UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

NO. 21-2101

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

vs.

QUENTIN VENENO, JR.,

Defendant/Appellant.

Appeal from the United States District Court
For the District of New Mexico
District Court No. 1:18-cr-03984-KWR
Hon. Kea W. Riggs, United States District Judge

APPELLEE'S ANSWER BRIEF – WITH ATTACHMENTS

ORAL ARGUMENT IS NOT REQUESTED

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June 2022

RULE 26.1 DISCLOSURE

The government is not aware of any organizational victims to the criminal activity charged in this case.

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PRIOR OR RELATED APPEALS

There are no prior or related appeals.

ISSUES PRESENTED FOR REVIEW

Defendant Quentin Veneno brutally assaulted his girlfriend, causing life-threatening injuries. A jury convicted him of several domestic-violence offenses. His appeal presents the following issues:

1. Veneno's jury trial occurred during the COVID-19 pandemic. The district court closed the courtroom to spectators but provided audio and video feeds over the internet for the public. Veneno now argues that his Sixth Amendment right to a public trial was violated and that he is entitled to a new trial.

    a. Did the district court commit plain error by not making findings to justify the closure before it occurred, where Veneno made no timely objection?

    b. Did the district court commit plain error by providing an audio-only feed during the first two hours of jury selection?

    c. Were the district court's findings adequate to support the closure?

2. Veneno was convicted of domestic assault by a habitual offender in Indian Country in violation of 18 U.S.C. § 117(a)(1). Under this statute, the Government was required to prove that Veneno had two prior convictions for domestic-assault offenses in federal, state, or tribal court. One of his two predicate convictions was for an offense in tribal court. Veneno now argues that his tribal-court conviction was not a proper predicate for purposes of § 117(a)(1) because the offense for which he was convicted was categorically overbroad.

    a. Is Veneno's claim barred by the invited-error doctrine, where he stipulated that the tribal-court conviction was valid and that it was a proper predicate under § 117(a)(1)?

    b. In the alternative, has Veneno failed to show that the district court committed plain error, where he analyzes an

irrelevant New Mexico statute instead of the tribal statute which formed the basis of his tribal-court conviction?

3. Did the district court abuse its discretion by admitting evidence of an uncharged assault that Veneno committed against his girlfriend just five days before one of the charged assaults, where the uncharged assault was relevant to show Veneno's motive and a lack of mistake by the victim?

4. Should this Court reject Veneno's claim that Congress lacks the authority to criminalize conduct by Indians in Indian country, where Veneno acknowledges that his claim is contrary to Supreme Court precedent?

STATEMENT OF THE CASE AND THE FACTS

I. Veneno severely beats his girlfriend on multiple occasions.

In August 2018, Veneno was living with his girlfriend, S.H., at her house on the Jicarilla Apache reservation in New Mexico. III ROA[1] 237-38. On August 22, 2018, S.H. was sitting in bed while checking her cell phone. *Id.* at 240-41. Veneno noticed this, accused S.H. of talking with other men, and struck the cell phone out of her hand. *Id.* at 241. Veneno then began striking S.H. with his fist. *Id.* at 241-42. After Veneno stopped hitting her, S.H. ran to a neighbor's house, and the neighbor called the tribal police. *Id.* at 242-44.

A Jicarilla Apache tribal police officer arrived soon thereafter and observed that S.H. had blood on her face and other injuries. *See* I Supp.

[1] "ROA" refers to the record on appeal, preceded by the volume number and followed by the "DNM" page number at the bottom of each page.

ROA,[2] 00:04-00:16; II Supp. ROA,[3] Exhibits 2-6; III ROA 177-78, 181-84. Veneno, who had blood on his hands, denied knowing what had happened to S.H. and claimed that he had punched a wall. I Supp. ROA, 00:31-00:54; III ROA 179.

Veneno and S.H. reconciled, and several months later, on about October 28, 2018, Veneno attacked S.H. again. III ROA 245-46, 250. On that occasion, he kicked her upper body and arm while wearing shoes. *Id.* at 250-51. S.H. fled into some hills near her house and hid there for several hours. *Id.* at 251. When S.H. finally returned home, Veneno accused her of being with another man. *Id.* at 251-52. S.H. denied this and showed him the place where she had been hiding. *Id.* at 252. Veneno then asked S.H., "Should I just kill you now?" *Id.*

Five days later, on November 2, 2018, Veneno attacked S.H. again. Both Veneno and S.H. had been drinking a lot of alcohol. III ROA 267-68. S.H. was sitting in bed while looking at her cell phone. *Id.* at 246. Veneno again accused S.H. of talking with other men and struck the cell phone from her hand. *Id.* He then grabbed S.H. by her hair, dragged her onto the floor,

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[2] "I Supp. ROA" refers to the police lapel camera video that was made part of the appellate record by this Court's order of June 7, 2022.

[3] "II Supp. ROA" refers to the photographs provisionally added to the appellate record by this Court's order of June 7, 2022.

and he began kicking S.H. while wearing shoes. *Id.* He then grabbed S.H. by her hair and dragged her outside. *Id.* at 247. Veneno slammed S.H.'s head onto a concrete step outside the house. *Id.*

When the attack subsided, S.H. felt extreme pain. III ROA 248. She retrieved some milk from the refrigerator to drink with some ibuprofen, but before she could take the medicine, Veneno grabbed the milk, poured the entire gallon over her head, and said, "Here's your f[uck]ing milk." *Id.* at 248. Veneno blamed S.H. because she had "made him" hit her, and he refused to allow her to seek medical attention. *Id.* at 249, 252-53, 284.

Finally, on November 7, Veneno was absent, and S.H. was in such extreme pain (it hurt even to breathe) that she finally dared to seek medical attention. III ROA 254-55. She called a tribal health care provider, who took her to an urgent care center and called the tribal police. *Id.* S.H. was transported to a hospital in nearby Farmington, New Mexico, where she was hospitalized for five days. *Id.* at 255-56, 282. FBI agents took photographs of her injuries. II Supp. ROA Exhibits 7, 8, 9, and 10; III ROA 256. Medical personnel discovered that S.H. had a collapsed lung and nine broken ribs – injuries usually caused by car crashes or serious assaults – and had to give her an epidural to control her pain. *Id.* at 285-87, 289. The collapsed lung would have posed a serious risk to S.H.'s life had it been left untreated much longer. *Id.* at 289-90.

II. <u>Veneno is charged with several domestic-violence offenses.</u>

A federal grand jury charged Veneno via a superseding indictment with two counts of domestic assault by a habitual offender in Indian Country, in violation of 18 U.S.C. §§ 117(a)(1) and 1153, one count for the August 22 assault and one for the November 2 assault. I ROA 33-34. Veneno was also charged with assaulting S.H. in Indian Country resulting in serious bodily injury, in violation of 18 U.S.C. §§ 113(a)(6) and 1153. *Id*. at 34.

The § 117 counts listed three prior assault convictions as predicates: two convictions for battery against a household member in the Jicarilla Apache tribal courts and one federal conviction of domestic assault by a habitual offender in Indian Country. I ROA 33-34.

III. <u>The Government gives notice of its intent to present evidence of Veneno's prior bad acts.</u>

Before trial, the Government gave notice that it intended to present evidence of uncharged conduct. I ROA 129-42. First, the Government sought to introduce evidence of Veneno's prior domestic violence convictions because they were necessary to prove the prior-conviction element of the § 117 counts. *Id*. at 129-30, 132-33. Second, the Government asked to introduce evidence that Veneno had assaulted S.H. shortly before both the August 22, 2018 and

November 2 assaults.[4] *Id.* at 130-32, 134-36. As to the assault before November 2, the Government asserted that the earlier assault was committed out of jealousy sparked by suspected infidelity and was thus relevant to prove Veneno's motive in the charged assault. *Id.* at 131. It also argued that it intended to show photographs of S.H.'s injuries and needed to explain that some of her injuries were not inflicted on the dates of the charged offenses. *Id.* at 130; III ROA 157. Veneno opposed admission of the evidence. I ROA 241-52. The district court granted the motion in limine. *Id.* at 284-85; III ROA 157-62. The evidence was ultimately admitted at trial. *Id.* at 244-45, 250-52.

IV. The district court closes the courtroom to protect jurors and other trial participants from the COVID-19 pandemic.

Veneno's jury trial was held in September 2020, during the COVID-19 pandemic. At the time, the district court's operations were subject to an administrative order (No. 20-MC-00004-17) issued by the chief judge of the District of New Mexico on April 27, 2020. I ROA 386-91. This order noted the guidance issued by the Centers for Disease Control and Prevention ("CDC") and the New Mexico Department of Health ("NMDOH") advising that "gatherings of people pose a threat to public health and safety" and noting

[4] On appeal Veneno challenges only the admission of the pre-November 2 incident.

the difficulty "in maintaining appropriate distance from other people during both jury trials and bench trials." *Id.* at 386. The order therefore limited entry to the courthouse to certain categories of persons having "official court business."[5] *Id.* at 387. At no point before trial did Veneno object to the order's exclusion of the public from the courthouse.

The District of New Mexico formulated a "Plan for Resumption of Jury Trials in DNM During the Pandemic" (August 4, 2020 version) (the "Plan"), which detailed the procedures that district court judges were to employ to protect jurors and other trial participants from the dangers posed by the COVID-19 virus. I ROA 398-416. The Plan stated that due to the need to maintain social distancing, only 20 to 25 prospective jurors could be safely seated in the jury assembly room and in the designated courtroom. *Id.* at 400. Jury selection would therefore need to take place in morning and afternoon "waves" of venire panels. *Id.* During each wave, the venire members would be seated in both the jury box and the gallery of the courtroom. *Id.* at 400-01.

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[5] The administrative order's prohibition on public entry into the courthouse was originally effective through May 29, 2020. I ROA 387. This prohibition on public entry was later extended. *See* Supplemental Administrative Order, July 2, 2020 (stating that all persons entering the courthouse, "as permitted by Administrative Order 20-MC-00004-17" were now required to wear face masks) (the order is posted at https://www.nmd.uscourts.gov/sites/nmd/files/general-ordes/20-MC-04-27_Supplementing%20Admin%20Order%2020-MC-04-17%20%26%20Superseding%20Admin%20Order%2020-MC-04-19.pdf) (viewed on May 27, 2022).

During the trial itself, however, witnesses would testify from the jury box, so the jurors and alternates would be seated in the gallery where members of the public would ordinarily sit. *Id.* at 402, ¶ 2.c. At no time before trial did Veneno object to the Plan.

In accord with the Plan, the district court arranged to select Veneno's jury from morning and afternoon "waves" of venire members. Before the jury selection began, the district court's courtroom deputy sent the parties an internet link from the district court's website that would allow members of the public to listen to the jury selection via an audio feed. IV ROA 133, 135-36.

At the conclusion of the morning session of the jury selection, the Government raised the issue of whether providing an audio-only feed of the proceedings, as opposed to an audio and visual feed, satisfied Veneno's right to a public trial. IV ROA 133. Defense counsel said he had understood that there was both an audio and visual feed of the proceedings but acknowledged that his assumption may have been incorrect. *Id.* at 134. The district court said it was incapable of providing a video feed but "we do have a live audio feed that is open to the public." *Id.* Defense counsel objected because "a proper jury trial should be open to the public, to include not only audio, but video as well." *Id.*

Before the afternoon jury selection session, defense counsel again objected to the lack of a video feed during the morning session. IV ROA 135-36. He said that he found out before the lunch break that the link only provided an audio feed. *Id.* at 135. Defense counsel noted that due to COVID-19 "we're already compromised because we do not have the ability to have people present." *Id.* He acknowledged the time and effort that went into the district court's jury trial plan, "[b]ut ultimately, it's not the same[.]" *Id.* "Now, to learn that in fact [there was] only audio, I think that essentially even further compromises the Sixth Amendment right to a public trial." *Id.* at 135-36. Defense counsel acknowledged that video equipment was now present in the courtroom, "[b]ut for purposes of the record, I would make that objection in regard to [Veneno's] Sixth Amendment right to a public trial being compromised." *Id.* at 136.

