UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN GRAHAM, a.k.a. JOHN BOY PATTON, and VINE RICHARD MARSHALL, a.k.a. RICHARD VINE MARSHALL, a.k.a. DICK MARSHALL, Defendants.	Case No. CR 08-50079 DEFENDANT MARSHALL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRE-TRIAL HEARING ON MOTION IN LIMINE #1

BACKGROUND FACTS

Serle Chapman is a writer who worked as a cooperating witness for the government during the investigation in this case. Under the pretext of writing a book on the history of the American Indian Movement (AIM), he interviewed dozens of American Indians who were involved in the Movement in the 1970s, and then turned over the tape recordings of his interviews and other information to the FBI. One of the people Chapman interviewed during the course of his work as a secret agent for the government was defendant Richard Marshall. Chapman did two interviews with Marshall in 2001. Both interviews were tape recorded. Chapman claims that he also had an unrecorded telephone conversation with Richard Marshall, evidently after the interviews, and that during that unrecorded telephone conversation, in response to a statement or a question from Chapman, Marshall said: "Back in the day, when you was asked to do something, when somebody asked you to do something, you didn't ask too many questions."

Based on one page of Chapman's handwritten notes, it appears that Serle Chapman would testify that he had a telephone conversation with defendant Richard Marshall some seven years ago; that he asked Richard Marshall if Theda Clark, John Graham, Arlo Looking Cloud, and

Anna Mae Aquash came to his home one night 33 years ago; that Chapman told Richard Marshall that he had heard a rumor that Marshall gave one of them a gun; that he asked Marshall about whether there was a note that said anything about a gun; and that at some point in the conversation, Marshall said that "back in the day" when somebody asked you to do something or asked you for something, one did not ask too many questions.

In trial, the government intends to offer this testimony from Chapman as evidence against the accused on the theory that it was an admission by Marshall under Rule 801(d)(2) of the Federal Rules of Evidence. Specifically, the government is expected to argue that the statement about "Back in the day..." should be admitted under FRE 801(d)(2)(B) as an adoptive admission by Marshall, whereby he allegedly acquiesced in or expressed an agreement with an accusatory statement made to him by Chapman.[1] The government contends that alleged statement by the accused was intended by the defendant as an admission that he gave a gun to John Graham, Theda Clark, and Arlo Looking Cloud.

Defendant Marshall challenges the admissibility of such evidence under FRE Rules 801(d)(2)(B), 402, and 403. Defendant Marshall contends that Serle Chapman's testimony as to his recollection of the details of a telephone conversation that he says took place seven years ago is not credible, nor is it sufficient as a matter of law to establish an evidentiary foundation for the admission of such testimony under Rule 801(d)(2)(B). Defendant Richard Marshall requests the Court to enter an order scheduling a pre-trial hearing so that the court can make preliminary findings of fact under Rule 104 and to determine whether the evidence proffered by the government is admissible against the defendant as an adoptive admission under FRE Rule 801(d)(2)(B).

ISSUE TO BE DECIDED

If Chapman's testimony is credited by the Court, the issue to be decided by the court in determining whether Chapman's testimony as to Marshall's out of court statement is admissible is: in making a statement that back in the day, one did not ask too many questions when someone

[1] The government has given notice that it intends to offer the same testimony regarding Richard Marshall's alleged out of court statements to Chapman against co-defendant John Graham as a statement against interest under FRE Rule 804(b)(3).

asked you to do something, Richard Marshall thereby manifested an adoption or belief in the truth of Chapman's statement concerning a rumor that Richard Marshall had given a gun to one of the group that consisted of Theda Clark, John Graham, and Arlo Looking Cloud.

LEGAL ARGUMENT

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THE GOVERNMENT MUST ESTABLISH THE ADMISSIBILITY OF THE DEFENDANT'S PURPORTED ADOPTIVE ADMISSION IN A PRE-TRIAL HEARING BEFORE THE COURT.

Rule 801(d)(2)(B) of the Federal Rules of Evidence provides that a statement is an admission by a party-opponent and as such, is not hearsay if:

> The statement is offered against a party and is .... a statement of which the party has manifested an adoption or belief in its truth.

Here, the government is not seeking to prove the truth of the facts asserted in the statement made by of Richard Marshall; rather, it is seeking to prove that by making that statement about "back in the day...," Richard Marshall was adopting or agreeing with a statement that was made by Serle Chapman, which preceded Marshall's statement. The government is not offering the defendant's statement for the purpose of proving the facts asserted in his statement that back in the day, when people asked people to do something, people did not ask too many questions. Instead, the government is seeking to prove the truth of the statement by Serle Chapman that referred to a rumor that the killers got a gun from Richard Marshall.

Serle Chapman's statement, coupled with Richard Marshall's alleged response to that statement, is being offered to show that Richard Marshall manifested a belief in the truth of Chapman's statement. Therefore, if this were to be admissible, it would not be admissible as "the party's own statement" under 801(d)(2)(A). Rather, it is being offered under 801(d)(2)(B) as "a statement of which the party has manifested an adoption or belief in its truth."

Therefore, to be admissible as evidence in trial, the government must first prove to the Court by a preponderance of the evidence that Richard Marshall's alleged statement to Chapman was in fact a statement that manifested an adoption or belief in the truth of a statement made by

Chapman. In ruling on whether a statement made by a defendant is admissible as an adoptive admission under Rule 801(d)(2)(B), the Court should make the admissibility determination under Rule 104(b), as to whether there is sufficient evidence of a statement's admissibility as an adopted admission to allow it to be offered to the jury as an adopted admission. See: 2 McCormick, Evidence, §§ 261-262.

