CASE NO. 04-2173

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRITZ ARLO LOOKING CLOUD,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of South Dakota
Western Division

BRIEF OF DEFENDANT-APPELLANT

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This case arises from the criminal conviction of Fritz Arlo Looking Cloud under 18 U.S.C. §§ 1111, 1112, and 1153 in the 1975 murder of Anna Mae Aquash. Defendant-Appellant Arlo Looking Cloud appeals his conviction on grounds of ineffective assistance of counsel; plain error of the court in admitting into evidence non-probative information that was highly prejudicial and not relevant to the case, admission of hearsay evidence, and failure to give appropriate jury instructions; and insufficiency of the evidence.

Defendant-Appellant submits that the issues raised herein can best be examined at oral argument. Defendant-Appellant respectfully requests that each side be granted thirty (30) minutes for oral argument before the Court due to the numerous issues on appeal, many of which are highly complex, fact intensive, and involve recent rulings of the United States Supreme Court.

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JURISDICTIONAL STATEMENT

Subject matter in this case arose with the filing of an indictment returned by a Federal Grand Jury in the District of South Dakota on March 20, 2003. Defendant-Appellant was charged with one count of violating 18 U.S.C. §§ 1111, 1112, and 1153.

Following pre-trial proceedings, this matter proceeded to a jury trial before the Honorable Lawrence L. Piersol. Appellant was found guilty as charged. At sentencing on April 23, 2004 he was committed to the Bureau of Prisons for a term of life imprisonment. A timely Notice of Appeal was filed in his behalf on May 3, 2004.

Defendant-Appellant contends that errors were committed during the course of these proceedings that may be considered by this Court. His conviction and sentence are now final and therefore appealable to this Court pursuant to 28 U.S.C. § 1291, it now having jurisdiction to hear and determine this appeal.

STATEMENT OF ISSUES FOR REVIEW

I. THE TRIAL COURT ERRONEOUSLY ADMITTED IRRELEVANT TESTIMONY REGARDING ACTIVITIES OF THE AMERICAN INDIAN MOVEMENT.

A. *The A\activities of the AIM were irrelevant to the alleged murder allegations against Defendant Arlo Looking Cloud.*

U.S. v. Schumaker, 238 F.3d 978 (8th Cir., 2001).

B. *Even if this evidence had a scintilla of relevance it should have been excluded under Rule 403.*

U.S. v. Parker, 364 F.3d 934 (8th Cir., 2004).
U.S. v. Malik, 345 F.3d 999 (8th Cir. 2003).

II. THE TRIAL COURT ERRED WHEN IT ALLOWED INADMISSIBLE HEARSAY INTO EVIDENCE.

A. *The Trial Court allowed hearsay into evidence in violation of Fed. R. Ev. 802.*

U.S. v. Bettelyoun, 892 F.2d 744 (8th Cir., 1989).
U.S. v. Kurkowski, 281 F.3d 699 (8th Cir., 2002).

B. *The Trial Court erred in failing to give a clear and appropriate hearsay instruction to the jury, instead making confusing and sometimes inaccurate statements to the jury regarding hearsay during the trial*.

American Eagle Ins. Co. v. Thompson, 85 F.3d 327, 333 (1996).

III. DEFENDANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL PURSUANT TO THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS VIOLATED IN THAT THE SERVICES OF HIS APPOINTED COUNSEL AT TRIAL WERE SO PREJUDICIALLY DEFICIENT AS TO DEPRIVE HIM OF A FAIR TRIAL AND TO UNDERMINE CONFIDENCE THAT HIS TRIAL PRODUCED A JUST RESULT.

Strickland v. Washington, 466 U.S. 668 (1984).
U.S. v. Brown, 183 F.3d 740, 743 (8th Cir. 1999).

A. *Trial counsel was ineffective and prejudicially deficient because he failed to object to the entry into evidence of a videotaped interview of Looking Cloud by law enforcement officials, despite the fact that the interview took place after Looking Cloud was indicted, without the presence of counsel, under false pretense, and while law enforcement officers knew that Looking Cloud was intoxicated and unable to knowingly and voluntarily waive his rights.*

Massiah v. U.S., 377 U.S. 201 (1964).
Fellers v. U.S., 124 S. Ct. 1019 (2004).
Brewer v. Williams, 430 U.S. 387 (1977).
U.S. v. Red Bird, 287 F.3d 709 (8th Cir. 2002).

B. *Trial counsel was ineffective and prejudicially deficient because he failed to object to the hearsay statements of Anna Mae Aquash, admitted into evidence, despite the fact that the hearsay clearly did not meet any exception within the Federal Rules of Evidence.*

U.S. v. Ortiz, 125 F.3d 630, 632 (8th Cir., 1997).
U.S. v. Iron Shell, 633 F.2d 77, 86 (8th Cir., 1980).
U.S. v. Manfre, 368 F.3d 832, 840 (8th Cir., 2004).

C. *Trial Counsel was ineffective and prejudicially deficient because he failed to request a hearsay instruction for the jury, despite the fact that throughout the trial, the trial court gave incorrect and confusing instructions on hearsay.*

American Eagle Ins. Co. v. Thompson, 85 F.3d 327, 333 (8th Cir., 1996).

D. *Trial Counsel was ineffective and prejudicially deficient because he failed to object to leading questions by the prosecution during the direct examination of prosecution witness Robert Ecoffey.*

U.S. v. Grassrope, 342 F.3d 866, 869 (8th Cir. 2003)

IV. THE EVIDENCE AT TRIAL, EVEN WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, WAS SO INSUFFICIENT THAT NO RATIONAL TRIER OF FACT COULD HAVE FOUND THE ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT.

U.S. v. Martin, 369 F.3d 1046, 1059 (8th Cir., 2004)
U.S. v. Graham, 548 F.2d 1302 (8th Cir., 1977).
U.S. v. Grey Bear, 828 F.2d 1286 (8th Cir., 1987).
U.S. v. Anziano, 606 F.2d 242 (8th Cir., 1979).

STATEMENT OF THE CASE

Defendant-Appellant Arlo Looking Cloud was indicted in Federal Court in the Western Division of the District of South Dakota on March 20, 2003 for violation of 18 U.S.C. §§ 1111, 1112, and 1153 in the murder of Anna Mae Aquash. Looking Cloud entered a plea of Not Guilty on April 21, 2003 and an Order of Detention was issued by Magistrate Judge Simko. Arlo Looking Cloud stood trial for the murder of Anna Mae Aquash on February 3-7, 2004. At the end of their case, the Defense moved for judgment acquittal pursuant to Fed. Crim R. 29, and the motion was denied. Trial Transcript ("TTR") 470-472. Looking Cloud was found guilty of first degree murder, or aiding and abetting in that crime, on February 9, 2004.

Timothy Rensch, Looking Cloud's trial attorney, filed a Motion to Substitute Attorney on February 25, 2004. The Court granted the motion on April 5, 2004, and Terry Gilbert was appointed as counsel for Looking Cloud. On April 23, 2004, Arlo Looking Cloud was sentenced to life in prison by Judge Lawrence L. Piersol. See Addendum, Judgment and Commitment Order. The Defendant-Appellant filed Notice of Appeal on May 3, 2004, and this appeal follows.

STATEMENT OF FACTS

I. ARLO LOOKING CLOUD

Arlo Looking Cloud, a member of the Oglala Sioux Tribe, was raised on the Pine Ridge Reservation in South Dakota. TTR 208. Richard Two-Elk, a friend of Looking Cloud's for more than 30 years, testified that during the 1970s, Looking Cloud had peripheral involvement with the American Indian Movement ("AIM"), providing "support" at rallies and events. TTR 347. Troy Lynn Yellow Wood (also known as Troy Lynn Irving) testified that after witnessing the murder of Anna Mae Aquash, Arlo Looking Cloud had no contact with the American Indian Movement. TTR 277.

II. THE BODY OF ANNA MAE AQUASH

In February 1976, Roger Amiotte discovered a body on his ranch, ten miles east of Wanblee, South Dakota. TTR 23. Amiotte testified that he discovered the body laying at the bottom of a cliff on land within the confines of the Pine Ridge Indian Reservation. TTR 24, 26. Nate Merrick, who in 1976 worked as a Criminal Investigator for the Bureau of Indian Affairs (BIA), testified that the decomposed body was that of an unidentified female, wearing a silver and turquoise bracelet, a light weight red jacket, a white blouse, and blue jeans. TTR 31-36. He testified that the general consensus of the investigators at the scene was that the woman had been

murdered. TTR 36. He further testified that there was no evidence of any guns being discharged at the scene and no bullets or bullet holes were discovered around the body. TTR 37, 44.

