

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

CR08-50079

Plaintiff,

v.

**UNITED STATES' NOTICE OF RES
GESTAE EVIDENCE, OR IN THE
ALTERNATIVE, FED. R. EVID.
RULE 404(b) RE: MONTILEAUX
INCIDENT**

JOHN GRAHAM aka JOHN BOY
PATTON, and VINE RICHARD
MARSHALL aka RICHARD VINE
MARSHALL aka DICK MARSHALL,

Defendants.

COMES NOW the United States of America, through its attorneys, United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, to provide notice of the United States' intention to submit evidence in its case-in-chief at trial regarding facts and circumstances involving the Martin Montileaux shooting. It is the United States' position that said evidence is admissible under the theory of *res gestae*, or in the alternative, Fed. R. Evid. 404(b).

I. FACTUAL BACKGROUND

The following evidence concerning the Montileaux incident is an integral part of both Defendant Marshall's and Defendant Graham's criminal venture in the murder of Anna Mae Aquash: (1) the .32-caliber revolver involved in the Montileaux matter; (2) the existence of Defendant Marshall's pending murder

charge in the Montileaux matter on December 12, 1975; and (3) Defendant Marshall's conviction for the premeditated murder of Montileaux.

On March 1, 1975, Defendant Marshall shot and killed Martin Montileaux with a .22-caliber handgun at the Scenic Bar. See State v. Marshall, 264 N.W. 2d 911, 914-15 (S.D. 1978). Following the high speed chase that ensued after the Montileaux shooting, officers seized several rifles and revolvers in Defendant Marshall's possession. See Graham 04962-04965. Included among these firearms was an H&R .32-caliber revolver, serial number 55938. Id. This revolver was subsequently released from police custody on or about June 1, 1975, approximately six months prior to Defendant Marshall's conduct in the Aquash murder. Id.

On or about the early morning hours of December 12, 1975, Defendant Graham, Arlo Looking Cloud, and Theda Clarke brought Anna Mae Aquash to Defendant Marshall's residence in Allen, South Dakota, house #363. See Graham 04854; DE 95; Exhibits 1-4 (Defendant Marshall's statements). Aquash was being held against her will. See Graham 04854; DE 95, Exh. 2 (Defendant Marshall's statement). Defendant Marshall took Defendant Graham, Looking Cloud, and Clarke into his bedroom in which he provided consultation, including the exchange of a handwritten note from Theda Clarke asking if he could take care of this "baggage." See Graham 04886-04888. See DE 95, Exh. 3, 4 (Defendant Marshall's statements). Thereafter, Defendant Marshall provided Clarke, Looking Cloud, and Defendant Graham with a .32-

caliber revolver and shells to further the criminal venture. See Graham 04886-04888; DE 95, Exh. 3 (Defendant Marshall's statement).

Defendant Marshall's possession of the .32-caliber revolver during the Montileaux incident, and the gun's release from police custody on June 1, 1975, tends to logically prove he had the opportunity to provide the weapon during the Aquash criminal venture. Furthermore, Defendant Marshall's pending murder charge in Montileaux was material to several aiders and abettors in developing and carrying out the plan and scheme to murder Aquash. It further affected Defendant Marshall's ultimate role which did not include serving as the triggerman in the murder of Aquash. It is anticipated that additional evidence will be introduced at trial regarding the role of the Montileaux matter at the Marshall residence the evening Aquash was present, forming the basis for actions taken by the criminal venture that night.

II. RES GESTAE

When evidence is admitted under a *res gestae* theory, Rule 404(b) is not implicated. See United States v. Riebold, 135 F.3d 1226, 1229 (8th Cir. 1998) (citing United States v. LeCompte, 108 F.3d 948, 952 (8th Cir. 1997)). Under the theory of *res gestae*, evidence falling within one of the following categories is admissible when the activity: (1) is so blended or connected, with the one on trial that proof of one incidentally involves the others; (2) explains the circumstance thereof; or (3) tends logically to prove any element of the crime charged. See United States v. Honken, 378 F. Supp. 2d 928, 940-41 (N.D.

Iowa 2004) (citing Riebold, 135 F.3d at 1229; United States v. Forcelle, 86 F.3d 838, 841 (8th Cir. 1996); United States v. Holliman, 291 F.3d 498, 502 (8th Cir. 2002); United States v. Roberts, 253 F.3d 1131, 1134-35 (8th Cir. 2001) (other citations omitted)).

