C.A. No. 11-10520

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JEFF LIVINGSTON, Defendant-Appellant.	)	DC No. 1:09 CR 00273 LJO (Eastern District, California, Fresno)

On Appeal From the United States District Court
For the Eastern District of California
Honorable Lawrence J. O'Neill

APPELLANT'S OPENING BRIEF

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UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JEFF LIVINGSTON, Defendant-Appellant.	CA. No. 11-10520 DC 1:09 CR 00273 LJO (Eastern District of California, Fresno) **OPENING BRIEF OF APPELLANT**

I. STATEMENT OF JURISDICTION

This Court has jurisdiction over Jeff Livingston's appeal from the judgment and sentence of the district court under 28 U.S.C. § 1291. The district court had jurisdiction over this criminal case under 18 U.S.C. § 3231.

The district court imposed sentence on September 23, 2011. CR 153. It entered judgment on September 28, 2011, CR 155; ER 133,[1/] and corrected a clerical error by amending the judgment and commitment on October 7, 2011. CR 158; ER 141.

[1] "CR" refers to the clerk's record from the district court. "ER" refers to the appellant's Excerpts of Record filed contemporaneously with this opening brief.

Mr. Livingston timely filed a notice of appeal on October 7, 2011.[2/] CR 160; ER140. *See* Fed.R. App. Proc., Rule 4(b)(1)(A)(i).

II. DETENTION STATUS

Jeff Livingston is in the custody of the Bureau of Prisons with an expected release date of September 23, 2013.

/ / /

[2] On October 11, 2011, Livingston filed a timely amended notice of appeal that referred to the amended judgment. CR 161; ER 148.

III. ISSUES PRESENTED

A. THE SUPERSEDING INDICTMENT WAS INSUFFICIENT TO ALLEGE:

1. THEFT BY EMPLOYEES OR OFFICERS OF GAMING ESTABLISHMENTS ON INDIAN LANDS, COUNTS 7-9.

2. MAIL FRAUD (COUNTS 1-6) & THE LAST THEFT (COUNT 9), AS THESE WERE CONSTITUTIONALLY INSUFFICIENT

B. THE JURY INSTRUCTIONS FAILED TO PROPERLY DEFINE THE ELEMENTS OF THE THEFT AND MAIL FRAUD OFFENSES:

1. THE DISTRICT COURT FAILED TO INSTRUCT THE JURY THAT BEFORE IT COULD CONVICT ON THE THEFT COUNTS 7-9, IT HAD TO FIND BEYOND A REASONABLE DOUBT THAT THE GAMING ESTABLISHMENT WAS ON INDIAN LANDS AT THE TIME OF THE ALLEGED OFFENSES

2. JURY INSTRUCTION DEFINING "INTENT TO DEFRAUD" INCORRECTLY STATED THE LAW GOVERNING MAIL FRAUD, 18 U.S.C. § 1341

C. DISTRICT COURT ERRED BY ADMITTING "PRIOR BAD ACT" EVIDENCE UNDER RULE 404(B)

IV. STATEMENT OF THE CASE

A. NATURE OF THE CASE

Jeff Livingston appeals his convictions following a jury trial. The jury convicted Livingston of six counts of mail fraud, 18 U.S.C. § 1341, and three counts of theft by officers or employees of gaming establishments on Indian lands, 18 U.S.C. § 1168(b).

B. COURSE OF THE PROCEEDINGS

At the time of the alleged offenses, Jeff Livingston was general manager of the Chukchansi Gold Resort and Casino. The casino was owned and operated by the Picayune Rancheria of the Chukchansi Indians. CR 1; ER 1. The government claimed that during his employment, Mr. Livingston used the casino's corporate credit card to make personal purchases in excess of $1,000. Mr. Livingston's defense claimed these purchases were within his preauthorized limits and he had acted without any fraudulent intent but to improve the casino's image in and relationships within the community.

1. ORIGINAL INDICTMENT

On July 23, 2009, the government filed a two-count indictment charging Mr. Livingston with "theft by officers or employees of gaming establishment on Indian lands" in violation of 18 U.S.C. § 1168(b). The first count alleged that in June-July

2007 Livington used a Chukchansi corporate credit card to pay for down payments on personal vehicles. The second count alleged that in May 2007 Livingston used a Chukchansi corporate credit card to purchase a personal vacation package to Hawaii. CR 1; ER 1-3. In a discovery motion, Livingston sought disclosure of any 404(b) evidence that the government intended to introduce at trial. CR 12, page 2. The government assured Livingston it would give 404(b) notice prior to trial. No 404(b) evidence was offered at this trial.

2. FIRST TRIAL

The case went to trial in April 2010. CR 38; ER 154. Just before jury selection began, Livingston raised an issue as to whether the government could prove that the land where the casino is located qualified as "Indian land" within the meaning of the charged theft statute. CR 190, page 5. The land was held in fee simple at the time of the charged offenses and thus, Livingston argued, did not qualify as "Indian land" under 25 U.S.C. § 2703. There was no evidence that either Congress or the President through Executive Order had declared the land at issue to be "Indian land," nor that the land was part of the historical reservation lands of the Picyaune Rancheria of the Chukchansi Tribe. Livingston contended that § 2703 required the land be held in trust by the United States at the time of the alleged thefts, but that the lands were held by the Tribe in fee simple. CR 190, page 10, 25, 31-33. The government countered

that the charged offense required only that the Indian gaming establishment be operated pursuant to an ordinance of the National Indian Gaming Commission [NIGC]. CR 190, page 34. It argued the jury would not have to decide whether the Chukchansi was an Indian tribe or if the Chukchansi casino was on Indian lands. *Id*. page 35. The defense, in turn, countered that even under the government's view of the elements, "Indian lands" remained an element of the offense because the NIGC's approval of the Chukchansi's gaming ordinance was "approved for gaming only on Indian lands, as defined in the [Indian Gaming Regulatory Act]." CR 190, pages 39-40, 44-67.

In the end, the district court concluded that it was not clear what the government was going to be able to prove and so denied what it deemed to be a defense motion to dismiss. CR 190, page 67.

The jury trial began the next day; it lasted four days. CR 39, 42, 43, 44; ER 155-56. The jury deliberated over two days, requested read-backs of testimony of numerous witnesses, and then announced it was deadlocked. CR 47, pages 4-6; *see* ER 156. After the district court consulted the jury about deliberating further, the court declared a mistrial. CR 44; ER 155. It set a new trial date for September 2010. CR 45.

3. DEFENSE MOTION TO DISMISS THE INDICTMENT - MISSING "INDIAN LANDS" ELEMENT

In July 2010, Livingston filed a written motion to dismiss the indictment; this motion was premised on the "Indian lands" issue raised earlier. Livingston asserted that the government could not establish an essential element of the offense because the Chukchansi casino was not located on "Indian lands" at the time of the alleged thefts. CR 56-58, 62; ER 157-58. This time the government opposed by arguing the land at issue "constituted a reservation and, thus, 'Indian lands'" under Indian Gaming Regulatory Act ("IGRA").[3/] CR 59, page 3; ER 157.

On September 1, 2010, the district court agreed that under the IGRA, the NIGC only had power to approve a gaming establishment that operates on Indian land. CR 76, page 13; ER 23. The court also concluded that the alleged theft must have taken place on "Indian lands" to violate the statute. *Id*. page 14; ER 24. It concluded "the 1996 NIGC approval was subject to a limitation explicitly stated in the approval letter; namely, that the NIGC approved the Tribe's ordinance for gaming only on Indian land." *Id*. The district court thus concluded the government had to prove at trial beyond a reasonable doubt that the casino was on Indian land at the time in

[3] 25 U.S.C. §§ 2701-2721.

question. *Id*. But, as it was the defense's burden at this pre-trial motion stage, the district court denied the motion because it concluded Livingston had failed to prove that the government could not, as a matter of law, establish an essential element of the crime. *Id*. page 19; ER 29.

4. SUPERSEDING INDICTMENT & BILL OF PARTICULARS

After the court denied Livingston's motion to dismiss, the government gave notice of its intent to offer 404(b) evidence. CR 77; 159. The 404(b) evidence concerned different purchases: an employee's purchase of gift baskets "in or about the summer of 2007" during a trip to Pebble Beach; and Livingston's purchases at two different charity auctions in 2006 and 2007, including a Monterey golf vacation package. CR 77, page 3.

Before disputes concerning the admissibility of this evidence could be resolved, in September 2010, the government filed a superseding indictment. That new indictment added seven new counts and broadened the time frame alleged in the two original theft counts. CR 80; ER 4-10. The superseding indictment alleged three, rather than two, counts of "Theft by Officers or Employees of Gaming Establishment on Indian Lands" (counts 7, 8, and 9)(18 U.S.C. § 1168(b), and six counts of mail fraud (18 U.S.C. § 1341).

Notwithstanding the district court's earlier ruling that the government had to prove at trial beyond a reasonable doubt that the casino was on "Indian land" at the time of the thefts, CR 76, page 14; ER 24, the superseding indictment did not allege any fact regarding this element in any of the theft counts. *See* CR 80, pages 5-7; ER 8-10.

