UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN J. GRAHAM, aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL, Defendants.	)	CR. 08-50079 ORDER ON DEFENDANTS' MOTIONS TO COMPEL DISCLOSURE OF ARLO LOOKING CLOUD'S PRESENTENCE REPORT

INTRODUCTION

This matter is before the court pursuant to a superceding indictment charging the defendants, John Graham and Richard Marshall, with first degree murder, in violation of 18 U.S.C. §§ 2, 1111, 1152, and 1153. Both Mr. Graham and Mr. Marshall have filed motions seeking an order from the court compelling the government to provide to defense counsel portions of the presentence report ("PSR") of codefendant Arlo Looking Cloud. Mr. Graham seeks those portions of the Looking Cloud PSR in which Mr. Looking Cloud's mental health history, chemical dependency history, or any other fact or circumstance bearing on Looking Cloud's ability to perceive or recall events is

discussed. [Docket 78]. Mr. Marshall seeks any part of the PSR that Mr. Marshall may use to impeach Looking Cloud's credibility. [Docket 73].

The government is not adverse to providing the Looking Cloud PSR to the court for *in camera* inspection, but resists production of any part of the PSR to defense counsel. Although the government recognizes that it could be required to produce any Brady[1] material contained in the Looking Cloud PSR, it asserts that there is no Brady material in that document.

The government has responded that it will agree to provide Mr. Looking Cloud's PSR to the court for *in camera* review, with the express reservation that only exculpatory material from that report be divulged to Mr. Graham. The district court, the Honorable Lawrence Piersol, referred Mr. Graham's motion to this court for determination pursuant to 28 U.S.C. § 636(b)(1)(A), and Chief Judge Karen Schreier's standing order dated June 11, 2007.

FACTS

The facts, insofar as they are relevant to the pending motion, are as follows. In 2003, Arlo Looking Cloud and John Graham were indicted as codefendants in the 1975 death of Annie Mae Pictou/Aquash. The superseding indictment charged both men with first degree murder and aiding and abetting first degree murder.

[1]Brady v. Maryland, 373 U.S. 83 (1963).

Mr. Looking Cloud was apprehended in 2003. He pleaded not guilty and was tried before a jury in February 2004. Mr. Looking Cloud did not testify at his trial, although several witnesses testified to out of court statements made by Mr. Looking Cloud about the murder. The jury convicted Mr. Looking Cloud of first degree murder or aiding and abetting first degree murder on February 6, 2004.

Mr. Graham made his initial appearance on the Looking Cloud-Graham indictment in December 2007. Thereafter, Mr. Graham made a motion for discovery of the Looking Cloud PSR. This court reviewed that document *in camera* and determined that certain portions of the PSR may be discoverable if Looking Cloud testified at trial, but not discoverable if Looking Cloud did not testify. Since it was not apparent at the time the motion was made whether Looking Cloud would be called as a witness, the court denied Mr. Graham's motion without prejudice to his ability to renew the motion if and when it was determined that Looking Cloud would be a witness at the trial.

On August 20, 2008, Richard Marshall was separately indicted for the death of Ms. Aquash under the above-numbered caption. Mr. Marshall was also charged with first degree murder and aiding and abetting first degree murder.

The 2003 indictment against Mr. Graham was then dismissed by the court due to an infirmity in the indictment. Thereafter, a superseding

indictment was filed in this case number, charging Mr. Graham and Mr. Marshall jointly with first degree murder and aiding and abetting first degree murder. Mr. Graham and Mr. Marshall are scheduled to be tried on the charges against them on February 24, 2009. Arlo Looking Cloud is expected to testify at that trial on behalf of the government.

DISCUSSION

Federal Rule of Criminal Procedure 32 addresses disclosure of the PSR, but does not itself authorize or prohibit disclosure. Instead, Rule 32(e) provides that the probation officer who prepares a PSR must give the report to the defendant who is the subject of the report. See Fed. R. Crim. P. 32(e)(2). As to third parties, the rule simply states that the district court may, through local rule or order, "direct the probation officer not to disclose to anyone other than the court the [probation] officer's recommendation on the sentence." See Fed. R. Crim. P. 32(e)(3). The District of South Dakota recently adopted local rules of criminal procedure. See D.S.D. LR 1.1 -58.1. Under our local rules, PSRs may not be disclosed by the United States Probation Office except by permission of a federal judge of the district where the records are maintained. See D.S.D. LR 32.1(B)(1). These rules do not answer the question of *when* a judge might order such records to be disclosed.