Merrick testified that the body was transported back to Pine Ridge, where Dr. Brown, a pathologist, conducted an autopsy. TTR 37. He testified that no X-ray was taken of the body during this autopsy because the machine was broken. TTR 39. Merrick testified that he and FBI agent John Munis removed the hands from the body and sent them to the FBI for fingerprinting, because the hands were too badly decomposed to fingerprint at Pine Ridge. TTR 39-40. Munis testified that he called the FBI laboratory in Washington, D.C. and they advised him to remove the hands and send them to the lab since the fingers were "shriveled" closed. TTR 64.

Dr. Garry Peterson, a pathologist later brought in to conduct a second autopsy, testified that the cause of death was ruled "exposure" at the first autopsy. TTR 76. Dr. Peterson also testified that on March 2, 1976, the still unidentified remains were buried at Holy Rosary Mission in Pine Ridge, South Dakota, and that on March 8, 1976, a court order was issued to exhume the body of Anna Mae Aquash for a second autopsy. TTR 82-83. Peterson testified that on March 11, 1976, he conducted a second autopsy and discovered a small caliber bullet in the skull. TTR 73. He concluded that this bullet was the cause of death. TTR 77.

Kimberly Edwards, an FBI fingerprint specialist, testified that the FBI had identified the body by the fingerprints as Anna Mae Aquash. TTR 111.

III. THE EVENTS SURROUNDING THE DEATH OF ANNA MAE AQUASH

Mathalene White Bear, a friend of Anna Mae Aquash's, testified that Aquash was afraid for her life and that she was afraid of the FBI. TTR 183. White Bear also testified that she helped Aquash disguise her appearance. TTR 184.

A. *Pierre*

Anna Mae Aquash was last seen some time in late November or early December of 1975. Aquash's attorney, Bob Ritter, testified that on November 24, 1975, she appeared in Federal Court in Pierre, South Dakota, on a bench warrant for possession of illegal firearms, and was released on bond, despite having failed to appear for a hearing in the same court just two weeks earlier. TTR 194-195. Ray Handboy testified that same night, he and Evelyn Bordeaux, his girlfriend and a member of AIM, picked Aquash up in Pierre and drove her to Denver, Colorado, letting her off where she "wanted to go." TTR 201-202, 204. Angie Janis testified Aquash was then taken to the Denver, Colorado home of Troy Lynn Yellow Wood, where she remained for approximately two weeks. TTR 214. It was there that Arlo Looking Cloud first encountered Anna Mae Aquash.

B. *Denver*

Janis also testified that at Yellow Wood's home, members of AIM met and discussed allegations that Anna Mae Aquash was an informant and how to deal with her. TTR 218. Troy Lynn Yellow Wood testified that at the time of this meeting, Arlo Looking Cloud left her home and told her he went drinking with his friend Joe Morgan. TTR 274. Angie Janis testified that among those at the meeting were herself, Troy Lynn Yellow Wood, John Boy Patton (also known as John Graham), George Palfry. TTR 216. There is conflicting testimony as to whether Arlo Looking Cloud was present for this meeting. Though Angie Janis initially testified that Looking Cloud was at the meeting, she later recanted stating that she was not sure whether he was present. TTR 216, 229. Troy Lynn Yellow Wood testified that Looking Cloud was definitely not present at the meeting where there was a discussion as to what to do with the suspected informant. TTR 269-270. She further testified that she did not see Looking Cloud in her home the day that members of AIM met to discuss Anna Mae Aquash. TTR 251.

Over hearsay objections, Yellow Wood testified as to the contents of conversations between Aquash and herself. TTR 252. Angie Janis testified, over hearsay objections, that she received information from AIM member Thelma Rios that Anna Mae Aquash was an FBI informant. She also testified that she told either

John Boy Patton or Theda Clark that Aquash needed to be taken from Denver to Rapid City. TTR 214. John Boy Patton is a man with whom Yellow Wood had a relationship at the time of the events in question. He is also a co-defendant in this criminal trial who is fighting extradition from his native Canada. Troy Lynn Yellow Wood testified that when Looking Cloud returned from drinking with Joe Morgan, Theda Clark asked him to drive to Rapid City. TTR 274.

Soon thereafter, Aquash left the Yellow Wood home. Janis testified that Aquash's arms were bound and she was tied to a board as she was removed from Troy Lynn Yellow Wood's home. TTR 225, 230. However, she testified that although she could see Aquash's hands, she did not see the rope that bound Aquash's arms, and she could not describe the board. TTR 232. Troy Lynn Yellow Wood testified that as Anna Mae Aquash left her home she was not tied up and, in fact, left voluntarily. TTR 254. Janis testified that despite the fact that she observed Aquash being tied up and removed from the home, she did not think anything bad was going to happen to her, based on how other informants had been treated in the past. TTR 226, 233.

C. *Rapid City*

Candy Hamilton testified that she saw Theda Clark, John Graham and the Defendant-Appellant Arlo Looking Cloud with Aquash in Rapid City, South Dakota at the offices of the Wounded Knee Legal Defense/Offense Committee ("WKLDOC")

in mid-December of 1975. TTR 309-310. Hamilton testified that while Aquash was at the WKLDOC offices, the two of them were left alone for "the better part of a day" and that she offered Aquash a place to go. TTR 323, 325. She also testified that, although no one was preventing her from doing so, Aquash made no attempts to leave the home. TTR 323. Hamilton testified that Aquash did not ask her for help, nor did she ask that the police be called. TTR 323-324.

Troy Lynn Yellow Wood testified that, in her presence, Looking Cloud told John Trudell that Aquash was then taken to Thelma Rios's apartment in Rapid City. TTR 262, 274. Yellow Wood testified that Looking Cloud said that while John Boy Patton, Theda Clark, and Anna Mae Aquash were inside the Rios apartment, Looking Cloud went to get gas and went out with a friend, Tony Red Cloud. TTR 274. Clark and Patton were upset with Looking Cloud because he was gone so long. TTR 275. Yellow Wood testified that Looking Cloud told Trudell that Aquash was taken to the Means' residence in Rosebud. TTR 262.

D. *Rosebud and Wanblee*

Cleo Gates testified that Theda Clark, John Boy Patton, Arlo Looking Cloud and Anna Mae Aquash stopped at her home in Rosebud but she would not let them stay. TTR 339. She also testified that when Clark, Looking Cloud, and Patton went to speak privately with Cleo Gates's husband, Dick Marshall, no one was guarding

Aquash or preventing her from leaving. TTR 342. She did not testify as to what occurred in the room while she was with Aquash. She further testified that Aquash did not ask to use the phone when they were alone. TTR 341. Arlo Looking Cloud denies entering the Marshall household. TTR 428; Govt's Exh 45.

The group then went to the home of Bill Means. Arlo Looking Cloud did not enter the Means' home in Rosebud. According to Yellow Wood's testimony, Looking Cloud told Trudell that he sat with Anna Mae Aquash in the vehicle while John Boy Patton and Theda Clark went inside. TTR 263. John Trudell testified Arlo told him that while in the car, Aquash was begging for her life. TTR 399. He also testified that Arlo did not know she would be killed. TTR 392. Yellow Wood testified that Arlo said Anna Mae asked him to let her go and he told Aquash that he did not believe that she would be hurt. TTR 264. She also testified that Looking Cloud did not know that Anna Mae Aquash was going to be killed. TTR 281. Trudell testified that when John Boy Patton and Theda Clark entered the Means' house, they received instructions to kill Anna Mae Aquash. TTR 394.

Troy Lynn Yellow Wood testified that Looking Cloud told Trudell that after leaving Rosebud, Theda Clark, John Boy Patton, Arlo Looking Cloud, and Anna Mae Aquash drove to the Badlands. TTR 264. She testified that Arlo told her that Theda Clark stayed in the car. TTR 264. She also testified that Arlo told Trudell that John

Boy Patton got Aquash out of the vehicle and that he and Anna Mae Aquash walked out onto the plains and up a hill. TTR 264, 265, 275. Yellow Wood testified that Looking Cloud said he followed them and as he did, Aquash began to pray as Patton shot her in the back of the head. TTR 275-276.

John Trudell also testified that Arlo told him that as Anna Mae was walking to the place where she was shot, she was crying and praying and knelt down before John Boy Patton shot her in the back of the head. TTR 390. Trudell testified that he believed that Looking Cloud did not know this was going to happen and that he was simply in the wrong place at the wrong time. TTR 393, 396. He further testified that killing Anna Mae Aquash was not the decision of Arlo Looking Cloud, John Boy Patton, or Theda Clark, and that someone had ordered it. TTR 394.

Both Yellow Wood and Denise Pictou, Aquash's daughter, testified that Looking Cloud told them he had no idea that Patton was going to kill Aquash. TTR 277, 281, 298. John Trudell testified that Looking Cloud believed they were taking her to South Dakota to be questioned about being an informant. TTR 389. He further testified that when John Boy Patton shot Anna Mae Aquash it came as "a complete surprise" to Looking Cloud. TTR 378. Yellow Wood testified that if Looking Cloud had known Aquash was going to be killed, he never would have participated in these events. TTR 277. Looking Cloud's life-long friend, Richard Two Elk, testified that

Arlo Looking Cloud believed they were taking her to South Dakota to help her respond to charges that she was an informant "more effectively." TTR 352.

