No. 15-420

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2015

UNITED STATES OF AMERICA,
Petitioner,

vs.

MICHAEL BRYANT, JR.,
Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

**ANTHONY R. GALLAGHER
Federal Defender
Steven C. Babcock
Assistant Federal Defender
Joslyn Hunt
Research Attorney
Federal Defenders of Montana
2702 Montana Avenue, Suite 101
Billings, Montana 59101
(406) 259-2459

**Counsel of Record

November 4, 2015

No. 15-420

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2015

UNITED STATES OF AMERICA,

Petitioner,

vs.

MICHAEL BRYANT, JR.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

*ANTHONY R. GALLAGHER
Federal Defender
Steven C. Babcock
Assistant Federal Defender
Joslyn Hunt
Research Attorney
Federal Defenders of Montana
2702 Montana Avenue, Suite 101
Billings, Montana 59101
(406) 259-2459
*Counsel of Record

QUESTION PRESENTED

This case concerns the use of convictions entered without the assistance of counsel, which generally, cannot be used in subsequent criminal proceedings, such as those targeted in 18 U.S.C. §117(a). The prior convictions targeted in this case were obtained in tribal court and were uncounseled, thereby violating the Sixth Amendment to the United States Constitution. The Ninth Circuit Court of Appeals held the prior uncounseled convictions invalid. Petitioner now seeks certiorari, but the question presented is more properly and accurately restated as follows:

> WHETHER RELIANCE ON UNCOUNSELED TRIBAL COURT MISDEMEANOR CONVICTIONS TO PROVE THE PREDICATE OFFENSE ELEMENT OF 18 U.S.C. §117(A) VIOLATES THE UNITED STATES CONSTITUTION.

TABLE OF CONTENTS

Page

QUESTION PRESENTED. i

TABLE OF CONTENTS. ii

TABLE OF AUTHORITIES. iii

PARTIES TO THE PROCEEDINGS. 1

OPINIONS BELOW. 2

JURISDICTION AND TIMELINESS OF THE PETITION. 2

CONSTITUTIONAL PROVISION INVOLVED. 3

STATUTORY AND/OR FEDERAL RULES INVOLVED. 3

STATEMENT OF THE CASE. 4

REASONS FOR DENYING THE PETITION. 9

A. The Ninth Circuit's holding is premised on sound circuit precedent as well as sound analysis of this Court's precedent. 9

B. Congress could not rationally conclude that uncounseled convictions used in a subsequent federal prosecution as evidence of guilt were reliable. 22

C. Other circuit decisions do not provide the constitutional checks that the Ninth Circuit's decision does. 26

D. Section 117(a) is not invalidated by *Bryant*. 27

CONCLUSION. 29

TABLE OF AUTHORITIES

Page No.

Cases

Alabama State Federation of Labor v. McAdory,
325 U.S. 450 (1945). 23

Argersinger v. Hamlin,
407 U.S. 25 (1972). 10, 15

Baldasar v. Illinois,
446 U.S. 222 (1980) 20

Custis v. United States,
511 U.S. 485 (1994). 9

Gideon v. Wainright,
372 U.S. 335 (1963). 10

In re Winship,
397 U.S. 358 (1970). 8

Johnson v. Zerbst,
304 U.S. 458 (1938). 22

Jones v. Meehan,
175 U.S. 1 (1899). 11

Lewis v. United States,
445 U.S. 55 (1980). 5

Nichols v. United States,
511 U.S. 738 (1994) 7-9, 14-16, 18-21

Powell v. Alabama,
287 U.S. 45 (1932). 22

Roff v. Burney,
168 U.S. 218 (1897) 11

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978). 11, 13

Scott v. Illinois,
440 U.S. 367 (1979). 10, 11, 14, 15, 17

Strickland v. Washington,
466 U.S. 668 (1984). 10

Talton v. Mayes,
163 U.S. 376 (1896). 11

United States v. Ant,
882 F.2d 1389 (9th Cir. 1989). 7, 8, 20, 21, 26-28

United States v. Bryant [*Bryant Order*],
792 F.3d 1042 (9th Cir. 2015). 7, 8, 18, 20, 22

United States v. Bryant,
769 F.3d 671 (9th Cir. 2014). 2, 5-8, 14, 15, 17, 20-22, 26-28

