**C.A. No. 11-10244**

D. Ct. No. CR 10-8049-PHX-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

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# SUPPLEMENTAL BRIEF OF APPELLEE

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## III. Argument

The government hereby responds to the Appellant's supplemental brief to the issue of whether the evidence at trial was sufficient to prove his Indian status in light of *United States v. Zepeda*, 2015 WL 4080164 (9th Cir. 2015) (en banc).

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.)

On January 25, 2011, trial began. (CR 95.) Evidence was presented that Defendant committed the crime while living at his mother's home on the Hualapai Indian Reservation and while associating with Hualapai tribal members, including the victim and Defendant's girlfriend.[1] (RT 1/25/11 156, 189, 195-96; ER 103, 136, 142-43.) Defendant's girlfriend testified the fight began because the victim claimed Defendant did not help his mother around the house and that Ms. Davis "wasn't being a good woman to him." (RT 1/25/2011 160; ER 107.) There was testimony that this residence was across the street from the tribal housing authority, and that the victim believed Defendant was a Hualapai tribal member. (RT

[1] It can be inferred from the testimony that Defendant lived at his mother's residence. For example, the argument began because the victim was "getting mad at [Defendant] for not helping his mother around the house." (RT 1/25/11 160; ER 107.) And the victim was told by Defendant's mother that "[Defendant] was home now, so she could leave." (RT 1/25/11 161; ER 108.)

1/25/11 143, 196; ER 90, 143.) Defendant's Certificate of Indian Blood (hereinafter "Certificate") was admitted into evidence and showed his blood quantum is 1/4 Colorado River Indian Tribe and 3/4 all tribes (including 3/8 Hualapai and 1/8 Havasupai). (RT 1/25/11 146-47; Exhibit 4; ER 93-94, 181.) It also showed Defendant enrolled as a member of the Colorado River Indian Tribe. (RT 1/25/11 145-47; Exhibit 4; ER 92-94, 181.)

Defendant never argued at trial that he was not an Indian or there was insufficient evidence of Indian status. In fact, defense counsel questioned the federal agent that interviewed Defendant regarding whether a tribal representative was present interview at the Hualapai Police Department and whether her client was advised that the purpose of the interview was a federal investigation and not tribal. (RT 1/26/11 296-98; ER 238-40.) Defense counsel also asked whether he told Defendant that he "was really lucky this would stay tribal it wouldn't go federal." (RT 1/26/11 307; ER 249.) These defense questions assumed Defendant's tribal affiliation.

The insufficient evidence of Indian status claim was also not specified during the Rule 29 motion. (RT 1/26/11 312-13; ER 254-55.) Defense stated only that it was "just to argue that there are not sufficient credible information or facts for the jury to deliberate upon given the inconsistent statements that have been made throughout the case by the witnesses." (RT 1/26/11 312-13; ER 254-55.)

That motion was later renewed without argument, and Indian status was not mentioned once during Defendant's closing summation (RT 1/26/11 357; ER 299.)

On January 26, 2011, Defendant was found guilty as charged and appealed. (CR 96-97.) Defendant argued in ground one of his opening brief there was insufficient evidence to prove Indian status because: (1) the government failed to prove his enrollment or ancestral connection to a federally recognized tribe, and (2) failed to produce evidence relating to the *Bruce* factors aside from tribal enrollment.[2] (Op. Br. at 16-17, 19-24.)

On January 12, 2012, the government responded. (CA 18.) The panel heard oral argument on June 12, 2012. (CA 32.) On March 14, 2013, the panel held the Certificate of Indian Blood was not a self-authenticating, reversed the conviction and remanded for a new trial. (CA 38-1 at 3.) Defendant filed a petition for rehearing on March 27, 2013. (CA 41-1.) He cited the Court's opinion in *United States v. Zepeda*, 705 F.3d 1052 (9th Cir. 2013) and requested reversal for a judgment of acquittal based upon insufficient evidence of Indian status. (CA 41-1.) *Zepeda* was later heard en banc.

