15-733

No. _____

In The

Supreme Court of the United States

LESTER ROGER DECKER,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In a prosecution under 18 U.S.C. §2241, for "aggravated sexual abuse by an Indian in Indian territory," occurring in Battle Mountain, Nevada, where a victim testifies to unconsented sexual penetration and the defendant denies any sexual contact; and a Nevada case, *Crawford v. State*, 107 Nev. 345, 351, 811 P.2d 67, 70-71 (1991), mandates that the giving of an attempted sexual assault jury instruction under those circumstances constitutes reversible error; does the Assimilated Crimes Act, 18 U.S.C. § 13(a), or 18 U.S.C. § 1153(b) mandate that federal courts are constrained to follow *Crawford* and either not give the attempt instruction or be reversed if they do?

The question of whether case law viz. state substantive lesser-included offenses must be assimilated into a prosecution where the state case law prohibits the giving of the instruction, was not addressed either in *Keeble v. United States*, 412 U.S. 205 (1973) or in *Lewis v. United States*, 523 U.S. 155 (1998); and *United States v. Walkingeagle*, 974 F.2d 551 (4th Cir. 1992), *cert. denied*, 507 U.S. 1019 (1993) presents both sides of the issue. Is the *Walkingeagle* dissent correct as a matter of law?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Lester Roger Decker, respectfully petitions for a Writ of Certiorari to review the order and judgment of the United States Court of Appeals for the Ninth Circuit.

CITES OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED

Memorandum, filed August 24, 2015, in the United States Court of Appeals for the Ninth Circuit, case no. 14-10132 (unpublished). (App. 1-App. 8)

Petitioner's Petition for Panel Rehearing, case no. 14-10132, filed September 3, 2015. (App. 10-App. 21)

Order, case no. 14-10132, filed September 8, 2015. (App. 9)

STATEMENT OF BASIS OF JURISDICTION

This Petition is filed within 90 days of September 8, 2015, as that is the date of the Order Denying the Petition for Rehearing. The Mandate thereon issued on September 17, 2015. This Petition is filed within 90 days of September 8, 2015. *See*: U.S. Sup. Ct. Rule 13.3, 28 U.S.C. §1651(a).

This Petition implicates U.S. Sup. Ct. Rule 10(c): The United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court. *See also*: *Kossick v. United Fruit Co.*, 365 U.S. 731, 733 (1961) [where case presents novel questions as to interplay of state and federal (maritime) law, Court will grant certiorari].

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS IMPLICATED BY THIS PETITION

18 U.S.C. §2241(a) states:

> "(a) **By force or threat**. – Whoever, in the special maritime and territorial jurisdiction of the United States, knowingly causes another person to engage in a sexual act –
>
> (1) by using force against that other person; or
>
> (2) by threatening or placing that other person in fear that any person would be subjected to death, serious bodily injury, or kidnapping;
>
> **or attempts to do so**, shall be fined under this title, imprisoned for any term of years or life, or both."

18 U.S.C. §1153 states:

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely. . . . a felony under chapter 109A,. . . . , shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) **Any offense referred to in subsection (a) of this section that is not defined and punished by federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.**

18 U.S.C. §13 states as follows:

(a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in §7 of this title,. . . . is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

18 U.S.C. §1152 states:

> 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.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

STATEMENT OF THE CASE

This is an aggravated sexual abuse case, meaning unconsented – to sexual penetration, Native American on Native American in Native American territory.

Originally, the Government proceeded by complaint and preliminary hearing. The complaint for violation of 18 U.S.C. §§2241(a), 1151 and 1153 charged Petitioner with aggravated sexual abuse in Indian country by using force against the victim, who had communicated an unwillingness to engage in a sexual act, by penetrating her genital opening and

with the intent to abuse, humiliate, harass, degrade, and arouse and gratify sexual desires. (ERv1: 1) The affidavit attached to the complaint indicated nothing about an attempt to abuse the victim, i.e., an act which was unsuccessfully completed. Rather, the affidavit clearly indicated the allegation that the Petitioner forcibly penetrated the victim's vagina both with his penis and with his fingers. (*Id.* at 3)

The cause went to a preliminary hearing. Again, nothing at the preliminary hearing indicated to the Petitioner a theory of attempted sexual abuse, i.e., an intended criminal act with an unsuccessful completion. Rather, again the Special Agent testifying for the Government indicated penetration of the victim's vagina, first with his fingers and then with his penis. (ERv1: 14-15) In fact, the prosecutor clarified that it was not an "attempt" but a successful penetration. (ERv1: 15) The United States Magistrate for the District of Nevada found probable cause of the charged offense, and ordered the Petitioner to appear for further proceedings. (*Id.* at 32)

For reasons unknown, the Government decided not proceed that way, notwithstanding the "bind-over order," but to cause Petitioner to be indicted on the same charge. Again, however, the count alleged penetration of the victim's genital opening by penis, hand, finger and by any object with the intent to abuse, humiliate, harass, degrade, and arouse and gratify his sexual desire. (ERv1: 35) Nothing in the indictment indicates facts consistent with intended but uncompleted sexual penetration. However, following

the language of 18 U.S.C. §2241(a), the indictment charged that the Petitioner did the above-described acts or attempted to do so. (*Id.*)

The case proceeded to a four-day jury trial. The victim, B.O., testified, but the Petitioner did not.

