IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. **09-16282-FF**

United States of America,

Appellee,

- versus -

Audie Watson,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES

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United States v. Audie Watson, Case No. 09-16282-FF

Certificate of Interested Persons

Undersigned counsel for the United States of America hereby certifies that the following is a complete list of persons and entities who have an interest in the outcome of this case who were not included in the Certificate of Interested Persons set forth in appellant's brief:

Acosta, R. Alexander

Bardfeld, Laurence

Dicowden, Mark

DiRosa, Phillip

Ferrer, Wifredo A.

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Statement Regarding Oral Argument

The United States of America respectfully suggests that the facts and legal arguments are adequately presented in the briefs and record before this Court and that the decisional process would not be significantly aided by oral argument.

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Statement of Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Statement of the Issues

I. Whether the district court properly denied Watson's motion to dismiss the superseding indictment.

II. Whether the district court properly denied Watson's motion to suppress the evidence seized from his residence.

III. Whether the evidence was sufficient to support Watson's convictions.

IV. Whether the district court properly denied Watson's requested jury instructions.

V. Whether the district court properly sentenced Watson.

Statement of the Case

1. Course of Proceedings and Disposition in the Court Below

On August 28, 2008, a federal grand jury in the Southern District of Florida returned a five-count indictment against appellant Audie Watson and codefendants Nancy Vertus, Anibal Reyes, and Laura Reyes (DE (Docket Entry) 3). The indictment charged all of the defendants with conspiring to commit offenses against the United States by (1) using the U.S. Postal Service to execute a scheme and artifice to defraud and (2) encouraging illegal aliens to unlawfully remain in the U.S., all in violation of 18 U.S.C. § 371 (Count 1) (id.).[1] The indictment also charged all of the

[1] The indictment charged that Watson furthered the conspiracy by (continued...)

defendants with a substantive count of encouraging illegal aliens to unlawfully remain in the U.S., in violation of 8 U.S.C. §§ 1324(a)(1)(A)(iv) and (B)(i) (Count 5) (id.). Watson was charged separately with substantive counts of mail fraud, in violation of 18 U.S.C. §§ 1341 and 2 (Counts 2-4) (id.).

On March 12, 2009, the grand jury returned a 10-count superseding indictment against the same defendants (DE (Docket Entry) 96). The superseding indictment was identical to the original indictment except that it added five counts against Watson, charging him with engaging in financial transactions involving criminally derived property of a value greater than $10,000, in violation of 18 U.S.C. §§ 1957 and 2 (Counts 5-9), and renumbered the original Count 5 as Count 10.[2]

On September 14, 2009, Watson alone proceeded to a trial by jury (DE 163).[3] After four days of trial (DE 164, 165, 180, 182), the jury found him guilty of all 10 counts of the superseding indictment, as charged (DE 182, 184; DE 255 at 639-40). In addition, the jury returned special verdicts, finding that the objects of the charged

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[1] (...continued)
completing applications on behalf of illegal aliens for "adoption" into the Pembina Nation Little Shell Band, a group of American Indians (DE 3 at 2, 4).

[2] The superseding indictment also added forfeiture allegations (DE 96 at 10-12), which Watson does not contest on appeal.

[3] Before the trial, codefendants Vertus and Anibal and Laura Reyes each pleaded guilty to Count 1 of the superseding indictment (DE 142, 147, 150).

conspiracy were (1) mail fraud and (2) encouraging illegal aliens to unlawfully remain in the U.S. and that Watson had committed the latter object for commercial advantage or for private financial gain (DE 184 at 1-2; DE 255 at 639-40).

On December 8, 2009, the district court sentenced Watson to concurrent terms of 60 months of imprisonment as to Count 1, 168 months of imprisonment as to each of Counts 2-4, and 120 months of imprisonment as to each of Counts 5-10, for a total term of 168 months of imprisonment (DE 235, 236; DE 248 at 18-21). In addition, the court sentenced him to three years of supervised release and ordered him to pay restitution of $11,250 and a special assessment of $1,000 (id.).[4]

Watson filed a timely notice of appeal from his convictions and sentence (DE 237).

2. Statement of the Facts

a. The Government's Case At Trial

Background

Before 1871, American Indian tribes were recognized by treaties between the President and particular tribes (DE 252 at 225-27, 243). Since 1871, Congress has assumed the exclusive authority to recognize, or acknowledge, Indian tribes (DE 252

[4] Codefendants Vertus and Anibal and Laura Reyes each received sentences that included a term of 18 months of imprisonment (DE 212, 213, 234).

at 228, 239). With such acknowledgment, Indian tribes become eligible for federal benefits, and they are accorded certain sovereign rights (DE 252 at 231, 237, 243, 251-53).

In order to become federally acknowledged, an Indian tribe is required to meet seven criteria, which establish that the group: (1) has "external sources," such as newspaper articles, identifying it as an American Indian tribe that has existed substantially and continuously since 1900; (2) has continuously existed as a "distinct community" from 1789 to the present; (3) has maintained political authority or influence over its members from 1789 to the present; (4) has "governing documents," such as a constitution or bylaws; (5) has a membership list and is descended from a documented historical Indian tribe; (6) has members that are not already members of any federally recognized Indian tribe; and (7) has members whose relationship with the United States previously has not been terminated (DE 252 at 228-31).

Even Indian tribes that previously were recognized by treaties are required to meet these criteria to become federally acknowledged (DE 252 at 236-37). Groups that do not meet the seven criteria are not eligible to receive federal aid and cannot exercise any sovereign rights (DE 252 at 231, 237, 251-52).[5]

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[5] An Indian group that is not federally acknowledged may be recognized as a tribe by a State government (DE 252 at 244-47). Moreover, any Indian group, (continued...)

As of 2009, there were 564 federally acknowledged Indian tribes in the United States (DE 252 at 236). The Pembina Nation Little Shell Band has never been acknowledged by the federal government as an Indian tribe (DE 252 at 233-38), even though it claims to have descended from the Chippewa Indian tribe that was recognized by a treaty in 1863 (DE 252 at 237-38, 248-51).

Whatever rights any Indian group possesses, Indian groups do not have the authority to determine whether aliens are permitted to work or reside in or become citizens of the United States (DE 254 at 451-58).[6] Only the federal government, through the office of Citizenship and Immigration Services, has the authority to permit aliens to work or reside in or become citizens of this country (id.).

Watson's Actions in the Name of the Pembina Nation Little Shell Band

In about October of 2005, Rotely Demelus met Watson (DE 253 at 265-71, 275). At that time, Demelus, an alien from Haiti, was working as a driver for Pepsi Cola, and his Florida driver's license was about to expire (id.). Watson told Demelus

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[5] (...continued)
whether recognized or not by any governmental entity, has the right to determine who its members are (DE 252 at 252-52; DE 254 at 591).

[6] An alien is a person who is not a citizen or a national of the United States (DE 254 at 453). Persons of Native American ancestry who are born in the United States are U.S. citizens by birth (DE 254 at 591). Such persons may also be citizens of a federally acknowledged Indian tribe, in which case they would possess dual citizenship with both the United States and their tribe (id.).

that for a fee of $1,500, he could provide Demelus with a "license and an ID" (DE 253 at 271). Demelus paid the fee and received two documents, both containing his photograph and signature, from Watson: one document purported to be an identification card from the "Pembina Nation Little Shell Band, Department of Transportation and Public Safety"; the other document purported to be a driver's license, which stated, "Pembina Nation Little Shell Band international license issued October 10, 2005" (DE 253 at 274-76).

In connection with his employment, Demelus took the documents to his supervisor (DE 253 at 272). His supervisor told Demelus that the documents were "no good," so Demelus "threw them away [into] the garbage" (DE 253 at 273, 280-81). Thereafter, Demelus tried to get his money back from Watson, but Watson refused to give him a refund (DE 253 at 272-73).

In 2006, St. Victor Lauriston, an alien from Haiti who was unlawfully in the United States, was working as a cook for the Mandarin Hotel in Miami, Florida (DE 253 at 282, 289, 296-97, 305). Lauriston heard from a taxi driver that Watson could help him obtain "papers" that would "make things easier" for him to reside and work in the United States (DE 253 at 283-86). Thereafter, Lauriston and his sister, also a Haitian-born alien, went to Watson's place of business in Tamarac, Florida (id.).

