UNITED STATES DISTRICT COURT
THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL, a.k.a. RICHARD VINE MARSHALL, a.k.a. DICK MARSHALL, Defendant.	Case No. CR 08-50079 DEFENDANT MARSHALL'S APPLICATION FOR PRETRIAL RELEASE ON CONDITIONS

NOW COMES the Defendant Richard Marshall, by and through his attorney Dana L. Hanna, and pursuant to the Bail Reform Act, 18 USC § 3142, hereby moves the Court to order that the Defendant be released from custody pending trial, subject to conditions.

On August 29, 2008, the Defendant appeared before the Court with undersigned counsel for the first time and did not oppose the government's motion for detention because defense counsel had received no discovery and was not then prepared to address the facts of the case. The court, without objection from Defendant, entered an order of detention.

Defendant Marshall is now prepared to address the issue of pretrial release in a hearing. He respectfully submits that the evidence and information that will be submitted in a hearing will show there are conditions which the Court can impose that will reasonably assure the safety of the community and the appearance of the Defendant as required, and that Defendant Marshall is entitled to pretrial release on conditions, pursuant to the Bail Reform Act.

LEGAL ARGUMENT

I.

THE BAIL REFORM ACT FAVORS PRETRIAL RELEASE.

The Bail Reform Act provides that a defendant shall be released from pre-trial custody, either on his personal recognizance or an unsecured appearance bond, or on conditions, unless "the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any person and the community". 18 USC § 3142 (e).

In this case, pursuant to the Bail Reform Act, there is a presumption in favor of pretrial release. If the government opposes release, the burden is on the government to either prove that the Defendant, if released, poses a danger to a person or to the community at large or that he is unlikely to appear in court when ordered to do so. The government's burden of proof is one of clear and convincing evidence to prove dangerousness; to prove probability of flight risk, the standard is preponderance of the evidence. United States v. Orta, 760 F.2d 887 (8th Cir. 1985) (en banc).

It was the intent of Congress, in enacting the Bail Reform Act, that "[p]retrial detention is to be the exception rather than the rule," and therefore "[t]he statute favors release over detention for the majority of accused persons." United States v. Holloway, 781 F.2d 124, 125 (8th Cir. 1986)(citing S. Rep. No. 225, 98th Cong., 1st Sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182.) The passage of the pretrial detention provision of the 1984 Act did not signal a congressional intent to incarcerate wholesale the category of accused persons awaiting trial. Rather, Congress was demonstrating its concern about 'a small but identifiable group of

particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons.' The legislative history stresses that '[t]he decision to provide for pretrial detention is in no way a derogation of the importance of the defendant's interest in remaining at liberty prior to trial. *It is anticipated that* [pretrial release] *will continue to be appropriate for the majority of Federal defendants.*' United States v. Orta, 760 F.2d 887, (8th Cir. 1985) (*en banc*) (citations and ellipses omitted; emphasis and brackets in original) (citing Senate Report at 6-7).

1.

Because the Statutory Presumptions in Favor of Detention Are Not Applicable in This Case, There is a Statutory Presumption in Favor of Pretrial Release.

Under specific and limited circumstances, the Bail Reform Act creates two rebuttable presumptions whereby it is presumed that no conditions can reasonably assure the safety of the community or the appearance of the defendant. The statute puts the burden of producing evidence to overcome the presumption on the defendant, although the burden of proof remains on the government. Neither statutory presumption in favor of detention is applicable in this case.

The previous violator presumption in § 3142 (e) creates a rebuttable presumption in favor of detention if a defendant has been convicted of a federal offense listed in Section 3142(f)(1), if that prior offense was committed while defendant was on release pending trial. That presumption does not apply here for two reasons: first, Defendant's prior offense, which occurred on March 1, 1975, was not committed while he was awaiting trial on any charge and, secondly, a period of more than five years has elapsed since his release from imprisonment in 2000 for that offense.

See: § 3142 (e)(3).

The second rebuttable presumption applies if the indictment charges that the defendant committed a drug offense that is punishable by ten or more years in prison, or if he is charged under 18 USC § 924 (c) for possession of a firearm in the commission of a crime of violence or a drug offense, or 18 USC § 956 (a), or 18 USC § 2332 (b)(terrorism), or an offense involving a minor. Here, the indictment does not charge the Defendant with any of those crimes. Since there is no formal charge of a violation of any of the statutes identified in 3142 (e), the presumption does not arise. United States v. Chimurenga, 760 F.2d 400, 405 (2d Cir. 1985)(the presumption cannot arise unless the defendant is charged in a complaint or indictment with a violation of §924 (c), even if there is probable cause that a defendant appearing before the court on other charges also committed an uncharged firearm offense.)

