

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

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UNITED STATES OF AMERICA,

CR 08-50079

Plaintiff,

v.

**UNITED STATES' RESPONSE TO  
DEFENDANTS' MOTION FOR  
DISCOVERY OF PRESENTENCE  
REPORT OF FRITZ ARLO  
LOOKING CLOUD**

JOHN J. GRAHAM aka  
John Boy Patton, and  
VINE RICHARD MARSHALL a/k/a  
Richard Vine Marshall a/k/a  
Dick Marshall,

Defendants.

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COMES NOW the United States, by and through United States Attorney Marty J. Jackley, and Assistant United States Attorney Robert A. Mandel, and respectfully files this response to defendants' motion for discovery of presentence report of Fritz Arlo Looking Cloud and states as follows:

Defendants Graham and Marshall both seek production of Fritz Arlo Looking Cloud's presentence report (PSR) for *in camera* review by the court and ultimately seek access of the PSR as Brady v. Maryland, 373 US 83 (1963), material in this case. The United States has no objection to the court conducting an *in camera* review of this document, but does resist providing this document to

the defendants, primarily on the grounds of the confidentiality of PSRs and the fact that it reveals no Brady material which the defendants are unaware, and Brady therefore does not require that it be provided.

1. Defendant Marshall makes numerous claims in seeking the PSR. He makes it clear that he is aware of issues regarding the mental condition of Looking Cloud, as well as his awareness of drug use by him. He further points out that he has previously been made aware of Looking Cloud's criminal history. He feels that the PSR would provide more information regarding all of these matters.

2. Defendant Graham seeks portions of the PSR which relate to mental health history, chemical dependency history or anything relating to the ability to perceive or recall events.

3. In Brady v. Maryland, 373 US 83 (1963), the prosecution is charged with the responsibility of making the defense aware of exculpatory evidence of which they are unaware. In the case of Brady, the evidence was a confession. In the instant case, no material is present in the PSR which the defendants are not aware of which can be used for impeachment purposes. The PSR is not a piece of evidence such as a confession. The question to resolve would be different if the PSR contained Brady material that the defense was unaware of, but that is not the case here. The defendants are aware of this impeachment material, and the PSR will not provide any further material information.

4. One of the things that enters into the balancing test as to whether the PSR should be disclosed is the fact that the PSR is, by its nature, a confidential document which is only disclosed to the court, the subject of the report, and the prosecution. This is due to a number of reasons, one of which is to encourage the disclosure of information in an accurate and honest manner by the defendant. As a matter of policy, the court should be highly protective of the secrecy of these reports.

5. The rule of Brady is also a very important concept on the other side of this balancing test. In this case, however, it is the position of the United States that the requirements have been complied with in that the defendants are already aware of all the potential areas of impeachment that would be disclosed by providing them with this report. Provision of the PSR would therefore be inappropriate under the facts of this case.

Accordingly, the United States asks that defendants' motions for disclosure of Fritz Arlo Looking Cloud's PSR be denied.

Respectfully submitted this 2<sup>nd</sup> day of December, 2008.

/s/ Robert A. Mandel

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### **CERTIFICATE OF SERVICE**

I hereby certify that on the 2<sup>nd</sup> day of December, 2008, I served by electronic transmission, a true and correct copy of the foregoing on:

John R. Murphy  
Attorney at Law

Dana Hanna  
Attorney at Law

/s/ Robert A. Mandel

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Robert A. Mandel