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United States v. Gillette: A Tiny Prairie Casenote Opening a Window on the Enveloping Fog Obscuring the Indian Civil Rights Act of 1968

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NOTE

UNITED STATES V. GILLETTE: A TINY PRAIRIE CASENOTE OPENING A WINDOW ON THE ENVELOPING FOG OBSCURING THE INDIAN CIVIL RIGHTS ACT OF 1968

Frank Pommersheim*

United States v. Gillette[1] is one of the first reported cases on the new post-*United States v. Bryant*[2] road. As of yet, there is no reliable (legal) GPS to point the way. This "tiny prairie"[3] casenote is not meant to focus on the answers, but rather to clarify the questions and to widen the discussion as the journey continues.

I. Introduction

> On January 31, 2017, Daniel Reynolds, a police officer for the Rosebud Sioux Tribe, responded to a domestic dispute call at a house in Rosebud, South Dakota. Upon entering the house, Officer Reynolds located Calvin Gillette and Lucille Running Enemy, the alleged victim, in a back bedroom. Officer Reynolds handcuffed Gillette, took him out to the living room to sit on a couch, and went back down the hall to speak with Running Enemy.[4]

* Professor of Law, University of South Dakota School of Law. This casenote owes much to the insights of fellow panelists, Judge Brian Morris and Professor Barbara Creel, at the University of Montana Law Review Symposium. Thoughtful suggestions were also provided by Thad Roche, law clerk for Judge Roberto Lange. Of course, any errors or mistakes that remain are wholly my own.

1. No. 3:17-CR-30122-RAL, 2018 WL 1446410, at *1 (D.S.D. Mar. 23, 2018).

2. 136 S. Ct. 1954 (2016).

3. A note about form. This "tiny prairie" casenote emulates National Public Radio's "Tiny Desk Concert" format. You show up in the studio and play some music. People say that's interesting. I haven't heard anything like that before. It makes me want to hear more. That's my goal here. Raise questions. Provide a few (if any) answers. Extend an invitation for further engagement and discussion.

4. *Gillette*, 2018 WL 1446410, at *1.

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Officer Reynolds had two brief conversations with Gillette. No *Miranda* warnings were given. Officer Reynolds also had a conversation with the alleged victim, Running Enemy.[5]

Following these events, "the Rosebud Sioux Tribe charged Gillette with multiple crimes, including domestic abuse of Running Enemy."[6] Then, "[i]n May 2017, Gillette appeared with counsel in tribal court and pleaded guilty to the domestic assault and several other charges."[7] Four months later, a federal grand jury indicted Gillette for domestic assault by an habitual offender[8] pursuant to 18 U.S.C. § 117(a).[9] The court stated that "[t]his federal charge arose from the same incident with Running Enemy that Gillette had pled guilty to in tribal court."[10] In the federal indictment, Gillette was charged with assaulting his significant other with two prior (tribal court) domestic abuse convictions at the time.[11]

Gillette's defense counsel filed a motion to suppress, arguing that his statements were inadmissible under *Miranda v. Arizona*.[12] In addition, Gillette's counsel filed a second motion to suppress the tribal court guilty plea as violative of the Fifth Amendment guarantee of due process.[13] The district court granted partial relief on the *Miranda* challenge[14] and denied the motion to suppress the tribal court guilty plea in its entirety.[15]

The district court's decision in *Gillette* is interesting and thought-provoking. The court treats the *Miranda* issue as routine and assumes the federal constitutional standard applies to the conduct of tribal law enforce-

5. *See id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. 18 U.S.C. § 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 against a child of or in the care of the person committing the domestic assault; or

(2) an offense under chapter 110A,

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

10. *Gillette*, 2018 WL 1446410, at *1.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at *1–2. The court held that Gillette's initial statements violated *Miranda*. Although they were voluntary, they were a product of custodial interrogation and thus subject to suppression. Gillette's second statements were voluntary but *not* the product of interrogation and therefore not subject to suppression.

15. *Id.* at *4.

