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 TO COMPEL DISCOVERY

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 to Compel Discovery and resists it in its entirety as follows.

Defendant seeks essentially all information in any United States file pertaining to the District of Oregon prosecution captioned *United States v. Loud Hawk, et al*, 75-CR-296-RE. That case relates to the 1975 Oregon shootout in which a number of individuals, including Leonard Peltier and Annie Mae Aquash, the victim in this case, were present in a motor home that was apprehended by the Oregon Highway Patrol.

Defendant Marshall, in seeking this information, relies primarily on *Brady v. Maryland,* 373 US 87 (1963) and *Kyles v. Whitley*, 514 US 419, (1995). There is no evidence in the Oregon prosecution which constitutes *Brady* material and *Kyles v. Whitley* does not authorize an abstract attack regarding the conduct of the investigation which authorizes discovery in every case pursued by the United States.

Federal Rule 16(a)(1)(E) reads, in part,

> Upon a defendant's request, the government must 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 within the government's possession, 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; or
> (iii) the item was obtained from or belongs to the defendant.

Fed. R. Crim. P. 16(a)(1)(E).

Discovery matters are committed to the sound discretion of the district court. *United States v. Banks*, 494 F.3d 684-85 (8th Cir. 2007)(citing *United States v. Woosley*, 761 F.2d 445 (8th Cir. 1985)). Before determining whether the requested information is material to the defense, it is important to consider what the phrase "the defense" means. In an earlier version of this Rule (then Rule 16(a)(1)(C)), the phrase "material to preparing the defense" was set out in a slightly, but immaterially, different manner as "material to the preparation of the defendant's defense." *See*, *United States v. Armstrong*, 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed. 2d 687 (1996). In *Armstrong*, the Supreme Court analyzed the

phrase "defendant's defense." The Court wrote the phrase "means the defendant's response to the Government's case-in-chief." *Armstrong*, 517 U.S. at 462. The Court explained this meant material "which refute[s] the Government's arguments that the defendant committed the crime charged." *Armstrong*, 517 U.S. at 462. The Court found that Rule 16(a)(1)(C) was designed as a "shield" enabling challenges to the argument in favor of guilt because "[i]f 'defense' means an argument in response to the prosecution's case-in-chief, there is a perceptible symmetry between documents 'material to the preparation of the defendant's defense' and, in the very next phrase, documents 'intended for use by the government as evidence in chief at the trial.'" *Armstrong*, 517 U.S. at 462.

Here, the United States does not intend to submit evidence from the case in relation to the Oregon incident.[1] Therefore, the requested evidence is not remotely relevant to refuting the government's case-in-chief. The requested information was not obtained from nor did it belong to the Defendant(s). The information is not "material to preparing the defense."

The United States is unable to find an Eighth Circuit case explicitly defining "material" in this context. Other circuits, however, have defined "material" as requiring the defendant to show that the pretrial disclosure of the material would enable the defendant to substantially alter the quantum of proof in his favor. *See,*

[1] The government will, however, seek admission of evidence Leonard Peltier admitted he shot FBI Special Agents Coler and Williams in 1975. This information was not a part of the evidence in the Oregon case. It is only offered as to its bearing regarding the belief that Ms. Aquash could have provided information relative to the shootings.

United States v. Ross, 511 F.2d 757, 762-63 (5th Cir. 1975); *United States v. Marshall*, 532 F.2d 1279, 1285 (9th Cir. 1976); *United States v. Orzechowski*, 547 F.2d 978, 984-85 (7th Cir. 1976); *United States v. Holloway*, 971 F.2d 675, 679-80 (11th Cir. 1992); *United States v. Stevens*, 985 F.2d 1175, 1180 (2nd Cir. 1993); *United States v. Marshall*, 132 F.3d 63, 68 (D.C. Cir. 1998); *see, also, United States v. Schembari*, 484 F.2d 931, 935 (4th Cir. 1973).

Defendant Marshall has failed to demonstrate that the material he is requesting would either enable Defendant to substantially alter the quantum of proof in his favor, or that the material is even remotely relevant to his defense. Defendant claims that Aquash was suspected of being one of the informants who gave information to the federal authorities and was murdered approximately thirty days after the incident in Oregon occurred. Assuming *arguendo* that Defendant is accurate in that regard, that in no way makes the file from the Oregon case discoverable.

Defendant Marshall wishes to engage in a fishing expedition to cause a search through the extensive files that relate to that prosecution. The requested information is not *Brady* material. Defendant is already aware that there could be a motive for the murder of the victim related to the erroneous belief that she was an informant.

The United States would entertain a stipulation with Defendant that Aquash was murdered, in part, based upon the erroneous belief that she was a government informant. The file from Oregon would disclose nothing further

relevant to that issue and contains no material which should be subject to discovery in this case.

Accordingly, the Defendant's motion should be in all respects denied.

Respectfully submitted this 6th day of February, 2009.

/s/ Marty J. Jackley

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 2009, I served by electronic transmission, a true and correct copy of the foregoing Government's Response to Defendant Marshall's Motion to Compel Discovery on:

Dana Hanna
Attorney at Law

John Murphy
Attorney at law

/s/ Marty J. Jackley

Marty J. Jackley