No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2011

GENTRY CARL LaBUFF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED

1. *HAS THE NINTH CIRCUIT, CONTRARY TO UNITED STATES V. ROGERS, ERRONEOUSLY MINIMIZED CONSIDERATION OF THE UNDISPUTED FACTS THAT PETITIONER IS NOT SOCIALLY RECOGNIZED AS AN INDIAN, DOES NOT PARTICIPATE IN INDIAN SOCIAL LIFE, AND DOES NOT HOLD HIMSELF OUT AS AN INDIAN AND THEREBY CREATED A CONFLICT WITH THE EIGHTH CIRCUIT?*

2. *DID THE GOVERNMENT PROVE BEYOND A REASONABLE DOUBT THAT PETITIONER IS AN INDIAN PERSON WHERE HE IS NOT A MEMBER OF A TRIBE, IS NOT SOCIALLY RECOGNIZED AS AN INDIAN, DOES NOT PARTICIPATE IN INDIAN SOCIAL LIFE, AND DOES NOT HOLD HIMSELF OUT AS AN INDIAN?*

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No. _____

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PETITION FOR A WRIT OF CERTIORARI
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The Petitioner, Mr. Gentry Carl LaBuff, (referred to herein as Petitioner), respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals (App. A) is unpublished, United States v. Gentry Carl LaBuff, No. 10-30274, 2011 WL 2601334 (9th Cir. July 1, 2011).

JURISDICTION

The judgment of the Ninth Circuit was entered on July 1, 2011. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's argument necessarily implicates his constitutional rights under the Fifth Amendment (Due Process of Law and Equal Protection of the Laws). Therefore, the relevant provisions of the Fifth Amendment to the United States Constitution are reproduced at App. B.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

1. Introduction

This Petition follows a direct appeal from a criminal conviction entered in United States District Court and affirmed by the Ninth Circuit Court of Appeals. Petitioner was convicted of, and was sentenced for, Robbery/Aiding and Abetting Robbery, in violation of Title 18 United States Code §§ 1153, 2111, and 2. The charges are alleged in the Indictment. (ER 1-2). Petitioner presented one argument on appeal: the Government failed to prove beyond a reasonable doubt that Mr. LaBuff, who considers himself white and whose mother is white, to be an "Indian person."

2. Course of the Proceedings

On February 18, 2010, Petitioner was charged by Indictment filed in the United States District Court for the District of Montana, Great Falls Division, in Cause No. CR 10-23-GF-SEH, with the offense of Robbery/Aiding and Abetting Robbery, in violation of Title 18

United States Code §§ 1153, 2111, and 2. (ER 1-2). This crime is alleged to have occurred on October 25, 2008, at Browning, in the State and District of Montana, and within the boundaries of the Blackfeet Indian Reservation, being Indian Country. (Id.).

On March 2, 2010, Petitioner appeared in Court and pleaded "Not Guilty" to the alleged offense. (Clerk of Court Docket Sheet; ER 366). He was detained pending trial. (ER 367). Pretrial motions were filed on behalf of Petitioner and resolved by the District Court prior to trial. (ER 368-370).

A jury trial commenced on June 8, 2010, and lasted two days. (Transcript of Jury Trial - Volumes 2 & 3 - Reporter's Transcript (RT) 1-315; ER 34-348). The jury found Petitioner guilty. (ER 31).

The District Court held the Sentencing Hearing on September 13, 2010. ER 375). The District Court sentenced Petitioner to 62 months in prison. (ER 354-359). A Notice of Appeal was filed on September 23, 2010. (ER 360-362).

3. Disposition in the District Court

Petitioner was sentenced to prison for a term of 62 months. (ER 354-359).

4. Ninth Circuit Panel's Decision

On July 1, 2011, a panel of the Ninth Circuit (Judges Fisher, Gould and Paez) affirmed the judgment of the District Court. The Decision is an unpublished memorandum decision, United States v. Gentry Carl LaBuff, No. 10-30274, 2011 WL 2601334 (9th Cir. July 1, 2011), and is replicated in Appendix A.