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ment.[16] The reason for this is not wholly obvious and merits further discussion. The court's treatment of the guilty plea issue is arguably more focused and nuanced. The court correctly determined that the Fifth Amendment does *not* apply against the Tribe, however, the Indian Civil Rights Act of 1968 (ICRA) does.[17] The court concluded that ICRA does have a due process guarantee,[18] that the guarantee is likely similar but not identical[19] to the Fifth Amendment guarantee, and that the guilty plea strictures of Rule 11 of the Federal Rules of Criminal Procedure[20] are not part of ICRA and do not apply in tribal judicial proceedings.[21] The Court concluded that there was no violation of ICRA's due process guarantee.[22]

The *Miranda* issue was disposed of on constitutional grounds, and the guilty plea issue was disposed of on ICRA grounds.[23] This seems odd, but let's examine each to see if these different standards might be harmonized.

II. The Three *Mirandas* and the No *Miranda*

There were three potential legal sources for the applicability of *Miranda* in evaluating the conduct of Tribal Officer Reynolds: the United States Constitution,[24] the Indian Civil Rights Act of 1968,[25] and the Rosebud Sioux Tribe Constitution.[26] Each will be examined in turn. In addition, a more radical line of analysis will suggest that there is no *Miranda* right in ICRA.

A. Constitutional Miranda

The essence of constitutional *Miranda* is as follows:

> To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be

16. *Id.* at *2.

17. *Id.* at *4 (citing 25 U.S.C. §§ 1301–1304).

18. *Id.* (citing 25 U.S.C. § 1302(a)(8)).

19. *Id.*

20. Fed. R. Crim. P. 11(b)(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

21. *See Gillette*, 2018 WL 1446410, at *4. For example, Rule 11's requirement of a "factual basis" for a plea is generally understood *not* to be part of the Fifth Amendment's due process guarantee.

22. *Id.*

23. *Id.* at *5.

24. U.S. Const. amend. V; *See* Miranda v. Arizona, 384 U.S. 436, 478 (1966).

25. 25 U.S.C. § 1302(a)(4) (1968).

26. Rosebud Sioux Tribe Const. art. X.

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> warned prior to any questions that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.[27]

Yet, the actions of tribal law enforcement and tribal courts are not bounded by the directives and constraints of the United States Constitution,[28] as their state and federal brethren are. While this might seem counterintuitive, even heretical, it is a bedrock Indian law principle. This indeed is the essential holding of the seminal case of *Talton v. Mayes*.[29]

In *Talton*, the Supreme Court held that an Indian defendant, who was being prosecuted in the Cherokee Nation Tribal Court, did not have the right to a grand jury indictment as required by the Fifth Amendment to the United States Constitution.[30] This rule was necessitated by the fact that tribal sovereign powers do not find their source in the United States Constitution, but rather in pre-Columbian sovereign authority that predates the United States Constitution.[31]

The Constitution cannot control or regulate authority that is not rooted within its majestic sweep. This essential principle was reiterated by the Supreme Court in *Santa Clara Pueblo v. Martinez*,[32] which interpreted key provisions of ICRA. Specifically, the Court noted: "[a]s separate sovereigns pre-existing the Constitution, the tribes have historically been regarded as unconstrained by those constitutional provisions framed as limitations on federal or state authority."[33] Thus both *Talton* and *Santa Clara Pueblo* make it clear that *Miranda* does not constitutionally apply in the tribal context.

27. *Miranda*, 384 U.S. at 478–79.

28. Talton v. Mayes, 163 U.S. 376, 384 (1896).

29. *Id.*

30. *Id.* at 381–82.

31. *Id*. at 384. This notion that Congress possesses (legitimate) authority outside the Constitution to regulate Tribes is doctrinally suspect. *See*, *e.g.*, United States v. Lara, 541 U.S. 193, 215 (2004) (Thomas, J., concurring); FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 125–51 (2009).

32. 436 U.S. 49 (1978).

33. *Id.* at 56.

B. *ICRA* Miranda

Despite this important recognition of tribal authority as pre-dating the Constitution, the *Talton* Court recognized that Congress nevertheless retained some kind of "paramount authority" in regard to Indian tribes.[34] This "paramount authority" subsequently morphed into a recognition of Congress' sweeping "plenary power" in Indian affairs,[35] despite the constitutional strictures described in *Talton* and later affirmed in *Santa Clara Pueblo*.

