

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	
	*	CR. 08-50079-01, -02
	*	
Plaintiff,	*	
	*	
	*	
vs.	*	DEFENDANT MARSHALL'S
	*	MOTION TO DISMISS INDICTMENT
	*	FOR GOVERNMENT'S FAILURE TO
RICHARD MARSHALL,	*	PRESERVE AND DISCLOSE
	*	FAVORABLE EVIDENCE
Defendant,	*	

NOW COMES the defendant Richard Marshall, by and through his attorney Dana L. Hanna, and pursuant to his constitutional right to due process of law, his right to present a defense and his right to a fair trial, hereby moves the court to dismiss the indictment against him, with prejudice, on the grounds that the government failed to preserve favorable evidence by allowing officers of the Denver Police Department, acting as agents of the federal government in a joint local-federal investigation, to destroy evidence that would have been favorable to the defendant, including evidence of prior inconsistent statements made by the government's key witness, Fritz Arlo Looking Cloud.

As grounds for the motion, Dana L. Hanna, attorney for Richard Marshall, hereby affirms under penalty of law:

1. The indictments in this case arose from a joint local and federal investigation by Denver Police Department and federal investigators. Beginning in 1994, the federal government supervised the Denver Police Department in an investigation into the murder of Anna Mae Pictou

Aquash. Detective Abel Alonzo was the lead investigator for the Denver Police. Beginning in 1994, Detective Alonzo investigated this case under the supervision of U.S. Marshall Robert Ecoffey and other federal investigators.

2. In 2003, the Denver Police Department publicly acknowledged that in 2001 they had destroyed files and records containing evidence in the Aquash murder investigation. See: Exhibit A, attached to Motion to Compel Disclosure of Impeachment Evidence [Document 436]: Rocky Mountain News article.

3. The evidence that was destroyed in this case was not destroyed in good faith or in keeping with normal police practice. According to the Denver Police Department, the evidence—which was evidence in a high profile ongoing murder investigation—was destroyed “mistakenly”.

4. On the 19th of August, 2009, defendant Marshall filed a motion to compel disclosure of evidence and information regarding the destruction of reports, tapes and other evidence in this case by the Denver Police Department in 2001 [Document 436] and a motion seeking an evidentiary hearing to determine what evidence was actually destroyed [Document 434], along with supporting memoranda of law. The government did not file any response in opposition to either motion, and both motions are presently pending before the Court.

5. All factual affirmations set forth in Documents 434 and 436 are hereby reaffirmed by reference and incorporated herein as though fully set forth.

6. In the aforesaid motions and the supporting memoranda of law, defendant Marshall argued that there was a strong likelihood that notes, records and evidence of statements made by the prosecution’s key witness, Looking Cloud, to Detective Alonzo were among the evidence

destroyed by Denver Police, and that such evidence was favorable to the defendant because it could have been used to impeach Looking Cloud's trial testimony. As a result of information recently obtained by the defense, the likelihood that evidence, notes and records of statements made by Looking Cloud to Detective Alonzo were destroyed is no longer speculative or merely probable: it is now a provable fact.

7. On the 19th of October, 2009, a potential witness in this case provided me with an excerpt from an article written by Denver journalist Maximilian Potter, who interviewed Arlo Looking Cloud and Detective Abel Alonzo in 2004. Mr. Potter wrote in his article and later confirmed to me in a telephone conversation that Alonzo had told him that among the evidence that had been "mistakenly destroyed" by the Denver Police Department in 2001 were notes that recorded statements made by Looking Cloud to Detective Alonzo and Marshall Ecoffey in 1995, when they took Looking Cloud, in custody, from Denver to the crime scene on the Pine Ridge Sioux Reservation and back again to Denver. During that time, the investigators questioned Looking Cloud about the abduction and killing of Aquash, and they took notes of Looking Cloud's answers to their questions. In 2004, Detective Alonzo admitted to Mr. Potter during their interview that those notes were among the evidence that was "mistakenly destroyed" by Denver Police in 2001.

8. Of the discovery materials that have been disclosed to date, the only surviving record of any statements made by Looking Cloud during the more than 16 hours he spent with Ecoffey and/or Alonzo in 1995 is a very brief and general summary written by Ecoffey. Even from that general summary, it is clear that the statements made by Looking Cloud to Ecoffey and Alonzo in 1995 about the murder of Anna Mae Aquash directly contradict statements Looking Cloud

made in 2008 to the grand jury that returned the indictment against Richard Marshall.

9. Looking Cloud's credibility is a critical issue for the jury in this case. The destruction of evidence that could have been used to impeach Looking Cloud's testimony has caused serious prejudice to Richard Marshall's ability to present a defense and his ability to confront his chief accuser. Mr. Marshall reasonably believes that in an evidentiary hearing he can prove that the destruction and loss of evidence in this case has deprived him of material evidence that would have been favorable to his defense.

10. The government has been aware at all times since 2003 that material and potentially exculpatory evidence was destroyed by Denver Police Department in 2001. But the government has never provided any information as to the destruction of that evidence to Richard Marshall.¹ Since the evidence that was destroyed, including evidence of prior inconsistent statements made by Looking Cloud, as well as the evidence of the government's gross negligence in failing to preserve such evidence, constitutes exculpatory evidence under Brady v. Maryland, 373 US 83(1963), United States v. Bagley, 473 US 667, 676, and (1985) and Kyles v. Whitley, 514 US 419 (1995), the government's failure to disclose that evidence to the accused constitutes willful suppression of exculpatory evidence.

11. The Denver Police's destruction of evidence that would have been favorable to Richard Marshall and the federal government's failure to preserve that evidence has caused substantial prejudice to Richard Marshall's constitutional right to a fair trial, his right to cross examine his chief accuser, and his right to fundamental fairness.

¹ Nor did the government provide any information about the destruction of such evidence to codefendant John Graham or to Arlo Looking Cloud, before his trial.

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