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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS.
COUNTY OF PENNINGTON) SEVENTH JUDICIAL DISTRICT

FILE NO. CRI 09-3953

THE STATE OF SOUTH DAKOTA)
)
)
) Plaintiff,)
)
) VS.)
)
) JOHN GRAHAM,)
)
))
))
))
) Defendant.)

TRANSCRIPT OF
MOTIONS HEARING

* * * * *

BEFORE: THE HONORABLE JOHN J. DELANEY,
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
MARCH 8, 2010

COPY

1 * * P R O C E E D I N G S * *

2 **THE COURT:** We're here, Mr. Murphy, right on
3 time I take it?

4 **MR. MURPHY:** Yeah.

5 **THE COURT:** Lawyer time.

6 **MR. MURPHY:** That's right.

7 **THE COURT:** And you are seeking?

8 **MR. MURPHY:** I am seeking disclosure of the
9 documents that were expressly referenced by the
10 Attorney General's Office at the first appearance in
11 state court that -- from the Canadian Government that
12 authorizes the state court prosecution.

13 At that first hearing representatives from
14 the Attorney General's Office said that they had
15 documents from Canada authorizing this prosecution.
16 We have asked for disclosure of those and they have
17 resisted.

18 **THE COURT:** Mr. Oswald?

19 I am trying to understand what power the
20 Canadian Government would have to authorize anybody to
21 do anything in the United States. That's my first
22 question. I don't know that that power exists.

23 Does it, Mr. Murphy?

24 **MR. MURPHY:** Your Honor, the government --
25 the United States Government went to Canada back in

1 2003 and asked permission to bring Mr. Graham here.
2 He was held pursuant to that permission for a number
3 of years.

4 **THE COURT:** Right.

5 **MR. MURPHY:** The Canadian Consolate was in
6 consultation with my client and me about that. In
7 fact, we met with them once.

8 At some point, when the United States
9 Government decided they were considering dismissing
10 the federal charges, the state petitioned or
11 something. We don't have a formal document, but we
12 were in discussion with the U.S. Attorney's Office at
13 that time. That they were asking the Canadian
14 Government for permission to turn Mr. Graham over to
15 state authorities. They represented that they, in
16 fact, got that permission. And they made an express
17 representation to the Court, not an ambivalent or
18 equivocal representation; they said they got that
19 permission. And so we are seeking disclosure of that.
20 Their position seems to be that they don't have the
21 duty to turn that over.

22 My position is that if their representations
23 to the Court were untrue, that constitutes
24 prosecutorial misconduct, which implicates due
25 process, which is material to my client's defense; and

1 that makes it discoverable under 23(a)-13-3.

2 And they've have cited a line of cases that
3 have stood for a number of propositions, none of which
4 are right on point in this case; and I frankly have
5 not had a chance to research those cases because I
6 just came back from Chicago Saturday night and I have
7 been gone for about eight days. But during the --
8 that period of time this response was filed.

9 But I believe we have legitimate grounds when
10 they have raised the issue -- brought that to the
11 forefront -- by representing that they had gotten this
12 permission, that now they have a duty to disclose that
13 so that we can pursue all defenses and -- when --

14 The statutes talk about items that are
15 material to the preparation of my defense -- or my
16 client's defense, I believe that has to be read in an
17 all encompassing nature which would mean any defenses
18 we may have which could be due process violations
19 based on misconduct by the prosecution, the
20 legality --

21 **THE COURT:** What would be the foreseeable or
22 imagined -- I am not trying to say illusions. I am
23 just saying in terms of -- what would constitute
24 misconduct that would give rise to a due process?

25 I mean, my general understanding of

1 extradition law is -- or being brought to trial is --
2 you know, bounty hunters bring you in. However you
3 get here really doesn't matter much, as long as you
4 get here.

5 **MR. MURPHY:** I think the remedy is, then, if
6 in fact there is no authorization, then there is
7 certainly potential for a writ of habeas corpus
8 because my client's body may be being held illegally.

9 My client is a member of a First Nation band
10 in Canada, the autonomous region within Canada. There
11 is a number of complicated matters that go into even
12 bringing him to the United States in the first place.