B.O. is a Native American member of the Paiute-Shoshone Reservation who lived on the colony in Battle Mountain, Nevada. (ERv2: 380) She babysat in 2012 for Mary Dann's three children; typically she would get to Ms. Dann's home about 4:30 a.m. and watch the children until about 9:30 p.m.. (*Id.* at 393-94)

Ms. O. had grown up with the Petitioner, but did not know him very well. (ERv2: 379) She first met Petitioner when she was about five years old. (*Id.* at 389) She did not socialize with him. (*Id.* at 395-96)

On April 12-13, 2013, Ms. O. saw her ex-boyfriend, Mr. Guzman, in his apartment and, per Ms. O., had intercourse with him approximately five or six times that evening. (*Id.* at 401-03)

Ms. O. got to Ms. Dann's home at about 4:30 a.m. and went into the house. About ten minutes later the Petitioner came over, and Ms. O. let him in. She asked him what he was doing, and he did not respond. (*Id.* at 403-05)

Petitioner and Ms. Dann talked in her kitchen for about five minutes. Ms. Dann then left the home and Petitioner followed her outside. (ERv2: 408) Ms. O. locked the door. There were four children in the home,

including one on the futon in the living room. (*Id.* at 410) The Petitioner knocked two times on the door. He was drunk. (*Id.* at 411, 414) Ms. O. thought the Petitioner was going to pass out. (*Id.* at 415) He sat on the couch, and talked to her for about ten minutes. (*Id.* at 416)

Petitioner then put his hand on Ms. O.'s knee. Ms. O. pushed his hand away, but said nothing. (*Id.* at 417) The Petitioner then took off his sweater and shirt, came in front of her, and started kissing her on the neck. (*Id.* at 418) Ms. O. shoved him. (*Id.* at 419) The Petitioner then unbuckled his pants, took his pants down, grabbed Ms. O. by her head, and told her to "suck his dick." (*sic*) She pulled her head back and said, "who the fuck do you think you are?" (*sic*) and shoved him again. (*Id.* at 420) The Petitioner back-handed her on her left cheek with his right hand. (*Id.* at 421)

Ms. O. stood up. The Petitioner grabbed her. They both landed on the floor. Petitioner held her down, back-handed her several times, and asked her if she liked to be hit. Ms. O. cursed at him. (*Id.* at 422-23) Petitioner then ripped off her underwear. While holding her hands above his head, Petitioner inserted his fingers hard into her vagina. He then tried to insert his penis and got a little bit in before she kicked him off. (*Id.* at 424)

While Petitioner sat in the living room, Ms. O. texted a mutual friend, Rusty Hicks, to come take Petitioner home. The children were asleep through all

of this. (*Id.* at 427-28) The Petitioner got up and sat on the couch. The Petitioner again tried to insert his fingers into her, and back-handed her, drawing blood from her lip. (*Id.* at 430)

Finally, Ms. O. reached Rusty, who said he would come over. (*Id.* at 431) Rusty called the police. Officer Kohr came to the door. (*Id.* at 432) Ms. O. did not want to press charges, because she was used to that lifestyle. (*Id.* at 433) When the officer came into the house, Petitioner was seated on a futon, "out of it." (*Id.* at 433-34) Ms. O. said nothing about being raped. (*Id.* at 434) The officer asked if anything ever happened. The witness responded negatively, but said she just wanted the Petitioner out of the home. Rusty then came and took Petitioner away (*Id.* at 435)

Kohr took Ms. O. to the hospital. Ms. O. gave inconsistent statements on whether she told Kohr that Petitioner had raped her. (*See*: ERv4: 436-38)

At the hospital the nurses took too long, so she walked out after a half an hour. Kohr took her home. (ERv2: 439-41) However, after the police officer spoke with her, she agreed to go back to the hospital. She did not see a doctor, but saw a nurse who took a rape kit examination of her. (ERv2: 442-45)

Ms. O. admitted that she sent text messages to Mary Dann and to Rusty Hicks, starting about ten minutes after Petitioner arrived in the home. (*Id.* at 446-47) However, she erased the text messages the next day (*Id.* at 449)

Ms. O. emphasized that she felt Petitioner stick his fingers inside her and his penis as well, and she realized she was raped, but did not think Petitioner realized what he had done because he was so drunk. (ERv2: 460-61)

Ms. O. did not want to have sexual relations with the Petitioner that morning, especially due to her night before with her ex-boyfriend. (ERv2: 478-79) On cross-examination Ms. O. gave testimony on a number of details that might have caused the jury to disbelieve her story:

1. She could not recall stating in a text message to Ms. Dann, which she erased, that she was being raped. (ERv2: 500)

2. Ms. O. claimed to be menstruating during the event, but did not start bleeding until she got to the hospital. She told the nurse she was in her period. However, she had not been bleeding the night before with her ex-boyfriend. (ERv4: 510-11)

3. Ms. O. stated in a text message that she did not want to press charges and be seen as a liar. (*Id.* at 519-20)

4. Ms. O. told Agent Elkington she was concerned about getting in trouble for pushing the Petitioner. At the time of the incident, Ms. O. had a domestic violence conviction from 2006, and had another arrest and conviction concerning domestic violence. (ERv4: 523, 525, 539)

Mary Dann added these details: Petitioner arrived at their home at 4:30 a.m. on April 14, 2013. (ERv2: 357) She left the home at 4:45 a.m.. (*Id.* at 358) Between 5 a.m. and 6:15 a.m., she received approximately **55 text messages** from Ms. O. (*Id.* at 360-61, 374) She received another 30 messages or so from her throughout the day. (*Id.* at 363) Yet, law enforcement did not take her phone (*Id.* at 361), and Ms. Dann got rid of the phone about four months later. (*Id.* at 369)

