

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR. 08-50079
	*	
Plaintiff,	*	
	*	
	*	MEMORANDUM OF LAW IN
	*	SUPPORT OF DEFENDANT’S
vs.	*	MOTION TO DISMISS INDICTMENT
	*	FOR GOVERNMENT’S FAILURE TO
VINE RICHARD MARSHALL,	*	PRESERVE AND DISCLOSE
	*	FAVORABLE EVIDENCE
Defendant,	*	

The defendant Richard Marshall respectfully submits that he has been denied due process of law by the government’s failure to preserve evidence favorable to the accused by allowing officers of the Denver Police Department, acting as agents of the federal government in a joint local-federal investigation, to destroy evidence that would have been favorable to the defendant, including evidence of statements that could have been used to impeach of the government’s key witness, Fritz Arlo Looking Cloud. The facts upon which this motion is based are set forth in the defendant’s Motion to Dismiss Indictment for Government’s Failure to Preserve and Disclose Favorable Information and in two prior motions seeking relief for the destruction of evidence [Documents 434 and 436].

When the government suppresses or fails to disclose material exculpatory evidence—or, as in this case, when police destroy such evidence—the good faith or bad faith of the prosecution is irrelevant: a due process violation occurs whenever the prosecution fails to provide such evidence to the accused. Brady v. Maryland, 373 US 83,83 S. Ct. 1194 (1963).

The government's duty to disclose favorable evidence includes the duty to disclose impeachment evidence. United States v. Barraza Cazares, 465 F. 3d 327, 333 (8th Cir. 2006), *citing* United States v. Bagley, 473 US 667,676, 105 S. Ct. 3375 (1985).

The duty to disclose favorable material evidence necessarily includes a duty to preserve such evidence so that it can be disclosed. The leading Supreme Court case on the destruction of evidence in criminal cases is Arizona v. Youngblood, 488 US 51, 109 S. Ct. 333 (1988),

In the Youngblood case and in California v. Trombetta, 467 US 479, 104 S. Ct. 2528 (1984), the Supreme Court draws a distinction between the destruction of evidence that is provably favorable to the defendant and evidence that is only potentially useful. The cases hold that if the defendant can show that the evidence that was destroyed was material and favorable, destruction of such evidence constitutes a violation of due process. If the favorable nature of destroyed evidence is merely hypothetical or possible, then the defendant has the burden of showing that the evidence was not destroyed in good faith in order to establish a due process violation.

Here, the defendant Marshall can present evidence in a hearing that in a joint local-federal investigation in which federal authorities supervised the investigation by Denver Police Department investigators, the Denver Police Department destroyed evidence of statements made by the government's key witness, Arlo Looking Cloud, to police and that the statements made by Looking Cloud were inconsistent and directly in conflict with statements he made to the grand

jury that returned an indictment against Richard Marshall; therefore, police destroyed evidence that could have been used to impeach the government's key witness against Mr. Marshall.

The destroyed evidence in this case was not just "potentially" favorable to the accused: it was provably favorable.

The favorable nature of this lost impeachment evidence is obvious. The government's willful failure to investigate the facts of the destruction of evidence in this case and its willful failure to disclose any facts about the destruction of such evidence to the defendant cannot be condoned. The government should not be allowed to evade responsibility for the destruction of this evidence by chalking that the destruction was the work of another, separate, local government. This was a joint investigation, undertaken by Denver Police at the request of, and under the supervision of, federal investigators.

Information and material possessed by the Denver Police Department should be considered to be in the control of the United States Attorney's Office for purposes of the disclosure requirements of Brady, regardless of whether the United States Attorney's office physically possesses such discovery material at the present time. 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, 878-7 (7th Cir. 1984).

Whether a state or local 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 or local agency which holds the alleged Brady material. United States v. Upton, 856 F. Supp. 727, 749 (SONY 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. See also: United States v. Ramos-Cartagena, 9 F.Supp.2d 88 (DPR 1998). Where the cooperative activity of state or local officials and United States Attorneys resulted in the indictment that motivates the Brady request, Brady material in possession of state or local 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 1998); United States v. Antone, 603 F.2d 566, 569 (5th Cir. 1979).

Although in general, knowledge of Brady material or evidence in possession of state agencies is not automatically imputed to the federal government, *see* United States v. Kern, 12 F.3d 122, 126 (8th Cir. 1993), the afore-cited cases stand for the proposition that when 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. Where there is a joint federal-state investigation, the federal government has a duty under Brady to preserve and disclose favorable evidence in the possession of state law enforcement agencies to the defendant.

Here, Denver police officials were acting in a joint federal and local investigation, assisting federal investigators at the request of federal investigators. Therefore, their failure to

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