U.S.C.A. No. 07-10379
U.S.D.C. No. CR 06-00869-PHX-DGC

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States of America,

Plaintiff-Appellee,

v.

Oleh Rostyslaw Stowbunenko-Saitschenko,

Defendant-Appellant.

Appeal from a Judgment of the United States District Court

District of Arizona

Appellant's Opening Brief

Nancy Hinchcliffe
Attorney-at-Law
State Bar No. 004052
11 West Jefferson, Suite 2
Phoenix, Arizona 85003-2302
(602) 252-3200

Attorney for Defendant-Appellant

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STATEMENT OF JURISDICTION

I. District Court

Oleh Rostyslaw Stowbunenko-Saitschendo appeals from a final judgment of conviction and sentence on two counts, bringing in illegal aliens to the United States and encouraging illegal aliens to enter the United States, federal offenses. [CR[1] 95, ER[2] 140]

The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

II. Bail Status

On May 14, 2007, Stowbunenko was sentenced to eight months, time served on both counts, "said counts to run concurrently." The prison sentence is to be followed by 2 years of supervised release. [CR 95, ER 140, RT[3] 5/14/07, pp. 10-11, ER 198-199] Stowbunenko currently is serving his conditions of supervised release and residing in Sacramento, California.

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[1] "CR" refers to the Clerk's Record and is followed by the appropriate document number.

[2] "ER" refers to the Excerpts of Record and is followed by the appropriate Excerpts of Record page number.

[3] "RT" refers to the Reporter's Transcript of Proceedings followed by the date of the proceeding and applicable page number(s).

III. Timeliness of Appeal

A timely notice of appeal was filed and entered on June 29, 2007, [CR 94, ER 138] after the district court granted Stowbunenko's Motion to Extend Time to File a Notice of Appeal and ordered that a Notice of Appeal be filed no later than June 29, 2007. [CR 93, ER 137]

IV. Court of Appeals

The appellate court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. The court erred in denying Stowbunenko's motion for summary judgment. It failed to rule on that portion of the motion requesting dismissal for the reason that Silva-Sandoval and Carrillo-Hidalgo, naturalized members of an Indian tribe, a sovereign nation, enjoyed an aboriginal right of free passage across the United States border and were wrongfully denied admission into the United States. Resultingly, Stowbunenko's convictions for assisting their entry into the United States were in violation of the law.

2. The trial court plainly erred, in violation of the Fifth Amendment, in instructing the jury that "[r]egardless of any tribal affiliation, Mexican nationals seeking admission to enter the United States must present official written authorization from the United States government in order to be eligible for lawful entry into the United States" and that "[a] Mexican national who enters the United States without official written authorization from the United States government does so in violation of law." This instruction ignored Silva-Sandoval's and Carrillo-Hidalgo's aboriginal right of free passage to be admitted into the United States.

3. The court plainly erred, in violation of the Fifth Amendment, in sentencing Stowbunenko on count one, bringing in illegal aliens to the United States, as

a class E felony offense, for the reason that Stowbunenko was convicted of a class A misdemeanor offense.

STATEMENT OF THE CASE

Appellant Stowbunenko, a United States citizen and member of the Little Shell Pembina Band of North America (PNLSB), was arrested on September 10, 2006, at the Port of Entry, San Luis, Arizona. Stowbunenko was in the company of Apolonia Silva-Sandoval and Adelelmo Carrillo-Hidalgo, both Mexican citizens and fellow members of the Little Shell Pembina Band of North America, along with two minor children, both United States citizens. [CR 5, ER 3]

Stowbunenko was charged by complaint [CR 1, ER 1], amended complaint [CR 5, ER 3], indictment [CR 22, ER 14] and superceding indictment [CR 66, ER 99], with 3 counts: (1) bringing in illegal aliens to the United States, in violation of 8 U.S.C. §§ 1324(a)(2) and 1324(a)(2)(A); (2) encouraging illegal aliens to enter the United States, in violation of 8 U.S.C. §§ 1324(a)(1)(A)(iv) and 1324(a)(1)(B)(ii); and (3) bulk cash smuggling, in violation of 31 U.S.C. §§ 5316, 5332(a)(1) and 5332(b)(1).

A detention hearing was held on September 13, 2006, and Stowbunenko was held without bond as a "flight risk." [CR 7, ER 8; CR 8, ER 9; RT 9/13/06, p. 6, ER 154]

On motion by the Government and order of the Court, Silva-Sandoval and Carrillo-Hidalgo were detained as material witnesses. Both were deposed on

September 28 and 29, 2006. [CR 16, ER 12; Exhibit 41; Exhibit 42]

On January 3, 2007, Stowbunenko filed Defendant's Motion: Waiver of Counsel. [CR 38, ER 17] This motion to represent himself was denied. [CR 44, ER 18] Stowbunenko believed his attorney had failed to raise crucial issues in a pretrial motion. However, the court allowed Stowbunenko to file his own motion, *in propria persona;* regarding these issues. Appellant filed his handwritten Motion for Judgment and Affidavit. [CR 64, ER 26] The Government responded. [CR 56, ER 20] Appellant replied. [CR 75, ER 114] The motion was denied. [CR71, ER 102]

