Case No. 21-2101

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

United States of America,

Plaintiff-Appellee,

v.

Quentin Veneno, Jr.,

Defendant-Appellant.

OPENING BRIEF

(Oral Argument Requested)

On Appeal from the United States District Court for
the District of New Mexico, case no. 1:18-cr-03984-KWR-1
The Honorable Judge Kea W. Riggs

Alan S. Mouritsen
PARSONS BEHLE & LATIMER
201 S. Main Street, Suite 1800
Salt Lake City, Utah 84111
Telephone: (801) 532-1234
ecf@parsonsbehle.com
amouritsen@parsonsbehle.com
Counsel for Defendant-Appellant

March 8, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF JURISDICTION

The jurisdiction of the United States District Court for the District of New Mexico arose out of 18 U.S.C. § 3231. The jurisdiction of the United States Court of Appeals for the Tenth Circuit is based on 28 U.S.C. § 1291. The district court's final judgment was entered on August 18, 2021. (*See* Addendum A; Vol. 1:505.) Veneno timely filed his notice of appeal on August 25, 2021. Vol. 1:513; Fed. R. App. P. 4(b)(1)(A).

PRIOR APPEALS

There are no prior or related appeals.

INTRODUCTION

At the heart of the Sixth Amendment's guarantee of a fair trial is the right to be tried publicly. Displaying the process by which persons are deprived of their life or liberty promotes public confidence in the criminal-justice system and protects each of us from overzealous or biased prosecutions. Over the two days that Quentin Veneno, Jr. was tried for three federal crimes, no one other than his attorney, the government's attorneys, the court, and court personnel could physically enter the courtroom in which he was being tried. Before closing Veneno's trial to the public, the district court was required to make findings on the record explaining its decision to

close the courtroom. It failed to do so, and that failure alone necessitates reversal.

After the government expressed concerns about the constitutionality of closing the courtroom, the district court belatedly tried to justify the closure. But even if preventing the spread of COVID-19 qualified as an overriding public interest, the district court came nowhere close to demonstrating that closing the courtroom to all outsiders was necessary to serve that interest. As pictures of the courtroom show, the court could have accommodated several members of the public, including members of Veneno's family, without sacrificing health-protective measures like social distancing.

In defending its closure of the courtroom, the district court emphasized that an audio feed and video feed of the proceedings were available to the public through the court's website. But that didn't fix the constitutional problem. For one thing, if the pandemic has taught us anything, it is that virtual interaction, especially one-way virtual interaction, is no substitute for the personal presence of other human beings.

In addition, for nearly two hours on the first morning of trial, the district court and the attorneys conducted *voir dire* of potential jurors. While

seventy pages of trial proceedings were transcribed, the only way for anyone *outside* the courtroom to get a sense of what was going on *inside* the courtroom was through whatever could be gleaned from an *audio stream* of the proceedings. No one could *see* what was going on because no video feed was available.

Then, when defense counsel challenged the absence of a video feed, the district court claimed that it did "not have the capability of a video feed." Vol. 4:134. Later that same day, however, the court backtracked, saying that it would make a video feed available "through Zoom," which would allow the public "to observe and listen to the trial." IV:138. The court never explained why a video feed of the first two hours of jury selection was not made available. On any understanding of an accused's right to a public trial, the district court's actions violated it. And because depriving a defendant like Veneno of his right to a public trial is a structural error, the jury's verdict must be reversed.

There are additional grounds for reversal.

The jury verdict should be reversed because Congress lacks constitutional authority to criminalize the conduct of Indians on tribal land.

Veneno's convictions on Counts 2 and 3 should be reversed because Veneno's tribal convictions for "Battery of a Household Member" under New Mexico law do not qualify as predicate convictions under 18 U.S.C. § 117(a). In determining whether Veneno had "prior convictions" under Federal, State, or Indian law for "any assault," a court must apply the categorical approach, not a circumstance-specific one. Under the categorical approach, a tribal-court conviction does not qualify as a predicate offense unless its elements fall entirely within the scope of the federal generic offense.

The federal generic offense of "assault" requires an attempt to inflict injury or reasonable apprehension of harm. The New Mexico statute under which Veneno was convicted, by contrast, is satisfied by the slightest offensive touching, even if no injury is intended and even if the victim does not experience a reasonable apprehension of harm. Because the statute under which Veneno was convicted is broader than the generic offense of assault, his convictions under § 117(a) must be reversed. The stipulation into which Veneno entered regarding his tribal-court convictions does not foreclose this Court's review because it was based on the district court's inaccurate statement of the law.

Veneno's convictions should also be reversed based on the admission of other-act evidence under Rule 404(b). That evidence served none of the purposes the government identified, and its probative value was far outweighed by its unfair prejudice.

STATEMENT OF THE ISSUES

First Issue

Did the district court violate Veneno's right to a public trial by completely closing the courtroom to the physical presence of anyone beyond the defendant, the attorneys, and court personnel? Did the district court's unexplained failure to provide a video feed of the first two hours of jury selection also violate Veneno's right to a public trial?

This issue was preserved. Vol. 4:133–42.

Second Issue

Were Veneno's convictions unconstitutionally procured because Congress lacks the constitutional authority to criminalize the conduct of Indians on tribal land?

This issue was not preserved.

Third Issue

Section 117(a) of Title 18 makes it a federal crime for any person to commit a domestic assault on tribal land if he has at least two prior convictions for a tribal-court offense that, if subject to federal jurisdiction, would constitute an assault, sexual abuse, or a serious violent felony against a spouse or intimate partner. Does this statute require a categorical match between the predicate tribal-court offense and the federal generic offense? If so, is the statute under which Veneno was convicted categorically broader than the generic offense of assault?

The issue of how the court should determine whether a prior conviction met the statutory criteria of § 117(a) was preserved. Vol. 1:239, 243; 3:109:2–6.

Fourth Issue

Did the district court abuse its discretion in admitting other-act evidence of Veneno physically assaulting the victim a few days before one of the charged offenses?

This issue was preserved. Vol. 1:243–47.

STATUTORY PROVISIONS

Relevant statutory provisions can be found at Addendum D.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

As part of the 2005 Violence Against Women and Department of Justice Reauthorization Act, Congress enacted 18 U.S.C. § 117(a), which makes it a federal crime for a person to "commit[] a domestic assault within . . . Indian country" if that person has been convicted "on at least 2 separate 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). If the assault results in "substantial bodily injury," the maximum punishment increases from five to ten years. 18 U.S.C. § 117(a).

Section 117 defines "domestic assault," in turn, as "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 cohabiting with or has cohabited 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." *Id.* § 117(b).

The government proffered three prior convictions as the "any-assault" predicate offenses under § 117(a). One was a 2014 federal-court conviction under § 117(a). Vol. 1:33. The other two were both entered in 2009 under New Mexico Statutes Annotated § 30-3-15. Vol. 1:33. The New Mexico statute makes it a misdemeanor to commit a "[b]attery against a household member," which the statute defines as "the unlawful, intentional touching or application of force to the person of a household member, when done in a rude, insolent or angry manner." N.M.S.A. § 30-3-15(A), (B).

The Major Crimes Act subjects Indians to federal trials for crimes committed on tribal lands. Under 18 U.S.C. § 1153, "[a]ny Indian who commits . . . a felony assault under section 113 . . . within the Indian country, shall be subject to the same law and penalties as all other persons." 18 U.S.C. § 1153(a). Section 113, in turn, states that any person who commits an assault "resulting in serious bodily injury" shall be punished "by a fine . . . or imprisonment for not more than ten years, or both." 18 U.S.C. § 113(a)(6).

II. RELEVANT FACTUAL BACKGROUND

According to trial testimony, Veneno, an enrolled member of the Jicarilla Apache Nation, started dating Shantana Howard, an enrolled member of the same tribe, in the summer of 2018. Vol. 3:238:17. They soon

moved in together. Vol. 3:238:20–24. On August 22, 2018, and again on November 2, 2018, Veneno physically assaulted Howard. Vol. 3:240–49.

III. PROCEDURAL BACKGROUND

A grand jury issued a superseding indictment on March 13, 2019, charging Veneno with three criminal counts. Vol. 1:33–34. First, Veneno was charged with domestic assault by a habitual offender under § 117(a) based on the August 22 assault. Second, he was charged with domestic assault by a habitual offender under § 117 based on the November 2 assault. Third, he was charged with assault resulting in serious bodily injury under §§ 1153 and 113(a)(6) based on the November 2 assault. The first and second counts listed three "prior convictions" as predicate offenses under § 117(a):

> 1 – Battery against a Household Member, Jicarilla Apache Nation, Rio Arriba County, CR2009-03724, July 2, 2009;
>
> 2 – Battery Against a Household Member, Jicarilla Apache Nation, Rio Arriba County, CR2009-03880, July 31, 2009; and
>
> 3 – Domestic Assault by a Habitual Offender in Indian Country, District of New Mexico, 13-CR-02989-001 MCA, March 18, 2014.

Vol. 1:33.

A. Prior Convictions as Predicate Offenses

Before trial, the government informed the district court that, to prove the predicate-offense requirement of § 117, the government planned to

introduce "certified copies of the judgments" reflecting Veneno's prior convictions. Vol. 1:132. The government later said that it would "introduce[e] defendant's tribal priors through one witness, and then his federal priors through another witness." Vol. 3:105:15–18.

In response to the government's proposed approach to Veneno's prior convictions, defense counsel argued that whether the prior convictions counted as predicate offenses under § 117(a) was "for the Judge and not the jury to decide." Vol. 1:242–43. Defense counsel made the same point in his objections to the government's jury instructions, stating that "Defendant's prior convictions should be properly considered by the Judge." Vol. 1:239. The government itself acknowledged that the defense was "challenging the whole issue" of whether the issue of "prior convictions" was a question for the jury. Vol. 3:109:2–7.

