CA No. 13-10510

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * *

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

DC No. 2:09-cr-206-KJD-PAL-1
(District of Nevada, Las Vegas)

-vs-

WILLIAM AUBREY,

Defendant/Appellant.
_____/

Appeal from the United States District Court
for the District of Nevada, Southern Division

APPELLANT'S OPENING BRIEF

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CIRCUIT RULES

I.

ISSUES PRESENTED FOR REVIEW

A. Whether the trial court erred in denying Aubrey's motion for judgment of acquittal for counts 5 and 4 because:

1. Payments for verified, certified and approved construction performance progress do not continue to belong to an Indian tribal organization or are not held in trust – an essential element of counts of conviction under Title 18 United States Code Section 1163, once payments are made;

2. Insufficient evidence supports the count 5 conviction: and

3. Insufficient evidence supports the count 4 conviction.

B. Whether the trial court erred in its jury instructions by failing to adequately guide the jury's deliberations and omitting Aubrey's proposed theory of defense instructional language?

C. Whether the trial court erred in admitting expert testimony and exhibits as summary testimony and summary exhibits and rejecting Aubrey's mistrial motion?

D. Whether the trial court erred in its advisory guideline sentencing calculation?

II.

STATEMENT OF JURISDICTION

This is a direct appeal from a judgment of conviction after a jury trial. Clerk's Docket Entry Number 167 & 195 [cited *infra* as CDE 167 & 195];EOR 108-113 & 119-124. The district court had jurisdiction pursuant 18 U.S.C. §3231. This Court has

jurisdiction pursuant to 28 U.S.C. §1291. Aubrey was sentenced on September 10, 2013 (CDE 164;EOR 2931-2932); the Judgment of Conviction was signed and entered on September 20, 2013 (CDE 167; EOR 108-113) and amended on December 9, 2013 (CDE 195;EOR 119-124). Aubrey's Notice of Appeal was timely filed on October 1, 2013. (CDE 168;EOR 114-115).

III.

BAIL STATUS OF APPELLANT

Aubrey was sentenced to 51 months imprisonment concurrent on the two counts of conviction (CDE 167 & 195;EOR 108-113 & 119-124). Aubrey is released pending appeal. (CDE 197;EOR 125).

IV.

STATEMENT OF RELATED CASES

Counsel is unaware of any related cases. However, still pending before the trial court is the issue of restitution (CDE 164, 172, & 190; EOR 2932-2933 & 2935). Depending upon its ruling, any appeal of that issue would then be a related case. CDE 193;EOR 2722-2764.

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V.

STATEMENT OF THE CASE

A. The Charges: Conspiracy, Bribery Related To Federal Program Funds, And Embezzlement, Theft, Conversion And Misapplication From An Indian Tribal Organization.

The government indicted Aubrey and his co-defendant Chester Carl[1] on May 19, 2009 charging conspiracy in violation of Title 18 United States Code Section 371, bribery relating to federal program funds in violation of Title 18 United States Code Section 666, and embezzlement, theft, conversion and misapplication from an Indian Tribal organization in violation of Title 18 United States Code Section 1163. CDE 1&4;EOR 1-12. Aubrey plead not guilty to the indictment on May 27, 2009. CDE 7; EOR 2916. The court declared the case complex on September 8, 2019. CDE 25; EOR 2917. Pretrial motions, responses, replies, and objections were filed (CDE 35-48 & 54;EOR 2918-2920) and the court entered reports and recommendations and orders for each pretrial motion (CDE 52-53 & 58;EOR 2920).

The government pursued a superseding indictment against Aubrey and Carl on September 13, 2011. CDE 66&69;EOR. 13-24. The same charges were alleged in the superseding indictment and Aubrey plead not guilty on January 4, 2012. CDE 77; EOR 2922. A protective order regarding voluminous third party documents was

[1] The jury acquitted Chester Carl on counts one and two. CDE 149;EOR 97.

entered on April 26, 2012. CDE 80;EOR 2922.

The government pursued a second superseding indictment against Aubrey and Carl on December 11, 2012. CDE 88&91;EOR 25-41. Aubrey plead not guilty to the second superseding indictment on December 21, 2012. CDE 100; EOR 2924. The second superseding indictment again charged Aubrey with conspiracy in violation of 18 U.S.C. § 371 (CDE 88;EOR 25-37), bribery relating to federal program funds in violation of 18 U.S.C. § 666(a)(2) (CDE 88;EOR 38), and embezzlement, theft, misapplication and conversion in violation of 18 U.S.C. § 1163 (CDE;EOR 39). Trial related motions, requested voir dire, jury instructions and exhibit lists were filed between April 1, 2013 and April 8, 2013 and ruling upon motions were entered. CDE 111-124;EOR 2925-2927.

B. Jury Trial On Second Superseding Indictment And Federal Rule Of Criminal Procedure 29(a) Motion For Judgement Of Acquittal.

Aubrey's jury trial began on April 9, 2013 (CDE 126;EOR 126-127) with jury selection, the government's opening statement (CDE 179;EOR 144-167), Carl's opening statement, and Aubrey's opening statement (CDE 179;EOR 167-192). Jennifer Ballough (CDE 177;EOR 217-290) and Louis Shepherd (CDE 177;EOR 291-380) testified on trial day two. (CDE 128;EOR 200-201). Shepherd continued his testimony (CDE 178;EOR 392-592 & CDE 185;EOR 604-833) on trial days three

(CDE 129;EOR 383-384) and four (CDE 133;EOR 596-597). Shepherd completed his testimony (CDE 187;EOR 841-949) – and the jury heard from Joanne Toecheene (CDE 187;EOR 950-1054) – on trial day five (CDE 135;EOR 835-836). Dezmer "Jack" Harris (CDE 189;EOR 1063-1125) and Dale Rowton (CDE 189;EOR 1127-1248) testified on trial day six (CDE 136;EOR 1057-1058). Leon Porter testified (CDE 194;EOR 1262-1555) on trial day seven (CDE 137;EOR 1251-1252). Marcus Tulley (CDE 202;EOR 1566-1693), Kathryn Catanzarro (CDE 202;EOR 1694-1744), Debra Heitman (CDE 202;EOR 1745-1787), Merri Moore (CDE 202;EOR 1789-1816), and Michelle Bush (CDE 202;EOR 1816-1849) testified on trial day eight (CDE 138; EOR 1557-1559).

Marlene Lynch (CDE 180;EOR 1858-2012) and James Hoogoian (CDE 180; EOR 2012-2051) testified on trial day nine (CDE 139;EOR 1852-1853). Aubrey moved for a mistrial (CDE 139;EOR 1853; CDE 180;EOR 55-67 & 2051-2054) during Hoogoian's testimony and the trial court denied the motion (CDE 180;EOR 67 & 2054). Hoogoian completed his testimony (CDE 203;EOR 2065-2158) and the government rested its case-in-chief (CDE 203;EOR 2159 & 2170) on trial day ten (CDE 140; EOR 2059-2060).

Aubrey moved for judgment of acquittal under Federal Rule of Criminal Procedure 29(a) on counts 1, 3, 4 and 5 and the trial court denied his acquittal motion.

CDE 140:EOR 2060 & CDE 203;EOR 68-78 & 2161-2169. Nick Tinnin testified (CDE 203;EOR 2170-2280) for the remainder of trial day ten. Robert Kerr testified (CDE 204;EOR 2290-2297) on trial day eleven (CDE 141;EOR 2283). Bryon Lee (CDE 205;EOR 2307-2326), Jerry Hegdahl (CDE 205;EOR 2326-2364), Paul Wood (CDE 205;EOR 2364-2374), D'Anna Wood (CDE 205;EOR 2376-2382), and Beth Cascaddan (CDE 205;EOR 2382-2455) testified on trial day twelve (CDE 143;EOR 2301-2302).

Aubrey rested (CDE 205;EOR 2456) and renewed his Rule 29(a) motion for judgment of acquittal (CDE 205;EOR 2458 & CDE 182;EOR 2480-2482), which the trial court denied. CDE 143;EOR 2302; CDE 205; EOR 79-82; CDE 182; EOR 86-90. The trial court addressed jury instructions and the parties made objections under Federal Rule of Criminal Procedure 30 for the remainder of trial day twelve (CDE 205;EOR 2467-2475).

On April 30, 2013 – trial day thirteen – the court instructed the jury (CDE 182; EOR 2483-2498) and the government presented its closing argument (CDE 182;EOR 2498-2522). Carl (CDE 182;EOR 2523-2543) and Aubrey (CDE 182;EOR 2543-2575) next presented closing argument, and the government concluded with its rebuttal argument (CDE 182;EOR 2578-2606). Jury deliberations begin the afternoon of trial day thirteen (CDE 146;EOR 2477), continued throughout trial day fourteen

with jury notes (CDE 147;EOR 2612 & CDE 206;EOR 2613-2632) and concluded mid-day on trial day fifteen with a jury verdict (CDE 148;EOR 2633 & CDE 207; EOR 2635-2644).

C. Mixed Jury Verdict.

After thirteen jury trial days and two plus days of jury deliberations, on May 2, 2013, the jury (a) acquitted Aubrey of count one (conspiracy to commit bribery related to federal program funds in violation of 18 U.S.C. §§ 371 & 666), (b) acquitted Aubrey of count three (bribery related to federal program funds in violation of 18 U.S.C. § 666(a)(2), (c) convicted Aubrey of count four (misapplication and conversion of money & funds from a tribal organization in violation of 18 U.S.C. § 1163), and (d) convicted Aubrey of embezzlement, theft, misapplication and conversion of money and funds from a tribal organization in violation of 18 U.S.C. § 1163). CDE 149;EOR 96-97.

