NO. 12-30177

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

V.

MICHAEL BRYANT, JR.,
DEFENDANT-APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
D.C. NO. CR-11-70-BLG-JDS

UNITED STATES' PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Other Authorities

INTRODUCTION

The United States petitions for rehearing en banc because:

1. The panel decision creates a split in the circuits over whether it violates the Sixth Amendment to rely on an uncounseled tribal court misdemeanor conviction—valid under the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301 *et seq.*, but in violation of the Sixth Amendment if it occurred in federal or state court—to prove the predicate-offense element of a violation under 18 U.S.C. § 117(a). *See United States v. Shavanaux*, 647 F.3d 993, 997 (10th Cir. 2011), and *United States v. Cavanaugh*, 643 F.3d 592, 603-604 (8th Cir. 2011)).

2. The panel decision is of exceptional importance because it extends the "general rule" of *United States v. Ant*, 882 F.2d 1389, 1395 (9th Cir. 1989)—that tribal court convictions must conform to the Constitutional requirements for federal convictions to be used in federal court—contrary to *Nichols v. United States*, 511 U.S. 738 (1994), *Scott v. Illinois*, 440 U.S. 357 (1979), and *Lewis v. United States,* 445 U.S. 55 (1980).

BACKGROUND

Michael Bryant, Jr., is a Native American from the Northern Cheyenne Reservation in Montana with an extensive history of petty crime and domestic violence. His tribal court criminal record contains nearly 100 various prior offenses including at least eight prior domestic abuse convictions. PSR ¶ 81. He was charged in this case with two counts of felony domestic assault by a habitual offender, a violation of 18 U.S.C. § 117(a), which provides:

> 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 specified domestic violence and sex offenses] shall be . . . imprisoned for a term of not more than 5 years . . . 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.

Bryant's tribal court convictions for domestic abuse were used as predicates in his § 117(a) prosecution and "were uncounseled and at least one resulted in a term of imprisonment." *United States v. Bryant*, No. 12-30177, slip op. at 3 (9th Cir. Sept. 30, 2014).

Bryant's uncounseled domestic abuse convictions are typical of tribal court proceedings. Although the Sixth Amendment requires the

appointment of counsel in any case where a term of imprisonment is imposed, *Scott v. Illinois,* 440 U.S. 367, 369 (1979), "the Bill of Rights does not apply to Indian tribal governments." *Duro v. Reina*, 495 U.S. 676, 693 (1990). As "separate sovereigns," tribes are free to impose terms of imprisonment of up to a year without the appointment of counsel. *United States v. Lara*, 541 U.S. 193, 197 (2004). To guarantee the basic fairness of the tribal court proceedings, Congress conferred a range of procedural safeguards on tribal court defendants in the ICRA.[1]

Bryant moved to dismiss the indictment arguing that it violated his Fifth and Sixth Amendment rights to rely on uncounseled tribal court convictions as predicates for two § 117(a) violations. *Bryant*, slip op at 5. The court denied the motion, and Bryant entered a conditional guilty plea. *Id.*

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[1] Under ICRA, a tribal court defendant has, *inter alia*, the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, as well as protection from excessive bail, excessive fines, and cruel and unusual punishment. 25 U.S.C. 1302(a)(6) and (7)(A). In addition, tribal court defendants may seek habeas corpus review of their convictions in a federal district court. 25 U.S.C. 1303. ICRA also guarantees the right to have the assistance of counsel at the defendant's own expense, 25 U.S.C. 1302(a)(6) (2006), but it does not entitle indigent defendants to court-appointed counsel.

The panel in this case reversed, holding that *Ant* "prohibits the use of such convictions in a § 117(a) prosecution." Slip op. at 4. It concluded that, "subject to the narrow exception recognized in *Lewis* and [*United States v. First*, 731 F.3d 998 (9th Cir. 2013)] 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 a minimum, coextensive with the Sixth Amendment right." Slip op. at 12. Because § 117(a) "is an ordinary recidivist statute and not a criminal enforcement scheme for a civil disability," the court concluded that "the general rule announced in *Ant* applies." *Id.* And because Bryant's uncounseled tribal court convictions "would have violated the Sixth Amendment if obtained in federal or state court," using them under § 117(a) was "constitutionally impermissible."[2] *Id.*

