UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR. 08-50079
Plaintiff,	*	
vs.	*	MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS INDICTMENT FOR GOVERNMENT'S FAILURE TO PRESERVE AND DISCLOSE FAVORABLE EVIDENCE
RICHARD MARSHALL,	*	
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 prior inconsistent statements made by 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, Documents 434 and 436..

When the government suppresses or fails to disclose material exculpatory evidence--{)r, 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

affirmative duty to disclose evidence that is favorable to the accused and material to the question of guilt extends to 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 In California v. Trombetta, 467 US 479, 104 S. Ct. 2528 (1984), police,

draws a distinction between the destruction of evidence that is favorable and material, which would include impeachment evidence, and evidence that is only potentially useful. If the evidence is 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.

Here, the defendant would adduce evidence in a hearing that in a joint local-federal investigation in which federal authorities supervised Denver Police investigators, Denver Police destroyed evidence of statements made by the government's key witness, Arlo Looking Cloud, and that the notes and files that were destroyed recorded statements by Looking Cloud that were inconsistent and directly in conflict with statements he made to the grand jury that returned an indictment against Richard Marshall.

The destroyed evidence therefore is not "potentially" favorable to the accused: it was

provably favorable.

The favorable nature of this 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 chaining 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 supposed 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, 878-79 (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. 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 (OPR 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 (SONY 19982); 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, where local police officials acting in a joint federal and local investigation, under the purported supervision of federal investigators, failed to preserve exculpatory evidence, then for purposes of Brady, the government failed to preserve

exculpatory evidence and the defendant Richard Marshall has been denied federal constitutional due process.

The government failed in its duty to preserve the evidence here by failing to insure the preservation of evidence by the local authorities who were working under the government's overall supervision.

Therefore, the defendant's right to due process requires this court to order the government to investigate the destruction of evidence in this case and to make full disclosure of the facts, and to order a hearing in which the defendant will have the opportunity to prove that the government, through its local agents, the Denver Police Department, destroyed evidence that would have been favorable to the accused.

Dated:

Respectfully submitted,

etc.

As grounds for the motion, Dana L. Hanna, attorney for Richard Marshall, hereby affirms under penalty of law:

1. The indictments in this case arose from a joint local and federal investigation by Denver Police Department and federal investigators. Beginning in 1994, the federal government supervised the Denver Police Department in an investigation into the murder of Anna Mae Pictou Aquash. Detective Abel Alonzo was the lead investigator for the Denver Police. Beginning in 1994, Detective Alonzo investigated this case under the supervision of U.S. Marshall Robert Ecoffey and other federal investigators.

2. In 2003, the Denver Police Department publicly acknowledged that in 2001 they had destroyed files and records containing evidence in the Aquash murder investigation. See: Exhibit A, attached to Motion to Compel Disclosure of Impeachment Evidence [Document 436]: Rocky Mountain News article.

3. The evidence that was destroyed in this case was not destroyed in good faith or in keeping with normal police practice. According to the Denver Police Department, the evidence–which was evidence in a high profile ongoing murder investigation–was destroyed "mistakenly."

4. On the 19th of August, 2009, defendant Marshall filed a motion to compel disclosure of evidence and information regarding the destruction of reports, tapes and other evidence in this case by the Denver Police Department in 2001 [Document 436] and a motion seeking an evidentiary hearing to determine what evidence was actually destroyed [Document 434], along with supporting memoranda of law. The government did not file any response in opposition to either motion, and both motions are presently pending before the Court.

5. All factual affirmations set forth in Documents 434 and 436 are hereby reaffirmed by reference and incorporated herein as though fully set forth.

6. In the aforesaid motions and the supporting memoranda of law, defendant Marshall argued that there was a strong likelihood that notes, records and evidence of statements made by the prosecution's key witness, Looking Cloud, to Detective Alonzo were among the evidence destroyed by Denver Police, and that such evidence was favorable to the defendant because it could have been used to impeach Looking Cloud's trial testimony. As a result of information recently obtained by the defense, the likelihood that evidence, notes and records of statements made by Looking Cloud to Detective Alonzo were destroyed is no longer speculative or merely probable: it is now a provable fact.

