

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

FILED  
MAR 23 2010



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UNITED STATES OF AMERICA,

CR 08-50079

Plaintiff,

vs.

ORDER

VINE RICHARD MARSHALL, a/k/a

Richard Vine Marshall, a/k/a

Dick Marshall,

Defendant.

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Defendant Marshall has renewed his Motion for Evidentiary Hearing on Destruction of Evidence and for Sanctions, Motion to Compel Disclosure of Impeachment Evidence, and Motion to Dismiss Indictment. (Doc. 687.) The renewed motion arises from the Denver Police Department's destruction of evidence relating to the investigation into the murder of Anna Mae Aquash. Marshall asserts that recent discovery reveals more evidence was destroyed than the government previously indicated. Furthermore, Marshall claims that Detective Abe Alonzo and others with the Denver Police Department were acting as agents of the federal government when evidence was gathered and destroyed.

In 2003, the Denver Police Department publicly acknowledged that in 2001 they had destroyed files and records containing evidence from the Aquash murder investigation. In 1995, Abe Alonzo, a detective with the Denver Police Department, drove Looking Cloud from Denver to the crime scene to meet with Marshal Ecoffey, then drove Looking Cloud back to Denver. In his initial Motion to Dismiss Indictment for Government's Failure to Preserve and Disclose Favorable Evidence, doc. 507, Marshall's lawyer asserted that a witness led him to believe that notes, records and evidence of statements made by Arlo Looking Cloud to Alonzo during that trip were among the evidence destroyed.

The government responded to the motion, stating that the Denver Police Department only provided assistance to the United States in its investigation, and that all evidence in the custody of the Denver Police Department was also in the custody of the United States and was provided to the defendants as discovery in this case. (Doc. 523.) According to the government, except for one interview of Frank Dillon, no part of the investigation was conducted by Denver Police Department officials which was not in the presence of Marshal Ecoffey or a Deputy Marshal.

Marshall's reply to the government's response, doc. 535, included a copy of a transcript of a recorded interview of Aquash's sister, Mary Lafford, which Alonzo conducted on 1998. (The government provided a copy of the transcript to Marshall in discovery.) The transcript indicates that Alonzo conducted the interview by himself, which contradicted the government's statement that only Frank Dillon was interviewed without the presence of a federal official. Marshall's reply also included a page of a transcript where Alonzo is advising government informant Kamook Nichols before she met with Looking Cloud and secretly recorded their conversation, which may suggest Alonzo was acting outside the presence of federal officials. Marshall pointed out that Alonzo recorded his interviews of Dillon and Lafford, but the tape or video recordings of those interviews, as well as of an interview of Julian Pokrywka (Theda Clark's husband), have not been provided to him. Marshall's lawyer believed this proved that the Denver police at one time had custody of evidence - - such as audio and video tape recordings of the witness interviews - - that was not also in the custody of the United States and that was not disclosed to him.

Because Marshall's reply called into question whether all evidence in the custody of the Denver Police Department was also in the custody of the United States and was provided to the defendants in this case, the Court ordered the government to re-contact the Denver Police Department to determine what evidence was gathered by Denver police and what evidence was destroyed. (Doc. 543.) The government also was directed to obtain information regarding the Denver Police Department's investigation of the evidence destruction, such as what evidence was retrieved and what was not.

Assistant U.S. Attorney, Robert Mandel, contacted the Denver police department and received a response from Commander Jonathyn Priest. (Doc. 591.) Commander Priest explained

that he signed a request for disposition of property authorizing the disposal of items under invoice number 590402, dated September 26, 2000. He said the invoice listed no case number or assigned investigator. Commander Priest indicated that 15 audio tapes and 2 video tapes, likely of witness interviews, were destroyed on January 30, 2002. He also stated that there was a box in the records archive of the Denver Police Headquarters labeled “Aquash” containing files and tapes from the Aquash investigation. The Court eventually ordered the government to produce the “Aquash box” and the invoice. (Docs. 632 and 643.)

Marshall’s lawyer asserts that evidence in the Aquash box shows that, in fact, 32 tape recordings were destroyed relating to interviews of 17 witnesses. The invoice lists Detective Abe Alonzo as the investigating officer and gives notice that the evidence was gathered in an “Ongoing Homicide Investigation.” The invoice records show there were 4 cassette tape recordings of an interview conducted by Detective Alonzo of Darlene “Kamook” Nichols and Serle L. Chapman, both government witnesses against Marshall. According to Marshall’s lawyer, the third tape stops abruptly before the end of the tape, and the fourth tape is missing. He concludes that the fourth tape has been destroyed and not copied. Marshall’s lawyer found a document in the Aquash box which generally describes the topics of discussion on each of the four tapes. It states that on the fourth tape Serle Chapman discusses his reasons and motivations for his participation in the investigation. Marshall’s lawyer believes the fourth tape contained exculpatory evidence that could have been used to impeach the credibility and testimony of Serle Chapman at trial.

Also among the documents in the Aquash box is a letter dated November 6, 1995, showing that Detective Abe Alonzo was sworn in as a Special Deputy U.S. Marshal by the United States Attorney, Mountain States Drug Task Force, Denver, Colorado, “participating in a multi-jurisdictional investigation being sponsored by this agency.” Marshall says this further supports his position that Detective Alonzo was acting as an agent of the federal government when evidence was gathered and destroyed in this case.

In response to the renewed motion to dismiss the indictment, the government again denies there was a joint investigation with the Denver Police Department. (Doc. 694.) The government states that there “may have been cooperation” between the City of Denver and the United States

Marshal Service, but that they had no authority over one another. (*Id.*) The government's response is not supported by sworn declarations, and it does not provide any details of the cooperation between the two agencies. The record is inadequate for the Court to determine the nature of the cooperation between Denver police and the United States Marshal Service, and to decide how much access the United States had to records of the Denver Police Department. The Court notes that the letter from Commander Priest states, in part:

Detective Alonzo told me at that time [early 2003] that the items related to an on-going homicide investigation that he was conducting as a detective in the Intelligence Bureau. I was familiar with the case, and had consulted previously, however, always believed that authorities in South Dakota were investigating and the Detective Alonzo was assisting with than (sic) endeavor.

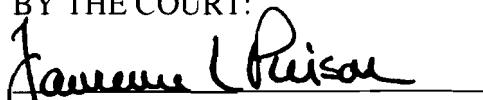
(Doc. 591-2.). Commander Priest also states that Detective Alonzo said he would make copies of the tapes in the Aquash box and pass them on to federal prosecutors. (*Id.*)

The Court will allow the government to supplement the record with sworn declarations, legal authority and additional written argument after which the Court will determine whether an evidentiary hearing is necessary to determine the extent of cooperation between the Denver Police Department and the United States Marshal Service in the homicide investigation, and the degree of access the United States had to the evidence gathered and kept by the Denver Police Department in regard to the investigation. Accordingly,

IT IS ORDERED that, on or before Tuesday, March 30, 2010, the government shall serve and file a supplemental response to Defendant Marshall's Supplemental Affirmation in Support of Motion for Dismissal of Indictment for Destruction of Evidence, doc. 687.

Dated this 23rd day of March, 2010.

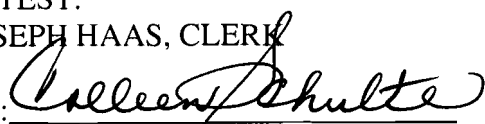
BY THE COURT:

  
Lawrence L. Piersol  
United States District Judge

ATTEST:

JOSEPH HAAS, CLERK

BY:

  
DEPUTY