ORAL ARGUMENT IS REQUESTED

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)

REPLY BRIEF FOR THE UNITED STATES

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ARGUMENT

Shavanaux argues that his tribal court convictions are "invalid" because he was indigent, was not provided with counsel, and was sentenced to a term of imprisonment, and that such convictions cannot be used as prior "final convictions" under 18 U.S.C. § 117(a). Shavanaux is wrong on every level. First, his tribal court convictions are valid under tribal law, the Indian Civil Rights Act, and the Federal Constitution. Second, even if those convictions had been obtained in state

or federal court, they would be valid despite the lack of counsel because only the term of imprisonment would violate the Federal Constitution, not the uncounseled misdemeanor convictions themselves. Third, even if those convictions were vulnerable to attack based on the lack of counsel, they were still "final convictions" at the time Shavanaux is alleged to have committed the new domestic assault charged as the Section 117(a) offense; that is all Congress required in Section 117(a). Fourth, even if a collateral attack on prior, final convictions were permitted in the context of a Section 117(a) prosecution, the only attack permitted is the unique defect of the complete denial of counsel in a felony prosecution; Shavanaux's prior tribal court convictions were not felony convictions. Finally, although Section 117(a) does not treat Indian and non-Indian defendants differently, even if it did it would not violate equal protection principles because the determination by Congress to encompass tribal court final convictions within Section 117(a) is not an invidious racial discrimination.

I. SHAVANAUX'S PRIOR TRIBAL COURT CONVICTIONS WERE VALID UNDER TRIBAL LAW, THE INDIAN CIVIL RIGHTS ACT, AND THE FEDERAL CONSTITUTION.

Section 117(a) reaches "[a]ny person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and 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, [domestic violence offenses]." 18 U.S.C. § 117(a). Shavanaux does not contest that he had two prior convictions for domestic violence offenses obtained in tribal court. He does not contest that he failed to exercise his rights to appeal within the tribal system or to seek federal habeas corpus review as permitted under the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1303. There is no doubt those prior convictions were "final convictions" at the time of the new domestic assault alleged as the Section 117(a) offense.

Shavanaux questions (Br. 17-18) the efficacy of the review of his tribal court convictions that was available to him in tribal and federal court. That complaint cannot be heard in the context of a Section 117(a) prosecution. In Daniels v. United States, 532 U.S. 374, 382 (2001), the Supreme Court held that, "[i]f * * * a prior conviction used to enhance a federal sentence is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), then that defendant is without recourse."

As Shavanaux points out (Br. 17) federal habeas corpus review of a tribal court conviction is only available "to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303. But Shavanaux was imprisoned for his tribal

offenses and there is no indication that he lacked the opportunity for federal court review. He elected not to pursue it. Cf. Spencer v. Kemna, 523 U.S. 1, 7-8 (1998) (if habeas petitioner is incarcerated when files petition and is challenging his conviction, his case is not mooted by his subsequent release).

In any event, Shavanaux does not identify any defect in those final convictions under tribal law. Nor does he claim that the convictions were in any way defective under ICRA, even with respect to the denial of counsel. See United States v. Benally, 756 F.2d 773, 779 (10th Cir. 1985) (ICRA does not require appointment of counsel for indigent defendants); Tom v. Sutton, 533 F.2d 1101, 1104-1105 (9th Cir. 1976) (same).

Contrary to governing Supreme Court precedent, however, Shavanaux asserts throughout his brief that the failure of the tribe to offer him appointed counsel in his tribal prosecutions violated a Sixth Amendment right to counsel. His claim is erroneous. Since Talton v. Mayes, 163 U.S. 376 (1896), it has been clear that the Constitution does not apply to Indian tribes when they exercise their retained sovereign powers because their limited sovereignty has its source in the tribes' historic existence prior to the adoption of the Federal Constitution. Shavanaux argues (Br. 43-44) that when Indians were granted full United States citizenship in 1924, 8 U.S.C. § 1401(b), that change of status effectively overruled Talton. It did

not. The fact that Indians are citizens – indeed the fact that they are "persons" under the Constitution – guarantees them the rights any other person would have against action by the federal government or the state governments, including the right to counsel guaranteed by the Sixth Amendment in federal criminal prosecutions and by the Due Process Clause of the Fourteenth Amendment in state criminal prosecutions. But an Indian's rights with respect to the prosecuting tribe are not dictated by the Federal Constitution. The Supreme Court has reiterated the continued vitality of the Talton principle numerous times since 1924, including quite recently. E.g., Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 337 (2008); United States v. Lara, 541 U.S. 193, 210 (2004); Nevada v. Hicks, 533 U.S. 353, 383-384 (2001); United States v. Wheeler, 435 U.S. 313, 318 (1978).

