In my mind it's just totally bad, but doing that to somebody, doing that to a woman.

DM: Um, um.

SC: Right.

DM: Yeah, you know, me and some of the **bros**, we, uh, when this started coming out again, we thought, man, you know, somebody's gotta (inaudible), somebody's gotta pay for this shit, man, you know, somebody's gotta own up to what really happened to her, you know.

SC: Um, um.

DM: As far as I'm concerned, you know, in a warrior's way, he's gotta protect the women instead of harming them, you know.

SC: I mean Christ, she's got, she had to young kids.

DM: Yeah. Um, um.

SC: You know, those girls are growin' up not knowing, you know, what the hell happened to their mother.

DM: Um, um.

SC: And then we got these guys, Clyde, Dennis, particularly **Leonard, a little bit,** Dave, **Hill**, Kills, Ted, fucking you know, what the hell, what gives them the right to...

DM: Um, um.

SC: . . . decide who's going to be livin' and who's gonna be dying.

DM: Um, um.

SC: You know. The Kangaroo Court they had over **there**.

DM: Um, um.

SC: It's bullshit.

DM: Um.

SC: Bruce, fucking Bruce Ellison, up to his neck in this shit. It's bad. It's fucking bad. I, um . . .

DM: Like you say, it's all **gonna come to light and I am really interested in** what the hell**, what really** went down.

SC: Um. So **but that was**, you know, I appreciate your candor . . . .

DM: Yeah.

SC: . . . . with that.
DM: Okay.

SC: See my position, I, people say this shit to me and if I don't **ask**, I'm not gonna know.

DM: Hum, um.

SC: You know, **how** to get into. See, I'm gettin' shit **from** people. **Man** you know, **like Vernon and them, you know** and, what the fuck do you know, you know, you know this, you know that, you know too much and my position is hey, I ain't never, I didn't kill . . .

DM: Um, um.

SC: . . . there's no shit to do with me.

DM: Um, um.

SC: I'm just writing a fucking book.

DM: Yeah.

SC: You know, I don't wanna be part of it, but at the same time I wanna know because, damn, there's a lot of long roads on these rezes . . .

DM: Hum, um.

SC: . . . if you know what I'm saying.

DM: um, um.

SC: **Guys are fucking nuts.**

DM: Yup.

SC: . . . some of these people, you know.. It's bad **scene** all the way around . . .

DM: Yeah.

SC: . . . to me. I mean back in that time, when was it that you heard they offed her? That they'd killed her? I know that thing we talked about was that Russ and Ted and Kills. Um, it was there at that basketball game, we talked about it there. Do you remember last time. It was just like you and Cleo out of that caravan. You went up into a wake and those guys...

DM: Mmmm.

SC: Do you remember that? That's about all we talked about.

DM: It **goes** to show where me and Cleo's hearts **were** at.

SC: Yeah, but I mean, **when** did you, like hear that they'd shot her there after that they'd brought her to your house? I mean, too her out and . . .

DM: Hum, hm.

SC: . . . . killed her. I mean, when did you hear about that? Was it **like**, soon after or . .

DM: '75. . . .**Let's see.**

SC: I mean they kill her . . .

DM: (inaudible)

SC: (inaudible) in December, obviously.

DM: I can't remember right off the bat, but we heard about it, through, uh, I felt bad, too . . .

SC: Um.

DM: **and** we went to her wake.

SC: Yeah. So you kinda heard about it between the time they did it and that wake?

DM: Yeah.

SC: That fucker. And, there's, there's a part of me, not ver much of me, but there's a part of me that feels kinda bad for Arlo and Arlo, I don't feel bad for John Boy cuz he didn't hafta shoot her in the head.

DM: I don't have faith in them fuckers...

SC: You know.

DM: ...not at all.

SC: Yeah. I mean this is the interesting, real interesting **but to** me, talking to John Boy, he can kinda tell, tell you what went down, you know, and the sequence and where they were, where they took her, and all that, but she, now it comes to like,

mention your place and shit and uh, but when he **gets to Kills'**, man, he like shits himself.

DM: Hum.

SC: 'Cuz, some, some shit went down at Kills' house.

DM: Um.

SC: And he doesn't even, he doesn't like think about it.

DM: Oh, yeah.

SC: 'Cuz he gets up and walks about the fucking room.

DM: Hmmm.

SC: He like, you don't know whether he's gonna cry or whether he's like, gonna go fuckin' ballistic. It's like, you know, (inaudible), that's kind of affected him.

DM: Hm.

SC: So to my mind, whatever was said to him in that house, that made him go out and shoot her in the back of the head.

DM: Hm.

SC: Somebody said to him in that house, gave him that ultimatum, I think.

DM: Um.

SC: You know, when they pick her up in Denver, I think they already knew, **like** Clyde and them guys know that she ain't gonna be with them. But these three, him anyway, John Boy and Arlo, I don't think that they know that they gonna be killin' her . . . .

DM: Um.

SC: . . . and I think that's the point, that they know they're gonna be killin' her, because he'd just like, he **ain't a**, he ain't a natural born killer. He did. He, someone, he was put in that position.

DM: Um.

SC: "Cuz he, fuck, he'd be able to hide it. Better, you know, uh, deal with it. Better, you know, deal with it, better, I mean (inaudible) he wouldn't tell.

DM: Um.

SC: You're talking to him, he's like this.

DM: Oh, yeah?

SC: You know, smokin', his fucking hands going and all that. So I bet you when this shit comes out, who ever was in Kills' house, that, that's the word right there.

DM: Um, um.

SC: They just drove up there and killed her. That's some bad shit. And I've been told that Clyde and David Hill were in Kills' house. Obviously Kills was there.

DM: Um.

SC: **At his** WYKLDOC office when they were interrogating Annie Mae and then they went to Kills' house that afternoon.

DM: Um.

SC: Then they went on to Sioux Falls and then they come back to Kills' house. While all this shit's going on, during that obviously then they took her to your place, stopped off at your place, before they ended up going over to his place.

DM: Um.

SC: And that's where it's at.

DM: Yeah, like I say it's **going to be** pretty interesting. I'd like know **myself...** (Inaudible).

SC: Well, if I, if I find out he was in that house, you know, . . .

DM: Um, um.

SC: Or who all else was in that house. If you hear anything . . .

DM: Um.

SC: . . . . let me know cuz I'd be interested.

DM: (inaudible).

SC: Seems at that point now where, well, me, I'm just trying, I'm just, some people I'm trying to avoid. You know. I don't want, I don't wanna talk about it.

DM: Um. Um.

SC: You know, with any of those guys. Because it's not even that they're, I don't think that they're anything. You know, it's just that I know it's the kind of thing that they do, you know, they get four or five other people to come out and they're looking for 'ya.

DM: Um, um.

SC: It's like how I think that they operate. They don't do their own . . . .

DM: What about Anna Mae's kids? Where they at now?

SC: They're up there in Canada, Nova Scotia, as far as I know. The same place as her sister.

DM: Um, um.

SC: No closure.

DM: Hum.

SC: You know, for them. Because although these names are out there, they, you know, how are they to know. You know, how they to know, unless they see somebody answer to it.

DM: Um. Um.

SC: You know. Well, my position is, it's not just them three. **Theda, Arlo and** John Boy. It's these others around here **who** put this shit in motion, I mean, but . . .

DM: Um.

SC: . . . (Inaudible) more people than I think.

DM: Um, um.

SC: And, I just, you know, as I said to you before, I don't know like, I don't even like to think about what she went through, that last 36 hours . . .

DM: Um, um.

SC: . . . of her life. That's bad. That's really bad.

DM: You know one time I read an article something about Indian, Indian Country paper, or something like that, some guy names Two Elk, something like that. Ah, three or four pages of it . . .

SC: Um, um.

DM: Did you ever talk to that guy?

SC: Ah, I didn't because I talked to Arlo and he got his information from Arlo.

DM: Um.

SC: I think Two Elk, you know, he's got kinda his own gripe?

DM: Oh yeah?

SC: Yeah, with **some** of these people. But a lot of what he said in there, is, ah, is true.

DM: Um.

SC: You know, 'cuz he got it from Arlo. And Arlo's just kind of a pitiful guy, you know.

DM: What's Arlo's last name?

SC: Looking Cloud.

DM: And he's from where?

SC: Well, he's from up here.

DM: Oh, yeah.
SC: Originally. (Inaudible) Remember Johnny Looking Cloud? His dad was kinda

real distinguished looking guy.

DM: Um.

SC: He was in a few movies and stuff. He's down from Pine Ridge.

DM: Oh yeah?

SC: But, he, they like got relatives and shit in Denver, but he was (inaudible) . . .

DM: Um.

SC: . . . but he's pitiful in that way that he drinks a lot. **He's** wrecked, he's wrecked his life.

DM: Oh, yeah.

SC: What, which I guess it would be.

DM: Um, um.

SC: You know, being involved this kind of **violence(?)** Ah, but, you know, people say that he's a fucking wino and a drug addict you know, and he's all these things...

DM: Um, um.

SC: . . . but he's got his own, his own ways of survival because he doesn't trust these guys either. You know, this is a guy, 40 odd years old or something, who, you know, he wants to get rid of it. You know, he wants, he wants, it **to be over** and I think he'd answer to it, I do, you know.

DM: Um, um.

SC: If they don't kill him first. And, who knows whether they will or they won't.

DM: Um, um.

SC: I don't know. Some people have a lot of shit to hide and I think they will do most anything to hide it.

DM: Um, um.

SC: Cuz **they've made their career** out of it) you know. It's sad, it's sad man. That's **why** I wanted to ask you about **it**.

DM: Okay.

SC: And I appreciate you coming down and visiting with me.

DM: Yeah I always wondered what happened to 'ya, you know, and, uh, uh, I've been livin' with that Maria Holy Eagle, but like I said, now I couldn't jive with her man, all together she, she's really into herself.

SC: Um.

DM: She just had an article in the Indian Country Journal paper about herself saying she was a spiritual person and she didn't tell me jack shit about these spirits of hers and I lived with her. In this town we have a lot of these, a lot of these Indian people in town who wanna be shaman, (inaudible) saying spirits are dead. Either that, what I've seen it's all for show, or personal greed or money, that's it.

SC: Well, there's a lot of that around.

DM: (inaudible) I just had a good Sundance at Rick Two Dogs, it was powerful (inaudible)

SC: (inaudible)

SC: Yeah, Rick's a good (inaudible). Rick's kind of like **Wilmer**, you know, real traditional people.

DM: Oh, yeah.

SC: Then there's all these other kids, you know, who are, who might lead in Sundances and stuff. I went to one of them and I, I had a friend who was dancing, she asked me to go and like record it so I went. Man, I couldn't believe the shit going on in there, too.

DM: Um.

SC: Lots of non-Indians and . . .

DM: Um, um.

SC: . . . Boy, kinda like a circus, you know, I was thinking . . . (inaudible)
DM: Yeah.

SC: You know, but with side shows and stuff going on, you know, there was a guy, a non-Indian guy, you know, he was like taking **flesh offering off** people. It was like, like at a fair or something you know, just . . .

DM: Um, um.

SC: It was just bad.

DM: Um, um. Well, I'm gonna hit the road, man, 'cuz I'm gonna go back to my apartment, and head for Pine Ridge and **my parole officer give me**. I got my last meeting with him on Monday, 4:30. And he says I can move any time after that, so I tell him, well, I can't come back Sunday night, can I come back Monday (inaudible) 'cuz I gotta bring back the trailer, bring my stuff back, so.

SC: Well, if you get down to **Wilmer**'s place, ah, give **him** a message for me. **He** wanted me to go down there on the 29th.

DM: You said he gave **him** a message for me too, and I never, did tell me that.

SC: Yeah, well **last fall**. You know when we visited, he said . . .

DM: Yeah.

SC: 'tell him to call me.' So I gave him your number.

DM: Um, um. Yeah, he never did call.

SC: Or that number I had, which was (inaudible) yeah.

SC: That woman's place, um, I don't know whether he did.

DM: (inaudible)

SC: But if you see him, man, can you tell him that I can't be there on the 29th.

DM: The 29th of this month?

SC: Yeah. I gotta go to Seattle.

DM: Ok. Today's what, the 27th?

SC: Yeah, it's like Sunday.

DM: Oh, all right. **Cause I'll be going through** there tomorrow.

SC: Okay. Ah, if you see you him and . . .

DM: All right.

SC: . . . . tell him that, that would be, that would be cool 'cuz then I ain't got no other way of getting a message to him.

DM: All right. I'll do that.

SC: And I'll try and hook up with Cleo . . .

DM: Um, um.

SC: . . . . see what she can remember.

DM: Um, um.

SC: Then I'll be back around here, uh, end of August. So I'll give you call then.

DM: K. Then, ah, ...

SC: See what's going on. And I'll, by that time

DM: You'll have a rough draft . . .

SC: Yeah.

DM: . . . . together.

SC: Yeah. It's just gonna be, it'll be like my questions and your . . .

DM: What other magazines did you send me?

SC: I sent you those AIM magazines that we get, those, ones with, uh, Fern, you know, Fern **Matthias** that lady . . .

DM: Hum.

SC: . . . lady, she like had a flag upside down.

DM: Um, no I didn't see that one.

SC: Ah, I sent you that one. I sent you that one with, ah, Peltier on the front and I sent you another one that I had stuff **about mascots** in it.

DM: Do you have anymore copies left?

SC: Yeah.

DM: Well, send them to this address (inaudible)

SC: 'Cuz I remember the last thing you said to me was if you can give **Wilmer** a message for me and I saw him right after that. I gave him that message.

DM: Um, um.

SC: And then he said if you got that magazine, send me that magazine.

DM: Um, um.

SC: So, I gave him the message and I sent you the magazines some time after that.

DM: **I didn't get it.**

SC: It wasn't right away.

DM: She's probably got them then but didn't give them to me.

SC: Well, I'm glad we . . . .

DM: Yeah.

SC: . . . . I didn't send that book.

DM: Yeah. (Inaudible) was there, so I probably (inaudible).

SC: All right. I'll do that.

DM: Um, um.

SC: We'll do that and I'll give you a call when I get back.

DM: Okay, man. Well, I gotta ride. All right.

SC: I'll walk you down.

DM: All right. **Been a** long day man since last time I worked **out there.**

End.

FILED
MAY 13 2009
CLERK

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S TRANSCRIPT OF TAPE

NOW COMES Defendant Richard Marshall, by and through his attorney Dana L. Hanna, and hereby submits Defendant's transcript of a tape recording that has been previously admitted into evidence as Exhibit # 1 in the motions hearing held May 5th, 2009. See: Exhibit List: document # 350. The Defendant's transcript is attached hereto.

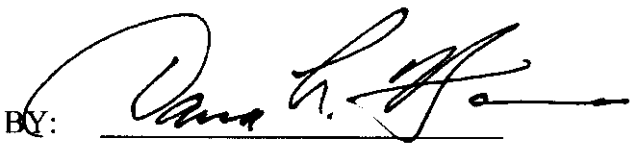
In the Defendant's transcript (which should be marked Exhibit # 5), corrections and differences between the Defendant's transcript of the tape and the Government's transcript (Exhibit # 2) are distinguished in the Defendant's transcript by bold face type.

There are numbers, bold faced and underlined, throughout the transcript. These show the time in the conversation where statements were made-e.g., 24:10 denotes that the statement was made 24 minutes and 10 seconds into the recording.

In addition, along with this corrected transcript, in a separate filing, the Defendant is filing with the Court an enhanced recording of Exhibit # 1, a compact disc of a tape-recorded conversation that took place on July 27, 2001 between defendant Richard Marshall and government witness Serle Chapman. This enhanced tape recording is exhibit # 3 in the record of the motions hearing.

Dated this 13th day of May, 2009.

VINE RICHARD MARSHALL, Defendant

BY: 

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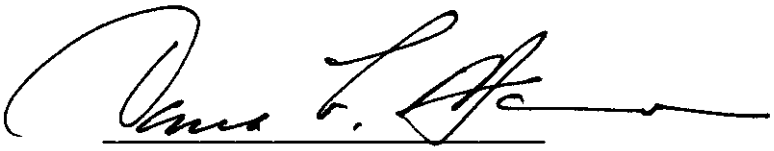
CERTIFICATE OF SERVICE

I hereby that I have served a true and correct copy of the foregoing Defendant Marshall's Transcript of Tape on the other parties in this case by mailing the same, postage prepaid, the attorneys of record at the addresses listed below:

Marty J. Jackley, United States Attorney and
Robert Mandel, Assistant United States Attorney
515 Ninth Street, #201
Rapid City, SD 57701

John Murphy
Murphy Law Office
328 E. New York St., #1
Rapid City, SD 57701

Dated this 13th day of May, 2009.



Dana L. Hanna

This is Serle Chapman. It is Friday, 27th of July, 2001, about to visit with Dick Marshall in regard to the murder of Anna Mae Pictou Aquash at the Alex Johnson Hotel, Room 918.

SC: Good timing (inaudible)... Eh, excellent timing, how's it going buddy.

DM: All right.

SC: Good to see you again.

SC: You too.

DM: Yeah I had to **be at the** Sundance.

SC: Uh.

DM: (inaudible).

SC: (inaudible).

DM: (inaudible).

SC: **Where did you dance?**

DM: **What's that?**

SC: **Whose place?**

DM: Rick Two **Dogs**.

SC: Oh

DM: I like going to his Sundance. Pretty strong . . . right.

SC: Yeah. Yeah . . . (inaudible) **Wilmer**'s got **his** going on.

DM: Yeah, I thought I'd stop in on the way, way back, way back home tonight..

SC: (inaudible).
DM: (inaudible).

SC: All I said was go the other one. (Inaudible). All three (inaudible)?

DM: **So**. When'd 'ya get to town?

SC: Ah, geez, ah, couple of days back.

DM: Oh, is that right?

SC: Yeah, the only contact I have for you is like through Karen Testerman remember that? That, ah, that lady, at her address. I know that she got that magazine, you know (inaudible) at her address (inaudible) . . .

DM: . . . . she finally got a better address . . .there were a lot of things that she didn't get back to me. She even stole my address **book.**

SC: Oh, really?

DM: I had a falling out with her, I guess. She was worse than my parole officer, man (laughs) (inaudible). Who was calling, **where I was**, how long I was going to be there, how come I didn't come back and all that. I couldn't put up with that.

SC: I've been trying to find out where in the hell you were and then I thought. . . I remembered Black **Hawk**.

DM: Really?(inaudible) yeah, (inaudible) Black **Hawk**.

SC: Yeah, Black **Hawk**, so I thought I'd give that a try and then I thought, well, I don't wanna get into any difficulty you know, but if I called you at that place and then I talked to that lady and, that answered the phone there . . .

DM: Yeah.

SC: And she said ah, no, it'll be fine. Get some privacy in here a little bit.

DM: Is this the **book you were talking about**?

SC: Yeah, that's for you anyways.

DM: Oh, really? **"Of Earth and Elders."**

SC: **Now**, let's try this.
DM: You know **what** , I seen this in an ad someplace (Inaudible).

SC: Oh, really?

DM: Yeah.

SC: God damn, security or what? Huh?

DM: (laughter)..

SC: Ah, shit. Yeah, that's the last one I did.

DM: Is that right?

SC: Yeah.

DM: Yeah, I seen this in an ad someplace.

SC: So I wanted to give you that . . .

DM: Thanks, man, I appreciate that.

SC: . . . while I was here and . . .

DM: (inaudible).

SC: Want a drink of this stuff?

DM: What's that?

SC: Want a drink?

DM: Yeah, I'm dying of thirst. I just got off work. I **had to run here and there.**

SC: Ah, find a, something (inaudible) . . . Yeah I was gonna send it to that address, but I'm kinda glad I didn't then.

DM: Yeah, good thing you didn't. But, ah, I got news for you too. I'm moving out of this town.

SC: Oh, really?

DM: My parole officer gave me the green light to go ahead and move back down home to Pine Ridge.

SC: Oh, all right.

DM: And I just recently got married here, June 2nd.

SC: Well, I kinda found that out.

DM: Did 'ya?

SC: Yeah. Can't remember that lady's name now but, uh, Brewer, maybe?

DM: **Yeah. Yeah**. The lady's name is Frieda Brewer.

SC: **(Inaudible.)** Is she up here or down?

DM: She's from down there.

SC: No, I'm kinda glad that we got . . .

DM: . . . . (inaudible) out there and (inaudible) already. Yeah, I requested to move back about 3 months ago. But what it boiled down to was that parole officer out of Winner, South Dakota, that oversees the state parolees on the Rosebud and Pine Ridge Reservations. Yeah, I her before when I was out twice on parole. Both times I messed up. They kinda had it in for me, you know.

SC: You must be anxious to get back down there?

DM: Yeah. Gotta better paying job and my wife lives down there plus I own land down there. So, I'm gonna build myself a log home on my land.

SC: I mean I tried to contact you, too, at Hope Lodge.

DM: **Yeah?**

SC: But they weren't real

DM: Cooperative, huh? Yeah. The people that work up there, the staff, are just as dysfunctional as the patients, I think. I go up there for AA meetings sometimes **and pour water for the sweats.**

SC: Uh, I said something up there, as far as I knew you, you like helped out up

there?

DM: Yeah.

SC: Boy, man, they were rude. Because I thought well maybe they don't know who you are or . . .

DM: Uh, uh.

SC: . . . . something, you, know, and I said well, **he was here**, and I says well, I **knew that he helped out at ceremonies** and she said he's not here, and I went, whoa . . .

DM: Really?

SC: Yeah.

DM: Hey.

SC: A couple of times.

DM: Yeah.

SC: You, know, but, uh, . . . I wanted to check a few things out with you because since we met I spoke to a number of other people and that's why I don't wanna do this as an interview, **as part of the interview.**

DM: **Uh huh.**

SC: But you appreciate it from my point of view, writing this thing. I don't, I gotta tell it like it is. But, there, ah, may be one or two things that I don't necessarily need to include, if you see what I'm saying. And, but I need to know what, what the deal is in order to do that, so that I can figure out a way of doing it without screwing anybody over, but still telling the truth of the matter. So .

DM: Um.

SC: Um, that interview that we have already done, do you remember Sarah, you met Sarah at that time?

DM: Um, um.

SC: She's actually getting the transcripts out now so if you can give me an address before we split today and I can get it mailed on down to you.

DM: Good.

SC: And . . .

DM: And this you are gonna let me proofread . . .

SC: Oh yeah.

DM: . . . . add to or . . . .

SC: Yeah, delete or take away or whatever. So, I'll just mail it to you and then either we can meet up and you can give me it back with your changes, or just mail it back to me.

DM: Give me your address and I'll give you mine. Where's your . . .
SC: Okay.

DM: . . . . pen and . . . .Yeah, I'm pretty fortunate that the, the parole officer here in town and Joe Hawk out of Winner, guess, ah, Hawk had, ah, told, ah, my significant other, my new wife, **and** her relative, that, um, **in a roundabout way** I guess, uh, Hawk had told, uh Brian Robb, my parole officer here in town, he says, uh, I gotta let you know, he says, your client, **Richard** Marshall, he said, he's got a lot of political pull. And that's, **I got a buddy that's a** state senator out of Rosebud, **named Paul Valandra.**

SC: Um, um.

DM: I, at one time here, about four months back, had told him, I asked him, I said hey, I might be needing your help and he said what's going on. So I said, I got two parole officers jacking me around. I said, uh, I wanna move home and they're running me around. I said let me check things out, I said June, from June 15th I'd be out a whole year, I said. After June 15th, I said **I'll** contact you. Nothing happened so I just said **OK**. I didn't contact him but, uh, he and Sharon must've **did** something, he and Sharon must've did something cuz, uh, he told me that the, that they're not talking to you like they are supposed to. You want to go to a better paying job, you wanna be with your wife, want to move home to your own rez. He said let me know and I said ... **manage... (inaudible).**

SC: Ah.

DM: (inaudible) my buddy Paul Valandra must have mentioned

SC: I seem to remember when we were talking about it. You said something like you couldn't go down to the rez for a year or . . .

DM: June 15th it's a full year. **Another** reason I wanna get outta this town. I hate this traffic. I'm kinda like a wide open area kinda guy . . .

SC: Um.

DM: . . . . you know.

DM: Plus I'm tired of running into a lot of ex-cons and, uh, finding out, somehow, my phone number, calling me up and asking me why (inaudible) I kind of like to stick to myself.

SC: Um, um.

DM: (inaudible).

SC: You're better off down there than up here.

DM: Mm Hmm. Can't imagine not . . . . (inaudible)

SC: Um, um.

DM: Today's my last day of work at the Visionary Lodging .

SC: Why?

DM: I've been there over a year.

SC: If I'd had my coffee there I'd never of found you probably.

DM: **No, it's a hard place to find me**... (inaudible) **out to Black Hawk.**

SC: Well, I used to live in Black Hawk **(inaudible)**

DM: Oh, yeah. But,

SC: But since I've seen you last, um, I've been on the road nearly all the time.

DM: Um, um.

SC: Cuz I've got another book that's coming out like November...
DM: Um, um.

SC: ... and I'll be finishing that up before doing this AIM project. So I actually moved out of Black Hawk.

DM: Um, um.

SC: So I've **got no fixed abode** over here at **present** and I'm just in and out of hotels and stuff. I've got two tours to do in like four weeks time.

DM: Really?

SC: Yeah, over Washington state, Idaho, and Oregon that way up, Montana a little bit.

DM: Um, um.

SC: Just busy, this is why I needed to, and I've written stuff down here **to clarify**. When we were visiting last, we didn't talk very much about Anna Mae...

DM: Um, um.

SC: ... if you remember that. We talked about other stuff, **Montileaux** and all this shit. Well, since that time, I've talked to a few other people and this is why I don't wanna do this, like **a** book interview kind of deal. And I can only tell you what it is that other people have said and then you can tell me what you remember about it. Um in February I went up to Vancouver. I interviewed John Graham, who shot Anna Mae in the head...

[***14:29***]

SC: I was with him for a long time, went through the sequence of events **and all that**, it was Vernon who set this interview up and that's how I got to go and see him. I've discussed all this with Vernon and I know a lot of this shit that went on and all the rest of it, **and I said to him** you know, to do her justice, you know, I, I need to be finding out the full detail and then putting the scenario in as to what happened and, you know, without **shafting anybody in this process.** Anyway, to make a long story short, he told me that

when they brought her up from Denver, up to Rapid City to Thelma **and all this** , as it went down, that after they had her at Thelma's, that Arlo drove across **the** Pine Ridge and across to the Rosebud and he said they stopped at two houses on the way. The last house they stopped at was Kills's place and he said they stopped at your house on the way to Kills's house.

DM: Um.

SC: Then I talked to Arlo himself you know, Arlo's in a pretty bad way.

DM: Arlo?

SC: Looking Cloud. He was **a kid then**, they were both **kids then**. He said pretty much the same thing other than **he added that**, and how he knows this, I mean, I, I'm assuming either his memory is good or his memory is bad, one or the other. He said the same thing though, that he drove and all that, they stopped at two houses and he said words to the effect of that when **then** they stopped in your place, something about that you, or, you or Cleo weren't happy about it, you know, weren't thrilled about it, or whatever, them showing up then. Choach. You know Choach.

[***16:26***]

DM: Choach? Yeah, yeah, her name is, uh...Arlene... **She's a Means now.**

SC: Was it Goings?

DM: She was Arlene Goings, Arlene "Choach" Goings. Yeah, she married that Dennis Means.

SC: Yeah. Well, I visited with her about it and she was saying **that** she saw Annie Mae **in all of this sequence** and she said she was **taking** Dusty and Lena, you know **Navajo Lynn** over to Sioux City, Iowa, to Cheryl **Decora's**, Lorelei's sister's place, over there. It was at night and she stopped up at your place and that Theda, Arlo, and John Boy were there and that they had Annie Mae there, too. And she said she thought Regina Brave was there also. Now way back, I remember a conversation I had with June Little, or it may have been **(inaudible)** about stuff and he mentioned that as well, but I hadn't given that very much credibility at that stage just because of the way that **June can be**. But now these other people have said it. So I need to ask you what you remember about it, you know that, that event. **That if you remember that night or what.**

[***17:42***]

DM: That was 19-, what?

SC: '75 it would have been. December **thereof**. Mid or early December. Russ was on trial in Sioux Falls. Now you see why I'm not doing **this as an**...

DM: Um, um.

SC: ... interview **or anything.**

DM: Did you visit Cleo yet?

SC: Unh Unh.

DM: You should visit her.

SC: I don't know where...

DM: She lives in Manderson.

SC: Okay.

DM: And she works at, ah, the school there. She's a finance officer. But at the time I was married to her.

SC: Um, um.

DM: We were **legally** married and we lived in **the Allen housing** and, uh, I can't **remember clearly who** all came that time, but, uh, we had company I remember and Anna Mae was with them. That's the first time I ever laid eyes on Anna Mae, ever met her and, uh, I didn't really visit with her. I just visited with, uh, can't remember **who I**, there were some dudes there. It happened so damn long ago I can't remember who's who. **(Inaudible).** But, I remember, huh, Cleo was like that. She always **fed** company. She didn't bother asking if you were hungry. When you come, she automatically cooked and started feeding people, setting places, you know, getting coffee, and huh, I think she did give Anna Mae some clothes. That's about all I can remember of that. You might want to talk to Cleo 'cause she was my wife then.

[***19:19***]

SC: Um, um.

DM: You know. She was a solid woman.
SC: **She's from Manderson.**
DM: Manderson.
SC: If I was to tell her that you told me that I should talk to her...
DM: Yeah.
SC: ...she'd talk to me?
DM: Um, um.

SC: And, uh...

DM: Cuz she'd probably remember more than I would 'cuz I was probably hazed out cuz I was smoking too **much peji** then.

SC: Huh, huh. But that's, that's what these guys have said and like the first time when I heard it I was like, but then when they kinda repeated the same thing, you know the three people, that before they took her to Kills' house they stopped off at your **house. But** nobody in the telling of it like made out to me that you had any involvement in it.

DM: Um.

SC: It was just like they stopped there.

DM: Yeah. Yeah, we always had company and they went on.

SC: For whatever the hell reason they stopped there, they just stopped there.

DM: That's because we was ah, movement members then **and** people would always stop in, you know.

SC: Yeah. But Choach, um, part of what she said was it seemed clear to her that looking at Annie Mae, that, uh, she wasn't there willingly. That these other three had like, brought her along, and she was like, she didn't have a choice but **to** be there.

DM: Hm.

SC: Kinda how she described that...

DM: Hm.

[20:43]

SC: ... and so I don't know if you remember that particularly...

DM: **Hm.**

SC: ...or, or whether Cleo would remember **that.**

DM: I, I suggest you talk to Cleo too.

SC: And because, she actually, she said that, ah, that as she recalled it, it seemed that Annie Mae was like, you know, that her hands were tied **or** something like that, on that occasion. And Christ it's only, it's gonna be a few hours after that they took her to Kills' house.

DM: **Hm..**
SC: ... and then up to Wanblee, **where Amiotte is,** and popped her, you know.

DM: Yeah, **I myself**, I'd like to know what the hell happened to her and why they did it, cuz, that's, that's about the only time I've ever seen her in my whole career. **I remember hearing about all the strong** things I heard that she's done. I've always had a lot respect for her coming all the way from her home country of Nova Scotia to help out **down** at Wounded Knee.

SC: Yeah. When we did that last interview that was one of the things that I respected about you was that if I asked you a question, you always answered it. And, I don't know these guys real well...

DM: **Um hm.**

SC: ... you know, and we've only met a couple of times, but I trust you to tell me the way that it is...

DM: **Hm.**

SC: ... the way that it was.

DM: **Um, hm.**

SC: Now this guy, John Boy, he's just a total fucking **wreck,** you know, because he did it, and he tells me at one point he says, uh, he says I'm not gonna say I'm not...

DM: **What is** John Boy's **last name**?

SC: Graham

DM: Graham?

SC: He was from up there too. Canada.

DM: Oh, yeah?

SC: His hair ain't real dark, its kinda darker than mine, but it's not **like** black, more dark brown.

DM: Oh yeah?

SC: Yeah.

DM: Um. So he's a Canadian skin?

SC: Yeah.

DM: Is he?

SC: He's Southern **Tchlone.**

DM: Huh?

SC: Southern T'Chone is the nation.

DM: Um.

SC: But, that was kinda (inaudible)...

DM: **I'm gonna have some more water.**

SC: **Sure. Finish it off.**

DM: That was from that sawdust. I work with sawdust all day, man. I gotta rinse my eyes out every day. We wear safety glasses but it still gets in, you know, so I use that Bausch & Lomb eye rinse.

SC: Um, um.

DM: Cuz if I don't, it feel like mud. Yeah, so I didn't care if you had talked to Cleo. She **works at Manderson.**

SC: Uh, um. She **works** at the school.

DM: Um, **hm....** Do you know Dave Clifford?

SC: I don't know him. I know of him.

DM: Um, **hm**. That's his sister. Dave used to be my brother-in-law.

SC: **Um, hm.**

SC: **But** this just bothered me...

DM: **Um, hm.**

SC: ... you, know, and it wasn't something I could put in a **fax to you** ....or

DM: **Um, hm.**

SC: ... anything like that. In the context of what we're **doing** with this book **I need to know,** you know to get it straight.

DM: Um, **hm.**

SC: But at the same time I **need to know what like not** , you know, to drop in there...

DM: Um, **hm.**

SC: ~~king~~ **of thing**. These three, Theda, Arlo, and John Boy, Christ everybody knows. Shit, everywhere I go, everybody know about this. **You talk to people, right** off the bat, you know.

DM: Hum.

SC: People have got stories about it. They might not have talked about it, for however many years. But it's like when, when they know that you've talked to them and (inaudible), they know that you're not bullshittin' them and people say what it is...

DM: **Hm.**

SC: ... and I'm thinking, you know what my impression is, everybody's fuckin' sick of it, **they're sick of living with it.**

DM: Um.

SC: ... and it's like people are getting to that point now where, it's like, what the fuck are we **kept this shit quiet** for, you know, because it was nothing to do with **us**. They did it and now you've said about Annie Mae then and as I recall you said it about her when we talked last, she was a strong person. This person didn't deserve to be taken out...

DM: **Right.**

SC: ... fuckin' wasted.

DM: Um, **hm.**

SC: You, know. So people, I think, ah, you know they're kinda scared and, in a way, **to** talk about it, but, then again I think they wanna, it's like a cleansing almost, you know, well, shit, this is it, it's all over. And that's why I wanted to ask you...

DM: Um, **hm.**

SC: ... you know, within that context but I didn't wanna do it like we did the interview

DM: Um, **hm.**

SC: **Yeah.**

DM: Yeah, that happened so long ago. A lot of that happened so long, its kinda, I hafta admit I'm gettin' old, man I'll be 51 come September, trying to stay at fifty but I (inaudible)... goin' over the side man. It's cool though. I've been told you hit **50 and over**, you become **a**, start getting elderly **status. Yeah, it's healing up. Must have really tore it good**. I mean, **this really tore this up. I keep 'em covered so I won't get dust in there.** *

SC: Yeah.

DM: **The ones** in the back **are healing** pretty good **and dry**. *

[25:49]

* Here Richard Marshall is referring to the piercing wounds in his chest and back that he received in the Sundance ceremony that he referred to on Page 1.

SC: Yeah... **But yeah** that would have been December 1975, so twenty, twenty-five and a half years ago.
DM: That's a long time.
SC: Yeah.
DM: But, uh, like I say, you know, tell Cleo that ah, I asked her to talk to you and see if she can't remember. **We were married then.**

SC: Uh, hm. . **But** you just, you remember this **is** the only time that you ever seen Annie Mae.

DM: **The only time**.

SC: When those three guys showed up with her at **your place**, which is like what Choach and them...
DM: Um, **hm**.
SC: ... have said. So they were telling it right. [1] ***[26:33]***

DM: **(Mm.)** [2] But like I say I can't remember who those guys were you know because they were youngsters, there were a lot of people in and out of my **camp**.
SC: Um.
DM: A lot of people come to visit me and Cleo.
SC: Um, um.
DM: And we were about the, like uh, one of the strongest AIM families there in Allen at the time. **A lot of** the shit went down they'd come to me and Cleo for help, you know, groceries, when they need a ride, and hauling wood for the elderly and...

SC: **But** you reckon that Cleo gave Annie Mae some clothes or ...

DM: I think she did.

SC: or gave them some clothes for her or...

DM: I don't know about that. She, she said she **was gonna give** some clothes to somebody but, it might have been Anna Mae, but, but uh, it happened so long ago, I think, you

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[1] The government's transcript has "..., so they were telling it right?" It is evident in the recording, from the pause before that sentence and from the lack of a rising inflection of his voice, that this sentence is a declarative statement of a fact or, more precisely, the declarant's conclusion or belief. It is not a question.

[2] Here, the government's transcript has: "Yeah." It is not at all clear from the tape whether Dick Marshall said anything at all before "But like I say..." He certainly did not say "Yeah. "On the tape-recording, if Marshall made any noise or audible response at all to that previous statement by Chapman, it was, at most, a barely audible "Mm".

know, I think it'd be good **if** you talk to her.

SC: Yeah, I will.

DM: If you go to Manderson and inquire around they tell you where she lives. She lives **out in White Horse Creek** near her folks.

SC: Does she have a phone, do you know?

DM: Ah, she might be, yeah.

SC: I, I . . .

DM: Her married name then, now, is, ah, her husband's last name, Gates, G-A-T-E-S. Cleo Gates. Cleo Clifford Gates.

SC: Yeah, I'll try **and** call her ahead of time rather than just show up.

DM: Um, um.

SC: You know, hopefully she'll remember . . . .

DM: Um, um.

SC: . . . that night.

DM: Um.

SC: You know. And from what you can remember, how did, how did, Annie Mae look? **Or is that like...?**

DM: Man, I can't remember.

SC: 'Cuz according to Choach, she said that she just kinda went in your place and she was just kinda there. You know. And she said she seemed to be, you know, like her hands were tied up .

DM: Um.

SC: . . . . Or something or other.

DM: Um.

SC: I don't think she's a bullshitter either I . . .

DM: Um, um. . . and Choach, she's kinda like a (inaudible) observer . . .

SC: Yeah. I mean there's no, there's no doubt in my mind at all, you know that it was like Arlo and John Boy who with Theda took her. **Flat out said it themselves.**

DM: Um.

SC: You know, but, from my mind what I've talked to people, they **weren't prominent** at all **in the movement. They were just kids**. You know, like twenty years **old**, but, and shit like that **they** get dragged into. Dragged into all of that. What do you, what about, what do you know of, Theda, what **did** you know about her? She seems like fuckin' . . . (inaudible). Theda is seventy years old now. Christ

DM: **To me** back then that she was a loud, boisterous woman. Like, when she was around, she wanted all the attention. **That kind of person**. She **lived over to Ogalala.**

SC: Um, um.

DM: **And, uh, I lived** over in Allen. I really didn't **want to** pay much attention to her. She came around, she talked so loud like she wanted everybody to know she was there at that time.

SC: Ah, ah.

DM: I really didn't care for her.

SC: Well, that's probably why they brought her to your house then, you know. She wanted, ah, wanted people to know that, hey, it's part of her show, (inaudible) she knew there'd be people at her place.

DM: Um.

SC: I mean, this, this is some whacked out shit to me.

DM: Um, um.

SC: Uh, doin' that to somebody.

DM: Um, um.

know. **It's** fuckin; bad.

DM: Um, um.

SC: That whole deal. Yeah, somebody else always visited like this I wanted to ask you about, that David Hill, you know, or remember him? DePalma?

DM: I can't remember David Hill, ah, that I **ever** even met him back in the day.

SC: **Guy** from Oklahoma.

DM: Um. I've heard of him.

SC: Yeah, he's fuckin' nuts too.

DM: Um.

SC: I interviewed him at least, about all sorts of shit you know, not just this. Real deceptive kind of a . . .

DM: Hm.

SC: . . . guy. You know, not to be trusted at all and ah, I kinda found out that he was right in the middle of this shit.

DM: Hm.

SC: You know, he kinda orchestrated it, what was going to happen to this girl.

DM: Um.

SC: In my mind it's just totally bad, but doing that to somebody, doing that to a woman.

DM: Um, um.

SC: Right.

DM: Yeah, you know, me and some of the **bros**, we, uh, when this started coming out again, we thought, man, you know, somebody's gotta (inaudible), somebody's gotta pay for this shit, man, you know, somebody's gotta own up to what really happened to her, you know.

SC: Um, um.

DM: As far as I'm concerned, you know, in a warrior's way, he's gotta protect the women instead of harming them, you know.

SC: I mean Christ, she's got, she had to young kids.

DM: Yeah. Um, um.

SC: You know, those girls are growin' up not knowing, you know, what the hell happened to their mother.

DM: Um, um.

SC: And then we got these guys, Clyde, Dennis, particularly **Leonard, a little bit,** Dave, **Hill**, Kills, Ted, fucking you know, what the hell, what gives them the right to...

DM: Um, um.

SC: . . . decide who's going to be livin' and who's gonna be dying.

DM: Um, um.

SC: You know. The Kangaroo Court they had over **there**.

DM: Um, um.

SC: It's bullshit.

DM: Um.

SC: Bruce, fucking Bruce Ellison, up to his neck in this shit. It's bad. It's fucking bad. I, um . . .

DM: Like you say, it's all **gonna come to light and I am really interested in** what the hell**, what really** went down.

SC: Um. So **but that was**, you know, I appreciate your candor . . . .

DM: Yeah.

SC: . . . . with that.
DM: Okay.

SC: See my position, I, people say this shit to me and if I don't **ask**, I'm not gonna know.

DM: Hum, um.

SC: You know, **how** to get into. See, I'm gettin' shit **from** people. **Man** you know, **like Vernon and them, you know** and, what the fuck do you know, you know, you know this, you know that, you know too much and my position is hey, I ain't never, I didn't kill . . .

DM: Um, um.

SC: . . . there's no shit to do with me.

DM: Um, um.

SC: I'm just writing a fucking book.

DM: Yeah.

SC: You know, I don't wanna be part of it, but at the same time I wanna know because, damn, there's a lot of long roads on these rezes . . .

DM: Hum, um.

SC: . . . if you know what I'm saying.

DM: um, um.

SC: **Guys are fucking nuts.**

DM: Yup.

SC: . . . some of these people, you know.. It's bad **scene** all the way around . . .

DM: Yeah.

SC: . . . to me. I mean back in that time, when was it that you heard they offed her? That they'd killed her? I know that thing we talked about was that Russ and Ted and Kills. Um, it was there at that basketball game, we talked about it there. Do you remember last time. It was just like you and Cleo out of that caravan. You went up into a wake and those guys...

DM: Mmmm.

SC: Do you remember that? That's about all we talked about.

DM: It **goes** to show where me and Cleo's hearts **were** at.

SC: Yeah, but I mean, **when** did you, like hear that they'd shot her there after that they'd brought her to your house? I mean, too her out and . . .

DM: Hum, hm.

SC: . . . . killed her. I mean, when did you hear about that? Was it **like**, soon after or . .

DM: '75. . . .**Let's see.**

SC: I mean they kill her . . .

DM: (inaudible)

SC: (inaudible) in December, obviously.

DM: I can't remember right off the bat, but we heard about it, through, uh, I felt bad, too . . .

SC: Um.

DM: **and** we went to her wake.

SC: Yeah. So you kinda heard about it between the time they did it and that wake?

DM: Yeah.

SC: That fucker. And, there's, there's a part of me, not ver much of me, but there's a part of me that feels kinda bad for Arlo and Arlo, I don't feel bad for John Boy cuz he didn't hafta shoot her in the head.

DM: I don't have faith in them fuckers...

SC: You know.

DM: ...not at all.

SC: Yeah. I mean this is the interesting, real interesting **but to** me, talking to John Boy, he can kinda tell, tell you what went down, you know, and the sequence and where they were, where they took her, and all that, but she, now it comes to like,

mention your place and shit and uh, but when he **gets to Kills'**, man, he like shits himself.

DM: Hum.

SC: 'Cuz, some, some shit went down at Kills' house.

DM: Um.

SC: And he doesn't even, he doesn't like think about it.

DM: Oh, yeah.

SC: 'Cuz he gets up and walks about the fucking room.

DM: Hmmm.

SC: He like, you don't know whether he's gonna cry or whether he's like, gonna go fuckin' ballistic. It's like, you know, (inaudible), that's kind of affected him.

DM: Hm.

SC: So to my mind, whatever was said to him in that house, that made him go out and shoot her in the back of the head.

DM: Hm.

SC: Somebody said to him in that house, gave him that ultimatum, I think.

DM: Um.

SC: You know, when they pick her up in Denver, I think they already knew, **like** Clyde and them guys know that she ain't gonna be with them. But these three, him anyway, John Boy and Arlo, I don't think that they know that they gonna be killin' her . . . .

DM: Um.

SC: . . . and I think that's the point, that they know they're gonna be killin' her, because he'd just like, he **ain't a**, he ain't a natural born killer. He did. He, someone, he was put in that position.

DM: Um.

SC: "Cuz he, fuck, he'd be able to hide it. Better, you know, uh, deal with it. Better, you know, deal with it, better, I mean (inaudible) he wouldn't tell.

DM: Um.

SC: You're talking to him, he's like this.

DM: Oh, yeah?

SC: You know, smokin', his fucking hands going and all that. So I bet you when this shit comes out, who ever was in Kills' house, that, that's the word right there.

DM: Um, um.

SC: They just drove up there and killed her. That's some bad shit. And I've been told that Clyde and David Hill were in Kills' house. Obviously Kills was there.

DM: Um.

SC: **At his** WYKLDOC office when they were interrogating Annie Mae and then they went to Kills' house that afternoon.

DM: Um.

SC: Then they went on to Sioux Falls and then they come back to Kills' house. While all this shit's going on, during that obviously then they took her to your place, stopped off at your place, before they ended up going over to his place.

DM: Um.

SC: And that's where it's at.

DM: Yeah, like I say it's **going to be** pretty interesting. I'd like know **myself...** (Inaudible).

SC: Well, if I, if I find out he was in that house, you know, . . .

DM: Um, um.

SC: Or who all else was in that house. If you hear anything . . .

DM: Um.

SC: . . . . let me know cuz I'd be interested.

DM: (inaudible).

SC: Seems at that point now where, well, me, I'm just trying, I'm just, some people I'm trying to avoid. You know. I don't want, I don't wanna talk about it.

DM: Um. Um.

SC: You know, with any of those guys. Because it's not even that they're, I don't think that they're anything. You know, it's just that I know it's the kind of thing that they do, you know, they get four or five other people to come out and they're looking for 'ya.

DM: Um, um.

SC: It's like how I think that they operate. They don't do their own . . . .

DM: What about Anna Mae's kids? Where they at now?

SC: They're up there in Canada, Nova Scotia, as far as I know. The same place as her sister.

DM: Um, um.

SC: No closure.

DM: Hum.

SC: You know, for them. Because although these names are out there, they, you know, how are they to know. You know, how they to know, unless they see somebody answer to it.

DM: Um. Um.

SC: You know. Well, my position is, it's not just them three. **Theda, Arlo and** John Boy. It's these others around here **who** put this shit in motion, I mean, but . . .

DM: Um.

SC: . . . (Inaudible) more people than I think.

DM: Um, um.

SC: And, I just, you know, as I said to you before, I don't know like, I don't even like to think about what she went through, that last 36 hours . . .

DM: Um, um.

SC: . . . of her life. That's bad. That's really bad.

DM: You know one time I read an article something about Indian, Indian Country paper, or something like that, some guy names Two Elk, something like that. Ah, three or four pages of it . . .

SC: Um, um.

DM: Did you ever talk to that guy?

SC: Ah, I didn't because I talked to Arlo and he got his information from Arlo.

DM: Um.

SC: I think Two Elk, you know, he's got kinda his own gripe?

DM: Oh yeah?

SC: Yeah, with **some** of these people. But a lot of what he said in there, is, ah, is true.

DM: Um.

SC: You know, 'cuz he got it from Arlo. And Arlo's just kind of a pitiful guy, you know.

DM: What's Arlo's last name?

SC: Looking Cloud.

DM: And he's from where?

SC: Well, he's from up here.

DM: Oh, yeah.
SC: Originally. (Inaudible) Remember Johnny Looking Cloud? His dad was kinda

real distinguished looking guy.

DM: Um.

SC: He was in a few movies and stuff. He's down from Pine Ridge.

DM: Oh yeah?

SC: But, he, they like got relatives and shit in Denver, but he was (inaudible) . . .

DM: Um.

SC: . . . but he's pitiful in that way that he drinks a lot. **He's** wrecked, he's wrecked his life.

DM: Oh, yeah.

SC: What, which I guess it would be.

DM: Um, um.

SC: You know, being involved this kind of **violence(?)** Ah, but, you know, people say that he's a fucking wino and a drug addict you know, and he's all these things...

DM: Um, um.

SC: . . . but he's got his own, his own ways of survival because he doesn't trust these guys either. You know, this is a guy, 40 odd years old or something, who, you know, he wants to get rid of it. You know, he wants, he wants, it **to be over** and I think he'd answer to it, I do, you know.

DM: Um, um.

SC: If they don't kill him first. And, who knows whether they will or they won't.

DM: Um, um.

SC: I don't know. Some people have a lot of shit to hide and I think they will do most anything to hide it.

DM: Um, um.

SC: Cuz **they've made their career** out of it) you know. It's sad, it's sad man. That's **why** I wanted to ask you about **it**.

DM: Okay.

SC: And I appreciate you coming down and visiting with me.

DM: Yeah I always wondered what happened to 'ya, you know, and, uh, uh, I've been livin' with that Maria Holy Eagle, but like I said, now I couldn't jive with her man, all together she, she's really into herself.

SC: Um.

DM: She just had an article in the Indian Country Journal paper about herself saying she was a spiritual person and she didn't tell me jack shit about these spirits of hers and I lived with her. In this town we have a lot of these, a lot of these Indian people in town who wanna be shaman, (inaudible) saying spirits are dead. Either that, what I've seen it's all for show, or personal greed or money, that's it.

SC: Well, there's a lot of that around.

DM: (inaudible) I just had a good Sundance at Rick Two Dogs, it was powerful (inaudible)

SC: (inaudible)

SC: Yeah, Rick's a good (inaudible). Rick's kind of like **Wilmer**, you know, real traditional people.

DM: Oh, yeah.

SC: Then there's all these other kids, you know, who are, who might lead in Sundances and stuff. I went to one of them and I, I had a friend who was dancing, she asked me to go and like record it so I went. Man, I couldn't believe the shit going on in there, too.

DM: Um.

SC: Lots of non-Indians and . . .

DM: Um, um.

SC: . . . Boy, kinda like a circus, you know, I was thinking . . . (inaudible)
DM: Yeah.

SC: You know, but with side shows and stuff going on, you know, there was a guy, a non-Indian guy, you know, he was like taking **flesh offering off** people. It was like, like at a fair or something you know, just . . .

DM: Um, um.

SC: It was just bad.

DM: Um, um. Well, I'm gonna hit the road, man, 'cuz I'm gonna go back to my apartment, and head for Pine Ridge and **my parole officer give me**. I got my last meeting with him on Monday, 4:30. And he says I can move any time after that, so I tell him, well, I can't come back Sunday night, can I come back Monday (inaudible) 'cuz I gotta bring back the trailer, bring my stuff back, so.

SC: Well, if you get down to **Wilmer**'s place, ah, give **him** a message for me. **He** wanted me to go down there on the 29th.

DM: You said he gave **him** a message for me too, and I never, did tell me that.

SC: Yeah, well **last fall**. You know when we visited, he said . . .

DM: Yeah.

SC: 'tell him to call me.' So I gave him your number.

DM: Um, um. Yeah, he never did call.

SC: Or that number I had, which was (inaudible) yeah.

SC: That woman's place, um, I don't know whether he did.

DM: (inaudible)

SC: But if you see him, man, can you tell him that I can't be there on the 29th.

DM: The 29th of this month?

SC: Yeah. I gotta go to Seattle.

DM: Ok. Today's what, the 27th?

SC: Yeah, it's like Sunday.

DM: Oh, all right. **Cause I'll be going through** there tomorrow.

SC: Okay. Ah, if you see you him and . . .

DM: All right.

SC: . . . . tell him that, that would be, that would be cool 'cuz then I ain't got no other way of getting a message to him.

DM: All right. I'll do that.

SC: And I'll try and hook up with Cleo . . .

DM: Um, um.

SC: . . . . see what she can remember.

DM: Um, um.

SC: Then I'll be back around here, uh, end of August. So I'll give you call then.

DM: K. Then, ah, ...

SC: See what's going on. And I'll, by that time

DM: You'll have a rough draft . . .

SC: Yeah.

DM: . . . . together.

SC: Yeah. It's just gonna be, it'll be like my questions and your . . .

DM: What other magazines did you send me?

SC: I sent you those AIM magazines that we get, those, ones with, uh, Fern, you know, Fern **Matthias** that lady . . .

DM: Hum.

SC: . . . lady, she like had a flag upside down.

DM: Um, no I didn't see that one.

SC: Ah, I sent you that one. I sent you that one with, ah, Peltier on the front and I sent you another one that I had stuff **about mascots** in it.

DM: Do you have anymore copies left?

SC: Yeah.

DM: Well, send them to this address (inaudible)

SC: 'Cuz I remember the last thing you said to me was if you can give **Wilmer** a message for me and I saw him right after that. I gave him that message.

DM: Um, um.

SC: And then he said if you got that magazine, send me that magazine.

DM: Um, um.

SC: So, I gave him the message and I sent you the magazines some time after that.

DM: **I didn't get it.**

SC: It wasn't right away.

DM: She's probably got them then but didn't give them to me.

SC: Well, I'm glad we . . . .

DM: Yeah.

SC: . . . . I didn't send that book.

DM: Yeah. (Inaudible) was there, so I probably (inaudible).

SC: All right. I'll do that.

DM: Um, um.

SC: We'll do that and I'll give you a call when I get back.

DM: Okay, man. Well, I gotta ride. All right.

SC: I'll walk you down.

DM: All right. **Been a** long day man since last time I worked **out there.**

End.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

FILED

MAY 14 2009

CLERK

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,

Defendant.

CR. 08-50079-01 & 02

NOTICE OF FILING OF OFFICIAL TRANSCRIPT

Notice is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above-captioned matter. The parties have twenty-one (21) calendar days to file a Redaction Request of this transcript. If no redaction request is filed, the transcript may be made remotely electronically available to the public without redaction after ninety (90) calendar days.

Any party needing a copy of the transcript to review for redaction purposes may purchase a copy from the court reporter or view the document at the public terminal located at the Office of the Clerk.

Dated this 14 day of May, 2009.

Carolyn Harkins, Court Reporter
Harkins Reporting
P. O. Box 1886
Rapid City, SD 57709-1886
(605) 348-7168

CERTIFICATE OF SERVICE

The undersigned hereby certifies on the 14th day of May, 2009, a true and correct copy of the Notice of Filing of Official Transcript was served upon the following persons, by placing the same in the U.S. Mail, postage prepaid, as follows:

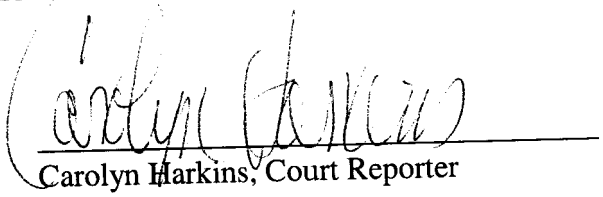
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Harkins Reporting
P. O. Box 1886
Rapid City, SD 57709-1886
(605) 348-7168

FILED
MAY 22 2009
CLERK

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 MOTION TO COMPEL DISCLOSURE OF WITNESS

NOW COMES Defendant Richard Marshall, by and through his attorney, Dana L. Hanna, and hereby moves the court to order the government to seek and disclose certain evidence that is favorable to the defendant, to-wit: the identity of the writer of the hand written notes on pages 1905 and 1906 in the discovery materials provided by the government. The defendant makes this motion on the grounds that he has a due process right to disclosure of favorable evidence and witnesses.

In support of the motion, attorney Dana L. Hanna, attorney for the defendant, hereby affirms:

1. On April 6th, 2009 I sent a letter to federal prosecutors in this case requesting the identity of the individual who wrote two pages of handwritten notes which appear to be notes taken from an interview of the key prosecution witness in this case, Arlo Looking Cloud. Those two pages are contained on pages 1905 and 1906 in the discovery materials provided to the

defendant by the government. They are filed along with this motion as "Exhibit A." I requested the government to identify the writer of those interview notes because I wish to call him as a defense witness to impeach the testimony of prosecution witness Arlo Looking Cloud.

2. If these notes are in fact what they appear to be–notes of statements made to a law enforcement officer or other government agent by Arlo Looking Cloud about his involvement in the kidnapping and murder of Anna Mae Aquash–then the statements made by Looking Cloud to the interviewer are inconsistent with his grand jury testimony, other prior statements to law enforcement, and the testimony he is likely to give at trial.

3. Looking Cloud has repeatedly claimed that he came to the house where Anna Mae Aquash was hiding in Denver in December 1975 without any prior knowledge of a plan to kidnap or otherwise harm Aquash, and that he went there seeking a drinking companion named Joe Morgan. However, page 1905 of the interview notes records that he told the writer of those notes that he had been "contacted" by someone and he then went to the house in Denver from which he and his criminal accomplices kidnaped Aquash. This is impeachment evidence by a prior inconsistent statement that goes to prove that Looking Cloud was acting with criminal knowledge and purpose from the outset.

4. Page 1905 of the handwritten notes records that Looking Cloud told the unidentified witness that his criminal accomplices took Aquash out of the house in Denver and put her in a vehicle with blankets over her head. This conflicts with his testimony and every known prior statement he made to law enforcement investigators.

5. The notes record that Looking Cloud told the unidentified interviewer that from Rapid City, they drove Aquash to a house 1 hour from Rapid City, and that he stayed in the car while

others went into the house. This statement arguably conflicts with testimony Looking Cloud gave to the grand jury and with the testimony he is likely to give in the trial of Richard Marshall on a key contested factual question in the trial: whether Looking Cloud observed Marshall hand a handgun to Theda Clarke in the Marshall house in Allen, South Dakota.

6. For the foregoing reasons, in my professional judgement, the writer of those pages is a potential defense witness who can give testimony that can be used to impeach the testimony of the government's key witness by proof of prior inconsistent statements.

7. In response to my request to the government for the identity of the writer of those two pages of handwritten notes, I received a letter dated April 21st, 2009, in which the government's attorney informed me that no further information on pages 1905 and 1906 would be forthcoming. In a subsequent telephone conversation I had with Assistant United States Attorney Robert Mandel, I informed Mr. Mandel that I want to call the writer of those handwritten pages as a defense witness to impeach the testimony of Arlo Looking Cloud. AUSA Mandel stated that he had made efforts to discover those efforts had not been successful. Mr. Mandel informed me that he had "no idea" who wrote those handwritten notes.

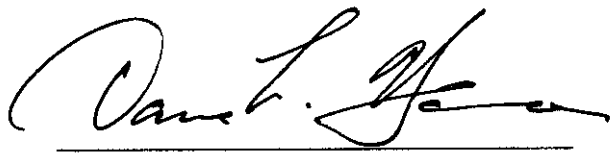
8. The information that is requested is solely within the knowledge and the possession of the government or of one or more of its agents. The identity of the witness can be discovered if the government were to make diligent and professional efforts to discover that witness's identity. The government could discover the identity of the witness by distributing the notes to all investigators involved in the case and making reasonable inquiries as to who wrote them.

WHEREFORE, the defendant moves the Court to order the government to make diligent efforts to discover and disclose to the defendant the identity of the person who wrote the

interview notes of Arlo Looking Cloud that are identified as pages 1905 and 1906 of the discovery.

Dated this 20th day of May, 2009.

RICHARD MARSHALL, Defendant

By: 

Dana L. Hanna
PO Box 3080
816 Sixth Street
Rapid City, SD 57709
605-791-1832
Attorney for Defendant Marshall

Alla looking Cloud
contacted Matt to Pay Lynn's
Anna Mae downstairs

Theta Tells him to help out
got car Backed it up to door

John Boy & Theta bring out my Blanket over head

Drove to S.A.

to R.C. to Apartment complex

Stayed there - Theta Left

Next morning Theta brings Breakfast

then went to a residence 1hr from R-C

Theta & John Boy go out to house
Stays in car

then goo between Kadertau Mountain
John gets out - walked over to spot
on Bluff - John Boy Takes out
silver cover revolver

EXHIBIT A

the fall over embankment down

~~John Boy~~ Arlo fire off list of names

then to Martin - Renee

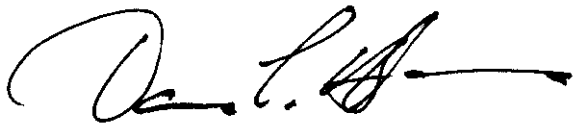
CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Motion to Compel Disclosure of Witness on the other parties in this case by mailing the same, postage prepaid, the attorneys of record at the addresses listed below:

Marty J. Jackley
United States Attorney
515 Ninth Street, #201
Rapid City, SD 57701

John Murphy
Murphy Law Office
328 E. New York St., #1
Rapid City, SD 57701

Dated this 20th day of May, 2009.



Dana L. Hanna

FILED
MAY 22 2009
CLERK

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 DEFENDANT MARSHALL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL DISCLOSURE OF WITNESS

The government has disclosed evidence that Arlo Looking Cloud made statements to an un-identified investigator, agent, or attorney that are inconsistent with other testimony he has given and with the testimony that he is likely to give in the trial. The defendant seeks the identity of the person to whom Looking Cloud made those statements, the person who wrote the two pages of handwritten notes that are attached as Exhibit "A". Defendant has made a request of the government to make diligent efforts to discover the identity of that potential defense witness and to disclose the identity of that person to the defendant. The government prosecutor contends that the government has made efforts, which were not specified, to discover the identity of that person, but those efforts were unsuccessful. The defendant contends that the government has not exercised due diligence to discover and disclose the name of this potential witness; and that since there was only a small and finite number of people involved in the investigation who questioned

Looking Cloud, the government should be ordered to make serious efforts to identify and contact those who did question Looking Cloud to determine the identity of the person who heard Looking Cloud make the statements recorded on pages 1905 and 1906 of the discovery and to disclose the identity of that witness to the defendant.

The defendant's right to due process and fundamental fairness imposes a duty on the prosecution to disclose to the defendant any evidence that is favorable to the accused. Brady v. Maryland, 373 US 83, 83 S.Ct. 1194 (1963).

The Brady duty to disclose favorable evidence to the defendant extends to impeachment evidence as well as exculpatory evidence , and Brady suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not the prosecutor. Youngblood v. Virginia, 547 US 867, 126 S.Ct. 2188 (2006). "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 US 419, at 437, 115 S.Ct. 1555 (1995).

A prosecutor cannot avoid his duty to disclose favorable Brady evidence to the defense by keeping himself in purposeful ignorance by failing to acquire relevant favorable evidence. See: United States v. Smith, 552 F.2d 257, 262 (8th Cir. 1977).

Here, there is a police investigator or federal agent or prosecutor who wrote up the notes of the Looking Cloud interview. In all likelihood, without any undue hardship or inconvenience, the government could find that person if it made a diligent, good faith effort to do so. It would be a simple matter for the government to contact each person who was present when Looking Cloud made statements to law enforcement, show them the handwritten notes, and ask who wrote them.

Here, the government has it within its power to use its resources to discover the identity of a witness who can give evidence that is material and favorable to the defendant. Therefore, the government should be ordered to make diligent efforts to use those resources to discover the identity of the witness and to disclose the name of the witness to the defendant.

Dated this 20th day of May, 2009.

Respectfully submitted,

By: 

Dana L. Hanna
PO Box 3080
816 Sixth Street
Rapid City, SD 57709
605-791-1832
Attorney for Defendant Richard Marshall

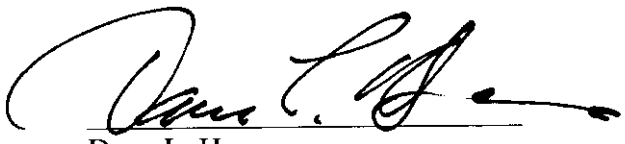
CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Defendant Marshall's Memorandum of Law In Support of Motion to Compel Disclosure of Witness on the other parties in this case by mailing the same, postage prepaid, the attorneys of record at the addresses listed below:

Marty J. Jackley
United States Attorney
515 Ninth Street, #201
Rapid City, SD 57701

John Murphy
Murphy Law Office
328 E. New York St., #1
Rapid City, SD 57701

Dated this 20th day of May, 2009.



Dana L. Hanna

8th interim

*eCJA 21 AUTHORIZATION AND VOUCHER FOR EXPERT AND OTHER SERVICES (Rev. 1/06)

FILED
MAY 27 2009
CLERK

1. CIR./DIST./ DIV. CODE	2. PERSON REPRESENTED	VOUCHER NUMBER
SDXRC	Marshall, Vine Richard	0905270000041

3. MAG. DKT./DEF. NUMBER	4. DIST. DKT./DEF. NUMBER	5. APPEALS DKT./DEF. NUMBER	6. OTHER DKT. NUMBER
	5:08-cr-050079-002		

7. IN CASE/MATTER OF (Case Name)	8. PAYMENT CATEGORY	9. TYPE PERSON REPRESENTED	10. REPRESENTATION TYPE (See Instructions)
U.S. v. Marshall	☑ Felony ☐ Petty Offense ☐ Misdemeanor ☐ Other ☐ Appeal	☑ Adult Defendant ☐ Appellant ☐ Juvenile Defendant ☐ Appellee ☐ Other	Criminal Case

11. OFFENSE(S) CHARGED (Cite U.S. Code, Title & Section) *If more than one offense, list (up to five) major offenses charged, according to severity of offense.*
1) 18:1111 First Degree Murder

REQUEST AND AUTHORIZATION FOR EXPERT SERVICES

12. ATTORNEY'S STATEMENT
As the attorney for the person represented, who is named above, I hereby affirm that the services requested are necessary for adequate representation. I hereby request:
☑ Authorization to obtain the service. Estimated Compensation and Expenses: $ 1,600.00 OR
☐ Approval of services already obtained to be paid for by the United States pursuant to the Criminal Justice Act. *(Note: Prior authorization should be obtained for services in excess of $500. excluding expenses)*

Signature of Attorney: Dana L. Hanna Date: 10/16/2008

☑ Panel Attorney ☐ Retained Attorney ☐ Pro-Se ☐ Legal Organization

ATTORNEY'S NAME (*First Name, M.I., Last Name, including any suffix*), AND MAILING ADDRESS
Dana Hanna
P. O. Box 3080, Rapid City, SD 57709-3080
Telephone Number: (605) 791-1832

13. DESCRIPTION OF AND JUSTIFICATION FOR SERVICES *(See Instructions)*
To provide an adequate defense
[redacted]
John Bruce

15. COURT ORDER
Financial eligibility of the person represented having been established to the Court's satisfaction, the authorization requested in Item 12 is hereby granted.
Signature of Presiding Judge or By Order of the Court
10/17/2008
Date of Order — Nunc Pro Tunc Date
Repayment or partial repayment ordered from the person represented for this service at time of authorization.
☐ YES ☑ NO

14. TYPE OF SERVICE PROVIDER

01 ☐ Investigator	15 ☐ Other Medical		
02 ☐ Interpreter/Translator	16 ☐ Voice/Audio Analyst		
03 ☐ Psychologist	17 ☐ Hair/Fiber Expert		
04 ☐ Psychiatrist	18 ☐ Computer (Hardware/ Software/Systems)		
05 ☐ Polygraph			
06 ☐ Documents Examiner	19 ☑ Paralegal Services		
07 ☐ Fingerprint Analyst	20 ☐ Legal Analyst/Consultant		
08 ☐ Accountant	21 ☐ Jury Consultant		
09 ☐ CALR (Westlaw/Lexis, etc.)	22 ☐ Mitigation Specialist		
10 ☐ Chemist/Toxicologist	23 ☐ Duplication Services *(See Instructions)*		
11 ☐ Ballistics			
13 ☐ Weapons/Firearms/Explosive Expert	24 ☐ Other *(Specify)*		
14 ☐ Pathologist/Medical Examiner			

CLAIM FOR SERVICES AND EXPENSES

16. SERVICES AND EXPENSES *(Attach itemization of services with dates)*	AMOUNT CLAIMED	FOR COURT USE ONLY: MATH/TECHNICAL ADJUSTED AMOUNT	FOR COURT USE ONLY: ADDITIONAL REVIEW
a. Compensation $35.00 / hr	43.6 hrs.	$1526.00	1526.00
b. Travel Expenses *(lodging, parking, meals, mileage, etc.)* 55¢/mi	200 miles	~~$110.00~~	110.00
c. Other Expenses			
GRAND TOTALS (CLAIMED AND ADJUSTED):	$0.00	$1627.00 $0.00	1636.00

17. PAYEE'S NAME AND MAILING ADDRESS
Karen Anderson-Miller, Legal Technology Solutions, LLC
~~P. O. Box 3245, Rapid City, SD 57709-3245~~
PMB 143; 24695 US Hwy 85, Four Corners, NM 87215
TIN: 68-0576951
Telephone Number: (605) 484-8909
CLAIMANT'S CERTIFICATION FOR PERIOD OF SERVICE FROM ~~10/17/2008~~ 4/21/09 TO 5/5/09

CLAIM STATUS ☐ Final Payment ☑ Interim Payment Number #8 ☐ Supplemental Payment

I hereby certify that the above claim is for services rendered and is correct, and that I have not sought or received payment *(compensation or anything of value)* from any other source for these services.

