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).

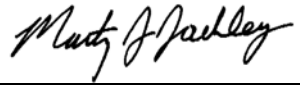
IV. CONCLUSION

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



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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
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