The Ninth Circuit panel rejected Petitioner's argument that the Government did not prove beyond a reasonable doubt that Petitioner is an "Indian person" under 18 U.S.C. §

1153.. (App. A at A1-A2). Ignoring that Petitioner is not a member of a federally recognized Indian tribe, that he is not socially recognized as an Indian, that he does not participate in Indian social life, and that he does not hold himself out as an Indian, the panel concluded that evidence of government recognition through receipt of assistance reserved for Indians and enjoyment of the benefits of tribal affiliation was sufficient to prove Indian status. (Id.).

The panel reasoned that the Government recognized Petitioner through receipt of assistance reserved only to Indians because Petitioner, the son of a Blackfeet tribal member who lived on the Blackfeet Reservation with his white mother, "received healthcare services from the Blackfeet Community Hospital." (App. A at A2). The Ninth Circuit also concluded that Petitioner enjoyed the "benefits" of tribal affiliation because he "frequently received healthcare services on the basis of his descendent status of an enrolled member." (Id.).

The panel further found "strong evidence of tribal recognition" because Petitioner "was arrested, prosecuted, and convicted under the jurisdiction of the tribal courts." (Id.). No mention was made of the lack of evidence of tribal enrollment or of the lack of evidence of social recognition as an Indian or of the lack of evidence of participation in Indian social life and of the fact that Petitioner has never held himself out as an Indian person.

5. Bail Status of Defendant-Appellant

Petitioner is presently incarcerated at the U.S. Penitentiary in Atwater, California.

B. STATEMENT OF THE FACTS

The only factual issue subject to challenge in this case is simply whether the Government proved beyond a reasonable doubt that Petitioner is an Indian person. All other facts and elements were either stipulated to, admitted, or proven.

A review of the record establishes that the Government failed to prove beyond a reasonable doubt that Petitioner is an Indian person. To the contrary, the facts presented at trial prove that he is not an Indian person:

Petitioner's mother is white. (ER 278-279, 284).

Petitioner has "very little" Blackfeet blood. (ER 10, 82, 284).

Petitioner is not a tribal member and does not enjoy any of the benefits of a tribal member. (ER 82, 120, 279, 295).

Petitioner is not eligible to be a tribal member. (ER 77, 294-295).

Petitioner is at least 78% non-Indian. (ER 10, 82).

Most importantly, Petitioner has always considered himself to be a white person and has never held himself out to be an Indian person. (ER 279). As to his physical appearance, Petitioner has been described as a "tall, white-looking guy...[and]..."a taller, light-skinned gentleman." (ER 154, 238).

Petitioner has not been recognized as an Indian person either by the Federal government or by the Blackfeet Tribe. He is not a member of the Blackfeet Tribe or of any other Indian tribe. (ER 83). Petitioner's father is an enrolled member of the Blackfeet Tribe. (ER 78, 83, 279, 294, 296).

As the child of a member of an Indian tribe, Petitioner is eligible for free medical and

hospital treatment at the Indian Health Service (IHS) facility in Browning, Montana. (ER 77, 100, 285). Because his father is a member of the Blackfeet Tribe, Petitioner has been designated as "a descendant of a member" of the Tribe, which is a federally recognized tribe. (ER 10, 82, 297). Thus, as a person with "some Native American blood," Petitioner is eligible for, and has received, IHS services. (ER 11-12, 100,102-103, 105, 285).

However, Petitioner enjoys virtually none of the benefits afforded to members of the Blackfeet tribe. (ER 279, 295). He has never received assistance reserved only to Indian persons. (ER 279).

As the child of a member of the Blackfeet tribe, he may have been entitled to hunting and fishing privileges but the Government presented no evidence to show that he ever was given such privileges. (ER 77, 87-88, 280). As the child of a member of the Blackfeet tribe, Petitioner may have been entitled to some college or educational grants but the Government presented no evidence to show that he ever received any college or educational grants. (ER 77, 280).

Petitioner cannot participate in Blackfeet tribal activities. (ER 88-89). He cannot vote in tribal elections. (ER 89, 283). Petitioner does not participate in tribal political activities. (Id.).

Petitioner is not eligible for financial assistance from the Blackfeet Tribe. (ER 89, 280). Petitioner is not entitled to per capita payments that come from the Blackfeet Tribe. (ER 90, 280). He is not eligible for general assistance or unemployment from the Blackfeet Tribe. (ER 90, 280). Petitioner is not entitled to any money from the Government for the

Cobell lawsuit.[1] (ER 281).

