C.A. No. 11-10244

D. Ct. No. CR-10-8049-PCT-DGC

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDGAR MIKE ALVIREZ, JR.

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLEE

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III. STATEMENT OF JURISDICTION

A. District Court Jurisdiction

The district court had subject matter jurisdiction pursuant to 18 U.S.C. §§ 3231 and 1153 based on an indictment charging Defendant-Appellant Alvirez, Jr. (Defendant) with offenses against the United States. (CR 1; ER 18.)[1]

B. Appellate Court Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 based on the district court's entry of final judgment on May 27, 2011. (CR 112; ER 347-350.)

C. Timeliness of Appeal

Defendant filed a notice of appeal on May 13, 2011. (CR 108; ER 345-346.) The notice was timely pursuant to Fed. R. App. P. 4(b).

D. Bail Status

Defendant is in the custody of the Bureau of Prisons serving a 37 month sentence of imprisonment with a projected release date of March 17, 2013.

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[1] "CR" refers to the Clerk's Record and will be followed by the pertinent document number. "RT" refers to the Reporter's Transcript and will be followed by a date and relevant page number. "ER" refers to the Excerpts of Record and will be followed by the pertinent page number. "SER" refers to the Supplemental Excerpts of Record and will be followed by the pertinent page number.

IV. ISSUES PRESENTED

A. Whether as a matter of law the Colorado River Indian Tribe is a federally-recognized tribe and whether Defendant's Certificate of Indian Blood documenting his enrollment in that tribe was sufficient evidence for a reasonable jury to conclude that Defendant is an Indian.

B. Whether the district court erred in admitting the Certificate of Indian Blood to prove Defendant's Indian status, when (A) Defendant waived his claim by affirmatively agreeing that the Certificate of Indian Blood was admissible under Federal Rule of Evidence 902(1) as a self-authenticating document and (B) the Certificate of Indian Blood was self-authenticating under Rule 902(1) because a political subdivision of the United States issued it, and the Certificate had the United States' seal affixed to it with a proper attestation.

C. Whether the district court abused its discretion by denying Defendant's motion in limine to reserve its ruling on admitting evidence that a polygraph examination was conducted until trial.

D. Whether the district court erred in finding a 7-level increase to the Offense Level for permanent or life-threatening bodily injury when (A) Defendant waived his claim by affirmatively agreeing to the calculated guideline range and (B) the victim (1) required nine screws and a plate to repair the ankle on which Defendant stomped, and (2) continues to suffer pain and lack of balance from the assault.

V. STATEMENT OF THE CASE

A. Nature of the Case; Course of Proceedings.

On March 23, 2010, a federal grand jury indicted Defendant on one count of assault resulting in serious bodily injury, in violation of 18 U.S.C. §§ 1153 and 113(a)(6). (CR 1; ER 18.) The indictment alleged that Defendant was an Indian and that this crime occurred on the Hualapai Indian Reservation. (CR 1; ER 18.) Defendant was tried by jury and found guilty of assault resulting in serious bodily injury (count 1). (RT 1/26/11 397; CR 97.)

The United States Probation Office (USPO) prepared a presentence report and calculated Defendant's total offense level as 21 and his criminal history as category I.[2] (PSR ¶¶ 22, 26.) The PSR calculated Defendant's total offense level by applying a 7-level enhancement for permanent bodily injury because of the damage to the victim's joint and because she is likely to develop osteoarthritis. (PSR ¶¶ 9, 16.) The PSR stated that the applicable statutory provisions and the sentencing guidelines provided for a term of 37 to 46 months' imprisonment. (PSR ¶ 53.) The PSR recommended that the district court sentence Defendant to 37 months' imprisonment followed by three-year term of supervised release. (PSR p. 14.)

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[2] Pursuant to Ninth Circuit Rule 30-1.10, Defendant submitted a copy of the presentence report under seal. "PSR" refers to the presentence report and will be followed by the relevant paragraph or page number(s).

On May 9, 2011, Defendant was sentenced. Prior to imposing sentence, the district court asked Defendant:

> THE COURT: Do you have any objections to the presentence report?
>
> MS. SPENCER: I have no objections. The only concern was the appearance of the name Buddy. My client has no idea where that name came from. Page 2, under aliases. That's the only concern.
>
> . . .
>
> THE COURT: With an offense level of 21 and criminal history category of I, the range of incarceration under federal sentencing guidelines is 37 to 46 months; two to three years of supervised release; a fine range of 7500 to $75,000. Restitution is calculated in the amount of $12,748.05. And a special assessment of $100 is required for the guilty verdict.
>
> Do you agree those are the relevant ranges.
>
> MS. SPENCER: Yes, Your Honor.

(RT 5/9/11 3-4; ER 331-335.)

The district court adopted the guideline computations within the PSR and sentenced Defendant to a 37-month term of imprisonment followed by a three-year term of supervised release. (CR 107, 109, & 112; RT 5/9/11 8-11; ER 13-15, 339-342 & 347-350.) Defendant never objected to the 7-level enhancement for permanent or life-threatening injury.

B. Statement of Facts.

1. *The Assault of Drametria Havatone.*

On November 3, 2009, Defendant, Brittany Davis (Defendant's girlfriend), Denisha Siyuja, and the victim, Drametria Havatone, were at the home of Defendant's mother. (RT 1/25/11 194-199; ER 141-146.) Everyone was intoxicated, an argument ensued, and Ms. Alvirez ordered the victim out of the home. (RT 1/25/11 161, 195, 199; ER 108, 142, 146.) When the victim did not immediately leave, she was kicked, punched and dragged out of the house by her two feet. (RT 1/25/11 161, 163-164; ER 108, 110-111.) As the victim lay in the front yard with her foot on the concrete pavement, Defendant stomped on her leg. (RT 1/25/11 201-202, 253; ER 148-149, 195.) The victim heard the crack and felt the rush of extreme pain. (RT 1/25/11 202, 223; ER 149, 170.) Unable to walk, she crawled on one knee and two hands out of the gateway. (RT 1/25/11 131, 171, 221, 224; ER 78, 118, 168, 171.) Lying in the road and in obvious pain, the victim cried out, "They jumped me." (RT 1/25/11 133; ER 80.)

2. *The Injury.*

The victim's ankle had a "bad break" and was fractured at two locations: the tibia and the fibula. (RT 1/26/11 256-257; ER 198-199.) The fracture was unstable and, within the spectrum of ankle fractures generally, severe. (RT 1/26/11 261;

ER 203.) It was the type of injury that causes extreme physical pain. (RT 1/26/11 260; ER 202.)

The victim required surgery to stabilize the fracture by realigning the bones into an anatomic position. (RT 1/26/11 261; ER 203.) The surgical procedure was performed by Dr. Emmett McEleney, an orthopedic surgeon. (RT 1/26/11 246-247, 261; ER 188-189, 203.) He inserted surgical-grade steel into the victim's ankle. (RT 1/26/11 262; ER 204.) In total, nine screws and a plate were inserted for stability. (RT 1/26/11 262; ER 204.) The victim may have the hardware in her ankle for the rest of her life. (RT 1/26/11 266; ER 208.) If the hardware is intolerable, it will be removed. (RT 1/26/11 266; ER 208.) That will require another surgical procedure. (RT 1/26/11 266; ER 208.)

The fracture caused the victim pain in cold weather and poor balance. (RT 1/25/11 206-207; ER 153-154.) The victim lost her balance and fractured the opposite ankle approximately one year after the assault. (RT 1/25/11 192-193; ER 139-140.) Long-term effects to this type of fracture are very common. (RT 1/26/11 264; ER 206.) When a fracture courses into a joint, as here, patients often develop posttraumatic osteoarthritis. (RT 1/26/11 264-265; ER 206-207.) This leads to arthritis at an earlier stage than would otherwise occur within as short a period as two to three years. (RT 1/26/11 265; ER 207.) The cardinal signs are pain,

stiffness, weakness, swelling. (RT 1/26/11 265; ER 207.) Individuals that suffer this type of fracture may also develop weakness that leads to balance issues related to insufficient strength. (RT 1/26/11 265; ER 207.)