Rusty Hicks added these details: He is the Petitioner's cousin, and is a friend of Ms. O., having known her for about 30 years. (ERv2: 551) He was formerly on the Reservation's Tribal Council. (*Id.*) On Officer Kohr's direction, Mr. Hicks went to Ms. Dann's home, picked up the Petitioner, and drove him home. (*Id.* at 556-57) On the way to his home, Petitioner said he did not know what had happened. (*Id.* at 557) He thought Ms. O. was Ms. O.'s sister. (*Id.*) Petitioner stated that Ms. O. tried to kiss him, but he did not say that he grabbed her and pushed her head towards his genitals. (*Id.* at 559)

Richard Kohr added these details: He is a western Shoshone Tribal Police Officer, assigned to the Colony at Battle Mountain. (ERv2: 562) He was dispatched to Ms. Dann's residence, and upon arriving there, Ms. O. opened the door. The Petitioner was passed out on the couch. (*Id.* at 564) Ms. O. simply wanted the Petitioner out. Officer Kohr attempted to awaken him. When he awoke, Petitioner was combative, belligerent and confused. (*Id.* at 565-66)

Officer Kohr retrieved and collected Ms. O.'s panties, which were torn from the seam on each side. (*Id.* at 567, 569) Officer Kohr did not see any sign of injury on Ms. O. or on the Petitioner. He did not see any blood in the living room near the couch, and looked with a high intensity flashlight for it. (ERv2: 580-83)

Vickie Hinton, the nurse at Battle Mountain General Hospital (ERv2: 587-88), conducted a DNA buccal swab on Ms. O., and swabbed her neck, labia, cervix and anus. (ERv3: 598-99) She also did fingernails scrapings on the Petitioner, as well as a buccal swab. (ERv3: 602-03) She saw a small split on Ms. O.'s lower lip. She saw redness in her genitals, but that could have been caused by repeated consensual intercourse for a few hours earlier with someone else. (*Id.* at 605) Ms. O. also had redness on her cheekbone. (*Id.* at 607) However, on the medical record Nurse Hinton checked the box marked "no evidence of trauma to the head and face." (ERv3: 631)

Ms. O. stated that her period had started two days prior on a April 12, 2013. (*Id.* at 631) However, she was not wearing a "maxi pad" (or other tampon) when she was at the hospital. (*Id.* at 635)

Ms. O. specifically denied being digitally penetrated to Nurse Hinton. (ERv3: 637)

Brittany Bagley, a criminalist who works on trace evidence and DNA analysis (ERv3: 650), testified that the DNA on the neck swabs of Ms. O. matched the Petitioner regarding saliva. (*Id.* at 666-67) She further testified that there was a weak

presumptive positive of semen stain on her panties, but the mixture contained **at least four sources**. (*Id.* at 670-71) She could not exclude either the ex-boyfriend or the Petitioner as any of the sources. (*Id.* at 672) However, from the vaginal swabs, no male DNA was detected. (*Id.* at 672)

She examined the Petitioner's fingernails scrapings. However, no blood was detected, and no DNA foreign to the Petitioner was detected. (ERv3: 675-76) She examined the Petitioner's boxer shorts, but could not draw any conclusions therefrom. (*Id.* at 677-78)

David Elkington, the FBI case agent on this case (ERv3: 705), added these details: When he interviewed Ms. O, he did not see any bruising on her face or forehead, or a swollen lip, or a swollen nose. (*Id.* at 710)

He obtained Ms. O.'s phone on April 18, 2013. Ms. Dann had advised that she and Ms. O. typically erase their text messages. (*Id.* at 717, 719) Agent Elkington sent Ms. O.'s phone to the forensic computer center, and they were not able to recover any deleted files from the phone. (*Id.* at 721-22)

Stephen Buffo, the store manager for AT&T Mobility (ERv3: 754-55) added these details: Between 5:40 a.m. and 5:44 a.m. on April 14, 2013, Ms. O. made six phone calls, including one lasting 54 seconds. (*Id.* at 765-66) Between 5:02 a.m. and 6:18 a.m., or 76 minutes, there was a total of 79 text messages sent in and out of Ms. O.'s telephone. (*Id.* at 771)

After the Government rested and after the Petitioner rested, outside of the presence of the jury the Petitioner moved for a judgment of acquittal on the charge of attempted aggravated sexual abuse. (ERv3: 824) Counsel specifically argued that based on the evidence, either there was sexual assault that occurred or there was not a sexual assault that occurred, but there was no middle ground. (ERv3: 825) He further noted that a theory of attempted sexual abuse had not been at issue at all during the entirety of the case. (*Id.* at 826)

The court denied the motion. (ERv3: 829) The court indicated that it intended to instruct on both aggravated sexual abuse and on attempted sexual abuse. (*Id.* at 828) Counsel indicated that other than the issues the trial court addressed, they had no objection to the instructions given. (ERv3: 853)[1]

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[1] It should be noted however, during the arguments on Petitioner's Rule 29(a) motion, the trial court at one point changed its mind, indicated it would take a recess and in all probability grant the defense's motion. After recess, the court came back on the record and indicated it agreed to reconsider the defense motion and grant the motion to dismiss the attempted aggravated sexual abuse charge. (*Id.* at 846) The court pointed out to the Government that its theory all along had been aggravated sexual abuse, not attempted aggravated sexual abuse, as the Government had not heretofore taken that position. (*Id.* at 848-49) The Government then restated that it would dismiss the attempted aggravated sexual abuse charge if the jury convicted Petitioner of both charges. (*Id.* at 849) On that condition, the trial court reversed itself again and reaffirmed its original position of denying the motion to dismiss. (*Id.* at 849-50)

