

04-8894

CAUSE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 2003 TERM

RICHARD WAYNE DREWRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Supreme Court, U.S.
FILED

JUL 27 2004

OFFICE OF THE CLERK

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

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(a) The Question Presented for Review Expressed in the Terms and Circumstances of the Case.

1) Petitioner, Richard Wayne Drewry, moved for judgment of acquittal based on the government's failure to prove beyond a reasonable doubt the victims of the crimes charged were "Indians". The victims were not enrolled members of a federally recognized tribe at the time the offenses were committed. This fact required the presentation of evidence the substance of which supported only speculation by the jury the victims were "Indians." Should a victim's enrollment in a federally recognized tribe be a requirement to invoke the federal government's jurisdiction under Title 18, United States Code, Section 1152 in crimes against Indians by non-Indians?

2) The district court applied a four level enhancement for "use of force" pursuant United States Sentencing Guidelines §2A3.1(b)(1) in calculating the sentencing guideline range of punishment. The "use of force" aggravator was neither charged in the indictment nor submitted to the jury for determination. Further, the enhancement was applied by the sentencing judge using a preponderance of evidence standard of proof. Does *Blakely v. Washington*, 124 S.Ct. 2531 (2004), require this Court to grant the petition for writ of habeas corpus, vacate the sentence imposed, and remand for further proceedings in light of *Blakely*.

(b) List of all Parties to the Proceeding

The caption of the case accurately reflects all parties to the proceeding before this Court.

(c) Table of Contents and Table of Authorities

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(d) Reference to the Official and Unofficial Reports of any Opinions

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(e) Concise Statement of Grounds on which the Jurisdiction of the Court is Invoked.

(i) Date of judgment sought to be reviewed.

The Opinion of which review is sought was filed April 28, 2004;

- (ii) Date of any order respecting rehearing.

Rehearing was not sought;

- (iii) Cross Petition.

Not applicable;

- (iv) Statutory Provision Believed to Confer Jurisdiction.

Pursuant Title 28, United States Code, §1254(1), any party to a criminal case may seek review by petitioning for a writ of certiorari after rendition of judgment by a court of appeals.

- (v) The provisions of Supreme Court Rule 29.4(b) and (c) are inapposite in this case. The United States is a party to this action and service is being effected in accordance with Supreme Court Rule 29.4(a).

- (f) The Constitutional Provisions, Statutes and Rules which the Case Involves.

- (1) Constitutional Provisions:

None

- (2) Statutes Involved:

Title 18, United States Code, Section 1152.

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.

(3) Rules Involved:

None.

(g) Concise Statement of the Case.

Basis of Jurisdiction in Court of First Instance

This Petition seeks review of a judgment entered by a United States Court of Appeals. The jurisdiction of the district court below was based originally upon alleged violations of the laws of the United States. The United States District Court for the Western District of Oklahoma has original jurisdiction over offenses against the laws of the United States which occur in that district. Title 18, United States Code, Section 3231.

Facts Material to Consideration of Question Presented

Nature of the case

On June 4, 2002, a five count Indictment was returned by a federal grand jury in the Western District of Oklahoma naming Richard Wayne Drewry as the sole defendant. The Indictment charged Mr. Drewry, in Count 1, with aggravated sexual abuse of a minor on Indian Land; in Counts 2, 3, and 5, with assaults on children under the age of 16 on Indian Land; and, in Count 4 with abusive sexual contact on a child under the age of 12 years on Indian Land. The offenses charged violations of Title 18, United States Code, Sections 2241(c), 113(a)(5), and 2244(c). Federal jurisdiction was invoked pursuant Title 18, United States Code, Section 1152. Mr. Drewry's case was tried to a jury September 9, 16 through 19, 2002. The jury returned verdicts of guilty on each of the five counts. A Presentence Report was ordered.

Mr. Drewry objected to the application of a sentencing guideline enhancement for "use of force" in the calculation of the sentencing guidelines. The district court overruled the objection and sentenced Mr. Drewry to a total of 210 months' imprisonment, three years' supervised release, and \$275.00 in special assessments. Mr. Drewry timely appealed.

