No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

SANTO ARRIETTA,

PETITIONER,

- vs -

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Douglas E. Couleur
Attorney for Petitioner
328 Staab Street
Santa Fe, NM 87501
(505) 984-1962

QUESTION PRESENTED FOR REVIEW

I. Whether the Tenth Circuit correctly applied this Court's decision in ***Alaska v. Native Village of Venetie Tribal Government et al***, in holding that a .7 mile long public road maintained by Santa Fe County, New Mexico, lying between parcels of land owned by non-Indians, but owned by, and within the exterior boundaries of, the Pojoaque Pueblo, is "Indian country" for purposes of federal criminal jurisdiction.

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Petitioner, Santo Arrietta, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, which filed its judgment on February 7, 2006 .

OPINION BELOW

On February 7, 2006, the Tenth Circuit affirmed the district court's Findings of Fact and Conclusions of Law. The decision is published at ***436 F.3d 1246 (10th Cir. 2006)***. A copy of the decision is attached to this petition as Exhibit A.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit affirming the District Court's denial of the Defendant's Motion to Dismiss was filed on February 7, 2006. This Petition for Writ of Certiorari is timely if filed on or before May 8, 2006, pursuant to Supreme Court Rule 13.4. The jurisdiction of this Court is invoked under ***28 U.S.C. § 1254(1)***.

FEDERAL PROVISION INVOLVED

18 U.S.C. §1151. Indian country defined:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights- of-way running through the reservation,

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same

18 U.S.C. §1152. Laws governing (in relevant part) :

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country.

STATEMENT OF THE CASE

Arrietta was indicted for assault resulting in serious bodily injury, and use of a firearm to facilitate a crime of violence, arising from an incident on a public road within the exterior boundaries of the Pojoaque Pueblo, in the State of New Mexico. Arrietta filed a motion to dismiss for lack of subject matter jurisdiction on the grounds that the public road was not a dependent Indian community within the meaning of ***18 U.S.C. §1151(b)***. The District Court denied the motion to dismiss. Arrietta pled guilty, pursuant to ***Rule 11(c)(1)(c), Fed.R.Crim.P.***, to a violation of ***18 U.S.C. §924(c)***, reserving his right to appeal the subject matter jurisdiction issue. The Tenth Circuit affirmed the District Court.

The incident occurred on Shady Lane (County Road 105), also known as Bouquet Lane, between Private Claims 239 & 256. Shady Lane, roughly .7 miles in length, as well as the non-Indian land bordering the road, is entirely within the exterior boundaries of the Pojoaque Pueblo. Shady Lane is bordered in its entirety by land owned in fee by non-Indians, as Indian title was extinguished by the Pueblo Land Act.

The Pueblo Land Act was enacted to resolve thousands of non-Indian claims to lands within Pueblo grants. The act established a Pueblo Lands Board to determine and report the exterior boundaries of any land granted to the Pueblos, and to determine the status of all land within such boundaries. The common practice for individual claimants was to claim title to their land, but not to claim title to the road that provided access to their land, thus leaving title to the land underlying the road with the Pojoaque Pueblo,

even though the land was burdened by an undefined easement for that road. As described by a Realty Specialist at the Department of the Interior, Bureau of Indian Affairs:

> This is the situation for the road within the Pojoaque Pueblo Grant that is known as Santa Fe County Road 105, or Bouquet Lane, or Shady Lane. Title to the land underlying this road remains with the Pueblo of Pojoaque even though the land is burdened by this road and is bordered on both sides by non-Indian owned lands.

The Government agreed that the land surrounding the public road was not Indian Country, however, argued that because title to Shady Lane itself remained with the Pojoaque Pueblo, it was a dependent Indian community. All roadway easements required by the State of New Mexico or Santa Fe County have been granted by the private non-Indian landowners adjacent to the road, rather than by the Pojoaque Pueblo or the United States. Santa Fe County has maintained the road since at least 1930, and the cost of such maintenance and improvements are paid for by Santa Fe County.

The final Pueblo Lands Board report refers to lands where title was not extinguished, as nevertheless being burdened:

> No evidence has been submitted to show that the Territory or State acquired title from the Indians for these rights of way, but it does appear that the roads or highways through said grant have been in use by the public for more than 50 years, and the Board has determined, and hereby determines, that the Territory and State have acquired by such use an easement in and over said lands, subject only to a reverter to the Pueblo, whenever said land shall no longer be used by the public or the State as a highway, or shall be abandoned for a new location across said grant.