As trial approached, the question arose as to whether Veneno would stipulate to the prior convictions. The government insisted that Veneno's potential stipulation not only make clear that the tribal-court convictions were valid, but also that they qualified as a predicate offense "against a spouse or intimate partner as defined in . . . § 117." Vol. 3:155:7–10. Faced with that condition, defense counsel stated that he wasn't sure that his

"client would allow [him] to do that." Vol. 3:155:11–13. The district court responded: "All right. If not, then you open it up for them to go into that." Vol. 3:155:14–15. At that point, counsel relented: "We would rather not do that, so we'll defer and we'll stipulate to that." Vol. 3:155:16–17.

B. Rule 404(b) Evidence

In addition to the prior convictions, the government also sought permission to introduce evidence under Rule 404(b) that Veneno physically assaulted Jane Doe a few days before the assault that occurred on November 2. Vol. 1:135. (We'll call this the "Pre-November 2 Assault"). According to the government, the Pre-November 2 Assault would be introduced for the non-propensity purpose of showing "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Vol. 1:135.

In response, defense counsel argued that the government had not identified the purpose of this evidence with the requisite specificity. Vol. 1:244. In addition, defense counsel pointed out that evidence of the Pre-November 2 Assault "was unduly prejudicial and cumulative," and did not survive the Rule-403 balancing test. Vol. 1:249.

The court held that evidence of the Pre-November 2 Assault was admissible. According to the court, the evidence was admissible to prove that the victim had suffered "great bodily harm," one of the statutory elements, as well as to show "motive and lack of mistake." Vol. 3:161:8–18. The court also held that whatever prejudice might be associated with these "prior events" was "outweighed by the probative value for the material reasons set forth by the United States." Vol. 3:161:19–23.

C. Closing the Proceedings

Trial was continued several times based in part on the spread of the COVID-19 pandemic. *See, e.g.*, Vol. 1:159. In the lead-up to trial, the district court informed the parties that "this [wa]s going to be the first trial out since this pandemic began." Vol. 3:98:11–13. The court assured the parties that this was not being "taken lightly," and that the court had "spent months coming up with a detailed protocol about how the trial is going to be handled in order to make sure that all of the parties, all of the witnesses, all of the jurors, everyone involved, is safe." Vol. 3:98:14–18. The court explained that a courtroom had been "set up specifically according to the protocol." Vol. 3:98:19–22. The court explained, "[t]he jurors will be sitting out where the audience is in this courtroom so that they can be spread out." Vol. 3:101:13–

14. No mention was made of the fact that members of the public would not be allowed to physically enter the courtroom.[1]

On September 21, 2020, trial began. For nearly two hours that morning, the court and attorneys conducted voir dire of the first venire panel. Vol. 4:63–133. Potential jurors were questioned, some were challenged for cause, and some were excused. Vol. 4:132:5–23. During that two-hour period the courtroom was physically inaccessible to any member of the public. Shortly before breaking for lunch, counsel for the government expressed concern about "the constitutionality of only providing audio versus video" of the trial proceedings. Vol. 4:133:8–10. "We would ask the Court," the government went on, "to put on the record, in part or in toto, the Court's administrative order talking about the reasons that we cannot have a public trial at this point." Vol. 4:133:10–14. If the district court could not provide a video feed of the proceedings, the government also urged the court to

[1] The document entitled "Plan for Resumption of Jury Trials in DNM During the Pandemic" did not provide notice of the barrier to entry because it was still "subject to approval by the Court." Vol. 1:399. And a different document, entitled "COVID-19 Safety Protocol for In-Person Hearings," stated that judges could "restrict the number of nonessential persons in the courtroom," but did not state that the public would be prevented from physically entering a courtroom. Vol. 1:411.

address that point as well, "so it is clear for any circuit court that might be looking at this in the future" that "only an audio feed could be provided in this case." Vol. 4:133:14–19.

The court thanked the government and explained that "when we talk about a public trial, we're talking about" how "members of the public" are usually free to "come in and observe the trial," but because the court had been required to "reconfigure the entire courtroom based on this pandemic and concerns for the safety of everyone, we cannot." Vol. 4:133:21–134:2. Defense counsel then observed that it was his understanding "that there was an audio/video feed," in response to which the court stated: "We do not have the capability of a video feed. However, we do have a live audio feed that is open to the public." Vol. 4:134:6–12.

After the lunch break, defense counsel objected to the court's proposed approach, stating that it was improper to exclude the public from the courtroom, and that providing "only audio" of the proceedings "even further compromises the Sixth Amendment right to a public trial." Vol. 4:135:8–136:3.

The district court held that the way in which the trial was being conducted had not violated Veneno's right to a public trial. Despite its

acknowledgment that the courtroom was "not physically accessible to the public," the court insisted that the proceedings were only "partially closed because the public, including defendant's family and representatives, had access . . . to the audio feed" during the morning proceedings, and would "have access to both audio and video feed" for the remainder of the trial. Vol. 4:138:11–139:21.

Because the proceedings were partially closed, the district court explained, it was only required to identify "a substantial reason for the partial closure," and was not required to satisfy the four-part test set forth in *Waller v. Georgia*, 467 U.S. 39 (1984). Vol. 4:140:17–20. In the court's words, "there is no greater responsibility than ensuring the health, life, and safety of the public," and that's what it was doing in preventing the public from physically entering the courtroom. Vol. 4:140:23–25. The closure was "not broader than necessary, and it [wa]s the only reasonable response to the COVID-19 pandemic." Vol. 4:141:5–7.

These findings, the court went on, "also support a conclusion that the *Waller* factors have been satisfied." Vol. 4:141:18–20. According to the court:

> First, the public health is an overriding interest to close the courtroom to the physical access of the public. Second, the closure is not broader than necessary to protect the public health.

> As explained previously, it is not possible to adequately social distance and put the public in the gallery because the venire panelists and jury will occupy the gallery. Third, reasonable alternatives have been put in place, as the proceeding is available to the public through audio and video. Fourth, and finally, the Court has set forth adequate findings for physically closing the courtroom, as discussed.

Vol. 4:141:18–142:6. For the remainder of the trial, no member of the public could physically enter the courtroom, but the proceedings could be viewed via audio and video stream on the district court's website.

D. Trial and Verdict

The trial lasted two days. The government's primary witness was Howard, the victim of the alleged offenses. She testified that she and Veneno began dating in July 2018. Vol. 3:238:17. On August 22, 2018, Howard testified, Veneno accused her of talking to other guys, they got into an argument, and then Veneno "hit the phone" out of her hand while she was sitting on the bed. Vol. 3:241:7–16. After more arguing, Veneno hit her several times with a closed fist. Vol. 3:242:1–18. The couple reconciled. Vol. 3:245:14–17.

Howard then described a similar experience that occurred on November 2, 2018. Vol. 3:246:3–11. She said that Veneno knocked her phone out of her hand, grabbed her by the hair, threw her on the floor, and began

kicking her. Vol. 3:246:12–17. He then dragged her out of the house by her hair. Vol. 3:247:5–11.

Howard next described a similar attack that had occurred about "five days" before the November 2 attack, when Veneno had kicked her several times. Vol. 3:250:4–22. The court did not offer a limiting instruction before this testimony was elicited.

The government called the doctor who had treated Howard for her injuries in the aftermath of the November 2 beating. Among other things, he described the extensive injuries Howard suffered upon being admitted to the hospital in early November. Vol. 3:285–90.

On cross-examination of the government's witnesses, defense counsel focused on Howard's excessive drinking, and the effect that drinking had on her memory. Vol. 3:266:18–24 ("Q. Now, you said you have problems remembering, and you stated earlier about what you do remember, but it is fair to say that you were very drunk, correct? A. Yes. Q. And when you get very drunk, it affects your memory, right? A. Yes."). In fact, Howard agreed with defense counsel's characterization of her as a "constant drunk." Vol. 3:265:2–11. Defense counsel elicited similar testimony from the treating

physician about alcohol in Howard's blood when she was admitted to the hospital several days after the alleged assault. Vol. 3:291:21–293:10.

The government introduced the stipulations regarding Veneno's prior convictions, and then rested. Vol. 3:308:6–7.

Defense counsel moved for a directed verdict on all counts because the government had not introduced sufficient evidence to submit the case to the jury. Vol. 3:14–22. The court denied each of the defense's motions, and then the defense rested. Vol. 3:309:13–24.

In its closing statement, the government argued that Howard's testimony alone was sufficient to satisfy the elements of the crimes with which Veneno had been charged. The government highlighted the Pre-November 2 Assault, telling the jury that Howard "might have been a little injured" before the November 2 attack, "when the defendant hurt her a few days before." Vol. 3:336:4–6. He mentioned the uncharged assault when he reminded the jury that they had "heard about Halloween and how that was a similar process, always over the phone, always around the bedroom." Vol. 3:341:6–8. The government then concluded its closing statement with some words about the "tragedy of domestic violence," the concluding lines of which were:

> I got flowers today. Today was a very special day. It was the day of my funeral. Last night he finally killed me. He beat me to death. If only I had had enough courage and strength to leave him, I would not have gotten flowers today.

Vol. 3:344:21–25.

Defense counsel continued the same basic theme during his closing argument. The prosecution had not bothered to pursue obvious investigative leads but had instead based its entire case on the unreliable memory of someone who was constantly inebriated. As a result, the government had not met its burden to prove Veneno's guilt beyond a reasonable doubt. Vol. 3:345–352.

The jury found Veneno guilty on all three counts. Vol. 1:449.

The court sentenced Veneno to concurrent terms of 60 months on Count 1 and 115 months on Counts 2 and 3, for a total term of 115 months. Vol. 1:507.

STANDARD OF REVIEW

Whether the district court violated Veneno's constitutional right to a public trial is reviewed de novo. *See, e.g.*, *United States v. Lampley*, 127 F.3d 1231, 1237 (10th Cir. 1997).

Whether Congress lacks the authority to criminalize the conduct of Indians on tribal land, thereby displacing tribal sovereignty, is reviewed de novo. *United States v. Solomon*, 399 F.3d 1231, 1239 (10th Cir. 2005).

Whether Veneno's convictions under § 117 should be reversed because Veneno's tribal-court convictions are categorically broader than the generic offenses described in § 117 is a question of law reviewed de novo. *United States v. Titties*, 852 F.3d 1257, 1263 (10th Cir. 2017).

Whether evidence of the Pre-November 2 Assault was properly admitted under Rule 404(b) is reviewed for an abuse of discretion. *United States v. Commanche*, 577 F.3d 1261, 1266 (10th Cir. 2009).

SUMMARY OF ARGUMENT

Veneno's convictions should be reversed.

First, one of the Constitution's bedrock guarantees is that the process by which persons are adjudged guilty of crimes will occur publicly. Adjudicating a person's guilt openly serves critical interests, both as to the accused and as to the public. As the old saying goes, sunlight is the best disinfectant, and one of the best ways to ensure fairness and discourage mistreatment is to provide all with the opportunity to observe criminal trials in person.

In attempting to carry out Veneno's trial amid the COVID-19 pandemic, the district court was insufficiently attentive to Veneno's right to be tried publicly. The trouble started with the district court's decision to close the courtroom to outsiders without first explaining its decision to do so. Under binding Supreme Court precedent, including *Presley v. Georgia*, 558 U.S. 209 (2010), and *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), that failure alone requires reversal.

But the district court's belated explanation for its decision did not justify complete closure of Veneno's trial even if it was timely made. Accepting for the sake of argument that preventing the spread of COVID-19 qualifies as the kind of overriding interest that might justify closing a courtroom, the district court never explained why no member of the public, including members of his own family, could attend Veneno's trial consistent with the district court's safety protocols.

Making matters worse, for two hours of jury selection on the morning of the first day of trial, the district court failed to make a video feed of those proceedings available to the public. Despite the district court's claims to the contrary, there was no technological barrier to doing so. And the ability of

members of the public to hear what is being said inside a courtroom is no substitute for the constitutional guarantee of a public trial.

Second, Veneno was convicted under federal statutes that make it a federal crime for Indians to engage in prohibited conduct on tribal land. There is no constitutional provision that authorizes Congress to criminalize such conduct, so Veneno's convictions are invalid. Veneno raises this issue purely for purposes of preservation.

Third, 18 U.S.C. § 117 makes it a federal crime for a person to commit a domestic assault on tribal land after having been twice convicted of an offense that, if subject to federal jurisdiction, would qualify as an assault, sexual abuse, or a serious violent felony against a spouse or intimate partner. As this language makes clear, in determining whether a defendant's prior conviction meets the relevant statutory criteria, § 117 calls for courts to apply a categorical approach. Under that approach, the elements of the state statute under which Veneno was convicted, N.M.S.A. § 30-3-15, are compared to the elements of the generic offense of assault to determine whether the state statute covers a wider range of activity than its federal counterpart. Here, the New Mexico law is unquestionably broader than the federal offense of assault because, unlike assault, the New Mexico statute requires neither the

intent to inflict physical injury nor a reasonable apprehension of imminent harm. Because the state statute is categorically broader than the relevant federal offense, Veneno's convictions under § 117 should be vacated.

Fourth, and finally, the district court abused its discretion in admitting other-act evidence of Veneno assaulting Howard. The unfair prejudice associated with that evidence far outweighed its probative value.

ARGUMENT

I. VENENO'S CONVICTIONS MUST BE REVERSED BECAUSE HIS SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL WAS VIOLATED.

The Constitution guarantees "the accused" in criminal prosecutions a fair trial. U.S. Const. Amend. VI. At the heart of that foundational right lies another of the Sixth Amendment's promises: a "public trial." *Id.* Allowing "*anyone* . . . to attend" the trial of a criminal defendant ensures "that established procedures are being followed and that deviations will become known," thereby promoting "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Super. Ct. of Cal.*, 464 U.S. 501, 508 (1984). It also "discourage[s] perjury," "misconduct of participants," and "decisions based on secret bias or partiality." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S.

555, 569 (1980). A long line of Supreme Court precedent has "uniformly recognized the public-trial guarantee as one created for the benefit of the defendant." *Presley*, 558 U.S. at 213.

A "public trial" is exactly what it sounds like: a trial in which the "doors of the courtroom be kept open and that the public, or such portion thereof as may be conveniently accommodated, be admitted, subject to the right of the court to exclude objectionable characters and persons of tender years." 75 Am. Jur. 2d Trial § 136 (Feb. 2022 Update). "As part of the right to a public trial, the Sixth Amendment guarantees public jury selection." *Wilder v. United States*, 806 F.3d 653, 660 (1st Cir. 2015); *see Presley*, 558 U.S. at 213. The bottom line is this: "Trial courts are obligated to take every reasonable measure to accommodate *public attendance* at criminal trials." *Presley*, 558 U.S. at 215 (emphasis added).

A. Veneno's convictions should be reversed because the district court totally closed the trial to the public without providing an explanation before doing so, and the explanation the court eventually provided was inadequate.

Although the Supreme Court has never distinguished between "total" and "partial" closures of a trial, *see United States v. Simmons*, 797 F.3d 409, 413 (6th Cir. 2015), many courts, including this Court, have suggested that

"partial closures" are subject to less rigorous requirements than "total closures," *see United States v. Galloway*, 937 F.2d 542, 545 (10th Cir. 1991). The difference between partial closures and total closures, according to those courts that have addressed the issue, depends on "who is excluded during the period of time in question." *Simmons*, 797 F.3d at 413; *United States v. Thompson*, 713 F.3d 388, 395 (8th Cir. 2013); *Judd v. Haley*, 250 F.3d 1308, 1316 (11th Cir. 2001). A courtroom is totally closed when all persons are excluded besides "witnesses, court personnel, the parties, and the lawyers." *Waller*, 467 U.S. at 42; *see People v. Jones*, 750 N.E.2d 524, 528 (N.Y. Ct. App. 2001). If other persons, though not all who so desire, are allowed to be present, closure of the courtroom is considered partial, not total. *Simmons*, 797 F.3d at 413.

Under this framework, Veneno's trial was totally closed to the public. For the entirety of his trial, no one besides witnesses, court personnel, the parties, and the lawyers were allowed to be physically present in the courtroom. Exclusion of everyone besides such individuals is the epitome of a "total closure." *Waller*, 467 U.S. at 42; *Jones*, 750 N.E.2d at 612. Holding to the contrary, the district court reasoned that the closure was merely "partial" because "the public, including defendant's family and representatives, had

access . . . to the audio feed" during the morning voir dire proceedings, and had "access to both audio and video feed" for the remainder of the trial. Vol. 4:138:11–139:21.

For two primary reasons, the ability to virtually access trial proceedings does not make closure of a trial partial instead of total. First, from the time of the founding, courts have emphasized the importance of the public's physical presence at a criminal trial. It is that physical presence that enables the public to act as a check on the proceedings, to discourage perjury, to remind the prosecutor and the judge of their responsibility to the accused, and to encourage witnesses to come forward. *Peterson v. Williams*, 85 F.3d 39, 43 (2d Cir. 1996). The "public trial was designed to infuse public knowledge into the trial itself," a purpose that is lost if all that's available is one-way virtual observation. Akhil Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 680 (1996). And, as everyone has now learned, observing something virtually is just not the same thing as seeing it in person.

Second, as noted above, the right to a public trial is the accused's constitutional right. And a core part of that right is to have present in the courtroom persons that love and support him. As the Supreme Court put it in *In re Oliver*, "an accused it at the very least entitled to have his friends,

relatives and counsel present, no matter with what offense he may be charged." 333 U.S. 257, 272 (1948). Allowing loved ones to watch the proceedings via live stream, much less listen to them over the internet, is no substitute for the constitutional guarantee of their comforting personal presence.

Because the closure of Veneno's trial was total, the court was required to comply with the four-factor test in *Waller* before closing the proceedings. That test required the district court to make three findings: (1) that closure served "an overriding interest that [wa]s likely to be prejudiced"; (2) that closure was "no broader than necessary to protect that interest"; (3) that "alternatives to closing the proceeding" had been considered and rejected; and (4) to make these findings on the record. *Waller*, 467 U.S. at 48.

As an initial matter, Veneno's right to a public trial was violated simply by the fact that the district court did not make any findings regarding the propriety of closure "*before* excluding the public from" the voir dire proceedings on the first morning of trial. *Presley*, 558 U.S. at 213 (emphasis added). Because a district court may not close trial proceedings to the public without *first* making the findings required under *Waller*, Veneno is entitled to a new trial. In addressing this point below, the government seemed to

think that a constitutional problem could be avoided if the district court addressed the need to close the courtroom "before the jury [wa]s impaneled." Vol. 4:133:10–14. But under *Presley*, courts are required to evaluate the *Waller* factors "*before* excluding the public from *any stage* of a criminal trial." 558 U.S. at 213 (emphasis added). Jury selection undoubtedly qualifies as one "stage" of a criminal trial, and the district court committed reversible error by closing the courtroom during that part of the trial without first making the findings required under *Waller*. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1909 (2017) ("A public-trial violation can occur, moreover, as it did in *Presley*, simply because the trial court omits to make the proper findings *before* closing the courtroom, even if those findings might have been fully supported by the evidence." (emphasis added)).

Even if the district court's *Waller* analysis was not impermissibly belated, Veneno's public-trial right was still violated because the district court's analysis did not meet *Waller*'s exacting standards. To begin, Veneno will accept for the sake of argument that limiting the spread of COVID-19 amid a global pandemic qualifies as the kind of "overriding interest" that might justify closure. But it's at the next step of the analysis that the district court's reasoning falls apart.

Under *Waller*, closure of a criminal trial must "be no broader than necessary to protect" the overriding interest. 467 U.S. at 48. Here, the only interest identified was limiting the spread of COVID-19. And, according to the court, closing the entire trial to the physical presence of anyone besides essential personnel was the *only* way "to protect the public health." Vol. 4:141:22–23. But that's just not true. As the pictures of the courtroom setup themselves demonstrate, dozens of individuals could be physically present in the courtroom without compromising social-distancing principles. Vol. 1:392–96. Nothing prevented the court, therefore, from reserving four or five of those seats for members of the public, the press, or of Veneno's family. But as far as the record reveals, the district court never even considered that possibility. "Trial courts are obligated to *take every reasonable measure* to accommodate public attendance at criminal trials." *Presley*, 558 U.S. at 215. Because "[n]othing in the record shows that the trial court could not have accommodated [at least some members of] the public at [Veneno's] trial," the district court's closure of Veneno's trial to the public violated his constitutional rights. *Id.*

Defense counsel preserved his objection to the closure of his trial, and because "a violation of the right to a public trial is a structural error," *Weaver*,

137 S. Ct. at 1908, Veneno is entitled to automatic reversal of his conviction, *see Meadows v. Lind*, 996 F.3d 1067, 1076 (10th Cir. 2021) ("When a defendant objects to [a structural] error at trial and successfully raises the error on direct appeal, 'the defendant generally is entitled to automatic reversal regardless of the error's actual effect on the outcome.'" (quoting *Weaver*, 137 S. Ct. at 1910)).

B. Veneno's convictions should be reversed because the district court failed, without justification, to provide a video stream of the first two hours of the voir dire proceedings.

Even if the Court is otherwise persuaded that the district court's *Waller* analysis satisfied the Constitution, it should still reverse because the district court never provided an adequate explanation for its failure to provide a video feed of the first two hours of Veneno's trial. As already noted, the Supreme Court has long made clear that a criminal defendant's right to a public trial extends to jury selection. *Weaver*, 137 S. Ct. at 1906 ("*Presley* made it clear that the public-trial right extends to jury selection as well as to other portions of the trial.").

The district court's *Waller* analysis was premised on the notion that the trial proceedings were "available to the public through audio and video." Vol. 4:142:2–4. But for the first two hours of jury selection, no member of the

public was given the opportunity to *see* what was happening inside the courtroom. Far from explaining why a video feed of the first two hours of jury selection was not made available, the district court completely ignored the issue. Making matters worse, when the government and the defense first raised the constitutional problems with only providing an audio feed of the proceedings, the district court claimed that it did "not have the capability of a video feed." Vol. 4:134:10–11. Then, after taking a lunch break, the district court stated that a video feed of the proceedings would "hereinafter" be made available. Vol. 4:139:20–21.

At no point did the district court explain why it said that it was not capable of providing a video feed, and at no point did it explain why, if it *could* do so, it had not provided a video feed of the two-hour jury selection process that morning. At bottom, the record suggests that the district court, despite its best efforts, did not ensure that the public could see *and* hear what was going on inside the courtroom. Its failure to do so was error, and that error warrants reversal.

II. VENENO'S CONVICTIONS MUST BE REVERSED BECAUSE CONGRESS LACKS THE CONSTITUTIONAL AUTHORITY TO CRIMINALIZE THE CONDUCT OF INDIANS ON TRIBAL LAND.

Veneno, an enrolled member of the Jicarillo Apache Tribe, was convicted of federal crimes for conduct involving another member of the Jicarillo Apache Tribe, and which occurred on tribal land. Because Congress does not enjoy "plenary power over Indian tribes," it may not "second-guess how tribes prosecute domestic abuse perpetrated by Indians against other Indians on Indian land." *United States v. Bryant*, 579 U.S. 140, 159–60 (2016) (Thomas, J., concurring). Neither the Constitution's treaty clause, Congress's power to regulate Commerce with Indian tribes, nor anything else "gives Congress" the authority to criminalize Indian conduct on tribal lands. *Id.* at 160; *see United States v. Lara*, 541 U.S. 193, 214–26 (2004) (Thomas, J., concurring). As a result, Veneno's convictions may not stand.

We recognize that the Supreme Court has authorized Congress to exercise plenary authority and power over Indian tribes, and that this Court may not overrule the Supreme Court's precedents. *See United States v. Kagama*, 118 U.S. 375, 384 (1886); *United States v. Wheeler*, 435 U.S. 313, 319 (1978) (recognizing Congress's "plenary authority to legislate for the Indian

tribes in all matters, including their form of government"). Thus, we raise the issue here purely for purposes of preservation.

III. VENENO'S CONVICTIONS UNDER 18 U.S.C. § 117 MUST BE REVERSED BECAUSE HIS TRIBAL-COURT CONVICTIONS ARE CATEGORICALLY BROADER THAN THE GENERIC OFFENSE OF ASSAULT UNDER § 117.

As set forth above, two of Veneno's convictions arose under 18 U.S.C. § 117, which makes it a federal crime for "any person" to commit "a domestic assault within Indian country" if the person 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, any assault, sexual abuse, or serious violent felony against a spouse or intimate partner.

18 U.S.C. § 117(a). When federal law makes a crime or a punishment dependent on a comparison "between a defendant's prior conviction and criteria set forth in a federal statute," courts employ two main approaches: "the categorical approach and the circumstance-specific approach." *United States v. White*, 782 F.3d 1118, 1130 (10th Cir. 2018). If the statute refers to a generic crime, courts apply the categorical approach, which means that they "compare the elements" of the generic crime with the elements of the prior conviction. *Id.* at 1131.

If, on the other hand, the statute refers "to the specific acts in which a defendant has engaged on a prior occasion," courts "use a circumstance-specific approach." *Id.* In applying a circumstance-specific approach, courts "may look beyond the elements of the prior offense and consider 'the facts and circumstances underlying an offender's conviction.'" *Id.* "Because a comparison made under the categorical approach may lead to a different conclusion than one made under the circumstance-specific approach, it is important to determine which approach Congress intended for a particular statute." *Id.*

A. Section 117 calls for a categorical match between a defendant's prior convictions and federal law.

In referring to a defendant's "final conviction," § 117(a) calls for application of the categorical approach in determining whether a defendant's prior convictions meet the statutory criteria. Start with the term "conviction." As this Court and the Supreme Court have long emphasized, Congress's use of the term "conviction," as opposed to a phrase like "commission of crimes," strongly suggests that Congress is concerned with "whether the defendant had been convicted of crimes falling with certain categories, and not about what the defendant had actually done." *Mathis v.*

United States, 136 S. Ct. 2243, 2252 (2016); *see Sessions v. Dimaya*, 138 S. Ct. 1204, 1217 (2018); *see also Ovalles v. United States*, 905 F.3d 1231, 1246 (11th Cir. 2018) (en banc) (explaining that the word "conviction" has long been "emphasized as a key textual driver of the categorical approach").

Next, consider the descriptors that are used to denote the crimes that qualify as predicate offenses: "any assault, sexual abuse, or a serious violent felony." 18 U.S.C. § 117(a)(1). Each of these terms is used to describe an offense as it is generally committed, not the facts or circumstances associated with a specific crime. *See United States v. Muskett*, 970 F.3d 1233, 1241 (10th Cir. 2020) (setting forth the elements of the federal generic offense of "assault"); *Nijhawan v. Holder*, 557 U.S. 29, 37 (2010) (applying the categorical approach to the generic offense of "sexual abuse") (citing *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1152 (9th Cir. 2008)); *Johnson v. United States*, 559 U.S. 133, 143 (2010) (categorically laying out the elements of a "violent felony"). That the next subsection of the statute expressly refers to a particular chapter of the federal criminal code is only further confirmation that the categorical approach was intended. 18 U.S.C. § 117(a)(2); *see White*, 782 F.3d at 1132 ("The Supreme Court has indicated that a reference to a corresponding section of the criminal code strongly suggests a generic intent.")

Third, and finally, the phrase "if subject to Federal Jurisdiction" also suggests that what Congress intended is a categorical comparison between a state conviction and a federal generic offense. *See United States v. Casey*, 2020 WL 1940446, at *3 n.1 (W.D. Wash. Apr. 22, 2020) ("If anything, this provision ["if subject to Federal jurisdiction"] explicitly directs courts to compare a defendant's prior statutes of conviction with the federal generic offenses to determine if they are a categorical match.").

Section 117's language is clear—to determine whether a prior conviction qualifies as a predicate offense, a court must apply the categorical approach.[2]

---

[2] Section 117 also requires that the "assault, sexual abuse, or serious violent felony" be against "*a spouse or intimate partner, or . . . a child of or in the care of the person committing the domestic assault*." 18 U.S.C. § 117(a) (emphasis added). We don't dispute the possibility, given this language, that § 117(a) calls for a hybrid approach, in which the categorical approach is used to determine whether a prior conviction amounted to assault, sexual abuse, or a serious violent felony, but then a circumstance-specific approach is used to determine whether the relationship component of the statute is satisfied. *See United States v. Escalanta*, 933 F.3d 395, 401 (5th Cir. 2019); *White*, 782 F.3d at 1134 (describing the components of such a "hybrid approach"); *see also United States v. Hayes*, 555 U.S. 415, 421 (2009) ("The manner in which the offender acts, and the offender's relationship with the victim, are conceptually distinct attributes.") (quotation marks omitted). In applying the hybrid approach, however, the "factual [or circumstance-specific] inquiry triggered by the qualifying language [the relationship component] is limited to the

B. Battery Against a Household Member under New Mexico law is categorically broader than the federal generic offense of "assault."

"To apply a categorical approach," the Court "compare[s] the elements of the statute forming the basis of the defendant's conviction with the elements of the [predicate] crime." *White*, 782 F.3d at 1136. As applied here, this means that the Court must compare the federal generic offense of "assault" with the statute under which Veneno's prior convictions arose—Battery Against a Household Member. Veneno's tribal-court conviction "is a categorical match" with the generic offense of assault only if his tribal-court conviction "*necessarily* involved facts equating to the generic federal offense." *United States v. Leaverton*, 895 F.3d 1251, 1253 (10th Cir. 2018) (emphasis added). Put another way, if the state statute "sweeps more broadly than the generic crime [of assault], a conviction under that law" cannot count as a domestic-assault "predicate, even if the defendant actually committed the offense in its generic form." *Descamps v. United States*, 570 U.S. 254, 261 (2013).

---

facts relevant to the qualification itself." *United States v. Dahl*, 833 F.3d 345, 351 (3d Cir. 2016). "The categorical approach continues to apply to the rest of the statute's non-qualifying elements." *Id.*

Section 117(a) does not define the term "assault," so that term is given its "common-law" meaning. *See Muskett*, 970 F.3d at 1241. At common law, this Court has held that the elements of an assault are "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." *Id.* A wide variety of courts and authoritative treatises define assault in the same way. *See United States v. Verwiebe*, 874 F.3d 258, 261 (6th Cir. 2017) ("[A]n individual may violate § 113 by (1) willfully attempting to inflict injury on another person or (2) threatening to inflict injury on another person, causing a reasonable apprehension of immediate bodily harm."); *Guarro v. United States*, 237 F.2d 578, 580 (D.C. Cir. 1956) ("Assault at common law is 'an attempt with force or violence to do a corporal injury to another."); 2 Wayne R. LaFave, Substantive Criminal Law § 16.3 (Dec. 2021 Update) (explaining that assault requires "an actual intent to cause a physical injury"); *id.* § 16.3(a) (stating that "an intent to injury is required" to commit assault). As these sources indicate, all versions of generic assault require either (1) intent to inflict physical injury, or (2) reasonable

apprehension of imminent harm. *See United States v. Wolfname*, 835 F.3d 1214, 1218 (10th Cir. 2016).

Because the New Mexico law under which Veneno was committed requires neither element, it necessarily captures a broader swath of conduct than its federal counterpart. *See Arellano v. Barr*, 784 F. App'x 609, 612 (10th Cir. 2019) ("The statute is broader than the federal analogue if it criminalizes a wider range of activity."). Section 30-3-15 states that "[b]attery against a household member consists of the unlawful, intentional touching or application of force to the person of a household member, when done in a rude, insolent or angry manner." Under this language, a person can be convicted of battery against a household member without intending to inflict injury on that person and without placing that person under a reasonable apprehension of imminent harm. Indeed, New Mexico's statute is consistent with common-law battery and a significant number of state statutes, none of which requires the kind of force capable of producing injury. *See Stokeling v. United States*, 139 S. Ct. 544, 553 (2019) (explaining that "common-law battery" does "not require force capable of causing physical pain or injury"); *United States v. Hays*, 526 F.3d 674, 679 (10th Cir. 2008) ("Under this common law approach to battery, any contact, however, slight,

may constitute battery."); *see also id.* (common-law battery can include "kissing without consent, touching or tapping, jostling, and throwing water" on someone). Given the minimal amount of force required to be convicted of battery, it is impossible to say that the commission of a battery under New Mexico law necessarily reflects an intent to inflict physical injury for purposes of a federal assault. *United States v. Johnson*, 911 F.3d 1062, 1072 (10th Cir. 2018) ("Oklahoma's crime of battery does not require violent force capable of causing physical pain or injury because this crime can be committed with only the slightest touching").

Because battery against a household member under New Mexico law is categorically broader than the generic federal offense of assault, Veneno's prior convictions cannot serve as a predicate offense under § 117(a). Therefore, Veneno's convictions under § 117(a) must be vacated without the possibility of retrial. *See Casey*, 2020 WL 1940446, at *6 (dismissing indictment charging violations of § 117(a) because "the prior statutes of conviction" did not categorically match "the generic statute").

C. Veneno would not have stipulated to his prior convictions as predicate convictions under § 117 if the district court had not incorrectly described the consequences of his declining to stipulate.

The government will undoubtedly direct the Court's attention to the stipulation into which Veneno entered. But that stipulation does not preclude this Court's review. For starters, consider the circumstances under which the stipulation was entered. When defense counsel was pressed to stipulate not only to the fact of the prior tribal-court convictions but to their status as predicate offenses under § 117(a), he responded: "I'm not sure my client will allow me to do that." Vol. 3:155:12–13. The court pressed harder: "All right. *If not, then you open it up for them to go into that*." Vol. 3:155:14–15 (emphasis added). The obvious implication of the court's statement was that the jury was going to hear the details of Veneno's prior convictions if he refused to stipulate. Only after the district court issued that warning did counsel agree to the stipulation: "We would rather not do that, *so* we'll defer and we'll stipulate to that." Vol. 3:155:16–17 (emphasis added).

Here's the problem. As explained above, § 117(a) requires the categorical approach to be used in determining whether a defendant's prior convictions qualify as "any assault, sexual abuse, or a serious violent

felony." And under Tenth Circuit caselaw, whether a prior conviction categorically satisfies "the statutory definition" of a generic offense "involves a question of law for a court to decide, and not a question of fact for a jury." *United States v. Moore*, 401 F.3d 1220, 1224 (10th Cir. 2005). Whether Veneno's tribal-court convictions qualified as an "assault" under § 117(a), therefore, was a question for the court, not the jury. That conclusion, in turn, renders the district court's representation about the consequences of Veneno's failure to stipulate—"open[ing] it up for [the government] to go into that"—was misleading at best.

As this discussion shows, Veneno's stipulation rests on the district court's inaccurate representation of the law. Under Rule 11 of the Federal Rules of Criminal Procedure, a guilty plea is invalid if it is "a product of a 'material misrepresentation' relied upon by the defendant." *United States v. Gigot*, 147 F.3d 1193, 1197 (10th Cir. 1998); *see generally United States v. Carillo*, 860 F.3d 1293, 1301 (10th Cir. 2017). If a defendant's guilty plea is rendered "involuntary" by the district court's failure to advise a defendant of the "mandatory minimum sentence" associated with his guilty plea, then surely entering a stipulation based on an incorrect statement of the consequences

of failing to do so is likewise invalid. *United States v. McCann*, 940 F.2d 1352, 1358 (10th Cir. 1991).

IV. VENENO'S CONVICTIONS SHOULD BE REVERSED BECAUSE THE COURT'S ADMISSION OF OTHER-ACT EVIDENCE DID NOT MEET THE RIGORS OF RULE 404(B).

The district court abused its discretion in admitting evidence of Veneno physically attacking Howard a few days before November 2. To properly be admitted under Rule 404(b), other-act evidence must satisfy a four-part test. First, the other-act evidence "must be introduced for a proper purpose." *United States v. McGlothin*, 705 F.3d 1254, 1262 (10th Cir. 2013). Second, it must be relevant to that purpose in a way that does not involve propensity-based reasoning. *Id.* Third, even if the other-act evidence is introduced for a legitimate purpose and is relevant to that purpose, the unfair prejudice of that evidence must still be balanced against its probative value to ensure that it complies with Rule 403. *Id.* Fourth, and finally, the court must instruct the jury upon request that the other-act evidence may only be considered "for the limited purpose for which it was admitted." *Id.*

It is on the third part of this test that the district court abused its discretion.

A. The other-act evidence lacked probative value.

As an initial matter, the district court offered little in the way of analysis under Rule 403. Despite acknowledging the prejudice associated with introducing evidence of the Pre-November 2 Assault, the court thought that prejudice was "certainly outweighed by the probative value for the reasons set forth by the United States." Vol. 3:19–23. The district court's barebones Rule-403 analysis by itself is an abuse of discretion warranting reversal. *See United States v. Tan*, 254 F.3d 1204, 1211 (10th Cir. 2001) (reversing and remanding to allow the district court to "conduct a new Rule 403 balancing test" because it had not "explain[ed] its reasoning in sufficient detail to permit informed appellate review"); *United States v. Pulliam*, 973 F.3d 775, 786 (7th Cir. 2020).

Even if the district court's analysis was sufficient, it still amounted to an abuse of discretion. On the probative-value side, the district court adopted the reasoning of the government, which argued that evidence of the Pre-November 2 Assault was relevant "for timeline purposes," to show motive and lack of mistake, and to determine whether Howard had suffered a "serious bodily injury." Vol. 3:159:1–5.

None of these theories holds up under scrutiny. The only "timeline" the government highlighted was the five-day period between November 2, when Veneno allegedly committed the charged offense, and November 7, when Howard went to the hospital for treatment. Vol. 3:158:13–23. What happened a few days before November 2 had nothing to do with the government's "timeline." Evidence of the Pre-November 2 Assault also did nothing to show "motive or lack of mistake" beyond what had already been introduced. The jury had already heard testimony that Veneno had physically attacked Howard on three occasions, a few days before August 22, on August 22, and on November 2, always based on jealousy stemming from suspicion about what she was doing on her phone. Evidence of the Pre-November 2 Assault added nothing to the government's theory about Veneno's motive or the lack of a mistake that Howard's testimony had not already established. Finally, the Pre-November 2 Assault did not meaningfully affect the jury's assessment of Howard's serious bodily injury. Her testimony that she was still "in a little bit of pain" from the Pre-November 2 Assault, Vol. 3:251:1–6, added nothing to the doctor's extensive testimony regarding the severe injuries she had suffered. Vol. 3:285–90. In short, this evidence was irrelevant at worst, cumulative at best.