In light of the repeated reaffirmation of the principle that the Constitution does not apply to Indian tribes, this Court must decline Shavanaux's invitation to recognize a constitutional right to counsel in tribal court. See Agnostini v. Felton, 521 U.S. 203, 237 (1997) ("We reaffirm that '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'") (quoting

Rodriguez de Quijas v. Shearson/American Exp., Inc., 490 U.S. 477, 484 (1989)).

II. EVEN IF SHAVANAUX'S PRIOR CONVICTIONS HAD BEEN OBTAINED IN STATE OR FEDERAL COURT AND HE HAD BEEN DENIED COUNSEL, THOSE CONVICTIONS WOULD STILL BE VALID CONVICTIONS.

Shavanaux assumes that, if his prior convictions had been obtained in state or federal court rather than tribal court, then they could not count as "final convictions" under Section 117(a) because they would have been invalid for denial of a right to counsel. That is not correct. At the time he committed and was prosecuted for his prior tribal domestic-violence offenses, ICRA authorized only misdemeanor-type prosecutions and punishment up to a year of imprisonment. See Lara, supra, 541 U.S. at 199 (ICRA recognizes tribal power "to prosecute nonmember Indians for misdemeanors."). Shavanaux's prior convictions were for misdemeanors, not felonies. Although an indigent misdemeanor defendant in state or federal court must be offered appointed counsel before he may be sentenced to a term of imprisonment, he has no such right to counsel to be simply convicted of a misdemeanor. See Scott v. Illinois, 440 U.S. 367 (1979).[1]

This Court has held that a misdemeanor conviction remains valid even if an

[1] "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).

indigent defendant was denied counsel and was unconstitutionally sentenced to imprisonment. In United States v. Reilley, 948 F.2d 648 (10th Cir. 1991), the indigent defendant was convicted in federal court of a misdemeanor offense, without counsel, and was sentenced to a suspended term of 30 days of imprisonment on the condition that he pay $100 of a $500 fine. 948 F.2d at 650. This Court held that the rule of Scott v. Illinois, supra, that counsel must be offered to an indigent misdemeanor defendant before he may be "sentenced to a term of imprisonment" applied even when the sentence was to a conditionally suspended term of imprisonment. 948 F.2d at 654. That prescient ruling was later confirmed by the Supreme Court in Alabama v. Shelton, 535 U.S. 654 (2002), which held that "[a] suspended sentence is a prison term imposed for the offense of conviction" for purposes of the right-to-counsel rule. 535 U.S. at 662. In Reilley, this Court set aside Reilley's conditionally suspended sentence but affirmed his conviction. 948 F.2d at 654. In United States v. Jackson, 493 F.3d 1179 (10th Cir. 2007), this Court more fully explained the rationale for that limited remedy:

> [T]he Sixth Amendment right at issue protects individuals against being sentenced to a deprivation of liberty without the benefit of counsel; accordingly, we held [in Reilley], the proper remedy was to vacate that portion of the sentence offensive to the Sixth Amendment without doing harm to the defendant's conviction or the remaining, constitutionally inoffensive, portions of his sentence. To go further, to hold the conviction and fine portion of a sentence infirm, would be to relieve the defendant from any consequence of his or her actions

> despite guidance from *Scott* and *Nichols* and now *Shelton* that uncounseled misdemeanor convictions and non-prison sentences may be given respect and effect consistent with the Sixth Amendment's remedial purposes.

493 F.3d at 1183.

Shavanaux seeks (Br. 31) to distinguish the rule of Reilley on the ground that the sentence of imprisonment in Reilley was suspended whereas his sentence of imprisonment was not. The holding of Reilley, however, as confirmed by Shelton, was that a sentence to a suspended term of imprisonment is indistinguishable from a sentence of actual imprisonment for purposes of the right to counsel in misdemeanor cases. The remedy for denial of counsel in both types of cases likewise is indistinguishable: the misdemeanor conviction remains valid although the sentence of imprisonment is not.

