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UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff vs. **DAMIEN MIGUEL ZEPEDA,** Defendant	**C.A. # 10-10131** **U.S.C.C# 08-CR-01329 (PHX-ROS)** **AFFIDAVIT IN SUPPORT OF CJA MOTION TO FILE REPLY BRIEF LATE**

1. I am an attorney licensed to practice law in the state of Arizona, and I have been assigned by the Office of the Federal Public Defender to represent Appellant Zepeda on appeal from judgment in the U.S. District Court, (Phoenix, Arizona).

2. Appellant's Reply Brief, submitted herewith, was due in this court on February 24, 2010.

3. Additional time, until today, March 6, 2012 was required to properly research and prepare Appellant's Reply Brief for the following reasons:

4. Appellant is incarcerated at FCI Tucson and required a pre-authorization for all packages to inmates, even if they concern legal proceedings.

5. Only recently did I receive such authorization to send Mr. Zepeda a copy of the Reply

Brief prior to submission.

6. Additional time was required due to novelty and complexity of the issues presented.

7. I am a sole practitioner working unassisted, and provide appellate representation only to indigent appellants.

8. I have been completing opening briefs imminently due in this Court on other CJA matters, and I am also preparing a Sec. 2255 Petition and Memorandum due in U.S. District Court, Phoenix, Arizona, in May. Each of these cases is complex and lengthy, and has required significant time commitments.

9. Appellant is currently incarcerated at F.C.I. Tucson, with a projected release date of July 2, 2087, and has not objected to this request.

` 13. The Office of the United States Attorney in Phoenix, Arizona, has not yet objected or assented to this request to file Appellant's Reply Brief late.

RESPECTFULLY SUBMITTED this the 6th day of March, 2012.

/s/ *Michele R. Moretti*
Michele R. Moretti
Attorney for Mr. Zepeda

Copies of the foregoing sent electronically on this date to:

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/s/ Michele R. Moretti

Michele R. Moretti

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States of America,
Plaintiff-Appellee

v.

Damien Miguel Zepeda,
Defendant-Appellant

C.A. # 10-10131

D.C. #08-01329-ROS
Arizona (Phoenix)

ON APPEAL FROM JUDGMENT IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA, PHOENIX DIVISION,

HONORABLE ROSLYN O. SILVER, PRESIDING

REPLY BRIEF FOR APPELLANT

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March 6, 2012

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A. Absent Zepeda's consent, trial counsel's stipulation regarding admission of the F.B.I. Firearm/Toolmark Report and Certification of Gila River Tribal Enrollment which were improperly admitted via second party affiants violated Zepeda's Confrontation Clause rights and resulted in plain error which requires reversal.

The Government argues that Zepeda waived any Confrontation Clause challenges to the Tribal Enrollment Form (Ex.1) and the FBI Firearm/Toolmark Report (Ex.41) (Answ.Br.3) It doesn't dispute that the Stipulations violated Zepeda's Sixth Amendment Confrontation Rights. Nor does the Government contend that the proper Affiants were unavailable for trial, or assert that Zepeda had a prior opportunity to cross-examination them. Instead, it posits that the FBI Firearm/Toolmark Report and the Tribal Enrollment Certificate were properly admitted since "Defendant . . stipulated as to both documents' admission [ ] thereby waiving any argument on appeal." (Answ.Br.32)

The Government relies on Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1108-09 (9th Cir.2001); however, "Yeti is not controlling here because Yeti was a civil case." United States v. Arreola, 467 F.3d 1153, 1162 (9th Cir.2006). Moreover, Yeti did not address the waiver of an important constitutional right. Yeti, supra at 1109 (stipulation regarding trade secrets warranted plain error review of sufficiency of evidence). Furthermore, in criminal cases, "[a] plain error that affects

substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). No corresponding rule exists in the Federal Rules of Civil Procedure. Arreola, supra at 1162.

1. Mr. Zepeda didn't consent to waive his important fundamental constitutional Confrontation Rights although trial counsel had stipulated to the admission of prejudicial, testimonial documents that were used to convict him.

The possible existence of a Confrontation Clause violation is ultimately a question of law that must be reviewed *de novo*. United States v. Larson, 495 F.3d 1094, 1102 (9th Cir.2007) (acknowledging an inter circuit conflict regarding standard of review). "There is a presumption against the waiver of constitutional rights." Id. (citation omitted). For a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938).

The test regarding effectiveness of a Defendant's waiver of rights by entry of a stipulation is voluntariness. United States v. Molina, 596 F.3d 1166, 1168-69 (9th Cir.2010). A Defendant who has stipulated to the admission, and can later show that the stipulation was involuntary may challenge its admission. Id. The burden is on the Government to show that the Defendant voluntarily waived an important constitutional right. See United States v. Butcher, 926 F.2d 811, 817 (9th Cir.1991), citing United

States v. Pricepaul, 540 F.2d 417, 423 (9th Cir.1976) (where record is silent as to whether Defendant waived the Confrontation Right, burden shifts to the Government to prove that waiver was voluntarily and intelligently made). Here, no record evidence shows that Mr. Zepeda knowingly and voluntarily waived his Confrontation Rights regarding the stipulated admissions. Compare United States v. Gray, 626 F.2d 102, 106 (9th Cir.1980) (record showed that district court made careful inquiries to determine that Appellant understood nature of waiver and that it was voluntarily). Zepeda didn't personally sign the stipulations, and nothing suggests he was apprised of their ramifications. Compare Molina, supra. (Stipulation clearly stated that hearsay evidence of material witnesses would be admissible in any hearing or trial, and Government's accompanying letter clearly explained purpose of stipulation to Defendant).

Although trial counsel apparently waived Mr. Zepeda's important fundamental constitutional Confrontation Rights, certain fundamental rights cannot be waived by a client's counsel alone. United States v. Gamba, 541 F.3d 895, 901 (9th Cir.2008), citing Florida v. Nixon, 543 U.S. 175, 125 S.Ct. 551 (2004).[1] See also United States v. Williams, 632 F.3d 129, 133 (4th

[1] The Circuit Courts are split regarding whether trial counsel may waive a Client's Sixth Amendment Right of Confrontation without the express or clear waiver of the Defendant. Williams, supra.

Cir.2011) (noting majority of circuits have held that "Defendant's attorney can waive his client's Sixth Amendment *right so long as the Defendant does not dissent from his attorney's decision, and so long as it can be said that the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy*") (emphasis supplied). This implies that a defendant must be fully informed of such a decision by counsel.

