13-4639

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

-vs-

MICHAEL THOMAS

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

This appeal stems from the District Court's decision to grant the Government's two motions in limine, denying the Appellant the right to present a potentially viable defenses to the elements of intent under 18 U.S.C. §§ 666 and 1163 in violation of his rights under the Sixth Amendment.

The District Court's ruling on the motions in limine is reported. United States v. Thomas, 2013 U.S. Dist. LEXIS 163855 (D.Conn. 2013).

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case was instituted by indictment, filed with the District Court on January 4, 2013, charging Michael Thomas with violating 18 U.S.C. §§ 666 and 1163. The Government alleged in Count One of the indictment that from October 2007 through April 2009, Mr. Thomas, an employee of the Mashantucket Pequot Tribe, violated 18 U.S.C. § 1163 by embezzling, stealing, converting to his own use, willfully misapplying or willfully permitted to be misapplied moneys, funds, and credits belonging to the Mashantucket Pequot Tribe valued at more than $1,000.

In Count Two, the Government also alleged that Mr. Thomas violated 18 U.S.C. § 666(a)(1)(A), stating that from October 1, 2007 through September 30, 2008 Mr. Thomas, as an agent of the Mashantucket Pequot tribal government, did embezzle, steal, obtain by fraud, intentionally misapply, and otherwise without authority knowingly convert to his own use property and funds worth $5,000 or more which was owned and under the care and control of the Mashantucket Pequot tribal government and that said government received more than $10,000 in grants from the United States Dept. of the interior in one year beginning on October 1, 2007. In Count Three, the Government restated the allegations found in Count Two but stated that the Mashantucket Pequot tribal government received in excess of $10,000 of grants from the United States Dept. of Interior.

Mr. Thomas was convicted under all three counts of the indictment. He was sentenced on November 22, 2013. The Appellant's notice of appeal was timely filed on December 2, 2013. Mr. Thomas contends that the District Court erred in preventing him from introducing evidence showing that he lacked the specific intent to violate 18 U.S.C. §§ 666 and 1163.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

ISSUE PRESENTED

Did the District Court abuse its discretion and violate the Appellant's right to present a defense under the Sixth Amendment when it prevented the Appellant from presenting evidence regarding the Appellant's past actions demonstrating his state of mind and intent to willfully misapply or embezzle funds under 18 U.S.C. §§ 666 and 1163.

STANDARD OF REVIEW ON APPEAL

A District Court's ruling regarding whether or not to admit or reject evidence will generally not be disturbed except in cases where the trial judge abused his or her discretion. United States v. Ramirez, 609 F.3d 495, 499 (2d Cir. 2010).

IN THE UNITED STATES DISTRICT COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 13-4639

UNITED STATES,

Appellee,

vs.

MICHAEL THOMAS,

Defendant/Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE DEFENDANT-APPELLANT MICHAEL THOMAS

STATEMENT OF THE CASE

The Appellant was convicted of violating 18 U.S.C. §§ 666 and 1163. The basis for this violation was that the Appellant, the Chairman of the Mashantucket Pequot Tribal Nation [hereinafter "The Tribe"], used his Tribe issued American Express card for personal expenses in violation of §§ 666 and 1163. Most of these expenses were to pay for his dying mother, a Tribe member, to be transported to and from her dialysis treatments. The Appellant's defense was grounded on the

theory that he and other members of Tribal Counsel were permitted to charge personal expenses on their American Express cards and provide subsequent reimbursement to the Tribe. The Government moved in limine to prevent the Defendant from introducing evidence of his intent to repay the funds and evidence regarding how other members of The Tribe used their American Express cards.

The District Court, Hon. Janet Arterton, held two separate hearings on the issue. The first took place on July 18, 2013 and the second, a telephonic status conference, took place on July 19, 2013. During the second hearing, the district court granted both of the Government's motions in limine. The Defendant was convicted at trial. Following the trial, the District Court issued a written ruling to "…confirm its oral ruling on the motions." United States v. Michael Thomas, 2013 U.S. Dist. LEXIS 163855, *1, n. 1 (D.Conn. 2013). The District Court held that 1) Evidence that the Defendant had reimbursed The Tribe for personal expenses improperly charged on his official credit card prior to the time period charged in the indictment is impermissible propensity evidence and not otherwise relevant; and 2) Evidence that other members of the Tribal Council used their American Express cards for personal expenditures cannot be offered to show Mr. Thomas's state of mind regarding the Tribe's policy concerning personal use of these credit cards.

