The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. DALE DUPREE CASEY, Defendant.	NO. 2:20-CR-0020-RAJ UNITED STATES' RESPONSE TO MOTION TO DISMISS COUNT 2 OF INDICTMENT

INTRODUCTION

The United States of America, by and through Brian T. Moran, United States Attorney for the Western District of Washington, and Charlene Koski and Rebecca S. Cohen, Assistant United States Attorneys for said District, hereby responds to Defendant Dale Casey's motion to dismiss count two of the indictment charging him with a violation of 18 U.S.C. § 117.

Casey argues this Court must dismiss the indictment because the elements of his prior tribal offenses are not a categorical match with the elements of federal assault, and therefore do not support the charge against him. He claims that, instead of having the government prove that the conduct for which he was previously convicted qualifies as a federal assault, this Court must employ the categorical approach typically applied to statutory penalty enhancements and Sentencing Guidelines provisions. But Section 117 is not a statutory penalty enhancement or Sentencing Guidelines provision, and the statute's text, structure, and legislative history counsel against Casey's position. Section 117 is a substantive criminal offense, and the defendant's prior convictions are elements of that offense that, along with the fact that the crimes were committed against an intimate partner, must be proven beyond a reasonable doubt. The plain language of the statue also limits its application to defendants whose prior crimes would qualify as crimes "if subject to federal jurisdiction," thus eliminating any risk of an overbroad application. Indeed,

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applying the categorical approach to § 117 would effectively prevent a large number of prior tribal convictions from qualifying as predicates, thereby defeating the primary purpose of the legislation. This cannot be what Congress intended when it enacted the statute in 2006.[1] If this Court nevertheless applies the categorical approach to § 117, the government agrees it should dismiss count two because at least one of Casey's prior assaults would not qualify as a predicate under the categorical approach.

FACTUAL BACKGROUND

The charges in this case stem from incidents alleged to have occurred on November 17, 2019 at approximately 1:00 p.m. on tribal trust land within the exterior boundaries of the Lummi Indian Reservation. Dkt. 1 at 3, 6. Tribal police responded to a 911 call reporting a physical domestic dispute at a residence owned by victim Jane Doe. Dkt. 1 at 3. The caller, referred to in the criminal complaint as "LT," reported that a man named Dale had hit and choked LT's aunt. Dkt. 1 at 3. Through subsequent interviews and written statements, police learned that LT and his girlfriend had been driving by the residence when they saw Casey strangling Doe inside a vehicle parked outside. Dkt. 1 at 4. LT got out of his vehicle to help Doe and, as he approached, saw Casey with both of his hands wrapped around Doe's neck. Dkt. 1 at 4. He also saw Casey use his left closed fist to hit Doe, who was trying to push away. Dkt. 1 at 4. Casey then got out of the car and, while hitting his fists together knuckle-to-knuckle, told LT everything was okay and that LT should leave. Dkt. 1 at 4. LT refused. Dkt. 1 at 4. While this exchange occurred, Doe got out of the vehicle. Dkt 1. at 4. LT could tell she was intoxicated and had been crying and noticed she coughed a few times, as if she had been choking and needed to catch her breath. Dkt. 1 at 4. Later that night, Doe said she could not touch the back of her head because she had a couple of bumps and her head was tender. Dkt. 1 at 4. Doe told officers she had been dating Casey for about two and a half years and living with him for about a year-and-a-half. Dkt. 1 at 4. Before this incident, Casey had received convictions in Swinomish Tribal Court for Assault – Class B, Domestic Violence, in violation of Swinomish Tribal Code, § 4-02.020(C) and Assault – Class C, in violation of Swinomish Tribal Code, § 5-1.030. The victim in those cases was a spouse or intimate partner of Casey's, with whom he shared four children. Dkt. 1 at 7.

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[1] In his motion to sever, Dkt. 20, Casey claims the government's argument that the categorical approach does not apply to Section 117 is "novel" and breaks "new ground," but that is not true. The government has never applied the categorical approach to this statute, and no court has found it applies. To the contrary, as explained *infra*, the few courts that have considered the question have not followed the categorical approach.

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THE CHARGES

On February 19, 2020, a grand jury returned an indictment charging Casey with one count of Assault by Strangulation in violation of 18 U.S.C. §§ 113(a)(8) and 1153, and one count of Domestic Assault by a Habitual Offender, in violation of 18 U.S.C. § 117(a). Dkt. 12. Casey challenges only the count charging him with a violation of § 117. This statute makes it a federal crime for any person to commit a domestic assault in Indian country or within the special maritime and territorial jurisdiction of the United States, if that person also has "a final conviction on at least two separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to federal jurisdiction . . . *any assault*, sexual abuse, or serious violent felony against a spouse or intimate partner, or against a child of or in the care of the person committing the domestic assault." 18 U.S.C. § 117(a)(1) (emphasis added).[2] Violations of 18 U.S.C. § 117 are punishable by imprisonment of up to five years, or ten years if the violation resulted in serious bodily injury. 18 U.S.C. § 117(a).

