

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

UNITED STATES' RESPONSE TO
DEFENDANT MARSHALL'S
MOTION TO COMPEL DISCLOSURE
OF WITNESS

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 Disclosure of Witness and states as follows:

1. The United States provided the Defendant in this case with two pages of discovery materials which he attempts to characterize as an interview of Arlo Looking Cloud. Defendant Marshall seeks to have the United States inform him as to the identity of the individual who wrote these notes. It is the position of the United States that neither the discovery rule (Fed. R. Crim. P. 16) nor *Brady V. Maryland*, 373 US 83 (1963) impose such an obligation upon the United States.

2. At the outset, it should be noted that Defendant assumes that these are notes from an interview. There is nothing within the document that indicates that they are, or for that matter, that they are from any contact with Arlo Looking Cloud. In addition, he claims that they are *Brady* material. While the United States does not necessarily agree with that, any obligation under *Brady* has been complied with by providing him with the materials.

3. What Defendant now seeks to do is to engage the prosecution to conduct an investigation on his behalf. Neither *Brady* nor the discovery rules impose such an obligation upon the prosecution. The United States may be required to provide this document, but it is not required to comment on it, analyze it or investigate it as to any aspect.

4. Even if the discovery sought is deemed to be *Brady* material, a violation has not occurred here because Defendant is in the same position as the prosecutor to access the source. “*Brady* is concerned only with cases in which the government possesses information which the defendant does not. Further, there is no *Brady* violation if the defendant knew or should have known the essential facts permitting him to take advantage of the information in question, or if the information was available to him from another source.” *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007) (quoting *United States v. Mullins*, 22 F.3d 1365, 1371 (1994)).

5. Defendant quotes *United States v. Smith*, 552 F.2d 257, 262 (8th Cir. 1977), for the principle that “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.” Defendant fails to point out that *Smith* goes on to say “It is unreasonable to impose upon a prosecutor the duty of personally searching agency files for favorable evidence.” *Smith*, 552 F.2d at 262. This is analogous to Defendant’s effort to seek having the prosecution conduct an investigation to identify the author of this document.

6. Simply stated, Defendant here seeks to have the United States prepare his case for him. The United States has fulfilled its obligations under both the discovery rule and *Brady*, and is not under an obligation to do more. Accordingly, the United States asks that Defendant’s motion be in all respects denied.

Respectfully submitted this 12th day of June, 2009.

/s/ Robert A. Mandel

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of June, 2009, I served by electronic transmission, a true and correct copy of the foregoing Government's Response to Defendant Marshall's Motion to Compel Disclosure of Witness on:

Dana Hanna
Attorney at Law

John Murphy
Attorney at Law

/s/ Robert A. Mandel

Robert A. Mandel