CASE NO. 10-4178

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellant,	)
v.	)
	)
ADAM SHAVANAUX,	)
	)
Defendant-Appellee.	)

On Appeal from the United States District Court
for the District of Utah
The Honorable Judge Tena Campbell
District Judge
D.C. No. 2:10-CR-234

BRIEF FOR THE APPELLEE

Respectfully submitted,

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Oral Argument is requested.

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PRIOR AND RELATED APPEALS

There are no prior or related appeals.

ISSUE

Whether the government may constitutionally rely on uncounseled tribal misdemeanor convictions for which jail was imposed to establish a violation of 18 U.S.C. § 117.

STATEMENT OF THE CASE

Defendant Adam Shavanaux was charged with one count of Domestic Assault by a Habitual Offender While Within Indian Country in violation of 18 U.S.C. § 117. Doc. 1. He moved to dismiss the charge on the ground that the government could not constitutionally rely on his prior, uncounseled tribal court convictions. Doc. 20. The district court granted this motion, following *United States v. Cavanaugh*, 680 F. Supp. 2d 1062 (D.N.D. 2009), and reasoning that the use of such convictions was prohibited by *Custis v. United States*, 511 U.S. 485 (1994). Doc. 31. The government timely appealed.

FACTS

The relevant facts are few and undisputed. Gov't Br. at 4–5. Adam Shavanaux was twice convicted in tribal court for misdemeanor assault on a domestic partner. In both cases, he was found guilty—once after a plea, and once after a trial. In both cases he was sentenced to jail. In neither case did the tribe provide him an attorney.

This case charged him with a third assault and brought him into federal court under 18 U.S.C. § 117. Because this charge was based on the prior uncounseled misdemeanors, Mr. Shavanaux moved to dismiss, and the district court granted the motion. The district court agreed with the rationale in *United States v. Cavanaugh*, 680 F. Supp. 2d 1062 (D.N.D. 2009), and concluded that under *Custis v. United States*, 511 U.S. 485 (1994), Mr. Shavanaux's Sixth Amendment right to counsel would be violated if this prosecution were to proceed." Doc. 31 at 3.

SUMMARY OF THE ARGUMENT

As the district court concluded, the government may not establish a violation of 18 U.S.C. § 117 by relying on a prior, uncounseled tribal conviction for which jail was imposed. The applicable rule is established by a line of cases starting with *Burgett v. Texas*, 389 U.S. 109 (1967), and reaffirmed in *United States v. Custis*, 511 U.S. 485 (1994), that a federal court may not rely on a prior conviction entered in violation of the Sixth Amendment because it causes the defendant to "suffer[] anew" the deprivation of his rights. *Burgett*, 389 U.S. at 115.

Notwithstanding this clear rule, the government tries to fit § 117 within two narrow exceptions. The first exception, created by *Lewis v. United States*, 445 U.S. 55 (1980), does not apply to § 117. For one thing, § 117 is a recidivist statute

analogous to the statutes at issue in *Burgett* and *Custis*, not the "sweeping prophylaxis" that the Supreme Court analyzed in the federal felon-in-possession statute. *Id.* at 63. Furthermore, the government's efforts to fit § 117 within *Lewis* are based on a misappropriation of a rational basis test that the *Lewis* court applied to an equal protection issue.

The second exception, recognized in *Nichols v. United States*, 511 U.S. 738 (1994), also does not apply. *Nichols* held that because an uncounseled misdemeanor conviction was "valid," it could therefore be considered at a later federal sentencing. The government argues that a conviction that is "valid for its own purposes" is admissible in a subsequent federal criminal case. Gov't Br. at 30. The problem with this argument is that *Nichols* is clear that a "valid" misdemeanor conviction is one that complies with the Sixth Amendment. Thus, the government misstates the law when it claims an uncounseled conviction is admissible under *Nichols* if it is "valid for its own purposes."

Furthermore, the government fails to establish that these uncounseled misdemeanors were "valid," even for their own purposes. It argues that a conviction with an unconstitutional sentence is still a "valid" conviction under *Nichols*. This argument ignores the language in *Nichols* that a "valid" misdemeanor conviction is one that was not sentenced to prison; the clear precedent that a court may not constitutionally enter a judgment of imprisonment

for an uncounseled misdemeanant, *see Argersinger v. Hamlin*, 407 U.S. 25 (1972); and the injustice of pretending to strike a jail sentence that has already been served.

The government also argues that because the Sixth Amendment does not apply to tribal courts, an uncounseled tribal conviction is "valid" under *Nichols*. This argument also ignores the language in *Nichols* that a "valid" conviction is one that complies with the Sixth Amendment. Furthermore, while the Supreme Court has stated that the Bill of Rights do not apply to Indian tribes, this precedent fails to consider the 1924 legislation that made Native Americans full citizens of the United States. Thus, it should no longer be said that tribal convictions that deprive Indian defendants of their constitutional rights are "valid" for any purposes. Because *Nichols* spoke of validity in a specific way—that the prior proceeding complied with the Sixth Amendment—the court should not now rely on the prior, uncounseled tribal convictions.

Should the court disagree with this analysis under the Sixth Amendment, it should recognize that allowing Native Americans to be prosecuted in federal court based on uncounseled tribal convictions violates Equal Protection. Because § 117 discriminates against Native Americans, it should be stricken after applying strict scrutiny. Should the court conclude that this law is subject to only rational basis

review, as the government argues, then the case should be remanded for further proceedings to determine whether it survives even rational basis review.

ARGUMENT

Although Mr. Shavanaux's prior tribal convictions arguably qualify as predicates under § 117, because he was convicted and sentenced to jail without the assistance of counsel, the government may not now rely on those convictions. So far, the only other court to rule on this issue has agreed. *United States v. Cavanaugh*, 680 F. Supp. 2d 1062 (D.N.D. 2009). The rationale for this holding is that such convictions do not comport with the protections of the Sixth Amendment, so introducing them in a federal prosecution violates the Sixth Amendment "anew." Additionally, relying on uncounseled tribal convictions would unconstitutionally discriminate based on racial grounds, in violation of Equal Protection.

This case raises purely legal issues that are reviewed de novo. *See, e.g., United States v. Lott*, 433 F.3d 718, 721 (10th Cir. 2006) ("In determining if a defendant has a Sixth Amendment right to counsel, we review any underlying factual determinations for clear error and the legal questions de novo.").

I. The government may not establish a violation of 18 U.S.C. § 117 by relying on a prior, uncounseled tribal conviction for which jail was imposed.

A. In general, a federal court may not rely on a prior conviction entered in violation of the Sixth Amendment.

The first problem with relying on uncounseled tribal convictions for which Mr. Shavanaux was sentenced to jail is that doing so violates "anew" the Sixth Amendment right to counsel and Due Process in this case.

In general, a conviction entered without the assistance of counsel cannot be used in a subsequent proceeding. *Burgett v. Texas*, 389 U.S. 109 (1967); *United States v. Tucker*, 404 U.S. 443 (1971); *Loper v. Beto*, 405 U.S. 473 (1972); *United States v. Custis*, 511 U.S. 485 (1994). Although the Supreme Court recognized narrow exceptions to this rule in *Lewis v. United States*, 445 U.S. 55 (1980), and *Nichols v. United States*, 511 U.S. 738 (1994), as discussed more fully below, these exceptions do not apply to § 117, so the court should apply the general rule.

The development of this doctrine begins with *Johnson v. Zerbt*, 304 U.S. 458 (1938), and *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Johnson* held that an indigent defendant charged with a crime in federal court must be provided an attorney. The court explained why the assistance of counsel is so important:

> [The Sixth Amendment right to counsel] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer—to the untrained layman—may appear intricate, complex, and mysterious. . . .