Signature of Claimant/Payee: Karen Anderson-Miller Date: 5/6/09

18. CERTIFICATION OF ATTORNEY I hereby certify that the services were rendered for this case.
Signature of Attorney: Dana L. Hanna Date: May 12, 2009

APPROVED FOR PAYMENT — COURT USE ONLY

19. TOTAL COMPENSATION	20. TRAVEL EXPENSES	21. OTHER EXPENSES	22. TOTAL AMOUNT APPROVED/CERTIFIED
1,526.00	110.00		~~$0.00~~ $1,636.00

23 ☑ Either the cost *(excluding expenses)* of these services does not exceed $500, or prior authorization was obtained.
☐ Prior authorization was not obtained, but in the interest of justice the Court finds that timely procurement of these necessary services could not await prior authorization, even though the cost *(excluding expenses)* exceeds $500.

Signature of Presiding Judge: [redacted] Date: 5.20.09 Judge Code: 6909

24. TOTAL COMPENSATION	25. TRAVEL EXPENSES	26. OTHER EXPENSES	27. TOTAL AMOUNT APPROVED
			$0.00

28. PAYMENT APPROVED IN EXCESS OF THE STATUTORY THRESHOLD UNDER 18 U.S.C. § 3006A(e)(3)
Signature of Chief Judge, Court of Appeals (or Delegate) — Date — Judge Code

$1,636.00 − $509 (1/3 comp) = $1,127.00 ☆ Net to Paralegal

Interim Voucher 7 paid already through 4/20/09. This 4/20/09 entry was changed to begin date of 4/21/09 in CJA in order to pay voucher. CS

EXPERT WORKSHEET

CR. 08-50079-02 USA v. VINE RICHARD MARSHALL

	LEGAL TECHNOLOGY SOLUTIONS, LLC					
Date	Brief Description of Services ***(at $35.00 per hour)***	Interviews/ Conferences	Obtain/Review Records	Mileage (50½¢ per mi)	Travel Time	Other Exp. (Specify and attach Receipt)
04/20/09	Import and review files of tape recorded interviews between cooperating witnesses and Troy Lynn Yellow Wood, Arlo Looking Cloud, and John Trudell. Compare with discovery documents. T/c with Attorney Hanna regarding additions to exhibit list; revise list and forward to Attorney Hanna.		3.5			
04/22/09	Import and review files of recorded interviews between cooperating witness and Richard Marshall. Review taped interview of Richard Marshall; search discovery for transcript. Compare to discovery produced. Collation of Marshall Discovery materials.		3.8			
4/24/09	T/C with clerk of court to discuss exhibits, to request copies of additional exhibits; procedure for juror questionnaires review; expert and fact witnesses. Review motion for juror questionnaire and jury plan received from clerk and forward to Attorney Hanna. E-mail to Attorney Hanna re summary of t/c with clerk. T/c with Attorney Hanna. Continued exhibit preparation for trial, and organization and review of Arlo Looking Cloud statements.		6.0			
4/28/09	Research re Corky Gonzales and Ernesto Vigil. Organization of case materials in preparation for trial. Index witness statements and all materials related to Arlo Looking Cloud. Research regarding travel routes as specified by witnesses and various theories related to travel. Continued exhibit preparation for trial.		4.5			
04/29/09	Prepare for conference with Attorney Hanna in preparation for trial. Review Pinto Manual and Weather records received. Telephone call to Meade County sheriff's office. Obtain documentation from Meade County Sheriff regarding telephone calls made by Arlo Looking Cloud. Return materials to Sheriff's office. Round trip travel to Rapid City for conference with Attorney Hanna.	6.2		200 miles $101.00	3 hrs.	

EXPERT WORKSHEET CR. 08-50079-02 USA v. VINE RICHARD MARSHALL						
	Conference with Attorney Hanna re case status and trial.					
5/1/09	Begin review of audio taped telephone conversations (68 total) of Arlo Looking Cloud received from Meade County; summarize information for period of March, 2009. Continued exhibit preparation.	4.5				
5/2/09	Continued review of audio taped telephone conversations of Arlo Looking Cloud from Meade County Jail. Summarize content. Prepare exhibits for trial. Telephone call to Meade County regarding missing telephone calls.	6.0				
5/4/09	T/c to Meade County to request copies of missing calls; t/c with Lawrence county. Complete review of audio taped telephone conversations of Arlo Looking Cloud from Meade County Jail.	7.0				
5/5/09	Pick up copies of materials from Meade County Sheriff. Review additional recorded conversations and summarize. Conference with Attorney Hanna to discuss information obtained.	2.1	17.9			
5/5/09	Attend hearing on various outstanding motions; trial continued.	25.8	2.5 (No Charge)		30	
	TOTAL	43.6 hours		200 miles		
	GRAND TOTAL	$1526.00		$101.00	No Charge	

8th interim

*eCJA 21 AUTHORIZATION AND VOUCHER FOR EXPERT AND OTHER SERVICES (Rev. 1/06)

FILED
MAY 27 2009
CLERK

1. CIR./DIST./ DIV. CODE	2. PERSON REPRESENTED	VOUCHER NUMBER
SDXRC	Marshall, Vine Richard	0905270000041

3. MAG. DKT./DEF. NUMBER	4. DIST. DKT./DEF. NUMBER	5. APPEALS DKT./DEF. NUMBER	6. OTHER DKT. NUMBER
	5:08-cr-050079-002		

7. IN CASE/MATTER OF (Case Name)	8. PAYMENT CATEGORY	9. TYPE PERSON REPRESENTED	10. REPRESENTATION TYPE (See Instructions)
U.S. v. Marshall	☑ Felony ☐ Petty Offense ☐ Misdemeanor ☐ Other ☐ Appeal	☑ Adult Defendant ☐ Appellant ☐ Juvenile Defendant ☐ Appellee ☐ Other	Criminal Case

11. OFFENSE(S) CHARGED (Cite U.S. Code, Title & Section) *If more than one offense, list (up to five) major offenses charged, according to severity of offense.*
1) 18:1111 First Degree Murder

REQUEST AND AUTHORIZATION FOR EXPERT SERVICES

12. ATTORNEY'S STATEMENT
As the attorney for the person represented, who is named above, I hereby affirm that the services requested are necessary for adequate representation. I hereby request:
☑ Authorization to obtain the service. Estimated Compensation and Expenses: $ 1,600.00 OR
☐ Approval of services already obtained to be paid for by the United States pursuant to the Criminal Justice Act. *(Note: Prior authorization should be obtained for services in excess of $500. excluding expenses)*

Signature of Attorney: Dana L. Hanna Date: 10/16/2008

☑ Panel Attorney ☐ Retained Attorney ☐ Pro-Se ☐ Legal Organization

ATTORNEY'S NAME (*First Name, M.I., Last Name, including any suffix*), AND MAILING ADDRESS
Dana Hanna
P. O. Box 3080, Rapid City, SD 57709-3080
Telephone Number: (605) 791-1832

13. DESCRIPTION OF AND JUSTIFICATION FOR SERVICES *(See Instructions)*
To provide an adequate defense
[redacted]
John Bruce

15. COURT ORDER
Financial eligibility of the person represented having been established to the Court's satisfaction, the authorization requested in Item 12 is hereby granted.
Signature of Presiding Judge or By Order of the Court
10/17/2008
Date of Order — Nunc Pro Tunc Date
Repayment or partial repayment ordered from the person represented for this service at time of authorization.
☐ YES ☑ NO

14. TYPE OF SERVICE PROVIDER

01 ☐ Investigator	15 ☐ Other Medical		
02 ☐ Interpreter/Translator	16 ☐ Voice/Audio Analyst		
03 ☐ Psychologist	17 ☐ Hair/Fiber Expert		
04 ☐ Psychiatrist	18 ☐ Computer (Hardware/ Software/Systems)		
05 ☐ Polygraph			
06 ☐ Documents Examiner	19 ☑ Paralegal Services		
07 ☐ Fingerprint Analyst	20 ☐ Legal Analyst/Consultant		
08 ☐ Accountant	21 ☐ Jury Consultant		
09 ☐ CALR (Westlaw/Lexis, etc.)	22 ☐ Mitigation Specialist		
10 ☐ Chemist/Toxicologist	23 ☐ Duplication Services *(See Instructions)*		
11 ☐ Ballistics			
13 ☐ Weapons/Firearms/Explosive Expert	24 ☐ Other *(Specify)*		
14 ☐ Pathologist/Medical Examiner			

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	TOTAL	43.6 hours		200 miles		
	GRAND TOTAL	$1526.00		$101.00	No Charge	

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

UNITED STATES' SUPPLEMENTAL RESPONSE TO DEFENDANT MARSHALL'S MOTION IN LIMINE #2 RE: MARSHALL'S STATEMENT

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully files its Supplemental Response to Defendant Marshall's Motion in Limine #2. Pursuant to the Court's request, the United States is submitting the revised transcript of the interview between Serle Chapman and Dick Marshall of July 27, 2001. See Exhibit 1 (revised transcript taken from enhanced disk filed by Defendant Marshall). The United States is also attaching the redacted transcript for the excerpt it intends to play at jury trial. See Exhibit 2.

It is the United States' position that Defendant Marshall's statements are non-hearsay and admissible pursuant to Fed. R. Evid. 801(d)(2)(A). Furthermore, Defendant Marshall's statements are admissible as statements

against interest pursuant to Fed. R. Evid. 804(b)(3). With respect to Defendant Marshall's specific challenge in relation to the transcript, the following revision has been made:

> SC: . . . have said, so they were telling it right?
>
> DM: ~~Yeah~~. Mm hm. But like I say I can't remember who those guys were you know because they were youngsters, there were a lot of people in and out of my ~~(inaudible)~~ camp.

See Exhibit 1 at p. 15. Whether or not the recording reflects Defendant Marshall's affirmative response of "mm, hm," "yeah," or "yes," at best goes directly to the weight of the evidence, and not its admissibility. Accordingly, Defendant's Motion in Limine should be denied in its entirety.

Dated and electronically filed this 28th day of May 2009.

MARTY J. JACKLEY
United States Attorney

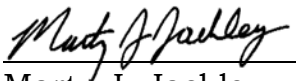
PO Box 2638
Sioux Falls, SD 57101-2638
Phone: 605.357.2330
Fax: 605.330.4405
Marty.J.Jackley@usdoj.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies on May 28, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Facsimile at
- ☐ Federal Express
- ☒ Electronic Case Filing



Marty J. Jackley

This is Serle Chapman. It is Friday, 27th of July, 2001, about to visit with Dick Marshall in regard to the murder of Anna Mae Pictou Aquash at the Alex Johnson Hotel, Room 918.

DM: Good timing (inaudible).

SC: Eh, excellent timing, how's it going buddy.

DM: All right.

SC: Good to see you again.

SC: You too.

DM: Yeah I had to be at the Sundance.

SC: Uh.

DM: (inaudible).

SC: I got us a room here.

DM: (inaudible).

SC: Where did you dance?

DM: What's that?

SC: Whose place?

DM: Rick Two Dogs.

SC: Ah.

DM: Yeah, I like going to his Sundance. Pretty strong . . . right.

DM: (inaudible).

SC: Yeah. Yeah . . . (inaudible) Wilmer's got his going on.

DM: Yeah, I thought I'd stop in on the way, way back, way back home tonight..

SC: (inaudible).

DM: (inaudible).

Exhibit 1

SC: All I said was go the other one. (Inaudible). All three (inaudible)?

DM: So. When'd 'ya get to town?

SC: Ah, geez, ah, couple of days back.

DM: Oh, is that right?

SC: Yeah, the only contact I have for you is like through Karen Testerman remember that? That, ah, that lady, at her address. I know that she got that magazine, you know (inaudible) at her address (inaudible) . . .

DM: . . . . she finally got a better address . . .there were a lot of things that she didn't get back to me. She even stole my address book.

SC: Oh, really?

DM: I had a falling out with her, I guess. She's worse than my parole officer, man (laughs) (inaudible) ask who was calling, and where I was going, how long I was going to be there, and how come I didn't come back and all that. I couldn't put up with that.

SC: I've been trying to find out where in the hell you were and then I thought. . . I remembered Black Hawk.

DM: Really?(inaudible) yeah, (inaudible) in Black Hawk.

SC: Furniture shop in, Black Hawk, so I thought I'd give that a try and then I thought, well, I don't wanna get into any difficulty you know, but if I called you at that place and then I talked to that lady and, that answered the phone there . . .

DM: Yeah.

SC: And she said ah, no, it'll be fine. Get some privacy in here a little bit. Okay.

DM: Is this the book you were talking about?

SC: Yeah, that's for you anyways.

DM: Oh, really? "Of Earth and Elders."

SC: Now, let's try this.

DM: You know what, I seen this in an ad someplace (Inaudible).

SC: Oh, really?

DM: Yeah.

SC: God damn, security or what? Huh?

DM: (laughter).

SC: Ah, shit. Yeah, that's the last one I did.

DM: Is that right?

SC: Yeah.

DM: Yeah, I seen this in an ad some place.

SC: So I wanted to give you that . . .

DM: Thanks, man, I appreciate that.

SC: . . . while I was here and . . .

DM: (inaudible).

SC: Want a drink of this stuff?

DM: What's that?

SC: Want a drink?

DM: Yeah I'm dying of thirst. I just got off work. I had to run here and there.

SC: Ah, find a, something (inaudible) . . . Yeah I was gonna send it to that address, but I'm kinda glad I didn't then.

DM: Yeah, good thing you didn't. But, ah, I got news for you too. I'm moving out of this town.

SC: Oh, really?

DM: My parole officer gave me the green light to go ahead and move back down home to Pine Ridge.

SC: Oh, all right.

DM: And I just recently got married here, June 2nd.

SC: Well, I kinda found that out.

DM: Did 'ya?

SC: Yeah. Can't remember the lady's name now but, uh, Brewer,

DM: Yeah.

SC: maybe?

DM: Yeah. Yeah. The lady's name is Frieda Brewer. We've been shacking up for a while.

SC: Is she up here or down?

DM: She's from down there.

SC: No, I'm kinda glad that we got . . .

DM: . . . . You better sign this for me.

SC: All right. (Inaudible) signature on there and all righty. Yeah, so I've been requesting Ito move back about 3 months ago. But what it boiled down to was that parole officer out of Winner, South Dakota, that oversees the state parolees on the Rosebud and Pine Ridge Reservations. Yeah, see, I had her before when I was out twice on parole. Both times I messed up. They kinda had it in for me, you know.

SC: You must be anxious to get back down there?

DM: Yeah. Gotta better paying job and my wife lives down there plus I own land down there. So, I'm gonna build myself a log home on my land.

SC: I mean I tried to contact you, too, at Hope Lodge.

DM: Yeah?

SC: But they weren't real

DM: Cooperative, huh? Yeah. The people that work up there, the staff, are just as dysfunctional as the patients, I think. I go up there for AA meetings sometimes and pour water for the occasional sweat.

SC: Uh, I said something up there, as far as I knew you, you like helped out up there?

DM: Yeah.

SC: Boy, man, they were rude. Because I thought well maybe they don't know who you are or . . .

DM: Uh, uh.

SC: . . . . something, you, know, and I said well, he was there, she said he's not here and I says well, I knew that he helped out at ceremonies and she said he's not here, and I went, whoa . . .

DM: Really?

SC: Yeah.

DM: Hey.

SC: A couple of times.

DM: Yeah.

SC: You , know, but, uh, . . . I wanted to check a few things out with you because since we met I spoke to a number of other people and that's why I don't wanna do this as an interview, as part of the interview . . .

DM: Yeah.

SC: But you appreciate it from my point of view, um, writing this thing. I don't, I gotta tell it like it is. But, there, ah, may be one or two things that I don't necessarily need to include, if you see what I'm saying. And, but I need to know what, what the deal is, in order to do that, so that I can figure out a way of doing it without screwing anybody over, but still telling the truth of the matter. So . . .

DM: Um.

SC: Um, that interview that we have already done, do you remember Sarah, you met Sarah at that time?

DM: Um, um.

SC: She's actually getting the transcripts out now so if you can give me an address before we split today and I can get it mailed on down to you.

DM: Good.

SC: And . . .

DM: And this you are gonna let me proofread . . .

SC: Oh yeah.

DM: . . . . add to or . . ..

SC: Yeah, delete or take away or whatever. So, I'll just mail it to you and then either we can meet up and you can give me it back with your changes, or just mail it back to me.

DM: Give me your address and I'll give you mine. Where's your . . .

SC: Okay.

DM: . . . . pen and . . . .Yeah, I'm pretty fortunate that the, the parole officer here in town and Joe Hawk out of Winner, guess, ah, Hawk had, ah, told, ah, my significant other, my new wife, and her relative, that, um, , in a roundabout way I guess, uh, Hawk had told, uh Brian Robb, my parole officer here in town, he says, uh, I gotta let you know, he says, your client, Richard Marshall, he said, he's got a lot of political pull. And that's I got a buddy that's a state senator out of Rosebud, named Paul Valandra.

SC: Um, um.

DM: I, at one time here, about four months back, had told him, I asked him, I said hey, I might be needing your help and he said what's going on. So I said, I got two parole officers jacking me around. I said, uh, I wanna move home and they're running me around. I said let me check things out, I said June, from June 15th I'd be out a whole year, I said. After June 15th, I said I'll contact you. Nothing happened so I just said OK. I didn't contact him but, uh, he and Sharon must've did something, he and Sharon must've did something cuz, uh, he told me that uh, that they're not helping you like they are supposed to. You want to go to a better paying job, you wanna be with your wife, want to move home to your own rez. He said let me know and I said manage. . . (inaudible).

SC: Ah.

DM: (inaudible) my buddy Paul Valandra must have mentioned

SC: I seem to remember when we were talking about it. You said something like you couldn't go down to the rez for a year or . . .

DM: June 15th it's a full year since I was released from Springfield. Another reason I wanna get outta this town. I hate this traffic. I'm kinda like a wide open area kinda guy . . .

SC: Um.

DM: . . . .you know.

DM: Plus I'm tired of running into a lot of ex-cons and, uh, finding out, somehow, finding my phone number, calling me up and asking me why (inaudible) I kind of like to stick to myself.

SC: Um, um.

DM: You know given a choice.

SC: You're better off down there than up here.

DM: Mm Hmm. Can't imagine not . . . . (inaudible).

SC: Um, um.

DM: Today's my last day of work at the Visionary Lodging (inaudible).

SC: Why?

DM: I've been there over a year.

SC: If I'd of had my coffee there I'd never of found you probably.

DM: No, it's a hard place to find me. . . (inaudible) out to Black Hawk.

SC: Well, I used to live in Black Hawk when I was a boy (inaudible) like before

DM: Oh, yeah. But,

SC: But since I've seen you last, um, I've been on the road nearly all the time.

DM: Um, um.

SC: Cuz I've got another book that's coming out like November . . .

DM: Um, um.

SC: . . . and I'll be finishing that up before doing this AIM project. So I actually moved out of Black Hawk.

DM: Um, um.

SC: So I've got no fixed abode over here at (inaudible) present and I'm just in and out of hotels and stuff. I've got two tours to do in like four weeks time.

DM: Really?

SC: Yeah, over Washington state, Idaho, and Oregon that way up, Montana a little bit.

DM: Um, um.

SC: Just busy, this is why I needed to, and I've written stuff down here to clarify when we were visiting last, we didn't talk very much about Anna Mae . . .

DM: Um, um.

SC: . . . if you remember that. We talked about other stuff, Montileaux and (inaudible) and all this shit. Well, since that time, I've talked to a few other people and this is why I don't wanna do this, like a book interview kind of a deal. And I can only tell you what it is that other people have said and then you can tell me what you remember about it. Um in February I went up to Vancouver. I interviewed John Graham, who shot Anna Mae in the head.

DM: Oh, really?

SC: I was with him for a long time, went through the sequence of events and all that, it was Vernon who set this interview up and that's how I got to go and see him. I've discussed all this with Vernon and I know a lot of this shit that went on and all the rest of it, and I said to him you know, to do her justice. You know, I, I need to be finding out the full detail and then putting the scenario in as to what happened. And, you know, without shafting anybody in this process. Anyway, to make a long story short, he told me that when they brought her up from Denver, up to Rapid City to Thelma and all this, as it went down, that after they had her at Thelma's, that Arlo drove across the Pine Ridge and across to the Rosebud and he said they stopped at two houses on the way. The last house they stopped at was Kills' place and he said they stopped at your house on the way to Kills' house.

DM: Um.

SC: Then I talked to Arlo himself you know, Arlo's in a pretty bad way.

DM: Arlo?

SC: Looking Cloud. He was a kid then, well they were both kids then. Well, he said pretty much the same thing other than he added that, and how he knows this, I mean, I, I'm assuming either his memory is good or his memory is bad, one or the other. He said the same thing though, that he drove and all that, they stopped at two houses and he said words to the effect of when they stopped in at your place, something about that you, or, you or Cleo weren't happy about it, (inaudible) you know, weren't thrilled about it, or whatever, them showing up then. Choach. You know Choach?

DM: Choach?

SC: Yeah, yeah, her name is, uh . . . Arlene . . .

DM: She's a Means now.

DM: (inaudible) Goings?

SC: She was a Goings?

DM: She was Arlene Goings, Arlene Choach Goings. Yeah, she married that Dennis Means.

SC: Yeah. Well, I visited with her about it and she was saying that when she saw Annie Mae in all of this sequence and she said she was taking Dusty and Lena, you know Navajo Lynn over to Sioux City, Iowa, she was taking her to Cheryl DeCora's, Lorelei's sister's place, over there. It was at night and she stopped up at your place and that Theda, Arlo, and John Boy were there and that they had Annie Mae there, too. And she said she thought Regina Brave was there also. Now way back, I remember a conversation I had with June Little, or it may have been Jim about stuff and he mentioned that as well, but I hadn't given that very much credibility at that stage just because of the way that June could be. But now these other people have said it so I need to ask you what you remember about it, you know that, that event and that if you remember that night or what.

DM: (inaudible).

SC: Do you remember that night or what?

DM: That was 19 – , what?

SC: '75 it would have been. December thereof., mid or early December. Russ was on trial in Sioux Falls. Now you see why I'm not doing this as an...

DM: Um, um.

SC: . . . interview or anything.

DM: Did you visit with Cleo yet?

SC: Unh Unh.

DM: You should visit with her.

SC: I don't know where . . .

DM: She lives in Manderson.

SC: Okay.

DM: And she works at, ah, the school there. She's a finance officer. But at the time I was married to her.

SC: Um, um.

DM: We were legally married and we lived in an the Allen housing and, uh, I can't remember clearly who all came that time, but, uh, we had company I remember and Anna Mae was with them. That's the first time I ever laid eyes on Anna Mae, ever met her and, uh, I didn't really visit with her. I just visited with, uh, can't remember who I there were some dudes there. It happened so damn long ago I can't remember who's who.

DM: But, I remember, huh, Cleo was like that. She always fed company. She didn't bother asking if you were hungry. When you come, she automatically cooked and started feeding people, setting places, you know, getting coffee, and huh, I think she did give Anna Mae some clothes. That's about all I can remember of that. You might want to talk to Cleo 'cause she was my wife then.

SC: Um, um.

DM: You know. She was a solid woman.

SC: She's from Manderson.

DM. Manderson

SC: If I was to tell her that you told me that I should talk to her . . .

DM: Yeah.

SC: . . . . she'd talk to me?

DM: Um, um.

SC: And, uh, . . .

DM: Cuz she'd probably remember more than I would 'cuz I was probably hazed out cuz I was smoking too much peji then.

SC: Huh, huh. But that's, that's what these guys have said and like the first time when I heard it I was like, but then when they kinda repeated the same thing, you know the three people, that before they took her to Kills' house they stopped off at your house but nobody in the telling of it like, made out to me that you had any involvement in it.

DM: Um.

SC: It was just like they stopped there.

DM: Yeah. Yeah, we always had company and they went on . . . .

SC: For whatever the hell reason they stopped there, they just stopped there.

DM: That's because we was ah, movement members then and people would always stop in, you know.

SC: Yeah. But Choach, um, part of what she said was it seemed clear to her that looking at Annie Mae, that, uh, she wasn't there willingly. That these other three had like, brought her along, and she was like, she didn't have a choice but be there.

DM: Hm.

SC: Kinda how she was described that . . .

DM: Hm.

SC: . . . and so I don't know if you remember that particularly.

DM: Hm.

SC: Or, or whether Cleo would remember that.

DM: I, I suggest you talk to Cleo too.

SC: And because, she actually, she said that, ah, that as she recalled it, it seemed that Annie Mae was like, you know, that her hands were tied or something like that, on that occasion and Christ it's only, it's gonna be a few hours after that they took her to Kills' house.

DM: Hm.

SC: . . . and then up to where, Wanblee, where Amiotte is, and popped her, you know.

DM: Yeah, I myself, I'd like to know what the hell happened to her and why they did it, cuz, that's, that's about the only time I've ever seen her in my whole career. I remember hearing about all the strong things I heard that she's done. I've always had a lot respect for her coming all the way from her home country of Nova Scotia to help out down at Wounded Knee.

SC: Yeah. When we did that last interview that was one of the things that I respected about you was that if I asked you a question, you always answered it. And, I don't know these guys real well . . .

DM: Um, hm.

SC: . . . . you know, and we've only met a couple of times, but I trust you to tell me the way that it is . . .

DM: Um, hm.

SC: . . . the way that it was.

DM: Um, um.

SC: Now this guy, John Boy, he's just a total fucking wreck, you know, because he did it, and he tells me at one point he says, uh, he says I'm not gonna say I'm not . . .

DM: What's this John Boy's last name.

SC: Graham.

DM: Graham?

SC: He was from up there too. Canada.

DM: Oh, yeah?

SC: His hair ain't real dark, its kinda darker than mine, but it's not like black more dark brown.

DM: Oh yeah?

SC: Yeah.

DM: Um. So he's a Canadian skin?

SC: Yeah.

DM: Is he?

SC: He's Southern Tchlone.

DM: Huh?

SC: Southern T'Chlone (inaudible) is the nation.

DM: Um.

SC: But, that was kinda (inaudible) . . .

DM: I'm gonna have some water.

SC: Sure. Finish it off. That was...

DM: That was from that sawdust. I work with sawdust all day, man. I gotta rinse my eyes out every day. We wear safety glasses but it still gets in, you know, so I use that Bausch & Lomb eye rinse.

SC: Um, um.

DM: Cuz if I don't, it feels like mud. Yeah, so I didn't care if you had talked to Cleo. She lives in Manderson.

SC: Uh, um. And she works at the school.

DM: Um, hm.

SC: (inaudible).

DM: Do you know Dave Clifford?

SC: I don't know him. I know of him.

DM: Um, hm. That's his sister. Dave used to be my brother-in-law.

SC: Um, hm.

SC: And but this just bothered me . . .

DM: Um, um.

SC: . . . .you, know, and it wasn't something I could put in a fax to you or . . .

DM: Um, hm.

SC: . . . anything like that. In the context of what we're doing with this book I need to know, you know to get it straight.

DM: Um, hm.

SC: But at the same time I (inaudible) to know what like not, you know, drop in there.

DM: Um, hm.

SC: . . . kind of thing. These three, Theda, Arlo, and John Boy, Christ everybody knows. Shit, everywhere I go, everybody knows about this, you talk to people, right off the bat, you know,

DM: Hum.

SC: People have got stories about it. They might not have talked about it, for however many years. But it's like when, when they know that you've talked to them and (inaudible), they know that you're not bullshittin' them and people say what it is . . .

DM: Hm.

SC: . . . . and I'm thinking, you know what my impression is, everybody's fuckin' sick of it, they're sick of living with it.

DM: Um.

SC: . . . . and it's like people are getting to that point now where, it's like, what the fuck did we kept this shit quiet for, you know, because it wasn't nothing to do with us. They did it and now you've said about Annie Mae then and as I recall you said it about her when we talked last, she was a strong person. This person didn't deserve to be taken out . . .

DM: Right.

SC: . . . . fuckin' wasted.

DM: Um, hm.

SC: You know. So people, I think, ah, you know they're kinda scared and, in a way, to talk about it, but, then again I think they wanna, it's like a cleansing almost, you know, well, shit, this is it, it's all over. And that's why I wanted to ask you . .

DM: Um, hm.

SC: . . . you know, within that context but I didn't wanna do it like we did the interview

DM: Um, hm.

SC: Yeah.

DM: Yeah, that happened so long ago. A lot of that happened so long, its kinda, I gotta admit I'm gettin' old, man I'll be 51 come September, trying to stay (inaudible) at fifty but I'm resisting. . .

DM: . . . . goin' over the side man. It's cool though. I've been told when you hit 50 and over, you become a, start getting elderly (inaudible) status. Yeah, it's healing up. I guess I really tore it good. I mean, that's what really tore us up. I keep 'em covered so they won't get dust in there.

SC: Yeah.

DM: The ones in the back are doing pretty good they're dry.

SC: Yeah... but yeah that would have been December 1975, so it's twenty, twenty-five and a half years ago.

DM: That's a long time.

SC: Yeah.

DM: But, uh, like I say, you know, tell Cleo that ah, I asked her to talk to you and see if she can't remember. But we were married then.

SC: Uh, uh. But you just, you remember this is the only time that you ever seen Annie Mae . . .

DM: The only time.

SC: . . . . when those three guys showed up with her at your place, which is like what Choach and them . . . .

DM: Um, hm.

SC: . . . have said, so they were telling it right?

DM: Mm hm. But like I say I can't remember who those guys were you know because they were youngsters, there were a lot of people in and out of my camp.

SC: Um.

DM: A lot of people come visit me and Cleo.

SC: Um. Um.

DM: And we were about the, like uh, one of the strongest AIM families there in Allen at the time. A lot of shit went down they'd come to me and Cleo for help, you know, groceries, when they need a ride, and hauling wood for the elderly and

SC: But you reckon that Cleo gave Annie Mae some clothes or . . .

DM: I think she did.

SC: or gave them some clothes for her or . . .

DM: I think she, I don't know about that. She, she said she was gonna give some clothes to somebody but, it might have been Anna Mae, but, but uh, it happened so long ago I think, you know, I think it'd be good you talk to her.

SC: Yeah, I will.

DM: If you go to Manderson and inquire around they'll show you where she lives. She lives out in White Horse Crick near her folks.

SC: Does she own a phone, do you know?

DM: Ah, she might be, yeah.

SC: I, I'll try . . .

DM: Her married name then, now, is, ah, her husband's last name, Gates, G-A-T-E-S. Cleo Gates. Cleo Clifford Gates.

SC: Yeah, I'll try and call her ahead of time rather than just show up.

DM: Um, um.

SC: You know, hopefully she'll remember . . . .

DM: Um, um.

SC: . . . that night.

DM: Um hm.

SC: You know. And from what you can remember, how did, how did, Annie Mae look or is that like?

DM: Man, I can't remember (inaudible).

SC: 'Cuz according to Choach, she said that she just kinda went in your place and she was just kinda there. You know and she said she seemed to be, you know, like her hands were tied up...

DM: Um.

SC: . . . . or something or other.

DM: Um.

SC: I don't think she's a bullshitter either I . . .

DM: Um, um. . . and Choach, she's kinda like a (inaudible) observer . . .

SC: Yeah. I mean there's no, there's no doubt in my mind at all, you know that it was like Arlo and John Boy who with Theda took her flat out said it themselves.

DM: Um.

SC: You know, but, to my mind from what I've talked to people, they weren't prominent at all in the movement. They were just two kids. You know, like twenty years old, but, and shit like that you get dragged into. Dragged into all of that. What do you, what about, what do you know of, Theda, what do did you know about her? She seems like fuckin' . . . (inaudible). Theda is seventy years old now. Christ

DM: To me uh back then that she was a loud, boisterous woman. Like, when she was around, she wanted all the attention. That the kind of person. And she lived over in Oglala.

SC: Um, um.

DM: And, uh, I lived over in Allen, I really didn't want to pay much attention to her. She come around, she talked so loud like she wanted everybody to know she was there at that time.

SC: Ah, ah.

DM: I really didn't care for her.

SC: Well, that's probably why they brought her to your house then, you know. She wanted, ah, wanted people to know that, hey, it's part of her show, or something and she knew there'd be people at your place.

DM: Um.

SC: I mean, this, this is some whacked out shit to me.

DM: Um, um.

SC: Uh, doin' that to somebody.

DM: Um, um.

SC: They had no, they had no proof she was an informant or nothing, you know. It's fuckin' bad.

DM: Um, um.

SC: That whole deal. Yeah, somebody else always visited like this I wanted to ask you about, that David Hill, you know, or remember him? DePalma?

DM: I can't remember David Hill, ah, that I ever even met him back in the day.

SC: Guy from Oklahoma.

DM: Um. I've heard of him.

SC: Yeah, he's fuckin' nuts too.

DM: Um.

SC: I interviewed him at least, about all sorts of shit you know, not just this. Real deceptive kind of a . . .

DM: Hm.

SC: . . . guy. You know, not to be trusted at all and ah, I kinda found out that he was right in the middle of this shit.

DM: Hm.

SC: You know, he kinda orchestrated it, what was going to happen to this girl.

DM: Um.

SC: To my mind it's just totally bad, but doing that to somebody, doing that to a woman.

DM: Um, um.

SC: Right.

DM: Yeah, you know, me and some of the bros, we, uh, when this started coming out again, we thought, man, you know, somebody's gotta, some, somebody's gotta pay for this shit, man, you know, somebody's gotta own up to what really happened to her, you know.

SC: Um, um.

DM: As far as I'm concerned, you know, in a warrior's way, you gotta protect the women instead of harming them, you know.

SC: I mean Christ, she's got, she had two young kids.

DM: Yeah. Um, um.

SC: You know, those girls are growin' up not knowing, you know, what the hell happened to their mother.

DM: Um, um.

SC: And then we got these guys, Clyde, Dennis, particularly, Leonard, a little bit, Dave Hill, Kills, Ted, fucking, you know, what the hell, what gives them the right to...

DM: Um, um.

SC: . . . decide who's going to be livin' and who's gonna be dying.

DM: Um, um.

SC: You know. The Kangaroo Court they had over here.

DM: Um, um.

SC: It's bullshit.

DM: Um.

SC: Bruce, fucking Bruce Ellison, up to his neck in this shit. It's bad. It's fucking bad. I, um . . .

DM: Like you say, it's all gonna come to light and I am really interested in what the hell, whose involved, what really went down.

SC: Um. So but that was, you know, I appreciate your candor . . . .

DM: Yeah.

SC: . . . . with that.

DM: Okay.

SC: See my position, I, people say this shit to me and if I don't ask, I'm not gonna know.

DM: Hum, um.

SC: You know, and what how to get into. See, I'm gettin' shit on people man you know, like Vernon and them, and, what the fuck do you know, you know, you know this, you know that, you know too much and my position is hey, I ain't never, I didn't kill . . .

DM: Um, um.

SC: . . . there's not shit to do with me.

DM: Um, um.

SC: I'm just writing a fucking book.

DM: Yeah.

SC: You know, I don't wanna be part of it, but at the same time I wanna know because, damn, there's a lot of long roads on these rezes . . .

DM: Hum, um.

SC: . . . if you know what I'm saying.

DM: um, um.

SC: Guys are fucking nuts.

DM: Yup.

SC: . . . some of these people, it's just a, it's a bad scene all the way around . . .

DM: Yeah.

SC: . . . to me. I mean back in that time, when was it that you heard that they offed her? That they'd killed her? I know that thing we talked about was that Russ and Ted and Kills. Um, it was at that basketball game, we talked about it there. Do you remember last time. It was just like you and Cleo out of that caravan. You went up into a wake and those guys....

DM: Mmmm.

SC: Inaudible and that's about all we talked about.

DM: Just goes to show where me and Cleo's hearts were at.

SC: Yeah, but I mean, when did you, like hear that they'd shot her there after that they'd brought her to your house? I mean, took her out and . . .

DM: Hum, hm.

SC: . . . . killed her. I mean, when did you hear about that? Was it like soon after or . . .

DM: '75. . . . let's see.

SC: I mean they kill her . . .

DM: I cant (inaudible).

SC: (inaudible) in December, obviously.

DM: I can't remember right off the bat, but we heard about it, through, uh, I felt bad, too . . .

SC: Um.

DM: and we went to her wake.

SC: Yeah. So you kinda heard about it between the time they did it and that wake?

DM: Yeah.

SC: That fucker. And, there's, there's a part of me, not very much of me, but there's a part of me that feels kinda bad for Arlo and Arlo, I don't feel bad for John Boy cuz he didn't hafta shoot her in the head.

DM: Yeah I don't have no faith in them fuckers...

SC: You know.

DM: ...not at all.

SC: Yeah. I mean this is the interesting, real interesting bit to me, talking to John Boy, he can kinda tell, tell you what went down, you know, and the sequence and where they were and where they took her, and all that, but which, now it comes to like, mention your place and shit and uh, but when he gets to Kill's, man, I'm thinking he like shits himself.

DM: Hum.

SC: 'Cuz, some, some shit went down in, in Kills' house.

DM: Um.

SC: And he doesn't even, he doesn't like to think about it.

DM: Oh, yeah.

SC: 'Cuz he gets up, he walks about the fucking room and.

DM: Hmmm.

SC: He like, you don't know whether he's gonna cry or whether he's like, gonna go fuckin' ballistic. It's like, you know, (inaudible), that's kind of affected him.

DM: Hm.

SC: So to my mind, whatever was said to him in that house, that made him go out and shoot her in the back of the head.

DM: Hm.

SC: Somebody said to him in that house, gave him that ultimatum, I think.

DM: Um.

SC: You know, when they pick her up in Denver, I think they already know, like Clyde and them guys know that she ain't gonna be with them. But these three, him anyway, John Boy and Arlo, I don't think that they know that they're gonna be killin' her . . . .

DM: Um.

SC: . . . and I think that's the point, that they know they're gonna be killin' her, because he just like, he ain't a, to me he ain't a natural born killer. He, he's, someone, who was like put in that position.

DM: Um.

SC: 'Cuz he, fuck, he'd be able to hide it better, you know, or deal with it better, I would have thought but he can't, you know he's like....

DM: Um.

SC: When you're talking to him, he's like this.

DM: Oh, yeah?

SC: You know, smokin', his fucking hands going and all that. So I bet you when this shit comes out, who ever was in Kills' house, that, that's the word right there.

DM: Um, um.

SC: They just drove up there and killed her. That's some bad shit. And I've been told that Clyde and David Hill were in Kills' house. Obviously Kills was there.

DM: Um.

SC: But I can't say for sure who all else might, or might not have been, but those guys, Clyde and Ted, uh, admitted that they were here.

DM: Um.

SC: This WYKLDOC office when they were interrogating Annie Mae and then they went to Kills' house that afternoon.

DM: Um.

SC: Then they went on to Sioux Falls and then they come back to Kills' house. While all this shit's going on, during that obviously that they took her to your place, stopped off at your place, before they ended up going over to his place.

DM: Um.

SC: And that's where it's at.

DM: Yeah, like I say it's been pretty interesting man. I'd like to know myself.

SC: Well, if I, if I find out who was in that house, I'll let you know, . . .

DM: Um, um.

SC: Or who all else was in that house. If you hear anything . . .

DM: Um.

SC: . . . . let me know cuz I'd be interested.

SC: Cuz it's getting to that point now where, for me, I'm just trying, I'm just, some people I'm trying to avoid. You know. I don't want, I don't wanna talk about this.

DM: Um. Um.

SC: You know, with, with those guys. Because it's not even that they're, I don't think that they're anything. You know, it's just that I know it's the kind of thing that they do, you know, they get four or five other people to come out and they're looking for 'ya.

DM: Um, um.

SC: It's like how I think that they operate. They don't do their own . . . .

DM: What about Anna Mae's kids? Where they at now?

SC: They're up there in Canada, Nova Scotia, as far as I know. The same place as her sisters.

DM: Um, um.

SC: No closure.

DM: Hum.

SC: You know, for them. Because although these names are out there, they, you know, how are they to know. You know, how are they to know, unless they see somebody answer to it.

DM: Um. Um.

SC: You know. Well, my position is, it's not just them three. Theda, Arlo and John Boy. It's these others around here who put this shit in motion, I mean, but . . .

DM: Um.

SC: . . . answer for it too.

DM: Um, um.

SC: And, I just, you know, I think I said to you before, I don't like, even like to think about what she went through, that last 36 hours . . .

DM: Um, um.

SC: . . . of her life. That's bad. That's really bad.

DM: You know one time I read an article something about Indian, Indian Country paper, or something like that, some guy named Two Elk, or something like that. Ah, three or four pages of it . . .

SC: Um, um.

DM: Did you ever talk to that guy?

SC: Ah, I didn't because I talked to Arlo and he got his information from Arlo.

DM: Um.

SC: I think Two Elk, you know, he's got kinda his own gripe?

DM: Oh yeah?

SC: Yeah, with some of these people. But a lot of what he said in there, is, ah, is true.

DM: Um.

SC: You know, ‘cuz he got it from Arlo. And Arlo’s just kind of a pitiful guy, you know.

DM: What’s Arlo’s last name?

SC: Looking Cloud.

DM: And he’s from where?

SC: Well, he’s from up here.

DM: Oh, yeah.

SC: Originally. His family, remember Johnny Looking Cloud? His dad was kinda real distinguished looking guy.

DM: Um.

SC: He was in a few movies and stuff. He’s down from Pine Ridge.

DM: Oh yeah?

SC: But, he, they like got relatives and shit in Denver, but he was lives here now. . .

DM: Um.

SC: . . . but he’s pitiful in that way that he drinks a lot and he’s wrecked, he’s wrecked his life.

DM: Oh, yeah.

SC: What, which I guess it would be.

DM: Um, um.

SC: You know, being involved this kind of violence(?). Ah, but, you know, people say he’s a fucking wino and a drug addict you know ,and he’s all these things...

DM: Um, um.

SC: . . . but he’s got his own, his own ways of survival because he doesn’t trust these guys either. You know, this is a guy, 40 odd years old or something, who, you know, he wants to get rid of it. You know, he wants, he wants it to be over and I think he’d answer to it, I do, you know.

DM: Um, um.

SC: If they don't kill him first. And, who knows whether they will or they won't.

DM: Um, um.

SC: I don't know. Some people have a lot of shit to hide and I think they will do most anything to hide it.

DM: Um, um.

SC: Cuz they've made their careers out of it you know. It's sad, it's sad, man. That's why I wanted to ask you about it.

DM: Okay.

SC: And I appreciate you coming down and visiting with me.

DM: Yeah I always wondered what happened to 'ya, you know, and, uh, uh, I've been livin' with that Maria Holy Eagle, but like I said, now I couldn't jive with her man, all together she, she's really into herself.

SC: Um.

DM: She just had an article in the Indian Country Journal paper about herself saying she was a spiritual person and she didn't tell me jack shit about these spirits of hers and I lived with her. In this town we have a lot of these, there's quite a few of these Indian people in town here who wanna be shaman, (inaudible) spiritual leaders this or leader of that. What I've seen it's all for show, or personal greed or money, that's it.

SC: Well, there's a lot of that around.

DM: (inaudible) I just had a good Sundance at Rick Two Dogs, it was powerful (inaudible)

SC: Yeah, Rick's a good (inaudible). Rick's kind of like Wilmer, you know, real traditional people.

DM: Oh, yeah.

SC: Then there's all these other kids, you know, who are, who might lead in sundances and stuff. I went to one of them and I, I had a friend who was dancing, she asked me to go and like record it so I went. Man, I couldn't believe the shit going on in there, too.

DM: Um.

SC: Lots of non-Indians and . . .

DM: Um, um.

SC: . . . Boy, it was kinda like a circus, you know, I was thinking what the hell.

DM: Yeah.

SC: You know, but with side shows and stuff going on, you know, there was a guy, a non-Indian guy, you know, he was like taking flesh offerings off people. It was like, like at a fair or something, you know, just . . .

DM: Um, um.

SC: It was just bad.

DM: Um, um. Well, I better hit the road, man, 'cuz I'm gonna go back to my apartment, and head for Pine Ridge and my parole officer gave me, gave me the go ahead to, I got my last meeting with him on Monday, 4:30. And he says I can move any time after that, so I tell him, well, I can't come back Sunday night, can I come back Monday he said yes 'cuz I gotta bring back the trailer, bring all my stuff back, so.

SC: Well, if you get down to Wilmer's place, ah, give him a message for me. He wanted me to go down there on the 29th.

DM: You said you gave him a message for me too, and I, he never did tell me that.

SC: Yeah, well last fall. You know when we visited, he said . . .

DM: Yeah.

SC: 'tell him to call me.' So I gave him your number.

DM: Um, um. Yeah, he never did call.

SC: Or that number that I had, which was (inaudible) yeah.

SC: That woman's place, um, I don't know whether he did or...

DM: (inaudible)

SC: But if you see him, man, can you tell him that I can't be there on the 29th cuz I gotta be in Seattle.

DM: The 29th of this month?

SC: Yeah. I gotta go to Seattle so that's why.

DM: Ok. Today's what, the 27th?

SC: Yeah, it's like Sunday.

DM: Oh, all right. Cause I'll be going through there tomorrow.

SC: Okay. Well, if you see you him and . . .

DM: All right.

SC: . . . . tell him that, that would be, that would be cool 'cuz then I ain't got no other way of getting a message to him.

DM: All right. I'll do that.

SC: And I'll try and hook up with Cleo . . .

DM: Um, um.

SC: . . . . see what she can remember.

DM: Um, um.

SC: Then I'll be back around here, uh, end of August. So I'll give you call then.

DM: K. Then, ah, ...

SC: See what's going on. And I'll, by that time

DM: You'll have a rough draft . . .

SC: Yeah.

DM: . . . . put together.

SC: Yeah. It's just gonna be, it'll be like my questions and your . . .

DM: What other magazines did you send me?

SC: I sent you those AIM magazines that we get, those, ones with, uh, Fern, you know, Fern Matthias (inaudible).

DM: Hum.

SC: . . . lady, she like had the flag upside down.

DM: Um, no I didn't see that one.

SC: Ah, I sent you that one. I sent you that one with, ah, Peltier on the front and I sent you another one that had stuff about mascots in it that we did you know.

DM: Do you have anymore copies left?

SC: Yeah.

DM: Well, send them to this address (inaudible).

SC: And then you'll get them..'Cuz I remember the last thing you said to me was if you can give Wilmer a message for me and I saw him right after that. I gave him that message.

DM: Um, um.

SC: And then he said if you got that magazine, send me that magazine.

DM: Um, um.

SC: So, I gave him the message and I sent you the magazines some time after that.

DM: I didn't get it.

SC: It wasn't right away I admit.

DM: Yeah so she's probably got them there and didn't give them to me.

SC: Well, I'm glad we . . . .

DM: Yeah.

SC: . . . . I didn't send that book.

DM: Yeah. That'd be my new address there, so that's where I'll be livin'.

SC: All right man. Well we'll do that.

DM: Um, um.

SC: We'll do that and I'll give you call when I get back.

DM: Okay, man. Well, I gotta ride. All right.

SC: I'll walk you down.

DM: All right.

SC: You look kind of tired.

DM: I am been a long day man since last time I worked (inaudible) like this (inaudible).

End.

This is Serle Chapman. It is Friday, 27th of July, 2001, about to visit with Dick Marshall in regard to the murder of Anna Mae Pictou Aquash at the Alex Johnson Hotel, Room 918.

Exhibit 2

SC: Just busy, this is why I needed to, and I've written stuff down here to clarify when we were visiting last, we didn't talk very much about Anna Mae . . .

DM: Um, um.

SC: . . . if you remember that. We talked about other stuff, Montileaux and (inaudible) and all this shit. Well, since that time, I've talked to a few other people and this is why I don't wanna do this, like a book interview kind of a deal. And I can only tell you what it is that other people have said and then you can tell me what you remember about it. Um in February I went up to Vancouver. I interviewed John Graham, who shot Anna Mae in the head.

DM: Oh, really?

SC: I was with him for a long time, went through the sequence of events and all that, it was Vernon who set this interview up and that's how I got to go and see him. I've discussed all this with Vernon and I know a lot of this shit that went on and all the rest of it, and I said to him you know, to do her justice. You know, I, I need to be finding out the full detail and then putting the scenario in as to what happened. And, you know, without shafting anybody in this process. Anyway, to make a long story short, he told me that when they brought her up from Denver, up to Rapid City to Thelma and all this, as it went down, that after they had her at Thelma's, that Arlo drove across the Pine Ridge and across to the Rosebud and he said they stopped at two houses on the way. The last house they stopped at was Kills' place and he said they stopped at your house on the way to Kills' house.

DM: Um.

SC: Then I talked to Arlo himself you know, Arlo's in a pretty bad way.

DM: Arlo?

SC: Looking Cloud. He was a kid then, well they were both kids then. Well, he said pretty much the same thing other than he added that, and how he knows this, I mean, I, I'm assuming either his memory is good or his memory is bad, one or the other. He said the same thing though, that he drove and all that, they stopped at two houses and he said words to the effect of when they stopped in at your place, something about that you, or, you or Cleo weren't happy about it, (inaudible) you know, weren't thrilled about it, or whatever, them showing up then. Choach. You know Choach?

DM: Choach?

SC: Yeah, yeah, her name is, uh . . . Arlene . . .

DM: She's a Means now.

DM: (inaudible) Goings?

SC: She was a Goings?

DM: She was Arlene Goings, Arlene Choach Goings. Yeah, she married that Dennis Means.

SC: Yeah. Well, I visited with her about it and she was saying that when she saw Annie Mae in all of this sequence and she said she was taking Dusty and Lena, you know Navajo Lynn over to Sioux City, Iowa, she was taking her to Cheryl DeCora's, Lorelei's sister's place, over there. It was at night and she stopped up at your place and that Theda, Arlo, and John Boy were there and that they had Annie Mae there, too. And she said she thought Regina Brave was there also. Now way back, I remember a conversation I had with June Little, or it may have been Jim about stuff and he mentioned that as well, but I hadn't given that very much credibility at that stage just because of the way that June could be. But now these other people have said it so I need to ask you what you remember about it, you know that, that event and that if you remember that night or what.

DM: (inaudible).

SC: Do you remember that night or what?

DM: That was 19 – , what?

SC: '75 it would have been. December thereof., mid or early December. Russ was on trial in Sioux Falls. Now you see why I'm not doing this as an...

DM: Um, um.

SC: . . . interview or anything.

DM: Did you visit with Cleo yet?

SC: Unh Unh.

DM: You should visit with her.

SC: I don't know where . . .

DM: She lives in Manderson.

SC: Okay.

DM: And she works at, ah, the school there. She's a finance officer. But at the time I was married to her.

SC: Um, um.

DM: We were legally married and we lived in an the Allen housing and, uh, I can't remember clearly who all came that time, but, uh, we had company I remember and Anna Mae was with them. That's the first time I ever laid eyes on Anna Mae, ever met her and, uh, I didn't really visit with her. I just visited with, uh, can't remember who I there were some dudes there. It happened so damn long ago I can't remember who's who.

DM: But, I remember, huh, Cleo was like that. She always fed company. She didn't bother asking if you were hungry. When you come, she automatically cooked and started feeding people, setting places, you know, getting coffee, and huh, I think she did give Anna Mae some clothes. That's about all I can remember of that. You might want to talk to Cleo 'cause she was my wife then.

SC: Um, um.

DM: You know. She was a solid woman.

SC: She's from Manderson.

DM. Manderson

SC: If I was to tell her that you told me that I should talk to her . . .

DM: Yeah.

SC: . . . . she'd talk to me?

DM: Um, um.

SC: And, uh, . . .

DM: Cuz she'd probably remember more than I would 'cuz I was probably hazed out cuz I was smoking too much peji then.

SC: Huh, huh. But that's, that's what these guys have said and like the first time when I heard it I was like, but then when they kinda repeated the same thing, you know the three people, that before they took her to Kills' house they stopped off at your house but nobody in the telling of it like, made out to me that you had any involvement in it.

DM: Um.

SC: It was just like they stopped there.

DM: Yeah. Yeah, we always had company and they went on . . . .

SC: For whatever the hell reason they stopped there, they just stopped there.

DM: That's because we was ah, movement members then and people would always stop in, you know.

SC: Yeah. But Choach, um, part of what she said was it seemed clear to her that looking at Annie Mae, that, uh, she wasn't there willingly. That these other three had like, brought her along, and she was like, she didn't have a choice but be there.

DM: Hm.

SC: Kinda how she was described that . . .

DM: Hm.

SC: . . . and so I don't know if you remember that particularly.

DM: Hm.

SC: Or, or whether Cleo would remember that.

DM: I, I suggest you talk to Cleo too.

SC: And because, she actually, she said that, ah, that as she recalled it, it seemed that Annie Mae was like, you know, that her hands were tied or something like that, on that occasion and Christ it's only, it's gonna be a few hours after that they took her to Kills' house.

DM: Hm.

SC: . . . and then up to where, Wanblee, where Amiotte is, and popped her, you know.

DM: Yeah, I myself, I'd like to know what the hell happened to her and why they did it, cuz, that's, that's about the only time I've ever seen her in my whole career. I remember hearing about all the strong things I heard that she's done. I've always had a lot respect for her coming all the way from her home country of Nova Scotia to help out down at Wounded Knee.

SC: Yeah. When we did that last interview that was one of the things that I respected about you was that if I asked you a question, you always answered it. And, I don't know these guys real well . . .

DM: Um, hm.

SC: . . . . you know, and we've only met a couple of times, but I trust you to tell me the way that it is . . .

DM: Um, hm.

SC: . . . the way that it was.

DM: Um, um.

SC: Now this guy, John Boy, he's just a total fucking wreck, you know, because he did it, and he tells me at one point he says, uh, he says I'm not gonna say I'm not . . .

DM: What's this John Boy's last name.

SC: Graham.

DM: Graham?

SC: He was from up there too. Canada.

DM: Oh, yeah?

SC: His hair ain't real dark, its kinda darker than mine, but it's not like black more dark brown.

DM: Oh yeah?

SC: Yeah.

DM: Um. So he's a Canadian skin?

SC: Yeah.

DM: Is he?

SC: He's Southern Tchlone.

DM: Huh?

SC: Southern T'Chlone (inaudible) is the nation.

DM: Um.

SC: But, that was kinda (inaudible) . . .

DM: I'm gonna have some water.

SC: Sure. Finish it off. That was...

DM: That was from that sawdust. I work with sawdust all day, man. I gotta rinse my eyes out every day. We wear safety glasses but it still gets in, you know, so I use that Bausch & Lomb eye rinse.

SC: Um, um.

DM: Cuz if I don't, it feels like mud. Yeah, so I didn't care if you had talked to Cleo. She lives in Manderson.

SC: Uh, um. And she works at the school.

DM: Um, hm.

SC: (inaudible).

DM: Do you know Dave Clifford?

SC: I don't know him. I know of him.

DM: Um, hm. That's his sister. Dave used to be my brother-in-law.

SC: Um, hm.

SC: And but this just bothered me . . .

DM: Um, um.

SC: . . . .you, know, and it wasn't something I could put in a fax to you or . . .

DM: Um, hm.

SC: . . . anything like that. In the context of what we're doing with this book I need to know, you know to get it straight.

DM: Um, hm.

SC: But at the same time I (inaudible) to know what like not, you know, drop in there.

DM: Um, hm.

SC: . . . kind of thing. These three, Theda, Arlo, and John Boy, Christ everybody knows. Shit, everywhere I go, everybody knows about this, you talk to people, right off the bat, you know,

DM: Hum.

SC: People have got stories about it. They might not have talked about it, for however many years. But it's like when, when they know that you've talked to them and (inaudible), they know that you're not bullshittin' them and people say what it is . . .

DM: Hm.

SC: . . . . and I'm thinking, you know what my impression is, everybody's fuckin' sick of it, they're sick of living with it.

DM: Um.

SC: . . . . and it's like people are getting to that point now where, it's like, what the fuck did we kept this shit quiet for, you know, because it wasn't nothing to do with us. They did it and now you've said about Annie Mae then and as I recall you said it about her when we talked last, she was a strong person. This person didn't deserve to be taken out . . .

DM: Right.

SC: . . . . fuckin' wasted.

DM: Um, hm.

SC: You know. So people, I think, ah, you know they're kinda scared and, in a way, to talk about it, but, then again I think they wanna, it's like a cleansing almost, you know, well, shit, this is it, it's all over. And that's why I wanted to ask you . .

DM: Um, hm.

SC: . . . you know, within that context but I didn't wanna do it like we did the interview

DM: Um, hm.

SC: Yeah.

DM: Yeah, that happened so long ago. A lot of that happened so long, its kinda, I gotta admit I'm gettin' old, man I'll be 51 come September, trying to stay (inaudible) at fifty but I'm resisting. . .

DM: . . . . goin' over the side man. It's cool though. I've been told when you hit 50 and over, you become a, start getting elderly (inaudible) status. Yeah, it's healing up. I guess I really tore it good. I mean, that's what really tore us up. I keep 'em covered so they won't get dust in there.

SC: Yeah.

DM: The ones in the back are doing pretty good they're dry.

SC: Yeah... but yeah that would have been December 1975, so it's twenty, twenty-five and a half years ago.

DM: That's a long time.

SC: Yeah.

DM: But, uh, like I say, you know, tell Cleo that ah, I asked her to talk to you and see if she can't remember. But we were married then.

SC: Uh, uh. But you just, you remember this is the only time that you ever seen Annie Mae . . .

DM: The only time.

SC: . . . . when those three guys showed up with her at your place, which is like what Choach and them . . . .

DM: Um, hm.

SC: . . . have said, so they were telling it right?

DM: Mm hm. But like I say I can't remember who those guys were you know because they were youngsters, there were a lot of people in and out of my camp.

SC: Um.

DM: A lot of people come visit me and Cleo.

SC: Um. Um.

DM: And we were about the, like uh, one of the strongest AIM families there in Allen at the time. A lot of shit went down they'd come to me and Cleo for help, you know, groceries, when they need a ride, and hauling wood for the elderly and

SC: But you reckon that Cleo gave Annie Mae some clothes or . . .

DM: I think she did.

SC: or gave them some clothes for her or . . .

DM: I think she, I don't know about that. She, she said she was gonna give some clothes to somebody but, it might have been Anna Mae, but, but uh, it happened so long ago I think, you know, I think it'd be good you talk to her.

SC: Yeah, I will.

DM: If you go to Manderson and inquire around they'll show you where she lives. She lives out in White Horse Crick near her folks.

SC: Does she own a phone, do you know?

DM: Ah, she might be, yeah.

SC: I, I'll try . . .

DM: Her married name then, now, is, ah, her husband's last name, Gates, G-A-T-E-S. Cleo Gates. Cleo Clifford Gates.

SC: Yeah, I'll try and call her ahead of time rather than just show up.

DM: Um, um.

SC: You know, hopefully she'll remember . . . .

DM: Um, um.

SC: . . . that night.

DM: Um hm.

SC: You know. And from what you can remember, how did, how did, Annie Mae look or is that like?

DM: Man, I can't remember (inaudible).

SC: 'Cuz according to Choach, she said that she just kinda went in your place and she was just kinda there. You know and she said she seemed to be, you know, like her hands were tied up...

DM: Um.

SC: . . . . or something or other.

DM: Um.

SC: I don't think she's a bullshitter either I . . .

DM: Um, um. . . and Choach, she's kinda like a (inaudible) observer . . .

SC: Yeah. I mean there's no, there's no doubt in my mind at all, you know that it was like Arlo and John Boy who with Theda took her flat out said it themselves.

DM: Um.

SC: You know, but, to my mind from what I've talked to people, they weren't prominent at all in the movement. They were just two kids. You know, like twenty years old, but, and shit like that you get dragged into. Dragged into all of that. What do you, what about, what do you know of, Theda, what do did you know about her? She seems like fuckin' . . . (inaudible). Theda is seventy years old now. Christ

DM: To me uh back then that she was a loud, boisterous woman. Like, when she was around, she wanted all the attention. That the kind of person. And she lived over in Oglala.

SC: Um, um.

DM: And, uh, I lived over in Allen, I really didn't want to pay much attention to her. She come around, she talked so loud like she wanted everybody to know she was there at that time.

SC: Ah, ah.

DM: I really didn't care for her.

SC: Well, that's probably why they brought her to your house then, you know. She wanted, ah, wanted people to know that, hey, it's part of her show, or something and she knew there'd be people at your place.

DM: Um.

SC: I mean, this, this is some whacked out shit to me.

DM: Um, um.

SC: Uh, doin' that to somebody.

DM: Um, um.

SC: They had no, they had no proof she was an informant or nothing, you know. It's fuckin' bad.

DM: Um, um.

SC: To my mind it's just totally bad, but doing that to somebody, doing that to a woman.

DM: Um, um.

SC: Right.

DM: Yeah, you know, me and some of the bros, we, uh, when this started coming out again, we thought, man, you know, somebody's gotta, some, somebody's gotta pay for this shit, man, you know, somebody's gotta own up to what really happened to her, you know.

SC: Um, um.

DM: As far as I'm concerned, you know, in a warrior's way, you gotta protect the women instead of harming them, you know.

SC: I mean Christ, she's got, she had two young kids.

DM: Yeah. Um, um.

SC: You know, those girls are growin' up not knowing, you know, what the hell happened to their mother.

DM: Um, um.

SC: And then we got these guys, Clyde, Dennis, particularly, Leonard, a little bit, Dave Hill, Kills, Ted, fucking, you know, what the hell, what gives them the right to...

DM: Um, um.

SC: . . . decide who's going to be livin' and who's gonna be dying.

DM: Um, um.

SC: You know. The Kangaroo Court they had over here.

DM: Um, um.

SC: It's bullshit.

DM: Um.

SC: Bruce, fucking Bruce Ellison, up to his neck in this shit. It's bad. It's fucking bad. I, um . . .

DM: Like you say, it's all gonna come to light and I am really interested in what the hell, whose involved, what really went down.

SC: Um. So but that was, you know, I appreciate your candor . . . .

DM: Yeah.

SC: . . . . with that.

DM: Okay.

SC: See my position, I, people say this shit to me and if I don't ask, I'm not gonna know.

DM: Hum, um.

SC: You know, and what how to get into. See, I'm gettin' shit on people man you know, like Vernon and them, and, what the fuck do you know, you know, you know this, you know that, you know too much and my position is hey, I ain't never, I didn't kill . . .

DM: Um, um.

SC: . . . there's not shit to do with me.

DM: Um, um.

SC: I'm just writing a fucking book.

DM: Yeah.

SC: You know, I don't wanna be part of it, but at the same time I wanna know because, damn, there's a lot of long roads on these rezes . . .

DM: Hum, um.

SC: . . . if you know what I'm saying.

DM: um, um.

SC: Guys are fucking nuts.

DM: Yup.

SC: . . . some of these people, it's just a, it's a bad scene all the way around . . .

DM: Yeah.

SC: . . . to me. I mean back in that time, when was it that you heard that they offed her? That they'd killed her? I know that thing we talked about was that Russ and Ted and Kills. Um, it was at that basketball game, we talked about it there. Do you remember last time. It was just like you and Cleo out of that caravan. You went up into a wake and those guys....

DM: Mmmm.

SC: Inaudible and that's about all we talked about.

DM: Just goes to show where me and Cleo's hearts were at.

SC: Yeah, but I mean, when did you, like hear that they'd shot her there after that they'd brought her to your house? I mean, took her out and . . .

DM: Hum, hm.

SC: . . . . killed her. I mean, when did you hear about that? Was it like soon after or . . .

DM: '75. . . . let's see.

SC: I mean they kill her . . .

DM: I cant (inaudible).

SC: (inaudible) in December, obviously.

DM: I can't remember right off the bat, but we heard about it, through, uh, I felt bad, too . . .

SC: Um.

DM: and we went to her wake.

SC: Yeah. So you kinda heard about it between the time they did it and that wake?

DM: Yeah.

SC: That fucker. And, there's, there's a part of me, not very much of me, but there's a part of me that feels kinda bad for Arlo and Arlo, I don't feel bad for John Boy cuz he didn't hafta shoot her in the head.

DM: Yeah I don't have no faith in them fuckers...

SC: You know.

DM: ...not at all.

SC: Yeah. I mean this is the interesting, real interesting bit to me, talking to John Boy, he can kinda tell, tell you what went down, you know, and the sequence and where they were and where they took her, and all that, but which, now it comes to like, mention your place and shit and uh, but when he gets to Kill's, man, I'm thinking he like shits himself.

DM: Hum.

SC: 'Cuz, some, some shit went down in, in Kills' house.

DM: Um.

SC: And he doesn't even, he doesn't like to think about it.

DM: Oh, yeah.

SC: 'Cuz he gets up, he walks about the fucking room and.

DM: Hmmm.

SC: He like, you don't know whether he's gonna cry or whether he's like, gonna go fuckin' ballistic. It's like, you know, (inaudible), that's kind of affected him.

DM: Hm.

SC: So to my mind, whatever was said to him in that house, that made him go out and shoot her in the back of the head.

DM: Hm.

SC: Somebody said to him in that house, gave him that ultimatum, I think.

DM: Um.

SC: You know, when they pick her up in Denver, I think they already know, like Clyde and them guys know that she ain't gonna be with them. But these three, him anyway, John Boy and Arlo, I don't think that they know that they're gonna be killin' her . . . .

DM: Um.

SC: . . . and I think that's the point, that they know they're gonna be killin' her, because he just like, he ain't a, to me he ain't a natural born killer. He, he's, someone, who was like put in that position.

DM: Um.

SC: 'Cuz he, fuck, he'd be able to hide it better, you know, or deal with it better, I would have thought but he can't, you know he's like....

DM: Um.

SC: When you're talking to him, he's like this.

DM: Oh, yeah?

SC: You know, smokin', his fucking hands going and all that. So I bet you when this shit comes out, who ever was in Kills' house, that, that's the word right there.

DM: Um, um.

SC: They just drove up there and killed her. That's some bad shit. And I've been told that Clyde and David Hill were in Kills' house. Obviously Kills was there.

DM: Um.

SC: But I can't say for sure who all else might, or might not have been, but those guys, Clyde and Ted, uh, admitted that they were here.

DM: Um.

SC: This WYKLDOC office when they were interrogating Annie Mae and then they went to Kills' house that afternoon.

DM: Um.

SC: Then they went on to Sioux Falls and then they come back to Kills' house. While all this shit's going on, during that obviously that they took her to your place, stopped off at your place, before they ended up going over to his place.

DM: Um.

SC: And that's where it's at.

DM: Yeah, like I say it's been pretty interesting man. I'd like to know myself.

SC: Well, if I, if I find out who was in that house, I'll let you know, . . .

DM: Um, um.

SC: Or who all else was in that house. If you hear anything . . .

DM: Um.

SC: . . . . let me know cuz I'd be interested.