13 And so that's something that -- I mean, there
14 is a lot to explore here. The United States
15 Government had to go up to Canada and put on quite a
16 dog-and-pony show just to get Canada to consider
17 bringing him here.

18 In some of those extradition documents on the
19 federal side, they mention some of the racial
20 components, which it's my understanding went to this
21 idea that my client is a member of a band that resides
22 within a autonomous region, the Yukon Territory.

23 And so I believe if, in fact, the government,
24 or the state in this case, doesn't have the proper
25 documentation, that then either through the Canadian

1 Consolate or through the state process, we would be
2 able to seek a writ of habeas corpus that his body is
3 presently being held in violation of the law.

4 **THE COURT:** Mr. Oswald?

5 **MS. OSWALD:** Judge, I believe the Court did
6 state it correctly that if he's here, it doesn't
7 matter. He can't -- it doesn't matter how he got
8 here.

9 The remedy in South Dakota law as I
10 understand it from the *Spotted Horse* case is that they
11 would invoke the exclusionary rule for any evidence
12 obtained, confessions, statements, things like that,
13 while he was illegally here. That has not happened.

14 Besides, Canada brought him here. The United
15 States Government, as I understand it, did not go up
16 there and get him. His asylum country brought him
17 here. And we feel that this is -- has no bearing and
18 no *Brady* material.

19 **THE COURT:** Well, one of the questions -- and
20 I am coming at it, apparently, at an angle that is
21 different than I am hearing expressed.

22 The question that hits my mind is in the
23 terms of the discussion, negotiations, and all of
24 this, were there representations as to evidence and
25 other materials that might be discoverable or should

1 be discoverable by Mr. Murphy that has not otherwise
2 been obtained?

3 My tendency, without having formed a firm
4 conclusion, is to believe that, absent those processes
5 containing discoverable material, I tend to agree with
6 the state that you are here and you are stuck here.

7 But I am concerned as to -- and have no idea
8 to think there is or isn't. Don't mistake me. But if
9 there is discoverable material which may or may -- may
10 have been presented to Canadian authorities, that that
11 material would be potentially relevant to the defense
12 in this case.

13 Now, if -- I am presuming underlying
14 Mr. Murphy's request is something of that ilk rather
15 than just -- I don't know -- I really don't know how
16 to get beyond the fact in terms of just that he's here
17 he's here. The due process by the Canadian Government
18 and sovereign nations in bringing him here, albeit let
19 us say heated and continued requests from the United
20 States Government or the State of South Dakota's
21 Government. That's where I am kind of stuck on that.

22 I am concerned that there may be -- I think
23 it may raise a question as to information there,
24 otherwise discoverable, that in representations that
25 may have been made to the Federal Government or to the

1 Canadian Government in terms of seeking assistance
2 from them in coming back to South Dakota for either
3 federal or state prosecutions.

4 Mr. Murphy?

5 **MR. MURPHY:** One, it's my understanding,
6 contrary to what Mr. Oswald represented to the Court,
7 that the U.S. Marshals actually traveled to Canada to
8 obtain my client and bring him back.

9 **THE COURT:** U.S. Attorney have any idea of
10 that?

11 **MR. MANDEL:** Your Honor, ultimately that's
12 correct.

13 This was initially -- if I could explain the
14 procedure a little bit, that might help. Initially
15 the United States sought the arrest of Mr. Graham up
16 in Canada and his extradition from Canada; that the
17 arrest actually took a substantial period of time
18 before they located him and arrested him. The arrest
19 was initially sought in early 2003. He wasn't even
20 arrested there until the end of 2003. Approximately.

21 Then the entire matter of the extradition was
22 litigated up in Canada from 2003 -- the end of 2003
23 through the end of 2007 before he was ultimately sent
24 back to the United States.

25 He did have representation up there that was

1 kind of fought tooth and nail every bit of the way up
2 there.

3 There was -- to answer another question the
4 Court mentioned, there is no discoverable material
5 that was provided to the Canadians. There was a
6 synopsis of the facts of the case that was provided.
7 But that was based upon the discovery that has been
8 provided to the defendant in this case.

