C. A. No. 10-10131
Published Opinion Filed September 19, 2013
(amended opinion)
(Fernandez, Paez, J.J.; Watford, J. dissenting)

D. Ct. No. CR 08-1329-PHX-ROS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAMIEN MIGUEL ZEPEDA,

Defendant-Appellant.

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

GOVERNMENT'S BRIEF REGARDING REHEARING EN BANC

JOHN S. LEONARDO
United States Attorney
District of Arizona

JOAN G. RUFFENNACH
Assistant U.S. Attorney
Two Renaissance Square
40 N. Central Avenue, Suite 1200
Phoenix, Arizona 85004-4408
Telephone: (602) 514-7500
Attorneys for Appellee

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I. STATEMENT OF COUNSEL

The government maintains its position that, viewing the evidence in the light most favorable to and drawing all reasonable inferences in favor of the verdict, there was sufficient evidence that the defendant's bloodline derives from the Tohono O'odham Nation of Arizona, a federally recognized tribe. In the government's view, the panel majority misapplied the sufficiency of the evidence standard of *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), and *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc), in concluding otherwise. Ordinarily en banc review would not be warranted because the question presented involves application of settled law to the unique facts and record in this case. In light of the seriousness of the defendant's criminal conduct, however, the United States supports rehearing en banc to correct the majority's error and to prevent the release back to the community of a violent criminal.

II. BACKGROUND

A. Statement of Facts

The defendant and his brothers, Matthew and Jeremy, traveled to the home of Dallas Peters, located on the Ak-Chin Reservation in Arizona. *United States v. Zepeda*, No. 10-10131, 2013 WL 5273093, *1 (9th Cir. Sept. 19, 2013) (*Zepeda II*). He and Matthew opened fire on the occupants of the house, severely injuring Peters. *Zepeda II*, *1. A nine-count indictment charged the defendant, an Indian,

with conspiracy to commit assault, three counts of assault with a dangerous weapon, one count of assault resulting in serious bodily injury, and four counts of use of a firearm during a crime of violence. *Id.*

To prove the defendant's Indian status, the government introduced at trial a certified tribal enrollment certificate based on information taken from "the official records and membership roll of the Gila River Indian Community." *Zepeda II*, *1. The parties stipulated to admission of the tribal enrollment certificate. *Id.* The defendant made a general motion for judgment of acquittal under Rule 29, Fed. R. Crim. P., which the district court denied. *Id.* The defendant was convicted on all counts.

On appeal, the defendant challenged admission of the tribal enrollment certificate on Confrontation Clause grounds. He further argued that even if properly admitted, the document did not satisfy the government's burden of proof that defendant is an Indian because there was no evidence that the Tohono O'odham or the Gila River Indian Community are federally recognized tribes. The government argued that the tribal enrollment certificate was properly admitted and, together with other evidence, established both a sufficient blood degree and the defendant's tribal recognition as an Indian.

B. Panel decisions

This Court applies a two-part test (*Bruce* test) to determine who is an Indian for purposes of jurisdiction under the Major Crimes Act, 18 U.S.C. § 1153. [1] *United States v. Bruce*, 394 F. 3d 1215 (9th Cir. 2005). Under the *Bruce* test, the court considers (1) the defendant's degree of Indian blood, and (2) his tribal or government recognition as an Indian. *Id*. at 1224. Since *Bruce*, this Court added another layer to the test: to be an Indian under section 1153, a defendant's bloodline must be "derived from a federally recognized tribe," and his affiliation, too, must be with such a tribe. *United States v. Maggi*, 598 F.3d 1073, 1078-79 (9th Cir. 2010).

1. The opinion of January 18, 2013 (*Zepeda I*)

In an opinion issued on January 18, 2013, the panel majority considered only the first prong of the *Bruce* test and reversed the defendant's convictions for the eight substantive offenses because it determined that the question of whether a tribe is federally recognized is a question of fact for the jury, not one of law for the judge. The majority concluded that the tribal enrollment certificate was not

[1] The offenses subject to prosecution under § 1153 are "murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country."

sufficient evidence from which a rational jury could find beyond a reasonable doubt that the defendant was an Indian for purposes of section 1153 because there was no evidence that the defendant's bloodline is derived from a federally recognized tribe. *United States v. Zepeda*, 705 F.3d 1052 (9th Cir. 2013) (*Zepeda I*).

