

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
APR 29 2009

CLERK

UNITED STATES OF AMERICA,	*	CR 08-50079
	*	
Plaintiff,	*	
	*	
vs.	*	ORDER ON MOTION TO DISMISS
	*	DUE TO PRE-ACCUSATORY DELAY
JOHN GRAHAM, a/k/a John Boy Patton,	*	
and VINE RICHARD MARSHALL, a/k/a	*	
Richard Vine Marshall, a/k/a	*	
Dick Marshall,	*	
	*	
Defendants.	*	
	*	

Pending before the Court is Defendant Marshall’s Motion to Dismiss Due to Pre-Accusatory Delay. (Doc. 96.) Marshall’s motion stems from a delay of 33 years from the time of Annie Mae Aquash’s murder in 1975 and his indictment in 2008.

The parties agree that the Eighth Circuit has a two-prong test for determining whether a defendant’s Fifth Amendment Due Process rights have been violated by pre-indictment delay: (1) the defendant must show the delay resulted in actual and substantial prejudice to the presentation of the defense, and (2) the defendant must establish that the government intentionally delayed the indictment either to gain a tactical advantage or to harass the defendant.¹ *United States v. Gladney*, 474 F.3d 1027, 1030 (8th Cir. 2007). The court will inquire into the reasons for delay only where actual prejudice has been established. *See id.* at 1030-31. To establish actual prejudice, a defendant must identify witnesses or documents lost during the delay period. *Id.* at 1031. Actual prejudice

¹The Eighth Circuit recognized that the Supreme Court suggested in *dicta* that the second prong might be satisfied if the government delay was “in reckless disregard of its probable prejudice impact upon the defendant’s ability to defend against the charges.” *United States v. Jackson*, 446 F.3d 847, 849-50 (8th Cir. 2006).

cannot be established by defendant's speculative or conclusory claims of possible prejudice as a result of the passage of time. *Id.* The defendant carries the burden to show the lost testimony or information is not available through other means. *Id.*

Defendant Marshall argues that a different, more lenient, test and burden of proof should apply in this case because there is no statute of limitations for murder and he was not indicted until more than three decades after the crime. He notes that there are no Eighth Circuit cases supporting his argument, but claims that is because the Eighth Circuit has not yet addressed pre-indictment delay in a murder case. Marshall urges this Court to follow the Fourth Circuit and Ninth Circuit which have ruled that if a defendant proves prejudice he is not required to prove improper prosecutorial motive; instead, the Court should balance the defendant's prejudice against the government's justification for the delay. *See Howell v. Baker*, 904 F.2d 889 (4th Cir. 1990); *United States v. Ross*, 123 F.3d 1181 (9th Cir. 1997). These are not murder cases, but Marshall asserts the reasoning of the Fourth and Ninth Circuits is even more compelling in a murder case with no statute of limitations. The Court will apply the Eighth Circuit's two-part test set forth above. Murder is the most serious of crimes and that is a reason there is no statute of limitations on murder. Given the seriousness of feloniously taking the life of another person, there is no good reason to have a lesser burden for the dismissal of a murder charge due to the passage of time before the charge is brought. A lesser test would run contrary to why there is no statute of limitations for murder.

The Court's view of Defendant Marshall's claim as to what Arlo Looking Cloud did say or might have said in the missing part of his taped interview of November 17, 1994 is supposition. Likewise, what Richard Marshall's now deceased parents knew of whether or not he had an easily hidden revolver in his house on December 12, 1975 is supposition, and a hearing will not produce anything further on that point. Richard Marshall's motivation for not having a gun in his house could be established in other ways without his parents' testimony. Finally, Theda Clark does have infirmities due to her advanced age, but there is no showing that she would have been of any assistance at any time to Marshall's defense. The opposite is apparently true, as it appears the United States is calling her as a witness for the prosecution.

Defendant has failed to demonstrate actual and substantial prejudice and, therefore, the Court need not inquire into the government's reasons for delay. The Court notes, however, that there is no evidence that the government either intentionally or recklessly delayed the indictment to either gain a tactical advantage or to harass Defendant Marshall. In 2004, this Court presided over the trial of Arlo Looking Cloud. The testimony of Robert Ecoffey indicated that he first became involved in the investigation of Annie Mae Aquash's murder in 1984 when Ecoffey accompanied the FBI to Denver to help interview witnesses. The FBI asked for Ecoffey's assistance because of his expertise in dealing with Indian people and in investigating homicides. Witnesses were not cooperating and nothing came of the investigation in 1984. Ecoffey testified that he continued to review the evidence in the case. A break occurred In June of 1993 when a woman contacted Ecoffey with the name of a witness who might cooperate and provide information about Ms. Aquash's murder. On June 18, 1993, that witness contacted Ecoffey. On September 6, 1994, Ecoffey had his first interview with Looking Cloud at the Denver County Jail in Denver, Colorado. Looking Cloud denied knowing anything about the murder. Looking Cloud began cooperating with Ecoffey in 1995, even taking him to the murder scene. Looking Cloud, however, did not tell Ecoffey or anyone else about the alleged stop at the Marshall residence in Allen, South Dakota, to get the murder weapon. Looking Cloud provided that information when he testified before the grand jury in August, 2008. ² At Looking Cloud's trial, Darlene ("Kamook") Nichols testified that she decided to cooperate with the government and she contacted the FBI. The exact time she started cooperating is not clear, but she testified that she recorded a conversation with her ex-husband, Dennis Banks, in 2002. Based on all of this information, it is the Court's view that the government did not intentionally or recklessly delay the indictment of Marshall to either gain a tactical advantage or to harass him.

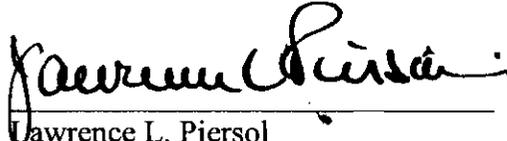
For all of these reasons, an evidentiary hearing is not necessary to decide Defendant Marshall's Motion to Dismiss Due to Pre-Accusatory Delay. The Court will, however, allow the parties to present argument on the Motion prior to issuing a ruling. Accordingly,

²At the Looking Cloud trial in 2004, Marshall's wife, Cleo, testified that Looking Cloud, Graham, Clark and Aquash all had stopped at the Marshall's residence after midnight one night in December, 1975. Cleo sat with Ms. Aquash while Graham, Clark and Looking Cloud talked with Marshall in the bedroom. She denied that Marshall had a gun in the bedroom.

IT IS ORDERED that the Court will hearing argument but will not accept evidence on Defendant's Motion to Dismiss Due to Pre-Accusatory Delay on Tuesday, May 5, 2009 at 1:00 p.m. (Mountain Time), at the federal courthouse in Rapid City, South Dakota.

Dated this 29th - day of April, 2009.

BY THE COURT:



Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: Summer Wahpik
DEPUTY