Other courts have followed the Reilley remedy of affirming the validity of a misdemeanor conviction obtained without counsel while vacating the unconstitutional term of imprisonment. See, e.g., United States v. Ortega, 94 F.3d 764, 769 (2d Cir. 1996); United States v. White, 529 F.2d 1390, 1394 (8th Cir. 1976); Ex Parte Shelton, 851 So. 2d 96, 102 (Ala. 2000), aff'd, Alabama v. Shelton, supra (without passing on remedy of affirming conviction but vacating the sentence of imprisonment).

Under controlling precedent in this Circuit, Shavanaux's prior convictions

would be upheld as valid final convictions even if they had been obtained in state or federal court, without counsel, and he had been unconstitutionally sentenced to imprisonment. Shavanaux does not suggest any rationale why his tribal court convictions should be considered invalid in circumstances where state or federal convictions would remain valid. Accordingly, even if Shavanaux had a right to appointed counsel in tribal court – which he did not – his tribal court convictions would remain valid, "final convictions" for purposes of the Section 117(a) prosecution.

In Nichols v. United States, 511 U.S. 738 (1994), the Supreme Court held that, in a typical recidivist statute, prior misdemeanor convictions, valid despite the absence of counsel, could be used as an element of a subsequent offense to increase that subsequent offense from a misdemeanor to a felony and to impose more severe punishment than would be applicable in the absence of the prior convictions. Shavanaux argues (Br. 35-37), as did the dissent in Nichols, that if the prior uncounseled misdemeanor convictions were not reliable enough to support a felony conviction or to support a sentence of imprisonment in those prior proceedings, then they were not reliable enough to support felony status and increased punishment in the subsequent proceeding. See 511 U.S. at 757-758 (Blackmun, J., dissenting); id. at 765-766 (Ginsburg, J., dissenting). The Court rejected that

argument because it "consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant," Nichols, 511 U.S. at 747 (quotation omitted), and therefore uncounseled misdemeanor convictions may be used as an element of an offense that has an increased seriousness, or an enhanced punishment, even though those uncounseled convictions are not reliable enough to support imprisonment in those prior prosecutions.

Shavanaux argues (Br. 3, 25-27) that the rationale of Nichols applies only to "valid" prior convictions. Nichols did not have occasion, however, to consider its application to misdemeanor convictions that were valid despite the absence of counsel but for which unconstitutional sentences of imprisonment were imposed. In any event, Shavanaux's prior final convictions were valid, as we have explained, even assuming his sentences of imprisonment were not.

Shavanaux also argues that Nichols created only a "narrow exception" (Br. 2, 6) allowing use of an uncounseled misdemeanor conviction in the sentencing context and argues (Br. 29-30) that Nichols does not relate to the inclusion of a prior misdemeanor conviction as an element of a subsequent felony offense. Shavanaux appears to be arguing that Nichols only qualified, with respect to the sentencing context, the previous holding in Baldasar v. Illinois, 446 U.S. 222 (1980) (per curiam), that a prior uncounseled misdemeanor conviction, valid under

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

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

Shavanaux's tribal court convictions were valid under tribal law, ICRA, and the Federal Constitution, and those convictions would have been valid even if they had been obtained without counsel in state or federal court. Shavanaux presupposes that, if those convictions were invalid, they could not be used in a Section 117(a) prosecution. That supposition is wrong. The element of prior "final convictions" for domestic-violence offenses may be fulfilled if the final convictions are extant at the time of the domestic assault alleged in the Section

117(a) prosecution, regardless of whether there would be grounds to challenge those prior convictions, and the defendant may not challenge the validity of such convictions in the context of the Section 117(a) prosecution.

The interpretation and application of Section 117(a) with respect to the use of prior final convictions is governed by Lewis v. United States, 445 U.S. 55 (1980). In Lewis, the Supreme Court considered a statute that proscribed as a felony the possession of a firearm by a person who "has been convicted" of a felony in federal or state court. See 445 U.S. at 56 n.1.[2] The Court considered the question "whether a defendant's extant prior conviction, flawed because he was without counsel, as required by Gideon v. Wainwright, 372 U.S. 335 * * * (1963), may constitute the predicate for a subsequent conviction under § 1202(a)(1)." 445 U.S. at 56. The Court held that the statute allowed a prior conviction obtained in violation of Gideon to be proved as an element of the firearm-possession offense and the Court precluded the defendant from challenging the validity of that prior conviction in the context of the firearm prosecution.

