No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

EDWARD ANTHONY TORRES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

The Ninth Circuit failed to analyze Petitioner's jurisdictional issue as set forth in clear Ninth Circuit precedent, including *Gomez*, 87 F.3d at 1096; *United States v. Nukida*, 8 F.3d 665, 670 (9th Cir. 1993); *Shortt Accountancy Corp.*, 785 F.2d at 1452; *United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005); and *United States v. Reza-Ramos*, 816 F.3d 1110 (9th Cir. 2016).

As a result, a magistrate court in Arizona facing the same issue may now, pretrial, address an Indian status jurisdictional issue while a district court in Montana is permitted not to do so under the Ninth Circuit's holding. Against this background the question presented is:

> Whether a district court may, pretrial, decide an Indian status jurisdictional question in light of conflicting Ninth Circuit law that results in a federal magistrate court in one state deciding the issue and a federal district court in a different state failing to so decide.

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Petitioner, Edward Anthony Torres, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

1. The memorandum disposition of the Ninth Circuit Court of Appeals styled as *United States v. Torres*, No. 18-30140, 2019 WL 2499308 (9th Cir. June 17, 2019) is unreported. A copy of it is attached in the Addendum to this petition at pages 1a-4a.

2. A written order denying Mr. Torres's motion to dismiss that was affirmed by the Ninth Circuit is attached in the Addendum to this petition at pages 5a-8a.

JURISDICTION AND TIMELINESS OF THE PETITION

The Ninth Circuit's memorandum disposition was filed on June 17, 2019 (Addendum at pages 1a-4a). Petitioner filed a petition for rehearing which was denied on July 24, 2019. (Addendum at 9a). This Court's jurisdiction arises under 28 U.S.C. §1254(1). Petitioner's petition is timely because it was filed electronically and placed in the United States mail, first class postage pre-paid, on October 22, 2019, within the 90 days for filing under the Rule of this Court (see Rule 13, ¶1).

FEDERAL STATUTORY PROVISION INVOLVED

This case involves the federal (Indian) jurisdictional component of 18 U.S.C. § 1152 which states:

> 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.

STATEMENT OF THE CASE

(A) General case overview.

1. On January 4, 2018, the United States filed an Indictment charging Mr. Torres with assault resulting in serious bodily injury, in violation of 18 U.S.C. §§ 1152 and 113(a)(6). Mr. Torres appeared on the charge on January 9, 2018, pleading not guilty.

2. Thereafter, Mr. Torres filed a motion to dismiss and brief in support thereof, alleging the government did not have jurisdiction to charge him because the victim in the case was

not an Indian. The government responded; Mr. Torres replied; and a hearing was held February 27, 2018.

3. The district court denied Mr. Torres's motion to dismiss and the case proceeded to jury trial. Ultimately, the jury found Mr. Torres guilty of the crime charged. Mr. Torres received a sentence of 52 months, followed by two years supervised release.

(B) The Ninth Circuit's decision.

4. A Panel of the Ninth Circuit indicated Mr. Torres's argument that the district court erred in failing to address, pretrial, his motion to dismiss as to the victim's Indian status was "unpersuasive." *Torres*, at *2. That followed because the Panel noted the government "does not have to allege facts in the Indictment," and instead, the district court "must accept the facts in the Indictment as true in considering a Rule 12 motion to dismiss." *Id.* (Addendum at pages 8a).

STATEMENT OF FACTS

1. Mr. Torres was charged with assault resulting in serious bodily injury in violation of 18 U.S.C. §§ 1152 and 113(a)(6) for intentionally assaulting "F.P., an Indian person," "on or about December 6, 2017, at or near Babb, in the State and District of Montana, and within the exterior boundaries of the Blackfeet Indian Reservation, being Indian Country." According to the Complaint, the victim, Frank Powell, "was a Descendent of the Blackfeet Tribe" and Mr. Torres "is not . . . affiliated with any federally recognized Indian Tribe."

2. Mr. Torres maintained he acted in self-defense.

3. At the hearing on Mr. Torres's motion to dismiss, the government called the victim in the case, Powell. Powell testified that he was 29 years old and had lived on the Blackfeet Indian Reservation since he was seven years old. He indicated he was a descendant of the Blackfeet

Tribe; he went to sweats and powwows; he has two different tattoos with eagle feathers on them; he has been arrested by Blackfeet law enforcement; he spent time in the Bureau of Indian Affairs correctional facility; he has been prosecuted by the tribal court; he graduated from Browning High School; he has used the Indian Healthcare Services; and he considered himself a member of the Blackfeet Tribe.