> A majority of our sister circuits have held that "a Defendant's attorney can waive his client's Sixth Amendment right so long as the Defendant does not dissent from his attorney's decision, and so long as it can be said that the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy." United States v. Cooper, 243 F.3d 411, 418 (7th Cir.2001) (citation omitted); see also Janosky v. St. Amand, 594 F.3d 39, 48 (1st Cir.2010) (same); United States v. Gamba, 541 F.3d 895, 900 (9th Cir.2008) ("defense counsel may waive an accused's constitutional rights as a part of trial strategy"); United States v. Plitman, 194 F.3d 59, 63 (2nd Cir.1999) (same); United States v. Reveles, 190 F.3d 678, 683 n.6 (5th Cir.1999) (same) . . .
>
> However, other circuits have found that a Defendant's waiver is required for an attorney to waive a Sixth Amendment right. See Clemmons v. Delo, 124 F.3d 944, 956 (8th Cir.1997) ("the law seems to be clear that the right of confrontation is personal and fundamental and cannot be waived by counsel"), cert. denied, 523 U.S. 1088, 118 S.Ct. 1548, 140 L.Ed.2d 695 (1998); Carter v. Sowders, 5 F.3d 975, 981 (6th Cir.1993) ("there must be evidence in the record to support" a Defendant's waiver of a Sixth Amendment right to confrontation for it to be valid).

United States v. Williams, 632 F.3d 129, 133 (4th Cir.2011).

In United States v. Gamba, 541 F.3d 895, 900 (9th Cir.2008), this Court held that defense counsel may waive a Defendant's constitutional rights as a part of trial strategy; however Gamba did not address the waiver of a *fundamental constitutional right* as part of trial strategy. Gamba's central issue was merely whether defense counsel lawfully consented to a Magistrate presiding over closing arguments without Defendant's express, personal consent. Id. Gamba held that the decision was appropriately made for tactical and strategic reasons where counsel understood the nuances of the case, observed the jury, and made an affirmative, tactical decision that a continuance would disadvantage his client. Id.

2. Trial Counsel's Waiver of Zepeda's important, fundamental constitutional Confrontation Rights could not have been a legitimate trial tactic in light of existing case law.

In stark contrast to Gamba's waiver regarding a relatively insignificant matter, Zepeda's counsel waived an important right that had a substantial effect on the trial's outcome when he stipulated, without his client's consent, to the admission of inculpatory testimonial, documentary evidence through second party affiants. Although Federal law had clearly established that Defendants' Confrontation Rights extended to makers of

testimonial certificates,[2] Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (June, 2009), counsel's stipulation to admission of an unconfronted FBI Firearm/Toolmark Report was used to support critical, damaging inferences against Zepeda. The Tribal Enrollment Certification purported to establish an essential jurisdictional element. In light of Melendez-Diaz and progeny, and United States v. Bruce and progeny, discussed infra at p.15, it is untenable that any tactical advantage of stipulating to these documents could have legitimately outweighed the prejudice of their admission in violation of Zepeda's Confrontation Rights. Nor does the record suggest that Zepeda would have voluntarily acquiesced had he been properly informed that the stipulations would deprive him of his substantial Confrontation Rights and would have likely made a difference in the outcome of his case under existing law.[3]

a. Prejudice should be presumed because Zepeda's lawyer failed to subject the Government's case to "meaningful adversarial testing.

Here, prejudice should be presumed because Zepeda's lawyer failed to subject the Government's case to "meaningful adversarial testing." Cf.

[2] Between that ruling and Zepeda's trial, judicial decisions prohibiting testimony of *non-test performing analysts* had issued nationally and trial counsel should have been alerted. For the same reasons, Appellant contends that this court may find that trial counsel's ineffective assistance of counsel is evident from the record with necessitating a collateral proceeding.

.

United States v. Cronic, 466 U.S. 648, 659-60, 104 S.Ct. 2039 (1984); Allerdice v. Ryan, 395 F. App'x 449, 451 (9th Cir.2010). Defense counsel didn't actually exercise Defendant's Confrontation Rights regarding the documents. Although he cross-examined Agent Catey, counsel failed to mention or question any information presented in the FBI Firearm/Toolmark Report itself. (ER-IV-712-728) Similarly, counsel failed to address the Tribal Enrollment Certificate during his entire cross-examination of Detective Sylvia Soliz. (RT-III-481-499)

In United States v. Williams, 632 F.3d 129, 134 (4th Cir.2011), the Court held that clear, pervasive prejudice resulted from the introduction of a stipulation where "it essentially established an element of the crime." Id. Here, the Tribal Enrollment Certificate purported to prove the jurisdictional requisite of Defendant's Indian status for purposes of §1153. In light of existing precedent, the stipulated admissions which unquestionably violated Zepeda's Due Process and Confrontation Rights cannot be even remotely imagined as a reasonable trial tactic.

b. The FBI Firearm/Toolmark Report, which should not have been admitted through a second-party affiant was highly prejudicial to Zepeda.

The Government doesn't dispute that the FBI Firearm/Toolmark Report was testimonial in nature. (Answ.Br.32-33) It was clearly subject to

Melendez-Diaz' confrontation rule and would have been inadmissible under Bullcoming's rule prohibiting testimony by second party affiants. Bullcoming v. New Mexico, 131 S. Ct. 2705, 180 L.Ed.2d 610 (2011).

The Government suggests that the Report was inconsequential and not prejudicial since "substantial evidence showed that the ammunition found at the scene belonged to Defendant." (Answ.Br.45) This ignores that the FBI Firearm/Toolmark Report provided crucial, factual foundation on which the Government relies to assert that "substantial evidence" supported the convictions. The Report also purports to support all of the other firearm and ammunition-related testimony, on which the Government relied heavily its closing argument. (ER-V-RT10/28/09-pp.841;846;850;865;877-878) The government relied on results of the Firearm/Toolmark Report to prove specific, inclupatory conclusions that Zepeda possessed a loaded gun, and fired first - toward Stephanie - a highly contested issue. Moreover, in its Answering Brief, the Government has already referenced the firearm/ammunition related evidence no fewer than nine (9) times as supporting Defendant's intent, conspiracy, and assaults with a dangerous weapon. (Answ.Br.11;14;15;16;34;47;53;59)

c. The Tribal Enrollment Certificate was a confrontational, testimonial document created solely for use at trial and was not properly admitted as merely a business or public record, absent confrontation.

The Government contends in its answering brief that, "[i]n any event, the Tribal Enrollment form is a non-testimonial public record admissible without confrontation." (Answ.Br.33) Appellee doesn't specify which statutory provision or rule renders the document an admissible "public record." Fed. R. App. P. 28(b). Nor does Appellee contest that the Certificate was used to establish Zepeda's "Indian" status – an essential element of the crime. Finally, the Government has wholly failed to address the Appellant's argument that the Certificate was insufficiently authenticated. (Op.Br.34)

Besides Matthew's testimony which merely suggested that Matthew and Damian shared a common "father" who as at least ½ Native American, the only evidence of Zepeda's Indian status consisted of a document entitled "Gila River Enrollment/Census Office Certified Degree of Indian Blood" which purported to assert that Zepeda was "an enrolled member of the Gila River Indian Community" and that he had a "Blood Quantum" of ¼ Poima and ¼ Tohono'Odham." The Certificate was signed by "Sheila Flores" an "Enrollment Services Processor." (SER-232).

