

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
MOTION TO PRECLUDE USE
OF FALSE TESTIMONY;
MOTION FOR PRE-TRIAL
EVIDENTIARY HEARING**

NOW COMES Defendant Richard Marshall, by and through his attorney Dana L. Hanna, and pursuant to his constitutional rights to a fair trial and due process of law, respectfully moves the Court to enter an order to prohibit the government from offering the testimony of Fritz Arlo Looking Cloud at trial, on the grounds that the government knows or has good reason to know that Looking Cloud will knowingly give false testimony as to material facts; specifically, the government knows or has good reason to know that Looking Cloud will give false exculpatory testimony in which he will falsely deny his own proven criminal culpability in the murder of Anna Mae Pictou Aquash.

The Defendant further moves the Court to order a pre-trial evidentiary hearing on this motion, if the government contests the fact that it knows or has good reason to know that Looking Cloud will give false exculpatory testimony when he is questioned in trial about his own guilt and intent to murder Aquash.

As grounds for this motion, Dana L. Hanna, attorney for the Defendant, hereby affirms:

1. The key prosecution witness in the government's case against Richard Marshall is convicted murderer Fritz Arlo Looking Cloud. In 2004, Looking Cloud was convicted after trial of murder in the first degree for murdering or aiding and abetting the murder of Anna Mae Pictou

Aquash in December 1975. Looking Cloud is presently serving a life sentence for his crime. He agreed to testify as a government witness in 2008.

2. I hereby affirm that I have a good faith reasonable belief that the government knows or should know that Looking Cloud intends to give testimony that the government knows is false in the trial of Richard Marshall. I make these affirmations on the basis of reliable information and belief, the sources of which include, but are not limited to: statements made to me by Assistant United States Attorney (AUSA) Robert Mandel; tape-recorded conversations made from jail between Looking Cloud and his wife, friends and relatives; transcripts of statements made by Looking Cloud to the government's prosecuting attorney before two grand juries; official court records in this case, the case of United States v. Looking Cloud, CR #03-50020, and in Arlo Looking Cloud's pending habeas action in this court, CV #06-5062; the government's brief and the Court of Appeals opinion in United States v. Looking Cloud, 419 F.3d 781 (8th Cir. 2005); the discovery materials that I have received from the government; and statements made by witnesses during the course of my own independent investigation.

3. Based on the aforesaid sources of information, I have good reason to believe and I do in fact believe that if and when he testifies, Looking Cloud will falsely testify that he had no prior knowledge of Aquash's murder, that he had no intent to help murder her, that he did not knowingly aid or abet her murder, and that he did not provide the murder weapon to the shooter at the murder scene. The testimony that Looking Cloud intends to give as to these material facts has been proven false beyond a reasonable doubt in his own trial; his guilt and his intent to murder are judicially noticeable facts and those judicially proven facts are not subject to reasonable dispute in this Court or in this trial.

4. In Looking Cloud's trial in 2004, Looking Cloud's defense was that he lacked specific intent to help murder Aquash. To disprove that defense, the government presented the testimony of Richard Two Elk, who testified that Looking Cloud had admitted to him that he—Looking Cloud—handed a gun to John Graham at the scene of the murder and that Graham then used that gun to murder Aquash. The jury found Looking Cloud guilty of murder in the first degree.

5. In his appeal to the United States Court of Appeals for the Eighth Circuit, Looking Cloud argued that the evidence in his trial was insufficient to prove that he knowingly intended

to help murder Aquash. In the statement of facts in the government's brief, AUSA Mandel stated as a proven fact that Looking Cloud handed the gun to John Graham at the murder scene.

6. In 2005, the Court of Appeals affirmed Looking Cloud's conviction and ruled that Looking Cloud's specific intent to murder was proven beyond a reasonable doubt. In its opinion, the Court specifically relied on the government's evidence that Looking Cloud handed the gun to the shooter at the murder scene as proof of his specific intent to murder. United States v. Looking Cloud, 419 F.3d at 790.

7. In 2006, Looking Cloud filed a motion to set aside his conviction, claiming he was wrongfully convicted as a result of ineffective counsel and government misconduct. That motion, which is filed pursuant to 28 U.S.C. §2255, at CV #06-0502, is presently pending before this Court. If Looking Cloud prevails on his motion to set aside his conviction and he is granted a new trial, then any inculpatory admissions he makes in his testimony at Mr. Marshall's trial would be used as evidence against Looking Cloud in a new trial. It is therefore entirely foreseeable that Looking Cloud will continue to deny his guilt and intent to murder Aquash if he is allowed to testify in Mr. Marshall's trial.

