Ninth Circuit Court of Appeals 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.

OPENING BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION
DISTRICT COURT NO. CR-11-70-BLG-JDS-1

HONORABLE JACK D. SHANSTROM
SENIOR UNITED STATES DISTRICT JUDGE

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SUBMITTED: August 31, 2012

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,
v.

MICHAEL BRYANT, JR.,

Defendant-Appellant.

OPENING BRIEF OF DEFENDANT-APPELLANT

I. STATEMENT OF JURISDICTION

A. Statutory Basis of Subject Matter Jurisdiction of the District Court

The United States District Court for the District of Montana had jurisdiction over the original criminal action under Article III, Section 2, Clause 1 of the United States Constitution and 18 U.S.C. § 3231, because the United States charged Defendant-Appellant Michael Bryant, Jr. ("Mr. Bryant") in the District of Montana with Domestic Assault by Habitual Offender, in violation of 18 U.S.C. § 117(a) .

B. Statutory Basis of Jurisdiction of the Court of Appeals

Mr. Bryant appeals from the judgment imposed by the district court. This Court has appellate jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and Rule 32 of the Federal Rules of Criminal Procedure.

C. Appealability

The district court convened a sentencing hearing for Mr. Bryant on May 9, 2012. (CR 33). A written judgment was filed on the same day. (CR 34; ER 88). Mr. Bryant filed his notice of appeal on May 21, 2012. (CR 37). Mr. Bryant complied with the time requirements governing criminal appeals in Rule 4(b) of the Federal Rules of Appellate Procedure.

II. STATEMENT OF THE ISSUES

Whether 18 U.S.C. § 117(a), the habitual offender statute, violates the Sixth Amendment right to counsel and the Fifth Amendment right to due process by permitting the use of uncounseled tribal court convictions to be offered as substantive evidence to prove an essential element of a federal charge?

Whether 18 U.S.C. § 117(a), which allows Native Americans to be prosecuted in federal court based on uncounseled tribal convictions, violates the Equal Protection Clause of the United States Constitution?

III. STATEMENT OF THE CASE

A. Nature of the Appeal

Mr. Bryant appeals from the judgment and the district court's decision denying his motion to dismiss the Indictment based on Constitutional challenges.

B. Course of the Proceedings

Following an initial appearance on a Complaint alleging probable cause for two counts of assault by a habitual offender on May 25, 2011, the Grand Jury returned an Indictment against Mr. Bryant on June 20, 2011. (CR 1, 9; ER 4, 12). The Indictment charged two counts of domestic assault by a habitual offender in violation of 18 U.S.C. § 117(a). (CR 9; ER 12).

Mr. Bryant moved to dismiss the Indictment on November 7, 2011. (CR 19, 20; ER 27, 30). The government responded and the district court conducted a hearing on December 21, 2011. (CR 21, 42; ER 43, 55). It denied Mr. Bryant's motion to dismiss the Indictment. (CR 42; ER 66).

Mr. Bryant plead guilty pursuant to a plea agreement. (CR 27, 30; ER 71). The plea agreement reserved his right to appeal the district court's denial of his motion to dismiss the Indictment. (CR 27; ER 73).

The district court held a sentencing hearing on May 9, 2012. (CR 33). It sentenced him to the custody of the Bureau of Prisons ("BOP") for 46 months on each

count to run concurrently, followed by three years of supervised release on each count to run concurrently. (CR 34; ER 88). This appeal followed.

C. Disposition in the District Court

The district court sentenced Mr. Bryant to the custody of the Bureau of Prisons ("BOP") for 46 months on each count to run concurrently, followed by three years of supervised release on each count to run concurrently. (CR 34; ER 88).

D. Bail Status

Mr. Bryant is in the custody of the Bureau of Prisons with a projected release date of August 21, 2014.

