No. 08-3580
Criminal

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

JOHN GRAHAM, a/k/a John Boy Patton,

Defendant and Appellant.

Appeal from the United States District Court
for the District of South Dakota
Southern Division

GOVERNMENT'S PETITION FOR REHEARING EN BANC

PRELIMINARY STATEMENT

This matter is before the Court upon the Government's Petition for Rehearing En Banc pursuant to Rule 35 and 40 of the Federal Rules of Appellate procedure. The panel's opinion overlooked the clear and unambiguous text of 18 U.S.C. § 2 and relied upon dicta from a prior sentencing decision to effectively hold that a defendant cannot

be held liable as an aider and abettor if he cannot be found guilty of the underlying offense. See United States v. Graham, 572 F.3d 954, 956-957 (8th Cir. 2009). The Government respectfully submits this was erroneous. Given the breadth and the significance of § 2 in federal criminal prosecutions, the Government believes the panel's decision implicates an issue of exceptional importance and is a worthy candidate for en banc review.[1]

ISSUE PRESENTED

WHETHER A NON-INDIAN WHO AIDS AND ABETS AN INDIAN IN MURDERING A NON-INDIAN IN INDIAN COUNTRY MAY BE PROSECUTED UNDER THE MAJOR CRIMES ACT, 18 U.S.C. § 1153.

STATEMENT OF THE CASE AND RELEVANT FACTS

John Graham is a former member of the American Indian Movement (AIM) who was charged in 2003 with Fritz Arlo Looking Cloud for the 1975 murder of Annie Mae Aquash on the Pine Ridge Indian Reservation in South Dakota. Both Graham and Aquash were members of Canadian Indian tribes, and the 2003 charge did not allege either of them were Indians for purposes of federal law.[2] Looking

[1] Pursuant to 8th Cir. Rule 40A(b), this Petition is also intended to serve as a petition for rehearing by the panel.

[2] For the limited purposes of these consolidated appeals, the Government has analyzed the issue of Graham's liability under § 2 as if he were not an Indian under federal law.

Cloud (an Oglala Sioux) is a member of a federally recognized tribe and was alleged to be an Indian in the 2003 superseding indictment, which provided in relevant part as follows:

> On or about the 12th day of December, 1975, . . . in Indian country . . . the defendants, Fritz Arlo Looking Cloud, an Indian, and John Graham . . .willfully, deliberately, maliciously, and with premeditation and malice aforethought, did unlawfully kill and aid and abet in the unlawful killing of Annie Mae Aquash . . . in violation of 18 U.S.C. §§ 1111, 1153 and 2.

Aquash's body was discovered by a rancher several months after her murder, but the investigation failed to yield an indictment until 2003. A jury convicted Looking Cloud in a separate trial of the murder, and he is currently serving a life sentence. See United States v. Looking Cloud, 419 F.3d 781 (8th Cir. 2005) (affirming Looking Cloud's conviction).[3]

After resisting extradition from his native Canada, Graham was ultimately delivered to United States law enforcement officials in December 2007. Only days before his trial, the district court granted Graham's motion to dismiss the single-count superseding indictment, citing the Government's failure to allege he was an "Indian"

[3] The Looking Cloud opinion includes a brief exposition of the more infamous incidents involving AIM and its members, including the 1973 occupation of the Village of Wounded Knee, South Dakota, as well as the murder of two federal agents by AIM member Leonard Peltier on the Pine Ridge Indian Reservation in 1975. Looking Cloud, 419 F.3d at 785 n.2.

under federal law. The dismissal prompted the initial Government appeal. See Appeal No. 08-3580.

The Government had unsuccessfully resisted the motion by arguing, among other things, that Graham could be held criminally liable under an aider and abettor theory. The district court was unpersuaded, however, and determined the "[c]itation of 18 U.S.C. § 2 in the Superseding Indictment is not enough to cure the omission of the essential element of 18 U.S.C. § 1153 (the underlying substantive offense) that Graham is an Indian."

After the order dismissing the indictment was entered, the Government filed a criminal complaint, and Graham's pretrial detention was continued. The Government then obtained a new indictment naming Graham and adding a new co-defendant who had been recently charged in a separate indictment for his role in Aquash's murder. The 2008 superseding indictment contains three counts:

Count I: Alleges Graham and his new co-defendant are both Indians, citing 18 U.S.C. § 1153;[4]

[4] Section 1153 makes certain enumerated offenses federal crimes when they are committed by an Indian within Indian country. It is generally referred to as the Major Crimes Act or the Indian Major Crimes Act.

Count II: Alleges only Aquash is an Indian, citing 18 U.S.C. § 1152;[5] and

Count III: Alleges Graham aided and abetted certain Indians, naming Looking Cloud, the current co-defendant and another, and citing 18 U.S.C. § 1153.

