C.A. No. 07-10379

D. Ct. 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.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLEE

DIANE J. HUMETEWA
United States Attorney
District of Arizona

JOHN R. LOPEZ IV
Deputy Appellate Chief

LINDA C. BOONE
Assistant U.S. Attorney
Two Renaissance Square
40 North Central Avenue, Suite 1200
Phoenix, Arizona 85004-4408
Telephone: (602) 514-7500
Attorneys for Appellee

Date Mailed: May 2, 2008

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A. District Court Jurisdiction

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 based on a Superceding Indictment charging defendant in Count 1 with Bringing In Illegal Aliens to the United States in violation of 8 U.S.C. § 1324(a)(2); in Count 2 with Encouraging Illegal Aliens to Enter the United States in violation of 8 U.S.C. §1324(a)(1)(A)(iv); and in Count 3 with Bulk Cash Smuggling in violation of 31 U.S.C. §§ 5332 and 5316. (CR 66; ER 99.)[1]

B. Appellate Court Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 based on a jury finding of guilty of Counts 1 and 2 on March 22, 2007, and entry of final judgment by the district court on May 16, 2007. The judgment was amended by the district court on July 30, 2007. (CR 83, 91, 95; ER 140.)

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[1]The abbreviation "CR" refers to the Clerk's Record and will be followed by the pertinent document number. The abbreviation "RT" refers to the Reporter's Transcript and will be followed by a date and relevant page number(s). The abbreviation "ER" refers to the Appellant's Excerpts of Record, "SER" refers to Appellee's Supplemental Excerpts of Record, and each will be followed by the relevant page number(s). The abbreviation "PSR" refers to the defendant's presentence report which is forwarded under separate cover pursuant to Ninth Cir. R. 30-1.10.

C. Timeliness of Appeal

Defendant filed a motion to extend time to file a notice of appeal which was granted by the district court. (CR 92, 93; ER 130, 137.) He then filed a notice of appeal on June 29, 2007. (CR 94; ER 138.) The notice was timely pursuant to Fed. R. App. P. 4(b).

D. Bail Status

Defendant was sentenced to eight months, which was time served, on May 14, 2007. (CR 91.) He was immediately released from federal custody and is believed to be residing in Sacramento, California.

IV. ISSUES PRESENTED

A. Whether the District Court Erred in Failing to Grant Defendant's Motion to Dismiss for Lack of Jurisdiction.

B. Whether the District Court Plainly Erred in Instructing the Jury on the Requirements for Mexican Nationals to Lawfully Enter the United States.

C. Whether the District Court Plainly Erred in Sentencing Defendant on Count One as a Class E Felony Offense, Rather than a Class a Misdemeanor Offense.

V. STATEMENT OF THE CASE

A. Nature of the Case; Course of Proceedings.

On September 26, 2006, an Indictment was returned in the District of Arizona charging defendant-appellant Oleh Rostyslaw Stowbunenko-Saitschenko ("defendant") in Count 1 with Bringing In Illegal Aliens to the United States for the Purpose of Commercial Advantage or Private Financial Gain in violation of 8 U.S.C. §§ 1324(a)(2) and 1324(a)(2)(B)(ii); in Count 2 with Encouraging Illegal Aliens to Enter the United States in violation of 8 U.S.C. §1324(a)(1)(A)(iv); and in Count 3 with Bulk Cash Smuggling in violation of 31 U.S.C. §§ 5332 and 5316. (CR 22; ER 14.) On March 14, 2007, a Superceding Indictment was returned in which the only change was omission of the allegation of commercial advantage or personal gain in Count 1, changing the offense from a felony to a misdemeanor. (CR 66; ER 99.)

Although represented by counsel, defendant was allowed by the district court to file a *pro se* "Summary Judgement [sic] and Affidavit" dated February 21, 2007. (CR 63, 64; ER 26.) This pleading was construed as a motion to dismiss for lack of jurisdiction, to which the government responded on March 2, 2007. (CR 56; ER 20.) The district court denied defendant's motion on March 20, 2007, and he proceeded to trial the next day. (CR 71, 77.) On the second day of trial, the jury returned a verdict of guilty against defendant on Counts 1and 2, and a verdict of not guilty on

Count 3. (CR 83.) Thereafter, defendant was sentenced on May 14, 2007 to concurrent terms of 8 months (time served) on both counts, followed by supervised release for 1 year on Count 1, and 2 years on Count 2, to run concurrently. Defendant was also ordered to pay a special assessment of $200.00 and a fine of $1000.00. (RT 5/14/07 10-11; ER 198-199; CR 90, 91.) The judgment was amended by the district court on July 30, 2007 to reflect suspension of the requirement for drug testing. (CR 95; ER 140.)

