IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 11-7029

UNITED STATES OF AMERICA,
***Plaintiff/Appellee*,**

v.

KERRY RAINA BRYANT,
***Defendant/Appellant*.**

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA
THE HONORABLE RONALD A. WHITE
Case No. CR-10-00087-RAW

BRIEF OF PLAINTIFF/APPELLEE

ORAL ARGUMENT IS NOT REQUESTED

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PRIOR OR RELATED APPEALS

There are no prior or related appeals.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231, because Defendant's crimes occurred within the Eastern District of Oklahoma. (*Indictment*, Doc. #3 at 1)[1].

Pursuant to 28 U.S.C. §1291, courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States." Fed. R. App. P. 4(b)(1)(A)(I) states that the "defendant's notice of appeal must be filed in the district court within 14 days after . . . the entry of . . . the order being appealed." The district court sentenced Defendant on April 14, 2011, and Defendant filed her Notice of Appeal on April 14, 2011. (*Judgment and Commitment*, Doc. #54 at 1; *Notice of Appeal*, Doc. #50 at 1).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. DID THE DISTRICT COURT CORRECTLY EXERCISE JURISDICTION IN SENTENCING THE DEFENDANT FOR VIOLATING 18 U.S.C. §§1168 AND 2?

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[1]References to the record will be made as follows:

Citations to pleadings will be made by identifying the document's title, followed by the document's number on the district court docket sheet and the page number within that document being referenced (e.g. "*Motion*, Doc. #2 at 1").

Citations to the sealed PSR materials will be made as "Sealed R. at X".

STATEMENT OF THE CASE

On December 8, 2010, a Grand Jury returned a single-count Indictment against Kerry Raina Bryant ("Defendant") and her sister, Viola Lanette Anderson[2], on the following charge: Theft by Officer or Employee of Gaming Establishment on Indian Lands, in violation of 18 U.S.C. §§1168 and 2. (*Indictment*, Doc. #3 at 1).

Defendant filed a motion to dismiss arguing that the Indictment failed to charge an offense because: (1) she was not an employee of the casino and (2) jurisdiction could not be based on aiding and abetting because the alleged crime was committed against the Choctaw Nation, not the United States. (*Motion to Dismiss*, Doc. #24 at 1-5; *Government's Response*, Doc. #26 at 1-4; *Defendant's Reply*, Doc. #27 at 1-4). The District Court entered a written order denying the Motion to Dismiss. (*Order*, Doc. #28 at 1-2).

Defendant entered a conditional guilty plea on January 21, 2011, pursuant to a written plea agreement, reserving the ability to appeal the denial of the motion to dismiss. (*Plea Agreement*, Doc. #40, at 4; *Minute Order*, Doc. #37). Defendant was later sentenced to a two-year term of supervised probation and ordered to pay $4,000.00 in restitution, in addition to a $100 special assessment. (*Judgment and Commitment*, Doc. #54 at 1-5).

[2] Defendant Anderson also entered a guilty plea prior to trial.

STATEMENT OF THE FACTS

The facts which form the basis for the Judgment and Sentence imposed in this case were adopted by the District Court from the Pre-Sentence Report (PSR):

> On June 20, 2010, Melody Dill, the Cage / Vault Manager of the Choctaw Casino and Resort in Durant, Oklahoma, was contacted by the Cage Accounting Department Manager regarding concerns of missing paperwork associated with a $4,000 pay-out from the previous night. After an audit of the reports and cash dispensers, and review of the surveillance video, it was discovered that just prior to 2:00 a.m. on June 20, 2010, $4,000.90 in cash was dispensed on a $.90 ticket by Viola Lanette Anderson, who was employed at the time as a cage clerk with the casino. The individual to whom the money was dispensed was Anderson's sister, and codefendant, Kerry Bryant, who at the time, was employed through Delaware North company, working in the kitchen area of the same casino.
>
> Further review of the surveillance video indicated that just prior to Bryant cashing the $.90 ticket, she played a gaming machine for approximately 34 seconds before walking to the cashier window where Anderson was working. Anderson counted out forty (40) bills and hands them, along with some change, to Bryant before scanning the cashed ticket. Bryant then leaves the cashier window and the casino. Surveillance video indicates that Bryant spent approximately five minutes inside the casino during this transaction.
>
> During the course of this investigation, it was discovered that Anderson and Bryant had previously discussed financial hardships, and together, further discussed and planned to unlawfully take money from the casino. Following the fraudulent transaction, the two later split the $4,000 proceeds.

(Sealed R. at 3-4)(paragraph numbering omitted).

The PSR also shows that Defendant "was employed with Delaware North as a cook in the kitchen of the Choctaw Nation Resort and Casino in Durant, Oklahoma, from January 2010 to June 2010, when the employment was terminated as a result of the instant offense." (Sealed R. at 8, ¶38). Delaware North is apparently a third-party contractor which provides food services for the casino and

resort operation.[3]

SUMMARY OF THE ARGUMENT

The district court did not err in denying the motion to dismiss and asserting jurisdiction over this crime. First, that Defendant was not directly employed on the gaming floor at the Choctaw casino does not absolve her of liability under §1168. Second, even if she were not liable directly as an "officer, employee or individual licensee" of an Indian gaming establishment under §1168, she is certainly culpable as one who aided and abetted the commission of an §1168 offense. The application of §2 is not restricted to those crimes in which the United States is the literal victim of the offense. Defendant's brief is filled with largely irrelevant citations which fail to support her simplistic assertion that §2 is inapplicable to this embezzlement because the Choctaw Nation is not the United States. The District Court correctly held that "18 U.S.C. §2 is an alternative charge in every count, whether explicit or implicit." (*Order*, Doc. #28 at 2).

Under the straightforward facts of this case, Defendant is plainly guilty of the charged offense - whether as an individual licensee herself or as an aider and

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[3]Filed contemporaneously herein is a motion by the United States to supplement the record, pursuant to 10th Cir. R. 10.3(E), with a page from the discovery materials provided to the defense and to the United State Probation Office, but not introduced as evidence. The page is a copy of Defendant's license to work as a food runner at the casino. This license was not discussed by either side in the briefing of the motion to dismiss. The license would, however, provide this Court with an independent ground to affirm the conviction as it appears Defendant was "an individual licensee" whose sentence could be grounded on 18 U.S.C. §1168 alone, without reliance on the "aiding and abetting" language of 18 U.S.C. §2.

abettor to her sister's crime. The judgment and sentence should be affirmed.

ARGUMENT AND AUTHORITIES

I. THE DISTRICT COURT CORRECTLY EXERCISED JURISDICTION IN SENTENCING THE DEFENDANT FOR VIOLATING 18 U.S.C. §§1168 AND 2.

A. Standard of Review

Defendant's brief does not identify an appropriate standard of review, but instead focuses on whether a failure to allege an offense may be raised for the first time on appeal. (Def. Brf. at 9). Such citations are irrelevant in this case. Where, as here, the question has been properly preserved for appellate review, this Court considers sufficiency of the indictment *de novo*, construing it liberally in favor of validity. ***United States v. Levine,*** 970 F. 2d 681, 685 (10th Cir. 1992).

B. The District Court's Order

The District Court noted that there is not yet much case law interpreting 18 U.S.C. §1168. (*Order,* Doc. #28 at 1). Pointing to "a somewhat analogous substantive statute, 18 U.S.C. §1163", (Embezzlement and Theft from a Tribal Organization), the Court noted that Defendant's argument would also not charge an "offense against the United States" and would therefore also not allow a conviction for aiding and abetting a violation of the statute. (*Id*. at 2). The District Court rejected Defendant's premise because, in the context of an §1163 crime, "the Tenth Circuit upheld federal jurisdiction in ***United States v. Palmer***, 766 F.2d 1441, 1444 (10th Cir. 1985). The District Court held that "18 U.S.C. §2 is an alternative charge in every count, whether explicit or implicit," citing ***United States v. Tucker***, 2010 WL 4487110 (11th Cir. 2010). (*Order*, Doc. #28 at 2).

Thus, the aiding and abetting charge was sufficient to support a conviction here despite Defendant's arguments and, the District Court ruled, "this case will be allowed to proceed." (*Id*.).

C. Authorities and Analysis

1. The Indictment, on its face, sufficiently alleged a violation of §1168.

The crime at issue was added to Title 18 two decades ago as part of the National Indian Gaming Regulatory Act. *See* Pub.L. 100-497, § 23, Oct. 17, 1988, 102 Stat. 2487, as amended by Pub.L. 101-647, Title XXXV, § 3537, Nov. 29, 1990, 104 Stat. 4925. The straightforward language of Section 1168(b) states:

> **(b)** Whoever, being an **officer, employee, or individual licensee** of a gaming establishment operated by or for or licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission, embezzles, abstracts, purloins, willfully misapplies, or takes and carries away with intent to steal, any moneys, funds, assets, or other property of such establishment of a value in excess of $1,000 shall be fined not more than $1,000,000 or imprisoned for not more than twenty years, or both.

(Emphasis added).

The first prong of Defendant's attack can be boiled down to the following: Defendant was not employed by the casino so the Indictment does not charge a cognizable federal offense as applied to her. (Def. Brf. at 10-18). The phrase "as applied to" reveals that this is not so much an attack on the charging language as on the sufficiency of the government's evidence to prove the elements of the offense. In other words, Defendant is actually challenging whether the United States could prove that she was "an officer, employee, or individual licensee" of an Indian gaming establishment.

Although Defendant's argument in this regard covers some ten pages of her brief, none of the cases cited even remotely address whether the Indictment here alleged all of the essential elements of the crime charged. She merely bickers with whether she fits within those elements. She does not, and cannot, challenge the government's proof regarding her sister who was, without question, an employee of the Choctaw Nation Casino and Resort. Therefore, a complete federal crime under §1168 was sufficiently alleged in the Indictment and the only issue remaining, even if Defendant is not "an individual licensee" herself (n. 3 infra), is whether such a crime may be aided and abetted in violation of §2.

2. The only complicated Indian jurisdictional quagmire is caused by Defendant's reliance on irrelevant authorities.

Defendant jumps from a cockfighting decision to cases discussing plain error analysis to a child pornography case before ever even reaching her complex Indian law analysis. (Def. Brf. at 11-13). First, ***United States v. Langford***, — F.3d.. —, 2011 WL 1368548 (10th Cir. April 11, 2011), examined whether state cockfighting laws could be applied, through federal statutes not at issue here, against non-Indians in Indian Country. The case appears to be cited by Defendant for the proposition that "Indian jurisdiction is complicated and mistakes in charging documents are often made." (Def. Brf. at 11). As a general proposition, the United States cannot disagree.

Yet, Defendant next jumps to the ***United States v. Peter***, 310 F. 3d 709, 713-15 (11th Cir. 2002), ***McCoy v. United States***, 266 F. 3d 1245, 1249 (11th Cir. 2001), and ***United States v. Meacham***, 626 F. 2d 503, 510 (5th Cir. 1980) opinions

while forcefully arguing that jurisdictional defects rendering an indictment void may be raised for the first time on appeal - a matter not at issue here. Her actual argument, raised in the pre-trial motion below, does not center on the failure to allege a federal crime - only that the government cannot prove that she fits within the charged crime as a non-employee. Moreover, she neglects to inform this Court that the ***Peter -McCoy- Meacham*** line of cases is simply no longer good law for the "void indictment" argument after the United States Supreme Court decision in ***United States v. Cotten***, 535 U. S. 625, 631 (2002). *See* ***United States v. Sinks***, 473 F. 3d 1315, 1320-1321 (10th Cir. 2007)("the failure to allege an element of an offense is not a jurisdictional error").

She concludes her first section with a lengthy discussion of a 9th Circuit child pornography case presented to show the difference between interstate and intrastate commerce where the United States is not the actual victim of an offense. (Def. Brf. at 12-13). Again, the relevance of the entire discussion is tenuous at best.

3. Defendant's Federal Indian Law citations are inapplicable.

Defendant proceeds to discuss the Indian Commerce Clause and a brief history of federal Indian policy before descending into an offensive, inaccurate and inapplicable argument which finally loops back to Indian land status. (Def. Brf. at 14-16). The relevance of this discussion to the case at hand is not clear.

Particularly obnoxious is Defendant's claim that Native Americans, "thorough their right of self-government" are able to "get around" laws and commit "horrible acts" like shooting eagles. (Def. Brf. at 15, *citing* ***United States***

v. White, 508 F.2d 453 (8th Cir. 1974)(also discussed at Def. Brf. 18-19). Although totally unrelated to the case at hand, it should be noted that the ***White*** decision was based on specific treaty rights and that Indians are not free to simply shoot eagles willy-nilly.[4] The United States would also take issue with the tone, if not the content, of Defendant's assertion that the tribes "make a lot of money in business endeavors that would be illegal for non-Indians; such as operating gambling casinos and selling cigarettes without paying taxes." (Def. Brf. at 15).