D. Renewed Motion Post-Trial For Judgment Of Acquittal Under Federal Rule Of Criminal Procedure 29(c) and 29(a).

Aubrey timely renewed his trial motion for judgment of acquittal for counts 5 and 4pursuant to Federal Rule of Criminal Procedure 29(c) and 29(a) on May 15, 2013. CDE 153;EOR 2931 & CDE 153-1;EOR 2850-2895 & CDE 154;EOR 2896-2901 (Exhibits A-F & errata to Exhibit F). The government opposed (CDE 155;EOR

2931) and Aubrey replied (CDE 156;EOR 2931). The trial court denied the motion on September 10, 2013 (CDE 164;EOR 2931-2932 & CDE 183;EOR 2647-2652) without a written order.

E. Contested Sentencing And Bail Pending Appeal.

Aubrey challenged the advisory guideline calculation and sought a statutory downward variance in his sentencing memorandum. CDE 160;EOR 2931.[2] The government responded (CDE 163;EOR 2931-2932) and on September 10, 2013, the trial court denied Aubrey's guideline challenge, refused a statutory downward variance, and imposed a 51 month imprisonment sentence concurrent on counts 5 and 4. CDE 183:EOR 2709; CDE 195;EOR 120. Aubrey moved for release pending appeal (CDE 161;EOR 2931). The government opposed (CDE 165;EOR 2932) and the trial court denied the motion (CDE 172;EOR 2932-2933 & CDE 173;EOR 2715-2717). This Court granted release pending appeal. CDE 197;EOR 125. Still pending before the trial court is the issue of restitution. Proceeding regarding restitution were continued from September 10, 2013 (CDE 164;EOR 2931-2932 & CDE 183;EOR 2712) to October 15, 2013 (CDE 172;EOR 2932-2933 & CDE 173;EOR 2715-2721) and then to November 19, 2013, when an evidentiary hearing was held (CDE 190;

[2] Four copies of the September 11, 2013 final pre-sentence investigation report are filed under seal pursuant to Ninth Circuit Rule 30.1-10.

EOR 2935 & CDE 193;EOR 2722-2764). Post-hearing briefs were filed by the government (CDE 192;EOR 2935) and Aubrey (CDE 196;EOR 2936) but the trial court has not issued a ruling.

VI.

STATEMENT OF FACTS

Beginning in 1996, after running Blaze Construction's business activities for twenty years, Aubrey sold his shares to his business partners, leaving him with a low seven figures net worth, to concentrate his housing construction, development, and consultant activities in his successor company Lodgebuilder, Inc., a Nevada corporation. CDE 205;EOR 2331-2332 & 2368. Aubrey's prior company Blaze Construction built thousands of homes and roads on Indian lands and elsewhere in Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, and Washington state, becoming the largest 100% Indian or Native American owned contractor employing the most Native Americans in the continental United States. CDE 189;EOR 1188-1189; CDE 205;EOR 2331-2332 & 2368.

Between 1996 and 2004, Lodgebuilder and Fort Defiance Housing Corporation (FDHC) entered into a series of development, construction and consulting agreements which resulted in more than 640 high quality low cost homes built on the Navajo Nation, including Rio Puerco, Arizona, Church Rock, New Mexico and Kayenta,

Arizona. CDE 185;EOR 610-622; CDE 205;EOR 2332 & 2384-2426; CDE 194;EOR 1462-1965 & 1475-1481. The prosecution offered to stipulate during trial to the quality of the homes built by Lodgebuilder/Aubrey for FDHC. CDE 185;EOR 629. Indeed, in August, 2000, the Rio Puerco Housing Project was the only Indian housing, and one of ten projects nationwide (out of thousands of applicants), to receive HUD's "Best-of-the-Best" national award, recognizing the quality of work by Aubrey/Lodgebuilder under its FDHC contract. CDE 185;EOR 618; CDE 194;EOR 1476; CDE 205;EOR 2421-2425.

The Chilchinbeto 90 home budget for constructing/on-site improvements was $12.6 million dollars which was based upon historical project construction costs from earlier Church Rock and Kayenta housing construction projects, CDE 185; EOR 607-639 & CDE 205;EOR 2384-2397, and well under HUD Total Development Cost. CDE 117;EOR 254-289. The primary source of funding was to come from the Native American Housing and Assistance Self-Determination Act of 1996 or NAHASDA. Id. & CDE 177;EOR 217-220 & 245-2500. "Under NAHASDA, the Navajo Housing Authority and all sub-grantee housing providers must implement leveraged funding." *Defense Exhibit 568, ¶6 & Defense Exhibit 568-1, ¶7*; CDE 185;EOR 639-640 & 761-762; CDE 180; EOR 1933-1935. Matching or leveraged funds were budgeted typically to fund 15% (Church Rock and Kayenta) of all construction costs associated

with construction progress. CDE 185;EOR 607-639.

The Navajo Housing Authority (NHA) initially slashed its portion of this construction budget from $10.8 million to $9.3 million, requiring the difference to be made up in 30% leveraged or matching funds. CDE 185;EOR 631, 635-636, 645-648, 655, 669, 681, 741, 772, 775, & 815. NHA CFO Lynch testified that NHA eventually determined that its NAHASDA portion was $120,000 per home or $10.8 million dollars, *Defense Exhibits 516 & 516-1*, and the difference between the $9,156,100 NAHASDA monies paid and the $10,800,000 NAHASDA monies due FDHC and Aubrey/Lodgebuilder would have paid **all** outstanding amounts owed to Chilchinbeto subcontractors/vendors. CDE 180;EOR 1965-1967. The $1 million dollar USDA 515 leveraged construction financing for 46 of the 90 homes that Aubrey budgeted to use to pay vendors and subcontractors (*Defense Exhibits 511, 551 & 558-3*) was never funded until after FDHC's bankruptcy.[3] CDE 185:EOR 766-768 & 780; CDE

[3] FDHC filed Chapter 11 bankruptcy to keep its 700 plus homes from a hostile takeover by NHA. Notwithstanding the Navajo Nation Council Resolution requiring that NTUA "shall ensure that all homes ... have power ... within seven (7) calendar days from the date of the contractor's request, once the buildings are substantially completed," *Defense Exhibit 568-1, ¶ 4*, NHA failed to timely pay the $1,300,000 needed to extend the power lines 13 miles to Chilchinbeto. *Defense Exhibit 606.0023 (2004 FY IHBG, electrical upgrade, 90 homes, Chilchinbeto)*. And the monies to pay Chilchinbeto subcontractors and vendors in bankruptcy came from this $1,000,000 in leveraged non-NAHADA funding obtained by Aubrey (the general contractor) on behalf of FDHC (the owner of the homes), *Defense Exhibit 558-3 (USDA 515 contract)*, and from Aubrey's own monies.

205;EOR 2396-2426. Construction progress proceeded at the 90 home Chilchinbeto project from 0% total progress in June, 2003 to 88% total progress verified, inspected and approved through January, 2004 (*Government Exhibit 34(A)*) with no unpaid invoices to vendors or subcontractors (*Government Exhibit 44*) hired by Lodgebuilder on behalf of FDHC in accordance with the parties 2002 Development/Consultant Agreement (*Defense Exhibit 500; Government Exhibit 13*).

Even without considering Lodgebuilder's salaried payroll and job costs (*Defense Exhibit 582-1.0052-120, 582-4, 582-5 & 583*-1; CDE 205;EOR 2126-2134), the FDHC Development Account paid more than **$8,000,000** for the Chilchinbeto project (*Defense Exhibit 580-1* & CDE 205;EOR 2019-2013); the FDHC Payroll Account paid **$1,634,170.06** for the Chilchinbeto project (*Defense Exhibit 581-2* & CDE 205;EOR 2014-2125); and the total paid by these two accounts alone is more than **$9.6 million**, an amount greater than the $9,156,100 Chilchinbeto construction progress performance reimbursement. *Defense Exhibit 525* & CDE 185;EOR 787-791. Construction progress performance reimbursement requests are not contracts for items to be paid but instead draw-downs for work completed. CDE 180;EOR 61 & 2025; CDE 177;EOR 276; CDE 187;EOR 903; CDE 205;EOR 2409, 2417, & 245302454. The payroll for 9 out of 10 project workers, including most subcontractor

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CDE 185;EOR 728-742 & CDE 205;EOR 2414-2418.

payroll, was paid weekly (by law) out of Aubrey's own funds, as construction progress performance reimbursement payments were paid monthly and are based on construction progress not cost. CDE 189;EOR 1174-1189 & 1198-1219.

FDHC CDO Cascaddan testified that substantial monies beyond $9,156,100 were expended to construct the 90 Chilchinbeto homes based upon project costs for the more than 200 homes built at Kayenta. CDE 205; EOR 2396-2400 & 2417-2418 & 2453-2454. Indeed, overall construction costs totaled $12,797,180. CDE 205;EOR 2408-2409; CDE 185;EOR 641-649; *Defense Exhibit 574*. Grants Manager Shepard testified that he knew that the NAHASDA line items do not pay the entire amount and that the project revenue or project funding was $3.5 million more than the $9.1 in NAHASDA funds paid. CDE 185;EOR 664 & 765-772 CDE 185;EOR 765-772; *Defense Exhibit 511, Shepherd's handwritten notes ("Project Cost $3.5 M more, did not have leveraging; NAHASDA line items does not pay entire amount"*).

VII.

SUMMARY OF ARGUMENT

A. The trial court erred in denying Aubrey's motion for judgment of acquittal for counts 5 and 4 under Federal Rule of Criminal Procedure 29(a) and 29(c) for several reasons.

First, payments for verified, certified and approved construction performance

progress reimbursements do not continue to belong to the Indian tribal organizations or are not held in trust – an essential element of the counts of conviction under 18 U.S.C. § 1163 - once payments are made. Instead, what belongs to the Indian tribal organizations are the homes and infrastructure which it inspected, verified, certified and approved prior to payment. For this reason alone, this Court should reverse the judgment of the trial court and remand for entry of judgment of acquittal on both counts.