The Defendant was sentenced on November 22, 2013. On December 2, 2013 the Defendant filed this timely appeal.

STATEMENT OF FACTS

The Mashantucket Pequot Tribal Nation is a federally recognized, sovereign Indian Tribe. A. at 117-18.[1] As such, it has a right to self governance. T. at 118. Michael Thomas was Chairman of the Mashantucket Pequot Tribal Nation. A. at 119. Mr. Thomas was elected Chairman of the Tribal Council in 2000. A. at 119 Prior to being Chairman, he served on the Tribal Council since at least 1994. A. at 119.

On January 4, 2013 Michael Thomas was indicted for violating 18 U.S.C. § 1163 and 18 U.S.C. § 666. A. at 3. The Government limited its indictment period for all crimes charged to a period between October 2007 and September 2009. A. at 3-4. The District Court ultimately ruled that it was this period that was the only relevant period to consider in regard to the Defendant's conduct and evidence of any policy or practice of reimbursement. A. at 120. During the indictment period, the Appellant placed certain charges on an American Express Card that was issued to him by the Tribe, including charges for the transportation of his ailing mother to

[1] Citations to "A" are citations to the Appellant's appendix, unless otherwise noted.

her dialysis treatments. A. at 121. The charges for her transportation to and from dialysis amounted to $89,000. A. at 122.

Prior to the trial, hearings were held on July 18 and July 19, 2013 regarding the Government's motions in limine. At one point during oral argument, the District Court indicated that "…the intent at the time [the charge is made] is all of apiece. If what he's [the Appellant] is saying is I used to charge it on the AMEX card, I used to pay it back, that's what the – even though that policy says you can't do it, that's what I understood was okay to do and that's what I was doing…." A. Lim. at 43. Defense counsel stated that Mr. Thomas understood the practice of the Tribe to be that personal expenses could be placed on the card and then reimbursed. A. at 49. The Government acknowledged that at one time, the Appellant had repaid the Tribe $159,000 worth of personal charges that he had put on his card. A. at 63.

Defense Counsel also noted that another tribe member placed $36,511 on her Tribe issued credit card from 2006-2007, charges which were ultimately reimbursed. A. at 97. These reimbursements were not always made within the thirty day period during which an expense report was purportedly required to be filed with Tribe. A. at 97. Defense Counsel's Memorandum re Government Motions in Limine set forth a proposed jury instruction regarding the term "willful" in 18. U.S.C. § 1163. D.Memo at 4. The District Court did not adopt this

instruction and instead gave a different instruction. A. at 123. Defense counsel objected to the court's instruction. A. at 124.

Donna Capoverde, a financial analyst for the Tribe, testified that in 2005 a Tribal Council Resolution was passed to limit usage of the American Express Card to business purchases and to provide a business justification for each purchase within thirty days of the Tribe receiving the American Express bill. A. at 125. She also testified that this policy had essentially been in effect prior to 2005 but without the specific requirement that the cardholder provide a business justification for each expense within thirty days of receipt of the bill. AT. at 125-26. In accordance with this policy, Capoverde testified that the Finance Department would send out a memo along with a copy of the monthly American Express Card statement. A. at 127. This memo would advise each of the council members that an expense report had to be submitted to the Finance Department within thirty days. A. at 127-128. The Finance Department would pay the American Express bills as they came in and await the cardholders' reconciliation reports. A. at 128. Capoverde testified that the memos that were sent out to cardholders stated "The Charges on your statement have been paid by finance based on the assumption that all charges are business related…." A. at 129. She also testified that this document included a note to cardholders that those who did not comply with the policy could have the charges on the American Express Card offset from Tribal Council

member's salary. A. at 130. No Tribe member ever had their salary offset, including Michael Thomas. A. at 130. Defense counsel then attempted to elicit testimony from Capoverde that other members of the Tribal Council had failed to meet the thirty day report requirement but the District Court barred him from doing so following an objection by the Government. A. at 130.

Laura Sasser-Cuff, a former member of the Tribe's financial staff, testified that each member of the Tribal Council received memos reminding them that they were to itemize their business expenses and to reimburse the tribe for any personal expenses. A. at 131. Sasser-Cuff also noted that if there was a personal expense charged, it could be reimbursed after the fact by a council member. A. at 132.

