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

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL, a.k.a. RICHARD VINE MARSHALL, a.k.a. DICK MARSHALL, Defendant.	Case No. CR 08-50079 RESPONSE TO USA MOTION TO QUASH SUBPOENA DUCES TECUM

PROCEDURAL BACKGROUND

In this case, the government relies on two witnesses whose testimony, if believed, would inculpate Richard Marshall in the crime charged in the indictment. One is Fritz Arlo Looking Cloud and the other is a British non-immigrant living in the United States who was and is a Confidential Informant (CI) for the government, as that term is defined by the Department of Justice. [1] Herein, he will be referred to as "CI".

On November 17, 2009, Defendant Marshall filed a motion for the issuance of a subpoena duces tecum directing the government's custodian of records to produce the documents contained

[1] The mandatory Department of Justice policies regarding the use of confidential informants are set forth in "The Attorney General's Guidelines Regarding the Use of Confidential Informants", which are published on-line at www.ignet.gov/pande/standards/prgexhibith.pdf. The Attorney General's Guidelines Regarding the Use of Confidential Informants defines a "Confidential Informant" or "CI" as "any individual who provides useful and credible information to [the FBI] regarding felonious criminal activities, and from whom [the FBI] expects or intends to obtain additional useful and credible information regarding such activities in the future."

in CI's "Alien file" which is kept by the United States Citizenship and Immigration Services (USCIS) [doc. 519]. Defendant served the United States Attorney's Office with a copy of the motion.

In his affirmation in support of the motion, counsel for Marshall set forth the following facts to demonstrate Mr. Marshall's specific need for the documents in the CI's Alien file and the evidentiary relevance of those documents:

> [CI] is a government witness against the defendant Marshall and his credibility will be a key issue of fact for the jury to determine in Mr. Marshall's trial. [CI] is a British citizen living in the United States under a visa or permanent alien "green card." As a direct benefit for his cooperation with the government in this case, the United States Attorney's office in South Dakota intervened on his behalf with immigration authorities, seeking favorable treatment for CI from federal immigration authorities when [CI] was seeking to have his visa renewed. I have read copies of correspondence from [CI] to federal prosecution authorities in which [CI] and his wife acknowledge the prosecutors' assistance and intervention with federal immigration authorities in consideration for his cooperation in the investigation and prosecution of the government's case against the defendants. Records and documents, including writings by [CI] concerning the assistance he has provided to the government as a government informant, will be found in his "A-file". [CI's] immigration records and his A-file will therefore contain Giglio material that the defendant intends to offer as evidence to show the benefits and rewards this witness received from the government in return for his testimony against defendant. Therefore, I have good reason to believe and I do in fact believe, that this individual's

"A-file" contains favorable evidence the defendant can and will use in his trial.

Without opposition from the government, on January 20, 2010, the Court granted the defendant's motion and ordered that a subpoena duces tecum should be issued and served [Doc. 576].

On January 28, 2010, the government's custodian of the records was served with the subpoena duces tecum [Doc. 641]. The subpoena ordered the custodian of records to produce the documents on or before February 2, 2010.

Soon after Mr. Moring was served, at his request, to assist him in locating CI's A-file expeditiously, I provided him with the CI's full name, his home address, his date of birth and his Social Security number, which were provided to me by my private investigator, Ryan Ross of Denver, during the course of a telephone call.

Thereafter, the government, the agency, and Mr. Moring ignored the subpoena (and my numerous phone calls and e-mail messages). The government did not move to quash or modify the subpoena or seek any other judicial relief regarding the subpoena.

On March 10, 2010, Defendant Marshall moved for an order to show cause why Mr. Moring should not be held in contempt of court [doc. 676]. The Court granted the motion and ordered Mr. Moring to show cause by the end of the business day on March 22, 2010.

On March 22, 2010, the government filed a motion to quash the subpoena, along with a declaration by the Director of the United States Citizenship and Immigration Services (USCIS), an agency within the federal Department of Homeland Security. In his declaration, the Director of USCIS asserted a claim that the CI's Alien file is protected from disclosure by a "law enforcement

privilege."