The mail fraud counts alleged Livingston caused specific mailings of credit card statements from Bank of America and of payments to Bank of America for the purposed of executing and attempting to execute the scheme and artifice to defraud. CR 80, pages 4-5; ER 7-8. This indictment generically and unlimitedly described the purchases as "Such personal purchases, goods, and benefits included, but were not limited to, vacation travel, downpayments on personal vehicles, golf packages, jewelry, and autographed sports and music memorabilia." CR 80, page 2; ER 5.

Livingston moved to dismiss the superseding indictment as insufficient. CR 87; ER 160. The mail fraud allegations, counts 1-6, failed to adequately allege and provide sufficient notice of (1) the alleged scheme; (2) the "false and fraudulent pretenses, representations, and promises" made as part of the alleged scheme; and (3) the property allegedly obtained as part of the alleged scheme. CR 87-1, page 2. The allegations were conclusory assertions, rather than factual allegations and failed to provide notice of the conduct committed or to which jeopardy attached as required

by the Fifth and Sixth Amendments of the United States Constitution. CR 87, pages 3-4, 7-8. While the superseding indictment alleged Livingston "engaged in a scheme to defraud Chukchansi by making a series of personal purchases, for the benefit of himself and other private individuals, using Chukchansi money, funds, and assets," CR 80, page 2; ER 5, it failed to identify with specificity the property or means alleged used. The superseding indictment gave specific dates for the mailings, but only a non-narrowing"including, but not limited to" description of the property allegedly purchased, as noted above. *Id*. It also gave a non-narrowing "including, but not limited to" description of means used. *Id*. page 3; ER 6 ("defendant utilized various means to make his personal purchases, including but not limited to, using his Chukchansi corporate credit card, using a staff member's corporate credit card, and by acquiring items and then having Chukchansi billed for the items.")

Livingston also sought to dismiss the theft counts because the superseding indictment omitted elements essential to allege violations of 18 U.S.C. § 1168(b). CR 87-1, page 8-11. As alluded to earlier, the superseding indictment did not allege that the tribal gaming establishment was on "Indian land" at the time of the alleged thefts. *See* CR 80, pages 5-7; ER 8-10.

The government opposed the motion to dismiss, CR 91, and the district court denied it. CR 94; ER 30-39.

Livingston also sought a bill of particulars. CR 88. The government opposed, CR 90, but did provide a letter explaining the charges in greater detail. In it, the government provided specific additional information concerning the specific property that is the subject of counts 1-6 and 9. This information assigned more specific descriptions of property to each count, as follows:

> Count 1: Check in payment for, among other things, a diamond necklace purchased for $1,000 at a Kitahara Foundation auction in and about October 2006.
>
> Count 2: Bank of America commercial card statement including, among other charges, a charge for a Hawaii vacation package purchased for $7,000 at a St. Agnes Medical Center Foundation event in and about May 2007.
>
> Count 3: Check in payment for, among other things, a Hawaii vacation package purchased for $7,000 at St. Agnes Medical Center Foundation event in and about May 1007.
>
> Count 4: Bank of America commercial card statement including, among other charges, amounting to $25,000 (consisting of charges in the amounts of $10,000, $10,000, and $5,000) for down payments on personal vehicles at Bret's Ford in and about June and July 2007.

> Count 5: Bank of America commercial card statement including, among other charges, a $15,500 charge (Gallery of Dreams) for sports and music memorabilia purchased at a Kitahara Foundation auction in and about October 2007 (consisting of a golf package, a signed photo, a fiddle, and a masters green jacket).
>
> Count 6: Check in payment for, among other things, $15,500 in sports and music memorabilia purchased at a Kitahara Foundation auction in and about October 2007 (consisting of a golf package, a signed photo, a fiddle, and a masters green jacket).
>
> Count 9: $15,500 in sports and music memorabilia purchased at a Kitahara Foundation auction in and about October 2007 (consisting of a golf package, a signed photo, a fiddle, and a masters green jacket).

CR 90-1; CR 92, pages 3-4. Relying on this additional information, the district court found that the government had provided adequate information regarding the nature of the charges and denied the motion. CR 92, page 1, 3-4.

/ / /

5. RULE 404(B) EVIDENCE

On April 26, 2011, the government gave notice of its intent to introduce additional evidence of Livingston's alleged scheme to defraud, asserting the evidence was either inextricably intertwined evidence fo the crimes charged or, alternatively, admissible under Rule 404(b) of the Federal Rules of Evidence. CR 98. Livingston opposed and filed a motion *in limine* to preclude the admission of prohibited propensity evidence. CR 99.

The government's notice described two set of purchases: $2,000 in gift baskets purchased during a family trip to Pebble Beach and items bought at a 2007 "Save Mart Shootout" auction in or about October 2007. The auction items included a team-signed USC Championship football helmet and a Annika Sorenstam golf tour bag. CR 98, page 4. The government argued this evidence was admissible to show Livingston's scheme to defraud, and/or as "inextricably intertwined evidence." CR 99, page 1. Livingston argued that there was insufficient evidence to prove that these other purchases were stolen. In opposing, the government stated that it intended to introduce evidence from witnesses that Livingston purchased the gift baskets for his personal benefit and that the casino did not receive the helmet and tour bag, as Livingston had claimed. CR 100, page 3.

On May 27, 2011, the district court heard the motion in limine. CR 114; ER 40. The government proffered that Howard Davies, an investigator with the casino, would testify that the casino never received these items. CR 114, page 35:13-16; ER 74. Defense counsel argued there was no evidence to support such testimony from Davies and requested an evidentiary hearing. CR 114, pages 35-37; ER 74-76. The district court denied the evidentiary hearing request. It did not allow the gift baskets evidence, but allowed the 2007 "Save Mart Shootout" auction evidence. The court noted that if, it turned out that the government did not have a witness as it claimed in Mr. Davies, the defense "ought to be dancing in the streets with happiness." CR 114, page 37:2-9; ER 76.

6. THE SECOND TRIAL

The second trial began on June 13, 2011. CR 131; ER 163. There were five days of testimony. CR 131-141; ER 163-64. The parties submitted proposed jury instructions that differed on the key elements and definitions of the charged offenses. CR 116, 117, 123; ER 83-89.

For the mail fraud counts (1-6), Livingston asked for a modified Ninth Circuit model instruction that explained "False representations or statements or omissions of material facts do not amount to fraud unless done with fraudulent intent." CR 116, page 8, citing *United States v. Yip*, 930 F.2d 142, 146-147 (2nd Cir. 1991); CR 117,

page 2; ER 83. The government asked for the model instruction that defines "the intent to defraud" simply as "the intent to deceive or cheat." CR 123, page 36; ER 87. The defense argued that this instruction required the additional caution that "false representations or statements or omissions of material facts do not amount to fraud unless done with fraudulent intent." CR 117, page 2; ER 83. Thus, the defense explained an action of deceiving without an intent to defraud is insufficient. It asked for an instruction that explained the intent to deceive had to be for purposes of causing some financial loss to another. Instead, the district court gave the model instruction. CR 140, page 28; ER 117.

Livingston also specifically requested an instruction for § 1168(b) theft counts that explained to the jury it had to determine, among other elements, whether the "the gaming establishment was on Indian land at the time in question". CR 116, page 9; CR 177, 3; ER 84. The government offered a different instruction that listed four elements for these offenses, none of which included an "Indian lands" element. The government's instruction listed these elements as required for conviction on counts 7-9:

> First, the defendant was an officer or employee of a gaming establishment;

> Second, the gaming establishment was operated by or for, or licensed by, an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission;
>
> Third, on or about the dates alleged in the Indictment, the defendant embezzled, purloined, willfully misapplied, or took with the intent to steal, moneys, funds, assets or other property of the gaming establishment; and,
>
> Fourth, that the value of such moneys, funds, assets or other property was in excess of $1,000."

CR 123, page 38; ER 89. Absent from the government's instruction was any requirement that the jury determine whether the casino was on "Indian lands" at the time of the alleged offenses. The district court gave the government's instruction. CR 140, page 29; ER 118. While it separately gave the jury the defense's definition of "Indian lands," *compare* CR 140, page 36 *with* CR 117, page 4,[4/] the court's instructions did not inform the jury that it had to determine the casino was on "Indian lands" before it could convict Livingston of the theft charges.

After the government closed, Livingston made a Rule 29 motion challenging all counts. CR 178, page 657. The district court denied the motion. *Id*. pages 657-661. Defense moved for a mistrial based on introduction of improper 404(b) evidence. *Id.* pages 661-63. District court denied that motion as well. *Id*. page 663.

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[4] *Compare* ER 125 *with* ER 85.

On June 21, 2011, the jury reached a verdict, convicting Livingston on all counts. CR 139; ER 164. Mr. Livingston remained free of custody pending sentencing. CR 141; ER 164.

7. SENTENCING

On September 19, 2011, Livinston filed a sentencing memorandum that objected to the presentence report's calculations and recommendation, and asked for a sentence of probation with home detention and substantial community service. CR 150. The government filed a sentencing memorandum that made no objections to the presentence report and asked for a sentence of 30 months. CR 152, page 14.

