No. 07-30429

UNITED STATES COURT OF APPEALS

FOR THE

NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

PETER MAHONEY,

Defendant-Appellant.

Appeal from the United States District Court

for the Eastern District of Washington

REPLY BRIEF OF APPELLANT

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I. STATEMENT OF FACTS

a. Disputed Facts

The Government indicates in *Appellee's Answering Brief*[1] that "the district court found that the Defendant's wholesale contraband cigarette trafficking into Washington was not the same as the Washington retailer's purchases of contraband cigarettes." (GB 7-8, citing ER 24). However, the Government's citation to the record does not support this finding.

II. SUMMARY OF ARGUMENT

In the wake of United States v. Smiskin, the Government cannot point to any authority to prove the Contraband Cigarette Trafficking Act (hereinafter "CCTA") applies to Indians. The Government also argues that untaxed cigarette sales from one Indian tribe to another Indian tribe are prohibited, yet case law indicates that the first taxable event is upon the consumer. The CCTA's legislative history shows Congress did not intend for it to apply to Indians and the Government provides no reliable authority to the contrary. The case against Mr. Mahoney should be dismissed because the CCTA was not intended to apply to Indians.

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[1] All references to the *Appellee's Answering Brief* will be designated by the citation to "GB".

Mr. Mahoney asserts that he has an express right to trade freely with other Indians by virtue of 25 U.S.C. § 4301, since Antoine v. Washington holds that federal statutes pertaining to Indians have the same force and effect as treaties. 420 U.S. 194 (1975). Mr. Mahoney has an inherent right to trade freely with other Indians. The Government posits that states can impose minimal burdens on inherent Indian rights; but United States v. Smiskin holds that the CCTA is meant purely for generation of tax revenue; thus the burdens imposed are not minimal. The Indictment against Mr. Mahoney should be dismissed because his express and inherent Indian rights to trade freely are being infringed.

United States v. Baker determined that the CCTA and Washington State tax scheme are not complex because they deal with highly-regulated items—cigarettes. United States v. Smiskin, however, found that cigarettes are not dangerous items subject to heavy regulations. Therefore, specific intent should be a required element of a CCTA violation because a person cannot be presumed to have knowledge of laws that are not assumed to be heavily regulated. The case should be remanded for a new instruction.

Proposed Instruction No. 7 was deficient because it confused the different elements of different crimes and their standards of knowledge. The district court itself had difficulty contemplating how to formulate the

instructions and what evidence as to Mr. Mahoney's knowledge would be permitted for trial presentation; thus the case should be remanded for new instructions.

At sentencing, the district court improperly considered two factually different cigarette transactions than those charged in the Superseding Indictment as evidence that Mr. Mahoney had not accepted responsibility for his actions and as support for the court's ultimate sentence of 33 months. The district court also failed to state on the record why the sentencing disparity between this case and that of other related cases was appropriate; therefore remand for resentencing is necessary.

Mr. Mahoney did not waive an Equal Protection issue on appeal because he bases his issue upon the recent case of United States v. Smiskin, and it would be a miscarriage of justice to stifle his claim where he had already entered a conditional guilty plea in this case prior to the issuance of that opinion. As a Native American Indian, he is similarly situated to those members of the Yakama tribe and therefore Mr. Mahoney is being discriminated against. For these reasons, the case should be dismissed for violations of Mr. Mahoney's Equal Protection rights.

Mr. Mahoney adopts and incorporates herein his *Brief of Appellant* and the accompanying *Excerpts of Record.*

III. LEGAL ARGUMENT

a. As noted in United States v. Smiskin, the legislative history of the CCTA indicates it was not intended to apply to Indians.

The Government cites several cases for the proposition that States have the authority to tax sales of cigarettes sold by Indians to non-Indians or non-tribal members. (GB 12-13 (citing Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 483 (1976); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 150-151 (1980); New York v. Milhelm Attea & Brothers, Inc., 512 U.S. 61 (1994)). However, these cases have no bearing on the legislative history of the Contraband Cigarette Trafficking Act (hereinafter "CCTA") and none of them even address the CCTA.

