

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. 08-50079

DEFENDANT RICHARD MARSHALL'S
OBJECTIONS TO ORDER ON
DEFENDANTS' MOTIONS TO SEVER

Defendant Richard Marshall, through his attorney, Dana L. Hanna, objects to the Court's order on the defendant's Motion to Sever (Doc. 116). These objections are filed pursuant to 28 USC 636 (b)(1). Defendant Marshall specifically objects as follows:

1. Both defendants Graham and Marshall filed motions to sever their trials. The Magistrate Judge denied their motions. In its order, the Court ordered that certain evidence that would be offered by defendant Marshall should be redacted in order to prevent any possible Crawford or Bruton violations that would deprive defendant Graham of his right to confrontation. In addition to any objections previously raised by defendant Marshall in his memorandum of law in support of his motion for severance, his fundamental objection to the Court's order is that it prevents defendant Marshall from offering evidence that is favorable and exculpatory for him in order to prevent prejudice to co-defendant Graham.

2. In the trial, government witness Robert Ecoffey will testify that he was a federal law enforcement officer in 2003 conducting an investigation into the murder of Anna Mae Aquash; that on December 26, 2003, Ecoffey interviewed Richard Marshall; and that Richard Marshall freely and voluntarily told Ecoffey that when he was living with his ex-wife, Cleo Gates, in Allen, South Dakota, Theda Clarke, Anna Mae Aquash, "and two other young guys" whose

names he could not remember stopped at his home. In the Court order (p. 30), the Court states: “Although this statement *may* pose a Bruton problem if introduced as it is now written, it can easily be redacted to make sure that it is not interpreted by the jury to refer to Graham. For example, if Marshall’s statement is changed to state that Clarke, Aquash, and ‘some other people’ or ‘others’ who Marshall could not name came to his house, the jury could not reasonably interpret Marshall’s statement to inculcate Graham.” For similar reasons, the Court also ordered redaction of a videotaped interview of Arlo Looking Cloud containing Ecoffey’s statements of a purported out of court declaration by Richard Marshall (p. 32).

3. Defendant Richard Marshall intends to offer into evidence at trial a videotape of an interview of Arlo Looking Cloud in which he made statements to Robert Ecoffey shortly after his arrest in this case. The interview is approximately an hour long. In it, Looking Cloud makes a number of admissions concerning his participation, along with Theda Clarke and John Graham, in the taking of Anna Mae Aquash from Denver, Colorado to Rapid City, South Dakota and on to her eventual place of execution in the Badlands of South Dakota near Wanblee. In his statement, Looking Cloud makes no reference to anyone getting a gun from Marshall or anyone else. He makes no reference to stopping at the Marshall home in Allen, South Dakota. After Looking Cloud went through the events, including his presence at the execution of Anna Mae Aquash, Looking Cloud was questioned specifically by Ecoffey if he, Clarke, Graham, and Aquash had stopped at Richard Marshall’s house in Allen, South Dakota. Looking Cloud repeatedly denied it and stated that he had no memory of stopping at the Marshall home. Ecoffey persisted and stated: “Cause I know—I know for a fact that you stopped there, cause both Dick and Cleo, are telling me that you, John Boy, and Theda stopped there, and that you had Anna Mae....” Looking Cloud continued to deny any memory of stopping at Richard Marshall’s home with Aquash in spite of Ecoffey’s insistence that he knew for a fact that he had made such a stop because Dick and Cleo Marshall had both told him so.

4. In its order, the Court correctly stated that Ecoffey’s own investigative report of his interview with Marshall establishes that Richard Marshall never told Ecoffey that either Looking Cloud or Graham were at Marshall’s house, only that “two young guys” were with Theda Clarke and Anna Mae Aquash. The Court also correctly recognized that Marshall’s statements to

Ecoffey, whatever the statements were, were testimonial under Crawford. However, the Court ruled that if the Ecoffey-Looking Cloud interview is to be introduced at trial by defendant Marshall, it must be edited to redact Ecoffey's attribution of the statement to Richard Marshall; instead of allowing the jury to hear Ecoffey informing Looking Cloud that Dick and Cleo Marshall had both told him that Looking Cloud had stopped at their house with Clarke and Graham, and that they had asked Richard Marshall to keep Aquash there at his home, the statement would be changed to say that only Cleo Marshall had given that information to Ecoffey.