IV. STATEMENT OF RELEVANT FACTS

Mr. Bryant moved to dismiss the Indictment charging him with two counts of assault by a habitual offender. (CR 19; ER 27). He argued that 18 U.S.C. § 117(a) violates the Sixth Amendment right to counsel, and the Fifth Amendment provision of Due Process and Equal Protection by permitting the use of uncounseled tribal court convictions to be offered as substantive evidence to prove an essential element of a federal charge in a manner affecting Native Americans uniquely. Both parties submitted briefs on the issue for the district court's review. (CR 20, 21; ER 30, 43).

At a hearing on the motion, Mr. Bryant did not dispute that he had previous domestic violence convictions from the Northern Cheyenne Tribal Court. He

explained, and the government did not question, that he did not have the assistance of counsel for any one of those convictions. He was incarcerated as a result of some of the convictions. (ER 62). He argued that the use of his prior tribal court convictions to prove an element of a federal crime where the tribe provided no court appointed counsel for an indigent defendant is unconstitutional. (ER 58-60). Mr. Bryant explained that the two Circuits to decide this issue were wrong. (ER 58-59). It asked the district court to instead turn to *United States v. Ant* for guidance.

The government argued that the two Circuits deciding the issue were correct. (ER 63-64). It asked the district court to also consider *United States v. Lewis* and to permit an analogy between a recidivist domestic violence offender and a felon in possession of a firearm. (ER 64).

The district court expressed surprise regarding the paucity of law on this issue. (ER 65). It denied the motion stating only "the convictions and the pleas do meet the criteria for the charge that's been filed here in the Indictment." (ER 66).

V. SUMMARY OF THE ARGUMENT

In this matter of first impression in the Ninth Circuit, Mr. Bryant urges that 18 U.S.C. § 117(a) and its application violates the Sixth Amendment right to counsel and the Fifth Amendment right to due process by permitting the use of uncounseled tribal court convictions to be offered as substantive evidence to prove an essential element

of a federal habitual offender charge. This Court's reasoning should be guided by the principles set forth in *Gideon v. Wainwright* and as discussed in *United States v. Ant*.

If the Court finds these arguments unpersuasive, it should next consider that allowing Native Americans to be prosecuted in federal court based on uncounseled tribal convictions violates Equal Protection. Because § 117 discriminates against, rather than protects Native Americans, it should be found unconstitutional.

VI. ARGUMENT

Standards of Review

A constitutional challenge to the district court's denial of a motion to dismiss is reviewed de novo. *United States v. Bueno-Vargas*, 383 F.3d 1104, 1106 (9th Cir.2004); *United States v. Palmer*, 3 F.3d 300, 305 (9th Cir.1993), cert. denied, 510 U.S. 1138 (1994).

Appealability

Mr. Bryant entered into a plea agreement that reserved his right to appeal the district court's denial of his motion to dismiss the Indictment. (CR 27; ER 73).

Argument

I. The federal habitual offender statute is unconstitutional because it permits uncounseled tribal court convictions to prove an element of the offense.

The government charged, and Mr. Bryant plead guilty to domestic assault by habitual offender pursuant to 18 U.S.C. § 117(a). (CR 1, 9, 27; ER 4, 12, 71). That statute provides, in relevant part:

> (a) In general.--Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction--
>
> (1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner; or
>
> (2) an offense under chapter 110A,
>
> shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.

18 U.S.C. § 117(a). Mr. Bryant is an enrolled member of the Northern Cheyenne Tribe. (CR 29; ER 86). The initial Complaint against Mr. Bryant and the offer of proof alleged that he had been convicted of domestic violence on more than two occasions in the Northern Cheyenne Trial Court of and for the Northern Cheyenne Tribe in Lame Deer, Montana. (CR 1, 29; ER 4, 87). He does not dispute that he has more than two tribal domestic violence convictions. (ER 58). These convictions, however, were obtained without the right to, or the assistance of counsel. (ER 58).

A. Neither the United States Constitution nor the Indian Civil Rights Act required the appointment of counsel for indigent criminal defendants in tribal court.

