10-1154

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

ROMAN CAVANAUGH, JR.,

Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
(Chief Judge Ralph R. Erickson)

REPLY BRIEF FOR THE UNITED STATES

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ARGUMENT

Cavanaugh asserts, contrary to controlling precedent, that the Sixth Amendment applies to Indian tribes and requires the appointment of counsel to indigent defendants in tribal court. From this unprecedented proposition, he argues that his prior tribal convictions for domestic-violence offenses were invalid under the Constitution and the Indian Civil Rights Act (ICRA), 25 U.S.C. 1301, et. seq. He then asserts that he may challenge the validity of such convictions in the context

of a Section 117(a) prosecution. Moreover, he claims that, if such convictions are used in this case, the application of Section 117(a) to him violates his rights under the equal protection component of the Due Process Clause of the Fifth Amendment. These arguments lack merit. Cavanaugh's prior tribal court convictions were valid under the Constitution and the Indian Civil Rights Act. In any event, even if his prior convictions were invalid, it would not make a difference in this case. Congress unambiguously has provided in Section 117(a) that the existence of two final convictions for qualifying domestic violence offenses that are extant at the time the defendant committed the domestic assault alleged in the indictment fulfill the prior-offenses element of the Section 117(a) offense. Under the governing precedent, Lewis v. United States, 445 U.S. 55 (1980), Congress constitutionally may do so.

I. THERE IS NO CONSTITUTIONAL RIGHT TO APPOINTED COUNSEL FOR INDIGENT INDIAN DEFENDANTS IN TRIBAL PROSECUTIONS.

Contrary to governing Supreme Court precedent, Cavanaugh asserts (Br. 2-8, 16) that the Federal Constitution applies to Indian tribes because Indians are now full citizens of the United States, and that the failure of the tribe to offer him appointed counsel in his tribal prosecutions violated his Sixth Amendment right to counsel and his Fifth Amendment right to equal protection of the laws. His claim is

erroneous. Since Talton v. Mayes, 163 U.S. 376 (1896), it has been clear that the Constitution does not apply to Indian tribes when they exercise their retained sovereign powers because their limited sovereignty has its source in the tribes' historic existence prior to the adoption of the Federal Constitution. Talton held that the Fifth Amendment right to indictment by a grand jury did not apply to prosecutions by an Indian tribe because the Fifth Amendment "is a limitation only upon the powers of the general government," id. at 382, and insofar "as the powers of local self-government enjoyed by the [Indian tribes] existed prior to the [C]onstitution, they are not operated upon by the Fifth Amendment," id. at 384.

The Supreme Court reaffirmed this reasoning when it examined the exercise of tribal sovereign power to prosecute tribal members, United States v. Wheeler, 435 U.S. 313 (1978), and the exercise of tribal sovereign power to prosecute members of other tribes who commit crimes on the prosecuting tribe's reservation, United States v. Lara, 541 U.S. 193 (2004). See Wheeler, 435 U.S. at 318 (a tribe's "sovereign power to punish tribal offenders," while subject to congressional "defeasance," remains among those "inherent powers of a limited sovereignty which has never been extinguished" (emphasis and internal quotation deleted); Lara, 541 U.S. at 210 ("the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians").

Cavanaugh argues (Br. 2-3) that when Indians were granted full United States citizenship in 1924, 8 U.S.C. § 1401(b), that change of status effectively overruled Talton. It did not. The fact that Indians are citizens – indeed the fact that they are "persons" under the Constitution – guarantees them the rights any other person would have against action by the federal government or the state governments, including the right to counsel guaranteed by the Sixth Amendment in federal criminal prosecutions and by the Due Process Clause of the Fourteenth Amendment in state criminal prosecutions. But an Indian's rights with respect to the tribe with which he is affiliated are not dictated by the Federal Constitution. The Supreme Court has reiterated the continued vitality of the Talton principle numerous times since 1924, including quite recently. E.g., Plains Commerce Bank v. Long Family Land and Cattle Co., 128 S. Ct. 2709, 2724 (2008) ("Tribal sovereignty, it should be remembered, is a sovereignty outside the basic structure of the Constitution. * * * The Bill of Rights does not apply to Indian tribes. [citing Talton]."); Nevada v. Hicks, 533 U.S. 353, 383-384 (2001) ("[I]t has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes. [citing Talton]").

