Supreme Court, U.S.
FILED

091044 DEC 16 2009

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No.

IN THE
Supreme Court of the United States

Riley Briones, Jr., and
Ricardo Briones,

Petitioners,

vs.

United States of America,

Respondent.

ON APPEAL FROM THE JUDGEMENT OF THE
NINTH CIRCUIT COURT OF APPEALS

PETITION WRIT FOR OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District Court and the Circuit Court erred in admitting the out-of-court statements of Arlo Eschief to the jury by the prosecution through testimony of a law enforcement agent constituting hearsay testimony in violation of the Sixth Amendment Confrontation Clause?

2. Whether the District Court had the jurisdiction under the General Crimes Act 18 U.S.C. § 1152 and the Major Crimes Act 18 U.S.C. § 1153, to apply federal statutes of crimes on Indian land not expressly authorized by Federal statute?

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STATEMENT OF JURISDICTION

Petitioners invoke the jurisdiction of the Court under 28 U.S.C. § 1254 (1). The Ninth Circuit Court of Appeals filed its Mandate affirming the decision of the District Court on August 4, 2009 in case numbers: 03-16300; 03-16299; 03-16302.

Petitioners are timely filing this Petition for Certiorari within 90 days of entry of the Circuit Court Memorandum/Opinion by mailing the Petition through family members for forwarding by placing 40 copies in a sealed, postage prepaid box on this 1st day of October, 2009. **Supreme Court Rules 13 (1) and 29 (2).**

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

FACTUAL BACKGROUND

On October 23, 1996, a seventeen-count indictment was filed in the United States District Court for the District of Arizona, charging five defendants, Philbert J. Antone, Ricardo Briones, Riley Briones, Sr., Riley Briones, Jr., and John Webster, with **inter alia**: First Degree/Felony Murder (Riley Briones, Jr., John Webster and Philbert J. Antone); Interference With Commerce by Threats of Violence (Philbert J. Antone and John Webster); Conspiracy to Commit Arson (Riley Briones, Jr. and John Webster); Arson (Riley Briones, Jr. and John Webster); Use of a Destructive Device During and In Relation to a Crime of Violence (John Webster); Possession of an Unregistered Destructive Device (Riley Briones, Jr.); Conspiracy to Commit Arson (Riley Briones, Jr.); Arson (Riley Briones, Jr.); Arson (Riley Briones, Jr.); Assault With a Dangerous Weapon (Ricardo Briones and Riley Briones, Jr.); Tampering With a Witness (Riley Briones, Jr. and Ricardo Briones); Tampering With a Witness (Riley Briones, Sr.); Tampering With a Witness (Riley Briones, Sr.); Assault With a Dangerous Weapon (Ricardo Briones); Assault With a Dangerous Weapon (John Webster); and, Conspiracy to

Participate in a Racketeering Enterprise (Philbert J. Antone, Ricardo Briones, John Webster, and Riley Briones, Sr.).

The defendants, together with other persons known and unknown to the Government, are alleged members of the Eastside Crips "Rolling 30's," an alleged enterprise as defined in 18 U.S.C. § 1961 (4), which enterprise engaged in, and its activities affected interstate commerce, unlawfully, knowingly, willfully, and intentionally conspired to conduct and participate, directly and indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering, as that term is defined by 18 U.S.C. § 1961 (1) and (5). It was part of the conspiracy that each defendant agreed to the commission of two acts of racketeering in the conduct of the affairs of the enterprise (CRIMINAL. INDICTMENT pp. 13-14).

The defendants, being Indians, and all alleged acts taking place within the confines of the Salt River Pima-Maricopa Indian Community, Indian Country, are in violation of the General Crimes Act [18 U.S.C. § 1152] and the Major Crimes Act of 1885 [18 U.S.C.§ 1153].

On April 15, 1997, the case proceeded to trial after the defendants were denied separate trials. During the second week of the trial the

Government offered the defendants a plea agreement if they would stop the trial and plead guilty. The Government offered Riley Briones, Jr., Philbert J. Antone, and John Webster (25 years); Ricardo Briones, Riley Briones, Sr., (12 years). All the defendants refused the Government's offer, except for John Webster, who wanted to accept the Government's offer. However, the Government stated that it was all or nothing. If all the defendants did not accept the plea agreement then none could accept. John Webster then met with the United States Attorney and agreed to testify against the remaining four defendants and plead guilty to (Conspiracy to Participate in a Racketeering Enterprise) with a sentence of 84 months, followed by 3 years of Supervised Release. As a result, Count 5 (Use of a Destructive Device During and In Relation to a Crime of Violence) and Count 16 (Assault With a Dangerous Weapon) were no longer before the jury.