On February 27, 2007, the Government filed a Motion to Consolidate case number 06–8458M, misdemeanor counts, with the case *sub judice.*[4] [CR 53, ER 19] These counts, based on the same conduct as the instant case, were not included in the superceding indictment, were not tried, and were dismissed, on oral motion of the Government, after the verdict was returned. [CR 78, ER 127; RT 3/22/07, p. 65, ER 65]

A jury trial commenced on March 20, 2007. [RT 3/20/07, ER 159] On March 22, 2007, the jury returned a verdict of guilty on counts 1 and 2, and not guilty on count 3. [CR 83, ER 129; RT 3/22/07, p. 61, ER 193]

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[4] The complaint charged two misdemeanor counts of Aid and Abet the Attempted Illegal Entry Into the United States of Undocumented Aliens, in violation of 18 U.S.C. § 2 and 8 U.S.C. § 1325.

Stowbunenko was sentenced on May 14, 2007, to eight months in prison on both counts. Because he had served this amount of time during pretrial incarceration, Stowbunenko received a time served sentence. These counts were ordered to be served concurrently. "Upon release from imprisonment, the defendant shall be placed on supervised release for two years. This term consists of one year on Count 1 and two years on Count 2 to run concurrently." A special assessment of $200 and a fine of $1,000 were imposed. [CR 95, ER 140 ; RT 5/14/07, pp. 10-11, ER 198-199]

At sentencing, Stowbunenko orally moved, *pro se*, to set aside the verdict, claiming ineffective assistance of counsel, and for a new trial, because his counsel, contrary to earlier promises, presented no defense in his behalf. [RT 5/14/07, pp. 8, 14, ER 197] Both motions were summarily denied. [RT 5/14/07, p. 8, ER 197]

Stowbunenko filed a Motion to Extend Time to File Notice of Appeal on June 25, 2007. [CR 92, ER 130] The motion was granted. [CR 93, ER 137] A timely Notice of Appeal was filed on June 29, 2007. [CR 94, ER 138]

STATEMENT OF FACTS

Appellant Stowbunenko, a United States citizen and member of the Little Shell Pembina Band of North America[5] (PNLSB), was arrested on September 10, 2006, at the port of entry, San Luis, Arizona. [RT 3/20/07, p. 148, ER 162] Stowbunenko was in the company of Apolonia Silva-Sandoval, Adelelmo Carrillo-Hidalgo, both Mexican citizens and fellow members of the Little Shell Pembina Band of North America, along with two minor children, both United States citizens. [CR 5, ER 3; RT 3/20/07, pp. 152-157, 165, ER 164, 166-167; Exhibit 1, ER 144; Exhibit 2, ER 145; Exhibit 6, ER 149; Exhibit 7, ER 150]

On September 10, 2006, Silva-Sandoval drove her vehicle (Honda Pilot) to the port of entry for admission into the United States. [RT 3/20/07, pp. 151-152, ER 163-164] Carrillo-Hidalgo was in the front passenger seat, with Stowbunenko, and two children, seated in the rear. [RT 3/20/07, p. 152, ER 164] Silva-Sandoval, a Mexican citizen, presented Pembina Nation Little Shell Band of North America identification cards [Exhibit 6, ER 149; Exhibit 7, ER 150; Exhibit 10, ER 152], along with other paperwork (identification certificates for Silva-Sandoval and Carrillo-Hidalgo

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[5] Stowbunenko was born in Hanover, Germany in 1940, and became a naturalized citizen of the United States in 1972. Stowbunenko became a member of an Indian tribe known as the Pembina Nation Little Shell Band of North America. [CR 71, ER]

[Exhibit 1, ER 144; Exhibit 2, ER 145]), driver's license, affidavit of fact and a constructive notice) for all three adult passengers, documenting their membership as members of the tribe. [RT 3/20/07, p. 152, 154 ER 164] She presented birth certificates for the two children indicating that both were born in the United States and were citizens of this country. [RT 3/20/07, p. 153] Upon inquiry, Silva-Sandoval told the border officer that she was presenting the documents to enter the United States. [RT 3/20/07, pp.. 164, 170, ER165, 170]

Silva-Sandoval and Carrillo-Hidalgo readily admitted they were born in Mexico and were not U.S. citizens. Stowbunenko told the officer that he was born in Germany. [RT 3/20/07, p. 165, ER 167] None of the adults claimed " . . . to have any lawful permit to be in the United States apart from the Pembina cards." [RT 3/20/07, p. 165, ER 167] None had border crossing or resident alien cards which would have permitted them lawful entry into the United States. [RT 3/20/07, pp. 165-166, ER 167-168]

The adults were cooperative and did not try to hide anything from the officer. [RT 3/20/07, p. 173, ER 171] However, since the agent was unfamiliar with and unsure about the significance of the paperwork, he referred the passengers to another officer for secondary inspection. [RT 3/20/07, pp. 152-153, 169, 170, 173, 174, ER 164, 169, 170, 171, 172]