B. Statement of Facts.[2]

On September 10, 2006, a vehicle containing three adults and two children arrived at the border between Mexico and the United States, and applied for admission into the United States at the San Luis Port of Entry within the District of Arizona. The vehicle had no license plates. The driver identified herself to a Border Patrol agent as Apolonia Silva-Sandoval, a member of the "Pembina Nation." She presented an identification card, identification certificate, driver's license, "Affidavit of Fact," and "Constructive Notice" – all purportedly issued by the "Pembina Nation, Little Shell Band of North America." She presented the same corresponding documentation identifying the two adult passengers as Adelelmo Carrillo-Hidalgo

[2]Portions of the Statement of Facts are taken from the Offense Conduct section of defendant's final presentence report to which no objections were filed. (*See* RT 5/14/07 4-5; SER 158-159.)

and defendant. The Border Patrol agent asked Silva the purpose of the Pembina Nation documentation, and she replied that it allowed them to enter the United States. The agent advised the travelers that he was unfamiliar with these documents, and referred them to secondary inspection. (PSR at ¶ 4; Govt Exhibit 42 at 26; SER 135.)

At secondary inspection, agents were able to determine that defendant was born in Hanover, Germany in 1940, and became a naturalized United States citizen in 1972. They also discovered that the Pembina Nation, Little Shell Band of North America (hereinafter "Pembina Nation"), is considered an extremist group. Members of the Pembina Nation claim to be a sovereign Native American tribe which is not subject to the laws and regulations of the United States. Its members are known to perpetrate, *inter alia*, insurance fraud schemes and tax evasion.[3] The Pembina Nation is not a federally recognized Native American tribe, nor is it included on the current list of Indian entities recognized and eligible to receive services from the United

[3]An NBC undercover investigative report aired in November 2006 revealed a multi-million dollar scheme in South Florida of people selling memberships in the disputed Pembina Nation, Little Shell Band of North America, for $1500.00, promising immigrants that they could legally enter, stay and work in the United States by becoming American Indians. Pembina Nation Chief Lawrence Henry, located in North Dakota, criticized the scheme and said that those behind it, including former Chief Ronald Delorme, were "kicked out of the tribe." (*See "Citizenship For Sale,"* Part 1 and 2, by Jeff Burnside and Scott A. Zamost at Addendum.)

States Bureau of Indian Affairs published in the Federal Register.[4] (CR 71; ER 103; PSR at ¶ 5.)

Apolonia Silva-Sandoval admitted that she was a citizen and national of Mexico, living in San Jose, California. She tried to obtain legal status in the United States through her husband, but whatever authorization she had to lawfully remain in the country expired in 2002 or 2003. (Govt Exhibit 41 at 6-7, 11; SER 14-15.)[5] In April 2006, defendant told her about the possibility of becoming a "naturalized" member of the Pembina Nation, getting a driver's license, and being able to legally cross the borders into Canada and Mexico. (Govt Exhibit 41 at 48, 61-62, 110-111; SER 25, 38-39, 85-86.) She obtained the Pembina Nation documents from defendant in May and June of 2006. (Govt Exhibit 41 at 48, 61-62; SER 25, 38-39.)

Silva saw defendant prepare some of the documents from internet print-outs. He showed her where to sign, and attached her photograph to some of the documents. (Govt Exhibit 41 at 59, 62; SER 36, 39.) Silva questioned defendant about the notary stamp that was already on the forms, because she thought you had to personally appear in front of a notary for a signature. However, defendant told her it was not

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[4] The list is published at 70 FR 71194 (November 25, 2005).

[5] The video deposition of Apolonia Silva-Sandoval, Vol. 1 & 2 (as redacted), was admitted at trial as Government Exhibit 41. (See CR 77, 81; SER 1-6.)

necessary, the forms were already signed. (Govt Exhibit 41 at 52-53; SER 29-30.) Silva had never heard of the Pembina Nation before meeting defendant. (Govt Exhibit 41, Vol. 2 at 4; SER 104.) However, based on what defendant explained to her, she believed that the Pembina Nation documents would allow her to visit family in Mexico and legally re-enter the United States. (Govt Exhibit 41 at 62- 65; SER 39-42.)

On a subsequent business trip to Las Vegas in August 2006, Silva introduced defendant to her step-father, Adelelmo Carrillo-Hidalgo. She told Carrillo about the Pembina Nation documents, and that she had obtained them from defendant. (Govt Exhibit 41 at 71, 74-75, 79; SER 47, 50-51, 54.) Silva, her two children, and defendant returned to her step-father's house in Las Vegas again on September 10, 2006. From there, defendant suggested that they go to Mexico. (Govt Exhibit 41 at 84-85; SER 59-60.) She observed defendant give Carrillo some documents in the garage, and he laminated them. (Govt Exhibit 41 at 90-91; SER 65-66.)

Defendant told Silva that her step-father could now come with them to Mexico because he had legal documents. (Govt Exhibit 41 at 93; SER 68.) So they drove to Mexico through San Luis, arriving between 12:30 and 1:00 p.m. on September 10, 2006. After eating and shopping in the border area, they headed back to the United States around 3:30 p.m. At that time, Silva presented the Pembina Nation documents

for admission at the San Luis Port of Entry. (Govt Exhibit 41 at 103-104; SER 78-79.)

