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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

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

Defendant Adam Shavanaux, by and through his attorney, Kristen R. Angelos, has asked this court to dismiss the indictment against him on the ground that the government seeks to introduce evidence of uncounseled tribal court convictions, in violation of his Sixth Amendment right to counsel and his Due Process rights. The government responds that it can properly rely on uncounseled tribal convictions because (a) the Constitution does not apply to tribal courts, (b) Mr. Shavanaux was not entitled to counsel in the prior cases, (c) Mr. Shavanaux cannot collaterally attack a prior conviction in the context of a criminal prosecution against him, and (d)

§ 117 does not violate Equal Protection because it has a rational basis. This arguments are without merit, so the case should be dismissed.

BACKGROUND

The government concedes that Mr. Shavanaux 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] The government argues, however, that Mr. Shavanaux has the burden of showing that he was indigent at the time of his prior convictions. However, affidavits submitted with this Reply establish that he was indigent at the time of his prior cases in 2006 and 2008.[2] The only real dispute in this case is whether uncounseled convictions from tribal court can be used to establish a violation of § 117.

ARGUMENT

I. Tribal courts should not be excused from the Constitution.

The government argues that it may properly rely on uncounseled tribal court convictions because Indian tribes are not subject to the protections of the Bill of Rights.[3] Mr. Shavanaux recognizes the authorities cited in the government's discussion that say the Bill of Rights does not apply to Indian tribal governments.[4] As explained previously, however, Mr. Shavanaux believes their analysis is flawed because it ignores the fact that since *Talton v. Mayes*,[5] which established the rule, Indians have been made full citizens.[6] It does not now make sense for the federal government to sanction a forum in which Indians can be denied their constitutional rights.

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[1] Gov't Resp. at 2.
[2] Declaration of Adam Shavanaux (Attachment A); Affidavit of Venice Shavanaux (Attachment B).
[3] Gov't Resp. at 3–6.
[4] *See, e.g., Duro v. Reina*, 495 U.S. 676 (1990).
[5] 163 U.S. 376 (1896).
[6] Def. Mem. at 5.

Ultimately, the court can grant the Motion to Dismiss without deciding whether Indian tribes are bound by the Constitution. As discussed below, use of an uncounseled conviction violates the Constitutional protections in *this* case, regardless of whether the prior convictions are allowed to stand as a matter of tribal governance.

II. Mr. Shavanaux's tribal cases should have enjoyed the assistance of counsel.

The government next argues that Mr. Shavanaux did not have an automatic right to counsel since his convictions were misdemeanors and, to the extent the sentence was unlawful in the absence of counsel, the sentence should be vacated but the conviction allowed to stand. This argument misreads precedent and ignores the facts of this case.

The government tries to take refuge in the holding of *Argersinger v. Hamlin*,[7] which left open the door to uncounseled misdemeanor convictions as long as a jail sentence was not imposed. However, the court recognized "that the problems associated with misdemeanor and petty offenses often require the presence of counsel to insure the accused of a fair trial."[8]

Recently, the Supreme Court recognized in *Padilla v. Kentucky* that significant collateral consequences may trigger a Sixth Amendment right to effective counsel, regardless of the risk of incarceration.[9] Under the government's theory, a defendant who pleads guilty to misdemeanor assault and receives a 365-day suspended sentence may not be able to later assert a Sixth Amendment violation on the rationale that the suspended sentence could be stricken in a subsequent proceeding.[10] However, under *Padilla*, that defendant may seek to invalidate the

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[7] 407 U.S. 25 (1972).

[8] *Id.* at 36–37.

[9] 130 S. Ct. 1473 (2010).

[10] *See United States v. Jackson*, 493 F.3d 1179, 1184 (10th Cir. 2007) (holding that a district court could properly strike a suspended jail sentence and rely on the uncounseled conviction at sentencing).

conviction on Sixth Amendment grounds once he discovers that this misdemeanor conviction for which jail was not imposed qualified as an aggravated felony and rendered him deportable.[11] *Padilla* makes clear that severe collateral consequences implicate a defendant's Sixth Amendment right to effective counsel even in the absence of actual incarceration.

In this case, the nature of Mr. Shavanaux's prior convictions makes the lack of counsel particularly problematic. Federal law imposes a number of significant collateral consequences for a domestic violence misdemeanor.[12] Under *Padilla*, the prospect of significant collateral consequences create an independent basis for finding a Sixth Amendment right to counsel.