Congress has used its plenary power extensively since 1903.[36] Most relevant for our purposes, Congress used its plenary power to pass the Indian Civil Rights Act of 1968.[37] One enumerated protection in the statute is the recognition of the privilege against self-incrimination,[38] which is almost identical to the Fifth Amendment text[39] and is the bedrock on which constitutional *Miranda* rests.[40]

Despite this textual similarity in the context of self-incrimination, there is an important difference in the Sixth Amendment right to counsel and ICRA's right to counsel provision at 25 U.S.C. § 1302(a)(6), which contains the caveat of "at his own expense."[41] This substantive difference has led all pertinent federal courts to hold that while *Miranda* and its warnings are part of ICRA, it is not necessary to inform the suspect "that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."[42]

In addition, prosecutions pursuant to 18 U.S.C. § 117(a) have their own related problems. One such "problem" is highlighted in *Gillette*. Constitutional rights, such as *Miranda*, become problematic in achieving uniformity when there is no consistent substantive analog in ICRA or tribal law. The substantive content of the right has no common floor (or ceiling

34. *Talton*, 163 U.S. at 379–80.

35. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903). The doctrine of plenary power has been subject to much scholarly criticism as essentially racist and doctrinally suspect. *See*, *e.g.*, Angela R. Riley, *The Apex of Congress' Plenary Power over Indian Affairs: The Story of* Lone Wolf v. Hitchcock, *in* INDIAN LAW STORIES 189 (Carole Goldberg, Kevin K. Washburn, & Philip P. Frickey eds. 2011).

36. *See*, *e.g.*, FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 46–56 (1995).

37. *See*, *e.g.*, Sepideh Mousakhani, *Seeking to Emerge from Slavery's Long Shadow: The Interplay of Tribal Sovereignty and Federal Oversight in the Context of the Recent Disenrollment of the Cherokee Freedmen*, 53 SANTA CLARA L. REV. 937, 948 (2013).

38. 25 U.S.C. § 1302(a)(4) (2018) ("No Indian tribe in exercising powers of self-government shall . . . compel any person in any criminal case to be a witness against himself.").

39. U.S. CONST. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself.").

40. Miranda v. Arizona, 384 U.S. 436, 478 (1966).

41. 25 U.S.C. § 1302(a)(6).

42. *Miranda*, 384 U.S. at 479.

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for that matter) and perhaps, more importantly, for purposes of *national* Indian country prosecution, there is no *uniformity* of applicable law. These discrepancies loom as problematic.

C. Tribal Miranda

Whether *Miranda* applies in the tribal law enforcement and tribal court context turns not on the Constitution, but on ICRA. In addition to ICRA, it is relevant to examine tribal law including any constitutional or tribal court interpretation of such laws. In the context of the Rosebud Sioux Tribe, the answer is remarkably straightforward. The Rosebud Sioux Tribe Constitution answers that question quite directly.

Article X, Sec. 1(d) of the Tribal Constitution expressly states that the Tribe shall not:

> Search or arrest any person without informing them of their right to remain silent, to have access to an attorney, to be informed that anything they say can be held against them in a court of law, to have their rights explained at the time of the search and arrest and to ask them if they understand those rights.[43]

This tribal constitutional provision was identified and applied by the Rosebud Sioux Supreme Court in the 2009 case of *Rosebud Sioux Tribe v. Luxon*.[44] In *Luxon*, the Rosebud Sioux Tribe Supreme Court held that it was "reasonable to conclude that Tribal intent was to adopt *Miranda* as its constitutional standard."[45] Oddly, none of this discussion appears in the *Gillette* opinion.

Which *Miranda* controls *Gillette*? The Court's opinion stands on constitutional *Miranda*, but it does not provide any explanation why.[46] Upon reflection, however, this does appear to be the correct standard based on the unique facts of *Gillette*.

What are these unique facts? They include the following:

43. ROSEBUD SIOUX TRIBE CONST. art. X, § 1(d).

44. Rosebud Sioux Tribe v. Luxon, at 9 (Oct. 30, 2009), https://perma.cc/D4M8-AHVB (I authored this opinion); *see also* FRANK POMMERSHEIM, TRIBAL JUSTICE: TWENTY-FIVE YEARS AS A TRIBAL APPELLATE JUSTICE 203 (2016).

45. *Luxon*, at 9.

46. Of course, the opinion doesn't have to explain why. Perhaps from the Court's point of view, the answer is so obvious as not to merit discussion. Also, the Court's reported opinion deals with the narrow evidentiary issues raised by a motion to suppress that did not include any controversy as to the applicable standard. Both defense counsel and the U.S. Attorney's memorandums of law on this issue pointed to constitutional *Miranda*. They differed only as to whether constitutional *Miranda* and its standards relevant to "custodial interrogation" were complied with.

