

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 DISMISS DUE TO
PRE-ACCUSATORY DELAY

NOW COMES Defendant Richard Marshall, by and through his attorney Dana L. Hanna, and pursuant to the Due Process Clause of the Fifth Amendment, hereby moves the Court to dismiss the indictment on the grounds that the delay of 33 years between the crime charged and the initiation of the prosecution has irrevocably prejudiced his ability to present a defense.

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

1. The government has accused Richard Marshall of first degree murder on the theory that he aided and abetted John Graham, Theda Clarke, and cooperating government witness Arlo Looking Cloud in the murder of Anna Mae Aquash in December 1975. The government indicted Richard Marshall in 2008--33 years after the crime charged in the indictment.

2. It is the government's theory that on or about December 12, 1975, Graham, Looking Cloud, Clarke, and Anna Mae Aquash went to the home of Defendant Richard Marshall and his wife Cleo in Allen, South Dakota; that someone in that party asked Richard Marshall to keep Anna Mae Aquash at his home; that Defendant Marshall refused to do so; that later that night, Graham, assisted by Looking Cloud and Clarke, shot and killed Aquash; and that Richard Marshall gave a gun to Theda Clarke while she was at his home on or around December 12, 1975. The government's theory is based on the testimony of Arlo Looking Cloud.

3. Defendant Marshall's ex-wife, Cleo Gates, testified in the trial of Arlo Looking Cloud that to her knowledge, there were no guns of any kind in her house on the night that Clarke, Graham and Looking Cloud came to her house in Allen with Aquash.

4. Defendant Marshall can present evidence that in December 1975, he was free on bond in a pending felony case; that as a condition of his bond, he was not allowed to possess any firearms; that the firearms that had been in his house in Allen, which consisted of a rifle and a shotgun, were taken to the home of his mother, Cora Galligo, and stepfather, Joseph Galligo in the spring of 1975. Therefore, if they were available to testify, Cora and Joseph Galligo would have corroborated the testimony of Cleo Gates that there were no firearms of any kind in the Marshall home in December 1975.

5. Joseph Galligo died in the early 1980s and Cora Galligo died in 1992. Therefore, as a result of the pre-indictment delay of 33 years between 1975 and 2008, the Defendant has been deprived of two critical witnesses who would have given testimony that contradicts the testimony of cooperating government witness, Arlo Looking Cloud.

6. Furthermore, in an evidentiary hearing, Defendant Marshall anticipates that he can show actual prejudice and loss of favorable evidence caused by the deterioration of memory of witnesses.

7. In a tape-recorded interview of Looking Cloud by law enforcement officers in November 1994, Looking Cloud was asked when was the first time he saw or knew that John Graham possessed a handgun on December 12, 1975. He was asked specifically if the first time he became aware that there was a gun was when Graham pulled it out of his pocket and shot Aquash. Looking Cloud began to answer that question, saying he thought it was "after..." However, in the middle of his answer, the tape ended and his full answer was unrecorded. On information and belief, Looking Cloud's answer was inconsistent with his recent claim that he saw Defendant Marshall give a gun to Theda Clarke in his house in Allen. However, the individuals who were present at that interview 14 years ago are unlikely to recall Looking Cloud's answer. This deprives the Defendant of evidence that would go directly to impeach Looking Cloud's trial testimony on the critical question of fact in the Defendant's case. That evidence has been lost to the Defendant as a result of delay by the government in bringing this

indictment.

8. Moreover, the defendant contends that he can adduce evidence in a hearing to show that the government chose to delay before seeking an indictment in reckless disregard of the inevitable prejudice that such delay would cause the defendant. By its reckless failure to charge the Defendant until 2008, 33 years after the crime, the government has gained an unfair strategic advantage over the Defendant; and the Defendant's ability to defend against this charge has been irrevocably prejudiced by the passage of more than three decades.

WHEREFORE Defendant Marshall moves the Court to order a pre-trial hearing in which the Defendant will have an opportunity to prove actual prejudice to his constitutional right to present a defense; the Defendant moves the Court to make findings of fact based on the evidence presented in such a hearing; and the Defendant moves the Court to enter an order dismissing the Indictment against Richard Marshall with prejudice.

Dated this 15th 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 Motion to Dismiss Due to Pre-Accusatory Delay 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
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John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 15th day of December, 2008.

/s/ Dana L. Hanna

Dana L. Hanna