

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

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.

**UNITED STATES' RESPONSE TO
DEFENDANT MARSHALL'S
OBJECTION TO ORDER ON
DEFENDANTS' 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 Marshall'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 (2006); 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).

Furthermore, Defendant Marshall's grand jury testimony and the respective Defendants' statements to law enforcement officers neither sufficiently implicate one another nor otherwise give rise to a clear likelihood of prejudice. Neither Defendant Graham's nor Defendant 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).

Defendant Marshall's additional claims associated with potential redactions of his own statements are misplaced. Defendant Marshall first raises issue with respect to the following paragraph contained within Investigator Ecoffey's interview report of December 26, 2003:

Marshall said he couldn't remember the exact date, but late one night a carload of people pulled up to his residence in Allen, South Dakota. He was married to Cleo Marshall at the time, living in Allen Housing. Marshall said someone knocked on the door and got him out of bed. Marshall said it was Theda Clarke, Anna Mae Aquash, and two other young guys....

See, United States' Response to Defendants' Motions for Severance, DE 95, Exh. 4 (Defendant Marshall's statement to Ecoffey).

The Magistrate Court's Order clearly and correctly recognized that this statement did not specifically identify Defendant Graham. See Magistrate Court's Order, p.30. To the extent there was a concern, the Magistrate Judge went on to state "although this statement *may* pose a Bruton problem if introduced as it is now written, it can easily be redacted to make sure that it is not interpreted by the jury to refer to Graham." Id. (*original*). The Magistrate Judge's use of the word *may* is significant.

Indeed, as recognized earlier in the Magistrate's Order, an out-of-court statement that does not implicate the non-declarant co-defendant, but becomes incriminating when linked with other admissible evidence introduced at trial, does not violate Bruton. See, Magistrate Court's Order, p.9 (citing Richardson v. Marsh, 481 U.S. 200, 208-11 (1987)). The United States anticipates that once this Court is able to assess the additional witness testimony and evidence, Defendant Marshall's reference to "two other young guys" would be incriminating only after referring to other evidence. It ultimately will, therefore, not create a Bruton problem, nor require redactions. See, Richardson, 481 U.S. at 208-11.

Defendant Marshall voices similar concerns with respect to potential redactions in the Ecoffey/Looking Cloud interview in which Ecoffey indicates to Looking Cloud:

Because I know, I know for a fact that you stopped there, because both Dick and Cleo, are telling me that you, John Boy, and Theda stopped there, and that you had Annie Mae ...

The Magistrate Court makes the interesting observation, “One may wonder, then, if *Marshall* never told Ecoffey that Graham was at his house, why would Marshall himself wish to introduce Ecoffey’s erroneous statement to the contrary during the Looking Cloud interview? The answer is unclear.” See, Magistrate Court’s Order, p.32. In any event, as further recognized by the Magistrate Court, a potentially erroneous statement by a third party about a co-defendant’s out-of-court statement does not create a Bruton problem. Id. However, the Magistrate Court indicated “in an abundance of caution” the Court holds that if the Ecoffey/Looking Cloud interview is to be introduced as evidence at trial, it must be edited to redact any erroneous attributions to Marshall. Id. To the extent the interview tape is admitted into evidence, the United States does not object to redacting out the reference to “Dick.” Despite Defendant Marshall’s assertions, redacting Dick’s name from the interviewer’s statement does not remove exculpatory evidence.

In the alternative, the Magistrate Court further recognized that Ecoffey may have been referring to what Marshall told other cooperating witnesses. See Magistrate Court’s Order, n.10. If the evidence at trial demonstrates as much, to the extent Marshall ultimately introduces the Ecoffey/Looking Cloud interview, the United States does not object to a redaction or entering into a stipulation which includes insertion of the properly identified witness. As duly recognized by the Magistrate Court, “Marshall’s statements to cooperating witnesses are not ‘testimonial’ and, thus, do not raise a Bruton problem.” Id.

Accordingly, the United States submits that the Magistrate Court 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. The Magistrate Court properly determined that Defendant Marshall's grand jury testimony and the respective statements to law enforcement officers neither sufficiently implicate one another nor otherwise give rise to a clear likelihood of prejudice.

The United States further submits that once this Court is able to assess the trial evidence, it will not be necessary to redact Defendant Marshall's reference to "two other young guys." This statement does not specifically identify Defendant Graham, and an out-of-court statement that does not implicate the non-declarant co-defendant, but becomes incriminating when linked to other admissible evidence introduced at trial, does not violate Bruton. Richardson, 481 U.S. at 208-11. Finally, any potentially erroneous statement during the Looking Cloud interview can be easily redacted to exclude reference to "Dick" without depriving Marshall of any exculpatory evidence. Any additional concerns can be addressed with a proper limiting instruction to the jury. Id.

Dated and electronically filed this 23rd day of March 2009.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies on March 23, 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



Marty J. Jackley
United States Attorney