The final Pueblo Lands Board report also states that roads not under control of the State or County were burdened:

By certain wagon roads and trails passing over and across said Pojoaque Indian Grant, but which do not appear to be under the control of the State or County authorities.

REASONS FOR GRANTING THE WRIT

I. *The Tenth Circuit did not correctly apply the two-prong test stated in this Court's decision in* ***Alaska v. Native Village of Venetie Tribal Government et al***.

"Indian country" is defined at ***18 U.S.C. §1151***, and consists of three subsections; (a) reservations, (b) "dependent Indian communities," and (c) allotments. Reservations and allotments are not at issue here.

In ***Alaska v. Native Village of Venetie Tribal Government et al***, this Court stated that a "dependent Indian community" is Indian land that has been set aside by the Federal Government for the use of the Indians as Indian land, and, that is under federal superintendence. ***118 S.Ct. 948, 953 (1998)***. Title, or ownership, is not the determining factor, as the Supreme Court rejected the argument that Indian country exists wherever land is owned by a federally recognized tribe. ***Id. at 955, fn.5***. Rather, the set-aside and superintendence requirements insure that the land in question is occupied by an "Indian community," and that the "Indian community" is sufficiently dependent on the federal government such that the federal government and the Indians involved exercise primary jurisdiction over the land in question. ***Id at 955***. The Federal Government must take some action setting apart the land for the use of the Indians "as such," and it is the land in question, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government. ***Id. at 955, fn.5***.

In ***Venetie***, the set-aside requirement was not met because Congress contemplated that non-Natives could own the former Venetie Reservation, and because the Tribe was free to use it for non-Indian purposes. ***118 S.Ct. at 955***. The federal superintendence requirement was not met in ***Venetie*** either, because the federal government did not actively control the lands in question. ***Id. at 956***.

A. *The Tenth Circuit's analysis relied entirely on title, or ownership, of the land in question, contrary to this Court's clear statement in* ***Alaska v. Native Village of Venetie Tribal Government et al****, rejecting such an analysis*.

Despite this Court's clear statement that title or ownership is not controlling, the Tenth Circuit nevertheless based its decision entirely on ownership. As to the set-aside requirement, the Tenth Circuit held:

> Although the PLA extinguished the Pueblo's title over some of the land that was originally set aside for them, any land where title was not extinguished by the Board remained set aside for use by the Pueblo. Thus, the federal set-aside requirement is satisfied.

United States v. Arrietta, 436 F.3d 1246, 1250 (10th Cir. 2006).

The Tenth Circuit did not consider whether Shady Lane was set aside by the Federal Government for the use of Indians as Indian land. Title or ownership is a starting point for determining the existence of a dependent Indian community, and certainly the absence of title or ownership by a federally recognized tribe would defeat the set-aside requirement. However, ***Venetie*** was clear that the land must be set aside for the use of the land as Indian land, and therefore, ownership of Shady Lane by the Pojoaque Pueblo

does not end the inquiry. The Tenth Circuit should have considered the historical and current use of Shady Lane.

As to the federal superintendence requirement, the Tenth Circuit held:

> Land owned by an Indian tribe within the exterior boundaries of land granted to the tribe is necessarily part of the Indian community, even if the state performs some services and maintenance with respect to the land. Because the Pojoaque Pueblo possesses title to Shady Lane and Shady Lane is within the exterior boundaries of the Pojoaque Pueblo, it is part of the Pojoaque Pueblo community. The road, like the Pueblo, is therefore subject to federal superintendence.

Id.

This holding ignores this Court's statement that "it is the land in question, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government." Instead of looking at the land in question, that is, the specific facts regarding Shady Lane, the Tenth Circuit considered only that title to Shady Lane remained with the Pueblo of Pojoaque, and that Shady Lane was within the exterior boundaries of the Pueblo.

In considering both prongs of the ***Venetie*** test, the Tenth Circuit ignored that the land surrounding Shady Lane was patented to non-Indians; Shady Lane was not patented by the landowners who used it to access their property, as was customary at the time; Shady Lane was recognized at the time of the Pueblo Land Act, and is still recognized, as a public road; Shady Lane is burdened by an easement for the public as well as the non-Indian landowners; Shady Lane has always been maintained by Santa Fe County; and, all

easements in favor of the State and County have been granted by the non-Indian landowners bordering Shady Lane.