On May 9, 1997, the jury found the remaining defendants guilty of fourteen of the remaining fifteen counts of the indictment. The lone acquittal was of defendant Riley Briones, Sr. on Count 13 (Tampering With a Witness).

On July 28, 1997, Riley Briones, Jr. was sentenced to a term of imprisonment of life on

Count 1 (First Degree/Felony Murder). In addition, he received sentences of twenty years each on Counts 3 (Conspiracy to Commit Arson); 4 (Arson); 7 (Conspiracy to Commit Arson), and 9 (Arson); sentences of five years each on Counts 8 (Arson); 10 (Arson); and sentences of ten years each on Counts 6 (Possession of an Unregistered Destructive Devise, 11(Assault With a Dangerous Weapon); and 12 (Tampering With a Witness). All terms were ordered to run concurrently.

Defendant Ricardo Briones was sentenced to a term of imprisonment of 240 months on Count 17 (Conspiracy to Participate in a Racketeering Enterprise). In addition, he was sentenced to terms of 55 months on each of Counts 11 (Assault With a Dangerous Weapon); 12 (Tampering With a Witness); and 15 (Assault With a Dangerous Weapon), with all terms to run consecutively and consecutive to the sentence in Count 17.

On November 30, 1998, the Ninth Circuit Court of Appeals affirmed the convictions of the defendants on all issues raised on direct appeal, except for the ineffectiveness of counsel issue, which was rejected without prejudice. See **United States v. Briones** 165 F. 3d 918 (9th Cir. 1998).

On November 29, 1999, defendant Ricardo Briones filed a motion pursuant to 28 U.S.C. §

2255, seeking to have his conviction vacated or set aside. December 9, 1999, defendant Riley Briones, Jr., filed his motion pursuant to 28 U.S.C. § 2255, seeking to have his conviction vacated and set aside.

On March 31, 2003, the District Court entered an order and judgment denying the defendants motions to vacate their convictions.

On May 19, 2003, the defendants filed a timely notice of appeal form the District Court's order and judgment.

On July 2, 2003, the District Court entered an order granting a certificate of appealability on limited issues.

On May 12, 2008, the Ninth Circuit Court of Appeal, denied relief to the defendants. Mandate issued June 3, 2009.

On July 24, 2009, the Ninth Circuit Court of Appeals, denied petitions for panel rehearing and petitions for rehearing en banc.

REASONS FOR GRANTING THE PETITION

I. THE PETITION SHOULD BE GRANTED TO RESOLVE THE WELL-DEVELOPED CONFLICT OVER WHETHER IN ADMITTING THE OUT-OF-COURT STATEMENTS OF THE DECLARANT'S CUSTODIAL CONFESSION VIOLATES THE SIXTH AMENDMENT CONFRONTATION CLAUSE.

This case presents the Court with the chance to resolve an open and notorious conflict among state and federal courts over whether the Sixth Amendment permits the introduction of a criminal declarant's custodial confession that implicates someone else, when said declarant refuses to testify for the Government or against the defendants. The United States Constitution Amendment VI, states' ["In all criminal prosecution.... the accused shall enjoy the right.... to be confronted with the witnesses against him..."]. An accused's right to confront witnesses against him is basically a trial right, and includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness.

Barber v. Page, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968).

It is clearly established that in order to prove that prior statements fall within the unavailability exception to the Confrontation Clause, the Government must show it made a good faith effort to obtain the witness's attendance at trial. Here, the Government brought Arlo Eschief to trial and offered him immunity for his testimony. The Government made an effort to have Arlo Eschief to testify. His refusal made him unavailable.

The problem here does not lie with the availability of the witness. Arlo Eschief was not a gang member and the Subway robbery/murder had nothing to do with a "conspiracy" and was only an unfortunate series of unconnected mishaps. Detective Auerbach testified as to the statements made by Arlo Eschief upon his arrest during custodial questioning. Detective Auerbach however did not testify as to the entire statements that Arlo Eschief made, that being that he was not a gang member and that the robbery/murder was not gang related and there was no conspiracy

involved. Arlo Eschief acted on his own and admitted this in his custodial statement. Detective Auerbach left this portion of the statement out because it did not advance the theory of the Government that the robbery/murder at the Subway was in furtherance of a criminal enterprise. Detective Auerbach lifted selected portions of Arlo Eschief's custodial statement in furtherance of the Government's case and ignored the portion that showed that the Subway robbery/murder was not gang related and not part of some conspiracy. Parties should not be able to lift selected portions [of a recorded statement] out of context. **United States v. Gravely,** 840 F. 2d 1156, 1163-64 (4th Cir. 1998).

