No. 10-30274

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-vs-

GENTRY CARL LaBUFF,

Defendant-Appellant.

OPENING BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

HONORABLE SAM E. HADDON
UNITED STATES DISTRICT JUDGE, PRESIDING

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I. STATEMENT OF JURISDICTION

A. STATUTORY BASIS OF SUBJECT MATTER JURISDICTION OF THE DISTRICT COURT

The United States District Court for the District of Montana has jurisdiction over this case in accordance with Article III, Section 2, Clause 1 of the United States Constitution and 18 United States Code § 3231 because Defendant Gentry Carl LaBuff (Mr. LaBuff) was charged with the offense of Robbery/Aiding and Abetting Robbery, in violation of Title 18 United States Code §§ 1153, 2111, and 2, within the District of Montana.

B. STATUTORY BASIS OF JURISDICTION OF THE COURT OF APPEALS

The Court of Appeals has jurisdiction over this case for the reason that Mr. LaBuff has appealed from the final decision of the United States District Court. *See*, 28 United States Code §1291 and Fed.R.Crim.P. 32.

C. APPEALABILITY OF DISTRICT COURT ORDER AND TIMELINESS OF THE APPEAL

The District Court filed and entered its Judgment, as required by Rule 32 of the Federal Rules of Criminal Procedure, on September 17, 2010. (Excerpts of the Record ("ER") 354-359). A Notice of Appeal was filed on September 23, 2010. (ER 360-362). Therefore, the appeal is timely as having been filed within ten days after the date of entry of judgment as required by Fed.R.App. 4(b).

II. STATEMENT OF THE ISSUE

DID THE GOVERNMENT PROVE BEYOND A REASONABLE DOUBT TO AN EVIDENTIARY CERTAINTY THAT MR. LaBUFF IS AN INDIAN PERSON WHERE MR. LaBUFF'S MOTHER IS WHITE AND MR. LaBUFF NEVER HELD HIMSELF OUT TO BE AN INDIAN PERSON?

III. STATEMENT OF THE CASE

A. NATURE OF THE CASE

1. Introduction

This is an appeal from a criminal conviction entered in United States District Court. Mr. LaBuff 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). Mr. LaBuff presents 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, Mr. LaBuff 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, Mr. LaBuff 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 Mr. LaBuff 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 Mr. LaBuff guilty. (ER 31).

The District Court held the Sentencing Hearing on September 13, 2010. ER 375). The District Court sentenced Mr. LaBuff 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

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

4. Bail Status of Defendant-Appellant

Mr. LaBuff 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 Mr. LaBuff 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 Mr. LaBuff is an Indian person. To the contrary, the facts presented at trial prove that he is not an Indian person:

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

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

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

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

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

Most importantly, Mr. LaBuff 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, Mr. LaBuff has been described as a "tall, white-looking guy...[and]..."a taller, light-skinned gentleman." (ER 154, 238).

Mr. LaBuff 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). Mr. LaBuff'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, Mr. LaBuff 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, Mr. LaBuff 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," Mr. LaBuff is eligible for, and has received, IHS services. (ER 11-12, 100,102-103, 105, 285).

However, Mr. LaBuff 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, Mr. LaBuff 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).

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

Mr. LaBuff is not eligible for financial assistance from the Blackfeet Tribe. (ER 89, 280). Mr. LaBuff 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). Mr. LaBuff is not entitled to any money from the Government for the Cobell lawsuit.[1] (ER 281).

Mr. LaBuff is not entitled to a low-income energy credit that the

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[1] 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.").

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). Mr. LaBuff 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), Mr. LaBuff 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, Mr. LaBuff 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).

Mr. LaBuff 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). Mr. LaBuff has never participated in smudging or other Indian ceremonies or religious activities. (ER 283).

Mr. LaBuff has been prosecuted in the Blackfeet Tribal Court. (ER 220,

285). However, this does not establish that Mr. LaBuff 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 Mr. LaBuff as he is not a "descendant" as defined in Ordinance No. 14. (ER 14-15, 85-87, 291-292). Mr. LaBuff 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 Mr. LaBuff 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.). Mr. LaBuff has never challenged the authority of the one tribal policeman 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).

Mr. LaBuff 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, Mr. LaBuff is not a member of the Blackfeet Tribe and is not an "American Indian" because he is not a member of any Indian tribe.