The USCIS Director's "Declaration and Formal Assertion of Privilege in Opposition to Defendant's Subpoena Duces Tecum" revealed information that the government had never previously disclosed to the defendant: that the government had given CI a special and rare visa that is only issued for alien confidential informants and the hope of permanent legal residence status–a "green card"– in exchange for CI's cooperation and testimony. Paragraph 10 of his Declaration states:

> (1) CI entered into an official agreement with the FBI to become a Confidential Human Source [CHS] on November 19, 2002. In his agreement, he agreed to provide testimony and information. The FBI, joined by the Department of Justice Criminal Division, filed an application (i.e. Form I-854, Interagency Alien Witness and Informant Record) on behalf of CI with the federal Immigration and Naturalization Service to obtain an "S-Visa", which gives legal immigration status to foreign government informants who otherwise have no legal right to be in the country. 8 U.S.C. § 1101(a)(15)(S).

Along with the USCIS's Director's Declaration, the government filed a motion to quash or modify the subpoena, claiming that a law enforcement privilege relieves the government from having to disclose any information contained in the CI's Alien file.

The government provided no privilege log or any other specific description of the actual documents in CI's Alien file that it seeks to keep secret from Richard Marshall, the court, and the jury.

The defendant Marshall opposes the government's motion to quash or modify the subpoena duces tecum on the grounds that the government has waived its right to raise a privilege issue; under the facts presented by the government, it is clear that a law enforcement privilege does not apply and cannot immunize the documents in CI's Alien file from disclosure, especially in view of their clear and significant value as evidence to prove the witness's bias and interest, his motive to lie and distort the facts, and to impeach his credibility.

For the reasons set forth herein, the government's motion to quash or modify the subpoena should be denied and the custodian of records should be ordered to produce all documents in CI's alien file to defense counsel, as ordered, forthwith, or be held in contempt.

1.

The government has waived its right to raise a claim of privilege because it has failed to make a timely motion to quash.

Under Rule 17(c)(2) of the Federal Rules of Criminal Procedure, a motion to quash must be "made promptly." The analogous rule in the Rules of Civil Procedure, Rule 45(c)(2)(B), provides guidance as to how long a prompt response is: 14 days.

Failure to make a timely response waives any potential privilege objections. See e.g., Marx v. Kelly, Hart & Hallman, P.C.,925 F.2d 8, 11-12 (1st Cir. 1990); Davis v. Fendler, 650 F.2d 1154, 1161 (9th Cir. 1981).

The party objecting to a subpoena on grounds of privilege should serve a complete response, which necessarily includes a privilege log giving a detailed description of the specific documents

for which privilege is claimed, within a reasonable time. Tuite v. Henry, 98 F.3d 1411, 1416 (D.C.Cir.1996).

The defendant moved for the issuance of this subpoena on November 17, 2009. The government did not oppose the motion or move to quash when the court granted the motion or when Moring was served with the subpoena. Instead, the government waited until March 22, 2010, until the last hour, after an order to show cause has been issued, to move to quash, and when the government moved to quash, it did not even provide a privilege log to support its claim of privilege. By failing to make a timely motion to quash, the government has waived its right to raise this claim of law enforcement privilege.

2.

The limited common law privilege that protects law enforcement agencies' investigatory reports in an ongoing investigation does not apply in this case.

Even if the government had not waived its claim of privilege, the law enforcement privilege does not apply here for a number of reasons, chief among which are the facts that the informant's identity and status as a government informer in this case are already matters of public record and there is no longer any ongoing investigation in which he is involved. Since the reasons for the privilege do not apply, the government's claim of privilege must fail.

The party that claims the privilege bears the burden of proving the information sought is protected by the privilege. Duffy v. Diers, 465 F.2d 416, 418 (8th Cir. 1972).

There is a limited federal common law privilege which protects criminal investigatory files.

It is a judge-fashioned evidentiary privilege which is not absolute. The privilege for the investigatory process is very narrow and should be honored only where the policy behind its invocation outweighs any necessity for the information articulated by the party who seeks it.

