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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ADAM SHAVANAUX, Defendant.	**MOTION TO DISMISS** Case No . 2:10-CR-234 TC

Defendant Adam Shavanaux, by and through his attorney, Kristen R. Angelos, submits this Motion to Dismiss. Mr. Shavanaux was charged with one count of Domestic Assault by a Habitual Offender While Within Indian Country in violation of 18 U.S.C. § 117. This statute prohibits the commission of a domestic assault within Indian country after sustaining at least two prior convictions for domestic assault. However, because Mr. Shavanaux's prior convictions were sustained in tribal court without the assistance of counsel, use of those convictions in this case violates his Sixth Amendment right to counsel and his Due Process rights. Because the

statute unfairly penalizes Native Americans, it violates Equal Protection as well. Accordingly, Mr. Shavanaux now asks the court to dismiss his case.

BACKGROUND

Mr. Shavanaux is an enrolled Ute on the Uintah and Ouray Reservation. He has been charged with one count of violating 18 U.S.C. § 117:

> (a) In general.—Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction—
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> (1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner; or
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> (2) an offense under chapter 110A,
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> shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.
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> (b) Domestic assault defined.—In this section, the term "domestic assault" means an assault committed by a current or former spouse, parent, child, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, child, or guardian, or by a person similarly situated to a spouse, parent, child, or guardian of the victim.[1]

In its discovery, the government has provided evidence of two prior convictions that it believes would qualify as prior convictions under this statute: a 2006 conviction for aggravated assault and a 2008 conviction for aggravated assault. In both of these cases, Mr. Shavanaux was convicted without having counsel appointed to represent him and was sentenced to time in jail.

[1] 18 U.S.C. § 117.

ARGUMENT

I. The case should be dismissed because Mr. Shavanaux did not have legal counsel for his prior convictions, so they may not constitutionally be used as elements of this offense.

Although Mr. Shavanaux's prior convictions arguably qualify as predicates under § 117, these convictions were obtained without the benefit of numerous protections afforded by the federal Constitution, most notably the right to counsel. So far, the only court to consider this argument, *United States v. Cavanaugh*,[2] has held that uncounseled tribal court convictions may not constitutionally be used to establish a violation of § 117. This holding follows from the fact that relying on uncounseled tribal convictions violates the Sixth Amendment right to counsel and Due Process. Moreover, allowing a conviction to stand based on uncounseled tribal convictions would unconstitutionally discriminate based on racial grounds, in violation of Equal Protection.

A. Mr. Shavanaux's uncounseled convictions were obtained in violation of the United States Constitution.

The Supreme Court has held that many of the provisions in the Bill of Rights are so "fundamental to the American scheme of justice" that their absence in a state's criminal justice system violates the protections of Due Process.[3] These protections include the right to counsel in a felony prosecution,[4] the right to trial by jury,[5] the right to suppress evidence seized in violation of the Fourth Amendment,[6] the right against self-incrimination,[7] the right to confront witnesses,[8]

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[2] 680 F. Supp. 2d 1062.

[3] *Duncan v. Louisiana*, 391 U.S. 145, 149 (1938).

[4] *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (extending *Gideon* to misdemeanors that resulted in actual imprisonment); *Alabama v. Shelton*, 535 U.S. 654 (2002) (extending *Gideon* to misdemeanors involving suspended jail sentences).

[5] *Duncan*, 391 U.S. at 150.

[6] *Mapp v. Ohio*, 367 U.S. 643 (1961).

[7] *Malloy v. Hogan*, 378 U.S. 1 (1964).