Mr. LaBuff 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.). Mr. LaBuff even had to fight to protect himself. (ER 283-284).

IV. SUMMARY OF ARGUMENT

"To be or not to be: that is the question:"
William Shakespeare
Hamlet. Act III, Sc. I, Line 56

Mr. LaBuff 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 Mr. LaBuff. He 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 Mr. LaBuff as Indian.

Not only has Mr. LaBuff 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." He is "white-looking" and "light skinned."

Mr. LaBuff lives on the Blackfeet Reservation but so does his white mother. Because he lives on the reservation, he gets free Indian Health Service benefits based on his father's membership in the Blackfeet Tribe.

Mr. LaBuff considers himself white and has never held himself out to be an Indian person. He cannot participate in tribal activities. He does not participate in Indian social or religious activities. The Government did not prove beyond a reasonable doubt that Mr. LaBuff is an Indian person.

V. ARGUMENT

THE GOVERNMENT DID NOT PROVE BEYOND A REASONABLE DOUBT TO AN EVIDENTIARY CERTAINTY THAT MR. LaBUFF IS AN INDIAN PERSON WHERE MR. LaBUFF'S MOTHER IS WHITE AND MR. LaBUFF NEVER HELD HIMSELF OUT TO BE AN INDIAN PERSON.

Standard of Review

This Court reviews *de novo* the district court's determination of Indian status under 18 U.S.C. § 1152 and § 1153 "because it is a mixed question of law and fact." United States v. Ramirez, 537 F.3d 1075, 1081 (9th Cir. 2008) (quoting United States v. Bruce, 394 F.3d 1215, 1218 (9th Cir. 2005)). This Court also conducts *de novo* review of the denial of a motion to acquit for insufficient evidence. Id. "Viewing the evidence in the light most favorable to the government, [this Court] must determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id.; *see also,* United States v. Maggi, 598 F.3d 1073, 1080 (9th Cir. 2010).

Reviewability

Mr. LaBuff presented a Rule 29 motion at the close of the Government's case-in-chief. (ER 259-260). The District Court denied the motion. (ER 265). Mr. LaBuff renewed the Rule 29 motion at the close of all evidence. (ER 302-303). The District Court reserved ruling on the renewed motion. (ER 303). After trial, the District Court denied the renewed Rule 29 motion in a written Order. (ER 32-33). No further objection is required.

Argument

1. Beyond a Reasonable Doubt Means to an Evidentiary Certainty.

"The beyond a reasonable doubt standard is a requirement of due

process." Victor v. Nebraska, 511 U.S. 1, 5 (1994). In Cage v. Louisiana, 498 U.S. 39 (1990), the Court examined a reasonable doubt instruction which included the terms "grave uncertainty", "actual substantial doubt", and "moral certainty." 498 U.S. at 40.[2]

The Court found this instruction in violation of due process of law, reasoning that "[i]t is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof

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[2] The instruction provided in relevant part as follows:

"If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*." State v. Cage, 554 So.2d 39, 41 (La. 1989) (emphasis added [in original]). 498 U.S. at 40.

below that required by the Due Process Clause." Id. at 41. Thus, beyond a reasonable doubt is a standard which equates to "evidentiary certainty."

On appeal, the government's evidence need not exclude every reasonable hypothesis consistent with innocence in order to satisfy the burden of proof beyond a reasonable doubt under Jackson v. Virginia, 443 U.S. 307 (1979). United States v. Miller, 688 F.2d 652, 663 (9th Cir. 1982). In United States v. Nevils, 598 F.2d 1158, 1167 (9th Cir. 2010) (*en banc*), this Court recently explained how the Jackson v. Virginia test must be applied:

> Although Jackson requires the reviewing court initially to construe all evidence in the favor of the government, the evidence so construed may still be so supportive of innocence that no rational juror could conclude that the government proved its case beyond a reasonable doubt. Moreover, the evidence construed in favor of the government may be insufficient to establish every element of the crime.

As explained below, the Government's evidence was insufficient to establish the Indian person element here.