On April 15, 2013, the panel withdrew its opinion until the *Zepeda* petition for rehearing was resolved. (CA 43.) That petition was granted. The en banc

[2] Other grounds were also raised. They are outside the scope of the issue to be addressed in this supplemental brief and are, therefore, not included.

panel issued its opinion on July 7, 2015. *United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015) (en banc).

Pursuant to Defendant's request, this Court ordered supplemental briefing as to the issue of whether the evidence at trial was sufficient to prove his Indian status in light of *Zepeda*. (CA 46-47.)

On August 21, 2015, Defendant filed his supplemental brief. (CA 48.) Defendant now claims *Zepeda* established that the government's evidence must prove that Defendant qualified as an Indian at the time of the charged offense, rather than at the time of trial, and that the government's evidence is insufficient to make that finding. (Supp. Br. at 8.) In support of this argument, he alleges that: (1) the Certificate was insufficient to show Indian status on the date of the offense because it was dated January 18, 2011; (2) his mother's residence on the reservation is insufficient because persons that do not self-identify as Indians live on reservations; and (3) that the victim's testimony that Defendant "is a Hualapai member of our reservation" is insufficient because it was phrased in present tense.[3] (Supp. Br. at 7-16.) These arguments were not made in Defendant's opening brief.

[3] Defendant argues that the record does not show that Defendant lived at his mother's house. (Supp. Br. 17.) However, it can be inferred from the record that Defendant lived with his mother at her home. *See* footnote 1, *infra*.

**A. Defendant Waived His New Arguments.**

"[O]n appeal, arguments not raised by a party in its opening brief are deemed waived." *Smith v. March*, 194 F.3d 1045, 1052 (9th Cir. 1999); *see also United States v. Torlai*, 728 F.3d 932, 947, fn. 14 (9th Cir. 2013).

Defendant did not argue in his opening brief that his Certificate was insufficient to prove Indian status based upon its date. He never addressed Defendant or his mother's residence on the reservation. He did not argue that the victim's testimony recognizing Defendant as a Hualapai tribal member was insufficient to prove Indian status because it was phrased in the present tense. Ostensibly, these claims are now asserted based upon his argument that "the *Zepeda* opinion establishes that the Indian status must be proven to have existed at the time of the offense." (Supp. Bf. at 4.) This argument is unavailing.

Indian status has always been as an element of the offense that the government must prove at trial to establish federal jurisdiction pursuant to 18 U.S.C. § 1153. Under *Zepeda*, Indian status is established by two factors: "(1) proof of some quantum of Indian blood, whether or not that blood derives from a member of a federally recognized tribe, and (2) proof of membership in, or affiliation with, a federally recognized tribe." 792 F.3d 1103, 1106-07 (9th Cir. 2015) (en banc). In so holding, *Zepeda* overruled *Maggi's* requirement that the blood be traceable to a federally recognized tribe, and left the determination as to

whether a tribe is federally recognized to the district court. *Id.* at 1106-07, 1114. It otherwise left intact the *Bruce* doctrine, and reiterated the criteria set forth in *Bruce* to prove tribal membership/affiliation.[4]

*Zepeda* also stated that evidence of membership/affiliation with a federally recognized tribe must exist at the time of the charged conduct. *Id.* at 1107. In reaching this conclusion, *Zepeda* did not overrule any prior case, as no case has ever held that evidence Defendant was a member of, or affiliated with, a federally recognized tribe only at the time of trial alone will satisfy this element. Indeed, case law existed at the time of trial that Indian status on the date of the offense was controlling. *Bruce*, 394 F.3d at 1215 (citing *United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974) (fact that tribe that defendant was affiliated with was no longer federally recognized at the time of the offense precluded jurisdiction pursuant to 18 U.S.C. § 1153)). This issue was not even contested in *Zepeda*, as the parties agreed that the government had the burden of proving to a jury that the defendant was a member of, or affiliated with, a federally recognized tribe at the time of the offense. *Id.*

[4] They are, "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; enjoyment of the benefits of affiliation with a federally recognized tribe; 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." *Zepeda* at 1114.