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1. The facts of the instant offense (not the predicate offenses) as set out in the grand jury § 117(a) indictment are themselves the very same facts that had already led to a tribal court guilty plea.[47]

2. The *Miranda* issue was not litigated in tribal court. Officer Reynolds did not testify in any tribal court proceeding. It was being challenged for the first time in federal court.

The *Miranda* issue raised in the motion to suppress in federal court had no hearing or disposition in tribal court, but the motion to suppress the tribal court guilty plea did.[48] This unique set of facts most likely led to the district court's view to see *Miranda* without reference to ICRA or the tribal constitutional standard, but to see the guilty plea issue as governed by ICRA and tribal law. As a result, *Gillette* is not schizophrenic as I suggested in an earlier (unpublished) draft, but rather a unique hybrid that properly requires looking forward and backward at the same time. Looking forward as to what is the constitutional standard in federal court (*Miranda*) and backward to the ICRA standard in tribal court (guilty plea).

In sum, ICRA *Miranda* and tribal *Miranda* apply against tribal law enforcement officers in tribal court proceedings. Constitutional *Miranda* applies against tribal law enforcement officers in federal court proceedings, particularly when there has been no tribal court proceeding. This explains *Gillette*. Such is the journey from schizophrenia to hybrid to harmony.

D. No Miranda

Despite the above discussion, is it possible that *Miranda* is not part of ICRA? ICRA was passed in 1968, two years after *Miranda*. The fact that neither the text nor the legislative history of ICRA makes any reference to *Miranda*[49] is some evidence that Congress lacked any general intent to incorporate *Miranda* into ICRA. This is particularly likely since much legislative and judicial confusion attended the *Miranda* decision itself.[50] Was *Miranda* indeed a constitutional decision or merely an example of the Supreme Court using its supervisory authority over federal courts to prescribe rules of evidence and procedure that are binding on federal courts? Such confusion abounded and was not resolved until the Supreme Court's decision in *Dickerson v. United States*,[51] thirty-four years after *Miranda* itself was decided.

47. United States v. Gillette, No. 3:17-CR-30122-RAL, 2018 WL 1446410, at *1 (D.S.D. Mar. 23, 2018).

48. *Id.* at *4.

49. *See generally* 25 U.S.C. § 1301–1302.

50. *See generally* Sheldon H. Elsen & Arthur Rosett, *Protections for the Suspect Under* Miranda v. Arizona, 67 COLUM. L. REV. 645 (1967).

51. 530 U.S. 428 (2000).

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The *Dickerson* Court held that the *Miranda* decision was indeed a constitutional decision explicating the parameters of the Fifth Amendment privilege against self-incrimination.[52] A superficial reading of *Dickerson* might then suggest that since *Miranda* is constitutional in nature, it automatically becomes part of ICRA's privilege against self-incrimination.

A closer reading of *Dickerson* suggests the opposite conclusion that *Miranda* is not part of ICRA. The precise issue in *Dickerson* was whether Congress' enactment of 18 U.S.C. § 3501[53] in 1968 effectively overruled *Miranda*, considering that § 3501 had adopted a strict voluntariness standard based on the totality of the circumstances (with no necessity of *Miranda* warnings including the right to counsel) for the admissibility of confessions.[54]

The Court stated the issue this way:

> Because of the obvious conflict between our decision in *Miranda* and § 3501, we must address whether Congress has constitutional authority to thus supersede *Miranda*. If Congress has such authority, § 3501's totality of the circumstances must prevail over our *Miranda*'s requirement of warnings; if not, that section must yield to *Miranda*'s more specific requirements.[55]

More important for ICRA purposes was the Court's acknowledgment that that Congress' intent when it enacted § 3501 was "to overrule *Miranda*."[56]

Congress' hostility to *Miranda* in the very year it passed ICRA is strong evidence of intent not to include it in ICRA. This conclusion, as noted above, is further bolstered by Congress' failure to make any mention of *Miranda* in the text or legislative history of ICRA, as well as the express limitation of the right to counsel in ICRA "at one's own expense" which is incompatible with the right to counsel regardless of the ability to pay as is required by *Miranda*.[57]

Preliminary research indicates that *no* federal court has held that *Miranda* is not some part of ICRA. The same is true for tribal courts. Various federal and tribal courts discern different parts of *Miranda* within ICRA—usually the warnings, but not the right to counsel if the defendant cannot afford one.[58]

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52. *Id.* at 432.

