IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 09-1946

UNITED STATES OF AMERICA
Plaintiff-Appellee,

-vs-

ROBERT GENSCHOW, Sr.,
Defendant-Appellant

Appeal From The United States District Court
For The Western District of Michigan
Southern Division

BRIEF FOR DEFENDANT-APPELLANT ROBERT GENSCHOW, SR.,

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Sixth Circuit Rule 34(a), Robert Genschow, Sr., respectfully requests oral argument because the Court's consideration of the issues presented by this appeal may be assisted or advanced by the presence of counsel before the Court to comment upon the issues and respond to inquiries from the Court.

JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered by the United States District Court for the Western District of Michigan, entered on July 6, 2009. The district court had subject matter jurisdiction under 18 U.S.C. § 3231 because Mr. Genschow was charged with and convicted of offenses against the United States, specifically, violations of 18 U.S.C. § 1853 and 18 U.S.C. § 1163.

This Court has jurisdiction over this appeal pursuant to 18 U.S.C. § 3742(a), which authorizes the review of final sentences, as well as under 28 U.S.C. § 1291, which authorizes review of final orders of the district courts. A timely Notice of Appeal was filed on July 15, 2009.

STATEMENT OF THE ISSUES

Mr. Genschow was convicted at trial for the wrongful cutting of trees on land held in trust for an Indian tribe and for theft from the Indian tribe. Three issues are presented on this appeal:

I. Whether the district court erred when it denied Mr. Genschow's motion to dismiss the indictment for lack of jurisdiction, based on the court's finding that the Ontonagon Band of Chippewa Indians ceased to exist as a separate entity when some of its members voted to join the Keweenaw Bay Indian Community in 1936.

II. Whether the district court erred in denying Mr. Genschow a sentence reduction for acceptance of responsibility under U.S.S.G. § 3E1.1, where the court found as a matter of fact that Mr. Genschow has recognized his erroneous action and has expressed great regret for the consequence of his action, but offset that finding by Mr. Genshow's conduct and mental state during the commission of the offense.

III. Whether the district court abused its discretion in ordering $47,200.00 in restitution, where the amount ordered does not represent the diminution of the market value of the property in question.

STATEMENT OF CASE

This is an appeal from the conviction of and sentence imposed on Robert Genschow, Sr. Mr. Genschow was charged in a two-count indictment with unlawfully cutting of trees in violation of 18 U.S.C. § 1853, and theft from a tribal organization in violation of 18 U.S.C. § 1163. (R. 1, Indictment). Specifically, the indictment charged that between August 1, 2007, and October 2, 2007, Mr. Genschow unlawfully arranged for logging a part of the Ontonagon Reservation that is held in trust for the use and occupancy of the Keweenaw Bay Indian Community. *Id*.

On August 25, 2008, Mr. Genschow filed a motion to dismiss the indictment for lack of jurisdiction. (R. 20, Motion to Dismiss; R. 21, Brief in Support of Motion to Dismiss). The government filed a response on October 14, 2008. (R. 25, Response to Motion). The parties jointly submitted nineteen exhibits. (R. 31, List of Exhibits, R. 32-50, Exhibits). The district court denied the motion and the case proceeded to trial. (R. 30, Order Denying Motion to Dismiss).

After a two-day bench trial held on March 23 and 24, 2009, the district court found Mr. Genschow guilty on both counts. (R. 72, Trial Transcript, at 178, 186). Mr. Genschow was sentenced on July 6, 2009. (R. 75, Minutes of Sentencing). At sentencing, the district court denied the two-level reduction in Mr. Genschow's offense level for acceptance of responsibility under U.S.S.G. § 3E1.1. (R. 83,

Sentencing Transcript, at 6-9). The district court imposed a sentence of ten months in prison, two years of supervised release, and ordered restitution in the amount of $47,200.00. (R. 83, Sentencing Transcript, at 54; R. 77, Judgment). A timely Notice of Appeal was filed on July 15, 2009. (R. 79, Notice of Appeal).

STATEMENT OF FACTS

1. Introduction

In August of 2007, Robert Genschow, Sr., a Native-American and a member of the Keweenaw Bay Indian Community ("KBIC"), who is a descendant of the members of the Ontonagon Band, arranged for logging and clearing part of a certain isolated parcel of land located in Ontonagon County in the Michigan Upper Peninsula. (R. 20, Motion to Dismiss, at 2; PSR, at 4). This parcel is a part of the 80-acre property known as the Ontonagon Reservation. (R. 21, Brief in Support of Motion to Dismiss, at 2). Mr. Genschow's intention was to clear the land and erect a building to be used as tribal headquarters for the Ontonagon Band, and to use the attic as living quarters for himself. (PSR, at 4, ¶ 13). Subsequently, on April 22, 2008, Mr. Genschow was charged in a two-count Indictment with unlawful cutting of trees and theft from a tribal organization based on his actions on that parcel. (R. 1, Indictment).

2. Motion to Dismiss Indictment for Lack of Jurisdiction

Before the trial, Mr. Genschow filed a motion to dismiss the indictment for lack of jurisdiction. (R. 20, Motion to Dismiss; R. 21, Brief in Support of Motion to Dismiss). He did not dispute that the government had the authority to prosecute the crimes under the statues in the indictment. (R. 30, Order, at 10). The motion involved

a rather complicated legal and historical issue regarding the status of part of the Ontonagon Band and the ownership of the Ontonagon Reservation.

