

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

UNITED STATES OF AMERICA,
Plaintiff,

vs.

VINE RICHARD MARSHALL, a.k.a.
RICHARD VINE MARSHALL, a.k.a.
DICK MARSHALL,
Defendants.

Case No. CR 08-50079

**DEFENDANT MARSHALL'S
MOTION TO COMPEL
DISCLOSURE;
MOTION FOR EXPEDITED RULING**

NOW COMES the Defendant Richard Marshall, by and through his attorney, Dana L. Hanna, pursuant to his constitutional right to due process of law and his right to present evidence in his defense at trial, and hereby moves the Court to order the government to disclose to the Defendant, forthwith, a copy of the Denver Police Department Property Bureau invoice #590402, on the grounds that such evidence is favorable evidence for the Defendant which is being suppressed by the government; and the Defendant further moves for an expedited ruling on the motion.

In support of the motion, attorney Dana L. Hanna, counsel for Mr. Marshall, hereby affirms:

1. Trial in this case is scheduled for February 16, 2010.
2. Since August 2009, I have filed motions seeking to compel disclosure from the government as to whether evidence, particularly tape-recorded interviews of government

witnesses, had been destroyed by the Denver Police Department (DPD), which investigated this case under the direction of the federal government. In opposing those motions, the government repeatedly affirmed to the court that all evidence that had been in the custody of the Denver Police Department had been copied, sent to the United States Attorney in South Dakota, and provided to defense counsel.

3. On December 17, 2009, this Court ordered that “the government shall re-contact the Denver Police Department to determine what evidence was gathered by the Denver Police and what evidence was destroyed. The government also shall obtain information regarding the Denver Police Department’s investigation of the evidence destruction, such as what evidence was retrieved and what was not.” The Court ordered the government to provide the information it would receive from Denver Police to the defendant.

4. Two weeks ago, on January 25, 2010, the government disclosed to the defendant and filed with the court a copy of a letter that appears to be from Commander Priest of the Denver Police Department, that disclosed that the Denver Police Department, in 2002, had destroyed 17 tape-recordings—15 audio tape-recordings and 2 videotape recordings—of what were evidently recorded interviews or conversations with witnesses in this case. [Doc. 591-2.] Commander Priest’s letter, which was written to AUSA Robert Mandel, advised that each of the 17 destroyed tape-recordings was described and listed in Denver Police Department Property Bureau invoice #590402; that the invoice date is September 26, 2000; and that on the invoice, “[m]any of the tape entries listed a name (the person interviewed perhaps).”

5. Commander Priest’s letter to AUSA Mandel also stated that two weeks earlier, on January 11, 2010, Commander had located a box in the archives in the basement of the Denver

Police Department that contained previously undisclosed files and tape-recordings gathered in the Aquash murder investigation.

6. The facts contained in the letter from Commander Priest disprove the government's assertions that all evidence that had been destroyed by Denver Police was first copied and then provided to federal prosecutors in South Dakota and then disclosed to the defendant. Priest's letter states that the date on the Property Bureau invoice that listed the 17 destroyed tape-recordings is September 26, 2000. The earliest tape-recording that I have received from the government in discovery is of a conversation with Arlo Looking Cloud secretly recorded by cooperating witness "Maverick", under the supervision of Denver Police Detective Abel Alonzo, on December 16, 2000. Since all 17 tape-recordings listed on the invoice were recorded before that date, it necessarily follows that none of the 17 destroyed tape-recordings were ever turned over to the government or disclosed to the defendants, and that 17 recordings of witnesses, at least some of whom will be prosecution witnesses in Mr. Marshall's trial, have been irretrievably lost, as a result of the government's failure to preserve that evidence.

7. Upon receipt of Doc. 591-2, I immediately wrote a letter to AUSA Mandel requesting information that was conspicuously absent from the document filed by the government. I specifically requested a copy of Denver Police Department Property Bureau invoice #590402. I received no response. I filed a motion to compel disclosure.

8. Last Thursday, on February 4, 2010, ruling on the motion, this Court ordered the government to copy and disclose to defense counsel all the contents of the Denver Police Department's newly discovered Aquash files on or before Wednesday, February 10, 2010. The order made no express mention of the invoice.

9. On Friday, February 5, 2010, I sent an e-mail message to AUSA Mandel requesting him to send me a copy of Denver Police Department Property Bureau invoice #590402. [Exhibit A].

10. Today, Monday, February 8, 2010, I received an e-mail message from AUSA Mandel refusing to disclose that invoice, unless it happens to be contained within the files contained in the “Aquash” box recently discovered in the basement of the Denver Police headquarters. A copy of that message is attached, as Exhibit “A”.