On September 23, 2011, the district court imposed a custodial sentence of 24 months custody as to each count to run concurrently; 36 months supervised release as to each count to run concurrently; $100.00 special assessment as to each count for a total assessment of $900.00; and $52,400.00 in restitution. It directed Mr. Livingston to self-surrender. CR 155; ER 133-139. To correct a clerical mistake an amended judgment was filed and entered on October 7, 2011. CR 158; ER 141-47.

Livingston filed timely notices of appeal from both judgments. CR 160, 161; ER 140, 148.

/ / /

C. STATEMENT OF FACTS

The Picayune Rancheria of Chukchansi Indians is a Native American tribe that owns, through the Chukchansi Economic Development Authority, the Chukchansi Gold Resort and Casino, in Coarsegold, California. In 2005, the Development Authority hired Jeff Livingston as general manager for the tribal casino and hotel. CR 177, page 359; CR 178, page 679. Livingston, as general manager, and other executives or executive assistants, were issued corporate credits cards and authorized to make business-related purchases. CR 177, page 391; CR 179, page 752, 862.

The government's case offered evidence to show Mr. Livingston made personal purchases using the Chukchansi corporate credit card. In his defense, Mr. Livingston offered evidence to show these purchases were not personal, were made within the scope and breadth of his authority to make and were made on behalf of the resort and casino, and/or made without any intent to defraud.

1. CHUKCHANSI TRIBE AND LAND: HISTORY RELEVANT TO THE THEFT FROM AN INDIAN GAMING ESTABLISHMENT COUNTS

The Chukchansi's tribal history and the legal status of the tribe's land requires a brief legal and factual discussion.

/ / /

a. Picayune Rancheria

The Picayune Rancheria comprises about 80 acres in Madera County, California. When it built the tribal casino, the Chukchansi tribe own two out of three lots that made up the historic rancheria lands. But the tribe granted the federal government title for these two lots to be held in trust on July 31. 2007.

In 1912, the President signed an executive order that set aside this land, land occupied by one family, the Wyatts, for the benefit of "Indians." CR 58-6, page 10. The Wyatts did not form a tribal government nor seek recognition as a tribal entity; the Wyatts simply resided on the land that was held by the United States in trust for Indian use. In 1935, the "tribe" affirmatively chose not to organize under the Indian Reorganization Act. *See* CR 58-6, page 17. (It did not organize as a tribe until much later, in 1988. *Id*.)

By the late 1950, the federal government's policy called for the termination of the federal government's trust relationship with the California Rancherias, including the Picayune Rancheria. In 1958, Congress passed the California Rancheria Act, which identified the Picayune Rancheria for distribution and termination. According to the Director of Tribal Services for the U.S. Bureau of Indian Affairs:

> The [Rancheria Act] provided for the termination of the Federal trust relationship for 41 rancherias or small reservations, and did not specify the tribal groups, if any, living on those lands. In most instances, these rancherias did not represent tribes, but were collections or remnants of homeless Indian groups for whom the United States had purchased homesites under various statutes. Prior to termination, most of these rancherias did not function as self-governing entities.
>
> They were not considered tribes by the Federal Government and they received no Federal services other than those associated with holding the land in trust. The rancherias were merely used as homesites. With termination, the assets of the rancherias were distributed to those individuals determined to have an interest in the rancheria who were termed "distributees." Some of the rancherias had only one or two distributees.

California Tribal Status Act: Hearing on H.R. 2144 Before the House Committee on Interior and Insular Affairs, 102nd Cong., 2nd Sess., 50.

On April 25, 1960, a distribution plan for land on the Picayune Rancheria was approved by the Bureau of Indian Affairs. CR 58-6. Effective June 1960, this distribution plan provided for the land to be distributed to the only people identified as living on the land - the Wyatt family. Specifically, the former trust land was divided into three lots for three distributees, Nancy Wyatt and her two children, Gordon Wyatt and Maryan Ramirez. CR 58-6, pages 11-12. On October 3, 1961, title in fee simple was conveyed to the distributees: lot 1 went to Nancy Wyatt, lot 2 to Gordon Wyatt and lot 3 to Maryan Ramirez. CR 57-1, pages 40-41. On February 14,

1966, the Department of the Interior, pursuant to the Rancheria Act, published notice of the termination of the Picayune Rancheria.

b. Recognition of the Chukchansi Tribe

In 1979, some individual Indians, whose rights as Indians had been terminated by the Rancheria Act, sought various claims of relief against the federal government for wrongful termination of their rights as Indians and regarding the status of the rancherias. The *Tillie Hardwick* class action represented plaintiffs who were distributees of land, or dependent members of their families, of former rancherias, including the Picayune Rancheria. CR 58-6, pages 65-67 (Exhibit 13). In 1983, the *Tillie Hardwick* plaintiffs and United States entered a stipulation for entry of judgment. CR 58-6, pages 68-82 (Exhibit 14). Paragraph 5 of the stipulation provided that the court would not include in any judgment any determination of the boundaries of the rancherias, including the Picayune Rancheria. CR 58-6, page 73. Paragraph 6 of the stipulation simply provided that any class member who received, or presently owns fee title in former rancheria land could elect to restore the land to trust status, to be held by the United States, pursuant to 25 U.S.C. § 465. CR 58-6, page73. Before her death, Maryan Ramirez, the distributee of lot 3 of the former Picayune rancheria, exercised this option and granted lot 3 to the United States of America in trust. But when Ms. Ramirez died intestate, the Department of Interior

redistributed her estate to her heirs in fee, pursuant to 25 U.S.C. § 372,[5/] and the land was again taken out of trust. CR 58-6, page 87-88.

In 1986, a second amended complaint was filed in the *Tillie Hardwick* case. CR 58-7, pages 1-28 (Exhibit 17). These plaintiffs included certain "restored tribes" including the Picayune. *Id*. This amended complaint led to stipulations between these restored tribes and certain counties in California. In one such stipulation, the United States agreed to restore the boundaries of various rancherias, but the Picayune Rancheria was not included. CR 58-7, pages 30-31 (Exhibit 18). In a later stipulation, Madera County and the plaintiffs agreed that the established "original boundaries" of the Picayune Rancheria were restored and all land within those restored boundaries "are declared to be 'Indian Country'." CR 58-6, pages 19-20. This settled property tax issues between the tribe and Madera County.

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[5] Section 372 reads in pertinent part:

> When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior . . . shall ascertain the legal heirs of such decedent . . . If the Secretary of the Interior decides the heir or heirs or heirs of such decedent competent . . . *he shall issue to such heir or heirs a patent in fee* for the allotment of such decedent . . . .

(Emphasis added).

c. Picayune Tribal Recognition & Its Gaming Establishment

The Chukchansi Indians of the Picayune Rancheria did not organize and were not recognized as a tribe by the federal government until November 7, 1988. The tribe adopted a constitution and became federally recognized for the first time when it was included in the BIA Federal Register list of recognized tribal entities, pursuant to 25 CFR 83.6(b). CR 58-6, page 20 (Exhibit 10 at ¶12); *see also* CR 58-7, page 41 (Exhibit 20.) At that time, the property that had made up the Picayune Rancheria remained in private hands. Between 1995 and 2002, the Picayune Rancheria of the Chukchansi Indians gained fee simple title to the two of the three lots that made up the historic Rancheria lands. *See* CR 57-1, page 44, ¶ X (Lot 1A), *id*., page 45, ¶ BB (Lot IB-I, Lot IB2 and Lot IB-3), *id*. page 47, ¶¶ M, N, P (Lots 2B-2, 2B-l, 2A). The Chukchansi tribe did not convey these lots to the United States as trust property until July 31, 2007. *Id*. page 45, ¶ CC and page 48, ¶ Q.

At trial, a land surveyor testified that when he did his survey in 2007, the Chuckchansi Casino was within the historical boundaries of the Picayune Rancheria. CR 178, page 627, 632. He also examined a grant deed (Exhibit 9) and explained that this deed granted to the United States the land, including the land upon which the casino was built, to be held in trust for the Rancheria.

2. LIVINGSTON'S ROLE AS GENERAL MANAGER: CONTRACT AND AUTHORITY

When the Chukchansi Development Authority hired Jeff Livingston as general manager for the tribal casino and hotel in 2005, it gave him a 3-year contract. CR 178, page 678. Under this contract, Livingston received a large salary, about $225,000 in the first year, and an incentive bonus structure. *Id*. Under the bonus system, Livingston could gain an additional 50% of his salary if he satisfied the set criteria. *Id*.

Two years into this contract, the Development Authority offered Livingston a new, 5-year contract. This contract paid Livingston a substantially higher salary, $302,000 in its first year, and again offered a lucrative bonus structure. *Id*. page 679.

As general manager, Livingston had a set amount of spending authority that did not require separate, pre-approval by the governing board. When he started that amount was set at $25,000. CR 178, page 702. It was raised later to $50,000. *Id*. page 695; CR 177, page 397. As general manager, Livingston oversaw all of the gaming operations, supervised all the employees, and made sure that all the regulations were being followed. His primary objectives regarding the casino were to make sure that its assets were protected, to generate revenues for the tribe, and to help promote and ensure the welfare of the tribal members who were employees.

