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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2011

ADAM SHAVANAUX, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

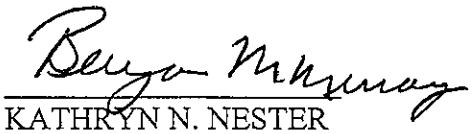
MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Petitioner, Adam Shavanaux, by and through his court-appointed counsel, Benjamin C. McMurray, respectfully requests this Honorable Court for leave to proceed *in forma pauperis* in filing the attached Petition for Writ of Certiorari. In support of this request, Petitioner states that undersigned counsel was appointed pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, by the United States Court of Appeals for the Tenth Circuit, and he is unable to retain counsel and pay for the costs attendant to the proceedings before the Honorable Court.

WHEREFORE, the Petitioner, Adam Shavanaux, respectfully requests that he be granted leave to proceed *in forma pauperis*.

Respectfully submitted,



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QUESTION PRESENTED

Section 117 of U.S.C. Title 18 makes it a federal felony to commit simple domestic assault in Indian country after having twice previously been convicted of domestic assault. The statute specifically includes tribal court convictions among those that may be used to establish two prior convictions. Federal and state courts are deeply and intractably divided about whether the government can use an uncounseled tribal court conviction to establish an element of a subsequent offense. The Tenth Circuit entrenched the circuit split with implications for all Indians who have prior tribal convictions used against them in state and federal court.

Does the Constitution prevent the use of a prior, uncounseled tribal court conviction that received a term of imprisonment to establish an element of the offense?

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1. United States of America

2. Adam Shavanaux

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2011

ADAM SHAVANAUX, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PRAYER

Petitioner Adam Shavanaux respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is published at 647 F.3d 993. (Pet. App. 1a.) The district court's order dismissing the case is unpublished. (Pet. App. 17a.)

JURISDICTION

The Tenth Circuit Court of Appeals issued its decision on July 26, 2011. (Pet. App. 1a.) The order of the court of appeals denying petition for rehearing en banc was filed on September 8, 2011. (Pet. App. 20a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The full text of the following provisions is set out in Appendix D. In relevant part, 18 U.S.C. § 117(a) provides:

> 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,
>
> shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.

The Fifth Amendment provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment of the U.S. Constitution states, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment states, in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

1. The relevant facts are undisputed. Petitioner Adam Shavanaux was charged with violating 18 U.S.C. § 117, which makes it a federal felony for a defendant to commit simple domestic assault in Indian country after having twice previously been convicted of domestic assault. The statute specifically includes tribal court convictions among those that may be used to establish two prior convictions. *Id.* Mr. Shavanaux acknowledged that he had twice been convicted in tribal court of convictions that could qualify as predicates under § 117. However, in both cases he lacked money to hire an attorney, and the tribal court did not appoint an attorney to represent him. In the absence of counsel, Mr. Shavanaux was convicted and sentenced to jail in both cases.

2. Mr. Shavanaux moved to dismiss the indictment on the ground that using his uncounseled tribal convictions that resulted in jail time would violate the Constitution. The district court agreed and dismissed the case. (Pet. App. 17a.)

3. The government appealed, and the Tenth Circuit reversed. Although it recognized its decision was "at odds with the Ninth Circuit," the court held that the Constitution did not preclude use of a prior, uncounseled tribal conviction to establish an element of § 117. 647 F.3d 993, 997 (10th Cir. 2011); (Pet. App. at 4a.).

4. Mr. Shavanaux moved for rehearing en banc, which was denied. (Pet. App. 20a.)

5. This petition follows.

REASONS FOR GRANTING THE WRIT

Federal and state courts are deeply and intractably divided as to whether the government can use an uncounseled tribal court conviction to establish an element of a subsequent offense. By allowing the government to use Mr. Shavanaux's uncounseled tribal convictions, the Tenth Circuit entrenched a circuit split affecting the criminal liability of Indian defendants in state or federal court who have prior tribal convictions. The Court should grant certiorari to decide whether the Constitution prevents the use of uncounseled tribal convictions in a subsequent prosecution in the same manner that it prevents the use of uncounseled state or federal convictions.

I. The Tenth Circuit's decision widens and entrenches an existing conflict among the circuits and the states.

The split of authority on the use of uncounseled tribal convictions arises from the different ways that federal circuit courts and state courts of last resort have applied this Court's decision in *Burgett v. Texas*, 389 U.S. 109 (1967). Beginning with *Burgett*, this Court held that the Sixth Amendment and Due Process Clause of the Constitution precluded the use of a prior,

uncounseled conviction in a prosecution for similar conduct under a recidivist statute. The Court stated:

> To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right.

Id. at 115. Under the rule in *Burgett*, the government could not offer an uncounseled conviction to establish that the defendant had "been before convicted of the same offense, or one of the same nature." *Id.* at 111 n.3 (quoting state statute at issue); *see also United States v. Tucker*, 404 U.S. 443 (1971) (applying *Burgett* to sentencing); *Loper v. Beto*, 405 U.S. 473 (1972) (applying *Burgett* to impeachment); *United States v. Custis*, 511 U.S. 485 (1994) (applying *Burgett* to a sentencing enhancement under the Armed Career Criminal Act); *but see Lewis v. United States*, 445 U.S. 55 (1980) (distinguishing *Burgett* under the felon in possession statute); *Nichols v. United States*, 511 U.S. 738 (1994) (distinguishing *Burgett* for a misdemeanor conviction that received no jail sentence).

A. The Ninth Circuit excludes uncounseled tribal convictions under Burgett v. Texas.

The Ninth Circuit applied *Burgett* to tribal convictions in *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989), holding that an uncounseled tribal conviction could not be used to establish an element of a later offense. In *Ant*, the government offered the defendant's prior tribal conviction to establish the conduct for which he was charged federally. Because he had been sentenced to tribal jail without the assistance of counsel, the defendant moved to exclude evidence of the tribal conviction under *Burgett*.

In light of *Burgett*, the Ninth Circuit recognized that "if Ant's tribal court guilty plea had been made in a federal court, not only would it be constitutionally infirm, but it would also be

inadmissible in a subsequent federal prosecution." *Id.* at 1393. However, because the Indian Civil Rights Act (ICRA) allowed tribes to prosecute indigent defendants without first providing counsel, the court had to consider "whether a constitutionally infirm guilty plea may be admitted as evidence in federal court solely because it was made in compliance with tribal law and with the ICRA." *Id.* at 1395.

ICRA notwithstanding, the Ninth Circuit concluded that an uncounseled tribal conviction was inadmissible for the same reason as an uncounseled conviction from federal court. *Id.* Under the Ninth Circuit's analysis, the fact that a tribal court proceeding complied with ICRA did not resolve the propriety of using the tribal conviction in federal court:

> [W]e have looked beyond the validity of the tribal conviction itself and have reviewed the actual tribal proceedings to determine if they were in conformity with the Constitutional requirements for federal prosecutions in federal court. Had the tribal court proceedings met these requirements, we would have affirmed the judgment of the district court below in refusing to suppress the plea. But since the tribal court proceedings did not meet these requirements, the tribal court guilty plea must be suppressed.

