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.	)	

DEFENDANT PARRY'S OBJECTIONS TO THE REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE SARAH W. HAYS FILED JANUARY 13, 2015

Attorney Paul J. Cambria, Esq. hereby submits defendant William Parry's objections to Magistrate Judge Sarah W. Hays' Report and Recommendation to deny Mr. Parry's Motion to Dismiss [Doc. No. 259]. Mr. Parry's motion sought dismissal of the indictment based on, *inter alia*, jurisdiction and insufficiency. As discussed herein, the Magistrate Judge's Recommendation should not be adopted.

I. REQUEST

A party may enter objections to a Magistrate Judge's report and recommendation, asking the District Court to review *de novo* the matters objected to in the Magistrate Judge's recommendation. Fed.R.Crim.P 59(b)(2); 28 U.S.C. § 636(b)(1). For the sake of brevity, Mr. Parry does not copy and reargue his arguments below before the Magistrate [Doc Nos. 197 and 227]; instead, he incorporates said prior pleadings into this pleading.

Here, Mr. Parry respectfully requests District Court Judge Brian C. Wimes' review of Magistrate Judge Hays' recommendation of January 13, 2015 denying Mr. Parry's Motion to Dismiss in light of Mr. Parry's objections stated herein. Specifically, the Magistrate Judge: (a) failed to properly consider Mr. Parry's argument with respect to the New York State government's lack of jurisdiction in sovereign Indian land, and its corresponding inability to enforce New York State laws therein; (b) failed to properly consider the implication of the jurisdictional defect on the pleading sufficiency of the indictment; and (c) failed to refrain from deciding this issue and defer to the New York State courts that currently have these issues before them.

II. PRELIMINARY STATEMENT

On October 9, 2012 and August 13, 2013, Mr. Parry was charged in two separate indictments, accused of contraband cigarette trafficking in violation of 18 U.S.C. §§ 2341-2346, wire fraud in violation of 18 U.S.C. § 1343, and conspiracy to commit the same. The government succeeded in moving to consolidate the two cases on May 6, 2014. This matter is set for the February 23, 2015 joint criminal jury trial docket.

On August 28, 2014, Mr. Parry, through counsel, filed a Motion to Dismiss his indictment [Doc No. 197]. Said motion was predicated, in part, on the grounds of lack of jurisdiction and insufficiency. The government opposed the motion in papers filed on September 24, 2014 [Doc. No. 211]. Mr. Parry replied to the government's opposition in papers filed on October 14, 2014 [Doc. No. 227]. Magistrate Judge Hays filed her Report and Recommendation on January 13, 2015 which recommended denying Mr. Parry's motion [Doc. No. 259].

Magistrate Judge Hays' recommendation rests on a faulty foundation – that the question of the enforceability of New York State law on sovereign Indian land is somehow settled law. On the contrary, the arguments raised by Mr. Parry are supported by historical legislative developments and intent, and raise questions yet to be definitively determined by New York State's highest court. As a result, Mr. Parry's indictment should be dismissed, or at the very least the proceedings stayed pending New York State's determination of the critical issue that necessarily informs the validity of the indictment.

III. ARGUMENT

A. The Magistrate Judge erred in recommending denial of Mr. Parry's motion to dismiss for lack of jurisdiction.

The following encapsulates Mr. Parry's motion to dismiss for lack of jurisdiction:

1. The Seneca Nation of Indians ("SNI") Cattaraugus and Allegany Reservations are *not* part of New York State, as has been historically demonstrated and established in case law and state legislation, particularly Indian Law § 6 (grounded in more than a hundred years of treaties between the U.S. government and the Seneca Nation).

2. New York State Tax Law § 471 ("Tax Law 471") attempts to impermissibly enforce a tax on sovereign land outside of the jurisdictional bounds of New York State and conflicts with Indian Law § 6.

3. The Contraband Cigarette Trafficking Act ("CCTA") is not applicable in the SNI because the New York State tax law pertaining to cigarettes is not enforceable in the sovereign land of the SNI.

