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10-4178

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

ADAM SHAVANAUX,

Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
(Hon. Tena Campbell)

BRIEF FOR THE UNITED STATES

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STATEMENT OF THE ISSUE

Whether the Sixth Amendment or the Due Process Clause of the Federal Constitution bars the use of uncounseled tribal court misdemeanor convictions for which imprisonment was imposed to prove an element of the recidivist domestic assault offense proscribed by 18 U.S.C. § 117(a).

STATEMENT OF JURISDICTION

This is an appeal from an order dismissing the indictment in a criminal case.

The order appealed from was entered on October 14, 2010. Doc. 31; App. 43-45. The notice of appeal was timely filed on October 15, 2010. Doc. 32; App. 46; see Fed. R. App. P. 4(b)(1)(B)(i). The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 18 U.S.C. § 3731 and 28 U.S.C. 1291.

STATEMENT OF THE CASE

An indictment returned on March 24, 2010, in the United States District Court for the District of Utah charged defendant Adam Shavanaux with domestic assault by a person with two or more final convictions for domestic assault or like offenses, a felony in violation of 18 U.S.C. § 117(a). Doc. 1; App. 7-8. On October 14, 2010, after briefing and a hearing, the district court (Hon. Tena Campbell) granted (Doc. 31) Shavanaux's motion (Doc. 20) to dismiss the indictment on the ground that Section 117 is unconstitutional to the extent it allows an uncounseled tribal court misdemeanor conviction to qualify as a predicate final conviction in a prosecution under Section 117(a). App. 43-45; Addendum, infra. This government appeal followed.

STATEMENT OF FACTS

A. Shavanaux Is Charged with Domestic Assault by an Habitual Offender, in Violation of 18 U.S.C. § 117(a), Based on an Assault He Committed After Having Two or More Final Domestic Assault Convictions Obtained in Tribal Court.

Defendant/appellee Adam Shavanaux is a member of the Ute Indian Tribe and resides on the Uintah and Ouray Reservation in Utah. The indictment alleges that, on January 10, 2010, he assaulted his domestic partner, R.T., after having been convicted of assault on a domestic partner on two prior occasions, in violation of 18 U.S.C. § 117(a). App. 7-8.

Section 117(a) provides:

> **§ 117. Domestic assault by an habitual offender**
>
> **(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 –
>
> (1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner or
>
> (2) an offense under chapter 110A [domestic violence and stalking offenses prescribed by 18 U.S.C. §§ 2261 (interstate domestic violence), 2261A (interstate stalking), 2262 (interstate violation of a protection order)],
>
> 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.
>
> **(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.

B. Shavanaux's Prior Tribal Court Misdemeanor Convictions for Domestic Assault Were Obtained Without Counsel, and He Was Sentenced to Imprisonment for Those Convictions.

Shavanaux has two prior tribal-court convictions. First, on October 28, 2008, Shavanaux pleaded guilty to aggravated assault and disorderly conduct in the Ute tribal court and thereafter was sentenced to a total of 13 months of imprisonment. App. 9-10. Second, on November 29, 2006, after a jury trial in the Ute tribal court, Shavanaux was convicted of aggravated assault and terroristic threats and thereafter was sentenced to 90 days of imprisonment. App. 11-13.[1] In those prosecutions, Shavanaux had the right "[t]o appear and defend in person or by counsel," but he did not "have the right to have appointed professional counsel

[1] The tribal court records do not themselves show that the assault convictions were against a domestic partner or other person satisfying the definition of "domestic assault" in Section 117(b). That would need to be proved at trial.

provided at the Tribe's expense." Rule 3(1)(b) of the Ute Indian Rules of Criminal Procedure.[2] By affidavits filed in the district court, Shavanaux established to that court's satisfaction that he was not represented by counsel in those tribal court prosecutions and he could not afford an attorney. App. 14-18.

C. The District Court Dismisses the Indictment on the Ground that 18 U.S.C. § 117(a) Is Unconstitutional Insofar as It Allows Uncounseled Tribal Court Misdemeanor Convictions for Which Imprisonment Was Imposed To Be Used as Predicate Convictions.

Shavanaux filed a motion to dismiss the indictment asserting that the Sixth Amendment and the Due Process Clause of the Fifth Amendment of the Federal Constitution forbid reliance on his uncounseled tribal misdemeanor convictions to support a charge under 18 U.S.C. § 117(a). He further argued that the statute's applicability to Indians violates the equal protection guarantee of the Fifth Amendment Due Process Clause. The government responded that Section 117(a) does not require that a person be represented by counsel in the underlying tribal prosecution and that the Federal Constitution is not violated by using such convictions as predicate offenses under Section 117(a) because the tribal court convictions are valid under tribal and federal law. The government further argued that Shavanaux cannot collaterally attack the validity of those convictions in the

[2] The Ute Indian Rules of Criminal Procedure may be found at http://www.narf.org/nill/Codes/uteuocode/utetoc.htm

Section 117(a) prosecution and that Section 117(a) does not violate equal protection because it satisfies the applicable rational basis requirement.

