No. 11-6168

IN THE SUPREME COURT OF THE UNITED STATES

GENTRY CARL LABUFF, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to establish that petitioner qualified as an "Indian" subject to federal criminal prosecution under 18 U.S.C. 1153.

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OPINION BELOW

The opinion of the court of appeals (App., infra, 1a-11a) is reported at 658 F.3d 873.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 2011. The petition for a writ of certiorari was filed on August 26, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

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[1] On October 13, 2011, after the certiorari petition had been filed, the initial unpublished memorandum opinion (Pet. App. A1-A2) was withdrawn and replaced by the published opinion attached to this brief (App., infra, 1a-11a). The published opinion supplemented the facts and legal analysis, but it retained the July

STATEMENT

After a jury trial in the United States District Court for the District of Montana, petitioner was convicted of robbery and aiding and abetting robbery in Indian country, in violation of 18 U.S.C. 1153(a), 2111, and 2. He was sentenced to 62 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. App., infra, 1a-11a.

1. a. On October 25, 2008, petitioner and his cousin robbed a Subway store located within the boundaries of the Blackfeet Reservation in Browning, Montana. App., infra, 5a. Petitioner was arrested and charged by indictment with being an Indian and committing robbery and aiding and abetting robbery in Indian country, in violation of the Major Crimes Act, 18 U.S.C. 1153(a), 2111 and 2. Indictment 1-2. Section 1153 provides federal criminal jurisdiction over certain crimes committed by Indians in Indian country.[2]

b. At his jury trial, petitioner contested his status as an

1, 2011, date of decision and did not purport to alter the original judgment. The court of appeals ultimately authorized petitioner to file a petition for rehearing (App., infra, 13a), and that petition was denied on December 28, 2011 (App., infra, 14a).

[2] Under 18 U.S.C. 1151, "the term 'Indian country' * * * means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government * * * (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof * * * and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

Indian. The evidence showed the following (App., infra, 4a-5a): Petitioner's father is an enrolled member of the Blackfeet Tribe, a federally recognized tribe based in northern Montana. Petitioner's mother is white. Petitioner is 5/32 Blackfeet Indian and 1/16 Cree Indian. Petitioner himself is not an enrolled member of the Blackfeet Tribe or any other Indian tribe, but the Blackfeet Tribe has designated petitioner a "descendant of a member" of the tribe. Petitioner's descendant status entitles him to receive medical care at the Blackfeet Community Hospital, to receive educational grants, and to fish and hunt on the reservation. The Blackfeet Community Hospital is a federally operated facility under the authority of the Indian Health Service. Its non-emergency services are limited to enrolled tribal members and other non-member Indians. Petitioner has accessed free healthcare services at the hospital since 1979. Id. at 4a.

With the exception of a six-month period when he lived in Washington State, petitioner has lived on the Blackfeet reservation his entire life. App., infra, 4a-5a. Petitioner is not eligible to vote in tribal elections and has not otherwise participated in tribal cultural activities. On multiple occasions, petitioner has been convicted of crimes in tribal court, and petitioner never challenged being subjected to tribal court jurisdiction as an Indian in those cases. Id. at 5a.

c. The jury found petitioner guilty. App., infra, 5a. The

district court denied petitioner's motions, made during and after trial, for a judgment of acquittal on the ground that the government had failed to present sufficient evidence of his status as an Indian. Ibid. The district court sentenced petitioner to 62 months of imprisonment, to be followed by three years of supervised release. Ibid.; Judgment 3.

2. On appeal, petitioner contested the sufficiency of the evidence that he was an Indian for purposes of Section 1153. The court of appeals affirmed. App., infra, 1a-11a.[3]

The court of appeals explained that "[u]nder § 1153, [a] defendant's Indian status is an essential element . . . which the government must allege in the indictment and prove beyond a reasonable doubt." App., infra, 7a (second brackets in original; internal quotation marks omitted) (citing 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))). Given the absence of a statutory definition, the court noted, it has applied a two-part test for determining Indian status under Section 1153: "the government must present evidence to establish that the defendant has a sufficient 'degree of Indian blood,' and that he has 'tribal or federal government recognition as an Indian.'" Id. at 7a-8a

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[3] Although the petition cites Pet. App. A1-A2 as the opinion below, the court of appeals subsequently withdrew that memorandum disposition and replaced it with a new published opinion (App., infra, 1a-11a). See note 1, supra. The discussion here is based on the prevailing published opinion.