SC: Cuz it's getting to that point now where, for me, I'm just trying, I'm just, some people I'm trying to avoid. You know. I don't want, I don't wanna talk about this.

DM: Um. Um.

SC: You know, with, with those guys. Because it's not even that they're, I don't think that they're anything. You know, it's just that I know it's the kind of thing that they do, you know, they get four or five other people to come out and they're looking for 'ya.

DM: Um, um.

SC: It's like how I think that they operate. They don't do their own . . . .

DM: What about Anna Mae's kids? Where they at now?

SC: They're up there in Canada, Nova Scotia, as far as I know. The same place as her sisters.

DM: Um, um.

SC: No closure.

DM: Hum.

SC: You know, for them. Because although these names are out there, they, you know, how are they to know. You know, how are they to know, unless they see somebody answer to it.

DM: Um. Um.

SC: You know. Well, my position is, it's not just them three. Theda, Arlo and John Boy. It's these others around here who put this shit in motion, I mean, but . . .

DM: Um.

SC: . . . answer for it too.

DM: Um, um.

SC: And, I just, you know, I think I said to you before, I don't like, even like to think about what she went through, that last 36 hours . . .

DM: Um, um.

SC: . . . of her life. That's bad. That's really bad.

DM: You know one time I read an article something about Indian, Indian Country paper, or something like that, some guy named Two Elk, or something like that. Ah, three or four pages of it . . .

SC: Um, um.

DM: Did you ever talk to that guy?

SC: Ah, I didn't because I talked to Arlo and he got his information from Arlo.

DM: Um.

End.

26

United States District Court

District of South Dakota
Western Division

FILED
MAY 29 2009
CLERK

UNITED STATES OF AMERICA
v.
JOHN GRAHAM A/K/A JOHN BOY GRAHAM, and VINE RICHARD MARSHALL, A/K/A RICHARD VINE MARSHALL, A/K/A DICK MARSHALL

SUBPOENA DUCES TECUM

Case Number: CR. 0~-50079-01 & 02

Type of Case	SUBPOENA FOR
[] CIVIL [X] CRIMINAL	[] PERSON [X] DOCUMENT(S) or OBJECT(S)

To: Dr. Robert C. Finley, M.D.
2929 ~~2925~~ Fifth Street, Suite 240
Rapid City, SD 57701
Fax: (605) 341-8692

YOU ARE HEREBY DIRECTED to provide the following records by May 28, 2009 to:

Michaele Sanders Hofmann
Costello Porter Hill Heisterkamp Bushnell & Carpenter
P. O. Box 290
704 St. Joseph Street
Rapid City, SD 57701
(605) 343-2410

A. You are to produce any and all medical records concerning diagnosis, treatment and/or medical services provided to Theda Clarke, D.O.B. August 25, 1924, SSN 520-22-2155, now in your custody or under your control.

IF YOU HAVE NO DOCUMENTS RESPONSIVE TO THIS SUBPOENA, YOU SHALL NOTIFY MICHAELE SANDERS HOFMANN IN WRITING OF THAT FAVT BY NO LATER THAN MAY 28, 2009

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

U.S. Magistrate or Clerk of Court	DATE
JOSEPH HAAS, CLERK	May 15, 2009
(By) Deputy Clerk	

This Subpoena is issued upon application of the:

[] Plaintiff [X] Defendant [] U.S. Attorney

Questions may be addressed to:
Michaele Sanders Hofmann
Costello Porter Hill Heisterkamp Bushnell & Carpenter
PO Box 290
704 St. Joseph St.
Rapid City , SD 57709
343-2410
Email: mhofmann@costelloporter.com

AO 89 (Rev. 3/90) Subpoena

RETURN OF SERVICE(1)

RECEIVED BY SERVER	Date 5-20-09	Place RC, SD
SERVED	Date 5-20-09	Place 2929 5th St. Suite 240 605-341-3770

Served on (Print Name) Melissia Kelly	Fees and Mileage Tendered to Witness(2) [ ] Yes [X] No Amount $_____
Served By (Print Name) Paul Thelen	Title DUSM

STATEMENT OF SERVICE FEES

Travel	Services	Total

DECLARATION OF SERVER(2)

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on 5-20-09 _____
date *Signature of Server*

RC, SD
Address of Server

Additional Information

(1) As to who may serve a subpoena and the manner of its service see Rule 17(d), Federal Rules of Criminal Procedure, or Rule 45(c), Federal Rules of Civil Procedure.

(2) "Fees and mileage need not be tendered to the deponent upon service of a subpoena issued on behalf of the United States or an officer or agency thereof (Rule 45(c). Federal Rules of Civil Procedure; Rule 17(d), Federal Rules of Criminal Procedure) or on behalf of certain indigent parties and criminal defendants who are unable to pay such costs (28 USC 1825, Rule 17(b) Federal Rules of Criminal Procedure)".

United States District Court

District of South Dakota
Western Division

FILED
MAY 29 2009
CLERK

UNITED STATES OF AMERICA
v.
JOHN GRAHAM A/K/A JOHN BOY GRAHAM, and VINE RICHARD MARSHALL, A/K/A RICHARD VINE MARSHALL, A/K/A DICK MARSHALL

SUBPOENA DUCES TECUM

Case Number: CR. 08-50079-01 & 02

Type of Case	SUBPOENA FOR
[] CIVIL [X] CRIMINAL	[] PERSON [X] DOCUMENT(S) or OBJECT(S)

To: Crest View Care Center
420 Gordon Avenue
Chadron, NE 69337
Fax: (308) 432-4535

YOU ARE HEREBY DIRECTED to provide the following records by May 28, 2009 to:

Michaele Sanders Hofmann
Costello Porter Hill Heisterkamp Bushnell & Carpenter
P. O. Box 290
704 St. Joseph Street
Rapid City, SD 57701
(605) 343-2410

A. You are to produce any and all medical records concerning diagnosis, treatment and/or medical services provided to Theda Clarke, D.O.B. August 25, 1924, SSN 520-22-2155, now in your custody or under your control.

IF YOU HAVE NO DOCUMENTS RESPONSIVE TO THIS SUBPOENA, YOU SHALL NOTIFY MICHAELE SANDERS HOFMANN IN WRITING OF THAT FAVT BY NO LATER THAN MAY 28, 2009

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

U.S. Magistrate or Clerk of Court	DATE
JOSEPH HAAS, CLERK	May 15, 2009
(By) Deputy Clerk	

This Subpoena is issued upon application of the:

[] Plaintiff [X] Defendant [] U.S. Attorney

Questions may be addressed to:
Michaele Sanders Hofmann
Costello Porter Hill Heisterkamp Bushnell & Carpenter
PO Box 290
704 St. Joseph St.
Rapid City , SD 57709
343-2410
Email: mhofmann@costelloporter.com

AO 89 (Rev. 3/90) Subpoena

RETURN OF SERVICE(1)

RECEIVED BY SERVER	Date 5-20-09	Place RC, SD
SERVED	Date 5-20-09	Place Chadron, NE

Served on (Print Name) * Charley Pile (Cust. of Records)	Fees and Mileage Tendered to Witness(2) [ ] Yes [X] No Amount $_____
Served By (Print Name) Paul Thielen	Title Dusm

STATEMENT OF SERVICE FEES

Travel	Services	Total
NC	NC	NC

DECLARATION OF SERVER(2)

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on 5-20-09 _____ Paul Thielen _____
date *Signature of Server*

RC, SD
Address of Server

Additional Information

* Served via fax to Charley Pile at 308-432-4535
(ph# 308-432-3355.)

(1) As to who may serve a subpoena and the manner of its service see Rule 17(d), Federal Rules of Criminal Procedure, or Rule 45(c), Federal Rules of Civil Procedure.

(2) "Fees and mileage need not be tendered to the deponent upon service of a subpoena issued on behalf of the United States or an officer or agency thereof (Rule 45(c). Federal Rules of Civil Procedure; Rule 17(d), Federal Rules of Criminal Procedure) or on behalf of certain indigent parties and criminal defendants who are unable to pay such costs (28 USC 1825, Rule 17(b) Federal Rules of Criminal Procedure)".

FILED
JUN 0 1 2009
CLERK

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 DEFENDANT MARSHALL'S MOTION TO FILE EXHIBITS UNDER SEAL

NOW COMES Defendant Richard Marshall, by and through his attorney, Dana L. Hanna, and hereby moves the Court to file the attached exhibits in support of his Motion for Reconsideration of Detention under seal.

Grounds for this motion are that the attached exhibit are part of his confidential medical record and are not to be made part of the public record.

WHEREFORE Defendant Marshall moves the Court to file the attached exhibit in support of his Motion for Reconsideration of Detention under seal.

Dated this 29th day of May, 2009.

RICHARD MARSHALL, Defendant

BY: Dana L. Hanna

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

FILED

JUN 0 1 2009

CLERK

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 DEFENDANT MARSHALL'S MOTION FOR RECONSIDERATION OF DETENTION

NOW COMES Defendant Richard Marshall, by and through his attorney, Dana L. Hanna, and hereby moves the Court to reconsider his continued detention and to issue an order setting conditions for his release pending trial. The grounds for this motion are as follows:

1. The Defendant has received a Treatment Needs Assessment from the City/County Alcohol and Drug Programs, and it was the opinion and recommendation of the counselor that did the assessment that Richard Marshall does not need drug or alcohol treatment [Exhibit 'A', Treatment Needs Assessment]. The final clinical impression of substance abuse (page 3 of 10) is: "At this time it does not appear that it would be necessary to refer client to any thing other that his spirituality and perhaps support meetings such as AA."

2. The defense counsel has communicated with the Oglala Sioux Tribe alcohol program, Aupetu Luta Otipi, which provides an after care support group with meetings once a week to which Richard Marshall would be able to participate.

3. Further, on May 5th, 2009, the Honorable Lawrence Piersol ordered that the trial of Richard Marshall should be continued indefinitely until such time as the Eighth Circuit Court of Appeals rules on the government's interlocutory appeal of the Court's order concerning the case of the co-defendant, John Graham. There is, of course, no way of predicting when the Eighth Circuit Court of Appeals will issue a decision in that case. It could be six months from

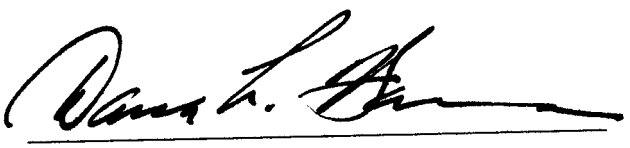
now or a year from now. In view of the serious likelihood of an extended delay in the trial and all the evidence previously presented in the prior detention hearing, this Court should reconsider its prior order.

4. In view of the facts and evidence set forth herein, the defendant is not a danger to the community and further indeterminate pretrial detention is not justified.

WHEREFORE Defendant Marshall moves the Court to reconsider detention, a hearing on the motion, and grant an order releasing the defendant pending trial on conditions.

Dated this 1st day of June, 2009.

RICHARD MARSHALL, Defendant

BY: 

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby that I have served a true and correct copy of the foregoing Defendant Marshall's Motion for Reconsideration of Detention on the other parties in this case by mailing the same, postage prepaid, the attorneys of record at the addresses listed below:

Marty J. Jackley, United States Attorney and
Robert Mandel, Assistant United States Attorney
515 Ninth Street, #201
Rapid City, SD 57701

John Murphy
Murphy Law Office
328 E. New York St., #1
Rapid City, SD 57701

Dated this 1st day of June, 2009.

Dana L. Hanna

FILED
JUN 02 2009
CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL, a/k/a RICHARD VINE MARSHALL, a/k/a DICK MARSHALL, Defendant.	CR. 08-50079-02 ORDER GRANTING DEFENDANT'S MOTION TO FILE EXHIBIT UNDER SEAL [DOCKET 396]

Defendant Vine Richard Marshall moves the court for an order sealing the exhibit attached to his motion for reconsideration of detention, see Docket 397, as it contains confidential information. Good cause appearing, it is hereby

ORDERED that Mr. Marshall's motion to file exhibit under seal [Docket 396] is granted.

Dated June 2, 2009.

BY THE COURT:

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

Criminal Initial Appearance/Arraignment Form

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA - WESTERN DIVISION

JUDGE -VERONICA L. DUFFY — TAPE RECORDED
Date - June 3, 2009 — CR. 08-50079-02

United States of America — Robert Mandel
For Government

vs.

Vine Richard Marshall — Dana Hanna
For Defendant

Age: Education:

MINUTES

() **INITIAL APPEARANCE** on
- () Complaint
- () Indictment
- () Information
- () Superseding Indictment or Information
- () Petition to Revoke Supervised Release/Probation

() Defendant Advised of Rights
() Appointment of Counsel
() **ARRAIGNMENT**
- () Not Guilty to
- () Guilty to

() **JUVENILE INITIAL APPEARANCE/ARRAIGNMENT**
- () Denial to
- () Admission to

Maximum Penalty:

(X) **BOND HEARING ON MOTION FOR RECONSIDERATION OF PRETRIAL RELEASE -**
Mr. Hanna makes statement as to motion for pretrial release.
Mr. Mandel objects to defendant's pretrial release.
Court denies motion for pretrial release.

() **CUSTODY**

() **DETENTION HEARING**

() **TRIAL**

() **JUDGMENT**

() **Next Hearing Date**

Time 9:30 a.m. to 9:40 a.m. Courtroom Deputy: BH

FILED
JUN 03 2009
CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL, a/k/a RICHARD VINE MARSHALL, a/k/a DICK MARSHALL, Defendant.	CR. 08-50079-02 ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION OF DETENTION [DOCKET 397]

Defendant Vine Richard Marshall moves the court to reconsider the detention order previously entered in this case, see Docket 16 as continued by Docket 39. A hearing on this matter was held on Wednesday, June 3, 2009. Mr. Marshall appeared in person and by his counsel, Dana Hanna. The government appeared by Assistant United States Attorney Robert Mandel. Upon consideration of Mr. Marshall's motion and the arguments presented at the hearing by both parties, the court hereby

ORDERS that Mr. Marshall's motion for reconsideration of detention [Docket 397] is denied for the same reasons set forth in the court's previous orders, see Dockets 16 & 261.

Dated June 3, 2009.

BY THE COURT:

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

FILED
JUN 04 2009
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE 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) Defendant.)	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S INVOCATION UNDER THE FIFTH AND SIXTH AMENDMENTS

Defendant John Graham expressly and unequivocally invokes his right to remain silent and his right to counsel guaranteed to him under both the Fifth and Sixth Amendments to the United States Constitution.

Dated this 2 day of June, 2009.

John Graham, Defendant

WITNESSED BY:

SIGNATURE

ERIN E DUCHENEAUX
PRINT NAME

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

MARTY J. JACKLEY	☒	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☐	Electronic Case Filing
ROBERT A. MANDEL	☒	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☐	Electronic Case Filing
DANA HANNA	☒	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☐	Electronic Case Filing

Dated this 3rd of June, 2009.

John R. Murphy

FILED

JUN 04 2009

CLERK

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 MOTION TO SUPPRESS STATEMENTS

NOW COMES Defendant Richard Marshall, by and through counsel, and hereby moves the Court to suppress statements allegedly made by him to a federal investigator, Robert D. Ecoffey, on December 26th, 2003, on the grounds that said statements were elicited in violation of Richard Marshall's Sixth Amendment right to counsel.

In support of the motion, Dana L. Hanna, attorney for Defendant Richard Marshall, hereby affirms:

1. I make these affirmations on the basis of information and belief, the sources of which are discovery materials provided to me by the government and information provided to me by attorney Charles Abourezk.

2. The government intends to offer into evidence statements allegedly made by Defendant Marshall to a federal investigator, Robert D. Ecoffey, on December 26th, 2003. At that time and on that date, both Ecoffey and federal prosecutors knew that Marshall had actually invoked his

Sixth Amendment right to counsel in the matter under investigation and that he had retained attorney Charles Abourezk to act as his legal counsel.

3. On January 3rd, 2003, attorney Charles Abourezk gave actual notice to both Robert Ecoffey, Director of Bureau of Indian Affairs Law Enforcement Services and Robert Mandel, Assistant United States Attorney, that he was representing Richard Marshall in the matter of the government's investigation into the death of Anna Mae Aquash. On January 15th, 2003, Marshall testified as a witness before the Grand Jury in that matter. Mr. Abourezk was there with him as his legal counsel.

4. At all times between January 3rd, 2003 and December 26th, 2003, both the government's attorneys and its investigator, Robert Ecoffey, were on notice that Richard Marshall was represented by attorney Charles Abourezk in all matters related to the investigation of this case. [See: Exhibit "A", Affidavit of Charles Abourezk].

5. In spite of the government's actual knowledge that Marshall was represented by counsel, on December 26th, 2003, Robert D. Ecoffey, acting as an investigator for the government, approached Richard Marshall in Pine Ridge, South Dakota and questioned him about events and facts involved in this case, without the presence or knowledge of Marshall's attorney and without any valid waver of his right to counsel. The government contends that Marshall made statements to Ecoffey that the government now intends to offer as evidence against Richard Marshall in its case in chief.

6. All statements made by Richard Marshall to Ecoffey were elicited by the government's agent in willful violation of the Defendant's Sixth Amendment right to counsel.

WHEREFORE, the Defendant moves this Court to suppress all evidence and statements

made by Richard Marshall to Ecoffey on December 26th, 2003, and further moves for an evidentiary hearing on this motion.

Dated this 4th day of June, 2009.

RICHARD MARSHALL, Defendant

By 

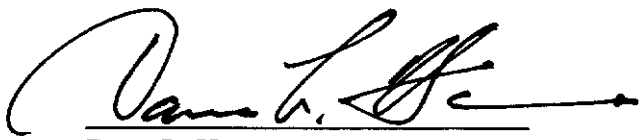
Dana L. Hanna
PO Box 3080
816 Sixth Street
Rapid City, SD 57709
605-791-1832
Attorney for Defendant Marshall

CERTIFICATE OF SERVICE

I hereby confirm that I have served a true and correct copy of the foregoing Motion to Suppress Statements on the other parties in this case by hand delivering to the attorneys of record at the addresses listed below:

Marty J. Jackley, United States Attorney and
Robert Mandel, Assistant United States Attorney
515 Ninth Street, #201
Rapid City, SD 57701

Dated this 4th day of June, 2009.



Dana L. Hanna

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. RICHARD MARSHALL, Defendant.	)	08-50079-02 AFFIDAVIT OF CHARLES ABOUREZK

I, Charles Abourezk, being first duly sworn upon my oath, depose and state as follows:

1. My name is Charles Abourezk. My professional address is P.O. Box 9460, Rapid City, South Dakota 57709. I am a licensed member of the State Bar of South Dakota and have been licensed and in good standing at all times pertinent to this Affidavit.

2. I was the attorney for Richard "Dick" Marshall, in any and all matters, including but not limited to a federal grand jury subpoena of Richard Marshall, dated July 29, 2008, and prior to that with regard to a federal grand jury subpoena issued on or about December 20, 2002 to him, and during the subsequent criminal proceedings.

3. On January 3, 2003, I sent a letter to Assistant United States Attorney Robert Mandel indicating that I was the attorney for Richard Marshall and that I had been asked to represent Richard Marshall, in addition to one other person, in the grand jury which was scheduled to convene on January 15, 2003. That letter was pursuant to a telephone call with Mr. Mandel, in which, among other matters

Exhibit 'A'

discussed, that I understood from what Mr. Mandel said Mr. Marshall was not a criminal target or subject of the Government.

4. On the same day, I also spoke with Bob Ecoffey, who was then one of the lead federal criminal investigators in the same criminal proceedings, and passed along an offer from Mr. Ecoffey to Mr. Marshall.

5. Mr. Marshall then agreed to and did appear before the grand jury on January 15, 2003 at the federal building in Rapid City, South Dakota and testified before the grand jury. His agreement to testify was based upon the representations made to him by Mr. Mandel on behalf of the United States Government. I continued to represent Mr. Marshall, which representation was known to the U.S. Attorney.

6. On January 30, 2004, just prior to the beginning of the United States v. Arlo Looking Cloud criminal trial, I had a telephone conversation with Assistant United States Attorney Robert Mandel. In that conversation, which I reduced to writing, and submitted in the form of a letter to Mr. Mandel, Mr. Mandel made various offers to me as Mr. Marshall's lawyer regarding Mr. Marshall's status in the death of Anna Mae Aquash.

7. In the same conversation Robert Mandel indicated, among other things, that if Mr. Marshall had anything further to provide in the way of testimony about the incident, above and beyond his grand jury testimony, he would like him to sit down and do a proffer, and that nothing he said would be used against him at the proffer meeting.

8. I do believe that throughout the time from, at least, December 20, 2002, through July, 2008 and into August, 2008, the U.S. Attorney was aware that I represented

Richard Marshall. At no point during that time did I state on behalf of Mr. Marshall that any attorneys, representatives or investigators on behalf of any level of government, could question Richard Marshall without me being present.

9. In 2004 I also had notified the U.S. Attorney that they are not to try to contact my client without my permission, nor to have anyone make the contact for them on their behalf, after there had been unauthorized contact.

FURTHER AFFIANT SAYETH NOT.

Dated this 27 day of April, 2009.

ABOUREZK & ZEPHIER, P.C.

Charles Abourezk
P.O. Box 9460
2020 W. Omaha
Rapid City, SD 57709
(605) 342-0097

SUBSCRIBED AND SWORN to before me this 27th day of April, 2009.

CHERYCE M. GULLIKSON NOTARY SEAL PUBLIC STATE OF SOUTH DAKOTA

Notary Public, South Dakota

My commission expires: 1-22-2014

FILED
JUN 04 2009
CLERK

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS STATEMENTS

FACTS

In December 2002, Richard Marshall was subpoenaed to testify as a witness before the Grand Jury in the matter of the investigation into the murder of Anna Mae Aquash. Richard Marshall retained attorney Charles Abourezk to represent him as his legal counsel in the matter.

On January 3, 2003, attorney Abourezk sent a letter to Assistant United States Attorney (AUSA) Robert Mandel informing Mr. Mandel that Mr. Abourezk was acting as attorney for Richard Marshall in the matter of the investigation into the death of Anna Mae Aquash. See: Affidavit of Charles Abourezk, Exhibit "A".

On that same day, January 3, 2003, Mr. Abourezk had a personal conversation with Robert Ecoffey, who was working as investigator for the government in its investigation concerning the death of Anna Mae Aquash. At the time, Ecoffey was employed by the Law

Enforcement Services of the Bureau of Indian Affairs (BIA). In their conversation, Abourezk informed Ecoffey that he was acting as attorney and legal counsel for Richard Marshall in the matter of the investigation into the death of Anna Mae Aquash.

With attorney Abourezk accompanying him and acting as his legal counsel in the matter, Richard Marshall testified before the Grand Jury on January 15th, 2003. That Grand Jury returned an indictment that charged Arlo Looking Cloud and John Graham with the first degree murder of Anna Mae Aquash.

Eleven months later, on December 26th, 2003, when the government was preparing for the trial of Looking Cloud, Robert Ecoffey approached Richard Marshall at Marshall's place of work, and without the presence or knowledge of his attorney and without any valid waiver of his right to counsel, Ecoffey questioned Marshall about facts involved in the investigation in the death of Anna Mae Aquash. Marshall made statements in answer to Ecoffey's questions that the government now seeks to offer as evidence in Marshall's trial.

The Defendant Richard Marshall moves for an order from the Court suppressing these statements on the grounds that on December 26th, 2003, the government and Robert Ecoffey had notice and actual knowledge that Marshall had invoked his right to counsel on all matters involving the government's investigation concerning the death of Aquash and that Charles Abourezk was his attorney in that matter, and that therefore all statements elicited from the defendant by Ecoffey were obtained by violating the defendant's Sixth Amendment right to counsel.

ARGUMENT

I.

THE GOVERNMENT'S AGENT VIOLATED MARSHALL'S SIXTH AMENDMENT RIGHT TO COUNSEL BY QUESTIONING HIM AFTER MARSHALL HAD INVOKED THAT RIGHT BY RETAINING COUNSEL IN THE MATTER.

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." Interrogation is a critical stage of a criminal proceeding and a person has a right to invoke his Sixth Amendment right to counsel at that stage. Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199 (1964).

Merely by requesting counsel, a person invokes his Sixth Amendment right to counsel, and all interrogation must then cease, unless the suspect himself initiates further conversation and waives his right to counsel. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981). Here, Richard Marshall had not merely requested counsel: he had actually retained counsel in the very matter that Ecoffey sought to question him about, thereby unequivocally invoking his right to have an attorney between him and the government in all matters related to the investigation of this particular case.

Here, the defendant had retained legal counsel to represent him in the matter under investigation and the government had notice of that fact. The federal investigator, Bob Ecoffey, had actual personal knowledge of the fact Mr. Abourezk was Richard Marshall's attorney in all matters relating to the investigation into the death of Aquash.

Under Massiah and Edwards, once Marshall retained legal counsel in the matter under investigation, a government agent may not deliberately question and elicit statements from him outside of the presence of counsel, without violating his Fifth and Sixth Amendment rights.

The Sixth Amendment imposes on the government an affirmative obligation to respect and preserve the citizen's choice to seek the assistance of legal counsel. Under the Sixth Amendment, the prosecutor and police have an affirmative obligation not to act in a matter that circumvents and thereby dilutes the protection afforded by the right to counsel. Maine v. Moulton, 474 U.S. 159,106 S.Ct. 477 (1985). The Sixth Amendment is violated when the government obtains statements by knowingly circumventing the citizen's right to have counsel present in a confrontation between the accused and the government agent. Maine v. Moulton above. The proof that the government must have known that its agent was likely to obtain statements from the accused in the absence of counsel suffices to establish the Sixth Amendment violation, Maine v. Moulton.

Once a citizen has requested or actually retained counsel, the police cannot question that citizen unless he voluntarily waives the previously invoked right to counsel. Brewer v.Williams, 430 U.S. 387, 97 S.Ct.1232 (1977). Here there is absolutely no evidence that Richard Marshall waived his right to previously invoked right to counsel.

Once the Sixth Amendment right to counsel has been invoked, the police may not interfere with efforts of the defendant's attorney to act as medium between his client and the police during interrogation. Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135 (1986). Here, the government investigator interfered with the attorney's efforts to act as medium between his client and the investigators by simply ignoring the fact, which he knew, that Marshall had legal counsel in the matter.

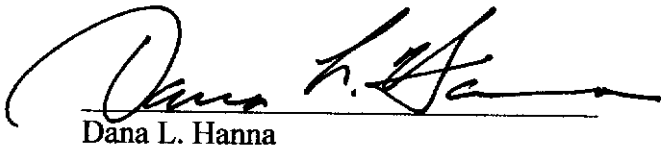
By questioning the defendant outside the presence of counsel, when he had actual knowledge that the defendant was represented by an attorney in the matter, Ecoffey ignored and

willfully violated the defendant's Sixth Amendment right to counsel.

Therefore, the government should be prohibited from offering any statements made by the defendant to Ecoffey in its case in chief.

Dated this 4th day of June, 2009.

RICHARD MARSHALL, Defendant

By 

Dana L. Hanna
PO Box 3080
816 Sixth Street
Rapid City, SD 57709
605-791-1832
Attorney for Defendant Marshall

CERTIFICATE OF SERVICE

I hereby confirm that I have served a true and correct copy of the foregoing Memorandum of Law in Support of Motion to Suppress Statements on the other parties in this case by hand delivering to the attorneys of record at the addresses listed below:

Marty J. Jackley, United States Attorney and
Robert Mandel, Assistant United States Attorney
515 Ninth Street, #201
Rapid City, SD 57701

Dated this 4th day of June, 2009.



Dana L. Hanna

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 TO COMPEL DISCLOSURE OF WITNESS

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 to Compel Disclosure of Witness and states as follows:

1. The United States provided the Defendant in this case with two pages of discovery materials which he attempts to characterize as an interview of Arlo Looking Cloud. Defendant Marshall seeks to have the United States inform him as to the identity of the individual who wrote these notes. It is the position of the United States that neither the discovery rule (Fed. R. Crim. P. 16) nor *Brady V. Maryland*, 373 US 83 (1963) impose such an obligation upon the United States.

2. At the outset, it should be noted that Defendant assumes that these are notes from an interview. There is nothing within the document that indicates that they are, or for that matter, that they are from any contact with Arlo Looking Cloud. In addition, he claims that they are *Brady* material. While the United States does not necessarily agree with that, any obligation under *Brady* has been complied with by providing him with the materials.

3. What Defendant now seeks to do is to engage the prosecution to conduct an investigation on his behalf. Neither *Brady* nor the discovery rules impose such an obligation upon the prosecution. The United States may be required to provide this document, but it is not required to comment on it, analyze it or investigate it as to any aspect.

4. Even if the discovery sought is deemed to be *Brady* material, a violation has not occurred here because Defendant is in the same position as the prosecutor to access the source. "*Brady* is concerned only with cases in which the government possesses information which the defendant does not. Further, there is no *Brady* violation if the defendant knew or should have known the essential facts permitting him to take advantage of the information in question, or if the information was available to him from another source." *United States v. Graham,* 484 F.3d 413, 417 (6th Cir. 2007) (quoting *United States v. Mullins,* 22 F.3d 1365, 1371 (1994)).

5. Defendant quotes *United States v. Smith,* 552 F.2d 257, 262 (8th Cir. 1977), for the principle that "A prosecutor cannot avoid his duty to disclose favorable *Brady* evidence to the defense by keeping himself in purposeful ignorance by failing to acquire relevant favorable evidence." Defendant fails to point out that *Smith* goes on to say "It is unreasonable to impose upon a prosecutor the duty of personally searching agency files for favorable evidence." *Smith*, 552 F.2d at 262. This is analogous to Defendant's effort to seek having the prosecution conduct an investigation to identify the author of this document.

6. Simply stated, Defendant here seeks to have the United States prepare his case for him. The United States has fulfilled its obligations under both the discovery rule and *Brady*, and is not under an obligation to do more. Accordingly, the United States asks that Defendant's motion be in all respects denied.

Respectfully submitted this 12th day of June, 2009.

/s/ Robert A. Mandel

ROBERT A. MANDEL
Assistant United States Attorney
515 9th Street #201
Rapid City, SD 57701
605.342..7822
FAX: 605.342.1108
Robert.Mandel@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of June, 2009, I served by electronic transmission, a true and correct copy of the foregoing Government's Response to Defendant Marshall's Motion to Compel Disclosure of Witness on:

Dana Hanna
Attorney at Law

John Murphy
Attorney at Law

/s/ Robert A. Mandel

Robert A. Mandel

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
JUN 15 2009
CLERK

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.	)	CR08-50079 MOTION TO WITHDRAW AS COUNSEL OF RECORD

COMES NOW Michaele Sanders Hofmann of Costello, Porter, Hill, Heisterkamp, Bushnell & Carpenter, LLP, attorney for Theda Clarke in the above-captioned matter, and moves this Honorable Court for its Order permitting Ms. Hofmann to withdraw as court-appointed counsel for Theda Clarke, having been appointed as Ms. Clark's attorney by this Court's Order, dated April 9, 2009. This Motion is supported by Counsel's Affidavit In Support of Motion To Withdraw.

WHEREFORE, it is requested that the Court allow Michaele Sanders Hofmann to withdraw as counsel for Theda Clarke, and further, that counsel be appointed to Theda Clarke pursuant to the Criminal Justice Act, 18 U.S.C. §§ 3006A, *et seq.*

Dated this 15th day of June, 2009.

Respectfully submitted,

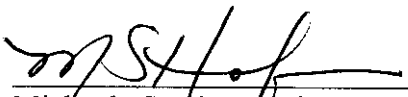
Michaele Sanders Hofmann
Costello, Porter, Hill, Heisterkamp,
Bushnell & Carpenter, LLP
704 St. Joseph Street
P.O. Box 290

Rapid City, SD 57709
Telephone: 605-343-2410
Facsimile: 605-343-4282
mhofmann@costelloporter.com

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2009, a true and correct copy of the foregoing **Motion to Withdraw as Counsel** was served upon the following persons, by First Class Mail, postage prepaid:

Marty Jackley United States Attorney United States Courthouse 515 Ninth Street Rapid City, SD 57701	[X] [ ] [ ] [ ] [ ]	U.S. Mail Hand Delivery Facsimile Federal Express Electronic Case Filing
John R. Murphy Murphy Law Office 328 East New York Street, # 1 Rapid City, SD 57701	[X] [ ] [ ] [ ] [ ]	U.S. Mail Hand Delivery Facsimile Federal Express Electronic Case Filing
Dana Hanna Hanna Law Office P.O. Box 3080 Rapid City, SD 57709	[X] [ ] [ ] [ ] [ ]	U.S. Mail Hand Delivery Facsimile Federal Express Electronic Case Filing
Theda Clark c/o Crest View Care Center 420 Gordon Avenue Chadron, NE 69337	[X] [ ] [ ] [ ] [ ]	U.S. Mail Hand Delivery Facsimile Federal Express Electronic Case Filing



Michaele Sanders Hofmann

FILED

JUN 15 2009

CLERK

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.	)	CR08-50079 AFFIDAVIT IN SUPPORT OF MOTION TO WITHDRAW AS COUNSEL OF RECORD

STATE OF SOUTH DAKOTA)
)ss
COUNTY OF PENNINGTON)

COMES NOW, Michaele Sanders Hofmann of Costello, Porter, Hill, Heisterkamp, Bushnell & Carpenter, LLP, and being first duly sworn, in support of her Motion to Withdraw on file with the Court, deposes and states as follows:

1. I am legal counsel for Theda Clarke in file number CR08-50079, appointed by Order of this Court dated April 9, 2009.

2. I am suspending my practice of law indefinitely.

3. My employment at Costello, Porter, Hill, Heisterkamp, Bushnell & Carpenter, LLP, ends Monday, June 22, 2009.

Dated this 15th day of June, 2009.

Michaele Sanders Hofmann

SUBSCRIBED AND SWORN to before me this _____ day of June, 2009.

Notary Public
My Commission Expires:

(SEAL)

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2009, a true and correct copy of the foregoing **Affidavit in Support of Motion to Withdraw as Counsel** was served upon the following persons, by First Class Mail, postage prepaid:

Marty Jackley United States Attorney United States Courthouse 515 Ninth Street Rapid City, SD 57701	[X] U.S. Mail [ ] Hand Delivery [ ] Facsimile [ ] Federal Express [ ] Electronic Case Filing
John R. Murphy Murphy Law Office 328 East New York Street, # 1 Rapid City, SD 57701	[X] U.S. Mail [ ] Hand Delivery [ ] Facsimile [ ] Federal Express [ ] Electronic Case Filing
Dana Hanna Hanna Law Office P.O. Box 3080 Rapid City, SD 57709	[X] U.S. Mail [ ] Hand Delivery [ ] Facsimile [ ] Federal Express [ ] Electronic Case Filing
Theda Clark c/o Crest View Care Center 420 Gordon Avenue Chadron, NE 69337	[X] U.S. Mail [ ] Hand Delivery [ ] Facsimile [ ] Federal Express [ ] Electronic Case Filing

Michaele Sanders Hofmann

FILED
JUN 16 2009
CLERK

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 ORDER GRANTING MOTION TO WITHDRAW AS COUNSEL OF RECORD [DOCKET 407]

Michaele Sanders Hofmann moves the court for permission to withdraw as counsel of record for Theda Clarke, a material witness in the above-captioned case. Good cause appearing, it is hereby

ORDERED that Ms. Hofmann's motion to withdraw as counsel [Docket 407] is granted. New counsel shall be appointed to represent Theda Clarke under separate order of the court.

Dated June 16, 2009.

BY THE COURT:

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

CJA 20 APPOINTMENT OF AND AUTHORITY TO PAY COURT APPOINTED COUNSEL

1. CIR./DIST./DIV. CODE	2. PERSON REPRESENTED	VOUCHER NUMBER
SDX	Clark, Theda	

3. MAG. DKT./DEF. NUMBER	4. DIST. DKT./DEF. NUMBER	5. APPEALS DKT./DEF. NUMBER	6. OTHER DKT. NUMBER
	5:08-50079-001		5:09-000002-001

7. IN CASE/MATTER OF (Case Name)	8. PAYMENT CATEGORY	9. TYPE PERSON REPRESENTED	10. REPRESENTATION TYPE (See Instructions)
USA v. Graham	Other	Other:	Material W[illegible]

FILED
JUN 17 2009
CLERK

11. OFFENSE(S) CHARGED (Cite U.S. Code, Title & Section) If more than one offense, list (up to five) major offenses charged, according to severity of offense.

12. ATTORNEY'S NAME (First Name, M.I., Last Name, including any suffix) AND MAILING ADDRESS
Erlandson, Gregory J.
Bangs McCullen Butler Foye and Simmons
P. O. Box 2670
Rapid City SD 57709
Telephone Number: (605) 343-1040

14. NAME AND MAILING ADDRESS OF LAW FIRM (only provide per instructions)
BANGS, MCCULLEN, BUTLER, FOYE, SIMMONS
PO BOX 2670
RAPID CITY SD 57709

13. COURT ORDER
☐ O Appointing Counsel ☐ C Co-Counsel
☐ F Subs For Federal Defender ☐ R Subs For Retained Attorney
☒ P Subs For Panel Attorney ☐ Y Standby Counsel
Prior Attorney's Name: Hofmann, Michaele Sanders
Appointment Date: 04/09/2009
☐ Because the above-named person represented has testified under oath or has otherwise satisfied this court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney whose name appears in Item 12 is appointed to represent this person in this case, or
☐ Other (See Instructions)
Signature of Presiding Judicial Officer or By Order of the Court
06/16/2009
Date of Order
6-17-09
Nunc Pro Tunc Date
Repayment or partial repayment ordered from the person represented for this service at time of appointment. ☐ YES ☐ NO

CLAIM FOR SERVICES AND EXPENSES				FOR COURT USE ONLY		
CATEGORIES (Attach itemization of services with dates)		HOURS CLAIMED	TOTAL AMOUNT CLAIMED	MATH/TECH ADJUSTED HOURS	MATH/TECH ADJUSTED AMOUNT	ADDITIONAL REVIEW
15. In Court	a. Arraignment and/or Plea					
	b. Bail and Detention Hearings					
	c. Motion Hearings					
	d. Trial					
	e. Sentencing Hearings					
	f. Revocation Hearings					
	g. Appeals Court					
	h. Other (Specify on additional sheets)					
	(Rate per hour = $) TOTALS:					
16. Out of Court	a. Interviews and Conferences					
	b. Obtaining and reviewing records					
	c. Legal research and brief writing					
	d. Travel time					
	e. Investigative and Other work (Specify on additional sheets)					
	(Rate per hour = $) TOTALS:					
17.	Travel Expenses (lodging, parking, meals, mileage, etc.)					
18.	Other Expenses (other than expert, transcripts, etc.)					
	GRAND TOTALS (CLAIMED AND ADJUSTED):					

19. CERTIFICATION OF ATTORNEY/PAYEE FOR THE PERIOD OF SERVICE	20. APPOINTMENT TERMINATION DATE IF OTHER THAN CASE COMPLETION	21. CASE DISPOSITION
FROM _____ TO _____		

22. CLAIM STATUS ☐ Final Payment ☐ Interim Payment Number _____ ☐ Supplemental Payment
Have you previously applied to the court for compensation and/or remimbursement for this case? ☐ YES ☐ NO If yes, were you paid? ☐ YES ☐ NO
Other than from the court, have you, or to your knowledge has anyone else, received payment (compensation or anything or value) from any other source in connection with this representation? ☐ YES ☐ NO If yes, give details on additional sheets.
I swear or affirm the truth or correctness of the above statements.
Signature of Attorney: _____ Date: _____

APPROVED FOR PAYMENT – COURT USE ONLY

23. IN COURT COMP.	24. OUT OF COURT COMP.	25. TRAVEL EXPENSES	26. OTHER EXPENSES	27. TOTAL AMT. APPR / CERT

28. SIGNATURE OF THE PRESIDING JUDICIAL OFFICER	DATE	28a. JUDGE / MAG. JUDGE CODE

29. IN COURT COMP.	30. OUT OF COURT COMP.	31. TRAVEL EXPENSES	32. OTHER EXPENSES	33. TOTAL AMT. APPROVED

34. SIGNATURE OF CHIEF JUDGE, COURT OF APPEALS (OR DELEGATE) Payment approved in excess of the statutory threshold amount.	DATE	34a. JUDGE CODE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079-02

UNITED STATES' RESPONSE OPPOSING DEFENDANT MARSHALL'S MOTION TO SUPPRESS STATEMENTS

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully files its Response opposing Defendant Marshall's Motion to Suppress Statements.

Defendant Marshall is seeking to suppress statements made to BIA Director Robert Ecoffey on December 26, 2003, "on the grounds that said statements were elicited in violation of Richard Marshall's Sixth Amendment right to counsel." See Exhibit A (statement of December 26, 2003, (Graham04408-04409)). As demonstrated herein, Defendant's Sixth Amendment right to counsel was not violated, and the same holds true with respect to his Fifth Amendment rights.

It is a fundamental and well-established principal of law that the Sixth Amendment right to counsel does not attach until adversarial judicial proceedings have been initiated. Kirby v. Illinois, 406 U.S. 682, 688-89 (1972). "It is the commencement of a formal prosecution, indicated by the initiation of adversarial judicial proceedings, that marks the beginning of the Sixth Amendment right to counsel." Texas v. Cobb, 532 U.S. 162, 176 (2001) (quoting McNeil v. Wisconsin, 501 U.S. 171 (1991); Austin v. United States, 509 U.S. 609, 608 (1993) ("the protections provided by the Sixth Amendment are explicitly confined to 'criminal prosecutions.'"). The Sixth Amendment right comes into play when the suspect has been formally charged (the right has "attached"), and the prosecution is at a "critical stage." See generally United States v. Gouveia, 467 U.S. 180, 190 (1980) (holding the Sixth Amendment right to counsel does not apply to pre-charge questioning, even if the suspect has been arrested); Hoffa v. United States, 385 U.S. 299, 307-08 (1966) (holding the Sixth Amendment right to counsel does not apply if the suspect has an attorney on other charges and is the focus of a government investigation); United States v. Moore, 122 F.3d 1154, 1156 (8th Cir. 1997) (holding the right to counsel does not attach with the filing of a complaint under Fed. R. Crim. P. 3); United States v. Manvujano, 425 U.S. 564, 581 (1975) (holding that Sixth Amendment right to counsel does not apply to a grand jury target); United States v. Hayes, 231 F.3d 663, 674 (9th Cir. 2000)

(Sixth Amendment right to counsel had not attached, even though the defendant had received a "target letter," counsel had been appointed, and a court order to depose witnesses had been obtained).

When Defendant Marshall provided his statement on December 26, 2003, there was no initiation of adversarial proceedings or formal charges. A federal grand jury did not indict Marshall until August 20, 2008 [DE1], with the Superseding Indictment filed on October 7, 2008 [DE28]. Accordingly, Defendant Marshall's Motion to Suppress his statement of December 26, 2003, on Sixth Amendment grounds should be denied.

Although Defendant's Motion to Suppress is premised only upon the Sixth Amendment, well-settled principles of law further demonstrate there was no Fifth Amendment violation. Defendant Marshall's meeting of December 26, 2003, did not violate his Fifth Amendment right to counsel in that it clearly was not a custodial interrogation. See Miranda v. Arizona, 384 U.S. 436, 467-70 (1966); Edwards v. Arizona, 451 U.S. 477, 481-82 (1981). Whether an encounter is a custodial interrogation is determined by balancing the following six Griffin factors: (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with

authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or, (6) whether the suspect was placed under arrest at the termination of the questioning. United States v. Griffin, 922 F.2d 1343, 1349 (8th Cir. 1990). A suspect is considered to be "in custody" either upon his/her formal arrest or "under any other circumstances where the suspect is deprived of his [or her] freedom of action in any significant way." Id. at 1347 (citing Berkemer v. McCarty, 468 U.S. 420, 429 (1984)).

On December 26, 2003, Director Ecoffey observed Marshall coming out of the Oglala Sioux Tribal Housing Office in Pine Ridge, South Dakota. See Exh. A. Director Ecoffey pulled up in front of the office, at which time Marshall approached the vehicle and got into the passenger side saying "hello." Id. Director Ecoffey told Marshall that he was still investigating the murder of Annie Mae Aquash, and advised Marshall of information he had received concerning what had occurred at Marshall's residence. Id. At the end of the interview, Marshall indicated that he would think about the things that were discussed and if he remembered any additional details, he would call Director Ecoffey. Id.

Examination of the totality of the circumstances and the Griffin factors clearly demonstrates that the December 26, 2003, meeting between Ecoffey

and Marshall was not a custodial interrogation triggering Fifth Amendment right to counsel. See generally United States v. Baswell, 792 F.2d 755, 759 (8th Cir. 1986) (statement made in agent's car where defendant voluntarily entered the car did not constitute a custodial interrogation). Indeed, on December 26, 2003, Director Ecoffey was not aware of the full extent of Defendant Marshall's conduct and involvement in the murder of Aquash, including Marshall's counseling the criminal venture to commit the murder, the exchange of the "baggage" note with Theda Clarke, and the specific details surrounding his providing the murder weapon and shells. During the December 26, 2003, meeting, Defendant Marshall voluntarily entered Director Ecoffey's vehicle, was never handcuffed or restrained, and was not arrested until approximately five years after his statement.

Furthermore, Defendant Marshall has failed to demonstrate a legally cognizable invocation of any Miranda rights. As recently reiterated by the United States Supreme Court "we have in fact never held that a person can invoke his *Miranda* rights anticipatorally, in a context other than 'custodial interrogation'. . . . " See Montejo v. Louisiana, 2009 WL 1443049 *12 (May 26, 2009) (quoting McNeil v. Wisconsin, 501 U.S. 171, 182 n.3 (1991)). In his Motion to Suppress Statement, Defendant Marshall's only claim to the invocation of any right to counsel stems from an anticipatory representation by an attorney associated with Marshall being a witness at grand jury proceedings

on or about January 3, 2003. This is more than eleven months prior to the date of his statement to Ecoffey. Based upon the fundamental principal that an individual cannot anticipatorally invoke Miranda rights, it is not necessary to address the scope of the attorney's representation nor concerns relating to an attorney's attempted global representation of various and numerous parties giving rise to potential inappropriate witness control and inherent conflicts of interest. *See S.D.C.L. app. 16-18* (2003) (SD Rules of Professional Conduct 1.7 Conflict of Interest); *see also S.D.C.L. app. 16-18* (2003) (SD Rules of Professional Conduct 1.8(b) Conflict of Interest).

CONCLUSION

Defendant Marshall's Motion to Suppress his statement of December 26, 2003, to Director Ecoffey should be denied because there clearly was no commencement of a formal prosecution. The statement date of December 26, 2003, combined with the August 8, 2008, issuance date of the Indictment obviates the need for any evidentiary hearing. Furthermore, there exists no claim, nor substantive evidence, that Marshall was subject to a custodial interrogation triggering any Fifth Amendment right to counsel nor does there exist any evidence of a proper invocation of the right to counsel. Accordingly, Defendant Marshall's statement is properly admissible under Fed. R. Evid. 801(d)(2).

Dated and electronically filed this 29th day of June 2009.

MARTY J. JACKLEY
United States Attorney

PO Box 2638
Sioux Falls, SD 57101-2638
Phone: 605.357.2330
Fax: 605.330.4405
Marty.J.Jackley@usdoj.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies on June 29, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Facsimile at
- ☐ Federal Express
- ☒ Electronic Case Filing

Marty J. Jackley

Dated this 20th day of July, 2009.

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S MEMORANDUM OF LAW IN SUPPORT OF RENEWED MOTION TO SEVER TRIALS

For reasons of economy, there is a preference in the federal system for joint trials of defendants who are indicted together. Richardson v. Marsh, 481 US 200, 107 S.Ct. 1702, 95 Law Ed. 2d 176 (1987). However, Rule 14 of the Federal Rules of Criminal Procedure provides: "if it appears that a defendant or the government is prejudiced by a joinder of ... defendants ... for trial together, the Court may order an election or separate trials of counts, grant a severance of defendants, or provide other relief justice requires."

Here, the government's interest in judicial economy can no longer outweigh Defendant Marshall's right to a speedy trial. Unless the Court of Appeals eventually rules that this Court erred in its ruling, then Marshall will likely have a separate trial. Recognizing that there are no guarantees, the most likely outcome is that the government will not prevail in its interlocutory appeal, and then the government will choose not to try a case that this court has already indicated

will be dismissed. Therefore, it is unfair and unreasonable to leave Defendant Marshall in a legal limbo, detained without bond in jail without a trial date, on the off chance that the Court of Appeals will reverse this court, in the interests of an entirely speculative judicial economy.

Richard Marshall is suffering serious prejudice–lengthy detention without trial–to the detriment of his constitutional and statutory federal speedy trial rights. If this Court grants this motion to proceed in a timely way with a separate trial for Richard Marshall, and then the Court of Appeals should reverse this court's order on the jurisdiction issue, before Richard Marshall's new trial date, the Court can always reconsider the severance issue if the government were to then move to re-join the defendants.

Therefore, this Court should exercise its discretion under Rule 14 to order and schedule a separate trial for Richard Marshall.

Dated this 20th day of July, 2009.

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
HANNA LAW OFFICE, P.C.
PO Box 3080
816 Sixth Street
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com
Attorney for Defendant Richard Marshall

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum of Law in Support of Renewed Motion to Sever Trials was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 20th day of July, 2009.

/s/ *Dana L. Hanna*
Dana L. Hanna

Dated this 20th day of July, 2009.

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S MEMORANDUM OF LAW IN SUPPORT OF RENEWED MOTION TO SEVER TRIALS

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will be dismissed. Therefore, it is unfair and unreasonable to leave Defendant Marshall in a legal limbo, detained without bond in jail without a trial date, on the off chance that the Court of Appeals will reverse this court, in the interests of an entirely speculative judicial economy.

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Therefore, this Court should exercise its discretion under Rule 14 to order and schedule a separate trial for Richard Marshall.

Dated this 20th day of July, 2009.

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
HANNA LAW OFFICE, P.C.
PO Box 3080
816 Sixth Street
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com
Attorney for Defendant Richard Marshall

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum of Law in Support of Renewed Motion to Sever Trials was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 20th day of July, 2009.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S RENEWED MOTION FOR SEVERANCE AND REQUEST FOR SPEEDY TRIAL

NOW COMES Defendant Richard Marshall, by and through his attorney Dana L. Hanna, and pursuant to his constitutional rights to a speedy trial and to Rule 8(b) of the Federal Rules of Criminal Procedure, hereby renews his motion to sever his trial from that of Co-Defendant John Graham and further moves this court to schedule a trial date. Defendant Marshall makes this motion on the grounds previously set forth in his original motion for severance and upon the further grounds that failure to order a severance would deny Richard Marshall his constitutional and statutory rights to a speedy trial.

In support of this motion, Dana L. Hanna, attorney for the Defendant, hereby affirms:

1. The Defendant Richard Marshall requests a speedy trial. He has been detained and held in custody without bond since August 2008. He has previously moved for a severance of his trial from that of the Co-Defendant John Graham. His motion for severance was denied. All evidence and factual affirmations previously set forth in support of his original motion for severance are

incorporated herein by reference.

2. After this Court dismissed one count of the indictment that charged Co-Defendant Graham with murder and indicated its intention to dismiss the remaining murder counts against Graham in a trial, the government filed an interlocutory appeal with the United States Court of Appeals for the Eighth Circuit. The government then requested a continuance of the trial for 60 days. In order to conduct further investigation and trial preparation, defendant Marshall joined in the government's request for a continuance for 60 days. This Court granted the motion in part and denied it in part. The Court ordered a continuance of the trial without setting a trial date, advising the parties that a trial date would be set after the Court of Appeals rules on the government's appeal.

3. Thereafter, Richard Marshall moved for release from custody pending trial. The government opposed Richard Marshall's motion for release from detention and the U.S. Magistrate judge denied the motion for release from detention. Since that time, the government's interlocutory appeal of the ruling on the Co-Defendant's case constitutes a fundamental change of circumstances that entitles the defendant Marshall to a severance. Failure to grant a severance is likely to deny Marshall his right to a speedy trial.

4. More than 60 days have passed since May 5, 2009, when this court entered its order for an indefinite continuance of the trial, and the 8th Circuit Court of Appeals has not ruled on the government's appeal. Richard Marshall is detained without bond and without a trial date. As a matter of law the trial of the Co-Defendant Graham cannot proceed while the appeal is pending, but there is no legal barrier to a trial for Richard Marshall.

5. In the professional judgment of counsel for Mr. Marshall, the legal issue raised by the

government in its interlocutory appeal does not present a close question; there is no legal authority for the government's argument; and this Court's ruling on the jurisdictional issues raised in the government's appeal will be affirmed. At that point, the government will have to try a case they know is going to be dismissed or dismiss the case against Graham. There being no way to predict whether the appellate court will decide the government's appeal within a month or four months or a year, it is fundamentally unfair to allow the government to delay the trial of Richard Marshall.

6. Richard Marshall is ready for trial and requests the Court to order a severance of his trial from that of John Graham. Richard Marshall asks this court to schedule a speedy and separate trial.

WHEREFORE, Defendant Marshall moves the Court to re-consider the Defendant Marshall's motion for severance; enter an order severing the trials of the two defendants; and to schedule a trial date for Richard Marshall.

Dated this 20th day of July, 2009.

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Defendant Marshall's Motion for Severance and Request for a Speedy Trial was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 20th day of July, 2009.

/s/ *Dana L. Hanna*

Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S MEMORANDUM OF LAW IN SUPPORT OF RENEWED MOTION TO SEVER TRIALS

For reasons of economy, there is a preference in the federal system for joint trials of defendants who are indicted together. Richardson v. Marsh, 481 US 200, 107 S.Ct. 1702, 95 Law Ed. 2d 176 (1987). However, Rule 14 of the Federal Rules of Criminal Procedure provides: "if it appears that a defendant or the government is prejudiced by a joinder of ... defendants ... for trial together, the Court may order an election or separate trials of counts, grant a severance of defendants, or provide other relief justice requires."

Here, the government's interest in judicial economy can no longer outweigh Defendant Marshall's right to a speedy trial. Unless the Court of Appeals eventually rules that this Court erred in its ruling, then Marshall will likely have a separate trial. Recognizing that there are no guarantees, the most likely outcome is that the government will not prevail in its interlocutory appeal, and then the government will choose not to try a case that this court has already indicated

will be dismissed. Therefore, it is unfair and unreasonable to leave Defendant Marshall in a legal limbo, detained without bond in jail without a trial date, on the off chance that the Court of Appeals will reverse this court, in the interests of an entirely speculative judicial economy.

Richard Marshall is suffering serious prejudice–lengthy detention without trial–to the detriment of his constitutional and statutory federal speedy trial rights. If this Court grants this motion to proceed in a timely way with a separate trial for Richard Marshall, and then the Court of Appeals should reverse this court's order on the jurisdiction issue, before Richard Marshall's new trial date, the Court can always reconsider the severance issue if the government were to then move to re-join the defendants.

Therefore, this Court should exercise its discretion under Rule 14 to order and schedule a separate trial for Richard Marshall.

Dated this 20th day of July, 2009.

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
HANNA LAW OFFICE, P.C.
PO Box 3080
816 Sixth Street
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com
Attorney for Defendant Richard Marshall

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum of Law in Support of Renewed Motion to Sever Trials was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 20th day of July, 2009.

/s/ *Dana L. Hanna*
Dana L. Hanna

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 08-3580 / 09-2009

United States of America,	*	
	*	
Appellant,	*	
	*	Appeal from the United States
v.	*	District Court for the District
	*	of South Dakota.
John Graham,	*	
	*	
Appellee.	*	

Submitted: April 15, 2009
Filed: July 28, 2009

Before RILEY, BENTON, and SHEPHERD, Circuit Judges.

BENTON, Circuit Judge.

A grand jury indicted John Graham on one count of first degree murder, 18 U.S.C. § 1153. The district court[1] dismissed the indictment because it failed to allege his Indian status. Months later, the district court dismissed an identical count in a later indictment. The government appeals. This court affirms.

[1] The Honorable Lawrence L. Piersol, United States District Judge for the District of South Dakota.

I.

In 2003, a grand jury charged:

> On or about the 12th day of December, 1975, near Wanblee, in Indian Country, in the District of South Dakota, the defendants, Fritz Arlo Looking Cloud, an Indian, and John Graham, a/k/a John Boy Patton, willfully, deliberately, maliciously, and with premeditation and malice aforethought, did unlawfully kill and aid and abet the unlawful killing of Annie Mae Aquash, a/k/a Annie Mae Pictou, by shooting her with a firearm, in violation of 18 U.S.C. §§ 1111, 1153, and 2.

While the indictment alleged that Looking Cloud was Indian, it did not allege Indian status as to Graham or the victim. Graham made a pretrial motion to dismiss the indictment, which the court granted. The government appeals.

In 2008, a grand jury again indicted Graham on first degree murder. Count I and II of the indictment brought new charges; Count III, the same charge as the 2003 indictment, did not allege that Graham is Indian.[2] Graham moved to dismiss all charges. The court dismissed Count III, preserving Counts I and II for trial. The government appeals the interlocutory dismissal of Count III.

---

[2] The 2008 indictment for first degree murder alleges:

> Count I: Only Graham is an Indian, citing 18 U.S.C. § 1153;
>
> Count II: Only Aquash is an Indian, citing 18 U.S.C. § 1152;
>
> Count III: Graham aided and abetted certain Indians, citing 18 U.S.C. § 1153.

Jurisdiction being proper under 28 U.S.C. § 1291 and 18 U.S.C. § 3731, this court consolidated the government's appeals from the dismissals of both the 2003 indictment and Count III of the 2008 indictment.

II.

This court reviews "*de novo* the district court's decision to grant [a] motion to dismiss the indictment." ***United States v. Keeney***, 241 F.3d 1040, 1042 (8th Cir. 2001). The Fifth Amendment states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." **U.S. Const. amend V**. Generally, the words "presentment" and "indictment" are interchangeable under the Fifth Amendment. *See* ***Hale v. Henkel***, 201 U.S. 43, 60-61 (1906).

"An indictment is sufficient if it contains 'all of the essential elements of the offense charged, fairly informs the defendant of the charges against which he must defend, and alleges sufficient information to allow a defendant to plead a conviction or acquittal as a bar to subsequent prosecution.'" ***United States v. Sohn***, 567 F.3d 392, 394 (8th Cir. 2009), *quoting* ***United States v. Cavins***, 543 F.3d 456, 458 (8th Cir. 2008).

The Indian Major Crimes Act, 18 U.S.C. § 1153, extends federal jurisdiction over specific offenses committed by Indians in Indian Country:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder . . . shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

The government argues that the district court erred in dismissing the indictments, because the failure to allege Indian status under § 1153 does not bar federal jurisdiction. *See* ***United States v. Pemberton***, 405 F.3d 656, 659 (8th Cir. 2005) (holding that "the alleged dispute over [the defendant's] Indian status did not deprive the district court of jurisdiction"); ***United States v. White Horse***, 316 F.3d 769, 772 (8th Cir. 2003) (concluding that the defendant's "assertion that he is an Indian is relevant to the matter of proof but irrelevant on the matter of jurisdiction"). *See also* ***United States v. Beck***, 250 F.3d 1163, 1165 (8th Cir. 2001) ("jurisdictional" elements such as an interstate nexus are not truly jurisdictional because they do not affect a court's constitutional or statutory power to adjudicate a case). *Pemberton* and *White Horse* establish that the court has subject matter jurisdiction; however, they do not control the issue in this case – whether the indictments sufficiently state a violation of § 1153.

The Tenth Circuit considered the sufficiency of an indictment that failed to allege a defendant's Indian status under the Indian Country Crimes Act, 18 U.S.C. 1152.[3] ***United States v. Prentiss***, 206 F.3d 960, 962 (10th Cir. 2000), *rev'd on other grounds*, 256 F.3d 971, 985 (10th Cir. 2001) (en banc). The panel reversed the conviction, holding "the Indian status of the defendant and victim are essential elements under 18 U.S.C. § 1152, which must be alleged in the indictment and established by the government at trial. Because [the defendant's] indictment did not allege these elements, it is insufficient." ***Id***. at 966. *Accord* ***United States v. Hilderbrand***, 261 F.2d 354, 357 (9th Cir. 1958) (dismissing an § 1153 indictment that "did not allege that appellant or victim of the accused was an Indian").

[3] The Indian Country Crimes Act, 18 U.S.C. § 1152, provides federal jurisdiction for crimes occurring within Indian country between an Indian and a non-Indian.

In a Ninth Circuit case, the defendant argued, post-trial, that the § 1153 indictment was defective because it failed to state that he was an Indian. ***United States v. James***, 980 F.2d 1314, 1316 (9th Cir. 1992). The court noted that "[w]hen the indictment is questioned *prior* to trial, reference to a statute cannot cure a defect in the indictment where it fails to allege the elements of the crime." ***Id***. at 1318, *citing* ***United States v. Kurka***, 818 F.2d 1427, 1431 (9th Cir. 1987). By "the liberal standard of review" for an indictment challenged post-trial, however, the indictment "adequately" alleged the necessary elements of the crime by including a reference to the statute. ***Id***.

In this case, Graham's pretrial motions challenged the sufficiency of the failure to allege his Indian status. The plain language of § 1153 covers any "Indian" who commits murder. This court concludes that the indictments are deficient because Graham's Indian status is an essential element of § 1153.

The government also argues that the court erred in dismissing the indictment because Graham can be charged as an aider-and-abettor. Looking Cloud was properly indicted under § 1153. *See* ***United States v. Looking Cloud***, 419 F.3d 781, 785 n.3 (8th Cir. 2005). The government claims that liability extends to Graham without an allegation of Indian status. The law provides that

> a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> b) Whoever willfully causes an act to be done which if directly performed by him or another person would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2.

The government cites no authority applying aider-and-abettor liability in the Indian law context. *See* ***United States v. Rector***, 538 F.2d 223, 225 (8th Cir. 1976) (stating that 18 U.S.C. § 2 is generally applicable to the entire criminal code); ***United States v. Sigalow***, 812 F.2d 783, 785 (2d Cir. 1987) ("A defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense."); ***United States v. Standefer***, 610 F.2d 1076, 1085 (3d Cir. 1979) (en banc) (affirming conviction of private citizen as aider and abettor under statute prohibiting government officials from receiving gifts); ***United States v. Lester***, 363 F.2d 68, 73 (6th Cir. 1966) (affirming convictions for aiding and abetting police officers in conspiracy even though defendants could not act under "color of law").

This court has considered accomplice liability under the Indian Major Crimes Act. ***United States v. Norquay***, 905 F.2d 1157, 1159-63 (8th Cir. 1990). There, the defendant, an Indian, pled guilty to burglary under § 1153. This court addressed whether he should be sentenced under Minnesota or federal law. The defendant argued that, because his non-Indian accomplice could be prosecuted only under Minnesota law, he should be sentenced under Minnesota law to avoid disparate treatment. This court reasoned that Federal Sentencing Guidelines applied, but agreed that the accomplice could not be federally prosecuted:

> Defendant is correct that his non-Indian accomplice is outside the reach of federal jurisdiction because the victim of the burglary was also a non-Indian. *United States v. McBratney*, 104 U.S. 621, 26 L. Ed. 869 (1881) (Congress did not assume jurisdiction over crimes committed within Indian country by non-Indians against other non-Indians in 18 U.S.C. § 1152 and therefore the states have jurisdiction over these offenses) (*McBratney*); *see United States v. Antelope*, 430 U.S. 641, 644 n.4, 97 S.Ct. 1395, 1397 n.4, 51 L. Ed. 2d 701 (1977).

Id. at 1162. *Accord* ***United States v. Dodge***, 538 F.2d 770, 775-76 (8th Cir. 1976) (reversing burglary conviction involving non-Indians for lack of jurisdiction); ***United***

States v. Torres, 733 F.2d 449, 453 n.1 (7th Cir. 1984) (noting that a non-Indian, who allegedly conspired to murder a non-Indian, was not prosecuted under §§ 1153 or 2).

Based on *Norquay*, § 2 does not extend federal jurisdiction to an accomplice charged under § 1153. The counts in both indictments failed to allege Graham's Indian status, which cannot be cured by an application of aider-and-abettor liability.

III.

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 08-3580/09-2009

United States of America,

Plaintiff - Appellant

v.

John Graham,
also known as John Boy Patten,

Defendant - Appellee

Appeal from U.S. District Court for the District of South Dakota
(5:03-cr-50020-LLP-2)
(5:08-cr-50079-LLP-1)

JUDGMENT

These appeals from the United States District Court were submitted on the record of the district court, briefs of the parties and argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

July 28, 2009

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

FILED
JUL 30 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER FOR TRIAL
JOHN GRAHAM, a/k/a John Boy Patton; and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendant.	*	

In accordance with the Opinion of the Eighth Circuit Court of Appeals, a trial date is required in the above action. Accordingly,

IT IS ORDERED:

1. That September 4, 2009, is hereby set as the deadline for submission to the Court of any proposed plea agreement.

2. Numerous motions in limine have already been filed. If any more motions in limine are to be filed, they shall be filed with the Court in writing, together with proposed instructions, by August 21, 2009.

3. That the jury trial herein for Defendants shall commence in Rapid City, South Dakota, on Tuesday, October 6, 2009, with counsel to be present for motions in limine at 9:00 A.M., and with the jury to report at 9:30 A.M.

Dated this 30th day of July, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: _____
DEPUTY

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S MOTION TO DISMISS INDICTMENT FOR FAILURE TO CORRECT FALSE TESTIMONY TO GRAND JURY

NOW COMES the defendant Richard Marshall, by and through his attorney Dana L. Hanna, and pursuant to his constitutional rights under the Fifth Amendment, hereby moves the court to dismiss the indictment, on the grounds that the government failed to correct false testimony presented by a government witness to the grand jury, knowing that said testimony was false.

In support of the motion, Dana L. Hanna, attorney for the defendant, hereby affirms:

1. I am court appointed legal counsel for the defendant Richard Marshall and I make these factual affirmations on the basis of information and belief, based on the transcript of the grand jury testimony of Arlo Looking Cloud, which I have read and reviewed, and upon the official court records in the trial and appeal of Arlo Looking Cloud.

2. On August 20th, 2008 the government presented the testimony of cooperating witness and convicted murderer Fritz Arlo Looking Cloud to a grand jury investigating the murder of Anna Mae Aquash in December of 1975. Based on Looking Cloud's testimony, the grand jury

returned an indictment against Richard Marshall for murder.

3. When he testified before the grand jury, the government allowed Looking Cloud to give false exculpatory testimony in which he denied his own his own culpability for the murder of Aquash. As he had done in trial on appeal, Looking Cloud denied any prior knowledge or intent to murder Anna Mae Aquash. Specifically, he testified: "I never expected anything." [Grand Jury transcript, Page 29, Lines 14-15].

4. The government prosecutors knew or should have known that that testimony from Looking Cloud was false. His prior knowledge and specific intent to murder Aquash were and are proven judicial facts.

5. After Looking Cloud gave that false testimony, the government's prosecutors allowed the witness to leave the grand jury without correcting his false testimony or taking any remedial action. Instead, they let the lie stand unchallenged.

6. The government's failure to correct testimony that it knew or should have known was false constituted prosecutorial misconduct that encroached on the grand jury's independent judgment and substantially impaired the integrity of the grand jury's fact finding process.

WHEREFORE, the defendant Marshall moves the court to enter an order dismissing the indictment.

Dated this 4th day of August, 2009.

(Signature block on next page)

RICHARD MARSHALL, defendant

BY: */s/ Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Motion to Dismiss Indictment for Failure to Correct False Testimony to the Grand Jury upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
robert.mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 4th day of August, 2009.

/s/ Dana L. Hanna
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS INDICTMENT FOR FAILURE TO CORRECT FALSE TESTIMONY TO GRAND JURY

FACTUAL BACKGROUND

In 2004, after a jury trial, Fritz Arlo Looking Cloud was convicted of first degree murder. In arriving at their verdict of guilty, the jury had to find that the evidence proved beyond a reasonable doubt that Looking Cloud had either killed or aided others in killing Anna Mae Pictou Aquash in December 1975, and that he had acted with malice, premeditation and with specific intent to murder her. Both the jury and the Court of Appeals rejected Looking Cloud's claims that he had no prior knowledge or intent to murder Aquash. In affirming his conviction, the Court of Appeals specifically ruled that the evidence presented in trial proved that Looking Cloud had acted with premeditation, malice and with specific intent to murder of Aquash. United States v. Looking Cloud, 419 F.3d 781 (8th Cir. 2005).