Lauriston and his sister paid Watson a total of $6,000 (DE 253 at 287-96). In return, they each received two documents, containing their photographs and signatures: one document purported to be a "Pembina Nation Little Shell identification card"; the other document purported to be a "Pembina Nation Little Shell International Driver's Certificate of Competency" (id.). Lauriston asked Watson whether the documents would permit him to work in the United States (DE 253 at 293). Watson replied that the documents would permit Lauriston to work "in all 50 American states" and in Canada and Mexico as well (DE 253 at 293-94).

At some point, Lauriston's employer asked to see his "papers," and Lauriston presented to a personnel officer and an attorney at the Mandarin Hotel the documents Watson had given him (DE 253 at 297-301). After they had examined the documents, the personnel officer called Watson on the telephone and questioned the validity of the documents (DE 253 at 297-99). Watson said that "these documents are good"; however, after further questioning, Watson became upset and hung up the phone (id.). Immediately thereupon, Lauriston was fired from his job (id.).

After Lauriston had been fired, he confronted Watson and angrily explained that he had been fired because of the documents Watson had given him (DE 253 at 301). Watson responded that "the documents were valid but the American government for political reasons [was] not cooperating" (id.). Lauriston demanded

his money back, but Watson told him to wait until he had received a "passport" that Watson promised to send him (DE 253 at 301-02).

Lauriston displayed the Pembina Nation documents at several other places, including a Social Security office (DE 253 at 302). At those places, the people who examined the documents refused to recognize their purported validity (id.). Lauriston never got his money back from Watson (id.).

On April 17, 2006, Felicia Skinner, the Director of the Atlanta Field Office for the Immigration and Customs Enforcement (ICE) Detention and Removal Operations, received a letter from Watson (DE 252 at 210-13). In the letter, Watson identified himself as the "common law attorney" for the Pembina Nation Little Shell Band of North America (DE 252 at 213). The letter read as follows:

> Please take notice that Lawrence Wasonga Tolo, A-27931078, is a naturalized member of our sovereign nation, and as such is a sovereign himself. He is a living soul created by God, the Creator[,] and accountable to God and the 10 laws set forth by Him.
>
> Any contract that the above-person has made with your department is now transferable to our courts for judgment. As a living soul, Lawrence Wasonga Tolo is taking responsibility for the [debts] of the fictional entity named Lawrence Wasonga Tolo as its agent. If there is a financial responsibility involved, please let us know. He is a Native American by adoption, and as such[,] legal in the U.S.[,] member number LS-83172.

> As you may know, our treaty of 1863 gives our Native American members and lineal descendants the right to live, work and travel anywhere in the U.S.A., and this is a perpetual treaty signed by President Abraham Lincoln in his own handwriting and agreed to by the U.S. Senate. If I do not hear from you in the next 20 days[,] I will assume that the removal proceedings that were issued by you have been changed and we are now responsible for the actions of our member.
>
> If more information is needed from me[,] I will be willing to furnish same. If [such] person remains in your custody[,] anyone working to keep him in custody is subject to us having their bond to work in jeopardy.
>
> Sincerely, Audie A. Watson

(DE 252 at 214-15).[7]

After reviewing Watson's letter, Director Skinner determined that the person referred to, Lawrence Wasonga Tolo, was an alien from Kenya who was subject to removal from the United States (DE 252 at 215-19). Thereafter, Director Skinner forwarded the letter to the supervisor in charge of the detention center responsible for Tolo's removal (id.). Director Skinner did not reply to Watson because she did not

[7] With respect to the term "lineal descendants" used in the third paragraph of Watson's letter, the district court took judicial notice, and instructed the jury, that the term "lineal descendant" meant "a blood relative in the direct line of descent; children, grandchildren, and great grandchildren are lineal descendants" (DE 254 at 523, 588).

believe that the letter warranted a reply, and she did not believe that the letter had any effect whatsoever on Tolo's removal status (id.).

Also in 2006, Anthony Aiello, the Assistant Director of the Miami Field Office for ICE received approximately 70 or 80 letters from Watson, all of which were virtually identical to the letter he had sent to Director Skinner, except that each letter referred to a different alien (DE 253 at 321-31).[8] Assistant Director Aiello, who had been an immigration officer for about 16 years, had never seen letters of that nature, and he considered the claims in the letters to have been "bizarre" (DE 253 at 322, 328-29). He did not respond to Watson because he believed that the letters "had no validity" and "no legal basis for any of the claims" therein (DE 253 at 331).

The Government's Investigation of Watson

In 2007, the FBI began investigating Watson (DE 251 at 33-37). During the course of the investigation, the FBI determined from Florida business records that Watson was listed as the President of "Universal Service Dedicated to God" (USDG), which was incorporated as a non-profit organization (DE 253 at 344-46). The organization had a business office at 7126 West McNab Road, Tamarac, Florida (DE 253 at 346-47).

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[8] The subject of one of the letters was St. Victor Lauriston (DE 253 at 326-29).

On June 13, 2007, FBI Special Agent Cesar Paz, posing as the owner of a landscaping business that employed illegal aliens, went to the USDG business office in Tamarac (DE 251 at 33-37). Agent Paz was wearing a recording device, and he was accompanied by Miguel Moran, who was posing as an applicant for Pembina Nation documents (DE 251 at 37-38).

At the USDG office, Agent Paz met USDG employees (and codefendants) Nancy Vertus and Anibal and Laura Reyes (DE 251 at 37). Agent Paz and Moran paid the USDG employees a $1,000 balance for Moran's Pembina Nation documents (DE 251 at 38).

On June 18, 2007, Agent Paz, again wearing a recording device and accompanied by Moran, returned to the USDG office "to ask more questions regarding the Pembina documents and also to meet with [Watson]" (DE 251 at 39). During their meeting, Agent Paz told Watson that his "employees" did not have any "papers" that would allow them to reside or work legally in the U.S. (DE 251 at 40-47).

On July 13, 2007, Agent Paz went to the USDG office and paid $4,500 for Pembina Nation documents on behalf of three of his purported employees (DE 251 at 48-51). In a recorded conversation, Anibal Reyes explained to Agent Paz that each of his employees would receive an identification card and a "temporary passport,"

which would allow them to travel within the U.S. (DE 251 at 52-68). Reyes said that the employees would subsequently receive "the permanent passport," which would allow them to travel outside the U.S. (DE 251 at 68). In addition, Reyes said that "included in the price" ($1,500) was a "license plate" that the employees could place on their vehicles (id.).

After speaking with Anibal Reyes, Agent Paz spoke to Watson (DE 251 at 70-71). During his conversation with Watson, Agent Paz offered to bring more "clients" to USDG in return for kickbacks (DE 251 at 71-72).

On July 20, 2007, Agent Paz returned to the USDG office and paid $1,500 for Pembina Nation documents for a purported "employee from Haiti" (DE 251 at 73; DE 252 at 83-84). At that time, Anibal Reyes told Agent Paz that Watson had "worked out a special deal" for Agent Paz and that Watson would give Agent Paz "priority regarding the processing of the Pembina documents" (DE 252 at 85-91). All of the Pembina documents that Agent Paz received from USDG were sent to him in the U.S. mail (DE 252 at 106-24).

On March 10, 2008, Agent Paz and another undercover agent met Watson at a restaurant (DE 252 at 124-34). There, they discussed the fees that Watson was charging for the Pembina Nation documents, and Watson gave Agent Paz an application for another of Agent Paz's purported employees (DE 252 at 127-34).

On August 25, 2008, Agent Paz went to Watson's residence to "check on the status of some applications" (DE 252 at 135-42). Watson met Agent Paz outside the residence, where Agent Paz asked Watson about the status of some particular applications (id.). Watson went inside his residence alone, then came back outside and said that he could not find any record of those particular applications (DE 252 at 137-38).