4. Defendant Marshall objects to that ruling because it deprives the defendant of important exculpatory evidence—evidence that goes directly to Arlo Looking Cloud's motive to falsely accuse Richard Marshall. Ecoffey's statement to Looking Cloud that Richard Marshall had accused him of being present with Anna Mae Aquash at his house in Allen, and that they had asked him to keep her there in his home, gives Looking Cloud a motive to make a false accusation implicating Marshall. Regardless of whatever the true facts were as to Marshall's statements to Ecoffey, in the interview Ecoffey told Looking Cloud that Richard Marshall made statements to Ecoffey that implicated Arlo Looking Cloud in the kidnapping and possibly the murder of Anna Mae Aquash. This information, whether it was true or not, would give Looking Cloud personal motive to pay Richard Marshall back by making a false accusation against him.

5. Furthermore, the defendant intends to cross-examine Looking Cloud on this point to prove motive to lie. Ecoffey's statement regarding what Marshall allegedly told him cannot be redacted in Richard Marshall's trial without denying Richard Marshall a powerful piece of evidence that he can use to attack the credibility of his main accuser and the government's case against him. The Sixth Amendment guarantees a defendant an opportunity for effective cross-examination of witnesses, including inquiry into motivation and bias. U.S. v. Beckman, 222 F.3d 512 (8th Cir. 2000).

6. Redaction of the videotaped evidence also deprives defendant Marshall of evidence that can be used to impeach the credibility of Robert Ecoffey and to attack the integrity of the investigation itself. In its unredacted true form, the videotaped interview between Ecoffey and Looking Cloud can be used to argue that Ecoffey lied to Arlo Looking Cloud when he said that

Richard Marshall made certain statements to him about Arlo Looking Cloud. His statement to Looking Cloud in which he tells Looking Cloud about statements allegedly made by Richard Marshall shows that Ecoffey either knowingly lied to a suspect in order to provoke an admission, or that he simply was negligent and unaware of the facts in his case. Either way, the statement can be used to attack the credibility and reliability of Robert Ecoffey. Moreover, even if Ecoffey's misstatement of the facts was erroneous as opposed to intentionally false, it can be used to attack the professionalism and integrity of the investigation itself. See: Kyles v. Whitley, 514 US 419 (1995).

7. If counsel for Richard Marshall is constrained in his cross-examination or in his presentation of evidence from exploring the full facts as to what Richard Marshall actually told federal investigators, Marshall would be deprived of evidence that is favorable to him. The defendant can argue that he freely and voluntarily gave information to federal law enforcement officers, thereby showing he had nothing to hide and no involvement in Graham and Looking Cloud's crimes. If defendant Marshall told Ecoffey that two young guys went to his house, then that is what the defendant should be able to adduce in his defense rather than "some other people," which could be interpreted by the jury as a deliberate attempt to refrain from giving details to a law enforcement officer in order to protect the "other people."

8. Defendant Richard Marshall objects to the magistrate's order, because if it is adopted, the result would be to deprive Richard Marshall of exculpatory evidence for his defense and of his right to cross-examine Looking Cloud on his motive to lie. The only solution to the Bruton and Crawford problems in this case is to sever the trials of the defendants.

Dated this 7th day of January, 2009.

VINE RICHARD MARSHALL, Defendant

BY: /s/ Dana L. Hanna

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Objections to Order on Defendants' Motions to Sever on the other parties in this case via the electronic mail addresses listed below:

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Dated this 7th day of January, 2009.

/s/ Dana L. Hanna

Dana L. Hanna