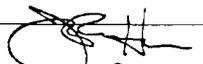


UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED

AUG 19 2009


CLERK

UNITED STATES OF AMERICA,
Plaintiff,

Case No. CR 08-50079

vs.

JOHN GRAHAM, a.k.a.
JOHN BOY PATTON, and
VINE RICHARD MARSHALL, a.k.a.
RICHARD VINE MARSHALL, a.k.a.
DICK MARSHALL,
Defendants.

DEFENDANT MARSHALL'S
MOTION FOR EVIDENTIARY
HEARING ON DESTRUCTION OF
EVIDENCE
AND FOR SANCTIONS

NOW COMES Defendant Richard Marshall, by and through his attorney Dana L. Hanna, and pursuant to his Fifth Amendment right to due process of law, hereby moves the court to order an evidentiary hearing to determine the facts concerning the destruction of evidence in this case by Denver Police Department in a joint state and federal investigation into the murder of Anna Mae Aquash, and to order appropriate sanctions against the government and remedies for the defendant. Defendant Marshall further moves the court to order the government to disclose to the defendant all information and records known to the government or its agents, including the Denver Police Department, concerning the destruction of said evidence.

As grounds for the motion, attorney Dana L. Hanna, counsel for the defendant, hereby affirms:

1. I make these factual affirmations on the basis of information and belief, the primary sources of which are the newspaper article that appeared in the *Rocky Mountain News* on August

21, 2003 under the headline “Police Mixup Destroys Evidence—Case Involves 1975 Slaying of Activist” [Exhibit A, attached hereto] and the discovery provided to me by the government.

2. From 1994 to 2003 Denver Police Detective Abe Alonzo worked directly with investigators from the FBI, the BIA, and the US Marshall’s office in a joint federal-state investigation into the murder of Anna Mae Aquash in December 1975. Since many of the witnesses and a main suspect, Arlo Looking Cloud, lived in Denver, much of the active investigation in this case from 1994 to 2003 was conducted by Detective Abe Alonzo. During the course of his investigation, Detective Alonzo personally interviewed and questioned various individuals, including Arlo Looking Cloud, who will be government witnesses in the trial of Richard Marshall.

3. Standard police practice and procedures would have required Detective Alonzo to make records, writings and police reports detailing statements made by witnesses and suspects in the investigation, including Looking Cloud. Alonzo tape-recorded interviews with witnesses and had those interviews transcribed.

4. In 2003, government officials in South Dakota contacted Denver Police, requesting copies of their tapes and evidence in the case. Armedia Gordon, the Denver Police Department’s Chief of Investigations, was quoted in the *Rocky Mountain News* as saying: “They lost everything, so they came back to Abe [Alonzo] asking the question.” When Detective Alonzo went to the police property bureau to recover the tapes, he learned that they had been destroyed in 2001 by the Police Department.

5. Denver police officials have asserted that, with the help of inventory records, copies of some, but not all, of the destroyed evidence had been found in the homicide unit’s computers.

Inventory records in the possession of the Denver Police Department would contain information as to what evidence had once existed, and could assist the court in determining what evidence has been destroyed and lost.

6. This information concerning the destruction of evidence by police in Denver was never disclosed to the defense in the discovery process. I learned of the destruction of the evidence in the case from non-governmental sources during the course of my own investigation.

7. I have good reason to believe that the Denver Police Department's destruction of evidence has deprived Richard Marshall of material exculpatory evidence. There is a strong likelihood that the evidence that was destroyed contained evidence that Defendant Marshall could have used to impeach the testimony of Arlo Looking Cloud, who is now the government's key witness against Marshall. Looking Cloud has a 15 year history, since he first began cooperating with the federal agents in 1994, of making contradictory statements to investigators, particularly false exculpatory statements with regard to his own lack of prior knowledge or criminal intent to murder Aquash. Any and all prior statements made by Looking Cloud to Detective Alonzo or other officers before his arrest would in all likelihood contradict the version of facts he is now giving to the government concerning Richard Marshall and could be used to discredit his testimony at trial.

8. An evidentiary hearing is necessary to determine exactly what evidence was destroyed by police, why such evidence was destroyed, and whether the destruction of evidence has permanently deprived Mr. Marshall of material favorable evidence that he could have used to discredit Looking Cloud and other government witnesses. If the court determines that material exculpatory evidence was destroyed and a violation of due process of law has occurred, then the

court would have to consider ordering appropriate sanctions and remedies, which could include dismissal of the indictment.

WHEREFORE Defendant Richard Marshall moves the court to order :

(1) that an evidentiary hearing be held to enable the court to determine the facts concerning the loss of evidence by the government and/or destruction of evidence by the Denver Police Department in 2001;

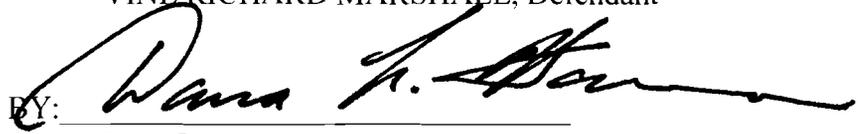
(2) that the government produce and disclose a full report to the court and the defendant on the destruction of this evidence, including a description and listing of the evidence that was destroyed;

(3) appropriate sanctions against the government for the destruction of evidence, based on the facts and evidence that will be adduced in the hearing; and

(4) for all other relief the court deems appropriate.

