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

FILED
MAR 22 2010
CLERK

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 Defendant.	))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MOTION TO HAVE COUNSEL APPOINTED

Defendant John Graham, moves this court for its order appointing John R. Murphy to represent him in the above-captioned matter. The basis for the relief requested is set forth below.

1. A central issue in this case has been whether Canadian Indians meet the definition of "Indians" under federal criminal law. Graham has consistently argued that Canadian Indians are not Indians, and sought dismissal on that basis.

2. The government opposed that claim. It consistently argued that Canadian Indians were Indians under federal criminal law and that the 2008 indictment should not be dismissed on that ground. Up until shortly before dismissal of the case in February of 2010, the government continued to

argue to the court that Canadian Indians were Indians under federal law.

3. On the eve of trial, the government moved for dismissal of the indictment against Graham without prejudice. In its motion, the government did not concede that its case was legally deficient based on the Canadian Indian status of Graham and Aquash. The court granted the government's motion and dismissed the case without prejudice.

4. The dismissal without prejudice leaves Graham open to future federal prosecution for these charges.

5. At no time in the litigation on the 2003 or 2008 indictments did the government ever advise Graham or the court that it knew or had reason to believe that its case was legally and factually defective.

6. Specifically, the government never disclosed to Graham or the court: (a) that it was the Department of Justice's policy to treat Canadian Indians as not being Indian under federal criminal law; (b) that the government was aware of contrary legal authority to its stated position; and, (c) that the United States Attorney's Office for the District of South Dakota had determined in 1998 that it should not proceed with this prosecution because Graham and Aquash were Canadian Indians and, thus, Graham was not subject to federal prosecution under 18 U.S.C. §§ 1152 or 1153.

7. After the 2008 indictment was dismissed, Graham was indicted on three counts of murder in a South Dakota state court. These charges arise from the same events alleged in the two dismissed federal indictments.

8. Materials within the "Aquash box," a collection of materials held by the Denver Police Department, were disclosed to the defense in both the state and federal prosecutions after Graham's federal indictment was dismissed.

9. In the Aquash box is a letter from Dennis R. Holmes, Assistant United States Attorney for the District of South Dakota, to Robert J. Whitley, Chief Deputy District Attorney from Denver, Colorado. Sealed Exhibit A. The letter is dated August 6, 1998. The letter is written on Department of Justice letterhead and is subsigned by Holmes under the caption of the United States Attorney for the District of South Dakota.

10. The letter was also sent to Robert Ecoffey, Superintendent of the Bureau of Indian Affairs.

11. The letter mentions Robert Mandel by name as one of the federal prosecutors working on the case at that time.

12. Mandel and Holmes still work together in the United States Attorney's Office. Mandel has been consistently involved in the federal and state prosecutions of Graham. Thus, the contents of Holmes letter, and the

positions taken therein, were well known to those prosecuting Graham in federal court in 2003 and 2008.

13. In the letter, Holmes states that it is his personal opinion that Graham is not subject to federal prosecution for the murder of Aquash because both Graham and Aquash were members of Canadian Indian tribes. Holmes states that Canadian Indians are not Indians under federal criminal law.

14. The portion of the letter specific to this issue states:

> One significant legal impediment to the federal prosecution of this case arises from the fact that the victim and one of the suspects are members of Canadian Indian tribes. Under the provisions of 18 U.S.C. § 1153, the United States is authorized to prosecute crimes consisting of one of the listed major crimes committed by Indians within Indian Country. Under the provisions of 18 U.S.C. § 1152, the United States can prosecute an offense where the victim is an Indian and where the offense was committed in Indian Country. Ms. Aquash's body was found within the exterior boundaries of the Pine Ridge Indian Reservation, which would constitute Indian Country.
>
> The difficulty in proceeding under either of these two statutes arises from the fact that generally the Justice Department has taken the position that Canadian Indians may not be considered "Indians" within the meaning of the federal criminal statutes. A United States District Court in the State of Washington dismissed a criminal indictment brought against a Canadian Indian in 1991, and the Solicitor General determined that no appeal should be taken from that matter.
>
> Ms. Aquash was a Canadian Indian and therefore a jurisdictional basis could not be found under 18 U.S.C. § 1152. One of the three

> persons believed to be involved in the actual commission of the homicide is also a Canadian Indian. The other two are members of South Dakota tribes. Criminal charges cannot be brought under 18 U.S.C. § 1153 against the Canadian Indian.

Exh. A.

15. The government's attorneys in the Graham case never disclosed to the court the contrary authority referenced in the letter.

16. The government's attorneys in the Graham case never disclosed to the court the Justice Department's position on this issue.

17. The government never provided this letter to Graham, even though it is exculpatory to a material issue in the case.

18. The government never disclosed its concerns with the validity of the prosecution at the time the grand jury was convened and during which time the court had the duty of supervising the function of the grand jury.

19. It is counsel's information and belief that the government never disclosed these issues to the Canadian Ministry of Justice when seeking Graham's extradition in 2003.

20. Graham wants counsel appointed so he can move for dismissal with prejudice of the charges that were dismissed without prejudice in February of 2010.

21. Graham has valid legal and factual grounds for seeking this relief. The government violated its duty to Graham to disclose exculpatory and impeachment evidence. The government violated its duty to the court to disclose adverse authority. Such misconduct is actionable as a basis for dismissal with prejudice.

22. Graham will be prejudiced if he is not able to seek this relief. In the pending state court prosecution, Graham is charged with three counts of murder. One of the counts is charged as first degree premeditated murder. The other two counts are charged as first degree felony murder, one involving kidnaping and the other involving rape.

23. The State of South Dakota has withheld having Graham arraigned on all three counts. Instead, it has held in abeyance having Graham arraigned on the felony murder count involving the rape allegation. This action was taken to allow a future federal prosecution on this charge if Graham is acquitted in state court. The State is holding that charge in abeyance to prevent a later double jeopardy bar to a future federal prosecution.

24. It is apparent that the government's attorneys have been manipulating the system at Graham's expense for years. They knew that Graham was not properly subject to federal prosecution before they sought his indictment in

2008. They failed to disclose to Graham or the court the adverse authority and DOJ policy referenced in the letter. The government waited until the last minute to move for dismissal, and then did so in such a way to leave open a future avenue for federal re-indictment.

25. The letter was a document created by the same government office that sought to prosecute Graham. The contents of the letter were well known to prosecutors and law enforcement agents involved in the case, including Ecoffey.

Based on the foregoing, Graham moves to have his counsel re-appointed so he can properly move for dismissal with prejudice of all federal charges pending against him.

Dated March 22, 2010.

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

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:

BRENDAN V. JOHNSON, U.S. ATTORNEY P.O. BOX 2638 SIOUX FALLS, SD 57101	☒ ☐ ☐ ☐ ☐	U.S. Mail, postage prepaid Hand Delivery Federal Express Facsimile at Electronic Case Filing
ROBERT A. MANDEL, ASSISTANT U.S. ATTORNEY 515 NINTH STREET #201 RAPID CITY, SD 57701	☒ ☐ ☐ ☐ ☐	U.S. Mail, postage prepaid Hand Delivery Federal Express Facsimile at Electronic Case Filing

Dated March 22, 2010.

John R. Murphy