

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. CR 08-50079

MOTION FOR ORDER TO COMPEL
DISCLOSURE

NOW COMES Defendant Richard Marshall, by and through his attorney, Dana L. Hanna, and pursuant to his constitutional rights to due process of law, confrontation of accusers, and a fair trial, hereby respectfully moves the Court to order the government to gather and disclose to the defendant, forthwith, all evidence and information within the custody, knowledge or control of the government or the Denver Police Department consisting of or relating to audio and video recordings of witness interviews made during the investigation of the murder of Anna Mae Pictou Aquash; all documents, items and recordings that are now or have ever been held or catalogued under Denver Police Department Property Bureau file # 590402, including the invoice(s) and other records listing the items maintained under that file number; a specific listing and description of the fifteen (15) audio tape recordings and two (2) videotaped recordings that were destroyed in January 2002, including the names of the witnesses; a description and copies of all audio and video tape recordings, police reports, documents, and files in the possession and

control of the Denver Police Department relating to the Aquash investigation; and any other evidence, writings, recordings, items, or information that would be favorable to the defendant, either as impeachment evidence or as evidence that the defendant's trial rights have been prejudiced by the government's failure to preserve potentially exculpatory evidence in this case. The defendant further renews his motion for an evidentiary hearing.

In support of the motion, Dana L. Hanna, attorney for the defendant, hereby affirms:

1. On August 19, 2009, the defendant Richard Marshall moved for an evidentiary hearing to show that the government, through the Denver Police Department, acting as agents of the government, had destroyed evidence in this case and thereby prejudiced the constitutional trial rights of the defendant. [Doc. 434]. The defendant also filed a motion to compel the government to disclose evidence and information relating to the defendant's claim of destruction of evidence. [Doc. 436 and Doc. 437].

2. The government opposed the motions. [Doc. 523]. The government, while acknowledging that the Denver Police Department had acted as local investigative agents of the federal government in the government's investigation of the Aquash murder, affirmed to the court that: "There was no known evidence in the custody of [Denver Police] Detective Alonzo that was not also in the custody of the United States and provided as discovery in this case." The government further affirmed: "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."

3. The factual accuracy of both those assertions have now been disproved beyond any doubt. In 2002, the Denver Police Department destroyed fifteen (15) audio tape recordings and two (2) video taped recordings of what Denver Police Commander Jonathyn Priest believes to be

interviews of witnesses in the Anna Mae Aquash murder investigation. It is now a provable fact that at least some of the taped recordings that were destroyed by Denver police were never given to the federal prosecutors or provided to the defendant through discovery.

4. The Court partially granted the defendant's motion and ordered the government "to determine what evidence was gathered by the Denver Police and what evidence was destroyed", and to disclose that information to the defendant. The court also directed the government to find out and disclose "what evidence was retrieved and what evidence was not".

5. Along with a letter dated January 21, 2010 [Doc. 591], the government's trial prosecutor has provided defense counsel with a letter from Denver Police Commander Jonathyn Priest [Doc. 591-2] which acknowledges that on January 30, 2002, Commander Priest authorized the destruction of fifteen (15) audio recordings and two (2) video recordings of interviews with witnesses in this case. In his letter, Commander Priest advised AUSA Mandel that the names of the witnesses whose interviews had been recorded on the destroyed recordings were listed in a description of the 17 destroyed items in Denver Police Department Property Bureau invoice #590402.

6. AUSA Mandel's letter to defense counsel did not disclose the names of those witnesses to defense counsel. Specific facts identifying "what evidence was gathered by the Denver Police and what evidence was destroyed" and "what evidence was retrieved and what evidence was not" are conspicuously absent from AUSA Mandel's letter to counsel and from Commander Priest's letter to AUSA Mandel. Although the government undoubtedly either has, or has easy access to, the facts as to which specific witness interviews have been destroyed, the government has not disclosed that information to the defense, although the disclosure of that specific information

would seem to be required by the court's order.

7. The factual information disclosed by the government, which is contained in Commander Priest's letter, certainly does not comply with the order of the court. It is inconceivable that the government has not asked the Denver Police Department about the names of the witnesses whose interviews were recorded and destroyed, the names that are listed in the property invoice. Unless the government has adopted a strategy of willful ignorance of the facts, then the government already has knowledge of the specific factual information it was ordered to gather by the court, has failed to disclose that information to the defendant.

8. In spite of the government's willful failure to disclose information it has been ordered to disclose, even the deliberately non-specific information contained in Commander Priest's letter is sufficient to prove that the Denver Police Department has destroyed at least two videotaped witness interviews that were evidently never provided to the government and which were certainly never provided to the defendant.

9. Commander Priest's letter informs AUSA Mandel that two video tape recordings were among the items destroyed on January 30, 2002. The only video tape recording that I have been given by the government in discovery was a copy of the audio tape recording of Arlo Looking Cloud's post-arrest questioning that took place on March 27, 2003. The government has never provided the defendant with any video tapes that were recorded before January 30, 2002. Therefore, it appears incontrovertible that at least two video recordings of witness interviews were destroyed by agents of the federal government without ever having been made available to the federal prosecutors or to defendant Richard Marshall.

10. Based on the foregoing facts, I have a good faith reasonable belief that agents of the

government have destroyed evidence that the defendant Richard Marshall could have used to impeach the testimony of government witnesses, including that of the government's key witness, Fritz Arlo Looking Cloud. To determine whether the destruction of their evidence has caused substantial prejudice to the defendant's trial rights, the defendant and the court need to know what tape recordings were destroyed and whether copies of any of those recordings were retrieved. That specific information is contained in the Denver Police Property Bureau invoice # 590402 and in the files and recordings related to the Aquash investigation that are referred to, but never described in any detail, in Commander Priest's letter.

11. On Monday, January 25, 2010, I wrote to AUSA Mandel requesting invoice # 590402 and the specific information and evidence I am now seeking through this motion. I have received no response to that request.

WHEREFORE, the Defendant Richard Marshall moves the Court to order the government to gather and disclose to the defendant, forthwith, all evidence and information within the custody, knowledge or control of the government or the Denver Police Department consisting of, or relating to, audio and video recordings of witness interviews made during the investigation of the murder of Anna Mae Pictou Aquash; all documents, contents and recordings that are now or have ever been held or catalogued under Denver Police Department Property Bureau file # 590402, including the invoice(s) and other records listing the items maintained under that file number; a specific listing and description of the fifteen (15) audio tape recordings and two (2) videotaped recordings that were destroyed in January 2002, including the names of the witnesses; a description and copies of all audio and video tape recordings, police reports, documents, and files in the possession and control of the Denver Police Department relating to

the Aquash investigation; and any other evidence, writings, recordings, items, or information that would be favorable to the defendant, either as impeachment evidence or as evidence that the defendant's trial rights have been prejudiced by the government's failure to preserve potentially exculpatory evidence in this case. The defendant further renews his motion for an evidentiary hearing, and moves for all other relief that this Court deems to be just and appropriate.

Dated this 29th day of January, 2010.

VINE RICHARD MARSHALL, Defendant

BY: /s/ Dana L. Hanna
Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Motion was electronically served upon the other parties in the case via the electronic mail addresses listed below:

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

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

Dated this 29th day of January, 2010.

/s/ Dana L. Hanna
Dana L. Hanna