Id. at 1396. Under *Ant*, an uncounseled tribal conviction is no more admissible in a later prosecution than an uncounseled state or federal conviction because none meet the rules for use in a federal prosecution.

B. *The Eighth and Tenth Circuits do not apply* Burgett *to uncounseled tribal convictions.*

The Eighth Circuit rejected *Ant* and applied a different rule to prior tribal convictions than it applies to state or federal convictions. In *United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011), *petition for cert. filed* (U.S. Nov. 10, 2011) (No. 11-7379), a divided panel of the Eighth Circuit held that the government could use an uncounseled tribal conviction that resulted in a jail sentence to establish a violation of § 117. After a lengthy discussion of *Burgett*'s impact on uncounseled misdemeanor convictions, the court decided that *Burgett* did not apply to "prior

convictions [that] involved no actual constitutional violation." *Id.* at 604. Because the Constitution did not apply to tribal courts, *see id.* at 595–96, the court concluded that *Burgett* and its progeny did not apply to tribal convictions. "[W]e do not believe we are free to preclude use of the prior conviction merely because it *would have been* invalid had it arisen from a state or federal court." *Id.* at 604.

The Eighth Circuit acknowledged that it conflicted with *Ant*: "Other courts have disagreed as to whether prior tribal court proceedings should be *treated* as involving constitutional violations where a similar absence of counsel would have violated the Sixth Amendment had it occurred in state or federal court." *Id.* at 604 (citing *Ant*, 882 F.2d at 1394). Persuaded by the reasoning in *Ant*, one judge dissented:

> There remains the problem that an uncounseled misdemeanor conviction obtained in tribal court does not directly implicate the Sixth Amendment. I nonetheless believe such a conviction should be treated as involving a constitutional violation where it is used to prove an element of an offense in a subsequent federal court proceeding where the Sixth Amendment is implicated.

Id. at 606 (Bye, J., dissenting).[1]

The Tenth Circuit's decision in this case entrenches the circuit split on this issue. As in *Cavanaugh*, the Tenth Circuit held that the government may use an uncounseled tribal court conviction to establish a violation of § 117, notwithstanding the fact that the defendant was sentenced to jail in the prior case. In so holding, the Tenth Circuit also acknowledged it was "at odds with the Ninth Circuit." 647 F.3d 993, 997.

The *Shavanaux* court spent little time considering the meaning of *Burgett* and its progeny, concluding that *Burgett* did not apply to tribal convictions because the Bill of Rights did not

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[1] The Eighth Circuit's decision in *Cavanaugh* is currently before this Court on a petition for writ of certiorari. Pet. for Writ of Cert., *United States v. Cavanaugh*, No. 11-7379 (U.S. Nov. 10, 2011).

apply to tribal courts in the first place. "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." *Id.* at 998 (10th Cir. 2011) (quoting *Burgett*, 389 U.S. at 115). The Tenth Circuit further held that complying with ICRA, which did not require appointment of counsel in tribal courts, was enough to satisfy Due Process. *Compare id.* at 1000 ("tribal convictions obtained in compliance with ICRA are necessarily compatible with due process of law") *with Ant*, 882 F.2d at 1395 (holding that "valid[ity] under tribal law and the ICRA" did not sanitize an uncounseled tribal conviction that would be inadmissible had it happened in federal court). The Tenth Circuit also held that Equal Protection did not bar the use of tribal convictions in § 117.[2] 647 F.3d at 1001–2.

C. *State courts are similarly split on applying* Burgett *to uncounseled tribal convictions.*

1. Montana does not apply *Burgett* to tribal convictions.

In addition to this split between the Eighth, Ninth, and Tenth Circuits, state courts of last resort have similarly split on the applicability of *Burgett* and its progeny to tribal convictions. The Eighth and Tenth Circuits relied on *State v. Spotted Eagle*, 71 P.3d 1239 (Mont. 2003), in which a divided Montana Supreme Court considered whether "valid uncounselled tribal court convictions [may] be used to enhance a state DUI charge to a felony in a Montana court." *Id.* a

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[2] The Tenth Circuit applied rational basis review to Congress's decision to include tribal convictions as a basis for § 117, reasoning that "'Indian' is not a racial classification, but a political one." 647 F.3d at 1001. However, this Court has made clear that the distinction between Indians and non-Indians for purposes of tribal jurisdiction *is* a racial one. *See, e.g., United States v. Lara*, 541 U.S. 193, 196 (2004) (upholding tribal authority "to exercise criminal jurisdiction over all Indians"); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding that "Indian tribes do not have inherent jurisdiction to try and punish non-Indians"). Thus, Congress's decision to base § 117 prosecutions on a tribal conviction should be subjected to strict scrutiny. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

373. The court acknowledged that because the prior convictions had resulted in some jail time, "had those prior DUI convictions been obtained in a federal or state court, they would be invalid at their inception pursuant to *Scott*." *Id.* at 376 (citing *Scott v. Illinois*, 440 U.S. 367 (1979)). However, like the Eighth and Tenth Circuits, the Montana Supreme Court reasoned that "whether a prior uncounselled conviction may be used to enhance a subsequent misdemeanor to a felony turns on whether that conviction was valid at its inception." *Id.* Because tribal courts were not bound by the Constitution, the court held that tribal convictions were valid at the outset and bore no defects that would prevent their use in a later prosecution under the recidivist statute. The dissent reasoned that the prior convictions should be excluded to maintain the integrity of the Montana courts, in which a citizen was guaranteed a right to counsel. *Id.* at 379–81 (Leaphart, J., dissenting).

2. New Mexico applies *Burgett* to tribal convictions.

In contrast to *Spotted Eagle*, New Mexico has applied *Burgett* and its progeny to tribal convictions. *State v. Watchman*, 809 P.2d 641 (N.M. App. 1991), *abrogated on other grounds by State v. Hosteen*, 923 P.2d 595, 599 (N.M. App. 1996) (stating that *Watchman's* holding on the bounds of the Sixth Amendment had been abrogated). In *Watchman*, the court considered whether the state could use prior, uncounseled state and tribal convictions to establish a recidivist enhancement. The state argued that tribal convictions should be treated differently from municipal convictions "because tribal courts are not required by the federal Constitution to provide counsel to Indian criminal defendants who reside on the reservation." *Id.* at 646. Discussing *Burgett* and its progeny, the New Mexico court rejected this rule: "We decline to adopt a blanket rule permitting the use of uncounseled tribal court convictions at sentencing hearings to alter a defendant's basic sentence." *Id.* at 647. The New Mexico Supreme Court later

made clear that the decision in *Watchman* to apply *Burgett* and its progeny to tribal convictions in the same way it applied to state convictions was still good law: "*Watchman* holds that it would be a denial of due process to treat uncounseled tribal court convictions differently from uncounseled state court convictions." *State v. Woodruff*, 951 P.2d 605, 610 (N.M. 1997).

