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 MARSHALL'S NOTICE OF INTENT TO OFFER STATEMENTS BY U.S. ATTORNEY AS ADMISSIONS BY A PARTY-OPPONENT AND MEMORANDUM OF LAW

Defendant Richard Marshall, by and through undersigned counsel, hereby gives notice to the government of his intent to offer into evidence statements made by the United States Attorney in the trial of *USA v. Arlo Looking Cloud, CR 03-50020,* and in the appeal of that case to the United States Court of Appeals for the Eighth Circuit, No.04-2173, as admissions by a party-opponent under Rule 801(d)(2)(B)(C) and (D) of the Federal Rules of Evidence (FRE). This memorandum of law will set forth the evidentiary basis for the admission of such statements.

Factual Background

In 2003, the government indicted Arlo Looking Cloud and co-defendant John Graham, charging them with first degree murder in the killing of Anna Mae Aquash in December 1975. In 2004, the government convicted Arlo Looking Cloud of murder in a jury trial. This Court imposed a mandatory life sentence. Looking Cloud appealed his conviction to the Court of Appeals for the Eighth Circuit. In 2005, that Court affirmed his conviction in United States v. Looking Cloud, 419 F.3d 781 (8th Cir. 2005).

In 2008, Arlo Looking Cloud agreed to cooperate with the government and testified before the grand jury. As a result of his testimony, the grand jury returned an indictment against

defendant Richard Marshall, charging him with first degree murder for aiding and abetting Looking Cloud and his accomplices in the murder of Aquash.

The principal witness for the prosecution in its case against Richard Marshall is Arlo Looking Cloud, who in 2008, for the first time since he began discussing Aquash's murder with law enforcement officials in 1994, told federal authorities that 33 years ago, he saw Richard Marshall hand a gun and a box of shells to Theda Clarke in the bedroom of Marshall's home in Allen, South Dakota.

The government's theory, which is based on the testimony of Looking Cloud, is that Richard "Dick" Marshall aided and abetted co-defendant John Graham, Arlo Looking Cloud and Theda Clarke in the murder of Anna Mae Aquash by providing the killers with the murder weapon. Defendant Richard Marshall contends that Looking Cloud's testimony that Marshall gave Clarke and her confederates a gun is false, motivated by Looking Cloud's desire for the government's assistance in securing him release from prison.

The credibility of Arlo Looking Cloud will be the major issue for the jury in the trial of Richard Marshall.

In the trial of Arlo Looking Cloud and in the government's appellate brief for the Court of Appeals in Looking Cloud's appeal, the United States Attorney made clear and unequivocal factual statements that are directly contrary to the factual claims they will be making in the trial of Richard Marshall, which facts go to critical contested factual issues in the case. These statements by the United States Attorney, which will be set forth herein, are admissible as admissions by a party-opponent under Rule 801(d)(2)(B)(C) and (D).

THE GOVERNMENT'S ADMISSIONS

1.

In the Trial Of Arlo Looking Cloud and in Looking Cloud's Appeal to the Court of Appeals, the United States Attorney Told the Jury and the Court of Appeals that Arlo Looking Cloud Provided the Gun to John Graham that Was Used to Murder Anna Mae Aquash.

The government now contends that Marshall aided and abetted in the murder of Aquash by providing the murder weapon to the killers. That is not what the government contended in the

trial of Arlo Looking Cloud, in February 2004. In Looking Cloud's trial, the government offered the testimony of Richard Two Elk, who testified that he was a friend of Looking Cloud and that on about six different occasions, Looking Cloud had confessed to him that he and Graham led Anna Mae Aquash out to a cliff in the Badlands, and that he–Arlo Looking Cloud–gave the murder gun to John Graham, just before Graham executed her. [Looking Cloud trial transcript, 354:2-19; 355: 17-25.]