Petitioner is not entitled to a low-income energy credit that the Blackfeet Tribe provides to its members. (ER 281). He is not eligible for Blackfeet tribal housing although he has stayed in tribal housing with others. (ER 91, 281, 285, 287). Petitioner is not eligible for fee exempt motor vehicle licensing from the State of Montana. (ER 281-282). Because he is not a member of the tribe, he cannot get into Glacier National Park without paying a fee. (ER 282).

Although he lived, grew up, and went to school on the Blackfeet Reservation (ER 97, 180, 194, 216, 233, 284), Petitioner was not socially recognized as an Indian and did not participate in Indian social life. (ER 282-283). Except for six months when he moved away to Washington, Petitioner has lived with his white mother "off and on" all his life. (ER 286). However, one does not have to be an Indian to live on the reservation. (ER 282). Nor does a person have to be an Indian to go to school on the reservation. (ER 282).

Petitioner has never worn traditional Indian clothing. (ER 282). He has never participated in Blackfeet social or ceremonial activities such as pow-wows or sweats. (ER 282-283). Petitioner has never participated in smudging or other Indian ceremonies or religious activities. (ER 283).

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On December 8, 2010, President Obama signed legislation approving the Cobell v. Salazar Class Action Settlement and authorizing $3.4 billion in funds to be distributed to individual Indian trust beneficiaries. *See, e.g.*, http://www.greatfallstribune.com/article/20101213/OPINION01/12130304/At+long+last++Native+Americans+get+a+kind+of+justice ("The United States government gave them justice.").

Petitioner has been prosecuted in the Blackfeet Tribal Court. (ER 220, 285). However, this does not establish that Petitioner is an "Indian person." The Blackfeet Tribal Enrollment Office, based on the Blackfeet Tribe's Constitution, uses Ordinance No. 14 to determine whether someone is eligible to become a member of the Blackfeet Tribe. (ER 290). The Blackfeet Tribal Court had no legal jurisdiction over Petitioner as he is not a "descendant" as defined in Ordinance No. 14. (ER 14-15, 85-87, 291-292). Petitioner is not a descendant because, born in 1979, he was not born "prior to August 30, 1962" and he does not have "one-fourth degree of Blackfeet Indian blood or more." (Id.)

Although the Blackfeet Tribal Court and tribal prosecutors "assert jurisdiction over every person who is an enrolled member of a federally-recognized tribe or a descendant of a federally-recognized tribe," the Blackfeet Tribal Law and Order Code establishes that the Blackfeet Tribal Court has no legal jurisdiction over Petitioner or other so-called descendants. (ER 220, 224, 227, 229, 23: "The Blackfeet Tribal Court has jurisdiction over all persons of Indian descent, who are members of the Blackfeet Tribe of Montana and over all other American Indians unless its authority is restricted by an Order of the Secretary of the Interior.").

Blackfeet tribal police assert authority to arrest "members and descendants of our tribe." (ER 234). According to the tribal police, "members" means "[t]he people that are enrolled" and "descendants" means people whose "father or mother is an enrolled member and they are not, but they are still a descendant of the tribe." (Id.). Petitioner has never challenged the authority of the tribal police to arrest him. (ER 234-235, 252). However, to make such a challenge, he would have had to claim, "I don't have any Indian blood." (ER

255).

Petitioner has also never challenged the Blackfeet Tribal Court's exercise of jurisdiction over him for minor and traffic offenses committed in Browning. (ER 223). However, he was never given legal advice to challenge jurisdiction as he was represented by defenders in Blackfeet Tribal Court are simply "advocates" who rely on "practical experience." (ER 228). They are not licensed lawyers and have no law school training. (Id.).

According to the Blackfeet Tribal Law and Order Code, the Blackfeet Tribal Court does not have jurisdiction over descendants of Blackfeet tribal members. (ER 228). Although he is a "person of Indian descent", i.e., he is the descendant of an Indian person, his father, Petitioner is not a member of the Blackfeet Tribe and is not an "American Indian" because he is not a member of any Indian tribe.

