STATE OF SOUTH DAKOTA)		IN THE CIRCUIT COURT
) SS		
COUNTY OF PENNINGTON)		OF THE SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	CRIM. NO. 09-3953
	)	
vs.	)	DEFENDANT GRAHAM'S FIRST
	)	DISCOVERY MOTION
JOHN GRAHAM	)	
a/k/a JOHN BOY PATTON,	)	
Defendant.	)	

John Graham, Defendant, through his counsel, John R. Murphy, moves for discovery. In the motions below the term "the State" is used to include both the South Dakota Attorney General's Office and the Pennington County State's Attorneys Office.

1. **Motion for Disclosure of Discoverable Material:**

The State should be ordered to produce all materials, whether requested or not, that it is required to disclose under the United States Constitution, the Constitution of the State of South Dakota, and the South Dakota Code. Lingle v. Iowa, 195 F.3d 1023, 1026 (8th Cir. 1999) (disclosure duty exists regardless of whether defendant makes a specific request).

2. **Motion for Disclosure of Materials in the Possession of the State, the United States, and Other Prosecution or Law Enforcement Agencies:**

The State should be ordered to disclose all discoverable material (1) that it

possesses, (2) that is known to it, (3) that it can learn of through the exercise of due diligence, and, (4) that is known to any law enforcement officer or investigating agent working on this case.

The State should be ordered to disclose the information described in (1) to (4) above, whether it is possessed by the State, the United States, the Denver Police Department, or any state, federal, tribal or out of state agency that has investigated the subject matter of the case. See Strickler v. Greene, 527 U.S. 263, 280-81 (1999) (prosecutors must learn of evidence favorable to the defense which is known to others involved in case); United States v. Tyndall, 521 F.3d 877, 882 (8th Cir. 2008) (prosecutor's duty to learn extends to information known to law enforcement agents); White v. McKinley, 519 F.3d 806, 814 (8th Cir. 2008) (Brady applies to investigative agents as well as prosecutors).

A factual basis exists for Mr. Graham's request for disclosure of state, federal, tribal and out of state information. This case is part of a joint investigation between the South Dakota Attorney General's Office, the Pennington County State's Attorneys Office, the United States Department of Justice, and the Denver Police Department. The State has openly acknowledged the joint nature of the investigation. "Aquash Trial Developments," Sept. 10, 2009, press conference (http://videos.rapidcityjournal.com/p/video?id=6089165). Federal prosecutors,

federal law enforcement agents, tribal law enforcement agents, and detectives from the Denver Police Department worked together to interview witnesses, gather evidence, review the crime scene, and make plea offers to witnesses. Attorney General Jackley, Assistant United States Attorney Mandel, FBI Agent McRodden, BIA Superintendent Ecoffey, Denver Police Department detective Abe Alonzo, and others, have worked together in the investigation of this case. The materials they have gathered relate directly to Mr. Graham.

The State may claim jurisdictional boundaries as an impediment to disclosure of other agencies' materials. However, any jurisdictional lines alleged to exist between these agencies have been eliminated by the voluntary conduct of the agents and agencies involved. Marty Jackley indicted Mr. Graham as a federal prosecutor and now has indicted him as a state prosecutor. Jackley's assistant in the state court case, Rod Oswald, was recently deputized as an Assistant United States Attorney to assist in the federal prosecution. The Denver Police Department and federal agents have been jointly investigating the case since at least 2000.

In the federal case, repeated discovery problems have led to delays in the case. The federal court has had to repeatedly order disclosure by the government. On February 10, 2010, two years after indictment and six days before trial, the

government produced an additional 20 audio tapes and 800 pages of documents from the Denver Police Department. To get this discovery, the court had to issue an order to compel. Previously, the government had alternatively claimed that the materials did not exist, if they had existed they had been destroyed, and, if they had not been destroyed they were not subject to disclosure. On February 11, 2010, the federal trial was delayed again due to these discovery issues. Still, the government has yet to comply with another order to compel regarding other information in the possession of the Denver Police Department.

Mr. Graham wants to prevent a continuation of the discovery issues that have plagued the federal prosecution. He asks that the Court recognize the joint nature of this investigation, mandate that the State learn of all discovery that exists regardless of which agency possesses it, and order the disclosure thereof.

3. **Motion for Disclosure of Defendant's Statements (Express, Adopted or Authorized):**

The State should be ordered to disclose to Mr. Graham any written or recorded statements he is alleged to have made to any person, whether or not the State intends to admit that statement at trial. SDCL 23A-13-1(1). Included in this request is the disclosure of any statements that Mr. Graham is alleged to have adopted under SDCL 19-16-3(2), or that he is alleged to have authorized under

SDCL 19-16-3(3). The request for disclosure of alleged adoptive admissions is based on the following:

In the federal prosecution, the government alleged that Mr. Graham made a number of adoptive admissions that it claimed were admissible under Federal Rule of Evidence 801(d)(2)(B). The government resisted disclosing the specific statements that were allegedly adopted by Mr. Graham. As the federal judge noted, one such "statement" identified by the government was actually an interview that filled nine audio cassettes and 257 pages of paper. The government was ultimately ordered to produce specific statements allegedly adopted by Mr. Graham, but the case was dismissed prior to the disclosure deadline.

Mr. Graham is not aware of what adoptive admissions he is alleged to have made, thus he is not in a position to contest the admissibility of these statements. Because the State is likely to argue that adoptive admissions made by Mr. Graham constitute a confession, Mr. Graham is entitled to an evidentiary hearing on the matter. SDCL 19-9-9. The Court cannot conduct a meaningful evidentiary hearing without pre-hearing disclosure of the alleged admissions.

All of these statements have been within the State's, United States', or Denver Police Department's possession for years. Therefore, Mr. Graham asks

that all statements, whether they be express, adopted or authorized, be disclosed to him immediately.

4. **Motion for Disclosure of Exculpatory Evidence Within Work Product:**

The State should be ordered to disclose all exculpatory or impeachment evidence, regardless of whether the information is contained within work product.

SDCL 23A-13-5 exempts a prosecutor's work product from disclosure. However, that exemption does not apply if the work product contains exculpatory or impeachment evidence subject to disclosure under the Constitution. See e.g. Mincey v. Head, 206 F.3d 1106, n. 63 (11th Cir. 2000) (work product exemption yields to constitutional disclosure requirement); Dickson v Quarterman, 462 F.3d 470, 480, n. 6 (5th Cir. 2006); Waldrip v. Head, 620 S.E.2d 829, 832 (GA 2005) ("[W]ere the work product doctrine and the constitutional right to exculpatory evidence to be in conflict, the former obviously would have to yield to the latter."); 2 Wright, Fed. Practice & Procedure § 254.2 (3rd Ed. 2000) (Brady requirement trumps work doctrine principle).

If any witness has provided the prosecutor (state or federal) with any information that tends to exculpate Mr. Graham, contradicts any other witnesses' statements, or is inconsistent with that witness's prior statements, it should be disclosed.

5. **Motion for Disclosure of Criminal Record:**

The State should be ordered to provide Mr. Graham with a complete copy of his prior criminal record. SDCL 23A-13-2.

6. **Motion for Disclosure of Documents and Tangible Evidence:**

The State should be required to disclose to Mr. Graham all tangible items or objects which are material to the preparation of Mr. Graham's defense, that will be used at trial by the prosecution, or that were taken from Mr. Graham. SDCL 23A-13-3.

7. **Motion for Disclosure of Examinations or Test Results:**

The State should be ordered to provide Mr. Graham with any photographs, examination results, or test results that the State knows about or could know about through the exercise of due diligence, and that are either material to Mr. Graham's defense or which the prosecution intends to use at trial. SDCL 23A-13-4.

8. **Motion for Disclosure of Documents Authorizing State Prosecution:**

The State should be ordered to provide Mr. Graham with any documents that authorize this state court prosecution. The State has alleged that the government of Canada has expressly authorized this state court prosecution. No documents have been disclosed to Mr. Graham corroborating this assertion. The only information provided to Mr. Graham related to his extradition from Canada to

face federal criminal charges. The existence or absence of authority for this prosecution is material to Mr. Graham's defense and may support a challenge to the legality of his confinement. As such, these documents are subject to disclosure under SDCL 23A-13-3.

9. **Motion for Disclosure of Other Acts and Res Gestae Evidence:**

The State should be required to disclose all "other acts" and res gestae evidence it intends to offer in its case-in-chief against Mr. Graham.

"The State is required to provide notice of intent to use [other acts] evidence so that the trial court, in determining admissibility, can balance the probative value of the evidence against the prejudice to the defendant." State v. Fool Bull, 2008 SD 11, ¶ 17 (citation omitted). See SDCL 19-12-5.

The State should be required to provide notice of any alleged res gestae evidence of the crime charged so that the Court may assess at a pretrial hearing whether the evidence meets the specific foundational requirements for admission on this basis. See State v. Pasek, 2004 SD 132, ¶ 20 (pretrial hearing held on admissibility of acts determined to be res gestae); SDCL 19-9-5 (hearings should be held outside presence of jury to prevent it from hearing inadmissible evidence).

For evidence to be admissible as res gestae, the evidence must be so blended or connected with the charged offense that it explains or tends to prove the crime

charged. Id. To be admissible, the evidence must have occurred immediately before the crime charged and have a causal connection therewith. Id. The evidence must be of a continuing act or series of events that transpired before the commission of the crime and lead up to and are necessary or helpful to an understanding of the crime charged, and which tends to explain the conduct and purposes of the parties. Id.

Because of the extensive and complicated nature of the foundation for admissibility of this evidence, a hearing should be held outside the presence of the jury on this issue. SDCL 19-9-5. To have such a hearing, the State must provide notice of the evidence it claims is admissible as res gestae.

10. **Motion for Disclosure of All Leniency, Plea or Sentencing Agreements:**

Evidence affecting the reliability of a prosecution witness must be disclosed to the defense. Giglio v. United States, 405 U.S. 150, 154 (1972). This includes disclosure of leniency agreements, non-prosecution agreements, plea agreements, favorable recommendations for sentencing, or any express or implied offers to provide any benefit to a witness. See State v. Piper, 2006 SD 1, ¶ 19 (quoting Reutter v. Solem, 888 F.2d 578, 581 (8thCir.1989) ("evidence that could be used to impeach a witness for the prosecution falls within the Brady rule"); Reutter,

supra, at 582 (disclosure applies to express or implied benefits) (reversing conviction because prosecutor failed to disclose that a witness had applied for commutation prior to his testimony – though no promise of support was express, it was implied). It is the prosecutor's duty to learn and disclose promises or offers made by other prosecutors involved in the case. Giglio, supra, at 154.[1]

The court's order should mandate disclosure of all benefits that are offered, discussed, implied, or which the government has reason to believe are anticipated by a witness. This should include offers made or benefits provided by prosecutors outside the Attorney General's Office. Due to the joint nature of this investigation, and the prosecutor's duty to learn what other prosecutors have offered, the Court's order should include benefits offered by the United States, the Pennington County State's Attorney, or any other law enforcement or prosecution office, to any witnesses. This is not an overly burdensome mandate due to the close relationship between the prosecuting agencies in this case. Attorney General Jackley was the United States Attorney that indicted Mr. Graham and made offers to Arlo Looking Cloud. He knows what offers, benefits, promises and

[1] A prosecutor not involved in a case made a no-prosecution offer to a witness. The trial prosecutor was unaware of the offer. The Court reversed the conviction and held lack of bad faith by the trial prosecutor was irrelevant because evidence affecting credibility of a witness must be disclosed to defense.

expectations exist, and he can easily learn what other prosecutors working with him have offered. The Court should mandate that he learn what offers are or have been made by his office, the Pennington County State's Attorneys Office, and the United States, to witnesses involved in this case, and to disclose that to Mr. Graham.

