

UNITED STATES DISTRICT COURT
FOR THE 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.

Case No. CR 08-50079

DEFENDANT MARSHALL'S
MEMORANDUM OF LAW
IN SUPPORT OF
MOTION FOR PRODUCTION
OF HANDWRITTEN NOTES

Defendant Richard Marshall moves the Court to order the government to disclose the handwritten notes of all government agents and persons present who during a proffer session interview of Arlo Looking Cloud at the office of the United States Attorney in Denver, Colorado in 1994. Defendant Marshall submits that such notes are likely to contain evidence that will impeach the trial testimony of Arlo Looking Cloud on a critical contested fact.

Arlo Looking Cloud told investigators in 2008 that defendant Richard Marshall gave a gun to Theda Clarke at his home in Allen, South Dakota in December 1975. The defense will offer evidence to show that Looking Cloud's testimony on this point is a self-serving recent fabrication that is directly in conflict with his earlier accounts of the events involving the abduction and murder of Anna Mae Aquash, including that account he gave to federal investigators in 1994.

In the tape-recorded proffer session in 1994, FBI Agent Graf asked Looking Cloud when

he became aware that Patton had a gun, if it was when he pulled it out to shoot Aquash or at some earlier time. Before Looking Cloud's complete answer could be recorded, the tape ended after Looking Cloud had begun to answer the question by saying he thought it was "after..." Judging from the question, the partial answer, and the context of the entire interview, it is more than likely that Looking Cloud answered the question by saying he did not know that Graham or anyone was armed with a gun until after Graham pulled it out to shoot Aquash. Obviously, if that was his answer, the defendant is entitled to disclosure of that evidence as exculpatory impeachment evidence. Brady v. Maryland, 373 US 83 (1963).

Generally, handwritten notes of law enforcement agents notes are not discoverable if the contents of the notes are summarized and written up into a formal investigative report. U.S. v. Leisure, 844 F.2d 1347, (8th Cir. 1988); Hayes v. U.S., 329 F.2d 209 (8th Cir. 1964); U.S. v. Greatwalker, 356 F.3d 908, (8th Cir. 2004).

However, the factual situation here is unique. It is distinguishable from the cases cited by this fact: although the rest of the interview was transcribed, Looking Cloud's full answer was not transcribed or written in any investigative report. (There is also an audio recording of the session, which counsel has heard and listened to. One can hear that the recording was interrupted before Looking Cloud finished his answer, as is reflected in the transcription.) The notes are the only possible written source of this evidence as to Looking Cloud's entire answer.

If they denote Looking Cloud's answer to Agent Graf's question, the handwritten notes are likely to contain impeachment evidence on a critical contested question of fact: if Looking Cloud told investigators in 1994 that he had never seen the gun that killed Anna Mae Aquash before Graham actually pulled it out and shot her, then it directly impeaches the account that he

began giving federal investigators in 2008 that he saw Richard Marshall hand a pistol to Theda Clarke in the presence of John Graham.

Therefore the defendant is entitled to disclosure of such notes pursuant to the Due Process Clause, under Brady v. Maryland and its progeny. In the alternative, the government should be ordered to gather the notes of all who were present, and present them to the court for an in camera inspection to determine whether said notes contain impeachment evidence for the defendant.

Dated this 22nd day of December, 2008.

VINE RICHARD MARSHALL, Defendant

BY: /s/ Dana L. Hanna
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CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Memorandum of Law in Support of Motion for Production of Handwritten Notes was electronically served upon the other parties in this case via the electronic mail addresses listed below:

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Dated this 22nd day of December, 2008.

/s/ Dana L. Hanna
Dana L. Hanna