3. *The Assault Investigation.*

Hualapai Nation Police Department (HNPD) Officer Williams responded to the scene. (RT 1/25/11 131; ER 78.) Officer Williams spoke with Defendant. (RT 1/25/11 135; ER 82.) Defendant stated that the victim arrived at Ms. Alvirez's home already beaten. (CR 72; ER 20.) Officer Williams turned the investigation over to Federal Bureau of Investigations (FBI) Special Agent (SA) Margo Barber and HNPD Deputy Chief Sam Tsosie. (RT 1/25/11 137; ER 84.)

On November 9, 2010, by SA Barber and Deputy Chief Tsosie re-interviewed Defendant outside his home. (CR 63; RT 1/13/11 59-60; ER 26-28; SER 68-69.) He was not handcuffed, placed under arrest, or read his *Miranda* warnings. (CR 63; RT 1/26/11 329; ER 26-28, 271.) Defendant admitted to dragging the victim out of the home by her leg but denied, however, injuring her leg. (CR 63; 1/13/11 60; ER 26-28; SER 69.) He stated that he did not believe that the force he used to pull the victim out of the home by her leg was sufficient to injure her leg. (CR 63; ER 26-28.) He also denied jumping on it or kicking or hitting it. (CR 63; ER 26-28.) At the conclusion of the interview, Defendant was asked whether he would be willing

to submit to a polygraph examination. (CR 63; RT 1/13/11 61; ER 28; SER 70.) Defendant advised that he was willing to submit to an examination if requested. (CR 63; RT 1/13/11 47; ER 28, 46; SER 56.)

On January 26, 2010, Defendant appeared for a polygraph examination by FBI SA Brian Fuller. (RT 1/13/11 47-48; ER 46; SER 56-57.) Prior to the polygraph examination, Defendant was advised of his *Miranda* rights as well as his right refuse the polygraph examination. (RT 1/13/11 9-12, 48; RT 1/26/11 275-281; ER 217-223; SER 18-21, 57.) Defendant signed two forms waiving these rights. (RT 1/13/11 9-12; RT 1/26/11 275-281; ER 217-223; SER 18-21.) He was then interviewed before the polygraph examination, and he stated that Ms. Alvirez, Ms. Davis, Ms. Siyuja, the victim and he were drinking when Ms. Alvirez asked the victim to leave. (CR 63; RT 1/26/11 284; ER 30-32, 226.) The victim did not leave and an argument ensued. (CR 63; RT 1/26/11 284; ER 30-32, 226.) According to Defendant, Ms. Davis tried to pull the victim off the couch. (CR 63; RT 1/26/11 285; ER 30-32, 227.) The victim fell to the floor. (CR 63; RT 1/26/11 285; ER 30-32, 227.) Ms. Davis then hit the victim a few times and asked Defendant to assist in getting the victim out the door. (CR 63; RT 1/26/11 285; ER 30-32, 227.) Defendant grabbed one of the victim's legs and with Ms. Davis' help dragged her outside. (CR 63; RT 1/26/11 285; ER 30-32, 227.) Once outside, Defendant told Ms. Davis and Ms. Siyuja to go back inside

because he did not want the police to be called. (CR 63; RT 1/26/11 285; ER 30-32, 227.) The victim picked up a rock and threw it at the door but did not hit anyone. (CR 63; RT 1/26/11 285; ER 30-32, 227.) Ms. Siyuja picked up the same rock and threw it at the victim, striking her. (CR 63; RT 1/26/11 285; ER 30-32, 227.) Defendant claimed, however, that he did not jump on the victim's leg and that he did not break it. (CR 63; ER 30-32.)

Defendant then took the polygraph examination and SA Fuller advised him of its results. (CR 63; RT 1/13/11 18; ER 32; SER 27.) SA Fuller interviewed Defendant again. (CR 63; RT 1/13/11 18; ER 32; SER 27.) Defendant again denied jumping on the victim's leg, stating that he could not remember. (CR 63; ER 32.) After further discussion, Defendant admitted that he stepped hard on the victim's leg with both feet. (CR 63; RT 1/13/11 18; RT 1/26/11 283; ER 32-33, 225; SER 27.) He stated that after he stepped on her leg with both feet, the victim could not get up and started to crawl away. (CR 63; RT 1/26/11 287; ER 32-33, 229.) He stated that he was sorry because the victim's family was going to beat him up. (CR 63; RT 1/26/11 286; ER 32, 228.) SA Fuller typed Defendant's statement into a computer as Defendant provided it. (CR 63; RT 1/13/11 19-20; RT 1/26/11 287; ER 229; SER 28-29.) SA Fuller reviewed the typed statement with Defendant and

Defendant signed it. (CR 63; RT 1/13/11 20; RT 1/26/11 287-290; ER 229-232; SER 29.)

After the interview, SA Barber, the presence of SA Fuller and Deputy Chief Tsosie, specifically questioned Defendant about some of the statements he made to SA Fuller. (CR 63, RT 1/13/11 52-53; RT 1/26/11 291-293; ER 34-35, 233-235; SER 61-62.) Defendant denied that he "jumped" on the victim's leg, but admitted that he stepped hard on it with both feet and bounced on it. (CR 63; RT 1/13/11 53; RT 1/26/11 293; ER 34-35, 235; SER 62.) Defendant was angry at the victim and "just had a bad night." (CR 63, RT 1/26/11 294; ER 34-35, 236.) Defendant stated that when he assaulted the victim, no one else was present and the prior physical altercation had ended. (CR 63; RT 1/26/11 293-294; ER 34-35, 235-236.) Defendant stated that the victim was lying outside on the ground partially on the walkway when the assault occurred. (CR 63; RT 1/26/11 293-294; ER 34-35, 235-236.)

4. *Defendant's Motion in Limine to Preclude Polygraph.*

Before trial, Defendant moved to preclude any mention that he took a polygraph exam on January 26, 2010. (CR 55; SER 5-9.) The government did not dispute that the substantive exam itself (questions and answers) was inadmissible. (CR 64; SER 1-4.) The government argued, however, that the fact that a polygraph was given was admissible as vital background information to explain the purpose of the interviews at the HNPD, and Defendant's sudden reversal about causing injury

to the victim's ankle. (CR 64; SER 1-4.) The government argued that the operative fact that a polygraph examination was arranged and given was relevant to (1) telling the complete story about why the defendant changed his story and (2) undermining Defendant's voluntariness argument. (CR 64; SER 1-4.) But the government informed the court that it did not intend to elicit evidence that the polygraph examination was conducted unless Defendant opened the door by introducing evidence and argument that law enforcement badgered a mentally-impaired person into confessing or to otherwise attack the reliability, credibility, or truth of the manner and means by which the agents took the statement. (CR 64; RT 1/13/11 81-82; ER 49-50; SER 1-4, 90-91.)

On January 13, 2011, the district court considered Defendant's motion in limine regarding the polygraph examination. (RT 1/13/11 81; ER 49; SER 90.) The district court acknowledged that post - *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), evidence of a polygraph examination may be admissible. (RT 1/13/11 83; ER 51; SER 92.) Nevertheless, the district court expressed concern that the jury would infer the results of the polygraph examination if such evidence were admitted at trial. (RT 1/13/11 84; ER 52; SER 93.) The district court stated that it was "leery of the notion that it ought to be mentioned at all." (RT 1/13/11 84; ER 52; SER 93.) However, the district court stated that if the government believes

that it should be mentioned in light of the evidence presented, the parties would have to confer outside the presence of the jury about how the evidence should be presented to not imply the result. (RT 1/13/11 84; ER 52; SER 93.) For this reason, the district court stated that it could not decide that day whether it would allow the government to mention the polygraph in response to defense questioning or an argument that was made. (RT 1/13/11 84; ER 52; SER 93.)

Defense counsel then asked for guidance about what opening the door meant. (RT 1/13/11 85; ER 53; SER 94.) The district court answered:

> Well, I think that is a fair question. I've assumed that one way the defense might approach this is to say in opening, or at some point, in effect to jury, Mr. Alvirez was interviewed on the 4th, he said he didn't do it; he was interviewed on the 9th, he said he didn't do it; he was interviewed again on the 26th at the police station with three officers present and only after being in a room with an officer alone for an hour and a half did he finally change his story.
>
> . . .
>
> I don't think that can limit you, Mr. Williams and say you can't make the argument that just suggested. It appears if you do, Ms. Belt's going to be at the side bar saying, " I want to mention the polygraph." And frankly, having not been in the courtroom and heard it asked and see how it comes out to the jury, don't know today what I would do.
>
> . . .