The first secondary officer encountered the travelers sitting in the main lobby pass-through processing site. [RT 3/20/07, p. 196, ER 173] It is the secondary officer's determination as to whether travelers can be admitted into the country. [RT 3/20/07, pp.196-197, ER 173174] None of the travelers produced a passport with visa, a resident alien (green) card, or a border crossing card, also know as a visitor's visa. [RT 3/20/07, pp. 197-198, ER 174-175] When asked about citizenship, Stowbunenko informed that he was a naturalized American Indian and in the officer's opinion kept evading the citizenship question. According to the officer's recollection, Stowbunenko said that his tribe had not signed a contract with the government, thus it did not recognize the federal government and was not subject to inspection. [RT 3/20/07, pp. 198, 206 ER 175, 178] Stowbunenko produced documents in addition to those shown to the first inspection officer. [RT 3/20/07, p. 198, ER 175] These documents included:

1. A notarized identification certificate indicating that Apolonia Silva was a registered member of Pembina Nation Little Shell Band of North America signed in North Dakota by Leo Delorme, Chairman Grand Council, on July 28, 2004. [Exhibit 1, ER 144]

2. A notarized identification certificate indicating that Adelelmo Carrillo was a registered member of Pembina Nation Little Shell Band of North America signed in North Dakota by Leo Delorme, Chairman Grand Council, on July 28, 2004. [Exhibit 2, ER 145]

3. A notarized Pembina Nation Little Shell Band of North America Constructive Notice, regarding the history and rights of the nation and its members, signed by affiant, Leo Delorme, Chariman

Grand Council, on July 28, 2004. [Exhibit 3, ER 146]

4. A Pembina Nation Little Shell Band of North America Affidavit regarding past treaties and their present-day effect (including its current sovereignty and status as a nation state) upon the band's rights. This Affidavit was signed on July 28, 2004, by Leo Delorme, Chairman Grand Council. [Exhibit 4, ER 147]

5. A Pembina Nation Little Shell Band of North America driver's license for Apolonia Silva issued on July 3, 2006. [Exhibit 5, ER 148]

6. A Pembina Nation Little Shell Band of North America identification card for Apolonia Silva indicating that she is a member of the band. [Exhibit 6, ER 149]

7. A Pembina Nation Little Shell Band of North America identification card for Adelelmo Carrillo indicating that he is a member of the band. [Exhibit 7, ER 150]

8. A Pembina Nation Little Shell Band of North America driver's license for Adelelmo Carrillo issued on August 15, 2006. [Exhibit 8, ER 151]

9. A Pembina Nation Little Shell Band of North America identification card for Oleh Stowbunenko indicating that he is a member of the band. [Exhibit 10, ER 152]

10. A Pembina Nation Little Shell Band of North America driver's license for Oleh Stowbunenko issued on July 3, 2006. [CR 64, ER 90]

[RT 3/20/07, p. 199, ER 176]

11. Pembina Nation Little Shell Band of North America Affidavit of Fact stating that the Pembina Nation Little Shell Band does exist and that registered members are entitled to travel the whole of North America, pursuant to the right too travel." [RT 3/20/07, pp.205-206, ER 178; CR 64, ER 85]

[RT 3/20/07, pp. 202-207, ER 177, 178-179]

At no time during this thirty minute interview with the second officer did any of the adults declare their citizenship other than to say they were members of the

Pembina Nation. [RT 3/20/07, p. 207, ER 179] Upon entering their names into a database, the second officer concluded that Stowbunenko could enter since he was a naturalized United States citizen. The other two adults, however, were determined to be citizens of Mexico and did not have the appropriate documents to enter. [RT 3/20/07, pp. 207-210, ER 179-182]

The second officer admitted that although the documents "looked authentic," he was unfamiliar with this particular band of Indians and could not confirm validity. However, he also never determined the documents were fraudulent or invalid. The second officer did very little followup research to determine if their tribe and claims were valid. [RT 3/20/07, pp. 212-213, ER 183-184]

At the end of his shift, the second officer passed the travelers off to a third officer, the assistant port director. [RT 3/20/07, pp. 207-208, ER 179-180]

Upon consulting a website, authorities learned that PNLSB was not a federally recognized tribe. Its members, according to the website claimed to be a sovereign native American tribe not subject to the laws of the United States. [RT 3/20/07, p. 260, ER 185]

The Government arrested Stowbunenko alleging that Stowbunenko assisted Silva-Sandoval and Carillo-Hidalgo, both Mexican citizens and members of the Pembina tribe, who had lived in the United States for years as undocumented aliens,

in reentering the United States after the three adults left the United States for this brief visit to Mexico. As they reentered the United States at the San Luis Port of Entry, Silva-Sandoval and Carrillo-Hidalgo produced Pembina tribal documents. Both told authorities that they had become tribal members with the assistance of Stowbunenko. [Exhibits 1-8, ER 144-151; RT 3/20/07, pp. 199, 207, ER 176, 179]

