No. 24-2128

IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

JOEL RUIZ,
Defendant-Appellant

On Appeal from the United States District Court
for the District of New Mexico
D.C. No. 22-CR-365 (The Hon. David Herrera Urias)

UNITED STATES' PETITION FOR REHEARING EN BANC

February 2026

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TABLE OF CONTENTS

PAGE

ATTACHMENT

TABLE OF CASES AND OTHER AUTHORITIES

TABLE OF CASES

PAGE

Cases

TABLE OF AUTHORITIES

PAGE

RULE 40(B)(2) STATEMENT

Rehearing en banc is appropriate to resolve a panel decision that "conflicts with a decision of the United States Supreme Court," "conflicts with an authoritative decision of another United States court of appeals," or involves "a question of exceptional importance." Fed. R. App. P. 40(b)(2)(B)–(D). The panel's decision here, which vacated the conviction of a man who sexually assaulted a young girl based on a direct application of *United States v. Prentiss*, 256 F.3d 971 (10th Cir. 2001) (per curiam) (en banc), satisfies all three criteria.

In *Prentiss*, a divided Tenth Circuit held that a defendant's non-Indian status is an essential element of any crime prosecuted under the General Crimes Act, 18 U.S.C. § 1152—one that must be alleged in the indictment, rather than an affirmative defense that the defendant bears the burden of raising. 256 F.3d 977–80. From the beginning, *Prentiss* conflicted with the Supreme Court's instruction that when a statute establishes an "exception" to criminal liability, the indictment need not negate that exception. *McKelvey v. United States,* 260 U.S. 353, 357 (1922). Instead, "it is incumbent on one who relies on such an exception to set it up and establish it." *Id.* This "settled rule" was affirmed just last year. *Cunningham v. Cornell Univ.*, 604 U.S. 693, 707 (2025) (citation omitted).

Aside from flouting Supreme Court precedent, *Prentiss* conflicts with the positions of the other courts of appeals to have addressed it. The Fifth and the Ninth Circuits have both squarely held that a defendant's non-Indian status is an affirmative defense. *See United States v. Hester*, 719 F.2d 1041, 1043 (9th Cir. 1983); *United States v. Haggerty*, 997 F.3d 292, 298–302 (5th Cir. 2021), cert. denied, 142 S. Ct. 759 (2022). And the Eighth Circuit has interpreted an adjacent enumerated exception to Section 1152 as an affirmative defense, not an element. *United States v. Webster*, 797 F.3d 531, 536 (8th Cir. 2015) (considering "the absence of a tribal prosecution"). *Prentiss* thus creates a needless disparity in the application of federal law across Indian Country.

Lastly, *Prentiss*'s error is one of exceptional importance. In recent years, *Prentiss* has led this Court to vacate the convictions of three child molesters—not because there was any doubt about the crimes they had committed, but because the government merely presented inadequate evidence of their non-Indian status. *United States v. Simpkins,* 90 F.4th 1312 (10th Cir. 2024); *United States v. Hebert*, 159 F.4th 777 (10th Cir. 2025); *United States v. Ruiz*, 164 F.4th 1223 (10th Cir. 2026). The defendants' status as Indians or non-Indians has nothing to do with their culpability; indeed, had these defendants in fact been Indians, they could each have been prosecuted under the Major Crimes Act, 18 U.S.C. § 1153. And the dangers

posed by *Prentiss*, particularly in Oklahoma, have increased exponentially since *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). *Prentiss*'s treatment of non-Indian status in Section 1152 cases thus threatens the safety of Indian victims and the general public.

This Court should therefore grant rehearing en banc to bring this circuit into alignment with the Supreme Court and the other courts of appeals that have addressed this issue, and to prevent dangerous offenders in Indian Country from escaping justice.

ISSUE PRESENTED

Is 18 U.S.C. § 1152's exception for offenses committed by one Indian against another an affirmative defense that the defendant bears the burden of raising?

STATEMENT OF THE CASE

I. Proceedings below

After a pair of cousins, Jane Doe 1 and Jane Doe 2, reported that Joel Ruiz lured them into his trailer on the Jicarilla Apache reservation with candy and sexually abused them when they were six or seven, and three or four, respectively, Ruiz was charged with aggravated sexual abuse of both girls under 18 U.S.C. §§ 1152, 2241(c), and 2246(2)(D). 1R.22.

At trial, the jury heard from two law-enforcement witnesses—Criminal Investigator (CI) Rome Wager, and FBI Special Agent Piere Himel—who both

testified that they had concluded that Ruiz was not Indian. Because Ruiz's confession had been suppressed, 1R.237–38, 257, these witnesses were not permitted to tell the jury that Ruiz had disclaimed any affiliation with the Jicarilla Apache tribe.

CI Wager works for the Jicarilla Apache Nation and holds a federal commission from the Bureau of Indian Affairs, one that requires training in federal law in Indian Country. 5R.170. As part of his duties investigating crime on the reservation, CI Wager has to determine whether any victims or suspects are Indian or not. *Id*. at 170, 189. In making this determination, CI Wager reaches out to the Jicarilla Apache enrollment office, *id*. at 190, and if the person is not enrolled there, he will speak with those involved in the alleged crime to find out what tribe they may be enrolled with, *id*. In this case, CI Wager reached out only to the Caddo Nation of Oklahoma, where Jane Does 1 and 2 were enrolled. *Id*.