The document was created on October 7, 2009 and admitted as Plaintiff's Exhibit 1 on 10/22/09. It contains two disclaimers: "Verification may be subject to change upon Disclosure of Additional Information."; and "Valid for (30) days from the date of issuance and signature by Enrollment Staff." (SER-232) The Certificate didn't establish that Zepeda was enrolled in the Tribe at the time of the offense. Nonetheless, the Certificate itself couldn't have legitimately proved Zepeda's status as an "Indian." See United States v. Cruz, 554 F.3d 840, 851 (9th Cir.2009) ("a showing that a tribal court on one occasion may have exercised jurisdiction over a Defendant is of little if any consequence in satisfying the status element in a §1153 prosecution.")

The Government incorrectly asserts that the Certificate was admissible as non-testimonial public record. When produced for use at trial, public records are subject to confrontation requirements. United States v. Orozco-Acosta, 607 F.3d 1156, 1161 (9th Cir. 2010), cert. denied, 131 S. Ct. 946, 178 L. Ed. 2d 782 (U.S. 2011) (CNR [certificate of non-existence of record] introduced as public record to prove Defendant's unauthorized presence in the United States for conviction under 8 U.S.C.A. § 1326 was subject to confrontation). Likewise, "[d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status."

Fed. Rule Evid. 803(6). "But that is not the case if the regularly conducted business activity is the production of evidence for use at trial." Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 2538 (2009). In Melendez-Diaz, the Supreme Court held that "[t]he analysts' Certificates—like police Reports generated by law enforcement officials—do not qualify as business or public records for precisely the same reason." Id. See Fed. R. Evid. 803(8) (defining public records as "excluding . . . in criminal cases matters observed by police officers and other law enforcement personnel").

Undisputedly, the Certificate of Enrollment was specifically prepared for and obtained by "law enforcement" Detective Soliz on October 7, 2009 for use at trial, shortly before it was admitted as Plaintiff's Exhibit #1 on 10/22/09. (SER-232) Having been created for the sole purpose of use at trial, it was not subject to Rule 803(6) or Rule 803(8)'s exclusion as an exception to the Hearsay Rule. Melendez-Diaz, supra.

Instructively, the Supreme Court's language in Melendez-Diaz speaks to the relationship between the business-and-official-records hearsay exceptions and the Confrontation Clause:

> *Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial*. Whether or not they qualify as business or official

> records, the analysts' statements here—prepared specifically for use at petitioner's trial—were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.

Id. (emphasis supplied). Ultimately, therefore, since the Certificate was prepared specifically for use at Zepeda's trial, it was testimonial, and thus subject to confrontation.

d. Contrary to the Government's assertion, the Tribal Enrollment Certificate failed to meet Fed. R. Evid. 803's qualifications for admission as a public or business record.

The Certificate failed to fulfill any of Fed. R. Evid 803(6) or 803(8)'s requirements for admission. It wasn't prepared in the course of regularly conducted business activity. It was obtained by and prepared for Detective Soliz specifically for use at trial. It was admitted through Soliz' testimony; however Soliz wasn't connected with issuing tribe. Nor was she a custodian or otherwise properly qualified to testify as to its contents as required by Fed. R. Evid. 803(D).[4]

Because Tribal Enrollment Certificates may confer eligibility for tribal welfare and financial benefits, these documents may by nature

[4] Although Soliz was a criminal investigator for the Ak-Chin Indian Community, she was not Native American and offered no other testimony that would qualify her to admit the document. (ERIII-452-453)

encourage falsification and unreliability, contravening Fed. R. Evid. 803(8)(B)'s reliability requirement. (ERIII-452-453) At minimum, a Bureau of Indian Affairs or tribal official should have testified regarding federal tribal recognition; the Certificate's authenticity; and the veracity and integrity of any scientific or genealogical conclusions it asserted – all subject to cross-examination. Fed. R. Evid. 803(D).

e. The Certificate was not self-authenticating under Federal Rule of Evidence 902(1).

Nor was the Certificate self-authenticating under Federal Rule of Evidence 902(1) which applies to documents containing a seal and a signature purporting to be an attestation. Rule 902(1) provides that extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to:

> (1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States ... or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

United States v. Martinez-Corona, 189 F.3d 476 (9th Cir. 1999).

Here, no testimony suggested that the document bore a *raised* seal; however even if it did, the document couldn't be self-authenticating pursuant to Federal Rule of Evidence 902(1) which provides that extrinsic evidence of

authenticity as a condition precedent to admissibility is not required with respect to:

> A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

Fed. R. Evid. 902(1) (Westlaw 2011). Although the Certificate purports to bear an "Official Seal" of the Gila River Indian Tribes, tribal Governments are not authorized to issue self-authenticating documents pursuant to Rule 902(1). *Cf.* Or. Rev. Stat. Ann. § 40.510(1)(k)(A) (Westlaw 2011) (expressly adding to list of self-authenticating documents enumerated in Fed. R. Evid. 902(1) documents bearing seal "purporting to be that of a federally recognized Indian tribal Government") (Addendum).

Detective Soliz couldn't authenticate the Certificate; she had no direct knowledge of the Gila River Indian Tribe's certification or recordkeeping procedures beyond her assumption that the Certificate might entitle someone to tribal benefits. See Fed. R. Evid. 901 (authentication requires "evidence sufficient to support a finding that the matter in question is what its proponent claims").

3. Since the Government failed to prove the jurisdictional element of 18 U.S.C. §1153 beyond a reasonable doubt, the "plain error" doctrine requires reversal.

The burden remained on the Government to prove Zepeda's Indian status beyond a reasonable doubt. Here, "a showing that a tribal court on one occasion may have exercised jurisdiction over a Defendant is of little if any consequence in satisfying the status element in a §1153 prosecution." United States v. Cruz, 554 F.3d 840, 851 (9th Cir.2009). Because the Certificate was wrongly admitted, although crucial to the Government's ability to prove Mr. Zepeda's Indian status, the Government's evidence was necessarily insufficient to prove the elements of the charged offense. A conviction which erroneously rests on insufficient evidence necessarily implicates "substantial rights" and seriously affects the "fairness" and "integrity" of the judicial process, constituting plain error which requires reversal. Cruz, supra at 851.

a. The Government failed to prove the essential element of Zepeda's "Indian" status under 18 U.S.C. § 1153.

The Government wrongly argues that the Tribal Certificate and testimony of Matthew Zepeda sufficed for a conviction. (Answ.Br.57) Even if the Certificate was properly admissible, there was insufficient evidence to convict Zepeda as an "Indian." Under §1153, Indian status is "an essential *element* of [the] offense which the Government must ... prove beyond a

reasonable doubt" in every case. Cruz, supra at 850-51, quoting United States v. Bruce, 394 F.3d 1215, 1229 (9th Cir.2005).