SUMMARY OF ARGUMENTS

The court erred in denying Stowbunenko's motion for summary judgment. It failed to rule on that portion of the motion requesting dismissal for the reason that Silva-Sandoval and Carrillo-Hidalgo, naturalized members of sovereign Indian tribe, enjoyed an aboriginal right of free passage across the United States border and were wrongfully denied admission into the United States. Indian tribes are currently recognized as sovereign because they were, in fact, sovereign before the arrival of non-natives on this continent. The United States courts recognize that American Indian tribes enjoy aboriginal rights. These aboriginal rights, including that of free passage, existed prior to political borders being established in North America. In traditional indigenous homelands, the right of free passage is an inherent aboriginal right, even where an international border has been created subsequently. Stowbunenko produced documents stating that PNLSB is composed of the lineal descendants of a nomadic, aboriginal group of Indians who were represented by the Chief who signed the 1863 treaty. Although the district court, in ruling on Stowbunenko's motion, indicated that the tribe has not been formally recognized by the United States. The PNLSB has been recognized by the United States as an American Indian tribe by virtue of the fact that the United States government entered into a treaty with the Pembina tribe in 1863. Stowbunenko maintains that PNLSB

has the inherent ability to determine the membership of its band and as he argued to the district court "Defendant and travel companions are Legal and Lawful Indians . . . [with] . . . Rights that no other Indian tribe has because they never ceded to the Federal Government any of their Natural, Inalienable and Absolute Rights, including the Right of Free and Unencumbered Border crossings, be it Canada or Mexico." Resultingly, Stowbunenko's convictions for assisting their illegal entry into the United States were illegal.

The trial court plainly erred, in violation of the Fifth Amendment, in instructing the jury that "[r]egardless of any tribal affiliation, Mexican nationals seeking admission to enter the United States must present official written authorization from the United States government in order to be eligible for lawful entry into the United States" and that "[a] Mexican national who enters the United States without official written authorization from the United States government does so in violation of law." This instruction ignored Silva-Sandoval's and Carrillo-Hidalgo's aboriginal right of free passage to be admitted into the United States.

The court plainly erred, in violation of the Fifth Amendment, in sentencing Stowbunenko on count one, bringing in illegal aliens to the United States, as a class E felony offense, for the reason that Stowbunenko was convicted of a class A misdemeanor offense. During the settlement of jury instructions, the parties agreed,

and the court acknowledged, that count one was a misdemeanor, not a felony. The court did not instruct the jury that this offense required an intentional culpable mental state, since only a felony offense required it to do so. The Presentence Investigation Report and amended judgment reflect that Stowbunenko was sentenced for this offense as a class E felony. Stowbunenko requests that to the extent he was sentenced for a felony offense, he is entitled to a resentencing, that the offense should be designated as a class A misdemeanor and the judgment in his case be amended to reflect that count 1 is a misdemeanor, not a felony.

ARGUMENT ONE

I. Issue

The court erred in denying Stowbunenko's motion for summary judgment. It failed to rule on that portion of the motion requesting dismissal for the reason that Silva-Sandoval and Carrillo-Hidalgo, naturalized members of an Indian tribe, a sovereign nation, enjoyed an aboriginal right of free passage across the United States border and were wrongfully denied admission into the United States. Resultingly, Stowbunenko's convictions for assisting their entry into the United States were obtained in violation of the law.

II. Standard of Review

The standard of review for dismissal of an indictment based on legal error is reviewed *de novo*. United States v. Barrera-Moreno, 951 F.2d 1089, 1091 (9th Cir.1991). The trial court's findings of fact with regard to a motion to dismiss are reviewed for clear error. United States v. Hinojosa-Perez, 206 F.3d 832, 835 (9th Cir.2000).

III. Facts Necessary for a Determination of the Issue

On January 3, 2007, Stowbunenko filed a pre-trial motion to allow self-representation. [CR 38, ER 17; RT 1/29/07 (unsealed), pp. 12-13, ER 157-158] The court denied the motion but allowed Stowbunenko to file a motion *pro se* raising

those issues that trial counsel refused to file on his behalf. [CR 44, ER 18; RT 1/29/07 (unsealed), pp. 9, 12-13, ER 156-158]

Based on this ruling, Stowbunenko's Summary Judgment and Affidavit, dated February 21, 2007, with accompanying documents, was filed. [CR 64, ER 26] The Government, treating it as a motion to dismiss for lack of jurisdiction, responded on March 2, 2007 [CR 56, ER 20]; and Stowbunenko replied on March 14, 2007. [CR 75, ER 114] After considering the pleadings, the court denied the motion. [CR 71, ER 102]

Stowbunenko's motion challenged the court's jurisdiction and the prosecution of his case. The gist of his complaint was that an Indian band, the Pembina Nation Little Shell Band of North American (PNLSB), included the lineal descendants of an Indian band that had signed a treaty with the United States government in 1863. Although the band had ceded some, not all, of its land pursuant to the treaty, the government had failed to pay for the land as it promised in the treaty. By signing the treaty, the band became a "treaty tribe", not a "Bureau of Indian Affairs tribe," recognized by the fact that the Government entered into the treaty. The Pembina band had never ceded its sovereign rights, as had other tribes, to the United States government. Stowbunenko argued that as a sovereign nation, the band members were not subject to the laws of the United States. Thus, the district court had no "in Rem

Jurisdiction, Subject Matter Jurisdiction, or in Personam Jurisdiction" over Stowbunenko since he had become a naturalized member of the PNLSB before his arrest in September, 2006. [CR 64, ER 26]

Although Stowbunenko argued that his case should be dismissed primarily because the federal court lacked jurisdiction, he also listed several other bases for dismissal. Stowbunenko further argued that members of the PNLSB, as citizens of a sovereign American Indian tribe, including Silva-Sandoval. Carrillo-Hidalgo, and Stowbunenko himself, enjoyed an aboriginal right of free passage across all borders, including the Canadian and Mexican borders. According to Stowbunenko:

> The Government is ignoring, avoiding, sweeping under the rug the fact that Defendant and travel companions are Legal and Lawful Indians and pursuant to the Treaty of 1863, they have Rights that no other Indian tribe has because they never ceded to the Federal Government any of their Natural, Inalienable and Absolute Rights, including the Right of Free and Unencumbered Border crossings, be it Canada or Mexico.