CI Wager also "review[ed]" "databases to determine whether Joel Ruiz was a member of any federally recognized tribe." 5R.191. From this inquiry, he learned that Ruiz had been born in Mexico. *Id*. at 193. In addition, CI Wager also spoke to an agent from the Department of Homeland Security, after which he reported that he was able to determine Ruiz's Indian status. *Id*. at 194. His investigation did not uncover any information that indicated Ruiz was Indian. *Id*. He thus determined that the matter was

subject to federal jurisdiction. *Id*. at 196.

As for Agent Himel, he had worked as a police and correctional officer with the Bureau of Indian Affairs. 5R.367. He attended the Indian Police Academy, *id*. at 367, where "a large portion" of the curriculum involved "Indian Country criminal jurisdiction training," *id*. at 368. He also holds a Master of Legal Studies in Indigenous People's law, *id*., which included the study of Indian Country criminal jurisdiction, *id*. Agent Himel explained that federal criminal jurisdiction in Indian Country depends on the Indian or non-Indian status of the suspect and victim. 3R.370-71. To determine someone's status, he will ask them "whether they're enrolled members of a tribe," *id*. at 375, and then "follow up" with the enrollment office, *id*., if any. If that process does not reveal a tribal affiliation, "they wouldn't be considered a member of a federally-recognized tribe." *Id*. In investigating Ruiz's status, he also received information from a government agency, which contained Ruiz's identifiers. *Id*. at 385. Furthermore, he reviewed documents that Ruiz signed under penalty of perjury. *Id*. at 390. Based on his review of those documents, he was able to determine that Ruiz was a non-Indian. *Id*. His determination was based partly, but not entirely, on Ruiz's Mexican birth. *Id*. at 392.

At the conclusion of the government's evidence, Ruiz moved for acquittal for lack of sufficient evidence on his status as non-Indian. The

district court denied the motion. The jury convicted Ruiz of abusing Jane Doe 1.

II. Panel opinion

On appeal, Ruiz argued that the evidence of his non-Indian status was insufficient, and the panel agreed.

"To begin," the panel wrote, "the witnesses' relationship and personal knowledge of Ruiz rest on a "'thin foundation.'" *Ruiz*, 164 F.4th at 1227. "Importantly, neither witness testified that they knew Ruiz personally, or that they knew that Ruiz was a non-Indian." *Id.* at 1228. "Nor did they testify that Ruiz ever mentioned that he was a non-Indian. And there is no showing that the government attempted to contact a family member to gather Ruiz's ancestry or recognition evidence." *Id.* Further, the government had evidently not asked any tribe whether Ruiz was an enrolled member. *Id.* And Agent Himel's review of government databases was little help because those databases "do not have information on whether an individual is an enrolled member of a tribe." *Id.* And finally, the Court discounted the evidence about Ruiz's Mexican birth because "the definition of a recognized Indian—tribal or federal government recognition—does not turn on race." *Id.* (cleaned up). Accordingly, "even in the light most favorable to the government, a rational jury would need to speculate to conclude that Ruiz is a non-Indian based on the evidence the government provided." *Id.*

The full panel, however, agreed that the Tenth Circuit should revisit its precedent requiring the government to prove a defendant's non-Indian status under § 1152. *Ruiz*, 164 F.4th at 1229–31. Echoing Judge Hartz's concurrence in *Hebert*, 159 F.4th at 790–92, the panel remarked that the *Prentiss* rule is "nonsensical" and "perverse[.]" In contrast, treating the matter as an affirmative defense is "logical" and is supported by the text of § 1152, by Supreme Court precedent on statutory exceptions to criminal liability, and by the decisions of other circuits. *Id*.

ARGUMENT

I. *Prentiss* conflicts with Supreme Court authority holding that statutory exceptions to liability are affirmative defenses.

The Supreme Court has long recognized that where a statute identifies an "exception" to criminal liability, the indictment need not negate that exception. *McKelvey v. United States,* 260 U.S. 353, 357 (1922). The rule applies where "the language of the section defining the offence is so entirely separable from the exception that the ingredients constituting the offence may be accurately and clearly defined without any reference to the exception[.]" *United States v. Cook,* 84 U.S. 168, 173 (1872). In that instance, the "settled rule" is that "the matter contained in the exception is matter of defence and must be shown by the accused." *Id.* at 173–74; *McKelvey*, 260 U.S. at 357 ("[I]t is incumbent on one who relies on such an exception to set it

up and establish it.").

This deep-rooted principle has been recently reaffirmed. Just last year, in *Cunningham*, the Court reiterated that exemptions to a statute "ordinarily constitute affirmative defenses that are entirely the responsibility of the party raising them." *Cunningham*, 604 U.S. at 701. This rule of construction applies "[e]ven in the criminal context." *Id*. at 707. Only in "narrow[]" situations as the Court has declined to apply it, "such as when an exception to a criminal offense is contained within the same sentence of the provision defining the offense." *Id*.