On August 20th, 2008 the government, in seeking to indict Richard Marshall, presented the testimony of Looking Cloud to a grand jury investigating the murder of Anna Mae Aquash.

During his testimony, the government did not adduce any testimony from Looking Cloud that he had been convicted of Aquash's murder, or that he was serving a life sentence for her murder, or that he had a pending motion to set aside his conviction.[1] Nor did the government present any questions to Looking Cloud concerning his own prior knowledge or intent to aid in the murder of Aquash. Instead, prosecutors allowed Looking Cloud to once more attempt to convey the impression that he had no prior knowledge of a plan to kill Aquash or any intent to aid in the commission of a murder. At the conclusion of his testimony, Looking Cloud volunteered this testimony to the grand jury: "I never expected anything." [Grand Jury transcript, Page 29, Lines 14-15].

Defendant Marshall submits that that statement, made under oath to the grand jury, was false; that the government prosecutors knew it was false; that Looking Cloud's guilt and murderous intent were facts material to the grand jury's investigation; that the government prosecutors had a duty to correct their witness's false testimony; and that they took no action to correct Looking Cloud's false testimony.

Given the facts of Looking Cloud's conviction for first degree murder and the Court of Appeals' ruling that Looking Cloud's prior knowledge and murderous intent were facts proven beyond a reasonable doubt, the government's prosecutors knew or should have known that Looking Cloud's exculpatory testimony that he had no prior knowledge or any intent to murder Aquash was false, in fact and as a matter of law. It was, and is, a proven judicial fact that Looking Cloud acted with malice and premeditation and with specific intent to bring about

---

[1] Looking Cloud's motion to set aside his conviction is presently pending before this court under Civil Docket No.06-05062.

Aquash's murder.

Nevertheless, the government allowed Looking Cloud to leave the grand jury without correcting his false testimony. Based on the testimony of Looking Cloud, that grand jury returned an indictment charging Richard Marshall with first degree murder.

The defendant Richard Marshall now moves to dismiss the indictment on the grounds that the government's prosecutors' failure to correct Looking Cloud's false testimony was constitutional error that interfered with the grand jury's independence and impaired the integrity of the grand jury proceeding, thereby depriving the defendant of his Due Process right to fundamental fairness and to his Fifth Amendment right to be tried on an indictment presented by an independent and unbiased grand jury.

I.

A GOVERNMENT PROSECUTOR HAS A CONSTITUTIONAL AND ETHICAL DUTY TO CORRECT TESTIMONY HE KNOWS TO BE FALSE, EVEN IF ITS INTRODUCTION WAS NOT KNOWING OR INTENTIONAL.

"[T]he government is under a duty not to present perjured testimony to the grand jury knowingly, or to mislead the grand jurors", United States v. Smith, 552 F.2d 257, 261 (8th Cir. 1977)(internal citations omitted).

The United States Supreme Court has held that a government prosecutor has a duty to correct testimony he knows to be false, even if the false testimony was not adduced by the prosecutor, and even if its introduction was not knowing or intentional. Giglio v. United States, 405 US 150, 92 S.Ct. 763 (1972); Napue v. Illinois, 360 US 264, 79 S.Ct. 1173 (1959).

The use by the government of evidence that it knows or should know is false violates the

fundamental fairness guarantee of the Due Process Clause. Napue v. Illinois, 360 US 264, 79 S.Ct. 1173 (1959).

It is unethical for a prosecutor knowingly to use false or perjured testimony before either a court or a grand jury. DR 7-102(A)(4) of the Code of Professional Responsibility provides that in his representation of a client, a lawyer shall not "[k]nowingly use perjured testimony or false evidence."

Accordingly, a prosecutor who has presented a witness who gives testimony that the prosecutor knows is false has a duty to "take remedial measures" to correct the false testimony if he learns during the proceedings that the evidence is false. Rule 3.3(a)(4) and (h), Model Rules of Professional Conduct.

Here, as soon as Looking Cloud falsely testified that "I didn't expect anything", the government had an affirmative duty to correct that misleading and false statement. Instead, they allowed the witness to mislead the grand jury. When the government fails to correct testimony from one of its witnesses that it knows to be false, even if the government did not ask the question that led to the false testimony, the government uses false testimony, and the use by the government of false testimony is a denial of due process of law. Napue v. Illinois, 360 US 264, 79 S.Ct. 1173 (1959); Giglio v. United States, 405 US 150, 92 S.Ct. 763 (1972).

Most courts assume that knowing use of perjured or false testimony will invalidate an indictment unless there is sufficient untainted evidence to support the charges. See, e.g., United States v. Fuertado, 191 F.3d 420, 425 (4th Cir. 1999), cert. denied 120 S.Ct. 1840 (2000); United States v. Spillone, 879 F.2d 514, 525 (9th Cir. 1989); United States v. Basuto, 497 F.2d, 785 (9th Cir. 1974); United States v. Roth, 777 F.2d 1200, 1205 (7th Cir. 1985); United States v. DeLeo,

422 F.2d 487, 494 (1st Cir. 1970); Coppredge v. United States, 311 F.2d 128, 131-32 (D.C. Cir. 1962); United States v. DiBernado, 775 F.2d 1470, 1475 (11th Cir. 1985); United States v. Hogan, 712 F.2d 757, 761-62 (2d Cir. 1983).

Although a prosecutor has no duty to present exculpatory evidence to the grand jury and the grand jury need only hear the prosecutor's side of the case, United States v. Williams, 504 US 36, 51-52 (1992), it is nevertheless indisputable that "a prosecutor may not deliberately mislead a grand jury or instill false impressions to it in an effort to obtain an indictment." United States v. Red Elk, 955 F.Supp. 1170, 1182 (D.S.D. 1997).

II.

BOTH TO VINDICATE A CONSTITUTIONAL RIGHT AND TO PROPERLY EXERCISE ITS SUPERVISORY POWER, THE COURT HAS THE AUTHORITY TO DISMISS AN INDICTMENT WHEN THE GOVERNMENT FAILED TO CORRECT A WITNESS'S FALSE TESTIMONY TO A GRAND JURY WHEN THE GOVERNMENT KNEW OR SHOULD HAVE KNOWN SUCH TESTIMONY WAS FALSE.

The court has the authority to dismiss an indictment tainted by the government's use of testimony that it knows to be false. That authority is derived from two sources: the court's authority to enforce and vindicate constitutional rights and the court's inherent supervisory powers to protect the integrity of the proceedings. United States v. Red Elk, 955 F.Supp.1170, 1182 (D.S.D. 1997), *citing* United States v. Derosa, 783 F.2d 1401, 1404 (9th Cir.) *cert denied* 477 US 908 (1986).

The Fifth Amendment of the United States Constitution guarantees that "no person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a Grand Jury..." United States Constitution, Amendment 5. A court may dismiss

an indictment if it perceives constitutional error that interferes with the grand jury's independence and the integrity of the Grand Jury proceeding. United States v. Red Elk, above. An indictment may be dismissed on constitutional grounds for prosecutorial misconduct if there is a showing of "flagrant error" that significantly infringes on the ability of the grand jury to exercise independent judgment and actually prejudices the defendant. Bank of Nova Scotia v. United States, 487 US 250, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1998).

To warrant a dismissal on the ground of constitutional error, the prosecutorial misconduct "must significantly infringe upon the grand jury's ability to render an independent judgment." United States v. Red Elk, above. Constitutional error is found "where the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice" to the defendant. Bank of Nova Scotia, 487 US at 257, 108 S.Ct. at 2374-75.

A court may also dismiss an indictment under its own supervisory powers "because of misconduct before the grand jury, at least where [the] misconduct amounts to a violation of one those 'few, clear rules that were carefully drafted and approved by [the Supreme] Court and by Congress to ensure the integrity of the Grand Jury's functions.'" United States v. Williams, 504 US 3646, 112 S. Ct. 1735, 1741-42 (1992) *quoting* United States v. Mechnik, 475 US 66, 74, 106 S. Ct. 938, 943-44 (1988) (O'Connor, J. concurring in judgment). Before dismissing an indictment pursuant to its supervisory power, "a court must first find that the defendant was actually prejudiced by the misconduct alleged, that the misconduct substantially influenced the grand jury's decision to indict or prove that there is grave doubt that the decision to indict was free from the substantial influence of the misconduct." Bank of Nova Scotia, 487 US at 256, 108

S. Ct at 2374.

Therefore, if this court finds that the prosecutor allowed Looking Cloud to make a false declaration before the grand jury, without correcting that false declaration, this court has the authority under its supervisory power to ensure the integrity of the grand jury process by dismissing the indictment.

Before dismissing an indictment pursuant to its supervisory power, "a court must first find that the defendant was actually prejudiced by the misconduct alleged, that the misconduct substantially influenced the grand jury's decision to indict or prove that there is grave doubt that the decision to indict was free from the substantial influence of the misconduct." Bank of Nova Scotia, 487 US at 256, 108 S. Ct at 2374.

Here, there was prejudice and real impairment of the integrity of the fact finding process. By allowing Looking Cloud's false exculpatory testimony–"I never expected anything"–taken in the context of his entire testimony, the government's failure to take remedial measures to cure the false testimony allowed Looking Cloud to portray himself in a false light. The government's failure to cure its witness's false statement misled the grand jury. When Looking Cloud gave his false testimony, the government did not contest his statement, or invite the grand jurors to question the witness, nor did the government advise the grand jury that that part of his testimony was false. They took no action. They excused Looking Cloud and let his lie stand unchallenged.

Here, the grand jury heard no other evidence, other than the tainted testimony of Looking Cloud, that was competent to sustain the indictment against Richard Marshall. Looking Cloud's perjury was material. Where the entire evidence to support an indictment comes from a single witness who gives false testimony that he himself was innocent of the crime about which he was

testifying, that knowing use of false and perjured testimony by the government cannot be harmless.

In United States v. Williams, 504 US 36, 112 S.Ct.1735 (1992) the court stated, at 504 US 46, that "Bank of Nova Scotia v. United States, 487 US 250, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1998), makes clear that the supervisory power can be used to dismiss an indictment because of misconduct before the grand jury, at least where that misconduct amounts to a violation of one of those 'few, clear rules which were carefully drafted and approved by this court and by Congress to ensure the integrity of the grand jury's function,'" quoting United States v. Mechnik, 475 US 66, 74, 106 S. Ct. 938, 943 (1986) (O'Connor, J., concurring). One of those "few, clear rules" created by Congress is 18 U.S.C. § 1623, the statute which criminalizes false declarations before a grand jury. Looking Cloud's testimony denying any foreknowledge of Aquash's murder was perjury. Perjury is an intention, voluntary and knowing false statement under oath. United States v. Johnson, 767 F.2d 1259 (8th Cir. 1995).

Simply stated, when Arlo Looking Cloud testified that he "never expected anything", Looking Cloud committed a crime and the government let him get away with it.

This court should ensure the integrity of the grand jury's function, and vindicate Richard Marshall's constitutional right to be tried upon an indictment brought by an independent, unbiased grand jury, by dismissing the indictment.

DATED: August 4, 2009

(Signature block on next page)

Respectfully submitted,

VINE RICHARD MARSHALL, Defendant

BY: */s/ Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Memorandum of Law in Support of Motion to Dismiss Indictment for Failure to Correct False Testimony to a Grand Jury upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
robert.mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 4th day of August, 2009.

/s/ Dana L. Hanna
Dana L. Hanna

FILED
AUG 10 2009
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION TO SEAL

Defendant requests that Defendant Graham's *Ex Parte* Motion for Issuance of Subpoenas, as well as the Court's order relating to that motion, and all returns/proofs/affidavits of service generated in connection with the service of these documents, be placed under seal. Further, Defendant asks that the U.S. Marshall's Service be instructed not to discuss the names of any witness served, nor the content of this motion, with any party.

The basis for this request is that the determination as to which witnesses to subpoena is attorney work product that should be protected. There is no alternative procedure available to the defense that would protect its work product.

Respectfully submitted August 7, 2009.

John R. Murphy: Counsel for Defendant
328 E. New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S MOTION FOR ACCESS TO JUROR QUESTIONNAIRES

Defendant Richard Marshall moves this Court for its Order giving permission for Dana L. Hanna to receive copies of juror questionnaires submitted by the prospective jury panels in the above-referenced matter for the purpose of preparing for trial. Defendant asks that these questionnaires be provided to him as soon as they have been compiled by the Clerk of Court.

Dated this 10th day of August, 2009.

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

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PO Box 3080
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(605) 791-1832
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CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Motion for Access to Jury Questionnaires was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 10th day of August, 2009.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
AUG 11 2009
CLERK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

ORDER TO SEAL DEFENDANT MARSHALL'S MOTION TO DISMISS INDICTMENT RE: GRAND JURY AND MEMORANDUM IN SUPPORT OF MOTION TO DISMISS INDICTMENT

Upon Motion of the United States and good cause having been shown, it is hereby

ORDERED, that the Motion to Seal Defendant Marshall's Motion to Dismiss Indictment Re: Grand Jury and Memorandum in Support of Motion to Dismiss Indictment in the above-entitled matter be sealed until it is ordered unsealed.

Dated this 10th day of August, 2009.

BY THE COURT:

Lawrence L. Piersol
US District Court Judge

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 DEFENDANT MARSHALL'S OPPOSITION TO GOVERNMENT MOTION TO SEAL MOTION [DOCUMENT 427]

The government has made a motion to seal the defendant's motion to dismiss the indictment and his memorandum of law [document 427]. As grounds for the motion, the government states that sealing is necessary to protect witnesses and to compel defense counsel's compliance with Rule 6(e) of the Federal Rules of Criminal Procedure. Defendant Marshall opposes the government's motion to seal on the following grounds: first, it has long been an acknowledged fact by the government that Fritz Arlo Looking Cloud is a cooperating government witness in the case against Richard Marshall. Secondly, Rules 6(e)(2)(A) of the Federal Rules of Criminal Procedure provides: "No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)". Rule 6(e)(2)(B) does not impose an obligation of secrecy on defense counsel. Therefore, reference to or a quotation from testimony given by a witness in the grand jury in a motion filed by defense counsel is not a violation of Rule 6(e)'s grand jury secrecy requirements. There is no basis in law for sealing the motion or memorandum.

WHEREFORE, the government's motion to seal should be denied.

Dated this 11th day of August, 2009.

(Signature block on next page)

RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

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Attorney for Defendant Marshall
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(605) 791-1832
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CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Opposition to Government Motion to Seal Motion was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 11th day of August, 2009.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN GRAHAM, aka JOHN BOY PATTON, and VINE RICHARD MARSHALL, aka RICHARD VINE MARSHALL, aka DICK MARSHALL, Defendants.	)	CR. 08-50079-01, -02 ORDER ON DEFENDANT'S MOTION FOR ACCESS TO JUROR QUESTIONNAIRES

Defendant Richard Marshall has filed a motion seeking an order from the court granting him permission to receive copies of the juror questionnaires submitted by the prospective jury panels in this matter for the purpose of preparing for trial. [Docket 426]. Mr. Graham would like access to these questionnaires as soon as the Clerk of Court has compiled them.

Good cause appearing, it is hereby

ORDERED that the office of the Clerk of Court notify the government, Mr. Graham, and Mr. Marshall as soon as the juror questionnaires for the jury panel(s) that will be called in this matter are available. All parties may review these questionnaires when they are soonest available in the Clerk's Office or in adjacent quarters in the federal building.

NOTICE OF RIGHT TO APPEAL

Pursuant to 28 U.S.C. § 636(b)(1)(A), any party may seek reconsideration of this order before the district court upon a showing that the order is clearly erroneous or contrary to law. The parties have ten (10) days after service of this order to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. See Fed. R. Crim. P. 58(g)(2). Failure to file timely objections will result in the waiver of the right to appeal questions of fact. Objections must be timely and specific in order to require review by the district court.

Dated August 14, 2009.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
AUG 19 2009
CLERK

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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S MOTION FOR EVIDENTIARY HEARING ON DESTRUCTION OF EVIDENCE AND FOR SANCTIONS

NOW COMES Defendant Richard Marshall, by and through his attorney Dana L. Hanna, and pursuant to his Fifth Amendment right to due process of law, hereby moves the court to order an evidentiary hearing to determine the facts concerning the destruction of evidence in this case by Denver Police Department in a joint state and federal investigation into the murder of Anna Mae Aquash, and to order appropriate sanctions against the government and remedies for the defendant. Defendant Marshall further moves the court to order the government to disclose to the defendant all information and records known to the government or its agents, including the Denver Police Department, concerning the destruction of said evidence.

As grounds for the motion, attorney Dana L. Hanna, counsel for the defendant, hereby affirms:

1. I make these factual affirmations on the basis of information and belief, the primary sources of which are the newspaper article that appeared in the *Rocky Mountain News* on August

21, 2003 under the headline "Police Mixup Destroys Evidence–Case Involves 1975 Slaying of Activist" [Exhibit A, attached hereto] and the discovery provided to me by the government.

2. From 1994 to 2003 Denver Police Detective Abe Alonzo worked directly with investigators from the FBI, the BIA, and the US Marshall's office in a joint federal-state investigation into the murder of Anna Mae Aquash in December 1975. Since many of the witnesses and a main suspect, Arlo Looking Cloud, lived in Denver, much of the active investigation in this case from 1994 to 2003 was conducted by Detective Abe Alonzo. During the course of his investigation, Detective Alonzo personally interviewed and questioned various individuals, including Arlo Looking Cloud, who will be government witnesses in the trial of Richard Marshall.

3. Standard police practice and procedures would have required Detective Alonzo to make records, writings and police reports detailing statements made by witnesses and suspects in the investigation, including Looking Cloud. Alonzo tape-recorded interviews with witnesses and had those interviews transcribed.

4. In 2003, government officials in South Dakota contacted Denver Police, requesting copies of their tapes and evidence in the case. Armedia Gordon, the Denver Police Department's Chief of Investigations, was quoted in the *Rocky Mountain News* as saying: "They lost everything, so they came back to Abe [Alonzo] asking the question." When Detective Alonzo went to the police property bureau to recover the tapes, he learned that they had been destroyed in 2001 by the Police Department.

5. Denver police officials have asserted that, with the help of inventory records, copies of some, but not all, of the destroyed evidence had been found in the homicide unit's computers.

Inventory records in the possession of the Denver Police Department would contain information as to what evidence had once existed, and could assist the court in determining what evidence has been destroyed and lost.

6. This information concerning the destruction of evidence by police in Denver was never disclosed to the defense in the discovery process. I learned of the destruction of the evidence in the case from non-governmental sources during the course of my own investigation.

7. I have good reason to believe that the Denver Police Department's destruction of evidence has deprived Richard Marshall of material exculpatory evidence. There is a strong likelihood that the evidence that was destroyed contained evidence that Defendant Marshall could have used to impeach the testimony of Arlo Looking Cloud, who is now the government's key witness against Marshall. Looking Cloud has a 15 year history, since he first began cooperating with the federal agents in 1994, of making contradictory statements to investigators, particularly false exculpatory statements with regard to his own lack of prior knowledge or criminal intent to murder Aquash. Any and all prior statements made by Looking Cloud to Detective Alonzo or other officers before his arrest would in all likelihood contradict the version of facts he is now giving to the government concerning Richard Marshall and could be used to discredit his testimony at trial.

8. An evidentiary hearing is necessary to determine exactly what evidence was destroyed by police, why such evidence was destroyed, and whether the destruction of evidence has permanently deprived Mr. Marshall of material favorable evidence that he could have used to discredit Looking Cloud and other government witnesses. If the court determines that material exculpatory evidence was destroyed and a violation of due process of law has occurred, then the

court would have to consider ordering appropriate sanctions and remedies, which could include dismissal of the indictment.

WHEREFORE Defendant Richard Marshall moves the court to order :

(1) that an evidentiary hearing be held to enable the court to determine the facts concerning the loss of evidence by the government and/or destruction of evidence by the Denver Police Department in 2001;

(2) that the government produce and disclose a full report to the court and the defendant on the destruction of this evidence, including a description and listing of the evidence that was destroyed;

(3) appropriate sanctions against the government for the destruction of evidence, based on the facts and evidence that will be adduced in the hearing; and

(4) for all other relief the court deems appropriate.

Dated this 19th day of August, 2009.

VINE RICHARD MARSHALL, Defendant

BY: _____

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Motion for Evidentiary Hearing on Destruction of Evidence and for Sanctions on the other parties in this case by mailing the same to attorneys of record at the addresses listed below:

Marty J. Jackley
United States Attorney
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Sioux Falls, SD 57101

Robert Mandel
Assistant United States Attorney
515 Ninth Street, #201
Rapid City, SD 57701

John Murphy
Murphy Law Office
328 E. New York St., #1
Rapid City, SD 57701

Dated this 19th day of August, 2009.

Dana L. Hanna

EXHIBIT A

1. POLICE MIXUP DESTROYS EVIDENCE CASE INVOLVES 1975 SLAYING OF ACTIVIST

Article from:

Rocky Mountain News

Article date:

August 21, 2003

Author:

Sarah Huntley and Karen Abbott ROCKY MOUNTAIN NEWS

More results for:

"abe alonzo"

Denver police officials are investigating whether evidence in the 1975 slaying of American Indian activist Anna Mae Pictou-Aquash is missing as a result of confusion over inventory records.
The Rocky Mountain News has learned that several tapes stored in the police department's property bureau were destroyed in 2001 after a homicide lieutenant was unable to link them to any known case.
Copies of at least some of the tapes have been recovered.
Armedia Gordon, division chief of investigations, said the mistake came to the department's attention last week when federal authorities asked Detective **Abe Alonzo** for new copies of the evidence.
Copies of all the department's evidence had been forwarded to the feds years ago when the case was transferred from Denver, where Pictou-Aquash was abducted, to South Dakota, where her body was found.
"They lost everything, so they came back to Abe asking the question," Gordon said.
When Alonzo went to the property bureau, he was told there were no tapes. In their place he found an order signed by Lt. Jon Priest authorizing the destruction of the evidence.
Gordon said Priest signed off on the order after receiving an incomplete - and erroneous - invoice from the property bureau's computer. The bureau forwards invoices to investigators every 13 months to determine whether evidence should still be preserved.
The computer printout given to Priest listed a 2000 date and an address in northwest Denver, neither of which appeared to be connected to Pictou-Aquash's death.
"It doesn't show the victim's name or the officer's name or any of that," Gordon said.
Some records associated with the evidence included a badge number, but the number belongs to a vice detective - not the detective assigned to the case.
"I don't think Priest thought there was any way to identify where this case belonged," Gordon said. "Somehow all the information didn't get transferred over (into the computer) . . . This is just

an error that needs to be checked out."
When the lieutenant learned of the mix-up, he was able to retrieve duplicate copies of at least some of the tapes from the homicide unit's archives, she said.
The unit is methodical about preserving its own archives, which are kept separate from the property bureau. Evidence in old cases is maintained indefinitely in the hope that new leads could result in an arrest.
"My understanding is that the critical evidence was found," Gordon said. "Whether it was everything, I'm not clear on."
Alonzo, who was handling the case for the department, wasn't available for comment.
Gordon said she is reviewing original inventory records to determine whether any tapes were irretrievable."I really hope that all is not lost," she said.
Federal officials in South Dakota, where two men face federal murder charges for Pictou-Aquash's death, couldn't be reached Wednesday.
Arlo Looking Cloud, of Denver, and John Graham, of Canada, also known as John Boy Patton, were arrested in April in connection with Pictou-Aquash's slaying. Looking Cloud's trial is scheduled for Sept. 30. No trial date has been set for Graham.
The 30-year-old woman, who has become a revered symbol to other American Indians, allegedly was snatched from the Denver home of TroyLynn Yellow Wood in 1975 by three people, then taken to the Pine Ridge Indian Reservation in South Dakota and killed.
A rancher found the badly decomposed body of a woman in a ravine near Wamblee, S.D., in February 1976. Nobody knew who she was, and a government pathologist concluded she died of exposure. The FBI had her hands cut off and sent to Washington, D.C., for identification. The rest of the body was buried in a pauper's grave.
A judge later ordered the body exhumed, and a second autopsy uncovered a bullet in the back of Pictou-Aquash's head.
Three grand juries reviewed the case. A fourth grand jury indicted Looking Cloud and Graham in March.
The long-unsolved murder has divided American Indian activists and the Pine Ridge reservation for decades. Rumors have circulated since her death that Pictou-Aquash may have been killed by other American Indian Movement members who believed she was an FBI informant, or by the real informants - perhaps with FBI knowledge - for fear she would disclose their identities.
Some AIM leaders even have accused each other of involvement in her death.
It was unclear Wednesday what effect, if any, the evidence mix-up in Denver would have on the federal prosecution. None of the physical evidence in the case was affected.
But Gordon acknowledged there could be unintended consequences.
"We were able to find evidence that was listed as destroyed in the homicide archives," she said. "But if this case is later lost, good Lord, people will be pointing to this and who knows what else."

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
AUG 19 2009
CLERK

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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR EVIDENTIARY HEARING

FACTUAL BACKGROUND

The arrests and prosecutions in this case resulted from a joint investigation by federal authorities and the Denver Police Department, who worked closely together for almost a decade before the investigation resulted in the first indictment in this case. Denver Detective Abe Alonzo and U.S. Marshal Robert Ecoffey began working together in 1994 to actively investigate the abduction and murder of Anna Mae Aquash. Detective Alonzo personally questioned a number of witnesses in the case between 1994 and 2003, recorded the interviews on audio-tapes and had them transcribed. According to statements made by Looking Cloud, at various times between 1994 and 2003, Detective Alonzo contacted him on several occasions and questioned him about the Aquash case. Standard police investigative procedures in a high-profile murder investigation would have required Detective Alonzo to write police reports recording statements made to him by witnesses and suspects, including Looking Cloud.

According to a high-ranking police official who was quoted in a news article in a Denver-based newspaper [Exhibit "A"], in 2003 federal authorities in South Dakota contacted Detective Alonzo and informed him that they had lost the evidence that Alonzo and the Denver police had provided to the federal authorities in South Dakota, and the federal authorities requested copies of the evidence that had been lost. When he tried to locate copies of evidence, including tapes, Detective Alonzo discovered that Denver Police had destroyed the evidence in 2001.

Although federal government agents and prosecutors must have been aware of the destruction of this evidence, the government did not disclose any information about the destruction of evidence and tapes to any of the defendants in this case. Undersigned counsel for Richard Marshall learned of the destruction of evidence by Denver police from non-governmental sources in the course of his own investigation.

Only three documents containing witness statements that were generated by Detective Alonzo have been disclosed to the defense: three transcripts of taped interviews between Alonzo and three individuals–the victim's sister, Theda Clarke's ex-husband, and a former Denver AIM supporter. Evidently, tapes of interviews between Alonzo and other witnesses have been destroyed and lost.

Defendant Marshall moves for an evidentiary hearing so he can have an opportunity to prove that material exculpatory evidence has been destroyed and lost, and that he has suffered prejudice to his constitutional trial rights.

I

THE COURT SHOULD ORDER A HEARING TO ALLOW THE DEFENDANT TO ESTABLISH THAT DENVER POLICE DESTROYED MATERIAL EXCULPATORY EVIDENCE AND THAT THE LOSS OF FAVORABLE EVIDENCE HAS PREJUDICED HIS TRIAL RIGHTS.

When the government suppresses or fails to disclose material exculpatory evidence–or, as in this case, when police destroy such evidence–the good faith or bad faith of the prosecution is irrelevant: a due process violation occurs whenever the prosecution fails to provide such evidence to the accused. Brady v. Maryland, 373 US 83, 83 S. Ct. 1194 (1963). The government's affirmative duty to disclose evidence that is favorable to the accused and material to the question of guilt extends to impeachment evidence. United States v. Barraza Cazares, 465 F. 3d 327, 333 (8th Cir. 2006), *citing* United States v. Bagley, 473 US 667, 676, 105 S. Ct. 3375 (1985).

The duty to disclose favorable material evidence necessarily includes a duty to preserve such evidence so that it can be disclosed. The leading Supreme Court case on the destruction of evidence in criminal cases is Arizona v. Youngblood, 488 US 51, 109 S. Ct. 333 (1988), a case involving the prosecution's failure to preserve semen samples from the victim's body and clothing in a sexual assault case. In that case, the Supreme Court held that there was no violation of due process where the State failed to preserve evidentiary material that was only potentially useful to the defendant, since there was no showing that the destroyed evidence was actually favorable to the defendant. The favorable nature of such evidence was merely speculative. It was "potentially useful", as opposed to demonstrably favorable. The court ruled that there is no due process violation of potentially useful, but not necessarily favorable, evidence as long as the State

destroyed the evidence in good faith. The court stated, "the Due Process Clause of the Fourteenth Amendment, as interpreted in Brady, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think that the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than it could have been subjected to tests, the results of which could have exonerated the defendant."

In California v. Trombetta, 467 US 479, 104 S. Ct. 2528 (1984), police officers who did not preserve breath samples used in a blood alcohol test were acting "in good faith and in accord with their normal practice." Again, in California v. Trombetta the case dealt with evidence that was only potentially useful since there was no way of knowing whether the destroyed samples would be helpful to the defendant or not.

This line of cases draws a distinction between the destruction of evidence that is favorable and material, which would include impeachment evidence, and evidence that is only potentially useful. If the evidence is material and favorable, destruction of such evidence constitutes a violation of due process. If the favorable nature of destroyed evidence is merely hypothetical or possible, then the defendant has the burden of showing that the evidence was not destroyed in good faith.

Here, Mr. Marshall submits that in an evidentiary hearing he would establish that valuable exculpatory evidence, including impeachment evidence, was destroyed. It is evident that tape-recordings of interviews between Alonzo and individuals who had knowledge of material facts have been lost, because tape-recordings of the three transcribed interviews done by Alonzo have not been provided to the defense. Statements made by Arlo Looking Cloud to Alonzo

would be crucial impeachment evidence because Looking Cloud has made consistently contradictory statements and false exculpatory statements about the Aquash murder since 1994.

Since the government has suppressed disclosure of any information about the destruction of such evidence, in spite of the obvious value of such information to the defense, and since the fact that evidence has been destroyed by police involved in a joint federal-state investigation cannot be denied, this court should order an evidentiary hearing to allow the court to determine the material facts and to rule on whether a constitutional violation has occurred.

II

THE DESTRUCTION OF FAVORABLE EVIDENCE BY DENVER POLICE SHOULD BE ATTRIBUTED TO THE GOVERNMENT FOR PURPOSES OF BRADY OBLIGATIONS BECAUSE THE DENVER POLICE WERE WORKING WITH FEDERAL AUTHORITIES IN A JOINT FEDERAL-STATE INVESTIGATION.

If material exculpatory evidence was destroyed by the Denver Police Department, then for purposes of Brady, the destruction and suppression of that evidence is attributable to the government, because the Denver Police Department was engaged in a joint cooperative investigation with the federal government that led to the indictments in this case.

Information and material possessed by the Denver Police Department should be considered to be in the control of the United States Attorney's Office for purposes of the disclosure requirements of Brady, regardless of whether the United States Attorney's office physically possesses such discovery material at the present time. For purposes of determining who is to be considered as part of the prosecution for Brady purposes, the "prosecution", in addition to any members of the United States Attorney's office, also includes police officers, agents and other investigatory personnel who participated in the investigation and prosecution of

the instant case. United States v. Brooks, 966 F.2d 1500, 1503 (DC Cir. 1992); Carey v. Duckworth, 738 F.2d 875, 878-79 (7th Cir. 1984). Whether a state law enforcement agency may be considered a part of a federal prosecution team depends upon the level of involvement between the United States Attorney's office and the state agency which holds the alleged Brady material. United States v. Upton, 856 F. Supp. 727, 749 (SDNY 1994). "The inquiry is not whether the United States Attorney's Office physically possesses the discovery material; the inquiry is the extent to which there was there was a "joint investigation" with another agency." Upton, 856 F. Supp. at 750. See also: United States v. Ramos-Cartagena, 9 F.Supp.2d 88 (DPR 1998). Where the cooperative activity of state officials and United States Attorneys resulted in the indictment that motivates the Brady request, Brady material in possession of state officials is considered to be in the possession of the United States Attorney for purposes of the government's duty to disclose favorable evidence to the defendant. United States v. Shakur, 543 F.Supp. 1059, 1060 (SDNY 19982); United States v. Antone, 603 F.2d 566, 569 (5th Cir. 1979).

Although in general, knowledge of Brady material or evidence in possession of state agencies is not automatically imputed to the federal government, *see* United States v. Kern, 12 F.3d 122, 126 (8th Cir. 1993), the afore-cited cases stand for the proposition that when there is a joint investigation between state and federal law enforcement agencies, knowledge and evidence in possession of the state law enforcement agency is imputed to the federal government. Where there is a joint federal-state investigation, the federal government has a duty under Brady to preserve and disclose favorable evidence in the possession of state law enforcement agencies to the defendant. If state officials acting in a joint federal and state investigation fail to preserve exculpatory evidence, then for purposes of Brady, the government has failed to preserve

exculpatory evidence and the defendant has been denied federal constitutional due process.

Here, the defendant should be granted an evidentiary hearing to establish that the evidence destroyed was in fact evidence that could have been used to impeach government witnesses, particularly Arlo Looking Cloud. The Denver Police have inventory records as to what was destroyed. According to their public statements, they have actually made efforts to determine what was destroyed. Some kind of investigation was done to determine what evidence was destroyed and that investigation undoubtedly produced records and documents. A pre-trial evidentiary hearing is necessary so the court can determine, to the extent that it can, whether or not the destroyed evidence included merely potentially useful evidence or evidence that was material favorable evidence to the defendant. Under Arizona v. Younblood if the evidence was not material exculpatory evidence but was merely "potentially useful", the defendant has the burden of showing bad faith on the part of the police in order to establish a due process violation. Here, by reason of the public admissions of the Denver Police Department, the defendant has shown a good faith basis for his belief that he can show gross negligence on the part of the police that is constitutionally equivalent to bad faith. If the evidence in a hearing shows that Denver police destroyed and lost material and favorable evidence, whether or not it was destroyed in good faith, or if the evidence was merely possibly useful, and it was destroyed in bad faith, then this court would have to determine the appropriate sanction and remedy for the constitutional violation.

Moreover, Defendant Marshall has previously filed a motion to dismiss on the grounds of pre-indictment delay. The court denied that motion on the grounds that the defendant had failed to establish actual prejudice to his ability to defend against the charge by the passage of time

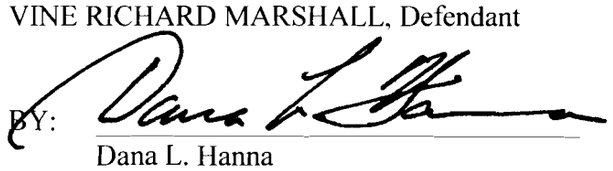
before indictment. [Doc. 96.] The destruction of favorable evidence is actual prejudice to the defendant's ability to defend against the charge.

In the interests of justice, the defendant should be given an opportunity to adduce evidence of actual prejudice to his ability to present a defense and cross-examine his accusers caused by the destruction of evidence.

Dated this 19th day of August, 2009.

Respectfully submitted,

VINE RICHARD MARSHALL, Defendant

BY: 

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
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CERTIFICATE OF SERVICE

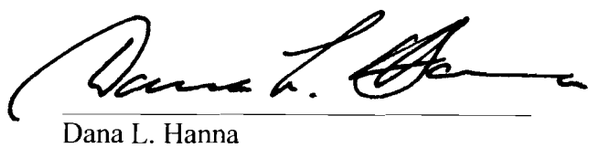
I hereby certify that I have served a true and correct copy of the foregoing Memorandum of Law in Support of Motion for Evidentiary Hearing on Destruction on the other parties in this case by mailing the same to attorneys of record at the addresses listed below:

Marty J. Jackley
United States Attorney
PO Box 2638
Sioux Falls, SD 57101

Robert Mandel
Assistant United States Attorney
515 Ninth Street, #201
Rapid City, SD 57701

John Murphy
Murphy Law Office
328 E. New York St., #1
Rapid City, SD 57701

Dated this 19th day of August, 2009.



Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
AUG 19 2009
CLERK

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.	Case No. 08-50079 DEFENDANT MARSHALL'S MOTION TO COMPEL DISCLOSURE OF IMPEACHMENT EVIDENCE

NOW COMES Defendant Richard Marshall, by and through his attorney Dana L. Hanna, pursuant to the Due Process Clause of the Fifth Amendment, and hereby moves the court to order the government to identify, gather and disclose to the defendant all evidence, records, police reports and information in the possession and control of Denver Police Department concerning statements made by Arlo Looking Cloud, or any other person, to any officer or detective of the Denver Police Department that is favorable to the defendant, including evidence and information that can be used to impeach the credibility of Looking Cloud or any other government witness. Mr. Marshall further moves for all records, evidence and information concerning the destruction of reports, tapes and other evidence in this case by the Denver Police Department in 2001.

In support of this motion, Dana L. Hanna, attorney for the defendant, hereby affirms:

1. On August 28, 2008, this court ordered that the prosecution "shall forthwith disclose to the defendant any exculpatory material discoverable under Brady v. Maryland, 373 US 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)." [Doc. #14.] As will be set forth herein, the government has failed to comply with that order. The government has suppressed and failed to disclose favorable evidence that is, or was, in the possession of the Denver Police Department to the accused. Furthermore, the government has suppressed or failed to disclose evidence and information

concerning the loss and destruction of evidence by Denver police.

2. From 1994 to 2003, the Denver Police Department and federal investigators worked together in a joint cooperative investigation into the murder of Anna Mae Aquash in December 1975. There is–or was–evidence and information in the possession of the Denver Police Department that can–or could have been–used to impeach the testimony of Arlo Looking Cloud and other prosecution witnesses. In 2001, the Denver police destroyed evidence, including tape recordings, that had been gathered during 7 years of investigation.

3. Beginning in 1994 until he arrested Looking Cloud in 2003, Detective Abe Alonzo was the lead investigator at the Denver Police Department in the joint federal-state investigation into the Aquash murder. During that time period, Detective Alonzo personally questioned and interviewed witnesses; he tape-recorded witness interviews and had them transcribed.

4. In 2001, Denver police destroyed tapes and evidence that they had acquired from 1994 to 2001 in the investigation into the murder of Anna Mae Aquash. [See: Exhibit "A", *Rocky Mountain News* article: "POLICE MIXUP DESTROYS EVIDENCE".] Some time after the destruction of this evidence was discovered in 2003, his superiors removed Detective Alonzo from the Aquash investigation.

5. Although government prosecutors were aware of the destruction of evidence in this case by Denver police, the government has never to this date disclosed any information about the destruction of evidence and tapes to Mr. Marshall. Undersigned counsel for Richard Marshall discovered this information from non-governmental sources in the course of his own independent investigation. Although an investigation of the destruction of evidence was conducted by Denver police, I have been provided with no reports at all by the government concerning the destruction of evidence.

6. Defense counsel has requested the government to produce and disclose all information and evidence compiled by Denver police that could be favorable to the defendant. That request was denied, with the government asserting that the government did not possess any material generated by Alonzo or the Denver Police that had not been disclosed to the defendant. I was not told that such records and evidence are not in the possession of Denver Police Department; I was only told that the U.S. Attorney does not have any such records or evidence in its possession.

7. Only four documents created and generated by Denver Detective Alonzo have been disclosed to Mr. Marshall: an e-mail message about a press conference given by Russell Means and transcripts of three tape-recorded interviews conducted by Alonzo with Mary Lafford (sister of Anna Mae Aquash), Julian Pokrywka (ex-husband of Theda Clarke), and Frank Dillon.

8. It is a practical certainty that any statements made by Looking Cloud to Detective Alonzo will be inconsistent with the testimony Looking Cloud gave to the grand jury in 2008 and the testimony he will give at trial. Any statements made by other witnesses that conflict with Looking Cloud's testimony are exculpatory Brady evidence for Mr. Marshall. Any evidence concerning the gross negligence of the government and the Denver police in allowing the destruction of evidence in this case is exculpatory Brady material. *See*: Kyles v. Whitley, 514 US 419 (1995). Moreover, evidence of loss and destruction of evidence can be used to show actual prejudice to the defendant to give further support to the defendant's motion to dismiss for pre-indictment delay which had previously been denied by the court. [Doc. 96.]

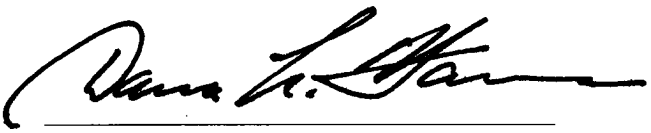
9. I have requested this impeachment evidence from the government, both in writing and in person, and the evidence and information that I requested has not been produced.

WHEREFORE Defendant Richard Marshall moves the court to order the government to gather and disclose all records, reports and information in the possession of Denver Police Department that contains any statements made by Arlo Looking Cloud or any government witness that can be used to impeach his testimony at trial; and to gather and disclose all evidence, investigative reports and inventory records concerning the destruction of evidence pertaining to the investigation of this case by Denver police in 2001.

Dated this 19th day of August, 2009.

VINE RICHARD MARSHALL, Defendant

(Signature block on next page)

BY: 

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
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CERTIFICATE OF SERVICE

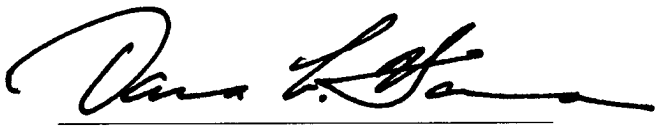
I hereby certify that I have served a true and correct copy of the foregoing Motion to Compel Disclosure if Impeachment Evidence on the other parties in this case by mailing the same to attorneys of record at the addresses listed below:

Marty J. Jackley
United States Attorney
PO Box 2638
Sioux Falls, SD 57101

Robert Mandel
Assistant United States Attorney
515 Ninth Street, #201
Rapid City, SD 57701

John Murphy
Murphy Law Office
328 E. New York St., #1
Rapid City, SD 57701

Dated this 19th day of August, 2009.



Dana L. Hanna

Exhibit A

1. POLICE MIXUP DESTROYS EVIDENCE CASE INVOLVES 1975 SLAYING OF ACTIVIST

Article from:

Rocky Mountain News

Article date:

August 21, 2003

Author:

Sarah Huntley and Karen Abbott ROCKY MOUNTAIN NEWS

More results for:

"abe alonzo"

Denver police officials are investigating whether evidence in the 1975 slaying of American Indian activist Anna Mae Pictou-Aquash is missing as a result of confusion over inventory records.
The Rocky Mountain News has learned that several tapes stored in the police department's property bureau were destroyed in 2001 after a homicide lieutenant was unable to link them to any known case.
Copies of at least some of the tapes have been recovered.
Armedia Gordon, division chief of investigations, said the mistake came to the department's attention last week when federal authorities asked Detective **Abe Alonzo** for new copies of the evidence.
Copies of all the department's evidence had been forwarded to the feds years ago when the case was transferred from Denver, where Pictou-Aquash was abducted, to South Dakota, where her body was found.
"They lost everything, so they came back to Abe asking the question," Gordon said.
When Alonzo went to the property bureau, he was told there were no tapes. In their place he found an order signed by Lt. Jon Priest authorizing the destruction of the evidence.
Gordon said Priest signed off on the order after receiving an incomplete - and erroneous - invoice from the property bureau's computer. The bureau forwards invoices to investigators every 13 months to determine whether evidence should still be preserved.
The computer printout given to Priest listed a 2000 date and an address in northwest Denver, neither of which appeared to be connected to Pictou-Aquash's death.
"It doesn't show the victim's name or the officer's name or any of that," Gordon said.
Some records associated with the evidence included a badge number, but the number belongs to a vice detective - not the detective assigned to the case.
"I don't think Priest thought there was any way to identify where this case belonged," Gordon said. "Somehow all the information didn't get transferred over (into the computer) . . . This is just

an error that needs to be checked out."
When the lieutenant learned of the mix-up, he was able to retrieve duplicate copies of at least some of the tapes from the homicide unit's archives, she said.
The unit is methodical about preserving its own archives, which are kept separate from the property bureau. Evidence in old cases is maintained indefinitely in the hope that new leads could result in an arrest.
"My understanding is that the critical evidence was found," Gordon said. "Whether it was everything, I'm not clear on."
Alonzo, who was handling the case for the department, wasn't available for comment.
Gordon said she is reviewing original inventory records to determine whether any tapes were irretrievable."I really hope that all is not lost," she said.
Federal officials in South Dakota, where two men face federal murder charges for Pictou-Aquash's death, couldn't be reached Wednesday.
Arlo Looking Cloud, of Denver, and John Graham, of Canada, also known as John Boy Patton, were arrested in April in connection with Pictou-Aquash's slaying. Looking Cloud's trial is scheduled for Sept. 30. No trial date has been set for Graham.
The 30-year-old woman, who has become a revered symbol to other American Indians, allegedly was snatched from the Denver home of TroyLynn Yellow Wood in 1975 by three people, then taken to the Pine Ridge Indian Reservation in South Dakota and killed.
A rancher found the badly decomposed body of a woman in a ravine near Wamblee, S.D., in February 1976. Nobody knew who she was, and a government pathologist concluded she died of exposure. The FBI had her hands cut off and sent to Washington, D.C., for identification. The rest of the body was buried in a pauper's grave.
A judge later ordered the body exhumed, and a second autopsy uncovered a bullet in the back of Pictou-Aquash's head.
Three grand juries reviewed the case. A fourth grand jury indicted Looking Cloud and Graham in March.
The long-unsolved murder has divided American Indian activists and the Pine Ridge reservation for decades. Rumors have circulated since her death that Pictou-Aquash may have been killed by other American Indian Movement members who believed she was an FBI informant, or by the real informants - perhaps with FBI knowledge - for fear she would disclose their identities.
Some AIM leaders even have accused each other of involvement in her death.
It was unclear Wednesday what effect, if any, the evidence mix-up in Denver would have on the federal prosecution. None of the physical evidence in the case was affected.
But Gordon acknowledged there could be unintended consequences.
"We were able to find evidence that was listed as destroyed in the homicide archives," she said. "But if this case is later lost, good Lord, people will be pointing to this and who knows what else."

FILED
AUG 19 2009
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UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL DISCLOSURE OF IMPEACHMENT EVIDENCE

The Brady rule encompasses evidence known only to police investigators and not to the prosecutors, and thus the individual prosecutor has a duty to learn of any evidence favorable to the defense that is known to others acting on the government's behalf in the case, including the police. Strickler v. Greene, 527 US 263, 119 S. Ct. 1936 (1999).

Although in general, knowledge of Brady material or evidence in possession of state agencies is not automatically imputed to the federal government, United States v. Kern, 12 F.3d 122, 126 (8th Cir. 1993), where there is a joint investigation between state and federal law enforcement agencies, knowledge and evidence in possession of the state law enforcement agency is imputed to the federal government.

For purposes of determining who is to be considered as part of the prosecution for Brady purposes, the "prosecution" in addition to any members of the United States Attorney's office, also includes police officers, agents and other investigatory personnel who participated in the

investigation and prosecution of the instant case. United States v. Brooks, 966 F.2d 1500, 1503 (DC Cir. 1992); Carey v. Duckworth, 738 F.2d 875, 878-79 (7th Cir. 1984). Whether a state law enforcement agency may be considered a part of a federal prosecution team depends upon the level of involvement between the United States Attorney's office and the state agency which holds the alleged Brady material. *See* United States v. Upton, 856 F. Supp. 727, 749 (SDNY 1994).

"The inquiry is not whether the United States Attorney's Office physically possesses the discovery material; the inquiry is the extent to which there was there was a "joint investigation" with another agency." Upton, 856 F. Supp. at 750. United States v. Ramos-Cartagena, 9 F.Supp.2d 88 (DPR 1998). Where the cooperative activity of state officials and United States Attorneys resulted in the indictment that motivates the Brady request, Brady material in possession of state officials is considered to be in the possession of the United States Attorney for purposes of the government's duty to disclose favorable evidence to the defendant. United States v. Shakur, 543 F.Supp. 1059, 1060 (SDNY 19982); United States v. Antone, 603 F.2d 566, 569 (5th Cir. 1979).

Information and material possessed by the Denver Police Department should be considered to be in the possession of the United States Attorney's Office for purposes of the disclosure requirements under Brady, regardless of whether the United States Attorney's Office physically possesses such discovery material. Here, it is an incontestable fact that Denver Police Detective Abe Alonzo was a chief investigator in a joint federal and Denver Police investigation that led to the charges against the defendants in this case. Therefore, the federal government has a duty under Brady to locate, gather and disclose to the accused all favorable evidence, including

impeachment evidence, in the possession of the Denver Police Department. If the law were otherwise, it would allow the federal government to adopt a "don't ask, don't tell the defendant" approach to favorable evidence in the possession of cooperating state law enforcement agencies. Here, the government cannot insulate itself from the Brady obligation simply by doing nothing to find out or gather exculpatory evidence that is in the possession of the Denver Police Department.

Consistent with the holding in Strickler v. Greene, 527 US 263, 119 S. Ct. 1936 (1999), the government's prosecutor should be ordered to make good faith inquiries of the Denver Police Department to identify and gather exculpatory evidence in their files of which the federal prosecutor is not yet aware. In a view of the strong probability that the Denver Police Department is in possession of material evidence that Richard Marshall can use to impeach the testimony of government witnesses and attack the quality of the investigation itself, "a government prosecutor who keeps himself in personal ignorance by deliberately failing to acquire all relevant evidence" (United States v. Smith, 552 F.2d 257, 262 (8th Cir. 1977) violates the defendant's constitutional right to disclosure of favorable evidence under Brady. Therefore this court should order the government to request from the Denver Police Department all favorable information and material that may be used to impeach the testimony of any government witness, as well as all information concerning the destruction of evidence by the Denver Police Department in 2001, and to disclose such evidence to the accused, so that Richard Marshall may produce such evidence in a pre-trial hearing to establish a constitutional violation to his right to due process.

Moreover, evidence of the grossly negligent destruction of evidence in this case is itself exculpatory evidence under Brady. Evidence that can be used to show unprofessional police

work and to attack the quality of the investigation is itself exculpatory evidence for purposes of Brady. In Kyles v. Whitley, 514 US 419 (1995), the Supreme Court overturned a conviction for murder on the basis of the prosecutor's failure to disclose Brady material about statements made by an individual who was not a witness in the trial, known as "Beanie". In Justice Souter's opinion for the court, at 446, he wrote that if the material had been disclosed to the defense, "the defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation ", quoting Bowen v. Maynard, 799 F.2d 593 , 613 (10th Cir.1986): "A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible Brady violation." Suppression of Beanie's various statements deprived the defendant of favorable evidence because he could have used those statements "to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well". Kyles v. Whitley, 514 US 419, at 445. The Court noted that it is entirely proper for jurors to consider "the sloppiness of the investigation" in assessing the probative value of the evidence: "indications of conscientious police work will enhance probative force and slovenly work will diminish it." Kyles v. Whitley, at footnote 15.

Certainly no evidence could be more probative of sloppy and unprofessional police investigative work than evidence that police destroyed the evidence gathered over 7 years in a high-profile ongoing joint federal-state murder investigation. Therefore, reports and evidence concerning the destruction and loss of evidence by the Denver police is Brady material and the government has a Brady obligation to disclose all evidence and reports generated by the Denver

Police Department concerning the destruction of tapes and evidence by Denver Police in 2001.

The court should grant Mr. Marshall's motion to compel the government to disclose exculpatory and impeachment evidence in the possession of the Denver Police Department, including all evidence concerning the destruction of evidence by the Denver Police Department, to the defendant forthwith.

Dated this 19th day of August, 2009.

Respectfully submitted,

VINE RICHARD MARSHALL, Defendant

BY: 

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Memorandum of Law in Support of Motion to Compel Disclosure of Impeachment Evidence on the other parties in this case by mailing the same to attorneys of record at the addresses listed below:

Marty J. Jackley
United States Attorney
PO Box 2638
Sioux Falls, SD 57101

Robert Mandel
Assistant United States Attorney
515 Ninth Street, #201
Rapid City, SD 57701

John Murphy
Murphy Law Office
328 E. New York St., #1
Rapid City, SD 57701

Dated this 19th day of August, 2009.

Dana L. Hanna

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff,	)	Case No. 08-50079
vs.	)	DEFENDANT MARSHALL'S PROPOSED JURY INSTRUCTIONS
JOHN GRAHAM, a/k/a JOHN BOY PATTON and VINE RICHARD MARSHALL, a/k/a RICHARD VINE MARSHALL, a/k/a DICK MARSHALL, Defendants.	)	

Attorney for Plaintiff: Marty J. Jackley, United States Attorney
Robert A. Mandel, Assistant United States Attorney
515 9th Street, 2nd Floor
Rapid City, SD 57701
605-342-7822

Attorney for Defendant: Dana L. Hanna
PO Box 3080
816 Sixth Street
Rapid City, SD 57701
605-791-1832

Defendant Richard Marshall files his proposed jury instructions.

Dated this 21st day of August, 2009.

*/s/ Dana L. Hanna*_____

Dana L. Hanna
PO Box 3080
816 Sixth Street
Rapid City, SD 57701
605-791-1832

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of Defendant Marshall's foregoing Proposed Jury Instructions upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
robert.mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 20th day of August, 2009.

/s/ Dana L. Hanna
Dana L. Hanna

DEFENDANT'S PROPOSED JURY INSTRUCTION-NO. 1

LAW ENFORCEMENT WITNESSES

You should judge the testimony of a law enforcement officer in the same way that you judge the testimony of any other witness.

_____
7th CIRCUIT INSTRUCTIONS

DEFENDANT'S PROPOSED JURY INSTRUCTION-NO. 2

3.09 PRIOR INCONSISTENT STATEMENTS - WITNESSES

You have heard evidence that before the trial [a witness[es] made [a] statement[s] that may be inconsistent with the witness[es]'s testimony here in court. If you find that it is inconsistent, you may consider the earlier statement in deciding the truthfulness and accuracy of that witness's testimony in this trial. You many not use it as evidence of the truth of the matters contained in that prior statement. However, if that prior statement was made under oath, you many also consider it as evidence of the truth of the matters contained in that prior statement

_____
7th CIRCUIT INSTRUCTIONS

DEFENDANT'S PROPOSED JURY INSTRUCTION-NO. 3

3.13 WITNESSES REQUIRING SPECIAL CAUTION

You have heard testimony from SERLE CHAPMAN who received benefits from the government in connection with this case, namely payments of more than 72 thousand dollars.

You may give his/her testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care.

_____
7th CIRCUIT INSTRUCTIONS

DEFENDANT'S PROPOSED JURY INSTRUCTION-NO. 4

4.05 SEPARATE CONSIDERATION FOR EACH DEFENDANT

Even though the defendants are being tried together, you must give each of them separate consideration. In doing this, you must analyze what the evidence shows about each defendant [, leaving out of consideration any evidence that was admitted solely against some other defendant or defendants]. Each defendant is entitled to have his/her case decided on the evidence and the law that applies to that defendant.

_____

7th CIRCUIT INSTRUCTIONS

DEFENDANT'S PROPOSED JURY INSTRUCTION-NO. 5

CAUTION AS TO PAID INFORMANT

You have heard the testimony of SERLE CHAPMAN. He provided evidence under an agreement with the government; and received money from the government in exchange for providing information.

Some people in this position are entirely truthful when testifying. Still, you should consider the testimony of these individuals with particular caution. They may have had reason to make up stories or exaggerate what others did because they wanted to help themselves.

_____

First Circuit Criminal Jury Instruction 2.07

DEFENDANT'S PROPOSED JURY INSTRUCTION-NO. 6

UNCORROBORATED ACCOMPLICE

In this case, you have heard the testimony of Fritz Arlo Looking Cloud, about the killing of Anna Mae Aquash, and who has himself been found guilty of murdering or aiding and abetting the murder of Anna Mae Aquash. The government contends that defendant Richard Marshall was an accomplice of Looking Cloud.

If you find that Looking Cloud's testimony as to the participation of Richard Marshall in the killing of Aquash is not corroborated by other evidence, then I charge you that you should consider the uncorroborated testimony of Arlo Looking Cloud with caution.

See: United States v. Shriver, 838 F.2d 980, 983 (8th Cir.1988) (quoting Esters v. United States, 260 F.2d 393, 397 (8th Cir.1958)); see also Schoenfeld, 867 F.2d at 1062.

[Cases holding there is no absolute right to an instruction that the testimony of an uncorroborated accomplice should be considered with caution; it is a matter of judicial discretion, depending on the evidence in the trial.]

DEFENDANT'S PROPOSED JURY INSTRUCTION-NO. 7

JUDICIAL NOTICE OF ADJUDICATIVE FACTS

The law allows the court to take judicial notice of facts that are not subject to reasonable dispute.

Accordingly, the court takes judicial notice of these facts:

The government's witness Fritz Arlo Looking Cloud was found guilty of first degree murder in the death of Anna Mae Aquash. His conviction was affirmed by the United States Court of Appeals. His guilt of that crime has been proven beyond a reasonable doubt.

In the course of his trial, the government proved, beyond a reasonable doubt, each of the following facts:

1.Arlo Looking Cloud killed or aided and abetted in the killing of Anna Mae Aquash.

2. Arlo Looking Cloud killed or aided and abetted the killing of Anna Mae Aquash with malice aforethought.

3. The killing was premeditated by Arlo Looking Cloud.

4. Arlo Looking Cloud acted with the specific intent to kill Anna Mae Aquash.

You may, but are not required to, accept as conclusive any fact judicially noticed.

_____

Source: Rule 201, Federal Rules of Evidence

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S ADDITIONAL MOTIONS IN LIMINE

NOW COMES Defendant Richard Marshall, by and through his attorney Dana L. Hanna, and pursuant to his constitutional rights to a fair trial, and to Rules 401, 402 and 403 of the Federal Rules of Evidence, hereby moves in limine for the following orders:

1. To preclude the government from offering testimony from Arlo Looking Cloud that the house that he and his accomplices stopped at in Rosebud, South Dakota belonged to any named individual. Grounds for the motion are that there is no foundation for such evidence in that the witness has no basis for the belief that the house belonged to any particular person; he has repeatedly stated to federal law enforcement officers that he did not know whose house they stopped at. But he was asked in the grand jury presentation if he had come to learn whose house it was, and he said yes, and gave a name. He was being asked to repeat hearsay that was told to him by federal investigators. His hearsay as to who he has been told owned the house is unduly prejudicial, entirely speculative, and has no probative value.

2. To preclude the government from making any reference to, adducing or offering any testimony or evidence concerning Richard Marshall's prior conviction or alleged bad acts or the specific charge of a prior offense. The grounds are that there is no basis under FRE Rule 404(b) for the introduction of such evidence. Richard Marshall denies having committed the act he is

accused of by the government–that is, the act of providing a gun and ammunition to Theda Clarke. Since he denies the act itself this evidence is not admissible to prove intent, plan or motive. *See* United States v. LeCompte, 99 F.3d 274 (8th Cir. 1996). Moreover, the fact and circumstances of the defendant's prior offense are entirely dissimilar to the facts alleged by the government in this case. There is no probative value to such evidence, and the undue prejudicial effect would substantially outweigh the non-existent probative value of such evidence, which the government would only be offering for purposes prohibited by Rule 404(b).

3. To preclude the government from offering any out of court statements made by Co-Defendant John Graham. Grounds for the motion are that they would deny the defendant his right to cross-examine, and they are unduly prejudicial and have no probative value as to the contested facts in the case against Richard Marshall.

4. To preclude the government from questioning Arlo Looking Cloud as to his belief concerning whether or not it appeared to him that Theda Clarke had previously observed a piece of paper. He was asked that question in the grand jury and such a question calls for pure speculation on his part.

5. To preclude Robert Ecoffey from testifying as to his opinion about ligature markings on the wrists of Anna Mae Aquash and his opinion concerning "post-mortem markings", on the grounds that there is no basis for this witness to give an expert opinion in a matter involving forensic pathology, a field of expertise for which he is not qualified to give an opinion.

6. Preclude the government from making reference in opening statement regarding the substance of an alleged note referring to"baggage" until after the testimony of Cleo Gates. No such alleged note will be offered into evidence. No witness will testify that they have ever seen such a note. Ms. Cleo Gates, ex-wife of the defendant, has never given testimony, in the grand jury or in Looking Cloud's trial, about the contents of any alleged note. Nevertheless, the government has repeatedly made references in court and in court documents about the contents of an alleged note that no witness at trial has ever seen or testified about. It would be highly prejudicial to allow the government to make reference to the contents of an alleged note about which there will likely be no testimony, for the purpose of creating a false impression of inculpatory evidence that does not exist. To allow the government to make reference to such a

prejudicial piece of non-evidence in the opening statement would be highly prejudicial to the defendant's right to a fair trial.

WHEREFORE, the defendant moves in limine for the above-described orders.

Dated this 21st day of August, 2009.

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing Additional Motions in Limine was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 21st day of August, 2009.

/s/ *Dana L. Hanna*
Dana L. Hanna

FILED
AUG 25 2009
CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER
JOHN GRAHAM, a/k/a/ John Boy Patton, VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendant.	*	

Pending before the Court are motions filed by both Defendants requesting leave to file further motions after the motion deadline. (Docs. 352 and 353.)

In the Order setting dates issued on October 6, 2008, the Court explained that it will consider a motion filed by a party after the motion deadline "if the party can show good cause as to why the motion was late filed." (Doc. 27.) Defendant Marshall filed a Motion for Continuance on January 12, 2009, doc. 143, and that motion was granted on January 22, 2009, doc. 167. A new scheduling order was issued which extended the motion deadline to March 23, 2009, with a trial date of May 12, 2009. (Doc. 187.) Extending the motion deadline allowed the parties an adequate opportunity to file any further motions, and numerous motions were filed prior to the March 23 deadline. On April 29 and April 30, 2009, this Court issued rulings on most of the pending motions, including an Order dismissing Count III of the Indictment against Defendant Graham, doc. 304.

The government immediately filed a Notice of Appeal from the order dismissing Count III. After a hearing with the parties in Rapid City on May 5, 2009, the Court granted the parties' joint motion to continue the trial scheduled for May 12, 2009 pending the Eighth Circuit's ruling on the

appeal, at which time the Court would set a new date for trial. (Doc. 348.) The Eighth Circuit's ruling was received on July 28, 2009, and on July 30, 2009, the Court issued an Order scheduling the trial for October 6, 2009. (Doc. 422.) The motion deadline was not extended.

The pending motions to file late motions were filed on May 11, 2009, after the trial was continued pending the Eighth Circuit's ruling. Subsequently, late motions were filed by Defendants without a showing of good cause why the motions could not have been filed prior to the March 23 motion deadline. Accordingly,

IT IS ORDERED:

1. That Defendants' Motions for leave to file further motions, docs. 352 and 353, are denied without prejudice to their right to show good cause for each motion that was filed after the motion deadline of March 23, 2009. The showing must be made on or before Tuesday, September 1, 2009.

Dated this 25th day of August, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK
BY: Colleen Schulte
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S RESPONSE TO ORDER

On August 25, 2009, this Court ordered that John Graham show good cause why motions he filed after the motions filing deadline (March 23, 2009) should be considered by the Court. Graham respectfully responds that his review of the file shows that all of his pending motions were filed in a timely manner and he has not violated the Court's filing deadline. In support of this assertion, Graham submits the following:

1. Graham has filed numerous motions in limine since March 23, 2009. However, those motions were timely filed as they were submitted prior to August 21, 2009, the deadline for filing motions in limine under the Court's Order for Trial, File Doc. 422.

2. Graham filed a Motion to Supplement Record on April 6, 2009. File Doc.

245. This motion was filed in response to the Court's Order dated April 2, 2009, File Doc. 223, asking him to submit in this file exhibits previously filed in United States v. Graham, File No. 03-50020. That motion was granted by the Court on the same date it was filed, File Doc. 248, and no further action needs to be taken in regard thereto.

3. Graham filed a Motion to Compel Disclosure of Leniency Agreements on April 21, 2009. File. Doc. 270. This motion was made six (6) days after Graham learned for the first time that the Theda Nelson had been appointed counsel and that the government was seeking her cooperation in its prosecution against Graham. This was a significant change of events because, up until this time, the government had represented that Nelson was unavailable as a witness due to her incompetency. The government responded that it had not entered into any leniency agreements with Nelson, and the Court issued an order denying as moot the motion. File Doc. 343. No further action is necessary in regard to this motion.

4. Graham filed his Motion for Severance of Counts and Objections to Stay of Proceedings on May 1, 2009. File Doc. 328. This motion was made the day after the government filed its Notice of Appeal, File Doc. 323. This motion was made moot by the Court's decision to continue the trial until after the

government's appeal was resolved. File Doc. 348.

5. The only other motions filed by Graham after March 23, 2009, were motions to seal. These related to motions for subpoenas or related to the filing of exhibits that were submitted in support of motions in limine. All of those matters were filed in a timely manner.

Dated August 26, 2009.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

MARTY J. JACKLEY	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
ROBERT A. MANDEL	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
DANA HANNA	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing

Dated August 26, 2009.

/s/ John R. Murphy

John R. Murphy

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 DEFENDANT MARSHALL'S RESPONSE TO COURT ORDER DOC. NO. 441

The court's order, Doc. No. 441, directs counsel to show good cause why Defendant Marshall's motions that were filed after the original motions deadline, March 23, 2009, should be considered by the court. In response thereto, Dana L. Hanna, attorney for Defendant Richard Marshall, hereby affirms:

1. When the trial in this case was scheduled to begin on May 12, 2009, the motion deadline established by the court was March 23, 2009. (Doc. No. 187). On May 5, 2009, the court continued the trial without a court date until the Eighth Circuit Court of Appeals ruled on the government's interlocutory appeal. After the Eight Circuit ruled on the government's interlocutory appeal and affirmed the trial court, the court set the trial date for October 6, 2009. The government has sought and received permission from the Court of Appeals to extend its time for filing a petition for re-hearing to September 25, 2009.

2. After May 5, 2009, when the case was continued without a trial date, counsel for Defendant Marshall continued to investigate, research, and prepare for trial. Counsel filed motions seeking relief for the defendant and also made a timely motion for permission to file further motions.

3. It was not until May 12, 2009 that I first received reliable and verifiable information

that potentially exculpatory evidence in this case, evidently including tape-recordings of witness interviews, had been destroyed by the Denver Police department in 2001. During my trial preparation and investigation, I had only heard rumors to the effect that Denver Police had lost evidence in the case, but I had no solid information upon which to base a motion until May 12, 2009, when I was provided with a copy of an article that appeared in the Denver newspaper, *Rocky Mountain News,* in 2003. That article quoted Denver police officials who admitted that they had destroyed evidence and case files in the police investigation into the murder of Anna Mae Aquash, which was conducted as a joint investigation with federal authorities. The destruction was discovered by Denver Police Department in 2003 and the facts of the destruction of that evidence were communicated to the United States Attorney's Office in South Dakota. The government did not disclose to Richard Marshall or the co-defendant the fact that evidence in the case had been destroyed. Although the government had a constitutional duty to disclose that information to the defense, since the destruction of evidence by police necessarily raises legal issues concerning the defendants' right to due process, the government suppressed that information. To date, the government has not provided the defendants with any police reports or records concerning the destruction of evidence by Denver Police. Once I received information from my own investigation that Denver Police had destroyed and lost evidence in this case, I made further efforts to investigate. I requested information from the government, without results. On August 19, 2009, Richard Marshall filed a motion for disclosure of impeachment evidence and a motion for an evidentiary hearing on the destruction of evidence; the motions seek relief and information concerning the loss and destruction of evidence by the Denver Police and the government's suppression of information concerning that destruction. The facts that gave rise to the motion were not known to defense counsel before the original motion deadline, as a result of the government's suppression of exculpatory evidence. Therefore, the delay was the result of the government's failure to disclose information pertinent to the motion until after the pre-trial motion deadline had expired. *See*: United States v. Chavez, 902 F.2d 259 (4th Cir. 1990), in which the Fourth Circuit concluded that the denial of an untimely suppression motion may constitute an abuse of discretion where the delay was the result of the government's failure to disclose information pertinent to the motion until after the pre-trial motion deadline had expired.

