

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 GRAHAM'S         |
|                               | ) | MOTION IN LIMINE REGARDING |
| JOHN GRAHAM, a/k/a            | ) | STATEMENTS TO MEDICINE MAN |
| JOHN BOY PATTON,              | ) |                            |
| VINE RICHARD MARSHALL, a/k/a) | ) |                            |
| RICHARD VINE MARSHALL, a/k/a) | ) |                            |
| DICK MARSHALL,                | ) |                            |
| Defendants.                   | ) |                            |

Defendant John Graham moves this Court for its Order prohibiting the government from introducing or eliciting any evidence of statements Mr. Graham allegedly made to any medicine man or spiritual leader, or Mr. Graham's response to law enforcement officers or witnesses/informants when questioned about those alleged statements to the medicine man. These discussions are privileged under the priest-penitent privilege, and the admission of these statements would violate that privilege, the confrontation clause, and the rule against hearsay.

A. BACKGROUND

Al Gates was a recognized spiritual leader and counselor in the Indian community. He practiced the "Indian religion" (his description) from 1944 to the time of his death in 2003. Graham Doc. 03667. Robert Ecoffey, a member of the

Oglala Sioux Tribe and a law enforcement officer, who has investigated this case for approximately thirty years, has repeatedly described Gates as a “spiritual leader” for people involved in the American Indian Movement. Graham Doc. 00927-28; Graham Doc. 00951. Ecoffey has identified Gates as someone to whom AIM members went for prayer and guidance. Graham Doc. 00927-28; Graham Doc. 00951.

Mr. Gates professed to have had conversations with Mr. Graham during a time when Graham was seeking spiritual guidance. Without Graham’s permission or waiver, Gates relayed the contents of those alleged conversations with law enforcement. Law enforcement then relayed those conversations to Serle Chapman, a “reimbursed witness” working with the FBI to collect evidence against members of AIM. Graham was then confronted by law enforcement and Chapman on separate occasions about Gates’ accusations, and Graham responded.

Al Gates is now dead. His version of events has never been subject to cross-examination. It is Graham’s statements to Gates, and Graham’s responses to law enforcement and Chapman about his statements to Gates, that are the subject of this motion.

**B. PRIVILEGE PREVENTS ADMISSION OF THIS EVIDENCE**

“The priest-penitent privilege recognizes the human need to disclose to a

spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.” Trammel v. United States, 445 U.S. 40, 51 (1980). Any statements allegedly made by Graham to Gates, are absolutely protected by privilege.

Trammel, supra. Though Gates may have violated the privilege, Graham did not waive privilege and he should remain protected by it.

#### C. ADMISSION WOULD VIOLATE THE CONFRONTATION CLAUSE

Gates’ statements are also inadmissible because admission would violate Graham’s right to confrontation. Gates made his statements to law enforcement and the grand jury. They are, therefore, testimonial. Crawford v. Washington, 541 U.S. 36, 53-54 (2004). Gates’ statements were not subject to cross-examination, and he cannot now be examined. Therefore, these statements are not admissible.

Id.

#### D. PUBLIC POLICY FAVORS EXCLUSION

The government should not be allowed to admit Graham’s alleged statements to Gates, either directly or through Graham’s responses thereto when confronted with the statements. The priest-penitent privilege is absolute and the interests that it promotes are more important than any benefit to the government in introducing this evidence. Similarly, Graham’s right to confrontation is more

important than any benefit derived by the government in introducing any portion of Graham's alleged conversations with Gates, or his responses to questions concerning these conversations. Mr. Graham would be substantially prejudiced and important rights would be infringed if the government is allowed to reference this topic in any manner.

The government seeks to establish a dangerous precedent in this case. The government obtained privileged information without a waiver. It then communicated that information to law enforcement and to Chapman, a lay person with no claim of right to this information and no legal obligation to keep it confidential. In fact, at all times relevant to this action, the government knew that Chapman was a journalist who was writing a book about the matter at the same time he was being reimbursed as a government witness.

Once law enforcement and Chapman had the information, they tried to elicit responses from Mr. Graham by telling him that his confidential communications were no longer private. Both Chapman and law enforcement deliberately itemized Gates' statements to Graham to let him know the extent of Gates' breach.

