IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 4:13-cr-00291-BCW
	)	
SHEFFLER, ET. AL.,	)	
	)	
Defendant.	)	

MOTION TO DISMISS

COMES NOW the defendant, WILLIAM F. PARRY, by and through his attorneys, LIPSITZ GREEN SCIME CAMBRIA LLP, PAUL J. CAMBRIA, JR., ESQ., ELIZABETH A. HOLMES, ESQ., and upon the annexed declaration of Paul J. Cambria, Jr., Esq., and all annexed exhibits and prior proceedings, hereby move this Court for the following relief:

I. MOTION TO DISMISS FOR LACK OF JURISDICTION

II. MOTION TO DISMISS ALL COUNTS OF THE INDICTMENT FOR INSUFFICIENCY

III. MOTION TO DISMISS BASED ON OUTRAGEOUS GOVERNMENT CONDUCT

DATED: August 28, 2014

Respectfully submitted,
LIPSITZ GREEN SCIME CAMBRIA LLP

By PAUL J. CAMBRIA, JR., ESQ.
Admitted Pro Hac Vice
ELIZABETH A. HOLMES, ESQ.
HERBERT L. GREENMAN, ESQ.

42 Delaware Avenue, Suite 300
Buffalo, New York 14202-3901
Phone: (716) 849-1333, ext. 344
Fax: (716) 855-1580

E-mail: pcambria@lglaw.com

JOHN G. GROMOWSKY, ESQ.
Local Counsel
THE GROMOWSKY LAW FIRM, LLC
1100 Main Street , Suite 2800
Kansas City, Missouri 64105
Phone: (816) 842-1130
Fax: (816) 472-6009
E-Mail: jgromowsky@gromowsky-law.com

Attorneys for Defendant
WILLIAM PARRY

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DECLARATION OF PAUL J. CAMBRIA, JR., ESQ. IN SUPPORT OF MOTION

PAUL J. CAMBRIA, JR., ESQ., being an attorney admitted to practice law in this District, and subject to the penalties for perjury, do hereby declare the following to be true and correct:

1. I am a senior partner with Lipsitz Green Scime Cambria LLP; and I represent the defendant, William F. Parry, herein. This declaration and memorandum is respectfully offered in support of defendant's various motions to dismiss as delineated below.

2. Unless otherwise indicated here, the assertions herein are made upon information and belief, the basis of which is your deponent's investigation of this matter, including review of our confidential office file and conversations with our client, Mr. Parry.

3. Mr. Parry was originally charged in an October 9, 2012 indictment in this District, and was subsequently charged by way of an August 13, 2013 indictment also filed in this District [hereinafter the "Sheffler indictment"]. On May 6, 2014, the Court, upon motion of the government and opposition of the defendant, consolidated the two cases. The Sheffler indictment charges 18 individuals with a collective forty-four counts, consisting of conspiracy and the substantive charges of wire fraud in violation of 18 USC §1343; contraband cigarette trafficking

in violation of 18 USC §§2341-2346; and money laundering in violation of 18 USC §2341. Mr. Parry was charged only with conspiracy to commit wire fraud and contraband cigarette trafficking, along with the substantive offenses.[1] Mr. Parry was arraigned in this Court on September 3, 2013. This matter is currently set for the February 23, 2015, joint criminal jury trial docket and pre-trial motions are due by August 29, 2014.

4. On July 22, 2014, your deponent filed a Motion to Transfer in the above matter, requesting that this Court transfer the matter pursuant to Federal Rule of Criminal Procedure 21(b) as to defendant William F. Parry from the Western District of Missouri, Western Division, to the Western District of New York. In the alternative, your deponent requested that this Court abstain from hearing the matter until New York State Courts have an opportunity to rule on the constitutionality of the New York State cigarette taxing scheme which is the basis for the government's criminalization of Defendant William Parry's activities. Your deponent herein incorporates by reference the pending Motion to Transfer.

I.

MOTION TO DISMISS FOR LACK OF JURISDICTION

5. Defendant William Parry is an enrolled member of the Seneca Nation of Indians ("SNI"), a federally recognized Indian tribe which is part of the Six Nation Iroquois Confederacy. His property, where he lives and runs his company, Wolf's Run Transport, is located on the Cattaraugus Indian Reservation, which is part of the Seneca Nation territory. [See Exhibit A, declaration of William Parry].

[1] The Indictment caption indicates that Mr. Parry is charged with Counts, 1, 2, 5, 6, 9, 10, 21, 22, 37 and 38, but the counts themselves do not identify him in counts 9 or 10, rather they do in count 8. The government needs to explain this discrepancy.

6. As Seneca territory, specifically the Cattaraugus Reservation, is not part of New York State, the state cigarette taxing scheme, and in turn the CCTA, is inapplicable to Mr. Parry while operating on sovereign land. Accordingly, the criminal activity alleged within the indictment fails to allege a crime upon which the federal government can assert over defendant Parry and must be dismissed.

7. The Contraband Cigarette Trafficking Act ("CCTA") makes it "unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes..." 18 USC §2342(a).

8. "Contraband cigarettes" under the CCTA means "a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment ***of applicable State cigarette taxes*** in the State where such cigarettes are found, if such State requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes..." 18 USC §2341(2)(emphasis added).

9. Thus, a violation of state law is a prerequisite for violating the CCTA. See United States v. Baker, 63 F.3d 1478, 1486 (9th Cir. 1995); United States v. Gord, 77 F.3d 1192, 1193 (9th Cir. 1996).

10. At bar, defendant Parry is charged with various CCTA violations and Wire Fraud violations stemming from the transactions utilized to allegedly violate the CCTA.

11. Specifically, William Parry is alleged to have "transported and caused to be transported into New York State unstamped cigarettes without prior approval by the New York State Department of Taxation and Finance and without first paying the required $4.35 per pack excise tax. PARRY would then sell those unstamped, untaxed cigarettes at Wolf's Run store."

[See Indictment, pg 14]. "PARRY would also sell those unstamped, untaxed cigarettes to other smoke shops on the reservations in New York State." Id.

12. Finally "[i]t was further part of the conspiracy that WILLIAM F. PARRY…would wire transfer money across state lines to prepay for orders of unstamped cigarettes." Id. at 15.