Count III of the 2008 superseding indictment is substantially similar to the single count in the 2003 superseding indictment which was dismissed. Upon Graham's motion, the district court dismissed Count III, and the Government filed a second notice of appeal after Appeal No. 08-3530 was submitted following oral argument. See Appeal No. 09-2009. The panel granted the Government's motion to consolidate the appeals without further briefing and issued its decision on July 28, 2009. The Government obtained an order allowing an extension until September 25, 2009, to file a petition for rehearing en banc.[6]

THE PANEL DECISION

The panel determined the indictment was insufficient because the application of § 1153 is limited to individuals who, as a matter of status, are Indians. Graham, 572

[5] Section 1152 extends federal enclave jurisdiction to offenses committed by non-Indians in Indian country subject to certain exceptions. It is sometimes called the Indian General Crimes Act.

[6] Although not part of the appellate record, Graham was indicted in South Dakota state court on September 9, 2009. The charges include two counts of felony murder and one count of premeditated murder.

F.3d at 956-957 (citing the "[a]ny Indian" provision of § 1153). The failure to allege the element could not be neutralized, in the panel's view, by reliance upon 18 U.S.C. § 2. Id. at 956-957. The panel noted the lack of authority "applying aider-and-abettor in the Indian law context[]" but acknowledged several cases cited by the Government in which a defendant was held liable as an aider and abettor despite the fact his status precluded guilt for the underlying offense. Id. (citing cases).

In addition, the panel relied upon a previous panel decision and determined "[t]his court has considered accomplice liability under the Indian Major Crimes Act. Id. (citing United States v. Norquay, 905 F.2d 1157, 1159-1163 (8th Cir. 1990)). However, Norquay was a sentencing case which presented the limited question of whether the federal Sentencing Guidelines or the Minnesota guidelines applied to a particular case. The Government argued unsuccessfully that a comment by the Norquay panel concerning the prosecution of non-Indian accomplices constituted dicta.

ARGUMENT AND AUTHORITIES SUPPORTING EN BANC REVIEW

I. THE PLAIN AND UNAMBIGUOUS PROVISIONS OF 18 U.S.C. § 2 EXTEND CRIMINAL LIABILITY TO GRAHAM FOR AIDING AND ABETTING LOOKING CLOUD IN AQUASH'S MURDER.

There is no "Indian law" exception to 18 U.S.C. § 2. Its plain and unambiguous text extends criminal liability to a person who aids and abets in the commission of a crime even where he could not be convicted of the underlying offense. See United States v. Sigalow, 812 F.2d 783, 785 (2d Cir. 1987) (a defendant can be convicted under an aider and abettor theory "without proof he participated in each an every element of the offense[]").

Section 2 is a statute of general applicability which applies regardless of the situs of the offense or the status of the defendant. 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). Furthermore, Aquash's murder is "an offense committed against the United States" to which the aider and abettor provisions of § 2 must apply. Section 1153 criminalizes certain enumerated offenses when they are committed by an Indian within Indian country, including first-degree murder as described in 18 U.S.C. § 1111. Accordingly, the fact that Looking Cloud is an Indian indisputably

establishes Aquash's murder as a case arising under the provisions of § 1153, particularly given Looking Cloud's final conviction[7].

The panel's opinion overlooked these principles and created an "Indian law" exception to § 2, basing its decision on the belief that Graham's status as an Indian was critical to his liability as an aider and abettor. However, the holding is contrary to the text of the statute and fails to recognize a defendant may be held liable as an aider and abettor even if his status prevents his conviction of the underlying offense. Indeed, this is the premise underlying § 2 and its 1951 amendments which were enacted "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." United States v. Lester, 363 F.2d 68, 73 (6th Cir. 1966) (quoting 1951 U.S. Code Cong. Service pp. 2578, 2583). The Lester decision from the Sixth Circuit and an en banc case from the Third Circuit illustrate the breadth of § 2's application.

In Lester, the Sixth Circuit Court of Appeals affirmed the convictions of two private citizens for aiding and abetting in a conspiracy to deprive a victim of his civil rights. Although the defendants, themselves, could not act under color of law, they

[7] The allegation in Count III of the 2008 superseding indictment alleging Graham's current co-defendant is also an Indian further supports this conclusion.

could be convicted of aiding and abetting in a conspiracy with police officers to do so – even though the police officers were ultimately acquitted. Lester, 363 F.2d at 73-74.

The Third Circuit Court of Appeals reached a similar conclusion in United States v. Standefer, 610 F.2d 1076, 1085 (3d Cir. 1979) (en banc). There, the defendant was a private citizen who argued he could not be held liable as an aider and abettor for violating 18 U.S.C. § 7215(a)(2), which prohibits only government officials from accepting unauthorized gifts. However, the en banc court rejected the claim and held that "despite [the defendant's] private status . . . [§] 7214(a)(2) is made applicable to [him] through 18 U.S.C. § 2(a) . . ." Standefer, 610 F.2d at 1085; see also State v. Norman, 193 Neb. 719, 721, 229 N.W.2d 55, 56 (1975) (adult can aid and abet possession of alcohol by minor).