(quoting Bruce, 394 F.3d at 1223-1224).

Because petitioner conceded that he possessed a sufficient degree of Indian blood, the court stated, only the recognition requirement was at issue. App., infra, 8a. The court considered four non-exclusive factors governing that latter requirement, 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." Ibid. (quoting Bruce, 394 F.3d at 1224).

The court stated that although petitioner was not an enrolled member of the Blackfeet Tribe, "enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction, at least where the Indian defendant lived on the reservation and 'maintained tribal relations with the Indians thereon.'" App., infra, 8a (quoting United States v. Antelope, 430 U.S. 641, 647 n.7 (1977)). Because petitioner resided on the Blackfeet reservation and maintained relations with the tribe, the court held, his lack of enrollment was not dispositive. Id. at 9a.

With respect to the second factor, the court found that the government presented sufficient evidence that petitioner had received "government recognition . . . through receipt of assistance reserved only to Indians." App., infra, 9a (quoting

Bruce, 394 F.3d at 1224). In particular, the court relied on evidence that petitioner repeatedly received free healthcare services from Blackfeet Community Hospital, which is operated by the federal government and which limits its services to tribal members and other non-member Indians. Ibid.

The court of appeals relied on the same evidence to conclude that petitioner enjoyed the "benefits" of his tribal affiliation, thereby satisfying the third factor. App., infra, 9a.

As to the fourth factor, the court of appeals stated that, despite the lack of evidence that petitioner participated in tribal activities or voted in tribal elections, the jury could reasonably infer social recognition as an Indian from the fact that petitioner had lived his entire life on the reservation. App., infra, 10a. Although the court acknowledged that evidence relating to the fourth factor was not "particularly strong," the court concluded that the jury could consider it. Id. at 10a-11a.

The court of appeals also found relevant that on multiple occasions, petitioner had been arrested, prosecuted, and convicted under the jurisdiction of the tribal courts. App., infra, 11a. "[T]he assumption and exercise of tribal jurisdiction over criminal charges," the court reasoned, "demonstrates tribal recognition" of petitioner's Indian status. The court noted that "[a]t the time he was prosecuted, [petitioner] did not challenge the authority of tribal officers to arrest him or the exercise of tribal criminal

jurisdiction by the Blackfeet Tribal Court." Ibid.

In sum, the court of appeals held that "the evidence presented at trial, when taken in the light most favorable to the government, was sufficient for any rational factfinder to have found, beyond a reasonable doubt, that [petitioner] is an Indian for purposes of § 1153." App., infra, 11a.

ARGUMENT

Petitioner asserts (Pet. 10-16) that the court of appeals' test for determining whether a person is an "Indian" subject to federal criminal prosecution under 18 U.S.C. 1153 conflicts with that of the Eighth Circuit and that the court of appeals erred in concluding that the government presented sufficient evidence of his Indian status. The decision below, however, is correct and does not conflict with any decision of this Court or another court of appeals. The factbound question whether the record contains sufficient evidence of petitioner's Indian status does not warrant this Court's review.

1. Congress has never defined the term "Indian" for purposes of 18 U.S.C. 1153, and its meaning has developed as a matter of federal common law. In United States v. Rogers, 45 U.S. (4 How.) 567 (1846), the Court held that an Indian tribe's adoption of a white person alone did not confer Indian status within the meaning of Section 1153; rather, an individual must have an ancestral connection to an Indian tribe in addition to a current social

affiliation with a tribe. Id. at 573.