In a concurring opinion, Judge Watford found that the Supreme Court's decision in *Nichols* "doesn't squarely overrule *Ant,* but it calls *Ant*'s reasoning into question." Slip op. at 16. Judge Watford also

[2] The panel also acknowledged that its decision "conflict[s] with" *Cavanaugh* and *Shavanaux*. Slip op. at 14. The court stated that these cases "cannot be reconciled with *Ant*, and we are bound by *Ant*." *Id.*

found that *Ant's* holding is undermined by the holdings in *Lewis* and *First* where "'the mere fact of conviction,' even if unreliable and unconstitutionally obtained, could be used to criminalize an act that might otherwise be lawful – firearm possession;" but, here, "the 'mere fact' of a domestic violence conviction cannot be used to support punishment for an act that is already criminal—domestic violence." Slip op. at 18. (citing *Lewis*, 445 U.S. at 67; *First*, 731 F.3d at 1008-09). That "asymmetry" struck Judge Watford as "illogical." *Id.* Given the circuit split created by the panel's decision, "and the lack of clarity in this area of Sixth Amendment law," Judge Watford opined that "the Supreme Court's intervention seems warranted." *Id.*

ARGUMENT

The Sixth Amendment does not prohibit the use of valid, but uncounseled, tribal court convictions as predicates under § 117(a).

The panel erred in holding that valid, uncounseled tribal court misdemeanor convictions may not serve as predicate offenses under § 117(a). There is no "general rule" prohibiting the use of prior convictions that did not measure up to Sixth Amendment standards in the prior proceeding *subject to* a limited exception for a "criminal

enforcement scheme for a civil disability." Slip op. at 12. To the contrary, the Supreme Court's cases establish a general rule that prior convictions of all kinds can be used *unless* they perpetuate, or renew, a previous Sixth Amendment violation. The prosecution here cannot violate that rule because "the Sixth Amendment was never violated in the first instance." *Shavanaux*, 647 F.3d at 998.

Even prior convictions that violated the Sixth Amendment can be used in a subsequent proceeding where the reliability of the prior conviction is not at issue "when one considers Congress' broad purpose." *Lewis*, 445 U.S. at 67. In § 117, as with the gun laws, Congress focused "not on reliability, but on the mere fact of conviction." *Lewis*, 445 U.S. 67. Considering Congress' "broad purpose" to address violence against women in Indian Country,[3] tribal convictions gained in compliance with the ICRA are reliable enough to establish the predicate offense element

[3] In 2005, Congress enacted § 117(a), "The Restoring Safety to Indian Women Act," to address domestic violence in Indian Country by creating a new federal offense "to charge repeat domestic violence offenders before they seriously injure or kill someone and to use tribal court convictions for domestic violence for that purpose." 151 Cong. Rec. S4873-74 (May 10, 2005) (remarks by Senator McCain).

of a § 117(a) prosecution without violating the Sixth Amendment in the subsequent proceeding. *See id.*

A. The principle of *Gideon* is not eroded by the use of prior uncounseled tribal court convictions to establish habitual status.

Gideon v. Wainwright, 372 U.S. 335, 345 (1963), extended the fundamental Sixth Amendment right to counsel against the states through the Fourteenth Amendment. After *Gideon*, the Court grappled with the problem of applying that rule to the use of prior convictions. It settled on the general rule that a conviction obtained in violation of the Sixth Amendment right to counsel may not be used in a subsequent prosecution if it would "erode the principle of" *Gideon*, or cause the defendant to "suffer[] anew from the deprivation of that Sixth Amendment right." *Burgett v. Texas*, 389 U.S. 109, 115 (1967); *accord United States v. Tucker*, 404 U.S. 443 (1972); *Loper v. Beto*, 405 U.S. 473 (1972).

The Supreme Court then began to pull back. In *Scott*, the Court noted how "[w]e have now in our decided cases departed from the literal meaning of the Sixth Amendment." 440 U.S. at 372. Drawing on *Argersinger v. Hamlin*, 407 U.S. 25, 32 (1972), the *Scott* Court held that

Sixth Amendment requires "only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." *Id*. at 374. That is, a Sixth Amendment violation invalidates only a sentence, not the conviction. *Hamlin*, 407 U.S. at 38 ("denial of the assistance of counsel will preclude the imposition of a jail sentence."); *Cavanaugh*, 643 F.3d at 597-98 ("[Some] courts [] have put *Scott* into practice by vacating sentences, but leaving convictions intact").

