

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KANDACE SITTING EAGLE,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to the
Tenth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

It is well-established that lesser included offense instructions should be given when there is a rational basis for the jury to acquit of the charged offense and convict of the lesser. Did the courts below err when they focused on the government's theory of prosecution, rather than the elements of the charged and lesser included offenses in making this determination?

Was it error for the court of appeals to affirm the trial court's refusal to instruct the jury on the lesser included offense of simple assault on Count Two (assault with serious bodily injury) and Count Four (assault with a deadly weapon)?

LIST OF PARTIES

1. Kandace Sitting Eagle
2. United States of America

LIST OF RELATED PROCEEDINGS

United States v. Kandace Sitting Eagle, Tenth Circuit Case No. 24-8068 (Dec. 10, 2025), rehearing denied Jan. 26, 2026.

United States v. Kandace Sitting Eagle, Case No. 2:24-CR-0000342-ABJ-2 (D. Wyo.) (Judgment entered September 25, 2024).

United States v. Truman Sitting Eagle, No. 2:24-CR-0000342-ABJ-1 (D. Wyo.) (Judgment entered August 7, 2024).

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CITATION OF THE UNOFFICIAL REPORT OF THE OPINION

United States v. Sitting Eagle, Case No. 24-8068 (10th Cir. Dec. 10, 2025)

JURISDICTION

The United States District Court for the District of Wyoming had jurisdiction over this matter pursuant to 18 U.S.C. § 3231. The Tenth Circuit Court of Appeals had jurisdiction under 28 U.S.C. §1291. The court of appeals affirmed Ms. Standing Eagle's convictions on December 10, 2025. The court granted an extension of time until January 15, 2026, in which to file a petition for rehearing. The Tenth Circuit denied rehearing on January 26, 2026. The government filed a motion to publish the decision on February 2, 2026, which the court denied on February 3.

This petition for writ of certiorari has been filed within the time allowed by Supreme Court Rule 13.1 and Rule 30.1.

The Court's jurisdiction to consider this petition arises from 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend V

No person shall be ... deprived of life, liberty, or property,
without due process of law....

U.S. Const. Amend VI

In all criminal prosecutions, the accused shall enjoy the
right to a speedy and public trial, by an impartial jury

18 U.S.C. §113, the federal assault statute, (a)(3), (a)(6), provides in pertinent part that:

(a) Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

....

(3) Assault with a dangerous weapon, with intent to do bodily harm, by a fine under this title or imprisonment for not more than ten years, or both.

....

(5) Simple assault, by a fine under this title or imprisonment for not more than six months, or both, or if the victim of the assault is an individual who has not attained the age of 16 years, by fine under this title or imprisonment for not more than 1 year, or both.

(6) Assault resulting in serious bodily injury, by a fine under this title or imprisonment for not more than ten years, or both.

REASONS TO GRANT CERTIORARI

This Court has long recognized the importance of instructing a jury on a lesser included offense when the evidence would rationally support conviction on the lesser and acquittal of the greater. *See, e.g., Beck v. Alabama*, 447 U.S. 625, 633 (1980); *Keeble v. United States*, 412 U.S. 205 (1973); *Stevenson v. United States*, 162 U.S. 313 (1896); *see also* Fed. Rule Crim. P. 31(c).

The question raised in this petition concerns how courts should determine whether trial evidence meets this threshold for a lesser included offense instruction.

Once it has been determined, as it was in this case, that the defense requested the lesser offense instruction and the requested offense is, indeed, a lesser included offense, a court's determination of whether the evidence, (the weight and

persuasiveness of which is for the jury to decide), would rationally support conviction on the lesser and acquittal of the greater should be relatively straightforward. The court should look at the elements of the greater and the lesser included offenses, review the trial evidence and determine whether a jury could accept some version of the trial evidence which would support conviction of the lesser and acquittal of the greater.

However, the Tenth Circuit's analysis strays far from this straightforward analysis, as explained below.

Given the importance of a defendant's right to a lesser included offense instruction, as both a safeguard against government charging decisions and a protection of the defendant's right to have a jury fairly decide the extent of their culpability, this Court should grant certiorari and exercise its supervisory powers to instruct the lower courts on the appropriate analysis for determining whether a defendant's request for a lesser included offense instruction must be granted.

STATEMENT OF THE CASE

As many cases involving child abuse do, this case involves a family living in poverty, one with a history of alcoholism and abuse over generations. There is evidence that Kandace Sitting Eagle had been doing her very best for years to break that cycle by sober living and teaching her children to be responsible and respectful. However, there is no doubt that her husband Truman Sitting Eagle seriously abused

MV.¹ Truman was also abusive to Ms. Sitting Eagle throughout their decade-long on again, off again relationship.

The question at trial was whether Truman alone abused MV and what assaultive acts, if any, Ms. Sitting Eagle herself had committed. MV claimed that his mother committed some, but not all the alleged abuse. Ms. Sitting Eagle denied hurting her son and testified that she “felt broken” when she first learned MV had accused her of beating him. She thought he was accusing her because he did not want to live with her and Truman.

The question for the jury was how much of MV and Ms. Sitting Eagle’s testimony to credit and whether there was reasonable doubt that Ms. Sitting Eagle committed the charged offenses.

A. Charges, Verdicts and Sentencing

On January 10, 2024, a grand jury indictment was filed alleging six counts against Kandace and Truman Sitting Eagle, each count was alleged to have occurred between November 1 and December 12, 2023. *Id.* at 37-56.

Before trial, Truman Sitting Eagle pled guilty to a single count and was ultimately sentenced to 108 months.²

¹ By agreement, the victim has been referred to as MV (minor victim), in lieu of his name or initials. The transcripts refer to MV by his first initial or as MV1.

² Truman Sitting Eagle was charged in Count One (assault-serious bodily injury), Count Three (assault-deadly weapon), Count Five (kidnapping) and Count Six (aggravated child abuse).

Ms. Sitting Eagle was tried by a jury on three counts:

Count Two: Assault against a child [MV] resulting in serious bodily injury in violation of 18 U.S.C. §§ 1153, 113(a)(6), and 3559(f)(3);

Count Four: Assault with a deadly weapon against [MV] in violation of 18 U.S.C. §§ 1153, 113(a)(3); and

Count Six: Aggravated child abuse in violation of 18 U.S.C. §§ 1153 and 2 and Wyoming Statutes §§6-2-503(b), (c) and 14-3-202(a)(i), (ii), 113(a)(3).

The defense asked the court to instruct the jury on the lesser offense of simple assault on Counts Two and Four, but the court denied the request without stating its reasons, except to state preliminarily that it was not sure simple assault was a lesser offense. App'x at 13. The jury returned guilty verdicts on all counts, and the court sentenced Ms. Sitting Eagle to concurrent sentences totaling 121 months, which was one month shy of the mandatory minimum possible sentence. Vol. IV at 469-472; 9.24.24 Sent'g Vol. at 26-27.

B. Trial Evidence

MV lived away from his family in foster care and institutions from the time he was two months old. Ms. Sitting Eagle always wanted MV back in her life and finally achieved her hope when he came to live with her family in 2022. Vol. III at 332.

By this time, Ms. Sitting Eagle had been with Truman Sitting Eagle, MV's stepfather, for eight years, and they had three young children together. By the time of the charges and trial, the Sitting Eagles had five children (between the ages of 1 and 8), three girls and two boys, in addition to MV. The family was living in a small 3-

bedroom trailer home. Throughout the years they had been together, Truman was abusive toward Ms. Sitting Eagle. Vol. III at 317, 335.

The transition for MV from foster care to living with his mother was difficult. From the beginning, Truman was verbally abusive toward MV and would belittle him, but there was no physical abuse. *Id.* at 339, 342.

Around Halloween of 2023, the school suspended MV for a week. The trial court would not allow testimony as to the reason for the suspension. When MV failed to return to school, it sent a resource officer to check on MV's welfare. Matt Lee, the resource officer, saw MV at the Sitting Eagle home, and he appeared fine on November 2. Lee returned to the home on December 12th and, at first, was told by Truman that MV was not at home. When Lee returned later, he ultimately found MV hiding under the trailer where Truman had told MV to hide. MV would not come out until Truman told him to and hugged Truman when he did. Vol. II at 195-96.

Lee observed MV had black eyes and bruises on his face, and he looked thinner than he had the month before. *Id.* at 197-200. MV was taken to the hospital where it was discovered he had vertebral and nasal fractures, and a ruptured testicle. MV claimed his mother had kneed him in the groin and that both parents had hit him with sticks. Vol. II at 239-241. He also claimed he had been locked in his room for a month without food, though multiple visitors to the family home contradicted this claim. Vol. II at 228; Vol. III at 304-05, 314-322. MV also told authorities that

Truman had choked him to the point of him fainting and had tied him to a rod in the closet with zip ties when Kandace was not home. Vol. II at 241.

Truman and Kandace were arrested that same day. Truman chose to plead guilty, and Kandace took her case to trial and testified. Vol. III at 330-384.

C. The appeal

The primary issue on appeal was whether the district court erred when it denied the defense request to instruct the jury on simple assault. *See* Opening Brief at 8-13; Reply Brief at 3-6; Petition for Rehearing at 2-5. The Tenth Circuit Court of Appeals affirmed the district court decision. Petitioner asked the circuit to rehear her case, but the court denied this request. App'x at 35.

On February 2, the government asked the court to publish its opinion asking the court “to provide clarity on the law as it relates to lesser-included offenses, especially for assaultive-type crimes.” Appx at 47-52. As grounds it asserted there was “not a published opinion that directly addresses whether the lesser-included offense of simple assault is warranted when the defense is a general denial of having committed the greater offense.” *Id.* at 48. The circuit court denied the government’s motion to publish opinion without comment on February 3, 2026. Doc. 80.

ARGUMENT

The court of appeals erroneously interpreted this Court’s precedent and the requirements of Fed.R.Crim.P. 31(c) when it affirmed the district court’s refused to instruct the jury on the lesser offense of simple assault.

A. *The jury in Ms. Sitting Eagle’s case should have been instructed on the lesser included offense of simple assault.*

A defendant is entitled to an instruction on a lesser included offense if the evidence would permit a rational jury to convict the defendant of the lesser offense and acquit him of the greater. *E.g., Keeble v. United States*, 412 U.S. 205, 212–13 (1973). This rule recognizes that “where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offenses, the jury is likely to resolve its doubts in favor of conviction.” *Id.* Thus, “if there is evidence to support a lesser included offense and defendant requests such a charge, the court has no discretion to refuse to give the instruction.” *United States v. Pacheco*, 884 F.3d 1031, 1047 (10th Cir. 2018) (quoting *United States v. Bruce*, 458 F.3d 1157, 1162 (10th Cir. 2006)).

In *Beck*, this Court recognized that:

[i]n the federal courts it has long been “beyond dispute that the defendant is *entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.*”

Beck v. Alabama, 447 U.S. 625, 635 (1980) (emphasis added by the Court) (quoting *Keeble v. United States*, 412 U.S. 205, 208 (1973)). Notably, this principle is so basic that all of the States agree with it. *See Beck*, 447 U.S. at 635–37 & nn. 11 & 12; *see also* Fed.R.Crim.P. 31(c)(1).

This rule of law arises from the fundamental right of an individual to a jury trial. As this Court explained well over a century ago in *Stevenson v. United States*, 162 U.S. 313, 323 (1896):

A judge may be entirely satisfied from the whole evidence in the case that the person doing the crime was actuated by malice; that he was not in any such passion as to lower the grade of the crime from murder to manslaughter by reason of any absence of malice; and yet if there be any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all the evidence what the condition of mind was, and to say whether the crime was murder or manslaughter.

In other words, a defendant is entitled to an instruction concerning a lesser crime, pursuant to Fed.R.Crim.P. 31(c), if the evidence justifies that instruction. *See, e.g., United States v. Duran*, 127 F.3d 911, 914 (10th Cir. 1997). It does not matter if a court finds the evidence unpersuasive, it is for the jury to decide, based on the evidence before it, what the government has proven to its satisfaction and whether a defendant is guilty of a greater or lesser offense, or no offense at all.

Although the language of Rule 31(c) is discretionary in terms, the rule “is mandatory in the sense that if there is evidence to support a lesser included offense and defendant requests such a charge, the court has no discretion to refuse to give the instruction.” *United States v. Humphrey*, 208 F.3d 1190, 1207 (10th Cir.2000) (emphasis and quotation omitted).

Here, the record does not reflect the district court’s rationale for refusing to instruct the jury on simple assault; it could have rejected the defense request based on

an erroneous belief that simple assault did not constitute a lesser included offense. App'x at 13. Here, we only have the Tenth Circuit's analysis, which strays significantly from the core premise that a jury should be instructed on a lesser included offense when the evidence supports it.

The Tenth Circuit purported to apply a four-part test to determine whether reversal is warranted due to a trial court's failure to instruct a jury on a lesser included offense. This test requires the defendant to establish: (1) the defense properly requested the instruction; (2) the elements of the lesser offense are included in the elements of the greater offense; (3) an element differentiating the two offenses is in dispute; and (4) the jury is able to rationally acquit the defendant of the greater offense and convict on the lesser offense. *See, e.g., United States v. Oldman*, 979 F.3d 1234, 1243 (10th Cir. 2020).

When, as here, a defendant has requested the lesser offense instruction and can satisfy each of these four elements, the district court must provide the instruction. *See, e.g., United States v. Burns*, 624 F.2d 95, 102-05 (10th Cir. 2006) (court abused discretion in declining to give instruction on mere possession where evidence showed the defendants drove from San Diego to Colorado with scales in their luggage and purchased \$13,000 worth of cocaine).

It is the Tenth Circuit's application of this law, which petitioner challenges. While the court correctly states the law in the abstract, it interprets it in a manner that

deprived petitioner of her right to a lesser included offense instruction when the instruction was clearly supported by the trial evidence.

Ms. Sitting Eagle established the four prerequisites for an instruction on simple assault vis-à-vis the two charged assaults in Counts Two and Four. Thus, the circuit court erred when it upheld the district court's refusal to instruct the jurors on the lesser offense of simple assault.

First, it is undisputed that trial counsel properly requested an instruction on simple assault on Count Two (assault-serious bodily injury) and Count Four (assault-deadly weapon) and objected when the court refused to instruct the jury on the lesser offense. Vol. I at 134-135; Vol. III at 393-94.

Second, it is similarly undisputed that the elements of simple assault are plainly included within the more serious assault charges. *See United States v. Bruce, supra*, 458 F.3d at 1168, n.4; *compare* 18 U.S.C. §113 (a)(6) (assault resulting in serious bodily injury, as charged punishable by ten years to life), §113 (a)(3) (assault with a dangerous weapon, with intent to do bodily harm, as charged punishable by ten years to life), and §113 (a)(5)(simple assault, punishable by imprisonment of not more than one year if the victim is not yet 16 years of age).

As the jury was instructed, each charged assault required, among other elements, proof of an assault. *See* Jury Instructions Nos. 24-27, Vol. 1 at 197-201. Accordingly, assault was a subset of the greater offenses. *See Schmuck v. United States*, 489 U.S. 705, 716 (1989) (an offense is a lesser included offense if the elements of the

offense form a subset of the elements of the charged offense); *see also* Wright & Miller, 3 Fed. Prac. & Proc. Crim. § 515 (5th ed.) (assault with a dangerous weapon includes simple assault).

In addition, the elements that distinguish simple assault from the more serious charged assaults in this case were in dispute. These elements include (a) use of a dangerous weapon, (b) intent to do bodily harm, and (c) resulting serious bodily injury. Ms. Sitting Eagle testified and strongly denied that she caused serious bodily injury (as required for Count Two) or that she ever used a deadly weapon, which was charged as a “blunt object,” (as required for Count Four). Vol. 1 at 30-31; Vol. III at 343-46, 365-66.

A court’s obligation to instruct on a lesser in a case like this arises because “[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.” *Keeble, supra*, 412 U.S. at 212–213. Also, in this case the jury could have been swayed by its belief that, as the mother of MV, Ms. Sitting Eagle was criminally liable for not having protected him from Truman Sitting Eagle’s repeated abuse. So, even if her proven discipline of MV was outside the realm of the charges, under the principles enunciated in *Keeble*, the jury would be likely to resolve its concerns about the abuse MV had suffered in favor of conviction.

And, finally, in light of the evidence presented at trial, the jury could rationally convict on the lesser offense of simple assault, which does not require actual striking,

and acquit on the greater offenses, which require the accused to have caused serious bodily injury (Count Two) and to have used a dangerous weapon (Count Four). For example, if the jury believed Ms. Sitting Eagle's denials and/or disbelieved part of MV's testimony, such as his accusation that it was his mother who kneed him in the groin (and, thus, caused serious bodily injury) or that it was "they" who hit him with metal and wooden sticks, it could have reasonable doubt whether Ms. Sitting Eagle caused serious bodily injury or ever used a dangerous weapon, two things she unequivocally denied. Vol. II at 233-238; Vol. III at 343-348.

