No. 09-30193

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JAMES H. GALLAHER, JR.,

Defendant-Appellant.

On Appeal From the United States District Court
for the Eastern District of Washington
District Court No. CR-05-224-RHW

The Honorable Robert H. Whaley
Senior United States District Court Judge

DEFENDANT-APPELLANT'S OPENING BRIEF

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FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	U.S.C.A. No. 09-30193
	)	
Plaintiff-Appellee,	)	D.C. No. CR-05-224-LRS
v.	)	
	)	
JAMES H. GALLAHER, JR.,	)	
	)	
Defendant-Appellant.	)	
	)	

ISSUES PRESENTED FOR REVIEW

Whether an indictment charging first degree murder must be brought within the 5 year limitation period under 18 U.S.C. § 3282 (Offenses not capital) when federal jurisdiction is predicated on the alleged crime occurring in Indian Country and Congress had eliminated the death penalty pursuant to 18 U.S.C. § 3598 for crimes committed in Indian Country.

STATEMENT OF THE CASE

A. Nature of the Case

1. Basis for Subject Matter Jurisdiction in the District Court

The district court had original jurisdiction in

this matter pursuant to 18 U.S.C. § 1111, and 18 U.S.C. § 1153(a).

2. Basis for Jurisdiction in the Court of Appeals

This Court has jurisdiction over an appeal from the final order of the district court pursuant to 28 U.S.C. § 1291 and 1294(1).

3. The Judgment is Appealable

A conditional guilty plea was entered, reserving the right to appeal the district court's order denying a motion to dismiss the indictment for violation of the statute of limitations. The Judgment in a Criminal Case was entered on May 4, 2009. The Judgment in a Criminal Case is a final order of the district court and is appealable pursuant to 28 U.S.C. § 1291.

4. The Notice of Appeal was Timely Filed

The Judgment in a Criminal Case was entered on May 4, 2009. The Notice of Appeal was lodged on April 28, 2009, and entered on May 5, 2009, within the time period required by Federal Rule of Appellate Procedure

4(b).

5. Bail Status

Mr. Gallaher is currently housed in FCI Florence in the custody of the Bureau of Prisons, serving a 6 year prison term. His projected release date is June 26, 2011.

B. Proceedings and Disposition in the District Court

On December 20, 2005, the government obtained an indictment charging Gallaher, a Native American, with first degree murder alleged to have occurred on the Colville Reservation in the Eastern District of Washington on April 14, 1991. [CR 1; ER 1]. Thereafter, Gallaher moved the district court to dismiss the indictment for violation of the statute of limitations. [CR 35-36]. The district court denied the motion to dismiss. [CR 45]. Gallaher then filed a Petition for Writ of Mandamus to this Court in connection with the denial of the motion to dismiss for violation of the limitation period. Gallaher v. U.S.

Dist. Court for Eastern District of Washington, CA No. 06-73909 (9th Cir. 2006). This Court dismissed the petition by order entered on December 6, 2006. Id. The United States Supreme Court later denied review. Gallaher v. U.S. Dist. Court for Eastern District of Washington, ___U.S.___, 127 S. Ct. 1869 (2007).

The parties eventually entered into a conditional plea agreement pursuant to Rule 11(a)(2) wherein Gallaher reserved his right to appeal the district court's denial of his motion to dismiss the indictment for violation of the statute of limitations. [CR 80]. The parties agreed that Gallaher would plead guilty to a 1esser included offense, involuntary manslaughter. Id.

In May 2007, the district court held a change of plea hearing and conditionally accepted Gallaher's guilty plea. The district court wanted to wait until it reviewed the Presentence Investigation Report before deciding to accept the guilty plea. On the date set for sentencing, the district court announced that it

would not accept Gallaher's conditional guilty plea. Gallaher again filed a Petition for Writ of Mandamus to this Court, seeking an order requiring the district court to accept Gallaher's tendered conditional plea of guilty. This Court denied the petition, but ordered reassignment of the judge because of the judge's premature review of the Presentence Investigation Report. See, In Re Gallaher, 548 F.3d 713, 718 (2008).

The judge was reassigned on February 20, 2009. [CR 118]. Gallaher again tendered a conditional guilty plea to the new judge, reserving the right to appeal the denial of his motion to dismiss for violation of the statute of limitations. [CR 121]. The new judge accepted Gallaher's conditional guilty plea. [CR 122]. Gallaher was sentenced to serve 72 months in prison. This appeal followed.