Adelelmo Carrillo-Hidalgo also admitted that he was a citizen and national of Mexico, and had been residing in the United States illegally since 1988. (Govt Exhibit 42 at 5-8; SER 114-117.)[6] He met defendant at a Las Vegas restaurant with Silva in August 2006. Defendant asked him where he was from, and when he had last visited his family. Carrillo told defendant that he was from Nayarit, Mexico, and had not returned to Mexico in 18 years because he did not have legal documents to return to the United States. (Govt Exhibit 42 at 9-10,13; SER 118-119, 122.)

Defendant told Carrillo that he could help him get paperwork which would allow Carrillo to travel back and forth from Mexico to the United States. When Carrillo said that there was no law right now that would grant such documents, defendant told him that the Indians were giving a "naturalization" to people. Defendant said it was not a residence permit, but a citizenship. (Govt Exhibit 42 at 11; SER 120.) Later that same day they met again at Carrillo's apartment. Carrillo told defendant that he did not think the documents were "legit," but defendant assured him that they were good. Defendant also said he would travel with Carrillo to

[6]The video deposition of Adelelmo Carrillo-Hidalgo (as redacted) was admitted at trial as Government Exhibit 42. (See CR 77, 81; SER 1-6.)

Mexico, and then come back to the United States using the same documents that defendant was going to give him. Before leaving that day to return to San Jose, California, defendant filled out an application form for Carrillo. (Govt Exhibit 42 at 13, 16; SER 122, 125.)

A few weeks later, defendant called Carrillo and said he had received the documents, and to get ready to travel to Mexico. (PSR at ¶ 7; Govt Exhibit 42 at 14-15; SER 123-124.) Sometime in the early morning hours of September 10, 2006, defendant arrived at Carrillo's apartment with Silva and her two children. (Govt Exhibit 42 at 17; SER 126.) Defendant took three or four pictures of Carrillo, put them on the documents, and told Carrillo where to sign. Defendant then laminated the documents. (Govt Exhibit 42 at 18-20, 22; SER 127-129, 131.) Afterwards, they drove to Mexico together. (Govt Exhibit 42 at 23; SER 132.) They arrived around lunch time, ate at a restaurant, and went shopping. (Govt Exhibit 42 at 24-25; SER 133-134.) When attempting to return to the United States, Carrillo's documents from the Pembina Nation were seized by Border Patrol agents. (Govt Exhibit 42 at 26; SER 135.)

At the port of entry, agents also asked defendant if he had anything to declare, and advised him of the legal requirement to declare certain amounts of currency upon entering the United States. Defendant initially said he was not required to provide a

declaration. However, he subsequently admitted to agents that he had $11,000 United States currency on his person, and an additional $30,000 in an envelope in the vehicle. Defendant was, in fact, found to have a total of $41,338.00 in cash. (PSR at ¶ 8.) He was arrested that day for immigration offenses and ordered detained based on a felony complaint filed September 11, 2006 in the District of Arizona. (PSR at ¶ 1.)

A three-count indictment was returned on September 26, 2006 charging defendant in Count 1 with Bringing In Illegal Aliens to the United States for the Purpose of Commercial Advantage or Private Financial Gain in violation of 8 U.S.C. §§ 1324(a)(2) and 1324(a)(2)(B)(ii); in Count 2 with Encouraging Illegal Aliens to Enter the United States in violation of 8 U.S.C. §1324(a)(1)(A)(iv); and in Count 3 with Bulk Cash Smuggling in violation of 31 U.S.C. §§ 5332 and 5316. (CR 22; ER 14.) On March 14, 2007, a Superceding Indictment was returned omitting the allegation of commercial advantage or personal gain in Count 1, but otherwise charging defendant with the same offenses. (CR 66; ER 99.)

Defendant filed a motion to waive counsel and represent himself, apparently alleging that counsel had failed to raise what defendant believed to be the crucial issues in a pretrial motion. (*See* Op. Br. at 6; CR 38; ER 17.) The court denied the motion (CR 44; ER 18), but allowed defendant to file a *pro se* "Summary Judgement

[sic] and Affidavit" dated February 21, 2007. Defendant's primary argument was that he and his traveling companions were "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." (*See* CR 63, 64; ER 26, 29.) The government responded on March 2, 2007, liberally construing the pleading as a motion to dismiss for lack of jurisdiction. (CR 56; ER 20.) The district court denied the motion on March 20, 2007, and defendant proceeded to trial. (CR 71, 77; ER 102.) On the second day of trial, the jury found defendant guilty of Counts 1 and 2, and not guilty of Count 3. (CR 83.)

At sentencing on May 14, 2007, speaking on his own behalf, defendant moved to set aside the verdict on the basis of ineffective assistance of counsel, and moved for a new trial because he did not have a "proper, valid defense." He also said that he was a "sovereign," and did not consent or accept the sentencing. The district court denied both motions. (RT 5/14/07 8; ER 197.) Thereafter, defendant was sentenced to concurrent terms of 8 months (time served) on both counts, followed by supervised release for 1 year on Count 1, and 2 years on Count 2, to run concurrently. Defendant was also ordered to pay a special assessment of $200.00 and a fine of $1000.00. (RT 5/14/07 10-11; ER 198-199; CR 90, 91.) The judgment was amended by the

district court on July 30, 2007 to reflect suspension of the requirement for drug testing. (CR 95; ER 140.) This timely appealed followed.