The indictment alleges that when Casey committed the November 17, 2019 assault, he had two prior domestic assault convictions in Swinomish Tribal Court. Dkt. 13. The victim in this case, Jane Doe, had been in a romantic relationship with Casey for more than two years and living with him for a year and a half. Dkt. 1 at 4. The victim of his prior assault was also a spouse or intimate partner with whom he shares four children. Dkt. 1 at 7.

Casey now seeks dismissal of count two on grounds it failed to state an offense. Applying the categorical approach, he claims his prior tribal court convictions are overbroad and not a categorical match to the elements of federal assault, thus not qualifying as predicate offenses for purposes of § 117.

ARGUMENT

I. To Prove a Violation of 18 U.S.C. § 117, the Government Must Establish the Facts of the Underlying Prior Convictions

Casey's motion is based on an assumption that this Court must determine as a matter of law whether his prior convictions qualify as predicate offenses under the "categorical approach" adopted in

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[2] A complete copy of the statute is attached as Exhibit A. Although not charged in this case, the statute also provides criminal penalties if an individual commits domestic assault and has at least two prior convictions for offenses that would be, if subject to federal jurisdiction, "an offense under chapter 110A." 18 U.S.C. § 117(a)(2). Chapter 110A criminalizes conduct related to domestic violence and stalking when that conduct involves interstate travel, the entering or leaving of Indian country, or occurs in the special maritime and territorial jurisdiction of the United States. *See, e.g.*, 18 U.S.C. § 2261, 2261A.

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Taylor v. United States, 495 U.S. 575 (1990). In *Taylor*, the Court employed that approach to determine whether enhanced penalties applied under the Armed Career Criminal Act. The categorical approach would require this Court to compare the elements of Casey's prior tribal convictions to the elements of federal assault to determine whether those elements are a categorical match. Casey asserts in his motion that this Court "must use the categorical approach," when considering predicate offenses under § 117, but the cases he cites do not involve convictions under that statute. Instead, they involve a court's determination of whether a prior conviction serves to enhance a defendant's sentence. By contrast, § 117 is not a sentencing enhancement. It is a substantive offense requiring, as an element of proof, that the defendant had two prior convictions for offenses that, "if subject to federal jurisdiction," would constitute "any assault, sexual abuse, or serious violent felony against a spouse or intimate partner, or against a child of or in the care of the person committing the domestic assault." 18 U.S.C. § 117(a)(1). The Ninth Circuit and Supreme Court have not yet decided the question Casey presents. Few courts have considered the issue, though those that have generally suggest Casey is incorrect.[3] Because his prior convictions, and the fact that he committed them against his domestic partner, are actual elements of the offense, the government should be permitted to prove them at trial. Concluding otherwise runs counter to the statute's text, structure, and purpose.

A. The Language and Structure of § 117 Suggest the Categorical Approach Does Not Apply

The categorical approach was adopted in *Taylor* to determine whether a prior state conviction constituted a "violent felony" triggering the enhanced statutory penalties provided for by the Armed Career Criminal Act, 18 U.S.C. § 924(e). *Taylor v. United States*, 495 U.S. 575, 600-01 (1990). Since then, courts have applied the approach primarily to determine whether a predicate crime supports imposition of a heightened penalty. *See, e.g.*, *Johnson v. United States*, 559 U.S. 133 (2010) (Section 924(e)(2)(B)(i)); *Johnson v. United States*, 135 S. Ct. 2551 (2015) (Section 924(e)(2)(B)(ii)), *United States v. Davis*, 139 S.Ct. 2319 (2019) (Section 924(c)(3)); *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018) (18 U.S.C. § 16). Similarly, the categorical approach applies to determine whether certain prior convictions trigger sentencing enhancements under the Sentencing Guidelines, *see, e.g.*, *United States v. Martinez-Lopez*, 864 F.3d 1034 (9th Cir. 2017). The categorical approach also informs whether a prior conviction constitutes a basis for deportation and removal. *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015).

[3] This issue has also been briefed and is pending in an identical motion before Judge John C. Coughenour in *United States v. Cline*, 2:19-CR-0023-JCC.