Yellow Wood testified that Looking Cloud said he was surprised and afraid when Aquash was shot, and that he took the gun from Patton and fired the remaining bullets over an embankment. TTR 276. She testified that he said that Patton and Looking Cloud then returned to the vehicle and, along the drive home, Clark, Patton, and Looking Cloud stopped and buried the gun under a bridge. TTR 276-277.

IV. THE TESTIMONY OF DARLENE "KAMOOK" NICHOLS

Darlene "Kamook" Nichols, a former member of AIM and paid FBI informant, testified over objection regarding the criminal activities of AIM, including: the armed occupation of Wounded Knee; criminal charges against AIM members, including her husband Dennis Banks; the shoot out on the Pine Ridge Reservation between AIM members and FBI agents that resulted in the death of two FBI agents; Leonard Peltier admitting to killing one of the agents; AIM members fleeing from law enforcement officials; law enforcement raids on AIM members' property; arrests of AIM members; dynamite planted in cars; and AIM members making bombs. TTR 113, 117, 119 128-130, 134, 137, 139, 141, 144-146.

Nichols also testified over hearsay, relevance and Fed. R. Ev. 403 objections, that there were rumors circulating at AIM events that Anna Mae Aquash was an

informant for the FBI. TTR 122-123, 131-132. Over the same objections, she testified that Leonard Peltier took Aquash away from camp at an AIM event in June 1975, accused her of being an informant, and put a gun to her head. She also testified that Peltier accused Aquash of being an informant while camping in Washington. TTR 121, 125, 144. Troy Lynn Yellow Wood also testified over objection about threats Peltier made to Aquash. TTR 245. Nichols further testified that in all the time Aquash traveled with her, she never asked Nichols to help her leave. TTR 173. Kamook Nichols also admitted on the stand that her husband and Aquash had an affair. TTR 127, 165.

Kamook Nichols testified that she recorded conversations with Arlo Looking Cloud and others for the FBI. TTR 151. She admitted that the FBI paid her $24,000 in 2003 and $25,000 in 2004 for her work as an informant in the Aquash murder investigation. TTR 161. Though she also testified that this was not a lot of money by her estimation, the previous year she had earned only $9,000 in her employment casting films. TTR 162. Though she was an FBI informant in the case and recorded conversations regarding Arlo Looking Cloud and Anna Mae Aquash, Nichols at no time testified as to the content of those conversations.

V. THE TESTIMONY OF ROBERT ECOFFEY

Robert Ecoffey, Director of the Bureau of Indian Affairs ("BIA") Law Enforcement Services, testified that he first interviewed Arlo Looking Cloud regarding the death of Anna Mae Aquash on September 6, 1994, while he was in Denver County Jail on local charges, because Ecoffey had learned that Looking Cloud "might have some information pertaining to the murder of Anna Mae Aquash." TTR 417. Ecoffey testified that after Looking Cloud was informed of his rights, he initially told Ecoffey that he knew nothing about the death of Anna Mae Aquash. TTR 417-418.

At trial, Ecoffey was questioned about a November, 1994 interview with Looking Cloud, conducted in the presence of his attorney. This interview was subject to a proffer stating that any information Looking Cloud gave would not be used against him unless he were to take the stand. TTR 443. Though the line of questioning was disallowed, the proffer agreement letter remains on the record. TTR 455. Approximately six months later, on July 25, 1995, Ecoffey took Looking Cloud to the scene of Aquash's murder and questioned him without his attorney. TTR 433.

Ecoffey testified that on July 25, 1995, when Looking Cloud was again in jail on local charges, he took Looking Cloud to South Dakota so he could "show us what happened to Anna Mae Aquash." TTR 419. Although Ecoffey testified that he

advised Looking Cloud of his rights, there is no written waiver or record of Ecoffey advising Looking Cloud of his rights at this time. Unlike all other interviews with Looking Cloud, including the proffered interview, no recording was made of this incident. TTR 434.

Ecoffey testified that Arlo Looking Cloud told him that he, Theda Clark, and John Boy Patton had tied Aquash up in Denver and taken her to Rapid City. TTR 421. Ecoffey testified that Arlo told him that they went to an empty apartment, at which time he left. When he returned, Theda Clark yelled at him for being gone for so long. TTR 421. He further testified that Looking Cloud told him he did not go to the WKLDOC offices with Patton, Clark, and Aquash. TTR 421. Ecoffey then testified that Arlo told him they left for Rosebud that night, stopped to get gas, and went to Wanblee. TTR 422. He then testified that he took Looking Cloud to Wanblee where he "agreed to provide basically a reenactment of the crime scene." TTR 422.

Ecoffey testified that Looking Cloud's reenactment was as follows: They pulled over to the side of the road about three miles North of the Junction of 73 and 44; Arlo was in the passenger seat, Theda Clark was driving, and John Boy Patton was in the back with Anna Mae. TTR 423-424. They then walked Anna Mae Aquash to a ditch, where she asked to pray. TTR 425. John Boy Patton then shot her in the

back of the head. TTR 425. Looking Cloud, unsure of what was going to happen to him and believing he might be shot next, asked Patton for the gun, which he fired into the ground until it was empty. TTR 425.

Ecoffey also testified that on March 27, 2003, immediately after Looking Cloud's arrest, he and Detective Abe Alonzo of the Denver Police Department interviewed Looking Cloud regarding the death of Anna Mae Aquash. TTR 427. He testified that Looking Cloud had been indicted for the murder of Aquash a week earlier. TTR 427. This interview was videotaped and played for the jury at the trial. TTR 432. Arlo Looking Cloud was intoxicated when this interview took place; Agent Ecoffey was aware of this. TTR 428; Govt's Exh 45. Despite having been indicted for the murder he was being interviewed about, Looking Cloud had no attorney present. TTR 428; Govt's Exh 45. Further, when obtaining a waiver of his rights, Agent Ecoffey and Detective Alonzo never told him that he had been indicted. TTR 428; Govt's Exh 45. After the tape was played, Ecoffey agreed with the prosecutor's assertion that the contents of the tape were "essentially the same" as the contents of his conversation with Looking Cloud in July 25, 1995. TTR 433.

SUMMARY OF THE ARGUMENTS

The conviction of Arlo Looking Cloud for the First Degree Murder of Anna Mae Aquash must be overturned. The trial court committed plain error, allowing into evidence, over objection, highly prejudicial, non-probative, irrelevant evidence of the illegal activities of the American Indian Movement. The court also erred in allowing hearsay into evidence and failing to properly instruct the jury on hearsay testimony, thus allowing testimony admitted for other purposes to be considered for the truth of the matter asserted.

Further, Defendant's trial counsel was prejudicially ineffective. Trial counsel failed to move to suppress illegally obtained evidence of statements made by the Defendant which were highly prejudicial. Trial counsel also failed to request jury instructions on hearsay, despite the trial court's incorrect and unclear instructions. Moreover, trial counsel failed to object to other hearsay evidence highly prejudicial to the Defendant.

Finally, there is insufficient evidence to support the conviction. The government failed to meet its evidentiary burden and did not show that Arlo Looking Cloud killed or aided and abetted in the killing of Anna Mae Aquash. The trial court erred when it did not grant the Defense's motion for acquittal under F. Crim. R. 29.

As such, the conviction of Arlo Looking Cloud must be overturned and the Defendant discharged, or in the alternative, a new trial be granted.

ARGUMENTS AND APPLICABLE STANDARD OF REVIEW

I. THE TRIAL COURT ERRONEOUSLY ADMITTED IRRELEVANT TESTIMONY REGARDING ACTIVITIES OF THE AMERICAN INDIAN MOVEMENT.

A. *The Activities of the AIM were Irrelevant to the Alleged Murder Allegations Against Defendant Arlo Looking Cloud.*

This case concerns allegations that Looking Cloud either murdered or aided and abetted in the murder of Anna Mae Aquash. Nevertheless, over objection, the Trial Court erroneously admitted evidence regarding activities of AIM, including: the armed occupation of Wounded Knee in 1973, criminal charges against AIM members, the shoot out on the Pine Ridge Reservation between AIM members and FBI agents that resulted in the death of two FBI agents, Leonard Peltier's alleged hearsay admission of killing the two agents, AIM members fleeing from law enforcement officials after the shootout, arrests of AIM members, law enforcement raids on AIM members' property, AIM members making bombs, and dynamite planted by AIM members in certain locations. TTR 113,117,119,128-30.134, 137,139,141,144-46. This evidence had no relevance to the murder of Anna Mae Aquash and should have been excluded.

This Court reviews the Trial Court's determination of relevance under an abuse of discretion standard. U.S. v. Johnson, 318 F.3d 821, 823 (8th Cir. 2003); U.S. v.

