IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. No. CR-11-2432MCA

MARIA BUNDY,

Defendant.

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION IN LIMINE TO INTRODUCE EVIDENCE OF DEFENDANT'S PRIOR DUI CONVICTION

The United States, in Doc. 149, seeks to introduce evidence at trial, that the Defendant was convicted of a DUI (Driving under the influence of alcohol) in the Navajo Tribal Court in 2009. Its rationale is based on US v. Tan, 254 F.3d 1204 (10th Cir. 2001) which held that evidence of a defendant's multiple DUI convictions support a second degree murder charge. Defendant is, contemporaneously with the filing of her response to this motion, filing a Motion to Dismiss Count III of the superseding indictment, based on similar arguments as those presented herein.

The instant motion is not well taken and should be denied. First, the 2009 conviction is infirm as there is no evidence that the defendant was advised of, nor allowed to exercise her rights defined in the Indian Civil Rights Act; second, Tan, as well as the other cases cited by the government in its motion, are inapplicable in that each of these cases involved multiple convictions, while Defendant has only one; and finally, the balancing required under Rule 403 FRE, weighs heavily in favor of not allowing such evidence in.

DISCUSSION

In U.S. v. Tan, 254 F.3d 1204 (10th Cir. 2001), the defendant, while intoxicated, caused a collision between his pickup truck and two motorcycles, killing one of the motorcyclists. It was later learned that Mr. Tan had seven prior DWI convictions over the course of the previous fourteen years, four of these convictions arose from Navajo tribal court and three from New Mexico state courts. The government sought to introduce Tan's driving record to establish malice, as a necessary element of second degree murder, but the trial court chose to exclude it. On interlocutory appeal from the trial court's ruling excluding Tan's driving record and prior convictions, the 10th circuit held Tan's DWI conviction history was relevant on the issue of malice:

> " A jury could infer from Defendant's prior drunk driving [seven] convictions that he is especially aware of the problems and risks associated with drunk driving. We agree that "[o]ne who drives a vehicle while under the influence after having been convicted of that offense knows *better than most* that his conduct is not only illegal, but entails a substantial risk of harm to himself and others." ...*cite omitted* ... From the number of convictions, the jury could infer that Defendant does not care about the risk he poses to himself and others since he continues to drink and drive. Id, 1210. (emphasis added)

DEFENDANT'S TRIBAL COURT CONVICTION FOR DWI

Here, Defendant has a single, uncounseled prior DWI conviction, arising in Navajo Tribal Court. The plea hearing lasted barely several minutes; see, Exhibit -A-, Transcript of April 2009 court proceeding. At this 2009 Navajo court proceeding, she admitted her guilt, and was sentenced to probation and ordered to attend an alcohol treatment program. This record reveals that there was some reference made that she may have been advised of some (unspecified) rights but there is no specific evidence that she

was advised, for example, that she had a right to plead innocent and have the charges proven against her, or to call and confront witnesses, or to be represented by an attorney. [1]

Moreover, there is no evidence that by virtue of her plea, she received any warnings, nor is there any evidence she was imbued, as a result of this truncated proceeding, with any special or superior knowledge, such that a jury, under Tan, could be allowed to fairly infer that she knew "better than most" of the special danger inherent in driving while intoxicated, or which would allow a jury, as a matter of law, based on this single conviction to infer that her conduct rose to the level of malice aforethought.

1. DEFENDANT'S UNCOUNSELED DWI CONVICTION IS CONSTITUTIONALLY INFIRM AND SHOULD NOT BE THE BASIS OF PROOF OF MALICE, NOR SHOUILD IT BE ALLOWED TO BE INTRODUCED FOR ANY PURPOSE AT TRIAL

In U.S. v. Shavanaux, 647 F.3d 993 (10th Cir. 2011), the court upheld the use of prior uncounseled tribal convictions to support a prosecution under 18 USC 117(a): "We hold that tribal convictions obtained in compliance with ICRA [Indian Civil Rights Act] are necessarily compatible with due process of law. Unless a tribal conviction has been vacated through habeas proceedings or on other grounds, it constitutes a valid conviction for the purposes of 18 U.S.C. § 117(a) and its use does not violate a defendant's right to due process in a federal prosecution."

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[1] Defendant obtained a tape recording of her appearance before the Tribal Court, the transcripts of which is attached as Exhibit –A-. In Exhibit –A-, defendant is asked by the court only if she understood "the rights previously read", to which she replied affirmatively. However, in trying to ascertain what was previously read to her, she also obtained the tape of the entire court docket for that day (obtained on March 20, 2012), and there is no evidence of any rights explained to to her, nor to any other person appearing in front of the court on that day. A copy of the tape of the complete docket has been provided to opposing counsel.

