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 REPLY BRIEF

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IN THE UNITED STATES COURT OF APPEALS

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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) **APPELLANT'S REPLY BRIEF**

I. INTRODUCTION

Mr. Livingston appeals his convictions, after two jury trials, for theft from an Indian gaming establishment (18 U.S.C. § 1168(b)) and mail fraud (18 U.S.C. § 1341). Livingston was the general manager of the Chukchansi casino and hotel from May 2005 through January 2008. CR 178, page 678. In essence, the government presented evidence to show Livingston abused his spending power to buy numerous items or services. *See e.g.,* Government's Brief, page 4-5. Livingston countered that the suspected purchases were within his standing purchasing authority and were intended to create good will for and market the Chukchansi casino and hotel to the larger Fresno area community. Livingston explained that he believed he had

won a trip to Hawaii that he took with his wife, but admitted that he now understood the records showed he was mistaken.

The jury found for the government, we believe, because of errors in the jury instructions and the improper admission of "prior bad acts" evidence under Federal Rule of Evidence 404(b). We also believe that the superseding indictment was defective because it failed to allege sufficiently detailed and necessary facts to support the crimes charged: it failed to allege the Chukchansi casino was on Indian lands as required for charging theft under 18 U.S.C. § 1168; it failed to allege sufficiently detailed facts to identify the objects of the mail fraud (counts 1-6) and the last theft allegation (count 9). Whether the indictment must allege, and the government must prove to the jury, that the Indian gaming establishment was on "Indian lands" for a valid conviction on the § 1168 counts appears to be an issue of first impression in this Circuit.[1/]

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[1] A Shepard's® search for cases that interpret section 1168 in this Circuit yields only two decisions from the district court in Mr. Livingston's own case. *United States v. Livingston*, 2011 U.S. Dist. LEXIS 13529 (E.D. Cal. Feb. 2, 2011), and *United States v. Livingston*, 2010 U.S. Dist. LEXIS 97598 (E.D. Cal. Sept. 1, 2010). There are no Ninth Circuit decisions and only one published out-of-circuit decision, *United States v. Bryant*, 664 F.3d 831 (10th Cir. 2012), that discusses the elements of § 1168 in any detail.

II. ARGUMENT

A. THEFT CONVICTIONS ARE INVALID

Regarding the theft convictions, there are two interrelated issues this Court must resolved. First, the superseding indictment failed to allege the Chukchansi's gaming establishment was located on "Indian lands" at the time of the offenses. Second, the jury instructions failed to tell the jury that the location of the casino -- whether it was on *Indian lands* or not -- was a necessary element before it could convict Livingston of theft under § 1168. Both of these issues ask a fundamental question - is the *Indian land* status of the property where a gaming establishment is located a necessary element of the theft charge.[2/]

1. Superseding Indictment Failed to Allege a Necessary Element of the 18 U.S.C. § 1168(b) Offence Charged, That the Casino Was on Indian Lands

The government's contends that the text of 18 U.S.C. § 1168(b) simply "does not require the indictment to specifically allege that the gaming establishment was

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[2] This question has the potential of becoming more contested as the state of California recently approved two large casinos to operated on nontribal lands. Under this authority, the Enterprise Rancheria and North Fork Rancheria plan casino-hotel complexes for Mariposa and Butte County. Jerry Brown Authoritzes California's First Off-Reservation Tribal Casinos, *L.A. Times* (August 31, 2012) (available at http://latimesblogs.latimes.com/california-politics/2012/08/jerry-brown-authorizes-californias-first-off-reservation-tribal-casinos-1.html).

located on Indian lands." Government's Brief, page 39. Tellingly, the government next asserts the "Indian lands" question was nonetheless "a factual issue of proof at trial – i.e., evidence to meet the government's burden to prove . . . the casino was operated pursuant to an [National Indian Gaming Commission or NIGC]-approved ordinance or resolution . . . ." Government's Brief, page 45. Alternatively, and in direct conflict with its first argument, the government also asserts "the casino's location on Indian lands was implicit in the superseding indictment's allegation that Chukchansi was operated pursuant to an ordinance approved by the NIGC . . . ." Government's Brief, page 46. If the government has to prove a fact in order to gain a conviction, that fact is an essential element of the offense. *See e.g., Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (any fact that increases the penalty for a crime must be submitted to jury); *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Here the government conceded in district court, and now in this Court, that it was obligated to prove that the casino was located on Indian lands at the times the superseding indictment claimed the thefts counts took place. *See* Government's Brief, pages 44-45. According to the government, this obligation was triggered only because it had to prove the Chukchansi casino was operated pursuant to an ordinance or resolution approved by the National Indian Gaming Commission and not because the Chukchansi casino had

to operate on Indian lands. *Id*. Yet, at the same time, the government concedes that the National Indian Gaming Commission could only give the Chukchansi approval for a gaming establishment that a was located on *Indian lands*. Government's Brief, page 26.

The government also misreads or misunderstands the relevance of the Tenth Circuit's *United States v. Bryant*, 664 F.3d 831 (10th Cir. 2012), decision. The government declares that *Bryant* "find[s] the indictment in that case sufficient" even though the language in the indictment did not include an allegation that the gaming establishment was located on Indian lands. Government's Brief, page 45. *Bryant* did not approve the indictment's lack "Indian lands" language. Rather, it rejected Ms. Bryant's challenge to the indictment that had been premised on her status – that she was neither an "officer, employee, or individual licensee." She had argued the statute could not be used against her. The *Bryant* decision rejected her argument because "the facts are that Ms. Bryant participated in a theft that involved an employee, and, as an aider and abetter, the law declares her a principal. If her sister [within whom she committed the theft] had not been a cashier at the casino, matters would have stood differently." *Id*. at 833. To Bryant's argument that she could not be held liable as an aider and abettor under 18 U.S.C. § 2 (she argued a theft from the Choktaw Nation is not a crime against the United States), the *Bryant* court held "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." *Id*.

The clear implication of *Bryant* is that jurisdictional basis for the § 1168(b) theft offense is territorial – that the casino was located on Indian lands and so subject to federal jurisdiction. The government misreads *Bryant* as directly approving the sufficiency of the indictment that lacked the Indian lands allegation. But this misreads the case. That issue was not put the test because it was not raised. Nonetheless *Bryant* bolsters Livingston's contention that the indictment, to properly allege a violation of § 1168(b), must include its jurisdictional basis, namely, that the gaming establishment's location has to be on Indian lands.[3/]

/ / /

[3] The ordinance or resolution from the National Indian Gaming Commission, though a prerequisite for running the casino, does not establish federal criminal jurisdiction. For example, if a person possesses a federal firearms license, he cannot automatically demand federal prosecution if he is gun shop or pawnshop is robbed. It is the status of the casino's location on Indian lands that gives territorial jurisdiction to the federal system.

2. Flawed Jury Instructions Failed to Direct the Jury's Deliberations to Consider Each Necessary and Essential Element of 18 U.S.C. § 1168

Regarding the theft-related jury instructions, the government agrees that Livingston asked the district court to include an instruction that required the jury to determine whether the casino was on "'Indian land at the time in question.'" Government's Brief, page 60. It also acknowledges that the district court ruled the Gaming Commission's approval letter permitted Chukchansi "gaming only on Indian lands." *Id*. page 61. Livingston asked for an instruction that defined the term "Indian lands." *Id*. With these statements, Livingston has no quarrel.

But the government continues to maintain that the status of the land where the Chukchansi casino was located was not an element of the offense that the jury had to consider. This we do contest. The government's brief twists Livingston's jury instruction claim into something unrecognizable and ends by claiming any error was invited by Livingston. This is clearly not accurate.

The jury instruction the trial court used for theft tracked the statutory language but failed to include an express requirement that the jury determine whether the casino was located on Indian lands. This error paralleled the indictment's failure to include this necessary element. But the district court had required the government

to prove the status of the land, admitted evidence regarding the title to the Chukchansi lands and survey analysis,[4/] yet gave the jury no instruction on what to do with the Indian lands status in its deliberations. The district court's definition of "Indian lands" did not fit into any of the issues the jury was asked to deliberate. This failure is not, as the government's brief mislabels it, a problem with giving an instruction that defined "Indian lands." It was failing to fit that instruction into the rest of the necessary elements of the § 1168(b) theft elements.

