UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka
JOHN BOY PATTON, and
VINE RICHARD MARSHALL aka
RICHARD VINE MARSHALL aka
DICK MARSHALL,

Defendants.

CR08-50079-01

UNITED STATES' MEMORANDUM OPPOSING DEFENDANT'S MOTION TO DISMISS INDICTMENT

This matter is before the Court upon the Motion of Defendant John Graham ("Graham") to Dismiss Count 3 of the Superseding Indictment filed on October 7, 2008 (DE 28). The United States opposes the Motion and respectfully submits this Response.

I. INTRODUCTION

On October 23, 2008, Graham filed a Motion to Dismiss pursuant to Fed. R. Crim. P. 12(b) asserting that this Court lacks jurisdiction over Count 3 that alleges, among other things, Graham aided and abetted specifically identified Indians in the first degree murder of Anna Mae Aquash aka Annie Mae Pictou (Aquash) in Indian Country, in violation of 18 U.S.C. §§ 1153, 1111, and 2.

Graham also claims Count 3 fails to state a charge. As demonstrated herein, this Court has jurisdiction over the Superseding Indictment that expressly alleges Defendant aided and abetted Indians who were principals in the killing occurring in Indian Country. See generally 18 U.S.C. §§ 1153 and 2.[1]

II. 18 U.S.C. § 2 – AIDING AND ABETTING

The United States intends to prove that Defendant Graham aided and abetted several Oglala Sioux enrolled members including, among others, former co-Defendant Arlo Looking Cloud (Looking Cloud), current co-Defendant Richard Marshall (Marshall), and principal Theda Clarke (Clarke) in the murder of Anna Mae Aquash. In this regard, 18 U.S.C. § 2 specifically provides as follows:

> (a) Whoever commits an offense again the United States or aids, acts, counsels, commands, induces or procures its commission, is punishable as a principal; and
>
> (b) Whoever willfully causes an act to be done **which if directly performed by him or another** would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2 (emphasis added).

As the Eighth Circuit has instructed, "to be guilty of aiding and abetting is to be guilty as if one were a principal of the underlying offense." United States v. Roan Eagle, 867 F.2d 436, 445 (8th Cir. 1989). "A person may be held

[1]In addition to Count 3, the Superseding Indictment in this case charges Graham is an Indian citing 18 U.S.C. § 1153, and alternatively alleging Anna Mae Aquash was an Indian and citing 18 U.S.C. § 1152. Graham has not challenged the sufficiency of those two counts.

responsible as a principal under 18 U.S.C. § 2(b) for causing another to do an act which would not have been criminal if directly performed by that other person." See United States v. Kelley, 395 F.2d 727, 729 (7th Cir. 1968) *(*citations omitted).

The broad scope of § 2(b) is buttressed by the fact that in 1951, Congress amended § 2(b) to read "which if directly performed by him or another." See United States v. Lester, 363 F.2d 68, 73 (6th Cir. 1966) (citing 65 Stat. 717 (1951)). "The Congressional purpose in enacting this amendment was 'to . . . make certain the intent to punish (persons embraced within § 2) . . . , regardless of the fact that they may be incapable of committing the specific violation.'" Id. (citing 1951 U.S. Code Cong. Service, pp. 2578, 2583). Therefore, under 18 U.S.C. § 2(b), an accused may be convicted as a causer, even though not legally capable of personally committing the act forbidden by a federal statute. See Lester, 363 F.2d at 73.[2]

The evidence presented in this case will demonstrate that the murder of Aquash was committed by, and included, at least three enrolled members of the Oglala Sioux Tribe (Looking Cloud, Clarke, and Marshall) who were aided and

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[2]Graham's reliance upon United States v. Torres, 733 F.2d 449 (7th Cir. 1984) is misplaced because it is not an aiding and abetting case. The Torres panel simply observed in footnote that a non-Indian member of a conspiracy to commit murder in Indian Country was not prosecuted with his Indian co-conspirators. The court did not, however, consider or analyze the question of whether the non-Indian co-conspirator could have been either charged or tried under an aider and abetter theory. Furthermore, unlike § 2, the offense of conspiracy to commit murder, 18 U.S.C. § 1117, contains a situs requirement and is not a statute of general applicability.

abetted by Defendant Graham. The criminal venture in which Defendant Graham participated is the murder of Aquash in Indian Country in violation of 18 U.S.C. § 1111, 1153, and 2. See United States v. Sorrells,145 F.3d 744, 753 (5th Cir. 1998) (the criminal venture with which the defendant must "participate" and "associate" here is the use or carrying of a firearm in relation to the drug offense).

18 U.S.C. § 2 is applicable to the entire criminal code. See United States v. Rector, 538 F.2d 223, 225 (8th Cir. 1976) (citations omitted). In fact, application of 18 U.S.C. § 2 to the Major Crimes Act analysis fulfills the underlying purpose of the Major Crimes Act: **"The purpose of this bill is to ensure equal treatment for Indian and non-Indian offenders who commit certain offenses in Indian country."** See 1976 U.S.C.C.A.N. 1125 (emphasis added).

