

I.

STATEMENT OF FACTS

On Sunday, September 14, 1975, Frank Hayes, Chief of Police of Castroville, Texas, called Mr. Candelario Zepeda, Constable for Medina County, the county wherein Castroville is located. The call was made at approximately 8:30 p.m. Mr. Hayes requested that Mr. Zepeda go with him to arrest Ricardo Morales on two misdemeanor theft warrants which had been issued and partially executed on August 7, 1975. Mr. Zepeda advised Mr. Hayes that since it was Sunday and it was rather late, Monday, the following day would be better and thus Mr. Zepeda declined to go with Mr. Hayes. Thereafter, at approximately 9:40 p.m. Mr. Hayes called the dispatcher in Hondo, Texas, Mr. Johnny Velasquez, and requested that Mr. Don McCall, Frank Hayes' deputy in Castroville, call Mr. Hayes at his home. This was done and Mr. Hayes instructed Mr. McCall to arrest Ricardo Morales on the warrants. Mr. McCall and a friend of his, a Mr. Steve Worthy, who was himself a Bexar County deputy, proceeded to the Morales' home and there arrested Ricardo Morales. Also, pursuant to Mr. Hayes' instructions, Mr. McCall obtained permission from Mrs. Morales and went into the home to obtain the serial numbers on different items of furniture, including a TV set and a stereo. As Morales was being placed in Mr. McCall's car, Mr. Hayes, without being called in for assistance, arrived at the scene. In the car with Mr. Hayes was his future son-in-law, Dennis Dunford, who Mr. Hayes had asked to go with him because "Mr. Hayes might need him as a witness if there was any trouble". When Mr. Hayes arrived Ricardo Morales was already handcuffed and in the back seat of Mr. McCall's car. Mr. Hayes got out of his personal car and approached Ricardo. Mr. Hayes jerked Ricardo out of the car, threatened to kill him numerous times, called him a son of a bitch, struck Ricardo in the stomach with his fists several times and instructed Mr. McCall "take the handcuffs off so that thieving son of a bitch can run because he, Frank Hayes, wanted to shoot Ricardo." These statements by Mr. Hayes were heard by Mr. McCall and Mr. Worthy. Almost as abruptly as he had begun, Mr. Hayes, instructed McCall to put Ricardo back in the car and to meet him on the old highway 90 bridge at a place called three points. Mr. McCall then left with Ricardo Morales in the back seat of his car. Mr. Hayes and Dennis followed in Mr. Hayes' car. On the way to the meeting point, Mr. Hayes told Dennis "not to be afraid if he, Dennis, heard a few shots because he, Frank Hayes, was just going to try to scare him, Ricardo Morales." At the meeting point, Mr. McCall got out of his car and Mr. Hayes got out of his car and instructed Mr. McCall to tell Ricardo that he, Frank Hayes, was going to kill him and that he, Ricardo Morales better make a statement about the stereo and TV set. Mr. Hayes then made the statement "I can change my mind, I don't want to do it here. Follow me." Mr. Hayes then instructed McCall to follow him and at this point they traveled west on the old Quihi Road for about five miles. There Mr. Hayes turned off into a one lane dirt gravel road. Mr. McCall followed. Mr. Hayes also instructed Mr. McCall that he wanted no lights of any kind. About one mile into the gravel road Mr. Hayes stopped his car and got out of it. At this point, both vehicles had deviated approximately four miles from the route to the Hondo Medina County Jail. Mr. Hayes approached Mr. McCall and again stated he was going to kill Morales unless he cooperated by giving information. Frank Hayes then removed the shotgun from the arms of Steve Worthy and instructed McCall to take the handcuffs off. Both McCall and Steve Worthy struggled to remove the handcuffs and Steve Worthy attempted to turn a flashlight on. At this point Hayes warned Worthy that he did not want any lights on. Thereafter Hayes struck Ricardo several times in the stomach with the butt and the barrel of the shotgun and made the statement "I have killed a Mexican before and I'm fixing to kill another one." This statement was heard by both Steve Worthy and Donald McCall. Dennis also saw Frank Hayes push Morales with the shotgun. After the handcuffs were removed, Hayes instructed McCall and Worthy to "go on back to Castroville, just drive off." McCall and Worthy left but about 200-300 yards away turned the car around and parked the car. About ten minutes later they heard a muffled sound and saw the dome light in Hayes car go on. Morales was shot