9 In any event, once there was finally a
10 decision made by the Canadians that he could be
11 extradited to the United States, to stand trial in
12 Federal Court, for the charge that was pending, the
13 first degree murder. Then the Marshals did actually
14 travel up to Canada to transport him back here at the
15 expense of the United States.

16 I noticed that Mr. Murphy used the expression
17 "permission" a lot of times. And I don't know that
18 permission is the appropriate word, but the Court
19 there did make a determination that he could be
20 extradited under Canadian law. He was brought back
21 here.

22 When the transfer from federal to state
23 jurisdiction took place, it is what they refer to in
24 Canada as a waiver of the Rule of Specialty. And
25 again, the Court -- excuse me. The Administer of

1 Justice up there considered the similarities between
2 the state case and the federal case and waived the
3 Rule of Specialty to put him here in state court for
4 the state to proceed against him.

5 **THE COURT:** I assume those are public
6 records?

7 **MR. MANDEL:** Um --

8 **THE COURT:** And what records in this
9 proceeding would not be public?

10 **MR. MANDEL:** I guess I don't know what the
11 procedure is up in Canada.

12 **MR. MURPHY:** I have not been able to obtain
13 those documents on my own, Your Honor. I don't know
14 what process --

15 **THE COURT:** Have you been in contact with the
16 counsel in Canada?

17 **MR. MURPHY:** I have.

18 **THE COURT:** And we don't have an answer as to
19 how to get these because the description I get from
20 Mr. Mandel is perfectly -- I mean, seems entirely
21 rational. And is saying the decision is typical of
22 those that we routinely make here. And that after the
23 trial in the matter and the hearing, the determination
24 was he was, I guess, extraditable and -- under the
25 provision that he was coming back to face federal

1 charges.

2 I don't understand the Rule of Specialty,
3 but --

4 **MR. MURPHY:** We have what we believe to be
5 the synopsis that we're not able to verify.

6 As for the waiver of the Rule of Specialty,
7 my client did not have counsel during that process.
8 My client's counsel was for the initial matter, the
9 transfer.

10 **THE COURT:** Do we know that it matters
11 whether or not he has counsel or not?

12 **MR. MURPHY:** Well, as lawyers, we always
13 matter, don't we?

14 **THE COURT:** Understand.

15 But he may not have had any input to the
16 decision?

17 **MR. MURPHY:** He did not, Your Honor. I was
18 his only counsel at that point.

19 **THE COURT:** Maybe was not entitled to any
20 input on the decision.

21 **MR. MURPHY:** Again, that's something I don't
22 know. I was attempting to get him representation in
23 Canada, but was unable to do so.

24 So at least the waiver of the Rule of
25 Specialty -- I mean, now this is the second hearing

1 where the state has admitted this document and said
2 that that's what justifies my client's body being here
3 and being in chains.

4 **THE COURT:** What's the problem with providing
5 the waiver of specialty?

6 I mean, one of my concerns, in all candor, is
7 let us assume for the sake of discussion only that
8 this matter proceeds to trial and goes badly for
9 Mr. Murphy's client. I'm not fond of having habeas
10 corpus proceedings follow a year or two later; and
11 then having the option, if successful, of retrying the
12 case if one can gather all its witnesses again and all
13 of that.

14 And if there is such a document, whether he
15 be entitled to it or not, my question is, where is the
16 harm in providing it and -- first of all, does it
17 exist; and secondly, if the proceedings for whatever
18 this waiver of specialty is are available, have you
19 had the opportunity to review those?

20 Mr. Mandel?

21 **MR. MANDEL:** To review the --

22 **THE COURT:** Well, to actually see them?

23 Know what they are and know what they consist
24 of, this proceeding to waive the Rule of Specialty,
25 which I assume it applies only to the given -- to the

1 Federal Government unless they otherwise allow the
2 extradition for determination as the South Dakota --
3 the United States authorities feels appropriate.

4 **MR. MANDEL:** Well, I will try and explain it
5 as best I can. You know, I'm not -- I don't consider
6 myself an expert on this, but I have at least been
7 through it so I have some experience with it.

