THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>DALE DUPREE CASEY,<br><br>Defendant. | No. CR 20-0020-RAJ<br><br>REPLY TO GOVERNMENT'S RESPONSE TO MOTION TO DISMISS<br><br>**(Oral Argument Requested)**<br><br>**Noted for: March 20, 2020** |

**A. The Text and Structure of § 117 Establish that the Categorical Approach Applies**

The Court's inquiry ends at the statutory text because the text unambiguously speaks to prior convictions as opposed to the facts underlying those convictions "…who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal proceedings…." 18 U.S.C. § 117. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("The inquiry begins with the statutory text, and ends there as the text is unambiguous."). If Congress intended § 117 to focus on the commission of an offense, rather than a conviction, the plain language of § 117 would not require prior convictions. The term "conviction" is clear and unambiguous. Therefore, a categorical match of the prior convictions with federal generic assault is necessary to support a § 117 conviction.



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**B. The Legislative History Supports the Unambiguous Text and Structure of § 117**

As explained above, the text and structure of § 117 supports Mr. Casey's position that the categorical approach applies to his prior convictions. Because the text and structure is unambiguous, the Court's inquiry should end. However, if the Court decides to continue its analysis, the legislative history for § 117 further supports Mr. Casey's position. Legislative history may be a useful tool for statutory interpretation when it represents "the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Zuber v. Allen*, 396 U.S. 168, 186 (1969). For this reason, the most authoritative sources of legislative history are congressional reports. *Garcia v. United States*, 469 U.S. 70, 76 (1984) (citing *United States v. O'Brien*, 391 U.S. 367, 385 (1968)).

In the congressional reports, Senator McCain repeatedly cited to prior "tribal court convictions" and not the commission of offenses. Dkt. 23-2 at 3. For example, Senator McCain noted the bill would "allow tribal court convictions to count" as predicate offenses. Dkt. 23-2 at 3. Again, Senator McCain stated that the bill would "create criminal history databases . . . to document final convictions" in State, Federal, and Tribal courts. Dkt. 23-2 at 3. Finally, Senator McCain stated that the law permitted the "use of tribal court convictions" to charge repeat offenders. Dkt. 23-2 at 3. The repeated citation to "convictions" stresses that the categorical approach is appropriate when analyzing predicate convictions for a § 117 prosecution.

**C. The Categorical Approach Applies Because § 117 Speaks to Convictions as Opposed to Circumstances Associated with the Convictions**

Courts have applied the categorical approach in situations involving statutes with similar text and structure. Armed Career Criminal Act (*United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016)), Career Offender (*United States v. Lee*, 821 F.3d 1124 (9th Cir. 2016)), 18 U.S.C. § 924(c) (*United States v. Davis*, 139 S.Ct. 2319 (June 24,



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2019)), 18 U.S.C. § 16 (*Sessions v. Dimaya*, 138 S.Ct. 1204 (April 17, 2018)), 21 U.S.C. § 851 (*United States v. Graves*, 925 F.3d 1036 (9th Cir. May 30, 2019)), and whether a prior state conviction relates to possession of child pornography (*United States v. Reinhart*, 893 F.3d 606, 615 (9th Cir. 2018)). The reason Courts do so is because the "practical difficulties and potential unfairness of a factual approach are daunting." *Taylor v. United States,*495 U.S. 575, 601-603 (1990) (describing a series of scenarios that counsel against using the factual approach).