> The '. . . right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

304 U.S. at 462–463 (quoting *Powell v. Alabama*, 287 U.S. 45, 68 (1932)). In *Gideon*, the court expanded this protection to felonies charged in state court. The court later extended *Gideon* to include misdemeanors for which a defendant was sentenced to jail. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

Following *Gideon*, a line of cases considered how an uncounseled conviction might be used in a subsequent criminal prosecution. Four years after *Gideon*, the Supreme Court in *Burgett v. Texas*, 389 U.S. 109 (1967), held that the Sixth Amendment was violated when an uncounseled conviction was offered in a subsequent prosecution for similar conduct under a recidivist statute. The Court stated:

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

Id. at 115 (emphasis added). Under this precedent, an uncounseled conviction could not be offered to establish that the defendant had "been before convicted of the same offense, or one of the same nature." *Id.* at 111 n.3 (quoting state statute at issue). The Court then applied the rule in *Burgett* to prevent use of an uncounseled conviction at sentencing and to impeach a defendant's testimony. *See United States v. Tucker*, 404 U.S. 443, 449 (1972) (sentencing); *Loper v. Beto*, 405 U.S. 473 (1972) (impeachment).

In 1980, the Supreme Court distinguished the *Burgett* line of cases to allow use of an uncounseled conviction in a prosecution for felon in possession of a firearm. *Lewis v. United States*, 445 U.S. 55 (1980). The main distinction between *Lewis* and the *Burgett* line of cases was that *Lewis* addressed a status offense intended to be "a sweeping prophylaxis. . . against misuse of firearms." *Id.* at 63. In contrast to the *Burgett* line, in which the prior prosecution was evidence that the defendant had previously committed certain acts, "[t]he federal gun laws . . . focus not on reliability, but on the mere fact of conviction." *Id.* at 66.

In 1994, the Supreme Court returned to this issue in *Custis v. United States*. 511 U.S. 485 (1994). The issue in *Custis* was whether the government could rely on a prior, uncounseled conviction of a specific type to support a 15-year mandatory minimum sentence under the Armed Career Criminal Act (ACCA). Although the Supreme Court was unwilling to read into the statute a provision for

collateral challenges generally, uncounseled convictions were unique: "There is thus a historical basis in our jurisprudence of collateral attacks for treating the right to have counsel appointed as unique, perhaps because of our oft-stated view that '[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.'" *Id.* at 494–95 (quoting *Powell*, 287 U.S. at 68–69). Thus, even though the ACCA did not provide for collateral challenges, the constitution—as defined by *Burgett* and its progeny—required an exception to be made for the complete deprivation of counsel.

Another case that term distinguished *Burgett* and its progeny to hold that an uncounseled misdemeanor for which no jail was imposed could be used to calculate a defendant's sentence under the U.S. Sentencing Guidelines. *Nichols v. United States*, 511 U.S. 738 (1994). The court reasoned that under *Scott v. Illinois*, 440 U.S. 367 (1979), an uncounseled misdemeanor for which no jail was imposed did not violate the Sixth Amendment, so *Burgett* and its progeny did not prevent using the prior conviction at sentencing in a later case. *See id.* at 743 n.9. Thus, "an uncounseled conviction *valid under* Scott may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment." *Id.* at 746–47 (emphasis added).

Thus, the general rule is that an uncounseled conviction cannot later be used in federal court. Although this rule does not apply to the use of an uncounseled

conviction in a "sweeping prophylaxis" (as in *Lewis*) or at sentencing where the uncounseled misdemeanor did not receive a sentence of imprisonment (as in *Nichols*), the most recent precedent reaffirms that the *Burgett* rule still holds today. *See Custis*, 511 U.S. at 494–95.

In light of this precedent, this court should affirm the district court's decision that the government may not rely on Mr. Shavanaux's uncounseled tribal convictions to establish a violation of § 117. It is undisputed that he was convicted and sentenced to time in jail without the assistance of counsel. Gov't Br. at 4–5. Such imprisonment, even for a misdemeanor, is a clear violation of the Sixth Amendment. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). Thus, to use Mr. Shavanaux's uncounseled convictions here would cause him to "suffer[] anew" the deprivation of counsel. *Burgett*, 389 U.S. at 115.

The government's Sixth Amendment analysis boils down to an effort to fit § 117 within either *Lewis* or *Nichols*. Under *Lewis*, it argues that § 117 is more like *Lewis's* "sweeping prophylaxis" than the statutes at issue in *Custis* or *Burgett* and that Congress's "rational choice" to rely on tribal convictions should be upheld. Gov't Br. at 22–29. Under *Nichols*, it argues that an uncounseled tribal conviction is "valid" in two ways that make it admissible here. First, it argues that because these convictions were "valid for [their] own purposes" (i.e., valid within the strictures of tribal court), they are "also valid for use in a subsequent federal

prosecution." Gov't Br. at 30; *see also id.* at 20–22, 29–32. Second, it argues that an uncounseled misdemeanor *conviction* is "valid, even if imprisonment is unconstitutionally imposed," so the remedy is to invalidate the already-served sentence and admit the conviction under § 117. Gov't Br. at 32–33, 32–35.

For the reasons that follow, this analysis cannot prevail.

B. The exception to the general rule created by Lewis v. United States does not apply to § 117.

The government attempts to place § 117 within the *Lewis* exception in a couple of ways. First, it argues that the use of the prior conviction in § 117 makes it more like *Lewis's* "sweeping prophylaxis" than the statutes at issue in *Custis* or *Burgett*. Second, it cites *Lewis* for the idea that such deprivation is appropriate if it was rational and that Congress's "rational choice" to rely on tribal convictions should be upheld. Gov't Br. at 22–29.

1. § 117 is a recidivist provision analogous to *Burgett* and *Custis*

To the first point, the government's argument fails because § 117 clearly falls within the scope of *Burgett* and *Custis* rather than *Lewis*. The government claims § 117 "is controlled by *Lewis*, not *Custis*," because "*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."[1] Gov't Br. at 25.

[1] In this discussion, the government also argues that *Custis* does not apply because it "only precluded use of prior convictions that were constitutionally

As a consequence, a defendant who was previously convicted of a certain type of crime (drug trafficking or violent felony) faces a mandatory minimum penalty that does not apply to others convicted of the same offense—under the ACCA, the judge lacks "discretion to evaluate the defendant's prior conduct to determine whether a 15-year sentence is appropriate." *Id.* In contrast, a judge sentencing a felon in possession or a § 117 defendant has "authority at sentencing to inquire into the history of the defendant to determine what punishment is warranted." *Id.* In short, the constitutional distinction, according to the government, is that the prior conviction in *Custis* triggered a mandatory minimum, where these other statutes do not.

This suggestion is a remarkable one, and the distinction lacks any merit. None of the cases in the *Burgett* line limited the Sixth Amendment issue to the imposition of a mandatory minimum. Rather, the problem in all these cases was the imposition of penal consequences based on a prior, uncounseled conviction. *Burgett v. Texas*, 389 U.S. 109 (1967) (prior offered to support conviction under recidivist statute); *United States v. Tucker*, 404 U.S. 443 (1971) (prior offered to

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invalid under *Gideon*" and that the prior convictions here are admissible because they are "otherwise valid." Gov't Br. at 25; *see also* 26–27. Mr. Shavanaux agrees that if there is no *Gideon* problem—and by extension no *Argersinger* problem—then *Custis* does not apply. However, the tribal convictions at issue here are clearly inconsistent with *Gideon* and its progeny, and as discussed further below, they are not "otherwise valid" and admissible under *Nichols.*

increase sentence); *Loper v. Beto*, 405 U.S. 473 (1972) (prior offered to impeach); *United States v. Custis*, 511 U.S. 485 (1994) (prior offered to trigger ACCA). Even *Lewis* makes lawful conduct illegal (firearm possession), and § 117 turns a misdemeanor into a felony (simple assault). Thus, the distinction between *Lewis* and *Burgett* cannot be the imposition of an increased penalty in the form of a mandatory minimum.