B. *The Tenth Circuit's analysis used a standard rejected by this Court in* ***Alaska v. Native Village of Venetie Tribal Government et al****, as reducing the federal set-aside and superintendence requirements to mere considerations*.

In considering the federal superintendence requirement, the Tenth Circuit stated that "[w]e examine the entire Indian community, not merely a stretch of road…." ***Arrietta, 436 F.3d at 1250***. That Court then stated that land "owned by an Indian tribe within the exterior boundaries of land granted to the tribe is necessarily part of the Indian community…." ***Id***. In ***Venetie***, this Court rejected the Ninth Circuit's "textured" six-factor balancing test as affording too much weight to factors that "were extremely far removed" from the set-aside and superintendence requirements. ***Venetie, 118 S.Ct. at 955, fn. 7***. Those factors were "the nature of the area", the relationship of the area inhabitants to Indian tribes and the federal government", and "the degree of cohesiveness of the area inhabitants." ***Id***. The only facts relied on by the Tenth Circuit – Shady Lane is owned by the Pueblo and is within the Pueblo's exterior boundaries – relegated the set-aside and superintendence requirement to a consideration of one factor only: the nature of the area. The Tenth Circuit gave cursory consideration to "the degree of federal ownership of and control over the area" (***Venetie, 118 S.Ct. at 955, ftn. 7***), noting only that the "state performs some services and maintenance with respect to the land." ***Arrietta, 463 F.3d at 1250***.

II. *There has not been consistent application of the **Venetie** two-prong test in either the Tenth Circuit or New Mexico state courts*.

A. *The Tenth Circuit continues to require a "community of reference" analysis separate from the set-aside and federal superintendence requirements stated in **Venetie***.

In ***Arrietta***, the Court cited two Tenth Circuit cases, ***HRI, Inc. v. Envtl. Prot. Agency, 198 F.3d 1224, 1248-49 (10th Cir.2000)*** and ***Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1542 (10th Cir.1995)***, in stating that it must examine the entire community, not just Shady Lane, in analyzing the set-aside and superintendence requirements. ***463 F.3d at 1250***. In ***Watchman***, the Court held that district courts must first determine the appropriate "community of reference", then the district courts must make detailed factual findings on the four prongs of the dependent Indian community test. ***Watchman, 52 F.3d at 1546***. In ***Venetie***, this Court rejected a similar approach taken by the Ninth Circuit (textured balancing test), discussed above. Yet, after ***Venetie***, the Tenth Circuit continues to follow its approach in ***Watchman***.

In ***HRI, Inc. v. Envtl. Prot. Agency***, the Tenth Circuit wrote:

> Because Venetie does not speak directly to the issue … Watchman, 52 F.3d at 1542-45, continues to require a "community of reference" analysis prior to determining whether land qualifies as a dependent Indian community under the set-aside and supervision requirements of 18 U.S.C. § 1151(b).

198 F.3d at 1249.

Venetie requires that the land in question be occupied by an "Indian community," not that there be an "Indian community" in the area that the land in question is in some fashion connected to.

At least two United States District Courts in New Mexico have applied ***Venetie***. In ***United States v. Jose Gutierrez, CR 00-M-375 LH***, the District Court's Order of Dismissal stated that because the Pueblo Lands Act "clearly and intentionally" quieted title to the land in question against the Santa Clara Pueblo, the land in question no longer satisfied the federal set-aside requirement. The Court did not mention the "community of reference."

In ***United States v. MC***, the District Court, applying ***HRI, Inc.***, stated that the first step was to determine the appropriate community of reference, then second, apply the ***Watchman*** factors, as modified by ***Venetie***. ***311 F.Supp.2d 1281, 1289 (D.N.M. 2004)***. This resulted in the following inquiry: "In determining whether a specific area is a community of reference, the Court first must analyze "the status of the area in question as a community." ***Id., citing Watchman***. Next, the "Court must focus on 'the community of reference within the context of the surrounding area'." ***Id***. Eventually, the District Court used the land in question as the community of reference, determined that the land in question was under federal superintendence, but found that because the land in question was titled in the federal government, and no "tribal government has the authority to determine the use, occupancy or transfer of any part of the land," the set-aside requirement was not met. ***Id. at 1282-1283, 1297***.