Following the government's petition for rehearing and suggestion for rehearing en banc and the defendant's response, this Court withdrew its opinion, stating that a new opinion would issue. *United States v. Zepeda*, 2013 WL 4437602 (9th Cir. Aug 20, 2013).

2. The opinion of September 19, 2013 (*Zepeda II*)

In its new opinion, the panel majority holds that whether a defendant's bloodline is derived from a federally recognized tribe "contains a legal component and a factual component. The question of whether a given tribe is federally recognized is a matter of law. The question of whether the government has proven that a defendant's bloodline derives from such a tribe is a question of fact for the jury to resolve." *Zepeda II*, *7. The majority recognizes that "absent evidence of its incompleteness, the BIA list" is the best source for identifying Indian tribes whose members "satisfy the threshold criminal jurisdiction inquiry." *Id*. at *8 (citations omitted). The majority also "recognizes as a matter of law" that both the "Gila River Indian Community of the Gila River Indian Reservation, Arizona" and

the "Tohono O'odham Nation of Arizona," "appear on the BIA's list of federally recognized tribes." *Id*.

The panel majority finds, however, that there is an "evidentiary gap" in the government's case such that no rational jury could find that the defendant's bloodline derives from the federally recognized "Tohono O'odham Nation of Arizona" because there was no evidence that the "Tohono O'odham" referenced in the defendant's tribal enrollment certificate refers to the federally recognized "Tohono O'odham Nation of Arizona." *Zepeda II*, *10. The majority finds that the defendant is not an enrolled member of the Tohono O'odham Nation of Arizona, and holds that it is not free to speculate that his Tohono O'odham blood derives from that federally recognized tribe because the government submitted "no evidence whatsoever to connect the appellation 'Tohono O'odham' to the federally recognized Nation of Arizona." *Id*.

III. ARGUMENT

The Panel Majority Erred in Finding that There Was Insufficient Evidence that the Defendant's Bloodline Derives from the Federally Recognized Tohono O'odham Nation of Arizona.

The majority holds that the defendant's tribal enrollment certificate is insufficient to establish that he is an Indian for purposes of federal jurisdiction under 18 U.S.C. § 1153. Under *Jackson v. Virginia*, a reviewing court determines "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 offense beyond a reasonable doubt." *Jackson v. Virginia*, 443 U. S. 307, 319 (1979); *United States v. Cruz*, 554 F.3d 840, 843-44 (9th Cir. 2009) (sufficiency of the evidence standard applies when reviewing the denial of a motion for acquittal challenging the jurisdictional element of Indian status; the reviewing court "owe[s] deference to the jury's ultimate factual finding."). This Court has explained that *Jackson* established a two-step process:

> First, a reviewing court must consider the evidence presented at trial in the light most favorable to the prosecution. This means that a court of appeals may not usurp the role of the finder of fact by considering how it would have resolved the conflicts, made the inferences or considered the evidence at trial. Rather, when "faced with a record of historical facts that supports conflicting inferences" a reviewing court "must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution."
>
> Second, after viewing the evidence in the light most favorable to the prosecution, the reviewing court must determine whether this evidence, so viewed, is adequate to allow "*any* rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." This second step protects against rare occasions in which "a properly instructed jury may convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." More than a "mere modicum" of evidence is required to support a verdict. At this second step, however, a reviewing court may not "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt," only whether "*any*" rational trier of fact could have made that finding.

United States v. Nevils, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc) (citations, omissions, and alterations omitted). Furthermore, "the government's evidence

need not exclude every reasonable hypothesis consistent with innocence." *United States v. Talbert*, 710 F.2d 528, 530 (9th Cir. 1991) (citations omitted).

