

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,)	CRIM. NO. 08-50079-01
Plaintiff,)	
)	
vs.)	DEFENDANT’S REPLY TO
)	GOVERNMENT’S MEMORANDUM
JOHN GRAHAM, a/k/a)	OPPOSING MOTION TO DISMISS
JOHN BOY PATTON and)	
VINE RICHARD MARSHALL, a/k/a))	
RICHARD VINE MARSHALL, a/k/a))	
DICK MARSHALL,)	
Defendants.)	

Defendant Graham moved to dismiss Count 3 of the superceding indictment because the court lacks jurisdiction over the charge and because the charge fails to state an offense. The government has responded in opposition. The government’s response, however, fails to cite any authority for the proposition that count 3 states an offense.

Both of these issues were previously litigated in United States v. Graham, File No. CR 03-50020-02. The court previously ruled that the government failed to properly charge a violation of 18 U.S.C. 1153 by failing to allege that Graham was an Indian.

In this case, count 3 of the superceding indictment again alleges a violation of 18 U.S.C. 1153 without alleging that Graham was an Indian. The government

has repeated the error previously identified by the court.

In its response, the government has not identified any authority for its position that count 3 properly charges a federal crime. By failing to present any authority, the government has tacitly conceded the issue.

The government's failure to cite any authority should be deemed a waiver of its claim that count 3 is valid. Cf. United States v. Lester, 283 Fed.Appx. 421, 423 (8th Cir. 2008) ("The argument section also cites no case law. Undeveloped issues perfunctorily averred to in an appellate brief are waived.") (citing United States v. McAdory, 501 F.3d 868, 870 n. 3 (8th Cir.2007)). The court should find the claim waived to prevent subsequent litigation in this case on that issue.

It appears the government is trying to set this matter up for successive prosecutions. By making an unsupported objection, the government ensures dismissal of count 3. However, unless the court specifies otherwise, that dismissal will be without prejudice.

The government is trying to reserve count 3 in the event Graham is acquitted on counts 1 and 2. If acquittal occurs, the government is likely to bring count 3 back before a grand jury, correct the deficiency, then seek trial of Graham on that count. This should not be permitted. It is a bad faith action by the government to prolong this litigation and give it multiple attempts at conviction.

It would offend Graham's right to trial, right to be free from double jeopardy, and offend the principles of fairness and finality safeguarded by the Bill of Rights.

Accordingly, Graham asks that the court dismiss count 3 of the indictment with prejudice. This is justified based on the government's failure to cite any authority for its position that the claim is valid, and the government's deliberate decision to recharge a facially invalid offense. See United States v. McKinney, 395 F.3d 837, 842 (8th Cir. 2005) (dismissal with prejudice appropriate when government acts in bad faith).

Dated October 29, 2008.

/s/ John R. Murphy
John R. Murphy
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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Dated October 29, 2008.

/s/ John R. Murphy
John R. Murphy