SUMMARY OF THE ARGUMENT

The Appellant's first two issues on appeal are inexorably linked. The Appellant, as a member of the Tribal Counsel, was given an American Express Card by the Tribe. The fundamental issue at the Appellant's trial was whether or not he believed his actions were permitted or authorized by the Tribe. In order to properly defend the Appellant, his trial counsel attempted to put forth evidence that Michael Thomas had, in the past, used his Tribe issued credit card for personal expenses and had reimbursed the Tribe for said expenses at a later date. Defense counsel also planned to offer evidence regarding instances where other members of the Tribe used Tribal credit cards for personal expenses and later reimbursed the

Tribe. The evidentiary offering regarding the Defendant's prior reimbursements would have permitted the jury to fully weigh whether or not his use of the Tribe's charge card was authorized by the Tribe and thus whether he had the requisite intent to commit the charged crimes. The evidence regarding other Tribe members' similar use of their cards for personal expenses and their subsequent reimbursements would have rebutted the Government's assertion that the Tribe did not permit personal expenses to be charged on Tribal cards and then reimbursed the funds later. The District Court's failure to allow the Defendant to offer evidence which may have negated the intent elements of 18 U.S.C § 666 and 1163 deprived him of his right to present a defense to the crimes with he was charged.

ARGUMENT

I. DEFENDANT'S RIGHT TO PRESENT A DEFENSE

Defendants have a Constitutional right to present a complete defense. Wade v. Dominic Manello, 333 F.3d 51, 57 (2d Cir. 2003) (citing Crane v. Kentucky, 476 U.S. 683, 690 (1986)). "The right to call witnesses in order to present a meaningful defense at a criminal trial is a fundamental constitutional right secured by both the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment." Id. at 57 (internal citations omitted). Indeed, few rights are more central than a defendant's right to present

witnesses in his own defense. Chambers v. Mississippi, 410 U.S. 284, 302 (1973). Trial courts do, of course, have the power to "…exclude evidence through the application of evidentiary rules that serve the interests of fairness and reliability…." Wade, at 58. There are, however, instances where exclusion under the Federal Rules of Evidence violate a defendant's to put on a defense. United States v. Scheffer, 523 U.S. 303, 308 (1998). The rule must "implicate a sufficiently weighty interest of the defendant." Id. The evidence submitted may not lack a legitimate purpose and trial judges are permitted to exclude evidence that lacks such a purpose. Holmes v. South Carolina, 547 U.S. 319, 326 (2006).

F.R.E. §§ 401 and 403 both serve to limit the admissibility of evidence. Rule 401 states that "evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Rule 403 states that a court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." These rules are commonly accepted limits on evidence with deep roots that need not be explored further here. It suffices to say that these rules were misapplied, hindering the Defendant's ability to present a viable defense.

A District Court's ruling regarding whether or not to admit or reject evidence will generally not be disturbed except in cases where the trial judge abused his or her discretion. United States v. Ramirez, 609 F.3d 495, 499 (2d Cir. 2010).

The Defendant was charged and convicted of violating two statutes. The pertinent part of the first statute, 18 U.S.C. § 666, titled Theft or Bribery Concerning Programs Receiving Federal Funds states that

> (a) Whoever, if the circumstances described in subsection (b) of this section exists –
> (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—
> (A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—
> (i) is valued at $5,000 or more, and
> (ii) is owned by, or is under the care, custody, or control of such organization, government of agency; ….
>
> (b) the circumstances referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal Assistance.

The second, 18 U.S.C. § 1163, titled Embezzlement and Theft from Indian Tribal Organizations states, in pertinent part, that

> Whoever embezzles, steals, knowingly converts to his use or the use of another, willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, goods, assets, or other property belonging to an Indian tribal organization or entrusted to the custody or care of any officer, employee, or agency of an Indian tribal organization….

The two statutes each require a specific intent to embezzle, steal, or knowingly convert without authority something that has been lawfully entrusted to another. 18 U.S.C. § 1163 includes an added element of "willfulness" to qualify misapplication.

The central premise of an embezzlement statute is that a person uses something "…entrusted to him by another person for his own purposes or benefit and in a way *that he knows the "entruster did not intend or authorize.*" United States v. Young, 955 F.2d 99, 102 (1st Cir. 1992) (emphasis added). "Authorization, or ratification, from those with authority can be an important evidentiary factor in favor of the defense, militating against a finding of intentional misapplication." United States v. De La Cruz, 469 F.3d 1064, 1068 (7th Cir. 2006). The presentation of "[e]vidence of a bank's consent is…treated as 'evidentiary matters [sic] that may be considered as part of the defense that there was either no willful misapplication or no intent to injure the bank.'" Id. (quoting United States v. Unruh, 855 F.2d 1363, 1368 (9th Cir. 1987)). "Whether the defendants were acting with the intent to misapply funds, or for proper purposes, is a question for the jury." Id. Consent or authorization by a proper authority "combined with a dearth of evidence supporting a criminal intent, results in insufficient evidence to find a defendant guilty under [18 U.S.C.] § 666(a)(1)(A)." Id. at 1069.

