IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,)
)
vs.)
)
JOHN GRAHAM, a/k/a)
JOHN BOY PATTON and)
VINE RICHARD MARSHALL, a/k/a)
RICHARD VINE MARSHALL, a/k/a)
DICK MARSHALL,)
Defendants.)

CRIM. NO. 08-50079-01

MEMORANDUM IN SUPPORT OF PROPOSED JURY INSTRUCTIONS
AND RENEWED MOTION FOR DISMISSAL

In support of Defendant Graham's proposed jury instruction regarding his and Aquash's status as Indians, and the government's burden of proof in regard thereto, Graham submits the following memorandum.

I. AUTHORITY IN SUPPORT OF PROPOSED INSTRUCTIONS

A two part test is used to determine whether a defendant or a victim are "Indians" as that term is used in 18 U.S.C. 1152 and 1153. The statutes themselves do not define the term.

First, the defendant or victim must be found to have "Indian blood." Second, the defendant or victim must be recognized as being Indian. United

States v. Antelope, 430 U.S. 641 (1977); In re Duane Garvis, 402 F.Supp.2d 1219, 1224 (E.D.Wa. 2004); United States v. Lawrence, 51 F.3d 150 (8th Cir. 1995).

A. THE INDIAN BLOOD REQUIREMENT

In its broadest sense, the term "Indian blood" refers to a recognition that a particular person's ancestors lived in America prior to the arrival of the Europeans. Canby, American Indian Law, 3rd Ed., p. 8. In the context of federal criminal law, when determining whether a person should be subject to federal or state jurisdiction, the definition of Indian blood is much narrower. See infra. The Canadian Indian blood that he and Aquash have does not fall within the definitions of Indian blood as that term is used in 18 U.S.C. 1152 and 1153.

1. LEGAL AND HISTORICAL CONTEXT

Neither "Indian" nor "Indian blood" are defined by statute. However, a long line of cases dating back to United States v. McBratney, 104 U.S. 621 (1882), instruct us as to how these terms are to be defined.

The term "Indian" and its component parts, such as "Indian blood," must be defined in a manner that recognizes and reflects the unique relationship between the United States government and some Indian tribes located within its borders. See Morton v. Mancari, 417 U.S. 535, 553 n. 24 (1974). These terms are not used to describe racial or ethnic origin; rather, these terms are to be defined through an

understanding of their distinct political and legal effect. See Mancari, 417 U.S. at 552-53 & n. 24 (1974).[1] See also United States v. Antelope, 430 U.S. 641, 643 & n. 2, 4 (1977) (citing United States v. McBratney, 104 U.S. 621 (1882)).

The term Indian in federal laws (whether that is in the employment law context or for the purposes of establishing federal criminal jurisdiction), and by extension component terms within that definition such as Indian blood, means an indigenous person who has an existing constitutional relationship with the United States government that stems from the commerce clause and/or the treaty power clause, and who is in a guardian-ward relationship with the United States. Alaska Assoc. General Contractors of America, Inc. V. Pierce, 694 F.2d 1162, 1167-68 (9th Cir. 1982) (citing Mancari, supra, and Antelope, supra). Thus, the terms Indian and Indian blood as they are used in the context of 18 U.S.C. 1152 and 1153 must be applied only to those indigenous persons who have an existing constitutional relationship with the United States government that stems from the commerce clause and/or the treaty power clause, and who are wards of the United States as a result of that relationship. See Antelope, supra, at 642-45.

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[1]Throughout this litigation and Graham's previous case, the government has attempted to frame this issue as one involving race based equal protection issues. Though that makes for interesting press, it is an approach that has been uniformly rejected by all courts addressing this issue. See Antelope, supra, at 645-47.

United States v. Antelope, 430 U.S. 641 (1977), is the primary case defining the term Indian for the purposes of establishing federal criminal jurisdiction under 18 U.S.C. 1152 and 1153. In that case, the Supreme Court stated that the principles articulated in Mancari for defining terms relating to Indians applied to federal prosecutions under these statutes. Id. The Antelope Court made clear that the definition of Indian under federal criminal law is to be based on the political and constitutional relationship between the United States and Indian tribes, and not upon racial or ethnic origin:

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

Id. at 645 (citations omitted).

In Antelope, the defendants were enrolled members of a federally recognized Indian tribe in the United States, the Coer d'Alene tribe. They were charged under 18 U.S.C. 1153 (the Major Crimes Act) with the murder and burglary of an non-Indian on the Coer d'Alene reservation. Id. at 642-43.

The defendants argued that the Major Crimes Act created an impermissible race-based classification structure by making it only applicable to Indians. Id. at

645. In rejecting that contention, the Court discussed the unique historical and constitutional relationship between the United States government and Indians, and defined the term Indian in 18 U.S.C. 1153 within that context. Id. at 647-48. Thus, because the defendants in that case were members of a federally recognized Indian tribe, and not because they were ethnically Indian, they were subject to federal prosecution under 18 U.S.C. 1153.