Mr. Genschow argued that the indictment was defective because it alleged that the illegal act occurred on the lands held in trust by the United States for the KBIC. (R. 21, Brief in Support of Motion to Dismiss, at 7-8; R. 30, Order, at 10) Mr. Genschow argued that this land, known as the Ontonagon Reservation, as a matter of law is reserved for the use and benefit of the portion of the Ontonagon Band of Chippewa Indians who did not merge into KBIC in 1936, and is therefore not held in trust for the KBIC. (R. 21, Brief in Support of Motion to Dismiss, at 7-8). He further contended that he is a descendent of one of the members of the Ontonagon Band who did not become a member of the KBIC, and as the elected chief of the present day Ontonagon Band, he has the right to use the property. (R. 20, Motion to Dismiss, at 2). He argued that the indictment was defective for these reasons, and should be dismissed. (R. 20, Motion to Dismiss, at 2). The disposition of the motion required the resolution of the rather complicated legal and historical issue: the status of the Ontonagon Band and the ownership of the Ontonagon Reservation.

Mr. Genschow and the government jointly submitted nineteen exhibits, including historical documents dating back to 1854. (R. 31, Exhibit List; R. 32- 50, Exhibits). The government and Mr. Genschow disputed how the historical documents

should be interpreted and what legal conclusions can be drawn from them. (R. 30, Order, at 2).

After reviewing the documents and hearing oral arguments, the district court denied the motion in 13-page Opinion. (R. 30, Order; R. 29, Opinion, at 13). The court found that, although there were members of the Ontonagon Band who were not covered by the 1936 KBIC Constitution, those Ontonagon Indians were not recognized as a separately organized tribe in 1936 nor have they been formally recognized as a tribe since that date. (R. 29, Opinion, at 11-13). The court found that the Ontonagon Band ceased to exist as a separate entity when the Ontonagon Band joined the KBIC in 1936, and that therefore, the land is held in trust for the KBIC, and accordingly the court does have jurisdiction. (R. 29, Opinion, at 11-12).

Subsequent to this ruling, on March 10, 2009, the government filed a motion in limine seeking to prevent Mr. Genschow from introducing at trial any evidence of the Ontonagon Band because the court had ruled as a matter of law that Ontonagon Band ceased to exist as a separate entity when it voted to join KBIC in 1936, and that Mr. Genschow's belief to the contrary is not objectively reasonable. (R. 56, Motion in Limine; R. 57, Memorandum in Support). The district court denied the motion, stating that a defendant has the right to present a defense, that Mr. Genschow's good-faith beliefs regarding the status of the Ontonagon Band and the Ontonagon

Reservation may negate the specific intent element contained in the count II, and that the reasonableness of Mr. Genschow's beliefs is a jury question. (R. 66, Order Denying Motion in Limine, at 2-3).

A two-day bench trial was held on March 23 and 24, 2009. While Mr. Genschow contested the specific intent element, he never denied his actions, and, as the government acknowledged in its closing argument, during his testimony, he admitted to all of the remaining elements of the offenses charged. (R. 72, Trial Transcript, at 158). The central issue at trial was whether Mr. Genschow held a good-faith belief that he had authority to order clear-cutting of the part of the property based on his belief regarding the status of the Ontonagon Band, which would negate specific intent requirement of the Count II. (R. 72, Trial Transcript, at 102-103, 158, 169, 178-79, 180). Ultimately, the district judge found that Mr. Genschow's belief regarding the status of the Ontonagon Band was not a good-faith belief, and the court found Mr. Genschow guilty on both counts. (R. 83, Trial Transcript, at 178, 186).

3. Sentencing Issues

At sentencing, there were two contested issues: the acceptance of responsibility under U.S.S.G. § 3E1.1, which the district court denied, and the method that should have been used to calculate the amount of restitution.

A. Denial of the Reduction for Acceptance of Responsibility

Before the sentencing proceedings, Mr. Genschow provided a written statement to the probation officer, in which he said that he accepts responsibility for his actions, that he is very sorry for the trouble he had caused to the Keweenaw Bay Indian Community, the BIA, the United States Attorney's Office, and the Court. (PSR, at 6, ¶ 27). He stated that he understands that any actions he might take in the future regarding the Ontonagon Band must be undertaken in accordance with federal law and through both the BIA and Congress. *Id*.

Relying on the application note § 3E1.1, comment, note 2, which states that acceptance of responsibility generally is not meant to apply to a defendant who goes to trial to deny the essential factual element of guilt, the Presentence Investigation Report ("PSR") recommended that the district court deny Mr. Genschow an acceptance of responsibility reduction because Mr. Genschow was found guilty after a trial. (PSR, at 8, ¶ 37).

Mr. Genschow objected to this recommendation. (R. 73, Sentencing Memorandum, at 4-6 ; R. 83, Sentencing Transcript, at 3-5). He pointed out that the Guideline note 2 states that conviction by trial does not automatically preclude consideration for reduction under § 3E1.1. *Id*. He argued that, under the application note, Mr. Genschow is eligible for acceptance of responsibility because he went to

trial to challenge not his factual guilt, but a purely legal issue, namely whether the statute applies to his conduct in a light of his belief regarding the status of the Ontonagon Band. *Id*. The government opposed the reduction, disputing that the issue at trial was a legal issue. (R. 83, Sentencing Transcript, at 5-6).

At the sentencing, the district court bypassed this contested issue. The court did not discuss whether the fact that Mr. Genschow went to trial precluded him from being considered for the acceptance of responsibility reduction under U.S.S.G. § 3E1.1, cmt. n. 2. The district court analyzed whether Mr. Genschow demonstrated acceptance of responsibility. (R. 83, Sentencing Transcript, at 6-9). The district court found as matter of fact that Mr. Genschow showed "great regret now for the consequences of his action," and found the "fact of [Mr. Genschow's] recognition of his erroneous action." (R. 83, Sentencing Transcript, at 8). Despite this finding, the district court ruled that Mr. Genschow did not accept responsibility. (R. 83, Sentencing Transcript, at 6-9). In so concluding, the district court relied on the offense conduct to offset its finding of Mr. Genschow's "great regret" and the fact of Mr. Genschow's recognition of his erroneous action. *Id*.

The district court discussed the offense conduct at some length. The court started its discussion by saying that "[i]n this case the Court finds more of a willful blindness than anything else. There was a total and willful blindness on Mr.