II. The split on this question is ripe for Supreme Court review.

The various conflicting opinions on this question reflect a deep and troublesome split. The Ninth Circuit and New Mexico (which is in the Tenth Circuit) apply *Burgett* and its progeny to tribal convictions. The Eighth and Tenth Circuits, as well as Montana (which is in the Ninth Circuit), do not apply *Burgett* and its progeny to tribal convictions because tribal courts are not subject to the Sixth Amendment. This issue will inevitably arise in the many state and federal cases that involve Indian defendants. Thus, whether a defendant's prior uncounseled tribal convictions can be used against him in a later proceeding will depend not only on which circuit he is in, but also on whether he is charged in state or federal court. Indeed, given the conflict among the circuits and the states within them, one case could be subject to two different rules, for example, a state law conviction affirmed by the Montana Supreme Court but later subjected to habeas review in the Ninth Circuit.

Because the Indian population in this country is largely concentrated in the western states, the split between these western courts is ripe for Supreme Court review. In *United States v. Lara*, 541 U.S. 193 (2004), this Court granted certiorari to resolve a split between the Eighth and Ninth Circuits on a question of tribal court jurisdiction. In its petition for a writ of certiorari, the government argued that the Eighth and Ninth Circuits contained "extensive Indian country" and that a direct conflict between the two circuits on a question of tribal jurisdiction needed to be settled. Pet. for Writ of Cert. at 18, *United States v. Lara*, 541 U.S. 193 (July 22, 2003) (No.

03-107). Faced with an irreconcilable conflict between the Eighth and Ninth Circuits, the government argued: "Because the vast majority of the Nation's Indian country lies within the Eighth and Ninth Circuits, together with the Tenth Circuit, there is particular reason for the Court to resolve the conflict in this case without awaiting additional cases from other circuits." *Id.* at 20. As it had done before, this Court granted certiorari in *Lara* to resolve an important question of Indian law that involved decisions from only the Eighth and Ninth Circuits. *See, e.g., Duro v. Reina*, 495 U.S. 676 (1990) (resolving split in Eighth and Ninth Circuits), and *United States v. Wheeler*, 435 U.S. 313 (1976) (same).

Here, the split is even more pronounced. In addition to the Eighth and Ninth Circuits, the Tenth Circuit has issued an opinion on this issue, completing the government's list of circuits that contain "the vast majority of the Nation's Indian country." Pet. for Writ of Cert. at 20, *United States v. Lara*, 541 U.S. 193 (July 22, 2003) (No. 03-107). State courts of last resort have also reached divergent opinions as to the utility of uncounseled tribal convictions in later prosecutions. That these states lie in circuits that have reached contrary decisions makes the split even more troublesome.

A review of cases dealing with Indian law confirms that the Eighth, Ninth, and Tenth Circuits are the courts that deal with the majority of Native American cases and that a split between these courts on an Indian law question is sufficient to justify Supreme Court intervention. For example, ICRA, 25 U.S.C. § 1302, was cited or discussed most often by these three courts. *See* 25 U.S.C. § 1302 (2011) (Shepard's Report, LEXIS, through PL 112-62). The Eighth Circuit has discussed ICRA in 85 cases; the Ninth in 124 cases; and the Tenth in 58 cases. The next closest Circuit is the Second Circuit, which has reviewed ICRA in just 18 cases.

Similarly, data tracking litigation of Native American cases and issues in state and federal courts, including the U.S. Courts of Appeal reported 340 cases out of the Courts of Appeal, with 234 of those cases being from the Eighth, Ninth, or Tenth Circuits. *See* National Indian Law Library, Indian Law Bulletins, (2006–2011), *available at* http://www.narf.org/nill/bulletins/ilb.htm#cta.

Additionally, the Census Bureau estimated in 1999 that approximately 1,678,544 Native Americans resided in the area that the Eighth, Ninth, and Tenth Circuits encompass. U.S. Census Bureau, States Ranked by American Indian and Alaska Native American Population, July 1, 1999 (Aug. 30, 2000), *available at* http://www.census.gov/popest/archives/1990s/ST-99-46.txt. All other circuits combined had only 718,792 Native Americans. *Id.* The Census Bureau has more recently produced a map showing the location of American Indians and Alaska Natives in the United States based on the results of the 2010 Census Data. U.S. Census Bureau, The American Indians and Alaska Natives Wall Map (2010), *available at* http://www.census.gov/geo/www/maps/aian2010_wall_map/aian_wall_ map.html. This map shows that most of the American Indian Tribes are located west of the Mississippi, and that the Eighth, Ninth, and Tenth Circuits cover more Indian Territory than any other Circuit. Consequently, these circuits face more issues of tribal law, more prosecutions arising under § 117, and more defendants with tribal convictions. This split is ripe for Supreme Court review.

III. The question presented in this case has ramifications for all Indians charged in state or federal court.

In the face of this circuit split, this Court is the last resort for Indian defendants who see the injustices of tribal court repeated in state and federal courts when their uncounseled convictions are used against them. Failure to review the Tenth Circuit's decision will allow the government to exploit—and magnify—the injustice of uncounseled tribal convictions by relying

on them again in state or federal court. It is one thing to allow tribes to prosecute and punish crimes according to their own procedures. It is quite another to allow federal courts to perpetuate any injustice arising out of these constitutionally inadequate proceedings. As it stands, the Constitution is applied differently to Indian defendants who have uncounseled tribal convictions, depending on what state or circuit they are in. The Supreme Court should grant certiorari to make sure their rights are protected consistently in all state and federal courts.

The government's continued use of § 117 shows the issue here is recurring and important, necessitating the Court's review. The government argued extensively below that 18 U.S.C. § 117 is an important piece of its effort to regulate violence on tribal land. Br. for the United States, *United States v. Shavanaux*, 647 F.3d 993, 2011 WL 1108784 at 11–14 (10th Cir. Dec. 23, 2010). In addition to *Cavanugh*, which is currently pending before this court, a quick internet search shows that the government continues to prosecute Native Americans throughout the western United States with violations of this statute occurring on reservations, using tribal court convictions. *See, e.g., United States v. Romero*, 1:10-CR-486 (D. Colo 2011); *United States v. Left Hand*, 1:10-CR-67 (D. Mont. 2011); *United States v. Shoulder Blade*, 1:09-CR-15 (D. Mont. 2009); *United States v. Thickstun*, CR 08-449 (D. Or. 2011); *United States v. Jack*, 2:11-mj-226 (D. Wa. 2011). A decision in Mr. Shavanaux's favor would properly protect Indians haled into state and federal court without undermining the government's ability to enforce § 117 because it is still able to use any prior conviction—state, federal, or tribal—where counsel had been provided. *See, e.g., United States v. Ferguson*, 0:11-CR-306 (D. Minn. 2011) (using prior state convictions to establish violation of § 117). To the extent the government wants to regulate violence on tribal land by haling Indians to federal court, this Court must ensure their rights are protected in the federal tribunal.

