IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, **Plaintiff-Appellant,** **vs.** **LAKOTA THOMAS FIRST,** **Defendant-Appellee.**	**C.A. 11-30346** **D.C. No.: CR-11-80-GF-SEH**

BRIEF OF APPELLANT UNITED STATES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

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INTRODUCTION

This case presents a purely legal question of first impression regarding a matter of statutory interpretation.

Lakota First was indicted for possessing a firearm after being convicted of a misdemeanor crime of domestic violence in violation of 18 U.S.C. § 922(g)(9). His prior misdemeanor occurred in tribal court where a defendant is only entitled to counsel at his own expense. 25 U.S.C. § 1302(a)(6). It is an affirmative defense to a gun charge under § 922(g)(9) if the defendant was not represented by counsel during his prior misdemeanor and did not waive the right to counsel in the case. 18 U.S.C. § 921(a)(33)(B)(i)(I). First was not represented by counsel during his misdemeanor crime of domestic violence, but did waive the right to retained counsel. As the Sixth Amendment right to *appointed* counsel does not exist for misdemeanor convictions in tribal court, however, he did not waive this latter right to counsel.

The question is whether the right to counsel that First had to waive for the affirmative defense is the Sixth Amendment right to appointed counsel or the right to counsel that the prior proceedings afforded him, which was the right to retained counsel.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291. Final judgment was entered on November 9, 2011. ER 44. The United States timely filed its notice of appeal on December 8, 2011. ER 45-46.

DETENTION STATUS

First has been released.

STATEMENT OF THE ISSUES

A misdemeanor domestic violence conviction cannot be used as the predicate offense for 18 U.S.C. § 922(g)(9), which prohibits misdemeanants from possessing a gun, unless the defendant was represented by counsel in the prior case or waived "the right to counsel in the case." 18 U.S.C. § 921(a)(33)(B)(i)(I).

1. Does this provision refer to the right to counsel applicable in the predicate, domestic violence case —which for a tribal defendant is the right to retained, not appointed, counsel— or the right to appointed counsel under the Sixth Amendment?

2. Is it constitutional to use a valid, uncounseled, tribal-court misdemeanor conviction as the predicate offense for a misdemeanant-in-possession gun charge in a subsequent federal proceeding?

3. Does it violate equal protection to provide tribal defendants with only retained counsel in misdemeanor proceedings while state and federal defendants are provided with a right to appointed counsel?

CIRCUIT RULE 28-2.7 STATEMENT

The pertinent statutory provisions are included in an addendum at the end of this brief.

STATEMENT OF THE CASE

First was indicted under 18 U.S.C. § 922(g)(9) for possessing a firearm after being convicted of a misdemeanor crime of domestic violence. ER 1-3. He moved to dismiss the indictment based upon the affirmative defense that he had not been represented by counsel or waived the right to counsel during the proceedings for his predicate offense. ER 4-5. The district court granted his motion and dismissed the indictment with prejudice. ER 44. The United States now appeals.

STATEMENT OF FACTS

I. Lakota First is indicted for possessing a firearm after his tribal conviction for a misdemeanor crime of domestic violence.

In December 2003, Lakota First beat up the live-in girlfriend with whom he shared a child.[1] ER 13. He was charged with domestic abuse in the Fort Peck Tribal Court in Montana. ER 8, 13. He pleaded guilty and received a 30-day suspended sentence. ER 8, 12.

First was not represented by counsel and did not waive court-appointed counsel in the tribal proceedings. ER 8. He concedes, however, that he waived the right to retained counsel. *Id.* ("I was indigent and could not afford to hire a lawyer"); Doc. # 25 at 7 ("[T]his Court can —and should— conclude that First was treated in accordance with tribal law" which "provide[s] that an accused only has a right to counsel at *his or her own expense*.") (emphasis in original).[2]

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[1] The record at this point does not establish that the victim was First's girlfriend with whom he shared a child. But the United States can establish that relationship at trial. *United States v. Hayes*, 555 U.S. 415, 418, 421-22 (2009).

[2] To the extent the record is insufficient to determine whether First waived his right to retained counsel, the burden fell upon First to establish the evidence in support of the affirmative defense that he had

Seven years later, he was indicted for possessing a semi-automatic rifle after conviction for a misdemeanor crime of domestic violence. ER 1-2.

II. The district court dismisses the indictment because First was not provided counsel and did not waive counsel in his tribal proceedings.

First moved to dismiss the indictment on the grounds that (1) his prior conviction did not qualify as a misdemeanor crime of domestic violence due to statutory exceptions in 18 U.S.C. § 921(a)(33)(B)(i)(I), (2) an uncounseled prior conviction resulting in a suspended sentence could not be used as a predicate offense under the Constitution, and (3) use of his prior uncounseled conviction as a predicate offense was precluded by *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989). Doc. ##18-19. On the first point, he argued that the government failed to provide sufficient proof that he knowingly waived his right to counsel or his right to a jury trial in the earlier proceeding. Doc. #19 at 7-8.

The government responded that the statutory exceptions cited by First are affirmative defenses for which he bears the burden and he

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not waived counsel. *United States v. Lenihan*, 488 F.3d 1175, 1176 n.1, 1177 (9th Cir. 2007).

had not established that he had not waived the right to counsel or his jury trial right in the earlier proceeding. Doc. #23 at 6-10. It addressed his constitutional arguments as well.

First replied that tribal proceedings provide only a right to counsel at one's own expense, so he could not have waived his right to appointed counsel during his earlier misdemeanor conviction. Doc. #25 at 6-8. He acknowledged that the dispute between the parties was not a factual one, but a legal one over the meaning of the "right to counsel." *Id.* at 2. He filed an affidavit where he admitted that:

1. he pleaded guilty to the charge of domestic abuse in tribal court in December 2003,

2. he was indigent at the time and could not afford a lawyer, but did not waive the right to court-appointed counsel, and

3. he did not recall whether the tribal court informed him of his right to a jury trial.

