

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 SEVER TRIALS

NOW COMES defendant Richard Marshall, by and through counsel, pursuant to Rule 14 of the Federal Rules of Criminal Procedure, and hereby moves the Court to order a severance of trials for defendant Marshall and co-defendant John Graham. Defendant Marshall makes this motion on the grounds that his right to a fair trial will be substantially prejudiced if he is compelled to be tried in a joint trial with the co-defendant.

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

1. In this case, the government's case against Richard Marshall consists chiefly of the testimony of cooperating government witness Arlo Looking Cloud, who has been convicted of murder in the killing of Anna Mae Aquash. After his conviction and his life sentence, Looking Cloud told federal investigators that defendant Richard Marshall gave a handgun to the individuals whom are accused of having aided and abetted one another in the murder of Anna

Mae Aquash in December 1975—Arlo Looking Cloud, Theda Clark, and co-defendant John Graham. Defendant Richard Marshall has pleaded not guilty. Looking Cloud has told investigators that he was present when Anna Mae Aquash was killed and that he witnessed John Graham shoot her in the head. The trial of both defendants Graham and Marshall is scheduled to begin on February 24, 2009.

2. On information and belief, which is based on the discovery provided to me by the government, the government will offer testimony from two witnesses—cooperating witness Serle Chapman and federal investigator Robert Ecoffey—that defendant Richard Marshall made statements to them that would tend to inculcate the co-defendant John Graham in the kidnapping and murder of Anna Mae Aquash. Chapman and Ecoffey are both expected to testify that Richard Marshall told each of them that John Graham, Theda Clark, and Arlo Looking Cloud came to his house in Allen, South Dakota sometime in or around December 1975 with Anna Mae Aquash and that they tried to persuade Richard Marshall to keep Anna Mae Aquash at his house and he refused, and that Graham, Looking Cloud, and Clark then left Marshall and his home, after asking for directions to Rosebud. Defendant Marshall’s out of court statements are directly in conflict with statements made by co-defendant Graham to federal investigators and witnesses.

3. It is anticipated that these statements by defendant Marshall would be offered as evidence against co-defendant Graham as statements against interest under FRE Rule 804(b)(3).¹ If such statements are introduced into evidence, under FRE Rule 806, co-defendant Graham would be permitted to offer evidence attacking the credibility of defendant Richard Marshall “by

¹ Defendant Marshall has filed a motion *in limine* to preclude the government from introducing the testimony of Serle Chapman as to the alleged statements which he claims were made to him by the defendant.

any evidence which would be admissible for those purposes if declarant had testified as a witness.” This would allow the co-defendant to adduce prejudicial evidence against Richard Marshall that the government would not be allowed to adduce in a trial if Richard Marshall does not testify.

4. The defenses of Richard Marshall and John Graham are mutually antagonistic and directly in conflict: defense counsel for Richard Marshall will argue to the jury that evidence which inculpates John Graham exculpates Richard Marshall.

5. Moreover, the government intends to offer evidence of uncharged bad acts and crimes against Graham, including rape, as well as extensive evidence about violent acts and crimes perpetrated by other members of the American Indian Movement in order to prove Graham’s motive. Much of the evidence that the government will offer against co-defendant Graham to prove motive and *res gestae* would be not admissible against Marshall in a trial and regardless of judicial instructions to the jury, such evidence is likely to be extremely and unfairly prejudicial to Richard Marshall.

6. Out of court statements made by co-defendant Graham, which are likely to be offered into evidence, could be misinterpreted by a jury as inculpatory to the defendant by inference. If Graham does not testify, defendant Marshall will be denied the right to cross-examine an accuser.

7. For these and all the reasons set forth in the defendant’s memorandum of law in support of this motion, defendant Richard Marshall would suffer substantial prejudice to his right to a fair trial and be denied his right to confrontation if he is compelled to defend himself in the same trial with the co-defendant John Graham, a.k.a. John Boy Patton.

WHEREFORE, defendant Richard Marshall moves the Court to order a severance of trials.

Dated this 8th day of December, 2008.

VINE RICHARD MARSHALL, Defendant

BY: /s/ Dana L. Hanna
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CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Memorandum of Law in Support of Motion to Sever Trials was electronically served upon the other parties in this case via the electronic mail addresses listed below:

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

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

Dated this 8th day of December, 2008.

/s/ Dana L. Hanna
Dana L. Hanna