JESSICA A. BETLEY
Assistant U.S. Attorney
U.S. Attorney's Office
P.O. Box 3447
Great Falls, MT 59403
119 First Ave. North, # 300
Phone: (406) 761-7715
FAX: (406) 453-9973
Email: Jessica.Betley@usdoj.gov

ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **WILLIAM TAYLER KIRKALDIE,** **Defendant.**	**CR 14-12-GF-BMM** **GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS**

ARGUMENT

"[A]n indictment sought under a statute that is unconstitutional on its face or as applied [will be] dismissed." *United States v. Mayer*, 503 F.3d 740, 747 (9th Cir. 2007) (citing *United States v. Lopez*, 514 U.S. 549 (1995)). The statute Kirkaldie challenges, 18 U.S.C. § 117(a), is not unconstitutional on its face or as applied. Therefore, Kirkaldie's motion to dismiss the indictment should be denied.

I. The use of a valid tribal court conviction as the predicate offense for 18 U.S.C. § 117(a) comports fully with the plain statutory language and legislative intent.

In 2005, Congress enacted "The Restoring Safety to Indian Women Act," which has now been codified at 18 U.S.C. § 117. 151 Cong. Rec. S4873-74 (May 10, 2005). This Act was designed to address domestic violence in Indian Country by creating a new federal offense "to charge repeat domestic violence offenders before they seriously injure or kill someone and to use tribal court convictions for domestic violence for that purpose." *Id*. (remarks by Senator McCain). Section 117(a) ("Domestic assault by a habitual offender") provides criminal penalties for:

> 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 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 110A, ...

18 U.S.C. § 117(a).

Kirkaldie acknowledges that at least one of his previous convictions was a tribal conviction that occurred in tribal court. Therefore, § 117(a) applies in this case, as Congress fully intended.

A. Congress enacted § 117(a) specifically to address domestic violence in Indian country.

In introducing The Restoring Safety to Indian Women Act, Senator McCain noted that the then-existing legal tools to combat domestic violence in Indian country were inadequate. 151 Cong. Rec. S4873. The division of criminal jurisdiction between federal and tribal authorities presented challenges. *Id*. The high standard required to bring felony charges under the then-existing statutes meant that "perpetrators may escape felony charges until they seriously injure or kill someone." *Id*. Section 117(a) is "aimed at the habitual domestic offender" and, accordingly, allows "tribal court convictions to count for purposes of Federal felony prosecution . . . ." *Id*.

B. Congress knew in enacting § 117(a) that tribal courts do not afford the Sixth Amendment right to counsel.

The Bill of Rights does not apply in Indian Country. Thus, there is no Sixth Amendment right to appointed counsel in tribal court. Civil rights in Indian Country are protected by statute and the Indian Civil Rights Act, which only affords a defendant the right to retain counsel of his own choice in tribal court.

When it enacted § 117(a), Congress knew that defendants in tribal misdemeanor cases did not have a Sixth Amendment right to counsel but, instead, only had the right to counsel at the defendant's own expense. This is a right that Congress itself afforded under the Indian Civil Rights Act in 1968. Courts presume that "Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp*., 498 U.S. 19, 32 (1990). Courts also presume that Congress 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).

Moreover, for similar statutes that take into account predicate offenses, the Ninth Circuit has acknowledged that Congress was aware that defendants convicted in tribal court have no right to counsel. *See e.g.*, *United States v. First*, 731 F.3d 998, 1007 (9th Cir. 2013) ("[W]e conclude that Congress was aware that by including tribal court convictions in § 921 (a)(33)(B), it was allowing convictions obtained without constitutional protections to qualify as misdemeanors capable of trigger prosecution under 922(g)(9)"). Congress was aware that uncounseled tribal convictions would serve as predicate offenses in a § 117(a) prosecution.

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II. The use of Kirkaldie's prior tribal conviction in the indictment did not violate Kirkaldie's Sixth Amendment right to counsel.

A. Kirkaldie's prior tribal court conviction is valid and involved no actual constitutional violation.

Kirkaldie acknowledges that at least one of the predicate convictions was a tribal court conviction. As noted above, the Indian Civil Rights Act does not afford defendants in tribal court the right to appointed counsel, and the Ninth Circuit has held that the Sixth Amendment right to appointed counsel does not apply to tribal criminal proceedings. *See Tom v. Sutton*, 533 F.2d 1101, 1102-03 (9th Cir. 1976). Therefore, the suggestion that Kirkaldie may not have been represented by counsel in his prior tribal court domestic abuse matter does not by itself constitute any actual constitutional injury. Kirkaldie does not allege that the previous tribal court proceeding violated any internal tribal court rules. Kirkaldie's prior tribal court conviction is valid, both under the applicable tribal court rules and under the Constitution.