ER 8.

The district court held a hearing on First's motion to dismiss. ER 15. First argued the right to counsel in the statute means the right to appointed counsel and he had met his burden in establishing that he

had not waived that right. ER 20-21, 27-30. The government argued the right to counsel means the right to counsel in the prior proceedings which, for a misdemeanor in tribal court, is the right to retained counsel provided by the Indian Civil Right Act of 1968, and First admitted he had waived that right. ER 22-27.

The district court agreed that the statutory exceptions upon which First relied were affirmative defenses for which he bore the burden. ER 34. It made factual findings that First had been "informed that he could be represented by hired counsel," but not that "appointed counsel would be available." ER 35.

This record led to "the core" question: "What is the meaning to be given to the phrase 'right to counsel' as it is used in the statute?" ER 37. The court said the right to counsel, "as that term is most generally used," is "grounded in the Sixth Amendment." ER 38. And an "indigent person" in any state or federal proceeding would have a right to court-appointed counsel for a felony or misdemeanor trial where a suspended jail sentence was imposed. *Id.* Thus, the court had to ask whether the right to counsel in a tribal court proceeding means

"something less than the right to counsel would mean if the case had been in a federal or state court?" *Id.*

Relying on *Ant,* the district court decided that tribal court proceedings had to meet federal constitutional-right-to-counsel obligations to establish a predicate conviction for § 922(g)(9). ER 39-40. An alternative reading of the statute would violate the Constitution:

> It is, at the end of the day, counsel, my conclusion that it simply cannot be said to make anything in the nature of a justifiable argument, whether it be on a logical basis, on a sociological basis, whether it be cultural, or ethnic background, or tribal affiliation grounds, and certainly not on constitutional grounds, that an individual could be charged in this court with a violation of 922(g)(9), who had not been afforded the same right to counsel in an earlier tribal proceedings [sic], and that he should face the risk of conviction of a federal felony that a person charged with the same offense in any other court other than a tribal court would not face federal prosecution.

ER 41.

"[T]he Congress of the United States cannot establish," said the court, "a statutory program that accords one group of United States' citizens constitutional rights to counsel, and in the same breath denies other citizens of the United States the same rights to counsel." *Id.*

For those reasons, First's "underlying tribal court conviction" could not "be used as a predicate offense for the federal prosecution" charged in the indictment against him. ER 42. The court granted First's motion to dismiss the indictment. ER 42, 44.

SUMMARY OF ARGUMENT

The plain language of the statute, its structure, the background against which Congress legislated the statute, and the statute's purpose of protecting at-risk Indian women from violent offenders all support the government's reading of the text. The "right to counsel in the case" under § 921(a)(33)(B)(i)(I) that must be waived to use a prior misdemeanor crime of domestic violence as the predicate offense to prohibit a person from possessing a firearm is the right to counsel that existed in the prior proceeding. That right in tribal court is the right to retained counsel, not the right to appointed counsel. First does not qualify for the affirmative defense because he waived the former.

The government's interpretation does not violate the United States Constitution. An uncounseled, prior conviction may be used as the predicate in a later proceeding so long as the conviction was valid for its own purposes. This Court's holding to the contrary in *Ant* was

rejected by the Supreme Court in *Nichols v. United States*, 511 U.S. 738, 748-49 (1994). Nor is *Ant*'s focus on the reliability of the prior conviction controlling here, since the federal gun laws focus on the fact of conviction, rather than its reliability, to prohibit gun possession. *Lewis v. United States*, 445 U.S. 55, 66-67 (1980).

The district court's equal protection concerns about treating defendants differently in tribal court than in federal or state court are similarly foreclosed by Supreme Court precedent. *United States v. Antelope*, 430 U.S. 641, 644-47 (1977).

ARGUMENT

I. The right to counsel that must be waived to establish an affirmative defense under 18 U.S.C. § 921(a)(33)(B)(i)(I) is the right to counsel that existed in the prior proceeding, not the Sixth Amendment right to counsel.

Standard of Review: Dismissal of an indictment based on a district court's interpretation of a federal statute is reviewed de novo. *See, e.g., United States v. W.R. Grace*, 504 F.3d 745, 751 (9th Cir. 2007).

Argument: In 1996, Congress passed 18 U.S.C. § 922(g)(9). Pub. L. 104-208, § 101(f). The provision was designed to keep guns from people who committed or attempted to commit violent crimes in

domestic relationships. Congress worried that the nature of domestic relationships often resulted in misdemeanor convictions for individuals who presented a danger to their loved ones and the greater community that was more comparable to a felony and therefore more serious than their misdemeanor conviction suggested.[3] Congress passed the law to prevent domestic violence misdemeanants from possessing firearms.

Section 922(g)(9) makes it a crime for any person "who has been convicted in any court of a misdemeanor crime of domestic violence" to possess a firearm. 18 U.S.C. § 922(g)(9). The term "misdemeanor crime of domestic violence" is defined by the statute. It provides that a misdemeanor crime of domestic violence is:

> an offense that—
>
> (i) is a misdemeanor under Federal, State, or Tribal law; and

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[3] See 142 Cong. Rec. S10379 (Sept. 12, 1996) ("plea bargains [in domestic violence cases] often result in misdemeanor convictions for what are really felony crimes") (statement of Sen. Feinstein); 142 Cong. Rec. S8831-06 (July 25, 1996) ("many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies") (statement of Sen. Lautenberg); see also *United States v. Hayes*, 555 U.S. 415, 426 (2009) (the provision was meant to remedy disparate treatment by the guns laws of those convicted of felony and misdemeanor crimes of domestic violence).

> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. § 921(a)(33)(A).

The statute provides affirmative defenses in its definition. A person "shall not be considered to have been convicted" of a misdemeanor crime of domestic violence:

> unless—
>
> (I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and
>
> (II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either
>
> (aa) the case was tried by a jury, or
>
> (bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

18 U.S.C. § 921(a)(33)(B)(i).[4]

[4] The provision also provides a defense for a person whose conviction has been expunged or set aside, who has received a pardon,

First moved to dismiss the indictment against him based on these affirmative defenses. He claimed that he was not provided with counsel or a jury trial and had not waived his right to counsel or to a jury trial during his earlier misdemeanor guilty plea. He bore the burden of proving those affirmative defenses. *United States v. Lenihan*, 488 F.3d 1175, 1176 n.1, 1177 (9th Cir. 2007).

The district court dismissed the indictment based only on First's argument that he had not waived his right to counsel in the earlier proceeding.[5] First established that he did not waive the Sixth Amendment right to appointed counsel in his prior case, because tribal courts do not provide such a right in misdemeanor proceedings. See

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or who had their civil rights restored. 18 U.S.C. § 921(a)(33)(B)(ii). Those defenses are not at issue in this appeal.

[5] The district court did not address First's argument that he had not waived his right to a jury trial except to say that very little existed in the record regarding First's right to a jury trial. ER 37. But, as pointed out below, it was First's burden to establish that affirmative defense and he failed. ER 22. He filed an affidavit with the court that stated he could "not recall" the tribal court informing him of his right to a jury trial, but did not affirmatively state that he had not waived the right. ER 8. As the district court did not rule on the matter, it is not before this Court. The government points out First's failure to meet his burden so that this Court does not use it is an alternative ground for affirming the district court's dismissal of the indictment.

Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(a)(6). But it is undisputed that he waived the right to retained counsel provided by the Indian Civil Rights Act.

The parties' dispute centers on whether § 921(a)(33)(B)(i)(I)'s defense for when a defendant did not "knowingly and intelligently waive[] the right to counsel in the case" requires First to prove that he did not waive the Sixth Amendment right to counsel or requires him to prove that he did not waive the right to counsel provided by the prior proceedings which, for a misdemeanor in tribal court, is the right to retained counsel. The district court held that First only had to establish the former and dismissed the indictment.[6]

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[6] The district court also noted that there was nothing in the record to "suggest that [First] was told anything at all about the disadvantages of self-representation." ER 36. As the burden was on First to establish that he had not waived his right to counsel, any gap in the record counseled in favor of finding waiver, not against it. And the district court is incorrect that First had to be told of the disadvantages of self-representation in order to knowingly and intelligently waive his right to counsel. *Lenihan* overruled *United States v. Akins*, 276 F.3d 1141 (9th Cir. 2002), a case which "require[d] that a defendant be informed of the dangers and disadvantages of self-representation when pleading guilty to a misdemeanor." *Lenihan*, 488 F.3d at 1177. It did so in light of *Iowa v. Tovar*, 541 U.S. 77, 81 (2004), which held that "[t]he constitutional requirement [of a knowing and intelligent waiver] is satisfied when the trial court informs the accused

But the plain language of the statute, its structure, the background against which Congress enacted the statute, and the reasons Congress enacted the provisions all favor the government's reading. "[T]he right to counsel in the case" that a defendant must waive for his prior misdemeanor conviction of domestic violence to qualify as a predicate offense for a § 922(g)(9) conviction is the right to counsel that existed in the prior proceeding. In this case, that right to counsel was the right to retained counsel under the Indian Civil Rights Act — not appointed counsel under the Sixth Amendment.

A. The plain language of the statute supports the government's reading.

When this Court construes a statute in a case of first impression, it begins with the statutory language. *United States v. Neville,* 985 F.2d 992, 995 (9th Cir. 1993). "[T]he plain meaning rule requires that if the language of a statute is clear and there is no ambiguity, then there is no need to interpret the language by resorting to the legislative

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of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of guilty plea." First does not dispute that the steps required by *Tovar* were taken in tribal court with respect to his right to retained counsel.

history or other extrinsic aids." *Id.* (internal citations & quotation marks omitted). In reviewing the plain meaning, "statutory language must always be read in its proper context." *Id.* (quoting *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991)). The court must look at both the "particular statutory language at issue" and "the language and design of the statute as a whole." *McCarthy*, 500 U.S. at 139.

An individual's prior misdemeanor conviction cannot be used as a predicate offense for § 922(g)(9) unless "the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case." 18 U.S.C. § 921(a)(33)(B)(i)(I). Because the first use of the phrase "in the case" makes clear that the whole provision is referring to the prior misdemeanor proceeding, the second "in the case" must serve a different purpose or it would be superfluous. It is a court's "duty to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). That different purpose is most naturally modifying "the right to counsel."

Given that the right to counsel is qualified by "in the case," the right that must be waived is best understood as whatever right to counsel the defendant had in the prior proceeding. In a state

proceeding, that right to counsel may be more expansive than the Sixth Amendment since some states provide appointed counsel even when the prosecution does not result in a prison sentence. *Nichols*, 511 U.S. at 749 n.12 (citing state statutes). But in a tribal misdemeanor prosecution, that right to counsel is less expansive: the Indian Civil Rights Act only provides for retained counsel.[7] 25 U.S.C. § 1302(a)(6).

Only one circuit has addressed this issue. With little analysis, it recognized the right to counsel referenced in the statute as the right to counsel in the prior proceeding, rather than the Sixth Amendment right to counsel. *United States v. Smith*, 171 F.3d 617, 622 (8th Cir. 1999) (defendant did not have a Sixth Amendment right to counsel in the prior proceeding, but the relevant right to counsel under § 921(a)(33)(B)(i)(I) was right to counsel provided by state law in the prior proceeding).