The panel in this case, however, concluded that a defendant's non-Indian status did, indeed, prevent the application of § 2 because a non-Indian could not be directly prosecuted for the underlying offense. However, its authority for this holding rests uneasily upon a prior sentencing decision in United States v. Norquay, 905 F.2d 1157 (8th Cir. 1990).

In Norquay, a panel considered the narrow issue of whether the defendant's sentence for a § 1153 burglary conviction should be calculated under Minnesota's sentencing guidelines or the federal Sentencing Guidelines. The panel determined the

defendant was subject to the federal Sentencing Guidelines notwithstanding § 1153's provisions that require the offense of burglary to be "defined and punished" according to state law.

After completing its analysis and announcing its holding, the Norquay panel rejected the defendant's unwarranted sentencing disparity argument, crediting, without analysis, the claim that a non-Indian accomplice could not be prosecuted in federal court. The reference, however, is, at best, dicta and certainly not part of the holding. It is simply part of the panel's response to one of the defendant's unsuccessful arguments. See United States v. Gill, 513 F.3d 836, 850 (8th Cir. 2008) (citing Black's Law Dictionary 1102 (8th Ed. 2004) – "obiter dictum" as "a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential."). Simply put, the issue of extending liability to a non-Indian aider and abettor was not squarely presented or addressed by this Court in Norquay.

Finally, the principle that Indian country offenses involving non-Indians are exclusively 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).[8]

Here, even if neither Graham nor Aquash were Indians under federal law, the offense could not be described as one committed solely between non-Indians. Looking Cloud's conviction, long since final on direct review, refutes any claim that this murder did not affect Indians. The crime is, by any account, an offense cognizable under § 1153, and there is no legal justification for failing to apply the plain and unambiguous provisions of § 2 to extend criminal liability to Graham. See 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

[8] The concept of "jurisdiction" as the term was used around the time of the 1881 McBratney decision "is not what the term "jurisdiction" means today, i.e., the courts' statutory or constitutional power to adjudicate the case." United States v. Cotton, 535 U.S. 625, 630 (2002) (citation and internal quotation omitted) (describing the "elastic concept of jurisdiction" utilized by the Supreme Court when it decided Ex parte Bain, 121 U.S. 1, 7 S. Ct. 781, 30 L. Ed. 849 (1887)). In this case, the panel correctly held that the district court had subject matter jurisdiction. Graham, 572 F.3d at 955-956; see also United States v. Stymiest, No. 08-3320, 2009 WL 2998063 (8th Cir., Sept. 22, 2009) (Indian status is an element of a § 1153 offense and not, in a strict sense, jurisdictional).

operating in Indian country because 18 U.S.C. §§ 231 and 371 are statutes of general applicability).

II. THE PANEL'S DECISION SATISFIES THE STANDARD FOR EN BANC PETITIONS SET OUT FEDERAL RULE OF APPELLATE PROCEDURE 35.

As it relates to this Petition, Rule 35(a) of the Federal Rules of Appellate Procedure provides that "[a]n en banc hearing or rehearing is not favored" and will not generally be ordered unless "the proceeding involves a question of exceptional importance." Fed. R. Civ. P. 35(a). "A rehearing en banc should be necessitated not by reason of a result in a given case, not because of the correctness of the decision but by reason of the exceptional importance of the case requiring the attention of the full court." United States v. Arpan, 887 F.2d 873, 879 n.2 (8th Cir. 1989) (Lay, J., dissenting) (citing Western Pac. R.R. Corp. v. Western Pac. R.R., 345 U.S. 247, 260-62 (1953)).

The panel's holding that the decision in Norquay precludes application of § 2 to Graham is an erroneous interpretation of this Court's precedent which can only be corrected through an en banc proceeding. See United States v. Williams, 546 F.3d 961 (8th Cir. 2008) (Colloton, J., dissenting from denial of en banc petition) (stating "prior panel rule"). Further, the fact that the particular aider and abettor issue presented in this case has not been litigated in the other federal courts does not change

its importance in the larger context of aider and abettor liability. Indeed, there is no analytical distinction between Lester and Standefer and this case. En banc review would allow the entire Court to bring this decision into conformity with the text of § 2 free of the view that Norquay is a binding prior panel decision on the issue of aider and abettor liability.

CONCLUSION

Based upon the foregoing, the Government respectfully requests that this Court grant the Petition for Rehearing En Banc, vacate the panel's decision and reverse the district court's orders dismissing the first-degree murder charges alleging Graham's criminal liability as an aider and abettor.

Respectfully submitted this 24th day of September, 2009.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of September, 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 – via e-filing

/s/ MARK E. SALTER
MARK E. SALTER
Assistant United States Attorney