

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

UNITED STATES OF AMERICA,)	CRIM. NO. 08-50079-01
Plaintiff,)	
)	DEFENDANT GRAHAM'S
vs.)	REPLY BRIEF REGARDING
)	MOTION IN LIMINE RE:
JOHN GRAHAM, a/k/a)	STATEMENTS TO MEDICINE MAN
JOHN BOY PATTON and)	
VINE RICHARD MARSHALL, a/k/a))	
RICHARD VINE MARSHALL, a/k/a))	
DICK MARSHALL,)	
Defendants.)	

Defendant John Graham replies to the government's Memorandum
Opposing Defendant Graham's Motion in Limine Re: Statements to Medicine Man
[hereinafter "Memorandum"], filed March 26, 2009.

In its Memorandum, the government mis-characterizes important facts
pertinent to the issues before the Court. If one were to read the government's
Memorandum without looking at the underlying facts, one would conclude that
Mr. Graham affirmatively made a number of statements and admissions about his
spiritual involvement with Al Gates that both waived his privilege and
incriminated himself. A cursory look at the underlying facts shows that this is not
the case, and that the government has mis-characterized what was said and the
context of the conversations in order to persuade the Court that Graham's

privilege was waived and his statements are admissible.

First, Graham did not waive his privilege or make admissions to Chapman as alleged by the government in enumerated paragraph 1 of its Memorandum. The facts pertinent to this issue are contained in the government's Exhibit 1.

Chapman recorded an interview with Graham. Chapman stopped the recording on his own, not at Graham's request. When the recorder was off, Chapman claims that he told Graham that he (Chapman) knew what Gates had told others. He then summarizes what he had been told Gates had alleged. He does not ask Graham to confirm or deny the summary. Graham's entire response to Chapman was, according to Chapman, "Uh huh." Immediately thereafter, when Graham begins to try to give a more substantive explanation ("Well, you know . . ."), but Graham is cut off by Chapman and not allowed to continue responding.¹

Statements such as "Uh huh" are used commonly as non-substantive responses. "Uh huh" has no content itself other than to acknowledge that one has been spoken to. Taken in its proper context, Graham's ambiguous response is

¹The government only provided one page of Chapman's 30 page interview with Graham. In Graham's previous file, 03-50020, Graham submitted the transcript of the interview as a sealed exhibit to his Reply to Government's Response to Motion in Limine Regarding Medicine Man Privilege. That exhibit shows that when Graham tried to begin addressing the comments made by Chapman, Chapman began discussing an entirely unrelated matter.

nothing more than a generic acknowledgment of the fact that Chapman said something to him.

Alternatively, Graham's response was specific to Chapman's declarative statement that he had been told something about Gates. Chapman does not ask Graham whether this information was true or false. There is no responsive assertion made by Graham indicating the truth of Chapman's summary. And, the assertions recited by Chapman were not of such a direct and inflammatory nature that the failure to deny them would constitute an admission by silence.

Most importantly, nothing Graham said in response to Chapman could be construed as a waiver of privilege. Consider the structure of the government's position. On the one hand, because Graham said nothing of a factual or specific nature to Chapman, the government is asserting that Graham's mere acknowledgment of Chapman constitutes an adoptive admission. On the other hand, the government is trying to claim that Graham's response was specific enough to constitute a complete abandonment of his claim to keep his communications with Gates confidential. There is nothing factually to support the notion that anything said by Graham constitutes a waiver of privilege.

Second, the government has similarly mis-characterized Graham's alleged statements to Ecoffey. In its Memorandum, the government suggests that Graham

made admissions to Ecoffey and openly discussed his activities with Gates.

Memorandum at enumerated paragraph 2. This is a mis-characterization of the whole context of the discussion.

As demonstrated in the government's Exhibit 2, law enforcement approached Graham in Canada and set forth a litany of facts, accusations and information. Graham's sole response to this litany was "yeh." Like "Uh huh," this response was nothing more than an ambiguous, non-committal, non-substantive acknowledgment that Graham had been spoken to. It is neither an adoptive admission, admission by silence, nor a waiver of privilege.

Third, in regard to Gates' grand jury testimony, the government's purported basis for admission is not legally defensible. There is no question that Gates' testimony before the grand jury was testimonial, and that the admission thereof implicates the confrontation clause. Absent confrontation, there is no basis for believing the statements are reliable, and the reliability and veracity of the statements cannot be tested. The government asserts that Gates' grand jury testimony is admissible to "explain the reasons for or propriety of a police investigation in the context of questioning." Memorandum p. 3. This assertion has no substance. Moreover, a closer review of Gates' actual grand jury testimony shows that much of what he attested to were his impressions of Graham, not actual

statements made to him by Graham. See Govt. Exhibit 3 (sealed). Thus, even in the context of impeachment, Gates' beliefs or impressions as to Graham's culpability or presence would not be admissible.

Last, the government contends that Graham has failed to establish the existence of a privilege that has not been waived. That is not accurate. Graham has repeatedly asserted the privilege, and has provided documentary evidence in this file and his previous file showing that the government's own information establishes that Gates was recognized as a spiritual leader with whom people would consult on spiritual matters. Gates' sworn grand jury testimony is more than sufficient to establish the requisite relationship between Graham and Gates for the privilege to vest. And, there is nothing indicating that Graham ever waived the privilege.

Gates breached the privilege. The government has aggravated this breach by communicating confidential matters obtained by the grand jury to law enforcement and Chapman. The privilege should have been respected by Gates and the government. It wasn't. The privilege should now be protected by the

Court to lessen the damage done thus far in protecting the relationship between a spiritual leader and a person seeking spiritual counsel.

Dated March 31, 2009.

/s/ 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:

MARTY J. JACKLEY

- U.S. Mail, postage prepaid
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- Electronic Case Filing

Dated March 31, 2009.

/s/ John R. Murphy
John R. Murphy