53. 18 U.S.C. § 3501 (2018) (voluntariness standard governing the admissibility of a defendant's confession).

54. *Dickerson*, 530 U.S. at 428–30.

55. *Id.* at 437.

56. *Id.* at 436.

57. 25 U.S.C. 1302(a)(6).

58. *See generally* Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 516 (1998); David J. D'Addio, *Dual Sovereignty and the Sixth Amendment Right to Counsel*, 113 YALE L.J. 1991, 1998 (2004); Mark D. Rosen, *Multiple Authoritative*

Within the *Miranda* matrix, many other issues are confronted in these cases. Such issues include tribal officers not giving proper *Miranda* warnings and then testifying concerning the resulting conversations in a federal prosecution,[59] the right to counsel provision of *Miranda* not applying in the tribal court prosecution,[60] and double warning issues involving the difference of straight up *Miranda* including the right to free counsel and ICRA *Miranda* involving no such right.[61] At the risk of being too far out on a limb of my own choosing and imagination, these cases might all be wrongly decided. *Miranda* may not be part of ICRA. It is just something to think about.

The fact that Congress was "wrong" about *Miranda*'s constitutional status in 1968 (as determined in the year 2000) does not in any way change its animus toward *Miranda* that surely was in play when it passed ICRA in 1968.[62] Congress, of course, certainly possesses the (plenary) power to amend ICRA to incorporate *Miranda*, but said power must be executed affirmatively.[63] It is not self-executing and has not been exercised to date. Until Congress acts, its 1968 anti-*Miranda* pulse may still beat at the heart of ICRA.

III. Finality

There is another issue that is likely to permeate 18 U.S.C. § 117(a), habitual offender domestic violence prosecutions in the future and that is the issue of finality. May a defendant in a § 117(a) prosecution that is based on prior tribal court convictions attack those convictions on any grounds whether constitutional, based in ICRA, or even rooted in tribal law? Even if he pled guilty (or was found guilty in a tribal court trial), but did not appeal his tribal court conviction? Even if he served time in a tribal jail pursuant to his tribal court conviction, but did not seek federal habeas relief?[64]

Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act, 69 Fordham L. Rev. 479, 592 (2000).

59. *See* United States v. Shavanaux, 647 F.3d 993, 997 (10th Cir. 2011); United States v. Swift Hawk, 125 F. Supp. 2d 384, 387 (D.S.D. 2000); United States v. May, CR 14-136-JRT-LIB, 2014 WL 6775283, at *2 (D. Minn. Dec. 2, 2014).

60. *See* United States v. Doe, 819 F.2d 206, 208 (9th Cir. 1985); United States v. Doherty, 902 F. Supp. 773, 777–78 (W.D. Mich. 1995), *aff'd*, 126 F.3d 769 (6th Cir. 1997).

61. *See Doe*, 819 F.2d at 208; *Doherty*, 902 F. Supp. at 777–78; United States v. Kitchenakow, 149 F. Supp. 3d 1062, 1067 (E.D. Wis. 2016); United States v. Sen., No. 3:11-CR-00442-BR, 2013 WL 1562851, at *6 (D. Or. Apr. 11, 2013); United States v. Fuentes, 800 F. Supp. 2d 1144, 1149–50 (D. Or. 2011); United States v. Boise, CR 07-477-RE, 2008 WL 4609992, at *1–2 (D. Or. Oct. 10, 2008).

62. *See* Dickerson v. United States, 530 U.S. 428, 436 (2000).

63. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

64. 25 U.S.C. § 1303 provides that "the privilege of the writ of habeas corpus shall be available to any person, in a court at the United States, to test the legality of his detention of order of and Indian tribe."

