IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Criminal
No. 10-2705

UNITED STATES OF AMERICA,

APPELLEE,

vs.

WESLEY CHUCK JACOBS,

APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, WESTERN DIVISION

The Honorable Jeffrey L. Viken
United States District Judge

APPELLEE'S BRIEF

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SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

Wesley Chuck Jacobs appeals a final judgement and conviction in a criminal case after pleading guilty to assault with a dangerous weapon in Indian country, in violation of 18 U.S.C. §§ 113(a)(3) and 1153. Jacobs' sole challenge on appeal consists of a claim that the district court lacked jurisdiction to prosecute him citing a failure on the part of the United States to comply with a provision of the Fort Laramie Treaty of 1868.

The United States opposes the appeal because Congress has expressed an intent to abrogate any provisions of the treaty which are contrary to enforcement of the Major Crimes Act in Indian country and, in any event, the treaty provision cited does not appear to be applicable to this prosecution. Given previous decisional law in this Court on this issue, the matter can be resolved without oral argument. If oral argument is ordered, the United States requests time equal to that granted to Jacobs.

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JURISDICTIONAL STATEMENT

District court jurisdiction is based upon 18 U.S.C. § 3231 as Jacobs, an Indian person, was indicted for an offense he committed in Indian country against the laws of the United States. Following entry of his guilty plea, the district court imposed sentence upon Jacobs on July 19, 2010, with a written judgement entered on July 20, 2010. Jacobs timely filed his notice of appeal on July 30, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

References to the record below will be made as follows: Docket Entries as "DKT" followed by the appropriate docket entry number; Appellant's Brief as "AB," followed by the appropriate page number; Jacobs's Presentence Investigation Report as "PSR", followed the appropriate paragraph number; and Sentencing Hearing as "Sent. Hrg." followed by the appropriate page number.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

WHETHER FAILURE TO COMPLY WITH ARTICLE V OF THE FORT LARAMIE TREATY OF 1868 DEPRIVED THE DISTRICT COURT OF SUBJECT MATTER JURISDICTION OVER AN INDIAN PERSON COMMITTING A CRIME IN INDIAN COUNTRY.

United States v. Drapeau, 414 F.3d 869 (8th Cir. 2005).

United States v. Kane, 537 F.3d 310 (8th Cir. 1976).

United States v. Dodge, 538 F.3d 770 (8th Cir. 1976).

STATEMENT OF THE CASE

On October 10, 2009, a federal indictment was filed against Wesley Chuck Jacobs charging assault resulting in serious bodily injury in Indian country (18 U.S.C. §§ 113(a)(6) and 1153) and assault with a dangerous weapon in Indian country (18 U.S.C. §§ 113(a)(3) and 1153) following his prolonged and particularly brutal assault of his wife. DKT 1, PSR 9-10. On April 27, 2010, Jacobs pleaded guilty to the assault with a dangerous weapon charge pursuant to a written plea agreement. DKT 48, 49, 50, 55. No motion to dismiss on jurisdictional or other grounds was raised below. On July 19, 2010, the district court sentenced Jacobs to 36 months' imprisonment.

STATEMENT OF THE FACTS

On September 21, 2009, the adult female victim in this case, Jennifer Jacobs, telephoned the Oglala Sioux Tribal Police Department three times using the tribal 911 system pleading with them to respond to her home. PSR 9. Jennifer reported that Jacobs, her husband, had physically assaulted her. *Id.* Jacobs had beat her for three hours and she feared he had broken her ribs. *Id.* She was so fearful of Jacobs who, apparently, had left the home for a time, that she asked the 911 dispatcher whether she should "run to the hills?" *Id.* The offense began shortly after Ms. Jacobs had returned home to collect clothing she had left behind after she had earlier separated

from Jacobs. PSR 10. Believing Jacobs was out of the house when she arrived, she entered the home where she was then ambushed by Jacobs. *Id.*

Jacobs made Jennifer take off her clothing because beating her with his belt would then be more painful. PSR 10. Jacobs claimed the beating just happened to begin right after Jennifer emerged naked from a shower. *Id.* Jennifer begged Jacobs to stop beating her, but he continued anyway. *Id.* Jennifer remained naked throughout the assault and the injuries thereby inflicted all over her body (numerous photographs of which were admitted into evidence at the sentencing hearing) tell of a gruesome ordeal for the survivor of this heinous assault. Sent. Hrg. 29-33.