> A: What he told me was that he gave the gun to John Boy, and John Boy went off with Anna Mae, and that she had started to pray or to begin the process for prayer when John Boy just put the gun to her head and pulled the trigger.
>
> [354: 16-19.]

In his summation, the United States Attorney made reference to that testimony, telling the jury that Looking Cloud had repeatedly told Two Elk that he, Looking Cloud, had handed the murder weapon to Graham just moments before Aquash was shot. [Prosecutor's summation, page 17: 22-25].

Nor is the government's latest version of the facts as to who provided the murder weapon to the shooter the same story that the government told the Court of Appeals.

When Looking Cloud appealed his conviction to the Court of Appeals for the Eighth Circuit, he argued that the evidence was insufficient to prove his guilt–specifically, the element of the crime requiring defendant's prior knowledge that Graham was going to kill Aquash. In the government's appellate brief, which was submitted on behalf of the United States Attorney James E. McMahon and signed by AUSA Robert A. Mandel, the government's attorneys made clear and unequivocal statements of fact to the Court that Arlo Looking Cloud had provided the murder weapon to Graham.

> "Near dawn, Aquash was then transported to a location on the Pine Ridge Indian Reservation approximately three miles north of the junction of South Dakota Highways 73 and 44. The vehicle was stopped by the side of the road and Aquash, still tied up, was forced by Looking Cloud and Graham to walk to the edge of a cliff. T 415-16, Ex. 45. She again begged for her life and spoke of her two young daughters. T 278, 280, 406. She

began to pray. T 354. **Looking Cloud handed a revolver to John Graham.** T 354. [1] Aquash was shot once in the back of the head carrying out the execution which Looking Cloud, Graham, and Clarke had been assigned."

[Bold face emphasis added.]
[USA brief, page 10.]

The government's brief made reference to Looking Cloud's admissions to Two Elk that he had provided the murder weapon for the execution, as particularly inculpatory evidence of Looking Cloud's active and knowing involvement in the murder.

"Far more inculpatory in that regard were statements he made to Richard Two Elk and John Trudell in which he admitted that Aquash was begging for her life while they waited in the car at Rosebud and the statement to Two Elk that Looking Cloud provided the gun that was used to kill Aquash." [USA brief, page 19].

Again:

"Looking Cloud and Graham forced Aquash to the edge of the cliff where she again begged for her life, at which time, according to admissions made by Looking Cloud, he provided a revolver to Graham who shot Aquash in the back of the head." [USA brief, page 24.]

In its opinion affirming Looking Cloud's conviction, the Court of Appeals relied on that evidence: "Two Elk testified that Looking Cloud told him he handed a gun to Graham and nodded at him. Aquash knelt to the ground, possibly to pray, and Graham held the gun to the back of her head and pulled the trigger." United States v. Looking Cloud, 419 F.3d 781 (8th Cir. 2005), at 790.

Four years ago, the government's prosecutors told a jury, a trial court, and a Court of Appeals that Arlo Looking Cloud provided the murder weapon to the killer of Anna Mae Aquash. Now, they intend to tell a jury that they should believe Arlo Looking Cloud when he says that it was not him who gave the murder gun to the killer, it was Richard Marshall.

The testimony that the government will offer from Arlo Looking Cloud in the trial of Richard Marshall is directly in conflict with the statements federal prosecutors made to the jury

[1] T 354 refers to the trial testimony of Richard Two Elk.

in Looking Cloud's trial and the statements federal prosecutors made to the United States Court of Appeals for the Eighth Circuit. The United States Attorney's prior statements are admissions of a party-opponent under FRE 801(d)(2)(B)(C) and (D).

2.

In the Trial of Arlo Looking Cloud, the United States Attorney Told the Jury that Looking Cloud Made it a Habit and Practice to Lie to Whomever He was Speaking to about his Involvement in the Murder of Aquash; Those Statements by the United States Attorney Are Admissions By the Government Going Directly to the Fundamental Question of Fact for the Jury in Defendant Marshall's Trial.