In United States v. Antelope, 430 U.S. 641 (1977), the Court rejected a claim that application of Section 1153 solely to "Indians" was based on impermissible racial classifications. Id. at 645-647 & n.7. The Court reasoned that a person's status as an Indian was not based solely on a racial characteristic of Indian genetic heritage, but also depended on a person's voluntary affiliation with a tribe. Id. at 646. Although the defendants in that case were enrolled members of a tribe, the Court noted that "enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction, at least where the Indian defendant lived on the reservation and 'maintained tribal relations with the Indians thereon.'" Id. at 647 n.7 (quoting Ex parte Pero, 99 F.2d 28, 30 (7th Cir. 1938), cert. denied, 306 U.S. 643 (1939)). The Court expressed no views on that issue. Ibid.

Consistent with Rogers and Antelope, it is settled law that Indian status for purposes of Section 1153 requires both some quantum of genetic Indian heritage and tribal or federal government recognition as an Indian. See, e.g., App., infra, 7a-8a; United States v. Prentiss, 273 F.3d 1277, 1280 (10th Cir. 2001); United States v. Lawrence, 51 F.3d 150, 152 (8th Cir. 1995); United States v. Torres, 733 F.2d 449, 456 (7th Cir.), cert. denied, 469 U.S. 864 (1984); see also Cohen's Handbook of Federal Indian Law § 3.03[1] at 171-172 (2005) ("Recognizing the diversity included in the

definition of Indian, there is nevertheless some practical value for legal purposes in a definition of Indian as a person meeting two qualifications: (a) that some of the individual's ancestors lived in what is now the United States before its discovery by Europeans, and (b) that the individual is recognized as an Indian by the individual's tribe or community."). Even petitioner acknowledges that this basic two-part test "has been generally followed by the courts." Pet. 11 (citing cases).

2. The court of appeals did not err in applying that established test to petitioner's sufficiency-of-the-evidence challenge. Because petitioner has conceded that he satisfies the genetic prong of the inquiry, App., infra, 8a, the only question here is whether the evidence would permit a rational juror to find tribal or government recognition of petitioner's Indian status.

Toward that end, the court of appeals considered several non-exclusive factors: (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. App., infra, 8a. Although petitioner is not an enrolled member of a tribe, the court of appeals -- consistent with the Court's recognition in Antelope of existing circuit precedent (see 430 U.S. at 647 n.7) -- correctly recognized that fact alone was not

dispositive, at least where (as here) the defendant had been recognized as a descendant of a tribe member and had lived on an Indian reservation for virtually his entire life.

As the court of appeals held (App., infra, 9a), the second and third factors clearly favor a determination of Indian status in light of petitioner's eligibility for and receipt of free healthcare services from the Blackfeet Community Hospital, a federally operated facility that served only Indians, based on his status as a descendant of a tribe member. Although the court acknowledged that the evidence on the fourth factor was not overwhelming, it correctly determined that a juror could consider petitioner's life-long residence on the reservation as demonstrating social recognition of Indian status even though he did not vote or participate in cultural activities. Id. at 10a-11a.

Finally, as the court of appeals noted (App., infra, 11a), the tribal court's exercise of criminal jurisdiction -- which extends only to Indians as defined for purposes of federal jurisdiction under Section 1153, see 25 U.S.C. 1301[4] -- over petitioner on

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[4] Section 1301(2) defines the "powers of self-government" of federally recognized Indian tribes to extend to the "exercise [of] criminal jurisdiction over all Indians." Section 1301(4) defines "Indian" to mean "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies."

multiple occasions, and petitioner's acquiescence in that exercise of jurisdiction, reinforces the determination that the tribe recognizes him as an Indian.

On balance, the evidence, viewed in the light most favorable to the prosecution, permits a rational trier of fact to conclude that petitioner is an Indian for purposes of Section 1153. See Jackson v. Virginia, 443 U.S. 307, 319 (1979). That factbound question does not warrant this Court's review.

3. Contrary to petitioner's contention (Pet. 10-14), the decision below does not conflict with the Eighth Circuit's decision in United States v. Stymiest, 581 F.3d 759 (2009), cert. denied, 130 S. Ct. 2364 (2010). In Stymiest, the Eighth Circuit began by invoking the same "generally accepted" two-part test used by the Ninth Circuit in this case, i.e., requiring Indian blood ancestry and tribal or federal government recognition of Indian status. Id. at 762. It further stated that "there is no single correct way to instruct a jury on [the latter] issue," id. at 764, and upheld the following jury instruction:

> Among the factors that you may consider are:
>
> 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.