Taylor, 106 F.3d 801, 803n.2 (8th Cir. 1997). "'Relevant evidence'" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 402; U.S. v. Schumaker, 238 F.3d 978 (8th Cir. 2001). None of the evidence concerning AIM had any probative value as to whether Looking Cloud murdered or aided and abetted in the murder of Anna Mae Aquash.

By all accounts, Looking Cloud had only peripheral involvement in AIM. TTR 347. Putting that aside, this trial was about Looking Cloud's involvement, if any, in the murder of Anna Mae Aquash, not AIM activities, particularly activities which had no possible bearing on the Looking Cloud issues. Yet, the Trial Court admitted rumor, conjecture, and innuendo about AIM activities. Because the Court admitted this evidence, it was ultimately AIM that was put on trial, not Looking Cloud, just as AIM was targeted by the FBI in the 1970s.

This turned Looking Cloud's trial into a trial within a trial, which had no bearing on the Defendant or the allegations against him. That AIM and its leadership were targeted by the FBI during the 1970s is utterly irrelevant to the alleged guilt of Looking Cloud. That AIM leaders were arrested and put on trial has no bearing on this case. That AIM dynamited certain locations has no bearing on this case. That AIM occupied Wounded Knee in 1973 had no bearing on Looking Cloud's guilt or

innocence. And, the shoot out at Pine Ridge on June 26, 1975, had no bearing on the Looking Cloud case. The circus atmosphere at trial turned this into a trial against AIM and not Looking Cloud. For these reasons, the Trial Court abused his discretion in allowing the introduction of AIM activities totally unrelated to the issue of whether Looking Cloud murdered or aided and abetted in the murder of Anna Mae Aquash.

B. *Even if this Evidence had a Scintilla of Relevance It Should Have Been Excluded under Rule 403.*

Relevant evidence is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. U.S. v. Parker, 364 F.3d 934 (8th Cir. 2004); Fed. R. Evid. 403. Unfair prejudice means an undue tendency to suggest a decision on an improper basis. U.S. v. Malik, 345 F.3d 999, 1003 (8th Cir. 2003).

Even if, *arguendo*, the AIM activities had some possible relevance to this case, such evidence was prejudicial and had no purpose but to confuse the jury. Instead of the jury's focusing on evidence probative to Looking Cloud, the trial became a trial of AIM activities. In light of the admission of this evidence, there existed the substantial reality that the jury convicted Looking Cloud because AIM was a purportedly militant organization and because of AIM activities.

The admission of AIM activities was permitted to go to the jury out of historical context. The AIM activities took place in the context of a war zone fueled by this government's money and participation. To defend against such inferences, Looking Cloud would have been required to introduce evidence of the period known as the "Reign of Terror," on the Pine Ridge reservation where anyone associated with AIM was targeted for violence. During this time, over 60 traditional Native Americans were murdered, homes were burned, and Pine Ridge had the highest murder rate in the United States. Nothing was done to stop this violence and, in fact, the FBI supplied the leaders on the Pine Ridge reservation with weaponry and intelligence on AIM and turned its head as crime after crime was committed against supporters of AIM.

However, that was not what this trial was about, and the jury received only evidence that AIM was somehow a violent organization with which Looking Cloud had involvement. Hence, the jury was tainted by incidents totally unrelated to the Aquash murder. Such evidence was so prejudicial, it could have had no effect but to incriminate Looking Cloud by association. This is exacerbated by the fact that the trial turned into a trial about AIM, with AIM in absentia, and the inflammatory evidence was not put into context.

In sum, the activities of AIM were totally irrelevant to this case and were

admitted solely to prejudice Looking Cloud and inflame the jury. For this reason alone, Looking Cloud should be granted a new trial.

II. THE TRIAL COURT ERRED WHEN IT ALLOWED INADMISSIBLE HEARSAY INTO EVIDENCE.

A. *The Court allowed hearsay into Evidence in violation of Fed. R. Ev. 802.*

Hearsay is testimony in court of an out-of-court statement offered to show the truth of the matters asserted in that statement. Giblin v. U.S., 523 F.2d 42, 45 (8th Cir., 1975), Fed. R. Ev. 801. If there is no other reason for a statement's admission, other than the truth of the matter asserted, it is inadmissible hearsay. U.S. v. Bettelyoun, 892 F.2d 744, 746 (8th Cir., 1989), Fed. R. Ev. 802. Statements not offered for the truth of the matter asserted are admissible for limited purposes to show understanding, predisposition, effect on the listener, or state of mind. American Eagle Ins. Co. v. Thompson, 85 F.3d 327, 332-333 (8th Cir. 1996); U.S. v. Kurkowski, 281 F.3d 699, 702 (8th Cir. 2002).

This court reviews a district court's ruling on admissibility of hearsay evidence for abuse of discretion. U.S. v. Mendoza, 85 F.3d 1347, 1351 (8th Cir., 1996). At the trial of Arlo Looking Cloud, much of the testimony centered around accusations that Anna Mae Aquash was an informant. Though the trial court allowed this hearsay testimony to be admitted with the caveat that it was not being offered for the truth of

the matter, that testimony clearly was used to prove the truth of the matter asserted: that members of the American Indian Movement believed Anna Mae Aquash was an informant.

On multiple occasions, each time over a hearsay objection, the trial court allowed witnesses to testify that other declarants accused Anna Mae Aquash of being an informant. Kamook Nichols testified that at an AIM convention rumors were circulating that Anna Mae was an informant. TTR 123. She also testified that Leonard Peltier held Aquash at gun point accusing her of being an informant, and that her response to this accusation was to tell him that if he believed she was, he should shoot her. TTR 125, 127. Nichols was also allowed to testify that another AIM member, Leonard Crow Dog, stated that Aquash "was a fed" and he didn't want her on his property. TTR 132. She further testified that Leonard Peltier again accused Aquash of being an informant by saying "he believed she was a fed, and he was going to get some truth serum and give it to her so that she would tell the truth." TTR 143-144.

The prosecution argued that these statements were not offered for the truth of the matter asserted, i.e. that the original declarants believed that Anna Mae Aquash was an informant, but instead went to state of mind. This is not the case. The only conceivable reason to admit testimony that AIM members said they believed Anna

Mae Aquash was an informant was to prove that they believed she was, in fact, an informant. In essence, the state of mind of these declarants is the truth of the matter asserted.

There was no testimony that Looking Cloud ever heard these statements, so they were certainly not offered for their effect on the listener or to show Looking Cloud's understanding of what needed to be done. Those who made the statements are not on trial in this case, so the statements were not offered to show their predisposition to any action. The speakers were stating their beliefs regarding Aquash. As such, the statements may go to their state of mind, but the state of mind of individuals that were never shown to speak to Looking Cloud is entirely irrelevant. The state of mind of these speakers has no bearing on Looking Cloud's state of mind. These statements of belief were highly damaging to Arlo Looking Cloud. The admission of these statements of belief into evidence provided the motive for the crimes with which he was charged. The trial court clearly abused its discretion in allowing these statements into evidence.

B. *The Court erred in failing to give a clear and appropriate hearsay instruction to the jury, instead making confusing and sometimes inaccurate statements to the jury regarding hearsay during the trial*.

Even if, *arguendo*, the statements regarding Aquash's status as an informant were not offered for the truth of the matter asserted, the Court erred in failing to give

accurate and clear hearsay instructions, thus allowing hearsay evidence to be admitted over objection. An out of court statement that is not offered to prove the truth of the matter asserted is not hearsay because reliability is not an issue. American Eagle, 85 F.3d at 333; Fed. R. Ev. 801.

Without an appropriate limiting instruction for testimony not offered for the truth of the matter asserted, that testimony is hearsay. American Eagle, 85 F.3d at 333. In American Eagle, the trial court failed to adequately explain to the jury the meaning of considering a statement for something other than the truth of the matter. Id. This Court found that as a result, the jury will likely consider the statements as true, and thus the testimony is inadmissible hearsay. This Court explained:

> The court's failure to give a limiting instruction leads us to conclude that the jury, in all probability, considered the evidence as proof of the matter asserted. Thus, [the declarant's] statements fall within the definition of hearsay. Id.

In the instant case, the limiting instructions were not only inadequate and unclear, but technically inaccurate. The trial court instructed the jury that the testimony was hearsay, though testimony offered for reasons other than the truth of the matter asserted is not. Further, though the court told the jury they could not consider the "truth of the matter asserted," it did not clearly explain what this meant, instead indicating that it could be considered for "what the rumor was" and for the

"fact of what was being stated." TTR 122, 124. The court did not explain that this means that it can be considered for the impact on the listener or someone's state of mind. The initial hearsay instruction was:

> The requested testimony is hearsay, but I am going to admit it for a limited purpose only, this is a limiting instruction. It isn't admitted nor received for the truth of the matter stated. In other words, whether the rumor is true or not. It is simply received as to what the rumor was. So it is limited to what the rumor was, it is not admitted for the truth of the statement as to whether the rumor was true or not. TTR 122.