To illustrate the significance of an on-going legal and political relationship between tribes and the federal government to the definition of Indian, the Antelope Court discussed United States v. Heath, 509 F.2d 16, 19 (9th Cir. 1974). Antelope, supra, at n. 7. Heath was ethnically and racially an Indian. His tribe was located inside the United States. His tribe had once been federally recognized by the United States government. But, prior to the time Heath was charged with a crime, his tribe lost its federal recognition.

Even though the defendant was an Indian "anthropologically," he was deemed not an Indian for federal criminal jurisdictional purposes. Antelope, supra, at 647, n. 7. Notwithstanding his ethnically Indian blood, that blood did not come from a lineage that had an existing constitutional relationship with the United States. The Court held that a defendant loses his status as an Indian for criminal jurisdictional purposes when "his unique status vis-a-vis the Federal

Government no longer exists." Antelope, supra, at 647, n. 7.

This discussion in Antelope is vital to Graham's case. The government asserts that Graham and Aquash are Indian. To be Indian requires a finding that one has Indian blood. Therefore, the government must be asserting that the Canadian Indian blood possessed by Graham and Aquash is Indian blood as that term is used in federal criminal law.

That position ignores the well articulated principles enunciated by the Supreme Court that the term Indian must be defined in legal and political terms, not racial terms. Graham and Aquash may be ethnically Native American, as are the Mayans from Mexico and the Kalaallit from Greenland, as all can trace their origin to descendants who lived in the Americas prior to the arrival of the Europeans. But, the Canadian Indians, the Mayans, and the Kalaallit do not share a unique, existing constitutional relationship with the United States government. Therefore, their blood, though ethnically Native American or Indian, is not Indian blood.

To understand the flaw in the government's reasoning, one only need to ask the following question: How could the Supreme Court affirm that Heath – an American Indian, from a tribe within the United States, that was once formally

recognized by the United States government – had his Indian status extinguished when the political relationship ended, yet hold that a Canadian Indian from a band not in the United States and that has never had formal recognition by the government, was an Indian? It couldn't. The flaw in the government's position is that it fails to recognize the difference between Canadian Indians and American Indians, it fails to understand that the analysis begins with a defendant or victim's tribe of origin, and it doesn't account for the necessity of an on-going political relationship with the government for a person to be Indian. See infra.

2. INDIAN BLOOD MEANS BLOOD FROM RECOGNIZED AMERICAN INDIAN TRIBES, NOT CANADIAN INDIAN BANDS OR OTHER FOREIGN TRIBES

According to the government, a Canadian Indian's blood stands on equal footing with the blood of American Indians from federally recognized tribes. There is no other conclusion that can be drawn from the government's argument. The government concedes that neither Graham nor Aquash has any American Indian blood. But, the government contends that they have the "Indian blood" required for a determination that they are Indian under 18 U.S.C. 1152 and 1153.

Thus, the government must believe that Canadian Indian blood is no different than blood ties to federally recognized Indian tribes within the United

States for the purpose of defining who is an Indian under these criminal statutes. This analysis, by necessity, must be based on racial or anthropological grounds: it must be premised on the notion that ethnically Canadian Indians and American Indians are the same. However, this kind of racial or ethnic analysis has been repeatedly determined to be inappropriate when defining the term Indian for the purposes of federal criminal jurisdiction. Whether Canadian Indians and American Indians are ethnically similar, as the government contends, is irrelevant to this analysis. LaPier v. McCormick, 986 F.2d 303, 306 (9th Cir. 1993) (cited by Canby, supra) (ethnic and racial distinctions are not relevant to political and legal analysis required to determine whether one is an Indian). The inquiry should be whether Canadian Indians enjoy a special constitutional and political relationship with the United States government that places them in a guardian-ward status. This, they clearly do not. The legal and political distinction between Canadian and American Indians has been recognized for many years in many courts.

Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935 (Ct.Cl. 1974), involved land claims based on legislation from 1905. The government was attempting to defeat an Indian tribe's claim to aboriginal title to land in North Dakota. The government argued that because, at the time of the legislation, the land was frequently occupied by Canadian Chippewa Indians, the

land could not be considered the land of the American Chippewa Indians. Id. at 944. The government expressly acknowledged a legal distinction between members of the same ethnic tribe based on which side of the border they primarily resided on. Id.

In finding against the government, the court recognized the legal significance of the distinction between American Chippewas and Canadian Chippewas. Id. It held that because there was proof that sufficient numbers of American Chippewas lived in the territory in question, they could claim aboriginal title thereto, notwithstanding the periodic presence of Canadian Chippewas. Id. ("[W]e cannot say that the Commission lacked substantial support for holding (as we think it did) that American Chippewa full and mixed bloods, rather than Canadian mixed bloods, exercised sufficient dominion over the award area.").

Similarly, in Akins v. United States, 407 F.Supp. 748 (Cust. Ct. 1976), aff'd, 551 F.2d 1222 (Cust. & Patent App. Ct. 1977), the court drew a distinction between Canadian Indians and American Indians. Id. at 752-53. It also dispensed with another argument raised by the government in this case. The government has argued in Graham's case that the existence of the Jay Treaty of 1790, which allowed free passage across the U.S.-Canadian border for Indians, demonstrates that no distinction should be drawn between Canadian Indians and American

Indians. In Akins, a similar argument was made and rejected. The court noted that the Jay Treaty of 1790 had been abrogated in 1812 and has never been reinstated, which terminated the general ability of free crossing except as permitted by specific statute. Id. With this abrogation, so goes the fiction alleged by the government in Graham's case that ethnic Indians on both sides of the border are entitled to uniform recognition under the federal criminal laws of the United States.

The distinction between Canadian and American Indians was also recognized in Alaska Assoc. General Contractors of America, Inc. V. Pierce, 694 F.2d 1162 (9th Cir. 1982). That case involved Alaskan Natives. Id. at n. 10.

In attempting to define the term Alaskan Natives, the court noted that the same construct for defining Indian under federal law applied to Alaskan Natives. Specifically, the court noted that the definition was to be derived from the special political relationship between Alaskan Native groups and the United States government, not on racial or ethnic grounds. Id. at 1167-68 & n. 10. The court referred to numerous federal statutes that helped define who was an Alaskan Native. Id. Those statutes uniformly describe a political relationship with the United States when defining who is and isn't an Alaskan Native. For instance, the person must be a citizen of the United States, or have descended from persons who

lived in Alaska when the territory was acquired from Russia, or, in the case of Canadians, have been in Alaska since 1939. Id. at n. 10. Though the statutes discussed in that case are not at issue in this case, the principles are similar: For an indigenous person to be recognized under federal law as an Indian, they must have a long standing physical and political relationship with the United States government.

4. THE INDIAN BLOOD ANALYSIS LOOKS TO THE TRIBE OF ORIGIN, NOT THE PLACE OF AFFILIATION OR THE LOCUS OF THE CRIME

In addition to disregarding the political relationship with the United States government necessary for a person to be considered an Indian, and in addition to disregarding the recognized legal differences between Canadian and American Indians, the government has disregarded a key element to the analysis of whether Graham and Aquash are Indian: an identification of the "tribe in question." Specifically, the government wants this Court to focus on Graham and Aquash's activities once they came to the United States to determine whether they were Indians under federal law. Instead, the focus should remain on the tribe from which they got their Indian blood.

LaPier v. McCormick, 986 F.2d 303 (9th Cir. 1993) (cited by Canby, supra,

in both 3rd and 4th eds.), is important because it instructs us where to look when determining whether a person has Indian blood. This superficially seems like an obvious point, but as demonstrated in Graham's case, it is a point that can be clouded by other issues.

Consider that in Graham's case the government's theory boils down to the following: The defendant and the victim are Canadian Indians. They come from tribes that are not within the United States. Their tribes are not recognized by the United States government. The United States government is not responsible as a guardian to these tribes' members. Nonetheless, tribal members are "Indian" under 18 U.S.C. 1152 and 1153 because they came to the United States and, for a relatively short period of time, affiliated socially or spiritually with members of a federally recognized Indian tribe in the United States.

In order to make this case, the government's objective has been and will be to orient the Court toward what Graham and Aquash did in the United States, rather than from where they came. Under LaPier, the focus should remain on Canada, not the United States.

In LaPier, the defendant claimed enrollment in the Little Shell Band of Chippewas. That tribe is not federally recognized. Id. at 306. He was charged

with committing murder under 18 U.S.C. 1153 on the Blackfeet reservation in Montana, a federally recognized tribe.

The court found that LaPier was not Indian for federal criminal jurisdiction purposes.[2] When determining whether LaPier was Indian under 18 U.S.C. 1153, it was irrelevant to the court that LaPier was ethnically or racially an Indian through his affiliation with the Chippewas. Id. at 306. Similarly, the fact that the crime occurred on a federally recognized reservation did not factor into the analysis. Id. at 306. And, the court's analysis was not concerned with whom LaPier affiliated while on the Blackfeet reservation.

Instead, the court looked to where LaPier came from -- his tribe of origin -- to determine whether he sat in a unique relationship with the government by virtue of his affiliation with that tribe:

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[2]As with Lawrence and other decisions discussed above, the court held that the determination as to whether the defendant was an Indian was a jurisdictional matter:

> Because the crime occurred on an Indian reservation, LaPier's legal status as an Indian (or non-Indian) determines jurisdiction. If LaPier is legally an Indian, the federal court would have jurisdiction, 18 U.S.C. § 1153 (1988), but if he is not, the Montana state courts would have exclusive jurisdiction, because the victim was a non-Indian.

Id. at 304 (citing United States v. McBratney, 104 U.S. 621 (1882), and United States v. Wheeler, 435 U.S. 313, 325 n. 21 (1978). See also State v. Sebastian, 243 Conn. 115, 701 A.2d 13 (1997); United States v. Bruce, 394 F.3d 1215, 1218 (9th Cir. 2005); United States v. Dodge, 538 F.2d 770 (8th Cir. 1976).

> It is therefore the existence of the special relationship between the federal government and the tribe in question that determines whether to subject the individual Indians affiliated with that tribe to exclusive federal jurisdiction for crimes committed in Indian country.

Id. LaPier's tribe was the "tribe in question," not the Blackfeet tribe. LaPier's tribe, like the tribe in Heath, supra, had no existing legal relationship with the United States government. Therefore, LaPier was not an Indian and not subject to federal prosecution. Id. See State v. Sebastian, 243 Conn. 115, 701 A.2d 13 (1997) (discussion of distinctions between racial and political tribal affiliations). Accord State v. Daniels, 16 P.3d 650, 654 (Wash.App. Div. 3 2001) (Canadian Indian may have Indian blood but not be Indian for federal criminal jurisdictional purposes because he is not "enrolled or affiliated with a tribe that is recognized by the United States and is individually subject to United States jurisdiction.").

The government has referred to Ex Parte Pero, 99 F.2d 28 (7th Cir. 1938), cert. denied, 306 U.S. 643 (1939), for proposition that members of Canadian Indian bands, such as Aquash and Graham, can be Indians for the purposes of federal criminal laws such as 18 U.S.C. 1152 & 1153. Pero is cited in footnote 7 of the Antelope decision. In dicta, the Antelope Court left open the possibility that "nonenrolled" Indians might fall within the purview of the term Indian in 18 U.S.C. 1152 & 1153, but specifically declined to address that issue. Antelope,

supra, at n. 7.

The dicta in Antelope regarding Pero occurs within the same discussion of the Heath decision, and whether a nonenrolled person can ever be an Indian. The dicta does not in any manner suggest an expansion of the term "Indian" or "Indian blood" to include Canadian, Mexican or other indigenous Native Americans.

Further, the actual holding in Pero does not support the government's expansive view that the terms "Indian" and "Indian blood" apply to Canadian Indians and Canadian Indian blood. Consistent with the earlier decision in McBratney, supra, and as a precursor to the later decisions in Mancari and Antelope, Pero affirms that the focus of our inquiry should remain on whether a person comes from an Indian tribe that has a recognized political relationship with the United States government.

In Pero, both Pero and Moore, defendants in a murder case, claimed they were Indian and, thus, subject to federal, not state, prosecution. The Seventh Circuit Court of Appeals agreed.

In regard to the Indian blood issue, it was acknowledged that at the time of the crime neither defendant was an enrolled member in a federally recognized Indian tribe. Id. At 30-32. However, in finding the defendants Indian under

federal criminal law, the court relied heavily on the fact that each defendant had extensive blood connections with federally recognized Indian tribes in the United States. Id.

Defendant Moore, the court noted, was the child of full blood mother and half-blood father from the St. Croix Band of Lake Superior Chippewas, a federally recognized tribe in Wisconsin. Pero, supra, at 30-32 & n.13. Moore, his parents, and his relatives, all resided on the St.Croix's federally recognized reservation, and the court noted that Moore could be a member of that tribe (although not enrolled). Id. at 31.

The court emphasized that it was Moore's blood tie to a tribe with a recognized relationship with the United States government that was dispositive:

> Of special significance for the present question is the treaty relating to the Chippewas of Lake Superior (of which Moore is a member if he is an Indian), in which the mixed-bloods were expressly mentioned, and it was recognized therein that a mixed-blood could be a member of the Chippewas.

Pero, 99 F.2d at 31. Additionally, the court noted that but for circumstances outside his control, both Moore and his mother would have been enrolled in this recognized tribe. Id. at 32.

The court's analysis for defendant Pero was based on the General Allotment

Act, specifically whether he held his tribal land in patent trust or fee simple at the time of the crime charged. Finding that Pero had not been granted the land in fee simple at the time of the crime charged, and, thus, was still in a guardian-ward relationship with the United States, the court found him to be an Indian under 18 U.S.C. 1153. Id. at 29, 32-35.

The Pero court's analysis focused on the existing constitutional, treaty and guardian-ward relationship between the alleged Indian, his tribe of origin, and the federal government. Id. at 31-32. Nothing in this decision suggests that the term Indian should apply to Canadian Indians, or that the concept of Indian blood refers to anything but blood ties with federally recognized Indian tribal members.

The reference to Pero in Antelope was in regard to nonenrolled Indians. Neither defendant in Pero was enrolled. However, the tribes to which they were affiliated through blood were federally recognized and had an on-going relationship with the United States government.

Thus, the dicta in Antelope and the holding in Pero do not suggest a dramatic revision of the definition of Indian or Indian blood to include members of tribes from foreign countries that have no constitutional relationship with the United States. Instead, that dicta and the Pero holding merely suggest that a

person who lacks formal enrollment in a federally recognized American Indian tribe, but who has sufficient blood ties to that tribe, may be considered to have Indian blood under 18 U.S.C. 1152 and 1153. These cases do not expand federal criminal jurisdiction to include Canadian Indians.

In re Duane Garvis, 402 F.Supp.2d 1219, 1224 (E.D.Wa. 2004), further supports Graham's assertion that the term "Indian blood" can only be defined to include American Indian blood. Garvis does not support the government's contention that Canadians such as Graham and Aquash are Indians under 18 U.S.C. 1152 & 1153 because they have Canadian Indian blood and spent time with American Indians in the United States.

The defendant in Garvis was being prosecuted in tribal court. He claimed he was Indian, and should be tried in federal court.[3] Id. at 1120-21. Garvis was not enrolled in a federally recognized tribe, so the court had to determine whether he had Indian blood. The court noted that Garvis had Indian blood from four (4) federally recognized Indian tribes within the United States: the Colville, the Yankton Sioux, the Santee Sioux, and the Kootenai. Id. at 1221; 67 Fed.Reg. 134,

[3]Garvis's case involved the term Indian in 25 U.S.C. 1301(2). That term, however, defines an Indian as someone who would be considered an Indian under 18 U.S.C. 1153. To make this determination, the court had to determine whether Garvis would be an Indian under 18 U.S.C. 1153, making it applicable to this case.

pp. 46327-33 (list of federally recognized tribes as of 2002) (Colville, #56; Kootenai, #130; Santee, #261; and, Yankton, #329).

It was this fact that was essential to the court's determination that Garvis had the requisite "Indian blood" for federal jurisdiction under 18 U.S.C. 1153:

> In this case, it is not disputed that Mr. Garvis does in fact have Indian blood, although that quantum is limited. His maximum Indian blood in any federally recognized Indian Tribe is 1/16th. Cumulating the Indian blood of his biological father and mother, Garvis' total Indian blood from all tribes would appear to be 6/32nds.

Id. at 1225.[4] See also United States v. Lawrence, 51 F.3d 150 (8th Cir. 1995) (victim's Indian blood from the federally recognized Oglala Sioux Tribe sufficient to find she had Indian blood).[5]

These cases orient our analysis of Graham's case. The first determination we must make is whether Graham and Aquash have Indian blood. When deciding

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[4]The court's computation of blood from federally recognized tribes appears to be in error. All of the tribes identified in the decision are federally recognized. The total blood from federally recognized tribes appears to be at least 1/8th. The appellate court did not dispute the findings of the lower court that Garvis had at least 1/8th blood from federally recognized tribes. It is unclear where the 1/16th 6/32nds numbers came from. In any regard, all of the tribes identified were American Indian tribes, in the United States, with federal recognition.

[5]Notwithstanding this finding, the victim was determined not to be Indian based on her lack of Indian recognition.

whether Graham or Aquash had Indian blood, we must determine where they got their blood from. Specifically, we must ask whether their blood comes from an American Indian tribe with an on-going constitutional relationship with the United States government that renders the government and tribe to be guardian and ward. If not, they do not have Indian blood and are not an Indian. Any activities by Graham or Aquash once in the United States are irrelevant to this inquiry, as is the issue of whether they are ethnically Native American.

Accordingly, in this case, if this is a proof matter for the jury, the jury should be instructed that absent a showing beyond a reasonable doubt that Graham and Aquash have blood ties to an American Indian tribe within the United States that had a recognized relationship with the United States government at the time the crime was committed, the jury must acquit Graham of the crimes charged.

B. INDIAN RECOGNITION

The second step of the analysis, whether Graham and Aquash were recognized as Indians, is closely related to the first step. As a result, many of the same principles and cases are discussed, infra.

1. LEGAL AND POLITICAL CONTEXT

United States v. McBratney, 104 U.S. 621 (1882), Morton v. Mancari, 417

U.S. 535 (1974), and United States v. Antelope, 430 U.S. 641 (1977), make clear that there is no racial or ethnic component to the determination of whether a person is recognized as an Indian. The concept of Indian recognition is derived solely from the unique relationship that exists between the United States government and some Indian tribes (and their members) within its territory. Mancari, 417 U.S. at 552-53 & n. 24; Antelope, 430 U.S. at 643 & n. 2, 4; Alaska Assoc. General Contractors of America, Inc. V. Pierce, 694 F.2d 1162, 1167-68 (9th Cir. 1982).

Placing the definition of Indian within this context immediately narrows its applications to a particular sub-set of the wider group of people that claim to be ethnically Indian. Antelope, supra, (Indian is not an ethnic classification but a political relationship). Accordingly, the Major Crimes Act and 18 U.S.C. 1152 are recognized as statutes of limited application that are not applicable to those who are not legally defined as being Indian. Id. at 643-44, n. 2 & 4 (citing United States v. McBratney, 104 U.S. 621 (1882)).

The government has failed to identify any significant legal authority for the proposition that the term Indian, or the concept of Indian recognition, applies to Canadian Indians or others who do not originate from an American Indian tribe that has some form of a politically or legally recognized relationship with the

United States government. Antelope and its progeny do not support the government's position that the term Indian can be stretched so wide as to encompass indigenous people from foreign countries who associate with Indians inside the United States.

Illustrative of the need for federal recognition of a person's tribe for that person to be recognized as an Indian is the discussion in Antelope related to terminated tribes. The Antelope Court stated that the defendants in that case were enrolled members of the Coeur d'Alene tribe, and, thus, were Indians under 18 U.S.C. 1153. The Court opined that had the defendants been emancipated from the tribe, or had they been members of a tribe that had lost federal recognition, they would not have been subject to prosecution under the Major Crimes Act. Id. at 647 n. 7 (citing Heath, supra). This underscores the fundamental need for a person's tribe to have an on-going relationship with the United States government for the person to be recognized as an Indian.

2. THE GOVERNMENT'S RELIANCE ON "AFFILIATION" IS MISPLACED

To overcome the lack of an ongoing constitutional or guardian-ward relationship between Aquash and Graham's bands and the United States government, the government has asserted that their mere "affiliation" with

enrolled members of the Oglala Sioux Tribe is sufficient to make Graham subject to prosecution under 18 U.S.C. 1152 and 1153. File 03-50020, File Doc. 319, p. 6 ("Both Defendant Graham and Anna Mae Aquash were further affiliated with, among others, the Oglala Sioux Tribe.").

The government's argument is premised upon the holding in State v. Daniels, 16 P.3d 650 (Wash.App. Div. 3,2001). Because of this, a detailed review of Daniels is necessary.

Daniels is of little precedential value in this case. It is a state court decision from an intermediate court of appeals that has not been reviewed by the Washington State Supreme Court. See A Citizen's Guide to Washington's Courts, http://www.courts.wa.gov/newsinfo/resources/?fa=newsinfo_jury.brochure_guide &altMenu=Citi. The holding in regard to affiliation does not appear to have been adopted by any other court, state or federal.

The facts and subject matter in Daniels do not make it applicable to the present case. It is not a case involving a dispute between state and federal jurisdiction under 18 U.S.C. 1152 or 1153. Rather, it is a dispute over whether a minor criminal offense should be handled in tribal or state court. Id. at 652-53.

And, the facts were left unresolved as to whether the defendant was a

descendant of a tribe recognized by the United States government. Id. The case was not decided on the factual merits of a jurisdictional claim, but rather on whether the defendant had met his burden under state court precedent for putting the jurisdictional defense before the court. Id. It is the burden shifting aspects of the case for which it is routinely cited, not its impact on federal criminal law.

The conclusions reached in Daniels are largely unsupported, but to the extent they have legal and factual support, they support Graham's position. In Daniels, the court claims there are two prongs to determining whether a person is an Indian. First, whether the person is racially an Indian. Second, whether he is "enrolled in or affiliated with" a tribe that is recognized by the United States government. Id. at 654.

The Daniels court summarily concludes that because the defendant had some Canadian Indian blood, he was racially an Indian. Id. at 654. The court cites no authority whatsoever for this position. The analysis is perfunctory, and does not refer to the Indian blood issue or the holdings in Mancari and Antelope that require that such determinations be made with reference to the political and legal history of federal Indian relations.

The government relies on the analysis in Daniels in regard to the second

prong to assert that mere affiliation with members of a federally recognized Indian tribe makes one "recognized" as an Indian. Daniels does not stand for that proposition. Id. At 654.

In Daniels, the defendant did have Canadian Indian blood. However, he also claimed to have American Indian blood. He claimed he was part of Sitting Bull's band that fled from the United States to Canada. He also claimed to be Chippewa, Mississippi Sioux, Aberdeen, and Devil's Lake Sioux. The Daniel's court "affiliation" analysis was whether the defendant could show a blood relationship with any federally recognized Indian tribe, not whether he socialized with members of a federally recognized tribe:

> But the fact that Mr. Daniels is an Indian in the racial sense does not establish federal jurisdiction; he must also show a sufficient connection with a tribe recognized by the United States. A proper starting point for making that determination is to consult the BIA's list of federally recognized tribes published in the Federal Register. At the relevant time, the BIA list appeared at 63 Fed.Reg. 71941 (1998).
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> Mr. Daniels claims to be part Chippewa and "Mississippi Sioux." He further claims his grandparents belonged to the "Aberdeen Band." The BIA list of tribes contains numerous Chippewa tribal entities, none of which Mr. Daniels has identified as the specific band with which he claims an affiliation. Of the many listed Sioux entities, none of them are called "Mississippi Sioux." The list contains no reference to the "Aberdeen Band."
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> Mr. Daniels' argument is merely supported by Garry Standing's written