United States v. Cavanaugh,
643 F.3d 592 (8th Cir. 2011) 26, 27

United States v. First,
731 F.3d 998 (9th Cir. 2013) 5

United States v. Kagama,
118 U.S. 375 (1886). 11

United States v. Ortega,
94 F.3d 764 (2d Cir. 1996). 17

United States v. Quiver,
241 U.S. 602 (1916). 11

United States v. Shavanaux,
647 F.3d 993 (10th Cir. 2011). 7, 26, 27

Williams v. Lee,
358 U.S. 217 (1959). 11

Constitutional Provisions

Fifth Amendment. 3, 4, 11, 23

Sixth Amendment . . . . . i, 3-7, 9, 10, 14, 15, 17-21, 23, 25-27

Federal Statutes

18 U.S.C. §117(a). . . . . i, 3-6, 8, 9, 12-14, 16, 19, 21, 25, 27, 28

25 U.S.C. § 1302(c)(2). 25

25 U.S.C. §1302. . . . . 13, 23, 26

25 U.S.C. §1302(a)(6). 6

25 U.S.C. §1302(c). 24

25 U.S.C. §1303. 13

25 U.S.C. §1304 28

25 U.S.C. §1304(b) 27

25 U.S.C. §1304(c). 27

25 U.S.C. §1304(d)(4) 27

28 U.S.C. §1254(1). 2

Rules of the United States Supreme Court

Rule 15, ¶3. 2

Other Sources

151 Cong. Rec. S4873
(daily ed. May 10, 2005) 28

Armed Career Criminal Act. 9

Indian Civil Rights Act. 6, 9, 12-14, 23, 25, 26, 28

The Constitutional Rights of the American Indian:
Hearings before the United States Senate Committee
on the Judiciary, Subcommittee on Constitutional
Rights, Eighty-Seventh Congress, first session
(1961 Hearings), Part I at 6. . . . . 12, 13

Tribal Law and Order Act 23-25

No. 15-420

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

vs.

MICHAEL BRYANT, JR.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PARTIES TO THE PROCEEDINGS

Petitioner is the United States of America, which was the Appellee in the Ninth Circuit. Respondent is Michael Bryant Jr., who was the Appellant in the Ninth Circuit.

OPINIONS BELOW

1. The opinion of the Ninth Circuit is published and reported at 769 F.3d 671 (9th Cir. 2014). A copy of that opinion is set forth in the Addendum to this response.

2. The oral ruling of the district court denying Respondent's motion to dismiss is unreported.

JURISDICTION AND TIMELINESS OF THE PETITION

The Ninth Circuit's opinion was filed on September 30, 2014. (Addendum at pages 1-8.) Petitioner filed a petition for rehearing en banc on December 15, 2014. (Addendum at pages 9-48.) Respondent responded to the petition for rehearing en banc on March 17, 2015. (Addendum at pages 49–86.) The Ninth Circuit issued its order denying the petition for rehearing en banc on July 6, 2015. (Addendum at pages 87-93.) Petitioner filed its application for writ of certiorari with this Court on October 5, 2015. (Pet.) This Court's jurisdiction arises under 28 U.S.C. §1254(1). Respondent's response is timely because it was placed in the United States mail, first class postage pre-paid, on November 4, 2015, which is the last day for filing under the Rule of this Court. *See* Rule 15, ¶3.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fifth and Sixth Amendments to the United States Constitution, which provide in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty, or property, without due process of law[.]
>
> U.S. Const., Amd. V

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

STATUTORY AND/OR FEDERAL RULES INVOLVED

This case involves 18 U.S.C. §117(a), which provides in part:

§117. Domestic assault by an habitual offender

(a) In general. Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction–

(1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner; or

(2) an offense under chapter 110A,

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

STATEMENT OF THE CASE

1. A Native American from the Northern Cheyenne Reservation, Respondent has never disputed he has prior domestic violence convictions from the Northern Cheyenne Tribal Court. Respondent was incarcerated as the result of some of the tribal court convictions. (Addendum at pages 54-55.) He did not have the assistance of counsel during proceedings on the tribal court convictions.

2. Respondent was indicted in the United States District Court for the District of Montana, Billings, Montana under 18 U.S.C. §117(a) with two counts of felony domestic assault by an habitual offender. (Addendum at page 55.) Prosecution under §117(a) requires a person to have "a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court[.]" 18 U.S.C. §117(a).

3. Respondent moved to dismiss the Indictment, arguing it violated his Fifth and Sixth Amendment rights for Petitioner to rely on uncounseled tribal

convictions as predicates for prosecution under §117(a). (Addendum at page 55.) The district court denied the motion. (Addendum at page 55.) Respondent ultimately entered into a plea agreement, reserving his right to appeal the pretrial denial of his motion to dismiss. (Addendum at page 55.)

4. Respondent appealed to the Ninth Circuit. A three-Judge Panel, analyzing the issue under the Sixth Amendment, reversed holding:

> subject to the narrow exception recognized in *Lewis*[1] and *First*[2] for statutes that serve merely as enforcement mechanisms for civil disabilities, tribal court convictions may be used in subsequent prosecutions only if the tribal court guarantees a right to counsel that is, at minimum, coextensive with the Sixth Amendment right.
>
> *United States v. Bryant*, 769 F.3d 671, 677 (9th Cir. 2014) (Addendum at page 5)

---

[1] *Lewis v. United States*, 445 U.S. 55, 67 (1980) (Supreme Court held that uncounseled convictions are not invalid for all purposes, recognizing a class of persons who could not possess firearms regardless of whether their convictions preventing them from possessing firearms were counseled or uncounseled. Enforcement of the federal firearm laws was just that–enforcement. Being unable to possess a firearm was a "civil disability.").