Furthermore, the use of uncounseled convictions extends beyond § 117. As noted above, this question will arise any time the government offers an uncounseled tribal conviction at trial. *See United States v. Ant*, 882 F.2d 1389, 1396 (9th Cir. 1989) (addressing use of tribal conviction as evidence that defendant committed the charged offense). Indians also face enhanced charges under recidivist statutes in state court based on their prior tribal convictions. *See, e.g., State v. Watchman*, 809 P.2d 641 (N.M. App. 1991); *State v. Spotted Eagle*, 71 P.3d 1239 (Mont. 2003); Kevin Washburn, *Tribal Courts and Federal Sentencing*, 36 Ariz. St. L.J. 403, 438 (2004) (citing states that "allow prior tribal court convictions to serve as predicate convictions to enhance charges for subsequent state prosecutions for driving under the influence of alcohol").

The question presented here also impacts the extent to which uncounseled tribal convictions can be used at sentencing. The Supreme Court has expanded *Burgett* to the sentencing context. *United States v. Tucker*, 404 U.S. 443 (1971) (applying *Burgett* to sentencing). Thus, *Burgett* is implicated any time the government seeks to increase a defendant's sentence by offering an uncounseled tribal conviction that was punished with jail. *See, e.g.*, USSG §4A1.2(I) (stating that tribal convictions, though not countable under the U.S. Sentencing Guidelines, may support an upward departure). Federal sentencing law directs sentencing courts to "avoid unwarranted sentence disparities among defendants *with similar records* who have been found guilty of similar conduct." 18 U.S.C. § 3553(a) (emphasis added). The circuit split makes it impossible for district courts to comply with this mandate—uncounseled tribal convictions in the Eighth and Tenth Circuits always may be used against a defendant while uncounseled tribal convictions that result in jail in the Ninth Circuit may not. Indian defendants with tribal convictions will be treated differently, depending on which circuit they are charged in. The Supreme Court must grant certiorari to resolve this disagreement.

IV. This case presents a good vehicle to resolve this issue.

This case is a good vehicle to decide whether the Constitution precludes the use of uncounseled tribal convictions to establish an element in a subsequent prosecution. The facts are undisputed, and Mr. Shavanaux raised the issue below. The Tenth Circuit's ruling that *Burgett* did not apply to tribal convictions was dispositive of the case. *Shavanaux*, 647 F.3d at 998 n.5. Because the case involves the use of an uncounseled misdemeanor that received a jail sentence to establish an element of a recidivist statute, it falls clearly within the scope of *Burgett*. *Cf Lewis v. United States*, 445 U.S. 55 (1980) (distinguishing *Burgett* under the felon in possession statute); *Nichols v. United States*, 511 U.S. 738 (1994) (distinguishing *Burgett* for a misdemeanor conviction that received no jail sentence). The Tenth Circuit's consideration of this issue under the Sixth Amendment, Due Process, and Equal Protection addresses every aspect of the Constitution that bear on the question presented. By granting certiorari in this case, the Court will have before it the various legal theories under which this issue can be decided.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

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Assistant Federal Public Defender
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2011

ADAM SHAVANAUX, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

AFFIDAVIT OF SERVICE

Benjamin C. McMurray, Assistant Federal Public Defender for the District of Utah, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and the accompanying Motion for Leave to Proceed *In Forma Pauperis* were served on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid or by delivery to a third party commercial carrier for delivery within 3 calendar days, and addressed to:

Donald B. Verrilli, Jr.
Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave, N.W.
Washington, D.C. 20530-001

It is further attested that the envelope was deposited with the United States Postal Service on December 7, 2011 and all parties required to be served have been served.

KATHRYN N. NESTER
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SCOTT KEITH WILSON
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STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

Subscribed and sworn to before me this 7th day of December, 2011.

Lacey Sue Bagley-Ishihara
NOTARY PUBLIC - STATE OF UTAH
My Comm. Exp. 11/16/2014
Commission # 603019

Notary Public

My Commission Expires:

11/16/14

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2011

ADAM SHAVANAUX, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for Writ of Certiorari to the
United States Court of Appeals
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AFFIDAVIT OF MAILING

Benjamin C. McMurray, Assistant Federal Public Defender for the District of Utah, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and the accompanying Motion for Leave to Proceed *In Forma Pauperis* were served on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid or by delivery to a third party commercial carrier for delivery within 3 calendar days, and addressed to:

Clerk of Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

It is further attested that the envelope was deposited with the United States Postal Service on December 7, 2011, and all parties required to be served have been served.

KATHRYN N. NESTER
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STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

Subscribed and sworn to before me this 7th day of December, 2011.

Lacey Sue Bagley-Ishihara
NOTARY PUBLIC - STATE OF UTAH
My Comm. Exp. 11/16/2014
Commission # 603019

Notary Public

My Commission Expires:

APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

July 26, 2011

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff–Appellant,

v.

ADAM SHAVANAUX,

Defendant–Appellee.

No. 10-4178

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:10-CR-00234-TC-1)

Richard A. Friedman, Department of Justice, Appellate Section, Criminal Division, Washington, D.C. (Charlie Christensen and Trina A. Higgins, Office of the United States Attorney, District of Utah, Salt Lake City, Utah; Lanny A. Breuer and Gregory D. Andres, Department of Justice, Criminal Division, Washington, DC, with him on the briefs), for the Plaintiff-Appellant.

Benjamin C. McMurray (Steven B. Killpack and Scott Keith Wilson with him on the briefs), Office of the Federal Public Defender, District of Utah, Salt Lake City, Utah, for the Defendant-Appellee.

Before **KELLY**, **ANDERSON**, and **LUCERO**, Circuit Judges.

LUCERO, Circuit Judge.

We consider the government's appeal from the dismissal of Adam Shavanaux's indictment under 18 U.S.C. § 117(a) for domestic assault by a habitual offender. Exercising jurisdiction under 18 U.S.C. § 3731 and 28 U.S.C. § 1291, we reverse and remand for proceedings consistent with this opinion.

I

Shavanaux is a member of the Ute Indian Tribe and resides on the Uintah and Ouray Reservations within Utah. In 2010, Shavanaux was indicted under 18 U.S.C. § 117 for assaulting his domestic partner after having been convicted of assaulting a domestic partner on two prior occasions. 18 U.S.C. § 117(a) provides that:

> (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 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 [domestic violence and stalking offenses prescribed by 18 U.S.C. §§ 2261 (interstate domestic violence), 2261A (interstate stalking), 2262 (interstate violation of a protection order)],
>
> shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.

Shavanaux's two prior convictions were in Ute tribal court. In neither of the tribal prosecutions did Shavanaux have the right to appointed counsel provided at the Tribe's

expense. Ute Indian R. Crim. P. 3(1)(b).[1] Shavanaux established by affidavits filed in the federal proceedings that he was not represented by counsel and could not afford an attorney in his previous tribal court prosecutions. He did, however, exercise his right to be represented by a lay advocate at his own expense.