The district court said that an audio-visual feed would be available to public from then on. IV ROA 136. It observed that Veneno had not objected before the jury selection process began that morning. *Id.* at 137. It found that the morning jury-selection session was not entirely closed to the public because an audio feed was available through the court's website. *Id.* at 137-38. The court said that going forward, the public would be able to watch the proceedings via an audio-visual feed. *Id.* at 138.

The district court stated that all trial participants were present in the courtroom, but that the COVID-19 pandemic made it necessary to exclude the public. IV ROA 138. It found that social distancing would not be possible "if the public were allowed in the gallery" because it was necessary to seat the jurors in that location. *Id.* "Therefore, there is no reasonable place to put the public." *Id.*

The district court acknowledged that the Sixth Amendment grants an accused defendant a right to a public trial, including jury selection. IV ROA 139. The district court found that the trial was only partially closed because the public, including Veneno's family, had access to an audio feed in the morning, and would have access to an audio-visual feed during the rest of the proceedings. *Id.*

But the district court also found that a total closure would satisfy the test in *Waller v. Georgia*, 467 U.S. 39 (1984). IV ROA 139. First, the danger posed by the COVID-19 pandemic constituted an overriding interest that justified the closure. *Id.* at 140-41. The district court found that "[u]nder the specific circumstances, it is not possible to maintain social distancing while granting the public physical access to the courtroom." *Id.* at 141. Second, the closure was not broader than necessary to protect the public health, because "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." *Id.* at

141-42. Third, the district court said that reasonable alternatives "have been put in place, as the proceeding is available to the public through audio and video." *Id.* at 142. Finally, the district court said it believed that it had made adequate findings to support the closure. *Id.* At no time did Veneno object to the district court's findings or suggest that they were insufficient to support the closure.

The district court then asked the parties if they had anything else to say before starting the afternoon jury-selection session. IV ROA 142. Defense counsel did not. *Id.* Jury selection continued. *Id.* at 142-205. At the end of the afternoon session, the district court asked if the parties had any objection to the way the jury was selected, and defense counsel said he did not. *Id.* at 203-04.

After a two-day trial, the jury convicted Veneno on all three counts in the indictment. I ROA 449; III ROA 363-68. The district court sentenced Veneno to concurrent prison sentences of 60 months and 115 months on the § 117 counts, respectively, and 115 months on the § 113 count. I ROA 505-07; III ROA 44-45.

SUMMARY OF THE ARGUMENT

The district court did not violate Veneno's right to a public trial. It correctly found that the courtroom was partially closed because the audio-visual feed on the court's website provided public access to the proceedings.

The need to prevent transmission of COVID-19 constituted a substantial reason justifying the partial closure, the audio-visual feed satisfied the interests that the right to a public trial protects, and the district court made appropriate findings.

But even if the courtroom closure were a total one, it was justified. As required by the Supreme Court's decision in *Waller v. Georgia*, 467 U.S. 39 (1984), the district court found that the danger posed by the COVID-19 virus was an overriding interest. It further found that the exclusion of the public was not broader than necessary, and that no reasonable alternatives existed because it was not possible to allow members of the public to enter the courtroom without compromising social-distancing requirements. The closure was also not overbroad under the circumstances because an audio-visual feed on the district court's website would allow the public to view the proceedings.

Veneno argues that the closure was fatally defective because the district court did not make its *Waller* findings until after the first two hours of jury selection. But Veneno did not object to the closure before that moment, and a district court's obligation to make findings is only triggered when a party objects.

Next, Veneno argues that reversal is required because the district court violated his right to a public trial by providing an audio-only feed during the first two hours of jury selection, instead of both an audio and video feed. This

claim should be reviewed for plain error because Veneno did not object until after the first two hours had elapsed. Veneno has failed to show that any error occurred, and he cannot show that any error was plain. But even if he could, this Court should not grant a new trial. If Veneno believed that his right to a public trial was fatally tainted by the lack of a video feed during the first two hours of voir dire, he should have asked the district court to convene a new venire and provide a video feed to the public during jury selection. Instead, Veneno opted to continue with the jurors that had been selected. This Court should not reward Veneno for his attempt to sandbag the district court.

Veneno's last public-trial argument is that the district court's courtroom closure was not narrowly tailored because photographs of the courtroom supposedly demonstrate that there was room for spectators, and that the district court did not consider this supposedly reasonable alternative. But the district court did consider whether there was room for any members of the public, and concluded that there was not. Moreover, Veneno's claim is subject to plain-error review because he did not raise the issue at the time. And even if Veneno had demonstrated the existence of an error that was plain, this Court should not grant a new trial because Veneno withheld his objection at the time when any error in the district court's findings could have been corrected at minimal cost.

Moving on, Veneno claims that his prior tribal-court conviction for a domestic-violence offense is categorically overbroad and therefore cannot be a predicate offense for his § 117(a)(1) convictions. But Veneno's claim is barred because he stipulated that his tribal-court conviction was a predicate offense under § 117(a)(1). Even if he were relieved from his stipulation, his attempt to show that the district court committed plain error, or even ordinary error, fails because he mistakenly assumes that he was convicted of the New Mexico offense of battery against a household member. But Veneno was convicted of violating an entirely different Jicarilla Apache domestic-violence statute, and he has not developed any argument that the tribal statute was categorically overbroad.

Veneno also claims that the district court abused its discretion by admitting evidence of an uncharged assault that he committed five days before the charged November 2 assault. But testimony about the other assault was properly admitted under Federal Rule of Evidence 404(b) because it helped to demonstrate Veneno's motive for assaulting his girlfriend and that she was not mistaken in identifying Veneno as her assailant. The strong probative value was not substantially outweighed by the risk of additional prejudice.

Finally, Veneno claims that Congress lacks the power to criminalize the conduct of Indians in Indian country, but he correctly acknowledges that his argument is contrary to longstanding Supreme Court precedent.

ARGUMENT

I. The district court's COVID-19 precautions did not violate Veneno's right to a public trial.

A. Legal background and standard of review

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" U.S. Const., amdt. VI. This right also extends to jury selection. *Presley v. Georgia*, 558 U.S. 209, 213-15 (2010) (per curiam). But the right to a public trial is "not absolute." *United States v. Addison*, 708 F.3d 1181, 1188 (10th Cir. 2013) (citations omitted). A courtroom may be totally closed when doing so will "advance an overriding interest that is likely to be prejudiced[.]" *Waller v. Georgia*, 467 U.S. 39, 48 (1984). "[T]he closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.* When a violation of the right to a public trial occurs, a defendant need not prove prejudice to obtain relief. *Id.* at 49-50 (citations omitted).

A less stringent standard applies when a courtroom is partially closed. In that instance, only a "substantial reason" for the closure need be shown.

Nieto v. Sullivan, 879 F.2d 743, 753 (10th Cir. 1989). "Nevertheless, the trial court must make sufficient findings to allow the reviewing court to determine whether the partial closure was proper." *United States v. Galloway*, 937 F.2d 542, 546 (10th Cir. 1991) (citation omitted).

This Court reviews the district court's findings of fact in support of a courtroom closure for clear error, and ordinarily reviews de novo whether the closure violated a defendant's Sixth Amendment rights. *Addison*, 708 F.3d at 1186 (citation omitted). But where a defendant does not timely object to a courtroom closure, review is for plain error. *See, e.g.*, *United States v. Negron-Sostre*, 790 F.3d 295, 301 (1st Cir. 2015) (citation omitted); *United States v. Gomez*, 705 F.3d 68, 74-76 (2d Cir. 2013); *United States v. Williams*, 974 F.3d 320, 340-45 (3d Cir. 2020); *United States v. Anderson*, 881 F.3d 568, 572-73 (7th Cir. 2018); *United States v. Cazares*, 788 F.3d 956, 966 (9th Cir. 2015) (citation omitted).

B. The need to protect jurors and other trial participants during the COVID-19 pandemic justified the courtroom closure, whether it was partial or total.

1. *The district court correctly found that the closure was a partial one, and that the closure was justified.*

The district court correctly found that the restrictions on entry into the courtroom, when combined with the audio and visual feeds making the proceedings available to the public, resulted in a partial closure.

Ordinarily, the distinction between a total and partial closure turns on whether no spectators are allowed, or only some. Thus, a courtroom is usually considered to be totally closed when it is closed to "all persons other than witnesses, court personnel, the parties, and the lawyers." *Waller*, 467 U.S. at 42. And a partial closure ordinarily occurs when a courtroom is physically closed to some but not all spectators. *Galloway*, 937 F.2d at 545 (courtroom was partially closed when members of the general public were excluded but the press and family members of the defendant and witness were allowed in the courtroom).

But that distinction does not work well when a courtroom closure is based on the need to limit the number of people present to protect trial participants from a contagious virus. Partial closures are often based on the need to protect a witness from threats or emotional harm. *See*, *e.g.*, *Galloway*, 937 F.2d at 545 (witness's emotional health); *Woods v. Kuhlmann*, 977 F.2d 74, 76-77 (2d Cir. 1992) (threats). This can be accomplished by excluding particular individuals, as in the case of threats, or limiting the number of spectators, as in the case of a fragile child witness testifying about sexual abuse. Some members of the public, however, are still admitted, and courts therefore evaluate partial closures with a less stringent test "because a partial closure does not implicate the same secrecy and fairness concerns that a total one does." *Id.* at 76 (citations omitted).

The situation with a deadly virus is different. It is not enough to exclude particular individuals while allowing others. Rather, the number of people in the courtroom must be strictly limited, which is what led to the district court's finding that there was no room for spectators. IV ROA 138-39. But it is not reasonable to regard this as a total closure, because it did not have "the same secrecy and fairness concerns" that a total closure does. *Woods*, 977 F.2d at 76. Here, the district court provided an audio-visual feed on its website, which allowed potentially more members of the public to see and hear the proceedings than would have been possible if the courtroom had been physically open to the public. Thus, the audio-visual broadcast served the same purposes as a physically open courtroom: it allowed the public to see that Veneno was "fairly dealt with and not unjustly condemned"; the knowledge that numerous people could be watching the proceedings kept "his triers keenly alive to a sense of their responsibility and to the importance of their functions"; and it "encourage[d] witnesses to come forward and discourage[d] perjury." *Waller*, 467 U.S. at 46 (citations omitted); *see also United States v. Sapalasan*, No. 3:18-cr-00130-TMB-MMS, 2021 WL 2080011, *1-*2 (D. Alaska May 24, 2021) (stating that partial closure was justified because the COVID-19 virus made it necessary to seat the jurors in the gallery and an audio-visual feed was set up in another courtroom for public viewing); *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 838-39 (Mass.

2021) (stating that exclusion of spectators, while providing a video feed over the Zoom website and an audio-only telephone line, satisfied requirements for a partial closure).

Because the district court's closure was a partial one, it only needed a "substantial reason" to justify it. *Nieto*, 879 F.2d at 753. That requirement was easily satisfied. The district court found that "there is no greater responsibility than ensuring the health, life, and safety of the public," and therefore "no more compelling reason to close a courtroom to the physical access of the public than the COVID-19 pandemic." IV ROA 140-41. The Supreme Court has acknowledged that "[s]temming the spread of COVID-19 is unquestionably a compelling interest[.]" *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam). Veneno himself assumes for the sake of argument that preventing the spread of COVID-19 met the higher standard of an overriding interest. Opening Brief ("Def. Br."), at 21.

While a district court contemplating a partial closure need not meet the more stringent requirements of the *Waller* test, it "must make sufficient findings to allow the reviewing court to determine whether the partial closure was proper." *Galloway*, 937 F.2d at 546 (citation omitted). Here, the district court found that the need to prevent the transmission of COVID-19 was a substantial reason for the partial closure; that no reasonable alternatives were available because the jurors would occupy the gallery where the public

would ordinarily sit; and that the closure was narrowly tailored because an audio-visual feed would be provided. IV ROA 139-42. But even if those findings were somehow insufficient, the remedy in the partial-closure context would not be a new trial, but a remand to allow the district court to supplement the record. *See Galloway*, 937 F.2d at 547.

In determining whether a partial closure violated the Sixth Amendment, this Court merely asks whether the interests that are protected by the right to a public trial were satisfied here: "the opportunity of interested spectators to observe the judicial system, the improvement of quality of testimony, the inducing of unknown witnesses to come forward with relevant testimony, insuring that the trial judge and prosecutor perform their duties responsibly, and discouraging perjury." *Nieto*, 879 F.2d at 753 (citations omitted). As noted above, the provision of audio and visual feeds satisfied those interests.