11. **Motion for Disclosure of Benefits Given to Witnesses:**

The State should be ordered to disclose all benefits it has given or offered to witnesses, or benefits that witnesses expect as a result of their cooperation with the government. This request goes beyond benefits relating to matters within the criminal justice system, discussed in the previous motion.

It is counsel's understanding that the United States and/or the State of South Dakota have paid witnesses over $130,000.00 so far in this case. The state and federal prosecutors have also assisted witnesses with immigration issues and have offered favorable parole hearing recommendations. If there are any other forms of compensation, favorable treatment or benefit being provided to any witness, the State should be required to disclose it immediately. Giglio v. United States, 405 U.S. 150, 154 (1972) (benefits affecting reliability of witnesses must be disclosed); Reutter v. Solem, 888 F.2d 578, 581 (8thCir.1989) ("evidence that

could be used to impeach a witness for the prosecution falls within the Brady rule").

12. **Motion to Compel Production of Criminal Records of Witnesses:**

This Court should order the State to disclose the criminal records of any witnesses it intends to call at trial. Impeachment evidence is subject to disclosure. See United States v. Bagley, 473 U.S. 667, 676-77 (1984) (Brady requires disclosure of evidence affecting the credibility of witnesses); Giglio v. United States, supra, 405 U.S. at 154. The criminal records of the State's witnesses, if any exist, will be used by Mr. Graham to impeach them. These records are not publically available, but are under the control of the prosecution through its agency relationship with law enforcement.

13. **Motion for Disclosure of Oral Statements by Defendant:**

This Court should order the State to produce all oral statements by Mr. Graham that it intends to offer at trial and which were made in response to interrogation by any person known to be employed by a law enforcement agency. Production of these statements is required pursuant to SDCL 23A-13-1(2), and, if the statement is exculpatory, disclosure is also required by Brady and its progeny.

14. **Motion for Notice of Undisclosed Statements:**

The Court should order that the State produce for in camera review any

statements by witnesses in this case that the State claims are unrelated to this case or are otherwise not subject to disclosure. SDCL 23A-13-8 provides a mechanism for in camera review of such statements. This process is an important safeguard to prevent the State from withholding evidence based through a unilateral assertion that it is not subject to disclosure.

Dated February 12, 2010.

/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 depositing the same in the U.S. Mail at Rapid City, South Dakota, first class postage prepaid, at his/her/their last known address(es), to wit:

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Rod Oswald
Assistant Attorney General
P.O. Box 70
Rapid City, SD 57709-0230

Dated February 12, 2010.

/s/ John R. Murphy
John R. Murphy

STATE OF SOUTH DAKOTA)		IN THE CIRCUIT COURT
) SS		
COUNTY OF PENNINGTON)		OF THE SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	CRIM. NO. 09-3953
	)	
vs.	)	DEFENDANT GRAHAM'S
	)	MOTION FOR DISCLOSURE OF
JOHN GRAHAM	)	"AQUASH BOX"
a/k/a JOHN BOY PATTON,	)	
Defendant.	)	

John Graham, Defendant, through his counsel, John R. Murphy, moves for disclosure of the 20 audio cassettes and 800+ pages of documentation contained within the "Aquash box." This box is a box of evidence compiled by the Denver Police Department and now in the possession of the United States. Graham also moves for disclosure of Invoice 590402. That invoice, prepared by the Denver Police Department and now in the possession of the United States, lists 22 recordings with witnesses that were deliberately destroyed by the Denver police.

FACTS

The Denver Police Department has been involved with the United States and the State of South Dakota in investigating this crime. Denver police officers have interviewed witnesses at the request of the United States. The Denver police

department has provided the United States with audio recordings and documents compiled during its investigation.

It is counsel's information and belief that prosecutors from the South Dakota Attorney General's Office have worked with law enforcement officers from Colorado on this case. This occurred during the time that the State prosecutors were working for the United States and during the time that the State prosecutors were working for the State of South Dakota. State prosecutors have had access to the materials gathered by the Denver Police Department, including the 20 audio tapes, over 800 pages of documentation, and Invoice 590402.

The federal court has ordered the United States to turn over all the materials in the Aquash box and the Invoice to defense counsel for Richard Marshall. That order was released one day after Graham's federal charges were dismissed. Attached as Exhibits A, B, and C, are copies of the court orders and a defense motion which describes the contents of the Aquash box.

AUTHORITY

The Aquash box and invoice are subject to disclosure because the existence of the items is known to the state prosecutors. Strickler v. Greene, 527 U.S. 263, 280-81 (1999) (prosecutors must learn of evidence which is known to others involved in case); United States v. Tyndall, 521 F.3d 877, 882 (8th Cir. 2008) (duty

to learn includes information possessed by police).

To the extent that any of the recordings or documents contain statements (express or adopted) allegedly made by Mr. Graham, these are subject to disclosure. SDCL 23A-13-1(1); SDCL 19-16-3.

These recordings and documents constitute tangible items that are material to the preparation of Mr. Graham's defense and are subject to disclosure. SDCL 23A-13-3. These recordings are material, as they include recorded interviews with the State's three primary witnesses, Looking Cloud, "Sierra," and Ecoffey.

It is likely that these recordings contain impeachment information, which is subject to disclosure. Giglio v. United States, 405 U.S. 150, 154 (1972). Any statement given by Looking Cloud has impeachment value as it will be in conflict with one of his many other conflicting stories. Statements given by "Sierra" and Ecoffey are likely to be used for impeachment as these witnesses have benefitted from financial and immigration support provided by prosecutors.

The invoice of destroyed evidence is also subject to disclosure. It is a tangible item that is material to Mr. Graham's defense. It lists or describes 22 pieces of physical evidence that were deliberately destroyed by the Denver Police Department during a time when this case was the subject of an on-going criminal investigation and during or immediately prior to a grand jury convening on these

charges. The existence of the recordings and the fact of their destruction was denied for many years by law enforcement agents from Denver. The mere existence of an item describing destroyed evidence is subject to disclosure due to its tendency to cast doubt on the legitimacy and competency of the investigation of this crime, and it may be used to impeach the testimony of witnesses who previously claimed the non-existence thereof.

CONCLUSION

The State should be required to immediately provide Graham with copies of the Invoice and the recordings.

Dated February 16, 2010.

/s/ John R. Murphy

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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 depositing the same in the U.S. Mail at Rapid City, South Dakota, first class postage prepaid, at his/her/their last known address(es), to wit:

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Rod Oswald
Assistant Attorney General
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Rapid City, SD 57709-0230

Dated February 16, 2010.

/s/ John R. Murphy
John R. Murphy

STATE OF SOUTH DAKOTA)		IN THE CIRCUIT COURT
) SS		
COUNTY OF PENNINGTON)		OF THE SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	CRIM. NO. 09-3953
	)	
vs.	)	DEFENDANT GRAHAM'S
	)	MOTION FOR DISCLOSURE OF
JOHN GRAHAM	)	HANDWRITTEN NOTES
a/k/a JOHN BOY PATTON,	)	
Defendant.	)	

John Graham, Defendant, through his counsel, John R. Murphy, moves for disclosure of law enforcement agent's handwritten notes made during the August 19, 2008, proffer meeting with Arlo Looking Cloud. This motion is based on the following:

FACTS

Arlo Looking Cloud is the State's primary witness against John Graham. Looking Cloud claims to have been present during Aquash's murder. He was convicted of first degree murder for his involvement and is serving a life sentence.

Looking Cloud has been negotiating with the government since his conviction to get a reduced sentence. Pursuant to an offer, Looking Cloud met with the FBI for a "proffer" on August 19, 2008. At this proffer, Looking Cloud was supposed to truthfully disclose his involvement in the crime.

The FBI opted not to record the proffer. Instead, it prepared a summary (FBI 302), which was disclosed to defense counsel. That 302 is not complete: it omits 2 portions of the proffer. Exh. B.

Graham's federal co-defendant, Richard Marshall, moved for disclosure of the FBI agent's handwritten notes. Exh. A. In response, the government provided the federal magistrate with the agent's notes for in camera review. Exh. B. The magistrate granted in part Marshall's motion, finding that the government had to disclose the agent's handwritten notes to him. Exh. B, p. 6. The government objected. The district court overruled the government's objection and ordered disclosure. Exh. C.

AUTHORITY

The federal magistrate and federal district court have already reviewed the handwritten notes and determined that the government had a duty to disclose them. The magistrate held that one of the omitted segments of the notes undermined Looking Cloud's "assertion of innocense" and was subject to disclosure under Brady and Giglio. Exh. B p. 5. The district court found that there was "a material difference" between the 302 and the handwritten notes. Exh. C p. 1.

For the reasons set forth in both the federal magistrate and district court's

decisions on this matter, which are based on their review of the notes, Graham asks that the State be ordered to immediately disclose this handwritten note to him.

Dated February 16, 2010.

/s/ John R. Murphy
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Dated February 16, 2010.

/s/ John R. Murphy
John R. Murphy

STATE OF SOUTH DAKOTA)		IN THE CIRCUIT COURT
) SS		
COUNTY OF PENNINGTON)		OF THE SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	CRIM. NO. 09-3953
	)	
vs.	)	DEFENDANT GRAHAM'S MOTION
	)	IN LIMINE RE: PRAYER
JOHN GRAHAM	)	ALLEGATION
a/k/a JOHN BOY PATTON,	)	
Defendant.	)	

Defendant John Graham moves this Court for its order prohibiting the state from asserting in opening statement, closing argument, or at any other time, that Anna Mae Aquash was kneeling and praying when she was allegedly shot by John Graham.

Numerous times during this federal litigation and in the state litigation the prosecution has made the unsupported claim that Anna Mae Aquash was kneeling and praying when she was shot in the back of the head, allegedly by John Graham. On January 16, 2010, Mr. Graham was provided for the first time with a grand jury transcript of a proceeding held on September 9, 2009. At that proceeding, Arlo Looking Cloud testified. He is the only alleged eye witness to this event. Looking Cloud unequivocally testified before the grand jury that Aquash was standing when she got shot and that she did not appear to be praying, and that he could not

hear what, if anything, was said by Aquash. Exh. A.

After Looking Cloud's testimony that Aquash was not kneeling and not praying, the prosecution took a break to speak with Looking Cloud outside the presence of the grand jury. Looking Cloud was then recalled as a witness. During a highly leading and suggestive examination, Looking Cloud stated that Aquash "seemed like she was praying." After the prosecutor told Looking Cloud, "you could hear Anna Mae Aquash praying and you couldn't make out the words that she was saying," Looking Cloud responded, "I think she was speaking in her language." Looking Cloud went on to state that the only thing suggestive of prayer was that Aquash was looking west. Exh. B.

