IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. CR-14-20-JHP**
	)	
	)	
JASON BRETT MERIDA,	)	
Defendant.	)	

BRIEF ON SENTENCING ISSUES

Comes now Jason Merida, by and through his undersigned attorneys, and pursuant to the Court's Order dated May 6, 2015 (Document 125), hereby submits the following analyses and argument as to the sentencing issues cited by the Court:

ISSUE 1: Does the Defendant, an official within the Choctaw Nation, constitute a "public official" as defined in United States Sentencing Guideline §2C1.1, Application Note (1)(E)? Specifically, does the Choctaw Nation constitute a government as referred to in Note (1)(E)? Parties should refer to specific case law and characteristics of the Choctaw Nation developed at trial and sentencing.

The answer is no, and Mr. Merida agrees totally with the statement by the Probation Office in the Addendum to the Presentence Report, which states the following:

> "**The Probation Office does not dispute many of the facts cited in the Government's objections. However, the Probation Office does not agree that the defendant should be considered a 'public official' as defined by USSG §2Cl.l. As defined in USSG §2Cl.1, application note 1, a 'public official' shall be**

construed broadly and includes the following: (A) 'public official' as defined by 18 USC §201(a)(1), (B) a member of a state or local legislature; (C) an officer or employee or person acting for or on behalf of a state or local government, or any department, agency, or branch of government thereof, in any official function, under or by authority of such department, agency, or branch of government, or a juror in a state or local trial; (D) any person who has been selected to be a person described in the above subsections, either before or after such person has qualified; (E) any individual who, although not otherwise covered by subdivision (A) through (D) is in a position of public trust with official responsibility for carrying out a government program or policy; (ii) acts under color of law or official right; or (iii) participates so substantially in government operations as to possess de facto authority to make governmental decisions.

The defendant was an employee of the Choctaw Nation of Oklahoma, which is considered a Tribal Government. As cited above, a Tribal Government is not included in the definition of 'public official'. Further, the defendant is convicted partly under Theft or Bribery Concerning Programs Receiving Federal Funds under 18 USC §666. This violation is considered the underlying offense in this case. In this statute, there is a clear distinction between local, state, and Indian Tribal Government. However, in USSG §2C1.1, which is the underlying sentencing guideline, there is the same clear distinction between local and state governments, but this guideline fails to cite Indian Tribal Government as an eligible form of government in which an 'agent', 'employee' or 'elected official' can be considered a 'public official'. As cited in the Presentence Report, the Choctaw Nation of Oklahoma's policies and procedures concerning the construction of casinos was under the sole discretion of the Business Committee and/or the Chief. Neither the Business Committee nor the Chief was controlled or monitored by any form of local, state or federal government policies, rather their privately developed Tribal Government policies. Therefore, the defendant was an employee of a form of government that is not cited in the definition of 'public official' under USSG §2C1.1. The

> **Probation Officer maintains that the defendant is not considered a 'public official' as defined by USSG §2C1.1 and that no adjustment pursuant to USSG § 2Cl.l(a)(l) is warranted. As to the Government's objection (Objection #3) regarding an application of USSG §2Cl.1(b)(3), for the same reasons stated above, an adjustment in accordance with that guideline is not warranted. The defendant does not appear to meet the definition of a 'public official'."**

On behalf of Mr. Merida, we agree with the Probation Officer's above-cited determination that Mr. Merida was not a "public official" under USSG §2C1.1(a)(1). Merida was not elected to his position, and he worked at the pleasure of the Chief and Assistant Chief, both of whom could fire him at will anytime. While he had substantial supervisory authority, the nature of his employment was more akin to that of a private employee. The subject guideline definition for public official does not reference tribal governments at all, and a tribal government is not part of the Federal Government, not a State Government, and is not a local Government (for example, the Cherokee Nation covers all or part of 14 counties in Oklahoma, with the Choctaw Nation covering a similarly large area). And a tribal government is not a state or local political party. Given the prominence of tribal governments across the United States, by not referencing tribal governments in the subject guideline provisions, it must be presumed that the Sentencing Commissions did not intend for those provisions to apply to tribal governments.

Another large factor weighing against the applicability of the subject provisions to tribal employees such as Mr. Merida is the fact that tribal governments are often in the business of providing for profit services and products, activities that are not traditional governmental functions or services. In fact, the vast majority of tribal operations today involve functions that are not typical governmental functions, such as operating casinos, hotels, and race tracks (for example the Chickasaw Nation owns both the Remington Park race track in Oklahoma City and the Lone Star Park race track near Dallas). For all practical purposes, tribal governments today are much more akin to private, for-profit corporations than a Federal, state, or local government providing public services.

