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**

REPLY 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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The parties' dispute centers on the meaning of "the right to counsel in the case" in 18 U.S.C. § 921(a)(33)(B)(i)(I). First eschews statutory text, structure, purpose, and legislative history as interpretive tools. He concedes several canons of construction support the government's reading of the statute, but says his interpretation should be adopted because: (1) there is a uniform federal definition of the "right to counsel," (2) that definition is easier for courts to administer, (3) the rule of lenity requires it, (4) the alternative leads to disparate treatment of defendants, and (5) his reading avoids constitutional problems.

The right to counsel is *not* uniform under federal law. The federal courts have no difficulty administering diverse legal rules and should respect the legislative determination that they do so here. The rule of lenity only applies when statutory meaning cannot be ascertained by the other tools of construction. And First's interpretation ignores the disparate protection his rule would provide victims of domestic abuse in Indian Country — the very individuals Congress sought to protect when prohibiting tribal misdemeanants from carrying guns. The government's interpretation does *not* violate the Constitution.

A. The government's interpretation is supported by the standard tools of statutory construction.

First admits the government's reading of the statute is supported by several canons of construction, First Br. at 17-19, but he argues that other canons oppose the government's reading. His argument mis-characterizes the government's position. The government does not violate the canon that a term appearing several places in a statute should be read the same way. First Br. at 17. It reads "in the case" to mean the same thing —i.e., the defendant's prior misdemeanor proceedings— every time. But "in the case" modifies a different phrase the second time it appears and therefore has a different effect, despite having the same meaning.

Nor does the government violate the canon assuming Congress is aware of existing judicial precedent by suggesting Congress was not aware of *Lewis v. United States*, 445 U.S. 67 (1980). First Br. at 18. The government assumes Congress was quite aware of *Lewis* and its ruling that it does not violate the Constitution to prohibit possession of firearms based on an uncounseled prior conviction. That informs why Congress included the affirmative defense that a prohibited person

could only be prosecuted after receiving whatever process was due them in the prior proceedings. Congress provided a limited statutory protection, because *Lewis* provided no constitutional protection.

As the canons of construction favor the government, First turns to other arguments that bear him little fruit.

1. There is not a uniform, federal definition of right to counsel.

First relies on the fiction that there is one federal understanding of "right to counsel," which is the Sixth Amendment right to appointed counsel. He suggests "right to counsel" in the statute here should be interpreted in accord with the technical, legal sense of the term and should represent "federal understandings" of the term. First Br. at 12-13. But there is no uniform, federal definition of the "right to counsel." The term varies throughout federal law.[1] Compare 25 U.S.C. § 1302(a)(6) with (c); see also Gov't Br. at 20 n.8, 26.

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[1] First's erroneous assumption of a uniform "right to counsel" leads him to assert mistakenly that the government thinks the "right to counsel . . . should be construed in terms of tribal rather than federal law." First Br. at 6. The right to counsel at one's own expense that tribal courts provide when enforcing tribal laws comes from federal, not tribal, law. It is the federal definition of right to counsel mandated by the Indian Civil Rights Act passed by Congress.

Even if there was a uniform federal definition of right to counsel, First recognizes "express language to the contrary" could preclude use of that definition. First Br. at 13. Yet he fails to recognize the "in the case" language is express language to the contrary. It modifies the relevant right to counsel from a generic right to counsel to the specific right to counsel that existed in the prior proceedings. First has violated his own rule of statutory construction by divorcing meaning from context. First Br. at 12.

He argues that adopting a single national standard would ensure every defendant equal treatment. But a single standard would require more than putting the floor on the right to counsel that First advocates. It would require a ceiling on the greater right to counsel that the various states provide. See Gov't Br. at 26.

2. Federal courts have little difficulty applying different laws from different jurisdictions.

First argues that it would be difficult to administer the statute if the courts had to look to the right to counsel provided by the underlying jurisdiction to determine whether the affirmative defense applied. First Br. at 13-14. This argument carries little weight against (1) the

federal courts' experience with applying different laws and (2) the structure and language of the Act suggesting Congress intended to recognize certain terms and rights vary by jurisdiction.

First's easier-to-administer argument ignores the special skill set of the federal courts. Understanding the differing right to counsel that existed in a prior proceeding should prove no more difficult for those courts than understanding the differing rights to counsel that are already provided by federal statute. The federal courts have experience interpreting varying state laws as part of their diversity and supplemental jurisdiction under the *Erie* doctrine. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Legal interpretation and application is the specialty of the federal courts.