Petitioner has never been treated as an Indian person by members of the Blackfeet Tribe. When he attended school, he was taunted and teased as being a white person. (ER 283). They called him "a little white boy." (Id.). Petitioner even had to fight to protect himself. (ER 283-284).

REASONS TO GRANT PETITION

1. *THE NINTH CIRCUIT HAS, CONTRARY TO UNITED STATES V. ROGERS, ERRONEOUSLY MINIMIZED CONSIDERATION OF THE UNDISPUTED FACTS THAT PETITIONER IS NOT SOCIALLY RECOGNIZED AS AN INDIAN, DOES NOT PARTICIPATE IN INDIAN SOCIAL LIFE, AND DOES NOT HOLD HIMSELF OUT AS AN INDIAN AND THEREBY CREATED A CONFLICT WITH THE EIGHTH CIRCUIT.*

Whether a person is "Indian" is a political, not a racial, determination because Federal criminal jurisdiction over Indians is "not over a discrete racial group but rather as members of quasi-sovereign tribal entities whose lives and activities are governed by the [Bureau of Indian Affairs] in a unique fashion." Morton v. Mancari, 417 U.S. 537, 554 (1974). There is no statutory definition of "Indian" for determining the Indian status element under the federal criminal jurisdiction statutes. Clinton, Robert N., Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Ariz.L.Rev. 503, 513 (1976). Thus, one commentator observed, "the question of Indian status for purposes of criminal jurisdiction is perplexing." Id.

Guided by a two-part test established in United States v. Rogers, 45 U.S. (4. How.) 567, 572-573 (1846), the courts of appeal have defined the term "Indian" as "an individual who has Indian blood and who is regarded as an Indian by his or her tribe or Indian community." Felix S. Cohen's Handbook of Federal Indian Law at 24 (Rennard Strickland et al. ed., 1982). A leading scholar has suggested that "the inquiry in all cases where Indian status is an issue for jurisdictional purposes should be whether the person has some demonstrable biological identification as an Indian and has been socially or legally recognized as an Indian." Clinton, 18 Ariz.L.Rev. at 520.

In Rogers, this Court held that the precursor statute to 18 U.S.C. § 1153 (the Major Crimes Act) did not apply to a white man who had been adopted into an Indian tribe. 45 U.S. (4. How.) at 573. While the reasoning in Rogers is not crystal clear, the courts of appeal have determined that Rogers "suggested" this two-part test which "has been generally followed by the courts": "(1) the degree of Indian blood; and (2) tribal or governmental recognition as an Indian." United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979); United States v. Prentiss, 273 F. 3d 1277, 1280 (10th Cir. 2001) (listing Rogers test applied by the Ninth Circuit, Seventh Circuit, District of South Dakota, and Connecticut and Montana Supreme Courts); and United States v. Lawrence, 51 F.3d 150, 152 (8th Cir. 1995) (listing Seventh and Eighth Circuits)).

While Petitioner, whose mother is white, does have Indian blood from his father, i.e., approximately 22%, he is not an enrolled member of a Federally recognized tribe. This Court has not yet been called on to decide whether a non-enrolled person of Indian descent is subject to 18 U.S.C. § 1153 jurisdiction. *See,* United States v. Antelope, 530 U.S. 641, 646 n.7 (1977).[2]

In implementing the Rogers test, the courts of appeal have adopted and expanded the it, resulting in a split between the Eighth and Ninth Circuits as to the definition of "Indian" for federal criminal jurisdiction. Lewis, Brian L., Do You Know What You Are? You Are

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2

Because, as explained below, enrollment in an Indian tribe recognized by the federal government is one factor, if not the most important factor, used to determine whether someone has tribal or federal recognition as an Indian, this Court would have to address this issue if certiorari was granted.

What You Is. You Is What You Am. Indian Status For The Purpose Of Federal Criminal J Jurisdiction And The Current Split In The Court Of Appeals, 26 Harv. BlackLetter L. J. 241 (2010).