[2] *United States v. First*, 731 F.3d 998 (9th Cir. 2013) (The Ninth Circuit followed the reasoning in *Lewis*, holding that the defendant's misdemeanor domestic violence conviction in tribal court, which was obtained in violation of his Sixth Amendment right to counsel, did not affect the Government's use of that conviction in a subsequent federal firearms prosecution. This was true because the focus of the Government's federal firearms prosecution was not on the prior conviction as an element of the offense. It was on the person possessing an item he was not legally supposed to possess.).

5. Contrary to Petitioner's assertions, nowhere in the *Bryant* decision does the Ninth Circuit hold "the Constitution prohibited reliance on respondent's *valid* uncounseled tribal-court convictions to prove Section 117(a)'s predicate-offense element." *See* Pet. at page 2 (emphasis added). Rather, the Ninth Circuit's holding reiterates that if an individual is subject to incarceration for his offenses, if given counsel, the tribal court convictions may be used to establish the predicate-offense element in federal court under a subsequent §117(a) prosecution. Otherwise, the tribal court convictions, as with Respondent, are invalid because they are uncounseled. *See Bryant*, 769 F.3d at 677 (Addendum at page 5). Later in the petition, even Petitioner agrees this is the holding in *Bryant*. *See* Pet. at page 5, 3.a.

6. Respondent acknowledges the absence of counsel guaranteed by the Sixth Amendment in tribal court results from the Indian Civil Rights Act (ICRA). *See* 25 U.S.C. §1302(a)(6). Respondent did not contend his tribal court convictions were unconstitutional. *Bryant*, 769 F.3d at 673 (Addendum at pages 3). Rather, he argued the uncounseled tribal court convictions were invalid and unconstitutional when used in federal court to prove an element required in a federal prosecution. Id.

7. Use of the tribal court convictions in federal court triggers the protections of the United States Constitution. Petitioner states that "[i]t is undisputed . . . those [tribal court] convictions are valid and were obtained in compliance with

ICRA." Pet. at page 4, 2.a. Respondent has disputed and continues to dispute the validity of uncounseled tribal court convictions when used in federal court to prove an element of the prosecution.

8. Judge Watford wrote separately, concurring with the *Bryant* decision, but indicating his belief that this Court's decision in *Nichols v. United States*, 511 U.S. 738 (1994) called the Ninth Circuit's decision in *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989) into question. *Bryant*, 769 F.3d at 679 (Addendum at page 6). Judge Watford posited *Nichols* undercut the proposition that uncounseled convictions were categorically unreliable. As such, the seemingly contrary holding in *Ant* was difficult to "square with" the notion Respondent's prior convictions were not obtained in violation of the Sixth Amendment since they occurred in tribal court. *Id.* Citing *United States v. Shavanaux*, 647 F.3d 993 (10th Cir. 2011), Judge Watford continued the Sixth Amendment could not be violated anew if it never first was violated. *Id.*

9. Petitioner filed a petition for rehearing en banc and Respondent answered. (Addendum at pages 9-48; 49-86, respectively.) The Ninth Circuit denied the petition for rehearing, explaining why *Bryant* does not apply the bright-line reading of *Nichols* advocated by the dissenters. *See United States v. Bryant* [*Bryant Order*], 792 F.3d 1042, 1043-1046 (Addendum at pages 87-89). That reading, according to the dissenters, permits the use of tribal court convictions in subsequent

federal prosecutions because tribal court convictions never violate the Sixth Amendment. *See Bryant Order*, 792 at 1046-1050 (Addendum at pages 89-92).

10. The Ninth Circuit explained "[t]he most salient difference between the guilt and punishment phases of criminal adjudication is that prosecutors must prove each element of an offense beyond a reasonable doubt." *Bryant Order*, 792 at 1043 (citing *In re Winship*, 397 U.S. 358 (1970)) (Addendum at page 87). Hence, "[n]othing in *Nichols* purports to sanction the use of an uncounseled conviction for *Winship* purposes." *Id.* Also, "*Nichols* does not hold that an uncounseled conviction is sufficiently reliable to support a conviction in a future prosecution where, as in *Bryant* and *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989), these accommodations are absent." *Bryant Order*, 792 at 1043 (Addendum at page 88).