The United States Supreme Court, ruling on the discoverability of a PSR under the Freedom of Information Act, stated that "the courts have been very reluctant to give *third parties* access to the presentence investigation report

prepared for some other individual . . . [in part due to] fear that disclosure of the reports will have a chilling effect on the willingness of various individuals to contribute information that will be incorporated into the report" and in part "to protect the confidentiality of the information contained in the report." United States v. Julian, 486 U.S. 1, 12 (1988) (emphasis in original) (citing United States v. McKnight, 771 F.2d 388, 390 (8th Cir. 1985); United States v. Anderson, 724 F.2d 596, 598 (7th Cir. 1984); United States v. Charmer Industries, Inc., 711 F.2d 1164, 1173-1174 (2d Cir. 1983); United States v. Martinello, 556 F.2d 1215, 1216 (5th Cir. 1977); Hancock Brothers, Inc. v. Jones, 293 F. Supp. 1229 (ND Cal. 1968)). For this reason, the Court noted, courts have "typically required some showing of special need before they will allow a third party to obtain a copy of a presentence report." Julian, 486 U.S. at 12.

In United States v. DeVore, 839 F.2d 1330, 1332-1333 (8th Cir. 1988), the defendant moved to discover a co-defendant's PSR who had pleaded guilty just prior to trial. The district court reviewed the codefendant's PSR *in camera* and ruled that DeVore could discover that portion of the PSR in which the codefendant described the robbery with which DeVore and he were charged. Id. On appeal, DeVore argued that it was error for the district court to have failed to state on the record that the undisclosed portions of the codefendant's PSR

contained no impeachment material. Id. The Eighth Circuit rejected this argument and affirmed the district court's handling of the matter. Id.

In United States v. McKnight, 771 F.2d 388, 390 (8th Cir. 1985), the Eighth Circuit held generally that "presentence reports are not public and should not be disclosed to third persons absent a demonstration that disclosure is required to meet the ends of justice." In that case, the defendants had given statements of their net worth to the probation officer who then, in turn, included that information in the PSR. Id. at 389. During the sentencing hearing, the district court read that portion of the PSR into the record during open court. Id.

The defendants objected on the basis that they had revealed their net worth to the probation officer in confidence and they asked that the district court's statement be stricken from the record. Id. The defendants' objection was overruled. Id. In order to effectuate a condition of sentence requiring the defendants to make payments to minority shareholders of a bank, the district court directed that a transcript of the sentencing hearing be prepared and given to the minority shareholders. Id. at 390. Defendants objected to this and the district court overruled their objection. Id.

In ruling on the appeal, the Eighth Circuit noted that the entire PSR had not been disclosed to third parties; rather, certain *facts* contained in the report were disclosed. Id. The Eighth Circuit held that it was appropriate for the court

to discuss these facts in open court before relying on the facts for the purpose of imposing sentence. Id. at 391. Hence, the court held that the district court had not abused its discretion in making these facts public at the sentencing hearing. Id. at 391-392.

In United States v. McGee, 408 F.3d 966, 974 (7th Cir. 2005), the court held that the Jenks Act, 18 U.S.C. § 3500, did not require routine disclosure of PSRs to third parties following the testimony of a witness who was the subject of a PSR. However, the court pointed out that, to the extent that "a defendant suspects that a presentence report contains Brady[2] material, he may request that the district court conduct an *in camera* review of the report to determine if his suspicions are warranted." Id. (citing United States v. Anderson, 724 F.2d 596, 598 (7th Cir. 1984)). Dissemination of those portions of a PSR containing Brady material, without disclosure of the entire report, is sufficient to protect a defendant's rights. Id.