Cavanaugh urges (Br. 3-4) that the right-to-counsel cased decided by the Supreme Court indicate it is of such importance that it cannot be denied to a tribal

defendant. In light of the repeated reaffirmation of the principle that the Constitution does not apply to Indian tribes, this Court must decline Cavanaugh's invitation to impose a constitutional right to counsel on the tribes. See Agnostini v. Felton, 521 U.S. 203, 237 (1997) ("We reaffirm that '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'") (quoting Rodriguez de Quijas v. Shearson/American Exp., Inc., 490 U.S. 477, 484 (1989)); see also United States v. Hatter, 532 U.S. 557, 567 (2001).

II. THE INDIAN CIVIL RIGHTS ACT DOES NOT REQUIRE THE APPOINTMENT OF COUNSEL IN TRIBAL PROSECUTIONS.

Cavanaugh does not dispute that the Indian Civil Rights Act, while it grants a right to retained counsel (25 U.S.C. § 1302(6)), does not by its terms grant a right to appointed counsel for indigent defendants. Cavanaugh appears to suggest (Br. 4-6) that ICRA's due-process guarantee (§ 1302(8)) must be interpreted to encompass the right of an indigent defendant to appointed counsel in tribal prosecutions. He further asserts (Br. 4) that "no federal court has taken up the issue of whether Indians in tribal court are entitled to court appointed counsel."

Contrary to Cavanaugh's assertion, two courts of appeals have rejected the contention that ICRA's due process guarantee requires the appointment of counsel

to indigent defendants in tribal prosecutions. Tom v. Sutton, 533 F.2d 1101, 1104-1105 (9th Cir. 1976); United States v. Benally, 756 F.2d 773, 779 (10th Cir. 1985).[1] As discussed in Tom, the legislative history of ICRA shows that Congress considered whether it should follow court decisions granting the right of appointed counsel in misdemeanor prosecutions, and Congress declined to do so. See 553 F.2d at 1104. Congress adopted the approach of incorporating only specific rights into ICRA. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 63 & n.14 (1978) (cataloging the rights included in and excluded from ICRA).[2]

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[1] In Lara, the Supreme Court declined to consider the argument that, because ICRA "lacks certain constitutional protections for criminal defendants, in particular the right of an indigent defendant to counsel, * * * the Due Process Clause forbids Congress to permit a tribe to prosecute a nonmember Indian citizen of the United States in a forum that lacks this protection." 541 U.S. at 207-208. Cavanaugh is a member of the tribe that prosecuted him, however, and the tribes never lost their inherent sovereign power to prosecute their own members. See Wheeler.

[2] In any event, it is questionable whether this Section 117(a) prosecution is the proper forum for Cavauaugh to assert that his tribal convictions were invalid under ICRA. ICRA provides for habeas corpus review in federal court of a tribal conviction that results in detention, 25 U.S.C. 1303. Cavanaugh has not pursued that remedy. Cf. Daniels v. United States, 532 U.S. 374, 382 (2001) ("If * * * a prior conviction used to enhance a federal sentence is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), then that defendant is without recourse.").

III. APPLICATION OF SECTION 117(a) TO CAVANAUGH DOES NOT VIOLATE THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Cavanaugh asserts (Br. 11, 16-17) that application of Section 117(a) violates the equal protection component of the Due Process Clause of the Fifth Amendment because it treats Indians differently than non-Indians. An Indian has the benefit of the Due Process Clause in Federal court, but there is no violation here.