CR 77, page 362. When he was hired, the overall revenues at Chukchansi Gold were just over $100 million and the earnings were approximately 25-26%. There was substantial revenue and earnings growth while Livingston was the general manager. In two-and-half years, revenues grew to approximately $200 million in and earnings rose to 39-40%. *Id*. page 679.

Livingston understood he was hired to fix some specific problems. His first goal was to complete a restructuring of the casino and resort's financing. It was paying interest rates that were too high. His second major task was to help repair the Chukchansi reputation. Three major lawsuits had harmed the tribe's reputation and so adversely affected its efforts to market the casino and resort. Madera County had filed a lawsuit regarding the status of the casino, questioning whether or not it was on "Indian land" and wrongfully was not paying county taxes; the original management company that had opened the casino and resort had also sued; and subcontractors who were not being paid had also filed a lawsuit. *Id*. page 681. Madera County had order a cessation of expansion construction work. *Id*. page 407, 683. These problems were pressing.

3. VEHICLES PURCHASED FROM BRET'S FORD

The casino's annual marketing budget was $17 million and included many line items from sponsorships to promotions to public relations. One marketing method

the casino used was to have car-give-away contest. Before Livingston was hired, the casino held a number of 10-car giveaway promotions. CR 177, page 427. After Livingston was hired, he recommended using a more local dealership, rather than the out-of-state one that had been used in the past. CR 178, page 718. In 2006, Bret's Ford, a local dealership, was used for this event. Livingston had no involvement in that event. *Id.* page 719, 726.

In 2007, the casino had another 10-car giveaway promotion and again used Bret's Ford to obtain these vehicles. CR 178, page 721. The former chief financial officer for Chukchansi, Bruce King, said a 3-bid process had been adopted by the executive committed before the 2007 10-car purchase was made with Bret's Ford. CR 177, page 424-27. Livingston testified this giveaway was included in the marketing budget and was discussed at executive meetings before the vehicles were purchased. CR 178, page 721-22. King could not recall such discussions, but recalled discussing *not* making car purchases in that manner anymore. CR 177, page 398-99. They discussed not buying a whole fleet of cars. *Id*. page 399.

Livingston acknowledged that when Bret Northington called him about the car giveaway for 2007, Northington also offered to sell a Ford Mustang to Livingston, for his use, not the casino's. CR 178, page 726-27. Livingston admitted that he discussed both the car giveaway and his personal car purchase with Northington.

Northington personally drove this Mustang to Livingston, so Livingston could test drive it. Northington drove Livingston's car back to the dealership. *Id*. page 728-29. Livingston had the Mustang for a week and a half before he went into the dealership to buy it. *Id*. 729-30.

On June 27, 2007, Livingston went to Bret's Ford to discuss the 10-car giveway and to buy the Mustang. Livingston said he picked out one car for the giveaway, a high-end Mustang, and discussed the kinds of he cars he wanted for the 10-car giveawy with Northington. CR 179, page 756. Livingston testified that Northington required a $20,000 deposit to save this high-end Mustang for the 10-car purchase. CR 178, page 732.

Bruce Boren, a manager at Bret's Ford, met with Livingston regarding Livingston's personal purchase. Boren testified that Livingston said he would put $20,000 down as a deposit on the car he was buying that day. Livingston then gave Boren a Chukchansi corporate credit card. CR 178, page 526-27. After a number to tries, the dealership eventually was able to charge $10,000 on that corporate card that day. *Id.* Boren asked Livingston to authorize a later charge of another $10,000 to this card. Livingston gave that permission in writing. *Id*. pages 528-30.

Livingston testified that Northington wanted the $20,000 deposit for the 10-car giveaway structured this way. CR 178, page 737. Livingston said he was

uncomfortable with it initially because people would not understand the paperwork. *Id*. But after he had spoken to a number of people at the casino about the charge, including the casino's controller, and the bank about running the credit card, he felt enough people knew what he was doing to ease his concern. *Id*. page 738-39; CR 179 page 751-52. After his conversation with Northington, Livingston believed that it was not unusual for dealerships to switch deposits amongst vehicles. *Id*. page 740.

Melissa Deharo, a finance manager for Bret's Ford, met with Livingston regarding his Mustang purchase. Livingston answered initially "yes" on a form question she had given him that asked if anything had been promised that was not in writing. CR 177, page 469-70. She explained she discussed this with Livingston, confirmed there were no other promises, and had him mark "no" and initial the paperwork. *Id*., page 470. Livingston, in contrast, explained that the "finance gal" simply told him that as Bret Northington was the owner, they did not need to mark this question yes. She had him initial it and change the answer to "no." CR 179, page 751.

Livingston returned to Bret's Ford in July 2007, accompanied by a new vice president of marketing for Chukchansi, Deborah Johnson. CR 179, page 757. According to Livingston, he wanted to introduce Johnson to Northington and help her understand how to do a car giveaway, as this was now part of her responsibility. *Id*.

He explained Johnson also wanted to buy a car for herself and wanted to be able to drive it back from the dealership. *Id*. page 758. Northington took the two to see a number of vehicles the dealership had staged for their review. Johnson picked nine more vehicles to go along with the high-end Mustang Livingston had reserved earlier. *Id*. Livingston then met with Northington who asked for an additional $5,000 deposit to secure these additional cars. Livingston paid this deposit with his corporate credit card. *Id*. page 759-62. He was given a receipt which he submitted to the casino accounting department after noting on it that it was for a marketing promotional line. *Id*. pages 761-62. He said he left the dealership while Johnson was filling out paperwork for her personal car purchase. He denied that he picked out her car and said he did not know the dealership had put the $5,000 corporate deposit on Johnson's personal car purchase. *Id*. page 764.

Johnson told a very different story. She explained that once at the dealership, Livingston pointed to a car, a Ford Fusion, and told her that was the car she was going to buy that day. CR 178, page 571. She reported that Livingston told her that he was going to pay $5,000 down on the Ford Fusion, and that he would take care of it. He told her not to say anything about it because he was just going to bury it within the 10 cars that were at Bret's Ford that were going to be part of the giveaway at the casino. *Id*. The dealership's paperwork and contract that she signed for the Fusion

showed a $5,000 down payment that she admitted she did not make. *Id*. pages 574-75. She explained she was uncomfortable with the whole thing, but said nothing and bought the car. *Id*. page 577. She later tried to return the Fusion, but the dealership would not take it back. *Id*.

Several weeks later, Johnson went to Phil Rooney, the vice-president of human resources for Chukchansi, and told him about the Fusion transaction and asked his advice. She explained Rooney brought in Bruce King, the chief financial officer, and she repeated her concerns. *Id*. pages 578-79. King told Rooney they needed to take the matter to Livingston. Johnson said she was then forced to resign by Livingston. CR 178, page 579.

King testified that the first time he was aware of an investigation concerning the 10-car purchase giveaway was not until after Livingston left in January 2008. An investigator, Scott Nelson, interviewed him. The government asked King if "that was the first time anybody associated with the casino discussed the car deal with you, as far as an investigation was concerned; is that correct?" King answered, "I believe that's all, yes." *Id*. page 416.

The government offered evidence that the price list for the 10-car purchase was inflated by $2500 per vehicle, while the price listing showed an offsetting $25,000

deposit had been not paid on these cars, but on the two cars purchased for Livignston and Johnson. CR 195, pages 1008-09.

4. AUCTION ITEMS

a. October 2006 Kitahara Auction

In October 2006, Livingston went to the Kitahara Foundation's charitable auction event held to support local nonprofits. CR 177, page 326. Fresno State athletics was one beneficiary that year. *Id*. page 328. At this auction, Livingston bid on and won a diamond necklace for $1,000. He then publically gave the necklace to Kelsi Bond, an assistant coach for Fresno's women's basketball team who had been modeling the item during the silent auction. *Id.* page 434-44. The casino was billed and paid for this necklace. CR 177, page 282-286.

Livingston acknowledged all of this. He explained his intention in bidding for the necklace was to show Chukchansi as generous. He could do that right in front of everybody by not even keeping the necklace. He said there were 8 to 10 people at each and at least 20 tables in the room. So his gift was made very publically. He also explained that the Chukchani's Board had approved of giving away items at events like this that were purchased by the casino with promotion dollars. CR 178, page 702.

Phil Rooney confirmed that Livingston gave the necklace to the basketball coach in front of everyone. Rooney reported that once Livingston gave it to the assistant coach, people clapped and complimented the donation. CR 179, page 897. Rooney described Livingston as being fine at the time, with a clear state of mind. *Id*. page 899. Rooney agreed that he had told an investigator for the tribe that there was no legitimate business purpose for Livingston to buy this necklace and give it to the coach. *Id*.

b. May 2007 Mercedes Benz - St. Agnes Benefit

Denee Conner, the director of the St. Agnes Foundation, helped run the Mercedes-Benz Championship in May of 2007. This was a three-day series of events: a tennis tournament; a black tie dinner; and a golf tournament, followed by an awards banquet. CR 176, pages 177, 180. She sold two golf packages that had been donated through Mercedes-Benz USA. The buyers bought a vacation package to Hawaii and the right to play in the National Dealer Championship. *Id*. page 182. She had intended to auction off both trips which were each valued at $6,800. She sold one at auction. But she held one and sold it directly to Livingston for $7,000 after her boss, Greg Walaitis, asked her to hold do so. *Id*. pages 182-84, 189, 219. Livingston paid for this item with his Chukchansi corporate credit card. *Id*. page 181, 184. Chukchanis paid for the trip. CR 177, pages 288-291.

In past years, the golfer who won of the local Mercedes-Benz charity golf tournament won this Hawaiian trip as the prize. *Id*. page 186. In 2007, by contrast, the winning team of the local tournament won a one-night stay at a golf and spa resort in Half Moon Bay, with a free round of golf. *Id*. page 191. The 2007 winning local golf team consisted of Dan Camp, a St. Agnes Medical Center vice-president; Greg Walaitis, Ms. Conner's boss at the time and vice-president of the foundation, Jeff Livingston; and a friend of theirs, Ed Dunkel. *Id*. page 192.

Mr. Dunkel testified that as part of the winning foursome, he had won the Half Moon Bay stay and round of golf. CR 195, page 1032. He did not know if there were any individual prizes for a trip to Hawaii given away. *Id*. page 1033.

Mr. Walaitis recalled the golf tournament, in part because it was his first day working for St. Agnes Foundation. He had invited Livingston and the others to golf in his foursome. CR 192, page 405. He recalls winning a Half Moon Bay trip as the gold tournament prize. *Id*. pages 406-07. He admitted discussing taking the Hawaii Mercedes-Benz trip with Livingston. *Id*. He believed that Livingston was going to purchase an additional trip to Hawaii. *Id.* Ms. Conner agreed that Walaitis asked her to find out if another trip was available for purchase. CR 176, page 216. She was not able to get another trip. *Id*. pages 217-18.

Livingston explained that at the time of the tournament and when he took the trip to Hawaii, he had honestly believed that he had won a Mercedes-Benz Hawaii trip and had bought a second trip. In going to Hawaii with his wife, he thought he was using his own trip. CR 179, page 800. He did not learn differently until trial preparations in this case. *Id.* page 802.

Livingston's foursome won the local tournament and he was the overall low-scorer. He explained that he knew Walaitis because Walaitis had worked for Fresno State and had initiated discussions that lead to Chukchansi entering into a memorandum of understanding to donate $1.5 million to Fresno State over six years. CR 179, page 772. After Walaitis moved to St. Agnes, Livingston said Walaitis invited him to play on a foursome at the St. Agnes Mercedes-Benz golf tournament, which he described as a competitive tournament. *Id*. page 773. Livingston understood the winner of the low score would win the trip to Hawaii. His understanding was based on something somebody else told him, and in part, on literature at the actual event. *Id*. pages 773-74.

The golf game took hours to play. During the game, Walaitis talked with him. Livingston understood from the conversations that St. Agnes Foundation wanted Chuckchansi to make a "naming rights" donation on a heart center. *Id*. pages 776-77.

Livingston explained that he initially considered taking Walaitis to Hawaii as a guest. He thought Walaitis interest in a heart center donation might be a way for Livingston to gain health care for the tribe at minimal cost over time. CR 179, page 786. Though if he could get another trip, what he thought was a third trip, he was going to use those two purchased trips to entertain a high-end casino customer and the customer's guests. *Id*. pages 784-86.

He had hosted Walaitis on another trip (to San Diego) with Board knowledge and, he believed, approval. CR 179, pages 790-93. Walaitis, in turn, had hosted Livingston and his family in Phoenix to show Livingston the health center there. *Id*. pages 793-94, 800.

c. October 2007 Kitahara Golf Classic

Livingston did not attend the 2007 Kitahara silent auction, but left his maximum bid amounts with Kristine Ballecer, a cochair for the event. CR 177, pages 326, 336-37. Livingston won bids and bought a Monterey Peninsula golf package, a framed and signed Masters Green Jacket, a Phil Mickeson/Mike Weir signed photo and a Dave Matthews Band signed fiddle. *Id*. page 338. Livingston charged all of these items using the Chukchansi corporate credit card. *Id*. page 343. Coach Bond offered to deliver these items, as Livingston was not present to pick them up. *Id*.

Livingston agreed he bought these items using the corporate credit card, but explained he brought all these items to the casino. Coach Bond called him to arrange for delivery. As Livingston was at Fresno State meeting not far from Bond's office when she called, he arranged to meet her in the parking lot of near football office. There, she delivered all the items to him save for the Master's jacket. CR 178, pages 707-08. His car was too small for the large frame. Livingston asked Bond if she would take it to the San Joaquin Country Club, where he was going to be golfing later that day, and leave it with the Pro Shop. *Id*. page 708. He then had someone deliver it to his home. *Id.* page 708-09. Livingston testified that he brought all these items to the casino. He denied taking or keeping any of these. *Id*.

Bruce King testified that there was no record the casino received the Hawaii golf vacation package, the Masters jacket, the photo or the fiddle. CR 177, page 378-80. King also said he would have expected Livingston to tell him about some of these items, but Livingston never did. *Id*. page 387.

Ballecer testified that the Monterey trip was never used. When she called Chukchansi to ask about this, she learned Livingston no longer worked at the casino. She faxed paperwork concerning the Monterey golf trip to Chuckchansi. CR 177, 354-55.

After the close of the evidence, the government announced that it was "not pursuing" the Monterey package. CR 195, page 919. The government believed there was not evidence to show the Monterey package was not returned to the casino. CR 195, pages 923-929. The district court refused to tell the jury that the government has conceded that the 2007 Monterey golf package was not stolen. *Id*. page 929.

5. 404(B) EVIDENCE - SAVE MART SHOOTOUT AUCTION

In October 2007, a charity golf tournament was held that benefitted children's charities and hospitals in the Fresno area. The Save Mart Shootout was named for it's principal sponsor. CR 177, page 445. After the golf tournament, there was a dinner at which items are auctioned both live and silently for charity. Jeff Corbett, a senior director of operations for a sports management company, oversaw the auction that year. He testified that Jeff Livingston made auction purchases at this event. He recalled that Livingston bought for $4,000, a 2005 USC championship football team-signed helmet. *Id*. page 450. He also bought a signed Annika Sorenstam pro golf bag with a set of Callaway irons. *Id*. pages 447, 449-50. Corbett recalled helping Livingston take these items to his car. *Id*. pages 450-54. Livingston paid for these items using his Chukchansi corporate credit card. *Id*. pages 302-06; 450-51.

Livingston acknowledged he made these purchases. CR 178, pages 712-14. One of the sponsors at this event was a competitor casino, Table Mountain. *Id*. page 714. Livingston explained he bought these items to promote the casino. He felt the bids cost less than a sponsorship and, by bidding high, he could steal the limelight for Chukchansi, while also having it be seen as generous and giving. Livingston also believed these items would be extremely well used at Chukchansi. He had in mind offering these items at the Chukchansi's Super Bowl event later in 2008. He testified he brought back these purchases to Chukchansi and gave them to the marketing department. He explained that plans for the USC helmet and the tour bag were discussed at the casino's operations meetings. *Id*. page 714. Livingston denied he kept or used either item. *Id*. page 717.

Bruce King testified that the casino never received the USC helmet. CR 177, pages 383-84. He was not aware of it receiving the Annika Sorenstam bag, but did know the casino had sets of Callaway irons. He could not say whether any of these sets were the same set as those that came with the Sorenstam bag from this auction. *Id*. pages 385-86. King also explained that he would not know when marketing received an item. The process called for the item purchased to go to marketing, the receipt went to accounting. Marketing and accounting were to cross check their records. If an item was valued at more than $1,500, then accounting would have to

physically verify its receipt. If something was missing, a special investigator was supposed to be contacted. King himself was not responsible for physically going and seeing that items were received. He relied on people in the accounting and marketing departments to do their jobs. CR 177, pages 417-20.

Howard Davies, an investigator for the Picayune Tribal Gaming Commission, testified that he searched the casino for items Lvingston had purchased. CR 195, pages 993-94. He said he did not find any of the items bought at the Kitahara Foundation auction (the Masters jacket, the Phil Mickelson/Mike Weir signed photo, or the Dave Matthews Band fiddle) or the golf bag or USC helmet from the SaveMart event. *Id*. pages 994-96. He interviewed people in marketing and searched offices and warehouses and other structures. He found no evidence these items were ever at the casino. *Id*. page 996. Davies also said he interviewed Livingston in January 2008 regarding these items. He said Livingston told him then that the items were left at the auction to be redistributed by the auction people. CR 195, page 996. He claimed Livingston did not tell him that they had been brought back to the casino. CR 195, page 997.

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V. SUMMARY OF ARGUMENT

The government initially charged Mr. Livingston with two counts of theft from an Indian gaming establishment, 18 U.S.C. § 1168(b). When that trial ended without a verdict, it superseded by adding another theft count and six mail fraud counts. Although aware of the issue, the superseding indictment failed to allege an essential and factually disputed element of a section 1168 charge – that the theft was from a gaming establishment located on "Indian lands." The jury instruction expanded this hole in the indictment by failing to tell the jury this was a necessary element of the offense for conviction.

The indictment's lack of specificity in charging the mail fraud counts also permitted the jury to reach verdict without any assurance the charges tried were the same as those the grand jury had in mind when it returned the indictment. These counts generically described purchases as "not limited to, vacation travel, downpayments on personal vehicles, golf packages, jewelry, and autographed sports and music memorabilia." Yet many different trips and golf packages was presented in evidence, including a Monterey trip the government ultimately conceded it had failed to prove. The lack of specificity left no assurance that the allegations the grand jury intended were the subject of the jury's deliberations at trial.

The jury instructions also failed to properly instruct the jury regarding mail fraud. Livingston admitted that he knew the paperwork Bret Northington had had prepared for his own car purchased listed a $20,000 down payment Livingston not made on his car; Livingston explained it had been made to reserve a high-end car for Chukchansi for a 10-car giveaway promotion, but that Northington wanted it documented on the open file for Livingston's personal car. By not properly instructing the jury that "an intent to defraud" required more than simply an "intent to deceive," the trial court allowed the jury to find Livingston acted with intent defraud merely by agreeing to a deceptive document. Even if the jury believed Livingston's version of events, that he did not intent to defraud the casino in this transaction, the jury could have concluded under the instructions had an intent to defraud. Once so labeled, this error spills over to its consideration of all the other counts.

This instructional error was aggravated by the admission of propensity evidence that the government failed prove met the foundational requirements of permitted 404(b) evidence.

VI. ARGUMENT

A. THE INDICTMENT WAS INSUFFICIENT

The sufficiency of an indictment is reviewed de novo. *See United States v. Rodriguez*, 360 F.3d 949, 958 (9th Cir. 2004); *United States v. Shryock*, 342 F.3d 948, 988 (9th Cir. 2003), *cert. denied*, 541 U.S. 965 (2004). A district court's decision whether to dismiss an indictment based on its interpretation of a federal statute is also reviewed *de novo*. *See, e.g.*, *United States v. W.R. Grace*, 504 F.3d 745, 751 (9th Cir. 2007).

1. THEFT BY EMPLOYEES OR OFFICERS OF GAMING ESTABLISHMENTS ON INDIAN LANDS, COUNTS 7-9.

Even though Livingston raised the "Indian lands" issue twice before the superseding indictment was filed, the superseding indictment failed to allege that the Chukchansi casino was on "Indian land" at the time of the offenses. *See* CR 80, pages 5-7; ER 8-10. Livingston moved to dismiss. CR 87-1, page 8.

a. Governing Standards

The Fifth Amendment requires an indictment by grand jury; its Due Process Clause requires an indictment that is sufficiently detailed. An indictment is sufficient if it contains the elements of the charged crime in adequate detail to inform the defendant of the charge and to enable him to plead double jeopardy. *Hamling v.*

United States, 418 U.S. 87, 117 (1974). Two corollary purposes of an indictment are: (1) to ensure that the defendants are being prosecuted on the basis of the facts presented to the grand jury, and (2) to allow the court to determine the sufficiency of the indictment. *Russell v. United States*, 369 U.S. 749, 760-61 (1962). An indictment must contain the elements of the offense intended to be charged; it must also sufficiently apprise the defendant of the charges against him to enable him to prepare his defense and to plead jeopardy against a later prosecution. *Russell*, 369 U.S. at 763-764; *see also Hamling*, 418 U.S. at 117; *United States v. Buckley*, 689 F.2d 893, 896 (9th Cir. 1982). The language of the statute "may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *Hamling*, 418 U.S. at 621. "The failure of an indictment to detail each element of the charged offense generally constitutes a fatal defect." *United States v. Keith*, 605 F.2d 462, 464 (9th Cir. 1979); *see also Russell*, 369 U.S. at 764. The failure of an indictment to allege sufficient facts requires reversal of a conviction. *See Russell*, 369 U.S. at 754-755 (reversal of conviction for failure to answer questions before a congressional committee based on insufficiency of indictment); *Cecil*, 608 F.2d at 1295 (reversal of conviction for conspiracy to import and distribute marijuana based on insufficiency of the

indictment); *Keith*, 605 F.2d at 463 (reversal of conviction for involuntary manslaughter based on insufficiency of the indictment); *see also United States v. Curtis*, 506 F.2d 985 (10th Cir. 1974) (mail fraud indictment invalid for failure to identify with particularity the nature of the alleged scheme).

b. Theft Under 18 U.S.C. § 1168 Requires the Indictment Allege the Gaming Establishment Was On "Indian Lands" at the Time of the Offense

Section 1168, entitled "Theft by officers or employees of gaming establishments on Indian lands," is a federal criminal offense. The theft criminalized by it is one committed by "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 . . . ." *Id*. The federal jurisdictional basis of this offense is the location of the gaming establishment. The gaming establishment must be on "Indian lands." *See United States v. Bryant*, 664 F.3d 831, 832 (10th Cir. 2012)("The crime was against a gaming establishment licensed by the National Indian Gaming Association *that sits on territory subject to the jurisdiction of the United States*. Plainly, there was a crime against the United States.")(emphasis added).

Section 1168 is part of the Indian Gaming and Regulatory Act passed in 1988. The IGRA is designed to regulate gaming on Indian lands. As the district court concluded in this Livingston's own case:

> "[T]he IGRA restricts approval of gaming on Indian lands. The Chairman of the NIGC "shall" approve an ordinance only if it meets the requirements of the IGRA. 25 U.S.C. §2710(e). One of the requirements of NIGC approval of a gaming ordinance is that the gaming establishment must be located on "Indian lands." "IGRA limits gaming to locations on Indian lands' as defined in 25 U.S.C. §2703(4)." *N. County Comty. Alliance, Inc. v. Salazar*, 573 F.3d 738, 741 (9th Cir. 2009). *See also*, COHEN'S HANDBOOK ON FEDERAL INDIAN LAW , §12.02 (2009) ("Gaming is permitted only on *Indian lands*.") (emphasis in original).

United States v. Livingston, 2010 U.S. Dist. LEXIS 97598, *24 (E.D Ca. Sept. 1, 2010)(unpublished); CR 76, page 13: ER 23.

Here, the superseding indictment failed to allege that the gaming establishment was located on Indian lands. The government argued in district court that the facts would show that the casino is locate on "Indian lands." *See* CR 91, pages 12-15. It also argued the superseding indictment tracked the statutory language and did not need to include an allegation that the casino was on "Indian lands."[6/] Relying on

[6] Such an argument suggests the government did not inform the grand jury that it had to determine whether there was evidence to support such a finding.`

Natural Resource Defense Council v. EPA, 915 F.2d 1314 (9th Cir. 1990), the government argued the "fact that the phrase 'Indian lands' may appear in the heading of the statute is irrelevant" as the statutory text of 18 U.S.C. § 1168(b) only refers to "Indian tribe." CR 91, page 8. But *Natural Resource Defense Council* addresses a question of statutory construction and held that "words in the title of a statute or the heading of a section can shed light on the meaning of an ambiguous word or phrase in the text of a statute" but such text "cannot *create* an ambiguity where none otherwise would exist." 915 F.2d at 1321 (emphasis added).

Here, there is no need to interpret an ambiguous statute. The government and the district court ultimately accepted that the government had the burden of proving beyond a reasonable doubt that the Chukchansi casino was located on "Indian land" at the time of the alleged thefts. *See* CR 91, pages 12-15; CR 94, page 9; ER 9 (adopting earlier ruling that "[[t]o establish] the element of this crime, the government must prove at trial beyond a reasonable doubt that Casino was on Indian land at the time in question.") Yet there are no facts alleged in the superseding indictment that assures us that any evidence of the land's status was presented to the grand jury, as required. *See*, *Russell*, 369 U.S. at 760-61 (indictment's purposes includes ensure that defendant is being prosecuted on the basis of the facts presented to the grand jury).

The superseding indictment gives no indication that the grand jury determined there was probable cause to believe the Chukchansi casino was on Indian lands. The government, by not requiring the grand jury to consider and allege this necessary element in the superseding indictment, and the district court, by denying the motion to dismiss, ignored that the grand jury functions under the Fifth Amendment are more than simply to give notice of the nature of the charges. As the Supreme Court in *Vasquez v. Hillery*, 474 U.S. 254 (1986),[7] the grand jury "does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not." 474 U.S. at 263. Rather, the grand jury has the power to select "a greater offense or a lesser offense." *Id.* "Moreover," the Court continued, "the grand jury is not bound to indict in every case where a conviction can be obtained." *Id*. Thus, "even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come." *Id*.

As noted earlier, the charged offense, section 1168(b), is part of a broader act, the IGRA. The precondition to congressional authority to regulate Indian gaming is

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[7] *Hillery*'s discussion arose in a different context – discrimination in the selection of the grand jurors.

the gaming's presence on "Indian land." The IGRA established an independent federal regulatory authority for gaming on Indian lands, federal standards for gaming on Indian lands, and the National Indian Gaming Commission (NIGC). That commission only has authority to regulate gaming on "Indian lands." *See* 25 U.S.C. § 2710 (detailing classes of gaming the Commission can regulate; each must be "on Indian lands."); *id*. § 2702(3) (declaring "establishment of independent Federal regulatory authority for gaming *on Indian lands*, the establishment of Federal standards for gaming *on Indian lands*, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue."); *id*. § 2701(3) (congressional finding that "existing Federal law does not provide clear standards or regulations for the conduct of gaming *on Indian lands*"). In this larger context, it is clear that section 1168 unambiguously required proof that the casino was on "Indian lands" as that is one precondition to gaining approval of a tribal gaming ordinance from the NIGC. As this necessary element is not alleged in the superseding indictment, this indictment was fatally defective.

