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.

REPLY BRIEF

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

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Veneno's convictions should be vacated because the district court violated his Sixth Amendment right to a public trial. The court did so by failing to make the requisite findings before closing the courtroom, by inadequately analyzing the *Waller* factors, and by providing an audio-only stream of the first session of voir dire.

The government tries to stack the deck against Veneno's constitutional arguments by claiming that Veneno did not object to the courtroom closure in a timely fashion. Not so. Despite a lengthy discovery period and exhaustive pretrial conference, the district court did not tell the parties before trial what its plans were in terms of allowing the public to attend trial. The government thinks that general administrative orders, a not-yet-approved planning document, and an email from a courtroom deputy—none of which were entered in the docket before trial—sufficed to put Veneno and his counsel on notice of the courtroom closure. They didn't. But more important, such materials are not how courts inform criminal defendants of potential infringements on their constitutional rights. As far as the record shows, Veneno and his counsel learned the details of the district court's specific approach to closing the courtroom

for the first time when the government raised the issue after the first session of voir dire. And when they learned those details, counsel objected. The issue is preserved.

With *de novo* review in place, the analysis is straightforward. The district court intentionally closed the courtroom to the public without first making any findings on the record. Under Supreme Court and Tenth Circuit precedent, the court's actions violated Veneno's right to a public trial, requiring vacatur of Veneno's convictions.

The district court also did not adequately explain why a total ban on the presence of all non-trial participants was narrowly tailored to the government's interest. It is not enough that the district court said that social distancing was not possible if the public was allowed in because the court reached that conclusion without exploring reasonable alternatives to total closure. The court never said anything about the possibility of reserving three or four seats for Veneno's family or members of the public. The court never talked about reducing the number of venire members to reduce congestion. Had it considered these alternatives, as it was required to, it would have recognized that excluding everyone from trial

was not necessary to meet the government's interest in preventing the spread of COVID.

Finally, the district court erred in declining to provide a video feed of the morning session of voir dire. The court did not claim that doing so served a substantial or overriding interest, that the necessary technology only became available after the first voir dire session, or that providing audio but not video was narrowly tailored to serve the government's interest. And it wouldn't matter if it had done any of these things. As the Ninth Circuit recently held, providing only an audio stream of criminal proceedings does not adequately protect a defendant's right to a public trial.

Veneno's convictions under § 117 should be reversed because his tribal-court conviction is not a categorical match for the federal generic offense of assault in § 117. The government says that the stipulation bars this Court's review. But as Veneno already explained, the stipulation arose out of the district court's misleading statement as to the consequences of Veneno's failure to stipulate. On the merits, we admit to have apparently analyzed the wrong statute in the Opening Brief (although, for reasons explained in footnote 4, we think the error defensible). But

the same result holds under the tribal statute attached to the government's brief. Veneno's prior conviction is not a categorical match for the federal generic offense of assault because it covers a broader swath of conduct than its federal counterpart.

The government argues that the district court did not abuse its discretion in admitting the evidence of the pre-November 2 Assault. But a careful review of the record, the additional evidence, and the non-character purposes the government identifies teach otherwise.

ARGUMENT

I. BECAUSE VENENO'S RIGHT TO A PUBLIC TRIAL WAS VIOLATED, HIS CONVICTIONS CANNOT STAND.

A. The District Court Violated Veneno's Right to a Public Trial When It Closed the Courtroom Without First Making the Requisite Findings.

The district court violated Veneno's right to a public trial by closing the courtroom without *first* making the findings required under *Waller v. Georgia*, 467 U.S. 39, 48 (1984). The government does not deny that courts must make factual findings before barring the public from a criminal trial. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1909 (2017); *Presley v. Georgia*, 558 U.S. 209, 215–16 (2010). Nor does the government deny that the district court closed the courtroom here without first

making the findings *Waller* requires. The government nonetheless contends that reversal is unwarranted. In the government's view, the district court's "obligation to make findings" was not "triggered" at the time it closed the courtroom because "Veneno failed to object before the morning jury-selection session began."

