

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
MEMORANDUM OF LAW
IN SUPPORT OF HIS
MOTION TO DISMISS
FOR DENIAL OF DUE PROCESS

Summary of Material Facts and Argument

Defendant Richard Marshall moves the Court to dismiss the indictment against him on the grounds that the government's use of irreconcilable and inherently contradictory prosecutorial theories and evidence is so fundamentally unfair that it violates the defendant's right to due process.

In February 2004, in a jury trial, the government convicted Arlo Looking Cloud of first degree murder in the killing of Anna Mae Aquash. In that trial the government presented evidence in the form of admissions made by Looking Cloud that while Aquash was begging for her life on a cliff in the badlands, Looking Cloud gave a pistol to John Graham and nodded to him, then Graham used that pistol to execute Aquash.

In 2005, when Looking Cloud appealed his conviction to the United States Court of Appeals for the Eighth Circuit, in the government's brief and in oral argument, the government clearly and unequivocally affirmed to that Court that Arlo Looking Cloud had provided the murder weapon that John Graham used to shoot Aquash.

Three years after his conviction was affirmed, Looking Cloud became a government witness. In August 2008, he gave testimony to a grand jury inculcating Richard Marshall in the

murder of Anna Mae Aquash. Looking Cloud's grand jury testimony radically and directly contradicted evidence and the factual theory that the government used in Looking Cloud's trial to prove Looking Cloud's guilt. After hearing Looking Cloud's testimony, the grand jury returned an indictment against Richard Marshall charging him with aiding and abetting the murder of Anna Mae Aquash.

Now, to convict Richard Marshall, the government intends to put forward evidence and a factual theory that is radically inconsistent with the evidence and factual theory it presented in Looking Cloud's trial:—the government will have Arlo Looking Cloud testify that he did not give a revolver to John Graham and that he did not supply the murder weapon for the killing; Looking Cloud will seek to shift culpability for providing murder weapon away from him and onto Richard Marshall. The government intends to put forward a factual theory, based on Looking Cloud's testimony, that the defendant Richard Marshall gave a handgun to Theda Clarke when Looking Cloud and his accomplices, along with Aquash, stopped at Richard Marshall's house in Allen, South Dakota, and it is the government's theory that the handgun that Marshall allegedly gave Clarke was used by Graham to murder Aquash.

The government seeks to obtain a conviction against Richard Marshall by putting forth testimony and factual theories that cannot possibly be true unless the testimony and factual theories that government prosecutors presented to the jury in Looking Cloud's trial were false. Therefore, "an inconsistency ... exist[s] at the core of the prosecutor's cases against the defendants for the same crime", and that violates Due Process. Smith v. Groose, 205 F.3d 1045, 1052 (8th Cir. 2000), *cert. denied* 531 US 985, 121 S.Ct. 441 (2000).

Factual Background

1.

In the Trial of Arlo Looking Cloud, the Government Presented Evidence that Arlo Looking Cloud Gave John Graham the Revolver that He Used to Kill Aquash.

In the trial of Arlo Looking Cloud, the United States Attorney presented evidence to the jury that Arlo Looking Cloud handed the gun to John Graham that Graham used to murder Anna Mae Aquash. Richard Two Elk testified that Looking Cloud had admitted to him that he—Arlo

Looking Cloud—had provided the shooter with the murder weapon.

Q. What did he tell you happened when they stopped?

A. That they got out of the vehicle and—

Q. Let me stop you there a minute. You said they got out of the vehicle, who are you talking about?

A. John Boy and Arlo and Anna Mae.

Q. Go ahead then?

A. That they had gotten out of the vehicle and they were going to go off the side of the road, and Arlo gave the gun to John Boy and nodded to him, and John Boy went off with Anna Mae.

Q. You said that Arlo gave the gun to John Boy?

A. That's what he told me.

Q. When they were out at the site where Anna Mae was killed?

A. Yes.

Q. And then he told you what happened after that?

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.

[*USA v. Looking Cloud*, trial transcript, Two Elk testimony, 353:25 - 354: 19.]

See also: Two Elk testimony, trial transcript, 355: 17-25.

In his summation the prosecutor referred to the evidence that Looking Cloud had admitted to Two Elk that he had handed the murder weapon to Graham immediately before Graham shot her. [Trial transcript, prosecutor's summation, page 17: 22-25.]