The district court agreed with the government that the Federal Constitution does not apply to tribal court prosecutions and therefore Shavanaux did not have any federal Sixth Amendment or due process right to appointed counsel in tribal court. App. 44 (Op. at 2). The court further agreed with the government that Shavanaux's tribal prosecutions complied with the applicable provisions of the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq*. Id. Accordingly, the district court concluded that "Shavanaux's two convictions for aggravated assault do not violate either the Indian Civil Rights Act or the United States Constitution." Id.

The district court ruled, however, that use of those otherwise-valid tribal court convictions in a Section 117(a) prosecution would violate Shavanaux's Sixth Amendment right to counsel. The court relied by reference on the decision to that effect of another district court, United States v. Cavanaugh, 680 F. Supp. 2d 1062 (D.N.D. 2009), appeal pending, No. 10-1154 (8th Cir.). App. 44 (Op. at 2). The court further found that "[t]he decision in Custis v. United States, 511 U.S. 485 (1994), supports the conclusion that Mr. Shavanaux's Sixth Amendment right to counsel would be violated if this prosecution were to proceed." App. 45 (Op. at 3).

LEGAL STANDARDS GOVERNING TRIBAL COURTS

This case does not involve the validity of Shavanaux's prior tribal-court domestic assault convictions, but rather the constitutionality of the use of those convictions in a Section 117(a) prosecution to establish the recidivism element of that domestic assault offense. Nevertheless, an overview of the legal standards governing tribal courts provides a backdrop for the constitutional issues involved in this case.

"[A]n Indian tribe acts as a separate sovereign when it prosecutes its own members." United States v. Lara, 541 U.S. 193, 197 (2004) (emphasis omitted). Tribal court prosecutions are not governed by the Federal Constitution. "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). Significantly, "the Bill of Rights does not apply to Indian tribal governments." Duro v. Reina, 495 U.S. 676, 693 (1990) (citing Talton v. Mayes, 163 U.S. 376 (1896)). Accordingly, the Sixth Amendment right to counsel does not apply in tribal court prosecutions. 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.

Congress has authorized the tribes to impose imprisonment up to one year in any single prosecution without providing counsel to indigent defendants. Pub. L. No. 111-211 § 234, 124 Stat. 2280 (July 29, 2010), amended Section 1302 to grant tribal courts jurisdiction to impose criminal penalties of up to 3 years of imprisonment for certain offenses or to impose consecutive punishments totaling up to 9 years of imprisonment for multiple convictions in a single prosecution; provided, however, that in any criminal proceeding in which the total punishment exceeds 1 year of imprisonment, the tribe must provide appointed, qualified counsel to an indigent defendant; and further provided that the judge in such a case must be licensed to practice law and must have sufficient experience to preside over a criminal proceeding.[3] This statutory right to counsel is not

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[3] Section 1302 now provides in pertinent part:

(a) In general.
No Indian tribe in exercising powers of self-government shall--

* * *

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));

(7)(A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

* * *

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000.
A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who--
(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or
(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

(c) Rights of defendants.
In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall--
(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;
(3) require that the judge presiding over the criminal proceeding--
(A) has sufficient legal training to preside over criminal proceedings; and

coextensive with the SixthAmendment right to counsel, however. It applies only as an adjustment to the tribes' sentencing authority. A tribe may prosecute any offense or combination of offenses without providing appointed counsel to an indigent defendant as long as the total punishment imposed in that single prosecution does not exceed a year of imprisonment. If an indigent defendant were sentenced to greater than a year of total punishment without appointed counsel being made available to him, the defect would not be in the prosecution or conviction, but rather in the sentence. The sentence would exceed ICRA's one-year maximum for uncounseled convictions.

Section 1303 provides that "[t]he privilege of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." In addition, tribes generally provide for direct review of such convictions in the tribal court system. See, e.g., Ute R. Crim.

(B) is licensed to practice law by any jurisdiction in the United States;
(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and
(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

* * *

P. 28-30 (appeal procedures). Ute R. Crim. P. 26 (Correction or Reduction of Sentence) provides that the tribal court "may correct an illegal sentence at any time * * *," which suggests that collateral review of an illegal sentence also may be available in the Ute tribal court.

CRIMINAL JURISDICTION OVER DOMESTIC VIOLENCE IN INDIAN COUNTRY

When a tribe prosecutes an Indian for an offense against another Indian in Indian Country, it exercises its inherent tribal authority and acts in its capacity as a separate sovereign. See Lara, 541 U.S. at 210. A tribe has no jurisdiction to prosecute a non-Indian, even for a crime against an Indian on the Reservation. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

State courts lack jurisdiction in Indian country over offenses committed by an Indian, or committed by a non-Indian if the victim is an Indian. Solem v. Bartlett, 465 U.S. 463, 465 n.2 (1984); New York ex rel. Ray v. Martin, 326 U.S. 496 (1946).[4]

Congress has provided for federal jurisdiction over certain offenses committed by or against Indians in Indian country, but that federal jurisdiction is

[4] Congress has granted a small number of states such jurisdiction, 18 U.S.C. § 1162, but Utah is not among them.

not comprehensive. See, e.g., 18 U.S.C. §§ 13, 1152, and 1153.[5] Specifically, those statutes do not adequately address the endemic and serious problem of domestic violence in Indian country. Congress sought to fill this gap by enacting The Violence Against Women Act of 2005, Pub. L. 109-162, Tit. IX, § 909, 119 Stat. 3084 (Jan. 5, 2006). The Congressional findings (codified at 42 U.S.C. 3796gg-10 (statutory note)) starkly illustrate the scope of the problem:

> (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.