To support its contention that Aquash was praying when she was executed, state court prosecutors called Darlene "Kamook" Nichols Ecoffey as a witness. Ecoffey testified that Aquash prayed in her own language. Ecoffey admitted, however, that she did not speak this language. And, Ecoffey could only speculate that Aquash prayed about her children because she spoke of them often. Ecoffey never suggested she was present at any time during the alleged murder of Aquash or otherwise had any direct information that she was kneeling or praying when shot. Exh. C.

Without a limine order, the state will try to inflame the jury's passions and bias them against Graham by making the unsupported accusation that Graham shot Aquash while she was kneeling and praying. The state has made this assertion in the past. Looking Cloud will be called by the state. Therefore, any prior statements made by Looking Cloud as to this matter could only be introduced by the state to show that Looking Cloud said something differently on a previous occasion, not for the substance of the statement. Fed.R.Evid. 613. It would be ethically impermissible for the state to make an assertion of fact to the jury that it knows is not supported by its witness's most recent statement. Without a limine order, Graham cannot protect himself against this kind of unethical behavior. Further, the subject matter itself is not probative and would only be introduced by the state for impermissible purposes, i.e. to prejudice the defense and inflame the jury. Fed.R.Evid. 401 & 402.

In light of the fact that Looking Cloud never deviated from his statement that Aquash was not kneeling, and in light of his coached, ambivalent statements that Aquash might possibly have been speaking her language, it would be unethical for the prosecution to assert as a matter of fact in opening statement that the testimony will be that Aquash was kneeling and praying when she was killed. Further, absent a dramatic change in the circumstances, it would be improper to

argue this point during summation. Last, the whole issue is irrelevant and is highly prejudicial, and the state should be precluded from delving into the subject at all.

Dated February 19, 2010.

/s/ John R. Murphy
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Rod Oswald
Assistant Attorney General
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Rapid City, SD 57709-0230

Dated February 19, 2010.

/s/ John R. Murphy
John R. Murphy

STATE OF SOUTH DAKOTA)		IN THE CIRCUIT COURT
) SS		
COUNTY OF PENNINGTON)		OF THE SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	CRIM. NO. 09-3953
	)	
vs.	)	DEFENDANT GRAHAM'S MOTION
	)	IN LIMINE RE: TIME OF DEATH
JOHN GRAHAM	)	TESTIMONY
a/k/a JOHN BOY PATTON,	)	
Defendant.	)	

Defendant John Graham moves this Court for its Order prohibiting the state from introducing or eliciting any testimony from Mike McRoden or any other non-expert witness in which the witness alleges or speculates that Anna Mae Aquash lived for a period of time after being shot. This motion is based on the argument set forth below.

The government has provided notice of its intent to call several expert witnesses. In the materials and reports provided relative to these experts, there is no indication that any of them intend to testify as to whether Ms. Aquash remained alive after being shot.

On January 16, 2010, Defendant Graham was provided with grand jury testimony taken by the State of South Dakota in September of 2009. During that grand jury proceeding, FBI Agent Mike McRoden was asked a series of questions

about whether Ms. Aquash may have been alive after being shot. McRoden speculated for the grand jury that Aquash was alive after she was shot. McRoden testified that it was likely that Aquash, after being shot, lived long enough to curl up in a ball to ward off the cold. Exh. A.

McRoden has not been tendered as an expert witness and he is not qualified to render the opinion given. McRoden's speculative, foundationless testimony is elicited to create an emotional response among the grand jurors and to prejudice them against the defendant. Whether the testimony is elicited from McRoden or an expert it lacks probative value. The issue as to whether Ms. Aquash lived for a time after being shot or died immediately does not relate to any element before the jury. The only reason the testimony would be introduced by the government is to create prejudicial speculation among the jurors as to her level of suffering and to bias the jurors against the defendants.

Because the testimony is not relevant to any material issue and is highly prejudicial, the state should be prohibited from introducing or eliciting it. Fed.R.Evid. 401 & 402 (only relevant evidence admissible), 403 (exclusion of

unfairly prejudicial evidence permissible), and, 702 (experts permitted to testify as to facts in issue).

Dated February 19, 2010.

/s/ John R. Murphy
John R. Murphy

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STATE OF SOUTH DAKOTA)		IN THE CIRCUIT COURT
) SS		
COUNTY OF PENNINGTON)		OF THE SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	CRIM. NO. 09-3953
	)	
vs.	)	DEFENDANT GRAHAM'S
	)	OBJECTION TO MOTION TO PROTECT
JOHN GRAHAM	)	DISCOVERY MATERIALS
a/k/a JOHN BOY PATTON,	)	
Defendant.	)	

John Graham, Defendant, through his counsel, John R. Murphy, objects to paragraph 1 of the State's Motion to Protect Discovery Materials. The relief requested by the State will interfere with Graham's preparation of his defense.

The State has asked the Court to prohibit the defense from copying, sharing or divulging discovery materials to any "outside person" without prior court approval. Motion at ¶ 1. The State claims this will not interfere with the performance of ministerial tasks, in-house research, or other office related tasks. Graham contends it will limit his ability to investigate and prepare a defense.

If this relief is granted, defense counsel could not show a witness a report or let them listen to a tape of a statement allegedly made by them. To do so might be construed as divulging discovery to an "outside person." Counsel could not give his investigator or paralegal a copy of a police report or a photograph to take

with them as they travel to the alleged crime scene to see if the document or photograph accurately describes the area. To do so might be construed as going beyond "in house research" or "office related tasks." Counsel could be alleged to have violated the order merely by giving a transcript or document to a local copy center to blow up for a demonstrative exhibit. This would be a ministerial task, but one not performed by "counsel's support staff" or "office personnel."

The State has not offered to make any portion of this proposed restriction reciprocal. That is because the State has allowed lay people access to its discovery. Serle Chapman, an alleged lay witness for the State, has been given access to discovery materials. Chapman's interviews repeatedly reference the contents of statements given by other witnesses (e.g. Al Gates) to law enforcement officers and the grand jury. Chapman was recorded discussing with one witness, Ka-Mook Ecoffey, the fact that he had been allowed to listen in with police while they secretly recorded a conversation between Ecoffey, Troy Lynn Yellow Wood and Arlo Looking Cloud. Thus, the State has not hesitated to divulge discovery to its witnesses in the preparation of this prosecution.

It would be fundamentally unfair and deny Graham the right to due process by severely restricting his use of discovery. This is especially true in light of the manner in which the prosecution has divulged discovery to others.

Defense counsel has offered not to provide copies of discovery to his client or witnesses. However, he and persons working with him, whether "in office" or not, should be allowed to use the discovery in any manner necessary to prepare Graham's defense.

Dated March 12, 2010.

/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 depositing the same in the U.S. Mail at Rapid City, South Dakota, first class postage prepaid, at his/her/their last known address(es), to wit:

Rod Oswald
Assistant Attorney General
P.O. Box 70
Rapid City, SD 57709-0230

Dated March 12, 2010.

/s/ John R. Murphy
John R. Murphy

STATE OF SOUTH DAKOTA)		IN THE CIRCUIT COURT
) SS		
COUNTY OF PENNINGTON)		OF THE SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	CRIM. NO. 09-3953
	)	
vs.	)	DEFENDANT GRAHAM'S MOTION
	)	IN LIMINE RE: MARSHALL'S
JOHN GRAHAM	)	CRIMINAL HISTORY &
a/k/a JOHN BOY PATTON,	)	CONNECTION TO RUSSELL MEANS
Defendant.	)	

Defendant John Graham moves this Court for its Order prohibiting the State from introducing or eliciting any testimony regarding Vine Richard Marshall's criminal history, that he had been charged with murder at the time of the acts alleged in Mr. Graham's case, that he was later convicted thereof, that he subsequently confessed thereto, and that he was believed to be Russell Means' enforcer and/or gunman.

SUMMARY OF FACTS

Vine Richard Marshall was charged with murder for shooting a man in a bar in Scenic, South Dakota, in 1975. He was awaiting trial and was out on bond in December of 1975, the time frame alleged for the charges against Mr. Graham. Marshall was subsequently convicted at trial of the murder. Nineteen years later he confessed to the crime in order to have his sentence commuted.

At Mr. Marshall's recent federal murder trial, evidence of Mr. Looking Cloud's knowledge of the charges pending against Mr. Marshall, and his subsequent conviction, were admitted for a limited purpose. Specifically, the Court held that this evidence was admissible to rebut an allegation of recent fabrication by Fritz Arlo Looking Cloud. That ruling was based on the following:

In statements dating from 1994 through 2008, Mr. Looking Cloud denied going to Mr. Marshall's residence with Anna Mae Aquash in 1975. In 2008, his story changed. He claimed he had gone to Marshall's house with Ms. Aquash, Theda Clarke, and John Graham. He also claimed that while at the house, Mr. Marshall gave Ms. Clarke the gun used in the murder. The Court held that because Mr. Looking Cloud had been cross-examined by Mr. Marshall about this change in his story in 2008, the government could ask Mr. Looking Cloud why he hadn't told anyone previously about stopping at Marshall's house. The limited basis of the admission was to explain that Looking Cloud previously feared retaliation by Mr. Marshall based on his personal knowledge of Mr. Marshall's involvement in the Scenic bar murder.

When the government attempted to rehabilitate Mr. Looking Cloud on re-direct examination, Mr. Looking Cloud gave unexpected testimony. Mr. Looking Cloud stated he feared Mr. Marshall based on his involvement in the Scenic bar

incident. He then blurted out that Mr. Marshall's was Russell Means' "enforcer." Motions for mistrial were debated and corrective instructions were given. The government was directed to meet privately with Mr. Looking Cloud and advise him of the permissible scope of his testimony. On re-cross examination, Mr. Looking Cloud then blurted out that Mr. Marshall was Mr. Means' "gunman." Similar motions for mistrial were debated and corrective instructions were given. The whole episode delayed the trial for approximately 45 minutes.

ARGUMENT

The State should not be allowed to introduce or elicit testimony from any witness that Mr. Marshall was alleged to be involved in a murder at the time of the events at issue, that he was subsequently convicted thereof, that he confessed later, or that he was Russell Means' enforcer or gunman or anything similar.

In Mr. Graham's case, this information is not relevant. Mr. Looking Cloud's knowledge, or any other witness' knowledge, of Mr. Marshall's history is not relevant or probative to whether Mr. Graham committed the acts alleged. There is no evidence that Graham knew about Marshall's past. Both men have given statements wherein they deny knowing the other. Graham has never alleged that he changed his conduct or story based on fear of Marshall.

The sole purpose of admitting that evidence would be for the State to try to prove guilt by associating Graham with a disreputable character. That is not a permissible basis for the admission of this kind of evidence.