[8] *Pointer v. Texas*, 380 U.S. 400 (1965).

the right to have compulsory process for obtaining witnesses,[9] and the protection against double jeopardy.[10]

While some of these rights are guaranteed by the Indian Civil Rights Act (ICRA)[11] and the Ute tribal code, two significant rights are not. First, regarding the right to counsel, the ICRA does not guarantee a right to an attorney,[12] and the tribal code states that while the defendant has a right to hire an attorney, "no Defendant shall have the right to have appointed professional counsel provided at the Tribe's expense."[13] Second, regarding the right to a jury trial, while the ICRA and tribal constitution guarantee the right of a jury trial, the tribal criminal code states: "All trials of offense shall be by the Court *without a jury* unless the defendant files a request for a jury trial and ten dollars ($10.00) jury fee."[14]

In this case, the absence of these rights prejudiced Mr. Shavanaux in the convictions that the government now seeks to use against him under § 117. It is undisputed that he did not have an attorney appointed to represent him.[15] In one of the two cases he tried his case pro se to a judge because he did not have money to pay the $10 jury fee.

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[9] *Washington v. Texas*, 388 U.S. 14 (1967).

[10] *Benton v. Maryland*, 395 U.S. 784 (1969).

[11] 25 U.S.C. § 1302.

[12] Congress passed the Indian Civil Rights Act in 1968 to ensure that Native American defendants in tribal court benefitted from the rights given to American citizens in other forums. However, because tribal courts had jurisdiction to try only misdemeanors, 25 U.S.C. § 1302(7), and because *Gideon* had not yet been extended to misdemeanors, *see Argersinger v. Hamlin*, 407 U.S. 25 (1972), the ICRA did not include a right to counsel in tribal court.

[13] The Law and Order Code of the Ute Indian Tribe of the Uintah and Ouray Reservation, Title XII, Rule 3(1)(b), *available at* http://www.narf.org/nill/Codes/uteuocode/utebodyt12.htm.

[14] *Id*., Title XII, Rule 15(1) (emphasis added).

[15] Dockets of Cases 08-03911 and 06-0558 (Attachment A). The docket for case 08-0391 reflects that at some hearings Mr. Shavanaux appeared in court with an advocate. The term "advocate" as used here does not refer to a law trained attorney for purposes of either tribal law or Constitutional law. An advocate is a lay person who is authorized by the court to assist a defendant in his case but is not an attorney.

The government may argue that these protections are not required because the Bill of Rights does not apply to tribal courts. This argument is misplaced for two reasons. First, the most recent authorities to support this view do not squarely address the issue but simply cite *Talton v. Mayes*,[16] a century-old precedent that predates the legislation that made Native Americans citizens of the United States.[17] In 1896, the *Talton* Court 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" and insofar "as the powers of local self-government enjoyed by the [Indian tribes] existed prior to the constitution, they are not operated upon by the Fifth Amendment."[18] In 1924, Native Americans were granted citizenship in the United States.[19] Since this legislation, Native Americans have had full citizenship, which one would expect to include the protections afforded by the Constitution in a criminal trial. However, while the Supreme Court has suggested the Bill of Rights does not bind tribes in its recent discussions of tribal sovereignty,[20] neither the Tenth Circuit nor the United States Supreme Court since 1924 has explicitly considered whether a tribe may exercise its sovereignty in such a way that deprives a defendant's rights under the federal constitution.

Second, even if this court were to conclude that a tribal court is not obligated to afford a defendant the rights guaranteed under the federal constitution, the court must still consider

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[16] 163 U.S. 376 (1896).

[17] *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."); *Nevada v. Hicks*, 533 U. 353, 383–84 (2001)

[18] 163 U.S. at 382, 384.

[19] 8 U.S.C. § 1401(b).

[20] *See, e.g., Plains Commerce Bank*, 128 S. Ct. at 2709; *Hicks*, 533 U.S. at 353.

whether convictions sustained in the absence of those rights may be admitted in federal court. This is the approach taken by the court in *Cavanaugh*: "The Court's decision today does not seek to bind upon tribal courts the protections of the Sixth Amendment. It simply stands for the proposition that tribal convictions introduced in a federal court to prove an essential element of a federal crime must be in compliance with the United States Constitution."[21] For the reasons that follow, even if the court concludes that a tribe is not obligated to provide legal representation or a jury trial, in the absence of those protections, the tribal conviction may not be used in a federal criminal case.