Most significant, however, is that fact that in this case Mr. Shavanaux was actually sentenced to jail.[13] Thus, the government's proposed remedy from *United States v. Jackson*[14] cannot apply. The remedy in *Jackson* was limited to a case where a suspended jail sentence was wrongly imposed.[15] It does not apply where the defendant was actually incarcerated, as in this case. As the Court in *Argersinger* stated, "We need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, however, for here petitioner was in fact sentenced to jail."[16] Because Mr. Shavanaux was incarcerated without the assistance of counsel, the convictions are invalid under *Argersinger*.

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[11] *See* 8 U.S.C. § 1101(a)(43)(G), § 1101(a)(48)(B) (including within the definition of "aggravated felony" a "theft offense" for which the sentence, including the suspended portion, was at least one year).

[12] *See, e.g,* 18 U.S.C. § 117 (instant offense); 18 U.S.C. § 922(g)(9) (prohibiting possession of a firearm by a person convicted of "a misdemeanor crime of domestic violence"); 8 U.S.C. § 1101(a)(43)(F), (48)(B) (defining "aggravated felony" to include including misdemeanor crimes of violence).

[13] Dockets of Cases 08-03911 and 06-0558. Def. Mem. Attachment A.

[14] 493 F.3d 1179 (10th Cir. 2007).

[15] The government also ignores the fact that *Jackson* arose in the sentencing context. The court specifically noted that "factors unique to the federal sentencing process . . . at least mitigate concerns about the reliance on prior uncounseled misdemeanor convictions and misdemeanor sentences in subsequent sentencing proceedings." 493 F.3d at 1185. Nothing in *Jackson* suggests the court would apply the remedy it did in a case where the prior conviction was an element of the offense rather than a sentencing factor.

[16] 407 U.S. at 37.

III. Mr. Shavanaux can collaterally attack the constitutionality of his prior convictions in a § 117 prosecution.

A. United States v. Lewis

The government 's main argument on the core issue seems to be simply that *United States v. Lewis* controls, so a § 117 prosecution is an inappropriate forum to challenge the constitutionality of a prior conviction.[17] This argument is misplaced for several reasons.

First, despite the government's characterizations, the statute at issue here is more like the recidivist statute at issue in *Burgett v. Texas*[18] than the status offense at issue in *Lewis*. As discussed previously,[19] § 117 is a recidivist statute because the crime specifically targets repeat offenders—it imposes a harsher penalty for criminal conduct based on the fact that the defendant was previously convicted of a similar offense. In contrast, a status offense criminalizes lawful conduct based on the fact that a person has a felony on his record, regardless of the nature of the prior crime. A status offense asks only if the prior conviction was in force at the time the second crime was committed. Despite the government's protestations, § 117 is controlled by *Burgett*.

Second, the rule in *Lewis* is based on the fact that a felon, even one who was wrongly convicted, could seek relief from his status as a convicted felon. In contrast, a person convicted of an uncounseled tribal conviction has no forum in which to seek relief. Mr. Shavanaux has already pointed out that he has no legal means to challenge his prior convictions.[20] Thus, even if the court holds that § 117 is more like the statute in *Lewis* than the one in *Burgett*, *Lewis* is still distinguishable because the court there relied on the fact that a defendant could challenge the

[17] Gov't Resp. at 9–13.
[18] 389 U.S. 109 (1967).
[19] Def. Mem. at 14.
[20] Def. Mem. 14–15.

prior unconstitutional conviction before possessing a weapon. Here, Mr. Shavanaux had no such option, so *Lewis* does not control. As discussed previously, this reasoning is reinforced by the analysis in *United States v. Mendoza-Lopez*,[21] to which the government has not responded. In the absence of any response from the government on this point, the court should accept it and dismiss the case against Mr. Shavanaux.

Third, the government suggests that, under *Lewis*, a Sixth Amendment deprivation is justified in a subsequent proceeding as long as the deprivation is supported by a rational basis.[22] This claim misplaces the rational basis discussion in *Lewis*. It is true that the *Lewis* Court stated that "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.[23] The context of this discussion, however, was not the defendant's Sixth Amendment claim but his Equal Protection argument.[24] Moreover, for reasons discussed further below, § 117 does not benefit from rational basis review.

Fourth, *Lewis* is in tension with the general rule that you may collaterally attack a prior conviction. Should the court reject all of the foregoing, Mr. Shavanaux notes his disagreement with the rule in *Lewis*. This rule is in tension with the *Burgett* before it and *Custis* after it. The better rule is expressed in the *Lewis* dissent. Should the court find that *Lewis* controls the application of § 117, Mr. Shavanaux notes his objection to the rule for the purpose of preserving the issue for later appeal.[25]

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[21] Def. Mem. 10–12, 14–15 (discussing *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987)).
[22] Gov't Resp. at 12.
[23] *Lewis*, 445 U.S. at 66.
[24] *Id.* at 65 (section IV discussing Equal Protection).
[25] *See, e.g., McKnight v. General Motors Corp*., 511 U.S. 659, 660 (1994) (per curium) (raising an issue on appeal that is foreclosed by circuit precedent preserves the issue for review by the Supreme Court).