18 U.S.C. § 1163 has been held to have a heightened mens rea element. United States v. Robertson, 709 F.3d 741, 745 (8th Cir. 2013). In Robertson, the Eighth Circuit held that § 1163's mens rea requirement means that the Government must prove that a defendant "…knew that [his or her] conduct was *wrongful*." Id. The court stated that to find someone guilty of misapplying tribal property, he or she must do so "knowing that such use was unauthorized or unjustifiable or wrongful." Id. (internal citations and quotations removed). The court also noted that "Good faith is a complete defense to the charge of [§ 1163] if it is inconsistent with a willful criminal intent, which is an essential element." Id. at 747.

Some courts have even noted that restitution of funds allegedly embezzled may be relevant evidence on the issue of the Defendant's intent. United States v. Cauble, 706 F.2d 1322, 1354 (5th Cir. 1983); cf. United States v. Buckley, 1996 U.S. App. LEXIS 12354, *5 (2d. Cir. 1996).

A. THE TRIAL COURT IMPROPERLY EXCLUDED EVIDENCE OF THE DEFENDANT'S PRIOR ACTIONS, ACTIONS WHICH DEMONSTRATED THAT HE LACKED THE SPECIFIC INTENT REQUIRED TO BE CONVICTED UNDER 18 U.S.C. § 666 AND 18 U.S.C. § 1163.

The Appellant was barred from offering evidence that he had been permitted by the Tribe in the past to use his Tribe issued American Express card for personal expenses and was allowed to reimburse the Tribe for said expenses at a later date.

The Appellant contends that the District Court abused its discretion in excluding this evidence. The District Court's ruling focused primarily on whether or not "intent to repay" is a defense, in and of itself, to embezzlement and ruled that it was not a defense. United States v. Thomas, at *3-5. The Appellant acknowledges that a defense solely founded on a defendant's intent to repay does not provide a defense for embezzlement. cf. United States v. Cauble, supra. That, however, is not the end of our inquiry.

The Appellant's intent to repay, when coupled with the Tribe's practice of permitting the Appellant to place personal expenses on the Tribe's charge card and reimburse them later could have demonstrated that the defendant lacked the requisite intent to commit the crimes with which he was charged. The District Court abused its discretion in barring the Appellant from presenting evidence of his prior repayments, the Tribe's acceptance of said payments as "impermissible propensity evidence [that was] not otherwise relevant." United States v. Thomas, supra, at *5. The District Court abused its discretion in that it failed to consider the value of this evidence to demonstrate that the Appellant was acting in conformity with the Tribe's practices. In doing so, the District Court violated the Appellant's Sixth Amendment right to present a defense to the elements of the crime charged.

In United States v. Rubin, the Fifth Circuit was asked to consider whether or not a trial court erred in preventing a defendant from testifying regarding his

knowledge and interpretation of a union's constitution in an embezzlement case. 591 F.2d 278, 283 (5th Cir. 1979). Rubin, a union president, was charged with embezzling money from a union by taking unauthorized salary increases knowing said increases were not permitted in violation of 29 U.S.C. § 501(c). Id. at 282. 29 U.S.C. § 501(c) requires the Government to prove a specific intent – namely that the offending action is knowing and willful. Id. at 282-83. Rubin attempted to offer evidence that present and prior union presidents had advised him that the union constitution, which appeared to forbid the salary increases he took, were not to be interpreted literally. Id. at 283. The trial court prevented him from offering this evidence on grounds that it was hearsay. Id. The Fifth Circuit reversed, holding that this evidence bore directly on Rubin's state of mind, went directly to his defense, and thus constituted reversible error. Id.

In United States v. Robertson, a member of the Spirit Lake Tribe was convicted of embezzling and misapplying funds from the tribe's federally funded heating assistance program in violation of 18 U.S.C. § 1163. 709 F.3d at 742-43. Robertson approved her daughters' applications for heating assistance even though they lived with her and did not report the gross income or the names of all of those living in the home, which was required by the program. Id. at 743. At trial, Robertson was permitted to present the testimony of family members who indicated that she would have been eligible for the assistance had she properly

applied for it. Id. at 744. This, her attorney argued, showed that even though she "knowingly and intentionally approved inaccurate applications, she did not act with the criminal intent required to…" violate § 1163 because she was eligible for the program and thus entitled to the funds. Id.

