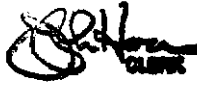


**FILED**  
MAR 26 2009  


UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

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UNITED STATES OF AMERICA,

CR08-50079-01

Plaintiff,

v.

**UNITED STATES' MEMORANDUM  
OPPOSING DEFENDANT  
GRAHAM'S MOTION IN LIMINE  
RE: STATEMENTS TO  
MEDICINE MAN**

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

Defendants.

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COMES NOW the United States, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully files this Memorandum in Opposition to Defendant Graham's Motion in Limine Re: Statements to Medicine Man Al Gates. Gates was an Oglala Sioux spiritual leader and medicine man who is now deceased.

**I. INTRODUCTION**

The United States has disclosed the following evidence associated with Defendant Graham's statements relevant to the disposition of Defendant Graham's Motion:

1. Defendant Graham's statement of February 11, 2001, to cooperating witness Sierra confirming that Defendant Graham had gone to see Al Gates and that he was having a hard time with what he had done to Anna Mae Aquash, wherein he went into the

mountains around Denver and had a ceremony (see Defendant John Graham's statement of February 11, 2001; GRAHAM01175) (attached as Exhibit 1).

2. Defendant Graham's statement to law enforcement wherein he made further admissions about what happened to Anna Mae Aquash. He wanted to know what he could do in a spiritual way to make up for it, and that he wanted Al Gates to perform a ceremony for him (see Ecoffey interview of John Graham April 21, 1994, GRAHAM01142) (attached as Exhibit 2).<sup>1</sup>
3. Al Gates' testimony of August 16, 1994, that John Graham admitted to Gates that Graham was present when Anna Mae Aquash was killed and expressed concerns regarding her killing (see Transcript, p. 54-61; GRAHAM03668-75) (attached as Exhibit 3, filed under seal).

This evidence is relevant and admissible with respect to: (a) items 1 and 2 are non-hearsay admissions by Defendant Graham about his involvement and actions with the criminal venture to murder Aquash pursuant to Rule 801(d)(2); and (2) items 1 through 3 address Defendant Graham's Indian status – tribal recognition and ceremonial practices. Defendant Graham's attempt to limit evidence regarding his direct statements fail by application of basic evidentiary principles. Defendant Graham's additional claim that the United States is misleading the Court is neither accurate nor productive in resolution of these issues. The above-referenced evidence associated with Defendant Graham's separate admissions to law enforcement, a cooperating witness, and

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<sup>1</sup>The report further indicates during this discussion that "Graham appeared to become upset about the information he heard, as he raised his cigarette to his lips, they were trembling and his hands was shaking." (GRAHAM01142).

to Al Gates are specifically cited above and attached hereto as exhibits.

Defendant Graham's lengthy concerns about the statements at best address the weight of the evidence as opposed to its admissibility.

## **II. DEFENDANT GRAHAM'S STATEMENTS TO WITNESS AND LAW ENFORCEMENT – FED. R. EVID. 801(d)(2)**

**Defendant Graham's statements to both cooperating witness Sierra and law enforcement constitute direct non-hearsay admissions by Defendant Graham. Accordingly, such statements are admissible pursuant to Fed. R. Evid. 801(d)(2).** They are non-hearsay statements by Defendant Graham, not Al Gates, and are, therefore, not excluded by Crawford. See, United States v. Rodriguez, 484 F.3d 1006, 1013-14 (8th Cir. 2007) (quoting Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004)).

## **III. DEFENDANT GRAHAM'S STATEMENTS TO AL GATES**

The United States only intends to introduce Defendant Graham's statements to Al Gates for impeachment/non-hearsay purposes. This may include for purposes of explaining the reasons for or propriety of a police investigation in the context of questioning. See, United States v. Malik, 345 F.3d 999, 1001 (8th Cir. 2003) (citing United States v. Davis, 154 F.3d 772, 778 (8th Cir. 1998)). Defendant Graham's position that "[t]he notion that Gates' statements or Graham's responses are necessary to explain the course of the investigation is a fiction created by the government to justify the admission of inadmissible evidence" rings hollow given both Defendant

Graham's and Defendant Marshall's well-rehearsed attacks on this investigation. Furthermore, no assertion of a privilege should "endow the person who testifies with a license to commit perjury." United States v. Wong, 431 U.S. 174, 179 (1977) (quoting Glickstein v. United States, 222 U.S. 139, 142 (1911)); Nix v. Whiteside, 475 U.S. 157, 163 (1986). Accordingly, the United States respectfully requests this Court reserve ruling on the admissibility of Defendant Graham's statements to Al Gates until it has the opportunity to hear the trial evidence and positions taken by the Defendants.