Although the term "Indian" is not statutorily defined, "courts have judicially explicated its meaning." Bruce, supra at 1225 (internal quotation marks omitted). The governing standard articulated by this Court in Bruce, supra, sets forth a two-part test, which applies to charges brought under § 1153. United States v. Maggi, 598 F.3d 1073, 1078 (9th Cir.2010). See also Ninth Circuit Manual of Model Jury Instructions – Criminal § 8.113 (Westlaw 2011) (Addendum).

The first prong of the Bruce test provides that in order to prove that Mr. Zepeda was an "Indian," the Government must produce evidence establishing that he had an ancestral connection to a federally recognized Indian tribe. Maggi, supra at 1080. Although no specific necessary percentage of Indian ancestry has been identified, evidence of a parent, grandparent, or great-grandparent from a recognized tribe may satisfy the first prong of the Bruce test. Id.

The second prong of the Bruce test required the Government to produce evidence that Mr. Zepeda had a sufficient "membership or affiliation" with a federally recognized Indian tribe. Id. at 1081 To determine satisfaction of this prong, this Court looks to the evidence of the following

factors, which are listed "in declining order of importance" Id.: (1) tribal enrollment; (2) formal and informal Government recognition through receipt of assistance reserved only to Indians; (3) enjoyment of tribal affiliation benefits; and (4) social recognition as an Indian through residence on a reservation and participation in Indian social life. Id. Although tribal enrollment is the most important factor, Bruce and its progeny stress that "enrollment, and, indeed, even eligibility therefor, is not dispositive of Indian status." Bruce, 394 F.3d at 1225; *accord* Cruz, 554 F.3d at 846 n.6, 847-48. Indeed, Bruce "explicitly forbids" treating enrollment as a dispositive determinant of Indian status. Cruz, 554 F.3d at 847-48.

Even if the Certificate was otherwise admissible, it plainly cannot satisfy the Bruce test. Regarding the Bruce test's first prong, while the Certificate purports to identify ancestral connections to two Indian tribes, there was no evidence that either of these tribes were *federally recognized*, without which the Certificate is irrelevant. Maggi, 598 F.3d at 1080 (ancestry must "be derived from a federally recognized tribe").

Regarding the Bruce test's second prong, the Certificate was equally insufficient. The fact that the Certificate lists Mr. Zepeda's status as "an enrolled member of the Gila River Indian Community" – cannot carry the Government's burden because: 1) there was no evidence that this tribe was

federally recognized, Id. at 1081 (second prong of Bruce test requires connection to a federally recognized Indian tribe); and 2) tribal enrollment alone is "not dispositive of Indian status." Bruce, 394 F.3d at 1225. See also Cruz, 554 F.3d at 847-48. Thus, even if the Government had proved Mr. Zepeda's enrollment in a federally recognized tribe, it would *also* have been required to produce adequate evidence touching upon the other three factors constituting the second prong of the Bruce test. It failed to do so, apparently assuming that the "Certificate of Enrollment" was sufficient proof of this element in and of itself.

The Government argues that even if the Certificate failed to furnish sufficient proof, Matthew Zepeda's "testimony that Defendant is an Indian sufficiently established his Indian status." (Answ.Br.57) Here, the trial court merely instructed the jury that they must find that "the defendant is an Indian. (A.SER-RT10/28/08,p.825) It is error for the court to fail to instruct the jury of the "declining order of importance" of the four factors used to determine whether there has been tribal or federal government recognition of the defendant as a Native American. United States v. Cruz, 554 F.3d 840, 851 n. 17 (9th Cir.2009).

Matthew's testimony failed to provide any of the information required under Bruce. On direct examination, Matthew testified that he was

half Mexican (Hispanic) on his mother's side, and that his father (who was purportedly also Damien's father) was at least half Native-American. (ERII-203). There was no testimony or proof that Matthew's *biological* father was necessarily Damien's biological father. In fact, Matthew couldn't even state with certainty the age difference between Matthew and Damien. (ERII-203) No evidence established that Damien had ever lived with his father. No evidence proved that Matthew's mother and father were actually married or that his mother (or Damien) had been born in the United States. Nor did any other evidence that would normally suffice to establish actual paternity exist. Cf. United States v. Viramontes-Alvarado, 149 F.3d 912, 917 (9th Cir. 1998) (Jury was correctly instructed that unmarried biological father must both openly and publicly admit paternity, and must also physically bring child into his home.); Tuan Anh Nguyen v. I.N.S., 533 U.S. 53, 65, 121 S. Ct. 2053, 2061 (2001) ("Given the 9-month interval between conception and birth, it is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father's identity.")

As to the fourth Bruce factor – "social recognition as an Indian through residence on a reservation and participation in Indian social life", Matthew actually testified that he and Damien lived together *off* a

Reservation for the past three years. Indeed, "brother" Jeremy Zepeda testified that he was from "Stanfield, Arizona" (ER-III-502) and had only lived in Maricopa for "about three years." (ER-III-507) No evidence suggested that Stanfield, Arizona was characteristically populated by Native Americans or affiliated with any Native American tribe or organization. Although Detective Soliz (improperly) testified that the Certificate could be utilized to receive tribal benefits, no evidence showed that Damien *actually received* any benefits "reserved only to Indians" or that he was involved in tribal life in any other respect. Cruz, supra at 849 (Court specifically rejected Government's argument that second Bruce factor could be established by demonstrating eligibility rather than actual receipt of benefits); Compare United States v. Bruce, 394 F.3d 1215, 1226 (9th Cir. 2005) (Defendant produced evidence of participation in sacred tribal rituals; sweat lodge ritual; that she was born on an Indian Reservation and continued to reside on one; that her children were enrolled members of an Indian tribe; and that she received treatment from Indian Health Services centers).

The Government's evidence was patently insufficient to prove beyond a reasonable doubt that Mr. Zepeda qualified as an Indian pursuant to the Bruce test. Because the evidence viewed in the light most favorable to the Government fails to demonstrate that Zepeda 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. Cruz, supra at 851. This Court accordingly should reverse the District Court's denial of Mr. Zepeda's motion for acquittal and vacate his convictions. Maggi, 598 F.3d at 1083; Cruz, 554 F.3d at 851.

b. Where the Government otherwise failed to prove the jurisdiction element of 18 U.S.C. §1153 beyond a reasonable doubt, Zepeda's conviction resulted in "plain error" which requires reversal.