Indeed, Defendant said at oral argument prior to this Court's decision in *Zepeda* that Indian status must be proven on the date of the offense. He also there argued, for the first time, that the Certificate was insufficient to establish that element due to its 2011 date. He ultimately conceded there is a reasonable inference that the date reflects when the Certificate was printed for trial. The new arguments could have been made when the opening brief was filed. They were not. The arguments have been waived.

**B. Sufficient Evidence of Defendant's Indian Status Exists.**

Even if Defendant's argument is considered, it fails. Evidence is sufficient if, viewing it most favorably to the prosecution, any rational trier of fact could have found the offense elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). An appellate court must not usurp the fact-finder's role "by considering how it would have resolved the conflicts, made the inferences, or considered the evidence at trial." *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc). Improperly admitted evidence is considered. *Lockhart v. Nelson*, 488 U.S. 33, 40-42 (1988). In determining whether sufficient evidence exists for the jury to find an element of the crime beyond a reasonable doubt, this Court considers the totality of the trial evidence. *United States v. Ware*, 416 F.3d 1118, 1121 (9th Cir. 2005).

Pursuant to the *Zepeda/Bruce* test, the government was required to prove that: (1) Defendant has a quantum of Indian blood, whether or not from a federally recognized tribe, and (2) that Defendant is a member of, or affiliated with, a federally recognized tribe. *Zepeda*, 792 F.3d at 1106-07. A tribal "member" is someone who has been enrolled. *United States v. Antelope*, 430 U.S. 641, 646 and n.7 (1977); 25 C.F.R. § 83.1.

The Certificate establishes sufficient evidence of Defendant's quantum of Indian Blood. (Exhibit 4; ER 181.) It shows that Defendant has Indian blood from three separate Indian tribes: Hualapai, Colorado River/Mojave and Havasupai. (Exhibit 4; ER 181.) This satisfies the first prong of the *Zepeda/Bruce* test. *Zepeda*, 792 F.3d at 1113. And, in analyzing the first prong, it is irrelevant whether these tribes were federally recognized at the time of the offense. *Id.*

The second prong requires membership or affiliation with a federally recognized tribe. The certificate states Defendant's affiliation with three tribes (Hualapai, Colorado River/Mojave and Havasupai) and enrollment within one tribe (Colorado River Indian Tribe). Each of these tribes was published on the BIA list of federally recognized tribes at the time of the offense. BIA List, 74 Fed. Reg. 40, 218-02 (Aug. 11, 2009). This list is "the best source to identify federally acknowledged Indian tribes whose members or affiliates satisfy the threshold criminal jurisdiction inquiry." *Id.* at 1114 (quoting *LaPier v. McCormick*, 986 F.2d

303, 305 (9th Cir. 1993)). Because recognition of a tribe is a federal political decision, "expressed in authoritative administrative documents," it is a question of law, decided by the court. *Id.* *Zepeda* found that the tribe there at issue was federally-recognized as a matter of law, based simply on its BIA listing. *Id.* at 1115. The three tribes here at issue are also federally-recognized as a matter of law, based upon their BIA listing. BIA List, 74 Fed. Reg. 40, 218-02 (Aug. 11, 2009). Therefore, the Certificate shows Defendant is a member of a federally recognized tribe. This is the strongest evidence available to support the second prong of the *Bruce/Zepeda* test. *Zepeda* at 1114. That prong is satisfied.

1. *The jury could reasonably infer tribal enrollment/affiliation at the time of the offense from the Certificate and other evidence.*

Defendant now argues that the date on the Certificate fails to establish that Defendant was a member of, or affiliated with, a federally recognized tribe at the time of the offense. This argument fails.

The Certificate is dated January 18, 2011. (Exhibit 4; ER 181.) It does not state this date was his enrollment date. Its presence at the top right-hand corner of the document indicates that the date represents when the document was printed by the Colorado River Indian Tribe. Tribes maintain enrollment records to determine who is eligible to receive government services. Most government services are performed by the tribe pursuant to a P.L. 93-638 (1975) federal contract with the United States Department of Interior, Bureau of Indian Affairs. The Certificate

admitted into evidence is a record of Defendant's entitlement to receive these services. It also shows that Defendant eligibility for enrollment. Eligibility for tribal enrollment, unlike membership in other associations, is established at birth. For these reasons, the jury could reasonably infer from this Certificate that Defendant was enrolled at the time of the offense. This inference is supported by other circumstantial evidence, including that the offense occurred on an Indian reservation where he resided and associated with other tribal members.