Ultimately, the trial court gave an instruction on attempted aggravated sexual abuse, Instruction No. 13 (ERv4: 958). The instruction read:

> "The Defendant is also charged in Count I of the indictment with attempted aggravated sexual abuse in violation of §2241(a) Title 18 of the United States Code. In order for the Defendant to be found guilty of that charge, the Government must prove each of the following elements beyond a reasonable doubt:
>
> First, the Defendant intended to use force to cause B.O. to engage in a sexual act;
>
> Second, the Defendant did something that was a substantial step toward committing the crime;
>
> Third, the offense was committed within Indian country of the United States; and
>
> Fourth, the Defendant is an Indian.
>
> In this case, "sexual act" means:
>
> 1. Contact between the penis and the vulva, and contact involving the penis occurs upon penetration, however slight, or
>
> 2. The penetration, however slight, of the genital opening of another by the hand or finger or by any object with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.
>
> Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's acts or

> actions must demonstrate that the crime will take place unless interrupted by independent circumstances.
>
> You do not need to agree unanimously as to which particular acts or actions constituted a substantial step toward the commission of the crime." (ERv4: 958)

In the first closing argument the trial prosecutor argued that the evidence supported a guilty verdict to attempted aggravated sexual abuse, because the Petitioner back-handed B.O., took her pants down, and pulled her head toward him saying "suck my dick." [*sic*] (ERv3: 876-77)

After Petitioner argued to the jury that he was not guilty on all charges, the trial prosecutor stated in rebuttal at ERv4: 918-19:

> "So what you have is, as you decide this case and we have proven to you that he was forcing her to engage in the acts, if you get to the point where you say, well, there is a question whether he actually penetrated her, then I say to you that's why you have the other instruction and the ballot to vote on that says attempted. Because if you did everything up to, but you're not quite certain of whether the proof is there, then you can say, okay, that's attempted because he took the acts to intentionally do that. **But I submit to you, and I'm telling you where can either way on that, but I submit to you that the evidence proves penetration. That's consistent with what she said from that**

> **witness stand; penis all the way through**. I mean, that's consistent testimony. There is – the only inconsistency on the fingers is what she told Nurse Hinton. But when you take the reality of Battle Mountain and the reality of the courtroom and you mix it with those text messages, you can see that there are reasons why someone under stress didn't necessarily say that, and we've proven that as well. And when you decide that matter, look at all the evidence as a whole through that." (ERv3: 918-19)

In other words, the position of the Government in rebuttal was that while the jury might conclude that the evidence supports a guilty verdict of attempted sexual abuse, that truly was not the position that Government was advocating. The Government's position was that the evidence actually supported the guilty verdict to the charge of aggravated sexual abuse because, as B.O. testified and as the Government stated in its very opening argument remarks, "he raped her." (ERv3: 866)

The jury reached its verdict on the "one count" indictment: Not guilty of the charge of aggravated sexual abuse, guilty of the charge of attempted aggravated sexual abuse. (ERv4: 969-70; 971-72)

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit. He raised three issues: 1) Did the Government either constructively amend the indictment with the approval of the court below, or did the proof create a fatal variance with the

indictment? 2) Did the trial court abuse its discretion and violate Petitioner's Fifth, Sixth and Fourteenth Amendment Rights by giving a lesser-included instruction on attempted sexual abuse, when the trial evidence established either completed sexual abuse or no abuse due to false testimony by the alleged victim? 3) Did the trial court commit reversible error under the U.S. Sentencing Guidelines in applying the §3C1.1 upward adjustment for obstruction of justice, based upon false but immaterial testimony regarding Petitioner's successful motion to suppress?

This Petition concerns only issue number 2. In the argument, Petitioner argued that the court was constrained to reverse based upon *Crawford v. State*, 107 Nev. 345, 811 P.2d 67 (1991), a case on all fours, because of 18 U.S.C. §1153(b) and the principle that the definition of attempt should be in accord with the law of the state in which the offense was committed. He also argued, however, that *Crawford* is not contrary to federal law, but in fact is in alignment with law from the Ninth Circuit and other circuits.

In the Reply Brief, Petitioner began his argument on this issue with these words:

> "Very frankly, this is the ground upon which the Court should grant relief to Mr. Decker. *Crawford* [*supra*] compels the Court to do so."

The Government attempted to distinguish *Crawford* and 18 U.S.C. §1153(b) in its brief, but on the basis that Nevada does not compel the giving of an

attempted crime instruction by statute, whereas the same is set forth in the body of 18 U.S.C. §2241(a). Petitioner argued that in light of NRS 175.501, the Government's argument was meritless.

In its unpublished memorandum at pp. 5-7, the Ninth Circuit made no mention of *Crawford* and no mention of 18 U.S.C. §1153(b). It did state that Petitioner's argument is "far from clear." The Ninth Circuit's summary disposition reads:

> "Even assuming that (1) attempted sexual aggravated assault is a lesser-included offense of aggravated sexual assault; and (2) That it is *improper* for the district court to give a lesser-included offense instruction *unless* the evidence permits the jury to find the Defendant guilty of the lesser-offense and acquit him of the greater offense – a proposition for which Decker provides no authority – Decker's argument fails because the evidence in this case *satisfies* the latter criterion. That is, the jury rationally could have concluded that Decker committed attempted aggravated sexual abuse, but not aggravated sexual abuse. Specifically, the jury could have credited B.O.'s testimony that Decker assaulted her, told her to "suck his dick," and ripped off her panties, and "tried to insert" into her vagina – evidence that clearly satisfies an attempt charge – but discredited her testimony that Decker in fact penetrated her with either his penis or his fingers. Moreover, there was evidence supporting the conclusion that Decker did not actually penetrate B.O.,

> including B.O.'s equivocal text sent shortly after Decker assaulted her (such as "he keeps *trying* to finger me I don't want it") and the forensic evidence, which concluded that Decker's DNA was not found in B.O.'s vaginal area, and that B.O.'s DNA was not found on Decker's fingers."