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Two possibilities suggest themselves. One answer is a wide open "yes." There is nothing "final" about a tribal court conviction when it is an inextricable part of a *federal* § 117(a) prosecution. This is *United States v. Bryant*.[65] In *Bryant,* the defendant challenged his predicate offenses as violative of his Sixth Amendment right to counsel.[66] The Court held that the appropriate standard was not the Sixth Amendment right to counsel, but the more limited ICRA right to counsel standard.[67] To be clear, Bryant was not challenging his predicate offenses as violative of the law (ICRA) under which they were rendered, but on Sixth Amendment grounds when they were dragged into federal court as predicates for a § 117(a) prosecution.[68]

The second approach is the one we see in the federal and state context as articulated by the Supreme Court in *Custis v. United States*.[69] *Custis* held that there was no right to collaterally attack the validity of prior state convictions used for federal sentence enhancement "with the sole exception of convictions obtained in violation of the right to counsel."[70] The Court further noted that such a challenger must also demonstrate that he did "not completely and intelligently waive his constitutional right."[71] Finality was not an issue in *Gillette*, but it might well be in other cases.

For example, what if a § 117(a) predicate offense did not comply with ICRA? Say that, hypothetically speaking, Gillette wanted to collaterally challenge his two predicate tribal court convictions as violative of ICRA *Miranda*, might he do so? *Bryant* intimates yes, but it is not directly on point.[72] Maybe collateral attack is a window that the Court doesn't want to open too wide? Maybe *Custis* comes into play? More research and discussion are needed to evaluate this thorny issue.

IV. Right to Counsel

While it is black letter law that any defendant prosecuted in federal or state court has the right to counsel, even if he cannot afford it, that is not the federal rule in tribal court prosecutions. The right to counsel provision in

65. 136 S. Ct. 1954.
66. *Id.* at 1963–64.
67. *Id.* at 1966.
68. *Id.* at 1964.
69. 511 U.S. 485 (1994).
70. *Id.* at 487.
71. *Id.* at 494 (quoting Johnson v. Zerbst, 304 U.S. 458, 468 (1938)).
72. *Bryant*, 136 S. Ct. at 1966 (suggesting that "ICRA makes habeas review in federal court available to persons incarcerated pursuant to a tribal-court judgment. By that means, a prisoner may challenge the fundamental fairness of the proceedings in tribal court." (internal citations omitted)). To be precise, *Bryant* is about whether constitutional standards as opposed to ICRA standards apply to tribal court predicate convictions in *federal* 117(a) prosecutions. *Bryant* answers this question in the negative, but does not address whether such predicate tribal court convictions can be collaterally attacked on ICRA grounds.

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the ICRA is different in one major respect. The right to counsel provision at 25 U.S.C. § 1302(a)(6) encodes the caveat of "at one's own expense."[73] It is important to note that in the context of the right of counsel the ICRA statutory standard was the *constitutional* standard in 1968 when ICRA was passed.[74] The concurrence in *Gideon v. Wainright* held that the constitutional standard of court-appointed counsel for indigent defendants applied only to *felonies*.[75] Since the maximum penalty for a tribal court criminal conviction was originally limited to six months by ICRA,[76] tribal court convictions were not considered felonies as defined under federal law and thus did not appear to meet the *Gideon* standard for court appointed counsel.

The constitutional rule of *Gideon* was expanded four years later in *Argersinger v. Hamlin*[77] to include any offense for which a defendant could be sentenced to any jail time. Therefore, the ICRA right to counsel provision, which was identical to the constitutional standard in 1968, fell below the new constitutional standard of *Argersinger* in 1972.[78] ICRA has never been amended to bring it back into line with the current constitutional standard of the right to counsel. Yet the Court noted in *Bryant*, while the rights are substantively different, that difference had no relevance to a federal prosecution under 18 U.S.C. § 117(a).[79]

It is significant to note that ICRA has nevertheless been amended in two other contexts relevant to the right to counsel.[80] Each amendment expands the right to counsel in order to advance and elevate the scope of tribal court criminal jurisdiction. 25 U.S.C. § 1302(b) expands tribal court sentencing authority from a maximum of one year in jail to a maximum of three years in jail.[81] 25 U.S.C. §1304 restores tribal criminal jurisdiction over non-Indians for crimes of "domestic violence."[82]

Each of these statutes requires tribes to provide defendants with the right to an attorney even if they cannot afford one. It seems pertinent to suggest here that this proliferation of different rights to counsel creates a potential fog of confusion. Why so many different right to counsel rules for tribal court, when no such variations exist in the Sixth Amendment right to

73. 25 U.S.C. § 1302(a)(6).