In United States v. Antelope, 430 U.S. 641 (1977), the Supreme Court squarely held that a federal criminal statute that applies to the disadvantage of Indians does not violate equal protection principles. In Antelope, the respondent Indians were prosecuted under 18 U.S.C. § 1153 for first degree murder for killing a non-Indian during a robbery on the reservation. 430 U.S. at 642-643. They argued that application of Section 1153 to them violated equal protection principles because a non-Indian would not be subject to federal prosecution and the state law applicable to a non-Indian perpetrator would be more favorable because it would not allow first-degree murder to be proved by application of the felony-murder rule. Id. at 643-644. The Supreme Court rejected the claim that application of Section 1153 solely to "Indians" was "invidious racial discrimination." Id. at 644. It reasoned that "federal regulation of criminal conduct within Indian country * * * is not based upon impermissible classifications. Rather, such regulation is rooted in

the unique status of Indians as a separate people with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a racial group consisting of Indians." Id. at 646. Of crucial importance was the circumstance that "respondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d'Alene Tribe." Id. If respondents had effectively renounced their affiliation with the tribe before they committed the crime, they would be non-Indians for purposes of Section 1153. See Id. at n.7.

Antelope requires rejection of Cavanaugh's claim. In Antelope, the federal offense applied only to Indians, not non-Indians. Section 117(a), by contrast, applies to "any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country."[3] The only different treatment of Indians under the statute is the inclusion of tribal convictions for prior domestic-violence offenses as well as state and federal convictions. But whether an Indian is amenable to tribal jurisdiction depends on his voluntary association with the tribe, not on his race or ethnicity. Under Antelope, the fact that

[3] Cavanaugh errs in stating (Br. 11) that "[t]he statutory framework of Section 117(a) subjects only Indians to prosecution under this statute," and (Br. 16) that "Section 117 is specifically designed to prosecute Indians."

Cavanaugh might be considered to be "disadvantaged" under Section 117(a) because he elected to associate himself with a tribe and submit himself to tribal criminal jurisdiction is not a racial classification.

IV. CONGRESS HAS PRECLUDED A DEFENDANT IN A SECTION 117(a) PROSECUTION FROM ATTACKING THE VALIDITY OF HIS PRIOR TRIBAL DOMESTIC-VIOLENCE CONVICTIONS, AND IT IS CONSTITUTIONAL FOR CONGRESS TO HAVE DONE SO.

Cavanaugh's tribal court convictions were valid under the Constitution and the Indian Civil Rights Act. By arguing that his prior tribal convictions were invalid under the Constitution and ICRA, Cavanaugh presupposes that, if those convictions were invalid, they cannot be used in a Section 117(a) prosecution. That supposition is wrong. The element of prior final tribal convictions for domestic-violence offenses may be fulfilled regardless of whether those prior convictions are valid under the Constitution or under any applicable law, and the defendant may not challenge the validity of such convictions in the context of the Section 117(a) prosecution.

A. The Interpretation and Application of Section 117(a) with Respect to Tribal Convictions Is Governed by Lewis v. United States, Which Held That an Extant Prior Conviction May Be Used To Prove an Element of an Offense Even If That Prior Conviction Is Constitutional Invalid.

The interpretation and application of Section 117(a) with respect to the use of

prior final tribal court convictions is governed by Lewis v. United States, 445 U.S. 55 (1980). In Lewis, the Supreme Court considered a statute that proscribed as a felony the possession of a firearm by a person who "has been convicted" of a felony in federal or state court. See 445 U.S. at 56 n.1.[4] The Court considered the question "whether a defendant's extant prior conviction, flawed because he was without counsel, as required by Gideon v. Wainwright, 372 U.S. 335 * * * (1963), may constitute the predicate for a subsequent conviction under § 1202(a)(1)." 445 U.S. at 56. The Court held that the statute allowed a prior conviction obtained in violation of Gideon to be proved as an element of the firearm-possession offense and the Court precluded the defendant from challenging the validity of that prior conviction in the context of the firearm prosecution.

The Court found that "[t]he statutory language is sweeping, and its plain meaning is that the fact of a felony conviction imposes a firearm disability until the conviction is vacated or the felon is relieved of his disability by some affirmative action, such as a qualifying pardon or a consent from the Secretary of the Treasury." 445 U.S. at 60-61. The Court found that, under the plain terms of the statute, "[n]o exception * * * is made for a person whose outstanding felony conviction

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[4] 18 U.S.C. App. § 1201(a)(1) (1970 ed.) (repealed by Pub. L. 99-308, § 104(b), 100 Stat. 459 (May 19, 1986)). The felon-in-possession prohibition presently is found in 18 U.S.C. § 922(g)(1).

ultimately might turn out to be invalid for any reason." Id. at 62.