C. Statement of Facts

Preamble

Section 3281 of Title 18 states that "[a]n indictment for any offense punishable by death may be found at any time without limitation." 18 U.S.C. § 3281. Section 3282 of Title 18 states generally that "no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." 18 U.S.C. § 3282.

In 1994, Congress passed the Death Penalty Act (Act). Within the Act, Congress enacted "Special provisions for Indian country" - 18 U.S.C. § 3598. Section 3598 states:

> no person subject to the criminal jurisdiction of an Indian tribal government shall be subject to a capital sentence under this chapter for any offense the Federal jurisdiction for which is predicated solely on Indian country . . . and which has occurred within the boundaries of Indian country, unless the governing body of the tribe has elected that this chapter have effect over land and persons subject to its jurisdiction.

18 U.S.C. § 3598 (citation omitted). The Confederated

Tribes of the Colville Reservation located in Eastern Washington have not passed any legislation making the federal death penalty applicable to that reservation. [CR 36; ER 2].[1]

Case Specific Facts

On December 20, 2005, the government obtained an indictment charging Gallaher, a Native American, with first degree murder alleged to have occurred on the Colville Reservation on or about April 14, 1991. [CR 1; ER 1]. Thereafter, Gallaher moved the district court to dismiss the indictment for violation of the statute of limitations. [CR 35-36]. Gallaher claimed that the elimination of the death penalty by Congress, with the enactment of 18 U.S.C. § 3598, changed the nature of "capital offenses" committed in Indian country to non-capital offenses. Therefore, the 5 year statute of limitations for non-capital offenses in 18 U.S.C. § 3282 governed since the Colville tribe has not

[1] "CR" refers to the Clerk's Record; "ER" refers to the Excerpt of Record.

enacted any legislation making the federal death penalty applicable in its territorial jurisdiction as required by § 3598. [CR 36; ER 2]. The district court denied the motion to dismiss, [CR 45; ER 13-17], observing this issue "is a matter of first impression." [CR 45; ER 14].

In denying the motion, the district court reasoned that "§ 3598 grants the discretion that normally resides with Congress to impose a capital sentence on persons subject to the criminal jurisdiction of a tribal government to the tribal governments themselves." [CR 45; ER 16]. The court then concluded that "'[c]apital offenses' under Title 18 are still 'punishable by death' under § 3598 because tribal governments could elect to impose the death penalty." Id. The district court also found that "Congress clearly continues to consider crimes such as first degree murder 'capital offenses' to which an unlimited period of limitations applies." Id. (citing 18 U.S.C. §§ 1111(b), § 3281). Finally, the district court

stated, "[w]ithout a clear expression of Congressional intent to remove first degree murder in Indian country from the classification of capital offenses in § 3281, this Court finds the offense charged in this matter to be subject to an unlimited statute of limitations." CR 45; ER 16-17].

SUMMARY OF ARGUMENT

The fact that Congress eliminated the death penalty for offenses occurring in Indian Country when it enacted 18 U.S.C. § 3598 is significant in relation to the applicable statute of limitations. Case law distinguish instances where a court has held the death penalty unconstitutional from instances where Congressional action has removed the death penalty as a punishment for an offense. Here, Congress removed the death penalty as a punishment for offenses committed in Indian Country, thereby, rendering such offenses non-capital. Therefore, the statute of limitations for Gallaher's alleged 1991 murder is governed by 18 U.S.C.

§ 3282, the five (5) year limitation period for non-capital offenses. Since five (5) years had lapsed before the filing of the indictment in this case, the indictment should have been dismissed.

ARGUMENT

The fact that Congress eliminated the death penalty in 18 U.S.C. § 3598 for offenses committed in Indian Country is significant in relation to the statute of limitations. Cases that analyze such issues distinguish instances where a court has held the death penalty unconstitutional from instances where Congress has removed the death penalty as a possible punishment for an offense. This Circuit's decision in United States v. Manning, 56 F.3d 1188 (9th Cir. 1995) is instructive.

In Manning, this Court faced a question of whether the 5 year statute of limitations applied to a murder conviction involving the use of the U.S. Mail after the death penalty under the statute was found

unconstitutional. Manning, 56 F.3d at 1194-95 (citing United States v. Cheely, 36 F.3d 1439 (9th Cir. 1994) (holding death penalty for violation of 18 U.S.C. § 1716 offenses unconstitutional). Manning argued that Cheely rendered his offense non-capital since he could not receive a death sentence; thus, he argued that the lesser five (5) year limitation period in § 3282 applied to his murder indictment. Manning, 56 F.3d at 1195. This Court disagreed.

