

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.)	MEMORANDUM IN SUPPORT
)	OF MOTION TO DISMISS ALL
JOHN GRAHAM, a/k/a)	COUNTS OF INDICTMENT
JOHN BOY PATTON and)	
VINE RICHARD MARSHALL, a/k/a))	
RICHARD VINE MARSHALL, a/k/a))	
DICK MARSHALL,)	
Defendants.)	

In support of his motion to dismiss all counts, File Doc. 152, Defendant John Graham asserts the following.

FACTS

Graham is charged with three counts of first degree murder. Jurisdiction is premised upon 18 U.S.C. 1111, 1152 and 1153.

In Count I, which is brought pursuant to 18 U.S.C. 1153, Graham is alleged to be an Indian.

In Count II, which is brought pursuant to 18 U.S.C. 1152, the victim, Aquash, is alleged to be an Indian, but Graham is not.

In Count III, which is brought pursuant to 18 U.S.C. 1153, Graham, the accused, is not alleged to be an Indian, but Aquash, the victim, is alleged to be an

Indian.

An element of the charge of 18 U.S.C. 1153 is that the defendant be an Indian. An element of the charge of 18 U.S.C. 1152 is that either the defendant or the victim must be an Indian.

In Graham's previous file, 03-50020, the Court dismissed the Superceding Indictment because the government failed to describe a public offense. File Doc. 327. Specifically, because the charge was brought pursuant to 18 U.S.C. 1153, and because it did not allege that Graham was an Indian, it failed to state an essential element of the offense. Counsel for the government has conceded in an action presently pending before the Eighth Circuit Court of Appeals that the dismissed charge in File 03-50020 is essentially the same charge as that in Count III of the Superceding Indictment in this file.

This Court, in File 03-50020, held that whether a defendant or a victim is an "Indian" under 18 U.S.C. 1152 and 1153 is not a jurisdictional issue. File 03-50020, File Doc. 327. Rather, it is a proof issue for the jury. In light of that ruling, Defendant Graham in this file has submitted proposed jury instructions and supporting legal authority setting forth the proof requirements that must be met by the government regarding Graham and Aquash's status as Indians. File Doc. 147 & 151.

Graham, however, contends that the issue of whether Aquash and Graham were Indians is a jurisdictional issue, and, accordingly moves this Court for dismissal based on the lack of jurisdiction.

ARGUMENT AND AUTHORITY

The Court is well versed in the issues presented in this case, as evidenced by its previous rulings in the 2003 file regarding dismissal of that case. Rather than present an exhaustive memorandum detailing why dismissal is appropriate, Graham sets forth herein his position and a list of cases supporting his contention.

Graham asserts that his status as an Indian under 18 U.S.C. 1153, and Aquash's status as an Indian under 18 U.S.C.1152, are jurisdictional questions that must be decided as a matter of law by the Court. These are not proof matters for the jury. In support of this, Graham relies on the following:

1. United States v. Lawrence, 51 F.3d 150, 151 (8th Cir. 1995) (“[T]he present case calls for a conclusion as to whether a particular person qualifies as an “Indian” for purposes of federal criminal jurisdiction. While many subsidiary facts may go into this determination, we believe that ultimately the determination of Indian or non-Indian status is a conclusion of law.”).
2. LaPier v. McCormick, 986 F.2d 303, 304 (9th Cir. 1993) (cited by Canby, American Indian Law, 3rd & 4th Eds, p. 8) (“Because the crime occurred on

an Indian reservation, LaPier's legal status as an Indian (or non-Indian) determines jurisdiction. If LaPier is legally an Indian, the federal court would have jurisdiction, 18 U.S.C. § 1153 (1988), but if he is not, the Montana state courts would have exclusive jurisdiction, because the victim was a non-Indian.”) (citing United States v. McBratney, 104 U.S. 621 (1882), and United States v. Wheeler, 435 U.S. 313 (1978)).

3. State v. Sebastian, 243 Conn. 115, 701 A.2d 13, 34-35 (1997) (extensive analysis throughout of jurisdictional nature of Indian status determination) (extensive analysis of and reliance upon LaPier, supra) (“Accordingly, the issue of whether the defendant is an Indian for purposes of establishing federal criminal jurisdiction, as opposed to standing under the Non-Intercourse Act, implicates a political question best left to the federal acknowledgment process performed by the BIA. In the absence of actual proof that the federal government has acknowledged the defendant's tribe and, therefore, that he is an Indian, we conclude that the state's exercise of criminal jurisdiction over the defendant was not preempted by the Indian Civil Rights Act.”).
4. United States v. Bruce, 394 F.3d 1215, 1218, 1221-2218 (9th Cir. 2005)

(district court's determination of Indian status is a mixed question of law and fact that is reviewed de novo, and 18 U.S.C. 1152 and 1153 create a complex jurisdictional structure for determining whether crimes in Indian country should be prosecuted by states, tribes or the federal government).