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Applying the categorical approach to statutes that impose heightened penalties ensures criminal penalties do not vary based on "technical definitions and labels under state law." *Taylor*, 495 U.S. at 590-91. Courts have applied the categorical approach when necessary to honor congressional intent related to the specific statute at issue and avoid Sixth Amendment concerns that arise when a sentencing judge, as opposed to a jury, finds facts that increase a maximum penalty. *Mathis v. United States*, 136 S.Ct. 2243, 2253 (2016); *Davis*, 139 S.Ct. 2319; *see also Nijhawan v. Holder*, 557 U.S. 29, 41-42 (2009) (describing history and purpose of categorical approach). But the categorical approach does not apply simply because a statute references a prior conviction. Rather, determining whether a statute requires application of the categorical approach begins with a review of the statute's language and structure. *United States v. Dailey*, 941 F.3d 1183, 1190-92 (9th Cir. 2019), *see also Nijhawan*, 557 U.S. at 36-37. A review of § 117's language and structure makes clear the statute does not implicate the concerns that have prompted courts to employ the categorical approach.

Section 117 requires the government to prove the defendant has a final conviction on at least two separate prior occasions for "offenses that would be, *if subject to federal jurisdiction* . . . any assault, sexual abuse, or serious violent felony against a spouse or intimate partner, or against a child of or in the care of the person committing the domestic assault." 18 U.S.C. § 117(a)(1) (emphasis added). By describing qualifying convictions as being for offenses that would, "if subject to Federal jurisdiction," constitute one of the listed crimes, the statute invites consideration of the defendant's conduct. The question is not whether the elements of the defendant's prior state or tribal offenses of conviction match the elements of a federal offense. Rather, the question is whether the federal government could have prosecuted the prior conduct had it occurred on land subject to federal jurisdiction. There is no risk the statute's enforcement would vary based on differences in the "technical definitions and labels" of tribal or state law because the statute's plain language requires conduct that would qualify as a federal crime. Applying the categorical approach to § 117 would make the term "if subject to federal jurisdiction" superfluous, which is an inappropriate result. *See Nijhawan*, 557 U.S. at 38 (avoiding statutory construction that would render statute's language meaningless); *United States v. Hayes*, 555 U.S. 415, 425 (2009) (same).

Courts have declined to apply the categorical approach when, as here, the federal statute at issue requires a factual inquiry into the particular circumstances in which an offender committed his predicate offense. *United States v. Doss*, 630 F.3d 1181, 1196-97 (9th Cir. 2011) (does not apply to § 3559(e)); *Nijhawan v. Holder*, 557 U.S. 29 (2009) (does not apply to 8 U.S.C. § 1101(a)(43)(M)(i)); *Descamps v. United States*, 570 U.S. 254, 267-68 (2013) (recognizing distinction); *see also United States v. Guzman-Mata*, 579 F.3d

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1065, 1070 (9th Cir. 2009) (does not apply to the family exception of 8 U.S.C. § 1101(a)(43)(N); *Dailey*, 941 F.3d at 1189 (does not apply to "sex offense" under 34 U.S.C. § 20911)). In addition to requiring the government to prove the conduct underlying the defendant's prior convictions could have been prosecuted as federal offenses if committed on land subject to federal jurisdiction, § 117(a) also requires a factual inquiry to determine whether the prior offense was "against a spouse or intimate partner, or against a child of or in the care of the person committing the domestic assault." 18 U.S.C. § 117(a)(1). This "relationship" requirement is not, as Casey suggests, part of the federal generic definition of "assault."[4] It is, instead, along with the fact of the prior convictions themselves, a necessary element of § 117 that must be proven beyond a reasonable doubt. To find otherwise would render the statute largely toothless, limiting its application to offenders whose prior offenses violated tribal or state statutes containing a relationship element.

Importantly, the government is unaware of any federal assault statute that includes as an element a requirement that the assault was committed "against a child of or in the care of the person committing the domestic assault," *see* 18 U.S.C. § 113. Moreover, only two federal assault statutes include, as an element, that the assault was committed against a "spouse or intimate partner," *see, e.g.*, 18 U.S.C. § 113(a)(7) and (8), and both of those crimes, when committed in Indian country, may already be prosecuted under the Major Crimes Act. This language in § 117(a) must therefore refer to the specific acts in which an offender engaged on a specific occasion. Any other reading would leave § 117(a)(1) with little, if any, meaningful application. *See Nijhawan*, 557 U.S. at 38-39.

Although courts have pointed to a statute's use of the word "conviction" to support application of the categorical approach, the term "conviction" as used in § 117(a) is modified by the language, "for offenses that would be, if subject to Federal jurisdiction," one of the qualifying crimes. 18 U.S.C. § 117(a). The government is unaware of a case applying the categorical approach to a statute containing this express limitation, and, as noted above, Congress's inclusion of the limitation suggests a focus on conduct, not statutory text. Indeed, if Congress had been operating under the assumption that the categorical approach applied, it need not have included that language at all.

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[4] In his motion, Casey refers to the "generic" definition of assault, but when discussing the relationship requirement, compares his tribal crimes to § 117(a)'s plain language, not the generic definition. Motion at 7. The generic definition of assault that applies to federal assault statutes does not contain a relationship component.