11. Finally, while "[n]o part of the decision in *Bryant* is intended to express contempt for tribal courts," "[n]or does the decision frustrate the purpose of §117(a)," the Ninth Circuit concluded that the *Bryant* decision "is consistent with Congress's dual interest in respecting tribal courts and ensuring due process for tribal court defendants." *Bryant Order*, 792 F.3d at 1044 (Addendum at page 88).

REASONS FOR DENYING THE PETITION

Petitioner's certiorari petition equates ICRA to the United States Constitution, contending that tribal court convictions obtained without the assistance of counsel are constitutionally valid when used in federal court.

Respondent's tribal court convictions were not validly entered under federal law. The protections of the United States attach to a prosecution in federal court and to evidence necessary for that prosecution. *See Custis v. United States*, 511 U.S. 485, 497 (1994) (denial of counsel is the only exception to the ban on collateral attacks of prior convictions used to invoke the enhancement provisions of the Armed Career Criminal Act). The Ninth Circuit's holding is correct under federal law, provides constitutional checks the Eighth and Tenth circuit court decisions do not, and does not eliminate prosecutions under 18 U.S.C. §117(a).

A. The Ninth Circuit's holding is premised on sound circuit precedent as well as sound analysis of this Court's precedent.

When Respondent's tribal court convictions were used by Petitioner in an attempt to prove an element of the offense, those convictions must have been obtained in accordance with the Sixth Amendment. The holding in *Nichols* actually supports that proposition. Given Respondent's tribal court convictions were uncounseled, they were not validly entered under federal law.

The Sixth Amendment to the United States Constitution provides "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. The Constitution dictates a fair trial is one where evidence that is subject to adversarial testing is presented to an impartial tribunal for resolution of elements defined in advance of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Certain safeguards are essential to the criminal justice system. The right to counsel is one of those safeguards.

In 1963, this Court held that the United States Constitution requires appointment of counsel for all indigent defendants charged with any felony. *Gideon v. Wainright*, 372 U.S. 335, 342-43 (1963). That right was extended at the state level where a defendant must be appointed counsel if the defendant's criminal charge carried with it the possibility of incarceration. *Argersinger v. Hamlin*, 407 U.S. 25, 37-38, 40 (1972). An indigent defendant who is charged with a misdemeanor offense and who receives a sentence of imprisonment is entitled to counsel under the Sixth Amendment to the United States Constitution. *Scott v. Illinois*, 440 U.S. 367, 374 (1979).

Respondent was incarcerated as the result of some of his tribal court convictions and he did not receive counsel during the proceedings on those tribal court convictions. Under *Scott*, Respondent should have had counsel during the

proceedings that led to his convictions since those proceedings led to the deprivation of his liberty. *Scott*, 440 U.S. at 373-74.

Respondent did not have counsel because "Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (citation omitted). Tribes remain a "separate people, with the power of regulating their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 381-82 (1886). They have the power to make their own substantive law in internal matters. *See Roff v. Burney*, 168 U.S. 218 (1897) (membership); *Jones v. Meehan*, 175 U.S. 1, 29 (1899) (inheritance rules); *United States v. Quiver*, 241 U.S. 602 (1916) (domestic relations). They also have the power to enforce the law in their own forums. *See e.g., Williams v. Lee*, 358 U.S. 217 (1959).

In *Talton v. Mayes*, 163 U.S. 376 (1896), this Court held the Fifth Amendment did not "operat[e] upon" "the powers of local self-government enjoyed" by tribes. Respondent has consistently acknowledged that tribes are distinct and that ICRA contains rights that are similar, but not identical to, the United States Constitution. In fact, Respondent acknowledges if the tribal court prosecuted him in tribal court for being an habitual offender, his two prior tribal court convictions would be valid for subsequent prosecution in tribal court.

The moment, however, Petitioner brought Respondent's case into federal court in an attempt to prove he was an habitual offender under a federal statute–§117(a)–based on his tribal court convictions, the United States Constitution applied to that prosecution. That prosecution involved Petitioner proving: (1) Respondent was a person who had committed a domestic assault within United States jurisdiction or Indian country; and (2) Respondent had been at least twice previously convicted "in Federal, State, or Indian tribal court" of "any assault, sexual abuse, or serious violent felony against a spouse or intimate partner[.]" 18 U.S.C. §117(a).

Petitioner cannot prove in federal court beyond a reasonable doubt that Respondent had two prior convictions when those two prior tribal court convictions were obtained without counsel. Those prior tribal court convictions are not valid in federal court because they were uncounseled. That they were obtained in tribal court in accordance with ICRA does not change their constitutional invalidity in federal court.

Congress enacted ICRA to afford the "individual Indian protection of his rights as a citizen in the face of tribal practices." *See* The Constitutional Rights of the American Indian: Hearings before the United States Senate Committee on the Judiciary, Subcommittee on Constitutional Rights, Eighty-Seventh Congress, first session (1961 Hearings), Part I at 6. ICRA established ten enumerated rights.

Congress did not require the right to court appointed counsel. 25 U.S.C. §1302. The Bureau of Indian Affairs actually opposed creating a right to defense counsel at tribal expense, because doing so would be costly and would create an imbalance. *See* 1961 Hearings, Part 1 at 13. Tribes were not usually represented and tribal court judges were not always legally trained. *Id.* at 8-9.

While ICRA may have meant to protect Indian defendants from arbitrary and unjust actions, without counsel Government actions such as those taken against Respondent will remain unchecked. *See Santa Clara Pueblo*, 436 U.S. at 61 (quotation omitted). That is, tribal defendants like Respondent will proceed, uncounseled, with the charges against them in tribal court without appreciating the penalties and disabilities their uncounseled convictions will subject them to. It is very plausible that a defendant in tribal court would plead guilty to simply get out of jail without understanding that the guilty plea is a predicate under §117(a). Habeas corpus relief also does not avail these concerns because that, too, is a right rendered virtually meaningless without the benefit of counsel[3]. *See* Pet. at page 19.

Petitioner argues that "nothing in the Constitution prohibits Congress's judgment" that prior uncounseled (and counseled) tribal convictions may be used to

---

[3]25 U.S.C. §1303. "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

"support a recidivist prosecution under Section 117(a)." Pet. at page 12. Petitioner also contends that "even if the defendant was not counseled, no principle in this Court's jurisprudence is undermined." Pet. at page 15. When Petitioner sought to prosecute Respondent in federal court based on two uncounseled tribal court convictions for which he was incarcerated, the Sixth Amendment to the United States Constitution applied and was undermined. Sixth Amendment jurisprudence, therefore, limits Congress's judgment regarding §117(a).

The rights Indians enjoy as United States citizens under the United States Constitution differ from their civil rights under ICRA. The holding in *Nichols* does not change that fact, which is why this Court need grant certiorari.

Under *Nichols*, a valid misdemeanor conviction is one that complies with the Sixth Amendment. *Nichols*, 511 U.S. at 748-49. The defendant's conviction at issue in *Nichols* comported with the Sixth Amendment because the defendant in that case did not receive a sentence of incarceration. *Id.* at 740. Hence, the defendant in *Nichols* need not under *Scott* be appointed counsel. *Id.* at 748-49. The defendant's sentence in *Nichols* was thereby properly enhanced using the prior uncounseled misdemeanor conviction to do so. *Id.*

Judge Watford indicated in his concurrence to the *Bryant* decision that "*Nichols* suggests that so long as a prior conviction isn't tainted by a constitutional

violation, nothing in the Sixth Amendment bars its use in subsequent criminal proceedings." *Bryant*, 769 F.3d at 679 (Watford, J. concurring) (Addendum at page 6). Respondent's convictions were tainted by a constitutional violation, however. In being used as evidence to prove an element to a federal criminal offense in federal court, they do not comport with the Sixth Amendment because the convictions were uncounseled.

Nichols does not undercut the proposition that uncounseled convictions are categorically unreliable. *See* Pet. at page 7. Rather, as the concurrence acknowledged in *Nichols*, reliability concerns still exist regarding uncounseled convictions; however, those concerns are "accommodated" because a defendant may "convince the sentencing court of the unreliability of any prior valid but uncounseled convictions. *Nichols*, 511 U.S. at 752 (Souter J., concurring in judgment). Also, the burden of proof is less, which equates to a less stringent reliability requirement. *See Nichols*, 511 U.S. at 747.

This Court in *Scott* relied on *Argersinger* drawing a bright line between imprisonment and lesser criminal penalties on the theory that concern over reliability raised by the absence of counsel is tolerable when a defendant does not face the deprivation of liberty. *See Scott*, 440 U.S. at 372-73; *see also Argersinger*, 407 U.S. at 34-37. Enhancement or recidivist statutes "do not change the penalty imposed for

the earlier conviction." *Nichols*, 511 U.S. at 747. Repeat-offender laws are instead sustained because they penalize "only the last offense committed by the defendant." *Id.*

That is not the case where, as here, an uncounseled misdemeanor conviction is used as evidence to establish guilt of an offense. The enhancement or recidivist statute relies on the fact a conviction exists. If a conviction does not exist–because it is invalid–there can be no statutory crime. Stated another way, prosecution of Respondent in federal court under §117(a) changes the earlier tribal court convictions. They no longer exist because they are no longer valid. Unlike sentencing enhancement or recidivist statutes which penalize the last offense, prosecution under §117(a) in federal court hinges on the existence of two prior tribal court convictions to establish a crime even occurred. The prosecution cannot exist without the two prior convictions.