[CR 64; ER 29] Therefore, as a matter of law, Stowbunenko could not be found guilty of either count 1, bringing in illegal aliens to the United States, or count 2, encouraging illegal aliens to enter the United States.

It is this contention which serves as the basis of Argument One and is discussed below.

IV. Points and Authorities

Stowbunenko, not an attorney nor learned in the law, filed a multi-faceted motion. Some of the relief (ie. civil damages and injunctive or declaratory relief) that he requested was not appropriate relief to be granted in a criminal case. However, Stowbunenko requested that his case be dismissed, as a matter of law (in addition to the reason of lack of jurisdiction), for the reason that Silva-Sandoval and Carrillo-Hidalgo had a right of free passage across the Mexican border. [CR 64, ER 26]

The court and the Government treated the motion, as a motion to dismiss for lack of jurisdiction, without addressing the issue of whether both charges should be dismissed because Silva-Sandoval and Carrillo-Hidalgo, as naturalized PNLSB tribal members, enjoyed an aboriginal right of free passage across the Mexican border. [CR 71, ER 102; CR 56, ER 20]

A. Sovereignty

American Indian tribes are sovereign and self-governing. "'Indian tribes consistently have been recognized . . . as 'distinct, independent political communities' qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty.' F. Cohen, *Handbook of Federal Indian Law* 232 (1982 ed.) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) . . . . In short, Indian tribes are currently recognized as

sovereign because they were, in fact, sovereign before the arrival of non-natives on this continent." Native Village of Venetie I.R.A. Council v. State of Alaska, 944 F.2d 548, 556 (9th Cir.1991).

B. Aboriginal Rights

The United States courts recognize that American Indian tribes enjoy aboriginal rights.[6] United States v. Dann, 470 U.S. 39, 105 S.Ct. 1058 (1985) (aboriginal title to lands); United States v. Dann, 873 F.2d 1189 (9th Cir.1989) (aboriginal title to land, aboriginal grazing rights); People of the Village of Gambell v. Hodel, 869 F.2d 1273 (9th Cir.1989) (aboriginal rights to the outer continental shelf, aboriginal subsistence rights-hunting and fishing rights); McCandless v. UnitedStates, 25 F.2d 71 (3rd Cir.1928) (aboriginal right of free passage); Akins v. Saxbe, 380 F.Supp. 1210 (D.Me. 1974) (aboriginal right of free passage).

C. Aboriginal Right of Free Passage

As noted in Akins v. Saxbe, 380 F.Supp 1210, 1220 (D.Me. 1974), referring

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[6] American Indians groups may be called tribes or bands. "'[B]and can have no precise definition. Although it generally signifies cohesion and inter- action between families that constitute a group of permanent membership, it may range in-size from a few families that are closely related to many families which include some not related, or it may be structured on unilineal or bilateral principles, and interaction between the families may take many forms.'" Steward, The Foundations of Basin-Plateau Shoshonean Society, in Languages and Cultures of Western North America 113, 115 (E. Swanson ed. 1970). *See* United States v. Dann, 470 U.S. 39, 43 n. 8, 105 S.Ct. 1058, 1061 n. 8 (1985).

to an earlier district court decision in United States *ex rel.* Diabo v. McCandless, 18 F.2d 282, 283 (E.D.Pa. 1927), aff'd, 25 F.2d 71, 73 (3rd Cir. 1928), aboriginal rights of free passage are not created by treaty, but existed prior to political borders being established in North America. "The court held that the right of free passage in traditional indigenous homelands is an inherent aboriginal right, even where an international border has been created subsequently." Luna-Firebaugh, *'Att Hascu 'AmO 'I-oi? What Direction Should We Take?: The Desert People's Approach to the Militarization of The Border,* Wash. U. J. L. Pol.. 333, 342 (2005).

The district court noted in its order that the "Pembina Tribe is located in North Dakota and apparently claims rights to land in North Dakota, Minnesota and Canada. [CR 71, ER 102] This band roamed the area on both sides of the United States/Canadian border. "In 1863, the United States signed the Old Crossing Treaty with the Red Lake and Pembina Bands of Chippewa. Chief Little Shell led the Pembina Band and signed the treaty as a representative. The treaty ceded several thousand acres of Indian lands near the Red River of the North to the United States government in exchange for a nominal amount of money to be paid to the Chippewa bands. . . In 1892, the United States government sent a commission, headed by P.J. McCumber, to negotiate with the Chippewa to extinguish aboriginal title to the land they still owned. Chief Little Shell attended the meetings but wanted to retain more

land than acceptable to the commission. He walked out of the negotiations and never signed the subsequent McCumber Agreement." Delorme v. United States, 354 F.3d 810 (9th Cir. 2004).