On April 28, 2004, the United States Court of Appeals for the Tenth Circuit filed an opinion wherein the judgment and sentence imposed by the district court

were affirmed. Mr. Drewry is seeking review of that opinion by the Supreme Court of the United States.

Facts material to the issues

Mr. Drewry was charged in Count 1 of the indictment with aggravated sexual abuse of a minor who had not attained the age of 12. The allegation was based on the government's contention Mr. Drewry used his finger to penetrate the vaginal opening of Jane Doe - StB, age 11, sometime in January 2002. Mr. Drewry was charged in Count 4 of the indictment with abusive sexual contact of a minor who had not attained the age of 12. This allegation was based on the government's contention Mr. Drewry touched, through the clothing, the genitalia of Jane Doe - SaB, age 8, sometime in March 2002. Both counts alleged the acts occurred on Indian land and that the victims were Indians.

Counts 2, 3, and 5 of the indictment charged Mr. Drewry with assaulting Jane Doe - StB, Jane Doe - AB, and Jane Doe - TB, who were Indians and at the time under the age of 16 years. The assault charges alleged in Counts 2, 3, and 5 were not contested by Mr. Drewry at trial. The jury trial concerning the charges in Counts 1 and 4 produced the following evidence.

Waka Tabbie Edwards, Mr. Drewry's significant other for over twenty-five years, moved from her home in Virginia to a rural area of Cotton County Oklahoma

in November 1999, after her mother died. Ms. Edwards's mother suffered significant health problems. Ms. Edwards's move to this area was prompted by her decision to return to Oklahoma to care for six children for whom her mother was caring at the time of her death. These children were her nieces and nephews, known collectively as the "B" children. The childrens' mother, Larue "B", had not cared for them for quite some time. Mr. Drewry joined the household in the Fall of 2001.

The children were one-eighth Comanche Indian and one-eighth Kiowa. While they had a quantum of one quarter Indian blood, the children were not enrolled members of a federally recognized tribe until some time in the Spring of 2002. In the Spring of 2002, the children became enrolled members of the Comanche Tribe after that tribe voted to reduce the blood quantum necessary for membership in the tribe to a minimum one eighth Comanche blood. Enrollment in the Comanche Tribe post dated the allegations in Counts 1 and 4.

Prior to enrollment in the Comanche Tribe, the children received health service through the Indian Health Services clinic. The government presented conflicting testimony on the issue of a dependent's eligibility for health services. James Campbell, a social worker for the ten county region served by the Lawton Indian Hospital testified medical services could be provided to children as dependents of an enrolled member of a tribe even though the children may not be "Indian" themselves.

Steve Barse, who was employed by Indian Health Services in Oklahoma City, also testified for the government. Mr. Barse does not analyze eligibility requirements, but read into the record a portion of the Indian Health Services Manual. The provision cited by Mr. Barse indicated a child would be eligible for services only if that child were recognized as an Indian by his or her community, were enrolled in a tribe, resided on tax exempt land or owned restricted property, actively participated in tribal affairs, or any other factor indicative of Indian descent. Mr. Barse did not cite which provision applied to the “B” children, or why Mr. Campbell in the Lawton region was relying on a completely different, more liberal provision, relating to services for dependents of “Indians”.

Elaine Geimausaddle, a child welfare worker for the Comanche Tribe, testified the “B” children attended a summer camp conducted by the Comanche tribe in approximately 1999 at the request of the Comanche Chairman. Ms. Geimausaddle’s only other contact with the children was after they were removed from the home incident to this case. Based on this, she knew them as Comanche. Prior to the change in the Comanche enrollment requirements in the Spring of 2002, the children’s status as “Indians” was based primarily on their mother’s tribal affiliation.

