

**FILED**

APR 22 2010

  
CLERK

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

\*\*\*\*\*

UNITED STATES OF AMERICA,

CR 08-50079

Plaintiff,

-vs-

JURY INSTRUCTIONS

VINE RICHARD MARSHALL, a/k/a

RICHARD VINE MARSHALL, a/k/a

DICK MARSHALL,

Defendant.

\*\*\*\*\*

*original set  
of instructions.  
Shirley G. Pearson  
US District Court Judge*

INSTRUCTION NO. 1

Members of the jury, the instructions I gave you during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because *all* are important. This is true even though some of those I gave you during the trial are not repeated here.

The instructions I am about to give you now are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, *all* instructions, whenever given and whether in writing or not, must be followed.

INSTRUCTION NO. 2

It is your duty to find from the evidence what the facts are. You will then apply the law, as I give it to you, to those facts. You must follow my instructions on the law, even if you thought the law was different or should be different.

Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you.

INSTRUCTION NO. 3

There is nothing particularly different in the way that you should consider the evidence in a trial from that in which any reasonable and careful person would treat any very important question that must be resolved by examining facts, opinions, and evidence. You are expected to use your good sense in considering and evaluating the evidence in the case for only those purposes for which it has been received and to give such evidence a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything other than the evidence received in the case and the instructions of the Court. Remember as well that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence because the burden of proving guilt beyond a reasonable doubt is always assumed by the government.

INSTRUCTION NO. 4

I have mentioned the word “evidence.” The “evidence” in this case consists of the testimony of witnesses, the documents and other things received as exhibits, and any facts that have been stipulated—that is, formally agreed to by the parties.

You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence in the case.

Certain things are not evidence. I will list those things again for you now:

1. Statements, arguments, questions, and comments by lawyers representing the parties in the case are not evidence.
2. Objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question, you must ignore the question and must not try to guess what the answer might have been.
3. Testimony that I struck from the record, or told you to disregard, is not evidence and must not be considered.
4. Anything you saw or heard about this case outside the courtroom is not evidence.

Finally, if you were instructed that some evidence was received for a limited purpose only, you must follow that instruction.

INSTRUCTION NO. 5

There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty.

INSTRUCTION NO. 6

If any reference by the Court or by counsel to matters of testimony or exhibits does not coincide with your own recollection of that evidence, it is your recollection which should control during your deliberations and not the statements of the Court or of counsel.

You are the sole judges of the evidence received in this case.

INSTRUCTION NO. 7

If you took notes during the trial, your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence. If you did not take notes, you should rely on your own independent recollection of the proceedings and you should not be influenced by the notes of other jurors. I emphasize that notes are not entitled to any greater weight than the recollection or impression of each juror as to what the testimony may have been.



INSTRUCTION NO. 8

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

If you conclude that any witness has wilfully sworn falsely to any material fact in issue, you may disregard the whole or any part of such witness' testimony.

In deciding what testimony to believe, consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

INSTRUCTION NO. 9

You have heard tape recordings of conversations. These conversations were legally recorded, and you may consider the recordings just like any other evidence.

INSTRUCTION NO. 10

There is a written transcript at the bottom of the video and audio recording you saw and heard of an interview of Arlo Looking Cloud. That transcript also undertakes to identify the speakers engaged in the conversation.

You are permitted to have the transcript for the limited purpose of helping you follow the conversation as you listen to and watch the video and audio recording, and also to help you keep track of the speakers. The transcript, however, is not evidence. The video and audio recording itself is the primary evidence of its own contents. The only reason you will be allowed to have this particular transcript during your deliberations is that it is a part of the video and audio recording of Arlo Looking Cloud and it cannot be deleted.

You also received typewritten transcripts of other tape recordings which you will not have during your deliberations because, again, the transcripts are not evidence.

You are specifically instructed that whether any transcript correctly or incorrectly reflects the conversation or the identity of the speakers is entirely for you to decide based upon what you have heard here about the preparation of the transcript, and upon your own examination of the transcript in relation to what you see and hear on the audio recording. If you decide that the transcript is in any respect incorrect or unreliable, you should disregard it to that extent.

