

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,)
) CR08-50079
 Plaintiff,)
)
 vs.)
) **MEMORANDUM IN SUPPORT OF**
) **MOTION TO QUASH SUBPOENA**
 JOHN GRAHAM A/K/A JOHN BOY) **OF THEDA CLARK**
 PATTON, and VINE RICHARD)
 MARSHALL, A/K/A RICHARD VINE)
 MARSHALL A/K/A DICK MARSHALL,)
)
 Defendants.)

Theda Clarke has been subpoenaed as a material witness by the United States in the trial of John Graham and Vine Richard Marshall. She has been ordered to appear at the U.S. Courthouse in Rapid City, South Dakota, on May 12, 2009 at 9:00 a.m. Ms. Clarke is incompetent to testify in this matter.

Ms. Clarke is 84 years old. She suffers from the late effects of a cerebral vascular accident (stroke), dementia, diabetes, hypertension, hyperlipidemia, anxiety, depression and arthritis. Both her long term and short term memory are significantly impaired. Her medications include: dilatin (seizure), zocor (cholesterol), celexa (anti-depressant), and remeron (anti-depressant/anxiety). These medications may also impair her memory. Ms. Clarke is currently wheelchair bound and her transportation to Rapid City poses a risk of falling. Ms. Clarke further suffers from “sundowning.” As Ms. Clarke tires, her confusion will increase. See attached Affidavit of John McClain M.D. and clinical notes of Ann Brost, M.A. attached to Court Document 256.

In addition, Ms. Clarke is uncommunicative. She distrusts strangers, including Court appointed counsel. If compelled to appear as a witness in this case, it is believed she will not

respond to questions posed by counsel or the Court. Counsel will invoke Ms. Clarke's Fifth Amendment privilege against self-incrimination on her behalf. See attached Affidavit of Michael Sanders Hofmann.

THEDA CLARKE IS INCOMPETENT TO TESTIFY

Theda Clarke is incompetent to testify. She lacks the capacity to remember and recount the alleged events upon which the Government bases its case against the Defendants.

Fed R. Evid. 601 provides in part that "[e]very person is competent to be a witness except as otherwise provided in these rules." As a general rule, the competence of a witness depends upon an ability to observe, *to remember*, to communicate and to understand the nature of an oath and the duty it imposes to tell the truth. U.S. v. Michael Bloome, 733 F. Supp. 545, 546-547 (Dist Ct. N.Y. 1991). Pursuant to Fed. R. Evid. 104, the competency of a witness to testify is for the Court to decide.¹

The Government seeks testimony concerning events which led to the death of Anna Mae Aquash in 1975. As stated *supra*, Ms. Clarke is 84 years old and confined to a wheel chair. She suffers from the late effects of a cerebral vascular accident (stroke), dementia, diabetes, hypertension, hyperlipidemia, anxiety, depression and arthritis. *Both her long term and short term memory are significantly impaired.* Her medications include: dilatin (seizure), zocor (cholesterol), celexa (anti-depressant), and remeron (anti-depressant/anxiety). These medications may also impair her memory. As a result of Ms. Clarke's dementia and memory impairment she cannot give meaningful testimony and is incompetent to testify. See Affidavit of Dr. John McClain M.D. and

¹The trial court's decision as to competency will only be reversed for an abuse of discretion. U.S. v. Peyro, 786 F.2d 826, 830 (8th Cir. 1986).

clinical notes of Ann Brost, M.A. attached to Court Document 256.

As a result of her dementia and memory impairment, Theda Clarke also lacks the personal knowledge required under Fed. R. Evid. 602. Fed R. Evid. 602 provides in part that “[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”

In the present case, the Government alleges that Ms. Clarke was an active participant in the kidnapping and murder of Ms. Aquash. However, as a result of her dementia, Ms. Clarke’s memory of the alleged events is so impaired that the Government cannot establish the requisite personal knowledge required of a witness under Rule 602.

In addition, as a result of her dementia, the probative value of any testimony by Ms. Clarke is substantially outweighed by the danger of misleading the jury. Pursuant to Fed. R. Evid. 403, Ms. Clarke’s testimony should be precluded.

INVOCATION OF FIFTH AMENDMENT PRIVILEGE

Testimony by Theda Clarke could be used by the Government to prosecute Ms. Clarke for federal crimes. U.S. Attorney Marty J. Jackley has stated that Ms. Clarke may be indicted in the future for the murder of Anna Mae Aquash. Ms. Clarke will refuse to testify in this matter and Counsel will invoke Theda Clarke’s Fifth Amendment privilege against self-incrimination.