5. United States v. Heath, 509 F.2d 16, 19 (9th Cir. 1974) (cited by United States v. Antelope, 430 U.S. 641, n. 7 (1977)) (“While anthropologically a Klamath Indian even after the Termination Act obviously remains an Indian, his unique status vis-a-vis the Federal Government no longer exists. Pursuant to 25 U.S.C. s 564q, Klamath Indians are subjected to state laws and are to be dealt with by the law no differently than any other citizen of a state. We conclude accordingly that 18 U.S.C. s 1153 cannot serve to confer Federal jurisdiction with respect to crimes committed by terminated Klamath Indians.”).
6. In re Duane Garvis, 402 F.Supp.2d 1219, 1224 (E.D.Wa. 2004) (“18 United States Code § 1153, commonly referred to as the Major Crimes Act, provides for federal jurisdiction over 14 enumerated crimes committed by “Indians” within “the Indian country”. Section 1153 contains no definition of “Indian,” and the determination of whether a person is an “Indian” has been left to the courts. The court decisions setting forth considerations in

defining “Indian” for jurisdictional as opposed to racial classification are therefore instructive.”).

7. Canby, American Indian Law, 3rd Ed. p. 8 (“For many federal jurisdictional purposes, it is not enough that the individual be regarded as an Indian by his or her community; the person must be considered a member of a federally recognized tribe.”) (citing to LaPier and Sebastian, supra).
8. United States v. McBratney, 104 U.S. 621 (1882) (deciding as a jurisdictional matter that United States District Court did not have jurisdiction to decide case involving murder of a non-Indian by a non-Indian in Indian country).
9. United States v. Antelope, 430 U.S. 641, 643-648 (1977) (Indian determination under 18 U.S.C. 1153 is a non-race based determination that vests federal courts with jurisdiction over persons sharing a unique political relationship with the United States).
10. State v. Daniels, 16 P.3d 650, 654 (Wash.App. Div. 3 2001) (analysis of Indian status pertains to whether tribe or state can exercise jurisdiction over the matter).
11. Ex Parte Pero, 99 F.2d 28, 31 (7th Cir. 1938), cert. denied, 306 U.S. 643

(1939) (“We are convinced that the overwhelming weight of authority, both judicial and statutory, requires the conclusion that a child of an Indian mother and half-blood father, where both parents are recognized as Indians and maintain tribal relations, who himself lives on the reservation and maintains tribal relations and is recognized as an Indian, is to be considered an Indian within the protection of the federal guardian-ward relationship and within the meaning of ‘Indian’ as used in the jurisdictional statute [18 U.S.C. 1153] in question.”).

12. United States v. Torres, 773 F.2d 449, 454 (7th Cir. 1984 (“In order to prosecute under 18 U.S.C. 1152, the government must prove as a jurisdictional prerequisite, that the crime was in violation of a federal enclave law, and that crime occurred between an Indian and a non-Indian within Indian country.”).

The import of the above-summarized cases is that there is a 100 year history of consistently treating the Indian status determination as a jurisdictional matter. Graham recognizes the Court’s previous reliance on United States v. Pemberton, 405 F.3d 656 (8th Cir. 2005), and United States v. White Horse, 316 F.3d 769 (8th Cir. 2003). He asserts that those cases, which are premised in United States v. Cotton, 535 U.S. 625 (2002), incorrectly decided the matter.

Graham has challenged the indictment based on its alleged defects, as was the case in Pemberton and Cotton. However, he also challenges this Court's jurisdiction based on a more structural or foundational basis.

As set forth more fully in Graham's Memorandum in Support of Proposed Jury Instructions, case law for over 100 years has recognized the unique and fundamental distinctions between prosecutions involving Indians under 18 U.S.C. 1152 and 1153 and other cases. The sole basis for federal jurisdiction over crimes in Indian country is derived from the unique constitutional relationship between the United States government and some Indian tribes (and their members). United States v. McBratney, 104 U.S. 621 (1882); Morton v. Mancari, 417 U.S. 535 (1974); United States v. Antelope, 430 U.S. 641 (1977).

