UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA,<br><br>Plaintiff/Appellee,<br><br>v.<br><br>GORDON RAY MANN, JR.,<br><br>Defendant/Appellant. | Dist.Ct.No. CR 08-68-GF-SEH<br><br>Ct.Apps.No. 09-30052 |

# APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, GREAT FALLS DIVISION, UNITED STATES DISTRICT JUDGE SAM E. HADDON, PRESIDING

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## REPLY

### 1. Oral argument is necessary.

The Government asserts that oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and record. *Appellee's Brief*, pg. 2.

Gordon Mann disagrees. On the contrary, oral argument is extremely necessary in this case in large part because the Government has completely failed to address the " 'separate people' with their own political institutions" argument made by Mann. This argument is found in *Morton v. Mancari*, 417 U.S. 535, 553 n. 24, 94 S.Ct. 2474, 2484, 41 L.Ed.2d 290 (1974), *United States v. Heath*, 509 F.2d 16, 19 (9th Cir.1974), *Fisher v. District Court*, 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976), *United States v. Antelope*, 430 U.S. 641, 646, 97 S.Ct. 1395, 1399, 51 L.Ed.2d 701(1977), and *LaPier v. McCormick*, 986 F.2d 303 (9th Cir. 1993). These cases stand for the proposition that the "special relationship between the federal government and the tribe" constitutes the basis for federal criminal jurisdiction over Indians under the Major Crimes Act. The Government needs to address this important legal issue at oral argument, since it did not do so in its brief.

The Government also needs to address what "affiliation" Mann had with the Blackfeet Tribe, and why *LaPier* does not apply to this case when Mann's only

"affiliation" with the Blackfeet Tribe is to engage in conduct that both non-Blackfeet Tribal members and non-Indians have a right to engage in.

Oral argument is therefore necessary in this case.

**2. Standard of review.**

Relying on *United States v. Cruz*, 554 F.3d 840, 843-44 (9th Cir. 2009), the Government contends that there is a deferential standard of review for ultimate findings of fact made by the jury.

Mann replies that a deferential standard of review is inapplicable here because Mann's Indian status is a legal question, not a factual question. In other words, *LaPier*, not *Bruce*, is determinative as a matter of law since there is no evidence that Mann is anything but an enrolled member of a non-federally recognized tribe of Indians. The standard of review is therefore *de novo*.

**3. Mann is not "affiliated" with the Blackfeet Tribe.**

The Government summarily dismisses *LaPier* and argues the factors referred to in *United States v. Bruce*, 394 F3d. 1215 (9th Cir. 2005). While it concedes that Mann is not a member of a federally recognized tribe, the Government argues that *LaPier* does not apply because the evidence showed that Mann was also "affiliated" with the Blackfeet Tribe. *Appellee's Brief*, pg. 7. In-so-doing, the Government sorely misconstrues the record. Contrary to the Government's

contention, there is no evidence whatsoever that Mann had any "affiliation" with the Blackfeet Indian Tribe.

First, he is clearly not a member of, enrolled in, or a descendent of an enrolled member of the Blackfeet Indian Tribe. *Trans*., 74:22 to 78:15; 140:22 to 142:24.

Second, because he was not a member of a federally-recognized tribe or a descendant thereof, he was expressly *denied* contract health services in the amount of $ 64,744.56 by the Blackfeet Service Unit Contract Health Services in Browning, Montana. *Trans.*, 114:3 to 126:5, Exhibits 2, 3, and 4; ER 7, 8, and 9. There clearly has been no tribal or federal government recognition of Mann as an Indian; otherwise, he would have been entitled to those contract health services. Whether he received emergency services does not win the day for the Government either because non-Indians are also entitled to emergency services. *Trans.*, 71:17 to 74:15. Whether it is free or paid for is immaterial since it is the *receipt* of assistance reserved only to Indians that is material. Since non-Indians also *receive* emergency services, it is not reserved *only* to Indians.

Third, the fact that Mann resided on the reservation has no import because both non-Indians and non-Blackfeet Tribal members can and do reside on the Blackfeet Indian Reservation. The Court can take judicial notice of that fact.

