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## United States v. Bryant

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***United States v. Bryant*, No. 15-420, 136 U.S. 1954, (June 13, 2016)**

**Lillian M. Alvernaz**

The epidemic of domestic violence committed against Native American women and the jurisdictional maze these women are forced to navigate for justice is an unfortunate reality created by gaps in laws between sovereigns. In an effort to curb this violence, the 2005 reauthorization of the Violence Against Women Act enacted 18 U.S.C. § 117(a), the habitual offender provision.<sup>1</sup> The Ninth Circuit's ruling in favor of the Sixth Amendment over the unreliability of uncounseled tribal court convictions created a circuit split, thus the United States Supreme Court granted certiorari for resolution.<sup>2</sup> The Court held that when tribal court convictions occur in proceedings that comply with ICRA, and thus are "valid when entered, use of those convictions as predicate offenses in a § 117(a) prosecution does not violate the Constitution."<sup>3</sup>

I. INTRODUCTION

*United States v. Bryant* establishes the permissibility of using uncounseled tribal court convictions to initiate the felony element of the recidivist habitual offender provision statute, 18 U.S.C. § 117(a).<sup>4</sup> A "complex patchwork of federal, state, and tribal law" governing Indian country, has made it difficult to stem the tide of domestic violence experienced by Native women.<sup>5</sup> Congress has restricted tribal courts' sentencing authority for criminal laws against Indian defendants.<sup>6</sup> When the Indian Civil Rights Act ("ICRA") was enacted in 1968, tribes were only able to sentence an Indian defendant to a maximum of one year of imprisonment.<sup>7</sup> Since the enactment of ICRA, Congress has expanded the sentencing authority of tribal courts, "allowing them to impose up to three years' imprisonment, contingent on adoption of additional procedural safeguards."<sup>8</sup> However, only a small number of tribes have employed this enhanced sentencing authority.<sup>9</sup> In the absence of tribal

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1. *United States v. Bryant*, 136 U.S. 1954, (June 13, 2016).
  2. *Id.* at \*1964.
  3. *Id.* at \*1957.
  4. *Id.* at \*1962.
  5. *Id.* at \*1959 (quoting *Duro v. Reina*, 495 U.S. 676, 680 (1990)).
  6. *Id.*
  7. *Id.*
  8. *Id.* (citing 25 U.S.C § 1302(a)(7) (2012)).
  9. *Id.* (citing TRIBAL LAW AND POLICY INST., IMPLEMENTATION

CHART: VAWA ENHANCED JURISDICTION AND TLOA ENHANCED SENTENCING, available at <http://www.tribal-institute.org/download/VAWA/VAWAImplementationChart.pdf> (last visited June 19, 2016)).

sentencing authority, states have been “unable or unwilling” to fill the enforcement gap.<sup>10</sup>

The habitual offender provision was included by Congress in the 2005 reauthorization of the Violence Against Women Act (“VAWA”) “in response to the high incidence of domestic violence against Native American women.”<sup>11</sup> Section 117(a)(1) states that “any person who ‘commits a domestic assault within . . . Indian country’ and who has at least two prior final convictions for domestic violence rendered ‘in Federal, State, or Indian tribal court proceedings . . . shall be fined . . . , imprisoned for a term of not more than five years, or both.’”<sup>12</sup> Two prior tribal court convictions for domestic violence crimes thus serve as “a predicate of the new offense.”<sup>13</sup>

It is well established that the use of a conviction in violation of the Sixth Amendment right to counsel cannot be used in a later case “either to support guilt or enhance punishment for another offense.”<sup>14</sup> Using a prior conviction that violated the Sixth Amendment would cause a defendant to “suffer anew” the previous violation of the right to counsel.<sup>15</sup> A previous uncounseled conviction consistent with the Sixth Amendment, however, is valid to enhance punishment in a later proceeding.<sup>16</sup>

ICRA controls tribal court proceedings, according a “range of safeguards to tribal-court defendants ‘similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment.’”<sup>17</sup> Specifically, ICRA only requires indigent defendants a right to appointed counsel for sentences of imprisonment of more than one year.<sup>18</sup> Compliance with ICRA’s right to counsel is not consonant with that of the Sixth Amendment.<sup>19</sup>

## II. FACTUAL AND PROCEDURAL BACKGROUND

Respondent Michael Bryant, Jr. holds a criminal record that includes more than 100 convictions in tribal court, including numerous misdemeanor domestic assault convictions.<sup>20</sup> Bryant, an enrolled member of the Northern Cheyenne Tribe, lived on the Northern Cheyenne

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10. *Id.*

11. *Id.* at \*1957 (citing Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162 §§ 901, 909, 119 Stat. 3077, 3084 (2006) [hereinafter VAWA Reauthorization Act]).

12. *Id.* at \*1956.