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2. THE SUPERSEDING INDICTMENT'S MAIL FRAUD (COUNTS 1-6) & LAST THEFT (COUNT 9) WERE CONSTITUTIONALLY INSUFFICIENT

Livingston also moved to dismiss the superseding indictment because it failed to adequately allege facts that fairly advised him of the mail fraud charges, count 1-6, and the last theft allegation, count 9, in violation of his rights under the Fifth and Sixth Amendments of the Constitution. CR 87-2, pages 1, 5-8, 10-11.

a. Mail Fraud Counts

This Court has clearly held that mail fraud indictments "alleging a scheme to defraud must provide sufficient facts to fulfill the purposes of an indictment." *United States v. Buckley*, 689 F.2d 893, 897 (9th Cir. 1982). In *United States v. Cecil*, 608 F.2d 1294 (9th Cir. 1972), this Court explained "the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." 608 F.2d at 1297. *Cecil* also explained that the lack of specificity in the indictment undercuts the very key role the grand jury plays – to act as an intervenor between the government prosecutor and the accused:

> We begin our analysis stating the established rule that a bill of particulars cannot save an invalid indictment. *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L. Ed. 2d 240

> (1962); *United States v. Keith*, 605 F.2d 462, 464 (9th Cir. 1979); *United States v. Nance*, 174 U.S.App.D.C. 472, 474, 533 F.2d 699, 701 (D.C. Cir. 1976). The very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. *Russell v. United States*, 369 U.S. at 771, 82 S. Ct. 1038 (citing *Stirone v. United States*, 361 U.S. 212, 218, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960)). If a bill of particulars were allowed to save an insufficient indictment, the role of the grand jury as intervenor would be circumvented. Rather than the assurance that a body of fellow citizens had assessed the facts and determined that an individual should face prosecution, the prosecutor would be in a position to second guess what actually happened within the grand jury and fill in the gaps with what he assumed transpired. The protection of a significant check on the power of the courts and prosecutors would thus be lost.

Cecil, 608 F.2d at 1296.

Both *Buckley* and the Tenth Circuit's decision *Cecil* relied upon with approval, *United States v. Curtis*, 506 F.2d 985 (10th Cir. 1974), specifically addressed the sufficiency of an indictment's mail fraud accusations.

In *Buckley*, this Court found the mail fraud allegations "barely sufficient." 689 F.2d at 900. In that case, the district court had dismissed the indictment on the ground it did not allege that a lobbyist disclosure form, mailed by Washington Water Power Company, contained false information. This Court reversed after concluding "the crucial allegation that Buckley made payments to legislators in 1975 and

intentionally omitted them from the disclosure form was necessarily implied in the three sentences of the indictment . . . ." 689 F.2d at 899. Concluding the defendants had sufficient notice from the indictment of the charged crime to prepare a defense and plead double jeopardy, "despite the fact that the indictment was lengthy, confusing, and largely irrelevant" this Court reversed the district court's decision. *Id*.

In *Curtis*, however, the appellate court vacated the mail fraud convictions because the indictment "pleads little more than the statutory language without any fair indication of the nature or character of the scheme or artifice relied upon, or the false pretenses, misrepresentations or promises forming a part of it." *Curtis*, 506 F.2d at 992. The court found "surplusage set out in connection with allegations of mailing, and the masking of acts, documents or conduct innocuous in themselves by appelations of 'falsity' did more to confuse than to clarify. The trial court's instructions, however accurate, could not have resuscitated these fatally defective charges . . . ." *Id*.

In Mr. Livingston's case, the mail fraud counts in the superseding indictment contained conclusory, not factual, statements and failed to provide notice of the conduct allegedly committed or to what jeopardy attaches. Paragraph 3 of the superseding indictment alleges, in conclusory terms, that Livingston committed mail fraud by devising a scheme to defraud Chukchansi, and to obtain money and property

from Chukchansi by means of materially false and fraudulent pretenses, representations and promises. CR 80, page 2. The only description of the alleged false and fraudulent pretenses, representations and promises is found paragraph 4, which alleged Livingston "purported to make such purchases for the benefit of Chukchansi." CR 80, page 2. It also alleges Livingston made purchases for the benefit of himself and "other private individuals," but does not identify these private individuals. It alleges the fraudulently obtained goods and benefits "included, but were not limited to, vacation travel, downpayments on personal vehicles, golf packages, jewelry and autographed sports and music memorabilia." CR 80, pages 2 (¶4) and 7 (¶17). The indictment further alleged Livingston "directed Chukchansi staff to pay for certain personal purchases." CR 80, pages 2-3, ¶5.

No factual allegations identify what, if anything, was conveyed, implied or professed outwardly by Livingston to purport to make such purchases for the benefit of Chukchansi, who Livingston is alleged to have said it to, when it was said, the purchases it concerned, the "private individuals" who received the purchases or the Chukchansi staff that was directed to make the purchases. The indictment provides no notice as to what scheme existed, and what false and fraudulent pretenses, representations and promises were made, in relation to any mail fraud count. The indictment does allege "Such personal purchases, goods, and benefits included, but

were not limited to, vacation travel, downpayments on personal vehicles, golf packages, jewelry, and autographed sports and music memorabilia." CR 80, page 2, ¶4. Such an unlimited allegation and general description fails to identify the purchases, goods and benefits at issue with the specificity constitutionally needed. We are left without "a statement of the facts and circumstances as will inform the accused of the specific offence . . . ." *Cecil,* 608 F.2d at 1297. And in a case that included many different trips and golf packages, travel to locals in Half Moon Bay, Hawaii, Idaho, Monterey, Napa Valley, Pebble Beach, Phoenix, San Diego, some clearly including golf, there is no assurance what allegations the grand jury intended. Thus, the very purpose of grand jury indictment is defeated. *See Russell*, 369 U.S. at 771; *Stirone*, 361 U.S. at 218.

b. Count 9 - Theft

In addition to the essential, but missing "Indian lands" element, the superseding indictment's Count 9, failed to provide sufficient notice of what was stolen and when it was stolen. Count 9 alleges from "about October of 2007 and continuing until in and about December 2007", Mr. Livingston stole "sports and music memorabilia". CR 80, page 7, ¶ 17; ER 10. Nothing more identifies what the grand jury believed Livingston stole or to what property jeopardy. This allegation is less specific than any of the mail fraud counts in that the mail fraud counts at least were tied to bank

commercial card statements and checks described by a specified mailing date. CR 80, pages 4-5; ER 7-8. Like the travel and golf packages discussed above, numerous items of sports memorabilia were in evidence in Livingston's case. Once again, there is no assurance that what the grand jury indicted Livingston for on this count is the specific crime he was convicted of committing.

For all the above reasons, the indictment was insufficient and the district court's judgment should be vacated and the indictment dismissed.

B. THE JURY INSTRUCTIONS FAILED TO PROPERLY DEFINE THE ELEMENTS OF THE THEFT AND MAIL FRAUD OFFENSES

1. STANDARD OF REVIEW

Whether jury instructions misstate an element of a crime or inadequately cover a defendant's proffered defense are questions of law reviewed *de novo*. *United States v. Romo-Romo*, 246 F.3d 1272, 1274 (9th Cir. 2001) ("Whether a jury instruction misstates elements of a statutory crime is a question of law reviewed de novo.") *United States v. Leyva*, 282 F.3d 623, 625 (9th Cir. 2002) (reviewing rejected instruction). The Court seeks to determine "whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation." *United States v. Cherer*, 513 F.3d 1150, 1155 (9th Cir. 2008).

/ / /

2. THE DISTRICT COURT FAILED TO INSTRUCT THE JURY THAT BEFORE IT COULD CONVICT ON THE THEFT COUNTS 7-9, IT HAD TO FIND BEYOND A REASONABLE DOUBT THAT THE GAMING ESTABLISHMENT WAS ON INDIAN LANDS AT THE TIME OF THE ALLEGED OFFENSES

Regarding the "Theft from Indian Gaming Establishment on Indian Lands" charges, 18 U.S.C. § 1168(b) and counts 7-9, Livingston proffered a jury instruction setting out the elements of the offense. Included in Livingston's list of elements was the instruction: "In order for the defendant to be found guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt: . . . Second, the gaming establishment was on Indian land at the time in question;" CR 117, page 3; CR 116, pages 2, 9 (ER 84). The government offered a different instruction that did not include this element. CR 123, page 38; ER 89. The district court gave the government's instruction:

> Defendant Livingston is charged in Counts 7 through 9 of the indictment with theft by an officer or employee of a gaming establishment on Indian land, in violation of section 11368(b) of Title 18 of the United States Code. For Defendant Livingston to be found guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:
>
> First, Defendant Livingston was an officer or employee of an Indian gaming establishment.