B. Relying on uncounseled tribal convictions to establish the elements of a federal crime violates the Sixth Amendment and Due Process.

Here, using Mr. Shavanaux's uncounseled convictions against him in federal court would violate the Sixth Amendment and Due Process Clause of the Constitution.

In general, a conviction entered without the assistance of counsel cannot be used in a subsequent proceeding.[22] In some contrast to this rule, the Supreme Court held in *Lewis v. United States*[23] that a defendant could not collaterally attack a prior felony conviction in the context of a prosecution for being a felon in possession. However, as discussed more fully below, *Lewis* does not control given the nature of the statute at issue and because means were available to challenge the prior conviction. Because neither of these considerations is present in this case, *Lewis* does not control, and the court should follow the well-established precedent that prohibits reliance on an uncounseled conviction in a criminal case.

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[21] 680 F. Supp. 2d 1062, 1076–77 (D.N.D. 2009).

[22] *Burgett v. Texas*, 389 U.S. 109 (1967); *United States v. Tucker*, 404 U.S. 443 (1971); *Loper v. Beto*, 405 U.S. 473 (1972); *United States v. Custi*, 511 U.S. 485 (1994).

[23] 445 U.S. 55 (1980).

The development of this doctrine begins with *Johnson v. Zerbst*[24] and *Gideon v. Wainwright*.[25] *Johnson* held that an indigent defendant charged with a crime in federal court must be provided an attorney. The court reasoned as follows:

> [The Sixth Amendment right to counsel] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer—to the untrained layman—may appear intricate, complex, and mysterious. . . .
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> The '. . . right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.[26]

In *Gideon*, the court expanded this protection to felonies charged in state court. The court later extended *Gideon* to include misdemeanors for which a defendant was sentenced to jail.[27]

Following *Gideon*, a line of cases considered how an uncounseled conviction might be used in a subsequent criminal prosecution. Four years after *Gideon*, the Supreme Court in *Burgett v. Texas*[28] held that the Sixth Amendment was violated when an uncounseled conviction was offered in a subsequent prosecution for similar conduct under a recidivist statute. The Court stated:

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[24] 304 U.S. 458 (1938).
[25] 372 U.S. 335 (1963).
[26] 304 U.S. at 462–463.
[27] *Argersinger v. Hamlin*, 407 U.S. 25 (1972).
[28] 389 U.S. 109 (1967).

> To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right.[29]

Under this precedent, an uncounseled conviction could not be offered to establish that the defendant had "been before convicted of the same offense, or one of the same nature."[30]

In *United States v. Tucker*,[31] the Court held that a court could not consider an uncounseled conviction at sentencing. There the trial court relied on the defendant's prior criminal record, which included two uncounseled convictions, to justify the lengthy sentence imposed. The defendant sought habeas relief on the ground that the prior convictions were invalid and should not have been a cause for increasing the sentence. The Supreme Court agreed, holding that the court could not rely on those convictions to justify a sentence. To treat them as valid convictions at sentencing would result in a "misinformation of constitutional magnitude," and to rely on them to "enhance punishment" would erode *Gideon*.[32]

In *Loper v. Beto*[33] the court held that an uncounseled conviction could not be used to impeach a defendant who testified at trial. The Court reasoned that such use would "deprive[] [a defendant] of due process of law" and would also cause the defendant to "'suffer[] anew' from this unconstitutional deprivation."[34] Quoting the First Circuit, the Court stated:

> We conclude that the *Burgett* rule against use of uncounseled convictions "to prove guilt" was intended to prohibit their use "to impeach credibility," for the obvious purpose and likely effect of impeaching the defendant's credibility is to imply, if not

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[29] *Id*. at 115.
[30] *Id.* at 111 n.3 (quoting state statute at issue).
[31] 404 U.S. 443 (1972).
[32] *Id.* at 447, 449.
[33] 405 U.S. 473 (1972).
[34] *Id.* at 483, 484.