First, the Court must make a determination as to preliminary factual questions; if admitted, the jury then decides whether the defendant acquiesced in the statement. United States vs. Sears, 663 F.2d 986 (9th Cir. 1981). To make those factual determinations, the trial court must conduct a hearing outside the presence of a jury. Securities Exchange Commission, 531 F.2d 39 (2nd Cir. 1976); United States vs. Kilbourne, 559 F.2d 12 63 (4th Cir. 1977).

To establish admissibility, the proponent of the statement has the burden of showing (1) that the defendant heard, understood and acquiesced in the statement and (2) that the defendant's response was intended by him as an adoption of truth of the statement. The proponent must prove those facts by a preponderance of the evidence, to establish foundation and admissibility. Ordinarily, it is for jury to decide, in light of all surrounding facts and circumstances, whether the accused actually heard and understood a statement, which tended to incriminate him, which was made in his presence, and which he did not deny, when such statement is introduced in a criminal prosecution; but the question whether the circumstances of the statement and its making were such as to call for a reply by the accused in the situation is a preliminary question for the court. United States v. Arpan, 260 F.2d 649, 654-656 (8th Cir. 1958).

Rule 104 (a) provides that preliminary questions concerning the admissibility of evidence shall be determined by the Court.

Rule 104 (c) provides: "Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests."

For all practical purposes, this would be a hearing on the admissibility of a statement which the government contends is a confession: the government contends–and the defendant denies–that the defendant's alleged statement to Chapman was an admission that he gave a gun to the co-defendant John Graham, Theda Clark, or to Arlo Looking Cloud. Since the alleged

statement is being offered by the government as a confession, one that was made to a cooperating witness who was acting as a government agent, under Rule 104 (c), the hearing on the admissibility of such purported confession must be held outside the presence of the jury.

Before the Court can rule on the admissibility of the purported adopted admission under Rule 801(d)(2)(B), the court has to make preliminary findings of fact as to these questions:

(1) What was the out of court statement made by Serle Chapman to Richard Marshall?

(2) What was Richard Marshall's response to Chapman's statement(s), if any?

(3) Did Richard Marshall say or do something that clearly "manifested an adoption or belief in [the] truth" of Chapman's statement?

These preliminary questions of fact must be determined by the Court and they can only be determined after a pre-trial evidentiary hearing in which the witness Serle Chapman would testify as to the facts of his alleged conversation with Richard Marshall.

In a hearing before the Court, the government would have the burden of proving preliminary facts and establishing admissibility of the defendant's statements.

Adoption by a defendant of another person's statement may constitute an incriminating admission. United States v. Metcalf, 430 F.2d 1197 (8th Cir. 1970). However, a defendant's response or silence in the face of a statement by another person should be held to be an adoptive admission only if it appears that the accused understood and unambiguously assented to those statements. United States vs. Cappola, 526 F.2d 763 (10th Cir. 1975).

In U.S. v. Lilley, 581 F.2d 182 (8th Cir. 1978), the Court stated that when an accusatory statement is made in the defendant's presence and hearing, and he understands it and has an opportunity to deny it, the statement and his failure to deny are admissible against him. See: United States v. Ojala, 544 F.2d 940, 946 (8th Cir. 1976), United States v. Moore, 522 F.2d 1068 (9th Cir. 1976).

Therefore, the Court has to make a factual determination as to whether someone (here, Chapman) made an "accusatory statement" to the defendant. If there was an accusatory statement, the next question would be whether the defendant response (or lack of response) evidenced a clear and unambiguous intent to agree with or acquiesce in the accusatory statement.

In making that determination, the Court should look to the context of the entire

conversation, not just the words in isolation. Thus, in United States vs. Lilley, 581 F.2d 182 (8th Cir. 1978), the 8th Circuit Court of Appeals held that the defendant's failure to expressly deny a government agent's statement did not amount to an admission by silence or adoption when the defendant's written statement given to the government agent contradicted the accusatory statement in every material detail. If the statement itself is inherently ambiguous, it is not an adoptive admission. United States vs. Hove, 52 F.3d 223 (9th Cir. 1995). In Hove, the officer's questioning of the defendant did not constitute an accusation. Therefore, the defendant's response to the question was not an adoption of an accusatory statement. The Court held it was error to allow the testimony to come in as an adoptive admission.

Surrounding circumstances must be examined to determine whether there was an intent to adopt the statement that is fairly reflected in some significantly identifiable way so as to demonstrate clearly the party's belief or the intentional adoption of that information. White Industries, Inc. v. Cessna Aircraft Co., 611 F.Supp. 1049 (Western District of Missouri, 1995).

United States vs. Disbrow, 768 F.2d 976 (8th Cir. 1985) gives the trial court guidance as to the government's burden of proof in establishing admissibility. The Court of Appeals stated in Disbrow that Lilley requires that the accusatory statement must be made in the defendant's presence, that the defendant must understand it, and that the defendant must have an opportunity to deny it. Here then, to establish admissibility, the government must prove by a preponderance of the evidence that Chapman made an accusatory statement, in the defendant's presence, that the Defendant heard and understood the statement to be an accusation, and that he had an opportunity to deny it. The Defendant Richard Marshall contends that the government cannot meet that burden of proof.

The Defendant submits that even Chapman's testimony were to be credited by the Court, as a matter of law, Richard Marshall's statements could not constitute an adoptive admission under FRE 801(b)(2)(B). The defendant is entitled to have the Court make preliminary findings of fact on the question of admissibility pursuant to FRE Rule 104 and to rule on the admissibility of such testimony in a pre-trial hearing.

Dated this 8th day of December, 2008.

VINE RICHARD MARSHALL, Defendant

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CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Memorandum of Law in Support of Motion in Limine #1 was electronically served upon the other parties in this case via the electronic mail addresses listed below:

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Dated this 8th day of December, 2008.

/s/ *Dana L. Hanna*
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