Fourth, Mann was expressly prohibited from hunting on the Blackfeet Reservation unless he had a special permit issued to non-members. Chapter 4, Section 2 (A) and (F), of the *Fish and Game Rules Governing Hunting, Fishing and Trapping on the Blackfeet Indian Reservation*[1] provides in pertinent part that it shall be unlawful for non-members of the Blackfeet Tribe to hunt, shoot, transport, or possess, big game. However, spouses of enrolled members of the Blackfeet Tribe may be eligible for special hunting permits, which they must apply for. Limited special permits may also be issued for non-members for special big-game hunts in designated areas.

Accordingly, Mann was only doing what both non-Indians and non-Blackfeet tribal members have full right to do, and that does not create a tribal "affiliation."

**4. The Government ignores the fact that Mann may be an Indian in an anthropological or ethnohistorical sense, but not an Indian for purposes of federal criminal jurisdiction.**

The Government essentially argues that jurisdiction is based on the fact that Mann is an Indian in a cultural, anthropological, and enthnohistorical sense. *Appellee's Brief*, pp. 9 and 10 (holds himself out to be an Indian person, lives and

[1] Available on-line at http://blackfeetfishandwildlife.com/codeofregs.html.

hunts on the Blackfeet Reservation, and participates there in Indian social, cultural, and religious ceremonies, and has been invited by members of the Blackfeet Tribe to attend Indian religious ceremonies such as sweats.) However, it does not address the fact that under *LaPier*, while Mann may be an Indian in an anthropological or ethnohistorical sense, he is not an Indian for purposes of federal criminal jurisdiction. *Id.*, 986 F.2d at 306. The Government simply refuses to address the reasoning of the *LaPier* case and the "special relationship between the federal government and the tribe" as the basis for federal criminal jurisdiction. It merely argues that *LaPier* is not applicable because Mann was "affiliated" with the Blackfeet Tribe. As argued above, there was no evidence whatsoever of Blackfeet Tribal "affiliation."

The case relied on by the Government, *United States v. Cruz*, 554 F.3d 840, 843-44 (9th Cir. 2009), actually supports Mann's position. *Cruz* involved the same district judge and the same issue as this case, and this Court reversed the district judge's denial of Cruz's motion for judgment of acquittal on a plain error standard of review. Like Gordon Mann in this case, Cruz was not an enrolled member of the Blackfeet Tribe of Indians or any other tribe. Cruz had "descendant" status in the Blackfeet Tribe as the son of an enrolled member (his mother), which entitled him to use Indian Health Services, to receive some

educational grants, and to fish and hunt on the reservation. Mann does not have "descendent" status and was expressly denied $ 64,744.56 worth of benefits and services because he was not entitled to them since he is a member of the Little Shell Tribe. Both Cruz and Mann lived on the Blackfeet Reservation like many non-Indians and non-tribal members. As a descendant, Cruz was subject to the criminal jurisdiction of the tribal court and was at one time prosecuted in tribal court, whereas Mann was neither. Cruz had never voted in a Blackfeet tribal election and did not have a Blackfeet tribal identification card. The same is true for Mann. Like Cruz, Mann would not have been eligible for preferential treatment under the Indian Preference Laws, as he is not a member of a recognized tribe and has less than "one-half or more Indian blood of tribes indigenous to the United States." 25 C.F.R. § 5.1.

## CONCLUSION AND PRAYER

Because the evidence viewed in the light most favorable to the Government does not demonstrate that Mann is an Indian or that he meets any of the *Bruce* factors, no rational trier of fact could have found that the government proved the statutory element of § 1153 beyond a reasonable doubt. Accordingly, the District Court's denial of the motion for judgment of acquittal was error. This Court should reverse the decision below and instruct the District Court to grant the motion for

judgment of acquittal.

DATED this 9th day of July, 2009.

RESPECTFULLY SUBMITTED:

By: /s/ Palmer Hoovestal
Palmer Hoovestal
Attorney for Appellant
GORDON RAY MANN

**CERTIFICATE OF COMPLIANCE**

I certify pursuant to F.R.A.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, that the attached Appellant's Reply Brief is proportionately spaced, has a type face of 14 points or more, and contains 1,815 words, including the Table of Contents and Table of Authorities.

DATED this 9th day of July, 2009.

RESPECTFULLY SUBMITTED:

By: /s/ Palmer Hoovestal
Palmer Hoovestal
Attorney for Appellant
GORDON RAY MANN

**CERTIFICATE OF SERVICE BY CM/ECF**

I hereby certify that on the 9th day of July, 2009, I duly served a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** on the counsel listed below by CM/ECF to:

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