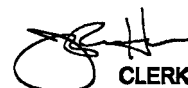


UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

**FILED**

NOV 28 2008



CLERK

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

AFFIDAVIT OF COUNSEL

STATE OF SOUTH DAKOTA     )  
                                          ) ss.  
COUNTY OF PENNINGTON     )

I, Dana L. Hanna, being duly sworn, hereby affirm:

1. I am the attorney for Defendant Richard Marshall, and I make these affirmations so that they may be considered by the Court in deciding the motion for separate trials that has been filed by Co-Defendant John Graham, a.k.a. John Boy Patton. I feel obligated to advise the Court and the other parties that, based on the discovery that has been provided to me, it is my legal opinion that the defenses of Richard Marshall and his Co-Defendant John Graham are irreconcilable and directly in conflict, and that if the Defendants are compelled to be tried together in a joint trial, then in the course of presenting evidence that is necessary for the defense of Richard Marshall, there is a very substantial likelihood that such evidence will result in a denial of the Co-Defendant Graham's Sixth Amendment right to confront his accusers.

2. Richard Marshall is accused by the government of aiding and abetting Arlo Looking Cloud, Theda Clark, and Co-Defendant John Graham, a.k.a. John Boy Patton, in the murder of Anna Mae Aquash on or about December 12, 1975. Arlo Looking Cloud has already been convicted of first degree murder in the killing of Anna Mae Aquash and is serving a life sentence

for his crime. Based on the discovery provided to me by the government and my discussions with the United States Attorney, I am aware that the main government witness in the trial of Richard Marshall will be Arlo Looking Cloud, who is expected to testify that one night 33 years ago he, along with Co-Defendant John Graham, Theda Clark, and Anna Mae Aquash, went to the home of Richard Marshall and his wife Cleo in Allen, South Dakota, and that while he, Graham, and Clarke were in the bedroom of the Marshall home, Richard Marshall gave a gun and a box of shells to Theda Clark. On the basis of that accusation by Looking Cloud, the government accuses Richard Marshall of aiding and abetting Graham, Looking Cloud, and Clark in the murder of Anna Mae Aquash. At trial, Defendant Richard Marshall, through counsel, will deny and dispute Looking Cloud's accusation that he provided Theda Clark with a gun. Looking Cloud's credibility will be the critical issue for the jury to decide in the trial of Richard Marshall.

3. At trial, Defendant Richard Marshall, through counsel, will introduce into evidence a videotaped interview of Arlo Looking Cloud being questioned on March 27, 2003 by Robert Ecoffey, Director of Law Enforcement Services for the Bureau of Indian Affairs, and Detective Abe Alonzo of the Denver Police Department, shortly after they arrested Looking Cloud for the murder of Anna Mae Aquash. The videotaped interview lasted approximately one hour. In that interview, Looking Cloud admitted to Ecoffey that he, Graham, and Theda Clark kidnaped Anna Mae Aquash in Denver, Colorado and drove her to Rapid City, South Dakota, then to Rosebud, and from Rosebud to the spot near Wanblee where Graham shot and killed her. However, in response to repeated questions and factual assertions from Ecoffey, Looking Cloud repeatedly denied having any memory of having stopped at the home of Richard and Cleo Marshall at any time during the journey from Denver to the spot where Anna Mae Aquash was shot and killed. In that videotaped interview, Ecoffey can be seen and heard making factual statements to Arlo Looking Cloud in which he informed Looking Cloud that Richard Marshall and his wife Cleo had both told Ecoffey that John Graham, Looking Cloud, Theda Clark, and Aquash had stopped at the Marshall house in Allen, that "they"—meaning John Graham, a.k.a. "John Boy" Patton, Looking Cloud and Clark—had tried to get the Marshalls to keep Anna Mae Aquash at their house, that Richard Marshall had refused to do so, and that Graham, Looking Cloud, Clark and Anna Mae Aquash then left the Marshall home. In the interview, neither Ecoffey nor Looking

Cloud said anything about Richard Marshall providing anyone with a gun, but Ecoffey did tell Looking Cloud that Richard Marshall had made statements to him that inculpated John Graham, Clark, and Looking Cloud in the murder of Aquash by putting them together at the Marshalls' house in Allen, before they drove on to Rosebud and then to the spot in the Badlands where, according to the prosecution, Graham killed her.

4. The following is an excerpt from the transcript of Looking Cloud's videotaped confession [page 28:20-30:24]. The questions are from federal investigator Robert Ecoffey. The answers are from Arlo Looking Cloud.

Q. \* \* \* \* Arlo, I know for a fact that on your way from Rapid City that you made another stop, and that you stopped at – you stopped in (inaudible)<sup>1</sup> South Dakota, that you stopped at Dick Marshal and Cleo Marshal's house. Do you remember stopping there?

A. No.

Q. Okay. You don't remember stopping there?

A. No.

Q. Cause I know – I know for a fact that you stopped there, *cause both Dick and Cleo are – are telling me that you, John Boy, and Theda stopped there, and that you had Anna Me, and that somebody had a note, and that you went into – you went into their house, you knocked on the door, they answered the door, you went into their house, and at that point in time, Theda said, Hey, we brought some baggage we got to take care of, and that – at that point in time she had a note from someone, and that you, John Boy, and her went into the bedroom with Dick Marshal, and Cleo stayed – Cleo stayed sitting out on the couch with Anna Mae, and that you guys went in there, and you had a conversation about this note. You wanted to leave – you want to leave Anna Mae there, but Dick and Cleo said No, that you couldn't leave her there.* Do you remember that happening?