To the extent the government explains *Custis* by the need for more reliable evidence where a prior conviction has sentencing consequences, this analysis turns the law on its head. Sentencing courts may properly support their determinations with evidence *less* reliable than evidence used in establishing guilt. Sentencing courts may thus employ inadmissible evidence, *see* Fed. R. Evid. 1101(c)(3); evidence of uncharged conduct, *Nichols*, 511 U.S. at 747; evidence of acquitted conduct, *United States v. Watts*, 519 U.S. 148 (1997); and other evidence included under the Guidelines' broad umbrella of relevant conduct, *see* U.S.S.G. § 1B1.3. *See also Nichols*, 511 U.S. at 747 (quotation and citation omitted) ("[T]he traditional understanding of the sentencing process [is that it is] less exacting than the process of establishing guilt. As a general proposition, a sentencing judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."). The fact that evidence has sentencing consequences, even very significant

sentencing consequences, does not trigger a sliding scale requiring increasing reliability.

Indeed, the fact of a conviction under § 117 carries with it significant consequences quite apart from whatever sentence is imposed. Whatever the benefits of a shorter sentence, the benefit of not being convicted is unquestionably of greater value to a criminal defendant. *See, e.g., Burgett*, 389 U.S. at 115 (holding that uncounseled conviction may not be used "either to support guilt or enhance punishment for another offense"). This fact is recognized in the application of much more stringent evidentiary and procedural rules protecting a defendant during the guilt phase—the rules governing sentencing are, in every way, less concerned with accuracy. After all, if there is no conviction, there is no need to be concerned with the sentencing court's discretion to fashion an appropriate sentence. The government offers no support, either legal or logical, for its extraordinary argument that the distinction between *Lewis* and *Burgett* is the imposition of a mandatory prison term.

The better distinction is not the threat of penal consequences (a threat that all these cases share), but the difference in the way that the statute at issue makes the prior conviction relevant. Specifically, *Burgett* and *Custis* involve recidivist statutes that impose a greater penalty by virtue of the fact that a defendant has engaged in specific types of crimes in the past. In this small way, the government

gets it right: "*Custis* involved . . . the accuracy of the determination of guilt in the prior prosecution was an essential ingredient of the statutory scheme." Gov't Br. at 25. As in *Burgett* and *Custis*, proof that a defendant committed a specific prior offense is relevant under § 117 to invoke a higher penalty. The present offense is more serious in light of a defendant's prior record.

In contrast, the felon-in-possession statute at issue in *Lewis* did not care whether a defendant had previously committed certain acts. *Lewis* faced "a sweeping prophylaxis . . . against misuse of firearms" that worked by "prohbit[ing] categories of presumptively dangerous persons from transporting or receiving firearms." 445 U.S. at 63, 64. However, this prohibition was not based on the fact that a person had actually committed acts of violence in the past but because the person had the status of a convicted felon or even was just under indictment. The court found in the legislative history an "expansive legislative approach," aimed at curbing gun violence. 445 U.S. at 60–61.

A prophylaxis works prospectively, averting a future evil (gun violence) by a present measure (preventing felons from having guns). In order to achieve that goal, the legislation casts a broad net, capturing those with valid convictions; those with constitutionally infirm convictions; and even those indicted for, but not yet convicted of, a felony. *Lewis*, 445 U.S. at 64. Those who can demonstrate, by obtaining a pardon, a permission, or by successfully attacking their convictions

directly, that they do not fit within the category of presumptively dangerous felons can obtain relief from the harshness of the scheme. *Lewis*, 445 U.S. at 64. While some whose convictions are constitutionally infirm may be caught within the wide net cast by the felon-in-possession statute, the statute's goal is to prevent future evil precisely by casting such a wide net. Moreover, the statute itself leaves open avenues to escape future liability, as well as recognizing the ordinary means of overturning a felony conviction.

The government makes no effort to show that § 117 is part of a scheme similarly directed at preventing future evil by removing present means of achieving that evil. Indeed, § 117 operates entirely retrospectively, punishing the present offense more harshly because the defendant has done the same thing before. The rationale animating the breadth of the felon-in-possession statute—casting a wide net to prevent future harms—is nonsensical when applied to a statute that increases punishment for conduct that is already complete. In this way, § 117, like *Burgett*, is a recidivist statute.

Moreover, *Lewis* repeatedly emphasizes that the expansive reach of the felon-in-possession statute is ameliorated by the existence of means to remove the disability. 445 U.S. 64. The opposite is true with regard to § 117 inasmuch as there appears to be no way to remove or judicially review a prior tribal conviction for which the sentence has already been discharged.

Although the Ute tribal code does allow a defendant to appeal a conviction, it contains no provision for expungement. Law and Order Code of the Ute Indian Tribe of the Uintah and Ouray Reservation, Title XII (Ute Indian Rules of Criminal Procedure), Section VI (Appeal), *available at* http://www.narf.org/nill/Codes/uteuocode/utebodyt12.htm. However, even if there were a right to appeal, under the Indian Civil Rights Act (ICRA) and tribal law, a defendant would not be entitled to relief based on the lack of appointed counsel, so the appeal would be pointless. Federal law does not provide for appellate review of a tribal conviction. While the ICRA does provide for habeas review in federal court, this review is available only "to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303. Thus, a Native American who has already discharged his sentence is not entitled to seek habeas relief in federal court.[2] Moreover, even if a court were to hold that a defendant who had already served his sentence was entitled to habeas review (and notwithstanding arguments below that the tribe is required to appoint counsel), it is not entirely clear that the defendant could succeed in vacating the tribal

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

conviction based on the unavailability of appointed counsel. *See, e.g., United States v. Ant*, 882 F.2d 1389, 1391–92 (9th Cir. 1989) (holding that a tribal conviction was not invalid based on the unavailability of appointed counsel); *United States v. Cavanaugh*, 680 F. Supp. 2d 1062, 1073 (D.N.D. 2009) (noting that "unless tribal law provides otherwise, an indigent defendant in tribal court has no right to a court-appointed attorney"). Thus, in contrast to the civil disability in *Lewis*, for which a defendant could find relief, a person convicted of a qualifying conviction in tribal court has no relief, so there must be collateral review. In the absence of any forum to collaterally challenge the prior conviction, the rationale in *Lewis* cannot apply to § 117.

Having noted the lack of any means to collaterally attack a tribal court conviction, the application of *Lewis* to § 117 becomes nonsensical. It is ludicrous to imagine a potential offender thinking to himself, "Well, I guess I should try to vacate my assault conviction so I can go beat my wife." This hypothetical scenario highlights the difference between a status offense and § 117. It is *always* a crime to assault a domestic partner, regardless of a defendant's status—§ 117 merely imposes a higher punishment for someone who has done it before, as shown by the fact of a prior conviction for the same conduct.

Significantly, *Lewis* does not represent the beginning of a retreat from the principles announced in *Gideon* but an exception to them. *Lewis* acknowledges

the authority of *Burgett* and distinguishes its finding that an uncounseled conviction could not be used as a predicate for a recidivist statute. In *Burgett* and its progeny, the Supreme Court

> found that the subsequent conviction or sentence violated the Sixth Amendment because it depended upon the reliability of a past uncounseled conviction. The federal gun laws, however, focus not on reliability but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons. . . . Enforcement of that essentially civil disability through a criminal sanction does not "support guilt or enhance punishment."

