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 EVIDENTIARY HEARING

FACTUAL BACKGROUND

The arrests and prosecutions in this case resulted from a joint investigation by federal authorities and the Denver Police Department, who worked closely together for almost a decade before the investigation resulted in the first indictment in this case. Denver Detective Abe Alonzo and U.S. Marshal Robert Ecoffey began working together in 1994 to actively investigate the abduction and murder of Anna Mae Aquash. Detective Alonzo personally questioned a number of witnesses in the case between 1994 and 2003, recorded the interviews on audio-tapes and had them transcribed. According to statements made by Looking Cloud, at various times between 1994 and 2003, Detective Alonzo contacted him on several occasions and questioned him about the Aquash case. Standard police investigative procedures in a high-profile murder investigation would have required Detective Alonzo to write police reports recording statements made to him by witnesses and suspects, including Looking Cloud.

According to a high-ranking police official who was quoted in a news article in a Denver-based newspaper [Exhibit "A"], in 2003 federal authorities in South Dakota contacted Detective Alonzo and informed him that they had lost the evidence that Alonzo and the Denver police had provided to the federal authorities in South Dakota, and the federal authorities requested copies of the evidence that had been lost. When he tried to locate copies of evidence, including tapes, Detective Alonzo discovered that Denver Police had destroyed the evidence in 2001.

Although federal government agents and prosecutors must have been aware of the destruction of this evidence, the government did not disclose any information about the destruction of evidence and tapes to any of the defendants in this case. Undersigned counsel for Richard Marshall learned of the destruction of evidence by Denver police from non-governmental sources in the course of his own investigation.

Only three documents containing witness statements that were generated by Detective Alonzo have been disclosed to the defense: three transcripts of taped interviews between Alonzo and three individuals–the victim's sister, Theda Clarke's ex-husband, and a former Denver AIM supporter. Evidently, tapes of interviews between Alonzo and other witnesses have been destroyed and lost.

Defendant Marshall moves for an evidentiary hearing so he can have an opportunity to prove that material exculpatory evidence has been destroyed and lost, and that he has suffered prejudice to his constitutional trial rights.

I

THE COURT SHOULD ORDER A HEARING TO ALLOW THE DEFENDANT TO ESTABLISH THAT DENVER POLICE DESTROYED MATERIAL EXCULPATORY EVIDENCE AND THAT THE LOSS OF FAVORABLE EVIDENCE HAS PREJUDICED HIS TRIAL RIGHTS.

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 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), a case involving the prosecution's failure to preserve semen samples from the victim's body and clothing in a sexual assault case. In that case, the Supreme Court held that there was no violation of due process where the State failed to preserve evidentiary material that was only potentially useful to the defendant, since there was no showing that the destroyed evidence was actually favorable to the defendant. The favorable nature of such evidence was merely speculative. It was "potentially useful", as opposed to demonstrably favorable. The court ruled that there is no due process violation of potentially useful, but not necessarily favorable, evidence as long as the State

destroyed the evidence in good faith. The court stated, "the Due Process Clause of the Fourteenth Amendment, as interpreted in Brady, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think that the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than it could have been subjected to tests, the results of which could have exonerated the defendant."

In California v. Trombetta, 467 US 479, 104 S. Ct. 2528 (1984), police officers who did not preserve breath samples used in a blood alcohol test were acting "in good faith and in accord with their normal practice." Again, in California v. Trombetta the case dealt with evidence that was only potentially useful since there was no way of knowing whether the destroyed samples would be helpful to the defendant or not.

This line of cases 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, Mr. Marshall submits that in an evidentiary hearing he would establish that valuable exculpatory evidence, including impeachment evidence, was destroyed. It is evident that tape-recordings of interviews between Alonzo and individuals who had knowledge of material facts have been lost, because tape-recordings of the three transcribed interviews done by Alonzo have not been provided to the defense. Statements made by Arlo Looking Cloud to Alonzo

would be crucial impeachment evidence because Looking Cloud has made consistently contradictory statements and false exculpatory statements about the Aquash murder since 1994.

Since the government has suppressed disclosure of any information about the destruction of such evidence, in spite of the obvious value of such information to the defense, and since the fact that evidence has been destroyed by police involved in a joint federal-state investigation cannot be denied, this court should order an evidentiary hearing to allow the court to determine the material facts and to rule on whether a constitutional violation has occurred.