Due to the nature of domestic violence, felony prosecution of repeat offenders is an important means to respond to a continuing pattern of violence.

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[5] Federal offenses of general applicability that apply to any person likewise apply in Indian country. See United States v. Errol D., Jr., 292 F.3d 1159, 1164-1165 (9th Cir. 2002).

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) ("The survey found that women who were physically assaulted by an intimate partner averaged 6.9 physical assaults by the same partner, [and] men averaged 4.4 assaults.); id. at 26 (Indian/Alaska-Native group in survey reported approximately 50 percent higher incidence of victimization from domestic violence than white group and approximately 29 percent higher incidence than African-American group). Moreover, research shows that prior physical abuse is often a precursor to intimate partner homicide and that frequent episodes of violence pose a high risk of future, deadly violence. See Jacquelyn C. Campbell, et al., "Risk Factors for Femicide in Abusive Relationships Results from a Multisite Case Control Study," 93 Am. J. of Pub. Health 1091 (Vol. 93, No. 7 July 2003) ("70% of the 307 total femicide cases were physically abused before their deaths by the same intimate partner who killed them"); Carolyn Rebecca Block, "How Can Practitioners Help an Abused Woman Lower Her Risk of Death?," NIJ Journal 5 (No. 250, Nov. 2003) ("In the great majority of homicides, the woman had experienced violence at the hands of her partner in the past year. Also, most

of the abused women had experienced other incidents in the past.").

To help confront this problem, Congress targeted domestic assaults by habitual offenders in Section 117(a). As the title of Section 117 states, it is targeted at "[d]omestic assault by habitual offender[s]." That section authorizes a district court to sentence by up to 5 years of imprisonment "any person" who commits a "domestic assault" within "the special maritime and territorial jurisdiction of the United States or Indian country" after having "a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings" for like offenses, and to sentence such an offender by up to 10 years of imprisonment "if substantial bodily injury results from violation under this section."

SUMMARY OF ARGUMENT

Shavanaux's tribal court misdemeanor convictions were not invalid under the Federal Constitution and could not have been set aside in any forum on the ground that the Ute Tribe does not provide appointed counsel to indigent defendants. It does not violate the Sixth Amendment or the Due Process Clause for Congress to have provided that such a tribal court conviction can be used as a predicate "final conviction" under 18 U.S.C. 117(a).

A. Shavanaux's tribal court convictions were constitutionally valid. "[T]he

Bill of Rights does not apply to Indian tribal governments." Duro v. Reina, 495 U.S. 676, 693 (1990). Accordingly, the Sixth Amendment right to counsel does not attach to defendants charged in tribal court. It is irrelevant to the validity of a tribal court conviction that an indigent defendant in federal court has a Sixth Amendment right to appointed counsel before he may be imprisoned for any offense, and that a defendant in state court has the same right under the Due Process Clause of the Fourteenth Amendment. Argersinger v. Hamlin, 407 U.S. 25 (1972).

B. Congress has broad authority to define offenses, and can include as an element the fact of a defendant's prior conviction. When it does so, the Due Process Clause does not require that the defendant's guilt of the underlying prior offense independently be established in the subsequent federal prosecution. If the element is defined in terms of the existence of a prior conviction, proof of the fact of that conviction is all that is required to satisfy the statutory element. The extent to which a defendant will be permitted to preclude use of a prior conviction for that purpose, or to qualify him for enhanced punishment, is primarily a matter of statutory interpretation, not constitutional limitation.

1. The constitutionality of Congress' decision to allow proof of the mere fact of a prior conviction to establish an element of an offense or qualify defendant

for an enhanced sentence is tested under the rationality principle of the Due Process Clause, "with the deference that a reviewing court should give to a legislative determination." Lewis v. United States, 445 U.S. 55, 67 & n.9 (1980). Congress' determination to allow the use of prior tribal court convictions in Section 117(a) satisfies due process.

There is no doubt that Congress reasonably concluded that the problems of recidivist domestic violence in Indian country required federal criminal intervention. Congress specifically included prior final convictions for domestic assault and like offenses obtained in tribal court proceedings. Congress was well aware that tribal courts do not generally provide counsel to indigent defendants and that ICRA does not provide all the safeguards of the Bill of Rights. Yet Congress has provided a range of guarantees to ensure a baseline of fairness in tribal prosecutions and has afforded review in federal court of any tribal court conviction for which the defendant is sentenced to imprisonment. Congress could rationally conclude that these safeguards produce a sufficiently reliable outcome to support use of a tribal court conviction to show habitual offender status. Moreover, quite apart from the reliability of the prior adjudications, Congress could rationally determine that felony punishment was warranted for a defendant who had twice formally been found by his community to have engaged in

domestic violence offenses, yet who nevertheless commits another domestic violence offense.