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As noted above, § 117(a)(2) also allows for prosecution under § 117(a) when the predicate offenses would, if subject to federal jurisdiction, qualify as offenses under Chapter 110A, which criminalizes domestic violence and stalking tied to interstate travel or the entering or leaving of Indian country. 18 U.S.C. § 117(a)(2); 18 U.S.C. § 2261(a). No state or tribe is likely to have criminal statutes that contain, as an element, interstate travel, because an interstate nexus is a basis for federal jurisdiction. There is no indication Congress intended the term "offense" to have different meanings throughout § 117. To the contrary, the primary goal of lawmakers enacting the statute was to provide federal prosecutors with the ability to "respond to *acts* of domestic violence when they occur," and "intervene in the cycle of violence by charging repeat offenders before they seriously injure or kill someone." 151 Cong. Rec. 9062 (2005) (emphasis added). [5] Congress's language suggests lawmakers were focused on the underlying conduct, not the elements of the underlying crimes.

B. Section 117's Legislative History Also Weighs Against Application of the Categorical Approach

When interpreting a statute, in addition to text and structure, courts take into account the statute's background, including its legislative history, and avoid interpretations that would render the law severely underinclusive or contrary to Congress's intent. *See, e.g.*, *Nijhawan*, 557 U.S. 29, 39-40; *Voisine v. United States*, 136 S.Ct. 2272, 2280 (2016); *United States v. Castleman*, 572 U.S. 157, 167-68 (2014). In this case, § 117's legislative history weighs strongly against application of the categorical approach.

Section 117 was enacted as part of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, tit. IX, § 909, Jan. 5, 2006, 119 Stat. 2960, 3085 (codified at 18 U.S.C. § 117). Although the statute applies to conduct occurring in either Indian country or the "special maritime and territorial jurisdiction of the United States," it was enacted primarily to fill an enforcement gap in Indian country concerning the commission of domestic violence against Native American women. *United States v. Bryant*, 136 S. Ct. 1954, 1960 (2016). Congress intended the statute to create "a new Federal criminal offense authorizing Federal prosecutors 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." 151 Cong. Rec. S4873 (daily ed. May 10, 2005) (statement of Senator John McCain); *see also Bryant*, 136 S. Ct. at 1961 (quoting same). When introducing the bill, initially titled "The Restoring Safety to Indian Women Act," Senator McCain, then chairman of the Senate Committee on

[5] The relevant portion of the legislative history is attached as Exhibit B.

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Indian Affairs, noted that Indian women experienced the highest rates of domestic violence compared to all other groups in the United States and that, "due to the unique status of Indian tribes, there are obstacles faced by Indian tribal police, Federal prosecutors and courts that impede their ability to respond to domestic violence in Indian country." 151 Cong. Rec. S4873 (daily ed. May 10, 2005). Section 117 was "intended to remove these obstacles at all levels and enhance the ability of each agency to respond to acts of domestic violence when they occur." *Id.* The express purpose of the Act was to "decrease the incidence of violent crimes against Indian women" and "ensure that perpetrators of violent crimes committed against Indian women are held accountable for their criminal behavior." VAWA Reauthorization Act, H.R. 3402, 109th Cong. § 902(1) and (3) (2006).

The statute's legislative history reflects the fact that, due to the complex jurisdictional web that applies in Indian country, federal prosecutors were limited to prosecuting only domestic-violence offenses that fell under the Major Crimes Act. *Id.*; *see also* 18 U.S.C. § 1153. That Act allows for federal prosecution of only the most serious crimes. Before enactment of § 117, federal prosecution for assaults committed by Indians against Indians in Indian country was limited to assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in 18 U.S.C. § 1365), and an assault against an individual not yet sixteen years of age. 18 U.S.C. § 1153(a) (2006 ed).[6] At the same time, tribal courts could not impose sentences longer than one year. 25 U.S.C. § 1302(a)(7) (2006 ed). Section 117 was enacted to "give federal prosecutors the ability to intervene in the cycle of violence by charging repeat offenders" without having to wait until those offenders committed an offense serious enough to satisfy the Major Crimes Act. 151 Cong. Rec. S4873 (daily ed. May 10, 2005); *see also Bryant*, 136 S. Ct. at 1961. Through § 117, which was tailored to the "unique problems" Indian tribes face, Congress intended to provide felony-level punishment for serial domestic-violence offenders in Indian country. *Bryant*, 136 S. Ct. at 1961. Applying the categorical approach to the statute would narrow its application nearly to the point of obscurity and prevent prosecutors from using the statute as Congress intended – to seek convictions against habitual domestic-violence offenders in Indian country, even when their conduct is not serious enough to trigger application of the Major Crimes Act. Because the categorical approach would leave the statute "with little, if any meaningful application," *Nijhawan*, 557 U.S. at 39, this Court should not apply it.

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[6] In 2013, the Major Crimes Act was amended. It now permits federal prosecutions of felony assault under 18 U.S.C. § 113 and assault against an individual younger than sixteen years of age.