A contrary interpretation of the statute —i.e., that First had to waive the Sixth Amendment right to appointed counsel— either implies

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[7] As a result of the Tribal Law and Order Act of 2010, the right to counsel in tribal court where the sentence is in excess of one year is now coextensive with the Sixth Amendment right. 25 U.S.C. § 1302(c)(1) & (2).

that (1) First possessed a Sixth Amendment right to appointed counsel in his tribal case that he could waive or (2) Congress meant to exempt tribal misdemeanor domestic abusers who are not represented by counsel from the reach of § 922(g)(9) since those misdemeanants cannot waive a Sixth Amendment right to counsel that they do not have.

The first possibility is false as matter of law. The Sixth Amendment's right to appointed counsel does not apply to tribal governments. *Duro v. Reina*, 495 U.S. 676 (1990). The Indian Civil Rights Act only provides tribal misdemeanor defendants with retained counsel. A tribal misdemeanant therefore cannot waive the right to appointed counsel, because he does not have a right to appointed counsel to waive.

That leaves only the possibility that Congress intended § 922(g)(9) to apply solely to tribal defendants who were represented by counsel. But this statutory reading places the statute at odds with itself and renders the affirmative defense's waiver requirement superfluous as applied to indigent defendants who were convicted in tribal court.

Congress wanted § 922(g)(9) to apply to tribal defendants. It explicitly said so. 18 U.S.C. § 921(a)(33)(A)(i) (a "misdemeanor crime of

domestic violence" includes misdemeanors "under Federal, State or Tribal law"). So to read the very next subsection to exempt every misdemeanor where the defendant did not hire his own attorney from the statute places the statute at odds with itself. See, e.g., *Edelman v. Lynchburg College*, 535 U.S. 106, 120 (2002) (that Congress intended two provisions to be read together "is suggested by the fact that the two provisions are found in subsections of the same section of the statute"). Congress would not explicitly cover tribal misdemeanors in one subsection and then immediately remove most of them from coverage in the next. "[W]e ordinarily assume . . . that Congress would not in one statute include two provisions that are at odds with each other." *Bilski v. Kappos*, 130 S. Ct. 3218, 3251 (2010).

Under the plain language of the statute, the defendant must prove both (1) that he was not represented by counsel and (2) that he did not knowingly and intelligently waive his right to counsel. But under the interpretation offered by First, the indigent tribal defendant would only need to show that he was not represented by counsel, since it would be impossible for a defendant to waive a right to appointed counsel that he did not have. This reading would render the waiver

provision of the statute superfluous to indigent tribal defendants. Rather than place them on equal footing with state or federal defendants, it would give them more rights by allowing them to escape prosecution without making the waiver showing. And it would provide less protection for their domestic victims from a future attack.

First's interpretation that the right to counsel means the Sixth Amendment right to counsel is simply not supported by the text. Congress knows how to provide Sixth Amendment guarantees where those guarantees would not otherwise apply.[8] The absence of any

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[8] See, e.g., 25 U.S.C. § 1302(c)(1) ("In a criminal proceeding in which an Indian tribe . . . imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall . . . provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution"); 25 U.S.C. § 1302(c)(2) ("In a criminal proceeding in which an Indian tribe . . . imposes a total of imprisonment of more than 1 year on a defendant, the Indian tribe shall . . . at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney"); 8 U.S.C. § 1534 ("The alien shall have a right to be present at such hearing and to be represented by counsel. Any alien financially unable to obtain counsel shall be entitled to have counsel assigned to represent the alien."); 18 U.S.C. § 4109(a)(1) ("In proceedings to verify consent of an offender for transfer, the offender shall have the right to advice of counsel. If the offender is financially unable to obtain counsel – (1) counsel for proceedings conducted under section 4017 shall be appointed in accordance with section 3006(a) of this title. Such appointment shall be considered an appointment in a misdemeanor

language suggesting the "the right to counsel" referenced by the statute means the constitutional right to counsel therefore appears deliberate.

B. The structure of the statute supports the government's reading.

The surrounding provisions in the statute also support the government's reading. As already noted, the subsection immediately preceding the affirmative defenses demonstrates that Congress intended for tribal misdemeanants to receive the same treatment as federal and state misdemeanants when it comes to prohibiting those convicted of domestic violence from possessing a gun. Qualifying misdemeanors under the statute are those "under Federal, State, or Tribal law." 18 U.S.C. § 921(a)(33)(A)(i).

The other affirmative defense in the subsection with the right to counsel provision also supports the government's reading. It reads that if the defendant "was entitled to a jury trial *in the jurisdiction* in which the [predicate] case was tried," the prior offense will only qualify as a

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case for purposes of compensation under the Act."); cf. 42 U.S.C. § 3797aa(b)(5)(E) ("Applicants for an implementation grant shall strive to ensure prompt access to defense counsel by criminal defendants with mental illness who are facing charges that would trigger a *constitutional* right to counsel.") (emphasis added).

misdemeanor crime of domestic violence if (1) "the case was tried by a jury, or" (2) "the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise." 18 U.S.C. § 921(a)(33)(B)(i)(II) (emphasis added). This provision makes clear that Congress knew the various rights that needed to be waived could vary based on the jurisdiction in which the prior misdemeanor case took place and wanted to recognize those differences — not eliminate them with a single standard.

One might argue as First did below (ER 28-29) that the use of the phrase "in the jurisdiction" in the right to jury provision and its absence in the right to counsel provision argues that only the former right should vary based upon where the prior misdemeanor occurred. But that argument ignores that while a defendant does not necessarily have a right to jury in every jurisdiction covered by the statute,[9] a defendant does have some form of a right to counsel in every one of those jurisdictions.

