IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, **Plaintiff-Appellee,** **vs.** **MICHAEL BRYANT, JR.,** **Defendant-Appellant.**	**C.A. 12-30177** **D.C. No.: CR-11-70-BLG-JDS**

BRIEF OF APPELLEE UNITED STATES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

MICHAEL W. COTTER
United States Attorney

MICHAEL S. SHIN
Assistant U.S. Attorneys

U.S. Attorney's Office
2601 Second Avenue N., Ste. 3200
Billings, MT 59101
Phone: (406) 247-4669
ATTORNEYS FOR APPELLEE
United States of America

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STATEMENT OF JURISDICTION

The district court had jurisdiction in this matter under 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. Final judgment was entered on May 9, 2012. ER 88. Bryant filed a timely notice of appeal on May 21, 2012. ER 94-95.

STATEMENT OF THE ISSUES

A charge of domestic assault by a habitual offender under 18 U.S.C. § 117(a) requires a final conviction on at least two prior occasions in federal, state, or tribal court proceedings for domestic violence offenses. This appeal raises the following two issues:

1. Were the Sixth Amendment right to counsel or Fifth Amendment right to due process violated by using prior uncounseled, tribal-court convictions as the predicate offenses for 18 U.S.C. § 117(a), where no right to appointed counsel existed in the prior tribal proceedings?

2. Does the use of uncounseled tribal court convictions as the predicate offenses for 18 U.S.C. § 117(a) violate the Equal Protection

Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

Michael Bryant was charged with two counts of domestic assault by a habitual offender under 18 U.S.C. § 117(a). ER 13. He filed a motion to dismiss the indictment, which the district court denied. ER 66. Bryant pleaded guilty to both counts but reserved the right to appeal his denied motion to dismiss. ER 71, 73. He now appeals.

STATEMENT OF FACTS

I. Bryant is indicted for domestic assault by a habitual offender after at least two prior misdemeanor domestic assault convictions.

A grand jury indicted Bryant for two counts of domestic abuse by a habitual offender, each count involving different victims. ER 12-13. The indictment alleged that Bryant had previously been convicted of at least two separate prior domestic assaults. ER 12. Bryant's criminal history reflects at least six prior convictions for domestic abuse in the Northern Cheyenne Tribal Court. PSR ¶ 81.

II. The district court rejects Bryant's argument that his prior uncounseled tribal court convictions cannot be used as predicate offenses.

Bryant moved to dismiss the indictment on the grounds that using prior tribal court convictions for which he did not have the right to appointed counsel violated his Fifth and Sixth Amendment rights, as well as the Equal Protection Clause. After receiving briefing from the parties and holding a hearing, the district court denied the motion with an oral ruling from the bench, stating that "the convictions and the pleas do meet the criteria for the charge that's been filed here in the Indictment." ER 64.

III. Bryant pleads guilty reserving the right to appeal the denial of his motion to dismiss.

Bryant subsequently moved to enter a voluntary plea of guilty to both counts in the indictment pursuant to a conditional plea agreement entered into by the parties. ER 68-69. As part of the plea agreement, Bryant expressly reserved his right to appeal the adverse decision on his motion to dismiss. ER 72-73. Bryant was sentenced to 46 months in the custody of the Bureau of Prisons on each count with the sentences to run concurrently. ER 88.

SUMMARY OF ARGUMENT

Bryant does not dispute that he has at least two prior tribal court convictions for domestic assault and that those convictions satisfy the statutory requirements for predicate offenses as defined in 18 U.S.C. § 117(a). Nor does Bryant contend that the tribal court proceedings were flawed or that the resulting convictions were infirm in any respect, constitutional or otherwise. Instead, Bryant argues that the absence of a right to appointed counsel in tribal court means his tribal convictions would have been unconstitutional if they occurred in state or federal court, so the use of his tribal convictions for § 117(a) charges in federal court violates his constitutional rights.

Accepting Bryant's argument would mean that an uncounseled tribal court conviction could never be used as a predicate offense in a § 117(a) prosecution, which would contradict both the clear statutory language and legislative intent behind the statute. Moreover, the Supreme Court has held that the use of an uncounseled conviction that is constitutionally valid for its own purposes comports fully with the Constitution. *Nichols v. United States*, 511 U.S.738, 748-49 (1994). Bryant's attempt to stretch this Court's decision in *United States v.*

Ant, 882 F.2d 1389 (9th Cir. 1989), to apply in this case conflicts with *Nichols*, and his Equal Protection claims are foreclosed by controlling Supreme Court precedent. *United States v. Antelope*, 430 U.S. 641, 644-47 (1977).

STANDARD OF REVIEW

A district court's denial of a motion to dismiss an indictment on constitutional grounds is reviewed *de novo*. *United States v. Latu*, 479 F.3d 1153, 1155 (9th Cir. 2007).

ARGUMENT

I. The use of a valid tribal court conviction as the predicate offense for 18 U.S.C. § 117(a) comports fully with the plain statutory language and legislative intent.

In 2005, Congress enacted "The Restoring Safety to Indian Women Act," now codified at 18 U.S.C. § 117, 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). Section 117(a) ("Domestic assault by an habitual

offender") provides criminal penalties for:

> 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, ...

18 U.S.C. § 117(a).

Bryant does not dispute that he has more than the requisite number of prior convictions for domestic abuse. Section 117(a) thus applies in his case, as Congress fully intended.

A. Congress enacted § 117(a) specifically to address domestic violence in Indian country.

In introducing The Restoring Safety to Indian Women Act, Senator McCain noted that then-existing legal tools to combat domestic violence in Indian country were inadequate. 151 Cong. Rec. S4873. The division of criminal jurisdiction between federal and tribal authorities presented challenges, and the high standard required to bring felony charges under the then-existing statutes meant that

"perpetrators may escape felony charges until they seriously injure or kill someone." *Id.* The provisions in § 117(a) were "aimed at the habitual domestic offender and allow tribal court convictions to count for purposes of Federal felony prosecution . . . ." *Id.*

B. Congress knew in enacting § 117(a) that tribal courts do not afford the Sixth Amendment right to counsel.

When it enacted § 117(a), Congress knew that defendants in tribal misdemeanor cases did not have a Sixth Amendment right to counsel but instead only had the right to counsel at the defendant's own expense—the right that Congress itself afforded under the Indian Civil Rights Act in 1968. Courts presume that "Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990), and that it passes laws "against a background of law already in place." *Exxon Mobil Corp. v. Allapattah Serv's, Inc.*, 545 U.S. 546, 587 (2005) (Ginsburg, J., dissenting). Thus, Congress was aware that uncounseled tribal convictions would serve as predicate offenses in a § 117(a) prosecution.

II. The use of Bryant's prior tribal convictions did not violate his Sixth Amendment right to counsel or Fifth Amendment right to due process.

A. Bryant's prior tribal court convictions are valid and involved no actual constitutional violations.

Bryant has not challenged—and does not in this appeal challenge—the validity of his prior tribal convictions.[1] As noted above, the Indian Civil Rights Act does not afford defendants in tribal court the right to appointed counsel, and this Court has held that the Sixth Amendment right to appointed counsel does not apply to tribal criminal proceedings. *See Tom v. Sutton*, 533 F.2d 1101, 1102-03 (9th Cir. 1976). Thus, the suggestion that Bryant may not have been represented by counsel in his prior tribal court domestic abuse matters does not by itself constitute any actual constitutional injury.[2] Nor does

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[1] Bryant's counsel noted in the hearing on the motion to dismiss that Bryant "has either four or five convictions in Northern Cheyenne Tribal Court" and that for the majority of the convictions he pleaded guilty at arraignment. ER 58.

[2] Bryant did not make an affirmative evidentiary showing that he was not represented by counsel for his prior tribal court convictions. Rather, his counsel simply assumed that he was not. ER 58. Bryant's failure to establish that he was not represented in the prior tribal court matters provides independent grounds on which this Court should affirm the district court's decision.

Bryant allege that the prior tribal court proceedings violated any internal tribal court rules. Accordingly, Bryant's prior tribal court convictions are valid, both under the applicable tribal court rules and under the Constitution.

B. The use of a valid tribal court conviction as the predicate offense for a § 117(a) violation does not violate the Constitution.

Bryant argues that although his tribal court convictions did not involve any actual constitutional injury, they could not be used as predicate offenses for the § 117(a) charges because had the prior convictions been in state or federal instead of tribal court, they would have been constitutionally invalid due to the absence of appointed counsel. The Supreme Court has held, however, that prior uncounseled convictions can be considered in subsequent criminal matters so long as the convictions do not involve actual constitutional violations. *Nichols*, 511 U.S. at 748-49. And two circuit courts that have directly addressed the issue presented in this appeal have held that the use of prior uncounseled tribal convictions as predicate offenses for § 117(a) charges does not violate the Constitution. *See United States v. Cavanaugh*, 643

F.3d 592, 605 (8th Cir. 2011); *United States v. Shavanaux*, 647 F.3d 993, 998 (10th Cir. 2011). This Court's reasoning in *Ant*, upon which Bryant primarily relies, was rejected by *Nichols* and, in any event, is not applicable in the context presented here.

1. *Nichols* expressly permits the use of uncounseled convictions in subsequent criminal prosecutions absent an actual constitutional violation.