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C. Because of Its Primary Purpose, Section 117 Must Be Construed Generously

In recognition of the special sovereign status tribes hold, it has it has long been the case that "the relations of the Indians among themselves – the conduct of one toward another – is to be controlled by the customs and laws of the tribe," unless Congress expressly provides otherwise. *United States v. Quiver*, 241 U.S. 602 (1916). The Supreme Court has "consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be 'construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.'" *United States v. Smith*, 925 F.3d 410, 419 (9th Cir. 2019) (quoting *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 846 (1982) (alterations in original)). Courts "must be guided by that 'eminently sound and vital canon' that 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'" *Bryan v. Itasca Cty.*, 426 U.S. 373, 392 (1976).

To help accomplish Congress's intent to reach habitual offenders in Indian country, Section 117 expressly allows tribal court convictions to serve as an element of that offense. But tribal law frequently varies from other sources of law because often in tribal courts, "custom serves in conjunction with appropriate principles from federal and state law." Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. Rev. 225, 229 (1994). Tribes may borrow from the laws of other tribes, states, and the federal government, but are not required to do so. *See Cohen's Handbook of Federal Indian Law*, §§ 4:05[1] and [8] (Nell Jessup Newton, ed., 2012) (1941) (citing examples). Indeed, tribal laws often incorporate both tribal common law, rooted in a tribe's conditions or customs, and positive law, which may include treaties, tribal constitutions, tribal legislative enactments, and administrative rules. *See id. at* § 4:05[1]. Federal law "does not prescribe or limit the types of tribal law that may govern any particular dispute or proceeding before a tribal court. So long as a tribe has jurisdiction to hear the matter, it may choose the governing rules, subject only to self-imposed limitations and the strictures of the Indian Civil Rights Act." *Id.* (citing 25 U.S.C. § 1301). Congress has encouraged tribes to exercise independence in law-making, not adopt a criminal code mimicking federal law. *See Bryant*, 136 S. Ct. at 1961.

Moreover, an easily accessible source for tribal legal materials does not exist, and access was even more limited in 2006, when lawmakers enacted § 117. *See* Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 Am. Indian L. Rev. 285, 289-90 (1998); *see also* Cohen's at 4:05[1] (2012). Until passage of the Tribal Law and Order Act in 2010, tribes were not even required to make their criminal laws publicly available. Even now, that requirement applies only to tribes exercising

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enhanced sentencing authority under that Act. *See* 25 U.S.C. § 1302(c)(4). Thus, given that a number of the tools courts use to compare elements of criminal offenses may be unavailable, Casey's claim that § 117 is enforceable only when the text of a tribe's criminal code categorically matches the elements of the comparable federal crime would likely exclude many tribal offenses from consideration. In light of this reality, Congress could not have intended the availability of § 117 to depend on the plain language of a tribe's criminal code. Such a requirement would have the effect of *restricting* federal authority over habitual domestic-violence offenders in Indian country compared to its authority over habitual domestic-violence offenders whose past crimes were committed elsewhere. That would essentially penalize tribes for exercising self-government and independence, in direct contrast to congressional intent.

D. Courts Have Treated Section 117 as a Specific-Circumstances Statute

Casey has identified no case in which a court has held the categorical approach applies to § 117, and the government is unaware of any such case.[7] Instead, the small number of courts that appear to have considered the question have treated § 117 as though it is appropriate to introduce facts proving that the conduct underlying the defendant's prior crimes constituted a federal assault.

In *United States v. Drapeau*, the Eighth Circuit addressed a case in which a jury convicted the defendant of two counts under § 117. *United States v. Drapeau*, 827 F.3d 773 (8th Cir. 2016). At trial, the government had called the defendant's ex-girlfriend to testify regarding facts underlying each of the defendant's predicate tribal convictions. *Id.* at 775. On appeal, the defendant argued his ex-girlfriend's testimony was irrelevant and unfairly prejudicial because only the elements of his prior crimes, not the underlying conduct, were relevant to proving that his prior offenses constituted federal assaults. Like Casey, he claimed a judge, not a jury, needed to apply the categorical approach to determine whether his prior domestic-abuse convictions qualified as predicate offenses. *Id.* at 776-77.

The *Drapeau* Court concluded that, regardless of which approach applied, the ex-girlfriend's testimony was relevant to proving the first and third elements of § 117, which required proof that the convictions occurred, and that the victim was a "spouse or intimate partner." *Id.* at 776. The court then found it unnecessary to determine whether the categorical approach applied because Drapeau had failed

[7] In *United States v. Flett*, Case No. 2:18-cr-0157 (E.D. Wash.), the government maintained the categorical approach did not apply to § 117, No. 2:18-cr-0157 at Dkt. 61, but the district court, in denying defendant's motion, declined to reach the question. 379 F. Supp. 3d 1152 (E.D. Wash. May 21, 2019). The defendant did not appeal.

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to preserve the argument, and any error would not be plain. *Id.* at 777. Indeed, before *Drapeau* was decided, courts appear to have operated under the assumption that the government was required to prove the facts of the underlying convictions. *See, e.g.*, *United States v. Harlan*, 815 F.3d 1100, 1104-05 (8th Cir. 2016).

Following *Drapeau*, a district court judge in the District of Nebraska denied a motion similar to Casey's seeking to dismiss a charge brought under § 117. The court rejected the argument that the judge was required to apply the categorical approach to determine whether the defendant's prior convictions qualified as "any assault." *United States v. Morris*, No. 8:18-cr-260, 2019 WL 1110211 (D. Neb. March 11, 2019) (slip copy). The defendant claimed his prior state offense did not qualify because it allowed for a conviction based on reckless conduct. Applying *Drapeau*'s reasoning, the court noted that the government was required to prove each element of § 117 beyond a reasonable doubt, and that, for the prior convictions, the victim's status as a spouse or intimate partner was a fact, not a legal element. *Id.* at *2. The court also found no reason to apply a different burden of proof to § 117's other factors, and concluded that a fact-specific approach was consistent with the statute's plain language and objective. *Id.*

E. Cases Applying the Categorical Approach Further Undercut Casey's Argument

The most recent case in which the Supreme Court considered whether to apply the categorical approach was *United States v. Davis*, 139 S. Ct. 2319 (2019), which Casey does not cite. *Davis* concerned 18 U.S.C. § 924(c)(3). Although a violation of that provision is considered a substantive offense, it is listed under the "penalty" provision of the chapter of the United States Code pertaining to firearms, and its purpose is, at least in part, to "threaten long prison sentences" when a firearm is used in connection with certain other federal crimes. *Davis*, 139 S. Ct. at 2323. The statute is only triggered when the defendant commits a "crime of violence," and, during the commission of that separate federal crime, uses a firearm. *Id.* In such a case, the statute allows for imposition of a consecutive mandatory term of imprisonment "over and above any sentence" already imposed. *Id.* at 2324; 18 U.S.C. 924(c)(1)(A). Although a jury must determine the elements of the crime, including whether the defendant used a firearm, prior to *Davis*, judges had historically employed the categorical approach to determine whether the separate federal offense qualified as a "crime of violence."

The term "crime of violence" is defined in § 924(c). *Davis* considered whether the second part of that definition, which defined a crime of violence as an offense "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," was unconstitutionally vague. *Davis*, 139 S.Ct. at 2324. *Davis* observed that because courts

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were applying the categorical approach to determine whether a prior crime qualified as a "crime of violence," the defendant's punishment impermissibly depended on "a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case.'" *Id.* at 2326. The government argued that, although courts had been employing the categorical approach, they should instead apply a case-specific approach, which would allow the jury to determine whether a prior crime qualified as a crime of violence and avoid any vagueness concerns. The Court agreed applying such an approach might save the statute, but concluded that, based on the text and history of § 924(c)(3), the categorical approach did, in fact, apply, and the statute was thus unconstitutionally vague.

Importantly, when explaining why the case-specific approach the government had advanced did not apply, the Court emphasized a number of characteristics about the text and history of 924(c)(3) that distinguish it from § 117. First, the Court noted it had already determined the categorical approach applied to identical language contained in the residual clause of 18 U.S.C. § 16. 139 S. Ct. at 2327-28. That statute defined "crime of violence" as an "offense that has *as an element* the use of . . . physical force against the person or property of another," or "any other offense that is a felony and that, *by its nature*, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 139 S. Ct. at 2328. The Court observed that, although in ordinary speech the word "offense" could mean either a "generic crime," such as fraud or theft in general, or the "specific acts" of an offender on a given occasion, because the word occurred only once in the statute and had already been held to carry the generic meaning in connection with the "elements" clause, the most natural reading would be to also apply the generic meaning to the residual clause. *Id.* at 2328.

The Court further emphasized that, like the residual clause contained in § 16, § 924(c)(3)'s residual clause referred to an offense that "by its nature" involved a certain type of risk. *Id.* at 2329. The Court reasoned that Congress's reference to the "nature" of the prior offense suggested it intended sentencing courts to consider what an offense normally entails, not what happened to occur on one occasion. *Id.*

Next, the Court considered the role of § 924(c)(3) in the broader context of the federal criminal code and, in doing so, again emphasized it had already determined the categorical approach applied to identical language in § 16. *Id.* The Court noted that dozens of federal statutes cross-referenced the term "crime of violence," and, in doing so, cited to both § 924(c)(3) and § 16. *Id.* Applying different definitions to each of those sections would thus result in "a series of seemingly inexplicable results." *Id.*