7. On the 19th of October, 2009, a potential witness in this case provided me with an excerpt from an article written by Denver journalist Maximilian Potter, who interviewed Arlo Looking Cloud and Detective Abel Alonzo in 2004. Mr. Potter wrote in his article and later confirmed to me in a telephone conversation that Alonzo had told him that among the evidence that had been "mistakenly destroyed" by the Denver Police Department in 2001 were notes that recorded statements made by Looking Cloud to Detective Alonzo and Marshall Ecoffey in

1995, when they took Looking Cloud, in custody, from Denver to the crime scene on the Pine Ridge Sioux Reservation and back again to Denver. During that time, the investigators questioned Looking Cloud about the abduction and killing of Aquash, and they took notes of Looking Cloud's answers to their questions. In 2004, Detective Alonzo admitted to Mr. Potter during their interview that those notes were among the evidence that was "mistakenly destroyed" by Denver Police in 2001.

8. Of the discovery materials that have been disclosed to date, the only surviving record of any statements made by Looking Cloud during the more than 16 hours he spent with Ecoffey and/or Alonzo in 1995 is a very brief and general summary written by Ecoffey. Even from that general summary, it is clear that the statements made by Looking Cloud to Ecoffey and Alonzo in 1995 about the murder of Anna Mae Aquash directly contradict statements Looking Cloud made in 2008 to the grand jury that returned the indictment against Richard Marshall.

9. Looking Cloud's credibility is a critical issue for the jury in this case. The destruction of evidence that could have been used to impeach Looking Cloud's testimony has caused serious prejudice to Richard Marshall's ability to present a defense and his ability to confront his chief accuser. Mr. Marshall reasonably believes that in an evidentiary hearing he can prove that the destruction and loss of evidence in this case has deprived him of material evidence that would have been favorable to his defense.

10. The government has been aware at all times since 2003 that material and potentially exculpatory evidence was destroyed by Denver Police Department in 2001. But the government

has never provided any information as to the destruction of that evidence to Richard Marshall.[1] Since the evidence that was destroyed, including evidence of prior inconsistent statements made by Looking Cloud, as well as the evidence of the government's gross negligence in failing to preserve such evidence, constitutes exculpatory evidence under Brady v. Maryland, 373 US 83(1963), United States v. Bagley, 473 US 667, 676, and (1985) and Kyles v. Whitley, 514 US 419 (1995), the government's failure to disclose that evidence to the accused constitutes willful suppression of exculpatory evidence.

11. The Denver Police's destruction of evidence that would have been favorable to Richard Marshall and the federal government's failure to preserve that evidence has caused substantial prejudice to Richard Marshall's constitutional right to a fair trial, his right to cross examine his chief accuser, and his right to fundamental fairness.

12. The court previously directed the parties to file their pre-trial motions by March 23, 2009, unless good cause excused the filing of a motion after that date. Here, there is good cause: in spite of due diligence by the defense, the facts that give rise to this motion were not discovered by the defense until after March 23, 2009. Although the destruction of evidence in this case by Denver police was known to the government since 2003, the government did not disclose any facts concerning the destruction of such evidence to Richard Marshall. The defendant could not confirm that evidence regarding prior statements made by Arlo Looking Cloud was among the evidence that was destroyed until counsel for the defendant received that information on October 19, 2009.

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[1] Nor did the government provide any information about the destruction of such evidence to codefendant John Graham or to Arlo Looking Cloud, before his trial.

WHEREFORE, the defendant Richard Marshall moves the court to enter an order:

(1) directing the government to provide the defendant with all information and evidence relating to the destruction and loss of evidence in this case by Denver Police Department;

(2) directing the government to respond to this motion and the defendant's prior motions [documents 434 and 436] within ten days or have the defendants' motions granted by default;

(3) scheduling an evidentiary hearing in which the defendant will have an opportunity to prove the material facts affirmed in this motion; and

(4) Granting dismissal of the indictment against Richard Marshall with prejudice.

DATED: October 27, 2009

RICHARD MARSHALL, Defendant

By: /s/ Dana L. Hanna

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