Differences in meaning between what you hear in the recording and read in the transcript may be caused by such things as the inflection in a speaker's voice. You should, therefore, rely on what you hear rather than what you read when there is a difference.

INSTRUCTION NO. 11

You have heard testimony that the defendant made statements to Robert Ecoffey and to Serle Chapman. It is for you to decide as to each purported statement:

First, whether the defendant made the statements and

Second, if so, how much weight you should give to each statement.

In making these two decisions as to each statement, you should consider all of the evidence, including the circumstances under which the statements may have been made.

INSTRUCTION NO. 12

You have heard evidence that witness Fritz Arlo Looking Cloud was convicted of a crime which arose out of the same events for which the defendant is on trial here. You must not consider Fritz Arlo Looking Cloud's conviction as any evidence of this defendant's guilt. You may consider Fritz Arlo Looking Cloud's conviction only for the purpose of determining how much, if at all, to rely upon his testimony.

INSTRUCTION NO. 12A

You have heard testimony concerning events and criminal acts committed by individuals - -not the defendant Richard Marshall - - who were members or leaders or supporters of the American Indian Movement.

This evidence was offered by the government to show what the government contends were the reasons and motives that led to the murder of Anna Mae Aquash.

That testimony is not to be considered by you as any evidence at all against Richard Marshall.

Nor is evidence that Richard Marshall was a supporter of the American Indian Movement to be considered by you as evidence tending to prove guilt of the crime charged in the indictment.

The defendant's political beliefs in 1975 are not on trial here. They are not evidence of the defendant's guilt, whatever those beliefs may have been

Nor can the defendant be found guilty for having supported a political movement.

INSTRUCTION NO. 12B

You have heard testimony from Arlo Looking Cloud that he did not tell investigators about stopping in Allen until 2008 because he believed that Richard Marshall had a reputation that made Looking Cloud fear him and that Richard Marshall had committed a crime of violence for which he had been imprisoned.

I charge you that that testimony is to be considered by you solely for the purpose of judging Looking Cloud's credibility as to why he did not tell authorities anything about Mr. Marshall until 2008.

That crime of violence is not to be considered by you as any evidence that Mr. Marshall committed the offense charged in this indictment.

INSTRUCTION NO. 13

You have heard evidence that witness Fritz Arlo Looking Cloud hopes to receive a reduction of his sentence in return for his cooperation with the Government in this case. If the prosecutor believes Fritz Arlo Looking Cloud provided substantial assistance, the prosecutor can file a motion to reduce his sentence. The judge has no power to reduce a sentence for substantial assistance unless the Government, acting through the United States Attorney, files such a motion. If such a motion for reduction of sentence for substantial assistance is filed by the Government, then it is up to the judge to decide whether to reduce the sentence at all and if so, how much to reduce it.

You may give the testimony of Fritz Arlo Looking Cloud such weight as you think it deserves. Whether or not the testimony of Fritz Arlo Looking Cloud may have been influenced by his hope of receiving a reduced sentence is for you to decide.



INSTRUCTION NO. 14

You have heard evidence that Serle Chapman and Darlene Nichols-Ecoffey have an arrangement with the Government under which they were reimbursed by the Government for providing information to the Government. You also heard evidence that Serle Chapman and his wife received benefits in terms of their legal right to continue to be in the United States. The testimony of Mr. Chapman and Ms. Nichols-Ecoffey was received in evidence and may be considered by you. You may give their testimony such weight as you think it deserves. Whether or not their information or testimony may have been influenced by such reimbursement is for you to determine.

INSTRUCTION NO. 15

You should judge the testimony of a law enforcement officer in the same way that you judge the testimony of any other witness.

INSTRUCTION NO. 16

You have heard evidence that before the trial witnesses made statements that may be inconsistent with the witnesses' testimony here in court. If you find that a statement is inconsistent, you may consider the earlier statement in deciding the truthfulness and accuracy of that witness' testimony in this trial. You may not use it as evidence of the truth of the matters contained in that prior statement.

