

***IN THE DISTRICT COURT OF THE UNITED STATES***

***For the Western District of New York***

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**November 2010 Grand Jury  
(Impaneled 11/5/10)**

**THE UNITED STATES OF AMERICA**

**-vs-**

**INDICTMENT**

**BERGAL L. MITCHELL, III**

**Violations:**

Title 18, United States Code,  
Sections 371, 666(a)(1)(B), 1001(a)(2),  
1168(b), 1343, 1957(a), and 2

(13 Counts and 2 Forfeiture  
Allegations)

**INTRODUCTORY ALLEGATIONS**

**The Grand Jury Charges That:**

1. At all times material to Counts 1 through 4 of this Indictment, the Seneca Nation of Indians (SNI) was a sovereign Indian Nation recognized under the laws of the United States. The legislative authority of the Seneca people was vested in the SNI Tribal Council.

2. At all times material to Counts 1 through 4 of this Indictment, the Seneca Gaming Corporation (SGC) was a corporation which was wholly-owned by the SNI and established by the charter of the SNI for the purpose of developing, financing, operating, and conducting the business of SNI gaming facilities.

3. In or about December of 2004, the SNI, desiring to establish a separate legal entity for the purpose of developing, financing, operating, and conducting the business of an SNI gaming facility to be established on SNI territory within Niagara County, New York, established the Seneca Niagara Falls Gaming Corporation (SNFGC) which was a wholly owned subsidiary of the SGC and subject to the control, operation, and management of the SGC. According to their Charters, both the SGC and the SNFGC constitute governmental instrumentalities of the SNI.

4. Between November of 2000 and November of 2004, defendant **BERGAL L. MITCHELL, III** (hereinafter **BERGAL MITCHELL**) was a member of the SNI Tribal Council. Beginning in approximately August of 2002, defendant **BERGAL MITCHELL** became a member of the Board of Directors of the SGC. Beginning in or about December of 2004, defendant **BERGAL MITCHELL** also became vice chairman of the Board of Directors of the SGC. Both in his role as a member of the Board of the SGC and as Vice Chairman of the Board of Directors of the

SGC, defendant **BERGAL MITCHELL**'s duties and responsibilities included promoting the business interests of the SGC and the SNFGC. Both the SGC's and the SNFGC's Charters prohibited "any person with an economic interest in any of the Company's activities" from serving as Board members and expressly provided that, "[b]oard members shall constitute 'public officials' for purposes of the Nation Ethics Law."

5. According to both the SGC and the SNFGC Charters, as a member of the Board of Directors of the SGC, defendant **BERGAL MITCHELL**'s authority included the authority "to purchase, receive, take by grant, devise, bequest or otherwise, lease or otherwise acquire, own, hold, improve, employ, use, and otherwise enjoy all powers necessary or appropriate to deal in and with, real and personal property, or an interest in real or personal property, wherever situated; provided, that purchases of real property and significant expenditures of personal property [were] subject to the approval of [Tribal] Council."

6. In April of 2002, Michael J. Dowd, Esq. (hereinafter "Dowd"), an attorney representing the owners of certain real property in the Town of Lewiston, New York, incorporated Old Creek Development, LLC (OCD), in order to facilitate the sale of such property for the purpose of the development of a golf course.

7. Since in or before sometime in 2004, Timothy J. Toohey (hereinafter "Toohey") was a principal in an entity variously known as Western New York Gaming Associates, LLC or Western New York Golf Associates, LLC (WNYGA, LLC).

8. Thereafter, Toohey approached defendant **BERGAL MITCHELL**, as agent of the SNI, SGC and SNFGC, and inquired whether the defendant **BERGAL MITCHELL** was interested in a deal in which the SNI would acquire certain lands in the Town of Lewiston in order to construct a golf course as an amenity to the Seneca Niagara Casino. Defendant **BERGAL MITCHELL** advised Toohey that he was interested in the proposal.