74. Gideon v. Wainright, 372 U.S. 335, 345 (1963).

75. *Id.* at 349–51 (Harlan, J., concurring). This concurring opinion is widely cited as the "*Gideon* standard" for determining when court-appointed counsel is appropriate.

76. 25 U.S.C. § 1302(b) (amended in 1986 to allow one year maximum sentences).

77. 407 U.S. 25 (1972).

78. *Id.* at 37.

79. United States v. Bryant, 136 S. Ct. 1954, 1959 (2016).

80. 25 U.S.C. § 1302(c) (1986); 25 U.S.C. § 1304 (2013).

81. *Id.* § 1302(b) (*e.g.*, "A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years[.]")

82. *See id.* § 1304(b)(1) (recognizing the inherent right of tribes, under certain circumstances, "to exercise special domestic violence criminal jurisdiction over all persons").

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counsel in state and federal court? Do too many rules—too many branches—begin to block the necessary sunlight of consistency and uniformity?

Note also the grievous asymmetry in the context of a 25 U.S.C. § 1304 prosecution of a non-Indian. The non-Indian gets the Sixth Amendment right to counsel if he cannot afford one,[83] but a tribal member prosecuted under the very same tribal law only gets the ICRA right to counsel at his own expense.[84] This "racial" asymmetry is quite troubling.

There is yet another potential asymmetry. If a native defendant is prosecuted in tribal court pursuant to the opt-in opportunity for enhanced sentencing (up to three years), pursuant to 25 U.S.C. § 1302(b), he must be afforded counsel regardless of his ability to pay.[85] Yet if prosecuted under 18 U.S.C. § 117(a), without such a right to counsel for predicate convictions, a native defendant faces a potential sentence of up to five years.[86]

Given these significant differences between the Sixth Amendment right to counsel and the ICRA right to counsel, should ICRA be amended (once again) to bring it into line with the Sixth Amendment? From a defendant's position, the answer would surely be yes.[87] Yet from a tribal sovereignty (including the problem of tribal governmental expense) point of view, the issue is likely to be seen as one for resolution by tribal governments, not the federal government. From the Native (woman) victim point of view, it is unclear. In *United States v. Bryant*, several of the amicus briefs supporting the United States' position of no Sixth Amendment right to appointed counsel came from Native women advocacy groups.[88]

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83. *Id.* § 1304(d).

84. *Id.* § 1302(a)(6). Note, defendants are also entitled to whatever right to counsel exists, as a matter of tribal law. At Rosebud, in the *Gillette* case, the tribal constitutional right to counsel was more expansive than ICRA. But in my experience, that is more the exception than the rule.

85. *Id.* § 1302(c).

86. Perhaps there is rationale to dispel this perceived asymmetry, but it is not readily apparent. United States v. Bryant, 136 S. Ct. 1954, 1961 (2016).

87. Maybe I speak too quickly. What is (and where is) the voice and perception of Native defendants themselves? Do they perceive that they lack sufficient rights in tribal court? Or the opposite? No one should be speaking for them without consultation and understanding.

88. Brief for the National Indigenous Women's Resource Center and Additional Advocacy Organizations for Survivors of Domestic Violence and Assault as Amicus Curiae, United States v. Bryant, 2016 WL 447646 (2016); Brief for National Congress of American Indians as Amicus Curiae, United States v. Bryant, 2016 WL 447645 (2016) ("Since the establishment of the NCAI Task Force on Violence Against Women in 2003, enhancing the safety of Native women has been a critical focus of NCAI's work.").

In addition, various former U.S. Attorneys filed an amicus brief which noted, "All of the amici curiae prioritized the reduction of violent crime on reservations and tribal trust land within their jurisdictions during their time as U.S. Attorney and all are acutely aware of the jurisdictional challenges facing tribal, state, and federal law enforcement officers and prosecutors in their efforts to reduce violent crime, particularly domestic violence offenses, in Indian Country." Brief for Dennis K. Burke, Former United States Attorney, District of Arizona; Paul K. Charlton, Former United States Attorney, District of Ari-

V. Conclusion

Several recommendations, then a deep breath, and then a note of humility and caution will serve to bring this little casenote to a close. There is a serious need to engage in robust and vigorous discussion about potentially amending ICRA. As this casenote indicates, there is a pressing need to consider amendments in the context of both *Miranda* and the right to counsel.