2. There is no constitutional limitation on Congress' authority to use an uncounseled determination of guilt in a misdemeanor prosecution to establish recidivist status for purposes of enhancing punishment or elevating what would otherwise be a misdemeanor offense to a felony. Nichols v. United States, 511 U.S. 738 (1994), held that it does not offend due process or the Sixth Amendment to use a valid, uncounseled misdemeanor conviction for purposes of sentencing enhancement in a subsequent prosecution. Nichols overruled the prior decision in Baldasar v. Illinois, 446 U.S. 222 (1980) (per curiam), which precluded use of such a conviction to elevate a misdemeanor offense to a felony for which imprisonment was imposed. Nichols strongly supports the conclusion that a determination of guilt in a constitutionally valid uncounseled misdemeanor conviction may be used to define a subsequent felony offense. Like Nichols' prior conviction, Shavanaux's prior convictions are not invalid under the Constitution. Their use in a prosecution designed to punish repeat offenders does not constitute additional punishment for those prior offenses; rather, the Supreme Court "consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant." Nichols, 511 U.S. at 747.

3. Even if there were some defect in Shavanaux's tribal court convictions, Section 117(a) does not authorize a collateral attack on the validity of those convictions in the context of the federal prosecution. A prerequisite for any challenge to a prior conviction used as a predicate for guilt or sentencing enhancement is a showing by defendant that the conviction itself is constitutionally invalid. A misdemeanor conviction may be constitutionally obtained without benefit of counsel if no imprisonment is imposed, Scott v. Illinois, 440 U.S. 367 (1979), and it may be used as a predicate offense in a subsequent prosecution, Nichols, supra. The constitutional infirmity when imprisonment is imposed for a misdemeanor conviction in state or federal court without the right to appointed counsel for an indigent defendant is the imposition of imprisonment, not the fact of conviction. The determination of guilt for the misdemeanor offense is the same, and the same procedures are employed, whether counsel is provided or not. Accordingly, this Court has held that an indigent defendant convicted of a misdemeanor offense in violation of his right to counsel may have his term of imprisonment vacated on direct or collateral review, but may not have the conviction itself overturned. United States v. Reilley, 948 F.2d 648, 654 (10th Cir. 1991). Thus, neither an Indian nor a non-Indian defendant may exclude the fact of a prior "final conviction" in a Section 117(a) prosecution

because the "final conviction" is valid.

4. Use of prior tribal-court convictions in a Section 117(a) prosecution does not violate the equal protection component of the Due Process Clause even if it could be viewed as treating Indian criminal defendants differently from non-Indian defendants. United States v. Antelope, 430 U.S. 641, 645 (1977). Legislation that "singles out Indians for particular and special treatment" will be upheld "[a]s 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 made a rational choice in determining that tribal court convictions could be counted as recidivist offenses under Section 117(a) and that such inclusion was appropriate to combat the special problem of domestic violence in Indian country.

STANDARD OF REVIEW

This case presents purely legal questions about the scope and constitutionality of a federal statute, which are reviewed de novo. E.g., United States v. Dorris, 236 F.3d 582, 584 (10th Cir. 2000).

ARGUMENT

THE USE OF UNCOUNSELED TRIBAL COURT MISDEMEANOR CONVICTIONS TO ESTABLISH THE RECIDIVIST ELEMENT OF 18 U.S.C. § 117(a) DOES NOT VIOLATE THE SIXTH AMENDMENT OR THE DUE PROCESS CLAUSE

Shavanaux's uncounseled tribal court misdemeanor convictions did not violate the Sixth or Fourteenth Amendments of the Federal Constitution because the Constitution does not apply to tribal prosecutions. Neither the Sixth Amendment nor the Due Process Clause bars the use of such tribal court convictions to establish the prior-convictions element of 18 U.S.C. § 117(a).

A. Shavanaux's Uncounseled Tribal Court Misdemeanor Convictions Were Not Invalid Under the Federal Constitution.

[A]n Indian tribe acts as a separate sovereign when it prosecutes its own members." United States v. Lara, 541 U.S. 193, 197 (2004) (emphasis omitted). Tribal court prosecutions are not governed by the Federal Constitution. "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). "[T]he Bill of Rights does not apply to Indian tribal governments." Duro v. Reina, 495 U.S. 676, 693 (1990) (citing Talton v. Mayes,

163 U.S. 376 (1896)). Thus, there is no constitutional right for a defendant in tribal court to have counsel appointed if he is indigent.

It is irrelevant to the validity of a tribal court conviction that an indigent defendant in federal court has a Sixth Amendment right to appointed counsel before he may be imprisoned for any offense, and that a defendant in state court has the same right under the Due Process Clause of the Fourteenth Amendment. Argersinger v. Hamlin, 407 U.S. 25 (1972); see Scott v. Illinois, 440 U.S. 367 (1979) (absent actual imprisonment, the Constitution does not guarantee the right to appointed counsel to a defendant convicted of a misdemeanor); Alabama v. Shelton, 535 U.S. 654 (2002) (Argersinger applies when punishment is a suspended term of imprisonment).[6]

Thus, it is clear that Shavanaux's prior uncounseled misdemeanor convictions for domestic assault did not violate any provision of the Federal Constitution and could never have been set aside in federal court based on the contention that Shavanaux was indigent and was denied appointed counsel.

[6] "In felony cases, in contrast to misdemeanor charges, the Constitution requires that an indigent defendant be offered appointed counsel unless that right is intelligently and competently waived." Nichols v. United States, 511 U.S. 738, 743 n.9 (1994); see Gideon v. Wainwright, 372 U.S. 335 (1963).