8. I have subpoenaed and listened to tape-recordings of telephone calls made by Looking Cloud from jail, after he agreed to testify for the government in August 2008, in which he tells his wife, relatives, and friends that he views his testimony in Mr. Marshall's trial as an opportunity to convince the triers of fact and the court that he was wrongly convicted of Aquash's murder. In those conversations, Looking Cloud has repeatedly told his wife, his relatives, and his friends that when he testifies as a government witness in the trial, he will testify that he was innocent of aiding and abetting Aquash's murder, that he had no intent to murder her, and that he was wrongly convicted in his trial, which he has characterized as a "kangaroo court." It is evident from these conversations that Looking Cloud intends to give falsely testify that he had no criminal intent to help murder Aquash and that he was innocent of the murder for which he was convicted.

9. I have provided copies of those tape recorded conversations to the government, at AUSA Mandel's request. Therefore, I have every reason to believe that the government has heard these tapes and knows that Looking Cloud intends to falsely deny his guilt in the murder of

Aquash if he testifies.

10. Based upon the false exculpatory statements Fritz Arlo Looking Cloud has made since his conviction to government prosecutors and agents in his proffer session and interviews, statements he has made to two grand juries and statements made in tape-recorded conversations, it is a foreseeable fact which is known to the government that if Looking Cloud is allowed to testify in the trial of Richard Marshall, Looking Cloud will give perjured testimony as to these material facts:

- he will false testify that until the moment she was shot, Looking Cloud had no prior knowledge that Anna Mae Aquash was going to be murdered;
 - he will falsely testify that he had no intent to help murder Aquash;
 - he will falsely testify that he did not knowingly aid or abet the murder of Aquash;
 - he will falsely testify that he did not hand a gun to John Graham at the murder scene;
- and
- he will falsely testify that he made no inculpatory admissions to Richard Two Elk.

11. I have raised the issue of Looking Cloud's foreseeable perjury with the government, both in personal conversation with AUSA Mandel and in correspondence to the United States Attorney. On June 3, 2009, I raised the issue of Looking Cloud's intent to commit perjury with AUSA Mandel in a conversation that took place in the courtroom after Mr. Marshall's detention hearing. I advised Mr. Mandel of my expectation that when he testifies in the trial of Richard Marshall, Looking Cloud will deny prior knowledge or intent to aid in the murder of Aquash. AUSA Mandel admitted and agreed that if he is questioned on those matters in trial, Looking Cloud could be expected to deny any prior knowledge or intent with regard to the murder of Aquash. However, AUSA Mandel did not see such testimony as presenting a constitutional problem; it was his opinion that, even though his guilt and his intent to murder have been judicially proven beyond a reasonable doubt, if Looking Cloud were to deny his guilt and testify that he had no intent to help murder Aquash, then such testimony would not constitute perjury. The government has never denied that when Looking Cloud testifies, it is likely that Looking Cloud will deny his criminal intent and guilt in the crime for which he has been convicted.

12. Based on the foregoing facts, it is reasonably foreseeable that if Arlo Looking Cloud testifies in the trial of Richard Marshall, Looking Cloud will give false exculpatory testimony that would constitute perjury. Based on the foregoing facts, the government knows or should know that when Looking Cloud intends to commit the crime of perjury when he is questioned on cross-examination.

13. If this Court allows the government to present the testimony of its key witness whom the government knows or should know will commit perjury as to material facts in the case, the knowing use of false testimony by the government will deprive the Defendant Richard Marshall of a fair trial and due process of law.

WHEREFORE, the Defendant Richard Marshall moves the Court to enter an Order :

(1) directing the government to admit or deny the fact that it is reasonably foreseeable that if Looking Cloud testifies as a government witness, he will testify that he had no prior knowledge, intent to murder or guilt in the murder of Anna Mae Aquash;

(2) if the government contests the fact that it is foreseeable that Looking Cloud will give such testimony, then the Defendant Marshall moves the Court to order that an evidentiary hearing be held, prior to trial, in which the Defendant will have an opportunity to prove the government knows or should know that its witness will give false exculpatory testimony if he testifies; and

(3) if the Court finds that it is a foreseeable fact, which is known or should be known to the government, that Looking Cloud will commit perjury if he testifies, then the Defendant Marshall moves the Court to enter an Order prohibiting the government from using false testimony and to refrain from presenting the testimony of Fritz Arlo Looking Cloud in the trial of Richard Marshall.

DATED: 19 JANUARY 2010

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 I have served a true and correct copy of the foregoing Motion 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 19th day of January, 2010.

/s/ Dana L. Hanna
Dana L. Hanna