UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Criminal No. 8:12-cr-569(TJM)

vs.

JAMES GRAY, WILLIAM ROGER JOCK,
THOMAS ANGUS SQUARE, also known as "Salt,"
ANTHONY LAUGHING, SR., and JOSEPH HIGHT,
Defendants.

DEFENDANT JOCK'S TRIAL MEMORANDUM OF LAW

Defendant, William Roger Jock, by and through his attorney, Lawrence Elmen, Esq., does submit this trial memorandum of law for the Court's consideration prior to the start of trial on Tuesday, October 29, 2013. Defendant Jock joins in the trial memorandum submitted on behalf of Defendant Laughing, in that the scope and ability of the defense in this matter to provide a full and complete statement regarding potential trial issues is nearly impossible due to the incredible amount of electronic data sent to the defense in a piecemeal fashion beginning in April and continuing through the date of this trial memorandum. To date, the defense is aware of thirty four (34) CD-ROMS shipped to the defense under seven separate letter covers, along with numerous emails containing electronic disclosures. Based upon BATES stamp numbering, it appears that the Government disclosed 26,016 documents, to date—many being extended play videos, with more documents still unreceived.[1]

It is simply not possible to align 26,016 pages of documents and videos with the testimony of the 35 proposed Government witnesses which were disclosed by the Government on Wednesday, October 16, 2013.

Additionally, as of Saturday, October 19, 2013, all *Jencks* and *Giglio* disclosures from the Government have not been received. The defense does not know how vast the remaining

[1] This restatement of disclosures excludes the 61 boxes of documents seized from the three feathers casino and stored at the Homeland Security Investigations Office in Massena, NY.

Jencks and *Giglio* disclosures will be or the issues that will be raised from the remaining disclosures.

This trial memorandum of law will address the following topics: (1) applicable law regarding 18 U.S.C. § 1955 (hereafter, "Count I") and the limitations upon Count I created by 25 U.S.C. §§ 2701—2721, commonly called the Indian Gaming Regulatory Act ("IGRA") and applicable case law; and (2) the evidentiary issues which appear to exist at this time and are known to the defense.

As a preliminary matter, Defendant Jock joins in Defendant Laughing's trial memorandum of law regarding the following issues: (1) request for additional peremptory challenges as no defendant in this matter is similarly situated and may possess theories of defense which are contrary to other defendants, if not hostile; and (2) Precluding Rule 404(b) evidence the Government intends to offer against defendant Laughing due to the additional and unavoidable prejudice which will be borne by the co-defendants, to include Defendant Jock—regardless of any curative or limiting instructions by this Court. Simply put, there is a complete absence of any connection between the so-called All-in Lounge and *Kanienkeha:ka Kaianerehkowa Kanonhsesne* (hereafter, "The People of the Way of the Longhouse") which operated and closed prior to the Three Feathers Casino. The lack of any connection between The People of the Way of the Longhouse and the All-In Lounge, except for the same physical location, substantially prejudices Defendant Jock and the remaining co-defendants.

I. Limitation Upon Application of 18 U.S.C. § 1955 and 18 U.S.C. § 1151.

Since 1989, the Northern District of New York recognized that, under certain circumstances:

> Congress intended no Federal statute should prohibit the use of gambling devices for *bingo or lotto,* which are legal class II games under the IGRA. Thus, the IGRA makes 15 U.S.C. § 1175 and other statutes including 18 U.S.C. § 1955, inapplicable to *class II bingo and lotto gaming*.

United States v. Burns, 725 F.Supp. 116, 124 (NDNY 1989)(McCurn, C.J.)(italics in original).

Mr. Jock's defense to both Count I and Count II is that the IGRA applies to The People of the Way of the Longhouse and precludes criminal liability under Count I and Count II.

The first issue of fact is whether The People of the Way of the Longhouse are, in fact, an "Indian Tribe." Whether The People of the Way of the Longhouse conducted their activities in good faith based upon IGRA is an issue of fact for the jury to decide.

Contrary to the assertions made by the Government, it is the Judicial Branch, not a representative from the Executive Branch, which makes the final determination upon this issue. See, *New York, et al v. The Shinnecock Indian Nation*, 400 F.Supp.2d 486 (EDNY 2005)(holding that Federal common law provides a standard for determining tribal existence separate from recognition by the Secretary of the Interior). In *Shinnecock*, the District Court held that "beginning with *Montoya* and continuing to the present, [the courts] establish[ed] a federal common law standard for determining tribal existence" which the Shinnecock Indian Nation "plainly satisfied" despite a complete lack of recognition by the Secretary of the Interior. *Shinnecock*, at 492.

In *Shinnecock*, the Indian Tribe which was <u>never</u> recognized by the Secretary of the Interior as an "Indian Tribe" was, in fact, an Indian Tribe for the purposes of the IGRA. The determination was an essential factual finding required to evaluate the Indian Tribe's claim of right to build and operate a casino. *Id.*

The Supreme Court held in 1901 that:

> By 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a 'band,' a company of Indians is not necessarily, though often, of the same race or tribe, but united under the same leadership in a common design. While a 'band' does not imply the separate racial origin characteristic of a tribe, of which it is usually an offshoot, it does imply a leadership and a concert of action. How large the company must be to constitute a 'band' within the meaning of the act it is unnecessary to decide. It may be doubtful whether it requires more than independence of action, continuity of existence, a common leadership, and concert of action.