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[9] A right to jury trial is not constitutionally required for crimes that are punishable for six months of imprisonment or less. See *Baldwin v. New York*, 399 U.S. 66 (1970).

The common understanding of "waiver" presupposes a preexisting right to waive. See *Johnston v. Zerbst*, 304 U.S. 458, 464 (1938) ("A waiver is ordinarily a an intentional relinquishment or abandonment of a *known* right or privilege.") (emphasis added). One cannot waive what one does not have. Hence, the provision requiring waiver of the jury right is only appropriate if a jury right existed "in the jurisdiction in which the case was tried."

But an individual has a right to counsel in every jurisdiction. It might not be the right to appointed counsel, but the right to retained counsel exists in every jurisdiction either by virtue of the Constitution or statute. See *Chandler v. Fretag*, 348 U.S. 3 (1954) ("Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified."); 25 U.S.C. § 1302(a)(6) (guaranteeing tribal defendants the right to retained counsel). The two provisions vary in language then because Congress understood that it would not make sense to include a provision where the waiver of the right to counsel only applied if the "person was entitled to a [right to counsel] in the

jurisdiction in which the case was tried" since a person is entitled to a right to counsel in every jurisdiction where a predicate case is tried.

A structure that includes the jury trial provision and the right to counsel provision in the same subsection also suggests that the right to counsel provision was not concerned with the Sixth Amendment, but rather with the same due process concerns that undergird the jury trial provision. The legislative history states that § 921(a)(33)(B)(i) protects the rights a defendant was supposed to be afforded by his prior proceedings and nothing more.

The jury trial provision was added because of concerns "that gun rights should not be lost without an assurance that offenders will be provided with all appropriate due process protections." 142 Cong. Rec. S11877 (daily ed. Sept. 30, 1996.) But the provision otherwise had "no real substantive effect" and only meant that the firearms prohibition "will not apply to someone who was wrongly denied the right to a jury trial," because "an offender" who "was wrongly denied the right to a jury trial . . . was not legally convicted." *Id.* The defense only covered those "who had been entitled to a jury trial." *Id.* If the prior

jurisdiction did not provide a jury trial right, then a defendant did not have to waive it to be legally convicted.

The same is true of the right to counsel. If the defendant only had a right to counsel at his own expense, and he waived it, then he received all of the process due him. He was legally convicted and his prior conviction can be used as a predicate offense.

C. The legal background against which Congress acted supports the government's reading.

Congress knew when it wrote § 921(a)(33)(B)(i)(I), that "the right to counsel" in tribal misdemeanor cases means the right to retained, not appointed, counsel. It is the right that Congress itself afforded tribal misdemeanor defendants under the Indian Civil Rights Act in 1968. The courts presume "Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990), and that it passes laws "against a background of law already in place." *Exxon Mobil Corp. v. Allapattah Serv's, Inc.,* 545 U.S. 546, 587 (2005) (Ginsburg, J., dissenting). For that reason, § 921(a)(33)(B)(i)(I) should be read hand in hand with the Indian Civil Rights Act to recognize that

the right to counsel that must be waived in tribal court is only the right to retained counsel.

Congress was also aware of the various state statutes that provide greater rights to counsel than the Sixth Amendment requires. While the Sixth Amendment only entitles indigent state and federal defendants a right to appointed counsel if a sentence of imprisonment is actually imposed or is suspended, *Scott v. Illinois*, 440 U.S. 367 (1979) and *Alabama v. Shelton*, 535 U.S. 654 (2002), many states guarantee the right to appointed counsel if a sentence of imprisonment is simply authorized. *Nichols*, 511 U.S. at 749 n.12 (collecting state statutes). Other states guarantee the right to appointed counsel if a sentence of imprisonment is likely to be imposed or if the "interests of justice" require appointment. See, e.g., Tex. Code of Crim Proc. Art. 1051(c). And still other states only require appointed counsel where it is "constitutionally required." See, e.g., Ala. Code §§ 15-12-1; see generally *Scott*, 440 U.S. at 386-88 & nn. 18-22 (Brennan, J., dissenting). Even federal law appears to guarantee a right that sweeps more broadly than the Constitution. Fed. R. Crim. Proc. 44(a).

Against this background of variety, the "in the case" language in the statutory provision suggests that Congress made waiver of the "right to counsel" turn on the right to counsel provided by the prior proceeding. It seems unlikely that Congress would have defined "the right to counsel in the case" to mean only the Sixth Amendment right to counsel when it was aware that many, if not the majority, of jurisdictions define the "right to counsel" as expressly not the Sixth Amendment formulation.

D. The findings and purposes behind the law support the government's reading.

Statues should be interpreted in a way that will further the overriding objective of Congress and not produce results at odds with the purposes underlying the statute. *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 56 (1983). "In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990).

As part of the Violence Against Women Act of 2005, Congress amended § 921(33)(A)(i) to treat tribal misdemeanors under § 922(g)(9)

in the same manner as federal and state misdemeanors. See Pub. L. 109-162, § 908(a). In passing that Act and amending the statute, Congress made several findings that crystallize its concerns that tribal women face greater risks of domestic abuse and ultimately death from their domestic abusers than any other segment of the population.

Congress found that Indian women experience the violent crime of battering at a rate of 23.2 per 1,000 compared with 8 per 1,000 among Caucasian women. *Id.* at § 901 (congressional findings). One out of every three Indian (including Alaska Native) women are raped in their lifetimes. *Id.* Congress found that Indian women experience 7 sexual assaults per 1,000 compared with 4 per 1,000 among Black Americans, 3 per 1,000 among Caucasians, 2 per 1,000 among Hispanic women, and 1 per 1,000 among Asian women. *Id.* Most important, from 1979 through 1992, homicide was the third leading cause of death of Indian females aged 15 to 34, and *75 percent of those victims were killed by family members or acquaintances*. *Id.* (emphasis added).