Section 1152 is "the exact type of statute contemplated by the Supreme Court." *Haggerty*, 997 F.3d at 300. The statute's first sentence sets forth the rule that federal criminal laws governing "offenses committed in any place within the sole and exclusive jurisdiction of the United States…shall extend to the Indian country." 18 U.S.C. § 1152. It is an "accurate[] and clear[]" definition that establishes a perfectly intelligible general rule "without providing an intra-Indian exception." *Haggerty*, 997 F.3d at 300; *Cook*, 84 U.S. at 173. The next sentence carves out three exceptions: "offenses committed by one Indian against the person or property of another Indian"; offenses committed by an Indian "who has been punished by the local law of the tribe"; and offenses over which a tribe has, by treaty, been given exclusive jurisdiction. *Id*. A straightforward application of *Cook*, *McKelvey,* and

Cunningham makes clear that the government need not "negate" these exceptions; rather, it is incumbent on the defendant to "set [] up and establish" them. *See McKelvey*, 260 U.S. at 357. Where, as here, a defendant does not raise the defense at all, the government should have no obligation to present such evidence.

Because *Prentiss's* allocation of the burden of proof conflicts with this Supreme Court authority, this Court should revisit its 2001 holding.

II. *Prentiss* conflicts with the authoritative decisions of other courts of appeals.

In contrast to *Prentiss*, the other circuits to have addressed this issue have heeded the Supreme Court's guidance. When *Prentiss* was decided, it created a circuit split with the Ninth Circuit's *Hester* decision, in which the Ninth Circuit relied upon *McKelvey* to conclude that "the Government need not allege the non-Indian status of the defendant in an indictment under section 1152, nor does it have the burden of going forward on that issue." 719 F.2d at 1043. Two decades after *Prentiss*, the Fifth Circuit deepened that split by joining the Ninth Circuit, again by applying "settled and reconcilable Supreme Court doctrine, as well as principles of statutory construction." *Haggerty*, 997 F.3d at 298–302.

Since *Prentiss*, the Eighth Circuit has offered additional support for the notion that "exceptions" in Section 1152's second paragraph should be treated

as affirmative defenses rather than elements. *Webster,* 797 F.3d at 536. Citing *McKelvey, Webster* concluded that Section 1152's second exception—that a defendant was previously punished by a tribe for the same offense—is not an element of Section 1152. The Eighth Circuit observed that its interpretation "squares with [Section] 1152's plain language and construction," as the first sentence of Section 1152 extends federal enclave law to Indian country, and the second sentence "contains three exceptions to the general extension of federal enclave laws to Indian country." *Id.* at 536–537 (citation and internal quotation marks omitted). Although the fact that *Webster* addressed a different exemption means that *Webster* avoids a *direct* conflict with *Prentiss*, *Webster*'s analysis further undermines the reasoning adopted by this Court two decades ago.

The Court should grant rehearing and align itself with the Fifth, Eighth, and Ninth Circuits. "Although…it is rarely appropriate to overrule circuit precedent just to move from one side of a conflict to another, reconsideration is more appropriate when this circuit can eliminate the conflict by overruling a decision that lacks support elsewhere." *United States v. Corner*, 598 F.3d 411, 414 (7th Cir. 2010). This is precisely that situation.

III. Correcting *Prentiss's* misallocation of the burden of proving non-Indian status is a matter of exceptional importance.

Finally, the Court should grant rehearing en banc because the error committed by *Prentiss* is one of exceptional importance. Correctly allocating the burden of raising non-Indian status can make or break a Section 1152 prosecution, determining whether a serious offender is held responsible and whether victims receive justice.

Proving that a defendant is not Indian requires a showing that the defendant "(1)…has no Indian blood or (2) that neither a tribe nor the federal government recognizes him as an Indian." *Hebert*, 159 F.4th at 785. Proving a negative is a task that "courts have called… impossible or near impossible." *Hebert*, 159 F.4th at 786 n.6. Establishing the lack of *any* Indian blood is difficult in the best of cases, and even more so where a defendant's paternity is disputed, or where a defendant (or any of his ancestors) is adopted or has no knowledge of his or her birth parents' identities. And proving a lack of tribal or federal recognition is no easier. As a leading Indian Law treatise recognizes, "In a nation with well over 570 federally recognized Indian tribal nations," it is "difficult to require the government to prove that the defendant is not a member of any of them, absent some evidence that the question is contested by the defendant." 1 Cohen's Handbook of Federal Indian Law § 11.02[1][b][iii] (2025). Without any input from a defendant, forcing the

government to produce evidence a defendant has *no* Indian blood or is not a member of any of more than 500 Indian tribes imposes an unjust, unreasonable, and unnecessary burden on an overburdened court system.