The Montileaux evidence, including the charges pending against Defendant Marshall on or about December 12, 1975, squarely fits all three admissible categories of *res gestae* evidence. This *res gestae* evidence of the Montileaux matter is so blended and connected with the aiding and abetting in the first degree murder of Aquash that proof of one incidentally involves the other with respect to Defendant Marshall's involvement and ultimate role in the murder of Aquash. It explains the circumstances surrounding the activities occurring at Defendant Marshall's residence on the evening of Aquash's murder, including why Defendant Marshall was offered and accepted a role into the criminal venture to murder Aquash. It further defined Defendant Marshall's role and ability to provide the .32-caliber revolver and shells, and logically tends to show why he did not serve as the triggerman in Aquash's murder. It further tends logically to prove the intent element of the offense, encompassing knowledge of what was occurring, the state of mind of the individuals involved, and intent to act. Accordingly, the Montileaux matter is admissible as part and parcel of the entire transaction of both Defendants Graham and Marshall and shows intent to commit and ultimately carry through with aiding and abetting in first degree murder.

III. RULE 404(b)

In the alternative, based upon the very nature of this evidence, it is further admissible pursuant to Fed. R. Evid. 404(b) in that it shows proof of opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident. See generally, United States v. Jourdain, 433 F.3d 652, 659 (8th Cir. 2006).

To properly admit Rule 404(b) evidence for purposes other than to prove a propensity, it must (1) be relevant to a material issue raised at trial, (2) be similar in kind and close in time to the crime charged, (3) be supported by sufficient evidence to support a finding by a jury that the defendant committed the other act, and (4) not have a prejudicial value that substantially outweighs its probative value. See, United States v. Kern, 12 F.3d 122, 124-25 (8th Cir. 1993) (other citations omitted).

Defendant Marshall's possession of the .32-caliber revolver during the Montileaux incident is relevant with respect to his alleged conduct of providing a .32-caliber revolver and .32-caliber shells to co-Defendant Graham and co-participants Arlo Looking Cloud and Theda Clarke on the evening of Aquash's murder. It tends to logically prove he had the opportunity to provide such a weapon during the criminal venture. Moreover, Defendant Marshall's pending murder charge for the Montileaux matter was material to several aiders and abettors in developing and carrying out the plan and scheme to murder

Aquash. It further affected Defendant Marshall's ultimate role that did not include serving as the triggerman in the murder of Aquash.

The Montileaux matter is clearly similar in kind and close in time to the crime charged. It occurred on or about March 1, 1975. Aquash was murdered on or about December 12, 1975. Furthermore, both instances involve a similar scheme and modus operandi of the victim being shot with a small caliber handgun in the back of the head/neck while facing away from the perpetrator.

The Montileaux shooting is supported by sufficient evidence, including a jury convicting Defendant Marshall of premeditated murder, which was affirmed by the South Dakota Supreme Court. See State v. Marshall, 264 N.W. 2d 911 (S.D. 1978). Defendant Marshall's possession of the .32-caliber revolver is well-documented with photographs and reports. See Graham 04962-04965. The Montileaux matter is a well-documented criminal case, including the existence of pending charges against Defendant Marshall in the Montileaux murder case on December 12, 1975.

Given the integral role of the Montileaux shooting, any limited prejudicial effect does not outweigh its significant probative value. To the extent either Graham or Marshall has concerns about any limited prejudicial effect, they may be cured by proper limiting instructions associated with this evidence. As duly noted by the Eighth Circuit Court of Appeals, "[a] jury is entitled to know the circumstances and background of a criminal charge. It cannot be expected to make its decision in a void-without knowledge of the time, place, and

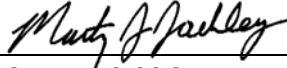
circumstances of the acts which form the basis of the charge.” See United States v. Fleck, 413 F.3d 883, 890 (8th Cir. 2005) (quoting United States v. Moore, 735 F.2d 289, 292 (8th Cir. 1984)).

IV. CONCLUSION

The jury is entitled to hear evidence regarding the .32-caliber revolver seized from Defendant Marshall in the Montileaux matter and ultimately released from police custody on or about June 1, 1975, approximately six months prior to Defendant Marshall’s conduct associated with the murder of Anna Mae Aquash. The jury is further entitled to hear the role the Montileaux matter played in both the planning and scheming of the criminal venture, and the ultimate roles carried out by Defendants Marshall and Graham in the Aquash murder.

Dated and electronically filed this 17th day of March 2009.

MARTY J. JACKLEY
United States Attorney



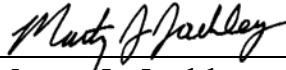
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CERTIFICATE OF SERVICE

The undersigned hereby certifies on March 17, 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