The government, and the Magistrate Judge, misconstrue Mr. Parry's arguments as being concerned with Tax Law 471's application to the consumer—Indian consumer verses non-Indian consumer. However, a careful review of Mr. Parry's motion papers reveals that his argument is *not* concerned with the application of the tax on individual consumers, but rather the inability of New York State to promulgate and enforce tax laws *on sovereign Indian land*. As discussed, New York State is devoid of jurisdiction to enforce tax laws on the SNI because

the land of SNI is and has been, from time immemorial, sovereign Indian land that is separate and not a part of New York State.

A premise of the government's case against Mr. Parry is the supposition that Mr. Parry was in some way involved in possessing and/or transporting and/or purchasing cigarettes which did not contain a New York State cigarette tax stamp and *which were required to contain a New York State cigarette tax stamp*. The occasions when he is alleged, factually, to have been in possession of or transporting or purchasing occurred in either Missouri or the SNI Cattaraugus Reservation. The government's allegations depend upon Mr. Parry's possession/transport/purchase of cigarettes which required a New York State cigarette tax stamp. Where Mr. Parry allegedly possessed/transported/purchased cigarettes in Missouri, those cigarettes unquestionably did not require a New York State cigarette tax stamp *in Missouri*. Similarly, where Mr. Parry allegedly possessed/transported/purchased cigarettes in the SNI, those cigarettes, too, did not require a New York State cigarette tax stamp *in the sovereign lands of the SNI*.

A state court generally lacks jurisdiction over Indian tribes where the exercise of such jurisdiction would infringe on the right of Indians to govern themselves. Williams v. Lee, 358 U.S. 217, 223 (1959). In discussing its "unique Indian tax immunity jurisprudence," the U.S. Supreme Court has recognized:

> "the doctrine of tribal sovereignty . . . [ ] historically gave state law 'no role to play' within a tribe's territorial boundaries." We have further explained that the doctrine of tribal sovereignty, which has a "significant geographical component," …, requires us to "revers[e]" the "'general rule'" that "'exemptions from tax laws should . . . be clearly expressed.'" And we have determined that the geographical component of tribal sovereignty "'provide[s] a backdrop against which the applicable treaties and federal statutes must be read.'"

Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 112 (2005) (emphasis added and internal citations omitted). This principle is also enforced in Oklahoma Tax Commission v. Chicksaw Nation, 515 U.S. 450, 453 (1995) ("We hold that Oklahoma may not apply its motor fuels tax, as currently designed, to fuel sold by the Tribe in Indian country. In so holding, we adhere to settled law: when Congress does not instruct otherwise, a State's excise tax is unenforceable if its legal incidence falls on a Tribe or its members for sales made within Indian country").[1]

While the government focuses on New York State's ability to impose a tax on cigarettes purchased by non-Indians, it does not adequately explain why this Court should find that New York State should be permitted to exercise enforcement of its tax laws on sovereign territory in the SNI in contravention of Indian Law § 6. For the same reason that New York State – indisputably - cannot tax cigarettes purchased by Indians on the sovereign SNI lands, New York State cannot enforce a tax on non-Indians on sovereign SNI lands.

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[1] See Oklahoma Tax Comm'n, 515 U.S. at 458 for a discussion regarding the categorical approach:

> [W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, "a more categorical approach: '[A]bsent cession of jurisdiction or other federal statutes permitting it,' we have held, a State is without power to tax reservation lands and reservation Indians." *County of Yakima v. Confederated Tribes and Bands of Yakima Nation,* 502 U.S. 251, 258, 112 S.Ct. 683, 688, 116 L.Ed.2d 687 (1992) (citation omitted). Taking this categorical approach, we have held unenforceable a number of state taxes whose legal incidence rested on a tribe or on tribal members inside Indian country. See, *e.g., Bryan v. Itasca County,* 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976) (tax on Indian-owned personal property situated in Indian country); *McClanahan,* 411 U.S., at 165–166, 93 S.Ct., at 1258–1259 (tax on income earned on reservation by tribal members residing on reservation).