Genschow's behalf as to the status of the Ontonagon Tribe in its 1936 folding into the other two tribes to become Keweenaw Bay." (R. 83, Sentencing Transcript, at 7). The district court then noted that Mr. Genschow was an enrolled member of the KBIC, he knew that the Keweenaw Tribe voted to become one band with two other bands, and that Mr. Genschow ran for office in KBIC. *Id.* The district court further discussed Mr. Genschow's appointment as a chief of the Ontonagon tribe, and further noted the fact that Mr. Genschow entered into the contract in his own name and that is "where good faith breaks down completely." *Id.* The district court then noted that the monies Mr. Genschow received from clearing the wood went into his own name and not in the Ontonagon Band trust account because there was no such trust account. *Id.* at 8. The court stated that Mr. Genschow knew that BIA had authority over the land, but he went ahead on his own to build a structure. *Id.* at 8. The district court also stated that Mr. Genschow continues to call himself Lonewolf (Mr. Genschow's name as the Ontonagon Band chief), and that he continues to wait for a governmental recognition of this tribe and its pull away from the KBIC. *Id.* at 9. The district court stated that neither the court nor anyone else is asking Mr. Genschow to abandon those beliefs. *Id.* After this discussion, the court denied Mr. Genschow two-level reduction for acceptance of responsibility under § 3E1.1. *Id.*

B. Amount of Restitution

The second contested issue was the amount of restitution. Both sides presented expert testimony at the sentencing proceedings. (R. 83, Sentencing Transcript, at 9-22). The experts used different methods to calculate damages and arrived at the different amounts.

The government expert did not calculate the property's current market value. (R. 83, Sentencing Transcript, at 21). Instead, the expert used a damage assessment appraisal method. (R. 83, Sentencing Transcript, at 11, 21, 36). This method calculates the amount it would take to restore the property to its original condition, before the trees were cut. (R. 83, Sentencing Transcript, at 21, 19).

The government's expert stated that she determined that the highest and best use of the property is recreational. (R. 83, Sentencing Transcript, at 12). The expert testified that the initial value of the property before cutting trees was $82,400.00. (R. 83, Sentencing Transcript, at 18). From this amount, there were two damage deductions. (R. 83, Sentencing Transcript, at 18-19). One deduction, in the amount of $26,100.00, is for the cost to repair perimeter damage, which is the cost to clean the property from fallen trees and stumps, and level back the top soil that has been pushed aside. (R. 83, Sentencing Transcript, at 15, 19). The second deduction is for the damage to the trees, in the amount of $21.100.00. (R. 83, Sentencing Transcript,

at 16). Adding these two amounts, the total amount of damages arrived at was $47,200.00. (R. 83, Sentencing Transcript, at 16-17). This amount does not represent the current value of the property and is the amount required to put the property back in its original state before the cutting of the trees. (R. 83, Sentencing Transcript, at 19, 21).

The defendant's expert used a market value calculation, which calculates the value of the property in its current state. (R. 83, Sentencing Transcript, at 26). Just as the governments's expert, the defense expert determined that the best use of the property is recreational, and she based her appraisal on such use. (R. 83, Sentencing Transcript, at 25, 27). The expert testified that the property's value actually did not decrease. (R. 83, Sentencing Transcript, at 26). The expert testified that a road access and clearing of the land actually increased the property's value. (R. 83, Sentencing Transcript, at 26). The expert appraised that the initial value of the property was $64,000, and that the current value of the property is $70,000.00. (R. 73, Sentencing Memorandum, Attachment 1, Appraisal, at 2; R. 83, Sentencing Transcript, at 26).

The district court found that both experts were very credible, but chose the government's expert calculation over the defense expert's calculation and ordered the restitution in the amount of $47,200.00. (R. 83, Sentencing Transcript, at 43, 47, 54).

The court justified its choice of the method of calculation by stating that, having reviewed a number of Native American documents, it concluded that the land in its pristine condition is of inestimable value to the tribes. (R. 83, Sentencing Transcript, at 43). No evidence, however, was presented at the sentencing proceeding regarding the value this particular Indian tribe, KBIC, places in this particular land, the property.

The damage calculation also impacted the Guidelines calculation. (R. 83, Sentencing Transcript, at 42; PSR, at 7, ¶ 31). The offense level was increased by six levels because the damage was calculated to be over $30,000.00. (PSR, at 7, ¶ 31). The adjusted offense level was 12. (R. 83, Sentencing Transcript, at 52). The district court stated that, other than some abuse of alcohol, Mr. Genschow has been law-abiding citizen who has served in the armed forces. (R. 83, Sentencing Transcript, at 53). The Criminal History Category was I. (R. 83, Sentencing Transcript, at 54). The advisory guideline range was 10 to 16 months. (PSR, at 15, ¶ 84). The district court sentenced Mr. Genschow to ten months in prison, to be followed by two years of supervised release, and ordered restitution in the amount of $47,200.00. (R. 83, Sentencing Transcript, at 54; R. 77, Judgment). This appeal follows.

SUMMARY OF ARGUMENT

I. The district court committed an error when it denied Mr. Genschow's motion to dismiss the indictment for lack of jurisdiction based on the court's finding that the Ontonagon Band of Chippewa Indians ceased to exist when some of the its members voted to join the Keweenaw Bay Indian Community ("KBIC") in 1936. Historical documents support the conclusion that only those members of the Ontonagon Band who lived within the original boundaries of the L'Anse Reservation merged into the KBIC. The land in question, the Ontonagon Reservation, remained property of those members of the Ontonagon Band who did not merge into the KBIC. Therefore, the Indictment, which alleged that Ontonagon Reservation was property of the KBIC, was defective, and it should have been dismissed for lack of jurisdiction.