Stephans Produce Co., Inc. v. National Labor Relations Board, 515 F.2d 1373, 1376-77 (8th Cir. 1975); Dellwood Farms, Inc. V. Cargill, Inc., 128 F.3d 1122, 1124-25 (7th Cir. 1997).

One of the primary purposes for the privilege is to protect the identity of confidential informants. "The scope of the privilege is limited by its underlying purpose . . . once the identity of the informer has already been disclosed to the person who would have cause to resent the communication, the privilege is no longer applicable." Mitchell v. Barr, 252 F.2d 513, 516 (8th Cir. 1958).

Here, as the government acknowledges, the identity of CI has been known since Arlo Looking Cloud's trial in 2004, when the government provided Looking Cloud with discovery documents detailing CI's activities as a confidential informant gathering evidence in the investigation of Anna Mae Aquash. His identity, the fact that he has worked as an informant in this case, and the fact that he has been paid a significant sum of money (more than $99,000 as of January 2010) are all matters of public record in the court file. Even before Richard Marshall was indicted, court filings by former co-defendant Graham and the government identified CI by name. See: Motion and Memorandum in Support of Defendant Graham's Motion to Compel Discovery, dated August 12, 2008.

Therefore, since there is no secret identity or anonymity to protect, the primary reason for the limited privilege has no application in this case and the claim of privilege must fail.

Moreover, the federal privilege requires a showing that the documents requested are part of

a criminal investigatory file and a showing that disclosure of the record would interfere with enforcement proceedings or an informer's expectation of confidentiality. If disclosure would not interfere with an ongoing investigation, the privilege does not apply. In the case relied upon by the USCIS Director to support the claim of privilege, In Re United States Department of Homeland Security, 459 F.3d 565 (2006), the Court made this explicit: "The law enforcement privilege lapses either at the close of an investigation or at a reasonable time thereafter based on a particularized assessment of the document."

Here, it is not at all clear whether CI's A-file is even part of a criminal investigatory file. The USCIS is not investigating the murder of Anna Mae Aquash; the agency regulates immigration by aliens in the United States and seeks to enforce immigration laws. Documents in CI's Alien file are contained in that file for that purpose. There are documents in the A-file that refer to a criminal investigation and CI's involvement in that investigation and what he has been given by the government, but those documents were provided to seek a 3 year temporary "S-visa", not to aid the USCIS in enforcing immigration laws.

For the government to establish a rightful claim of law enforcement privilege, it must make a *particularized* showing that disclosure would interfere with an ongoing criminal investigation; otherwise , the mere general, conclusory assertion of interference would serve as a universal bar against disclosure. See: In re Department of Investigation of City of New York, 856 F.2d 481 (2d Cir. 1988).

In any case, the investigation is not ongoing; it has resulted in three federal murder indictments. CI's active involvement in the investigation, except for his trial testimony, ended years ago. He is not out in the Indian communities, posing as a sympathizer of Indian causes, secretly

recording conversations and turning them over to the government, and has not done so for at least six years. His usefulness as a confidential informer ended when his identity was exposed in 2004. Therefore, the release of these documents cannot interfere with an ongoing criminal investigation, and therefore the claim of privilege must fail.

Since the government has not made any showing or even a claim that there is any ongoing criminal investigation that would be compromised by disclosure, the claim of privilege must fail.

3.

The Defendant Marshall's need for the evidence contained in CI's A-file and his constitutional right to present that evidence in his defense at trial outweighs any claim of limited law enforcement privilege in this case.

The government argues that the subpoena should be quashed, whether the privilege applies or not, because the Defendant Marshall is merely embarked on a "fishing expedition" for unidentified documents to see what may "turn up". That argument is disproved by Defendant Marshall's original motion for this subpoena duces tecum, in which the affirmations of counsel identified the specific documents he sought–CI's Alien file–and the defendant's evidentiary need and relevance of those documents.