Lewis, 445 U.S. at 67 (quoting *Burgett*, 389 U.S. at 115). Section 117 is not a civil disability enforced through a criminal sanction but a recidivist statute in which prior convictions are used to "support guilt [and to] enhance punishment." And *Burgett* could not be clearer in refusing to permit the use of an uncounseled prior conviction for which the government advocates here:

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

Burgett, 389 U.S. at 115.

It is true that the Court in *Lewis* found no constitutional difficulty in enforcing the intent of Congress to eliminate collateral attacks on predicate convictions that were uncounseled. But *Custis v. United States*, 511 U.S. 485 (1994), demonstrates that the Court's unwillingness to sanction such statutes as a

general matter. *Custis* borrows its analysis from *Lewis*, searching the Armed Career Criminal Act ("ACCA") for any sign that Congress intended to authorize collateral attacks on predicate convictions and finding none: "Similarly [to the statute in *Lewis*], § 924 (e) lacks any indication that Congress intended to permit collateral attacks on prior convictions used for sentence enhancement purposes." *Custis*, 511 U.S. at 493. The fact that the statute did not authorize a collateral attack on predicate convictions decided the matter—for every constitutional defect but one:

> There is thus a historical basis in our jurisprudence of collateral attacks for treating the right to have counsel appointed as unique, perhaps because of our oft-stated view that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." . . . We think that since the decision in *Johnson v. Zerbst* more than half a century ago, and running through our decisions in *Burgett* and *Tucker*, there has been a theme that failure to appoint counsel for an indigent defendant was a unique constitutional defect.

Custis, 511 U.S. at 494–96 (quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932). The Court thus recognized uncounseled convictions as a unique constitutional defect, and did so despite the fact that the statute offered no evidence that Congress intended to permit collateral attacks on uncounseled convictions. *Custis* makes clear that the general rule still holds: except for the narrow exception drawn in *Lewis*, a court may not properly rely on prior, uncounseled convictions. In the end, § 117 falls squarely within the cases from

Burgett to *Lewis* that forbid relying on uncounseled convictions in a subsequent proceeding.

2. An uncounseled tribal conviction is not saved by a "rationality test" under the Due Process clause.

Apart from analogizing to the statute in *Lewis*, the government argues that § 117 should be upheld under a "rationality principle" that it infers from *Lewis*: "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." Gov't Br. at 22–23 (emphasis added). The government initially cites no authority for this proposition, only later attributing this test to *Lewis*: "Congress's 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," so this court must assess "whether Congress's choice was rational . . . 'with the deference that a reviewing court should give to a legislative determination.'" *Id.* at 24 (quoting *Lewis*, 445U.S. at 65, 67 n.9).

This belated citation to authority would be considerably more persuasive were it not transposed from the section of *Lewis* that deals, not with what the statute actually accomplishes, but whether the resulting scheme comports with equal protection. *See Lewis*, 445 U.S. at 65–66 (discussing equal protection argument to distinction between felons and non-felons).

As discussed above, the analysis performed by *Lewis* is considerably different, attending to the language and structure of the statute—to what Congress actually intended and achieved—rather than to whether or not these choices were rational. By substituting the rationality standard from *Lewis's* equal protection analysis into its own analysis of what § 117 accomplishes, the government avoids the rigors of any of the analysis *Lewis* conducts—and requires. Rather than the unitary analysis the government proposes under a "rational principle," it appears that *Lewis* reaches two conclusions: First, the distinction between felons and non-felons is rational. Second, a disability based on firearms does not offend *Burgett* and its progeny because the felon-in-possession statute uses the fact of the prior conviction differently than those other cases did.

Having misappropriated this legal standard, the government argues it is satisfied by claiming without citation to authority that other federal statutes "do not adequately address the endemic and serious problem of domestic violence in Indian country," and that the Violence Against Women Act of 2005 represents a Congressional effort to fill the void. Gov't Br. at 12, 27–29.

Though violence against Indian women is undoubtedly a serious social issue, it is not necessarily a uniquely Indian problem, justifying a uniquely Indian

solution.[3] Further consideration of the data suggests the situation is not so dire nor Congress's legislation so well-reasoned as the government claims. For example, the government points out that between 1979 and 1992, "homicide was the third leading cause of death of Indian females aged 15 to 34." Gov't Br. at 12. Although distressing, it is not perhaps altogether surprising that a large percentage of women who die between the ages of 15 and 34 do so as the result of accident or violence rather than heart attack or stroke. Indeed, 2006 data from the Centers for Disease Control and Prevention (CDC) reveals that homicide is the second leading cause of death (behind unintentional injuries) for *all* women in the United States between the ages of 15 and 24. *See* CDC, Leading Causes of Death by Age Group, All Females-United States, 2006, *available at* http://www.cdc.gov/women/lcod/06_all_females.pdf.

The high incidence of homicide among American women overall conceals an even more disturbing trend. Even if the government's figures from 1979–1992 are taken as correct, the rate of homicide for Indian women is below average for the age group from 15 to 24, and slightly above average only for the 25 to 34 age group. *See also* CDC, Leading Causes of Death by Age Group, American Indian or Alaska Native Females-United States, 2006, *available at*

[3] "[S]imply because Congress may conclude that a particular activity [has a certain effect] does not necessarily make it so." *United States v. Morrison*, 529 U.S. 598, 614 (2000) (quoting *United States v. Lopez*, 514 U.S. 549, 557 (1995)).

http://www.cdc.gov/women/lcod/06_native_females.pdf. Unfortunately, women of two other races do not fare so well. Homicide is the second leading cause of death for African American and Hispanic women between the ages of 15 and 24. *See* CDC, Leading Causes of Death by Age Group, Black Females-United States, 2006, *available at* http://www.cdc.gov/women/lcod/06_black_females.pdf ; CDC, Leading Causes of Death by Age Group, Hispanic Females-United States, 2006, *available at* http://www.cdc.gov/women/lcod/06_hispanic_females.pdf. (Homicide drops to fifth place for African-American women between the ages of 25 and 34, and to third for Hispanic women in the same age group.) It is a tragedy that homicide claims the lives of so many young women, but it is a tragedy not unique to, or even most acutely experienced by, Indian women. The government brief does not attempt to explain why § 117 and its particularly harsh application to Native American men is necessary—or even appropriate—to address a problem so broadly experienced across racial categories.

The government has identified a problem experienced by Indian women which it has chosen to address with a criminal penalty directed at Indian men, but its bullet points do little to suggest, and nothing to prove, that Indian men are responsible for any particular portion of the ills suffered by Indian women. Indeed, the government only attempts to connect Indian men to any of the problems outlined in its brief when it points out that seventy-five percent of the

Indian women victims of homicides are killed by family members or acquaintances. Gov't Br. at 12. There is nothing in the government's brief to suggest that the acquaintances mentioned here are either Indian or men. Even the data on family members is inconclusive because that category does not account for racially mixed families and marriages; people in this category need not be either Indians or men. Even if the government could show that Indian men were in large measure responsible for the crimes against Indian women the government discusses, the other evidence the government adduces suggests that the problem is likely to be the same among all races.

In the end, none of this data really matters under *Lewis* or the Sixth Amendment. The "rational principle" suggested by the government is a misplaced standard that does not bear *at all* on the analysis of whether a prior uncounseled conviction should be excluded under the Sixth Amendment. For the careful reading of the relevant statute and legislative history in *Lewis*, the government thus substitutes its own interpretation of legislative intent and data.

