

Case Summary: *United States v. Zepeda*, 10-10131, 2013 WL 5273093 (9th Cir. Sept. 19, 2013).

In *United States v. Zepeda*, the defendant drove to the victim's home on the Ak-Chin Reservation in Arizona, and opened fire on the people within.<sup>1</sup> He seriously injured one person, and was charged and convicted of conspiracy to commit assault, assault with a deadly weapon, and use of a firearm during a crime of violence.<sup>2</sup> The defendant was alleged to be an "Indian" in the indictment.<sup>3</sup>

Under the Major Crimes Act, certain crimes committed by Indians in Indian country come under federal jurisdiction.<sup>4</sup> Determining whether a person is an Indian for purposes of the statutes requires examining: (1) the Defendant's degree of Indian blood, and (2) their recognition by tribes or governments as an Indian.<sup>5</sup> In this case, the court held that a Certificate of Enrollment is not sufficient evidence for a reasonable jury to find beyond a reasonable doubt that a person is an Indian for purposes of the statute.<sup>6</sup>

The Certificate of Enrollment in this case stated that the defendant was enrolled in the Gila River Indian Community.<sup>7</sup> It had information on it that claimed the Defendant was  $\frac{1}{4}$  Pima and  $\frac{1}{4}$  Tohono O'Odham Indian.<sup>8</sup> The parties stipulated the certificate and the facts contained in it as fact.<sup>9</sup> The defendant's brother also testified as to the Defendant's status of an Indian.<sup>10</sup> This was all the evidence that the prosecutor presented relating to the defendant's status as an Indian.<sup>11</sup> The defendant moved for acquittal based on the prosecutor's failure to prove he was an Indian for purposes of the Major Crimes Act.<sup>12</sup>

The court evaluated the test put forth in *Bruce*, which requires the government to show that the defendant has the required degree of Indian blood, and that he has tribal or government recognition as an Indian.<sup>13</sup> The first requirement is usually satisfied by showing that the defendant has a parent or grandparent who is an identified Indian.<sup>14</sup> The second requirement requires the court to analyze whether the defendant has tribal enrollment, government recognition by receipt of assistance reserved only to Indians, that the defendant enjoys benefits of tribal affiliation, and that the defendant is socially

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<sup>1</sup> *United States v. Zepeda*, 10-10131, 2013 WL 5273093 at \*1 (9th Cir. Sept. 19, 2013).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* (citing 18 U.S.C. § 1153).

<sup>5</sup> *Zepeda*, 2013 WL 5273093 at \*1.

<sup>6</sup> *Id.* at \*9.

<sup>7</sup> *Id.* at \*1.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at \*2.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at \*4 (citing *U.S. v. Bruce*, 394 F.3d 1215 (9th Cir. Jan. 13, 2005)).

<sup>14</sup> *Id.* at \*5.

recognized as an Indian.<sup>15</sup> Tribal enrollment is not necessarily definitive proof of the second requirement.<sup>16</sup> The court also stated that there is a threshold requirement of being affiliated with a federally recognized tribe.<sup>17</sup>

The court determined that the tribes the Gila River Indian Community of the Gila River Indian Reserve and the Tohono O’Odham Nation of Arizona were federally recognized tribes, because both tribes appeared in the BIA’s list of federally recognized tribes.<sup>18</sup> The court next examined whether the government presented enough evidence to show that the defendant’s blood was from those tribes.<sup>19</sup> The court stated that the Certificate and testimony the government presented did not provide any evidence that the defendant’s blood was from any federally recognized Indian tribes.<sup>20</sup> This is because the defendant’s Enrollment Certificate referenced only the Tohono O’Odham Nation collectively, and not the federally recognized Tohono O’Odham Nation of Arizona.<sup>21</sup> Thus, the court found that the government had not introduced any evidence to connect the defendant to a federally recognized tribe, and therefore did not meet the requirements of *Bruce*.<sup>22</sup> The court held that the prosecutors did not meet the requirements under the Major Crimes Act for federal jurisdiction over the defendant.<sup>23</sup>

This case provides a seemingly heightened standard for the evidence that must be provided to show that a Defendant is Indian for purposes of the Major Crimes Act. By not allowing a jury to make any inferences relating to the contents of a tribal certificate of enrollment, the Ninth Circuit has placed a much heavier burden on prosecutors seeking to gain jurisdiction over persons who would come under federal jurisdiction because of the Major Crimes Act. Now prosecutors must be able to provide evidence that a defendant’s blood derives specifically from a federally recognized tribe. It will not be enough to make a connection between a defendant and a general group of Indians that portions of which are federally recognized.

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at \*6 (citing *United States v. Maggi*, 598 F.3d 1073 (9th Cir. Mar. 16, 2010)).

<sup>18</sup> *Id.* at \*8.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at \*9.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*