Dated this 19th day of August, 2009.

VINE RICHARD MARSHALL, Defendant

BY: 

Dana L. Hanna
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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Motion for Evidentiary Hearing on Destruction of Evidence and for Sanctions on the other parties in this case by mailing the same to attorneys of record at the addresses listed below:

Marty J. Jackley
United States Attorney
PO Box 2638
Sioux Falls, SD 57101

Robert Mandel
Assistant United States Attorney
515 Ninth Street, #201
Rapid City, SD 57701

John Murphy
Murphy Law Office
328 E. New York St., #1
Rapid City, SD 57701

Dated this 19th day of August, 2009.



Dana L. Hanna

EXHIBIT A

1. POLICE MIXUP DESTROYS EVIDENCE CASE INVOLVES 1975 SLAYING OF ACTIVIST

Article from:

Rocky Mountain News

Article date:

August 21, 2003

Author:

Sarah Huntley and Karen Abbott ROCKY MOUNTAIN NEWS

More results for:

"abe alonzo"

Denver police officials are investigating whether evidence in the 1975 slaying of American Indian activist Anna Mae Pictou-Aquash is missing as a result of confusion over inventory records. The Rocky Mountain News has learned that several tapes stored in the police department's property bureau were destroyed in 2001 after a homicide lieutenant was unable to link them to any known case.

Copies of at least some of the tapes have been recovered.

Armedia Gordon, division chief of investigations, said the mistake came to the department's attention last week when federal authorities asked Detective **Abe Alonzo** for new copies of the evidence. Copies of all the department's evidence had been forwarded to the feds years ago when the case was transferred from Denver, where Pictou-Aquash was abducted, to South Dakota, where her body was found.

"They lost everything, so they came back to Abe asking the question," Gordon said.

When Alonzo went to the property bureau, he was told there were no tapes. In their place he found an order signed by Lt. Jon Priest authorizing the destruction of the evidence.

Gordon said Priest signed off on the order after receiving an incomplete - and erroneous - invoice from the property bureau's computer. The bureau forwards invoices to investigators every 13 months to determine whether evidence should still be preserved.

The computer printout given to Priest listed a 2000 date and an address in northwest Denver, neither of which appeared to be connected to Pictou-Aquash's death.

"It doesn't show the victim's name or the officer's name or any of that," Gordon said.

Some records associated with the evidence included a badge number, but the number belongs to a vice detective - not the detective assigned to the case.

"I don't think Priest thought there was any way to identify where this case belonged," Gordon said. "Somehow all the information didn't get transferred over (into the computer) . . . This is just

an error that needs to be checked out."

When the lieutenant learned of the mix-up, he was able to retrieve duplicate copies of at least some of the tapes from the homicide unit's archives, she said.

The unit is methodical about preserving its own archives, which are kept separate from the property bureau. Evidence in old cases is maintained indefinitely in the hope that new leads could result in an arrest.

"My understanding is that the critical evidence was found," Gordon said. "Whether it was everything, I'm not clear on."

Alonzo, who was handling the case for the department, wasn't available for comment.

Gordon said she is reviewing original inventory records to determine whether any tapes were irretrievable. "I really hope that all is not lost," she said.

Federal officials in South Dakota, where two men face federal murder charges for Pictou-Aquash's death, couldn't be reached Wednesday.

Arlo Looking Cloud, of Denver, and John Graham, of Canada, also known as John Boy Patton, were arrested in April in connection with Pictou-Aquash's slaying. Looking Cloud's trial is scheduled for Sept. 30. No trial date has been set for Graham.

The 30-year-old woman, who has become a revered symbol to other American Indians, allegedly was snatched from the Denver home of TroyLynn Yellow Wood in 1975 by three people, then taken to the Pine Ridge Indian Reservation in South Dakota and killed.

A rancher found the badly decomposed body of a woman in a ravine near Wamblee, S.D., in February 1976. Nobody knew who she was, and a government pathologist concluded she died of exposure. The FBI had her hands cut off and sent to Washington, D.C., for identification. The rest of the body was buried in a pauper's grave.

A judge later ordered the body exhumed, and a second autopsy uncovered a bullet in the back of Pictou-Aquash's head.

Three grand juries reviewed the case. A fourth grand jury indicted Looking Cloud and Graham in March.

The long-unsolved murder has divided American Indian activists and the Pine Ridge reservation for decades. Rumors have circulated since her death that Pictou-Aquash may have been killed by other American Indian Movement members who believed she was an FBI informant, or by the real informants - perhaps with FBI knowledge - for fear she would disclose their identities. Some AIM leaders even have accused each other of involvement in her death.

It was unclear Wednesday what effect, if any, the evidence mix-up in Denver would have on the federal prosecution. None of the physical evidence in the case was affected.

But Gordon acknowledged there could be unintended consequences.

"We were able to find evidence that was listed as destroyed in the homicide archives," she said.

"But if this case is later lost, good Lord, people will be pointing to this and who knows what else."