For two reasons, the government is mistaken.

1. *Veneno did not waive his challenge to the district court's failure to make findings in a timely manner.*

First, this Court does not lightly conclude that criminal defendants have waived their constitutional rights.[1] *See United States v. Cherry*, 217

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[1] Although courts are sometimes careless with their terminology, "[w]aiver is different than forfeiture." *United States v. Olano*, 507 U.S. 725, 733 (1993). "Waiver is accomplished by intent, but forfeiture comes about through neglect." *United States v. Cornelius*, 696 F.3d 1307, 1319 (10th Cir. 2012) (quotation marks and citations omitted). "Waiver of a right extinguishes any error and precludes appellate review, whereas forfeiture of a right is reviewed for plain error." *United States v. Brodie*, 507 F.3d 527, 530 (7th Cir. 2007); *see United States v. Puckett*, 556 U.S. 129, 138 (2009).

As we understand the government's brief, it applies this framework as follows. First, it contends (at 24–26) that Veneno *waived* his argument that the district court committed reversible error by failing to make *Waller* findings before closing the courtroom, so the Court is precluded from addressing that argument on the merits. Second, it asserts (at 26–32) that Veneno *forfeited* his argument as to the constitutionality of an audio-only feed of the morning voir dire session, which makes that argument reviewable only for plain error. Third, it seems to agree (at 32–35) that

F.3d 811, 815 (10th Cir. 2000). Defendants do not waive their challenges to courtroom closures, therefore, unless it is "obvious from the record" that they failed to object despite *knowing* that the courtroom was closed. *United States v. Anderson*, 881 F.3d 568, 572 (7th Cir. 2018); *see United States v. Moon*, 33 F.4th 1284, 1299 (11th Cir. 2022); *United States v. Hitt*, 473 F.3d 146, 155 (5th Cir. 2006). Typically, a defendant learns about the possibility of closure when the district court rules on the issue or when a party seeks such a ruling. *See* Fed. R. Crim. P. 51(b); *United States v. Rodriguez*, 919 F.3d 629, 634 (1st Cir. 2019).

Here, the district court did not issue a ruling or order on closing the courtroom before the morning voir dire session on the first day of trial. The government points to no written ruling or order on the topic (or any request, orally or in writing, asking the court to issue one). Nor did the district court say anything about closing the courtroom during the pre-trial conference ten days before trial. Vol. 3:64, 98–106. Because there is no indication that Veneno or his counsel were given an opportunity to object to the district court's closure before the first voir dire session,

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Veneno preserved his challenge to the the district court's *Waller* analysis, making that challenge reviewable de novo.

Veneno's silence that morning does not preclude *de novo* review of this issue. *See United States v. Gupta*, 699 F.3d 682, 689–90 (2d Cir. 2012); *Walton v. Briley*, 361 F.3d 431, 433 (7th Cir. 2004).

Citing two administrative documents that were not made part of the record until long after trial ended, the government incorrectly insists (at 24) that "Veneno knew that the courtroom was closed to the public." As an initial matter, the government cites no authority for the proposition that criminal defendants must object to general administrative orders or planning documents that have not been entered on their case docket. Rule 51 certainly imposes no such requirement.

What is more, neither document provided unambiguous notice that only trial participants would be allowed to physically enter the courtroom. The administrative order, originally entered months before trial, stated that "only persons with official court business" would be allowed to enter courthouses, but included within that category "[o]thers specifically authorized by a presiding judge." Vol. 1:387. And besides continuing

all criminal trials, the order said nothing about whether criminal trials would be closed to the public.[2] Vol. 1:386–91.