The government also argues that the "unrebutted evidence" presented at trial proved the Chukchansi casino was on Indian lands "at all relevant times." Government's Brief, page 62. That there was evidence to support the government's view of the evidence does not equate to that evidence be undisputed. The evidence also showed that the tribal lands were not placed into trust until the end of July 2007 -- after many of the alleged offenses took place. *See e.g.,* Government's Exhibit 9 (SER 0386); CR 195, pages 1092-95 (defense argument). The jury was responsible for making this decision. It was up to the jury, as it was told, to " accept it or reject [the expert opinion], and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the

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[4] *See e.g.*, CR 178, pages 621, 627 (witness Tim Jackson, land surveyor for the Bureau of Land Management).

other evidence in the case." CR 140, page 25 of 43 (ER page 114). Thus, the failure to properly include the "Indian lands" question as an essential element of the theft counts was error requiring this Court to vacate these convictions.

B. MAIL FRAUD CONVICTIONS ARE INVALID

Turning to the mail fraud convictions, there are again two issues before this Court. First, the superseding indictment was insufficiently specific.[5/] The second again concerns the jury instructions.

1. Superseding Indictment Failed to Adequately Allege Facts Needed for the Mail Fraud Charges, Count 1-6, and the Last Theft Allegation, Count 9.

The lack of specificity in the superseding indictment's description of the objections of the mail fraud and last theft count gives us no assurance that the jury tried the same charges as those grand jury had returned. The superseding indictment too broadly and generically described the subject of the mail fraud (purchases "not limited to, vacation travel, downpayments on personal vehicles, golf packages, jewelry, and autographed sports and music memorabilia"). As the evidence the jury

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[5] This lack of specificity also affected count 9's theft conviction concerning "sports and music memorabilia" allegedly taken about October-December of 2007. *See* Appellant's Opening Brief, pages 53-54.

received concerned many different trips and golf packages, including a Monterey trip the government conceded it had failed to prove, there is no assurance the allegations the grand jury intended were actually the subject of the jury's deliberations at trial. *See* Appellant's Opening Brief, pages 52-54 (describing the effectively "unlimited" scope of the allegations).

The government's reply claims the indictment gave "substantial detail." But aside from stating Livingston used his authority as general manager for Chukchansi's operations in this scheme, the government's discussion repeats the same generalized language as in the indictment -- "various types of goods and benefits" using bank credit card statements and identified Chukchansi checks. Government's Brief, pages 34-36. Such information fails to be specific or narrowing as a general matter, and certainly was not specific enough in the context of this case. The superseding indictment's language was unlimited and never identified an item taken by any description that was even close to unique or narrowing.[6/] As a result, the final charges from the grand jury fail to give any assurance that those charges are the same as the specific crimes the jury deliberated over at the end of the second trial. Nothing

[6] The superseding indictment's specific language reads: "Such personal purchases, goods, and benefits included, but were not limited to, vacation travel, downpayments [sic] on personal vehicles, golf packages, jewelry, and autographed sports and music memorabilia." CR 80, page 2; ER 5.

in the government's response gives assurance that the grand jury's check on governmental power was not circumvented by the superseding indictment's lack of specificity.

2. Jury Instructions Failed Define "Intent to Defraud" and Incorrectly Equated it to an Intent to Deceive

The second mail fraud issue returns our attention to the jury instructions. This time, the trial court failed to properly instruct the jury that a mail fraud conviction required it to find Livingston intended to cause some financial loss to the casino. This was prejudicial because Livingston admitted that he made mistakes and that not all the paperwork he signed for purchases was fully accurate. Under the instructions given, even if the jury believed Livingston's version of events, including his testimony that he did not intent to defraud the casino in any transaction, the jury could have concluded from his admissions that some paperwork was deceptive, meant that he had an "intent to deceive" and therefore an intent to defraud. Once so labeled, this error spilled over to the jury's consideration of all the other mail fraud counts.

The government simply defends the district court's instruction by pointing to its status as a model instruction. Government's Brief, page 49. An instruction's status as a model instruction does not grant it immunity from review or make it in infallible. Ninth Circuit Model Criminal Jury Instructions, CAVEAT, page iv (July

2010).