These startling findings guided Congress' purposes in amending § 921(33). The purposes of the amendment were:

(1) to decrease the incidence of violent crimes against Indian women;

(2) to strengthen the capacity of Indian tribes to exercise their sovereign authority to respond to violent crimes committed against Indian women; and

(3) to ensure that perpetrators of violent crimes committed against Indian women are held accountable for their criminal behavior.

Pub. L. 109-162, § 902.

The violent realities of domestic relations on tribal lands drove Congress to include tribal domestic abuse misdemeanants among those prohibited from possessing firearms. Interpreting 18 U.S.C. § 921(a)(33)(B)(i)(I) to exclude all tribal misdemeanants who are not represented by counsel from the reach of § 922(g)(9) cannot be countenanced. See, infra. Part I-A. Congress passed the law to prevent such individuals from getting guns with which they could kill those they had abused in the past as well as others. Given the higher incidence of abuse and murder in Indian relationships, it would go against the purpose and the findings of Congress to provide Indian women with less protection from such risks than the victims of those

who were previously charged in state or federal court. See also "Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey," National Institute of Justice, U.S. Department of Justice 25-26 (July 2000) (Indian/Alaska-Native group in survey reported about 50-percent higher incidence of victimization from domestic violence than white group and about 29-percent higher than African-American Group).

The statute should not be read to undercut the purpose underlying it: protecting Indian women from violence due to guns held by abusive family members and acquaintances. See *Hayes*, 555 U.S. at 426-27 (reading another provision of § 921(a)(33) in light of § 922(g)(9)'s "purpose to keep firearms out of the hands of domestic abusers").

II. It does not violate the Constitution to use a valid, but uncounseled, prior conviction as the predicate offense for a violation of 18 U.S.C. § 922(g)(9).

Standard of Review: This Court reviews issues pertaining to constitutional law de novo. *United States v. Begay*, 622 F.3d 1187, 1193 (9th Cir. 2010).

Argument: The district court adopted First's interpretation of the statute because it believed that using an uncounseled prior

conviction as a predicate offense for a § 922(g)(9) violation without a waiver of the Sixth Amendment right to counsel would violate the Constitution. It relied on this Court's decision in *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989). *Ant's* reasoning has been overruled by *Nichols,* 511 U.S. 738. Even if *Nichols* had not overruled *Ant*, the case at hand is governed by *Lewis v. United States*, 445 U.S. 55, 67 (1980).

A. *Ant's* reasoning was rejected by *Nichols*.

In *Nichols*, 511 U.S. at 748-49, the Supreme Court held that a conviction that is valid for its own purposes may be used to enhance a sentence in a later prosecution, even if the earlier uncounseled misdemeanor conviction could not itself support imprisonment. Absent a Sixth Amendment violation in the earlier proceeding, the uncounseled conviction was valid for use in subsequent proceedings.[10]

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[10] In overruling its prior holding that a valid, uncounseled, misdemeanor conviction could not be used as a predicate offense to elevate a subsequent offense into a felony, 511 U.S. at 748, the Supreme Court in *Nichols* rejected any general rule that an uncounseled but valid conviction may not be used in subsequent proceedings. That the prior convictions at issue in *Nichols* were used for purposes of a recidivist sentencing enhancement, and First's prior conviction would supply the required elements of a § 922(g)(9) offense, does not render *Nichols* inapposite. Although *Nichols* observed that the broad-ranging sentencing inquiry would permit a judge to rely on a

The Court had consistently "sustained repeat-offender laws as penalizing only the last offense committed by the defendant." *Id.* Under *Nichols*' reasoning, a subsequent conviction under § 922(g)(9) should not be rendered invalid based on its use of a prior validly-obtained conviction to establish that a defendant is prohibited from possessing firearms.

In this case, First's prior conviction did not violate the Sixth Amendment. An Indian tribe "acts as a separate sovereign when it prosecutes its own members," *United States v. Lara*, 541 U.S. 193, 197 (2004), and therefore the Bill of Rights, along with the Sixth Amendment right to appointed counsel does not apply to Indian tribes. *Duro*, 495 U.S. at 693. The right to counsel guaranteed to defendants in tribal court is the right to retained counsel, which First was afforded, but waived. So his earlier conviction —though uncounseled— was

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defendant's "past criminal behavior" in increasing a sentence whether or not the conduct resulted in a conviction, 511 U.S. at 747, the Court's primary rationale —that a constitutionally valid uncounseled misdemeanor conviction may be used for enhancement purposes because the subsequent proceeding does not impose additional punishment for the misdemeanor offense— applies equally to the use of a prior conviction as the element of a § 922(g)(9) offense.

valid. That is all that *Nichols* requires for the conviction to serve as a predicate offense to a later prosecution.

In reaching its holding, *Nichols* specifically overruled *Baldasar v. Illinois*, 446 U.S. 222 (1980) (per curiam), which had held that a prior misdemeanor conviction that was valid, but uncounseled, could not be used for recidivist enhancement purposes in a subsequent prosecution. 511 U.S. at 748.

The *Ant* decision reached its ruling by applying the (now-overruled) principle that a valid, uncounseled, misdemeanor conviction may not be used in a subsequent prosecution if that subsequent prosecution results in imprisonment. *Ant*, 882 F.2d at 1395-96 (ordering suppression of plea because it "would have been in violation of the Sixth Amendment had it been made in federal court"). It cited the then-extant holding of *Baldasar*. *Ant*, 882 F.2d at 1394. Given the overruling of *Baldasar* and the rejection of *Ant*'s reasoning by *Nichols*, *Ant* is no longer good law. "[W]here the reasoning or theory of . . . prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself

bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc); see also *State v. Spotted Eagle*, 71 P.3d 1239, 1244 n.1 (Mont. 2003) ("In light of *Nichols*, the continued viability of *Ant* is questionable, at best").

