

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.) REPLY BRIEF REGARDING
) MOTION FOR SEPARATE TRIALS
JOHN GRAHAM, a/k/a)
JOHN BOY PATTON and)
VINE RICHARD MARSHALL, a/k/a)
RICHARD VINE MARSHALL, a/k/a)
DICK MARSHALL,)
Defendants.)

Defendant John Graham has requested a separate trial from the trial of Vine Richard Marshall. In support of that motion, Mr. Graham set forth several bases for separate trials. File Doc. 76.

First, Graham alleged his right to confrontation would be violated if jointly inculpatory statements by Marshall were introduced at a trial involving Graham. Marshall's statements to law enforcement and others directly inculcate Graham by placing him in Marshall's house, with Aquash, at a time when the government alleges she had been kidnaped.

Second, Graham alleged that separate trials are necessary because a joint trial would lead to inadmissible evidence being introduced against Graham. File Doc. 76. Graham has further elaborated on this issue in his Trial Memorandum

Regarding Statements Against Interest, File Doc. 101.

Marshall has also moved for separate trials. File Docs. 87. Marshall has stated that he is not going to testify at trial, and that he intends to introduce Looking Cloud's video taped interview with Robert Ecoffey in his own defense. In that interview, Ecoffey summarizes statements made by Marshall to him that inculcate Graham. Because Marshall is not going to testify at trial, Graham will not be able to confront the declarant about inculpatory statements that Marshall plans to introduce.

CONFRONTATION ISSUE

In its opposition brief, the government has attempted to circumvent the confrontation clause issue by claiming that the statements it seeks to introduce don't actually inculcate Graham. File Doc. 95, p. 3. The basis for this assertion is that because Graham is not directly identified by name by Marshall, there are no confrontation clause issues.

The government intends to introduce Marshall's statements that Aquash was at his home, against her will, possibly tied up, and that she was brought there by Theda Clarke and two other young guys. File Doc. 95 at p. 3. The fact that Marshall does not name Graham specifically in these statements does not remedy the confrontation clause problem.

The United States Supreme Court addressed this issue in Gray v. Maryland, 118 U.S. 1151, 1155 (1998). In that case, the issue was whether redacting a defendant's name from a co-defendant's jointly inculpatory out of court statement cured the confrontation clause violation. The Court held that the absence of an actual name did not cure the issue because, in light of the facts of the case, the jury would still understand that the un-named person was the defendant. Id. The Court noted that because the prosecution in that case was arguing that the defendant and co-defendant jointly participated in the crime, the jurors would only have to look to counsel table to figure out the identity of the un-named person.

In this case, the absence of Graham's name will not protect him from being identified as one of the "two young guys" identified by Marshall to Ecoffey. Opposition Brief, File Doc. 95, p. 3, ¶ 4. This statement to law enforcement was testimonial in nature. As such, it is subject to a confrontation clause analysis. Crawford v. Washington, 541 U.S. 36, 53 (2004).

This statement placed in the context of the case will give rise to the inevitable conclusion by the jury that Graham and Looking Cloud were the two other young guys with Clarke. In every pleading submitted by the government where the facts are summarized, the government has claimed that Clarke, Looking Cloud, Graham and Marshall were the participants in this crime. Clarke is a

woman and Marshall is the declarant, leaving only Graham and Looking Cloud left, both of whom happened to be young at the time of the alleged crime.

The government's contention that Marshall's statements to Ecoffey doesn't sufficiently implicate Graham to trigger a confrontation clause issue is erroneous. File Doc. 95 p. 9. The only two males associated with Aquash's kidnaping are Graham and Looking Cloud. Both were young at the time. Both were seen previously with Clarke. To say that Marshall's statements to Ecoffey doesn't implicate Graham, when the jury will know Looking Cloud has been convicted and will see Graham sitting next to Marshall, ignores the reality of the case.

INADMISSIBLE EVIDENCE ISSUE

The government's opposition brief fails to address Graham's argument that joint trials would lead to inadmissible evidence being admitted against Graham. Graham urges the court not to discount the importance of this concern.