On August 29, 2008, FBI Special Agent Ronald Gaskins and other law enforcement officers executed a search warrant at Watson's residence, located at 7500 Northwest 73rd Avenue, Tamarac, Florida (DE 253 at 344-48). From Watson's garage, the officers seized a number of documents, including: annual reports relating to USDG for the years 2005-2008; a list of USDG employees and their telephone numbers; USDG's articles of incorporation; a blank application form for "nonlineal naturalization" into the "Little Shell Nation"; an eight-page list of approximately 400 names with "amount paid" and "amount to be refunded"; a file containing copies of the letters that Watson had sent to the Miami Field Office for ICE; and nine boxes of folders containing "client files," approximately 600 in all, each folder of which contained copies of completed applications of specific individuals to the Pembina

Nation Little Shell Band or the Little Shell Nation (DE 253 at 352-63, 366-72, 387-88, 402-03).[9]

In addition to the documents seized, law enforcement officers seized a safe from the garage (DE 253 at 349-52, 363-66). The garage safe contained $15,000 in cash, 100 one-ounce gold Krugerrand coins, jewelry, safe deposit box keys, and passports (id.). The officers also seized another safe from the master bedroom of the residence (id.). The master bedroom safe contained 64 envelopes stuffed with cash, amounting to $737,150 (id.).

On the day of the search, Agent Gaskins interviewed Watson, after Watson had waived his constitutional rights and agreed to be interviewed (DE 253 at 372-74). Watson said that he was an ordained minister, a spiritual advisor, and the president of his own business, Universal Service Dedicated to God, Inc. (DE 253 at 374). He said that he was a member of the Little Shell Nation, that he had "sponsored over 2,000 people into the Little Shell Nation," and that he had charged each person $1,500 for that service (DE 253 at 374-75).

Watson said that the individuals whom he had sponsored into the Little Shell Nation were "illegal in the United States" and were "desperate for some type of

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[9] The applications seized from Watson indicated that the "clients" were aliens from countries that included Mexico, Haiti, Venezuela, and Belize, and that most of the aliens were from South American countries (DE 253 at 371).

documentation to be able to reside and live in the United States" (DE 253 at 375). He said that the "Pembina documents" had allowed the individuals to reside and live in the United States (DE 253 at 377). He said that for each fee of $1,500 he had received from these individuals, he had sent $500 to the Little Shell Nation and kept $1,000 for himself, "for whatever . . . he wanted to use it for" (DE 253 at 378).

The Money Trail

An auditor examined all of the financial accounts connected to Watson (DE 253 at 405-07). These accounts included a USDG account at Bank of America and Watson's BankAtlantic account (id.). The auditor examined the deposits into these accounts and determined which of those deposits appeared to have been related to the purchase of Pembina Nation Little Shell Band documents (DE 253 at 408-17).

Between January 2006 and August 2008, a total of $1,899,629 was deposited into the USDG account at Bank of America (DE 253 at 408-17). From that amount, the auditor deducted deposit items that were not related to Watson's fraud scheme (DE 253 at 417-19). The auditor also deducted $429,828, which reflected checks containing the notations "refund," "partial refund," and "half refund," written by Watson to different individuals (DE 253 at 418). After the deductions, the net deposit amount in the account was $696,250.06 (DE 253 at 419).

During the same period, Watson's BankAtlantic account showed a net deposit amount, after deductions for refunds and deposits that were unrelated to the fraud scheme, of $331,687 (DE 253 at 420-24). Adding the net deposits from the two accounts resulted in a total fraud-related amount of $1,027,937.06.

The auditor also examined specific financial transactions that appeared to have been conducted with criminally derived property of a value greater than $10,000: (1) on November 2, 2006, an electronic transfer of $100,000 from the USDG account at Bank of America to Watson's PayPal account; (2) on November 23, 2007, a wire transfer of $199,560 from Watson's account at EverBank to Watson's EverTrade account at J.P. Morgan Chase; (3) on July 14, 2008, a check drawn from Bank of America for $80,000 and deposited into Watson's EverBank account; (4) on July 31, 2008, a wire transfer of $93,406 from Watson's EverTrade account to Key Bank Kitco, in Montreal, Canada, for the purchase of 100 one-ounce gold Kruggerand coins; and (5) on August 9, 2008, a check drawn from USDG's account at Bank of America for $75,000 and deposited into Watson's EverBank account (DE 253 at 424-30).[10]

[10] These five transactions were the bases for the offenses charged in Counts 5-9 of the superseding indictment (DE 96 at 8-9).

b. The Defense Case

Watson testified as the sole witness in his defense (DE 254 at 475-523). He stated that he had been an ordained minister since 1968 and that his ministry had always been "nonprofit," that is, any money that "was ever collected was strictly for expenses of the church itself" (DE 254 at 475-76). He said that he had incorporated USDG in 1996 (DE 254 at 476).

Watson said that he had gotten involved with the Pembina Nation "by happenstance" in February 2005 (DE 254 at 477-78). He said that someone had told him about the group's Internet web site and that, after having read about the group, Watson had "sent them the money" for an identification card, by virtue of which he had become "an adopted Indian" (DE 254 at 478).

Watson said that in September 2005, he had met Lawrence Henry, the chief of the Pembina Nation Little Shell Band, and a group of "judges, clerks, marshals, and attorneys" (DE 254 at 479). Watson claimed that at that time, he had been "made an attorney" (id.). Thereafter, he said, he had taken "a course of study," consisting of "booklets" and "CDs," to "become acquainted with their legal procedures" (DE 254 at 480). He said that in his position as "attorney," he had also obtained a book "to learn about the rights of Indians and tribes" (DE 254 at 482). He described the book

as "a recognized treatise on the rights of Indians that's used everywhere" (DE 254 at 483).

Watson testified that after he became an attorney for the Pembina Nation Little Shell Band, he had begun "sponsoring" people to become "tribal members" (DE 254 at 484). He said that he had sponsored U.S. citizens as well as "undocumented aliens" (id.). He said that the tribe had given him "the authorization to accept people into the Pembina Nation" (DE 254 at 485, 491). He said that the tribe itself had the ultimate authority to accept or reject membership for the people whom he had sponsored (DE 254 at 485-87). He said that the people whom he had sponsored had paid him "most all the time" in cash and that he had issued a receipt to and kept a record of every individual who had paid him (DE 254 at 487).

Watson said that he had kept a "cash reserve on hand" for refunds (DE 254 at 493-94). He said that he had refunded $700,000 to applicants, primarily because the waiting time for Pembina Nation documents had begun to stretch to "almost a year" (id.). He said that he had intended to use for refunds the cash that had been seized from his residential safes (DE 254 at 494-97). He said that he had not put the money into a bank because banks were "kind of shaky" and were "operating in a deficit" (DE 254 at 496).

Watson claimed that the Pembina Nation had authorized him to compensate himself by telling him, "Whatever you get over and above what we require or we request[,] then you can use it at your own discretion" (DE 254 at 498). He claimed that the money in his EverBank account had been compensation for the "efforts" that he had "put forth 70 and 80 hours a week" (id.). He claimed that, in his mind, he had done nothing fraudulent (DE 254 at 509).

On cross-examination, Watson admitted that he had "never checked with any U.S. government official" before charging $1,500 each to sponsor individuals for membership into the Pembina Nation (DE 254 at 510, 512). He also admitted that he had never gone to law school and did not possess a law degree, that he had paid employees of USDG to "process the applications for the Pembina documents," and that he had processed applications for "undocumented aliens" (DE 254 at 511).

Watson declined to characterize undocumented aliens as "illegal aliens" because he said that "legal" was a "very broad" term (DE 254 at 512). He said that "as an Indian," an undocumented alien had the "right by treaty to live, to work, and to travel anywhere in the United States" (id.). Watson also declined to characterize the money seized from his residence as "profit" (DE 254 at 513). He claimed that he had intended to use the money only for "other charges that [were] going to come up with people having trouble or refunds" (DE 254 at 514). He admitted, however, that

he had failed to refund money to Lauriston, Demelus, and other applicants who had complained that the Pembina documents that they had received were invalid (DE 254 at 517-18).

c. The Presentence Investigation Report (PSI)[11]

The Probation Office grouped Watson's offense conduct into two groups, according to separate harms against different victims (PSI at 8-9, ¶¶ 23-25). Group One consisted of the mail fraud and the offenses involving financial transactions in criminally derived property (Counts 2-9) (id.). Group Two consisted of the alien-harboring offense (Count 10) (id.).[12]

With respect to Group One, the Probation Office determined that Watson's base offense level was 7, the level corresponding to offenses involving fraud (PSI at 9, ¶ 26). The Probation Office recommended the following adjustments to that base offense level: (1) a 16-level increase because the loss was more than $1 million but not more than $2.5 million; (2) a 6-level increase because the offense involved 250 or more victims; and (3) a 4-level increase because Watson was an organizer or leader

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[11] All references to the PSI are to the revised version, dated November 24, 2009.