The court then instructed the jury, "Once again, this witness heard is admitted not for the truth of the matter stated, but simply for the fact of whatever was being stated." TTR 124-125.

In a bench conference, out of the jury's hearing, the court then clarified its ruling stating, "this has to do with the state of mind of Aquash and what she was doing." TTR 126. While this statement does clarify the court's instructions to some extent, the jury never had the opportunity to hear it. The court continued to allow into evidence statements by declarants not testifying into the record, reminding the jury that it is not for the truth of the matter asserted, without ever explaining what that meant. It stated that the testimony was "not allowed for the truth of the matter or not those things were in fact said [sic]." TTR 131.

The court again explained its hearsay rulings, describing state of mind and quoting from the ruling in U.S. v. Malik, 345 F.3d 999 (8th Cir. 2003). In this explanation, the court clearly stated that this testimony should be considered with regards to Aquash's state of mind. TTR 159. Significantly, the court gave this clarification prior to the jury being seated for that day, so they never received the clarification. TTR 160. Such a clarification indicates that the court understood its prior instructions were incorrect and inadequate; however, there was no attempt to remedy this to the jury.

At trial, the court failed to properly instruct the jury to the fact that accusations that Aquash was an informant could not be used to consider whether she actually was. Absent a clear instruction and considering the nature of these statements, it is undeniable that the jury would consider the truth of the matter asserted: Anna Mae Aquash's status as an FBI informant. Because this status, or believed status, was the crux of the government's theory of motive, and because without this hearsay the government would have scant, if any, proof of an alleged motive, the admission of this hearsay testimony was irreparably prejudicial to Looking Cloud. Without this testimony, the government would not have been able to prove an essential part of their case. As such, the conviction of Arlo Looking Cloud should be overturned and the case remanded for retrial.

III. DEFENDANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL PURSUANT TO THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS VIOLATED IN THAT THE SERVICES OF HIS APPOINTED COUNSEL AT TRIAL WERE SO PREJUDICIALLY DEFICIENT AS TO DEPRIVE HIM OF A FAIR TRIAL AND TO UNDERMINE CONFIDENCE THAT HIS TRIAL PRODUCED A JUST RESULT.

Defendant-Appellant Arlo Looking Cloud's right to effective assistance of counsel pursuant to the Sixth Amendment of the United States Constitution was violated at trial, and he was deprived of a fair trial. A convicted defendant's ineffective assistance of counsel claim must demonstrate that counsel's performance was deficient and that this performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. To demonstrate prejudice to the defense, the defendant must show counsel's errors were so serious as to deprive the defendant of a fair trial with a reliable result. Id.

Although the Eighth Circuit does not normally hear claims of ineffective assistance of counsel on direct appeal, it will consider these claims where "the district court has developed a record on the ineffectiveness issue or where the result would otherwise be a plain miscarriage of justice." U.S. v. Brown, 183 F.3d 740, 743 (8th

Cir., 1999). In the instant case, the record clearly shows that Looking Cloud's counsel failed to make a number of objections which any attorney should have made.

The failure to make these objections allowed copious amounts of highly prejudicial, inadmissible evidence to be admitted at trial. Further, counsel neglected to request a jury instruction despite abundant evidence on the record that the trial court gave erroneous and confusing instructions to the jury throughout the trial. Taken individually, each of these errors is prejudicial enough to warrant a new trial. Taken cumulatively, these errors are grossly prejudicial and resulted in an enormous amount of inadmissable evidence to be admitted, more than satisfying the Defendant's burden to show prejudice. To disallow the hearing of these issues at this time would be a miscarriage of justice. Should the court decline to hear these issues at this time, Defendant hereby respectfully preserves his right to raise them in a *habeas* action pursuant to 28 U.S. C. §2255. Defendant further preserves his right to raise other issues of ineffective assistance of counsel not contained in the trial record.

A. *Trial counsel was ineffective and prejudicially deficient because he failed to object to the entry into evidence of a videotaped interview of Looking Cloud by law enforcement officials, despite the fact that the interview took place after Looking Cloud was indicted, without the presence of counsel, under false pretense, and while law enforcement officers knew that Looking Cloud was intoxicated and unable to knowingly and voluntarily waive his rights.*

The taped interview between Arlo Looking Cloud and BIA Agent Robert Ecoffey on March 27, 2003 ("2003 Interview") should never have been admitted into evidence at Looking Cloud's trial. Trial counsel's failure to move to suppress it was ineffective and highly prejudicial. This tape was procured in violation of Looking Cloud's Sixth Amendment right to counsel. First, the 2003 Interview was conducted without Looking Cloud's counsel, through Government deception and while he was under the influence of alcohol. As such, Looking Cloud had not effectively waived his Sixth Amendment right to counsel, and it was ineffective assistance of counsel for his trial attorney to fail to move for the tape's suppression on this ground.

Second, the 2003 Interview tape was used at trial to bolster Ecoffey's testimony about an earlier interview that took place in 1995 ("1995 Interview"). At the 1995 Interview, Ecoffey took Looking Cloud to the site where Anna Mae Aquash's body was found and asked him a series of leading questions. This interview was conducted without Miranda warnings and without the presence of Looking Cloud's counsel. The 2003 Interview was fruit of a poisonous tree, and without this tape in evidence,

Looking Cloud would probably not have been convicted. Therefore, trial counsel's failure to move to suppress this evidence was ineffective assistance of counsel.

Trial counsel's failure to move for the suppression of the 2003 Interview tape constituted representation which fell below an objective standard of reasonableness. Strickland, 466 U.S. at 688. There was simply no reasonable explanation for a trial strategy that would involve keeping in this type of damaging, self-incriminating evidence. During the pre-trial period, defense counsel had nothing to lose by moving for the suppression of this damaging evidence, because if for some reason trial counsel decided he wanted it in later, he could have introduced it himself at trial. Defense counsel had an obligation to protect his client's fundamental Constitutional rights.

Additionally, had Looking Cloud's counsel moved for the tape's suppression, there is a reasonable probability that he would not have been convicted. Id. at 694. The 2003 Interview was the only evidence submitted by the government showing Looking Cloud talking about the events leading up to the murder of Anna Mae Aquash. This tape was instrumental to the United State's case against Looking Cloud; in fact, Arlo's statements made on the tape were mentioned *eight times* in the U.S. Attorney's closing argument. Settle Instructions, Final Arguments, Verdict Transcript ("IATR") at 13-14; 16-17; 19. This powerful admission of conduct and

knowledge leading to the murder of Anna Mae Aquash undoubtedly played a significant role in Looking Cloud's conviction. Because trial counsel's failure to move to suppress the 2003 Interview satisfies both prongs of the Strickland test, his inaction constitutes ineffective assistance of counsel. Therefore, the conviction of Arlo Looking Cloud must be overturned and the Defendant discharged, or in the alternative, a new trial be granted.

1. Looking Cloud's trial counsel should have moved to suppress the 2003 Interview because the interview was conducted without Counsel, after Looking Cloud had been indicted, and through deception and while Looking Cloud was intoxicated.

The U.S. Supreme Court has consistently held that a defendant is denied the protections of the Sixth Amendment "when there [is] used against him at his trial...his own incriminating words, which federal agents...deliberately elicited from him after he had been indicted and in the absence of his counsel." Fellers v. United States, 124 S. Ct. 1019, 1023 (2004) (quoting Massiah v. United States, 377 U.S. 201, 206 (1964). See also, Maine v. Moulton, 474 U.S. 159 (1985); Brewer v. Williams, 430 U.S. 387 (1977). In Brewer, the Court succinctly articulated that "the clear rule of Massiah is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him. Id. at 401. In U.S. v. Red Bird, 287 F.3d 709 (8th Cir. 2002), the Eighth Circuit, in

explaining Massiah and its progeny, emphasized that the period of time after indictment and before trial "is perhaps the most critical period of the proceedings and a defendant is 'as much entitled to [counsel's aid] during that period as at the trial itself.'" Id. at 714, quoting Powell v. Alabama, 287 U.S. 45, 57(1932).

In Red Bird, the defendant, who was indicted on a rape charge, made statements to a federal investigator and submitted to buccal swabs for a saliva specimen after signing the waiver portion of the advice of rights form. 287 F.3d at 712. The Eighth Circuit ruled that because the statement and saliva specimen were obtained after indictment and in the absence of defendant's counsel, the trial court had been correct in suppressing the evidence. Id. at 716.