11. Unless he has made a conscientious effort to remain uninformed of critical facts, AUSA Mandel is aware of whose names are listed on the invoice; he knows whether or not the name of Arlo Looking Cloud, the government’s key witness against Mr. Marshall, appears on that invoice. The government’s refusal to provide Mr. Marshall with a copy of the invoice is a willful refusal to comply with this Court’s order to provide the defense with the “information” it has received from the Denver Police, and constitutes willful suppression of evidence favorable to the defendant.

12. That invoice contains information that can help the defendant prove that his trial rights have been prejudiced by the destruction of evidence—especially if it shows that tape recorded conversations and statements made by the government’s key witness, Arlo Looking Cloud, were destroyed.

13. If the government does not have an actual copy of the invoice in its custody, it can acquire that invoice by making a phone call to the Denver Police to request it.

14. The government’s refusal to provide the defendant with Denver Police Department Property Bureau invoice #590402 is part of the government’s pattern of conduct on the

destruction of evidence issue—a pattern of maintaining a willful ignorance of the facts, assertions of fact that have been conclusively disproved, and stone-walling the defendant’s requests for evidence to which the defendant is entitled.

15. The defendant requires this evidence—the invoice—to support his motion for an evidentiary hearing in which he will have an opportunity to present evidence that his trial rights have been substantially prejudiced by the destruction of 17 witness interviews or conversations, which destruction was caused by the government’s failure to supervise its own investigation and preserve exculpatory evidence. Even if the recordings of the conversations have been irretrievably lost, the invoice will tell the defendant and the court what the government already knows but refuses to disclose: *whose* conversations were on the destroyed tapes.

16. Because of the government’s last minute disclosure of critical information and evidence, which either has been or should have been within the government’s knowledge and control since 2003, and because of the government’s continuing willful suppression of potentially exculpatory evidence, including Property Bureau invoice #590402, it may be necessary for Mr. Marshall to move for a continuance of the trial to conduct further investigation and preparation.

17. It is likely that the recently discovered “Aquash” box will not contain a copy of the Property Bureau invoice #590402. If it does not, I will have to wait until 2 court days before the scheduled trial to move for its disclosure, unless the court orders disclosure forthwith.

18. In order not to allow the defendant to be further prejudiced by the government’s dilatory refusal to comply with either the spirit or the letter of this Court’s order, the defendant requests the court for an expedited ruling on this motion.

WHEREFORE, the Defendant Richard Marshall moves the Court to order the government to acquire a copy of Denver Police Department Property Bureau invoice #590402, and to disclose it to the Defendant forthwith.

Dated this 8th day of February, 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 this case via the electronic mail addresses listed below:

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

Dated this 8th day of February, 2010.

/s/ Dana L. Hanna _____

Dana L. Hanna



Fw: USA v. Marshall,

Monday, February 8, 2010 2:21 PM

From: "Dana Hanna" <dhanna@midconetwork.com>
To: "D LaMunyon" <sa9598@yahoo.com>

— Original Message —

From: Mandel, Robert (USASD)
To: Dana Hanna
Sent: Monday, February 08, 2010 9:30 AM
Subject: RE: USA v. Marshall,

Mr. Hanna:

I am attempting to comply with the courts order of Feb. 4, 2010 regarding sending you copies of everything in the box labeled "Aquash" in the Denver PD archives. I am going to do what the court has ordered in this regard. I do not have a copy of the invoice described and will provide a copy only if it is one of the items in the box.

Robert Mandel

From: Dana Hanna [mailto:dhanna@midconetwork.com]
Sent: Friday, February 05, 2010 3:31 PM
To: Mandel, Robert (USASD)
Subject: USA v. Marshall,

Mr. Mandel:

In view of the court's order directing the government to provide me with copies of all material in the custody of Denver police on the Aquash investigation and in view of the rapidly approaching trial date, I am respectfully requesting that you send me a copy of DPD Property Bureau Invoice #590402 by fax or e-mail today, February 5, if possible, or if not today, on Monday. I presume you must have a copy and if you do not, you can contact the Denver Police Department to have them send me a copy.

Since that invoice contains a description of the evidence destroyed, and since the court has ordered the government to provide that to me, I would appreciate it if you could get it to me now rather than waiting to Wednesday.

Thank you for your cooperation.

Dana Hanna
HANNA LAW OFFICE, P.C.
PO Box 3080
816 Sixth Street
Rapid City, SD 57709
605-791-1832