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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,	:	2:10CR234 TC
	:	
Plaintiff,	:	UNITED STATES' MEMORANDUM
	:	IN OPPOSITION TO DEFENDANT'S
vs.	:	MOTION TO DISMISS
	:	
ADAM SHAVANAUX,	:	
	:	
Defendant.	:	Honorable Tena Campbell

The United States, by and through the undersigned Assistant United States Attorney, respectfully submits this Memorandum in Opposition to Defendant's Motion to Dismiss. The Court should deny defendant's motion to dismiss because defendant's prior uncounseled tribal court convictions for assault on a domestic partner can be used to prove that defendant committed a Domestic Assault by a Habitual Offender, a violation of 18 U.S.C. § 117, as charged in the Indictment.

FACTS

On March 24, 2010, the Grand Jury indicted defendant on one count, a violation of 18 U.S.C. § 117, Domestic Assault by a Habitual Offender While Within Indian Country. The Indictment charges that defendant assaulted a domestic partner after having two final convictions for assaulting a domestic partner. Of defendant's many prior assault convictions, the government chose to rely on two egregious cases that resulted in convictions of Aggravated Assault which were committed against a domestic partner, one in August 2006 and one in June 2008. Defendant was sentenced to serve time in jail in both cases. Both convictions occurred in the Ute Indian Tribal Court. In both cases defendant had the right to hire an attorney but did not exercise that right. In the 2008 case, the Ute Indian Tribe appointed an advocate to assist him.

The crux of defendant's motion, however, is that he was not given the right to have a licensed attorney appointed and paid for by the Ute Indian Tribe upon a showing that he was indigent.¹ The government concedes that defendant was not represented by a licensed attorney and that the Ute Indian Tribe would not have paid for a licensed attorney to represent him if he had made a showing of indigency.

¹ Defendant's claimed right to appointed counsel would only apply if he was indigent at the time he was prosecuted in the tribal court. To assert a claim that he was deprived counsel that would have been available to him if he had been prosecuted in state or federal court, defendant must demonstrate to this court his prior indigency.

ARGUMENT

The issue in this case is whether uncounseled tribal court misdemeanor convictions for which imprisonment was imposed may be used to prove an element of the Domestic Violence by a Habitual Offender statute, a violation of 18 U.S.C. § 117. The convictions can be used because (1) uncounseled tribal court convictions for which imprisonment was imposed are constitutional; (2) the defendant cannot collaterally attack those prior convictions; and (3) using uncounseled tribal court convictions to establish an element of a federal crime does not violate Equal Protection.

A. Defendant's Tribal Court Aggravated Assault Convictions Were Not
Obtained in Violation of the United States Constitution and May be
Used to Establish Elements of a Federal Offense.

The defendant's prior convictions were not obtained in violation of the Constitution. First, Indian tribal courts are not bound by the United States Constitution. Second, the prior convictions are valid and enforceable even when applying Constitutional protections.

1. *Because Indian tribal courts are not bound by the United States Constitution, the defendant's prior convictions do not violate Constitutional protections*

An overview of the legal standards governing tribal courts provides a backdrop for the constitutional issues involved in this case.² “[A]n Indian tribe acts as a separate

² Portions of the argument section were taken from the United States's briefs written by the Department of Justice Appellate Section in *United States v. Cavanaugh*, No. 10-1154, Eight Circuit Court of Appeals, with permission.

sovereign when it prosecutes its own members. *United States v. Lara*, 541 U.S. 193 (2004). “As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). “The Bill of Rights does not apply to Indian Tribal Governments.” *Duro v. Reina*, 495 U.S. 676 (1990).

Because Indian Tribes have status as separate sovereigns they are not required, within their unique criminal justice systems, to afford their members all of the rights included in the Bill of Rights. An individual who voluntarily lives within the boundaries of an Indian reservation and chooses to remain an enrolled member of a Indian tribe is subject to the jurisdiction of that tribe and the system designed by that tribe to process violations of criminal law. The process varies between tribes but the Federal Government does not force upon the tribes or require of the tribes that their criminal justice systems be constrained by the United States Constitution.