9. Following his conversation with defendant **BERGAL MITCHELL**, Toohey, on or about July 8, 2004, contacted Dowd and advised Dowd, among other things, that "[a] source with authority within the Seneca Nation has authorized me to contact you regarding the Old Creek Development golf course project. Before we proceed, confirm to me please that any discussions will be off the record, subject to mutual non-disclosure (except for those with a need to know)."

10. In early July of 2004, Toohey advised defendant **BERGAL MITCHELL** that OCD was looking to get \$1.2 million for the land that

it was offering for sale. At that point, Toohey envisioned that the transaction would be completed in two parts, with OCD transferring the property to Toohey's LLC, WNYGA, for \$1.2 million, and WNYGA, in turn, selling it to the SNI for an increased price, such that Toohey himself could be compensated for his role in the transaction.

11. During July or August of 2004, Toohey met with defendant **BERGAL MITCHELL**. During that meeting, defendant **BERGAL MITCHELL** and Toohey discussed who would receive what portion of the proceeds of the sale. Defendant **BERGAL MITCHELL**, who was aware that Toohey would be adding his fee to the \$1.2 million purchase price for the land, advised Toohey that he (defendant **BERGAL MITCHELL**) expected to get paid out of Toohey's cut.

12. On or about August 25, 2004, in response to Dowd's suggestion that any "consulting fee or finders fee" that Toohey was looking to collect would have to come from the buyer, Toohey advised Dowd by e-mail that, "[a]t this point, I don't know if I could satisfy that requirement and accomplish the objective of my LLC." Referring to defendant **BERGAL MITCHELL**, Toohey stated that the "current thinking" of those working on the deal with him was that, "they have the ability to sell the idea to the Nation and that ability may be unique to them. It is that uniqueness that

create's [sic] value, not as a finder's fee or commission but as having sufficient influence to bring about the deal."

13. On or about August 26, 2004, Toohey added to his electronic message to Dowd from the prior day, by further advising Dowd, and once again referring to defendant **BERGAL MITCHELL**, that, "on[e] of the principals of WNY LLC [sic] is a Seneca. He will not permit me or anyone with whom I am associated to seek a direct contract with the casino. If this were to be attempted he would take immediate steps to quash the deal. He is not being heavy-handed. He has an interest to protect and has the power to do so. If we can't work this out he will walk away and go to the next thing. I likewise do not wish to sound heavy handed but need to clarify that at no time did I intend to convey [or] represent to you that I had any 'authority' from the casino to make a deal for that entity. I have associates, including the person referenced above, who believe they can bring about the transaction as I have laid it out. Their interests, in all candor, are not exclusively to get a golf property for the casino spa hotel. They are driven by more capitalistic tendencies."

14. On more than one occasion during the Summer and Fall of 2004, defendant **BERGAL MITCHELL** made presentations to the Economic Development Subcommittee of the SNI Tribal Council in support of

the Lewiston Golf Course Project. During his presentations, defendant **BERGAL MITCHELL** advocated on behalf of the benefits of acquiring the land and developing a golf course. While defendant **BERGAL MITCHELL** had originally suggested a slightly lower price, defendant **BERGAL MITCHELL** ultimately told the subcommittee that the price for acquiring the land was \$2.1 million.

15. On or about January 25, 2005, defendant **BERGAL MITCHELL** opened an account in the name of Barry S. Halftown d/b/a SMOKE-SPIRITS.COM at Community Bank, N.A. Gowanda, New York ("Halftown nominee account"), with a deposit of \$100.

16. In or about February of 2005, during a pre-Council session held in advance of a regular session of the SNI Tribal Council, defendant **BERGAL MITCHELL** again made a presentation in support of the Lewiston Golf Course Project.

17. On or before February 19, 2005, Toohey, following consultation with defendant **BERGAL MITCHELL**, prepared and provided to defendant **BERGAL MITCHELL** a draft of the resolution which was to be presented to the SNI Tribal Council.

18. On or about February 19, 2005, the SNI Tribal Council considered a resolution which indicated that WNYGA, LLC.,

identified as the proposed seller of 200 acres of land in the Town of Lewiston, had offered such parcel for sale to the SNFGC. Such resolution further indicated that "negotiations h[ad] resulted in a proposed purchase price not to exceed \$2.1 million."