C. An uncounseled tribal misdemeanor for which jail was imposed is not "valid" under Nichols v. United States.

The government's next line of attack is to argue that an uncounseled misdemeanor in tribal court is a "valid" conviction and, therefore, admissible under *Nichols*. It is true that "*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." Gov't Br. at 29. However, the government impermissibly extends this holding to argue 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." *Id.* at 30 (emphasis added). From this impermissible extension, the government argues that an uncounseled misdemeanor *conviction* is always "valid," even though an uncounseled *sentence* in its wake might have to be stricken. The government also argues that because tribal courts are not bound by the Sixth Amendment, an uncounseled tribal conviction is "valid" under *Nichols* and should be admitted. All of these points are flawed.

1. "Validity" under *Nichols* does not depend on whether prior convictions were "valid for their own purposes" but whether they complied with the Sixth Amendment.

The first problem with the government's *Nichols* analysis is that the Court did not create the proffered standard of "valid for its own purposes." The conviction at issue in *Nichols* was an uncounseled misdemeanor conviction which resulted in a fine, but no imprisonment. *Nichols*, 511 U.S. at 740. The Court had previously determined, in *Scott v. Illinois*, 440 U.S. 367 (1979), that "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment," and accordingly that "actual imprisonment [is] the line defining the constitutional right to appointment of counsel" in misdemeanor cases. *Scott*,

440 U.S. at 373. Because no prison was imposed, the prior conviction in *Nichols* accordingly had no constitutional defect, and the question at issue in *Nichols* was whether the conviction could be used in a subsequent case, specifically whether it could be counted for criminal history points under Sentencing Guidelines. Because there was no Sixth Amendment defect under *Scott*, *Burgett* did not apply. 511 U.S. at 743 n.9. Thus, "an uncounseled misdemeanor conviction *valid under Scott because no prison term was imposed*, is also valid when used to enhance punishment at a subsequent conviction." *Id.* at 749 (emphasis added).

Clearly, *Nichols* does not stand for the proposition that a constitutional defect ignored in the jurisdiction where the conviction was entered may also be ignored by a federal court. Rather, *Nichols* stands for the proposition that a federal court may properly rely on a prior conviction where there was no constitutional infirmity. *Nichols* does not depend on the validity of a conviction "for its own purposes." Rather, *Nichols* depends on a conviction's actual validity under the Sixth Amendment. Finally, *Nichols* does not repudiate *Burgett* and its progeny. Rather, it specifically distinguishes it on the ground that there was no constitutional infirmity at all in the prior conviction. The reference to *Burgett* and the fact that *Custis* was decided the same term show that *Burgett* and its progeny are still the law on the admissibility of a prior conviction for which counsel was not provided.

Indeed, by its own terms, *Nichols* does not apply to a misdemeanor conviction for which prison was imposed. Consistent with this view, the Sentencing Guidelines count a prior uncounseled conviction misdemeanor only "where imprisonment was not imposed." USSG §4A1.2, Comment. Background; *United States v. Ortega*, 94 F.3d 764, 771 (2d Cir. 1996) (holding that §4A1.2 "excludes from criminal history computations all uncounseled misdemeanor sentences of imprisonment"); *see also* USSG App'x C, Amend. 353 (explaining that this commentary to §4A1.2 was added to clarify "the circumstances under which prior sentences are excluded from the criminal history score"). In short, it does not matter that a conviction was "valid for its own purposes." Under *Nichols*, the prior conviction must be valid in a specific way—counsel must have been provided if counsel was required. If counsel was required but not provided, then *Nichols* does not apply.

As discussed above, in this case, Mr. Shavanaux's prior convictions did not comport with the Sixth Amendment because he was sent to jail without the assistance of counsel. *See Argersinger v. Hamlin*, 407 U.S. 25 (1972). The court need not decide whether the convictions were "valid for their own purposes" because under *Argersinger*, *Burgett*, and even *Nichols*, they may not now be used in a federal criminal proceeding against Mr. Shavanaux.

Another omission from the government's expansive reading of *Nichols* is the sentencing context in which it arises. The issue was whether the prior uncounseled conviction could be used against the defendant under the U.S. Sentencing Guidelines. *Nichols* held that it could, relying on "the traditional understanding of the sentencing process, which we have often recognized as less exacting than the process of establishing guilt," and noting that "a sentencing judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come." *Nichols*, 511 U.S. at 747 (quotation and citation omitted).

The government may argue that *Nichols*' reference to "recidivist statutes that are commonplace in state criminal laws," *id.*, brings elements of the offense within the ambit of its argument. However, *Nichols* casts its entire discussion of its holding in terms of the procedures of sentencing courts, and it is in that context that this reference must be understood. *Nichols*, 511 U.S. at 747. Indeed, *Nichols* points out that the sentencing court in his case could have taken into account the behavior underlying the uncounseled conviction whether it has resulted in any kind of conviction or not and that the state would have only had to prove the conduct by a preponderance of the evidence standard, an argument that could have no application to a recidivist statute that used predicate convictions as elements of the offense rather than sentencing factors. *Nichols*, 511 U.S. at 748. As discussed

above, while some latitude might be afforded at sentencing, there is no authority to support the use of an uncounseled misdemeanor for which prison was imposed as an element of a future case. *See Burgett*, 389 U.S. at 115 (holding that uncounseled conviction cannot "be used against a person either to support guilt or enhance punishment").

In support of its expansive reading of *Nichols*, the government cites various cases, including two from this court. Gov't Br. at 30–31. However, a closer look at these cases shows they do not apply here. The Tenth Circuit cases on which the government relies are clearly directed at sentencing issues. The discussion of uncounseled convictions in *United States v. Benally*, 756 F.2d 773 (10th Cir. 1985), is confined entirely to the use to which such convictions may be put in sentencing, discussing neither their use as an element of an offense nor the continuing validity of unconstitutional uncounseled convictions. Significantly, *Benally* predates even the advent of the U.S. Sentencing Guidelines, at which time a sentencing court had even broader latitude than now as to what it could consider. *United States v. Jackson*, 493 F.3d 1179 (10th Cir. 2007), holds that "a federal sentencing court may, consistent with the Sixth Amendment, take into account a defendant's previous uncounseled misdemeanor convictions, together with any sentence that does not result in actual imprisonment." *Jackson*, 493 F.3d at 1180; *see also* USSG §4A1.2, comment. background (stating that criminal history

includes uncounseled misdemeanor sentences only "where imprisonment was not imposed"). *Jackson*, thus, falls squarely within the *Nichols* line of cases, accordingly pointing out various "factors unique to the federal sentencing process that at least mitigate concerns about the reliance on prior uncounseled misdemeanor convictions and misdemeanor sentences *in subsequent sentencing proceedings*." *Id*. at 1185 (emphasis added). *Jackson* also discusses several other cases in which this Court and the Supreme Court vacated suspended prison sentences resulting from uncounseled misdemeanor convictions, but did not vacate the misdemeanor conviction itself. *Id*. at 1183.

The issues animating this discussion, however, are very different from those in Mr. Shavanaux's case. The sentence imposed in *United States v. Reilley*, 948 F.2d 648 (10th Cir. 1991) was suspended; since "the Sixth Amendment right at issue protects individuals against being sentenced to a deprivation of liberty without the benefit of counsel," vacating the suspended sentence protected that right from the possibility of future injury, should the suspended sentence ever have been imposed. *Jackson*, 493 F.3d at 1183.

But this remedy is inappropriate when the defendant has already served a sentence of imprisonment as the result of an unrepresented, and therefore constitutionally infirm, conviction, a matter not at issue—and not decided—in *Jackson* or any of the cases it discusses. Indeed, *Jackson* points out that vacating

the conviction in *Reilly* "would be to relieve the defendant from *any* consequence of his . . . actions," an equitable concern not present where the defendant has served a sentence of imprisonment already. While the remedy in *Jackson* might make sense for an unserved suspended sentence in the sentencing context, it makes no sense at all for an already-served sentence on a conviction offered as an element of the offense.