Veneno argues that providing audio-visual access did not make the closure of his trial a partial one. First, he argues that the physical presence of the public is critical, and that seeing an event on video "is just not the same as seeing it in person." Def. Br. 26. But although the physical presence of spectators is the preferred method of implementing the right to a public trial, that right "is not absolute." *Galloway*, 937 F.2d at 545 (citations omitted). And the test for partial closures is not whether the access offered to some

spectators is "the same" as physical presence, but rather whether that access served the same interests as those that the right to a public trial protects. *Nieto*, 879 F.2d at 753. Audio-visual access protected those interests here.

Second, Veneno argues that even when a courtroom is partially closed the defendant is entitled to have the comforting presence of his family and friends in the courtroom. Def. Br. 26-27. Although that is doubtless a serious interest, it too is not absolute. Otherwise, it would never be possible to exclude a defendant's family or friends for even a moment of the proceedings. But that is not the law. *See*, *e.g.*, *Nieto*, 879 F.2d at 749-54 (excluding the defendant's family members from the testimony of a particular witness).

2. *A total closure of the courtroom was also justified.*

But even if a total closure occurred, it was fully justified under the four *Waller* factors.

First, the district court correctly found that the need to protect jurors and the other trial participants from infection with COVID-19 constituted an "overriding interest" that would have been prejudiced if the courtroom were open to anyone who desired to attend the proceedings. IV ROA 141. Veneno does not dispute that this was the case. Def. Br. 21; *see also Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67 ("[s]temming the spread of COVID-19 is unquestionably a compelling interest[.]").

Second, the district court also correctly found that limiting physical access to the courtroom to jurors and other trial participants was not broader than necessary. IV ROA 138-41. During the pandemic, both the CDC and the New Mexico Department of Health recommended that people observe social distancing principles (including staying at least six feet apart) to minimize the spread of the virus. *See*, *e.g.*, Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): Social Distancing, Quarantine, and Isolation*[6] (advising readers to stay six feet away from others); Emergency Public Health Order, Sept. 18, 2020,[7] at 2 (stating that "social distancing … in public spaces" is one of "the most effective ways New Mexicans can minimize the spread of COVID-19 and mitigate the potentially devastating impact of this pandemic in New Mexico"). Because courtrooms have limited space, compliance with social distancing principles necessarily required a limit on the number of people allowed inside. In accord with public-health recommendations, the district court found that because the jurors would have to be seated in the gallery and jury box during voir dire, and in the gallery during the trial, "there is no reasonable place to put the public." IV ROA 138,

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[6] https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html (viewed May 28, 2022).

[7] https://cv.nmhealth.org/wp-content/uploads/2020/09/091820-PHO.pdf (viewed May 28, 2022).

141-42. It further found that "[u]nder the specific circumstances, it is not possible to maintain social distancing while granting the public physical access to the courtroom." *Id.* at 141. The district court provided an audio feed during the first two hours of jury selection, and both audio and video feeds for the remainder of the proceedings, which also supports a conclusion that the closure was no broader than necessary.

Third, the district court correctly concluded that no reasonable alternatives to the closure existed. IV ROA 138-41. The district court specifically found that there was no room for spectators in the courtroom consistent with social distancing principles. *Id.* at 138, 141-42. It therefore concluded that providing an audio and video feed on the court's website was the only reasonable alternative. *Id.*

Finally, the district court set forth its findings at length once the public-trial issue was raised. IV 137-42. These findings were adequate to support the closure because they explained that the need to prevent transmission of the COVID-19 virus was a compelling reason for the closure, explained why the exclusion of the public was the only way to achieve that goal given social distancing principles and the limited space in the courtroom, and explained that no other reasonable way of proceeding existed. *Id.*

After the district court made its findings, Veneno did not object to them or suggest that they were insufficient to support the closure.

C. Veneno's arguments fail to establish that any public-trial violation occurred.

1. *Veneno's claim that the district court failed to make findings before closing the courtroom lacks merit because he did not object at the time.*

Veneno's first argument is that reversal is required because the district court did not make its *Waller* findings before the morning jury-selection session began. Def. Br. 1-2, 21, 27-28. Although the district court made findings later, Veneno regards them as "impermissibly belated." *Id.* at 28. This claim lacks merit because Veneno failed to object at the time.

To be sure, the Supreme Court has said that when a district court closes a courtroom, it must, among other things, "make findings adequate to support the closure." *Waller*, 467 U.S. at 48. But the Supreme Court also said that the district court is obligated to do so when the courtroom is closed "*over the objections of the accused*." *Id.* at 47 (emphasis added).

Here, Veneno failed to object before the morning jury-selection session began, and therefore failed to trigger the district court's obligation to make findings at that time. Veneno knew that the courtroom was closed to the public. Both the District of New Mexico's administrative order and its Plan for Resumption of Jury Trials made this clear.[8] And because Veneno was

[8] Indeed, when the Government later raised the issue of whether the audio-only feed was constitutional, defense counsel did not express any surprise that the courtroom was closed to the public, but only said he had assumed

present in the courtroom he was aware that none of his family or friends were there. Nevertheless, Veneno did not object to the courtroom closure or the district court's failure to make findings justifying it, but instead told the district court that he was ready to proceed. IV ROA 63-64. Later, when Veneno finally objected, the district court fulfilled its obligation to make findings justifying the closure. *Id.* at 134-42.

Veneno's arguments in support of this claim fail. He relies primarily on the Supreme Court's statement in *Presley* that a district court should make findings justifying a closure "before excluding the public from" voir dire proceedings. Def. Br. 27 (citing *Presley*, 558 U.S. at 213). But unlike here, the defense attorney in *Presley* objected *before* the trial court excluded the defendant's uncle from the voir dire proceedings. *Presley*, 558 U.S. at 210. Therefore, *Presley* did not address, and does not undermine, *Waller's* statement that the district court's obligation to make findings only arises when it closes a courtroom over the defendant's objection. *See also Williams*, 974 F.3d at 343 (stating that under *Waller* and *Presley*, a violation of the right to a public trial is reversible error "*when a party lodges a contemporaneous objection* and the trial court fails to articulate the interest behind the closure or to make the appropriate findings") (emphasis added).

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that the proceedings were being broadcast via video as well as audio. IV ROA 133-34.

Second, Veneno's reliance on *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017) is unavailing for the same reason. There, the Supreme Court observed that "[a] public-trial violation can occur … 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." *Weaver*, 137 S. Ct. at 1909 (citation omitted). But as noted above, *Presley* involved a district court that failed to make findings justifying a courtroom closure despite timely objection. That did not occur here.

2. *The district court did not commit plain error when an audio feed, but not a video feed, was provided to the public during the first two hours of jury selection.*

Veneno's next claim is that, assuming that the district court provided sufficient *Waller* findings, it still violated his right to a public trial by providing only an audio feed during the first two hours of the jury selection, rather than both audio and video. Def. Br. 30-31.

This claim should be reviewed, if at all, only for plain error. It is well-settled that a defendant's failure to timely object to an alleged public-trial violation constitutes a forfeiture of the claim. *See Levine v. United States*, 362 U.S. 610, 619-20 (1960). Such claims are therefore reviewed for plain error when raised for the first time on appeal. *Negron-Sostre*, 790 F.3d at 301; *Gomez*, 705 F.3d at 74-76; *Williams*, 974 F.3d at 340-45; *Anderson*, 881 F.3d at 572-73; *Cazares*, 788 F.3d at 966.

To be sure, Veneno objected to the audio-only feed in the district court, but his objection was untimely. As the Government noted when it raised the issue, the courtroom deputy had sent an internet link to an audio feed of the jury-selection proceedings to the parties before the morning session. IV ROA 133-34. Defense counsel mistakenly assumed that the link was to both an audio and visual feed. *Id.* at 134-35. Veneno therefore did not object to the audio-only feed until the Government raised the issue, after the morning jury-selection session was already over. *Id.* Moreover, once Veneno discovered the purported error, he did not ask that the morning venire panel be stricken or that a new one be held with both an audio and video feed. *Id.* The plain-error standard should therefore apply because Veneno failed to seek effective relief at the time from an error he now claims was fatal. *Cf. United States v. Anaya*, 727 F.3d 1043, 1052 (10th Cir. 2013) (stating that plain-error standard applies where defendant objected to purported prosecutorial misconduct but did not object to the adequacy of any curative instruction or ask for a mistrial) (citation omitted).

To establish plain error, Veneno has the burden of showing "(1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Gonzalez-Huerta*, 403 F.3d 727, 732 (10th Cir. 2005) (en banc) (citation omitted). He has not done so. Veneno does not acknowledge

his failure to timely object to the audio-only feed, and he has not even tried to carry his burden of showing that plain error occurred. For that reason alone, he is not entitled to plain-error review in this Court. *See United States v. Garcia*, 936 F.3d 1128, 1131 (10th Cir. 2019) (citation omitted).

But even if Veneno had attempted to show that the district court had committed plain error, his claim would fail. First, Veneno has failed to show that the district erred by providing an audio-only feed for the first two hours. Veneno asserts that the audio-only feed was insufficient because "for the first two hours of jury selection, no member of the public was given the opportunity to *see* what was happening inside," Def. Br. 30-31, but he cites no authority and has developed no argument in support of his claim that allowing the public to hear the proceedings, rather than see them, is insufficient to protect the interests that the Sixth Amendment safeguards.[9] Even an audio feed expanded public access by making it possible for members of the public to attend regardless of geographical distance; it also allowed access by those whose health conditions would foreclose the option of

[9] After Veneno filed his opening brief, the Ninth Circuit held that an audio-only feed is insufficient to protect a defendant's right to a public trial when a video feed is also available. *See United States v. Allen*, 34 F.4th 789, 2022 WL 1532371, *5 (9th Cir. May 16, 2022). But Veneno did not develop any similar analysis in his opening brief.

exposing themselves to infection by mingling with a large group of people in a courtroom.

Second, if the district court erred in providing an audio-only feed, Veneno cannot show that the error was plain. For an error to be plain, it must be "clear or obvious under current law." *United States v. Rosales-Miranda*, 755 F.3d 1253, 1258 (10th Cir. 2014) (citation omitted). An error "is clear or obvious if 'it is contrary to well-settled law.'" *United States v. Finnesy*, 953 F.3d 675, 684 (10th Cir. 2020) (citations omitted). "In general, for an error to be contrary to well-settled law, either the Supreme Court or this court must have addressed the issue." *Id.* (citation omitted). Veneno has cited no authority from the Supreme Court or this Court for the proposition that providing an audio-only feed of jury selection proceedings to the public violates a defendant's right to a public trial when the courtroom is otherwise properly closed under *Waller*.

But even if Veneno had shown the existence of an error that was plain, and that the error affected his substantial rights,[10] this Court should not

[10] The Supreme Court has reserved the question of whether the third prong of plain-error analysis, which requires a showing of prejudice, is automatically satisfied when a structural error (such as a violation of a defendant's public-trial rights) is involved. *See United States v. Marcus*, 560 U.S. 258, 263 (2010). This Court has assumed that where structural error occurs, a defendant need not show that any error affected his substantial rights on plain-error review. *See*, *e.g.*, *Gonzalez-Huerta*, 403 F.3d at 732-34; *United States v. Trujillo*, 960 F.3d 1196, 1201-02 (10th Cir. 2020) (citations omitted).

exercise its discretion to correct the error under the fourth prong of plain-error analysis because Veneno has failed to show that "it seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Finnesy*, 953 F.3d at 684 (citations omitted). This Court should exercise its discretion to correct an unobjected-to error only "in those circumstances in which a miscarriage of justice would otherwise result." *United States v. Olano*, 507 U.S. 725, 736 (1993) (citations omitted). "This is a demanding standard, and of course, depends on the facts of the particular case." *Gonzalez-Huerta*, 403 F.3d at 737 (internal citation omitted).

This Court should not exercise its discretion to correct any error in providing an audio-only feed because at the time Veneno himself did not believe that it caused any serious injustice. When Veneno learned that the first two hours of jury selection had only been made available to the public via audio feed, he objected after the fact but did not ask for any specific relief. IV ROA 134-35. If Veneno believed that his trial had been irrevocably tainted by a public-trial violation at that point, he should have moved to strike the morning venire and convene a new one. The district court could then have corrected the purported error at a relatively low cost, *i.e.*, by ensuring that Veneno's jury was made up entirely of jurors selected in proceedings that were broadcast via video *and* audio to the public. Instead, Veneno took his chances with the jury that was ultimately selected. Veneno now wants a do-

over because his gamble did not pay off, but granting him a new trial in these circumstances would reward the sort of sandbagging that this Court has condemned. *See United States v. Turrietta*, 696 F.3d 972, 985 (10th Cir. 2012) (discussing the fourth prong of plain-error analysis: "If anything would imperil the integrity of the judicial proceedings, it would be a decision rewarding [defense counsel] for holding his objection in his back pocket hoping it might ultimately work in his client's favor.") (citation omitted).

Other factors also weigh in favor of leaving the jury's verdict in place. In determining whether an error in jury selection affects the public integrity of the judicial proceedings, this court has evaluated: (1) the strength of the evidence against the defendant; (2) the actual impact of the error; (3) whether the jury was fairly selected; and (4) whether the trial was otherwise fair. *Turrietta*, 696 F.3d at 984-85. First, the evidence against Veneno was strong. S.H. identified him as the perpetrator. Although S.H. admitted that she and Veneno were both drunk at the time of some of the assaults, she never wavered from her identification of Veneno as her assailant. III ROA 262-68. Second, Veneno has not identified any reason to think that the audio-only feed caused the venire members or trial participants to be any less mindful of their duties than if a video feed had also been provided. Third, Veneno has not even alleged that the jury-selection process resulted in a jury that was biased. Finally, apart from his claim that the district court admitted

improper bad acts evidence against him (and the Government will explain why that claim lacks merit later in this brief), Veneno has not identified any reason to think the trial was procedurally unfair.

3. *The district court did not violate Veneno's right to a public trial during the remainder of jury selection and the trial itself.*

Veneno argues that the reasons the district court offered for closing the courtroom to the public were insufficient. Def. Br. 28-29. First, he argues that closing the courtroom to all but jurors and other trial participants was not narrowly tailored because "photographs of the courtroom setup demonstrate [that] dozens of individuals could be physically present in the courtroom without compromising social-distancing principles," and the district court could therefore have reserved four or five seats "for members of the public, the press, or of Veneno's family." Def. Br. 28. Second, he asserts that the district court violated its obligation to consider reasonable alternatives by not considering this option sua sponte. *Id.*

But the district court *did* consider whether there was any room for members of the public. And it found that there was not "because of space limitations due to social distancing requirements by the CDC." IV ROA 137. The district court then said, "Specifically, the Court finds that social distancing is not possible if the public were allowed in the gallery." *Id.* at 138. The district court explained that because jurors would be occupying the

gallery, "there is no reasonable place to put the public." *Id.* The district court noted that it would place photographs of the courtroom in the record for purposes of appellate review. *Id.* at 139. Later, the district court returned to the subject and said, "Under the specific circumstances, it is not possible to maintain social distancing while granting the public physical access to the courtroom." *Id.* at 141. Finally, the court found that "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." *Id.* at 141-42. The district court found that providing audio and video feeds of the proceedings was therefore a reasonable alternative. *Id.* at 142.

Veneno's real claim is not that the district court failed to consider whether there was any room for the public — it did — but rather that its factual finding was *incorrect*. He contends that notwithstanding the district court's factual findings, there actually was room for at least a few spectators. But this claim is forfeited. After the district court made an explicit finding that there was no room for spectators consistent with social-distancing guidelines, IV ROA 137-38, 141-42, it asked if either party had anything further to say. *Id.* at 142. If defense counsel believed that the district court was making a mistake, that was the time to say so. Instead, defense counsel responded, "No, Your Honor. Thank you." *Id.* at 142.

It is one thing to say, as *Presley* did, that a district court must consider reasonable alternatives even if not suggested by the parties. 558 U.S. at 214. But when a district court considers an alternative and finds that it is not reasonable, *Presley* does not authorize a party who thinks the court is wrong to stand silent. *See*, *e.g.*, *United States v. Puckett*, 556 U.S. 129, 135 (2009) (stating that "the contemporaneous-objection rule prevents a litigant from 'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.") (citations omitted). In other contexts, this Court has required a party who believes a district court's findings offer an insufficient explanation for a decision to object at the time they are made. *Cf.*, *e.g.*, *United States v. Gehrmann*, 966 F.3d 1074, 1081 (2020) (when a district court makes findings to justify a sentence, "a defendant must object at the hearing to preserve an objection to the adequacy of the court's findings") (citations omitted).

Accordingly, this claim can only be reviewed for plain error. But the district court did not err. The Plan for Resumption of Jury Trials explains that during jury selection, venire members would occupy the jury box and the gallery, and during trial, the jurors and alternates would occupy the gallery, while the jury box would serve as the witness box. I ROA 400, 402. The district court found that there was no room for spectators for those reasons. IV ROA 136-42.

And even if there were some error, it is not plain. The district court surely had a better grasp of the physical confines of its own courtroom than a cold record can convey. While Veneno appears to believe that two-dimensional photographs demonstrate an obvious error, neither the district court nor defense counsel thought so, despite their physical presence in the courtroom. Moreover, defense counsel's failure to object has prevented the creation of a more detailed record that might have demonstrated whether Veneno's present argument has merit or not.

Finally, even if there were some error that was plain, the Court should not exercise its discretion to grant a new trial because to do so would reward defense counsel's failure to object at a time when any deficiency in the district court's findings could have been cured. *Turrietta*, 696 F.3d at 985-86.

II. Veneno's claim that his convictions under 18 U.S.C. § 117(a)(1) must be vacated because his predicate tribal-court conviction was categorically overbroad is waived and meritless.

A. Legal background and standard of review

Under 18 U.S.C. § 117(a)(1), a person who commits a "domestic assault within … Indian country" is subject to enhanced penalties if he has two prior convictions "in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction … any assault, sexual abuse, or serious violent felony against a spouse or intimate partner[.]"

Veneno argues that his tribal-court conviction was categorically broader than "assault" under § 117(a)(1). Def. Br. 33-43. Whether a prior conviction counts as a predicate offense for purposes of a statute that imposes enhanced penalties on recidivists is ordinarily a matter of statutory interpretation that is reviewed de novo. *See, e.g., United States v. Mendez*, 924 F.3d 1122, 1124 (10th Cir. 2019) (citation omitted). When a defendant does not object, however, this Court reviews for plain error. *United States v. Wilkins*, 30 F.4th 1198, 1203 (10th Cir. 2022) (citation omitted).

B. Veneno's stipulation that his tribal-court conviction was a predicate offense under 18 U.S.C. § 117(a)(1) bars his present claim.

Veneno's claim is barred under the invited-error doctrine because he stipulated that his tribal-court conviction was a predicate offense under § 117(a)(1).

In its notice that it would offer evidence of Veneno's prior convictions because they were necessary to prove essential elements of § 117(a)(1), the Government noted that absent a stipulation, it would offer not only the judgments themselves, but also would "seek to introduce evidence to satisfy the element of the offense that the victim in each of the cases was an intimate partner." I ROA 132; *see also* 18 U.S.C. § 117(a)(1) (requiring that the predicate domestic-violence convictions be for acts committed "against a spouse or intimate partner").

At a pretrial hearing, defense counsel said that Veneno would be willing to stipulate to the prior federal-court conviction and one of the two tribal-court convictions alleged in the indictment. III ROA 151-52. Later, the prosecutor asked to clarify whether Veneno was willing to stipulate both that each was a valid conviction and that each was a predicate offense under § 117. *Id.* at 155. Defense counsel answered, "As to the federal one, absolutely. As to the tribal, I'm not sure that my client will allow me to do that." *Id.* The district court said, "All right. If not, then you open it up for them to go into that." *Id.* Defense counsel responded, "We would rather not do that, so we'll defer and we'll stipulate to that." *Id.*

At trial, the district court was told that the parties had stipulated to one domestic-violence conviction in federal court, and a conviction for "battery against a household member, Jicarilla Apache Nation, Rio Arriba County, CR-2009-03880, July 31, 2009." III ROA 307. The jury thereafter convicted him of both § 117(a)(1) counts. I ROA 449.

As a result of Veneno's stipulation both that the tribal-court conviction was valid and that it was a predicate offense under § 117(a)(1), his present challenge to his two § 117(a)(1) convictions is barred. *See*, *e.g.*, *United States v. Williams*, 10 F.4th 965, 973 (10th Cir. 2021) ("The invited error doctrine prevents a party from inducing action by a court and later seeking reversal on the ground that the requested action was error") (citation omitted).

Veneno acknowledges the stipulation, but he argues that it should be ignored because the district court "misled" him. Def. Br. 42-43. He argues that the district court "pressed" defense counsel to stipulate that the tribal-court conviction was valid but also that it was a predicate offense under § 117(a)(1), and said that if he would not stipulate, "then you open it up for them to go into that." *Id.* at 42 (citing III ROA 155). Veneno says that this was an inaccurate statement because it would not have been up to the jury to determine whether the tribal-court conviction was a predicate offense; it would have been an issue of law for the district court. Def. Br. 42-43.

But that's not what happened. No one "pressed" Veneno to do anything. The prosecutor asked defense counsel to confirm whether Veneno would be stipulating both to the validity of the federal and tribal-court convictions, as well as their status as predicate offenses for purposes of § 117. III ROA 155. Defense counsel answered that he would so stipulate as to the federal conviction, but he was unsure whether his client would stipulate to the tribal conviction, though did not explain why. *Id.* The district court then cautioned that if Veneno would not stipulate, "then you open it up for them [the Government] to go into that." *Id.*

The district court's caution was both reasonable and accurate. To obtain a conviction under § 117(a)(1), the Government was required to prove (1) that Veneno had at least two prior convictions; (2) that the prior

convictions were for offenses that would be considered "any assault" under federal law; and (3) that the convictions were for offenses committed against "a spouse or intimate partner." 18 U.S.C. § 117(a)(1). Absent a stipulation, the Government would have had to offer the prior convictions themselves to prove the first element, and conceivably would have had to call the victims (or other witnesses) to the prior offenses to prove the third element. *See United States v. Drapeau*, 827 F.3d 773, 776 (8th Cir. 2016) (holding, in § 117(a)(1) case, that testimony of victim of predicate offenses was relevant to prove that the prior convictions had occurred and that she was a spouse or intimate partner of the defendant).

The district court almost certainly had the first and third elements in mind when it warned defense counsel that the Government would "go into that" without a stipulation, and there's no reason to think defense counsel thought the district court was talking about anything else. Veneno may be correct that the district court, and not the jury, would have decided the second element — *i.e.* whether the prior convictions were for offenses that would constitute "any assault" under federal law for purposes of § 117(a)(1) — but his assumption that the district court was talking about this element is unsupported by the record and makes no sense. Accordingly, Veneno has failed to show that the district court misled him.

C. Veneno has failed to show that the district court committed plain error.

If this Court believes that Veneno should be relieved from his stipulation, his claim should still be reviewed for plain error because he never argued in the district court that his tribal-court conviction was categorically overbroad and that his § 117(a)(1) convictions were invalid as a result. But whether plain-error or de novo review applies, Veneno's claim still fails because the argument in his opening brief is based on the wrong statute.

Veneno assumes that his tribal-court conviction was based on the New Mexico offense of battery against a household member, N.M. Stat. Ann. § 30-3-15(A), and he argues that this statute is categorically overbroad and therefore cannot serve as a predicate offense for his § 117(a)(1) convictions. Def. Br. 37-40. But Veneno's assumption is incorrect. He was convicted under a *tribal* statute, not a state one.