Stowbunenko maintained in his motion, through the submitted documents and in oral statements to the court that as members of this Indian band they had the "Right of Free and Unencumbered Border crossings, be it Canada or Mexico." [CR 64; ER 29] He produced documents stating that PNLSB is composed of the lineal descendants of a nomadic, aboriginal group of Indians who were represented by Chief Little Shell who signed the 1863 treaty. His claim that its members enjoy the aboriginal right of free passage was never refuted or disproved by the Government. [CR 56, ER 20]

D. Federal Recognition

Stowbunenko attached a copy of the "Old Crossing Treaty[7] of 1863" to his motion, a copy of which is enclosed in the Excerpts of Record. [CR 64, ER 48-52]

"A treaty between the United States and an Indian tribe 'is essentially a contract between two sovereign nations.' (citation omitted) [T]reaties constitute the

[7] The signatories to the treaty included "Mis-co-muk-quoh, his x mark, (Red Bear), Chief of Pembina," "Ase-anse, his x mark, (Little Shell), Chief of Pembina," "Joseph Gomon, his x mark, Warrior of Pembina," "Joseph Mentreuil, his x mark, Warrior of Pembina," and "Teb-ish-ke-ke, his x mark, Warrior of Pembina."

'supreme law of the land . . .'" Richmond v. Wampanoag Tribal Court Cases, 431 F.Supp.2d 1159, 1174 (D.Utah 2006).

PNLSB has been a federally recognized tribe based upon its signing of treaties with the United States government.

> Federal recognition may arise from **treaty**, statute, executive or dealing with the tribe as a political entity." William C. Canby, Jr., *American Indian Law in a Nutshell* 4 (4th ed.2004).

Kahawaiolaa v. Norton, 386 F.3d 1271, 1272-73 (9th Cir.2004) (footnote omitted) (emphasis added).

> Historically, the federal government has determined that certain groups of Indians will be recognized as tribes for various purposes. Such determinations are incident to the Indian Commerce Clause of the Constitution,[8] which expressly grants Congress power "[t]o regulate Commerce . . . with the Indian tribes." When Congress or the Executive has found that a tribe exists, courts will not normally disturb such a determination . . . *Felix S. Cohen's Handbook of Federal Indian Law* 3 (Rennard Strickland, *et al.*, ed. 1982) ("*Handbook* (1982 ed.)") (Footnotes omitted). "For most current purposes, judicial deference to findings of tribal existence is still mandated by the extensive nature of congressional power in the field. Congress has implicitly recognized the existence of most tribes through **treaties**, statutes, and ratified agreements." *Id.* at 3-4 (footnote omitted).

Richmond v. Wampanoag Tribal Court Cases, 431 F.Supp.2d 1159, 1163 (D.Utah 2006) (emphasis added).

According to this rationale, the Little Shell Pembina Band of North America

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[8] U.S. Constitution, Art. 1, Sect. 8, Clause 3.

has been recognized by the United States as an American Indian tribe. Despite this, the district court, in ruling on Stowbunenko's motion, stated, "The [Pembina] Tribe has not been formally recognized by the United States. *See Delorme v. United States*, 354 F.3d 810 n.6 (8th Cir.2004)." [CR 71, ER 103] This belies the fact that the United States government entered into a treaty with the Pembina tribe in 1863.

E. Tribal Membership

Stowbunenko included documents (membership I.D. cards, Affidavit, Affidavit in Fact, and Constructive Notice) with his motion showing that Silva-Sandoval and Carrillo-Hidalgo were members of the PNLSB claiming they had the right to cross the border at the port of entry. [CR 64, ER 26] This documentation was provided to immigration officials at the time of entry.

The district court never ruled that these individuals were not members of the tribe. In deciding Stowbunenko's jurisdictional challenge, the court never refused to accept the assertion that Silva-Sandoval and Carrillo-Hidalgo were members because they were naturalized (as opposed to lineal descendants by blood) members. The United States Supreme Court has written:

> The powers of Indian tribes are, in general, "*inherent powers of a limited sovereignty which has never been extinguished.*" F. Cohen, Handbook of Federal Indian Law 122 (1945) (emphasis in original). Before the coming of the Europeans, the tribes were self-governing sovereign political communities. See *McClanahn v. Arizona State Tax*

> *Comm'n,* 411 U.S. 164, 172, 93 S.Ct. 1257, 1262. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws.

United States v. Wheeler, 435 U.S. 313, 323, 98 S.Ct. 1079, 1086 (1978). "The practical result of this doctrine [of inherent sovereignty] is that an Indian tribe need not wait for an affirmative grant of authority from Congress in order to exercise dominion over its members." Included in this sovereignty is their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. *See* Montana v. United States, 450 U.S. 544, 564, 101 S.Ct. 1245, 1257 (1981); Native Village of Venetie I.R.A. Council et al. v. State of Alaska, 944 F.2d 548, 556 (9th Cir.1991).

Stowbunenko maintains that PNLSB has the inherent ability to determine the membership of its band and as he argued to the district court "Defendant and travel companions are Legal and Lawful Indians . . . [with] . . . Rights that no other Indian tribe has because they never ceded to the Federal Government any of their Natural, Inalienable and Absolute Rights, including the Right of Free and Unencumbered Border crossings, be it Canada or Mexico." [CR 64, ER 26]

F. Conclusion

The court erred in denying Stowbunenko's motion for summary judgment. It failed to rule on that portion of the motion requesting dismissal, as a matter of law,

for the reason that Silva-Sandoval and Carrillo-Hidalgo, naturalized members of PNLSB, enjoyed an aboriginal right of free passage across the United States border and were wrongfully denied admission into the United States. Resultingly, Stowbunenko's convictions for assisting their entry into the United States should be vacated and the case dismissed with prejudice.