In contrast, asking a defendant to put forth evidence of his Indian status—the facts of which are uniquely within his grasp—presents no such concerns. As Judge Hartz observed in his *Hebert* concurrence, if a defendant is Indian, he can "easily point to [this evidence] and do so without implicating in any way his culpability for the underlying crime." *Hebert*, 159 F.4th at 790. *See also Hester*, 719 F.2d at 1043 ("It is far more manageable for the defendant to shoulder the burden of producing evidence that he is a member of a federally recognized tribe than it is for the [g]overnment to produce evidence that he is not a member of any one of the hundreds of such tribes.").

Subjecting the government to this "unrealistic" burden, *Ruiz*, 164 F.4th at 1231, has wrought devastating consequences in recent prosecutions. In *Simpkins*, *Hebert*, and *Ruiz*, the Court was bound by *Prentiss* to free men who sexually abused children. As the panel in *Ruiz* put it, "It is nonsensical to have convictions vacated and overturned because, despite putting forth convincing evidence of a defendant's offense conduct, the government did not have ample evidence in its arsenal 'to prove a negative.'" 164 F.4th at 1229. The "perverse[]" rule of *Prentiss* "turns the table on victims when the defendant most likely holds the evidence that proves his status." *Id*. And this

result is even more difficult to stomach because if the defendants in these cases *had* been Indian, they could instead have been held responsible for these same crimes under the Major Crimes Act, 18 U.S.C. § 1153, which applies to "any Indian."

Prentiss, in short, generates unjust results in high-stakes cases. The Court should seize this opportunity to overrule it.

Respectfully submitted,

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TYPE-VOLUME CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this petition contains 2819 words. I relied on my word processor to obtain the count. My word processing software is Word for Microsoft 365.

s/ C. Paige Messec
C. PAIGE MESSEC
Assistant U.S. Attorney

CERTIFICATE OF SERVICE AND DIGITAL SUBMISSION

I HEREBY CERTIFY that the foregoing petition was filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on February 17. 2026.

I ALSO CERTIFY that Violet N.D. Edelman, attorney for Defendant-Appellant Joel Ruiz, is a registered CM/ECF user, and that service will be accomplished by the appellate CM/ECF system.

s/ C. Paige Messec
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164 F.4th 1223
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Joel RUIZ, Defendant - Appellant.

No. 24-2128
|
FILED January 28, 2026

Synopsis
Background: Defendant was convicted in the United States District Court for the District of New Mexico, David Herrera Urias, J., of sexual abuse of a minor under 12 years old in Indian country and sentenced to 30 years of imprisonment. Defendant appealed.

[Holding:] The Court of Appeals, Tymkovich, Circuit Judge, held that insufficient evidence supported finding that defendant was non-Indian.

Vacated and remanded.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection.

West Headnotes (12)

[1] Criminal Law Review De Novo

The Court of Appeals reviews de novo a district court's denial of a motion for a judgment of acquittal. Fed. R. Crim. P. 29.

[2] Criminal Law Nature of Decision Appealed from as Affecting Scope of Review
Criminal Law Construction in favor of government, state, or prosecution

On review of a district court's denial of a motion for judgment of acquittal, the Court of Appeals views all the evidence in the light most favorable to the government and determines whether there is evidence from which a jury could find the defendant guilty beyond a reasonable doubt. Fed. R. Crim. P. 29.

[3] Criminal Law Nature of Decision Appealed from as Affecting Scope of Review

On review of a district court's denial of a motion for judgment of acquittal, the Court of Appeals does not weigh the evidence or consider the credibility of the witnesses in making its determination whether there is evidence from which a jury could find the defendant guilty beyond a reasonable doubt. Fed. R. Crim. P. 29.

[4] Indians Weight and sufficiency

If evidence of a defendant's non-Indian status is insufficient to sustain a conviction for committing a crime in Indian country, a judgment of acquittal must be entered. 18 U.S.C.A. § 1152; Fed. R. Crim. P. 29(a).

[5] Indians Crimes by non-Indians

To convict a defendant of committing a crime in Indian country, the government must prove, among other things, that (1) the defendant is not an Indian and (2) the victims are Indians. 18 U.S.C.A. § 1152.

[6] **Indians** Who is an Indian; tribal status

An individual has "some Indian blood," for purposes of determining Indian status under the statute extending the general criminal laws of the United States to offenses committed by a non-Indian against an Indian in Indian country, if he has Indian ancestors. 18 U.S.C.A. § 1152.

[7] **Indians** Weight and sufficiency

Evidence of a parent, grandparent, or great-grandparent who is clearly identified as an Indian is generally sufficient to show the individual has some Indian blood, for purposes of determining Indian status under the statute extending the general criminal laws of the United States to offenses committed by a non-Indian against an Indian in Indian country. 18 U.S.C.A. § 1152.

[8] **Indians** Who is an Indian; tribal status

The government can prove that a defendant charged with committing a crime in Indian country is a non-Indian by showing that he either does not have any Indian blood, i.e., does not have any Indian ancestors, or is not recognized as an Indian by a tribe or by the federal government. 18 U.S.C.A. § 1152.

[9] **Indians** Evidence

A witness may testify about the Indian or non-Indian status of a victim or defendant charged with committing a crime in Indian country if the witness has personal knowledge of the matter. 18 U.S.C.A. § 1152.

