UNITED STATES DISTRICT COURT

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.	CR 08-50079 UNITED STATES' MOTION TO REQUIRE DEFENDANT MARSHALL'S COUNSEL TO RETURN UNITED STATES' TAPES

COMES NOW the United States of America, through its attorneys, United States Attorney Brendan V. Johnson, and Assistant United States Attorney Robert A. Mandel, and moves that this Court issue an order that defendant Marshall return tapes that were provided to him, pursuant to a court order, for copying for discovery purposes on the following grounds:

1. On January 20, 2009, defendant made a motion for disclosure and production of evidence seeking to have the United States copy a large number of tapes that were in the possession of the United States. Exhibit 1.

2. On January 30, 2009, the United States filed a response stating it was not required to make copies of those tapes for defendant pursuant to the discovery rules and offered defendant's counsel the opportunity to listen to the tapes in the United States Attorney's Office. Exhibit 2.

3. On February 24, 2009, this Court issued an order requiring that the United States make the tapes available to defendant in order for him to make copies and allowing him to have those tapes for that purpose for up to six weeks. Exhibit 3.

4. On February 25, 2009, defense counsel Dana Hanna wrote to the United States and indicated that it was his intention to have the tapes copied into a digital format and that it would not be necessary for the United States to make copies for him. He further sought to have the tapes turned over to him so copies could be made digitally, after which he would return the tapes to the United States. Exhibit 4.

5. On September 30, 2009, defense counsel had still not returned these tapes to the United States and a letter was sent to him seeking their return. Exhibit 5.

6. On October 6, 2009, defense counsel sent a letter to the United States indicating that the tapes that he was given to copy were marked "copy" on the label and that the government had not provided him with "originals." Exhibit 6. Upon receipt of this letter, the Assistant U.S. Attorney called Attorney Hanna who indicated he had not decided whether or not to return the tapes to the United States.

7. On October 14, 2009, defense counsel again wrote to the United States and indicated that it would be expensive and inconvenient for him to make copies of the copies and therefore refused to return the tapes to the United States. Exhibit 7.

It is the position of the United States that it complied with the court order by making these tapes available for defense counsel to copy and that defense counsel should have made copies and returned these tapes to the United States in a timely fashion as ordered by the court.

Wherefore, the United States asks that the Court order the defendant to return the tapes to the United States Attorney's Office forthwith.

Respectfully submitted this 16th day of October, 2009.

/s/ Robert A. Mandel

ROBERT A. MANDEL
Assistant United States Attorney
515 9th Street #201
Rapid City, SD 57701
605.342..7822
FAX: 605.342.1108
Robert.Mandel@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of October, 2009, I served by electronic transmission, a true and correct copy of the foregoing United States' Motion to Require Defendant Marshall's Counsel to Return United States' tapes on:

Dana Hanna
Attorney at Law

John Murphy
Attorney at law

/s/ Robert A. Mandel

Robert A. Mandel

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. 08-50079 DEFENDANT MARSHALL'S MOTION FOR DISCLOSURE AND PRODUCTION OF EVIDENCE

NOW COMES defendant Richard Marshall, by and through counsel, and hereby moves the Court to order the government to produce and provide to the defendant copies of all tape recordings of witnesses in this case, including but not limited to all tape recorded conversations with any cooperating witness or potential witness in this case. The defendant makes this motion on the grounds that these tapes are necessary to prepare an effective defense at trial.

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

1. On information and belief, the government has in its possession over 100 tapes of recorded conversations made by cooperating witnesses in this case. Many of the tapes involve recordings of conversations with other witnesses and potential witnesses. These tape recordings were made by, and record statements by cooperating witnesses who will testify in the trial.

2. I have previously requested these tapes in writing and in telephone conversations with the government prosecutor and I have been told that I cannot have copies of those tapes, and that if I wanted to hear them, I would have to make arrangements to hear them at the United States Attorney's office. There are probably 100 hours of taped conversations. I have received transcripts of some of the tapes. The vast majority of those tapes have not been transcribed.