VI. SUMMARY OF ARGUMENTS

A. Without regard to nationality or citizenship, by presenting themselves for admission to the United States at an official port of entry, defendant and his companions voluntarily subjected themselves to the jurisdiction of the United States. Although defendant argues that they are "sovereign" members of the Pembina Nation, Silva-Sandoval and Carrillo-Hidalgo admitted that they are citizens and nationals of Mexico whose only connection with the Pembina Nation is the documentation provided to them by defendant. The documents are fraudulent on their face because both sets of documents were purportedly notarized on July 28, 2004, two years before defendant even met Silva and Carrillo.

Regardless, federal courts have uniformly rejected the suggestion that membership in another sovereign nation relieves one of criminal liability. Also, none of the limited exceptions to the presumption that federal laws of general applicability apply with equal force to Indians, pertain to this case. Lastly, to prove the aboriginal right claimed by defendant, continuous exercise of the right since before pre-treaty times must be established. Such a claim is defeated by the documented termination of lineal descendants of the Pembina Indians as an organized band or tribe by 1951. There is no basis therefore to solely exclude the disputed Pembina Nation Indians

from federal immigration laws, and the district court properly denied defendant's motion to dismiss for lack of jurisdiction.

B. The general rule in this Circuit is that an issue raised for the first time on appeal is not considered by this Court. This Court may exercise its discretion to grant relief on an issue of error raised for the first time on appeal only if the defendant proves that (1) there was error; (2) the error was plain; (3) the error affected substantial rights; and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. However, as defendant concedes, defense counsel not only had no objection, but specifically agreed that the challenged jury instruction comported with Ninth Circuit law. Accordingly, plain error review does not apply; but rather the objection has been waived by defense counsel's agreement.

C. There is an error in the written judgment in this case, but it appears to be simply a clerical mistake. There is no basis to reject the general presumption that the district court knew the law and followed it in making the sentencing decision. Clerical mistakes in judgments or orders arising from oversight or omission may be corrected by the district court at any time under Fed. R. Crim. P. 36. This Court should therefore remand this case to the district court for the limited purpose of correcting the written judgment to reflect defendant's conviction on Count 1 as a Class A misdemeanor offense, rather than a Class E felony.

VII. ARGUMENTS

A. The District Court Properly Denied Defendant's Motion to Dismiss for Lack of Jurisdiction.

1. Standard of Review.

A district court's denial of a motion to dismiss an indictment for lack of jurisdiction is reviewed *de novo*. *United States v. Phillips*, 367 F.3d 846, 854 (9th Cir. 2004). Whether a federal statute applies to Indians is a question of law reviewed *de novo*. *United States v. Baker*, 63 F.3d 1478, 1484 (9th Cir. 1995).

2. Analysis

Defendant claims that the district court erred in denying his *pro se* "Summary Judgement [sic] and Affidavit." He claims further that the court failed to rule on his argument that Apolonia Silva-Sandoval and Adelelmo Carrillo-Hidalgo, as members of the Pembina Nation, had "an aboriginal right of free passage across all borders" of the United States, and therefore as a matter of law defendant could not be guilty of bringing in illegal aliens or encouraging them to enter the United States. (Op. Br. at 17-19.) Defendant's procedurally improper request for summary judgment was liberally construed as a motion to dismiss the indictment for lack of jurisdiction. (CR 56; ER 22.)

Regardless of nationality or citizenship, by presenting themselves for admission to the United States at an official port of entry, defendant and his companions voluntarily subjected themselves to the jurisdiction of the United States. *See, e.g., United States v. McKenzie*, 818 F.2d 115, 118 (1st Cir. 1987) (defendant subjected to federal drug laws by entering United States regardless of subsequent intent); *Marine Cooks & Stewards v. Panama Steamship Co.*, 362 U.S. 365, 372 (1960) ("[A foreign] ship that voluntarily enters the territorial limits of this country subjects itself to our laws and jurisdiction as they exist.").

Although defendant argues that they are "sovereign" members of the Pembina Nation, Silva-Sandoval and Carrillo-Hidalgo admitted that they are citizens and nationals of Mexico whose only connection with the Pembina Nation is the documentation provided to them by defendant. (Govt Exhibit 41 at 6-7, 11; Govt Exhibit 42 at 5-8; SER 14-15, 19 and 114-117.) Silva admitted that she met defendant in California in April 2006, and received Pembina Nation documents from him in May and June of 2006. (Govt Exhibit 41 at 48, 61-62; SER 25, 38-39.) Carrillo admitted that he met defendant in Las Vegas in August 2006, and received Pembina Nation documents from defendant on September 10, 2006. (Govt Exhibit 42 at 9-10, 18-20; SER 118-119, 127-129.) The documents are therefore fraudulent on their face because both sets of documents were purportedly notarized on July 28,

2004, two years before defendant even met Silva and Carrillo. (Govt Exhibits 1-4; ER 144-147.)

