IN THE 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.	)	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MEMORANDUM IN SUPPORT OF MOTION FOR SEPARATE TRIALS

Defendant John Graham submits the following in support of his request for a separate trial from the trial of Vine Richard Marshall:

FACTS

Defendant Graham is charged with Vine Richard Marshall with committing first degree murder. It is Defendant's Graham's information and belief based on the representation of Marshall's attorney that Marshall does not intend to testify if jointly tried with Mr. Graham. An affidavit to this effect will be filed by Marshall's counsel at a later date.

At trial, the government intends to admit statements allegedly made by Marshall to Serle Chapman, a paid witness acting on the government's behalf to accumulate information against members of AIM. These statements, which were

made approximately 30 years after Aquash was murdered, inculpate both Graham and Marshall. Though Chapman recorded several conversations with Marshall, the statements the government seeks to admit were not recorded.

The unrecorded, jointly inculpatory statements the government seeks to admit through Chapman are: Graham, Theda Clark, Fritz Arlo Looking Cloud, and Anna Mae Aquash came to his home in December of 1975; one among them gave Marshall a note about keeping "the baggage," presumably referring to Aquash; when Marshall refused to keep Aquash at his house, someone in the group asked him for directions to Rosebud; and, in response to a compound inquiry about rumors in the Indian community that Marshall provided the gun that was used to kill Aquash, or whether the note referenced a gun, Marshall said "[b]ack in the day when you was asked to do something, somebody asked you for something, you didn't ask too many questions." Graham Doc. 4870.

ARGUMENT

A two-step analysis is used to determine whether joinder of defendants is proper. United States v. Darden, 70 F.3d 1507, 1526-27 (8th Cir. 1995). First, the court must determine whether the defendants were properly joined on the indictment under Fed.R.Crim.P. 8(b). If the offenses were properly joined under Fed.R.Crim.P. 8(b), then, pursuant to Fed.R.Crim.P. 14, the court must determine

whether joinder will result in undue prejudice to one of the defendants. United States v. Flores, 362 F.3d 1030, 1039-1041 (8th Cir. 2004); Darden, supra, 70 F.3d at 1526-27.

Graham is not disputing the joinder of the defendants on the indictment under Fed.R.Crim.P. 8(b). Instead, he asserts that undue prejudice would result to him if his case is tried with Marshall's.

To prevail, Graham must show the prejudice to him from joint trials is severe or compelling. Flores, supra. This standard can be met when joint trials would result in a violation of one defendant's Sixth Amendment right to confrontation. See Bruton v. United States, 391 U.S. 123, 126 (1968). This standard can be met if a joint trial would result in evidence being admitted against both defendants that would otherwise only be admissible against one defendant if separate trials were granted. Flores, supra, at 1040 ("This high standard could be met when evidence that would be inadmissible against one defendant if he were tried alone is admitted against his codefendant, . . . "). And, this standard can be met where the jointly charged defendants present mutually exclusive defenses. "Mutually antagonistic defenses exist when the jury must disbelieve the core of one defense in order to believe the core of the other." Flores, supra (citing Hood v. Helling, 141 F.3d 892, 896 (8th Cir. 1997)).

A. Joint Trials Will Result in a Violation of Graham's Right to Confrontation:

If joint trials are ordered, and if Marshall's statements to Chapman are admitted, Graham's right to confrontation under the Sixth Amendment will be violated. Bruton v. United States, 391 U.S. 123, 126 (1968). It is counsel's information and belief that Marshall will not testify if he and Graham are jointly tried. And, the government has asserted that it will be trying to admit Marshall's alleged statements to Chapman at this joint trial. Therefore, joint trials will violate Graham's right to confrontation.

A curative or limiting instruction will not overcome the confrontation clause violation. As stated in Bruton, curative or limiting instructions are not sufficient to cure a confrontation clause violation when "powerfully incriminating extrajudicial statements" are "deliberately spread before the jury in a joint trial." Id. at 135-36.

In this case, Marshall's alleged statements are powerfully incriminating. Marshall's statements directly inculpate Graham by placing him at the scene, with a note that contains kidnaping instructions, and places a weapon in his hands or the hands of one of his alleged accomplices. There is no possible way in which a limiting instruction could cure the prejudice to Graham if he is tried jointly and this statement is admitted against Marshall.

Graham has no independent means of challenging the statement. Because Marshall is not going to testify, Graham will not be able to confront him to challenge the veracity of his statement. And, because Marshall is not going to testify, and because he has the right to remain silent, Graham is unable to compel Marshall to testify so that he could deny that the statement was ever made.

Redaction is not a feasible method of addressing the confrontation issue presented in this case. Redaction can not take the place of severance if the redacted statement still creates an inevitable association between the defendant and co-defendant. See U.S. v. Van Hemelryck, 945 F.2d 1493, 1503 (11th Cir. 1991); U.S. v. Petit, 841 F.2d 1546, 155 (11th Cir. 1988).

For redaction to cure a confrontation clause challenge, the redaction must remove all references to the other defendant's existence. See Richardson v. Marsh, 481 U.S. 200, 211 (1987). Redactions that simply replace a co-defendant's name with a blank space or with the word "deleted" are not sufficient to cure the confrontation clause problems cited in Bruton. In such cases, the identity of the omitted person is understood by the jury when the jury looks to the defense table and sees both defendant and co-defendant seated together:

> A juror who does not know the law and who therefore wonders to whom the blank might refer need only lift his eyes to Jones, sitting at counsel table, to find what will seem the obvious answer, at least if the juror hears the

> judge's instruction not to consider the confession as evidence against Jones, for that instruction will provide an obvious reason for the blank. A more sophisticated juror, wondering if the blank refers to someone else, might also wonder how, if it did, the prosecutor could argue that the confession is reliable, for the prosecutor has been arguing that Jones, not someone else, helped Smith commit the crime.

Gray v. Maryland, 118 U.S. 1151, 1155 (1998).

Therefore, Graham must be granted a separate trial to preserve his right to confrontation under the Sixth Amendment.

B. Joint Trials Would Lead to Inadmissible Evidence Being Admitted Against Graham:

Marshall's alleged statements to Chapman would not be admissible against Graham if he was tried alone. They are not admissions by Graham. They are not admissions that he adopted. And, Marshall's statements don't fall within the co-conspirator exclusion from the hearsay rule: They were not made during the course of or in furtherance of a conspiracy, but were descriptive statements made decades after the alleged crime. See e.g. United States v. Mitchell, 31 F.3d 628, 631-32 (8th Cir. 1994).

Therefore, Graham and Marshall should not be tried jointly. At a joint trial, Graham would not be able to prevent inadmissible statements that inculpate him from being admitted. For the reasons set forth in section A, supra, curative

instructions or redactions would not be a sufficient remedy to cure the prejudice caused by the situation.

C. The Defendants Will Present Mutually Exclusive Defenses:

The core of Marshall's defense is that he was not aware of any plan to kill Aquash when he met with Graham, Clark and Looking Cloud. And, he will argue that he never provided the group with any assistance in carrying out their plan. The core of Graham's defense is that this alleged "baggage" meeting did not occur. The jury must disbelieve Marshall's defense in order to believe Graham's, and vice versa. Thus, joint trials should not be ordered. Flores, supra, at 1040 (citing Hood v. Helling, 141 F.3d 892, 896 (8th Cir. 1997)).

Dated November 21, 2008.

/s/ John R. Murphy

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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 November 21, 2008.

/s/ John R. Murphy
John R. Murphy