The government asserts, correctly, that the defense instruction would have added this sentence: "False representations or statements or omissions of material facts do not amount to fraud unless done with fraudulent intent." Government's Brief, page 51; *see also* CR 116, page 8, *citing United States v. Yip*, 930 F.2d 142, 146-147 (2nd Cir. 1991); CR 117, page 2; ER 83. But the government then errs by claiming this additional instruction was "fully covered by the model instruction given by the court . . . ." Government's Brief, page 51-52. The government cites for this coverage idea the same language that Livingston identified in the opening brief as creating the error because it did not include the excluded defense-offered clarification, that fraudulent intent means "the intent to deceive or cheat." Government's Brief, page 52. The government fails to admit that there are differences between deceiving and cheating,[7/] but argues that such an instructional error could only have affected count 4, which concerned the car purchase. *Id*. at pages 52-53. It also incorrectly argues that Livingston "waived any objection to the district court's definition of 'intent to defraud,' as his own proffered instructions twice included that very definition of

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[7] *See e.g., United States v. Alvarez*, 638 F. 3d 666, 673-74 (9th Cir. 2011) (Kozinski, C.J., concurring in the denial of rehearing *en banc*, on value of various forms of false statements).

intent. ER 83; SER 397." The two citations the government gives are separate filings made on the same day. While both (really the same one showing up twice) uses the disjunctive language found in the model instruction, Livingston also plainly asked that this language ("intent to deceive or cheat") be made clearer by proffering a modification that gave the caveat noted and quoted above (see footnote 5) that false representations are not enough. *See* ER 83.

The government claims at the start of its discussion of the mail fraud instructions that the district court's instructions covered adequately the defense's false-representations-are-not-enough instruction. Government's Brief, pages 51-52. But it fails to point out this coverage. A search through the instructions the trial court actually gave, found at ER 90-132, yields no such clarifying, limiting instruction.

The government also asserts that Livingston could not have been convicted for mail fraud for just signing Bret Northington's deceptive paperwork (which attributed the casino's deposit on a 10-car purchase to Livingston's own car purchase). It argues that the jury also had to decide that Livingston had knowingly devised a scheme or plain to defraud and that the statements he made as part of the scheme were material. Government's Brief, page 53. But a "scheme to defraud" does not fix the problem created by the district court's incorrect disjunctive definition of an "intent to defraud." Nothing in the scheme language in the instruction necessarily leads to

the conclusion that the jury necessarily determined that Livingston acted with an intent to cheat rather than with an intent to deceive (by accepting the inaccurate paperwork from Northington). To the jury, the scheme portion was simply the way the purchases were handled and billed by the casino and its bank. There was never any question that the Northington papers billings to the tribal casino were not material.

In sum, by reducing the intent to defraud to simply having an intent to deceive, the jury could have believed Livingston's testimony and still convicted him because he knew the Northington paperwork was not accurate. His decision to trust Northington's assurance that he could transfer balances/credits from one file to another, an honest if mistaken belief, would have been enough because Livingston knew the paperwork was deceptive.

C. District Court Erred by Admitting "Prior Bad Act" Evidence under Rule 404(b) after Government Failed to Establish Prior Acts by Preponderance of the Evidence

Lastly, we believe the admission of propensity evidence that the government failed to prove by a preponderance of the evidence were in fact "prior bad acts," was prejudicial error. The specific acts concerned purchases of a Annika Sorenstan golf bag and Callaway clubs and a signed USC football helmet. The sole evidence the government offers to support its obligation to prove by a preponderance of the

evidence that Livingston kept these items for himself[8] was the testimony Bruce King. Government's Brief, pages 66-67. That King never saw these items at the casino is not disputed. King was the head of marketing. He expected Livingston would have, as a friend and colleague, shown these items to King because of their shared interests in golf. But, King admitted that he did not personally do any of the physical verification work to see that the items purchased were received by marketing. He relied on people in the accounting and marketing departments to do their jobs. CR 177, pages 417-20. The government called none of these staffers to testify. The government downplays King's admission that he did see a football helmet at some point. Government's Brief, page 67. It ignores King's admission that the casino had Callaway clubs, CR 177, page 385, the same kind that Livingston purchased with the Annika Sorenstam golf bag. *See id*. page 447.

But most importantly, the government's brief never deals with the fact that the casino had poor documentation and control over property. Although an investigator searched the casino property and found neither of these items, the evidence also showed that items were sometimes taken by employees, awarded to employees, and given away to customers without a consistent and complete accounting. *See e.g.,* CR

[8] There was no dispute that Livingston had purchased these items at the 2007 "Save Mart Shootout" auction using Chukchansi credit.

195, pages 980-82. Thus, there no way to tell if these items were missing because, after Livingston did turn them over to the casino, the items were later misplaced, taken by others or given away as a promotion without an itemized paper trail.