The other document (Vol. 1:398–416) provided more specific guidance but was similarly vague about whether any members of the public would be allowed to physically enter the courtroom during criminal trials. It stated on a hopeful note that "[s]eparate video feeds *should be* set up from a dedicated courtroom." Vol. 1:405 (emphasis added). But then added that, for purposes of in-person viewing, "priority [would be] given to family members of trial participants." Vol. 1:405. The corresponding safety protocol, moreover, gave individual judges "discretion" in deciding whether "nonessential persons" could enter the courtroom and, if so, how many. Vol. 1:411. Before the government raised the issue after the first voir dire session, however, the district court had not informed the parties how it would exercise its discretion here.

In the end, "[n]othing apart from the Government's speculation supports the conclusion that [Veneno] was aware of the closure when it happened and thus had the ability to raise a contemporaneous objection."

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[2] The government cites (at 7 n.5) another administrative order that was never entered in the record, but it too says nothing about criminal trials or whether the public would have access to such trials.

Gupta, 699 F.3d at 689–90. Because the "district court made no findings as to whether [Veneno] or his counsel was aware" of the closure, and because their "awareness [of the closure] is not obvious from the record," Veneno did not waive his challenge to the district court's failure to make findings before closing the courtroom. *Anderson*, 881 F.3d at 572.

2. *Before intentionally closing the courtroom to the public, the district court was required to make findings justifying the closure.*

Second, the government seems to think (at 24–26) that district courts are free to close courtrooms without explaining their decision so long as the defendant does not immediately object. But that is not the law. To the contrary, "if a court intends to exclude the public from a criminal proceeding, it must *first* analyze the *Waller* factors and make specific findings with regard to those factors." *Gupta*, 699 F.3d at 687. If the court "fails to adhere to this procedure, any intentional closure is unjustified and will, in all but the rarest of cases, require reversal." *Id.* In *Press-Enterprise Co. v. Super. Ct. of Cal., Riverside Cnty.*, 464 U.S. 501 (1984), for example, "neither the defendant nor the prosecution requested an open courtroom during juror voir dire proceedings," but the Supreme Court "nonetheless found it was error to close the courtroom." *Presley*,

558 U.S. at 214–15 (discussing *Press-Enterprise*). Given the fundamental constitutional interests at stake, a district court has "an independent obligation to consider public trial rights *before* closing all or a portion of the proceedings." *State v. Duckett*, 173 P.3d 948, 952 (Wash. Ct. App. 2007) (emphasis added). Because the district court did not do so here, Veneno's convictions must be vacated.

B. Closure of the Courtroom Was Total and Was not Justified Under *Waller*.

As explained in the Opening Brief (at 24), the Supreme Court has never recognized a distinction between a "partial closure" and a "total closure." But if the Court is inclined to draw that distinction here, the district court's closure of the courtroom was "total" because it excluded all persons from the courtroom besides "witnesses, court personnel, the parties, and the lawyers." *Waller*, 467 U.S. at 42.

1. *The district court's closure of the courtroom was total.*

The government agrees that the physical exclusion of all non-participants has always been the standard by which courts determine whether a closure is total or partial. But as the government sees things (at 17–18), that standard does not work in the context of "a contagious virus." When the reason for a closure is to prevent the spread of a "deadly

virus," a closure is "partial" if the public retains the ability to witness the proceedings through an "audio-visual broadcast."

The problem with this theory is that it minimizes the core component of the public-trial right—the right to be tried in the *physical presence* of a local audience. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 566–67 (1980) (plurality opinion); *see also* Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 Harv. L. Rev. 2173, 2203 (2014) ("The Supreme Court's jurisprudence displays an unmistakable focus on the physical presence of locals inside the courtroom.").

The government thinks (at 18–21) that courts should be allowed to instead *broadcast* criminal trials if they can articulate a "substantial reason" for doing so. "As a free-floating test" for the scope of a person's right to a public trial, the government's approach "is startling and dangerous." *United States v. Stevens*, 559 U.S. 460, 470 (2010). For one thing, it is not clear what counts as a "substantial reason" under the government's test. Preventing transmission of other respiratory viruses? Protecting a vulnerable witness? Avoiding the risk of physical or emotional outbursts in

an especially high-profile or controversial case? This ambiguity gives courts too much leeway in barring the public from criminal trials.