Jacobs beat Jennifer with a belt, boots, and his fists and that she actually passed out at one point during the assault. PSR 11. Jennifer reported Jacobs changed his shirt three times in the course of the assault because the continuous exertion brought on by his beating her caused him to perspire excessively. PSR 11. Neither Jennifer nor Jacobs registered on a portable breath test as having any alcohol in their system. PSR 12, footnote 4. At one point in the assault, Jacobs put the end of the barrel of his rifle to Jennifer's head and declared he was going to kill them both. PSR 11; Sent. Hrg. 137.

At Jacobs's sentencing hearing, the district court characterized Ms. Jacobs's 911 calls as "calls of desperation" and "calls clearly pleading for help from law

enforcement." Sent. Hrg. 137. The court also noted Jacobs was sober when he committed this prolonged assault. Sent. Hrg. 138. Answering those supporters of Jacobs who characterized the event as a mistake, the court stated, "To be completely sober and to beat your wife or anyone else for three hours or more and produce those kinds of injuries, that's not a mistake. That is a vicious assault." Sent. Hrg. 139. The court said of Jacobs, "[h]e's a guy with postgraduate degrees and extraordinary public service who is completely sober and beat the living tar out of his wife . . . ." Sent. Hrg. 138.

The court credited the testimony of a domestic violence expert called by the United States at the sentencing hearing who testified the severity of this assault was, as characterized by the district court, at "the top end of what she's [the expert] seen in terms of looking at thousands of pictures of other assaults." *Id.* Ultimately, the court sentenced Jacobs within the advisory guideline range to 36 months imprisonment. Sent. Hrg. 142, 145.

SUMMARY OF THE ARGUMENT

The district court properly exercised subject matter jurisdiction over the offense charged. The crime to which Jacobs pleaded guilty is specifically enumerated under the Major Crimes Act (MCA)(18 U.S.C. § 1153) as one of the crimes over which the United States has authority to prosecute in federal court when the perpetrator is an

Indian person and the offense was committed in Indian country. This Court has held that Fort Laramie Treaty provisions which are contrary to the Major Crimes Act are deemed abrogated. This claim, therefore, raises a non-jurisdictional issue which has been waived by the Rule 11 plea hearing. In any event, it is not apparent the provision of the Treaty cited by Jacobs addressed criminal wrongdoing committed by an Indian on the reservation.

ARGUMENT

ARTICLE V OF THE FORT LARAMIE TREATY DID NOT DEPRIVE THE DISTRICT COURT OF JURISDICTION OVER THIS MAJOR CRIMES ACT ASSAULT COMMITTED BY AN INDIAN PERSON IN INDIAN COUNTRY.

A. Standard of Review.

To the extent this Court finds the appeal raises a matter of subject matter jurisdiction, review is *de novo*. *United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir. 1995). As set out below, the United States believes the issue is non-jurisdictional in nature and because the issue was not raised below, the appeal is waived and Jacobs's claim is not reviewable.

B. Congress has Abrogated Those Treaty Provisions Which Run Counter to its Intent to Prosecute Major Crimes in Indian Country.

This Court has long held the jurisdictional rules governing federal jurisdiction in Indian country "do not extend or restrict the application of general federal criminal

statutes to Indian reservations." *United States v. Blue*, 722 F.2d 383, 384 (8th Cir. 1983). This Court has also held the Major Crimes Act (MCA)(18 U.S.C. § 1153) is "explicit legislation which overcomes the [Fort Laramie] Treaty of 1868 regarding criminal jurisdiction and is a valid and constitutional law." *United States v. Kane*, 537 F.2d 310, 311(8th Cir. 1976)(quoting *Consolidated Wounded Knee Cases*, 389 F. Supp. 235, 243 (D. Neb. 1975)).

