11-10244

Opinion filed March 14, 2013 (withdrawn April 15, 2013)
(Nelson, Rawlinson, Ikuta, CJJ)

IN THE 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 THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA (CR-10-08049-DGC-1)

DEFENDANT - APPELLANT'S SUPPLEMENTAL BRIEF

JON M. SANDS
Federal Public Defender
District of Arizona

DANIEL L. KAPLAN
Assistant Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, Arizona 85007-2730
(602) 382-2767

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

Statutes

Other Authorities

Rules

Introduction and Statement of Pertinent Facts

Edgar Mike Alvirez is a 29-year-old northern Arizona native.[1] In the winter of 2009, Mr. Alvirez was at his mother's house on the Hualapai Indian Reservation in Peach Springs, Arizona when a fight broke out involving his girlfriend, her friend, and her friend's cousin – a woman named Drametria Havatone. Ms. Havatone suffered a broken ankle, which she later claimed Mr. Alvirez caused by stepping on her ankle. The government prosecuted Mr. Alvirez under 18 U.S.C. § 113(a)(6) – which outlaws assault resulting in serious bodily injury committed "within the special maritime and territorial jurisdiction of the United States" – and 18 U.S.C. § 1153, which provides that "[a]ny Indian" who commits a felony under § 113 "shall be subject to the same law and penalties as all other persons committing [that offense] within the exclusive jurisdiction of the United States." *Id.* § 1153(a) (Westlaw 2015).[2] A jury convicted Mr. Alvirez, and the district court sentenced him to 37 months of incarceration.

Mr. Alvirez took an appeal to this Court, in which he raised several challenges to his conviction and sentence. First, he argued that the trial evidence was insufficient to prove beyond a reasonable doubt that he was an "Indian"

---

[1] Presentence Report at 2.

[2] Defendant-Appellant's Excerpts of Record ("ER") Vol. II at 18.

subject to prosecution under § 1153.[3] Second, he argued that the district court erred in admitting a "Certificate of Indian Blood" without proper authentication.[4] Third, he argued that the district court erred in denying his motion in limine to preclude the government from referring at trial to his polygraph examination.[5] Fourth and finally, he argued that the district court misapplied the United States Sentencing Guidelines in determining his sentence.[6] The panel heard oral argument in Mr. Alvirez's appeal on June 12, 2012.

On March 14, 2013, the panel issued an opinion that granted relief on Mr. Alvirez's second claim, holding that the district court had erred in admitting the "unauthenticated Certificate of Indian Blood."[7] The panel accordingly reversed the judgment and remanded, noting that a "retrial" might occur on remand.[8] The opinion did not address Mr. Alvirez's first claim – that the trial evidence was insufficient to prove the Indian-status element of the offense. Mr. Alvirez filed a petition for rehearing in which he expressed his agreement with the panel's treatment of his second claim, but urged it to address his first claim.[9] Mr. Alvirez

---

[3] Op. Br. at 19-24.
[4] *Id.* at 24-26.
[5] *Id.* at 27-31.
[6] *Id.* at 31-34.
[7] DktEntry: 38-1 at 3.
[8] *Id.*
[9] DktEntry: 41-1.

noted that if the panel were to agree with his first claim, the proper remedy would be a remand for the entry of a judgment of acquittal, and that the Double Jeopardy Clause would then bar any retrial. *United States v. Recio*, 371 F.3d 1093, 1104 (9th Cir. 2004) ("we cannot remand for another trial if we conclude that the government failed to put on sufficient evidence at the first"). Mr. Alvirez also noted that the Court's then-recent panel opinion in *United States v. Zepeda*, 705 F.3d 1052 (9th Cir. 2013), was relevant to his sufficiency claim. The Court later decided to rehear *Zepeda* en banc.

On April 15, 2013, the panel issued an order withdrawing its opinion "pending resolution of the petition for rehearing en banc in *United States v. Zepeda*, 705 F.3d 1052 (9th Cir. 2013)."[10] Pursuant to this order, this appeal was effectively stayed until the *Zepeda* en banc petition was resolved. That occurred on July 7, 2015, when the *Zepeda* en banc panel issued its opinion. *United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015) (en banc). On July 24, 2015, Mr. Alvirez filed a motion for supplemental briefing regarding the effect of the *Zepeda* en banc opinion upon his first claim in this appeal.[11] On July 31, 2015, the panel granted Mr. Alvirez's motion and ordered him to file a supplemental brief not exceeding 8,000 words within 21 days of its order, after which the government may file a response brief and Mr.