under the left armpit on the lateral side from approximately 6 inches away. Hayes and Dennis drove up to McCall's car and Hayes stated "Don, I killed him" and thereafter made a self-serving statement that it was an accident. McCall called him a liar and told him this because, he, McCall, would have heard the shotgun blast. Hayes responded that the reason McCall had not heard the shotgun blast was "because he, Hayes, had the shotgun stuck under Morales' armpit." Hayes indicated that Morales was dead and lying out in the ditch. McCall and Hayes went back to the spot where Ricardo was last seen by McCall and a search by him, McCall, did not produce Morales' body. Both Hayes and McCall drove back to the point where Steve Worthy and Dennis were waiting. Hayes then instructed McCall to call Hondo and tell them his prisoner had escaped. Hayes also told McCall "he was putting him, McCall to the test. He was going to see who was loyal to who." Hayes showed McCall the shotgun but refused to turn it over to him. Thereafter, both McCall and Steve Worthy left for Hondo. Hayes and Dennis went back to the scene of the killing. Hayes got off and went into the ditch and instructed Dennis to drive the car down there when he saw a flashlight blinking on and off. This was done and then Hayes placed some mats on the floorboard of the car and instructed Dennis to help him load the body. The body was loaded and thereafter both Hayes and Dennis proceeded to attempt to cover the different blood stains out in the field. Hayes and Dennis drove back to Hayes' home. On the way there, Hayes stated to Dennis "I want you to know that it was an accident and that I'm sorry for getting you into this mess." Hayes also stated to Dennis that if he, Dennis, knew of any place to bury Morales to which Dennis responded in the negative. Upon arrival at Hayes' home, Hayes talked to his wife and then instructed Dennis to go with him in the car to a place called Flat Rocks Road. There they removed the body from the floorboard of the back seat and placed it in the trunk. Hayes then instructed Dennis "get some dirt and cover up the blood stains on the road," which both Hayes and Dennis proceeded to do. They, then, drove back to Hayes' home. Upon arrival, Hayes instructed Dennis to "open the trunk slightly" and Hayes then proceeded to place the mats and the cushion into the trunk where the body was located. He also instructed Dennis to go in and wash up. Thereafter, both Hayes and his wife left and drove around with the body in the trunk for approximately one hour and forty-five minutes. By this time, Constable Cerda had called the Hayes' home wondering what was going on. This was done pursuant to requests from the Morales' family who had gone to the Hondo County Jail looking for Ricardo and had been unable to locate him in jail or out in the field where he was last seen. Mr. Hayes and his wife arrived back at the house and Mr. Hayes instructed his daughter, Jennie, "if she would go to East Texas with her mother." Both Mrs. Hayes and Hayes' daughter left and came to San Antonio to pick up Hayes' sister-in-law. All three then proceeded to the city of Carthage in East Texas, approximately 400 miles from Castroville where the shooting had taken place. Dennis went back to San Antonio and Hayes remained in Castroville. Monday afternoon, September 15, 1975, the Morales' family went to see Frank Hayes and he advised them that "he did not know what the hell was going on." He told them Ricardo had escaped and denied knowing anything of Ricardo's whereabouts. Hayes made the same statement to Sheriff Hitzfelder. That same Monday, Mrs. Hayes called the Jefferson State Bank in San Antonio where she had been employed and stated that "she was having car trouble and was somewhere near the Louisiana border." That same day Dennis was arrested by Deputy Santleben and he confessed as to what had happened. Both Dennis and Hayes were charged with murder and Hayes remanded to jail in lieu of a \$50,000 bond, but Dennis was released on a \$2,500 Personal Recognizant Bond. The Texas Rangers were called in to the case and pursuant to a search warrant proceeded to the Hayes home where the shotgun and the shells were found. A search for Mrs. Hayes at the house and at her place of employment led the Rangers to conclude that she was in Carthage at her brother's ranch. An APB was issued for Mrs. Hayes and her car. Pursuant to this APB report, a deputy in Llano County, approximately 200 miles from San Antonio, located the car with Mrs. Hayes, her sister, and her daughter in the car. Also found in the car, was a plastic bag containing huge spots of blood which were later confirmed to be human blood. The deputy also found two shovels and a pick. Mrs. Hayes at first denied any knowledge of the whereabouts of Ricardo Morales body, but subsequently confessed and led Texas Rangers, Dan North and Bobby Favor, back to Carthage where, on her brother's land, the body of Ricardo Morales was located buried under three feet of dirt.

Mrs. Hayes participated in the actual physical burial of Ricardo Morales. She was charged with a misdemeanor offense, Section 38.05 of the Texas Penal Code with hindering apprehension or prosecution and released on a \$2,500 Personal Recognizant Bond. Dennis Dunford's charge was also reduced to that same misdemeanor offense.