But for this unique legal relationship, jurisdiction over crimes in Indian country would rest with tribes or states. The defendant or victim's status as an Indian is the fundamental jurisdictional prerequisite necessary to determine whether a tribe, a state or the federal government will decide a dispute. Torres, supra.

Cases like White Horse and Pemberton, supra, have extended the language in Cotton and Hugi v. United States, 164 F.3d 378, 380 (7th Cir. 1999) (the

beginning and end of the jurisdictional inquiry is 18 U.S.C. 3231), to an area of law where it is inapplicable. Those cases involved proof that an item moved in interstate commerce, Hugi, or proof as to the quantity of drugs alleged, Cotton. These kind of determinations are different in kind and significance than establishing that a particular person has Indian blood and is a member of a quasi-sovereign nation that has a direct constitutional relationship with the United States government. The issue of Indian status implicates issues of sovereignty, treaty rights, and an ongoing constitutional relationship. The holdings in Cotton and Hugi are not applicable to concepts such as these.

For an ethnic Indian, the determination that he is legally an Indian under federal criminal law may mean the difference between: (a) being prosecuted by the government with whom it shares a guardian-ward relationship; (b) being prosecuted by a state with whom his tribe may have long standing historical animosities and be in competition with in regard to its relationship with the federal government; or, (c) being prosecuted by his own tribe from whom he claims first identity.

A close reading of these decisions reflects a certain ambivalence by the Pemberton and White Horse Courts as to the power of their own reasoning. In Pemberton, the Court left open the possibility that the defendant was correct in

asserting Indian status was a jurisdictional matter, and stated that, if he was, there were alternative grounds to uphold the decision:

Even if Pemberton's characterization of § 1153(a) as jurisdictional is correct, it is well settled “[i]n order for a defendant who has pleaded guilty to sustain a challenge to the district court's jurisdiction, he must establish that the face of the indictment failed to charge a federal offense.” Here, he does not challenge the sufficiency of the indictment, and it is apparent the indictment charged all the necessary elements, including his Indian status under § 1153(a). While a guilty plea does not confer jurisdiction, “[a] guilty plea admits factual allegations in the indictment that form the basis for federal jurisdiction,” We conclude his guilty plea was sufficient to establish the factual predicate necessary for the district court to find he was an Indian under § 1153(a).

Pemberton, *supra* at 659 (citations omitted).

Similarly, in White Horse, the procedural history and findings of the Court suggest that had the issue been properly presented, the matter would have been decided differently. The defendant in White Horse did not appear to have raised his jurisdictional or sufficiency arguments at the district court level. *Id.* at 772. The appellate court had no record to work from as to whether White Horse was an Indian. *Id.*

The jurisdictional challenge raised by White Horse was that the indictment should have alleged that he was not an Indian. He wanted the indictment to allege what he was not as opposed to what he was. This requirement does not appear to

be mandated by the plain language of the statute under which he was prosecuted, 18 U.S.C. 1152. Id. There is no fundamental requirement in 18 U.S.C. 1152 that the defendant not be an Indian. The statute applies if either the defendant or the victim is Indian and if the crime occurred in Indian country. Presumptively, if an indictment fails to declare one an Indian, it is alleging one is not, which, in White Horse's case, would place him within the jurisdiction of 18 U.S.C. 1152.

More problematic for White Horse was the Court's recognition that the issue was of no consequence jurisdictionally. Id. There was no consequence because regardless of White Horse's Indian status, he would remain in the same tribunal regardless of the error. The victim's status as an Indian was not challenged. Thus, if White Horse was an Indian as he alleged for the first time on appeal, the federal court had jurisdiction under 18 U.S.C. 1153. Id. at 772-73. If White Horse was not an Indian but the victim was, the federal court had jurisdiction under 18 U.S.C. 1152. Id. Under these circumstances, the Court could not find plain error.

In Graham's case, there is a substantial consequence. If, as he has alleged, neither he or Aquash are Indian, then this Court does not have jurisdiction, and another sovereign will have to decide the matter.

Accordingly, Graham asks that this Court dismiss all three counts as lacking in jurisdiction because, as a matter of law, neither he or Aquash are Indians. Or, he asks that further evidentiary hearings be held on the jurisdictional determination as to the Indian blood and Indian recognition issues addressed in Graham's Memorandum in Support of Proposed Jury Instructions.

Dated January 13, 2009.

/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:

MARTY J. JACKLEY

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Facsimile at
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ROBERT A. MANDEL

- U.S. Mail, postage prepaid
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- Electronic Case Filing

DANA HANNA

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- Facsimile at
- Electronic Case Filing

Dated January 13, 2009.

/s/ John R. Murphy
John R. Murphy