Instead, the minimum federal rights guaranteed to defendants in tribal courts are statutory rights provided by the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. § § 1301-1303. Although Section 1302 provides that “[n]o Indian tribe in exercising power of self-government shall - ... (6) deny to any person in a criminal proceeding the right ... at his own expense to have the assistance of counsel for his defense,” it does not provide for appointed counsel for indigent defendants. *See Lara*, 541 U.S.at 207; *Duro*, 495 U.S.

at 693. Section 1302(8) also provides that no Indian tribe shall “deny to any person within its jurisdiction ... due process of law.” However, that provision does not guarantee the appointment of counsel for indigent defendants. Section 1303 provides tribal defendants the right to federal habeas corpus review of any conviction that results in detention.

Contrary to defense counsel’s suggestion, the Tenth Circuit has considered whether Indian Tribal Courts are bound by the Constitution. In fact, the Tenth Circuit has specifically considered whether the Sixth and Fourteenth Amendments require Indian Tribal Courts to provide defendants with representation by counsel.

In *United States v. Benally*, the Tenth Circuit held that an Indian defendant's uncounseled tribal convictions were constitutional and admissible. *United States v. Benally*, 756 F.2d 773 (10th Cir. 1985). It reasoned that Congress, through the enactment of the ICRA, did not intend to require Indian tribal courts to provide representation for indigent defendants. *Id.* at 779. Indian tribes are considered quasi-sovereign nations, so the Constitution does not apply. *Id.* Because the convictions were not obtained in violation of the Constitution, a trial court may consider those convictions in sentencing. *Id.* *Benally* specifically held that ICRA’s due process guarantee does not incorporate a right to appointed counsel for indigent defendants. *Id.*

In a more recent decision, the Tenth Circuit again considered the constitutionality of Indian tribal court convictions obtained without the representation of counsel. In

United States v. Lonjose, 42 Fed. Appx. 177, 181-82 (10th Cir. 2002) (unpublished), the court reasoned that tribal convictions are valid at their inception because Indian tribes are quasi-sovereign nations and the protections of the Constitution are not applicable. Therefore, it concluded that a valid conviction at inception is valid for all purposes. *Id.* at 182. The court ruled that such convictions could be used as a basis for an upward departure from the advisory Sentencing Guidelines range for a subsequent federal conviction. *Id.* at 179-182.

Tribal court convictions are not obtained in violation of the Constitution and are valid convictions that may be used for all purposes. The government has appropriately charged defendant with a violation of 18 U.S.C. § 117 based on two prior final tribal court convictions for assault against a domestic partner.

2. *Even if defendant had a constitutional right to appointed counsel in his tribal prosecutions, his prior final convictions could be employed as an element of the federal offense under Section 117.*

Gideon v. Wainwright, 372 U.S. 335 (1963), established that an indigent defendant charged with a felony must be provided an attorney to comply with the rights afforded in the Sixth Amendment. Nine years later, the Supreme Court considered how the application of the Sixth Amendment is affected when the defendant is charged with a misdemeanor. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). In *Argersinger*, the court held that the appointment of counsel was not necessary for all misdemeanor convictions, but required that the denial of the assistance of counsel would preclude the imposition of a

jail sentence. *Id.* at 38. In *Scott v. Illinois*, 440 U.S. 367 (1979), the Court held that the right to appointed counsel for indigent defendants in federal or state court applied only if imprisonment actually was imposed, not merely if it was an authorized punishment.

These holdings do not require a misdemeanor conviction without the appointment of counsel is voidable in the same sense that a felony conviction obtained in violation of the right to counsel is voidable. Only a sentence of incarceration imposed in violation of the right to counsel after a misdemeanor conviction is voidable; the conviction itself may constitutionally be obtained without appointed counsel.