> prove, guilt. Even if such prohibition was not originally contemplated, we fail to discern any distinction which would allow such invalid convictions to be used to impeach credibility. The absence of counsel impairs the reliability of such convictions just as much when used to impeach as when used as direct proof of guilt.[35]

Notwithstanding these precedents, the Supreme Court held in *Lewis v. United States*[36] that an uncounseled conviction could be used to establish that a defendant was a felon in possession of a firearm. The court reviewed the statute's text to conclude that Congress had created a status offense under which the validity of the prior conviction did not matter:

> An examination of [the statute at issue] reveals that its proscription is directed unambiguously at any person who 'has been convicted . . . of a felony.' No modifier is present, and nothing suggests any restriction on the scope of the term "convicted." "Nothing on the face of the statute suggests a congressional intent to limit its coverage to persons [whose convictions are not subject to collateral attack.] The 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.[37]

To the majority, this rule reflected "the common-sense notion that a disability based upon one's status as a convicted felon should cease only when the conviction upon which that status depends has been vacated."[38] In reaching this conclusion, the Court considered the statute's text (which made no provision for a collateral attack) and legislative history (which manifested an "intent to impose a firearm disability based on the fact of conviction"[39]). The Court also emphasized that a person subject to this prohibition could take steps to remove his status as a convicted felon:

> Finally, it is important to note that a convicted felon is not without relief. As has been observed above, the Omnibus Act, in §§ 1203(2) and 925(c), states that the disability

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[35] *Id.* at 483 (quoting *Gilday v. Scafati*, 428 F.2d 1027, 1029 (1st Cir. 1970)).
[36] 445 U.S. 55 (1980).
[37] *Id.* at 60–61 (citations omitted).
[38] *Id.* at 61 n.5.
[39] *Id.* at 62.

> may be removed by a qualifying pardon or the Secretary's consent. Also, petitioner, before obtaining his firearm, could have challenged his prior conviction in an appropriate proceeding in the Florida state courts. It seems fully apparent to us that the existence of these remedies, two of which are expressly contained in the Omnibus Act itself, suggests that Congress clearly intended that the defendant clear his status before obtaining a firearm.[40]

In short, *Lewis* seems to say that where Congress created a status offense (i.e., one where the fact of conviction was relevant but the elements of the conviction were not) and provided some means of removing the disability, it was not constitutionally required to provide a means of collaterally challenging the prior conviction in the context of the status offense.[41]

Since *Lewis*, two more recent decision suggest that Congress cannot completely eliminate the availability of a collateral challenge in the context of a criminal prosecution, thus either carving away at *Lewis's* strict prohibition on collateral challenges in felon-in-possession cases or limiting *Lewis's* holding to its facts. In *United States v. Mendoza-Lopez*,[42] the defendant charged with illegal reentry argued that he could not be convicted because his prior deportation was unconstitutional. The issue before the Court was whether a defendant charged with the status offense of illegal reentry could collaterally challenge the fact of his prior deportation. As in *Lewis*, the Court studied the statutory text and concluded that Congress intended this statute to apply to all individuals who had been previously deported, regardless of whether the prior deportation was constitutionally defective. Notwithstanding Congress's intent to make collateral challenges to a prior deportation unavailable in a subsequent reentry prosecution, the Court held that some deprivations required a collateral remedy:

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[40] *Id.* at 64.
[41] *See id.* at 66 ("The federal gun laws . . . focus not on reliability, but on the mere fact of conviction.").
[42] 481 U.S. 828 (1987).

