

Ninth Circuit Court of Appeals No. 07-30384
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-vs-

CHRISTOPHER PATRICK CRUZ,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION
DISTRICT COURT NO. CR-07-52-GF-SEH**

**HONORABLE SAM E. HADDON
UNITED STATES DISTRICT JUDGE, PRESIDING**

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SUBMITTED: April 3, 2008

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ABBREVIATIONS

Criminal Docket	"CR"
Excerpts of Record	"ER"
Reporter's Change of Plea Transcript	"RT-JT"
Reporter's Sentencing Transcript	"RT-SEN"

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I. INTRODUCTION

When the parties arguments are reduced to their most basic level, it appears that the issue this Court must decide is whether an eligibility for assistance is the same as the actual receipt of the assistance. When a person purchases a lottery ticket, he or she is *eligible* to win the prize. It is only when the person *receives* the payout that he or she has actually *received* the prize money and can be subject to taxes. While Mr. Cruz may have been *eligible* for tribal benefits, he never actually *received* any tribal benefits. Thus he is not an Indian Person subject to Federal prosecution.

II. STATEMENT REGARDING ORAL ARGUMENT

Mr. Cruz disagrees with the Government's statement regarding oral argument. (GB 2). Adequate consideration of the parties' relative positions will require full exploration of the record. These issues cannot be properly evaluated by review of the cold record. Rather, proper analysis will require the give and take of oral argument to allow the Court to question both counsel concerning details that may not be obvious through a mere reading of the record. Through oral argument the parties can fully and completely present their arguments.

III. ARGUMENT

A. The District Court Erred in Denying Mr. Cruz' Motion for Judgement of Acquittal.

Even when reviewed under the plain error standard, see *United States v. Alvarez-Valenzuela*, 231 F.3d 1198, 1200 (9th Cir. 2000), the government did not establish that Mr. Cruz is an Indian person.

It appears that the parties agree that *United States v. Bruce* 394 F.3d 1215, 1223 (9th Cir. 2005), controls the issue of Indian status. With 22% Blackfeet Indian blood, Mr. Cruz meets the *Bruce, supra*, requirement of "some" Indian blood.

It is on the "government recognition formally and informally through receipt of assistance reserved only to Indians" requirement of the second prong of the

Bruce, supra, factors where the parties disagree. It is Mr. Cruz submission that receipt of assistance reserved only to Indians means just that. To be considered an Indian, the person must actually receive assistance reserved only to Indians. The record is void of any indication that Mr. Cruz received any assistance reserved only to Indians.

The government in its brief (GB 20) seeks to substitute eligibility for assistance in the place of an actual receipt of assistance. Nothing in *Bruce, supra*, supports this expansion of federal criminal jurisdiction. If the *Bruce* court had meant mere eligibility, it would have so stated. Surely one who does not receive any benefit should not be subject to federal jurisdiction. The government's expansive view of *Bruce* is erroneous. The district court committed reversible error in denying Mr. Cruz' motion for judgment of acquittal at the close of the Government's case.

B. The District Court Committed Reversible Error by Giving an Improper Jury Instruction.

The jury instruction given in this case inaccurately stated the law. The district court's omission of the "*declining* order of importance" incorrectly instructed the jury. The Government's arguments to the contrary are unavailing. The Government states that "The district court's jury instruction accurately captured the meaning of *Bruce*." (GB 18) Mr. Cruz vehemently disagrees. *Bruce*, specifically stated that

factors were to be considered in declining order of importance. *Bruce, supra* at 1224. The district court purposefully omitted the declining order of importance language. (RT-JT 121; ER 48). However, the district court gave the standard instruction that all of the instructions are equally important.” (RT-JT 119; ER 48). This only served to compound the error.

The Government does not argue that the declining order of importance language is dicta. It is critical to the holding of *Bruce*. The district court’s refusal to include this language in its instruction was in error. The jury was not properly instructed on the law. This error deprived Mr. Cruz of a fair trial, and his conviction should be reversed.

C. There Was Insufficient Evidence to Support the Jury’s Verdict.

Mr. Cruz did not meet the factors outlined in *Bruce* for Indian person status. Mr. Cruz has not received any benefit from the Blackfeet Tribe, nor has Mr. Cruz received any medical care from the Indian Health Service. (RT-JT 96; ER 42). Mr. Cruz has never voted in a tribal election. (RT-JT 96-97; ER 42). He has not participated in Indian religious ceremonies. (RT-JT 84; ER 39). The fact that Mr. Cruz attended school in Browning is not relevant as the public school system is open to all young people regardless of tribal membership. (RT-JT 84-85; ER 39). There

simply was no evidence adduced at trial to support the jury's finding that Mr. Cruz was an Indian person. The conviction must be reversed.

IV. CONCLUSION

For the reasons set forth above, The Defendant-Appellant, Christopher Patrick Cruz, prays this Honorable Court reverse his conviction, or in the alternative remand the case for a new trial.

RESPECTFULLY SUBMITTED this 3rd of April, 2008.



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V. CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply Brief of Defendant-Appellant is in compliance with Ninth Circuit Rule 32(a) (as amended). The Brief's line spacing is double spaced. The brief is proportionately spaced, the body of the argument has a Times New Roman typeface, 14 point size and contains less than 7,000 words at an average of 280 words (or less) per page, including footnotes and quotations. (Total number of words: 807, excluding tables and certificates).

DATED this 3rd day of April, 2008.



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VI. STATEMENT OF RELATED CASES

The undersigned, Counsel of record for the Defendant-Appellant, pursuant to Rule 28-2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, states that, to his knowledge, there are no related cases pending in this Court.

DATED this 3rd day of April, 2008.



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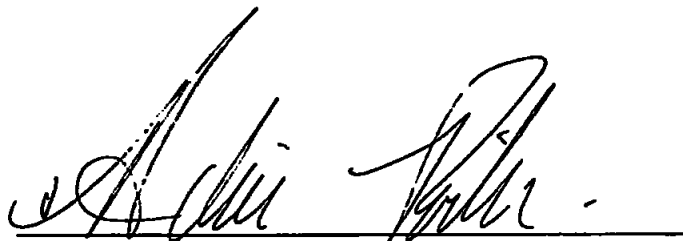
VII. CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April, 2008, copies of the foregoing
Reply Brief of Defendant-Appellant were sent, postage paid, by first class mail, to:

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