Accordingly, the Tenth Circuit has held that “the appropriate remedy ... is to strike down the suspended sentence of imprisonment but affirm the conviction.” *United States v. Jackson*, 493 F.3d 1179, 1184 (10th Cir. 2007). In its reasoning, the court considered *Argersinger*, which established that the Sixth Amendment right at issue protects individuals against being sentenced to a deprivation of liberty without the benefit of counsel. *Id.* The Court held, “the proper remedy was to vacate that portion of the sentence offensive to the Sixth Amendment without doing harm to the defendant's conviction or the remaining, constitutionally inoffensive, portions of his sentence.” *Id.* Thus, it is controlling precedent in this court that a misdemeanor *conviction* obtained against an indigent in state or federal court without the right to appointed counsel remains valid even if an unconstitutional *sentence* of incarceration is voidable.

Defense counsel relies heavily on the holding of a district court case arising in the

District of North Dakota, in the Eighth Circuit, *United States v. Cavanaugh*, 680 F.Supp.2d 1062 (D.N.D. 2009), which ruled that uncounseled tribal court convictions could not be used as an element of the Section 117 offense. The *Cavanaugh* court's analysis is based on the notion that a defendant's previous misdemeanor conviction obtained without the assistance of counsel for which imprisonment is imposed is unconstitutional. *Id.* at 1075-77. The *Cavanaugh* court disregarded its own Eighth Circuit that held, as did the Tenth Circuit in *Jackson*, that such convictions are constitutionally valid. *United States v. White*, 529 F.2d 1390, 1394 (8th Cir. 1976). *Cavanaugh* is not binding on this Court and the holding should be disregarded because it is grounded in a flawed analysis.

B. Alternatively, Whether the Tribal Convictions Are Constitutionally Valid is Irrelevant Because Defendant Cannot Collaterally Attack the Validity of the Prior Convictions in the Forum of a Section 117(a) Prosecution.

Uncounseled tribal court misdemeanor convictions for which imprisonment was imposed on an indigent defendant may be used to satisfy an element of an offense, regardless of whether those prior convictions are valid under the Constitution. Defendant cannot collaterally attack his prior convictions because the right to challenge the validity of a prior conviction is primarily a matter of statutory interpretation, not constitutional limitation.

1. *A valid prior conviction may be used to prove an element of an offense, even if that prior conviction is constitutionally 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.1.³ 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 ultimately might turn out to be invalid for

³ 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).

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.*

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 that was 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.

Section 117’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 in 2006,⁴ well after *Lewis* established the constitutional standard and after *Lewis* highlighted the significance of Congress’ omission

⁴ Pub. L. 109-162, Tit. IX, § 909, 119 Stat. 3084 (Jan. 5, 2006).

of any explicit statutory authorization for challenging the validity of a prior conviction.⁵

Section 117 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 offense. The danger of recidivism for domestic violence offenses is well known. Domestic violence is a type of crime with high recidivism rates, and the degree of violence often escalates as the offender recidivates. See “Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey,” National Institute of Justice, U.S. Department of Justice iv (July 2000). In the survey, the Indian/Alaska-Native group reported approximately 50 percent higher incidence of victimization from domestic violence than white group and approximately 29 percent higher incidence than African-American group.

In light of the substantial procedural protections assured to tribal court 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

⁵ 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). Section 117(a) does not incorporate the same exception.

available process of direct appeal has been exhausted – is a further indicia of reliability. Congress could rationally focus its Section 117 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 and formally informed on two separate occasions that his community will not tolerate or excuse domestic violence

Section 117 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”). Congress has elected to define the element in terms of the existence of two prior final tribal court convictions, not independent proof that defendant previously committed acts of domestic violence. Congress rationally could do so and, as *Lewis* held, that satisfies the Constitution.