In July 2009, Veneno committed a battery against his then-girlfriend (not S.H.) and was charged with domestic-violence offenses in the Jicarilla Apache Nation court in Case No. CR-2009-03880. *See* Presentence Report, II ROA 16. Veneno was ultimately convicted of the tribal offense of "domestic violence" and acquitted of other offenses. *See* Final Order on Criminal Complaint, *Jicarilla Apache Nation v. Quentin Scott Veneno*, *Jr.*, Case No. CR2009-3880, Attachment 1. This judgment is not part of the district court

record due to the parties' stipulation, which made it unnecessary for the Government to offer it into evidence at trial.[11] The Government has not found any cases from this Court (or any other federal appellate court) addressing whether judicial notice may be taken of tribal-court records, but some federal district court decisions suggest that judicial notice of such documents may be proper. *See*, *e.g.*, *Nygaard v. Taylor*, 563 F. Supp. 3d 992, 998 (D.S.D. 2021) (taking judicial notice under Fed. R. Evid. 201 of the record of certain tribal-court cases at the request of the parties); *Resources for Indian Student Educ., Inc. v. Cedarville Rancheria of Northern Paiute Indians*, No. 2:14-cv-02543 JAM-CMK, 2015 WL 631473, *2 (E.D. Cal. Feb. 13, 2015) (taking judicial notice of documents filed in tribal court because they "are matters of public record") (citations omitted).

Like many other sovereign tribes, the Jicarilla Apache Nation has enacted its own statutes, which are compiled as the Jicarilla Apache Nation Code. The Code creates the "crime of domestic violence," which prohibits batteries against household or family members. The offense is committed when "any person … knowingly commit[s] an act of domestic violence, as defined by J.A.N.C. § 3-5-2[.]" *See* Title 3, Chapter 5 of the Jicarilla Apache

[11] The Government did say at trial, however, that it had all the originals in the courtroom if the court or defense counsel wished to inspect them. III ROA 152.

Nation Code, at § 3-5-3(A), Attachment 2. In turn, § 3-5-2(C) defines "domestic violence" as "an act of abuse by a perpetrator on a family member or household member of the perpetrator." *Id.* at § 3-5-2(C). The Code defines "abuse" as "the infliction of physical or bodily injury or sexual assault or the infliction 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." *Id.* at § 3-5-2(A). "Assault" and "assault and battery" are then defined at § 7-2-4(A) and (B). *See* excerpt from Title 7, Chapter 2 of the Jicarilla Apache Nation Code, Attachment 3.

The district court did not commit plain error. First, Veneno has failed to establish that any error occurred because his argument is based on an irrelevant New Mexico statute. His opening brief, while recognizing that this offense was a tribal one, does not mention the Jicarilla Apache statute on which his tribal-court conviction was based, and it develops no argument that the tribal statute is categorically overbroad. Even if Veneno had identified overbreadth on the face of the statute, which he has not, he would still need to consider whether the statute may be divisible and thus subject to the modified categorical approach. *See Descamps v. United States*, 570 U.S. 254, 258-64 (2013). That analysis itself has several components, *see Mathis v. United States*, 579 U.S. 500, 517-19 (2016), none of which Veneno has even touched upon.

Nor has Veneno shown that any overbreadth in the tribal statute is plain. For an error to be plain, it must be "clear or obvious under current law." *Rosales-Miranda*, 755 F.3d at 1258 (citation omitted). Veneno has not cited any tribal-court decisions or authoritative sources of tribal law that might bear on the meaning of § 3-5-3(A), nor has he cited any decisions in this Court or any other analyzing that tribal statute. Accordingly, Veneno has failed to show that his tribal conviction is not a valid predicate under § 117(a)(1).[12]

III. <u>The district court did not abuse its discretion by admitting evidence of Veneno's other assaults against S.H.</u>

A. Legal background and standard of review

Federal Rule of Evidence 404(b)(1) provides that "[e]vidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." But such evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2).

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[12] A reversal on this point would affect Veneno's two § 117(a)(1) convictions, for which he was sentenced to concurrent terms of 60 and 115 months' imprisonment, respectively. I ROA 505-07; III ROA 44-45. But that would not result in a reduction of his sentence because he also received a concurrent 115-month sentence on the § 113(a)(6) count. *Id.*

"Rule 404(b) is considered to be an inclusive rule, admitting all evidence of other crimes or acts except that which tends to prove *only* criminal disposition." *United States v. Tan*, 254 F.3d 1204, 1208 (10th Cir. 2001) (citations and internal punctuation omitted). Evidence that is properly admitted under Rule 404(b) may "involve[ ] a kind of propensity inference[.]" *United States v. Moran*, 503 F.3d 1135, 1145 (10th Cir. 2007). For example, where a defendant was charged with being a felon in possession of a firearm, this Court said that evidence of his prior conviction on a felon-in-possession charge showed that "because he knowingly possessed a firearm in the past, he knowingly possessed the firearm in the present case." *Id.* But this sort of inference "is specific and does not require a jury to first draw the forbidden general inference of bad character or criminal disposition; rather, it rests on a logic of improbability that recognizes that a prior act involving the same knowledge decreases the likelihood that the defendant lacked the requisite knowledge in committing the charged offense." *Id.* (citation omitted).

"There are four requirements for admissibility under 404(b). The evidence of other crimes, wrongs or acts must be introduced for a proper purpose, must be relevant, must have probative value that is not substantially outweighed by the potential for unfair prejudice; and, on request, the trial court must give a jury instruction limiting the evidence to the proper purpose." *United States v. Hardwell*, 80 F.3d 1471, 1488 (10th Cir.

1996) (citation omitted). "[W]hen other-act evidence is admitted for a proper purpose and is relevant, it may be admissible even though it has the 'potential impermissible side effect of allowing the jury to infer criminal propensity.'" *Moran*, 503 F.3d at 1145 (citation omitted).

"Admission of evidence under [Rule] 404(b) is reviewed for abuse of discretion." *Hardwell*, 80 F.3d at 1488.

B. Evidence of Veneno's October 2018 assault against S.H. was relevant to rebut his potential defenses, and its probative value exceeded any potential for unfair prejudice.

Given Veneno's statements to police in August disclaiming any knowledge of how S.H. sustained her injuries, the Government reasonably anticipated that Veneno's defense to both the August and November assaults might be to claim that he did not know how S.H. sustained her injuries, or to claim that he was not the cause of them (e.g. by claiming that S.H caused them herself). In addition, because some of S.H's injuries were caused by Veneno's charged assaults, and some were caused by his uncharged assaults, the Government needed to show which injuries were caused by Veneno's charged assaults. In addition, with respect to the § 113 count, the Government had to show that the injuries caused by Veneno's charged November 2 assault caused serious bodily injury. *See* 18 U.S.C. § 113(a)(6)

(prohibiting "[a]ssault resulting in serious bodily injury" within the special territorial jurisdiction of the United States).

The Government therefore moved to admit evidence of the prior assaults under Rule 404(b). I ROA 129-42. The district court agreed that the evidence was admissible and said that it would give a limiting instruction to counteract any unfair prejudice. *Id.* at 284-85; III ROA 160-62.

At trial, S.H. testified that Veneno attacked her several days before the November 2 assault. III ROA 250-52. She testified that as with the other assaults, this one began when she was using her phone. *Id.* at 250. Veneno kicked her upper body and her arm while wearing shoes. *Id.* When the attack subsided, S.H. hid in some hills near her house for a couple of hours. *Id.* at 251. Veneno was suspicious that she had been to see another man, and S.H. showed him her hiding place to allay his suspicions. *Id.* at 251-52.

A surgeon who saw S.H. on November 7 testified that her injuries were consistent with having been assaulted over an extended period of time. III ROA 286. In closing argument, the prosecutor mentioned that some of the pain that S.H. experienced at the time of the November 2 assault was due to Veneno's actions several days earlier. *Id.* at 336. The district court also gave a limiting instruction informing the jury that evidence of Veneno's other acts could only be used to evaluate his "motive, intent, absence of mistake or accident, and for no other purpose." *Id.* at 327. The district court told the jury

that "the fact that the defendant may have previously committed an act similar to the one charged in this case does not mean that the defendant necessarily committed the act charged in this case." *Id.*

The district court properly exercised its discretion under the four-part test. *Hardwell*, 80 F.3d at 1488. First, evidence of the late October assault was offered for several non-propensity purposes. It supported the Government's contention that Veneno's attacks were motivated by jealousy arising from his suspicion that S.H. must be cheating on him with other men. At trial, Veneno's defense was that S.H. had been drunk during the assaults and therefore her identification of Veneno as the assailant was unreliable. But showing that Veneno had beaten her several days before, in the same place (her house), in the same way (by kicking), and for the same reason (jealousy) made it more likely that her identification of Veneno as her assailant on November 2 and her description of his actions was accurate and reliable. In addition, the evidence was offered to inform the jury that not all of S.H.'s injuries were attributable to the charged November 2 assault, thus forestalling any accusation by the defense that the Government was not being forthright with the jury. None of these purposes for admission depended on an improper propensity inference. Veneno concedes as much. *See* Def. Br. 43 ("It is on the third part of this test [i.e. the Rule 403 balancing] that the district court abused its discretion.").

Second, the evidence was relevant. "To determine relevance under Rule 404(b), we must examine factors such as the similarity of the uncharged act to the charged conduct and the temporal proximity of the two acts." *United States v. Cardinas Garcia*, 596 F.3d 788, 797-98 (10th Cir. 2010) (citations omitted). Here, the uncharged and charged acts were similar — in late October and on November 2, Veneno assaulted S.H. by kicking her in a jealous rage. And S.H. testified that the uncharged assault occurred only five days before. As noted in the previous paragraph, the uncharged assault was relevant to rebut Veneno's defense that S.H. incorrectly identified him as her assailant, to show that he had a motive for beating her, and to help the jury evaluate the injuries attributable to the charged conduct.

Third, the probative value of the evidence was not outweighed, much less substantially outweighed, by the danger of unfair prejudice. *See* Fed. R. Evid. 403. Unfair prejudice "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Id.* at Advisory Committee Note. "In engaging in the requisite balancing, courts give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." *United States v. Alfred*, 982 F.3d 1273, 1282 (10th Cir. 2020) (citation omitted). The probative value of evidence is strong when it is necessary to rebut the defendant's defenses. *United States v. Poole*, 929 F.2d 1476, 1482 (10th Cir. 1991); *United States v. Sturmoski*, 971 F.2d

452, 459 (10th Cir. 1992). As explained above, the evidence was relevant to rebut Veneno's potential defenses.

Veneno, however, asserts that the evidence "did nothing" to prove his motive or S.H.'s lack of mistake "beyond what had already been introduced." Def. Br. 45. In his view, since S.H. testified that he committed two assaults in August, and one on November 2, evidence about the October assault "added nothing to the government's theory about Veneno's motive or the lack of a mistake that [S.H.]'s testimony had not already established." *Id.* But evidence does not *lack* probative value merely because similar evidence has already been offered. Evidence is relevant, and therefore has probative value, if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. Evidence of the late October assault, and Veneno's motive for committing it, made it more likely that he acted from the same motive on November 2, and made it more likely that S.H.'s identification of Veneno as her assailant was not a mistake. Evidence of the August assaults did not have the same probative value with respect to the November 2 assault because they occurred several months earlier.

On the other side of the equation, the additional prejudice caused to Veneno by this evidence was minimal. Veneno does not contest that the jury was properly informed of his prior convictions for domestic-violence offenses,

convictions that Congress has made an element of the § 117(a)(1) offense. Nor does he challenge on appeal the introduction of evidence that he had assaulted S.H. shortly before the charged August 22 attack. III ROA 244-45. In light of this evidence already on the record, the marginal potential unfair prejudice from the pre-November 2 evidence was just that: marginal. Although Veneno calls this argument a "remarkable proposition," Def. Br. 47, it is entirely consistent with the law. *See, e.g., United States v. Otuonye*, 995 F.3d 1191, 1207 (10th Cir. 2021) (stating that where "wrongly admitted evidence was cumulative of other properly admitted evidence, it is less likely to have injuriously influenced the jury's verdict") (citation omitted); *United States v. Obi*, 239 F.3d 662, 667-68 (4th Cir. 2001) (prejudicial effect of evidence that defendant had been incarcerated was slight when jury had already heard uncontested evidence of defendant's arrest); *United States v. Atkins*, 702 F. App'x 890, 898 (11th Cir. 2017) ("Moreover, the jury heard admissible and unchallenged evidence that Atkins had engaged in other sex acts with the two minors, so any additional prejudicial effect from the challenged testimony was negligible.").

Fourth and finally, the district court mitigated the danger of unfair prejudice by giving a limiting instruction based on Tenth Circuit Pattern Jury Instruction 1.30:

> You have heard evidence of other acts engaged in by the defendant. You may consider that evidence only as it bears on the defendant's motive, intent, absence of mistake or accident, and for no other purpose. Of course, the fact that the defendant may have previously committed an act similar to the one charged in this case does not mean that the defendant necessarily committed the act charged in this case.

III ROA 327. This instruction properly informed the jury about the purposes for which it could consider the other-acts evidence, and did not automatically mean that Veneno was guilty of the November 2 assault. *United States v. Cherry*, 433 F.3d 698, 702 (10th Cir. 2005) (stating that a similar instruction "appropriately constrained the jury's consideration of the evidence[.]") (citation omitted).

D. The district court's Rule 403 analysis was adequate.

Veneno argues that the district court's Rule 403 analysis was defective because its explanation was insufficiently detailed. Def. Br. 44. But Veneno did not object to the sufficiency of the district court's Rule 403 analysis at the time. III ROA 160-62.

In any event, the district court's explanation was sufficient. It did not, as Veneno seems to imply, offer a conclusory assertion that the prejudice was "certainly outweighed by the probative value for the reasons set forth by the United States." Def. Br. 44. Instead, it acknowledged that a potential for unfair prejudice existed, but explained that the evidence had probative value because it helped to establish Veneno's motive, a lack of mistake on S.H.'s

part, and as an acknowledgment that not all of the injuries that S.H. sustained during that time period were caused by Veneno's assault on November 2. III ROA 160-62. This was a classic Rule 403 analysis.

Veneno's reliance on *United States v. Tan*, 254 F.3d 1204 (10th Cir. 2001) does not help him. In that case, an appeal by the United States, this Court held that the district court's Rule 403 analysis was defective not because it was insufficiently detailed, but rather because it was premised on an erroneous belief that the evidence at issue was not offered for a proper purpose. *Id.* at 1211.

E. Any error in admitting the other-act evidence was harmless.

This Court need not reach the issue of harmless error because no error occurred. But if the Court reaches this issue, it can conclude that any error in admitting the evidence of the pre-November 2 assault was harmless.

The evidence against Veneno was strong. S.H. described both charged assaults in detail, and the severity of her injuries was consistent with the acts that she described. To be sure, defense counsel elicited testimony that she had a drinking problem that impaired her memory, and Veneno argues that this shows that any error was not harmless because the evidence was supposedly not overwhelming. Def. Br. 47. But it is improbable that S.H. would be confused about whether it was her live-in boyfriend, or someone

else, who repeatedly assaulted her. Moreover, S.H. never wavered from her testimony that Veneno was her attacker, and nothing in the record suggests that anyone other than Veneno was responsible for S.H.'s injuries.

Veneno also argues that any error was not harmless because the prosecutor combined evidence of the pre-November 2 assault with an "inflammatory" closing argument. Def. Br. 47-48. But Veneno did not object to the closing argument, and the prosecutor did not connect the pre-November 2 assault with his reading of poetic language intended to convey the difficulties faced by women who experience domestic violence. III ROA 343-44.

V. Veneno's argument that Congress lacks the constitutional authority to criminalize the conduct of Indians on tribal land is contrary to controlling authority.

Finally, Veneno argues that his convictions must be reversed because Congress lacks the authority to criminalize the conduct of Indians on tribal land. Def. Br. 32-33. But Veneno correctly acknowledges that his argument is directly contrary to Supreme Court authority, and that he advances this argument solely for purposes of issue preservation. *Id.* (citing *United States v. Kagama*, 118 U.S. 375, 383-85 (1886); *United States v. Wheeler*, 435 U.S. 313, 319 (1978) (stating that Congress has "plenary authority to legislate for the Indian tribes in all matters, including their form of government.") (citations omitted)). Therefore, this Court should reject this claim.

CONCLUSION AND STATEMENT CONCERNING ORAL ARGUMENT

The United States respectfully requests that this Court affirm the district court's judgment.

The United States does not request oral argument.

Respectfully submitted,

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TYPE-VOLUME CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this brief contains 12,907 words. I relied on my word processor to obtain the count. My word processing software is Word 2016.

s/ Emil J. Kiehne
Emil J. Kiehne
Assistant United States Attorney

CERTIFICATE OF SERVICE AND DIGITAL SUBMISSION

I HEREBY CERTIFY that the foregoing brief was filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on June 8, 2022, and that seven photocopies of the foregoing brief will be sent by Federal Express to the United States Court of Appeals for the Tenth Circuit, Office of the Clerk, located at the Byron White United States Courthouse, 1823 Stout Street, Denver, Colorado, 80257, following notification that the electronic brief is compliant.

I ALSO CERTIFY that Alan S. Mouritsen, attorney for Defendant-Appellant Quentin Veneno, is a registered CM/ECF user, and that service will be accomplished by the appellate CM/ECF system.

s/ Emil J. Kiehne
EMIL J. KIEHNE
Assistant United States Attorney

IN THE COURTS OF THE JICARILLA APACHE NATION
DULCE, NEW MEXICO

THE JICARILLA APACHE NATION,)
Plaintiff,)
vs.)
)
Quentin Scott Veneno Jr.,)
Defendant,)

No.(s) **CR2009-03880**

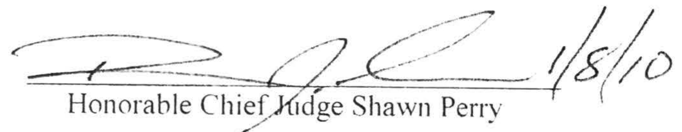
FINAL ORDER
ON
CRIMINAL COMPLAINT
**Amended 12-28-2009 **

At the regular arraignment session of the Court of the Jicarilla Apache Nation held on 7/31/2009, the Defendant entered a plea (s) to charges(s):
Disorderly Conduct-Not Guilty Domestic Violence-Not Guilty Assault & Battery-Not Guilty Intoxication-Not Guilty Indirect Contempt of Court-Not Guilty
THE COURT FINDS THE DEFENDANT GUILTY of : **Domestic Violence**
AND NOT GUILTY OF THE FOLLOWING CHARGES: **Disorderly Conduct Assault & Battery Intoxication Indirect Contempt of Court - Dismissed by the Court ,**

for which THE COURT ADJUDGES THAT THE DEFENDANT IS:
4 Charge(s), DISMISSED BY THE COURT.
To Serve a sentence of jail, jail suspended for
_____ Class A Trusty: Eligible to work at three for one or to dispel a fine a $10.00/day
_____ Class B Trusty: Eligible for work release at the following times and days.

Given Credit for **60 days** Served.
_____ A Non-Trusty. One for One.
To pay a fine of: **$.00**
on or before _ at **4:30 p.m.**
Paid on ______________ Receipt No. ____________.
Defendant is Sentenced to: Defendant must Complete: hours of community service
By: Contact Person: .
To be placed on: _ Probation for which the above sentence is suspended subject to the conditions identified by the probation officer.
Other: ** .Defendant plead Guilty to Domestic Violence with Credit Time Served for 60 days. Remaining Charges Dismissed per stipulated judgment, Defendant entered on October 22, 2009 with Nation Prosecutor. **

Done this 29th, day of December 2009.



Honorable Chief Judge Shawn Perry

CHAPTER 5: DOMESTIC VIOLENCE

§ 1 STATEMENT OF PURPOSE.

It is the purpose of this Chapter to stop all family violence within the Jicarilla Apache Nation and to promote the healing of families where possible. Domestic violence is a serious crime against society and this Chapter seeks to guarantee to the victim of domestic violence the maximum protection from abuse which the law can provide.

It is the intent of the Legislative Council that the official response to cases of domestic violence shall be that violent behavior is not to be tolerated or excused, whether or not the abuser is intoxicated. The elders, adults, and children of our Nation, and of the entire community residing within the Jicarilla Apache Nation are to be cherished and treated with respect.

§ 2 DEFINITIONS.

As used in this Chapter the following terms shall have the meanings given below.

(A) ***ABUSE*** 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.

(B) ***COURT*** means the Jicarilla Apache Nation Court.

(C) ***DOMESTIC VIOLENCE*** means an act of abuse by a perpetrator on a family member or household member of the perpetrator.

(D) ***ELDERLY PERSON*** means a person fifty-five (55) or more years old.

(E) ***FAMILY MEMBER*** or ***HOUSEHOLD MEMBER*** of a person means a spouse, a former spouse, a person related by blood, a person related by an existing or prior marriage, a person who resides or formerly resided with the person, or a person with whom the person has a child in common regardless of whether the parents of the child have been married or have lived together at any time.

(F) ***MANDATORY ARREST*** means that the victim need not sign a complaint for an arrest to occur. A police officer shall arrest if there is probable cause to believe the person to be arrested has committed an offense as defined by this Chapter even though the arrest may be against the expressed wishes of the victim.

(G) ***ORDER OF PROTECTION*** means a court order granted for the protection of victims of domestic violence.

(H) ***PERPETRATOR*** means the person who has committed an act of abuse on his or her family member or household member.

(I) ***POLICE OFFICER*** means a member of the Jicarilla Apache Police Department.

(J) ***PROBABLE CAUSE*** for arrest means that the police officer, acting as a person of reasonable caution, has reasonable grounds to believe that the person to be arrested has committed an offense as defined by this Chapter, based on all the facts known to the officer, including the officer's personal observations, statements made by parties involved in the incident, statements made by witnesses, if any, and any other reliable information.

§ 3 CRIME OF DOMESTIC VIOLENCE.

(A) Any person who shall knowingly commit an act of domestic violence, as defined by J.A.N.C. § 3-5-2, shall be deemed guilty of the offense of domestic violence and upon conviction thereof shall be sentenced to confinement not to exceed six (6) months and/or to a fine not to exceed Five Hundred Dollars ($500.00) or to both such confinement and fine.

(B) In addition to or in lieu of the imposition of such confinement and/or fine, the court shall order the person convicted of the offense of domestic violence to participate in a domestic violence treatment program, as provided in J.A.N.C. § 3-5-5.

(C) Prosecution for the offense of domestic violence shall not preclude prosecution for any other offense under the Jicarilla Apache Nation Code arising from the same circumstances.

§ 4 MANDATORY ARREST.

(A) A police officer shall arrest an alleged perpetrator of domestic violence of any age, if an arrest warrant has been issued, or without a warrant if the offense occurs in the presence of the officer or if the officer has probable cause to believe that the person to be arrested has committed domestic violence without regard to any other requirements imposed by J.A.N.C. § 2-1-4. If the conditions for arrest established by this Section are present, the officer shall arrest the alleged perpetrator of domestic violence whether or not the alleged victim signs a complaint and whether or not the arrest is against the expressed wishes of the alleged victim.

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(B) Whenever a police officer investigates an allegation of domestic violence, whether or not an arrest is made, the officer shall make a written incident report of the alleged abuse and submit that report to the Domestic Violence Program within forty-eight (48) hours for purposes of program coordination.

(C) In all domestic violence arrests, after notifying the alleged perpetrator of his/her rights, if the alleged perpetrator consents, a police officer or criminal investigator shall interview the alleged perpetrator within twenty-four (24) hours after the arrest.

(D) Immediately following a domestic violence incident, the Police Officer shall advise all known victims of the availability of Domestic Violence Treatment Programs and shall give the victims cards describing their legal rights and available services. The police officer shall coordinate with Social Services Department to transport the victim to a medical facility, place of shelter or safe place.

(E) Upon an arrest of an alleged perpetrator under this Section, the arresting police officer shall forthwith file with the court a criminal complaint and an affidavit or a written report of the alleged abuse.

(F) Whether or not the alleged perpetrator has been arrested, the Clerk of Courts or the Prosecutor shall assist the alleged victim or other appropriate person in the preparation and filing of a criminal complaint under this Section and/or a petition under J.A.N.C. § 3-5-6.

(G) The Jicarilla Apache Police Department shall develop and maintain a protocol for implementation of its obligations under this Chapter.

(H) Any alleged perpetrator arrested under this Section shall be held in custody for a period not less than twelve (12) hours, or such longer period as is necessary to conduct a commitment hearing or as determined by the Court, as a mandatory cooling off period. Prior to the commitment hearing, the alleged perpetrator shall not be released on bail or on his own recognizance.