[12] The conspiracy count of the superseding indictment (Count 1) was not included in either Group One or Group Two because the offense level computation was based on the intended offense conduct, that is, the objects themselves of the conspiracy (PSI at 8-9, ¶ 23).

of criminal activity that involved five or more participants or was otherwise extensive (PSI at 9-10, ¶¶ 27, 28, 30). Watson's adjusted offense level for Group One was 33 (PSI at 10, ¶ 32).

With respect to Group Two, the Probation Office determined that Watson's base offense level was 12, the level corresponding to offenses involving harboring unlawful aliens (PSI at 10, ¶ 33). The Probation Office recommended the following adjustments to that base offense level: (1) a 9-level increase because the offense involved 100 or more unlawful aliens; and (2) a 4-level increase because Watson was an organizer or leader of criminal activity that involved five or more participants or was otherwise extensive (PSI at 10, ¶¶ 34, 36). Watson's adjusted offense level for Group Two was 25 (PSI at 10, ¶ 38).

The Probation Office determined that the adjusted offense level for Group One (33) was 1 and ½ units greater than the adjusted offense level for Group Two (25) (PSI at 10-11, ¶¶ 39-41). Accordingly, the Probation Office determined that the greater adjusted offense level (33) should be increased by one level, thereby resulting in a combined adjusted offense level, and a total offense level, of 34 (PSI at 11, ¶¶ 42-45).

Watson had a prior State of Florida conviction for grand theft, which resulted in one criminal history point (PSI at 11-12, ¶ 49).[13] In addition, he committed the offense in this case while serving probation in connection with the grand theft conviction, conduct that resulted in two more criminal history points (PSI at 12, ¶ 51). He had a total of three criminal history points, resulting in a criminal history category of II (PSI at 12, ¶ 52).

Based on a total offense level of 34 and a criminal history category of II, Watson's applicable advisory guideline range was 168 to 210 months of imprisonment (PSI at 22, ¶ 98). Statutorily, he was subject to maximum authorized terms of imprisonment of five years as to Count 1, 20 years as to each of Counts 2-4, 10 years as to each of Counts 5-9, and 10 years per alien as to Count 10 (PSI at 22, ¶ 97).

Watson filed objections to the PSI (DE 217). In pertinent part, he argued that (1) his offense conduct should have been grouped in only one group because "all counts in actuality involve the same harm"; (2) he was not a leader or organizer in the offense; (3) the government had not established that there were 250 or more victims

[13] Watson's prior grand theft conviction stemmed from another fraud scheme involving USDG (PSI at 11-12, ¶ 49).

involved in the offense; and (4) the government had not established that there were 100 or more unlawful aliens that had been harbored (DE 217 at 1-2).

In addition to his objections to the PSI, Watson filed a motion for a downward variance from the applicable advisory guideline range (DE 220). He argued that he deserved a downward variance based on his advanced age (76), his "law abiding life," and the government's "vindictive prosecution" in this case (DE 220 at 1-2).

The government and the Probation Office filed responses to Watson's objections to the PSI (DE 219; Addendum to the PSI). In their responses, both the government and the Probation Office defended the conclusions and calculations set forth in the PSI (id.). In addition, the government filed a response to Watson's request for a downward variance (DE 225). The government argued that a variance was not warranted because the government had not engaged in vindictive prosecution and because the sentencing factors under 18 U.S.C. § 3553(a) did not militate in favor of a variance (DE 225 at 1-2).[14]

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[14] Under § 3553(a), the district court is required to consider the following factors before imposing a sentence: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment; (B) to afford adequate general deterrence; (C) to protect the public from further crimes of the defendant; and (D) to provide rehabilitation; (3) the kinds of sentences available; (4)-(5) the sentencing ranges and policy statements under the guidelines; (6) the need to avoid unwarranted sentence (continued...)

Watson filed a reply to the Probation Office's addendum to the PSI (DE 222). In that pleading, he raised a new objection to the PSI, arguing that the recommended sentencing enhancements based on the number of victims and the fraud loss amount were a violation of Apprendi v. New Jersey, 530 U.S. 466, 130 S. Ct. 2348 (2000), because the enhancements had not been alleged in the superseding indictment and had not been found by the jury beyond a reasonable doubt (DE 222 at 1).

The government and the Probation Office filed responses to Watson's reply to the Probation Office's addendum to the PSI (DE 226; Second Addendum to the PSI). Both the government and the Probation Office argued that Apprendi did not apply in this case because the guidelines were merely advisory and that, under an advisory guideline regime, United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005), authorized the sentencing court, using a preponderance-of-the-evidence standard, to enhance a defendant's sentence on the basis of facts that were not determined by a jury (DE 226 at 1-2; Second Addendum to PSI at 2).

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[14] (...continued)
disparities; and (7) the need to provide restitution to victims. 18 U.S.C. § 3553(a).

d. The Sentencing Hearing

At the sentencing hearing, Watson reiterated his sentencing objections, and both parties essentially relied on the pleadings that they had filed (DE 248 at 3-6). Thereafter, the district court overruled all of Watson's objections (DE 248 at 7-8).

In overruling Watson's objections, the district court found: that Watson was a leader and/or organizer in the offense and that, "at the very least," the criminal activity was "otherwise extensive"; that the Probation Office had properly grouped the offense conduct; that there were "far more than 250 victims"; and that there were more than 100 illegal aliens "who were clients of [Watson], who were illegally in the United States, and that he encouraged them . . . to remain in the United States" (id.).[15]

After the district court had resolved the guideline calculations, the court invited the parties to present "whatever information or evidence may be offered in extenuation or mitigation of punishment or which is otherwise relevant to the sentence to be imposed" (DE 248 at 10).

Watson's counsel asked the district court to consider Watson's age, the fact that he was "a lifelong minister," and the fact that he had "never engaged in criminal

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[15] The district court did not specifically address Watson's Apprendi objection. The court did, however, specifically adopt "the statements of the probation officer in her addenda to the defendant's objections as additional reasons of the [court] for overruling the objections" (DE 248 at 9). As set forth above, the Probation Office's Second Addendum to the PSI rebutted Watson's Apprendi objection.

conduct till he was age 70" (DE 248 at 11). In addition, counsel asked the court to consider the government's "vindictive prosecution" (id.).

Counsel claimed that the government had initially offered Watson the opportunity to plead guilty to a conspiracy charge under 18 U.S.C. § 371, which effectively would have capped his sentence at five years of imprisonment (DE 248 at 11-12). Counsel claimed that only after Watson had decided to proceed to a jury trial, the government vindictively decided to supersede the indictment (DE 248 at 12-15), thereby adding charges that carried significantly more time than the § 371 charge.

Watson himself addressed the district court (DE 248 at 15-16). He said that his "intentions were honorable" and that he had "no idea that [he] was doing anything wrong" (DE 248 at 15). He said that he had been "adopted by the Pembina Nation Little Shell Band in 2005" and that he had "followed their doctrine and became a sovereign" (id.). He said that several of his friends had "followed after" him and that they had suggested that "the same opportunity may even be available to illegal aliens" (id.). Watson said that he "didn't think of them as illegal aliens," but he conceded that "of course, the United States does" (id.).

Watson said that he had provided illegal aliens with Pembina Nation documents "in [the] spirit of doing good" (id.). He suggested that the Little Shell

Nation had the right to "adopt anyone on U.S. land as long as they weren't a violent criminal" (id.). He said that he had "followed the price guidelines published by the Pembina Nation Little Shell Band Web site while providing additional benefits, including refunds" (id.). He said that when he had not received any responses to the letters he had sent to ICE, he "assumed [he] wasn't doing anything illegal" (DE 248 at 15-16).

Watson said that he was an ordained minister, that he believed in the Ten Commandments, that he had dedicated the past 40 years of his life to "doing the Lord's work without compensation," and that it had been "[o]nly in the past few years" that he had sought "compensation towards [his] retirement" (DE 248 at 16). He asked the district court for leniency in light of the fact that he was a "76-year-old man facing the humiliation and suffering of an effective life sentence" (id.).