The Court then considered the statute's history, noting that §§ 924(c)(3) and 16 were originally designed to be read together, and that, even after subsequent amendments, and after courts had started

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applying the categorical approach to § 16, Congress copied and pasted the definition from that section directly into § 924(c)(3), suggesting the term "crime of violence" should have similar meaning in both statutes, and that Congress intended the categorical approach to apply. *Id.* at 2330-31. The Court further emphasized that, as originally enacted in 1968, § 924(c)(3) prohibited the use of a firearm "in connection with *any* federal felony." *Id.* at 2331. In 1984, Congress narrowed the statute by limiting its predicate offenses to "crimes of violence." *Id.* The Court reasoned that applying a specific-circumstances approach would "go a long way toward nullifying that limitation and restoring the statute's original breadth," thus undermining Congress's deliberate limitation of the statute to crimes of violence. *Id.* at 2332. There is no such limiting language in § 117(a), and, at the time the statute was enacted, the Supreme Court had only applied the categorical approach in the criminal context to statutes functioning as sentencing enhancements, which § 117 is not.

Other considerations relied on in *Davis* also fail to apply to § 117. As a preliminary matter, unlike § 924(c)(3) and the other statutory and Guidelines provisions to which courts have applied the categorical approach, application of Section 117 does not depend on the commission of a separate federal crime. And, as explained above, prior convictions required under § 117(a) are also elements of the federal crime itself, and thus must be proven beyond a reasonable doubt before a finder of fact. *United States v. Drapeau*, 827 F.3d 773, 776-77 (8th Cir. 2016) (quoting *Alleyne v. United States*, 133 S.Ct. 2151, 2156 (2013)). The jury instructions must therefore identify the elements of the federal assault statute under which the defendant's prior offense would qualify, and the government must prove that qualification. This is another material distinction, as jury instructions for 18 U.S.C. 924(c) require only that the jury find a prior conviction occurred, not that it qualified as a "crime of violence." *See* Ninth Circuit Model Instruction 8.71; *see also Davis*, 139 S.Ct. at 2327. Here, by contrast, a jury must determine as an element of § 117 that the defendant previously committed "any assault" that, if subject to federal jurisdiction, would constitute a federal crime. In addition, because § 117 is a substantive offense that must be proven at trial, and not a sentencing enhancement or penalty to be determined by a court, the Sixth Amendment is not implicated.

Also unlike § 924(c)(3), Congress has not narrowed the scope of § 117. To the contrary, it applies broadly to prior "offenses that would be, if subject to federal jurisdiction . . . *any* assault, sexual abuse, or serious violent felony." 18 U.S.C. § 117(a) (emphasis added). Under the reasoning of *Davis*, which emphasized Congress had narrowed § 924(c)(3) from applying to "any" felony to only crimes of violence, § 117's use of similarly broad language suggests Congress intended a fact-specific approach, not a categorical one. Nor does § 117 refer to the "nature" of an offense, or its elements. And, although the

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statute uses generic terms such as "assault," and "sexual abuse," there is absolutely no risk a conviction would capture more conduct than the applicable federal offense because the plain language of § 117 allows federal prosecution only when the underlying conduct would have qualified as a crime if subject to federal jurisdiction requirements.[8]

Finally, the need to rely on old court records to prove a prior offense has sometimes been cited as a potential concern when considering whether to allow proof of prior convictions to prove a predicate offense. *See, e.g., Davis*, 139 S.Ct. at 2344 (J. Kavanaugh, dissenting). Although it is true the government might sometimes need to rely on such records, the factual inquiry would go to the nature of the prior conviction, and "is not an invitation to relitigate the conviction itself." *Nijhawan*, 557 U.S. (2009). In any event, because the defendant would have an opportunity to contest the government's evidence at trial, any "uncertainties caused by the passage of time are likely to count" in his favor. *Id.* at 2303. Section 117 clearly sets out its elements, and it is the government's burden to prove them beyond a reasonable doubt. Because the categorical approach does not apply to § 117, this Court should deny Casey's motion.

II. Casey's Convictions Also Qualify Under the Categorical Approach

If this Court rejects the government's arguments and conclusions, it must apply the categorical approach to determine whether Casey's prior convictions qualify as predicates for purposes of § 117(a). Under that approach, a court looks to the judgment of conviction to determine on which statutory provision the prior conviction was based. Only if it is unclear from the judgment whether the prior conviction was based on a provision that would qualify as a predicate offense may the court consider a