Beginning with United States v. Bruce , 394 F.3d 1215, 1224 (9th Cir. 2005), followed by United States v. Cruz, 554 F.3d 840, 845-846, 849 n. 13 (9th Cir. 2009), and as further refined by United States v. Maggi, 598 F. 3d 1073, 1081 (9th Cir. 2010), in a series of Montana reservation cases, the Ninth Circuit has adopted and applied the following test:

"Indian Person" under 18 U.S.C. § 1153 (and § 1152) means someone who:

1. has some ["a sufficient"] degree of Indian blood; and

2. has tribal or federal recognition as an Indian.

In determining whether someone has some ["a sufficient"] degree of Indian blood, evidence of a parent, grandparent, or great-grandparent who is clearly identified as an Indian is generally sufficient to satisfy this prong. Bruce, 394 F. 3d at 1223.

In determining whether someone has tribal or federal recognition as an Indian, evidence of the following factors must be considered, **in declining order of importance**:

1. Tribal enrollment in a tribe recognized by the federal government;

2. Government recognition formally and informally through receipt of assistance reserved only to Indians;

3. Enjoyment of the benefits of tribal affiliation; and

4. Social recognition as an Indian through residence on a reservation and participation in Indian social life.

Bruce, Id. at 1224 (Emphasis added); *see,* 9th Cir. Crim. Jury Instr. 8.113 (2010). As shown below, the Ninth Circuit adopted this test from the Eighth Circuit and modified its application,

ultimately creating a conflict between two of the Indian country circuits.

After Bruce and Cruz, the Eighth Circuit announced a similar, but distinct, test in United States v. Stymiest, 581 F.3d 759, 764 (8th Cir. 2009), which it first discussed in United States v. Lawrence, 51 F.3d 150 (8th Cir. 1995). A South Dakota district court originated the test in United States v. St. Cloud, 702 F.Supp. 1456, 1461 (D. S.D. 1988).

In Stymiest, the Eighth Circuit began by noting Rogers' "generally accepted test" for defining Indian, and that "four circuits and state courts apply this test." 581 F3d at 762 (citations omitted). The Eighth Circuit ruled "there is no single correct way to instruct a jury on [the Indian status] issue" and approved the district court's jury instruction on the second Rogers element – recognition by a tribal or federal government – using a non-exclusive five-factor test:

> 1. enrollment in a tribe;
>
> 2. government recognition formally or informally through providing the defendant assistance reserved only to Indians;
>
> 3. tribal recognition formally or informally through subjecting the defendant to tribal court jurisdiction;
>
> 4. enjoying benefits of tribal affiliation; and
>
> 5. social recognition as an Indian through living on a reservation and participating in Indian social life, including whether the defendant holds himself out as an Indian.
>
> It is not necessary that all of these factors be present. Rather, the jury is to consider all of the evidence in determining whether the government has proved beyond a reasonable doubt that the defendant is an Indian.

Id. at 763 and 764.

The Eighth Circuit thus split from the Ninth Circuit in Cruz, which interpreted Bruce

to require a jury to be instructed using the four factor test **in declining order of importance.** Cruz, 554 F.3d at 846.

The Eighth Circuit solidified its conflict with the Ninth Circuit by further explaining that the factors listed "may prove useful, depending upon the evidence, but they should not be considered exhaustive. Nor should they be tied to an order of importance, unless the defendant is an enrolled tribal member, in which case that factor becomes dispositive." Stymiest, 581 F.3d at 764. The Eighth Circuit thus split from Ninth in Bruce by not adopting the declining order of importance rule, and then from the Ninth in Cruz by ruling that tribal membership is dispositive of Indian status. *Contrast,* Bruce, 534 F.3d at 1224 and Cruz, 554 F.3d at 847.