B. The use of a valid tribal court conviction as the predicate offense for a § 117(a) violation does not violate the Constitution.

Kirkaldie argues that even though his tribal court conviction did not involve any actual constitutional injury, it cannot be used as a predicate offense for the instant charge. He argues that if the previous offense had been in state or federal court, as opposed to tribal court, the offense would have been constitutionally invalid due to the absence of appointed counsel. The Supreme Court, however, has

held that prior uncounseled convictions can be considered in subsequent criminal matters so long as the convictions do not involve actual constitutional violations. *Nichols v. United States*, 511 U.S. 738, 748-49 (1994).

Additionally, two circuit courts have directly addressed this issue. *See United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011); *United States v. Shavanaux*, 647 F.3d 993 (10th Cir. 2011). The Eighth and Tenth Circuits have held that the use of a prior uncounseled tribal conviction as a predicate offense for § 117(a) charges does not violate the Constitution. *Cavanaugh*, at 605; *Shavanaux*, at 998 ("Use of tribal convictions in a subsequent prosecution cannot violate "anew" the Sixth Amendment because the Sixth Amendment was never violated in the first instance.") (citation omitted). Kirkaldie argues that this Court should follow the reasoning in *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989), however, this matter is controlled by *Nichols*, 511 U.S. at 746, not *Ant*.

1. The only circuit courts to have reached the issue presented in this motion have held that uncounseled tribal convictions can be used as predicate offenses for § 117(a) charges.

Both the Eighth and Tenth Circuits have resolved the exact issue raised in this appeal. Both circuits have followed the rationale in *Nichols* and have both held that a prior uncounseled tribal conviction can serve as the predicate offense for a § 117(a) charge. In *Cavanaugh*, the Eighth Circuit stated that "[a]s per *Nichols*, then, we believe it is necessary to accord substantial weight to the fact that

Cavanaugh's prior convictions involved no constitutional violation." *Cavanaugh*, 643 F.3d 603-04. The court thus concluded that "in the absence of any other allegations of irregularities or claims of actual innocence surrounding the prior convictions, we cannot preclude the use of such a conviction in the absence of an actual constitutional violation." *Id*. at 605.

The Tenth Circuit, in *Shavanaux*, did not expressly mention *Nichols*, but noted that "[a]lthough a tribal prosecution may not *conform* to the requirements of the Bill of Rights, deviation from the Constitution does not render the resulting conviction constitutionally *infirm*." *Shavanaux*, 647 F.3d at 997 (emphasis in original). The court concluded that because there were no Sixth Amendment violations in the prior tribal convictions, "[u]se of tribal convictions in subsequent prosecution cannot violate 'anew' the Sixth Amendment" and prior uncounseled tribal convictions could be used in a § 117(a) prosecution. *Id*. at 998.

The *Shavanaux* court thus distinguished the decision in *Burgett v. Texas*, 389 U.S. 109 (1967), upon which Kirkaldie relies in his argument. Under *Burgett*, a "conviction obtained *in violation of Gideon v. Wainwright*, [372 U.S. 335 (1963)]" cannot "be used against a person either to support guilt or enhance punishment for another offense." *Burgett*, 389 U.S. at 115 (emphasis added). The *Gideon* decision, however, incorporated the Sixth Amendment right to counsel *against the States*, and the Sixth Amendment has never been incorporated against Indian

tribes. Thus, the use of an uncounseled tribal court conviction cannot constitute a violation of *Gideon*, and *Burgett* does not apply.

2. The reasoning in *Ant* was rejected by *Nichols* and is inapplicable to this case.

In *Ant*, the Ninth Circuit held that the defendant's prior uncounseled guilty plea in a tribal court matter was inadmissible as evidence of guilt in a subsequent federal prosecution "involving the same criminal acts." *Ant*, 882 F.2d at 1391, 1397. In doing so, the *Ant* Court relied on *Baldasar*'s holding that a prior misdemeanor was an uncounseled, but valid conviction, yet could not be used to convert a misdemeanor to a felony in a subsequent prosecution under a recidivist enhancement statute. *Id*. at 1394; *Nichols*, 511 U.S. at 748. The *Ant* Court concluded that because Ant was "in jeopardy of being imprisoned by a federal court because of a prior uncounseled guilty plea," the prior conviction was inadmissible. *Ant*, 882 F.2d at 1394. *Nichols*, however, expressly overruled *Baldasar* and rejected the reasoning in *Ant*. *Nichols*, 511 U.S. at 748-749.