Another factor weighing against the Government's objection is that the subject guideline provision is in Part C of USSG §2, which is entitled "**PART C – OFFENSES INVOLVING PUBLIC OFFICIALS AND VIOLATIONS OF FEDERAL ELECTION CAMPAIGN LAWS".** The reference to public officials and violations of election laws together evidences that the Sentencing Commission intended that the subject guideline provision to apply to elected officials and electoral positions (hence the inclusion of political party leaders), and not to non-elected employees. It also evidences an intention by the Commission that the

provisions not apply to tribal officials, as Federal election campaign laws do not apply to tribal governments. Each tribal government is subject only to its own campaign laws, if any. For example, the continuous trial testimony regarding the $50,000 "Dinner with the Chief and Assistant Chief" contribution to Chief Greg Pyle's campaign, which would without question be prohibited under Federal campaign laws, as would all of the purchases/contributions held at the golf tournament and trail ride auctions. However, because there were no Choctaw laws banning those types of contributions, there was no illegality.

The Government has cited absolutely no case law in support of its contention that USSG §2C1.1 applies to tribal governments, tribal officials, or tribal employees. And we would submit that the reason for such omission is that there is no such case law, as the guideline provision obviously does not apply to officials and employees of Native American tribes. The undersigned counsel has substantially researched this issue on Westlaw, and has not found any Federal decisions applying USSG §2C1.1 to tribal governments.

Also, not only was Mr. Merida, as a tribal employee, not a public official, he also was not in a high-level decision making or sensitive position. His former job title, Executive Director of Construction, does not

accurately describe his position or authority. For one thing, around 20 different people (heads of 20 different departments) at the Choctaw Nation carry the title "Executive Director". However, there is only one Chief, one Assistant Chief, and only five members of the Business Committee. As noted in the Presentence report and noted by the Probation Officer in the Addendum thereto, the Choctaw Nation's policies and procedures concerning the construction of casinos were under the sole discretion of the Business Committee and/or the Chief. Merida was not a member of the Business Committee, and he was not the Chief, so he had no authority in the formulation or development of policies and procedures concerning the construction of the casinos, despite his job title as Executive Director of Construction. Simply stated, the Chief and the Business Committee had the authority and responsibility for casino construction policies and procedures, not the Executive Director of Construction. Accordingly, Mr. Merida did not serve in a high-level decision-making position.

ISSUE 2: Was the fraud committed by Builders Steel by not purchasing the amount of steel represented to the Choctaw Nation reasonably foreseeable to the Defendant at any time?

The answer is no. While the Government might argue that it was reasonably foreseeable to Mr. Merida that Builders Steel would charge an above-market price to the Choctaw Nation for the steel (in fact, that was

certainly foreseeable to Chief Pyle and Assistant Chief Battan and other members of the tribal administration who were involved in fundraising, as there was no possible way that Builders Steel could have afforded to make the astronomical contributions to the Chief's Campaign without charging above market prices), there is not one scintilla of evidence, and the Government cannot seriously argue, that it was reasonably foreseeable to Merida that Builders Steel would take money for steel that it not provide to the Choctaw Nation at all. Simply stated, that was foreseeable to know one, and when Brent Parsons and Laurie Parsons committed such fraud it was unprecedented. There is no evidence that Brent Parsons and/or Laurie Parsons told anyone at the Choctaw Nation, or anyone else at all, that they planned to take millions of dollars from the tribe for the purchase of steel and not provide any of the steel.

BRENT AND LAURIE PARSONS' FAILURE TO TESTIFY AT SENTENCING EVIDENCES THAT MERIDA DID NOT KNOW OF THE $10.5 MILLION STEEL FRUAD.

The most apparent evidence that Mr. Merida was not involved in the steel fraud is the Government's failure to call Brent Parsons or Laurie Parsons as witnesses for the sentencing. Brent Parsons and Laurie Parsons both entered into cooperation agreements and testified at trial, and at trial

neither testified that Merida was involved in, or knew about, their $10.5 million fraud scheme. In fact, to the best of the memory of the undersigned counsel, Laurie Parsons testified that Merida did not know that the steel had not been purchased and did now know that it was not in Builders Steel's yard in Tulsa; and, Brent Parsons simply denied that the $10.5 million steel fraud occurred, and therefore he certainly did not implicate Merida in any steel fraud scheme.