If the government is allowed to circumvent privilege by releasing confidential information to third parties, who then confront the privilege holder in order to seek confirmation, the value of the privilege disappears. The government

should not be encouraged to employ these tactics in order to obtain evidence. The only party in a position to stop this abuse is the court, and the remedy is to prevent the government from introducing any of the three statements set forth above.

E. ADMISSION OF PARTICULAR STATEMENTS BY GATES

In Graham's previous case, the government identified three statements that it argued should be admissible. File CR 03-50020, File Doc. 305. A review of those statements shows them to be inadmissible.

1. STATEMENT TO CHAPMAN:

The government intends to admit a statement allegedly made by Graham to "reimbursed witness" Chapman. The government states that Mr. Graham confirmed with Chapman that "he was having a hard time with what he had done Anna Mae, wherein he went into the mountains around Denver and had a ceremony." CR 03-50020, File Doc. 305, pp. 1-2, ¶ 2. The government failed to provide the court with the facts surrounding that alleged statement that demonstrate why the privilege should not be set aside to permit admission of this evidence.

Mr. Graham participated in a lengthy recorded interview with Chapman. The single-spaced transcript of that recorded interview is over 30 pages. The statement identified by the government, however, allegedly occurred when the

tape recorder was turned off. Graham Doc. 00977. In fact, all of the alleged inculpatory statements that Chapman claims Graham made supposedly occurred when the tape recorder was inexplicably turned off.

The section of the transcript where Mr. Gates is discussed is identified as being part of a “Notated conversation before restarting the tape recorder.” Graham Doc. 00977. Assuming arguendo that the conversation occurred, the conversation does not contain the admission claimed by the government.

Chapman tells Graham what he believes Mr. Graham told Mr. Gates. Chapman himself does not have first hand knowledge of this conversation and did not learn this information from Gates. Chapman’s involvement began in 2000, and he states during the interview that Gates is in a sanitarium for Alzheimer’s disease at that time. Graham Doc. 00977. Chapman is simply restating hearsay information he received from the government attorneys or law enforcement agents about statements allegedly made by Gates in 1994.

In response to two compound recitations of the alleged facts by Chapman, Mr. Graham is responds with the ambiguous phrase “Uh huh.” Graham Doc. 00977. Chapman does not ask Mr. Graham any questions about these recitations of fact, and does not ask him to confirm anything. Thus, Mr. Graham’s responses are not confirmatory of anything. Graham Doc. 00977. When Mr. Graham tries to

respond by saying, “Well, you know . . .”, he is cut off by Chapman, who then begins describing a completely different issue involving Vernon Bellecourt. Graham Doc. 00977-78.

The government has misled the court as to the contents of this alleged admission and omitted key facts as to its veracity and reliability. To allow this unrecorded, unreliable, ambiguous, and misleading statement into evidence would violate Mr. Graham’s priest-penitent privilege. He was not asked a question, and he was cut off before he could respond. Even if the “notated” transcript of this unrecorded conversation is accurate, there is nothing in it that suggests any waiver of the privilege.

Moreover, with absolutely no way for Mr. Graham to confront the alleged declarant, Mr. Graham’s right to fair trial and confrontation are violated. Graham’s responses are not casual statements. He was presented with information obtained from Gates in a testimonial scenario (discussions with law enforcement and the grand jury), and he has never had the opportunity to confront the declarant. In a case of such magnitude, the court should not permit the government to seek a conviction on this evidence as it doesn’t pass basic thresholds of reliability for admission.

2. GRAND JURY TESTIMONY:

The government also intends to introduce at trial grand jury testimony by Al Gates in 1994, in which he alleges that John Graham told him he was present when Aquash was killed. CR 03-50020, File Doc. 305, pp. 1-2, ¶ 1. That statement should not be admitted.

Mr. Gates' statements were testimonial in nature, but never subjected to confrontation. He is now dead so the details of the conversation will never be examined. Crawford, supra. To admit these statements would violate Graham's right to confrontation.

Further, in addition to being privileged information obtained without a waiver from Mr. Graham, Gates' testimony is so unreliable that it should not be admitted. Mr. Gates never placed Mr. Graham at the scene of the crime until the government proposed this to him in a leading question. Graham Doc. 03671 ("And during this conversation that you had with John Boy, did he tell you that he was present when Anna Mae was killed?"). In response, Gates never testified that Mr. Graham had actually said he was present. Instead, Gates responded, "Yeah, yeah, he was present." Graham Doc. 03671. It appears that Gates formed the opinion that Mr. Graham was present, but he does not actually say that Mr. Graham told him this. Without Mr. Gates being subjected to cross-examination,

Mr. Graham will have no way of questioning Mr. Gates as to whether this was an assumption he had made or whether it was an actual statement made. Further, there is no indication anywhere in the grand jury transcript that Mr. Graham ever waived his right to privilege.

