

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

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UNITED STATES OF AMERICA,

CR08-50079

Plaintiff,

v.

**UNITED STATES' NOTICE OF *RES*  
*GESTAE* EVIDENCE, OR IN THE  
ALTERNATIVE, RULE 404(b)  
EVIDENCE**

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

Defendants.

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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



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### 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
- Hand Delivery
- Facsimile at
- Federal Express
- Electronic Case Filing



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Marty J. Jackley  
United States Attorney

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