B. The unfair prejudice associated with the other-act evidence substantially outweighed its minimal probative value.

The unfair prejudice of the Pre-November 2 Assault substantially outweighed its limited probative value. At bottom, that evidence suggested to the jury that Veneno had a propensity to physically assault women. And that is exactly what Rule 404(b) is designed to prevent—the use of other-act evidence to paint a defendant with a character-damaging brush. Mueller & Kirkpatrick, *Evidence* § 4.15, at 214 (2d. ed. 1999) (explaining that other acts are admissible under Rule 404(b) for "any relevant purpose that *does not require an inference from character to conduct*" (emphasis added)). And there are few labels more damaging to a person's character than that of domestic assailant. *See United States v. Caldwell*, 760 F.3d 267, 276 (3d Cir. 2014) (explaining that Rule 404(b) "reflects the revered and longstanding policy that, under our system of justice, an accused is tried for *what* he did, not *who* he is").

The government's only response to this point is to discount the unfair prejudice because the evidence otherwise admitted already established that Veneno was a bad actor who committed bad acts in domestic situations. That approach blows a gaping hole in Rule 404(b)'s limitations on the

government's introduction of other-act evidence. So long as some admissible evidence suggests that the defendant has a propensity to act in certain unlawful ways, the government is free to introduce additional evidence confirming that propensity. The government offered no on-point authority for that remarkable proposition.

C. Admission of the other-act evidence was not harmless.

Admitting evidence of the Pre-November 2 Assault was not harmless. For one thing, as defense counsel showed, the only eyewitness to the alleged attacks acknowledged that she had a drinking problem and that her drinking problem affected her memory. Vol. 3:266:18–24. The evidence against Veneno, in short, was far from overwhelming. What's more, the government seized on the evidence of Veneno's propensity to paint him as a potential murderer during closing argument. Describing a victim of domestic violence, the government recited language suggesting to the jury that defendant would murder someone if he was not convicted.

> I got flowers today. Today was a very special day. It was the day of my funeral. Last night he finally killed me. He beat me to death. If only I had had enough courage and strength to leave him, I would not have gotten flowers today.

Vol. 3:344:21–25. This highly inflammatory rhetoric, combined with improper other-act evidence, "leave[s] one in grave doubt" as to whether it had "a substantial influence on the outcome of the trial." *United States v. Jordan*, 485 F.3d 1214, 1222 (10th Cir. 2007).

CONCLUSION

Because Veneno's right to a public trial was violated, the jury verdict against him should be reversed.

Because Congress lacks the constitutional authority to criminalize the conduct of Indians on tribal land, Veneno's convictions must be reversed.

Veneno's convictions on Counts 2 and 3 should be reversed because his tribal-court convictions for battery of a household member under New Mexico law are categorically broader than the generic federal offense of assault.

Veneno's convictions should be reversed because unfairly prejudicial other-act evidence was introduced against him.

STATEMENT CONCERNING ORAL ARGUMENT

Given the complicated legal and factual questions presented by this appeal, counsel believes that oral argument is warranted.

PARSONS BEHLE & LATIMER

/s/ Alan S. Mouritsen

Alan S. Mouritsen
Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

I, Alan S. Mouritsen, hereby certify as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the entire brief contains 9,939, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I relied on the word count function of Microsoft Word 2010 to ascertain this information.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, in 14-point font size and Book Antigua type style.

/s/ Alan S. Mouritsen
ALAN S. MOURITSEN

CERTIFICATE OF COMPLIANCE WITH GENERAL ORDER 95-01

I, Alan S. Mouritsen, hereby certify as follows:

1. all privacy redactions have been made;

2. the ECF submission of the **OPENING BRIEF** is an exact copy of the seven hard copies filed with the Court;

3. the ECF submission of the foregoing **OPENING BRIEF** was scanned for viruses with the most recent version of Microsoft Forefront and, according to the program, is free of viruses.

/s/ Alan S. Mouritsen
ALAN S. MOURITSEN

Attorney for Appellant

CERTIFICATE OF SERVICE

In accordance with 10th Cir. R. 25.4, I, Alan S. Mouritsen, hereby certify that on March 8, 2022, I electronically served a copy of the **OPENING BRIEF** via ECF, which, in turn, accomplished electronic service on the following.

Emil John Kiehne
Office of the United States Attorney
District of New Mexico
201 3rd Street NW, Suite 900
P.O. Box 607
Albuquerque, NM 87103
emil.kiehne@usdoj.gov

/s/ Alan S. Mouritsen
ALAN S. MOURITSEN

Attorney for Appellant

Addendum A

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT
District of New Mexico

UNITED STATES OF AMERICA

V.

QUENTIN VENENO JR.

Judgment in a Criminal Case

Case Number: **1:18CR03984-001KWR**
USM Number: **75017-051**
Defendant's Attorney: **Marc Grano**

THE DEFENDANT:

☐ pleaded guilty to count(s) .
☐ pleaded nolo contendere to count(s) which was accepted by the court.
☒ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title and Section	*Nature of Offense*	*Offense Ended*	*Count*
18 U.S.C. Sec. 117(a)(1)	Domestic Assault by a Habitual Offender in Indian Country 18 U.S.C. Sec. 1153	08/22/2018	S1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 The sentence is imposed pursuant to the Sentencing Reform Act of 1984 .The Court has considered the United States Sentencing Guidelines and, in arriving at the sentence for this Defendant, has taken account of the Guidelines and their sentencing goals. Specifically, the Court has considered the sentencing range determined by application of the Guidelines and believes that the sentence imposed fully reflects both the Guidelines and each of the factors embodied in 18 U.S.C. § 3553(a). The Court also believes the sentence is reasonable, provides just punishment for the offense and satisfies the need to impose a sentence that is sufficient, but not greater than necessary to satisfy the statutory goals of sentencing.

☐ The defendant has been found not guilty on count(s) .
☐ Count(s) dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

August 18, 2021
Date of Imposition of Judgment

/s/ Kea W. Riggs
Signature of Judge

Honorable Kea W. Riggs
United States District Judge
Name and Title of Judge

August 19, 2021
Date

DEFENDANT: **QUENTIN VENENO JR.**
CASE NUMBER: **1:18CR03984-001KWR**

ADDITIONAL COUNTS OF CONVICTION

Title and Section	*Nature of Offense*	*Offense Ended*	*Count*
18 U.S.C. Sec. 117(a)(1)	Domestic Assault by a Habitual Offender Resulting in Substantial Bodily Injury in Indian Country 18 U.S.C. Sec. 1153	11/02/2018	S2
18 U.S.C. Sec. 113(a)(6)	Assault Resulting in Serious Bodily Injury in Indian Country 18 U.S.C. Sec. 1153	11/02/2018	S3

DEFENDANT: **QUENTIN VENENO JR.**
CASE NUMBER: **1:18CR03984-001KWR**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: .

A term of 60 months custody is imposed as to Count 1; as to Counts 2 and 3 of the Superseding Indictment, a term of 115 months custody is imposed; said terms shall run concurrently for a total term of 115 months.

☒ The court makes the following recommendations to the Bureau of Prisons:

FCI Greensville, Illinos
The Court recommends the defendant participate in the Bureau of Prisons 500 hour drug and alcohol treatment program.

☒ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district:
  ☐ at on .
  ☐ as notified by the United States Marshal.
☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
  ☐ before 2 p.m. on .
  ☐ as notified by the United States Marshal.
  ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

_____ at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **QUENTIN VENENO JR.**
CASE NUMBER: **1:18CR03984-001KWR**

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **3years** .
A term of 3 years supervised release is imposed as to Counts 1 - 3; said terms shall run concurrently

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(Check, if applicable.)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state, local, or tribal sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(Check, if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may, after obtaining Court approval, require you to notify that person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: **QUENTIN VENENO JR.**
CASE NUMBER: **1:18CR03984-001KWR**

SPECIAL CONDITIONS OF SUPERVISION

You must not use or possess alcohol. You may be required to submit to alcohol testing that may include urine testing, a remote alcohol testing system, and/or an alcohol monitoring technology program to determine if you have used alcohol. Testing shall not exceed more than 4 test(s) per month. You must not attempt to obstruct or tamper with the testing methods. You may be required to pay all, or a portion, of the costs of the testing.

You must not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances (e.g., synthetic cannabinoids, synthetic cathinones, etc.) that impair your physical or mental functioning, whether or not intended for human consumption.

You must participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program. You may be required to pay all, or a portion, of the costs of the program.

You shall waive your right of confidentiality and allow the treatment provider to release treatment records to the probation officer and sign all necessary releases to enable the probation officer to monitor your progress. The probation officer may disclose the presentence report, any previous mental health evaluations and/or other pertinent treatment records to the treatment provider.

You must take all mental health medications that are prescribed by your treating physician. You may be required to pay all, or a portion, of the costs of the program.

You must reside in a residential reentry center for a term of (up to) 180 days. You must follow the rules and regulations of the center.

You must not communicate, or otherwise interact, with the victim(s), either directly or through someone else without prior approval of the probation officer.

You must complete 30 hours of community service during his term of supervised release . The probation officer will supervise the participation in the program by approving the program (agency, location, frequency of participation, etc.). You must provide written verification of completed hours to the probation officer.

You must participate in an outpatient substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You may be required to pay all, or a portion, of the costs of the program.

You shall waive your right of confidentiality and allow the treatment provider to release treatment records to the probation officer and sign all necessary releases to enable the probation officer to monitor your progress. The probation officer may disclose the presentence report, any previous substance abuse evaluations and/or other pertinent treatment records to the treatment provider.

You must submit to substance abuse testing to determine if you have used a prohibited substance. Testing shall not exceed more than 60 test(s) per years. Testing may include urine testing, the wearing of a sweat patch, and/or any form of prohibited substance screening or testing. You must not attempt to obstruct or tamper with the substance abuse testing methods. You may be required to pay all, or a portion, of the costs of the testing.