That social-recognition inquiry is consistent with the one undertaken by the Ninth Circuit below. Both circuits frame the multi-factor analysis as non-exclusive, and neither requires proof of all the factors to find Indian status. Moreover, the Ninth Circuit examined essentially the same five factors outlined by the Eighth Circuit: although the Ninth Circuit listed only four factors in describing the inquiry, it expressly considered the additional factor listed by the Eighth Circuit, i.e., the exercise of tribal court jurisdiction over the defendant. App., infra, 11a.

Petitioner nevertheless suggests two purported differences between the two inquiries. Pet. 14. First, he relies on the Eighth Circuit's statement that if "the defendant is an enrolled tribal member, * * * that factor becomes dispositive" of Indian status. Stymiest, 581 F.3d at 764. But that statement is in no way inconsistent with the Ninth Circuit's ruling in this case that lack of enrollment is not dispositive of non-Indian status. App., infra, 8a-9a. Indeed, the Ninth Circuit had no occasion to consider here whether enrollment is dispositive in favor of Indian

status because petitioner is not an enrolled tribe member. Second, petitioner relies on the Ninth Circuit's listing of the factors "in declining order of importance." Id. at 8a. But, as noted above, the Eighth Circuit itself recognizes the special importance of enrolled status (the first factor in both circuits' inquiries). And any theoretical distinction that exists as to the relative weight accorded the other factors would not have compelled the jury to reach a different result in the Eighth Circuit, as all those factors weighed in favor of Indian status. See pp. 10-11, supra. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2012

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. GENTRY CARL LABUFF, *Defendant-Appellant.*	No. 10-30274 D.C. No. 4:10-cr-00023-SEH-1 OPINION

Appeal from the United States District Court
for the District of Montana
Sam E. Haddon, District Judge, Presiding

Submitted June 8, 2011*
Portland, Oregon

Filed July 1, 2011

Before: Raymond C. Fisher, Ronald M. Gould, and
Richard A. Paez, Circuit Judges.

Opinion by Judge Paez

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

COUNSEL

Daniel Donovan, Attorney at Law, Great Falls, Montana, for the appellant.

Michael W. Cotter, U.S. Attorney, and E. Vincent Carroll, Assistant U.S. Attorney, Great Falls, Montana, for the appellee.

OPINION

PAEZ, Circuit Judge:

The Major Crimes Act, 18 U.S.C. § 1153, provides federal criminal jurisdiction for certain crimes committed by Indians in Indian country.[1] We previously have noted that determining who is an Indian under § 1153 is not easy, as the statute does not define the term "Indian." *United States v. Maggi*, 598 F.3d 1073, 1075 (9th Cir. 2010) (citing *Felix S. Cohen's Handbook of Federal Indian Law* at 24 (Rennard Strickland et al. ed., 1982)). Our circuit, however, has developed a specific framework for determining whether a person can be prosecuted by the federal government under § 1153. To meet its burden, the government must prove both that the defendant has a sufficient "degree of Indian blood" and has "tribal or government recognition as an Indian." *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005) (internal quotations omitted).

Gentry Carl LaBuff was charged with robbery and aiding and abetting robbery in Indian country in violation of 18 U.S.C. §§ 1153(a) and 2111. A jury convicted LaBuff of these charges following a two-day trial. On appeal, LaBuff contends that the government did not present sufficient evidence to establish that he is an "Indian" for purposes of prosecution under § 1153. We disagree and conclude that, in light of all the evidence presented at trial, a reasonable trier of fact could have found that LaBuff is an Indian. We therefore affirm his conviction.

[1]"[T]he term 'Indian country' . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151.

I[2]

LaBuff was born in 1979 to Levi Samuel LaBuff and Margie Downey. His mother is white and his father is an enrolled member of the Blackfeet Tribe. The Blackfeet are a federally recognized tribe based in northern Montana. Given his parents' heritage, LaBuff is 5/32 Blackfeet Indian and 1/16 Cree Indian.

