

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

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

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

Case No. 08-50079

DEFENDANT MARSHALL'S  
RESPONSE TO COURT  
ORDER DOC. NO. 441

The court's order, Doc. No. 441, directs counsel to show good cause why Defendant Marshall's motions that were filed after the original motions deadline, March 23, 2009, should be considered by the court. In response thereto, Dana L. Hanna, attorney for Defendant Richard Marshall, hereby affirms:

1. When the trial in this case was scheduled to begin on May 12, 2009, the motion deadline established by the court was March 23, 2009. (Doc. No. 187). On May 5, 2009, the court continued the trial without a court date until the Eighth Circuit Court of Appeals ruled on the government's interlocutory appeal. After the Eight Circuit ruled on the government's interlocutory appeal and affirmed the trial court, the court set the trial date for October 6, 2009. The government has sought and received permission from the Court of Appeals to extend its time for filing a petition for re-hearing to September 25, 2009.

2. After May 5, 2009, when the case was continued without a trial date, counsel for Defendant Marshall continued to investigate, research, and prepare for trial. Counsel filed motions seeking relief for the defendant and also made a timely motion for permission to file further motions.

3. It was not until May 12, 2009 that I first received reliable and verifiable information

that potentially exculpatory evidence in this case, evidently including tape-recordings of witness interviews, had been destroyed by the Denver Police department in 2001. During my trial preparation and investigation, I had only heard rumors to the effect that Denver Police had lost evidence in the case, but I had no solid information upon which to base a motion until May 12, 2009, when I was provided with a copy of an article that appeared in the Denver newspaper, *Rocky Mountain News*, in 2003. That article quoted Denver police officials who admitted that they had destroyed evidence and case files in the police investigation into the murder of Anna Mae Aquash, which was conducted as a joint investigation with federal authorities. The destruction was discovered by Denver Police Department in 2003 and the facts of the destruction of that evidence were communicated to the United States Attorney's Office in South Dakota. The government did not disclose to Richard Marshall or the co-defendant the fact that evidence in the case had been destroyed. Although the government had a constitutional duty to disclose that information to the defense, since the destruction of evidence by police necessarily raises legal issues concerning the defendants' right to due process, the government suppressed that information. To date, the government has not provided the defendants with any police reports or records concerning the destruction of evidence by Denver Police. Once I received information from my own investigation that Denver Police had destroyed and lost evidence in this case, I made further efforts to investigate. I requested information from the government, without results. On August 19, 2009, Richard Marshall filed a motion for disclosure of impeachment evidence and a motion for an evidentiary hearing on the destruction of evidence; the motions seek relief and information concerning the loss and destruction of evidence by the Denver Police and the government's suppression of information concerning that destruction. The facts that gave rise to the motion were not known to defense counsel before the original motion deadline, as a result of the government's suppression of exculpatory evidence. Therefore, the delay was the result of the government's failure to disclose information pertinent to the motion until after the pre-trial motion deadline had expired. *See: United States v. Chavez, 902 F.2d 259 (4<sup>th</sup> Cir. 1990)*, in which the Fourth Circuit concluded that the denial of an untimely suppression motion may constitute an abuse of discretion where the delay was the result of the government's failure to disclose information pertinent to the motion until after the pre-trial motion deadline had expired.

Chavez, at 262-264.

4. On August 4, 2009 I filed Doc. No. 423, Motion to Dismiss the Indictment for Failure to Correct False Testimony to the Grand Jury. I was not aware of the existence of grounds for the motion before the original March 23<sup>rd</sup> deadline. I became aware of the fact that the government has good reason to know that key government witness, Arlo Looking Cloud, intends to give false testimony at his trial—specifically, testimony denying culpable *mens rea* or guilt in the murder for which he has been convicted—while listening to the tape-recorded conversations of Looking Cloud’s telephone calls from jail. This led to me to research the law on the use of false testimony by the government and to review the grand jury testimony of Looking Cloud, which provided the evidentiary basis for the motion.

5. On July 21, 2009, after more than 60 days had passed since the court had continued the trial date, in Doc. No. 418, I renewed a previously filed Motion to Sever (Doc. 87). The specific grounds for renewing the motion—passage of time due to the government’s interlocutory appeal—did not exist on March 23, 2009.

6. On June 4, 2009, I filed Doc. No. 402, a Motion to Suppress Statements allegedly made by Richard Marshall to federal investigator Robert Ecoffey, on the grounds that the taking of any statements was in violation of the defendant’s right to counsel. I filed that motion after March 23, 2009 because it was not until after that date that I became aware that Mr. Marshall was represented by counsel at the time he allegedly made his statements to Robert Ecoffey.

7. On May 22, 2009, I filed Doc. No. 380, which is a Motion to Compel Disclosure of a Witness. Prior to filing that motion, I had made efforts consistent with the court’s local rules to resolve the discovery dispute with the government. I made a written request for the identity of the writer of handwritten notes which appeared to be favorable to the defendant. I received a letter dated April 21, 2009 in which I was informed that no information concerning the identity of that potential defense witness was going to be forthcoming from the government, after which I made this motion.

8. I have also recently filed motions for service of subpoenas, which had to be filed to secure the presence of defense witnesses for the new trial date in October. I anticipate filing further motions for subpoenas for witnesses and subpoenas duces tecum before trial.

9. The aforesaid motions, which were filed after the original motions deadline of March 23<sup>rd</sup>, which was scheduled when there was a May trial date, are all substantive motions raising constitutional issues. They are filed in good faith, based on factual grounds; they are not frivolous or made to harass or delay. The government has not in any way been unduly prejudiced by the fact that the defendant has filed these motions after the original March 23<sup>rd</sup> date. Neither the court nor the government can reasonably expect the defendant to sit on his hands without continuing to build his defense for trial, while the trial of his case is delayed by the government's appeal.

10. Under Rule 12(c) of the Federal Rules of Criminal Procedure, a court may set a deadline for the filing of pre-trial motions. If a party fails to file a pre-trial motion before that deadline, the party may be deemed to have waived the issue. Federal Rule of Criminal Procedure 12(e). However, the District Court has the discretion to excuse the waiver upon a showing of a good cause for the delay. "The absence of prejudice or delay in the trial may be relevant to whether the District Court is willing to grant relief, but those factors themselves do not require a finding of 'good cause'". United States v. Trobee, 551 F.3d 835 (8<sup>th</sup> Cir. 2009). In this case, unlike in United States v. Salgado-Compost, 442 F.3d 684 (8<sup>th</sup> Cir. 2006), in which the defendant did not make a request for an extension of time in which to file pre-trial motions until nearly three months after the deadline had expired, counsel for Mr. Marshall filed his motion to extend the deadline eight days after the deadline had passed.

WHEREFORE, Defendant Richard Marshall respectfully moves the court to find that good cause exists to grant a waiver of the original filing deadline.

Dated this 1st day of September, 2009.

RICHARD MARSHALL, Defendant

BY: /s/ Dana L. Hanna  
Dana L. Hanna  
Attorney for Defendant Marshall  
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**CERTIFICATE OF SERVICE**

I hereby certify that I a true and correct copy of the foregoing Response to Court Order Doc. No. 441 was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney  
kim.nelson@usdoj.gov

Robert Mandel, Assistant United States Attorney  
Robert.Mandel@usdoj.gov

John Murphy, Attorney for Defendant Graham  
jmurphysd@hotmail.com

Dated this 1st day of September, 2009.

*/s/ Dana L. Hanna* \_\_\_\_\_

Dana L. Hanna