UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

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

Defendants.

CR08-50079-01

UNITED STATES' MEMORANDUM OPPOSING DEFENDANT GRAHAM'S MOTION IN LIMINE RE: FED. R. EVID. 801(c) AND STATE OF MIND HEARSAY

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully files this Memorandum Opposing Defendant Graham's Motion in Limine Regarding Fed. R. Evid. 801(c) and State of Mind Hearsay.

The Defendant is requesting the Court to exclude evidence associated with accusations that Annie Mae Aquash was an informant, including the following:

1. Testimony that Leonard Peltier had held a gun to Aquash's head and accused her of being an informant.

2. Leonard Crow Dog's removal of Aquash from his property because he suspected her of being an informant.

Defendant Graham's theory to exclude witness testimony surrounding informant accusations has been specifically rejected in United States v. Looking Cloud, 419 F.3d 781, 786-90 (8th Cir. 2005). The anticipated witness testimony surrounding informant accusations constitutes non-hearsay admissible pursuant to Fed. R. Evid. 801(c). Id. In admitting this same evidence during the Looking Cloud trial, this Court properly relied upon United States v. Malick, 345 F.3d 999, 1001 (8th Cir. 2003) and United States v. Amahia, 825 F.2d 177, 181 (8th Cir. 1987) (cited in Looking Cloud, 419 F.3d at 787-88).

The Looking Cloud court recognized that "the murder of Aquash could only be explained within the context of the American Indian Movement and its activities." Id. at 786. Specific events depicting a violent conflict between the Movement and the federal government showed why the Movement would be enraged if one of its members turned against it to become a government informant. Id. at 787. The Looking Cloud court recognized that "an out-of-court statement is not hearsay if it is not offered for the truth of the matter asserted." Id. (citing Fed. R. Evid. 801(c)). The court went on to opine that "evidence that Aquash was rumored to be an informant was probative of Looking Cloud's motive to kill her." Id. The same holds true with respect to the motives of the aiders and abettors – Defendants Graham and Marshall.

The Eighth Circuit provided this further rationale in its affirmance of this District Court's admission of the evidence:

> Here, the evidence that Aquash was rumored to be an informant was not offered for the truth of the matter asserted. It was not important for the jury to determine whether Aquash was actually an informant. Rather, the rumors' value was in helping the jury understand Looking Cloud's alleged motive for killing her. It only mattered whether Looking Cloud had heard or believed that Aquash was an informant, not whether she was an informant. The informant rumors were therefore not hearsay and irrelevant to Looking Cloud's guilt. The informant rumors helped the jury understand the context and circumstances of the murder.

Id. at 788.

Under the same analysis, Leonard Peltier's act of holding a gun to Aquash's head and accusing her of being an informant constitutes non-hearsay under Rule 801(c). This incident is further relevant and admissible to show the effect it had on Aquash and to further explain why Aquash took certain actions. See, Looking Cloud, 419 F.3d at 787-88; Amahia, 825 F.2d at 181. This may include, but is not limited to, an explanation as to why Aquash did not perceive a more immediate threat from Defendant Graham and other aiders and abettors when taken from Denver and forced to face informant accusations at the Wounded Knee Legal Defense Offense Committee (WKLDOC). Peltier's actions could give rise to a false sense of security that her abductors may not carry through with the threatening conduct, or that when provided the opportunity she could convince her accusers that she was not an informant.

Similarly, Leonard Crow Dog's removal of Aquash from his property constitutes admissible non-hearsay under Rule 801(c) when considering the effect it had on those who heard or otherwise witnessed it, whether or not it

was true that Annie Mae Aquash was an informant. See, Looking Cloud, 419 F.3d at 788; Malik, 345 F.3d at 1001.

To the extent that certain statements are ultimately determined to be hearsay, they further fall within varying exceptions, including Fed. R. Evid. 804(b)(3) on statements against interest. For example, Leonard Peltier's description of the shooting of an FBI agent to, among others, Kamook Nichols and Annie Mae Aquash, wherein he said "the motherfucker was begging for his life, but I shot him anyway." (See, Looking Cloud JT 145). Leonard Peltier is unavailable for trial; its reliability is evidenced from his conviction; and it certainly was against his interest. See, United States v. Hazelett, 32 F.3d 1313, 1316 (8th Cir. 1994). It provides further significant legal relevance for including, but not limited to, a further motive or explanation as to why Annie Mae Aquash was murdered by the criminal venture.

Other statements fall within the hearsay exceptions under Rule 803(1) (present sense impressions) and 803(3) (then existing mental, emotional, or physical condition). Such statements include, but are not limited to, matters occurring at Troy Lynn Yellow Wood's residence in Denver, Thelma Rios' residence in Rapid City, and WKLDOC. Furthermore, other potential statements may fall within the residual exception of Fed. R. Evid. 807 in that the statement is to be offered as evidence of a material fact; it is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and the general purposes of

the rules of evidence and the interests of justice will be best served by admission of the statement into evidence.

Defendant's reliance upon the Crawford and the Shepard decisions to exclude the informant-related statements is misplaced. As more fully established in the United States' Trial Memorandum on Crawford, non-hearsay under Rule 801(c) is not impacted by Crawford. See, United States v. Rodriguez, 484 F.3d 1006, 1013-14 (8th Cir. 2007) (citations omitted). Furthermore, the statements Defendant Graham is referring to are non-testimonial and are not formal statements to law enforcement. See Crawford v. Washington, 541 U.S. 36 (2004); see also, United States v. Hyles, 521 F.3d 946 (8th Cir. 2008).

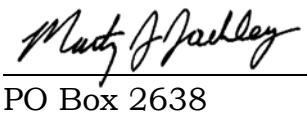
Defendant's reliance upon Shepard v. United States, 290 U.S. 96 (1933) is misdirected based upon the above Fed. R. Evid. 801(c) analysis, and the fact that the United States is not seeking to introduce any such statements for the limited purpose of "a statement of memory or belief to prove the fact remembered or believed." See, Shepard, 290 U.S. at 105-06; Looking Cloud, 419 F.3d at 787-88; Malik, 345 F.3d at 101; Amahia, 825 F.2d at 181.

Accordingly, the United States respectfully requests this Court deny Defendant Graham's Motion in Limine Re: Fed. R. Evid. 801(c) and State of Mind Hearsay.

Dated and electronically filed this 27th day of March 2009.

MARTY J. JACKLEY

United States Attorney



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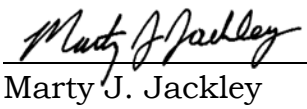
CERTIFICATE OF SERVICE

The undersigned hereby certifies on March 27, 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