In Petitioner's Petition for Panel Rehearing, he emphasized that 18 U.S.C. §1153 is directly applicable, and if the Court were to disagree, then 18 U.S.C. §13(a) would apply. He reasserted, as he had at pp. 30-31 of the Opening Brief, that the definition of attempted sexual abuse should be in accord with the law of the state in which the offense was committed. Accordingly, he again contended that *Crawford* must apply and mandated a reversal. He noted that to uphold the conviction, the Panel ruled consistently with the *Crawford dissent*, *not* the majority.

He argued that per *Crawford* the issue was not whether trial court committed error in instructing on attempted sexual abuse, but whether the error was harmless. He argued that based upon the standard of *Kotteakos v. United States*, 327 U.S. 750, 763-64 (1946), the court could not use a sufficiency of the evidence test and cherry-pick and cobble together contradictory evidence so as to hold the error to be harmless or nonexistent. He further argued that the trial prosecutor's two arguments were inconsistent. The first argument does not establish facts constituting attempted abuse, because there was no evidence from B.O.'s mouth of interruption by independent

circumstances of Petitioner's attempt to penetrate her at the time Petitioner engaged in the described conduct. The trial prosecutor's position in rebuttal was one that the trial prosecutor "put out there," but did not advocate – because to do so would be to profess disbelief in B.O.'s testimony.

Within two business days the Ninth Circuit summarily denied the Petition for Rehearing. It simply was not interested in the question of whether federal law commands application of state law on all fours to this situation.

REASONS FOR GRANTING THE PETITION

It must first be noted up front: "attempted aggravated sexual abuse" in the context of this case has to be considered as a lesser-included offense of aggravated sexual abuse and not as a separately charged offense. Petitioner believes that neither the Government nor the Ninth Circuit disagrees. But that has to be so for this reason:

Various sex acts in violation of 18 U.S.C. §2241(a) within a single course of conduct constitute *separate offenses* for double jeopardy purposes. *United States v. Two Elk*, 536 F.3d 890, 899 (8th Cir. 2008) [indictment alleging multiple counts of sex offenses out of the same course of conduct not multiplicitous for that reason]. *Accord*: *Rhoden v. Rowland*, 10 F.3d 1457, 1461-62 (9th Cir. 1993), and cases cited therein. [A defendant may receive multiple punishments for

numerous sex offenses rapidly committed with the sole aim of sexual gratification.]

Here, we had a one count indictment, not a multiple count indictment.

So, if B.O.'s claim is that Petitioner sexually penetrated her, and after the penetration attempted to do so again but could not, and she sent text messages to Ms. Dann and Mr. Hicks to that effect, the fact of the text messages is irrelevant to the charge if a jury believes Ms. O.; i.e., this is a one-count indictment that must be presumed not to be duplicitous, and the offense was complete when Petitioner sexually penetrated her. The text messages could have said anything; they would have been irrelevant. The text messages became relevant, in the context of this allegedly non-duplicitous indictment, only if the jury did not believe Ms. O.'s claim of penetration. And by its verdict, the jury had a reasonable doubt as to that claim.

But can an offense truly be a "lesser-included" in a case like this, where the jury does not accept the prosecutrix's essential claim? I.e., can a lesser-included offense attend to conduct other than the offense as charged and proven? And more pointedly, can it so attend if the state law in the state where the Indian territory is situated expressly prohibits that conclusion?

I.

Neither 18 U.S.C. §2241(a) nor 18 U.S.C. §1153(b) specifically states that when prosecuting an Indian who commits aggravated sexual abuse against another Indian in Indian country, that the federal court must incorporate state case law that establishes when the state court can and cannot give an "attempt" lesser-included instruction in a sexual assault case. There is no question that aggravated sexual abuse is a "felony under Chapter 109A" as set forth in 18 U.S.C. §1153(a), so 18 U.S.C. §1153(b) certainly applies. Presumably, the position of the Government and of the Ninth Circuit would be that because federal law specifically sets forth the crime of attempted sexual abuse in the body of 18 U.S.C. §2241(a), 18 U.S.C. §1153(b) does not apply to this case. Although the Ninth Circuit did not articulate why it was ignoring *Crawford*, presumably that would have been the reason.

However, as noted at AOB at 30-31, although 18 U.S.C. §2421(a) *references* attempted sexual abuse, it does not *define* it. Therefore, per 18 U.S.C. §1153(b), the *definition* of attempt should be in accord with the law of the state in which the offense was committed. *See*: *United States v. Red Bear*, 250 F.Supp. 633, 636 (D.S.D. 1966) [Congress in making rape a major crime within an Indian Colony left it to the states exclusively to define rape].

Certainly, if *Crawford* applies, the giving of an attempted sexual abuse jury instruction in this case was error.