Regardless of the validity of defendant's claim to sovereignty as a member in the Pembina Nation, federal courts have uniformly rejected the suggestion that membership in another sovereign nation relieves one of criminal liability. *See, e.g., United States v. Jagim*, 978 F.2d 1032, 1036 (8th Cir. 1992) (finding "completely without merit" and "patently frivolous" defendant's argument that he could not be punished under federal laws because he was a "sovereign citizen of the Republic of Idaho"); *United States v. Hilgeford*, 7 F.3d 1340, 1342 (7th Cir. 1993) (finding although defendant might hold sincere belief that he is a citizen of "mythical Indiana State Republic," and an alien beyond jurisdictional reach of federal courts, such belief, "of course, is incorrect").

Federal laws of general applicability are presumed to apply with equal force to Indians. *Baker*, 63 F.3d at 1485 (finding Contraband Cigarette Trafficking Act applies to Indians). There are only three exceptions to this general principle:

> A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches "exclusive rights of self-governance in purely intramural matters;" (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties;" or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations."

Donavan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1115 (9th Cir. 1985), quoting *United States v. Farris*, 624 F.2d 890, 893 (9th Cir. 1980).

Defendant bases his argument on an 1863 Treaty entered into between the Pembina Nation and the United States, a copy of which he attached to his motion. (CR 64; ER 26 at Exhibits.) After careful review, the district court found that "[t]he Treaty says nothing about the ability of tribal members to cross the borders of the United States freely and without compliance with United States law... [and] nothing in the Treaty suggests that tribal members are immune from liability for post-Treaty crimes committed off the reservation." (CR 71; ER 105.) The federal immigration statutes therefore do not involve self-governance of the Pembina Nation, or any rights guaranteed to it by treaty. The Pembina Nation is not recognized by the federal government, and has no reservation. Accordingly, none of the above exceptions apply.

The law in this Circuit clearly allows Indians to be charged under federal criminal statutes of nationwide applicability - laws that make actions criminal wherever committed - if the charge is not otherwise affected by the federal enclave law (e.g., the Major Crimes Act, 18 U.S.C. §1153), or if Indians have not been particularly excluded, either expressly or impliedly, from the statutes' application. *United States v. Begay*, 42 F.3d 486, 498-500 (9th Cir. 1994). There is no evidence

that Pembina Indians have been excluded, either expressly or impliedly, from application of the immigration statutes, nor does defendant claim that such is the case.

Aboriginal title refers to the right of the original inhabitants of the United States to use and occupy their historical territory. It exists at the pleasure of the United States, and may be extinguished "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy or otherwise . . ." *Confederated Tribes of Chehalis Indian Reservation v. State of Washington*, 96 F.3d 334, 341 (9th Cir. 1996). The United States has the power to extinguish Indian title: "the power of Congress in that regard is supreme." *United States v. Kabinto*, 456 F.2d 1087, 1091 (9th Cir. 1972).

"Whether or not an aboriginal right exists would be a question of fact to establish *continuous* exercise of the right since before pre-treaty times." *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176, 180 n.2 (9th Cir. 1981) (emphasis added). Whatever "aboriginal right of free passage" claimed by defendant that may have existed has evidently not been continuously exercised. In fact, as the Eighth Circuit noted in *Delorme v. United States*, 354 F.3d 810 (8th Cir. 2004), in 1951 lineal descendants of the Pembina Indians were no longer even organized as a band or

tribe.[7] *Delorme*, 354 F.3d at 812 (finding plaintiff failed to establish standing as representative of descendants of previously existing Little Shell Band of Pembina Indians to challenge distribution of monetary awards under the Indian Claims Commission Act).

Congress possesses authority over immigration policy as "an incident of sovereignty." *United States v. Hernandez-Guerrero*, 147 F.3d 1075, 1076 (9th Cir. 1998). "Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Id.* Contrary to defendant's argument, the government finds no basis to solely exclude the disputed Pembina Nation Indians from federal immigration laws, and the district court properly denied defendant's motion to dismiss for lack of jurisdiction.

[7]Pembina ancestry apparently still remains disputed even among Native Americans themselves. *See Delorme*, 354 F.3d at 814 n.6 ("At least two groups currently claim to be Little Shell Bands descended from the Pembina led by Chief Little Shell in the late nineteenth century:" the Little Shell Band of Chippewa Indians of North Dakota and the Little Shell Tribe of Chippewa Indians of Montana, neither of which has federal recognition.).

B. Defendant's Objection to the Jury Instructions by the District Court is Waived.

1. Standard of Review.

The general rule in this Circuit is that an issue raised for the first time on appeal is not considered by this Court. *United States v. Reyes*, 8 F.3d 1379, 1390 (9th Cir. 1993). This Court has permitted only narrow and discretionary exceptions to this general rule: (1) when exceptional circumstances exist which excuse the failure to raise the issue in the trial court; (2) when a new issue arises while appeal is pending because of a change in the law; and (3) when the issue is purely one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court. *United States v. Robertson*, 52 F.3d 789, 791 (9th Cir. 1994).