The Court found that, under the plain terms of the statute, "[n]o exception * * * is made for a person whose outstanding felony conviction ultimately might turn

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[2] 18 U.S.C. App. § 1202(a)(1) (1970 ed.) (repealed by Pub. L. 99-308, § 104(b), 100 Stat. 459 (May 19, 1986)). The felon-in-possession prohibition presently is found in 18 U.S.C. § 922(g)(1).

out to be invalid for any reason." 445 U.S. at 62. Indeed, the Court found that the plain meaning of the statute – which referred to a prior "conviction," not a prior "final conviction" – was "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" and therefore the firearm disability "would apply while a felony conviction was pending on appeal," even if it was subsequently reversed. Id. at 61 n.5.

The Court observed that the statute "stands in contrast with other federal statutes that explicitly permit a defendant to challenge, by way of defense, the validity or constitutionality of the predicate felony." Under one of the provisions cited by the Court (18 U.S.C. § 3575(e) (1970 ed.) (repealed)), an enhanced sentence for a federal felony conviction could be imposed on persons with two or more qualifying prior felony convictions, but "[a] conviction shown on direct or collateral review or at the [sentencing] hearing to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded." Under another provision cited by the Court (21 U.S.C. § 851(c)(2) (still extant)), a prior drug felony conviction used to enhance the maximum sentence, and to impose a mandatory minimum sentence, for a subsequent drug felony conviction under 21 U.S.C. § 841 is not counted if the defendant shows at the sentencing

hearing that the prior conviction "was obtained in violation of the Constitution."

Lewis held that Congress may constitutionally use an extant prior conviction as an element of an offense, even if the prior conviction was invalid under Gideon, "if there is some rational basis for the statutory distinctions made or they have some relevance to the purpose for which the classification is made." 445 U.S. at 65 (internal quotation and ellipses omitted). The Court found that "Section 1202(a)(1) clearly meets that test" because "[t]he federal gun laws * * * focus not on reliability, but on the mere fact of conviction * * * in order to keep firearms away from potentially dangerous persons. Congress' judgment that a convicted felon, even one whose conviction was allegedly uncounseled, is among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness is rational." Id. at 67.

Under the rationale of Lewis, a prior felony conviction invalid for deprivation of counsel under Gideon was a sufficient indication that the person committed the prior offense, and therefore was a "potentially dangerous person." The Court distinguished the use of a prior conviction as an element of the firearm-possession offense from the circumstances involved in Burgett v. Texas, 389 U.S. 109 (1967) (uncounseled felony conviction triggered mandatory minimum sentence), United States v. Tucker, 404 U.S. 443 (1972) (sentencing judge mistook

uncounseled felony conviction as conclusive proof that defendant committed prior conduct); and Loper v. Beto, 405 U.S. 473 (1972) (jury instructed to be skeptical of a witnesses' testimony because he had an uncounseled felony conviction). Lewis explained that the use of an uncounseled felony conviction was impermissible in those cases because it "depended upon the reliability of a past uncounseled conviction." 445 U.S. at 67. By contrast, the firearm-possession statute considered in Lewis did not require such conclusive proof of prior criminal conduct, just a sufficient indication that the person was "potentially dangerous."

With respect to Burgett, Tucker, and Loper, Shavanaux argues (Br. 12) that "the problem in all of these cases was the imposition of penal consequences based on a prior, uncounseled conviction." As Lewis makes clear, however, the "problem" with these cases was that the use of the prior uncounseled conviction in the state or federal proceeding "depended upon the reliability of [the] past uncounseled conviction." 445 U.S. at 67. The use of prior uncounseled convictions in Section 117(a), as in the firearms statute, does not depend on the reliability of that past conviction because 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 (quotation omitted).

