

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.)	
)	
JOHN GRAHAM, a/k/a)	
JOHN BOY PATTON and)	
VINE RICHARD MARSHALL, a/k/a))	
RICHARD VINE MARSHALL, a/k/a))	
DICK MARSHALL,)	
Defendants.)	

SUPPLEMENT TO PROPOSED JURY INSTRUCTIONS

Defendant Graham filed proposed jury instructions, Doc. 154, and a memorandum in support of those instructions, Doc. 151. He previously supplemented the memorandum with additional authority. Doc. 299.

Based on United States v. Stymiest, 581 F.3d 759, 764 (8th Cir. 2009) (filed September 22, 2009, rehearing denied November 19, 2009) (appeal from the District of South Dakota), Defendant Graham asks that the following paragraph be added at the end of enumerated paragraph #2 of proposed instructions 1 and 2 in Document 154:

Also, a person is not recognized as being an Indian merely because they hold themselves out to be an Indian by submitting to tribal court jurisdiction, or because they have sought or received care at a tribal

hospital, or because they have participated in tribal community activities, or because they are socially involved with enrolled tribal members. To be recognized as an Indian, a person must be recognized by a particular Indian tribe's government or the United States government as being an Indian. If the government's only proves that [Mr. Graham][Ms. Aquash] was recognized or accepted as being Indian by particular Indian people, that is insufficient to find that [Mr. Graham][Ms. Aquash] was recognized as being Indian under the law.

The language in Stymiest clearly illuminates an issue that has been misapprehended by the government. The government has alleged that it will prove Mr. Graham is recognized as being an Indian by showing he socialized with members of federally recognized tribes and participated in their ceremonies.

The issue is not whether Mr. Graham was accepted by or socialized with enrolled members of recognized American Indian tribes. The issue is whether he was recognized as being Indian by a federally recognized Indian tribe, the United States government, or both. Id. (Indian recognition requires "that the defendant be recognized as an Indian by the tribe or by the federal government." (emphasis in original)). The issue is whether a particular person has been recognized by a political entity, not whether a particular person has been socially recognized by members of that political entity. Id. at 764 (Indian recognition prong has "political underpinnings.").

Therefore, the jury should be specifically instructed that the kind of social,

cultural and religious evidence that the government intends to present to establish Indian recognition is precisely the kind of evidence that the Eight Circuit has held is not sufficient.

Dated January 19, 2010.

/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:

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 January 19, 2010.

/s/ John R. Murphy
John R. Murphy