The autopsy report indicated that Ricardo Morales died from a shotgun wound inflicted under the left armpit from a distance as close as six inches from the lateral side, in an upward direction. The wadding from the shell, the left lung and internal organs from the lateral portion of his body, were found imbedded in his right lung. The blast also demolished the sixth and seventh ribs of his ribcage on the lateral side.

II.

STATE'S PROSECUTION

Frank Hayes, the principal in this murder, was convicted of aggravated assault and his punishment assessed at two years to ten years in the Texas Department of Corrections with the possibility that, taking good behavior into consideration, he may be released in twenty months. He was not convicted of murder.

Dennis Dunford, an accomplice witness under the Texas Penal Code, was granted immunity from prosecution for murder in exchange for his testimony. Subsequently, all charges, including the misdemeanor offense, were dropped against him and there is no further state proceeding pending.

Mrs. Dorothy Hayes, wife of Frank Hayes, who drove the body to Carthage and who assisted in the coverup and burial of Ricardo Morales, pled nolo contendere, meaning "no contest", to the misdemeanor offense for which she was charged and received a one year probation and assessed a \$49.50 fine.

Jennie Hayes Dunford, wife of Dennis and daughter of Frank Hayes, who participated in the coverup plot, has never been charged with any offense.

Mrs. Hayes sister, who assisted Mrs. Hayes in burying the body and in the coverup plot, has never been charged with any offense.

As regards any further state prosecution, the state sovereign has now concluded its prosecution.

III.

FEDERAL GOVERNMENT INTERVENTION

A. AUTHORITY FOR INTERVENTION

The federal government has the authority to intervene in this case under a federal statute entitled, Title 18, United States Code, Section 242, which reads as follows:

"Whoever, under color of any law, statute, ordinance, regulation or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life."

B. INTERPRETATION OF 18 U.S.C. 242

Elements of the Offense--Federal Sovereign

1. Elements of an offense under statute prohibiting anyone, under color of law, from willfully depriving inhabitant of state of any right protected by Constitution or laws of the United States are:

- a. The defendant's acts must have deprived someone of a right secured or protected by Constitution or laws of the United States
- b. The defendant's illegal acts must have been committed under color of law
- c. The person deprived of his rights must have been an inhabitant of a state territory, or district
- d. The defendant must have acted willfully.

U.S. v. Senak, United States Court of Appeals, Seventh Circuit, 477 F.2d 304 (1973); U.S. v. Shafer, United States District Court, N.D. Ohio, 384 F. Supp 496 (1974); Kennedy v. Anderson, United States District Court, E.D. Oklahoma, 373 F. Supp 1345 (1974).

2. Federal criminal statute having to do with subjecting one to different punishment because he is alien or ;because of color or race afforded no relief to prisoners convicted under state law; any charge under such federal statute could be initiated only by federal grand jury or United States attorney. Kennedy v. Anderson, 373 F.Supp 1345 (1974).

3. Misuse of power, possessed by virtue of state law and made possible only because wrongdoer is clothed with authority of state law, is action taken under color of state law. U.S. v. Barr, 295 F.Supp. 889 (1969).

4. Suspected criminality or accomplished incarceration furnish no license for destruction of guaranteed constitutional rights. Miller v. U.S., 404 F.2d 611 (1968).

5. A willful effort to deprive a citizen accused of crime of his constitutional right to a trial, or to intimidate him in its exercise, if mounted under color of state law, violates the criminal civil rights statute; a conspiracy ;toeffect such ends, whether directed against

citizens or mere inhabitants of the United States, is likewise punishable. U.S. v. O'Dell, 462 F.2d 224 (1972).

6. In order for a person to be guilty of crime of willful deprivation of constitutional rights while acting under color of law, defendant's action must be done under color of law and, where use of force is involved, force used must be unreasonable and unnecessary. U.S. v. Stokes, 506 F.2d 771 (1975).

C. DOUBLE JEOPARDY CONTENTION

1. There are always two questions which must be resolved when a defendant in a criminal case interposes a plea of former jeopardy. The first is whether both tribunals before which the defendant was tried derived their authority and jurisdiction from the same sovereign; the second is whether both prosecutions were for the same offense. U.S. v. Vaughan, 491 F.2d 1096 (1974).

2. Municipality and federal government represented two distinct sovereigns so that an act denounced as crime by both was an offense against the peace and dignity of both and could be punished by each. U.S. v. Vaughan, 491 F.2d 1096 (1974).

3. Even if charge against defendant of disorderly conduct in violation of tribal code surfaced from defendant's conduct which led to federal charge of robbery perpetrated by an Indian in Indian country, double jeopardy clause did not bar federal prosecution for robbery, where elements of offenses were different and, under any applicable test, tribal disorderly conduct charge was a legal stranger to federal robbery charge. U.S. v. Leeds, 505 F.2d 161 (1974).