Second, there was insufficient evidence to sustain the count 5 conviction (embezzlement, theft, misapplication and conversion of monies or funds from an Indian tribal organization on or about June 24, 2004). Aubrey's use of $25,400 on or about June 24, 2004 from a construction performance progress reimbursement payment could not constitute criminal embezzlement or theft or conversion or misapplication when Aubrey (a) paid all labor, subcontractor and vendor material costs directly associated with Requisition #13 – in an amount greater than $134,205 during the count 5 relevant time period, even before adding additional monies paid by Aubrey for Lodgebuilder salaried payroll expense; and (b) the construction performance progress reimbursement payment (Requisition #13) totaled $133,700, which is less than the trial evidence showed Aubrey paid to labor, subcontractors, and vendors to accomplish that percentage construction progress. Accordingly, this Court

should reverse the judgment of trial court for count 5 and remand for entry of judgment of acquittal.

Third, there was insufficient evidence to sustain the count 4 conviction (misapplication or conversion of monies or funds from an Indian tribal organization on or about May 20, 2004 through June 8, 2004). No rational jury could conclude beyond a reasonable doubt that monies used to pay personal expenses in the amount of $141,980 between May 20, 2004 and June 8, 2004 were monies belonging to an Indian tribal organization either knowingly converted or willfully misapplied when the record shows $690,400 in project costs paid by Aubrey from his own monies between March 17, 2004 and June 8, 2004 and overall deposits in the relevant Aubrey bank account from non-FDHC construction progress performance reimbursement payments exceeded expenditures for personal expenses by more than one million dollars. Therefore, this Court should reverse the judgment of the trial court and remand for entry of judgment of acquittal for count 4.

B. The trial court committed reversible error when it omitted Aubrey's theory of the defense instructional language in its final instructions after it had given the same or similar language in its preliminary instructions to guide the jury in listening to the trial testimony and viewing the trial exhibits. Nowhere else in the final jury instructions was this defense adequately covered. Instructions that fail to adequately

guide the jury's deliberations require reversal. Therefore, this Court should reverse the convictions and remand for a new trial.

C. The trial court committed reversible error when it allowed expert testimony and exhibits in the guise of summary testimony and exhibits and therefore permitted the jury to convict based upon the application of an accounting method instead of specific identification of Indian tribal organization monies and funds. Specific identification is required as an element of the offense of conviction under 18 U.S.C § 1163. Summary testimony and exhibits are not admissible as substantive evidence. Yet the trial court admitted the same as substantive evidence over Aubrey's objection and mistrial motion. Thus, this Court should reverse and remand for a new trial.

D. A mistake in calculating the recommended advisory sentencing guideline range is a significant procedural error that requires a remand for re-sentencing. The trial court erred in two respects in calculating the advisory sentencing guideline range. First, it imposed a specific offense characteristic loss increase of 16 levels when no more than a 10 level or 4 level increase was warranted. Based upon this error alone, the advisory sentencing guideline range would decrease from 51-63 months to 27-33 or 10-16 months. Second, it imposed a 2 level upward adjustment for abuse of trust even though Aubrey's convictions fall within the category of offenses that the guidelines normally exclude from the abuse of trust enhancement. Based upon this

additional error, the advisory sentencing guideline would decrease to 21-27 or 6-12 months. For either of these two reasons, this Court should reverse the judgment of the trial court and remand for re-sentencing.

VIII.

ARGUMENT

A. The Trial Court Erred In Denying Aubrey's Motion For Judgment Of Acquittal For Counts 5 and 4 Under Federal Rule Of Criminal Procedure 29(a) and 29(c).

Standard of Review: Aubrey preserved his claim of insufficient evidence under Federal Rule of Criminal Procedure 29(a) and 29(c) by moving for judgment of acquittal after the government rested its case (CDE 203;EOR 68-78 & 2161-2169), by renewing his motion after he rested his case and the close of all evidence (CDE 205;EOR 79-82 & 2456-2458; CDE 182;EOR 86-90 & 2480-2482), and by renewing his motion after the jury verdict (CDE 153;EOR 2931). *United States v. White Eagle*, 721 F.3d 1108, 1113 (9th Cir. 2013).

This Court reviews both a trial court's denial of a Rule 29 motion and sufficiency of the evidence challenges *de novo*. *United States v. Lequire*, 672 F.3d 724, 728 (9th Cir. 2012) (internal citations omitted).

Legal Standard: There is sufficient evidence to support a conviction if, viewing the evidence in the light most favorable to the prosecution, any rational trier

of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "While inferences from facts which have been established by circumstantial evidence may be sufficient to sustain a verdict of guilt, *United States v. Nelson*, 419 F.2d 1237 (9th Cir. 1969), mere suspicion or speculation cannot be the basis for the creation of logical inferences." *United States v. Thomas*, 453 F.2d 141, 143 (9th Cir. 1971), *cert. denied*, 405 U.S. 1069 (1972). More than a "mere modicum" of evidence is required to support a verdict. *Jackson v. Virginia*, 443 U.S. at 320 (rejecting the rule that a conviction be affirmed if "some evidence" in the record supports the jury's finding of guilt).

A court must reverse the verdict if the evidence of innocence, or lack of evidence of guilt, is such that all rational fact finders would have to conclude that the evidence of guilt fails to establish every element of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. at 319. "The Due Process Clause requires the Government to prove all facts necessary to convict a defendant beyond a reasonable doubt." *United States v. Orduno-Aguilera*, 183 F.3d 1138, 1140 (9th Cir. 1999) (conviction reversed for insufficient evidence); *In re Winship*, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every

fact necessary to constitute the crime with which he is charged.").

1. Payments For Verified, Certified And Approved Construction Performance Progress Do Not Continue To Belong To The Tribal Organization Or Are Not Held In Trust – An Essential Element of Counts Of Conviction Under 18 U.S.C. § 1163 – Once Payments Are Made After Inspection.

To uphold this verdict, this Court must find that payments made for verified, certified, and approved construction progress performance reimbursements continue to **"belong to"** a tribal organization rather than **"belong to"** those who performed the work (Aubrey/Lodgebuilder and subcontractors) once payments are made after inspection.[4] Several reasons compel a finding that the monies do not continue to

[4] *See Government Exhibit 13, NHA-00405-407, ¶ "2.* Scope of duties-Lodgebuilder, Inc., d.) Construction. Lodgebuilder shall provide full construction management services from the initiation through the completion and occupancy of each housing construction project authorized under the One-Year and Five-year Plans. Agreement services shall include: 1.) Procurement of quality building materials in conformance with approved construction plans and specifications. 2.) Hiring, supervising, and coordinating subcontractors and labor force in compliance with Navajo Nation preference requirements. 3.) Contracting for and furnishing all equipment required for proper and efficient construction activities for all phases of construction. 4) Monitoring and enforcement for compliance with approved construction plans and specifications as well as quality of work and craftsmanship for all phases of construction. 5.) Cooperation and compliance with orders of FDHC and the Navajo Housing Authority construction inspectors. 6) All payment activities for construction work related to labor, subcontractors, materials, and consultants, including applicable tax reporting and full accounting for all receipts and expenditures. 7.) One-year warranty on construction labor and materials."

"belong to" a tribal organization and that monies were not held in trust. CDE 182; EOR 93. Accordingly, this Court should reverse the trial court's judgment and remand for entry of judgment of acquittal on all counts.

First, the tribal organizations received more than its contractual benefit of its bargain for the monies paid after their inspectors verified, certified and approved the construction performance progress payments. CDE 202;EOR 1626-1628, 1653, & 1685-1686; CDE 203;EOR 2409 & 2417 & 2453. Tribal government entity NHA and tribal non-profit corporation FDHC, as agents of the Navajo Nation, received 90 homes of the highest quality with 97% progress completion from June, 2003 to June, 2004 (and 99% by January, 2005) in exchange for the $9,156,100.00 paid to Aubrey and his company Lodgebuilder (see *Defense Exhibit 525*) in construction progress performance reimbursement payments pursuant to the express terms of the October, 2002 Development/Consultant Agreement between Aubrey/Lodgebuilder and FDHC.[5] CDE 187;EOR 939. Significantly, NHA and FDHC received 99% verified,

[5] *Government Exhibit 13, NHA-00407-408* ("4. Developer Compensation. Lodgebuilder shall be compensated for all phases of development work from NAHASDA funds and other financing arranged by Lodgebuilder. Said compensation shall be in accordance with line item amounts established and approved by FDHC and [NHA] and in accordance with NAHASDA cost principles. Payment requests shall be generally submitted on a monthly basis for percentages or line item units of work completed. All progress payments shall be subject to inspection of work completed by FDHC and the [NHA].").

certified and approved construction performance progress from Aubrey in exchange for only $9,156,100, even though NHA CFO Marlene Lynch testified that NHA determined, based upon its own independent review, that Aubrey and his company was entitled to $120,000 per home or $10,800,000, for the NAHASDA portion of the total project costs. CDE 180;ROR 1965-1967; *Defense Exhibit 516 - NHA determined cost per housing unit is $120,000 & Defense Exhibit 516-1 - same)* & EOR 1965-1969 & EOR 1967 ("Q. If you had paid him $120,000 [per home], every one of those payables in June of 2005, could have been covered by the difference of 1.5 million, right? A. Exactly.").

Second, all monies/funds at issue here were legally paid to Lodgebuilder and Aubrey as construction performance progress reimbursement requests - not contracts for items to be paid - but instead construction draw-downs for work completed. CDE 177;EOR 276 (HUD "Line-of- Credit-Central-Control-System" payments are "reimbursements for work already performed and inspected and approved by the TDHE").

Title 24 Code of Federal Regulation Part 85.21(d) (HUD) (Administrative Requirements for Grants and Cooperative Agreements to State, Local and Federally Recognized Indian Tribal Governments) provides that "reimbursement shall be the preferred method of payment" (as opposed to an "advance" which would be monies

held in trust) to subgrantees and contractors and that "grantees or subgrantee ... may use the percentage of completion method to pay construction grants." 24 CFR § 85.21(a), (c) & (d). The unanimous trial testimony from both prosecution and defense witnesses was that all payments to Aubrey were "reimbursements" and not "advances" and that each payment was for construction progress "performance" after inspection, verification, and approval by all tribal organizations prior to payment rather than payments based upon costs. CDE 177;EOR 233-234 & 273-275 (Bullough); CDE 187;EOR 903-904 (Shepherd); CDE 194;EOR 1871-1872 (Porter); CDE 180;EOR 1871-1872 (Lynch); CDE 205;CDE 2409 & 2417 & 2453-2454 (Cascaddan).