4. In clarifying his testimony during cross-examination, the district court heard testimony that Powell's parents were not enrolled members of the Blackfeet Tribe; he is actually 1/32 Blackfeet; he has never received a per capita payment from the tribe; he has never received a Cobell settlement payment; he has never lived in tribal housing; he speaks a little of the Pikuni language; he has never voted in a tribal election; he has never held office with the tribe; the tribal court records indicate all of his tribal cases were dismissed; the powwows he participated in were the North American Indian Days and the Big Time Powwow in California; he only watched the games and the powwows at the North American Indian Days; he did not compete in the games; he did not compete in the dance competition; he did not compete in any type of ceremony at the North American Indian Days; he got his tattoos in California; the Blackfeet Tribe did not pay for the tattoos; the Blackfeet Tribe did not approve the designs; the sweats he participated in were during school; he does not know who paid for his medical treatment even though he went to the Indian Healthcare Services; and a person does not need to be a tribal member to attend Browning High School.

5. In discussing Mr. Torres's argument regarding the lack of subject matter jurisdiction, the district court's main concern was that Mr. Torres was making a factual argument for the jury to decide–that is, whether Mr. Torres, subjectively, considers himself to be an Indian.

Mr. Torres countered that the test was objective. To that end, the district court then noted the "objective facts."

> THE COURT: Well, let's look at the objective facts. It is asking a lot for someone who has been indicted, if there's a question about the court's jurisdiction, to make them actually go to trial. We have unrefuted evidence that Mr. Powell is not enrolled in the Blackfeet Tribe.
>
> MR. STARNES [the prosecutor]: That is correct.
>
> THE COURT: And you are not claiming that his parents are enrolled?
>
> MR. STARNES: Correct.
>
> THE COURT: And, as he testified, his grandparent was enrolled.
>
> MR. STARNES: Grandparents enrolled. That's correct.
>
> THE COURT: He's 1/32 blood quantum. Do you agree?
>
> MR. STARNES: Yes.
>
> THE COURT: That's what he testified.
> He's never received a Cobell payment. He's never received a per capita payment. He's never lived in tribal housing.
>
> MR. STARNES: Correct.
>
> THE COURT: All of those factors are undisputed.
>
> MR. STARNES: Correct.

THE COURT: He doesn't speak much of the native language.

MR. STARNES: Well, that's true. So he indicated that he spoke some. He's lost a fair amount of it is what he said. So there may have been a time where he spoke the language perhaps better than he does today, but that is true. As of today, he doesn't speak much of the Pikuni language.

THE COURT: And he never voted in tribal elections or held any office in tribal government.

MR. STARNES: That is correct.

THE COURT: All right. So if you look at the proof of the four factors, in declining order of importance: Number 1, tribal enrollment. That's negative.

MR. STARNES: Correct.

THE COURT: Number 2, government recognition formally and informally through receipt of assistance reserved only to Indian. So no per capita. No Cobell. He claims he's always gone to IHS for medical treatment.

MR. STARNES: Correct.

THE COURT: And as to whether that's paid by the federal government through the Indian Health Service Program or whether it's paid through Medicare, we don't know. There's nothing in the record at this point.

MR. STARNES: Correct. He simply indicated – I mean, he says he doesn't know who pays. So that implies he didn't pay it.

THE COURT: Right. I interpreted his testimony, he wasn't paying. He didn't know who was paying.

MR. STARNES: Correct.

THE COURT: So it's either through Medicare or the IHS itself.

MR. STARNES: Potentially. Although he said he only started receiving Medicare six months ago, and he's in his late twenties, early thirties.

THE COURT: I agree.
All right. Then enjoyment of the benefits of – I don't think there are any other assistance reserved for only Indians in the record here.

MR. STARNES: Not that I can recall off the top of my head. No, Your Honor.

THE COURT: Now, then we're down to enjoyment of the benefits of tribal affiliation. What would you point to there?

MR. STARNES: Well, I mean, he does receive IHS benefits in some degree. So that would be a enjoyment of benefit.

. . .

What I think is more important for the Court to consider is all of the things that he said that indicate that he does live a native lifestyle.

. . .

What we're really arguing about now are those four factors in declining order of precedence, and only the jury is going to be able to decide whether or not they attach value to the things that Mr. Powell has discussed here today and presumably will testify to at trial in a couple of weeks.