Specifically, this Court has declared, "the extension by Congress of federal jurisdiction to crimes committed on Indian reservations inherently includes every aspect of federal criminal *procedure* applicable to the prosecution of such crimes." *Kane*, 537 F.2d at 311 (quoting *In re Long Visitor*, 523 F.2d 443, 446 (8th Cir. 1975)(emphasis added)). In *Kane*, this Court analyzed the so-called "Bad Man" provision of the Fort Laramie Treaty of 1868 (Treaty with the Sioux, April 29, 1868, US-Sioux, 15 Stat. 635; hereinafter "Treaty")(Article I) and pondered the question whether this provision required the United States to request "delivery" of the suspect before the district court was imbued with jurisdiction to hear the case. Ultimately, this Court held, ". . . Congress intended full implementation of federal criminal jurisdiction in those situations to which the Major Crimes Act extended. The request procedure which defendant seeks to impose would clearly be inconsistent with that congressional intent." *Kane*, 537 F.3d at 311; see also, *United States v. Drapeau*, 414

F.3d 869, 878 (8th Cir. 2005); *United States v. Ghost Bear*, 2010 WL 2836738 (C.A.8) (S.D.)(unpublished).[1]

In *Drapeau*, this Court held the Bad Man provisions did not restrict enforcement of federal drug trafficking statutes. Even if the treaty provisions imposed a notice and request obligation upon the United States, any failure to comply did not implicate the district court's jurisdiction:

> [W]e have twice approved the opinion in *United States v. Consolidated Wounded Knee Cases*, which held that Congress' grant of citizenship to the Indians, 8 U.S.C. § 1401(a)(2) (now § 1401(b)), . . . makes them 'subject to all restrictions to which any other American citizen is subject, in any state,' and that the 'legislative history and the language of the

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[1] The operative language of Article I, the so-called Bad Man language, reads as follows:

> If bad men among the *whites*, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent *and forwarded to the Commissioner of Indian Affairs* at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States . . . . (emphasis added)
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> If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws . . . .
>
> Treaty, art. I.

> statute itself are sufficient expression of a clear Congressional intent to abrogate or modify any treaty provisions to the contrary).

Drapeau, 414 F.3d at 878 (quoting *Consolidated Wounded Knee Cases*, 389 F. Supp. at 243 (internal quotation marks and additional statutory citation omitted)(citing *Kane*, 537 F.2d at 311; *United States v. Dodge*, 538 F.2d 770-774-76 (8th Cir. 1976)). Because Congress has assumed jurisdiction over major crimes in Indian Country through the MCA, those provisions of the Fort Laramie Treaty which run counter to this assumption of power have been abrogated.

Article V of the Treaty, cited here by Jacobs in support of his claim, cannot be distinguished from Article I sufficient to take it out of the coverage of the *Kane-Drapeau* line of cases holding the treaty language is abrogated. Addressing the duties of the Indian agent, the operative language of Article V reads:

> [T]he agent . . . shall . . . keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indian as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined on him by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his findings, to the Commissioner of Indian Affairs, whose decision, subject to the revision of the Secretary of the Interior, shall be binding on the parties to this Treaty.

Treaty, art. V.

Like Article I, this language purports to set up a mechanism of action to be

taken by the Indian agent, the Commissioner of Indian Affairs, and, potentially, the Secretary of the Interior. In fact, Jacobs claims this action is a prerequisite to the federal prosecution of an Indian in Indian country and, by definition, precedes the agent's action in the Bad Man provision of Article I. AB 31. Qualitatively, there is no difference between the procedural mechanism set forth in Article V and the procedural mechanism set forth in Article I sufficient to separate Article V from the rulings of this Court that such procedural mechanisms have been abrogated by Congress. *Kane*, 537 F.2d at 311. Because Article I is abrogated by Congress, logic dictates Article V must as well be abrogated.[2]

C. In Accordance With His Rule 11 Plea, Jacobs Has Waived this Non-Jurisdictional Claim.

"It is a well-established legal principle that a valid plea of guilty is an admission of guilt that waives all non-jurisdictional defects and defenses." *United States v. Smith*, 422 F.3d 715, 724 (8th Cir. 2005)(citing *United States v. McNeely*,