In Looking Cloud's trial, the main issue presented by the defense was a question of intent: whether Looking Cloud had prior knowledge that Graham and Clarke intended to murder Aquash. The government offered several out of court statements by Looking Cloud to prove his knowledge and intent. In his defense at trial, and in many of the out of court statements made by Looking Cloud, the defendant tried to assert that he did not know that his companions were going to kill Aquash until Graham actually shot her. The government's entire case in the trial was largely directed to proving that Looking Cloud had repeatedly lied to whomever he was speaking to when he claimed no prior knowledge of the plan to kill.

The government's attorney made this factual assertion as to the credibility of Arlo Looking Cloud and his history of lying about his involvement in Aquash's murder in the government's summation:

> "You see, he [Arlo Looking Cloud] tells whatever story he thinks is going to sound best to whoever he is telling it to."
>
> [USA summation, page 20.]

In the trial of Richard Marshall, Looking Cloud's credibility will be the fundamental question of fact for the jury to determine. The government will argue that Looking Cloud should be believed because he is a truthful witness. That is not what the government's lawyers told the jury and the Court in Looking Cloud's trial. Their prior statements are directly in conflict with the statements they will make to the jury in Marshall's trial. The United States Attorney's prior

statements in trial about Looking Cloud's method, habit and practice of telling self-serving lies to avoid his own culpability are admissions by the government that go directly to contradict the government's newfound faith in the credibility of their key witness.

3.

In the Trial and the Appeal of Arlo Looking Cloud, the United States Attorney Repeatedly and Consistently Told the Jury and the Court of Appeals that Graham, Clarke, Looking Cloud and Aquash Left Rapid City, Then Later Stopped at Marshall's house in Allen, and from Allen, They Drove to a House in Rosebud.

In the Looking Cloud trial, the government prosecutor told the jury that in December 1975, John Graham, Arlo Looking Cloud, and Theda Clarke abducted Anna Mae Aquash in Denver, Colorado and drove her in Theda Clarke's Pinto to Rapid City, South Dakota, where she was questioned to find out whether she had cooperated with federal law enforcement officers. In opening statements and summation, the United States Attorney consistently presented these facts as to the sequence of the killers' journey: when Looking Cloud and his accomplices, along with Aquash, left Rapid City, they drove south through the Pine Ridge Reservation, where they made a brief stop at the home of defendant Marshall and his then-wife Cleo, in Allen, South Dakota; that after the four left Allen, they then drove east, to a house in Rosebud community on the Rosebud Reservation; Looking Cloud, Graham, Clarke and Aquash then drove from Rosebud to a spot off Highway 73, near Wanblee, where Graham shot Aquash in the back of the head with a .32 caliber pistol.

In its appellate brief to the Court of Appeals, the government again stated that the route that was taken by Looking Cloud and his accomplices in the Pinto was from Rapid City to Allen to Rosebud to the spot off Highway 73 where they killed their victim. [USA brief, pages 23-24.]

On information and belief, based on the discovery provided to the defendant, in the trial of Richard Marshall, the government will offer a different version of facts than the one it presented in the trial and appeal of Looking Cloud. In Marshall's trial, the government will present testimony from Arlo Looking Cloud that he and his accomplices did not drive Aquash from Rapid City to Allen to Rosebud to the place of execution; rather, Looking Cloud will now testify, and the government will argue, that after they left Rapid City, they drove east to the house

in Rosebud, and from Rosebud, they then drove back west and stopped in the Marshalls' home in Allen, and from Allen, they drove Aquash to the cliff near Wanblee where they killed her.