Chavez, at 262-264.

4.On August 4, 2009 I filed Doc. No. 423, Motion to Dismiss the Indictment for Failure to Correct False Testimony to the Grand Jury. I was not aware of the existence of grounds for the motion before the original March 23rd deadline. I became aware of the fact that the government has good reason to know that key government witness, Arlo Looking Cloud, intends to give false testimony at his trial–specifically, testimony denying culpable *mens rea* or guilt in the murder for which he has been convicted–while listening to the tape-recorded conversations of Looking Cloud's telephone calls from jail. This led to me to research the law on the use of false testimony by the government and to review the grand jury testimony of Looking Cloud, which provided the evidentiary basis for the motion.

5. On July 21, 2009, after more than 60 days had passed since the court had continued the trial date, in Doc. No. 418, I renewed a previously filed Motion to Sever (Doc. 87). The specific grounds for renewing the motion–passage of time due to the government's interlocutory appeal–did not exist on March 23, 2009.

6. On June 4, 2009, I filed Doc. No. 402, a Motion to Suppress Statements allegedly made by Richard Marshall to federal investigator Robert Ecoffey, on the grounds that the taking of any statements was in violation of the defendant's right to counsel. I filed that motion after March 23, 2009 because it was not until after that date that I became aware that Mr. Marshall was represented by counsel at the time he allegedly made his statements to Robert Ecoffey.

7. On May 22, 2009, I filed Doc. No. 380, which is a Motion to Compel Disclosure of a Witness. Prior to filing that motion, I had made efforts consistent with the court's local rules to resolve the discovery dispute with the government. I made a written request for the identity of the writer of handwritten notes which appeared to be favorable to the defendant. I received a letter dated April 21, 2009 in which I was informed that no information concerning the identity of that potential defense witness was going to be forthcoming from the government, after which I made this motion.

8. I have also recently filed motions for service of subpoenas, which had to be filed to secure the presence of defense witnesses for the new trial date in October. I anticipate filing further motions for subpoenas for witnesses and subpoenas duces tecum before trial.

9. The aforesaid motions, which were filed after the original motions deadline of March 23rd, which was scheduled when there was a May trial date, are all substantive motions raising constitutional issues. They are filed in good faith, based on factual grounds; they are not frivolous or made to harass or delay. The government has not in any way been unduly prejudiced by the fact that the defendant has filed these motions after the original March 23rd date. Neither the court nor the government can reasonably expect the defendant to sit on his hands without continuing to build his defense for trial, while the trial of his case is delayed by the government's appeal.

10. Under Rule 12(c) of the Federal Rules of Criminal Procedure, a court may set a deadline for the filing of pre-trial motions. If a party fails to file a pre-trial motion before that deadline, the party may be deemed to have waived the issue. Federal Rule of Criminal Procedure 12(e). However, the District Court has the discretion to excuse the waiver upon a showing of a good cause for the delay. "The absence of prejudice or delay in the trial may be relevant to whether the District Court is willing to grant relief, but those factors themselves do not require a finding of 'good cause'". United States v. Trobee, 551 F.3d 835 (8th Cir. 2009). In this case, unlike in United States v. Salgado-Compost, 442 F.3d 684 (8th Cir. 2006), in which the defendant did not make a request for an extension of time in which to file pre-trial motions until nearly three months after the deadline had expired, counsel for Mr. Marshall filed his motion to extend the deadline eight days after the deadline had passed.

WHEREFORE, Defendant Richard Marshall respectfully moves the court to find that good cause exists to grant a waiver of the original filing deadline.

Dated this 1st day of September, 2009.

RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Response to Court Order Doc. No. 441 was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 1st day of September, 2009.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

****

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER DENYING MOTION TO DISMISS DUE TO PRE-ACCUSATORY DELAY
JOHN GRAHAM, a/k/a John Boy Patton, and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

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FILED
SEP 02 2009
CLERK

Pending before the Court is Defendant Marshall's Motion to Dismiss Due to Pre-Accusatory Delay. (Doc. 96.) The Court issued its preliminary opinion on this motion on April 29, 2009, doc. 302, finding that Defendant Marshall failed to demonstrate actual and substantial prejudice and that there is no evidence that the government either intentionally or recklessly delayed the indictment to either gain a tactical advantage or to harass Defendant Marshall. The Court allowed the parties to present further argument regarding this motion at a hearing in Rapid City on May 5, 2009. Following further argument, the opinion of the Court remains unchanged. Accordingly,

IT IS ORDERED that Defendant Marshall's Motion to Dismiss Due to Pre-Accusatory Delay, doc. 96, is denied.

Dated this 2nd day of September, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK
BY: Colleen A. Schulte
DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

UNITED STATES' MOTION FOR CONTINUANCE

COMES NOW the United States of America, by and through Acting United States Attorney Dennis R. Holmes and Assistant United States Attorney Robert A. Mandel, and respectfully files its Motion for Continuance of the trial in the above-captioned matter on the following grounds:

1. The trial in this action is currently set for October 6, 2009.

2. The United States has sought rehearing of its appeal regarding the count of the Indictment dismissed against John Graham aka John Boy Patton. The Eighth Circuit has allowed the United States until September 25, 2009, to file its motion for rehearing or rehearing en banc. The United States must receive permission from the Solicitor General prior to seeking rehearing en banc. Assuming such permission is granted, it is the intention of the United States to file its motion not later than the date currently set by the Court of Appeals.

3. The issue on appeal is the count of the indictment which charges Defendant Graham as an aider and abettor in this action. As this is one of the alternative counts charged, the United States feels that it is precluded from going forward on the two remaining counts without a final resolution of this issue by the Court of Appeals.

4. It has been anticipated by counsel to this action that the trial of this case would take approximately two weeks. Numerous witnesses will be called by the United States, many of whom will be attending from out-of-state and possibly a witness from outside the United States. Because of the potential length and complexity of this trial, it is the position of the United States that it is appropriate to continue this action as to both Defendants until the appellate issue is ultimately resolved in this case.

Accordingly, the United States asks that the trial of this matter be continued until such time as the pending issue is resolved before the United States Court of Appeals for the Eighth Circuit.

Dated and electronically filed this 4th day of September, 2009.

DENNIS R. HOLMES
Acting United States Attorney

By: /s/ Robert A. Mandel
ROBERT A. MANDEL
Assistant US Attorney
201 Federal Building
515 Ninth Street
Rapid City, SD 57701

CERTIFICATE OF SERVICE

The undersigned hereby certifies on September 4, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Facsimile at
- ☐ Federal Express
- ☒ Electronic Case Filing

/s/ Robert A. Mandel
ROBERT A. MANDEL

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S OPPOSITION TO CONTINUANCE; REQUEST FOR SPEEDY TRIAL; RENEWED MOTION FOR SEVERANCE

NOW COMES defendant Richard Marshall, by and through his attorney Dana L. Hanna, and hereby files his response in opposition to the government's motion for a continuance of his trial, and requests that his trial proceed on October 6, 2009. Mr. Marshall further renews his previous motions for severance of his trial from that of co-defendant Graham.

In support of Mr. Marshall's request for a speedy trial and a severance, attorney Dana L. Hanna hereby affirms:

1. On September 4, 2009, the government filed a motion seeking a continuance of Mr. Marshall's trial (Doc. No. 449). Mr. Marshall opposes the government's motion for continuance and affirms to the court that he is ready to proceed with his trial on October 6, 2009. He requests that the government be ordered to proceed with his trial on that date, and he respectfully submits that the if the government is allowed to delay his trial beyond October 6, 2009, that delay would constitute a violation of his statutory and constitutional rights to a speedy trial.

2. Mr. Marshall has been incarcerated in the Pennington County Jail without bond, awaiting trial in this case for more than one year. If his trial proceeds on October 6, 2009, when the trial starts, he will have been in pre-trial incarceration, held without bond at the government's request, for almost 14 months. He has twice made motions to be released on strict conditions, the

government has twice opposed his release and his motion for release has been twice denied by the court. Now the government is seeking another indefinite continuance of his trial, until some indefinite time in the future after the Eight Circuit Court of Appeals decides whether to grant the government a re-hearing in the government's interlocutory appeal of this court's dismissal of one count in the indictment against the co-defendant Graham.

3. After this court dismissed one of the counts in the indictment against co-defendant John Graham, the United States filed an interlocutory appeal. A unanimous Eight Circuit Court panel affirmed the trial court. The government now intends to petition for a re-hearing of the appeal. Since the decision by the panel was unanimous and there is no conflict on the issue of law among Circuits, it is the professional judgment of the undersigned counsel that the government's chances of being granted a re-hearing are practically nil and the government's chances of being granted a re-hearing and then persuading the Court of Appeals to reverse the trial court are infinitesimal. Therefore the government's most recent, second request for an indefinite continuance of Mr. Marshall's trial is be purely dilatory and another continuance would serve no legitimate judicial purpose.

4. In support of its motion to continue, the prosecution states: "The United States feels that it is precluded from going forward on the two remaining counts without a final resolution of this issue by the Court of Appeals." (Doc. 449, paragraph #3) There is no legal authority to support the government's feeling on this matter.

5. This court has informed the government that if the prosecution chooses to go forward with a trial of Graham, unless the government can prove that John Graham was a member of a federally recognized United States American Indian tribe, the court will dismiss the case against Graham at the end of the government's case. It is uncontested that Graham is not a member of any Indian tribe that is recognized as such by the United States. Therefore, with regard to the prosecution of the co-defendant Graham, the government has two options: (1) dismiss the indictment against John Graham or (2) proceed with the trial against John Graham, knowing that the court will order a judgment of acquittal at the conclusion of the prosecution's case. To proceed with the trial of a case the government knows it cannot prove would be both irresponsible and unethical. Therefore, for all practical purposes, the overwhelming likelihood in

this case is that at some time in the future, the government will have to dismiss the indictment against Graham and then try Richard Marshall without the co-defendant.

6. Given the posture of the case, the government can no longer credibly oppose a severance on the grounds of judicial economy. It would be neither a reasonable nor a responsible expenditure of judicial resources to try defendant John Graham in federal court when the government has been fully and fairly informed by the trial court that the court will grant a motion for acquittal at the end of the government's case. There is no rational benefit the government could achieve by going forward with a trial against John Graham other than to prejudice Richard Marshall's right to a fair trial by means of spill-over prejudice. Therefore, since the practical reality is that a joint trial is now highly unlikely, Richard Marshall's rights to a speedy trial outweigh any purely hypothetical economy of judicial resources that would result from a joint trial.

7. All other grounds, facts and legal authority set forth in support of Marshall's previous motions for severance and in his memoranda of law in support of those motions are hereby repeated and incorporated herein by reference.

8. The defense has interviewed and requested service of subpoenas on more than a dozen witnesses, many of whom live outside the state of South Dakota, some of whom regularly travel beyond their home states to other parts of the United States and to other countries. They have made arrangements to be present in Rapid City, South Dakota for the trial in this case in October.

WHEREFORE defendant Richard Marshall respectfully urges the Court to deny the government's request for continuance, to order a severance of his trial from that of his co-defendant and to allow him to proceed with trial on October 6, 2009.

Dated this 8th day of September, 2009.

(Signature block on next page)

VINE RICHARD MARSHALL, Defendant

BY: */s/ Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Opposition to Continuance; Request for Speedy Trial; Renewed Motion for Severance was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 8th day of September, 2009.

/s/ *Dana L. Hanna*
Dana L. Hanna

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff,	)	CRIM. NO. 08-50079-01
vs.	)	DEFENDANT GRAHAM'S OBJECTION TO UNITED STATES' MOTION FOR CONTINUANCE
JOHN GRAHAM, a/k/a JOHN BOY PATTON and VINE RICHARD MARSHALL, a/k/a RICHARD VINE MARSHALL, a/k/a DICK MARSHALL Defendant.	)	

Defendant, John Graham, through his attorney, John R. Murphy, objects to the government's motion for a continuance. Doc. 449. Defendant Graham asks that his case proceed to trial on October 6, 2009 as previously ordered by the Court. Doc. 422. A continuance of the trial would deprive Mr. Graham of his constitutional right to a speedy trial, his statutory right under the Speedy Trial Act, and would not serve any legitimate purpose.

Mr. Graham has been in continuous custody for this alleged crime for 27 months. Much of the delay in bringing this case to trial has been caused by the government. The government has protracted the appellate process by seeking extensions of time to file and brief matters related to its interlocutory appeal. The government is now trying to further protract the appellate process by seeking

extensions of time to consider seeking rehearing of the appeal. The government knows the chance of obtaining a rehearing is minimal and the chance of prevailing if rehearing is granted is even less. The government wasn't able to persuade a single judge on the Court of Appeals to accept its interpretation of 18 U.S.C. 1153 and the government has not cited to any authority of development that is likely to cause the Court of Appeals to vacate its previous decision and reverse the District Court. It is counsel's belief that the government has no realistic expectation of obtaining further review of this matter, but instead is using the prospect of further appellate review as a pretext for further delaying this case. Mr. Graham is ready to proceed. He has subpoenaed over 20 witnesses. Many of the witnesses are old, in poor health, or have been hard to locate. Further delay only increases the chance that witnesses will loose their memories, die, or relocate. For these reasons, the government motion should be denied.

Dated September 9, 2009.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

DENNIS R. HOLMES	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
ROBERT A. MANDEL	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
DANA HANNA	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing

Dated September 9, 2009.

/s/ John R. Murphy
John R. Murphy

FILED
SEP 09 2009
CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER DENYING DEFENDANT MARSHALL'S RENEWED MOTION FOR SEVERANCE AND REQUEST FOR SPEEDY TRIAL
JOHN GRAHAM, a/k/a/ John Boy Patton, VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendant.	*	

Pending before the Court is Defendant Richard Marshall's Renewed Motion for Severance and Request for Speedy Trial. (Doc. 418.) Marshall previously moved for a severance of his trial from that of Co-Defendant John Graham. His motion for severance was denied. After this Court dismissed one count of the indictment against Graham, the government filed an interlocutory appeal to the Eighth Circuit. The government and Marshall stipulated to a 60-day continuance of the trial which had been scheduled to begin on May 12, 2009. After a hearing with the parties in Rapid City on May 5, 2009, the Court granted the parties' joint motion to continue the trial, but held that the continuance would not be 60 days; rather it would be until the Eighth Circuit issued a ruling on the appeal.[1] The Court stated at the May 5 hearing that a new trial date would be set as soon as the Eighth Circuit ruled. Counsel for Marshall asked the Court for permission to renew the motion for severance to allow Marshall to proceed to trial if the Eighth Circuit had not ruled within 60 days.

[1]Granting of the continuance rendered moot Defendant Graham's Motion for Severance of Counts and Objection to Stay of Proceedings, doc. 328, in which Graham asked to proceed with trial of the remaining two counts on May 12, 2009.

On July 21, 2009, when more than 60 days had passed and the Eighth Circuit had not ruled on the government's appeal, Marshall filed the Renewed Motion to Sever so he could proceed to trial while the appeal was pending. On July 28, 2009, the Eighth Circuit issued its ruling on the appeal and, two days later, this Court set a new trial date of October 6, 2009. (Doc. 422.) This action rendered moot Marshall's Renewed Motion for Severance and Request for Speedy Trial. Accordingly,

IT IS ORDERED:

1. That Defendant Richard Marshall's Renewed Motion for Severance and Request for Speedy Trial, doc. 418, is denied as moot.

2. That Defendant Graham's Motion for Severance of Counts and Objection to Stay of Proceedings, doc. 328, is denied as moot.

Dated this 9th day of September, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: _____
DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION



FILED
SEP 09 2009
CLERK

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER GRANTING MOTION FOR CONTINUANCE
JOHN GRAHAM, a/k/a/ John Boy Patton, VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendant.	*	

The Defendants have each filed resistances to the Motion for Continuance filed by the United States. This Court is reluctant to again continue this case. However, there is little alternative as the Eighth Circuit Court of Appeals granted the United States until September 25, 2009, to determine whether or not the United States would file a Motion for Rehearing or a Rehearing En Banc regarding the Eighth Circuit Court of Appeals July 21, 2009, affirmance of this Court's decision. If such a Motion is filed, permission to file must come from the Solicitor General of the United States. If the Motion is filed, then the Eighth Circuit Court of Appeals will not have time enough to rule on the Motion before the present trial date of October 6, 2009.

The Court has considered the alternatives suggested by the Defendants of trying only Mr. Marshall on that trial date, and the other alternative of releasing the Defendants pending a new trial date. The Court on April 23, 2009 denied a severance, and the basis for that decision has not changed. The possibility of a failure to prove membership of either a Defendant or an alleged victim in a United States American Indian Tribe does not preclude the United States from proceeding to trial with Defendant Graham. The request for separate trials is again denied. Also, the reasons for detaining the Defendants have not changed, despite the delay in trying this case. Accordingly, those alternatives are rejected and the continuance is granted. If the United States does not file a Motion

for Rehearing or Rehearing En Banc, this Court will then set another trial date. If a Motion for Rehearing or Rehearing En Banc is filed and after a ruling is entered, then this Court will again set a new trial date. Accordingly,

IT IS ORDERED:

1. That the United States' Motion for Continuance, Doc. 449, is granted.

Dated this 9th day of September, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: _____
DEPUTY

FILED
SEP 10 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

JUDGE - Lawrence L. Piersol
CASE NO. - CR08-50079

REPORTER - FTR #1
Date - 09/10/09

CASE	COUNSEL
USA,	Robert A. Mandel
Plaintiff,	
vs.	
John Graham a/k/a John Boy Patton and	John Richard Murphy
Vine Richard Marshall a/k/a Richard Vine Marshall a/k/a Dick Marshall,	Dana Hanna
Defendants.	

COURTROOM DEPUTY: Colleen Schulte

TIME HEARING SCHEDULED TO BEGIN: 3:05 p.m.

TIME:

3:05 p.m. Enter telephonic status conference before the Hon. Lawrence L. Piersol, U.S. District Judge, Sioux Falls. Counsel state their appearances for the record.

Status conference regarding State of South Dakota's indictment of Mr. Graham as well as a Ms. Rios with regard to the Annie Mae Aquash matter and whether it moots the request previously granted on the motion to continue trial set for October 6, 2009. Court states September 25, 2009, is the date by which U.S. has time to file motion for rehearing or rehearing on bond and whether it is mooted.

Mr. Mandel states it is not mooted and USA will pursue petition for rehearing on bond and to proceed against both defendants.

Discussion between Mr. Hana and Court regarding need for additional

discovery because of state prosecution.

Court advises order issued yesterday stands and the federal case will be continued.

Mr. Murphy requests clarification on closure of discovery. Court reiterates court's discovery date has passed.

3:10 p.m. Court in recess.

IN THE UNITED STATES DISTRICT COURT
FOR THE 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 Defendant.	)))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION TO FILE MOTIONS PAST FILING DEADLINE

Defendant John Graham moves this Court for its Order permitting him to continue filing discovery motions in this case, and to relieve him of any express or implied closure of the discovery process.

This motion is based on the need for Defendant Graham to address a discovery issue that arose on September 10, 2009. On that date, Defendant Graham was indicted in state court (Pennington County, South Dakota, Criminal File No. 09-3953) with three counts of murder (felony murder/kidnaping, felony murder/rape, and premeditated murder).

During a telephonic hearing on the same date, this Court advised counsel that discovery was closed. The official minutes of that hearing state, "Mr. Murphy requests clarification on closure of discovery. Court reiterates court's

discovery date has passed." Doc. 454.

In order for Mr. Graham to receive a fair trial, he needs to have access to all discovery to which he is permitted under the Federal Rules of Criminal Procedure, United States Supreme Court and Eighth Circuit Court of Appeals precedent, and, the due process clause of the Fifth Amendment to the United States Constitution. Mr. Graham will be deprived those rights if the Court views discovery as being closed and prohibits him from addressing on-going discovery issues.

Additionally, Mr. Graham respectfully submits that the Court may be mistaken in believing that discovery has been closed and that a discovery deadline has passed. Counsel for Mr. Graham has reviewed the Court's Order for Trial, Doc. 422, Order Granting Continuance, Doc. 348, Order for Trial, Doc. 187, and Order Fixing Dates, Doc. 44. He is unable to ascertain any date that closed the government's obligation to provide discovery or set a discovery closure date.

It appears that the Court previously anticipated that discovery would not be closed and that counsel would have the opportunity to seek further relief from the Court. In its Order for Trial, Doc. 187, the Court stated that motions for leave to file additional motions would be considered upon a showing of good cause.

Good cause exists in this case. Mr. Graham seeks immediate disclosure of discoverable information that he has no other means of obtaining. Mr. Graham

has not yet been arraigned on the state court charges. It may be weeks or months before he is arraigned. Until such time as he is arraigned, he has no ability through the state court prosecution to obtain his grand jury transcripts.

Mr. Graham has been given limited access to his state court file. This access shows a deliberate attempt to prevent him from obtaining discovery. The version of the state court indictment that was made available to Mr. Graham has had the names of the witnesses who testified before the grand jury blocked out. South Dakota Codified Law 23A-8-2(2) states that a court must dismiss an indictment if it fails to set forth the name of the witnesses testifying at the grand jury at the foot of the indictment. However, until Mr. Graham is arraigned, he has no ability to address the redaction of names on his indictment. Federal court is the only avenue by which he may obtain discovery of state grand jury transcripts pertinent to the federal murder charges pending against him.

Mr. Graham's desire to obtain the state court grand jury transcripts is not a "fishing trip" that will lead to the disclosure of irrelevant or tangential materials. These transcripts were obtained during a joint state and federal investigation of Mr. Graham. They relate to conduct that the government alleges is relevant to the federal prosecution. The government has already asserted its intent to admit evidence of an alleged rape and kidnaping by John Graham in its federal

prosecution. Rape and kidnaping are the underlying offenses alleged in the state court felony murder counts. These grand jury transcripts will almost certainly contain information that is subject to disclosure. The transcripts are likely to contain alleged statements by Mr. Graham, statements by witnesses that are inconsistent with previous statements they have given, statements by alleged co-conspirators that the government intends to attribute to Mr. Graham, statements alleged by the government as being adoptive admissions by Mr. Graham, and statements by witnesses that contradict or are inconsistent with statements given by other government witnesses.

For these reasons, Mr. Graham seeks leave to file additional discovery motions and to be relieved of any express or implied closure of the discovery process by the Court.

Dated September 11, 2009.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

	☐	U.S. Mail, postage prepaid
ROBERT A. MANDEL	☐	Hand Delivery
DANA HANNA	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing

Dated September 11, 2009.

/s/ John R. Murphy
John R. Murphy

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S APPLICATION TO EXTEND MOTIONS DEADLINE

NOW COMES Defendant Richard Marshall, by and through his attorney Dana L. Hanna, and pursuant to his Sixth Amendment right to effective counsel, hereby moves the Court to order that the deadline for the filing of motions be extended.

In support of this motion Dana L. Hanna, attorney for Defendant Marshall, hereby affirms:

1. In its amended order that scheduled the defendants' trial for May 12, 2009 [Doc. 27], the Court ordered the defendants to file their motions by March 23, 2009, and further ordered that if motions were filed after that date, counsel would have to show good cause why the motions were filed late.

2. On May 5, 2009, the Court ordered that the defendants' trial be continued, without a trial date, until after the Eighth Circuit Court of Appeals ruled on the government's interlocutory appeal. After the Court of Appeals ruled on the interlocutory appeal, affirming the trial court, the

trial court ordered that this case would be tried on October 6, 2009. On September 4, 2009 the government made a motion to continue the trial to allow the government further time to decide whether to seek a re-hearing on its interlocutory appeal. Over Defendant Marshall's objection, the Court granted the government's motion to continue and again continued the trial without scheduling a new trial date.

3. In order to provide Defendant Richard Marshall with effective assistance of counsel, it is necessary for defense counsel to continue to investigate the case, research legal issues and make further motions as new information and evidence becomes known and new legal issues present themselves to counsel. Since March 23, 2009, new information and evidence has been discovered that has made it necessary for the defendant to seek judicial relief by means of motions. For example, in May, counsel learned that the case file containing evidence that had been developed by Detective Abel Alonzo of the Denver Police Department during a joint federal-local investigation into the Aquash murder had been destroyed, and that the government had failed to disclose that information to the defense. This new information about the destruction of evidence required the defendant to file motions for a hearing and for disclosure of evidence that are presently pending before the Court, and which have not been answered by the government.

4. The day after this Court granted the government's motion for continuance, the former United States Attorney, now South Dakota Attorney General, announced that a joint cooperative federal-state prosecution effort had resulted in indictments from a grand jury in State Circuit Court that charged co-defendant John Graham and another defendant, Thelma Rios, with the murder of Anna Mae Pictou Aquash. It is a practical certainty that new discoverable evidence

was generated by this joint federal-state presentation to the grand jury, which will in turn necessitate further motions by the defendant, including motions to compel discovery.

5. Good cause exists to extend the motions deadline to allow Mr. Marshall to file further motions while the defense continues to prepare for trial. Since March 23, 2009, there have been fundamental changes of circumstances: the defendant's trial has been continued twice since that deadline was ordered. The original motion deadline was determined by its temporal relation to the then-scheduled trial date of May 12, 2009. Now that Mr. Marshall's trial date has again been continued, there is no logical rationale for not extending the motion deadline as well. It would be an arbitrary limitation on the accused's right to a fair trial and his right to counsel to hold the defendant to a deadline that was chosen when the trial date was May 12, 2009. It would be fundamentally unfair to allow the government to be granted an indefinite postponement of Mr. Marshall's trial, with the defendant confined in jail, so that the government can decide whether it will petition for a re-hearing on its interlocutory appeal, and at the same time restrict Mr. Marshall's right to request court orders by means of motions while he continues to prepare for his trial.

6. There will be no prejudice to the government caused by allowing the defendant to file further motions. On the other hand, if the Court denies the defendant's motion to extend the deadline for filing motions, his right to fair trial and counsel will be unduly prejudiced.

WHEREFORE Defendant Marshall moves the Court to extend the previously scheduled motions deadline to allow the filing of further motions by the defendant.

Dated this16th day of September, 2009.

(Signature block on next page)

VINE RICHARD MARSHALL, Defendant

BY: */s/ Dana L. Hanna*
Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Application to Extend Motions Deadline was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 16th day of September, 2009.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

FILED
SEP 17 2009
CLERK

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER
JOHN GRAHAM, a/k/a/ John Boy Patton, VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendant.	*	

Pending before the Court is Defendant Graham's Motion to File Motions Past Filing Deadline. (Doc. 455.)

The Court has indicated that it will consider a motion filed by a party after the motion deadline if the party can show good cause as to why the motion was late filed. Defendant John Graham ("Graham") asserts that he has good cause to file a discovery motion at this time because he was indicted in state court with three counts of murder on September 10, 2009. He wants access to the grand jury transcripts from the state court proceedings but cannot obtain them in state court because he has not been arraigned. Graham cites SDCL 23A-8-2(2) which states that a court must dismiss an indictment if it fails to set forth the name of the witnesses testifying at the grand jury at the foot of the indictment. According to Graham, the names of the witnesses who testified before the grand jury are "blocked out" on the version of the state court indictment that was made available to him. Until Graham is arraigned in state court, he cannot address the redaction of the names on his indictment. Graham believes federal court is the only avenue by which he may obtain discovery of state grand jury transcripts which he believes are pertinent to the federal murder charges pending again him.

The Court will direct the federal government to respond to Graham's pending motion, and will invite the State to respond. The parties should address whether Graham is entitled to discovery of the grand jury transcripts in the state proceedings, as well as the unredacted version of the indictment. Accordingly,

IT IS ORDERED:

1. That the United States shall submit a response to Graham's motion, doc. 455, and the State of South Dakota may submit a response to the motion. The responses must be served and filed on or before Monday, September 28, 2009. Graham may submit a reply on or before Wednesday, September 30, 2009.

Dated this 17th day of September, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: Colleen Schulte
DEPUTY

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 GRAHAM'S MOTION TO FILE MOTIONS PAST FILING DEADLINE

COMES NOW the United States of America, through its attorneys, Acting United States Attorney Dennis R. Holmes and Assistant United States Attorney Robert A. Mandel, and respectfully responds to Defendant Graham's Motion to File Motions Past Filing Deadline as ordered by the Court.

1. Defendant Graham seeks from the United States' Attorney's Office transcripts of a state court grand jury proceeding which resulted in charges against defendant. The United States' Attorney's Office does not possess any of these transcripts nor did the United States' Attorney's Office participate in any way in the state grand jury proceedings.

2. At the outset, it is the position of the United States that the grand jury transcripts from state court, even were they in the possession of the United States' Attorney's Office, would not be discoverable under Fed. R. Crim. P. 16. The United States might be required to provide these materials pursuant to the *Jencks* Act, 18 U.S.C. § 3500, were they in the possession of the United States, however, they would not be discoverable at this time. By the same token, were the United States to have possession of them and were they materials which the United States was required to turn over pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), the United States would be required to turn over such materials.

3. Pursuant to the *Jencks* Act, 18 U.S.C. § 3500(b), the United States is only under an obligation to produce a statement which is "in the possession of the United States." Sworn statements that a witness made to a state officer who investigated a case which were not requested or received by the federal attorney prosecuting the case or any federal agent have been held not to be "in the possession of the United States." *United States v. Smith*, 433 F.2d 1266, 1269 (5th Cir. 1970); *Beavers v. United States*, 351 F.2d 507, 509 (9th Cir. 1965); *United States v. Harris*, 368 F. Supp. 697, 708-09 (ED Penn. 1973), affirmed 498 F.2d 1164 (3rd Cir. 1974).

4. It is also noted that the names of the witnesses who testified before the grand jury are "blocked out" on some version of the indictment issued by the state court that was obtained by Graham's attorney. It is the understanding of the United States' Attorney's Office that Defendant Graham has yet to have had an initial appearance in state court on these charges. It is the further understanding

of the United States' Attorney's Office that the blocking out of the names on the indictment was done pursuant to an order of the state court. In any event, this is strictly a state court issue and does not provide any basis for discovery in federal court. It is the position of the United States that Defendant Graham's entitlement to an unredacted version of the indictment is a question to be resolved by the state court. The United States does not possess an unredacted copy of the indictment.

5. If the United States obtains a copy of the state court grand jury proceedings in this case, the United States recognizes that this document would be subject to the same discovery rules as any other documents in the possession of the United States.

Accordingly, the United States asks that Defendant's Motion to File a Further Discovery Motion at this time be denied.

Respectfully submitted this 25th day of September, 2009.

/s/ Robert A. Mandel

ROBERT A. MANDEL
Assistant United States Attorney
515 9th Street #201
Rapid City, SD 57701
605.342..7822
FAX: 605.342.1108
Robert.Mandel@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of September, 2009, I served by electronic transmission, a true and correct copy of the foregoing United States' Response to Defendant Graham's Motion to File Motions Past Filing Deadline on:

Dana Hanna
Attorney at Law

John Murphy
Attorney at law

/s/ Robert A. Mandel

Robert A. Mandel

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN GRAHAM, a/k/a John Boy Patton, VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall, Defendant.	*	CR 08-50079 THE STATE'S RESPONSE RE: COURT ORDER OF SEPTEMBER 17, 2009

Comes now, the State of South Dakota, by and through Attorney General Marty J. Jackley and Assistant Attorney General Rod L. Oswald and respectfully files its response pursuant to the Court's Order of September 17, 2009.

On September 11, 2009, Defendant Graham filed a Motion to File Motions Past filing Deadline. Defendant Graham specifically alleged that he has been given limited access to the State Court file which "shows a deliberate attempt to prevent him from obtaining discovery." There has been no deliberate attempt by neither the State Court, nor the State prosecutors to prevent discovery or hide anything. Contained in the State Court file under seal is a proper indictment listing all witnesses that testified before the state grand jury. He will be provided a copy of the unredacted indictment at his arraignment, and there is clearly no violation of SDCL 23A-8-2.

The unsealed grand jury indictment was redacted in the interest of protecting witnesses, the need for which has been enhanced by the collective[1] activities of the defendants, which include but are not necessarily limited to the following:

1. Directly filing federal grand jury witness materials into the public record without redaction; placing said grand jury information on the Graham defense website; and requiring the United States Attorney's Office to file motions to seal defense pleadings referencing said grand jury witness testimony;

2. Specifically referencing cooperating and confidential witnesses by name into the public record, despite specific cautions by the Magistrate Court regarding the same;

3. Repeated and deliberate credibility attacks upon witnesses based upon speculation and conjecture without supporting factual basis;

4. Generating witnesses complaints regarding unwelcome and continued contact by defense representatives.

The State fully intends to provide both State defendants John Graham and Thelma Rios with all the discovery they are entitled to including the grand jury transcripts. However, given the nature of this case and the above history, it is the State's intent to request the State Court to put in place discovery safeguards to avoid the disclosure of the grand jury testimony and other sensitive witness materials. To the extent it is this Honorable Court's intent to order discovery of the State grand jury testimony, the State respectfully request the Court similarly put in place adequate protections for witnesses, including but not limited to the following:

1. No copying of discovery materials without leave of Court;

---

[1] The State is not intending to single out any defense counsel nor infer that Defendant Graham is responsible for all of these activities. The State is simply establishing the basis for the redacted indictment and the need for additional protections for witnesses and grand jury material.

2. Review of discovery material limited to the Defendant, defense counsel and defense representatives;

3. No public display of grand jury material including in pleadings or websites without proper redaction or filing under seal.

The State is also willing to enter into a discovery stipulation that reasonably protects witnesses and provides the grand jury materials to defendants within a reasonable period of time.

Respectfully submitted this 28th day of September, 2009.



Marty J. Jackley
Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
(605) 773-3215
marty.jackley@state.sd.us

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day of September, 2009, a true and correct copy of the State's Response Re: Court Order of September 17, 2009, was served through United States mail, first class, postage prepaid.

John Murphy
Attorney at Law
328 E. New York Street #1
Rapid City, SD 57701

Dana Hanna
Attorney at Law
P.O. Box 3080
Rapid City, SD 57709

Matthew T. Stephens
Attorney at Law
108 Kansas City Street
Rapid City, SD 57701

/s/ Marty J. Jackley
Marty J. Jackley
Attorney General

FILED
OCT 14 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER
JOHN GRAHAM, a/k/a/ John Boy Patton, VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendant.	*	

Pending before the Court is Defendant Graham's Motion to File Motions Past Filing Deadline. (Doc. 455.) The substance of the motion Defendant Graham wishes to file is in fact addressed by the United States, Graham and the State of South Dakota. On the basis of the representations made by the United States, there are no grounds at this time for this Court to order the turning over to Defendant Graham the State of South Dakota grand jury proceedings nor the State of South Dakota unredacted indictment. Accordingly,

IT IS ORDERED that Defendant Graham's Motion to File Motions Past Filing Deadline, doc. 455, is denied. The Court will continue to consider motions filed by a party if the party can show good cause as to why the motion was late filed.

Dated this 14th day of October, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: _____
DEPUTY

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' MOTION TO REQUIRE DEFENDANT MARSHALL'S COUNSEL TO RETURN UNITED STATES' TAPES

COMES NOW the United States of America, through its attorneys, United States Attorney Brendan V. Johnson, and Assistant United States Attorney Robert A. Mandel, and moves that this Court issue an order that defendant Marshall return tapes that were provided to him, pursuant to a court order, for copying for discovery purposes on the following grounds:

1. On January 20, 2009, defendant made a motion for disclosure and production of evidence seeking to have the United States copy a large number of tapes that were in the possession of the United States. Exhibit 1.

2. On January 30, 2009, the United States filed a response stating it was not required to make copies of those tapes for defendant pursuant to the discovery rules and offered defendant's counsel the opportunity to listen to the tapes in the United States Attorney's Office. Exhibit 2.

3. On February 24, 2009, this Court issued an order requiring that the United States make the tapes available to defendant in order for him to make copies and allowing him to have those tapes for that purpose for up to six weeks. Exhibit 3.

4. On February 25, 2009, defense counsel Dana Hanna wrote to the United States and indicated that it was his intention to have the tapes copied into a digital format and that it would not be necessary for the United States to make copies for him. He further sought to have the tapes turned over to him so copies could be made digitally, after which he would return the tapes to the United States. Exhibit 4.

5. On September 30, 2009, defense counsel had still not returned these tapes to the United States and a letter was sent to him seeking their return. Exhibit 5.

6. On October 6, 2009, defense counsel sent a letter to the United States indicating that the tapes that he was given to copy were marked "copy" on the label and that the government had not provided him with "originals." Exhibit 6. Upon receipt of this letter, the Assistant U.S. Attorney called Attorney Hanna who indicated he had not decided whether or not to return the tapes to the United States.

7. On October 14, 2009, defense counsel again wrote to the United States and indicated that it would be expensive and inconvenient for him to make copies of the copies and therefore refused to return the tapes to the United States. Exhibit 7.

It is the position of the United States that it complied with the court order by making these tapes available for defense counsel to copy and that defense counsel should have made copies and returned these tapes to the United States in a timely fashion as ordered by the court.

Wherefore, the United States asks that the Court order the defendant to return the tapes to the United States Attorney's Office forthwith.

Respectfully submitted this 16th day of October, 2009.

/s/ Robert A. Mandel

ROBERT A. MANDEL
Assistant United States Attorney
515 9th Street #201
Rapid City, SD 57701
605.342..7822
FAX: 605.342.1108
Robert.Mandel@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of October, 2009, I served by electronic transmission, a true and correct copy of the foregoing United States' Motion to Require Defendant Marshall's Counsel to Return United States' tapes on:

Dana Hanna
Attorney at Law

John Murphy
Attorney at law

/s/ Robert A. Mandel

Robert A. Mandel

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 DEFENDANT MARSHALL'S MOTION FOR DISCLOSURE AND PRODUCTION OF EVIDENCE

NOW COMES defendant Richard Marshall, by and through counsel, and hereby moves the Court to order the government to produce and provide to the defendant copies of all tape recordings of witnesses in this case, including but not limited to all tape recorded conversations with any cooperating witness or potential witness in this case. The defendant makes this motion on the grounds that these tapes are necessary to prepare an effective defense at trial.

In support of this motion, Dana L. Hanna, attorney for defendant Marshall, hereby affirms:

1. On information and belief, the government has in its possession over 100 tapes of recorded conversations made by cooperating witnesses in this case. Many of the tapes involve recordings of conversations with other witnesses and potential witnesses. These tape recordings were made by, and record statements by cooperating witnesses who will testify in the trial.

2. I have previously requested these tapes in writing and in telephone conversations with the government prosecutor and I have been told that I cannot have copies of those tapes, and that if I wanted to hear them, I would have to make arrangements to hear them at the United States Attorney's office. There are probably 100 hours of taped conversations. I have received transcripts of some of the tapes. The vast majority of those tapes have not been transcribed.

Exhibit 1

3. On January 18, 2009, I heard for the first time the tape recording of a conversation secretly recorded by "Kamook" Darlene Nichols in July 2001 with Cleo Gates, the defendant's ex-wife. Cleo Gates was a government witness in the trial of Arlo Looking Cloud and she is expected to be a government witness in the trial of Richard Marshall. In Looking Cloud's trial, she testified that Arlo Looking Cloud, co-defendant Graham, Theda Clarke, and Anna Mae Aquash went to the home of her and defendant Marshall one night in 1975 and she testified to what transpired during their visit. The events discussed are the very essence of the government's case regarding Richard Marshall and I have never been provided with either that tape nor a transcript of that tape by the government. I borrowed that tape from counsel for the co-defendant.

4. The government has provided these tapes to the co-defendant's attorney. It is impractical and burdensome for me to have to listen to 100 hours of tapes at the United States Attorney's office. Moreover, I need to review the transcripts of some of the tapes that were made for accuracy. It may very well be necessary to seek electronic enhancement of some of the more important tapes, and I may offer some of the tape recordings as evidence.

5. These tapes are necessary for me to prepare an effective defense at trial. They contain Jencks Act material and if the government has not provided the tapes before trial, the government will have an obligation to provide them to me after these witnesses have testified. Therefore, it is economic for the Court in terms of time to order the government to provide me with those tapes before trial and not during trial.

WHEREFORE the defendant moves the Court to direct the government to provide the defendant with copies of all taped recorded conversations involving witnesses or potential witnesses in this case to the defendant forthwith.

Dated this 20th day of January, 2009.

VINE RICHARD MARSHALL, Defendant

BY: */s/ Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080, Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Motion for Disclosure and Production of Evidence upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney
robert.mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 20th day of January, 2008.

/s/ Dana L. Hanna
Dana L. Hanna

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

GOVERNMENT'S RESPONSE TO DEFENDANT MARSHALL'S MOTION FOR DISCLOSURE AND PRODUCTION OF EVIDENCE

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 Disclosure and Production of Evidence and states as follows:

1. Regarding any recordings of statements of the defendant, Fed. R. Crim. P. 16 provides that the United States is required to make it "available for inspection [or] copying." The United States has made these tapes available for defense counsel to listen to in the U. S. Attorney's Office. Defense counsel has not done so. The rule does not require that the United States make a copy of these tapes for defense counsel. While the United States did have an extra set

of copies that were given to co-defendant's counsel, the United States is not required to create another set. Defendant Marshall has not been provided copies of all of the taped conversations based in part upon continuing concerns raised by Defendant Graham that copy of tapes results in reduced quality. See Exhibit 1 (Defendant Graham's correspondence of December 31, 2008) and Exhibit 2 (the United States' response dated January 8, 2009). The United States notes from defendant's pleading that he did on one occasion borrow one of the copies of a tape from co-defendant's counsel to listen to. As long as the Court's order regarding discovery is complied with, the United States does not object to any arrangements between defense counsel to work out an arrangement whereby they can both listen to those copies of the tapes.

2. Regarding any other recordings in the possession of the United States, again there is no legal obligation for the United States to make copies for the defendant. Again, these tapes are available for defense counsel to listen to but he has not done so. Again, the United States does not object to an arrangement between defense counsel.

3. While it is the position of the United States that while a number of the tapes referred to by the defendant are probably not even discoverable under federal law, nonetheless, all are being made available to defense counsel to listen to in the U. S. Attorney's Office. If defense counsel chooses to copy these tapes, the United States is agreeable to working out arrangements if proper procedures and assurances are put in place to protect sensitive discovery

materials. The United States is not required to make copies of these tapes for the defendant under any rule or law and therefore resists the defendant's motion in its entirety.

Respectfully submitted this 30th day of January, 2009.

/s/ Robert A. Mandel

ROBERT A. MANDEL
Assistant United States Attorney
515 9th Street #201
Rapid City, SD 57701
605.342.7822
FAX: 605.342.1108
Robert.Mandel@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 30th 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 Disclosure and Production of Evidence on:

Dana Hanna
Attorney at Law

John Murphy
Attorney at law

/s/ Robert A. Mandel

Robert A. Mandel

MURPHY LAW OFFICE, P.C.
JOHN R. MURPHY - ATTORNEY AT LAW
ERIN E. DUCHENEAUX - LEGAL ASSISTANT

AT THE HISTORIC FEIGEL HOUSE
328 E. NEW YORK STREET, SUITE 1
RAPID CITY, SD 57701

PHONE: (605) 342-2909 FAX: (605) 343-9760 E-MAIL: jmurphysd@hotmail.com www.murphylawoffice.org

December ~~31,~~ 2008

Marty J. Jackley
United States Attorney
P.O. Box 3303
Sioux Falls, SD 57101

RECEIVED
JAN 02 2009
United States Attorney
Sioux Falls, SD

Robert Mandel
Assistant United States Attorney
515 9th Street, Room 201
Rapid City, SD 57701

RE: United States v. John Graham; File No. 08-50079-01

Dear Mr. Jackley and Mr. Mandel:

I am in receipt of an audio tape labeled, "198A-MP-47472; 1 of 1; DATE UNKNOWN; COPY." The exterior of the tape does not indicate who the parties on the tape are that are speaking. The tape is inaudible. Please produce an audible version of the tape and indicate who the parties are that are speaking. Thank you.

Sincerely,

John R. Murphy

Cc: Client

EXHIBIT 1

U.S. Department of Justice

Marty J. Jackley
United States Attorney
District of South Dakota

515 Ninth Street, Room 201
Rapid City, South Dakota 57701
(605)342-7822
FAX:(605)342-1108

January 8, 2009

John R. Murphy
Attorney at Law
328 E. New York St. #1
Rapid City, SD 57701

RE: United States v. John Graham

Dear John:

I am returning the tape you sent to us on January 6, 2009 as per our discussion. This tape is a recording of [redacted]. I was not able to detect any audibility problems with this tape on our player of any significant nature and it is no different from the copy we have. If you are still unable to hear it on your equipment, you can bring it over here and we can play it for you on ours.

Best regards,

MARTY J. JACKLEY
United States Attorney
By:

ROBERT A. MANDEL
Assistant U.S. Attorney

RAM/lc
Enc.
cc: Marty Jackley

EXHIBIT 2

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL, aka RICHARD VINE MARSHALL, aka DICK MARSHALL, Defendant.	)	CR. 08-50079-01, -02 ORDER ON DEFENDANT MARSHALL'S MOTION FOR DISCLOSURE & PRODUCTION OF EVIDENCE

Pending before the court is defendant Richard Marshall's motion for disclosure and production of evidence. [Docket 162]. The government has in its possession audio tapes of recorded conversations. The government previously provided copies of these tapes to defendant John Graham, but now refuses to provide copies to Mr. Marshall, instead requiring Mr. Marshall's counsel to listen to the tapes at the government's offices. The government states that it will allow Mr. Marshall's counsel to make copies of the tapes himself, but the government will not make and provide the copies itself. Mr. Marshall is currently detained in federal custody, so it is not possible for him to accompany his counsel to the federal building to listen to the tapes in question.

Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure requires the government to "permit the defendant to inspect and to copy or photograph

books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is in within the government's possess, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial . . ." See Fed. R. Crim. P. 16(a)(1)(E). The government's assertion that it must allow defendant to copy, but that the government is not required to copy discovery itself, is borne out by Rule 16.

Accordingly, it is hereby

ORDERED that the government shall immediately turn over all the tapes in question to Mr. Marshall's counsel so that he may make copies of the tapes. Mr. Marshall's counsel shall have possession of the tapes for up to six weeks in order to accomplish the copying, at which time the original tapes shall be returned to the government. Counsel's cost for such copying shall be included on his CJA voucher and he shall be reimbursed for the same. Alternatively, if the government reconsiders its position and agrees to make copies of the tapes itself, the government must make such copies and deliver them to Mr. Marshall within 10 days from the date of this order.

Dated February 24, 2009.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

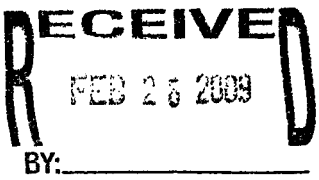
DANA L. HANNA
Attorney at Law

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Post Office Box 3080
Rapid City, SD 57709
(605) 791-1832

dhanna@midconetwork.com

Licensed in the States of:
South Dakota
Nebraska
New York

February 25, 2009



VIA FAX AND MAIL

Robert Mandel
Assistant United States Attorney
515 Ninth St., #201
Rapid City, SD 57701

RE: United States vs. Richard Marshall, CR 08-50079

Dear Mr. Mandel:

In reference to the Court's order directing the government to turn over the tapes referred to in my motion to compel, it is my intention to have those tapes copied into a digital format. Therefore, it will not be necessary for the government to make copies for me.

In accordance with the Court's order, I would appreciate it if we could make arrangements to have the original tapes turned over to me. I will then arrange for copies to be made and return the original tapes to you.

Please advise me as to when I can pick up the tapes from your office. Thank you.

Sincerely,

Dana L. Hanna tjh

Dana L. Hanna

U.S. Department of Justice

Dennis R. Holmes
Acting United States Attorney
District of South Dakota

515 Ninth Street, Room 201
Rapid City, South Dakota 57701

(605)342-7822
FAX:(605)342-1108

September 30, 2009

Dana Hanna
Attorney at Law
816 Sixth Street
Rapid City, SD 57701

RE: United States v. Marshall

Dear Dana:

On February 24, 2009, Judge Duffy ordered the United States to either provide you with the audio tapes of recorded conversations in this case so that you may have them copied and returned to us within six weeks, or, alternatively, make copies of said tapes and deliver them to you. (DE 179). In correspondence dated February 25, 2009, you requested the originals as you wanted to have them copied yourself into a digital format. We provided the original tapes to you at that time; to date, you have not returned them to our office. Please check on the status of this issue and get back to me as soon as possible.

Best regards,

DENNIS R. HOLMES
Acting United States Attorney
By:

ROBERT A. MANDEL
Assistant U.S. Attorney

RAM/lc
Encs.

DANA L. HANNA
Attorney at Law

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Nebraska
New York

October 6, 2009

Robert Mandel
Assistant United States Attorney
515 Ninth St., #201
Rapid City, SD 57701

RE: United States vs. Richard Marshall, CR 08-50079

Dear Mr. Mandel:

I have received your letter dated September 30, 2009 in which you request that I return to you the original tape recorded conversations in this case. It is accurate that I requested the originals to have them copied. It is not accurate that you provided they original tapes to me at that time. The government provided with me with copies of the tapes: each and every one of the 40 some cassette tapes that were provided to me are marked "copy" on the label. I do not know where the original tapes are and the government has never provided me with any originals.

Respectfully yours,

Dana L. Hanna

10-7
called Hanna

Exhibit 6

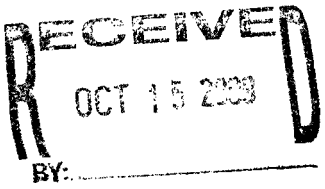
DANA L. HANNA
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Licensed in the States of:
South Dakota
Nebraska
New York

October 14, 2009



Robert Mandel
Assistant United States Attorney
515 9th St., #201
Rapid City, SD 57701

RE: U.S. v. Richard Marshall

Dear Mr. Mandel:

You recently wrote me a letter requesting that I return the original audio tapes of recorded conversations that the government had previously provided me. I responded to you that I have received no original tapes and that all tapes that I had been given were copies. You then requested that I return the copied tapes to you.

As I read Document 179, the Magistrate Judge's order, it directs me to return the tapes to you if the government were to provide me with the original tapes for copying. However, the order states that if the government were to reconsider its position refusing to provide me with copies of tapes and were to agree to make copies of the tapes, then the government was ordered to deliver the copies of the tapes to me within 10 days of the date of this order. The government opted to make copies available to me without any condition upon returning copies.
As I have previously pointed out to you, each of the tapes provided to me has the word "copy" written on the label. Then, several months later, you informed me for the first time that you want the copies returned, even though you acknowledge that the FBI has the original tapes.

Since the court's order directed me to return originals, but not copies, and because it would be both expensive and inconvenient for me to make copies of the copies, I must respectfully decline your request.

Respectfully yours,

Dana L. Hanna

Exhibit 7

FILED
OCT 20 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR. 08-50079-01, -02
Plaintiff,	*	
vs.	*	DEFENDANT MARSHALL'S RESPONSE TO GOVERNMENT MOTION
RICHARD MARSHALL,	*	FOR RETURN OF TAPES
Defendant,	*	

NOW COMES the defendant Richard Marshall, by and through his attorney Dana L. Hanna, and hereby opposes the government's motion for return of copies of tapes provided to the defendant pursuant to Court order.

As grounds for the defendant's opposition to the government's motion, attorney Dana L. Hanna hereby affirms:

1. The government has in its possession over 40 audio cassette tape recordings of interviews conducted by law enforcement with murder suspect Arlo Looking Cloud and conversations secretly recorded by government informants with various individuals who were supporters of the American Indian Movement 34 years ago. The government provided copies of those tapes for the co-defendant Graham, but refused to make or provide copies of the tape-recordings for Mr. Marshall. Mr. Marshall moved for an order directing the government to "produce and provide to the defendant copies of all tape recordings of witnesses in this case". [Doc. 162].

2. In her order of February 24, 2008 [Doc. 179], the United States Magistrate Judge gave the government the choice between two options: the government could provide counsel for Mr.

Marshall with the original tapes, in which case counsel for the defendant was ordered to make copies and return "the original tapes" to the government within six weeks or, "[a]lternatively, if the government reconsiders its position and agrees to make copies of the tapes itself, the government must make such copies and deliver them to Mr. Marshall within 10 days of the date of this order." The court did not order counsel for Mr. Marshall to make or return any *copies* of the tapes, if the government opted to make and provide copies, rather than the original tapes, for Mr. Marshall.

3. In a letter dated February 25, 2008, I wrote a letter to the prosecutor, asking that he provide me with the original tapes so that I could make digital copies. The government declined to grant that request. Instead, the government opted to comply with the court's order by making copies of their tapes and providing Mr. Marshall with those copies. The identifying label on each and every tape provided by the government to Mr. Marshall has the word "copy" written on it.

4. In a letter dated September 30, 2009, and written to me, AUSA Mandel mistakenly asserted that the government had provided me with the original tapes, and inquired as to why I had not returned the original tapes, in view of the court's order.

5. In a letter dated October 6, 2009, I informed Mr. Mandel of his mistake of fact: I informed him that the government had not provided me with any original tapes, as he had affirmed in his letter of September 30; the government had provided me with copies, which, under the court's order, I was not obligated to return to the government (until after trial). I pointed out that all tapes that I had received from the government were marked "copy".

6. I then received a phone call on October 7, 2009, from Mr. Mandel, who informed me that, even if I had been given copies of the original tapes, he wanted me to return the government- made copies of the original tape-recordings. I responded to that request with a

letter dated October 14, 2009, calling the prosecutor's attention to the court order directing me to return originals, if the government provided me with the original tapes, but which did not direct me to make copies of copies, if the government chose to make and provide Mr. Marshall with copies. I declined to undergo the unnecessary expense and inconvenience of making copies of copies for the government, since the order did not require me to do so and since the government had the originals, in any case.

7. In preparing for trial, I frequently listen to the tape-recordings provided to me. They are necessary for my trial preparation, and I intend to offer some of the tape-recordings, or portions thereof, into evidence. Since the government opted to make and provide copies for Mr. Marshall, rather than grant my request for original tapes, and since the return of any copies of tape-recordings to the government prior to trial was neither contemplated or ordered by the Magistrate, the government has shown no good cause to order Mr. Marshall to return the copies of the tapes he received from the government.

WHEREFORE, defendant Marshall urges the Court to deny the government's motion for return of the copies of tapes provided to the defendant pursuant to the Court's order, Document 179.

DATED: October 19, 2009.

RICHARD MARSHALL, Defendant

By 

Dana L. Hanna
HANNA LAW OFFICE, P.C.
PO Box 3080
816 Sixth Street
Rapid City, SD 57709
605-791-1832

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the defendant's response to the Government Motion on the government by mailing a copy of the same to AUSA Robert Mandel, 515 9th St., #201, Rapid City, SD 57701, on the 20th day of October, 2009.

Dana L. Hanna

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 08-3580 / 09-2009

United States of America,	*	
	*	
Appellant,	*	
	*	Appeal from the United States
v.	*	District Court for the District
	*	of South Dakota.
John Graham,	*	
	*	
Appellee.	*	

Submitted: April 15, 2009
Filed: July 28, 2009 (Corrected: 10/23/2009)

Before RILEY, BENTON, and SHEPHERD, Circuit Judges.

BENTON, Circuit Judge.

A grand jury indicted John Graham on one count of first degree murder, 18 U.S.C. § 1153. The district court[1] dismissed the indictment because it failed to allege his Indian status. Months later, the district court dismissed an identical count in a later indictment. The government appeals. This court affirms.

---

[1] The Honorable Lawrence L. Piersol, United States District Judge for the District of South Dakota.

I.

In 2003, a grand jury charged:

> On or about the 12th day of December, 1975, near Wanblee, in Indian Country, in the District of South Dakota, the defendants, Fritz Arlo Looking Cloud, an Indian, and John Graham, a/k/a John Boy Patton, willfully, deliberately, maliciously, and with premeditation and malice aforethought, did unlawfully kill and aid and abet the unlawful killing of Annie Mae Aquash, a/k/a Annie Mae Pictou, by shooting her with a firearm, in violation of 18 U.S.C. §§ 1111, 1153, and 2.

While the indictment alleged that Looking Cloud was Indian, it did not allege Indian status as to Graham or the victim. Graham made a pretrial motion to dismiss the indictment, which the court granted. The government appeals.

In 2008, a grand jury again indicted Graham on first degree murder. Count I and II of the indictment brought new charges; Count III, the same charge as the 2003 indictment, did not allege that Graham is Indian.[2] Graham moved to dismiss all charges. The court dismissed Count III, preserving Counts I and II for trial. The government appeals the interlocutory dismissal of Count III.

---

[2] The 2008 indictment for first degree murder alleges:

> Count I: Only Graham is an Indian, citing 18 U.S.C. § 1153;
>
> Count II: Only Aquash is an Indian, citing 18 U.S.C. § 1152;
>
> Count III: Graham aided and abetted certain Indians, citing 18 U.S.C. § 1153.

Jurisdiction being proper under 28 U.S.C. § 1291 and 18 U.S.C. § 3731, this court consolidated the government's appeals from the dismissals of both the 2003 indictment and Count III of the 2008 indictment.

II.

This court reviews "*de novo* the district court's decision to grant [a] motion to dismiss the indictment." ***United States v. Keeney***, 241 F.3d 1040, 1042 (8th Cir. 2001). The Fifth Amendment states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." **U.S. Const. amend V**. Generally, the words "presentment" and "indictment" are interchangeable under the Fifth Amendment. *See* ***Hale v. Henkel***, 201 U.S. 43, 60-61 (1906).

"An indictment is sufficient if it contains 'all of the essential elements of the offense charged, fairly informs the defendant of the charges against which he must defend, and alleges sufficient information to allow a defendant to plead a conviction or acquittal as a bar to subsequent prosecution.'" ***United States v. Sohn***, 567 F.3d 392, 394 (8th Cir. 2009), *quoting* ***United States v. Cavins***, 543 F.3d 456, 458 (8th Cir. 2008).

The Indian Major Crimes Act, 18 U.S.C. § 1153, extends federal jurisdiction over specific offenses committed by Indians in Indian Country:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder . . . shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

The government argues that the district court erred in dismissing the indictments, because the failure to allege Indian status under § 1153 does not bar federal jurisdiction. *See* ***United States v. Pemberton***, 405 F.3d 656, 659 (8th Cir. 2005) (holding that "the alleged dispute over [the defendant's] Indian status did not deprive the district court of jurisdiction"); ***United States v. White Horse***, 316 F.3d 769, 772 (8th Cir. 2003) (concluding that the defendant's "assertion that he is an Indian is relevant to the matter of proof but irrelevant on the matter of jurisdiction"). *See also* ***United States v. Beck***, 250 F.3d 1163, 1165 (8th Cir. 2001) ("jurisdictional" elements such as an interstate nexus are not truly jurisdictional because they do not affect a court's constitutional or statutory power to adjudicate a case). *Pemberton* and *White Horse* establish that the court has subject matter jurisdiction; however, they do not control the issue in this case – whether the indictments sufficiently state a violation of § 1153.

The Tenth Circuit considered the sufficiency of an indictment that failed to allege a defendant's Indian status under the Indian Country Crimes Act, 18 U.S.C. 1152.[3] ***United States v. Prentiss***, 206 F.3d 960, 962 (10th Cir. 2000), *rev'd on other grounds*, 256 F.3d 971, 985 (10th Cir. 2001) (en banc). The panel reversed the conviction, holding "the Indian status of the defendant and victim are essential elements under 18 U.S.C. § 1152, which must be alleged in the indictment and established by the government at trial. Because [the defendant's] indictment did not allege these elements, it is insufficient." ***Id***. at 966. *Accord* ***United States v. Hilderbrand***, 261 F.2d 354, 357 (9th Cir. 1958) (dismissing an § 1153 indictment that "did not allege that appellant or victim of the accused was an Indian").

[3] The Indian Country Crimes Act, 18 U.S.C. § 1152, provides federal jurisdiction for crimes occurring within Indian country between an Indian and a non-Indian.

In a Ninth Circuit case, the defendant argued, post-trial, that the § 1153 indictment was defective because it failed to state that he was an Indian. ***United States v. James***, 980 F.2d 1314, 1316 (9th Cir. 1992). The court noted that "[w]hen the indictment is questioned *prior* to trial, reference to a statute cannot cure a defect in the indictment where it fails to allege the elements of the crime." ***Id***. at 1318, *citing* ***United States v. Kurka***, 818 F.2d 1427, 1431 (9th Cir. 1987). By "the liberal standard of review" for an indictment challenged post-trial, however, the indictment "adequately" alleged the necessary elements of the crime by including a reference to the statute. ***Id***.

In this case, Graham's pretrial motions challenged the sufficiency of the failure to allege his Indian status. The plain language of § 1153 covers any "Indian" who commits murder. This court concludes that the indictments are deficient because Graham's Indian status is an essential element of § 1153.

The government also argues that the court erred in dismissing the indictment because Graham can be charged as an aider-and-abettor. Looking Cloud was properly indicted under § 1153. *See* ***United States v. Looking Cloud***, 419 F.3d 781, 785 n.3 (8th Cir. 2005). The government claims that liability extends to Graham without an allegation of Indian status. The law provides that

> a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> b) Whoever willfully causes an act to be done which if directly performed by him or another person would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2.

The government cites no authority applying aider-and-abettor liability in the Indian law context. *See* ***United States v. Rector***, 538 F.2d 223, 225 (8th Cir. 1976) (stating that 18 U.S.C. § 2 is generally applicable to the entire criminal code); ***United States v. Sigalow***, 812 F.2d 783, 785 (2d Cir. 1987) ("A defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense."); ***United States v. Standefer***, 610 F.2d 1076, 1085 (3d Cir. 1979) (en banc) (affirming conviction of private citizen as aider and abettor under statute prohibiting government officials from receiving gifts), *aff'd*, 447 U.S. 10 (1980); ***United States v. Lester***, 363 F.2d 68, 73 (6th Cir. 1966) (affirming convictions for aiding and abetting police officers in conspiracy even though defendants could not act under "color of law").

This court has considered accomplice liability under the Indian Major Crimes Act. ***United States v. Norquay***, 905 F.2d 1157, 1159-63 (8th Cir. 1990). There, the defendant, an Indian, pled guilty to burglary under § 1153. This court addressed whether he should be sentenced under Minnesota or federal law. The defendant argued that, because his non-Indian accomplice could be prosecuted only under Minnesota law, he should be sentenced under Minnesota law to avoid disparate treatment. This court reasoned that Federal Sentencing Guidelines applied, but agreed that the accomplice could not be federally prosecuted:

> Defendant is correct that his non-Indian accomplice is outside the reach of federal jurisdiction because the victim of the burglary was also a non-Indian. *United States v. McBratney*, 104 U.S. 621, 26 L. Ed. 869 (1881) (Congress did not assume jurisdiction over crimes committed within Indian country by non-Indians against other non-Indians in 18 U.S.C. § 1152 and therefore the states have jurisdiction over these offenses) (*McBratney*); *see United States v. Antelope*, 430 U.S. 641, 644 n.4, 97 S.Ct. 1395, 1397 n.4, 51 L. Ed. 2d 701 (1977).

Id. at 1162. *Accord* ***United States v. Dodge***, 538 F.2d 770, 775-76 (8th Cir. 1976) (reversing burglary conviction involving non-Indians for lack of jurisdiction); ***United States v. Torres***, 733 F.2d 449, 453 n.1 (7th Cir. 1984) (noting that a non-Indian, who allegedly conspired to murder a non-Indian, was not prosecuted under §§ 1153 or 2).

Based on *Norquay*, § 2 does not extend federal jurisdiction to an accomplice charged under § 1153. The counts in both indictments failed to allege Graham's Indian status, which cannot be cured by an application of aider-and-abettor liability.

III.

The judgment of the district court is affirmed.

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

MEMORANDUM

TO: All Counsel of Record

FROM: DeAnn M. Sharpless, Deputy Clerk

DATE: October 23, 2009

Re: 08-3580 United States v. John Graham

On 07/28/2009, the Court issued an opinion in the referenced appeal, but did not cite the Supreme Court's opinion in the Standefer case.

On page 6, first paragraph, eighth line that citation is corrected by adding "aff'd, 447 U.S. 10 (1980)".

cc: All Circuit Judges
St. Paul Clerk's Office
West Publishing
Missouri Lawyers Weekly

District Court/Agency Case Number(s): 5:03-cr-50020-LLP-2

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR. 08-50079
Plaintiff,	*	
vs.	*	MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS INDICTMENT FOR GOVERNMENT'S FAILURE TO PRESERVE AND DISCLOSE FAVORABLE EVIDENCE
RICHARD MARSHALL,	*	
Defendant,	*	

The defendant Richard Marshall respectfully submits that he has been denied due process of law by the government's failure to preserve evidence favorable to the accused by allowing officers of the Denver Police Department, acting as agents of the federal government in a joint local-federal investigation, to destroy evidence that would have been favorable to the defendant, including evidence of prior inconsistent statements made by the government's key witness, Fritz Arlo Looking Cloud.

The facts upon which this motion is based are set forth in the defendant's Motion to Dismiss Indictment for Government's Failure to Preserve and Disclose Favorable Information and in two prior motions, Documents 434 and 436..

When the government suppresses or fails to disclose material exculpatory evidence--{)r, as in this case, when police destroy such evidence-the good faith or bad faith of the prosecution is irrelevant: a due process violation occurs whenever the prosecution fails to provide such evidence to the accused. Brady v. Maryland, 373 US 83,83 S. Ct. 1194 (1963). The government's

affirmative duty to disclose evidence that is favorable to the accused and material to the question of guilt extends to impeachment evidence. United States v. Barraza Cazares, 465

F. 3d 327, 333 (8th Cir. 2006), *citing* United States v. Bagley, 473 US 667,676, 105 S. Ct. 3375 (1985).

The duty to disclose favorable material evidence necessarily includes a duty to preserve such evidence so that it can be disclosed. The leading Supreme Court case on the destruction of evidence in criminal cases is Arizona v. Youngblood, 488 US 51, 109 S. Ct. 333 (1988),

In the Youngblood case and in In California v. Trombetta, 467 US 479, 104 S. Ct. 2528 (1984), police,

draws a distinction between the destruction of evidence that is favorable and material, which would include impeachment evidence, and evidence that is only potentially useful. If the evidence is material and favorable, destruction of such evidence constitutes a violation of due process. If the favorable nature of destroyed evidence is merely hypothetical or possible, then the defendant has the burden of showing that the evidence was not destroyed in good faith.

Here, the defendant would adduce evidence in a hearing that in a joint local-federal investigation in which federal authorities supervised Denver Police investigators, Denver Police destroyed evidence of statements made by the government's key witness, Arlo Looking Cloud, and that the notes and files that were destroyed recorded statements by Looking Cloud that were inconsistent and directly in conflict with statements he made to the grand jury that returned an indictment against Richard Marshall.

The destroyed evidence therefore is not "potentially" favorable to the accused: it was

provably favorable.

The favorable nature of this evidence is obvious. The government's willful failure to investigate the facts of the destruction of evidence in this case and its willful failure to disclose any facts about the destruction of such evidence to the defendant cannot be condoned. The government should not be allowed to evade responsibility for the destruction of this evidence by chaining that the destruction was the work of another, separate, local government. This was a joint investigation, undertaken by Denver Police at the request of, and under the supposed supervision of, federal investigators.

