IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

BRANDON RAY BUCKLES,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

MOTION TO PROCEED *IN FORMA PAUPERIS*

Pursuant to Title 28, United States Code, § 1915(a) and Rule 39 of this Court, applicant asks for leave to file the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals without prepayment of fees or costs *in forma pauperis*.

The undersigned counsel was appointed pursuant to 18 U.S.C. § 3006A. Therefore, it is requested that the Court grant leave to file the Petition for Writ of Certiorari without prepayment of fees or costs *in forma pauperis.*

I declare under penalty of perjury under the laws of the United States of American, the foregoing is true and correct.

Dated this 10th day of August, 2020.

Respectfully Submitted,

Stephen R. Hormel, Hormel Law Office LLC
17722 East Sprague Avenue
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Attorney for Buckles

No. _____

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BRANDON RAY BUCKLES,

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Proof of Service

Stephen R. Hormel, declares as follows:

That I am admitted to practice before this Court. On August 10, 2020, the Petition for Writ of Certiorari in the above-entitled matter was sent by United States mail to the Clerk of the Supreme Court of United States for filing said Petition; an additional copy of the petition was serviced on counsel for Respondent by placing the same in the United States mail to:

The Honorable Noel Francisco
Solicitor General of the United States
Department of Justice
950 Pennsylvania Ave., N.W., Room 5143
Washington D.C. 20530

I declare under the penalty of the United States of America, the foregoing is true and correct.

Executed on August 10, 2020, at Spokane Valley, WA.

Stephen R. Hormel,
Attorney for Buckles

IN THE SUPREME COURT OF THE UNITED STATES

BRANDON RAY BUCKLES,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTIONS PRESENTED FOR REVIEW

1. Is it improper for a district court to summarily deny a federal prisoner's motion to vacate, set aside or correct a sentence pursuant to 28 U.S.C. § 2255 without an evidentiary hearing where the prisoner alleges trial counsel was ineffective by stipulating to an essential element of the offense without the prisoner's consent and without investigating a meritorious defense, thereby, depriving the prisoner Fifth and Sixth Amendment rights to a fair trial and to effective assistance of counsel?

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No. _____

IN THE UNITED STATES SUPREME COURT

BRANDON RAY BUCKLES,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

Petitioner, BRANDON RAY BUCKLES, (hereinafter Buckles) respectfully prays that a writ of certiorari issue to review the unpublished memorandum of the United States Court of Appeals for the Ninth Circuit entered on May 12, 2020, affirming the district court's order summarily denying his motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 without an evidentiary hearing.

OPINION BELOW

On May 12, 2020, the Ninth Circuit Court of Appeals entered an unpublished memorandum affirming the district court's order denying Buckles' motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. The unpublished memorandum is attached in the Appendix (App.) at pages 1-4. This petition is timely.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution states in pertinent part: "[n]o person shall ... be deprived of life, liberty, or property, without due process of law...." U.S. Const., Amend. V.

The Sixth Amendment to the United States Constitution states in pertinent part: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... and to have the Assistance of Counsel for his defence." Const., Amend. VI.

Section 1153 of Title 18 of the United States Code states the following in pertinent part:

> (a) Any Indian who commits against the person or property of another Indian ... a felony under chapter 109A ... within Indian country, shall be subject to the same law and penalties as other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 U.S.C. § 1153(a).

Section 2246 of Title 28 of the United States Code states the following in pertinent part:

> On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

28 U.S.C.A. § 2246.

Section 2255 of Title 28 of the United States Code states the following in pertinent part:

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or the laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> (b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

28 U.S.C.A. § 2255(a) and (b).

STATEMENT OF THE CASE

On January 7, 2015, the government obtained a three count indictment charging Buckles in the United States District Court for the District of Montana with one count of sexual abuse in violation of 18 U.S.C. § 2242(2)(B), and two counts of making material false statements to the Federal Bureau of Investigation (FBI) during the investigation in violation of 18 U.S.C. § 1001(a)(2).[1] The government alleged that the federal court had jurisdiction under 18 U.S.C. §

[1] 18 U.S.C. § 2242(2)(b) states in pertinent part: "[w]hoever, in the special maritime and territorial jurisdiction of the United States ... knowingly– ... (2) engages in a sexual act with another person if that other person is– (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act; ... or attempts to do so, shall be fined

1153(a), the Indian Major Crimes Act (IMCA). App. 15-18. Buckles was convicted after a jury trial on all three counts.[2]

Count I of the indictment alleged that Buckles was, "an Indian person" within the meaning of the IMCA and "knowingly engaged in a sexual act with J.L.S.B," on or about June 26, 2010, when she was incapable of consent. App 16. At close of evidence, the district court, among other elements, instructed the jury that the government was required to prove beyond a reasonable doubt that Buckles "was an Indian person." App. 27. The district court also instructed the jury that for Count III, charging a false statement, the government had to prove Buckles made a false statement to "FBI Special Agent David Burns in a matter within the jurisdiction of the FBI, an agency of the United States." App. 28. The matter within the jurisdiction of the FBI was an alleged violation of the IMCA. Thus, Indian status was an element on all counts of conviction.

On appeal of the district court's summary denial of his § 2255 motion, Buckles centered on the elements in Counts I and III that required the government to prove that Buckles was "an Indian person" at the time he committed the offenses in June of 2010. App. 2. In his § 2255 motion, Buckles alleged that trial counsel failed to investigate his status as a non-Indian. App. 34. He alleged that had trial counsel conducted such investigation, he could have put forward

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under this title and imprisoned for any term of years or for life."

18 U.S.C. 1001(a)(2) states in pertinent part: (a) ... "whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully– ...(2) makes any materially false, fictitious, or fraudulent statement or representation ... shall be ... imprisoned not more than 5 years."

[2] The district court vacated the conviction on Count II.

evidence that negated status as "an Indian person" at the time of the alleged offenses. App. 58-59.

Before Buckles' jury trial, his trial counsel entered into a stipulation with the prosecution.[3] App. 19-21. The filed stipulation does not contain Buckles' signature. App. 21.

During the district court's preliminary instructions to the jury, the district court read the following stipulation to the jury:

> Instruction Number 13. The parties have stipulated to the follow (sic), that means they have agreed to the following facts: Number 1. The defendant, Brandon Ray Buckles, is an enrolled member of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation. Number 2. The Assiniboine and Sioux Tribes are federally-recognized tribes. Three. The defendant, Brandon Ray Buckles, is an Indian person. No further evidence is required to prove that the defendant is an Indian person. You should treat these facts as having been proved.

App 25. The stipulation did not specify that Buckles was "an Indian person" at the time of the alleged sexual abuse offense, which occurred nearly five years prior to Buckles' trial. App. 19- and 25. The district court did not discuss the stipulation with Buckles before it was entered into the record at his jury trial. App. 25.

During trial, the district court admitted Government Exhibit 1. App. 30. Exhibit 1 is a Certificate of Indian Blood for Buckles. *Id.* The certificate shows that Buckles has 3/16 quantum of blood with the Assiniboine and Sioux Tribes of Fort Peck. *Id.* The certificate includes an "Enrollment Status: Enrolled." It includes an "Enrollment Number: 206-AM-

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[3] The stipulation that Buckles was "an Indian person" was filed on April 1, 2015. App. 19. Trial commenced on June 1. 2015. App. 22.

001731." *Id.*[4]

At the close of evidence, the district court reread the stipulation that Buckles was "an Indian person" to the jury, stating, "[t]he parties have stipulated as follows: (1) "Buckles is an enrolled member of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation;" (2) "The Assiniboine and Sioux Tribes are federally recognized tribes;" and (3) Buckles "status as an Indian person has been proven beyond a reasonable doubt. You should treat these facts as having been proved." App. 29. Again, the stipulation did not specify that Buckles was "an Indian person" at the time of the alleged sex abuse offense in 2010. App. 20, 25, and 29.

Buckles' § 2255 motion alleged that trial "[c]ounsel failed to appropriately investigate [Indian] status." App. 34. The motion alleged that "Buckles was not eligible for any benefits" from the Tribes of Fort Peck. *Id.* It alleged Buckles "[w]as denied benefits [and] per capita payments" and the Bureau of Indian Affairs, the "BIA did not recognize [him] as an Indian[,] [and] Buckles blood quantum did not allow him to be a full member of the Tribe[s]." *Id.* He claimed "[c]ounsel was ineffective for stipulating that Buckles was an Indian for purposes of 18 U.S.C. § 1153." *Id.*

In his memorandum with "Points and Authorities in Support" of his motion, Buckles elaborated on his allegations. He alleged the following: (1) "he is not an Indian," since he cannot have full membership in the Assiniboine or Sioux tribes with only 3/16 blood quantum App. 55;[5] (2) the "AM" in his enrollment number in the Certificate of Blood means "associate member"

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[4] The "AM" in the number on the certificate means Associate Member. App. 56.

[5] *See, United States v. Smith*, 442 Fed. Appx. 282, 284 (9th Cir. 2011) (recognizing that a quantum of at least 1/8 blood, but less than 1/4 blood permits "associate membership" in the tribes.

App. 56; (3) Buckles "attempted to apply for benefits reserved for tribal members in 2011 and was denied - as he was not an actual member of the Tribes and [not] eligible" *Id.*; (4) "[i]n 2012 Buckles applied for per capita payment [of] ... $2500 reserved for Indians and again denied" *Id.*; (5) he was denied funds for medical treatment though the Tribes "since he was not a formal member and not eligible to receive the benefit" App. 56-57; (6) "Buckles did not involve himself in Indian social life" App. 57; (7) "Buckles did not participate in 'sweats'" *Id.*; (8) Buckles did not attend "'pow-wows'" *Id.*; (9) Buckles did not vote, nor was he eligible to vote "in Tribal affairs" *Id.*; (10) Buckles did not "attend Tribal counsel meetings" *Id.*; and (11) North Dakota state records from 2008 and the first Presentence Investigation Report for this case identified Buckles' race as "'white' non-indian." *Id.*

Buckles alleged that he "advised defense counsel ... that he was not an Indian." *Id.* He advised counsel that "he was denied per capita payments and denied formal enrollment" with the Tribes. Buckles alleged that he told trial counsel that "he was denied government benefits reserved for Indians[,] ... that he lived on and off the reservation and went to a public school integrated with non-Indians." *Id.* He advised counsel "that he was denied assistance from the tribal clinic." App. 58.