The prosecutor reminded the district court that the court previously had denied Watson's motion to dismiss the superseding indictment on the basis of purported vindictive prosecution (id.). In addition, the prosecutor stated that the original indictment had been superseded only "to add the money laundering counts for which the [g]overnment did not have all the evidence" at the time of the original indictment (id.).

The prosecutor argued that a sentence within the applicable advisory guideline range was appropriate (DE 248 at 17-18). The prosecutor further argued that the § 3553(a) factors militated against a downward variance because the offense comprised "a huge fraud scheme" involving "significant planning," Watson "took advantage of illegal aliens who were vulnerable, who feared being deported," and Watson "committed this offense while on probation" (DE 248 at 17).

After the parties had addressed the district court, the court stated that it had considered the statements of the parties, the PSI, which, the court observed, contained the advisory guideline calculations, and "all of the statutory sentencing factors" (DE 248 at 18). The court concluded that "a sentence at the low end of the advisory guideline range is sufficient to provide adequate punishment and deter future criminal conduct" (id.). Thereafter, as set forth above, the court imposed a sentence that included a term of 168 months of imprisonment (DE 248 at 18-19).

3. Standards of Review

Issue I. Generally, this Court reviews a district court's denial of a motion to dismiss an indictment for an abuse of discretion. United States v. Madera, 528 F.3d 852, 854 (11th Cir. 2008). To the extent that the district court's denial rests on the resolution of questions of law, however, this Court reviews those questions of law de novo. Id. Accordingly, questions of law concerning whether prosecutorial

vindictiveness exists are reviewed de novo; however, the district court's factual findings concerning prosecutorial vindictiveness are reviewed for clear error. See United States v. Barner, 441 F.3d 1310, 1315 (11th Cir. 2006).

Issue II. This Court reviews the district court's denial of a motion to suppress evidence as a mixed question of law and fact, with the rulings of law reviewed de novo and the findings of fact reviewed for clear error. United States v. Lindsey, 482 F.3d 1285, 1290 (11th Cir. 2007).

Issue III. This Court reviews de novo whether there is sufficient evidence in the record to support a jury's verdict in a criminal trial, viewing the evidence in the light most favorable to the government and drawing all reasonable inferences in favor of the jury's verdict. United States v. Beckles, 565 F.3d 832, 840 (11th Cir. 2009).

Issue IV. This Court reviews the district court's denial of a requested jury instruction for an abuse of discretion. United States v. Klopf, 423 F.3d 1228, 1241 (11th Cir. 2005).

Issue V. Appellate review of a sentence is a two-step process. United States v. Pugh, 515 F.3d 1179, 1190 (11th Cir. 2008). This Court must first "ensure that the district court committed no significant procedural error," such as improperly calculating the advisory guidelines range, failing to consider the § 3553(a) factors,

or failing to adequately explain the chosen sentence. Id. (quoting Gall v. United States, 552 U.S. 38, 51, 128 S. Ct. 586, 597 (2007)). The Court's procedural review is de novo. United States v. Hunt, 459 F.3d 1180, 1183 (11th Cir. 2006). This Court "should then consider the substantive reasonableness of the sentence imposed under an abuse of discretion standard." Pugh, 515 F.3d at 1190 (quoting Gall, 552 U.S. at 51, 128 S. Ct. at 597). The review for substantive reasonableness involves inquiring whether the § 3553(a) factors support the sentence. Gall, 552 U.S. at 56, 128 S. Ct. at 600. The Court's review for substantive reasonableness is deferential. United States v. Williams, 456 F.3d 1353, 1363 (11th Cir. 2006). The party challenging the sentence has the burden of establishing the unreasonableness of the sentence. United States v. Talley, 431 F.3d 784, 788 (11th Cir. 2005).

Summary of the Argument

Issue I. The district court properly denied Watson's motion to dismiss the superseding indictment. In his motion, he had accused the government of prosecutorial vindictiveness for having made the pre-trial decision to seek additional charges after Watson had declined the government's offer to plead guilty to one count of the original indictment. Contrary to his argument, the law permits the government to seek a superseding indictment under such circumstances unless the defendant can show evidence of actual vindictiveness. Watson concedes that he cannot show actual

vindictiveness; moreover, he is not entitled to a presumption of vindictiveness in the pre-trial context.

Issue II. The district court properly denied Watson's motion to suppress the evidence seized from his residence. The pertinent evidence was seized pursuant to a search warrant, and, contrary to Watson's argument, the affidavit in support of the search warrant application was based on probable cause that evidence of a crime would be found in Watson's residence. Among the affidavit's factual statements, which Watson does not dispute, was his own statement to an undercover agent that he kept documents (relating to his criminal activity) in his residence.

Issue III. The evidence was sufficient to support Watson's convictions. With respect to all of the offenses of conviction, Watson contends only that he had no intent to violate the law. The record evidence established, however, that Watson sold purported identity documents to aliens in conjunction with the false promise that those documents would allow them to live and work legally in the U.S. In addition, the evidence established that Watson knew that the aliens were not lawfully in the U.S. and that the identity documents were not recognized as valid by the federal government. Accordingly, the evidence was sufficient to have permitted a reasonable jury to conclude that Watson had intentionally violated the law.

Issue IV. The district court properly denied Watson's requested jury instructions. His requested instructions, regarding American Indian tribes' ability to "adopt" new members and to govern their own legal affairs, were not based on the evidence and were intended to create the misleading impression that Indian tribes had the authority to determine that unlawful aliens could live and work in the U.S. The evidence established, however, that only the federal government has the authority to make such determinations.

Issue V. The district court properly sentenced Watson. Procedurally, the court properly determined that it could exercise judicial fact-finding by a preponderance of the evidence and that the offense involved more than 250 fraud victims and 100 or more unlawful aliens. In addition, the court sufficiently explained its reasons for imposing the particular sentence in this case, but the court was not required to give reasons for rejecting Watson's request for a downward variance from the advisory guideline range. Substantively, the sentence imposed was reasonable because it was within a properly calculated guideline range, far below the maximum authorized sentence that could have been imposed, and not more severe than Watson deserved in view of his history as a scam artist.

Argument

I. The District Court Properly Denied Watson's Motion To Dismiss The Superseding Indictment.

Watson contends that the district court erred by not dismissing the superseding indictment, or at least the "added charges," on the ground that the government's action in seeking a superseding indictment established a "vindictive prosecution" (Br. at 16-26). Watson's contention is entirely without merit.

The Procedural Background

After the grand jury had returned the superseding indictment, Watson filed a motion to dismiss the superseding indictment, or alternatively Counts 5-9 (involving financial transactions with criminally derived property), the counts that constituted new charges against him (DE 122). He contended that the new charges had been "occasioned by [g]overnmental vindictiveness" after he had "declined to accept the [g]overnment's offer" to plead guilty to the conspiracy charge in Count 1 of the original indictment (DE 122 at 2).[16]

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[16] Attached to his motion to dismiss, Watson included only page 1 of the government's proposed plea agreement, indicating that the only pertinent proposal was that the government offered to dismiss Counts 2-5 of the original indictment if Watson agreed to plead guilty to Count 1 (DE 122-1). Watson essentially stated that the reason he declined the government's plea offer was because the government could not guarantee that he would not be incarcerated after pleading guilty (DE 122 at 2) ("The defendant, being advised of potential prison time upon a plea, declined to (continued...)

The government filed a response to Watson's motion to dismiss (DE 127). In its response, the government stated that "[s]hortly after Watson's bond hearing, the prosecutor and defense counsel commenced plea negotiations," during which "the government sent Watson a proposed plea agreement" that "Watson chose to reject" (DE 127 at 2).[17]

The government further stated that on March 12, 2009, more than six months after Watson's bond hearing, the grand jury returned the superseding indictment, adding five new charges involving financial transactions with criminally derived property (id.). The government explained that the delay in seeking the additional charges stemmed not from vindictiveness but from the fact that, during the search of Watson's residence on August 29, 2008, the government had seized approximately 23 boxes containing "numerous financial records which had to be reviewed and analyzed by law enforcement agents" (id.). The government also noted that, based on its seizure of the financial records, it had "subsequently obtained additional documentary evidence pertaining to money laundering and Watson's assets" (id.).

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[16] (...continued)
accept the [g]overnment's offer to the '371' conspiracy.").

[17] Watson's bond hearing took place on September 5, 2008 (DE 9, 43, 49).