Because LaBuff's father is a member of the Blackfeet Tribe, the Tribe designated LaBuff as a "descendant of a member"[3] of the tribe. LaBuff, however, is not an enrolled member of the Blackfeet Tribe or any other Indian tribe. LaBuff's descendant status entitles him to receive medical care at the Blackfeet Community Hospital, to receive educational grants, and to fish and hunt on the reservation. The Blackfeet Community Hospital is a federally-operated facility under the authority of the Indian Health Service. The hospital's non-emergency services are limited to enrolled tribal members and other non-member Indians. Because the hospital recognizes LaBuff as an Indian person, he has received free health care services there since 1979.

LaBuff was born and raised on the Blackfeet Reservation. As a child, LaBuff attended a public school on the reservation that is open to non-Indians. With the exception of a brief six-month period when LaBuff lived in Washington State, he has

[2]This factual background is drawn from the witnesses who testified at trial on behalf of the government and from the several witnesses that LaBuff called in his own defense. These witnesses testified not only about the circumstances of the alleged robbery, but also about LaBuff's status as a Blackfeet descendant and his connection to the Blackfeet Reservation. As we must, we review the trial evidence in the light most favorable to the government. *United States v. Nevils*, 598 F.3d 1158, 1163-64 (9th Cir. 2010) (en banc) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

[3]As we noted in *Maggi*, "[w]hile descendant status does not carry similar weight to enrollment . . . it reflects some degree of recognition." 598 F.3d at 1082.

lived on the reservation his entire life. Although LaBuff has descendant status, he is not eligible to vote in tribal elections and he has not otherwise participated in tribal cultural activities.

On multiple occasions, LaBuff has been arrested, prosecuted, and convicted of crimes under the jurisdiction of the tribal court. LaBuff, however, has never before challenged the tribal court's exercise of jurisdiction on the basis of his alleged status as a non-Indian.

On October 25, 2008, LaBuff and his cousin robbed a Subway restaurant that was located within the boundaries of the Blackfeet Reservation in Browning, Montana. They were arrested and charged by indictment with robbery and aiding and abetting robbery in violation of 18 U.S.C. § 2111, which is a federal offense when committed by an Indian on an Indian reservation, 18 U.S.C. § 1153. LaBuff pleaded not guilty and proceeded to trial, where his Indian status was a contested issue. At the close of the government's case-in-chief, LaBuff moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29 on the ground that the evidence presented by the government was insufficient to establish his Indian status beyond a reasonable doubt. The district court denied the motion. At the conclusion of the trial, LaBuff renewed his motion for a judgment of acquittal. The court reserved ruling on LaBuff's renewed motion. The jury subsequently found LaBuff guilty and the district court denied LaBuff's renewed motion for judgment of acquittal. Following imposition of a 62-month prison sentence, LaBuff timely appealed.

II

We review *de novo* the sufficiency of the evidence, *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*, 443 U.S. at 319 (emphasis in original).

III

[1] Native American tribes generally have exclusive jurisdiction over crimes committed by Indians against Indians in Indian country. Two federal statutes, however, provide for federal jurisdiction over such crimes. The first statute, 18 U.S.C. § 1152, known as the General Crimes Act,[4] grants federal jurisdiction over certain crimes committed by non-Indians against Indians in Indian country, but excludes crimes committed by one Indian against another. The second statute, 18 U.S.C. § 1153, known as the Major Crimes Act,[5] creates

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[4]The General Crimes Act, in its entirety, provides that:

> 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. 18 U.S.C. § 1152.

[5]The Major Crimes Act, in its entirety, provides:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall

federal jurisdiction for cases in which an Indian commits one of a list of enumerated crimes against another Indian in Indian country.

[2] Under § 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 *Bruce*, 394 F.3d at 1229). Although there are a variety of statutory definitions[6] of "Indian," Congress has not defined "Indian" as used in §§ 1152 and 1153. *Maggi*, 598 F.3d at 1077.