Buckles alleged that he "did not agree with [counsel] stipulating to Indian status, did not sign any papers stipulating to Indian status, nor [was he] consulted as to whether he would authorize stipulating to Indian status." App. 58. Buckles alleged that the district court did not inquire as to whether he agreed with the stipulation, nor did the district court inquire of Buckles whether "he agreed to waive the Government's burden to prove ... an essential element of the offense..." *Id.*

Finally, Buckles re-alleged that trial counsel "was ineffective for stipulating that Buckles was an Indian for purposes of the IMCA." *Id.* He alleged that trial counsel "should have properly investigated Buckles' Indian status and challenged this contention at trial." *Id.* Finally, Buckles alleged that "but for [counsel's] deficient performance there was a reasonable probability that the outcome would have been different." App. 59.

The district court did not order the government to answer Buckles' § 2255 motion. The district court did not seek any discovery from the parties, nor did it hold an evidentiary hearing on Buckles' motion. Instead, the district court summarily denied Buckles' motion. App. 5-14.

At the time of Buckles' trial, the test for determining Indian status was set forth in *United States v. Maggi*, 598 F.3d 1073, 1080-81 (9th Cir. 2010);[6] and *United States v. Bruce*, 394 F.3d 1215, 1223-24 (9th Cir. 2005). App. 8. The test applied by the district court at the time of Buckles' trial to determine Indian status for IMCA purposes was as follows: (1) the defendant had a quantum of Indian blood traceable to a federally recognized tribe; and (2) the defendant was a member of, or was affiliated with, a federally recognized tribe. *Id.* (citing *Maggi*, 598 F.3d at 1080-81; and *Bruce*, 394 F.3d at 1223-24).[7]

Buckles' § 2255 motion challenged the second prong of the test. In denying his motion, the district court wrote:

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[6] *Maggi* was overruled in part by *United States v. Zepeda*, 792 F.3d 1103, 1106-07, 1113 (9th Cir. 2015) (*en banc*). *Zepeda* overruled *Maggi* only in so far as *Maggi* held that the requirement that a tribe be federally recognized applied to both prongs of the two-part test to determine Indian status. *Zepeda* clarified that proof of federal recognition of a tribe only applies to the second prong. *Id.* It was the second prong that was at issue before the Ninth Circuit, but not the federal recognition aspect of the second prong. Buckles concedes that the Assiniboine and Sioux Tribes of the Fort Peck Reservation were federally recognized tribes in 2010.

[7] Buckles agrees that he has "some [quantum of] Indian blood" under the first prong.

> The certificate also satisfied the second prong of the test. In *Smith*, the court considered whether an associate member of the Fort Peck Tribes who had relinquished his membership years before trial nonetheless qualified as an Indian. The court determined that evidence "that Smith at one time enjoyed formal tribal enrollment," even as an associate member, was "the most important indicator of tribal recognition of a defendant's Indian status," although he had altered his enrollment status. *See Smith*, 442 Fed. Appx. at 284.

App. 9 (citing *United States v. Smith*, 442 Fed. Appx. 282, 284 (9th Cir. 2011)).

The district court further stated, "[a]n enrolled tribal member, even one with fewer rights and privileges than others, is by definition 'affiliated with' a tribe" ... [and] "the Ninth Circuit may one day decide the second prong of the test requires a stronger affiliation than associate membership in the Fort Peck Tribes." *Id.* The district court relied on *Zepeda* where the Ninth Circuit upheld the defendant's conviction under the IMCA. *Id. Zepeda* held that evidence at trial met both prongs of the test - the evidence consisted of an enrollment certificate and the testimony from defendant's brother that their father was an Indian. App. 9-10.

The district court essentially utilized Buckles' Certificate of Indian Blood from the Tribes (Government Exhibit 1) as conclusively establishing that Buckles' was "entitled to no relief." In affirming the district court, the Ninth Circuit held,

> The district court correctly rejected that argument. Certificates of enrollment are important evidence of Indian status. *See, e.g., id.; Zepeda*, 792 F.3d at 1115–16; *United States v. Alvirez*, 831 F.3d 1115, 1124 (9th Cir. 2016). And, this Court has previously decided that an individual with the same enrollment status as Buckles, with the same tribe, qualified as an Indian person. *See United States v. Smith*, 442 F. App'x. 282, 284–85 (9th Cir. 2011). Accordingly, Buckles' trial counsel was not ineffective in making the strategic decision to stipulate to the fact that Buckles is an "Indian person." *See United States v. McMullen*, 98 F.3d 1155, 1157 (9th Cir. 1996). And, because the critical facts that informed counsel's decision are not contested, the trial court did not err in dismissing

> this § 2255 motion without an evidentiary hearing. *See United States v. Howard*, 381 F.3d 873, 877 (9th Cir. 2004).

App. 3-4.

Ninth Circuit authority recognizes, however, that enrollment is just one factor of four that courts consider when reviewing whether sufficient evidence establishes Indian status under the IMCA, § 1153. Those factors are:

> "in declining order of importance, evidence of the following: 1) tribal enrollment; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life." *Id.* at 1224 (quoting *United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir.1995)); *accord. United States v. Ramirez*, 537 F.3d 1075, 1082 (9th Cir.2008).

United States v. Cruz, 554 F.3d 840, 846 (9th Cir. 2009) (quoting *Bruce*, 394 F.3d at 1224)

In *Cruz*, the Ninth Circuit noted,

> As *Bruce* itself makes clear, "[t]ribal enrollment is 'the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative' .... [E]nrollment, and indeed, even eligibility therefor, is not dispositive of Indian status." 394 F.3d at 1224-25 (quoting *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir.1979)). Although the parties in *Ramirez* raised only a limited question, the opinion specifically acknowledges the Bruce test and the four applicable factors that are determinative of its second prong. *See Ramirez*, 537 F.3d at 1082. Because the dispute on appeal related to the facts underlying only one of the factors, the court had no reason to note the relative weight of the various other factors-specifically, that they are to be considered "in declining order of importance." *Bruce*, 394 F.3d at 1224.

554 F.3d at 846 n. 6.

Since tribal enrollment is not "necessarily determinative," then Buckles would be entitled to relief if after reviewing discovery or receiving evidence the district court determined that counsel entered the stipulation without Buckles' consent and evidence established a factual defense that Buckles did not qualify as an "Indian person" within the meaning of IMCA as he alleged in his § 2255 motion. Buckles alleged several factors that supported his claim that he did not qualify as "an Indian person." Indeed, the district court found that Buckles "reasonably could have contested the issue of Indian status." App. 9. The district court ultimately concluded that trial counsel's failure to investigate Buckles' Indian status "was not unreasonable" under *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). App. 10.

REASONS FOR GRANTING THE WRIT

1. The question of whether a district court improperly dismisses a federal prisoner's motion to vacate, set aside or correct the sentence pursuant to § 2255 without an evidentiary hearing where the prisoner alleges trial counsel stipulated to an element of the offense without the prisoner's consent and before investigating a meritorious defense presents a significant federal question that should be addressed by the Court.

The Court has stated:

> The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without "due process of law"; and the Sixth, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." We have held that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 277–278, 113 S.Ct. 2078, 2080–2081, 124 L.Ed.2d 182 (1993). The right to have a jury make the ultimate determination of guilt has an impressive pedigree. Blackstone described "trial by jury" as

> requiring that "*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors...." 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (emphasis added). Justice Story wrote that the "trial by jury" guaranteed by the Constitution was "generally understood to mean ... a trial by a jury of twelve men, impartially selected, who must unanimously *concur in the guilt of the accused before a legal conviction can be had*." 2 J. Story, Commentaries on the Constitution of the United States 541, n. 2 (4th ed. 1873) (emphasis added and deleted). This right was designed "to guard against a spirit of oppression and tyranny on the part of rulers," and "was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties." *Id.*, at 540–541. *See also Duncan v. Louisiana*, 391 U.S. 145, 151–154, 88 S.Ct. 1444, 1448–1450, 20 L.Ed.2d 491 (1968) (tracing the history of trial by jury).

United States v. Gaudin, 515 U.S. 506, 509–11 (1995).

In addition, criminal defendants' right to present evidence and witnesses in their defense at trial is as fundamental to due process as is the right to have the prosecution prove each element of the offense beyond a reasonable doubt. *Washington v. Texas*, 388 U.S. 14, 19 (1967). In *Washington*, the Court reiterated,

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id.

Finally, Sixth Amendment protections include criminal defendants' right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). This right imposes a duty on trial counsel to "make reasonable investigations." *Id.* at 690-91.

In 1977, the Court granted a petition for writ of certiorari under similar circumstances in *Blackledge v. Allison*, 431 U.S. 63 (1977). The Court resolved the question of whether a federal district court erred in failing to hold an evidentiary hearing before summarily denying a state prisoner's habeas corpus petition filed pursuant to 28 U.S.C. § 2254.

In *Blackledge*, the defendant claimed that during his state court criminal proceedings, his trial counsel induced him to plead guilty by promising that the judge would impose a maximum of 10 years in prison. He alleged that he was told by counsel that counsel had consulted with the judge and prosecutor about the 10 year sentence. Instead of imposing 10 years, the sentencing court imposed 17 to 21 years in prison. *Id.* at 68-69.

The district court dismissed the petition without receiving any evidence and without holding an evidentiary hearing. The district court relied on a form signed by the trial court judge at the time of the guilty plea that "conclusively showed that [the defendant] had chosen to plead guilty knowingly, voluntarily, and with full awareness of the consequences." *Id.* at 69-70.

The defendant in *Blackledge* claimed that the district court should have held an evidentiary hearing before ruling on his petition. On appeal, the Fourth Circuit reversed and remanded for an evidentiary hearing. *Id.* at 70-71 (citing *Allison v. Blackledge*, 533 F.2d 894 (4th Cir. 1976)). The prison warden, Blackledge, filed a petition for writ of certiorari. The Court "granted certiorari ... to consider the significant federal question." *Blackledge*, 431 U.S. at 71.

The Court concluded that the defendant's allegations in his petition "were not in themselves so 'vague and conclusory' ... as to warrant dismissal for that reason alone." *Id.* at 75 (citing *Machibroda v. United States*, 368 U.S. 487, 495 (1962)). The Court further wrote:

> Allison alleged as a ground for relief that his plea was induced by an unkept promise. But he did not stop there. He proceeded to elaborate upon this claim with specific factual allegations. The petition indicated exactly what the terms of the promise were; when, where, and by whom the promise had been made; and the identity of one witness to its communication. The critical question is whether these allegations, when viewed against the record of the plea hearing, were so "palpably incredible," *ibid.*, so "patently frivolous or false", *Herman v. Claudy*, 350 U.S. 116, 119, 76 S.Ct. 223, 225, 100 L.Ed. 126, as to warrant summary dismissal. In the light of the nature of the record of the proceeding at which the guilty plea was accepted, and of the ambiguous status of the process of plea bargaining at the time the guilty plea was made, we conclude that Allison's petition should not have been summarily dismissed.

Blackledge, 431 U.S. at 75–76.

The Court then explained the process by which federal district courts may receive evidence on habeas corpus petitions, short of a full evidentiary hearing. *Id.* at 80. The Court recognized that the warden may move for summary judgment under Federal Rule of Civil Procedure 56. Such procedure would allow the defendant to respond, and provide the district court a means to determine the existence of any "genuine issue of fact." *Id.* at 80-81.

The Court also recognized that existing rules of procedure permit district court's to receive evidence without a full evidentiary hearing. *Id.* at 81-82. Likewise, a district court may receive evidence in a habeas corpus proceeding "taken orally or by deposition, or, in the discretion of the judge, by affidavit." 28 U.S.C. § 2246. The Court noted,

> There may be cases in which expansion of the record will provide "evidence against a petitioner's extra-record contentions . . . so overwhelming as to justify a conclusion that an (allegation of a dishonored plea agreement) does not raise a substantial issue of fact." *Moorhead v. United States*, 456 F.2d 992, 996 (CA3). But before dismissing facially adequate allegations short of an evidentiary hearing, ordinarily a district judge should seek as a minimum to obtain affidavits from all persons likely to have firsthand knowledge of the existence of any plea agreement. *See Walters v. Harris*, 460 F.2d, at 992. " 'When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive, but that is not to say they may not be helpful.'" Advisory Committee Note to Rule 7, Rules Governing Habeas Corpus Cases, 28 U.S.C., p. 269 (1976 ed.), quoting *Raines v. United States*, 423 F.2d 526, 530 (CA4).

Blackledge, 431 U.S. at 82 n. 25.

The Court affirmed the Fourth Circuit's remand of the case to the district court. The Court stated, "[i]n short, it may turn out upon remand that a full evidentiary hearing is not required. But Allison is 'entitled to careful consideration and plenary processing of (his claim,) including full opportunity for presentation of the relevant facts.'" *Blackledge*, 431 U.S. at 82–83 (quoting *Harris v. Nelson*, 394 U.S. 286, 298 (1969)).

Buckles' § 2255 motion and memorandum allege facts that, if proved, establish that trial counsel's actions and inactions denied him fundamental constitutional rights to a fair trial under both the Fifth and Sixth Amendments. Buckles alleged that trial counsel entered a stipulation with the prosecutor as to Indian status at trial without his consent, and without investigating facts that Buckles provided to counsel that would negate status as "an Indian person." App. 56-59.

As in *Blackledge*, Buckles went further and specifically alleged facts that necessitated further evidentiary development in order to test the veracity and accuracy of the allegations. *See*, App. 56-59; and Petition at 6-7, *supra*. Buckles alleged that he informed trial counsel of facts

that proved "he was not an Indian." App. 57-58. Buckles alleged that trial counsel "advised him that since he had some indian (sic) blood and lived on the reservation, the Government could establish that he was an Indian." App. 58. Buckles alleged that he "did not agree with [trial counsel's] stipulating to Indian status, did not sign any papers stipulating to Indian status, nor [was he] consulted as to whether he would authorize stipulating to Indian status." *Id.* Buckles alleged trial counsel "was ineffective for stipulating that Buckles was an Indian for purposes of IMCA." *Id.* As in *Blackledge*, Buckles' motion, the files and records of his case do not conclusively show he is entitled to no relief. 28 U.S.C. § 2255(b).

The district court did not seek evidence nor did the court provide Buckles an opportunity to develop the record to support his factual allegations. Instead, the district court summarily denied Buckles' § 2255 motion, although the district court found that Buckles could have reasonably challenged Indian status. App. 9.

The district court concluded that Ninth Circuit case-law, coupled with Buckles' certificate of Indian blood as an associate member of the Tribes of Fort Peck, establish that trial counsel's stipulation to Indian status, and his failure to investigate facts that negated Indian status, did not fall outside the range of professional assistance, under the first prong in *Strickland.* App. 10. (citing *Strickland*, 466 U.S. at 687-88, 694). In essence, the district court's order finds that Buckles "motion and the files and records of the case conclusively show that [Buckles] was entitled to no relief." 28 U.S.C. § 2255(b).

Ninth Circuit case law, however, also establishes that tribal enrollment is not "necessarily determinative" of Indian status. *Cruz*, 554 F.3d at 846 n. 6. This supports the district court's view that Buckles could have challenged Indian status at trial. App. 9.

Buckles alleged that he attempted to have trial counsel investigate evidence that ran contrary to Indian status. App. 57-58. Instead, trial counsel entered into a stipulation that alleviated this defense at trial. App. 19-21. Only additional development of the record and evidence could resolve Buckles' allegations. Thus, the district court's order summarily denying Buckles' § 2255 motion is squarely at odds with the Court's decision in *Blackledge*.

Therefore, the Court should grant this petition to resolve the significant federal question.

2. This case is the ideal vehicle for the Court to resolve this significant federal question.

As in *Blackledge*, this petition raises a significant federal question that this Court should address and resolve. This Court has not addressed this type of federal question since deciding *Blackledge*. This case presents the Court with an ideal vehicle to reiterate the principal's announced in *Blackledge*, and to apply those principals in circumstances that protect the federal constitutional rights of both federal and state prisoners in post-conviction proceedings under Title 28. *See*, *Davis v. United States*, 417 U.S. 333, 344-45 (1974) ("No microscopic reading of § 2255 can escape either the clear and simple language of § 2254 authorizing habeas corpus relief 'on the ground that (the prisoner) is in custody in violation of the . . . laws . . . of the United States' or the unambiguous legislative history showing that § 2255 was intended to mirror § 2254 in operative effect."). Resolution of this question will impact post-conviction proceedings throughout the nation and serve as a current reminder to federal district courts the importance of the writ of habeas corpus to the federal system of justice.

As the Court previously stated,

> The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. Its pre-eminent role is recognized by the admonition

> in the Constitution that: 'The Privilege of the Writ of Habeas Corpus shall not be suspended * * *.' U.S.Const., Art. I, s 9, cl. 2. The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.

Davis, 417 U.S. at 344.

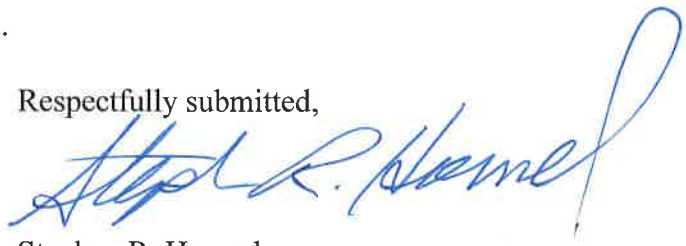
Resolution of this significant federal question will promote a universal application of the federal habeas corpus process. This case presents an ideal vehicle for the Court to accomplish that end.

CONCLUSION

Based on the foregoing, it is requested that this Court grant this petition for writ of certiorari.

Dated this 10th day of August, 2020.

Respectfully submitted,



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Appendix

NOT FOR PUBLICATION

FILED

MAY 12 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BRANDON RAY BUCKLES, Defendant-Appellant.	No. 18-36024 D.C. No. CV-18-55-GF-BMM CR-15-01-GF-BMM MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Brian M. Morris, District Judge, Presiding

Submitted May 7, 2020**
Portland, Oregon

Before: WATFORD and HURWITZ, Circuit Judges, and BATTAGLIA,*** District Judge.

Brandon Ray Buckles was convicted of sexual abuse and making a false statement to a federal officer and his conviction was affirmed on direct appeal.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Anthony J. Battaglia, United States District Judge for the Southern District of California, sitting by designation.

United States v. Buckles, 666 F. App'x. 670 (9th Cir. 2016). Buckles then filed a 28 U.S.C. § 2255 motion, alleging that his trial counsel was ineffective for stipulating that Buckles was an Indian person within the meaning of the Indian Major Crimes Act.[1] *See* 18 U.S.C. § 1153(a). The district court denied the motion without an evidentiary hearing. Buckles timely appealed. We have jurisdiction of that appeal under 28 U.S.C. §§ 1291 and 2255(d), and affirm.

Under the Indian Major Crimes Act, a defendant qualifies as an Indian person, if he: (1) has some quantum of Indian blood; and (2) is a member of or is affiliated with a federally recognized tribe. *United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015) (en banc); *United States v. Maggi*, 598 F.3d 1073, 1080–81 (9th Cir.

[1] The following stipulation was read to the jury during preliminary instructions: "Instruction Number 13. The parties have stipulated to the follow [sic], that means they have agreed to the following facts: Number 1. The defendant, Brandon Ray Buckles, is an enrolled member of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation. Number 2. The Assiniboine and Sioux Tribes are federally recognized tribes. Three. The defendant, Brandon Ray Buckles, is an Indian person. No further evidence is required to prove that the defendant is an Indian person. You should treat these facts as having been proved."

At the close of evidence, the district court again reiterated the stipulation in Jury Instruction 22: "The parties have stipulated as follows: (1) The defendant Brandon Ray Buckles is an enrolled member of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation. (2) The Assiniboine and Sioux Tribes are federally recognized tribes. (3) Defendant's status as an Indian person has been proven beyond a reasonable doubt. You should treat these facts as having been proved."

2010), *overruled in part by Zepeda*, 793 F.3d at 1113.[2] In determining whether the defendant is a member or affiliated with a federally recognized tribe, evidence of the following is considered in declining importance: "1) tribal enrollment; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life." *United States v. Bruce*, 394 F.3d 1215, 1224 (9th Cir. 2005) (internal quotation marks omitted).

Buckles does not contest that he has a quantum of Indian blood; nor does he contest that he has Certificate of Indian Blood documenting his membership in a federally recognized tribe. But he nonetheless contends that trial counsel was ineffective in stipulating that he was an "Indian person," because there was evidence that he received fewer benefits of tribal affiliation than others.

The district court correctly rejected that argument. Certificates of enrollment are important evidence of Indian status. *See, e.g.*, *id.*; *Zepeda*, 792 F.3d at 1115–16; *United States v. Alvirez*, 831 F.3d 1115, 1124 (9th Cir. 2016). And, this Court has previously decided that an individual with the same enrollment status as Buckles, with the same tribe, qualified as an Indian person. *See United States v. Smith*, 442 F.

[2] Although *Zepeda* was decided after Buckles' trial, it did not materially change the two-part test as relevant to this case.

App'x. 282, 284–85 (9th Cir. 2011). Accordingly, Buckles' trial counsel was not ineffective in making the strategic decision to stipulate to the fact that Buckles is an "Indian person." *See United States v. McMullen*, 98 F.3d 1155, 1157 (9th Cir. 1996). And, because the critical facts that informed counsel's decision are not contested, the trial court did not err in dismissing this § 2255 motion without an evidentiary hearing. *See United States v. Howard*, 381 F.3d 873, 877 (9th Cir. 2004).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA, Plaintiff/Respondent, vs. BRANDON RAY BUCKLES, Defendant/Movant.	Cause No. CR 15-01-GF-BMM CV 18-55-GF-BMM ORDER DENYING § 2255 MOTION AND DENYING CERTIFICATE OF APPEALABILITY

This case comes before the Court on Defendant/Movant Brandon Ray Buckles' motion to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255. Buckles is a federal prisoner proceeding pro se.

I. Preliminary Review

The Court first must determine whether "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b); *see also* Rule 4(b), Rules Governing Section 2255 Proceedings for the United States District Courts. A petitioner "who is able to state facts showing a real possibility of constitutional error should survive Rule 4 review." *Calderon v. United States Dist. Court*, 98 F.3d 1102, 1109 (9th Cir. 1996) ("*Nicolas*") (Schroeder, C.J., concurring) (referring to Rules Governing § 2254 Cases). The Court should "eliminate the burden that would be placed on the

respondent by ordering an unnecessary answer, Advisory Committee Note (1976), Rule 4, Rules Governing § 2255 Proceedings (*citing* Advisory Committee Note (1976), Rule 4, Rules Governing § 2254 Cases).

II. Background

A grand jury indicted Buckles on January 7, 2015, on one count of sexual abuse in violation of 18 U.S.C. § 2242(2)(B) (Count 1), and two counts of making a false statement to a federal officer in violation of 18 U.S.C. § 1001 (Counts 2 and 3). Jurisdiction arose under the Major Crimes Act, 18 U.S.C. § 1153(a). All three counts involved one victim, B. Count 1 alleged that Buckles engaged in a sexual act with B. on or about June 26, 2010, when she was physically incapable of consent. Counts 2 and 3 alleged that Buckles lied to FBI Agent Golob on July 16, 2010, and to Agent Burns on October 7, 2014, by saying he did not have sexual contact with B. on or about June 26, 2010. (Doc. 1 at 2-3.) Attorney Paul Gallardo represented Buckles. (Doc. 15.)

Trial commenced on June 1, 2015. (Doc. 69.) The jury found Buckles guilty on all three counts. (Doc. 81.) Before sentencing, the Court granted Buckles's Rule 29 motion, in part, and, acquitted him of Count 2. (Doc. 93.)

The Court sentenced Buckles to serve 125 months in prison on Count 1 and 96 months on Count 3, concurrently, followed by a five-year term of supervised release. (Doc. 98); (Doc. 99 at 2-3.)

Buckles appealed. He challenged the materiality of the false statement underlying Count 3 and an evidentiary ruling excluding evidence of his prior sexual relationship with B. On December 12, 2016, The Ninth Circuit rejected his claims and affirmed his convictions on December 12, 2016. (Doc. 118 at 2-3); *United States v. Buckles*, No. 15-30257 (9th Cir. 2016).

Buckles's conviction became final on March 12, 2017. *See Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012). He timely filed his § 2255 motion on March 7, 2018. (Doc. 120 at 12); 28 U.S.C. § 2255(f)(1); *Houston v. Lack*, 487 U.S. 266, 276 (1988).

III. Claims and Analysis

Buckles claims that his counsel provided ineffective in various respects. *Strickland v. Washington*, 466 U.S. 668 (1984) governs these claims. At this stage of the proceedings, Buckles must allege facts sufficient to support an inference (1) that counsel's performance fell outside the wide range of reasonable professional assistance, and (2) that a reasonable probability exists that, but for counsel's unprofessional performance, the result of the proceeding would have been different. *Id.* at 687-88, 694.

A. Indian Status

The indictment invoked jurisdiction under the Indian Major Crimes Act, 18 U.S.C. § 1153(a). Section 1153 confers federal jurisdiction over certain offenses,

including first- and second-degree murder, committed in "Indian country," *see id.* § 1151, by "[a]ny Indian," *id.* § 1153(a). The United States had to prove, beyond reasonable doubt, that Buckles was an Indian. *See United States v. Cruz*, 554 F.3d 840, 845 (9th Cir. 2009). No statute defines who counts as an "Indian person."

At the time of Buckles' trial, the Ninth Circuit's test required the United States to prove the following elements:

(1) the defendant had a quantum of Indian blood traceable to a federally recognized tribe; and

(2) the defendant was a member of, or was affiliated with, a federally recognized tribe.

See United States v. Maggi, 598 F.3d 1073, 1080-81 (9th Cir. 2010), *overruled in part by United States v. Zepeda*, 792 F.3d 1103, 1106-07, 1113 (9th Cir. 2015) (en banc) (issued after Buckles' trial); *see also United States v. Bruce*, 394 F.3d 1215, 1223-24 (9th Cir. 2005).

Counsel stipulated that Buckles was an "Indian" within the meaning of 18 U.S.C. § 1153(a). Buckles claim that he should have contested the element because Buckles has been denied benefits and per capita payments, the Bureau of Indian Affairs does not recognize him as an Indian, and his blood quantum does not permit him to be a full member of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation. (Doc. 120 at 4); (Doc. 121 at 12-17); (Doc. 121-1 at 3); (Doc. 127 at 4 ¶ D, 8.)

Buckles's tribal enrollment certificate showed a blood quantum of 5/16 Indian, consisting of 3/16 Assiniboine and Sioux and 1/8 unknown other tribe. (Doc. 121-1 at 3); (Doc. 121 at 14.) Five-sixteenths is "well in excess of the 1/8 . . . approved in *Bruce* and *Maggi*." *United States v. Smith*, 442 Fed. Appx. 282, 284 (9th Cir. July 8, 2011). The first prong of the *Maggi* test was met.

The certificate also satisfied the second prong of the test. In *Smith*, the court considered whether an associate member of the Fort Peck Tribes who had relinquished his membership years before trial nonetheless qualified as an Indian. The court determined that evidence "that Smith at one time enjoyed formal tribal enrollment," even as an associate member, was "the most important indicator of tribal recognition of a defendant's Indian status," although he had altered his enrollment status. *See Smith*, 442 Fed. Appx. at 284.

Buckles reasonably could have contested the issue of Indian status. An enrolled tribal member, even one with fewer rights and privileges than others, is by definition "affiliated with" a tribe. The Ninth Circuit may one day decide the second prong of the test requires a stronger affiliation than associate membership in the Fort Peck Tribes. The Ninth Circuit has never determined, however, that an enrolled tribal member is *not* an Indian. *See, e.g.*, *Zepeda*, 738 F.3d 201, 214 (9th Cir. 2013) (declining to consider "whether the tribal enrollment certificate alone was sufficient to carry the government's burden as to the second prong.");

overruled, 792 F.3d at 1115-16 (holding that enrollment certificate and testimony that father was an Indian met both prongs of the test).

Counsel's performance was not unreasonable. *See United States v. Ratigan*, 351 F.3d 957, 964-65 (9th Cir. 2003). As the first prong of the *Strickland* test is not met, there is no need to consider the second. *Strickland*, 466 U.S. at 697. This claim is denied.

B. DNA Evidence

Buckles claims that counsel should have challenged the forensic evidence. Buckles notes that he did not possess the trial transcript when he prepared his motion. (Doc. 121 at 17 n.7.) Not surprisingly, Buckles does not accurately describe the forensic testimony presented at trial.

B.'s panties contained sperm. Dr. Davis could not exclude Buckles as the major contributor of the DNA in the panties. Dr. Davis excluded "99.99 percent of the rest of the world." After explaining random-match probabilities, Dr. Davis agreed that Buckles's DNA was a "match" with DNA in B.'s panties. She found another, minor contributor of DNA in the panties as well, but it was not B.'s boyfriend Morales. (Doc. 112 at 30:22-34:1.)

Dr. Davis found semen in B.'s vaginal swabs. Dr. Davis could identify only B.'s DNA. (Doc. 112 at 35:16-19.) Dr. Davis also found B.'s DNA in a swab taken from Buckles's penis. Another, minor contributor appeared and was

consistent with B.'s sister J, but the sample was too small to identify J. with the same high degree of certainty that Dr. Davis had about B.'s DNA. (Doc. 112 at 37:1-40:13.)

Buckles asserts that counsel should have objected to Dr. Davis's testimony that DNA on a swab taken from his penis "was" B.'s DNA, "when the results only could not exclude" her. He also contends that counsel should have moved for another DNA sample from J. to improve the chance of a more conclusive result. (Doc. 120 at 5); (Doc. 121 at 17-22); (Doc. 121-1 at 5-18); (Doc. 127 at 3 ¶ B, 4-6.)

Dr. Davis explained, however, that nonexclusion is what DNA analysts mean by a match. DNA analysts do not say someone cannot be excluded unless the DNA sample proves large enough to support a statistically meaningful result. *See, e.g.*, (Doc. 112 at 22:13-23:21.) And further testing showing J. contributed the smaller sample of DNA would not exclude B. as the major contributor.

Finally, counsel pointed out to the jury that Dr. Davis found no semen or foreign DNA in other samples. *Compare, e.g.*, (Doc. 121 at 19-22) *with* (Doc. 112 at 51:5-53:22.) He also suggested DNA transfers might explain why Buckles' DNA was found amid a semen stain on B.'s underwear and B.'s DNA was found on Buckles' penis. (Doc. 112 at 41:16-48:4.) He did as much as anyone could to undermine the persuasive force of the forensic evidence.

Neither prong of the *Strickland* test is met. This claim is denied.

C. Impeaching B.

Buckles contends that counsel should have introduced evidence that B. falsely had accused another person in 2005 of raping her and that B. fraudulently had obtained social security benefits in 2009. He also avers his cell phone records would have undermined B.'s testimony about whether and when she used Buckles's phone and a previous incident involving Buckles's sister Chantelle might have provided a motive for B. to lie. All this evidence, he says, could have persuaded the jury to disbelieve B.'s trial testimony. (Doc. 120 at 6); (Doc. 121 at 22-2)6; (Doc. 123 at 4-5) (under seal); (Doc. 127 at 3 ¶ C, 6-8.)

Counsel challenged B.'s credibility by using words from B.'s own mouth. *See, e.g.*, (Doc. 112 at 200:20-202:20.) The other matters that Buckles describes appear less compelling. *See, e.g.*, *United States v. Frederick*, 683 F.3d 913, 915-20 (8th Cir. 2014) (discussing cases).

Regardless, B.'s credibility was less significant than Buckles suggests. Buckles told FBI agents that he went into B.'s bedroom to look for his phone and did nothing more than pull a blanket up over her and Morales. At trial, he told the jury he also went through B.'s and Morales' pockets. Dr. Davis testified that she found Buckles's DNA in B.'s underwear and that B.'s DNA was on his penis. Counsel provided the jury what it needed to explain away the forensic evidence

during closing argument. *See, e.g.*, (Doc. 112 at 167:7-15, 199:3-8, 202:21-205:18, 206:17-207:3.)

Counsel's performance was not unreasonable. Even if counsel taken the steps that Buckles now claims he should have, no reasonable probability of an acquittal exists. Neither prong of the *Strickland* test is met. This claim is denied.

IV. Certificate of Appealability

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a), Rules Governing § 2255 Proceedings. A COA should issue as to claims on which the petitioner makes "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), provided "jurists of reason could disagree with the district court's resolution of [the] constitutional claims" or "conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Buckles's claims meet the relatively low threshold for a COA by making a substantial showing of denial of a constitutional right. Therefore, a COA is warranted here.

Accordingly, IT IS HEREBY ORDERED:

1. Buckles' motion to vacate, set aside, or correct the sentence under 28 U.S.C. § 2255 (Docs. 120, 121, 123, 127) is DENIED.

2. A certificate of appealability is GRANTED as to Buckles ineffective assistance of counsel claims. The Clerk of Court shall immediately process the appeal if Buckles files a Notice of Appeal.

3. The Clerk of Court shall ensure that all pending motions in this case and in CV 18-55-GF-BMM are terminated and shall close the civil file by entering judgment in favor of the United States and against Buckles.

DATED this 27th day of September, 2018.

Brian Morris
United States District Court Judge

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ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **BRANDON RAY BUCKLES,** **Defendant.**	**CR 15-01 -GF-BMM** **INDICTMENT** **SEXUAL ABUSE** **(Count I)** **Title 18 U.S.C. §§ 1153(a) and 2242(2)(B)** **(Penalty: Life imprisonment, $250,000 fine, and not less than five years to life supervised release)** **FALSE STATEMENT TO A FEDERAL OFFICER** **(Counts II & III)** **Title 18 U.S.C. § 1001(a)(2)** **(Penalty: Eight years imprisonment, $250,000 fine, and three years supervised release)**

THE GRAND JURY CHARGES:

COUNT I

That on or about June 26, 2010, at Poplar, in the State and District of Montana, and within the exterior boundaries of the Fort Peck Indian Reservation, being Indian Country, the defendant, BRANDON RAY BUCKLES, an Indian person, knowingly engaged in a sexual act with J.L.S.B., and at the time of the sexual act, J.L.S.B. was physically incapable of declining participation in, and communicating unwillingness to engage in, that sexual act, in violation of 18 U.S.C. §§ 1153(a) and 2242(2)(B).

COUNT II

That on or about July 16, 2010, at Poplar, in the State and District of Montana, the defendant, BRANDON RAY BUCKLES, willfully and knowingly made a materially false, fictitious, and fraudulent statement in a matter within the jurisdiction of the Federal Bureau of Investigation, a department and agency of the United States, and which related to an offense under Chapter 109A of Title 18 of the United States Code, that is Sexual Abuse, by stating to FBI Special Agent Simon Golob that he, BRANDON RAY BUCKLES, never had sexual contact with J.L.S.B. on or about June 26, 2010, which was the date of the alleged sexual offense, and the statement was false because, as BRANDON RAY BUCKLES,

then and there knew, he had sexual contact with J.L.S.B. on or about June 26, 2010, all in violation of 18 U.S.C. § 1001(a)(2).

COUNT III

That on or about October 7, 2014, at Poplar, in the State and District of Montana, the defendant, BRANDON RAY BUCKLES, willfully and knowingly made a materially false, fictitious, and fraudulent statement in a matter within the jurisdiction of the Federal Bureau of Investigation, a department and agency of the United States, and which related to an offense under Chapter 109A of Title 18 of the United States Code, that is Sexual Abuse, by stating to FBI Special Agent David Burns that he, BRANDON RAY BUCKLES, never had sexual contact with J.L.S.B. on or about June 26, 2010, which was the date of the alleged sexual offense, and the statement was false because, as BRANDON RAY BUCKLES, then and there knew, he had sexual contact with J.L.S.B. on or about June 26, 2010, all in violation of 18 U.S.C. § 1001(a)(2).

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Foreperson signature redacted. Original document filed under seal.

A TRUE BILL.

MICHAEL W. COTTER
United States Attorney

JOSEPH E. THAGGARD
Criminal Chief Assistant U.S. Attorney

Crim. Summons____
Warrant: ✓
Bail:____

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ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **BRANDON RAY BUCKLES,** **Defendant.**	**CR 15-01-GF-BMM** **TRIAL STIPULATION**

INTRODUCTION

The United States of America, by and through Ryan G. Weldon, Assistant United States Attorney for the District of Montana, and the defendant, through defense counsel Paul Gallardo, hereby notify the Court that the parties have stipulated to the matter listed below.

STIPULATION

Indian person status:

Brandon Ray Buckles is an Indian person, enrolled with the Assiniboine and Sioux Tribes of the Fort Peck. The Assiniboine and Sioux Tribes of the Fort Peck are federally recognized tribes. Government's Exhibit 1, identified as the Assiniboine and Sioux Tribes of the Fort Peck tribal enrollment certificate for Brandon Ray Buckles, is admissible into evidence at trial.

The element that Brandon Ray Buckles is an Indian person has been proven beyond a reasonable doubt and no further evidence needs to be admitted to prove that the defendant is an Indian person.

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DATED this 1st day of April, 2015.

MICHAEL W. COTTER
United States Attorney

/s/ Ryan G. Weldon
RYAN G. WELDON
Assistant U.S. Attorney

/s/ Paul Gallardo
PAUL GALLARDO
Counsel for Defendant

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United States Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	CR-15-01-GF-BMM
versus	)	
	)	
BRANDON RAY BUCKLES,	)	
	)	
Defendant.	)	

TRANSCRIPT OF JURY TRIAL PROCEEDINGS

PRELIMINARY INSTRUCTIONS BY THE COURT
OPENING STATEMENTS BY COUNSEL
DAY 1 OF WITNESS TESTIMONY

BEFORE THE HONORABLE BRIAN M. MORRIS
UNITED STATES DISTRICT COURT JUDGE
FOR THE DISTRICT OF MONTANA

Charles N. Pray Courtroom
Missouri River Federal Courthouse
United States District Court Great Falls
125 Central Avenue West
Great Falls, MT 59404

June 1, 2015
1:45 p.m.

Proceedings recorded by machine shorthand
Transcript produced by computer-assisted transcription

an Indian person.

MR. GALLARDO: Oh, yes, Your Honor.

THE COURT: No, we're not talking about foundation stuff.

MR. WELDON: And I agree, Your Honor.

THE COURT: Okay. Anything else?

MR. GALLARDO: No, Your Honor.

THE COURT: Okay. Bring in the jury, please.

(Jury enters.)

THE COURT: Please be seated. Members of the jury, we stand in your honor; so whenever you're ready to be seated, go ahead. Welcome back from lunch. I hope you were able to find something. We are ready to move on to the next phase of the trial. I'm going to read the preliminary instructions that will guide you throughout the trial, and then we will move on to our opening statements.

And if you'd please pay attention, and on the screens in front of you the clerk will allow you to follow along.

Preliminary Instruction Number 1. Ladies and gentlemen, you are now the jury in this case, and I'm going to take the next few minutes to talk with you about your duties as jurors and to provide you with some preliminary instructions on the law you are to follow in carrying out your duties. At the end of the trial, I will give you more detailed instructions to use, along with these instruction, in your deliberations.