Shavanaux filed a motion to dismiss the indictment asserting that the Sixth Amendment and the Due Process Clause of the Fifth Amendment of the United States Constitution forbid reliance on his uncounseled tribal misdemeanor convictions to support a charge under 18 U.S.C. § 117(a). The district court determined that the Constitution does not apply to tribal court prosecutions and therefore Shavanaux did not have Sixth Amendment or due process rights to appointed counsel in tribal court. It found that Shavanaux's tribal prosecutions complied with the applicable provisions of the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 ("ICRA"). Accordingly, the district court concluded that "Shavanaux's two convictions for aggravated assault do not violate either the Indian Civil Rights Act or the United States Constitution."

However, the district court ruled that use of those otherwise-valid tribal court convictions in a § 117(a) prosecution would violate Shavanaux's Sixth Amendment right to counsel.[2]

---

[1] Available at http://www.narf.org/nill/Codes/uteuocode/utebodyt12.htm.

[2] The district court relied upon another district court that reached the same conclusion. United States v. Cavanaugh, 680 F. Supp. 2d 1062 (D.N.D. 2009), rev'd No. 10-1154, 2011 WL 2623314 (8th Cir. July 8, 2011).

II

Dismissal of the indictment was predicated on the grounds that a prosecution under § 117(a) would violate the Sixth Amendment. United States v. Shavanaux, 2010 WL 4038839 at *1 (D. Utah, Oct. 14, 2010) (Slip. Op.) Shavanaux argues that the use of his tribal convictions would also violate due process and the equal protection component of the Fifth Amendment's Due Process Clause.[3] "We review challenges to the constitutionality of a statute de novo." United States v. Dorris, 236 F.3d 582, 584 (10th Cir. 2000).

In resolving whether prosecution under § 117(a) would violate the Sixth Amendment, it is first necessary to consider the relationship between Indian tribes and the United States. "The Bill of Rights does not apply to Indian tribes." Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 337 (2008) (citing Talton v. Mayes, 163 U.S. 376, 382-85 (1896)); see also Nevada v. Hicks, 533 U.S. 353, 383-84 (2001); Duro v. Reina, 495 U.S. 676, 693 (1990), superseded in other respects by statute, 25 U.S.C. § 1301.[4] This is so because:

[3] We treat Shavanaux's arguments as alternative bases for affirming the district court's dismissal of the indictment. See United Fire & Cas. Co. v. Boulder Plaza Residential, LLC, 633 F.3d 951, 958 (10th Cir. 2011) (noting that an "appellee may, without filing a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court." (quotation omitted)).

[4] We must, of course, decline Shavanaux's initiation to overrule or ignore Talton and its progeny.

> the Indian nations ha[ve] always been considered as distinct, independent political communities. . . . The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.

Talton, 163 U.S. at 383 (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832)). Although the Court has moved away from Worcester's "platonic notions of Indian sovereignty," McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 172 (1973), tribes "still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a result of their dependent status." United States v. Wheeler, 435 U.S. 313, 323 (1978), superseded in other respects by statute, 25 U.S.C. §§ 1301-1303. One of the attributes of sovereignty which Indian tribes possess is the "power to prescribe and enforce internal criminal laws." Wheeler. at 326.

The Talton Court acknowledged as much and reasoned "[i]t follows that, as the powers of local self-government enjoyed by the Cherokee Nation existed prior to the Constitution, they are not operated upon by the [F]ifth [A]mendment, which . . . had for its sole object to control the powers conferred by the Constitution on the national government." 163 U.S. at 384. Any appeal to the Fourteenth Amendment is similarly unavailing because, by its own terms, it applies only to the states. See U.S. Const. Amend. XIV. Thus, rather than being subject to the United States Constitution, the tribal exercise of inherent power is constrained only by "the supreme legislative authority of the United States." Talton, 163 U.S. at 384; see also Santa Clara Pueblo v. Martinez, 436

U.S. 49, 56-57 (1978) (Congress has plenary power over Indian affairs and exercised this power by passing ICRA).

Because the Bill of Rights does not constrain Indian tribes, Shavanaux's prior uncounseled tribal convictions could not violate the Sixth Amendment. Although 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.

In reaching this conclusion, we recognize we are at odds with the Ninth Circuit. In United States v. Ant, 882 F.2d 1389, 1393 (9th Cir. 1989), the court held that an uncounseled tribal conviction was "constitutionally infirm." Relying upon Burgett v. Texas, 389 U.S. 109, 115 (1967), the Ninth Circuit determined that the admission of such a prior conviction was "inherently prejudicial" and thus unconstitutional. Ant, 882 F.2d at 1393, 1396.

Ant overlooks the Talton line of cases. We therefore disagree with Ant's threshold determination that an uncounseled tribal conviction is constitutionally infirm. Shavanaux's rights under the Sixth Amendment were not violated by the tribal prosecutions. For this reason Burgett, 389 U.S. at 115, and United States v. Custis, 511 U.S. 485 (1994), are inapposite. Use of tribal convictions in a subsequent prosecution cannot violate "anew" the Sixth Amendment, see Burgett, 389 U.S. at 115, because the

Sixth Amendment was never violated in the first instance.[5]

We reiterate that because the Bill of Rights does not apply to Indian tribes, tribal convictions cannot violate the Sixth Amendment. Shavanaux's convictions complied with ICRA's right to counsel provision, 25 U.S.C. § 1302(a)(6). Thus, use of Shavanaux's prior convictions in a prosecution under § 117(a) would not violate the Sixth Amendment, anew or otherwise.

III

A

The next issue is whether under the Due Process Clause of the Fifth Amendment, prior convictions which were obtained through procedures which did not comply with, but also did not violate, the Constitution may be introduced in subsequent prosecutions in federal court.

Again, our analysis turns on the nature of tribal sovereignty. "The condition of the Indians in relation to the United States is perhaps unlike that of any other [relationship] in existence." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831). Indian tribes are neither states of the union, nor foreign states exercising perfect sovereignty. Id. at 16-17. They are instead "domestic dependent nations," id. at 17, which, though enjoying the protection of the United States, continue to exercise "limited sovereignty." Wheeler, 435

[5] For the same reason we find the Eighth Circuit's analysis of Sixth Amendment doctrine in United Sates v. Cavanaugh, No. 10-1154, 2011 WL 2623314 (8th Cir. July 8, 2011), unnecessary.

U.S. at 322; see also Worcester, 31 U.S. at 561.

Although Indian tribes are not foreign states, for the purposes of our analysis they share some important characteristics with foreign states insofar as tribes are sovereigns to whom the Bill of Rights does not apply. See supra, Part II. Indeed, in the due process context, federal courts have analogized Indian tribes to foreign states in considering whether to recognize the civil judgments of tribal courts. Courts analyze the recognition of tribal judgment under principles of comity derived from foreign relations law. See Wilson v. Marchington, 127 F.3d 805, 810 (9th Cir. 1997); see also Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15 (1987) (extending comity to tribal courts); MacArthur v. San Juan County, 309 F.3d 1216, 1225 (10th Cir. 2002) (citing Wilson); Burrell v. Armijo, 456 F.3d 1159, 1168 (10th Cir. 2006) (citing Wilson); State v. Spotted Eagle, 71 P.3d 1239, 1245-1246 (Mont. 2003) (analogizing tribes to foreign sovereigns and applying principles of comity).