Information and material possessed by the Denver Police Department should be considered to be in the control of the United States Attorney's Office for purposes of the disclosure requirements of Brady, regardless of whether the United States Attorney's office physically possesses such discovery material at the present time. For purposes of determining who is to be considered as part of the prosecution for Brady purposes, the "prosecution", in addition to any members of the United States Attorney's office, also includes police officers, agents and other investigatory personnel who participated in the investigation and prosecution of

the instant case. United States v. Brooks, 966 F.2d 1500, 1503 (DC Cir. 1992); Carey v. Duckworth, 738 F.2d 875, 878-79 (7th Cir. 1984). Whether a state law enforcement agency may be considered a part of a federal prosecution team depends upon the level of involvement between the United States Attorney's office and the state agency which holds the alleged Brady material. United States v. Upton, 856 F. Supp. 727, 749 (SONY 1994). "The inquiry is not whether the United States Attorney's Office physically possesses the discovery material; the inquiry is the extent to which there

was there was a "joint investigation" with another agency." Upton, 856 F. Supp. at 750. See also: United States v. Ramos-Cartagena, 9 F.Supp.2d 88 (OPR 1998). Where the cooperative activity of state officials and United States Attorneys resulted in the indictment that motivates the Brady request, Brady material in possession of state officials is considered to be in the possession of the United States Attorney for purposes of the government's duty to disclose favorable evidence to the defendant. United States v. Shakur, 543 F.Supp. 1059, 1060 (SONY 19982); United States v. Antone, 603 F.2d 566, 569 (5th Cir. 1979).

Although in general, knowledge of Brady material or evidence in possession of state agencies is not automatically imputed to the federal government, *see* United States v. Kern, 12 F.3d 122, 126 (8th Cir. 1993), the afore-cited cases stand for the proposition that when there is a joint investigation between state and federal law enforcement agencies, knowledge and evidence in possession of the state law enforcement agency is imputed to the federal government. Where there is a joint federal-state investigation, the federal government has a duty under Brady to preserve and disclose favorable evidence in the possession of state law enforcement agencies to the defendant.

Here, where local police officials acting in a joint federal and local investigation, under the purported supervision of federal investigators, failed to preserve exculpatory evidence, then for purposes of Brady, the government failed to preserve

exculpatory evidence and the defendant Richard Marshall has been denied federal constitutional due process.

The government failed in its duty to preserve the evidence here by failing to insure the preservation of evidence by the local authorities who were working under the government's overall supervision.

Therefore, the defendant's right to due process requires this court to order the government to investigate the destruction of evidence in this case and to make full disclosure of the facts, and to order a hearing in which the defendant will have the opportunity to prove that the government, through its local agents, the Denver Police Department, destroyed evidence that would have been favorable to the accused.

Dated:

Respectfully submitted,

etc.

As grounds for the motion, Dana L. Hanna, attorney for Richard Marshall, hereby affirms under penalty of law:

1. The indictments in this case arose from a joint local and federal investigation by Denver Police Department and federal investigators. Beginning in 1994, the federal government supervised the Denver Police Department in an investigation into the murder of Anna Mae Pictou Aquash. Detective Abel Alonzo was the lead investigator for the Denver Police. Beginning in 1994, Detective Alonzo investigated this case under the supervision of U.S. Marshall Robert Ecoffey and other federal investigators.

2. In 2003, the Denver Police Department publicly acknowledged that in 2001 they had destroyed files and records containing evidence in the Aquash murder investigation. See: Exhibit A, attached to Motion to Compel Disclosure of Impeachment Evidence [Document 436]: Rocky Mountain News article.

3. The evidence that was destroyed in this case was not destroyed in good faith or in keeping with normal police practice. According to the Denver Police Department, the evidence–which was evidence in a high profile ongoing murder investigation–was destroyed "mistakenly."

4. On the 19th of August, 2009, defendant Marshall filed a motion to compel disclosure of evidence and information regarding the destruction of reports, tapes and other evidence in this case by the Denver Police Department in 2001 [Document 436] and a motion seeking an evidentiary hearing to determine what evidence was actually destroyed [Document 434], along with supporting memoranda of law. The government did not file any response in opposition to either motion, and both motions are presently pending before the Court.

5. All factual affirmations set forth in Documents 434 and 436 are hereby reaffirmed by reference and incorporated herein as though fully set forth.

6. In the aforesaid motions and the supporting memoranda of law, defendant Marshall argued that there was a strong likelihood that notes, records and evidence of statements made by the prosecution's key witness, Looking Cloud, to Detective Alonzo were among the evidence destroyed by Denver Police, and that such evidence was favorable to the defendant because it could have been used to impeach Looking Cloud's trial testimony. As a result of information recently obtained by the defense, the likelihood that evidence, notes and records of statements made by Looking Cloud to Detective Alonzo were destroyed is no longer speculative or merely probable: it is now a provable fact.

7. On the 19th of October, 2009, a potential witness in this case provided me with an excerpt from an article written by Denver journalist Maximilian Potter, who interviewed Arlo Looking Cloud and Detective Abel Alonzo in 2004. Mr. Potter wrote in his article and later confirmed to me in a telephone conversation that Alonzo had told him that among the evidence that had been "mistakenly destroyed" by the Denver Police Department in 2001 were notes that recorded statements made by Looking Cloud to Detective Alonzo and Marshall Ecoffey in

1995, when they took Looking Cloud, in custody, from Denver to the crime scene on the Pine Ridge Sioux Reservation and back again to Denver. During that time, the investigators questioned Looking Cloud about the abduction and killing of Aquash, and they took notes of Looking Cloud's answers to their questions. In 2004, Detective Alonzo admitted to Mr. Potter during their interview that those notes were among the evidence that was "mistakenly destroyed" by Denver Police in 2001.

8. Of the discovery materials that have been disclosed to date, the only surviving record of any statements made by Looking Cloud during the more than 16 hours he spent with Ecoffey and/or Alonzo in 1995 is a very brief and general summary written by Ecoffey. Even from that general summary, it is clear that the statements made by Looking Cloud to Ecoffey and Alonzo in 1995 about the murder of Anna Mae Aquash directly contradict statements Looking Cloud made in 2008 to the grand jury that returned the indictment against Richard Marshall.

9. Looking Cloud's credibility is a critical issue for the jury in this case. The destruction of evidence that could have been used to impeach Looking Cloud's testimony has caused serious prejudice to Richard Marshall's ability to present a defense and his ability to confront his chief accuser. Mr. Marshall reasonably believes that in an evidentiary hearing he can prove that the destruction and loss of evidence in this case has deprived him of material evidence that would have been favorable to his defense.

10. The government has been aware at all times since 2003 that material and potentially exculpatory evidence was destroyed by Denver Police Department in 2001. But the government

has never provided any information as to the destruction of that evidence to Richard Marshall.[1] Since the evidence that was destroyed, including evidence of prior inconsistent statements made by Looking Cloud, as well as the evidence of the government's gross negligence in failing to preserve such evidence, constitutes exculpatory evidence under Brady v. Maryland, 373 US 83(1963), United States v. Bagley, 473 US 667, 676, and (1985) and Kyles v. Whitley, 514 US 419 (1995), the government's failure to disclose that evidence to the accused constitutes willful suppression of exculpatory evidence.

11. The Denver Police's destruction of evidence that would have been favorable to Richard Marshall and the federal government's failure to preserve that evidence has caused substantial prejudice to Richard Marshall's constitutional right to a fair trial, his right to cross examine his chief accuser, and his right to fundamental fairness.

12. The court previously directed the parties to file their pre-trial motions by March 23, 2009, unless good cause excused the filing of a motion after that date. Here, there is good cause: in spite of due diligence by the defense, the facts that give rise to this motion were not discovered by the defense until after March 23, 2009. Although the destruction of evidence in this case by Denver police was known to the government since 2003, the government did not disclose any facts concerning the destruction of such evidence to Richard Marshall. The defendant could not confirm that evidence regarding prior statements made by Arlo Looking Cloud was among the evidence that was destroyed until counsel for the defendant received that information on October 19, 2009.

---

[1] Nor did the government provide any information about the destruction of such evidence to codefendant John Graham or to Arlo Looking Cloud, before his trial.

WHEREFORE, the defendant Richard Marshall moves the court to enter an order:

(1) directing the government to provide the defendant with all information and evidence relating to the destruction and loss of evidence in this case by Denver Police Department;

(2) directing the government to respond to this motion and the defendant's prior motions [documents 434 and 436] within ten days or have the defendants' motions granted by default;

(3) scheduling an evidentiary hearing in which the defendant will have an opportunity to prove the material facts affirmed in this motion; and

(4) Granting dismissal of the indictment against Richard Marshall with prejudice.

DATED: October 27, 2009

RICHARD MARSHALL, Defendant

By: /s/ Dana L. Hanna

Dana L. Hanna
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PO Box 3080
816 Sixth Street
Rapid City, SD 57709
605-791-1832

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR. 08-50079-01, -02
Plaintiff,	*	
vs.	*	DEFENDANT MARSHALL'S MOTION TO DISMISS INDICTMENT FOR GOVERNMENT'S FAILURE TO PRESERVE AND DISCLOSE FAVORABLE EVIDENCE
RICHARD MARSHALL,	*	
Defendant,	*	

NOW COMES the defendant Richard Marshall, by and through his attorney Dana L. Hanna, and pursuant to his constitutional right to due process of law, his right to present a defense and his right to a fair trial, hereby moves the court to dismiss the indictment against him, with prejudice, on the grounds that the government failed to preserve favorable evidence by allowing officers of the Denver Police Department, acting as agents of the federal government in a joint local-federal investigation, to destroy evidence that would have been favorable to the defendant, including evidence of prior inconsistent statements made by the government's key witness, Fritz Arlo Looking Cloud.

As grounds for the motion, Dana L. Hanna, attorney for Richard Marshall, hereby affirms under penalty of law:

1. The indictments in this case arose from a joint local and federal investigation by Denver Police Department and federal investigators. Beginning in 1994, the federal government supervised the Denver Police Department in an investigation into the murder of Anna Mae Pictou

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destroyed by Denver Police, and that such evidence was favorable to the defendant because it could have been used to impeach Looking Cloud's trial testimony. As a result of information recently obtained by the defense, the likelihood that evidence, notes and records of statements made by Looking Cloud to Detective Alonzo were destroyed is no longer speculative or merely probable: it is now a provable fact.

7. On the 19th of October, 2009, a potential witness in this case provided me with an excerpt from an article written by Denver journalist Maximilian Potter, who interviewed Arlo Looking Cloud and Detective Abel Alonzo in 2004. Mr. Potter wrote in his article and later confirmed to me in a telephone conversation that Alonzo had told him that among the evidence that had been "mistakenly destroyed" by the Denver Police Department in 2001 were notes that recorded statements made by Looking Cloud to Detective Alonzo and Marshall Ecoffey in 1995, when they took Looking Cloud, in custody, from Denver to the crime scene on the Pine Ridge Sioux Reservation and back again to Denver. During that time, the investigators questioned Looking Cloud about the abduction and killing of Aquash, and they took notes of Looking Cloud's answers to their questions. In 2004, Detective Alonzo admitted to Mr. Potter during their interview that those notes were among the evidence that was "mistakenly destroyed" by Denver Police in 2001.

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made in 2008 to the grand jury that returned the indictment against Richard Marshall.

9. Looking Cloud's credibility is a critical issue for the jury in this case. The destruction of evidence that could have been used to impeach Looking Cloud's testimony has caused serious prejudice to Richard Marshall's ability to present a defense and his ability to confront his chief accuser. Mr. Marshall reasonably believes that in an evidentiary hearing he can prove that the destruction and loss of evidence in this case has deprived him of material evidence that would have been favorable to his defense.

10. The government has been aware at all times since 2003 that material and potentially exculpatory evidence was destroyed by Denver Police Department in 2001. But the government has never provided any information as to the destruction of that evidence to Richard Marshall.[1] Since the evidence that was destroyed, including evidence of prior inconsistent statements made by Looking Cloud, as well as the evidence of the government's gross negligence in failing to preserve such evidence, constitutes exculpatory evidence under Brady v. Maryland, 373 US 83(1963), United States v. Bagley, 473 US 667, 676, and (1985) and Kyles v. Whitley, 514 US 419 (1995), the government's failure to disclose that evidence to the accused constitutes willful suppression of exculpatory evidence.

11. The Denver Police's destruction of evidence that would have been favorable to Richard Marshall and the federal government's failure to preserve that evidence has caused substantial prejudice to Richard Marshall's constitutional right to a fair trial, his right to cross examine his chief accuser, and his right to fundamental fairness.

---

[1] Nor did the government provide any information about the destruction of such evidence to codefendant John Graham or to Arlo Looking Cloud, before his trial.

12. The court previously directed the parties to file their pre-trial motions by March 23, 2009, unless good cause excused the filing of a motion after that date. Here, there is good cause: in spite of due diligence by the defense, the facts that give rise to this motion were not discovered by the defense until after March 23, 2009. Although the destruction of evidence in this case by Denver police was known to the government since 2003, the government did not disclose any facts concerning the destruction of such evidence to Richard Marshall. The defendant could not confirm that evidence regarding prior statements made by Arlo Looking Cloud was among the evidence that was destroyed until counsel for the defendant received that information on October 19, 2009.

WHEREFORE, the defendant Richard Marshall moves the court to enter an order:

(1) directing the government to provide the defendant with all information and evidence relating to the destruction and loss of evidence in this case by Denver Police Department;

(2) directing the government to respond to this motion and the defendant's prior motions [documents 434 and 436] within ten days or have the defendants' motions granted by default;

(3) scheduling an evidentiary hearing in which the defendant will have an opportunity to prove the material facts affirmed in this motion; and

(4) Granting dismissal of the indictment against Richard Marshall with prejudice.

DATED: October 27, 2009

RICHARD MARSHALL, Defendant

By: /s/ Dana L. Hanna

Dana L. Hanna
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PO Box 3080
816 Sixth Street
Rapid City, SD 57709
605-791-1832

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR. 08-50079
Plaintiff,	*	
vs.	*	MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS INDICTMENT FOR GOVERNMENT'S FAILURE TO PRESERVE AND DISCLOSE FAVORABLE EVIDENCE
VINE RICHARD MARSHALL,	*	
Defendant,	*	

The defendant Richard Marshall respectfully submits that he has been denied due process of law by the government's failure to preserve evidence favorable to the accused by allowing officers of the Denver Police Department, acting as agents of the federal government in a joint local-federal investigation, to destroy evidence that would have been favorable to the defendant, including evidence of statements that could have been used to impeach of the government's key witness, Fritz Arlo Looking Cloud. The facts upon which this motion is based are set forth in the defendant's Motion to Dismiss Indictment for Government's Failure to Preserve and Disclose Favorable Information and in two prior motions seeking relief for the destruction of evidence [Documents 434 and 436].

When the government suppresses or fails to disclose material exculpatory evidence–or, as in this case, when police destroy such evidence–the good faith or bad faith of the prosecution is irrelevant: a due process violation occurs whenever the prosecution fails to provide such evidence to the accused. Brady v. Maryland, 373 US 83,83 S. Ct. 1194 (1963).

The government's duty to disclose favorable evidence includes the duty to disclose impeachment evidence. United States v. Barraza Cazares, 465 F. 3d 327, 333 (8ht Cir. 2006), *citing* United States v. Bagley, 473 US 667,676, 105 S. Ct. 3375 (1985).

The duty to disclose favorable material evidence necessarily includes a duty to preserve such evidence so that it can be disclosed. The leading Supreme Court case on the destruction of evidence in criminal cases is Arizona v. Youngblood, 488 US 51, 109 S. Ct. 333 (1988),

In the Youngblood case and in California v. Trombetta, 467 US 479, 104 S. Ct. 2528 (1984), the Supreme Court draws a distinction between the destruction of evidence that is provably favorable to the defendant and evidence that is only potentially useful. The cases hold that if the defendant can show that the evidence that was destroyed was material and favorable, destruction of such evidence constitutes a violation of due process. If the favorable nature of destroyed evidence is merely hypothetical or possible, then the defendant has the burden of showing that the evidence was not destroyed in good faith in order to establish a due process violation.

Here, the defendant Marshall can present evidence in a hearing that in a joint local-federal investigation in which federal authorities supervised the investigation by Denver Police Department investigators, the Denver Police Department destroyed evidence of statements made by the government's key witness, Arlo Looking Cloud, to police and that the statements made by Looking Cloud were inconsistent and directly in conflict with statements he made to the grand

jury that returned an indictment against Richard Marshall; therefore, police destroyed evidence that could have been used to impeach the government's key witness against Mr. Marshall.

The destroyed evidence in this case was not just "potentially" favorable to the accused: it was provably favorable.

The favorable nature of this lost impeachment evidence is obvious. The government's willful failure to investigate the facts of the destruction of evidence in this case and its willful failure to disclose any facts about the destruction of such evidence to the defendant cannot be condoned. The government should not be allowed to evade responsibility for the destruction of this evidence by chaining that the destruction was the work of another, separate, local government. This was a joint investigation, undertaken by Denver Police at the request of, and under the supervision of, federal investigators.

Information and material possessed by the Denver Police Department should be considered to be in the control of the United States Attorney's Office for purposes of the disclosure requirements of Brady, regardless of whether the United States Attorney's office physically possesses such discovery material at the present time. For purposes of determining who is to be considered as part of the prosecution for Brady purposes, the "prosecution," in addition to any members of the United States Attorney's office, also includes police officers, agents and other investigatory personnel who participated in the investigation and prosecution of the instant case. United States v. Brooks, 966 F.2d 1500, 1503 (DC Cir. 1992); Carey v. Duckworth, 738 F.2d 875, 878-7 (7th Cir. 1984).

Whether a state or local law enforcement agency may be considered a part of a federal

prosecution team, depends upon the level of involvement between the United States Attorney's office and the state or local agency which holds the alleged Brady material. United States v. Upton, 856 F. Supp. 727, 749 (SONY 1994). "The inquiry is not whether the United States Attorney's Office physically possesses the discovery material; the inquiry is the extent to which there was there was a "joint investigation" with another agency." Upton, 856 F. Supp. at 750. See also: United States v. Ramos-Cartagena, 9 F.Supp.2d 88 (DPR 1998). Where the cooperative activity of state or local officials and United States Attorneys resulted in the indictment that motivates the Brady request, Brady material in possession of state or local officials is considered to be in the possession of the United States Attorney for purposes of the government's duty to disclose favorable evidence to the defendant. United States v. Shakur, 543 F.Supp. 1059, 1060 (SDNY 19982); United States v. Antone, 603 F.2d 566, 569 (5th Cir. 1979).

Although in general, knowledge of Brady material or evidence in possession of state agencies is not automatically imputed to the federal government, *see* United States v. Kern, 12 F.3d 122, 126 (8th Cir. 1993), the afore-cited cases stand for the proposition that when there is a joint investigation between state and federal law enforcement agencies, knowledge and evidence in possession of the state law enforcement agency is imputed to the federal government. Where there is a joint federal-state investigation, the federal government has a duty under Brady to preserve and disclose favorable evidence in the possession of state law enforcement agencies to the defendant.

Here, Denver police officials were acting in a joint federal and local investigation, assisting federal investigators at the request of federal investigators. Therefore, their failure to

preserve exculpatory evidence, for purposes of Brady, is a failure by the government to preserve exculpatory evidence, and the government's failure caused the Richard Marshall a denial of federal constitutional due process.

Here, the defendant submits that he can show that government failed in its duty to preserve and disclose material impeachment evidence–notes recording inconsistent and false statements by the government's key witness against Richard Marshall–by failing to insure the preservation of that evidence by the local authorities who were working under the government's supervision.

Therefore, the defendant respectfully submits that this court should order that a hearing be held to provide the defendant with the opportunity to prove that the government, through its local agents, the Denver Police Department, destroyed evidence that would have been favorable to the accused; and if the defendant establishes that the destruction of evidence in this case has caused a violation of the defendant's right to due process of law, then this court should dismiss the indictment against Richard Marshall.

Dated: October 28, 2009

Respectfully submitted,

By: /s/ Dana L. Hanna

Dana L. Hanna
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PO Box 3080

816 Sixth Street
Rapid City, SD 57709
605-791-1832

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the Memorandum in Law of Support of Defendant's Motion to Dismiss Indictment for Government's Failure to Preserve and Disclose Favorable Evidence on the government by e-mailing a copy of the same to AUSA Robert Mandel (Robert.Mandel@usdoj.gov) and John Murphy (jmurphysd@hotmail.com) on the 28th day of October, 2009.

/s/ Dana L Hanna
Dana L. Hanna

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 08-3580 / 09-2009

United States of America,

Appellant,

v.

John Graham,
also known as John Boy Patten,

Appellee.

Appeal from U.S. District Court for the District of South Dakota
(5:03-cr-50020-LLP-2)
(5:08-cr-50079-LLP-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

GRUENDER, Circuit Judge, with whom COLLOTON, Circuit Judge, joins, dissenting from denial of rehearing en banc.

I would grant rehearing en banc because I conclude that 18 U.S.C. § 2 does not require an indictment to allege that an aider and abettor shares the status element necessary to convict the principal of the particular offense at issue. The indictment here alleges that Looking Cloud is an Indian, thereby satisfying the status requirement

set out in the Indian Major Crimes Act, 18 U.S.C. § 1153. Because the indictment fails to allege that either Graham or the victim is also an Indian,[1] the panel concludes that the indictment is fatally defective. Although the panel opinion on its face appears limited to interpreting Section 2 as it applies "in the Indian law context," *United States v. Graham*, 572 F.3d 954, 956 (8th Cir. 2009), I see no reason why the underlying logic of the holding would not likewise prevent the prosecution of aiders and abettors who do not share the status requirements of various other federal criminal offenses. In any event, this holding runs counter to the text and history of Section 2, a clear statement by the Supreme Court, and the reasoned holdings of two of our sister circuits.

The plain language of Section 2 contains no exception that would make it inapplicable to the many crimes that include a status element. Section 2(a) states that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." By its terms, Section 2 applies to all "offense[s] against the United States." *See United States v. Posters 'N' Things Ltd.*, 969 F.2d 652, 662 (8th Cir. 1992) ("This provision is applicable to the entire criminal code.") (internal quotation omitted). Section 1153 describes an offense against the United States. Thus, under the plain language of Section 2, a person commits a federal crime if, regardless of his Indian status, he aids or abets someone who violates § 1153. Here, the indictment alleges Graham did precisely that: he aided and abetted Looking Cloud, an Indian, in the murder of Annie Mae Aquash.

Furthermore, according to the Supreme Court, Congress amended 18 U.S.C. § 2 in 1951 for the purpose of directly answering the question this case presents. *Standefer v. United States*, 447 U.S. 10, 18 n.11 (1980). The statute previously stated

[1] Section 1153 also applies if the victim was an Indian.

that "[w]hoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." Act of Mar. 4, 1909, § 332, 35 Stat. 1152. In 1951, Congress inserted the words "punishable as" into the statute. *See* Act of Oct. 31, 1951, § 17(b), 65 Stat. 710, 717. This amendment

> was designed to eliminate all doubt that in the case of offenses whose prohibition is directed at members of specified classes (*e.g.* federal employees) a person who is not himself a member of that class may nonetheless be punished as a principal if he induces a person in that class to violate the prohibition.

Standefer, 447 U.S. at 18 n.11 (citing S. Rep. No. 1020, at 7-8 (1951), *reprinted in* 1951 U.S.C.C.A.N. 2578, 2583).[2] The panel decision reaches a contrary conclusion, relying primarily on *United States v. Norquay*, 905 F.2d 1157 (8th Cir. 1990). However, neither the panel opinion nor *Norquay* discusses the text of Section 2, its history, or the Supreme Court's discussion of the 1951 amendment.

Additionally, the panel decision creates a conflict among the circuits. Both the Third and Sixth Circuits have analyzed and rejected arguments similar to Graham's, each affirming a conviction where an alleged aider and abettor lacked the necessary status element, being a public official, to commit the underlying crime himself. *See United States v. Standefer*, 610 F.2d 1076, 1082-85 (3d Cir. 1979) (en banc); *United States v. Lester*, 363 F.2d 68, 72-73 (6th Cir. 1966). The Sixth Circuit in *Lester* first noted the long-established principle that "even though a defendant was incompetent to commit the offense as a principal by reason of not being of a particular age, sex,

[2]Indeed, the Senate Report states that "[t]his section is intended to clarify and make certain the intent to punish aiders and abettors regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted." S. Rep. No. 1020, at 7-8.

condition, or class, he may, nevertheless, be punished as procurer or abettor." 363 F.2d at 72 (internal quotation omitted). The court then concluded, in language equally applicable to this case: "Congress, as if in anticipation of [the defendant's] argument here, amended [18 U.S.C. § 2] 'to * * * make certain the intent to punish (persons embraced within § 2) * * * , regardless of the fact that they may be incapable of committing the specific violation.'" *Id.* at 73 (quoting S. Rep. No. 1020, at 7-8). Similarly, the Third Circuit held in *Standefer* that, because of the "unambiguous statement by Congress" in amending the aiding and abetting statute, "18 U.S.C. § 2(a) may be used to reach one who could not be indicted as a principal." *Standefer*, 610 F.2d at 1085.[3] Neither the panel opinion nor *Norquay* can be squared with the reasoning of *Lester* and *Standefer*.

In breaking rank with our sister circuits on this important question of statutory interpretation, the panel opinion calls into question the application of Section 2 to a broad range of criminal statutes. Many federal crimes require a defendant to have a specified status as an element of the offense. *See, e.g.*, 18 U.S.C. § 207 (defendant must be a government employee); 18 U.S.C. § 656 (defendant must be a bank officer or employee); 18 U.S.C. § 922(g) (defendant must be a felon); 18 U.S.C. § 1709 (defendant must be a Postal Service officer or employee); 26 U.S.C. § 7214 (defendant must be a government employee); 29 U.S.C. § 186 (defendant must be a union representative); *see also* S. Rep. No. 1020, at 8 (collecting other statutes). Both this circuit and our sister circuits have regularly affirmed convictions for aiding and abetting such crimes where the defendant did not satisfy the necessary status element, albeit without discussion of this issue. *See, e.g.*, *United States v. Copple*, 827 F.2d 1182 (8th Cir. 1987) (affirming a conviction of a non-bank employee for aiding and abetting a violation of 18 U.S.C. § 656); *United States v. Miller*, 547 F.3d 718 (7th

[3]Standefer did not appeal this holding after losing in the Third Circuit, and thus the Supreme Court's analysis of the 1951 amendment in *Standefer* was not essential to its decision. Still, "federal courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings." *Jones v. St. Paul Cos.*, 495 F.3d 888, 893 (8th Cir. 2007) (internal quotation omitted).

Cir. 2008) (same with respect to 18 U.S.C. 922(g) and a non-felon); *United States v. McGowan*, 58 F.3d 8 (2d Cir. 1995) (same with respect to 29 U.S.C. § 186 and a non-union-representative); *United States v. Wolfswinkel*, 44 F.3d 782 (9th Cir. 1995) (same with respect to 18 U.S.C. § 656 and a non-bank employee); *United States v. Liu*, 960 F.2d 449 (5th Cir. 1992) (same with respect to 18 U.S.C. § 207 and a non-government employee); *United States v. Campbell*, 426 F.2d 547 (2d Cir. 1970) (same with respect to 26 U.S.C. § 7214 and a non-government employee). Although the panel opinion only decides the issue with respect to § 1153, by logical extension its holding also imperils aiding and abetting charges under these statutes as well.

I conclude the Third and Sixth Circuits correctly interpreted 18 U.S.C. § 2, in line with its text, its history, and the Supreme Court's statement in *Standefer*. Because I see no reason to interpret Section 2 differently as it applies in the Indian law context, I respectfully dissent from the denial of rehearing en banc.

November 4, 2009

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

_____

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL, a/k/a RICHARD VINE MARSHALL, a/k/a DICK MARSHALL, Defendant.	)	CR. 08-50079-02 ORDER DENYING GOVERNMENT'S MOTION FOR RETURN OF TAPES

On February 24, 2009, this court, ruling on defendant Richard Marshall's motion for disclosure and production of evidence, ordered the government to provide discovery to Mr. Marshall of certain audio tapes of recorded conversations. See Docket 179. That order gave the government a choice of either turning over its original tapes to Mr. Marshall's counsel to make copies of himself, or the government could make a set of copies for Mr. Marshall itself. Id. If the government elected to turn over the originals, the order established a time frame during which Mr. Marshall could make copies and then return the originals to the government. The order did not require Mr. Marshall to return copies if the government elected to provide a set of copies rather than the originals.

Following that order, Mr. Marshall's counsel sent a letter to government counsel "electing" to receive the original recordings from which he intended to

make digital copies. However, the court's order did not grant the election to Mr. Marshall, but rather granted the election as to how to proceed to the government. The government elected to make a set of copies itself and turn over that set of copies to Mr. Marshall.

The government then filed the instant motion seeking an order from this court requiring Mr. Marshall to return the copies it previously provided to Mr. Marshall. A hearing was held on November 12, 2009, at 9:30 a.m. Mr. Marshall was present with his counsel Mr. Dana Hanna. The government was represented by Assistant United States Attorney Robert Mandel. At the court's request, Mr. Hanna brought the tapes he received from the government to the hearing. This court's examination of a representative sampling of the tapes reveals that all are clearly marked "COPY." Furthermore, the government confirmed orally at the hearing that it continues to maintain custody of the original audio tapes which were never turned over to Mr. Marshall.

The court's February 24, 2009, order required Mr. Marshall to return only the original tapes if the government elected to provide the originals to Mr. Marshall. That order did not contemplate or order the return of copies if the government elected to provide copies. Since the government clearly elected to provide a set of copies to Mr. Marshall, he has no obligation to return those tapes to the government until after the trial in this matter. Accordingly, the government's motion lacking in good cause, it is hereby

ORDERED that the government's motion for the return of tapes [Docket No. 502] is denied.

Dated November 12, 2009.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

VERONICA L. DUFFY, U.S. MAGISTRATE JUDGE, PRESIDING

Sandie Thielen, Deputy Clerk — November 12, 2009

CR:08-50079

United States of America	*	Robert A. Mandel
For Government	*	
vs.	*	
Vine Richard Marshall, a/k/a Richard Vine Marshall, a/k/a Dick Marshall	*	Dana Hanna
For Defendant	*	

9:31 a.m. Enter proceedings on government's **MOTION TO RETURN TAPES** before the Honorable Veronica L. Duffy, United States Magistrate Judge, presiding.

Enter ORDER denying motion to return tapes

Mr. Hanna requests that the Court order the government to respond to the defendant's motions regarding destruction of evidence

The Court declines to order the government to respond to the defendant's motions and directs Mr. Hanna to direct this matter to the district court

9:40 a.m. Court adjourned

SST
Courtroom Deputy

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 APPLICATION AND AFFIRMATION IN SUPPORT OF AN ORDER FOR THE ISSUANCE OF SUBPOENA

NOW COMES the defendant Richard Marshall, by and through his counsel, Dana L. Hanna, and pursuant to Rule 17 of the Federal Rules of Criminal Procedure, hereby makes application to the Court to order the issuance of a subpoena duces tecum to

Douglas G. Moring
National Records Center
150 Space Center Loop
Lee's Summit, Missouri 64064

to produce, on or before December 11, 2009, the following evidence:

All records, documents, correspondence and writings of any kind in the possession or control of the United States Citizenship and Immigration Services concerning a British citizen named Serle L. Chapman, presently residing in the United States, and whose present address is believed to be : 5 Means Drive, Sheridan, Wyoming, including copies of all documents and writings in Mr. Chapman's "A-file" or alien file.

Defendant requests that said subpoena be issued at the expense of the United States government.

This motion is based on the following affirmations of undersigned counsel.

In support of the defendant's motion. Dana L. Hanna, attorney for defendant Richard Marshall, hereby affirms under penalty of law:

1. I make these affirmations on the basis of information and belief, the sources of which are the documents in the court's case file, discovery provided to me, and my own investigation.

2. Serle Chapman is a government witness against the defendant Marshall and his credibility will be a key issue of fact for the jury to determine in Mr. Marshall's trial. Chapman is a British citizen living in the United States under a visa or permanent alien "green card." As a direct benefit for his cooperation with the government in this case, the United States Attorney's office in South Dakota intervened on his behalf with immigration authorities, seeking favorable treatment for Chapman from federal immigration authorities when Chapman was seeking to have his visa renewed. I have read copies of correspondence from Chapman to federal prosecution authorities in which Chapman and his wife request and acknowledge the prosecutors' assistance and intervention with federal immigration authorities in consideration for his cooperation in the investigation and prosecution of the government's case against the defendants. Records and documents, including writings by Chapman concerning the assistance he has provided to the government as a government informant, will be found in his "A-file". Chapman's immigration records and his A-file will therefore contain Giglio material that the defendant intends to offer as evidence to show the benefits and rewards this witness received from the government in return for his testimony against the defendant. Therefore, I have good reason to believe and I do in fact believe, that this individual's "A-file" contains favorable evidence the defendant can and will use in his trial. The evidence sought by this subpoena is necessary to provide the defendant with his constitutional rights to present evidence in his defense, to confront his accusers, and to be represented in trial by effective counsel.

3. No other means of acquiring this evidence are available to the Defendant other than through subpoena. Mr. Moring is the custodian of the documents sought by this subpoena.

4. The Defendant, Richard Marshall, is indigent. I have been appointed to act as his counsel because he has been found by the court to be indigent. Therefore, defendant seeks service of this subpoena by the United States Marshall or Deputy Marshall, pursuant to Federal Rule of Criminal Procedure Rule 17 (b), with costs to be paid by the United States.

Dated this 13th day of November, 2009.

RICHARD MARSHALL, Defendant

By _____

Dana L. Hanna
HANNA LAW OFFICE, P.C.
PO Box 3080
816 Sixth Street
Rapid City, SD 57709
605-791-1832

Attorney for Defendant Marshall

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the Application and Affirmation in Support of an Order for the Issuance of Subpoena on the government by e-mailing a copy of the same to AUSA Robert Mandel (Robert.Mandel@usdoj.gov) and John Murphy (jmurphysd@hotmail.com) on the 13th day of November, 2009.

/s/ Dana L Hanna
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 DEFENDANT MARSHALL'S MOTION AND AFFIRMATION FOR THE ISSUANCE OF A SUBPOENA PURSUANT TO RULE 17(C) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

NOW COMES Defendant Richard Marshall, by and through his attorney, Dana L. Hanna, and pursuant to Rule 17 (c) of the Federal Rules of Criminal Procedure, respectfully petitions this Court for an Order directing the issuance of a subpoena directing the Sheriff of Lawrence County to appear as a witness in the trial of the defendant and to produce certain tape-recordings and records in his possession. Said subpoena is to be issued at the expense of the United States government.

In support of the motion, Dana L. Hanna, attorney for defendant Richard Marshall, hereby affirms:

1. On August 20, 2008, the defendant Richard Marshall was charged in an indictment with the crime of first degree murder. He has pleaded not guilty and is awaiting trial. The government's key witness against Mr. Marshall is Fritz Arlo Looking Cloud, who is serving a life sentence for the murder of Anna Mae Aquash. After he began cooperating with the

government in August 2008, the government had Looking Cloud removed from federal penitentiary and allowed him to be held in county jails in South Dakota.

2. Looking Cloud was being held in the Lawrence County jail in Deadwood from April 4, 2009 to some unknown date, believed to be in August.

3. I have previously subpoenaed, received and listened to tape-recordings of telephone calls Looking Cloud made from the Lawrence County jail in Deadwood, as well as recordings of calls made earlier from the Meade County jail in Sturgis. Looking Cloud has no expectation of privacy in these calls: each and every call made by prisoners in those jails is preceded by a recording warning the prisoner that his call is subject to recording and monitoring.

4. The recordings of calls made by Looking Cloud from the Lawrence County jail that I received and listened to were made between April 4 and April 21, 2009. I am now seeking to subpoena recordings of calls made after April 21, 2009.

5. While Looking Cloud was incarcerated in the Meade and Lawrence County jails, he regularly telephoned members of his family and friends. Pursuant to the Sheriff's regular jail policy, telephone calls made by prisoners in the Lawrence County jail are recorded and saved by jail personnel. In the recordings of Looking Cloud's calls from jail I have listened to, I have heard him make statements that he expects to benefit from his co-operation and testimony for the government, that he expects to "get out," and make other statements that can be used as favorable trial evidence for Defendant Richard Marshall. I have good reason to believe and do in fact believe that recordings of statements made by Looking Cloud in his telephone calls from jail made after April 21, 2009 will also constitute evidence that is favorable to the defendant Richard Marshall.

6. Moreover, based on my own investigation, I have reasonable cause to believe that Looking Cloud was transferred from Lawrence County jail to the South Dakota State penitentiary some months ago, for approximately two months, presumably as punishment for some serious disciplinary offense while he was incarcerated in the Lawrence County jail. His phone conversations are likely to provide evidence concerning that misconduct that can be used to further impeach his credibility.

7. The audio-tape recordings of Looking Cloud's calls made from the Lawrence County jail after April 21, 2009 are necessary and essential to the defendant's right to present a defense, to present exculpatory evidence and to cross-examine his accuser. They are necessary to show Mr. Looking Cloud's motive for testifying and his expectations of receiving benefits and reward as a result of his cooperation with the prosecution.

8. Therefore, undersigned defense counsel requests issuance of a subpoena as follows:

To: RICHARD MOWELL, SHERIFF
LAWRENCE COUNTY SHERIFF'S OFFICE AND JAIL
78 SHERMAN STREET
DEADWOOD, SD 57732

PRODUCE ALL TAPE-RECORDINGS OF TELEPHONE CALLS AND CONVERSATIONS OF LAWRENCE COUNTY JAIL PRISONER FRITZ ARLO LOOKING CLOUD, FROM APRIL 21, 2009 TO THE PRESENT DATE; AND ALL RECORDS, REPORTS, MEMORANDA, NOTES, LOGS AND OTHER DOCUMENTS IN THE POSSESSION OF THE SHERIFF'S DEPARTMENT AND/OR THE LAWRENCE COUNTY JAIL PERTAINING TO DISCIPLINARY OFFENSES, WRITE-UPS, VIOLATIONS OR POSSIBLE CRIMES INVOLVING FRITZ ARLO LOOKING CLOUD AT ANY TIME DURING HIS INCARCERATION IN THE LAWRENCE COUNTY JAIL.

8. Counsel requests that the order should provide that the materials should be produced to defense counsel on or before December 11, 2009.

9. I was appointed defense counsel under the Criminal Justice Act (CJA). The Defendant, Richard Marshall, is indigent and seeks service of this subpoena by the United States Marshall or Deputy Marshall, pursuant to Federal Rule of Criminal Procedure Rule 17(b), with expenses and fees to be paid by the United States government.

Dated this _____ day of November, 2009.

RICHARD MARSHALL, Defendant

By _____

Dana L. Hanna
HANNA LAW OFFICE, PC
PO Box 3080
816 Sixth Street
Rapid City, SD 57709
605-791-1832
Attorney for Defendant Richard Marshall

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the Motion and Affirmation for the Issuance of Subpoena on the government by e-mailing a copy of the same to AUSA Robert Mandel (Robert.Mandel@usdoj.gov) and John Murphy (jmurphysd@hotmail.com) on the 13th day of November, 2009.

/s/ Dana L Hanna
Dana L. Hanna

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-2009

United States of America,

Appellant

v.

John Graham, also known as John Boy Patten,

Appellee

Appeal from U.S. District Court for the District of South Dakota
(5:08-cr-50079-LLP-1)

MANDATE

In accordance with the opinion and judgment of 07/28/2009, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

November 13, 2009

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

FILED
NOV 17 2009
CLERK

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER
JOHN GRAHAM, a/k/a/ John Boy Patton, VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendant.	*	

Now that the Eighth Circuit's Mandate has returned jurisdiction to this Court on November 13, 2009, the Court will rule on Defendant Marshall's Application to Extend Motions Deadline (doc. 492). The Government has not responded to the Application to Extend Motions Deadline, and it will be given an opportunity to do so prior to the Court's ruling. If the Government desires to do so, it should respond within the next ten (10) business days. The Government shall advise the Court immediately if it does not intend to respond to this motion.

If the Court grants Defendant Marshall's Motion to Extend Motions Deadline, then the Court will consider the late-filed motions. The government has not responded to all of those late-filed motions, and it may do so within the next ten (10) business days. If the Government is not going to respond to a particular motion, it should advise the Court immediately. Accordingly,

IT IS ORDERED:

1. That within the next ten (10) business days, the United States may respond to Defendant Marshall's Application to Extend Motions Deadline, Doc. 492.

The United States shall immediately advise the Court if it does not intend to file a response to docket 492.

2. The United States shall immediately advise the Court if it does not intend to respond to any one of the defendants' late-filed motions. Otherwise, a response to the motion shall be filed within the next ten (10) business days.

Dated this 17th day of November, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: _____
DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

JUDGE - Lawrence L . Piersol
CASE NO. - CR08-50079

REPORTER - Jerry May/FTR #1
Date - November 17, 2009

CASE	COUNSEL
United States of America Plaintiff, vs.	Robert Mandel
John Graham, a/k/a John Boy Patton Vine Richard Marshall, a/k/a Richard Vine Marshall, a/k/a Dick Marshall Defendants.	John Richard Murphy Dana Hanna

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COURTROOM DEPUTY: Deb Peterson
TIME HEARING SCHEDULED TO BEGIN: 11:15 a.m.

TIME:

11:15 a.m. Enter telephonic status conference before Hon. Lawrence L. Piersol, United States District Judge, Sioux Falls, SD. Counsel state their appearances for the record.

The Court notes the mandate has come down from the 8th Circuit on the Graham case, so jurisdiction has now returned to this Court. The Court has scheduled this conference call to discuss scheduling issues.

Discussion between counsel and the Court regarding the various scheduling scenarios.

11:30 a.m. Court in recess.

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. 08-50079 DEFENDANT MARSHALL'S MOTION AND AFFIRMATION FOR THE ISSUANCE OF A SUBPOENA PURSUANT TO RULE 17(C) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

NOW COMES Defendant Richard Marshall, by and through his attorney, Dana L. Hanna, and pursuant to Rule 17 (c) of the Federal Rules of Criminal Procedure, respectfully petitions this Court for an Order directing the issuance of a subpoena directing the Sheriff of Lawrence County to appear as a witness in the trial of the defendant and to produce certain tape-recordings and records in his possession. Said subpoena is to be issued at the expense of the United States government.

In support of the motion, Dana L. Hanna, attorney for defendant Richard Marshall, hereby affirms:

1. On August 20, 2008, the defendant Richard Marshall was charged in an indictment with the crime of first degree murder. He has pleaded not guilty and is awaiting trial. The government's key witness against Mr. Marshall is Fritz Arlo Looking Cloud, who is serving a life sentence for the murder of Anna Mae Aquash. After he began cooperating with the

government in August 2008, the government had Looking Cloud removed from federal penitentiary and allowed him to be held in county jails in South Dakota.

2. Looking Cloud was being held in the Lawrence County jail in Deadwood from April 4, 2009 to some unknown date, believed to be in August.

3. I have previously subpoenaed, received and listened to tape-recordings of telephone calls Looking Cloud made from the Lawrence County jail in Deadwood, as well as recordings of calls made earlier from the Meade County jail in Sturgis. Looking Cloud has no expectation of privacy in these calls: each and every call made by prisoners in those jails is preceded by a recording warning the prisoner that his call is subject to recording and monitoring.

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6. Moreover, based on my own investigation, I have reasonable cause to believe that Looking Cloud was transferred from Lawrence County jail to the South Dakota State penitentiary some months ago, for approximately two months, presumably as punishment for some serious disciplinary offense while he was incarcerated in the Lawrence County jail. His phone conversations are likely to provide evidence concerning that misconduct that can be used to further impeach his credibility.

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8. Counsel requests that the order should provide that the materials should be produced to defense counsel on or before December 11, 2009.

9. I was appointed defense counsel under the Criminal Justice Act (CJA). The Defendant, Richard Marshall, is indigent and seeks service of this subpoena by the United States Marshall or Deputy Marshall, pursuant to Federal Rule of Criminal Procedure Rule 17(b), with expenses and fees to be paid by the United States government.

Dated this _____ day of November, 2009.

RICHARD MARSHALL, Defendant

By /s/ Dana L Hanna

Dana L. Hanna
HANNA LAW OFFICE, PC
PO Box 3080
816 Sixth Street
Rapid City, SD 57709
605-791-1832
Attorney for Defendant Richard Marshall

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the Motion and Affirmation for the Issuance of Subpoena on the government by e-mailing a copy of the same to AUSA Robert Mandel (Robert.Mandel@usdoj.gov) and John Murphy (jmurphysd@hotmail.com) on the 13th day of November, 2009.

/s/ Dana L Hanna
Dana L. Hanna

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 APPLICATION AND AFFIRMATION IN SUPPORT OF AN ORDER FOR THE ISSUANCE OF SUBPOENA

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Douglas G. Moring
National Records Center
150 Space Center Loop
Lee's Summit, Missouri 64064

to produce, on or before December 11, 2009, the following evidence:

All records, documents, correspondence and writings of any kind in the possession or control of the United States Citizenship and Immigration Services concerning a British citizen named Serle L. Chapman, presently residing in the United States, and whose present address is believed to be : 5 Means Drive, Sheridan, Wyoming, including copies of all documents and writings in Mr. Chapman's "A-file" or alien file.

Defendant requests that said subpoena be issued at the expense of the United States government.

This motion is based on the following affirmations of undersigned counsel.

In support of the defendant's motion. Dana L. Hanna, attorney for defendant Richard Marshall, hereby affirms under penalty of law:

1. I make these affirmations on the basis of information and belief, the sources of which are the documents in the court's case file, discovery provided to me, and my own investigation.

2. Serle Chapman is a government witness against the defendant Marshall and his credibility will be a key issue of fact for the jury to determine in Mr. Marshall's trial. Chapman is a British citizen living in the United States under a visa or permanent alien "green card." As a direct benefit for his cooperation with the government in this case, the United States Attorney's office in South Dakota intervened on his behalf with immigration authorities, seeking favorable treatment for Chapman from federal immigration authorities when Chapman was seeking to have his visa renewed. I have read copies of correspondence from Chapman to federal prosecution authorities in which Chapman and his wife request and acknowledge the prosecutors' assistance and intervention with federal immigration authorities in consideration for his cooperation in the investigation and prosecution of the government's case against the defendants. Records and documents, including writings by Chapman concerning the assistance he has provided to the government as a government informant, will be found in his "A-file". Chapman's immigration records and his A-file will therefore contain Giglio material that the defendant intends to offer as evidence to show the benefits and rewards this witness received from the government in return for his testimony against the defendant. Therefore, I have good reason to believe and I do in fact believe, that this individual's "A-file" contains favorable evidence the defendant can and will use in his trial. The evidence sought by this subpoena is necessary to provide the defendant with his constitutional rights to present evidence in his defense, to confront his accusers, and to be represented in trial by effective counsel.

3. No other means of acquiring this evidence are available to the Defendant other than through subpoena. Mr. Moring is the custodian of the documents sought by this subpoena.

4. The Defendant, Richard Marshall, is indigent. I have been appointed to act as his counsel because he has been found by the court to be indigent. Therefore, defendant seeks service of this subpoena by the United States Marshall or Deputy Marshall, pursuant to Federal Rule of Criminal Procedure Rule 17 (b), with costs to be paid by the United States.

Dated this 13th day of November, 2009.

RICHARD MARSHALL, Defendant

By /s/ Dana L Hanna

Dana L. Hanna
HANNA LAW OFFICE, P.C.
PO Box 3080
816 Sixth Street
Rapid City, SD 57709
605-791-1832

Attorney for Defendant Marshall

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the Application and Affirmation in Support of an Order for the Issuance of Subpoena on the government by e-mailing a copy of the same to AUSA Robert Mandel (Robert.Mandel@usdoj.gov) and John Murphy (jmurphysd@hotmail.com) on the 13th day of November, 2009.

/s/ Dana L Hanna
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S FOURTH MOTION FOR SEVERANCE; REQUEST FOR SPEEDY TRIAL

NOW COMES Defendant Richard Marshall, by and through his attorney Dana L. Hanna, pursuant to Rules 8(b) and 14 of the Federal Rules of Criminal Procedure and pursuant to his constitutional and statutory rights to a speedy trial, and hereby moves the court to order a severance of his trial from that of the co-defendant. The defendant further moves the court to enter an order scheduling a trial date.

Good cause exists for the court to consider this motion, which is being filed after the motion deadline of March 23, 2009, because the facts and events that give rise to this motion occurred after that date.

In support of this motion, Dana L. Hanna, attorney for the defendant, hereby affirms:

1. Since his arrest on August 25, 2008, Richard Marshall has been awaiting trial, detained in Pennington County jail without bond, for one year and three months. Mr. Marshall is ready to proceed to trial. He objects to further delays.

2. Mr. Marshall has filed three previous motions for severance, none of which were granted. Mr. Marshall remains in jail, detained without bond, with no trial date scheduled.

3. On May 5, 2009, after this court dismissed one of the counts in the indictment charging the co-defendant John Graham, the government moved to continue the trial so that it could proceed with an interlocutory appeal to the Court of Appeals. That motion was granted and the trial was continued with no trial date, pending a decision by the Court of Appeals.

4. On July 20, 2009, Mr. Marshall filed his second motion for a severance of trials, with memorandum of law, on the grounds that he was being denied his right to a speedy trial because of the government's interlocutory appeal on the co-defendant's case. [Doc. 418, 419]. That motion was not granted.

5. On July 28, 2009, the Eighth Circuit Court of Appeals affirmed the trial court's dismissal of Count III. Thereafter, the government requested the Court of Appeals to give the government extra time to decide whether it would petition for a rehearing. That motion was granted.

6. In the meantime, the federal government cooperated with the South Dakota State Attorney General in seeking and obtaining an indictment against John Graham in state court in Pennington County, charging him with the murder of Anna Mae Aquash.

7. After the government lost its interlocutory appeal, this court scheduled a trial date of October 6, 2009 for the joint trial of the defendants.

8. On September 4, 2009, the government moved for another indefinite continuance of the trial until such time as the Court of Appeals ruled on its petition for rehearing – a petition that the government had not yet filed. [Doc. 449].

9. On September 8, 2009, Richard Marshall filed his objection to the government's motion for a continuance and requested a speedy trial, and he again moved for severance on the grounds that he was being denied a speedy trial because his case was joined with that of Graham. [Doc. 450]. Mr. Marshall's third motion for severance was not granted. Over the defendants' objection, the court granted the government another indefinite continuance of the trial, pending a ruling by the Court of Appeals on the government's petition for a rehearing.

10. On September 25, 2009, the government filed its petition in the Court of Appeals for a rehearing on its interlocutory appeal in the co-defendant's case.

11. On November 4, 2009, the Court of Appeals denied the government's petition for a rehearing.

12. On November 17, 2009, this Court held a telephonic status conference with attorneys for the parties. The Court inquired of the Assistant United States Attorney whether the government intended to petition the Supreme Court for a writ of certiorari or whether the government intended to proceed with the trial in district court. The Assistant United States Attorney replied that he did not know; that he could not answer that question; that that decision was for the Solicitor General to make and he had 90 days to make that decision.

13. In the telephonic conference on November 17, 2009, the court inquired of the Assistant United States Attorney if the government intended to dismiss the indictment against John Graham if the government elects not to file a petition for a writ of certiorari. The Assistant United States Attorney stated that if the government does not seek review from the Supreme Court, the government will probably dismiss the indictment against Graham and allow the trial of Graham to proceed in state court.

14. This court, in its order dismissing Count III of the indictment against co-defendant John Graham, has given clear notice to the government that the court will grant a motion for a judgment of acquittal if the government proceeds to trial against Graham, because it is evident from undisputed facts in the record that the government will be unable to prove a necessary element of the remaining crimes charged in the indictment–that Graham is Indian for purposes of the federal murder statute. Therefore, the government has been told by the court that it is the court's legal opinion that there is insufficient evidence to support a conviction of Graham on any of the remaining charges in the indictment.

15. Unless the United States Supreme Court were reverse the Court of Appeals' ruling in the Graham matter, the government cannot ethically proceed with a trial of John Graham in federal court. As the matter stands now, without a reversal from the Supreme Court, the government will be ethically obligated to dismiss the federal indictment against the co-defendant Graham. "A prosecutor should not institute, cause to be instituted, *or permit the continued pendency of criminal charges* in the absence of sufficient admissible evidence to support a conviction." American Bar Association Standards for the Prosecution Function, Standard 3-3-9. Italics added.

16. Unless Mr. Marshall is granted a severance now, it is likely that he will have to remain in custody without a trial for several more months while the government pursues its course of exhausting all avenues of appeal regarding the co-defendant. Particularly in view of the likelihood that at the end of that lengthy appellate process, the government will then dismiss the indictment against Mr. Marshall's co-defendant, it is fundamentally unfair to continue to deny Mr. Marshall a separate trial now.

17. If the court does not grant a severance, Mr. Marshall will suffer undue prejudice as a result of joinder, because he will be denied his constitutional right to a speedy trial.

WHEREFORE, the defendant Richard Marshall moves the court to order a severance of trials and to enter an order scheduling a trial date.

DATED: November 30, 2009

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Severance and Request for a Speedy Trial was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 30th day of November, 2009.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 MEMORANDUM IN SUPPORT OF DEFENDANT MARSHALL'S FOURTH MOTION FOR SEVERANCE; REQUEST FOR SPEEDY TRIAL

LEGAL ARGUMENT

THE DEFENDANT'S RIGHT TO A SPEEDY TRIAL WILL BE VIOLATED IF THE COURT DOES NOT ORDER A SEVERANCE OF TRIALS.

If the court does not grant a severance, Mr. Marshall will be denied his constitutional right to a speedy trial.

Rule 14 of the Federal Rules of Criminal Procedure provides that if it appears that a defendant "is prejudiced by a joinder of ... defendants ... for trial together, the Court may order an election or separate trials of counts, grant a severance of defendants, or provide other relief justice requires."

Richard Marshall has been and will continue to be prejudiced by the joinder of defendants because he is being denied his right to a speedy trial while the government seeks delay in order to postpone the all but certain dismissal of the indictment against Mr. Marshall's co-defendant.

Although the Court of Appeals has denied the government's petition for rehearing, there is no trial date scheduled. Richard Marshall is waiting in jail, after being held one year and three months of custody, while the government decides whether it will petition the Supreme Court to hear an interlocutory appeal that has nothing to do with the case of Richard Marshall.

A joint trial is now, for all practical purposes, extremely unlikely. The government's prosecutor has stated to the court that if the government decides not to file a petition for certiorari, it will probably dismiss the charges against the co-defendant Graham. If the government does eventually file for certiorari, it will delay a trial for months unless there is a severance. Unless Mr. Marshall is granted a severance, he will have to remain in custody without a trial for several more months while the government pursues its dilatory course of exhausting all avenues of appeal, before it eventually dismisses the indictment against Graham. Therefore, the court's interest in the judicial economy that would result from a joint trial can no longer outweigh Richard Marshall's right to a speedy trial.

This court has given the government unequivocal notice of its legal opinion that there is insufficient evidence to support a conviction of Graham on any of the remaining charges in the indictment if the government goes to trial against Graham. In its order dismissing Count III against co-defendant John Graham, this court stated its opinion that it is evident from the undisputed facts in the case that the government will be unable to prove a necessary element of the remaining crimes charged in the indictment–that Graham is Indian. As this case stands now, the government is on notice that it cannot prove a crime against Graham.

Therefore, the government is going to be ethically obligated, sooner or later, to dismiss the federal indictment against the co-defendant Graham. "A prosecutor should not institute,

cause to be instituted, *or permit the continued pendency of criminal charges* in the absence of sufficient admissible evidence to support a conviction." American Bar Association Standards for the Prosecution Function, Standard 3-3-9. Italics added. Only if the United States Supreme Court would reverse the Court of Appeals in Graham's case could the government ethically proceed with a trial of John Graham in federal court.

According to the Supreme Court's website, approximately 7500 to 10,000 petitions for certiorari are filed each year. Each year, the Supreme Court grants about 150 of those petitions. Even if certiorari were to be granted, it would likely take another year before the case was decided. Meanwhile, Richard Marshall would be denied his right to a speedy trial.

The practical reality at this stage of the case is that Richard Marshall will have a separate trial, even without a severance, because the government will dismiss the charges against Graham, either about 90 days from now or later. The only real question is when that separate trial for Richard Marshall will take place. In view of the likelihood the government will eventually dismiss the indictment against Mr. Marshall's co-defendant, either some 90 days from now or at the end of a lengthy appellate process, it is fundamentally unfair to continue to allow the government to delay Mr. Marshall's trial by leaving him in legal limbo as a result of prejudicial joinder.

Therefore, this Court should grant the defendant Richard Marshall's motion for a severance of trials and enter an order scheduling a trial date.

DATED: November 30, 2009

Respectfully submitted,

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
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dhanna@midconetwork.com

Attorney for defendant Marshall

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Severance and Request for a Speedy Trial was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 30th day of November, 2009.

/s/ *Dana L. Hanna*
Dana L. Hanna

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 TO EXTEND MOTIONS DEADLINE

COMES NOW the United States of America, through its attorneys, United States Attorney Brendan V. Johnson, and Assistant United States Attorney Robert A. Mandel, and respectfully responds to Defendant Marshall's Motion to Extend Motions Deadline and states as follows:

1. The United States filed the Indictment against Defendant Marshall on August 20, 2008, and he made his initial appearance on August 26, 2008. The United States provided Defendant Marshall with virtually all discovery in this case on October 6, 2008.

2. The Order of the District Court filed on February 27, 2009, setting a deadline for the filing of motions did not prohibit the filing of motions after the date of March 23, 2009, but rather indicated that for any motions filed after that date, there would have to be a showing of good cause by counsel as to why the motions were filed late. There was no question that if the Defendant can

show good cause for the filing of a late motion, the Court would allow Defendant to do so.

3. Defendant claims to have first discovered evidence regarding the Denver police department dating back to May of 2009. At the outset, the United States feels it is important to clarify that there was no "joint federal-local investigation" in this case. Regardless of the truth or falsity of that accusation, Defendant was not precluded from seeking to file a motion in that regard.

4. By the same token, Defendant claims there was a "joint federal-state presentation to the grand jury" in this case. In reality, no Assistant United States Attorney was in any way involved in the state grand jury nor was any prosecutor from the state of South Dakota involved in the federal grand jury in this case. The United States has never seen the transcript from the state grand jury and would resist any discovery motions in that regard.

Accordingly, the United States resists Defendant's Motion to Extend Motions Deadline in this action.

Respectfully submitted this 1st day of December, 2009.

/s/ Robert A. Mandel

ROBERT A. MANDEL
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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of December, 2009, I served by electronic transmission, a true and correct copy of the foregoing Government's Response to Defendant Marshall's Motion to Extend Motions Deadline on:

Dana Hanna
Attorney at Law

John Murphy
Attorney at law

/s/ Robert A. Mandel

Robert A. Mandel

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 TO DISMISS INDICTMENT FOR GOVERNMENT'S FAILURE TO PRESERVE AND DISCLOSE FAVORABLE EVIDENCE

COMES NOW the United States of America, through its attorneys, United States Attorney Brendan V. Johnson, and Assistant United States Attorney Robert A. Mandel, and respectfully responds to Defendant Marshall's Motion to Dismiss Indictment for Government's Failure to Preserve and Disclose Favorable Evidence (DE 507) as well as the incorporated documents 434 and 436 and states as follows:

1. At the outset, Defendant refers to a joint local and federal investigation by the Denver Police Department and federal investigators. No such investigation took place. In reality, Robert Ecoffey, who was then U.S. Marshal for the District of South Dakota, did go to Denver to conduct part of his investigation of this case. Detective Abe Alonzo was assigned to assist Marshal Ecoffey, but there was no investigation conducted by the Denver Police Department itself at that time. Throughout the investigation, no part was

conducted by Detective Alonzo which was not in the presence of Marshal Ecoffey or a Deputy Marshal. The one known exception to that is an interview of Frank Dillon, which Detective Alonzo, at the request of Marshal Ecoffey, did conduct without the physical presence of anyone from the U.S. Marshal's Office. A copy of that interview was provided as discovery and is attached as Exhibit 1.

2. There was no known evidence in the custody of Detective Alonzo that was not also in the custody of the United States and provided as discovery in this case. For example, defense counsel refers to records of statements made by Arlo Looking Cloud during the more than 16 hours he spent with Marshal Ecoffey and Detective Alonzo in 1995, at which time Looking Cloud was taken to South Dakota. Contrary to the suggestions made by counsel, there were no recordings that took place and the only pertinent document is the brief and general summary written by Marshal Ecoffey that counsel concedes that he has. The purpose of that trip was to have Looking Cloud identify various locations relevant to the case, not to conduct interviews of him, which had already taken place. A recorded interview of Looking Cloud did take place in Denver; however, that has also been provided as discovery. While Detective Alonzo was present at that interview, he is not the individual who conducted it.

3. Defendant claims that the material that was destroyed by the Denver Police Department constitutes exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Bagley*, 473 U.S. 667 (1985); and *Kyles v. Whitley*, 514 U.S. 419 (1995). This is completely contrary to the facts of this

case. Whatever destruction of evidence that took place in Denver was not of any evidence that was not part of the file of the United States. The only documents that could have been destroyed that were not in the possession of the United States would be internal documents of the Denver Police Department, which would not be discoverable pursuant to Fed. R. Crim. P. 16.

4. The United States did not conduct a joint investigation with the Denver Police Department in this case. The Denver Police Department merely assisted the United States in an investigation that it conducted. While Denver officials may have independently considered the issue of any state charges that may have arisen as a result of the activities occurring there, they did not pursue an investigation in concert with the United States, but rather provided assistance to the United States in carrying out its law enforcement duties as many local agencies often do. Defendant has been deprived of no discovery and there exists no basis to dismiss the Indictment against him.

Respectfully submitted this 2nd day of December, 2009.

/s/ Robert A. Mandel

ROBERT A. MANDEL
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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of December, 2009, I served by electronic transmission, a true and correct copy of the foregoing Government's Response to Defendant Marshall's Motion to Dismiss Indictment for Government's Failure to Preserve and Disclose Favorable Evidence on:

Dana Hanna
Attorney at Law

John Murphy
Attorney at law

/s/ Robert A. Mandel

Robert A. Mandel

May 20, 1998

The following is the transcript of an audio taped interview with Frank Dillon, conducted by Detective Abe Alonzo, 72091, of the Denver Police Department Intelligence Bureau, regarding an investigation of an abduction/homicide of Anna Mae Huaquash, approximately 22 years ago. Also present is Deputy District Attorney Geanne Moroye.

****

ALONZO: ...and sign there. (Long pause) Witness that Frank. (Long pause) Do you have a current home address or mailing address Frank?

DILLON: Twenty Three Twenty Three First, (unintelligible) right now.

ALONZO: Do you have a phone number you can be reached at?

DILLON: (Unintelligible) ... (unintelligible) ... two nine seven one five seven seven. Nine seven one five seven seven.

ALONZO: Uhm, have any promises or threats been made to ya, at anytime, by myself or anyone else to get ya to make this statement?

DILLON: No.

ALONZO: Are you under the influence of any narcotic, drug or alcohol?

DILLON: Nah.

ALONZO: Is this statement being made voluntarily?

DILLON: Yes it is.

ALONZO: Do you understand that this is being videod and audio tape recorded?

DILLON: Yeah, I understand that.

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ALONZO: Why don't'cha print your name there Geanne. Frank, it's been a long time, you and I have talked on a couple of occasions concerning the investigation involving Anna Mae Huaquash and that's the reason why we're here today. Uhm ... as you know this case has been ongoing for several years.

DILLON: Yes I know that.

ALONZO: We're going on twenty two years...

DILLON: I know that.

ALONZO: ...that Anna Mae Huaquash is, uh ... was kidnapped and murdered.

DILLON: Um-huh.

ALONZO: She was kidnapped in Denver and murdered in, uh, South Dakota. Uhm, obviously, lot of speculation to a lot of things that have happened, but I think, uh, with the knowledge that you may have, uh, you know this is the time that we would like to have you sit and share that with us. Uhm, and understand that, uh ... uh, whatever information, uh, that we get, uh, at this time, is ... is, uh, only gonna assist with the investigation. And ... and will assist, uh ... uh, the situation surrounding Anna Mae's, uh, homicide. Why don't we start from the beginning. Uhm ... do you remember when Anna Mae came to Denver?

DILLON: Well, see I was in Rosebud, I was working at the (unintelligible) school at the time, but approximately ... November of nineteen seventy five, at some point ... 'cause I didn't get back here till after Thanksgiving. And, uh ... Troylyn and John Boy Patton, I don't what his real name is. John Boy came to my house

98-2

'cause I was livin' at Tenth and Kalamath at the time. 'Cause I (sic)...

ALONZO: You lived where?

DILLON: Tenth and Kalamath. Between Tenth and Eleventh. And he came to my house right after, er, the holiday, after Thanksgiving, I got back about at that, I don't know (sic). And almost from day one he told that they had to off this girl sh-... s... at the time I didn't know what was goin' on. And Anna Mae had left some messages earlier, but my partner, he didn't know who Anna Mae was 'cause he wasn't, you know, active in South Dakota like we were. And she had tried to contact me.

ALONZO: Anna Mae tried to contact you?

DILLON: Yeah. To this ... it had to be around Thanksgiving time or prior to that. Somewhere around there ... seventy five. I didn't get back till a little bit after Thanksgivin' and that's when I, you know, see this messages, by then, she's already been taken. That's all I knew at the time that she was taken somewhere. Now John Boy told me that they had to off a girl. Uh, this was before Christmas, so it's between November, December, nineteen seventy five ... before Christmas he told me this.

ALONZO: John Boy Patton told you directly that he had to off the girl? Or did he say who?

DILLON: At that time, he just said we had to off, uh ... a girl. No, I must've ... well, not too long afterwards, uh, George Palfrey (sic) told me we'll probably have to take this girl and move her. And I had these messages and then later on they found the body in February of nineteen seven six around there (sic). January or

February around there. And John Boy was very paranoid. He told me that they had stashed a girl, you know, somewhere near Wamley (sic) under a bridge.

ALONZO: Let's go back a little ways. Where was Anna Mae at the time prior to her bein', uh, murdered?

DILLON: I think she was at Troylyn Irving's house. Troylyn Irving's house.

ALONZO: At Troylyn Irving's house?

DILLON: Yeah. And...

ALONZO: And where was that located, do you remember?

DILLON: Oh, okay, that's on, uh ... let's see ... she doesn't live there anymore, but ... Pecos. Right before the freeway. I don't remember the exact address.

ALONZO: On Pecos street?

DILLON: Yeah, Pecos an' then the freeway there. North Pecos, I can't remember the exact address. I know where it is, but ... where it was. And ... she told me that...

ALONZO: Who told you?

DILLON: Troylyn told me that ... uhm, she was tied up downstairs and they had a meeting upstairs.

ALONZO: When you say they had a meeting upstairs, who ... who were they?

DILLON: Well, some of them were Crusade for Justice people and then some of the A members.

ALONZO: Do you remember who the Crusade for Justice people might have been?

DILLON: Ernesto Vigil.

ALONZO: Ernesto Vigil?

DILLON: (No verbal response)

ALONZO: Who else?

DILLON: Well, that's the name that ... the only one I really know at the time. (Unintelligible) like this.

ALONZO: Wait a minute pal (sic). Ernesto Vigil is the only one you remember that was associated with...

DILLON: I wasn't there.

ALONZO: I understand...

DILLON: (Unintelligible).

ALONZO: ...that. Uh, and this is information that Troylyn had told you?

DILLON: Yeah.

ALONZO: Okay. And the only name you remember is Ernesto Vigil?

DILLON: Yeah. Uh ... uh, I guess he was (unintelligible).

ALONZO: Do what like that?

DILLON: Ernesto.

ALONZO: For what reason?

DILLON: (Unintelligible) case ... I mean his first year tuition (sic).

ALONZO: Uh, was anything said about who the A members might've been?

DILLON: All I know is George Palfey (sic) and there was ... of course John Boy was probably there. At the time, George was the president of the, uh, organization.

ALONZO: President of what organization?

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DILLON: AIM. At that time. (Long pause) I don't know what John Boy's real name is, he goes by (unintelligible). I don't know what his real name is, but he ... he started comin' to my place after that.

ALONZO: When you say he started comin' to your place after what?

DILLON: Actually, I got back after Thanksgivin' an' he started comin' over there. Before Christmas, so it was in that time frame in between there. Which would be nineteen seventy five. A little bit early December he started comin' over (sic).

ALONZO: What did John Boy Patton tell ya?

