

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,)	CR. 08-50079-01, -02
)	
Plaintiff,)	
)	
vs.)	ORDER ON
)	DEFENDANT MARSHALL'S
)	MOTION TO COMPEL
VINE RICHARD MARSHALL, aka)	DISCOVERY
RICHARD VINE MARSHALL, aka)	
DICK MARSHALL,)	
)	
Defendant.)	

Pending before the court is defendant Richard Marshall's motion seeking an order compelling the government to produce all records, investigative reports, witness statements, court records and transcripts in the government's possession that relate to the case of United States v. Loud Hawk, 75-CR-296-RE (D. Or. 1975). [Docket 160]. The government resists the motion, arguing that the material is not required discovery under either Brady v. Maryland, or under Rule 16.

Under Fed. R. Crim. P. 16 and 18 U.S.C. § 3500, the government is required only to give the defendant copies of the defendant's own statements. As to statements by other witnesses, the government is required to provide copies of those statements only after the witness testifies upon direct examination. See Fed. R. Crim. P. 26.2. Thus, if the government in fact has copies of witness statements from the Loud Hawk file, those statements would

not be subject to compelled discovery at this stage of the litigation.

The Due Process Clause of the Fifth Amendment requires the government to disclose to the accused favorable evidence that is material to guilt or punishment and not otherwise available to the defendant. See United States v. Bagley, 473 U.S. 667, 678 (1985); Brady v. Maryland, 373 U.S. 83, 87 (1963). To prove a violation, the defendant must show that the evidence was both favorable and material, and that the government suppressed the evidence. United States v. Barraza-Cazares, 465 F.3d 327, 333 (8th Cir. 2006). The government has suppressed evidence when it was otherwise unavailable to the defendant, and the prosecution failed to disclose the evidence in time for the defendant to use it. Id. at 334.

The court finds that the defendant's argument as to the compelled discovery of the Loud Hawk file is too attenuated at this point to support a motion to compel. The court notes that some of the information Mr. Marshall seeks is already in his hands, as evidenced by the reference to the affidavit in support of the search warrant discussed in Mr. Marshall's brief. Also, the court has confirmed that the records from the Loud Hawk case are publicly available through the District of Oregon. Thus, there are other avenues through which defendant may obtain the Loud Hawk file materials. Bagley, 473 U.S. 678; Barraza-Cazares, 465 F.3d at 334 (Brady violation is shown when the materials were not otherwise available to defendant through other

sources). Accordingly, the court will require Mr. Marshall to exhaust other avenues for obtaining the Loud Hawk file. If those other avenues prove unsatisfactory, this order is without prejudice to Mr. Marshall's ability to renew his motion to compel at a later date. It is therefor

ORDERED that Mr. Marshall's motion to compel [docket 160] is hereby denied.

Dated March 31, 2009.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE