

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAY 12 2020

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

No. 18-36024

Plaintiff-Appellee,

D.C. No.

v.

CV-18-55-GF-BMM

CR-15-01-GF-BMM

BRANDON RAY BUCKLES,

MEMORANDUM\*

Defendant-Appellant.

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.

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\* 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.<sup>1</sup> 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.

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<sup>1</sup> 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 Assiniboiné and Sioux Tribes of the Fort Peck Indian Reservation. Number 2. The Assiniboiné 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 Assiniboiné and Sioux Tribes of the Fort Peck Indian Reservation. (2) The Assiniboiné 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.<sup>2</sup> 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. Alvarez*, 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.

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<sup>2</sup> 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 27<sup>th</sup> day of September, 2018.

A handwritten signature in cursive script, reading "Brian Morris". The signature is written in dark ink and is positioned above a horizontal line.

Brian Morris  
United States District Court Judge

**FILED**

**JAN 07 2015**

Clerk, U.S. District Court  
District Of Montana  
Great Falls

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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**

<b>UNITED STATES OF AMERICA,</b>	<b>CR 15-01 -GF-BMM</b>
<b>Plaintiff,</b>	<b>INDICTMENT</b>
<b>vs.</b>	<b>SEXUAL ABUSE</b>
	(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)
<b>BRANDON RAY BUCKLES,</b>	<b>FALSE STATEMENT TO A FEDERAL</b>
<b>Defendant.</b>	<b>OFFICER</b>
	(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.



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MICHAEL W. COTTER  
United States Attorney



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

Crim. Summons \_\_\_\_\_  
Warrant: ☒ \_\_\_\_\_  
Bail: \_\_\_\_\_

**RYAN G. WELDON**  
**Assistant U.S. Attorney**  
**U.S. Attorney's Office**  
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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**

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

## **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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5 (406) 498-3941  
6 fortherecord@bresnan.net  
7  
8 United States Official Court Reporter  
9

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10 **IN THE UNITED STATES DISTRICT COURT**  
11 **FOR THE DISTRICT OF MONTANA**  
12 **GREAT FALLS DIVISION**

13 UNITED STATES OF AMERICA, )  
14 )  
15 Plaintiff, ) CR-15-01-GF-BMM  
16 versus )  
17 )  
18 BRANDON RAY BUCKLES, )  
19 )  
20 Defendant. )

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21 **TRANSCRIPT OF JURY TRIAL PROCEEDINGS**

22 **PRELIMINARY INSTRUCTIONS BY THE COURT**  
23 **OPENING STATEMENTS BY COUNSEL**  
24 **DAY 1 OF WITNESS TESTIMONY**

25 **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

1 an Indian person.

2 MR. GALLARDO: Oh, yes, Your Honor.

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

5 MR. WELDON: And I agree, Your Honor.

6 THE COURT: Okay. Anything else?

7 MR. GALLARDO: No, Your Honor.

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

9 (Jury enters.)

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

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

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

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

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

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

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





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

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

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

18 Mr. Weldon.

19 MR. WELDON: Thank you, Your Honor.

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

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11 **IN THE UNITED STATES DISTRICT COURT**  
12 **FOR THE DISTRICT OF MONTANA**  
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14 UNITED STATES OF AMERICA, )  
15 )  
16 Plaintiff, ) CR-15-01-GF-BMM  
17 versus )  
18 )  
19 BRANDON RAY BUCKLES, )  
20 )  
21 Defendant. )  
22

23 **TRANSCRIPT OF JURY TRIAL PROCEEDINGS**

24 **DAY 2 OF WITNESS TESTIMONY**  
25 **SETTLING OF FINAL JURY INSTRUCTIONS**  
26 **FINAL JURY INSTRUCTIONS BY THE COURT**  
27 **CLOSING ARGUMENTS**  
28 **VERDICT**