This issue has previously been briefed in Graham's motion for separate trials, File Doc. 76, p. 6, and in his Trial Memorandum Regarding Statements Against Interest, File Doc. 101. Graham's position will be briefly restated below.

The government intends to introduce Marshall's statements to Chapman and/or Nichols that Aquash brought by others to his home, against her will, possibly bound at the time. Gov. Opposition (File Doc. 95), p. 3, ¶ 1-2. During

those conversations, there are repeated references by the interviewers that the persons who brought Aquash to his home were Clarke, Looking Cloud and Graham. Similarly, in Ecoffey's interview of Looking Cloud, which Marshall intends to admit, there are repeated statements by Ecoffey that Marshall and others have told him that it was Clarke, Looking Cloud and Graham that brought Aquash to Marshall's home.

When discussing the matter with Chapman and/or Nichols, Marshall attempts to exculpate himself by saying that he had nothing to do with her abduction, did not know what was intended for Aquash, and that he refused to participate in holding her or otherwise assisting her alleged captors. Instead, he claims to have sent them away, with Aquash, after having provided her with clothes and coffee.

The government intends to offer these statements against Marshall to show that Aquash was at his house with Clarke, Graham and Looking Cloud. This establishes Marshall's opportunity to give them the gun that was used to kill Aquash. And, Marshall's alleged statement to Chapman about what AIM members did "back in the day," Govt. Opposition Brief, File Doc. 95, p. 3, ¶ 3, establishes motive.

Under Fed.R.Evid. 801(d)(2), Marshall's statements are admissible only against him, not Graham. They are either direct statements by him, or adoptive admissions. Rule 801 does not provide for one party's statements to be admissible against another unless the statements were made by co-conspirators during the course of and in furtherance of a conspiracy, which is not applicable in this case.

Marshall's statements are also not admissible against Graham as statements against interest. Fed.R.Evid. 804(b)(3). Marshall's statements are either directly exculpatory statements as to Marshall, or partially inculpatory, partially exculpatory statements as to Marshall that inculcate Graham and deflect blame to AIM. See Williamson v. United States, 512 U.S. 594, 599, 606-07 (1994) (plurality opinion) (six justices concurring that Fed.R.Evid. 804(b)(3) should be construed narrowly so that collateral matters, non-self-inculpatory statements, and statements that are partially inculpatory but partially exculpatory, are inadmissible).

One statement that the government has repeatedly stated it intends to admit demonstrates the admissibility issues in this case. The government intends to admit Marshall's "back in the day" comment. Govt. Opposition Brief, File Doc. 95, p. 3, ¶ 3. According to Chapman, he advised Marshall that there were rumors in the Indian community that there was a baggage note presented to him regarding

Aquash, or that he, Marshall, had provided the gun used to kill Aquash. In response to this compound and ambiguous assertion, Marshall allegedly responded something to the effect that back in the day you didn't ask too many questions.

The government claims that this "back in the day" comment is an adoptive admission by Marshall of Chapman's statements. It is far from clear what Marshall would be adopting: the statement that rumors existed in the Indian community about a baggage note, the statement that rumors existed in the Indian community that he provided a gun, that there was a baggage note, or, that there was a gun? Regardless, only Marshall can attest to whether he made the comment, and what he meant by his response.

As to Graham, the hearsay issues are many. First, it is not Marshall's statement that is being admitted. Rather, it is Marshall's adoption of Chapman's statement through his "back in the day" comment that is being admitted. Chapman's statements aren't admissible under Rule 801 except to the extent that they relate directly to Marshall's adoption thereof. Marshall's adoptive statements are not admissible against Graham under Rule 801 as that rule only permits the statements to be used against the declarant. Rule 804(b)(3) doesn't permit Marshall's non-incriminatory statement that purportedly adopts Chapman's re-statement of hearsay comments within the Indian community to be admitted as a

statement against interest in regard to Graham.

The government has entirely avoided discussing these relevant, material issues that were raised in Graham's motion for separate trials. Separate trials should be granted in this case based on the combined arguments set forth in Graham's and Marshall's motions and supporting briefs.

Dated December 19, 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 19, 2008.

/s/ John R. Murphy
John R. Murphy