> I think in fairness defense should be able to make the argument, but in fairness government should be able to give an accurate picture of what happened at station and how we do that without prejudicing the jury is the tough issue.

(RT 1/13/11 85-88; ER 54-56; SER 94-97.)

Defense counsel then argued to the district court that it would only be cross-examining the government's witnesses on information that the government had elicited. (RT 1/13/11 88-89; ER 56-57; SER 94-97.) In response, the government explained that it would not introduce evidence of the first two interviews with Defendant and would only admit his statements from the third interview. (RT 1/13/11 91; ER 59; SER 100.) The government further argued that it would be hearsay for Defendant to elicit his out-of-court denials. (RT 1/13/11 91; ER 59; SER 100.) The district court agreed:

> THE COURT: So what you're saying Mr. Williams, that if Ms. Belt never mentions the interviews, you may bring them out and seek to bring out the fact that he denied responsibility precisely so that she can argue she came back a third time to see if she could get him to change his story.
>
> MR. WILLIAMS: Precisely.
>
> THE COURT: And if do you that, if you in effect suggest to the jury that the reason for the third interview was to bear down and get him to change his story, that seems to be to get a lot closer to suggesting the relevancy of why that third interview occurred.

> I know your theory is that the whole reason for the polygraph was to bear down and get him to change his story. But prohibiting the government from explaining exactly why they requested or he agreed to the third interview after you're the one that set up the fact there's a third interview makes it a closer question.
>
> I think all I can do it this today. I've already indicated that I think it's a rare case where polygraph should be mentioned at all. My instinct going in will be to avoid mention of polygraph. If there's a fair way for the government to make its arguments without it being mentioned then that's the way we're going to go.
>
> Whether or not something happens in the trial that persuades me this is the rare case where it should be mentioned I can't say. But my instinct is to avoid the mention of polygraph going in.
>
> The government is going to steer a pretty wide path around it. If I think it's the defense that walks right up to the edge and there is this sort of hanging question in the room why was the third interview held, it will be a closer question for me as to whether or not it should be used.
>
> But by saying that I'm not intending to limit in any way what the defense can do at trial. You have the right to present whatever defense you can.
>
> So my instinct is it shouldn't come in. But I can't rule today it won't because I don't know how it will all play out in the courtroom.

(RT 1/13/11 93-94; ER 61-62; SER 102-103.) For that reason, the district court denied the motion in limine with the express understanding that the word "polygraph"

would not be mentioned in the courtroom without a discussion outside the presence of the jury pertaining to that issue. (RT 1/13/11 94; ER 62; SER 103.)

5. *Proof of Indian Status.*

On January 25, 2011, the trial began. (CR 95; ER 358.) To prove Indian status, the government offered Defendant's Certificate of Indian Blood documenting his enrollment with the Colorado River Indian Tribe. (RT 1/25/11 146; ER 93, 181.) Defendant objected to the admission of the document. (RT 1/25/11 146; ER 93.) The following exchange ensued:

> MS. BELT: At this time the government moves to admit Government's Exhibit Number 4.
>
> MS. SPENCER: I would object with respect to this witness.
>
> THE COURT: Your basis for the objection?
>
> MS. SPENCER: Hearsay and he's not affiliated in any way with the Colorado River Indian Tribe who generated this document.
>
> THE COURT: Your response?
>
> MS. BELT: This is self-authenticating, this document.
>
> THE COURT: Give me just a minute, please. Would you hand me a copy of the exhibit, please. Ms. Spencer, is there a particular reason you think this does not fall within Rule 902(1)?
>
> MS. SPENCER: I'm sorry, Your Honor?

> THE COURT: Is there a particular reason you think this does not fall within Rule 902(1)?
>
> MS. SPENCER: No, Your Honor.

(RT 1/25/11 146; ER 93.) The district court overruled Defendant's objection and admitted the Certificate of Indian Blood into evidence. (RT 1/25/11 146; ER 93, 181.)

The government also offered testimony that Defendant's mother lived on the Hualapai reservation. (RT 1/25/11 195; ER 142.) The victim also testified that Defendant was "a Hualapai member of our reservation." (RT 1/25/11 196; ER 143.) Although no evidence showed that Defendant was an enrolled member of the Hualapai tribe, his "Certificate of Indian Blood" listed his quantum of Hualapai blood as 3/8. (RT 1/25/11 147; ER 94, 181.)

6. *Testimony Regarding Defendant's Interviews*.

During the course of trial, the government called SA Fuller in its case-in-chief, but did not elicit any information regarding his polygraph examination of Defendant. (RT 1/26/11 273-296; ER 215-238.) SA Fuller was cross-examined about the circumstances surrounding his interview with Defendant, including that they were alone with the door closed and that the interview was not tape-recorded or video-recorded. (RT 1/26/11 299, 306; ER 241, 248.)

Because the government chose not to present SA Barber as a witness at trial, Defendant chose to call her as a witness. (RT 1/26/11 313; ER 255.) Defendant introduced evidence that SA Barber met with Defendant on November 9, 2009 and that it was not recorded and she did not read him *Miranda* rights. (RT 1/26/11 327-329; ER 269-271.)

VI. SUMMARY OF ARGUMENTS

A. The government established federal criminal jurisdiction under 18 U.S.C. § 1153 by showing that Defendant is an Indian and that his tribe is recognized by the federal government. Defendant is an enrolled member of the Colorado River Indian Tribe, which is a federally-recognized tribe. Therefore, this threshold jurisdictional inquiry is satisfied. In addition, Defendant's Certificate of Indian Blood proved both prongs of the Indian status test because it documented his degree of Indian blood and demonstrated that he has tribal recognition of his status as an Indian.

B. Although Defendant contends that the district court erred by admitting the Certificate of Indian Blood as a self-authenticating document under Federal Rule of Evidence 902(1), this Court should not consider his contention because he waived it for appellate review by affirmatively agreeing at trial that the Certificate was properly admitted under Rule 902(1). Moreover, regardless whether Defendant waived this claim, the district court properly admitted the document as self-authenticating because the United States through its political subdivision–the Hualapai Indian Tribe–placed its seal on the Certificate with a signature attesting to its authenticity.

C. The district court did not abuse its discretion when, prior to trial, it denied Defendant's motion in limine to preclude evidence that a polygraph examination was administered and reserved its ruling in light of arguments by Defendant attacking the

circumstances under with the statement was taken. The operative fact that a polygraph examination is administered is admissible at trial if relevant and so long as its results are not admitted.

D. Although Defendant contends that the district court erred by applying a 7-level enhancement for permanent injury, this Court should not consider his contention because he waived it for appellate review by affirmatively agreeing to the guideline calculation in the PSR that applied this enhancement. Moreover, regardless whether Defendant waived this claim, the district court properly applied the enhancement because the victim was permanently injured by Defendant when he stomped on her ankle. As a result, the victim underwent surgery and has nine screws and a plate inserted in her ankle. This hardware may have to be removed in the future and require another surgical operation. The victim suffers continued pain in her ankle as a result and has poor balance.

VII. ARGUMENTS

A. The Status of the Colorado Indian Tribe as a Federally-Recognized Tribe Was a Matter of Law for the District Court to Determine and Defendant's Certificate of Indian Blood Establishing His Tribal Enrollment Was Sufficient Evidence for a Reasonable Jury to Determine Defendant's Indian Status.

[Defendant's Argument I]

1. Standard of Review.

Whether a defendant is an Indian is a mixed question of fact and law and is determined by the jury. *See United States v. Bruce*, 394 F.3d 1215, 1218 (9th Cir. 2005). Whether the defendant's tribe is a federally-recognized Indian tribe is a question of law that is determined by the court. *See United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974) (deciding as a matter of law that membership in an Indian tribe whose federal recognition has been terminated cannot confer federal criminal jurisdiction under § 1153).