You must submit to a search of your person, property, residence, vehicle, papers, computers (as defined in 18 U.S.C. 1030(e)(1)), other electronic communications or data storage devices or media, or office under your control. The probation officer may conduct a search under this condition only when reasonable suspicion exists, in a reasonable manner and at a reasonable time, for the purpose of detecting firearms, weapons, drugs, alcohol or any other illegal contraband . You must inform any residents or occupants that the premises may be subject to a search.

You must participate in and successfully complete a community-based program which provides education and training in anger management.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: **QUENTIN VENENO JR.**
CASE NUMBER: **1:18CR03984-001KWR**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments.

☐ The Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

Totals:	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
	$300.00	**$0.00**	**$0.00**	**$ 0.00**	**$0.00**

☐ The determination of the restitution is deferred until . An *Amended Judgment in a Criminal Case* will be entered after such determination.
☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ In full immediately; or

B ☐ $ due immediately, balance due (see special instructions regarding payment of criminal monetary penalties).

Special instructions regarding the payment of criminal monetary penalties: Criminal monetary penalties are to be made payable by cashier's check, bank or postal money order to the U.S. District Court Clerk, 333 Lomas Blvd. NW, Albuquerque, New Mexico 87102 unless otherwise noted by the court. Payments must include defendant's name, current address, case number and type of payment.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

Addendum B

THE COURT: You may be seated. Counsel, is there anything else that we need to take up before we break for lunch?

MR. NAYBACK: Briefly, Your Honor.

THE COURT: You may.

MR. NAYBACK: I talked about this with James Braun, our criminal chief, and we know that Ms. Bevel sent out an audio feed of the trial this morning. We have some concerns about the constitutionality of only providing audio versus video. We would ask the Court, before the jury is impaneled, outside the presence of the jury, to put on the record, in part or in toto, the Court's administrative order talking about the reasons that we cannot have a public trial at this point. Also, if the Court does not have video capability, we would ask that the Court add that to the record, as well, just so it is clear for any circuit court that might be looking at this in the future, that they understand that only an audio feed could be provided in this case.

Thank you.

THE COURT: Thank you, Mr. Nayback. I will certainly do that. And when we talk about a public trial, we're talking about usually we are able to allow members of the public to come in and observe the trial, and because we've had to reconfigure the entire

courtroom based on this pandemic and concerns for the safety of everyone, we cannot. So maybe we would want to attach a copy of how we have reconfigured the courtroom for that, for appellate purposes.

Mr. Grano, anything from you, sir?

MR. GRANO: My apologies, Your Honor. I guess I understand that there was an audio/video feed. That's what I understood. I don't know if that's an incorrect assumption.

THE COURT: We do not have the capability of a video feed. However, we do have a live audio feed that is open to the public.

MR. GRANO: Okay. So I guess for purposes of the record, what I would do in regard to Mr. Veneno, we would object to that. We believe that a proper jury trial should be open to the public, to include not only audio, but video as well.

THE COURT: All right. Thank you. And the Court will make a record when we come back this afternoon. Anything further?

MR. NAYBACK: Not on behalf of the United States, Your Honor.

THE COURT: We'll be in recess. If you-all could be back here at 1:00.

(Recess from 11:08 a.m. until 1:16 p.m.)

(Outside the presence of the Venire Jurors.)

COURTROOM DEPUTY CAROL BEVEL: All rise.

THE COURT: Please be seated.

We are back on the record in United States v. Quentin Veneno, Junior.

Mr. Grano, I understand that you have some objections that you'd like to put on the record.

MR. GRANO: Yes, Your Honor. For purposes of the record, I would like to -- essentially, the objection is as you stated. And so earlier today I found out, right before the break, I found out that apparently -- it was my misunderstanding, so my wrong initially. I understood that the link was not only audio, but also video, and so I found out that that was not the case.

So for purposes of the record, I would object. I think that we're already, you know, in our COVID environment, we're already compromised because we do not have the ability to have people present. I think the dynamics of the courtroom -- and I completely understand all the time and effort and money and manpower that has gone into this.

But ultimately, it's not the same, and I think that's true for everyday life right now. But this is definitely not the same. Now, to learn that in fact

only audio, I think that essentially even further compromises the Sixth Amendment right to a public trial.

And so for purposes of the record, that is what I'm putting in. I do acknowledge the fact that I walked in after lunch and saw that apparently they have captured some type of video-recording device. I haven't received a link yet, so I'm not sure if it operates kind of in the same fashion as to where we can get it and send it or e-mail it to whoever we need to.

But for purposes of the record, I would make that objection in regard to his Sixth Amendment right to a public trial being compromised.

THE COURT: Thank you, Mr. Grano.

We had discussed this several times prior to trial. However, this issue came up after we had gone through the first jury selection panel, and before the second. We do have a video feed up this afternoon. The audio link was available for anyone, the public, anyone who wanted to listen to the first session this morning. We will have audio and video from here on out. We do have the password and the whatever. We do have the identifiers that you need to log into the Zoom proceeding, and they will be available to anyone who calls, and certainly the public, to access it.

I would like to make some findings on the record.

For the first time, after the session this morning of voir dire with the first panel, and before the second panel, the government requested that the Court make a record on the steps taken to ensure public access to this trial and the reasons necessitating closing the courtroom. The Court notes that no motion was filed prior to trial beginning, and no objections were made by the defense prior to beginning trial this morning.

Moreover, the government has not specifically argued whether and how any specific constitutional right was violated. Mr. Grano has just put some objections on the record.

The Court notes that this trial, including a portion of jury selection this morning, was not closed to the public. The public has access to this trial by an audio feed this morning, which was accessible through the Court's public website. This will likely reach a broader audience than merely having the courtroom open to the public because we certainly just don't have the room, even though they're not being allowed at this point in person, because of space limitations due to social distancing requirements by the CDC.

Notably, neither party has cited to any law or principle that a trial is closed to the public when the public can listen to the trial through the Court's website.

Nevertheless, beginning this afternoon, the Court will have a video feed available through Zoom. The public will be able to observe and listen to the trial through this video feed. The Court notes that all participants, including the court staff, venire panel, jurors, counsel, the parties, and the undersigned are present in the courtroom. However, the courtroom is not physically accessible to the public. A partial restriction prohibiting the public from accessing the physical courtroom is necessitated by the COVID-19 pandemic. This limited restriction is necessitated by CDC and State guidelines on the COVID pandemic.

Specifically, the Court finds that social distancing is not possible if the public were allowed in the gallery. In order to adequately social distance the jurors and other court participants, the jurors are currently placed in the gallery. Therefore, there is no reasonable place to put the public. The District of New Mexico has spent hours formulating a plan for resumption of jury trials, some of which were detailed earlier this morning.

The Court will enter into the record the plan for resumption of jury trials in the District of New Mexico during the pandemic, and also photographs of the courtroom for review purposes. The plan details the precautions taken by this Court for this proceeding.

The Sixth Amendment to the United States Constitution in part indicates that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...The Supreme Court of the United States has interpreted the Sixth Amendment and the First Amendment as imposing a presumption that criminal trials, including voir dire, will be open to the public."

The Court finds that this standard does not entirely apply here because the trial is not closed to the public, although there are certain restrictions. As previously explained, the Court considers the trial only partially closed because the public, including defendant's family and representatives, had access this morning to the audio feed, and hereinafter will have access to both audio and video feed.

If this closure were considered a complete closure, the circumstances must satisfy the test set forth in the Waller v. Georgia case, 467 U.S. 39. In order to justify closure, the party seeking to close the

proceeding must advance an overriding interest that is likely to be prejudiced. The closure must be no broader than necessary to protect that interest. And the trial court must consider reasonable alternatives to closing the proceeding. And, finally, it must make findings adequate to support that closure.

It appears that the Tenth Circuit has not addressed this specific issue at this time. However, the Eleventh Circuit has recognized a common-sense distinction between total closures of proceedings and situations where the courtroom is only partially closed to spectators. The Eleventh Circuit has held that when access to the courtroom is retained by some spectators, such as representatives of the press or the defendant's family, the impact of the closure is not as great and not as deserving of such a rigorous level of constitutional scrutiny. In the event of a partial closure, a court need merely find a substantial reason for the partial closure, and need not satisfy the elements of the more rigorous Waller test.

There is a substantial reason for partial closure of the trial, and the Court need not analyze the Waller factors herein. Specifically, there is no greater responsibility than ensuring the health, life, and safety of the public. There is no more compelling

reason to close a courtroom to the physical access of the public than the COVID-19 pandemic. Under the specific circumstances, it is not possible to maintain social distancing while granting the public physical access to the courtroom. The closure is not broader than necessary, and it is the only reasonable response to the COVID-19 pandemic.

The President of the United States has declared a national emergency due to the COVID-19 pandemic. The Governor declared a state of emergency and issued statewide orders restricting the number of people who could gather together inside. The CDC has similarly recommended adopting social distancing to limit the spread of COVID-19. This Court has issued multiple administrative orders. The Court herein adopts 20-mc-00004, Document 17, into the record for purposes of review.

Nevertheless, the previous findings also support a conclusion that the Waller factors have been satisfied. First, the public health is an overriding interest to close the courtroom to the physical access of the public. Second, the closure is not broader than necessary to protect the public health. As explained previously, it is not possible to adequately social distance and put the public in the gallery because the

venire panelists and jury will occupy the gallery. Third, reasonable alternatives have been put in place, as the proceeding is available to the public through audio and video. Fourth, and finally, the Court has set forth adequate findings for physically closing the courtroom, as discussed.

Is there anything else that we need to take up before we bring in the jury panel?

MR. NAYBACK: Not on behalf of the United States, Your Honor. Thank you so much.

MR. GRANO: No, Your Honor. Thank you.