The only point at which this evidence would become admissible is if Mr. Looking Cloud is cross-examined as to his change in stories regarding the trip to Mr. Marshall's home. If Mr. Graham does not allege recent fabrication as to why Mr. Looking Cloud previously omitted going to Mr. Marshall's house, the evidence has no relevance.

It would be highly prejudicial to admit this evidence. It is inadmissible character evidence pertaining to a person who is not being prosecuted with Mr. Graham. It is an attempt to attach liability to Mr. Graham through his alleged association with a convicted murderer. It would be admitted merely to inflame the jury.

The need for a pretrial ruling in this case is evident. Mr. Looking Cloud is a "loose cannon." He blurted out matters and disrupted Mr. Marshall's trial deliberately. The prosecution stated that it had instructed Mr. Looking Cloud prior to his testimony as to the limits of the examination. When arguing lack of bad faith regarding Looking Cloud's unsolicited testimony, the prosecution

admitted that it had no control over Mr. Looking Cloud. This matter must be addressed clearly and unequivocally prior to trial.

CONCLUSION

For these reasons, until such time as the Court has ruled on the issue out of the presence of the jury, and absent a showing that there is a legal basis for admitting the evidence, the State should be prohibited from introducing or eliciting any evidence regarding Mr. Marshall's criminal history or his alleged association with Russell Means. The prosecution should also be ordered to instruct Mr. Looking Cloud as to the Court's ruling on this matter.

Dated April 22, 2010.

/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 depositing the same in the U.S. Mail at Rapid City, South Dakota, first class postage prepaid, at his/her/their last known address(es), to wit:

Rod Oswald
Assistant Attorney General
P.O. Box 70
Rapid City, SD 57709-0230

Dated April 22, 2010.

/s/ John R. Murphy
John R. Murphy

STATE OF SOUTH DAKOTA)		IN THE CIRCUIT COURT
) SS		
COUNTY OF PENNINGTON)		OF THE SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	CRIM. NO. 09-3953
	)	
vs.	)	DEFENDANT GRAHAM'S MOTION
	)	IN LIMINE RE: LIGATURE MARKS
JOHN GRAHAM	)	AND/OR REQUEST FOR DAUBERT
a/k/a JOHN BOY PATTON,	)	HEARING
Defendant.	)	

Defendant John Graham moves this Court for its Order prohibiting the State from introducing or eliciting any testimony from Robert Ecoffey or any other law enforcement or lay witness that Anna Mae Aquash's body showed signs of ligature marks on her wrists. This motion is based on the argument set forth below.

FACTS

At Vine Richard Marshall's federal trial, the government admitted evidence through Robert Ecoffey, a law enforcement officer, that he believed marks on Anna Mae Aquash's wrists were ligature marks consistent with her having been tied up. He acknowledged he did not see her actual body at the time she died. He acknowledged his first substantive involvement in the case was in 1994, nineteen years after the alleged crime. He based his opinion on old Polaroid photographs

taken in 1975 that are of substandard quality. He admitted that his primary experience in observing ligature marks came from responding to suicides by hanging.

At the same trial, the government admitted evidence through Dr. Gary Peterson. Dr. Peterson was the forensic pathologist who conducted the second autopsy. He is an eminently qualified medical doctor and lawyer with approximately 40 years experience in the field of forensic pathology. He is the former head of the Hennepin County Medical Examiner's Office and has conducted thousands of autopsies. He has testified hundreds of times.

Dr. Peterson stated, based on questions put to him by the government, that based on his review of the photographs of Ms. Aquash's wrists, he could not render a conclusion as to whether there was any evidence of ligature marks on Aquash's body. He stated he had viewed the photographs as recently as the same day of his testimony and still could not render an opinion that they showed evidence of ligature marks. When pressed by the government, he repeated that he would not render an opinion that the alleged marks were ligature marks. He also rebutted other portions of Ecoffey's testimony where Ecoffey claimed a correlation between heart activity and ligature marks. Peterson denied any such correlation.

LAW

The State has not provided any pretrial expert witness disclosures regarding its intent to call Ecoffey or any other person as a witness to opine as to the existence of ligature marks. Absent such a notice, the State should be automatically precluded from calling any witness to render an opinion on the issue. SDCL 19-15-6.

Additionally, the evidence is inadmissible as it fails to pass the threshold inquiry for admission of all scientific evidence: reliability. State v. Lemler, 2009 SD 86, ¶ 22. The State knows that Ecoffey's opinion, which is not based on medical training, and which is based on his empirical observations in dissimilar cases, is not supported by the State's own expert witness. This is not a garden variety "battle of experts" where reasonable expert minds disagree. Ecoffey is not an expert, Peterson is, and they are both the State's witnesses.

If the State intends to admit Ecoffey's testimony regarding the existence of ligature marks, Graham asks that this Court Order the State to fully comply with the mandates of the rules of discovery in regard to disclosure of expert witness reports and examinations. SDCL 23A-13-4; 19-15-6. And, Graham asks that a hearing be held so that the Court can determine whether the State has met its burden of establishing the foundation for admission of this evidence under

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

Dated April 22, 2010.

/s/ John R. Murphy
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 depositing the same in the U.S. Mail at Rapid City, South Dakota, first class postage prepaid, at his/her/their last known address(es), to wit:

Rod Oswald
Assistant Attorney General
P.O. Box 70
Rapid City, SD 57709-0230

Dated April 22, 2010.

/s/ John R. Murphy
John R. Murphy

STATE OF SOUTH DAKOTA)		IN THE CIRCUIT COURT
) SS		
COUNTY OF PENNINGTON)		OF THE SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	CRIM. NO. 09-3953
	)	
vs.	)	DEFENDANT GRAHAM'S
	)	ADMINISTRATIVE MOTIONS
JOHN GRAHAM	)	
a/k/a JOHN BOY PATTON,	)	
Defendant.	)	

Defendant John Graham moves this Court: (1) for a sequestration order for all witnesses; (2) for permission to have his paralegal sit at counsel table; (3) for the defendant to appear in court without shackles or handcuffs; and, (4) to permit the defendant to appear in street clothes.

Dated April 23, 2010.

/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 depositing the same in the U.S. Mail at Rapid City, South Dakota, first class postage prepaid, at his/her/their last known address(es), to wit:

Rod Oswald
Assistant Attorney General
P.O. Box 70
Rapid City, SD 57709-0070

Dated April 23, 2010

/s/ John R. Murphy
John R. Murphy

STATE OF SOUTH DAKOTA)		IN THE CIRCUIT COURT
) SS		
COUNTY OF PENNINGTON)		OF THE SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	CRIM. NO. 09-3953
	)	
vs.	)	DEFENDANT GRAHAM'S
	)	MOTION FOR TWENTY
JOHN GRAHAM	)	PEREMPTORY CHALLENGES
a/k/a JOHN BOY PATTON,	)	
Defendant.	)	

John Graham, Defendant, through his counsel, John R. Murphy, moves this Court to allow him to twenty peremptory challenges at trial.

SDCL 23A-20-20 gives Mr. Graham twenty (20) peremptory challenges in this case. In a typical joint trial with multiple defendants, those challenges would be split among the defendants. However, SDCL 23A-20-22 permits the Court to grant defendants in multi-defendant cases additional peremptory challenges, and to allow them to exercise them separately, if necessary and proper.

At this time it is not clear whether Graham's case will be tried jointly with Thelma Rios's case. The defendants are charged in separate files, and the State has never moved to join the cases for trial. Graham will oppose any attempt to join the cases for trial.

However, if the State moves for a joint trial, and the Court overrules Graham's objection, Graham moves under SDCL 23A-20-22 for twenty (20) peremptory challenges to exercise on his own. Good cause exists for granting this request.

This case has been followed by the public and covered by the media extensively for seven (7) years. Throughout that time, Graham's name has been in the paper, on TV and the subject of books and movies. There have already been two trials in this case where Graham's involvement was widely discussed. Graham's multiple appeals in his federal case and the subsequent multiple dismissals of federal charges have garnished much attention. Rios's name was hardly mentioned in either trial and has not been the subject of nearly the press attention as Graham's name. Rios has not litigated any substantive matter in her own case and thus has not generated much pretrial interest.

Infamous matters and well known public figures will be discussed during trial. The occupation of Wounded Knee, the killing of two FBI agents, the Custer County Courthouse riots, the bombings at Mount Rushmore, and other infamous incidents will be presented to the jury. At both of the previous federal trials, the government has gone to great lengths to introduce evidence about well known persons such as Leonard Peltier, Russell Means, Dennis Banks, Bruce Ellison and

Charles Abourezk.

Both defendants and the decedent are alleged to have been members in the American Indian Movement (A.I.M.). That organization is viewed unfavorably by many in the community. Further, references to A.I.M. membership is likely to cause jurors to be predisposed against the defendants.

The defendants are not aligned in interest. Because they have separate and inconsistent theories of defense, they will not be sharing or pooling peremptory challenges. Instead, they will each be exercising challenges based on their own theories of the case.

Both defendants face a mandatory life sentence if convicted.

The amount of pretrial publicity, the past history of political and social unrest surrounding this case, the negative associations created by A.I.M. membership, and the inconsistent defense theories, all strongly suggest a need for more peremptory challenges.

Defendant Graham asks that he be permitted the same twenty (20) peremptory challenges that he would have gotten if he was tried alone in this case.

Dated April 23, 2010.

/s/ John R. Murphy
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Rod Oswald
Assistant Attorney General
P.O. Box 70
Rapid City, SD 57709-0070

Dated April 23, 2010.

/s/ John R. Murphy
John R. Murphy

STATE OF SOUTH DAKOTA)		IN THE CIRCUIT COURT
) SS		
COUNTY OF PENNINGTON)		OF THE SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	CRIM. NO. 09-3953
	)	
vs.	)	DEFENDANT GRAHAM'S MOTION
	)	IN LIMINE RE: BAGGAGE NOTE
JOHN GRAHAM	)	
a/k/a JOHN BOY PATTON,	)	
Defendant.	)	

Defendant John Graham moves this Court for its order prohibiting the state from introducing or eliciting testimony through Cleo Marshall Gates about the contents of an alleged "baggage" note.

FACTS

Cleo Marshall Gates is Vine Richard Marshall's ex-wife. She has testified that one night in the winter of 1975 Theda Clarke, Anna Mae Aquash, and two unknown young males, came to her home. During the time they were in the home, or at some point after they left, Mr. Marshall told her he saw a note, written by an unknown person at an unknown time, that referenced taking care of or holding on to baggage or luggage. The State's theory is that the reference to baggage or luggage meant Aquash.

Ms. Gates has an unclear recollection of what the note actually said. She never saw the note. She vaguely recalls what Marshall told her it said. The note does not exist and no other person is alleged to have read the note or recall its contents.

ARGUMENT

Cleo Marshall Gates should be prohibited from testifying as to the existence of the note or contents thereof. This testimony is inadmissible hearsay on several levels.

First, Gates did not see the note. She cannot testify that the note existed as she has no basis for personal knowledge of this fact. Thus, anything she says about the note is hearsay from Marshall.

Second, Gates should not be able to testify as to what Marshall told her of the note. This would be testimony as to an out of court statement made by Marshall as to an out of court statement contained in the note. Marshall will not be testifying as to the contents of the note and neither will any other witness. Thus, her testimony would be double hearsay.