Section 117(a)'s use of tribal court convictions fits comfortably within the

rationale of Lewis. It provides, as an element of the offense, that at the time the defendant commits the alleged domestic assault he "has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for [domestic violence] offenses." As in Lewis, there is no exception for prior final convictions that might be invalid. Congress enacted Section 117(a) in 2006,[3] well after Lewis established the constitutional standard and after Lewis highlighted the significance of Congress' omission of any explicit statutory authorization for challenging the validity of a prior conviction.[4]

Shavanaux argues (Br. 8) that Lewis involved a mere "status offense" that allowed for a special rule permitting Congress to rely on an uncounseled conviction as a predicate for a felony offense. There is nothing in the rationale of Lewis that limits the decision in that fashion. In the firearm statute, Congress prohibits a specific action – possession of a firearm – under certain conditions, including the condition that the person has a felony conviction extant at the time he

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

[4] In contrast to Section 117(a), 18 U.S.C. § 922(g)(9), which prohibits possession of a firearm by any person "who has been convicted in any court of a misdemeanor crime of domestic violence," explicitly does not include such a misdemeanor offense unless "the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case," 18 U.S.C. § 921(a)(33)(B)(i)(I). Shavanaux does not assert that Section 117(a) incorporates the same exception.

possesses the firearm. In Section 117(a), Congress prohibits a specific action – commission of a domestic assault – under certain conditions, including the condition that the person has two final convictions for domestic violence offenses extant at the time of the domestic assault. Section 117(a) and the firearm statute both define federal offenses by prohibiting certain acts under certain conditions. They are governed by the same rule of interpretation respecting the validity of the prior conviction and the inability of a defendant to collaterally challenge the prior conviction, even on constitutional grounds, in the context of the later criminal prosecution.

Section 117(a) satisfies the rational-basis standard of Lewis for the use of prior final tribal-court domestic-violence convictions as an element of the Section 117(a) offense, as we discussed in our opening brief, at pages 12-14. The danger of recidivism for domestic violence offenses is well known. Persons who have committed such offenses in the past are more likely to commit them again, and the level of violence is likely to escalate. In light of the substantial procedural protections assured to tribal court defendants by ICRA, Congress could rationally determine that tribal court convictions are sufficiently reliable to identify such "potentially dangerous persons," Lewis, 445 U.S. at 67, who should be subject to federal prosecution if they commit a domestic assault. The requirement that the

prior conviction is "final" – i.e., that the available process of direct appeal has been exhausted – is a further indicia of reliability. Congress could rationally focus its Section 117(a) prosecutions on persons identified by prior domestic-violence convictions as possible recidivists, even though those prior convictions, if invalid for lack of counsel or for any other reason, might not be sufficiently reliable to conclusively prove the person committed the prior offenses.

Shavanaux argues (Br. 21-22) that it is significant that Lewis applied its rational-basis test to reject an equal-protection argument and that a rational-basis test does not apply to the use of prior final convictions in Section 117(a). But it is a general principle that a statute that does not infringe a constitutional limitation is within Congress' power if the "statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." United States v. Comstock, 130 S. Ct. 1949, 1956-1957 (2010). Lewis held that the use of a prior, uncounseled felony conviction as an element of a subsequent federal offense does not violate the Sixth Amendment. All that is required of the statute is rationality, and Section 117(a) plainly satisfies that minimal test.

Section 117(a) does not require proof that a defendant in fact had committed two prior acts of domestic violence when he committed the new alleged crime of domestic assault, but merely requires proof that the defendant had two or more

"final convictions" for domestic-violence offenses. Compare U.S.S.G. § 2A6.2, Comment. N. 1 (in determining whether sentencing enhancement should apply for a "pattern of activity involving stalking, threatening, harassing, or assaulting the same victim," court should consider prior conduct, "whether or not such conduct resulted in a conviction"). The fact that Section 117(a) does not require proof of the conduct underlying the prior domestic-violence convictions is the principal reason why Shavanaux is mistaken in relying (Br. 44-45) on United States v. Ant, 882 F.2d 1389 (9th Cir. 1989). In Ant, the government sought to use a tribal guilty plea obtained without counsel as proof in federal court that Ant had committed the conduct underlying that guilty plea, which was the same conduct alleged as the federal offense. 882 F.2d at 1391. Where a prior conviction is being used in that manner, the rationale of Lewis does not apply, because the use of the prior conviction "depend[s] upon the reliability of a past uncounseled conviction." Lewis, 445 U.S. at 67.

IV. SHAVANAUX MAY NOT CHALLENGE HIS PRIOR CONVICTIONS UNDER CUSTIS v. UNITED STATES EVEN IF HE WAS ENTITLED TO APPOINTED COUNSEL IN HIS TRIBAL PROSECUTIONS.

