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DEC 09 2009


CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD MARSHALL,

Defendant,

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CR. 08-50079

DEFENDANT MARSHALL'S REPLY
TO GOVERNMENT'S RESPONSE TO
MOTION TO DISMISS INDICTMENT

COMES NOW the defendant Richard Marshall, by and through his attorney Dana L. Hanna, and hereby replies to the government's Response to Defendant Marshall's Motion to Dismiss Indictment (Document 523).

The defendant Marshall moved to dismiss the indictment on the grounds that he has been denied due process because Denver police, acting as agents of the federal government, destroyed evidence that would have been favorable to the defendant. In support of his motion, Marshall points to the destruction of evidence of prior inconsistent statements which he could have used to impeach the testimony of the government's key witness, Arlo Looking Cloud—specifically, notes recording statements made by Looking Cloud to Denver Police Detective Abel Alonzo and U.S. Marshall Robert Ecoffey in 1995.

The government responded in opposition to the motion, arguing that the government is not responsible for the destruction of evidence by Denver police because there was no joint federal-local investigation in this case. The government also asserts, without providing any

factual basis to support its assertion, that no favorable evidence was destroyed.

While asserting that there was no joint local and federal investigation in this case, the government concedes that the Denver Police Department actively participated along with federal investigators in the federal government's investigation of the Anna Mae Aquash murder, and the government concedes that in doing so, Denver police were acting on the federal government's behalf. The fact that members of the Denver Police Department, particularly Detective Abel "Abe" Alonzo, gathered evidence and conducted witness interviews for the federal government's investigation is not in dispute.

Therefore, as a matter of law, for Brady purposes, when the Denver Police gathered evidence and information in the investigation of this case, acting on the federal government's behalf, they were acting as agents of the federal government and the government has a duty to disclose any favorable evidence or information gathered by its agents—Denver police department—to the defendant. "To comply with *Brady*, a prosecutor must 'learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.'" Villasana v. Wilhoit, 368 F.3d 976, 978 (8th Cir. 2004), *citing* Kyles v. Whitley, 514 US 419, 437, 115 S.Ct. 1555 (1995).

Moreover, the government's Brady obligation to disclose favorable evidence to the defendant includes the duty to disclose information about the destruction of such evidence by its agents—the Denver police—since evidence of "sloppy", unprofessional and grossly negligent police work in the investigation of the case is evidence that can be used to impeach prosecution witnesses and attack the prosecution's case. Kyles v. Whitley, 514 US 419, 115 S. Ct. 1555 (1995).

In its response, the government seeks to avoid responsibility for the destruction of evidence by Denver police by attempting to minimize the role that Detective Alonzo played in the federal government's investigation of the Aquash killing. In its response, the government asserts that with the single exception of an interview of Frank Dillon, conducted by Detective Alonzo in 1998,¹ "throughout the investigation, no part was conducted by Detective Alonzo which was not in the presence of Marshall Ecoffey or a deputy Marshall."

First, the fact that a federal investigator often accompanied Detective Alonzo when he questioned potential witnesses only proves the defendant's point: this was a joint local and federal investigation, in which Denver police were gathering evidence for federal authorities.

Secondly, the government's assertion that Frank Dillon was the only person that Detective Alonzo ever interviewed by himself is disproved by the discovery material provided to the defendants.

The government has provided defendant with a copy of a transcript of a recorded interview of Mary Lafford, conducted by Detective Alonzo on July 14, 1988. [GRAHAM discovery materials, pages 04644 - 04658, attached hereto as Exhibit "A".] The transcript heading reads: "ANNA MAE AQUASH INVESTIGATION –TRANSCRIPTION OF INTERVIEW TAPE". In that interview, Mary Lafford, sister to Anna Mae Aquash, reported a phone conversation she had with Anna Mae Aquash in 1975, in which Aquash expressed her fears that she was going to be murdered. In that interview, Detective Alonzo told Mary Lafford that Denver Police and the State's District Attorney had been investigating the kidnaping and

¹ The transcript of Alonzo's interview with Dillon is filed as an exhibit attached to document #523.

murder of her sister and expected to file charges soon. No federal investigator was present during the interview.

In fact, Detective Alonzo played an important and active role in the federal government's investigation in Denver, over a period of ten years, beginning in 1994. On November 17, 1994, Detective Alonzo was present during the questioning of Looking Cloud during Looking Cloud's proffer session at the US Attorney's Office in Denver. In the summer of 1995, Detective Alonzo drove Looking Cloud from Denver to the crime scene near Wanblee, South Dakota and along with Marshall Ecoffey, participated in questioning him about the kidnaping and murder of Aquash. On March 27, 2003, Detective Alonzo arrested Looking Cloud on the federal murder warrant in this case and actively participated, again along with Robert Ecoffey, in Looking Cloud's post-arrest interrogation in Denver.

On August 25, 1995 Detective Alonzo conducted a tape-recorded interview with Julian Pokrywka, the husband of unindicted accomplice Theda Clarke, in the presence of Special Agent Iannucci of the US Marshall's Service. A document titled "ANNA MAE AQUASH INVESTIGATION –TRANSCRIPTION OF INTERVIEW TAPE"– is a transcription of that tape-recorded interview. [GRAHAM discovery pages 4610-4619; the first page is attached hereto as Exhibit "B".]