The government says the fact based approach should nevertheless be used emphasizing five words in § 117: "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." Dkt. 23, p. 5. That language is not meant as an invitation to consider the facts underlying the defendant's conduct. The language is necessary to provide a "…jurisdictional element [or hook for the statute]…," *United States v. Morrison,* 529 U.S. 598, 613-614 (2000), so that the statute is not subject to a Commerce Clause challenge. In *Morrison,* the Court stated that a jurisdictional element establishing that the federal cause of action created by a federal statute is in pursuance of Congress' power to regulate interstate commerce and inclusion of language in the statute providing for federal jurisdiction would lend support to the argument that the statute was sufficiently tied to interstate commerce to withstand a Commerce Clause challenge. *Id.*

The government also suggests that the categorical approach does not apply, citing to *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)); *United States v. Guzman-Mata*, 579 F.3d 1065, 1070 (9th Cir. 2009) (does not apply to the family exception of 8 U.S.C. § 1101(a)(43)(N)); *United States v. Dailey*, 941 F.3d 1183, 1189 (9th Cir. 2019) (does not apply to "sex offense"



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under 34 U.S.C. § 20911)). In contrast to § 117, the statutes at issue in those cases expressly required a factual inquiry into the particular circumstances in which an offender committed his predicate offense. In *Doss*, the statute provided "for a mandatory minimum life sentence for a federal sex offense of the type of which [the defendant] was convicted *if* the defendant has a 'prior sex conviction *in which a minor was the victim*.'" *Doss* at 1196 (emphasis in original). In *Nijhawan v. Holder*, the statute involved "an offense that involves fraud or deceit *in which the loss to the victim or victims exceeds $10,000*." 557 U.S. 29 (2009) (emphasis in original). Similarly, and unlike § 117, the statute in *Guzman-Mata* did not refer to a generic crime but to an exception to the statute called the "family exception" which required, like the statute in *Nijhawan,* a factual inquiry into a circumstance related to an offense. *Guzman-Mata* at 1070-72. The same is true for the statute at issue in *Dailey* where the court held that "most pointedly, the residual clause [in the statute at issue] covers 'any *conduct*' in [its] residual clause, as opposed to 'conviction,' [which] strongly indicates a non-categorical approach applies." *Dailey* at 1191.

Moreover, in *United States v. Mi Kyung Byun*, 539 F.3d 982, 991 (9th Cir. 2008), the Ninth Circuit reviewed the specific facts from a prior conviction because the statute's "use of the word "committed," rather than "convicted" persuasively indicates that . . . [the Court] may consider" the defendant's "actual conduct." Notably, in *United States v. Flett*, 379 F.Supp.3d 1152, 1154 (E.D. Wash. 2019), the Honorable Salvador Mendoza, Jr., "assum(ed), without deciding, that the categorical approach applies" to determine whether prior convictions may serve as predicates in a § 117 prosecution. A comparison of § 117 to the statutes at issue in these cases demonstrate that § 117 is not a conduct specific statute.

Importantly, the government's attempt to distinguish *Davis* demonstrates the practical difficulties with their proposed factual approach. Dkt. 23, p. 11-14. For



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example, one practical difficulty is related to a severance motion that Mr. Casey filed. Dkts. 20, 20-1, 20-2. One of the convictions is from approximately 20 years ago. In both cases, Mr. Casey explicitly refused to admit to the facts of the case and entered into a no-contest plea. *Id.* He never entered into those pleas expecting that the facts underlying the no-contest convictions would be used at a trial under § 117. In fact, Mr. Casey is going to consider moving to vacate his prior no-contest pleas and/or convictions on grounds that at least one of them predated the passage of § 117 and that he would have asserted his Sixth Amendment right to a trial had he known that the prior convictions would have been used against him in a subsequent § 117 prosecution. The Court, respectfully, should apply the categorical approach given the analysis.

**D. The Government is Asking the Court to Rewrite § 117**

Realizing the significant deficiencies and inconsistencies in its position, the government states that § 117 "must be construed generously." Dkt. 23, p. 9. Stated differently, the government is asking the Court to rewrite the statute, into the types of statutes written by Congress in *Doss*, *Nijhawan*, *Guzman-Mata*, and *Dailey*, because otherwise it "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." *Id.* at 10. "[T]he sky is [not] falling.[1]" The government's suggestion that application of the categorical approach would prevent prosecutors from prosecuting federal crimes in Indian country is an exaggeration. Should the Court dismiss Count 2 as argued by Mr. Casey, he would still face prosecution under Count 1 which carries a statutory maximum of a 120 months. And, to the extent the government is legally able to make the showing, the government can seek to admit the prior convictions under F.R.E.