The Court observed that the statute "stands in contrast with other federal statutes that explicitly permit a defendant to challenge, by way of defense, the validity or constitutionality of the predicate felony. See, e. g., 18 U.S.C. § 3575(e) (dangerous special offender) and 21 U.S.C. § 851(c)(2) (recidivism under the Comprehensive Drug Abuse Prevention and Control Act of 1970)." Id. Under the provision of 18 U.S.C. § 3575(e) (1970 ed.) (repealed by Pub. L. 98-473, § 212(a)(2), 98 Stat. 1987 (Oct. 12, 1984)) that was cited by the Court, an enhanced sentence for a federal felony conviction could be imposed on persons with two or more qualifying prior felony convictions, but "[a] conviction shown on direct or collateral review or at the [sentencing] hearing to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded." Similarly, under the provision of 21 U.S.C. § 851(c)(2) (still extant) cited by the Court, a prior drug felony conviction used to enhance the maximum sentence, and to impose a mandatory minimum sentence, for a subsequent drug felony conviction under 21 U.S.C. 841 is not counted if the defendant shows at the sentencing hearing that the prior conviction "was obtained in violation of the Constitution."

In Lewis, the Court held that Congress may constitutionally use an extant prior conviction as an element of an offense, even if the prior conviction was

invalid under Gideon, "if there is some rational basis for the statutory distinctions made or they have some relevance to the purpose for which the classification is made." 445 U.S. at 65 (internal quotation and ellipses omitted). The Court found that "Section 1202(a)(1) clearly meets that test" because "Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm." Id. at 66. "The federal gun laws * * * focus not on reliability, but on the mere fact of conviction * * * in order to keep firearms away from potentially dangerous persons. Congress' judgment that a convicted felon, even one whose conviction was allegedly uncounseled, is among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness is rational." Id. at 67.

Under the rationale of Lewis, a prior felony conviction invalid for deprivation of counsel under Gideon was a sufficient indication that the person committed the prior offense, and therefore was a "potentially dangerous person," even though the Gideon violation negated the prior conviction and forbid its use as conclusive proof that the person was guilty of the prior offense. The Court distinguished the use of a prior conviction as an element of the firearm-possession offense from the circumstances involved in Burgett v. Texas, 389 U.S. 109 (1967), United States v. Tucker, 404 U.S. 443 (1972), and Loper v. Beto, 405 U.S. 473 (1972), each of

which precluded the use of a prior felony conviction obtained in violation of Gideon because the use of the prior conviction in those cases "depended upon the reliability of a past uncounseled conviction." 445 U.S. at 67. In Burgett, the prior Gideon-invalid conviction was employed as conclusive proof that the defendant had committed the prior offense and must receive the maximum permissible sentence for the later offense with no discretion left to the sentencing judge. See 389 U.S. at 111 n.3. In Tucker, the sentencing judge had explicitly relied on prior convictions to impose a severe sentence, believing such convictions could be relied upon as conclusive proof that the defendant had committed those prior offenses, without realizing that those convictions were invalid under Gideon and therefore were not reliable. See 404 U.S. at 444. In Loper, Gideon-invalid prior convictions were used to impeach the defendant's credibility at trial for a later offense, with the intention of giving the jury the impression that those prior convictions were conclusive proof that defendant was a felon and therefore his testimony should not be believed. See 405 U.S. at 474. By contrast, the firearm-possession statute considered in Lewis did not require such conclusive proof of prior criminal conduct, just a sufficient indication that the person was "potentially dangerous."

Section 117(a)'s use of tribal court convictions fits comfortably within the rationale of Lewis. It provides, as an element of the offense, that at the time the

defendant commits the alleged domestic assault he "has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for [domestic violence] offenses." As in Lewis, there is no exception for prior final tribal convictions that might be invalid. Congress enacted Section 117(a) in 2006,[5] well after Lewis established the constitutional standard and after Lewis highlighted the significance of Congress' omission of any explicit statutory authorization for challenging the validity of a prior conviction.[6]

Section 117(a) satisfies the rational-basis standard of Lewis for the use of prior final tribal-court domestic-violence convictions as an element of the Section 117(a) offense. As we explained in our opening brief (pp. 12-15), the danger of recidivism for domestic violence offenses is well known. Persons who have committed such offenses in the past are more likely to commit them again, and the level of violence is likely to escalate. As we explained in our opening brief (pp. 34-35), in light of the substantial procedural protections assured to tribal court

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[5] Pub. L. 109-162, Tit. IX, § 909, 119 Stat. 3084 (Jan. 5, 2006).