B. Congress Constitutionally May Provide that a Tribal Court Conviction for Domestic Assault May Be Used as a Predicate Prior "Final Conviction" for the Section 117(a) Offense.

When Congress elects to use the fact of a defendant's prior conviction to partially define an offense, or to define the punishment for an offense, there is no constitutional requirement that the defendant's guilt of the underlying prior offense independently be established in the subsequent federal prosecution. If the element is defined in terms of the existence of a prior conviction, proof of the fact of that conviction is all that is required. The extent to which a defendant will be permitted to preclude use of a prior conviction to satisfy an element of an offense, or to qualify him for enhanced punishment, is primarily a matter of statutory interpretation, not constitutional limitation. It does not violate the Sixth Amendment or the Due Process Clause to use uncounseled tribal court misdemeanor convictions to prove an element of the Section 117(a) offense.

1. There Is No Statutory Right for a Defendant To Preclude Use of a Valid Tribal Court Conviction in a Section 117(a) Prosecution.

Where Congress has permitted the use of a prior conviction as an element of proof or for sentencing enhancement, a defendant is not permitted to object to the use of a prior conviction that is valid under the Constitution. Congress may define an element of an offense in terms of the fact of a prior conviction if it satisfies the

rationality principle of the Due Process Clause.

a. In 18 U.S.C. § 922(g)(1), for example, Congress has defined a criminal offense for a person who "has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year" to "ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." In Lewis v. United States, 445 U.S. 55 (1980), the Supreme Court held that proof of the fact of a prior felony conviction could be used as conclusive proof of that element of a now-superseded version of the Section 922(g)(1) offense (18 U.S.C. App. § 1202(a)(1) (1982 ed.)), regardless of whether the predicate felony conviction might be subject to collateral attack on constitutional grounds, even if the predicate felony conviction was defective under Gideon v. Wainwright for deprivation of the right to counsel. The Court reasoned that Congress decided to rely on "the mere fact of conviction * * * in order to keep firearms away from potentially dangerous persons." 445 U.S. at 67.[7] There was no requirement for confidence in the reliability of the underlying

[7] See id. at 61 n.5 ("[W]e view the language Congress chose as consistent with 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. We note, nonetheless, that the disability effected by § 1202(a)(1) would apply while a felony conviction was pending on appeal.")

conviction. Congress' decision to rely on the fact of a prior conviction alone, without permitting challenge to its constitutional validity, is to be tested for rationality under the Due Process Clause, id. at 65, and the assessment of whether Congress' choice was rational must be made "with the deference that a reviewing court should give to a legislative determination," id. at 67 & n.9.

b. In addition to using the mere fact of a prior felony conviction as an element of the felon-in-possession statute, in sentencing that offense Congress has provided for a 15-year mandatory minimum under the Armed Career Criminal Act (ACCA) for an offender who "has three previous convictions by any court * * * for a violent felony or a serious drug offense." 18 U.S.C. § 924(e).[8] In Custis v. United States, 511 U.S. 485 (1994), the Supreme Court held that the ACCA precluded a defendant from challenging a predicate conviction in the context of the Section 924(e) sentencing except for the "unique" circumstance of the deprivation of the right to counsel in obtaining a prior felony conviction in violation of Gideon v. Wainwright. 511 U.S. at 494-495. Custis singled out Gideon violations for this special treatment because the deprivation of counsel in obtaining a felony conviction is so fundamental that a court has no authority to

[8] The definitions of "violent felony," and "serious drug offense" limit the scope of this prevision to predicate federal or state convictions and do not include any tribal convictions. See Sections 924(e)(2).

convict a person of a felony if he is denied counsel. 511 U.S. at 496 ("We think that since the decision in Johnson v. Zerbst [304 U.S. 458 (1938)] more than half a century ago, and running through our decisions in Burgett [v. Texas, 389 U.S. 109 (1967),] and [United States v.] Tucker, [404 U.S. 443 (1972),] there has been a theme that failure to appoint counsel for an indigent defendant was a unique constitutional defect. Custis attacks his previous convictions claiming the denial of the effective assistance of counsel, that his guilty plea was not knowing and intelligent, and that he had not been adequately advised of his rights in opting for a 'stipulated facts' trial. None of these alleged constitutional violations rises to the level of a jurisdictional defect resulting from the failure to appoint counsel at all.").

The district court here thought that Custis supported its ruling. It does not. First, Custis only precluded use of prior convictions that were constitutionally invalid under Gideon. It did not authorize attack on the use of otherwise valid uncounseled prior convictions. Second, the instant case is controlled by Lewis, not Custis. Custis involved a sentencing statute where the accuracy of the determination of guilt in the prior prosecution was an essential ingredient of the statutory scheme. The ACCA prescribes a mandatory minimum 15 years of imprisonment for persons who are armed career criminals and who possess a

firearm. It uses the mere fact of the prior conviction to conclusively determine that the person in fact committed the prior criminal conduct – i.e., is a "career criminal" – and it strips the sentencing judge of discretion to evaluate the defendant's prior conduct to determine whether a 15 year sentence is appropriate. Section 117(a) is like the substantive offense involved in Lewis and unlike the sentencing statute involved in Custis. Section 117(a), like the felon-in-possession statute, relies on the fact of the prior conviction as an element of the offense, but does not restrict the district court's authority at sentencing to inquire into the history of the defendant to determine what punishment is warranted.

c. In the penalty provisions of 21 U.S.C. § 841(b), Congress has required enhanced punishment for drug offenses if the person "commits such a violation after a prior conviction for a felony drug offense has become final." Congress has provided in 21 U.S.C. § 851(c)(2) that, in the context of a Section 841(b) sentencing, the defendant may challenge such a predicate conviction on the ground that it "was obtained in violation of the Constitution of the United States" – not limited to Gideon violations – and if he prevails in that challenge the prior conviction may not be used for sentencing enhancement. See Custis, 511 U.S. at 492 ("The language of § 851(c) shows that when Congress intended to authorize collateral attacks on prior convictions at the time of sentencing, it knew how to do

so.").