[1] https://en.wikipedia.org/wiki/Henny_Penny (last checked March 18, 2020).



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404(b) at Mr. Casey's trial under Count 1. Finally, in the event the government is able to secure a conviction under Count 1, it can present reliable facts under 18 U.S.C. § 3553(a) to this Court at Mr. Casey's sentencing including facts related to his prior convictions in support of any sentence up to the statutory maximum.

There is also another good reason why this Court should not follow the government's advice in rewriting the statute. The statute does not only apply to tribal convictions, it also applies to individuals who have convictions under "State" law, i.e., Washington state law. 18 U.S.C. § 117. If the Court were to apply the approach suggested by the government, that approach would be inconsistent with *United States v. Robinson*, 869 F.3d 933, 938 (9th Cir. 2017). There, the court applied the categorical approach in analyzing *Robinson's* prior Washington assault conviction. Thus, if a native American were prosecuted under 18 U.S.C. § 117 and that individual had the same assault conviction as *Robinson*, the Court would be asked by the government to apply an approach inconsistent with *Robinson*.

**E. Casey's Prior Convictions are Overbroad**

The government first argues that Mr. 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 [before the statute can be declared overbroad]. *See Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). Dkt. 23, p. 16. "There are two ways to show "a realistic probability" that a [ ] statute exceeds the generic definition." *Lopez-Aguilar v. Barr*, 984 F.3d 1143, 1147 (9th Cir. 2020). "First, there is not a categorical match if a [ ] statute expressly defines a crime more broadly than the generic offense." *Id.* (citations omitted). "As long as the application of the statute's express text in the nongeneric manner is not a logical impossibility, the relative likelihood of application to the nongeneric conduct is immaterial." *Id.* (citing *United States v. Valdivia-Flores*, 876 F.3d 1201, 1208 (9th Cir. 2017)).



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Here, the government does not address or dispute Mr. Casey's arguments that Swinomish assault statute is broader because it lacks a mens rea requirement. Dkt. 18, p. 6. The government does not address or dispute that the Swinomish assault statute is broader because it does not have the immediacy element. *Id.* The government also does not address or dispute that the Swinomish assault statute is broader because it allows the assault to be perpetrated against anyone. *Id.* Finally, the government also does not address or dispute that the Swinomish assault code is indivisible. *Id.* The government states under *Swinomish Tribal Community v. Fornsby*, 2009 WL 9125779 at *1-2 (Swinomish Tribal Court, Oct. 6, 2009) (unpublished) that "the Swinomish Tribal Court does look to state law when interpreting ambiguous language in its tribal code." Dkt. 23, p. 6. This is not a case like *Fornsby* where the Swinomish assault statute is "…silent as to the legal requirements and application …" of the assault statute. *Id. Fornsby* involved the "insanity defense" which was not addressed in the Swinomish statutes and required the court in *Fornsby* to look to Washington law for guidance. The elements for assault are clearly described under Swinomish law. A straightforward analysis demonstrates that the Swinomish definition of assault is overbroad when compared to the federal generic definition of assault. Dkt. 18, p. 5-10.

Finally, the government asks this Court to look to *United States v. Juvenile Male*, 930 F.2d 727, 728 (9th Cir. 1991) for Washington's definition of assault. *Juvenile Male* does not provide any analysis whatsoever with respect to Washington's assault statute. The appropriate legal framework for Washington's assault statute is found in *United States v. Robinson*, 869 F.3d 933 (9th Cir. 2017), a framework the government does not address in its response. Respectfully, the Court should conclude that Mr. Casey's prior convictions are overbroad and dismiss Count 2 for the reasons set out in his opening motion and this reply.



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DATED this 10th day of March, 2020.

Respectfully submitted,

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