Shavanaux argues throughout his brief that the denial of counsel to indigent defendants in tribal prosecutions is the equivalent of a violation of Gideon v. Wainwright. From this proposition, he argues that the decision in Custis v. United

States, 511 U.S. 485 (1994), which permits a Gideon challenge to a prior conviction used for a certain type of sentencing enhancement supports his position. He is wrong for several reasons. First, as discussed above, an indigent defendant in tribal court has no right to appointed counsel even when imprisonment is imposed. Second, even if Shavanaux had the same right to counsel as a defendant in federal or state court, there would be no defect in the "final conviction" because Shavanaux's tribal convictions are misdemeanor-type convictions and a misdemeanor conviction obtained without counsel in state or federal court is valid, even if an unconstitutional sentence of imprisonment has been imposed. Third, Custis involved the use of a prior uncounseled felony conviction as conclusive proof that the defendant had committed the conduct underlying that conviction; Custis did not retreat from the rationale of Lewis, which applies when the use of the prior conviction does not depend on its conclusive reliability.

Shavanaux argues that Custis applied a "general rule" that "an uncounseled conviction cannot later be used in federal court" (Br. 9) and that Lewis identified a "narrow exception" (Br. 2, 6). Quite the contrary. Custis relied on Lewis as establishing the general rule that prior convictions "are not subject to collateral attack" in a proceeding under a statute that refers to a prior "conviction," such as the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). 511 U.S. at 492-

493. Custis rejected the argument that "ACCA should be read to permit defendants to challenge the constitutionality of convictions used for sentencing purposes," because "[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." Id. at 490-491 (emphasis in original). Custis also rejected the argument that "an implied right to challenge the constitutionality of prior convictions" should be inferred into Section 924(e). Id. at 491. Moreover, Custis rejected the argument of the dissenting justices (now advanced by Shavanaux) that, when Congress uses the term "conviction" in a statute, it means "lawful conviction." Id. at 504-505 (Souter, J., dissenting).

Custis identified a narrow exception to the no-collateral-attack rule that was required by the Constitution. Custis held that a collateral attack would be allowed on a prior felony conviction that was invalid because of the complete denial of counsel in violation of Gideon, which Custis identified as a "unique constitutional defect" that amounted to a "jurisdictional defect." 511 U.S. at 496. Although it permitted the narrow Gideon challenge to the use of a prior felony conviction, Custis rejected petitioner's argument to permit a challenge on another Sixth Amendment, right-to-counsel ground – a claim that the felony conviction was obtained by denial of his Sixth Amendment right to effective assistance of counsel.

Id. at 488, 496-497; see Strickland v. Washington, 466 U.S. 668 (1984). Custis also rejected petitioner's argument to permit a constitutional challenge on the ground that his guilty plea violated due process because it was not knowingly and voluntarily made. 511 U.S. at 488, 496-497; see Boykin v. Alabama, 395 U.S. 238, 243 n.5 (1969). Custis precluded raising such defects in a Section 924(e) sentencing proceeding because "[n]one of these alleged constitutional violations rises to the level of a jurisdictional defect resulting from the failure to appoint counsel at all" in a felony prosecution. Id. at 496.

The distinction between Lewis and Custis relates to the mandatory nature of the 15 year mandatory minimum sentence required under Section 924(e) when a disqualified person possesses a firearm (in violation of 18 U.S.C. § 922(g)) when he has three or more prior felony convictions for certain types of offenses that qualify as "serious drug offenses" or "violent felonies" as defined by that section. Section 924(e) strips the judge of sentencing discretion to impose less than 15 years of imprisonment on the premise that the three prior felony convictions conclusively establish that the defendant has the character trait of a "career criminal," i.e., he has in fact committed, and has been convicted of, offenses that are serious drug offenses or violent felonies. Thus, the use of predicate felonies under Section 924(e) "depend[s] upon the reliability of [the] past * * *

conviction[s]." Lewis, 445 U.S. at 67. For that reason, the rationale of Gideon, Burgett, Tucker, and Loper applies and uncounseled felony convictions cannot be used as Section 924(e) predicates. Not so with respect to Section 117(a). The sentencing judge in a Section 117(a) prosecution retains full discretion to consider defendant's arguments that, although he has final convictions for prior domestic-violence offenses, he did not in fact commit that conduct or for some other reason should not be sentenced as a recidivist offender. Thus, the use of those predicate convictions under Section 117(a) does not depend on the reliability of those convictions; it depends on the mere fact that those final convictions were extant at the time the defendant committed the domestic assault alleged in the Section 117(a) prosecution.