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[2] Even if the Treaty provisions were enforceable here, Jacobs has not established that infirmities in bringing him to the district court deprived it of jurisdiction to try him. See, e.g., *United States v. Stuart*, 689 F.2d 759, 762 (8th Cir. 1982)("It is well established that irregularities in the manner in which a defendant is brought into custody does not deprive the court of personal jurisdiction over the defendant in a criminal case.")(citing *United States v. Peltier*, 585 F.2d 314, 335 (8th Cir. 1978); *Frisbie v. Collins*, 342 U.S. 519, 522, 72 S. Ct. 509, 511, 96 L. Ed. 541 (1952); *Ker v. Illinois*, 119 U.S. 436, 440, 7 S. Ct. 225, 227, 30 L. Ed. 421 (1886); and other cases)).

20 F.3d 886, 888 (8th Cir. 1994)). "[A] valid guilty plea forecloses an attack on a conviction unless on the face of the record the court had no power to enter the conviction or impose the sentence." *Walker v. United States*, 115 F.3d 603, 604 (8th Cir. 1997)(quoting *United States v. Vaughan*, 13 F.3d 1186, 1188 (8th Cir. 1994)).

"[T]he matter of jurisdiction has to do only with the court's statutory or constitutional *power* to adjudicate the case." *United States v. Pemberton*, 405 F.3d 656, 659 (8th Cir. 2005)(quoting *United States v. White Horse*, 316 F.3d 769, 772 (8th Cir. 2003)(quoting *United States v. Cotton*, 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002)(citation omitted)(emphasis in original)). "Subject-matter jurisdiction in every federal criminal prosecution comes from 18 U.S.C. § 3231.... That's the beginning and the end of the jurisdictional inquiry." *Pemberton*, 405 F.3d at 659 (quoting *Cotton*, 535 U.S. at 630). In *Pemberton*, this Court, for instance, held an "alleged dispute over Pemberton's Indian status did not deprive the district court of jurisdiction" over the matter. *Pemberton*, 405 F.3d at 659.

If, as set forth above, Article V of the Treaty has, like Article I, been abrogated and is not a bar to the jurisdiction of the district court, Jacobs' claim cannot be characterized as jurisdictional in nature. At his change of plea hearing, Jacobs adopted a statement of factual basis accompanying his plea agreement in which he admitted he is an Indian person and that he committed the crime of assault with a

dangerous weapon in Indian country which is sufficient to place the matter within the purview of the MCA. DKT 49; See 18 U.S.C. §§ 113(a)(3) and 1153.

Under the circumstances, this appeal is foreclosed by precedent which holds the Treaty does not raise a jurisdictional bar to prosecution. The appeal should be dismissed as having thereby been waived through the Rule 11 plea. Alternatively, even if this Court views the appeal as raising a jurisdictional issue, it should affirm the conviction and assumption of jurisdiction on the basis of its holdings in *Kane* and *Drapeau*. See, also, *United States v. Ghost Bear*, 2010 WL 2836738 *2 (C.A.8) (S.D.)(unpublished).

D. The Text of Article V Does Not Appear to Apply to the Facts of This Case.

The language of Article V suggests it does not apply to the prosecution of an Indian for committing a crime on the reservation. The Bad Man sections of the Treaty contained in Article I address the delivery, trial, and punishment of wrongdoers on the reservations. Article I, paragraph 2, specifically applies to non-Indian wrongdoers and Article I, paragraph 3, specifically applies to Indian wrongdoers. Paragraph 2 requires that the Indian agent forward proof presented to him to the Commissioner of Indian Affairs in Washington, D.C. (then known as "city"). Paragraph 3, however, contains no such requirement for Indian wrongdoers

and no mention of the Commissioner of Indian Affairs. Instead, it simply requires that the Indian wrongdoer be delivered to the United States for trial and punishment only upon receipt of proof and notice from the agent and delivery by the respective tribe.