Indian Law § 6 states, in its entirety: "No 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." N.Y. Indian Law § 6 (McKinney). The rules of statutory construction set forth by the highest court in this country affirmatively require that statutes related to Indian affairs be construed in favor of the Indians. "'The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.' …, statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985), quoting Oneida County v. Oneida Indian Nation, 470 U.S. 226, 247 (1985). Here, the Magistrate Judge failed to interpret Indian Law § 6 pursuant to the mandates of Indian law statutory construction.

The Magistrate Judge relies heavily on a Second Circuit decision for the proposition that New York State has authority to impose taxes (whose ultimate liability rests with the consumer) on non-Indian purchasers of cigarettes on sovereign SNI lands. Oneida Nation of New York v. Cuomo, 645 F.3d 154 (2d Cir. 2011). In so doing, the Magistrate Judge fails to recognize two salient facts: (i) the Oneida case was merely a review by a federal circuit court of a federal district court's decision to deny preliminary injunctions sought by Indians to enjoin the application of the newly amended tax law. Id. at 164; and (ii) the court in Oneida did not address the Indian Law § 6 preclusion argument raised by Mr. Parry herein.

The standard for a preliminary injunction includes "likelihood of success on the merits" of the underlying cause of action. Id. While engaging in lengthy dicta, the Oneida Court ultimately finds that the Indian Nations "failed to demonstrate a likelihood of success on the merits of their claims". Id. at 175. With regard to issues raised concerning the new law's

interference with Indian rights to self-governance, the court replied: "***[a]t this pre-enforcement stage***, Plaintiffs have not demonstrated that they are likely to prevail on their claim that the amended tax law infringes tribal sovereignty or unduly burdens tribal retailers." Id. at 175. "Likelihood of success" is not a determinative ruling on the claims themselves—it is ***not*** a statement that the plaintiffs **could not** prevail, but instead a determination of where the claims stood at the very earliest stages of litigation. The Second Circuit's decision is neither controlling precedent in the application of New York State tax law (that is for the State's highest court to determine), nor is it at all dispositive on how SNI's historic sovereignty impacts the enforceability of New York State tax law in a sovereign land.

Further, the government's supposition, and the Magistrate Judge's adoption of the same, that Indian Law § 6 only bars taxation of real estate in SNI territory flies in the face of the treaty precedent that led to the statute's enactment and the case law that has come after it. The Magistrate Judge herself cites United States Supreme Court cases which state unequivocally that "[s]tates are categorically barred from placing the legal incidence of an excise tax on a tribe or tribal members for sales made inside Indian country." Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 101-02 (2005) (internal citations and emphasis omitted); see also, Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 764 (1985) ("in recognition of the sovereignty retained by Indian tribes…, Indian tribes and individuals generally are exempt from state taxation within their own territory"). The United States Treaty with the Senecas entered into on July 20, 1831 "**guarantee[s]** that said lands shall never be within the bounds of any State or Territory, nor subject to the laws thereof…" This and the other treaties codified by the legislature thereafter demonstrates that the government, and the Magistrate Judge, are erroneous

in their statements that Indian Law § 6 "only" applies to real estate within the SNI territorial boundaries.

The treaty rights conferred on the SNI and its people, are distinct from rights held by other Indian nations, and must be analyzed on their own and within the historical context within which the treaties were first entered into. See McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164, 174, 93 S.Ct. 1257 (1973) (applying a contextual analysis of the history of dealings with the Navajo nation and holding that it was unlawful to impose Arizona's state individual income tax on income derived wholly from reservation sources).

While certain general principles of construction may be applied - see generally, Alaska Pacific Fisheries Co. v. U S, 248 U.S. 78, 89, 39 S.Ct. 40, 42 (1918) ("statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians") - the breadth and extent of each individual Indian Nation's rights must be subject to individualized factual and legal inquiry.

As demonstrated, the issue here is not whether Tax Law 471 imposes a valid tax upon non-Indian consumers, i.e., citizens of New York State; it is whether New York State can enforce the application of a tax in a sovereign nation or as against its inhabitants who ***do not reside within the state***. Mr. Parry respectfully submits that it cannot. Tax liability for one who may purchase and take the product off sovereign land is not at issue.