2.

In Looking Cloud's Appeal, the Government Clearly and Unequivocally Affirmed to the United States Court of Appeals That Arlo Looking Cloud Provided the Revolver That His Accomplice Used to Kill Anna Mae Aquash.

After Looking Cloud was found guilty and this Court sentenced him to life imprisonment, Looking Cloud appealed his conviction to the Court of Appeals for the Eighth Circuit.

In its brief to the Court of Appeals, the government represented as a proven fact 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. Aquash was shot once in the back of the head carrying out the execution which Looking Cloud, Graham, and Clarke had been assigned.”

[Government's appellate brief, *United States of America, Appellee v. Fritz Arlo Looking Cloud, Appellant*, No. 04-2173, page 10.]

[Emphasis added.]

In its brief, as it had in trial, the government again pointed to Looking Cloud's admissions to Two Elk as proof that Looking Cloud had provided the murder weapon to Graham.

“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

¹ T 354 refers to Richard Two Elk's testimony.

in the car at Rosebud **and the statement to Two Elk that Looking Cloud provided the gun that was used to kill Aquash.**”

[Government’s appellate brief, *United States of America, Appellee v. Fritz Arlo Looking Cloud, Appellant*, No. 04-2173, page 19.]

[Emphasis added.]

The government positively affirmed to the Court of Appeals that Looking Cloud gave Graham the gun that he used to murder Aquash:

“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.**”

[Government’s appellate brief *United States of America, Appellee v. Fritz Arlo Looking Cloud, Appellant*, No. 04-2173, page 24.]

[Emphasis added.]

Again, in the government’s oral argument to the Court of Appeals, Assistant United States Attorney Robert A. Mandel referred the court to the evidence that Looking Cloud had given the murder weapon to Graham. [*United States of America, Appellee v. Fritz Arlo Looking Cloud, Appellant*, No. 04-2173, oral argument, at www.ca8.uscourts.gov/oralargs/oaFrame.html].

In its opinion affirming Looking Cloud’s conviction, the United States Court of Appeals for the Eighth Circuit relied on that evidence and on the government’s representation of those specific facts: “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.

In the Trial of Arlo Looking Cloud and in His Appeal, the Government Put Forward Evidence and the Factual Theory that after Looking Cloud, Graham, Clarke and Aquash Left Rapid City, They Drove to the Marshall Home in Allen, and From Allen to a House in Rosebud, and from Rosebud They Drove to the Site Near Wanblee Where They Killed Her.

The question of whether Looking Cloud, Clarke, Graham and Aquash stopped first in Allen and from there drove to Rosebud or whether they drove first to Rosebud and then to Allen is a critical question of fact in determining Richard Marshall's guilt or innocence.

In opening statements and summation in the Looking Cloud trial, the United States Attorney consistently and unequivocally told the jury that after Looking Cloud, Graham, Clarke and Aquash left Rapid City, they drove to the Pine Ridge Reservation; there, they made a brief stop around midnight at the home of Richard Marshall in Allen, South Dakota; after they left the Marshall home in Allen, they drove east to the Rosebud Reservation, and stopped at a house in Rosebud community; and after they left Rosebud, Looking Cloud, Graham, Clarke and Aquash then drove to a spot in the Badlands near Wanblee, where Aquash was shot and killed.

“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....”

[Government's opening statement: pages 10:12 - 11:5.]

See also: Government's summation: pages 13, 14, 27, 32, 52, 55.

In its appellate brief to the Court of Appeals, the government again clearly put forward a factual theory, based on the evidence presented in trial, that after Looking Cloud, Clarke, Graham and Aquash left Rapid City, they drove to Allen; from Allen they then drove to Rosebud, and from Rosebud, they drove to the spot off Highway 73 where Looking Cloud aided his accomplices in the murder of their victim. [Government's appellate brief, pages 9-10; 23-24].

In the evidence presented by prosecutors and in the prosecution's theory of the facts, the government consistently told both the jury and the Court of Appeals that Looking Cloud and his accomplices, along with Aquash, stopped at Richard Marshall's home in Allen *before* they drove to Rosebud—that is, *before* they were directed to kill Aquash.

4.

It is The Government Demonstrated Intent to Use Inherently Irreconcilable and Inconsistent Evidence and Factual Theories to Convict Arlo Looking Cloud and Richard Marshall for the Same Crime in Separate Trials.