Article V of the Treaty, with Jacobs' meaning attached, is inconsistent with paragraph 3 of Article I's notice, request, and delivery provisions which do not contemplate an additional Article V mechanism for the prosecution of Indian wrongdoers. By its terms, it does not require that "evidence" of wrongdoing is to be gathered by the agent in writing, investigated by him, and then forwarded to the Commissioner of Indian Affairs, whose "decision" (what kind of decision is unknown), subject to the revision of the Secretary of the Interior, "shall be binding on the parties to the treaty." Treaty, art. V. The third paragraph of Article I appears to define the totality of the Indian agent's responsibilities with respect to removal and prosecution of Indian wrongdoers. Jacobs, an Indian offender, simply fails to notice this distinction in the treatment of non-Indian versus Indian wrongdoers in Article I of the treaty. Thus, his attempt to tie Articles I and V together when addressing Indian wrongdoers is unavailing.

The reason for the distinction between the treatment of non-Indian versus Indian offenders may simply be what might have been perceived as the sensitivity of a federal prosecution of a non-Indian for the commission of an offense in Indian

country in 1868. Under the circumstances, the government negotiators may have been under some pressure to insert language assuring another level of oversight (review by the Commissioner of Indian Affairs) before a non-Indian person could be prosecuted for the commission of an offense in Indian country.

Jacobs' citation to the Ninth Circuit Court of Appeals decision in *Means v. Navaho Nation*, 432 F.3d 924 (9th Cir. 2005) is not persuasive. *Means* involved a claim by a non-Navaho Indian person challenging Navaho *tribal* jurisdiction over him in Navaho tribal court. After deciding against Means and ruling the Navaho Tribal Court could exercise jurisdiction over Means in their court, the Ninth Circuit also rejected Means's claim the Bad Man provisions of a treaty between the United States and the Navaho (using language similar to the Fort Laramie Treaty, Article I) *required* that the Navaho turn him over to the United States for prosecution. 432 F.3d at 935-37. In doing so, the court merely stated what the Bad Man "remedies provided for [in] . . . the 1868 [U.S.-Navaho] treaty." 432 F.3d at 936. That is, without expressly ruling these remedies any longer had the force of law, the court merely set forth what the treaty purported to provide. The *Means* court went on to point out, however, the United States never sought Means from the Navaho and, therefore, the issue whether the Bad Man provisions must be complied with was never firmly addressed in the opinion. Moreover, this Court has already ruled the Bad Man

provisions of the Fort Laramie Treaty do not, under the MCA, require notice to the tribe. *Dodge*, 538 F.2d at 774-76.

Likewise, Jacobs's citation to *Elk v. United States*, 87 Fed. Cl. 70 (2009) is unavailing. First, the decision is not binding upon this Court. Second, this Court has already ruled that exercise of those provisions of the Treaty, including the Bad Man provisions, which conflict with the MCA, are abrogated by Congress. *Kane*, 537 F.3d at 311.

CONCLUSION

Based upon the foregoing, the United States respectfully requests this Court affirm Jacobs's judgement and conviction in all respects.

Respectfully submitted this 9th day of December, 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Eighth Circuit Rule 10.6.3, I certify that this brief was prepared using Corel WordPerfect X4. I further certify that I have provided to the Court and to each party separately represented by counsel a copy of the full text of the brief.

I further certify that:

[x] Pursuant to Fed. R. App. P. 32(a)(7)(C), the attached opening/answering/reply/cross-appeal brief is:

[x] Proportionately spaced, has a typeface of 14 points or more, and contains 3300 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words); or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains ___ lines of text (opening, answering, and the second and third briefs filed in cross appeals must not exceed 1,300 lines of test; reply briefs must not exceed 650 lines of text).

On this 9th day of December, 2010.

Gregg S. Peterman

CERTIFICATE OF SERVICE

The undersigned attorney for Appellee United States of America hereby certifies that service of one correct copy of the foregoing Appellee's Brief was made upon the appellant's attorney of record, by electronic transmission, on this 9th day of December, 2010, as follows:

Gary Colbath (ECF filing)

Gregg S. Peterman