In United States v. Figurski, 545 F.2d 389, 391 (4th Cir. 1976), the Fourth Circuit addressed the issue of disclosure of a PSR to a third party. The court initially noted that PSRs are generally confidential, and that this confidentiality should not be lifted unless it is required in order to meet the ends of justice. Id. However, the court noted that a witness's credibility in a criminal trial is an important issue, especially where that witness is a partner in crime with the

[2]Brady v. Maryland, 373 U.S. 83 (1963).

defendant. Id. Under such circumstances, the witness will often shade the truth "to curry favorable treatment" instead of being premised on an overriding concern for the truth. Id. The Figurski court concluded that material in a PSR that is exculpatory to the defendant must be disclosed. Id. Where the material in a PSR is relevant to impeachment only, however, "disclosure is required only when there is a reasonable likelihood of affecting the trier of fact." Id. at 591-592. The suggested procedure for distinguishing between exculpatory material and impeachment material, and what information should be disclosed, was for the district court to examine the PSR *in camera* and disclose only those portions of the report that meet either test set forth by the court. Id. See also Anderson, 724 F.2d at 598.

The Second Circuit requires that a party seeking disclosure of a PSR first make "a threshold showing of a good faith belief that a co-defendant's PSR contains exculpatory evidence not available elsewhere." United States v. Molina, 356 F.3d 269, 274 (2d Cir. 2004).

Give the above authorities, the government's concession is well-placed that the defendants are entitled to Brady material–that is, exculpatory material–contained in the Looking Cloud PSR. However, the government fails to acknowledge the rule that impeachment evidence falls under Brady when the reliability of a given witness may be determinative of a defendant's guilt or innocence. Giglio v. United States, 405 U.S. 150, 154 (1972).

Here, Mr. Looking Cloud may very well be a pivotal witness in the government's case. The court concludes that Looking Cloud's reliability as a witness may indeed be determinative of the guilt or innocence of Mr. Graham and Mr. Marshall. Therefore, the court concludes that Mr. Graham and Mr. Marshall are entitled to portions of the Looking Cloud PSR that are relative to impeachment of Mr. Looking Cloud. Giglio, 405 U.S. at 154; Figurski, 545 F.2d at 591-592. Having already reviewed the Looking Cloud PSR in the context of Mr. Graham's earlier motion in his 2003 case, the court will forego the step of examining that document again *in camera*.[3]

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the government shall provide to defense counsel those portions of Mr. Looking Cloud's presentence report that constitute impeachment material. This shall include, but is not limited to, those portions of the PSR that describe Mr. Looking Cloud's criminal history, mental health history, substance abuse history, and any other fact that bears on Mr. Looking Cloud's ability to

[3]The court's earlier review of the PSR revealed that Mr. Looking Cloud declined to make any statement about the facts of the offense during his PSR interview with the United States Probation Office. The description of the offense conduct in the PSR came from the trial transcript, which is already available to defense counsel. Accordingly, the court does not address the discoverability of any portion of the PSR in which Looking Cloud described his or his co-defendants' role in the offense, because there is no such description from Looking Cloud in the PSR.

perceive and/or recall events. In order to limit the disclosure of Mr. Looking Cloud's PSR, it is further

ORDERED that counsel for Mr. Graham and Mr. Marshall shall not disclose the contents of any portion of the Looking Cloud PSR to any other person, shall not make any copies or duplicates of the documents provided to them pursuant to this order, shall not use the documents for cross-examination at trial of any witness except Mr. Looking Cloud, and shall immediately return to the government any documents provided to them pursuant to this order upon the conclusion of Mr. Looking Cloud's testimony at trial.

NOTICE OF RIGHT TO APPEAL

Pursuant to 28 U.S.C. § 636(b)(1)(A), any party may seek reconsideration of this order before the district court upon a showing that the order is clearly erroneous or contrary to law. The parties have ten (10) days after service of this order to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. See Fed. R. Crim. P. 58(g)(2). Failure to file timely objections will result in the waiver of the right to appeal questions of fact. Objections must be timely and specific in order to require review by the district court.

Dated December 3, 2008.

BY THE COURT:

/s/ Veronica L. Duffy

VERONICA L. DUFFY
UNITED STATES MAGISTRATE JUDGE