Petitioner argues that "Respondent should not be protected against the use of his tribal criminal record based on the sentence he received in tribal court, when that sentence has no relevance to the use of the conviction as a predicate under Section 117(a)." Pet. at page 15. Petitioner continues, arguing "nothing in logic supports allowing the government to rely on a tribal-court misdemeanor conviction when the tribal court imposed only a fine, but barring it from using the same conviction if the

tribal court imposed imprisonment, when nothing in the federal recidivist prosecution turns on the sentence received in tribal court." Pet. at page 16.

Respondent is not protected against use of his tribal court convictions based on the sentences he received. The fact he was incarcerated meant he was entitled to counsel under *Scott* when Petitioner sought to prosecute Respondent in federal court using the tribal court convictions as evidence of his guilt. Since he did not have counsel, those convictions in the federal prosecution were invalid as violating the Sixth Amendment. Hence, the sentences Respondent received in tribal court are not what drove the Ninth Circuit's analysis in *Bryant*. The constitutional protections provided under the Sixth Amendment are.

Petitioner desires this Court to use Respondent's prior tribal court convictions as evidence to prove an element of a crime when those same tribal court convictions, upon sentencing, would be subject to further scrutiny and possibly not applied to enhance Respondent's sentence given their unreliability.

Indeed, USSG §4A1.2 discusses the use of prior sentences in increasing a term of imprisonment, indicating those sentences will not count if they result from tribal court convictions. The Sentencing Guidelines count a prior uncounseled conviction misdemeanor only "where imprisonment was not imposed." USSG §4A1.2, Comment. Background; *United States v. Ortega*, 94 F.3d 764, 771 (2d Cir. 1996)

(§4A1.2 "excludes from criminal history computations all uncounseled misdemeanor sentences of imprisonment"). While the Sentencing Guidelines do not allow criminal history points to be assessed for tribal court convictions, they do allow a district court to find a criminal history score is understated because of a significant tribal court record. *See* USSG §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

Petitioner points to Judge O'Scannlain's statement that "the court's [Ninth Circuit] argument is illogical" since Nichols' and Respondent's uncounseled convictions "comport" with the Sixth Amendment for the same reason–that being the Sixth Amendment did not apply to either conviction. Pet. at page 16 (citing to *Bryant Order*, 792 F.3d at 1048 (Addendum at page 91). Remembering that *Nichols* is a punishment case and this case is a guilt phase case is essential as pointed out by Judge Paez. *Bryant Order*, 792 F.3d at 1043 (Addendum at page 87).

Additionally, Nichols' case and Respondent's case are not identical because even if this case was a punishment case, Respondent's uncounseled tribal court convictions could not be used to assess criminal history points under the United States Sentencing Guidelines. USSG §4A1.2. What seems illogical is the argument that Respondent's uncounseled tribal court convictions cannot be counted to assess

criminal history points for the advisory Sentencing Guidelines yet can be used to establish an essential element at the guilt phase in federal court.

The Government is held to a higher burden when proving a crime, yet Petitioner's approach appears to equate its burden to the less exacting standard required at sentencing, stating the "procedural difference [of proving the prior tribal convictions beyond a reasonable doubt] does not alter the substantive use of the conviction to demonstrate that the defendant is a repeat offender." Pet. at page 18.

Petitioner has stated that this is a federal recidivist prosecution. Pet. at page 16. Respondent disagrees with that assertion. Clearly, all agree that uncounseled tribal court convictions would have violated the Sixth Amendment had they been obtained in state or federal court. As applied to Respondent, it is illogical to assume his case is a federal recidivist prosecution when the previous recidivist behavior does not comport with the Sixth Amendment at the guilt phase. In other words, how can §117(a) be deemed a recidivist prosecution when the Government could have not prosecuted Respondent before in federal court due to the Sixth Amendment violations that occurred in tribal court? His behavior should not be deemed repeat behavior, under a true recidivist statute, when the rules are not the same.

As the Ninth Circuit indicated in denying Petitioner's petition for rehearing en banc, *Nichols* leaves open the question "whether a potentially unreliable uncounseled

misdemeanor conviction passes muster at the guilt phase." *Bryant Order*, 792 F.3d at 1043 (Addendum at page 88). The Ninth Circuit's decision in *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989) "fills this gap" and does so correctly. *Id. Ant* holds that the Government may not use prior tribal court misdemeanor convictions as evidence of guilt in subsequent federal prosecutions where those prior convictions were obtained in violation of the defendants' Sixth Amendment right to counsel. *Ant*, 882 F.2d at 1396.

