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 OF LAW IN SUPPORT OF MOTION TO PRECLUDE USE OF FALSE TESTIMONY**

FACTS AND BACKGROUND

Since 1994 to the present date, Arlo Looking Cloud has consistently told federal government prosecutors and agents that he had no intent to help murder Anna Mae Aquash, that her murder came as a surprise to him, and that he did not knowingly aid and abet her murder. Those claims have been judicially proven beyond a reasonable doubt to be false. Even if the government does not elicit that false testimony on direct examination, the government knows, or should know, that Looking Cloud is going to repeat his false claims of ignorance and innocence when he is questioned by defense counsel on cross-examination in Mr. Marshall's trial. The Defendant Marshall contends that certain facts and evidence in the possession of the government, including statements made by Looking Cloud in tape-recorded conversations with family members and in conversations with government attorneys, the government must be charged with knowledge that its key witness against Mr. Marshall will knowingly lie about his own intent, knowledge and guilt when he is questioned on those material facts in cross-examination.

Defense counsel has directly confronted the government's prosecutors with the question of whether its witness will deny intent to murder or knowingly aiding and abetting the murder of

Aquash when he testifies in Mr. Marshall's trial. The government has not denied that such would likely be Looking Cloud's testimony. Instead, the trial prosecutor took the position that such testimony would not constitute perjury.

Rather than contest the fact that Looking Cloud will deny his own proven guilt when he testifies, the government would argue as a point of law that even if Looking Cloud denies facts which have been proven beyond a reasonable doubt–his intent, prior knowledge and guilt in the murder of Aquash–then such testimony would not constitute perjury and therefore the Defendant Marshall's constitutional guarantee of a fair trial would not preclude the government from calling Looking Cloud as a government witness.

Defendant Marshall contends that if the government knows or should know that its key witness is going to give false testimony, whether on direct or cross-examination, as a matter of law, that would constitute knowing use of false testimony by the government, which would violate the Defendant's Constitutional guarantees of a fair trial and due process of law.

Pursuant to the Constitution's guarantees of an accused citizen's rights to a fair trial and due process of law, and pursuant to this court's supervisory powers to protect the integrity of the judicial fact finding process, the Defendant Richard Marshall moves the Court to order an evidentiary hearing on the motion and to preclude the government from knowingly presenting false testimony in his trial.

THE ISSUE TO BE DECIDED :

Whether the government uses false testimony, and thereby violates a defendant's right to due process of law and a fair trial, when the government presents the testimony of a convicted murderer to testify about the murder for which he was found guilty, knowing that the witness will falsely deny his own prior knowledge, intent, and guilt with regard to that murder when he is questioned by on cross-examination.

ARGUMENT

I

THE GOVERNMENT KNOWINGLY USES FALSE TESTIMONY AND VIOLATES DUE PROCESS WHEN IT PRESENTS THE TESTIMONY OF A GOVERNMENT WITNESS KNOWING THAT THE WITNESS WILL GIVE FALSE TESTIMONY ON CROSS-EXAMINATION.

It is a violation of a defendant's right to due process of law for the government to use perjured testimony in a trial. Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340 (1935); Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173 (1959).

"The prosecution may not use or solicit false evidence, or allow it to go uncorrected." United States v. Martin, 59 F.3d 767, 770 (8th Cir. 1995), *citing* Giglio v. United States, 405 US 150, 154, 92 S.Ct. 763 (1972). To establish a constitutional violation arising from the use of false testimony, "the testimony must have been perjured, the government must have known it was, and there must have been a reasonable likelihood that the perjured testimony affected the jury's determinations." United States v. Martin, *above*.

To violate due process, it is not necessary for the government's prosecutor to elicit the false testimony on direct examination. Recognizing that a jury's determination of the truthfulness of a given witness may well be determinative of guilt or innocence, the Supreme Court and the Eighth Circuit Court of Appeals have held that the government uses false testimony, and thereby denies a defendant fundamental fairness, if a government witness gives false testimony on cross-examination and the government knows or should know that the testimony is false and fails to correct the false testimony. Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763 (1972); United States v. Bigeleisen, 625 F.2d 203 (8th Cir., 1980); United States v. Foster, 874 F.2d 491 (8th Cir. 1988). "[T]o the extent that the government allows (perjured) testimony to go uncorrected, perjured testimony will be considered a part of 'the prosecution's case,' even if elicited by defense counsel on cross-examination." United States v. Boyd, 833 F.Supp. 1277, 1345 (N.D.Ill. 1993).

Most appellate cases addressing the issue of the government's use of perjury involve

cases in which the purported perjury was discovered after the prosecution witness testified. The case before this Court is unique in that the Defendant Marshall affirms that he can prove in an evidentiary hearing that even now, before the trial begins, the government knows its key witness will testify falsely as to his own lack of guilt in the murder he has been proven to have committed. This is not merely a matter of impeachment, but goes to the very subject matter of his testimony and the government's case against Mr. Marshall.