19. On or about February 19, 2005, the SNI Tribal Council passed a resolution "authoriz[ing] the SNFGC to acquire the said 200 acres upon terms consistent with this resolution and upon the completion of such due diligence as required by SNFGC."

20. Thereafter, further negotiations regarding the mechanics of the sales contract(s), including the role, if any, that OCD and/or WNYGA would play in the transfer of title of the property to the SNI were conducted by Dowd, Toohey, and the defendant **BERGAL MITCHELL**.

21. Between in or about late April and early May of 2005, a dispute arose after Dowd learned that the SNI, through defendant **BERGAL MITCHELL**, were unwilling to allow Dowd to retain rights to develop housing as part of the project.

22. On May 2, 2005, Dowd sent a letter to Barry Snyder, then-President of the SNI, which indicated that, "[a] mutual acquaintance, Timothy Toohey, has made me aware that the Seneca



Nation of Indians has already inspected the site and is interested in acquiring the property to build a resort style golf course. I have been presented with a proposal, purportedly from the Seneca Nation, which fails to address specific requirements related to my company's plans for residential housing integrated within the golf course. I am confident, however, that this hurdle can be overcome through direct negotiations. \* \* \* I have no contract or other arrangement with Mr. Toohey requiring his involvement and if the Seneca Nation remains interested I request that you or a member of the Tribal Council, familiar with this proposal, contact me."

23. On or about May 5, 2005, Dowd, having previously been advised by Toohey that defendant **BERGAL MITCHELL** was willing to talk with him, met with defendant **BERGAL MITCHELL** in order to discuss Dowd's dissatisfaction with defendant **BERGAL MITCHELL's** refusal to allow him to retain the development rights for the property. During that meeting, defendant **BERGAL MITCHELL** advised Dowd that, rather than doing a two-step transaction in which the property would be sold by OCD to WNYGA, LLC, which, in turn, would sell it to the SNI, the transaction would now occur as a direct \$2.1 million dollar deal between OCD and the SNI. Defendant **BERGAL MITCHELL** further advised Dowd: (a) that the SNI would pay \$1.4 million for the land (which was \$200,000 more than the OCD was originally asking so that Dowd could receive \$200,000 in exchange

for his agreement to forego his housing development rights); (b) that Dowd would enter into a consulting agreement to pay Toohey \$700,000; and (c) that Dowd would have to send a letter to Barry Snyder advising Snyder that he and defendant **BERGAL MITCHELL** had met and that defendant **BERGAL MITCHELL** had fixed the problem.

24. On or about May 6, 2005, Dowd sent Toohey an e-mail in which he advised Toohey that he had "met with Bergal and resolved my problems with the contract." Dowd, after indicating that he was going to forward the purchase and sale agreement to defendant **BERGAL MITCHELL**, told Toohey that he "would agree to pay a consulting fee to WNYGA, LLC in the amount of \$700,000.00 and will require a consulting contract as soon as possible."

25. On or about May 6, 2005, Dowd sent defendant **BERGAL MITCHELL** an e-mail to which he attached a revised purchase and sale agreement contract which provided for OCD to sell 200 acres of land to the SNI for a price of \$2.1 million. Dowd also forwarded a letter that he drafted at the request of defendant **BERGAL MITCHELL** which was to be sent to SNI President Barry Snyder advising him that after meeting with defendant **BERGAL MITCHELL**, he and defendant **BERGAL MITCHELL** had successfully "resolved all outstanding issues related to the proposed sale of the golf course site in Lewiston, New York."

26. Thereafter, also on May 6, 2005, defendant **BERGAL MITCHELL** reviewed such letter prior to it being sent, and after doing so, defendant **BERGAL MITCHELL** sent Dowd an e-mail wherein the defendant stated "[t]hat letter is perfect I will forward the contract."

27. On or about May 9, 2005, following additional review by Toohey, Dowd's letter, prepared at the request of defendant **BERGAL MITCHELL**, was sent to SNI President Snyder.

