

UNITED STATES DISTRICT COURT  
FOR THE 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.

Case No. 08-50079

DEFENDANT MARSHALL'S  
MEMORANDUM OF LAW  
IN SUPPORT OF HIS  
MOTION IN LIMINE #2

The statement that Chapman claims was made to him by Richard Marshall in 2001—"Choach got it right"—is clearly being offered as an adoptive admission under Rule 801(d)(2)(B). Richard Marshall's alleged statement would be offered to show that he adopted or acquiesced in the statement made by Chapman to him—to-wit, that "Choach" told Chapman Anna Mae Aquash was tied up.

Whenever the government seeks to offer a purported adoptive admission under Rule 801(d)(2)(B), the defendant has a right to a pre-trial hearing before the Court in which the government has the burden of establishing that a particular statement was made by an out of court declarant, that the defendant heard and understood the statement; and that the defendant did or said something that manifested his belief in the truth of the statement. Whether all the elements necessary to give a response (or lack of response) to a statement the capacity to be admitted as an implied or adoptive statement are preliminary questions for the Court. Arpan v. United States, 260 F.2d 649, at 654. United States v. Carter, 760 F.2d 1579-1580 (11<sup>th</sup> Cir. 1985). See: Committee Comments on Jury Instruction 4.14, Model Criminal Jury Instructions for the District Court of the Eighth Circuit; 2 McCormick, Evidence §§ 261-262.

In a pre-trial hearing, which would be held under Rule 104, the Court would be the finder

of fact as to the witness's credibility and the relevant facts, and would rule on the legal question of admissibility of the evidence. The government would have the burden of proof for purposes of establishing admissibility. See: Arpan, above.

Therefore, this Court should order a pre-trial evidentiary hearing in this matter to determine the facts and rule on the question of whether or not a statement attributed by a government witness to Richard Marshall qualifies as an adoptive admission under Rule 801(d)(2)(B) of the Federal Rules of Evidence.

Dated this 7<sup>th</sup> day of January, 2008.

VINE RICHARD MARSHALL, Defendant

BY: /s/ Dana L. Hanna  
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**CERTIFICATE OF SERVICE**

I hereby certify that I have served a true and correct copy of the foregoing Memorandum of Law in Support of Motion in Limine #2 upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney  
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Robert Mandel, Assistant United States Attorney  
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John Murphy, Attorney for Defendant Graham  
jmurphysd@hotmail.com

Dated this 7<sup>th</sup> day of January, 2008.

/s/ Dana L. Hanna  
Dana L. Hanna