Therefore, the statutory presumption in favor of detention is not applicable in this case; instead, there is a statutory presumption in favor of pretrial release, on conditions, and the burden of overcoming that presumption is on the government–by clear and convincing evidence of dangerousness or by a preponderance of evidence of flight risk.

The language of § 3142 (c) is mandatory: the "judicial officer shall order the pretrial release of the person..." unless the government proves by clear and convincing evidence that he poses a danger to a person or to the community, or if it proves by a preponderance of evidence that he is unlikely to appear in court as required, regardless of conditions.

"Clear and convincing evidence" means that a particular defendant poses a real and not merely a theoretical danger to others. See, e.g. United States v. Patriarca, 948 F.2d 749 , 792(1st Cir. 1991) (alleged former Mafia boss released because "although *in theory* a Mafia Boss was an

intimidating and highly dangerous character, the Government had not demonstrated that *this Boss* posed a significant danger, or at least not a danger that could not be overcome given appropriate conditions.") [Emphasis in the original]. Moreover, in the Bail Reform Act, the words "reasonably assure" do not mean "guarantee". United States v. Orta, 760 F.2d 887, 891-892 (8th Cir. 1985)(en banc).

In assessing the evidence with regard to dangerousness, the question is not what risk would be presented if the defendant were as free as an ordinary citizen, but rather what risk he would pose under the most restrictive conditions available to the court–including 24 hour electronic surveillance, searches and breath tests without probable cause–and, in this case, parole supervision. See: United States v. Aileman, 165 F.R.D. 571, 580 (N.D.Cal. 1996).

2.

This Court Can and Should Consider the Factors Set Forth in the Bail Reform Act To Determine If There Are Conditions the Court Can Impose that Will Reasonably Assure The Safety of the Community and the Defendant's Appearance in Court.

Pursuant to § 3142 (g), this court must consider various factors in determining whether there are conditions of release that will reasonably assure the appearance of the Defendant as required and the safety of any person and the community.

1. The Nature and Circumstance of the Offense Charged.

The indictment charges the Defendant with one count of aiding and abetting murder. The government's theory is that on December 12, 1975, around midnight, Arlo Looking Cloud, John Graham, Theda Clarke, and Anna Mae Aquash came to the home of Richard and Cleo in Allen, South Dakota; that Theda Clarke asked Marshall to keep Anna Mae Aquash, who was then a wanted federal fugitive, in his house and that Richard Marshall refused. Convicted murderer and

cooperating government witness, Arlo Looking Cloud, has accused Richard Marshall of giving Theda Clarke a handgun and a box of bullets in his bedroom. Aquash, Looking Cloud, Graham and Clarke then left Marshall and his home; and that later that night, John Graham shot and killed Anna Mae Aquash in a field on the Pine Ridge reservation, about ten miles from Wanblee.

There is no allegation by the government that the Defendant was present at the murder of Anna Mae Aquash or that he himself personally committed an act of violence.

The Defendant does not deny that Looking Cloud, Aquash, Clarke, and Graham came to his home. He does deny that he had any reason to believe that Aquash was being held against her will. He denies giving Clarke, Graham, or Looking Cloud a gun. And he denies intentionally doing anything to aid Looking Cloud and his accomplices in bringing about the murder of Anna Mae Aquash.

2. The Weight of the Evidence Against the Defendant.

The evidence that the government has to put forward to prove its theory that Richard Marshall gave a gun to Clarke is based almost entirely on the testimony of Arlo Looking Cloud, who is serving a life sentence for the murder of Aquash, and the jury's determination of his credibility or lack of credibility is likely to be the deciding issue in the trial. Looking Cloud is a lifelong chronic alcoholic, drug addict and street criminal. He first made his accusation against Marshall to law enforcement in August 2008, when he told the FBI and the US Attorneys that while he was at the Marshall home 33 years earlier, he went into Richard Marshall's bedroom and saw Richard Marshall hand Theda Clarke a piece of paper, a handgun, and a box of shells. According to Looking Cloud's statements to the FBI, he heard no discussion about Anna Mae Aquash.

That story conflicts with every other recorded account Looking Cloud gave of the abduction and killing of Aquash since 1988. It conflicts with stories he told fellow AIM members John Trudell, Richard Two Elk, Troy Lynn Yellow Wood, and Kamook Banks, and it conflicts with the accounts he gave to Robert Ecoffey and other federal law enforcement officers in 1994, when he made a proffer statement at the US Attorney's office in Denver, and 2003, after his arrest. In none of those prior statements, made over a period of 15 years to friends and to law enforcement, did Looking Cloud ever mention being at Richard Marshall's home in Allen or claim that Richard Marshall had any involvement in Aquash's killing.