Moreover, based on the Declaration by the USCIS Director, the Defendant knows and the Court knows for a certainty what will be found in CI's A-file: documentary evidence that CI was a deportable unlawful alien whose visa had expired and who had no legal right to be in this country when he was granted a Visa that is only available to alien informants in criminal investigations; that

CI made a deal with the government in 2002 whereby, in return for CI's promise to testify for the government in this case, CI and his wife (also a deportable illegal alien) would be given S-Visas that would protect them from deportation for at least 3 years, work permits that will allow them to work in this country legally, and the legal possibility that the government, after the S-Visas expire, will seek permanent lawful residence status– "green cards"–for CI and his wife if, in the judgment of the government, CI's testimony helps bring about a "successful" prosecution.

Evidence of a prosecution witness's bias, his interest in the outcome of the case, and any possible rewards or punishments that he may believe may flow from his testimony for the government is always relevant and admissible evidence for the defendant in a criminal case. Davis v. Alaska, 415 U.S. 308 (1974). Even more directly relevant to the issue before the Court, since Giglio v. United States, 405 U.S. 150 (1972), it has been settled law that a government prosecutor has a constitutional duty to disclose to the defendant any evidence of an agreement or deal between the government and a prosecution witness whereby the government will give the witness a legal benefit or a promise of immunity from a legal harm in return for that witness's agreement to testify for the government.

Here, the evidentiary relevance and importance of the CI's S-Visa deal with the government is obvious Giglio material, which is not only admissible as evidence, but is evidence that the government had a constitutional duty to disclose to the defendant in this case even without a specific request, let alone a subpoena duces tecum. [2]

[2] The fact that in answer to discovery requests from the defendant, the government had asserted that the government had no more Giglio material to disclose because all Giglio evidence had already been provided, the fact that the government has willfully sought to conceal the existence of this secret S-Visa agreement, and the fact that the government only revealed that there was a *quid pro quo* S-Visa - for - testimony deal until three weeks before trial, when

S-Visas are rarely- granted visas that are given to alien informants who have no other legal right to be in this country in return for their cooperation and testimony in criminal investigations and prosecutions. 8 USC §101(a)(15)(S). By statute, only 200 such visas can be granted in a year. CI has evidently been given an S5-Visa. [3] An S5- visa is for an alien who: (a) is in possession of critical reliable information regarding a criminal organization or enterprise; (b) is willing to or has supplied such information to state or federal law enforcement or courts: and (3) whose presence the United States Attorney General determines is essential to the success of an investigation or prosecution. S-visas are only valid for a maximum of 3 years and they cannot be renewed or changed to any other temporary visa status. At the discretion of the Attorney General, at the expiration of the S-visa, the Attorney General can request USCIS to grant the alien informant permanent legal residency status, if the Attorney General determines that the alien's cooperation contributed to a "successful" criminal prosecution. The spouse and family members of the alien informant can get beneficiary S-visas (called S7-visas) that also allow them to stay in the country for 3 years without fear of deportation, as long as the informant's S5-visa is not revoked or expired. An S-visa holder and beneficiary family members can also get work permits and employment authorizations. 8 C.F.R. §274a.12(c)(21).

The statutes and federal regulations governing S-visas are 8 U.S.C. §101(a)(15)(S); 8 U.S.C.§ 214(k); 8 U.S.C. §245(j); 8 C.F.R. §214.2(t); and 8 U.S.C. §245.11. The statutes and rules all set

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disclosure of the secret agreement was imminent as a result of the defendant's subpoena duces tecum will all be addressed in a motion for sanctions that counsel for Defendant Marshall intends to file within the week.

[3] The other types of S-visas are S6-visas, which are given for informants involved in terrorist investigations and S-7 visas, which are given to the spouses and family members of those informants who are given S-5 visas. Presumably, CI's wife has been given an S7-visa as part of his deal with the government.

forth and describe documents that must be filed and which will be found in CI's alien file, including:

(1) USCIS Form I-854, which the FBI prepared and submitted requesting S5 - visa status for CI, and setting forth the reasons for the application, which may include affidavits or reports that set forth information about his cooperation and what he will be expected to testify;

(2) the FBI's regular reports, which are statutorily mandated, regarding CI and his activities;

(3) any request by the Attorney General or FBI for "green card" status for the CI; if approved, that will appear on Form I-485.