[6] In contrast to Section 117(a), 18 U.S.C. § 922(g)(9), which prohibits possession of a firearm by any person "who has been convicted in any court of a misdemeanor crime of domestic violence," explicitly does not include such a misdemeanor offense unless "the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case," 18 U.S.C. § 921(a)(33)(B)(i)(I). Cavanaugh does not assert error in the district court's ruling (JA 95-96 (Op. 22-23)) that Section 117(a) does not incorporate the same exception. See Cavanaugh Br. at 9-10.

defendants by the Indian Civil Rights Act, Congress could rationally determine that tribal court convictions are sufficiently reliable to identify such "potentially dangerous persons," Lewis, 445 U.S. at 67, who should be subject to federal prosecution if they commit a domestic assault. The requirement that the prior conviction is "final" – i.e., that the available process of direct appeal has been exhausted – is a further indicia of reliability. Congress could rationally focus its Section 117(a) prosecutions on persons identified by prior domestic-violence convictions as possible recidivists, even though those prior convictions, if invalid for lack of counsel or for any other reason, might not be sufficiently reliable to conclusively prove the person committed the prior offenses.

There is the further consideration that a person who has two prior final convictions for domestic-violence offenses has been specifically informed on two separate occasions that his community will not tolerate or excuse domestic violence. This is a pertinent consideration in the area of domestic violence, where some persons may believe it is acceptable to "punish" perceived misbehavior of a spouse or domestic partner with violence. In the present case, for example, Cavanaugh's prior tribal convictions involved assaults against the same victim as the assault alleged as the Section 117(a) violation, see JA 10-12, and in connection with his prior convictions he was ordered to commit "no same or similar violations" as a

condition of probation and suspension of a portion of his jail sentence, JA 53, 55. As applied to Cavanaugh, it plainly was constitutional under Lewis for Congress to count his prior final convictions for domestic-violence offenses regardless of their constitutional validity.

The district court reasoned that "[t]o permit a conviction that violates the Sixth Amendment to be used against a person to support guilt for another offense would erode the very principle set forth in Gideon." JA 95 (Op. 22). Cavanaugh echoes that objection. Br. 14-15. But Lewis squarely rejected that view. It squarely held that a prior conviction obtained in violation of Gideon can be used as a element of a federal offense if there is a rational basis for Congress to have determined that the fact of the prior conviction is relevant to the purposes of the federal offense. Accordingly, even if Cavanaugh's prior tribal court convictions were invalid, they can be used as predicate prior convictions under Section 117(a).

B. Section 117(a) Does Not Require Proof of the Conduct Underlying the Prior Final Convictions for Domestic-Violence Offenses.

Cavanaugh argues that Section 117(a) does not rely on the fact of a prior conviction, but rather on the commission of the underlying conduct, and therefore "someone who has been found guilty of some [prior] offense is being treated more harshly because of his prior conduct which resulted in tribal court convictions." Br.

15. Section 117(a) is simply not written that way. It does not require proof that a defendant had "committed two prior acts of domestic violence" when he committed the alleged crime of domestic assault, but merely requires proof that the defendant had two or more "final convictions" for domestic-violence offenses. Compare U.S.S.G. § 2A6.2, Comment. N. 1 (in determining whether sentencing enhancement should apply for a "pattern of activity involving stalking, threatening, harassing, or assaulting the same victim," court should consider prior conduct, "whether or not such conduct resulted in a conviction").