4. Charging defendant with violation of federal statute relating to weapons and explosives after defendant had been convicted of first-degree murder arising out of use of bomb involved in federal charge did not violate double jeopardy provisions.

Here we have separate offenses: the elements of proof are dissimilar, and the proscriptions emanate from different sovereigns.

Brinlee v. U.S., 496 F.2d 351 (1974).

5. Federal government was not precluded by doctrines of double jeopardy and collateral estoppel from trying defendants on federal extortion charges because the defendants were acquitted on state charges of kidnapping, extortion and assault with intent to murder. U.S. v. Burke, 495 F.2d 1226 (1974).

6. State conviction does not bar subsequent federal prosecution for same act. U.S. v. Delay, 500 F.2d 1361 (1974).

7. An act denounced as a crime by both federal and state sovereignties is an offense against the peace and dignity of both and may be punished by each.

Federal prosecution of defendant for altering and uttering a United States Treasury check was not barred on ground of double jeopardy by his prior state prosecution for the same act. U.S. v. Jackson, 470 F.2d 684 (1972).

8. State offense of kidnapping and federal offense of extortion are separate crimes requiring proof of different elements by the prosecution, and defendant's acquittal in state court trial of kidnapping did not constitute a double jeopardy bar to Hobbs Act prosecution. U.S. v. Johnson, 516 F.2d 209 (1975).

D. PERSON SUBJECT TO PUNISHMENT UNDER 18 U.S.C. 242

1. To act "under color" of law for purposes of this section prohibiting, under color of law, willfully subjecting any inhabitant of any state to deprivation of any rights, privileges or immunities secured or protected by Constitution or laws of United States does not require that accused be officer of state and it is enough that he is a willful participant in joint activity ;with state or its agents. U.S. v. Price, 86 S.Ct. 1152, (1966).

2. Private persons, jointly engaged with state officials in prohibited action, are acting "under color of law" for purposes of this section prohibiting, under color of law, willfully subjecting any inhabitant of any state to deprivation of any rights, privileges or immunities secured or protected by Constitution or laws of United States. Id.

E. POLICY OF FEDERAL GOVERNMENT NOT TO GET INVOLVED IN 18 U.S.C. 242 ACTIONS

1. Where state court in prosecution against defendants instructed jury that if two or more persons conspire to injure, oppress, threaten or intimidate any citizen in free exercise or enjoyment of right or privilege secured him by Constitution or laws of United States, they shall be guilty of conspiracy against rights of citizens but that language was not based on statute upon which present indictment was grounded for interfering, under color of state law, with civil rights of named person, defendants had not been twice placed in jeopardy in violation of Fifth Amendment. U.S. v. McMahon, 339 F.Supp. 1092 (1971), United States District Court, S.D. Texas, Houston Division.

2. Neither Fifth nor Fourteenth Amendments prohibit multiple prosecutions by different sovereigns, even though prosecutions are based on same facts and require same evidence to sustain them. Harlow v. U.S., 301 F.2d 361 (1962), United States Court of Appeals, Fifth Circuit, San Antonio.

For pleas of double jeopardy to be upheld, it must be established that both tribunals before which defendant was tried derived their authority and jurisdiction from same sovereign and that both prosecutions were for same offense. Id.

3. Defendant's prosecution for bank robbery under federal law did not amount to double jeopardy although he had been previously convicted of the same robbery in state courts. U.S. v. Hayles, 492 F2d 125 (1974), United States Court of Appeals, Fifth Circuit, Corpus Christi.

NOTE: See attached exhibit of government's involvement under 18 U.S.C 242. in many other state jurisdictions throughout the United States.

F. STATE SOVEREIGN

1. Elements of First Degree Murder, Texas Penal Code, Section 19.02:

a. A person commits an offense if he:

1) intentionally or knowingly causes death,

2) intentionally causes serious bodily injury which leads to death, or

3) commits a felony and during the course of the felony causes death

2. Elements of Aggravated Assault, Texas Penal Code, Section 22.02:

a. causes serious bodily injury

b. causes bodily injury to one he knows is a peace officer in the lawful discharge of his duties, or

c. uses a deadly weapon in making an assault.

3. Elements for Hindering Apprehension or Prosecution, Texas Penal Code, Section 38.05:

- a. harbors or conceals the other;
- b. provides or aids in providing the other with any means of avoiding arrest or effecting escape; or
- c. warns the other of impending discovery or apprehension.