

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

UNITED STATES OF AMERICA	)	CRIM. NO. 08-50079-01
Plaintiff,	)	
	)	DEFENDANT GRAHAM'S
vs.	)	MOTION TO JOIN
	)	DEFENDANT MARSHALL'S
JOHN GRAHAM, a/k/a	)	MOTION FOR PRETRIAL HEARING
JOHN BOY PATTON and	)	AND MOTION IN LIMINE #1
VINE RICHARD MARSHALL, a/k/a)	)	
RICHARD VINE MARSHALL, a/k/a)	)	
DICK MARSHALL	)	
Defendant.	)	

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 (8<sup>th</sup> 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 (8<sup>th</sup> 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. In 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.

/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 9, 2008.

*/s/ John R. Murphy*  
John R. Murphy