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

UNITED STATES' RESPONSE OPPOSING DEFENDANT GRAHAM'S MOTION TO DISMISS ALL COUNTS OF INDICTMENT

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant United States Attorney Robert A. Mandel, and respectfully files its Response Opposing Defendant Graham's Motion to Dismiss All Counts of Indictment.

Defendant Graham's attempt to equate a defendant's Indian status under 18 U.S.C. § 1153 with federal criminal jurisdiction has been expressly rejected by the Eighth Circuit Court of Appeals. See, United States v. Pemberton, 405 F.3d 656, 659 (8th Cir. 2005); United States v. White Horse, 316 F.3d 769, 772 (8th Cir. 2003). Defendant Graham's unproductive effort to skirt these holdings underscores that Defendant Graham's Indian status is not jurisdictionally significant nor does it affect his criminal liability as an aider and abettor.

First, it is a well-established precedent in this circuit that a "dispute over [a defendant's] status as an Indian or non-Indian, while relevant to the matter of proof at trial d[oes] not deprive the district court of jurisdiction." Pemberton, 405 F.3d at 659 (citing White Horse, 316 F.3d at 772).[1] "[T]he matter of jurisdiction has to do only with 'the court's statutory or constitutional *power* to adjudicate the case.'" Id. (quoting United States v. Cotton, 535 U.S. 625, 630 (2002)) (original emphasis). In this regard, "[s]ubject matter jurisdiction in every federal criminal prosecution comes from 18 U.S.C. § 3231 . . . That's the beginning and the end of the 'jurisdictional' inquiry." Id. (quoting Hugi v. United States, 164 F.3d 378, 380 (7th Cir. 1999)).

As a matter of law, any dispute over Defendant Graham's or Anna Mae Aquash's Indian status[2] does not deprive this District Court of federal criminal

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[1]Graham claims the jurisdictional holdings of White Horse and Pemberton are limited because they involved plain error review. In neither case, however, did the courts provide exposition of the applicable jurisdictional principles within the context of the plain error doctrine. Instead, it was only after determining that jurisdiction was not implicated that the plain error standard was applied. For instance, in White Horse, the panel considered and rejected the defendant's forfeited claim that there was insufficient evidence of his "non-Indian status" to affirm his conviction. The Pemberton court determined, alternatively, that the defendant's jurisdictional argument was unsustainable for the additional reason that he had not challenged the sufficiency of the indictment which alleged his Indian status. See also, United States v. Cotton, 535 U.S. 625, 629-31 (2002) (considering the defendant's forfeited error after concluding that omissions in the indictment were not jurisdictional, noting that such an argument "can never be forfeited or waived[]").

[2]Defendant Graham's most recent attempt through proposed jury instructions to significantly limit the scope and definition of "Indian" to, among

jurisdiction. Pemberton, 405 F.3d at 659. Therefore, Defendant Graham is properly charged in Counts I (18 U.S.C. § 1153) and II (18 U.S.C. § 1152). See, White Horse, 315 F.3d at 772 (complimentary nature of §§ 1152 and 1153); United States v. Driver, 945 F.2d 1410, 1414-15 (8th Cir. 1991) ("alternate counts ensured that the district court would have jurisdiction to convict Driver of assault, whether he was an Indian or non-Indian").

Secondly, criminal liability of aiders and abettors as alleged in Count III of the Indictment is also supported by the fact that a defendant's Indian status is not a jurisdictional requisite to federal criminal jurisdiction. The federal aider and abettor statute, 18 U.S.C. § 2, is neither dependent upon Indian

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other matters, specifically exclude "Canadian Indian tribe" runs contrary to the Constitution, statute, treaty, and case authority. It is well-settled that one may be an Indian for purposes of §§ 1152 and 1153 if there is evidence that: (1) he/she is an Indian in the racial sense; and (2) he/she is enrolled or affiliated with a tribe that is recognized by the United States and is individually subject to United States' jurisdiction. In fact, Defendant's attempt to employ overly restrictive interpretations on Indian status case authorities has been specifically rejected. State v. Daniels, 16 P.3d 650, 653-54 (104 Wash. App. 271) (engaging in an in-depth analysis of federal authorities and the two Rogers' prongs). See, United States v. Rogers, 45 U.S. 567 (1846); St. Cloud v. United States, 702 F. Supp.1456 (D.S.D. 1988); LaPier v. McCormick, 986 F.2d 303 (9th Cir. 1993); United States v. Heath, 509 F.2d 16 (9th Cir. 1974); United States v. Broncheau, 597 F.2d 1260 (9th Cir. 1976).

