

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff,

vs.

JOHN GRAHAM a/k/a
JOHN BOY PATTEN,

Defendant.

CR 03-50020-02

RESPONSE TO DEFENDANT
GRAHAM'S MOTION TO
PRESERVE AND PRODUCE
EVIDENCE

The United States of America, through its attorneys, United States Attorney Marty J. Jackley, and Assistant United States Attorney Robert A. Mandel, responds to defendant Graham's motion to preserve and produce evidence as follows:

1. Initially, the United States notes that the crime charged in this case occurred more than 32 years ago, at a time when DNA testing did not exist. The United States further notes that the pathologist who performed the original autopsy, Dr. Brown, died many years ago and is no longer available to the United States.

2. The United States is unaware of the location of the sanitary napkin observed during Aquash's autopsy and based on the information kept in the file, the United States never had possession of it. It is the position of the United States that there was not a scientific basis for the pathologist to retain that for DNA evidence at the time the autopsy

was performed in 1976. The United States, through the Federal Bureau of Investigation, has retained as evidence the panties worn by the victim obtained when the original autopsy was performed by Dr. Brown. These panties were scientifically tested in the FBI laboratory in 1976 and no blood or semen were determined to be present.

3. It is the position of the United States that the United States should be allowed to complete any scientific testing before any material would be supplied to defendant for testing. If any DNA is determined to be present on the panties or any other item tested, the United States asks that the Court order that defendant be required to submit to DNA samples being taken from him. After that, the United States does not object to a defense test being performed if then determined to be appropriate by the Court.

4. It is the position of the United States that only DNA belonging to John Graham would be relevant to the issue of guilt in this case based upon the evidence and case circumstances.

Accordingly, the United States asks that the defendant's motion be decided as outlined above.

Respectfully submitted this 19th day of February, 2008.

MARTY J. JACKLEY
UNITED STATES ATTORNEY

/s/ Robert A. Mandel

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of February, 2008, I served by electronic transmission a true and correct copy of the foregoing Government's Response to Defendant's Motion to Preserve and Produce Evidence on:

John R. Murphy
Attorney at Law

/s/ Robert Mandel

Robert Mandel