On May 12, 2002, Mr. Drewry physically abused two of the children. Mr. Drewry assaulted Jane Doe - AB by slapping her. He left welts on Jane Doe - TB

after spanking her with a switch. The punishment of Jane Doe - AB was the culmination of a dispute that extended several days. Mr. Drewry disciplined Jane Doe - AB by forbidding her from attending three summer camps she had been scheduled to attend.

Jane Doe - AB was angry about the loss of her privilege to attend the summer camps. On May 12, 2002, Ms. Edwards dropped Jane Doe - AB, Jane Doe - SaB, Jane Doe - StB, and their brother off at the Methodist Church in Walters, Oklahoma. Jane Doe - AB's anger toward Mr. Drewry did not lessen during the drive to church and was obvious to individuals who saw her at church. Several adults asked Jane Doe - AB what was wrong. Jane Doe - AB advised her sisters, Jane Doe - StB and Jane Doe - SaB, not to expect to go home from church and then began advising several women at the church about the physical abuse she suffered at the hands of Mr. Drewry.

Observing and hearing Jane Doe - AB's revelations to these women, Jane Doe - SaB and Jane Doe - StB interjected they, too, had been physically abused by Mr. Drewry. In addition, Jane Doe - SaB and Jane Doe - StB alleged Mr. Drewry sexually abused them. Hearing these complaints, the women at the church contacted several persons, including a Department of Human Services worker and a Deputy for the Cotton County Sheriff's office. Deputy Gary Wittington responded to the call and

found the girls together in the fellowship hall at the church. Deputy Wittington listened as the girls repeated again the allegations of Mr. Drewry's abuse. The girls repeated their stories several times that day and were allowed to recount their stories in the presence of each other. The children testified as follows.

Jane Doe - SaB testified she was no longer living with Mr. Drewry because "he spanked on us." Jane Doe - SaB related Mr. Drewry touched her private parts with his hand, on the outside of her clothes, on two occasions. The first of these acts was said to have occurred in the house while she was lying on the couch with Mr. Drewry. Jane Doe - SaB testified this made her feel very uncomfortable. Jane Doe - SaB admitted she never told anyone about this incident and her testimony in court was the first time she had mentioned this act.

The second act occurred when she went for a walk with Mr. Drewry, Jane Doe - AB, Jane Doe - StB, and her brother. Mr. Drewry was sitting by a tree and he "touched me in the private part." Both of these events occurred when she was seven years of age. She admitted she never told anyone about these incidents because she was scared and nervous. She also admitted the first time she told anyone about the second incident of abuse was when she was housed at the shelter with her two sisters and brother. Jane Doe - SaB related she loves all of her brothers and sisters. She looks up to Jane Doe - AB, the oldest. Jane Doe - SaB said she believes that if

something happened to Mr. Drewry, then she and her brothers and sisters would all live together again.

Jane Doe - StB testified she no longer lives with Mr. Drewry because he was being mean to her. Jane Doe - StB related an example of this meanness advising the jury that Mr. Drewry beat her, pulled her hair, and stomped on her one time after she asked him if he was going to eat lunch. Mr. Drewry told her that was none of her business and proceeded to beat her as described, while her Aunt Tabbie stood by and watched.

Jane Doe - StB related an incident during which Mr. Drewry touched her body on a place she did not like. One day she was in the hallway near the kitchen, looking at a picture of her sister in a Veterans Day program a few days after Veterans Day. Mr. Drewry came into the house, saw her, and told her to put her leg on a chair. As she placed her leg on the table, he touched her with his finger on her private parts. His finger went inside her "private" and did not feel very good. According to Jane Doe-StB, as Mr. Drewry did this to her he asked her who he was. She told him that he was her uncle. He said no, "I am a warrior." Jane Doe - StB testified this event occurred when she was ten years of age. Jane Doe - StB stated that she told her Aunt Tabbie about what Mr. Drewry did, but she did not do anything about it.

The jury returned a verdict of guilty on each count of the indictment. The district court referred the case to the Probation Office for completion of a presentence investigation and report. The Presentence Report contained a calculation of the sentencing guideline range of punishment to which Mr. Drewry submitted numerous objections. The objections pertaining to the calculation of the sentencing guidelines for Count 1 were the determining factor as it relates to the range of punishment Mr. Drewry faced.