A year later in *Lewis*, the Court noted that it "has never suggested that an uncounseled conviction is invalid for all purposes." 445 U.S. 55, 66-67. Carrying forward the rule of *Scott* that constitutionally-infirm convictions are not *per se* invalid, the Court held that the federal gun laws allow the use of prior uncounseled convictions "not inconsistent with *Burgett*, *Tucker*, and *Loper*" because the laws "focus not on reliability, but on the mere fact of conviction." *Id.* at 67. That is, even constitutionally-infirm convictions can be, in some circumstances, reliable enough to use without eroding the principle of *Gideon*.

The Supreme Court overruled its only decision finding that *Gideon* can be undermined absent an underlying Sixth Amendment

violation. Four months after *Lewis*, the Court handed down *Baldasar v. Illinois*, 446 U.S. 222, 224 (1980), a plurality decision where a constitutionally-valid prior misdemeanor conviction was used to prove a subsequent violation of an Illinois recidivist statute. The case offered no cohesive rationale, but it appeared to rest, at least partly, on the idea that "unless an accused has 'the guiding hand of counsel at every step in the proceedings against him,' his conviction is not sufficiently reliable to support the severe sanction of imprisonment." *Id*. at 227 (Marshall, J., concurring and quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

Baldasar created widespread confusion in the circuits. *See Nichols*, 511 U.S. at 745-46. As noted by the dissent in *Baldasar*, the fractured decision "misapprehended the nature of enhancement statutes that 'do not alter or enlarge a prior sentence, ignored the significance of the constitutional validity of the first conviction under *Scott*, and created a 'hybrid' conviction, good for the punishment actually imposed but not available for sentence enhancement in a later prosecution. *Id.* at 744 (quoting *Baldasar,* 446 U.S. at 232-33 (Powell, J. dissenting)). The Court in *Nichols* corrected that problem by falling back on the principles of *Gideon* and *Scott*.

In overruling *Baldasar,* the Court held that a conviction "gained in violation of *Gideon* cannot be used to support guilt or enhance punishment for another offense," *id.* at 743 n. 9, but a conviction, "valid under Scott," can. *Id.* at 749. The Court "agree[d] with the dissent in *Baldasar* that a logical consequence of the holding [in *Scott*] is that an uncounseled conviction valid under *Scott* may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment." *Id.* at 746-47.

Nichols reasoned that "[e]nhancement statutes [and] recidivist statutes . . . do not change the penalty imposed for the earlier conviction." 511 U.S. at 748. As a result, the Court noted, it "consistently ha[d] sustained repeat-offender laws as penalizing only the last offense committed by the defendant." *Id.* (quotation marks and citation omitted). The Court accordingly held that uncounseled but constitutionally valid prior convictions could be used to enhance the punishment for a subsequent offense.[4] Thus, the principle of *Gideon*

[4] Although *Nichols* involved the federal sentencing guidelines, the Court made clear that there was no significant difference between the mandatory guidelines and recidivist statutes. *See* 511 U.S. at 747. In either case, the federal sentence does not penalize a defendant a second time for the prior offense.

was preserved in a way that made clear that the use of a constitutionally-valid prior conviction does not, by itself, give rise to a Sixth Amendment violation in a later proceeding.

B. The use of Bryant's prior convictions in this case does not perpetuate a prior Sixth Amendment violation or cause the kind of reliability concerns at issue in *Ant*.

Because Bryant's tribal court convictions are constitutionally valid, they cannot perpetuate an earlier Sixth Amendment violation. *Nichols* demonstrates that when a federal court imposes a sentence for a violation of § 117(a), it is penalizing only that offense and not any uncounseled tribal court convictions that serve as predicate offenses. The general rule, post-*Gideon*, is that a conviction that is valid for its own purposes despite the absence of counsel—like Bryant's tribal court convictions—is therefore also valid for use in a subsequent federal prosecution.