It is absolutely clear from the discovery provided to the defendant, including the grand jury testimony of Arlo Looking Cloud, and from statements and documents submitted to this Court by government prosecutors that the government intends to use evidence and to present a factual theory in its case against Richard Marshall that would be in direct and irreconcilable conflict with evidence, testimony and the factual theory that the government presented to the jury and to the Court of Appeals to prove the guilt of Arlo Looking Cloud.

Before this Court, in Looking Cloud's trial, and before the United States Court of Appeals for the Eighth Circuit in his appeal, the government presented evidence and made factual statements to the jury and the court that it was Arlo Looking Cloud who provided the shooter with the gun that he used to kill Anna Mae Aquash. Now, after both the jury and the Court of Appeals accepted and relied upon the government's evidence and argument, the government intends to offer the testimony of none other than Arlo Looking Cloud to try to convince another jury that it was not Looking Cloud who provided the murder weapon that was used to kill Anna Mae Aquash—rather, it was Richard Marshall. [See: Exhibit 1, Grand jury testimony of Arlo Looking Cloud; Exhibit 2, FBI 302 report of Looking Cloud interview].

Furthermore, in order to support the government's new theory that it was Richard Marshall and not Arlo Looking Cloud who provided the gun for the murder, the government intends to use testimony from Looking Cloud to present a new and contradictory factual theory as to the timing and sequence of the stops made by Looking Cloud and his accomplices as they drove Anna Mae Aquash from Rapid City to the spot in the Badlands where they killed her. In so doing, the government intends to offer testimony from Arlo Looking Cloud to disprove evidence and the theory of guilt that the government used to convict Looking Cloud in his trial. The government is going to put Looking Cloud on the witness stand to testify that he and his accomplices did *not* drive Aquash from Rapid City to Allen to Rosebud to the place of execution, as the government argued to Looking Cloud's jury and to the Court of Appeals. It is clear from Exhibit 1 and Exhibit 2, that in a trial of Richard Marshall, Looking Cloud will testify, and the government will argue, that after Looking Cloud, Graham, Clarke and Aquash left Rapid City, they drove to the house in Rosebud, and from Rosebud, they then drove back west to the Marshalls' home in Allen, and after they left Allen, they drove Aquash out to the cliff near Wanblee. [See: Exhibit 1, Grand jury testimony of Arlo Looking Cloud; Exhibit 2, FBI 302 report of Looking Cloud interview]. In other words, contrary to the theory presented in Looking Cloud's trial and appeal, the government's factual theory and evidence in Marshall's trial will be that they drove to Allen *after* they left Rosebud.

This change of facts as to the timing and sequence of stops is of crucial evidentiary significance as to Marshall's guilt or innocence—specifically, as to the elements of premeditation and intent to murder.

From the record now before the court, it is clear that in order to prove the government's new and revised factual theories, both as to who provided the murder weapon and as to the sequence of stops made by Looking Cloud and his accomplices, government prosecutors will have to effectively *disprove* evidence and the factual theory they presented to the jury to convict Arlo Looking Cloud. Furthermore, they will have to disprove the truth of their own statements to the Court of Appeals.

LEGAL ARGUMENT

I.

The Government's Use of Inherently Contradictory Evidence and Factual Theories in the Prosecutions of Arlo Looking Cloud and Richard Marshall for the Same Murder Violates Due Process.

It is settled law in the Eighth Circuit that a prosecutor's use of inconsistent, irreconcilable factual theories of guilt in two separate trials to convict two defendants charged with participating in the same crime is a violation of due process.

In Smith v. Goose, 205 F.3d 1045 (8th Cir. 2000), the Court of Appeals for the Eighth Circuit ruled that the Due Process Clause prohibits prosecutors from putting forth inherently factually contradictory theories to convict two defendants of the same murder in separate trials. The Court of Appeals overturned Smith's felony murder conviction and held that the prosecution's use of inconsistent prosecutorial theories in two separate trials of two separate defendants violated Smith's due process rights in a way that rendered his conviction fundamentally unfair.