13. *Id.*

14. *Id.* at \*1962 (quoting *Burgett v. Texas*, 389 U.S. 109, 115 (1967)).

15. *Id.* (quoting *United States v. Tucker*, 404 U.S. 443, 448 (1972)).

16. *Id.* (citing *Nichols v. United States*, 511 U.S. 738, 748-49 (1994) [hereinafter *Nichols*]).

17. *Id.* at \*1956 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978)).

18. *Id.*; see 25 U.S.C. § 1302(c)(2) (2012).

19. *Bryant* at \*1956.

20. *Id.*

reservation in Montana, during all relevant times of this case.<sup>21</sup> Bryant was sentenced to imprisonment for most of his convictions, but always for less than one year.<sup>22</sup> During Bryant’s criminal proceedings, he was indigent and never appointed counsel.<sup>23</sup> Bryant acknowledged all of his previous tribal court convictions complied with ICRA because his imprisonment never exceeded one year; therefore his convictions were valid when entered.<sup>24</sup>

Bryant’s actions are “illustrative of the domestic violence problem existing in Indian country.”<sup>25</sup> In 2011, Bryant was arrested for assaulting a woman.<sup>26</sup> In February of that same year, Bryant “attacked his then girlfriend, dragging her off the bed, pulling her hair, and repeatedly punching and kicking her. . . . Bryant admitted that he had physically assaulted this woman five or six times.”<sup>27</sup> Three months later, Bryant assaulted another woman with whom he was living by yelling at her and choking her until she almost lost consciousness, and later stated that he had assaulted this woman “on three separate occasions during the two months they dated.”<sup>28</sup>

Domestic violence perpetrators “exhibit high rates of recidivism, and their violence ‘often escalates in severity over time.’”<sup>29</sup> Due to these 2011 assault convictions, a federal grand jury in Montana indicted Bryant on “two counts of domestic assault by a habitual offender, in violation of § 117(a).”<sup>30</sup> Represented in federal court by appointed counsel, Bryant contended that his prior, uncounseled tribal court convictions did not satisfy § 117(a)’s predicate offense element because they violated the Sixth Amendment and counsel moved to dismiss the indictment.<sup>31</sup> The United States District Court for the District of Montana denied Bryant’s motion, and he entered a conditional guilty plea, reserving his right to appeal that decision.<sup>32</sup> Bryant was sentenced to forty six months imprisonment on each count, to run concurrently, followed by three years of supervised release.<sup>33</sup>

The United States Court of Appeals for the Ninth Circuit reversed Bryant’s conviction and directed dismissal of his indictment.<sup>34</sup> The Ninth Circuit contended that the tribal court convictions themselves did not violate the Constitution, and acknowledged that “the Sixth

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21. *Id.* at \*1962.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at \*1959 (quoting *United States v. Castleman*, 134 S. Ct. 1405 (2014)).

30. *Id.* at \*1963.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

Amendment right to appointed counsel does not apply to tribal court proceedings.” However, since Bryant had received terms of imprisonment, such convictions would have violated a state or federal court proceeding.<sup>35</sup> Relying on *United States v. Ant*<sup>36</sup>, the Ninth Circuit held, “tribal court convictions may be used in subsequent [federal] prosecutions only if the tribal court guarantees a right to counsel that is, at minimum, coextensive with the Sixth Amendment Right.”<sup>37</sup> The Ninth Circuit decided that *Nichols v. United States*<sup>38</sup> only applies when the prior conviction does not violate the Sixth Amendment’s right to counsel, and rejected the Government’s argument that applied *Nichols* requiring the opposite result.<sup>39</sup>

By negating uncounseled tribal court convictions used to establish a prior domestic violence conviction to use § 117(a), the Ninth Circuit created a circuit split.<sup>40</sup> Both the United States Courts of Appeals for the Eighth and Tenth Circuits held that “tribal court ‘convictions, valid at their inception, and not alleged to be otherwise unreliable, may be used to prove the elements of § 117.’”<sup>41</sup> To resolve the circuit split, certiorari was granted, and the Supreme Court of the United States reversed.<sup>42</sup> The Supreme Court held, “[b]ecause Bryant’s tribal court convictions occurred in proceedings that complied with ICRA and were therefore valid when entered, use of those convictions as predicate offenses in a § 117(a) prosecution does not violate the Constitution.”<sup>43</sup>

### III. ANALYSIS

#### *A. Sixth Amendment Application in Tribal Court*

The Supreme Court relied on its decision in *Nichols*, that “convictions valid when entered retain that status when invoked in a subsequent proceeding,” because “‘enhancement statutes . . . do not change the penalty imposed for the earlier conviction,’ rather, repeat-offender laws ‘penalize only the last offense committed by the defendant.’”<sup>44</sup> Bryant’s § 117(a) conviction punished “his most recent

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35. *Id.* (quoting *Nichols*, 511 U.S. at 675).

36. 882 F.2d 1389 (9th Cir. 1989).