Third, in its oral pronouncement denying Aubrey release pending appeal, the trial court specifically found that the monies and funds **"belonged to"** ***unpaid subcontractors and not to either NHA or FDHC, as agents of the Navajo Nation***. CDE 173;EOR 117 at 2:14-3:05 (" ... I believe that – once the application was made and the payment was approved it belonged to the subcontractors who – who turned up in this case not receiving payment. ... ."). The trial court's ruling is consistent with the trial testimony that post-payment neither NHA nor FDHC had any claim to the monies paid for the verified, certified and approved construction performance progress. The trial court's ruling alone on these unique facts compels acquittal for

counts 5 and 4 because the monies did not belong to any tribal organization.

Fourth, Aubrey did not hold **any** monies in trust. The circumstances here are identical in all important aspects with the circumstances in *United States v. Lequire*, 672 F.3d 724 (9th Cir. 2012). There, this Court reversed the trial court's denial of a Rule 29 motion and remanded the case for entry of judgment of acquittal on all counts. *United States v. Lequire*, 672 F.3d 724, 731 (9th Cir. 2012). This Court in *Lequire* recoginezed that "[o]ne cannot be guilty of embezzlement if the alleged victim did not own the funds that were supposedly embezzled." *Lequire*, 672 F.3d at 725. In *Lequire*, "the contract between the agency and the company, which permitted agency commingling, required monthly agency payments whether premiums were collected or not, *and* created a right to interest on late payments" resulted in "a credit-or-debtor relationship, not a trust." *Lequire*, 672 F.3d at 725-726. Accordingly, in *Lequire*:

> The agency had a contractual and fiduciary duties to the company, but was not a trustee. Because the funds in question were held not 'in trust' by the agency as a matter of law, an essential element of embezzlement was lacking. We reverse the denial of the defendant's motion for judgment of acquittal.

Lequire, 672 F.3d at 726.

Similarly, here, as in *Lequire*, commingling was permitted under the contract

between Lodgebuilder and FDHC and the relevant federal regulations. Title 24 Code of Federal Regulations Part 85.21 (Administrative Requirements for Grants and Cooperative Agreements to State, Local and Federally Recognized Indian Tribal Governments) provides that "[a] grantee or subgrantee shall maintain a separate account only when required by Federal-State agreement." 24 C.F.R. § 85.21(h)(2).

The trial court based its denial of Aubrey's acquittal motion on the erroneous finding that his contractual duty to pay subcontractors made payments for verified, certified and approved construction progress into trust funds and thus were like attorney-client trust funds where there is a strict prohibition against combining personnel funds with trust funds. CDE 183;EOR 98-102. Yet neither NHA nor FDHC as Indian tribal organizations were required to maintain (and did not maintain) Indian Housing Block Grant (IHBG) funds in separate accounts but instead commingled funds. Indeed, NHA itself "commingled" Chilchinbeto Requisition #1 for $309,500 [*Government Exhibit 24(A)(1)*], Springstead 82-Unit Requisition #1 for $281,900 [*Government Exhibit 24(A)(2)*] and Springstead Off-Site Requisition #1 for $155,000 [*Government Exhibit 24(A)(3)*] into a single construction performance progress reimbursement check for $746,400 [*Government Exhibit 24(B)*]. Nothing was improper with that "commingling" as it simply used one check instead of three checks to pay for construction related progress.

No NAHASDA project could be paid only with NAHASDA funds as NAHASDA itself and the NHA resolution required as a mandatory condition of obtaining the grant that other funds – i.e. leveraged or matching funds – be used to pay for a percentage portion of all aspects of the construction costs. "Under NAHASDA, the Navajo Housing Authority and all sub-grantee housing providers must implement leveraged funding." *See Defense Exhibit 568, ¶ 6 & Defense Exhibit 568-1, ¶ 7*. Therefore, the NAHASDA funding alone did not, and could not, per NHA's own Board of Directors' Resolution – pay for **all** project costs. CDE 185;EOR 638-644; CDE 205;EOR 2354-2426 & 2453-2454.

The project budget for the Chilchinbeto 90 home construction project exceeded $12,000,000 dollars. *Defense Exhibit 551.0006 & 574*; CDE 205;EOR 2409. That is why every subcontractor purchase order contract introduced and received in evidence, by either the government or the defense, exceeded the budgeted NAHASDA funding for that budget line item. CDE 185;EOR 689-701 (*Defense Exhibit 650*) & 701-724 (*Defense Exhibits 652 & 655*); *Government Exhibits 58(A) - 58(G) & 57(a) - 57(C)*. This was true whether or not Aubrey payed sub-contractors materials and labor costs up-front. CDE 189;EOR 1198-1231.

All construction activities required the leveraged or matching funds to reimburse Lodgebuilder and Aubrey for the portion of project costs over and above

the $9,156,100 paid (which represented only 70% of the total project costs). CDE 205;EOR 2453-2454. Even so, NHA and FDHC received 99% verified, certified and approved construction performance progress from Aubrey even though the failures of NHA and NTUA prevented the payment of the leveraged or matching funds needed to cover remaining non-NAHASDA 30% of the Chilchinbeto project costs. CDE 185;EOR 638-641 & 760-763; CDE 189;EOR 1095-1122; CDE 205;EOR 2410-2417

The fact that amounts were owed to vendors and subcontractors for project costs above $9,156,100 (after total construction was more than 99% complete) does not make the failure to pay those project costs a knowing conversion or willful misapplication of monies or funds to sustain a Title 18, United States Code, Section 1163 conviction. CDE 183;EOR 100-102. Neither *United States v Kranovich*, 401 F.3d 1107 (9th Cir. 2003) nor *United States v Johnson*, 596 F.2d 842 (9th Cir. 1979) nor any 18 U.S.C. § 1163 decision holds that verified, certified and approved construction progress performance payments – and the funds used to make those payments – continue to **"belong to"** tribal organizations after payment is made. Therefore, this Court should reverse Aubrey's count 5 and 4 convictions and remand for entry of judgment of acquittal.

2. Insufficient Evidence For Count 5 Conviction.

A fundamental flaw in the count 5 conviction (embezzlement, theft, misapplication and conversion of monies and funds from a tribal organization on or about June 24, 2004) is that (a) Aubrey paid **all** labor, subcontractors and vendor material costs directly associated with Requisition #13; (b) Aubrey paid an amount **greater than $134,205.06** to labor, subcontractors and vendors for the count 5 relevant time period, even before adding additional monies paid by Aubrey for Lodgebuilder's salaried payroll expenses and job costs directly related to the Chilchinbeto 90 home project; and (c) the construction performance progress reimbursement payment Requisition #13 totaled **only $133,700**, which is less than the trial evidence showed Aubrey paid to labor, subcontractors and vendors to accomplish that percentage construction progress.

Therefore, Aubrey's use of $25,400 on or about June 24, 2004 from the construction performance progress reimbursement payment could not constitute criminal embezzlement or theft or conversion or misapplication. Even viewing the evidence in a light most favorable to the prosecution, no rational trier of fact could have found beyond a reasonable doubt every fact necessary to constitute the crime charged in count five. Accordingly, the court must set aside the verdict and enter an acquittal as to count 5 of the second superseding indictment.

The IHBG funds requested in the time period pertinent to count five – Requisition #13 – totaled $133,700 for construction progress in the amount of $120,000 for site improvement (Line Item No. 1450) and $13,700 for dwelling construction (Line Item No. 1460). *Government Exhibit 40(A)(2), HUD_00649-00652*. The construction progress from May of 2004 to June of 2004 was directly related to the percentage (%) completion in two areas of site improvement (streets and site electrical) and one area of dwelling construction (gutters). *Government Exhibit 40(A)(2), HUD_00653*. Contrary to the jury verdict, the trial evidence relevant to count five established conclusively that Aubrey paid all labor costs and material costs directly associated with Requisition #13.

First, with respect to construction progress payment in line item #1450 for site improvement directly related to "streets" between the May 1, 2004 Requisition #12 [*Government Exhibit 39(A), HUD_00638*] and the June 9, 2004 Requisition #13 [*Government Exhibit 40(A)(2), HUD_00653*], the uncontradicted facts are that (a) Aubrey authorized and signed (on 6/16/2004) an $84,000 check from Fort Defiance Development Account #1002410 to pay White Mesa Materials, Inc. which cleared on 6/22/2004 (*Defense Exhibit 580-1.00101-0102, BANK_06278-06279 & BANK_07082 (underlying original check referenced in Exhibit 580-1.00101-102) & EOR 2853 (C.R. 153-1, Exhibit A, pages 1-4)* and (b) the $84,000 check dated 6/16/2004 to

White Mesa Materials was payment for the progress from 20% to 50% in the category designated as "streets" for materials and labor associated with the Chilchinbeto project and in the exact amount sought for the construction progress. *Government Exhibit 40(A)(2), HUD_00653*; CDE 185;EOR 724 ($84,000 White Mesa payment in June of 2004).

Second, with respect to construction progress in line item #1450 for site improvement directly related to "site electrical" between the May 1, 2004 Requisition #12 [*Government Exhibit 39(A), HUD_00638*] and the June 9, 2004 Requisition #13 [*Government Exhibit 40(A)(2), HUD_00653*], the uncontradicted facts are that (a) Four States Electrical did **no work** in May or June of 2004 [*EOR 1078 & Government Exhibit 58(D*) – Invoice #4860 dated March 30, 2004 and Invoice #4883 dated April 28, 2004]; CDE 189;EOR 1078-11083 (b) the June 9, 2004 construction draw for $36,000 for construction progress from 85% to 100% in "site electrical" [*compare Government Exhibit 39(A), HUD_00638 – 85%, with Government Exhibit 40(A)(2), HUD_00653 – 100%*] related specifically to the $50,205.60 FDHC payroll labor costs incurred, in part, for "ditch and backfill" work performed by FDHC labor in relation to "site electrical" [*Government Exhibit 58(A)(1) & 58(A)(2) ("Our understanding is that you will furnish all ditch and backfill")]* & CDE 189;EOR 1074 (*"Fort Defiance Housing would furnish all ditch and backfill on the project that the cable*

and conduits would go in ...”); and (c) Aubrey paid $50,205.60 in payroll checks and related expenses to/for workers between June 1, 2004 and June 30, 2004 from the Fort Defiance Payroll Account #1007153 for the Chilchinbeto 90 home construction project (*EOR 2854-2861, C.R. 153-1, Exhibit B, pages 5-12, Defense Exhibit 581-2.0144-0150, BANK_06548-06554*).