Although jurisdictional questions are ordinarily reviewed *de novo*, when a defendant brings a motion for acquittal challenging the sufficiency of the evidence underlying a jurisdictional element, this Court reviews the evidence in the light most favorable to the government to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United*

States v. Cruz, 554 F.3d 840, 843-44 (9th Cir. 2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

2. Argument.

In this case, the government asserts federal criminal jurisdiction for the charges against Defendant under the Major Crimes Act, 18 U.S.C. § 1153. (CR 1; ER 18.) This statute provides federal criminal jurisdiction for certain crimes committed by Indians in Indian country. *United States v. Maggi*, 598 F.3d 1073, 1075 (9th Cir. 2010). "[T]he defendant's Indian status is an essential element of a § 1153 offense which the government must allege in the indictment and prove beyond a reasonable doubt." *Bruce*, 394 F.3d at 1229. Thus, "the question of who is an Indian bears significant legal consequences." *Id*. at 1222.

a. *Applying a Two-Prong Test, the Jury Determines a Defendant's "Indian Status*."

The term "Indian" is not defined in § 1153, but instead has been explained in case law. *Maggi*, 598 F.3d at 1075. The generally accepted test for Indian status considers (1) the degree of Indian blood, and (2) tribal or government recognition as an Indian. *Bruce*, 394 F.3d at 1223. The first prong requires the presence of some Indian blood indicating tribal ancestry. *Id.* The second prong of the test "probes whether the Native American has a sufficient non-racial link to a formerly sovereign

people." *Id.* at 1224 (quoting *St. Cloud v. United States*, 702 F. Supp. 1456, 1461 (D. S.D. 1988)). As this Court explained in *Bruce*:

> When analyzing this [second] prong, courts have considered in declining order of importance, evidence of the following: (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.

Id. (citing *United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir. 1995) (citing *St. Cloud*, 702 F. Supp. at 1461)). The jury resolves any factual disputes arising under the two prongs of the *Bruce* test to determine the defendant's Indian status. *See Bruce*, 394 F.3d at 1223 (defendant claiming Indian status under § 1152 must come forward with sufficient evidence to permit a fact-finder to decide the issue in her favor); *Maggi*, 598 F.3d 1082-83 (Indian status presents question for jury). Such factual issues could include the degree of a defendant's Indian blood and the nature and extent of any contacts with an Indian tribe, such as whether the defendant is an enrolled member of the tribe, resides on the reservation, receives benefits as a result of Indian status, or participates in Indian social life. *See e.g., Bruce*, 394 F.3d 1218; *Cruz*, 554 F.3d at 846-47; *Maggi*, 598 F.3d 1082-83.

b. *The Court Determines as a Matter of Law Whether the Defendant's Tribe is Federally Recognized.*

As "an important overlay to the *Bruce* test," however, the defendant "must have a sufficient connection to an Indian tribe that is *recognized by the federal government"* to be considered an Indian for purposes of federal criminal jurisdiction under § 1153. *Maggi*, 598 F.3d at 1078. This Court has stated this "threshold question" as whether "the Indian group with which [the defendant] claims affiliation [is] a federally acknowledged Indian tribe?" *LaPier v. McCormick*, 986 F.2d 303, 304-05 (9th Cir. 1993).

In *LaPier*, the Court raised this issue *sua sponte* and decided it as a matter of law. *See id.* at 304 (applying a "different analytical test" than the district court to determine whether the defendant was an Indian for purposes of federal criminal jurisdiction). The Court explained that "[f]ederal legislation treating Indians distinctively is rooted in 'the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized tribes.'" *Id.* at 305. (citations omitted). "It is therefore the existence of the special relationship between the federal government and the tribe in question that determines whether to subject the individual Indians affiliated with that tribe to exclusive federal

jurisdiction for crimes committed in Indian country." *Id.* (citing *United States v. Antelope*, 430 U.S. 641, 646-47 n.7 (1977); *Heath*, 509 F.2d at 19).

The Court further explained that "[t]o determine whether that special relationship exists — whether the United States recognizes a particular tribe — we defer 'to the political departments.'" *Id.* (citations omitted). Specifically, the Court deferred to the BIA list of federally-recognized Indian tribes, noting that this list is published in the Federal Register pursuant to 25 C.F.R. § 83.2, and stating that "[a]bsent evidence of its incompleteness, the BIA list appears to be the best source to identify federally acknowledged Indian tribes whose members or affiliates satisfy the threshold criminal jurisdiction inquiry."[3] *Id.* at 305.

In *LaPier*, the Court cited the Federal Register and found as a matter of law that the tribe in which the defendant asserted membership was not a federally-recognized tribe and, therefore the defendant was not an Indian for purposes of criminal jurisdiction. *Id.* at 306 (citing 53 Fed. Reg. 52,829 (1988)). In *Heath*, which

[3] *See also Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1057 (10th Cir. 1993) (explaining that in 1978 the Department of the Interior published regulations establishing procedures for federal recognition of tribes and requiring that BIA publish the list of recognized tribes in the Federal Register, and thus federal regulations eclipsed the limited historical circumstances in which judicial determinations of tribal status were appropriate); Fed. R. Crim. P. 6(i) (defining an "Indian tribe" as a tribe recognized by the Secretary of the Interior on a list published in the Federal Register).

was cited with approval in *LaPier*, when the issue of tribal federal recognition was raised for the first time on appeal, the Court cited 25 U.S.C. § 564, which terminated federal supervision and special status for Klamath Indians, and held as a matter of law that a member of the terminated Klamath tribe could not be subject to federal criminal jurisdiction under § 1153. *Heath*, 509 F.2d at 19.

In *Maggi*, the Court rejected the argument that the *Bruce* test superseded the requirement in *LaPier* that a defendant be a member of a federally-recognized tribe. 598 F.3d at 1079 ("*LaPier*'s holding that Indian status requires affiliation with a federally-recognized tribe remains good law and is complemented by the *Bruce* test, which presupposes that 'tribal or government recognition as an Indian' means as an Indian from a federally recognized tribe.") The Court considered consolidated appeals and found that one of the defendants, Mann, was a member of a tribe that was not federally recognized and therefore was not subject to federal criminal jurisdiction under § 1153. *Id.* at 1075, 1078. The Court cited *LaPeir* to support this finding. *Id.*

Thus, in *LaPier*, *Heath*, and *Maggi*, this Court decided as a matter of law whether the defendant's tribe was a federally-recognized Indian tribe. *See LaPier*, 986 F.2d at 306; *Heath*, 509 F.2d at 19*; Maggi*, 598 F.3d at 1079; *see also Western Shoshone Business Council*, 1 F.3d at 1057 (concluding that the tribe's absence from the BIA list was "dispositive," and because the tribe was not on BIA list, it was not

a federally-recognized tribe and BIA was not required to approve the tribe's contracts under 25 U.S.C. § 81). These cases do not suggest that the issue of whether a tribe is federally recognized should be decided as a question of fact for the jury.

The jurisdictional issue whether a defendant has Indian status based on sufficient affiliation with an Indian tribe and whether that Indian tribe is federally-recognized is analogous to the jurisdictional issue whether a crime occurred in a particular location and whether that location is in Indian country. *See United States v. Gipe*, 672 F.2d 777, 779 (9th Cir. 1982) (whether offense occurred at a particular location is question of fact decided by the jury, and whether location is within Indian country is decided by court as a matter of law).[4] In both instances, the jurisdictional issue presents a factual issue (whether the defendant has Indian status and where a crime occurred) and also presents a legal issue for the court (whether the defendant's tribe is federally recognized and whether the location of the crime is in Indian country).

Thus, federal criminal jurisdiction under § 1153 presents questions of fact for the jury (Indian status based on blood and tribal affiliation) and questions of law for

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[4] *See also United States v. Jones*, 480 F.2d 1135, 1138 (2d Cir. 1973) ("Counsel have not cited, nor have we found, a case where it has been contended that the question of acceptance of jurisdiction or the location of territorial boundaries should be determined by a jury. There are many cases in which it is clear that these questions have been determined by the court.").

the court (tribal status as federally-recognized tribe). The jury must resolve any factual disputes arising under the two-prongs of the *Bruce* test to determine the *defendant's status*. *Bruce*, 394 F.3d at 1223; *Maggi*, 598 F.3d 1082-83. And the court must determine as a matter of law the *tribe's status*, that is whether the defendant's tribe is a federally-recognized Indian tribe. *See LaPier*, 986 F.2d at 306; *Maggi*, 598 F.3d at 1079; *Heath*, 509 F.2d at 19.

c. *The Colorado River Indian Tribe Is a Federally-Recognized Tribe*.