In *Nichols*, the Supreme Court overruled *Baldasar v. Illinois*, 446 U.S. 222 (1980), one of the main cases relied upon by this Court in *Ant*. In rejecting *Baldasar*, the *Nichols* Court held that an uncounseled prior state law misdemeanor conviction could be considered at sentencing in a subsequent federal criminal prosecution. 511 U.S. at 748-49. The Court based its holding on *Scott v. Illinois*, 440 U.S. 367 (1979), in which the Court held that a defendant charged with a misdemeanor does not have a constitutional right to counsel where no sentence of imprisonment was imposed. *Scott*, 440 at 373. Because the defendant in *Nichols* had not received a sentence of incarceration in connection with the prior misdemeanor conviction, the *Nichols* Court held that the prior conviction was valid under *Scott* and could therefore be

collaterally used at sentencing to calculate criminal history points in the subsequent federal matter. *Nichols*, 511 U.S. at 748-49. In so doing, the *Nichols* Court recognized that "a logical consequence of the holding" is that a prior uncounseled conviction could be used to "enhance the sentence for a subsequent offense, even though that sentence entails imprisonment." *Id.* at 745. The *Nichols* Court further stated:

> Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes that are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction.

Id.

The rationale in *Nichols* applies with equal force in the present context. Section 117(a) is a recidivist statute of the type expressly contemplated in *Nichols*. There is no meaningful legal distinction between a prior uncounseled state conviction valid under *Scott* and a prior uncounseled tribal conviction valid under the Constitution and tribal law. Both can be used collaterally in subsequent criminal prosecutions because subsequent prosecutions do not retroactively

create constitutional injury or otherwise alter the constitutional validity of the prior convictions. As the *Nichols* Court stated, the Supreme Court "consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant." *Id.* at 747.

Bryant has also failed to demonstrate that he was incarcerated as a result of any of the prior tribal convictions. Indeed, his counsel stated that Bryant "was either released or he was sent to a voluntary work program" in the tribal matters. ER 58. Thus, under *Scott*, Bryant has failed to establish the basic premise underlying his argument — that the tribal convictions would have been unconstitutional had they been in state or federal court.

2. The only circuit courts to have reached the issue presented in this appeal have held that uncounseled tribal convictions can be used as predicate offenses for § 117(a) charges.

Both the Eighth and Tenth Circuits have reached the exact issue raised in this appeal, and following the rationale in *Nichols*, both held that a prior uncounseled tribal conviction can serve as the predicate offense for a § 117(a) charge. In *Cavanaugh*, the Eight Circuit stated

that "[a]s per *Nichols*, then, we believe it is necessary to accord substantial weight to the fact that Cavanaugh's prior convictions involved no constitutional violation." 643 F.3d at 603-04. The court thus concluded that "in the absence of any other allegations of irregularities or claims of actual innocence surrounding the prior convictions, we cannot preclude the use of such a conviction in the absence of an actual constitutional violation." *Id.* at 605.

In *Shavanaux*, the Eight Circuit did not expressly mention *Nichols* but noted that "[a]lthough a tribal prosecution may not *conform* to the requirements of the Bill of Rights, deviation from the Constitution does not render the resulting conviction constitutionally *infirm*." 647 F.3d at 997 (emphasis in original). The court concluded that because there were no Sixth Amendment violations in the prior tribal convictions, "[u]se of tribal convictions in a subsequent prosecution cannot violate 'anew' the Sixth Amendment" and prior uncounseled tribal convictions could be used in a § 117(a) prosecution. *Id.* at 998.

The *Shavanaux* court thus distinguished the decision in *Burgett v.*

Texas, 389 U.S. 109 (1967), upon which Bryant relies in his brief. Br. at 12. Under *Burgett*, a "conviction obtained *in violation of Gideon v. Wainwright*[, 372 U.S. 335 (1963)]" cannot "be used against a person either to support guilt or enhance punishment for another offense." 389 U.S. at 115 (emphasis added). The *Gideon* decision, however, incorporated the Sixth Amendment right to counsel *against the States*, and the Sixth Amendment has never been incorporated against Indian tribes. Thus, the use of an uncounseled tribal court conviction cannot constitute a violation of *Gideon*, and *Burgett* does not apply.[3]

3. The reasoning in *Ant* was rejected by *Nichols* and is inapplicable to this case.

In *Ant*, this Court held that Ant's prior uncounseled guilty plea in a tribal court matter was inadmissible as evidence of guilt in a subsequent federal prosecution "involving the same criminal acts." 882 F.2d at 1391, 1397. In doing so, the *Ant* court relied on *Baldasar*'s