§ 5 SPECIAL COURT RULES.

In addition to the rules of court generally applicable to criminal proceedings, the Court is authorized to take the following actions in a proceeding involving alleged domestic violence offenses.

(A) At the commitment hearing, if the alleged perpetrator is to be released from custody, the Court, in its discretion and as a condition of release, may issue an order for protection temporarily excluding the alleged perpetrator from the home of the alleged victim and restraining the alleged perpetrator from any contact with the alleged victim.

(B) If the alleged perpetrator pleads guilty, a pre-sentence report may be ordered at the discretion of the court prior to sentencing.

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(C) If it appears to the Court that alcohol or drugs played a part in the abuse, a chemical dependency evaluation with a treatment plan may be ordered, at the discretion of the Court, prior to sentencing.

(D) Upon a guilty plea or conviction, the perpetrator shall be ordered to participate in an appropriate domestic violence program consisting of at least the following:

(1) The perpetrator shall attend and cooperate in an intake session for evaluation;

(2) The evaluation shall be completed by the domestic violence program not later than ten (10) calendar days after entry of the order requiring evaluation, unless the Court extends that time period;

(3) A copy of the evaluation and recommended treatment plan shall be provided to the Court;

(4) In the discretion of the Court, the perpetrator's participation in treatment sessions based on the domestic violence programs treatment plan may be in lieu of confinement and/or fine, or the execution of any such penalty may be suspended pending completion of the treatment ordered by the Court;

(5) The domestic violence program or other service provider shall submit progress reports to the Court at least every six (6) calendar weeks.

(E) Willful failure or refusal to comply with a Court order requiring a perpetrator to attend and cooperate in evaluation and/or to undergo treatment as described in a treatment plan shall constitute contempt of court punishable as provided in J.A.N.C. § 2-9-1 and § 2-9-2. If the Court has suspended execution of any penalty imposed under J.A.N.C. § 3-5-3 on the condition that the perpetrator undergo court-ordered evaluation and/or treatment, the Court may also order execution of any such suspended sentence.

(F) Any written statement made by the alleged victim under oath and signed by the victim which describes the alleged acts of domestic violence shall not be considered inadmissible hearsay evidence, but shall be admissible in any proceeding related to a prosecution under J.A.N.C. § 3-5-3.

§ 6 CIVIL REMEDY – ORDER OF PROTECTION.

(A) *Availability of Petition.*

(1) A petition to obtain an order of protection under this Section may be filed by:

(a) Any person claiming to be the victim of domestic violence,

(b) Any family member or household member of a person claimed to be the victim of domestic violence, on behalf of the alleged victim,

(c) The Nation's prosecutor,

(d) Any person claiming to be a victim of stalking as defined in J.A.N.C. § 7-2-22, or

(e) The Jicarilla Apache Social Services Department or Domestic Violence Program.

(2) A petition shall allege the existence of domestic violence or stalking, and shall be verified or supported by an affidavit made under oath stating the specific facts and circumstances justifying the requested order.

(3) A petition may be filed regardless of the pendency of any other civil or criminal proceeding related to the allegations in the petition.

(4) No filing fee shall be required for the filing of a petition under this Section. If an alleged perpetrator has been arrested for the offense of domestic violence, the Court or the arresting police officer shall advise the alleged victim of the right to file a petition under this Section without cost.

(5) The petitioner, or the victim on whose behalf a petition has been filed, is not required to file for annulment, separation, or divorce as a prerequisite to obtaining an order of protection; but the petition shall state whether any other action is pending between the petitioner or victim and the respondent.

(6) Standard, simplified petition forms with instructions for completion shall be available to persons not represented by counsel. The Jicarilla Apache Police Department and the Nation's Court shall keep such forms and make them available upon request to victims of domestic violence.

(B) *Procedure for Issuance of an Order of Protection*. Upon the filing of a petition for order of protection, the Court shall:

(1) Immediately grant an ex-parte order of protection without bond if, based on the specific facts stated in the affidavit or the verified petition, the Court has probable cause to believe that the petitioner or the person on whose behalf the petition has been filed is the victim of an act of domestic violence committed by the respondent, and issuance of the ex-parte order is necessary to protect the victim from further abuse;

(2) Cause an ex-parte order of protection, together with notice of hearing, to be served immediately on the respondent. Service must be made by posted notice if personal service cannot be completed within twenty-four (24) hours;

(3) Within fifteen (15) days after the granting of the ex-parte order of protection, hold a hearing to determine whether the order should be vacated, extended for an additional fifteen (15) days, or modified in any respect;

(4) If an ex-parte order is not granted, serve notice to appear upon both parties and hold a hearing on the petition for order of protection within seventy-two (72) hours after the filing of the petition; provided that, if notice of hearing cannot be personally served within twenty-four (24) hours, the parties shall be served by posted notice, and the court shall hold a hearing on the petition within fifteen (15) days after the filing of the petition.

(C) *Contents of an Order of Protection*. An ex-parte order of protection or an order of protection entered after notice and hearing shall, when deemed appropriate by the Court, include provisions:

(1) Restraining the respondent from committing any acts of domestic violence.

(2) Excluding the respondent from the residence of the victim, whether or not the respondent and the victim share that residence.

(3) Restraining the respondent from any contact with the victim.

(4) Awarding temporary custody or establishing temporary visitation rights with regard to minor children of the respondent on a basis which gives primary consideration to the safety of the claimed victim of domestic violence and the minor children.

(a) If the court finds that the safety of the claimed victim or the minor children will be jeopardized by unsupervised or unrestricted visitation, the court shall set forth conditions or restrict visitation as to the time, place, duration, or supervision, or deny visitation entirely, as needed, to guard the safety of the claimed victim and the minor children.

(b) Any temporary custody order shall provide for child support and temporary support for the person having custody of the children, in amounts deemed proper by the Court.

(5) Ordering temporary guardianship with regard to an elderly or handicapped victim of domestic violence if necessary for the safety of the elderly or handicapped person.

(6) Awarding temporary use and possession of property of the respondent.

(7) Restraining one or both parties from transferring, encumbering, concealing, or disposing of property except as authorized by the Court and requiring that an accounting shall be made to the Court for all such transfers, encumbrances, dispositions, and expenditures.

(8) Ordering the respondent to timely pay any existing debts of the respondent, including mortgage or rental payments necessary to maintain the claimed victim in his/her residence.

(9) Describing any prior orders of the Court relating to domestic matters which are superseded or altered by the order of protection.

(10) Notifying the parties that the willful violation of any provision of the order constitutes contempt of court punishable by a fine or imprisonment or both and constitutes a violation of this Chapter for which civil penalties may be assessed.

(11) Ordering, in the Court's discretion, any other lawful relief as it deems necessary for the protection of any claimed or potential victim of domestic violence, including orders or directives to the Jicarilla Apache Police Department.

(D) *Duration and Modification of Order of Protection.*

(1) The provisions of the order shall remain in effect for the period of time stated in the order, not to exceed six (6) months unless extended by the Court at the request of any party.

(2) Either party may request a hearing to modify an order of protection, but the Court shall on its own initiative conduct hearings to review the order every ninety (90) days or sooner as necessary.

§ 7 SERVICE OF ORDER OF PROTECTION.

Orders of protection are to be served personally upon the respondent by a police officer. If the respondent cannot be located, the order will be mailed by certified mail to the respondent's last known address, and upon application with the Court, notice will be posted.

§ 8 ASSISTANCE OF POLICE DEPARTMENT IN SERVICE OR EXECUTION OF ORDER OF PROTECTION.

When an order of protection is issued, upon request of the petitioner, the Court shall order the police to accompany and assist any claimed victim of domestic violence in taking possession of the claimed victims' residence or otherwise to assist in execution of the order.

§ 9 RIGHT TO APPLY FOR RELIEF.

A person's right to apply for relief under J.A.N.C. § 3-5-6 or to file a criminal complaint under J.A.N.C. § 3-5-3 shall not be affected by his/her leaving the residence or household to avoid abuse.

§ 10 COPY TO LAW ENFORCEMENT AGENCY.

Each order of protection granted pursuant to J.A.N.C. § 3-5-6 and each order issued under J.A.N.C. § 3-5-5(A) shall be forwarded by the Clerk of Courts immediately to the Jicarilla Apache Police Department. The Police Department shall make available to each officer information as to the existence and status of any such orders.

§ 11 VIOLATION OF COURT ORDERS MANDATORY ARREST.

Willful violation of an order issued under J.A.N.C. § 3-5-5(A) or J.A.N.C. § 3-5-6 shall constitute contempt of court punishable as provided in J.A.N.C. § 2-9-1 and § 2-9-2.

(A) A police officer shall arrest without a warrant and take into custody any person who the police officer has probable cause to believe has willfully violated an order issued under J.A.N.C. § 3-5-5(A) or § 3-5-6.

(B) All provisions of an order issued under J.A.N.C. § 3-5-5(A) or § 3-5-6 shall remain in full force and effect until the order terminates or is modified by the Court. Violation of the order, including any prohibition against entering a residence, is not excused by the consent or permission of the alleged victim or any other person.

(C) Any person who knowingly violates an order issued under J.A.N.C. § 3-5-6 may, after notice and hearing, be assessed a civil penalty in an amount not to exceed Five Hundred Dollars ($500.00).

§ 12 ORDERS FOR PROTECTION FROM OTHER JURISDICTIONS.

The Courts of the Jicarilla Apache Nation shall recognize and give full faith and credit to all orders for protection from other jurisdictions unless such orders violate the Constitution or laws of the Jicarilla Apache Nation. In the event a conflict of laws exists as to a part of the Order of Protection, the Court will effectuate such parts of the Order of Protection which are not in conflict with the Constitution and laws of the Jicarilla Apache Nation.

§ 13 REPORTING DOMESTIC VIOLENCE.

(A) Any physician, nurse, school teacher, psychologist, social worker, probation officer, community health representative, or any other person knowing or suspecting that domestic violence is occurring or has occurred is encouraged to report the matter orally and immediately by telephone or otherwise to the Jicarilla Apache Police Department and the Social Services Department.

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(B) Any person, including individuals, corporations, governmental entities and their agents, who in good faith makes or participates in the making of a report pursuant to this Section shall have immunity from any liability, civil or criminal, which might otherwise arise from making that report and shall have the same immunity with respect to participation in any court proceeding resulting from such a report.

(C) Any person who shall make a report of domestic violence knowing that the facts reported are false or misleading, and the report causes the arrest of the person identified in the report, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to confinement not to exceed six (6) months and/or to a fine not to exceed Five Hundred Dollars ($500.00) or to both such confinement and fine.

(D) Any person who shall make a report of domestic violence knowing that the facts reported are false or misleading may, after notice and hearing, be assessed a civil penalty in an amount not to exceed Five Hundred Dollars ($500.00) .

§ 14 LIABILITY.

No police officer shall be held criminally or civilly liable for making an arrest authorized by this Chapter, provided he acted in good faith and without malice.

§ 15 SEVERABILITY.

If any part or parts, or the application of any part, of this Chapter is held invalid, such holding shall not affect the validity of the remaining parts of this Chapter. The Council declares that it would have passed the remaining parts of this Chapter even if it had known that such part or parts of application of any part thereof would be declared invalid.

§ 16 VIOLATIONS BY MINORS.

Whenever a police officer has grounds under J.A.N.C. § 3-5-4 or § 3-5-11 to arrest a person who is a minor, the officer shall arrest the minor as provided in this Chapter, but the following conditions shall apply to the arrest and subsequent proceedings:

(A) Under J.A.N.C. § 3-5-4(H), the juvenile perpetrator shall be held in custody for the mandatory twelve (12) hour period, or longer by Court order at a facility as approved in Title 5, Chapter 3 (Delinquency), of the Jicarilla Apache Nation Code. The Juvenile may not be released during this mandatory twelve (12) hour period, notwithstanding J.A.N.C. § 5-2-6.

(B) Under J.A.N.C. § 3-5-(C), the officer shall inform the parents or guardians of the intent and time to interview the juvenile perpetrator. If the parents or guardians are the victims, the officer shall inform the Domestic Violence Prevention Program of the intent and time for interviewing the juvenile perpetrate and the Domestic Violence Prevention Program shall arrange to have personnel at the interview.

