

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)	MEDIA INTERVIEWS
JOHN BOY PATTON, and)	
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 at trial video taped programs relating to the death of Anna Mae Pictou Aquash. In addition to this request, Mr. Graham asks that the government be ordered to provide the Court and counsel with the exact versions of these programs it intends to admit at trial so that more specific objections can be made prior to trial. And, Mr. Graham asks that the government be required to produce the complete, un-redacted video recording of Mr. Graham's interviews with the broadcasters that created these programs. The factual and legal basis for these requests are set forth below.

SUMMARY OF FACTS

On October 2, 2008, immediately prior to the trial that was supposed to

begin on October 6, 2008, the government informed Graham's counsel that it intended to offer at trial three media programs about John Graham. These recordings included a Canadian television news show called "The Fifth Estate," an internet video interview that was broadcast on MySpace by a group called "Native Youth," and a Canadian television news show on the Canadian Television (CTV) network called "First Story." It appears these shows were made in 2003 or in the years thereafter as matters related to the charges filed against Mr. Graham in April of 2003 are referenced.

These broadcasts contain interviews with a number of people and include narration by named and un-named commentators. They also contain footage and photographic montages of Ms. Aquash, the crime scene, various AIM leaders and AIM activities.

These broadcasts also contain selected statements by John Graham, but do not include the entire, un-redacted version of Mr. Graham's statements or responses to the interviewers' questions. The government is aware that one of its own witnesses, John Trudell, has complained that the producers of the Fifth Estate program interviewed him for a lengthy period of time, then selectively edited his statements in such a way that they were presented out of context and in a manner that distorted what he had intended to say. Graham Doc. 02536-37.

And, these broadcasts include conversations with Mr. Graham about subjects outside the scope of the charges in this case. Mr. Graham is asked to discuss his political views and his feelings about political figures. For instance, in the Native Youth interview, there is a protracted discussion about Governor Janklow that does not relate to the crime charged.

Mr. Graham, through his counsel, has repeatedly requested that the government provide him with the redacted versions of these broadcasts that the government intends to use at trial. To date, redacted versions have not been provided to him, even though they were supposed to be provided to him in advance of the October 6, 2008 trial. And, Mr. Graham has not been provided with the un-redacted footage of Mr. Graham's interviews with these interviewers, from which portions were selected for broadcast.

SUMMARY OF LAW

A. REQUEST FOR IMMEDIATE PRODUCTION OF TRIAL VERSION OF BROADCASTS:

Mr. Graham is not able to specifically object to the introduction of the media broadcasts at this time because the government has not specifically identified which portions of the interviews it intends to offer. Therefore, Mr. Graham's first request for relief is that the government immediately provide to the

Court and counsel the exact versions of these interviews it intends to offer at trial so that specific objections can be made and the record preserved prior to trial.

This is not something that should wait until trial. As set forth below, these videos contain much hearsay and irrelevant or inadmissible material. Mr. Graham should be provided an opportunity prior to trial to make specific objections to the portions of the broadcasts that the government actually believes are admissible. And, the Court should have the opportunity prior to trial to review the tapes and consider Graham's specific objections. The government has already acknowledged it is not seeking admission of the complete television programs and that it has already or will be redacting the recordings for trial. The government should be required to present these materials to Mr. Graham's counsel immediately so that the matter can be addressed in a timely and orderly fashion.

B. THE BROADCASTS CONTAIN HEARSAY AND INADMISSIBLE EVIDENCE:

Mr. Graham objects to the narration, commentary, video montages, and all other portions of the broadcasts that are not actual recordings of Mr. Graham's statements.

The broadcasts contain interviews with other persons, narration of alleged events, and commentary by reporters. This evidence is hearsay. It is not

admissible under any rule of evidence, and it should be redacted completely from the broadcasts.

The broadcasts also contain photographic montages and video footage of various people and events related to the American Indian Movement and Ms. Aquash. There are no references made as to the source or authenticity of any of the materials depicted.

These government should be prohibited from introducing these segments of the broadcasts. There is no possible means by which Mr. Graham could meaningfully challenge the authenticity of any image depicted. Moreover, these images are not relevant to any issue before the jury. Instead, these images would be introduced by the government to create bias against Mr. Graham based on his alleged affiliation with the American Indian Movement, and to create sympathy for Ms. Aquash and her family. Because the images are not relevant and would only serve to create bias and sympathy, the government should be prohibited from introducing these portions of the broadcasts. Fed.R.Evid. 401, 402 & 403.

The broadcasts also contain segments of interviews with Mr. Graham where he discusses his present political beliefs and opinions about specific elected officials, such as former governor Janklow. These statements by Mr. Graham should be excluded from presentation to the jury. They are not relevant or

probative on any issue before the jury. Fed.R.Evid. 401 & 402. Further, the government's sole purpose of admitting the statements would be to bias members of the jury who do not share Mr. Graham's political beliefs against him. This is not a valid purpose of the admission of evidence. Fed.R.Evid. 403.

C. THE GOVERNMENT SHOULD BE REQUIRED TO DISCLOSE THE COMPLETE FOOTAGE OF MR. GRAHAM'S INTERVIEWS WITH THE BROADCASTERS:

The broadcasts at issue in this case are not entirely comprised of unedited footage of an interview with John Graham. Rather, selected statements are introduced, in some instances without any indication of what question is being responded to by Mr. Graham. These purported statements should be viewed with skepticism because, as discussed above, one of the government's own witnesses has already complained that statements he made to the producers of the Fifth Estate were presented out of context and edited in such a way as to distort their meaning.

Fed.R.Evid. 106 states in full:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

If the government is going to be permitted to introduce any portion of a broadcast interview with Mr. Graham, it should be required to produce the entire unedited footage of the interview with Mr. Graham. The government apparently has access to this material through its relationship with the producers of these programs, which, presumably, will be used to lay the foundation for admission of the evidence. Mr. Graham does not have such access as he has no authority to subpoena witnesses or evidence from Canada. Therefore, the government should be required to present this material to defense counsel so that the greater context of Mr. Graham's statements can be introduced to the jury pursuant to Fed.R.Evid. 106.

Alternatively, if the government does not have access to the unedited footage or the producers of the programs, then the selected "sound bites" contained in these broadcasts should not be admitted at trial. In addition to the authentication and foundation issues that would exist if the raw interview footage and/or the producers of the program are not available for examination by the defense, Mr. Graham would be severely prejudiced if edited comments made by him were admitted at trial. He would have no way of proving that a comment selected for publication by the broadcaster was in response to a misleading question or taken out of context when edited into the program.

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 | <input type="checkbox"/> | U.S. Mail, postage prepaid |
| | <input type="checkbox"/> | Hand Delivery |
| | <input type="checkbox"/> | Federal Express |
| | <input type="checkbox"/> | Facsimile at |
| | <input checked="" type="checkbox"/> | Electronic Case Filing |
| ROBERT A. MANDEL | <input type="checkbox"/> | U.S. Mail, postage prepaid |
| | <input type="checkbox"/> | Hand Delivery |
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| | <input checked="" type="checkbox"/> | Electronic Case Filing |
| DANA HANNA | <input type="checkbox"/> | U.S. Mail, postage prepaid |
| | <input type="checkbox"/> | Hand Delivery |
| | <input type="checkbox"/> | Federal Express |
| | <input type="checkbox"/> | Facsimile at |
| | <input checked="" type="checkbox"/> | Electronic Case Filing |

Dated March 26, 2009.

/s/ John R. Murphy
John R. Murphy