

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

UNITED STATES OF AMERICA)	CRIM. NO. 08-50079-01
Plaintiff,)	
)	
vs.)	DEFENDANT GRAHAM'S
)	OBJECTION TO ORDER ON
JOHN GRAHAM, a/k/a)	DEFENDANTS' MOTIONS TO SEVER
JOHN BOY PATTON and)	
VINE RICHARD MARSHALL, a/k/a))	
RICHARD VINE MARSHALL, a/k/a))	
DICK MARSHALL)	
Defendant.)	

Defendant, John Graham, through his attorney, John R. Murphy, objects to the Court's Order on Defendant's Motions to Sever, File Doc. 116. These objections are filed pursuant to 28 U.S.C. 636(b)(1). Defendant Graham specifically objects as follows:

1. The confrontation clause protections provided to the accused under Bruton v. United States, 391 U.S. 123 (1968), should be treated distinctly from the confrontation clause analysis set forth in Crawford v. Washington, 541 U.S. 36 (2004). Bruton remains good law and its application to the present case mandates severance. United States v. Spotted Elk, 548 F.3d 641 (8th Cir. 2008), improperly blurs the distinction between the two analyses of out of court statements made in Bruton and Crawford. Further, Spotted Elk was

based on statements admissible under the co-conspirator exemption to the rule against hearsay and, thus, are not subject to a strict confrontation clause analysis. Spotted Elk does not support a determination in this case that severance is not warranted.

2. Redaction as suggested by the court will not cure the confrontation clause problems previously identified by Mr. Graham in his severance pleadings. The facts and inferences that will be produced at trial, the fact that Graham and Marshall will be the only two persons on trial, and the fact that the jury will be well aware of Looking Cloud's previous conviction, will all lead to an inevitable recognition by the jury that one of the persons referenced by Marshall in his statements was Graham.
3. Notwithstanding the holding in Crawford, supra, Graham asserts that all out of court statements by a non-testifying co-defendant raise confrontation clause problems for any other defendant implicated by the statement. Marshall's alleged statements to any other person that implicate Graham violate Graham's right to confrontation because Graham will never have the opportunity to confront the alleged declarant, Marshall. Graham will never be able to elicit from Marshall basic information such as whether the statement was in fact made, what context the statement was made in, and

what was meant by the statement. In this light, whether the statement was “testimonial” or “non-testimonial” does not alter the fact that Graham will not be able to confront the declarant. The testimonial/non-testimonial distinction drawn in Crawford is a distinction not recognized by the plain language of the Sixth Amendment.

4. Graham incorporates herein all of the arguments made previously in his Motion for Separate Trials, File Doc. 75, Memorandum in Support of Motion for Separate Trials, File Doc. 76, and Defendant Graham’s Reply Brief Regarding Motion for Separate Trials, File Doc. 102, as a basis for objection to the court’s Order.

Dated December 31, 2008.

/s/ John R. Murphy
John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
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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:

MARTY J. JACKLEY

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile at
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ROBERT A. MANDEL

- U.S. Mail, postage prepaid
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DANA HANNA

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile at
- Electronic Case Filing

Dated December 31, 2008.

/s/ John R. Murphy
John R. Murphy