Manning held that the limitless period in § 3281 still applied even though the defendant could not be punished by death. Manning reasoned that when a court's "decision renders unconstitutional a penalty for an offense, it does 'not necessarily have the effect of invalidating all statutes that were tied to the concept of a 'capital case.'" Id. at 1196 (quoting United States v. Kennedy, 618 F.2d 557, 558 (9th Cir. 1980) (citing United States v. Watson, 496 F.2d 1125, 1128 (4th Cir. 1973)). "After all, '[i]n a very literal sense, the offense defined [in section 1716] is still

a'capital crime;' the *statute* still authorizes the imposition of the death penalty and Congress has not repealed it.'" Manning, 56 F.3d at 1196 (quoting Watson, 496 F.2d at 1127 (emphasis in original). Thus, Manning recognizes a difference in the inability of the government to pursue death due to a court ruling that the penalty is unconstitutional from the inability to seek death due to the removal of the death penalty as a punishment by act of Congress. Id.

Manning primarily relied on this Court's decision in Kennedy. Manning, 56 F.3d at 1196 (citing Kennedy, 618 F.2d at 559) (holding that a court's finding that the death penalty is unconstitutional does not repeal the statute withholding bail for "capital crimes"). Kennedy specifically adopted the reasoning in the Fourth Circuit's Watson decision. Kennedy, 618 F.2d at 558 n. 5 ("We point to Watson because we endorse its mode of analysis").

Watson's analysis focused on the fact that Congress

had not acted in any way to repeal the death penalty. Watson, 496 F.2d at 1127. This analysis was reiterated by the Fourth Circuit in United States v. Massingale, 500 F.2d 1224 (4th Cir. 1974) when it distinguished its holding from Watson because Congress had eliminated the death penalty for kidnapping. Massingale stated:

> If this case presented nothing more than the declaration of the unconstitutionality of the death penalty provision of section 1201 by the Court . . . we would be faced with a different dilemma which has confronted the courts in the wake of Furman v. Georgia . . . and which was thoroughly discussed by Judge Winter in . . . Watson . . . However, the 1972 amendment of Section 1201 by Congress, which eliminated the death penalty, removed kidnapping from the classification of a capital offense. . . .

Massingale, 500 F.2d at 1224 (citations omitted).

What Watson, and the cases that have adopted its rationale, make clear is that the inferences that courts are to draw when the death penalty is found unconstitutional are different from the inferences drawn by courts after Congress has eliminated the death penalty. When a court holds the death penalty unconstitutional, courts do not infer that statutes

tied to the death penalty are repealed. Watson, 496 F.2d at 1129.

It is quite different, however, when Congress has acted to eliminate the death penalty for an offense. When Congress has eliminated the death penalty, courts infer that statutes tied to the death penalty are also eliminated. Manning, 56 F.3d at 1196; Massingale, 500 F.2d at 1224; Watson, 496 F.2d at 1127 (Congress has not "amended any of the statutes creating special procedural rules in capital cases"); see also, United States v. Provenzano, 423 F.Supp. 662, 667 (S.D.N.Y. 1976), affirmed, 556 F.2d 562 (2nd Cir. 1977) ("a court has a different role when determining the ramifications of a judicial holding that a death penalty provision is unconstitutional, from that when Congress has taken some action of the matter . . . Where Congress has not acted to reconsider statutes" tied to the death penalty after Congress removed that penalty, courts "may not infer an intent to do so"). Thus, when Congress eliminates the death penalty for certain offenses, the

limitless statute of limitation for the offenses are also eliminated. Provenzano, 423 F. Supp. at 666-67 (concluding that the 5 year limitation period applied to kidnapping after Congress removed the death penalty for that offense).

Therefore, the district court erred when it concluded that a "clear expression of Congressional intent" was needed before first degree murder in Indian country is classified as non-capital. [CR 45; ER 16-17]. The legal inference to be employed in this case is that Congress did consider § 3281 when it enacted § 3598 and chose not to save § 3281's application to the offense of first degree murder committed in Indian country. Massingale, 500 F.2d at 1224; Provenzano, 423 F. Supp. at 667.

The district court's reliance on Manning's rationale is misplaced. [CR 45; ER. 16]. What distinguishes Manning from this case is that Congress in passing § 3598 eliminated the death penalty for offenses committed in Indian Country when Federal

jurisdiction is predicated on the act occurring on Tribal land. Congress specifically targeted murder as an offense covered by § 3598. See, 137 Cong. Rec. S8488-03. Such offenses, therefore, are no longer capital offenses.