Two other circuit courts have relied on similar reasoning to reject *Ant* and allow prior, uncounseled, tribal convictions to serve as the predicate offense for convictions under 18 U.S.C. § 117(a), the recidivist domestic assault statute. *United States v. Cavanaugh*, 643 F.3d 592, 604-05 (8th Cir. 2011); *United States v. Shavanaux*, 647 F.3d 993, 998 (10th Cir. 2011).

B. First's prior conviction is only used for the fact of conviction — not for the conviction's reliability.

Even if *Nichols* had not overruled *Ant*, the government's statutory interpretation would still be constitutional. First's prior misdemeanor conviction is only being used to establish that he is prohibited from possessing a firearm. The Supreme Court held in *Lewis* that an uncounseled prior conviction may be used to support a firearms disability without violating the Constitution. 445 U.S. at 66-67.

The firearms laws seek to keep guns out of the hands of dangerous persons. *Id.* at 66. For that reason, Congress "focus[ed] not on [the] reliability" of the prior conviction, but "on the mere fact of conviction" to "keep firearms away from potentially dangerous persons." *Id.* at 67. Nothing in the Constitution forbade Congress from relying on an uncounseled conviction to establish an individual's prohibited status. "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 (emphasis added). The case for prohibiting a misdemeanant from having guns is even stronger here than in *Lewis*, because though uncounseled, no one disputes that the conviction was valid under tribal law.

While the Sixth Amendment prohibits the use of an uncounseled felony conviction "for certain purposes," the Supreme Court "has never suggested that an uncounseled conviction is invalid for all purposes." *Id.* at 67. It is only where the prior conviction has been used to "support guilt or enhance punishment" that Sixth Amendment concerns about the reliability of a prior, uncounseled conviction have arisen. *Id.* at 67. As in *Lewis*, the prior conviction here only establishes the

defendant's status as a person prohibited from firearms. Enforcing such "an essentially civil disability through a criminal sanction" does not support guilt or enhance punishment. *Id.*

Congress "focused on the nexus between violent crime and the possession of a firearm by any person with a criminal record" in passing the statute challenged in *Lewis* — the predecessor statute to § 922(g)(1). 445 U.S. at 66. Likewise here, Congress focused on the risk between those who had abused their wife or children and the potential for future violence involving a gun. 142 Cong. Rec. S10377-10379 (daily ed. Sept. 12, 1996). ("[I]n all too many cases, the only difference between a battered woman and a dead woman is the presence of a gun.") ("When you combine wife beaters and guns, the end result is more death.") ("Domestic violence, no matter how it is labeled, leads to more domestic violence, and guns in the hands of convicted wife beaters leads to death.").

And Congress has used the firearms laws to punish the possession of firearms by individuals who were afforded even less procedural protection than that of the uncounseled misdemeanor proceedings in tribal court at issue here. See, e.g., 18 U.S.C. § 922(g)(8) (disallowing

individuals who are subject to certain court restraining orders from possessing firearms); *cf. United States v. Young,* 458 F.3d 998, 1005 (9th Cir. 2006) (reversing a judgment acquitting defendant of possession of firearm while subject to a restraining order, and applying *Lewis* to hold that even an allegedly invalid restraining order was sufficient to support a conviction). The restraining orders that provide for a firearms disability under § 922(g)(8) can be based upon a lower burden of proof than a misdemeanor: preponderance of the evidence. See, e.g., *Pearson v. Pearson*, 488 S.E.2d 414, 424 (W. Va. 1997); *State v. J.T.,* 683 A.2d 1166, 1169 (N.J. Super. A.D.1996) (citing N.J.S.A. 2C:25-29(a)). And *Lewis* suggests the mere fact of an indictment, even without a conviction, would be sufficient to support a criminal sanction against gun possession. 445 U.S. at 67. So actual conviction of a domestic-violence misdemeanor should be sufficient.

Congress was concerned with the fact of conviction when it passed § 922(g)(9), not the reliability of the conviction. As Senator Wellstone explained, § 922(g)(9) took the "next logical step" beyond existing firearm prohibitions for those subject to "a restraining order . . . for having abused their spouse or their child." 142 Cong. Rec. S10378.

Since reliability was not a concern in the preceding step of prohibiting those with restraining orders from possessing guns, there is no reason to think it was a concern in passing § 922(g)(9) either.

1. The affirmative defenses do not change the constitutional analysis.

First argued that *Lewis* does not apply here because of the statutory exceptions that exclude defendants who neither waived the right to counsel, nor were provided counsel. Doc. 25 at 9. The district court agreed. ER 37-38. It concluded those exceptions required it "to look beyond the fact of conviction and to look specifically at the procedures that led up to the conviction." ER 38.

But that position is based on the assumption that the statute refers to the Sixth Amendment right to counsel. As explained above, if the government's interpretation is the correct interpretation, then Congress did not provide the affirmative defenses because it was concerned about the reliability of the conviction, but rather because it wanted to make sure that the defendant was afforded whatever due process was required by the prior proceedings. If the defendant had a right to counsel at his own expense, Congress wanted to be sure he

received that right. This interpretation makes sense in light of the fact that the accompanying jury trial affirmative defense in the statute is not typically associated with Sixth Amendment reliability concerns, but rather with a concern that due process was provided.

The question of who Congress intended to prohibit from firearms —those convicted with due process or only those reliably convicted— is properly answered under the statutory analysis, not the constitutional analysis. The constitutional analysis under *Lewis* focuses only on whether what Congress intended was rational. It was.