There is no evidence in the discovery materials that Looking Cloud ever mentioned Richard Marshall until August 2008, when he was seeking to make a cooperation agreement with the government. In fact, in a video-recorded statement made in 2003 to BIA Law Enforcement Director Robert Ecoffey after his arrest, Looking Cloud repeatedly denied Ecoffey's attempts to get him to say he had stopped at Richard Marshall's house. He had no memory of stopping there or doing or seeing any of the things he now says he saw and did at Marshall's house 33 years ago.

In the trial of Arlo Looking Cloud, the government adduced evidence, through its own witnesses in its own case, that it was Arlo Looking Cloud who gave John Graham the gun he used to kill Aquash, after they both marched her out to the killing ground [see: testimony of Richard Two Elk]; the government also adduced evidence from its own witness that there were no guns in the home of Richard and Cleo Marshall on the night that Clarke, Looking Cloud, Graham and Aquash came to their home [see: testimony of Cleo Gates].

There is no physical evidence to corroborate Looking Cloud's story about Richard

Marshall. The government has no other witnesses who were at the Marshall home that night who corroborate Looking Cloud's claim that Marshall gave Clarke a gun. The only purported corroboration of Looking Cloud's story about the gun is the testimony of Serle Chapman, a confidential informant who received 69,000 dollars from the government; according to the government, Chapman would testify that he had an unrecorded telephone conversation with Richard Marshall 8 years ago, and that in that conversation Marshall made a statement to the effect that when people in the movement asked other people in the movement to do something, one did not generally ask too many questions. The government characterizes that statement as an admission by the Defendant. The Defendant denies making any such statement and contests its admissibility under the Federal Rules of Evidence. Even if the court determines it is admissible, this alleged statement is so inherently ambiguous that it has little, if any, probative value or relevance at all and certainly does not constitute credible corroboration for Looking Cloud's testimony against Richard Marshall.

Moreover, at trial, the Defendant will offer into evidence the statements made by the US Attorneys in the Looking Cloud trial, and in his appeal, that directly conflict with and contradict the arguments and evidence they now seek to offer to convict Richard Marshall. In both the trial and appeal of Looking Cloud, the government's attorneys offered evidence and argued that *Arlo Looking Cloud* provided the murder weapon to Graham at the scene of the murder; those statements of the government's lawyers will be offered into evidence by the defense as admissions by a party-opponent. Simply stated, five years ago, the US Attorneys told a jury that Arlo Looking Cloud did what they are now using Arlo Looking Cloud to say that Richard Marshall did–provide the murder weapon for the purpose of killing Aquash; they will also have

to tell the jury that Looking Cloud did *not* do what they offered evidence to prove that he did in Looking Cloud's own trial–give Graham a gun. Given the fact that the government will be trying to tell a radically different story to the jury that will hear Marshall's case than the one it told to the jury that convicted Arlo Looking Cloud, the government's case against Marshall has no credibility and cannot persuade any rational, fair minded jury.

The weakness of the prosecution's case against Richard Marshall makes a conviction very unlikely. This factor weighs heavily in favor of the Defendant's pretrial release.

3. The History and Characteristics of the Defendant.

Richard Marshall is 58 years of age. The last time he was convicted of a crime was 33 years ago.

His home for his entire life has been in South Dakota. He lives on the Pine Ridge reservation with Devona Pourier. He is an enrolled member of the Oglala Sioux Tribe. The reservation is, and always has been, his home and permanent domicile. He graduated from Todd County High School in Mission, South Dakota in 1969. He is a carpenter and construction worker by trade. He comes from a traditional Lakota background: he is a fluent Lakota speaker.

Richard Marshall was convicted of murder after trial in 1976 and was sentenced to life in state prison. It was an alcohol-fueled shooting in a bar in Scenic, South Dakota. Prior to trial, the Court released him on cash bond. He never failed to appear in court and bond was returned to the surety after trial. In prison, Marshall was made a trustee. He was allowed to live outside the prison walls, even though he was serving a life sentence. He never abused the trust of the prison authorities who allowed a prisoner serving a life sentence to live outside the walls of the prison.

In part due to the fact that he was a model prisoner, after Richard had served 9 years of

his sentence, Governor William Janklow commuted his sentence from life imprisonment to a term of 99 years, which allowed Marshall to be released shortly thereafter on parole. He is now on lifetime parole. As a result, he is supervised by State Parole Officer, Brian Green of Rapid City.

Since his release on parole, he has twice violated the conditions of his parole by drinking alcohol and was returned to prison. Neither violation involved the commission of any crime. He has been out of prison almost ten years and has lived on the Pine Ridge reservation since 2001. He lives in a committed relationship with a lady, Devona Pourier, who has no criminal record. As can be seen from respected tribal leaders and citizens attesting to his character, Marshall is now a sober, respected member of the tribal community.

He has been steadily employed in construction type jobs for several years and he has been promised employment as a laborer with Puckett Drywall Company in Rapid City if he is released.