Congress molded its statutory language so the courts would take into account the differing rights to jury and counsel among jurisdictions, see Gov't Br. at 21-24, just as it did with the differing definition of "crime punishable by imprisonment for a term exceeding one year," which varies based upon "the law of the jurisdiction in which the proceedings were held." 18 U.S.C. § 921(20). This legislative decision should be respected. The statutory language is also why

United States v. Frechette, 456 F.3d 1 (1st Cir. 2006); *United States v. Bethurum*, 343 F.3d 712, 718 (5th Cir. 2003); and *United States v. Jennings*, 323 F.3d 263, 275-76 (4th Cir. 2003) do not help First. The "in the case" language here does not modify the "knowingly and intelligently" phrase that was interpreted in those cases, it only modifies the right to counsel.

To be sure, a single standard is easier to administer than multiple standards. It would also be easier to administer if this Court eliminated the greater right to counsel that the states provide. But this Court cannot ignore the statutory language, structure, purpose, and legislative history just to make its job easier at the expense of making life more difficult for victims of domestic violence in Indian Country or by reducing the rights of state defendants.

3. The rule of lenity is a last resort.

Even where statutory language is not "crystalline," the rule of lenity is a last resort. *DePierre v. United States*, 131 S.Ct. 2225, 2237 (2011). It "is reserved for cases where, after seizing everything from which aid can be derived, the Court is left with an ambiguous statute." *Id.* (citation and quotation marks omitted). Where "the normal rules of

statutory construction" and "the statutory text" allow a court to make more than "a guess as to what Congress intended," as here, the rule does not apply. *Id*.

4. Congress intended defendants in tribal court to have a different right to counsel than other defendants.

First says the government's interpretation leads to disparate treatment of those convicted in tribal court. This is true. But it is true because Congress explicitly provided those in tribal court with a different right to counsel in the Indian Civil Rights Act of 1968. 25 U.S.C. § 1302(a)(6). Congress weighed the costs to the tribes of providing counsel in misdemeanor proceedings against the interests of the defendants in having counsel in those proceedings. It weighed those concerns again when it passed the Tribal Law and Order Act in 2010 and decided to provide appointed counsel to tribal defendants facing imprisonment of over one year, 25 U.S.C. § 1302(c), while leaving those facing a misdemeanor with only retained counsel.

Concerns about the disparate treatment that tribal defendants receive in misdemeanor proceedings from state or federal defendants must defer to the balancing Congress has done between tribal sovereign

interests and the rights of tribal defendants. Those concerns are not an excuse to accept First's interpretation and eliminate every tribal misdemeanant who is not represented by counsel from the scope of the misdemeanant-in-possession provision. Gov't Br. at 17-19. Such an interpretation would give disparate protection to the domestic violence victims in Indian Country that Congress determined are at greater risk of violence than other victims. Gov't Br. at 27-30.

B. The government's interpretation does not violate the Constitution.

First admits that the rule from *Nichols v. United States*, 511 U.S. 738 (1994), that an uncounseled, constitutionally-valid, prior conviction may be used in a subsequent prosecution controls this case. First Br. at 28. Because the Sixth Amendment does not apply to the Indian tribes, First's prior uncounseled conviction was constitutionally valid. That means it may be used in the prosecution here.

This case is not the government using an uncounseled conviction "to support guilt . . . for another offense" in violation of *Burgett v. Texas*, 389 U.S. 109, 115 (1967). First Br. at 25, 31. The Supreme Court rejected that same argument in *Lewis* where it held *Burgett* did

not apply because the prior uncounseled conviction only imposes the civil disability of a firearms prohibition. 445 U.S. at 67. It is not the imposition of the disability that supports guilt, but rather the violation of the disability that supports guilt. *Id.*

First claims in a footnote that *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *Small v. United States*, 544 U.S. 385 (2005), have undercut *Lewis*, but he fails to explain how. First Br. at 29, n. 12. *Heller* mentioned that a *Lewis* footnote referring to the Second Amendment was dicta. It said that a Second Amendment challenge had not been raised in *Lewis*. 554 U.S. at 625, n.25. *Small* asked whether a foreign felony could impose the civil disability against felons possessing firearms. It mentioned *Lewis* only to point out that the dangers leading Congress to pass the felon-in-possession statute, which were recognized in *Lewis*, were not enough to read the statute as encompassing foreign convictions. 544 U.S. at 393-94. Neither reference to *Lewis* undercuts its reasoning or its status as governing Supreme Court precedent.

CONCLUSION

The parties agree that the disputed affirmative defense was put in place to assure that those prohibited from carrying guns due to a prior domestic abuse misdemeanor had received their due process in the prior domestic abuse proceedings. Compare First Br. at 8-9 (the provision helps "to insure that those accused of domestic abuse crimes do not lose their gun rights without adequate due process") with Gov't Br. at 24, 38-39. The due process provided by the Indian Civil Rights Act —a federal law— is the right to counsel at a defendant's own expense.

First waived that right.

His conviction should be affirmed.

DATED this 18th day of June 2012.

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/s/ J. Bishop Grewell
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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 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__
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, the attached reply brief is proportionately spaced, has a typeface of 14 points or more, and the body of the argument contains 1877 words.

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