28. On or about June 14, 2005, Barry Snyder, acting in his capacity as President of the SNI (as purchaser), and Dowd, acting on behalf of OCD (as seller), fully executed an agreement to purchase and sell 200 acres of unimproved land in Niagara County for \$2.1 million.

29. On or about June 16, 2005, an Interest on Lawyer Account ("IOLA") and a business account ("business account"), were both opened at HSBC Bank in the name of defendant **BERGAL MITCHELL's** wife, Rachel Mitchell; the latter account was opened with a deposit of \$200.

30. Between June of 2005 and February of 2006, defendant **BERGAL MITCHELL** had discussions with Dowd and Toohey regarding how

much each of them would receive at the time of closing. The defendant **BERGAL MITCHELL** directed that the amount of money to be paid under Toohey's consulting agreement be reduced first from \$700,000 to \$500,000. Prior to closing, defendant **BERGAL MITCHELL** also instructed Dowd that since Toohey owed defendant **BERGAL MITCHELL** \$50,000, the amount paid under the consulting agreement should be further reduced to \$450,000. The defendant **BERGAL MITCHELL** further directed Dowd to include that money as part of the \$90,000 that defendant **BERGAL MITCHELL** was having Dowd pay to his wife Rachel Mitchell so that she could "represent" Dowd in his future efforts to construct the golf course clubhouse.

31. Between on or about February 10, 2006, and on or about February 15, 2006, the SNFGC disbursed approximately \$2.1 million (total funds) to Trinity Title and Abstract Corp. ("Trinity").

32. On or about February 15, 2006, OCD transferred title to approximately 251.18 acres of land located in the Town of Lewiston, New York, to SNFGC.

33. On or about February 16, 2006, Trinity disbursed approximately \$1,860,084.90 to the IOLA account maintained by Dowd ("Dowd IOLA account").

34. On or about February 17, 2006, approximately \$248,000 was disbursed from the Dowd IOLA account to the Halftown nominee account, and an additional \$90,000 was disbursed from the Dowd IOLA account to the Rachel Mitchell IOLA Account. Thereafter, Rachel Mitchell transferred the aforesaid \$90,000 to the Rachel Mitchell business account.

35. Between on or about February 17, 2006, and on or about August 7, 2006, defendant **BERGAL MITCHELL** and Rachel Mitchell spent the aforementioned proceeds of \$338,000 in order to purchase personal assets, in order to pay personal expenses, and in order to loan money to third parties.

36. At no time prior to receiving and spending the \$338,000 that he and his wife obtained from the monies expended by the SNI and its subsidiaries to acquire the property, did defendant **BERGAL MITCHELL**, notwithstanding the fact that he was a member of the Board of Directors of both the SGC and the SNFGC (and vice chairman of the Board of Directors of the SGC since about December of 2004), ever disclose his personal financial interest in such transaction to the SNI, the SGC, or the SNFGC.

COUNT 1

**(Conspiracy to Violate Sections 1163, 666(a)(1)(B), 1168(b), and 1343 of Title 18 of the United States Code)**

**The Grand Jury Further Charges That:**

1. The Introductory Allegations, set forth in paragraphs 1 through 36 above, are incorporated by reference as if fully set forth herein.

2. Between sometime in 2004 and in or about August of 2006, the exact dates being unknown, in the Western District of New York, and elsewhere, the defendant, **BERGAL L. MITCHELL, III**, ("**BERGAL MITCHELL**"), did knowingly, willfully, and unlawfully combine, conspire, and agree together with Timothy J. Toohey, and with others, both known and unknown, to commit the following offenses against the United States:

(a) to violate Section 1163 of Title 18 of the United States Code, that is, embezzling, stealing, knowingly converting to the use of another, willfully misapplying, and willfully permitting to be misapplied, monies, funds, credits and assets and other property, in excess of the sum of \$1,000, namely, approximately \$338,000 belonging to the SNI, SGC, and the SNFGC, the same being Indian tribal organizations as that term is defined in Title 18, United States Code, Section 1163;