As a general matter, although Indians are citizens of the United States entitled to the same constitutional protections against federal and state action as all citizens, tribal court proceedings are not governed by the United States Constitution. Instead, tribal court proceedings must adhere to the provisions in the Indian Civil Rights Act ("ICRA") and to the laws of the individual tribe. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.")

More specifically, the United States Constitution grants Congress "plenary" powers to legislate in respect to tribes through the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and the Treaty Clause, art. II, § 2, cl. 2. See *United States v. Lara*, 541 U.S. 193, 200 (2004). Pursuant to this authority, Congress passed ICRA, which adopted certain of the protections from the Bill of Rights for situations where an Indian tribe is the governmental actor. See Pub. L. No. 90–284, Title II, § 202, 82 Stat. 77 (1968) (codified in part at 25 U.S.C. § 1302).

Relevant here, the right to appointed counsel is absent from the list of rights extended by ICRA to defendants in tribal court proceedings. Thus, although Section 202 of ICRA forbids an Indian tribe from denying a defendant in a criminal proceeding the right "at his own expense" to counsel, 25 U.S.C. § 1302(6), there is no right to appointed counsel for an indigent defendant in tribal court. See *United States v. Ant*, 882 F.2d 1389, 1391, 92 (9th Cir. 1989) ("According to Northern Cheyenne tribal law . . . "[a]ny Indian charged with an offense, at his option and expense, may be represented in tribal court by professional legal counsel, or, by a member of the Tribe" and under ICRA "[n]o Indian tribe ... shall deny to any person in a criminal proceeding the right ... at his own expense to have assistance of counsel." 25 U.S.C. § 1302(6)).[1] Put another way, Indian defendants in tribal court have no Constitutional or statutory right to appointed counsel in tribal proceedings unless the prosecution falls under the 2010 enactment of the Tribal Law and Order Act and the defendant is sentenced to a term of incarceration greater than one year. Mr. Bryant's tribal court convictions occurred prior to 2010, thus Mr. Bryant did not

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[1]ICRA was amended by the Tribal Law and Order Act of 2010, Pub. L. No. 111–211, Title II, § 234(a), 124 Stat. 2279 (2010). Prior to that act, tribal courts were restricted to impose no sentences of incarceration greater than one year. Now, tribal courts may impose longer sentences (up to three years for individual offenses). 25 U.S.C. § 1302(b). Accordingly, the Indian Civil Rights Act now mandates court appointed counsel if a tribe imposes a sentence greater than one year. *Id*. § 1302(a)(6), (b), & (c)(2).

have the assistance of counsel or the option for appointed counsel when convicted by the tribe of his prior domestic violence acts.[2]

B. A gapping hole thus exists between the right to counsel the United States Constitution requires and the rights applicable to tribal court proceedings.

Well-recognized values of tribal sovereignty permit and urge autonomy in tribal law. Differences and gaps in rights afforded may occur. Mr. Bryant argues, however, that one such gap led to his unconstitutional treatment once the uncounseled tribal conviction was used to prove an element of a federal offense because his Sixth Amendment right would have been violated had it been applicable and because it was violated anew by the federal prosecution.

The United States Supreme Court has determined that the Sixth Amendment requires courts to provide counsel for indigent federal defendants in criminal cases. *Johnson v. Zerbst*, 304 U.S. 458, 463. (1938). It explained, assistance of counsel is so important because:

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

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[2] It appears from the record that Mr. Bryant's last conviction occurred in 2007, prior to the passage of the Tribal Law and Order Act of 2010 which expanded both the tribes' powers and the defendant's protections. PSR ¶ 81.

> orderly, and necessary to the lawyer--to the untrained layman--may appear intricate, complex, and mysterious. . . .
>
> The '... right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

Zerbst, 304 U.S. at 462-463 (quoting *Powell v. Alabama*, 287 U.S. 45, 68 (1932)). In *Gideon v. Wainwright*, the court expanded this protection to felonies charged in state court. 372 U.S. 335 (1963). The court later extended *Gideon* to include misdemeanors for which a defendant was sentenced to jail. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) clarified that it was the loss of liberty attendant to a sentence of imprisonment triggering Sixth Amendment protections.

