UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
Plaintiff,	*	
vs.	*	ORDER
JOHN GRAHAM, a/k/a/ John Boy Patton,	*	
Defendant.	*	

Pending before the Court is Defendant John Graham's Motion to Have Counsel Appointed. (Doc. 690.) On February 3, 2010, the United States moved to dismiss without prejudice the indictment against Graham. (Doc. 623.) The Court granted the motion and dismissed the case against Graham without prejudice. (Doc. 624.) Graham asks the Court to appoint counsel so he can move for dismissal with prejudice. The United States resists the motion.

The State of South Dakota charged Graham with one count of first degree premeditated murder and two counts of first degree felony murder, one involving kidnap and the other involving rape. Graham asserts that the State has withheld having him arraigned on all three counts. Instead, it has held in abeyance the felony murder count involving the rape allegations. Graham believes this action is being taken to allow a future federal prosecution on this charge if Graham is acquitted in state court, and he does not want to be in jeopardy of federal prosecution. Graham argues that the federal charges which were dismissed without prejudice on February 3, 2010, should be dismissed with prejudice for lack of jurisdiction because Graham and the victim are Canadian Indians and thus not subject to federal prosecution under 18 U.S.C. §§ 1152 or 1153. In support of his argument Graham relies on two letters written in 1998 but only recently discovered by Graham. One of the letters, written by an Assistant United States Attorney, states the author's personal opinion that Graham is not subject to federal prosecution because both he and the victim were members of

Canadian Indian tribes. The second letter, written by the Deputy Attorney General for the State of South Dakota, indicates that the fact Graham and Aquash were Canadian "puts United States jurisdiction into question."

The Eighth Circuit has held that whether a defendant or a victim are Indians under 18 U.S.C. §§ 1152 and 1153 is not a jurisdictional issue but rather is a matter of proof at trial. *See United States v. Pemberton*, 405 F.3d 656, 659 (8th Cir. 2005) (holding that "the alleged dispute over [the defendant's] Indian status did not deprive the district court of jurisdiction"); *United States v. White Horse*, 316 F.3d 769, 772 (8th Cir. 2003) (concluding that the defendant's "assertion that he is an Indian is relevant to the matter of proof but irrelevant on the matter of jurisdiction"). The 1998 letters cited by Graham in support of his pending motion to have counsel appointed do not change the Eighth Circuit law, and the letters do not convince the Court that dismissal of the charges against Graham should be with prejudice.

Furthermore, Graham's motion for counsel to be appointed in order to move for dismissal with prejudice is not ripe because no federal charges are pending and it is possible that such charges never will be filed. *See, e.g,. Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568, 580 (1985) (a claim is not ripe if it involves "contingent future events that may not occur as anticipated, or indeed may not occur at all"). Accordingly,

IT IS ORDERED that Defendant John Graham's Motion to Have Counsel Appointed, doc. 690, is denied.

Dated this 15th day of July, 2010.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: _____
DEPUTY