

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

11-CR-57-A

BERGAL MITCHELL, III,

Defendant.

**GOVERNMENT'S RESPONSE TO THE
DEFENDANT'S MOTION TO DISMISS
ON "SOVEREIGN IMMUNITY" GROUNDS**

THE UNITED STATES OF AMERICA, by and through its attorneys, James P. Kennedy, Jr.¹ and Anthony M. Bruce, Assistant United States Attorneys, hereby files its response to the defendant's motion to dismiss on grounds of "sovereign immunity."

IN SUPPORT THEREOF, it is respectfully shown unto the Court as follows:

1. The defendant moves the Court to dismiss the indictment, relying on the recent Fourth Department decision in *Sue/Perior Concrete and Paving, Inc. v. Seneca Gaming Corp.*, 952 N.Y.S.2d 353 (4th Dept. 2012) saying that, based on that case, "the government

¹The United States Attorney, William J. Hochul, Jr. has been recused from this case.

is barred from prosecuting defendant under the doctrine of sovereign immunity."

2. From a reading of the defendant's papers, he appears to be arguing that (1) because Indian Tribes, in this case, the Seneca Nation and the Nation's subsidiary corporations, enjoy immunity from lawsuits under the doctrine of sovereign immunity; (2) because this sovereign immunity extends "to individual tribal officials acting [both] in their representative capacity and within the scope of their authority;"² (3) because the defendant was a member of the board of directors of the of Seneca Gaming Corporation ("SGC") (and eventually became its vice chairman); (4) the defendant was, in this capacity, supposed to "promote[] the business interests of the SGC" (and those of its parent corporation, the Seneca Niagara Falls Gaming Corporation); and (5) the defendant had the authority to, among other things, purchase the real estate that is the focus of the case, the defendant was acting in his official capacity and thus cannot be sued (for his actions in this capacity). Obviously, in his argument, the defendant has stretched "lawsuit" to mean that not only is he immune from suit, he also is immune from being charged and convicted. His argument is plainly and simply wrong.

²See *Sue/Perior Concrete and Paving, Inc. v. Seneca Gaming Corp.*, 952 N.Y.S.2d at 355

3. In *Pallyup Tribe, Inc. v. Dep't of Game of Washington*, 433 U.S. 165, 171 - 72 (1977), the Court wrote, very simply, that "the doctrine of sovereign immunity . . . does not immunize the individual member of the tribe." This, to us, brings the defendant's argument to a dead end and requires the Court to deny his motion. See also *Catskill Development, LLC v. Park Place Entertainment Corp.*, 206 F.R.D. 78, 86 (S.D.N.Y. 2002) (citing *Pallyup Tribe*) for the proposition that "it is well settled that tribal sovereign immunity does not extend to individual members of a tribe."

4. In addition, even if the defendant's theory had some traction, the case upon which he relies, *Sue/Perior Concrete and Paving, Inc. v. Seneca Gaming Corp*, specifically limits the doctrine of sovereign immunity, when applied to an individual acting in a representative capacity, to those actions that are "within the scope of [his] authority," and notes that the individual "is . . . 'stripped' of tribal immunity when he acts 'manifestly or palpably beyond his authority'." *Id.* at 355. Scheming to steal and then stealing \$338,000 from the Seneca Nation hardly qualifies as an act within the scope of the defendant's authority.

5. As noted in *United States v. Juvenile Male 1*, 431 F.Supp.2d 1012, 1016 (D.Ariz. 2006), a case in which the Navajo Nation sought to quash a subpoena in a criminal case on the basis of sovereign immunity, the court there noted that sovereign immunity "protects the tribe," and that the service of a subpoena on the tribe in a criminal case "was neither a suit, nor one against the tribe." And "tribal immunity is just that: sovereign immunity which attaches to a tribe because of its status as a dependent domestic nation." See *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992). (emphasis supplied). Bergal Mitchell can hardly claim to be "a tribe" or a "dependent domestic nation." See also *In re Long Visitor*, 523 F.2d 443 (8th Cir.1975). Thus, there simply is no basis for him to personally claim sovereign immunity.

6. We note further that (and again assuming the defendant's theory has traction) the defendant is in Federal Court where he is asking this Court to dismiss the indictment in reliance on a decision from an intermediate state appellate court (and which cites *Pallyup Tribe, Inc.* which the defendant did not cite, much less distinguish).

BASED ON ALL OF THE FOREGOING, this Court should recommend that the defendant's motion be denied in all respects.

DATED: Buffalo, New York, November 29, 2012.

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Attorney for the United States
Acting Under Authority Conferred
by 28 U.S.C. § 515

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