

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 TO SEVER TRIALS

In this case, the government seeks to prove that in December 1975, co-defendant Graham, along with cooperating witness Arlo Looking Cloud and unindicted coconspirator Theda Clark, abducted and kidnaped Anna Mae Aquash in Denver, Colorado, and drove her to Rapid City; that Graham raped Aquash in Rapid City; that the three took Aquash to Rosebud, South Dakota, and out to the Badlands near Wanblee, where John Graham, assisted by Clark and Looking Cloud, shot and killed her.

As to Richard Marshall, the government's theory is that Graham, Looking Cloud, and Theda Clark, along with Aquash, stopped at the home of Richard Marshall in Allen, South Dakota, after they left Rapid City, and asked Marshall to keep Aquash there at his home and that Marshall refused. The government's entire prosecution against Richard Marshall is based on Looking Cloud's claim, which he evidently made for the first time in 2008, that he saw Richard Marshall give Theda Clark a handgun and a box of shells in the presence of John Graham.

The government's theory is that Graham, Looking Cloud, and Clark murdered Aquash because they and other members of AIM suspected that Aquash was a government informant.

In statements made to federal investigators and witnesses, John Graham has stated that he drove her from Denver to the Pine Ridge Reservation to help her hide from the FBI, and that he left her at a "safe house" somewhere on the Pine Ridge Reservation. Graham said he did not know whose house it was and he did not go into any house that night with Anna Mae Aquash.

According to government witnesses Robert Ecoffey and Serle Chapman, defendant Richard Marshall told them that Graham, Looking Cloud and Clark, showed up at his house in Allen, South Dakota, on the Pine Ridge reservation, with Anna Mae Aquash and asked him to keep her there, and after he refused to do so, they left, after asking for directions to Rosebud.

Both in terms of the defendants' conflicting out of court statements and in terms of theories of defense, the defenses of Marshall and Graham are mutually antagonistic and directly in conflict.

To impeach Looking Cloud's testimony, Richard Marshall will offer into evidence a videotape of an interrogation of Arlo Looking Cloud, in which federal investigator Robert Ecoffey tells Arlo Looking Cloud that defendant Richard Marshall and his wife both told him that John Graham, Looking Cloud, and Clark brought Anna Mae Aquash to his home and asked him to keep her there, and after he refused to do so, Graham, Looking Cloud and Clark left the Marshall home around midnight with Aquash. It is the government's theory that Graham shot and killed her some hours later that same night or in the early hours of the morning.

Marshall's out of court statement, as related by Ecoffey, inculpates John Graham in the murder of Anna Mae Aquash. Therefore, for confrontation right purposes, Marshall would be an

accuser of the co-defendant whom Graham will not be able to cross-examine, if Marshall chooses not to testify.<sup>1</sup> Nevertheless, Graham could seek to impeach defendant Marshall's credibility under Rule 806, even with evidence that would not be admissible if it were offered by the prosecution.

Moreover, in the trial of co-defendant John Graham, the government will undoubtedly introduce a great deal of evidence concerning crimes and violent activity committed by various factions and members of the American Indian Movement during the 1970s to prove Graham's motive for murder, just as it did in the trial of the government's chief witness Arlo Looking Cloud. In United States vs. Looking Cloud, 419 F.3d 781 (8<sup>th</sup> Cir. 2005), Looking Cloud argued that such evidence was unduly prejudicial, since he himself had not participated in the violent drama, such as the Wounded Knee occupation or the killings of two FBI agents, that made up much of the government's evidence. The 8<sup>th</sup> Circuit Court of Appeals recognized the such evidence had the potential to cause unfair prejudice to the defendant's right to a fair trial, but ruled that such evidence was relevant and admissible, chiefly to prove the defendant's motive. The prosecution's theory was that defendant Looking Cloud, along with Graham and Clark, kidnaped and murdered Anna Mae Aquash because they suspected her of being a government informant against individuals involved with AIM. There was evidence in Looking Cloud's trial that Looking Cloud and his two accomplices were all told that Aquash was an informer for the federal government. The government will offer the same theory and the same evidence to prove Graham's motive to kill. Thus again, in a joint trial, extremely prejudicial

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<sup>1</sup> Based on these facts and the law as set forth in the Crawford and Bruton cases, defendant Marshall agrees with and joins the co-defendant's legal argument that if the two defendants are tried together, co-defendant Graham will be denied his right to confrontation.

evidence that would probably be inadmissible against Richard Marshall will be introduced in the trial of co-defendant Graham. Such evidence is likely to cause unfair prejudice to Richard Marshall's right to a fair trial since it will have the effect of moving the jury to find guilt by association and judicial instructions will not be able to cure that real danger.