As the Wilson court observed:

> Comity does not require that a tribe utilize judicial procedures identical to those used in the United States Courts. Foreign-law notions are not per se disharmonious with due process by reason of their divergence from the common-law notions of procedure. Indeed, Hilton rejected challenges to a judgment based on lack of adequate cross-examination and unsworn testimony. Federal courts must also be careful to respect tribal jurisprudence along with the special customs and practical limitations of tribal court systems. Extending comity to tribal judgments is not an invitation for the federal courts to exercise unnecessary judicial paternalism in derogation of tribal self-governance.

Id. at 810 (citing Hilton v. Guyot, 159 U.S. 113, 205 (1895)) (other citations and

quotations omitted).

In assessing whether to recognize tribal judgments under principles of comity, both this court and the Ninth Circuit have turned to the criteria enumerated in the Restatement (Third) of Foreign Relations § 482 (1987) ("the Restatement"). See Burrell, 456 F.3d at 1167; MacArthur, 309 F.3d at 1225; Wilson, 127 F.3d at 810-11. The Restatement lists two grounds upon which a court in the United States must refuse to recognize the judgment of a foreign court: (1) "the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law"; or (2) "the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 421." Restatement (Third) of Foreign Relations, § 482(1).

We find that neither of the Restatement's two mandatory factors for rejecting a foreign judgment has been met in this case. First, Shavanaux's tribal convictions were obtained through "procedures compatible with due process of law." Second, Shavanaux does not contest that the tribal court properly exercised jurisdiction over him.

Our determination that the Ute tribal court procedures are "compatible with due process of law" flows from the compliance of the Ute courts with the requirements of ICRA. United States v. Shavanaux, 2010 WL 4038839 at *1 (D. Utah, Oct. 14, 2010)

(Slip. Op.).[6] Even though the "Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes," Hicks, 533 U.S. at 383-84, ICRA does apply a number of identical or analogous safeguards to Indian tribes, see 25 U.S.C. § 1302. However, ICRA does not require Indian tribes to provide counsel at tribal expense to criminal defendants. ICRA provides that a defendant may "at his own expense . . . have the assistance of counsel for his defense." 25 U.S.C. § 1302(a)(6) (emphasis added). Shavanaux does not claim that his tribal convictions failed to comply with the requirements of ICRA.

This reasoning is consistent with the Montana Supreme Court's conclusion in State v. Spotted Eagle, 71 P.3d 1239, 1245-1246 (Mont. 2003). In Spotted Eagle, the court held that, under principles of comity, Montana state courts must recognize uncounseled tribal convictions which complied with ICRA. The court noted that "[c]omity requires that a court give full effect to the valid judgments of a foreign jurisdiction according to that sovereign's laws, not the Sixth Amendment standard that applied to proceedings [in the court where recognition is sought]."

[6] Although Shavanaux does not contend that his tribal convictions violated ICRA, he does cite to the "problems associated with tribal courts" and the discussion of tribal courts in Cavanaugh, 680 F. Supp. 2d at 1072-73. We reject such generalizations regarding Indian tribes and their courts because, as Worcester counsels us, Indian tribes are "distinct, independent political communities." 31 U.S. at 559 (1832) (emphasis added). Each tribe's judicial system must be assessed on its own merits. Cf. United States v. Swift Hawk, 125 F. Supp. 2d 384, 388 (D.S.D. 2000) (emphasizing the differences in tribal court proceedings among tribes).

The court also observed that "the practice of failing to fully recognize convictions from individual tribal courts also risks imposing inappropriately sweeping standards upon diverse tribal governments, institutions and cultures," which undermines ICRA's objective of allowing tribes to adopt "their own tribal court[s] and criminal justice system[s]." Id. at 1245 (citation omitted). We find this analysis compelling.

We hold that tribal convictions obtained in compliance with ICRA are necessarily compatible with due process of law. Unless a tribal conviction has been vacated through habeas proceedings or on other grounds, it constitutes a valid conviction for the purposes of 18 U.S.C. § 117(a) and its use does not violate a defendant's right to due process in a federal prosecution.[7]

B

We further note in considering the due process implications of recognizing tribal convictions that federal courts have repeatedly recognized foreign convictions and accepted evidence obtained overseas by foreign law enforcement through means that

[7] The treatment of tribal convictions by the United States Sentencing Guidelines § 4A1.2(i) is irrelevant to our due process analysis. Congress' decision to exclude tribal convictions from criminal history calculation while specifically including them in the recidivist statute of 18 U.S.C. § 117 represents a policy choice, which does not bear upon the constitutional issues in this case. This exercise of Congress' "plenary power[]" over Indian affairs is consonant with the Constitution. See United States v. Lara, 541 U.S. 193, 200-04 (2004) (discussing the bounds of Congress' authority in Indian affairs).

deviate from our constitutional protections.[8]

The most analogous situation to the case before us is the use of a foreign conviction as a predicate offense under federal law. In determining whether the use of a prior Japanese conviction as a predicate offense violated due process, the Third Circuit assessed whether such use "comport[ed] with our notions of fundamental fairness." United States v. Small, 333 F.3d 425, 428 (2003), rev'd on other grounds by Small v. United States, 544 U.S. 385 (2005). The Third Circuit held that a prior conviction which met the Restatement criteria did not violate the Due Process Clause. Small, 333 F.3d at 428.

Courts have also permitted the introduction into evidence of prior convictions rendered by courts sitting without juries. Despite the failure of the German justice system to provide a right to a jury trial, the Fourth Circuit held that a German conviction was admissible absent a showing that the "German legal system lacks the procedural protections necessary for a fundamental fairness." United States v. Wilson, 556 F.2d 1177, 1178 (4th Cir. 1977). In United States v. Kole, 164 F.3d 164, 172 (3rd Cir. 1998), the Third Circuit also concluded that the admission into evidence of a non-jury criminal conviction from the Philippines did not violate due process.

[8] Shavanaux contends that that "[i]t is unthinkable that the government would be allowed to introduce evidence of a French or Mexican conviction without first proving that basic protections were afforded the defendant, most importantly Due Process and the right to effective counsel." Yet, as we explain, courts have repeatedly permitted the introduction of foreign convictions. Further, we limit the introduction of tribal convictions to valid convictions which meet the due process requirements of ICRA.

Similarly, this court and others have repeatedly permitted the use at trial of statements made to foreign law enforcement, even though Miranda warnings were not given, absent substantial participation by agents of the United States. See United States v. Mundt, 508 F.2d 904, 906 (10th Cir. 1974); United States v. Welch, 455 F.2d 211, 213 (2d Cir. 1972); United States v. Chavarria, 443 F.2d 904, 905 (9th Cir. 1971); United States v. Nagelberg, 434 F.2d 585, 588 n.1 (2d Cir. 1970); United States v. Conway, 1995 WL 339403, at *3 (10th Cir. June 8, 1995) (unpublished).