13. Therefore, the crimes alleged as to Mr. Parry require a jurisdictional element, that is, a violation of New York State Tax Law, §471 et. seq. As explained below, as Mr. Parry resides and works on the Cattaraugus Reservation, not within New York State, §471 is unconstitutional as enforced against him and therefore not applicable to his actions on the reservation.

14. Furthermore, the CCTA itself is a statute of general applicability that cannot abrogate rights guaranteed by Indian treaties. Accordingly, it is unconstitutional as applied to Mr. Parry.

15. Accordingly, the indictment must be dismissed. In the alternative, as a lawsuit has been filed in New York State asserting that the state taxing mechanism as applied to Seneca territories is unconstitutional, this Court should stay the criminal proceedings as to Mr. Parry in order to allow this issue to be decided by the state court.[2]

A. The NYS Cigarette Tax System in General

16. As referenced, Section 471 of the New York State Tax Law is the State's taxing mechanism for cigarettes that are possessed, sold or transferred within New York State.

17. However, Section 471 explicitly recognizes its limited ability to only collect taxes on cigarettes the State has the power to tax, and cigarettes possessed in our state are not to be taxed where New York is "without power" to tax. *See again* NY Tax Law §471(1).

[2] This request is also under consideration by the Court in defendant Parry's transfer motion, filed on July 22, 2014 [Dkt #173].

18. Section 6 of the New York State Indian Law prohibits taxation upon Indian Land ***for any purpose.*** The concept of Indian sovereignty has been recognized not only by our State Constitution through years of legislative history, but by the highest Courts of both this state and country.

B. <u>The Seneca Nation is Not a "State" and Therefore not Subject to New York Tax Law and in turn, the CCTA</u>

19. The CCTA defines the term, "State," to mean "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands." Aside from the fact that Congress elected to exclude Indian territories from this definition, as further observed below, in the commentary related to the Act of 1857, the SNI territory has never been deemed part of New York State.

C. <u>Interpretation and Applicability of Indian Law § 6</u>

20. The constitutional interpretation and enforcement of Tax Law Section 471 that requires the taxation of cigarettes on reservation land (i.e. Mr. Parry's property) must be seen in light of Indian Law Section 6 (entitled, "Exemption of reservation lands from taxation"). As indicated above, this provision indicates that "[n]o taxes shall be assessed, ***for any purpose whatever***, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same (emphasis added)."

21. This provision was derived from state legislation enacted in 1857. The law, found in Chapter 45 of the Laws of New York; 80th Session, read, in pertinent part: "AN ACT to relieve the Seneca Nation of Indians from certain taxes on the Allegany and Cattaraugus reservations. Passed February 19, 1857…

> Section 1. The title of every such lot or parcel of the Allegany reservation, and of every such lot or parcel of the Cattaraugus reservation, as has been heretofore sold by the

> comptroller for taxes, and bid in by him for the States, is hereby released by the State to the Seneca nation of Indians residing on said reservation…
>
> Section 4. No tax shall hereafter be assessed or imposed on either of said reservations, or on any part thereof, ***for any purposes whatever***,[3] so long as said reservations remain the property of the Seneca nation; and all acts of the legislature of this State conflicting with the provisions of this section, are hereby replaced." (emphasis added)

22. Commentary, believed to be part of a legislative judiciary committee report, released contemporaneously with the Act, observed that "[a]ny authority in th[e] State, to tax those Indians, is disclaimed, and it is acknowledged, that the land owned by them never belonged to the State of New York." *See* Documents and Official Reports ("illustrating the causes which led to the revolution in government of the Seneca Indians, in the year 1848, and the recognition of their representative republican constitution, by the authorities of the United States and of the State of New York," printed by Wm. Moody & Son, 1857), pg. 91.

23. The above commentary further noted that "the Senecas do not hold the title to the Cattaraugus and Allegany Reservations under the State of New York, but **their title to the same is original, absolute and exclusive**." *See* Documents and Official Reports, et al., pg. 89, 92 (emphasis added).[4] Governor Dewitt Clinton's promise to the Senecas, also noted in the commentary above, should be considered: "You may retain your lands as long as you please - no man can deprive you of them without your consent. The State will protect you in the *enjoyment* of your property." Id. at 92 (emphasis added).

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[3] Note that this provision still remains in the present version of Indian Law §6 (see above).

[4] The Senecas "are not citizens of this State, and have no representative in our Legislature, we can claim no right to tax them…" Id. at 89. They are "to be regarded as a distinct and independent nation, having a constitution and representative government of their own." Id.

24. The treaty rights and privileges, as analyzed below; i.e., in 1831, 1838 and 1842, were, in effect, codified in the legislative history of the 1857 Act (now Indian Law §6). No Tax law legislation (i.e., Article 471) may supersede Indian Law §6, which, again, prohibits the assessment of taxes "***for any purpose whatever***, upon any Indian reservation in this state…" (emphasis added). Superseding Indian Law §6 would be akin to our state superseding Indian treaty rights. And again, as observed by our legislature, Tax Law §471(1) does not apply where the state is with "without power" to impose the taxes in question.

25. In sum, New York's statutory scheme must be viewed in light of Indian Law §6 and its legislative history, as set out in the 1857 Act,[5] which recognizes Indian sovereignty. Without jurisdiction within the Seneca lands, New York State, and in turn the federal government through the CCTA, has no authority to enforce a tax on any product possessed or sold by the Senecas on sovereign territory. As set out below, the Seneca's sovereignty is further recognized in both Federal and New York State case law.

[5] In 1978, Indian Law §200 repealed the 1857 Act as part of an administrative purging of laws enacted from 1779 through 1908. No reason is articulated for the Act being repealed. However, the above commentary and the Act itself are still important in explaining the legislative history of Indian Law §6, which has been unchanged in content since 1892. Further, while there is case law indicating that Indian Law §6 only applies to the taxing of real property (*see* Snyder v. Wetzler, 193 A.D.2d 329, 331-332 [3d Dep't 1993], *aff'ed* 84 N.Y.2d 941, 942 [1994] [but noted the court, "**[t]o the extent plaintiff contends that the State tax statutes at issue violate** either the Supremacy Clause or **New York law**, **his arguments** are unpreserved and **cannot be considered on this appeal**. Plaintiff's complaint asserted only violations of the Commerce Clause and "the Laws of the United States enacted pursuant thereto."] [emphasis added]), the content of §6 is informed by the 1857 Act and its commentary, as they were in place when the state legislature first articulated the §6 phrase, "[n]o taxes shall be assessed, for any purpose whatever, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same."