Moreover, as discussed below, *Reilly* and *Alabama v. Shelton*, 535 U.S. 654 (2002), both vacate a suspended sentence of imprisonment and affirm a lower court's decision not to vacate the associated conviction with analysis only of the first question and not of the second. As the *Jackson* court itself pointed out, it is unsound practice to, as the government does here, "attribute to [a decision] a holding on a legal question on which the parties never engaged." *Jackson*, 493 F.3d at 1186.

In short, the better reading of *Nichols* is to recognize not only its holding that a "valid" conviction may be later used against a defendant but also its understanding of what a "valid" conviction looks like: "valid under *Scott because no prison term was imposed*." 511 U.S. at 749 (emphasis added).

2. An uncounseled misdemeanor conviction that receives a sentence of imprisonment is not "valid," even for its own purposes.

Should the court conclude that *Nichols* asks only whether a conviction was "valid for its own purposes," the government must then establish that Mr. Shavanaux's uncounseled misdemeanor convictions for which he was sent to jail are "valid" for their own purposes. It tries to do so in two ways. It argues that (a) with an uncounseled misdemeanor, it is the *sentence* not the *conviction* that is invalid, so the remedy is to vacate the sentence but recognize a "valid" conviction and (b) because federal law does not require tribes to provide counsel, an uncounseled conviction is always "valid." Notwithstanding these claims, the prior convictions here should not be admitted because they are not valid, even for their own purposes, neither because they were misdemeanors nor because they were tribal convictions.

The government's first argument under *Nichols* is that an uncounseled misdemeanor *conviction* is always valid because the Sixth Amendment prohibits only the imposition of a prison term and not a finding of guilt. The government argues:

> A misdemeanor conviction may be constitutionally obtained without benefit of counsel if no imprisonment is imposed. 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. The determination of guilt is the same, and it is obtained by the same procedures, whether counsel is provided or not.

Gov't Br. at 33. The authority for this claim is that "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." *Id.*

At the core of this argument is the government's contention that an uncounseled misdemeanor conviction that receives a prison sentence in violation of the Sixth Amendment is still a "valid" conviction. Thus any uncounseled defendant sentenced to imprisonment after a misdemeanor conviction is treated the same way by § 117, whether the conviction took place in tribal court or not. *See* Gov't App'x at 31. Under the government's reasoning, an uncounseled misdemeanor conviction in state or federal court that resulted in imprisonment may later be used as a predicate conviction under § 117 because the appropriate remedy for the earlier Sixth Amendment deprivation is vacating the sentence of imprisonment, not vacating the conviction. *Id*. The government concludes that even if there were a Sixth Amendment difficulty associated with an uncounseled conviction in tribal court resulting in imprisonment, the remedy would be the same as that available for what is unquestionably a Sixth Amendment violation in state or federal court: an affected could have the sentence vacated, leaving the

conviction intact and available for use as a predicate offense in a § 117 prosecution. *Id*.

This argument presents a number of difficulties. The easiest place to begin is the government's suggestion that "the determination of guilt is the same, and is obtained by the same procedures, whether counsel is provided or not." The government appears to argue here that the conviction of an unrepresented defendant is as reliable as the conviction of a represented defendant: the problem is not "the fact of conviction," but "the imposition of imprisonment." In the government's formulation, the right to appointment of counsel is apparently a formality necessary only to immunize a sentencing determination from constitutional infirmity; appointed counsel is a necessary appurtenance to a prison sentence rather than a constitutional safeguard against wrongful conviction.

To be sure, under *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and *Scott v. Illinois*, 440 U.S. 367 (1979), the right to appointed counsel in misdemeanor prosecutions is tied to the imposition of a sentence of imprisonment. However, imprisonment is not a freestanding difficulty addressed by the appointment of counsel, but a consequence sufficiently serious to require appointment of counsel so as to ensure a reliable verdict. This point is explicit in *Alabama v. Shelton*, 535 U.S. 654, 667 (2002), on which the government relies heavily in this context: "the key Sixth Amendment inquiry [is] whether the adjudication of guilt corresponding

to the prison sentence is sufficiently reliable to permit incarceration." *See also Shelton*, 535 U.S. at 665 (quoting *Argersinger*, 407 U.S. at 40) ("Th[e] relaxed standard [appropriate to sentencing determinations] has no application in this case, where the question is whether the defendant may be jailed absent a conviction credited as reliable because the defendant had access to 'the guiding hand of counsel.'"); *Shelton*, 535 U.S. at 667 (quoting *United States v. Cronic*, 466 U.S. 648, 656 (1984) ("a defendant in Shelton's circumstances faces incarceration on a conviction that has never been subjected to 'the crucible of meaningful adversarial testing.").

The government's insistence that the presence or absence of counsel is relevant only to sentencing determinations and not to determinations of guilt thus directly contradicts the relevant Supreme Court precedent:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. *Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.* If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Powell v. Alabama, 287 U.S. 45, 68–9 (1932) (emphasis added). The reality is that uncounseled misdemeanor convictions are *not* reliable, even if jail is not imposed. As the Supreme Court stated in *Argersinger v. Hamlin*, "The requirement of counsel may well be necessary for a fair trial even in a petty-offense prosecution." 407 U.S. at 33. But notwithsanding any reliability issues associated with an uncounseled conviction, where jail would not be imposed, the Supreme Court has accommodated the demands of an overburdened justice system by not requiring counsel. *Id.* at 38–40.

The government's insistence that convictions obtained in violation of the Sixth Amendment right are no different than those obtained in compliance with it forms the foundation for its next argument, that the proper remedy for such a violation is to strike the sentence of imprisonment, but to leave the conviction intact, ready to serve as a constitutionally valid predicate under § 117. See Gov't Br. at 32 ("The conviction of an indigent, uncounseled misdemeanor defendant in state or federal court is valid, even if imprisonment is unconstitutionally imposed."). Although the government marshals some authority in support of this position, this precedent is ultimately unavailing. It is true that the Supreme Court in *Shelton* did not disturb that portion of the lower court's ruling that left intact the judgment of conviction, but as the government admits, the Court did not consider the propriety of that aspect of the ruling below at all. *See* Gov't Br. at 34.

Moreover, the repeated insistence in *Shelton* that uncounseled convictions are inherently unreliable would not be easy to reconcile with a remedy that permits such convictions to serve as an element of a different offense.

United States v. Reilley, 948 F.2d 648, 654 (10th Cir. 1991) provides precisely the same analysis that *Shelton* does of the government's argument: none. The issue in *Reilley* was whether a conditionally suspended sentence is a sentence of imprisonment so as to require appointed counsel, a question this Court answered in the affirmative. As in *Shelton*, this Court struck only the sentence imposed, leaving the conviction intact, but without any discussion of this aspect of the remedy. In the absence of any analysis on this issue, this court should not rely on these cases. *See United States v. Jackson*, 493 F3d 1179, 1186 (2007) (warning against "attribut[ing] to [a case] a holding on a legal question on which the parties never engaged").

Moreover, the procedural posture of these cases suggests why they would be resolved in the manner they were. An uncounseled misdemeanant pleading guilty to a crime has already accepted the question of guilt, so when a jail sentence is imposed, his interest on direct appeal is to challenge only the sentence imposed.

But that does not mean he would not be entitled to vacate even the conviction based on the deprivation of counsel from the outset of the case.[4]

Finally, the government's argument assumes that the fact that a sentence of imprisonment has been executed is irrelevant to the question of remedy: "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." Gov't Br. at 33 (citing *Scott* generally). While it is true that the right to counsel is triggered by a suspended sentence as well as by a sentence actually imposed, it is not clear that the remedy must be the same in either case. In both *Shelton* and *Reilly* the remedy selected averted the possibility of future imprisonment, which appears to have been the only remedy sought by the defendant in each case.