A magistrate judge, apparently having determined that an evidentiary hearing was not necessary, issued a report recommending that Watson's motion to dismiss be denied (DE 132). The magistrate judge concluded that it was not even necessary to consider the government's explanation for its delay in seeking additional charges because the government had every right to supersede and bring more serious charges after the defendant had rejected the government's plea offer (DE 132 at 14-15). "Such actions by the [g]overnment," the magistrate judge held, "are part of the constitutional and permissible 'give and take' of plea bargaining or part of the 'effort to persuade'; they are not an unconstitutional and impermissible 'punishment for exercising a right'" (DE 132 at 15). The district court "approved, adopted and ratified" the magistrate judge's determination (DE 157 at 1) and denied Watson's motion to dismiss the superseding indictment (DE 157 at 2).

The Pertinent Law

The Supreme Court has held that a defendant's due process right is not violated by so-called vindictive prosecution even where a prosecutor carries out a threat made during plea negotiations to have the defendant re-indicted on more serious charges on which he is plainly subject to prosecution if he does not plead guilty to the offense with which he was originally charged. Bordenkircher v. Hayes, 434 U.S. 357, 362-65, 98 S. Ct. 663, 667-69 (1978). In other words, where a prosecutor does no more

than openly present a defendant with the "unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution," there is no constitutional violation. 434 U.S. at 365, 98 S. Ct. at 669.

The Supreme Court has further held that a prosecutor's ***pre-trial*** decision to modify the charges against a defendant does not give rise to any presumption of vindictiveness. United States v. Goodwin, 457 U.S. 368, 380-82, 102 S. Ct. 2485, 2492-93 (1982). Absent some evidence of ***actual*** vindictiveness, "[a] prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution." 457 U.S. at 380-81, 384 102 S. Ct. at 2492-94.

In accordance with the Supreme Court's rulings, this Court has held that although there is a presumption of vindictiveness that arises when new charges are brought ***post-trial***, there is no such presumption in the ***pre-trial*** context. See United States v. Barner, 441 F.3d 1310, 1316-17 (11th Cir. 2006). Thus, to prevail in the pre-trial context, a defendant must establish actual vindictiveness. Id. Moreover, in the pre-trial context, this Court has never reversed a defendant's conviction on the basis of prosecutorial vindictiveness simply because a prosecutor pressed additional charges after a defendant rejected a plea bargain. See, e.g., United States v. Cole, 755 F.2d 748 (11th Cir. 1985); United States v. Astling, 733 F.2d 1446 (11th Cir. 1984).

The Law Applied to the Facts

In this case, which involves the prosecutor's pre-trial decision to seek a superseding indictment, Watson cannot establish actual vindictiveness. He has pointed to nothing in the record to show that the prosecutor sought a superseding indictment to harass him or to punish him for having rejected the government's plea offer. Indeed, his counsel stated at the sentencing hearing, "I'm not suggesting vindictiveness or willfulness on the part of the prosecutors here . . . ." (DE 248 at 12), and he all but concedes on appeal that he cannot demonstrate vindictiveness by proving that the prosecutor actually had a vindictive motive (Br. at 24-25).

Having failed to establish actual vindictiveness, Watson argues that the "circumstances" of this case "warrant a presumption of vindictiveness" (id.). Under the law, however, he is not entitled to such a presumption, a fact that he readily concedes (Br. at 25) ("Admittedly, however, the Supreme Court has held that there is generally no presumption of prosecutorial vindictiveness in the pretrial setting."). Moreover, even if there were a presumption of vindictiveness in this case, the government rebutted that presumption by explaining that the new charges were added only because of the time required to evaluate the numerous financial documents seized from Watson's residence, an explanation with which Watson has never taken issue.

Finally, we cannot help but observe that Watson's challenge on appeal is largely moot because he challenged the wrong indictment in the court below. His vindictive-prosecution challenge would have made more sense if he had moved to dismiss the original indictment instead of the superseding indictment. The original indictment, in addition to the conspiracy charge, included a charge of encouraging illegal aliens to remain in the U.S. The alien charge alone, which carried a maximum authorized penalty of 10 years "***for each alien in respect to whom such a violation occurs***" exposed Watson to a potential sentence of at least 6,000 years in prison (600 "clients" x 10). 8 U.S.C. § 1324(a)(1)(B). So, for all practical purposes, Watson would not have been appreciably better off if only the superseding indictment, which merely added five 10-year counts, had been dismissed.

II. The District Court Properly Denied Watson's Motion To Suppress The Evidence Seized From His Residence.

Watson contends that the district court erred by denying his suppression motion, arguing that the affidavit in support of the search warrant application was not supported by probable cause (Br. at 27-30). His argument is meritless.

Before trial, Watson filed a motion to suppress the evidence that had been seized during the search of his residence (DE 121). He argued that the affidavit in

support of the search warrant application "fails to state requisite probable cause for a warrant to be issued for that residence" (DE 121 at 1).[18]

The government filed a response to Watson's suppression motion (DE 128). The government argued that "[t]here were sufficient factual allegations in the affidavit upon which the magistrate judge could reasonably conclude that there was probable cause to search Watson's residence" (DE 128 at 2).

The magistrate judge, apparently having determined that an evidentiary hearing was not necessary, issued a report recommending that Watson's motion to suppress be denied (DE 132). The magistrate judge recounted at length the facts from the search warrant affidavit that established Watson's criminal activities and the probability that certain evidentiary items might be located at his residence (DE 132 at 3-7). Based on those facts, the magistrate judge concluded that the affidavit "clearly established" a fair probability that contraband or evidence of a crime would be found at Watson's residence (DE 132 at 9). The district court "approved, adopted and ratified" the magistrate judge's report (DE 157 at 1) and denied Watson's suppression motion (DE 157 at 2).

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[18] For ease of reference, we have attached as an appendix to this brief all of the documents relating to the search of Watson's residence. These documents appear in the record as an attachment to Watson's suppression motion (DE 121-1).

This Court has held that probable cause to support a search warrant exists when the totality of the circumstances allows the conclusion that there is a fair probability of finding contraband or other evidence of a crime at a particular location. United States v. Kapordelis, 569 F.3d 1291, 1310 (11th Cir. 2009) (quoting Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)). Where the warrant concerns a residence, the affidavit in support of the warrant application must provide the authorizing magistrate judge with a reasonable basis for concluding that the defendant might keep evidence of his crimes at his home. Kapordelis, 569 F.3d at 1310.

In this case, the search warrant affidavit stated that Watson and his employees had actually sold to an undercover agent identity documents for aliens whom they knew to have been unlawfully in the U.S. (DE 121-1 at 9-12). Consequently, there was a reasonable basis for concluding that Watson had committed a crime.

With respect to the probability that Watson kept evidence of his crimes at his home, the affidavit stated that "State of Florida corporation records reflect that in March 2008, USDG changed its address from 7126 W. McNab Road to the [address of Watson's residence]" (DE 121-1 at 9). The affidavit further stated that this change of address had been corroborated by physical surveillance (id.). In addition, the affidavit stated that undercover agents had met Watson outside his house, where he

had told them that "all of the applicants' files were at his residence" (DE 121-1 at 13). In his brief, Watson concedes that these facts are included in the affidavit (Br. at 29).

Based on the facts set forth in the affidavit connecting Watson's crimes to his residence, the magistrate judge had a reasonable basis for concluding that the defendant might keep evidence of his crimes at his home. Therefore, as the magistrate judge aptly determined, the affidavit clearly established probable cause to support the search of Watson's residence. Accordingly, there is simply no ground upon which this Court could reverse the district court's denial of Watson's suppression motion.

III. The Evidence Was Sufficient To Support Watson's Convictions.

Watson argues that the evidence was insufficient to sustain the jury's verdicts (Br. at 31-34). His argument is without merit.

To prove the § 371 charge, the government was required to show that Watson joined a conspiracy intending to further its goals of defrauding illegal aliens and encouraging them to remain unlawfully in the U.S. (DE 254 at 592-94).

To prove the substantive mail fraud charges, the government was required to show that Watson participated in a scheme by which he intended to defraud others of money or property by means of false representations or promises (DE 254 at 594-98).

To prove the charges regarding financial transactions in criminally derived property, the government was required to show that Watson knew that the transactions involved property derived from his fraudulent scheme (DE 254 at 598-600).