8 The waiver of the Rule of Specialty does not
9 go back through the court system in Canada. That's a
10 determination made by the Canadian Minister of Justice
11 whether it's permissible to make this transfer.

12 And I'll add to that, you know, the rest of
13 the world doesn't understand the difference between
14 state and federal courts. That's an oddity of the
15 United States that doesn't exist anywhere else quite
16 like it does here.

17 So that -- the start is, it's a difficult
18 thing to convey to them how the court systems interact
19 here and what the differences are. That's a
20 determination that is not -- again, not made in the
21 court system. It was made by the Minister of Justice,
22 the equivalent of the United States Attorney General,
23 as to whether or not we're allowed to do this. And
24 under Canadian law, there is not a right for
25 representation. There, frankly, is not a proceeding

1 in the sense of a court proceeding. The defendant is
2 not entitled to representation at that which is why
3 they didn't provide him representation up there.

4 I guess --

5 **THE COURT:** My question is, do you have, A, a
6 copy of the ruling by the whoever it is in Canada that
7 made that ruling?

8 And if so, is there some problem with or some
9 reason why it should not be provided?

10 You know, is it a secret document?

11 Is it a public record?

12 **MS. OSWALD:** I actually don't know the
13 answer, whether or not they make that record public up
14 there.

15 I guess my objection would be that we're
16 litigating an issue that really isn't before this
17 court.

18 **THE COURT:** I don't know that were litigating
19 it.

20 My point is, if we don't need to, we
21 shouldn't. And -- simply because it's easy enough, I
22 assume, for the state, or in this case assistance from
23 the Federal Government, to obtain that record, find
24 out if it's a public record and available to peruse
25 the record and decide if there is some objection to

1 producing it. At which point it can come before me in
2 the wisdom of in camera proceeding and we can examine
3 it subject to those rules and make a decision.

4 I -- you know, I -- I don't like the concept
5 of post conviction, and I am not trying to convey
6 anything other than a post conviction that wanders
7 around in the clouds of I requested this information,
8 it may have been of value to the defense, nobody will
9 even show us at this date what it is, and it was
10 absolutely refused for anybody to get a copy of it and
11 make some sort of a determination.

12 Now, whether that's a successful habeas or
13 not, I don't have a clue. And I suspect it may depend
14 on the judge and the other data. But in any event, I
15 don't see the profit in that for anybody. That's my
16 problem.

17 So it would be my thought that the government
18 will, A, determine if it's a public record. If it is,
19 they will either advise Mr. Murphy how to get it or
20 will get it and provide it to Mr. Murphy.

21 Is there is an objection -- if it's a secret
22 record, you -- which wouldn't surprise me -- but if it
23 is somehow a confidential document that the government
24 can obtain or provide evidence that it can't obtain
25 it, then we -- and you object to giving it to

1 Mr. Murphy, we'll have an in camera review. And if
2 it's innocuous, Mr. Murphy will be satisfied, you will
3 be satisfied, and we'll get on the way with trying
4 this matter.

5 Should it reveal information useful to the
6 defense, then we have resolved that question as well.
7 You know, I don't -- given the Denver box, I don't
8 want to walk further down that road than I have to. I
9 have no idea what the Denver box is other than it
10 appeared in the paper.

11 And in any event, I don't want this procedure
12 tainted unless it's done by me by accident and I can
13 take the fall for it. That's my job, to make the
14 decisions and take the heat. I suspect -- I would be
15 affirmed in not proceeding this any further. But as I
16 indicated, I don't want it coming back for a habeas
17 and then shifting over, if denied, to a habeas within
18 the federal system. I don't see any profit in that
19 for the state or any profit in it for Mr. Murphy.

20 So my direction is, find out if it's a public
21 record and if it is, inform Mr. Murphy how he can get
22 it or the government will get it and provide it.

23 Other than that, if there is some objection,
24 I need to know about it. And we'll review it in
25 camera if we can. If we can't get it at all, then

1 data from the Canadian Government that says that
2 should be -- you know, at that point I can't subpoena
3 anything in Canada that I know of.

