

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

UNITED STATES OF AMERICA)	CRIM. NO. 03-50020-002
Plaintiff,)	
)	
vs.)	DEFENDANT GRAHAM'S
)	MEMORANDUM IN SUPPORT OF
FRITZ ARLO LOOKING CLOUD and)	MOTION TO PRESERVE AND
JOHN GRAHAM, a/k/a JOHN BOY)	PRODUCE EVIDENCE
PATTEN,)	
Defendants.)	

SUMMARY OF FACTS IN SUPPORT OF MOTION

On February 25, 1976, Dr. W.O. Brown performed an autopsy on the then unidentified body of Ms. Anna Mae Aquash. Dr. Brown found the presence of acid phosphatase in Ms. Aquash's vagina. From this he concluded that Ms. Aquash had engaged in sexual activity near the time of her death. As part of his autopsy, he collected Ms. Aquash's underpants and a sanitary napkin that was found in her underpants. It appears these items and other unidentified "artifacts" from Ms. Aquash's body were turned over to the FBI by Dr. Brown at the conclusion of the autopsy.

On February 7, 2008, Mr. Graham notified the government in writing that he intended to have these items DNA tested. Mr. Graham asked in writing on that date for the government to disclose whether these items have ever been DNA tested by the government, and also to identify the present location of the items. The government has not responded to this request. Previously, on December 11, 2007, Mr. Graham made a written request for production of all objects in the government's possession that were material to preparation of his defense.

LAW IN SUPPORT OF MOTION

A defendant has a fundamental due process right to present a defense, which includes the right to present witnesses and evidence to establish a defense. Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923 (1967). This right is memorialized in Federal Rule of Criminal Procedure 16(a)(1)(E)(I). Under that rule, upon a written request by a defendant, the government must provide a defendant with access to tangible objects in its possession that are “material to preparing the defense.” Mr. Graham has complied with the requirement of Rule 16 by providing the government with a written demand to be afforded access to these items.

ARGUMENT AND CONCLUSION

Mr. Graham needs to have these items preserved and tested in order to fully investigate the facts of his case. DNA testing on these items may lead to the production of material evidence that assists Mr. Graham in his defense by implicating others in the crime alleged, corroborating other witnesses’ version of events that implicate uncharged third parties in this crime, and by attacking the credibility and consistency of the government’s theory of prosecution.

If the government destroys this evidence, or is not required to produce it for defense testing, Mr. Graham’s fundamental right to present a defense will be denied. There is no basis for the government to delay identification of the evidence and make it available for defense testing as it has been in the government’s possession for 32 years.

Accordingly, Mr. Graham asks this Court to issue an order requiring the

government to preserve Ms. Aquash's underwear and the sanitary napkin found within them; to disclose to the defense their location; and, to make these items available to Mr. Graham's expert witness (once identified) for testing.

Dated February 12, 2008.

/s/ John R. Murphy
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 by electronic delivery:

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Dated February 12, 2008.

/s/ John R. Murphy
John R. Murphy