For another thing, the Sixth Amendment "itself reflects a judgment by the American people that the benefits" of a public trial "outweigh the costs." *Id.* "Our Constitution forecloses any attempt to revise that judgment simply on the" government's assertion that virtual trials serve the same interests as public trials.[3] *Id.* To paraphrase Justice Scalia, "[v]irtual [public trials] might be sufficient to protect virtual constitutional rights; I doubt whether [they are] sufficient to protect real ones." *Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure*, 207 F.R.D. 89, 94 (2002) (statement of Scalia, J.). The only other federal appellate court to address this argument, moreover, rejected it, holding that making available an audio stream of the proceedings did not make a closure partial. *United States v. Allen*, 34 F.4th 789, 797 (9th Cir. 2022).

[3] The government's paean to the virtues of virtual trials overlooks another important purpose served by the physical presence of the public at trials—the enhancement of "self-government and democracy among local citizenry" by giving attendees the opportunity to exert a "palpable effect on the speakers in the courtroom." *Simonson*, 127 Harv. L. Rev. at 2182, 2200.

2. *Barring all members of the public from physically attending trial was not narrowly tailored to the government's interests.*

Because closure of the courtroom was "total," the district court was required to address whether excluding all non-trial participants from trial was "no broader than necessary to protect" against the spread of Covid-19 and, in making that determination, to consider "reasonable alternatives to closing the proceeding." *Waller*, 467 U.S. at 48. The district court's analysis fell short.

The government argues (at 23) that the district court's closure of the courtroom was no broader than necessary because the court found that it was "not possible to maintain social distancing while granting the public physical access to the courtroom." But the district court only arrived at that conclusion after failing to consider reasonable alternatives to its preferred approach. For example, at no point did the district court explore what other district courts had done under the circumstances, such as allowing a limited number of spectators, including the defendant's family, to physically attend the trial. *See Presley*, 558 U.S. at 215; *Allen*, 34 F.4th at 798 n.5 (collecting cases). Nor did the court consider

"dividing the jury venire panel to reduce courtroom congestion." *See Presley*, 558 U.S. at 215; *State v. Martinez*, 956 N.W.2d 772, 787 (N.D. 2021).

It is not enough to show that closing the courtroom would help "curb[] the spread of COVID"; the court was required to "strike a balance between protecting a defendant's public trial right and the goal of stemming the spread of COVID." *Allen*, 34 F.4th at 799. Because nothing in the district court's analysis showed "that allowing a limited number of members of the public to view the trial in the courtroom . . . would imperil public health," the district court erred in imposing a total ban on public entry. *Id.*

C. Providing Nothing More than an Audio Stream of the Morning Voir Dire Session Independently Violated Veneno's Right to a Public Trial.

1. *Veneno preserved this issue below and in his Opening Brief.*

Finally, the district court violated Veneno's right to a public trial by providing only an audio stream of the first session of voir dire. The government argues that this argument was forfeited below and inadequately briefed on appeal. It is wrong on both counts. On timeliness, the record makes clear that Veneno's counsel objected to an audio-only stream of the

morning session of voir dire as soon as he "found out" that only audio had been provided. Vol. 4:134.

The government cannot point to any pretrial discussion or motion practice about the court providing only audio of the voir dire, but still argues (at 27) that counsel should have objected before trial based on the audio-only internet link sent out the first morning of trial. We strongly disagree. Trial lawyers are often too caught up in the heat of battle to test a link sent from a courtroom deputy on the first day of trial. Further, district courts should not relay information implicating fundamental constitutional rights via hyperlink. The bottom line is that counsel "found out" for the first time that a video stream had not been made available after the first two hours of voir dire. Upon making that discovery, he objected. Vol. 4:134:13–17. Principles of preservation require nothing more. *See Rodriguez*, 919 F.3d at 634.