Indeed, a failure to find federal jurisdiction would give rise to unequal treatment of parties to a single transaction on the impermissible premise of race. Under modern application of Defendant Graham's theory, an Indian aider and abettor in the first degree murder of a non-Indian on Pine Ridge Indian Reservation would face life imprisonment. See 18 U.S.C. §§ 1111, 2, and 3598. His non-Indian companion that aided and abetted in the commission of this first degree murder would face death in South Dakota state court. SDCL §§ 22-16-12; 22-6-1(1). Neither Congress in the Major Crimes Act legislation contemplated such race-based unequal treatment, nor should this Court accept Defendant Graham's invitation. See 1976 U.S.C.C.A.N. 1125.

Applying § 2 in this case is consistent with two other jurisdictional principles gleaned from the case law – (1) jurisdiction pursuant to § 1153 over lesser included, but unlisted, offenses; and (2) Indian Country jurisdiction through the application of 18 U.S.C. § 3. See United States v. Yankton, 168 F.3d 1096, 1097-98 (8th Cir. 1999) (federal jurisdiction for accessory after the fact pursuant to 18 U.S.C. § 3); Felicia v. United States, 495 F.2d 353, 355 (8th Cir. 1974) (federal jurisdiction in the context of lesser included offenses); United States v. Walkingeagle, 974 F.2d 551, 553 (4th Cir. 1992) (under the Major Crimes Act, a federal court has jurisdiction over a non-enumerated offense if, as a matter of federal trial procedure, the court is permitted to instruct the jury on a lesser included, non-enumerated offense).

Simply put, an elementary application of the plain and unambiguous text of § 2, along with the weight of controlling decisional law leads to only one result – Graham may be held criminally liable as a principal if a jury determines he aided and abetted an Indian in Aquash's murder. Graham's effort to avoid this result is based upon a claim that the jurisdictional elements of § 1153 must be satisfied before he can be subjected to liability under an aider and abettor theory. However, he cites no authority for this proposition, and the argument is contrary to the fundamental premise of § 2 which contemplates that a person may be held liable as a principal even if he could not have been convicted of the underlying

offense. The presence of a "jurisdictional" element in the underlying offense does not defeat the application of this principle.

For instance, where the interstate nature of an offense is necessary to the invocation of federal criminal jurisdiction, a defendant may be guilty of aiding and abetting in the offense even in the absence of evidence that he "knowingly participated in the use of . . . interstate facilities." See United States v. Sigalow, 812 F.2d 783 (2d Cir. 1987) (affirming defendant's conviction for aiding and abetting Travel Act [18 U.S.C. § 1952] violation without evidence he had knowledge of use of the mails). The Sixth Circuit's decision relied, in part, upon the principle that a defendant can be "convicted as an aider and abettor without proof that he participated in each and every element of the offense[]" – including jurisdictional elements:

> **[i]n a case where jurisdiction depends upon the interstate nature of the criminal activity . . . [18 U.S.C. § 2] considerably eases the prosecutor's burden. Because of section 2, he does not have to show the interstate nature of each defendant's activity, but rather that the scheme had substantial interstate connections. . . .**

Sigalow, 812 F.2d at 785 (emphasis added) (quoting United States v. Ryan, 548 F.2d 782, 786 (9th Cir. 1976)); see also United States v. Weaver, 290 F.3d 1166, 1174 (9th Cir. 2002) (affirming the "equity skimming" convictions for two defendants who did not satisfy the jurisdictional element of at least two transactions but who aided and abetted others who did satisfy the element).

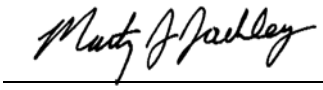
In another compelling example, the Sixth Circuit has also affirmed the convictions of two private citizens for aiding and abetting in a conspiracy to deprive a victim of his civil rights. Lester, 363 F.2d at 69. Although the defendants, themselves, could not act under color of law, they could be convicted of aiding and abetting in a conspiracy with police officers to do so – even where the police officers were acquitted. Lester, 363 F.2d at 73-74.

These cases support a literal interpretation of the plain and unambiguous provision of § 2. They are also consistent with the well-settled rule that "where a statute provides that an accessory may be prosecuted and convicted as for a substantive felony the crime is cognizable in any court having jurisdiction over the principal." Hoss v. United States, 232 F. 328, 335 (8th Cir. 1916); see also Eley v. United States, 117 F.2d 526, 528 (6th Cir. 1941) (citing Hoss).

III. CONCLUSION

The murder of Anna Mae Aquash is undisputedly a federal crime – a fact confirmed by Looking Cloud's federal conviction and its affirmance by the Eighth Circuit Court of Appeals. United States v. Looking Cloud, 419 F.3d 781 (8th Cir. 2005). Under the unambiguous and generally applicable provisions of § 2, any person who aided and abetted in this federal crime is guilty as a principal without regard to their status as an Indian. The United States respectfully requests that the Court deny Graham's Motion to Dismiss Count 3.

Date: October 29, 2008



MARTY J. JACKLEY
United States Attorney
ROBERT A. MANDEL
Assistant United States Attorney
PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2310
FAX: 605.330.4405
Marty.J.Jackley@usdoj.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies on October 29, 2008, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Facsimile at
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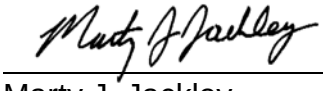

Marty J. Jackley

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