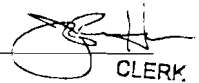


UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED

AUG 19 2009


CLERK

UNITED STATES OF AMERICA,
Plaintiff,

Case No. CR 08-50079

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.

MEMORANDUM OF LAW
IN SUPPORT OF
MOTION TO COMPEL
DISCLOSURE OF IMPEACHMENT
EVIDENCE

The Brady rule encompasses evidence known only to police investigators and not to the prosecutors, and thus the individual prosecutor has a duty to learn of any evidence favorable to the defense that is known to others acting on the government's behalf in the case, including the police. Strickler v. Greene, 527 US 263, 119 S. Ct. 1936 (1999).

Although in general, knowledge of Brady material or evidence in possession of state agencies is not automatically imputed to the federal government, United States v. Kern, 12 F.3d 122, 126 (8th Cir. 1993), where there is a joint investigation between state and federal law enforcement agencies, knowledge and evidence in possession of the state law enforcement agency is imputed to the federal government.

For purposes of determining who is to be considered as part of the prosecution for Brady purposes, the "prosecution" in addition to any members of the United States Attorney's office, also includes police officers, agents and other investigatory personnel who participated in the

investigation and prosecution of the instant case. United States v. Brooks, 966 F.2d 1500, 1503 (DC Cir. 1992); Carey v. Duckworth, 738 F.2d 875, 878-79 (7th Cir. 1984). Whether a state law enforcement agency may be considered a part of a federal prosecution team depends upon the level of involvement between the United States Attorney's office and the state agency which holds the alleged Brady material. See United States v. Upton, 856 F. Supp. 727, 749 (SDNY 1994).

“The inquiry is not whether the United States Attorney's Office physically possesses the discovery material; the inquiry is the extent to which there was there was a “joint investigation” with another agency.” Upton, 856 F. Supp. at 750. United States v. Ramos-Cartagena, 9 F.Supp.2d 88 (DPR 1998). Where the cooperative activity of state officials and United States Attorneys resulted in the indictment that motivates the Brady request, Brady material in possession of state officials is considered to be in the possession of the United States Attorney for purposes of the government's duty to disclose favorable evidence to the defendant. United States v. Shakur, 543 F.Supp. 1059, 1060 (SDNY 19982); United States v. Antone, 603 F.2d 566, 569 (5th Cir. 1979).

Information and material possessed by the Denver Police Department should be considered to be in the possession of the United States Attorney's Office for purposes of the disclosure requirements under Brady, regardless of whether the United States Attorney's Office physically possesses such discovery material. Here, it is an incontestable fact that Denver Police Detective Abe Alonzo was a chief investigator in a joint federal and Denver Police investigation that led to the charges against the defendants in this case. Therefore, the federal government has a duty under Brady to locate, gather and disclose to the accused all favorable evidence, including

impeachment evidence, in the possession of the Denver Police Department. If the law were otherwise, it would allow the federal government to adopt a “don’t ask, don’t tell the defendant” approach to favorable evidence in the possession of cooperating state law enforcement agencies. Here, the government cannot insulate itself from the Brady obligation simply by doing nothing to find out or gather exculpatory evidence that is in the possession of the Denver Police Department.

Consistent with the holding in Strickler v. Greene, 527 US 263, 119 S. Ct. 1936 (1999), the government’s prosecutor should be ordered to make good faith inquiries of the Denver Police Department to identify and gather exculpatory evidence in their files of which the federal prosecutor is not yet aware. In a view of the strong probability that the Denver Police Department is in possession of material evidence that Richard Marshall can use to impeach the testimony of government witnesses and attack the quality of the investigation itself, “a government prosecutor who keeps himself in personal ignorance by deliberately failing to acquire all relevant evidence” (United States v. Smith, 552 F.2d 257, 262 (8th Cir. 1977)) violates the defendant’s constitutional right to disclosure of favorable evidence under Brady. Therefore this court should order the government to request from the Denver Police Department all favorable information and material that may be used to impeach the testimony of any government witness, as well as all information concerning the destruction of evidence by the Denver Police Department in 2001, and to disclose such evidence to the accused, so that Richard Marshall may produce such evidence in a pre-trial hearing to establish a constitutional violation to his right to due process.

Moreover, evidence of the grossly negligent destruction of evidence in this case is itself exculpatory evidence under Brady. Evidence that can be used to show unprofessional police

work and to attack the quality of the investigation is itself exculpatory evidence for purposes of Brady. In Kyles v. Whitley, 514 US 419 (1995), the Supreme Court overturned a conviction for murder on the basis of the prosecutor's failure to disclose Brady material about statements made by an individual who was not a witness in the trial, known as "Beanie". In Justice Souter's opinion for the court, at 446, 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 ", quoting 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." Suppression of Beanie's various statements deprived the defendant of favorable evidence because he could have used those statements "to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well". Kyles v. Whitley, 514 US 419, at 445. The Court noted that it is entirely proper for jurors to consider "the sloppiness of the investigation" in assessing the probative value of the evidence: "indications of conscientious police work will enhance probative force and slovenly work will diminish it." Kyles v. Whitley, at footnote 15.

Certainly no evidence could be more probative of sloppy and unprofessional police investigative work than evidence that police destroyed the evidence gathered over 7 years in a high-profile ongoing joint federal-state murder investigation. Therefore, reports and evidence concerning the destruction and loss of evidence by the Denver police is Brady material and the government has a Brady obligation to disclose all evidence and reports generated by the Denver

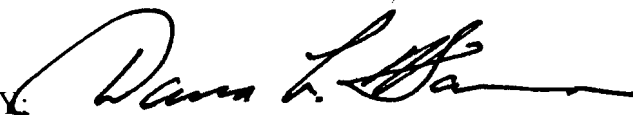
Police Department concerning the destruction of tapes and evidence by Denver Police in 2001.

The court should grant Mr. Marshall's motion to compel the government to disclose exculpatory and impeachment evidence in the possession of the Denver Police Department, including all evidence concerning the destruction of evidence by the Denver Police Department, to the defendant forthwith.

Dated this 19th day of August, 2009.

Respectfully submitted,

VINE RICHARD MARSHALL, Defendant

BY: 

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Memorandum of Law in Support of Motion to Compel Disclosure of Impeachment Evidence on the other parties in this case by mailing the same to attorneys of record at the addresses listed below:

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Dated this 19th day of August, 2009.


Dana L. Hanna