Third, the statement is not admissible as a non-hearsay admission by a party opponent. This was the grounds for admission of Gates' testimony in Marshall's

trial. In Graham's trial, neither Marshall nor Gates are party-opponents. Fed.R.Evid. 801(d)(2); SDCL 19-16-3. Nor is the author of the note a party-opponent, as this person is unknown. Thus, the fundamental foundational requirement for admission under this rule is not met.

Fourth, the statement is not admissible as the statement of a co-conspirator. Fed.R.Evid. 801(d)(2); SDCL 19-16-3. Cleo Gates, to the extent she is the testifying declarant, has never been alleged to have been a member of any conspiracy. Marshall was acquitted of all charges regarding this matter. There is no factual basis from which the court Could find the foundational requirements for admissibility of the statement on the basis that Marshall's statement to Gates was a co-conspirator's declaration. State v. Tiegen, 2008 SD 6, ¶ 27. There is no credible proof that Marshall and Graham were members of the same conspiracy. United States v. Guerra, 113 F.3d 809 (8th Cir. 1997). The jury quickly rejected that theory in Marshall's federal case, in which he was tried as an aider and abetter to Graham. There is no plausible factual basis for alleging that Marshall's statement to Gates furthered the objectives of the conspiracy. United States v. DeLuna, 763 F.2d 897, 909 (8th Cir.), cert. denied, 474 U.S. 980 (1985). Marshall's statement was purely descriptive, and was not even a description of his

own criminal activity, thus it is not admissible as co-conspirator statements. United States v. Mitchell, 31 F.3d 628 (8th Cir. 1994).

Fifth, Gates' testimony cannot come in as a statement against Marshall's interest. Fed.R.Evid. 804(b)(3); SDCL 19-16-32. There are three basic foundational prerequisites under this rule: (1) the declarant must be unavailable; (2) at the time the statement was made it must be so contrary to the declarant's penal interest that a reasonable person would not say it unless true; (3) and, because the exception is not a firmly rooted exception to the rule against hearsay, Lilly v. Virginia, 527 U.S. 116 (1999) (plurality opinion), the statement must be corroborated by circumstances that clearly indicate its trustworthiness, State v. Lindner, 2007 SD 60, ¶ 8. These foundational matters cannot be established in this case.

The note does not exist. Therefore, its alleged contents would have to come in through Gates via Marshall. Gates has limited recollection of what she was told about the note, and never claims to have seen it herself. No information is known as to the note's author, when it was written, its exact contents, or the circumstances under which it was written. No third party has ever claimed to have read the note. Therefore, there are no corroborating circumstances clearly establishing the trustworthiness of Marshall's statements to Gates about the note.

And, there is no foundation that the statement about that note was against any declarant's penal interest to such an extent that it meets the requirements of the statute. It was not against Gates' penal interest to be told about the note by Marshall. The statement by Marshall to Gates that the note existed and his description of its contents was not so against Marshall's interest as to satisfy the foundational requirements of the statute. He merely described the contents of a note. Gates testified that Marshall did not agree to do what was implied in the note, nor did he manifest any agreement with the request being made. He merely told her about the note, and shortly thereafter escorted Clarkee, Looking Cloud, Graham and Aquash out of his home. Marshall's mere description of the existence of the note did not subject him to any criminal liability, and thus renders his statement not a statement against penal interest.

CONCLUSION

This matter should be addressed pretrial. The foundational requirements of the various evidentiary statutes are too complicated to parse out before the jury, and in-trial consideration will delay the orderly progression of the case. Further, on such potentially prejudicial matters, it is important to resolve the matter so that witnesses don't blurt out inadmissible materials to loosely worded questions. For

that reason, Graham asks the Court to issue its ruling prohibiting the State from introducing Gates' testimony on this issue.

Dated April 23, 2010

/s/ John R. Murphy
John R. Murphy
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(605) 342-2909

CERTIFICATE OF SERVICE

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Rod Oswald
Assistant Attorney General
P.O. Box 70
Rapid City, SD 57709-0070

Dated April 23, 2010.

/s/ John R. Murphy
John R. Murphy

STATE OF SOUTH DAKOTA)		IN THE CIRCUIT COURT
) SS		
COUNTY OF PENNINGTON)		OF THE SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	CRIM. NO. 09-3953
	)	
vs.	)	DEFENDANT GRAHAM'S MOTION
	)	IN LIMINE RE: LAY WITNESS
JOHN GRAHAM	)	OPINION AS TO DURATION
a/k/a JOHN BOY PATTON,	)	OF EXPOSURE
Defendant.	)	

Defendant John Graham moves this Court for its Order prohibiting the state from introducing or eliciting any lay testimony or testimony through an expert witness that has not been properly noticed under SDCL 19-15-6 as to the duration of time Aquash's body had been left in the badlands before she was discovered by law enforcement.

At Vine Richard Marshall's trial law enforcement officers testified as to their speculative beliefs as to how long Aquash's body had been in the badlands prior to its discovery. These witnesses were not expert witnesses and no foundation was laid for their testimony. No objections were made to this testimony, so no ruling as to foundation was made.

The State has not provided any pretrial expert witness disclosures regarding its intent to call any witness to opine as to the time of death or the duration of time

that the body was left in the badlands. Absent such a notice, the State should be automatically precluded from calling any witness to render an opinion on the issue. SDCL 19-15-6.

Additionally, the evidence is should be deemed inadmissible. The witnesses who rendered the testimony are not experts. No foundation was laid to support their testimony. Therefore, their opinion was not reliable. Reliability is the threshold requirement for the admission of scientific evidence. State v. Lemler, 2009 SD 86, ¶ 22. Complicated issues like the rate at which a body decomposes are not within the ken of lay or law enforcement officers. If the State seeks to elicit this information, it should only be allowed to do so through a qualified expert witness after full disclosure of the expert's report and basis for testimony.

Dated April 23, 2010

/s/ John R. Murphy

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Rod Oswald
Assistant Attorney General
P.O. Box 70
Rapid City, SD 57709-0070

Dated April 23, 2010.

/s/ John R. Murphy
John R. Murphy

STATE OF SOUTH DAKOTA)		IN THE CIRCUIT COURT
) SS		
COUNTY OF PENNINGTON)		OF THE SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	CRIM. NO. 09-3953
	)	
vs.	)	DEFENDANT GRAHAM'S MOTION
	)	IN LIMINE RE:
JOHN GRAHAM	)	VINE RICHARD MARSHALL'S
a/k/a JOHN BOY PATTON,	)	STATEMENTS
Defendant.	)	

Defendant John Graham moves this Court for its order prohibiting the state from introducing or eliciting any testimony regarding statements made by Vine Richard Marshall in the trial against John Graham.

FACTS

In federal court, Vine Richard Marshall was alleged to be John Graham's co-defendant. Mr. Marshall was expeditiously acquitted of all charges. Mr. Marshall was alleged to have made various statements regarding his own involvement in the case to law enforcement and to an informant, Serle Chapman. Those statements implicate Mr. Graham in the killing of Anna Mae Aquash. Mr. Marshall is not available as a witness as he has a Fifth Amendment right against self-incrimination and will not testify if subpoenaed.

ARGUMENT

Violation of Right to Confrontation:

Mr. Graham's right to confrontation will be violated if the inculpatory statements of a non-testifying accomplice that implicate him are admitted at trial. Bruton v. United States, 391 U.S. 123 (1968). Mr. Marshall's statements are inculpatory. The government strenuously argued at the federal trial that these statements were admissions against interest and/or admissions that went directly to Mr. Marshall's involvement in providing the murder weapon to Graham and others. Without Marshall as a witness, Graham cannot elicit from him his denial of having made the statement, or elicit from him the context of the comment.

Therefore, Marshall's statements are not admissible against Graham.

Not Admissible as Co-Conspirator Statements:

The State cannot admit these statements as those of a co-conspirator under SDCL 19-16-3 (5). Co-conspirator's statements are admissible in limited circumstances only:

> Before a co-conspirator's out-of-court statement may be admitted in evidence, (1) "there must be substantial evidence of conspiracy;" (2) "the statement must have been made while the conspiracy was continuing; and" (3) "the statement must have constituted a step in furtherance of the conspiracy."

State v. Tiegen, 2008 SD 6, ¶ 27 (citations omitted).

The first requirement is that there is substantial evidence of a conspiracy. This requires a showing that the defendant and the declarant are members of the same conspiracy. E.g. United States v. Guerra, 113 F.3d 809 (8th Cir. 1997). In this case, Marshall was quickly acquitted of being involved in the killing of Aquash. At his trial, numerous statements were admitted establishing that Marshall had no involvement with Graham or his alleged accomplices. Therefore, there is no foundation for admission on this basis.

The second requirement is that the statements were made during the course of the conspiracy. Tiegen, supra; Bourjaily v. United States, 483 U.S. 171, 182-83 (1987). Marshall's alleged statements were made approximately 30 years after Aquash was killed. There is no foundation to claim Marshall's statements were made during the conspiracy.

The third requirement is that the statements furthered the conspiracy. Marshall's statements were merely descriptive or explanatory, if in fact they were made at all. Statements that merely describe past criminal activity do not further a conspiracy's objectives and are not admissible. E.g. United States v. DeLuna,

763 F.2d 897, 909 (8th Cir.), cert. denied, 474 U.S. 980 (1985). Statements made by Marshall decades after the event did not further the conspiracy.

Therefore, none of Marshall's out of court statements are admissible as co-conspirator testimony.

CONCLUSION

None of Marshall's alleged statements are admissible against Graham. The Court should issue a pretrial order prohibiting any reference thereto to prevent irreparable harm to Graham if the statements are introduced before an objection can be made. A limiting or remedial instruction will not suffice to cure the harm.

Dated April 23, 2010.

/s/ John R. Murphy

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(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 depositing the same in the U.S. Mail at Rapid City, South Dakota, first class postage prepaid, at his/her/their last known address(es), to wit:

Rod Oswald
Assistant Attorney General
P.O. Box 70
Rapid City, SD 57709-0070

Dated April 23, 2010.

/s/ John R. Murphy
John R. Murphy

STATE OF SOUTH DAKOTA)		IN THE CIRCUIT COURT
) SS		
COUNTY OF PENNINGTON)		OF THE SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	CRIM. NO. 09-3953
	)	
vs.	)	DEFENDANT GRAHAM'S MOTION
	)	IN LIMINE RE:
JOHN GRAHAM	)	MYRTLE POOR BEAR'S
a/k/a JOHN BOY PATTON,	)	STATEMENTS
Defendant.	)	

Defendant John Graham moves this Court for its order prohibiting the state from introducing or eliciting any testimony regarding statements made by Myrtle Poor Bear in the trial against John Graham.

Myrtle Poor Bear is deceased. She was a notorious figure in the Indian community on the Pine Ridge Indian Reservation for giving false testimony in high profile cases, such as that of Leonard Peltier, and then later recanting the testimony. She had a long history of mental illness. Prior to her death she made various statements claiming to have received or heard admissions by various persons involved in the case against John Graham. None of those statements have ever been corroborated.