D. Further Support from Indian Law § 71

26. New York State Indian Law Section 71, entitled (in pertinent part) "Exclusion of villages from reservations" also stems from the 1875 Act and further preserves the tax prohibition set out in the 1857 Act cited above:

> Those parts of the Allegany reservation included in the villages of Vandalia, Carrollton, Great Valley, Salamanca, West Salamanca and Red House, as surveyed, located and established pursuant to an act of congress approved February nineteenth, eighteen hundred and seventy-five, have been constituted parts of the several towns within which they are located, and all the general laws of the state are extended over and apply to the same; ***except that this section shall not authorize the taxation of any Indian or the property of any Indian, not a citizen of the United States.*** [6] (emphasis added).

27. This language derives from the Session Laws of 1881, Chapter 188, entitled "An Act extended the general laws of the State of New York over lands included in the villages surveyed…" Passed, May 2, 1881:

> SECTION 1. All those parts of the Allegany Indian Reservation included in the villages of Vandalia, Carrollton, Great Valley, Salamanca, West Salamanca and Red House, as surveyed…are constituted parts of the several towns within which they are

[6] While the Act of 1875 provided that all municipal laws and regulations of the state may extend over and be in force with certain Indian villages, it has been further reinforced that only the leaseholds held by non-indians may be subject to taxation. See, City of Salamanca v. County of Cattaraugus, 245 A.D.2d 1058, 1059 (4th Dep't 1997)("[i]n 1881, the New York Legislature enacted chapter 188 of the Laws of 1881 (now Indian Law § 71), which extended the general laws of the State over the six villages mentioned in the Act of 1875 and provided that '[l]and situate in said villages, held by or under lease from the Seneca Nation of Indians and which the holders are entitled to have renewed at the expiration thereof by virtue of said act of congress are and shall be for all purposes considered a freehold estate' thereby allowing for taxation of those leaseholds"); United States v. Salamanca, 31 F. Supp. 60 (W.D.N.Y. 1939)('[i]n United States v. County of Erie, D.C., 31 F.Supp. 57, decided November 21, 1939, this court held that such a leasehold is taxable when held by a white person…[t]he act of 1875 specifically exempts the Indian and Indian property from taxation. When such a leasehold is in the hands of an Indian, it is Indian property just as is a title descendible under tribal custom.").

> located, and all the general laws of this state are extended over and shall apply to the same. ***Provided always, that nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States.***[7]

28. Accordingly, it was always the legislature's intent to exclude the sovereign Senecas from taxation of any kind.

E. Historically, New York State Has Had No Authority to Regulate Indian Commerce

29. As previously noted, Mr. Parry is an enrolled member of the SNI, a federally recognized Indian tribe which is part of the Six Nation Iroquois Confederacy. The federal government has always had the sole and exclusive right to enter into treaties with, and regulate trade with, Indian territories (including the SNI).

30. In fact, Articles IX and XI of the 1781 Articles of Confederation, the latter known as the "Indian Commerce Clause," provided Congress with the "exclusive right" to regulate trade with the Indians. Indian treaties are deemed the legal equivalent of federal statutes (Solis v. Matheson, 563 F.3d 425, 430 [9th Cir. 2009]).[8] The 1784 Fort Stanwix Treaty between the United States and the Six Nations (7 U.S. Stat. 15), ratified in what is now known as Rome, New York, recognized the Nations' possession of their aboriginal territory in New York State, in that the Indians "shall be secure in the peaceful possession of the lands they inhabit." Though New York State refused to participate in the agreement, an Indian Tribe's treaty rights must be respected none the less.[9]

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[7] In 1892 New York State codifies Indian Law wherein Section 71 first appears. It combines sections 1 and 3 of L. 1881, c.188 as referenced above. It remains unchanged today with regard to the taxation of Indians and Indian property.

[8] And if silent as to their applicability to Indian tribes, statutes will not be interpreted to violate rights guaranteed by Indian treaties. U.S. v. Fiander, 547 F.3d 1036, 1039 (9th Cir. 2008).

[9] *See* Department of Taxation and Finance v. Milhelm Attea & Brothers, 512 U.S. 61, 73 (1994)(requiring "a particularized inquiry into the nature of the state, federal, and tribal interests at stake,

31. In July of 1788, New York State ratified the United States Constitution. Article I, §10, ¶1, therein provides that "no state shall enter into any treaty…" Further, Article II, §2, ¶2, grants treaty making power with the President, conditioned upon the advice and consent of the Senate. Moreover, Article I, §8, ¶3, provides that "[t]he Congress shall have power [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

32. New York agreed to these terms, which are, of course, the law of the land. *See also* Seminole Tribe v. Florida, 517 U.S. 44, 62 (1996) (in a decision authored subsequent to the Milhem Attea ruling, discussed below; the court noted that "[t]he Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.").[10]

33. Several treaties between the Six Nations and the United States were ratified in subsequent years, including the 1794 Canandaigua Treaty (7 Stat. 44), which granted the Nations under Articles 2, 3 and 4, the "free use and enjoyment" of their lands; a concept eventually embraced in the Tribe's own constitution. [11] The dictate that the Seneca Reservations are not part

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an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law").

[10] Seminole Tribe was criticized for other reasons in Cent. Va. Cmty. College v. Katz, 546 U.S. 356, 363-389 (2006).

[11] Moreover, it can no longer be disputed that treaties involving Indian tribes must be interpreted in favor of the Indians. As observed by the Supreme Court:

> The treaty nowhere explicitly states that the Navajos were to be free from state law or exempt from state taxes. But **the document is not to be read as an ordinary contract agreed upon by parties dealing at arm's length with equal bargaining positions**. We have had occasion in the past to describe the circumstances under which the agreement was reached. "At the time this document was signed the Navajos were an exiled people,

of the State of New York is further developed in the Treaty with the Senecas (July 20, 1831; 7 Stat. 351); where in Article 11 thereof, it provides:

> **[t]he United States guarantee that said lands shall never be within the bounds of any State or Territory, nor subject to the laws thereof**; and further that the President of the United States will cause said tribe to be protected at their new residence against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever; and he shall have the same care and superintendence over them in the country to which they design to remove, that he has heretofore had over them at their present place of residence (*emphasis added*).