Like Custis, Burgett involved a mandatory minimum sentence. See 389 U.S. at 111 n.3. Tucker involved a situation where the sentencing judge mistook a Gideon-invalid prior felony conviction as conclusive proof that the defendant had committed the prior conduct; it would not have offended the Constitution for the sentencing judge in Tucker to have considered the defendant's conduct underlying that prior invalid felony conviction. See 404 U.S. at 444, 446. In Loper, the jury was instructed to conclusively presume that the testimony of a person with a Gideon-invalid prior felony conviction should be viewed with skepticism because

he was the type of person who had engaged in, and had been convicted of, felonious conduct; it would not offend the Constitution to impeach the credibility of a witness by showing that he had previously engaged in disreputable conduct, even if his Gideon-invalid felony conviction for that conduct could not be used. See 405 U.S. at 474.

Shavanaux argues (Br. 6-10) for a broad interpretation of these cases to stand for the proposition that "a conviction entered without the assistance of counsel cannot be used in a subsequent proceeding" (Br. 6). The dissenting justices in Lewis, Custis, and Nichols likewise argued for a broad interpretation of these cases. See Lewis, 445 U.S. at 71-72 (Brennan, J., dissenting) ("The clear teaching of [Burgett, Tucker, and Loper] is that an uncounseled felony conviction can never be used to support guilt or enhance punishment for another offense.") (quotation omitted); Custis, 511 U.S. at 505-506 (Souter, J., dissenting) (arguing that these cases "announc[e] the broader principle that a sentence may not be enhanced by a conviction the defendant can show was obtained in violation of an specific federal right * * * because to do so would be to allow the underlying right to be denied anew") (quotations omitted); Nichols, 511 U.S. at 762-763 (Blackmun, J., dissenting) ("Given * * * the inherent risk of unreliability in the absence of counsel, * * * there is no reason in law or policy to construe the Sixth

Amendment to exclude the guarantee of counsel where the conviction subsequently results in an increased term of incarceration."). Lewis, Custis, and Nichols rejected such a broad interpretation of Burgett, Tucker and Loper. See Lewis, 445 U.S. at 67 ("In each of those cases, this Court found that the subsequent conviction or sentence violated the Sixth Amendment because it depended upon the reliability of a past uncounseled conviction."); Custis, 511 U.S. at 492-493 (embracing the reasoning of Lewis); id. at 495-496 (adopting a narrow interpretation of Burgett and Tucker); Nichols, 511 U.S. at 748-749 (holding that a valid, uncounseled misdemeanor conviction can be used to enhance punishment for a subsequent conviction).

Even if Custis, rather than Lewis, governed the interpretation of Section 117(a), Shavanaux's prior tribal misdemeanor convictions do not fall into the same category as the "jurisdictional defect" of the denial of counsel in a felony prosecution. There is no doubt that the court in a misdemeanor case has "jurisdiction" in every sense to convict an indigent defendant of a misdemeanor without making counsel available to him. Even in state or federal court, no right to counsel attaches merely because the offense is of sufficient severity that imprisonment may be imposed. Scott v. Illinois, supra. The same procedures are followed to determine guilt and to enter a conviction whether there is no sentence

of imprisonment (and therefore no constitutional violation) or there is a sentence of imprisonment (and thereby a constitutional violation). Shavanaux does not argue that, if his tribal court convictions had not involved sentences of imprisonment, they could not be used as predicates in this Section 117(a) prosecution. The rule of Custis does not aid him.

V. APPLICATION OF SECTION 117(a) TO SHAVANAUX DOES NOT VIOLATE EQUAL PROTECTION PRINCIPLES.

Shavanaux asserts (Br. 45-51) that application of Section 117(a) violates the equal protection component of the Due Process Clause of the Fifth Amendment because it treats Indians differently than non-Indians and fails the strict-scrutiny evaluation applicable to invidious racial discriminations by the government. There is no merit to Shavanaux's contention.