Simply stated, the issue of sufficiency of the evidence must be taken seriously and reviewed carefully. The jury's guilty verdict cannot be presumed inviolate or automatically be given the rubber stamp of approval. Beyond a reasonable doubt has meaning. It requires "evidentiary certainty" not mere probability. "It would not satisfy the Sixth Amendment to have a jury

determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as Winship requires) whether he is guilty beyond a reasonable doubt." [Emphasis by the Court]. Sullivan v. Louisiana, 508 U.S. 275, 278 (1993) (Emphasis by the Court).

The Jackson v. Virginia requirement to view the evidence in the light most favorable to the government does not mean that this Court may resolve doubts, including those created by a lack of evidence, in favor of the government. As eloquently stated by Judge Noonan, in his dissent, in United States v. Tipton, 56 F.3d 1009, 1015-1016 (9th Cir. 1995) (emphasis added):

> We all agree as to the standard of evidence set by *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 2791-92, 61 L.Ed.2d 560 (1978); the evidence must be looked at from the government's perspective, and we must then ask whether any reasonable juror could find the defendants guilty beyond a reasonable doubt. What is sometimes forgotten in applying this standard is that, while we adopt the government's perspective, we must still ask whether there is proof beyond a reasonable doubt. **If adoption of the government's perspective means the resolution of all doubts in favor of the government, the effect is to eliminate reasonable doubt from the review and to substitute in its place the presumption that the defendant is guilty, a presumption rebuttable only by the defendant producing unimpeachable evidence of his innocence**.

Thus, the issue in this case becomes, Did the Government prove Mr. LaBuff to be an Indian person beyond a reasonable doubt to an evidentiary

certainty? Any doubt, if reasonable, must be resolved in Mr. LaBuff's favor.

2. The *Bruce/Cruz* Test.

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." Bruce, 394 F.3d 1215, 1229 (9th Cir. 2005); United States v. Cruz, 554 F.3d 840, 845 (9th Cir. 2009); Maggi, 598 F.3d at 1077. This Court, in Bruce, established a two prong "test for determining an individual's Indian status under 18 U.S.C. § 1152.....and the same test applies to the determination of Indian status under § 1152's companion statute, 18 U.S.C. § 1153." Cruz, 554 F.3d at 845; Maggi, 598 F.3d at 1078.

a. Sufficient Degree of Indian Blood.

First, the Government must prove beyond a reasonable doubt that "the defendant has a sufficient 'degree of Indian blood.'" Cruz, Id. (quoting Bruce 394 F.3d at 1223). The cases cited by this Court in Bruce indicate that an individual must have at least 1/8 Indian blood to have a **sufficient** degree of Indian blood. *See,* Bruce at 1223-1224 (1/4 to 3/8 Indian blood; 1/8 Indian blood; 15/32 Indian blood; slightly less than 1/4 Indian blood; 1/4 Indian blood). Violet Bruce herself was 1/8 Indian blood (1/8 Chippewa Indian) and Christopher Cruz himself was 61/128 Indian blood (29/128 (22%) Blackfeet

Indian and 32/128 Blood Indian). Bruce at 1223-1224; Cruz at 843 and 846.

Although he does not have enough Indian blood to become a member of the Blackfeet Tribe, Mr. LaBuff, through his father, satisfies the first prong of Bruce/Cruz test as he has more than 1/8 Indian blood, i.e., 7/32 total Indian blood. (ER 10). However, in comparison with Christopher Cruz, who was not proven to be an Indian person, Mr. LaBuff has close to the same percentage of Blackfeet blood (about 22%) and significantly less total Indian blood, i.e., 7/32 (21.8 %) compared to 61/128 (47.6 %).

b. Tribal or Federal Government Recognition as an Indian.

Second, the Government must prove beyond a reasonable doubt that the defendant "has 'tribal or federal government recognition as an Indian.'" Cruz, Id. at 845-846 (quoting Bruce, 394 F.3d at 1224). "This prong "require[s] membership or affiliation with a federally recognized tribe." Maggi, 598 F.3d at 1081 (citation omitted).

In Bruce, this Court outlined four factors "that govern the second prong" of the test. Cruz, Id. at 846. The four factors are, "in declining order of importance, evidence of the following:

1) tribal enrollment;

2) government recognition formally or 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, Id. (quoting Bruce, 394 F.3d at 1224).

A careful analysis of the evidence presented at trial reveals that the Government failed to prove beyond a reasonable doubt that Mr. LaBuff has "tribal or federal government recognition as an Indian."