ARGUMENT TWO

I. Issue

The trial court plainly erred, in violation of the Fifth Amendment, in instructing the jury that "[r]egardless of any tribal affiliation, Mexican nationals seeking admission to enter the United States must present official written authorization from the United States government in order to be eligible for lawful entry into the United States" and that "[a] Mexican national who enters the United States without official written authorization from the United States government does so in violation of law." This instruction ignored Silva-Sandoval's and Carrillo-Hidalgo's aboriginal right of free passage to be admitted into the United States.

II. Standard of Review

The court reviews *de novo* whether a district court erred in giving an instruction. U.S. v. Heredia, 429 F.3d 820,824 (9thCir.2005). An objected to instruction shall be reviewed for harmless error while an unobjected to instruction will be reviewed for plain error. A claim that a jury instruction violated due process is reviewed *de novo*. U.S. v. Amparo, 68 F.3d 1222,1224 (9thCir.1995).

III. Facts Necessary for a Determination of the Issue

The court instructed the jury, as follows:

> Regardless of any tribal affiliation, Mexican nationals seeking

> admission to enter the United States must present official written authorization from the United States government in order to be eligible for lawful entry into the United States. A Mexican national who enters the United States without official written authorization from the United States government does so in violation of the law.

[CR 74, ER 111]

During the discussion of jury instructions, the Government asked the court to instruct the jury that the PNLSB was not a federally recognized tribe and that unless its members were United States citizens, they needed to obtain lawful permission from the United States government to enter the country. [RT 3/21/07, pp. 99, 114, ER 187-188]

Defense counsel was unsure regarding this proposal. [RT 3/21/07, p. 99, ER 187] Stowbunenko objected and asked the court to consider, Richmond v. Wampanoag Tribal Court Cases, 431 F.Supp.2d 1159 (D.Utah 2006). Stowbunenko informed the court that the Government's request was contrary to the law. He asked the court to consider "Indian tribal sovereignty in federal recognition of Indian tribes. And if you read the article here, I've highlighted, 'Congress has implicitly recognized the existence of most tribes through treaties, statutes, and ratified agreements.'" [RT 3/21/07, p. 116, ER 189]

The court acknowledged that the government could not have entered the treaty with the Pembina band without recognizing them. However, it determined that the

issue before it was a different one. Discounting Stowbunenko's argument, the court indicated: "There's I think another question, which is whether that tribe has been recognized in the sense that it is among the lists of tribes that the government has entered into relationships with and regulates and is under the Bureau of Indian Affairs, et cetera." [RT 3/21/07, p. 117, ER 190]

The next day, the Government requested the above instruction, citing 8 U.S.C. § 1182(a)(7), without the last sentence, which the court added on its own. [CR 72, ER 108; CR 73, ER 110] Withdrawing the previously requested instruction (judicial notice) regarding the Pembina nation not being a federally recognized tribe, the Government indicated that the above instruction was proposed in its stead. [RT 3/22/07]

Defense counsel stated that he had no objection to the instruction since it comported with Ninth Circuit law. [RT 3/22/07, p. 10]

IV. Points and Authorities

The jury instruction was contrary to the law. American Indian aboriginal law relating to the right of free passage applies to a member of an American Indian tribe regardless of whether her or she is a United States, Canadian or Mexican citizen. McCandless v. United States, 25 F.2d 71 (3rd Cir.1928). [Brief of Appellant, Argument One] As set forth in Argument One, Silva-Sandoval and Carrillo-Hidalgo,

naturalized members of the PNLSB, enjoyed an aboriginal right of free passage across the United States border and were wrongfully denied admission into the United States.

Although this language was set forth in the count two instruction, the language also pertained to the count one instruction. The second element of that instruction required that Silva-Sandoval and Carrillo-Hidalgo "had not received prior official authorization to come to, enter, or reside in the United States." [CR 74, ER 111]

The objected to language instructed the jury that they had entered the country in violation of the law. It incorrectly informed the jury that the Mexican born American Indians had no right to enter the United States without presenting "official written authorization from the United States government."

V. Conclusion

Stowbunenko in his motion for summary judgment and his objection during the discussion of jury instructions repeatedly urged the right of aboriginal right of free passage. The instructional error was instrumental to his conviction on both count counts and substantially affected his right to a fair trial. Both convictions for assisting their illegal entry into the United States should be vacated and the case dismissed with prejudice.

ARGUMENT THREE

I. Issue

The court plainly erred, in violation of the Fifth Amendment, in sentencing Stowbunenko on count one, bringing in illegal aliens to the United States, as a class E felony offense, for the reason that Stowbunenko was convicted of a class A misdemeanor offense.

II. Standard of Review

The legality of a sentence is reviewed *de novo*. United States v. Williams, 291 F.3d 1180, 1191 (9th Cir. 2002).