Smith was charged with felony murder. The murder victims, Mr. and Mrs. Chambers, were stabbed to death in their home during a burglary and robbery. Smith and three accomplices, including Bowman and Lytle, went to burglarize the Chambers' home, when they found that another group of criminals, including Cunningham, were already in the process of burglarizing the home. After some discussion, both groups decided to proceed with the burglary and share in the proceeds.

Smith's defense at trial was that Cunningham had murdered the victim before Smith and his accomplices entered the home, and therefore he was not guilty of felony murder. In support of that theory of defense, in Smith's trial, evidence was introduced of a statement made by Lytle that soon after he and the Smith burglars had entered the Chambers' home, he saw the body of Mr. Chambers and heard Cunningham admit that "we took care of it." The prosecutor offered another post-arrest statement that Lytle had made to police to impeach Lytle's trial testimony and to argue that Bowman (another one of Smith's burglary crew) was the one who had stabbed Chambers, thus making Smith guilty of felony murder. The jury evidently accepted the prosecutor's theory

of the facts and found Smith guilty of felony murder.

After Smith was convicted, the State tried Cunningham for Chambers' murder. In Cunningham's trial, the prosecutor (who was the same prosecutor who had prosecuted Smith) argued that it was Cunningham who had stabbed and murdered the victims. Lytle testified for the prosecution and gave testimony consistent with his statement that was used in Smith's trial, that Cunningham had admitted the killing to him, but this time the State did not impeach Lytle's testimony with his prior statement to police that Bowman had done the stabbing. Cunningham was convicted of murder.

In Smith's trial, the prosecutor presented evidence and argued that Bowman had killed the victim and in Cunningham's trial, the prosecutor presented evidence and argued that Cunningham had killed the victim.

The issue to be decided was "whether the Due Process Clause forbids a state from using inconsistent, irreconcilable theories to secure convictions against two or more defendants in prosecutions for the same offenses arising out of the same event." Smith v. Groose, at 1049.

The first question in the court's analysis was whether the factual theories presented by the prosecution in the two trials were actually inconsistent. The Court determined that they were. When trying Smith, the State asserted that Lytle's post-arrest statement to the police was the truth and that Bowman had killed the victims after Smith's group entered the house. Later, when trying Cunningham, the State contended that Cunningham killed the victims, that Lytle's testimony that Cunningham admitted the killing was the truth, and the prosecutor did not introduce Lytle's prior inconsistent statement to police. The court found that the prosecutors' theories in the two trials were inconsistent because "[i]n short, what the State claimed to be true in Smith's case it rejected in Cunningham's case, and vice versa." [At 1050].

After finding that the theories presented by the State in the two trials were inconsistent, the Court held that this manipulation of the evidence by the prosecution deprived Smith of due process and rendered his trial fundamentally unfair. The Court ruled that "the use of inherently factually contradictory theories violates the principles of due process." Smith v. Groose, at 1052. The Court of Appeals did not rule that prosecutors must present precisely the same evidence and theories in trials for different defendants. "To violate due process, an inconsistency must exist at

the core of the prosecutor's cases against defendants for the same crime.” *Id.*, at 1052.

In United States v. Paul, 217 F.3d 989 (8th Cir. 2000), the Court affirmed the legal principal of Smith v. Goose, but since it found no inconsistency of factual theories or evidence, the Court ruled there was no due process violation. Distinguishing the facts in Paul from the facts in Smith v. Goose, the Court of Appeals ruled that the prosecution theories in Paul’s case were not factually inconsistent or irreconcilable. In arriving at that decision, the Court pointed out that Paul only argued that the prosecutor made inconsistent arguments at the two trials, but could not point to the use of evidence at Paul’s trial that was factually inconsistent and irreconcilable from the evidence at the co-defendant’s trial.

Similarly, in Clay v. Bowersox, 367 F.3d 993 (8th Cir. 2004), the Court of Appeals again affirmed the principal of Smith v. Goose, but found that the prosecutor had not relied on inconsistent factual theories or evidence. The Court of Appeals again made a distinction between alternative legal theories and inconsistent factual theories based conflicting evidence. Although a prosecutor can argue alternative *legal* theories of culpability in separate trials without violating due process, if a prosecutor argues two irreconcilable *factual* theories or offers irreconcilable evidence at two trials, the use of inconsistent evidence and inconsistent factual theories in two trials of two defendants violates due process. In Clay v. Bowersox the Court distinguished the facts from the facts of Smith v. Goose and Thompson v. Calderon, 120 F.3d 1045, 1059 (9th Cir. 1997) (en banc), *vacated on other grounds*, 523 US 538, 118 S.Ct. 1489 (1998), by pointing out there was no showing that inconsistent *evidence* was presented in the two trials.