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[8] As noted above, this issue is currently before Judge Coughenour in *United States v. Cline*, 2:19-cr-0023. In a footnote in Cline's reply brief, he observed that courts have applied the categorical analysis to the term "serious violent felony" under 18 U.S.C. § 3559(c)(1) to determine whether a prior conviction serves as a predicate offense to trigger a life sentence under that statute. Cline suggested that meant the categorical approach must also apply to § 117. That argument fails for the reasons already given. The statute's plain language, which requires the prior offenses to qualify as crimes "if subject to federal jurisdiction," demands a factual analysis, not the categorical analysis Casey asks this Court to employ. Nevertheless, because Casey is not charged with having convictions for prior offenses that would qualify as "serious violent felonies" under federal law, this Court need not reach the question. Moreover, even if this Court concludes the term "serious violent felony" suggests a modicum of ambiguity, such ambiguity would be insufficient to support application of the categorical approach in light of the statute's language, structure, and legislative history, all of which suggest Congress contemplated a non-categorical approach. *See, e.g.*, *United States v. Mi Kyung Buyn*, 539 F.3d 982, 992-93 (9th Cir. 2008); *United States v. Dailey*, 941 F.3d 1183, 1191 (9th Cir. 2019).

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limited set of underlying charging documents, including the indictment, jury instructions, plea agreement, and plea colloquy. *Mathis v. United States*, 136 S.Ct. 2243, 2249 (2016). The defendant's underlying criminal conduct is not relevant to the court's inquiry. *See Mathis*, 136 S. Ct. at 2248 (describing categorical and modified categorical approaches).

A. The Statutes of Conviction are Not Overbroad

The judgment relating to Casey's 2002 tribal court conviction states he was found guilty of Assault Class C in violation of § 5-1.030 of the Swinomish Tribal Code. Ex. D. At the time of Casey's offense, that statute provided as follows:

> Any person who (a) attempts with unlawful force to inflict bodily injury upon another, OR (b) without consent touches, strikes, cuts, shoots or poisons the person or body of another, OR (c) intentionally, with unlawful force, creates in another a reasonable apprehension and fear of bodily injury even though the infliction of bodily injury was not actually intended, OR (d) by threatening violence causes another to harm himself, commits the crime of assault.

Ex. C. The current version of the statute, which served as the basis for Casey's 2014 conviction for Assault – Class B, uses identical language. Motion Ex. 1 at 4.[9] Under federal law, an assault is committed "by either a willful attempt to inflict injury upon the person of another, or by a threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm." *United States v. Dupree*, 544 F.2d 1050, 1051 (9th Cir. 1976). Casey argues the statute is overbroad and indivisible because it subsections (b) and (d) encompass unintentional conduct, and because subsection (c) does not require fear of "immediate" bodily injury.[10] But Casey must show a "realistic probability, not a theoretical possibility," that the tribe would apply its statute to conduct falling outside the generic definition of assault. *See Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

The Swinomish Tribal Court has not yet considered whether its assault statute encompasses unintentional conduct or whether fear of bodily injury must be "immediate," and the plain language of the statute does not specify. Nor has Casey cited any decision in which the Swinomish Tribal Court has applied its statute to unintentional conduct or fear of anything other than immediate bodily injury. The

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[9] That one of his prior convictions was for a Class B assault and one for a Class C assault does not affect the categorical analysis, as the underlying crime in both instances was assault.

[10] As noted above, Casey also argues the tribe's statute is overbroad because it is not limited to assaults committed against a spouse or intimate partner, but neither is federal simple assault. His argument confuses § 117's elements with the elements of federal assault.

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tribe's code does, however, permit the tribal court to "be guided by common law as developed by other tribal, state or federal courts" when a matter is not expressly covered by the tribal code. Swinomish Tribal Code § 4-01.070(B) (2003); 5-0.050(b) (1991). And, in fact, the Swinomish Tribal Court does look to state law when interpreting ambiguous language in its tribal code. *See, e.g.*, *Swinomish Tribal Community v. Fornsby*, 2009 WL 9125779 at *1-2 (Swinomish Tribal Court, Oct. 6, 2009) (unpublished); *see also Colville Confederated Tribes v. Clark*, 1991 WL 35315068 at *2 (Colville C.A. March 19, 1998) (relying on state definition of "assault" to interpret tribal code). Under Washington law, assault requires either a "willful attempt to inflict injury upon the person of another," or a "threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm." *United States v. Juvenile Male*, 930 F.2d 727, 728 (9th Cir. 1991). Applying that interpretation to the Swinomish Tribal Code, as the tribal court would, intent must be proven for purposes of subsection (b), fear of "immediate" harm must be proven for subsection (c) and, because subsection (d) requires actual harm to another person, a violation of that provision would qualify as a battery, which "need not be intentional to constitute a violation" of the assault statute. *Id.* The statute is therefore not overbroad and is a categorical match to the federal definition.

CONCLUSION

Because the categorical approach does not apply, this Court should deny Casey's motion and uphold count two of the indictment. The government should be permitted to present evidence at trial proving the prior convictions were for offenses that would be, if subject to federal jurisdiction, any assault. Even if, however, this Court applies the categorical approach, Casey's prior convictions still qualify.

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DATED this 17th day of March, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s).

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