The Presentence Report calculated the range of punishment for Count 1 by application of United States Sentencing Guidelines §2A3.1. Mr. Drewry objected to application of the four level enhancement in §2A3.1(b)(1). This section directs a four level increase in the offense level computation if the crime was committed by means set forth in Title 18, United States Code, Section 2241(a) or (b). The probation officer applied the enhancement under the theory Mr. Drewry “threatened the victim.” The government argued at sentencing the adjustment applied, “[b]ecause the offense that took place in the context of a year long period of the defendant beating not only the victim in that count, but also her siblings, all except the baby, beating them and the horrendous beatings that she herself underwent with -- under the defendant’s hands.”

The district court held the testimony at trial sustained the enhancement finding that all of the children, were “intimidated and threatened over a lengthy period of time, such that submission to the defendant’s sexual advances was as a result of the fear of force.” The application of the four level enhancement resulted in a total offense level of 37. A total offense level of 37 and a Criminal History Category of I resulted in a sentencing guideline range of imprisonment of 210 to 262 months. Mr. Drewry was sentenced to 210 months’ confinement. If the four level enhancement had not been applied, Mr. Drewry’s total offense level would be 33, resulting in a range of imprisonment of 135 to 168 months.

(h) Direct and Concise Arguments Amplifying the Reasons Relied on for the Allowance of the Writ.

I. FOR CRIMES COMMITTED BY NON-INDIANS AGAINST INDIANS, A VICTIM’S ENROLLMENT IN A FEDERALLY RECOGNIZED TRIBE SHOULD BE A REQUIREMENT TO INVOKE FEDERAL JURISDICTION.

Pursuant this Court’s decision in *Donnelly v. United States*, 228 U.S. 243, 271-272 (1913), crimes against Indians by non-Indians fall within the jurisdiction of Title 18, United States Code, Section 1152. In the instant case, federal jurisdiction over each count in the indictment hinged on the premise the crimes occurred on “Indian Land” and the victims were “Indians.” The parties stipulated the location of the alleged offenses was “Indian Land.” The parties did not stipulate to the remaining

jurisdictional requirement that the victims be “Indians.” The jury was instructed on the definition of “Indian” for the purpose of their deliberation.

You are instructed that person is recognized as an “Indian” when he or she 1) has a degree of Indian blood, however slight; and 2) there is tribal or federal recognition of that person as an Indian. You are instructed that there is tribal or federal recognition of a person as an “Indian” if that person 1) is enrolled in a tribe; 2) receives informal or formal government recognition as an Indian through assistance provided only to Indians; 3) enjoys the benefits of tribal affiliation; or 4) receives social recognition as an Indian through residence on the reservation and participation in Indian culture and social life.

The instruction mirrors the Tenth Circuit’s two part test announced in *United States v. Prentiss*, 273 F.3d 1277 (10th Cir. 2001):

In the absence of a statutory definition, this circuit has applied a two-part test for determining whether a person is an Indian for the purpose of establishing federal jurisdiction over crimes in Indian country. We have concluded that, “[f]or a criminal defendant to be subject to § 1153, the court must make factual findings that the defendant ‘(1) has some Indian blood; and (2) is recognized as an Indian by a tribe or by the federal government.’”

Id., 273 F.3d at 1280. The same test applies for determining whether a victim is an Indian for purposes of federal jurisdiction. *Prentiss*, 273 F.3d at 1282.

In this case, the government proved the victims had a degree of Indian blood. However, on the requirement that the jury find the victims were “recognized as an Indian by a tribe or by the federal government” the government’s evidence was suspect. Neither of the alleged victims of sexual abuse were enrolled members of a

tribe at the time the crimes were alleged to have been committed. At most, the government showed the victims received some health services through Indian Health Services. Whether the children qualified for those services based on their own heritage, or on that of their caretaker was highly questionable. Further, the only other evidence presented was the testimony of a child welfare worker who saw the children attend a tribal sponsored summer camp on one occasion and on one occasion attend a pow wow. Ms. Geimausaddle opined that the children were recognized as Indians in the community, but offered no evidence to support this assertion. The record clearly establishes Ms. Geimausaddle did not have a sufficient fund of knowledge to support her broad assumption of community recognition.

