UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff,

vs.

JOHN GRAHAM, a/k/a JOHN BOY PATTON and VINE RICHARD MARSHALL a/k/a RICHARD VINE MARSHALL a/k/a DICK MARSHALL,

Defendants.

CR 08-50079

UNITED STATES' RESPONSE TO DEFENDANT GRAHAM'S MOTION TO FILE MOTIONS PAST FILING DEADLINE

COMES NOW the United States of America, through its attorneys, Acting United States Attorney Dennis R. Holmes and Assistant United States Attorney Robert A. Mandel, and respectfully responds to Defendant Graham's Motion to File Motions Past Filing Deadline as ordered by the Court.

1. Defendant Graham seeks from the United States' Attorney's Office transcripts of a state court grand jury proceeding which resulted in charges against defendant. The United States' Attorney's Office does not possess any of these transcripts nor did the United States' Attorney's Office participate in any way in the state grand jury proceedings.

- 2. At the outset, it is the position of the United States that the grand jury transcripts from state court, even were they in the possession of the United States' Attorney's Office, would not be discoverable under Fed. R. Crim. P. 16. The United States might be required to provide these materials pursuant to the *Jencks* Act, 18 U.S.C. § 3500, were they in the possession of the United States, however, they would not be discoverable at this time. By the same token, were the United States to have possession of them and were they materials which the United States was required to turn over pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), the United States would be required to turn over such materials.
- 3. Pursuant to the *Jencks* Act, 18 U.S.C. § 3500(b), the United States is only under an obligation to produce a statement which is "in the possession of the United States." Sworn statements that a witness made to a state officer who investigated a case which were not requested or received by the federal attorney prosecuting the case or any federal agent have been held not to be "in the possession of the United States." *United States v. Smith*, 433 F.2d 1266, 1269 (5th Cir. 1970); *Beavers v. United States*, 351 F.2d 507, 509 (9th Cir. 1965); *United States v. Harris*, 368 F. Supp. 697, 708-09 (ED Penn. 1973), affirmed 498 F.2d 1164 (3rd Cir. 1974).
- 4. It is also noted that the names of the witnesses who testified before the grand jury are "blocked out" on some version of the indictment issued by the state court that was obtained by Graham's attorney. It is the understanding of the United States' Attorney's Office that Defendant Graham has yet to have had an initial appearance in state court on these charges. It is the further understanding

of the United States' Attorney's Office that the blocking out of the names on the

indictment was done pursuant to an order of the state court. In any event, this is

strictly a state court issue and does not provide any basis for discovery in federal

court. It is the position of the United States that Defendant Graham's entitlement

to an unredacted version of the indictment is a question to be resolved by the state

court. The United States does not possess an unredacted copy of the indictment.

5. If the United States obtains a copy of the state court grand jury

proceedings in this case, the United States recognizes that this document would

be subject to the same discovery rules as any other documents in the possession

of the United States.

Accordingly, the United States asks that Defendant's Motion to File a Further

Discovery Motion at this time be denied.

Respectfully submitted this 25th day of September, 2009.

/s/ Robert A. Mandel

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of September, 2009, I served by electronic transmission, a true and correct copy of the foregoing United States' Response to Defendant Graham's Motion to File Motions Past Filing Deadline on:

Dana Hanna Attorney at Law

John Murphy Attorney at law

/s/ Robert A. Mandel

Robert A. Mandel