Even the most generous of these statutes relating to the use of prior convictions in subsequent proceedings, Section 851, requires that the defendant show that the prior conviction was constitutionally invalid before it may be disqualified from use as a predicate conviction. As we have established above, however, Shavanaux's tribal court misdemeanor domestic assault convictions did not offend the Constitution.

2. Congress Made a Rational Choice To Permit Use of Tribal Court Convictions as Prior "Final Convictions" in Section 117(a), and that Satisfies Due Process.

The constitutionality of the use of prior convictions in a Section 117(a) prosecution is controlled by Lewis, which accepts the legislative discretion to define an offense in part based on prior convictions regardless of their validity, as long as the statute satisfies the rationality principle of the Due Process Clause, "with the deference that a reviewing court should give to a legislative determination." Lewis, 445 U.S. at 67 & n.9.

We have explained above the reasonableness of Congress' determination that Section 117 was an appropriate response to the problem of recidivist domestic violence in Indian country. The occurrence of domestic violence in Indian country is an especially serious problem. Recidivism is a frequent occurrence, with the

degree of violence and the injuries inflicted on the victim escalating as the offender recidivates.

In Section 117(a), Congress specifically included prior "final conviction[s]" for domestic assault and like offenses obtained in "Indian tribal court proceedings." Congress could rationally reach the conclusion that tribal court convictions are sufficiently reliable that a defendant who has twice been convicted of the specified domestic violence offenses should be liable to federal prosecution and punishment when he subsequently commits a domestic violence offense. Congress was well aware that tribal courts do not universally provide counsel to indigent defendants and that ICRA does not provide all the safeguards of the Bill of Rights in recognition of "the unique political, cultural, and economic needs of tribal governments." Santa Clara Pueblo, 436 U.S. at 62-63. Yet Congress has provided a range of guarantees to ensure a baseline of fairness in tribal prosecutions and has afforded habeas review in federal court of any tribal misdemeanor conviction for which the defendant is sentenced to imprisonment. Id. at 67; ICRA Section 1303. Congress could rationally conclude that these safeguards produced a sufficiently reliable outcome to support use of a tribal court conviction to show habitual offender status.

Quite apart from the reliability of the prior adjudications, however,

Congress could reasonably determine that a person who has twice formally been found by his community to have engaged in that domestic violence, and who nevertheless commits another domestic violence offense, warrants felony prosecution and punishment.

3. There Is No Constitutional Restriction on Section 117(a)'s Inclusion of Uncounseled Tribal Court Misdemeanor Convictions.

Nichols v. United States, 511 U.S. 738 (1994), strongly supports the conclusion that there is no constitutional restriction on Section 117(a)'s inclusion of uncounseled tribal court misdemeanor convictions as predicate convictions. Nichols held that a constitutionally valid uncounseled misdemeanor conviction for which no imprisonment was imposed may be used for purposes of sentencing enhancement in a subsequent prosecution. In Nichols, the defendant had been convicted of a prior state misdemeanor for which he was fined but not imprisoned. 511 U.S. at 740. He later pleaded guilty under 21 U.S.C. § 846 to a federal drug conspiracy. At sentencing, his criminal history category under the then-mandatory Sentencing Guidelines was enhanced because of his prior misdemeanor conviction, thereby increasing his sentencing range. Nichols did not dispute that his uncounseled conviction was valid under Scott v. Illinois, supra, because he was not sentenced to imprisonment for that offense. He sought to rely, however,

on Baldasar v. Illinois, supra, which held that an uncounseled misdemeanor conviction that is constitutionally valid because no imprisonment was imposed may not be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with imprisonment. In Nichols, the Supreme Court disagreed, overruling Baldasar and holding that "an uncounseled conviction valid under Scott may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment." 511 U.S. at 746-747.

Nichols overruled Baldasar, including its holding precluding use of a constitutionally valid uncounseled misdemeanor conviction to elevate a misdemeanor offense into a felony for which imprisonment is imposed. The principle of Nichols is that a conviction that is valid for its own purposes, despite the absence of counsel, is also valid for use in a subsequent federal prosecution, whether for sentencing enhancement or as a component of an element of an offense. Courts have so interpreted Nichols. See United States v. Jackson, 493 F.3d 1179 (10th Cir. 2007) (Nichols allows prior uncounseled misdemeanor conviction to be used to deny statutory eligibility for safety-valve treatment that would grant relief from mandatory minimum sentence); United States v. Perez-Macias, 335 F.3d 421 (5th Cir. 2003) (valid uncounseled misdemeanor conviction can be used to elevate illegal reentry offense to a felony); United

States v. Benally, 756 F.2d 773 (10th Cir. 1985) (uncounseled tribal misdemeanor convictions for which imprisonment was imposed may be considered in sentencing for subsequent federal conviction); compare United States v. Ortega, 94 F.3d 764, 770-771 (2d Cir. 1996) (uncounseled state misdemeanor conviction for which imprisonment was imposed, invalid under Scott, cannot be counted in calculating criminal history under the Sentencing Guidelines because the Guidelines define a qualifying misdemeanor offense based on the term of imprisonment imposed, and the term of imprisonment for uncounseled misdemeanor convictions is constitutionally invalid).

