

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,)	CR. 08-50079
)	
Plaintiff,)	
)	
vs.)	MEMORANDUM IN RESPONSE
)	TO DEFENDANTS' AND UNITED
JOHN GRAHAM, A/K/A JOHN BOY)	STATES OF AMERICA'S
PATTON, AND VINE RICHARD)	OPPOSITION TO MOTION TO
MARSHALL, A/K/A RICHARD VINE)	QUASH TRIAL SUBPOENA
MARSHALL, A/K/A DICK MARSHALL,)	
)	
Defendants.)	

Theda Clarke, by and through her attorney of record, Gregory Erlandson, has moved this Honorable Court, pursuant to Federal Rules of Evidence 403, 601 and 602, to enter an Order quashing the subpoena of Theda Clark in the trial of the above-referenced matter.

Richard Marshall has filed a brief in opposition to Ms. Clarke's motion. Defendant John Graham has joined Marshall's opposition. Marshall's opposition is factually and procedurally flawed. The United States has opposed Ms. Clarke's motion as well.

In support of her motion, Ms. Clarke provided the Court with affidavits from two attorneys and three medical professionals. Unlike the Marshall or United States brief, Clarke's motion is supported by facts based upon the affiant's personal knowledge, not inadmissible hearsay or vague self-serving generalizations.

Marshall's opposition does not contain a single relevant fact based upon personal knowledge. Rather, Marshall bases his opposition on what his private investigator allegedly observed and recalled from an interview that took place over one-year ago. Marshall does not claim that his investigator has the necessary foundation or expertise to give a medical or mental

health opinion or diagnosis. Yet, Marshall attempts to do just that by claiming back in January of 2009, his investigator “saw absolutely no signs of dementia or irrationality.”

As stated in the affidavits on file herein, Ms. Clarke’s nurses and physician, who actually have frequent and relevant contact with Ms. Clark, and have professional medical educations and geriatric health care experience, beg to differ.

Marshall boldly states that Ms. Clarke can “communicate meaningfully” when she wants to do so. He bases this statement, again not on personal knowledge, but rather some anonymous sources he believes “to be reliable.” The United States, without providing any foundation or evidence, simply states it believes Ms. Clarke “does have personal knowledge regarding the facts of this case.”

Neither Defendants nor the United States address or controvert the legal authorities provided in Ms. Clarke's initial briefing. Further, Ms. Clarke’s medical evidence is, for all practical purposes, uncontroverted by any competent evidence. As such, Ms. Clark respectfully requests this Honorable Court quash the subpoena of Ms. Clarke.

Dated this 3rd day of February, 2010.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of this legal document upon the person herein designated, all on the date below shown, by electronically filing a copy of the same via the ECF filing system.

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