THE COURT: Thank you. Can we have her bring up the venire jury panel?

COURTROOM DEPUTY CAROL BEVEL: Yes, Your Honor.

THE COURT: The venire panel?

COURTROOM DEPUTY CAROL BEVEL: Yes.

THE COURT: I'm going to step down. You may remain seated. Please let me know when they arrive.

COURTROOM DEPUTY CAROL BEVEL: I will, Judge.

(Recess from 1:26 p.m until 1:38 p.m.)

COURTROOM DEPUTY CAROL BEVEL: All rise.

THE COURT: Please be seated.

Good afternoon. Thank you for being here this afternoon. I think it's a beautiful day outside.

Addendum C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Cr. No. 18-CR-03984-KWR
	)	
QUENTIN VENENO, JR.,	)	
	)	
Defendant.	)	

VERDICT

WE, THE JURY, find the Defendant, Quentin Veneno, Jr., GUILTY (Guilty or Not Guilty) of Domestic Assault by a Habitual Offender in Indian Country, in violation of 18 U.S.C. §§ 1153 and 117(a)(1), as charged in Count One of the Superseding Indictment.

WE, THE JURY, find the Defendant, Quentin Veneno, Jr., GUILTY (Guilty or Not Guilty) of Domestic Assault by a Habitual Offender resulting in substantial bodily injury in Indian Country, in violation of 18 U.S.C. §§ 1153 and 117(a)(1), as charged in Count Two of the Superseding Indictment.

WE, THE JURY, find the Defendant, Quentin Veneno, Jr., GUILTY (Guilty or Not Guilty) of Assault Resulting in Serious Bodily Injury, in violation of 18 U.S.C. §§ 1153 and 113(a)(6), as charged in Count Three of the Superseding Indictment.

Dated this 22 day of September, 2020.

/s/
FOREPERSON

Addendum D

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 7. Assault

18 U.S.C.A. § 117

§ 117. Domestic assault by an habitual offender [1]

Effective: May 20, 2014
Currentness

(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 against a child of or in the care of the person committing the domestic assault; 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; amended Pub.L. 113-104, § 3, May 20, 2014, 128 Stat. 1156.)

Notes of Decisions (9)

Footnotes

1 Section was enacted without corresponding amendment to analysis.

18 U.S.C.A. § 117, 18 USCA § 117
Current through P.L. 117-80. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 53. Indians (Refs & Annos)

18 U.S.C.A. § 1153

§ 1153. Offenses committed within Indian country

Effective: March 7, 2013
Currentness

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 758; May 24, 1949, c. 139, § 26, 63 Stat. 94; Pub.L. 89-707, § 1, Nov. 2, 1966, 80 Stat. 1100; Pub.L. 90-284, Title V, § 501, Apr. 11, 1968, 82 Stat. 80; Pub.L. 94-297, § 2, May 29, 1976, 90 Stat. 585; Pub.L. 98-473, Title II, § 1009, Oct. 12, 1984, 98 Stat. 2141; Pub.L. 99-303, May 15, 1986, 100 Stat. 438; Pub.L. 99-646, § 87(c)(5), Nov. 10, 1986, 100 Stat. 3623; Pub.L. 99-654, § 3(a)(5), Nov. 14, 1986, 100 Stat. 3663; Pub.L. 100-690, Title VII, § 7027, Nov. 18, 1988, 102 Stat. 4397; Pub.L. 103-322, Title XVII, § 170201(e), Title XXXIII, § 330021(1), Sept. 13, 1994, 108 Stat. 2043, 2150; Pub.L. 109-248, Title II, § 215, July 27, 2006, 120 Stat. 617; Pub.L. 113-4, Title IX, § 906(b), Mar. 7, 2013, 127 Stat. 125.)

Notes of Decisions (524)

18 U.S.C.A. § 1153, 18 USCA § 1153
Current through P.L. 117-80. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 7. Assault

18 U.S.C.A. § 113

§ 113. Assaults within maritime and territorial jurisdiction

Effective: March 7, 2013
Currentness

(a) Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

(1) Assault with intent to commit murder or a violation of section 2241 or 2242, by a fine under this title, imprisonment for not more than 20 years, or both.

(2) Assault with intent to commit any felony, except murder or a violation of section 2241 or 2242, by a fine under this title or imprisonment for not more than ten years, or both.

(3) Assault with a dangerous weapon, with intent to do bodily harm, by a fine under this title or imprisonment for not more than ten years, or both.

(4) Assault by striking, beating, or wounding, by a fine under this title or imprisonment for not more than 1 year, or both.

(5) Simple assault, by a fine under this title or imprisonment for not more than six months, or both, or if the victim of the assault is an individual who has not attained the age of 16 years, by fine under this title or imprisonment for not more than 1 year, or both.

(6) Assault resulting in serious bodily injury, by a fine under this title or imprisonment for not more than ten years, or both.

(7) Assault resulting in substantial bodily injury to a spouse or intimate partner, a dating partner, or an individual who has not attained the age of 16 years, by a fine under this title or imprisonment for not more than 5 years, or both.

(8) Assault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate, by a fine under this title, imprisonment for not more than 10 years, or both.

(b) Definitions.--In this section--

(1) the term "substantial bodily injury" means bodily injury which involves--

(A) a temporary but substantial disfigurement; or

(B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty;

(2) the term "serious bodily injury" has the meaning given that term in section 1365 of this title;

(3) the terms "dating partner" and "spouse or intimate partner" have the meanings [1] given those terms in section 2266;

(4) the term "strangling" means intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim; and

(5) the term "suffocating" means intentionally, knowingly, or recklessly impeding the normal breathing of a person by covering the mouth of the person, the nose of the person, or both, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 689; Pub.L. 94-297, § 3, May 29, 1976, 90 Stat. 585; Pub.L. 99-646, § 87(c)(2), (3), Nov. 10, 1986, 100 Stat. 3623; Pub.L. 99-654, § 3(a)(2), (3), Nov. 14, 1986, 100 Stat. 3663; Pub.L. 103-322, Title XVII, § 170201(a) to (d), Title XXXII, § 320101(c), Title XXXIII, § 330016(2)(B), Sept. 13, 1994, 108 Stat. 2042, 2043, 2108, 2148; Pub.L. 104-294, Title VI, § 604(b)(7), (12)(B), Oct. 11, 1996, 110 Stat. 3507; Pub.L. 113-4, Title IX, § 906(a), Mar. 7, 2013, 127 Stat. 124.)

Notes of Decisions (368)

Footnotes

1 So in original. Probably should be “meaning”.

18 U.S.C.A. § 113, 18 USCA § 113

Current through P.L. 117-80. Some statute sections may be more current, see credits for details.

West's New Mexico Statutes Annotated
Chapter 30. Criminal Offenses
Article 3. Assault and Battery (Refs & Annos)

N. M. S. A. 1978, § 30-3-11

§ 30-3-11. Definitions

Effective: July 1, 2018
Currentness

As used in the Crimes Against Household Members Act:

A. "household member" means a spouse, former spouse, parent, present or former stepparent, present or former parent in-law, grandparent, grandparent-in-law, a co-parent of a child or a person with whom a person has had a continuing personal relationship. Cohabitation is not necessary to be deemed a household member for the purposes of the Crimes Against Household Members Act;

B. "continuing personal relationship" means a dating or intimate relationship;

C. "strangulation" means the unlawful touching or application of force to another person's neck or throat with intent to injure that person and in a manner whereby great bodily harm or death can be inflicted, the result of which impedes the person's normal breathing or blood circulation; and

D. "suffocation" means the unlawful touching or application of force that blocks the nose or mouth of another person with intent to injure that person and in a manner whereby great bodily harm or death can be inflicted, the result of which impedes the person's normal breathing or blood circulation.

Credits

L. 1995, Ch. 221, § 2, eff. July 1, 1995; L. 2008, Ch. 16, § 1, eff. July 1, 2008; L. 2010, Ch. 85, § 1, eff. July 1, 2010; L. 2018, Ch. 30, § 1, eff. July 1, 2018.

Notes of Decisions (3)

NMSA 1978, § 30-3-11, NM ST § 30-3-11
Current with emergency legislation through Ch. 5 of the 2nd Special Session of the 55th Legislature (2021)

End of Document

West's New Mexico Statutes Annotated
Chapter 30. Criminal Offenses
Article 3. Assault and Battery (Refs & Annos)

N. M. S. A. 1978, § 30-3-15

§ 30-3-15. Battery against a household member

Effective: July 1, 2008
Currentness

A. Battery against a household member consists of the unlawful, intentional touching or application of force to the person of a household member, when done in a rude, insolent or angry manner.

B. Whoever commits battery against a household member is guilty of a misdemeanor.

C. Upon conviction pursuant to this section, an offender shall be required to participate in and complete a domestic violence offender treatment or intervention program approved by the children, youth and families department pursuant to rules promulgated by the department that define the criteria for such programs.

D. Notwithstanding any provision of law to the contrary, if a sentence imposed pursuant to this section is suspended or deferred in whole or in part, the period of probation may extend beyond three hundred sixty-four days but may not exceed two years. If an offender violates a condition of probation, the court may impose any sentence that the court could originally have imposed and credit shall not be given for time served by the offender on probation; provided that the total period of incarceration shall not exceed three hundred sixty-four days and the combined period of incarceration and probation shall not exceed two years.

Credits
L. 1995, Ch. 221, § 6, eff. July 1, 1995; L. 2001, Ch. 144, § 1, eff. July 1, 2001; L. 2007, Ch. 221, § 1, eff. July 1, 2007; L. 2008, Ch. 16, § 2, eff. July 1, 2008.

Notes of Decisions (12)

NMSA 1978, § 30-3-15, NM ST § 30-3-15
Current with emergency legislation through Ch. 5 of the 2nd Special Session of the 55th Legislature (2021)

End of Document