On December 16, 2000, Detective Alonzo personally oversaw and monitored government informant Kamook Nichols, formerly Kamook Banks, when she secretly recorded a 6 hour conversation she had with Troy Lynn Yellow Wood and Arlo Looking Cloud. Detective Abel "Abe" Alonzo is identified in the transcript and is heard on the tape recording advising Kamook Nichols, before she met with Looking Cloud and Yellow Wood, to debrief with him at

the police station after the secret recording was done. [Page 1594, GRAHAM discovery materials, Exhibit 'C'].

In its response the government contends that whether or not the Denver police were acting as agents of the federal government in this case, the defendant Marshall has not been prejudiced by any destruction of evidence. This contention is based on nothing more than a factually unsupported assertion : “There was no known evidence in the custody of Detective Alonzo that was not also in the custody of the United States and provided as discovery in this case.” [Paragraph 2, Doc. #523.]

That assertion too is disproved by the government’s own discovery material and by statements made by Alonzo. In a hearing, the defendant can offer evidence that at least 3 tape-recorded witness interviews were destroyed or lost or suppressed, along with notes of statements made by Looking Cloud that could have been used to impeach his trial testimony.

The government has disclosed transcripts of three recorded interviews of potential witnesses conducted by Detective Alonzo, which are referred to above. Alonzo recorded his interviews with Dillon, Lafford, and Pokrywka. The transcripts of those interviews state that Alonzo’s interview with Frank Dillon was recorded by audio and video recording. The transcripts of Alonzo’s interviews with Mary Lafford and Julian Pokrywka show that they were recorded by audiotape recordings. None of those tape or video recordings have been provided to the defendant or to the co-defendant. The government has not disclosed any of the three actual recordings of those interviews, presumably because it has never been provided with those recordings. This proves that the Denver police at one time had custody of evidence– audio and video tape recordings of witness interviews–that is not also in the custody of the United States

and that was not disclosed to the defendant. The logical inference that must be drawn from those facts is that the three tape-recordings must have been among the evidence that was destroyed by Denver police in 2001.

Thus, the government's own discovery disproves the government's assertion that all evidence gathered by Denver police was also provided to the federal government and disclosed to the defendant and supports an inference that such evidence was destroyed.

In its response, the government expressly denies any destruction of any written records of statements made by Looking Cloud during his trip to South Dakota with Ecoffey and Alonzo in 1995. That assertion is contradicted by statements made by Detective Alonzo in 2004 when he was interviewed by a Denver magazine writer, Maximilian Potter. Alonzo told Mr. Potter, and Mr. Potter reported, that "many notes from Looking Cloud's 1994 interview with Alonzo and the 1995 interview with Alonzo and Ecoffey at the crime scene had been, as Alonzo puts it, 'mistakenly' destroyed." As undersigned counsel has previously stated in the defendant's motion to dismiss, I spoke by telephone to Mr. Potter and Mr. Potter confirmed that Abe Alonzo told him in an interview in 2004 that the notes that were taken during the 1995 questioning of Looking Cloud, when Alonzo drove Looking Cloud from Denver to the crime scene and back to Denver, were destroyed by Denver Police.

The government's response consists only of unsupported conclusory assertions of fact, -, e.g., "whatever destruction of evidence that took place in Denver was not of any evidence that was not part of the file of the United States." The government does not even inform the court as to what, if any, efforts it has made to communicate with the Denver police to find out what evidence was gathered by Denver police and what evidence was destroyed.

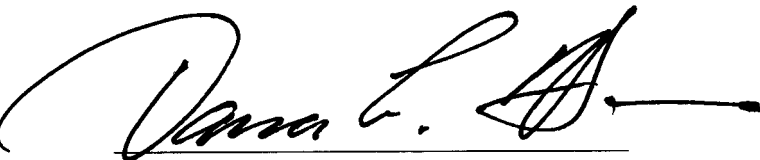
In an evidentiary hearing, Richard Marshall can present evidence that contests and disproves factual assertions made by the government on this issue. It is precisely to resolve these contested questions of fact that an evidentiary hearing is necessary.

The defendant has made a showing of specific exculpatory evidence that was destroyed by agents of the government, including evidence of statements made by the government's key witness against Richard Marshall—notes of statements that could have been used to impeach the witness, if they had not been destroyed.

Therefore, the court should order an evidentiary hearing, and direct the government to provide to the defendant prior to the hearing all evidence and information concerning the destruction of evidence in this case by the Denver Police Department, and dismiss the indictment if the evidence in the hearing proves that the government has violated Richard Marshall's constitutional right to due process of law.

DATED: December 8, 2009

RICHARD MARSHALL, Defendant

By 

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CERTIFICATE OF SERVICE

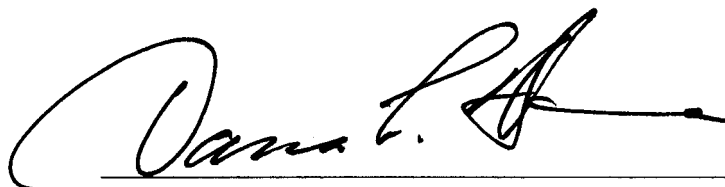
I hereby certify that I served a copy of the Defendant Marshall's Reply to the Government's Response on the government by mailing a copy to

AUSA Robert Mandel
515 9th Street #201
Rapid City, SD 57701

and

John Murphy
328 E. New York Street #1
Rapid City, SD 57701

on the 8th day of December, 2009.

A handwritten signature in black ink, appearing to read "Dana L. Hanna", written over a horizontal line.

Dana L. Hanna