[3] For the same reason, the other decisions that Bryant cites discussing *Gideon* and what Bryant calls the "general rule" regarding the denial of counsel in prior *state* court proceedings are not applicable here. Br. at 12 (citing *United States v. Tucker*, 404 U.S. 443 (1972); *Loper v. Beto*, 405 U.S. 473 (1972); and *Custis v. Untied States*, 511 U.S. 485 (1994)).

holding that a prior misdemeanor that was valid but uncounseled could not be used to convert a misdemeanor to a felony in a subsequent prosecution under a recidivist enhancement statute. *Id.* at 748. The *Ant* court concluded that because Ant was "in jeopardy of being imprisoned by a federal court because of a prior uncounseled guilty plea," the prior conviction was inadmissible. 882 F.2d at 1394. *Nichols*, however, expressly overruled *Baldasar* and rejected the reasoning in *Ant*. Thus, *Ant* is no longer good law. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc) ("[W]here the reasoning or theory of . . . prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled."); *see also State v. Spotted Eagle*, 71 P.3d 1239, 1244 n.1 (Mont. 2003) ("In light of *Nichols*, the continued viability of *Ant* is questionable, at best.").

Even if *Nichols* had not overruled the reasoning on which *Ant* relies, *Ant* is distinguishable from this case. In *Ant*, the government

offered evidence of Ant's prior tribal conviction as "substantive evidence of guilt" that Ant had committed the offense charged in the subsequent federal prosecution. 822 F.2d at 1395 n.8. Because the same acts were at issue in both matters, admitting the tribal conviction would have been "tantamount to a directed verdict." *Id.* at 1394. Thus, the *Ant* court was primarily concerned with the reliability of the tribal conviction, which gave rise to Sixth Amendment concerns. Here, in contrast, the prior tribal convictions involve entirely separate criminal acts, and the government offered them for the fact of the convictions rather than, as in *Ant*, for the "the truth of the matters asserted in the plea." *Cavanaugh*, 643 F.3d at 604. *Ant* is therefore inapplicable to the present matter.

III. Section 117(a) does not violate the Equal Protection Clause.

Bryant argues that § 117(a) violates the Equal Protection Clause because "it deprives a certain class of citizens their constitutional right to have counsel appointed based on their race, ethnic origin and political class." Br. at 25. This argument fails at the threshold because by its plain terms, § 117(a) applies equally to any offense within the

"special maritime and territorial jurisdiction of the United States or Indian country" and counts as predicate offenses any prior state, federal, or tribal convictions for domestic violence. The statute makes no distinction based on race, ethnicity, or political class.

Moreover, § 117(a) does not "deprive" any individuals the right to counsel. The Indian Civil Rights Act established the limited right to counsel, and to the extent Bryant argues that it was unconstitutional for Congress to provide those in tribal court a different right to counsel than those in state or federal court, that argument is foreclosed by controlling precedent.[4]

Indian tribes are "separate sovereigns pre-existing the Constitution," and thus, they "have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v.*

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[4] Bryant's note that the addition of a right to appointed counsel for tribal convictions in excess of one year by the Tribal Law and Order Act of 2010 suggests Congress found the prior lack of counsel under the Indian Civil Rights Act to be improper, Br. at 29, is belied by Congress's decision to leave in effect the more limited right to retained counsel when it comes to tribal misdemeanors. *See* 25 U.S.C. § 1302(a)(6).

Martinez, 436 U.S. 49, 56 (1978); *Duro v. Reina*, 495 U.S. 676, 693 (1990) ("It is significant that the Bill of Rights does not apply to Indian tribal governments."). They "are not bound by the United States Constitution the exercise of their powers, including their judicial powers." *Means v. Navajo Nation*, 432 F.3d 924, 930-31 (9th Cir. 2005); *Settler v. Lameer*, 507 F.2d 231, 240-42 (9th Cir. 1974) (recognizing Sixth Amendment right to counsel does not apply to Tribes).

In *Antelope*, the Supreme Court held that the application of a federal criminal statute to Indians only is not premised on "invidious racial discrimination," but rather on the "quasi-sovereign status of [tribes] under federal law." 430 U.S. at 644-47. Because tribal status is a political rather than racial distinction, it does not violate equal protection to provide different legal protections in tribal court than in federal court.

CONCLUSION

This Court should affirm Bryant's conviction.

DATED this 15th day of November, 2012.

MICHAEL W. COTTER
United States Attorney

/s/ Michael S. Shin
MICHAEL S. SHIN
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I certify that on November 15, 2012, 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/ Michael S. Shin
MICHAEL S. SHIN
Assistant U.S. Attorney

STATEMENT OF RELATED CASES

United States v. First, C.A. 11-30346 (9th Cir.), is a related case.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and the Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and the body of the argument contains 3,372 words.

/s/ Michael S. Shin
MICHAEL S. SHIN
Assistant U.S. Attorney