At the federal trial of Vine Richard Marshall, the government conceded Mr. Marshall's motion in limine on this topic. The government agreed not to put forth

any statements by Poor Bear. Marshall File Doc. 750.

Mr. Graham asks that this Court issue its Order prohibiting the introduction of any statements made by Myrtle Poor Bear to any other person absent a pretrial evidentiary hearing on Ms. Poor Bear's competency at the time she reported the alleged statements and the trustworthiness and corroborating circumstances surrounding the statements. See Williamson v. United States, 521 U.S. 594 (1994).

Dated April 23, 2010.

/s/ John R. Murphy

John R. Murphy
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Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

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Rod Oswald
Assistant Attorney General
P.O. Box 70
Rapid City, SD 57709-0070

Dated April 23, 2010

/s/ John R. Murphy
John R. Murphy

STATE OF SOUTH DAKOTA)		IN THE CIRCUIT COURT
) SS		
COUNTY OF PENNINGTON)		OF THE SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	CRIM. NO. 09-3953
	)	
vs.	)	DEFENDANT GRAHAM'S MOTION
	)	IN LIMINE RE:
JOHN GRAHAM	)	THEDA CLARKE NELSON'S
a/k/a JOHN BOY PATTON,	)	STATEMENTS
Defendant.	)	

Defendant John Graham moves this Court for its order prohibiting the state from introducing or eliciting any testimony regarding statements made by Theda Clarke a/k/a Theda Nelson in the trial against John Graham.

FACTS

Theda Clarke and John Graham are alleged to be accomplices in the killing of Anna Mae Aquash. Clarke has never been charged.

Clarke is not available as a witness. In April of 2010 she was declared competent in federal court. She then invoked her Fifth Amendment right to remain silent. She has stated that even if granted immunity, she will not testify. She was not called as a witness by either party in the federal prosecution of Vine Richard Marshall.

Approximately 25 years after Aquash was killed, Clarke is purported to have made statements to government informant Ka-Mook Ecoffey and law enforcement agents. The statements implicate her and Graham in the crime.

ARGUMENT

Violation of Right to Confrontation:

Mr. Graham's right to confrontation will be violated if the inculpatory statements of a non-testifying accomplice that implicate him are admitted at trial. Bruton v. United States, 391 U.S. 123 (1968). Clarke's statements are inculpatory. Clarke is purported to have said that the reason why she, Graham and Looking Cloud killed Aquash was to silence a witness. Without Clarke as a witness, Graham cannot elicit her denial of having made the statement (it was not recorded), or elicit from her the context of the comment.

Therefore, Clarke's statements are not admissible against Graham.

Not Admissible as Co-Conspirator Statements:

The State cannot admit these statements as those of a co-conspirator under SDCL 19-16-3 (5). Co-conspirator's statements are admissible in limited

circumstances only:

> Before a co-conspirator's out-of-court statement may be admitted in evidence, (1) "there must be substantial evidence of conspiracy;" (2) "the statement must have been made while the conspiracy was continuing; and" (3) "the statement must have constituted a step in furtherance of the conspiracy."

State v. Tiegen, 2008 SD 6, ¶ 27 (citations omitted).

To be admissible, co-conspirator statements must be made during the course of the conspiracy. Tiegen, supra; Bourjaily v. United States, 483 U.S. 171, 182-83 (1987). Clarke's alleged statements were made approximately 25 years after Aquash was killed. There is no foundation to claim Clarke's statements were made during the conspiracy.

To be admissible, co-conspirator statements must further the objectives of the conspiracy. Statements that merely describe past criminal activity do not further a conspiracy's objectives and are not admissible. E.g. United States v. DeLuna, 763 F.2d 897, 909 (8th Cir.), cert. denied, 474 U.S. 980 (1985). Clarke's alleged statements decades after the event did not further the conspiracy and are inadmissible.

Therefore, none of Clarke's out of court statements are admissible as co-conspirator testimony.

CONCLUSION

None of Clarke's alleged statements are admissible against Graham. The Court should issue a pretrial order prohibiting any reference thereto to prevent irreparable harm to Graham if the statements are introduced before an objection can be made. A limiting or remedial instruction will not suffice to cure the harm.

Dated April 23, 2010.

/s/ John R. Murphy
John R. Murphy
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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 depositing the same in the U.S. Mail at Rapid City, South Dakota, first class postage prepaid, at his/her/their last known address(es), to wit:

Rod Oswald
Assistant Attorney General
P.O. Box 70
Rapid City, SD 57709-0070

Dated April 23, 2010.

/s/ John R. Murphy
John R. Murphy

STATE OF SOUTH DAKOTA)		IN THE CIRCUIT COURT
) SS		
COUNTY OF PENNINGTON)		OF THE SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	CRIM. NO. 09-3953
Plaintiff,	)	
	)	**SUPPLEMENT TO**
vs.	)	DEFENDANT GRAHAM'S MOTION
	)	IN LIMINE RE: TIME OF DEATH
JOHN GRAHAM	)	TESTIMONY
a/k/a JOHN BOY PATTON,	)	
Defendant.	)	

Defendant John Graham previously moved this Court for its Order prohibiting the state from introducing or eliciting any testimony from Mike McRodden or any other non-expert witness in which the witness alleges or speculates that Anna Mae Aquash lived for a period of time after being shot. Additional sworn testimony has recently been presented that further supports the relief requested by Mr. Graham.

At the federal trial of Vine Richard Marshall, Dr. Gary Peterson, forensic pathologist, was asked questions by the government. In response to these questions, Peterson stated that he believes that Aquash's brain functions ceased immediately upon being shot. Any movement by Aquash after being shot, according to Peterson, were involuntary movements.

In light of Peterson's unrebutted, qualified expert testimony on this issue, it would be improper to allow FBI Agent McRodden to testify that he believed Aquash may have been alive for awhile after being shot. McRodden has no qualifications on this issue. McRodden did not perform the autopsy, as Peterson did. The only purpose for introducing this speculative testimony through McRodden would be to horrify the jurors at the thought that Aquash remained alive for a time after being shot, and, thus, was subject to suffering. This is the kind of prejudicial inflammatory speculation that SDCL 19-12-3 is designed to exclude.

Dated April 23, 2010.

/s/ John R. Murphy

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(605) 342-2909

CERTIFICATE OF SERVICE

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Rod Oswald
Assistant Attorney General
P.O. Box 70
Rapid City, SD 57709-0070

Dated April 23, 2010.

/s/ John R. Murphy
John R. Murphy

STATE OF SOUTH DAKOTA)		IN THE CIRCUIT COURT
) SS		
COUNTY OF PENNINGTON)		OF THE SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	CRIM. NO. 09-3953
	)	
vs.	)	DEFENDANT GRAHAM'S MOTION
	)	MOTION FOR DISCLOSURE OF
JOHN GRAHAM	)	IMMIGRATION BENEFITS,
a/k/a JOHN BOY PATTON,	)	REIMBURSEMENT RECEIPTS, AND
Defendant.	)	RECORD OF PAYMENTS

John Graham, Defendant, through his counsel, John R. Murphy, moves for discovery of three specific sets of items: (1) all documents and records relating to any immigration related benefits that were provided to Serle Chapman and Sarah Chapman by the United States government; (2) all receipts Serle Chapman, Sarah Chapman and/or Ka-Mook Ecoffey provided to the United States government in support of their request for reimbursement of expenses; and, (3) an updated ledger of all monetary payments along with supporting documents regarding all reimbursement payments made to Serle Chapman, Sarah Chapman and Ka-Mook Ecoffey.

FACTS

At the trial of United States v. Richard Marshall, Serle Chapman admitted that he had received extensive immigration related assistance from the United

States government as part of his work as an informant in this case. He and his wife were provided S-Visas, extensions on S-Visas, and green cards. He admitted that these benefits were the direct result of intervention by Assistant United States Attorney Robert Mandel, other government attorneys, and various FBI agents. Neither the government nor the State has provided Graham with any documents related to these immigration benefits provided to the Chapmans.

During the trial of United States v. Richard Marshall, Serle Chapman adamantly maintained that he was not a paid informant. He stated he was reimbursed for expenses. He said the process of getting reimbursed involved providing receipts to FBI Agent Graf, and then getting checks cut to him. By the time of the Marshall trial, he had been reimbursed approximately $100,000.00. This money was provided to him tax free because it was characterized as a "reimbursement." Part of the process of obtaining the money tax free was to provide receipts for each reimbursed expense. Similarly, Ka-Mook Ecoffey had been provided approximately $40,000.00 in tax free reimbursements for her work on behalf of the government. The government has never provided Graham with any of the alleged receipts for expenses incurred by Chapman or Ecoffey.

The amount of money paid to witnesses Chapman and Ka-Mook Ecoffey continues to increase with each trial they participate in. At present, the

government has conceded paying these witnesses roughly $140,000.00. However, the government has not consistently supplemented its discovery materials with updated ledgers of payments.

ARGUMENT

These materials should be disclosed because they are material to the presentation of Graham's defense and they go directly to the credibility of material witnesses:

1. The State has an affirmative obligation to provide Mr. Graham with all tangible items that are material to the preparation of his defense. SDCL 23A-13-3. These items are material to the preparation of his defense. Chapman and Ecoffey are key witnesses in this case. Their credibility will be of primary importance to resolution of the case.

Documents showing immigration benefits Chapman received go to his bias and credibility. The existence or lack thereof of receipts for claimed reimbursed expenses goes directly to the credibility of both Chapman and Ecoffey, particularly if they have been improperly receiving tax free money from the government for their involvement in this case without having the receipts to justify the payments.

This also goes directly to an oft-repeated claim of the government and State that Chapman and Ecoffey are not paid informants but merely reimbursed witnesses. If they do not have records supporting their reimbursement claims, they become paid informants. Last, the ledger of payments to each goes directly to the timing of payments to these witnesses. It is Graham's counsel's representation to the Court that the payment ledger will show that payments were made to these witnesses long after their active work in the case ceased. These payments correspond to their testimony as witnesses. This goes directly to bias, credibility and motive to fabricate.

2. Evidence affecting the reliability of a prosecution witness must be disclosed to the defense. Giglio v. United States, 405 U.S. 150, 154 (1972). This includes any express or implied offers to provide any benefit to a witness. See State v. Piper, 2006 SD 1, ¶ 19 (quoting Reutter v. Solem, 888 F.2d 578, 581 (8thCir.1989) ("evidence that could be used to impeach a witness for the prosecution falls within the Brady rule"); Reutter, supra, at 582 (disclosure applies to express or implied benefits). It is the prosecutor's duty to learn and disclose promises or offers made by other prosecutors involved in the case. Giglio, supra, at 154.

All of the material at issue in this motion is subject to disclosure under Giglio, supra. The immigration documents, the receipts for payment, and the payment ledgers, all go directly to the reliability, bias and credibility of material witnesses.

Dated May 4, 2010.

/s/ John R. Murphy
John R. Murphy
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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 depositing the same in the U.S. Mail at Rapid City, South Dakota, first class postage prepaid, at his/her/their last known address(es), to wit:

Rod Oswald
Assistant Attorney General
P.O. Box 70
Rapid City, SD 57709-0230

Dated May 4, 2010.