II. The district court improperly denied Mr. Genschow a two point reduction for acceptance of responsibility under U.S.S.G. § 3E1.1. The court found as a matter of fact that Mr. Genschow has recognized his erroneous action and has expressed great regret for the consequence of his action, but offset that finding by Mr. Genschow's conduct and mental state during the offense. However, the district court cannot deny an acceptance of responsibility reduction based on the facts of the offense.

Offense conduct is not the proper basis for the determination of whether a defendant accepted responsibility for his action. The proper basis for this

determination is the time after the defendant is put on notice that the federal government has an interest in the defendant's affair, which is typically after the federal indictment has been filed. Since Mr. Genschow was not on notice that the federal government had interest in his affairs at the time he committed his offense, the district court could not consider the offense conduct. The district court thus erroneously denied reduction for acceptance of responsibility.

III. The district court committed an error when it ordered restitution in the amount of $47,200.00. This amount is the damage appraisal and it represents the amount it would take to restore the land to its original condition. Since it does not represent the market value of the land in question, it should have been rejected as a measure of restitution.

The proper way to calculate the damages is to adopt a market value measurement. The market value should be rejected in favor of the other method only when there is a determination that market value does not adequately represent the amount of damages. In this case, the district court stated that the market value is not adequate and that damage appraisal is a better determinant because Indian tribes generally value land in its pristine condition. However, since there was no specific finding regarding what value KBIC places in this particular land, the district court

improperly chose damage appraisal over the market value calculated by the defense's expert.

STANDARD OF REVIEW

Denial of the motion to dismiss the indictment involving questions of law is reviewed *de novo*. *United States v. Evans*, 581 F.3d 333, 338 (6th Cir. 2009) (*citing United States v. Ali*, 557 F.3d 715, 720 (6th Cir. 2009); *United States v. Granier*, 513 F.3d 632, 635 (6th Cir. 2008).

The district court's denial of a reduction for acceptance of responsibility is reviewed for clear error. *United States v. Webb,* 335 F.3d 534, 538 (6th Cir. 2003). However, the question of whether the district court relied on improper considerations is a legal question, not a factual matter, and is reviewed *de novo*. *United States v. Hakley,* 101 Fed. Appx. 122, 126 (6th Cir. 2004)(unpublished).

This Court reviews *de novo* the district court's application and interpretation of the sentencing guidelines, and factual determinations under the clearly erroneous standard. *United States v. Hazelwood*, 398 F.3d 792, 794 (6th Cir. 2005).

ARGUMENT

I. The district court improperly denied Defendant's Motion to Dismiss the Indictment for Lack of Jurisdiction

The district court denied Mr. Genschow's motion to dismiss the indictment for lack of jurisdiction, finding that the Ontonagon Band ceased to exist when some of the members voted to join the KBIC in 1936. This was an erroneous determination and therefore the district court committed an error by making such a finding and committed an error by denying Mr. Genschow's motion to dismiss.

In 1854, the Ontonagon Band of Chippewa Indians was one of several bands of Chippewa in the Lake Superior region to be recognized by the federal government and to have particular tracts of land reserved for them. Article 2 of the Treaty with the Chippewa, 1854, 10 Stat. 1109, provides in applicable part:

> The United States agree to set apart and withhold from sale, for the use of the Chippewas of Lake Superior, the following described tracts of land, viz:
>
> * * *
>
> 6th. The Ontonagon band and that subdivision of the La Pointe band of which Buffalo is chief, may each select, on or near the lake shore, four sections of land, under the direction of the President, the boundaries of which shall be defined hereafter. And being desirous to provide for some of his connections who have rendered his people important services, it is agreed that the chief Buffalo may select one section of land, at such place in the ceded territory as he may see fit, which shall be reserved for that purpose, and conveyed by the United States to such person or persons as he may direct.

(R. 45, Exhibit N, Treaty with Chippewa, 1854).

This reservation of land to the Ontonagon Band of Chippewa Indians and to a number of other bands of Chippewa, along with the agreement to make annuity payments in the form of cash and goods for twenty years, was in exchange for the agreement by these Chippewa of the Lake Superior region to cede all of the lands owned by them to the United States.[1] *See*: "Treaty with the Chippewa, 1854," 10 Stat. 1109. (R. 45, Exhibit N, Treaty with Chippewa, 1854).

It is assumed that the appropriate selection was made, because by Executive Order of President Franklin Pierce the "Ontonagon Reserve" was created on September 25, 1855. Included within the reserve were the following described lands:

> Lots Nos. 1, 2, 3, and 4 of section 14, township 53 north, range 38 west, Michigan meridian; lots Nos. 1, 2, 3, and 4 of section 15, township 53 north, range 38 west, Michigan meridian; southwest quarter and southwest quarter of southeast quarter of section 15, township 53 north, range 38 west, Michigan meridian; the whole of sections 22 and 23, township 53 north, range 38 west, Michigan meridian; north half of section 26, township 53 north, range 38 west, Michigan meridian; north half section 27, township 53 north, range 38 west, Michigan meridian; all situated in the northern peninsula of Michigan.[2]

(R. 50, Exhibit S, Executive Order Establishing Ontonagon Reservation).

Subsequent allotments were made to members of the Ontonagon Band and, in

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[1] Both the L'Anse and Vieux De Sert [Lac Vieux Desert] Bands of Chippewa were separately provided for within the first paragraph of Article 2 of the 1854 Treaty.

[2] Charles J. Kappler, 1 Indian Affairs: Laws and Treaties 848 (1904)

particular, on July 19, 1875 the W ½ of the NW ¼ of Section 26, Township 53 North, Range 38 West within the "Ontonagon Reservation" – the particular parcel of land described in the Indictment – was patented to Menogezhick or Me no ge zhick. [3] (R. 39, Exhibit H, Deed). However, on March 15, 1912, Menogezhick, who was also known as Antoine Jocco or Antoine Jocko, relinquished this allotment because he had received another allotment of land within the Bad River Reservation. (R. 40, Exhibit I, Affidavit of Antoine Jocco). This eighty acres parcel of land was thus returned to possession of the Ontonagon Band of Chippewa Indians.