In United States v. Williams, 632 F.3d 129, 134 (4th Cir. 2011), the court held that clear, pervasive prejudice resulted from the introduction of a stipulation where "it essentially established an element of the crime." Id. Here, the Enrollment Certificate was insufficient to prove the jurisdictional requisite of Zepeda's Indian status under §1153, and insufficient additional evidence failed to satisfy the element. Bruce, supra. A conviction which erroneously rests on insufficient evidence necessarily implicates "substantial rights" and seriously affects the "fairness" and "integrity" of the judicial process. It constitutes plain error which requires reversal. United States v. Cruz, 554 F.3d 840, 851 (9th Cir. 2009). A Defendant's "substantial rights," as well as the "fairness" and "integrity" of the courts are seriously affected "when the court, as a matter of law, has no jurisdiction to try him for the

alleged offense. United States v. Flyer, 633 F.3d 911, 917 (9th Cir. 2011); Cruz, supra at 845.

B. Where the Government elicited substantial evidence of Defendant's intoxication and urged the jury to consider it as proof of "intent", the absence of a *sua sponte* instruction regarding voluntary intoxication's correct interplay with specific intent was plain error which deprived Zepeda of a substantial constitutional right and warrants reversal.

1. An instruction that voluntary intoxication may be relevant to a Defendant's state of mind is distinguishable from the instruction given when voluntary intoxication has been asserted as an affirmative defense.

The Government apparently suggests that a Defendant must assert and rely on an affirmative defense of intoxication to warrant a mere jury instruction regarding intoxication's relevance when evaluating a Defendant's mental state. (Answ.Br.36-36) As Ninth Circuit Model Jury Instruction 6.8 illustrates, an instruction should alert the jury that intoxication may be relevant to determine whether a Defendant established a requisite mental state to commit the crime. (Addendum) That is distinguishable from an affirmative defense-related instruction requiring that the jury *must* find the Defendant not guilty *unless* the Government *disproves the affirmative defense beyond a reasonable doubt*. See United States v. Martinez-Martinez, 369 F.3d 1076, 1084 (9th Cir.2004) (court sufficiently addressed intoxication evidence, stating that the jury "may consider evidence of drug use in

deciding whether the Government has proved beyond a reasonable doubt that the Defendant acted with the intent to commit the crime charged.")

2. An intoxication instruction may be warranted when unrequested – or even objected to - if relevant evidence of intoxication has been introduced.

The Government apparently asserts that the Court may never give an intoxication instruction *sua sponte* if the Defendant had not expressly requested or relied on such defense at trial. (Answ.Br.35) That is clearly incorrect. Once evidence of intoxication has been introduced, that Court may *sua sponte* instruct that intoxication may be *relevant* to a finding of specific intent. Defendant needn't necessarily raise or rely upon intoxication as an affirmative defense. United States v. Littlebear, 531 F.2d 896 (8th Cir.1976) (upholding unrequested instruction in second degree murder case despite conflicting evidence regarding Defendant's intoxication); United States v. Moore, 435 F.2d 113, 116 (D.C. Cir. 1970) (cert. denied, 402 U.S. 906, 91 S.Ct. 1376, 28 L.Ed.2d 647 (1971) (per curiam) (intoxication instruction would have been required *sua sponte* but for the fact that intoxication evidence related to previous night instead of night of offense); Cf. United States v. Lavallie, 666 F.2d 1217, 1218 (8th Cir. 1981) (instruction that intoxication was not a defense to a general intent crime prejudicially

portrayed Defendant as a "drunken Indian" where it *wholly lacked* evidentiary support or relevance to crime).

Particularly where the Government elicited substantial evidence of intoxication, regardless of whether Zepeda asserted or relied on that as an affirmative defense, that very reliance necessitated a *correct instruction* on the interplay between intoxication and establishment of specific intent for the crimes. Cf. United States v. McMillan, 820 F.2d 251, 258 (8th Cir. 1987) (although neither requested nor relied upon by counsel, evidence regarding Defendant's intoxication was permissible and warranted instruction that intoxication may rebut evidence of requisite specific); United States v. Rahman, 189 F.3d 88, 143 (2d Cir. 1999) (unrequested intoxication instruction was proper over Defendant's objection).

Despite assertions in its brief that any that intoxication evidence was minimal, at trial the Government exploited evidence that the Zepeda brothers were "drunk and high" at the time of the incident.[5] The Government

[5] Prosecutor 2 emphasized the men were "drunk and high" and later (wrongly) suggested that intoxication supplied requisite intent for conviction. (ER-V-.838;844;873-874)

> We heard about the Defendant **drinking beer**. He's **smoking marijuana.** He's loaded with guns. He's looking for a fight. And, remember, this all pertains to what **we need to prove for an assault. Is this intentional** conduct at this point: Absolutely.

attempts to minimize substantial intoxication evidence that entered at trial, much through its own witnesses. (Answ.Br.36) Contrary to the Government's contention, "expert testimony" is not a prerequisite for a mere instruction that the jury may determine whether Zepeda's intoxication level could have affected his mental state. Moreover, Defendant need only show "slight evidence" of intoxication to warrant an instruction. United States v. Echeverry, 759 F.2d 1451, 1455 (9th Cir.1985). The degree of intoxication may be able to be inferred by the jury. United States v. Sneezer, 900 F.2d 177, 180 (9th Cir. 1990) (Defendant could be entitled to instruction on intoxication's interplay with specific intent).

3. Where the Government itself suggested that intoxication was affirmative evidence of defendant's intent, lack of instruction regarding the *correct* interplay between voluntary intoxication and requisite intent deprived Zepeda of fundamental fairness and due process.

Since the jury was urged - by the Government - to consider this evidence in reaching its verdict – the judge's failure to *sua sponte* instruct on intoxication was a denial of Zepeda's Due Process rights. In United States v. Kenyon, 481 F.3d 1054, 1070-71 (8th Cir.2007), the Court found that a

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Is this reckless conduct. Most assuredly. **Drunk and high with loaded guns**. (ER-V-RT10/28/09-pp.838)

She also suggested Damian stalked the house, "going to shoot somebody that night **because** he's angry and he's high and he's drunk." (ER-V-844)

voluntary instruction could have been given on the basis of the *Government's testimony* that Defendant might have acted while he was "high or drunk or both." In Kenyon, the prosecutor's final remarks twice urged the jury to rely on testimony that Defendant admitted he could or might have acted while drunk or high. Id. Since some evidence existed that Defendant committed the crimes while intoxicated, "and the jury was urged - by the Government to consider this evidence in reaching its verdict", a voluntary intoxication instruction was warranted. Kenyon, supra at 1070-71 (emphasis supplied).

In Zepeda's case, once the Government presented and argued the intoxication evidence as it did, safeguards of fundamental fairness and due process were violated when the court did not *sua sponte* instruct the jury as to the *correct* interplay between voluntary and requisite intent - even if only by providing a Model Jury 6.8 - type instruction, as opposed to instructing the jury that intoxication is an affirmative defense that the Government must disprove beyond a reasonable doubt. United States v. Sayetsitty, 107 F.3d 1405, 1413 (9th Cir. 1997). Due Process entitles a Defendant to have the jury consider such evidence in order to determine whether the Government has proved all elements of the offense. See Montana v. Egelhoff, 518 U.S. 37, 65, 116 S. Ct. 2013, 2028 (1996) (Ginsburg, J., concurring) (If a jury

may not consider Defendant's evidence of his mental state, the jury may impute to the Defendant the culpability of a mental state he did not possess). A District Court's failure to give an instruction *sua sponte*, where permitted by law, may be a "denial of fundamental fairness and due process." Id. (citations omitted).

