

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 FOURTH
MOTION FOR SEVERANCE;
REQUEST FOR
SPEEDY TRIAL

NOW COMES Defendant Richard Marshall, by and through his attorney Dana L. Hanna, pursuant to Rules 8(b) and 14 of the Federal Rules of Criminal Procedure and pursuant to his constitutional and statutory rights to a speedy trial, and hereby moves the court to order a severance of his trial from that of the co-defendant. The defendant further moves the court to enter an order scheduling a trial date.

Good cause exists for the court to consider this motion, which is being filed after the motion deadline of March 23, 2009, because the facts and events that give rise to this motion occurred after that date.

In support of this motion, Dana L. Hanna, attorney for the defendant, hereby affirms:

1. Since his arrest on August 25, 2008, Richard Marshall has been awaiting trial, detained in Pennington County jail without bond, for one year and three months. Mr. Marshall is ready to proceed to trial. He objects to further delays.

2. Mr. Marshall has filed three previous motions for severance, none of which were granted. Mr. Marshall remains in jail, detained without bond, with no trial date scheduled.

3. On May 5, 2009, after this court dismissed one of the counts in the indictment charging the co-defendant John Graham, the government moved to continue the trial so that it could proceed with an interlocutory appeal to the Court of Appeals. That motion was granted and the trial was continued with no trial date, pending a decision by the Court of Appeals.

4. On July 20, 2009, Mr. Marshall filed his second motion for a severance of trials, with memorandum of law, on the grounds that he was being denied his right to a speedy trial because of the government's interlocutory appeal on the co-defendant's case. [Doc. 418, 419]. That motion was not granted.

5. On July 28, 2009, the Eighth Circuit Court of Appeals affirmed the trial court's dismissal of Count III. Thereafter, the government requested the Court of Appeals to give the government extra time to decide whether it would petition for a rehearing. That motion was granted.

6. In the meantime, the federal government cooperated with the South Dakota State Attorney General in seeking and obtaining an indictment against John Graham in state court in Pennington County, charging him with the murder of Anna Mae Aquash.

7. After the government lost its interlocutory appeal, this court scheduled a trial date of October 6, 2009 for the joint trial of the defendants.

8. On September 4, 2009, the government moved for another indefinite continuance of the trial until such time as the Court of Appeals ruled on its petition for rehearing – a petition that the government had not yet filed. [Doc. 449].

9. On September 8, 2009, Richard Marshall filed his objection to the government's motion for a continuance and requested a speedy trial, and he again moved for severance on the grounds that he was being denied a speedy trial because his case was joined with that of Graham. [Doc. 450]. Mr. Marshall's third motion for severance was not granted. Over the defendants' objection, the court granted the government another indefinite continuance of the trial, pending a ruling by the Court of Appeals on the government's petition for a rehearing.

10. On September 25, 2009, the government filed its petition in the Court of Appeals for a rehearing on its interlocutory appeal in the co-defendant's case.

11. On November 4, 2009, the Court of Appeals denied the government's petition for a rehearing.

12. On November 17, 2009, this Court held a telephonic status conference with attorneys for the parties. The Court inquired of the Assistant United States Attorney whether the government intended to petition the Supreme Court for a writ of certiorari or whether the government intended to proceed with the trial in district court. The Assistant United States Attorney replied that he did not know; that he could not answer that question; that that decision was for the Solicitor General to make and he had 90 days to make that decision.

13. In the telephonic conference on November 17, 2009, the court inquired of the Assistant United States Attorney if the government intended to dismiss the indictment against John Graham if the government elects not to file a petition for a writ of certiorari. The Assistant United States Attorney stated that if the government does not seek review from the Supreme Court, the government will probably dismiss the indictment against Graham and allow the trial of Graham to proceed in state court.

14. This court, in its order dismissing Count III of the indictment against co-defendant John Graham, has given clear notice to the government that the court will grant a motion for a judgment of acquittal if the government proceeds to trial against Graham, because it is evident from undisputed facts in the record that the government will be unable to prove a necessary element of the remaining crimes charged in the indictment—that Graham is Indian for purposes of the federal murder statute. Therefore, the government has been told by the court that it is the court’s legal opinion that there is insufficient evidence to support a conviction of Graham on any of the remaining charges in the indictment.

15. Unless the United States Supreme Court were reverse the Court of Appeals’ ruling in the Graham matter, the government cannot ethically proceed with a trial of John Graham in federal court. As the matter stands now, without a reversal from the Supreme Court, the government will be ethically obligated to dismiss the federal indictment against the co-defendant Graham. “A prosecutor should not institute, cause to be instituted, *or permit the continued pendency of criminal charges* in the absence of sufficient admissible evidence to support a conviction.” American Bar Association Standards for the Prosecution Function, Standard 3-3-9. Italics added.

16. Unless Mr. Marshall is granted a severance now, it is likely that he will have to remain in custody without a trial for several more months while the government pursues its course of exhausting all avenues of appeal regarding the co-defendant. Particularly in view of the likelihood that at the end of that lengthy appellate process, the government will then dismiss the indictment against Mr. Marshall’s co-defendant, it is fundamentally unfair to continue to deny Mr. Marshall a separate trial now.

17. If the court does not grant a severance, Mr. Marshall will suffer undue prejudice as a result of joinder, because he will be denied his constitutional right to a speedy trial.

WHEREFORE, the defendant Richard Marshall moves the court to order a severance of trials and to enter an order scheduling a trial date.

DATED: November 30, 2009

VINE RICHARD MARSHALL, Defendant

BY: /s/ Dana L. Hanna
Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Severance and Request for a Speedy Trial was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 30th day of November, 2009.

/s/ Dana L. Hanna

Dana L. Hanna