/s/ John R. Murphy
John R. Murphy

STATE OF SOUTH DAKOTA)		IN THE CIRCUIT COURT
) SS		
COUNTY OF PENNINGTON)		OF THE SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	CRIM. NO. 09-3953
	)	
vs.	)	DEFENDANT GRAHAM'S MOTION
	)	IN LIMINE RE: MEDIA INTERVIEWS
JOHN GRAHAM	)	AND MOTION FOR DISCLOSURE
a/k/a JOHN BOY PATTON,	)	
Defendant.	)	

Defendant John Graham moves this Court for its Order: (1) prohibiting the State from introducing at trial video taped programs relating to the death of Anna Mae Pictou Aquash in the guise of claiming that the programs are Graham's "statements"; (2) requiring the State to provide the Court and counsel with the exact versions of recorded statements by Graham it intends to admit at trial so that specific objections can be made prior to trial; (3) that the State be required to provide complete copies of the recorded statements by Graham, not only the production or redacted versions; and, (4) for a pretrial resolution of all these matters.

FACTS

At the trial of United States v. Richard Marshall, some matters related to the

redaction of statements were left unresolved until trial.[1] A hearing was held during the trial regarding the adequacy of certain redactions. When the court determined that the redactions were inadequate, one witness's direct examination had to be suspended. Other witnesses had to be called out of order. Redactions had to be accomplished during the trial.

The State has not formally notified either Graham or the Court of its intent to admit recorded interviews with John Graham. However, in the federal case against Mr. Graham, the government notified the Court of its intent to admit recorded interviews Graham gave with three media outlets. These recordings included a Canadian television news show called "The Fifth Estate," a video interview that was broadcast on MySpace by a group called "Native Youth," and a Canadian television news show on the Canadian Television (CTV) network called "First Story."

These broadcasts contain interviews with a number of people. They include narration by named and un-named commentators. They contain footage and photographic montages of Ms. Aquash, the crime scene, various AIM leaders and AIM activities. These broadcasts also contain selected statements by John

[1]These were not the same recordings at issue in Graham's case.

Graham, but do not include the entire, un-redacted version of Mr. Graham's statements or responses to the interviewers' questions.

The government is aware that one of its own witnesses has called the accuracy of the broadcasts into question. John Trudell complained that the producers of the Fifth Estate program interviewed him for a lengthy period of time. Then, his statements were selectively edited and presented out of context and in a manner that distorted the meaning. Graham Doc. 02536-37.

These broadcasts include conversations with Mr. Graham about subjects outside the scope of the charges in this case. Mr. Graham is asked to discuss his political views and his feelings about political figures and the court system.

ARGUMENT

A. THE COURT SHOULD REQUIRE THE STATE TO IMMEDIATELY PRODUCE THE EXACT VERSION OF THE BROADCASTS THAT IT INTENDS TO USE AT TRIAL AS MARKED EXHIBITS

To avoid the problems encountered at the Marshall trial, the Court should require the State to immediately produce as marked exhibits the statements it intends to admit at trial. This will enable the Court and the parties to make a complete record sufficient for appellate review of all objections to the statements. Prosecutor Mandel has had these statements for approximately five (5) years and

has been through this process before, and should be able to accommodate this request without any effort. Graham has never been provided with the exact, "trial ready" version of the statements.

B. A BASIS EXISTS FOR OBJECTING TO THE STATEMENTS AND REQUESTING IMMEDIATE PRODUCTION THEREOF

This is not a "garden variety" matter where the statements at issue are clearly admissible. The broadcasts previously identified as intended for admission by the government contained many objectionable materials.

The broadcasts previously identified contain narration and commentary. This is inadmissible hearsay.

The broadcasts previously identified as intended for admission by the government contained video montages. There are no references made as to the source or authenticity of any of the materials depicted. There is no foundation for admission of the video montages. Much of it is irrelevant and highly prejudicial, such as footage from the occupation of Wounded Knee and of political rallies and the occupation of federal buildings.

The broadcasts also contain segments of interviews with Graham where he discusses his present political beliefs and opinions about specific elected officials,

such as former governor Janklow. These statements by Mr. Graham should be excluded from presentation to the jury. They are not relevant or probative on any issue before the jury. SDCL 19-12-2/3. The State's sole purpose of admitting the statements would be to bias members of the jury who do not share Mr. Graham's political beliefs. This is not a valid purpose of the admission of evidence. SDCL 19-12-3.

C. THE STATE SHOULD BE REQUIRED TO DISCLOSE THE COMPLETE FOOTAGE OF GRAHAM'S INTERVIEWS

The broadcasts at issue contain selected portions of statements made by Graham. In some instances, it is not clear what question Graham is responding to. These purported statements should be viewed with skepticism because, as discussed above, one of the State's own witnesses has already complained that statements were edited in an unreliable manner.

SDCL 19-9-13 states in full:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

If the State is going to be permitted to introduce any portion of a broadcast interview with Mr. Graham, it should be required to produce the entire unedited

footage of the interview. That is the only way in which the defense and the Court can determine whether other parts of the interview should be considered contemporaneously with it.

If the State does not have access to the unedited footage or the producers of the programs, then the selected "sound bites" contained in these broadcasts should not be admitted at trial. Mr. Graham would be severely prejudiced if edited comments made by him were admitted at trial. He would have no way of proving that a comment selected for publication by the broadcaster was in response to a misleading question or taken out of context when edited into the program.

CONCLUSION

Mr. Graham asks this Court to require the State to immediately produce its "trial ready" versions of these video taped interviews so that Mr. Graham can make specific objections to the contents thereof and the Court can review the materials prior to trial. And, he asks that all statements by persons other than Mr. Graham in the programs be redacted as these statements, narration or commentary constitute inadmissible hearsay. Further, he asks that all footage and montages and other visual depictions contained in the programs be redacted as they are irrelevant and prejudicial. Last, he asks that the State be ordered to produce the

raw footage of Mr. Graham's interviews for these broadcast programs be produced for his review so that he can introduce them at trial if necessary to fairly explain or put in context statements introduced by the State.

Dated May 6, 2010.

_____COPY_____

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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 depositing the same in the U.S. Mail at Rapid City, South Dakota, first class postage prepaid, at his/her/their last known address(es), to wit:

Rod Oswald
Assistant Attorney General
P.O. Box 70
Rapid City, SD 57709-0070

Dated May 6, 2010.

_____COPY_____

John R. Murphy

STATE OF SOUTH DAKOTA)		IN THE CIRCUIT COURT
) SS		
COUNTY OF PENNINGTON)		OF THE SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	CRIM. NO. 09-3953
	)	
vs.	)	DEFENDANT GRAHAM'S MOTION
	)	IN LIMINE RE: STATEMENTS
JOHN GRAHAM	)	TO MEDICINE MAN
a/k/a JOHN BOY PATTON,	)	
Defendant.	)	

Defendant John Graham moves this Court for its Order in Limine. Graham seeks to preclude the introduction of two related forms of testimony. First, he seeks to preclude the introduction of statements he allegedly made to medicine man/spiritual leader Al Gates. Second, he seeks to preclude the admission of questions put to Graham that include a recitation of statements allegedly made by him to Gates.

A. BACKGROUND

Al Gates died in 2003. In 1994 Mr. Gates gave some statements to law enforcement and provided grand jury testimony regarding conversations he had with Graham in 1976. According to Gates, Graham was seeking spiritual advice when he spoke with him.

Gates was recognized as a spiritual leader and counselor in the Indian community. He practiced the "Indian religion" from 1944 to the time of his death in 2003. August 16, 1994 Grand Jury Testimony of Al Gates, Graham Doc. 03667, (Exhibit A). Robert Ecoffey, a member of the Oglala Sioux Tribe, former United States Marshal, present Bureau of Indian Affairs Superintendent for Pine Ridge, and a person who has investigated this case for approximately twenty years, repeatedly described Gates as a "spiritual leader" for people involved in the American Indian Movement. August 16, 1994 Grand Jury Testimony of Robert Ecoffey at Graham Docs. 00745-00746 (Exhibit B); April 21, 1994 Interview of John Graham at Graham Doc. 00951 (Exhibit C). Ecoffey identified Gates as someone to whom AIM members went for prayer and guidance. Exhibit B at Graham Docs. 00745-00746; Exhibit C at Graham Doc. 00951. Graham was in the American Indian Movement.

After Gates spoke with law enforcement and federal prosecutors, this information was turned over to FBI informant Chapman. Chapman never had direct contact with Gates. Gates was incapacitated with Alzheimer's disease by the time Chapman became an informant.

Federal prosecutors previously provided a notice of intent to admit hearsay that identified three statements related to Gates' conversation with Graham that

they sought to admit at trial. The matter was never ruled upon by the federal court because the case was dismissed.

The State has not provided a notice of its intent to admit this evidence. Anticipating that such a notice will come, Graham has pro-actively moved to limine out the evidence. He also asserts herein that he claims the privilege and has not waived it.

The first statement identified by federal prosecutors came from a conversation between Graham and Serle Chapman, an informant. Federal prosecutors misleadingly characterized this conversation as one where Graham admitted that"he was having a hard time with what he had done Anna Mae, wherein he went into the mountains around Denver and had a ceremony." Fed. File CR 03-50020, File Doc. 305, pp. 1-2, ¶ 2 (Exhibit D). That is not a fair description of the facts.

Graham participated in a lengthy, tape recorded interview with Chapman. The single-spaced transcript of that recorded interview is over 30 pages. During the interview Chapman turned the tape recorder off. February 11, 2001 Interview of John Graham at Graham Docs. 00977-00978 (Exhibit E). Graham did not ask him to do this.

At that point, according to Chapman's notes made at an indeterminate time after the interview, Chapman recites a long litany of allegations to Graham that he claims came from Gates. Exhibit E at Graham Docs. 00977-00978. Graham's first response is "Uh huh." Exhibit E at Graham Docs. 00977-00978. Chapman does not ask any specific question to Graham about Gates' allegation. Nor does Chapman seek to confirm any particular fact contained within his recitation of Gates' allegations. Exhibit E at Graham Docs. 00977-00978. Graham then tries to respond to Chapman's narrative by saying, "Well, you know . . ." Before Graham can finish, Chapman cuts him off and begins discussing a completely unrelated topic involving Vernon Bellecourt. Exhibit E at Graham Docs. 00977-00978.

The second statement the federal prosecutors identified comes from Gates' grand jury testimony in 1994. During his testimony, Gates was asked a leading question: "And during this conversation that you had with John Boy, did he tell you that he was present when Anna Mae was killed?" Exhibit A at Graham Doc. 03671. Gates skirts the question. He does not say Graham said he was present. Rather, he answers with a statement of Gates' personal belief: "Yeah, yeah, he was present." Exhibit A at Graham Doc. 03671.