[3] In the absence of a statutory definition, we have 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, for a criminal defendant to be subject to § 1153, the government must present evidence to establish that the defendant has a sufficient "degree of Indian blood," and that he has "tribal or fed-

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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. § 1153.

[6]For example, in the Indian Reorganization Act, 25 U.S.C. § 479 *et seq.*, "Indian" is defined to mean "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood." In an unrelated statute, the Indian Financing Act, 25 U.S.C. § 1452, Indian is defined to mean "a member of any Indian tribe . . . which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs . . . ."

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eral government recognition as an Indian." *Bruce*, 394 F.3d at 1223, 1224.

[4] Here, the government's evidence showed that LaBuff is 5/32 Blackfeet Indian.[7] In light of this evidence, LaBuff concedes that he possesses a sufficient degree of Indian blood. The government therefore satisfied the first prong. Thus, we turn to the second prong, i.e. whether the government established that LaBuff was recognized by the government or the Tribe as an Indian. In *Bruce*, we outlined four factors that govern the second prong; those four factors are, "in declining order of importance, evidence of the following: 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." *Bruce*, 394 F.3d at 1224. These factors are not exclusive. *Maggi*, 598 F.3d at 1081.

LaBuff first contends that because he was not an enrolled member in the Blackfeet Tribe, "the government failed to prove the most important factor in determining if the accused has tribal or federal government recognition as an Indian." As LaBuff acknowledges, however, tribal enrollment is not required to establish "recognition" as an Indian. Indeed, "enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction, at least where the Indian defendant lived on the reservation and 'maintained tribal relations with the Indians thereon.' " *United States v. Antelope*, 430 U.S. 641, 647 n.7 (1977); *see also United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979) ("Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it neces-

[7]We have recognized varying degrees of Indian blood, including one-eighth, as sufficient for this part of the *Bruce* test. *Bruce*, 394 F.3d at 1223-26.

sarily determinative."). Although LaBuff was not an enrolled member of the Blackfeet Tribe, he resided on the reservation and maintained relations with the Tribe. Thus, we conclude that the absence of any evidence that LaBuff was an enrolled member in the Blackfeet Tribe is not dispositive of his Indian status.

[5] Turning to the second *Bruce* factor, the government presented evidence that LaBuff received "government recognition . . . through receipt of assistance reserved only to Indians." *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 which limits its services to tribal members and other non-member Indians. Butterfly further testified that since May 1979, LaBuff received free healthcare services from the hospital.[8] Because the evidence showed that LaBuff repeatedly accessed healthcare services "reserved only to Indians," we conclude that the government presented sufficient evidence to establish the second most important *Bruce* factor.

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

[7] LaBuff contends that this case is analogous to *United States v. Cruz*, where we concluded that the government

[8]Specifically, Butterfly testified that since 1979, LaBuff was seen at the Blackfeet Community Hospital for Well Child care services, walk-in visits, urgent care, and mental health assistance. Butterfly further testified that the hospital's records showed that since 2009, LaBuff sought medical care approximately 10 to 15 times.

failed to satisfy any of the *Bruce* factors. 554 F.3d at 842-43. In discussing the second *Bruce* factor, we found that the government failed to demonstrate "government recognition" of Cruz's Indian status "through *receipt* of assistance reserved only to Indians." *Id.* at 848. (emphasis in original). In so concluding, we noted that the record was completely devoid of evidence showing that Cruz had received any benefits from his tribe. *Id.* Moreover, we specifically rejected the government's argument that the second *Bruce* factor could be established by demonstrating eligibility rather than actual receipt of benefits. *Id.* at 849. By contrast, the evidence presented by the government here showed that the Tribe recognized LaBuff as an Indian and that he repeatedly received and took advantage of healthcare benefits "reserved only to Indians." LaBuff attempts to gloss over these critical facts by arguing that he did not take advantage of *all* of the benefits for which he was eligible. We are not persuaded. In *Cruz*, we simply acknowledged that the receipt of benefits was essential to satisfying the second *Bruce* factor. *Id.* at 848. We, however, did not suggest that the government needed to prove receipt of every benefit for which Cruz was eligible. Consequently, we conclude that the second and third *Bruce* factors can be satisfied by demonstrating receipt of a substantial benefit "reserved only to Indians," such as the free medical care provided to LaBuff.