(C) Any conviction of a juvenile under the Domestic Violence Code shall be treated similar to a conviction for a juvenile offense as set forth in Title 5.

(D) A civil petition for an Order of Protection under J.A.N.C. § 3-5-6 may be filed against a minor who is alleged to have committed an act of domestic violence, and the provisions of this Chapter shall govern all subsequent proceedings in the action.

TITLE 3
HISTORY

Title 3, Chapter 4, §4, Consent of Parents Not Required, was amended by Ordinance No. 2003-O-411-08 on August 20, 2003. The effective date of approval is based upon the failure of the Secretary to disapprove within the required 120 days pursuant to Article XI, Section 2 of the Jicarilla Revised Constitution and therefore deemed approved as of December 20, 2003.

The Ordinance reads as follows:

WHEREAS, Article XXIII of Section 1 of the Revised Constitution of the Jicarilla Apache Nation vests the judicial powers of the Jicarilla Apache Nation in the Nation's Courts; and

WHEREAS, Article XXIII, Section 3 of the Revised Constitution of the Jicarilla Apache Nation provides that the duties and procedures of the Nation's courts shall be established by ordinance of the Legislative Council; and

WHEREAS, Article XI Section 1(d) of the Revised Constitution of the Jicarilla Apache Nation authorizes the Legislative Council to prescribe the powers, rules and procedures of the Nation's courts in the adjudication of civil actions; and

WHEREAS, Article XI, Section 1(d) of the Revised Constitution of the Jicarilla Apache Nation authorizes the Legislative Council to enact ordinances to promote the peace, safety, property, health and general welfare of the Jicarilla Apache Nation; and

WHEREAS, on May 6, 1999 the Legislative Council enacted Resolution No. 99-R-245-05 establishing a Committee to update the Juvenile Code of the Nation to address changes in law

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and practice governing children, juveniles and families in need of services since the time the code was last amended in 1987; and

WHEREAS, the Juvenile Code Review Committee consisted of two members of the Legislative Council and representatives from Behavioral Health, Law Enforcement, Jicarilla Dormitory, Bureau of Indian Affairs, Jicarilla Housing, Dulce Public Schools, Public Defender, Probation Office and Emergency Medical Service; and

WHEREAS, the Jicarilla Apache Legislative Council finds that the future of our people as a Nation is intricately tied to the future of the children who are members of the Nation, children of members of the Nation and other children living within the Nation. The protection of these children family relationships and Jicarilla Apache traditions and culture, is necessary to protect the integrity of the Nation and the health and welfare of its members; and

WHEREAS, the Nation has criminal jurisdiction over conduct of Indian juveniles within the Nation's jurisdiction and civil regulatory jurisdiction over juveniles engaged in behavior harmful to themselves or the community within the Nation; and

WHEREAS, the Nation seeks to enact laws that will preserve the family unit in a manner consistent with the customs and traditions of the Jicarilla Apache Nation whenever possible and to provide for the care, protection, mental and physical development of youth offenders and/or delinquent juveniles who are within the jurisdiction of the Nation; and

WHEREAS, the Committee has presented the Legislative Council with a new Title 5 that recognizes these fundamental concerns; and

WHEREAS, the Committee found that certain sections of Title 3 Chapter 5 (Domestic Violence), Title 3 Chapter 4 (Adoption), Title 16 (Per Capita Distributions), and Title 7 (Criminal Offenses) require amendments to conform to the new Title 5 and/or federal law and grants; and

WHEREAS, the peace, safety, property, health, and general welfare of the Jicarilla Apache Nation will be promoted by modernizing the existing Juvenile Code and related sections of Titles 3, 7 and 16 to better address the needs of juveniles and families who are need of services from the Nation.

NOW, THEREFORE, BE IT ORDAINED by the Legislative Council of the Jicarilla Apache Nation as follows:

ORDINANCE PART E:

J.A.N.C. § 3-4-4 (Adoption) is hereby amended as follows: [Text of Ordinance]

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Title 3, Chapter 5, Domestic Violence, was enacted by Ordinance No. 92-O-349-4 on April 2, 1992 and received Secretarial approval on August 20, 1992. Ordinance No. 92-O-349-4 was amended by Ordinance No. 93-O-020-7 on January 12, 1993. Ordinance No. 93-O-020-7 received Secretarial approval on January 12, 1993. Ordinance 93-O-020-7 was amended by Ordinance No. 2003-O-411-08 on August 20, 2003. The effective date of approval is based upon the failure of the Secretary to disapprove within the required 120 days pursuant to Article XI, Section 2 of the Jicarilla Revised Constitution and therefore deemed approved as of December 20, 2003.

Ordinance No. 92-0-349-4 reads as follows:

WHEREAS, the Jicarilla Apache Tribal Council is authorized by Article XI, Section 1 of the Revised Constitution of the Jicarilla Apache Tribe to enact ordinances to promote the health and general welfare of the Jicarilla Apache Tribe; and

WHEREAS, the Tribal Council has determined that domestic violence has become a serious problem on the Reservation and that existing laws do not adequately protect the victims of domestic violence; and

WHEREAS, the Domestic Violence Committee established by the Tribal Council has developed a draft Domestic Violence Code to address the deficiencies in the laws of the Jicarilla Apache Tribe; and

WHEREAS, the Jicarilla Apache Tribal Council has reviewed and discussed the draft code and has determined that adoption of the code is in the best interests of all persons residing within the Jicarilla Apache Reservation.

Now, THEREFORE, BE IT ORDAINED that the Tribal Council of the Jicarilla Apache Tribe hereby adopts the following ordinance to be codified as Title 3, Chapter 5 of the Jicarilla Apache Tribal Code: [Text of Ordinance]

Ordinance No.93-0-020-7 reads as follows:

WHEREAS, the Jicarilla Apache Tribal Council is authorized by Article XI, Section 1 of the Revised Constitution of the Jicarilla Apache Tribe to enact ordinances to promote the health and general welfare of the Jicarilla Apache Tribe; and

WHEREAS, on April 2, 1992 the Tribal Council adopted Ordinance No. 92-0-349-4, enacting a Domestic Violence Code; and

WHEREAS, questions have been raised concerning application of the recently enacted Domestic Violence Code and the existing Juvenile Code (Title 5 of the Jicarilla Apache Tribal Code) when a minor commits an act of domestic violence; and

WHEREAS, the Tribal Council has determined that it is in the best interests of the Tribe to clarify the effect of the Domestic Violence Code on the existing Juvenile Code.

NOW, THEREFORE, BE IT ORDAINED that the Tribal Council of the Jicarilla Apache Tribe hereby adopts the following ordinance as an amendment to Tribal Council Ordinance No. 92-0-349-4, to be codified as Title 3, Chapter 5, Section 15 of the Jicarilla Apache Tribal Code: [Text of Ordinance]

Ordinance No. 2003-O-411-08 reads as follows:

WHEREAS, Article XXIII of Section 1 of the Revised Constitution of the Jicarilla Apache Nation vests the judicial powers of the Jicarilla Apache Nation in the Nation's Courts; and

WHEREAS, Article XXIII, Section 3 of the Revised Constitution of the Jicarilla Apache Nation provides that the duties and procedures of the Nation's courts shall be established by ordinance of the Legislative Council; and

WHEREAS, Article XI Section 1(d) of the Revised Constitution of the Jicarilla Apache Nation authorizes the Legislative Council to prescribe the powers, rules and procedures of the Nation's courts in the adjudication of civil actions; and

WHEREAS, Article XI, Section 1(d) of the Revised Constitution of the Jicarilla Apache Nation authorizes the Legislative Council to enact ordinances to promote the peace, safety, property, health and general welfare of the Jicarilla Apache Nation; and

WHEREAS, on May 6, 1999 the Legislative Council enacted Resolution No. 99-R-245-05 establishing a Committee to update the Juvenile Code of the Nation to address changes in law and practice governing children, juveniles and families in need of services since the time the code was last amended in 1987; and

WHEREAS, the Juvenile Code Review Committee consisted of two members of the Legislative Council and representatives from Behavioral Health, Law Enforcement, Jicarilla Dormitory, Bureau of Indian Affairs, Jicarilla Housing, Dulce Public Schools, Public Defender, Probation Office and Emergency Medical Service; and

WHEREAS, the Jicarilla Apache Legislative Council finds that the future of our people as a Nation is intricately tied to the future of the children who are members of the Nation, children of members of the Nation and other children living within the Nation. The protection of these children family relationships and Jicarilla Apache traditions and culture, is necessary to protect the integrity of the Nation and the health and welfare of its members; and

WHEREAS, the Nation has criminal jurisdiction over conduct of Indian juveniles within the Nation's jurisdiction and civil regulatory jurisdiction over juveniles engaged in behavior harmful to themselves or the community within the Nation; and

WHEREAS, the Nation seeks to enact laws that will preserve the family unit in a manner consistent with the customs and traditions of the Jicarilla Apache Nation whenever possible and to provide for the care, protection, mental and physical development of youth offenders and/or delinquent juveniles who are within the jurisdiction of the Nation; and

WHEREAS, the Committee has presented the Legislative Council with a new Title 5 that recognizes these fundamental concerns; and

WHEREAS, the Committee found that certain sections of Title 3 Chapter 5 (Domestic Violence), Title 3 Chapter 4 (Adoption), Title 16 (Per Capita Distributions), and Title 7 (Criminal Offenses) require amendments to conform to the new Title 5 and/or federal law and grants; and

WHEREAS, the peace, safety, property, health, and general welfare of the Jicarilla Apache Nation will be promoted by modernizing the existing Juvenile Code and related sections of Titles 3, 7 and 16 to better address the needs of juveniles and families who are need of services from the Nation.

NOW, THEREFORE, BE IT ORDAINED by the Legislative Council of the Jicarilla Apache Nation as follows:

ORDINANCE PART D:

Title 3, Chapter 5 (Domestic Violence) is hereby amended as follows: [Text of Ordinance]

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the lawful orders of any public official or fireman attempting to control such fire, or who interferes with any such officer in any such case, or who refuses to assist in controlling said fire, or who persuades or attempts to persuade others to do any of the foregoing, is guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period not to exceed six (6) months or to a fine not to exceed Five Hundred Dollars ($500.00) or to both such fine and confinement.

§ 4 ASSAULT AND BATTERY.

(A) *Assault*. Any Indian who shall willfully and unlawfully attempt to commit a battery upon the person of another by force or violence, or any unlawful act, threat or menacing conduct which causes another person to reasonably believe that he is in danger of receiving an immediate battery or who uses obscene or insulting language toward another shall be deemed guilty of an assault, and upon conviction thereof shall be sentenced to confinement not to exceed thirty (30) days or to a fine of not less than Twenty-Five Dollars ($25.00) nor more than One Hundred Dollars ($100.00) or to both such confinement and fine.

(B) *Assault and Battery*. Any Indian who shall unlawfully and intentionally touch or apply force to the person of another in a rude, insolent, threatening or angry manner or who by offering violence causes another to harm himself shall be deemed guilty of assault and battery and upon conviction thereof, shall be sentenced to confinement not to exceed six (6) months or to a fine not to exceed Five Hundred Dollars ($500.00) or to both such confinement and fine.

(C) *Assault and Battery on an Official of the Nation*. Any Indian who shall unlawfully and intentionally touch or apply force in a rude, insolent, threatening or angry manner to the person of any elected official or law enforcement officer of the Nation, or any person who is officially acting for the Nation's government, or who shall by offering violence, cause such official to harm himself, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not less than three (3) months nor more than six (6) months and to a fine of not less than Two-Hundred Fifty Dollars ($250.00) nor more than Five Hundred Dollars ($500.00).

§ 5 BRIBERY.

Any Indian who shall give or offer to give any money, property, service, or anything of value to another person with corrupt intent to influence another in the discharge of his duties or conduct, and any Indian who shall accept, solicit, or attempt to solicit any bribe as above described shall be deemed guilty of an offense and, upon conviction thereof, shall be sentenced to confinement for a period not to exceed six (6) months or to a fine not to exceed Five Hundred Dollars ($500.00) or to both such confinement and fine.