Four States Electrical invoices show a March 30, 2004 invoice for $120,862.00 for mobilization and materials and an April 28, 2004 invoice for $97,788.60 for materials and labor. *Government Exhibit 58(D)*. The final invoice from Four States Electric in the amount of $81,942.00 was for work performed in January of 2005. EOR 1079 &1082; *Government Exhibit 58(D)*. Four States Electrical did **no** work in either May or June of 2004. *Id*. Government Exhibit 58(A)(1) and 58(A)(2) – together with Jack Harris' trial testimony – established that the $300,593.00 contract [Government Exhibit 58(C)] did **not** include work associated with "ditch and backfill" to complete the "site electrical". CDE 189;EOR 1074, 1082 & 1096. That is precisely the work done which relates to the progress payment for the $36,000 for "site electrical". Therefore, the June 9, 2004 construction performance progress payment of $36,000 for "site electrical" related specifically to the $50,205.60 FDHC payroll labor costs incurred, in part, for "ditch and backfill" in relation to "site electrical." *See Government Exhibit 58(A)(1) & 58(A)(2)*.

Third, the same is true for the June 9, 2004 construction performance progress reimbursement for $13,700 for costs associated with "gutters" as this cost again relates specifically to the $50,205.60 FDHC payroll labor costs incurred, in part, to affix "gutters" to 35 homes for a total of 63 homes during this time period. *Compare Government Exhibit 39(A),HUD_00638 – 28 homes as of 5/1/2004 with Government Exhibit 40(A)(2),HUD_00653 – 63 homes as of 6/9/2004*.

Therefore, even before considering Lodgebuilder's salaried payroll expenses and job costs directly related to the Chilchinbeto 90 home project for that time period, *see Defendants' Exhibit 582-1.0116-0120*, the trial evidence conclusively established that an amount **greater than** the construction draw of $133,700 was paid out by Aubrey to a Chilchinbeto subcontractor (White Mesa Materials) and FDHC payroll project workers for the precise IHBG Items 1450.01 (Site Improvement) and 1460.01 (Dwelling Construction) materials and labor for which progress payment was sought in Requisition #13.

Once the trial evidence established the construction performance progress payment of $133,700 was, in fact, a reimbursement, for the $134,205.06 previously paid by Aubrey to subcontractors and payroll workers for the Chilchinbeto job costs associated with the construction progress, then Aubrey's use of $25,400 from that reimbursement could not constitute criminal embezzlement or theft or conversion or

misapplication. The government's count 5 proof centered exclusively on check #2269 and the testimony that $25,400 of the June 17, 2004 reimbursement check was the source of funds for a portion of a $50,000 check to Paris Casino by Bill Aubrey. *See Government Exhibit 40(D)*. To sustain the Title 18, United States Code, Section 1163 conviction charged in count 5, the government must prove, beyond a reasonable doubt, that, on or about June 24, 2004, Aubrey either (a) embezzled or (b) stole or (c) knowingly converted to his own use or (d) willfully misapplied – monies or funds with the intent of depriving the owner of the use or benefit of the monies.

No rational jury could conclude that the government had proven beyond a reasonable doubt that "monies" paid in reimbursement "belonged to an Indian tribal organization' which is an essential element of 18 U.S.C. § 1163. That it did not and could not do for this simple reason. The "owner" of the monies paid in reimbursement in Requisition #13 was, on or about June 24, 2004, Lodgebuilder and its owner Aubrey, because all "authorized and substantiated work for which the NAHASDA funds had been requisitioned" had been paid by Aubrey as shown above. One cannot embezzle or steal or convert or misapply one's own monies. Therefore, the court must set aside the verdict and enter an acquittal.[6]

[6] The trial testimony established that neither Requisition #12 nor Requisition #13 included any construction progress for "stucco" because **no** progress was made despite the labor and material costs associated with that work in those

3. **Insufficient Evidence For Count 4 Conviction**.

Even viewing the evidence in a light most favorable to the prosecution, no rational trier of fact could conclude beyond a reasonable doubt that monies used to pay personal expenses in the amount of $141,980 between May 20, 2004 and June 8, 2004 were monies identified as belonging to an Indian tribal organization either knowingly converted or willfully misapplied when the record shows **$690,400** in project costs paid by Aubrey from his own monies between March 17, 2004 and June 8, 2004 and overall deposits in the relevant Aubrey bank account from non-FDHC construction progress performance reimbursement payments exceeded expenditures for personal expenses by **more than one million dollars**. Accordingly, this Court should reverse Aubrey's conviction and remand for entry of judgment of acquittal as to count 4 of the second superseding indictment.

First, the trial record [*see Defense Exhibits 599-2 (bank statements) and 599-1 (summary of bank statements)*] contained the following deposits in the Aubrey/Todd Account #1101419 from sources other than FDHC construction progress performance

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months. No progress was made because the subcontractor admitted that she failed to follow proper instructions for synthetic materials in the stucco application but instead used a procedure for non-synthetic materials. CDE 187;EOR 988-1037. The trial testimony also established that Thermo-Flex was the material used in the stucco work so transfers of monies to Thermo-Flex reflect payments for materials used despite the fact that no progress resulted. CDE 187;EOR 957-958 & CDE 189;EOR 1129-1130, 1194 & 1247-1248.

payments which were neither "counted" nor "followed" as the source of the personal expenditures: (1) **$800,000.00** on 3/17/2004-*Defense Exhibit 599-2, BANK_01868*; (2) **$42,650.00** on 01/23/2004- *Defense Exhibit 599-2, BANK_01859*; (3) **$169,037.55** on 12/05/2003-*Defense Exhibit 599-2, BANK_01850*; (4) **$20,144.89** on 12/05/2003-*Defense Exhibit 599-2, BANK_01850*; (5) **$316,000.00** on 9/10/2003-*Defense Exhibit 599-2, BANK_01831*; (6) **$1,000,000.00** on 9/03/2003, *Defense Exhibit 599-2, BANK_01830*; and (7) **$815,302.00** on 07/18/2003-*Defense Exhibit 599-2, BANK_01823*.

These **non**-FDHC construction progress performance payment deposits contained in the trial record total **$3,163,134.44**. The "personal expenditures by Aubrey" identified by HUD Certified Public Accountant/Certified Independent Auditor James Hoogoian which were summarized in Government Exhibit 42 total **$1,965,341**. The fact that Aubrey's non-FDHC reimbursement deposits were greater than the personal expenditures undermines any proof beyond a reasonable doubt that the monies used to pay personal expenses were monies belonging to an Indian tribal organization. Unless all deposits are counted from all sources, one can only speculate as to any expert calculation based on accounting principles such as "LIFO" or "FIFO" and "speculation cannot be the basis for the creation of logical inferences." *Thomas*, 453 F.2d at 143.

Therefore, no rational jury could conclude that the government had proven beyond a reasonable doubt that the monies used to pay personal expenses in the amount of $141,980 between May 20, 2004 and June 8, 2004 were monies belonging to an Indian tribal organization either knowingly converted or willfully misapplied – as opposed to monies belonging to Bill Aubrey.

Second, the trial evidence established that on March 17, 2004, Aubrey deposited **$800,000.00 (**derived from the Vista de Lago construction project in Mesquite, Nevada **) into the Aubrey/Todd Account #1101419 from Lodgebuilder monies** not derived from, or traceable to, the FDHC Chilchinbeto project or any other FDHC project. CDE 153-1;EOR 2862-2886 (*Defense Exhibit 599-2 at BANK_01868, pertinent portions of Defense Trial Exhibit 599-2 attached as Exhibit C; see Defense Exhibit 582-3, FRE 1006 summary trial exhibit summarizing Defense Trial Exhibit 582-1.0052-0120, with TUC_13194-13195 attached as Exhibit D.*

The original source of the **$800,000** was a March 16, 2004 wire transfer into Lodgebuilder Account #1002267 from a non-Aubrey Mesquite State Bank account. CDE 153-1;EOR 2881-886 (*Defense Exhibit 582-3, summarizing Defense Trial Exhibit 582-1.104, TUC_ 13194, attached as Exhibit D.*

Between March 17, 2004 and June 8, 2004 (end date of count 4 allegations), the following occurred:

(a) Aubrey transferred a total of **$468,400** from the Aubrey/Todd Account #1101419 to the Fort Defiance Development Account #1002410 for Chilchinbeto project payments. CDE 153-1;EOR 2862-2880 (Exhibit C, Defense Trial Exhibit 599-2, BANK_01868-01878; CDE 153-1;EOR 2887-2889 (*Exhibit E attached, summarizing Defense Trial Exhibit 599-2 individual transfers by date and amount (with running total) from Aubrey/Todd Account #1101419 to Fort Defiance Development Account #1002410 totaling $468,400 swept back into the Development Account for payment of project costs with reference to "BANK" bates number*); and

(b) Aubrey transferred a total of **$222,000** from the Aubrey/Todd Account #1101419 to the Fort Defiance Payroll Account #1007153 for Chilchinbeto project payroll. CDE 153-1; EOR 2862-2880 (*Exhibit C, Defense Trial Exhibit 599-2, BANK_01868-01879*; CDE 154;EOR 2896-2901 (*Exhibit F attached, summarizing Defense Exhibit 599-2 individual transfers by date and amount (with running total) from Aubrey/Todd Account #1101419 to Fort Defiance Payroll Account*

#1007153 totaling $222,000 swept back into for the Payroll Account for payment of payroll costs with reference to "BANK" bates number).[7]

Accordingly, Aubrey, therefore, transferred a total of **$690,400** from his $800,000 deposit of non-FDHC money to pay Chilchinbeto project and payroll costs between March 17, 2004 through June 8, 2004. CDE 153-1;EOR 2862-2880. None of this **$690,400** was ever transferred back to the Aubrey/Todd #1101419 from either the Fort Defiance Development Account #1101419 or the Fort Defiance Payroll Account #1007153. CDE 153-1;EOR 2862-2880 (*Exhibit C, pertinent portions of Trial Exhibit 599-2, BANK_01868-01879*. Instead, the **$690,400** was paid out in project Chilchinbeto job costs and project payroll. *See Defense Trial Exhibits 580-4, 580-5 & 580-1.0052-0102 (FDHC Development Account #1002410); Defense Trial Exhibits 581-4, 581-5, & 581-1.0004-0150 (FDHC Payroll Account #1007153)*; *& Defense Exhibit 551 (Chilchinbeto: summary of all construction expenses as of March 1, 2005 with documentation)*.