[10] **Indians** Weight and sufficiency

Insufficient evidence supported finding that defendant was non-Indian, and thus, did not support defendant's conviction for sexual abuse of a minor under 12 years old in Indian country, although there was evidence defendant was born in Mexico and two witnesses who testified with respect to whether defendant was recognized by a tribe or federal government had extensive experience working with and in tribal communities; birthplace evidence did not establish absence of Indian ancestors, government did not introduce any DNA or genealogical evidence as to his non-Indian blood, witnesses did not testify they knew defendant personally, one witness did not contact any tribe to check defendant's potential enrollment status, and other witness checked two law enforcement databases that did not contain enrollment information. 18 U.S.C.A. §§ 1152, 2241(c), 2246(2)(D).

[11] **Indians** Weight and sufficiency

Evidence about a defendant's birthplace does not establish that he has no Indian ancestors, for purposes of determining Indian status under the statute extending the general criminal laws of the United States to offenses committed by a non-Indian against an Indian in Indian country. 18 U.S.C.A. § 1152.

[12] **Indians** Who is an Indian; tribal status

The definition of a recognized Indian, whether tribal or federal government recognition, does not turn on race, for purposes of determining Indian status under the statute extending the general criminal laws of the United States to offenses committed by a non-Indian against an

Indian in Indian country. 18 U.S.C.A. § 1152.

Appeal from the United States District Court for the District of New Mexico (D.C. No. 1:22-CR-00365-DHU-1)

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Before HARTZ, TYMKOVICH, and McHUGH, Circuit Judges.

Opinion

TYMKOVICH, Circuit Judge.

***1225** Joel Ruiz was convicted of sexual abuse of a minor under twelve years old and sentenced to thirty years of imprisonment. He appeals his conviction based on three grounds: (1) his indictment should have been dismissed for vagueness; (2) the government failed to establish his non-Indian status; and (3) the jury was improperly instructed with a modified *Allen* instruction.

Exercising jurisdiction under 28 U.S.C. § 1291, we **VACATE** the conviction and **REMAND**. We agree that the government failed to produce sufficient evidence to prove Ruiz's non-Indian status beyond a reasonable doubt. Because proof of a defendant's non-Indian status is an essential element of the convicted crime in this circuit, Ruiz's conviction fails. We do not reach Ruiz's other arguments.

I. Background[1]

[1] We resolve this appeal based on the government's failure to produce sufficient evidence of Ruiz's non-Indian status, and thus we provide only the relevant facts and history as to that issue.

A pair of cousins reported that Ruiz lured them into his trailer with candy and abused them by touching their genitals when Jane Doe 1 was six or seven years old, and when Jane Doe 2 was three or four years old. Based on his conduct, Ruiz was charged with two counts of engaging in a sexual act with a minor under the age of twelve within an aggregate seven-year period, in violation of 18 U.S.C. §§ 1152, 2241(c), and 2246(2)(D). The indictment alleged that the victims were Indian, and that Ruiz was a non-Indian.

The case proceeded to trial. To prove that Ruiz was a non-Indian, the government presented two witnesses who testified that they concluded Ruiz was a non-Indian based on their respective review of certain databases and relevant documents. At the conclusion of the government's case, Ruiz moved for judgment of acquittal under Federal Rule of Criminal Procedure 29 for failure to prove his non-Indian status. The court denied the motion based on witness testimonies at trial.

Ultimately, Ruiz was found guilty of only one instance of engaging in a sexual act with a minor under the age of twelve. ***1226** He was sentenced to thirty years of imprisonment, followed by ten years of supervised release.

II. Discussion

Ruiz contends that the evidence produced at trial proving his non-Indian status is insufficient as a matter of law.

[1] [2] [3]"We review de novo the district court's denial of a motion for a judgment of acquittal." *United States v. Ramirez*, 348 F.3d 1175, 1180 (10th Cir. 2003) (citing *United States v. Bailey*, 327 F.3d 1131, 1140 (10th Cir. 2003)). "We view all the evidence in the light most favorable to the government" and "determine whether there is evidence from which a jury could find the defendant guilty beyond a reasonable doubt." *Id.* (citation modified). But we do not "weigh the evidence or consider the credibility of the witnesses in making our determination." *Id.* (citation modified).

[4]If evidence of a defendant's non-Indian status is insufficient to sustain a conviction, a judgment of

acquittal must be entered. *See* Fed. R. Crim. P. 29(a); *United States v. Simpkins*, 90 F.4th 1312, 1315 (10th Cir. 2024) ("[W]hen faced with a sufficiency challenge, a court asks only whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found *the essential elements of the crime* beyond a reasonable doubt." (citation modified)).

A. Legal Standard: Proving Non-Indian Status

[5]"To convict [Ruiz] under § 1152, the government needed to prove, among other things, that (1) he is not an Indian and (2) his victims are Indians." *Simpkins*, 90 F.4th at 1315 (citation omitted).