[10] DktEntry: 43.
[11] DktEntry: 46.

Alvirez may file a reply brief.[12] Mr. Alvirez hereby submits this supplemental brief in compliance with the panel's order.

Statement of the Issue

What bearing does the Court's en banc opinion in *United States v. Zepeda* have upon Mr. Alvirez's first claim in this appeal, which alleges that the trial evidence was insufficient to prove his Indian status beyond a reasonable doubt?

Summary of the Argument

The *Zepeda* en banc opinion confirms that when the government prosecutes an individual pursuant to the Indian Major Crimes Act, 18 U.S.C. § 1153, it must produce sufficient evidence to prove the defendant's Indian status beyond a reasonable doubt. The *Zepeda* opinion further establishes that the government's evidence must prove that the defendant qualified as an Indian *at the time of the charged offense*, rather than at the time of trial. Here, the evidence to which the government points as proving this element of the offense establishes only that Mr. Alvirez was enrolled in one tribe, and had an unspecified connection to a different tribe, more than a year *after* the offense. Because no reasonable jury could find that this evidence proved beyond a reasonable doubt that Mr. Alvirez qualified as an Indian at the time of the offense, this Court should vacate his conviction and

[12] DktEntry: 47.

remand the case for the entry of a judgment of acquittal. If, however, this Court concludes that this evidence was sufficient to prove the Indian status element of the offense under *Zepeda*, it should reinstate its withdrawn opinion and reverse and remand for the reasons set forth in that opinion.

Argument

The *Zepeda* en banc opinion confirms that the evidence of Mr. Alvirez's Indian status was insufficient to prove this offense element beyond a reasonable doubt.

A. The *Zepeda* en banc opinion stresses that the government must prove that a § 1153 defendant qualified as an Indian at the time of the charged offense.

The *Zepeda* en banc opinion reaffirms most of the pre-existing standard for proof of Indian status under the Indian Major Crimes Act that was articulated in *United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005). The *Bruce* standard established a two-prong test for proving Indian status. The first prong requires proof that the defendant has some quantum of Indian blood, while the second prong requires proof that the defendant has tribal or government recognition as an Indian. *Zepeda*, 792 F.3d at 1106. In assessing the evidence on the second prong, the Court considers the following factors, in declining order of importance:

(1) enrollment in a federally recognized tribe; (2) government recognition formally and informally through receipt of assistance available only to individuals who are

members, or are eligible to become members, of federally recognized tribes; (3) enjoyment of the benefits of affiliation with a federally recognized tribe; and (4) social recognition as someone affiliated with a federally recognized tribe through residence on a reservation and participation in the social life of a federally recognized tribe. *Id*. at *9. The *Zepeda* opinion modifies and supplements the *Bruce* test in two ways.

First, *Zepeda* deletes a component of the first prong of the *Bruce* test that had been added by the Court's post-*Bruce* opinion in *United States v. Maggi*, 598 F.3d 1073 (9th Cir. 2010). The *Maggi* panel held that the defendant's quantum of Indian blood with respect to the first prong of the *Bruce* test must be traceable to a federally recognized tribe. *Zepeda*, 792 F.3d at 1110. Finding it "unnecessary and burdensome," the *Zepeda* opinion jettisons this requirement. *Id*. at 1113. Because Mr. Alvirez concedes that the government's evidence was sufficient to satisfy the first prong of the *Bruce* test, this aspect of *Zepeda* does not affect his sufficiency claim.

Second, the *Zepeda* opinion holds that in order to prove the Indian-status element of a § 1153 offense, the government must prove that the defendant was an Indian "at the time of the offense with which the defendant is charged." *Zepeda*, 792 F.3d at 1113. The *Zepeda* opinion explains that this gloss on the *Bruce* test is

necessary because "[i]f the relevant time for determining Indian status were earlier or later, a defendant could not 'predict with certainty' the consequences of his crime at the time he commits it." *Id.* (*quoting Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000)). The *Zepeda* opinion further notes that without this requirement "the government could never be sure that its jurisdiction, although proper at the time of the crime, would not later vanish because an astute defendant managed to dissociate himself from his tribe." *Id.* Such a rule would be unacceptable because it would "undermine the 'notice function' we expect criminal laws to serve." *Id.* (*quoting United States v. Francisco*, 536 F.2d 1293, 1296 (9th Cir. 1976)).