34. This is confirmed in the Treaty with the New York Indians (January 15, 1838; 7 Stat. 550) when the Senecas, and other New York Indians were being asked to move west of the Mississippi. While the treaties made it clear that the Seneca's homeland was not part of the State of New York, the Senecas wanted to be sure that the land to which they would be moving could never become a part of any state or territory of the United States:

> And whereas this subject was agitated in a general council of the Six nations as early as 1810, and resulted in sending a memorial to the President of the United States, inquiring whether the Government would consent to their leaving their habitations and their removing into the neighborhood of their western brethren, and if they could procure a home

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> forced by the United States to live crowded together on a small piece of land on the Pecos River in eastern New Mexico, some 300 miles east of the area they had occupied before the coming of the white man. In return for their promises to keep peace, this treaty 'set apart' for 'their permanent home' a portion of what had been their native country."
>
> It is circumstances such as these which have led this Court in interpreting Indian treaties, to adopt the general rule that **"doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."**

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973) (emphasis added and internal citations omitted). Further, it should be pointed out that the High Court in the often cited Attea decision specifically elected not to address any treaty arguments. *See* Attea, 512 U.S. at 77, fn 11.

> there, by gift of purchase, whether the Government would acknowledge their title to the lands so obtained in the same manner it had acknowledged it in those from whom they might receive it; and further, whether the existing treaties would, in such a case remain in full force…

35. Thus, and to satisfy the Senecas who were being asked to move to the land west of the Mississippi that their ownership of this land would be the same as their homeland (the Allegany and Cattaraugus "Reservations"), the following language was inserted into the treaty:

> The lands secured to them by patent under this treaty shall never be included in any State or Territory…(Article 4, 7 Stat 550, 1838).

36. Some Senecas actually moved to that land while the others stayed on their homeland, which is now, in part, the Cattaraugus and Allegany "Reservations," where Mr. Parry resides.

37. This language was ultimately ratified by the final Treaty with the Seneca (May 20, 1842; **7** Stat. 586):

> [T]hey the said nation (the said indenture not withstanding) shall and may continue in the occupation and enjoyment of the whole of the said two several tracts of land, called the Cattaraugus Reservation, and the Allegany Reservation with the same right and title in all things, as they had and possessed therein immediately before the date of the said indenture, saving and reserving to the said Thomas Ludlow Ogden, and Joseph Fellows the right of pre- emption, and all other the right and title which they then had or held in or to the said tracts of land. (Article 1, 7 Stat 586, 1842).

38. Accordingly, the treaties expressly provide that the new Seneca land established west of the Mississippi would enjoy the same sovereign status as the Seneca's homeland in New York and therefore, "***shall never be included in any State or Territory***."

39. This specific treaty language is an explicit acknowledgement of the retained sovereign status of the Seneca land (the Allegany and Cattaraugus "Reservations") and New York simply cannot legislate to the contrary.

40. Again, it is clear that New York State has historically recognized that the Seneca Nation land is not a part of the State and is the original ancestral homeland of the Senecas. As further developed above, the state enacted legislation in 1857, now codified in Indian Law §6, which indicated that "[n]o taxes shall be assessed, ***for any purpose whatever***, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same (emphasis added)." This legislation is a direct product of the principles of sovereignty set forth in the treaties of 1831, 1838 and 1842. This is further supported by the legislative history and enactment of Indian Law §71.

41. Accordingly, as the Seneca Reservations are not and never have been a part of the State of New York, the state's attempts to impose taxes upon goods on Seneca land impermissibly impedes upon the sovereignty explicitly granted and historically recognized by both the Federal and the State government.

42. Further, the Seneca Nation of Indians Constitution of 1848 was ratified by New York's legislature in 1849. In 1927, the New York Court of Appeals summarized the relationship between New York State and the SNI Constitution this way:

> Section 19 provides: "The laws passed by the Legislature of the State of New York *for the protection and improvement of the Seneca Nation of Indians*, [12] and also all laws and regulations heretofore adopted by the Chiefs in legal Council assembled shall continue in full force and effect as

[12] *See also* Buffalo Creek Treaty of 1842, Art. 9, between New York, Massachusetts, the United States and the SNI, wherein it was agreed that the US would protect the Senecas' land from "all taxes, and assessments for roads, highways and other purposes…" This treaty is also cited in the commentary to the Act of 1857.

> heretofore *except so far as they are inconsistent with the provisions of this Constitution or Charter*." The words which we have italicized are significant. Laws enacted by the State of New York must be "for the protection and improvement of the Seneca Nation of Indians." **They must not be "inconsistent with the provisions of this Constitution or Charter.**"

Patterson v. Council of Seneca Nation, 245 N.Y. 433, 441 (1927) (bold emphasis added; italicized emphasis in original). Our state's highest court is acknowledging here the supremacy of SNI law over New York law in Indian affairs and that New York law must be for the protection and improvement of the SNI.

43. Therefore, New York law is subordinate to SNI law regarding Indian affairs and must not be inconsistent therewith.

44. Accordingly, as New York State does not have the power to tax Mr. Parry's possession of cigarettes on his reservation lands not within New York State, the government cannot attempt to criminalize his behavior as a CCTA violation, and in turn Wire Fraud violations.

45. Without the prerequisite state tax violations, no CCTA or Wire Fraud violations can stand, and therefore the charges must be dismissed as to defendant Parry.

F. The CCTA as a Statute of General Applicability does not apply to the Senecas

46. The government alleges that the CCTA can be enforced against Mr. Parry, despite his status as a member of the sovereign Seneca nation. However, the CCTA is a law of general applicability United States v. 1,920,000 Cigarettes, 02-CV-437A, 2003 WL 21730528 at *4 (W.D.N.Y. Mar. 31, 2003), and accordingly, "[a] federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by

legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations...." Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 177 (2d Cir. 1996)(*quoting* Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir.1985).[13]

47. Therefore, in order for the CCTA to apply to the Senecas and in turn Mr. Parry, it must pass the three-prong test established by the Ninth Circuit and adopted by the Second Circuit.