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[4] The government cites *United States v. Ortega*, 94 F.3d 764 (2d Cir. 1996), for the proposition that an uncounseled misdemeanor conviction is "valid," notwithstanding a jail sentence. Although the case involved a guideline calculation rather than a direct appeal, it relied on *Reilley* for the rule, so if *Reilley* is questioned, *Ortega* is too. Moreover, the fact that the court ruled in the defendants' favor further calls the strength of the rule into question. Notwithstanding its pronouncement that the misdemeanor conviction would still stand, *Ortega* held that "the constitutional problems" of using "uncounseled misdemeanor sentences in which imprisonment was imposed" precluded the use of such sentences to calculate a defendant's criminal history. *Id.* at 770–71. It would be odd, indeed, to adopt a rule that says the jury must find these convictions before convicting under § 117, but then once convicted, the judge cannot use them to calculate the guideline range.

But where a term of imprisonment has already been served, the government's proposed remedy (vacating an already-served sentence of imprisonment), provides a defendant with no relief from the constitutional violation. In other words, the government suggests that there be no remedy in a case where a term of imprisonment unconstitutionally imposed has already been served. The government's parsing of the Sixth Amendment would turns it into a right without a remedy for misdemeanants who actually serve a prison sentence on an uncounseled misdemeanor. The better rule is to hold that an where an uncounseled misdemeanant is sentenced to prison, the conviction itself is unconstitutional and, therefore, not "valid" for subsequent use under § 117. *See United States v. Eckford*, 910 F.2d 216, 218 (5th Cir.1990).

3. An uncounseled conviction in tribal court is not "valid," even for its own purposes.

The second way that the government hopes to establish "validity" under *Nichols* is by arguing that an uncounseled conviction in tribal court is nevertheless "valid" and, therefore, admissible against a defendant under *Nichols*. The government argues: "[I]t is clear that [Mr.] 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 [Mr.] Shavanaux was indigent and was denied appointed counsel." Gov't Br. at 21. The argument seems to be that because the constitution

does not apply to tribal proceedings, it does not offend the constitution to offer tribal convictions under § 117.

The troubling aspect of this argument is the tacit recognition that Mr. Shavanaux would have had a right to counsel in federal court for the prior convictions at issue here, and it is equally clear that the judgment in those cases convictions would have violated the constitution had they been obtained in federal court. It is bad enough that Mr. Shavanaux was imprisoned without the assistance of counsel in the first place. To rely on those convictions now in federal court causes him to "suffer[] anew" that deprivation. *See Burgett*, 389 U.S. at 115.

To the extent Mr. Shavanaux's prior convictions were "valid" under tribal law, they are valid only insofar as a non-constitutional procedure is permitted there. From a criminal procedure not governed by the Constitution, the government infers a criminal procedure that conforms to the Constitution:

> 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. . . . Thus, it is clear that [Mr.] Shavanaux's prior uncounseled misdemeanor convictions for domestic assault did not violate any provision of the Federal Constitution.

Gov't Br. at 21. A conviction valid only because the Constitution does not apply is a very different thing from a constitutionally valid conviction, and the government offers no authority for its logical leap from the non-constitutional to

the constitutionally valid, a failing particularly telling when the government's argument rests so heavily on this proposition. The government insists that Mr. "Shavanaux's prior convictions do not offend the Constitution," Gov't Br. at 31, but to the extent this statement is true at all, its truth is limited to the use of those convictions in tribal court, not federal court.

Given the problems associated with tribal courts, *see, e.g., United States v. Cavanaugh*, 680 F. Supp. 2d 1062, 1072–73 (D.N.D. 2009) (describing the problems with tribal court), the Sentencing Commission has excluded them from a defendant's criminal history calculation. USSG §4A1.2(I). Should the court hold that a "valid" tribal conviction is admissible under *Nichols*, it would create the ironic situation where the judge would be prohibited from relying on the tribal convictions in the guideline calculation after the jury was required to rely on them to convict. (The district court could, of course, exercise its discretion to depart upward under USSG §4A1.3, but this decision would happen after calculating the applicable guideline range.) Clearly, the better view is to hold that a tribal conviction, though "valid for its own purposes," is not valid under *Nichols.*

Hopefully this court will see the wisdom of affirming without reaching the issue of whether tribes are bound by the constitution. As the district court noted in this case, "The 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." Doc. 31 at 2 (quoting *Cavanaugh*, 680 F. Supp. 2d at 1075). However, should the court reach this point in the analysis, it should conclude that tribes are governed by the Constitution, so an uncounseled tribal conviction for which prison is imposed is invalid, even in its own context.

The government's argument to the contrary relies on Supreme Court language reaffirming the rule that the Bill of Rights does not apply to tribes. *See, e.g., Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709, 2724 (2008); *Nevada v. Hicks*, 533 U. 353, 383–84 (2001); *Duro v. Reina*, 495 U.S. 676, 693 (1990). However, these cases do not squarely address the issue but simply cite *Talton v. Mayes*, 163 U.S. 376 (1896), a century-old precedent that predates the legislation that made Native Americans citizens of the United States.

In 1896, the *Talton* Court held that the Fifth Amendment right to indictment by a grand jury did not apply to prosecutions by an Indian tribe because the Fifth Amendment "is a limitation only upon the powers of the general government" and insofar "as the powers of local self-government enjoyed by the [Indian tribes] existed prior to the constitution, they are not operated upon by the Fifth Amendment." *Id.* at 384.

The problem with simply relying on *Talton*, as the Supreme Court cases do, is that in 1924, Native Americans were granted citizenship in the United States. 8

U.S.C. § 1401(b). Since this legislation, Native Americans have had full citizenship, so one would expect them to receive the protections of the Constitution in any criminal proceeding that falls under United States sovereignty. It does not now make sense for the federal government to sanction a criminal tribunal in which Indians can be denied their constitutional rights. Accordingly, this court should conclude that the 1924 law abrogated *Talton* and that Native Americans are entitled to constitutional protections, even in tribal court.

To the extent tribes are not bound by the Constitution, allowing Native Americans to be punished under § 117 based on their prior tribal convictions is essentially the same as allowing the government to rely on any foreign conviction in a federal case. It is unthinkable that the government would be allowed to introduce evidence of a French or Mexican conviction without first proving that basic protections were afforded the defendant, most importantly Due Process and the right to effective counsel. Indeed, for this very reason, foreign convictions are also excluded from a defendant's criminal history calculation under the guidelines. USSG §4A1.2(h). The absence of these protections in tribal court undermine the reliability of Mr. Shavanaux's prior convictions, so the court should affirm the decision to exclude them in this case. *See United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989) (holding that guilty plea entered in accordance with tribal code and the

ICRA could not be admitted in federal prosecution because it violated the Sixth Amendment).

II. Relying on uncounseled tribal convictions for which jail was imposed violates Equal Protection

In addition to violating the Sixth Amendment and due process, relying on uncounseled tribal convictions violates Equal Protection because it deprives a certain class of citizens of their constitutional right to have counsel appointed based on their race and ethnic origin.

Of the Supreme Court cases discussed above, only one discusses the deprivation of the right to counsel as an issue of equal protection. In *Lewis*, the defendant argued that the felon in possession statute unreasonably discriminated between felons and non-felons, regardless of the validity of the conviction. The Court rejected this argument, reasoning that if Congress could deprive other civil rights, such as voting or holding office, then "Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm." 445 U.S. at 66.

It makes sense to apply a rational-basis review where the distinction between felons and non-felons does not fall along racial lines. But under § 117, the line between those with counseled and uncounseled convictions is, in fact, a racial one. Because tribal courts have jurisdiction over Native Americans only,

the only defendants to be charged based on an uncounseled tribal conviction would be Native Americans. Because this distinction falls along racial lines, it is subject to higher scrutiny than the rational basis review applied in *Lewis*. Given the important nature of the right to counsel, there is not even a rational basis to use an uncounseled tribal conviction in federal court.