The Ninth and Fifth Circuits have permitted the use of evidence obtained overseas by foreign law enforcement, even though the searches and seizures producing that evidence would have violated the Fourth Amendment had they been conducted by United States agents. "The Fourth Amendment exclusionary rule does not apply to foreign searches by foreign officials in enforcement of foreign law, even if those from whom evidence is seized are American citizens." United States v. Rose, 570 F.2d 1358, 1361-62 (9th Cir. 1978); see also United States v. Hawkins, 661 F.2d 436, 455-56 (5th Cir. 1981) ("[T]he general rule is that the Fourth Amendment does not apply to arrests and searches made by foreign authorities in their own country and in enforcement of foreign law.").

In considering the admission of evidence obtained through a search by foreign law enforcement, we have observed that:

> [t]he mere fact that the law of the foreign state differs from the law of the state in which recognition is sought is not enough to make the foreign law inapplicable. . . . Indeed, this Court is reminded of the oft-paraphrased

> advice of St. Ambrose, Catholic bishop of Milan in the fourth century, to St. Augustine. "When you are at Rome, live in the Roman style; when you are elsewhere, live as they do elsewhere."

Brennan v. Univ. of Kan., 451 F.2d 1287, 1288 (10th Cir. 1971). This logic pertains to the instant case as well. Although Shavanaux's tribal convictions were obtained through procedures which did not comply with the Constitution, these convictions did not violate the Constitution. Nor does their subsequent use in federal court.

C

We conclude that under principles of comity the use of Shavanaux's prior tribal convictions in a subsequent federal prosecution does not violate the Due Process Clause of the Fifth Amendment.

IV

Shavanaux also argues that § 117 violates the equal protection component of the Due Process Clause. See Schweiker v. Wilson, 450 U.S. 221, 226 n. 6 (1981) ("[T]he Fifth Amendment imposes on the Federal Government the same standard required of state legislation by the Equal Protection Clause of the Fourteenth Amendment."). Shavanaux argues that § 117 singles out Indians for prosecution on the basis of prior uncounseled tribal convictions. Because such disparate treatment "falls along racial lines," Shavanaux claims the statute is unconstitutional.

This claim fails. "Indian" is not a racial classification, but a political one. Morton v. Mancari, 417 U.S. 535, 554, n.24 (1974).

> [F]ederal regulation of Indian affairs is not based upon impermissible

> classifications. Rather, such regulation is rooted in the unique status of Indians as a separate people with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a racial group consisting of Indians.

United States v. Antelope, 430 U.S. 641, 646 (1977) (quotation omitted).

Shavanaux is not merely Native American by blood, but is also Indian by virtue of his membership in the Ute tribe. As in Antelope, 430 U.S. at 646, Shavanaux was not subjected to differential treatment in federal court because of his ancestry, but because of his voluntary association with an Indian tribe. Through his tribal membership and residence in Indian country, Shavanaux chose to submit himself to tribal jurisdiction and the criminal procedures of the Ute tribe.

We review for a rational basis "legislation that singles out Indians for particular and special treatment." Mancari, 417 U.S. 535, 554-55 (1974). "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." Id. at 555.[9] "Equal protection provides that a statute shall not treat similarly situated persons differently unless the dissimilar treatment is rationally related to a legitimate legislative objective." United States v. Weed, 389 F.3d 1060, 1071 (10th Cir. 2004) (quotation omitted).

[9] Congress' "unique obligation" flows from the relationship between Indians and the United States, which "resembles that of a ward to his guardian." Cherokee Nation, 30 U.S. at 17. On the basis of Congress's obligations to the Indians, the Supreme Court has upheld federal jurisdiction over crimes by reservation Indians. United States v. Kagama, 118 U.S. 375, 383-84 (1886).

Protecting Indians from domestic violence is unquestionably a legitimate government interest. Congress has found that Indian women are subject to physical and sexual abuse at higher rates than other groups in the United States. See 42 U.S.C. 3796gg-10 (statutory note). The government also cites to evidence that domestic abusers are prone to recidivate. A criminal statute which targets recidivist abusers for enhanced punishment is rationally tied to Congress' legitimate interest and indeed obligation to protect Indians.

In conclusion, to the extent Indians are subject to disparate treatment under § 117, Congress has a rational basis for doing so.

V

We **REVERSE** the order dismissing the indictment and **REMAND** for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ADAM SHAVANAUX, Defendant.	ORDER AND MEMORANDUM DECISION Case No. 2:10 CR 234 TC Judge Tena Campbell

Adam Shavanaux has moved to dismiss the indictment against him. The indictment charges Mr. Shavanaux with one count of violation of 18 U.S.C. § 117(a) which makes it a felony offense for a person who has had two or more prior domestic assault convictions to commit a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian Country. Because Mr. Shavanaux was not represented by an attorney when he was convicted of the two earlier domestic assault charges, use of these convictions in this federal prosecution would violate Mr. Shavanaux's Sixth Amendment right to counsel. Accordingly, the court GRANTS the motion to dismiss.

Background

The government intends to offer two aggravated assault convictions sustained by Mr. Shavanaux, an enrolled member of the Ute Tribe, in Ute Tribal Court. The first conviction was in 2006, the second in 2008. At the time of each conviction, Mr. Shavanaux was indigent and could not hire an attorney. Mr. Shavanaux served time in jail for each conviction.

Analysis

Apparently only one other district court has been faced with the question whether a prosecution under 18 U.S.C. § 117(a) which relies on two prior uncounseled tribal court convictions violates the Sixth Amendment. The court in United States v. Cavanaugh, Jr., 680 F. Supp. 2d 1062 (D.N.D. 2009), held that it did. In a thoughtful, thorough opinion, the Cavanaugh court noted that "[t]he issue before the Court is not to question the validity of the tribal court proceedings or question the tribal justice system, but instead to evaluate whether the convictions satisfy constitutional requirements for use in a federal prosecution in federal court." Id. at 1075.

This court agrees with the above statement. The government argues, correctly, that tribal court proceedings are not governed by the United States Constitution but by the Indian Civil Rights Act or tribal law. And although Section 202 of the Indian Civil Rights Act of 1968 forbids an Indian tribe from denying a defendant in a criminal proceeding the right "at his own expense" to counsel, 25 U.S.C. § 1302(6), there is no right to appointed counsel for an indigent defendant in tribal court.

For that reason, Mr. Shavanaux's two convictions for aggravated assault do not violate either the Indian Civil Rights Act or the United States Constitution. As the court in Cavanaugh pointed out:

> The fact that Congress has left the tribes with exclusive jurisdiction over misdemeanor offenses committed by one Indian against another Indian in Indian country is evidence that it presumes tribal courts exist and are competent to prosecute misdemeanors. On the other hand, felony offenses by Indians against Indians are handled exclusively by the United States. Thus, Congress has created a scheme, which, in part, ensures that an Indian charged with a

> felony is afforded all of the protections of the United States Constitution.