It is this latter component of *Zepeda* that most profoundly affects Mr. Alvirez's first claim, because the evidence at his trial was plainly insufficient to establish his Indian status at the time of the charged offense.

B. The trial evidence failed to prove beyond a reasonable doubt that Mr. Alvirez met the Indian-status test at the time of the charged offense.

The offense with which Mr. Alvirez was charged occurred on November 4, 2009.[13] The evidence that the government claims sufficed to prove the Indian-status element of this offense consisted of (1) a "Certificate of Indian Blood" purporting to show Mr. Alvirez's enrollment in the Colorado River Indian Tribes;

[13] ER Vol. II at 18.

(2) Ms. Havatone's testimony that Mr. Alvirez's mother "lives in the reservation," and (3) Ms. Havatone's testimony that Mr. Alvirez "is a Hualapai member of our reservation."[14] Whether considered individually or in the aggregate, this evidence was insufficient to prove beyond a reasonable doubt that Mr. Alvirez was an Indian pursuant to the *Zepeda/Bruce* test on November 4, 2009.

(1) Certificate of Indian Blood

The sole evidence to which the prosecutor directed the jury's attention in her closing argument at trial, with respect to the Indian-status element of the offense, was a "Certificate of Indian Blood."[15] The district court admitted the Certificate on the premise that it was self-authenticating pursuant to Federal Rule of Evidence 902(1).[16] (In its now-withdrawn opinion, the panel held that the district court erred in admitting the certificate[17]; notwithstanding this fact, the Certificate should be considered in connection with the sufficiency inquiry. *Lockhart v. Nelson*, 488 U.S. 33, 40-42 (1988).) The Certificate, which was government Exhibit 4 and is also reproduced on page 181 of Mr. Alvarez's Excerpts of Record, is pictured below:

[14] Gov. Br. at 20-38.
[15] ER Vol. II at 302:3-11, 181.
[16] *Id.* at 93:24-25.
[17] DktEntry: 38-1.

Colorado River Indian Tribes
26600 Mohave Road
Parker, AZ 85344

Tuesday, January 18, 2011

Certificate of Indian Blood

Name: **Edgar Mike Alvirez, Jr.**

Photo

Date of Birth: **02/19/1986**
Enrollment Status: **Enrolled**
Resolution Number:
Enrollment Number: **CRIT083197**
Resolution Date:

Ethnic Affiliation/Blood Quantum

Total Quantum This Tribe: **1/4**
Total Quantum All Tribes: **3/4**

Ethnic Group: **-** Blood Quantum: **3/8**
Affiliation: **Hualapai**

Ethnic Group: **Colorado River Indian Tribe - (R)** Blood Quantum: **1/4**
Affiliation: **Mohave**

Ethnic Group: **-** Blood Quantum: **1/8**
Affiliation: **Havasupai**

Chairman Signature — Authorizing Signature

Rochelle Booth, Enrollment Officer — Authorizing Signature

CONFIDENTIAL

Page 1

Colorado River Indian Tribes
26600 Mohave Road
Parker, AZ 85344
(928) 669-9211

The Certificate indicates that Mr. Alvirez's "Ethnic Affiliation/Blood Quantum" is ¾ Indian, deriving from three different tribes. This aspect of the Certificate satisfies the first prong of the *Zepeda/Bruce* test, regardless of whether these three tribes are federally recognized. *Zepeda*, 792 F.3d at 1113. The Certificate bears the name and address of the Colorado River Indian Tribes on its upper left corner, and clearly refers to the same tribe as "This Tribe" in reference to Mr. Alvirez's ¼ blood quantum, because no other listed tribe has the same blood quantum. These facts indicate that when the Certificate describes Mr. Alvirez's status as "Enrolled," it is describing his enrollment in the Colorado River Indian Tribes. The Colorado River Indian Tribes appears on the Bureau of Indian Affairs (BIA) lists of federally recognized tribes issued before and after the time of the offense. 74 Fed. Reg. 40,218-02 (Aug. 11, 2009); 75 Fed. Reg. 60,810-01 (Oct. 1, 2010). Assuming, *arguendo*, that the Certificate proves that Mr. Alvirez was enrolled in a federally recognized tribe at *some* point, it could not satisfy the second prong of the *Zepeda/Bruce* test, because it fails to prove that he was enrolled *at the time of the offense*.