The government has the burden to prove that a defendant has waived his right to counsel, and the "courts indulge in every reasonable presumption against waiver." Brewer, 430 U.S. 404. The Supreme Court has differentiated between situations where a defendant does not have representation and situations where a defendant already has an attorney or has asked for an attorney. In the former scenario, a "knowing and intelligent" waiver of Miranda rights serves as an effective waiver. Patterson v. Illinois, 487 U.S. 285(1988). In Moran v. Burbine, 475 U.S. 412 (1986), the Supreme Court explained:

> The inquiry [of Miranda waiver] has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or *deception*. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.
>
> Id. at 421 (emphasis added).

Further, the Eighth Circuit has held that a defendant's intoxication may invalidate a Miranda waiver. See, U.S. v. Turner, 157 F.3d 552, 555 (8th Cir. 1998); U.S. v. Korn, 138 F.3d 1239 (8th Cir. 1998); U.S. v. Byrne, 83 F.3d 984, 989 (8th Cir. 1996).

Where a defendant already has counsel or has asked for counsel, the Supreme Court has explained that "a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." Patterson, 487 U.S. at 290. Thus, in cases where an attorney has been asked for or been procured, questioning an indicted defendant without his attorney violates the defendant's Sixth Amendment right to counsel. See, Id.; see also, Michigan v. Jackson, 475 U.S. 625 (1986). Although a defendant always has an initial right to counsel during post-indictment questioning, when determining whether the right to counsel has been

waived, the court makes a different inquiry depending on whether or not the defendant has already obtained or asked for counsel.

a. Because Looking Cloud had counsel in this matter prior to his post-indictment interview, the 2003 Interview was conducted in violation of his Sixth Amendment right to counsel.

It is undisputed that the 2003 Interview between Ecoffey and Looking Cloud occurred *after* Looking Cloud was indicted for the murder of Anna Mae Aquash. At trial, the government acknowledged that Arlo had been indicted before the 2003 Interview had taken place. TTR 427-28. Arlo's indictment is dated March 20, 2003; the interview took place on March 27, 2003. However, during the course of the 2003 Interview, the government *never* informed Looking Cloud that he had been indicted. TTR 428; Govt's Exh 45.

When Ecoffey interviewed Arlo Looking Cloud on March 27, 2003, Arlo had counsel in this matter. Attorney Henry Mulvihill of Denver had represented Looking Cloud in arranging the proffer agreement leading to Ecoffey's 1994 interview with Looking Cloud regarding the same murder investigation. Because Looking Cloud already had counsel in this matter, he was entitled to the full panoply of Sixth Amendment protections that come with post-indictment questioning under Massiah.

Specifically, Looking Cloud's attorney was required to be present during the 2003 interview in order for the contents of that interview to be admissible at his trial.

b. Even if Looking Cloud did not have counsel at the time of the 2003 Interview, he did not knowingly and intelligently waive his right to counsel during this interview, because he was intoxicated and the government engaged in deception in order to obtain his waiver.

Although Looking Cloud was read his Miranda rights and given a waiver form to sign, he did not effectively waive his right to have counsel present during this crucial post-indictment 2003 interview. First, despite the fact that under Massiah, the right to counsel is activated after indictment, and despite the fact that an indictment had been filed *seven days before* the 2003 Interview was conducted, the government *never* informed Looking Cloud that he had been indicted for the murder of Anna Mae Aquash during the course of the 2003 Interview. TTR 428; Exh. 45. The failure to inform Looking Cloud of this critical fact renders any waiver to counsel he made on that day ineffective, because the waiver was made as a result of government deception.

Secondly, when asked whether he was under the influence of drugs or alcohol during the 2003 Interview, Looking Cloud informed Detective Abe Alonzo and Ecoffey that he had been drinking that day. TTR 428; Exh. 45. Rather than attempt

to ascertain whether Looking Cloud was competent to effectuate a waiver of counsel, Ecoffey and Detective Alonzo inexplicably ignored Looking Cloud's answer and went on with the interview. TTR 428; Exh. 45. They did not perform a blood alcohol content test to determine how much alcohol Looking Cloud had consumed, nor did they even attempt to ask Looking Cloud exactly how much alcohol he had imbibed. The fact that Looking Cloud had been consuming alcohol that day, coupled with Detective Alonzo's and Ecoffey's failure to conduct reasonable tests or ask follow-up questions to determine Looking Cloud's competency, throws serious doubt onto his ability to waive his right to counsel during the 2003 interview.

After a day of drinking, Looking Cloud was picked up by the government, and asked questions about the murder of Anna Mae Aquash. At no point was he informed that he was being indicted for murder. When the circumstances surrounding this interview are viewed in their totality, the picture that emerges is that of an already impaired individual basing a decision to waive a fundamental right on false information. Looking Cloud, therefore, did not make a knowing and voluntary waiver of his right to counsel during the 2003 interview.

2. The failure of Looking Cloud's counsel to move to suppress the tape of the 2003 Interview under the Fruit of the Poisonous Tree Doctrine amounts to prejudicial ineffective assistance of counsel.

Defense counsel's failure to move to suppress the tape based on the fact that it was the Fruit of the 1995 Interview in which Looking Cloud was not read his Miranda rights, and did not have his attorney present was ineffective assistance of counsel. The Supreme Court has held that evidence is improperly admitted when it is obtained as fruit of a prior failure to provide Miranda warnings. Fellers 124 S. Ct. at 1023. Recently, the Court has expounded on this logic, holding that obtaining information from an accused, then providing Miranda warnings and extracting the same information, violates the individual's Fifth Amendment rights under the U.S. Constitution. Missouri v. Seibert, 124 S. Ct. 2601 (2004).

In Fellers, the police came to the defendant's home to "deliberately elicit" information from him regarding his involvement in the distribution of drugs and his involvement with alleged co-conspirators. 124 S. Ct. at 1023. The police obtained information from the defendant without first reading him his Miranda rights. Id. After taking him to the station and reading him his Miranda rights, the police extracted the same information from the defendant. Id. The Supreme Court held that the failure to provide the defendant of notice of his right to counsel during the home interview, rendered that information inadmissible. Id. The Court remanded the case

to determine whether the information obtained after he was read his rights was also inadmissible. Id.

Similarly, although Ecoffey testified that he read Looking Cloud his Miranda rights during the 1995 Interview, there is no evidence on the record supporting that assertion. Although Ecoffey had recorded every other interview he conducted with Looking Cloud, and although he could have recorded the 1995 interview in order to ensure that Looking Cloud was properly advised of his rights, Ecoffey, inexplicably, did not use a recording device. TTR 434-35. Although Attorney Henry Mulvihill was representing Looking Cloud in this matter, Mulvihill was not present at the 1995 Interview. Mulvihill had arranged a proffer agreement between the government and Looking Cloud in 1994. TTR 455. The proffer letter, dated November 3, 1994, states that "[n]o statements made by or other information provided by Looking Cloud...will be used directly against your client in any criminal proceeding." See, TTR 445. Ecoffey, aware of this earlier proffer agreement, took Arlo, without Attorney Mulvihill, to the site of Anna Mae's murder, and proceeded to ask him a series of leading questions. Ecoffey used the information obtained in the 1995 Interview in order to elicit the same responses from Arlo in the 2003 Interview. At trial, Ecoffey testified about the Interviews, using Arlo's 1995 statements to corroborate the statements Ecoffey obtained at the 2003 Interview. TTR 423, 432. Looking Cloud's

1995 statements (made without the presence of his attorney) were crucial to the statements Ecoffey obtained during the 2003 Interview. Because the statements made in the 2003 Interview were fruits of the improperly used 1995 Interview, the 2003 Interview was inadmissible at Looking Cloud's trial. As such, defense counsel's failure to move to suppress the 2003 tape on this basis constitutes ineffective assistance of counsel.

B. *Trial counsel was ineffective and prejudicially deficient because he failed to object to the hearsay statements of Anna Mae Aquash, admitted into evidence, despite the fact that the hearsay clearly did not meet any exception within the Federal Rules of Evidence.*

Trial counsel was prejudicially ineffective due to his failure to object to damaging evidence in the form of double hearsay: witnesses testifying to the alleged statements of Arlo Looking Cloud or other individuals containing the alleged statements of Anna Mae Aquash. Double hearsay "is inadmissible unless each level of hearsay falls within an exception to the hearsay rule." U.S. v. Ortiz, 125 F.3d 630, 632 (8th Cir., 1997).

On multiple occasions, Defendant's counsel failed to object to hearsay statements regarding what Anna Mae Aquash said to Arlo Looking Cloud and others. Testimony that long before her abduction or death, Anna Mae Aquash told others she was afraid for her life, was admitted without objection. TTR 183-184. Trial counsel

failed to object on hearsay grounds to testimony that Arlo Looking Cloud told prosecution witnesses that Anna Mae Aquash begged for him to let her go when they were alone in the car in Rosebud, and to statements that she begged for her life and began to pray while on the plains near Wanblee. TTR 183, 264, 275-76, 390, 392, 399.