The Jury in the Appellant's case was presented with information regarding the policy of the Tribe regarding use of its American Express charge cards. A written policy was introduced into evidence by the government. It stated that personal expenses could not be placed on the Tribe's credit card. The finance department of the tribe, however, sent out monthly requests to those who had Tribal credit cards. Those requests instructed card users to provide the finance office with an itemization of expenses that explained the business purpose of each. It reminded users that personal expenses were not meant to be placed on the cards but, if they were placed on the cards, the card user was to provide the Tribe with reimbursement for said personal expenses. A time frame for this reimbursement was not stated in the policy.

The original tribal resolution stating that personal expenses could not be placed on tribal cards was enacted in 1996. A subsequent resolution was passed in 2005. Throughout this period, the Defendant's evidence would have shown that the Defendant (and others, as discussed below in Section B) were permitted to place personal expenses on the Tribe's American Express card and provide the

Tribe with reimbursement later. The Defendant's evidence would have further shown that he continually provided the Tribe with reimbursement for his personal charges up until roughly 2007, which is the period just before the conduct charged in the indictment. This evidence showed that it was, in fact, the practice of the Tribe to permit cardholders to use the cards for personal expenses so long as they provided the requisite reimbursement. Whether the Appellant believed he was acting within the Tribe's rules or not at the time he was making these personal charges goes directly to his intent. See, United States v. Young, supra.

Much like the defendant in Rubin, the Appellant's intent at the time the charges were made was a question of fact for the jury to decide. The jury, if provided the opportunity to properly consider the Tribe's extensive history of permitting the Appellant to place personal charges on the American Express Card and provide subsequent reimbursement, would have had the chance to weigh that evidence against the written policy of the Tribe to determine whether the Appellant made these personal charges in good faith and without the intent necessary to commit embezzlement.[2] Relevant and vital evidence of the Appellant's intent and

[2] Had the District Court allowed evidence of the Appellant's previous conduct of charging and reimbursing for personal expenses on his Tribal American Express Card, the jury could have concluded that the Appellant did not act with a bad purpose when he charged said personal expenses. If that evidence had been admitted, the District Court would or should have given the jury instruction requested by the Appellant in regard to willfulness pursuant to 18 U.S.C. § 1163. The court would also have had to instruct the jury as to "good faith". Without this evidence, the jury was simply instructed that "willfully misapply means to act with a culpable state of mind

good faith could have been gleaned from acts of the Tribe demonstrating that his practice of charging and reimbursing the Tribe for expenses was permitted. See, United States v. De La Cruz, supra.

The defendant in Robertson was permitted to go so far as to offer testimony that, because she was eligible for the heating assistance program, it was essentially permissible for her to take these benefits despite the fact that she was obtaining them with intentionally inaccurate applications. Robertson's defense, while less viable than the Appellants, is comparable to what the Defendant ought to have been allowed to offer. Both theories go to whether or not their use of funds was undertaken in good faith and with the understanding that it was permitted. The difference between these defenses is that the Appellant could have shown a substantial track record of the Tribe permitting his use of American Express Card for personal expenses so long as he ultimately reimbursed the Tribe for these expenses. The Appellant, unlike the defendant in Robertson, did not have to speculate as to whether he was allowed to use his card in this fashion. He was permitted to do so by the Tribe and because of this, he lacked the intent necessary to violate 18 § 666 or 18 U.S.C. § 1163.

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and not due to negligence, inadvertence, or mistake." Instead of this instruction, the Court would have had grounds to give the Appellant's proposed instruction, which stated that "Willfully means to act with knowledge that one's conduct is unlawful and with the intent to do something the law forbids, that is to say with bad purpose to disobey or to disregard the law…the Defendant's conduct was not willful if it was due to negligence, inadvertence or mistake…if it was the rule of a good faith misunderstanding of the requirement of the law." DM at 4.

The Appellant could have demonstrated that the misapplication or embezzlement was not complete under these statutes unless the Appellant decided to not repay in accordance with the policy of the Tribe. This is true because of the fact that the Tribe setup a system where it paid the expenses you placed on the card upfront and gave cardholders the opportunity to reimburse the Tribe later for expenses that were not for business purposes. This was because there was insufficient time for the Tribe's finance office to wrangle expense and reimbursement summaries from the various Council members in time to pay the American Express bills before they became due.