(b) to violate Section 666(a)(1)(B) of Title 18 of the United States Code, that is, while defendant **BERGAL MITCHELL** was an agent of organizations and agencies of an Indian tribal government, that is, the SGC and the SNFGC of the SNI, a government that in the one year period immediately preceding February 17, 2006, received Federal benefits in excess of \$10,000 in grants, subsidies, and other forms of Federal assistance, corruptly soliciting and demanding, and accepting and agreeing to accept, a thing of value of \$5,000 or more, that is, approximately \$338,000 arising from a land transaction between OCD and the SNI and its organizations and agencies, intending to be influenced and rewarded in connection with such transaction;

(c) to violate Section 1168(b) of Title 18 of the United States Code, in that, defendant **BERGAL MITCHELL**, using his position as an officer and employee of the SGC and the SNFGC, the same being gaming establishments operated by the SNI pursuant to an ordinance and resolution of the National Indian Gaming Commission, did embezzle, abstract, purloin, willfully misapply, and take and carry away with intent to steal, moneys, funds, assets and other property of the SGC and the SNFGC of a value in excess of \$1,000, that is, approximately \$338,000 in funds; and

(d) to violate Section 1343 of Title 18 of the United States Code by devising, and intending to devise, a scheme and artifice to defraud the SNI, the SGC, and the SNFGC and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, and by transmitting and causing to be transmitted by means of wire communication in interstate commerce, writings, signs, and signals, that is a wire transfer of money, for purpose of executing such scheme and artifice.

**Overt Acts:**

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed by the defendant **BERGAL MITCHELL** and others:

1. As set forth in paragraph 9 of the Introductory Allegations, Toohey, on or about July 8, 2004, sent a facsimile transmission to Dowd.

2. As set forth in paragraph 11 of the Introductory Allegations, defendant **BERGAL MITCHELL**, during July or August of 2004, had a meeting with Toohey.



3. As set forth in paragraph 14 of the Introductory Allegations, defendant **BERGAL MITCHELL**, on more than one occasion during the Summer and Fall of 2004, made presentations to the Economic Development Subcommittee of the SNI Tribal Council.

4. As set forth in paragraph 15 of the Introductory Allegations, defendant **BERGAL MITCHELL**, on or about January 25, 2005, opened a bank account.

5. As set forth in paragraph 16 of the Introductory Allegations, defendant **BERGAL MITCHELL**, in or about February of 2005, made a presentation to the SNI Tribal Council during a pre-Council session.

6. As set forth in paragraph 17 of the Introductory Allegations, Toohey, on or before February 19, 2005, prepared and provided to defendant **BERGAL MITCHELL** a draft resolution.

7. As set forth in paragraph 23 of the Introductory Allegations, sometime between on or about May 3 and on or about May 6, 2005, defendant **BERGAL MITCHELL** had a meeting with Dowd.

8. As set forth in paragraphs 25 through 27 of the Introductory Allegations, on or about May 9, 2005, Dowd, at the

request of defendant **BERGAL MITCHELL**, sent a letter to SNI President Barry Snyder.

9. As set forth in paragraph 29 of the Introductory Allegations, on or about June 16, 2005, certain bank accounts were opened.

10. As set forth in paragraph 30 of the Introductory Allegations, defendant **BERGAL MITCHELL** had conversations with Dowd and Toohey.

11. As set forth in paragraph 34 of the Introductory Allegations, on or about on or about February 17, 2006, approximately \$338,000 in proceeds of the sale of the land was paid to accounts controlled by defendant **BERGAL MITCHELL** and his wife.

12. As set forth in paragraph 35 of the Introductory Allegations, on or about February 17, 2006, and August 7, 2006, defendant **BERGAL MITCHELL** and his wife spent \$338,000 that they received from the proceeds of the sale of the golf course land by OCD to SNI.

**All in violation of Title 18, United States Code, Section 371.**

COUNT 2

**(Theft or Bribery Concerning Programs Receiving Federal Funds)**

**The Grand Jury Further Charges That:**

1. The Introductory Allegations, set forth in paragraphs 1 through 36 above, are incorporated by reference as if fully set forth herein.