### 3. STATEMENTS TO LAW ENFORCEMENT:

The government also intends to admit an alleged admission by Mr. Graham to law enforcement officers as to why he sought guidance from Mr. Gates. CR 03-50020, File Doc. 305, p. 2, ¶ 3. The document referred to by the government (Graham Doc. 00951), states that, in an unrecorded interview with a law enforcement agent, the agent summarized a multitude of facts from an alleged conversation between Mr. Graham and Mr. Gates. Mr. Graham is not questioned about the truth of any particular fact contained in the summary. Graham Doc. 00951. Mr. Graham's only response to the entire factual recitation is a solitary "yeah." Graham Doc. 00951.

Assuming that the law enforcement report is accurate, it does not establish an admissible statement or a waiver of privilege. Mr. Graham's response was not an admission, but an ambiguous response to a narrative that included a number of alleged facts. For instance, according to the law enforcement summary, Mr. Graham might have been responding to the assertion of fact that he visited with

Mr. Gates or that he felt bad about what happened to Ms. Aquash. Graham Doc. 00951. Nothing in Mr. Graham's limited response constitutes a waiver of privilege or a willingness to divulge confidential information.

There is nothing to indicate the reliability or veracity of the statement because the source of the information can no longer be questioned. It is a statement of questionable probative value. Admission of it, like the preceding two alleged statements, would be highly prejudicial to Mr. Graham, and would violate his right to fair trial and confrontation if admitted.

#### F. NON-HEARSAY GROUNDS FOR ADMISSION

The government also seeks admission of Mr. Gates' grand jury testimony for impeachment purposes or to explain the propriety of the police investigation of this matter. Both asserted "non-hearsay" grounds are without merit.

The impeachment justification for admission of the evidence is not supported by law. A witness's prior statement may be used to impeach that witness under Fed.R.Evid. 613. In this case, Gates' prior statements could be used to impeach Gates, not Graham. Gates made statements to law enforcement implicating Graham in the crime. Gates is the declarant, not Graham. Gates is not available as a witness or subject to cross-examination, which implicates the confrontation clause. Thus, Graham can't be impeached by a law enforcement

officer or other witness testifying as to what Gates told them that Graham had told him.

The notion that Gates' statements or Graham's responses are necessary to explain the course of the investigation is a fiction created by the government to justify the admission of inadmissible evidence. There is no context in which the government would need to recite a lengthy string of facts improperly divulged by Gates in 1994 during the course of confidential communications in order to explain their investigation of this case.

#### G. THE PRIVILEGE EXISTS AND WAS NOT WAIVED

The government's next assertion is that Mr. Graham has failed to establish the existence of the privilege, or demonstrate that it has not been waived. CR 03-50020, File Doc. 305.

Mr. Graham has affirmatively claimed privilege. To support his claim, he cited the government's own documents to establish that Mr. Gates was a medicine man who provided spiritual guidance to people. The government has not put forth anything suggesting the privilege was waived.

Implicit in Mr. Graham's motion in limine is the assertion that any communication he may have had with Mr. Gates was confidential. The value of protecting the sanctity of such communications between members of the clergy

and their parishioners is well recognized and should not be violated unless compelling reasons exist.

For all of the reasons set forth above, the government should be prohibited from introducing any evidence related to Graham's alleged statements to Gates.

Dated December 19, 2008.

/s/ John R. Murphy  
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:

MARTY J. JACKLEY  U.S. Mail, postage prepaid  
 Hand Delivery  
 Federal Express  
 Facsimile at  
 Electronic Case Filing

ROBERT A. MANDEL  U.S. Mail, postage prepaid  
 Hand Delivery  
 Federal Express  
 Facsimile at  
 Electronic Case Filing

DANA HANNA  U.S. Mail, postage prepaid  
 Hand Delivery  
 Federal Express  
 Facsimile at  
 Electronic Case Filing

Dated December 19, 2008.

/s/ John R. Murphy  
John R. Murphy