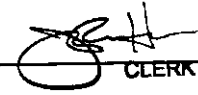


UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

**FILED**

MAY 22 2009

  
CLERK

UNITED STATES OF AMERICA,  
Plaintiff,

Case No. 08-50079

vs.

DEFENDANT MARSHALL'S  
MEMORANDUM OF LAW IN  
SUPPORT OF MOTION TO COMPEL  
DISCLOSURE OF WITNESS

JOHN GRAHAM, a.k.a.  
JOHN BOY PATTON, and  
VINE RICHARD MARSHALL, a.k.a.  
RICHARD VINE MARSHALL, a.k.a.  
DICK MARSHALL,  
Defendants.

The government has disclosed evidence that Arlo Looking Cloud made statements to an un-identified investigator, agent, or attorney that are inconsistent with other testimony he has given and with the testimony that he is likely to give in the trial. The defendant seeks the identity of the person to whom Looking Cloud made those statements, the person who wrote the two pages of handwritten notes that are attached as Exhibit "A". Defendant has made a request of the government to make diligent efforts to discover the identity of that potential defense witness and to disclose the identity of that person to the defendant. The government prosecutor contends that the government has made efforts, which were not specified, to discover the identity of that person, but those efforts were unsuccessful. The defendant contends that the government has not exercised due diligence to discover and disclose the name of this potential witness; and that since there was only a small and finite number of people involved in the investigation who questioned

Looking Cloud, the government should be ordered to make serious efforts to identify and contact those who did question Looking Cloud to determine the identity of the person who heard Looking Cloud make the statements recorded on pages 1905 and 1906 of the discovery and to disclose the identity of that witness to the defendant.

The defendant's right to due process and fundamental fairness imposes a duty on the prosecution to disclose to the defendant any evidence that is favorable to the accused.

Brady v. Maryland, 373 US 83, 83 S.Ct. 1194 (1963).

The Brady duty to disclose favorable evidence to the defendant extends to impeachment evidence as well as exculpatory evidence, and Brady suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not the prosecutor. Youngblood v. Virginia, 547 US 867, 126 S.Ct. 2188 (2006). "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 US 419, at 437, 115 S.Ct. 1555 (1995).


A prosecutor cannot avoid his duty to disclose favorable Brady evidence to the defense by keeping himself in purposeful ignorance by failing to acquire relevant favorable evidence. See: United States v. Smith, 552 F.2d 257, 262 (8<sup>th</sup> Cir. 1977).

Here, there is a police investigator or federal agent or prosecutor who wrote up the notes of the Looking Cloud interview. In all likelihood, without any undue hardship or inconvenience, the government could find that person if it made a diligent, good faith effort to do so. It would be a simple matter for the government to contact each person who was present when Looking Cloud made statements to law enforcement, show them the handwritten notes, and ask who wrote them.

Here, the government has it within its power to use its resources to discover the identity of a witness who can give evidence that is material and favorable to the defendant. Therefore, the government should be ordered to make diligent efforts to use those resources to discover the identity of the witness and to disclose the name of the witness to the defendant.

Dated this 20<sup>th</sup> day of May, 2009.

Respectfully submitted,

By: 

Dana L. Hanna  
PO Box 3080  
816 Sixth Street  
Rapid City, SD 57709  
605-791-1832  
Attorney for Defendant Richard Marshall

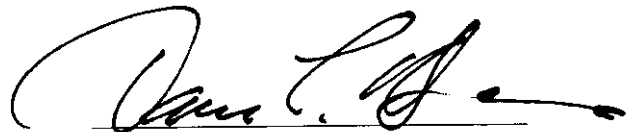
**CERTIFICATE OF SERVICE**

I hereby certify that I have served a true and correct copy of the foregoing Defendant Marshall's Memorandum of Law In Support of Motion to Compel Disclosure of Witness on the other parties in this case by mailing the same, postage prepaid, the attorneys of record at the addresses listed below:

Marty J. Jackley  
United States Attorney  
515 Ninth Street, #201  
Rapid City, SD 57701

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

Dated this 20<sup>th</sup> day of May, 2009.

A handwritten signature in black ink, appearing to read 'Dana L. Hanna', written over a horizontal line.

Dana L. Hanna