In the end, Mr. Shavanaux does not question the government's suggestion that Congress intended to pass a law that would deprive him of his right to collaterally attack his prior convictions.[26] However, its decision to do so was unconstitutional.

B. Custis v. United States

The government cites *Custis v. United States*[27] for the suggestion that a collateral challenge is only available where Congress has expressly permitted such a challenge.[28] This claim misreads *Custis*. At issue in *Custis* was whether a defendant facing an enhancement under the Armed Career Criminal Act (ACCA) could collaterally attack a prior conviction on any and all grounds. To be sure, the Court rejected such a broad right in the absence of a provision specifically authorizing a collateral attack. However, contrary to the government's position, the Court in *Custis* specifically acknowledged a separate, constitutional right to bring a collateral challenge based on a Sixth Amendment violation, *despite* its conclusion that the statute at issue did not expressly authorize such attack.[29] The Court reasoned: "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.'"[30] Although a statutory authorization was necessary to bring a challenge on other grounds, *Custis* makes clear that statutory authorization is unnecessary where the right at issue is based on the deprivation of a defendant's Sixth Amendment right to effective counsel.

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[26] Gov't Resp. at 11–12, n.4–5 and accompanying text.
[27] 511 U.S. 485 (1994).
[28] Gov't Resp. at 14.
[29] 511 U.S. at 490–92.
[30] *Id.* at 494–95 (quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)).

In short, the great weight of precedent indicates that Mr. Shavanaux should be allowed in this case to challenge the constitutionality of his prior convictions on Sixth Amendment grounds.

IV. Relying on uncounseled tribal convictions violates equal protection.

The government's main response to the equal protection argument seems to be that any discrimination in the context of Native Americans needs to survive only rational basis review.[31] However, the government's cited authorities do not carry the weight it assigns to them.

The government cites *United States v. Antelope*[32] for the proposition that discriminatory application of federal statutes towards Indians does not violate Equal Protection.[33] In *Antelope*, the Court considered whether a federal murder prosecution of an Indian for a crime that occurred on tribal land violated Equal Protection because a non-Indian could not have been prosecuted under that statute. The Court found no violation, reasoning that once the defendant had been subjected to federal jurisdiction over a federal enclave, the statute was equally applicable to any defendant who committed such a crime in a federal enclave. The Court noted that the defendants were "subjected to the same body of law as any other individual, Indian or non-Indian, charged with first-degree murder committed in a federal enclave."[34] The Court concluded: "Under our federal system, the National Government does not violate equal protection when its own body of law is evenhanded, regardless of the laws of States with respect to the same subject matter."[35]

As with the statute at issue in *Antelope*, § 117 applies to any defendant who commits this crime within a federal enclave. The distinction, however, is that it prejudices many Native

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[31] Gov't Resp. at 15–17.
[32] 430 U.S. 641 (1997).
[33] Gov't Resp. at 15–16.
[34] 430 U.S. at 648.
[35] *Id.* at 649.

Americans whose prior convictions were established without the right of counsel. *Antelope* does not control because § 117 does not involve the evenhanded application of a consistent federal scheme. Indians whose tribal convictions were entered without the benefit of counsel will be deprived their right to effective assistance of counsel, while others will not.

The government cites *Morton v. Mancari*[36] for the proposition that the government may "single out Indians for particular and special treatment" without running afoul of Equal Protection. *Morton* is distinguishable in two respects. First, the conduct charged does not single out Indians. Although the cited legislation suggests § 117 was adopted with Indians in mind, it is a statute of universal applicability, so it cannot be viewed in this special class of discriminatory statutes that is immune to Equal Protection review. Second, the "special treatment" at issue in *Morton* was preferential hiring within the Bureau of Indian Affairs, which was justified as being "reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups."[37] Had Congress passed legislation that gave "special treatment" to the victims of domestic violence on an Indian reservation, that benefit would undoubtedly survive equal protection analysis under *Morton*. But that is not what has happened here. Rather than giving Indians special treatment to foster self-government, Congress has singled out Indian defendants who are already disadvantaged by the lack of appointed counsel and further subjected them to federal authority external to their tribal governments.

[36] 417 U.S. 535, 554–55 (1974).
[37] *Id.* at 554.