The Certificate bears only two dates. The first is a date that fell 23 years before the offense, and is expressly identified as Mr. Alvirez's "Date of Birth."

(The same date of birth appears in the presentence report.[18]) The second is "Tuesday, January 18, 2011" – listed without explanation on the Certificate's upper right-hand corner. This date fell fourteen months *after* the charged offense.

This document cannot prove beyond a reasonable doubt that Mr. Alvirez was enrolled in a federally recognized Indian tribe on November 4 of 2009. At most, the Certificate shows that Mr. Alvirez was enrolled in such a tribe over a year *after* that date. The Certificate thus supports only speculation that Mr. Alvirez might have been enrolled in the Colorado River Indian Tribes as early as November of 2009 – and it is well settled that speculation is an improper basis for finding an element of a criminal offense proven beyond a reasonable doubt. *United States v. Andrews*, 75 F.3d 552, 556 (9th Cir. 1996). The Certificate thus cannot satisfy the second prong of the *Zepeda*/*Bruce* test.

(2) Testimony that Mr. Alvirez's mother "lives in the reservation"

Although at trial it relied solely on the Certificate as proving Mr. Alvirez's Indian status, on appeal the government also points to two statements in Ms. Havatone's testimony as establishing this element. Neither of these statements serves to patch up the fatal hole in the government's evidence.

[18] Presentence Report at 2.

The first statement to which the government points is the following reference to Mr. Alvirez's mother, in the course of Ms. Havatone's account of what happened on November 4, 2009:

> Q When you walked around the community, did you at any point come in contact with a lady by the name of Mary Grace Alvirez?
>
> A Yes.
>
> Q At that time how well did you know Ms. Alvirez?
>
> A I know she lives in the reservation, but I don't know her that well.[19]

The "community" and "reservation" referenced in this exchange is the Hualapai Indian reservation in northern Arizona.[20] The Hualapai tribe is included in the BIA lists bracketing the date of the offense. 74 Fed. Reg. 40,218-02 (Aug. 11, 2009); 75 Fed. Reg. 60,810-01 (Oct. 1, 2010). This testimony thus supports the conclusion that Mr. Alvirez's mother "lives in the reservation" of a federally recognized tribe.

But Mr. Alvirez's mother's residence on a reservation does not prove any of the four factors this Court examines under the second prong of the *Zepeda/Bruce* test. *Zepeda*, 792 F.3d at 1114. It does not prove that Mr. Alvirez was enrolled in the Hualapai tribe. In fact, there was no evidence that Mr. Alvirez *or* his mother were enrolled in the Hualapai tribe. The fact that she lived on the Hualapai reservation

[19] ER Vol. II at 141:23-142:3.
[20] *Id.* at 136:20-139:3.

certainly does not establish the fact of her enrollment, or even make it probable: The Census Bureau reported that in 2010, 77% of people living on reservations and other "American Indian areas" did *not* identify themselves as Indians. U.S. Census Bureau, *The American Indian and Alaska Native Population: 2010* (2012)[21] at 13-14. This evidence likewise does not prove that Mr. Alvirez received governmental recognition formally or informally through receipt of assistance available only to tribe members. Nor does it prove that Mr. Alvirez enjoyed the benefits of affiliation with a federally recognized tribe. And it does not prove that Mr. Alvirez enjoyed social recognition as someone affiliated with the Hualapai tribe through residence on its reservation and participation in its "social life." *Zepeda*, 792 F.3d at 1114. Indeed, the record does not show that Mr. Alvirez lived at his mother's house or participated in any meaningful way in the Hualapai tribe's "social life."

In short, the fact that Mr. Alvirez's mother lived on the Hualapai reservation does not satisfy the *Zepeda*/*Bruce* test.

(3) Testimony that Mr. Alvirez "is a Hualapai member of our reservation"

The government also points to a statement that Ms. Havatone made regarding Mr. Alvirez. After walking Ms. Havatone through the early part of her

[21] http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf.

visit to Mr. Alvirez's mother's house on November 4, 2009, the prosecutor asked her to describe Mr. Alvirez:

> Q Did anyone else arrive later that evening?
>
> A Yes.
>
> Q Who arrived?
>
> A There were three individuals: Edgar Alvirez, Junior; Brittany Davis; and Denisha Siyuja.
>
> Q Okay. Let's first talk about Edgar Alvirez. Who is Edgar Alvirez?
>
> A He is a Hualapai member of our reservation.[22]

The prosecutor did not ask Ms. Havatone to elaborate on what she meant by describing Mr. Alvirez as a "Hualapai member of our reservation," and Ms. Havatone provided no explanation. The meaning of her statement is thus a matter for speculation. Only by aggressive and unsupported inferences could this vague statement be connected to any of the factors comprising the second prong of the *Zepeda*/*Bruce* test. Such "inferential leap[s]" are not a permissible method of finding an element of a criminal offense proven beyond a reasonable doubt. *United States v. Lopez*, 484 F.3d 1186, 1201 (9th Cir. 2007) (en banc).