II

THE DESTRUCTION OF FAVORABLE EVIDENCE BY DENVER POLICE SHOULD BE ATTRIBUTED TO THE GOVERNMENT FOR PURPOSES OF BRADY OBLIGATIONS BECAUSE THE DENVER POLICE WERE WORKING WITH FEDERAL AUTHORITIES IN A JOINT FEDERAL-STATE INVESTIGATION.

If material exculpatory evidence was destroyed by the Denver Police Department, then for purposes of Brady, the destruction and suppression of that evidence is attributable to the government, because the Denver Police Department was engaged in a joint cooperative investigation with the federal government that led to the indictments in this case.

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 (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. See also: 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).

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. If state officials acting in a joint federal and state investigation fail to preserve exculpatory evidence, then for purposes of Brady, the government has failed to preserve

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

Here, the defendant should be granted an evidentiary hearing to establish that the evidence destroyed was in fact evidence that could have been used to impeach government witnesses, particularly Arlo Looking Cloud. The Denver Police have inventory records as to what was destroyed. According to their public statements, they have actually made efforts to determine what was destroyed. Some kind of investigation was done to determine what evidence was destroyed and that investigation undoubtedly produced records and documents. A pre-trial evidentiary hearing is necessary so the court can determine, to the extent that it can, whether or not the destroyed evidence included merely potentially useful evidence or evidence that was material favorable evidence to the defendant. Under Arizona v. Younblood if the evidence was not material exculpatory evidence but was merely "potentially useful", the defendant has the burden of showing bad faith on the part of the police in order to establish a due process violation. Here, by reason of the public admissions of the Denver Police Department, the defendant has shown a good faith basis for his belief that he can show gross negligence on the part of the police that is constitutionally equivalent to bad faith. If the evidence in a hearing shows that Denver police destroyed and lost material and favorable evidence, whether or not it was destroyed in good faith, or if the evidence was merely possibly useful, and it was destroyed in bad faith, then this court would have to determine the appropriate sanction and remedy for the constitutional violation.

Moreover, Defendant Marshall has previously filed a motion to dismiss on the grounds of pre-indictment delay. The court denied that motion on the grounds that the defendant had failed to establish actual prejudice to his ability to defend against the charge by the passage of time

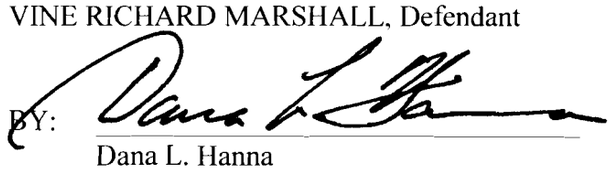
before indictment. [Doc. 96.] The destruction of favorable evidence is actual prejudice to the defendant's ability to defend against the charge.

In the interests of justice, the defendant should be given an opportunity to adduce evidence of actual prejudice to his ability to present a defense and cross-examine his accusers caused by the destruction of evidence.

Dated this 19th day of August, 2009.

Respectfully submitted,

VINE RICHARD MARSHALL, Defendant

BY: 

Dana L. Hanna
Attorney for Defendant Marshall
PO Box 3080
Rapid City, SD 57709
(605) 791-1832
dhanna@midconetwork.com

CERTIFICATE OF SERVICE

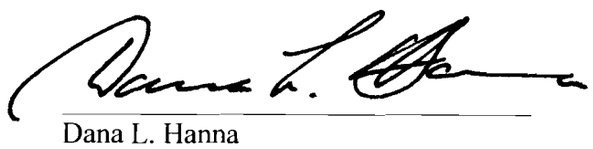
I hereby certify that I have served a true and correct copy of the foregoing Memorandum of Law in Support of Motion for Evidentiary Hearing on Destruction on the other parties in this case by mailing the same to attorneys of record at the addresses listed below:

Marty J. Jackley
United States Attorney
PO Box 2638
Sioux Falls, SD 57101

Robert Mandel
Assistant United States Attorney
515 Ninth Street, #201
Rapid City, SD 57701

John Murphy
Murphy Law Office
328 E. New York St., #1
Rapid City, SD 57701

Dated this 19th day of August, 2009.



Dana L. Hanna