Also, MV's testimony was equivocal concerning whether his mother hit him. When first asked by the prosecutor if his mother ever hit him, he responded that he did not recall. Vol. II at 238. But he later said "Kandace and Truman" both hit him. *Id.* at 247-48. "They" used hands, belt, metal and wooden sticks. *Id.* MV also testified consistently that Ms. Sitting Eagle was not around when Truman choked him and hogtied him to a closet rod. *Id.* at 233-34. MV also admitted to being mad and frustrated at his mother for having allowed Truman to hit him. *Id.* at 250.

At baseline, what matters is that jurors can choose to believe all, part or none of any witness' testimony. That is uniquely the jury's province. In deciding whether a lesser offense instruction need be given, a court must take this into account so that a properly instructed jury will be able to decide reliably the degree a defendant's culpability. *See, e.g., Keeble, supra.*

B. *The Circuit Court Seriously Deviated from Controlling Precedent and, in Doing So, Deprived Petitioner of Her Right to a Lesser Included Offense Instruction and Her Right to Have the Jury Fully Decide Her Level of Culpability.*

In the circuit court, all agreed that the appropriate test for determining whether a defendant is entitled to a lesser offense instruction is whether they have: (1) properly requested the instruction, (2) the elements of the lesser offense are included in the elements of the greater offense, (3) the element[s] differentiating the two offenses [are] in dispute, and (4) the jury is able to rationally acquit the defendant of the greater offense and convict on the lesser offense.

In essence, this four-factor test should be equivalent to the standard recognized by this Court—that a jury should always be instructed on a lesser included offense when the evidence would rationally support conviction on the lesser and acquittal of the greater. *See, e.g., Beck, supra*, 447 U.S. at 633 (1980); *Keeble, supra*.

Here, only the second two factors were disputed. And an examination of the court’s decision illustrates how far the circuit court has deviated from this Court’s fundamental test for when an individual defendant is entitled to lesser included offense instruction, upon request.

1. The elements differentiating between the two offenses were in dispute.

As a preliminary matter, the circuit court relied on the “Government’s theory underlying the charge[s]”, to determine whether the elements differentiating the two offenses were disputed at trial. Op. at 15. Specifically, the court relied on the

Government's theory that the assault resulting in serious bodily injury was based on Ms. Sitting Eagle kneeling MV in the groin and rupturing his testicle and its theory that the charge of assault with a dangerous weapon was based on Ms. Sitting Eagle striking MV with blunt objects, including "metal sticks" and "rods."

However, the charging document and the jury instructions never specified any "dangerous weapon" or the assaultive behavior underlying the alleged serious bodily injury. (Vol. 1, pp.30, 197-199). Thus, as instructed, the jury was required to find, in pertinent part, only that:

Three: The Defendant, Kandace Sitting Eagle, an Indian;

Four: Knowingly assaulted MV;

Five: As a result, MV, suffered serious bodily injury;

Instruction No. 24: Count Two of the Indictment [Assault-SBI] (Vol.1, p197).

Similarly, for the offense of assault with a dangerous weapon, the jury was instructed, generically, that it must find, in pertinent part, that:

Three: The Defendant, Kandace Sitting Eagle, an Indian;

Four: Knowingly assaulted MV;

Five: With a dangerous weapon, to wit: a blunt object; and,

Six: The Defendant intended to do bodily harm to MV

Instruction No. 24: Count Four of the Indictment [Assault-DW] (Vol.1, p199).

Assault, a lesser included offense of both charges, was defined to mean:

a willful attempt to inflict injury upon the person of another, or a threat to inflict injury upon the person of another, coupled with the apparent present ability to do so

Instruction Nos. 25 and 27 (Vol. 1, pp. 198, 200).

Because of this lack of specificity (and because the jury was never told it must base its verdict on the Government's theory or find beyond a reasonable doubt that the Government had proven the factual basis underlying its theory (i.e., the specific injury, dangerous weapon, or serious bodily injury underlying its theory), the jury was free to base its decision on any assault, any blunt object, or any serious injury.

Moreover, in a case like this, one in which the victim's credibility and motive to wrongly accuse the defendant are at issue and where the victim has plainly been seriously abused by someone, analysis of each element in a vacuum to determine whether the element is disputed leads to an unwarranted result. The inquiry should be whether the pertinent elements of whether **the defendant** used a dangerous weapon or caused serious bodily injury were disputed, and, clearly, they were.

For example, while it would be folly to dispute that the injury MV suffered to his groin was not serious, it was wholly disputed that Ms. Sitting Eagle caused that injury, and by severing the element of identity of the alleged assaulter from the injury, the Court erroneously concluded that the elements that distinguished simple assault from the charged offenses were not in dispute.