48. At bar, the CCTA violates both the second and third prong of the general applicability test; sovereign treaty rights and legislative history.

49. With regard to the legislative history, while it is true that the CCTA was enacted to provide support to the states in enforcing their tax laws (United States v. Morrison, 686 F.3d 94, 106 (2d Cir. 2012) cert. denied, 133 S. Ct. 955, 184 L.Ed. 2d 729 (U.S. 2013), as observed by the Ninth Circuit, the legislative history of the CCTA, enacted in 1978, indicates that the primary concern of Congress was with large scale cigarette bootlegging and the involvement of organized crime. United States v. Baker, 63 F.3d 1478, 1485 (9th Cir. 1995), citing S. Rep. No. 962, 95th Cong., 2d Sess. 1, 9, *reprinted in* 1978 U.S. Code and Cong. Admin. News 5518, 5523; *see also* United States v. Elshenway, 801 F.2d 856, 859 (6th Cir. 1986) (discussing the statute's legislative history). [14]

50. The Ninth Circuit in Baker analyzed the pertinent legislative history in question which includes a footnote specifically in reference to Indian rights:

> We do not interpret this footnote as evidence of congressional intent to create an additional category of persons exempt from the CCTA. *But see United States v.*

[13] "[i]n the area of taxation, Congress has passed neither a statute specifically abrogating the provisions of Indian treaties nor a statute of general application that has the effect of abrogating Indian treaties." Lazore v. C.I.R., 11 F.3d 1180, 1183 (3d Cir. 1993). Additionally, "provisions of the income tax law are to be applied 'with due regard to any treaty obligation of the United States which applies to such taxpayer.'" Id. *citing* I.R.C. §894(a)(1).

[14] *See also* Morrison, 521 F. Supp. 2d at 257-258 (EDNY 2007).

> *Brigman*, 874 F. Supp. 1125, 1131 (E.D. Wash. 1994) (relying on this footnote in dismissing the charges against some of the severed coconspirators). A fair reading of the footnote indicates Congress merely intended not to preempt rights granted to Indians by the states to transport and distribute untaxed cigarettes. It accomplished this goal by using the phrase "applicable State cigarette taxes" in the statute. Thus, to the extent the states exempt Indians from having to pay cigarette taxes, so does the CCTA.

Baker, at 1486. Therefore the holding in Baker supports the argument that if New York is not authorized to impose the tax in question, then neither is the federal government under the CCTA.[15] It is undisputed that the law is not intended to impact "any other immunity from state tax held by any Indian or Indian tribe," meaning, among other things, that *treaty rights* are not extinguished by the CCTA. Id.[16]

51. Accordingly, the legislative history of the CCTA dictates that a state tax exemption in turn provides for an exemption from taxation. This lends directly to the second exception under Coeur d'Alene; treaty rights. In light of the specific provisions contained within the treaties of 1794, 1831, 1838, and 1842 which establish the Seneca's sovereignty and independence, as well as the specific provisions of the New York State Indian Law exempting them from taxation, the third exception of the general applicability test is also present at bar with regard to both the CCTA and the IRC. The Seneca Indians maintain treaty rights granted to them by the United States which prohibit the imposition of taxes upon their sovereign nation by either the state or the federal government.

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[15] *See also* United States v. Gord, 77 F.3d 1192, 1193 (9th Cir. 1996) (recognizing that "[a] violation of the state cigarette tax law is a predicate to a CCTA violation").

[16] The Baker court further rejected the argument that the state law as of 1978, when the CCTA was enacted, should control. *See* Baker, 63 F.3d at 1486, fn 7. Of course, New York did not have an operating statutory and regulatory regime in place to tax Indians in this regard in 1978.

52. Indeed, the Supreme Court mandates that an Indian treaty be interpreted "to give effect to the terms as the Indians themselves would have understood them." Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999); Cook v. United States, 32 Fed. Cl. 170, 173-174 (U.S. C.F.C. 1994) (recognizing that treaties must be understood as the Indians would have); *see also* United States v. Farris, 624 F.2d 890, 893 (9th Cir. 1980) ("it is presumed that Congress does not intend to abrogate rights guaranteed by Indian treaties when it passes general laws, unless it makes specific reference to Indians;" *decision subsequently questioned for other reasons*).

53. Accordingly, as the CCTA fails to pass the Ninth Circuit's test of applicability as to the Seneca Nation, and in turn, Mr. Parry, the CCTA cannot be enforced against him and the Indictment must be dismissed.

II.

MOTION TO DISMISS ALL COUNTS OF THE INDICTMENT FOR INSUFFICIENCY

54. The Counts applicable to Parry should also be dismissed as facially deficient. See F.R.Cr.P. 12 (b)(3)(B).

55. A valid indictment is a "plain, concise and definite written statement of the essential facts constituting the offense charged." F.R.Cr.P. 7(c)(1). While a perfect indictment is not required, the instrument must set out the charged elements so as to insure that the defendant is not, in contravention of the Fifth Amendment, "convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." United States v. Mallen, 843 F.2d 1096, 1102 (8th Cir. 1988)

56. An indictment must be specific enough, permitting one to prepare a defense in compliance with the Sixth Amendment in it "fairly informs a defendant of the charge against which he must defend" United States v. Zangger, 848 F.2d 923, 925 (8th Cir. 1988); as well as to prevent a subsequent prosecution violative of the prohibition against Double Jeopardy. See, United States v. Davis, 103 F.3d 660, 675 (8th Cir. 1996)

57. In the matter at bar, each count of the indictment fails as to sufficiency with regard to Mr. Parry for the following reasons:

A. Counts 2, 5, 6 and 8 – Violations of 18 USC §§2342(a), 2344 (a) and 2:

58. As set forth above, the Contraband Cigarette Trafficking Act ("CCTA") makes it "unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes..." 18 USC §2342(a).

59. Again, "contraband cigarettes" under the CCTA means "a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State cigarette taxes in the State where such cigarettes are found, if such State requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes..." 18 USC §2341(2).