In a "he said/she said" aggravated sexual abuse/ sexual assault case,[2] the question of whether in Nevada a state trial court can give the jury an instruction on attempted sexual assault is answered in the negative per *Crawford*. *Crawford* was a three-to-two opinion of the Nevada Supreme Court, and the majority held as follows:

> "Despite the right of the trier of fact to convict on attempt where the State has only charged the completed offense, it may not do so unless there is evidence to support an attempt. [cite omitted] In the instant case, the only evidence was, from the defendant, that no sexual conduct occurred between the men and, from [the victim], that three acts of sexual assault occurred in the form of forcible anal intercourse. The jury disbelieved the complaining witness regarding the consummated crimes and thereafter sought and received instructions for a lesser crime, attempted sexual assault, concerning which there was no evidence upon which to base a conviction. Therefore, the district court erred in instructing the jury on the lesser crime of attempted sexual assault concerning the

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[2] "Sexual assault" in the state of Nevada, per NRS 200.366, is functionally the same offense as aggravated sexual abuse in federal court.

> three counts of sexual assault because there was no evidence of record to support such instructions."

Crawford, 107 Nev. at 352, 811 P.2d at 71.

However, the *Crawford* dissent – *exactly* like the Ninth Circuit Panel – held that the jury had the ability to evaluate contradictory evidence and conclude an attempted sexual assault had been proven beyond a reasonable doubt, and therefore the evidence was "sufficient" to support an attempted sexual assault conviction. *Crawford*, 107 Nev. at 355, 811 P.2d at 73-74.

While it may not matter in the final analysis, Petitioner first notes that the *Crawford* majority is clearly correct as a matter of this Court's precedent, while the *Crawford* dissent is incorrect. That is for two reasons:

First, as the *Crawford* majority holds, attempted sexual assault is technically not a lesser-included offense of sexual assault, because an attempt to commit an offense cannot be a lesser-included offense of a completed crime. *Crawford*, 107 Nev. at 351, 811 P.2d at 71.

In addition to that, sexual abuse is a *general* intent offense (*Bargas v. Burns*, 179 F.3d 1207, 1215-16 (9th Cir. 1999)), but *attempted* sexual abuse is a *specific* content offense. *See*: *United States v. Kenyon*, 481 F.3d 1054, 1069-71 (8th Cir. 2007) [reversed in part] [an instruction of the defendant's level of

intoxication or drug usage may be appropriate to a charge of attempted sexual abuse, albeit not to sexual abuse]; *United States v. Sneezer*, 900 F.2d 177, 179 (9th Cir. 1990). Where the lesser offense requires proof of an element not required for the greater offense, no lesser-included instruction is to be given. *Schmuck v. United States*, 489 U.S. 705, 716 (1989).[3]

Secondly, if it is error to instruct on a charge of attempt because it is not a lesser-included offense as a matter of law, the issue is whether that error is harmless or prejudicial. That issue is *not* answered by utilizing a sufficiency of the evidence test. This Court stated as such in *Kotteakos v. United States*, 327 U.S. 750, 763-64 (1946). To that extent, *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995), or the "harmless error" test for federal *habeas corpus* purposes, is not contradictory. That is, the evidence could theoretically be "sufficient"; but if the record is so evenly

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[3] However, an attempted crime is within the scope of Fed. R. Crim. P. Rule 31(c), especially when it is referenced in the governing statute. *See*: *United States v. Rosa*, 404 F.Supp. 602, 607 (W.D. Pa. 1975), *affirmed*, 535 F.2d 1247 (3d. Cir. 1976) [table], *cert. denied*, 429 U.S. 822 (1976), and cases cited therein; *United States v. Pumpkin Seed*, 572 F.3d 552, 562 (8th Cir. 2009). Therefore – and exactly as the *Crawford* majority states – a jury has the *right* to return a guilty *verdict* on the charge of attempt. An interesting question that is not before the Court is whether the jury should be allowed to do that when in reality it is no compromise, as was the case here. For purposes of this Petition, the important distinction is between the right to return the verdict and the "right" to be instructed on an offense which technically is not a lesser-included offense.

balanced that a conscientious judge is in grave doubt as to the harmlessness of the error, then the error cannot be harmless. *O'Neal*, 513 U.S. at 437.

The question, then, for purposes of determining harmlessness of the instructional error, is not whether a jury could "cherry pick contradictory facts" and come up with a conclusion of attempted sexual abuse. Rather, the question is whether the evidence *compels* a finding of attempted sexual abuse. *See*: *Polk v. Sandoval*, 503 F.3d 903, 912 (9th Cir. 2007); *Chambers v. McDaniel*, 549 F.3d 1191, 1200 (9th Cir. 2008); and *Keating v. Hood*, 191 F.3d 1053, 1062-63 (9th Cir. 1999), *cert. denied*, 531 U.S. 824 (2000). If the court on review has to cobble together contradictory facts in order to determine sufficient evidence, as here, then the error clearly cannot be "harmless beyond a reasonable doubt" within the meaning of *Chapman v. California*, 386 U.S. 18, 23-24 (1967).

But again, all that all of the above establishes is that if *Crawford* must be followed, then the giving of the attempted aggravated sexual abuse instruction herein was error, and the error was not harmless. That leads us back to the basic question: Does federal law require the application of directly applicable state court case law?

The closest this Court has come to answering the question is *Keeble v. United States*, 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973). This Court's holding in *Keeble* is that an Indian tried in United States District Court under the predecessor to 18 U.S.C.