In this case, the Defendant's Certificate of Indian Blood was admitted into evidence. (RT 1/25/11 146; ER 93, 181.) This certificate documented Defendant's status as an enrolled member of the Colorado River Indian Tribe and his degree of Indian blood, consisting of a 1/4 Colorado River Indian Tribe, 3/8 Hualapai tribe, and 1/8 Havasupai tribe. (RT 1/25/11 147; ER 94, 181.) The Colorado Indian Tribe is included in the BIA's comprehensive listing of Indian tribes recognized by the federal government. 74 Fed. Reg. 40218-02, 40220 (Aug. 11, 2009). Thus, the district court could determine as a matter of law that the Colorado River Indian Tribe is a federally-recognized tribe and was not required to submit this issue to the jury.

Defendant did not argue at trial that the Colorado River Indian Tribe is not a federally-recognized tribe, nor does he make that argument on appeal. Instead,

Defendant assumes that whether an Indian tribe is federally recognized is a question of fact for the jury to determine. (Op. Br. at 23.) Defendant argues that the undisputed evidence that Defendant was an enrolled member of the Colorado River Indian Tribe was insufficient evidence for the jury to determine that the Colorado River Indian Tribe is a federally-recognized Indian tribe. (Op. Br. at 23.)

A jurisdictional issue that may be determined with certainty by reference to a published and authoritative list — whether a tribe is federally recognized — cannot be submitted to a jury to be decided as a disputed factual issue. Indeed, if a defendant is charged under § 1153, but he is not affiliated with a federally-recognized tribe, he is entitled to the protection of Fed. R. Crim. P. 12(b) to file a pretrial motion to dismiss the indictment for lack of jurisdiction as a matter of law. He is also entitled to the protection of *de novo* review of this issue on appeal, without deference to potentially faulty factfinding. *See Heath,* 509 F.2d at 19. If the issue of tribal federal recognition were considered a factual issue for a jury to determine, defendants would be stripped of these protections and could be subjected to prosecutions and even convictions based on faulty assertions of federal criminal jurisdiction.

The status of an Indian tribe, that is whether it is federally recognized, is *not* subject to dispute and is not a question of fact to be determined by weighing evidence and making credibility determinations. Instead, as this Court explained in *LaPier*, it

is an issue on which the courts defer to the political departments of government, and it is resolved by reference to the BIA's published list of federally-recognized tribes. *LaPier*, 986 F.2d at 305. The only determination is whether the tribe is included on the BIA list. The court makes this determination and the jury has no role.

As set forth above, whether a *defendant* has Indian status through Indian blood and tribal recognition is a separate issue from whether a *tribe* has federal recognition. *See supra* pp. 20-26. Furthermore, even if the district court erroneously found that tribal federal recognition is a question of fact for the jury, this is an issue of law that this Court reviews *de novo. See LaPier*, 986 F.2d at 306; *Maggi*, 598 F.3d at 1079; *Heath,* 509 F.2d at 19. Thus, deferring to the BIA list of recognized tribes, as *LaPier* directs, this Court may determine as a matter of law that the Colorado River Indian Tribe is a federally-recognized tribe. *LaPier*, 986 F.2d at 305; 74 Fed. Reg. 40218-02, 40221(Aug. 11, 2009).

Therefore, any error by the district court was in failing to instruct the jury that as a matter of law the Colorado River Indian Tribe is a federally-recognized tribe; but any such error must be considered harmless because whether the Colorado River Indian Tribe is a federally-recognized Indian tribe is beyond dispute. Defendant did not dispute this issue at trial, and "[t]here is no reasonable possibility that failure to instruct the jury on the jurisdictional element of the offense affected the verdict." *See*

United States v. Warren, 984 F.2d 325, 328 (9th Cir. 1993) (harmless error for court to fail to instruct jury that Army barracks was within the special jurisdiction of the United States, under 18 U.S.C. § 7(3), when evidence was undisputed that assault occurred on Army base.)

d. *Defendant's Certificate of Blood and Tribal Enrollment Provided Sufficient Evidence of His Indian Status*.

As set forth above, Defendant's status as an Indian is determined by a two-prong test that considers (1) his degree of Indian blood and (2) whether he has tribal or government recognition as an Indian. *See Bruce*, 394 F.3d at 1223. At trial, the government introduced Defendant's Certificate of Indian Blood, which documented his degree of Indian blood as 3/8 Hualapai, 1/4 Colorado River Indian Tribe, and 1/8 Havasupai and established the first prong of the test for Indian status. (RT 1/25/11 146-147; ER 93-94, 181.) While Defendant argues that the certificate was insufficient to establish that his Indian blood was from a federally-recognized tribe (Op. Br. at 23), he does not challenge the sufficiency of the certificate to establish that he has some Indian blood as the first prong of the Indian status test requires. *See Bruce*, 394 F.3d at 1223.

Defendant's Certificate of Indian Blood also established the second prong of the test — tribal or government recognition as an Indian — by documenting his

status as an enrolled member of the Colorado River Indian Tribe. (RT 1/25/11 145; ER 92, 181.) Courts have considered several factors to determine tribal or government recognition as an Indian. *Bruce*, 394 F.3d at 1224 (citing *United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir. 1995) (citing *St. Cloud*, 702 F. Supp. at 1461)). These factors, listed in order of declining importance, include (1) tribal enrollment, (2) government recognition through receipt of assistance reserved for Indians, (3) enjoyment of benefits of tribal affiliation, and (4) social recognition as an Indian through residence on a reservation and participation in Indian social life. *Id.* The most important of these factors is tribal enrollment. *Id.*

Indeed, numerous courts have found that evidence of tribal enrollment is sufficient to establish tribal or government recognition as an Indian. *See United States v. Antelope*, 430 U.S. 641, 646, n.7 (1977) (finding enrolled members of Coeur d'Alene Tribe subject to federal jurisdiction under § 1153 and while noting that tribal enrollment not an "absolute requirement for federal jurisdiction," declining to decide whether non-enrolled Indians can be subject to § 1153); *United States v. Ramirez*, 537 F.3d 1075, 1082-83 (9th Cir. 2008) (victims were Indians within meaning of § 1152 when they were enrolled members of tribe and as enrolled members resided on the reservation); *St. Cloud*, 702 F. Supp. at 1461 ("On several occasions, courts have found tribal enrollment alone sufficient proof that a person is an Indian. But a person

may still be an Indian though not enrolled with a recognized tribe.") (citations omitted).[5]

As explained in a noted treatise on Indian law, "[i]t is not always necessary for an individual to be formally enrolled in a recognized tribe to be regarded as a member for jurisdictional purposes. Nevertheless, enrollment is commonly a prerequisite for acceptance as a member of the tribal community and it provides by far the best evidence of Indian status." *Garvais,* 402 F. Supp. 2d 1224 (quoting William C. Canby, *American Indian Law*, at 10 (4th ed. 2004) (internal citations omitted)).

Defendant, however, argues that his status as an enrolled member of the Colorado River Indian Tribe is insufficient evidence of tribal recognition, the second prong of the Indian status test. (Op. Br. at 2.) Defendant seizes upon the language from *Bruce* that tribal enrollment is "not dispositive of Indian status " to argue that

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[5] Courts outside this Circuit have also found that tribal enrollment is sufficient to establish the tribal recognition prong of the Indian status test. *See United States v. Torres*, 733 F.2d 449, 455 (7th Cir. 1984) ("courts have held that uncontradicted evidence of tribal enrollment and a degree of blood constitute adequate proof that one is an Indian for purposes of 18 U.S.C. § 1153") (citations omitted); *In re Garvais,* 402 F. Supp. 2d 1219, 1225 (E.D. Wa. 2004) (finding no jurisdiction under § 1153 over person who was not enrolled member of any tribe, stating "[w]hile enrollment in a federally recognized tribe has never been determinatively adjudicated to be an absolute requirement of § 1153 or tribal jurisdiction, 'enrollment is the common evidentiary means of establishing Indian status.' The importance of enrollment is evidenced by the fact that courts have found tribal enrollment alone sufficient proof that a person is an Indian.") (citations omitted).

the *presence* of tribal enrollment is not dispositive of tribal recognition. (Op. Br. at 22 (quoting *Bruce*, 394 F.3d at 1125)). When read in context, however, this Court clearly meant in *Bruce* that the *absence* of tribal enrollment is not dispositive and that other evidence of tribal recognition may be sufficient for a reasonable jury to find Indian status. *See Bruce*, 394 F.3d at 1224, 1226.