INSTRUCTION NO. 17

You have heard testimony from a person described as an expert. Persons who, by knowledge, skill, training, education or experience, have become expert in some field may state their opinions on matters in that field and may also state the reasons for their opinion.

Expert testimony should be considered just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case.

INSTRUCTION NO. 18

Your decision on the facts of this case should not be determined by the number of witnesses testifying for or against a party. You should consider all the facts and circumstances in evidence to determine which of the witnesses you choose to believe or not believe. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

INSTRUCTION NO. 19

The Superseding Indictment charges the defendant, Vine Richard Marshall, a/k/a Richard Vine Marshall, a/k/a Dick Marshall, with one count of first degree murder or aiding and abetting first degree murder. The defendant has pleaded not guilty to this charge.

As I told you earlier, the Superseding Indictment is simply an accusation. It is not evidence of anything. To the contrary, the defendant is presumed to be innocent. Thus the defendant, even though charged, begins the trial with no evidence against him. The presumption of innocence alone is sufficient to find the defendant not guilty and can be overcome only if the government proves, beyond a reasonable doubt, each essential element of the crime charged.

There is no burden upon a defendant to prove that he is innocent. Accordingly, the fact that the defendant did not testify must not be considered by you in any way, or even discussed, in arriving at your verdict.

INSTRUCTION NO. 19A

In order for the Government to meet its burden of proving the defendant's guilt of aiding and abetting the murder of Anna Mae Aquash, the Government must prove beyond a reasonable doubt that Richard Marshall provided the murder weapon that was used to kill Aquash and also that he did so with the specific intent to help murder Aquash.

It is the defendant's theory of the case that the evidence has failed to prove beyond a reasonable doubt that Richard Marshall gave Theda Clarke a gun or that he provided the murder weapon that was used to kill Aquash.

If you find that the evidence has failed to prove beyond a reasonable doubt that the defendant Richard Marshall gave Theda Clarke a gun that was later used to murder Aquash, you must find the defendant not guilty.

Furthermore, it is the defendant's theory of the case that the evidence has failed to prove beyond a reasonable doubt that Richard Marshall knew that Anna Mae Aquash was going to be killed when Clarke, Graham, Looking Cloud and Aquash were at his home in Allen.

Specific intent to murder is an element of the crime charged that must be proven beyond a reasonable doubt. That means that even if you were to find that the evidence has proven beyond a reasonable doubt that the defendant gave Theda Clarke a gun that was later used to kill Aquash, unless the evidence also convinces you beyond a reasonable doubt that the defendant gave a gun to Theda Clarke knowing that the gun was to be used to murder Aquash, then you must find the defendant not guilty.

Unless the evidence proves beyond a reasonable doubt both that Richard Marshall gave a gun to Theda Clarke and that he gave a gun to Theda Clarke knowing the gun was going to be used to murder Aquash and he thereby intended to help bring about her murder, then you must find the defendant not guilty.

INSTRUCTION NO. 20

A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.



INSTRUCTION NO. 21

The Superseding Indictment charges that the offense alleged was committed “on or about” a certain date. Although it is necessary for the government to prove beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged in the Superseding Indictment, it is not necessary for the government to prove that the offense was committed precisely on the date charged.

INSTRUCTION NO. 22

Section 1111 of Title 18 of the United States Code, provides:

Murder is the unlawful killing of a human being with malice aforethought. . . . [A]ny . . . kind of willful, deliberate, malicious, and premeditated killing . . . is murder in the first degree.

INSTRUCTION NO. 23

The crime of murder in the first degree as charged in the Superseding Indictment has five (5) essential elements, which are:

- One. That the defendant, at the time and place alleged in the Superseding Indictment, killed, or aided and abetted the killing of, Annie Mae Aquash, a/k/a Annie Mae Pictou.
- Two. That the defendant did so with malice aforethought as defined in Instruction No. 25.
- Three. That the killing was premeditated as defined in Instruction No. 26.
- Four. That the defendant is an Indian.
- Five. That the offense took place in Indian Country.

