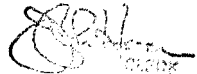


**FILED**  
DEC 30 2008  


UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

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UNITED STATES OF AMERICA,

CR08-50079-02

Plaintiff,

v.

**UNITED STATES' RESPONSE IN  
OPPOSITION TO DEFENDANT  
MARSHALL'S MOTION FOR  
PRODUCTION OF  
HANDWRITTEN NOTES**

JOHN GRAHAM aka JOHN BOY  
PATTON, and VINE RICHARD  
MARSHALL aka RICHARD VINE  
MARSHALL aka DICK MARSHALL,

Defendants.

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COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant US Attorney Robert A. Mandel and respectfully files its Response in Opposition to Defendant Marshall's Motion for Production of Handwritten Notes.

On December 22, 2008, Defendant Marshall filed a Motion for Production of Handwritten Notes. Specifically, he is requesting the Court order the United States to disclose all handwritten notes and writings "prepared by any person who was present at the interview" of Arlo Looking Cloud in the United States Attorney's Office in Denver, Colorado, on November 17, 1994. The United States is requesting Defendant Marshall's motion be denied based upon the following grounds:

1. Lack of good faith efforts under D. S.D. Crim. LR 16.1.

2. Overly broad discovery request contrary to case precedent and inappropriately including the handwritten notes of attorneys for both the United States and Arlo Looking Cloud contrary to Fed. R. Crim. P. 16(a)(2).
3. Mootness based upon the United States' willingness to provide handwritten notes that are found to exist with exception of attorneys, to either the Court for in camera review or to the Defendant.

From the onset, it should be noted that these Defendants have collectively made approximately seventy-five specific discovery requests. See generally United States' Response to Defendant Graham's Motion to Compel Discovery (CR03-50020, DE 254 at ¶2; Marshall discovery requests of November 11, 2008; November 24, 2008; and December 18, 2008). Many of the requests have sought information that had already been provided to Defendants in original discovery, or sought discovery contrary to clearly established Eighth Circuit precedent. The United States has presented approximately 5,000 pages of discovery, including many transcripts of tape recordings, and either provided audio copies or made available all recordings at a time convenient at the United States Attorney's Office. The Defendants have provided no discovery pursuant to their obligations under Fed. R. Crim. P. 16(b).

D.S.D. Crim. LR 16.1 requires a party filing a motion concerning a discovery dispute to file a separate declaration describing the good faith efforts of the parties to solve the dispute. As outlined in the attached Exhibit 1, correspondence of Defendant Marshall's counsel, the United States, by and through AUSA Mandel requested more specific information regarding the handwritten note request. See Exhibit 1. This information was not received from Defendant Marshall until December 22, 2008, as

identified on Exhibit 1. That is the same date Defendant Marshall filed his Motion to Compel. Accordingly, Defendant Marshall's motion should be denied consistent with D.S.D. Crim. LR 16.1.

Alternatively, as specifically recognized by Defendant Marshall, "handwritten notes of law enforcement agents' notes [sic] are not discoverable if the contents of the notes are summarized and written up into a formal investigation report." See Defendant Marshall's Memorandum at p.2 (citations omitted). To be sure, neither the Jencks Act, 18 U.S.C. § 3500, nor the doctrine of Brady v. Maryland, 373 U.S. 83 (1963), require police officers to retain their original investigative notes. See United States v. Kuykendall, 633 F.2d 118, 119 (8th Cir. 1980). There exists no duty upon law enforcement officers to retain their rough, handwritten notes after the contents have been incorporated into more formal reports and the reports are checked for accuracy, especially when the notes have been destroyed in good faith. Id. at 119.


As specifically set forth in counsel's correspondence at Exhibit 1, the United States has produced both the actual recording of the interview, and the actual transcript of the interview. Defendant Marshall has also been provided a summary report of Deputy US Marshal Rick Ianucci. Id. It is the United States' position that it has produced all required under Fed. R. Crim. P. 16, Jencks, and Brady in relation to this request. However, the United States is in the process of requesting any other handwritten notes from agents that may exist from this interview, and will provide any such notes to either the Court for in camera review or defense counsel. The United

States should not be required to provide either AUSA notes or Arlo Looking Cloud's attorney's notes as requested by Defendant Marshall if any do exist. Furthermore, it is the United States' intent to only present handwritten notes that may exist without additional commentary as suggested in Defendant Marshall's request. See Exhibit 1.

Accordingly, the United States is respectfully requesting that this Court deny Defendant Marshall's Motion to Compel based upon D.S.D. Crim. LR 16.1 requirements, the overly broad nature of the request which is contrary to legal precedent, and the mootness brought about by the United States' response.

Date: December 30, 2008

MARTY J. JACKLEY  
United States Attorney

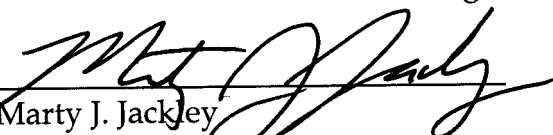
  
PO Box 2638  
Sioux Falls, SD 57101-2638  
605.357.2330

#### CERTIFICATE OF SERVICE

The undersigned hereby certifies on December 30, 2008, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy  
Dana Hanna

- U.S. Mail, postage prepaid
- Hand Delivery
- Facsimile at
- Federal Express
- Electronic Case Filing

  
Marty J. Jackley  
United States Attorney