> statement that he believed Tom Standing was "registered" at the Devils Lake Sioux Tribe. The federally recognized Spirit Lake Tribe, located in North Dakota, was formally known as the Devils Lake Sioux Tribe. Thus, at most, the record shows by hearsay that Mr. Daniels' grandfather may have been enrolled in or affiliated with a recognized American tribe. Even if true, that does not mean Mr. Daniels is affiliated with the tribe for purposes of jurisdiction. Mr. Daniels has not shown the Spirit Lake Tribe recognizes him as a member. He does not claim membership in the Spirit Lake Tribe or received any membership benefits from it. Mr. Daniels has not even alleged setting foot there.
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> Mr. Daniels has also alleged that the Colville Tribe has recognized him as an Indian and has provided him with services and privileges because he is an Indian. But Mr. Daniels has not produced any evidence to substantiate his claim. There is no documentation in the record connecting Mr. Daniels to the Colville Tribe. No one from the tribe testified as to Mr. Daniels' interaction with or acceptance by the Colvilles. Mr. Daniels testified that he lived on the reservation for merely a month.

Id. at 654-55. (emphasis added).

To the extent that Daniels stands for any principle relevant to this case, it stands for the principle that even a person with Canadian Indian blood must establish a blood tie to a federally recognized Indian tribe in order to be Indian. Nothing in Daniels suggests that mere social affiliation would be sufficient to make a person an Indian. And, the discussion of tribal recognition of Daniels is instructive. Note, the Daniels court did not suggest that social acceptance by a tribal member would be sufficient to make a person an Indian. Rather, formal recognition by an Indian tribe (i.e. the tribal government) would be required at

minimum. Id. Thus, the court's references to recognition by the Devil's Lake or Colville tribes as being necessary for a person to be an Indian.

Accordingly, if this Court were to adopt Daniels as being of precedential value, a jury instruction would be warranted that required a showing of some blood tie to an American Indian tribe, and formal recognition of a person's Indian status by a recognized tribe, as pre-requisites to a finding by the jury that a defendant is an Indian.

Graham asserts, however, that Daniels should not guide this Court's analysis of what constitutes Indian recognition. To weaken the definition of the term Indian to include persons such as Graham and Aquash would be to weaken "the solemn commitment of the Government toward the Indians" that is affirmed when that term is applied only to those with a special relationship with the United States. See Mancari, 417 U.S. at 553 (citation omitted). Under the broad view of Daniels that is promoted by the government, any indigenous person who socially affiliates with members of a federally recognized tribe could be an Indian, regardless of whether they have any blood ties to that tribe, or whether that tribe has given the person some official recognition.

The blanket assertion in Daniels that Canadian Indians are Indians for the

purposes of federal criminal jurisdiction is not supported by the cases cited above, such as Allery, supra, Akins, supra, and Turtle Mountain, supra, that have recognized the distinction between Canadian and American Indians. It is instructive that in a case that otherwise makes ample use of authority, the Daniels court did not cite to a single case for the proposition that Canadian Indian blood is sufficient to meet the Indian blood requirement.

When confined to its facts Daniels is not too dissimilar from the analysis in Pero and other cases. In Pero, the court was faced with two ethnic Indians that had substantial blood ties to members of a federally recognized Indian tribe, lived on the reservation, owned land on the reservation, and had family members that lived and had blood ties to the reservation. Pero, 99 F.2d at 31. Though not members, they were substantially affiliated with the tribe through their blood connection with that federally recognized tribe. Understood in that context, which accords the legal and political dynamic that must be respected per Mancari and Antelope, affiliation makes sense. It is another way of saying a person with substantial blood ties to a federally recognized tribe and who has substantial other connections is not automatically excluded from the definition of Indian based on their lack of enrollment.

This understanding of Indian is also consistent with United States v.

Lawrence, 51 F.3d 150 (8th Cir. 1995), a case from South Dakota. In that case, which was prosecuted under 18 U.S.C. 1152, the victim was not enrolled but had sufficient blood quantum to be enrolled in the Oglala Sioux Tribe. Id. at 151. She was not an enrolled member. She was found to have Indian blood based on her blood tie to a federally recognized tribe. Id. at 153. But, she was deemed not to be an Indian because she was not recognized by that tribe or the government. Id. She had no formally recognized affiliation with the tribe and was not an Indian, regardless of her Indian blood. Id. The Lawrence, Pero and Daniels decisions can be read together to stand for the following proposition: To be recognized as an Indian, one must be able to trace their blood to a federally recognized tribe, and, if there is not enough blood quantum to become enrolled, one must show a strong recognition by or affiliation with that tribe, not mere social affiliation or acceptance by some tribal members.