B. THE TRIAL COURT IMROPERLY EXCLUDED EVIDENCE OF THE CONDUCT OF SIMILARLY SITUATED TRIBAL COUNSEL MEMBERS WHOSE CONDUCT COULD HAVE DEMONSTRATED THAT THE DEFENDANT'S CONDUCT WAS APPROVED BY THE TRIBE, REBUTTING THE GOVERNMENT'S ARGUMENT THAT THE DEFENDANT'S CONDUCT WAS NOT PERMITTED BY THE TRIBE.

The Appellant was barred from putting on evidence that other Tribe members with American Express Cards were also allowed to put personal expenses on the cards and reimburse the Tribe later. The District Court held that this evidence was not relevant because the Appellant was not able to show that he had specific knowledge of the actions of the other individuals. What this evidence should have been admitted for, however, is to show that there was, in fact, a

practical policy in place which contradicted the Tribe's written policy. While the written policy would seem to limit individuals' ability to place personal expenses on the card and require prompt reimbursement within thirty days for personal charges made in contravention of the written policy, it is clear that the actual practice of the Tribe was to permit personal charges so long as the charges were ultimately reimbursed.

The District Court relied on United States v. Oldbear, where a member of another Indian tribe was convicted under 18 U.S.C. § 1163. 568 F.3d 814, 821 (10th Cir. 2009). Old Bear attempted to offer evidence that other members of her tribe had used the Energy Assistance Program to purchase or repair vehicles, but was barred from doing so. Id. at 818. The Oldbear court held that the conduct of other members did not show that Oldbear knew anyone approved her expenditures or that the other members' actions had any effect on her state of mind. Id. at 821. It also relied upon the fact that Oldbear's purported witnesses were not employees of the tribe and did not have any specific knowledge of their tribe's policy for the Energy Assistance Program. Id. The "consequential facts at issue during Oldbear's trial were whether or not the tribe authorized her expenditures and whether she possessed the requisite intent to commit embezzlement." Id. at 820.

Unlike Oldbear, the Appellant could have shown that the Tribe had a long established practice of permitting those with tribal credit cards to place personal

expenses on the cards so long as a subsequent reimbursement was made. Also unlike Oldbear, the Appellant would have been able to offer specific evidence that another Tribal Council member made a series of personal charges and then reimbursed them in a way that would have demonstrated how the Tribe actually handled personal charges American Express Cards. Such evidence would have permitted the Appellant to rebut the Government's assertion that Council members were not permitted to make personal charges on the American Express cards and provide reimbursement later.

The evidence would also have bolstered the Appellant's assertion that there existed a practice or policy within the Tribe to place personal expenses on the card so long as they were reimbursed. This issue, when coupled with the Defendant's prior pattern of charges and reimbursements, speak directly to the Appellant's primary defense: that he had a good faith belief that he could place personal charges on the Tribe's American Express Card because such charges were permitted. The District Court's failure to permit the Appellant to present this evidence prevented him from fully defending himself and thus violated his rights under the Sixth Amendment and constituted an abuse of discretion.

C. CONCLUSION

The Appellant was denied the right to present a defense to the intent elements of the very crimes with which he was charged and ultimately convicted. The District Court's decision to prevent the Appellant from presenting evidence which would have negated specific elements of the Government's case against him was an abuse of discretion and a violation of his rights under the Sixth Amendment. Accordingly, this Appellant asks this Court to vacate his conviction and to grant him a new trial.

Respectfully submitted,

THE DEFENDANT-APPELLANT,

MICHAEL THOMAS

Dated: April 2, 2014

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief and Appendix have been mailed to Assistant United States Attorney Douglas Moribito, 157 Church Street, 25th Floor, New Haven, Connecticut 06510 by First Class Mail and one copy of the Brief and Appendix have been sent via First Class Mail to Michael Thomas, FMC Devins, 42 Patton Road, Satellite Camp, P.O. Box 879 Ayer, MA 01432 on this the 2nd day of April, 2014.

Dated: April 2, 2014

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CERTIFICATE PER FED. R. APP. P. 32(a)(7)(C)

This is to certify that the forgoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word process program to contain 5,417 words, exclusive of the Table of Contents, Table of Authorities, and Addendum.

Dated: April 2, 2014

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