Though the alleged statements by Arlo Looking Cloud are admissible as statements of a party opponent, the statements Anna Mae Aquash allegedly made to Arlo Looking Cloud and other witnesses are hearsay and do not fall within any exception to the hearsay rule. See Fed. R. Ev. 801, 803, 804. As such, all testimony of witnesses regarding what Arlo Looking Cloud told them Anna Mae Aquash said to him and in his presence are inadmissible hearsay under Fed. R. Ev. 802.

A statement is not hearsay if (1) it is a prior statement of a witness, (2) it is an admission by a party opponent, or (3) it is not offered for the truth of the matter asserted. Fed. R. Ev. 801. Although Aquash is neither a witness nor a party to the instant case, her statements were offered for the truth of the matter asserted; that being that she feared for her life and wished to be freed. Therefore, the alleged statements made by Anna Mae Aquash are hearsay, and thus inadmissible.

Because these statements do not fall under any exception to the hearsay rule they were inadmissible. The Appellee cannot argue that these statements fall under

the excited utterance exception. An excited utterance is one that relates to a startling event or condition and is made while the declarant is perceiving that event or immediately thereafter. U.S. v. Manfre, 368 F.3d 832, 840 (8th Cir. 2004); Fed. R. Ev. 803(2). It requires "that the declarant's condition at the time was such that the statement was spontaneous, excited or impulsive rather than the product of reflection and deliberation." U.S. v. Iron Shell, 633 F.2d 77, 86 (8th Cir. 1980). In Manfre, this Court explained that " '[t]he underlying rationale of the present sense impression exception is that substantial contemporaneity of event and statement minimizes unreliability due to [the declarant's] defective recollection or conscious fabrication.' " 368 F.3d at 840 (quoting U.S. v. Blakey, 607 F.2d 779, 785 (7th Cir., 1979)). In that case, this Court expressly declined to apply the present sense impression exception to "relatively recent memories." Manfre, 368 F.3d at 840.

Throughout the months that Anna Mae Aquash had been traveling with members of AIM and the weeks of traveling with Arlo Looking Cloud and the others, it is significant that Anna Mae had not attempted to leave during any of the various times that the opportunity presented itself. TTR 173, 214, 323-325, 341-342. It is difficult to believe that these statements, were they made, were spontaneous reactions to an immediate threat on Aquash's life. Such a lengthy travel time indicates that these alleged statements were the product of reflection over a period of weeks, and

Aquash's refusal to leave despite opportunities to do so indicates that this was not a situation which prompted excitement or fear. Her lack of attempt to escape at that time is further indication that her words were not the product of excitement or fear.

Even if Aquash felt threatened, there is no evidence that Arlo Looking Cloud threatened her life or did anything other than sit with her when they remained in the car. In fact, there is evidence to the contrary. TTR 264, 281, 392, 394. Therefore, her comments were, at best, based on recent memories, and thus not covered by the exception.

Anna Mae Aquash's statements do not qualify as statements under belief of impending death, because such statements must concern "the cause or circumstances" of the impending death. Fed. R. Ev. 804(2). Here, the statements are requests to be set free, comments on her children, and prayers. They do not concern the cause or circumstances of the death.

Allowing these statements into evidence was highly prejudicial to the Defendant, as such statements, if true, would tend to establish that Arlo Looking Cloud had knowledge or reason to know that Anna Mae Aquash was to be killed. In fact, without these statements, it would have been impossible for the prosecution to demonstrate that Arlo Looking Cloud should have had any knowledge that Aquash was to be executed, an essential element of the crime of which he was convicted.

C. *Trial Counsel was ineffective and prejudicially deficient because he failed to request a hearsay instruction for the jury, despite the fact that throughout the trial, the trial court gave incorrect and confusing instructions on hearsay.*

Though the trial court gave incorrect and confusing instructions on hearsay, Defendant's counsel did not request that the court give a specific jury instruction to clarify his previous instructions. As a result, the jury was able to consider inadmissible hearsay testimony. As discussed in Section IIB, the trial court gave inaccurate and inappropriate limiting instructions to the jury, which allowed them to consider inadmissible hearsay. Despite this, defense counsel failed to ask for a jury instruction to clarify the meaning of "truth of the matter asserted." See, IATR 3-8. As established above, since the jury did not have a clear instruction on hearsay, the testimony that they heard, though not offered for the truth of the matter, was likely considered for the truth and is thus hearsay. American Eagle, 85 F.3d at 333. The court's instructions to the jury were so convoluted and unclear that no reasonable attorney would have failed to request a more specific jury instruction. This failure prejudiced Looking Cloud and, therefore, his conviction must be overturned and, at minimum, a new trial should be granted.

D. *Trial Counsel was ineffective and prejudicially deficient because he failed to object to leading questions by the prosecution during the direct examination of prosecution witness Robert Ecoffey.*

During questioning of prosecution witness Robert Ecoffey, the prosecutor asked the witness multiple leading questions in violation of Fed. R. Ev. 611, without objection from Defendant's attorney. TTR 433. This Court has explained that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony." U.S. v. Grassrope, 342 F.3d 866, 869 (8th Cir. 2003); See also, Fed. R. Ev. 611.

Were objections made by the defense, the standard of review would have been abuse of discretion, the test being whether the leading questions were necessary to develop the testimony. Grassrope, 342 F.3d at 869; U.S. v. Mora-Higuera, 269 F.3d 905, 912 (8th Cir. 2001). It is clear from the entire testimony of Ecoffey that he was fully capable of testifying to these events in his own words and there was no need for the prosecutor to "develop" his testimony. See generally, TTR 408-464. Had defense counsel objected, the trial court, in all likelihood, would have sustained the objection.

During his examination of Ecoffey, the prosecutor asked:

> Q: On July 25, 1995 you were with Arlo Looking Cloud when he willingly went out to the scene of this killing and he showed you what happened, didn't he sir?
> A: Yes.

Q: And what he showed you happened was essentially the same thing that he just talked about on this video that we have seen, is that correct sir?
A: Yes.
TTR 433.

Phrases such as "isn't that correct" have been found to indicate leading questions. Ohio v. Roberts, 448 U.S. 56, 71 (1980) (overruled on other grounds by Crawford v. Washington, 124 S. Ct. 1354 (2004)). Allowing the prosecutor to question Ecoffey in this manner was grossly prejudicial to the defense. In these instances, the prosecutor was essentially testifying for the witness without objection. This brief exchange allowed the prosecutor to "testify" that: (1) Looking Cloud went willingly with Ecoffey; (2) the location that they went to was the scene of Anna Mae Aquash's murder; (3) Looking Cloud showed Ecoffey what happened when she was killed; (4) what he showed Ecoffey was essentially the same as statements made in a subsequent, illegal interrogation.

The prosecutor's manner of questioning and Ecoffey's responses establish an evidentiary record that is grossly damaging to Looking Cloud, indicating his involvement in and confession to a crime. Further, it reinforces the illegally obtained evidence discussed in Section IIIA of this brief without utilizing the testimony of the witness, but rather, through his acquiescence to statements made by the prosecutor.

IV. THE EVIDENCE AT TRIAL, EVEN WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, WAS SO INSUFFICIENT THAT NO RATIONAL TRIER OF FACT COULD HAVE FOUND THE ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT.

The court erred in failing to grant the Defense's motion for acquittal pursuant to Fed. Crim. R. 29, as there was insufficient evidence of Arlo Looking Cloud's guilt to warrant submission of the case to a jury. The Eighth Circuit reviews *de novo* claims regarding sufficiency of the evidence, viewing the evidence in the light most favorable to the verdict. Verdicts are upheld only where, based on all the evidence and all reasonable inferences, any reasonable juror could find the defendant guilty beyond a reasonable doubt. U.S. v. Martin, 369 F.3d 1046, 1059 (8th Cir. 2004); U.S. v. Hamilton, 332 F.3d 1144, 1148-49 (8th Cir. 2003); Durns v. U.S., 562 F.2d 542, 546 (8th Cir. 1977) .

Mere presence at the scene of the crime is insufficient proof on which to base an aiding and abetting conviction. U.S. v. Grey Bear, 828 F.2d 1286, 1292-1293 (8th Cir. 1987) (citing U.S. v. Larson, 760 F.2d 852, 858 (8th Cir. 1985)); See also, U.S. v. Lard, 734 F.2d 1290, 1298 (8th Cir. 1984); U.S. v. Anziano, 606 F.2d 242, 245 (8th Cir. 1979). This Court has explained that "guilt cannot be inferred from the mere presence of a defendant at the scene of the crime or mere association with members of a criminal conspiracy." U.S. v. Graham, 548 F.2d 1302, 1312 (8th Cir. 1977). A

conviction for aiding and abetting in a murder requires "some affirmative participation (by the defendant) which at least encourages the perpetrator." Anziano, 606 F.2d at 294. Further, "*[m]ere association with* the principal and *even knowledge that a crime is about to be committed are insufficient* to support an aiding and abetting conviction without proof of culpable purpose". Grey Bear, 828 F.2d at 1293 (emphasis added).