The fact that Section 117(a) does not require proof of the conduct underlying the prior domestic-violence convictions is the principal reason why Cavanaugh (Br. 8-9) and the district court (JA 94-95 (Op. 21-22)) are mistaken in relying on United States v. Ant, 882 F.2d 1389 (9th Cir. 1989), as we explained in our opening brief (pp. 45-47). In Ant, the government sought to use a tribal guilty plea obtained without counsel as proof in federal court that Ant had committed the conduct underlying that guilty plea. 882 F.2d at 1391. Where a prior conviction is being used in that manner, the rationale of Lewis does not apply, because the use of the prior conviction "depend[s] upon the reliability of a past uncounseled conviction." Lewis, 445 U.S. at 67.

In a Section 117(a) prosecution, the concern addressed in Ant would only

arise if the act of domestic assault alleged as the Section 117(a) offense was itself proved by the admission of an uncounseled tribal guilty plea for a tribal offense involving the same conduct. Even in such a hypothetical, the rationale of Ant might not apply because Ant depended in part on the holding in Baldasar v. Illinois, 446 U.S. 222 (1980) (per curiam), that a constitutionally valid uncounseled misdemeanor conviction (because imprisonment was not imposed) could not be used to enhance a subsequent offense into a felony for which imprisonment could be imposed. See 882 F.2d at 1394 (reasoning that, as in Baldasar, "Ant is in jeopardy of being imprisoned by a federal court because of a prior uncounseled guilty plea"). Baldasar has been overruled, however, by Nichols v. United States, 511 U.S. 738 (1994), which held that a prior uncounseled misdemeanor conviction, valid under Scott v. Illinois, 440 U.S. 367 (1979), because no imprisonment was imposed, may be used to enhance a defendant's criminal history, and thus his sentencing range, under the then-mandatory sentencing guidelines.

Cavanaugh attempts to distinguish Nichols on the ground that "[t]here is a difference between making someone a criminal and giving a criminal a stiffer sentence." Br. 14. If Cavanaugh is arguing that Nichols only qualified Baldasar with respect to the use of a valid prior uncounseled conviction for sentencing, not also for purposes of defining a new offense or upgrading conduct from a

misdemeanor to a felony, he is mistaken. Nichols declared, "we * * *overrule Baldazar," 511 U.S. at 748, and the Court applied the rationale of its holding to all "[e]nhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes that are comonplace in state criminal laws," id. at 747, because "[a]s pointed out in the dissenting opinion in Baldasar, '[t]his Court consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant,'" id., quoting from 446 U.S. at 232 (Powell, J., dissenting).

C. Cavanaugh May Not Challenge His Prior Convictions Under Custis v. United States Even If He Was Entitled To Appointed Counsel in His Tribal Prosecutions.

Cavanaugh argues (Br. 8, 9, 11, 13) that the denial of counsel to indigent defendants in tribal prosecutions is the equivalent of a violation of Gideon v. Wainwright. From this proposition, he argues that the decision in Custis v. United States, 511 U.S. 485 (1994), which permits a Gideon challenge to a prior conviction used for a certain type of sentencing enhancement, "fully supports his position." Br. 12. He is wrong for several reasons. First, as discussed above, an indigent defendant in tribal court has no right to appointed counsel even when imprisonment is imposed. Second, even if a tribal defendant had the same right to counsel as a defendant in federal or state court, there would be no defect in the "final

conviction" obtained in tribal court that would be so fundamental that it would be the equivalent of a Gideon violation. Third, Custis involved the use of a prior conviction as conclusive proof that the defendant was guilty of the prior offense; Custis did not retreat from the rationale of Lewis, which applies when the use of the prior conviction does not depend on its conclusive reliability.

As we explained in our opening brief (pp. 41-43), even when the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment requires that appointed counsel be made available to an indigent defendant before imprisonment may be imposed for a misdemeanor offense, there is no constitutional defect in the "final conviction" in such a case; the only constitutional defect is in the imposition of a sentence of imprisonment. Section 117(a) refers to a qualified "final conviction," not to a conviction for which imprisonment was imposed. Compare U.S.S.G. § 4A1.1 (calculating severity of criminal history based on duration of imprisonment actually imposed); United States v. Ortega, 94 F.3d 764, 768-769 (2d Cir. 1996) (prior misdemeanor conviction for which defendant was imprisoned without right to appointed counsel could not be counted in criminal history because counting it depended on the constitutional validity of the term of imprisonment).