Here, the government must be charged with prior knowledge that the key prosecution witness will give perjured testimony: he will deny prior knowledge, intent to murder, and guilt of the crime for which he was convicted. Given the legal fact of his conviction (which was affirmed on appeal), there can no reasonable dispute that Looking Cloud knowingly aided and abetted murder and that he intended to help murder Aquash. His testimony denying those judicially proven facts would constitute perjury as a matter of law.

Moreover, in Looking Cloud's appeal, the government represented to the United States Court of Appeals in plain and unambiguous language that it was a proven fact in Looking Cloud's trial that Arlo Looking Cloud handed the murder weapon to John Graham at the murder scene. It is a practical certainty that Looking Cloud will deny that fact when questioned on cross-examination. If the government knows or has reason to know that Looking Cloud will deny that he handed the gun to Graham, that too constitutes a present intention by the government to knowingly use perjured testimony in its trial against Richard Marshall.

The government has stated to the Court of Appeals that Looking Cloud handed a gun to Graham at the murder scene. If the government had any reason to believe that the evidence it relied on in Looking Cloud's trial was false, or that the fact it represented to the Court of Appeals as true is not true, then the government would have a duty to bring that matter to the attention of the Court; it has not done so. Therefore, if the government knows that Looking Cloud will testify on cross-examination that he did not give a gun to Graham, or that he did not take any other actions to knowingly help murder Anna Mae Aquash, then the government must be held to know that Looking Cloud is going to give testimony that the government knows is false.

If the government's knowledge of Looking Cloud's intent to testify falsely is admitted or proven, then, as a matter of law, the government intends to use perjured testimony in its case.

II

THE COURT SHOULD ORDER AN EVIDENTIARY HEARING TO DETERMINE WHETHER THE GOVERNMENT INTENDS TO USE FALSE TESTIMONY IN ITS CASE.

To establish a violation of due process after conviction, the Defendant has the burden of establishing that the government's case included perjured testimony; the defendant must show that the challenged testimony constituted "the willful assertion under oath of a false, material fact." United States v. Boyd, 833 F.Supp. 1277, 1335 (N.D.Ill. 1993). Richard Marshall respectfully submits that he can establish in an evidentiary hearing that the government knows now, prior to trial, that its key witness will commit the crime of perjury on cross-examination when he is questioned about his own knowing participation in the murder that would be the subject matter of his testimony.

The knowing and premeditated use of perjured testimony by the government goes to the heart of the integrity of the judicial fact finding process. If the government's intention to call a witness it knows will testify falsely can be established prior to trial, the Court should not wait until the government's witness commits a crime in the courtroom to address the issue. The Court should know, prior to trial, if the government intends to call a witness who will give perjured testimony. Just as the Court will preclude a party from calling a witness it knows will assert his right to remain silent, here, the Court should not wait until the trial has been tainted by perjury to take appropriate preventive action.

To protect the integrity of the judicial process and the Defendant's right to fundamental fairness, the factual question of whether the government's key witness will give false exculpatory testimony on cross-examination must be decided before trial.

Therefore, the Court should grant the Defendant's motion and order the government to disclose what Looking Cloud's testimony will be when he is asked these questions on cross-examination:

– whether Looking Cloud had prior knowledge that Anna Mae Aquash was going to be murdered before she was shot;

– whether Looking Cloud intended to help murder Aquash;

– whether Looking Cloud knowingly acted to aided and abet the murder of Aquash; and

– whether Looking Cloud handed a gun to John Graham at the murder scene.

If the government admits that Looking Cloud will deny those facts when he is cross-examined, then there would be no contested facts to establish in an evidentiary hearing, and the court could then make legal rulings on the issue. If, on the other hand, the government denies that Looking Cloud will give false exculpatory testimony on cross-examination or if the government claims ignorance as to what the testimony of its key witness will be on these material facts, then this Court should order that an evidentiary hearing be held in which the Defendant will have an opportunity to present evidence to prove that the government intends to use false testimony in its case by calling a witness it knows will commit perjury on cross-examination.

If the government contests the fact that Looking Cloud would testify falsely about his own guilt and actions, the Court should hear evidence in a pre-trial hearing and make preliminary rulings of fact pursuant to FRE Rule 104 as to whether the prosecution's witness intends to give false exculpatory testimony in trial; and if the Court finds it is reasonably foreseeable that Looking Cloud will give perjured testimony if he testifies, the Court should then make a legal ruling that the use of such testimony by the government would deprive the Defendant Richard Marshall of due process of law.

DATED: 19 JANUARY 2010

Respectfully submitted,

/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 Memorandum was electronically served upon the other parties in this case via the electronic mail addresses listed below:

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Dated this 19th day of January, 2010.

/s/ Dana L. Hanna

Dana L. Hanna