As an initial matter, there is no discrimination under Section 117(a) in the treatment of Indians and non-Indians with respect to their right to counsel. We have explained (pp. 6-11, supra) why, even if Shavanaux had the same right to appointed counsel in tribal court as he would have had in state or federal court, he would retain valid final convictions for purposes of the Section 117(a) prosecution. He would not be treated differently than a non-Indian defendant who had prior state or federal convictions. Moreover, we have explained (pp. 11-26, supra) why both Indian and non-Indian defendants who had prior "final convictions" for

misdemeanor domestic violence offenses at the time of the new domestic assault alleged in the Section 117(a) prosecution would not be permitted to collaterally challenge those prior convictions in the context of the Section 117(a) prosecution. Thus, there is no substance to Shavanaux's claim that Section 117(a) disadvantages Indians with respect to the use of uncouseled convictions.

Indeed, properly viewed, Congress' inclusion of tribal court final convictions as predicate convictions under Section 117(a) has the effect of moderating an inequity that would otherwise exist to the advantage of Indian defendants, and to the disadvantage of non-Indian defendants (as well as Indian victims), if tribal court convictions were not encompassed by Section 117(a). Indians are prosecuted primarily in tribal court for domestic violence misdemeanor offenses committed in Indian country. State courts do not have jurisdiction over such offenses. See Solem v. Bartlett, 465 U.S. 463, 465 n.2 (1984) ("State jurisdiction is limited to crimes by non-Indians against non-Indians, * * * and victimless crimes by non-Indians."). There is federal jurisdiction under Section 1152, concurrent with tribal jurisdiction, over misdemeanor offenses committed by Indians against non-Indians. See United States v. Errol D., Jr., 292 F.3d 1159, 1164 (9th Cir. 2002). But that Section provides that federal jurisdiction does "not extend to offenses committed by one Indian against the person or property of

another Indian, nor to any Indian committing any offense in Indian country who has been punished by the local law of the tribe." Thus, to be effective in including Indian defendants in the coverage of Section 117(a) when they have two prior convictions for domestic violence offenses, it was necessary for Congress to include tribal court convictions. Congress thereby equalized the treatment of Indian and non-Indian recidivist domestic-violence offenders within Indian country.

Even supposing, however, that Section 117(a) is thought to discriminate against Indians in favor of non-Indians, there would be no equal protection violation. In United States v. Antelope, 430 U.S. 641 (1977), the Supreme Court squarely held that a federal criminal statute that applies to the disadvantage of Indians does not violate equal protection principles. In Antelope, the respondent Indians were prosecuted under 18 U.S.C. § 1153 for first degree murder for killing a non-Indian during a robbery on the reservation. 430 U.S. at 642-643. They argued that application of Section 1153 to them violated equal protection principles because a non-Indian would not be subject to federal prosecution and the state law applicable to a non-Indian perpetrator would be more favorable because it would not allow first-degree murder to be proved by application of the felony-murder rule. Id. at 643-644. The Supreme Court rejected the claim that application of

Section 1153 solely to "Indians" was "invidious racial discrimination." Id. at 644. It reasoned that "federal regulation of criminal conduct within Indian country * * * is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as a separate people with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a racial group consisting of Indians." Id. at 646. Of crucial importance was the circumstance that "respondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d'Alene Tribe." Id. If respondents had effectively renounced their affiliation with the tribe before they committed the crime, they would be non-Indians for purposes of Section 1153. See Id. at n.7. Because the different treatment of Indians in the criminal statute at issue in Antelope was not invidious racial discrimination, only a rational-basis equal-protection test applied.

jurisdiction

Antelope requires rejection of Shavanaux's equal protection claim. The only different treatment of Indians under the statute is the inclusion of tribal convictions for prior domestic-violence offenses as well as state and federal convictions. Only Indians would have convictions in tribal court. But whether an Indian is amenable

to tribal jurisdiction depends on his voluntary association with a tribe, not solely on his race or ethnicity. Under Antelope, the fact that Shavanaux might be considered to be "disadvantaged" under Section 117(a) because he elected to associate himself with a tribe and submit himself to tribal criminal jurisdiction is not a racial classification.

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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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 6,833 words, as measured by using the WordPerfect X4 software.

ss/ Richard A. Friedman
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March 17, 2011

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 March 17, 2011, 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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March 17, 2011

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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