Here, not only did the Ninth Circuit erroneously grant less importance to the undisputed facts that Petitioner is not socially recognized as an Indian and does not participate in Indian social life but the Court did not even consider these facts. Furthermore, the Ninth Circuit overlooked and ignored the undisputed fact that Petitioner has never held himself out to be an Indian person, another fact considered to be of equal importance by the Eighth Circuit. If these undisputed facts had, first, been considered by the Ninth Circuit, and, second, been considered by the Ninth Circuit to be of equal importance to the other factors, the Ninth Circuit could have reached only one conclusion: that the Government did not prove beyond a reasonable doubt that Petitioner is an Indian person

2. *THE GOVERNMENT DID NOT PROVE BEYOND A REASONABLE DOUBT THAT PETITIONER IS AN INDIAN PERSON BECAUSE HE IS NOT A MEMBER OF A TRIBE, IS NOT SOCIALLY RECOGNIZED AS AN INDIAN, DOES NOT PARTICIPATE IN INDIAN SOCIAL LIFE, AND DOES NOT HOLD HIMSELF OUT AS AN INDIAN.*

Petitioner had a choice, to be an Indian person or to be a white person. His mother is white, his father is a Blackfeet Indian. The Blackfeet Tribe and its members made the decision for Petitioner. He is not a member of the Blackfeet Tribe or of any other Indian tribe. Petitioner is not eligible to become a member of the Blackfeet Tribe. He enjoys virtually none of the benefits of being an Indian person. The Tribe does not treat Petitioner as Indian.

Not only has Petitioner been treated as a non-Indian person by the Blackfeet Tribe, tribal members have treated him as a white person. When he attended school on the reservation, Blackfeet children teased and taunted him as being a "white boy." Petitioner is "white-looking" and "light skinned." He lives on the Blackfeet Indian Reservation but so does his white mother.

Because he lives on the reservation, Petitioner gets free Indian Health Service benefits based on his father's membership in the Blackfeet Tribe. Although he was prosecuted in tribal court, by its own laws and constitution, the Blackfeet Tribe does not have jurisdiction over Petitioner. He cannot participate in tribal activities. Petitioner does not participate in Indian social or religious activities. He considers himself white and has never held himself out to be an Indian person.

"No man should be deprived of his life under the forms of law unless...the evidence ...is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." Davis v. United States, 160 U.S. 469, 488 (1895), quoted with

approval in In re Winship, 397 U.S. 358, 363 (1970). "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Winship, Id. at 364. Petitioner cannot be adjudged guilty unless "a proper factfinder [is convinced] of his guilt with **utmost certainty**." Winship, Id. at 368. (Emphasis added).

A "defendant's Indian status is an essential element of a § 1153 [Major Crimes Act] offense which the government must allege in the indictment and prove beyond a reasonable doubt." United States v. Bruce, 394 F.3d 1215, 1229 (9th Cir. 2005); United States v. Cruz, 554 F.3d 840, 845 (9th Cir. 2009); United States v. Maggi, 598 F. 3d 1073, 1077 (9th Cir. 2010). Quite simply, primarily because he is not a member of an Indian tribe and he does not hold himself out to be an Indian, Petitioner's Indian status was not proven beyond a reasonable doubt.

Clearly, Petitioner is not a member of a "quasi-sovereign tribal entit[y] and, although he lives on a reservation, his "li[fe] and activities are [not] governed by the [Bureau of Indian Affairs]." Morton v. Mancari, 417 U.S. 537, 554 (1974). For the Government to designate Petitioner, whose mother is white and who has always considered himself white, to be an "Indian person" is a clear violation of Petitioner's constitutional rights to due process of law and equal protection of the laws.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED this 26th day of August, 2011.

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APPENDIX A

MEMORANDUM

DECISION

OF THE

UNITED STATES COURT OF APPEALS

FOR THE

NINTH CIRCUIT

United States v. Gentry Carl LaBuff, No. 10-30274, 2011 WL 2601334

(Unpublished 9th Cir. July 1, 2011)

Slip Copy, 2011 WL 2601334 (C.A.9 (Mont.))
(Not Selected for publication in the Federal Reporter)

(Cite as: 2011 WL 2601334 (C.A.9 (Mont.)))

United States Court of Appeals,

Ninth Circuit.
UNITED STATES of America, Plaintiff–Appellee,
v.
Gentry Carl LABUFF, Defendant–Appellant.
No. **10–30274**.

Submitted June 8, 2011.[FN*]

FN* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R.App. P. 34(a)(2).

Filed July 1, 2011.

Eric Vincent Carroll, Esquire, Assistant U.S., USGF–Office of the U.S. Attorney, Great Falls, MT, Leif Johnson, Assistant U.S., USBI–Office of the U.S. Attorney, Billings, MT, for Plaintiff–Appellee.

