EVANGELO ARVANETES
Assistant Federal Defender
Federal Defenders of Montana
104 2nd Street South, Suite 301
Great Falls, Montana 59401
vann_arvanetes@fd.org
Phone: (406) 727-5328
Fax: (406) 727-4329
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM TAYLER KIRKALDIE, Defendant.	**Case No. CR-14-12-GF-BMM** **DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS INDICTMENT**

COMES NOW Defendant William Tayler Kirkaldie by and through his counsel of record, Evangelo Arvanetes, Assistant Federal Defender, and the Federal Defenders of Montana and moves the Court for an Order to dismiss the Indictment filed in this case.

I. ARGUMENT

A. The Indictment for Mr. Kirkaldie should be dismissed because it uses an uncounseled Tribal Court conviction to prove an element of the offense.

The Government charged Mr. Kirkaldie by Indictment with Domestic Assault by Habitual Offender pursuant to 18 U.S.C. § 117(a). That statute provides in relevant part the following:

> (a) In general – Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian Country and who has a final conviction on at least two (2) separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction –
>
> (1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner; or
>
> (2) an offense under chapter 110(A),
> shall be fined under this title, imprisoned for a term of not more than five (5) years, or both, except that if substantial bodily injury results from the violation under this subsection, the offender shall be imprisoned for a term of not more than 10 years.

Title 18 U.S.C. § 117(a).

The Indictment alleges that Mr. Kirkaldie assaulted K.S., a person similarly situated to a spouse who has co-habitated with Mr. Kirkaldie after Mr. Kirkaldie had been convicted of at least two (2) separate, prior domestic assaults. At least one of the prior domestic assaults was a tribal conviction in Tribal Court.

Tribal proceedings are not governed by the United States Constitution but rather by the Indian Civil Rights Act of 1968 (hereinafter ICRA) or tribal law. Under this paradigm, the ICRA affords no right to appointed counsel for an indigent defendant in Tribal Court. Thus for at least one of the two prior domestic convictions against Mr. Kirkaldie, Mr. Kirkaldie was not afforded a right to have the assistance of counsel for representation in his Tribal Court proceeding.[1]

Conversely, the Sixth Amendment of the United States Constitution provides an indigent defendant the right to appointed counsel as well as the corresponding right to waive that right to counsel and proceed *pro se*.

Moreover, in the seminal case, *Gideon v. Wainright*, 372 U.S. 335 (1963), the Court expanded this important protection to felonies charged in State Court. Furthermore, the Court later expanded this right to include misdemeanors for which the specter of jail time was present.

Thus a conviction entered without the assistance of counsel cannot be used in a subsequent proceeding. *See*, *Burgett v. Texas*, 339 U.S. 109 (1967); *United States v. Tucker*, 404 U.S. 443 (1971); *United States v. Custis*, 511 U.S. 485 (1994)

[1]Counsel's note: The lack of right to appointed counsel under the ICRA is the fundamental reason why tribal convictions are not scoreable as criminal history under the United States Sentencing Guidelines.

("[F]ailure to appoint counsel for an indigent defendant was a unique constitutional defect.").

In the present case, the standard for waiver of the right to counsel in Federal Court was not met in the Tribal Court proceedings for Mr. Kirkaldie. Therefore, the issue at present requires an evaluation of whether Mr. Kirkaldie's tribal conviction(s) for domestic violence satisfies the constitutional requirements to charge Mr. Kirkaldie with the present Indictment. If a tribal conviction is introduced in Federal Court to prove an essential element of a federal offense (as in Mr. Kirkaldie's case at present), is it in compliance with the United States Constitution? Mr. Kirkaldie argues it is not in compliance.

While this issue was raised in both the Eighth and Tenth Circuits (*See*, *United States v. Cavenaugh*, 643 F.3d 592 (8th Cir. 2011), and *United States v. Shavanaux*, 647 F.3d 993 (10th Cir. 2011), their conclusions were adverse to the ruling from the Ninth Circuit in *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989).

In *Ant*, the Ninth Circuit held that a guilty plea entered in accordance with the tribal code and ICRA could not be admitted in a Federal prosecution because it violated the Sixth Amendment of the United States Constitution. In *Ant*, the person pled guilty to assault and battery in tribal court and was sentenced to six months in jail. The person was not represented by a lawyer. Subsequently, a Federal Indictment

was filed charging the person with voluntary manslaughter. The person then moved to suppress his confession and guilty plea from Tribal Court arguing that exclusion was appropriate because his right to counsel under the Sixth Amendment was violated and his confession was involuntary in violation of the Fifth Amendment. The Court then analyzed whether the guilty plea was made under conditions similar to the United States Constitution, and because of the lack of appointed counsel afforded to him, the Court suppressed the uncounseled tribal plea of guilty. 882 F.2d at 1395-96.