Other Circuit Courts have also ruled that a prosecutor’s presentation of inconsistent theories and evidence to convict separate defendants at separate trials deprives the defendants of fundamental fairness and violates due process.

In Thompson v. Calderon, above, which was cited in Smith v. Goose, the Ninth Circuit Court ruled that a prosecutor who seeks to convict two defendants at separate trials by offering inconsistent theories and facts regarding the same crime violates due process.

In Stumpf v. Mitchell, 367 F.3d 594 (6th Cir. 2004), the Sixth Circuit came to the same conclusion and set aside the appellant’s guilty plea in a murder case. In Bradshaw v. Stumpf, 545 U.S. 175, 125 S.Ct. 2398 (2005), without deciding the issue of whether the prosecutor’s theories

were inconsistent, the Supreme Court reversed the Sixth Circuit's decision to set aside the appellant's guilty plea, on the grounds that the prosecutor's use of an allegedly inconsistent theory in a co-defendant's trial that occurred after Bradshaw had pled guilty did not affect the knowing, voluntary and intelligent nature of the defendant's plea of guilty; however, the Supreme Court remanded the case for a determination as to whether the prosecutor had violated due process by the use of inconsistent theories of guilt that affected the death penalty decision in sentencing.

In United States v. Higgs, 353 F.3d 281 at 326, (4th Cir. 2003), citing the Eighth Circuit's decisions in Smith v. Groose and United States v. Paul, the Fourth Circuit Court of Appeals affirmed the principle that the Due Process Clause prohibits the government from presenting mutually inconsistent theories of the same case against different defendants if an inconsistency exists at the core of prosecutor's cases against the defendants for the same crime or where the evidence used at the two trials is "factually inconsistent and irreconcilable," citing Paul, 217 F.3d at 998.

The Fifth Circuit has also addressed the issue of inconsistent prosecutorial theories within the context of judicial and collateral estoppel. Nichols v. Scott, 69 F.3d 1255, 1268-72 (5th Cir. 1995).

Another case standing for the same principal is In Re Sakarias, 35 Cal. 4th at 155-156, 25 Cal. Rptr. 3d 265, 106 P.3d 931, in which the Supreme Court of California held that "fundamental fairness does not permit the People, without a good faith justification, to attribute to two defendants, in separate trials, a criminal act only one defendant could have committed."

In this case, the first issue for the court to decide is whether the evidence and the factual theories that the government used to convict Arlo Looking Cloud are irreconcilable and inconsistent with the evidence and factual theories that the government seeks to use to try to convict Richard Marshall. If the answer to that question is in the affirmative, the defendant has established a violation of due process.

Here, it is already clear from the evidence in the record that an irreconcilable inconsistency exists between the evidence and factual theory that the government used to convict Arlo Looking Cloud and the evidence and factual theory the government is using to try to convict Richard

Marshall, and that the inconsistency exists at the very core of the government's cases against the two defendants.

In order to convict Richard Marshall, government prosecutors will have to effectively *disprove* the evidence and the theory they presented to convict Arlo Looking Cloud. Specifically, to convince a jury that Looking Cloud's most recent self-serving story is true, government prosecutors will have to effectively discredit the testimony and evidence of prosecution witnesses, including Richard Two Elk, whose testimony they have previously offered to the court to prove Arlo Looking Cloud's guilt. This inherent contradiction in evidence alone establishes that the government seeks to use evidence and a factual theory to convict Marshall that is inherently contradictory to and irreconcilable with the evidence and factual theory it used to convict Arlo Looking Cloud. As in Smith v. Goose, what the government claimed to be true in Looking Cloud's case—that Looking Cloud gave John Graham the murder weapon—it rejects in Marshall's case. If the court allows the government to proceed with a trial of Richard Marshall, the government, either expressly or implicitly, will necessarily have to discredit the very evidence and the factual theory its prosecutors presented to the jury in Looking Cloud's trial and to the Court of Appeals for the Eighth Circuit in his appeal.