III. Facts Necessary for a Determination of the Issue

A supervening indictment, filed on March 14, 2007, charged Stowbunenko with bringing in illegal aliens to the United States in violation of Title 8, United States Code, Sections 1324(a)(2) and 1324(a)(2)(A). [CR 66, ER 99]

During discussions about the jury instructions, the prosecutor agreed with the court that:

> Now, I didn't add it [intent element] to Count 1 because it's my understanding, Ms. Bardorf, that Count 1 is a misdemeanor offense. Is that correct?
>
> My understanding is that it becomes a felony only if there's an aggravating factor, which in this case was originally charged as financial gain, and that was eliminated. And therefore what we're left with in Count 1 is what the Ninth Circuit called in one case a gross

misdemeanor.

MS. BARDORF: That's right, Your Honor. The statutory maximum penalty is one year.

[RT 3/22/07, p. 7, ER 192]

Since the offense was a misdemeanor, the court determined not to add an "intent" element to the offense set forth in the jury instruction. [CR 74, ER 111]

THE COURT: Okay. If that's the case, the Ninth Circuit has said, in these cases that I just described, that the intent requirement doesn't apply to misdemeanors under 1324(a).

[RT 3/22/07, p. 7, ER 192]

Despite this resolution, the Presentence Investigation Report treats the offense as a class E felony rather than a class A misdemeanor. [PSR, p. 1]

At sentencing, the court pronounced "[t]he defendant was found guilty after a jury trial of Count 1, bringing illegal aliens into the United States in violation of 8 United States Code Section 1324(a)(2) and (a)(2)(A)" without referring to it as felony or a misdemeanor. [RT 5/14/07, p. 3, ER 196].

The Amended Judgment in a Criminal Case (drug testing suspended) incorrectly states that the defendant is guilty of "violating Title 8 U.S.C. 1324(a)(2) and (a)(2)(A) - Bringing in Illegal Aliens into the United States, a Class E Felony offense, as charged in Count 1 of the Superceding Indictment. . ." [CR 95, ER 140]

IV. Points and Authorities

The prosecutor conceded that count 1 was a misdemeanor offense. The court did not add a culpable mental state element to the instruction for the reason that it concluded this was not necessary when dealing with a misdemeanor, rather than a felony, offense.

Title 8, U.S.C. § 1324(a)(2)(A) prescribes that a person who violates § 1324(a)(2) shall "be fined in accordance with Title 18 or imprisoned not more than one year, or both."

The sentencing classification statute, 18 U.S.C. § 3559(a)(6), mandates that: An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is . . . one year or less but more than six months, as a Class A misdemeanor."

The error is plain. Stowbunenko should not be saddled with a felony conviction when the culpable mental state necessary to prove him guilty of a felony offense was never submitted to, or found by, the jury. Nor was he charged in the indictment with a felony offense.

V. Conclusion

Stowbunenko requests that to the extent he was sentenced for a felony offense, he is entitled to a resentencing, that the offense be designated as a class A

misdemeanor and the judgment in his case be amended to reflect that count 1 is a misdemeanor, not a felony, offense.

Dated this 4th day of February, 2008.

Nancy Hinchcliffe

Nancy Hinchcliffe
Attorney for Appellant

Form 8. Certificate of Compliance Pursuant to Fed.R.App. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 07-10379

(see next page) **Form Must Be Signed By Attorney or Unrepresented Litigant *Attached to the Back of Each Copy of the Brief***

I certify that: **(check appropriate options(s))**

_X_ 1. Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

A. Proportionately spaced, has a typeface of 14 points or more and contains 7462 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

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☐ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines or text(opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

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☐ This brief complies with Fed. R. App. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

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☐ This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 **and is**

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____ 4. *Amicus Briefs*

☐ Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

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2/4/08
Date

Nancy Hinchcliffe
Signature of Attorney

STATEMENT OF RELATED CASES

Appellant Stowbunenko was charged alone in this case. There are no related cases involving other defendants, or the circumstances out of the incidents giving rise to appellant's charges, before the Court of Appeals for the Ninth Circuit.

CERTIFICATE OF SERVICE

I certify that on February 4, 2008, I served an original and fifteen copies of Appellant's Opening Brief, five copies of Appellant's Excerpts of Record, and a sealed envelope containing four copies of the Presentence Investigation Report by mailing them via U.S. mail, postage prepaid, to Clerk at the U.S. Court of Appeals, 95 Seventh Street, P.O. Box 193939, San Francisco, CA, 94119-3939.

I certify that on February 4, 2008, I served two copies of Appellant's Opening Brief and one copy of Appellant's Excerpts of Record by mailing them via U.S. mail, postage prepaid, to Tracey A. Bardorf, Assistant United States Attorney, counsel for plaintiff-appellee, Office of the United States Attorney, Two Renaissance Square, 40 North Central Avenue, Suite 1200, Phoenix, Arizona 85004-4408.

I certify that on February 4, 2008, I mailed one copy of Appellant's Opening Brief and one copy of Appellant's Excerpts of Record, via U.S. mail, postage prepaid, to Oleh Rostyslaw Stowbunenko-Saitschenko, P.O. Box 348205, Sacramento, California 95834.

Dated this 4th day of February, 2008.

Nancy Hinchcliffe

Nancy Hinchcliffe
Attorney for Appellant
11 West Jefferson, Suite 2
Phoenix, Arizona 85003-2302