37. *Id.* (quoting *United States v. Ant*, 882 F.2d 1389, 677 (9th Cir. 1989)).

38. Holding that an uncounseled misdemeanor conviction is “valid under *Scott* (holding that the “Sixth Amendment guarantees indigent defendants appointed counsel in any state or federal criminal proceeding in which a term of imprisonment is imposed”), because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.” *Nichols*, 511 U.S. 783.

39. *Id.* (citing *Nichols*, 511 U.S. at 677-78).

40. *Id.* at \*1964.

41. *Id.* (quoting *United States v. Cavanaugh*, 643 F.3d 592, 594 (8th Cir. 2011)); see *United States v. Shavanaux*, 647 F.3d 993, 1000 (10th Cir. 2011).

42. *Bryant*, at \*1964.

43. *Id.* at \*1957.

44. *Id.* (quoting *Nichols*, 511 U.S. at 747).

acts of domestic assault, not his prior crimes prosecuted in tribal court.”<sup>45</sup> The Court concluded that Bryant was not denied a right to counsel in tribal court, and his Sixth Amendment right was honored in federal court.<sup>46</sup>

Bryant contended that he was deprived of his right to counsel because his prior tribal court convictions resulted in a term of imprisonment.<sup>47</sup> Bryant argued that *Nichols* would have allowed reliance on tribal court uncounseled convictions if they had only resulted in fines, to satisfy § 117(a)’s “prior-crimes predicate.”<sup>48</sup> The Court, however, could find no reason to distinguish tribal court proceedings as “less reliable” when a defendant is sentenced to imprisonment for over one year than a fine-only tribal court conviction, stating, “no evidentiary or procedural variation turns on the sanction.”<sup>49</sup> The Court concluded that, valid, but uncounseled tribal court convictions that result in imprisonment of less than one year do not violate the Sixth Amendment,<sup>50</sup> because the Sixth Amendment does not apply to tribal courts.<sup>51</sup>

The Court further dismissed Bryant’s reliance on *Burgett v. Texas*.<sup>52</sup> A defendant convicted in tribal court does not suffer an initial deprivation of the Sixth Amendment, “so [Bryant] cannot ‘suffer anew’ from a prior deprivation of his federal prosecution.”<sup>53</sup> ICRA only requires indigent defendants have a right to appointed counsel when a sentence exceeding one year of imprisonment is imposed.<sup>54</sup> It was undisputed that Bryant’s earlier tribal court convictions were valid when entered.<sup>55</sup> The Court concluded that because Bryant’s tribal court convictions were not in violation of the Sixth Amendment when obtained, “they retain[ed] their validity when invoked in a § 117(a) prosecution; [t]hat proceeding generates no Sixth Amendment defect where none previously existed.”<sup>56</sup>

### B. Further Holdings

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45. *Id.*

46. *Id.*

47. *Id.* at \*1958 (citing *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979)).

48. *Id.* at \*1957.

49. *Id.* at \*1966.

50. *Id.* at \*1957.

51. *Id.* at \*1958 (citing *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 326, 337 (2008)).

52. Holding that a “conviction obtained in state or federal court in violation of a defendant’s Sixth Amendment right to counsel cannot be used in a subsequent proceeding ‘to support guilt or enhance punishment for another offense.’” *Burgett*, 389 U.S. 109.

53. *Id.* at \*1957 (quoting *Burgett*, 389 U.S. at 115).

54. *Id.* (citing 25 U.S.C. § 1301 (2012)).

55. *Id.*

56. *Id.*

Bryant also argued the Due Process Clause of the Fifth Amendment supported the assertion that tribal court judgments could not be used as predicate offenses necessary to § 117(a).<sup>57</sup> However, ICRA itself guarantees “‘due process of law,’ accords other procedural safeguards, and permits a prisoner to challenge the fundamental fairness of tribal court proceedings in federal habeas corpus proceedings.”<sup>58</sup> The Court concluded that proceedings complying with ICRA “sufficiently ensure the reliability of tribal court convictions,” and the use of those convictions in a federal prosecution does not violate the due process right of a defendant.<sup>59</sup>

#### IV. CONCLUSION

By reason of colonization and the development of federal Indian law, the relationship between Indian nations and the federal government is complex. “Congress’[s] purported plenary power over Indian tribes rests on even shakier foundations.”<sup>60</sup> Domestic violence continues to be an ailment among Indian nations, but advocates must also be aware of the implications this holding has on Indian defendants. *United States v. Bryant* is a pivotal case in Indian law, but it comes with a price. While *Bryant* is a win for tribal advocates working to combat domestic violence within Native American communities, Indian defendants are only afforded a right to appointed counsel under certain circumstances, and the convictions obtained without such counsel are valid in federal court.

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57. *Id.* at \*1958.

58. *Id.*

59. *Id.*

60. *Id.*