This Court may exercise its discretion to grant relief on an issue of error raised for the first time on appeal only if the defendant proves that (1) there was error; (2) the error was plain; (3) the error affected substantial rights; and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); Fed. R. Crim. P. 52(b).

2. Analysis.

Defendant argues that in instructing the jury on the elements of Count 2, the district court plainly erred by including the following language:

> 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 113.) (Op. Br. at 28-29.) Defendant argues that this jury instruction was contrary to American Indian aboriginal law relating to the right of free passage. (Op. Br. at 30.) However, as defendant concedes, defense counsel not only had no objection, butspecifically agreed that the instruction "comported with Ninth Circuit law." (Op. Br. at 30.) Accordingly, plain error review does not apply; but rather the objection has been waived by defense counsel's agreement. *United States v. Gaither*, 245 F.3d 1064, 1069 (9th Cir. 2001) (challenge to sentencing enhancement waived by defense counsel's agreement with PSR regarding obstruction of justice); accord, *United States v. Visman*, 919 F.2d 1390, 1393 (9th Cir. 1990).

C. The District Court Properly Sentenced Defendant on Count One as a Class A Misdemeanor Offense, Rather than a Class E Felony Offense.

1. Standard of Review.

The general rule in this Circuit is that an issue raised for the first time on appeal is not considered by this Court. *United States v. Reyes*, 8 F.3d 1379, 1390 (9th Cir. 1993). This Court has permitted only narrow and discretionary exceptions to this general rule: (1) when exceptional circumstances exist which excuse the failure to raise the issue in the trial court; (2) when a new issue arises while appeal is pending because of a change in the law; and (3) when the issue is purely one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court. *United States v. Robertson*, 52 F.3d 789, 791 (9th Cir. 1994).

This Court may exercise its discretion to grant relief on an issue of error raised for the first time on appeal only if the defendant proves that (1) there was error; (2) the error was plain; (3) the error affected substantial rights; and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); Fed. R. Crim. P. 52(b).

2. Analysis.

Defendant's last claim is that the district court plainly erred in sentencing him on Count 1 as a Class E felony offense, instead of a Class A misdemeanor. (Op. Br.

at 32.)[8] The written judgment erroneously identifies Count 1 as "a Class E Felony offense." (CR 95; ER 140.) However, as defendant concedes, the district court did not refer to his conviction on Count 1 as a felony in pronouncing the sentence, and it was the district court that specifically noted during consideration of jury instructions that Count 1 had been reduced to a misdemeanor in the Superceding Indictment. (Op. Br. at 32-33.) Defendant was also sentenced to eight months confinement on Count 1, which is well within the one-year statutory limitation for a Class A misdemeanor.

Accordingly, there is no basis to reject the general presumption that the district court knew the law and followed it in making the sentencing decision. *United States v. Carty*, __ F.3d __, 2008 WL 763770*5 (9th Cir. 2008) (citing *Walton v. Arizona*, 497 U.S. 639, 653 (1990) (judges are presumed to know the law and follow it even if they don't "tick off each §3553 factor" to show it has been considered). The error in the written judgement appears to be simply a clerical mistake. Clerical mistakes in judgments or orders arising from oversight or omission may be corrected by the district court "at any time" under Fed. R. Crim. P. 36. "Clerical mistakes" include errors made by judges as well as ministerial employees. *Blanton v. Anzalone*,

[8]Defendant presents no challenge to the sentence on Count 2 which was properly designated a felony.

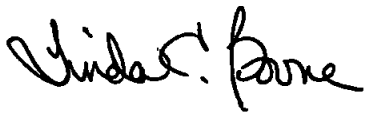
813 F.2d 1574, 1577 (9th Cir. 1987). This Court should therefore remand this case to the district court for the limited purpose of correcting the written judgment to reflect defendant's conviction on Count 1 as a Class A misdemeanor offense, rather than a Class E felony.

VIII. CONCLUSION

This Court should remand the case to the district court for the limited purpose of correcting the written judgment to reflect defendant's conviction on Count 1 as a Class A misdemeanor offense, rather than a Class E felony. For all of the foregoing reasons, in all other respects, the judgment of conviction and sentence of defendant should be affirmed.

DIANE J. HUMETEWA
United States Attorney
District of Arizona

JOHN R. LOPEZ IV
Deputy Appellate Chief



LINDA C. BOONE
Assistant U.S. Attorney

IX. STATEMENT OF RELATED CASES

There are no related cases pending to the knowledge of counsel.

X. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 07-10379

I certify that: (check appropriate option(s))

___ 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

- ☐ Proportionately spaced, has a typeface of 14 points or more and contains _____ 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), or is

- ☐ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or ____ lines of 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).