Congress knew that the Indian Civil Rights Act provides tribal defendants with a number of safeguards, including the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, as well as protection from excessive bail, excessive fines, or cruel and unusual punishments. 25 U.S.C. § 1302(a)(6) & (7)(A). Tribal-court defendants may even seek habeas corpus review of their convictions in federal district court. 25 U.S.C. § 1303. Congress could conclude that in light of those safeguards and its concerns about the violence in Indian

domestic relations that it was not unreasonable to allow uncounseled misdemeanor convictions to serve as § 922(g)(9) predicates.

Lewis also indicated that any constitutional concerns were ameliorated by the fact that the convicted felon had other routes to challenge his prior conviction or otherwise remove his disability before obtaining a gun. 445 U.S. at 67. The same is true here. See 25 U.S.C. § 1303 (providing tribal-court defendants with federal habeas review); 18 U.S.C. § 921(a)(33)(B)(ii) (disqualifying prior convictions that have been expunged or set aside from serving as § 922(g)(9) predicate offenses); 18 U.S.C. § 925(c) (allowing defendant to petition Attorney General for relief from disability).

2. Ant *was concerned with reliability rather than the fact of conviction.*

Ant dealt with a prior conviction used in a subsequent proceeding to establish guilt based on the facts underlying that prior conviction. Reliability was paramount. It did not, like *Lewis*, deal with the federal firearms laws where the only concern is the fact of conviction.

The government used the predicate offense in *Ant* as "substantive evidence of guilt" that the defendant had committed the substantive

acts charged in the later prosecution. 882 F.2d at 1395 n.8. Ant had pleaded guilty in tribal court to the assault and battery that led the death of Keri Birdhat. 882 F.2d at 1390. He was subsequently charged with manslaughter in federal court when Birdhat died from the assault. *Id.* at 1390-91. Ant claimed that use of his guilty plea would violate his Sixth Amendment rights. *Id.* at 1391. That forced this Court to address whether Ant's prior uncounseled misdemeanor tribal conviction to the assault and battery could be "admitted as evidence of [his] guilt in [the] subsequent federal prosecution [for manslaughter] involving the same criminal acts." *Id.*

Because the reliability of the prior conviction was crucial in *Ant* to prove that Ant had committed the acts charged, it implicated the Sixth Amendment concerns that use of prior offenses to establish a gun prohibition does not. As the Eighth Circuit put it, "the government in *Ant* sought to use the guilty plea from tribal proceedings to prove, not the fact of a prior conviction, but rather the truth of the matters asserted in the plea." *Cavanaugh*, 643 F.3d at 604. The *Ant* Court had to consider the underlying validity of the guilty plea because if the

plea were deemed admissible, it would have been "tantamount to a directed verdict against" the defendant. 882 F.2d at 1394.

In the present case, the government did not seek to use First's prior conviction as substantive evidence of guilt regarding the same criminal acts. It couldn't. First's prior crime of domestic violence is nothing like his current crime of illegally possessing a weapon.

III. It does not violate the Constitution to treat those convicted in tribal court differently than those convicted in state or federal court.

Standard of Review: This Court reviews issues pertaining to constitutional law de novo. *Begay*, 622 F.3d at 1193.

Argument: In making its ruling, the district court stated that Congress could not afford one right to counsel to one group of United States' citizens and another right to counsel to other citizens. ER 41. To the extent the court was claiming that it violates the Equal Protection Clause of the Constitution to provide those in tribal court with a different right to counsel than those convicted in state or federal court, the district court erred.

The Indian tribes are "separate sovereigns pre-existing the Constitution" and so they "have historically been regarded as

unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *Duro*, 495 U.S. at 693 ("It is significant that the Bill of Rights does not apply to Indian tribal governments."). They "are not bound by the United States Constitution in the exercise of their powers, including their judicial powers." *Means v. Navajo Nation*, 432 F.3d 924, 930-31 (9th Cir. 2005).

In *United States v. Antelope*, 430 U.S. 641, 644-47 (1977), the Supreme Court held that the application of a federal criminal statute to Indians only is not premised on "invidious racial discrimination," but rather on the "quasi-sovereign status of [tribes] under federal law." Because tribal status is a political rather than racial distinction, it does not violate equal protection to provide different legal protections in tribal court than in federal court.

CONCLUSION

The district court's decision should be reversed, the indictment against First should be reinstated, and the case should be remanded for further proceedings.

DATED this 20th day of April 2012.

MICHAEL W. COTTER
United States Attorney

/s/ J. Bishop Grewell
J. BISHOP GREWELL
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ J. Bishop Grewell__
J. BISHOP GREWELL
Assistant U.S. Attorney

STATEMENT OF RELATED CASES

There are no related cases.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and the body of the argument contains 8,961 words.

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STATUTORY APPENDIX

18 U.S.C. § 922(g)

Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 44. Firearms (Refs & Annos)
§ 922. Unlawful acts

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 921(a)(33)

Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 44. Firearms (Refs & Annos)
§ 921. Definitions

(a) As used in this chapter--

(33)(A) Except as provided in subparagraph (C), [FN2] the term "misdemeanor crime of domestic violence" means an offense that--

(i) is a misdemeanor under Federal, State, or Tribal [FN3] law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim

(B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless--

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

25 U.S.C. § 1302

Title 25. Indians
Chapter 15. Constitutional Rights of Indians (Refs & Annos)
Subchapter I. Generally (Refs & Annos)
§ 1302. Constitutional rights

(a) In general

No Indian tribe in exercising powers of self-government shall--

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

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

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

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

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

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

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who--

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

(c) Rights of defendants

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall--

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding--

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) Sentences

In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant--

(1) to serve the sentence--

(A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;

(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c) of the Tribal Law and Order Act of 2010;

(C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or

(D) in an alternative rehabilitation center of an Indian tribe; or

(2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

(e) Definition of offense

In this section, the term "offense" means a violation of a criminal law.

(f) Effect of section

Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.