> That Congress did not intend the validity of the deportation order to be contestable in a § 1326 prosecution does not end our inquiry. If the statute envisions that a court may impose a criminal penalty for reentry after any deportation, regardless of how violative of the rights of the alien the deportation proceeding may have been, the statute does not comport with the constitutional requirement of due process. Our cases establish that where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be some meaningful review of the administrative proceeding.[43]

Because deportation was an administrative proceeding that did not entail the full panopoly of rights afforded in a criminal case, the scope of a collateral challenge was limited. "[I]n the very least," however, the Court held "that where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense."[44] Thus, at a minimum, collateral review must "be made available in any subsequent proceeding in which the result of the deportation proceeding is used to establish an element of a criminal offense."[45] While the Court declined to "enumerate which procedural errors are so fundamental that they may functionally deprive the alien of judicial review," the court noted that "in the context of criminal proceedings," "some errors necessarily render a trial fundamentally unfair," such as the use of a coerced confession, adjudication by a biased judge, or the knowing use of perjured testimony.[46]

In finding a constitutional right to collaterally attack a prior deportation, the Court specifically rejected the government's position that *Lewis* eliminated the availability of collateral review for this status offense. The Court emphasized that the holding in *Lewis* turned on the

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[43] *Id.* at 837–38.
[44] *Id*. at 838.
[45] *Id.* at 839.
[46] *Id.* at 839 n.17.

"availability of alternative means to secure judicial review of the conviction."[47] Here, "[i]t is precisely the unavailability of effective judicial review that sets this case apart from *Lewis*. . . . Persons charged with crime are entitled to have the factual and legal determinations upon which convictions are based subjected to the scrutiny of an impartial judicial officer."[48] Thus, despite Congress's clear intent to make such collateral review unavailable, under the Constitution, a defendant charged with illegal reentry had the right to challenge the prior deportation where the constitutional defects deprived him of judicial review of that deportation.

The most recent case to consider the availability of a collateral challenge to a prior uncounseled conviction is *Custis v. United States*.[49] In *Custis*, the defendant was convicted of being a felon in possession, and at sentencing the government sought to impose the 15-year mandatory minimum sentence under the Armed Career Criminal Act (ACCA) based on the defendant's prior convictions. At sentencing, the defendant argued that the court could not rely on two of his prior convictions because they were constitutionally defective, alleging among other things ineffective assistance of counsel. The district court rejected the argument on the merits, holding that prior counsels' actions were not ineffective. The district court then reversed course, holding instead that the defendant could not collaterally attack the prior convictions at all, except "when there was a complete denial of counsel in the prior proceeding."[50] The Supreme Court affirmed, holding that, in general, a defendant facing a sentencing enhancement under the ACCA could not collaterally challenge the validity of a prior conviction. As in *Lewis*, the Court

[47] *Id.* at 841.
[48] *Id.* at 841.
[49] 511 U.S. 485 (1994).
[50] *Id.* at 489.

reasoned that "[t]he statute focuses on the *fact* of the conviction and nothing suggests that the prior final conviction may be subject to collateral attack for potential constitutional errors before it may be counted."[51]

Notwithstanding this holding, the Court carved out an exception where the prior conviction was uncounseled. The defendant cited *Burgett* and *Tucker* for the proposition that a collateral challenge must be allowed in this context under the Constitution. The Court recognized these authorities to mean that the right to counsel was unique among other rights such that a challenge to its deprivation must always be made available. The Court stated: "There is thus a historical basis in our jurisprudence of collateral attacks for treating the right to have counsel appointed as unique, perhaps because of our oft-stated view that '[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.'"[52] Thus, while the ACCA did not contemplate collateral challenges in general, the constitution—as defined by the cases discussed above—required an exception to be made for the complete deprivation of counsel.

These cases make clear that a defendant charged with a violation of § 117 may properly challenge his prior convictions on the ground that he was deprived the assistance of counsel. Section 117 is a recidivist statute like the one at issue in *Burgett*, so that case should control the outcome of this case. Under *Burgett*, *Tucker*, and *Loper*, it is clear that relying on such uncounseled convictions would cause Mr. Shavanaux to "suffer anew" a violation of the Sixth Amendment, and even if the Court were to conclude that a defendant charged with § 117 is not

[51] *Id.* at 490–91.
[52] *Id.* at 494–95.

generally afforded the right to collaterally challenge a prior conviction, the challenge raised here falls squarely within the exception noted in *Custis*.