There are also no reliability concerns here that would preclude the use of Bryant's prior convictions under § 117(a). Congress's decision that certain convictions are reliable enough to use as elements of a subsequent prosecution is tested for rationality under the Due Process Clause. *Lewis*, 445 U.S. at 65 (holding that Congress's decision that

certain convictions are reliable enough to use as elements of a subsequent prosecution is tested for rationality under the Due Process Clause). In enacting § 117(a), Congress was aware that tribal court misdemeanor defendants do not universally have counsel. By specifically including tribal court convictions—with no restriction as to their conformance with the Sixth Amendment—as predicate offenses under § 117(a), Congress rationally concluded that ICRA's procedural protections are sufficient to ensure that tribal court convictions are reliable enough to prove habitual-offender status in a subsequent prosecution. *See id.* at 62 (distinguishing the statutory term "conviction" from "valid conviction" or constitutional conviction).

The panel here was wrong to apply the "general rule" of *Ant* to a § 117(a) prosecution, because *Ant* involved completely different reliability concerns. Ant confessed to the murder of his niece and pleaded guilty in tribal court to assault. 882 F.2d at 1390. The government then indicted Ant for manslaughter based on Ant's confession and guilty plea. *Id.* at 1391. The trial court allowed the guilty plea as evidence of the federal crime. *Id.* This Court reversed "because the tribal federal charges arose out of the same exact incident, [and thus] the admission of Ant's

tribal court guilty plea in federal court could also be seen as tantamount to a directed verdict against him . . . ." *Id.* at 1393.

Here, the government is not seeking to use a tribal court conviction for the purpose of, in essence, converting a tribal court misdemeanor into a federal court felony. While it may undermine the principle of *Gideon* to allow the government to do so, that is not what § 117(a) contemplates. Under § 117(a), Bryant's prior tribal offenses, valid under the ICRA, are used for the limited purpose of showing that he is more dangerous than other domestic abusers in Indian Country. That use neither perpetuates an earlier Sixth Amendment violation, nor creates a new one.

C. The general rule of *Ant* is no longer valid.

This case is analogous to *Baldasar,* not *Ant.* *Baldasar* involved an Illinois recidivist statute that converted misdemeanor theft into a felony on the second offense. 446 U.S. at 223. This case also involves a recidivist statute that enhances the punishment for serial offenders. 18 U.S.C. § 117. But *Ant* did not involve such a statute.

Relying on *Baldasar*, the *Ant* court held that a tribal guilty plea was inadmissible in federal court unless it met the constitutional

standards of federal court. *Id.* at 1396. Applying that rule to this case recalls the dissent in *Baldasar*. Valid tribal court convictions are not "hybrid(s) . . . good for the punishment actually imposed but not available for sentence enhancement in a later prosecution." *Baldasar,* 446 U.S. at 232-33. They are valid, reliable convictions that can be used in a recidivist statutory scheme without perpetuating a prior Sixth Amendment violation. By overruling *Baldasar*, *Nichols* effectively limits *Ant's* holding to the circumstances of that case.

In sum, nothing about the use of prior, uncounseled, tribal court convictions in § 117(a) undermines the principle of *Gideon*. Their use does not violate the Sixth Amendment "anew," nor do they direct a verdict against the defendant. Thus, it was rational for Congress to conclude, some 15 years after *Ant,* that tribal court convictions gained in conformance with the procedural protections of the ICRA are reliable enough to use in federal court to establish habitual status.

Rehearing en banc is warranted to bring this Court's decision in line with Supreme Court precedent, to resolve a split in authority with the Eighth and Tenth Circuits, and to allow § 117(a) to function as Congress intended.

CONCLUSION

This Court should grant the petition for rehearing en banc.

DATED this 15th day of December, 2014.

Respectfully submitted,

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/s/ Leif M. Johnson
LEIF M. JOHNSON
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(c)(2) and Ninth Circuit Rule 40-1, I certify that the attached petition for rehearing en banc is proportionately spaced, has a typeface of 14 points or more, and does not exceed 15 pages.

DATED: December 15, 2014

/s/ Leif M. Johnson
LEIF M. JOHNSON
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Leif M. Johnson
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