Moreover, as we explained in our opening brief (pp. 43-44), even assuming the final conviction itself is considered to be constitutionally defective – not just the

unconstitutionally imposed sentence of imprisonment – the nature of the defect is not so fundamental as the defect of the deprivation of counsel in obtaining a felony conviction. Custis refused to permit a challenge to a prior felony conviction on the grounds that it was obtained by denial of the Sixth Amendment right to effective assistance of counsel, see Strickland v. Washington, 466 U.S. 668 (1984), or in violation of the due process requirement that a guilty plea being knowingly and voluntarily made, see Boykin v. Alabama, 395 U.S. 238, 243 n.5 (1969). Custis, 511 U.S. at 496-497. Custis refused to permit such defects to be raised in a Section 924(e) sentencing proceeding because "[n]one of these alleged constitutional violations rises to the level of a jurisdictional defect resulting from the failure to appoint counsel at all" in a felony prosecution. Id. at 496. That rationale likewise precludes application of Custis to the challenge to a misdemeanor conviction on the ground that imprisonment was imposed without counsel.

There is no doubt that the court in a misdemeanor case has "jurisdiction" in every sense to convict an indigent defendant of a misdemeanor without making counsel available to him. No right to counsel attaches merely because the offense is of sufficient severity that imprisonment may be imposed. Scott v. Illinois, supra. The same procedures are followed to determine guilt and to enter a conviction whether there is no sentence of imprisonment (and therefore no constitutional

violation) or there is a sentence of imprisonment (and thereby a constitutional violation). Accordingly, even if Cavanaugh's tribal convictions were invalid because he was not provided with appointed counsel, Custis precludes him from raising that contention in the Section 117(a) proceeding.

Finally, Custis did not in any way retreat from the holding of Lewis that a constitutionally invalid prior conviction can be used as an element of a federal offense if there is a rational basis for Congress to have determined that the prior conviction is relevant to the purposes of the federal offense. Indeed, Custis relied on Lewis in support of its statutory interpretation. 511 U.S. at 493. Custis involved use of a prior Gideon-invalid conviction to trigger a mandatory minimum sentence, similar to the problem in Burgett v. Texas. Section 117(a) cannot be viewed as a sentencing provision that prescribes a more severe punishment, let alone a mandatory punishment. The Section 117(a) offense specifically charged against Cavanaugh was a domestic assault that "resulted in substantial bodily injury" (JA 8), which is punishable under Section 117(a) with up to five years of imprisonment. The most analogous federal offenses that do not involve a prior-convictions element – Section 113(a)(6) (assault resulting in "serious bodily injury") and Section 113(a)(7) (assault of a minor "resulting in substantial bodily injury") – carry the same punishment as the Section 117(a) offense of domestic

assault resulting in substantial bodily injury, so the use of Cavanaugh's prior final domestic-violence convictions in his Section 117(a) prosecution cannot properly be viewed as a sentencing enhancement, and certainly they do not restrict the district court's sentencing discretion in any way. Section 117(a) does not come within the scope of Custis.

CONCLUSION

For the reasons stated above and in the government's opening brief, the district court order dismissing the indictment should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(C)

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the foregoing brief is set in Times New Roman, 14 point type, and contains 5,428 words, as measured by using the WordPerfect X4 software.

Richard A. Friedman

May 10, 2010

CERTIFICATION OF CONFORMITY OF EMAIL SUBMISSION, VIRUS PROTECTION, AND PRIVACY REDACTION

The undersigned hereby certifies that the copy of this brief that was electronically transmitted to opposing counsel and/or the court on May 10, 2010, was identical to the hard copy of the brief filed the same day, that any required privacy redactions have been made, and that the emailed submission has been virus scanned by McAfee Virus Scan Enterprise 8.7.0i, which is updated continuously, and is free of viruses.

Richard A. Friedman

May 10, 2010

CERTIFICATE OF SERVICE

Two copies of the foregoing reply brief have been served this day by overnight delivery on counsel for appellee at the following mailing address, and an electronic copy has been served to the following email address:

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