Exhibit 1

3. On January 18, 2009, I heard for the first time the tape recording of a conversation secretly recorded by "Kamook" Darlene Nichols in July 2001 with Cleo Gates, the defendant's ex-wife. Cleo Gates was a government witness in the trial of Arlo Looking Cloud and she is expected to be a government witness in the trial of Richard Marshall. In Looking Cloud's trial, she testified that Arlo Looking Cloud, co-defendant Graham, Theda Clarke, and Anna Mae Aquash went to the home of her and defendant Marshall one night in 1975 and she testified to what transpired during their visit. The events discussed are the very essence of the government's case regarding Richard Marshall and I have never been provided with either that tape nor a transcript of that tape by the government. I borrowed that tape from counsel for the co-defendant.

4. The government has provided these tapes to the co-defendant's attorney. It is impractical and burdensome for me to have to listen to 100 hours of tapes at the United States Attorney's office. Moreover, I need to review the transcripts of some of the tapes that were made for accuracy. It may very well be necessary to seek electronic enhancement of some of the more important tapes, and I may offer some of the tape recordings as evidence.

5. These tapes are necessary for me to prepare an effective defense at trial. They contain Jencks Act material and if the government has not provided the tapes before trial, the government will have an obligation to provide them to me after these witnesses have testified. Therefore, it is economic for the Court in terms of time to order the government to provide me with those tapes before trial and not during trial.

WHEREFORE the defendant moves the Court to direct the government to provide the defendant with copies of all taped recorded conversations involving witnesses or potential witnesses in this case to the defendant forthwith.

Dated this 20th day of January, 2009.

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

Case 5:08-cr-50079-LLP Document 162 Filed 01/20/2009 Page 3 of 3

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Motion for Disclosure and Production of Evidence upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

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

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

Dated this 20th day of January, 2008.

/s/ Dana L. Hanna
Dana L. Hanna

UNITED STATES DISTRICT COURT

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.

CR 08-50079

GOVERNMENT'S RESPONSE TO DEFENDANT MARSHALL'S MOTION FOR DISCLOSURE AND PRODUCTION OF EVIDENCE

COMES NOW the United States of America, through its attorneys, United States Attorney Marty J. Jackley, and Assistant United States Attorney Robert A. Mandel, and respectfully responds to Defendant Marshall's Motion for Disclosure and Production of Evidence and states as follows:

1. Regarding any recordings of statements of the defendant, Fed. R. Crim. P. 16 provides that the United States is required to make it "available for inspection [or] copying." The United States has made these tapes available for defense counsel to listen to in the U. S. Attorney's Office. Defense counsel has not done so. The rule does not require that the United States make a copy of these tapes for defense counsel. While the United States did have an extra set

of copies that were given to co-defendant's counsel, the United States is not required to create another set. Defendant Marshall has not been provided copies of all of the taped conversations based in part upon continuing concerns raised by Defendant Graham that copy of tapes results in reduced quality. See Exhibit 1 (Defendant Graham's correspondence of December 31, 2008) and Exhibit 2 (the United States' response dated January 8, 2009). The United States notes from defendant's pleading that he did on one occasion borrow one of the copies of a tape from co-defendant's counsel to listen to. As long as the Court's order regarding discovery is complied with, the United States does not object to any arrangements between defense counsel to work out an arrangement whereby they can both listen to those copies of the tapes.

2. Regarding any other recordings in the possession of the United States, again there is no legal obligation for the United States to make copies for the defendant. Again, these tapes are available for defense counsel to listen to but he has not done so. Again, the United States does not object to an arrangement between defense counsel.

3. While it is the position of the United States that while a number of the tapes referred to by the defendant are probably not even discoverable under federal law, nonetheless, all are being made available to defense counsel to listen to in the U. S. Attorney's Office. If defense counsel chooses to copy these tapes, the United States is agreeable to working out arrangements if proper procedures and assurances are put in place to protect sensitive discovery

materials. The United States is not required to make copies of these tapes for the defendant under any rule or law and therefore resists the defendant's motion in its entirety.

Respectfully submitted this 30th day of January, 2009.