Nor is there any merit to the government's contention that Veneno inadequately briefed the issue on appeal. Counsel devoted seven pages to the scope and nature of a criminal defendant's right to a public trial. (Op. Br. 23–30.) Counsel explained that the right entitled the defendant to the physical presence of his family and loved ones at trial, that virtual access

was no substitute for physical access, and that the district court's analysis under *Waller* was inadequate. In the ensuing two pages (30–32) counsel argued that, even if the district court's *Waller* analysis was generally sufficient, it did not justify the district court's decision to provide only audio for two full hours of voir dire. By denying the public (and Veneno's family) the ability to see what was happening during voir dire, counsel explained, the district court violated Veneno's constitutional rights. Under the circumstances, we respectfully submit that Veneno's discussion of this issue did "not compel [the Court] to scavenge through his brief for traces of argument." *United States v. Fisher*, 805 F.3d 982, 991 (10th Cir. 2015).

2. *As the Ninth Circuit recently held, providing only an audio stream of trial proceedings is a violation of the public-trial right.*

On a de novo standard of review, the district court unquestionably violated Veneno's right to a public trial. As the Ninth Circuit recently explained:

> For purposes of the public trial right, an audio stream is not substantially different than a public transcript. Although a listener may be able to detect vocal inflections or emphases that could not be discerned from a cold transcript, an audio stream deprives the listener of information regarding the

> trial participant's demeanor and body language. Nor can a listener observe the judge's attitude or the reactions of the jury to a witness's testimony, or scan any visual exhibits.

Allen, 34 F.4th at 796. Consistent with Veneno's argument in the Opening Brief, the court then went on to say that "the public trial guaranteed by the Sixth Amendment is impaired by a rule that precludes the public from observing a trial in person, regardless whether the public has access to a transcript or audio stream." *Id.*

The district court's failure to meaningfully address the problems with providing an audio-only stream only confirms the constitutional violation. At no point did the district court explain why it had told defense counsel that it was not capable of providing a video feed of voir dire, 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.

Perhaps recognizing the deficiencies in the district court's analysis, the government attempts to shift the blame to Veneno, arguing (at 30) that Veneno should have "moved to strike the morning venire" or asked for some other kind of "specific relief." The government cites no authority for this argument, and for good reason. Veneno informed the district court that it was a violation of Veneno's right to a public trial to not

provide a video stream of the first session of voir dire. The district court rejected that argument. Nothing required Veneno to also explain to the district court how to cure the constitutional violation.

Veneno preserved his challenge to the district court's closure of the courtroom, the closure was belatedly and inadequately justified, and Veneno is therefore entitled to a vacatur of his convictions. *See Meadows v. Lind*, 996 F.3d 1067, 1076 (10th Cir. 2021).

II. 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.

We showed in the Opening Brief (at 33–43) that Veneno's convictions under 18 U.S.C. § 117 must be reversed because his tribal-court convictions were categorically broader than the generic offense of assault under § 117. The government seems to agree (at 39) that the categorical approach applies in determining whether a defendant's prior conviction satisfies § 117. According to the government, however, Veneno's § 117 convictions should not be reversed because Veneno stipulated that his prior convictions counted as predicate offenses under § 117 and because the Opening Brief applies the categorical approach to the wrong underlying statute. We will take these points in turn.

A. The Stipulation does not Preclude Review.

As an initial matter, there is no dispute that, if the district court misled Veneno or his counsel about the consequences of Veneno's failure to stipulate, then the stipulation does not preclude this Court's review.