3. The Indian Person Evidence in the Light Most Favorable to the Government.

The closing argument presented to the jury by the Assistant United States Attorney (AUSA) summarizes the Indian person evidence in the light most favorable to the Government. (ER 318-322, 334-336). After conceding the fact that the Government could not prove that Mr. LaBuff is an enrolled member of an Indian tribe, the AUSA argued that the Government proved beyond a reasonable doubt that Mr. LaBuff has tribal or federal government recognition as an Indian. (Id.).

a. Government Recognition Formally or Informally through Receipt of Assistance Reserved Only to Indians.

The AUSA pointed out that Mr. LaBuff's "status as a descendant of an

enrolled member of the Blackfeet Tribe qualified him" to receive free medical care at the Indian Health Service facility in Browning for "pretty much all of his life." (ER 320-321). "So, the federal government, through that, recognizes him as a Native American or an Indian person." (ER 321).

The AUSA maintained that because the Blackfeet Tribal Court "exercised jurisdiction" over Mr. LaBuff, '[t]he tribal government also recognizes him, or at least the tribal court recognizes him as an Indian person." (Id.). The AUSA noted that Mr. LaBuff never challenged the jurisdiction of the Blackfeet Tribal Court. (Id.).

b. Enjoyment of the Benefits of Tribal Affiliation and Social Recognition as an Indian through Residence on a Reservation and Participation in Indian Social Life.

The AUSA combined the evidence supporting the "benefits" and "participation" factors. (ER 321-322). "[H]e lived on the reservation all of his life.....so he has enjoyed the social recognition as an Indian through residence on a reservation." (ER 322).

Later in his summation, the AUSA capsulized the Government's Indian person evidence as follows: "The defendant growing up on a reservation; the defendant receiving benefits from IHS reserved only to Indian persons or Native Americans. And being prosecuted by the tribal court...whose

jurisdiction is limited to enrolled members or descendants of enrolled members." (ER 324).

In rebuttal, the AUSA focused on the fact that Mr. LaBuff had been prosecuted in the Blackfeet Tribal Court:

> And as far as him being an Indian person, Mr. Donovan said: "It's not a benefit to be prosecuted." But it is recognition by the tribal court, a branch of the tribal government, that this man is an Indian person. They don't prosecute people who are not Native Americans. You've heard witnesses testify to that...So the fact that he has been prosecuted by the tribal court is recognition that this man is a Native American. And it also shows that this man, in fact, held himself out as an Indian person, at least implicitly, because he did not challenge the tribal court's jurisdiction over him by saying that he was non-Native. That would have kicked him out of tribal court. It's as simple as that.

(ER 335-336).

Thus, the Government's proof that Mr. LaBuff is an Indian person is based on the following four factors: 1) Mr. LaBuff received free medical care at the Indian Health Service, 2) Mr. LaBuff has been prosecuted in the Blackfeet Tribal Court, 3) Mr. LaBuff grew up and lived all his life on the Blackfeet Indian Reservation, and 4) Mr. LaBuff held himself out as an Indian person because he did not challenge the jurisdiction of the Blackfeet Tribal Court.

4. Reasonable Doubt as to Whether Mr. LaBuff is an Indian Person.

Mr. LaBuff is not an enrolled member of the Blackfeet Tribe. The Government conceded this point. (ER 320) ("He's not an enrolled member of any tribe. There's no question about that."). Thus, the Government failed to prove the most important factor in determining if the accused has tribal or federal government recognition as an Indian. This alone is a significant reasonable doubt which the Government cannot overcome.

a. Free Medical Care at IHS. As his father's son, and thus as a descendant of a member of the Blackfeet Tribe, Mr. LaBuff elected to receive treatment at the Indian Health Service. An individual is eligible for services from IHS if the person is "of Indian of Alaskan Native descent." Indian Health Service Manual § 2-1.2.

