

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

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UNITED STATES OF AMERICA,

CR08-50079

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' RESPONSE TO  
DEFENDANT GRAHAM'S  
OBJECTION TO ORDER ON  
DEFENDANT'S MOTION TO SEVER**

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and AUSA Robert A. Mandel and respectfully submits its Response to Defendant Graham's Objection to Order on Defendant's Motion to Sever. Pursuant to 28 U.S.C. § 636(b)(1)(A), Defendant has failed to demonstrate that the Magistrate Judge's Order on Severance is clearly erroneous or contrary to law. The Magistrate Judge properly applied the law of this circuit as established in United States v. Spotted Elk, 548 F.3d 641 (8th Cir. 2008). Indeed, the United States Supreme Court has made it clear that the Confrontation Clause does not apply to non-testimonial statements by an out-of-court declarant. See Davis v. Washington, 547 U.S. 813, 823-26 (2004); Whorton v. Bockting, 549 U.S. 406 (2007).

The Magistrate Court's decision properly determined that the statements at issue to both the cooperating witness and the media are non-testimonial and do not trigger the protections of the Confrontation Clause under either Crawford or Bruton. See Davis, 547 U.S. at 825; Spotted Elk, 548 F.3d at 662; United States v. Watson, 525 F.3d 583, 589 (7th Cir. 2008).

Finally, Defendant Marshall's grand jury testimony and the respective Defendants' statements to law enforcement officers neither sufficiently implicate one another or otherwise give rise to a clear likelihood of prejudice. Neither Defendant Graham nor Marshall's statements place sufficient responsibility for the murder on the other. See Hollins v. Dep't of Corr., State of Iowa, 969 F.2d 606 (8th Cir. 1992). Both defendants have failed to demonstrate that the risk of any minimal prejudice posed by a joint trial could not be cured by careful and thorough jury instructions, or limited redaction at trial in the event this Court deems it appropriate. See United States v. Mickelson, 378 F.3d 810, 818 (8th Cir. 2004). Accordingly, the United States respectfully requests this Court deny Defendants' requests for severance.

Date: January 2, 2009

MARTY J. JACKLEY  
United States Attorney



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## CERTIFICATE OF SERVICE

The undersigned hereby certifies on January 2, 2009, 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

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