Considering the instructions as a whole, a trial court's formulation of jury instructions must "fairly and adequately cover the issues presented." Escheverry, supra at 1455. Although jury instructions are viewed "as a whole" it cannot be fairly said that any part of the instruction alerted the jury to the correct interplay of Defendant's possible intoxication to the specific intent required by the actual charges in this case. United States v. Martinez-Martinez, 369 F.3d 1076, 1084 (9th Cir.2004) (Defendant entitled to an instruction regarding the interplay between intoxication and his ability to formulate a specific criminal intent). Particularly where *the Government* expressly linked intoxication evidence to Defendant's intent, Zepeda was prejudiced when the jury wasn't correctly informed that intoxication could be relevant to their finding of specific intent, which was an element of all but one offense.

4. Forfeiture of a correct instruction cannot be excused as legitimate trial strategy or dismissed as an inconsistent "defense."

The preclusion of a voluntary intoxication instruction could not have been a legitimate trial strategy, since all but one charge required a showing of specific intent. Contrast United States v. Gabaldon, 361 F. App'x 930, 932-33 (10th Cir.2010) (More explicit voluntary intoxication instruction on aiding and abetting would have alerted jury that voluntary intoxication could not be a defense to other, substantive offenses, and could have been counterproductive). [6]

Even if an instruction could have been deemed equivalent to asserting an "inconsistent defense", Defendant wouldn't have been precluded from arguing to the jury, to wit: (1) he didn't commit the act(s) with a firearm, (2) but even if the jury found he did commit the act(s), the evidence shows at most that he did so while he was intoxicated and without the requisite specific intent.

Because Damien could have been vicariously liable for brother Matthew's actions, and Matthew admitted shooting a weapon, the Government's suggestion that Damien's assertion that he didn't have a gun

[6] For the same reasons, Appellant contends that this court may find that trial counsel's ineffective assistance of counsel is evident from the record, without the necessity of a collateral proceeding.

that night would preclude or obviate any instruction, is particularly irrelevant. Aid and Abet and Conspiracy charges permeated the Indictment. (Answ.Br.37) Additionally, the jury could have found Damien guilty on the Conspiracy, Aid and Abet, and any Assault with Dangerous Weapon charges based upon *Matthew*'s actions. In fact, the Government urged such a result and the judge so instructed the jury. (ESER-818;823;824;828) Considering the Government's arguments and the ambiguous verdict forms which failed to specify whether the jury actually found Zepeda guilty as a Principal, Aider/Abettor, or Co-conspirator, it is impossible to determine under exactly which facts and theories the jury convicted Zepeda.

In United States v. Sayetsitty, 107 F.3d 1405, 1413 (9th Cir. 1997), this court found the lack of a voluntary intoxication instruction to be plain error. It expressly noted the fact that the jury *could have legitimately* convicted Defendant of second-degree murder as a principal instead of as an Aider and Abettor did not affect its analysis or render the omission of voluntary instruction permissible. Id. "[T]he proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." Id. at 1413, n.3, quoting Yates v. United States, 354 U.S. 298, 312, 77 S.Ct. 1064, 1073 (1957).

C. Zepeda's convictions should be reversed since the trial was tainted by pervasive Government vouching, instructional error, misrepresentation of evidence, and failure to investigate the conduct of a sleeping juror.

The Government apparently concedes that the prosecutor vouched for its witnesses at trial. (Answ.Br.44) Contrary to the prosecutor's contentions, however, the repeated and cumulative vouching so pervasively infected the fairness of the proceedings that a new trial is required.

The Government also acknowledges that a juror slept during Peters' testimony, but conclusorily states that since Peters' testimony favored the prosecution, it was unimportant, and no prejudice resulted to Zepeda. (Answ.Br.45-46). The Government misrepresents the holding in United States v. Barrett, 703 F.2d. 1076 (9th Cir.1983). There, the judge affirmatively considered a juror's request to be designated as an alternate because the juror claimed he'd been sleeping during the trial; however, unlike this case, Barrett's judge had "watched the jurors constantly during the trial" and affirmatively denied that anyone had been sleeping. Id. at 1082. Furthermore, the Barrett Court actually disallowed the trial judge's judicial notice of the fact that "there was no juror asleep during [ ] trial", since the trial court didn't further inquire into the matter. Id. The case was remanded to determine whether the juror was in fact sleeping during trial and, if so, whether the juror's condition prejudiced Defendant to the extent that he did

not receive a fair trial. Id. at 1083, citing United States v. Hendrix, 549 F.2d 1225,1229 (1977) (Court must determine whether the resulting prejudice amounted to a deprivation of the Fifth Amendment Due Process or Sixth Amendment impartial-jury guarantees).

The Government's contention that Peters' testimony was favorable to the Government, and thus necessarily not prejudicial to Zepeda, fails to address a crucial point. It was uncertain how long the juror was dozing and what testimony he'd missed. Earlier, Matthew Zepeda, Detective Soliz, Jeremy Zepeda, and Dr. Marc Matthews testified. The juror was possibly unwell, and may have also slept during other important testimony. An inquiry was necessary.

Finally, regarding prejudice, the Government inconsistently concedes that "[s]ubstantial evidence [independent of Matthew's testimony], establishes that Defendant used a handgun as a principal to assault Peters . . . ." (Answ.Br.47) This statement suggests that the jury *indeed* relied on evidence presented while the juror slept. Moreover, in its closing argument, the prosecutor urged that Zepeda's mistaken admission of shooting Peters in the leg sufficed for conviction of Assault with a Dangerous Weapon, rendering accurate assessment of Peters' testimony even more crucial. (ERV-876)

The prejudice to Zepeda was pervasive, particularly given the total absence of inquiry by the trial judge. Self-defense against Peters was Zepeda's his sole defense. Zepeda was actually convicted of crimes against Peters. The juror's slumber during Peters' important testimony violated Zepeda's Fifth Amendment Due Process right and Sixth Amendment right to an impartial jury.

D. Prosecutorial misconduct before and during the closing argument warrants reversal.

The Government concedes the prosecutor's repeatedly reference to the unadmitted "doing dirt" testimony. Since the matter was *not in evidence*, the Government improperly asserted in its brief that "[t]he statement appears in an FBI Report of Jeremy's November, 18, 2008 interview, provided to Defendant in discovery." (Answ.Br.51) The Government wholly ignores the argument that Prosecutor 1 improperly exposed the jury to this inadmissible evidence through impermissible innuendo during Zepeda's cross-examination. (Op.Br.62)

The Government completely fails to address the prosecutor's inflammatory mischaracterization of the events as a "conspiracy" to "ambush" in a "dirty," "three on one" attack using "two fully loaded weapons against an unarmed man and a house with women and children." (Op.Br.67). Jennifer's testimony that Zepeda "kept pointing to the left"

when talking to Stephanie couldn't reasonably support even the most attenuated inference of a "conspiracy." Appellant disputes that "the record supported reasonable inferences" to warrant the prosecutor's inflammatory mischaracterization. "[C]harges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes." Direct Sales Co. v. United States, 319 U.S. 703, 711, 63 S. Ct. 1265, 1269 (U.S.S.C. 1943).