In *Bruce*, the defendant was charged with assaulting her son, a person less than 16 years of age, on an Indian reservation, in violation of 18 U.S.C. § 1152. *Id*. at 1217. She argued that because she was an Indian, and her son was an Indian, she was charged under the wrong statute, § 1152 rather than § 1153, and therefore the court lacked jurisdiction. *Id*. The defendant offered a certificate of blood to establish that she was 1/8 Chippewa Indian and, therefore, she established the first prong of the Indian status test, that she had some Indian blood. *Id*. at 1224. "Her status, therefore, turned on whether a tribe or the federal government had recognized her as an Indian." *Id.* The district court found that because the defendant was not an enrolled member of an Indian tribe, she could not establish tribal recognition and denied her motion to dismiss. *Id.*

This Court rejected the district court's conclusion, stating that "[t]ribal enrollment is 'the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative.'" *Id.* (quoting *United States*

v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979)). The Court then cited four additional cases with parenthetical explanations clearly establishing that the *absence* of tribal enrollment is not determinative and does not necessarily preclude a finding of sufficient tribal recognition to satisfy the second prong of the Indian status test. *Id*. (citing *Antelope*, 430 U.S. at 646, n.7 (enrollment in an official tribe is not absolute requirement for jurisdiction); *United States v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996) (tribal enrollment is one means of establishing Indian status, but is not the sole means of proving such status); *Ex Parte Pero,* 99 F.2d 28, 31 (7th Cir. 1938) (the lack of enrollment is not determinative of Indian status); *St. Cloud*, 702 F. Supp. at 1461 (a person may still be an Indian though not enrolled with a recognized tribe).[6] The Court then concluded that even in the absence of tribal enrollment, the defendant had offered sufficient evidence to submit the issue of her Indian status to the jury. *Bruce*, 394 F.3d at 1226.

In the portion of the *Bruce* decision that Defendant quotes in his brief (Op. Br. at 21-22), the Court rejected a test for Indian status that would depend solely upon

[6] In this responsive brief the government has summarized and not quoted the parenthetical explanations of these cases as set forth in the *Bruce* case. In addition, although decided later and not cited in this Court's decision in *Bruce*, the Eighth Circuit decision in *United States v. Stymiest*, also explains that tribal enrollment is the most important factor to determine tribal recognition, "but it is not essential and its absence is not determinative." 581 F.3d 759, 764 (8th Cir. 2009).

tribal enrollment, or eligibility for enrollment, and that would preclude a finding of Indian status for anyone who was not an enrolled tribal member. *Bruce,* 394 F.3d at 1225. The Court stated "we are bound by the body of case law which holds that enrollment, and, indeed even eligibility therefore, is not dispositive of Indian status." *Id.* (citing *Broncheau*, 597 F.2d at 1263; *Keys*, 103 F.3d at 761). Neither of the cases cited after this quote in *Bruce* — *Broncheau* or *Keys* — held that an enrolled member of an Indian tribe did not have sufficient tribal recognition for Indian status.

Instead, in *Broncheau*, the Court addressed the sufficiency of the indictment alleging that defendant was an Indian under § 1153. *Broncheau*, 597 F.2d at 1262-63. In *Keys*, the Court rejected the defendant's argument that the victim, who was not an enrolled member of a tribe, could not be considered an Indian for federal jurisdiction under § 1152. *Keys*, 103 F.3d at 761. The Court noted that the victim was eligible for enrollment, but was only two-years old and so was incapable of enrolling herself in the tribe. *Id.* The Court explained that "[w]hile tribal enrollment is one means of establishing status as an 'Indian' under 18 U.S.C. § 1152, it is not the sole means of proving such status." *Id.*

Thus, when read in context, this Court's statement in *Bruce* that it was bound by a "body of case law which holds that enrollment . . . is not dispositive of Indian status," referred to the cases holding that the *absence* of tribal enrollment is not

dispositive. *See Bruce*, 394 F.3d at 1224-24. Thus, the Court explained that its precedent allows consideration of other factors to determine Indian status, even when tribal enrollment is absent. *Id; see also Cruz*, 554 F.3d at 853 (Kozinski, J., dissenting) *(*"*Bruce* certainly doesn't hold that tribal enrollment is insufficient to support a finding of Indian status. *Bruce* holds the converse: that the absence of tribal enrollment does not preclude finding that defendant is an Indian.").[7]

Importantly, Defendant has not cited a case in which a court has found that an enrolled member of a federally- recognized Indian tribe does not have sufficient tribal recognition to satisfy the second prong of the test for Indian status. In all of the cases that Defendant cites — *Bruce*, *Cruz,* and *Maggi* — the Court analyzed whether other factors demonstrated tribal recognition because none of the defendants were enrolled members of a federally-recognized tribe. *See Bruce*, 394 F.3d at 1224*; Cruz*, 554 F.3d at 846; *Maggi*, 598 F.3d at 1082.

Defendant also appears to argues that when the Court in *Bruce* listed the factors that other courts had "considered" to analyze tribal recognition, it actually announced a mandatory requirement that tribal enrollment alone cannot satisfy the second prong

[7] In *Cruz*, the Court noted that tribal enrollment is not dispositive of Indian status, but to the extent this language is construed to suggest that tribal enrollment does not establish Indian status, it must be disregarded as dicta because the Court refused to "decide an issue not raised by the parties." *Cruz*, 554 F.3d at 847-48.

of the test for Indian status and that all of the factors must be present. (Op. Br. at 23.) Even a cursory reading of the cases demonstrates that this argument is wrong. In *Bruce*, *Cruz*, and *Maggi*, the Court was considering various factors to determine if sufficient evidence established Indian status in the absence of the first and most important factor, tribal enrollment. Thus, these cases clearly do not hold all of the *Bruce* factors must be present to establish the tribal recognition prong of Indian status.

In addition, this argument fails because the *Bruce* decision did not state that the factors it listed were mandatory or that evidence of each factor was essential to establish sufficient tribal recognition. Instead, in *Bruce* the Court described its list as factors "courts have considered." *Bruce,* 394 F.3d at 1224. Furthermore, the factors listed in *Bruce* were first identified in *St. Cloud*, where the court cautioned that "[t]hese factors do not establish a precise formula for determining who is an Indian. Rather, they merely guide the analysis of whether a person is recognized as an Indian." *St. Cloud*, 702 F. Supp. 1461.

In *Maggi*, this Court again rejected any notion that the factors set forth in *Bruce* are mandatory, noting that "these four factors, while broad, should not be deemed exclusive." *Maggi*, 598 F.3d at 1081. The Court stated that there is "little guidance

as to the quantum of evidence necessary to sustain Indian status jurisdiction," which "underscores the need for case-by-case analysis." *Id.* at 1083.

Thus, this Court's case law clearly establishes that Defendant's status as an enrolled member of the Colorado River Indian tribe was, in and of itself, sufficient evidence for the jury to determine his Indian status based on tribal recognition. But this was not "the government's sole trial evidence" regarding proof of Indian status. (Op. Br. at 2.) The victim testified at trial that she was 1/2 Hualapai and 1/2 Havasupai and that Defendant was a "Hualapai member of our reservation."[8] (RT 1/25/11 196; ER 143.) This is evidence that Defendant has social recognition as an Indian. In light of this evidence and the Certificate of Indian Blood documenting Defendant's enrollment with the Colorado River Indian Tribe, ample evidence existed at trial for the jury to determine his Indian status.