The Sixth Amendment gives a criminal defendant the right to counsel and the corresponding right to waive the right to counsel and proceed pro se. *Faretta v. California*, 422 U.S. 806, 820 (1975); *United States v. Erskine*, 355 F.3d 1161, 1167 (9th Cir. 2004). While this right may be waived, a waiver of the right to counsel "must be voluntary, intelligent, and knowing." *Id*. This standard is met if a court

informs the defendant of the dangers and disadvantages of self-representation and the record evidences the defendant knew and understood the disadvantages. *Id.* [3]

In general, however, a conviction entered without the assistance of counsel cannot be used in a subsequent proceeding. *Burgett v. Texas*, 389 U.S. 109 (1967); *United States v. Tucker*, 404 U.S. 443 (1972); *Loper v. Beto*, 405 U.S. 473 (1972); *Custis v. United States*, 511 U.S. 485 (1994) ("failure to appoint counsel for an indigent defendant was a unique constitutional defect."). *Burgett* refused to permit the use of an uncounseled prior conviction because:

> [t]o permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right.

Burgett, 389 U.S. at 115. And while this rule does not apply to the use of an uncounseled conviction in a "sweeping prophylaxis" (see *Lewis v. United States*, 445 U.S. 55 (1980)) or at sentencing where the uncounseled misdemeanor did not receive a sentence of imprisonment (see *Nichols v. United States*, 511 U.S. 738 (1994)), it has not been tested under the circumstances at play here, thus the general rule should govern.

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[3]Here, there can be no argument that the standard for waiver of the right to counsel in federal court was met in the tribal court proceedings because unlike in federal court, Mr. Bryant had no right to a court-appointed lawyer.

Moreover, *Custis v. United States*, 511 U.S. 485 (1994), demonstrates that the Court's unwillingness to sanction convictions obtained in violation of right to counsel as a general matter. In that case, the court held a sentence could be enhanced, under the Armed Career Criminal Act, for a defendant convicted of unlawfully possessing a firearm, who had three previous convictions for violent a felony or a serious drug offense, without providing the defendant the opportunity to collaterally attack the prior convictions. The fact that the statute did not authorize a collateral attack on predicate convictions decided the matter--for every constitutional defect but one:

> There is thus a historical basis in our jurisprudence of collateral attacks for treating the right to have counsel appointed as unique, perhaps because of our oft-stated view that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." . . . We think that since the decision in *Johnson v. Zerbst* more than half a century ago, and running through our decisions in *Burgett* and *Tucke*r, there has been a theme that failure to appoint counsel for an indigent defendant was a unique constitutional defect.

Custis, 511 U.S. at 494-96 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)). The court thus recognized uncounseled convictions as a unique constitutional defect, and did so despite the fact that the statute offered no evidence that Congress intended to permit collateral attacks on uncounseled convictions. *Custis* makes clear that the general rule still holds: a court may not properly rely on prior, uncounseled convictions.

C. The Ninth Circuit has not determined whether the federal habitual offender statute is unconstitutional because it permits uncounseled tribal court convictions to fulfill an element of the offense, however, Ninth Circuit's persuasive precedent requires a result different from the holdings reached in the two circuits that have decided the issue.

Mr. Bryant does not question the workings of the tribal justice system, but instead asks this Court to evaluate whether his prior uncounseled convictions satisfy constitutional requirements for use in a federal prosecution in federal court. He urges that relying on uncounseled tribal convictions are unconstitutional not only because his Sixth Amendment right to counsel would have been violated had it been applicable, but also because reliance on such convictions violates "anew" the Sixth Amendment right to counsel and due process. Any conviction introduced in any federal court to prove an essential element of a federal crime must be in compliance with the United States Constitution.