Lewis is distinguishable in two important ways. First, the statute at issue here is not a status offense like felon in possession but is a recidivist statute like the one at issue in *Burgett*. In general, firearm possession is not a crime, and *Lewis* makes clear that Congress could properly burden that civil right based on the conviction of a felony, regardless of the elements of that crime. Here, as in *Burgett*, the statute does not prohibit lawful conduct by those of a certain status. Rather, it says that a defendant who has previously committed a similar crime faces a higher penalty now than in the first instance. Under § 117, the fact that certain elements were established beyond a reasonable doubt is central to the prosecution. For the reasons discussed in these cases, the complete deprivation of the right to counsel undermines the reliability of those convictions such that they cannot now be used to establish that Mr. Shavanaux is a habitual offender.

Second, there appears to be no way to remove or judicially review a prior tribal conviction for which the sentence has already been discharged. Although the Ute tribal code does allow a defendant to appeal a conviction, it contains no provision for expungement.[53] However, even if there were a right to appeal, under the ICRA and tribal law, a defendant would not be entitled to relief based on the lack of appointed counsel. In contrast to an administrative deportation, for which an alien is entitled to review by an Article III court, there is no direct federal court review of a tribal conviction. The only way to review a tribal conviction is to bring

[53] Law and Order Code of the Ute Indian Tribe of the Uintah and Ouray Reservation, Title XII (Ute Indian Rules of Criminal Procedure), Section VI (Appeal), *available at* http://www.narf.org/nill/Codes/uteuocode/utebodyt12.htm.

a habeas petition in federal court. While the ICRA does provide for habeas review in federal court, this review is available only "to test the legality of his detention by order of an Indian tribe."[54] Thus, a Native American who has already discharged his sentence is not entitled to seek habeas relief in federal court.[55] Moreover, even if a court were to hold that a defendant who had already served his sentence was entitled to habeas review (and notwithstanding arguments here that the tribe is required to appoint counsel), it is not entirely clear that the defendant could succeed in vacating the tribal conviction based on the unavailability of appointed counsel.[56] Thus, in contrast to the civil disability in *Lewis*, for which a defendant could find relief, a person convicted of a qualifying conviction in tribal court has no relief, so there must be collateral review.

These considerations carried the day in *United States v. Cavanaugh*,[57] the only court so far to consider the constitutionality of relying on uncounseled tribal convictions under § 117. The court held that "a tribal court conviction that complies with tribal law and the Indian Civil Rights Act, but not the United States Constitution, [cannot] be used to establish an essential element of a federal crime."[58] Citing the precedents discussed herein, the court reasoned:

> The Court is unable to contemplate another situation in which it would permit a party to introduce evidence obtained in violation of the United States Constitution and allow it to be offered as substantive evidence to prove an essential element of a

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[54] 25 U.S.C. 1303.

[55] The Tenth Circuit has made clear that the "detention" standard in § 1303 is the same as the "in custody" standard under state habeas. *See Dry v. CFR Court of Indian Offenses for the Choctaw Nation*, 168 F.3d 1207, 1208 n.1 (10th Cir. 1999). A defendant whose sentence "has fully expired" is no longer "in custody" and cannot bring a habeas action. *See, e.g., McCormick v. Kline*, 572 F.3d 841, 851 (10th Cir. 2009).

[56] *See, e.g., United States v. Ant*, 882 F.2d 1389, 1391–92 (9th Cir. 1989) (holding that a tribal conviction was not invalid based on the unavailability of appointed counsel); *United States v. Cavanaugh*, 680 F. Supp. 2d 1062, 1073 (D.N.D. 2009) (noting that "unless tribal law provides otherwise, an indigent defendant in tribal court has no right to a court-appointed attorney").

[57] 680 F. Supp. 2d 1062.

[58] *Id.* at 1074–75.

