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 MOTION IN LIMINE REGARDING FEDERAL RULE OF EVIDENCE 801(c) AND STATE OF MIND HEARSAY

Defendant John Graham moves this Court for its Order prohibiting the government from introducing hearsay testimony under the theory that it is not being offered for the truth of the matter asserted, Fed.R.Evid. 801 (c), or under the state of mind exception to the rule against hearsay, Fed.R.Evid. 803(3), in the presence of the jury until an out of court ruling as to admissibility has been obtained.

A. FACTS AND PROCEDURAL HISTORY

At Arlo Looking Cloud's trial (CR #03-50020), the government was allowed to introduce evidence from witnesses who said they heard others state that Anna Mae Pictou Aquash had been accused of being an informant by members of the American Indian Movement's (AIM), or that Aquash herself had stated that

she had been accused of being an informant by members of AIM. Some witnesses were allowed to testify as to "rumors" in the AIM community that Aquash had been accused of being an informant. For instance, testimony was received that Leonard Peltier had held a gun to Aquash's head and accused her of being an informant, and that Leonard Crow Dog had removed Aquash from his property because he suspected her to be an informant.

Looking Cloud objected at trial on hearsay grounds. At the time of Looking Cloud's trial (February 3, 2004), the United States Supreme Court had not issued its ruling in Crawford v. Washington, 541 U.S. 36 (March 8, 2004). When the Eighth Circuit Court of Appeals reviewed this issue, it did not review the matter under the confrontation clause. United States v. Looking Cloud, 419 F.3d 781, 787-88 (8th Cir. 2005). Further, at trial, when the Court admitted the evidence under the state of mind exception to the rule against hearsay, Looking Cloud did not object to that basis for admission.

In light of the heightened awareness of the value of confrontation established in Crawford, and based on the benefit of hindsight available at this juncture as to the facts of the case and the government's theory of admissibility, the kind of testimony described above should not be admitted at Mr. Graham's trial. To do so will violate the confrontation clause and the rule against hearsay.

B. THE TESTIMONY IS OFFERED FOR THE TRUTH OF THE MATTER ASSERTED

When considering whether evidence is non-hearsay under Fed.R.Evid. 801(c), the analysis begins with identifying the matter being asserted. In Looking Cloud's trial, witnesses were allowed to testify that they heard from some other person that Aquash had been accused of being informant. The accusation at issue – that Aquash was an informant – was not made by the testifying witness. None of them claimed to have accused Aquash of being an informant.

Therefore, the operative fact being asserted was that Aquash had been accused of being an informant. The matter being asserted was not whether Aquash was actually an informant. This is a key distinction in the analysis of this issue.

The government's contention was that these accusations weren't being offered to prove that Aquash was an informant. Whether Aquash was an informant is irrelevant. The government's theory is that Aquash was killed because she was accused of being an informant by AIM. The government has repeatedly asserted that she wasn't an informant. Thus, the fact the government seeks to prove is the accusation, not whether Aquash was actually an informant.

Understood in that light, the testimony (that Aquash was accused of being an informant) was hearsay because it was being offered to prove a material fact

(that an accusation had been made). Oftentimes, the testimony admitted at Looking Cloud's trial was double hearsay. The testifying witness said they heard from others that other persons had accused Aquash of being an informant. The matter being asserted throughout, whether through single or double hearsay, was the fact of the accusation.

This kind of evidence should not be admitted at Mr. Graham's trial. Admitting this evidence will violate Mr. Graham's right to confrontation and his right to not be convicted upon hearsay.

C. THE TESTIMONY IS NOT ADMISSIBLE STATE OF MIND EVIDENCE

At Looking Cloud's trial, the Court also admitted the testimony on the alternate ground that it was admissible under the state of mind exception to the rule against hearsay. Fed.R.Evid. 803(3). The court admitted testimony that Aquash had been accused of being an informant as going to Aquash's state of mind that she feared AIM. Looking Cloud did not specifically object at trial to this basis for admission.

Fed.R.Evid. 803(3) only permits the admission of evidence that goes to the declarant's state of mind. And, the exception is expressly limited to admission of evidence to prove the declarant's thoughts and feelings, not to prove an act committed by someone else. Fed.R.Evid. 803.

In Shepard v. United States, 290 U.S. 96 (1933), a unanimous Supreme Court reversed a murder conviction and held testimony not admissible under the state of mind exception. The facts and analysis in Shepard are applicable to this case.

In Shepard, the government offered evidence that Shepard's wife told her nurse that she thought her husband had poisoned her. The appellate court held that this evidence was admissible as going to the wife's state of mind in that it contradicted the defense assertion that the wife was suicidal.

In reversing the court of appeals, Justice Cardozo outlined the limitations on the state of mind exception. He cautioned that if testimony of past acts committed by other parties was admitted under the state of mind exception, it "would be an end, or nearly that, to the rule against hearsay . . ." Id. at 105. Cardozo went on to state:

> [The government] did not use the declarations by Mrs. Shepard to prove her present thoughts and feelings, or even her thoughts and feelings in times past. It used the declarations as proof of an act committed by some one else, as evidence that she was dying of poison given by her husband. This fact, if fact it was, the government was free to prove, but not by hearsay declarations.
>
> * * *
>
> The testimony now questioned faced backward and not forward. This at least it did in its most obvious implications. What is even more important, it spoke to a past act, and, more than that, to an act by some one not the speaker. Other tendency, if it had any, was a filament too fine to be

disentangled by a jury.

Id. at 105-06 (citations omitted) (emphasis added).

The theory of admissibility discredited in Shepard is the same theory of admissibility presented by the government in this case. In Shepard the government admitted past acts against the decedent (poisoning); in this case the government intends to admit past acts against Aquash (threats). The acts were allegedly committed by a third party (in Shepard, the husband; in the present case, by Peltier, Crow Dog, etc.), but introduced at trial through a third party (the nurse in Shepard; through Nichols and others in this case).

This kind of evidence should not be admitted in Mr. Graham's trial as it does not meet the basic foundational requirements for the state of mind exception to the rule against hearsay. Accordingly, to preserve Mr. Graham's right to confrontation and his rights under Fed.R.Evid. 802 (exclusion of hearsay), Mr. Graham asks for an order that prohibits the government from introducing this kind of evidence until the matter has been addressed and ruled upon by the Court outside the presence of the jury.

C. THIS ISSUE SHOULD BE RESOLVED PRETRIAL

It is not sufficient to wait until the government attempts to elicit the

evidence to address the matter. Justice Cardozo correctly identified the likely, irreparable prejudice that will result from this approach:

> The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.

Shepard, supra, at 104.

Therefore, the government should be required to present this evidence outside of the presence of the jury before delving into these areas. Mr. Graham would be irreparably prejudiced if the government were to be able to present the issue to the jury, even if the objection were sustained or the testimony stricken.

Dated December 19, 2008.

/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 December 19, 2008.

/s/ John R. Murphy
John R. Murphy