60. Thus, a violation of state law is a prerequisite for violating the CCTA. See United States v. Baker, 63 F.3d 1478, 1486 (9th Cir. 1995); United States v. Gord, 77 F.3d 1192, 1193 (9th Cir. 1996).

61. The indictment at bar alleges violations of New York State Tax Laws *only* with regard to defendant William Parry as the prerequisite to the alleged CCTA violations contained in counts 1, 2, 5, 6, and 8.

62. Accordingly, the indictment must sufficiently plead a CCTA violation consisting of the following four elements: (1) that Mr. Parry knowingly shipped, transported, received, possessed, sold, distributed, or purchased (2) more than 10,000 cigarettes (3) that do not bear tax stamps (4) ***under circumstances where state or local cigarette tax law requires the cigarettes to bear such stamps.*** See, City of New York v. Golden Feather Smoke Shop, Inc., 2011 WL 6945759 *3 (E.D.N.Y. 2011).

63. Accordingly, under the statute, it must be alleged that Mr. Parry possessed knowledge of the alleged contraband cigarettes. Mr. Parry cannot be convicted of a CCTA violation if he does not know that the packages he received, possessed, distributed, or transported contained contraband cigarettes.[17]

64. Furthermore, under 18 U.S.C. § 2341(2), a common carrier may be exempt from a CCTA violation. Therefore, "[i]t is only if the carrier receives cigarettes from, or distributes them to, an entity the carrier knows may not lawfully possess them that the carrier incurs liability." See City of New York v. Gordon, 2013 WL 2190060 *8 (S.D.N.Y. 2013).

65. The CCTA only prohibits the knowing transport of contraband cigarettes. See id. (Finding Defendant Regional Parcel Services likely had knowledge that the cigarettes it was transporting were contraband; therefore, it was not protected by the common carrier exception).

66. Each transaction Mr. Parry is alleged to have participated in is discussed below:

[17] Recently, in United States v. Tang (Janny) Nguyen, 13-1455, 2014 WL 3408673 (8th Cir. July 15, 2014), the Eighth Circuit found that the defendant had not violated the CCTA when she received packages of contraband cigarettes that she would then give to her sister, when there was no evidence that she knew there were contraband cigarettes within the packages. Tang at *4. Defendant never opened the packages, nor did she ever see any of the individual, unstamped packages of cigarettes. Id.

Count 2:

67. The overt acts alleged in support of Count 2 of the indictment involve an August 4, 2011 purchase by defendant SHEFFLER from undercover ATF agents of 132 cases of alleged contraband cigarettes. Mr Parry's involvement is limited to the following: "[t]he contraband cigarettes were transported from Oklahoma to Totem Pole Smoke Shop in New York State by Wolf's Run Transport, the company owned by WILLIAM F. PARRY. PARRY was paid $7,950 by BNC for the transportation." [See Indictment, pages 19-20].

68. Nowhere is it alleged that Mr. Parry was the driver of the vehicle transporting the cigarettes or that he had personal knowledge of what was in the vehicle transporting the cigarettes.

69. Further, payment for his transportation services does not evince any knowledge of contraband cigarettes, nor does the alleged fact that the contents were picked up from SCTC, a cigarette manufacturer, and distributed to an on-reservation convenience store.

70. Accordingly, Count 2 of the indictment fails to sufficiently allege all elements required in a CCTA violation and accordingly that count must be dismissed for lack of sufficiency with regard to defendant Parry.

Counts 5 & 6:

71. The overt acts alleged in support of counts 5 and 6 involve an alleged purchase of 258 cases of contraband cigarettes from undercover ATF agents on September 15, 2011. On the very same day, it is alleged that Wolf's Run transferred $235,080 to the SCTC "in order to complete the sale of the contraband cigarettes" [See Indictment, page 21-22]. It is further alleged that Wolf's Run transported the "contraband cigarettes" from Missouri to Oklahoma and finally to Virginia and New York State. [See Indictment, page 22-23; 39].

72. It does not state specifically where in New York State the contraband cigarettes were delivered, although it can be assumed that they were delivered to Jan's Smoke Shop, as owner SUNDOWN is implicated in count 6.

73. Accordingly, counts 5 and 6 again fail to sufficiently plead knowledge of the alleged contraband nature of the cigarette shipment with regard to Mr. Parry, as required by the statute. In count 5 it is specifically alleged that Mr. Parry was not the driver of the vehicle transporting the cigarettes, and nowhere is it alleged that knowledge was imputed to him.

74. Therefore, with regard to count 5, not only was defendant Parry never in possession of the cigarettes, even if his company was operating as a common carrier of the load, and no knowledge of the contraband nature of the load has been plead within the indictment.

75. As count 6 of the indictment identifies Mr. Parry as the driver, but the overt acts in support of the counts do not, count 6 fails to sufficiently plead possession or knowledge by Mr. Parry.

76. Even assuming, *arguendo,* that count 6 alleges that Mr. Parry purchased a portion of the alleged contraband cigarettes and accordingly took possession of the cigarettes at his property on the Cattaraugus reservation, the CCTA charge still fails, as no New York State tax was due on those cigarettes until after they leave the reservation and *enter the stream of commerce within New York State.*

77. Again, the present indictment fails to allege any facts in support of this scenario and accordingly counts 5 and 6 must be dismissed for lack of sufficiency with regard to defendant Parry, as the elements lacking are jurisdictional and must be plead with regard to violations of the CCTA.

Count 8:

78. The overt acts alleged in support of count 8 involve an alleged purchase of 354 cases of contraband cigarettes from undercover ATF agents on October 13, 2011. [See Indictment, page 25]. The indictment further alleges that a portion of the amount was loaded onto a Penske truck, which was driven from the government's undercover warehouse in Kansas City, Missouri to a location in North Kansas City, where Mr. Parry then picked the truck up. [See Indictment, page 25-26]. It is then further alleged that Mr. Parry drove the truck to his property on the Cattaraugus reservation.

79. As in the scenario of count 6, a CCTA charge with regard to Mr. Parry's possession of those cigarettes on his sovereign property on the Cattaraugus reservation fails, as no New York State tax was due on those cigarettes until after they leave the reservation and *enter the stream of commerce within New York State.*

80. Accordingly, the requisite element of state tax liability is not present and therefore count 8 must be dismissed for lack of sufficiency with regard to defendant Parry.