> federal offense. . . . To 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*.[59]

The *Cavanaugh* court specifically rejected the government's argument that a collateral challenge was unavailable in the absence of a specific statutory authorization. Despite the compelling concern for protecting Native American women from serious injury or death, "in exercising its powers, Congress is not free to ignore constitutional rights. The constitutionality of a federal law is left to the Courts, and ultimately resides in the United States Supreme Court."[60] While this ruling did not go so far as to "bind upon tribal courts the protections of the Sixth Amendment," it recognized "the proposition that tribal convictions introduced in a federal court to prove an essential element of a federal crime must be in compliance with the United States Constitution."[61] Accordingly, "the introduction of uncounseled tribal court convictions in federal court as proof of an essential element of a federal crime violate[s] a defendant's right to counsel and due process."[62]

This court should similarly hold that the government may not properly rely on Mr. Shavanaux's uncounseled tribal convictions and dismiss the case against him.

C. Relying on uncounseled tribal convictions to establish the elements of a federal crime violates Equal Protection.

In addition to violating the Sixth Amendment and due process, relying on uncounseled tribal convictions violates Equal Protection because it deprives a certain class of citizens of their

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[59] *Id.* at 1076.

[60] *Id.*

[61] *Id.* at 1076–77; *see also United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989) (holding that while uncounseled guilty plea was valid under tribal law, it could not be admitted at a trial in federal court because it would have been invalid under federal law).

[62] *Id.* at 1076.

constitutional right to have counsel appointed based on their race and ethnic origin.

Of the Supreme Court cases discussed above, only one discusses the deprivation of the right to counsel as an issue of equal protection. In *Lewis*, the defendant argued that the felon in possession statute unreasonably discriminated between felons and non-felons, regardless of the validity of the conviction. The Court rejected this argument, reasoning that if Congress could deprive other civil rights, such as voting or holding office, then "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."[63]

This reasoning may make sense where the distinction between felons and non-felons does not fall along racial lines. But under § 117, the line between those with counseled and uncounseled convictions is, in fact, a racial one. Because tribal courts have jurisdiction over Native Americans only, the only defendants to be charged based on an uncounseled tribal conviction would be Native Americans. Because this distinction falls along racial lines, it is subject to higher scrutiny than the rational basis review applied in *Lewis*. Given the important nature of the right to counsel, there is not even a rational basis for wholesale discrimination against Native Americans charged in federal court.

The court in *Cavanaugh* relied on this rationale to conclude that § 117 was unconstitutional:

> As it stands now, American Indians are the only group of defendants that could face conviction under 18 U.S.C. § 117(a) as a result of underlying convictions for which they had no right to court-appointed counsel. While recognizing the unique status of tribes and tribal sovereignty, this Court does not believe it must give deference to tribal convictions if the result is to accord American Indians less than the minimum

[63] 445 U.S. at 66.

> protections guaranteed by the Constitution. After all, American Indians indicted under the Indian Major Crimes Act enjoy the same procedural benefits and privileges as all other persons within federal jurisdiction, so should they under 18 U.S.C. § 117(a).[64]

If the court is not persuaded that Supreme Court precedent prohibits the use of uncounseled convictions under § 117, it should nevertheless hold that § 117 violates Equal Protection because it improperly burdens only Native Americans whose tribal court convictions were entered without the assistance of counsel.

CONCLUSION

Because Mr. Shavanaux's prior convictions were entered without the assistance of counsel, relying on those convictions would violate his Sixth Amendment right to counsel as well as his Due Process right. Moreover, allowing the government to rely on uncounseled convictions would create an improper class based on racial/ethnic grounds. For these reasons, Mr. Shavanaux respectfully requests that the court dismiss the charge against him.

DATED this 30th day of June, 2010.

/s/ Kristen R. Angelos
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/s/ Benjamin C. McMurray
BENJAMIN C. MCMURRAY
Assistant Utah Federal Defender

[64] 680 F. Supp. 2d at 1077.

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing **MOTION TO DISMISS** was electronically filed, mailed/hand delivered on this 30th day of June, 2010, to:

Trina Higgins
Assistant United States Attorney
185 South State Street, Suite 400
Salt Lake City, UT 84101

/s/ A. Ashment
Utah Federal Defender Office