

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

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UNITED STATES OF AMERICA,

CR08-50079-02

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY  
PATTON, and VINE RICHARD  
MARSHALL aka RICHARD VINE  
MARSHALL aka DICK MARSHALL,

Defendants.

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**UNITED STATES' MEMORANDUM  
OPPOSING DEFENDANT  
MARSHALL'S MOTION TO  
DISMISS FOR SELECTIVE  
PROSECUTION**

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and AUSA Robert A. Mandel and respectfully submits its Memorandum Opposing Defendant Marshall's Motion to Dismiss for Selective Prosecution. The United States is requesting denial of Defendant Marshall's motion in its entirety based upon Defendant's failure to meet his burden. Specifically, Defendant Marshall has failed to establish he has been singled out for prosecution while others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted. He has also failed to demonstrate that his prosecution is based upon an impermissible ground, such as race, religion, or his exercise of his First Amendment right to free speech.

## I. DISCUSSION

Procedures and burdens associated with examining a claim of selective prosecution are rigorous and clear in this circuit:

To establish the essential elements of a prima facie case of selective discrimination, a defendant must first demonstrate that he has been singled out for prosecution while others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted. Second, the defendant must demonstrate that the government's discriminatory selection of him for prosecution was based upon an impermissible ground, such as race, religion or his exercise of his first amendment right to free speech.

United States v. Catlett, 584 F.2d 864, 866 (8th Cir. 1978); United States v. Swanson, 509 F.2d 1205, 1208-09 (8th Cir. 1975); United States v. Eklund, 733 F.2d 1287, 1289-90 (8th Cir. 1984) (applying the Catlett two-part test); United States v. Perry, 152 F.3d 900, 903 (8th Cir. 1998) (recognizing the justifications for a "rigorous standard" for the elements of a selective prosecution claim).

The gravamen of Defendant Marshall's selective prosecution claim is premised upon "[T]he government has never sought an indictment against Theda Clarke, in spite of compelling evidence of her guilt" which "would appear to be an arbitrary classification based on age." See Defendant Marshall's Motion to Dismiss for Selective Prosecution, p.1-2. Defendant has failed to make a preliminary or threshold showing of the essential elements of the selective prosecution defense. See United States v. Jacob, 781 F.2d 643, 647 (8th Cir. 1986).

First, Defendant has not shown that he has been singled out for prosecution while others similarly situated have not been prosecuted for similar conduct. To date, three individuals involved in the criminal venture of Anna Mae Aquash's murder have been indicted. Arlo Looking Cloud has been charged and his conviction has been affirmed by the Eighth Circuit Court of Appeals. See United States v. Looking Cloud, 419 F.3d 781 (8th Cir. 2005). Defendant John Graham has been indicted and is scheduled to stand trial with Defendant Marshall beginning February 24, 2009.

Defendant Marshall's renewed attempts to claim that either Clarke's or Graham's guilt is more compelling than the evidence the government intends to offer against Defendant Marshall fails to satisfy his rigorous burden. This self-serving claim, however, overlooks significant incriminating evidence associated with his conduct. See generally United States' Opposition to Severance, p.10 (Defendant Marshall's failure to recognize his own admissions against interest, coupled with additional witness discovery that has been provided, including eyewitness accounts from other individuals than Graham, Looking Cloud, or Dick Marshall); United States' Memorandum Opposing Defendant's Motion to Dismiss Due to Pre-Accusatory Delay at p.3-4 (evidence of Defendant's firearms and related conduct).

Defendant has similarly failed to set forth a *prima facie* case for discriminatory selection of him for prosecution based upon an impermissible ground, such as race, religion, or his exercise of his First Amendment right to free speech. Specifically, the Defendant's claim that the United States' decision to prosecute Marshall and to forego

prosecution of Clarke “would appear to be an arbitrary classification based on age” is both legally and factually inaccurate. Defendant Marshall appears to set forth a reverse age discrimination claim, that he was apparently indicted due to his relative youthfulness and has failed to demonstrate that his prosecution is based upon an impermissible classification. See generally 29 U.S.C. § 621 et seq. (Age Discrimination in Employment Act of 1967); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (holding age classifications not violating the Equal Protection Clause). In any event, two other members of the joint criminal venture of similar age to Defendant Marshall, John Graham and Arlo Looking Cloud, have been charged for their aiding and abetting and conduct associated with this criminal venture.

## II. CONCLUSION

Defendant has failed to establish the essential elements of a *prima facie* case of selective prosecution warranting dismissal of Defendant’s motion in its entirety. Defendant has not sufficiently shown that he was singled out for prosecution while others similarly situated have not been prosecuted particularly in light of the prosecution of both Graham and Looking Cloud. Similarly, he has not sufficiently set forth evidence that the government’s selection of him for prosecution was discriminatory and based upon an impermissible ground, such as race, religion, or exercise of the First Amendment right to free speech.

Date: January 2, 2009

MARTY J. JACKLEY  
United States Attorney



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PO Box 2638  
Sioux Falls, SD 57101-2638  
605.357.2330

### CERTIFICATE OF SERVICE

The undersigned hereby certifies on January 2, 2009, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy  
Dana Hanna

- U.S. Mail, postage prepaid
- Hand Delivery
- Facsimile at
- Federal Express
- Electronic Case Filing



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Marty J. Jackley  
United States Attorney

This document has been filed electronically.