Although Federal Rules of Criminal Procedure, Rule 803, provides a hearsay exception for statements against the declarant's interest, this Rule has been consistently disregarded by this Court in situations where the declarant's custodial confession at all implicates somebody else. Such statements are never truly against the declarant's penal interest because a defendant in custody always has a motivation to implicate and pass the blame

to another, even if in the slightest. **Lee v. Illinois,** 476 U.S. 530 106 S. Ct. 2056, 90 L. Ed. 2D 514 (1986); **Burton v. United States,** 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 4476 (1968). As this Court stated in **Williams v. United States,** 512 U.S. 594, 599-600, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994), such statements are inherently unreliable because "one of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature". This Court has clearly established the principle that co-defendant's custodial confessions are unreliable and not within a "firmly rooted" hearsay exception prior to **Lilly v. Virginia,** 527 U.S. 116, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999). Here, Arlo Eschief's custodial statements are no different than those statements held inadmissible in **Burton** and **Lee** and the admission of Eschief's statement was "contrary to" the law of those indistinguishable Supreme Court cases.

The prejudicial effect of the testimony was that, if the jury found it credible it would be more likely to find that the Government had met its burden in proving Briones' guilt. Under Rule 804 (a), Arlo

Eschief's refusal to testify made him unavailable. However, Rule 804 (b) (3), questions the trustworthiness of the statement. Corroborating evidence may not be considered because it "would permit".... bootstrapping on the trustworthiness of other evidence at trial." **Idaho v. Wright,** 497 U.S. 805, 823, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990). This is exactly what the Circuit Court stated was the reasoning for denying the Petitioners' relief. It was that other testimony bootstrapped the out-of court hearsay statement. The trial court cannot make by reference to the other evidence used at trial. It must possess indicia of reliability by virtue of its inherent trustworthiness on its own.

A totality of the circumstances analysis of the out-of-court statement of Arlo Eschief does not reveal any particularized indicia of reliability. The statement was not under oath and was not subject to cross-examination or other scrutiny. **United States v. Becker,** 230 F. 3d 1224, 1230 (10th Cir. 2000). While Detective Auerbach testified that he found Arlo Eschief's statement to be true and reliable, the jury had no basis, such

as an oath or cross-examination, to independently evaluate Eschief's reliability.

Accordingly, the **only** genuine question under **Roberts** prejudice analysis is whether, as the majority of jurisdictions have concluded, the custodial statement of Arlo Eschief should have been excluded from trial. If, as a minority of jurisdictions have asserted, the Ninth Circuit being one, that the out-of-court statement was supported by additional testimony. All of this testimony was also from co-defendants that had made deals with the Government for their testimony, Eschief's statement being the linchpin of the entire case against the petitioners, should have been excluded. In 2004, this Court addressed this issue in **Crawford v. Washington**, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), however, it failed to make the issue retroactive and the time has come for this Court to finally resolve whether the Sixth Amendment Confrontation Clause permits the introduction of a declarant's custodial statement, without an oath or cross examination be presented as hearsay evidence at the defendants' trial to prove his involvement in a conspiracy that never existed in the first place. The selective

testimony of Detective Auerbach of only part of Arlo Eschief's statement denied the defendants a fair trial.

II. THE PETITION SHOULD BE GRANTED TO RESOLVE THE JURISDICTIONAL QUESTION AS TO CRIMES THAT OCCUR ON INDIAN LAND BY INDIANS AND HOW FEDERAL JURISDICTIONAL STATUES APPLY TO CRIMES NOT EXPRESSLY AUTHORIZED BY A CONGRESSIONAL ACT.

Indian tribes are recognized as quasi-sovereign entities with the power to regulate their own affairs, save to the extent to which Congress has modified or abrogated that power by treaty or statute. **Ex parte Crow Dog,** 109 U.S. 556, 3 S. Ct. 396, 27 L. Ed. 1030 (1883); **Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation,** 231 F.2d 89 (8th Cir. 1956). To invoke the District Court's jurisdiction under the Indian Major Crimes Act, the indictment must allege defendants are Indians, the offenses charged must be one of the 14 offenses enumerated in the Act, alleged offenses must occur in "Indian Country," and the victim of the alleged offenses must be an Indian or other person. 18 U.S.C. § 1153.