DILLON: He said that they offed ... they had to off somebody ... some girl. At that time, he didn't say her name, but I better ... I put two and two together. Because of what George said. And then what Anna, uh, Troylyn, who was Anna Mae (sic).

ALONZO: What did George Palfey (sic) tell ya?

DILLON: They had to remove somebody. That's all he said, we have to move that girl. And Billy Means ... I was with (unintelligible) they had to, uh, do somethin' with a snitch. And later on I found out that, uh ... that was Bill and Ted, they're cousins. She goes by Thunder Hawk (sic), I told Bill about this. She used to be ahead of a survival school, uh, (unintelligible).

ALONZO: Who, Thunder Hawk?

DILLON: Yeah. She goes by Thunder Hawk, but her first name is, uh, ... anyway that's Bill and Ted's first cousin. And then of course, Theda. Theda ... Theda Clark or Theda Nelson, whatever she goes by. S-...

98-6

ALONZO: Who's Theda?

DILLON: Uh, that's who's car they took her in up to Wambley (sic). Little red car ... station wagon.

ALONZO: Who took, uh, Anna Mae?

DILLON: Theda, John Boy ... and I assumed that Arlo was with 'em 'cause talks about it (unintelligible)...

ALONZO: I'm sorry, what?

DILLON: Arlo was in the car with 'em (sic) ... he was in the car. Uh, John Boy told me that. (Unintelligible) somewhere around Wambley (sic) I don't exactly where. Under a bridge somewhere. Yeah, he was e-... extremely paranoid, you know, during that period of time. And I showed him a picture of Anna Mae, I says you know this woman and he just looked away and he says, yeah and then he says yeah, so I says huh. 'Cause I did my own investigation at that time, you know. (Unintelligible) should help was National dir-... director of (unintelligible) movement at the time.

ALONZO: You say you did your own investigation at the time?

DILLON: Yeah.

ALONZO: For yourself or for someone else?

DILLON: Uh, for AIM.

ALONZO: For AIM?

DILLON: 'Cause AIM didn't know what's goin' on. Apparently, this group of people ... thought they were ... I don't know if they were laughin' at (sic). I guess they thought they were vigilantes or something, I'm not sure, you know, but they killed Anna Mae and dumped her ... I know that the executive director is a good friend of

Anna Mae also and he's been expressed to me, find out what happened. I found out that John Boy was the shooter (sic).

ALONZO: How did you find that out?

DILLON: He told me.

ALONZO: John Boy told you he was the shooter?

DILLON: Yeah.

ALONZO: Did John Boy mention what type of weapon was used?

DILLON: It was a thirty eight I think. It was a pistol. (Long pause) He also told me that she started praying before it happened. That he had raped her.

ALONZO: John Boy said that Anna Mae was praying?

DILLON: Before he shot her in the head.

ALONZO: And he had raped her?

DILLON: He had raped her previously (sic).

ALONZO: Did he say when?

DILLON: Not exactly when, but ... I don't know if maybe it was the same night or the night before, I don't know.

ALONZO: Do you have any knowledge of the circumstances of how Anna Mae, uh, came to Denver and the circumstances in which she left Denver?

DILLON: I understand that she was in court in Pierre, South Dakota and then released her and after that she came to Denver. She was at, uh, Troylyn's house. And also ... when the situation came down here (sic), all these people thought she was a snitch. Tied her up downstairs and then moved her from there, then put here in Theda's car, took her to Wambley (sic), so they shot her in the badlands.

ALONZO: Do you have any knowledge of Anna Mae being removed by force or did she willingly go with these folks?

DILLON: She did not willingly go with 'em. That's what Troylyn tells me, that's her house ... it was her house anyway.

ALONZO: What exactly did Troylyn tell ya?

DILLON: Troylyn was cryin' and she's tellin' me that they had tied her up downstairs and kept her tied up. And then they had that meeting and after that go gas Theda's car and left her.

ALONZO: Was it described at all as to how Anna Mae went to the car, was she escorted to the car?

DILLON: Yeah. Forcibly put her in the car?

ALONZO: How do you know this?

DILLON: That's what George Palfey (sic) tells me. That's what Troylyn tells me. (Long pause) She didn't exactly go by willingly, you know.

ALONZO: (Long pause) When did ... excuse me ... when did ya have the opportunity to talk to Troylyn about Anna Mae?

DILLON: Approximately about the same time December of seventy five, around there.

ALONZO: Did Troylyn at that time mention who it was they took?

DILLON: Yeah. Well, I ... yeah. That's when I started finding out things, you know, and that's when she told me it was Anna Mae. It had to be before Christmas of seventy five. Or Thanksgivin' to Christmas, right around that time frame. And that's when John Boy had talked to me too, so I put two and two together and it was that day (sic).

ALONZO: So John Boy was back in Denver sometime between that period of Thanksgiving and Christmas?

DILLON: Yeah, he came to my house.

ALONZO: He came to your house?

DILLON: Yeah.

ALONZO: Why did he come to your house?

DILLON: Uh, he just ke-... started hangin' out there, you know so.

ALONZO: And how was it that John Boy ended up tellin' you about what had happened?

DILLON: He just told me.

ALONZO: Besides Troylyn and John Boy, was there anyone else that discussed this, uh...

DILLON: I told you George Palfey (sic). He lives in Wheat Ridge now. Works for the postal service.

ALONZO: So George Palfey (sic) knew that ... Theda Clark, John Boy and Arlo Looking Cloud took Anna Mae from Troylyn's house?

DILLON: Yeah, I don't know if Arlo was involved, but I guess he was in the car. He tells me he was drunk at the time, so he wasn't sure what's goin' on. But then he knew that they'd put her in the car and they left.

ALONZO: Who were ... who took her to the badlands after they arrived in South Dakota?

DILLON: John Boy, Theda, those are the one ... the two ... the two people that I know for sure. If there's others in the car, you know, I don't know about that, but I Theda Clark and, uh, John Boy were the orchestrators.

ALONZO: (Long pause) When John Boy came back to Denver, during that period of time that your talkin' about, uh, Thanksgiving and December of nineteen seventy five, uh, did he right away tell you what had happened? How did ... how did this conversation come about?

DILLON: (Unintelligible) he didn't tell me right off the bat, but, you know, maybe about the second or third time he came to the house he started talkin' about it ... you know. And then had to off a girl and ... and you know, I was like ... talkin' about the gun that they stashed and all that, you know.

ALONZO: Did he say where they got the gun?

DILLON: No, not really. He said it was a thirty eight they used. He used.

ALONZO: Did they say why?

DILLON: They thought she was a snitch.

ALONZO: Who thought they were ... she was a snitched (sic)?

DILLON: John Boy, Theda, Bill Means told me after a while.

ALONZO: Snitch for who?

DILLON: The FBI.

ALONZO: So was it John Boy and Theda that decided that because she was a snitch that, uh...

DILLON: From what I understand, they had some kind of a mock trial in Rapid City, the meetin's (sic). Bill and Ted Means, Ladonna Gilbert (sic), that crew.

ALONZO: Who was the last one you just mentioned?

DILLON: Ladonna Gilbert (sic). She was with Thunder Hawk. And that crew. I don't know exactly ... those are the main ones that I know. 'Cause I know Ted was really ... really active cohorts (sic)

with (unintelligible) couple of years ago, so ... I don't think Russell is involved, he's too busy going trials and stuff, but I know that Bill and Ted were ... Billy told me himself, Bill Means.

ALONZO: What did Billy tell ya?

DILLON: He said that Theda and them showed up with a snitch and they had to make a move on it.

ALONZO: (Long pause) Why would John Boy discuss this, uh, incident with ya?

DILLON: What? He just discussed it ... I mean he kept showin' up at (sic) the house and about the second or third time he showed up he told me.

ALONZO: Were you very close friends or?

DILLON: At ... at first I thought he was a good bro, you know, a good friend, you know, at first. You know, then I heard about, you know, what he told me and then it's .... I didn't say anything at the time, you know.

ALONZO: Had you talked to Troylyn before John Boy? Didja know about it?

DILLON: About the same time. About the same time Troylyn discussed it with me too.

ALONZO: But did you know about Anna Mae before John Boy had talked to you about what happened?

DILLON: Not really.

ALONZO: Was it after that Troylyn talked to you?

DILLON: About the same time.

ALONZO: About the same time?

DILLON: Yeah. But all one had to do is go into a bar and people were buzzin' about it ... you know.

ALONZO: What, uh ... what bar? I mean do you remember?

DILLON: Eleventh and Broadway, Arties.

ALONZO: Arties?

DILLON: Yeah. I don't know it it's still called Arties, but...

ALONZO: Is that...

DILLON: ...uh, everybody's buzzin' about it. There was talkin' about it (unintelligible) (sic).

ALONZO: What, uh ... what kind of bar was this?

DILLON: A lot of Indians hung out there, you know.

ALONZO: A lot of Indians hung out there?

DILLON: Yeah.

ALONZO: How old were you back then?

DILLON: Let's see, seventy five? I was twenty two years old.

ALONZO: Twenty two?

DILLON: Let's see, seventy five? No, I was ... I just turned forty three. (Long pause) And in February ... by the time Anna Mae was found, I was elected as a coordinator for the American Indian Movement at the time.

ALONZO: When Anna Mae was found you said you were elected coordinator for the American Indian Movement?

DILLON: About that time. January, February, like January.

ALONZO: How did you find out about Anna Mae being found?

DILLON: John Boy told me.

ALONZO: What did John Boy tell you?

DILLON: He said they found her. They found Anna Mae. He came to the house and told me. He was extremely paranoid at the time. Then of course Troylyn told me about a day later. She was crying and everything (sic).

ALONZO: (Long pause) Troylyn also told you that Anna Mae was found?

DILLON: Yeah. I really wasn't in a (unintelligible) about this ... days later, but I ... I don't (unintelligible), but that's what they said right off the bat (sic). (Long pause) Okay, (Unintelligible) I do have a bad cold (unintelligible).

ALONZO: Is there anything else that you remember back at ... during that period of time that, uh ... concerning Anna Mae that...

DILLON: (Lots of coughing) I already explained to (unintelligible) we had two directors (sic) (unintelligible), you know, a few months before and we ... and my ... my wife at the time she said, come with us we're goin' up to Cheyenne River Reservation (unintelligible), we're gonna do our sun dance up there. Anna Mae decided to stay there ... you know, this is background information, but she'd decided not to come with us (sic). So we stayed there, she has some parents there ... (unintelligible) sun dance, so I said well, it's too much hassle here and so we went up north for our sun dance up there. Of course half the A crew came with us ... but I have ask (sic) you that's about last time I really talked to her, you know. Obviously in months, you know, I was working in Rosebud, and I got back to Denver that's ... I have these messages on the phone. And my friend Harold, he's ... he was manning the house and he says

told me himself early December or somethin' like that. Before Christmas.

ALONZO: (Long pause) How well do you know Theda Clark now (unintelligible)?

DILLON: I've known her since seventy one.

ALONZO: Had she ever discussed this incident with you?

DILLON: Yeah.

ALONZO: And what did Theda Clark tell you?

DILLON: She said that they had to move Anna Mae north. Is what she said. And they had stopped at Bill Means' house and Bill Means said that how come you're bringin' the snitch with you. And that's what Billy told me too. Said they brought a snitch with 'em.

ALONZO: Did Theda Clark tell you that they had taken Anna Mae?

DILLON: Yeah. Yeah.

ALONZO: Did she tell you why?

DILLON: She said they had to move Anna Mae north, you know. 'Cause we really don't talk that much, you know. That's what sh-... sh-... she told me.

ALONZO: How long after you found out about Anna Mae did you talk with Theda or was it before you found out?

DILLON: It was approximately about the same time, around Christmas time, right around there. Right around that period of time, December, right around there. 'Cause I know it was between the holidays.

ALONZO: Was Steven Clark living here at the time?

DILLON: Yeah, actually livin' in Brighton. Parethaca (sic) was her old man's name. She's ... he was a bar owner.

ALONZO: What was his name?

DILLON: Porithca (sic).

ALONZO: Porithca (sic)?

DILLON: P-O-R-I...

ALONZO: Where'd he have his bar at?

DILLON: Right down that way (sic).

ALONZO: In Brighton?

DILLON: Yeah. And Theda was an alcoholic, so she ... she used drink and talk, you know.

ALONZO: Did, uh, John Boy Patton live in Denver at the time?

DILLON: Yeah. Yeah, they were living in Thornton I think. Somewhere, her and Angie.

ALONZO: Angie who?

DILLON: Begay.

ALONZO: Begay?

DILLON: She was at the Grand Jury (sic).

ALONZO: (Long pause) Have you talked to anybody else about this, uh ... about Anna Mae Huaquash since nineteen seventy five ... nineteen seventy six?

DILLON: Well, I mentioned it to my ... my wife, you know, at the time. Mary Killsinsight (sic) I talked to her about it and that's (unintelligible)...

ALONZO: Talked to who?

DILLON: Mary Killsinsight (sic).

ALONZO: Mary Killsinsight (sic)?

DILLON: Yeah.

ALONZO: Who's she?

DILLON: Uh, she's my ex, my daughter's mom.

ALONZO: Oh, okay.

DILLON: My ex-wife. My oldest daughter's mom.

ALONZO: But have you had any contact with John Boy Patton or Troylyn Irving or Theda Clark any of these people since...

DILLON: Yeah, I...

ALONZO: ...Arlo Looking Cloud?

DILLON: ...yeah, I saw Arlo Friday and then Troy's been goin' to (unintelligible) ceremonies with us for, you know, the last number of years.

ALONZO: After all these years, and obviously I don't know the significance of a lot of the Indian ways or the Indian culture, uhm, but from the little history that I've gotten, Anna Mae was, uh, somewhat of a role model I guess back then...

DILLON: Right (sic).

ALONZO: ...and the person...

DILLON: Oh, yeah, she was.

ALONZO: ...it was my understanding, why have you waited so long to tell us what happened to Anna Mae?

DILLON: I was afraid for my life. I thought those guys were gonna waste me in front of my kids (sic).

ALONZO: How do you feel about it now Frank?

DILLON: I don't care if I die tomorrow ... my kids are grown now. And I got enough (unintelligible) left behind me now so if anything happens to me those guys gonna get it (sic).

ALONZO: Do you have anything else?

MOROYE: Just a couple questions Mr. Dillon. You indicated that John Boy told you he was the shooter.

DILLON: Yes.

MOROYE: Correct?

DILLON: Correct.

MOROYE: That he's the one that shot Anna Mae.

DILLON: That's true.

MOROYE: Did he give you anymore details about that ... did he tell you where he shot her?

DILLON: Near Wamley (sic), towards the badlands. Wamley's (sic) here, the badlands are over here, so back there somewhere (sic). In a field.

MOROYE: Did he say where on her body he shot her?

DILLON: In the back of the head.

MOROYE: He said in the back of the head?

DILLON: Yeah. But he ... sh-... she was prayin' before ... he said ... he said s-... she wanted to do some prayers. And he waited and after she done her prayers then he shot her back here, behind the head.

MOROYE: All right.

DILLON: Ear or somethin', it's right here.

MOROYE: And during this time in nineteen seventy five, you were with a woman named Eba (sic)?

DILLON: Eba Nichols, yeah.

MOROYE: Eba Nichols?

DILLON: Uh...

MOROYE: Was Eba present during any of these conversations you had with John Boy?

DILLON: Eba was around, but it was actually John Boy who's callin' to me straight, you know, it wasn't ... it was kind of in private conversation between me and him.

MOROYE: So Eba would not have been party to any of these conversations you were having with John Boy or Theda Clark Nelson...

DILLON: No.

MOROYE: ...or anyone else?

DILLON: Eba didn't get along with Theda or any ... Troylyn or them guys at all, so. I don't know, I just let ... basically left Eba outta it 'cause, you know, didn't know what to do (sic). I didn't know if they were gonna waste me next or what, you know ... I wasn't sure.

MOROYE: And Troylyn told you...

DILLON: Yes.

MOROYE: ...that Anna Mae was taken from her home...

DILLON: Yes, she said that.

MOROYE: ...and I wasn't clear, did she know this because she was actually present when Anna Mae...

DILLON: Yes, yes.

MOROYE: ...was ... was taken...

DILLON: Yes.

MOROYE: ...and saw the people take her?

DILLON: Yes. Correct.

MOROYE: And conveyed to you that she was forcibly taken?

DILLON: Yes.

MOROYE: Thank you Mr. Dillon.

DILLON: It's not a statement if (unintelligible)...

ALONZO: I'm sorry, what was that?

DILLON: I want justice taken, uh, signed a letter of release (unintelligible) (sic).

ALONZO: Okay. (Long pause) This interview, uh, after Mr. Dillon's signature on the video tape interview introduction form, uh ... you need to sign down below there.

DILLON: Right here?

ALONZO: Yeah, below there that black line there.

DILLON: I want justice to be done. (Unintelligible) I was used. I don't care if they kill me ... my kids are gone.

ALONZO: This interview is concluded at four o eight p.m. It's April twenty third, nineteen ninety eight.

DILLON: So you're a District Attorney?

MOROYE: I am.

DILLON: Are you?

MOROYE: Um-huh.

DILLON: I'll be darn. S-...

(LET THE RECORD REFLECT THIS IS THE END OF THE AUDIO TAPE.)

****

Transcribed by Peggy A. Burns, Crimes Against Persons.

98-21

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
DEC 02 2009
CLERK

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'
MOTION TO SEAL

COMES NOW the United States of America, through its attorneys, United States Attorney Brendan V. Johnson, and Assistant United States Attorney Robert A. Mandel, and respectfully moves to seal the United States' Response to Defendant Marshall's Motion to Dismiss Indictment for Failure to Correct False Testimony to Grand Jury due to the fact that it discloses grand jury information.

Respectfully submitted this 2nd day of December, 2009.

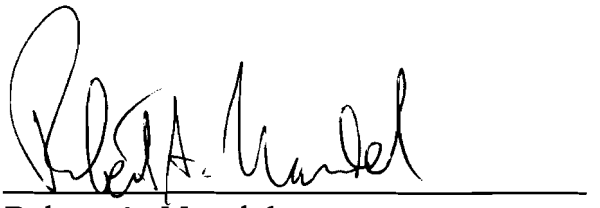
ROBERT A. MANDEL
Assistant United States Attorney
515 9th Street #201
Rapid City, SD 57701
605.342..7822
FAX: 605.342.1108
Robert.Mandel@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of December, 2009, I served by first class mail, postage prepaid, a true and correct copy of the foregoing United States' Motion to Seal on:

Dana Hanna
Attorney at Law
816 Sixth Street
Rapid City, SD 57701

John Murphy
Attorney at law
325 E. New York Street
Rapid City, SD 57701



Robert A. Mandel

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, CR 08-50079

Plaintiff, ORDER TO SEAL

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.

This matter having come before the Court and the Court being fully advised in the premises, does hereby

ORDER that the United States' Response to Defendant Marshall's Motion to Dismiss Indictment for Failure to Correct False Testimony to Grand Jury shall be sealed as it contains sensitive grand jury information.

Dated this ____ day of December, 2009.

BY THE COURT:

_____

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

FILED
DEC 0 2 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER
JOHN GRAHAM, a/k/a/ John Boy Patton, VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

Pending before the Court is the Government's Motion to Seal, Doc. 524, in which the Government requests its Response to Defendant Marshall's Motion to Dismiss Indictment for Failure to Correct False Testimony to Grand Jury be filed under seal. After consideration of the Motion,

IT IS ORDERED:

1. That the Government's Motion to Seal, Doc. 524, is granted and the Government's Response to Defendant Marshall's Motion to Dismiss Indictment for Failure to Correct False Testimony to Grand Jury shall be sealed by the Clerk until further Order of the Court.

Dated this 2nd day of December, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: Summa Ushford
DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, CR 08-50079

Plaintiff, ORDER TO SEAL

vs.

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

FILED
DEC 02 2009
CLERK

Defendants.

This matter having come before the Court and the Court being fully advised in the premises, does hereby

ORDER that the United States' Response to Defendant Marshall's Motion to Dismiss Indictment for Failure to Correct False Testimony to Grand Jury shall be sealed as it contains sensitive grand jury information.

Dated this 2nd day of December, 2009.

BY THE COURT:

Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

FILED
DEC 0 3 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER
JOHN GRAHAM, a/k/a/ John Boy Patton, VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendant.	*	

Pending before the Court is Defendant Marshall's Application to Extend Motions Deadline. (Doc. 492). The Government has responded to the Application. (Doc. 522.) In doc. 444, Defendant Marshall explained why he has filed motions after the motions deadline. The Court finds that the motions were filed in good faith, good cause was shown, and the government will suffer no prejudice if the Court considers the motions. Accordingly,

IT IS ORDERED:

1. That Defendant Marshall's Application to Extend Motions Deadline, doc. 492, is granted.

2. That Defendant Marshall's Motion to Suppress Statements, doc. 402, is hereby referred to United States Magistrate Judge Veronica L. Duffy pursuant to 28 U.S.C. § 636(b)(1) and the Court's Standing Order dated June 11, 2007.

3. That the Court will continue to consider motions filed by a party if the party shows good cause as to why the motion was filed after the deadline. The showing of good cause must be included with the motion.

Dated this 3rd day of December, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: _____
DEPUTY

FILED
DEC 0 3 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079-02
Plaintiff,	*	
vs.	*	
	*	ORDER
JOHN GRAHAM, a/k/a John Boy Patton; and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

The Defendant Vine Richard Marshall's Motion and Affirmation for the Issuance of a Subpoena, Doc. 518, is before the Court. The Court finds that the Motion for a Subpoena shall be granted. Accordingly,

IT IS ORDERED:

1. That the Defendant Vine Richard Marshall's Motion and Affirmation for the Issuance of a Subpoena, Doc. 518, is granted in part and denied in part.

2. That the Clerk shall prepare a Subpoena [Duces Tecum] to include name and address and other necessary information for the following person:

	Name and Address	Date and Time of Appearance
1.	Richard Mowell, Sheriff Lawrence County Sheriff's Office 78 Sherman Street Deadwood, SD 57732	Date to be Determined Rapid City, SD

You are commanded to produce to defense counsel by December 21, 2009:

(1) All tape recordings of telephone calls and conversations of Lawrence County Jail

prisoner Fritz Arlo Looking Cloud, from April 21, 2009 to the present date; and all records, reports, memoranda, notes, logs and other documents in the possession of the Sheriff's Department and/or the Lawrence County Jail pertaining to disciplinary offenses, write-ups, violations of possible crimes involving Fritz Arlo Looking Cloud at any time during his incarceration in the Lawrence County Jail.

3. That witness fees shall be paid in the same manner in which similar fees are paid to a witness subpoenaed on behalf of the Government.

4. That the United States Marshals Service shall cause the Subpoena to be served. Costs incurred by process shall be paid in the same manner in which similar costs are paid on behalf of the Government.

5. That the Subpoena issued by the Court for a date certain remain in full force and effect for any subsequent dates to which the appearance or trial date is continued. It is the obligation of the attorney issuing the Subpoena to convey this information to the person receiving the Subpoena.

Dated this 3rd day of December, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: _____
DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR. 08-50079-01, -02
Plaintiff,	*	
vs.	*	MOTION TO SEAL
RICHARD MARSHALL,	*	
Defendant,	*	

COMES NOW the Defendant Richard Marshall, by and through his attorney Dana L. Hanna, and hereby moves to file the documents attached as Exhibits to his Reply to Government's Response to Motion to Dismiss Indictment, filed December 8th, 2009, under seal.

Grounds for the Motion are:

1. The Reply contains Exhibits A, B and C, which are copies of discovery materials provided to the Defendant by the government, which should not be made part of the public record.

WHEREFORE, Defendant Richard Marshall moves the Court for leave to file Exhibits A, B and C of the Defendant's Reply to Government's Response to Motion to Dismiss Indictment under seal.

Dated December 8th, 2009

RICHARD MARSHALL, Respondent

By /s/ Dana L. Hanna

Dana L. Hanna
HANNA LAW OFFICE, P.C.
PO Box 3080
816 Sixth Street
Rapid City, SD 57709
605-791-1832

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the Motion to Seal on the government by e-mailing a copy to

AUSA Robert Mandel
Robert.Mandel@usdoj.gov

and

John Murphy
jmurphysd@hotmail.com

on the 8th day of December, 2009.

/s/ Dana L. Hanna
Dana L. Hanna

FILED
DEC 09 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079-01
Plaintiff,	*	
vs.	*	
	*	ORDER
JOHN GRAHAM, a/k/a John Boy Patton; and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

Pending before the Court is Defendant Marshall's Motion to Seal, Doc. 533, requesting the Court seal Exhibits A, B and C to Defendant Marshall's Reply to Government's Response to Motion to Dismiss Indictment, and after consideration of the motion, together with the file in this matter,

IT IS ORDERED:

1. That Defendant Marshall's Motion to Seal, Doc. 533, is granted

2. That Exhibits A, B and C to Defendant Marshall's Reply to Government's Response to Motion to Dismiss Indictment shall be sealed until further Order of this Court.

Dated this 9th day of December, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: Jackie Meisenheimer
DEPUTY

FILED
DEC 09 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RICHARD MARSHALL, Defendant,	*	CR. 08-50079 DEFENDANT MARSHALL'S REPLY TO GOVERNMENT'S RESPONSE TO MOTION TO DISMISS INDICTMENT

COMES NOW the defendant Richard Marshall, by and through his attorney Dana L. Hanna, and hereby replies to the government's Response to Defendant Marshall's Motion to Dismiss Indictment (Document 523).

The defendant Marshall moved to dismiss the indictment on the grounds that he has been denied due process because Denver police, acting as agents of the federal government, destroyed evidence that would have been favorable to the defendant. In support of his motion, Marshall points to the destruction of evidence of prior inconsistent statements which he could have used to impeach the testimony of the government's key witness, Arlo Looking Cloud–specifically, notes recording statements made by Looking Cloud to Denver Police Detective Abel Alonzo and U.S. Marshall Robert Ecoffey in 1995.

The government responded in opposition to the motion, arguing that the government is not responsible for the destruction of evidence by Denver police because there was no joint federal-local investigation in this case. The government also asserts, without providing any

factual basis to support its assertion, that no favorable evidence was destroyed.

While asserting that there was no joint local and federal investigation in this case, the government concedes that the Denver Police Department actively participated along with federal investigators in the federal government's investigation of the Anna Mae Aquash murder, and the government concedes that in doing so, Denver police were acting on the federal government's behalf. The fact that members of the Denver Police Department, particularly Detective Abel "Abe" Alonzo, gathered evidence and conducted witness interviews for the federal government's investigation is not in dispute.

Therefore, as a matter of law, for Brady purposes, when the Denver Police gathered evidence and information in the investigation of this case, acting on the federal government's behalf, they were acting as agents of the federal government and the government has a duty to disclose any favorable evidence or information gathered by its agents–Denver police department–to the defendant. "To comply with *Brady,* a prosecutor must 'learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.' " Villasana v. Wilhoit, 368 F.3d 976, 978 (8th Cir. 2004), *citing* Kyles v. Whitley, 514 US 419, 437, 115 S,Ct. 1555 (1995).

Moreover, the government's Brady obligation to disclose favorable evidence to the defendant includes the duty to disclose information about the destruction of such evidence by its agents–the Denver police–since evidence of "sloppy", unprofessional and grossly negligent police work in the investigation of the case is evidence that can be used to impeach prosecution witnesses and attack the prosecution's case. Kyles v. Whitley, 514 US 419, 115 S. Ct. 1555 (1995).

In its response, the government seeks to avoid responsibility for the destruction of evidence by Denver police by attempting to minimize the role that Detective Alonzo played in the federal government's investigation of the Aquash killing. In its response, the government asserts that with the single exception of an interview of Frank Dillon, conducted by Detective Alonzo in 1998,[1] "throughout the investigation, no part was conducted by Detective Alonzo which was not in the presence of Marshall Ecoffey or a deputy Marshall."

First, the fact that a federal investigator often accompanied Detective Alonzo when he questioned potential witnesses only proves the defendant's point: this was a joint local and federal investigation, in which Denver police were gathering evidence for federal authorities.

Secondly, the government's assertion that Frank Dillon was the only person that Detective Alonzo ever interviewed by himself is disproved by the discovery material provided to the defendants.

The government has provided defendant with a copy of a transcript of a recorded interview of Mary Lafford, conducted by Detective Alonzo on July 14, 1988. [GRAHAM discovery materials, pages 04644 - 04658, attached hereto as Exhibit "A".] The transcript heading reads: "ANNA MAE AQUASH INVESTIGATION –TRANSCRIPTION OF INTERVIEW TAPE". In that interview, Mary Lafford, sister to Anna Mae Aquash, reported a phone conversation she had with Anna Mae Aquash in 1975, in which Aquash expressed her fears that she was going to be murdered. In that interview, Detective Alonzo told Mary Lafford that Denver Police and the State's District Attorney had been investigating the kidnaping and

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[1] The transcript of Alonzo's interview with Dillon is filed as an exhibit attached to document #523.

murder of her sister and expected to file charges soon. No federal investigator was present during the interview.

In fact, Detective Alonzo played an important and active role in the federal government's investigation in Denver, over a period of ten years, beginning in 1994. On November 17, 1994, Detective Alonzo was present during the questioning of Looking Cloud during Looking Cloud's proffer session at the US Attorney's Office in Denver. In the summer of 1995, Detective Alonzo drove Looking Cloud from Denver to the crime scene near Wanblee, South Dakota and along with Marshall Ecoffey, participated in questioning him about the kidnaping and murder of Aquash. On March 27, 2003, Detective Alonzo arrested Looking Cloud on the federal murder warrant in this case and actively participated, again along with Robert Ecoffey, in Looking Cloud's post-arrest interrogation in Denver.

On August 25, 1995 Detective Alonzo conducted a tape-recorded interview with Julian Pokrywka, the husband of unindicted accomplice Theda Clarke, in the presence of Special Agent Iannucci of the US Marshall's Service. A document titled "ANNA MAE AQUASH INVESTIGATION –TRANSCRIPTION OF INTERVIEW TAPE"– is a transcription of that tape-recorded interview. [GRAHAM discovery pages 4610-4619; the first page is attached hereto as Exhibit "B".]

On December 16, 2000, Detective Alonzo personally oversaw and monitored government informant Kamook Nichols, formerly Kamook Banks, when she secretly recorded a 6 hour conversation she had with Troy Lynn Yellow Wood and Arlo Looking Cloud. Detective Abel "Abe" Alonzo is identified in the transcript and is heard on the tape recording advising Kamook Nichols, before she met with Looking Cloud and Yellow Wood, to debrief with him at

the police station after the secret recording was done. [Page 1594, GRAHAM discovery materials, Exhibit 'C'].

In its response the government contends that whether or not the Denver police were acting as agents of the federal government in this case, the defendant Marshall has not been prejudiced by any destruction of evidence. This contention is based on nothing more than a factually unsupported assertion : "There was no known evidence in the custody of Detective Alonzo that was not also in the custody of the United States and provided as discovery in this case." [Paragraph 2, Doc. #523.]

That assertion too is disproved by the government's own discovery material and by statements made by Alonzo. In a hearing, the defendant can offer evidence that at least 3 tape-recorded witness interviews were destroyed or lost or suppressed, along with notes of statements made by Looking Cloud that could have been used to impeach his trial testimony.

The government has disclosed transcripts of three recorded interviews of potential witnesses conducted by Detective Alonzo, which are referred to above. Alonzo recorded his interviews with Dillon, Lafford, and Pokrywka. The transcripts of those interviews state that Alonzo's interview with Frank Dillon was recorded by audio and video recording. The transcripts of Alonzo's interviews with Mary Lafford and Julian Pokrywka show that they were recorded by audiotape recordings. None of those tape or video recordings have been provided to the defendant or to the co-defendant. The government has not disclosed any of the three actual recordings of those interviews, presumably because it has never been provided with those recordings. This proves that the Denver police at one time had custody of evidence– audio and video tape recordings of witness interviews–that is not also in the custody of the United States

and that was not disclosed to the defendant. The logical inference that must be drawn from those facts is that the three tape-recordings must have been among the evidence that was destroyed by Denver police in 2001.

Thus, the government's own discovery disproves the government's assertion that all evidence gathered by Denver police was also provided to the federal government and disclosed to the defendant and supports an inference that such evidence was destroyed.

In its response, the government expressly denies any destruction of any written records of statements made by Looking Cloud during his trip to South Dakota with Ecoffey and Alonzo in 1995. That assertion is contradicted by statements made by Detective Alonzo in 2004 when he was interviewed by a Denver magazine writer, Maximilian Potter. Alonzo told Mr. Potter, and Mr. Potter reported, that "many notes from Looking Cloud's 1994 interview with Alonzo and the 1995 interview with Alonzo and Ecoffey at the crime scene had been, as Alonzo puts it, 'mistakenly' destroyed." As undersigned counsel has previously stated in the defendant's motion to dismiss, I spoke by telephone to Mr. Potter and Mr. Potter confirmed that Abe Alonzo told him in an interview in 2004 that the notes that were taken during the 1995 questioning of Looking Cloud, when Alonzo drove Looking Cloud from Denver to the crime scene and back to Denver, were destroyed by Denver Police.

The government's response consists only of unsupported conclusory assertions of fact, -, e.g., "whatever destruction of evidence that took place in Denver was not of any evidence that was not part of the file of the United States." The government does not even inform the court as to what, if any, efforts it has made to communicate with the Denver police to find out what evidence was gathered by Denver police and what evidence was destroyed.

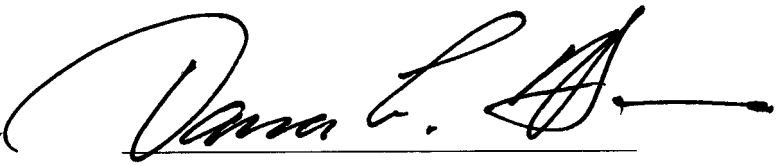
In an evidentiary hearing, Richard Marshall can present evidence that contests and disproves factual assertions made by the government on this issue. It is precisely to resolve these contested questions of fact that an evidentiary hearing is necessary.

The defendant has made a showing of specific exculpatory evidence that was destroyed by agents of the government, including evidence of statements made by the government's key witness against Richard Marshall–notes of statements that could have been used to impeach the witness, if they had not been destroyed.

Therefore, the court should order an evidentiary hearing, and direct the government to provide to the defendant prior to the hearing all evidence and information concerning the destruction of evidence in this case by the Denver Police Department, and dismiss the indictment if the evidence in the hearing proves that the government has violated Richard Marshall's constitutional right to due process of law.

DATED: December 8, 2009

RICHARD MARSHALL, Defendant

By 

Dana L. Hanna
HANNA LAW OFFICE, P.C.
PO Box 3080
816 Sixth Street
Rapid City, SD 57709
605-791-1832

CERTIFICATE OF SERVICE

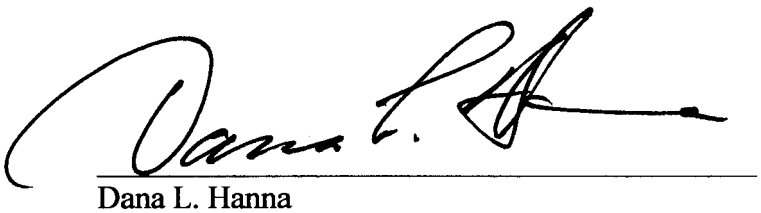
I hereby certify that I served a copy of the Defendant Marshall's Reply to the Government's Response on the government by mailing a copy to

AUSA Robert Mandel
515 9th Street #201
Rapid City, SD 57701

and

John Murphy
328 E. New York Street #1
Rapid City, SD 57701

on the 8th day of December, 2009.



Dana L. Hanna

FILED
DEC 09 2009
CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER
JOHN GRAHAM, a/k/a/ John Boy Patton, VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendant.	*	

Pending before the Court is a Motion to Quash Subpoena of Theda Clark. (Doc. 337.) The motion seeks to quash a subpoena requiring Theda Clark to appear as a material witness in the trial of this case which was scheduled to begin on May 12, 2009. The government's appeal to the Eighth Circuit after this Court dismissed a count of the indictment against Graham resulted in a continuance of the May 12 trial, which in turn rendered moot the Motion to Quash Subpoena of Theda Clark. Accordingly,

IT IS ORDERED that the Motion to Quash Subpoena of Theda Clark, doc. 337, is denied as moot, without prejudice to Ms. Clark's right to renew the motion if she is served with a subpoena for a future trial date.

Dated this 9th day of December, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK
BY: _____
DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL, a/k/a RICHARD VINE MARSHALL, a/k/a DICK MARSHALL, Defendant.	)	CR. 08-50079-02 REPORT AND RECOMMENDATION

INTRODUCTION

Defendant Vine Richard Marshall has moved the court to suppress certain statements made to law enforcement officer Robert D. Ecoffey on December 26, 2003, on the ground that these statements were elicited in violation of his right to counsel as secured by the Sixth Amendment. The government resists Mr. Marshall's motion. The district court, the Honorable Lawrence L. Piersol, referred the motion to this magistrate judge for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

FACTS

The facts pertinent to this motion are taken from Mr. Marshall's motion to suppress, memorandum of law in support of his motion to suppress, and the affidavit of Charles Abourezk submitted in support of the motion. See Docket Nos. 402, 402-2, and 403. Robert Ecoffey, a law enforcement officer for the

government, has been investigating the 1975 murder of Anna Mae Aquash on the Pine Ridge Indian Reservation in the District of South Dakota since the time her body was discovered in March, 1976.

In January, 2003, the government subpoenaed Mr. Marshall to testify before a federal grand jury in this investigation. Attorney Charles Abourezk represented Mr. Marshall both before and during his appearance before the grand jury. In March, 2003, the grand jury indicted Arlo Looking Cloud and John Graham in the murder of Ms. Aquash.

On December 26, 2003, Mr. Ecoffey questioned Mr. Marshall about the case without Mr. Abourezk present. The statements Mr. Marshall made during this questioning are the subject of the suppression motion before the district court.

The government subpoenaed Mr. Marshall to testify before the grand jury a second time in July, 2008, at which time attorney Charles Abourezk again represented Mr. Marshall. In August, 2008, the grand jury indicted Mr. Marshall for the murder of Ms. Aquash.

Because the government knew prior to December 26, 2003, that Mr. Marshall was being represented by attorney Charles Abourezk, Mr. Marshall contends that the statements Mr. Ecoffey elicited from him on December 26, 2003, were taken in violation of his right to counsel under the Sixth Amendment.

DISCUSSION

The Sixth Amendment provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. "At the pre-indictment stage, appellant's sixth Amendment rights have not attached; . . ." In Re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 243 (2d Cir. 1986). See also Kirby v. Illinois, 406 U.S. 682, 688 (1972) (plurality opinion):

> [t]he initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable.

Kirby, 406 U.S. at 689-90.

A criminal prosecution has been initiated when a formal charge, preliminary hearing, indictment, information, or arraignment has been filed or has occurred. Doe, 781 F.2d at 244. The Sixth Amendment right to counsel does not attach during a grand jury investigation of an unindicted target. Id. (citing United States v. Mandujano, 425 U.S. 564, 581 (1976) (dicta in a plurality opinion); and In Re Groban, 352 U.S. 330, 333 (1957) (dictum)).

The burden of proving a Sixth Amendment violation rests with the defendant. See Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986) (from which one infers that it is the defendant's burden); Moore v. United States, 178 F.3d 994,

999 (8th Cir.), cert. denied, 528 U.S. 943 (1999) (reciting that it is the defendant's burden to prove a Sixth Amendment violation).

In this case, the conversations between law enforcement and Mr. Marshall on December 26, 2003, took place nearly five years before the government indicted Mr. Marshall in August, 2008. Therefore, the rights provided under the Sixth Amendment did not attach as to Mr. Marshall until that August, 2008, indictment was handed down. It follows, then, that law enforcement could not have violated Mr. Marshall's Sixth Amendment rights five years before those rights had materialized.

In support of his motion, Mr. Marshall cites no cases that are factually apposite. All are distinguishable. Mr. Marshall cites Massiah v. United States, 377 U.S. 201 (1964); Edwards v. Arizona, 451 U.S. 477 (1981); and Brewer v. Williams, 430 U.S. 387 (1977). However, in all three of those cases, the respective defendants had already been formally charged and had either retained counsel or had asserted the right to counsel at the time law enforcement interrogated them. See Edwards, 451 U.S. at 478-49; Brewer, 430 U.S. at 398-99; Massiah, 377 U.S. at 201-03. Therefore, because formal judicial proceedings against the defendants had been initiated in these cases, the defendants' Sixth Amendment rights had attached at the time each was interrogated. Mr. Marshall had not been indicted at the time he spoke with Mr. Ecoffey, and the facts of his case are therefore distinguishable.

In another case cited by Mr. Marshall in support of his motion, Moran v. Burbine, 475 U.S. 412 (1986), the defendant had been arrested for a burglary at the time police questioned him about a murder. Id. at 415-18. He neither retained a lawyer nor asserted his right to counsel when law enforcement read him his Miranda[1] rights, which he agreed to waive. Id. Although the defendant was given access to a telephone, he declined to use it. Id. Unbeknownst to the defendant, his sister had hired a lawyer to represent him on the burglary charges. Id. The attorney contacted the police, who falsely told the attorney that no interview would take place. Id. Following a series of police interviews, the defendant ultimately signed three incriminating written statements as to the murder. Id. The defendant unsuccessfully moved to suppress the statements. Id. at 418.

The Supreme Court held that the defendant's waiver of his Miranda rights was freely and voluntarily made and that the fact that the defendant was unaware of the attorney's phone call did not affect this conclusion. Id. at 424,

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[1]Miranda v. Arizona, 384 U.S. 436 (1966). The holding in Miranda is that, prior to conducting custodial interrogation of a suspect, police must advise the suspect that he has the right to remain silent, that anything he says can and will be used against him in court, that he has a right to have counsel present at the interrogation, and that if he cannot afford to hire an attorney, then an attorney will be appointed to represent him. Id. at 467-79. Once the advisement is given, police are permitted to interrogate only if the suspect makes a voluntary and knowing waiver of the rights he has just been advised of. Id. A suspect is considered to be "in custody" when he is under arrest, or under other circumstances restricting the suspect's freedom to a degree associated with formal arrest. Berkemer v. McCarty, 468 U.S. 420, 442 (1984).

428. As to the defendant's argument that the interrogation violated his right to counsel under the Sixth Amendment, the Court noted that the interrogation took place *before* the defendant was charged with the crime of murder. Id. at 428-29. The Court concluded that, because a defendant's Sixth Amendment right to counsel does not attach until the defendant is formally charged, there could be no Sixth Amendment violation under these circumstances. Id.

The defendant in Moran specifically argued that the fact that he had not yet been formally charged with murder was not fatal to his Sixth Amendment argument. Id. He argued that the integrity of the attorney-client relationship should be protected, at least in some situations such as custodial interrogation, even where formal charges have not yet been asserted by the government. Id. at 429. The Court rejected this position. Id. The Court explained that the Sixth Amendment, "[b]y its very terms, . . . become[s] applicable only when the government's role shifts from investigation to accusation. For it is only then that the assistance of one versed in the 'intricacies . . . of law,' is needed to assure that the prosecution's case encounters 'the crucible of meaningful adversarial testing.' " Id. at 430 (quoting United States v. Cronic, 466 U.S. 648, 656 (1984)). Furthermore, citing Maine v. Moulton, 474 U.S. 159 (1985), also relied upon by Mr. Marshall in his brief, the Court stated that the fact that a defendant is represented by an attorney even though he has not yet been indicted does not change the Sixth

Amendment analysis. Id. at 431. Mr. Marshall has thus failed to carry his burden of demonstrating that law enforcement violated his Sixth Amendment rights when statements were elicited from him on December 26, 2003.

Mr. Marshall's argument, though nominally based on the Sixth Amendment, really seems more akin to the rules of ethics governing lawyers. Under those rules, an attorney who knows that a party is represented is forbidden from communicating with that party in the absence of the party's attorney about the substance of the attorney's representation. See American Bar Association Model Rule of Professional Conduct 4.2. However, ethical rules governing the conduct of attorneys do not supplant the analysis under the Sixth Amendment, as the Supreme Court recently held in Montejo v. Louisiana, ___ U.S. ___, 129 S. Ct. 2079, 2087-88 (2009), a case cited by neither Mr. Marshall nor the government in their briefs.[2]

In Montejo, the defendant had been charged and an attorney had been appointed by the state court to represent him, but the record was devoid of any evidence that Montejo had ever asked for an attorney or otherwise affirmatively asserted his right to counsel under the Sixth Amendment. Id. at 2082-83. In arguing that his Sixth Amendment rights had been violated by the police when they questioned him in the absence of his lawyer after his initial court

[2]The Montejo decision was issued nine days before Mr. Marshall filed his motion and more than a month prior to the government's responsive brief.

appearance, Montejo urged the Court to adopt the position that police should never have contact with a represented defendant in the absence of his lawyer.[3] Id. at 2083-91.

Noting that Montejo's position had its "theoretical roots" in the ABA model rule noted above, the Court declined to hold that those model rules had any application to Sixth Amendment analysis. Id. at 2087-89. First, the Court noted that the Model Rules of Professional Conduct govern the actions of attorneys and that the police who interrogated Montejo were not attorneys. Second, the Court noted that under the Model Rules, an attorney would be guilty of an ethical violation for talking to a represented party even if the represented party was the one who initiated contact with the attorney. Id. By contrast, under established Sixth Amendment precedent, police may interrogate a defendant in a criminal case who is represented by counsel if the defendant is the one who initiates contact. Id.

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[3]The police read Montejo his Miranda rights and he waived those rights before speaking to the police. Montejo, 129 S. Ct. at 2082. Even though, under the facts of Montejo, the Sixth Amendment right to counsel had attached, the Court held that the police could appropriately ask Montejo to waive his right to counsel after it had attached (in large part because the record was unclear as to whether Montejo had ever affirmatively invoked his right to counsel). Id. at 2090-91. The Court continued to adhere to the Fifth Amendment rule, announced in Edwards, *supra*, that once a defendant clearly and unequivocally invokes his right to counsel after formal charges have been brought, police may not initiate contact with the defendant and ask him again to waive that right. Id. at 2091-92.

In this case, like Montejo, the police officer who interrogated Mr. Marshall on December 26, 2003, was not a lawyer and, thus, was not bound by the ABA Model Rules. In addition, because the Sixth Amendment had not attached, there was no prohibition against the police contacting Mr. Marshall in the absence of his lawyer. Mr. Marshall has cited to no precedent that would support an extension of the Sixth Amendment beyond its well-established boundaries to cover the facts surrounding the making of his statement on December 26, 2003. Because Mr. Marshall's Sixth Amendment argument fails as a matter of law, no evidentiary hearing is necessary. This court recommends denial of his suppression motion on the briefs alone.

The entirety of the legal analysis and factual discussion in Mr. Marshall's pleadings are devoted to his Sixth Amendment argument. However, at the bottom of page three of Mr. Marshall's memorandum of law in support of his motion, there is literally a bare citation to the Fifth Amendment. See Docket 403, at page 3. From this bare citation to the Fifth Amendment, the court is unable to discern whether Mr. Marshall is indeed making an argument to suppress based on the Fifth Amendment. Mr. Marshall never discusses which aspect, if any, of his Fifth Amendment rights he believes the government to have violated.[4] He never discusses any legal authority analyzing the Fifth

[4]For example, the Fifth Amendment is the basis of the holding in Miranda. It is also the basis of the rule that coerced statements are not admissible. Mr. Marshall never asserts that his interview with the police on

Amendment. He never asserts any facts which the court could interpret as supporting a Fifth Amendment argument of any kind. The court will not be in the position of guessing what the basis of Mr. Marshall's Fifth Amendment argument is, if it is being asserted at all.

Accordingly, although the court recommends denial of Mr. Marshall's suppression motion in all respects, Mr. Marshall will be given fourteen days from the date of this report to file a supplemental brief to explain his Fifth Amendment argument if indeed he is asserting such an argument. If no brief is filed within the given time frame, Mr. Marshall shall be waiving any argument to suppress based upon the Fifth Amendment. The government shall have seven days to respond to any supplemental brief filed by Mr. Marshall.

CONCLUSION

Based on the foregoing discussion, the court hereby recommends that Mr. Marshall's motion to suppress [Docket No. 402] be denied in its entirety. In the event Mr. Marshall files a supplemental brief on the issue of any argument premised on the Fifth Amendment, the court will issue a supplemental report and recommendation on that claim.

December 26, 2003, was a custodial interrogation necessitating the advisement of Miranda rights. He also never argues any facts or legal authority to the effect that police coerced him into making the statements he made on that date.

NOTICE TO PARTIES

The parties have fourteen (14) days after service of this report and recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1)(B), unless an extension of time for good cause is obtained. See Fed. R. Crim. P. 59(b); 28 U.S.C. § 636(b)(1)(B). Failure to file timely objections will result in the waiver of the right to appeal questions of fact. Id. Objections must be timely and specific in order to require *de novo* review by the district court. See Thompson v. Nix, 897 F.2d 356 (8th Cir. 1990); Nash v. Black, 781 F.2d 665 (8th Cir. 1986).

Dated December 10, 2009.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

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 FOURTH MOTION FOR SEVERANCE; REQUEST FOR SPEEDY TRIAL

COMES NOW the United States of America, through its attorneys, United States Attorney Brendan V. Johnson, and Assistant United States Attorney Robert A. Mandel, and responds to defendant Marshall's fourth motion for severance; request for speedy trial as follows:

1. The trial of this case will be both extensive in terms of its length and a significant burden to many of the witnesses that will have to travel to Rapid City to testify. Based on the estimates of time made by counsel to the Court, this trial could last as long as three weeks. Defendant Marshall now seeks severance, which the United States resists.

2. As defense counsel noted, on November 4, 2009, the United States Court of Appeals for the Eighth Circuit denied the petition in which the United States sought a rehearing on the dismissal of the charges against co-defendant John Graham, in which he was charged as an aider and abettor. The United States has 90 days in which to file a petition for certiorari in this case, in the event that it chooses to do so.

3. Defendant claims that this Court has given clear notice to the United States that it would grant a motion for a judgment of acquittal if the United States were to proceed to trial against Graham on the remaining counts. The United States takes issue with that and believes that there is evidence both that Graham could be considered an Indian for the purposes of jurisdiction under 18 U.S.C. § 1153 and also that the victim, Annie Mae Pictou Aquash, could be considered an Indian for the purposes of jurisdiction under 18 U.S.C. § 1152. While recognizing that a difference of opinion can exist as to these issues, the United States disagrees with the suggestion made by defense counsel that it could not ethically proceed with a trial of Graham in federal court.

4. It is the position of the United States that to grant severance at this time would be inappropriate. Once various issues regarding Graham are resolved, the United States agrees that it would be appropriate to revisit the matters raised by defendant.

Therefore, the United States requests defendant's motion be denied.

Respectfully submitted this 14th day of December, 2009.

/s/ Robert A. Mandel

ROBERT A. MANDEL
Assistant United States Attorney
515 9th Street #201
Rapid City, SD 57701
605.342..7822
FAX: 605.342.1108
Robert.Mandel@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of December, 2009, I served by electronic transmission, a true and correct copy of the foregoing United States' Response to Defendant Marshall's Fourth Motion for Severance; Request for Speedy Trial on:

Dana Hanna
Attorney at Law

John Murphy
Attorney at law

/s/ Robert A. Mandel

Robert A. Mandel

FILED
DEC 14 2009
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER FOR TRIAL
JOHN GRAHAM, a/k/a John Boy Patton; and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendant.	*	

In accordance with the Opinion of the Eighth Circuit Court of Appeals, a trial date is required in the above action. Accordingly,

IT IS ORDERED:

1. That January 15, 2010, is hereby set as the deadline for submission to the Court of any proposed plea agreement.

2. Numerous motions in limine have already been filed. If any more motions in limine are to be filed, they shall be filed with the Court in writing, together with proposed instructions, by January 19, 2010.

3. That the jury trial herein for Defendants shall commence in Rapid City, South Dakota, on Tuesday, February 16, 2010, with counsel to be present for motions in limine at 9:00 A.M., and with the jury to report at 9:30 A.M.

Dated this 14th day of December, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: Jackie Meyerhoffer
DEPUTY

FILED
DEC 17 2009

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER
JOHN GRAHAM, a/k/a/ John Boy Patton, VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendant.	*	

Pending before the Court is a Motion to Compel Disclosure of Witness, doc. 380, filed by Defendant Marshall. Marshall asks the Court to order the government to investigate, discover and disclose the identity of an individual who wrote two pages of notes contained in discovery materials provided to Marshall by the government. Marshall speculates that the notes were taken during an interview of Arlo Looking Cloud. He wishes to call the writer as a witness to impeach Looking Cloud's testimony at trial because he believes Looking Cloud made statements which are inconsistent with the notes. In the motion to compel, Marshall's lawyer talks about communications he had with the Assistant United States Attorney, Robert Mandel, regarding the handwritten notes. Mandel informed Marshall's lawyer that his efforts to locate the writer of the two pages of notes have been unsuccessful, and that he has "no idea" who wrote the notes.

The Court reviewed the two pages of notes and cannot determine whether they are from an interview of Looking Cloud. The notes could be from a variety of things. The government provided the defense with the notes, and there is no indication that the government is withholding any favorable evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Marshall cites no

authority for the proposition that the government is required to find the author of the notes, and the Court finds that the government does not have a duty to conduct further investigation to determine who wrote the notes. Accordingly,

IT IS ORDERED that the Motion to Compel Disclosure of Witness, doc. 380, is denied.

Dated this 17th day of December, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: Jackie Meyerhoffer
DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

FILED
DEC 17 2009

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER
JOHN GRAHAM, a/k/a/ John Boy Patton, VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendant.	*	

Pending before the Court are three related motions filed by Defendant Marshall: 1) Motion for Evidentiary Hearing on Destruction of Evidence and for Sanctions, doc. 434; 2) Motion to Compel Disclosure of Impeachment Evidence, doc. 436 and; 3) Motion to Dismiss Indictment for Government's Failure to Preserve and Disclose Favorable Evidence, doc. 507. All three motions arise from the Denver Police Department's apparent inadvertent destruction of evidence relating to the investigation into the murder of Anna Mae Aquash. Marshall asserts that the government has not provided him or co-defendant Graham with any information about the destruction of the evidence.

In 2003, the Denver Police Department publicly acknowledged that in 2001 they had destroyed files and records containing evidence from the Aquash murder investigation. In 1995, Abe Alonzo, a detective with the Denver Police Department, drove Looking Cloud from Denver to the crime scene to meet with Marshal Ecoffey, then drove Looking Cloud back to Denver. Marshall's lawyer asserts that a witness has lead him to believe that notes, records and evidence of statements made by Arlo Looking Cloud to Alonzo during that trip were among the evidence destroyed.

The government responded to this motion, stating that the Denver Police Department only provided assistance to the United States in its investigation, and that all evidence in the custody of the Denver Police Department was also in the custody of the United States and was provided to the defendants as discovery in this case. According to the government, except for one interview of Frank Dillon, no part of the investigation was conducted by Denver Police Department officials which was not in the presence of Marshal Ecoffey or a Deputy Marshal.

Marshall's reply to the government's response includes a copy of a transcript of a recorded interview of Aquash's sister, Mary Lafford, which Alonzo conducted on 1998. The government provided a copy of the transcript to Marshall in discovery. The transcript indicates that Alonzo conducted the interview by himself, which contradicts the government's statement that only Frank Dillon was interviewed without the presence of a federal official. Marshall's reply also includes a page of a transcript where Alonzo is advising government informant Kamook Nichols before she met with Looking Cloud and secretly recorded their conversation, which may suggest Alonzo was acting outside the presence of federal officials. Marshall points out that Alonzo recorded his interviews of Dillon and Lafford, but the tape or video recordings of those interviews, as well as of an interview of Julian Pokrywka (Theda Clark's husband), have not been provided to the defendants. Marshall's lawyer thinks this is proof that the Denver police at one time had custody of evidence - - such as audio and video tape recordings of the witness interviews - - that is not also in the custody of the Untied States and that was not disclosed to the defendants.

Marshall's reply calls into question whether all evidence in the custody of the Denver Police Department was also in the custody of the United States and was provided to the defendants in this case. Accordingly,

> IT IS ORDERED that Defendant Marshall's Motion for Evidentiary Hearing on Destruction of Evidence and for Sanctions, doc. 434; Motion to Compel Disclosure of Impeachment Evidence, doc. 436 and; Motion to Dismiss Indictment for Government's Failure to Preserve and Disclose Favorable Evidence, doc. 507, are granted to the extent that the government shall re-contact the Denver Police Department to determine what evidence was gathered by Denver police and what evidence was destroyed. The government also shall obtain information regarding the

Denver Police Department's investigation of the evidence destruction, such as what evidence was retrieved and what was not. The information received by the government from the Denver Police Department shall be provided to the defendants.

Dated this 17th day of December, 2009.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY _____
DEPUTY

UNTIED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR. 08-50079-01
Plaintiff,	*	DEFENDANT'S REQUEST FOR PRELIMINARY INSTRUCTION ON READ BACK OF TESTIMONY
vs.	*	
RICHARD MARSHALL,	*	
Defendant,	*	

NOW COMES the Defendant Richard Marshall, by and through his attorney of record, Dana L. Hanna, and hereby moves the Court to give the jury a preliminary instruction that the court will allow read back of testimony to the jury during deliberation.

As grounds for the motion, attorney Dana L. Hanna hereby affirms:

1. Generally, whether to allow the court reporter to read back testimony to the jury, if the jury so requests, during deliberations, is a matter within the discretion of the trial court. United States v. Bear Ribs, 722 F.2d 420, 422 (8th Circ. 1983); Stone v. United States, 506 F.2d 561 (8th Cir. 1975).

2. This is a murder trial in which the sentence, if there were to be a conviction, would be a mandatory sentence of life in prison.

3. All parties are likely to call several witnesses. The trial is likely to last 2 or 3 weeks.

4. Given the length of the trial and the number of witnesses, it will be difficult for even the most conscientious jurors to accurately recall specifics details of witness testimony that they may

have heard 2 weeks prior to deliberations.

4. There is no good reason to deny the jury the right to hear the verbatim testimony of any witness it wants to hear in order that they find the facts in this case. If a jury requests a read back, it indicates that there is likely to be a difference of opinion, based on the imperfections of memory, as to what the testimony was. Allowing jurors to request the read back of testimony would serve the interests of justice and enhance the integrity of the fact finding process.

WHEREFORE, the defendant Marshall moves the Court to give the jury a preliminary instruction that they will be allowed to hear testimony read back to them during deliberations, if they so request.

Dated this 8th day of January, 2010

RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
P.O. Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com
Attorney for Defendant Richard Marshall

CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Document was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 8th day of January, 2010.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNTIED STATES DISTRICT
COURT DISTRICT OF SOUTH
DAKOTA WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. RICHARD MARSHALL, Defendant,	*	CR. 08-50079-01 DEFENDANT'S MOTION FOR PRELIMINARY INSTRUCTION ON READ BACK OF TESTIMONY

NOW COMES the Defendant Richard Marshall, by and through his attorney of record, Dana L. Hanna, and hereby moves the Court to give the jury a preliminary instruction that the court will allow read back of testimony to the jury during deliberation.

As grounds for the motion, attorney Dana L. Hanna hereby affirms:

1. Generally, whether to allow the court reporter to read back testimony to the jury, if the jury so requests, during deliberations, is a matter within the discretion of the trial court. United States v. Bear Ribs, 722 F.2d 420, 422 (8th Circ. 1983); Stone v. United States, 506 F.2d 561 (8th Cir. 1975).

2. This is a murder trial in which the sentence, if there were to be a conviction, would be a mandatory sentence of life in prison.

3. All parties are likely to call several witnesses. The trial is likely to last 2 or 3 weeks.

4. Given the length of the trial and the number of witnesses, it will be difficult for even the

most conscientious jurors to accurately recall specifics details of witness testimony that they may have heard 2 weeks prior to deliberations.

4. There is no good reason to deny the jury the right to hear the verbatim testimony of any witness it wants to hear in order that they find the facts in this case. If a jury requests a read back, it indicates that there is likely to be a difference of opinion, based on the imperfections of memory, as to what the testimony was. Allowing jurors to request the read back of testimony would serve the interests of justice and enhance the integrity of the fact finding process.

WHEREFORE, the defendant Marshall moves the Court to give the jury a preliminary instruction that they will be allowed to hear testimony read back to them during deliberations, if they so request.

Dated this 11th day of January, 2010

RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

DanaL.Hanna
P.O. Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com
Attorney for Defendant Richard Marshall

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Document was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Robert Mandel, Assistant United States Attorney Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham jmurphysd@hotmail.com

Dated this 11th day of January, 2010.

/s/ *Dana L. Hanna*
Dana L. Hanna

FILED
JAN 15 2010
CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

****

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER
JOHN GRAHAM, a/k/a/ John Boy Patton, VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendant.	*	

****

The Court has reviewed the United States' Trial Memorandum Re: Crawford, doc. 64, Defendant Graham's Response, doc. 86. The government lists four out-of-court statements it anticipates introducing at trial and indicates that it may introduce other similar types of conversations during trial. In his response, Graham points out that the government fails to specify the statements it seeks to admit. For example, at page 2 of Graham's Response, he indicates that one recorded conversation fills nine audio tapes, and the transcript of the conversation is 257 pages long. Whether these out-of-court statements are admissible is a significant issue in the trial of this case. Thus the Court will order the government to specify the out-of-court statements it intends to introduce at trial by submitting copies of the transcripts of the four out-of-court statements listed in its Trial Memorandum, doc. 64, as well as any other out-of-court statements it intends to introduce at trial. The portion of the transcript that the government intends to introduce shall be highlighted.

In addition, Judge Duffy directed the government to submit to the court in camera any out-of-court statements of either defendant that it intended to introduce at trial. (Doc. 77.) The government submitted nine separate statements by defendants. The nine statements were filed under seal

concurrently with Judge Duffy's Order on Defendants' Motions to Sever. (Doc. 116.) The Court will order the government to submit copies of those transcripts, such copies to include highlighted sections it intends to introduce at trial.

This case involves difficult evidentiary questions requiring considerable time and thought by counsel and the Court. Setting a deadline for the government to advise the Court whether it intends to proceed against defendant Graham will assist the Court with evidentiary rulings, trial procedure and scheduling issues. Accordingly,

IT IS ORDERED:

1. That, on or before Wednesday, February 3, 2010, the government shall advise the Court whether or not it intends to proceed against Defendant John Graham in this case.

2. That, on or before Wednesday, February 3, 2010, the government shall provide counsel and the Court with highlighted transcripts of all out-of-court statements it intends to introduce at trial.

3. That defendants may submit any objections to the admission of the out-of-court statements, including argument and authority, on or before Wednesday, February 10, 2010.

Dated this 15th day of January, 2010.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: _____
DEPUTY

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 **DEFENDANT MARSHALL'S MOTION TO PRECLUDE USE OF FALSE TESTIMONY; MOTION FOR PRE-TRIAL EVIDENTIARY HEARING**

NOW COMES Defendant Richard Marshall, by and through his attorney Dana L. Hanna, and pursuant to his constitutional rights to a fair trial and due process of law, respectfully moves the Court to enter an order to prohibit the government from offering the testimony of Fritz Arlo Looking Cloud at trial, on the grounds that the government knows or has good reason to know that Looking Cloud will knowingly give false testimony as to material facts; specifically, the government knows or has good reason to know that Looking Cloud will give false exculpatory testimony in which he will falsely deny his own proven criminal culpability in the murder of Anna Mae Pictou Aquash.

The Defendant further moves the Court to order a pre-trial evidentiary hearing on this motion, if the government contests the fact that it knows or has good reason to know that Looking Cloud will give false exculpatory testimony when he is questioned in trial about his own guilt and intent to murder Aquash.

As grounds for this motion, Dana L. Hanna, attorney for the Defendant, hereby affirms:

1. The key prosecution witness in the government's case against Richard Marshall is convicted murderer Fritz Arlo Looking Cloud. In 2004, Looking Cloud was convicted after trial of murder in the first degree for murdering or aiding and abetting the murder of Anna Mae Pictou

Aquash in December 1975. Looking Cloud is presently serving a life sentence for his crime. He agreed to testify as a government witness in 2008.

2. I hereby affirm that I have a good faith reasonable belief that the government knows or should know that Looking Cloud intends to give testimony that the government knows is false in the trial of Richard Marshall. I make these affirmations on the basis of reliable information and belief, the sources of which include, but are not limited to: statements made to me by Assistant United States Attorney (AUSA) Robert Mandel; tape-recorded conversations made from jail between Looking Cloud and his wife, friends and relatives; transcripts of statements made by Looking Cloud to the government's prosecuting attorney before two grand juries; official court records in this case, the case of United States v. Looking Cloud, CR #03-50020, and in Arlo Looking Cloud's pending habeas action in this court, CV #06-5062**;** the government's brief and the Court of Appeals opinion in United States v. Looking Cloud, 419 F.3d 781 (8th Cir. 2005); the discovery materials that I have received from the government; and statements made by witnesses during the course of my own independent investigation.

3. Based on the aforesaid sources of information, I have good reason to believe and I do in fact believe that if and when he testifies, Looking Cloud will falsely testify that he had no prior knowledge of Aquash's murder, that he had no intent to help murder her, that he did not knowingly aid or abet her murder, and that he did not provide the murder weapon to the shooter at the murder scene. The testimony that Looking Cloud intends to give as to these material facts has been proven false beyond a reasonable doubt in his own trial; his guilt and his intent to murder are judicially noticeable facts and those judicially proven facts are not subject to reasonable dispute in this Court or in this trial.

4. In Looking Cloud's trial in 2004, Looking Cloud's defense was that he lacked specific intent to help murder Aquash. To disprove that defense, the government presented the testimony of Richard Two Elk, who testified that Looking Cloud had admitted to him that he–Looking Cloud–handed a gun to John Graham at the scene of the murder and that Graham then used that gun to murder Aquash. The jury found Looking Cloud guilty of murder in the first degree.

5. In his appeal to the United States Court of Appeals for the Eighth Circuit, Looking Cloud argued that the evidence in his trial was insufficient to prove that he knowingly intended

to help murder Aquash. In the statement of facts in the government's brief, AUSA Mandel stated as a proven fact that Looking Cloud handed the gun to John Graham at the murder scene.

6. In 2005, the Court of Appeals affirmed Looking Cloud's conviction and ruled that Looking Cloud's specific intent to murder was proven beyond a reasonable doubt. In its opinion, the Court specifically relied on the government's evidence that Looking Cloud handed the gun to the shooter at the murder scene as proof of his specific intent to murder. United States v. Looking Cloud, 419 F.3d at 790.

7. In 2006, Looking Cloud filed a motion to set aside his conviction, claiming he was wrongfully convicted as a result of ineffective counsel and government misconduct. That motion, which is filed pursuant to 28 U.S.C. §2255, at CV #06-0502, is presently pending before this Court. If Looking Cloud prevails on his motion to set aside his conviction and he is granted a new trial, then any inculpatory admissions he makes in his testimony at Mr. Marshall's trial would be used as evidence against Looking Cloud in a new trial. It is therefore entirely foreseeable that Looking Cloud will continue to deny his guilt and intent to murder Aquash if he is allowed to testify in Mr. Marshall's trial.

8. I have subpoenaed and listened to tape-recordings of telephone calls made by Looking Cloud from jail, after he agreed to testify for the government in August 2008, in which he tells his wife, relatives, and friends that he views his testimony in Mr. Marshall's trial as an opportunity to convince the triers of fact and the court that he was wrongly convicted of Aquash's murder. In those conversations, Looking Cloud has repeatedly told his wife, his relatives, and his friends that when he testifies as a government witness in the trial, he will testify that he was innocent of aiding and abetting Aquash's murder, that he had no intent to murder her, and that he was wrongly convicted in his trial, which he has characterized as a "kangaroo court." It is evident from these conversations that Looking Cloud intends to give falsely testify that he had no criminal intent to help murder Aquash and that he was innocent of the murder for which he was convicted.

9. I have provided copies of those tape recorded conversations to the government, at AUSA Mandel's request. Therefore, I have every reason to believe that the government has heard these tapes and knows that Looking Cloud intends to falsely deny his guilt in the murder of

Aquash if he testifies.