[22] ER Vol. II at 143:9-16.

In any case, even if such inferential leaps *were* permitted, they could not establish Mr. Alvirez's Indian status *at the time of the offense*, as *Zepeda* requires. Both the prosecutor's question and Ms. Havatone's answer were explicitly phrased in the present tense:

> Q Okay. Let's first talk about Edgar Alvirez. Who *is* Edgar Alvirez?
>
> A He *is* a Hualapai member of our reservation.[23] [Emphases added]

Thus, assuming that any firm conclusion could be extracted from this vague statement, that conclusion would relate to the time of *trial*, not the "time of the charged conduct." *Zepeda*, 792 F.3d at 1107.

It is thus evident that Ms. Havatone's description of Mr. Alvirez as a "Hualapai member of our reservation" cannot satisfy the second prong of the *Zepeda*/*Bruce* test.

(4) Facts in the aggregate

It is of course appropriate to consider these facts in the aggregate, as well as individually. *Lopez*, 484 F.3d at 1201. But aggregating the above items does not enhance their ability to prove Mr. Alvirez's Indian status at the time of the offense. Indeed, the only one of these facts that has any bearing on the state of affairs at the

[23] ER Vol. II at 143:14-16.

time of the offense is Mr. Alvirez's mother's residence on the Hualapai reservation, and nothing about that fact enables it to cure the fatal flaw in the other two – *i.e.*, their inability to prove anything about the state of affairs on November 4, 2009.

It is also significant in this regard that the Certificate pertains to the Colorado River Indian Tribes, while the other evidence pertains to the Hualapai tribe. If the Certificate and the other evidence all pertained to the *same* tribe, it would at least be open to the government to argue that the jury could consider the Certificate together with the other evidence to support the conclusion that Mr. Alvirez was enrolled in a recognized tribe at the time of the offense. But on this record, no such argument is available. There was no evidence that Mr. Alvirez had *any* connection to the Colorado River Indian Tribes at the time of the offense, or at any other time prior to the date listed on the Certificate. For all that appears on this record, the date printed on the Certificate might have been the date on which he became an enrolled member of that tribe.

It is thus apparent that aggregating these facts does not enhance their ability to carry the government's burden with respect to the Indian status element of the offense.

Conclusion

The *Zepeda* en banc opinion establishes that in a case prosecuted under 18 U.S.C. § 1153, the government must prove the defendant's Indian status *at the time of the charged offense*. Here, the government's evidence proved, at most, that over a year *after* the offense Mr. Alvirez was enrolled in one tribe and had some unexplained connection to another tribe. Because no reasonable jury could find that this evidence proved beyond a reasonable doubt that Mr. Alvirez was an Indian at the time of the offense, this Court should vacate Mr. Alvirez's conviction and remand the case for the entry of a judgment of acquittal. If, however, the Court were to conclude that the trial evidence was sufficient to prove beyond a reasonable doubt that Mr. Alvirez was an Indian at the time of the offense, it should reinstate its withdrawn opinion and reverse and remand the case for the reasons set forth in that opinion.

Respectfully submitted on August 21, 2015.

s/*Daniel L. Kaplan*
DANIEL L. KAPLAN
Assistant Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, Arizona 85007-2730
(602) 382-2767

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I hereby certify that, pursuant to FRAP 32(a)(7)(B), the foregoing Defendant-Appellant's Supplemental Brief is proportionately spaced, has a typeface of 14 points, and contains 3,427 words.

s/*Daniel L. Kaplan*
DANIEL L. KAPLAN
Assistant Federal Public Defender
Attorney for Defendant - Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I caused the foregoing Defendant-Appellant's Supplemental Brief to be submitted to the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on August 21, 2015, using the appellate CM/ECF system. I further 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/*Daniel L. Kaplan*
DANIEL L. KAPLAN
Assistant Federal Public Defender
Attorney for Defendant - Appellant