Miranda needs explicit recognition in ICRA, along with a statement as to the specific warnings required, including express reference to the right to counsel. Such changes will advance a common understanding and a national uniformity of application and interpretation—same for the right to counsel. Perhaps it is time to reconsider returning the ICRA right to counsel to congruence with the constitutional right.

Yet the conversation needs committed participation of all the relevant groups—not just tribes and federal government attorneys, but also representatives of Native women advocacy groups and native defendant organizations. This cannot be a top-down solution, but something more comprehensive. Without collaboration and consensus, there is little hope for positive and enduring change.

Indian law swirls on. Yet it is important not to lose sight of its impact on actual Native individuals, both defendants[89] and the people (women, by-and-large) they victimize.[90] How do Indian defendants perceive the general absence of counsel in tribal court? Good, bad, indifferent? How do native

zona; Thomas B. Heffelfinger, Former United States Attorney, District of Minnesota; David C. Iglesias, Former United States Attorney, District of New Mexico; Brendan V. Johnson, Former United States Attorney, District of South Dakota; and Timothy Q. Purdon, Former United States Attorney, District of North Dakota as Amicus Curiae, United States v. Bryant, 2016 WL 491886 (2016).

89. With a nod to the writer Franz Kafka, it is worth pointing out that Calvin Gillette ultimately pled guilty to a superseding information of assaulting a federal officer pursuant to 18 U.S.C. § 111(a). He was sentenced to four months' imprisonment, three years supervised release and $100 special assessment. The §117(a) habitual offender domestic assault charge was dismissed. United States Attorney's Office District of South Dakota, *Rosebud Man Sentenced for Assaulting a Federal Officer*, United States Department of Justice, https://perma.cc/2MW5-BUAZ.

90. Note the powerful data cited by Justice Ginsburg in *Bryant* for the necessity of Congress to enact section 117(a) to provide some *federal* legal protection for native women victims of domestic abuse:

> [C]ompared to all other groups in the United States," Native American women "experience the highest rates of domestic violence." According to the Centers for Disease Control and Prevention, as many as 46% of American Indian and Alaska Native women have been victims of physical violence by an intimate partner. American Indian and Alaska Native women "are 2.5 times more likely to be raped or sexually assaulted than women in the United States in general." American Indian women experience battery "at a rate of 23.2 per 1,000, compared with 8 per 1,000 among Caucasian women," and they "experience 7 sexual assaults per 1,000, compared with 4 per 1,000 among Black Americans, 3 per 1,000 among Caucasians, 2 per 1,000 among Hispanic women, and 1 per 1,000 among Asian women."

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women victims perceive their treatment in tribal and federal court? What are the roles of poverty and cultural norms in the lives of both victims and perpetrators? What is the access to rehabilitative and traditional services for both victims and defendants in these circumstances of significant risk and personal trauma?

In light of these relentless human concerns, gathering reliable, empirical data and individual narratives is critical to assess the validity and worth of what is occurring in tribal and federal court. Justice is never a fixed answer, but rather the product of an ongoing conversation between truth and fairness; a conversation informed and animated by reliable data, personal narratives, compassion, and commitment. A conversation grounded in patience and respect. A conversation that identifies reasonable possibilities for the future. Much is at stake and much is demanded from all.

> As this Court has noted, domestic abusers exhibit high rates of recidivism, and their violence "often escalates in severity over time." Nationwide, over 75% of female victims of intimate partner violence have been previously victimized by the same offender, often multiple times. ("[W]omen who were physically assaulted by an intimate partner averaged 6.9 physical assaults by the same partner."). Incidents of repeating, escalating abuse more than occasionally culminate in a fatal attack. ("[D]uring the period 1979 through 1992, homicide was the third leading cause of death of Indian females aged 15 to 34, and 75 percent were killed by family members or acquaintances.").
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> The "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 American women. Although tribal courts may enforce the tribe's criminal laws against Indian defendants, Congress has curbed tribal courts' sentencing authority. At the time of § 117(a)'s passage, ICRA limited sentences in tribal court to a maximum of one year's imprisonment. Congress has since expanded tribal courts' sentencing authority, allowing them to impose up to three years' imprisonment, contingent on adoption of additional procedural safeguards. To date, however, few tribes have employed this enhanced sentencing authority.

Bryant, 136 S. Ct. at 1959–60 (footnotes and internal citations omitted).