The Keweenaw Bay Indian Community claims to exercise authority over the entire "Ontonagon Reservation" in general through the Constitution and By-Laws of the Keweenaw Bay Indian Community adopted on November 7, 1936 and approved by the Secretary of the Interior Harold L. Ickes on December 17, 1936. With regards to the W ½ of the NW ¼ of Section 26, Township 53 North, Range 38 West in Ontonagon County, Michigan, in particular, that claim is supported by a Certification recently issued by the Bureau of Indian Affairs (hereinafter sometimes referred to as

[3] While the original patent appears to indicated a conveyance date of July 19, 1975, the affidavit of relinquishment later signed by Mr. Jocco reflects a date of July 29, 1875.

"BIA"). (R. 46, Exhibit O, BIA Certification). On May 28, 2008, BIA Realty Officer Esther M. Thompson issued the following:

CERTIFICATION

> I, Esther M. Thompson, Realty Officer, for the U.S. Department of the Interior, Bureau of Indian Affairs, Michigan Agency, hereby certify that property described as the W ½ of the NW 1/4, Section 26, Township 53 North, Range 39 West, located in Ontonagon County, Michigan is vested in the Federal Government and held in trust for the Keweenaw Bay Indian Community. Said parcel was initially held in the name of the Ontonagon Band of Chippewa Indians pursuant to the Treaty with the Chippewa, 1854. Parcel was allotted to Me No ge zhick (aka: Antoine Jocco) via restricted fee patent, dated July 19, 1875. Said allotment was cancelled July 12, 1912 due to the allottee receiving a second allotment in Wisconsin. Ownership of the allotment then reverted to the "Ontonagon Band" which is now under the jurisdiction of the Keweenaw Bay Indian Community per Field Solicitor's Opinion dated July 2, 2004. [4]

(R. 46, Exhibit O, BIA Certification)

The "Field Solicitor's Opinion" referenced by Ms. Thompson appears to be that opinion issued by United States Department the Interior's Field Solicitor Priscilla A. Wilfahrt in 2004. (R. 33, Exhibit B, Field Solictor's Opinion dated July, 2, 2004). Noting that a BIA title status report showed that title to certain property was being held by the government in trust for the "Ontonagon Band of Indians," Ms. Wilfahrt cited the Preamble of the Constitution and By-Laws of the Keweenaw Bay Indian

[4] Although it is not significant to this issue, it appears that Ms. Thompson's certification mistakenly refers to the property as being in "Range 39 West," rather than "Range 38 West."

Community and concluded that the Ontonagon Band of Chippewas had become a part of KBIC and that, because the Ontonagon Band no longer existed, the property was held by KBIC. *Id*. Having been asked to consider the application of a January 28, 1992 opinion from her office, Ms. Wilfahrt went on to say:

> The 1992 opinion correctly cites the Territory clause of the Community's Constitution to include all land within the original boundaries of the L'Anse reservation as established by the Treaty of 1854 (10 Stat. 1009) *and any and all future additions of land acquired within or without said boundary line by the Secretary of the Interior or by the Tribe, except as otherwise provided by law*. (Emphasis added.) Thus, the Community may exercise its authority over any land acquired by or for it after the date of the adoption of the Constitution. The Constitution was adopted on November 7, 1936 and approved by the Secretary on December 17, 1936. This property was acquired by the Secretary for the Community in 1971 when individual allotments were canceled and title was taken in trust in the name of the Ontonagon Band. Since this property was acquired after the passage of the Constitution it appears to fall within the "future additions" language of the Territory clause and is therefore within the territorial jurisdiction of the Keweenaw Bay Indian Community. The 1992 opinion is therefore distinguishable and is not overruled by this opinion. *Id*.

In a footnote following the fourth sentence in the above quote, Ms. Wilfahrt added:

> Our file does not reveal why title was denominated this way since by 1971 the Ontonagon Band had already organized as part of the Keweenaw Bay Indian Community and no longer existed as independent recognized tribal entity. Denomination of title in this fashion created the legal anomaly that the United States purported to hold land in trust for a nonexistent entity, with the equally *anomalous result* that no one could use or benefit from the trust. To avoid such a *ridiculous result* it is reasonable to assume that the successor in interest to the Ontonagon Band was the intended beneficiary of the trust. (emphasis added). *Id*.

Contrary to the position of the KBIC and the position taken by Field Solicitor Wilfahrt, it is not at all ridiculous to conclude that the Ontonagon Band of Chippewa Indians continues to exist and thus is entitled to the use and benefit of the remaining "Ontonagon Reservation" lands, including the W ½ of the NW ¼ of Section 26, Township 53 North, Range 38 West in Ontonagon County, Michigan. In fact, this is the very conclusion that was arrived at by the Acting Area Director of the Great Lakes Region of the BIA in a memorandum he issued to the superintendent in June, 1971. [5] (R. 48, Exhibit Q, BIA Memorandum dated June, 1971). Discussing the "status of tribal land on the Ontonagon Reservation," it was said:

> The Treaty of September 30, 1854 refers to the Ontonagon Reservation under the 6th Article separately from the L'Anse and Lac Vieux Desert Bands which were collectively reserved what was then named the L'Anse Reservation. The Constitution and Bylaws of the Keweenaw Bay Community however includes the descendants of all three bands residing within the L'Anse Reservation and establishes the boundary of the territorial jurisdiction to that of the L'Anse Reservation.
>
> It would appear from the above that the 160 acres of tribal land remaining in trust on the Ontonagon Reservation described as the N½NW¼, Section 22 and W½NW¼, Section 26 in Township 53 North, Range 38 West is not a part of or within the jurisdiction of the Keweenaw Bay Community. It is in effect an unorganized tribe but independent from all other existing groups. We understand the tribal tracts reverted to tribal ownership by canceled allotment

[5] While Ms. Wilfahrt noted the existence of this memorandum at the end of her 2004 opinion, she dismissed its conclusion because it cited "no authority" and appeared "to ignore the language of the Community's constitution."

