IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN GRAHAM, a/k/a JOHN BOY PATTON and VINE RICHARD MARSHALL, a/k/a) RICHARD VINE MARSHALL, a/k/a) DICK MARSHALL, Defendants.	))))))))))	CRIM. NO. 08-50079-01 DEFENDANT GRAHAM'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COUNT 3

Count 3 of the superceding indictment (Doc. 28) filed on October 7, 2008, should be dismissed. Count 3 should be dismissed because the court lacks jurisdiction over the offense and because count 3 fails to state a charge. Fed.R.Crim.P. 12.

LACK OF JURISDICTION:

Count 3 alleges that John Graham aided and abetted Fritz Arlo Looking Cloud, Theda Rose Clarke, and Richard Marshall in the killing of Annie Mae Aquash. Looking Cloud, Clarke, Marshall and Aquash are alleged to be Indians in count 3. Graham is not. Count 3 alleges violations of 18 U.S.C. 2, 1111, and 1153.

Under the plain, unequivocal language of 18 U.S.C., 1153, Mr. Graham must be an Indian as that term is defined under federal criminal law for the court to have jurisdiction over him under that statute. 18 U.S.C. 1153. Mr. Graham is not an Indian as that term is defined under federal criminal law.

To determine whether a person is "Indian" under federal criminal law, the threshold inquiry is whether that person is a member of a federally recognized Indian tribe. In re Duane Garvis, 402 F.Supp.2d 1219, 1224 (E.D.Wa. 2004) (citing William C. Canby, American Indian Law, 4th. Ed. 2004, pp. 8-10; LaPier v. McCormick, 986 F.2d 303, 305 (9th Cir. 1993); State v. Sebastian, 243 Conn. 115, 701 A.2d 13 (1997); United States v. Antoine, 318 F.3d 919 (9th St. Cir. 2003); United States v. Heath, 509 F.2d 16, 19 (9th Cir. 1974)). Enrollment is not required, but membership in a federally recognized tribe is the primary evidence of being an Indian. Id. Defendants who are affiliated with Indian groups not recognized by the United States government are not Indian for criminal jurisdiction purposes. Id.

If a person is not enrolled, the government must then show that the person received benefits extended by the federal government exclusively to Indians based on their status as Indians. See United States v. Lawrence, 51 F.3d 150, 152-53 (8th Cir. 1995) (inquiry into whether defendant was eligible to receive benefits

from the United States Indian Health Service or through the Johnson O'Malley Act, and considered whether child in question was subject to coverage under the Indian Child Welfare Act); United States v. Bruce, 394 F.3d 1215, 1225 (9th Cir. 2005) (looking to whether person was recognized in some fashion by United States Secretary of the Interior in absence of formal enrollment in federally recognized tribe).

The importance of formal recognition by the United States government for an Indian tribe as it relates to determining whether a person is an "Indian" is highlighted in cases involving "terminated" tribes. Persons affiliated with tribes that have had their federal recognition terminated are not "Indians" within the meaning of 18 U.S.C. 1153. United States v. Antelope, 430 U.S. 641 (1977); St. Cloud v. United States, 702 F.Supp. 1456 (D.S.D. 1988). Historically, when Indian tribes living in the United States migrated to Canada, the United States' relationship with the tribes ceased to exist because no further special trust relationship existed between the two entities. See New York Indians v. United States, 40 Cl.Ct. 498, 1904 WL 879 (Cl.Ct. 1904).

In this case, there are certain facts that are not reasonably subject to dispute. Neither John Graham nor Anna Mae Pictou Aquash are or ever were members of or enrolled in any tribe recognized by the United States government. Neither were

non-enrolled members either. There is nothing in the record to support the notion that either held themselves out to be members of any federally recognized United States tribe. The undisputed facts contained within discovery provided by the government is that both were consistently recognized by their peers and the United States government as Canadian citizens and persons affiliated with indigenous Canadian tribal "bands."

Therefore, based on these undisputable facts, the court lacks jurisdiction under the charged statute, 18 U.S.C. 1153. And, the government cannot place this case under federal jurisdiction by now alleging a violation of 18 U.S.C. 1152, as that statute is also not applicable to the case because Aquash does not meet the definition of Indian under federal criminal law.

The government alleges that because Looking Cloud, Clarke and Marshall are Indians, jurisdiction exists over Mr. Graham pursuant to 18 U.S.C. 2. There is nothing in the plain, unequivocal language of either 18 U.S.C. 2 or 1153 that supports the government's position. Jurisdiction over a non-Indian is not created by either statute merely because the non-Indian is alleged to have aided and abetted Indians.