Therefore, both the Chilchinbeto performance progress reimbursement check #11 dated April 9, 2004 in the amount of $204,900 and the Chilchinbeto performance

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[7] Chilchinbeto payroll expenses totaled $106,500 for March, 2004 (*Defense Exhibit 581-2.118-127*), $75,100 for April, 2004 (*Defense Exhibit 581-2.128-134*), and $79,800 for May, 2004 (*Defense Exhibit 581.2-135-143*). Combined these three months total $261,400.

progress reimbursement check #12 dated May 11,2004 in the amount of $289,400 – were, in fact, partial "reimbursements" in the truest sense of the word for the **$690,400** that Aubrey paid from his own monies for Chilchinbeto project and payroll costs during the time period from March 17, 2004 through June 8, 2004, a time period which includes the entire count four time period of May 20, 2004 to June 8, 2004. The reimbursement is partial because the two reimbursement checks together equal only $494,300 and thus the reimbursement falls well short by **$196,100** (**$690,400 - $494,300 = $196,100**) of a complete reimbursement, as shown by the underlying bank account evidence.

The payment of personal expenses in the amount of $141,980 between May 20,2004 and June 8, 2004 – even if paid from Chilchinbeto reimbursement check #12 – cannot be a payment made with Indian tribal organization monies because reimbursement check #12 was in fact only a partial reimbursement for greater payments of Chilchinbeto project job and payroll costs from Bill Aubrey's own monies – i.e. the **$690,400**. And the use of $141,980 dollars from a $289,400 reimbursement cannot constitute criminal misapplication or conversion because the "owner" of the monies paid in reimbursement was, between May 20, 2004 and June 8, 2004, Lodgebuilder and its owner Aubrey.

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B. The Trial Court Erred In Its Jury Instructions When It Omitted Aubrey's Theory Of Defense Language For Counts 5 And 4 In Its Final Instructions After It Had Given The Same Or Similar Language In Its Preliminary Instructions.

Standard of Review: This Court reviews whether jury instructions omit or misstate elements of a statutory crime or adequately cover a defendant's proffered defense are questions of law reviewed *de novo*. *United States v. King*, 122 F.3d 808, 809 (9th Cir. 1997); *United States v. Mason*, 902 F.2d 1434, 1438 (9th Cir. 1990); reviews the formulation of jury instructions for an abuse of discretion, *United States v. Hofus*, 598 F.3d 1171, 1174 (9th Cir.), *cert. denied*, ___ U.S. ___, 131 S.Ct. 364 (2010); and inquires whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation, *United States v. Driggers*, 559 F.3d 1021, 1024 (9th Cir.), *cert. denied*, 556 U.S. 1266 (2009).

Argument: The trial court committed reversible error when it omitted Aubrey's theory of the defense instructional language in its final instructions after it had given the same or similar language in its preliminary instructions to guide the jury in listening to the trial testimony and viewing the trial exhibits. CDE 123;EOR 42-55 & CDE 205;EOR 83-85; CDE 182;EOR 91-95 & 2493-2495; CDE 177;EOR 215-216. Nowhere else in the final jury instructions was this defense adequately covered. CDE 182;EOR 2484-2498 & CDE 152;EOR 2823-2849.

Instructions that fail to adequately guide the jury's deliberations require reversal. *United States v. Tagalicud*, 84 F.3d 1180, 1183-1184 (9th Cir. 1996). A defendant is entitled to have the judge instruct the jury on his theory of the defense, provided that it is supported by law and has some foundation in the evidence. *United States v. Mason*, 902 F.2d 1434, 1438 9th Cir. 1990).

Aubrey outlined his theory of the case and defense to the charges of conspiracy, bribery, embezzlement, theft, conversion and misapplication in his opening statement. CDE179;EOR 167-192. After opening statement but before the first witness testified, the trial court gave preliminary instructions incorporating Aubrey's theory of the case and defense to the charges, including counts 5 and 4 (CDE 123;EOR 43-46 & 2795-2798):

> That the monies or funds belonged to the Navajo Housing Authority or its sub-grantee, Fort Defiance Corporation, as agents of the Navajo Nation rather than belonging to Defendant William Aubrey or someone else.

CDE 177;EOR 215-216. However, after the parties rested, the trial court reversed itself and rejected Aubrey's counts 4 and 5 elements jury instruction (CDE 205;EOR 2473-2474) which mirrored the preliminary jury instruction given and incorporated his theory of the case and defense to counts 4 and 5:

> Second, those monies and funds belonged to the Navajo Housing Authority and its subgrantee Fort Defiance

> Housing Authority, as agents of the Navajo Nation, **rather than belonged to defendant William Aubrey or someone else"**) (emphasis added on omitted portion of instruction).

CDE 123;EOR 47-49 & 2815-2817.

Instead, the trial court gave an elements instruction (CDE 182:EOR 92-94 & 2840-2841) which **not only** omitted Aubrey's theory of defense language which the trial court gave before testimony was presented, but in the second element, provided two alternative basis to prove the second element to sustain a conviction:

> Second, those funds or that money belonged to an Indian tribal organization or was intrusted to the custody or care of an agent of an Indian tribal organization.

CDE 182;EOR 92-94 & 2493-2495 & CDE 152;EOR 2840-2841.

This was reversible error. This aspect of Aubrey's trial theory and defense was unambiguously supported by law. *Mason*, 902 F.3d at 1488; *United States v. Big Crow*, 327 F.3d 685, 686-688 (8th Cir. 2003) (tenant's occupation of tribal property without paying full rent did not constitute conversion or theft from an Indian tribal organization inasmuch as the funds never became the property of the Indian tribal organization). The statute requires that the monies or funds or property must "belong to" an "Indian tribal organization." 18 U.S.C. § 1163 ("moneys, funds, credits, goods, assets, or other property belonging to any Indian tribal organization ...").

Equally important, Aubrey's trial theory and defense found substantial foundation in the evidence. *Mason*, 902 F.3d at 1488; CDE 180;EOR 61 & 2025 (Hoogian: understood checks were reimbursement checks for work progress already approved); CDE177;EOR 273 (Bullough: HUD Office of Native American Programs, National Director of Grants Evaluation: cost reimbursement contract is not typically how housing construction is funded) & EOR 276 (reimbursement for work already performed and inspected and approved by the TDHE); CDE 185;EOR 674 (Shepherd: all federally funded projects require weekly certified payroll); CDE 187;EOR 903 (not $1 paid by NHA and FDHC to Aubrey for Chilchinbeto 90 homes and on-site infrastructure prior to to work being shown, inspected and done); CDE 189;EOR 1205 (Rowton: vast majority of labors paid weekly by Aubrey and construction performance progress payments associated with this labor come long after the work is completed); CDE 194;EOR 1474-1492 (Porter: FDHC contracted with Aubrey to provide construction, development and consulting and at a time when costs were rising Aubrey delivered 90 three and four bedroom homes at Chilchinbeto in 2003-2005 at the identical NAHASDA funding level as Porter built much smaller apartments in 1998); CDE 202;EOR 1626-1628 (FDHC contracted with Lodgebuilder rather than four other verbal inquires with developers because Lodgebuilder was prepared to front-load its own funds for 10%-40% construction performance progress

prior to seeking reimbursement payments) & EOR 1653 (Lodgebuilder assumed all the risk in contract with FDHC) & EOR 1685-1686 (construction performance progress payment system: NHA and FDHC have an asset (the homes) for each stage of % completed progress for which it has paid to Lodgebuilder per the contract monies for the completed progress); CDE 203;EOR 2113 (more than $4 million dollars of Aubrey monies other than FDHC construction performance progress payments paid out in Chilchinbeto FDHC development account payments) & 2125 (more than $600,000 of Aubrey monies other than construction performance progress reimbursement payments paid out in Chilchinbeto FDHC payroll account payments) & 2133 (more than $11 million of Aubrey monies other than FDHC construction performance progress payments deposited in the Lodgebuilder account); CDE 203;EOR 2227 (reimbursement payment delays); CDE 205; EOR 2409 (Lodgebuilder paying out its money throughout and getting NAHASDA funds as reimbursement) & 2417 (Aubrey paying payroll and job costs out of his own funds and seeking reimbursement for draws based upon progress of completion) & 2453-2454 (30 cents for every $1 never funded for Chilchinbeto project).