> Second, the gaming establishment was operated by or for or licensed by an Indian tribe pursuant to an ordinance, a Resolution approved by the National Indian Gaming Commission.
>
> Third, on or about the dates alleged in the indictment, Defendant Livingston embezzled, willfully misapplied, or took with the intent to steal monies, funds, assets or other property of the Indian gaming establishment.
>
> And, fourth, that the value of such monies, funds, assets or other property was in excess of $1,000.

CR 195, page 1040; CR 140, page 29 (No. 27); ER 118. *Compare* CR 123, page 38; ER 89.

Several instructions later, the district court also defined the term "Indian lands" as meaning:

> INSTRUCTION NO. 34
>
> INDIAN LANDS–Defined
>
> The term "Indian lands" means :
>
> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

CR 140, page 36; ER 125. This same instruction was offered by Livingston. CR 116, page 10; CR 117, page 4; ER 85.

Both the government and Livingston addressed their conflicting views regarding the evidence on this element in closing. *See* CR 195, pages 1070, 1111 (government discussing evidence that it believe showed the gaming establishment was on Indian lands); CR 195, pages 1092-95 (defense arguing land was not "Indian lands," not placed into trust of the government until two weeks after the alleged offenses). As discussed earlier, the district court also had concluded in pretrial proceedings that the government had the burden of proving beyond a reasonable doubt that the casino was located on "Indian lands." CR 76, page 13; ER 23. Yet the district court did not instruct the jury that such a requirement existed. It told the jury its definition of "Indian lands," but not what to do with it or it how that definition fit into its deliberations on counts 7-9.

As the jury instructions omitted a necessary element of the offense and as there was disputed evidence regarding this element, the jury's verdict was prejudicially tainted by the inaccurate instruction. The convictions on these counts 7-9 should be vacated.

/ / /

3. JURY INSTRUCTION DEFINING "INTENT TO DEFRAUD" INCORRECTLY STATED THE LAW GOVERNING MAIL FRAUD, 18 U.S.C. § 1341

For the mail fraud counts (1-6), Livingston asked for a modified Ninth Circuit model instruction that explained "False representations or statements or omissions of material facts do not amount to fraud unless done with fraudulent intent." CR 116, page 8, citing *United States v. Yip*, 930 F.2d 142, 146-147 (2nd Cir. 1991). The government asked for the model instruction that defines "the intent to defraud" as "the intent to deceive or cheat." This instruction, by being disjunctive, failed to require a finding that any intent to deceive be for purposes of causing some financial loss to another. It is thus an incorrect statement of the law governing federal mail fraud.

There is nothing in the plain language of the mail fraud statute that suggests the required elements for a conviction can be satisfied by merely an intent to deceive. The statutes require either a scheme to defraud or a scheme for obtaining money. The statute then requires that if the scheme is to obtain money or property, it must also involve the use of false or fraudulent pretenses. The use of false pretenses, however, is a separate element from the scheme to defraud or the scheme to obtain money.

Livingston's jury was not instructed on a required element of the offenses charged: an intent to defraud rather than a mere intent to deceive. *See United States*

v. Starr, 816 F. 2d 94, 98 (2d Cir. 1987); *Yip*, 930 F.2d at 146-147; *but see, United States v. Shipsey*, 2004 U.S. App. LEXIS 9304 (9th Cir. 2004). This hole in the instructions was particularly prejudicial in Mr. Livingston's case. In his own testimony, he explained that he knew the paperwork the car dealership put together on his own Mustang purchase was incorrect because it showed a $20,000 down payment he had not made for that car. He explained that he was not comfortable with it because people would not understand the paperwork. It simply did not accurately reflect the payment he believed he was making to reserve the cars for the casino's 10-car give-away promotion. CR 178, page 737. Thus, the jury could have credited his testimony as truthful and yet, under deceiving is enough standard, still conclude that Livingston was guilty because his own admissions demonstrated the he went along with paperwork that was deceptive -- it was inaccurate and misleading. His willingness to sign paperwork that was deceptive exposed him to conviction even though the jury could have believed that he had no intent to defraud the casino of this down payment. Once labeled under the instructions some one who acted with an intent to defraud by his own admissions, his credibility it is adversely affected as to all the other counts.

This is a case in which the deception was not intended to be fraudulent, even though the deception was understood. The jury could have determined Livingston

was guilty even though it believed that Livingston truly believed the money was to reserve the 10 cars and that he honestly believed Bret Northington when Northington led him to believe it was common practice to move deposits between car accounts as Northington had proposed. *Cf United States v. Molinaro*, 11 F.3d 853, 863 (9th Cir.1993)(approving instruction in bank fraud case that explained jury could determine whether defendant had an honest, good faith belief in the truth of specific misrepresentations alleged in determining whether or not defendant acted with intent to defraud; but not his belief that investors were going to recoup investments as promised).

C. DISTRICT COURT ERRED BY ADMITTING "PRIOR BAD ACT" EVIDENCE UNDER RULE 404(B)

1. STANDARD OF REVIEW

Whether evidence is relevant to other acts or to the crime charged is reviewed *de novo*. *See United States v. Castillo*, 181 F.3d 1129, 1134 (9th Cir. 1999).

2. GOVERNMENT FAILED TO ESTABLISH PRIOR ACTS BY PREPONDERANCE OF THE EVIDENCE

Pretrial, Livingston sought to preclude the admission of prohibited propensity evidence that he believed the government could not prove was stolen: the Annika Sorenstam golf bag and clubs and a USC football helmet. CR 99. To prove Livingston had taken these 2007 "Save Mart Shootout" auction items, the government proffered that the casino investigator Howard Davies would testify that the casino never received these items. CR 114, page 35:13-16; ER 35. As the defense counsel had argued pretrial, Davies did not so testify. Instead, Davies testified that he searched the casino, its outbuildings and the like, and that he did not find the golf bag or the USC helmet. CR 195, page 994-96. Nor did he find evidence that these items had ever been at the casino. *Id*. Davies did not testify that he found a inventory control system at the casino that assured him that the absence of any evidence proved that these items were never at the casino. In fact, Don Lull, a player development

host for the casino explained that there was not an itemization procedure where the items would be logged in or checked in or anything like that. An item purchased at an auction would be put in a secure location. These locations varied -- hosts' offices were used as was a cage that the purchasing department had access. CR 195, pages 980-82.

Nor did the testimony regarding the marketing and accounting departments' cross-checking system provide this foundation. While Mr. King testified about the process, King admitted that he did not personally do any of the physical verification work to see that the item purchased was received. He relied on people in the accounting and marketing departments to do their jobs. CR 177, pages 417-20. None of them testified. In fact, King was asked if the casino had received a 2005 USC championship football team-signed helmet. Before he was cut off, he answered, "No. I, however, saw a football helmet that may have been this helmet--" CR 177, page 383. He also admitted that the casino had Callaway clubs, *id.*, page 385, the same kind that Livingston purchased with the Annika Sorenstam golf bag. *See id*. page 447.

The district court had noted pretrial that if, it turned out that the government did not have a witness as it claimed in Mr. Davies, the defense "ought to be dancing in the streets with happiness." CR 114, page 37:2-9; ER 76. The government did not

have the witness or witnesses he believed it had. Yet, the district court did not declare a mistrial or instruct the jury to disregard this evidence that lacked the foundation to really be 404(b) evidence. As a result, the admission of the Save Mart auction evidence amounted to nothing more than unproven propensity evidence that should have been barred. The government had the duty to affirmatively prove these other auction items were not returned to the casino, as Livingston had claimed. The evidence the government offered at trail failed to affirmatively prove this foundational fact. Thus, this other acts evidence was not relevant and should not have been admitted. *See United States v. Curtin,* 489 F.3d 935, 944 (9th Cir. 2007) (en banc) ("Rule 404(b) is merely a clarification of the general rule precluding the shotgun use of extrinsic "bad man" evidence.") The district court erred in allowing this evidence to go to the jury and in failing to grant the defense motion for a mistrial.

/ / /

VII. CONCLUSION

For all the above reasons, the district court's judgment must be vacated.

Dated: May 7, 2012

Respectfully submitted,

DANIEL J. BRODERICK
Federal Defender

/s/ Ann C. McClintock
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Assistant Federal Defender

Attorneys for Defendant-Appellant
JEFF LIVINGSTON

STATEMENT OF RELATED CASES

Mr. Livingston knows of no other case currently pending before this Court which raises the same or closely related issues.

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that this brief is in Time New Roman, a proportionately-spaced typeface, 14 point, and contains 13,742 words.

Dated: May 7, 2012

s/ Ann C. McClintock
ANN C. McCLINTOCK
Assistant Federal Defender

C.A. No. 11-10520

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	D.C. No. 1:09-CR 00273 LJO
Plaintiff-Appellee,	)	(Eastern District, California, Fresno)
	)	
v.	)	**CERTIFICATE OF SERVICE**
	)	
JEFF LIVINGSTON,	)	
	)	
Defendant-Appellant.	)	
	)	

I hereby certify that on May 7, 2012, 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.

Dated: May 7, 2012 *s/ Ann C. McClintock*