Nor does the government's brief address this Court's recent decision on 404(b) evidence, *United States v. Bailey*, 696 F.3d 794 (9th Cir. 2012). *Bailey* emphasized that before 404(b) evidence may be admitted, "there must be sufficient, independent evidence (besides the accusation alone) to support a finding that the prior conduct occurred." 696 F.3d at 802. In that case, Bailey was accused in a Security and Exchange Commission complaint of misconduct. Bailey settled that complaint without admitting liability. The government then sought successfully to present this complaint into the new criminal case as 404(b) prior bad acts evidence. This Court reversed. *Id*. "[A] mere accusation of prior conduct is insufficient to support a finding that the prior act was committed and, therefore, does not tend to prove that the defendant committed the act for which he is on trial." *Id*.

In essence, a mere accusation is all that was presented in Livingston's case. The accusation did not come directly from a witness, but from the government. Neither Mr. King nor and casino's investigator could testify that he saw Livingston take the Sorenstam items or the USC helmet. King's testimony amounted to no more than his expectation that Livingston would have shown or mentioned these items to

him. The investigator's evidence was simply that he could not locate the items at the casino or hotel. King admitted that he saw Callaway golf clubs. CR 177, page 385. But it was not King's personal duty to check in such items to the marketing department. That was his staff's job, but no staffer was called to testify. *Id*. page 394. Livingston testified that he turned these items into the marketing department. Don Lull testified that there was not an itemization procedure that required by which these items would be logged or checked-in. *See* Appellant's Opening Brief, pages 37-39, 61-62. All of this amounts to simply an accusation, not proof.

The government asserts any error was harmless, that this evidence was "inextricably intertwined" with the charged offenses, and that Livingston cannot show prejudice. Government's Brief, page 69. The middle assertion is simply not accurate. The was nothing about these specific purchases that compelled the government to discuss them in order to prosecute Livingston on the charges it actually made. *See United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1012 (9th Cir. 1995) (evidence of prior acts admissible as "inextricably intertwined" if the evidence "constitutes a part of the transaction that serves as the basis for the criminal charge" or is need "to offer a coherent and comprehensible story regarding the commission of the crime.")

When evidence is improperly admitted under 404(b), the presumption is that

it harmed Mr. Livingston and the burden to prove harmless is on the government. *See Bailey*, 696 F.3d at 803. This Court "must reverse unless there is a 'fair assurance' of harmlessness or . . . unless it is more probable than not that the error did not materially affect the verdict." *Id*. The government's pale effort at a harmless error argument is this: "If this evidence was irrelevant because it showed he did nothing wrong, . . . then it is more probable than not that the evidence did not materially affect the jury's verdict, particularly given the overwhelming evidence against Livingston." Government's Brief, page 69.

This is an odd case for the government claim overwhelming evidence against Livingston. The only witness who directly claimed that Livingston admitted to her that he was cheating the Chukchansi was Deborah Johnson. But Johnson admitted that she was fired. She claimed that she agreed to Livingston both picking out her car, unethically having the casino pay $5,000 down payment for a car she did not want. CR 178, pages 572-79. While we understand that the jury had to power and authority to believe her, it is far fetched to claim the evidence against Livingston was overwhelming. Much of the government's was not contested. This was not a case in which Livingston denied making the purchases that were at issue. What was at issue and what Livingston strongly contested was his intent to defraud. He contended throughout this case, and so testified, that he acted within the spending authority he

was granted as general manager. The key issue had to do with his intent. Putting on evidence and presenting it to the jury as "other wrongs or acts" (ER page 112), without actually presenting sufficient evidence that these other acts were in fact wrong – without sufficient evidence to prove the Sorenstam bag and clubs and the USC football helmet – was reversible error.

III. CONCLUSION

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

Dated: December 10, 2012

Respectfully submitted,

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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 4,205 words.

Dated: December 10, 2012

s/ Ann C. M^cClintock
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C.A. No. 11-10520

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
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Plaintiff-Appellee,	)	(Eastern District, California, Fresno)
	)	
v.	)	**CERTIFICATE OF SERVICE**
	)	
JEFF LIVINGSTON,	)	
	)	
Defendant-Appellant.	)	
	)	

I hereby certify that on December 10, 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: December 10, 2012 *s/ Ann C. McClintock*