No one could seriously argue that NHA and FDHC were entitled to **property** consisting of 90 high quality homes which were at 99% verified, certified and approved construction performance progress **yet still owned all** he monies or funds

paid for that construction performance progress. Aubrey (a for-profit 100% Indian owned corporation owner) was both "permitted to pay himself with NAHASDA grant funds" and was "entitled to retain NAHASDA funds as profit" because it is absurd to believe that Aubrey/Lodgebuilder built over 640 high quality affordable homes for FDHC (recognized by HUD as the "Best of the Best") without any expectation of compensation.[8] The same is true for subcontractors and vendors. That is why the monies and funds paid for verified, certified and approved construction performance progress belonged to someone else (either Aubrey or subcontractors or vendors) rather than NHA or FDHC, as agents of the Navajo Nation. Therefore, the jury instructions, read as a whole, impermissibly permitted the jury to convict Aubrey of embezzlement, theft, conversion or misapplication based upon the mere failure to timely pay all subcontractors before 100% of the multiple sources of construction funding was received. That is not the crime set forth in 18 U.S.C. § 1163 as the monies must be proven beyond a reasonable doubt to belong to an Indian tribal organization. 18 U.S.C. § 1163; CDE 123;EOR 45-54.

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[8] 48 C.F.R. 31.102 provides that "application of cost principles to fixed-price contracts and subcontracts shall not be construed as a requirement to negotiate agreements on individual elements of cost in arriving at an agreement on the total price" and "the final price accepted by the parties reflects agreement only on the final price." 48 C.F.R. 31.102 (which provides for fixed-price construction contracts (as opposed to cost-plus construction contracts) like the one here with percentage (%) draw-drowns based upon percentage of completion).

The jury instructions also permitted the jury to convict Aubrey as an "agent" of an Indian tribal organization – even if the jury concluded that the monies did not **belong to** any Indian tribal organization – once the monies were paid to Aubrey and his company for construction progress performance payments for work inspected, verified and completed.

However, the second superseding indictment, charged Aubrey with misapplication, conversion, embezzlement or theft of moneys and funds belonging to, and intrusted to the custody and care, of the NHA and FDHC, as agents of the Navajo Nation. CDE 88;EOR 39. The "agent" instruction given by the trial court was applicable specifically to co-defendant Chester Carl's status. It was relevant only to the acquitted counts – counts one, two and three – which applied to the federal funds conspiracy and bribery counts for which the jury acquitted both Aubrey and Carl. CDE 182;EOR 92; CDE 152;EOR 2839; CDE 123;EOR 2810 (quoting 18 U.S.C. § 666(d)(1)). Using an instruction only applicable to acquitted counts is misleading and inadequate to guide jury deliberations. The government proposed no "agent" instruction for counts 4 and 5 (CDE 121;EOR 2765-2792), no instruction specific to the definition of "agent" in this context was given, and no factual basis for the second clause applied to Aubrey as a private business owner. This is reversible error.

C. The Trial Court Erred In Admitting Expert Testimony And Exhibits As Summary Testimony And Exhibits And Rejecting Aubrey's Mistrial Motion.

Standard of Review: Denial of a mistrial is reviewed for abuse of discretion. *United States v. Frederick*, 78 F.3d 1370, 1375 (9th Cir. 1996). Admission of summary testimony and exhibits is reviewed for abuse of discretion. *United States v. Baker*, 10 F.3d 1374, 1411 (9th Cir. 1993). A trial court's failure to designate a witness an expert is reviewed for abuse of discretion. *United States v. Laurienti*, 611 F.3d 530, 547 (9th Cir. 2010), *cert. denied*, ___ U.S. ___, 131 S.Ct. 969 (2011).

Argument: The trial court committed reversible error and abused its discretion when it allowed expert testimony and exhibits in the guise of summary testimony and exhibits and therefore permitted the jury to convict based upon the application of an accounting method instead of specific identification of tribal organization monies and funds. CDE 180;EOR 55-67; CDE 180;EOR 2012-2051; CDE 203;EOR 2065-2158). Thus, this Court should reverse and remand for a new trial.

First, the use of "last-in-first-out" is an application of an accounting method, used as an equitable substitute for specific identification. *United States v. Henshaw*, 388 F.3d 738, 741 (10th Cir. 2004). Specific identification is required as an element of the offense of conviction. 18 U.S.C. 1163; *Lequire*, 672 F.3d at 731 ("money can be converted despite commingling if the funds can be identified, segregated, and an

obligation to treat it in a specific manner can be established"). Over continuing defense objection and Aubrey's mistrial motion (CDE 180;EOR 55-67), HUD Certified Public Accountant/Internal Auditor James Hoogoian testified as simply a "summary witness" rather than an "expert witness" and introduced "summary exhibits" rather than "expert exhibits" – government exhibits 24(D), 25(D), 26(D), 27(D), 28(D), 29(D), 30(D), 32(D), 34(D), 36(D), 37(D), 39(D), 40(D), and 42 – which were each based on the use of an accounting method as an equitable substitute for the requisite specific identification of trial organization monies and funds. CDE 180;EOR 2012-2051 and CDE 203;EOR 2065-2158. The error affected substantial rights because there would be no conviction absent his testimony.

Second, Title 24 Code of Federal Regulations Part 85.21 (Administrative Requirements for Grants and Cooperative Agreements to State, Local and Federally Recognized Indian Tribal Governments) provides that "[a] grantee or subgrantee shall maintain a separate account only when required by Federal-State agreement." 24 C.F.R. § 85.21(h)(2). Neither NHA nor FDHC as Indian tribal organizations were required to maintain (and did not maintain) IHBG grant funds in separate accounts but instead commingled funds.

Given that neither NHA nor FDC were required and did not maintain separate accounts and instead commingled funds – together with the fact that only 70% of the

Chilchinbeto construction funding for 90 homes and on-site infrastructure came from NAHASDA funding – Aubrey had no regulatory duty under 24 C.F.R. § 85.21(h)(2) and no contractual duty to maintain multiple separate construction accounts for each individual project. The FDHC construction performance progress reimbursement payments #1 through #13 to Lodgebuilder and Aubrey – post-NHA and FDHC inspection, verification, certification and approval – were contractual payments for incremental percentage of construction progress completed. *Government Trial Exhibit 13; Defense Trial Exhibit 500 (Developer Compensation*; CDE 205;EOR 2384-2426; CDE 189;EOR1175-1231. For each increment of percentage of construction progress completed Aubrey paid out substantial monies on a weekly basis for labor and monthly basis for vendors and the few pure subcontractors for which Aubrey was not paying directly the labor costs. CDE 189;EOR 1175-1231 & 1242-1248.

Third, the use of "last-in-first-out" is neither a Federal Rule of Evidence 1006 summary nor an example of lay witness opinion proper under Federal Rule of Evidence 701. The summary testimony exhibits admitted in *United States v. Olano* or *Baker* was **not** admitted as substantive evidence. *United States v. Olano*, 62 F.3d 1180, 1203-1204 (9th Cir. 1995) ("limiting instructions informing the jury that neither the agent's summary testimony nor summary charts was admissible as substantive evidence"); *Baker*, 10 F.3d at 1412-1413 ("The court gave a thorough

limiting instruction three times during Agent Besse's tesimony, minimizing any risk that the summary would be treated as substantive evidence.").

Conversely, here, HUD CPA/CFI Hoogoian's testimony and exhibits were admitted over continuing objection and Aubrey's mistrial motion as substantive evidence of specific identification of trial organization monies even though he used an expert accounting methodology as an equitable substitute to specific identification. The application of an accounting method such as LIFO is based upon Federal Rule of Evidence 702 education, training, experience and skill of the person performing the expert forensic accounting application. While multiple versions of the summaries themselves (final changes made even after trial began) were provided by the prosecution, not one of the thousands of calculations implicit in the use of the equitable substitute for specific identification of funds was disclosed. CDE 180;EOR 57-67 & CDE 183;EOR 2676. The identification that LIFO was used was made for the first time after objection during trial.

The introduction over a continuing objection of testimony and exhibits through a "summary witness" rather than an expert witness in a criminal trial as a substitute for specific identification of funds – where specific identification is required as an element of the offense of conviction – is reversible error. This Court should reverse and remand for a new trial.

D. The Trial Court Erred In Its Advisory Guideline Sentencing Calculation.

Standard of Review: Post *United States v. Booker*, 543 U.S. 220 (2005), a trial court's sentencing decisions are reviewed for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 49 (2007). The appellate court must first ensure that there are no significant procedural errors and then review the sentence for substantive reasonableness under an abuse of discretion standard. *United States v. Carty,* 520 F.3d 984, 991-94 (9th Cir. 2008)(en banc), *cert. denied*, 553 U.S. 1061 (2008). A mistake in calculating the recommended advisory sentencing guideline range is a significant procedural error that requires remand for re-sentencing. *United States v. Munoz-Camarena*, 631 F.3d 1028, 1030-1031 (9th Cir. 2011).

Legal Standard: Relevant conduct requires at a minimum a finding of proof by a preponderance of evidence, *United States v. Harrison-Philpot*, 978 F.2d 1520, 1523 (9th Cir. 1992), *cert. denied*, 508 U.S. 929 (1993), and, in situations such as this sentencing, a finding of proof by clear and convincing evidence, *United States v. Munoz*, 233 F.3d 1117, 1126-1127 (9th Cir. 2000) ("We hold, however, that in this case, the district court should have relied at sentencing only on those factual findings supported by clear and convincing evidence" – specific offense characteristic for loss increased offense level by 14 levels, the guidelines increased from 12-18 months to

41-51 months, and this sentencing factor had a "extremely disproportionate effect" on the sentence).

The trial court's application of the abuse of trust adjustment is a mixed question of law and fact reviewed de novo. *See United States v. Hoskins*, 282 F.3d 772, 776 (9th Cir. 2002), overruled on other grounds by *United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010) (en banc); *but see United States v. Thornton*, 511 F.3d 1221, 1227 (9th Cir. 2008) (questioning whether de novo review still applies post-*Booker*, but declining to decide).

Argument: The trial court erred in two respects in calculating the advisory sentencing guideline range. CDE 183;EOR 103-107 & 2645-2714.