X___ 2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

- X This brief complies with Fed. R. App. P. 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;

- ☐ This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

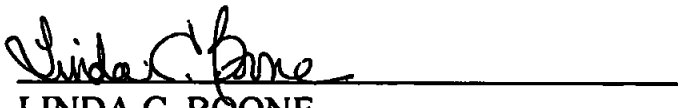
- ☐ Proportionately spaced, has a typeface of 14 points or more and contains _____ words, or is

- ☐ Monospaced, has 10.5 or fewer characters per inch and contains _____ pages or _____ words or _____ lines of text.

May 2, 2008 — Signature of Attorney

XI. CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2008, I caused the Brief of Appellee to be served by causing two copies of the brief to be mailed, postage prepaid, to Nancy Hinchcliffe, 11 West Jefferson, Suite 2, Phoenix, Arizona 85003-2302, counsel for defendant-appellant.



LINDA C. BOONE
Assistant U.S. Attorney

ADDENDUM
TO BRIEF
OF APPELLEE

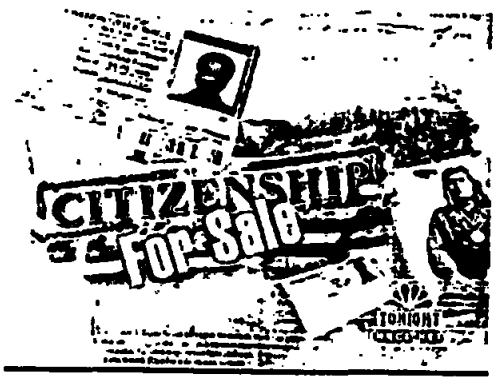
nbc6.net

Citizenship For Sale -- Part 1

POSTED: 6:03 pm EST October 31, 2006
UPDATED: 5:17 am EDT June 14, 2007

Airdate: Nov. 2, 2006
By Jeff Burnside and Scott A. Zamost
NBC 6 Investigative Team

More



Video: Citizenship For Sale Part I

An NBC 6 investigation has uncovered a multi-million-dollar scheme in South Florida promising immigrants from across the country a way to enter and stay in the United States legally. It's done simply by paying to become, of all things, an American Indian. NBC 6 went undercover to expose "Citizenship For Sale."

Buying your way into the United States? Our undercover cameras capture the sales pitch.

"So, if somebody's here, they're not legal. They're not legal here, but they get this, they become legal?" NBC 6 asked a worker inside the office selling memberships.

"Correct," she said.

The four-month investigation found thousands of desperate immigrants from around the country flocking to a Tamarac strip mall, money in hand, ready to pay $1,500.

"The $1,500? What is that?" NBC 6 asked.

"That's a membership," the office worker said.

It's a membership in the Pembina Indian Nation -- a little-known North Dakota tribe not recognized by the U.S. government.

The promise? If you're an American Indian, you can enter, stay and work in the United States.

"This is one of our Pembina members," the office worker told NBC 6 during an undercover videotaping. "They get a certificate. They get an ID card and an international drivers' license. With this ID card, you don't pay taxes."

"You're working legally in the country?" NBC 6 asked.

"Yeah," the office worker said.

Immigration officials say that's not true.

"It's unbelievable, really," said Zachary Mann, Customs and Border Protection Special Agent spokesman. "You can't buy your way into the United States."

"I don't want to be illegal. I just want to feel free," said Patti, who told her story to NBC 6.

Patti, who asked that she not be identified, is here on a tourist visa from Colombia.

"I thought I would be able to get my papers. I would be able to work here, to stay legal," she said.

Patti discovered the ID was worthless. NBC 6 followed her to get her money back to another office part of a recruiting network where she and others paid middlemen $350 just to take them to where the Pembina IDs are sold.

"They'll give you an ID, a driver's license," the middleman told NBC 6 during the undercover visit.

When we went back, the middleman, Reginald Thabuteau, admitted he took the money, but now feels duped himself.

"Because I find out it's no good," he told NBC 6's Jeff Burnside.

"And you paid the $1,500?" Burnside asked.

"Yeah! 15 for me."

"You paid and became a member of the Pembina tribe?"

"Exactly."

Immigration advocate Cheryl Little says some of her clients got duped, paying up to $5,000.

"Innocent, vulnerable immigrants continue to be ripped off, continue to be duped, and walk around thinking they are legal residents of the United States when in fact they are not," Little told NBC 6.

"I'm the Rev. Doctor Audie Watson. I'm the attorney for the Pembina Nation," Watson says on a videotape prepared for clients.

NBC 6 discovered the man who runs the operation is not an attorney or a doctor. And he has no divinity training.

Here is what he tells clients on a videotape.

"If you have been ordered for deportation, or you suspect that they have issued a warrant for any reason, as soon as you get an ID card, I will write to the immigration department and tell them they no longer have jurisdiction over you," he said on the videotape.

"If you've purchased an identification card or any type of ID that someone has claimed will allow you to enter the United States, live here and work here, you've been ripped off," Mann said.

NBC 6 has confirmed at least one recent case where someone trying to use a Pembina ID card to enter the U.S. was thrown in jail and deported.

NBC 6 will talk to Watson and travel to North Dakota to hear how the real Pembina Indian chief reacts in part 2 of "Citizenship For Sale."