[6] [7] [8]"Although the statute does not define 'Indian,' we have held that persons qualify as Indians under § 1152" if: (1) they have "some Indian blood";[2] and (2) are "recognized as an Indian by a tribe or by the federal government." *Id.* at 1318 (citation modified). Conversely, the government can prove that a person is a non-Indian by showing that he fails either prong. *Id.* (citation omitted).

[2] An individual has "some Indian blood" if he has "Indian ancestors." *United States v. Hebert*, 159 F.4th 777, 780 (10th Cir. 2025) (citation omitted). "Evidence of a parent, grandparent, or great-grandparent who is clearly identified as an Indian is generally sufficient to satisfy this prong." *Id.* (citation modified).

[9]"Our cases applying this test have approved a totality-of-the-evidence approach to determining Indian status, although certain types of evidence, by themselves, may not be sufficient." *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *see United States v. Hatley*, 153 F.4th 1112, 1123–24 (10th Cir. 2025) (noting that a Certificate of Degree of Indian Blood or tribal documents that fall under an exception to the bar on hearsay may suffice). A witness may testify about a victim or defendant's Indian or non-Indian status if he has personal knowledge of the matter. *United States v. Walker*, 85 F.4th 973, 980–81 (10th Cir. 2023).

B. Sufficiency of the Evidence

[10] [11]At Ruiz's trial, the government did not introduce any DNA or genealogical evidence as to his non-Indian blood. Although there is evidence that Ruiz was born in Mexico, evidence about a defendant's birthplace does not establish that he has no Indian ancestors. *Cf. Hebert*, 159 F.4th at 787 ("[A]lthough [defendant] identified as part-Mexican, white, and Latino/Hispanic, that also does not show he has no Indian ancestors.").

Instead, the government focused on proving that Ruiz is not recognized as an Indian by a tribe or the federal government. ***1227** We have identified several nonexclusive factors in addressing this inquiry: "(1) enrollment in a tribe, (2) provision of government assistance reserved only for Indians, (3) enjoying the benefits of tribal affiliation, and (4) social recognition as an Indian through living on a reservation and participating in Indian social life." *Id.* at 780 (citation omitted). But as we explain, the testimonies of the government's two witnesses were insufficient to conclude Ruiz is a non-Indian beyond a reasonable doubt.[3]

[3] We recently clarified that when proving a defendant's Indian status, the government must prove that the defendant was an Indian "at the time of the offense." *Hatley*, 153 F.4th at 1123. We do not reach whether the government must similarly prove a defendant's non-Indian status at the time of the offense because our conclusion would be the same either way.

The government first called Jicarilla Apache criminal investigator Rome Wager[4] as a witness. Investigator Wager testified that he lived on the Jicarilla Apache Reservation for 27 years, and that he is an enrolled member of the tribe. He stated he was familiar with Ruiz from seeing him on the Jicarilla Apache Nation's reservation. R., Vol. V at 183–84. Investigator Wager also testified that Ruiz resided on the reservation. R., Vol. V at 185, 188, 195. When asked whether he reached out to any tribes to determine if federal jurisdiction exists, Investigator Wager said he contacted the Caddo Nation of Oklahoma (where the two minor victims are enrolled) to determine the victims' Indian status. R., Vol. V at 190. But he denied having asked any tribe about Ruiz's enrollment status. R., Vol. V at 191. Investigator Wager also testified that he reviewed the National Crime Information Center database and the Interstate Identification Index database, and learned that Ruiz was born in Mexico. Investigator Wager stated that he did not find any information that indicated Ruiz was an Indian. R., Vol. V at 194.

[4] Investigator Wager testified that he had been a criminal investigator since July 2021 and was previously a highway safety officer and a patrol

officer. In total, he had been with the Jicarilla Apache Police Department for 13 years.

The government then called FBI Special Agent Piere Robert Himel.[5] Special Agent Himel testified that to confirm an individual is non-Indian, the individual is "ask[ed] whether they're enrolled members of a tribe." R., Vol. V at 375. He stated: "we can query their name with various tribes, and if they're not on the enrollment records, they wouldn't be a member of that tribe." R., Vol. V at 375. He did not make clear whether he conducted this process for Ruiz, however. When questioned, Special Agent Himel testified that he concluded Ruiz is a non-Indian based on: (1) his review of documents that Ruiz signed under penalty of perjury, (2) his review of Ruiz's "identifiers" and photographs, and (3) in part, the fact that Ruiz's birthplace was Mexico. R., Vol. V at 385–86, 390, 392. Ruiz's documents did not affirmatively indicate his tribal status.

[5] Special Agent Himel testified that prior to joining the FBI, he was a police officer for the Bureau of Indian Affairs and served on the Standing Rock Reservation in North and South Dakota. Before that, he was a corrections officer with the Bureau of Indian Affairs on the Hopi Reservation. He testified that he was familiar with crimes in Indian Country and with relevant jurisdictional issues.