[8] Although Defendant is actually an enrolled member of the Colorado River Indian Tribe, evidence was admitted that he is 3/8 Hualapai and that his mother resides on the Hualapai reservation. (RT 1/25/11 147, 195; ER 94, 142, 181.)

B. Defendant Has Waived His Claim That the District Court Erred In Admitting His Certificate of Indian Blood As a Self Authenticating Document Because He Affirmatively Stated That There Was Not A Particular Reason Why the Document Should Not Be Admitted Pursuant to Rule 902(1)and His Certificate of Indian Blood Was Properly Admitted Because A Political Subdivision of the United States Issued It With a Proper Attestation .

[Defendant's Argument II]

1. Standard of Review.

Questions of waiver are reviewed *de novo*. *United States v. Fort*, 472 F.3d 1106, 1109 (9th Cir. 2007). Waived claims are unreviewable on appeal. *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997). Ordinarily this Court reviews the evidentiary rulings of a district court that were objected to below for an abuse of discretion. *United States v. Salcido*, 506 F.3d 729, 732 (9th Cir. 2007). Otherwise, this Court reviews for plain error. *United States v. Gomez-Norena*, 908 F.2d 497, 500 (January 12, 2012, 9th Cir. 1990).

2. Argument.

This Court should not consider Defendant's claim that the district court erred in admitting the sealed Certificate of Indian Blood as a self-authenticating document because Defendant waived that claim. Although this Court can review for plain error claims that were not preserved below, if a defendant has invited an error and has

intentionally relinquished a known right before the district court, then the claim of error is waived and this Court cannot review it. *Perez*, 116 F.3d at 845.

While Defendant argues that this Court should review his claim for an abuse of discretion because he initially objected to its admission (Op. Br. at 24, 26.), he thereafter intentionally relinquished his right to object that this document was not self-authenticating pursuant to Rule 902(1). The district court specifically inquired of Defendant if there was a particular reason why the document did not fall within the provisions of Fed. R. Evid. 902(1), and his counsel answered, "No, Your Honor." (RT 146; ER 93.) Thus, Defendant invited any error in the district court's admitting the Certificate of Indian Blood pursuant to Rule 902(1) and intentionally relinquished his right on that basis. Although Defendant's counsel made these decisions for Defendant, Defendant is bound by them. *Standen v. Whitley*, 994 F.2d 1417, 1422 (9th Cir. 1993) ("The defendant is bound by counsel's strategic decisions."); *see also Coleman v. Thompson*, 501 U.S. 722, 753 (1991) (attorney's waiver binds the defendant). Defendant waived his claim on appeal.

Despite waiving his claim on appeal, Defendant now raises this evidentiary objection. Rule 902(1) provides:

> 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;

Defendant argues that documents from Indian tribes cannot be self-authenticating because Indian tribes are not specifically listed in Fed. R. Evid. 902(1). Defendant's argument is belied by the relationship that exists between Indian tribes and the United States. Indian tribes have been called "domestic dependent nations," *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831), under the "tutelage" of the United States, *Heckman v. United States*, 224 U.S. 413 (1912), and subject to "the exercise of the Government's guardianship over . . . their affairs." *United States v. Sandoval*, 231 U.S. 28, 48 (1913). The United States Constitution grants Congress the authority to regulate Indian tribes in Article 1, Section 8. Most of the functions of tribal governments such as law enforcement, social services, roads and transportation, and courts are performed pursuant to the P.L. 93-638 (1975) contract with the United States Department of Interior, Bureau of Indian Affairs. The United States is also responsible for torts by Indian tribes that were committed while performing functions under these contracts. 25 U.S.C. § 450f (historical note). As such, Indian tribes have a much closer relationship as a political subdivision of the

United States than most other entities. Since Indian tribes are a political subdivision of the United States, the Certificate of Indian Blood reflecting tribal enrollment was admissible as a self-authenticated document pursuant to Rule 902(1).

A similar argument was raised in *United States v. Torres*, 733 F.2d 449, 455 n.5 (7th Cir. 1984). In *Torres*, a certificate of enrollment was admitted into evidence and the defendant argued that the certificate of enrollment constituted hearsay. The court found it was a public record and qualified as an exception to the general hearsay rule pursuant to Fed. R. Evid. 803(8)(B) and, therefore, was admissible pursuant to Fed. R. Evid. 902(4) as certified copies of the original public record. For a document to be admissible pursuant to Rule 902(4), it must comply with the provisions of Rule 902(1). Like the tribal enrollment record in *Torres*, the Certificate of Indian Blood presented at trial here was self-authenticating.

Defendant has failed to show that the district court erred in the admission of the Certificate of Indian Blood as a self-authenticating document, much less demonstrated plain error.

C. Defendant Did Not Abuse Its Discretion in Denying Defendant's Motion In Limine to Preclude the Government from Referring to His Polygraph Examination.

[Defendant's Argument III]

1. Standard of Review.

This Court reviews a decision whether to admit polygraph evidence for an abuse of discretion. *United States v. Miller*, 874 F.2d 1255, 1260 (9th Cir. 1989).

2. Argument.

This Court recognizes that the admissibility of polygraph evidence is left to the "wide discretion" of the district court. *See United States v. Benavidez-Benavidez,* 217 F.3d 720, 724 (9th Cir.). If the polygraph evidence is an operative fact or otherwise relevant to other issues, it can be admitted for a limited purpose, provided the results of the exam are not admitted. *See United States v. Campos*, 217 F.3d 707, 712 n.2 (9th Cir.) ("polygraph evidence relating to collateral issues will continue to be potentially admissible"); *Benavidez-Benavidez,* 217 F.3d at 724 n.2 ("unstipulated polygraph testimony is potentially admissible under the Federal Rules of Evidence"); *United States v. Miller*, 874 F.2d at 1261 ("polygraph evidence might be admissible if it is introduced for a limited purpose that is unrelated to the substantive correctness of the results of the polygraph examination"); *United States v. Bowen*, 857 F.2d 1337, 1341 (9th Cir. 1988) ("If the polygraph evidence is being introduced because it is

relevant that a polygraph examination was given, regardless of the result, then it may be admissible"). Other circuits have addressed the limited admission of polygraph evidence. *Miller,* 874 F.2d at 1261-62 (*citing United States v. Johnson*, 816 F.2d 918, 923 (3rd Cir. 1987); *United States v. Hall*, 805 F.2d 1410, 1416-17 (10th Cir. 1986); *United States v. Kampiles,* 609 F.2d 1233, 1244 (7th Cir. 1979)).

Here, the government never sought to admit the actual results of the polygraph. (CR 64; SER 1-4.) The government argued in its response to Defendant's motion in limine that, with a proper limiting instruction, the fact that a polygraph was arranged and given should be admitted into evidence should Defendant introduce facts or argument that he was badgered into confessing through a series of interviews or attack the reliability, credibility, or truth of the manner and means by which the agents conducted its interviews. (CR 64; SER 1-4.) The government's position was supported by the case law, *supra*, and appropriate given that Defendant affirmatively argued to the district court that he intended to introduce evidence of Defendant's prior interviews and his denials of responsibility to challenge the interview conducted with SA Fuller. *See United States v. Pitner*, 969 F. Supp. 1246, 1253-54 (W.D. WA 1997) (admitting fact of polygraph as relevant to explain why informant changed his story to law enforcement).

The district court denied Defendant's motion in limine and reserved the determination on the issue to admit evidence of the polygraph examination until trial. (RT 1/13/11 94; ER 62; SER 103.) The district court precluded the government from any mention of the polygraph unless approved by the district court outside the presence of the jury. (RT 1/13/11 94; ER 62; SER 103.) This was a prudent measure and an effort to give both parties a fair trial, not an abuse of discretion.

This decision did not preclude Defendant from presenting a complete defense, and the district court repeatedly told Defendant that the ruling did not limit his defense. (RT 1/13/11 87, 94; ER 55, 62; SER 96, 103.) Nor was his defense limited. Any decision to make an argument or present evidence might lead to rebuttal evidence or counter-arguments. Defendant's decision to present certain arguments or evidence remained a tactical decision and he could choose how to proceed in light of the relevant case law. Defendant still chose to cross-examine SA Fuller regarding the length of his interview, that they were alone, that it was not tape-recorded, and called SA Barber as a witness to testify that he spoke with her on another date without the benefit of *Miranda*. (RT 1/26/11 299, 306, 327-329; ER 241, 248, 269-271.) The government chose not to ask for admission of the fact of the polygraph examination despite the evidence presented. Thus, the district court did not abuse its discretion in denying Defendant's motion in limine.

