

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

In response to the Court's Order Regarding Notice of Appeal and Motion to Sever, Doc. 331, Defendant Graham states the following:

RELIEF REQUESTED

Graham asks this Court to sever counts one and two from count three and allow him to proceed with trial on May 12, 2009. Graham asks that he be permitted to go to trial on May 12, 2009, regardless of whether his case is severed from that of Vine Richard Marshall's case.

THE COURT HAS CONTINUING JURISDICTION TO
ADDRESS MOTIONS FOR SEVERANCE OF COUNTS AND DEFENDANTS

District courts only lose jurisdiction over an entire case if the government is appealing a final judgment. United States v. Weber, 1997 WL 61442 (W.D. Mo.)

(citing Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 378-79 (1985), for the proposition that trial courts lose jurisdiction when an appeal is taken from a final judgement). A final judgment is one that “disposes of all the issues in a case and brings it to an end.” Weber, supra (citing Abney v. United States, 431 U.S. 651 (1977)).

If the government takes an interlocutory appeal, the district court only loses jurisdiction to decide matters related directly to the precise issue being appealed. See Weber, supra (citing Britton v. Co-op Banking Group, 466 U.S. 648, 667 n. 42 (1984), for the proposition that “[w]here a party appeals an interlocutory order, the trial court only loses jurisdiction as to the precise issue appealed.”).

In this case, the government has taken an interlocutory appeal. The notice of appeal is drafted broadly as an appeal of this Court’s entire order. Doc. 323. In reality, the only issue subject to appellate review at this time is the dismissal of count three. The Court made no final or appealable decisions in that order. Doc. 304. The government cannot, in good faith, argue that the Court’s statements in that order as to the likelihood of dismissal of counts one and two at trial constitute an appealable judgment or order.

Under the law cited above, this Court has only lost jurisdiction to resolve matters directly related to the dismissal of count three. Count three does not

implicate Defendant Marshall. He is not charged in that count. Therefore, this Court has jurisdiction to address both Graham and Marshall's motions for separate trials. Docs. 75 & 87.

Similarly, under the law cited above, this Court has jurisdiction to address Defendant Graham's motion for severance of counts. Doc. 328. The precise issue presented in that motion is whether Graham can go ahead to trial on counts one and two while count three is on appeal. Doc. 328. That determination is not affected by the government's appeal as to the propriety of the dismissal of count three. And, that determination does not call for any determination of fact or law that relates to the propriety of the dismissal of count three.

Accordingly, Graham believes that this Court has the continuing jurisdiction to address the motions for separate trials and motion to sever counts. Graham renews his request to have the counts pending against him severed. Graham takes no position on whether he and Marshall should be tried together at this juncture as he is prepared to go ahead to trial on May 12, 2009 either way.

Dated May 1, 2009.

/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 May 1, 2009.

/s/ John R. Murphy

John R. Murphy