United States v. Kunick, ___ F. Supp. 3d ___, 2021 WL 1326670 (W.D. Mich. Apr. 9, 2021)

- **Holding:** Defendants violated 18 U.S.C. § 1167(a) by stealing free play credits for use in a tribal casino.
- **Summary:** 18 U.S.C. § 1167(a), which is one of three criminal statutes added by the Indian Gaming Regulatory Act, provides:

  > Whoever abstracts, purloins, willfully misapplies, or takes and carries away with intent to steal, any money, funds, or other property of a value of $1,000 or less belonging to an establishment operated by or for or licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission shall be fined under this title or be imprisoned for not more than one year, or both.

  Here, Defendants conspired to acquire without authority free play credits for slot machine use at any gaming facility operated or licensed by the Keweenaw Bay Indian Community. The amount in question was $682. Prior to trial, the parties agreed that all elements of the offense existed except one: "the requirement that the Government prove beyond a reasonable doubt that the stolen money, funds or property belonged to the Indian gaming establishment." Also during a pre-trial conference, the parties agreed that "the definition of 'belong to' provided in *United States v. Aubrey*, 800 F.3d 1115, 1125 (9th Cir. 2015), a case in which the Ninth Circuit defined this phrase in the context of 18 U.S.C. § 1163, which criminalizes theft from an Indian tribal organization" should be used as the definition for "belonging to" or "belong to" in § 1167(a). Under *Aubrey*, "the issue of whether money, funds or property belong to another is determined by the degree of control that the person or entity–in this case, the Casino–exercises over the money, funds or property." During the ensuing bench trial, two witnesses, both present or former casino managerial employees, explained how the free play credit system functions and the control that the casino exercises over the availability, use and accounting status of the credits. Defendants contended that "the free play credits they stole were essentially gifts to the legitimate Players Club card holders and, accordingly, that the free play credits did not belong to the Casino."

  The court was unpersuaded and found Defendants guilty. First, "the Casino clearly obtained something of value by distributing free play credits to players via the Players Club system. The Casino obtained (1) the players' presence not only in the Casino but also at a slot machine, and (2) the players' involvement in gambling. Stating the obvious, the Casino got something of value to it by distributing free play credits." Second, and more important, "[t]he issue here is the degree of control that the Casino had over the free play credit on the Players Club card[,]" and "the evidence shows that the Ojibwa Casino maintained significant control over the free play credits stolen by Defendants." The court identified six facts supporting this conclusion:

  • that the Casino can withdraw a player's free play credits or cancel the free play credit system at any time,

  • that free play credit is not transferrable,

  • that Players Club cards cannot be used outside of the Ojibwa Casino facility that issued the card,

  • that free play credits cannot be redeemed for cash,

  • that free play credits cannot be redeemed for prizes and benefits, like food or a hotel stay, and

• that the free play credits may only be used at authorized slot machines.

It further noted the tax consequences attendant to the credits' use: "[T]he Casino did not treat the use of free play credit as income. In contrast, ... when players used their own money and not the free play credits, the Casino counted the money as revenue. In addition, ... the Casino did not treat free play credits as income for the player who received them." Thus, "[t]he Casino's conduct indicates that the free play credits–although distributed to authorized players' accounts–were viewed by the Casino as if they belonged to the casino."

- **Relevant (2020) Deskbook Section:** 12:55 n.1