If Mr. Merida had been involved in, or had known about, the Parsons' scheme, then the Parsons', as cooperating and testifying defendants, would have testified at sentencing that Merida had such involvement or knowledge. But the Government could not call them as witnesses to testify to that effect, because Merida was not involved and had no knowledge. Instead, the Government has come up with this meritless argument that Merida somehow manipulated the Business Committee. Such contention is ridiculous and defies common sense. Assistant Chief Batton was the Chairman of the Business Committee and controlled it. Assistant Chief Batton received gifts and trips from Builders Steel/Brent Parsons; he and Chief Pyle agreed to have dinner with Parsons in exchange for Builders Steel's $50,000 contribution to Chief Pyle's campaign; and there was testimony at both the sentencing evidentiary hearing and trial that Builders Steel was the largest

campaign contributor to Chief Pyle. That is why the $10.5 million steel purchase from Builders Steel was approved by the Business Committee and then by Chief Pyle. It had nothing to do with the presentation by Mr. Merida, which Merida had presented at the request of the Committee Chairman, Assistant Chief (and now Chief) Gary Batton.

The testimony of Matt Gregory, a member of the Business Committee, is of absolutely no evidentiary value. The responsibility to approve or not approve the $10.5 million steel purchase was the responsibility of Gregory and other members of the Committee, and the Chief. It was not the responsibility of Mr. Merida, who was not a Committee member and therefore had no such authority. Also, Gregory works for and at the pleasure of now Choctaw Chief Gary Batton. Obviously, Gregory is not going to testify that Batton was at fault or negligent in approving the steel purchase, or that he or any other member of the Business Committee was at fault. Instead, Gregory, Batton, and other members of the Business Committee and former Chief Pyle have all predictably pointed the finger of blame at Jason Merida (who had no authority or responsibility to approve the purchase) and away from themselves (the only individuals with such authority or responsibility).

The Presentence Report was correct in its conclusion that Merida was not involved in, did not know about, and did not foresee the steel fraud; as the Probation Officer stated in the Addendum:

> "**The Probation Office does not dispute any of the facts relating to the pre-purchase of steel in this case. However, based upon the evidence in this case, it appears that the defendant made a proposal to the business committee for the pre-purchase of steel from a jobsite in Las Vegas. As stated in the Presentence Report, the Business Committee did not act upon this proposal quickly enough and it was known that the steal from Las Vegas was no longer available. At this point, Builder's Steel approached the defendant with information concerning the future of steel price and represented that the Choctaw Nation could save money by pre-purchasing steel. However, the Business Committee determined that an investigation into the future of steel prices needed to be performed before they would commit to purchasing any steel. It was after this review of steel prices and assessment of future steel prices that the Business Committee agreed to purchase $10,500,000 in steel from Builder's Steel. Therefore, the fact that a portion of the steel agreed to be purchased by the Choctaw Nation may have been previously purchased by Builder's Steel is irrelevant to the defendant's involvement in the pre-purchase of steel. It appears that the Choctaw Nation Business Committee agreed to pre-purchase steel from Builder's Steel with the future cost of projects in mind and were not under the impression that they were receiving any steel from the Las Vegas jobsite as originally proposed by the defendant. Rather, they were responding to a letter sent by Lauri Parsons regarding the future of steel prices. Further, based upon the informality of the pre-purchase deal as a whole, the Choctaw Nation was never fully aware of how much steel they were agreeing to purchase until an internal audit revealed that Builder's Steel had failed to purchase the steel and hold it in their yard as previously agreed by the parties. As stated in the Presentence Report, due to evidence surrounding the pre-purchase of steel the Probation Officer**

contends that the defendant should not be held accountable for any loss caused by Builder's Steel to the Choctaw Nation in relation to the pre-purchase of the steel."

Similar to the Probation Officer cited above, the jury likewise concluded that Mr. Merida was not involved in the $10.5 million steel fraud, as evidenced by its finding of not guilty as to the Count Four, which was the only count in the Indictment that was exclusively based on the $10.5 million steel purchase.

As noted above, Count Four was the only count in the Indictment exclusively based on the $10.5 million pre-purchase of steel from Builders Steel. All of the other counts involved or included other aspects of the case. For example Count One, Conspiracy to Commit Theft or Bribery of Programs Receiving Federal Funds, which is based on the acceptance of numerous gifts and trips to influence transactions with the Choctaw Nation generally, and not confined to the $10.5 million steel pre-purchase; Count Two, Theft by an Employee or Officer of a Tribal Government Receiving Federal Funds, is exclusively based on the Scott Rice/Trip-to-Africa account aspect of the case; Count Three, Theft by an Employee or Officer of a Tribal Government Receiving Federal Funds, is exclusively based on the Missouri hunting trip involving Mr. Merida, Brent Parsons, and Brian Fagerstrom of the Worth Group architecture firm; Count Five, Money Laundering, is

exclusively based on the money laundering aspect of Scott Rice/Trip-to-Africa account aspect of the case; and, Counts Six and Seven are Tax Fraud counts are exclusively based on unreported personal income.

