

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

CR08-50079-01

Plaintiff,

v.

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

Defendants.

**UNITED STATES' RESPONSE IN
OPPOSITION TO DEFENDANT
MARSHALL'S MOTION TO
DISMISS FOR DENIAL OF DUE
PROCESS**

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully files its Response in Opposition to Defendant Marshall's Motion to Dismiss for Denial of Due Process based upon both legal and factual grounds.

Defendant Marshall has made considerable representations with respect to his factual background that may or may not be borne out at trial through witness testimony and exhibits. With respect to the discovery disclosed and provided to both Defendants, Defendant Marshall conveniently leaves out or fails to recognize several witnesses' accounts, along with his very own admissions. See generally, United States' Memorandum in Opposition to Defendants Marshall and Graham's Motion for Severance, p.10-11; DE 95

(referencing additional witness accounts of Defendant Marshall's conduct); Graham 04885-04888 (additional witnesses' accounts of Defendant Marshall's conduct); DE 95, Exh. 1-4 (Defendant Marshall's statements and associated witness notes).

Defendant Marshall's further attempt to create a factual discrepancy by mixing aider and abettor conduct at Defendant Marshall's residence with aider and abettor conduct at the bluff scene of Aquash's murder rings hollow. The conduct in both locations is certainly blended and an integral part of the criminal venture to murder Aquash. At his residence, Defendant Marshall provided aid to the criminal venture, including the revolver, shells, and consultation. See DE 95, Exh. 1-4 (Defendant Marshall's statements); Graham 04962-04965; Graham 04886-04888. Thereafter, other aiders and abettors, namely co-Defendant Graham and co-participants Arlo Looking Cloud and Theda Clarke, continued the criminal venture at the bluff where Aquash was murdered. See Graham 04893-04895; United States v. Looking Cloud, 419 F.3d 781, 875 (8th Cir. 2005) ("Looking Cloud and Graham marched Aquash up a hill and Graham shot her at the top of the cliff").

The United States has not alleged, nor does the law require, Defendant Marshall to have participated in each and every element of the offense. 18 U.S.C. § 2; United States v. Sigalow, 812 F.2d 783, 785 (2d Cir. 1987). Liability for the actions of a principal requires only that the defendant knowingly associated with the criminal venture and participated in a material

respect. United States v. Stands, 105 F.3d 1565, 1577 (8th Cir. 1997)(quoting United States v. Dunlap, 28 F.3d 823, 826 (8th Cir. 1994)).

With respect to Defendant Marshall, there exists no material factual discrepancy nor inherently contradictory evidence giving rise to due process violations. Consequently, Defendant Marshall's failure to identify inherently contradictory evidence warrants denial of his motion. Defendant Marshall's reliance on the Smith decision is misplaced. Smith v. Groose, 205 F.3d 1045, 1047-51 (8th Cir. 2000). In Smith, Smith, Bowman, Lytle, and Dixon set out to burglarize the Chambers' house. Id. at 1047. When the foursome arrived, a burglary was in progress by the Cunningham party. Id. The foursome approached Cunningham, who agreed to allow them to enter the house and steal what remained. Id. It is from this point that the serious factual discrepancy existed in the Smith case. Id.

At the Smith trial, the state convicted Smith on the theory that the Chamberses were murdered while the Smith foursome was present during the robbery. Id. at 1047-48. Specifically, that Bowman was the killer and Smith was, therefore, guilty of felony murder, armed criminal action, and robbery, because the murders occurred while he was in the house committing the burglary. Id. at 1048.

After the Smith conviction, the state indicted Cunningham for the murders. Id. At Cunningham's trial, the state relied upon a wholly inconsistent theory that the Chamberses were already dead when the Smith

foursome arrived. Id. Cunningham was ultimately convicted of two counts of first degree murder. Accordingly, the state's murder convictions based upon inconsistent and diametrically opposed testimony was determined to violate Smith's due process rights. Id.

To apply the factual scenario from Smith, it would require a claim that Defendant Marshall provided the murder weapon, shells, and consultation *after* Aquash had already been murdered. See, Smith, 205 F.3d at 1047-51. To be sure, neither in the Looking Cloud case nor in the Marshall prosecution does there exist such a claim. See Looking Cloud, 419 F.3d at 785; DE 95, Exh. 1-4 (Defendant Marshall's statements). Rather, Defendant Marshall provided the .32-caliber revolver and shells while Aquash was present and alive at his residence, albeit held against her will. See Graham 04886-04888; DE 95, Exh. 1-4 (Defendant Marshall's statements). Thereafter, the other aiders and abettors, including Defendant Graham, used Defendant Marshall's .32-caliber revolver and shells to murder Aquash. Looking Cloud, 419 F.3d at 785; Graham 04886-04888.

"To violate due process, an inconsistency must exist at the core of the prosecutor's cases against defendants for the same crime...." See Clay v. Bowersox, 367 F.3d 993, 1004 (8th Cir. 2004) (recognizing the significance that petitioner's only showing of inconsistent theories was a purported "from the prosecutor's closing argument as opposed to evidence.") (citing Smith v. Groose, 205 F.3d 1045, 1052 (8th Cir. 2000)). Defendant Marshall's attempt to

create a factual discrepancy by mixing aider and abettor conduct at Defendant Marshall's residence with aider and abettor conduct at the bluff scene of Aquash's murder fails to give rise to due process concerns.

The United States respectfully requests this Court deny Defendant Marshall's Motion to Dismiss for denial of due process.

Dated and electronically filed this 19th day of March 2009.

MARTY J. JACKLEY
United States Attorney



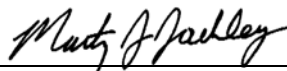
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CERTIFICATE OF SERVICE

The undersigned hereby certifies on March 19, 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