B. *New Mexico courts interpret **Venetie** differently than the Tenth Circuit and have reached opposite results for the same land.*

The New Mexico Supreme Court interprets ***Venetie*** differently than the Tenth Circuit regarding a "community of reference" inquiry. In ***State v. Frank***, the New Mexico Supreme Court stated: "[i]n light of the clear guidelines in the *Venetie* opinion, we decline to incorporate a community of reference inquiry into our case law." ***52 P.3d 404, 409 (N.M. 2002)***. Prior to ***Frank***, the New Mexico Court of Appeals had noted that the set-aside prong of ***Venetie*** seemed to obviate the need for defining the relevant community, yet noted that a community of reference analysis would lead to the same result. ***State v. Dick, 981 P.2d 796, 799 (N.M. Ct. App. 1999)***.

Most important for this Court however, is that the same parcel of land was at issue in both ***State v. Dick*** and ***United States v. MC***, yet the Courts reached opposite conclusions. Whereas the United States District Court found that the set-aside requirement had not been met because the land was titled in the federal government, not a federally recognized tribe, the State Court of Appeals found the set-aside requirement met because the congressional enactment stated: "Title to the land so transferred shall remain in the United States for the use of the Bureau of Indian Affairs." ***Dick, 981 P.2d at 800***. The United States District Court discussed the ***Dick*** opinion, yet rejected the broader interpretation of set-aside taken by the State court:

> As a review of the case law makes clear, there has never been a finding of a dependent Indian community unless the community at issue was located on tribal lands or land held in trust for Native Americans…. Accordingly, this land was set aside for the use of the BIA, not for the use of Indians as Indian land.

MC, 311 F.Supp.2d at 1295.

Although New Mexico courts appear to be in agreement after ***Frank*** that a community of reference inquiry is not required, the significance of title or ownership is less clear. ***Dick*** found the set-aside prong met, even though the land was titled in the federal government, yet in ***Frank***, the New Mexico Supreme Court stated that the ***Venetie*** two-prong test redirected the inquiry to land and its title and away from the more nebulous issue of community cohesiveness. ***Frank, 52 P.3d at 409***.

Finally, one case involving the Taos Pueblo and one case involving the Pojoaque Pueblo are pending in the New Mexico Supreme Court. ***State v. Romero, 84 P.3d 670 (N.M. Ct. App. 2004), cert. granted, January 20, 2004, No. 28,410; State v. Gutierrez, Memorandum Opinion, cert. granted June 14, 2004, No. 28,688***. In both cases, Indian title to the land in question was extinguished by the Pueblo Land Act. In its published opinion in ***Romero***, the New Mexico Court of Appeals analyzed congressional intent in the passage of ***18 U.S.C. §1151***, and concluded that Congress intended to "maintain the linkage between Pueblo title and status as Indian country." ***Romero, 84 P.2d at 675***. The ***Romero*** analysis is inconsistent with this Court's opinion in ***Venetie***, where this Court rejected the argument that Indian country exists wherever land is owned by a federally recognized tribe. ***Venetie, 118 S.Ct. at 955, fn.5***.

CONCLUSION

Judge Sutin, dissenting in Romero, summed up the state of the law regarding dependent Indian communities as follows:

> The legal backdrop is quaggy and unstable. What exists is a hodgepodge of cases involving a patchwork of statutes, and a mishmash of analyses, stated purposes, arguments, and results, providing, in my view, no common direction for the right result in this case. I am unable to find a congressional purpose that leads me to a definitive, much less right, result. The solution in this case needs a political, not a judicial solution.[1]

Romero, 84 P.2d at 683-684, Judge Sutin dissenting.

Ultimately, the interpretation of a federal statute is for the federal courts. The Tenth Circuit Court of Appeals continues to apply an inquiry for determining the presence of a dependent Indian community that has been rejected by the United States Supreme Court. New Mexico courts have specifically declined to follow Tenth Circuit precedent. A New Mexico appellate court and a United States District Court have reached opposite results for the same parcel of land. The question of federal criminal jurisdiction is an important federal question that should be decided by the United States Supreme Court.

For the foregoing reasons, Petitioner requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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Dated: May 1, 2006

Douglas E. Couleur
Attorney for Petitioner
328 Staab Street
Santa Fe, NM 87501

[1] In December, 2005, Congress amended the Pueblo Land Act to provide for criminal jurisdiction within the exterior boundaries of the Pueblos. ***See Pueblo Land Act, Pub. L. No. 109-133, 119 Stat. 2573 (Douglas E. Couleur. 20, 2005)***. The parties agreed below that the amendment did not apply to this case, and the Tenth Circuit did not consider it. ***Arrietta, 436 F.3d at 1251***.

(505) 984-1962