To sustain its burden of proof for the crime of first degree murder as charged in the Superseding Indictment, the government must prove all of these essential elements beyond a reasonable doubt, otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 24

A person may be found guilty of first degree murder even if he personally did not do every act constituting the offense charged, if he aided and abetted the commission of first degree murder.

In order to have aided and abetted the commission of a crime a person must, before or at the time the crime was committed,

- (1) have known first degree murder was being committed or going to be committed; and
- (2) have knowingly acted in some way for the purpose of causing, encouraging, or aiding the commission of first degree murder.

For you to find the defendant guilty of first degree murder by reason of aiding and abetting, the Government must prove beyond a reasonable doubt that all of the essential elements of first degree murder were committed by some person or persons and that the defendant aided and abetted the commission of that crime.

You should understand that merely being present at the scene of an event, or merely acting in the same way as others or merely associating with others, does not prove that a person has become an aider and abettor. A person who has no knowledge that a crime is being committed or about to be committed, but who happens to act in a way which advances some offense, does not thereby become an aider and abettor.

INSTRUCTION NO. 25

As used in these instructions, “malice aforethought” means an intent, at the time of a killing, willfully to take the life of a human being, or an intent willfully to act in callous and wanton disregard of the consequences to human life; but “malice aforethought” does not necessarily imply any ill will, spite or hatred towards the individual killed.

In determining whether Annie Mae Aquash, a/k/a Annie Mae Pictou, was unlawfully killed with malice aforethought, you should consider all the evidence concerning the facts and circumstances preceding, surrounding and following the killing which tend to shed light upon the question of intent on the part of the defendant.

INSTRUCTION NO. 26

A killing is premeditated when it is intentional and the result of planning or deliberation. The amount of time needed for premeditation of a killing depends on the person and the circumstances. It must be long enough for the defendant, after forming the intent to kill, to be fully conscious of his intent, and to have thought about the killing.

For there to be premeditation the defendant must think about the taking of a human life before acting. The amount of time required for premeditation cannot be arbitrarily fixed. The time required varies as the minds and temperaments of people differ and according to the surrounding circumstances in which they may be placed. Any interval of time between forming the intent to kill, and acting on that intent, which is long enough for the defendant to be fully conscious and mindful of what he intended and willfully set about to do, is sufficient to justify the finding of premeditation.

INSTRUCTION NO. 27

Intent or knowledge may be proved like anything else. You may consider any statements made and acts done by the defendant, and all the facts and circumstances in evidence which may aid in a determination of defendant's knowledge or intent.

You may, but are not required to, infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

INSTRUCTION NO. 28

An "Indian" is a person who:

- (1) has some Indian blood; and
- (2) the person is "recognized" as an Indian.

In determining whether a person is recognized as an Indian you may consider in declining order of importance evidence, if any, of:

- (a) Whether the person is enrolled in a tribe;
- (b) Whether the government has recognized either formally or informally that the person is an Indian through providing the person with assistance reserved only to Indians;
- (c) Whether the person enjoys the benefits of tribal affiliation; and
- (d) Whether the person is socially recognized as an Indian through living on the reservation and participating in Indian social life.

The term "Indian country," includes, but is not limited to, all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.



INSTRUCTION NO. 29

In conducting your deliberations and returning your verdicts, there are certain rules you must follow. I will list those rules for you now.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because your verdict – whether guilty or not guilty – must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict.

Third, if the defendant is found guilty, the sentence to be imposed is my responsibility. You may not consider punishment in any way in deciding whether the government has proved its case beyond a reasonable doubt.

Fourth, if you need to communicate with me, you may send a note to me through the marshal, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone, including me, how your vote stands numerically.

INSTRUCTION NO. 29, continued

Fifth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. Nothing I have said or done is intended to suggest what your verdict should be -- that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed upon the verdict, your foreperson will fill in the form, sign and date it, and advise the marshal that you are ready to return to the courtroom.

INSTRUCTION NO. 30

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.