Appellant disputes the remainder of the arguments in the Government's Answering Brief, but relies on substantial authority presented in its Opening Brief for support, and particularly argues that the "cumulative effect of the potentially damaging circumstances of this case violated [Zepeda's] due process guarantee of fundamental fairness." Taylor v. Kentucky, 436 U.S. 478, 487 & n. 15, 98 S.Ct. 1930 (1978).

CONCLUSION

Accordingly, appellant respectfully requests that the convictions and sentences be vacated and remanded for corrective action.

Respectfully submitted this 6th day of March, 2012.

/s Michele R. Moretti
Michele R. Moretti, Esq.
7671 S.W. 117th Place
Lake Butler, Florida 32054
Attorney for Appellant

Dated: March 6, 2012

REQUEST FOR ORAL ARGUMENT

Because of the complexity of the legal issues and the importance of the constitutional questions presented in this case, particularly trial counsel's waiver of Appellant's fundamental constitutional confrontation rights, Appellant respectfully requests that the Court schedule this case for oral argument.

Respectfully submitted this 6th day of March, 2012.

/s Michele R. Moretti
Michele R. Moretti, Esq.
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Lake Butler, Florida 32054
Attorney for Appellant

CERTIFICATION OF RELATED CASES

Appellant is unaware of any case before this court related to this appeal.

/s Michele R. Moretti
Michele R. Moretti, Esq.
7671 S.W. 117th Place
Lake Butler, Florida 32054
Attorney for Appellant

Dated: March 6, 2012

CERTIFICATION OF COMPLIANCE

In accordance with F.R.A.P. Circuit Rule 32, the foregoing document has been produced using double spaced, proportionately spaced, fourteen (14) point type face with a word count of 6998, comprised of an average of fewer than two-hundred eighty (280) words per page.

/s Michele R. Moretti
Michele R. Moretti, Esq.
7671 S.W. 117th Place
Lake Butler, Florida 32054
Attorney for Appellant

Dated: March 6, 2012

CERTIFICATION OF SERVICE

I, Michele R. Moretti, Esq., certify that on this day I have mailed two (2) copies of Appellant's Brief and accompanying Appendix to, A.U.S.A., Joan Ruffenach, United States Department of Justice, 2 Renaissance Square, 40 N. Central Ave., Suite 1200, Phoenix, Arizona 85004-4408, postage prepaid.

/s Michele R. Moretti
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Attorney for Appellant

Dated: March 6, 2012

ADDENDUM

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C.A. § 1153

§ 1153. Offenses committed within Indian country

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

8 U.S.C.A. § 1326

§ 1326. Reentry of removed aliens

(a) In general

Subject to subsection (b) of this section, any alien who--

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection--

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.[1] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term “removal” includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2)[2] of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other

penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) of this section or subsection (b) of this section unless the alien demonstrates that--

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

Fed. R. App. P. 28 – Briefs

Appellant's Brief. The appellant's brief must contain, under appropriate headings and
(a) in the order indicated:

(1) a corporate disclosure statement if required by Rule 26.1;

(2) a table of contents, with page references;

a table of authorities — cases (alphabetically arranged), statutes, and other authorities
(3) — with references to the pages of the brief where they are cited;

(4) a jurisdictional statement, including:

the basis for the district court's or agency's subject-matter jurisdiction, with citations
(A) to applicable statutory provisions and stating relevant facts establishing jurisdiction;

the basis for the court of appeals' jurisdiction, with citations to applicable statutory
(B) provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some
(D) other basis;

(5) a statement of the issues presented for review;

a statement of the case briefly indicating the nature of the case, the course of
(6) proceedings, and the disposition below;

a statement of facts relevant to the issues submitted for review with appropriate
(7) references to the record (see, Rule 28(e));

a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely
(8) repeat the argument headings;

(9) the argument, which must contain:

appellant's contentions and the reasons for them, with citations to the authorities and
(A) parts of the record on which the appellant relies; and

for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the
(B) discussion of the issues);

(10) a short conclusion stating the precise relief sought; and

(11) the certificate of compliance, if required by Rule 32(a)(7)

Appellee's Brief. The appellee's brief must conform to the requirements of Rule 28(a)(1)-(9) and (11), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:
(1)the jurisdictional statement;
(2)the statement of the issues;
(3)the statement of the case;
(4)the statement of the facts; and
(5)the statement of the standard of review.

Federal Rules of Criminal Procedure, Rule 52

Rule 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Federal Rules of Evidence Rule 803, 28 U.S.C.A.

Rule 803. Exceptions to the Rule Against Hearsay--Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.
(3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.
(4) Statement Made for Medical Diagnosis or Treatment. A statement that:
(A) is made for--and is reasonably pertinent to--medical diagnosis or treatment; and
(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.
(5) Recorded Recollection. A record that:
(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) Absence of a Record of a Regularly Conducted Activity. Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

(8) Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

(9) Public Records of Vital Statistics. A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) Absence of a Public Record. Testimony--or a certification under Rule 902--that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(11) Records of Religious Organizations Concerning Personal or Family History. A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Certificates of Marriage, Baptism, and Similar Ceremonies. A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and
(C) purporting to have been issued at the time of the act or within a reasonable time after it.
(13) Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.
(14) Records of Documents That Affect an Interest in Property. The record of a document that purports to establish or affect an interest in property if:
(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;
(B) the record is kept in a public office; and
(C) a statute authorizes recording documents of that kind in that office.
(15) Statements in Documents That Affect an Interest in Property. A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose--unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.
(16) Statements in Ancient Documents. A statement in a document that is at least 20 years old and whose authenticity is established.
(17) Market Reports and Similar Commercial Publications. Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.
(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet if:
(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.
If admitted, the statement may be read into evidence but not received as an exhibit.
(19) Reputation Concerning Personal or Family History. A reputation among a person's family by blood, adoption, or marriage--or among a person's associates or in the community--concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.
(20) Reputation Concerning Boundaries or General History. A reputation in a community--arising before the controversy--concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.
(21) Reputation Concerning Character. A reputation among a person's associates or in the community concerning the person's character.
(22) Judgment of a Previous Conviction. Evidence of a final judgment of conviction if:
(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;
(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.
The pendency of an appeal may be shown but does not affect admissibility.
(23) Judgments Involving Personal, Family, or General History, or a Boundary. A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:
(A) was essential to the judgment; and
(B) could be proved by evidence of reputation.
(24) [Other Exceptions.] [Transferred to Rule 807.]