Instruction Number 2. This is a criminal case brought by the United States government. The government charges the defendant with sexual abuse, in violation of Title 18, United States Code Section 1153(a) and Section 2242(2)(b), and two counts of making a false statement to a federal officer, in violation of Title 18, United States Code Section 1001(a)(2). The charges against the defendant are contained in the Indictment.

The Indictment simply describes the charges made by the government against the defendant, it is not evidence of anything. The defendant has pled not guilty to the charges, and he is presumed innocent unless and until the government proves the defendant guilty beyond a reasonable doubt. The defendant has the right to remain silent and never has to prove innocence or present any evidence.

Preliminary Instruction Number 3. The evidence you are to consider in deciding what the facts are consists of the following items: The sworn testimony of any witness, the exhibits that are received into evidence, and any facts to which the lawyers stipulate or agree.

Preliminary Instruction Number 4. You must not consider any of the following as evidence in deciding the facts of the case: Statements and arguments of the lawyers. Questions and objections of the lawyers; testimony that I instruct you to ignore or disregard; evidence that the Court excludes; and

arguments. After that, you will go to the jury room to deliberate on your verdict.

Finally, Instruction Number 13. Do you have that, madam clerk? Instruction 12 was the first break instruction I gave you this morning. Instruction Number 13. The parties have stipulated to the follow, that means they have agreed to the following facts: Number 1. The defendant, Brandon Ray Buckles, is an enrolled member of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation. Number 2. The Assiniboine and Sioux Tribes are federally-recognized tribes. Three. The defendant, Brandon Ray Buckles, is an Indian person. No further evidence is required to prove that the defendant is an Indian person. You should treat these facts as having been proved.

So, those are your instructions that you will follow for the remainder of the trial. I will now call upon Mr. Weldon to present an opening statement on behalf of the government.

Mr. Weldon.

MR. WELDON: Thank you, Your Honor.

Ladies and gentlemen of the jury, this is a case about the rape of a vulnerable lady. On June 26th of 2010, Jonna Spotted Bird was walking and hanging out with various friends. And she was drinking with them, and ultimately they decided to return back to her residence. And there were various individuals there that you're going to hear about in

Julie Pesanti Sampson
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United States Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	CR-15-01-GF-BMM
versus	)	
	)	
BRANDON RAY BUCKLES,	)	
	)	
Defendant.	)	

TRANSCRIPT OF JURY TRIAL PROCEEDINGS

DAY 2 OF WITNESS TESTIMONY
SETTLING OF FINAL JURY INSTRUCTIONS
FINAL JURY INSTRUCTIONS BY THE COURT
CLOSING ARGUMENTS
VERDICT

BEFORE THE HONORABLE BRIAN M. MORRIS
UNITED STATES DISTRICT COURT JUDGE
FOR THE DISTRICT OF MONTANA

Charles N. Pray Courtroom
Missouri River Federal Courthouse
United States District Court Great Falls
125 Central Avenue West
Great Falls, MT 59404

June 2, 2015
8:30 a.m.

Proceedings recorded by machine shorthand
Transcript produced by computer-assisted transcription

Page 179 of 223

Instruction Number 5. Section 1153(a) of Title 18 of the United States Code provides in pertinent part, any Indian who commits against another Indian or other person the offense of sexual abuse within Indian Country shall be guilty of an offense against the laws of the United States. Indian Country means all lands within the exterior boundaries of an Indian reservation.

Instruction Number 6. Section 2242(2)(b) of Title 18 of the United States Code provides in pertinent part, whoever in the territorial jurisdiction of the United States knowingly engages in a sexual act with another person who is physically incapable of declining participation in or communicating unwillingness to engage in that sexual act is guilty of the crime of sexual abuse.

Instruction Number 7. In order for the defendant to be found guilty of sexual abuse, as charged in Count I of the Indictment, the government must prove each of the following elements beyond a reasonable doubt: First, the defendant is an Indian person. Second, the defendant knowingly engaged in a sexual act with J.L.S.B. Third, J.L.S.B. was physically incapable of declining participation in or communicating unwillingness to engage in that sexual act, and, fourth, the crime occurred within the exterior boundaries of the Fort Peck Indian Reservation. In this case, the term "sexual act" means contact between the penis and the vulva, contact

Agent David Burns that he, Brandon Ray Buckles, never had sexual contact with J.L.S.B. on or about June 26th, 2010, which was the date of the alleged sexual offense, and the statement was false, because, as Brandon Ray Buckles then and there knew, he had sexual contact with J.L.S.B. on or about June 26th, 2010, all in violation of Title 18, United States Code Section 1001(a)(2).

Instruction Number 12. In order for the defendant to be found guilty of knowingly and willfully making a false statement to an agent of the Federal Bureau of Investigation, as charged in Count III of the Indictment, the government must prove each of the following elements beyond a reasonable doubt: First, the defendant made a false statement to FBI Special Agent David Burns in a matter within the jurisdiction of the FBI, an agency of the United States. Second, the defendant acted willfully; that is, deliberately and with knowledge that the statement was untrue and that his conduct was unlawful. Third, the statement was material to the activities or decisions of the FBI; that is, it had a natural tendency to influence or was capable of influencing the decisions or activities of the FBI with respect to the allegation of sexual abuse charged in Count I of the Indictment.

Instruction Number 13. An act it done knowingly if the defendant is aware of the act and does not act through

evidence. If, after a careful and impartial consideration of all of the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if, after a careful and impartial consideration of all of the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

Instruction Number 22. The parties have stipulated to the following facts: One, the defendant, Brandon Ray Buckles, is an enrolled member of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation. Two, the Assiniboine and Sioux Tribes are federally-recognized tribes. Three, the defendant's status as an Indian person has been proven beyond a reasonable doubt. You should treat these facts as having been proved.

Instruction Number 23. When you begin your deliberations, you should elect one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in court. You will then discuss the case with your fellow jurors to reach agreement, if you can do so. Your verdict, whether guilty or not guilty, must be unanimous.

Each of you must decide the case for yourselves, but you should do so only after you have considered all of the

Assiniboine and Sioux Tribes of Fort Peck
PO Box 1027
Poplar, MT 59255

Thursday, August 09, 2012

Certificate of Indian Blood

Name: **Brandon Ray Buckles**

Date of Birth: **05/31/1987**
Enrollment Status: **Enrolled**

Resolution Number: **2076-2007-9**
Enrollment Number: **206-AM-001731**

Resolution Date: **09/24/2007**
BIA ID Number:

Address (Mailing): **PO Box 1212**
City: **Poplar, MT 59255**
County/Borough: **Roosevelt**

Ethnic Affiliation/Blood Quantum

Total Quantum This Tribe: **3/16**
Total Quantum All Tribes: **5/16**

Ethnic Group: **Assiniboine and Sioux Tribes of Fort Peck - (R)**
Affiliation: **Sioux**
Blood Quantum: **3/16**

Ethnic Group: **Unknown**
Affiliation: **(unknown)**
Blood Quantum: **1/8**

Ken Heathman
Authorizing Signature

Ken Heathman
Enrollment Clerk / Notary

GOVERNMENT EXHIBIT
U.S. v. Buckles
CR 15-01-GF-BMM
1

Assiniboine and Sioux Tribes of Fort Peck
PO Box 1027
Poplar, MT 59255
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AO 243 (Rev. 01/15)

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District: Montana, Great Falls Division
Name *(under which you were convicted)*: Brandon Buckles	Docket or Case No.: 4:15-cr-00001-BMM-1
Place of Confinement: USP Tucson	Prisoner No.: 13562-046
UNITED STATES OF AMERICA V.	Movant *(include name under which convicted)*: Brandon Buckles

MOTION

1. (a) Name and location of court which entered the judgment of conviction you are challenging:
United States District Court for the District of Montana
Great Falls Division
125 Central Ave, West
Great Falls, MT 59404

(b) Criminal docket or case number (if you know): 4:15-cr-00001-BMM-1

2. (a) Date of the judgment of conviction (if you know): June 2, 2015

(b) Date of sentencing: September 8, 2015

3. Length of sentence:

4. Nature of crime (all counts):
Count I: Sexual Abuse -- 18 U.S.C. §§ 1153(a) and 2242
Count II: Making a false statement to a Federal Officer -- 18 U.S.C. § 1001(a)(2) -- dismissed
Count III: Making a false statement to a Federal Officer -- 18 U.S.C. § 1001(a)(2)

5. (a) What was your plea? (Check one)
(1) Not guilty [XX] (2) Guilty [ ] (3) Nolo contendere (no contest) [ ]

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or what did you plead guilty to and what did you plead not guilty to?
Not guilty on all counts

6. If you went to trial, what kind of trial did you have? (Check one) Jury [XX] Judge only [ ]

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes [XX] No [ ]

8. Did you appeal from the judgment of conviction? Yes [XX] No [ ]

9. If you did appeal, answer the following:

(a) Name of court: Ninth Circuit Court of Appeals

(b) Docket or case number (if you know): 15-30257

(c) Result: Conviction and Sentences Affirmed.

(d) Date of result (if you know): December 12, 2016

(e) Citation to the case (if you know): 666 Fed. Appx. 670 (9th Cir. 2016)

(f) Grounds raised:

I. Whether the district court erred when it prohibited the defendant from testifying about his prior relationship with the victim when it showed a motive to lie.

II. Whether the district court erred in not dismissing count III of the indictment for failure to prove each element.

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☒

If "Yes," answer the following:

(1) Docket or case number (if you know): N/A

(2) Result: N/A

(3) Date of result (if you know): N/A

(4) Citation to the case (if you know): N/A

(5) Grounds raised: N/A

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?

Yes ☐ No ☒

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: N/A

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☒ XX

(7) Result:

(8) Date of result (if you know):

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: N/A

(2) Docket of case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

N/A

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☒ XX

(7) Result:

(8) Date of result (if you know):

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☒ XX

(2) Second petition: Yes ☐ No ☒ XX

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: Counsel was ineffective for stipulating that Buckles was an Indian for purposes of 18 U.S.C. § 1153.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Counsel failed to appropriately investigate status: Buckles was not eligible for any benefits. Was denied benefits, denied per capita payments, the BIA did not recognize Buckles as an Indian. Buckles blood quantum did not allow him to be a full member of the Tribe.