The United States anticipates that the evidence at trial will demonstrate that Graham is an Indian in the racial sense based in part upon his own admissions and upon the Certificate of Authenticity of Official Records establishing Defendant Graham is a registered member of the Champagne Indian Band which is located in Yukon Territory, Canada. The United States anticipates that the evidence at trial will further demonstrate Defendant Graham's affiliation with, among others, the Oglala Sioux Tribe.

status of the defendant, nor the situs of the underlying offense. See, United States v. Rector, 538 F.2d 223, 225 (8th Cir. 1976) (18 U.S.C. § 2 is applicable to the entire criminal code) (citations omitted); see also, United States v. Dodge, 538 F.2d 770, 776 (8th Cir. 1976) (both Indians and non-Indians can be liable for conspiring together to impede law enforcement officials operating in Indian country because 18 U.S.C. §§ 3231 and 371 are statutes of general applicability).

A defendant can be convicted under an aider and abettor theory "without proof he participated in each and every element of the offense." United States v. Sigalow, 812 F.2d 783, 785 (2d Cir. 1987).[3] This is true even where the defendant does not satisfy the "jurisdictional" elements of an offense. Id. at 785-86; see also, United States v. Beck, 250 F.3d 1163, 1165-66 (8th Cir. 2001) ("jurisdictional" elements such as an interstate nexus in an arson prosecution are not truly jurisdictional because they do not affect a court's constitutional or statutory power to adjudicate a case).

In fact, the text of § 2 and its legislative history specifically contemplate the inability to convict an aider and abettor of the underlying offense. By

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[3]Graham's further efforts to avoid the application of 18 U.S.C. § 2 by relying on evidence that he was the person who actually shot Aquash is inconsistent with the modern view of principals and accessories. Every state and the federal government have "expressly abrogated the distinction" between principals and aiders and abettors which includes accessories before the fact, but not accessories after the fact. Gonzales v. Duenas-Alvaraz, 549 U.S. 183, 189-90 (2007) (citation omitted).

imposing criminal liability for those who cause an act to be done that would be a violation of federal law "if directly performed by him or another[,]" Congress extended § 2's reach to aiders and abettors who could not be convicted of the underlying offense – a fact confirmed in the 1951 amendment's legislative history:

> This section is intended to clarify and make certain the intent to punish aiders and abettors regardless of the fact they may be incapable of committing the specific violation they are charged to have aided and abetted.

United States v. Standefer, 610 F.2d 1076, 1085 (3d Cir. 1979) (en banc) (citing S.Rep. No. 1020, 82nd Cong. 1st Sess.); United States v. Ruffin, 613 F.2d 408, 414 (2d Cir. 1979) ("If there were any question about Congress' intent to enlarge the scope of 18 U.S.C. [§] 2 it was removed by the Senate Report accompanying the proposed amendment. . .").

The principle that Indian country offenses involving non-Indians are state court matters is based upon the premise that these crimes do not affect Indians. See, United States v. McBratney, 104 U.S. 621, 624 (1881) (murder of non-Indian by another non-Indian in Indian country with "no question . . . as to the punishment of crimes committed by or against Indians . . ."); see also, New York ex rel. Ray v. Martin, 326 U.S. 496, 500 (1946) (suggesting McBratney applies to "crimes between whites and whites which do not affect Indians"); United States v. Goings, 527 F.2d 183, 185 (8th Cir. 1975) (McBratney held that "state courts have exclusive jurisdiction of offenses

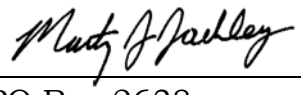
committed *solely between non-Indians* on Indian reservation") (emphasis added). Graham overlooks this critical limitation upon the McBratney line of cases in relation to the Aquash murder. To be sure, several enrolled Oglala Sioux members, including Looking Cloud, Defendant Marshall, and Theda Clarke, were an integral part of the criminal venture to murder Aquash. He also fails to acknowledge that none of the cases invoking McBratney analyze the propriety of extending liability to a non-Indian who aids and abets an Indian in committing a § 1153 offense in Indian country.

It is the law of this circuit that the dispute over Defendant Graham's Indian status does not deprive this District Court of jurisdiction with respect to any of the three counts contained in the Indictment. Proper resolution of Defendant Graham's Motion to Dismiss Count III does not turn upon principles of jurisdiction nor a dispute over Defendant's status as an Indian, but rather the application of the plain and unambiguous provisions of 18 U.S.C. § 2. Indeed, under the particular facts of this case, the Indian status element necessary for the underlying federal murder charge has been unequivocally established with the federal conviction of Defendant Graham's Indian co-Defendant, Fritz Arlo Looking Cloud. See, United States v. Looking Cloud, 419 F.3d 781 (8th Cir. 2005). The United States respectfully requests that Defendant Graham's Motion to Dismiss all counts of the Indictment be denied.

Dated and electronically filed this 25th day of March 2009.

MARTY J. JACKLEY

United States Attorney



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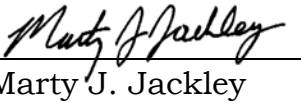
CERTIFICATE OF SERVICE

The undersigned hereby certifies on March 25, 2009, 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
- ☐ Federal Express
- ☒ Electronic Case Filing



Marty J. Jackley
United States Attorney