Like Nichols' prior conviction, Shavanaux's prior convictions do not offend the Constitution. Their subsequent use in a proceeding designed to punish repeat offenders does not constitute punishment for those prior offenses; rather, the Supreme Court "consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant." Nichols, 511 U.S. at 747. Nichols necessarily rejected any constitutional limitation based on concern that the determination of guilt for an uncounseled misdemeanor conviction is less reliable than it would be if counsel were provided. In other statutory contexts, Congress plainly has incorporated as an element of an offense the existence of a prior legal judgment that was obtained on proof less than beyond a reasonable doubt. See,

e.g., 18 U.S.C. § 922(g)(8) (firearm prohibition applies to a person who is subject to a civil protection order); Lewis, 445 U.S. at 57 n.2, 64 (firearm prohibition at that time extended to persons under felony indictment). The choice Congress made in Section 117(a) to include predicate uncounseled tribal court misdemeanor convictions to show recidivist status was rational, and thus satisfies due process.

4. Indian Defendants in Section 117(a) Prosecutions Are Not Disadvantaged Compared to Non-Indian Defendants Whose Prior Convictions Were Obtained in State or Federal Court.

An Indian defendant facing a Section 117(a) prosecution predicated on prior tribal court misdemeanor convictions is not unfairly disadvantaged as compared with a non-Indian defendant who was charged with a Section 117(a) offense predicated on state or federal misdemeanor convictions for similar offenses. An indigent defendant in state or federal court who has been denied appointed counsel in a misdemeanor prosecution for which he is sentenced to imprisonment cannot preclude use of that conviction in a subsequent Section 117(a) prosecution.

First, as discussed above, even under the most generous provisions of 21 U.S.C. § 851, a prerequisite for any challenge to a prior conviction in the context of another prosecution is a showing by the defendant that the conviction itself is constitutionally invalid. The conviction of an indigent, uncounseled misdemeanor defendant in state or federal court is valid, even if imprisonment is

unconstitutionally imposed. A misdemeanor conviction may be constitutionally obtained without benefit of counsel if no imprisonment is imposed. Scott, supra. The constitutional infirmity when imprisonment is imposed on an indigent, uncounseled, state or federal misdemeanor defendant is the imposition of imprisonment itself, not the fact of conviction. It is not pertinent to the right to counsel whether a misdemeanor defendant is exposed to the punishment of imprisonment, only whether imprisonment actually is imposed as a sentence. Scott. The determination of guilt is the same, and it is obtained by the same procedures, whether counsel is provided or not. Accordingly, this Court and other courts have held that an indigent defendant convicted of a misdemeanor offense in state or federal court and sentenced to imprisonment without the right to appointed counsel may have his term of imprisonment vacated on direct or collateral review, but the conviction itself will not be overturned. See Iowa v. Tovar, 541 U.S. at 88 n.10 (acknowledging argument but not ruling on it); Ortega, 94 F.3d at 769 (2d Cir.) ("[W]e reject defendants-appellants' contention that their state court *convictions* are invalid. Under Scott, the Sixth Amendment protects an uncounseled misdemeanor defendant not from a judgment of conviction but from the imposition of certain types of sentences. The appropriate remedy for a Scott violation, therefore, is vacatur of the invalid portion of the sentence, and not

reversal of the conviction itself."); United States v. Reilley, 948 F.2d 648, 654 (10th Cir.1991) (vacating suspended term of imprisonment imposed on uncounseled misdemeanor defendant but affirming conviction and fine); United States v. White, 529 F.2d 1390, 1394 (8th Cir.1976) (same); Ex Parte Shelton, 851 So. 2d 96, 102 (Ala. 2000) (vacating suspended sentence for uncounseled misdemeanor conviction, but affirming conviction), aff'd Alabama v. Shelton, 535 U.S. 654 (2002) (deciding that Argersinger applies even when a term of imprisonment is suspended; not considering the lower court's holding that the proper remedy is to affirm the conviction but vacate the sentence of imprisonment); but see United States v. Eckford, 910 F.2d 216, 218 (5th Cir.1990) ("If an uncounseled defendant is sentenced to prison, the conviction itself is unconstitutional.") (dictum).

Second, even if Section 117(a) were interpreted as permitting attack on a prior conviction based on the deprivation of counsel, Custis limits the attack to the unique and fundamental defect inherent in a Gideon violation – the deprivation of counsel in the determination of guilt for a felony offense. Custis, 511 U.S. at 496-497. There is no constitutional defect in the determination of guilt for the uncounseled misdemeanor conviction; the defect lies in the sentence. Even if, contrary to the approach adopted by this Court in Reilley, supra, the appropriate

prophylactic remedy for an Argersinger violation is to vacate the otherwise valid conviction as well as the illegal sentence, the nature of the constitutional defect in sentencing an uncounseled misdemeanor defendant to imprisonment is not as fundamental as a Gideon violation, and thus could not be raised in a Section 117(a) prosecution as a bar to use of a predicate conviction.