See attached Points and Authorities.

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒ XX

(2) If you did not raise this issue in your direct appeal, explain why:

The issue may not have been ripe for litigation or otherwise appellate counsel was inefffective for failing to raise the issue.

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒ XX except the instant motion.

(2). If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed:

N/A

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒ XX

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☒ XX

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND TWO: Counsel was ineffective for failing to properly challenge the DNA analyst's testimony.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The DNA analyst inappropriately testified that the victim's DNA was found on Buckles' penile swab, when the results only could not exclude the victim as a donor. Buckles had consensual coitus with the victim's sister, her DNA could not be compared to the penile swab and could not be excluded as a donor. Counsel should have requested another sample be taken from the victim's sister or another test performed.

See attached Points and Authorities.

(b) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: The issue was not ripe for litigation, preserved for appeal or otherwise appellate counsel was ineffective for failing to raise the issue on appeal.

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒ XX

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☒ XX

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☒ XX

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

N/A

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

N/A

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

N/A

GROUND THREE: Counsel was ineffective for his failure to properly challenge JSB 1's credibility

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Counsel failed to use information at his diposal to properly impeach JSB 1 to include information she made false allegations of rape against Alexis Sharbonue in or around 2005; she fraudulently obtained SSI benefits as well as false accusations of a previous assault by Mr. Buckles against herself in or around 2009. See Points and Authorities.

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒ XX

(2) If you did not raise this issue in your direct appeal, explain why: This issue was not ripe for litigation, preserved for alleal or otherwise appellate counsel was ineffective for failing to raise the issue on appeal.

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒ XX

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒ XX

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☒ XX

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☒ XX

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

N/A

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND FOUR: N/A

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

N/A

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒ XX

(2) If you did not raise this issue in your direct appeal, explain why:

N/A

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒ XX

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒ XX

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☒ XX

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☒ XX

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

N/A

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

N/A

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the you are challenging? Yes ☐ No ☒ XX

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

N/A

15. Give the name and address, if known, of each attorney who represented you in the following stages of the you are challenging:

(a) At the preliminary hearing:

(b) At the arraignment and plea:

(c) At the trial:

Paul Gallardo, 1026 1st. Ave., South, P.O. Box 1968 Great Falls, MT 59401

(d) At sentencing: Same

(e) On appeal:

Carl Jensen, Jr., 410 Central Ave., Suite 506B, Great Falls MT 59401

(f) In any post-conviction proceeding: N/A

(g) On appeal from any ruling against you in a post-conviction proceeding:

N/A

16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes [XX] No [ ]

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes [ ] No [X]

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

N/A

(b) Give the date the other sentence was imposed: N/A

(c) Give the length of the other sentence: N/A

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes [ ] No [X]

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

Mr. Buckles did not file for a Writ of Certiorari, therefore his deadline is March 12, 2018 and this Motion is timely filed.

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction became final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief:

Vacate Count I or order an evidentiary hearing,
or any other relief to which movant may be entitled.

X D. B
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on X March 07, 2018
(month, date, year)

Executed (signed) on X March 07, 2018 (date)

X B. B
Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

N/A

Civil Case No.: _____

IN THE
DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

United States of America,
Plaintiff;

v.

Brandon Buckles,
Defendant.

Criminal Case No.: 4:15-cr-00001-BMM-1

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY PURSUANT TO 28 U.S.C. § 2255

Brandon Buckles
Reg. # 13562-046
USP Tucson
P.O. Box 24550
Tucson, AZ 85734

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STATUTES

Brandon Buckles
Reg. # 13562-046
USP Tucson
P.O. Box 24550
Tucson, AZ 85734

IN THE
DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

United States of America, Plaintiff;	
v.	Criminal Case No: 4:15-cr-00001-BMM-1
Brandon Buckles, Defendant.	Civil Case No: _____

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO VACATE, SET ASIDE, OR CORRECT A SENTENCE BY A PERSON IN FEDERAL CUSTODY PURSUANT TO 28 U.S.C. § 2255

COMES NOW defendant, Brandon Buckles ("Buckles"), pro se, to timely submit this Points and Authorities in Support of Motion to Vacate, Set Aside, or Correct a Sentence by a Person in Federal Custody Pursuant to 28 U.S.C. § 2255 ("2255").

I. INTRODUCTION

Mr. Buckles timely submits this 2255. Buckles presents 3 claims of ineffective assistance of counsel in violation of his constitutional rights.

II. LEGAL STANDARD

The seminal ineffective assistance of counsel case, Strickland v. Washington, 466 U.S. 668 (1984) sets out a two-prong test, where a defendant must show 1) deficient performance; and 2) prejudice. Counsel's performance must have fallen below an

objective standard of reasonableness, and, but for that deficient performance there was a reasonable probability that the outcome of the proceeding would have been different.

Deficient performance is defined as errors serious enough to violate the Sixth Amendment's right to effective counsel. United States v. Wagner, No. 92-55967, No. 92-56471, 1993 U.S. App. LEXIS 21076 (9th Cir. 1993). This amorphus concept may be further defined as errors which fell below the prevailing professional norms. Wiggins v. Smith, 539 U.S. 510, 523 (2003)(quoting Strickland, 466 U.S. at 688)(internal quotations omitted).

Strickland's prejudice prong means that but for counsel's unprofessional errors there was a reasonable probability that the outcome of the proceeding would have been different. Summerlin v. Schriro, 427 F.3d 623, 629 (9th Cir. 2005)(citing and quoting Strickland, supra.)

A "reasonable probability" standard is a less than "preponderance" standard. Whaley v. Thompson, 22 F. Supp. 2d 1146, 1159 (D. OR 1998); United States v. Ervin, 198 F. Supp. 3d 1169, 1176 (D. MT 2016); Visciotti v. Woodford, 288 F.3d 1097, 1108 (9th Cir. 2002); James v. Ryan, 679 F.3d 780, 810 (9th Cir. 2012).

Mr. Buckles is proceeding pro se and therefore is entitled to liberal construction in his pleadings and papers. Haines v. Kerner, 404 U.S. 519 (1971); Baldwin County Welcome Center v. Brown, 466 U.S. 147, 164 (1984); Erickson v. Purdus, 551 U.S.

89, 94 (2007)(per curiam); Porter v. Ollison, 620 F.3d 952, 958 (9th Cir. 2010).

Twenty-eight U.S.C. § 2255(b) makes clear that "[u]nless the motion and the files and records of the case conclusively show that the petitioner is entitled to no relief, the court shall . . . grant a prompt hearing thereon . . . .

III. PROCEDURAL POSTURE

Mr. Buckles was arrested on January 12, 2015 on the Fort Peck Indian Reservation, Poplar, Montana.

Buckles was charged in a three (3) count indictment charging him with sex abuse in violation of 18 U.S.C. §§ 2242(2)(B) and 1153(a) (Count 1); and two (2) counts of making a false statement to a federal officer in violation of 18 U.S.C. § 1001(a)(2) (Counts 2 and 3).

Buckles plead not guilty and proceeded to jury trial on June 1, 20015. The jury returned a verdict of guilty on June 2, 2015. United States v. Buckles, 4:15-cr-00001-BMM-1.

Buckles submitted a motion to dismiss Counts 2 and 3. This Court Granted in part, and denied in part, the Motion, dismissing Count 2.

Buckles timely appealed to the Ninth Circuit Court of Appeals. United States v. Buckles, 666 Fed. Appx. 670 (9th Cir. 2016). Buckles raised two (2) issues on appeal -- 1) whether the district court abused its discretion probibiting him from testifying about his prior relationship with the alleged victim; and 2) the district court erred in not dismissing Count 3 on sufficiency of the evidence. On December 12, 2016 the Ninth

Circuit affirmed Buckles convictions and sentence.

Mr. Buckles did not petition for a Writ of Certiorari from the Supreme Court.

IV. TIMELINESS

Mr. Buckles filed a direct appeal to the Ninth Circuit, as noted supra. The Ninth Circuit denied Buckles' appeal on December 12, 2016. He did not file a petition for a Writ of Certiorari to the Supreme Court.

It is well settled law that the clock for filing 2255's starts when the time expires for filing a petition for a Writ of Certiorari to the Supreme Court ("Writ"). See United States v. Garcia, 210 F.3d 1058, 1060 (9th Cir. 2000); Clay v. United States, 537 U.S. 522, 532 (2003)(holding that for purposes of starting the clock on 2255's one-year limitation period, a judgment of conviction becomes final when the time expires for filing a petition for a Writ contesting the appellate court's affirmation of the conviction.)

Since Buckles did not file for a Writ, his current filing deadline is on Sunday, March 11, 2018. Since the deadline is on a Sunday, Buckles' deadline is Monday, March 12, 2018.

V. BACKGROUND

On June 26, 2010 Mr. Buckles was in the company of JSB 1,[1] RSB, Rick Morales (JSB 1's boyfriend), Wyatt Bergie (Buckles' brother), and Chantelle Buckles (Buckles' sister) at approxmately 11:00 am. The six (6) began drinking alcohol together

1. Out of privacy concerns, Buckles refers to the alleged victim as "JSB 1", the alleged victim's sister as "JSB 2," and alleged victims brother as "RSB."

at about 11:00 a.m.[2]

The group was at JSB 1's house when Mr. Buckles passed out on her couch at approximately 2:30 p.m. Buckles had received a phone call from his sister, Tana, at approximately 2:26 p.m., prior to passing out.

At approximately 2:48 p.m. JSB 1 used Buckles' phone to call her mother, while he was passed out on the couch. The group was together at the time Buckles passed out.

At approximately 3:30 p.m. Buckles woke up. After he woke up. After he woke up, no one was present; Buckles was going to leave and he began to look for his phone, Buckles maintains that he went into JSB 1's bedroom, where Rick Morales ("Morales") was also on the bed sleeping, to look for his phone. JSB 1 was nude from the waist down, with her underware on the bed. Buckles did move the underware and saw his phone next to JSB 1. Buckles kicked the bed to wake her[3] up to get his phone. Buckles maintains she woke up and yelled at him to "get the fuck out or [she would] call the cops."