This change of facts is necessary if the government is going to convict Marshall. All the evidence supports the inference that it was when they were in Rosebud that someone gave Looking Cloud, Clarke and Graham an assignment to kill Aquash (see the trial testimony of John Trudell); and that Looking Cloud, Graham and Clarke formed the actual intent to murder Aquash while they were at the house in Rosebud. Therefore, if they stopped first at Allen, before they went to Rosebud, they had not yet decided to kill Aquash when they were at Richard Marshall's house. Marshall could not have shared an intent or premeditation to do murder because Looking Cloud, Clarke and Graham had not formed that specific criminal intent when they stopped at the Marshall home. If they stopped at Richard Marshall's home in Allen *before* they drove to Rosebud, then they stopped there before they had formed an intent to kill Aquash and defendant Richard Marshall could not be guilty of aiding and abetting murder, since he would have lacked the specific intent and premeditation necessary to make him guilty of murder. Thus, the government's convenient change in the facts of their case:–if Looking Cloud and his accomplices drove first to Rosebud, then to Allen, the killers could already have formed an intent and a plan to kill Aquash when they arrived at Marshall's home in Allen. Therefore, the question of whether Looking Cloud and his accomplices stopped first in Allen and from there drove to Rosebud or whether they drove first to Rosebud and then to Allen will be a critical question of fact for the jury to decide in Richard Marshall's trial.

In opening statements and summation in Looking Cloud's trial, the United States Attorney repeatedly, clearly, and unequivocally stated that this was the sequence of stops made by Looking Cloud, Clarke, Graham and Aquash:

> "When they left that house [in Rapid City], the defendant [Looking Cloud], Mr. Graham, Theda Clarke again took Anna Mae, they put her back in the little red Pinto, again bound, tied up. The defendant was now driving and they headed south toward the Pine Ridge Indian reservation. They first went to a small town, Allen, South Dakota, on the Pine Ridge reservation..... They showed up at the house of Cleo and Dick Marshall... Dick Marshall said to his wife they want us to keep her here for a while. Cleo said I don't like the looks of this, no way. So the defendant, Mr. Graham, Theda Clarke take Anna Mae, put her back in the car again and now they are on their way to Rosebud. They stop at a

house in Rosebud in the wee hours of the morning...."

[USA opening statement: pages 10:12: 11:5.]

[See also: USA summation: pages 13, 14, 27, 32, 52, 55.]

In its appellate brief to the Court of Appeals, the government again clearly and unequivocally stated that the sequence of stops on Anna Mae Aquash's last journey was Rapid City, to Allen, and from Allen to Rosebud, and from Rosebud to the murder scene near Wanblee. [USA brief, pages 9-10; 23-24.]

These factual statements by the government's attorneys are directly in conflict with the version of facts that Looking Cloud and the government will present in the trial of Richard Marshall. In order to have the evidence conform to the prosecution's theory of guilt, the facts that will be put forward by the government have changed from the time of Looking Cloud's trial. If the trial is a quest for the truth, the jury has a right to know that and the defendant has a right to introduce evidence that will allow the jury to know that.

Defendant Marshall intends to offer these prior statements of fact that the United States Attorneys made to the Looking Cloud jury and to the Court of Appeals as admissions made by a party-opponent.

LEGAL ARGUMENT

ADMISSIONS BY AN AUTHORIZED REPRESENTATIVE OF A PARTY-OPPONENT

FRE Rule 801(d) provides, in relevant part:

> **(d) Statements which are not hearsay.** A statement is not hearsay if-
> ***
> **(2) Admission by party-opponent.** The statement is offered against a party and is
> ***
> (B) a statement of which the party has manifested an adoption or belief in its truth, or
> (C) a statement by a person authorized by the party to make a statement concerning the subject, or
> (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship. . .

I.

STATEMENTS MADE BY A UNITED STATES ATTORNEY IN A PRIOR TRIAL AND IN A LEGAL MEMORANDUM TO THE COURT OF APPEALS ARE ADMISSIBLE IN A LATER TRIAL AS ADMISSIONS OF A PARTY-OPPONENT.