If the evidence the government presented in Looking Cloud's trial is true—that Looking Cloud provided the shooter with the murder weapon in the last moments of Aquash's life—then Richard Marshall is innocent. Marshall cannot be guilty, unless the evidence and theory presented by the government to prove Looking Cloud's guilt is proven false. The evidence and factual theory presented by the government to prove Looking Cloud's guilt and the evidence and factual theory presented by the government to prove Marshall's guilt are inconsistent and contradictory “at the core of the prosecution's cases against defendants for the same crime.” Smith v. Goose at 1052.

In a trial, in order to prove its factual theory of Marshall's guilt, which it will present through the testimony of Arlo Looking Cloud, the government will seek to prove that its theory in the first trial was wrong and the evidence it presented to the jury was false. The government now contends, and Looking Cloud will testify, that Arlo Looking Cloud did not provide the murder weapon for the killing of Aquash, and instead of Looking Cloud providing the gun for the killing,

that Richard Marshall did that. That theory and that testimony can only be true if Richard Two Elk's testimony in Looking Cloud's trial was false. Whether expressly or implicitly, in order to convict Marshall, the government will have to discredit the testimony of a government witness it relied on to prove Looking Cloud's guilt and disprove the factual theory it presented in Looking Cloud's trial.

On this point, it is noteworthy that the government has not filed any legal papers that affirm or even suggest that the testimony of Two Elk or any other prosecution witness in the Looking Cloud trial was false, or any affidavits or other documents that would call into question the reliability of any of the evidence presented against Looking Cloud. If they have good reason to believe that Looking Cloud was convicted on the basis of false evidence, the government's prosecutors have a clear ethical duty to move to vacate his conviction. The fact that they have not done so would seem to prove that the government has no reliable evidence that any witness in Looking Cloud's trial gave false or unreliable testimony. The government has not filed any petition to vacate or modify Looking Cloud's conviction or his sentence, based on any newly discovered evidence of false testimony by any witnesses, nor has the government represented to any court that Looking Cloud was denied fundamental fairness in his trial or that there is any legal or factual reason to question the reliability of the verdict of guilt.²

The government's purported justification for its about-face in its theories is that three years after his murder conviction was affirmed, Arlo Looking Cloud told federal prosecutors that they were wrong: he did not do what they said he did; he did not provide the murder weapon, Richard Marshall did that. Evidently, Looking Cloud's self-serving post-conviction statements to

² If the government's case against Richard Marshall is allowed to go forward, it is entirely foreseeable that, soon after Marshall's trial, whatever the verdict, a petition to vacate Looking Cloud's conviction will be made by Looking Cloud's attorneys, who will cite *Smith v. Groose* to argue that Looking Cloud was denied due process and his conviction should be overturned. Although it is not undersigned counsel's responsibility to make legal arguments concerning the rights of Arlo Looking Cloud, it is evidently necessary to point out to the government that if it proceeds to trial against Richard Marshall on a theory that conflicts with the theory it presented in its prosecution of Looking Cloud, in addition to denying fundamental fairness and due process to Richard Marshall, *the government's use of contradictory theories will place the conviction of Arlo Looking Cloud in legal jeopardy*. If this case goes to trial, the government's prosecution of Richard Marshall will provide Looking Cloud with a sound legal basis to move to vacate his conviction on the grounds that *he* was denied due process by the government's use of a conflicting theory of prosecution in the trial of Marshall. *Smith v. Groose*, after all, was a case in which the defendant who went on trial *first* got his conviction overturned as a result of the prosecutor's use of an inherently contradictory theory to convict another defendant in a trial that took place *after* Smith's conviction.

prosecutors are not reliable enough to persuade the government to move to set aside Looking Cloud's conviction, but they are enough to indict and try Richard Marshall for murder.

In this case, the conflict between the government's two factual theories could hardly be more obvious and irreconcilable. In Looking Cloud's trial, the government offered evidence to prove that Arlo Looking Cloud provided the gun that was used to murder Anna Mae Aquash. Now, the government intends to go before another jury and argue that Arlo Looking Cloud did *not* provide the murder weapon for the execution of Anna Mae Aquash; it was Richard Marshall who provided the murder weapon; and we know that because Arlo Looking Cloud says so.