To prove the alien-harboring charge, the government was required to show that Watson intended to encourage aliens to remain in the U.S. and that Watson either knew, or acted in reckless disregard of the fact, that the aliens entered or remained in the U.S. in violation of the law (DE 254 at 601-02).

On appeal, Watson challenges only the one element common to of all his convictions – his intent (id.). He claims essentially that he had "no intent to commit any criminal act whether it be conspiracy or any substantive act" and that he had no "conscious purpose or intent to violate the law" (Br. at 32). Contrary to his claims, the record evidence was more than sufficient enough to have permitted the jury to conclude that Watson intended to violate the law. See United States v. Maxwell, 579 F.3d 1282, 1301 (11th Cir. 2009) (holding that a jury may infer an intent to violate the law from the defendant's conduct) (internal citations omitted).

The evidence established that Watson made more than $1 million from illegal aliens by selling them purported identity documents in conjunction with the false promise that those documents would permit them to live and work lawfully in the

U.S. Watson knew that the aliens were unlawfully in the U.S. because, as set forth above, an undercover agent told him that the aliens on whose behalf the agent wanted to purchase identity documents were illegally in the U.S. Furthermore, Watson admitted upon his arrest that the individuals whom he had "sponsored" into the Pembina Nation Little Shell Band were "illegal in the United States."

Watson's intent to defraud the aliens was proven by evidence showing that he knew that the federal government did not recognize the validity of the Pembina Nation documents he had sold. In this regard, the evidence showed that he tried to convince Lauriston that the documents were valid, even as Watson admitted to Lauriston that the "American government" was "not cooperating" in recognizing the documents "for political reasons."

Watson's intent to violate the law was also evident from the fact that he knew that the purported process of "adopting" illegal aliens into the Pembina Nation Little Shell Band did not authorize the aliens to reside and work lawfully in the U.S. As set forth above, Watson's own letters to ICE demonstrated his understanding that the treaty of 1863 gave only the Indian signatories to the treaty and their "lineal descendants" the right to live and work in the U.S. Watson either knew, or acted in reckless disregard of the fact, that the illegal aliens in this case, from countries such

as Mexico, Haiti, Venezuela, and Belize, were not lineal descendants of American Indians.

Watson's intent to violate the law also could have been inferred from his own testimony at trial. When he chose to testify, he subjected himself to an evaluation of his credibility, and he ran the risk that he might bolster the government's case rather than help his own cause. United States v. Vazquez, 53 F.3d 1216, 1225 (11th Cir. 1995); United States v. Allison, 908 F.2d 1531, 1535 (11th Cir. 1990). Moreover, the jury was free not only to reject Watson's exculpatory testimony as a complete fabrication but to conclude that the opposite of his testimony was true and to view that testimony as substantive evidence of his guilt. Vazquez, id.; Allison, id.; accord United States v. Williams, 390 F.3d 1319, 1325 (11th Cir. 2004); United States v. Ellisor, 522 F.3d 1255, 1272 (11th Cir. 2008).

In challenging the sufficiency of the evidence concerning his intent, Watson relies primarily on two arguments: (1) his "refunds" to various "applicants [who] were unable to receive the membership they sought" demonstrated that he had no intent to defraud anyone; and (2) his identity-document operation was "open and notorious," thereby purportedly demonstrating his "non-criminal intent" (Br. at 31). These arguments are misconceived.

The refund argument is too clever by half. As set forth above, a large portion of Watson's refunds were only "partial" or "half" refunds. The fact that he gave only partial refunds for documents that were wholly invalid suggests that he repaid small sums of money in the hope that his fraud victims would be less likely to go to the police. At the end of the day, Watson still took in substantially more money than he ever paid back.

The "open and notorious" argument is likewise unavailing. In the first place, conducting a criminal enterprise in an open and notorious manner is not the sine qua non of a lack of criminal intent. See, e.g., United States v. Hadfield, 918 F.2d 987, 999 (1st Cir. 1990) (rejecting sufficiency challenge of defendant who conducted a "booming marijuana enterprise" in an "open and notorious" manner). In any event, Watson's fraud scheme was not as "open and notorious" as he would have us believe. For example, the letters that he sent to ICE, while they may have reflected a lame attempt to fool certain officials into believing that the government no longer had jurisdiction over certain "adopted" Indians, made no reference at all to the fact that Watson had fleeced the "adoptees" of $1,500 each in return for the false promise that they could live and work lawfully in the U.S.

In sum, the evidence was more than substantial enough to have permitted the jury reasonably to conclude that Watson intended to violate the law. Accordingly, this Court should not disturb the jury's verdicts.

IV. The District Court Properly Denied Watson's Requested Jury Instructions.

Watson contends that the district court erred by refusing to give two of his requested jury instructions (Br. at 35-37). He further contends that he is entitled to a new trial because the court's purported error resulted in the jury not having been "fully" instructed (Br. at 37). His contentions are meritless.

Before trial, Watson filed a number of requested jury instructions (DE 168-77). Among those instructions were the following two:

> Defendant's Jury Instruction Number 1
> Ability to Adopt
>
> A person who is not an Indian can legally be adopted into an Indian tribe, if that tribe so decides.
>
> It is the tribes, not the Bureau of Indian Affairs, that have exclusive authority for membership determinations for trial purposes.

(DE 168).

Defendant's Jury Instruction Number 3
Status of Tribes

> Indian tribes are distinct, independent political communities retaining their original natural rights in matters of local self-government. Although no longer possessed of the full attributes of sovereignty, they remain a separate people, with the power of regulating their internal and social relations. They have power to make their own substantive law in internal matters and to enforce that law in their own forums. As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.

(DE 170).

During the charge conference, where the district court and the parties discussed the propriety of proposed jury instructions (DE 254 at 526-37), Watson agreed that all of his requested instructions, except for the two set forth above, were adequately covered by other proposed instructions (DE 254 at 529-31). Accordingly, he requested that the court specifically give only Defendant's Jury Instruction Number 1 and Number 3 (id.).

The government objected to Defendant's Jury Instruction Number 1 on the ground that it was already covered by other proposed instructions (DE 254 at 531). The government objected to Defendant's Jury Instruction Number 3 on the ground that it was "confusing" and "not clear" (DE 254 at 532). In this regard, the

government argued that this case did not involve the enforcement of tribal laws in a tribal forum, as the instruction alluded to; rather, the government argued, the case concerned the authority to "make illegal aliens legal," an authority possessed only by the federal government (DE 254 at 532-33).

Watson responded that his requested instruction Number 1 included the fact that Indian tribes could legally "adopt" members, a fact, he noted, that was absent from the other proposed instructions (DE 254 at 532). With respect to his requested instruction Number 3, Watson argued that it was "also a theory of defense instruction" (DE 254 at 533-34).

The district court did not directly address Watson's argument concerning his requested instruction Number 1. With respect to Watson's requested instruction Number 3, however, the court stated that not only was the instruction "confusing" (DE 254 at 534) but that it was merely "a statement about tribes" and "not a theory of defense" (DE 254 at 535). The court observed that Watson had not submitted a theory-of-the-defense instruction and suggested that he "write out" such an instruction and submit it to the court then and there (DE 254 at 534-35). Watson's counsel did so, the government did not object to the proposed instruction, and the court subsequently instructed the jury as follows:

> It is the defendant's theory of defense that he at all times was acting as an attorney and member of the Pembina Indian tribe and at no time had any intent to defraud or encourage illegal aliens to remain in the United States. He felt based upon what he had been advised that he was acting properly and within the scope of his authority.

(DE 254 at 535-37, 592). The court did not give Watson's requested instructions Number 1 and Number 3.[19]

On appeal, in a bare-bones argument, Watson simply asserts that the requested instructions regarding "ability to adopt" (Number 1) and "status of tribes" (Number 3) were "major factors of the defense" (Br. at 36). He also seems to argue that he was entitled to the instructions simply because he took their language from reported cases (Br. at 36-37). In any event, the district court's refusal to give his requested instructions was not reversible error.

Where the district court has refused to give a requested defense instruction, this Court will find reversible error only if "(1) the requested instruction was a correct statement of the law, (2) its subject matter was not substantially covered by other instructions, and (3) its subject matter dealt with an issue in the trial that was so

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[19] The district court never ruled explicitly on Watson's requested instructions Number 1 and Number 3. Clearly, however, the fact that the court did not give the instructions was an implicit rejection of them.

important that failure to give it seriously impaired the defendant's ability to defend himself." United States v. Jordan, 582 F.3d 1239, 1247-48 (11th Cir. 2009).