Defendant next informs this court that 18 U.S.C. §1168(b) "recognizes and protects *from embezzlement* only the Indian tribes' casino-gambling windfall." [5]

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[4]Congress amended the 1940 Bald and Gold Eagle Protection Act in 1978, allowing the Secretary of Interior to regulate a permit process which allows practitioners of Native religions to obtain a permit to even possess feathers of an eagle. *See generally*, F. Cohen, Handbook of Federal Indian Law §14.03[2][C] (2005 Ed.). Permit seekers are forced to wait years in order to obtain eagle parts necessary for certain ceremonies since the eagles are obtained through a regulated depository and demand far exceeds supply. The 5,000 people on the waiting list can expect to wait three and a half years. *See* U.S. Fish and Wildlife Service, "Questions and Answers About the National Eagle Repository" at http://www.fws.gov/mountain-prairie/law/eagle.

[5]That the Choctaw casinos generate substantial profits is not at issue. That such profits are a "windfall" given the prior treatment of the Choctaw Nation is ludicrous. Like the other Five Civilized Tribes, the Choctaws were forceably removed to Oklahoma on the Trail of Tears during which a substantial of their number died. They, with the rest of the Five Tribes in Indian Territory, suffered through allotment under the Dawes Act. "Because of the magnitude of the plunder and the rapidity of the spoilation the most spectacular development of this [allotment] policy occurred with the Five Civilized Tribes of the Indian Territory... The orgy of exploitation that resulted is almost beyond belief. Debo, And Still the Waters Run: The Betrayal of the Five Civilized Tribes, ix-x (1940). The counties at the heart of the Choctaw Nation remain, even today, among the most socio-

(*Id*). The statute actually punishes any "officer, employee, or individual licensee" who "embezzles, abstracts, purloins, willfully misapplies, or takes and carries away with intent to steal, any moneys, funds, assets, or other property of such establishment." 18 U.S.C. §1168(b). After delving into an irrelevant discussion of Indian status and Indian land, Defendant asserts that she was not an "officer, employee, or individual licensee" of the Choctaw tribe or casino and cannot be held liable under §1168.[6] Again, this is an argument regarding the sufficiency of the government's evidence, not the sufficiency of the allegation in the Indictment.

4. 18 U.S.C. §1168 is an "offense against the United States" and, like any other federal crime, is subject to an aiding and abetting charge under §2.

When a person aids and abets another in committing a federal crime against a Tribal victim as outlawed by 18 U.S.C. §1167 or §1168, that crime is punishable under 18 U.S.C. §2 as a crime "against the United States." Like §1163 embezzlement from the Seminole Nation in ***United States v. Palmer***, 766 F. 2d at 1444, the §1168 scam here was plainly and specifically intended to address corruption within a tribal financial entity. ***Id.*** Also, as in ***Palmer***, the indictment here tracked the language of the statute, stated facts sufficient to prepare a defense

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economically challenged in the state. The Choctaws pump substantial funds into community infrastructure, are the largest employer in the area, and have constructed the first hospital paid for by an Indian Tribe in the United States. *See* generally www.choctawnation.com.

[6]The license included in the discovery and discussed at n. 3 demonstrates that her assertion is untrue and she was likely an individual licensee subject to prosecution directly under 18 U.S.C. §1168.

and gave the notice necessary to avoid prejudicial surprise or double jeopardy. *See,* ***Id.*** at 1445. The District Court did not err in refusing to dismiss the Indictment.

As she did below, Defendant relies on a simplistic conclusion: "An Indian tribe is not the United States." (Def. Brf. at 16). From that sentence forward, the remainder of Defendant's brief consists of a discussion of jurisdiction under 18 U.S.C. §1152, federal enclave law, and whether "general laws" apply to the Choctaw Nation casino. No effort will be made herein to refute and correct individually the cases which are irrelevant, misinterpreted, and relied upon by Defendant to support her circular logic regarding §1152 and principles of enclave law. The United States has never even hinted that §1152 forms any basis for the Court's jurisdiction in this matter.

CONCLUSION

Because the district court properly denied the Motion to Dismiss and accepted Defendant's guilty plea in this matter, the Defendant's conviction should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

The United States does not believe that oral argument would materially assist this Court in deciding this case since the single issue of law, when properly narrowed to the statutes actually relied upon by the United States, is clear and there are no contested issues of fact.

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). According to WordPerfect X3, this brief contains 2,974 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/Linda A. Epperley

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I, hereby certify that on July 1, 2011, I electronically transmitted the attached documents to the Clerk of Court using the ECF System for filing. A Notice of Electronic Filing will be sent via the Court's ECF system to the following counsel of record for Defendant/Appellant:

Mr. Art Fleak [fleakart@hotmail.com]

I hereby certify that I caused a true and correct copy of the foregoing document to be mailed via the United States Postal Service on July 1, 2011, to the following:

Not Applicable as Defendant Has Counsel

/s/Linda A. Epperley