To begin, the witnesses' relationship and personal knowledge of Ruiz rest on a "thin foundation." *Hebert*, 159 F.4th at 787. Investigator Wager testified that he was familiar with Ruiz based on his experience passing "Ruiz on the road" in the community, but conceded that he "never stopped him." R., Vol. V at 183–84. He also indicated that he could identify Ruiz's specific vehicle and testified that he saw Ruiz's ***1228** vehicle at a residence on the reservation, and thus concluded that Ruiz lived there. But seeing Ruiz's vehicle at a specific address, or evidence that Ruiz lived on the reservation, does not mean Ruiz is or is not affiliated or socially recognized as an Indian. Importantly, neither witness testified that they knew Ruiz personally, or that they knew that Ruiz was a non-Indian. *See Hebert*, 159 F.4th at 788 (finding the witness's "equivocal testimony and the scant evidence about their relationship does not support a reasonable inference that [the witness] actually knew [defendant's] Indian status"). Nor did they testify that Ruiz ever mentioned that he was a non-Indian. And there is no showing that the government attempted to contact a family member to gather Ruiz's ancestry or recognition evidence. *Id.* at 789.

Second, Investigator Wager testified that he did not contact any tribe to check Ruiz's potential enrollment status. Similarly, Special Agent Himel did not indicate that he contacted any tribes. Although we have stated that the government does not have a duty "to bring forth tribal officials to *disprove* [an individual] was a member of their tribes," *Diaz*, 679 F.3d at 1188, we have also recently held that "merely contacting five tribes without results proved nothing" about a defendant's non-Indian status. *Hebert*, 159 F.4th at 789 & n.10. Here, the government's failure to ask *any* tribe about Ruiz's enrollment status cuts against satisfaction of its burden to prove his non-Indian status.

Third, Investigator Wager concluded that Ruiz was a non-Indian based on his review of national databases that did not indicate otherwise. But as Special Agent Himel noted in his testimony, law enforcement databases do not have information on whether an individual is an enrolled member of a tribe. R., Vol. V at 375 ("[T]hey may on occasion, but, generally, [Indian status is] something you have to ask the individual about and then follow-up with the local enrollment office.... If we don't find anything, they wouldn't be considered a member of a federally-recognized tribe."). Accordingly, Investigator Wager's conclusion that Ruiz is a non-Indian based on his review of such databases, or any adjacent archive for that matter, falls short of proving this essential element.

[12]Finally, both witnesses concluded Ruiz was a non-Indian at least partly because Ruiz was born in Mexico. But as we established in *Hebert*, "[t]he definition of a recognized Indian ... —tribal or federal government recognition—does not turn on race." 159 F.4th at 789 ("And even if relevant, the race evidence tells little because ... someone can be both Hispanic and Native American.").

In short, even in the light most favorable to the government, a rational jury would need to speculate to conclude that Ruiz is a non-Indian based on the evidence the government provided. The witnesses' respective experience working with and in tribal communities, although extensive, cannot prove Ruiz's non-Indian status when their conclusions are likewise predicated on mere inferences.

Hence, we must vacate Ruiz's conviction and remand because the government failed to set forth sufficient evidence to prove, beyond a reasonable doubt, a defendant's non-Indian status under 18 U.S.C. § 1152.

C. Proving a Defendant's Non-Indian Status in the Tenth Circuit

We acknowledge that in reaching this conclusion, the government has a difficult and potentially impractical task "to prove a negative." *Hebert*, 159 F.4th at 786 (citations omitted). That is especially so when the government must do so beyond a reasonable doubt and "when the information is more likely in possession of the defendant." *Id.* (citations omitted).

***1229** Our current caselaw originates from *United States v. Prentiss*, 256 F.3d 971 (10th Cir. 2001), where our circuit concluded that the Indian and non-Indian statuses of a victim and defendant are essential elements of a crime under § 1152 that must be alleged in an indictment. In recognizing that § 1152 "does not expressly allocate the burden of alleging and proving the statuses of the victim and the defendant," our circuit, a bit amorphously, concluded that because the status of a victim is an essential element, the status of a defendant must be also. *Prentiss*, 256 F.3d at 975–78 ("[W]e are not persuaded that the status of the defendant should be treated differently from the status of the victim ... [because] the status of the defendant may be just as significant in determining whether a federal court has jurisdiction ....").

But an alternative interpretation—that proof of defendant's non-Indian status should be an affirmative defense—resolves the pickle, and more. First, it's logical. It is nonsensical to have convictions vacated and overturned because, despite putting forth convincing evidence of a defendant's offense conduct, the government did not have ample evidence in its arsenal "to prove a negative." Our rule, perversely, turns the table on victims when the defendant most likely holds the evidence that proves his status. *See United States v. Hester,* 719 F.2d 1041, 1043 (9th Cir. 1983) ("It is far more manageable for the defendant to shoulder the burden of producing evidence that he is a member of a federally recognized tribe than it is for the [g]overnment to produce evidence that he is not a member of any one of the hundreds of such tribes.").