Furthermore, consistent with its apparent rejection of evidence it has previously relied on and represented as true to a jury and to a Court of Appeals, in a trial of Richard Marshall, the government would adduce testimony from Arlo Looking Cloud that Looking Cloud and his accomplices stopped at Marshall's house *after* they stopped in Rosebud. In both the trial and the appeal of Looking Cloud's case, government prosecutors repeatedly and unequivocally presented evidence and a factual theory that Looking Cloud and his accomplices took Aquash first to the Marshall home in Allen, and after they left the Marshall home, they drove to Rosebud. For the reasons discussed above, this proposed change in the government's evidence goes directly to the question of Marshall's guilt or innocence. In order to prove their new theory of the facts on this critical point in a trial against Marshall, although they may not want the jury to know it, the government's prosecutors will effectively be seeking to discredit and disprove the very same evidence, testimony, and factual theory they have put forward as true and trustworthy to a jury and to a United States Court of Appeals.

As was true in the prosecution of Smith in Smith v. Goose, the question of timing and the sequence of events in this case is crucial. The government presented evidence from John Trudell in Looking Cloud's trial that some un-identified co-conspirator or co-conspirators gave Theda Clarke and her accomplices an assignment to kill Aquash when they were at the house in Rosebud. It is a reasonable inference from the evidence that Looking Cloud, Graham and Clarke formed the actual intent to murder Aquash *while they were at the house in Rosebud or shortly*

thereafter.³ Therefore, if they stopped at Marshall's home in Allen *before* they went to Rosebud, then neither Clarke, Graham, or Looking Cloud had yet formed any intent to kill Aquash when they were at Richard Marshall's house. That decision had not yet been made, that order had not yet been given, before they went to Rosebud. Therefore, Marshall could not have formed or shared a premeditated intent to murder Aquash with Looking Cloud, Clarke and Graham, if they stopped at Richard Marshall's home in Allen *before* they drove to Rosebud.

Here, as in the *Smith* case, what the government's prosecutors claimed to be true in Arlo Looking Cloud's case, they reject in Marshall's case, and vice versa. On the all important question of who provided the gun that was used to kill Aquash, what the government claimed to be true in Looking Cloud's case—it was Looking Cloud who gave Graham the gun—the government now rejects in Marshall's case. What the government rejected in Looking Cloud's trial—the defendant's argument that Two Elk's testimony as to Looking Cloud's admissions was unreliable—the government now, implicitly or otherwise, necessarily advocates as being the truth. On the critical issue of timing, what the government claimed was true in Looking Cloud's trial—that Looking Cloud and his accomplices drove Aquash to Rosebud *after* they left Marshall's home in Allen—they reject in Marshall's case.

Here, the conflict between the government's evidence and theories is even more dramatic than the one presented in *Smith v. Groose*. In this case, the government seeks to offer the testimony of Fritz Arlo Looking Cloud to prove that Richard Marshall committed the very act that the government has previously attributed *to the government's witness himself*—supplying the murder weapon.

On the basis of the evidence in the record as it now stands, the conclusion is inescapable that an irreconcilable inconsistency exists “at the core” of the prosecutor's evidence and factual theories in its cases against Looking Cloud and Marshall.

Once that determination is made by the Court, pursuant to the authority of the Eight Circuit Court of Appeals' holding in *Smith v. Groose*, the Court must rule that the government's use of inconsistent theories and evidence in this case violates the Due Process Clause of the Fifth

³ See the trial testimony of John Trudell, on Looking Cloud's admissions to him. *United States v. Looking Cloud* trial transcript, pages 380-401.

Amendment to the United States Constitution.

CONCLUSION

What Justice Clark stated in his concurring opinion in Drake v. Kemp, 762 F.2d 1449, 1479 (11th Cir. 1985)(en banc)(decided on other grounds), is equally applicable to the facts of this case and equally true: “The prosecutor’s . . . flip flopping of theories of the offense was inherently unfair. Under the peculiar facts of this case the actions by the prosecutor violate the fundamental fairness essential to the very concept of justice.”

The Court should enter an order dismissing the indictment against defendant Richard Marshall.

Dated this 4th day of February, 2009.

VINE RICHARD MARSHALL, Defendant

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Memorandum of Law in Support of Motion to Dismiss for Denial of Due Process upon the other parties in this case via the electronic mail addresses listed below:

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Dated this 4th day of February, 2009.

/s/ Dana L. Hanna

Dana L. Hanna