The government argues that the district court's statement did not mislead Veneno or his counsel. In arriving at that conclusion, the government suggests (at 38–39) that the district court's statement about the government "[go]ing into that" referred to the fact of the convictions and the nature of Veneno's relationship with the victim of the offense, not the nature of the crime itself. We disagree. First, there is no indication that the district court ever understood that whether Veneno's prior convictions qualified as "any assault" under § 117 was a question of law instead of a question of fact.

Second, defense counsel's response to the district court's statement—"we would rather not do that"—suggests that counsel was worried that certain aspects of Veneno's prior convictions would prejudice the jury against his client. And what, in counsel's mind, would most prejudice the jury against Veneno? Not the convictions themselves or the fact that they involved an intimate partner. After all, the jury was going to hear

that evidence through the stipulation regardless. *See* Vol. 1:289. Instead, counsel would have been worried about the jury hearing unsettling details of the assault. Thus, counsel's expressions of concern reflected his understanding that the district court telling him that the government would be allowed to provide introduce those details to the jury if Veneno did not stipulate. But under the categorical approach, those details are precisely what the jury would not have heard. Because the record suggests that the district court inadvertently misled counsel about the effect of the stipulation, review is warranted.

B. Generic "Assault" Under § 117 Is not a Categorical Match for the Tribal Statute Under Which Veneno Was Convicted.

Based on the attachments to the government's brief, we agree that we inadvertently applied the categorical approach to the wrong statute in the Opening Brief.[4] But the same result follows under the tribal

[4] We apologize for the error. By way of explanation, the record repeatedly refers to the crime Veneno was convicted of as "Battery Against a Household Member," usually in capital letters. Vol. 1:91, 99, 116, 206; 3:307, 331. As the court documents from the Jicarilla Apache Nation show, Veneno was convicted in tribal court of the crime of "Domestic Violence," *not* of "Battery Against a Household Member." In addition, the New Mexico Code contains a criminal offense entitled "Battery Against a Household Member." N.M.S. § 30-3-15. Under the circumstances, counsel thought it

statute. As the government notes, Veneno was convicted of "domestic violence," which tribal law defines as "an act of abuse by a perpetrator on a family member or household member of the perpetrator." Title 3, Chapter 5 of the Jicarilla Apache Nation Code, at § 3-5-2(C). Abuse, in turn, means "the infliction of physical and bodily injury or sexual assault or the infliction of the fear of imminent physical harm, bodily injury or sexual assault, and includes but is not limited to assault and assault and battery as defined in the Jicarilla Apache Nation Code." § 3-5-2(A).

Recall that under the categorical approach the Court compares the federal generic offense of "assault" under § 117 with the statute of conviction—here, "domestic violence" under tribal law. (Op. Br. 37.) Veneno's domestic-violence conviction "is a categorical match" with the generic offense of assault only if his conviction "necessarily involved facts equating to the generic federal offense." *United States v. Leaverton*, 895 F.3d 1251, 1253 (10th Cir. 2018). As already explained, generic assault requires either (1) intent to inflict physical injury or (2) reasonable apprehension of imminent harm. (Op. Br. 38–39.)

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reasonable to believe that the Jicarilla Apache Nation had borrowed or incorporated the New Mexico statute.

The next question, therefore, is how the elements of generic federal assault map on to § 3-5-2 of the tribal code. The complicating factor here, as the government recognizes, is that the tribal crime of "domestic violence" is framed in the alternative. It requires an "act of abuse," which can mean any of the following:

- infliction of physical or bodily injury or
- sexual assault or
- infliction of the fear of imminent physical harm, bodily injury or sexual assault or
- assault or
- assault and battery.

§ 3-5-2(A). When "faced with an alternatively phrased statute," the Court's first task is "to determine whether its listed items are elements or means." *Mathis v. United States*, 579 U.S. 500, 517 (2016). If the statute contains "alternative elements" that "create distinct crimes," *see United States v. Titties*, 852 F.3d 1257, 1267 (10th Cir. 2017), then the reviewing court may review a limited set of materials—the indictment, the terms of a plea agreement, or the transcript of the colloquy between judge and defendant—to determine if the defendant was convicted of "the version of the crime . . . corresponding to the generic offense." *Descamps*,

570 U.S. at 262–63. But if the alternatives are merely different "means" of committing the same crime, "the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution." *Mathis*, 579 U.S. at 517.