§1153 is entitled to a jury instruction on a lesser-included offense, even if it is not listed as an enumerated crime. In footnote 13 of *Keeble*, this Court stated:

> "Similarly, in view of our conclusion that the trial court erred in denying the requested instruction, we need not decide whether an apparent defect in the indictment – a defect to which petitioner did not object – provides an independent ground for reversal. The Major Crimes Act provides that an Indian may be tried in federal court for the offense of assault resulting in serious bodily injury. The statute further provides that this offense "shall be defined and punished in accordance with the laws of the State in which such offense was committed." Petitioner was not charged, however, with assault with resulting in serious bodily injury, but rather with assault with intent to commit serious bodily injury. *See*: S.D.Comp. Laws Ann. §22-18-12 (1967). The South Dakota criminal code does not specifically proscribe the offense of assault resulting in serious bodily injury. Whether the prosecution should have been required to prove not only that the petitioner *intended to commit* serious bodily injury, but also that the assault *resulted in* serious bodily injury, is a question we do not now decide."

Keeble, 412 U.S. at 214 n. 13, 93 S.Ct. at 1998 n. 13.

In other words, this Court left open whether and to what extent the federal court may look to state

case law in fleshing out the parameters of the lesser-included offense – including whether in fact that it is a lesser-included offense.

This is an issue of some controversy, and the controversy is brought home in *United States v. Walkingeagle*, 974 F.2d 551, 553-54 (4th Cir. 1992), *cert. denied*, 507 U.S. 1019 (1993).

The *Walkingeagle* majority held that when Congress granted jurisdiction over major felonies committed by Indians, it granted jurisdiction over all offenses included within those felonies to the extent that *federal trial procedure* would allow the jury to return a verdict on a lesser offense. *Walkingeagle*, 974 F.2d at 553-54. That is, the majority suggested that whether a jury should be instructed on a lesser-included offense is determined by federal trial procedure, meaning that if there is a conflict between federal trial procedure and state trial procedure, federal controls. Without articulating it that way, that essentially is what the Ninth Circuit held as well.

However, the *Walkingeagle* dissent [Cir. J. Hamilton], found at 974 F.2d at 554-59, is a very thorough and impeccably reasoned opinion in support of this Petitioner's position.

First, the dissent noted that with respect to allocation of criminal jurisdiction over crimes committed by Indians or in Indian country, the federal courts must exercise restraint to ensure that they do not exceed the jurisdiction properly allotted to them. 974 F.2d at 554, citing *United States v. Hudson*, 11

U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812) and *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

Second, the dissent noted that it is improper for a court to create jurisdiction over offenses that would not otherwise be in federal court, but only in tribal courts. Indian tribes traditionally punish crime through restitutionary, rather than retributive punishment. However, Congress, and not federal prosecutors, is charged with setting the boundaries of federal court jurisdiction. 974 F.2d at 555-56.

Third, without *viable* charges under the Act, there is no firm jurisdictional basis for extending a federal court's authority over the lesser-included offense. 974 F.2d at 557. That is, it is not enough that the U.S. District Court theoretically has jurisdiction over a lesser-included offense, as here; that lesser offense on the facts of the case must be viable.

Fourth, and consequently, the Federal Rules of Criminal Procedure, like the Federal Rules of Civil Procedure or the Bankruptcy Rules, should not be employed in any manner that expands criminal jurisdiction beyond that set by Congress. 974 F.2d at 557. Applied to this case, even though attempted aggravated sexual abuse is within the scope of 18 U.S.C. §2241(a), if it is presented as a lesser-included offense, and as a matter of state law attempted sexual assault/attempted aggravated sexual abuse is not a lesser-included offense of sexual assault/ aggravated sexual abuse based upon the *Schmuck* test, then Fed. R. Crim. P. Rule 31 should not be

allowed to permit a guilty verdict to a highly punitive crime that otherwise would have no business being in a federal prosecution in this case.

Fifth, this Court in *Keeble* specifically avoided the constitutional question of whether or not *due process* requires the giving of a lesser-included jury instruction. However, per *Spaziano v. United States*, 468 U.S. 447, 456-57 (1984) no party has the right to receive a lesser-included offense instruction where there is no jurisdiction over that offense. 974 F.2d at 558.

II.

To the extent that 18 U.S.C. §1153(b) does not answer the question at bar, Petitioner respectfully submits that 18 U.S.C. §13(a), or the "Assimilated Crimes Act," would. The ACA promotes uniformity through even-handed application of state law to local conduct by insuring that state's law are uniformally applied, off and on federal land. The intent of the ACA is for state law to fill in the gaps of federal law. Thus, where state law does not incorporate more onerous state law sentencing schemes, regulatory requirements or evidentiary rules for the conduct covered under pertinent law, state laws are not prohibited from being assimilated into federal law. *See*: *United States v. Reed*, 878 F.Supp.2d 1199, 1204, 1205 (D. Nev. 2012), *affirmed*, 734 F.3d 881, 888 (9th Cir. 2013).

This case raises a threshold question: Does 18 U.S.C. §13 apply at all? In terms of creating a prosecutable crime in an original charging document that otherwise is not covered under 18 U.S.C. §1153(a), the answer is no. *Acunia v. United States*, 404 F.2d 140, 142 (9th Cir. 1968). In terms of referencing state law to "fill in the gaps" of offenses specifically set forth in 18 U.S.C. §1153(a), the answer is "not really, because 18 U.S.C. §§1152 and 1153(b) already cover that." *See*: *Acunia*, 404 F.2d at 142-43.