10. Based upon the false exculpatory statements Fritz Arlo Looking Cloud has made since his conviction to government prosecutors and agents in his proffer session and interviews, statements he has made to two grand juries and statements made in tape-recorded conversations, it is a foreseeable fact which is known to the government that if Looking Cloud is allowed to testify in the trial of Richard Marshall, Looking Cloud will give perjured testimony as to these material facts:

– he will false testify that until the moment she was shot, Looking Cloud had no prior knowledge that Anna Mae Aquash was going to be murdered;

– he will falsely testify that he had no intent to help murder Aquash;

– he will falsely testify that he did not knowingly aid or abet the murder of Aquash;

– he will falsely testify that he did not hand a gun to John Graham at the murder scene; and

– he will falsely testify that he made no inculpatory admissions to Richard Two Elk.

11. I have raised the issue of Looking Cloud's foreseeable perjury with the government, both in personal conversation with AUSA Mandel and in correspondence to the United States Attorney. On June 3, 2009, I raised the issue of Looking Cloud's intent to commit perjury with AUSA Mandel in a conversation that took place in the courtroom after Mr. Marshall's detention hearing. I advised Mr. Mandel of my expectation that when he testifies in the trial of Richard Marshall, Looking Cloud will deny prior knowledge or intent to aid in the murder of Aquash. AUSA Mandel admitted and agreed that if he is questioned on those matters in trial, Looking Cloud could be expected to deny any prior knowledge or intent with regard to the murder of Aquash. However, AUSA Mandel did not see such testimony as presenting a constitutional problem; it was his opinion that, even though his guilt and his intent to murder have been judicially proven beyond a reasonable doubt, if Looking Cloud were to deny his guilt and testify that he had no intent to help murder Aquash, then such testimony would not constitute perjury. The government has never denied that when Looking Cloud testifies, it is likely that Looking Cloud will deny his criminal intent and guilt in the crime for which he has been convicted.

12. Based on the foregoing facts, it is reasonably foreseeable that if Arlo Looking Cloud testifies in the trial of Richard Marshall, Looking Cloud will give false exculpatory testimony that would constitute perjury. Based on the foregoing facts, the government knows or should know that when Looking Cloud intends to commit the crime of perjury when he is questioned on cross-examination.

13. If this Court allows the government to present the testimony of its key witness whom the government knows or should know will commit perjury as to material facts in the case, the knowing use of false testimony by the government will deprive the Defendant Richard Marshall of a fair trial and due process of law.

WHEREFORE, the Defendant Richard Marshall moves the Court to enter an Order :

(1) directing the government to admit or deny the fact that it is reasonably foreseeable that if Looking Cloud testifies as a government witness, he will testify that he had no prior knowledge, intent to murder or guilt in the murder of Anna Mae Aquash;

(2) if the government contests the fact that it is foreseeable that Looking Cloud will give such testimony, then the Defendant Marshall moves the Court to order that an evidentiary hearing be held, prior to trial, in which the Defendant will have an opportunity to prove the government knows or should know that its witness will give false exculpatory testimony if he testifies; and

(3) if the Court finds that it is a foreseeable fact, which is known or should be known to the government, that Looking Cloud will commit perjury if he testifies, then the Defendant Marshall moves the Court to enter an Order prohibiting the government from using false testimony and to refrain from presenting the testimony of Fritz Arlo Looking Cloud in the trial of Richard Marshall.

DATED: 19 JANUARY 2010

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Motion was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 19th day of January, 2010.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO PRECLUDE USE OF FALSE TESTIMONY**

FACTS AND BACKGROUND

Since 1994 to the present date, Arlo Looking Cloud has consistently told federal government prosecutors and agents that he had no intent to help murder Anna Mae Aquash, that her murder came as a surprise to him, and that he did not knowingly aid and abet her murder. Those claims have been judicially proven beyond a reasonable doubt to be false. Even if the government does not elicit that false testimony on direct examination, the government knows, or should know, that Looking Cloud is going to repeat his false claims of ignorance and innocence when he is questioned by defense counsel on cross-examination in Mr. Marshall's trial. The Defendant Marshall contends that certain facts and evidence in the possession of the government, including statements made by Looking Cloud in tape-recorded conversations with family members and in conversations with government attorneys, the government must be charged with knowledge that its key witness against Mr. Marshall will knowingly lie about his own intent, knowledge and guilt when he is questioned on those material facts in cross-examination.

Defense counsel has directly confronted the government's prosecutors with the question of whether its witness will deny intent to murder or knowingly aiding and abetting the murder of

Aquash when he testifies in Mr. Marshall's trial. The government has not denied that such would likely be Looking Cloud's testimony. Instead, the trial prosecutor took the position that such testimony would not constitute perjury.

Rather than contest the fact that Looking Cloud will deny his own proven guilt when he testifies, the government would argue as a point of law that even if Looking Cloud denies facts which have been proven beyond a reasonable doubt–his intent, prior knowledge and guilt in the murder of Aquash–then such testimony would not constitute perjury and therefore the Defendant Marshall's constitutional guarantee of a fair trial would not preclude the government from calling Looking Cloud as a government witness.

Defendant Marshall contends that if the government knows or should know that its key witness is going to give false testimony, whether on direct or cross-examination, as a matter of law, that would constitute knowing use of false testimony by the government, which would violate the Defendant's Constitutional guarantees of a fair trial and due process of law.

Pursuant to the Constitution's guarantees of an accused citizen's rights to a fair trial and due process of law, and pursuant to this court's supervisory powers to protect the integrity of the judicial fact finding process, the Defendant Richard Marshall moves the Court to order an evidentiary hearing on the motion and to preclude the government from knowingly presenting false testimony in his trial.

THE ISSUE TO BE DECIDED :

Whether the government uses false testimony, and thereby violates a defendant's right to due process of law and a fair trial, when the government presents the testimony of a convicted murderer to testify about the murder for which he was found guilty, knowing that the witness will falsely deny his own prior knowledge, intent, and guilt with regard to that murder when he is questioned by on cross-examination.

ARGUMENT

I

THE GOVERNMENT KNOWINGLY USES FALSE TESTIMONY AND VIOLATES DUE PROCESS WHEN IT PRESENTS THE TESTIMONY OF A GOVERNMENT WITNESS KNOWING THAT THE WITNESS WILL GIVE FALSE TESTIMONY ON CROSS-EXAMINATION.

It is a violation of a defendant's right to due process of law for the government to use perjured testimony in a trial. Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340 (1935); Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173 (1959).

"The prosecution may not use or solicit false evidence, or allow it to go uncorrected." United States v. Martin, 59 F.3d 767, 770 (8th Cir. 1995), *citing* Giglio v. United States, 405 US 150, 154, 92 S.Ct. 763 (1972). To establish a constitutional violation arising from the use of false testimony, "the testimony must have been perjured, the government must have known it was, and there must have been a reasonable likelihood that the perjured testimony affected the jury's determinations." United States v. Martin, *above*.

To violate due process, it is not necessary for the government's prosecutor to elicit the false testimony on direct examination. Recognizing that a jury's determination of the truthfulness of a given witness may well be determinative of guilt or innocence, the Supreme Court and the Eighth Circuit Court of Appeals have held that the government uses false testimony, and thereby denies a defendant fundamental fairness, if a government witness gives false testimony on cross-examination and the government knows or should know that the testimony is false and fails to correct the false testimony. Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763 (1972); United States v. Bigeleisen, 625 F.2d 203 (8th Cir., 1980); United States v. Foster, 874 F.2d 491 (8th Cir. 1988). "[T]o the extent that the government allows (perjured) testimony to go uncorrected, perjured testimony will be considered a part of 'the prosecution's case,' even if elicited by defense counsel on cross-examination." United States v. Boyd, 833 F.Supp. 1277, 1345 (N.D.Ill. 1993).

Most appellate cases addressing the issue of the government's use of perjury involve

cases in which the purported perjury was discovered after the prosecution witness testified. The case before this Court is unique in that the Defendant Marshall affirms that he can prove in an evidentiary hearing that even now, before the trial begins, the government knows its key witness will testify falsely as to his own lack of guilt in the murder he has been proven to have committed. This is not merely a matter of impeachment, but goes to the very subject matter of his testimony and the government's case against Mr. Marshall.

Here, the government must be charged with prior knowledge that the key prosecution witness will give perjured testimony: he will deny prior knowledge, intent to murder, and guilt of the crime for which he was convicted. Given the legal fact of his conviction (which was affirmed on appeal), there can no reasonable dispute that Looking Cloud knowingly aided and abetted murder and that he intended to help murder Aquash. His testimony denying those judicially proven facts would constitute perjury as a matter of law.

Moreover, in Looking Cloud's appeal, the government represented to the United States Court of Appeals in plain and unambiguous language that it was a proven fact in Looking Cloud's trial that Arlo Looking Cloud handed the murder weapon to John Graham at the murder scene. It is a practical certainty that Looking Cloud will deny that fact when questioned on cross-examination. If the government knows or has reason to know that Looking Cloud will deny that he handed the gun to Graham, that too constitutes a present intention by the government to knowingly use perjured testimony in its trial against Richard Marshall.

The government has stated to the Court of Appeals that Looking Cloud handed a gun to Graham at the murder scene. If the government had any reason to believe that the evidence it relied on in Looking Cloud's trial was false, or that the fact it represented to the Court of Appeals as true is not true, then the government would have a duty to bring that matter to the attention of the Court; it has not done so. Therefore, if the government knows that Looking Cloud will testify on cross-examination that he did not give a gun to Graham, or that he did not take any other actions to knowingly help murder Anna Mae Aquash, then the government must be held to know that Looking Cloud is going to give testimony that the government knows is false.

If the government's knowledge of Looking Cloud's intent to testify falsely is admitted or proven, then, as a matter of law, the government intends to use perjured testimony in its case.

II

THE COURT SHOULD ORDER AN EVIDENTIARY HEARING TO DETERMINE WHETHER THE GOVERNMENT INTENDS TO USE FALSE TESTIMONY IN ITS CASE.

To establish a violation of due process after conviction, the Defendant has the burden of establishing that the government's case included perjured testimony; the defendant must show that the challenged testimony constituted "the willful assertion under oath of a false, material fact." United States v. Boyd, 833 F.Supp. 1277, 1335 (N.D.Ill. 1993). Richard Marshall respectfully submits that he can establish in an evidentiary hearing that the government knows now, prior to trial, that its key witness will commit the crime of perjury on cross-examination when he is questioned about his own knowing participation in the murder that would be the subject matter of his testimony.

The knowing and premeditated use of perjured testimony by the government goes to the heart of the integrity of the judicial fact finding process. If the government's intention to call a witness it knows will testify falsely can be established prior to trial, the Court should not wait until the government's witness commits a crime in the courtroom to address the issue. The Court should know, prior to trial, if the government intends to call a witness who will give perjured testimony. Just as the Court will preclude a party from calling a witness it knows will assert his right to remain silent, here, the Court should not wait until the trial has been tainted by perjury to take appropriate preventive action.

To protect the integrity of the judicial process and the Defendant's right to fundamental fairness, the factual question of whether the government's key witness will give false exculpatory testimony on cross-examination must be decided before trial.

Therefore, the Court should grant the Defendant's motion and order the government to disclose what Looking Cloud's testimony will be when he is asked these questions on cross-examination:

– whether Looking Cloud had prior knowledge that Anna Mae Aquash was going to be murdered before she was shot;

– whether Looking Cloud intended to help murder Aquash;

– whether Looking Cloud knowingly acted to aided and abet the murder of Aquash; and

– whether Looking Cloud handed a gun to John Graham at the murder scene.

If the government admits that Looking Cloud will deny those facts when he is cross-examined, then there would be no contested facts to establish in an evidentiary hearing, and the court could then make legal rulings on the issue. If, on the other hand, the government denies that Looking Cloud will give false exculpatory testimony on cross-examination or if the government claims ignorance as to what the testimony of its key witness will be on these material facts, then this Court should order that an evidentiary hearing be held in which the Defendant will have an opportunity to present evidence to prove that the government intends to use false testimony in its case by calling a witness it knows will commit perjury on cross-examination.

If the government contests the fact that Looking Cloud would testify falsely about his own guilt and actions, the Court should hear evidence in a pre-trial hearing and make preliminary rulings of fact pursuant to FRE Rule 104 as to whether the prosecution's witness intends to give false exculpatory testimony in trial; and if the Court finds it is reasonably foreseeable that Looking Cloud will give perjured testimony if he testifies, the Court should then make a legal ruling that the use of such testimony by the government would deprive the Defendant Richard Marshall of due process of law.

DATED: 19 JANUARY 2010

Respectfully submitted,

/s/ Dana L. Hanna
Dana L. Hanna
HANNA LAW OFFICE, P.C.
PO Box 3080
816 Sixth Street
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Counsel for Defendant Marshall

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Memorandum was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 19th day of January, 2010.

/s/ Dana L. Hanna

Dana L. Hanna

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	)	CRIM. NO. 08-50079-01

SUPPLEMENT TO PROPOSED JURY INSTRUCTIONS

Defendant Graham filed proposed jury instructions, Doc. 154, and a memorandum in support of those instructions, Doc. 151. He previously supplemented the memorandum with additional authority. Doc. 299.

Based on United States v. Stymiest, 581 F.3d 759, 764 (8th Cir. 2009) (filed September 22, 2009, rehearing denied November 19, 2009) (appeal from the District of South Dakota), Defendant Graham asks that the following paragraph be added at the end of enumerated paragraph #2 of proposed instructions 1 and 2 in Document 154:

> Also, a person is not recognized as being an Indian merely because they hold themselves out to be an Indian by submitting to tribal court jurisdiction, or because they have sought or received care at a tribal

> hospital, or because they have participated in tribal community activities, or because they are socially involved with enrolled tribal members. To be recognized as an Indian, a person must be recognized by a particular Indian tribe's government or the United States government as being an Indian. If the government's only proves that [Mr. Graham][Ms. Aquash] was recognized or accepted as being Indian by particular Indian people, that is insufficient to find that [Mr. Graham][Ms. Aquash] was recognized as being Indian under the law.

The language in Stymiest clearly illuminates an issue that has been mis-apprehended by the government. The government has alleged that it will prove Mr. Graham is recognized as being an Indian by showing he socialized with members of federally recognized tribes and participated in their ceremonies.

The issue is not whether Mr. Graham was accepted by or socialized with enrolled members of recognized American Indian tribes. The issue is whether he was recognized as being Indian by a federally recognized Indian tribe, the United States government, or both. Id. (Indian recognition requires "that the defendant be recognized as an Indian by the tribe or by the federal government." (emphasis in original). The issue is whether a particular person has been recognized by a political entity, not whether a particular person has been socially recognized by members of that political entity. Id. at 764 (Indian recognition prong has "political underpinnings.").

Therefore, the jury should be specifically instructed that the kind of social,

cultural and religious evidence that the government intends to present to establish Indian recognition is precisely the kind of evidence that the Eight Circuit has held is not sufficient.

Dated January 19, 2010.

/s/ John R. Murphy
John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

ROBERT A. MANDEL	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
DANA HANNA	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing

Dated January 19, 2010.

/s/ John R. Murphy
John R. Murphy

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S SUPPLEMENTAL MOTIONS IN LIMINE

NOW COMES Defendant Richard Marshall, by and through his attorney Dana L. Hanna, and pursuant to his constitutional rights to a fair trial, and to Rules 401, 402 and 403 of the Federal Rules of Evidence, hereby moves in limine for the following orders:

1. To preclude the government from using any name other than Vine Richard Marshall, the defendant's legal name when reading the indictment. Use of other names is prejudicial.

2. To preclude government from offering any testimony from Cleo Gates or any other witness making any reference to the contents of a writing that has never been seen by Cleo Gates or any other government witness. On information and belief, the government may seek to ask questions calling for speculation as to the contents of a writing that will not be introduced in evidence and which neither Cleo Gates or any other government witness would claim to have read. Testimony speculating as to the contents of an out of court writing is inadmissible hearsay, not relevant or probative, and unfairly prejudicial.

3. To preclude the government from offering or making any reference to an out of court statement by a deceased out of court declarant– Myrtle Poor Bear on the grounds that such out of court declaration would be inadmissible, irrelevant and prejudicial hearsay.

4. Cleo Gates will testify that some weeks prior to December 1975, rifles belonging to

Richard Marshall were removed from the Marshall home and taken to Mr. Marshall's father and stepmother. The Defendant moves to preclude the government from questioning the witness Cleo Gates as to the reason why defendant Marshall had his rifles removed from his home and taken to the home of his mother and stepfather. Such questioning would lead to the introduction of testimony that is inadmissible, not probative, and unduly prejudicial.

5. To preclude the government from making any reference to or eliciting or offering any testimony or evidence concerning events regarding any arrest of the defendant or any case other than the one charged in the indictment, as such testimony would be irrelevant, without probative value and unduly prejudicial.

6. To preclude the testimony of any FBI agent, Ecoffey or any witness other than a qualified pathologist as to their opinion as to whether marks on Anna Mae Aquash's body were "ligature marks" or any testimony as to the origin of any alleged marks, on the grounds that only a qualified expert witness such as a forensic pathologist would be competent to give such an opinion.

7. To prohibit the government from offering any theories, opinions or testimony that Anna Mae Aquash was or may have been raped, on the grounds that such a theory would be entirely speculative, lacking in any probative value as to contested issues in this case and would create a substantial likelihood of undue prejudice.

WHEREFORE, the defendant moves in limine for the above-described orders.

Dated this 19th day of January, 2010.

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing Motion was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 19th day of January, 2009.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 **DEFENDANT MARSHALL'S MOTION FOR EARLY PRODUCTION OF JENCKS/RULE 26.2 MATERIAL**

NOW COMES the Defendant Richard Marshall, by and through his attorney of record, Dana L. Hanna, and hereby moves the Court to require the government to produce all materials, within the scope of 18 U.S.C. § 3500 and Fed. R. Crim. P. 26.2, at least one week prior to trail.

In support of this motion, the defendant avers that early production will avoid the inconvenience and expense of recessing the proceedings during trial, pursuant to Fed. R. Crim. P. 26.2(d), to permit counsel to examine such statements and to prepare for their use in trail. To deny the defendant access to witnesses' statements in advance of trial, so that counsel can read and digest these materials, discuss them with the defendant, and find and prepare witnesses who may refute the testimony of the governments's witnesses, will deny the defendant meaningful disclosure, deny the defendant his right to effective assistance of counsel; and impair the defendant's ability to prepare his defense, all in contravention of the United States Constitution.

WHEREFORE, the defendant respectfully requests that the Court grant the relief herein

sought, and require the government to turn over all Jencks Act/Rule 26.2 materials one week in advance of trial.

DATED: 19 JANUARY 2010

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Motion was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 19th day of January, 2010.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL, a.k.a. RICHARD VINE MARSHALL, a.k.a. DICK MARSHALL, Defendant.	Case No. CR 08-50079 MOTION FOR SEQUESTRATION ORDER

NOW COMES Defendant Richard Marshall, by and through his attorney, Dana L. Hanna, and hereby moves the Court to enter an order for sequestration of the government's witnesses, excluding the government's witnesses from the court room except for when they are testifying, and further directing the government's witnesses to refrain from discussing the testimony or evidence in this case until after they have completed their testimony. Grounds for the motion are that the defendant has a right to a sequestration order as recognized in the case *United States v. Camacho*, 555 F.3d 695 (8th Cir. 2009).

WHEREFORE Defendant Richard Marshall respectfully moves the Court to enter an order (1) directing the government's witnesses to be excluded from the courtroom during the testimony of other witnesses and opening statements of counsel; (2) directing the government's witnesses to not discuss the testimony or evidence with other witnesses until both sides have rested or until otherwise excused from this order by the Court; and (3) directing the Prosecutor to advise the government's witnesses of the order.

Dated this 19th day of January, 2010.

VINE RICHARD MARSHALL,
Defendant

BY: */s/ Dana L. Hanna*
Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Motion was electronically served upon the other parties in the case via the electronic mail addresses listed below:

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 19th day of January, 2010.

/s/ Dana L. Hanna
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S MOTION FOR PRODUCTION OF HANDWRITTEN NOTES FOR IN CAMERA INSPECTION

NOW COMES Defendant Richard Marshall, by and through his attorney Dana L. Hanna, and hereby moves the Court to order the government to produce the handwritten notes of government agents and attorneys present during the proffer session questioning of Arlo Looking Cloud, on August 19, 2008, for this Court's in-camera inspection.

As grounds for this motion, Dana L. Hanna, attorney for the Defendant, hereby affirms:

1. I have good reason to believe and I do in fact believe that in an interview with agents and prosecutors on or about August 19, 2008, in a proffer session, government cooperating witness Fritz Arlo Looking Cloud testimony made statements to the prosecutors that are false, and which the government knew or should have known were false, including false exculpatory statements in which he claimed to have had no prior knowledge or any intent to help murder Anna Mae Pictou Aquash in 1975.

2. The reasons for my belief that Looking Cloud made false exculpatory statements in his proffer session are set forth in the Defendant's Motion to Prohibit Use of False Testimony and the memorandum of law in support of that motion, both of which are being filed with this court today.

3. An FBI agent wrote a "302" report summarizing Looking Cloud's statements in the

proffer session. The proffer session evidently was not recorded, and there is no verbatim record of the interview, to my knowledge. Therefore, not all statements made by Looking Cloud were referred to in the 302 report. The report made no mention of any exculpatory statements by Looking Cloud.

4. I know from the discovery provided to me that every time Looking Cloud has been questioned about Aquash's murder by government agents or attorneys, since his first proffer session in 1994, he has sought to persuade them that he is innocent of Aquash's murder. Therefore, it is entirely predictable and foreseeable that he would have made exculpatory statements claiming lack of prior knowledge or intent when he proffered his potential testimony to the government in 2008. On information and belief, therefore, it is probable that false exculpatory statements were made by Looking Cloud at his proffer session in August 2008, but were not included in the investigative report.

5. False exculpatory statements can be used to impeach the credibility of the government's key witness in trial .

WHEREFORE the Defendant Marshall moves the Court to direct the federal prosecutors and agents to turn over their own handwritten notes, as well as the handwritten notes of agents, that were taken during the proffer session with Arlo Looking Cloud in August 2008, for the Court's in-camera review to determine whether such notes contain evidence that the Defendant can use to impeach the credibility of Looking Cloud.

DATED: 19 JANUARY, 2010.

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Motion for Production of Handwritten Notes was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 19th day of July, 2010.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 DEFENDANT MARSHALL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRODUCTION OF HANDWRITTEN NOTES FOR IN CAMERA INSPECTION

Defendant Richard Marshall moves the Court to order the government to produce the handwritten notes of government agents and attorneys present during the proffer session questioning of Arlo Looking Cloud, on August 19, 2008, for the Court's in-camera inspection. The Defendant requests the court to inspect the handwritten notes to determine whether exculpatory statements were made by Looking Cloud and omitted from the investigative report.

The Defendant contends that there is a realistic likelihood that Looking Cloud, told agents that he was innocent of the murder for which he was convicted, and that he had no intent to help murder Aquash or any knowledge that she was going to be murdered until the moment of her death. These statements have been proven to be false by reason of his conviction for first degree murder. False exculpatory statements are evidence that can be used to impeach the credibility of this witness, and Mr. Marshall is entitled to disclosure of those statements by the Due Process Clause. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963).

Moreover, in his Motion to Prohibit Use of False Testimony, which is being filed today, the Defendant Marshall contends that the government knows or should know that Looking Cloud will give false exculpatory testimony, in the trial of Richard Marshall. Any such statements made to government investigators at the proffer session would be highly probative as to the factual

issues raised in that motion.

Therefore, the court should order the government to produce the handwritten notes taken during the proffer session for an in-camera inspection by the court, so that the court may determine whether there were material omissions from the written investigative report–specifically, statements made by Looking Cloud in which he claimed innocence or lack of prior knowledge or intent to help murder Aquash. United States v. Greatwalker, 356 F.3d 908 (8th Cir., 2004); United States. v. Grunewald, 987 F.2d 531 (8th Cir. 1993).

DATED: 19 JANUARY 2010

Respectfully submitted,

/s/ Dana L. Hanna

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Memorandum of Law was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 19th day of July, 2010.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 **DEFENDANT MARSHALL'S MOTION TO PRECLUDE USE OF FALSE TESTIMONY; MOTION FOR PRE-TRIAL EVIDENTIARY HEARING**

NOW COMES Defendant Richard Marshall, by and through his attorney Dana L. Hanna, and pursuant to his constitutional rights to a fair trial and due process of law, respectfully moves the Court to enter an order to prohibit the government from offering the testimony of Fritz Arlo Looking Cloud at trial, on the grounds that the government knows or has good reason to know that Looking Cloud will knowingly give false testimony as to material facts; specifically, the government knows or has good reason to know that Looking Cloud will give false exculpatory testimony in which he will falsely deny his own proven criminal culpability in the murder of Anna Mae Pictou Aquash.

The Defendant further moves the Court to order a pre-trial evidentiary hearing on this motion, if the government contests the fact that it knows or has good reason to know that Looking Cloud will give false exculpatory testimony when he is questioned in trial about his own guilt and intent to murder Aquash.

As grounds for this motion, Dana L. Hanna, attorney for the Defendant, hereby affirms:

1. The key prosecution witness in the government's case against Richard Marshall is convicted murderer Fritz Arlo Looking Cloud. In 2004, Looking Cloud was convicted after trial of murder in the first degree for murdering or aiding and abetting the murder of Anna Mae Pictou

Aquash in December 1975. Looking Cloud is presently serving a life sentence for his crime. He agreed to testify as a government witness in 2008.

2. I hereby affirm that I have a good faith reasonable belief that the government knows or should know that Looking Cloud intends to give testimony that the government knows is false in the trial of Richard Marshall. I make these affirmations on the basis of reliable information and belief, the sources of which include, but are not limited to: statements made to me by Assistant United States Attorney (AUSA) Robert Mandel; tape-recorded conversations made from jail between Looking Cloud and his wife, friends and relatives; transcripts of statements made by Looking Cloud to the government's prosecuting attorney before two grand juries; official court records in this case, the case of United States v. Looking Cloud, CR #03-50020, and in Arlo Looking Cloud's pending habeas action in this court, CV #06-5062**;** the government's brief and the Court of Appeals opinion in United States v. Looking Cloud, 419 F.3d 781 (8th Cir. 2005); the discovery materials that I have received from the government; and statements made by witnesses during the course of my own independent investigation.

3. Based on the aforesaid sources of information, I have good reason to believe and I do in fact believe that if and when he testifies, Looking Cloud will falsely testify that he had no prior knowledge of Aquash's murder, that he had no intent to help murder her, that he did not knowingly aid or abet her murder, and that he did not provide the murder weapon to the shooter at the murder scene. The testimony that Looking Cloud intends to give as to these material facts has been proven false beyond a reasonable doubt in his own trial; his guilt and his intent to murder are judicially noticeable facts and those judicially proven facts are not subject to reasonable dispute in this Court or in this trial.

4. In Looking Cloud's trial in 2004, Looking Cloud's defense was that he lacked specific intent to help murder Aquash. To disprove that defense, the government presented the testimony of Richard Two Elk, who testified that Looking Cloud had admitted to him that he–Looking Cloud–handed a gun to John Graham at the scene of the murder and that Graham then used that gun to murder Aquash. The jury found Looking Cloud guilty of murder in the first degree.

5. In his appeal to the United States Court of Appeals for the Eighth Circuit, Looking Cloud argued that the evidence in his trial was insufficient to prove that he knowingly intended

to help murder Aquash. In the statement of facts in the government's brief, AUSA Mandel stated as a proven fact that Looking Cloud handed the gun to John Graham at the murder scene.

6. In 2005, the Court of Appeals affirmed Looking Cloud's conviction and ruled that Looking Cloud's specific intent to murder was proven beyond a reasonable doubt. In its opinion, the Court specifically relied on the government's evidence that Looking Cloud handed the gun to the shooter at the murder scene as proof of his specific intent to murder. United States v. Looking Cloud, 419 F.3d at 790.

7. In 2006, Looking Cloud filed a motion to set aside his conviction, claiming he was wrongfully convicted as a result of ineffective counsel and government misconduct. That motion, which is filed pursuant to 28 U.S.C. §2255, at CV #06-0502, is presently pending before this Court. If Looking Cloud prevails on his motion to set aside his conviction and he is granted a new trial, then any inculpatory admissions he makes in his testimony at Mr. Marshall's trial would be used as evidence against Looking Cloud in a new trial. It is therefore entirely foreseeable that Looking Cloud will continue to deny his guilt and intent to murder Aquash if he is allowed to testify in Mr. Marshall's trial.

8. I have subpoenaed and listened to tape-recordings of telephone calls made by Looking Cloud from jail, after he agreed to testify for the government in August 2008, in which he tells his wife, relatives, and friends that he views his testimony in Mr. Marshall's trial as an opportunity to convince the triers of fact and the court that he was wrongly convicted of Aquash's murder. In those conversations, Looking Cloud has repeatedly told his wife, his relatives, and his friends that when he testifies as a government witness in the trial, he will testify that he was innocent of aiding and abetting Aquash's murder, that he had no intent to murder her, and that he was wrongly convicted in his trial, which he has characterized as a "kangaroo court." It is evident from these conversations that Looking Cloud intends to falsely testify that he had no criminal intent to help murder Aquash and that he was innocent of the murder for which he was convicted.

9. I have provided copies of those tape recorded conversations to the government, at AUSA Mandel's request. Therefore, I have every reason to believe that the government has heard these tapes and knows that Looking Cloud intends to falsely deny his guilt in the murder of

Aquash if he testifies.

10. Based upon the false exculpatory statements Fritz Arlo Looking Cloud has made since his conviction to government prosecutors and agents in his proffer session and interviews, statements he has made to two grand juries and statements made in tape-recorded conversations, it is a foreseeable fact which is known to the government that if Looking Cloud is allowed to testify in the trial of Richard Marshall, Looking Cloud will give perjured testimony as to these material facts:

– he will falsely testify that until the moment she was shot, Looking Cloud had no prior knowledge that Anna Mae Aquash was going to be murdered;

– he will falsely testify that he had no intent to help murder Aquash;

– he will falsely testify that he did not knowingly aid or abet the murder of Aquash;

– he will falsely testify that he did not hand a gun to John Graham at the murder scene; and

– he will falsely testify that he made no inculpatory admissions to Richard Two Elk.

11. I have raised the issue of Looking Cloud's foreseeable perjury with the government, both in personal conversation with AUSA Mandel and in correspondence to the United States Attorney. On June 3, 2009, I raised the issue of Looking Cloud's intent to commit perjury with AUSA Mandel in a conversation that took place in the courtroom after Mr. Marshall's detention hearing. I advised Mr. Mandel of my expectation that when he testifies in the trial of Richard Marshall, Looking Cloud will deny prior knowledge or intent to aid in the murder of Aquash. AUSA Mandel admitted and agreed that if he is questioned on those matters in trial, Looking Cloud could be expected to deny any prior knowledge or intent with regard to the murder of Aquash. However, AUSA Mandel did not see such testimony as presenting a constitutional problem; it was his opinion that, even though his guilt and his intent to murder have been judicially proven beyond a reasonable doubt, if Looking Cloud were to deny his guilt and testify that he had no intent to help murder Aquash, then such testimony would not constitute perjury. The government has never denied that when Looking Cloud testifies, it is likely that Looking Cloud will deny his criminal intent and guilt in the crime for which he has been convicted.

12. Based on the foregoing facts, it is reasonably foreseeable that if Arlo Looking Cloud testifies in the trial of Richard Marshall, Looking Cloud will give false exculpatory testimony that would constitute perjury. Based on the foregoing facts, the government knows or should know that Looking Cloud intends to commit the crime of perjury when he is questioned on cross-examination.

13. If this Court allows the government to present the testimony of its key witness whom the government knows or should know will commit perjury as to material facts in the case, the knowing use of false testimony by the government will deprive the Defendant Richard Marshall of a fair trial and due process of law.

WHEREFORE, the Defendant Richard Marshall moves the Court to enter an Order :

(1) directing the government to admit or deny the fact that it is reasonably foreseeable that if Looking Cloud testifies as a government witness, he will testify that he had no prior knowledge, intent to murder or guilt in the murder of Anna Mae Aquash;

(2) if the government contests the fact that it is foreseeable that Looking Cloud will give such testimony, then the Defendant Marshall moves the Court to order that an evidentiary hearing be held, prior to trial, in which the Defendant will have an opportunity to prove the government knows or should know that its witness will give false exculpatory testimony if he testifies; and

(3) if the Court finds that it is a foreseeable fact, which is known or should be known to the government, that Looking Cloud will commit perjury if he testifies, then the Defendant Marshall moves the Court to enter an Order prohibiting the government from using false testimony and to refrain from presenting the testimony of Fritz Arlo Looking Cloud in the trial of Richard Marshall.

DATED: 19 JANUARY 2010

VINE RICHARD MARSHALL, Defendant

BY: /s/ *Dana L. Hanna*

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
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John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 19th day of January, 2010.

/s/ *Dana L. Hanna*
Dana L. Hanna

UNITED STATES DISTRICT COURT
FOR THE 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.	Case No. CR 08-50079 **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO PRECLUDE USE OF FALSE TESTIMONY**

FACTS AND BACKGROUND

Since 1994 to the present date, Arlo Looking Cloud has consistently told federal government prosecutors and agents that he had no intent to help murder Anna Mae Aquash, that her murder came as a surprise to him, and that he did not knowingly aid and abet her murder. Those claims have been judicially proven beyond a reasonable doubt to be false. Even if the government does not elicit that false testimony on direct examination, the government knows, or should know, that Looking Cloud is going to repeat his false claims of ignorance and innocence when he is questioned by defense counsel on cross-examination in Mr. Marshall's trial. The Defendant Marshall contends that certain facts and evidence in the possession of the government, including statements made by Looking Cloud in tape-recorded conversations with family members and in conversations with government attorneys, the government must be charged with knowledge that its key witness against Mr. Marshall will knowingly lie about his own intent, knowledge and guilt when he is questioned on those material facts in cross-examination.

Defense counsel has directly confronted the government's prosecutors with the question of whether its witness will deny intent to murder or knowingly aiding and abetting the murder of

Aquash when he testifies in Mr. Marshall's trial. The government has not denied that such would likely be Looking Cloud's testimony. Instead, the trial prosecutor took the position that such testimony would not constitute perjury.

Rather than contest the fact that Looking Cloud will deny his own proven guilt when he testifies, the government would argue as a point of law that even if Looking Cloud denies facts which have been proven beyond a reasonable doubt–his intent, prior knowledge and guilt in the murder of Aquash–then such testimony would not constitute perjury and therefore the Defendant Marshall's constitutional guarantee of a fair trial would not preclude the government from calling Looking Cloud as a government witness.

Defendant Marshall contends that if the government knows or should know that its key witness is going to give false testimony, whether on direct or cross-examination, as a matter of law, that would constitute knowing use of false testimony by the government, which would violate the Defendant's Constitutional guarantees of a fair trial and due process of law.

Pursuant to the Constitution's guarantees of an accused citizen's rights to a fair trial and due process of law, and pursuant to this court's supervisory powers to protect the integrity of the judicial fact finding process, the Defendant Richard Marshall moves the Court to order an evidentiary hearing on the motion and to preclude the government from knowingly presenting false testimony in his trial.

THE ISSUE TO BE DECIDED :

Whether the government uses false testimony, and thereby violates a defendant's right to due process of law and a fair trial, when the government presents the testimony of a convicted murderer to testify about the murder for which he was found guilty, knowing that the witness will falsely deny his own prior knowledge, intent, and guilt with regard to that murder when he is questioned on cross-examination.

ARGUMENT

I

THE GOVERNMENT KNOWINGLY USES FALSE TESTIMONY AND VIOLATES DUE PROCESS WHEN IT PRESENTS THE TESTIMONY OF A GOVERNMENT WITNESS KNOWING THAT THE WITNESS WILL GIVE FALSE TESTIMONY ON CROSS-EXAMINATION.

It is a violation of a defendant's right to due process of law for the government to use perjured testimony in a trial. Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340 (1935); Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173 (1959).

"The prosecution may not use or solicit false evidence, or allow it to go uncorrected." United States v. Martin, 59 F.3d 767, 770 (8th Cir. 1995), *citing* Giglio v. United States, 405 US 150, 154, 92 S.Ct. 763 (1972). To establish a constitutional violation arising from the use of false testimony, "the testimony must have been perjured, the government must have known it was, and there must have been a reasonable likelihood that the perjured testimony affected the jury's determinations." United States v. Martin, *above*.

To violate due process, it is not necessary for the government's prosecutor to elicit the false testimony on direct examination. Recognizing that a jury's determination of the truthfulness of a given witness may well be determinative of guilt or innocence, the Supreme Court and the Eighth Circuit Court of Appeals have held that the government uses false testimony, and thereby denies a defendant fundamental fairness, if a government witness gives false testimony on cross-examination and the government knows or should know that the testimony is false and fails to correct the false testimony. Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763 (1972); United States v. Bigeleisen, 625 F.2d 203 (8th Cir., 1980); United States v. Foster, 874 F.2d 491 (8th Cir. 1988). "[T]o the extent that the government allows (perjured) testimony to go uncorrected, perjured testimony will be considered a part of 'the prosecution's case,' even if elicited by defense counsel on cross-examination." United States v. Boyd, 833 F.Supp. 1277, 1345 (N.D.Ill. 1993).

Most appellate cases addressing the issue of the government's use of perjury involve

cases in which the purported perjury was discovered after the prosecution witness testified. The case before this Court is unique in that the Defendant Marshall affirms that he can prove in an evidentiary hearing that even now, before the trial begins, the government knows its key witness will testify falsely as to his own lack of guilt in the murder he has been proven to have committed. This is not merely a matter of impeachment, but goes to the very subject matter of his testimony and the government's case against Mr. Marshall.

Here, the government must be charged with prior knowledge that the key prosecution witness will give perjured testimony: he will deny prior knowledge, intent to murder, and guilt of the crime for which he was convicted. Given the legal fact of his conviction (which was affirmed on appeal), there can no reasonable dispute that Looking Cloud knowingly aided and abetted murder and that he intended to help murder Aquash. His testimony denying those judicially proven facts would constitute perjury as a matter of law.

Moreover, in Looking Cloud's appeal, the government represented to the United States Court of Appeals in plain and unambiguous language that it was a proven fact in Looking Cloud's trial that Arlo Looking Cloud handed the murder weapon to John Graham at the murder scene. It is a practical certainty that Looking Cloud will deny that fact when questioned on cross-examination. If the government knows or has reason to know that Looking Cloud will deny that he handed the gun to Graham, that too constitutes a present intention by the government to knowingly use perjured testimony in its trial against Richard Marshall.

The government has stated to the Court of Appeals that Looking Cloud handed a gun to Graham at the murder scene. If the government had any reason to believe that the evidence it relied on in Looking Cloud's trial was false, or that the fact it represented to the Court of Appeals as true is not true, then the government would have a duty to bring that matter to the attention of the Court; it has not done so. Therefore, if the government knows that Looking Cloud will testify on cross-examination that he did not give a gun to Graham, or that he did not take any other actions to knowingly help murder Anna Mae Aquash, then the government must be held to know that Looking Cloud is going to give testimony that the government knows is false.

If the government's knowledge of Looking Cloud's intent to testify falsely is admitted or proven, then, as a matter of law, the government intends to use perjured testimony in its case.

II

THE COURT SHOULD ORDER AN EVIDENTIARY HEARING TO DETERMINE WHETHER THE GOVERNMENT INTENDS TO USE FALSE TESTIMONY IN ITS CASE.

To establish a violation of due process after conviction, the Defendant has the burden of establishing that the government's case included perjured testimony; the defendant must show that the challenged testimony constituted "the willful assertion under oath of a false, material fact." United States v. Boyd, 833 F.Supp. 1277, 1335 (N.D.Ill. 1993). Richard Marshall respectfully submits that he can establish in an evidentiary hearing that the government knows now, prior to trial, that its key witness will commit the crime of perjury on cross-examination when he is questioned about his own knowing participation in the murder that would be the subject matter of his testimony.

The knowing and premeditated use of perjured testimony by the government goes to the heart of the integrity of the judicial fact finding process. If the government's intention to call a witness it knows will testify falsely can be established prior to trial, the Court should not wait until the government's witness commits a crime in the courtroom to address the issue. The Court should know, prior to trial, if the government intends to call a witness who will give perjured testimony. Just as the Court will preclude a party from calling a witness it knows will assert his right to remain silent, here, the Court should not wait until the trial has been tainted by perjury to take appropriate preventive action.

To protect the integrity of the judicial process and the Defendant's right to fundamental fairness, the factual question of whether the government's key witness will give false exculpatory testimony on cross-examination must be decided before trial.

Therefore, the Court should grant the Defendant's motion and order the government to disclose what Looking Cloud's testimony will be when he is asked these questions on cross-examination:

– whether Looking Cloud had prior knowledge that Anna Mae Aquash was going to be murdered before she was shot;

– whether Looking Cloud intended to help murder Aquash;

– whether Looking Cloud knowingly acted to aided and abet the murder of Aquash; and

– whether Looking Cloud handed a gun to John Graham at the murder scene.

If the government admits that Looking Cloud will deny those facts when he is cross-examined, then there would be no contested facts to establish in an evidentiary hearing, and the court could then make legal rulings on the issue. If, on the other hand, the government denies that Looking Cloud will give false exculpatory testimony on cross-examination or if the government claims ignorance as to what the testimony of its key witness will be on these material facts, then this Court should order that an evidentiary hearing be held in which the Defendant will have an opportunity to present evidence to prove that the government intends to use false testimony in its case by calling a witness it knows will commit perjury on cross-examination.

If the government contests the fact that Looking Cloud would testify falsely about his own guilt and actions, the Court should hear evidence in a pre-trial hearing and make preliminary rulings of fact pursuant to FRE Rule 104 as to whether the prosecution's witness intends to give false exculpatory testimony in trial; and if the Court finds it is reasonably foreseeable that Looking Cloud will give perjured testimony if he testifies, the Court should then make a legal ruling that the use of such testimony by the government would deprive the Defendant Richard Marshall of due process of law.

DATED: 19 JANUARY 2010

Respectfully submitted,

/s/ Dana L. Hanna
Dana L. Hanna
HANNA LAW OFFICE, P.C.
PO Box 3080
816 Sixth Street
Rapid City, SD 57709
605-791-1832
Counsel for Defendant Marshall

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Memorandum was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 19th day of January, 2010.

/s/ Dana L. Hanna

Dana L. Hanna

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
JAN 19 2010
CLERK

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.	)	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION TO SEAL

Defendant, John Graham, through his attorney, John R. Murphy, moves this Court for its Order sealing Defendant Graham's Motion in Limine Regarding Prayer Allegation and attached Exhibits A-C. This motion is made for the reason that the motion contains references to matters presented to a grand jury and the exhibits are excerpts from grand jury transcripts and should not be made available to the public.

Dated January 19, 2010.

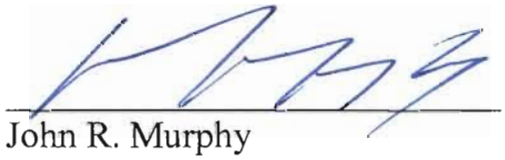
John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

ROBERT A. MANDEL	☒	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☐	Electronic Case Filing
DANA HANNA	☒	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☐	Electronic Case Filing

Dated January 19, 2010.



John R. Murphy

FILED
JAN 20 2010
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

****

UNITED STATES OF AMERICA,	*	CR 08-50079-02
Plaintiff,	*	
vs.	*	
	*	ORDER
JOHN GRAHAM, a/k/a John Boy Patton; and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

****

Pending before the Court is Defendant Vine Richard Marshall's Application and Affirmation in Support of an Order for the Issuance of Subpoena, Doc. 519. The Court finds that the Application for Subpoena shall be granted. Accordingly,

IT IS ORDERED:

1. That the Defendant Vine Richard Marshall's Application and Affirmation in Support of an Order for the Issuance of Subpoena, Doc. 519, is granted.

2. That the Clerk shall prepare a Subpoena [Duces Tecum] to include name and address and other necessary information for the following person:

   Name and Address

   Douglas G. Moring
   National Records Center6
   150 Space Center Loop
   Lee's Summit, Missouri 64064

   You are commanded to produce all records, documents, correspondence and writings of any kind in the possession or control of the United States Citizenship and Immigration Services concerning a British citizen named Serle L. Chapman, presently residing in the United States, and whose present address is believed to be: 5 Means

Drive, Sheridan, Wyoming, including copies of all documents and writings in Mr. Chapman's "A-file" or alien file. Said information shall be produced to defense counsel by the close of business on February 2, 2010.

3. That witness fees shall be paid in the same manner in which similar fees are paid to a witness subpoenaed on behalf of the Government.

4. That the United States Marshals Service shall cause the Subpoena to be served. Costs incurred by process shall be paid in the same manner in which similar costs are paid on behalf of the Government.

5. That the Subpoena issued by the Court for a date certain remain in full force and effect for any subsequent dates to which the appearance or trial date is continued. It is the obligation of the attorney issuing the Subpoena to convey this information to the person receiving the Subpoena.

Dated this 20th day of January, 2010.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK
BY: Summer Wahlfeld
DEPUTY

FILED
JAN 19 2010
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	CRIM. NO. 08-50079-01
vs.	DEFENDANT GRAHAM'S MOTION TO SEAL
JOHN GRAHAM, a/k/a JOHN BOY PATTON and VINE RICHARD MARSHALL, a/k/a) RICHARD VINE MARSHALL, a/k/a) DICK MARSHALL. Defendants.	

Defendant, John Graham, through his attorney, John R. Murphy, moves this Court for its Order sealing Defendant Graham's Motion in Limine Regarding Time of Death Testimony and attached Exhibit A. This motion is made for the reason that the motion contains references to matters presented to a grand jury and the exhibit is an excerpt from grand jury transcripts and should not be made available to the public.

Dated January 19, 2010.

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

ROBERT A. MANDEL	☒	U.S. Mail, postage prepaid
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	☐	Facsimile at
	☐	Electronic Case Filing
DANA HANNA	☒	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☐	Electronic Case Filing

Dated January 19, 2010.

John R. Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
JAN 19 2010
CLERK

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.	)	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION TO SEAL

Defendant, John Graham, through his attorney, John R. Murphy, moves this Court for its Order sealing Defendant Graham's Motion in Limine Regarding Prayer Allegation and attached Exhibits A-C. This motion is made for the reason that the motion contains references to matters presented to a grand jury and the exhibits are excerpts from grand jury transcripts and should not be made available to the public.

Dated January 19, 2010.

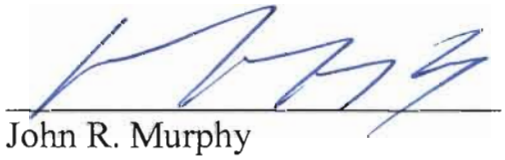
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	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☐	Electronic Case Filing

Dated January 19, 2010.



John R. Murphy

FILED
JAN 21 2010
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	
	*	ORDER
JOHN GRAHAM, a/k/a John Boy Patton; and VINE RICHARD MARSHALL, a/k/a Richard Vine Marshall, a/k/a Dick Marshall,	*	
Defendants.	*	

The Defendant Marshall made a Motion to Suppress, Doc. 402. On December 10, 2009, Judge Duffy entered a Report and Recommendation, Doc. 537, which allowed fourteen (14) days for the Defendant to file a supplemental brief to explain his Fifth Amendment argument, if indeed he was asserting such an argument, in addition to his Sixth Amendment argument. No such brief has been filed and the time for objecting to the Report and Recommendation has also expired. After considering the file, including the submissions of the parties on this suppression motion, the Court does adopt the Report and Recommendation and, accordingly,

IT IS ORDERED:

1. That the Magistrate Judge's Report and Recommendation, Doc. 537, is ADOPTED by the Court, and Defendant's Motion to Suppress, Doc. 402, is denied.

Dated this 21st day of January, 2010.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK
BY: Summer Wahpekute
DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

FILED
JAN 22 2010
CLERK

UNITED STATES OF AMERICA,	)	**CR. 08-50079**
	)	
Plaintiff,	)	
	)	
vs.	)	**MOTION TO SEAL**
	)	
JOHN GRAHAM, A/K/A JOHN BOY PATTON, AND VINE RICHARD MARSHALL, A/K/A RICHARD VINE MARSHALL, A/K/A DICK MARSHALL,	)	
	)	
Defendants.	)	

COMES NOW, Theda Clarke, by and through her CJA appointed attorney of record, Gregory J. Erlandson , and hereby moves this Honorable Court for its Order to Seal the Memorandum In Support of Motion to Quash Trial Subpoena and attached Affidavits, in and for the reason that said memorandum and affidavits contain confidential information.

Dated this 22nd day of January, 2010.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

By: _____

Gregory J. Erlandson
Attorney for Theda Clarke
PO Box 2670; 333 West Blvd, Ste 400
Rapid City, SD 57709
(605) 343-1040
Email: gerlandson@bangsmccullen.com

CERTIFICATE OF SERVICE

I certify that on the 22nd day of January, 2010, I caused to be served, by e-mail and first class, United States Mail, postage prepaid, a true and correct copy of the foregoing document to:

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Robert.Mandel@usdoj.gov

Attorney for United States

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Murphy Law Office
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Rapid City, SD 57701
jmurphysd@hotmail.com

Attorney for Defendant Graham

Dana Hanna, Esq.
Hanna Law Office
P.O. Box 3080
Rapid City, SD 57709
dhanna@midconetwork.com

Attorney for Defendant Marshall



Gregory J. Erlandson

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA,	)	**CR. 08-50079**
	)	
Plaintiff,	)	
	)	
vs.	)	**MOTION TO QUASH SUBPOENA OF THEDA CLARKE**
	)	
JOHN GRAHAM, A/K/A JOHN BOY PATTON, AND VINE RICHARD MARSHALL, A/K/A RICHARD VINE MARSHALL, A/K/A DICK MARSHALL,	)	
	)	
Defendants.	)	

Theda Clarke, by and through her attorney of record, Gregory Erlandson, respectfully moves this Court, pursuant to Federal Rules of Evidence 403, 601 and 602, to enter an Order quashing the subpoena of Theda Clark in the trial of the above-referenced matter.

This Motion is made and filed based upon: 1) the official court file; 2) the accompanying legal memorandum; 3) the affidavits of Gregory Erlandson and Debra Powell, R.N., filed contemporaneously herewith; and the affidavits of Dr. Jerry L. McLain, M.D. and Jaynelle Hinnegan, R.N., which were filed with the Court in April of 2009.

The undersigned respectfully requests an expedited ruling on this Motion since he has a trial scheduled to commence in the 7th Judicial Circuit, State of South Dakota, on February 17, 2010, which would conflict with the trial of the above-captioned matter.

Dated this 22nd day of January, 2010.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

By: _____

Gregory J. Erlandson
Attorney for Theda Clarke
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CERTIFICATE OF SERVICE

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Dana Hanna, Esq.
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dhanna@midconetwork.com

Attorney for Defendant Marshall

_____
Gregory J. Erlandson

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.

CR08-50079

UNITED STATES' PROPOSED JURY INSTRUCTIONS

Attorney for Plaintiff: Robert A. Mandel, Assistant US Attorney
515 9th Street #201
Rapid City, SD 57701

Attorneys for Defendants: John R. Murphy
328 East New York Street #1
Rapid City, SD 57701

Dana L. Hanna
816 Sixth Street
Rapid City, SD 57701

CERTIFICATE OF SERVICE

The undersigned hereby certifies on January 22, 2010, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana L. Hanna

☐ U.S. Mail, postage prepaid
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☐ Facsimile at
☐ Federal Express
☒ Electronic Case Filing

/s/ Robert A. Mandel
_____
Robert A. Mandel
Assistant United States Attorney

.

PROPOSED JURY INSTRUCTIONS INDEX

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GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 1

WIRETAP OR OTHER TAPE-RECORDED EVIDENCE

You have heard tape recordings of conversations. These conversations were legally recorded, and you may consider the recordings just like any other evidence.

Source: 8th Circuit Model Pattern Jury Instruction §2.5.

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 2

TRANSCRIPT OF TAPE-RECORDED CONVERSATION

There is a typewritten transcript of the tape recordings you have heard. The transcript also undertakes to identify the speakers engaged in the conversation.

You are permitted to have the transcript for the limited purpose of helping you follow the conversation as you listen to the tape recording, and also to help you keep track of the speakers. Differences in meaning between what you hear in the recording and read in the transcript may be caused by such things as the inflection in a speaker's voice. It is what you hear, however, and not what you read, that is the evidence.

You are specifically instructed that whether the transcript correctly or incorrectly reflects the conversation or the identity of the speakers is entirely for you to decide based upon what you have heard here about the preparation of the transcript, and upon your own examination of the transcript in relation to what you hear on the tape recording. If you decide that the transcript is in any respect incorrect or unreliable, you should disregard it to that extent.

Source: 8th Circuit Pattern Jury Instruction §2.06; see also, United States v. Arlo Looking Cloud, Jury Instruction No. 9 (modified).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 3

STATEMENTS BY THE DEFENDANT

You have heard testimony the defendant made statements to law enforcement and to other witnesses. It is for you to decide as to each purported statement:

first, whether the defendant made the statement; and

second, if so, how much weight you should give to it.

In making these two decisions you should consider all of the evidence, including the circumstances under which the statement may have been made.

Source: 8th Circuit Model Pattern Jury Instruction §2.07, See also, United States v. Arlo Looking Cloud, Jury Instruction No. 10.

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 4

INFLUENCING WITNESS, ETC.

Attempts by a defendant to make up evidence or influence a witness in connection with the crime charged in this case may be considered by you in light of all other evidence in the case. You may consider whether this evidence shows a consciousness of guilt and determine the significance to be attached to any such conduct.

Source: 8th Circuit Model Pattern Jury Instruction §4.09.

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 5

OPINION EVIDENCE, EXPERT WITNESS

You have heard testimony from persons described as experts. Persons who, by knowledge, skill, training, education or experience, have become expert in some field may state their opinions on matters in that field and may also state the reasons for their opinion.

Expert testimony should be considered just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness' education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case.

Source: 8th Circuit Model Pattern Jury Instruction §4.10. United States v. Arlo Looking Cloud, Instruction No. 13.

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 6

SILENCE IN THE FACE OF ACCUSATION

Evidence has been introduced that a statement accusing the defendant of the crime charged in the Indictment was made, and that the defendant did not deny the accusation or object to the statement. If you find the defendant was present and actually heard and understood the statement, and that it was made under such circumstances that the defendant would be expected to deny or object to it if it were not true, then you may consider whether the defendant's silence was an admission of truth of the statement.

Source: 8th Circuit Pattern Jury Instruction §4.14. See generally, Jenkins v. Anderson, 447 U.S. 231 (1980); Fletcher v. Weir, 455 U.S. 603 (1982). Post-arrest silence by a defendant after Miranda warnings have been given is inadmissible against the defendant. Doyle v. Ohio, 426 U.S. 610 (1976). If a defendant gives a statement, however, his silence as to other matters may be admitted. Anderson v. Charles, 447 U.S. 404 (1980); see United States v. Mitchell, 558 F.2d 1332, 1334-35 (8th Cir. 1997). A defendant's pre-arrest silence may be admitted, Jenkins v. Anderson, 447 U.S. 231 (1980) as well as silence after arrest but prior to warnings. Fletcher v. Weir, 455 U.S. 603 (1982).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 7

FALSE EXCULPATORY STATEMENTS

When a defendant voluntarily and intentionally offers an explanation, or makes some statement before trial tending to show his innocence, and this explanation or statement is later shown to be false, you may consider whether this evidence points to a consciousness of guilt. The significance to be attached to any such evidence is a matter for you to determine.

Source: 8th Circuit Model Pattern Jury Instructions §4.15 (committee comment). False exculpatory statements are properly admissible as substantive evidence tending to show consciousness of guilt. United States v. Hudson, 717 F.2d 1211, 1215 (8th Cir. 1983). This Circuit has repeatedly held that an instruction of this nature "is properly given when a defendant . . . offers an exculpatory explanation which is later proven to be false." United States v. Wells, 702 F.2d 141, 144 (8th Cir. 1983); United States v. Hudson, 717 F.2d 1211 (8th Cir. 1983); see also Rizzo v. United States, 304 F.2d 810, 830 (8th Cir. 1962).

Wells also held that such an instruction does not unfairly penalize the criminal defendant who, upon confrontation, denies the crime rather than remain silent. 702 F.2d at 144. Hudson further held such an instruction proper because it permits the jury to attach as much or as little significance to the statement as it chooses. 717 F.2d at 1215.

United States v. Toby Bolzer, CR 02-50025 (D. SD).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 8

INDICTMENT TIME FRAME

The Superseding Indictment charges that the offense alleged was committed "on or about" a certain date. Although it is necessary for the government to prove beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged in the Superseding Indictment, it is not necessary for the government to prove that the offense was committed precisely on the date charged.

Source: United States v. Arlo Looking Cloud, Instruction No. 17.

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 9

MURDER STATUTE

18 U.S.C. § 1111 provides:

Murder is the lawful killing of a human being with malice aforethought. . . . . [A]ny . . . . kind of willful, deliberate, malicious, and premeditated killing ... is murder in the first degree.

Source: United States v. Arlo Looking Cloud, Instruction No. 18. 18 U.S.C. § 1111.

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 10

MURDER, FIRST DEGREE, WITHIN SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES

The crime of murder in the first degree as charged in Count I of the Superseding Indictment has five (5) essential elements, which are:

One: That the defendant, at the time and place alleged in the Superseding Indictment, killed, or aided and abetted the killing of, Annie Mae Aquash aka Annie Mae Pictou.

Two: That the defendant did so with malice aforethought as defined in Instruction No. ____.

Three: That the killing was premeditated as defined in Instruction No. ____.

Four: That the defendant is an Indian or aided and abetted an Indian in the commission of the offense.

Five: That the offense took place in Indian Country.

To sustain its burden of proof for the crime of first degree murder as charged in the Superseding Indictment, the government must prove all of these essential elements beyond a reasonable doubt, otherwise you must find the defendant not guilty of this crime.

Source: 8th Circuit Pattern Jury Instructions 6.18.1111A, and 5.01 (aiding and abetting).

18 U.S.C. § 2 provides as follows:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

United States v. Roan Eagle, 867 F.2d 436, 445 (8th Cir.) cert. denied 490 U.S. 1028 (1989) ("to be guilty of aiding and abetting is to be guilty as if one were a principal of the underlying offense. Aiding and abetting is not a separate crime but rather is linked to the underlying offense and shares a reckless intent of the offense.") H.R. Rep. No. 1038, 94th Cong., 2d Sess, 1 reprinted in 1976 US Code Cong. & Admin. News 1125 (Congress' desire that Indians and non-Indians committing the same crime be subject to the same punishment was clearly expressed in the legislative history of the 1976 amendments to the Major Crimes Act). United States v. Walking Eagle, 974 F.2d 551, 553 (4th Cir. 1992) (under the Major Crimes Act, a federal court has jurisdiction over a non-enumerated offense if, as a matter of federal trial procedure, the court is permitted to instruct the jury on the lesser included, non-enumerated offense). United States v. Yankton, 168 F.3d 1096, 1097-98 (8th Cir. 1999) (federal jurisdiction for accessory after the fact pursuant to 18 U.S.C. § 3). Felicia v. United States, 495 F.2d 353, 355 (8th Cir. 1974) (federal jurisdiction in the context of lesser included offenses). United States v. White Horse, 316 F.3d 769, 772-73 (8th Cir. 2003) (even if non-Indian status was element of charge violation of 1152, government's failure to prove non-Indian status was not error since the defendant's conviction was sustainable under 1153 if he was an Indian, and under 1152 if he was not); see also United States v. Driver, 945 F.2d 1410 (8th Cir. 1991).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 11

MURDER, FIRST DEGREE, WITHIN SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES

The crime of murder in the first degree as charged in Count II of the Superseding Indictment has five (5) essential elements, which are:

One. That the defendant, at the time and place alleged in the Superseding Indictment, killed, or aided and abetted the killing of, Annie Mae Aquash aka Annie Mae Pictou.

Two: That the defendant did so with malice aforethought as defined in Instruction No. ____.

Three: That the killing was premeditated as defined in Instruction No. ____.

Four. That Annie Mae Aquash aka Annie Mae Pictou was an Indian.

Five. That the offense took place in Indian Country.

To sustain its burden of proof for the crime of first degree murder as charged in the Superseding Indictment, the government must prove all of these essential elements beyond a reasonable doubt, otherwise you must find the defendant not guilty of this crime.

Source: 8th Circuit Pattern Jury Instructions 6.18.1111A, and 5.01 (aiding and abetting).

18 U.S.C. § 2 provides as follows:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

United States v. Roan Eagle, 867 F.2d 436, 445 (8th Cir.) cert. denied 490 U.S. 1028 (1989) ("to be guilty of aiding and abetting is to be guilty as if one were a principal of the underlying offense. Aiding and abetting is not a separate crime but rather is linked to the underlying offense and shares a reckless intent of the offense.") H.R. Rep. No. 1038, 94th Cong., 2d Sess, 1 reprinted in 1976 US Code Cong. & Admin. News 1125 (Congress' desire that Indians and non-Indians committing the same crime be subject to the same punishment was clearly expressed in the legislative history of the 1976 amendments to the Major Crimes Act). United States v. Walking Eagle, 974 F.2d 551, 553 (4th Cir. 1992) (under the Major Crimes Act, a federal court has jurisdiction over a non-enumerated offense if, as a matter of federal trial procedure, the court is permitted to instruct the jury on the lesser included, non-enumerated offense). United States v. Yankton, 168 F.3d 1096, 1097-98 (8th Cir. 1999) (federal jurisdiction for accessory after the fact pursuant to 18 U.S.C. § 3). Felicia v. United States, 495 F.2d 353, 355 (8th Cir. 1974) (federal jurisdiction in the context of lesser included offenses). United States v. White Horse, 316 F.3d 769, 772-73 (8th Cir. 2003) (even if non-Indian status was element of charge violation of 1152, government's failure to prove non-Indian status was not error since the defendant's conviction was sustainable under 1153 if he was an Indian, and under 1152 if he was not); see also United States v. Driver, 945 F.2d 1410 (8th Cir. 1991).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 12

AIDING AND ABETTING

A person may be found guilty of first degree murder even if he personally did not do every act constituting the offense charged, if he aided and abetted the commission of first degree murder.

In order to have aided and abetted the commission of a crime a person must, before or at the time the crime was committed:

1. Have known first degree murder was being committed or going to be committed; and
2. Have knowingly acted in some way for the purpose of causing, encouraging, or aiding the commission of first degree murder.

For you to find the defendant guilty of first degree murder by reason of aiding and abetting, the government must prove, beyond a reasonable doubt, that all of the essential elements of first degree murder were committed by some person or persons and that the defendant aided and abetted the commission of that crime.

You should understand that merely being present at the scene of an event, or merely acting in the same way as others or merely associating with others, does not prove that a person has become an aider and abettor. A person who has no knowledge that a crime is being committed or about to be committed, but who happens to act in a way which advances some offense, does not thereby become an aider and abettor.

Source: 8th Circuit Model Jury Instruction §5.01; United States v. Arlo Looking Cloud, Instruction No. 20.

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 13

MALICE AFORETHOUGHT DEFINED

As used in these instructions, "malice aforethought" means an intent, at the time of a killing, willfully to take the life of a human being, or an intent willfully to act in callous and wanton disregard of the consequences to human life; but "malice aforethought" does not necessarily imply any ill will, spite or hatred towards the individual killed.

In determining whether Annie Mae Aquash aka Annie Mae Pictou was unlawfully killed with malice aforethought, you should consider all the evidence concerning the facts and circumstances preceding, surrounding and following the killing which tend to shed light upon the question of intent.

Source: 8th Circuit Pattern Jury Instruction §6.18.1111A-1; United States v. Arlo Looking Cloud Jury Instruction No. 21.

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 14

PREMEDITATION DEFINED

A killing is premeditated when it is intentional and the result of planning or deliberation. The amount of time needed for premeditation of a killing depends on the person and the circumstances. It must be long enough for the defendant, after forming the intent to kill, to be fully conscious of his intent, and to have thought about the killing.

For there to be premeditation the defendant must think about the taking of a human life before acting. The amount of time required for premeditation cannot be arbitrarily fixed. The time required varies as the minds and temperaments of people differ and according to the surrounding circumstances in which they may be placed. Any interval of time between forming the intent to kill, and acting on that intent, which is long enough for the defendant to be fully conscious and mindful of what he intended and willfully set about to do, is sufficient to justify the finding of premeditation.

Source: 8th Circuit Pattern Jury Instruction §6.18.1111A-2; United States v. Arlo Looking Cloud Jury Instruction No. 22.

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 15

PROOF OF INTENT OR KNOWLEDGE

Intent or knowledge may be proved like anything else. You may consider any statements made and acts done by the defendant, and all the facts and circumstances in evidence that may aid in a determination of the defendant's knowledge or intent.

You may, but are not required to, infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

Source: 8th Circuit Pattern Jury Instruction §7.05; United States v. Arlo Looking Cloud Jury Instruction No. 23.

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 16

KNOWINGLY

An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake or accident. The government is not required to prove that the defendant knew that his acts or omissions were unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

Source: 8th Circuit Pattern Jury Instruction §7.03 (committee comments modified); United States v. Arlo Looking Cloud Jury Instruction No. 24 (modified).

GOVERNMENT'S PROPOSED JURY INSTRUCTION NO. 17

"INDIAN" DEFINED

An "Indian" is a person who:

(1) has some Indian blood; and

(2) the person is "recognized" as an Indian.

In determining whether a person is recognized as an Indian you may consider, among other matters:

(a) whether the person is enrolled in a tribe.

(b) whether the government has recognized either formally or informally that the person is an Indian through providing the person with assistance reserved only to Indians.

(c) whether the person enjoys the benefits of tribal affiliation.

(d) whether the person is socially recognized as an Indian through living on the reservation and participating in Indian social life.

The term "Indian Country" includes, but is not limited to, all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.

Source: United States v. Arlo Looking Cloud Jury Instruction No. 25 (modified); United States v. Lawrence, 51 F.3d 150, 153 (8th Cir. 1995) (citing St. Cloud v. United States, 702 F. Supp. 1456 (D.S.D. 1988)); United States v. Torres, 733 F.2d 449, 456 (7th Cir. 1984); United States v. Bruce, 394 F.3d 1215, 1223-24 (9th Cir. 2005); United States v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976) (emphasis on importance of individual having held themselves out to be Indian).

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 PRELIMINARY INSTRUCTION ON READ BACK OF TESTIMONY

COMES NOW the United States of America, through its attorneys, United States Attorney Brendan V. Johnson, and Assistant United States Attorney Robert A. Mandel, and responds to Defendant Marshall's motion for preliminary instruction on read back of testimony as follows:

1. The United States agrees that the question of allowing the court reporter to read back trial testimony to the jury if there is such a request from the jury during deliberations is within the discretion of the trial court.

2. The United States does not agree that it is appropriate to instruct the trial jury that it will be allowed to hear testimony read back to it during its deliberations.

Whether or not such a request of the trial jury should be granted is something for the trial court to decide on the basis of what it seeks and the availability of such testimony. In general, it is fairly unusual for the trial jury to have trial testimony read back and the jurors are told to rely on their memories.

3. Defendant cites the potential length of the trial as a reason to instruct the jury that it will be allowed to have testimony read back. Counsel for the United States is unaware of any case in which the jury has been instructed as Defendant seeks in this case, including cases of great complexity lasting several weeks. If the jury of its own volition seeks a read back of some testimony, it is the position of the United States that the court should consider and make its appropriate ruling at that time.

Respectfully submitted this 22nd day of January, 2010.

/s/ Robert A. Mandel

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of January, 2010, I served by electronic transmission, a true and correct copy of the foregoing United States' Response to Defendant Marshall's Motion for Preliminary Instruction on Read Back of Testimony on:

Dana Hanna
Attorney at Law

John Murphy
Attorney at law

/s/ Robert A. Mandel

Robert A. Mandel