81. Finally, as defendant Parry is listed on the caption of the indictment as included in counts 9 and 10, but is not alleged to have participated in the facts supporting those counts, defendant also moves to dismiss counts 9 and 10 for sufficiency.

B. <u>Counts 21, 22, 37 and 38 – Violations of 18 USC §1343 and 2</u>:

82. Counts 21, 22, 37 and 38 allege violations of 18 USC §1343, the federal wire fraud statute.

83. A wire fraud violation consists of three elements: (1) a scheme to defraud; (2) the use of wires in furtherance of the scheme and; (3) the specific intent to defraud. <u>United States v.</u>

Louper-Morris, 672 F.3d 539, 556 (8th Cir. 2012); United States v. Edelmann, 458 F.3d 791, 812 (8th Cir. 2006); U.S. v. McNeil, 320 F.3d 1034, 1040 (9th Cir. 2003).

84. An indictment under the wire fraud statute must "set out clearly what the artifice was wherein the fraud consisted, and how it was to be accomplished." See U.S. v. Charnay, 537 F.2d 341, 352 (9th Cir. 1976).

85. Here, the alleged fraud consisted of a scheme to defraud New York State of owed tax revenue, by engaging in the sale of contraband cigarettes that were alleged to have a tax due and owing to the state.

86. Each fraud Mr. Parry is alleged to have participated in is discussed below:

Counts 21 & 22:

87. Counts 21 and 22 specifically relate to the transactions alleged on September 15, 2011, wherein Mr. Parry's company, Wolf's Run Transport, was a common carrier for the subsequent deliveries.

88. Mr. Parry is alleged to have been part of the overall conspiracy to violate the CCTA, part of which involved email transactions between codefendants SHEFFLER, BISHOP and JONES.

89. However, as set forth above, the government has failed to plead any knowledge on behalf of common carrier Wolf's Run Transport, and accordingly defendant Parry. It has also failed to allege that Mr. Parry possessed the specific intent to defraud, as required by the statute.

90. Accordingly, the requisite element of intent is not present and therefore counts 21 and 22 must be dismissed for lack of sufficiency with regard to defendant Parry.

Counts 37 & 38:

91. Counts 37 and 38 relate to the transactions solely between defendant Parry and the undercover agents, initiated by the ATF agents on December 8, 2012. Specifically, the indictment alleges that on "December 16, 2011, Mr. Parry purchased 110 cases of untaxed Marlboro cigarettes and 30 cases of untaxed Newport cigarettes from ATF undercover agents for $265,800 in cash." [See Indictment, page 33]. The transaction took place on Mr. Parry's property, located on the Cattaraugus reservation.

92. The wire fraud alleged stems from two telephone calls initiated by the agent to purportedly arranged the purchase: one call from the undercover agent to Mr. Parry on December 8, 2011, and a second call between the two on December 12, 2011.

93. Here, both the scheme and specific intent to defraud elements are not sufficiently alleged within the indictment.

94. The factual bases for the counts are alleged above. Nowhere does the indictment indicate that Mr. Parry knew the cigarettes he agreed to purchase were untaxed.

95. Further, Mr. Parry did not pick up or transport the cigarettes in any fashion. He received them, as alleged, on his sovereign property within the Cattaraugus reservation.

96. Accordingly, no tax was due and owing to New York State at the time Mr. Parry allegedly took possession of them, as they remained on sovereign land not within New York State.

97. Without a predicate state tax violation, there was no CCTA violation, and accordingly no scheme to defraud New York State.

98. Therefore, as the required elements of scheme to defraud and intent are not present with regard to counts 37 and 38, they must be dismissed for lack of sufficiency.

C. Conspiracy Count - Violation of 18 USC §371

99. As each and every substantive count with regard to Mr. Parry is insufficient, it follows that the conspiracy count must be dismissed.

III

MOTION TO DISMISS BASED ON OUTRAGEOUS GOVERNMENT CONDUCT

100. This case involves the unlawful distribution of illegal (untaxed) cigarettes by the ATF from an undercover warehouse in Kansas City, Missouri to locations all over the country for a period of over two (2) years.

101. The Bureau of Alcohol, Tobacco and Firearms set up this operation which unlawfully sold untaxed cigarettes in "over 65 undercover cigarette transactions," [See Application in Support of Search Warrant, Exhibit A to Motion to Suppress, pg. 11] and rather than arrest the alleged perpetrators upon purchase of the untaxed cigarettes, the government allowed them be distributed to consumers all over the country.

102. For the foregoing reasons, this operation constituted a violation of Mr. Parry's Fifth Amendment right to Due Process, and accordingly requires that the case be dismissed and/or the evidence from the sales excluded.

103. "When the government's conduct during an investigation is sufficiently outrageous, the courts will not allow the government to prosecute offenses developed through that conduct." United States v. Mosley, 965 F.2d 906, 908 (10th Cir. 1992).

104. "A defendant may challenge such conduct by means of the outrageous conduct defense, which is predicated on the Due Process Clause of the Fifth Amendment to the United States Constitution." Id. at 908-909.

105. "The defense of outrageous government conduct is distinct from the defense of entrapment in that the entrapment defense looks to the state of mind of the defendant to determine whether he was predisposed to commit the crime for which he is prosecuted. The outrageous conduct defense, in contrast, looks at the government's behavior." Id. (citations omitted).

106. "Although the requirement of outrageousness has been stated in several different ways by various courts, the thrust of each of these formulations is that the challenged conduct must be shocking, outrageous, and clearly intolerable." Id. at 910.

107. The government's investigation began in 2009 with a number of individuals the government suspected of supplying convenience stores in the Kansas City Metropolitan Area with untaxed cigarettes [Exhibit A to Motion to Suppress, page 11]. Nearly a year and a half into the investigation, agents learned of William Parry, a Seneca Indian who resides on sovereign territory on the Cattaraugus Indian Reservation.

108. They were told, through the various codefendants, that William Parry owned Wolf's Run Transport, also located on the Cattaraugus Indian Reservation. It was alleged that a truck being used to transport the cigarettes provided by the agents was rented by Parry and his company, as use of his company made the truck part of the sovereign nation and therefore not subject to applicable CCTA laws. [Exhibit A to Motion to Suppress, page 13].