[8] The fourth and final *Bruce* factor, requires a showing of "social recognition as an Indian through residence on a reservation and participation in Indian social life." *Bruce*, 394 F.3d at 1224. While the record evidence established that LaBuff lived, grew up, and attended school on the Blackfeet Reservation, there was no evidence that he participated in tribal activities or voted in tribal elections. While voting and participating in tribal activities are important for purposes of evaluating this factor, the lack of any such activities, does not preclude a reasonable inference of social recognition, especially where the defendant has lived his entire life on the reservation. Although the evidence relating to the fourth factor

was not particularly strong, it was proper for the jury to consider it in determining whether LaBuff is an Indian for purposes of § 1153.

[9] Finally, we note that in addition to all of the above evidence relating directly to the *Bruce* factors, which are not exclusive, *Maggie*, 598 F.3d at 1081, the government also presented evidence that on multiple occasions, LaBuff was arrested, prosecuted, and convicted under the jurisdiction of the tribal courts.[9] As we observed in *Bruce*, the assumption and exercise of tribal jurisdiction over criminal charges, demonstrates tribal recognition. 394 F.3d at 1227. At the time he was prosecuted, LaBuff did not challenge the authority of tribal officers to arrest him or the exercise of tribal criminal jurisdiction by the Blackfeet Tribal Court.

[10] In sum, the evidence presented at trial, when taken in the light most favorable to the government, was sufficient for any rational factfinder to have found, beyond a reasonable doubt, that LaBuff is an Indian for purposes of § 1153.

AFFIRMED.

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[9]The facts here are thus distinguishable from those in *Cruz* and *Maggi*, where we previously noted that while the defendants had been prosecuted in tribal court, the record was devoid of any evidence of the outcome of those prosecutions. *Cruz*, 554 F.3d at 850; *Maggi*, 598 F.3d at 1083. In particular, the government presented the testimony of Michael Connelly, a public defender for the Blackfeet Tribal Court, and former tribal prosecutor. Connelly testified that as a tribal prosecutor, he prosecuted LaBuff on at least three occasions for traffic and criminal offenses. Connelly further testified that LaBuff was subsequently convicted of those offenses. Finally, Connelly testified that in the cases he prosecuted, LaBuff did not challenge the jurisdiction of the tribal court on the basis of his alleged status as a non-Indian.

FILED

OCT 13 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. GENTRY CARL LABUFF, Defendant - Appellant.	No. 10-30274 D.C. No. 4:10-cr-00023-SEH-1 District of Montana, Great Falls ORDER

Before: FISHER, GOULD, and PAEZ, Circuit Judges.

The government's request for publication is GRANTED. The memorandum disposition filed on July 1, 2011 is withdrawn and is replaced with an opinion filed concurrently with this order.

No petitions for rehearing or rehearing *en banc* may be filed in response to the opinion.

FILED

OCT 20 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. GENTRY CARL LABUFF, Defendant - Appellant.	No. 10-30274 D.C. No. 4:10-cr-00023-SEH-1 District of Montana, Great Falls ORDER

Before: FISHER, GOULD, and PAEZ, Circuit Judges.

In light of Appellant's October 18, 2011 objection to entry of an opinion after the mandate issued, the court orders as follows.

The mandate previously issued on July 25, 2011 is recalled.

Notwithstanding the prior order of October 13, 2011, Appellant shall have 14 days from the date of the filing of this order within which to file a petition for rehearing or rehearing *en banc*. Ninth Circuit Rule 40-2.

Appellant's remaining objections are without merit.

FILED

DEC 28 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. GENTRY CARL LABUFF, Defendant - Appellant.	No. 10-30274 D.C. No. 4:10-cr-00023-SEH-1 District of Montana, Great Falls ORDER

Before: FISHER, GOULD, and PAEZ, Circuit Judges.

The panel has voted to deny the petition for rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.