Montoya v. United States, 180 U.S. 261, 266 (1901). See also, United States v. Candelaria, 271 U.S. 432, 442 (1926)

The test set forth by the Supreme Court, which remains unchanged through 2013, was adopted and followed by the Second Circuit in *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 59 (2d Cir 1994). The *Golden Hill* Court recognized that "[t]he formation of this standard and its use by the federal courts occurred after Congress delegated to the executive branch the power to prescribe regulations for carrying into effect statutes relating to Indian affairs, . . ., and without regard to whether or not the particular group of Indians at issue had been recognized by the Department of the Interior." *Id.*

The test to determine if The People of the Way of the Longhouse are, in fact, an "Indian Tribe" under Federal law is, not limited to recognition by the Secretary of Interior, but rather:

> (1) Whether they are a body of Indians which are of the same or similar race; and
> (2) Whether The People of the Way of the Longhouse are united in a community under one leadership or government; and
> (3) Whether The People of the Way of the Longhouse inhabit a particular though sometimes ill-defined territory.

Like the *Shinnecock* case, the trial evidence will prove each of the three necessary elements to establish that The People of the Way of the Longhouse are an Indian Tribe. Regarding the second element, the Government concedes in their Trial Memorandum that The

People of the Way of the Longhouse, are in fact a "traditional community group." See Trial Memorandum of United States, page 11 (ECF Document #152.

Testimony provided by lay witnesses and three expert witnesses (Tekarontakeh, Kanentiio, and Rarihokwats) will prove the three elements set forth by The *Montoya* Court by showing:

- The common oral language, customs, traditions, and governmental functions performed by The People of the Way of the Longhouse, as well as the mode and operation of the governing body historically and today;
- Role a purpose of clan mothers and clan chiefs within the Longhouse; and
- The current and historical decision making process and leadership structure of the People of the Way of the Longhouse.

Trial evidence will establish that unlike the St. Regis Mohawk Tribe, which was created by the Federal Government and the State of New York, The People of the Way of the Longhouse existed as a governing and decision-making body long before the Saint Regis Mohawk Tribe was imposed upon The People of The Way of the Longhouse. Unlike the Saint Regis Mohawk Tribe, The People of the Way of the Longhouse possess and adhere to a constitution which existed prior to the effective date for the United States Constitution on March 4, 1789. Defense expert witnesses will also address the historical area of habitation for the People of the Way of the Longhouse throughout New York, Ohio, and Pennsylvania and their residency along the Saint Regis River and Saint Lawrence River well before 1789.

Upon the jury's determination that The People of the Way of the Longhouse are, in fact, an Indian Tribe, the jury must determine whether the governing leaders of The People of the Way of the Longhouse, to include Defendant Jock, properly engaged in, licensed and regulated a

class II gaming facility within Indian Lands. This evidence shall also be presented to the jury through lay witness testimony. The trial evidence will show that The People of The Way of the Longhouse took all steps required by the IGRA and adhered to the requirements of the IGRA as required by Indian Tribes.

At no time did The People of The Way of the Longhouse, to include Defendant Jock, commit any action in violation of 18 U.S.C. § 1955 under Count I or 15 U.S.C. § 11175 (a) and 1176, under Count II. The People of the Way of the Longhouse cannot be criminally liable for aiding and abetting violations of Count I and Count II, pursuant to 18 U.S.C. § 2, as they lack criminal liability for under underlying charged offenses.

II. FRE 801(d)(2)(E) Does Not provide Unrestricted Access to Hearsay Testimony at Trial

The Government Trial Brief states an anticipation to offer evidence of conversations between so-called co-conspirators not charged by this current indictment or any other indictment. The Government intends to seek the admission of evidence regarding hearsay statements between non-charged defendants when no Defendant was a party to the conversation. Government Trial Memorandum of Law, page 16—19). Government's assertion of such a right is fatally flawed and such statements are not *per se* admissible under FRE 801(d)(2)(E).

Defendant Jock objects based upon the circumvention and violation of defendants right to confront witnesses against him.

Initially, the Government must establish that each any every so-called "co-conspirator" was, in fact, a co-conspirator. The Government must first establish the defendants had the specific intent necessary to commit the specific substantive crimes that are the object of the claimed conspiracy. *United States v. Samaria*, 239 F.3d 228, 238 (2d Cir 2001)(insufficient

evidence of defendant's specific intent to participate in crimes charged to be found participant in conspiracy). Second, the Government must establish that the claimed "co-conspirator" possessed the same specific intent as the defendants to commit the substantive crimes charged by this indictment as a co-conspirator. No defendant possessed such a specific intent because The People of the Way of the Longhouse were not able to violate the criminal statutes alleged by Count I and Count II. The Government cannot establish an illegal relationship between any charged defendant and any unidentified, so-called "co-conspirator." Therefore, the Government cannot establish an illegal relationship between two co-conspirators.

Defendant Jock requests the Government to provide an offer of proof prior to jury selection, or in the alternative, prior to questioning any witnesses in its case-in –chief if the Government asserts the witness is also an unnamed, unindicted co-conspirator subject to prosecution.

Defendant Jock also demands all *Giglio* and *Jencks* materials regarding the so-called "co-conspirators" from the Government.

III. CONCLUSION

Defendant Jock respectfully submits this memorandum of law and reserves the right to submit further memorandum of law regarding legal issues which arise between not and the end of trial.

Date: October 21, 2013

Respectfully submitted,

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Certificate of Service for Electronic Case Filing System

I hereby certify that on October 21, 2013, I electronically filed with the Northern District of New York Clerk of the District Court using CM/ECF system the above referenced document(s) in connection with the above-referenced case. The CM/ECF system automatically sent electronic notifications of such filing to the attorneys of record in this case, as maintained by the District Court Clerk's Office, and who are properly registered in the CM?ECF system for the NDNY as required pursuant to NDNY General Order #22.

In addition, a copy was mailed to *pro se* defendant Square at his place of incarceration.

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