> procedures probably subsequent to the organization of the Keweenaw Bay Community. (R. 48, Exhibit Q, BIA Memorandum dated June, 1971).

While Ms. Wilfahrt, and by default the realty department of the BIA, interpreted that language of the Constitution and By-Laws of the Keweenaw Bay Indian Community in a manner to avoid a perceived "anomalous result" (i.e., that the jurisdiction of the remaining lands of the "Ontonagon Reservation" rests with the unrecognized Band of Chippewa Indians rather than KBIC), a review of the plain language of the Constitution and By-Laws of the Keweenaw Bay Indian Community[6] shows that this is just what must occur.

- The Preamble to the Constitution and By-Laws of the Keweenaw Bay Indian Community states:

> "We, the L'Anse, Lac Vieux Desert and Ontonagon Bands of Chippewa Indians, *residing within the original confines of the L'Anse Reservation*. In order to organize as a tribe for the common welfare of ourselves and our posterity, to insure domestic tranquillity, to conserve and develop our natural resources, to form business and other organizations, to establish a credit system, to enjoy certain rights of home rule, do ordain and establish this Constitution and By-laws, for our community which shall be known as the Keweenaw Bay Indian Community." (emphasis added) (R. 34, Exhibit C, Constitution of KBIC).

Clearly, only those members of the Ontonagon Band of Chippewa Indians residing within the original lands given to the L'Anse and Vieux De Sert [Lac Vieux

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[6] It is understood that this Constitution was adopted in response to the passage of the Indian Reorganization Act of 1934.

Desert] Bands of Chippewa by the first paragraph of Article 2 of the 1854 Treaty became KBIC members under this Constitution.

- The territorial jurisdiction of the Constitution and By-Laws of the Keweenaw Bay Indian Community is outlined in Article I and it provides:

> The territorial jurisdiction of this Constitution shall embrace the land within the original boundary lines of the L'Anse Reservation as defined pursuant to treaty dated September 30, 1854, (10 Stat. 1109), and any and all future additions of land acquired within or without said boundary line by the Secretary of the Interior or by the Tribe, except as otherwise provided by law. (R. 34, Exhibit C, Constitution of KBIC).

By referencing the "L'Anse Reservation," this article confirms the territorial jurisdiction of KBIC to be the lands originally set apart in 1854 for the L'Anse and Vieux De Sert [Lac Vieux Desert] Bands of Chippewa.

- The significant portion of the Constitution and By-Laws of the Keweenaw Bay Indian Community pertaining to membership is contained within Article II and it says:

> Section 1. The membership of the Keweenaw Bay Indian Community shall consist of the following:
> (a) The bona fide enrolled members of the L'Anse, Lac Vieux Desert and Ontonagon Bands of Chippewa Indians as shown on any of the allotment rolls of the L'Anse, Lac Vieux Desert and Ontonagon Reservations, and their descendants *who were residing within the limits of the L'Anse Reservation of June 1, 1934*." (emphasis added) (R. 34, Exhibit C, Constitution of KBIC).

Again, only those members of the Ontonagon Band of Chippewa Indians residing within the limits of the "L'Anse Reservation" are to be included.

• Finally, the Constitution and By-Laws of the Keweenaw Bay Indian Community describes the Community's land in Article VII, and even there, only the "L'Anse Reservation" is mentioned – nothing about the "Ontonagon Reservation" can be found:

> Section 1. Allotted Lands. - Allotted lands, including heirship lands, within the L'Anse Reservation shall continue to be held as heretofore by their present owners. . . .
> Sec. 2 Tribal lands. - The unallotted lands of the Community, and all lands which may hereafter be acquired by the Community or by the United States in trust for the Community shall be held as tribal lands, . . ."(R. 34, Exhibit C, Constitution of KBIC, at 5-6).

In summary, the Constitution and By-Laws of the Keweenaw Bay Indian Community clearly contemplated that not all members of the Ontonagon Band of Chippewa Indians were becoming members of KBIC. And by limiting the tribal land to the "L'Anse Reservation," that Constitution, by implication, acknowledged that not all land reserved to the various bands of Chippewa in the Lake Superior region (and specifically the "Ontonagon Reservation") would come under KBIC jurisdiction. [7] And that is what exists today. The trees and other property Mr. Genschow is claimed

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[7] It is interesting to note that publications and other maps of the Ontonagon area do not associate this property with the KBIC. The current Plat Book identifies this eighty acre parcel as "Indian Allotment." An earlier Plat Book from 1930 says that it is owned by the "United States." National Geographic maps obtained from the Bureau of Land Management recognizes the property in general as the "Ontonagon Indian Reservation."

to have unlawfully cut and destroyed and the property he is claimed to have converted were located on the W ½ of the NW ¼ of Section 26, Township 53 North, Range 38 West – a remaining portion of the "Ontonagon Reservation." As a matter of law, that property belongs to and is for the use of the Ontonagon Band of Chippewa Indians, not the Keweenaw Bay Indian Community.[8]

The Indictment filed against Mr. Genschow was thus defective, the district court lacked jurisdiction over this matter, and the Indictment should have been dismissed. The denial of Mr. Genschow's motion to dismiss was reversible error.