Links:

- Pembina Nation Little Shell Band of North America Led by Chief Sitting Golden Eagle
- Tribal Faction Led by Ron Delorme
- Third Tribal Faction
- Florida Immigration Advocacy Center

If you have purchased a Pembina membership, please e-mail: nbc6.investigates@nbc6.net

nbc6.net

Citizenship For Sale -- Part 2

POSTED: 4:04 pm EST November 3, 2006
UPDATED: 7:53 am EST November 6, 2006

Airdate: Nov. 3, 2006
By Jeff Burnside and Scott Zamost
NBC 6 Investigative Team

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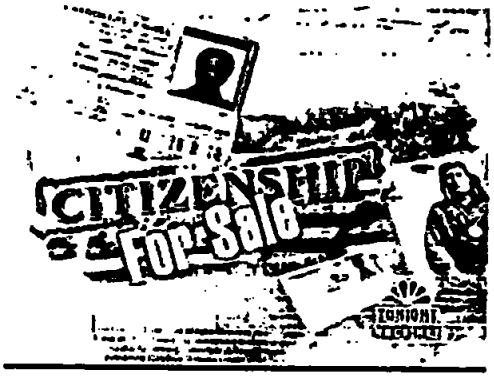

NBC 6 reveals the man behind a multi-million-dollar scheme to help thousands of illegal aliens into the United States.

Video: Citizenship For Sale Part 2

In our four-month investigation, NBC 6's Jeff Burnside uncovers what's behind the scheme and goes directly to a Native American tribe at the center of the controversy of "Citizenship For Sale."

"They may have a tendency to not believe that this is legitimate," Audie Watson said on a videotape.

Who is the man selling the impossible?

"Will this allow us to work? Legally? In this country?" NBC 6 asked when it went undercover to Watson's operation in Tamarac.

Our undercover investigation captures his staff offering $1,500 memberships to an obscure Indian tribe called the Pembinas.

Day after day, desperate immigrants from South Florida and throughout America travel to a Tamarac storefront, believing they can live and work in the U.S. with free health care and pay no taxes at all.

"This is where it starts," Watson told NBC 6 on a tour of his office.

Watson says it came to him in a vision.

"If living, working and traveling in the United States is the American Dream, then that's what we're trying to offer to them," Watson told NBC 6.

Watson, who's white, joined the tribe. He claims old treaties give Pembina Indians enormous rights, including free passage into the U.S. So selling memberships transfers those rights to anyone.

Does the U.S. government agree?

"I don't know. I haven't talked to them," Watson said.

"You haven't talked to the federal government about what you're doing?" Burnside asked.

"No," Watson said.

Watson has talked to a judge, though. He's on probation for a felony grand theft charge in an unrelated pyramid scheme.

Our investigation found Watson's new moneymaker is attracting thousands of people. He says he sells 45 memberships each week at $1,500 each.

If true, his non-profit one-man company "Universal Service Dedicated to God" earns $3.5 million a year.

"Why am I getting this third-degree about money?" Watson asked.

"You're taking..." Burnside said.

"We're not supplying the terrorists with any money."

"And where does it go?"

"I just told you. It goes to a lot of different places."

"For example?"

"Pembina Nation, for one."

So we traveled to the hills of North Dakota -- Pembina Indian ancestral territory -- where we found a different story. Audie Watson does not speak the complete truth.

"What he's doing is not right for the people out there," said Chief Lawrence Henry.

Sitting Golden Eagle -- Chief Lawrence Henry -- oversees the Pembina Nation Little Shell Band of North America.

The Pembinas believe they still own millions of acres in North Dakota and Canada. They're not recognized by the U.S. government and so have no reservation.

The chief says Audie Watson was kicked out of the tribe.

"He's taking advantage of poor people, bottom line," Chief Henry told NBC 6. "That's totally against our grain. Even the way we think, we don't think like that."

Pembina officials say former Chief Ron Delorme gave Watson the OK to sell memberships, and was getting a cut of Watson's money as chief until he, too, was kicked out over the scheme.

Still, Watson, continues to sell memberships to those with non-Indian blood.

"Blood has nothing to do with it," Watson said.

"Blood has nothing to do with it?" Burnside asked.

"No."

Other Indian leaders vehemently disagree.

"That's criminal," said Stuart LaFountain, a leader of the Chippewa Tribe. "You're not a part of our tribe if you're not a direct descendant."

"Aren't you in fact using this as a ruse to take money from people who are vulnerable?" Burnside asked Watson.

"Absolutely not."

NBC 6 has confirmed that state and federal authorities are now investigating Audie Watson's operation.

Ron Delorme referred us to a tribal leader, who says Watson was never authorized to sell memberships, and the tribe has never received money from him.

Links:

- Pembina Nation Little Shell Band of North America Led by Chief Sitting Golden Eagle
- Tribal Faction Led by Ron Delorme
- Third Tribal Faction
- Florida Immigration Advocacy Center

If you have purchased a Pembina membership, please e-mail: nbc6.investigates@nbc6.net

Previous Stories:

- November 3, 2006: Citizenship For Sale -- Part 1