So, if there is a felony statute squarely on point, the federal statute will trump any competing state law. *United States v. Antelope*, 430 U.S. 641, 647-48 (1977), citing *Keeble v. United States*, 412 U.S. 205, 212 (1973). Otherwise, Indians and non-Indians ordinarily should be subject to the same law when both commit the same offense in the same state, and a strong showing is necessary to require the Court to abandon such principle of equality. *United States v. Francisco*, 536 F.2d 1293, 1296 (9th Cir.), *cert. denied*, 429 U.S. 942 (1976).

If 18 U.S.C. §13 is unnecessary for our situation because of 18 U.S.C. §§1152 and 1153(a), it follows that cases construing the scope of 18 U.S.C. §13 should apply directly in construing the scope of 18 U.S.C. §§1152 and 1153(a). After all, it is a very basic principle that the Court should, if possible, construe statutes so as to produce a harmonious and consistent result. *Petition of Public Nat. Bank of New York*, 278 U.S. 101, 104 (1928); *Food and Drug Admin. v. Brown*

& Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

Thus, as noted in *United States v. Smith*, 965 F.Supp. 756, 761-62 (E.D. Va. 1997), the federal district courts are bound by state substantive case law when applying the ACA. The ACA assimilates the entire substantive law of the state, including laws relating to the definition and scope of an offense in laws governing the manner in which an offense is to be punished. *Smith*, 965 F.Supp. at 761, and cases cited therein.

This Court did not go quite that far in *Lewis v. United States*, 523 U.S. 155, 118 S.Ct. 1135, 140 L.Ed.2d 271 (1998). In *Lewis*, this Court held that Louisiana's first degree murder statutes specific to child killings, relative to the homicide of a minor child on an U.S. Army base, did not apply under the ACA. As this Court noted, in a case where the defendant's act or omission is made punishable by an enactment of Congress, the Court must ask the question of whether the federal statutes that apply to the act or omission in question preclude application of the state law in question, because its application would interfere with the achievement of a federal policy, because the state law would effectively rewrite an offense definition that Congress carefully considered, or because federal statutes reveal an intent to occupy so much of a field that they would exclude use of the particular state statute at issue. *Lewis*, 523 U.S. at 164, 118 S.Ct. at 1141. As this Court further noted, a substantial difference in the kind of wrongful

behavior covered (on the one hand by the state's statute, on the other, by federal enactment) will ordinarily indicate a gap for a state statute to fill – unless Congress, through the comprehensiveness of its regulations or through language revealing the conflicting policy, indicates to the contrary in a particular case. The primary question is one of legislative intent: Does applicable federal law indicate an intent to punish conduct such as the defendant's to the exclusion of the particular state statute at issue? 523 U.S. at 165-66, 118 S.Ct. at 1142.

It would seem, then, that the issue of whether *Crawford* is assimilated into federal law for this fact pattern depends upon whether Congress and the courts have intended a clearly contrary approach to *Crawford*. That would be the Government's and the Ninth Circuit's best case. Congress, of course, has not spoken to this; so the question is whether the federal courts have clearly set forth a policy of instructing on a lesser-included offense, over defense's objection, in a "he said/she said" type of case where the lesser-included instruction causes the jury to disbelieve the prosecutrix in material respects.

III.

And the answer to that question is in the negative, based upon cases that the Ninth Circuit did not cite in its analysis.

Ironically, the Government cited *United States v. Torres*, 937 F.2d 1469 (9th Cir. 1991) in its Fed. R.

App. P. Rule 28(j) letter prior to oral argument. Regrettably, the Ninth Circuit made no mention of *Torres*. *Torres* holds that while abusive sexual contact is a lesser-included offense of aggravated sexual abuse of a child by digital penetration, the defendant is not entitled to a jury instruction on abusive sexual contact, where the defendant's position is wholly exculpatory and the jury's belief of the victim would not allow the jury to conclude that the defendant engaged in an abusive sexual contact without penetration. *Torres*, 937 F.2d at 1477.

In other words, *Torres* is perfectly consistent with *Crawford*.

But it is not only the Ninth Circuit that is consistent with *Crawford*. In *United States v. Waters*, 194 F.3d 926 (8th Cir. 1999), the Eighth Circuit held that while a judge cannot prevent a jury from rejecting the prosecution's entire case, he or she is not obligated to give a lesser-included offense instruction that will assist the jury in coming to an *irrational* conclusion of partial acceptance and partial rejection of the prosecutor's case. Thus, the defendant is not entitled to a lesser-included offense instruction in a 28 U.S.C. §2241 prosecution under those circumstances. 194 F.3d at 932, citing *United States v. Harrison*, 55 F.3d 163, 167 (5th Cir.), *cert. denied*, 516 U.S. 924 (1995); *United States v. Mansaw*, 714 F.2d 785, 792 (8th Cir.), *cert. denied*, 464 U.S. 964 (1983); and *United States v. Two Bulls*, 940 F.2d 380, 382 (8th Cir. 1991), *cert. denied*, 502 U.S. 1065 (1992) [where victim's testimony establishes aggravated sexual abuse and defendant

professes complete innocence, his testimony cannot support a conviction on any other offense].

CONCLUSION

In conclusion, the Court should grant this Petition to answer the question left open in *Keeble*, and hold that for an Indian in Indian territory major crimes prosecution under 18 U.S.C. §1153(a) and 18 U.S.C. §2241(a), state law that would prohibit the giving of a lesser-included instruction should be assimilated into such a prosecution, even if federal law might arguably authorize the giving of the instruction, for all of the reasons stated above. So assimilated, the giving of the lesser-included instruction in this case constituted error; and the error cannot be deemed harmless under the familiar standards of appellate review.

Accordingly, this Court should grant certiorari and reverse and remand for further proceedings.

Respectfully submitted,

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