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<sup>1</sup> Allen, South Dakota

- A. No, I don't remember that part. I don't know.
- Q. Do you know a Dick Marshal?
- A. I – yeah, I met him.
- Q. You met Dick. How about his wife, Cleo?
- A. Yeah, but not – maybe once.
- Q. Do you remember stopping at their house?
- A. No.
- Q. Do you remember going into the bedroom with them and Theda having a conversation with Dick about keeping her there?
- A. No.
- Q. And she had a note from someone?
- A. Huh-uh.
- Q. I want you to think about this real hard, Arlo, because *this is what they're telling me*. This is coming from Cleo. She said she sat out there, she said she fed you guys, she said she gave Anna Mae a change of clothes. She said you went in – she says you, you, John Boy, Theda, and Dick went into the bedroom and had a conversation. And then Dick came out and told her, she said, They want to keep – they want to keep her here, they want us to keep her here, that they had a note from somebody, that they wanted him to take care of this baggage. And Cleo said, No, we got kids here, we're not gonna get involved. So then Dick went back into the bedroom and you guys came out, and she fed Anna Mae some soup, she changed clothes, and you guys came out, and then you took her and you left again. Do you remember stopping there?
- A. No, I don't remember.
- Q. You need – I need you to be – I need you to be truthful, Arlo.
- A. I don't remember right now, I don't remember that, I thought we just went straight to Rosebud.

[Italics added .]

4. Based on the discovery I have received, particularly an investigative report by Robert Ecoffey, I anticipate that the government will call Robert Ecoffey to testify as a witness, and that Ecoffey will testify that the statements he attributed to Richard Marshall in his interview of Arlo Looking Cloud on March 27, 2003 were made to him in an investigatory interview he conducted with Richard Marshall. In that interview, Ecoffey was seeking information from Marshall about the involvement in the kidnaping and murder of Anna Mae Aquash.


5. Based on the discovery provided to me by the government, the out of court statements that Ecoffey states that Richard Marshall made to him about John Graham coming to his home with Aquash, Clark, and Looking Cloud are in direct conflict with exculpatory statements made by John Graham to Ecoffey and BIA investigator Mitch Pourier, in an interview they did with John Graham in White Horse, Yukon Territory, Canada on April 21, 1994. [GRAHAM discovery materials, page 0955.]

6. On information and belief, based on discovery and information provided to me by the government, at trial, the government will call as a witness a writer and tour guide named Serle Chapman, who worked as a secret government informant in this case, using the code name "Sierra." In cooperation with the FBI, Chapman interviewed people who had been involved in the American Indian Movement (AIM) under the pretext of writing a book about the history of AIM, for the actual purpose of providing the information he obtained from the subjects of his interviews to the FBI. The government intends to offer the testimony of Serle Chapman that he had an unrecorded telephone conversation with Richard Marshall some years ago, and that during that conversation, Richard Marshall confirmed to him that John Graham, a.k.a. John Boy Patton, Arlo Looking Cloud, Theda Clark, and Anna Mae Aquash, came to his home in Allen one night, and that they—Graham, Looking Cloud, and Clark—asked him to keep Aquash there at his house and Richard Marshall refused to do so. On information and belief, Serle Chapman would also testify that in that conversation Richard Marshall made a statement to him, something to the effect that "back in the day," when people asked other people to do something, people generally did not ask too many questions. The government has given notice that it will seek to offer Chapman's testimony regarding Richard Marshall's out of court declarations about John Graham, Looking Cloud and Clark, as well as the "back in the day" statement, as evidence

against both Richard Marshall and John Graham. It is my understanding that the government will contend that the alleged "back in the day" statement is admissible against Marshall as an adoptive admission that he provided a gun to Theda Clark in the presence of John Graham. Defendant Marshall disputes the truth and accuracy of Chapman's testimony, the legal conclusions to be drawn from it, and the admissibility of such testimony under the Federal Rules of Evidence. Defendant Marshall will seek a pre-trial ruling as to the admissibility of Chapman's testimony on those alleged statements. If the court were to rule that such testimony by Chapman would be admissible in a joint trial, it would constitute an inculpatory, out-of-court accusation against John Graham made by Richard Marshall.

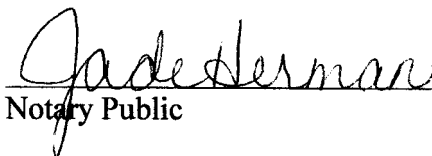
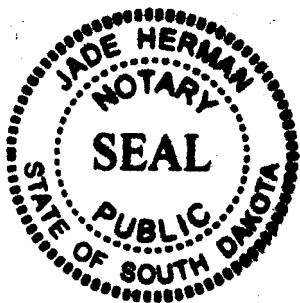
7. In view of what I judge to be the weakness of the government's case against Richard Marshall, at this time I consider it to be extremely unlikely that I will advise my client to testify in his trial. Based on all the facts and circumstances, including my opinion as to the legal insufficiency of the government's case, it is in my judgment extremely unlikely that my client will give testimony in his trial

Dated this 26<sup>th</sup> day of November, 2008.



Dana L. Hanna  
Attorney for Defendant Marshall  
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dhanna@midconetwork.com

Subscribed and sworn to before me on this 26<sup>th</sup> day of November, 2008



Notary Public

My Commission Expires: 3-7-14

**CERTIFICATE OF SERVICE**


I hereby certify that I have served a true and correct copy of the foregoing Affidavit of Counsel on the other parties in this case by mailing the same to the addresses listed below:

Marty J. Jackley  
United States Attorney  
PO Box 2638  
Sioux Falls, SD 57101

Robert Mandel  
Assistant United States Attorney  
515 Ninth Street, #201  
Rapid City, SD 57701

John Murphy  
Murphy Law Office  
328 E. New York St., #1  
Rapid City, SD 57701

Dated this 26<sup>th</sup> day of November, 2008.

  
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Dana L. Hanna