680 F. Supp. 2d at 1074 (internal footnote omitted).

But the issue here is more complex: "Significant constitutional issues tend to arise when tribal court convictions cross over into the federal judicial system." Id. at 1073. The decision in Custis v. United States, 511 U.S. 485 (1994), supports the conclusion that Mr. Shavanaux's Sixth Amendment right to counsel would be violated if this prosecution were to proceed. The Custis Court held that a defendant in a federal sentencing proceeding has no right to collaterally attack the validity of previous state convictions used to enhance his sentence under the Armed Career Criminal Act "with the sole exception of convictions obtained in violation of the right to counsel[.]" Id. at 487. The Court analyzed its Sixth Amendment precedent, stressing the "unique" nature of the right to counsel. The court repeated its "oft" stated view that "'[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.'" Id. at 494-95 (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)). The Court concluded that its long-standing precedent had "a theme that failure to appoint counsel for an indigent defendant was a unique constitutional defect." Id. at 496.

Based on the above, the court grants Mr. Shavanaux's motion to dismiss the indictment (Docket No. 20).

SO ORDERED this 13th day of October, 2010.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
Chief Judge

FILED
United States Court of Appeals
Tenth Circuit

September 8, 2011

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff–Appellant, v. ADAM SHAVANAUX, Defendant–Appellee.	No. 10-4178

ORDER

Before **KELLY**, **ANDERSON**, and **LUCERO**, Circuit Judges.

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

Effective: January 5, 2006

United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 7. Assault
→→ **§ 117. Domestic assault by an habitual offender** [FN1]

(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 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,

shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.

(b) **Domestic assault defined.**—In this section, the term "domestic assault" means an assault committed by a current or former spouse, parent, child, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, child, or guardian, or by a person similarly situated to a spouse, parent, child, or guardian of the victim.

CREDIT(S)

(Added Pub.L. 109-162, Title IX, § 909, Jan. 5, 2006, 119 Stat. 3084.)

[FN1] Section was enacted without corresponding amendment to analysis.

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2006 Acts. House Report No. 109-233, see 2005 U.S. Code Cong. and Adm. News, p. 1636.

References in Text

Chapter 110A, referred to in subsec. (a)(2), is Domestic Violence and Stalking, 18 U.S.C.A. § 2261 et seq.

RESEARCH REFERENCES

ALR Library

115 ALR 1263, Criminal Offense of Bribery as Affected by Lack of Legal Qualification of Person Assuming or Alleged to be an Officer.

Encyclopedias

27 Am. Jur. Trials 1, Representing the Mentally Disabled Criminal Defendant.

Am. Jur. 2d Assault and Battery § 14, Federal Law.

Forms

5 West's Federal Forms § 7423, Guilty Plea Procedure--Outline.

NOTES OF DECISIONS

Constitutionality 1-3
Constitutionality - Indian Commerce Clause 2
Constitutionality - Right to counsel 3
Indian Commerce Clause, constitutionality 2
Indictment 4
Right to counsel, constitutionality 3

1. Constitutionality--Generally

Congress did not exceed its power under the Indian Commerce Clause in enacting the statute making it a federal crime to commit a domestic assault within Indian country if the defendant had at least two prior final convictions 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. U.S. v. Cavanaugh, D.N.D.2009, 680 F.Supp.2d 1062, reversed 643 F.3d 592, rehearing and rehearing en banc denied. Commerce ⊂⊃ 6; Commerce ⊂⊃ 82.6; Indians ⊂⊃ 261

2. ---- Indian Commerce Clause, constitutionality

Congress did not exceed its power under the Indian Commerce Clause in enacting the statute making it a federal crime to commit a domestic assault within Indian country if the defendant had at least two prior final convictions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal juris-

diction, any assault, sexual abuse, or serious violent felony against a spouse or intimate partner. U.S. v. Cavanaugh, D.N.D.2009, 680 F.Supp.2d 1062, reversed 643 F.3d 592, rehearing and rehearing en banc denied. Commerce ⚿ 6; Commerce ⚿ 82.6; Indians ⚿ 261

3. --- Right to counsel, constitutionality

In the prosecution of the defendant under the statute making it a federal crime to commit a domestic assault within Indian country if the defendant had at least two prior final convictions 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, the use of the defendant's prior tribal court convictions in cases in which there was no right to court-appointed counsel and the defendant was not represented by counsel to establish the prior-conviction element of the offense violated the defendant's Sixth Amendment right to counsel and his right to due process. U.S. v. Cavanaugh, D.N.D.2009, 680 F.Supp.2d 1062, reversed 643 F.3d 592, rehearing and rehearing en banc denied. Constitutional Law ⚿ 4669; Indians ⚿ 261

4. Indictment

Indictment charging defendant with domestic assault within Indian country following at least two final convictions for offenses that would be, if subject to Federal jurisdiction, assault, sexual abuse, or serious violent felony against a spouse or intimate partner was sufficiently clear to allow defendant to prepare a defense and to plead double jeopardy to any future prosecution for the alleged domestic assault, and thus, indictment was sufficient; although indictment did not specify that alleged prior assault convictions were committed against a spouse or intimate partner, it specifically alleged defendant had at least two prior convictions, identified by court and date, for "domestic abuse" that would be, if subject to Federal jurisdiction, assault, sexual abuse, or serious violent felony. U.S. v. Cavanaugh, D.N.D.2009, 680 F.Supp.2d 1062, reversed 643 F.3d 592, rehearing and rehearing en banc denied. Indians ⚿ 303

18 U.S.C.A. § 117, 18 USCA § 117

Current through P.L. 112-44 (excluding P.L. 112-40 to 112-43) approved 10-21-11

END OF DOCUMENT

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United States Code Annotated Currentness
Constitution of the United States
Annotated
→ Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property (Refs & Annos)

→ Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<This amendment is further displayed in five separate documents according to subject matter,>

<see USCA Const Amend. V-Capital Crimes>

<see USCA Const Amend. V-Double Jeopardy>

<see USCA Const Amend. V-Self Incrimination>

<see USCA Const Amend. V-Due Process>

<see USCA Const Amend. V-Just Compensation>

→ Amendment V. Grand Jury Indictment for Capital Crimes

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; * * *

<For complete text of Amend. V, see USCA Const Amend. V-Full Text>

<This amendment is further displayed in four separate documents according to subject matter,>

Westlaw

United States Code Annotated Currentness
Constitution of the United States
Annotated
Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)

Amendment VI. Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VI. Jury trials for crimes, and procedural rights

<Notes of Decisions for this amendment are displayed in three separate documents. Notes of Decisions for subdivisions XXI through XXIX are contained in this document. For text of section, historical notes, references, and Notes of Decisions for subdivisions I to XX, see first document for Amendment VI. For Notes of Decisions for subdivisions XXX through XXXIII, see third document for Amend. VI.>

Amendment VI. Jury trials for crimes, and procedural rights

<Notes of Decisions for this amendment are displayed in three separate documents. Notes of Decisions for subdivisions XXX through XXXIII are contained in this document. For text of section, historical notes, references, and Notes of Decisions for subdivisions I to XX, see first document for Amendment VI. For Notes of Decisions for subdivisions XXI through XXIX, see second document for Amend. VI.>

END OF DOCUMENT

C
United States Code Annotated Currentness
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement (Refs & Annos)

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.