Even though the death penalty was eliminated by Congress with the enactment of § 3598, the district court, nonetheless, focused on the fact that the first degree murder statute, 18 U.S.C. § 1111, retains the death penalty. [CR 45; ER 16]. The district court reasoned that since the Tribe could elect to impose the death penalty within its territorial boundaries, the offense is still capital. Id. The district court concluded that § 3598 "simply" gives "tribal governments the discretion to determine whether the death penalty should apply within their reservations." Id. The following example helps illustrate why the district courts rationale runs afoul of case law.

Congress clearly has the authority to determine whether the death penalty could be imposed for any

offense. In this regard, Congress may enact a general statute that eliminates the death penalty for all federal offenses without amending the penalty provision of each enabling statute. Under the district court's reasoning, the fact that each offense still retains the death penalty after Congress eliminated it in another statute, means that each offense continues to constitute a "capital offense." This reasoning is not supported by case law. Massingale, 500 F.2d at 1224.

On the other hand, if after Congress had eliminated the death penalty by separate enactment, it may later re-enact the death penalty. Under this scenario, crimes committed after Congress re-enacted the death penalty would again be "capital offenses" so long as Congress retained the death penalty in the enabling statute. Such action would not render crimes committed before the re-enactment of the death penalty "capital offenses."

With the enactment of § 3598, Congress did two things: (1) Congress eliminated the death penalty for

offenses that fall within the scope of the enactment; and (2) it vested tribal governments with the power to re-enact the federal death penalty through Tribal legislation. 18 U.S.C. § 3598. See e.g., United States v. Mazurie, 419 U.S. 544, 557 (1975) (Congress has the power to vest in tribal councils portions of its own authority"). Unless and until the Colville Tribal government pass legislation enacting the death penalty, offenses that come within the scope of § 3598 are not punishable by death as is required by § 3281 to apply the limitless statute of limitations.

The above analysis does not change even though § 3598 was enacted after the alleged murder in 1991. Since the alleged murder took place prior to the enactment of § 3598, then the questions becomes which statute of limitations applies - § 3281 or § 3282? The answer to this question is found in three significant cases.

The first case is Provenzano. That case dealt with Congressional action that removed the death penalty for

federal kidnapping. In 1961, when the alleged kidnap and murder took place, the offense was punishable by death. Id. at 664. Eleven years later, the death penalty provision was repealed and the offense was punishable by life in prison. Id. at 666-67. The district court observed that there were no "steps taken by Congress to amend other provisions of Title 18 or the Federal Rules of Criminal Procedure or statute of limitations so as to validate their continued applicability to the new" statute. Id. at 667. The court concluded that Congress "clearly 'removed kidnapping from the classification of 'capital offense.'" Id. (citing Massingale, 500 F.2d at 224). Therefore, the "five-year statute of limitations" in § 3282 applied. Id.

In Provenzano, the government argued that 1 U.S.C. § 109 saved its right to prosecute the defendant because the alleged criminal act occurred prior to the

change in penalty.[2] The district court concluded, however, that the savings provision did not apply to procedural statutes, like the statute of limitations. Id. 667-69. In drawing this conclusion the district court relied on two other significant cases - Bridges v. United States, 346 U.S. 209 (1952) and United States v. Obermeier, 186 F.2d 243 (2nd Cir. 1950). Provenzano 423 F.Supp. at 668.

Both Bridges and Obermeier addressed whether a change in the statute of limitations from five (5) years to three (3) years for immigration offenses required dismissal if the criminal conduct occurred before the lesser statute of limitations took effect. Bridges, 346 U.S. at 224-25; Obermeier, 186 F.2d at 250. In both cases, the defendants were charged with making a false statement in relation to their application for naturalization. Bridges, 346 U.S. at

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[3] 1 U.S.C § 109 is a savings clause that saves substantive rights and substantive liabilities, but does not save procedural remedy such as statutes of limitation. Provenzano, 423 F.Supp at 668-69.

212-13; Obermeier, 186 F.2d at 244. At the time the offenses were allegedly committed, the statute of limitations was five (5) years.

These statutes were subsequently changed to a three (3) year limitations period. This change occurred prior to the filing of the indictments in both cases. Each of the defendants' offenses occurred after the three (3) year limitation had expired. Bridges, 346 U.S. at 212; Obermeier, 186 F.2d at 250. Both the Supreme Court and the Second Circuit held that the lessor three (3) year period applied, barring prosecution for the alleged offense, even though the criminal act occurred during the previously enacted five (5) year limitation period. Bridges, 346 U.S. at 223-34; Opermeier, 186 F.2d at 250-56.