Reasoning that neither the Fifth nor Sixth Amendment of the United States Constitution applies to tribal judicial proceedings, the court rejects the defendant's claims for deprivations of those rights. [2] However, so long as the rights afforded under the ICRA were complied with, the court allowed the subsequent use of the prior uncounseled tribal convictions to establish certain elements of the pending criminal prosecution.

Shavanaux does note that at least one other circuit court disagrees with this analysis. "In reaching this conclusion, we recognize we are at odds with the Ninth Circuit. In *United States v. Ant*, 882 F.2d 1389, 1393 (9th Cir. 1989), the court held that an uncounseled tribal conviction was "constitutionally infirm." Relying upon *Burgett v. Texas*, 389 U.S. 109, 115, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), the Ninth Circuit determined that the admission of such a prior conviction was "inherently prejudicial" and thus unconstitutional. *Ant*, 882 F.2d at 1393, 1396."

And see, US v Cavanaugh, 643 F.3d 592 (8th Cir. 2011), adopting a position similar to the 10th circuit's.

The inquiry Shavanaux requires here is whether Defendant's 2009 DWI conviction complied with the ICRA's requirements. Defendant contends, and the evidence available does not dispute, that it did not. There is no evidence that Defendant was informed of her rights to a trial, nor to counsel, nor was she allowed the opportunity to make a knowing waiver of those rights. Instead, she contends that after her arrest on April 20, 2009, she remained in custody until her court appearance in April 22, 2009,

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[2] The Indian Civil Rights Act 25 USC 1302 imposes certain requirements on tribal court proceedings. These included, among other rights, the right to be represented by counsel.

which, as the record reveals, was perfunctory, and during which she was neither advised of her right to retain counsel, nor of her rights to a trial, nor any other right guaranteed under the ICRA, but simply plead guilty.

Accordingly, the court should hold that her 2009 DWI conviction from Navajo Court did not comply with the ICRA, and under Shavanaux, should be deemed infirm, and should not be introduced as the predicate conviction under Tan, as the basis of Count III of this indictment.

2. EVEN IF DEFENDANT'S 2009 DWI CONVICTION IS DEEMED VALID, IT STILL DOES NOT MAKE TAN APPLICABLE

The justification of Tan to allow consideration of Defendant's driving history on the issue of malice aforethought does not apply in this case. It is factually distinguishable in term of the number of prior convictions (seven as opposed to one).

See also, US v Leonard, 439 F.3d 648 (10th Cir. 2006), where the court allowed in evidence of the defendant's prior driving record to establish the element of malice in a second degree murder prosecution.

In Leonard, the court seized on to the "persistent violations [to] betoken a conscious disregard for these considerations. A jury may infer that an individual with a record like Mr. Leonard's "knows better than most" that his conduct is illegal and unsafe, and continues to do so in defiance of that risk. This evidence tends to show, even if only slightly, that Mr. Leonard acted with malice aforethought." (emphasis added). The Leonard opinion, in a footnote, added that: "Of the fifteen citations, nine were for driving with a suspended license, two were for failing to appear for traffic citation hearings, and

two were for moving violations. Of the two moving violations, one was for illegal lane use, a citation which "is usually associated with a motor vehicle accident." Trial Tr. 243-44." …

Defendant here does not have persistent violations, (Leonard, fifteen, Tan seven), but only one.

Similarly, in the other cases cited by the government in its motion, at pages 4 and 5, each of them involved multiple convictions, or at least multiple arrests. For example, in U.S. v. Norris (D.Ariz. 2009) 649 F. Supp.2d 968, the court found:

1. Evidence regarding Defendant's conviction for DUI in Tempe in 1995 and that he ultimately ended his prison term in 2005 for the offense.
2. Evidence that Defendant completed two classes entitled "State of Arizona D.U.I. Advanced Chemical Dependency Lectures," which lasted for a combined total of 36 hours.
3. Evidence regarding the fact that Defendant's license was revoked due to the Tempe conviction and not reinstated until July 2008.
4. Evidence regarding the fact that the Defendant was arrested for driving drunk on the Gila River Indian Reservation on 6/13/07.
5. Evidence regarding the fact that the Defendant was arrested for driving drunk on the Gila River Indian Reservation on 8/18/07.

In, U.S. v. Loera, 923 F.2d 725 (9th Cir. 1991), the court found that "at the time of the accident Loera had suffered three prior convictions in California for driving under the influence of intoxicating liquor and was on probation. He was under court order not to

drink. His driver's license had been revoked for one year on February 19, 1988, and had not been renewed.

And in United States v. Fleming, 739 F.2d 945 (4th Cir. 1984), the facts were that the defendant had been observed driving upwards of 100 mph in a busy, posted 45mph speed zone, had a BAC of .315, and also had multiple convictions (though it was not specified as to the exact number)

Finally, in US v Chippewa, 141 F.3d 1180, 1198 (unpublished), the court referenced " multiple alcohol related driving incidents".