With respect to Watson's requested instruction Number 1, even assuming that it was a correct statement of the law, its subject matter – the ability of Indian groups to determine their own membership – was substantially covered by other instructions. Specifically, the district court instructed the jury that Indian groups "may exist without federal recognition" (DE 254 at 590) and that even a "non-recognized" Indian group had the right to "determine who its members are, just the same as any other general membership association or corporation can" (DE 254 at 591).

The district court did not err by omitting the part of Watson's requested instruction regarding the ability of Indian tribes to "legally adopt" members. Watson only wanted to include the word "adopt" so that he could create the false impression that illegal aliens who were "adopted" into a tribe had the same right to live and work in the U.S. as Indians who were already citizens of this country. However, there was no evidence to support such an argument. Accordingly, the court was not obligated to give an instruction that had no basis in the evidence. See United States v. Nolan, 223 F.3d 1311, 1313 (11th Cir. 2000). Thus, the omission of the "adoption" language was not so important that failure to give it seriously impaired the defense because there was no basis in the evidence to support that part of the instruction.

Watson's requested instruction Number 3, with its broad allusion to Indian tribes' "power to make their own substantive law," was another attempt to create a false impression that Indian tribes had the authority to determine that illegal aliens could live and work in the U.S. simply by designating them as members of a tribe. Unfortunately for Watson, the evidence did not support that claim. In fact, as set forth above, the evidence established that only the federal government had the power to determine the rights of aliens to live and work in this country.

Because Watson's requested instruction Number 3 was not based on the evidence, the district court's refusal to give it, like the court's refusal to give instruction Number 1, was not so important that failure to give it seriously impaired the defense. Watson's defense – that he did not intend to defraud illegal aliens because he believed he had the authority (mistaken or not) to promise that they would be permitted to live and work in the U.S. – was not hampered by the court's refusal to give his requested instructions, particularly where the court instructed the jury as to Watson's theory of defense.

V. The District Court Properly Sentenced Watson.

Watson contends that district court procedurally erred in several respects: (1) by enhancing his sentence on the basis of facts that were not determined by the jury beyond a reasonable doubt (Br. at 45); (2) by finding that his offense involved more

than 250 fraud victims and more than 100 unlawful aliens (Br. at 45-46); and by not adequately explaining its reasons both for imposing the particular sentence and for denying his request for a downward variance (Br. at 46-49). Watson also makes a mere assertion that the court's sentence was "substantively erroneous" (Br. at 47), but he does not support that assertion with any argument. In any event, his sentencing challenge is meritless in every respect.

As to Watson's claim that the district court erred by enhancing his sentence with facts not found by the jury, by now it should be clear that a court may enhance a sentence based upon judicial fact-finding beyond the facts admitted by the defendant or found by the jury in an advisory guidelines system. See United States v. Rodriguez, 398 F.3d 1291, 1300 (11th Cir. 2005); see also United States v. Dean, 487 F.3d 840, 854 (11th Cir. 2007) (holding that district court may enhance sentence based on judicial fact-finding provided that its findings do not increase the sentence beyond the statutory maximum sentence authorized by facts determined in a guilty plea or jury verdict); United States v. Dudley, 463 F.3d 1221, 1227-28 (11th Cir. 2006) (applying Booker to hold that judicial fact-finding that increases a defendant's guideline range does not violate Apprendi under an advisory guidelines system).

As to Watson's claim that the district court erred in determining the number of fraud victims and unlawful aliens involved in his offense, the guidelines require a 6-

level enhancement if the offense involved more than 250 victims, USSG § 2B1.1(b)(2)(C), and a 9-level enhancement if the offense involved 100 or more unlawful aliens. USSG § 2L1.1(b)(2)(C). Moreover, the court is entitled to make those determinations based on a preponderance of the evidence. See United States v. Douglas, 489 F.3d 1117, 1129 (11th Cir. 2007); United States v. Chau, 426 F.3d 1318, 1324 (11th Cir. 2005).

In this case, the evidence concerning the number of fraud victims and the number of unlawful aliens was essentially the same. That evidence consisted of testimony concerning the fact that approximately 600 "client files" were seized from Watson's residence, each file containing an application for a different alien, most of whom originally came from South America. That evidence was corroborated by Watson's own post-arrest statements, in which he said that the individuals whom he had sponsored into the Pembina Nation Little Shell Band were "illegal in the United States," that he had sponsored over 2,000 individuals into the Little Shell Band, and that he had charged each individual $1,500.

The evidence concerning the fact that there were at least 600 aliens (the seized client files), and as many as 2,000 aliens (Watson's post-arrest statement), who were fraud victims was undisputed and unrebutted. Under the circumstances, the district

court did not err in finding that Watson's offense involved more than 250 fraud victims and 100 or more unlawful aliens.

As to Watson's claim that the district court did not adequately explain its reasons, a sentencing court is not required to "incant the specific language used in the guidelines" or "articulate its consideration of each individual § 3553(a) factor," so long as the record reflects that the court considered the proper factors. United States v. Ghertler, ___ F.3d ___, 2010 WL 1930264, *3 (11th Cir. May 14, 2010) (internal citations omitted). It is sufficient that the sentencing judge "set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legitimate decision[-]making authority." Id. (citation omitted).

Here, the record establishes that the district court listened to the parties' arguments regarding the appropriate sentence within the guideline range. Thereafter, as set forth above, the court specifically stated that it had considered the statements of the parties, the PSI, which, the court observed, contained the advisory guideline calculations, and "all of the statutory sentencing factors." Then, the court specifically stated that "a sentence at the low end of the advisory guideline range is sufficient to provide adequate punishment and deter future criminal conduct." The court was not required to do more.

Watson's further complaint, that the district court erred by not stating specific reasons for rejecting his request for a variance, is misconceived. Although a sentencing court is required to provide written reasons for imposing a sentence that varies from the advisory guideline range, 18 U.S.C. § 3742(c)(2), there is no such requirement that the court give reasons for ***not*** granting a variance. Moreover, Watson cites no authority for the proposition that a sentencing court is required to give reasons for not granting a variance.

To the extent that Watson argues that his sentence is substantively unreasonable, he is mistaken. Any substantive challenge should be rejected for several reasons.

First, as set forth above, the district court correctly calculated the guideline range in this case (168 to 210 months of imprisonment) and imposed a sentence within, and at the low end of, that range (168 months of imprisonment). Accordingly, this Court should presume that sentence to be reasonable. See United States v. Willis, 560 F.3d 1246, 1251 (11th Cir. 2009) ("Because the district court sentenced Defendant within a properly calculated guideline range, its decision was presumptively reasonable.").

Second, the 168-month sentence was far below the maximum authorized sentence of 125 years of imprisonment that Watson could have received if his

sentences had been consecutive and if the sentence on Count 10 had been based on only one unlawful alien. See United States v. Winingear, 422 F.3d 1241, 1246 (11th Cir. 2005) (when considering substantive reasonableness, appellate court compares the sentence actually imposed to the statutory maximum).

Finally, the sentence imposed reflected the fact that Watson had committed the fraud scam in this case while he was still on probation for previously having committed a similar fraud scam in another case. He thus demonstrated his utter lack of respect for the law as well as the fact that his prior conviction and sentence failed to deter him from committing other crimes. Under the circumstances, Watson did not deserve a less severe sentence than he received.

In sum, the sentence imposed by the district court was both procedurally and substantively reasonable. Accordingly, this Court should not disturb Watson's sentence.

Conclusion

For the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,799 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements for Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-based typeface using Corel Word Perfect 9, 14-point Times New Roman.

Certificate of Service

I hereby certify that an original and six (6) copies of the foregoing Brief for the United States were mailed to the Court of Appeals via Federal Express this 25th day of May 2010, and that, on the same day, the foregoing brief was electronically uploaded to the Eleventh Circuit Court of Appeals' Internet web site at www.ca11.uscourts.gov (see attached Brief Upload Result Page). I further certify that, on the same day, a true and correct copy of the foregoing brief was sent by Federal Express to Fred Haddad, Esq., One Financial Plaza, Suite 2612, Fort Lauderdale, Florida 33394.

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