D. Defendant Waived any Objections to the Presentence Report, and even if Defendant's Objections Are Not Considered Waived, the District Court Did Not Plainly Err By Imposing a Seven-Level Enhancement to the Offense Level Because the Victim Suffered Permanent Bodily Injury.

[Defendant's Argument IV]

1. Standard of Review.

Questions of waiver are reviewed *de novo*. *United States v. Fort*, 472 F.3d at 1109. Waived claims are unreviewable on appeal. *United States v. Perez*, 116 F.3d at 845.

2. Argument.

This Court should not consider Defendant's claim that the district court erred in enhancing his sentence under United States Sentencing Guidelines § 2A2.2(b)(3)("U.S.S.G.") for permanent injury because he waived the claim. Although this Court can review for plain error claims that were not preserved below, if a defendant has invited an error and has intentionally relinquished a known right before the district court, then the claim of error is waived and this Court cannot review it. *Perez*, 116 F.3d at 845. A defendant can waive not only trial errors but also sentencing errors. *See United States v. Si*, 343 F.3d 1116, 1128 (9th Cir. 2003) (defendant waived claim of sentence entrapment by not arguing it to the district court); *United States v. Gaither*, 245 F.3d 1064, 1069 (9th Cir. 2001) (defendant

waived objection to sentence enhancement for obstruction of justice on appeal by affirmatively agreeing at sentencing that enhancement was appropriate).

While Defendant argues that this Court should review his claim *de novo*, for clear error, or an abuse of discretion (Op. Br. at 31), he waived his claim when he affirmatively agreed to its guideline calculation. (RT 5/9/11 3-4; ER 331-335.) The PSR described the permanence of the victim's injuries due to the damage to the joint and the likelihood the victim would develop osteoarthritis. (PSR ¶ 9.) The PSR applied a 7-level enhancement for permanent bodily injury. (PSR ¶ 16.) The PSR calculated a 37 to 46 months guideline range. (PSR ¶ 53.) Defendant reviewed the PSR. (RT 5/9/11 3; ER 331.) The district court specifically inquired of Defendant's counsel whether he objected to the PSR and, thus, he knew that could have raised this objection. (RT 5/9/11 3-4; ER 331-335.) Defendant's counsel said, "I have no objections." (RT 5/9/11 3-4; ER 331-335.) He was then asked if he agreed that "with an offense level of 21 and criminal history category of I, the range of incarceration under federal sentencing guidelines is 37 to 46 months." (RT 5/9/11 3-4; ER 331-335.) Defendant's counsel said, "Yes, Your Honor." (RT 5/9/11 3-4; ER 331-335.) By agreeing to the guideline range after reviewing the PSR that included the enhancement and its basis, Defendant affirmatively waived any objection to the 7-level enhancement for permanent bodily injury. Thus, Defendant invited any error

in the district court's finding the enhancement and intentionally relinquished his right to object on that basis.[9] Although Defendant's counsel made these decisions for Defendant, Defendant is bound by them. *Standen v. Whitley*, 994 F.2d at 1422 ("The defendant is bound by counsel's strategic decisions."); *see also Coleman v. Thompson*, 501 U.S. at 753 (attorney's waiver binds the defendant). Defendant waived his claim on appeal.

Nevertheless, Defendant objects for the first time on appeal that the district court erred in determining the victim's injuries amounted to a permanent bodily injury pursuant to U.S.S.G. § 2A2.2(b)(3) rather than serious bodily injury. (Op. Br. at 31.) The sentencing guideline assigns 7 points for permanent injury and 5 points for serious bodily injury. *Id.* The disputed two point difference in the guideline calculation did not effect the eventual sentence.

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[9] This Court's decision in *United States v. Jimenez*, 258 F.3d 1120 (9th Cir. 2001), does not call for a different result. In *Jimenez*, this Court held that the defendant did not waive his sentencing claim by stating that he had no objections to the PSR and conceding its factual accuracy. 258 F.3d at 1123-24. Unlike the defendant in *Jimenez*, Defendant's counsel did not merely confirm his PSR's accuracy and fail to object, but affirmatively agreed to the relevant guideline range. (RT 5/9/11 3; ER 331.) Furthermore, unlike *Jimenez*, Defendant's PSR did not fail to include to include information supporting the enhancement. (PSR ¶ 9.) This shows that, unlike the defendant in *Jimenez*, Defendant intentionally relinquished his objection to the prior conviction.

Here, with the assessment of permanent bodily injury the Defendant's offense level was 21 with a sentencing range of 37 to 46 months. (RT 5/9/11 3-4; ER 331-335.) If the district court had not assigned the additional two points for permanent bodily injury, the Defendant's offense level would have been 19 with a sentencing range of 30 to 37 months. The Defendant was sentenced to 37 months. Regardless whether the victim's injury was assessed as serious or permanent, his eventual sentence was within the recommended guideline range of both offense level calculations and thus the sentence was unaffected. *See United States v. Francisco-Peguero*, unpublished, 2011 WL 5056457 (9th Cir. 2011). Therefore, even if the district court erred, it could not be "prejudicial" since it did not "affect[ ] the outcome of the district court proceedings," and thus no "substantial rights" were affected. *United States v. Olano*, 507 U.S. 725, 732 (1993).

But not only was there not plain error, the district court did not err or abuse its discretion at all when it found the victim suffered permanent bodily injury.[10] An

[10] While normally the Court reviews the district court's application of the guidelines to the facts for an abuse of discretion, when the Defendant fails to object at the time of sentencing, this Court reviews for plain error. *See United States v. Burgum*, 633 F.3d 810, 812 (9th Cir.2011) (citing *United States v. Evans–Martinez*, 611 F.3d 635, 642 (9th Cir.2010)). The district court commits plain error only where there is "(1) error, (2) that is plain, and (3) that affect[s] substantial rights." *Johnson v. United States*, 520 U.S. 461, 466-67 (1997). An error is plain only if it "is so clear-cut, so obvious, a competent district judge should be able to avoid it without benefit (continued...)

orthopedic surgeon testified at trial that the victim's ankle fracture was at the "more severe part of the spectrum of ankle fracture" (RT 1/26/11 261; ER 203.) The surgeon had to place a special plate with 9 screws to re-align and stabilize the victim's ankle bones. (RT 1/26/11 262; ER 204.) She still had the appliances in her body and may require an additional surgery. (RT 1/26/11 265-266; ER 207-208.) She was also likely to suffer long term stiffness, pain, weakness, swelling and balance issues. (RT 1/26/11 263-267; ER 205-209.) The victim testified that over one year later, even after reconstructive surgery, she was still suffering pain and falls due to the injury. ((RT 1/26/11 265; ER 207.) Defendant did not present any evidence during trial to dispute the injury.

[10](...continued)
of objection." *United States v. Turman*, 122 F.3d 1167, 1170 (9th Cir. 1997). If those three conditions are met this Court may exercise its discretion to notice the forfeited error, but only if the error seriously affected the fairness, integrity, or public reputation of the judicial proceeding. *United States v. Reyes-Bosque*, 596 F.3d 1017, 1032 (9th Cir. 2010).

VIII. CONCLUSION

For the foregoing reasons, the judgment of conviction should be affirmed.

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IX. STATEMENT OF RELATED CASES

To the knowledge of counsel, there are no related cases pending.

X. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 11-10244

I certify that: (check appropriate option(s))

√ 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

√ Proportionately spaced, has a typeface of 14 points or more and contains 11,676 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words), or is

□ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

___ 2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

□ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

□ This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

□ Proportionately spaced, has a typeface of 14 points or more and contains _____ words, or is

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January 12, 2012
Date

s/ Heather H. Belt
Signature of Attorney

XI. CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2012, 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.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Heather H. Belt
HEATHER H. BELT
Assistant U.S. Attorney