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.

REPLY 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. INTRODUCTION

In his Opening Brief, Mr. LaBuff presents one argument: 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." Because the Government did not prove this jurisdictional element, the conviction must be set aside and Mr. LaBuff must be released from prison.

The Government's arguments are not well taken. Mr. LaBuff responds herein to the assertions raised by the Government.

II. ARGUMENT

1. The Government has ignored the most important fact of this case, i.e., that Mr. LaBuff's mother is White. (ER 278-279, 284). Mr. LaBuff is more than ½ White and is less than ¼ Native American. (ER 10, 82). Indeed, he has "very little" Blackfeet blood. (ER 10, 82, 284). Not only is Mr. LaBuff not a member of the Blackfeet Tribe, he has been labeled as a White person and has even been discriminated against by Indian people because he is a "White boy", "White-looking", and "light skinned." (ER 154, 238). *Compare,* United States v. Bruce, 394 F.3d 1215, 1226 (9th Cir. 2005) (The defendant was treated as an Indian person).

2. The Government has also ignored the crucial fact that Mr. LaBuff has always considered himself to be a White person and has never held himself out to be an Indian person. (ER 279). The Government has presented the Court with no case where a defendant, who did **not** hold himself out to be an Indian, was found to be an "Indian person" under § 1153(a). *Compare,* United States v. Maggi, 598 F.3d 1073, 1083 (9th Cir. 2010) (Despite testimony that Maggi "held himself out as an Indian", the Government did not prove that Maggi was an Indian person because, in part as here, he had no involvement in Indian social, cultural, religious, or political life.).

3. Although the Government concedes that Mr. LaBuff does not receive the benefits of an enrolled member of the Blackfeet tribe (a federally recognized tribe), the Government attempts to minimize the fact that Mr. LaBuff is not an enrolled member of a federally recognized tribe. (Brief of Appellee at 12, 8-9). This Circuit has decided, in Bruce, Cruz, and Maggi, that the most important factor to use to determine tribal or federal recognition as an Indian is whether the individual is enrolled in a tribe recognized by the federal government. *Compare,* United States v. Cruz, 554 F.3d 840, 847 (9th Cir. 2009) ("As to the first and most important factor, it is undisputed that Cruz is not an enrolled member of the Blackfeet Tribe or any other tribe. In fact, Cruz is not even eligible to become an enrolled member of the Blackfeet Tribe, as he has less than one quarter Blackfeet blood, which is the minimum amount necessary for enrollment."). Mr. Labuff is neither enrolled, nor eligible to be enrolled, in the Blackfeet tribe.

The cases cited by the Government do not support its argument. "Bruce clearly requires an analysis from the perspective of both the tribe ***and*** the individual." Cruz, 554 F.3d at 850 (Emphasis by the Court). Unlike the defendant in St. Cloud v. United States, 702 F.Supp. 1456, 1460 (D.S.D. 1988), Mr. LaBuff is socially recognized as White not as Indian. Unlike the

defendant in United States v. Dodge, 538 F.2d 770, 787 (8th Cir. 1976) (cited with approval in Bruce, 394 F.3d at 1226 n.7), Mr. LaBuff has never applied to be a member of the Blackfeet tribe and has never "held [himself] out to be [an] Indian[ ]."

4. The Government's emphasis on the fact that Mr. LaBuff has lived on the Blackfeet Reservation for most of his life is misplaced. (Brief of Appellee at 1, 5, 9, 11). The Government ignores the fact that Mr. LaBuff's White mother lives on the Blackfeet reservation. Neither Mr. LaBuff nor his mother is required to be Indian to live on the Blackfeet reservation. (ER 282).

Mr. LaBuff has lived with his White mother "off and on" all his life. (ER 286). As an indigent person, where else would the Government have Mr. LaBuff live except with his White mother on the reservation? This falls way short of proof that Mr. LaBuff is "social[ly] recogni[zed] as an Indian through residence on a reservation." Cruz, 554 F.3d at 848 ("But even this only partially supports the government's position under the fourth Bruce factor, which also requires a showing of 'participation in Indian social life.'").

5. The Government confuses the terms Indian person and Native American when it states that free Indian Health Service medical and hospital care "is reserved to Native Americans or Indian persons only. The Indian

Health Services considers LaBuff to be a Native American or Indian person." (Brief of Appellee at 3, 9, 11). "Indian person" is a term of art for purposes of jurisdiction under § 1153(a) and its definition has been determined by this Court in Bruce, Cruz, and Maggi. Native American is the term used by IHS.

IHS care is not reserved "only to Indians or tribal members," as the Government has asserted, but to individuals with Native American blood. *See,* Indian Health Service Manual § 2-1.2. 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). All this proves is that Mr. LaBuff has some Native American blood, not that he is recognized by the Federal Government or by a tribe as an Indian person.

As an indigent person, where else would the Government have Mr. LaBuff seek medical care on the Blackfeet reservation? There is no evidence that any other medical or hospital facility would be available to Mr. LaBuff as an alternative to IHS.

6. The Government attempts to the equate the power to arrest with the power to determine Indian status. (Brief of Appellee at 1, 3, 11). This argument was soundly rejected in Cruz wherein this Court found that tribal police officers do not have authority to determine whether an individual may

be prosecuted federally as an Indian person. Cruz, 554 F.3d at 850 n.15.

7. The Government's assertion that "[t]he Blackfeet Tribal Court has jurisdiction only over enrolled members of a federally recognized tribe, or a descendant of an enrolled member of a federally recognized tribe" misstates the law. (Brief of Appellee at 1, 3-4, 5, 11-12). Clearly, 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).

The Government wants this Court to ignore the Blackfeet Tribal Law and Order Code which 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."); *see,* Cruz, 554 F.3d at 846 n.7 and 849-850 & n.15 ("[T]he fact that charges were brought against [Mr. LaBuff] in tribal court does not necessarily mean the tribal court had jurisdiction over him.").

8. There are several reasonable doubts as to whether Mr. LaBuff is an "Indian person": He is more than ½ White, he is not a member of a federally recognized tribe, he has never held himself out as an Indian person, he is

socially recognized as White, not as an Indian, and he has never participated in Indian social, cultural, religious, or political life. Therefore, **no rational trier of fact** could find beyond a reasonable doubt that Mr. LaBuff is an **"Indian person"** under 18 U.S.C. § 1153(a). Jackson v. Virginia, 443 U.S. 307 (1979) **(**"The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence. The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless.").

III. CONCLUSION

Based on the foregoing and on the Opening Brief, there is no dispute that 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 4th day of February, 2011.

GENTRY CARL LaBUFF

By /s/ Daniel Donovan
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CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply 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 7,000 words at an average of 194 words (or less) per page, including footnotes and quotations. (Total number of words: 1,526, excluding tables and certificates).

DATED this 4th day of February, 2011.

GENTRY CARL LaBUFF

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CERTIFICATE OF SERVICE
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I hereby certify that on February 4, 2011, 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.

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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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