II. The district court committed an error by denying the acceptance of responsibility reduction

The Guidelines state that a defendant who proceeds to trial to deny an essential factual element of guilt is not eligible for the reduction. U.S.S.G. § 3E1.1, cmt. n. 2. However, this is not intended to apply to a defendant who proceeds to trial to challenge a legal issue. *Id.* Mr. Genschow proceeded to trial to challenge a legal issue, so he is not precluded from being considered for the reduction under § 3E1.1. This issue was briefed and argued extensively by both parties at the sentencing proceedings in the district court. The district court did not address this issue, and the

[8] The Defendant claims to descend from members of the Ontonagon Band of Chippewa Indians who did not become members of KBIC.

court denied the acceptance of responsibility reduction based on Mr. Genschow's offense conduct.

The district court erred when it denied Mr. Genschow a two-level reduction in his offense level under U.S.S.G. § 3E1.1. In denying the reduction under § 3E1.1 the district court relied on Mr. Genschow's offense conduct instead of its favorable findings that defendant recognized the wrongfulness of his actions and showed regret. This was erroneous because a defendant cannot be denied the acceptance of responsibility reduction based on the criminal conduct itself. If this were the case, no defendant would ever be eligible for an acceptance of responsibility reduction. The district court must confine itself to consideration of events beginning when the defendant was put on notice that federal authorities are interested in his affairs.

"If the Defendant clearly demonstrates acceptance of responsibility for his offense," a district court should reduces his offense level by two levels. U.S.S.G. § 3E1.1(a). Defendant has the burden to demonstrate acceptance of responsibility by a preponderance of the evidence. *United States v. Banks*, 252 F.3d 801, 806 (6th Cir.2001).

The district court found facts that support a finding that Mr. Genschow accepted responsibility. The district court noted "the fact of [Mr. Genschow's] recognition of his erroneous action" and made a factual finding that Mr. Genschow

exhibited "great regret now for the consequence of what he did." (R. 83, Sentencing Transcript, at 8). The district court discounted his recognition of his erroneous action and his great regret by erroneously relying on the offense conduct. Had the court applied the proper standard and considered the proper time-frame, these factual findings would mandate finding that Mr. Genschow accepted responsibility for his offense.

The district court improperly focused on the offense conduct. The court discussed the circumstances of the offense at significant length, both the surrounding events and Mr. Genschow's state of mind at the time of the offense. The court started its acceptance of responsibility discussion by discussing its finding regarding Mr. Genschow's good faith defense. The court said that "[i]n this case the Court finds more of a willful blindness than anything else. There was a total and willful blindness on Mr. Genschow's behalf as to the status of the Ontonagon Tribe in its 1936 folding into the other two tribes to become Keweenaw Bay." (R. 83, Sentencing Transcript, at 7). The district court then noted that Mr. Genschow was an enrolled member of the KBIC, that he knew that the Keweenaw Tribe voted to become one band with two other bands, and that Mr. Genschow ran for office in KBIC. *Id*. at 7. The district court further discussed Mr. Genschow's appointment as a chief of the Ontonagon tribe, and further noted the fact that Mr. Genschow entered into the

contract in his own name and that is "where good faith breaks down completely." *Id*. The district court then noted that the monies Mr. Genschow received from clearing the wood went into his own name and not in the Ontonagon Band trust account because there was no such a trust account. *Id.* at 8. The court stated that Mr. Genschow knew that BIA had authority over the land, but he went ahead on his own to build a structure. All these facts are the facts of the offense conduct and are not within the proper time-frame for consideration whether Mr. Genschow accepted responsibility for his action.

This Court has explained that although district courts have discretion in determining the time period for acceptance of responsibility, that discretion is not unbridled. *United States v. Jeter*, 191 F.3d 637, 639-40 (6th Cir. 1999) *overruled on other grounds by United States v. Webb*, 335 F.3d 534, 536-38 (6th Cir. 2003) (noting that the *de novo* review standard for the application of the acceptance of responsibility adjustment to uncontested facts used in *United States v. Jeter*, 191 F.3d 637, 638 (6th Cir. 1999) was no longer valid in light of *Buford v. United States*, 532 U.S. 59, 121 S. Ct. 1276, (2001)). This Court held that the proper time-frame to consider when making a determination whether defendant accepted responsibility begins at the time when the defendant is put "on notice that the federal government has an interest in his or her affairs." *Id.* In *Jeter*, the district court denied an

acceptance of responsibility reduction to a defendant who had continued to engage in fraudulent criminal conduct after he was charged in a state court, but before his federal indictment. *Id.* at 638. This Court reversed, stating that the relevant time period for acceptance of responsibility cannot begin until "the date that federal authorities indicted [defendant] and he became aware that he was subject to federal investigation and prosecution." *Id*. at 641.

This holding was reiterated in *United States v. Harper*, 246 F.3d 520, 527 (6th Cir. 2001), *overruled on other grounds by United States v. Leachman*, 309 F.3d 377, 384 n. 7 (6th Cir. 2002). In *Harper*, a defendant wrote an obstructive letter after he was indicted, but before he signed a plea agreement. *Id.* at 526-27. This Court affirmed the district court's proper consideration of the defendant's behavior following his indictment in federal court in determining acceptance of responsibility. *Id*. After the federal indictment has been filed, "the defendant is certainly 'on notice that the federal government has an interest in his ... affairs' at the time of indictment." *Id*. (*quoting Jeter*, 191 F.3d at 639-40).

It follows from these cases that a defendant cannot be denied an acceptance of responsibility reduction based on the fact that he committed a crime and the facts of the crime. At the time when defendant is committing the crime and before there is a federal indictment or investigation, the defendant is not on notice that federal

government has an interest in his affairs. These cases make it clear that offense conduct prior to notice of federal interest is not a proper time period to consider when determining whether the defendant accepted responsibility for his offense. Therefore, the district court erred by considering Mr. Genschow's offense conduct to determine whether he accepted responsibility for his offense. The conduct described by the district court is the conduct occurring before the federal indictment has been filed and before Mr. Genschow was put on notice that the federal government has interest in his affairs.

