

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.)	MOTION FOR SEVERANCE
)	OF COUNTS AND
JOHN GRAHAM, a/k/a)	OBJECTION TO STAY OF
JOHN BOY PATTON and)	PROCEEDINGS
VINE RICHARD MARSHALL, a/k/a))	
RICHARD VINE MARSHALL, a/k/a))	
DICK MARSHALL,)	
Defendants.)	

Based on the Court's Order on Motions to Dismiss Indictment, Doc. 304, and the government's Notice of Appeal of that Order, Doc. 323, Defendant Graham moves this Court to sever counts one and two from count three of the superceding indictment. He asks this Court not to stay trial on the matter and to allow him to proceed to trial on counts one and two on May 12, 2009.

SUMMARY OF FACTS

Graham has been in federal custody since December of 2007. He does not consent to any further delay in these proceedings. He is ready to have his case tried on May 12, 2009.

Graham is charged with Marshall in a three count indictment. The Court has recently dismissed the third count in that indictment. Doc. 304.

The Court has not ruled on whether it will dismiss counts one and two of the indictment at this time. Doc. 304. The Court has expressly held that this issue is not ripe for dismissal and must be decided at trial as a factual issue. Doc. 304.

The government has appealed this Court's Order. Doc. 323. The only final decision subject to review in that Order is the dismissal of count three. Doc. 304.

The government was not required to file its notice of appeal at this time. It could have waited until after Graham's trial, which was set to be completed well within the time frame allowed for appeals to commence. Had the government reserved action, and had the Court dismissed counts one and two at the conclusion of the government's case, the dismissal of all three counts would be ripe for appellate review. As it stands now, the government, through its own conduct, has created a situation where successive appeals are likely.

Graham is asking the Court to sever counts one and two from count three. This will dramatically lessen the delays in this case and the time Mr. Graham has to stay in custody pending resolution of the matter. Graham opposes any general stay in the proceedings in regard to counts one and two as this will cause substantial delay in the process.

ARGUMENT

If offenses are properly joined, the Court should order separate trials where

the defendant is exposed to prejudice by joinder of the offenses. Fed.R.Crim.P. 14; United States v. Darden, 70 F.3d 1507, 1526-27 (8th Cir.), reh'g denied, cert. denied, Hopkins v. United States, 116 S.Ct. 2567(1995).

At this juncture, the government can only appeal the dismissal of the third count. The other two counts are not affected by the appeal and are ready for trial.

By taking an appeal at this time, the government is squandering resources and needlessly delaying this action. Graham is prejudiced by this as he is sitting in custody and has been sitting approximately two years.

It is reasonable to assume the following scenario will unfold in this case:

If the Court of Appeals affirms the dismissal of count three, the entire case will be remanded back to the district court for resolution of counts one and two. By this time, several months will have elapsed. Once the case is remanded back, Graham's motion to dismiss counts one and two will still be pending. The case will then proceed to trial. After trial, provided that no evidence of American Indian blood has been introduced, this Court will grant a judgment of acquittal on those two counts. The government will then appeal that decision. Many more months will elapse before a ruling is issued. Graham will have sat in custody for close to three years by that time.

Much less delay will occur if this Court denies the government's request for a stay of proceedings and grants his request to have counts one and two severed from count three. If this occurs, trial will go ahead as planned on May 12, 2009. In all likelihood, if the government fails to meet its burden and the charges are dismissed, the trial will be done in a week. The government can then appeal the dismissal of counts one and two. That appeal will be pending almost simultaneously with the appeal already filed in regard to count three. There won't be successive appeals as it appears there will be if a stay of trial is granted.

The government will not be prejudiced by being required to proceed forward in this manner. It will be the most expeditious use of time and resources. The government has stated it has been ready for trial for over a year. Graham is ready for trial. Marshall has not moved to continue the trial. All witnesses are subpoenaed. The case should move forward notwithstanding the government's decision to file a notice of appeal prior to the trial commencing. Graham should

not be prejudiced by being denied his right to a speedy trial because of the government's tactical decision to appeal count three at this time.

Dated May 1, 2009.

/s/ John R. Murphy
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Rapid City, SD 57701
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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
- 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 May 1, 2009.

/s/ John R. Murphy

John R. Murphy