

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

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UNITED STATES OF AMERICA,

CR08-50079-01

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY  
PATTON, and VINE RICHARD  
MARSHALL aka RICHARD VINE  
MARSHALL aka DICK MARSHALL,

Defendants.

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**UNITED STATES' MEMORANDUM  
IN OPPOSITION TO DEFENDANT  
GRAHAM'S MOTION FOR  
ADDITIONAL PEREMPTORY  
CHALLENGES, OR IN THE  
ALTERNATIVE, REQUEST FOR  
SAME ADDITIONAL PEREMPTORY  
CHALLENGES**

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 submits its Memorandum in Opposition to Defendant Graham's Motion for Additional Peremptory Challenges, or in the Alternative, Request for Same Additional Peremptory Challenges. Defendant Graham has failed to set forth a sufficient rationale to displace this District's longstanding customary procedure for conducting jury peremptory challenges set forth in Fed. R. Crim. P. 24(b). The United States believes the Court will, through voir dire combined with for cause challenges, address Defendant's concerns and seat a fair and impartial jury.

It is well-settled that:

It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case . . . . It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

See United States v. Blom, 242 F.3d 799, 805 (8th Cir. 201) (quoting Irvin v. Dowd, 366 U.S. 717 (1961)).

The United States recognizes that increasing the number of peremptory challenges may be an appropriate means for the Court to counteract the problem of pretrial publicity. See United States v. Johnson, 403 F. Supp. 2d 721, 777-78 (N.D. Ia. 2005) (citing United States v. Blom, 242 F.3d 799 (8th Cir. 2001)). However, Defendant has waived this issue by Defendant's creation of the very pretrial publicity he voices concern about through his various public interviews, website, and pretrial filings. See [www.grahamdefenseorg.com](http://www.grahamdefenseorg.com) (John Graham Defense Committee); Defendant Graham's Fifth Estate interview of November 8, 2000; Graham's *Indian Country Today* interview of February 20, 2004; Graham's Antoinette Claypoole interview of March 30-31, 2004; Defendant Graham's Native Youth Movement interview of October 18, 2006; Defendant Graham's Motion to Compel Discovery naming cooperating witnesses (CR03-50020, DE 250); and Marshall's Affidavit of Counsel in Support of Severance (CR08-50079, DE 81).

To the extent the Court increases the number of peremptory challenges, as a matter of fairness in light of the fact that pretrial publicity would burden both parties,

the United States is requesting the Court grant both parties the same number of additional peremptory challenges. See Blom, 242 F.3d at 804; Johnson, 403 F. Supp. 2d at 777-78.

Date: December 19, 2008

MARTY J. JACKLEY  
United States Attorney



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#### CERTIFICATE OF SERVICE

The undersigned hereby certifies on December 19, 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



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Marty J. Jackley  
United States Attorney

This document has been filed electronically.