The district court did discuss some of Mr. Genschow's post-offense conduct. The district court stated that Mr. Genschow "continues to call himself Lonewolf. He still believes that he's tribal chair. He is still waiting for a governmental recognition of this particular tribe and apparently a pull away from KBIC. That he hasn't backed away from. That's his belief. " (R. 83, Sentencing Transcript, at 8-9). That conduct, however, does not undercut Mr. Genschow's acceptance of responsibility for his action of clear-cutting KBIC's property.

The fact that Mr. Genschow continues to believe that he is tribal chair and is waiting for congressional recognition of his tribe does not indicate that he had not recognized and acknowledged the wrongfulness of his conduct. There is nothing in his beliefs that belies an acceptance of responsibility. The district court in a way

acknowledged that when it stated that neither the court nor anyone else is asking Mr. Genschow to abandon these "heartfelt beliefs." (R. 83, Sentencing Transcript, at 9). He can continue to believe he is Lonewolf and also acknowledge the wrongfulness of his criminal conduct. Even though he might continue to call himself Lonewolf, Mr. Genschow explicitly recognized and acknowledged that, in retrospect, his earlier conduct was wrongful. (See PSR, at 6-7, ¶ 27, Mr. Genschow's statement). In his letter to the PSR writer he recognized that his conduct was wrongful and he acknowledged that any future action on his part will have to be accordance with federal law and through BIA and Congress. *Id*.

The district court expressed findings that support a reduction for acceptance of responsibility. But the court's acceptance of responsibility discussion erroneously focused primarily on offense conduct that occurred before defendant was on notice that federal authorities were interested in his conduct. The court's reliance on offense conduct facts was improper. Defendant requests that this Court reverse the district court's decision to deny Mr. Genschow two-level reduction for acceptance of responsibility under § 3E1.1. In the alternative, Mr. Genschow requests that the district court decision on this issue be vacated and the case remanded for further proceeding with instructions that the court consider only conduct within the proper time frame.

III. The district court committed an error by ordering restitution in an amount that does not represent the current market value of the property

The district court improperly ordered restitution in the amount of $47,200.00 as calculated by the government's expert. This amount represents the amount that would be needed to restore the property to its original condition before the clear-cutting of the wood. The proper amount is that calculated by the defense expert because that amount represents the property's current market value.

Determination of the amount of restitution is a two-step process. *United States v. Sosebee*, 419 F.3d 451, 456 (6th Cir. 2005). "The initial determination is whether a market value for the . . . property is readily ascertainable. Second, we must determine whether that figure adequately measures either the harm suffered by the victim or the gain to the perpetrator, whichever is greater." *Id*. The market value should be bypassed only if it does not adequately measure the harm or gain. *Id*. (*citing United States v. Warshawsky*, 20 F.3d 204, 212-14 (6th Cir. 1994).

In this case, the market value was easily ascertainable and should have been used as the measure of damages. The defense expert used a market value approach and was able to calculate damages. The district court, however, rejected this method, stating that the better method is the one used by the government, which measures damages by the cost to restore the land to its original condition. The district court justified its choice of this method by stating that the land in its pristine condition is

of inestimable value to the tribes. This general statement about the value tribes place on land is not sufficient to justify rejecting the market value method.

There was no testimony about what value this particular tribe places in this particular piece of land. Time-worn notions of American Indian reverence for land in its pristine condition may have romantic appeal, but have little connection with the modern reality of casino-resort land use.[9] Therefore, since the district court did not make individualized findings about the value KBIC places in the Ontonagon Reservation, the court was not justified in rejecting a market value calculation.

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[9] At least two of the casino resorts among the many on the Upper Peninsula are within 30 minutes drive of the disputed property, http://www.lvdcasino.com/golf.html http://www.ojibwacasino.com

CONCLUSION

For the reasons stated in the argument I of the Argument section, Mr. Genschow requests that this Court vacates the district court's decision to deny the Motion to Dismays the Indictment, dismiss the Indictment for the lack of jurisdiction, and vacate Mr. Genschow's conviction. In the alternative, if this Court affirms the denial of the motion to dismiss, Mr. Genschow requests this Court to: (1) reverse the district court's denial of the acceptance of responsibility reduction, or to vacate and remand for the further proceeding with instructions regarding the proper time frame and (2) to vacate the restitution award ordered by the district court and instead adopt the market value calculation offered by the defense expert.

Respectfully Submitted,

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CERTIFICATE OF COUNSEL

It is hereby certified that this brief contains 8, 300 words, as counted by WordPerfect X4.

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was filed electronically on November 23, 2009, and that a copy was made upon opposing counsel through the Court's CM – ECF system.

/s/ Paul L. Nelson
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APPELLANT'S DESIGNATION OF RECORD FROM DISTRICT COURT

Appellant, pursuant to Sixth Circuit Rule 30(b), hereby designates the following filings in the district court's record as items relevant to the disposition of this appeal.

Pleadings

Docket Entry No.	Document	Date
R. 1	Indictment	04/22/2008
R. 20	Motion to Dismiss	08/25/2008
R. 21	Brief in Support of Motion to Dismiss	08/25/2008
R. 25	Response to Motion	10/14/2008
R. 29	Opinion	11/14/2008
R. 30	Order Denying Motion to Dismiss	11/14/2008
R. 31	Exhibit List	11/18/2008
R. 32-50	Exhibits	11/18/2008
R. 56	Motion in Limine	03/10/2009
R. 57	Memorandum in Support	03/10/2009
R. 66	Order Denying Motion in Limine	03/19/2009
R. 73	Sentencing Memorandum	06/30/2009
R. 75	Minutes of Sentencing	07/06/2009
R. 77	Judgment	07/06/2009
R. 79	Notice of Appeal	07/15/2009

Transcripts of Hearings

Docket Entry No.	Document	Date
R. 72	Trial Transcript	03/23-24/2009
R. 83	Sentencing Transcript	07/06/2009

Confidential Document

Docket Entry No.	Document	Date
N/A	Amended Presentence Report	