

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

| | | |
|-------------------------------|---|--------------------------|
| UNITED STATES OF AMERICA |) | CRIM. NO. 08-50079-01 |
| Plaintiff, |) | |
| |) | MEMORANDUM IN SUPPORT OF |
| vs. |) | DEFENDANT GRAHAM'S |
| |) | MOTION TO COMPEL |
| JOHN GRAHAM, a/k/a |) | DISCLOSURE OF LENIENCY |
| JOHN BOY PATTON and |) | AGREEMENTS |
| VINE RICHARD MARSHALL, a/k/a) |) | |
| RICHARD VINE MARSHALL, a/k/a) |) | |
| DICK MARSHALL |) | |
| Defendant. |) | |

In support of Defendant Graham's Motion to Compel Disclosure of
Leniency Agreements, Mr. Graham offers the following:

SUMMARY OF FACTS

On April 15, 2009, Graham's counsel was informally notified that Theda Nelson a/k/a Theda Clarke a/k/a Theda Clarke had been appointed counsel in this case. On April 20, 2009, Graham was formally notified of this fact through a letter from Nelson's a/k/a Clark's a/k/a Clarke's counsel. The government has designated Nelson a/k/a Clark a/k/a Clarke as a material witness in its case against Graham and Marshall.

The government has claimed that Nelson a/k/a Clark a/k/a Clarke aided and abetted in the first degree murder of Aquash, subjecting her to a mandatory life

without parole sentence if convicted. Nelson a/k/a Clark a/k/a Clarke is alleged to have been the “ring leader” in this case. The government has consistently alleged that Nelson a/k/a Clark a/k/a Clarke directed that Aquash be held in Denver, that Aquash be tied up and brought to South Dakota, and that Aquash be taken to Pine Ridge in the winter of 1975. The government has alleged that Nelson a/k/a Clark a/k/a Clarke went from house to house on the Pine Ridge and Rosebud reservations getting instructions and a weapon, and that she directed Graham and Looking Cloud to kill Aquash.

The government has not disclosed to defense counsel as single page of discovery related to any plea agreements, immunity agreements, or any other form of leniency agreements offered or extended to Nelson a/k/a Clark a/k/a Clarke. The government has further not provided to defense counsel any information relating to oral discussions between it and Nelson a/k/a Clark a/k/a Clarke or her counsel regarding potential leniency, preferential treatment, or immunity.

SUMMARY OF LAW

The government has a duty to disclose all documents within its possession or control if the documents are material to preparation of a defendant’s defense. Fed.R.Crim.P. 16(a)(1)(E)(i). The government also has a duty to disclose all evidence known to it, or which could be known to it through the exercise of due

diligence, that relates to the reliability or credibility of its witnesses. United States v. Bagley, 473 U.S. 667, 676-77 (1984). The failure to disclose a leniency agreement or a promise by the government to a witness violates a defendant's right to due process and may warrant vacating a conviction. Giglio v. United States, 405 U.S. 150, 154-55 (1972)).

In this case, the government should be required to immediately provide to the defense the actual records reflecting the communication of a leniency or immunity offer made to Nelson a/k/a Clark a/k/a Clarke, or a summation of an oral agreement extended to her or her counsel. It is vital that the defense be provided this information immediately as there are only three weeks remaining prior to trial.

Dated April 21, 2009.

/s/ John R. Murphy
John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

MARTY J. JACKLEY

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile at
- Electronic Case Filing

ROBERT A. MANDEL

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile at
- Electronic Case Filing

DANA HANNA

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile at
- Electronic Case Filing

Dated April 21, 2009.

/s/ John R. Murphy
John R. Murphy