

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

CR08-50079

Plaintiff,

v.

**UNITED STATES' RESPONSE IN
OPPOSITION TO DEFENDANT
MARSHALL'S MOTION FOR BILL
OF PARTICULARS**

JOHN GRAHAM a.k.a. JOHN BOY
PATTON, and VINE RICHARD
MARSHALL a.k.a. RICHARD VINE
MARSHALL a.k.a. DICK MARSHALL,

Defendants.

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, to respectfully request this Court deny Defendant Marshall's Motion for Bill of Particulars based upon both legal and factual grounds.

It is well established in this circuit that:

[a] bill of particulars serves to inform the defendant of the nature of the charge against him with sufficient precision to enable the defendant to prepare for trial, to avoid or minimize the danger of surprise at trial, and to enable the defendant to plead acquittal or conviction in bar of another prosecution for the same offense when the indictment is too vague and indefinite.

United States v. Agard, 531 F. Supp. 2d 1072, 1073-74 (D. N.D. 2008)(citing United States v. Hernandez, 299 F.3d 984, 989-90 (8th Cir. 2002)). Defendant Marshall's Indictment is neither vague nor indefinite. The Indictment is legally

sufficient in that it contains all the essential elements of the offense charged, fairly informs both Defendants of the charges against them for which they must defend, and alleges sufficient information to allow both Defendants to plead a conviction or acquittal as a bar to subsequent prosecution. See United States v. Wessels, 12 F.3d 746, 750 (8th Cir. 1993)(citing United States v. Young, 618 F.2d 1281, 1286 (8th Cir. 1980)).

It is well-settled that “a bill of particulars may not be used as a discovery tool or to obtain detailed disclosure of the government’s evidence and theories.” See Wessels, 12 F.3d at 750; Agard, 531 F. Supp. 2d at 1074. Standing alone, the Indictment contains sufficient information and detail to warrant denial of Defendant’s request for a Bill of Particulars. Moreover, a further examination of the case pleadings and discovery provided to both Defendants clearly proves the Defendant’s request is unsupportable.

On October 10, 2008, both Defendants Graham and Marshall were served with the United States’ Request for Notice of Alibi Defense. Defendant Marshall’s Alibi Notice provides, among other matters, as follows:

On or about the early morning hours of December 12, 1975, at his residence in Allen, South Dakota, house #363, Richard Marshall knowingly aided and abetted Defendant John Graham, Theda Clarke and Arlo Looking Cloud in the first degree murder of Anna Mae Aquash by, including but not limited to, providing consultation and exchange of the “baggage note,” as well as providing the .32 caliber revolver and shells to murder Anna Mae Aquash.

See United States' Request for Notice of Alibi Defense to Defendant Marshall, DE 40. See also, United States' Request of Alibi Defense to Defendant John Graham, DE 41.

The pleadings further set forth as follows:

Eyewitness accounts include “[i]t was about 11:30 p.m. when Theda Clarke, Arlo Looking Cloud, John Boy Graham, and Annie Mae Aquash came to [the Marshall] residence.” See Graham 04854. “Dick and the three others went into the bedroom and shut the door.” See Graham 04854. “Annie Mae was being held against her will and that she wasn’t free to go.” See Graham 04854. “Theda had a handwritten note from someone asking Dick if he could take care of this baggage.” See Graham 04854. “Theda, Arlo, and John Boy took Annie Mae and left. . . . it wasn’t too much longer after that is when Annie Mae was found dead.”

See United States' Memorandum in Opposition to Defendants Graham and Marshall's Motions for Severance, p.10-11, DE 95.

Through additional discovery, both Defendants Graham and Marshall have been provided additional witness accounts of the stop at Dick Marshall's residence during which Anna Mae Aquash was held against her will. See Graham discovery 04885-04888. This material also describes Dick Marshall's consultation with Theda Clarke and of his supplying both the gun and shells used to murder Anna Mae Aquash. Id.

In addition, Defendant Marshall's statements and the associated witness notes have also been disclosed, including: (1) Defendant Marshall's confirmation of Anna Mae Aquash's presence at his home during the time in question; (2) Defendant Marshall's description of Anna Mae Aquash as possibly

being tied up and acknowledgment that she didn't want to be there; and (3) Defendant Marshall's discussion on the "baggage note," the .32-caliber handgun, and his response of "back in the day when you was asked to do something, somebody asked you for something, you didn't ask too many questions." See DE 95, Exh. 1-4.

Interestingly, Defendant Marshall's submissions to the Court appear to have sufficient information and detail regarding the United States' case with respect to claims he has advanced in his previous pleadings. With specificity, he sets forth claims that he could not have aided and abetted in Anna Mae Aquash's murder due to his pre-trial release conditions in place for his role in the murder of Martin Montileaux. See Defendant Marshall's Motion to Dismiss Due to Pre-Accusatory Delay, DE 125; see also State v. Marshall, 264 N.W. 2d 911 (SD 1978)(jury conviction for Dick Marshall's pre-meditated murder of Montileaux). Although his elaborate pre-trial bond claims fail for various reasons, the shortcomings are neither cured by nor based upon the need for a

Bill of Particulars.¹ See United States' Memorandum in Opposition to Defendant Marshall's Motion to Dismiss Due to Pre-Accusatory Delay, DE 125.

In conclusion, Defendant Marshall has failed to prove the legal or factual basis to support his request for a Bill of Particulars. Furthermore, any such potential justification is overcome by the pleadings and discovery provided to Defendant Marshall at this time. See generally, United States v. Fleming, 8 F.3d 1264, 1265 (8th Cir. 1993) (stating that there was no need for a bill of particulars where, despite a question as to the conduct complained of in the indictment, the defendant learned of the facts alleged by the government during an evidentiary hearing). The United States requests that Defendant Marshall's Motion for a Bill of Particulars be denied in full. See generally, Wessels, 12 F.3d at 750.

¹ On or about December 12, 1975, the date of Defendant Marshall's alleged conduct associated with the death of Annie Mae Aquash, he was on pre-trial release awaiting his trial for the Montileaux murder. Defendant Marshall has represented in his Motion to Dismiss Due to Pre-Accusatory Delay that apparently to satisfy a part of his pre-trial release conditions, firearms in his residence, consisting of a rifle and a shotgun, were taken into his mother and step-father's residence. See Defendant Marshall's Memorandum to Dismiss Due to Pre-Accusatory Delay, p.4. An obvious flaw in Defendant Marshall's argument is that the alleged murder weapon in this instance was a .32-caliber handgun, as opposed to a rifle or shotgun.

Dated and electronically filed this 12th day of March 2009.

MARTY J. JACKLEY
United States Attorney



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CERTIFICATE OF SERVICE

The undersigned hereby certifies on March 12, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

- U.S. Mail, postage prepaid
- Hand Delivery
- Facsimile at
- Federal Express
- Electronic Case Filing



Marty J. Jackley
United States Attorney