Further, the government intends to offer evidence of uncharged crimes against Graham that would have no probative value with regard to the government's case against Richard Marshall. The government has given notice of its intent to offer evidence that co-defendant John Graham raped Anna Mae Aquash in Rapid City. Although such evidence has no relevance or probative value as to the case against Richard Marshall, such evidence is so inherently prejudicial that there is a very real danger that the jury will erroneously allow that evidence to affect their decision regarding the case of Richard Marshall. Again, such evidence presents a substantial likelihood of spill over prejudice and a verdict based on guilt by association, rather than the law and evidence, if the two defendants are tried together.

For reasons of economy, there is a preference in the federal system for joint trials of defendants who are indicted together. Richardson v. Marsh, 481 US 200, 107 S.Ct. 1702, 95 Law Ed. 2d 176 (1987). However, Rule 14 of the Federal Rules of Criminal Procedure provides: "if it appears that a defendant or the government is prejudiced by a joinder of ... defendants ... for trial together, the Court may order an election or separate trials of counts, grant a severance of defendants, or provide other relief justice requires."

Courts of Appeals frequently have expressed the views that "mutually antagonistic" or irreconcilable defenses may be so prejudicial in some circumstances as to mandate severance. See: United States vs. Benton, 852 F.2d 1456, 1469 (6<sup>th</sup> Cir.) *cert denied* 488 US 993 (1988);

United States v. Keck, 773 F.2d 759, 765 (7<sup>th</sup> Cir. 1985); United States vs. Smith, 788 F.2d 663, 668 (10<sup>th</sup> Cir. 1986); United States vs. MagDaniel-Mora, 746 F.2d 715, 718 (11<sup>th</sup> Cir. 1984); United States vs. Berkowitz, 662 F.2d 1127, 1133-1134 (5<sup>th</sup> Cir. 1981); United States vs. Haldeman, 181 US. App. D. C. 254, 294-295, 559 F.2d 31, 71-72 (1976) *cert. denied*, 431 US 933 (1977). However, in Zafiro vs. United States, 506 US 534, 113 S.Ct. 933 (1993), the Supreme Court declined to adopt a bright line rule that would mandate severance whenever co-defendants have conflicting defenses; the Court ruled that mutually antagonistic defenses are not unduly prejudicial *per se*. The Court stated that when defendants properly have been joined under Rule 8(b), the District Court should grant a severance only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence.

The issue here, then, is whether there is a serious risk that a joint trial would compromise a specific trial right of defendant Richard Marshall or prevent the jury from making a reliable judgment about guilt or innocence.

Evidence is “unfairly prejudicial” if it tends to encourage the jury to find guilt from improper reasoning; whether there is unfair prejudice in the evidence depends on whether there was a undue tendency to suggest decision on an improper basis, such as guilt by association. . . United States vs. Looking Cloud, 419 F.3d 781 (8<sup>th</sup> Cir. 2005).

Here, in a joint trial with the co-defendant, evidence of AIM-related violent crimes is likely to become a “pervasive theme” in the trial. United States vs. Johnson, 28 F.3d 1487 at 1197-98 (8<sup>th</sup> Cir. 1994). Such evidence will have a tendency to encourage the jury to base its verdict on guilt by association. See: United States vs. Sills, 120 F.3d 17 at 920 (8<sup>th</sup> Cir. 1997).

The danger of guilt by association and unfair prejudice is compounded by the evidence that the government will adduce of the co-defendant's alleged sexual assault of the victim. Added to which is the danger that the co-defendant will be able to use FRE Rule 806 to seek to impeach the defendant's out of court declarations about Graham, even though the defendant does not testify and the government would be prohibited from doing so.

The Supreme Court ruled in Zafiro that mutually antagonistic defenses are not *per se* so prejudicial as to require a severance, and left the question of severance to the sound discretion of the trial court. However, as Justice Stevens observed in his concurring opinion, in a case where there is a genuine antagonism between defenses, "joinder may well be highly prejudicial, particularly when the prosecutor's own case in chief is marginal and the decisive evidence of guilt is left to be provided by a co-defendant." Zafiro, 506 US at page 543.

Here, the government's case against Richard Marshall is marginal at best, since it is based almost totally on the testimony of Fritz Arlo Looking Cloud, convicted murderer of Anna Mae Aquash, whose testimony is motivated chiefly by his desire not to die in prison. Therefore, any error that tended to prejudice Richard Marshall's right to a fair trial could not be deemed harmless. This would be a different case if the government's case against defendant Marshall was strong, but here, in the interests of justice, the court should not allow the government to lighten its burden of proof against this defendant by trying Richard Marshall in a joint trial in which irrelevant but highly prejudicial evidence will inevitably spill over onto him, a trial in which the defendants will be in conflict with each other and not just against the government. In this case, the Court should find there is a substantial danger of unfair prejudice for the defendants in a joint trial and should exercise its discretion under Rule 14 to order separate trials

for the defendants.

Dated this 8<sup>th</sup> 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 to Sever Trials was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney  
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Dated this 8<sup>th</sup> day of December, 2008.

/s/ Dana L. Hanna  
Dana L. Hanna