The analysis in United States v. Torres, 733 F.2d 449 (7th Cir. 1984), contradicts the government's premise and its analysis supports Mr. Graham's

motion to dismiss. In that case, three persons were alleged to have conspired to commit murder and kidnaping in regard to a non-Indian victim. Id. at 453. The murder charge was prosecuted under 18 U.S.C. 1153, and the kidnaping charge was prosecuted under 18 U.S.C. 1152. The crime occurred in Indian country. Id. However, only two of the accused were Indians. The non-Indian potential defendant was not charged in federal court. Id. at 454, n.1. The court, in noting that the non-Indian defendant was not federally prosecuted in that case, cited to both 18 U.S.C. 1152 & 1153 as the reason. Moreover, in its discussion of the case, the court stated unequivocally that crimes committed by non-Indians against non-Indians in Indian country are not subject to federal jurisdiction. Id. at 454, n. 4 (under 18 U.S.C. § 1152, "crimes committed by non-Indians against non-Indians, in Indian country, are subject to state jurisdiction.") (citing United States v. McBratney, 104 U.S. 621, 26 L.Ed. 869 (1881), and New York ex rel. Ray v. Martin, 326 U.S. 496, 66 S.Ct. 307, 90 L.Ed. 261 (1946)).

The government has ignored the plain language of the statutes and the long history of United States Supreme Court precedent on point. Instead, the government asserts that 18 U.S.C. 2 provides this court with jurisdiction over the matter. That is misplaced. All that statute does is make aiders and abetters subject to the same punishment as principles. It does not remove or otherwise modify any

proof or jurisdictional pre-requisites set forth in 18 U.S.C. 1152 or 1153.

In United States v. White Horse, 316 F.3d 769 (8th Cir.), cert. denied, 540 U.S. 844 (2003), the Eighth Circuit held that the "Indian" recognition matter was a proof issue, not a jurisdictional issue. However, that case is distinguishable in several important regards. Further, its holding appears to contradict existing United States Supreme Court case law on point.

First, in that case, the issue of Indian recognition was not raised at trial. The matter was raised on appeal and reviewed for plain error. The court declined to find plain error. Therefore, the standard of review was different than in the present case.

Second, that case involved facts opposite to those presented in Mr. Graham's case. In that case, the defendant was charged under 18 U.S.C. 1152. He argued on appeal that he was an Indian. This was dispositive of the issue as the court found that if he was an Indian, he would fall within the parameters of 18 U.S.C. 1153. Id. at 772. Thus, the court found the charging error to be harmless because he was subject to federal jurisdiction under either 18 U.S.C. 1152 or 1153.

This is the opposite situation presented in Mr. Graham's case. Neither Mr. Graham nor Ms. Aquash were "Indians" at the time of the alleged offense. Thus,

neither statute subjects Mr. Graham to the court's jurisdiction. Under 18 U.S.C. 1152, one of them must be Indian to invoke the court's jurisdiction, and under 18 U.S.C. 1153, Mr. Graham must be Indian to invoke the court's jurisdiction. Neither condition exists. Accordingly, Mr. Graham asks for dismissal of count 3 in the superceding indictment.

FAILURE TO STATE A CHARGE

Count 3 of the superceding indictment fails to state an offense. Count 3 fails to set forth an essential element of the 18 U.S.C. 1153, specifically, that Mr. Graham is an Indian. The failure to set forth every essential element in the indictment, and to present every essential element in the charge to the grand jury, violates Mr. Graham's Fifth and Sixth Amendment rights.

A defendant's Indian status is an essential element of 18 U.S.C. 1153. United States v. Pemberton, 405 F.3d 656, 659 (8th Cir. 2005); United States v. Prentiss, 273 F.3d 1277 (10th Cir. 2001). The failure to allege an essential element violates a defendant's Fifth Amendment right to a grand jury indictment because the grand jury was never asked to make a probable cause determination in regard to that element. Hamling v. United States, 418 U.S. 87 (1974); United States v. Williams, 429 F.3d 767, 775 (8th Cir. 2005). The failure to set forth all essential elements in an indictment also violates a defendant's Fifth and Sixth Amendment

rights. A defendant has the right to be fully informed of the nature of the charges, to be put on sufficient notice of the conduct alleged so that he can prepare a defense, and, the right to have an indictment of sufficient factual clarity so that he can assert bar to future prosecution. U.S. Const. Amend. V & VI; United States v. Zanagger, 848 F.2d 923, 925 (8th Cir. 1988); United States v. Spinner, 180 F.3d 514, 516 (3rd Cir. 1999). The defects in count 3 cannot be cured by amendment or additions. Williams, supra; United States v. Opsta, 659 F.2d 848, 850 (8th Cir. 1981).

Therefore, because count 3 fails to state an offense, it should be dismissed.

CONCLUSION

This court lacks jurisdiction over count 3 of the superceding indictment. And, count 3 is defective for failing to state a charge. Therefore, count 3 of the indictment should be dismissed.

Dated October 23, 2008.

/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:

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	☒	Electronic Case Filing

Dated October 23, 2008.

/s/ John R. Murphy
John R. Murphy