In In re Duane Garvis, 402 F.Supp.2d 1219, 1224 (E.D.Wa. 2004), the issue at hand was whether the defendant met the definition of Indian under 18 U.S.C. 1153. The defendant in Garvis was not enrolled in a federally recognized tribe. He had some blood from federally recognized tribes, however. Id. at 1221; 67 Fed.Reg. 134, pp. 46327-33 (list of federally recognized tribes: Colville is #56; Kootenai is #130; Santee is #261; and, Yankton is #329).

The defendant in that case attempted to make himself "an Indian" for federal criminal jurisdictional purposes based on the same kind of affiliation arguments advanced by the government in Graham's case. The court dispensed with the affiliation arguments as not being supported by law. Id. at 1225-26. The court focused on whether Garvis was eligible for enrollment in a federally recognized tribe to determine whether he was recognized as an Indian. Id. The court emphasized the importance of this inquiry based on the need for a constitutional relationship between an Indian and the United States government for jurisdiction to vest. Id. at 1225.

The affiliation evidence presented by Garvis was significant: he was married to a tribal member, was "assimilated" into Indian culture, had worked on the reservation for 5 years, lived on the reservation for 19 months, and had received some benefits from the tribe and federal government reserved for Indians. However, this evidence was deemed of little value "in view of his limited blood quantum and his lack of enrollment, or eligibility for enrollment in any Indian Tribe." Id. at 1226.

Garvis has much greater precedential value than Daniels, and is factually and legally on point. It should be the guide post for this Court's analysis of what the government must prove to the jury, and what the jury instructions should

include, regarding the Indian recognition issue. Garvis does nothing to expand the definition of Indian or the concept of Indian recognition to include social affiliation by Canadian Indians with members of federally recognized tribes. It should be noted that the often recited "St. Cloud" factors for determining Indian recognition place social recognition as the least important factor in determining Indian recognition. Lawrence, supra (citing St. Cloud v. United States, 702 F.Supp. 1456 (D.S.D. 1988)).

The LaPier decision, supra, lends further support to Graham's assertion that, when courts such as Daniels refer to affiliation, they are referring to a blood tie with a recognized tribe that doesn't quite meet enrollment criteria. See analysis of Pero, Lawrence and Daniels, supra. LaPier is cited repeatedly in Daniels, as well as by Canby and other commentators.

In LaPier, 986 F.2d 303 (9th Cir. 1993), the facts were similar to those presented in Graham's case. The defendant was from one tribe, but was alleged to have committed a crime on another reservation. The reservation where the crime occurred was federally recognized. However, when doing its Indian recognition analysis, the LaPier court did not look to that reservation to see if LaPier was sufficiently affiliated with it to be Indian. Rather, the court said the analysis goes back to the defendant's (or victim's) tribe of origin: that is the "tribe in question"

for determining whether someone is enrolled in or affiliated with a federally recognized tribe. Id. at 306. In that context the court stated, "[a] defendant whose only claim of membership or affiliation is with an Indian group that is not a federally acknowledged Indian tribe cannot be an Indian for criminal jurisdiction purposes." Id.

In the present case, Graham and Aquash do not come from Pine Ridge. The tribes in question for the recognition analysis is not the Oglala Sioux Tribe, but rather their Canadian bands. Because these bands do not have an existing constitutional relationship with the United States government, their affiliation or membership therewith is not sufficient to make them Indians under 18 U.S.C. 1152 and 1153.

Accordingly, in regard to the Indian recognition prong, the Court's jury instructions should make plain to the jury that for Aquash or Graham to be considered Indian, it is not sufficient that the government show that they were affiliated with members of a federally recognized tribe within the United States. Instead, the government must prove beyond a reasonable doubt that Graham and Aquash were members of or affiliated by blood tie with a tribe that is federally recognized by the United States government, and recognized by that tribe as being Indian.

CONCLUSION

The government has no authority for its position that persons such as Graham or Aquash are Indians under 18 U.S.C. 1152 or 1153. There is no meaningful authority for the position that Canadian blood alone is sufficient for a finding of Indian blood. All cases that have addressed the issue have looked for blood from a federally recognized Indian tribe to find that a defendant or a victim was an Indian under these statutes.

The government also has no authority to support its position that persons such as Graham and Aquash that have no blood ties to any tribe recognized by the United States can be considered "recognized as Indian." Indian recognition requires some blood tie to a federally recognized tribe, even if it doesn't meet the criteria for enrollment, and some formal recognition by that tribe as to one's Indian status. Mere social acceptance by tribal members from a tribe other than one's own does not make one an Indian.

The jury instructions in this case must set forth these principles and the government's burden clearly so that the jury understands what kind of evidence is insufficient for a finding of guilt in this case.

Dated January 12, 2009.

/s/ John R. Murphy

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

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	☒	Electronic Case Filing

Dated January 12, 2009.

/s/ John R. Murphy

John R. Murphy