The Ninth Circuit in *Ant* closely considered the possibility that uncounseled proceedings may contribute to a defendant's misunderstanding or confusion. *See Ant*, 882 F.2d at 1394. The Ninth Circuit in *Ant* also highlighted genuine concerns for judicial accuracy. *See Ant*, 882 F.2d at 1394, 1396. *Ant* did not rely on *Baldasar v. Illinois*, 446 U.S. 222 (1980) in ultimately holding that the defendant's guilty plea, which was constitutionally infirm if obtained in federal court, was inadmissible in a subsequent federal prosecution. In fact, *Ant* made only a passing citation to *Baldasar* in the overarching discussion of an individual's Sixth Amendment right to counsel at the time the person pleads guilty. *See Ant*, 882 F.2d at 1394. That *Nichols* overruled *Baldasar* had no effect on *Ant* or *Bryant*. The rationale of *Ant* and *Bryant* still remain.

That is, the *Ant* and *Bryant* decisions evaluated whether the plea and the tribal court convictions, respectively, met "the requirements of the United States Constitution for use in a federal prosecution in federal court." *Ant*, 882 F.2d at 1396. They "looked beyond the validity of the tribal conviction itself and . . . reviewed the actual tribal proceedings to determine if they were in conformity with the Constitutional requirements for federal prosecutions in federal court." *Id.*

Accordingly, where a person is not given the opportunity to have appointed counsel–thereby making that person unaware that either the tribal guilty plea (in *Ant*) or the tribal court conviction (in *Bryant*) would be used against him in future federal court prosecutions–the guilty plea or conviction is not admissible in a subsequent federal prosecution. The Sixth Amendment right to counsel "d[oes] not obtain" in tribal court proceedings. *Nichols*, 511 U.S. at 746. Respondent's §117(a) proceeding was in federal court, however, where the Sixth Amendment right to counsel does obtain.

> [The Sixth Amendment right to counsel] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer–to the untrained layman–may appear intricate, complex, and mysterious[.] . . .

> The 'right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.'
>
> *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938) (quoting *Powell v. Alabama*, 287 U.S. 45, 68 (1932)).

Indian defendants are citizens of the United States as well. The deprivation of counsel in tribal court does not serve to protect Indian tribes. Should this Court accept Petitioner's argument, deprivation of counsel in federal court will be endorsed. This Court should reject Petitioner's request to twist and configure the United States Constitution in a manner so as to further a statutory purpose that does not square with a core provision of the Constitution.

B. Congress could not rationally conclude that uncounseled convictions used in a subsequent federal prosecution as evidence of guilt were reliable.

The *Bryant* decision was not decided under the Due Process clause, nor was the *Bryant* Order denying the petition for rehearing. This Court should therefore reject any attempt by Petitioner to grant certiorari under a constitutional provision not

addressed by the Ninth Circuit. *See Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945) ("It has long been its considered practice [in the United States Supreme Court] not . . . to decide any constitutional question in advance of the necessity for its decision, or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, or to decide any constitutional question except with reference to the particular facts to which it is to be applied.") (citations omitted).

In the alternative, Petitioner argues "Congress could rationally conclude that appointed counsel is not essential to an accurate determination of guilt in tribal-court misdemeanor proceedings, particularly in light of the other procedural protections that help ensure the reliability of tribal-court convictions." (Pet. at page 19.) Petitioner makes this assertion but does not indicate what these "other procedural protections" contained in ICRA are, and more importantly, how they ensure reliability above and beyond the Fifth and Sixth Amendments of the United States Constitution.

Indeed, as it applies to tribal court matters, Congress agrees the procedural safeguards of the criminal justice system under the United States Constitution are essential as evidenced by Congress enacting the Tribal Law and Order Act in 2010. *See* 25 U.S.C. §1302.

The Tribal Law and Order Act expanded the tribal sentencing authority for certain tribal court cases (where the tribe imposes a term of imprisonment of more than one year) provided the tribe actually secures certain rights to the tribal court defendants. Those rights include:

> (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
>
> (2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;
>
> (3) require that the judge presiding over the criminal proceeding–
>
> (A) has sufficient legal training to preside over criminal proceedings; and
>
> (B) is licensed to practice law by any jurisdiction in the United States;
>
> (4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and
>
> (5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

25 U.S.C. §1302(c).

Since Congress appreciates the need for counsel and due process when a person is imprisoned for greater than one year, it cannot be said that in the interest of prosecuting habitual offenders under §117(a) for what Petitioner purports to be a serious epidemic it is rational not to provide domestic violence offenders counsel in tribal court. Rather, it appears that Congress has indicated a problem exists, yet has failed to account for the fact §117(a) prosecutions occur in federal court where the United States Constitution applies.

Respondent received a sentence of forty-six months–significantly more than one year. As stated above, Congress certainly has acknowledged the importance of effective assistance of counsel by passing the Tribal Law and Order Act of 2010 requiring that an indigent defendant receive appointed counsel when a sentence of over year is imposed. 25 U.S.C. § 1302(c)(2). Therefore, any conviction obtained pursuant to §117(a) should require all essential offense elements comply with the Sixth Amendment. Arguing that ICRA does not require compliance with the Sixth Amendment should not be an out.