In conclusion, in the present case, at least one uncounseled tribal conviction is being used in the Government's Indictment to prove Mr. Kirkaldie guilty of being an habitual offender. This notion violates the tenets expounded in *Ant* and is in violation of the United States Constitution – to permit a conviction that is in violation of the Sixth Amendment to support an element of guilt for another offense erodes the principles set in *Gideon*, as expounded in both *Tucker* and *Burgett*, *supra*.

B. <u>Allowing Native Americans to be prosecuted in Federal Court based on uncounseled tribal convictions violates the Equal Protection Clause of the United States Constitution.</u>

Allowing the present Indictment to go forward would violate the Equal Protection Clause of the United States Constitution because it deprives a certain class of citizens of their constitutional right to have counsel appointed based on their race, ethnic origin, and political class.

The statute from which the Indictment is based was enacted by Congress to address the serious problem of domestic violence in Indian country. Although 18 U.S.C. § 117(a) on its face applies to any domestic violence committed on a federal enclave, the legislative history demonstrates that this particular statute was not adopted as a statute of general applicability but was specifically targeted towards Native Americans.

In addition, given the widespread recognition in State and Federal Courts that the Sixth Amendment requires appointment of counsel even in misdemeanors where jail is possible, the reality that a defendant's prior convictions will be uncounseled rests exclusively with Native Americans. In fact, it is highly unlikely that a person of any other race will be prosecuted under 18 U.S.C. § 117 based upon uncounseled misdemeanors; and it is a legal certainty that they will not be charged based on uncounseled tribal convictions. Yet, the Native American population continues to be charged with violations of 18 U.S.C. § 117 based in part or in whole on uncounseled tribal convictions. This cannot survive a strict scrutiny analysis.

Given the important nature of the right to counsel, there is not even a rational basis to use uncounseled tribal convictions in Federal Court. As the United States Supreme Court stated under rational basis review:

> the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the

> classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

Nordlinger v. Hahn, 505 U.S. 1, 11-12 (1992).

In the present case, while recognizing the unique status of tribes and tribal sovereignty, Native Americans should not be accorded less than the minimum protections guaranteed by the Constitution. After all, within the context of Native American jurisprudence, Native Americans indicted under the Indian Major Crimes Act enjoy the same procedural benefits and privileges as all other persons with Federal jurisdiction – thus Native Americans should enjoy the same benefits and privileges under 18 U.S.C. § 117. *See*, Troy Eid & Carrie Doyle, Separate but Unequal: The Federal Criminal Justice System in Indian Country, 81 U. Colo. L. Rev. 1067 (2010) (arguing that constitutional "first principles" call for reforms to ameliorate the discrimination against Native Americans under the Federal criminal justice system).

The Tribal Law and Order Act of 2010 serves as an empirical paradigm for the present argument. This relatively new act increased Tribal court sentencing authority, and with it, heightened certain important constitutional protections such as "the right to effective assistance of counsel at least equal to that guaranteed by the United States

Constitution . . . ." *See*, Tribal Law and Order Act of 2010 § 234(a), 124 Stat. at 2279-80 (codified at 25 U.S.C. § 1302(a)(7)(D), (c)(1)-(3) (Supp. IV 2010).

Finally, a finding that this statute violates the Equal Protection Clause (by using an uncounseled tribal conviction to prove an element in the offense) not only adheres to the protections guaranteed to individual citizens by the Constitution but places all defendants indicted under 18 U.S.C. § 117(a) on the same playing field.

RESPECTFULLY SUBMITTED this 17th day of March, 2014.

/s/ Evangelo Arvanetes

Federal Defenders of Montana
104 2nd Street South, Suite 301
Great Falls, MT 59401
(406) 727-5328

CERTIFICATE OF COMPLIANCE

I hereby certify that this Memorandum in Support of Motion to Dismiss Indictment is in compliance with Local Rule 7.1(d)(2)(as amended). The brief's line spacing is double spaced, and is proportionately spaced, with a 14 point font size and contains less than 6,500 words. (Total number of words: 1,518, excluding tables and certificates).

DATED this 17th day of March, 2013.

/s/ Evangelo Arvanetes

Federal Defenders of Montana
104 2nd Street South, Suite 301
Great Falls, MT 59401
(406) 727-5328

CERTIFICATE OF SERVICE
L.R. 5.2(b)

I hereby certify that on March 17, 2014, a copy of the foregoing document was served on the following persons by the following means:

1, 2 CM-ECF
____ Hand Delivery
3 Mail
____ Overnight Delivery Service
____ Fax
4 E-Mail

1. CLERK, UNITED STATES DISTRICT COURT

2. JESSICA A. BETLEY
Assistant United States Attorney
United States Attorney's Office
P.O. Box 3447
Great Falls, MT 59403
Counsel for the United States of America

3. WILLIAM TAYLER KIRKALDIE
Defendant

/s/ Evangelo Arvanetes