/s/ Robert A. Mandel

ROBERT A. MANDEL
Assistant United States Attorney
515 9th Street #201
Rapid City, SD 57701
605.342.7822
FAX: 605.342.1108
Robert.Mandel@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January, 2009, I served by electronic transmission, a true and correct copy of the foregoing Government's Response to Defendant Marshall's Motion for Disclosure and Production of Evidence on:

Dana Hanna
Attorney at Law

John Murphy
Attorney at law

/s/ Robert A. Mandel

Robert A. Mandel

MURPHY LAW OFFICE, P.C.
JOHN R. MURPHY - ATTORNEY AT LAW
ERIN E. DUCHENEAUX - LEGAL ASSISTANT

AT THE HISTORIC FEIGEL HOUSE
328 E. NEW YORK STREET, SUITE 1
RAPID CITY, SD 57701

PHONE: (605) 342-2909 FAX: (605) 343-9760 E-MAIL: jmurphysd@hotmail.com www.murphylawoffice.org

December ~~31, 2008~~

Marty J. Jackley
United States Attorney
P.O. Box 3303
Sioux Falls, SD 57101

RECEIVED
JAN 02 2009
United States Attorney
Sioux Falls, SD

Robert Mandel
Assistant United States Attorney
515 9th Street, Room 201
Rapid City, SD 57701

RE: United States v. John Graham; File No. 08-50079-01

Dear Mr. Jackley and Mr. Mandel:

I am in receipt of an audio tape labeled, "198A-MP-47472; 1 of 1; DATE UNKNOWN; COPY." The exterior of the tape does not indicate who the parties on the tape are that are speaking. The tape is inaudible. Please produce an audible version of the tape and indicate who the parties are that are speaking. Thank you.

Sincerely,

John R. Murphy

Cc: Client

EXHIBIT 1

U.S. Department of Justice

Marty J. Jackley
United States Attorney
District of South Dakota

515 Ninth Street, Room 201
Rapid City, South Dakota 57701

(605)342-7822
FAX:(605)342-1108

January 8, 2009

John R. Murphy
Attorney at Law
328 E. New York St. #1
Rapid City, SD 57701

RE: United States v. John Graham

Dear John:

I am returning the tape you sent to us on January 6, 2009 as per our discussion. This tape is a recording of [redacted]. I was not able to detect any audibility problems with this tape on our player of any significant nature and it is no different from the copy we have. If you are still unable to hear it on your equipment, you can bring it over here and we can play it for you on ours.

Best regards,

MARTY J. JACKLEY
United States Attorney
By:

ROBERT A. MANDEL
Assistant U.S. Attorney

RAM/lc
Enc.
cc: Marty Jackley

EXHIBIT 2

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL, aka RICHARD VINE MARSHALL, aka DICK MARSHALL, Defendant.	)))))))))))	CR. 08-50079-01, -02 ORDER ON DEFENDANT MARSHALL'S MOTION FOR DISCLOSURE & PRODUCTION OF EVIDENCE

Pending before the court is defendant Richard Marshall's motion for disclosure and production of evidence. [Docket 162]. The government has in its possession audio tapes of recorded conversations. The government previously provided copies of these tapes to defendant John Graham, but now refuses to provide copies to Mr. Marshall, instead requiring Mr. Marshall's counsel to listen to the tapes at the government's offices. The government states that it will allow Mr. Marshall's counsel to make copies of the tapes himself, but the government will not make and provide the copies itself. Mr. Marshall is currently detained in federal custody, so it is not possible for him to accompany his counsel to the federal building to listen to the tapes in question.

Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure requires the government to "permit the defendant to inspect and to copy or photograph

books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is in within the government's possess, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial . . ." See Fed. R. Crim. P. 16(a)(1)(E). The government's assertion that it must allow defendant to copy, but that the government is not required to copy discovery itself, is borne out by Rule 16.

Accordingly, it is hereby

ORDERED that the government shall immediately turn over all the tapes in question to Mr. Marshall's counsel so that he may make copies of the tapes. Mr. Marshall's counsel shall have possession of the tapes for up to six weeks in order to accomplish the copying, at which time the original tapes shall be returned to the government. Counsel's cost for such copying shall be included on his CJA voucher and he shall be reimbursed for the same. Alternatively, if the government reconsiders its position and agrees to make copies of the tapes itself, the government must make such copies and deliver them to Mr. Marshall within 10 days from the date of this order.