The third statement identified by the federal prosecutors were statements allegedly given by Graham in response to a statement, not a question, made by law enforcement. In an unrecorded police interview, Exhibit C at Graham Doc. 00951, the agent summarized a multitude of facts from an alleged conversation between Graham and Gates. Graham is not asked whether the facts contained in the question are true. The facts are not recited in question form. Exhibit C at Graham Doc. 00951. Graham's only response to the factual recitation is "yeah." Exhibit C at Graham Doc. 00951.

B. PRIVILEGE PREVENTS ADMISSION OF THIS EVIDENCE

All of Graham's statements to Gates, and the derivative use made of these statements by law enforcement and Chapman, are protected by the priest-penitent privilege. Graham did nothing to waive this privilege. The fact that Gates may have violated the privilege without Graham's consent or knowledge does not impede Graham's ability to claim the privilege in this legal proceeding.

"The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return." Trammel v. United States, 445 U.S. 40, 51 (1980). Communications

made to a religious leader for the purpose of seeking "religious counsel, advice, solace, absolution or ministration" are covered by the privilege. Matter of Fuher, 419 N.Y.S.2d 426, 431 (N.Y.Supp. 1979) (citing United States v. Wells, 446 F.2d 2 (2nd Cir. 1972), and, Burger v. State, 231 S.E.2d 769 (S.Ct.Ga. 1977).

According to Gates' own statements, Graham came to him, a spiritual leader, for the purpose of receiving spiritual guidance, advice and solace. All statements made by Graham to Gates are absolutely protected by privilege. Trammel, supra; Fuher, supra.

Federal prosecutors and law enforcement officers worked with Gates to violate Graham's right to confidentiality. The grand jury, law enforcement officers, federal prosecutors and Chapman should never have been privy to this information. Therefore, their use of the information should be enjoined as they were never lawfully in possession of the information to begin with.

To allow Gates' grand jury testimony to come in would violate the privilege. It would also violate the privilege to allow the jury to hear the narrative statements put to Graham that describe his contacts with Gates.

C. ADMISSION WOULD VIOLATE THE CONFRONTATION CLAUSE

Gates' statements are also inadmissible because admission would violate

Graham's right to confrontation.

Gates made his statements to law enforcement and the grand jury. These were made during a time when Gates was aware this matter was being investigated by state and federal authorities. Gates was interviewed in connection with that investigation and provided testimony as part of that investigation. Gates' statements are, therefore, testimonial. Crawford v. Washington, 541 U.S. 36, 53-54 (2004).

Gates' statements were not subject to cross-examination and he cannot now be examined. Thus, Graham cannot exercise his right to confrontation in regard to Gates. Therefore, Gates' statements to the grand jury, or as related through third party witnesses (Chapman, law enforcement officers), is inadmissible. Id.

D. THE TESTIMONY IS DOUBLE HEARSAY

It is clear that Chapman never discussed the matter directly with Gates. It is unclear as to whether the law enforcement officers that interviewed Graham spoke directly with Gates.

In Chapman's case, and in the case of the law enforcement officers if they did not speak directly with Gates, this testimony is subject to exclusion as double hearsay. Gates' out of court statements to the federal prosecutor or the grand jury

are hearsay. The prosecutor then relayed Gates' statements to him (or revealed the grand jury testimony) to Chapman and law enforcement officers. Chapman's and law enforcement's statements to Graham as to what Gates told others is double hearsay. SDCL 19-16-36. As such, it is inadmissible.

E. PUBLIC POLICY FAVORS EXCLUSION

The government should not be allowed to admit Graham's alleged statements to Gates, either directly from the grand jury testimony or indirectly through the statements made by Chapman and law enforcement officers when they re-state Gates' allegation. The priest-penitent privilege is absolute and the interests that it promotes are more important than any benefit to the State in introducing this evidence. And, Graham's right to confrontation is more important than any benefit derived by the State in introducing any portion of Graham's alleged conversations with Gates, or his responses to statements concerning these conversations. Graham would be substantially prejudiced and important rights would be infringed if the government is allowed to reference this topic.

The State seeks to establish a dangerous precedent in this case. The government obtained privileged information without a waiver. It then communicated that information to law enforcement and to Chapman, a lay person

with no claim of right to this information and no legal obligation to keep it confidential. In fact, at all times relevant to this action, the government knew that Chapman was a journalist who was writing a book about the matter at the same time he was being reimbursed as a government witness.

Once law enforcement and Chapman had the information, they tried to elicit responses from Mr. Graham by telling him that his confidential communications were no longer private. Both Chapman and law enforcement deliberately itemized Gates' statements to Graham to let him know the extent of Gates' breach.

If the State is allowed to circumvent privilege by releasing confidential information to third parties, who then confront the privilege holder in order to seek confirmation, the value of the privilege disappears. The State should not be encouraged to employ these tactics in order to obtain evidence. The only party in a position to stop this abuse is the court, and the remedy is to prevent the State from introducing any of the Graham's alleged statements to Gates.

F. THE STATEMENTS ARE NOT RELIABLE

Both Graham's alleged statements to Chapman and law enforcement were not recorded. And, Graham did not take any act or make any statement constituting an adoption thereof. His response to both recitations was ambiguous

and non-responsive. When he tried to respond to Chapman, he was cut off. To admit unrecorded, un-examined, double hearsay statements into evidence would violate Graham's right to privilege, confrontation and due process

G. NON-HEARSAY GROUNDS FOR ADMISSION

Federal prosecutors sought to admit Gates' grand jury testimony for impeachment purposes or to explain the propriety of the police investigation of this matter. Both asserted "non-hearsay" grounds are without merit.

The impeachment justification for admission of the evidence is not supported by law. A witness's prior statement may be used to impeach that witness under Fed.R.Evid. 613 and SDCL 19-14-24. In this case, Gates' prior statements could be used to impeach Gates, not Graham. Gates made statements to law enforcement implicating Graham in the crime. Gates is the declarant, not Graham. Gates is not available as a witness or subject to cross-examination, which implicates the confrontation clause. Thus, Graham can't be impeached by a law enforcement officer or other witness testifying as to what Gates told them that Graham had told him. If Graham testifies, he cannot be impeached with statements allegedly made by him in a privileged context.

The notion that Gates' statements or Graham's responses are necessary to explain the course of the investigation is a fiction created by federal prosecutors to justify the admission of inadmissible evidence. There is no context in which the government would need to recite a lengthy string of facts improperly divulged by Gates in 1994 during the course of confidential communications in order to explain their investigation of this case.

H. THE PRIVILEGE EXISTS AND WAS NOT WAIVED

Federal prosecutors asserted that Graham failed to establish the existence of the privilege or demonstrate that it has not been waived. Graham has affirmatively claimed privilege. To support his claim, he cited the government's own documents to establish that Gates was a medicine man who provided spiritual guidance to people. Implicit in Graham's assertion of the privilege and express in this motion in limine is the assertion that any communication he may have had with Gates was confidential. The value of protecting the sanctity of such communications between members of the clergy and their parishioners is well recognized and should not be violated unless compelling reasons exist. Further, Graham has consistently asserted he did nothing to waive the privilege, and neither the State or federal prosecutors have come forward with any evidence of a waiver thereof.

CONCLUSION

This matter should be addressed pretrial. It is a complicated legal and factual matter. Resolution of the matter will affect voir dire, opening statements, and the orderly progression of the trial.

Dated May 6, 2010.

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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 depositing the same in the U.S. Mail at Rapid City, South Dakota, first class postage prepaid, at his/her/their last known address(es), to wit:

Rod Oswald
Assistant Attorney General
P.O. Box 70
Rapid City, SD 57709-0070

Dated May 6, 2010.

_____COPY_____
John R. Murphy

STATE OF SOUTH DAKOTA)		IN THE CIRCUIT COURT
) SS		
COUNTY OF PENNINGTON)		OF THE SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	CRIM. NO. 09-3953
	)	
vs.	)	MOTION IN LIMINE
	)	REGARDING PELTIER THREAT
JOHN GRAHAM	)	
a/k/a JOHN BOY PATTON,	)	
Defendant.	)	

Defendant John Graham moves this Court for its Order prohibiting the State from introducing evidence that Aquash had been threatened by Leonard Peltier or others because she was believed to be an informant. This evidence is inadmissible hearsay and not subject to admission under any exception.

SUMMARY OF FACTS AND ARGUMENT

Graham anticipates that the State will try to introduce evidence through third party witnesses that Leonard Peltier held a gun to Aquash's head because he believed she was an informant. This incident allegedly occurred in Farmington, New Mexico, in June of 1975. John Graham was not alleged to be any part of this incident.

This testimony will not come through eye witnesses. The only persons present during this alleged event were Aquash, Peltier and Darrel "Dino" Butler,

who denies the event occurred. Thus, it will come through multiple layers of hearsay in the form of statements Aquash allegedly made to others, who then will relay them to the jury. This testimony was not the subject of a specific objection in the trial of Richard Marshall.

The first basis for objection is relevancy and lack of probative value compared to its prejudicial effect. As evidenced by the two prior trials arising from this case, the State/government is intent on trying the American Indian Movement, and in particular Leonard Peltier, for killing two FBI agents in June of 1975. There has never been any connection made, express or implied, that Graham was connected with Peltier, present when the FBI agents were killed, or involved in any discussions between Peltier and Aquash. Thus, this evidence is not relevant. And, because of the prejudicial effect of introducing evidence of an infamous person such as Leonard Peltier, and bringing up matters related to the killing of the FBI agents, this evidence should be excluded as unduly prejudicial.

The second basis for objection is that the evidence is inadmissible hearsay. Out of court statements introduced for the truth of the assertion are hearsay. SDCL 19-16-1(3). By necessity, when considering the application of this rule, the Court must determine what the declaration is, and what truth or purpose it is being offered for. In this instance, the out of court declaration is that Leonard Peltier

held a gun to Aquash's head, and it is being offered by the State to prove that Leonard Peltier held a gun to Aquash's head. Thus, it fits squarely within the rule against hearsay.

This is not a statement that is subject to admission as a declarant's state of mind under SDCL 19-16-7. If Aquash told others that Peltier held a gun to her head, she was not relaying a then existing state of mind. She was describing a historical event. Any state of mind consequences of the declaration are derived by inference; they are not part of the statement.

The state of mind exception is expressly limited to admission of evidence to prove the declarant's present thoughts and feelings, not to prove an act committed by someone else. Fed.R.Evid. 803; SDCL 19-16-7; Shepard v. United States, 290 U.S. 96 (1933).

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. This case has been cited by other courts in a positive manner over 350 times.

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: i.e. that she was not 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 wrote:

> [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 State in this case. The State wants to admit evidence of a past act by someone other than the declarant. It is not Aquash's statement describing her own past conduct, but instead the conduct of Peltier. The

State's purpose in admitting the evidence is to establish that Aquash was suspected of being an informant, as evidenced by Peltier's past act of threatening to kill her. This is precisely the kind of evidence proscribed by Shepard.

Therefore, all testimony of this kind should be deemed inadmissible at a pretrial hearing. It is the kind of evidence that is so prejudicial that a cautionary instruction or admonishment will be inadequate.

Dated May 7, 2010.

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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 depositing the same in the U.S. Mail at Rapid City, South Dakota, first class postage prepaid, at his/her/their last known address(es), to wit:

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