29 **BEFORE THE HONORABLE BRIAN M. MORRIS**  
30 **UNITED STATES DISTRICT COURT JUDGE**  
31 **FOR THE DISTRICT OF MONTANA**

32 Charles N. Pray Courtroom  
33 Missouri River Federal Courthouse  
34 United States District Court Great Falls  
35 125 Central Avenue West  
36 Great Falls, MT 59404

37 **June 2, 2015**  
38 **8:30 a.m.**

39  
40  
41 Proceedings recorded by machine shorthand  
42 Transcript produced by computer-assisted transcription

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

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

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

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

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

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

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

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

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

24 Each of you must decide the case for yourselves, but you  
25 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)**

Blood Quantum: **3/16**

Affiliation: **Sioux**

Ethnic Group: **Unknown**

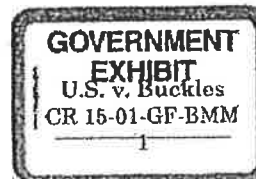
Blood Quantum: **1/8**

Affiliation: **(unknown)**

*Ken Heathman*

Ken Heathman  
Enrollment Clerk / Notary

Authorizing Signature



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Assiniboine and Sioux Tribes of Fort Peck  
PO Box 1027  
Poplar, MT 59255  
(406) 768-2300  
www.fortpecktribes.org

AO 243 (Rev. 01/15)

MAR 16 2018

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT  
SENTENCE BY A PERSON IN FEDERAL CUSTODYClerk, U.S. Courts  
District of Montana  
Great Falls Division

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		Movant (include name under which convicted) V. 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) -- dismissedCount 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 ☒(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 ☒Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing?

Yes ☒No ☐

8. Did you appeal from the judgment of conviction?

Yes ☒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 ☒

(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 ☒

(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 ☒

(2) Second petition: Yes ☐ No ☒

(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 ☒

(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 ineffective 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 ☒ 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 ☒

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

Yes ☐ No ☒

(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 ☒

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

Yes ☐ No ☒

(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:

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 disposal 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 ☒

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

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

Yes ☐

No ☒

(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:

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 ☒

(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 ☒

(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 ☒

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

Yes ☐ No ☒

(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:

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 ☒

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

(d) At sentencing: Great Falls, MT 59401

Same

(e) On appeal:

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

(f) In any post-conviction proceeding: 59401

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 ☒ No ☐

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

(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 ☒

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.

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\* 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.

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Page 13

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. M.  
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.: \_\_\_\_\_

MAR 16 2018

Clerk, U.S. Courts  
District of Montana  
Great Falls Division

---

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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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;	:	
	:	Criminal Case No:
v.	:	4:15-cr-00001-BMM-1
	:	
Brandon Buckles,	:	Civil Case No:
Defendant.	:	
	:	

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 amorphous 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, 2015. 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 prohibiting 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,<sup>1</sup> RSB, Rick Morales (JSB 1's boyfriend), Wyatt Bergie (Buckles' brother), and Chantelle Buckles (Buckles' sister) at approximately 11:00 am. The six (6) began drinking alcohol together

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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.<sup>2</sup>

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 underwear on the bed. Buckles did move the underwear and saw his phone next to JSB 1. Buckles kicked the bed to wake her<sup>3</sup> 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  $\frac{1}{2}$  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-

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2. Buckles had been drinking alcohol prior to the group getting together.

3. JSB 1's testimony 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<sup>4</sup> 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~~<sup>2</sup> 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 4:40 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").

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4. Buckles also resided at his dad's 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 of importance, evidence of the following: 1) tribal enrollment; 2) government recognition formally or 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 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  $\frac{1}{4}$  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 ( $\frac{1}{8}$ ) or more but less than one-quarter ( $\frac{1}{4}$ ), 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 decendant 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<sup>5</sup> 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.<sup>6</sup> 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

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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 stipulating 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 sacrifice 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.<sup>7</sup> 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-

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