Dated February 24, 2009.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE

DANA L. HANNA
Attorney at Law

816 Sixth Street
Post Office Box 3080
Rapid City, SD 57709
(605) 791-1832

dhanna@midconetwork.com

Licensed in the States of:
South Dakota
Nebraska
New York

February 25, 2009

RECEIVED
FEB 26 2009
BY:_____

VIA FAX AND MAIL

Robert Mandel
Assistant United States Attorney
515 Ninth St., #201
Rapid City, SD 57701

RE: United States vs. Richard Marshall, CR 08-50079

Dear Mr. Mandel:

In reference to the Court's order directing the government to turn over the tapes referred to in my motion to compel, it is my intention to have those tapes copied into a digital format. Therefore, it will not be necessary for the government to make copies for me.

In accordance with the Court's order, I would appreciate it if we could make arrangements to have the original tapes turned over to me. I will then arrange for copies to be made and return the original tapes to you.

Please advise me as to when I can pick up the tapes from your office. Thank you.

Sincerely,

Dana L. Hanna tjh

Dana L. Hanna

Exhibit 4

U.S. Department of Justice

Dennis R. Holmes
Acting United States Attorney
District of South Dakota

515 Ninth Street, Room 201
Rapid City, South Dakota 57701

(605)342-7822
FAX:(605)342-1108

September 30, 2009

Dana Hanna
Attorney at Law
816 Sixth Street
Rapid City, SD 57701

RE: United States v. Marshall

Dear Dana:

On February 24, 2009, Judge Duffy ordered the United States to either provide you with the audio tapes of recorded conversations in this case so that you may have them copied and returned to us within six weeks, or, alternatively, make copies of said tapes and deliver them to you. (DE 179). In correspondence dated February 25, 2009, you requested the originals as you wanted to have them copied yourself into a digital format. We provided the original tapes to you at that time; to date, you have not returned them to our office. Please check on the status of this issue and get back to me as soon as possible.

Best regards,

DENNIS R. HOLMES
Acting United States Attorney
By:

ROBERT A. MANDEL
Assistant U.S. Attorney

RAM/lc
Encs.

DANA L. HANNA
Attorney at Law

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Nebraska
New York

October 6, 2009

Robert Mandel
Assistant United States Attorney
515 Ninth St., #201
Rapid City, SD 57701

RE: United States vs. Richard Marshall, CR 08-50079

Dear Mr. Mandel:

I have received your letter dated September 30, 2009 in which you request that I return to you the original tape recorded conversations in this case. It is accurate that I requested the originals to have them copied. It is not accurate that you provided they original tapes to me at that time. The government provided with me with copies of the tapes: each and every one of the 40 some cassette tapes that were provided to me are marked "copy" on the label. I do not know where the original tapes are and the government has never provided me with any originals.

Respectfully yours,

Dana L. Hanna

10-7

called Hanna

Exhibit 6

DANA L. HANNA
Attorney at Law

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(605) 791-1832

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Licensed in the States of:
South Dakota
Nebraska
New York

October 14, 2009

RECEIVED
OCT 15 2009
BY:

Robert Mandel
Assistant United States Attorney
515 9th St., #201
Rapid City, SD 57701

RE: U.S. v. Richard Marshall

Dear Mr. Mandel:

You recently wrote me a letter requesting that I return the original audio tapes of recorded conversations that the government had previously provided me. I responded to you that I have received no original tapes and that all tapes that I had been given were copies. You then requested that I return the copied tapes to you.

As I read Document 179, the Magistrate Judge's order, it directs me to return the tapes to you if the government were to provide me with the original tapes for copying. However, the order states that if the government were to reconsider its position refusing to provide me with copies of tapes and were to agree to make copies of the tapes, then the government was ordered to deliver the copies of the tapes to me within 10 days of the date of this order. The government opted to make copies available to me without any condition upon returning copies.
As I have previously pointed out to you, each of the tapes provided to me has the word "copy" written on the label. Then, several months later, you informed me for the first time that you want the copies returned, even though you acknowledge that the FBI has the original tapes.

Since the court's order directed me to return originals, but not copies, and because it would be both expensive and inconvenient for me to make copies of the copies, I must respectfully decline your request.

Respectfully yours,

Dana L. Hanna

Dana L. Hanna

Exhibit 7