Here, this "threshold inquiry . . . is easy." *Id.* The tribal code's alternatives are means, not elements. Two points are critical. First, the listed alternatives were "drafted to offer illustrative examples" of the "act of abuse," not to enact five separate crimes. *Titties*, 852 F.3d at 1268. Second, "the record of the prior conviction [attached at the back of the government's brief] itself" shows that the alternatives are means, not elements. According to that document, Veneno was found guilty of "Domestic Violence." The fact that the record of conviction refers only to the overarching crime—domestic violence—without specifying which "act of abuse" he committed is compelling evidence that the tribal code's alternative definitions of an "act of abuse" are not separate crimes but are "alternative means" to commit "one offense"—domestic violence. *Mathis*, 579 U.S. at 517. As a result, the Court may not further explore the statutory alternatives to determine which "was at issue in the earlier prosecution." *Id.* Given the breadth of the tribal statute of conviction, it is

impossible to conclude that Veneno's conviction under tribal law is a categorical match for the generic crime of assault. (Tellingly, the government never says otherwise.) Veneno's § 117 convictions should be vacated.[5]

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

Veneno showed in the Opening Brief (at 44–48) that the district court abused its discretion in admitting evidence of the pre-November 2 Assault because the unfair prejudice of that evidence far outweighed its probative value. As for probative value, the government argues (at 49) that evidence of Veneno's motive for committing the pre-November 2 assault "made it more likely that he acted from the same motive on November 2" and more likely that S.H.'s identification of Veneno as her assailant was not a mistake.

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[5] The government suggests (at 43 n.12) that this does not matter because Veneno's sentence will be the same regardless. If this were an appeal from a court's sentencing determination, we might agree. But Veneno's recidivism was part and parcel of the jury trial, which makes it impossible to say how the evidence of Veneno's prior convictions influenced the jury's verdict. Under these circumstances, therefore, the Court should reverse and remand for a new trial on just the § 113 charge. (That would only be necessary, of course, if the Court does not vacate Veneno's convictions on Sixth Amendment grounds.)

We are not persuaded. S.H. testified about three additional physical attacks besides the pre-November 2 Assault, all stemming from jealousy about her phone activity and all involving Veneno. It is hard to see how additional testimony about one more attack could have meaningfully moved the needle in the jury's evaluation of the charges against Veneno.

On the unfair prejudice side, the government claims (at 49) that "Veneno does not contest that the jury was properly informed of his prior convictions for domestic-violence offenses." The government is mistaken. A key part of Veneno's categorical-approach argument is that the jury never should have heard about Veneno's prior convictions because whether they qualified as "any assault" was a question for the judge, not the jury. That leaves the government's insistence that evidence of the pre-November 2 Assault was not unfairly prejudicial because it merely added to evidence that had already been admitted. Even if that's how courts have approached this issue, it's still a "remarkable proposition" that creates unhealthy incentives and risks convictions based on character instead of conduct.

As for harmless error, Veneno stands on the arguments made in his Opening Brief. (Op. Br. 47–48.)

CONCLUSION

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

Veneno's convictions on Counts 2 and 3 should be reversed because his tribal-court convictions 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.

PARSONS BEHLE & LATIMER

/s/ Alan S. Mouritsen

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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 5,332 words, 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 Century Schoolbook 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 **REPLY BRIEF** is an exact copy of the seven hard copies filed with the Court;

3. the ECF submission of the foregoing **REPLY 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 July 13, 2022, I electronically served a copy of the **REPLY BRIEF** via ECF, which, in turn, accomplished electronic service on the following.

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