#### **IV. FED. R. EVID. 501 – EVIDENTIARY PRIVILEGE**

It is the United States' position that if the Court does not deem Defendant Graham's statements admissible pursuant to Fed. R. Evid. 801(d)(2), Defendant Graham has failed to establish the existence of a privilege that has not otherwise been waived.

Rule 501 of the Federal Rules of Evidence governs the applicability of evidentiary privileges in criminal cases and provides in part as follows:

Except as otherwise required . . . , the privilege of a witness, [or] person . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Congress adopted Rule 501 after rejecting nine proposed rules concerning discrete privileges that had been adopted by the Supreme Court after study by the Advisory Committee. See, Trammel v. United States, 445 U.S. 40, 45-51 (1980), the Supreme Court acknowledged, *in dicta*, the existence

of a “priest penitent” privilege. *Id.* at 45, 51. In this regard, Congress sought to advance the view that the recognition of a privilege based upon a confidential relationship and other privileges should be determined “on a case-by-case basis.” *Id.* at 47 (quoting 120 Cong. Rec. 40891 (1974)).

The Eighth Circuit Court of Appeals does not appear to have had occasion to expound upon the existence of either the “priest penitent” or “medicine man” privilege or the prerequisite to assert the privilege. As a general matter, *Wigmore on Evidence* (McNaughton rev. 1961) sets forth the following four fundamental prerequisites for a privilege against the disclosure of communications:

1. The communications must originate in a *confidence* that they will not be disclosed.
2. This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
3. The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
4. The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

*Wigmore* at § 2285. *In re Grand Jury Investigation*, 918 F.2d 374, 384 (3rd Cir. 1990). The defendant, as the party who asserts the privilege, has a burden of

proving its existence and applicability. See, In re Grand Jury Investigation, 918 F.2d at 385.<sup>2</sup>

**The United States does not dispute that Defendant Graham practiced both spiritually and ceremonially with Lakota medicine men, participated in Sundance rituals, and is otherwise an accepted and “recognized” Indian.** See, United States v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976) (emphasis on importance of individual having held themselves out to be Indian). However, Defendant Graham has failed to demonstrate the confidentiality of his admissions to Al Gates due in part to both parties’ very disclosure of the information conveyed. This disclosure by Defendant Graham further constitutes a waiver of any privileged communication. See generally, PaineWebber Group v. Zinsmeyer Trusts P’ship, 187 F.3d 988, 992 (8th Cir. 1999) (waiver of attorney/client privilege by voluntary disclosure of privileged communications, and application to all communications on the same subject matter); United States v. Webb, 615 F.2d 828 (9th Cir. 1980) (court found that prisoner’s confession to crime in presence of a minister and security officer was

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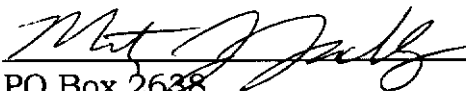
<sup>2</sup>The “very purpose of the criminal justice system is that of investigating, charging, trying, convicting and sentencing those who have committed offenses legislatively determined to be violative of the rights of persons and property.” In re Grand Jury Proceedings of John Doe, 842 F.2d 244, 246 (10th Cir. 1988) (citations omitted). Accordingly, “the search for truth in society’s quest to administer justice creates a strong presumption against testimonial privileges because they result in the suppression of competent evidence.” Id.

not confidential and declined to reach the question whether clergy communication privilege applies in federal proceedings); State v. Guthrie, 2001 SD 61 ¶¶ 69-72, 627 N.W. 2d 410 426-27.<sup>3</sup> See also, State v. Gray, 891 So.2d 1260, 1265 (La. 2005).

Accordingly, Defendant Graham's statements to both cooperating witness Sierra and law enforcement are non-hearsay admissions pursuant to Fed. R. Evid. 801(d)(2). The United States requests this Court reserve ruling on the statements of Defendant Graham to Al Gates until such time as this Court may assess the trial evidence and Defendants' positions. Furthermore, Defendant Graham has failed to satisfy his burden of demonstrating a privilege that has not been waived by both his and Al Gates' disclosures.

Dated this 26th day of March 2009.

MARTY J. JACKLEY  
United States Attorney

  
PO Box 2638  
Sioux Falls, SD 57101-2638  
605.357.2330

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<sup>3</sup>The citation to the South Dakota Supreme Court's Guthrie decision is intended to be illustrative of the waiver principles for the clergy privilege. The existence and the applicability of testimonial privileges in federal criminal prosecutions is a matter of federal common law. United States v. Espino, 317 F.3d 788, 795 (8th Cir. 2003).