Daniel Donovan, Esquire, Thompson, Potts & Donovan, P.C., Great Falls, MT, for Defendant–Appellant.

Appeal from the United States District Court for the District of Montana, Sam E. Haddon, District Judge, Presiding. D.C. No. 4:10–cr–00023–SEH–1.

Before FISHER, GOULD, and PAEZ, Circuit Judges.

MEMORANDUM [FN**]

FN** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36–3.

***1** Gentry Carl LaBuff ("LaBuff") appeals his conviction of one count of robbery/aiding and abetting robbery, in violation of 18 U.S.C. §§ 1153 and 2111. On appeal, LaBuff contends that there was insufficient evidence to prove that he is an "Indian person" under § 1153. We review the sufficiency of the evidence de novo, *United States v. LeVeque*, 283 F.3d 1098, 1102 (9th Cir.2002), and consider whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Under Section 1153, "[a] 'defendant's Indian status is an essential element ... which the government must allege in the indictment and prove beyond a reasonable doubt.' " *United States v. Cruz*, 554 F.3d 840, 845 (9th Cir.2009) (quoting *United States v. Bruce*, 394 F.3d 1215, 1229 (9th Cir.2005)). To meet its burden, the government must prove both that the defendant has a sufficient "degree of Indian blood" and has "tribal or federal government recognition as an Indian." *Id.* (quoting *Bruce*, 394 F.3d at 1223–24). The first prong of the test requires "some" Indian blood. *Bruce*, 394 F.3d at 1223. Thus, "evidence of a parent, grandparent, or great-grandparent who is clearly identified as an Indian is generally sufficient to satisfy this prong." *United States v. Ramirez*, 537 F.3d 1075, 1082 (9th Cir.2008) (quoting *Bruce*, 394 F.3d at 1223). Here, LaBuff does not contest that he has a sufficient degree of Indian blood. Thus, we turn to whether the government established that LaBuff was recognized as an Indian.

In *Bruce*, we outlined four factors that govern the second prong; those four factors are, "in declining order of importance ... 1) tribal enrollment; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the

benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life." *Cruz*, 554 F.3d at 846 (quoting *Bruce*, 394 F.3d at 1224).

At trial, the government presented the testimony of Helen Butterfly ("Butterfly"), a health records lab technician at the Blackfeet Community Hospital. Butterfly testified that on the basis of LaBuff's classification as an Indian descendant of a tribal member, he was eligible to receive healthcare services at the hospital, which is operated by the federal government and whose non-emergency services are limited to enrolled tribal members and other non-member Indians. Butterfly further testified that since May 1979, LaBuff received healthcare services from the Blackfeet Community Hospital. Because the evidence showed that LaBuff repeatedly accessed healthcare services "reserved only to Indians," we conclude that the government sufficiently established the second *Bruce* factor.

*2 Similarly, we conclude that because LaBuff frequently received healthcare services on the basis of his descendent status of an enrolled member, he enjoyed the "benefits" of his tribal affiliation, as required by *Bruce's* third factor.

In addition to establishing the second and third *Bruce* factors, the government also presented evidence that on multiple occasions, LaBuff was arrested, prosecuted, and convicted under the jurisdiction of the tribal courts. As we observed in *Bruce*, the assumption and exercise of tribal criminal jurisdiction is strong evidence of tribal recognition. 394 F.3d at 1227. At the time he was prosecuted, LaBuff did not challenge the authority of tribal authorities to arrest him or the exercise of tribal criminal jurisdiction. Therefore, viewing the evidence in the light most favorable to the government, we conclude that, contrary to LaBuff's contention, the evidence was sufficient for any rational fact-finder to have found, beyond a reasonable doubt, that he is an "Indian person."

AFFIRMED.

C.A.9 (Mont.),2011.

END OF DOCUMENT

APPENDIX B

CONSTITUTION

OF THE

UNITED STATES

AMENDMENT V

FIFTH AMENDMENT

.....nor shall any person.....be deprived of life, liberty, or property, without due process of law.....(The Due Process Clause of the Fifth Amendment includes Equal Protection of the Laws. Bolling v. Sharpe, 347 U.S. 497 (1954)).