*2. The jury could reasonably infer tribal enrollment/affiliation at the time of the offense from the victim's testimony and other evidence.*

In fact, there was sufficient evidence for the jury to find Defendant was a member of one federally recognized tribe (Colorado River Indian Tribe) and affiliated with another (Hualapai Tribe). The Certificate showed Defendant has Hualapai blood. The victim, an enrolled Hualapai tribal member, recognized Defendant's affiliation with her tribe as she believed he was a member. (RT 1/25/11 196; ER 143.) Testimony from knowledgeable persons that someone is an Indian can support the Indian status element. *Zepeda* at 1115 (tribal enrollment certificate and testimony from the defendant's brother their father was an Indian sufficient to establish the defendant was an Indian at the time of the offense); *United States v. Broncheau*, 597 F.2d 1260, 1263-64 (9th Cir. 1979) (defendant's Indian status supported by district court's recognizing him as such; judge had lived in the community and knew the defendant's family).

Here, the evidence indicates that persons within the Hualapai community are familiar with each another. The town where the assault occurred has approximately 1,300 residents and yet is the largest town on the reservation. (RT 1/25/11 144; ER 91.) Based upon its small size, it is reasonable to infer that community members are not only familiar with one another but recognize outsiders. Indeed, the victim not only knew Defendant before the assault, she knew his girlfriend, another Hualapai tribal member, since childhood. (RT 1/25/11 156, 197; ER 103, 144.) By recognizing Defendant as a tribal member, the victim implicitly recognized his strong Hualapai tribal affiliation. Her testimony supports the second prong of the *Bruce/Zepeda* test.

Nevertheless, Defendant argues that her testimony does not establish his affiliation with a federally recognized tribe the date of the assault because it was phrased in the present tense. (Supp. Bf. at 15.) His argument ignores the other circumstantial evidence of his affiliation. *See United States v. Ware*, 416 F.3d 1118, 1124 (holding that where trial occurred six months after offense, teller's testimony that bank was federally insured at the time of trial, in combination with other circumstantial evidence, was sufficient to allow the jury to find that element); *but see United States v. Ali*, 266 F.3d 1242, 1244 (9th Cir. 2011) (present tense trial testimony and certificate of insurance antedated more than a decade before the offense was insufficient to establish bank was federally insured more than two

years after the offense); *United States v. Allen*, 88 F.3d 765, 769 (9th Cir. 1996) (present tense trial testimony alone is insufficient to prove bank was federally insured where trial was approximately five years after the offense).

Here, the trial occurred approximately one year after the offense. Unlike a bank's insurance status, one's status as an Indian generally does not fluctuate over time. In addition to hearing the victim's testimony that Defendant was a Hualapai member, the jury heard evidence that Defendant assaulted the victim on the Hualapai reservation while associating with Hualapai tribal members; the assault occurred at a house where he lived with his mother across from the tribal housing authority; Defendant is enrolled in the Colorado River Indian Tribe; and Defendant's Indian blood quantum is 1/4 Colorado River, 3/8 Hualapai and 1/8 Havasupai. When considered in its totality, and in the light most favorable to the government, the evidence was sufficient for the jury to not only infer Defendant was either a member of, or affiliated with, a federally recognized tribe at the time of the offense.

## IV. CONCLUSION

In sum, rational jurors could easily find from the evidence that Defendant was an Indian who belonged to or was affiliated with a federally-recognized tribe. For these reasons, and those in prior filings, the conviction should be affirmed.

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## V. 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 this supplemental brief is proportionately spaced, has a typeface of 14 points or more and contains 3,418 words.

September 18, 2015
Date

*s/ Heather H. Sechrist*
HEATHER H. SECHRIST
Assistant U.S. Attorney

## VI. CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 2015, I electronically filed the Supplemental Brief of Appellee with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

*s/ Heather H. Sechrist*
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