Moreover, there are simply no facts presented by the government to establish that the defendant was warned, nor knew better than most of the risks of driving while intoxicated, which is the basis of Tan's rationale. Compare the finding in Norris, supra, that that defendant had attended classes on DUI and chemical dependency. Rather, introduction of Bundy's prior DUI would invite a jury to speculate about what the Defendant knew or may be presumed to know, in the face of extremely prejudicial propensity evidence. See, point three, infra.

Further, U.S. v. Commanche, 577 F.3d 1261 (10th Cir. 2009), while explaining Tan's rationale in allowing prior DWI into evidence to establish malice, the court spoke in terms of the multiple convictions and warnings that made them relevant to the issue of malice. "Tan clearly concedes that it was the 'numerous' prior DWI convictions that established malice". Nowhere does a single, isolated DUI conviction support an inference of malice.

Additionally, applying Tan to this case could impermissibly remove from the province of the jury the opportunity to weigh the evidence on the issue of malice, but

rather impose almost a strict liability inquiry, allowing the Government to argue, unfairly, that defendant's prior DWI was sufficient evidence of malice, per se, rather than base its case on any evidentiary predicate in the events of March 5, 2011 See, Begay v. U.S., 553 U.S. 137 (2008):

> "statutes that forbid driving under the influence, such as the statute before us, typically do not insist on purposeful, violent, and aggressive conduct; rather, they are, or are most nearly comparable to, crimes that impose strict liability, criminalizing conduct in respect to which the offender need not have had any criminal intent at all."

Applying a Tan standard to this, and proceeding with the murder charge under Count III, without more than a single conviction for DUI would offend Begay's rationale.

3. INTRODUCTION OF DEFENDANT'S PRIOR DWI WOULD BE MORE UNFAIRLY PREJUDICIAL THAN PROBATIVE, AND SHOULD BE EXCLUDED

Alternatively, assuming the court holds Defendant's prior DUI conviction to be valid, and that Tan is applicable, defendant further contends that the prejudice resulting from the introduction of the 2009 DWI conviction so outweighs its probative value to as make its introduction unfair and would deprive the defendant of a fair trial.

Rule 403 (FRE) requires that a court carefully weigh the probative value against the prejudicial effect of a prior conviction, given the likelihood that any prior conviction will have a prejudicial effect on the defendant's case.

Similarly, under a Begay rationale, the only basis to infer malice is through Tan. Commanche warns of the risk of introducing prior convictions, which might be misconstrued as impermissible propensity evidence, which is the problem in doing so in this case. That is, there is a serious risk that the jury would be confused and unfairly

attributed propensity from this evidence when it shouldn't: "In some instances, the *permissible* purposes of 404(b) evidence are logically independent from the *impermissible* purpose of demonstrating conformity with a character trait. (Cite omitted) in which prior drunk driving convictions were admissible not because they indicated the defendant's propensity for driving drunk but because he had been warned of the risks of his actions. *Id.* at 1207, 1210-11. That is, the defendant's disregard of prior warnings helped to establish malice. Notably, the prior drunk driving convictions were relevant to demonstrate malice without first requiring the jury to conclude that the defendant acted in conformity with an alleged character trait. *Id.* at 1210-11. (emphasis in original)". Here, there is no evidentiary basis that Bundy's DUI conviction is relevant to the issue of any prior warning, as required by Tan: the tribal court proceedings are silent on that point, nor has the government produced any evidence to support that claim. As such, it can only be considered impermissible propensity evidence

According to Commanche, numerous prior convictions may tilt this Rule 403 balancing inquiry in favor of relevant evidence of malice, as opposed to propensity; one conviction is so much less likely to establish malice, but could still be seen by the fact finder as propensity. But, while a single DUI conviction is marginal or equivocal to proof malice, it could still be extremely prejudicial. The risk of this occurring should inform the court to exercise its discretion and find that the potential prejudice outweighs any minimal probative value.

Here, and unlike in Tan, Defendant's single conviction makes its probative value on the issue of malice somewhat negligible, thus making the countervailing prejudicial effect more overwhelming. That is, in Tan, the court recognized the numerous

convictions as significantly probative of malice; one conviction simply lacks that probative component but none the less makes the risk of potential prejudice far greater.

CONCLUSION

For the above reasons, the court should deny the government's motion and not allow it to introduce evidence of the Defendant's 2009 DUI conviction.