Why would anyone of Indian descent who lives on the reservation refuse free medical care? What alternative was available? This is a privilege which is bestowed on tribal members, i.e., the right to provide health care to their children. All it proves is that Mr. LaBuff has some Native American blood, not that he is recognized by the Federal Government as an Indian person.

b. Prosecutions in Tribal Court. Although he was prosecuted in the Blackfeet Tribal Court, Mr. LaBuff was not represented by a licensed

lawyer. Mr. LaBuff's tribal court "lawyers" apparently failed to challenge the fact that the Blackfeet Tribal Court had no jurisdiction over Mr. LaBuff.[3]

As pointed out by this Court in Cruz and as proven at trial, the Blackfeet Tribal Court has jurisdiction only over members of the Blackfeet Tribe or members of any other American Indian tribe. Cruz, Id. at 846 n.6; (ER 23). Because Mr. LaBuff is not a member of the Blackfeet Tribe and the Government did not prove that he is a member of any other tribe, the Blackfeet Tribal Court has no jurisdiction over Mr. LaBuff. An Indian tribe's criminal jurisdiction is limited to "its own members and members of other Indian tribes." Means v. Navajo Nation, 432 F.3d 924, 932 (9th Cir. 2005).

c. Lived on Reservation. Mr. LaBuff did grow up and live all his life on the Blackfeet Indian Reservation. By choosing to live with his white mother on the reservation, which is not restricted to Indians, Mr. LaBuff did not become an Indian person. Not only is there no evidence that Mr. LaBuff was culturally and socially assimilated into the tribe, the testimony shows that he was treated as a non-Indian outsider.

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[3] The Government's claim that because he did not challenge the tribal court's jurisdiction, Mr. LaBuff held himself out as an Indian person is patently absurd. *Compare,* Maggi, 598 F.3d at 1083 (There is no evidence that "jurisdiction based on Indian status was determined by the court.").

d. Unrebutted Reasonable Doubt. Mr. LaBuff raised reasonable doubt to directly contradict all Government's evidence that he may be an Indian person. The Government failed to present any evidence to overcome or contradict the following facts which prove that Mr. LaBuff is not an Indian person.

Mr. LaBuff enjoys virtually none of the benefits afforded to members of the Blackfeet Tribe. Although he has received medical care provided only to those with some quantum of Native American blood, he has never received assistance reserved only to Indian persons. These benefits include hunting and fishing privileges, educational grants, tribal activities (including elections and political activities),[4] financial assistance, general assistance, per capita payments, unemployment, Cobell lawsuit money, low-income energy credit, tribal housing on his own, fee exempt motor vehicle licensing, and free entry into Glacier National Park.

There is no evidence that Mr. LaBuff was socially recognized as an Indian or that he participated in Indian cultural life. Cruz, 554 F.3d at 848

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[4] This is very significant because "federal statutory recognition of Indian status is 'political rather than racial in nature.'" Means, 432 F.3d at 932 (citation omitted).

(Nothing suggested that Cruz participated in any way in tribal cultural life.). He has never worn traditional Indian clothing, he has never participated in Blackfeet social or ceremonial activities, and he has never participated in any other Indian ceremonies or religious activities.

There is no evidence that Mr. LaBuff has ever been treated as an Indian person by members of the Blackfeet Tribe. In fact, he was treated as a white person.

Finally, and most importantly, although he did live on the reservation, there is no evidence that Mr. LaBuff held himself out as an Indian person. In truth, Mr. LaBuff did not hold himself out as an Indian person. *Compare,* Maggi, 598 F.3d at 1083 ("...[W]itnesses...testified that Maggi held himself out as an Indian.").

5. A Comparison with *Cruz* Shows that the Government did not Prove that Mr. LaBuff has Tribal or Federal Government Recognition As An Indian.

In Cruz, this Court analyzed seven factors to determine that the Government did not prove beyond a reasonable doubt that Mr. Cruz was an Indian person. Cruz, 554 F.3d at 846-847. A comparison here shows that the Government presented even less evidence in Mr. LaBuff's case (the only real difference is that Mr. LaBuff has spent more of his life living on the

reservation, has received medical care from IHS on more occasions, and has been prosecuted more often in the Blackfeet Tribal Court).

> a. "Cruz is not an enrolled member of the Blackfeet Tribe or any other tribe."

Mr. LaBuff is not an enrolled member of the Blackfeet Tribe or any other tribe.

> b. "Cruz has 'descendant' status in the Blackfeet Tribe as the son of an enrolled member (his mother), which entitles him to use Indian Health Services, to receive some educational grants, and to fish and hunt on the reservation."

Through his father, Mr. LaBuff has status and benefits identical to Cruz.