5. Even If Indian Defendants in Section 117(a) Prosecutions Were Treated Differently Than Non-Indian Defendants, It Would Not Violate the Constitution.

Even if Congress had treated Indian defendants and non-Indian defendants differently in a Section 117(a) prosecution, that would not have violated 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). Legislation that "singles out Indians for particular and special treatment" will be upheld "[a]s 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). As we have explained, Congress made a rational choice in determining that tribal court misdemeanor convictions could be counted as recidivist offenses under Section 117(a) and that

such inclusion was appropriate to combat the special problem of domestic violence in Indian country.

STATEMENT RESPECTING ORAL ARGUMENT

This case presents novel questions of statutory interpretation and constitutional law. The government suggests that the Court's resolution of the case would benefit from oral argument.

CONCLUSION

For the reasons stated above, the district court order dismissing the indictment should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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December 23, 2010

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 8,030 words, as measured by using the WordPerfect X4 software.

ss/ Richard A. Friedman
Richard A. Friedman

December 23, 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 the Court on December 23, 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.

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CERTIFICATE OF SERVICE

Two copies of the foregoing 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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ADDENDUM

District Court Order on Motion To Dismiss the Indictment

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ADAM SHAVANAUX, Defendant.	ORDER AND MEMORANDUM DECISION Case No. 2:10 CR 234 TC Judge Tena Campbell

Adam Shavanaux has moved to dismiss the indictment against him. The indictment charges Mr. Shavanaux with one count of violation of 18 U.S.C. § 117(a) which makes it a felony offense for a person who has had two or more prior domestic assault convictions to commit a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian Country. Because Mr. Shavanaux was not represented by an attorney when he was convicted of the two earlier domestic assault charges, use of these convictions in this federal prosecution would violate Mr. Shavanaux's Sixth Amendment right to counsel. Accordingly, the court GRANTS the motion to dismiss.

Background

The government intends to offer two aggravated assault convictions sustained by Mr. Shavanaux, an enrolled member of the Ute Tribe, in Ute Tribal Court. The first conviction was in 2006, the second in 2008. At the time of each conviction, Mr. Shavanaux was indigent and could not hire an attorney. Mr. Shavanaux served time in jail for each conviction.

Analysis

Apparently only one other district court has been faced with the question whether a prosecution under 18 U.S.C. § 117(a) which relies on two prior uncounseled tribal court convictions violates the Sixth Amendment. The court in United States v. Cavanaugh, Jr., 680 F. Supp. 2d 1062 (D.N.D. 2009), held that it did. In a thoughtful, thorough opinion, the Cavanaugh court noted that "[t]he issue before the Court is not to question the validity of the tribal court proceedings or question the tribal justice system, but instead to evaluate whether the convictions satisfy constitutional requirements for use in a federal prosecution in federal court." Id. at 1075.

This court agrees with the above statement. The government argues, correctly, that tribal court proceedings are not governed by the United States Constitution but by the Indian Civil Rights Act or tribal law. And although Section 202 of the Indian Civil Rights Act of 1968 forbids an Indian tribe from denying a defendant in a criminal proceeding the right "at his own expense" to counsel, 25 U.S.C. § 1302(6), there is no right to appointed counsel for an indigent defendant in tribal court.

For that reason, Mr. Shavanaux's two convictions for aggravated assault do not violate either the Indian Civil Rights Act or the United States Constitution. As the court in Cavanaugh pointed out:

> The fact that Congress has left the tribes with exclusive jurisdiction over misdemeanor offenses committed by one Indian against another Indian in Indian country is evidence that it presumes tribal courts exist and are competent to prosecute misdemeanors. On the other hand, felony offenses by Indians against Indians are handled exclusively by the United States. Thus, Congress has created a scheme, which, in part, ensures that an Indian charged with a

> felony is afforded all of the protections of the United States Constitution.

680 F. Supp. 2d at 1074 (internal footnote omitted).

But the issue here is more complex: "Significant constitutional issues tend to arise when tribal court convictions cross over into the federal judicial system." Id. at 1073. The decision in Custis v. United States, 511 U.S. 485 (1994), supports the conclusion that Mr. Shavanaux's Sixth Amendment right to counsel would be violated if this prosecution were to proceed. The Custis Court held that a defendant in a federal sentencing proceeding has no right to collaterally attack the validity of previous state convictions used to enhance his sentence under the Armed Career Criminal Act "with the sole exception of convictions obtained in violation of the right to counsel[.]" Id. at 487. The Court analyzed its Sixth Amendment precedent, stressing the "unique" nature of the right to counsel. The court repeated its "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.'" Id. at 494-95 (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)). The Court concluded that its long-standing precedent had "a theme that failure to appoint counsel for an indigent defendant was a unique constitutional defect." Id. at 496.

Based on the above, the court grants Mr. Shavanaux's motion to dismiss the indictment (Docket No. 20).

SO ORDERED this 13th day of October, 2010.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
Chief Judge