The Indictment charged the defendants with committing a variety of criminal acts in the furtherance of a criminal enterprise by acts of racketeering. 18 U.S.C. § 1962 (d). Section 1153 of Title 18, commonly referred to as the Indian Major Crimes Act, is a jurisdictional statue designed to give federal courts criminal jurisdiction over certain federal and state crimes committed by an Indian in Indian country. **See United States v. Bear,** 932 F. 2d 1279, 1281 (9th Cir. 1990). To invoke the Court's jurisdiction under section 1153, several requirements must be satisfied. First, the Indictment must allege the defendants are Indian. Second, the offenses charged must be one of the fourteen offenses enumerated in section 1153 (a). Third, the alleged offenses must occur in "Indian Country". Fourth, the victim of the alleged offenses must be and Indian or other person".

The Indictment is this case failed to satisfy the second jurisdictional prerequisite. Specifically, the Racketeer Influenced and Corrupt Organizations Act (RICO) is not one of the 14 offenses enumerated in section 1153 (a). Although some acts charged in the Indictment are part of the 14 enumerated in section 1153 (a), this cannot relieve the Court of its jurisdiction of the crimes not listed.

To establish a RICO conspiracy, the Government needed to prove that the defendants "objectively manifested, through words or actions, an agreement to participate in... the affairs of [an] enterprise through the commission of two or more predicate crimes." **United States v. Starrett**, 55 F.3d 1525, 1543 (11th Cir. 1995) (**quoting United States v. Russo,** 796 F. 2d 1443, 1455 (11th Cir. 1986) **cert. denied,** 517 U.S. 1111, 1127, 116 S. Ct. 1335, 1369, 134 L. Ed. 2d 485, 534 (1996). An agreement on an overall objective may be proved "by circumstantial evidence showing that each defendant must necessarily have known that others were also conspiring to participate in the same enterprise through a pattern of racketeering activity." **Starrett,** 55 F. 3d at 1544 (internal quotations marks omitted). RICO and racketeering statutes allow an individual to be found guilty for the actions of others, this in not included in the Major Crimes Act 18 U.S.C. § 1153.

Even if the Court assumes that the Subway robbery/murder had some gang members present during the crime, that fact alone would not prove that the defendants agreed to an overall objective of supporting the enterprise through a **series** of robberies within the Indian community. The Government offered no proof that the defendants

were involved in a pattern of illegal robberies in the furtherance of the enterprise. Even the person that committed the actual robbery/murder of the Subway stated that he was not a gang member and that no conspiracy existed. It was an isolated incident where a group of friends went to a Subway to get something to eat. Had no money, and with one being a former employee, figured they could talk the clerk into giving them something to eat. It was Arlo Eschief who admittedly committed the act of robbery/murder on his own.

Also, the Indictment alleged that the predicate acts that constitute a RICO pattern were in violation of the Commerce Clause. Other courts have stated that a Liquor Store robbery did not affect interstate commerce. **United States v. Quigley,** 53 F. 3d 909 (8th Cir. 1995). Even the arson of a neighbor's home did not involve interstate commerce. **United States v. Denalli,** 90 F. 3d 444 (11th Cir. 1996); **United States v. Gaydos,** 108 F. 3d 505 (3rd Cir. 1997); and **Jones v. United States,** 120 S. Ct. 1904 (2000).

The robbery of cash did not have sufficient impact on the interstate commerce. **United States v. Wang,** 222 F. 3d 234 (6th Cir. 2000). Here, even though the bank bag was stolen, nobody seems to

know what happened to the money. Not one of the defendants or witnesses admitted having the bank bag and money. If a pattern of racketeering was to be established then the money from the robbery that was supposed to have been a predicate act of the enterprise should have been accounted for. This further leads to the assumption that the Subway robbery/murder was a random act of one individual, Arlo Eschief. There was insufficient evidence to find Riley Briones, Jr. guilty of conspiring or aiding and abetting the robbery/murder of the Subway. **United States v. Wilson,** 160 F. 3d 732 (D.C. Cir.), **cert. denied,** 120 S. Ct. 81 (1999). Evidence of association or acquaintance, though relevant, is not enough by itself to establish a conspiracy. **United States v. Espino,** 317 F. 3d 788 (8th Cir. 2003).

The Major Crimes Act enumerates 14 crimes for which an Indian, on his reservation, can be charged with. The RICO statutes do not apply. Thus, the District Court is without jurisdiction to try the defendants under the RICO statutes. The petition for certiorari should be granted on this issue of fundamental importance of the Major Crimes Act and its application under the RICO statutes, and the decision below reversed granting the defendants a new trial.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Dated this 25th day of September, 2009.

Respectfully Submitted,

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