My point is that the government at this stage of the game has alleged that Mr. Powell is an Indian person. The court has heard some evidence of that fact. So for purposes of determining the jurisdictional questions as to whether or not we even get to trial, the government has met its burden. The government is not required to marshal all of its evidence in a pretrial proceeding.

. . .

THE COURT: . . .

All right. I'll take this under advisement. I'll have an order out in the next day or two. I am debating whether this is more appropriate for a Rule 29 motion. I will look again at those cases, but I think we're – the government if it were to go to trial, is going to have to rely upon Factor 3, to a slight degree; more heavily on Factor 4. So I think we have got an issue that's subject to dispute on that point at trial if we get there. My first inclination is this is a Rule 29 motion. But I'll look at the cases again and see where they fall.

6. The district court denied Mr. Torres's motion to dismiss. In doing so, the district court indicated that a person's Indian status is mixed question of law and fact. Citing *United States*

v. Reza-Ramos, 816 F.3d 1110 (9th Cir. 2016), the district court continued that the government has the burden of proving at trial the victim was an Indian.

> The government does not have to allege facts in the Indictment, however, that the victim will be recognized as an Indian. The Court must accept the facts in the Indictment as true in considering a Rule 12 motion to dismiss. The government has alleged that the victim is an Indian. The government's allegation proves sufficient at this time.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision fails to analyze altogether how it was that Mr. Torres's question of federal subject matter jurisdiction was so "intermeshed" with questions regarding the merits of Mr. Torres's case that the district court could not decide the Indian status issue pretrial. *See United States v. Gomez*, 87 F.3d 1093, 1096 (9th Cir. 1996); *United States v. Nukida*, 8 F.3d 665, 670 (9th Cir. 1993). Instead, the Ninth Circuit sidestepped the analysis by asserting the government did not need to allege facts in the Indictment that the victim would be recognized as an Indian.

Indian status is a jurisdictional element the government must prove. *United States v. Reza-Ramos*, 816 F.3d 1110, 1120-1121 (9th Cir .2015). As it concerned Mr. Torres, however, the jurisdictional element had no bearing on his defense nor was it a substantive element of the crime of assault resulting in serious bodily injury. Cases within the Ninth Circuit have held (1) "a motion requiring factual determination may be decided before trial if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense" (*United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir. 1986)); and (2) pretrial, a magistrate court ruled it lacked subject matter jurisdiction to address a complaint that

alleged the defendant (a non-Indian) assaulted an Indian victim *United States v. Loera*, 190 F.Supp.3d 873 (D. Ariz. 2016).

Yet, with these precedents squarely before the Ninth Circuit, the Panel failed even to acknowledge them, let alone distinguish them. The Ninth Circuit also failed to discuss the *United State v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005) factors. The only analysis provided was that the Ninth Circuit has previously held the government had the burden of proving the victim was an Indian in *Reza-Ramos*, and the government did so at trial. *Torres*, at *2. *See also Reza-Ramos*, 816 F.3d at 1121 ("[b]ecause the district court's jurisdiction hinges on [the victim's Indian] status, the government has the burden of proving this element").

Mr. Torres never disputed that situations do exist where a jurisdictional question as to Indian status is best suited for a jury determination. But that is not the situation here, and the Ninth Circuit's citation to and brief discussion of *Reza-Ramos* as dispositive of Mr. Torres's issue leaves more questions than it answers. That follows because even *Reza-Ramos* notes that the government has the burden of proving the Indian status. The government never did. There was a hearing Mr. Torres's motion to dismiss. The government could not prove then, nor could it at trial, that the victim was an Indian under the *Bruce* factors. Permitting the district court to escape analysis after a hearing and then again on appeal under the notion that only the factual assertions made in the Indictment apply leaves one wondering why other law exists. Law that allows for pretrial motions and hearings, which were done here. Law that allows for the determination of motions when it is made clear no jurisdiction exists.

The law of the Ninth Circuit required more than the Panel provided in Mr. Torres's. When this issue again presents itself, what law applies? Should it be the case that in the district court of Arizona, a magistrate court there will address the issue pretrial (disposing of the case) but not a

district court in Montana? The Ninth Circuit's opinion was wrongly decided and the decision not only affects Mr. Torres's case. It affects how and when jurisdictional questions as to Indian status are raised nationally.

CONCLUSION

WHEREFORE, the Court should grant this petition and set the case down for full briefing.

Respectfully submitted,

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October 22, 2019