

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  
MOTION TO DISMISS  
FOR DENIAL OF DUE PROCESS

NOW COMES defendant Richard Marshall, by and through his attorney, Dana L. Hanna, and hereby moves this Court to dismiss the indictment on the grounds that the government's use of inherently contradictory evidence and factual theories in the trial of Arlo Looking Cloud and the prosecution of Richard Marshall for the same crime violates the Due Process Clause.

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

1. I make these affirmations on the basis of information and belief, the sources of which include, but are not limited to, the grand jury testimony of Arlo Looking Cloud [Exhibit 1, filed under seal]; the FBI form 302 report of the proffer interview of Arlo Looking Cloud on August 19, 2008 [Exhibit 2, filed under seal]; the official transcript of the trial testimony in the trial of Arlo Looking Cloud in this Court, February 2004; the [government's appellate brief](#) in the appeal of Arlo Looking Cloud before the Court of Appeals for the Eighth Circuit; and the discovery provided to the defendant by the government.

2. Based on the aforesaid sources, I have good reason to believe and affirm, and I do in fact believe and affirm, that the evidence and factual theory of prosecution that the government has put forward and will put forward in its prosecution of Richard Marshall is directly and

irreconcilably inconsistent with the evidence and factual theory of prosecution that the government put forward to prove the guilt of Arlo Looking for the same crime in his trial and appeal.

3. An irreconcilable conflict exists between the evidence and factual theories presented by the government in Looking Cloud's trial and the evidence and the factual theory the government has and will put forward in its case against Richard Marshall: in order to prove its factual theory of prosecution against Richard Marshall, the government will necessarily have to disprove and discredit testimony, evidence, and the factual theory it presented to the jury and the Court of Appeals to prove Arlo Looking Cloud's guilt.

4. In February 2004, in a jury trial before this Honorable Court, the government convicted Arlo Looking Cloud of aiding and abetting the murder of Anna Mae Aquash. The government offered the testimony of Richard Two Elk, who testified that Looking Cloud had admitted to him on several occasions that he, Looking Cloud, had given the murder weapon—a revolver—to John Graham at the scene of the murder and that Graham then shot Aquash in the head. Looking Cloud was sentenced to life imprisonment. [Transcript, *United States v. Looking Cloud* trial, pages 354 *et seq.*]

5. In Looking Cloud's appeal, in its brief and in oral argument, the government represented to the United States Court of Appeals for the Eighth Circuit as a proven fact that "Looking Cloud handed a revolver to John Graham." [Government's brief, page 10]. Looking Cloud's conviction was affirmed. *United States v. Looking Cloud*, 419 F.3d 781 (8<sup>th</sup> Cir. 2005).

6. In August 2008, the government presented the testimony of Arlo Looking Cloud to a grand jury and secured an indictment against Richard Marshall. It is now the theory of the prosecution that it was Richard Marshall—and not Arlo Looking Cloud—who provided the gun that was used to murder Aquash.

7. In order to prove that factual theory in the trial of Richard Marshall, the government intends to offer the testimony of Arlo Looking Cloud, who will attempt to shift the blame from himself onto Richard Marshall for committing the very act—providing the murder weapon—that the government told Looking Cloud's jury and the Court of Appeals that Arlo Looking Cloud

had committed.

8. On this and other questions of contested fact, the evidence and factual theories that the government intends to put forward in its trial against Richard Marshall are directly in irreconcilable conflict with the evidence and factual theories that it presented to the jury to convict Arlo Looking Cloud for the same crime.

9. Pursuant to Eighth Circuit precedent and the legal authority set forth in the memorandum of law in support of this motion, the government's use of inconsistent evidence and factual theories of prosecution in two trials to convict two defendants of the same crime violates defendant Marshall's right to fundamental fairness and due process of law.

WHEREFORE defendant Richard Marshall moves this Court to dismiss the indictment.

Dated this 4<sup>th</sup> day of February, 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 Motion to Dismiss for Denial of Due Process upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney  
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney  
robert.mandel@usdoj.gov

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

Dated this 4<sup>th</sup> day of February, 2009.

*/s/ Dana L. Hanna*

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Dana L. Hanna