Respondent's convictions raise reliability concerns for the reasons already addressed in Section A. Congress may "make a tribal misdemeanor conviction an element of a recidivist domestic-violence crime," as it has done under §117(a). (Pet. at pages 16-17). In application in federal court, however, where a prosecutor seeks

to use a misdemeanor conviction as evidence of that element and the conviction violates the Sixth Amendment, the determination made by Congress cannot be deemed rationale.

C. Other circuit decisions do not provide the constitutional checks that the Ninth Circuit's decision does.

The Ninth Circuit recognized the circuit split its *Bryant* decision caused. *Bryant*, 769 F.3d at 678 (Addendum at page 5). However, the *United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011) and *Shavanaux* decisions fail to acknowledge the dual rights that every individual Indian holds: the rights of a United States citizen under the United States Constitution (Const. amend VI) and the distinct rights as a tribal citizen under ICRA (25 U.S.C. §1302). Moreover, those cases were not decided en banc and can be further resolved in their own circuits. This Court did not grant certiorari in either of those cases.

The *Cavanaugh* and *Shavanaux* courts overlooked the importance of attorney representation in tribal court. Instead, those courts have automatically accepted the validity of prior uncounseled tribal court convictions as they apply to domestic violence assaults. The accuracy of prior convictions cannot be ensured without constitutional checks from the federal system–the very constitutional checks that *Ant* applied.

The *Cavanaugh* and *Shavanaux* decisions encroach on tribal sovereignty as well. In an interesting twist to tribal sovereignty concerns by the dissenters, the holdings in *Cavanaugh* and *Shavanaux* give federal courts more authority. Section 117(a) allows the United States Attorneys' office to assert more authority in the area of domestic violence in Indian country. Without proper deference to a person's fundamental right to counsel in federal court, federal prosecutors under the *Cavanaugh* and *Shavanaux* reasoning need not hesitate prosecuting any habitual domestic violence offender. This usurps the authority–and sovereignty–afforded tribal courts under 25 U.S.C. §1304(b) and (c).

Finally, had domestic violence concerns not underscored the courts' reasoning in *Cavanaugh* and *Shavanaux*, can it be said that the holdings would have been the same? Or, would the resulting decisions been in line with *Ant*? As stated above, domestic violence in Indian Country is a legitimate concern. However, the statute enacted to address the issue must comply with the Sixth Amendment.

D. Section 117(a) is not invalidated by *Bryant*.

The *Bryant* decision does not prevent the Government from prosecuting under §117(a). The *Bryant* decision only prevents the Government from prosecuting under §117(a) when the Government seeks to use prior convictions that were obtained in violation of the Sixth Amendment. In addition, 25 U.S.C. §1304(d)(4) requires a

defendant to receive "all other rights whose protection is necessary under the Constitution of the United States," including the right to court-appointed counsel. Any concerns about *Ant* and *Bryant* all but writing §117(a) off the books is availed by §1304. *See* Pet. at pages 26-27.

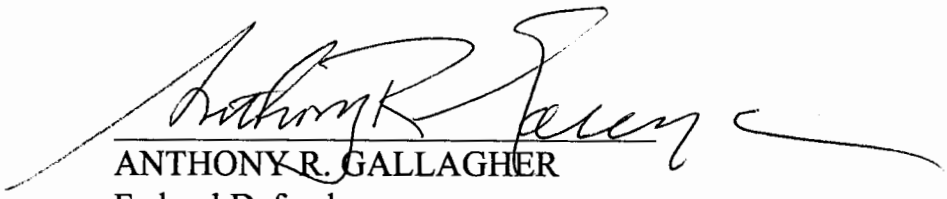
The *Bryant* decision does not condone domestic violence. But where, as here, the statute that was drafted to address domestic violence concerns runs afoul of the United States Constitution in its application, this Court should not be asked to cure the statute with legal gymnastics. If a portion of a statute is unconstitutional it must be changed. That is the job of Congress.

Section 117(a) has been utilized to achieve a legislative goal. It was developed to combat a serious problem with domestic violence in tribal communities. *See* 151 Cong. Rec. S4873 (daily ed. May 10, 2005) (statement of Sen. John McCain). The pursuit of justice under §117(a) by Petitioner, however, should not be a pursuit of effortless conviction. Rather, the solution to the issue presented in Petitioner's petition for a writ of certiorari is to amend ICRA, expanding attorney representation to matters Congress has already deemed serious–namely, domestic violence proceedings in tribal court.

CONCLUSION

WHEREFORE, this Court should deny Petitioner's petition for writ of certiorari.

Respectfully submitted,



ANTHONY R. GALLAGHER
Federal Defender

November 4, 2015

Counsel of Record