

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 DISMISS  
FOR SELECTIVE PROSECUTION

Defendant Richard Marshall moves to dismiss on the grounds that he has been denied equal protection of the laws as a result of selective prosecution. He contends that he has been singled out for prosecution while another who is similarly situated, Theda Clarke, is not being prosecuted and that the decision to prosecute him is based on impermissible bases and motives—age and his exercise of a constitutional right.

In order to make out a *prima facie* case of selective prosecution, the defendant must show that he was singled out for prosecution while others similarly situated were not prosecuted for similar conduct; and that the decision to prosecute was based on an impermissible motive such as race, religion, or an attempt by the defendant to secure other constitutional rights. United States v. Kelley, 152 F3d 881, 885-886 (8<sup>th</sup> Cir. 1998).

The burden of showing selective or vindictive prosecution is on the defendant. Kelley, at 885. The defendant's burden is a heavy one, and because the courts afford broad discretion to

prosecuting authorities, courts require a showing of intentional and purposeful discrimination. United States v. Matter, 818 F.2d 653, 654-655 (8<sup>th</sup> Cir. 1987).

Whether to hold an evidentiary hearing on a pre-trial motion to dismiss an indictment is a matter within the trial court's discretion. United States v. Aanarud, 893 F.2d 956, 960-961 (8<sup>th</sup> Cir.); *cert. denied* 498 US 822 (1990).

## I

### **THE DEFENDANT MARSHALL HAS BEEN SINGLED OUT FOR PROSECUTION WHILE ANOTHER PERSON WHO IS ALLEGED TO HAVE AIDED AND ABETTED IN THE MURDER OF ANNA MAE AQUASH IS NOT BEING PROSECUTED.**

The defendant asks the Court to take judicial notice of the trial record in the case of United States v. Arlo Looking Cloud and the official court record in this case.

According to Looking Cloud's testimony and the testimony of other witnesses, and according to the government's statements in trial and in this record of this case, in December 1975, Theda Clarke, Arlo Looking Cloud, and John Graham abducted Anna Mae Aquash in Denver, drove her to South Dakota and aided and abetter one another in her execution by gunshot on the Pine Ridge reservation near Wanblee. The government's theory of prosecution with regard to defendant Richard Marshall is that Richard Marshall gave a handgun to Theda Clarke and that handgun was the weapon the John Graham used to kill Aquash. The main prosecution witness against the defendant is Arlo Looking Cloud, who has consistently portrayed Theda Clarke as the dominating force who directed him and Graham in the abduction and murder of Aquash.

In 2001, a cooperating government witness, Darlene Nichols, a.k.a. Kamook Banks, tape-recorded a conversation she had with Theda Clarke about events surrounding the death of

Aquash. It appears from the transcript of that recording, Clarke was cogent, aware, and communicative during the conversation. The cooperating witness has asserted to the government prosecutors and agents that at some point in the conversation that was not recorded, Clarke admitted that she, Graham and Looking Cloud killed Aquash and that they did so because Aquash was believed to be providing information to government law enforcement agents.

In 2003, the government indicted Arlo Looking Cloud and John Graham for the murder of Aquash. The government did not seek an indictment against Theda Clarke. In 2004, the government tried and convicted Arlo Looking Cloud on the theory that he and Theda Clarke aided and abetted John Graham in murdering Anna Mae Aquash. During the trial, although there was testimony that Clarke, Graham, Looking Cloud and Aquash went to the home of Richard Marshall, it was not the government's theory that Richard Marshall gave anyone a gun or that he aided and abetted in the murder.

In 2008, the government again presented evidence to a new grand jury. Arlo Looking Cloud had by then entered into an agreement to cooperate with the government. The government communicated to attorney Charles Abourezk, then counsel for Richard Marshall, that prosecutors sought the cooperation of Richard Marshall and offered him use immunity if he would cooperate by giving an interview to the government concerning Anna Mae Aquash. Marshall declined to do so, exercising his constitutional rights.

The government sought and obtained an indictment for murder against Richard Marshall. The government has never sought an indictment against Theda Clarke. The government is not prosecuting her, even though it is the government's theory that she was the ringleader of the group of accomplices that abducted and killed Anna Mae Aquash.

## II

### **THE DECISION TO SINGLE OUT RICHARD MARSHALL FOR PROSECUTION, WHILE NOT PROSECUTING THEDA CLARKE, IS BASED ON CONSTITUTIONALLY IMPERMISSIBLE REASONS.**

The government has never filed any document known to the defendant in which they seek to explain or justify the decision to prosecute this defendant, on the testimony of convicted murderer and cooperating witness Arlo Looking Cloud, while the same evidence and much more, if credited by a jury, would prove the far greater culpability of Theda Clarke.

On information and belief, Clarke is in a rest home, and she is now more than eighty years of age; if age is the classification for allowing her to be un-prosecuted for murder, defendant Marshall (age 58) submits that the relative ages of the defendant and Theda Clarke is an arbitrary and impermissible basis on which to base the government's disparate treatment of two individuals who are similarly situated, in terms of the government's theory of prosecution. The decision to prosecute Marshall and not prosecute Clarke is even more irrational, given the fact that the government's evidence against Clarke is far stronger than the case against Richard Marshall and according to the government's own theory and evidence, Theda Clarke is far more culpable than any of the three defendants who have been indicted, with the possible exception of the alleged shooter, since she was the one whom the government contends led and directed Looking Cloud and Graham in the abduction and murder of the Anna Mae Aquash.

Moreover, based on the facts and circumstances that would be adduced in evidence in a hearing, the defendant would show that it is a reasonable inference from the circumstances that the decision to prosecute Marshall, and not Clarke, was motivated at least in part by the defendant's exercise of rights guaranteed to him by the Constitution.

Therefore, this Court should exercise its discretion and grant the defendant an opportunity to put forth evidence in a pre-trial hearing to prove his claim of selective prosecution, and if he does so, the court should dismiss the indictment against him.

Dated this 22<sup>nd</sup> day of December, 2008

VINE RICHARD MARSHALL, Defendant

BY: /s/ Dana L. Hanna  
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**CERTIFICATE OF SERVICE**

I hereby certify that I a true and correct copy of the foregoing Reply Memorandum of Law in Support of Motion to Dismiss for Selective Prosecution 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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John Murphy, Attorney for Defendant Graham  
jmurphysd@hotmail.com

Dated this 22<sup>nd</sup> day of December, 2008.

/s/ Dana L. Hanna  
Dana L. Hanna