The evidence here was sufficient to support the jury's finding that the defendant is an Indian. The defendant stipulated to the admission of a tribal enrollment certificate that states that he is enrolled in the "Gila River Indian Community" and has a "Blood Degree" of "1/4 Pima [and] 1/4 Tohono O'odham" for a total of 1/2. *Zepeda II*, *2. This evidence was sufficient for a rational jury to infer that the reference in the tribal enrollment certificate to "1/4 Tohono O'odham" is a reference to the federally recognized Tohono O'odham Nation of Arizona. The defendant testified that he has lived his entire life in Arizona. In addition, Detective Soliz testified that "certification of Indian blood" is "a piece of paper confirming through the tribe that you obtained from the enrollment office that confirms that this person is an enrolled member of their tribe and he[,] and they[,] do meet the blood quantum[,]" and Matthew Zepeda "testified that he was half 'Native American,' from the 'Pima and Tiho' tribes, [ ] that his Indian heritage came from his father[,]" and he and the defendant "shared the same father, as well as the same mother, who was 'Mexican.'" *Id.* Viewing this evidence in the light most favorable to the prosecution, a rational jury could reasonably infer that "Tiho" is a phonetic transcription of "T.O.," the colloquialism for "Tohono O'odham," as Matthew's testimony corroborates the bloodline listed in the

defendant's tribal enrollment certificate. "[E]vidence of a parent, grandparent, or great-grandparent who is clearly identified as an Indian is generally sufficient" to satisfy the "Indian blood" prong of the *Bruce* test. *United States v. Ramirez*, 537 F.3d 1075, 1082 (9th Cir. 2008) (quoting *Bruce*, 394 F.3d at 1223).

The majority agrees that both the "Gila River Indian Community of the Gila River Indian Reservation, Arizona" and the "Tohono O'odham Nation of Arizona" are federally recognized Indian tribes, *id*. at *9, but, relying upon *Maggi*, finds no evidence that the "Tohono O'odham" referenced in the tribal enrollment certificate refers to the federally recognized "Tohono O'odham Nation of Arizona." The majority's reliance on *Maggi* for this finding is misplaced.

The decision in *Maggi* actually supports a finding that there is sufficient evidence that Zepeda's bloodline derives from a federally recognized tribe. In concluding that the evidence was insufficient, the majority relies on the fact that "the BIA specifically lists *only* the 'Tohono O'odham Nation of Arizona,'" and "the name 'Tohono O'odham' is *not* on the BIA list." *Zepeda* II, *8. But in *Maggi*, the court accepted as federally recognized "the Blackfeet tribe," *Maggi*, 598 F.3d at 1080-81 ("Maggi has a very small percentage of Indian blood from a federally recognized tribe—1/64 Blackfeet blood."), whereas the BIA list recognizes the "Blackfeet Tribe of the Blackfeet Indian Reservation of Montana"; the "Blackfeet tribe" is not on the list. 78 FR 26384-02 at 26385, 2013 WL

1856910 (April 24, 2013). Thus, by finding that the reference to "1/4 Tohono O'odham" blood in Zepeda's tribal enrollment certificate does not refer to the "Tohono O'odham Nation of Arizona," the majority's opinion is inconsistent with *Maggi*.[2]

The majority concludes that it is not free to speculate that the defendant's Tohono O'odham bloodline is derived from the "Tohono O'odham Nation of Arizona" because there is no evidence in the record connecting the two. *Zepeda II*, *9. But any factual ambiguity regarding the Tohono O'odham is based on the defendant's assertion, first made in a supplemental appellate brief, that:

> [the] appellation "Tohono O'odham" describes the *collective* Tohono O'odham population, a substantial portion of which has always resided in the Sonoran Desert of northwest Mexico. The BIA specifically lists as federally recognized *only* the "Tohono O'odham Nation of Arizona," and *not* members of the collective "Tohono O'Odham" tribe, "wherever residing" that Zepeda's certificate apparently describes.