2. A correct analysis of all the evidence discloses a rational basis for the jury to acquit of the charges and convict of the lesser offense.

As an alternative (and possibly primary) basis for finding no error in the district court's refusal to instruct the jury on simple assault as a lesser included offense, the circuit court found there was no rational basis for the jury to acquit of the charges and convict of the lesser. See App'x A at 17 [Slip op. at 16].

The circuit court's analysis vis-à-vis whether there was a rational basis for the jury to find simple assault and acquit on the charged aggravated assaults was fundamentally flawed.

First, the court rejected petitioner's analysis of the evidence, i.e., that the jury could have rejected some of her testimony (denying ever hitting MV), rejected much of MV's testimony (accusing his mother of conduct that would, if believed by the jury, prove the charged aggravated assaults), believed some of it (e.g., petitioner hit MV with her hands), and believed undisputed testimony that petitioner disciplined MV by having him do chores outside in the cold. If the jury came to these types of conclusions, in light of the government's burden to prove all elements beyond a reasonable doubt, there would indeed be a rational basis for the jury to acquit of the charged aggravated assaults and convict of simple assault.

Despite this state of the evidence, the court concluded there was no rational basis for the jury to come to these conclusions, in large part because the defense endeavored "to impeach MV's general credibility and invited the jury to discredit all of MV's testimony, claiming she never hit or kneed MV at all." *Id.* at 18. The court concluded that: "[a jury, examining all the evidence, would have no rational reason to

disregard most of the evidence in this case and believe only MV's statement that Ms. Sitting Eagle hit him with her hands on some occasions." But it is fundamental that a jury may believe all or part or none of a witness's testimony. Respectfully, it is for a properly instructed jury, including one that receives an applicable lesser offense instruction, as required by Fed. Rule Crim. P. 31(c), to make its considered determination as to what elements or facts the government has proven beyond reasonable doubt.

The circuit court, however, did not rely exclusively on the above analysis to reject petitioner's claim that she was entitled to a simple assault instruction at trial. To the contrary, the court stated that "even if we assume that the jury could rationally [believe only MV's statement that Ms. Sitting Eagle hit him with her hands on some occasions] MV's statement would not support a conviction for simple assault." *Id.* Of course, if the jury could rationally believe this, there would be the requisite rational basis for the jury to acquit of the greater and convict of the lesser.

However, the court determined that because simple assault, as that offense is interpreted under circuit precedent "does not require actual physical contact", MV's testimony that his mother hit him with her hands described conduct that is "outside the scope of simple assault." *Id.* at 18-19, quoting *United States v. Wolfname*, 835 F.3d 1214, 1218 (10th Cir. 2016). Thus, according to the court, "even if the jury were to credit only MV's testimony that Ms. Sitting Eagle hit him with her hand, there would

be no rational basis for the jury to convict Ms. Sitting Eagle of simple assault.” *Id.* at 19.

In other words, the court reasoned there could be no rational basis for the jury to convict Ms. Sitting Eagle of simple assault, in part, because that lesser offense does not require physical contact. But the court failed to recognize that the presence of physical contact does not disprove simple assault. In other words, MV’s testimony that Ms. Sitting Eagle hit him with her hands would not support conviction of the charged aggravated assaults, because it involves neither a dangerous weapon nor serious injury, but it would support conviction for simple assault, albeit the physical contact would not be necessary to the proof.

Again, the court’s analysis is flawed when it fails to focus on the actual elements of the greater and lesser offenses. Both the government and the defense are entitled to lesser included offense instructions upon request. *See Keeble, supra*; Fed.R.Crim.P. 31(c). It is highly doubtful that a court would deny the government’s Rule 31(c) request in an appropriate case, e.g., one in which the degree of injury was disputed, on the ground that the victim was actually struck. And this is what the Tenth Circuit concluded, albeit when it was the defense that requested the instruction

For these reasons, the requisite strait forward analysis reveals the requisite rational basis for acquittal of the charged aggravated assaults and convictions for the lesser offenses of simple assault.

CONCLUSION

Ms. Sitting Eagle respectfully requests that this Court grant her petition, review the decision of the Tenth Circuit Court of Appeals and provide guidance to the lower courts on the appropriate standard for determining when a lesser included offense instruction should be given to the jury upon request.

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