

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

UNITED STATES OF AMERICA,) CRIM. NO. 08-50079-01
Plaintiff,)
)
vs.) **SUPPLEMENT TO**
) **DEFENDANT GRAHAM’S**
) **MEMORANDUM IN SUPPORT OF**
JOHN GRAHAM, a/k/a) **MOTION FOR SEPARATE TRIALS**
JOHN BOY PATTON and)
VINE RICHARD MARSHALL, a/k/a)
RICHARD VINE MARSHALL, a/k/a)
DICK MARSHALL,)
Defendants.)

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 inculcate 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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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:

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 November 26, 2008.

/s/ John R. Murphy
John R. Murphy