2. Between on or about February 15, 2006, and on or about February 17, 2006, in the Western District of New York, defendant, **BERGAL MITCHELL**, who was then and there an agent of organizations and agencies of an Indian tribal government, that is, the SGC and the SNFGC of the SNI, a government that in the one year period immediately preceding February 17, 2006, received Federal benefits in excess of \$10,000 in grants, subsidies, and other forms of Federal assistance, did corruptly solicit and demand, and did accept and agree to accept, a thing of value of \$5,000 or more, that is, approximately \$338,000 in funds from a land transaction between OCD and the SNI and its organizations and agencies, intending to be influenced and rewarded in connection with such transaction.

**All in violation of Title 18, United States Code, Sections 666(a) (1) (B) and 2.**

COUNT 3

**(Theft by Officer or Employee of Indian Gaming Establishment)**

**The Grand Jury Further Charges That:**

1. The Introductory Allegations, set forth in paragraphs 1 through 36 above, are incorporated by reference as if fully set forth herein.

2. Between in or about early 2004 and continuing until on or about August of 2006, the exact dates being unknown, in the Western District of New York and elsewhere, the defendant **BERGAL MITCHELL**, who, at all times material to this count, was an officer and employee of the SGC and the SNFGC, gaming establishments operated by the SNI pursuant to an ordinance and resolution of the National Indian Gaming Commission, did embezzle, abstract, purloin, willfully misapply, and take and carry away with intent to steal, moneys, funds, assets and other property of the SGC and the SNFGC of a value in excess of \$1,000, that is, approximately \$338,000 in funds arising from a land transaction between OCD and the SNI.

**All in violation of Title 18, United States Code, Sections 1168(b) and 2.**

COUNT 4

(Wire Fraud)

**The Grand Jury Further Charges That:**

1. The Introductory Allegations, set forth in paragraphs 1 through 36 above, are incorporated by reference as if fully set forth herein.

2. Between in or about early 2004 and continuing until in or about August of 2006, the exact dates being unknown, in the Western District of New York, and elsewhere, the defendant **BERGAL MITCHELL**, did devise, and intend to devise, a scheme and artifice to defraud the SNI, the SGC, and the SNFGC and to obtain money and property by means of false and fraudulent pretenses, representations, and promises.

3. It was part of the scheme and artifice that defendant **BERGAL MITCHELL** purposefully concealed from the SNI, the SGC, and the SNFGC his financial interest in the sale of the golf course property, that is, the fact that he was to receive from OCD a portion of the sales proceeds being paid by the SNFGC for the property it was purchasing from OCD.

4. For the purpose of executing the scheme and artifice described above, the defendant **BERGAL MITCHELL** did, on or about February 17, 2006, cause to be transmitted by means of wire communications in interstate commerce, writings, signals and sounds, that is, a wire transfer of \$248,000, which traveled from Michael J. Dowd's IOLA account at Keybank in the Western District of New York, across state lines to Kansas City, Missouri, where it was cleared and processed, and which funds were then transmitted back into the Western District of New York where they were deposited into the Halftown nominee account at Community Bank.

**All in violation of Title 18, United States Code, Sections 1343 and 2.**

**COUNTS 5 THROUGH 12**

**(Engaging in Monetary Transactions in Property Derived From the Violations Charged in Counts Two and Four)**

**The Grand Jury Further Charges That:**

On or about the dates listed below, in the Western District of New York, the defendant **BERGAL MITCHELL** did knowingly engage, and attempt to engage, in monetary transactions, within the United States, namely, the deposit, withdrawal, transfer, and exchange of funds and monetary instruments, such monetary transactions

described in each count listed below, by, through, and to financial institutions, affecting interstate commerce, in criminally derived property of a value greater than \$10,000, such property having been derived from specified unlawful activity, namely, the violation of Section 666(a)(1)(B) of Title 18 of the United States Code set forth in COUNT 2 of this Indictment, and the violation of Section 1343 of Title 18 of the United States Code set forth in COUNT 4 of this Indictment, and knowing that the funds and monetary instruments were derived from a criminal offense:

COUNT	DATE	AMOUNT	ACCOUNT	CHECK	DESCRIPTION
5	02/17/06	\$125,000	Barry Halftown Nominee Account	1002	Exchange for Bank Check No. 4488409373 - Community Bank
6	02/21/06	\$50,333.03	Barry Halftown Nominee Account	1003	Withdrawal of \$50,333.03 via Check No. 1003
7	02/24/06	\$10,418	Barry Halftown Nominee Account	1005	Withdrawal of \$10,418 via Check No. 1005
8	02/25/06	\$10,039	Barry Halftown Nominee Account	1004	Withdrawal of \$10,039 via Check No. 1004
9	03/07/06	\$90,000	Rachel Mitchell IOLA Account	1007	Transfer to Rachel Mitchell Business Account
10	03/09/06	\$20,000	Barry Halftown Nominee Account	1011	Exchange for Bank Check No. 4488409478 - Community Bank

<b>11</b>	04/09/06	\$21,200	Rachel Mitchell Business Account	1014	Transfer of \$21,200 to IRA at State Street Bank & Trust
<b>12</b>	04/10/06	\$28,253	Rachel Mitchell Business Account	1016	Withdrawal of \$28,253 via Check No. 1016

**All in violation of Title 18, United States Code, Sections 1957(a) and 2.**

**COUNT 13**

**(Making Material False Statements to FBI Agents)**

**The Grand Jury Further Charges That:**

On or about September 10, 2008, in the Western District of New York, the defendant **BERGAL MITCHELL**, in a matter within the jurisdiction of the executive branch of the Government of the United States, did knowingly, willfully, and unlawfully make materially false, fictitious, and fraudulent statements and representations to Special Agents of the Federal Bureau of Investigation (FBI) during the course of an official investigation by the FBI, that is, the defendant, **BERGAL MITCHELL**, made the following statements and representations, each of which individually was materially false, fictitious and fraudulent in the manner set out in each specification:



(a) that, in sum and substance, he was not aware that \$248,000 was wire-transferred from Michael Dowd to Barry Halftown, when in truth and in fact, as the defendant then and there well knew, he knew of and had directed such wire transfer;

(b) that, in sum and substance, he was not aware that \$125,000 had been paid out of the Barry S. Halftown d/b/a SMOKE-SPIRITS.COM account (Halftown nominee account) to buy a house for his parents, when in truth and in fact and as the defendant then and there well knew, he delivered and caused to be delivered the \$125,000 in the form of check 1002 drawn on the Halftown nominee account at Community Bank in Gowanda, New York to Community Bank in exchange for Community Bank cashier's check no. 4488409373 and that he personally delivered Community Bank cashier's check no. 4488409373 to the sellers of the property; and

(c) that, in sum and substance, he asked Barry Halftown to loan \$23,000 to Jon Phillips, when in truth and in fact, and as the defendant then and there well knew, the defendant himself loaned and personally delivered to Jon Phillips the \$23,000 that was the subject of the agents' questions.

**All in violation of Title 18, United States Code, Section 1001(a)(2) .**

**FIRST FORFEITURE ALLEGATION**

**The Grand Jury Alleges That:**

As a result of his convictions of Counts 1, 2, 3, or 4 of this Indictment, the defendant, **BERGAL MITCHELL**, shall forfeit to the United States any property real or personal, which constitutes or is derived from proceeds traceable to the violations described in such offenses, including but not limited to the following:

**A. MONETARY AMOUNT**

The sum of not less than THREE HUNDRED THIRTY-EIGHT THOUSAND DOLLARS (\$338,000.00) United States currency;

**B. FINANCIAL ACCOUNTS**

The sum of \$21,200.00 in IRA financial account originally held at Phoenix Investment Partners c/o State Street Bank and Trust Company, account number 5808036-0 now transferred to Pacific Life & Annuity Co, Contract no. \*\*\*\*\*1413, held in the name of Rachel L. Mitchell;

**C. SUBSTITUTE ASSETS**

If any of the properties described above, as a result of any act or omission of the defendant:

1. cannot be located upon the exercise of due diligence;
2. has been transferred or sold to, or deposited with, a third party;
3. has been placed beyond the jurisdiction of the court;
4. has been substantially diminished in value; or
5. has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant (substitute assets) up to the value of \$338,000.00 or such other amount of money ordered forfeited herein, including but not limited to the following:

1. One 2007 Cougar, Whitehouse Trailer, bearing VIN: 4YDT3012472502624, registered to **BERGAL MITCHELL**; and
2. One 2010 Chevrolet Avalanche, bearing VIN: 3GNVKGE00AG105479, registered to **BERGAL MITCHELL**; and
3. One 2006 SeaDoo Boat In/Out-15', bearing VIN: CEC11597D606 registered to **BERGAL MITCHELL**; and
4. One 2009 Karavan Trailer, bearing VIN: 5KTWS171X9F552490, registered to **BERGAL MITCHELL**; and
5. One Suntracker boat 31' Aluminum, bearing VIN: BUJ01984B909, registered to **BERGAL MITCHELL** and Rachel L. Mitchell; and
6. One 2009 Trailex Trailer, bearing VIN: 4TM13NW299B001035, registered to **BERGAL MITCHELL** and Rachel L. Mitchell.

All pursuant to Title 18, United States Code, Section 981(a)(1)(C), Title 21, United States Code, Section 853(p) and Title 28, United States Code, Section 2461.

**SECOND FORFEITURE ALLEGATION**

**The Grand Jury Further Alleges That:**

As a result of his conviction of any of Counts 5 through 12 of this Indictment, the defendant, **BERGAL MITCHELL** shall forfeit to the United States any property, real or personal, involved in the offense of conviction or any property traceable, including but not limited to the following properties:

**A. MONETARY AMOUNT**

The sum of United States currency equal to the amount involved in each of Counts 5 through 12;

**B. FINANCIAL ACCOUNTS**

The sum of \$21,200.00 in IRA financial account originally held at Phoenix Investment Partners c/o State Street Bank and Trust Company, account number 5808036-0 now transferred to Pacific Life & Annuity Co, Contract no. \*\*\*\*\*1413, held in the name of Rachel L. Mitchell;

**C. SUBSTITUTE ASSETS**

If any of the properties described above, as a result of any act of omission of the defendant:

1. cannot be located upon the exercise of due diligence;
2. has been transferred or sold to, or deposited with, a third party;
3. has been placed beyond the jurisdiction of the court;
4. has been substantially diminished in value; or
5. has been commingled with other property which cannot be divided without difficulty;

the Court shall order the forfeiture of any other property of the defendants, up to the value of the above-referenced properties, including but not limited to the following assets:

1. One 2007 Cougar, Whitehouse Trailer, bearing VIN: 4YDT3012472502624, registered to **BERGAL MITCHELL**; and
2. One 2010 Chevrolet Avalanche, bearing VIN: 3GNVKGE00AG105479, registered to **BERGAL MITCHELL**; and
3. One 2006 SeaDoo Boat In/Out-15', bearing VIN: CEC11597D606 registered to **BERGAL MITCHELL**; and
4. One 2009 Karavan Trailer, bearing VIN: 5KTWS171X9F552490, registered to **BERGAL MITCHELL**; and
5. One Suntracker boat 31' Aluminum, bearing VIN: BUJ01984B909, registered to **BERGAL MITCHELL** and Rachel L. Mitchell; and

6. One 2009 Trailex Trailer, bearing VIN: 4TM13NW299B001035, registered to **BERGAL MITCHELL** and Rachel L. Mitchell.

**All pursuant to Title 18, United States Code, Section 982(a)(1) and Title 21, United States Code, Section 853(p).**

DATED: Buffalo, New York, February 9, 2011.

WILLIAM J. HOCHUL, JR.  
United States Attorney  
Western District of New York

BY: S/ANTHONY M. BRUCE  
ANTHONY M. BRUCE  
Assistant U.S. Attorney

BY: S/JAMES P. KENNEDY, JR.  
JAMES P. KENNEDY, JR.  
Assistant U.S. Attorney

A TRUE BILL:

S/FOREPERSON  
FOREPERSON