4 **MR. MURPHY:** Well, what I am concerned about,
5 Your Honor, and this goes to the due process issue.
6 At a previous hearing in this case they said they had
7 the document. Now you've kind of asked Mr. Mandel
8 whether he has it and he hasn't answered that
9 question. He skirted that question. So, I mean, I
10 think at --

11 **THE COURT:** I perceived him to say he didn't.

12 **MR. MURPHY:** Well, I don't think he said
13 that. And --

14 **THE COURT:** Well, I understand that.

15 **MR. MURPHY:** There is the candor to the Court
16 issues that have been plaguing this issue.

17 **THE COURT:** All right. So we'll, just ask
18 that question flat out.

19 Do you have a copy any of the documents that
20 relate to the Canadian Government's waiver of the --
21 of specialty?

22 **MR. MANDEL:** Your Honor, I think I -- I have
23 some of them electronically. But what I don't -- even
24 if I don't, through main justice, I think whatever
25 they've got copies of, assuming that it's -- can be

1 made public, I can get from them. That's not an
2 issue.

3 **THE COURT:** Well, would we do that?

4 **MR. MANDEL:** My only -- first of all, I have
5 no problem with anything the Court -- not that it
6 would matter.

7 **THE COURT:** I realize I am talking to federal
8 people, but I can run it through Mr. Oswald and then
9 he can lateral to you.

10 **MR. MANDEL:** My only question is, are you
11 just talking about the document under which the
12 Canadians waived the Rule of Specialty or are you
13 talking about more documents?

14 **THE COURT:** That's what I am talking about
15 right now.

16 I am presuming from what I heard that the
17 question of the propriety of extradition to the United
18 States was established in the litigation in Canada.
19 If that's incorrect, somebody let me know. But it
20 would seem to me that that would resolve that issue.

21 And then the question came up as to the
22 Federal Government -- for the potentiality of them
23 dismissing the charges. And there is some sort of a
24 rule in Canada that apparently would restrict
25 extradition to the entity to which it was granted and

1 not to another sovereign, which would be the State of
2 South Dakota. And would, given the federal nature of
3 our system, I am advised that they waived that Rule of
4 Specialty. At least that's the context in which it
5 seems to enter my cranial fog. And I would like to
6 clarify that if we can.

7 **MR. MANDEL:** I think we could do that. I
8 don't see any problem, Your Honor.

9 **THE COURT:** I think that tends to solve the
10 problem at this point in time.

11 Mr. Murphy?

12 **MR. MURPHY:** That -- what I will do is I will
13 draft an order that I hope conforms to what the
14 Court's ruled and I will run it by Mr. Oswald.

15 **THE COURT:** If they agree with form -- if not
16 both send me one by email and I will cobble together
17 the order I sign.

18 **MR. MURPHY:** Okay.

19 Thank you.

20 **THE COURT:** Let's -- I assume you would do it
21 without the order, but let's keep the record clean,
22 all right.

23 Thank you.

24 Anything else?

25 **MR. MURPHY:** Not from the defense, Your

1 Honor.

2 **THE COURT:** I should have put you first.

3 Thank you.

4 Are there any further hearings set or do I
5 need to set them?

6 **MR. MURPHY:** What's that?

7 **THE COURT:** If you need to schedule a further
8 hearing, call me.

9 (Whereupon, the proceedings in this matter
10 were then concluded.)

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STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
COUNTY OF PENNINGTON)

I, TINA RAE PRUSS, Official Court Reporter
and Notary Public in and for the County of Pennington,
State of South Dakota,

DO HEREBY CERTIFY that the foregoing
transcript is a true and accurate transcript of the
questions asked, the testimony given, and of the
proceedings had.

I FURTHER CERTIFY that I am not of kin or in
any way associated with any of the parties to said
cause of action, or their counsel; and that I am not
interested in the event thereof.

IN WITNESS WHEREOF, I have hereunto set my
hand this 3rd day of May, 2011.

COPY

Tina Rae Pruss
Official Court Reporter and
Notary Public
Pennington County, South Dakota
My Commission expires: 10-04-2012