Even if *Nichols* had not overruled the reasoning on which *Ant* relies, *Ant* is still distinguishable from this case. *Ant* only "stands for the general proposition that even when tribal court proceedings comply with IRCA and tribal law, if the denial of counsel in that proceeding violates federal constitutional law, the resulting conviction may not be used to support a subsequent federal prosecution." *First*, 731 F.3d at 1008 n.9.

In *Ant*, the government offered evidence of Ant's prior tribal conviction as "substantive evidence of guilt" that Ant had committed the offense charged in the subsequent federal prosecution. *Ant*, 822 F.2d at 1395 n.8. Because the same acts were at issue in both matters, admitting the tribal conviction would have been "tantamount to a directed verdict." *Id*. at 1394. Thus, the *Ant* Court was primarily concerned with the reliability of the tribal conviction, which gave rise to Sixth Amendment concerns. Here, however, the prior tribal convictions involve entirely separate criminal acts, and the government offered them for the fact of the convictions rather than, as in *Ant*, for the "truth of the matters asserted in the plea." *Cavanaugh*, 643 F.3d at 604. Therefore, *Ant* is inapplicable to the present matter.

III. Section 117(a) does not violate the Equal Protection Clause.

Kirkaldie argues that § 117(a) violates the Equal Protection Clause because "it deprives a certain class of citizens their constitutional right to have counsel appointed based on their race, ethnic origin, and political class." Kirkaldie is wrong. "[C]lassifications based on status as a member of a recognized Indian tribe do not violate the Equal Protection Clause." *United States v. First*, 731 F.3d 998, 1007 (9th Cir. 2013); *see Cavanaugh*, 643 F.3d at 605-06; *Shavanaux*, 647 F.3d at 1001-02.

Section 117(a) applies equally to any offense committed within "special maritime and territorial jurisdiction of the United States or Indian country." In

calculating previous offenses, § 117(a) counts not only tribal domestic violence convictions, but also any federal or state convictions. This statute makes no distinctions based on race, ethnicity, or political class.

Section 117(a) also does not "deprive" any individuals of the right to counsel. The Indian Civil Rights Act established the limited right to counsel. *See* 25 U.S.C. §§ 1302 *et seq*. Kirkaldie argues that it was unconstitutional for Congress to provide those in tribal court a different right to counsel than those in federal or state court. This argument, however, is foreclosed by controlling precedent.[1]

Indian tribes are "separate sovereigns pre-existing the Constitution," and thus, Indian tribes "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 v. Reina*, 495 U.S. 676, 693 (1990) ("It is significant that the Bill of Rights does not apply to Indian tribal governments."). They "are not bound by the United States Constitution the exercise of their powers, including their judicial powers." *Means*

[1] Kirkaldie draws attention to the Tribal Law and Order Act of 2010. This Act added a right to appointed counsel for tribal convictions in excess of one year. Kirkaldie suggests that this addition shows that Congress determined the prior lack of counsel under the Indian Civil Rights Act to be improper. Kirkaldie's suggestion is misguided, however, as Congress made the decision to leave in effect the more limited right to retained counsel in tribal misdemeanor cases. *See* 25 U.S.C. § 1302(a)(6).

v. Navajo Nation, 432 F.3d 924, 930-31 (9th Cir. 2005); *Settler v. Lameer*, 507 F.2d 231, 240-42 (9th Cir. 1974) (recognizing Sixth Amendment right to counsel does not apply to Tribes).

In *Antelope*, 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." 430 U.S. at 644-47 (quoting *Morton v. Mancari*, 417 U.S. 535, 552-54 (1974)). Further, "[f]ederal regulation of Indian tribes . . . is governance of once-sovereign political communities; it is not to be viewed as legislation of a racial group consisting of Indians." *Id*. at 646 (quoting *Morton*, at 553) (internal marks omitted).

The federal criminal statute was applicable in *Antelope*, because the defendants were enrolled members of a federally recognized tribe, not because of their Indian racial background. *See id*. at 646. 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

This Court should deny Kirkaldie's Motion to Dismiss.

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DATED this 30th day of March, 2014.

MICHAEL W. COTTER
United States Attorney

/s/ Jessica A. Betley
JESSICA A. BETLEY
Assistant U.S. Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to D. Mont. L.R. 7.1(d)(2) and CR 47.2, the body of the attached response is proportionately spaced, has a typeface of 14 points or more, and the body contains 2,370 words, excluding the caption and certificate of compliance.

MICHAEL W. COTTER
United States Attorney

/s/ Jessica A. Betley
JESSICA A. BETLEY
Assistant U.S. Attorney
Attorney for Plaintiff