The last time he was convicted of a crime was his conviction in 1976.

4. The Nature and Seriousness of the Danger to Any Person or the Community

There is no credible evidence that would support a finding of clear and convincing proof that the Defendant poses a danger to any person or to the community. Counsel is not aware of any accusation or evidence of any act or threat of violence by Richard Marshall since his conviction in 1976.

At his initial detention hearing, the Prosecutor made reference to the fact that a woman with whom the Defendant had once had a relationship applied to State Court for an ex parte order of protection. However, upon investigation, there is no evidence at all of dangerousness: the

complainant in that case stated in her application for such order that Marshall had never used violence or threatened any violence against her. She wanted to break up with him, and according to her, he would not leave her alone. The court ordered an ex parte order which was served on the Defendant. He then ceased all contact with the complainant, in lawful obedience to the Court's order, and the complainant had the order dismissed. My investigator, Stan Zakinski, has interviewed this woman and she re-affirmed to him that Richard Marshall never threatened her with violence or committed any act of violence against her; she states that she feels no fear from Richard Marshall and has no fear of him if he is released by this Court.

He does not now pose any danger to either the community at large or to any individual person.

II.

THERE ARE CONDITIONS THAT THE COURT CAN IMPOSE THAT CAN REASONABLY ASSURE THE SAFETY OF ALL PERSONS AND THE COMMUNITY, AS WELL AS RICHARD MARSHALL'S APPEARANCE AT ALL COURT PROCEEDINGS.

In making this determination, the Court must ask whether this Defendant poses a real danger, as opposed to a theoretical danger, to any person or the community at large, in view of the specific conditions that the Court can impose to monitor and control his actions, his whereabouts, and his life while on pretrial release. Moreover, the law only requires reasonable assurance–not a guarantee. See: United States v. Orta, above, 760 F.2d at 891-892. If it were otherwise, no person would ever be allowed pretrial release and detention would be the rule, rather than the exception to the rule.

The Defendant respectfully submits that the following conditions would reasonably assure the Court that the Defendant will not pose a real danger to any person or the community while he is living at home on pretrial release, pursuant to § 3142 (c), and that he will appear at all court appearances as ordered.

1. The Defendant will report by phone daily, and in person weekly, both to his State Parole Officer and to the US Probation Officer, and will comply with all the terms of his parole supervision, including the requirements that the Defendant not commit any state, federal or local criminal offenses and that he abstain from alcohol. The Defendant's prior offense, and his two previous parole violations, were both alcohol related. Therefore, abstinence from alcohol and any non-prescribed drug is absolutely a requirement for his parole and will be a condition of his pretrial release. The State Parole Officer and his US Pretrial Release Officer shall have the right to do random searches and give breath or chemical tests without probable cause, at his or her pleasure. This monitoring will give the Court reasonable assurance that Defendant will not violate any law while on pretrial release.

2. The Defendant will be ordered to refrain from having any personal contact with any witness in this case. The Court can be supplied with a list of potential witnesses by the government.

3. That he remain in the custody of Devona Pourier while he is not working, and that he be in the custody of his employer, Rusty Puckett, while he is working at his job.

4. That Devona Pourier, Rusty Puckett, and his Parole Officer each be ordered to assume supervision of the Ddefendant and to report any violation of a release condition to the Court.

5. That he maintain employment with Puckett Dry Wall, 920 ½ E. Chicago Street, Rapid

City, SD.

6. That he abide by specific restrictions that prohibit him from leaving the Pine Ridge reservation without permission of his US Probation Officer, except to travel to Rapid City on work or case-related business–e.g., to meet with his attorney, his State Parole Officer, his U.S. Pretrial Services Officer, or to appear in court. Any exceptions to this condition would have to be approved beforehand by the Court or the US Pretrial Services Officer.

7. That he appear personally each day of his pretrial release and report to the Oglala Sioux Tribal police department in Kyle, SD, and take a breath test, if requested, to determine whether there is alcohol in his blood.

8. That he submit to 24 hour a day electronic monitoring by means of a so-called electronic ankle bracelet.

9. Make all court appearances, and meetings with the US Probation Officer and his State Parole Officer, as ordered.

10. And abide by and comply with any other conditions the Court deems appropriate, reasonable, and necessary.

WHEREFORE, the Defendant Richard Marshall moves the Court to order the pretrial release of Richard Marshall on the conditions set forth herein and on any other conditions deemed appropriate, necessary and reasonable by the Court.

Dated: April 8, 2008

RICHARD MARSHALL, defendant

By:

/s/ Dana L. Hanna

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CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Defendant Marshall's Application for Pretrial Release on Conditions was electronically served upon the other parties in this case via the electronic mail addresses listed below:

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Dated this 8th day of April, 2009.

/s/ *Dana L. Hanna*
Dana L. Hanna