The fact that Count Four, of which Mr. Merida was acquitted, is exclusively based on the $10.5 million pre-purchase of steel by Builders Steel is confirmed by a review of the language in Count Four, which states the following:

COUNT FOUR
CONSPIRACY TO COMMIT MONEY LAUNDERING - 18 U.S.C. §1956(h)

During the period of time from on or about January 4, 2010 to on or about October 15, 2010, in the Eastern District of Oklahoma and elsewhere, the defendant, JASON BRETT MERIDA, did knowingly conspire, confederate and agree with persons known and unknown to the grand jury to engage and attempt to engage in a monetary transaction by, through or to a financial institution, affecting interstate or foreign commerce, in criminally derived property of a value greater than $10,000.00, such property having been derived from a specified unlawful activity, that is, funds received from the Choctaw Nation of Oklahoma for partial payment for steel dated January 6, 2010, as a result of a violation of Title 18, United States Code, Section 666 as

alleged in Count One of the Indictment, in violation of Title 18, United States Code, Section 1957.

MANNER AND MEANS

1. On or about January 4, 2010, JASON BRETT MERIDA approved the invoices that caused the deposit of CNO funds into Builders Steel bank account number xxx117, in the amount of $4,250,000.00.

2. On or about February 12, 2010, Brent Alan Parsons paid Acoma Game and Fish, check number 2129 from Builders Steel bank account number xxx117, in the amount of $25,000.00, for a hunting trip to include JASON BRETT MERIDA, Brent Alan Parsons, James Winfield Stewart, and others known to the grand jury.

3. On or about September 20, 2010, JASON BRETT MERIDA, approved the invoice that caused the deposit of CNO funds into Builders Steel bank account number xxx117, in the amount of $500,000.00.

4. On or about October 15, 2010, Brent Alan Parsons paid Acoma Game and Fish, check number 3673 from Builders Steel bank account number xxx117, in the amount of $13,000.00, for a hunting trip to

include JASON BRETT MERIDA, Brent Alan Parsons, James Winfield Stewart, and others known to the grand jury.

All in violation of Title 18, United States Code, Section 1956(h).

As confirmed by a review of the above-language of Count 4, for which Mr. Merida was found not guilty and acquitted, that is the only count of the Indictment based exclusively on the $10.5 million pre-purchase of steel by the Choctaw Nation from Builders Steel. And by acquitting him of that Count, the jury expressly concluded that the Government did not prove that Mr. Merida was involved in Brent Parson's scheme to defraud the Choctaw Nation out of $10.5 million. A review of the testimony of Brent Parsons and Laurie Parsons confirms that Mr. Merida did not know that Builders Steel was just going to take the money from the tribe and not purchase the steel. And all Mr. Merida did was present the proposal to the Choctaw Business Committee. Since he was not a member of the Committee and was not the Chief or Assistant Chief, Mr. Merida was not responsible for approving the Steel purchase and had no authority to do so. After Merida made his presentation, he was no longer involved in the tribe's consideration of the steel purchase. The Assistant Chief and the Committee directed Ryan Garner, Executive Director of Finance, to evaluate the proposal, and in so doing Garner contacted Brent

Parsons directly. Accordingly, the evidence is overwhelming that Mr. Merida was not involved in the Parsons' scheme to defraud the Choctaw Nation in the $10.5 million steel transaction, and therefore it is not surprising that the jury acquitted him of Count 4.

For the reasons stated above, it is obvious that it was not foreseeable to Mr. Merida or anyone else with the Choctaw Nation that Builders Steel was going to take $10.5 million for steel and not provide the steel at all. While Builders Steel had a prior history of overcharging the Choctaw Nation for quantities of steel it actually provided to the Nation, it had no prior history of charging for steel that it did not provide. Accordingly, since Builders Steel had never perpetrated a fraud of that type (charging for steel it never provided) before, the $10.5 million steel fraud was simply unforeseeable. It was unforeseeable to Mr. Merida, and it was unforeseeable to everyone at the Choctaw Nation. Unfortunately, the unforeseeable nature of the fraud has not prevented the responsible parties with the Choctaw Nation (those on the Business Committee including former Assistant Chief and now Chief Gary Batton) from pointing the finger of blame at Jason Merida, who was not responsible given that he did not serve on the Business Committee and was not the Chief.

Respectfully submitted,

/s/ J. Lance Hopkins

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May, 2015, a true and correct copy of the above and foregoing instrument was electronically transmitted to all counsel of record contemporaneously with the filing thereof.

/s/ J. Lance Hopkins
J. Lance Hopkins