The same is true here. At the time Gallaher allegedly committed the first degree murder, the statute of limitations was governed by § 3281 because Congress had not enacted § 3598. However, when Congress enacted § 3598 in 1994, it removed the death

penalty for offenses falling within its scope. Without an act by Congress to save the application of § 3281, the statutes tied to the death penalty, including the time on which an indictment must be brought, do not apply. Provenzano, 423 F. Supp at 667-69. If an alleged offense is not brought within the shorter applicable statute of limitations, the indictment must be dismissed, even if the alleged criminal conduct occurred while the greater statute of limitations was in effect. Bridges, 346 U.S. at 223-34; Opermeier, 186 F.2d at 250-56.

Here, the alleged murder occurred in April of 1991. In April 1991, first degree murder carried a limitless period in which the charges could be brought. However, subsequent to April 1991, Congress eliminated the death penalty for first degree murder for offenses occurring in Indian County, when it enacted § 3598. The enactment of § 3598 also eliminated all procedural statutes tied to the death penalty, including the lifetime statute of limitations of § 3281. The

Colville tribal authority has not enacted the death penalty. Therefore, the applicable statute of limitations to the instant indictment is five (5) years pursuant to § 3282. The indictment, having been brought more than fourteen (14) years after the alleged offense, should be dismissed.

Rule of Lenity

The district court stated that "Congress clearly continues to consider crimes such as first degree murder "capital offenses" to which an unlimited period of limitations applies." [CR 45; ER. 16] (emphasis added). This conclusion is not supported by the case law cited above. However, if there is any ambiguity in Congress' enactment of § 3598 and what effect its enactment has on the application of the proper statute of limitations, the rule of lenity requires a holding in favor of Gallaher's interpretation.

The rule of lenity was summarized by this Court as follows:

to the extent that any doubt remains, the scope

> of the statute is sufficiently ambiguous to invoke the rule of lenity. "In those circumstances-where text, structure and history fail to establish that the Government's position is *unambiguously* correct-we ... resolve the ambiguity in [the defendant's] favor." United States v. Granderson, 511 U.S. 39, 54, 114 S. Ct. 1259, 127 L.Ed.2d 611 (1994) (emphasis added). See also, United States v. Bass, 404 U.S. 336, 347, 92 S. Ct. 515, 30 L.Ed.2d 488 (1971) ("[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we chose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.") (internal quotation marks omitted); People v. Materne, 72 F.3d 103, 106 (9th Cir. 1995) ("[T]he rule of lenity applies where a criminal statute is vague enough to deem both the defendant's and the government's interpretations of it as reasonable.").

United States v. Cabaccang, 332 F.3d 622, 635 (9th Cir. 2003) (*en banc*)(emphasis in original).

In light of the Congress' act, eliminating the death penalty for any offense covered by § 3598, and from the authority cited in support Gallaher's position, "it is evident that the [district court's] position is far from unambiguously correct." Id. In enacting § 3598, Congress did nothing to save

application of other procedural statutes tied to capital crimes for offenses covered by that section. Under these circumstances, § 3598 changed the nature of first degree murder committed in Indian country from capital to non-capital. Therefore, the indictment should have dismissed for violation of the 5 year limitation period in 18 U.S.C. § 3282.

CONCLUSION

Based on the foregoing, it is requested that the Court reverse the district court's order denying the motion to dismiss for violation of the statute of limitations.

Respectfully submitted July 30, 2009.

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32-1, I certify that the foregoing brief uses a proportionately-spaced font with a 14-point typeface, and contains 4,088 words. (Opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words.)

s/Stephen R. Hormel
Attorney for Appellant

CERTIFICATE OF RELATED CASES

Counsel for James H. Gallaher, Jr., U.S.C.A. No. 09-30193, is not aware of any cases that raise the same issues, currently pending in this Court.

Respectfully submitted July 30, 2009.

s/Stephen R. Hormel
Attorney for Appellant

CERTIFICATE OF SERVICE

I, the undersigned, declare:

On July 30, 2009, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service of the brief will be accomplished by the appellate CM/ECF system.

I certify that the foregoing is true and correct. Executed on July 30, 2009, at Spokane, Washington.

s/Stephen R. Hormel
Attorney for Appellant