Respectfully submitted,

/s/ David L. Plotsky
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I HEREBY CERTIFY THAT on the 5th day of April, 2013, I filed the foregoing electronically through the CM/ECF system, which caused AUSA Kyle Nayback and AUSA Mark Baker to be served by Electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ David L. Plotsky
David L. Plotsky

JUDGE: Navajo Nation vs. Maria Bundy, SR-TR, 1016-2009, RCR 019, 109-2009, RCR 351-2009. Maria Bundy?

MARIA BUNDY: Yes ma'am.

JUDGE: Do you understand your rights as explained to you?

MARIA BUNDY: Yes I do.

JUDGE: Do you have any questions about those rights?

MARIA BUNDY: No I don't.

JUDGE: Do you understand [INAUDIBLE] any questions on those [INAUDIBLE]

MARIA BUNDY: No.

JUDGE: As driver with an actual physical control of a motor vehicle while under the influence of intoxicating liquor in violation of Title 14, Section 707A, Docket number SR-TR-1016-09. This occurred on or about the 20th day of April 2009 at 1:38 p.m. at US Highway 491 southbound lane. South of Shiprock, New Mexico [INAUDIBLE] 86, [INAUDIBLE] Officer [INAUDIBLE] Jr. [INAUDIBLE] 24 hours [INAUDIBLE] jail for a payment of $300.00. The court will also order you to attend a [INAUDIBLE] class and [INAUDIBLE] obtaining alcohol screening. Do you understand these penalties?

MARIA BUNDY: Yes ma'am.

Exhibit-A-

JUDGE: How do you wish to plead to this charges.

MARIA BUNDY: Guilty.

JUDGE: You have entered a guilty plea. Has anyone forced you or threatened you into a guilty plea.

MARIA BUNDY: No ma'am.

JUDGE: Have you entered into this guilty plea on your own free will?

MARIA BUNDY: Yes ma'am.

JUDGE: The charge is following too closely. Driver is following another vehicle also [INAUDIBLE] is reasonable in violation of Title 14, Section 306, Docket number SR-TR 1019-09. This occurred on or about the 20th day of April 2009 at 11:22 p.m. at US Highway 491 southbound lane south of Shiprock [INAUDIBLE] Officer [INAUDIBLE] Jr. The penalty for this offense is $37.50. Do you understand the penalties?

MARIA BUNDY: Yes ma'am.

JUDGE: How do you wish to plead to these charges?

MARIA BUNDY: Guilty.

JUDGE: You have entered a guilty plea. Has anyone forced you or threatened you into a guilty plea?

MARIA BUNDY: No ma'am.

JUDGE: Are you entering a guilty plea of your own free will?

MARIA BUNDY: Yes ma'am.

JUDGE: The charge with possession of liquor in violation of Title 7, Section [INAUDIBLE], docket number SR-TR-351-09. The defendant knowingly [INAUDIBLE] transport any beer, wine or any other beverage [INAUDIBLE] alcohol intoxication if such alcoholic beverage is intended for personal use. The court [INAUDIBLE] dismiss this complaint. It will be dismissed without prejudice. Without prejudice means [INAUDIBLE] The statutory language that I just read to you is appropriate. Do you understand that?

MARIA BUNDY: Yes ma'am.

JUDGE: There are two charges that you pleaded guilty [INAUDIBLE]

MARIA BUNDY: No, other than that I have a job and I don't [INAUDIBLE] on my part for what I did and I know it won't happen again. That, you know, I want to keep my job where I'm working at.

JUDGE: Where are you working at?

MARIA BUNDY: I'm working at [INAUDIBLE]

JUDGE: The charges that are [INAUDIBLE] intoxicating liquor in regards to SR-TR-1016-09. The

court rules that [INAUDIBLE] jail [INAUDIBLE] supervised probation. [INAUDIBLE] fines. The fines are due in 90 days. You will also be required to pay [INAUDIBLE] impact counseling [INAUDIBLE] Before you leave today you will be meeting with a probation officer. Further traffic citation of following too closely under docket number SR-TR 1019-09, the court [INAUDIBLE] $37.50 [INAUDIBLE] pending. The court did have a pending speeding citation from 2005. Before you leave, you need to take care of that also. Do you understand that?

MARIA BUNDY: I thought I did pay for that.

JUDGE: There's a default judgment, check with the clerk before you leave today.

MARIA BUNDY: Okay. Thank you.

[END OF HEARING]

TRANSCRIPTIONIST'S CERTIFICATE

IT IS HEREBY CERTIFIED that the foregoing is a true and correct transcript of the proceeding had in the within titled and numbered cause on the date hereinbefore set forth.

IT IS FURTHER CERTIFIED that Paul Baca Professional Court Reporters is neither employed by nor related to any of the parties or attorneys in this case, and that this firm has no interest whatsoever in the final disposition of this case in any court.

Melinda Palmer

PAUL BACA PROFESSIONAL COURT REPORTERS