As a result of New York State's want of jurisdiction to enforce a tax on the sovereign SNI lands, the CCTA cannot be violated by the absence of a cigarette tax stamp on cigarettes allegedly possessed, transported, or purchased by Mr. Parry on **sovereign SNI land**, because there is no valid legal requirement for the tax stamp on those cigarettes. Accordingly, Mr. Parry submits that all counts of the indictment founded upon CCTA violations should be dismissed

for lack of jurisdiction. In the alternative, as addressed in Mr. Parry's transfer motion, the court should abstain from engaging in an analysis of New York State Tax Law until the state's highest court can address the issues raised by Mr. Parry in the pending action in New York State Court, addressing the same issues presented here.

B. The Magistrate Judge erred in recommending denial of Mr. Parry's motion to dismiss due to the indictment's insufficiency.

As has been discussed at length in the moving papers of Mr. Parry, the government is obligated to charge him with an accusatory instrument that is facially sufficient to support the charges. Where a key element is not pleaded on legally sufficient grounds, the accusatory instrument (here, the indictment) is not sufficient and must be dismissed. Fed.R.Crim.P. 12(3)(b)(v).

Here, because the state tax predicate to the current CCTA charges is invalid as applied to Mr. Parry as a member of the sovereign Seneca Nation on sovereign SNI land, all counts relative to the CCTA charges [counts 2, 5, 6 and 8] must be dismissed as insufficiently pled. Without jurisdiction to impose state cigarette taxes, the state tax violation required as an element of CCTA charges is missing. Because a state tax violation is an essential element, the CCTA charges therefore fail to meet the sufficiency standard of alleging an offense. United States v. Baker, 63 F.3d at 1485 ("a violation of the CCTA requires, as a predicate, the failure to comply with state tax laws.")

The wire fraud charges must be dismissed for the same reasons. The government failed to sufficiently allege the requisite "scheme to defraud" element in counts 21, 22, 37 and 38 of the indictment of Mr. Parry. As pleaded in the indictment, the scheme to defraud was specific to the defendants' failure to pay applicable New York State taxes on the cigarettes they are alleged to have purchased. If there was no lawful tax owed to New York State enforceable on

SNI land and on SNI members, then with regard to Mr. Parry's transport and possession of cigarettes on SNI lands, no scheme to defraud the state can exist.

Accordingly, for the reasons set forth above, as well as the arguments set forth in Mr. Parry's motion to dismiss, the Magistrate Judge erred in her recommendation to deny dismissal of Mr. Parry's indictment, which should, indeed, be dismissed for insufficiency.

C. The Magistrate Judge erred in recommending denial of Mr. Parry's motion to dismiss based on the government's conduct.

"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." United States v. Mosley, 965 F.2d 906, 911 (10th Cir. 1992). The government's actions in engaging Mr. Parry to sell him alleged "contraband" cigarettes and then choosing to impose criminal sanctions for a law that has historically been in flux with regard to its applicability to Indians such as William Parry certainly begs the Court's consideration of the outrageousness of that conduct. Where the government claims over $8 million in lost taxes were suffered by the State of New York during the pendency of the investigation, they neglect to note that the government, itself, was supplying the untaxed cigarettes for distribution in the market without taxation. This type of unconscionable crime creation is precisely the sort of conduct that qualifies as outrageous.

Notably, the Magistrate Judge fails to distinguish between grounds for dismissal for outrageous governmental conduct and the defense of entrapment. A careful analysis of the outrageous governmental conduct standard, instead of applying the standard for entrapment, would lead the court to a different conclusion at this procedural standpoint.

As a result of the foregoing, Mr. Parry requests that the Court reject the Magistrate Judge's Report and Recommendation of January 13, 2015 and grant Mr. Parry's motion to dismiss in its entirety.

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 19th day of January, 2015, 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/Kristina Drewery
Kristina Drewery