Federal Rules of Evidence Rule 902, 28 U.S.C.A.

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:
(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:
(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and
(B) a signature purporting to be an execution or attestation.
(2) Domestic Public Documents That Are Not Sealed but Are Signed and Certified. A document that bears no seal if:
(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and
(B) another public officer who has a seal and official duties within that same entity certifies under seal--or its equivalent--that the signer has the official capacity and that the signature is genuine.
(3) Foreign Public Documents. A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester--or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:
(A) order that it be treated as presumptively authentic without final certification; or
(B) allow it to be evidenced by an attested summary with or without final certification.
(4) Certified Copies of Public Records. A copy of an official record--or a copy of a document that was recorded or filed in a public office as authorized by law--if the copy is certified as correct by:
(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.
(5) Official Publications. A book, pamphlet, or other publication purporting to be issued by a public authority.
(6) Newspapers and Periodicals. Printed material purporting to be a newspaper or periodical.
(7) Trade Inscriptions and the Like. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.
(8) Acknowledged Documents. A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.
(9) Commercial Paper and Related Documents. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.
(10) Presumptions Under a Federal Statute. A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.
(11) Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record--and must make the record and certification available for inspection--so that the party has a fair opportunity to challenge them.
(12) Certified Foreign Records of a Regularly Conducted Activity. In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

Or. Rev. Stat. Ann. § 40.510(1)(k)(A)

40.510 Rule 902. Self-authentication.

(1) Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(a) A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(b) A document purporting to bear the signature, in an official capacity, of an officer or employee of any entity included in subsection (1)(a) of this section, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official

capacity and that the signature is genuine.

(c) A document purporting to be:

(A) Executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation; and

(B) Accompanied by a final certification as provided in subsection (3) of this section as to the genuineness of the signature and official position of:

(i) The executing or attesting person; or

(ii) Any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation.

(d) A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with subsection (1)(a), (b) or (c) of this section or otherwise complying with any law or rule prescribed by the Supreme Court.

(e) Books, pamphlets or other publications purporting to be issued by public authority.

(f) Printed materials purporting to be newspapers or periodicals.

(g) Inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control or origin.

(h) Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(i) Commercial paper, signatures thereon and documents relating thereto to the extent provided by the Uniform Commercial Code or ORS chapter 83.

(j) Any signature, documents or other matter declared by law to be presumptively or prima facie genuine or authentic.

(k)(A) A document bearing a seal purporting to be that of a federally recognized Indian tribal government or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(B) A document purporting to bear the signature, in an official capacity, of an officer or employee of any entity included in subparagraph (A) of this paragraph, having no seal,

if a public officer having a seal and having official duties in the district or political subdivision or the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(L)(A) Any document containing data prepared or recorded by the Oregon State Police pursuant to ORS 813.160 (1)(b)(C) or (E), or pursuant to ORS 475.235 (4), if the document is produced by data retrieval from the Law Enforcement Data System or other computer system maintained and operated by the Oregon State Police, and the person retrieving the data attests that the information was retrieved directly from the system and that the document accurately reflects the data retrieved.

(B) Any document containing data prepared or recorded by the Oregon State Police that is produced by data retrieval from the Law Enforcement Data System or other computer system maintained and operated by the Oregon State Police and that is electronically transmitted through public or private computer networks under an electronic signature adopted by the Oregon State Police if the person receiving the data attests that the document accurately reflects the data received.

(m) A report prepared by a forensic scientist that contains the results of a presumptive test conducted by the forensic scientist as described in ORS 475.235, if the forensic scientist attests that the report accurately reflects the results of the presumptive test.

(2) For the purposes of this section, “signature” includes any symbol executed or adopted by a party with present intention to authenticate a writing.

(3) A final certification for purposes of subsection (1)(c) of this section may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification. [1981 c.892 §69; 1995 c.200 §2; 1999 c.674 §2; 2001 c.104 §12; 2003 c.14 §21; 2003 c.538 §3; 2005 c.22 §31; 2005 c.118 §4; 2007 c.636 §4; 2009 c.610 §10]

Ninth Circuit Model Criminal Jury Instructions
8.113 DETERMINATION OF INDIAN STATUS FOR OFFENSES COMMITTED WITHIN INDIAN COUNTRY (18 U.S.C. § 1153)

In order for the defendant to be found to be an Indian, the government must prove the following, beyond a reasonable doubt:

First, the defendant has descendant status as an Indian, such as being a blood relative to a parent, grandparent, or great-grandparent who is clearly identified as an Indian from a federally recognized tribe; and

Second, there has been tribal or federal government recognition of the defendant as an Indian.

Whether there has been tribal or federal government recognition of the defendant as an Indian is determined by considering four factors, in declining order of importance, as follows:

1. tribal enrollment;
2. government recognition formally and 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.

Comment

The question of Indian status operates as a jurisdictional element under 18 U.S.C. § 1153. *See United States v. Bruce*, 394 F.3d 1215, 1223-24 (9th Cir.2005) (describing two prong test: Indian blood and tribal or federal government recognition as an Indian). "Some blood" evidence must be from a federally recognized tribe. *United States v. Maggi*, 598 F.3d 1073, 1078-79 (9th Cir.2010). The second prong probes whether the Native American has a sufficient nonracial link to a formerly sovereign people. It is error for the court to fail to instruct the jury of the "declining order of importance" of the four factors used to determine whether there has been tribal or federal government recognition of the defendant as a Native American. *United States v. Cruz*, 554 F.3d 840, 851 n. 17 (9th Cir.2009). "Although some prefer the term 'Native American' or 'American Indian,' we use the term 'Indian' . . . as that is the term employed in the statutes at issue. . . ." *Id.*, 554 F.3d at 842 n.1.

Offenses committed within Indian country are identified in 18 U.S.C. § 1153(a) as follows: murder, manslaughter, kidnapping, maiming, a felony under chapter 109A (sexual abuse felonies), incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in 18 U.S.C. § 1365), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 (embezzlement and theft) committed

by any Indian against the person or property of another Indian or other person within Indian country.

Section 1153(b) provides: "Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense."

Whether the offense occurred at a particular location is a question of fact to be decided by the jury, with the court determining the jurisdictional question of whether the location is within Indian country as a question of law. *See United States v. Gipe*, 672 F.2d 777, 779 (9th Cir.1982).

For the enumerated offenses prosecuted under 18 U.S.C. § 1153, the court should give this instruction, and the jury instruction used for the offense should include two additional elements, as follows:

> _____ [*Number of element*], the ____ [*specify offense*] occurred at a place within the _____ [*name of the alleged Indian Country where the offense occurred*], which I instruct you is in Indian Country.
>
> _____ [*Number of element*], the defendant is an Indian.