In the instant case, Looking Cloud was charged with violating 18 U.S.C. §§ 1111, Murder; 1112, Manslaughter; and 1153, Offenses committed within Indian Country. He was found guilty and convicted of First Degree Murder or aiding or abetting in that crime for "unlawfully killing Annie [sic] Mae Aquash a/k/a Annie [sic] Mae Pictou, with malice aforethought, by shooting her in the perpetration of a kidnapping." Judgement and Commitment Order, pg. 1, Ad. Pg. A-1.

Taking the evidence presented at trial in the light most favorable to the verdict, the government failed to prove anything more than Looking Cloud's presence at the murder of Anna Mae Aquash. This is insufficient to prove guilt. Graham, 548 F.2d at 1312, Grey Bear, 828 F.2d at 1292. The government failed to show affirmative participation by Looking Cloud and further failed to show any actions on his part which would have encouraged the crime, as is required by Anziano, 606 F.2d at 245. Notably, no direct evidence was presented that Looking Cloud even knew Aquash

would be killed. Further, the circumstantial evidence presented was weak, not definitive, and was contradicted by definitive evidence to the contrary. At best, the government proved that Looking Cloud aided in the kidnapping of Anna Mae Aquash, a crime for which he was not charged.

Though the verdict indicates Looking Cloud shot Aquash, not one scintilla of evidence was presented indicating that he pulled the trigger. In fact, significant evidence was presented that John Boy Patton fatally shot Aquash in the back of the head. TTR 275-276, 390. Evidence was also presented that Theda Clark and Patton, but notably *not* Looking Cloud, were given orders to kill Anna Mae Aquash. TTR 394. Evidence was presented that Theda Clark and/or John Boy Patton, *not* Arlo Looking Cloud, were told that Aquash was an informant. TTR 214. There was no testimony that Arlo Looking Cloud was ever told that Anna Mae Aquash was an informant, much less that she should be killed.

Angie Janis testified that she attended a meeting, as the events leading to Aquash's death unfolded, at which the topic of discussion was what to do with Aquash. She testified that John Boy Patton was present at this meeting. TTR 216. She initially testified that Looking Cloud was also present at the meeting. TTR 216. However, on cross-examination, Janis recanted and testified that she did not know whether Arlo Looking Cloud was at this meeting. TTR 229. Further, Troy Lynn

Yellow Wood, in whose home the meeting was held, testified that Looking Cloud was definitely not in the meeting. TTR 269-270. She further testified that he was not even at her home at the time of the meeting. TTR 251. Evidence was presented that Arlo was, in fact, out with his friend Joe Morgan as the meeting was taking place and when he stopped by his friend Troy Lynn's house later that day, Theda Clark asked him to drive to Rapid City. TTR 274. Even if Janis is to be believed over Yellow Wood, her testimony merely proves that Looking Cloud *might* have been at the meeting discussing the informant and does not prove any knowledge of the crime, as no evidence in the record indicates that those present at the meeting concluded that Anna Mae should be killed.

Angie Janis also testified that Anna Mae Aquash was tied up as she was removed by Looking Cloud and Patton from the Yellow Wood home. TTR 225. Troy Lynn Yellow Wood testified that she was not tied up and in fact left voluntarily. TTR 254. On cross-examination, Janis admitted that despite her claims that Aquash was bound and tied to a board as she left the home, she never saw any rope, though she did see Aquash's hands. TTR 232. Further, Janis could not describe the board to which she alleges Aquash was tied. TTR 232. Even if Janis's testimony is to be believed, this merely proves that Arlo Looking Cloud aided in the kidnapping of Anna Mae Aquash and does not prove that he had any knowledge of or involvement

in her murder. This is bolstered by that fact that Janis testified that despite watching Anna Mae removed from the home tied to a board, she did not believe that anything bad would happen to her, since nothing had happened to other informants. TTR 226, 233. It is clear from this statement that even if Looking Cloud had been present in the meeting and Anna Mae had been removed tied to a board, there was no indication that these incidents would cause one to believe a murder would take place.

No witnesses other than Angie Janis testified that Anna Mae Aquash was forcibly removed from the Yellow Wood home. In fact, other witnesses corroborate Troy Lynn Yellow Wood's assertion that Aquash went with AIM members willingly. Cleo Gates testified that when the AIM members stopped at her home, no one was guarding Aquash or preventing her from leaving. TTR 342. She further testified that Aquash did not ask to use the phone when they were alone. TTR 341. Candy Hamilton testified that while Aquash was at the WKLDOC offices, the two of them were left alone for "the better part of a day" and she offered Aquash a place to go. TTR 323, 325. She also testified that Aquash declined and made no attempts to leave the home, though no one was preventing her from doing so. TTR 323. Hamilton testified that Aquash did not ask her for help, nor did she ask that the police be called. TTR 323-324.

Further, multiple witnesses testified that Arlo Looking Cloud did not know that Anna Mae Aquash would be killed. John Trudell testified that he believed Looking Cloud did not know this was going to happen and that he was simply in the wrong place at the wrong time. TTR 393, 396. He also testified that Looking Cloud believed they were taking Anna Mae to South Dakota to be questioned about being an informant and that John Boy Patton shooting her came as "a complete surprise" to Looking Cloud. TTR 378, 398. Both Yellow Wood and Denise Pictou, Aquash's daughter, testified that Looking Cloud told them he had no idea that Patton was going to kill Aquash. TTR 277, 281, 298. Yellow Wood testified that if Looking Cloud had known Aquash was going to be killed he never would have participated in these events. TTR 277. Finally, Yellow Wood testified that Looking Cloud was surprised and afraid when Aquash was shot and he took the gun from Patton and fired the remaining bullets over an embankment. TTR 276.

In their closing argument, the government theorized that Arlo Looking Cloud was present at Troy Lynn Yellow Wood's home with Anna Mae Aquash. IATR 11. They argue that because she was tied up, he must have known she would die. IATR 11-12. They claim that because Looking Cloud left and came back, he must have been a willing participant. IATR 13. They claim that since Looking Cloud was present in the meeting at the Gates' home, he must have been a willing participant, despite the

fact that there is absolutely *no* evidence in the record that Aquash's murder was planned in this brief meeting. IATR 14. They claim that since Looking Cloud did not let Aquash go when she asked him to in the car, he was a participant in the murder, though Looking Cloud told her she was being paranoid for no reason. IATR 14-15. The government suggests to the jury, despite an *absolute* lack of evidence on the record, that Arlo Looking Cloud shot Anna Mae Aquash. IATR 17.

The government was not able to show that Looking Cloud had any knowledge that Anna Mae Aquash would be killed, much less malice aforethought. They could not prove that he was in the meeting planning a course of action regarding Anna Mae Aquash. One witness ultimately testified that she did not know whether he was there and the second testified that he was definitively not there. They could not prove that Anna Mae Aquash was not traveling with the others of her own free will. They could not prove that Arlo was present when orders to kill Aquash were given. They did not counter testimony from multiple witnesses that Looking Cloud had no idea that Aquash would be killed. At best, they proved that Arlo Looking Cloud aided in the kidnapping of Anna Mae Aquash. And by the testimony of their own witness, such a kidnapping did not lead to the inference that she would be killed. The government's case rested entirely on outlandish assumptions regarding occurrences and conversations not in evidence. As such, the court erred in failing to grant the

Defense's motion under Crim. R. 29, as no reasonable juror could have found that Arlo Looking Cloud was responsible for the murder of Anna Mae Aquash. The conviction of Arlo Looking Cloud must be overturned and the Defendant discharged.

CONCLUSION

The conviction of Arlo Looking Cloud for First Degree Murder must be overturned. The government failed to satisfy its evidentiary burden. The Court erred in failing to grant the Defendant's motion for acquittal under Fed. Crim. R. 29. Thus the conviction of Arlo Looking Cloud must be overturned and the Defendant discharged.

The Court also erred in admitting testimony that was not relevant and more prejudicial than probative, as well as in failing to give appropriate jury instructions on hearsay. The Defendant's counsel was also prejudicially ineffective for his failure to move to suppress illegally obtained evidence, to request critical jury instructions, and to object to highly prejudicial hearsay evidence. For these reasons, the conviction of Arlo Looking Cloud must be overturned and, at minimum, a new trial should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

It is hereby certified that the foregoing Brief contains 13,123 words in compliance with Fed. R. App. P. 32(A)(7)(B). It is further certified that this brief was created using Word Perfect 12 and that all diskettes containing PDF forms of this brief are virus-free.

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CERTIFICATE OF SERVICE

Two copies of the foregoing Brief of Defendant-Appellant has been sent by regular U.S. Mail, postage prepaid, this _____ day of August, 2004, to Robert Mandel, Esq., Assistant United States Attorney, at his office, 515 Ninth Street, Room 201, Rapid City, South Dakota 57701.

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ADDENDUM