Buckles left and proceeded to T.J. Dupree's home a block or two away. Buckles remained there approximately ½ hour drinking beer.

He then left at approximately 4:00 p.m. and walked to Arthur Chapman's home, approximately two blocks away where he re-

2. Buckles had been drinking alcohol prior to the group getting together.
3. JSB 1's testimoney is substantially different, see infra.

mained for approximately five minutes.

At approximately 4:05 p.m. Buckles walked to Alvin Houle's ("Houle") house, where he used Houle's phone to call his own -- there was no answer. Shortly thereafter Houle's phone received a text from his own phone, from JSB 1, asking "who is this?" Buckles returned the text that it was himself -- at that time JSB 1 text alleging the sexual assault.

Buckles then walked to his dad's house[4] where Wyatt Buckles ("Wyatt"), his brother, was passed out. Buckles arrived at his dad's home at approximately 4:40 p.m. Wyatt's cellphone received a phone call from Buckles' phone, several minutes after he arrived at his dad's house. Buckles answered the phone; Morales was on the other end asking where Buckles was at. He advised that he was at his dad's house.

Shortly thereafter (at approximately 4:42 p.m.) Juna (JSB 1's mother), JSB 1, RSB, Morales, and Catherine (JSB 1's sister) arrived at Buckles house and attacked him. During the assault Buckles was knocked out. At approximately 5:00 p.m., after regaining consciousness he called 911 and was transported to the Hospital.

JSB 1 was present at the hospital alleging the sexual assault.

Buckles consented to a penile swab, later identified as Q26 and Q27 on FBI laboratory reports ("lab reports").

4. Buckles also resided at his dads house.

JSB 1 testified that at approximately 4:30 p.m. she woke up on her bed, on her stomach, with Buckles lying on her back, applying his body weight to hold her down, penetrating her vagina with his penis in non-consensual coitus.

VI. ARGUMENTS

a. Counsel was ineffective for stipulating that Buckles was an Indian for purposes of 18 U.S.C. § 1153

Mr. Buckles was charged, in Count 1, with violating 18 U.S.C. §§ 2242(2)(B) and 1153(a), Indian Major Crimes Act ("IMCA").

Section 1153 states in pertinent part "[a]ny Indian who commits against the person or property of another Indian or other person . . . ." 18 U.S.C. § 1153(a).

Therefore, for federal jurisdiction to prosecute Mr. Buckles for violating 18 U.S.C. § 2242(2)(B), he must be an Indian and the offense must have been committed on Indian Country.

Thusly, Indian status is an essential offense element which must be proved beyond a reasonable doubt. United States v. Bruce, 394 F.3d 1215, 1229 (9th Cir. 2005).

Indian Major Crimes Act confers federal jurisdiction to prosecute specific offenses committed by an Indian in Indian country. However, IMCA does not define who is an Indian, but the generally accepted test -- adapted from United States v. Rogers, 4 Howard 567, 572-73, 45 U.S. 567 (1846) -- asks whether the defendant (1) has some Indian blood, and (2) is recognized as an Indian by the tribe or federal government or both.

The Ninth Circuit stated in Broncheau, in determining Indian status, courts should consider degree of blood and tribal recognition as an Indian. United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979).

Subsequent to Broncheau, the Ninth Circuit further clarified who is an Indian in Bruce, infra. Bruce acknowledged Rogers' two-prong test -- that is Indian blood and tribal or governmental recognition. Bruce identified the manner a court determines the second prong, or otherwise tribal or governmental recognition. The court should "consider, in declining order order of importance, evidence of the following: 1) tribal enrollment; 2) government recogition formally or informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of trial affiliation, and 4) social recognition as an Indian through residence on a reservation AND participation in Indian social life." United States v. Bruce, 394 F.3d 1215, 1224 (9th Cir. 2005)(internal citations, quotations omitted and emphasis added).

Mr. Buckles asserts that he is not an Indian subject to 18 U.S.C. § 1153(a) ("1153"). Buckles does not dispute that he has "some [quantum of] Indian blood." Bruce, 394 F.3d at 1223-24. Establishing the first prong. In fact Buckles' Certificate of Indian Blood shows that he has 3/16 Assiniboine and Sioux Tribes of Fort Peck (Affiliation: Sioux)("Fort Peck Tribes").

The Fort Peck Tribes require that an individual have a total ¼ blood Assiniboine and /or Sioux for full membership. United States v. Smith, 442 Fed. Appx. 282, 284 (9th Cir. 2011). "Each child of one-eighth (1/8) or more but less than one-quarter (¼), Assiniboine and/or Sioux blood born to any member of the Assiniboine and Sioux Tribes qualifies for associate member-

ship," id. (citing and quoting Sioux & Assiniboine ord. No. 1, § 1(e), internal quotations omitted). Thusly, Buckles was an associate member, or otherwise has decsendant status of the Tribe, and is not eligible for benefits reserved only for Indians.

Buckles was born in Williston, North Dakota, not on a reservation. His parents lived on Fort Peck Reservation; and as a dependant child, he too lived on the reservation with his parents. Buckles went to public school, intergrated with non-indians.

He lived off reservation between 2009-10. Mr. Buckles moved back to the Fort Peck Reservation around 2010, where non-indians are allowed to reside as well.

Buckles was denied formal enrollment status, but was allowed to enroll as an associate member (due to descendant status) on or about September 24, 2007. Mr. Buckles' associate membership is denoted by the "AM" in his enrollment Number. In fact his Certificate of Indian Blood (printed on Friday, October 13, 2017) shows no Bureau of Indian Affairs ("BIA") Identification Number -- the BIA does not recognize Buckles as an Indian. See Exhibit ("Ex") A.

Mr. Buckles attempted to apply for Government assistance benefits reserved for tribal members in 2011 and was denied -- as he was not an actual member of the Tribes and eligible. In 2012 Buckles applied for a per capita payment of two thousand five hundred dollars ($2,500) reserved for Indians and again denied. In 2013 Mr. Buckles "broke" his hand. He went to the tribal clinic, which is open to non-members, who refered him to Billings, MT for medical care. The clinic did not arrange for

any transfer to Billings, but originally advised him to return to the clinic for funds[5] to be used for incidentals while in Billings. However, when he returned to the clinic, he was denied the funds since he was not a formal member and not eligible to receive the benefit.

Mr. Buckles did not involve himself in Indian social life.[6] Mr. Buckles did not participate in any "sweats." He did not go to pow-wows. He did not vote (and not eligible to vote) in Tribal affairs. Nor attend Tribal counsel meetings.

State arrest warrants, in North Dakota (in 2008) identified Buckles as "white," non indian. In fact, his first Presentence Report ("PSR") indicated that Mr. Buckles was "white" non-indian.

There is a paucity of evidence to establish that Buckles was an Indian beyond a reasonable doubt -- as required -- save his counsel's stipulation that he was. In fact Buckles meets none of the requirements for Bruce's second prong. An individual must meet both prongs of Bruce's and Rogers' test to be an Indian for purposes of IMCA.

Mr. Buckles advised defense counsel, Mr. Paul Gallardo ("Gallardo"), that he was not an Indian. He advised Mr. Gallardo that he was denied per capita payments and denied formal enrollment. He was denied government benefits reserved for indians. That he lived on and off the reservation and went to a public school intergrated with non-indians. He advised Gallardo that

5. Funds reserved only for formally recognized members of the Fort Peck Tribes.
6. Unless this Court decides that consuming alcohol and using methamphetamines is tribal social life.

he was denied assistance from the tribal clinic.

However, Mr. Gallardo advised Buckles that since he had some indian blood and lived on the reservation, the Government could establish that he was an Indian. Dismissing Buckles' assertions. As established supra, residence on a reservation is not dispositive; nor is "some indian blood" dispositive.

Buckles did not agree with Mr. Gallardo's stipulating to Indian status, did not sign any papers sitpulating to Indian status, nor consulted as to whether he would authorize stipulating to Indian status. Nor did the Court inquire as to whether Buckles in fact knowingly agreed to stipulate to Indian status; or whether he agreed to waive the Government's burden to prove beyond a reasonable doubt an essential element of the offense charged.

Mr. Gallardo was ineffective for stipulating that Buckles was an Indian for purposes of IMCA. Mr. Gallardo should have properly investigated Buckles' Indian status and challenged this contention at trial. Had Gallardo actually investigated Buckles' status he would have been able to determine that Buckles was not an Indian for IMCA purposes.

Though stipulating may be appropriate under certain circumstances for ease of flow of court proceedings -- but not to sacrafice the Defendant's rights and only after an appropriate investigation. Which did not happen in the instant case. Gallardo's representation and investigation fell below an objectively reasonable standard, as there appears to have been no investigation. Buckles was prejudiced by counsel's errors, in that the alleviation of the Government's onus allowed for a

conviction. Had Counsel not stipulated, there is a reasonable probability that the outcome of the proceeding would have been different.

Therefore counsel's performance fell below an objectively reasonable standard, and but for this deficient performance there was a reasonable probability that the outcome would have been different.

Therefore Buckles should be afforded an evidentiary hearing on this claim.

b. Counsel was ineffective for failing to properly challenge the DNA analyst's testimony

It is well understood that an expert's testimony carries special weight with a jury. United States v. Freeman, 498 F.3d 893, 903 (9th Cir. 2006)(internal citations and quotation marks omitted). This being the case, caution should be exercised in the presentation of the opinion testimony. United States v. Brown, 766 F.2d 397, 401 n.6 (2d Cir. 1985)(internal citations omitted).

In the instant case Government's expert DNA analyst ("analyst") originally testified that she was not able to state with certainty that a sample of DNA was this person's or that person's.[7] She testified that she was only able to provide random match possibilities, probabilities of inclusion among the population or exclusion as a donor.

The analyst testified that Buckles' random match possibil-

7. Mr. Buckles requested his trial transcripts from counsels, however, he was not provided them. Therefore he can not provide citations to the trail record.