The resolution is further supported by the text of 18 U.S.C. § 1152, also known as the Indian Country Crimes Act or the General Crimes Act.[6] The provision enables the government to prosecute crimes committed in Indian country by non-Indians against Indians. It lists three exceptions, however, one of which is that broad coverage does "not extend to offenses committed by one Indian against the person or property of another Indian." § 1152. Relatedly, the Supreme Court has directed lower courts that

> an indictment ... founded on a general provision defining the elements of an offense, or of a right conferred, *need not negative the matter of an exception* made by a proviso ..., whether in the same section or elsewhere, and that *it is incumbent on one who relies on such an exception to set it up and establish it*."

McKelvey v. United States, 260 U.S. 353, 357, 43 S.Ct. 132, 67 L.Ed. 301 (1922) (emphases added) (citations omitted); *see also Cunningham v. Cornell University*, 604 U.S. 693, 707, 145 S.Ct. 1020, 221 L.Ed.2d 591 (2025) (noting in a civil case that "even in the criminal context, it remains a settled rule that an indictment or other pleading ... need not negative the matter of an exception made by a proviso or other distinct clause" (citation modified)). Thus, a natural interpretation is ***1230** that, like affirmative defenses, the enumerated exception should be raised first by the defendant; the government would then be required to provide any evidence proving otherwise.[7]

[6] 18 U.S.C. § 1152 provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

[7] "If ... the exceptions are essential elements, then the [g]overnment must also allege and affirmatively prove—every time it prosecutes a crime under § 1152—that the defendant has not already been punished by the local law of the tribe and that there is no treaty stipulation that grants

exclusive jurisdiction to the respective tribe." *United States v. Haggerty*, 997 F.3d 292, 301 (5th Cir. 2021).

Indeed, even at the time *Prentiss* was decided, the Ninth Circuit had already determined that a defendant's non-Indian status is an affirmative defense that the defendant must first properly raise. *Hester,* 719 F.2d at 1043 (holding "the [g]overnment need not allege the non-Indian status of the defendant in an indictment under section 1152, nor does it have the burden of going forward on that issue. Once the defendant properly raises the issue of his Indian status, then the ultimate burden of proof remains, of course, upon the [g]overnment" (citation omitted)). Circuits that have addressed the same question have followed *Hester*'s reasoning. *See Haggerty*, 997 F.3d at 300–02 (discussing the circuit split between the Ninth and Tenth Circuits, and concluding that "settled and reconcilable Supreme Court doctrine, as well as principles of statutory construction, demonstrate that, when the victim is Indian, the defendant's status as Indian is an affirmative defense for which the defendant bears the burden of pleading and production, with the ultimate burden of proof remaining with the [g]overnment"); *cf. United States v. Webster*, 797 F.3d 531, 536 (8th Cir. 2015) (concluding that one of the enumerated exceptions, "the absence of tribal prosecution[,] is not an element of § 1152" because, applying the same reasoning in *Hester*, "[i]t is far more manageable for [a defendant] to initially show he was 'punished by the local law of the tribe' than it is for the government to initially show the negative" (citation omitted)).

Finally, experts and academics have also acknowledged the difficulty of our current standard.[8] The authors of the foremost treatise on Federal Indian Law note that "[p]erhaps because of the evidentiary difficulty in proving a negative, even in the Tenth Circuit where non-Indian status is treated an element of the offense that must be proven at trial, the courts have given prosecutors substantial latitude in establishing non-Indian status." 1 Cohen's Handbook of Federal Indian Law § 11.02[1][b][iii] (2025) ("In a nation with well over 570 federally recognized Indian tribal nations, ... it would be difficult to require the government to prove that the defendant is not a member of any of them, absent some evidence that the question is contested by the defendant."). Indeed, and as evidenced by Ruiz's trial, our circuit has allowed testimony of personal knowledge that the defendant was a non-Indian to be admitted if there is adequate foundation. *Walker*, 85 F.4th at 983–84 ("The personal knowledge standard is not difficult to meet." (citation modified)). But this workaround misses the forest for the trees.

[8] The *American Indian Law in a Nutshell*, a comprehensive resource on the federal law of American Indians, cognizes the circuit split. William C. Canby, Jr., *American Indian Law in a Nutshell* 195 (Jesse E. Chopper et al. eds., 8th ed. 2025) ("Circuits have split on the question whether the Indian or non-Indian status of the *defendant* must be pleaded and proved by the government in a prosecution under 18 U.S.C.A. § 1152."). Notably, the author of the guide is Judge William Canby, Jr., the author of *United States v. Hester* in the Ninth Circuit.

As unrealistic as our current standard for proving a defendant's non-Indian status may seem, we must abide by our existing ***1231** precedent unless and until we revisit our decision in *Prentiss*. We join our colleague in encouraging this court to reexamine and correct our current caselaw on the issue. *See Hebert*, 159 F.4th at 790–92. (Hartz, J., concurring) ("I write separately only to urge this court to reconsider its view, stated in the en banc decision in *United States v. Prentiss*, 256 F.3d 971 (10th Cir. 2001), that the non-Indian status of the defendant is an element of the offense charged under 18 U.S.C. § 1152.").

III. Conclusion

For the foregoing reasons, we vacate Ruiz's conviction and remand for further proceedings.

All Citations

164 F.4th 1223

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