2. *A defendant may not challenge his tribal court convictions in a Section 117 prosecution even if he was entitled to appointed counsel in those tribal prosecutions.*

Congress has not expressly permitted the challenge to prior convictions in Section 117 prosecutions but has expressly permitted such a challenge in other statutes. *Custis v. United States*, 511 U.S. 485, 492-3 (1994). *See* 21 U.S.C. § 851(c) (sets forth specific procedures allowing a defendant to challenge the validity of a prior conviction used to enhance the sentence for a federal drug offense) When Congress intends to authorize collateral attacks on prior convictions, it knows how to do so and the omission of similar language indicates that it does not intend to give defendants the right to challenge the validity of prior convictions. *Id.* at 493. Absent specific statutory authorization, a statute should not be interpreted to permit a defendant to attack the constitutional validity of his prior convictions. *Id.* at 491. According to this principle, a defendant in a Section 117(a) prosecution cannot attack the validity of a prior “final conviction” without the specific authority to do so according to the statute.

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, 389 U.S. 109 (1967). Section 117(a) cannot be viewed as a sentencing provision that prescribes a more severe punishment, let alone a mandatory punishment.

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 a Section 117 defendant’s prior convictions (in state, federal, or tribal court) were invalid because he was not provided with appointed counsel, *Custis* precludes him from raising that contention in the Section 117 proceeding.

Section 117 does not include any language that can be interpreted to mean that Congress intended defendants to be allowed to collaterally attack the validity of prior convictions. Therefore, the defendant has no right to collaterally attack his prior convictions in this case.

C. Relying on Uncounseled Tribal Convictions to Establish the
Elements of a Federal Crime Does Not Violate Equal Protection.

The different treatment of Indian defendants and non-Indian defendants does not violate the equal protection component of the Due Process Clause. *See United States v. Antelope*, 430 U.S. 641 (1997) (prosecution of Indian for felony murder under 18 U.S.C.

§§ 1111 & 1153 does not violate equal protection principles even though a non-Indian could not be prosecuted for a like offense under the state law applicable to non-Indian defendants). Additionally, legislation that “singles out Indians for particular and special treatment” will be upheld “as long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians.” *Morton v. Mancari*, 417 U.S. 535, 554-555 (1974).

Congress enacted the Violence Against Women Act of 2005, Pub. L. 109-162, Tit. IX, § 909, 119 Stat. 3084 (Jan. 5, 2006), which included the offense of Domestic Violence by a Habitual Offender, 18 U.S.C. § 117, after making the following findings:

- (1) 1 out of every 3 Indian (including Alaska Native) women are raped in their lifetimes;
- (2) Indian women experience 7 sexual assaults per 1,000, compared with 4 per 1,000 among Black Americans, 3 per 1,000 among Caucasians, 2 per 1,000 among Hispanic women and 1 per 1,000 among Asian women;
- (3) Indian women experience the violent crime of battering at a rate of 23.2 per 1,000, compared with 8 per 1,000 among Caucasian women;
- (4) during the period 1979 through 1992, homicide was the third leading cause of death of Indian females aged 15 to 34, and 75 percent were killed by family members or acquaintances;
- (5) Indian tribes require additional criminal justice and victim services resources to respond to violent assaults against women; and
- (6) the unique legal relationship of the United States to Indian tribes creates a Federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women.

See Congressional findings (codified at 42 U.S.C. 3796gg-10.) Congress made a rational choice in determining that tribal court misdemeanor convictions could be counted as recidivist offenses under Section 117 and that such inclusion was appropriate to combat

the special problem of domestic violence in Indian country.

CONCLUSION

This Court should deny defendant's motion to dismiss the Indictment because uncounseled tribal court misdemeanor convictions for which imprisonment was imposed may be used to prove the offense of the Domestic Violence by a Habitual Offender statute, a violation of 18 U.S.C. § 117.

RESPECTFULLY SUBMITTED this 30th day of July, 2010.

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/s/ Trina A. Higgins
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