The evidence presented and the law under which the jury was to consider the evidence allowed the jury to make a subjective and speculative determination of the “Indian-ness” of the victims. Mr. Drewry contends this Court should establish a clear definition of who is an “Indian” for purposes of federal jurisdiction in criminal cases arising under Title 18, United States Code, Section 1152.

This Court declined to reach the issue whether a non-enrolled Indian was subject to Title 18, United States Code, Section 1153 in *United States v. Antelope*, 430 U.S. 641 (1977). It has been recognized for some time that determining Indian status for criminal jurisdiction purposes is often an imperfect and subjective science.

United States v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977). The subjective standards used in the instant case and others brought under Title 18, United States Code, Section 1152, allow for imprecise and unreliable determinations on the critical issue of jurisdiction.

Requiring proof of enrollment in a federally recognized tribe as evidence of the victim's status as an Indian in prosecutions brought under Section 1152 is the only fair and just way of preventing decisions on this jurisdictional prerequisite from being based on evidence which lends itself to subjective and speculative conclusions. Mr. Drewry requests the Court decide this important federal question by granting his petition for writ of certiorari.

II. *Blakely v. Washington*, 124 S.Ct. 2531 (2004), REQUIRES THIS COURT TO GRANT THE PETITION FOR WRIT OF HABEAS CORPUS, VACATE THE SENTENCE IMPOSED, AND REMAND FOR FURTHER PROCEEDINGS BECAUSE THE DISTRICT COURT INCREASED THE SENTENCE BASED ON AN AGGRAVATING FACTOR THAT WAS NOT CHARGED IN THE INDICTMENT OR PROVED TO THE JURY BEYOND A REASONABLE DOUBT.

The district court applied an aggravating sentencing enhancement that was neither charged in the indictment or proved beyond a reasonable doubt to the jury. The enhancement in this case was pursuant to United States Sentencing Guidelines §2A3.1(b)(1), which provides a four-level enhancement "if the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b)." Commission of the

offense by means set forth in Title 18, United States Code, Sections 2241(a) or (b), that is by force or other means impairing the victim's faculties, was not charged in the indictment. This aggravating factor was not submitted to the jury for a finding of fact. Similarly, the aggravating factor was not proved beyond a reasonable doubt.

Application of this sentencing aggravator is in direct violation of this Court's holding in *Blakely v. Washington*, 124 S.Ct. 2531 (2004). In *Blakely*, this Court extended the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to include the requirement that any facts legally essential to punishment must be proved to a jury. Mr. Drewry raised this issue before the Tenth Circuit when he argued that the district court's application of this enhancement was clearly based on the use of "relevant conduct" and that only facts surrounding the acts involved in the commission of the offense may be considered in assessing the application of this enhancement. This Court should vacate the opinion of the Tenth Circuit Court of Appeals and remand with directions to grant relief based on *Blakely*.

(i) Appendix.

- (i) Opinion delivered upon the rendering of judgment by the court where decision is sought to be reviewed:

United States v. Drewry, 365 F.3d 957 (10th Cir. 2004).

(ii) Any other opinions rendered in the case necessary to ascertain the grounds of judgment:

None;

(iii) Any order on rehearing:

None;

(iv) Judgment sought to be reviewed entered on date other than opinion referenced in (i):

None;

(v) Material required by Rule 14.1(f) or 14.1(g)(i):

None;

(vi) Other appended materials:

None.

CONCLUSION

For the foregoing reasons, Mr. Richard Wayne Drewry, respectfully requests a Writ of Certiorari issue to review the Order and Judgment of April 28, 2004, of the United States Court of Appeals for the Tenth Circuit in Case Number 03-6011.

Respectfully submitted,



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