Therefore, the subpoena requiring Ms. Clarke’s presence before this Honorable Court on May 12, 2009, should be quashed.

When a witness invokes the Fifth Amendment privilege against self-incrimination, the Court typically questions the witness outside the presence of the jury in order to determine the

validity of the claimed privilege.² However, a witness' attendance should not be compelled where he may reasonably invoke his Fifth Amendment privilege against self-incrimination as grounds for refusing to answer essentially all relevant questions. U.S. v. Sawyer, 2006 LEXIS 52351 (E.D. CA).

In the present case, there is little doubt that Ms. Clarke's Fifth Amendment privilege against self-incrimination is proper. As stated *supra*, the Government alleges that Ms. Clarke was an active participant in the kidnapping and murder of Ms. Aquash. The Government has also represented that it may indict Ms. Clarke for Ms. Aquash's murder. As a result, Ms. Clarke may reasonably invoke the Fifth Amendment privilege against self-incrimination as grounds for refusing to answer essentially all relevant questions and should not be compelled to appear.

Furthermore, Ms. Clarke is uncommunicative and distrusts strangers, including her Court appointed counsel. If compelled to appear as a witness in this case, it is believed she will not respond to questions posed by counsel or the Court. Thus, Counsel will necessarily invoke Theda Clarke's Fifth Amendment privilege against self-incrimination on Ms. Clarke's behalf. See attached Affidavit of Michael Sanders Hofmann.

The subpoena also subjects Ms. Clarke and Ponderosa Villa to undue burden. Ms. Clarke is currently a resident of Ponderosa Villa. Ponderosa Villa is a nursing home located in Crawford, Nebraska. Ms. Clarke is currently wheelchair bound and takes several medications. The transportation of Ms. Clarke pursuant to the subpoena will require that she be attended by a

²“To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.” U.S. v. Bowling, 239 F.3d 973 (8th Cir.).

nursing assistant for mobility and toileting and a registered nurse for the dispensing of medications. Arrangements will also need to be made for the overnight stay of Ms. Clarke and the medical staff as she physically cannot tolerate travel to and from Rapid City, South Dakota and Crawford, Nebraska in a single day. Counsel notes that the subpoena requires Ms. Clarke to travel 120 miles from Crawford, Nebraska to Rapid City, South Dakota. See attached Affidavit of Jaynelle Hinnegan, R.N.

CONCLUSION

Theda Clark is incompetent to testify under Fed. R. Evid. 601. In addition, as a result of significant impairment of both her long and short term memory, she lacks personal knowledge as required by Fed. R. Evid. 602, and any probative value of Ms. Clarke's testimony would be outweighed by the danger of misleading the jury pursuant to Fed. Rule Evid. 403. Finally, Counsel will invoke Ms. Clarke's Fifth Amendment privilege against self-incrimination and the transportation of Ms. Clarke to Rapid City, S.D. is unduly burdensome.

Therefore, it is respectfully requested that this Honorable Court quash the subpoena of Theda Clarke.

Dated this 4th day of May, 2009.

Respectfully submitted,

/s/ *Michaele Sanders Hofmann*
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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of May, 2009, a true and correct copy of the **MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENA OF THEDA CLARK** were served upon the following persons, by placing the same in the service indicated, addressed as follows:

Marty Jackley	<input type="checkbox"/>	U.S. Mail
United States Attorney	<input type="checkbox"/>	Hand Delivery
United States Courthouse	<input type="checkbox"/>	Facsimile
515 Ninth Street	<input type="checkbox"/>	Federal Express
Rapid City, SD 57701	<input checked="" type="checkbox"/>	Electronic Case Filing

John R. Murphy	<input type="checkbox"/>	U.S. Mail
Murphy Law Office	<input type="checkbox"/>	Hand Delivery
328 East New York Street, # 1	<input type="checkbox"/>	Facsimile
Rapid City, SD 57701	<input type="checkbox"/>	Federal Express
	<input checked="" type="checkbox"/>	Electronic Case Filing

Dana Hanna	<input type="checkbox"/>	U.S. Mail
Hanna Law Office	<input type="checkbox"/>	Hand Delivery
P.O. Box 3080	<input type="checkbox"/>	Facsimile
Rapid City, SD 57709	<input type="checkbox"/>	Federal Express
	<input checked="" type="checkbox"/>	Electronic Case Filing

**COSTELLO, PORTER, HILL, HEISTERKAMP,
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