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies on March 26, 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



**John Graham: Hmm.**

CW: But it's not what people think it is. You know it's not that watertight 'he isn't going to end up in the shit' situation. But there's something about Arlo and that is, you know; Arlo likes everybody to think that he's a complete fucking waster and that his brain's pouring out of his ears because he's taken so many drugs and had so many drinks, but Arlo can be quite lucid when he's not drunk; and that's why I'm just putting to you what I've heard from him because in fairness that's all that I can do in the situation that we're in; bearing in mind that what we are talking about and the sensitivity of what we're talking about. As I said to you before we started, some of this isn't going to go into a book or whatever, otherwise Vern wouldn't have sent me up here and we wouldn't be sat here visiting like this; and there's things that I'm telling you that I wouldn't tell you, you know, under a different set of circumstances.

**John Graham: Well, if they can get this err, thing going on me you know the way they have been; they got the whole Movement divided over it down south it sounds like; you know, everybody's still taking sides and err . . .**

CW: Well it's like this you know; Russ and all of his group are just over there - and Russ is turning it into a sideshow, the whole thing. Russ doesn't really give a shit about it. *(Side 1 of the tape runs out).*

*Notated conversation before restarting the tape recorder:*

CW: There's an old man you knew back then who's not very well and you should think about going to see him.

**John Graham: Who's that?**

CW: Al Gates.

**John Graham: Hmm.**

CW: I believe he's in a sanitarium and he's got Alzheimer's or something like that.

**John Graham: Oh.**

CW: I know what he told. I know that you went to see him right after all of this happened because you were having a hard time with it; a hard time with what you did to Annie Mae; and that you went into the mountains around Denver and he held ceremony for you.

**John Graham: Uh huh.**

CW: You told him about it in there. In there, in a sacred manner, he told you what they said and what you should do; that you'd never be free from her and her murder unless you faced it. He told you, you wouldn't be free of it until you told the truth.

**John Graham: Uh huh.**

CW: I thought I should tell you that I knew that. You know I know what went down there don't you, because of the people I know?

**John Graham: Well, you know . . .**

At 3:30 PM, Constable Miller, Marshal Ecoffey and C.I. Pourier, went to the Whitehorse airport and picked up SA Graf.

Since JOHN GRAHAM had refused in the past to cooperate with the F.B.I. and R.C.M.P., it was decided that Marshal Ecoffey and C.I. Pourier would approach him.

At approximately 4:30 PM we all returned to the Westmark Hotel, at which time JOHN GRAHAM climbed down the ladder from the roof and started walking up the alley. Marshal Ecoffey and C.I. Pourier approached GRAHAM. Marshal Ecoffey reached out and shook GRAHAM'S hand introducing himself and C.I. Pourier as Law Enforcement Officer's from Pine Ridge, South Dakota.

Ecoffey told GRAHAM that we would like to talk to him concerning recent information regarding the murder of ANNA MAE AQUASK.

Ecoffey told GRAHAM that we weren't there to arrest him, that we had no authority in Canada.

GRAHAM asked Ecoffey; "How do you know about me?" Marshal Ecoffey told GRAHAM that he had learned about him through an old Lakota man by the name of AL GATES. Ecoffey told GRAHAM that GATES had been a spiritual leader for the American Indian Movement in the mid-1970's in Denver, Colorado.

Ecoffey told GRAHAM that GATES had come forward with information that JOHN GRAHAM, also known as JOHN BOY FATON, who was a young man at the time came to him shortly after the death of ANNA MAE AQUASK. That GATES had told us that you "GRAHAM" told him, that you had felt real bad about what had happened to ANNA MAE AQUASK, and that you wanted to know what you could do in a spiritual way to make up for it, and that you wanted GATES to perform a ceremony for him. GRAHAM then responded by nodding his head and said, "yeh". GRAHAM appeared to become upset about the information he heard, as he raised his cigarette to his lips, they were trembling and his hand was shaking. Ecoffey told GRAHAM that other information had been learned, that CORKY CONSALLES, a leader for the Chicano Movement, Crusade for Justice in Denver, Colorado during the mid-1970's, had been in a meeting where discussions had been held concerning what to do with ANNA MAE AQUASK, as it was felt that she was an informant. That CONSALLES had made the statement, "you know what we do with informants we take them out in the hills and kill them".

Shortly after this, a brown colored station wagon pulled up to the curb. A female driving the vehicle had previously been identified to us as GRAHAM'S common-law-wife VIOLA PAPAQUASK. GRAHAM told us, that he would talk to us, but he would not talk to the F.B.I., as he did not trust them.