In support of the FBI's application for an S-visa for CI, CI's A-file is likely to contain detailed statements by the FBI agent or agents involved in monitoring and working the CI, and may well include statements or reports by CI himself setting forth the details of his agreement with the government and the testimony and cooperation he has given and is expected to give.

This is obviously impeachment material of great value to the defendant and which is essential to the integrity of the fact finding process in trial.

Moreover, the A-file will contain other evidence that is relevant and favorable. CI made his application for the S-visa in 2002; he claims he had a telephone conversation with Richard Marshall in 2001 in which Marshall made a statement that he understood to be inculpatory. The FBI's application would be likely to contain affidavits or reports setting forth the valuable evidence and testimony he will give as to who participated in the killing of Anna Mae Aquash. If the A-file contains no mention of Richard Marshall, then the omission of any such mention is impeachment by omission evidence, and the entire file is therefore exculpatory by virtue of the very fact that it does not mention Marshall. If it were to mention Marshall, if any such statements contradict his present account of what Marshall said, then that would also be impeachment evidence.

The government seeks to prevent the defendant from having access to this evidence by baseless fearmongering, asserting that revealing information to the Defendant Marshall, such as CI's address, date of birth, and Social Security number, could endanger the safety of CI and his family. As the government knows, or should know, defense counsel already has that information; it is available to the public. CI's address is known and can be obtained by typing CI's name into a White Pages cite on the Internet. Defense counsel sent his investigator to the home of CI to request an interview. Defense counsel has had a subpoena served on CI's wife at that address, which he supplied to the US Marshall. In the course of a two minute telephone conversation with his private investigator, Defendant Marshall's counsel obtained the date of birth and Social Security number of CI and provided that information to Mr. Moring to help him locate CI's Alien file; this information is available on public data websites. Moreover, redaction and court protective orders could be applied for to minimize even a hypothetical possibility of witness safety concerns.

In order to keep the defendant from having access to favorable evidence, thirty-five years after the American Indian Movement ceased to exist as a functioning political movement, the government is seeking to portray the members of that movement as a present day danger to CI. Not only is the organization, to the extent that it was an organization, defunct, but the young firebrands of yesteryear are now grandfathers and grandmothers, many of whom are in their 70s. AIM supporters and leaders who were radical activists 35 years ago are now teachers, retirees, show business personalities, residents of elder care homes, and managers of Subway shops, and many are dead.

The government has presented only speculative and conclusory assertions that the witness might be subjected to retaliation if evidence in his A-file is disclosed to the defendant.

Therefore, the government has submitted no factual basis to support its claim that a speculative and imaginary risk to its witness outweighs the defendant's demonstrated need for the evidence in CI's file.

CONCLUSION

The custodian of the records and the government should be ordered to produce the entire contents of CI's A-file to defense counsel forthwith or be held in contempt.

An in camera inspection is not a better course. With all due respect to the Court, defense counsel is in the best position to be able to identify favorable information that can be used as evidence, due to his knowledge of facts about CI that have been discovered in defense counsel's investigation, and his familiarity with all the discovery materials produced by or referring to CI, as well as CI's published works and statements CI has made in interviews.

Therefore, the Court should rule that no law enforcement privilege applies to prevent CI's A-file from disclosure. The Court should order the custodian of records to provide the subpoenaed materials to defense counsel forthwith. The government's motion should be denied in its entirety.

DATED: 31 MARCH 2010

RICHARD MARSHALL, Defendant

By: */s/ Dana L. Hanna*

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Motion was electronically served upon the other parties in the case via the electronic mail addresses listed below:

Robert Mandel, Assistant United States Attorney
Robert.Mandel@usdoj.gov

Dated this 31st day of March, 2010.

/s/ Dana L. Hanna
Dana L. Hanna