

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. CR 08-50079

MEMORANDUM IN SUPPORT
OF DEFENDANT
MARSHALL'S FOURTH
MOTION FOR SEVERANCE;
REQUEST FOR
SPEEDY TRIAL

LEGAL ARGUMENT

THE DEFENDANT'S RIGHT TO A SPEEDY TRIAL WILL BE VIOLATED
IF THE COURT DOES NOT ORDER A SEVERANCE OF TRIALS.

If the court does not grant a severance, Mr. Marshall will be denied his constitutional right to a speedy trial.

Rule 14 of the Federal Rules of Criminal Procedure provides that if it appears that a defendant "is prejudiced by a joinder of ... defendants ... for trial together, the Court may order an election or separate trials of counts, grant a severance of defendants, or provide other relief justice requires."

Richard Marshall has been and will continue to be prejudiced by the joinder of defendants because he is being denied his right to a speedy trial while the government seeks delay in order to postpone the all but certain dismissal of the indictment against Mr. Marshall's co-defendant.

Although the Court of Appeals has denied the government's petition for rehearing, there is no trial date scheduled. Richard Marshall is waiting in jail, after being held one year and three months of custody, while the government decides whether it will petition the Supreme Court to hear an interlocutory appeal that has nothing to do with the case of Richard Marshall.

A joint trial is now, for all practical purposes, extremely unlikely. The government's prosecutor has stated to the court that if the government decides not to file a petition for certiorari, it will probably dismiss the charges against the co-defendant Graham. If the government does eventually file for certiorari, it will delay a trial for months unless there is a severance. Unless Mr. Marshall is granted a severance, he will have to remain in custody without a trial for several more months while the government pursues its dilatory course of exhausting all avenues of appeal, before it eventually dismisses the indictment against Graham. Therefore, the court's interest in the judicial economy that would result from a joint trial can no longer outweigh Richard Marshall's right to a speedy trial.

This court has given the government unequivocal notice of its legal opinion that there is insufficient evidence to support a conviction of Graham on any of the remaining charges in the indictment if the government goes to trial against Graham. In its order dismissing Count III against co-defendant John Graham, this court stated its opinion that it is evident from the undisputed facts in the case that the government will be unable to prove a necessary element of the remaining crimes charged in the indictment—that Graham is Indian. As this case stands now, the government is on notice that it cannot prove a crime against Graham.

Therefore, the government is going to be ethically obligated, sooner or later, to dismiss the federal indictment against the co-defendant Graham. "A prosecutor should not institute,

cause to be instituted, *or permit the continued pendency of criminal charges* in the absence of sufficient admissible evidence to support a conviction.” American Bar Association Standards for the Prosecution Function, Standard 3-3-9. Italics added. Only if the United States Supreme Court would reverse the Court of Appeals in Graham’s case could the government ethically proceed with a trial of John Graham in federal court.

According to the Supreme Court’s website, approximately 7500 to 10,000 petitions for certiorari are filed each year. Each year, the Supreme Court grants about 150 of those petitions. Even if certiorari were to be granted, it would likely take another year before the case was decided. Meanwhile, Richard Marshall would be denied his right to a speedy trial.

The practical reality at this stage of the case is that Richard Marshall will have a separate trial, even without a severance, because the government will dismiss the charges against Graham, either about 90 days from now or later. The only real question is when that separate trial for Richard Marshall will take place. In view of the likelihood the government will eventually dismiss the indictment against Mr. Marshall’s co-defendant, either some 90 days from now or at the end of a lengthy appellate process, it is fundamentally unfair to continue to allow the government to delay Mr. Marshall’s trial by leaving him in legal limbo as a result of prejudicial joinder.

Therefore, this Court should grant the defendant Richard Marshall’s motion for a severance of trials and enter an order scheduling a trial date.

DATED: November 30, 2009

Respectfully submitted,

BY: /s/ Dana L. Hanna
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Severance and Request for a Speedy Trial was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Robert Mandel, Assistant United States Attorney
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John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 30th day of November, 2009.

/s/ Dana L. Hanna

Dana L. Hanna
