

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
MOTION FOR IN-CAMERA
INSPECTION AND DISCLOSURE
OF PRE-SENTENCE
INVESTIGATION REPORT

NOW COMES Defendant Richard Marshall, by and through his attorney Dana L. Hanna, and hereby moves the Court to order the disclosure of government witness Arlo Looking Cloud's Pre-Sentence Investigation Report to counsel for Defendant Marshall. The Defendant submits that he is entitled to disclosure of Looking Cloud's Pre-Sentence Investigation, pursuant to his right to fundamental fairness and due process of law, because the report contains evidence that will impeach the credibility of the government's key witness. The Defendant moves for an in-camera inspection of the Pre-Sentence Investigation Report by the Court to determine whether the contents of the report constitute evidence that Defendant Richard Marshall can use to impeach the credibility of his accuser, Arlo Looking Cloud, in trial.

In support of this motion, Dana L. Hanna, attorney for Defendant Richard Marshall, hereby affirms:

1. In this case, the government accuses Richard Marshall of having aided and abetted

Arlo Looking Cloud and Co-Defendant John Graham in the murder of Anna Mae Aquash on or about December 12, 1975. On information and belief, the source of which is the discovery provided to me by the government, the government's evidence against Richard Marshall is based almost entirely on the testimony of cooperating government witness and convicted murderer Arlo Looking Cloud.

2. In 2004, Arlo Looking Cloud was convicted of first degree murder in the killing of Anna Mae Aquash. Looking Cloud was sentenced before this Court to life imprisonment for his crime. In 2008, four years into his life sentence, Arlo Looking Cloud agreed to become a cooperating witness for the government in this case. In his interviews with government investigators, Looking Cloud made an accusation that he had never made before in all his previous statements to investigators: he accused Richard Marshall of having given a gun to Theda Clark, Looking Cloud's unindicted co-conspirator in this case. Thereafter, the government sought and obtained an indictment against Richard Marshall, in August 2008.

3. I have reviewed some 5,000 pages of discovery material, including Grand Jury testimony, trial testimony in Looking Cloud's trial, FBI investigative reports, and transcripts of interviews with witnesses. Based upon my review of the discovery that has been provided to Defendant Marshall, I can state categorically that the credibility of Arlo Looking Cloud and his credibility will be the fundamental issue for the jury to decide in the case against Richard Marshall. Therefore, any evidence that can be used to impeach and discredit Looking Cloud's honesty or reliability as a witness is exculpatory and favorable evidence for Richard Marshall, and he is entitled to its disclosure pursuant to his constitutional guarantee of fundamental fairness under the Due Process Clause. *Brady v. Maryland*, 373 US 83 (1963).

4. On information and belief, based on standard procedure and practice, prior to his sentencing, Looking Cloud met with United States Probation Officer Holloway and made statements to the Probation Officer concerning his prior criminal history, his decades-long history of drug and alcohol abuse, and his treatment and hospitalization for mental disorders. In addition, he may have spoken about his involvement in the kidnapping and murder of Anna Mae Aquash.

5. I have good reason to believe, and I do in fact believe, that the Pre-Sentence Investigation Report that was prepared by the United State Probation Office and provided to the Court at the time of Looking Cloud's sentencing contains valuable and important information and evidence that Defendant Marshall can use to impeach the credibility of his accuser, Arlo Looking Cloud.

6. Arlo Looking Cloud was sentenced on April 23, 2004 by the Honorable Lawrence Piersol, United States District Court Judge. At his sentencing, Looking Cloud was represented by attorney Terry Gilbert of Cleveland, Ohio. The government was represented by Assistant United States Attorney Robert Mandel. The transcript of the sentencing is to be at document #151 in Looking Cloud's Court file.

7. At the sentencing (beginning on page 15, line 2), Mr. Gilbert informed the Court that he had serious concerns about Arlo Looking Cloud's mental condition. He stated that the Pre-Sentence Investigation Report makes reference to "some serious problems that go back all the way for a number of decades. In addition to the history of drug abuse, which I will go into in a moment, there is evidence of thought process, that the seizure disorders, and post-traumatic stress, and references to—this is in paragraph 51—and references to treatment at various hospitals

that none of these records had been obtained.” Mr. Gilbert then made reference to the fact that previous counsel had requested a mental health evaluation for Looking Cloud in an ex parte affidavit in which he too had evidently questioned Looking Cloud’s mental health condition. Attorney Gilbert then went on to inform the Court that he personally did attest that in his communications with Looking Cloud, he observed “problems here that affect his judgement, that affect his memory, that affect his perception.” He expressed his opinion that Looking Cloud was “clearly mentally deficient.” He went on to inform the Court that Looking Cloud had informed him that he had been abusing drugs “since he was a boy”; that he had injected hallucinogenic drugs, including LSD, peyote, and mescaline for ten years through the 1970s; that he had injected methamphetamine intravenously; that he shot heroin intravenously; that he took pills; that he smoked crack; that he smoked marijuana; that he abused alcohol; and he was in and out of jail for substance abuse related criminal activity. Mr. Gilbert requested a mental examination of his client prior to sentencing, which was denied.

8. Having reviewed Pre-Sentence Investigation Reports in other cases, I am familiar with the general format of those reports and the practice and procedure of the U.S. Probation Office in preparing Pre-Sentence Investigation Reports. The Pre-Sentence Investigation Reports contain histories of the Defendant’s criminal activity, his convictions, his account of the crime, and his drug and alcohol history.

9. Although the government has provided me with an FBI sheet showing dozens of arrests and criminal cases of Arlo Looking Cloud, the records that have been provided to me do not clearly indicate to me the disposition, the convictions, or the sentences. Looking Cloud’s convictions are potentially valuable impeachment evidence under Rule 609 of the Federal Rules

of Evidence and they are contained within the Pre-Sentence Investigation Report.

10. The Pre-Sentence Investigation Report contains a history of Looking Cloud's hospitalization for drug abuse and mental disorders. Such evidence can be used to impeach him and it can lead to other investigative resources, e.g. hospital records.

11. For these reasons, it is my professional judgment that the disclosure of the Pre-Sentence Investigation Report of Arlo Looking Cloud is necessary for me to prepare an effective defense and provide effective counsel to Richard Marshall, and the impeachment evidence in the Pre-Sentence Investigation Report is particularly necessary for me to effectively cross-examine Richard Marshall's main accuser. The Pre-Sentence Investigation Report not only contains evidence that can be used to attack Looking Cloud's credibility, and his ability to remember, perceive, and testify accurately and truthfully; it also contains information that I can use to further my investigation and which will lead to other evidence that I can use to attack the credibility of the government's witness at trial.

WHEREFORE Defendant Richard Marshall moves the Court to conduct an in-camera review of the Pre-Sentence Report to determine whether it should be provided to the Defendant as *Brady* material, and to order the disclosure of the Pre-Sentence Investigation Report of Arlo Looking Cloud to counsel for Richard Marshall.

Dated this 20th day of November, 2008.

VINE RICHARD MARSHALL, Defendant

(Signature Block on Next Page)

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 Motion for In-Camera Inspection and Disclosure of Pre-Sentence Investigation Report was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Marty Jackley, United States Attorney
kim.nelson@usdoj.gov

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

John Murphy, Attorney for Defendant Graham
jmurphysd@hotmail.com

Dated this 20th day of November, 2008.

/s/ Dana L. Hanna
Dana L. Hanna