Statements by a party's attorney are admissible against the party as admissions, if the statements are with the scope of the attorney's representation. United States v. Ojala, 544 F.2d 940, 945-946, 1 Fed.R.Evid.Serv.413 (8th Cir. 1976); United States v. McKeon, 738 F.2d 26, 15 Fed.R.Evid.Serv 1409 (2d Cir. 1984); United States v. Blood, 806 F.2d 1218, 22 Fed.R.Evid.Serv. 156 (4th Cir. 1986); Williams v. Union Carbide Corporation, 790 F.2d 552, 20 Fed.R.Evid.Serv. 964 (6th Cir. 1986). See, generally: Admissibility as `Not Hearsay' of Statements by Party's Attorney under FRE 801(d)(2)(C) and 801(d)(2)(D), 117 ALR Fed. 599. See also: United States v. Rice, 449 F.3d 887 (8th Cir. 2006), (testimony recounting the statements made by defendant's loan counsel are admissions by an agent of a party opponent under FRE Rule 801(d)(2)(C) and (B)).

This proposition extends to statements made by a party's attorney during a trial in opening statements and final arguments to a jury. See: United States v McKeon, above. More than a hundred years ago, the United States Supreme Court acknowledged the binding effect of an attorney's unambiguous statement of fact in an opening statement. Oscanyan v. Arms Co., 103 US 261, 263 , 26 L.Ed. 539 (1880). The Court of Appeals for the Eighth Circuit ruled that the same principle applies in criminal trials almost 80 years ago, in Dick v. United States, 40 F.2d 609, 611 (8th Cir. 1930), when that Court held that a statement made by defense counsel in opening statement was a binding admission by the defendant.

Counsel's opening statement or closing argument may be used in a later trial as an admission by a party under 801(d)(2)(C). United States v. Martin, 773 F.2d 579 (4th Cir. 1985); United States v McKeon, above.

The government is a party-opponent for purposes of FRE Rule 801(d)(2) in a criminal case; therefore, statements made by a federal prosecutor in legal briefs or memoranda to the court can be introduced into evidence by a defendant as admissions by a party-opponent.

United States v. Kattar, 840 F.2d 118 (1st Cir. 1988). See also: United States v. Morgan, 581 F.2d 933 (CADC 1978)(where government's attorneys had indicated their belief in a sworn affidavit to a judicial officer that they believed certain statements were trustworthy, government could not later sustain an objection to those statements on the grounds that they were hearsay; rather, they were admissible as adoptive admissions of belief by the government); United States v. Bakshinian, 65 F.Supp.2d 1104, 1109 (CD Cal.).

Moreover, a statement that is admitted as an admission by a party-opponent need not be against the interest of the party when made. Auto-Owners' Ins. Co. v. Jensen, 667 F.2d 714, 722 (8th Cir., 1981).

Here, the government, by and through United States Attorneys acting in the course of their representation of the government, in a case concerning the same facts in the same alleged crime as that of which defendant Marshall is accused, have made clear and unequivocal factual statements to a jury and to a court that are directly relevant to critical issues in this case. Those statements are statements for which the government's attorneys have manifested and adopted a belief in their truth; they are statements made by attorneys who were authorized to speak for the government concerning the facts of the murder of Anna Mae Aquash; and they are statements made by an authorized attorney-agent of the United States concerning a matter within the scope of the attorney's employment, made during and in the course of the attorney's representation of the government.

Therefore, these statements made by the government's attorneys in the trial and appeal of Arlo Looking Cloud are admissible as admissions by a party opponent under FRE Rule 801(d)(2)(B)(C) and (D).

Dated this 27th 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 Notice of Intent to Offer Statements by U.S. Attorney as Admissions by a Party-Opponent and Memorandum of Law upon the other parties in this case via the electronic mail addresses listed below:

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Dated this 27th day of January, 2008.

/s/ Dana L. Hanna
Dana L. Hanna