

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

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|------------------------------|---|----------------------------|
| UNITED STATES OF AMERICA |) | CRIM. NO. 08-50079-01 |
| Plaintiff, |) | |
| |) | |
| vs. |) | DEFENDANT GRAHAM'S |
| |) | MOTION IN LIMINE REGARDING |
| JOHN GRAHAM, a/k/a |) | ADOPTIVE ADMISSIONS |
| JOHN BOY PATTON, and |) | |
| VINE RICHARD MARSHALL, a/k/a |) | |
| RICHARD VINE MARSHALL, a/k/a |) | |
| DICK MARSHALL, |) | |
| Defendants. |) | |

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 promptly 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
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 1, 2008.

/s/ John R. Murphy
John R. Murphy