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. CR 08-50079 MEMORANDUM OF LAW FOR DEFENDANT MARSHALL'S MOTION TO COMPEL DISCLOSURE OF FAVORABLE BRADY AND GIGLIO IMPEACHMENT MATERIAL

The defendant moves for an order compelling the government to gather and disclose all information and evidence relating to (1) any agreements between the government and its key witness Arlo Looking Cloud or expectations of benefit that Looking Cloud may have, (2) any impeachment evidence in Looking Cloud's central inmate file with the Bureau of Prisons, and (3) any investigation or sanction of then- Bureau of Indian Affairs federal investigator Robert Ecoffey for an improper personal relationship with cooperating informant "Maverick" during the investigation in this case. Defendant asks for disclosure to the defendant, or in the alternative, for disclosure to the Court for an in camera inspection by the Court to determine what, if any, information or evidence should be disclosed to the defense.

Brady v. Maryland, 373 US 83 (1963) and United States v. Bagley, 473 US 667 (1985) stand for the proposition that the Due Process Clause imposes a constitutional obligation on the

government to disclose to the accused any information that could be used to impeach the credibility of a government witness. In Brady, the Supreme Court held that suppression, by the prosecution, of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

In this case, which involves a charge of murder, Arlo Looking Cloud is the key government witness against the defendant, Richard Marshall. The government's witness is serving a life sentence. He was serving his sentence in a federal penitentiary until he was removed from Bureau of Prisons custody, by the government, after he agreed to be a witness in this case. Every inmate in Bureau of Prisons custody has a central inmate file that contains information about his medical and mental history, his disciplinary record in prison, his criminal history and associations, special treatment or security he may have received as an informant, etc.

Any evidence or information relating to Arlo Looking Cloud's psychiatric disorders or treatment, his activities as an informant in this or other cases, the reasons why he is not presently in a federal prison, or any other information that can be used to impeach him that is contained in the Bureau of Prison's central inmate file on Looking Cloud, is Brady material and the government has a duty to disclose it to the defendant.

"In order to comply with *Brady*, . . . the individual prosecution has a duty to learn of any favorable evidence known to the others acting on the government's behalf." Strickler v. Greene, 527 US 263, 281 (1999). Here, that duty imposes on the government an obligation to acquire and disclose the witness's central inmate file.

The government has an affirmative duty to inquire and investigate as to whether a

cooperating witness has any expectation of receiving a benefit from his testimony, whether that expectation or hope comes from an express agreement or not, and to disclose any such information to the defendant. Here, the government has claimed that Arlo Looking Cloud has not been made any promises and has not been given any reason to expect a benefit from his cooperation. That claim is incredible: Looking Cloud has already received a benefit by being removed from federal prison. The government should be ordered by the Court to provide full disclosure regarding every benefit their witness has received and has reason to expect that he may receive in the future.

In Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 (1972), the Supreme Court held that non-disclosure of a promise of benefit made to a government witness, even though that promise was not communicated to the Assistant United States Attorney who tried the case, would constitute a violation of due process, requiring a new trial.

In Reutter v. Solem, 888 F.2d 578 (8th Cir. 1989), there was no express promise made by the government to the prosecution's cooperating witness; there was no proof of any actual "deal". However, the cooperating witness had a commutation of sentence petition filed and a hearing was scheduled for the witness after the defendant's trial, and the witness therefore had reason to hope for or expect favorable treatment at that hearing as a result of his cooperation and testimony. His pending petition for commutation of sentence and the future parole board hearing was known to the government's prosecutor, but that information was not disclosed to the defendant Reutter. In Reutter's trial, the government argued that the cooperating witness had no reason to expect anything in return for his testimony. Reutter was convicted. The Court of Appeals for the Eighth Circuit reversed the conviction of the defendant because the government

had not disclosed that its witness had reason to expect or hope for a favorable decision by the parole board, even though he had received no actual promise of a benefit by the government.

If Arlo Looking Cloud has been given any reason to expect, anticipate or hope for any favorable treatment or reward from the government–including, but not limited to, a letter from the government or a recommendation when he becomes eligible for parole or when he moves for a re-sentencing or other relief–then the government has a duty to disclose that information to the defendant, whether express agreements have been entered into or not.

In this case, a male federal investigator entered into an intimate personal relationship with a female cooperating witness during the course of the investigation.

If there has been any investigation or sanction involved in the professionally improper and unethical personal relationship between a federal investigator and the cooperating informant he was charged with supervising, then that is information that goes to discredit both the investigator-witness and the integrity and professionalism of the investigation itself, and all information and records pertaining to any such misconduct is Brady material under Kyles v. Whitley, 514 US 419 (1995).

In Kyles v. Whitley, the Supreme Court overturned a conviction for murder on the basis of the prosecutor's failure to disclose Brady material about statements made by a witness called "Beanie". In Part IV-B of Justice Souter's opinion for the court, he wrote that if the material had been disclosed to the defense, "the defense could have examined the police to good effect on their knowledge of Beanie's statements *and so have attacked the reliability of the investigation* ..." [Emphasis added.]. The Court quoted Bowen v. Maynard, 799 F.2d 593 , 613 (10th Cir.1986): "A common trial tactic of defense lawyers is to discredit the caliber of the

investigation or the decision to charge the defendant, and we may consider such use in assessing a possible Brady violation."

On reliable information which I have received during the course of my investigation into the facts of this case, prosecution witness Robert Ecoffey, former U.S. Marshall and then Director of Law Enforcement Services for the Bureau of Indian Affairs (BIA), while he was charged with investigative and supervisory responsibilities in the investigation into the murder of Anna Mae Aquash, entered into an ongoing personal and intimate relationship with a female cooperating witness in this case–known by the code name "Maverick"–and that their intimate relationship violated rules and policies of the Bureau of Indian Affairs prohibiting such relationships. Such relationships are considered professional misconduct by law enforcement agencies, including the BIA, because they can and do compromise the objectivity of the investigator and the integrity of the investigation. Based on those facts, it is reasonable to inquire whether Ecoffey's demotion in 2004 from Director of Law Enforcement Services for BIA to Deputy Director was a sanction related to misconduct related to this case. If his personnel file and other BIA records, including Internal Affairs records, contain evidence that can be used to impeach both his credibility and the government's investigation in this case, then the government has a duty to disclose it to the defense.

Therefore, the Court should grant the defendant's motion to compel discovery.

DATED: March 31, 2009

Respectfully submitted,

/s/ Dana L. Hanna

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CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Memorandum of Law for Defendant Marshall's Motion to Compel Disclosure of Favorable Brady and Giglio Impeachment Material was electronically served upon the other parties in this case via the electronic mail addresses listed below:

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Dated this 26th day of November, 2008.

/s/ *Dana L. Hanna*

Dana L. Hanna