> c. "Cruz has never taken advantage of any of the benefits or services to which he is entitled as a descendant."

Mr. LaBuff has used Indian Health Services but there is no evidence that he has received educational grants or that he ever hunted or fished on the Blackfeet Reservation.

> d. "Cruz lived on the Blackfeet Reservation from the time he was four years old until he was seven or eight. He rented a room in a motel on the reservation shortly before the time of the offense."

Mr. LaBuff was raised and lived on the Blackfeet Indian Reservation. However, one does not have to be an Indian to live on the reservation. (ER 282). *Compare,* United States v. Ramirez, 537 F.3d at 1082-1083 (Unlike the

Blackfeet, an individual must be a member of the tribe to reside on the Tohono O'Odham Indian Reservation in Arizona.).

> e. "As a descendant, Cruz was subject to the criminal jurisdiction of the tribal court and was at one time prosecuted in tribal court."

Mr. LaBuff has been prosecuted in the Blackfeet Tribal Court more than once. However, Mr. LaBuff does not agree that, as a descendant rather than a member of the tribe, he was properly subject to the criminal jurisdiction of the Blackfeet Tribal Court. Cruz, 554 F.3d at 846 n.7; *Compare,* Maggi, 598 F.3d at 1083 ("Maggi was prosecuted in tribal court several times.").

> f. "Cruz attended a public school on the reservation that is open to non-Indians and worked as a firefighter for the federal Bureau of Indian Affairs, a job that is also open to non-Indians."

Mr. LaBuff attended school on the Blackfeet Reservation. Clearly, one does not have to be an Indian person to go to school on the reservation. Cruz, 554 F.3d at 848 n.10 ("[T]he school was open to non-Indians."). While he attended school, Mr. LaBuff was not treated as an Indian person but instead was taunted, teased, and called "a little white boy."

> g. "Cruz has never participated in Indian religious ceremonies or dance festivals, has never voted in a Blackfeet tribal election, and does not have a tribal identification card."

Mr. LaBuff likewise has never participated in Indian religious

ceremonies or dance festivals, has never voted in a Blackfeet tribal election, and does not have a tribal identification card. *Compare,* United States v. Ramirez, 537 F.3d at 1082-1083 (Individuals who possessed tribal identification cards were proven to be Indian persons because only a member of the tribe is entitled to receive a tribal identification card.).

Mr. LaBuff has always considered himself to be a white person and has never held himself out to be an Indian person. *Compare,* Maggi, 598 F.3d at 1077 ("...Maggi held himself out as an Indian and discussed attending powwows and participating in sweats and smudging, which are tribal religious practices.").

"Analyzing this evidence, it is clear that [Mr. LaBuff like] Cruz does not satisfy **any** of the four Bruce factors." Cruz, 554 F.3d at 847 (Emphasis by the Court). "When the record is boiled down, the evidence produced by the government to show tribal or government recognition of [Mr. LaBuff] as an Indian.....[amounts to a] sparse collection [that] does not provide sufficient evidence of any of the factors set forth in Bruce." Maggi, 598 F.3d at 1083. For the Government to designate Mr. LaBuff, whose mother is white and who has always considered himself white, an "Indian person" is a clear violation of Mr. LaBuff's rights to due process and equal protection.

VI. CONCLUSION

The Government failed to prove beyond a reasonable doubt to an evidentiary certainty that Mr. LaBuff is an Indian person. Thus, this Court must enter a judgment of acquittal and order that Mr. LaBuff be immediately released from prison.

RESPECTFULLY SUBMITTED this 23rd day of December, 2010.

GENTRY CARL LaBUFF

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Opening Brief is in compliance with Ninth Circuit Rule 32. 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 14,000 words at an average of 194 words (or less) per page, including footnotes and quotations. (Total number of words: 5,998, excluding tables and certificates).

DATED this 23rd day of December, 2010.

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STATEMENT OF RELATED CASES

The undersigned, counsel of record for the Defendant-Appellant, GENTRY CARL LaBUFF, certifies, pursuant to Ninth Circuit Rule 28-2.6, that there are no related cases pending in this Court known to this Appellant to the best of counsel's knowledge, information and belief.

DATED this 23rd day of December, 2010.

GENTRY CARL LaBUFF

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CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the
Appellate CM/ECF System

I hereby certify that on December 23, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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