First, under USSG § 2B1.1(b)(1) (Nov. 2012), the trial court imposed a 16 level specific offense characteristic for loss [§ 2B1.1(b)(1)(I)] when the prosecution proved, if counts 5 and 4 are upheld, a loss amount of "more than $120,000 but less than $200,000" [§ 2B1.1(b)(1)(F)] justifying no higher than a 10 level specific offense characteristic for loss, or alternatively, if only count 5 is upheld, a loss amount of "more than $10,000 but less than $30,000" [§ 2B1.1(b)(1)(C)] justifying no higher than a 4 level specific offense characteristic for loss. CDE 183;EOR 2660-2682; CDE 160:EOR:2931. Based on this error alone, the advisory guideline range would decrease from 51-63 months (total offense level 24) to 27-33 months (total

offense level 18), or alternatively, 10-16 months (total offense level 12).

Second, under USSG § 3B1.3 (Nov. 2012), the trial court imposed a 2 level upward adjustment for abuse of trust even though any breach of trust was not particularly egregious and Aubrey did not hold any position which significantly facilitated the commission of the crimes found by the jury. Based upon this additional error, the advisory guideline properly calculated is either 21-27 months (total offense level 16) or 6-12 months (total offense level 10).

1. **The Trial Court Erred In Imposing Over Aubrey's Objection A 16 Level Specific Offense Characteristic Increase For Loss Under USSG 2B1.1(b)(1) (Nov. 2012)**.

The trial court ruled that the loss amount for criminal culpability was more than $1 million but less than $2.5 million. CDE 183;EOR104 & 2688. The trial court abused its discretion in arriving at this ruling. The trial court based its decision primarily on an approximation of amounts owed to subcontractors and vendors. CDE 183;EOR 103-107. This ruling and methodology is flawed in several respects.

First, NHA CFO Lynch testified that NHA determined that $10.8 million ($120,000 per home) rather than $9.1 million ($101,734 per home) should have been paid Aubrey and Lodgebuilder, and, the difference between what was and what should have been paid would have paid all amounts outstanding for subcontractors

and venders for the Chilchinbeto 90 home project. CDE 180;EOR 1935-1967 & 1965-1967; *Defense Exhibits 516 & 516-1*. This was the exact amount of NAHASDA funding ($10,800,000) requested by FDHC, Lodgebuilder and Aubrey for Chilchinbeto (*see Defense Exhibit 529*) in combination with $1,800,000 in leveraged funding for a total construction project cost of $12,600,000. CDE 185;EOR 604-610. The overall budget for constructing 90 homes and on-site improvements for Chilchinbeto was $12.6 million dollars. CDE 185;EOR 608 & 628.

NHA initially slashed its portion from of this construction budget from $10.8 million to $9.3 million, requiring the difference to be made up in leveraged or matching funds. CDE 185;EOR 630-631. This decision did not change the cost of building the 90 homes and on-site improvement for Chilchinbeto. CDE 185;EOR 635. While NHA eventually determined that its portion under NAHASDA was $120,000 per home or $10.8 million dollars (CDE 180;EOR 1965-1967), the NAHASDA portion actually funded was $9.156 million dollars. *Defense Exhibit 525*; CDE 185; EOR 780-790. The prosecution provided no evidence to rebut NHA CFO Lynch's trial testimony as to the fact of Chilchinbeto project costs of $120,000 per home or $10,800,000, for the NAHASDA portion of the total project costs. Therefore, the proximate cause of the outstanding amounts is NHA under-funding a 12.6 million dollar project.

Second, the $1 million USDA 515 construction leveraged funding for 46 of the 90 homes (CDE 205;EOR 2396-2400) which the USDA, FDHC and Aubrey intended to use to pay vendors and subcontractors (*Defense Trial Exhibits 511, 551 & 558-3*) was never funded until after FDHC's bankruptcy. Eventually, that same $1 million dollars was funded and used by the trustee to pay outstanding vendor and subcontractor invoices. CDE 193;EOR 2737-2742. This was precisely the purpose for this "leveraged funding" and it served that purpose here. *Defense Trial Exhibits 511, 551 & 558-3*. The remaining portion of leveraged funds was never funded. CDE 185;EOR 604-815. The trial court's loss calculation erroneously includes this amount in arriving at the figure which exceeds $1 million but is less than 2.5 million.

Third, NHA Grants Manager Shepherd testified that he understood that the NAHASDA line items did not pay the entire amount because each depends upon receipt of leveraged or matching funds and that the project cost 3.5 million more than the 9.1 million in NAHASDA funds paid for construction performance progress reimbursements. CDE 185;EOR 765-772; *Defense Exhibit 511.01*. Defense Exhibit 551 provided job cost and job payroll documentation showing over $12,300,000 in Chilchinbeto construction project costs. CDE 185;EOR 780-790. Project job costs totaling $12,300,000 were in line with historical project construction costs from Church Rock and Kayenta – projects where NAHASDA funding was $120,000 per

home (as opposed to $101,734 at Chilchinbeto) and matching funds were $20,000 and $25,000 respectively (as opposed to $0 at Chilchinbeto). *See Government Exhibit 4(A).0024*; CDE 185;EOR 610-626. FDHC Chief Development Officer Beth Cascaddan testified that she had no doubt that substantial monies beyond $9,156,100 were in the 90 homes at Chilchinbeto based upon project costs for the more than 200 homes built at Kayenta by FDHC and Lodgebuilder. CDE 205; EOR 2384-2410, 2416-2418 & 2453-2454.

Fourth, even without considering Lodgebuilder's salaried payroll and job costs, the FDHC Development Account paid **more than $8 million** (**Defense Exhibit 580-4**) ($8,852,824.52 - minus some double counting of deposits totaling $8,185.302.30) for the Chilchinbeto project (*Defense Exhibit 580-1.0058, .0060, .0062, .0065, .0069, .0072, .0076, .0080, .0086, .0089, .0093. .0097, .0099, & 0101*) and the FDHC Payroll Account paid **$1,634,170.06** (*Defense Exhibit 581-4*) for the Chilchinbeto project (*Defense Exhibit 581-2.0004, .0008, .0013, .0020, .0030, .0047, .0065, .0082, .0099, .0108, .0118, .0128, .0135, & 0144*). Over $4 million for the FDHC Development Account (*compare Defense Exhibit 580-4 with 580-5*) and over $600,00 for the FDHC Payroll Account (*compare Defense Exhibit 581-4 with 580-5*) came from sources other than Chilchinbeto construction performance progress reimbursement payments. Therefore, just from theses two accounts, **more than 9.6**

million was paid out labor, subcontractor and vendor costs which is an amount greater than the total Chilchinbeto reimbursements of $9,156,100.00. CDE 203; EOR 2148-2153 & 2154-2157.

Fifth, construction progress proceeded at the 90 home Chilchinbeto project from June of 2003 through January of 2004 – from 0% total progress to 88% total progress – without unpaid invoices to vendors or subcontractors hired by Lodgebuilder (see Government Exhibit 44) on behalf of FDHC pursuant to its 2002 Development/Consultant Agreement (*Defense Exhibit 500; Government Exhibit 13*). This is solid proof that Aubrey's own monies paid for the claimed $1,727,128 in personal expenditures (*Government Exhibit 42*) between June of 2003 and January of 2004.

For all these reasons, Aubrey requested a hearing before the trial court to resolve these factual disputes. *Harrison-Philpot*, 978 F.2d at 1525 (" ... we hold that a reasonable factual dispute exists ... the district court must determine whether to hold an evidentiary hearing ... [in accordance with] the procedural requirements established by the Guidelines and Fed.R.Crim.P. 32"); USSG § 6A1.3 (Nov. 2012). No evidentiary hearing was held. This Court should reverse and remand to the trial court for an evidentiary hearing and re-sentencing.

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2. The Trial Court Erred In Imposing Over Aubrey's Objection A 2 Level Enhancement For Abuse Of Private Or Public Trust Under USSG § 3B1.3 (Nov. 2012).

USSG § 3B1.3 provides that "[t]his adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic." USSG § 3B1.3 (Nov. 2012). Based upon the jury verdict, Aubrey's count 4 conviction involved the misapplication or conversion of monies and funds belonging to a tribal organization during the period from May 20, 2004 to on or about June 8, 2004. CDE 88;EOR 39; CDE 149;EOR 97. His count 5 conviction involved the misapplication or conversion or embezzlement of monies or funds belonging to a tribal organization on or about June 24, 2004. *Id*. His convictions fall within the category of offenses that the guidelines exclude from the abuse of trust enhancement, unless the breach of trust is particularly egregious. *United States v. Christiansen*, 958 F.2d 285, 287 (9th Cir. 1992).

While Aubrey had professional and managerial discretion with respect to his private for-profit company Lodgebuilder, he did not have that same position within FDHC or NHA to warrant this enhancement. Nor did his position "significantly facilitate" the commission of the crime. *United States v. Contreras*, 581 F.3d 1163, 1165 (9th Cir. 2009), *opinion adopted in part and vacated in part*, 593 F.3d 1135 (9th

Cir. 2010) (*en banc*). Non-payment to vendors or subcontractors was an activity easy to observe and easily detected. The gist of the misapplication was the timely failure to pay vendors and subcontractors. If all vendors and subcontractors were paid before the payment for the incremental construction progress draw-down, there would be no basis for the criminal convictions. Accordingly, only Lodgebuilder and Aubrey were placed in the position to **not** receive its/his portion of any payment for construction progress until, and only until, the final 30% of the total construction funding was received in the form of the leveraged or matching funds to pay all the construction expenses. Given the above, any breach of trust was not particularly egregious. For these reasons, the trial court erred in applying this enhancement.

IX.

CONCLUSION

Aubrey respectfully requests this Court reverse the judgment of the trial court and remand for entry of judgment of acquittal on all counts, or alternatively, remand for a new trial or a re-sentencing.

DATED this the 16th day of July, 2014.

Respectfully Submitted:

/s/ Michael J. Kennedy
Michael J. Kennedy
Chief Assistant Federal Public Defender

X.
CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

Case No. 13-10510

I certify that:

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/s/ Michael J. Kennedy
Michael J, Kennedy
Chief Assistant Federal Public Defender
Counsel for William Aubrey

XI.
CERTIFICATE OF SERVICE
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I hereby certify that on July 16, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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