For example, in Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 483 (1976), the Supreme Court only addressed those on-reservation sales of cigarettes by an Indian to a non-Indian. There was no discussion or consideration in Moe of the applicability or legislative history of the CCTA under 18 U.S.C. § 2341. More importantly, Moe did not address the scenario of an Indian wholesaler transporting or trading cigarettes with an Indian retailer. Id. Moe's primary concern was ensuring that a non-Indian could not purchase untaxed cigarettes so that he could reap "the benefit of the tax exemption". Id. at 481-83 (citations & quotations omitted).

The Government also cites to Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 157 (1980) as authority for United States Supreme Court approval of the Washington State tax scheme. (GB 12). Yet the tax scheme referred to in Colville was a tax scheme in effect prior to the current Washington tax scheme, and Colville merely stated that Washington was permitted to tax the on-reservation sales of cigarettes by Indians to non-member Indians. Id. at 161; R.C.W. § 82.24.250. When Colville was decided in 1980 there was no "pre-notification requirement" in effect in Washington. Furthermore, the Colville Court made an important distinction about who is responsible for the legal incidence of the tax:

> In the case of sales by non-Indians to non-Indians . . . the incidence of the tax is on the seller, or perhaps on someone even further up the chain of distribution, because that person is the one who first sells, uses, consumes, handles, possesses, or distributes the products. **But where the wholesaler or retailer is an Indian on whom the tax cannot be imposed** under McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973), **the first taxable event is the use, consumption, or possession by the non-Indian purchaser.**

Id. at 142, n. 9 (emphasis added).

Here, an Indian wholesaler—Mr. Mahoney—is being punished for another Indian retailer's inability or unwillingness to collect the cigarette tax imposed upon the non-Indian purchaser. Any transportation or trade

between Indians or tribes as wholesalers and retailers does not constitute a "taxable event". The cigarettes are not taxable until they reach the ultimate consumer of these products. Id.

Finally, with the exception of United States v. Baker, 63 F. 3d 1478 (9th Cir. 1995), the Government points to no authority that upholds the CCTA based upon its legislative history. However, United States v. Smiskin, 487 F.3d 1260, 1264 (9th Cir. 2007), clearly calls into question the holding in Baker by noting that the CCTA's legislative history suggests the CCTA was not intended to apply to Indians. As thoroughly argued in Mr. Mahoney's *Brief of Appellant*[2], a federal statute of general applicability does not apply to Indians if legislative history indicates otherwise. (Mahoney Brief 26-30); Baker, 63 F.3d at 1484-85 (quotations omitted). Smiskin simply does not support the holding in Baker, as the Government suggests. (GB 13). Rather, Smiskin directly questions the legislative intent of the CCTA:

> Congress did not expressly make the CCTA applicable to Indian tribes . . . and, if anything, the relevant legislative history suggests the opposite.

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[2] All references to the "Brief of Appellant" will be designated by the citation to "Mahoney Brief".

487 F.3d at 1264 (citation omitted).

In summary, the Government has not pointed to any authority upon which it can prove the CCTA was intended to apply to Indians, and this very Court in Smiskin has questioned the applicability of the CCTA to Indians. United States v. Smiskin, 487 F.3d 1260, 1264 (9th Cir. 2007).

The Government also asserts that Mr. Mahoney claims he is completely free of any state regulation. (GB 15-16). Mr. Mahoney does not assert that as a Native American Indian he has the right to trade freely in goods that are dangerous or harmful to public health or safety. (Mahoney Brief 36-37). However State laws are not applicable to tribal Indians on Indian reservations except where Congress has expressly determined otherwise. Gobin v. Snohomish County, 304 F.3d 909, 914 (9th Cir. 2002). (GB 15). Here, the applicability of the CCTA is unclear due to its legislative history and it obviously has not been expressly applied to Indians.

The Government also argues that even if Mr. Mahoney can prove that the CCTA was not meant to apply to Indians, the holding in Colville prevents cigarettes from being traded between other Indian tribes because untaxed cigarettes must be sold only to tribal members on "their" reservations. (GB 16). However Colville clearly determined that the legal incidence of the tax is upon the "first taxable event" such as the "use,

consumption, or possession by the non-Indian purchaser." 447 U.S. at 142, n. 9 (emphasis added). Since the legal incidence of the tax does not apply until the first taxable event, wholesale and retail trade between Indians is not in contravention to Colville. Moreover, such restraints on trade between Indian tribes would likely violate the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, as well as the Sherman Antitrust Act, 15 U.S.C. § 1 et seq. See also R.C.W. § 19.86 et seq.

Next the Government argues that the legislative history of the CCTA is not subject to canons of construction in McClanahan because McClanahan dealt with treaty interpretation and not the interpretation of legislative history. (GB 17). Yet Congress must expressly determine that State laws are applicable to tribes and tribal lands. Gobin v. Snohomish County, 304 F.3d 909, 914 (9th Cir. 2002). Lastly, ambiguity does exist here as to the interpretation of the statute since its legislative history has produced two differing opinions as to the CCTA's applicability to Indians. See Baker, 63 F.3d at 1484-85; Smiskin, 487 F.3d at 1264.

The Government makes the broad and sweeping generalization that the Supreme Court has conclusively permitted the state to regulate the transportation of contraband cigarettes. (GB 17). Yet the Supreme Court has not addressed the issue of the CCTA and the effect of its legislative

history; the Supreme Court has merely indicated that some activities by Indians are taxable events. (GB 17-18 (citing Moe, 425 U.S. 463; Colville, 447 U.S. 337; and Milhelm, 512 U.S. 61)).

The legislative history of the CCTA indicates Congress did not intend for it to apply to Indians. For these reasons, the Indictment against Mr. Mahoney should be dismissed.

b. Mr. Mahoney has both an express and inherent right to assert a treaty defense to the CCTA.

The Government claims that because Mr. Mahoney is not a tribe, he cannot claim the benefits of being an Indian under 25 U.S.C. § 4301(a)(4). Regardless of the classification the Government relies upon, the statute clearly applies to all Indians, as evidenced in the "purposes" section of 25 U.S.C. § 4301(b):

> The purposes of this chapter are as follows:
> (1) To revitalize economically and physically distressed Native American economies by —
> (A) encouraging the formation of new businesses by eligible entities, and the expansion of existing businesses; and
> (B) facilitating the movement of goods to and from Indian lands and the provision of services by **Indians**.
> (2) To promote private investment in the economies of Indian tribes and to encourage the sustainable development of resources of Indian tribes and **Indian-owned businesses**.
> (3) To promote the long-range sustained growth of the economies of Indian tribes.

> (4) To raise incomes of **Indians** in order to reduce the number of **Indians** at poverty levels and provide the means for achieving a higher standard of living on Indian reservations.
>
> (5) To encourage intertribal, regional, and international trade and business development in order to assist in increasing productivity and the standard of living of **members of Indian tribes** and improving the economic self-sufficiency of the governing bodies of Indian tribes.
>
> (6) To promote economic self-sufficiency and political self-determination for Indian tribes and **members of Indian tribes**.

Id. (emphasis added). Clearly, 25 U.S.C. § 4301 applies not only to Indian tribes, but Indians as individuals. Along the Government's line of reasoning, Mr. Mahoney would have to request permission from his Tribe prior to entering into every single one of his business contracts, and he might have no contractual remedy of enforcement as an individual Indian. To argue that Mr. Mahoney cannot claim the benefits and privileges under 25 U.S.C. § 4301 because he is an individual Indian and not an Indian "group" is specious.

Further, the Government argues that Antoine v. Washington, 420 U.S. 194 (1975) does not provide support for the proposition that statutes have the same effect as treaties with the Indians. Yet Antoine clearly states that although 25 U.S.C. § 71, which states that no future or additional treaties would be made between Congress and the Indians was passed in 1871,

> This meant no more, however, than that **after 1871 relations with Indians would be governed by Acts of Congress and not by treaty**. . . . The change in no way affected Congress' plenary powers to legislate on problems of Indians, including legislating the ratification of contracts of the Executive Branch with Indian tribes to which affected States were not parties. Several decisions of this Court have long settled that proposition.

Id. at 203 (citations omitted) (emphasis in original & added). Thus, any legislation of Congress with regards to Indian affairs has the same effect as a treaty and the issue is merely one of semantics. According to Antoine, 25 U.S.C. § 4301 has the same effect as a treaty and Mr. Mahoney asserts his rights as an Indian under that treaty.

Lastly, Mr. Mahoney reiterates that he has an inherent right to travel and trade freely with other tribes. The Government argues that inherent rights can be overcome by "state laws that impose only minimal burdens on [those inherent] rights", claiming that the Supreme Court has repeatedly affirmed the minimal burdens in this case. (GB 19). However, the cases the Government cites to do not and have not at any time addressed the applicability of the CCTA to Indians; nor have they specifically addressed the current Washington State tax scheme, which incorrectly places the legal incidence of the tax upon an Indian wholesaler. (GB 19 (citing Colville, 447 U.S. at 151; Moe, 425 U.S. at 483; Milhelm, 512 U.S. at 71-72)).

Furthermore, Smiskin recognizes the Washington State tax scheme for what it is—a cash cow. 487 F.3d at 1271. There is no redeeming quality in the Washington tax scheme; as Smiskin notes, the Government cannot claim that the Washington tax scheme in conjunction with the CCTA is meant to protect the health and safety of the general public by imposing minimal burdens. Id. Washington State is using federal criminal legislation to generate revenue from Indians who otherwise should not be taxed. Id.; (Mahoney Brief 36-38).

Mr. Mahoney has both the express and inherent right to trade freely with other Indians; the Indictment should be dismissed.

c. The CCTA is a specific intent crime because the holding in United States v. Smiskin clarifies that cigarettes are not dangerous items subject to regulation for public health and safety concerns.

The Government fails to address the most recent case law on the issue of whether the CCTA requires specific knowledge as an element of the crime. (GB 19-20). The Supreme Court has recognized that where laws are complex, specific intent is a required element of the crime. Cheek v. United States, 498 U.S. 192, 200 (1991). Baker distinguished the CCTA from income tax violations in Cheek on the basis that cigarettes are dangerous, highly-regulated items, and therefore the CCTA and Washington State statutes are not complex enough to create an innocent violation. 63 F.3d at

1492-93. This line of reasoning conflicts with the recent holding in Smiskin wherein this Court held that cigarettes are not dangerous items—such as illegal narcotics—that need to be regulated for public health and safety. 487 F.3d at 1270-71. While it is true that Baker held the Government is not required to prove specific intent an as element of violating the CCTA, 63 F.3d at 1492, Smiskin clearly undermines the court's reasoning and holding in Baker by determining that cigarettes are not dangerous items which need to be regulated for "public health and safety" reasons. 487 F.3d at 1271.

Moreover, the Government cites Colville as authority that Indians cannot trade cigarettes with Indians from another tribe. (GB 20). Again, Coville itself contradicts this statement, however, as the Supreme Court recognized that the legal incidence of the tax is upon the first taxable event:

> ....where the wholesaler or retailer is an Indian on whom the tax cannot be imposed under McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973), the first taxable event is the use, consumption, or possession by the non-Indian purchaser.

447 U.S. at 142, n.9. Colville dealt strictly with the retail scenario of a consumer non-member Indian purchasing cigarettes from its own tribe; there is no discussion or consideration in the case of a wholesaler Indian of one tribe purchasing cigarettes for retail distribution from a wholesaler Indian of another tribe. Id. at 161. The Government's interpretation of Colville runs

in complete contravention to the findings and purposes of 25 U.S.C. § 4301; and, as previously noted, such restraints on trade between Indian tribes appear to be violative of the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, as well as the Sherman Antitrust Act, 15 U.S.C. § 1 et seq. See also R.C.W. § 19.86 et seq. The Government also fails to point to any state laws or regulations that make it impermissible for Indian tribes to trade cigarettes on a wholesaler to retailer basis. (GB 20).

Lastly, the Government argues that Mr. Mahoney cannot claim he is ignorant of the taxation and regulation of cigarettes. (GB 20). Again, the Government oversimplifies the situation. Mr. Mahoney is not only an Indian who has an expectant right to be free from Washington State cigarette taxation, but also is an Idaho business owner. (Mahoney Brief 4-5, 42). As the Government notes in its brief, Idaho does not require the collection of state cigarette taxes for any cigarettes sold on a reservation by tribal vendors. (GB 4). In addition, Mr. Mahoney's own family was part of the process behind Idaho's lack of state cigarette tax regulations. Mahoney v. State of Idaho, 96 Idaho 59, 524 P.2d 187 (1973) (holding Idaho could not tax Indians' trade of cigarettes). Thus, the Washington State tax scheme involved here is especially complex because Mr. Mahoney is an Idaho Indian and the CCTA allows every one of the 50 States to come up with its

own definition of "contraband cigarettes". Combine that with the fact that most if not all Indians probably believe they have a right to be free from State taxation, see McClanahan, 411 U.S. at 165 (holding Arizona could not impose personal income tax on a reservation Indian whose entire income was derived from reservation resources), and it is not difficult to understand that the CCTA and Washington tax scheme are complex as applied to Indians. If specific intent is required to violate the federal personal income tax laws—laws which every person is required to follow in the United States and are presumed to have knowledge of—then it seems unfounded to argue that an Indian in Mr. Mahoney's position should not be privy to the same specific intent element in an alleged CCTA violation.

The district court's jury instruction should be overruled and remanded with the instruction that specific intent or knowledge is a required element of a CCTA violation.

d. Proposed Instruction No. 7 was deficient in failing to appropriately identify and separate the different types of knowledge required to be proven for different violations.

The Government counters that Proposed Instruction No. 7 was not confusing because it is similar to the instruction upheld in United States v. Knapp, 120 F.3d 928, 931 (9th Cir. 1997). Yet the Government fails to

include the entire background in Knapp, because an additional instruction was given by the trial court in that case, which stated:

> The term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the defendant knew that the property involved in the transaction represented proceeds from some form, though not necessarily which form of activity that constitutes a felony under federal or state law. Drug trafficking is a felony under federal or state law.

Id. at 932. The jury in Knapp had the benefit of an additional instruction—which clarified the knowledge element as to money laundering. Id. Here, the jury would have had no such additional instruction since none was offered or proposed by the trial court despite Mr. Mahoney's objections. (ER[3] 113-14, 121-23, 131-133; CR 144).

"In reviewing jury instructions, the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation." United States v. Cherer, 513 F.3d 1150, 1154 (9th Cir. 2008) (citations & quotations omitted). Here, Proposed Instruction No. 7 was misleading because it did not provide the appropriate clarification as to

[3] "ER" citations reference documents in the Excerpts of Record previously filed by appellant. "CR" citations reference court documents by docket number.

which elements of conspiracy, contraband cigarette trafficking, and money laundering required specific versus general knowledge instructions. The district court did struggle with this problem, as the determination affected what evidence was admissible at trial as it pertained to Mr. Mahoney's knowledge:

> [Defense counsel]: ...Everything is predicated on the CCTA in this case, but yet conspiracy has a different burden of proof that the CCTA. And I think that money laundering does too. It has a different mens rea....
>
> The Court: It may well be that all [Mr. Mahoney's] evidence is admissible based upon whether or not they knew they believed that what they were doing was illegal. I don't know. What's your response to that? If they have to know it was illegal and they put a defense on that I didn't know it was illegal, and the reason I didn't know it was illegal was because of this evidence, how would you keep that out?
>
> [The Government]: Well, they have to know that it's illegal that—yeah—that it's illegal activity. I guess it would be an instruction from the Court.
>
> The Court: **Well, I mean, I'd have to instruct the jury that this evidence is admissible on the intent of these counts but not on these or something. A great way to avoid that is to drop the money laundering counts. But I think—I mean, you should have brought that up about a month ago.**
>
> [Defense Counsel]: Well, Judge—
>
> The Court: I know. You know, some of your best thinking is on the fly. I know that.

(Laughter.)

[Defense Counsel]: Some of my best thinking is on the fly. You got it.

[The Court]: **I think that's legitimate, and there is a different scienter.** And it may be that that evidence is admissible on the money laundering counts....

(ER 116-17). Obviously the district court was not entirely certain what approach would be the best in assembling the jury instructions.

Proposed Jury Instruction No. 7, as it currently stands, would have been misleading and unduly prejudicial as the instruction would have severely undermined Mr. Mahoney's ability to put on any evidence as to his lack of knowledge about his violations of the CCTA; a jury would have had difficulty understanding how to use the lack of knowledge evidence Mr. Mahoney intended to present to the jury. For these reasons, Proposed Jury Instruction No. 7 should be overruled and stricken and the case should be remanded for trial.

e. The 33-month sentence imposed was not reasonable in light of the sentencing disparity among similarly-situated defendants and the district court's improper consideration of legal conduct.

The Government states that the district court properly found that Mr. Mahoney had violated the CCTA in two instances following the search warrant in this case. (GB 25-26). Yet as the Government recognizes in its

brief, Idaho does not require the collection of state cigarette taxes for any cigarettes sold on a reservation by tribal vendors. (GB 4). The district court incorrectly criminalized these cigarette transactions and placed undue weight upon them during sentencing. (ER 25-26). It is not illegal in Idaho for Mr. Mahoney to sell untaxed cigarettes to any person who comes to his store.

Here, the district court held Mr. Mahoney responsible for what it believed were Indians purchasing cigarettes to transport across state lines into Washington. (ER 25-26). Regardless of whether the CCTA applies to Mr. Mahoney, he is not responsible for ensuring that cigarettes purchased in his store are not transported across state lines. Such a burden is impossible for him to meet—he cannot be held responsible for what a person does with the untaxed cigarettes purchased from his store and in Idaho State. Second, the sales here are not even prosecutable offenses. Thus the district court improperly relied upon these alleged sales in imposing Mr. Mahoney's sentence. (ER 26 ("And so I see you differently . . . the conduct since the indictment and since the search are of great concern to me.")).

Furthermore, although Mr. Mahoney did present 18 U.S.C. § 3553 factors to the district court, the district court failed to consider on the record the sentencing disparity that resulted between Mr. Mahoney's case and other related cases. (GB 27); (Mahoney Brief 46-53). The Government states that

"The Defendant also claims that Washington State charges similar conduct as gross misdemeanors [and that] . . . There is no evidence of such in this record . . . ." (GB 26-27). It is clear that violations of the Washington State tax scheme are punishable as gross misdemeanors. R.C.W. § 82.24.110. Also, it is clear the district court obviously had some information upon which to base its reasoning that Washington State has a "history of the use of gross misdemeanors in charging, and punishing illegal cigarette trafficking". (ER 83).

The district court failed to articulate its consideration of the § 3553 factors in light of the related sentencing disparities, and also improperly considered evidence of legal conduct. For these reasons this case should be remanded for resentencing.

f. Mr. Mahoney has not waived his right to raise an Equal Protection issue because United States v. Smiskin is new case law that was decided after his plea and pending sentencing; he is similarly situated to a Yakama Indian because he is an Indian and not a member of the general public.

The Government argues that Mr. Mahoney has waived his right to raise an Equal Protection violation issue in this appeal based on the terms of his conditional plea. (GB 27-29). However, Mr. Mahoney is not arbitrarily raising the issue because it is based upon the new case law of United States v. Smiskin, 487 F.3d 1260 (9th Cir. 2007). It was not until this Court upheld

Smiskin that this case became overriding precedent for the district courts to follow. It would be a miscarriage of justice not to address the Equal Protection argument raised by virtue of the new case law in Smiskin because the case first appeared after he had already pleaded guilty. MacDonald v. Grace Church Seattle, 457 F.3d 1079, 1086 (9th Cir. 2006) (delineating the circumstances under which constitutional issues raised for the first time on appeal are allowed to be reviewed).

Contrary to the Government's argument, Mr. Mahoney is similarly situated to a Yakama tribal member because he is a member of an Indian tribe. (GB 29). Mr. Mahoney does not assert his Equal Protection right on the basis that he is a U.S. citizen—he asserts it because he is a Native American Indian. (GB 29). Finally, Mr. Mahoney adopts and incorporates the arguments made in his *Brief of Appellant*. (Mahoney Brief 53-60). The Indictment against Mr. Mahoney should be dismissed for Equal Protection violations.

IV. CONCLUSION

For the reasons set forth herein and in Mr. Mahoney's *Brief of Appellant*, Mr. Mahoney respectfully requests this honorable Court grant him the requested relief.

DATED this 11 day of April, 2008.

Mark E. Vovos, WSBA #4474
Attorney for ~~Peter~~ Mahoney

BRIEF FORMAT CERTIFICATION

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, I certify that the *Appellant's Reply Brief* is proportionately spaced, has a typeface of 14 points or more and contains 5,724 words.

DATED this 11 day of April, 2008.

Mark E. Vovos, WSBA #4474
Attorney for Peter Mahoney