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

> As it stands now, American Indians are the only group of defendants that could face conviction under 18 U.S.C. § 117 as a result of underlying convictions for which they had no right to court-appointed counsel. While recognizing the unique status of tribes and tribal sovereignty, this Court does not believe it must give deference to tribal convictions if the result is to accord American Indians less than the minimum protections guaranteed by the Constitution. After all, American Indians indicted under the Indian Major Crimes Act enjoy the same procedural benefits and privileges as all other persons within federal jurisdiction, so should they under 18 U.S.C. § 117.

680 F. Supp. 2d at 1077.

The government anticipates this argument by arguing that laws pertaining to Native Americans are reviewed only for a rational basis: "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's *unique obligation* toward the Indians.'" Gov't Br. at 35 (quoting *Morton v. Mancari*, 417 U.S. 535, 554-555 (1974)).

Morton v. Mancari applied a rational basis test to uphold an employment preference for Indians in the Bureau of Indian Affairs. The "special treatment" at issue was preferential hiring within the Bureau of Indian Affairs, which was justified as being "reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups." *Id.* at 554. However, it is one thing to give preferential treatment within an agency whose mission is to improve the situation for Native Americans in this country. It is a much different thing to deprive members that race—because of their race—of the most important benefit this country offers: the protection of the Constitution. Had Congress passed legislation that gave "special treatment" to the victims of domestic violence on an Indian reservation, that benefit would undoubtedly survive equal protection analysis under *Morton*. But that is not what has happened here. Rather than giving Indians special treatment to foster self-government, in § 117 Congress has singled out Indian defendants who are already disadvantaged by the lack of appointed counsel in the first place and then subjected them to enhanced penalties in federal court outside of those tribal governments.

The government also cites *United States v. Antelope*, 430 U.S. 641 (1997), in support of rational basis review. In *Antelope*, the Court considered whether a federal murder prosecution of an Indian for a crime that occurred on tribal land

violated Equal Protection because a non-Indian could not have been prosecuted under that statute. Essentially, the court held that the statute did not discriminate against Native Americans because it applied equally to any defendant who committed the offense in a federal enclave. The Court noted that the defendants were "subjected to the same body of law as any other individual, Indian or non-Indian, charged with first-degree murder committed in a federal enclave." *Id.* at 648. The Court concluded: "Under our federal system, the National Government does not violate equal protection when its own body of law is evenhanded, regardless of the laws of States with respect to the same subject matter." *Id.* at 649.

In contrast to generally-applicable statute at issue in *Antelope*, the statute at issue here—by the government's own concession—was enacted to "address the endemic and serious problem of domestic violence in Indian country." Gov't Br. at 12. Although § 117 on its face applies to any domestic violence committed on a federal enclave, the legislative history makes clear that this statute was not adopted as a statute of general applicability but was specifically targeted towards Native Americans. Moreover, given the widespread recognition in state and federal courts that the Sixth Amendment requires appointment of counsel even in misdemeanors where jail is possible, the possibility that a defendant's prior convictions will be uncounseled rests exclusively with Native Americans. It is highly unlikely that a White, Black, or Hispanic defendant will be prosecuted

under § 117 based on uncounseled prior misdemeanors. And it is a legal certainty that they will not be charged based on uncounseled tribal convictions. Yet Native Americans across the country are being charged with violations of § 117 based on uncounseled tribal convictions. *See, e.g., United States v. Cavanaugh*, 680 F. Supp. 2d 1062 (D.N.D. 2009). The government makes no argument that this legislation would survive strict scrutiny, so the court should affirm on that basis.

If the court concludes that rational basis review applies, it should remand because the district court made no findings as to whether this legislation could survive even rational basis review. However, as discussed above, the government has not established even a rational basis for singling out Native Americans in this way. The government maintains that the enactment of § 117 was "an appropriate response to the problem of recidivist domestic violence in Indian country," given that the "occurrence of domestic violence in Indian country is an especially serious problem." Gov't Br. at 27. The government offers problematic support for the assertion that § 117 represents even a reasonable fit between means and end, however. While the government cites statistics indicating that the problem of violence directed at Indian women is a serious one, the government's evidence does not demonstrate either that this problem is unique or that it can be addressed by stripping Indian men of rights men of other races enjoy in criminal prosecutions.

For example, the government supports its claim by pointing out that between 1979 and 1992, "homicide was the third leading cause of death of Indian females aged 15 to 34." Gov't Br. at 12. As noted previously, a large percentage of women who die between the ages of 15 and 34 do so as the result of accident or violence rather than heart attack or stroke. 2006 data from the Centers for Disease Control and Prevention reveals that homicide is the second leading cause of death (behind unintentional injuries) for all women in the United States between the ages of 15 and 24. *See* CDC, Leading Causes of Death by Age Group, All Females-United States, 2006, *available at* http://www.cdc.gov/women/lcod/06_all_females.pdf. The incidence of homicide in American women overall conceals an even more disturbing trend. Even if the government's figures from 1979–1992 are taken as correct, the rate of homicide for Indian women is below average for the age group from 15 to 24, and above average for the 25 to 34 age group. Unfortunately, women of two other races do not fare so well. Homicide is the second leading cause of death for African American and Hispanic women between the ages of 15 and 24. *See* CDC, Leading Causes of Death by Age Group, Black Females-United States, 2006, *available at* http://www.cdc.gov/women/lcod/06_black_females.pdf ; CDC, Leading Causes of Death by Age Group, Hispanic Females-United States, 2006, *available at* http://www.cdc.gov/women/lcod/06_hispanic_females.pdf. It is tragic that

homicide claims the lives of so many young women, but it is a tragedy not unique to, or even most acutely experienced by, Indian women. The government brief does not attempt to explain why § 117 is necessary—or even appropriate—to address a problem so broadly experienced across racial categories.

Using this data, Congress might conclude that Hispanics or African Americans should face higher penalties for repeat acts of domestic violence. Clearly, however, any such legislation would be stricken down under equal protection. Yet the government argues not only that such discrimination against Native Americans is appropriate but also that they, the original inhabitants of this country, are not entitled to the same protection (strict scrutiny) that other races receive under the Constitution. By the government's own admission, § 117 represents a targeted effort by Congress to federalize conduct that is typically left to local governments and to impose harsher penalties on Native Americans who engage in misdemeanor-level offenses. Under § 117, the government seeks to take further advantage of the inequities already inherent in the system by relying on uncounseled tribal convictions. This disparity must not be allowed. *See* Troy Eid & Carrie Doyle, *Separate but Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. Colo. L. Rev. 1067 (2010) (arguing that constitutional "first principles" call for reforms to ameliorate the discrimination against Native Americans under the federal criminal justice system).

CONCLUSION

Admitting Mr. Shavanaux's prior, uncounseled convictions for which he was sent to jail would cause him to "suffer anew" the deprivation of his Sixth Amendment right to counsel. Doing so in the context of § 117, which targets Native Americans, violates Equal Protection. Accordingly, the court should AFFIRM the order dismissing the case.

STATEMENT REGARDING ORAL ARGUMENT

Oral Argument is requested due to the complexity of the issues raised.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **BRIEF OF THE APPELLEE**, was sent to the following and a copy of the digital submission in electronic form was served via the ECF system, or mailed, postage prepaid, to the parties named below, on this the 28th day of February, 2011.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the forgoing **BRIEF OF THE APPELLEE,** as submitted in Digital Form is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Symantec Endpoint Virus Definition File Dated 2/28/2011, rev.3, and, according to the program, is free of viruses.

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