[2] As a practical matter, many "tribes" do not refer to themselves in the exact manner in which they are identified on the BIA list. For example, the Gila River Indian Community does not include "of the Gila River Indian Reservation, Arizona" on its official documents, just as the Navajo Nation does not refer to itself as the "Navajo Nation, Arizona, New Mexico & Utah," 78 FR 26384-02 at 26386, and tribal enrollment certificates from the Navajo Nation refer to "Navajo" blood. The majority opinion recognizes this disconnect between the way in which Native Americans refer to themselves and the terms by which they are identified in the law. *See Zepeda II*, *1, n.2 ("Although we are mindful that the term 'Native American' or 'American Indian' may be preferable, we use the term 'Indian' throughout this opinion since that is the term used in 18 U.S.C. § 1153 and at issue in this appeal.").

Zepeda II, *8 (quoting Defendant's Response to Govt.'s Motion to take Judicial Notice). Although the majority recognizes that "[i]t is horn book law that we, as an appellate court, are limited to the record before the jury when assessing the sufficiency of the evidence," *Zepeda II*, *10, this erroneous factual assertion regarding the purported existence of another Tohono O'odham tribe in Mexico was never presented to the jury, and the majority misapplies the sufficiency of the evidence standard by considering it. [3]

This factual assertion is also contrary to the majority's holding that the question of whether a given tribe is federally recognized is a matter of law. As a matter of law, it is for the court, not the jury, to determine the scope of the membership of the federally-recognized "Tohono O'odham Nation of Arizona."

Thus, the question is whether a rational jury, confronted with the facts in the record, and viewing the evidence in the light most favorable to the government,

[3] There is no other Tohono O'odham tribe in existence. The traditional Tohono O'odham Nation extended into an area that now is in the Republic of Mexico. Indeed, this Court has recognized that there is an "unofficial port of entry" on the Tohono O'odham Reservation that is for the exclusive use by Tohono O'odham members to pass between the United State and Mexico. *United States v. Morgan*, No. 12-10056, 2013 WL 3491418, *1 (9th Cir. July 15, 2013). The federally-recognized Tohono O'odham Nation of Arizona recognizes these Mexican Tohono O'odham individuals as members of the Tohono O'odham Nation. Thus, as a matter of law and logic, all members of the Tohono O'odham nation are members of a federally recognized tribe (regardless of whether their individual specific bloodline derives from a Mexican citizen). That is, under *Maggi*, the Indian bloodline must be derived from a federally recognized tribe (not a federally recognized specific Indian).

could conclude that the Tohono O'odham referenced in the tribal enrollment certificate is the federally recognized Tohono O'odham Nation. In this case, there was no evidence presented to the jury that there is any Tohono O'odham tribe in existence anywhere other than the Tohono O'odham Nation of Arizona. In the absence of any evidence that an unrecognized Tohono O'odham Nation exists anywhere, the evidence was sufficient for a jury to find that the defendant, who lived his entire life in Arizona, was an Indian, with his Indian bloodline from his father derived, in part, from the federally recognized Tohono O'odham Nation of Arizona.

IV. CONCLUSION

For the foregoing reasons, the government recommends rehearing en banc to correct the panel's error in light of the seriousness of the defendant's criminal conduct.

JOHN S. LEONARDO
United States Attorney
District of Arizona

s/ Joan G. Ruffennach
JOAN G. RUFFENNACH
Assistant U.S. Attorney

V. CERTIFICATE OF COMPLIANCEPURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 10-10131

I certify that pursuant to Fed. R. App. P. 40 and Ninth Circuit Rules 40-1, the attached brief regarding rehearing en banc is:

☐ Proportionately spaced, has a typeface of 14 points or more and contains _words (petitions and answers must not exceed 4200 words), or is

☐ Monospaced, has 10. 5 or fewer characters per inch and contains ____ words or ___ lines of text (petition and answers must not exceed 4200 words or 390 lines of text), or is

☒ In compliance with Fed. R. App. P. 32(c) and does not exceed 15 pages.

December 12, 2013
Date

s/ Joan G. Ruffennach
JOAN G. RUFFENNACH
Assistant U.S. Attorney

VI. CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2013, I electronically filed the Government's Brief Regarding Rehearing En Banc 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.

I further certify that on December 12, 2013, fifty copies of Government's Brief Regarding Rehearing En Banc have been mailed to the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit via Federal Express overnight shipping.

s/ Joan G. Ruffennach
JOAN G. RUFFENNACH
Assistant U.S. Attorney