CONCLUSION

It is bad enough that U.S. citizens prosecuted in tribal court, all of them Native Americans, may be denied their right to effective counsel. To then bring them into federal court and rely on those uncounseled convictions in a federal prosecution solidifies their place as second-class citizens. Recently, Congress has recognized this disparity by passing the Tribal Law and Order Act, which gives tribes felony jurisdiction over Indians but requires, among other things, the appointment of counsel.[38] Going forward, many Native Americans will be given the assistance of counsel, and in such cases, the government may properly rely on those convictions in a § 117 prosecution. In this case, however, Mr. Shavanaux's prior convictions were entered without the assistance of counsel, so using them now would violate his Sixth Amendment right to counsel and his due process rights.

For these reasons, the indictment against Mr. Shavanaux should be DISMISSED.

DATED this 27th day of September, 2010.

/s/ Kristen R. Angelos
KRISTEN R. ANGELOS
Assistant Utah Federal Defender

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

[38] Pub. L. 111-211, Tit. II (July 29, 2010).

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing **REPLY TO GOVERNMENT'S RESPONSE TO MOTION TO DISMISS** was electronically filed, mailed/hand delivered on this 27th day of September, 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

Attachment A

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. Adam Shavanaux, Defendant.	**DECLARATION OF** Adam Shavanaux Case No.: 2:10-cr-00234-TC-SA

STATE OF UTAH)
:ss
County of Salt Lake)

I, Adam Shavanaux, declare the following

1. In 2006 I was working at KB Insulation in Gusher, Utah full time. I was making $12 per hour.
2. About half my check was being garnished for current and back child support payments for two of my three children not living with me.

3. My 12 year old son Adam Shavanaux Jr. was living with me and I was responsible for caring for him.
4. I was living in my deceased parents' home on the Fort Duchesne Indian Reservation. It is an older home with no heating system. A wood burning stove provided its only heat.
5. I had a 1994 Ford Pickup Truck and it was working at the time. Its approximate value would be less that $1,000.
6. I did not have any money to hire a licensed attorney or even a Tribal advocate for my criminal case, so I represented myself. I wasn't aware I could have a jury trial so I tried the case to the bench.
7. In 2008 I was not working and my only source of income was a dividend I received from the Ute Tribe. It was about $500 per month,
8. I was still living in my deceased parents' home. My truck was not working.
9. I could not afford to hire a licensed attorney.
10. I asked my aunt, Venice Shavanaux, for assistance and she hired a Tribal Advocate for me.
11. This time I plead guilty without a trial and got a year in jail.

I declare (certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 31 day of Aug, 2010

Adam Shavanaux

Attachment B

STEVEN B. KILLPACK, Federal Defender (#1808)
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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. Adam Shavanaux, Defendant.	**AFFIDAVIT OF** Venice Shavanaux Case No.: 2:10-cr-00234-TC-SA

STATE OF UTAH)

:ss

County of Duchesne)

I, Venice Shavanaux, having been first duly sworn upon oath, deposes and states as follows:

1. I am Adam Shavanaux's aunt and my mailing address is

My phone number is I have information about Adam's financial status in 2006 and 2008.

2. Adam is living in a home that belonged to my mother. The home is an older home without a heating system. The only heat comes from a wood burning stove. The home is a Tribal home and belongs to the Tribe..
3. Adam has three children. Two are in foster care and one lives with him.
4. In 2006 and 2008 Adam was responsible for child support for his two children in foster care and for supporting the child who lives with him.
5. Adam owns an older pickup truck. I believe it is a 1994 Ford.
6. In 2006 I recall that Adam was working an insulation company. He wasn't making much money. I think that half his wages were being garnished for child support for the two children not living with him.
7. In the 2006 case, he needed bail money to get out of jail. I posted the needed cash and put up my car as a property bond. I did this because Adam did not have the money to do it.
8. Adam didn't have enough money to hire an attorney. I didn't have enough to lend him for an attorney, so none was hired.
9. In 2008 Adam wasn't working and he had limited financial resources.
10. I was able to get enough money together to hire a tribal advocate. I hired Norman Cambridge to assist Adam in the criminal case. Mr. Cambridge is not a licensed attorney. He is a member of the community who has some knowledge of the Ute Indian legal system.
11. As I recall the Tribal Advocate charged a fee of $250 pr $300.
12. I could not get enough money together to hire an attorney. Adam did not have money to hire an attorney.

DATED this 31 day of August, 2010

Venice Shavanaux

The foregoing Affidavit was Subscribed and sworn to before me by

this 31 day of August, 2010.

NOTARY PUBLIC
My Commission Expires: Sept 3, 2013