109. Accordingly, the agents did not speak with Parry, witness Parry engaging in any of the alleged contraband cigarette trafficking or observe Parry taking possession of any alleged contraband cigarettes until an October 13, 2011 transaction also facilitated by the undercover agents.

110. In that particular transaction, the agents allegedly observe Mr. Parry take possession of a truck filled with cigarettes provided by the agents, and drive it from Kansas City, Missouri to

his property on the Cattaraugus Reservation. As surveillance was terminated during the travel from Terre Haute, Indiana to Parry's residence on the reservation, it is not known what was in the truck while Parry was in possession of it on his sovereign land. [Exhibit A to Motion to Suppress, page 24-25].

111. Based upon that surveillance, agents contacted William Parry directly, apparently in an attempt to sell him alleged contraband cigarettes. During a December 8, 2011 phone call, where the agents contacted Mr. Parry, he allegedly agreed to purchase cigarettes from the agent, without any discussion regarding the order containing contraband. [Exhibit A to Motion to Suppress, page 25-26]. The order was allegedly delivered to Mr. Parry, *on reservation lands*, on December 16, 2011. Id.

112. Accordingly, the only transaction where agents actually observed Mr. Parry in possession of the cigarettes they provided was the December 16, 2011 transaction where they *delivered the cigarettes to him* on his sovereign land.

113. As explored in Point I of this motion, possession of unstamped cigarettes within Mr. Parry's sovereign territory amounted to nothing more than possession outside of New York State, and accordingly, the cigarettes were not subject to any tax by New York until they entered the stream of commerce in the State of New York.

114. The agent's actions in driving the alleged contraband cigarettes to Mr. Parry's place of business and then essentially placing them in his possession and later indicting him for CCTA violations all with the knowledge that Mr. Parry was a Seneca operating on sovereign territory certainly meets the requirement of outrageous conduct by the government. *See* Mosley, 965 F.2d at 911 ("[o]ne factor that has contributed to successful invocation of the outrageous conduct defense has been excessive government involvement in creating the prosecuted crime. ***Where the***

government essentially generates new crime for the purpose of prosecuting it or induces a defendant to become involved for the first time in certain criminal activity, as opposed to merely interposing itself in an ongoing criminal enterprise, such conduct has occasionally been held to be outrageous.")(emphasis added).

115. At bar, there was simply no evidence that Mr. Parry engaged in this transaction with the intent to violate the CCTA laws, as he has always maintained that his territory is sovereign and not within New York State, as recognized by the state's own Indian Laws, codified with the principles of the Seneca treaties.

116. That fact runs opposite to many of the codefendants and their actions in facilitating contraband cigarettes all over the country. Mr. Parry's act of taking possession of the alleged contraband cigarettes on his property provides no basis to allege his involvement in a crime.

117. Accordingly, the government cannot argue that Mr. Parry had engaged in similar criminal conduct before the agents approached him for the December 2011 transaction. United States v. Haas, 141 F.3d 1181 (9th Cir. 1998).

118. The only arguable evidence at the time that Mr. Parry was predisposed to engage in alleged contraband cigarette trafficking was the October 13, 2011 transport of alleged contraband cigarettes from Missouri to Mr. Parry's property on the Cattaraugus reservation.

119. That did not, however, rise to the level of predisposition, as it was never determined that at the time whether Mr. Parry took possession of the truck that it (a) contained contraband cigarettes; or (b) that Mr. Parry believed them to be contraband. The nature of the goods was not so apparent as it would be with illegal drugs or weapons.

120. This is further supported by the fact that Mr. Parry had a legitimate belief that cigarettes possessed on his territory were not required to be affixed with tax stamps. Finally, this

transaction was initiated by the agents, as was the delivery to Mr. Parry on his property. This inevitably leads to the conclusion that it was in fact the government that did in fact "sow the seeds of criminality and lure the defendant into a conspiracy." United States v. Twigg, 588 F.2d 373, 380 (3d Cir. 1978).

121. Accordingly, the agent's actions in establishing and conducting this undercover operation for over two years which resulted in arguably millions of contraband cigarettes entering the stream of commerce; contacting Mr. Parry and offering to deliver cigarettes to his sovereign property and then indicting him for alleged CCTA and wire fraud violations, rise to the level of actions "offensive to traditional notions of fundamental fairness" so as to violate Due Process and warrant dismissal of the indictment as to Mr. Parry. Hasan, 846 F. Supp. 2d 541, 546 (E.D. Va. 2012) aff'd, 718 F.3d 338 (4th Cir. 2013).

122. This also constitutes "sentencing entrapment" which must also be addressed by the Court. United States v. Clark, 36 F.3d 1101 (8th Cir. 1994)

123. Defendant Parry requests dismissal or in the alternative a hearing which will develop the actions of the government with regard to the undercover operation.

CONCLUSION

124. Defendant respectfully requests that the Court issue orders granting all of the relief sought in the attached notice of motion; or in the alternative, grant defendant a hearing regarding all requests for relief herein.

Respectfully submitted,

LIPSITZ GREEN SCIME CAMBRIA, LLP

By: s/Paul J. Cambria, Jr.
PAUL J. CAMBRIA, JR., ESQ.
Admitted Pro Hac Vice

42 Delaware Avenue, Suite 120
Buffalo, New York 14202-3901
Phone: (716) 849-1333, ext. 344
Fax: (716) 855-1580
E-mail: pcambria@lglaw.com

JOHN G. GROMOWSKY, ESQ.
Local Counsel

THE GROMOWSKY LAW FIRM, LLC
1100 Main Street , Suite 2800
Kansas City, Missouri 64105
Phone: (816) 842-1130
Fax: (816) 472-6009
E-Mail: jgromowsky@gromowsky-law.com

Attorneys for Defendant
WILLIAM F. PARRY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served electronically via the Court's CM/ECF Filing System, this 28th day of August, 2014, upon the following:

Justin Davids
Assistant United States Attorney
Charles Evans Whittaker Courthouse
400 East 9th Street, Fifth Floor
Kansas City, Missouri 64106
ATTORNEY FOR GOVERNMENT

/s/ *Paul J. Cambria*
Attorney for Defendant