The Ninth Circuit's jurisprudence supports this conclusion. In *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989), the this Court held that a guilty plea entered in accordance with tribal code and the ICRA could not be admitted in federal prosecution because it violated the Sixth Amendment. In *Ant*, the defendant, an Indian, pled guilty to assault and battery in tribal court and was sentenced to six months in jail. *Id*. at 1391. The defendant was not represented by a lawyer, although he was likely advised of his right to a lawyer. *Id*. at 1392. Subsequently, a federal

indictment charged the defendant with voluntary manslaughter. *Id*. at 1391. The defendant moved to suppress his confession and guilty plea from tribal court, arguing exclusion was appropriate because his right to counsel under the Sixth Amendment was violated and his confession was involuntary in violation of the Fifth Amendment.

This Court analyzed whether the guilty plea was made under conditions consistent with the United States Constitution "independent of issues involving tribal law or the ICRA." *Id*. at 1393–94. This Court explained, "it appears that if Ant's earlier guilty plea had been made in a court other than in a tribal court, it would not be admissible in the subsequent federal prosecution absent a knowing and intelligent waiver." *Id*. at 1394. Because the defendant was not provided the opportunity for court-appointed counsel in tribal court and thus the proceedings did not meet constitutional requirements, the Ninth Circuit suppressed the uncounseled tribal court guilty plea. *Id*. at 1395–96.

While the this Court has not addressed the precise issue presented here, the two circuits to consider whether the federal habitual offender statute is unconstitutional because it permits uncounseled tribal court convictions to prove an element of the offense found it necessary to distinguish and dismiss *Ant* in order to find the law constitutional.

i. The Eighth Circuit erroneously concluded that the "technical validity of a conviction was a more important factor than the *Gideon*-type reliability" so an uncounseled prior conviction can be used in the absence of an actual constitutional violation.

In *United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011), the court considered "whether the Fifth or Sixth Amendments to the United States Constitution preclude the use of these prior tribal-court misdemeanor convictions as predicate convictions to establish the habitual-offender elements of § 117." *Id*. at 593. The appeal came after the district court held the uncounseled convictions were infirm for the purpose of proving the habitual-offender predicate-conviction elements of the § 117(a) offense in subsequent federal court proceedings even though the prior convictions were valid at their inception under ICRA and tribal law. The Eighth Circuit reversed the district court decision holding:

> as a matter of first impression, we hold 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 addressing the Eighth Circuit's reasoning in *Cavanaugh*, it is important to note that the court itself seemed unconvinced by its own reasoning and recognized that there was no controlling and clear rule of law from the United States Supreme Court. *Id*. at 603-604. Moreover, it highlighted that this Circuit's case, *United States*

v. Ant, was a relevant statement related to the issue presented. *Id*. at 604-05. After discussing *Ant*, the Eighth Circuit, noted only that:

> the most we take from [*Ant* and another case] is that Supreme Court authority in this area is unclear; reasonable decision-makers may differ in their conclusions as to whether the Sixth Amendment precludes a federal court's subsequent use of convictions that are valid because and only because they arose in a court where the Sixth Amendment did not apply.

Id. at 605. Thus, in considering whether the Eighth Circuit's reasoning is persuasive, its own recognition of other possibilities and apparent insecurity with its conclusions should be noted.

In *Cavanaugh*, the defendant was an enrolled member of the Spirit Lake Sioux Tribe and had been convicted in that tribal court for domestic violence on three instances. *Id*. The tribal court had advised him of his right, at his own expense, to obtain counsel. *Id*. The defendant asserted that he was indigent at the time of the conviction. The Eighth Circuit noted that the convictions would have been unconstitutional in violation of the Sixth Amendment right to appointed counsel had they been obtained in a state or federal court. *Id*.

The *Cavanaugh* court recognized that "the tribal-court ability to impose a term of incarceration of up to one year based upon an uncounseled conviction is inconsistent with *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979)." *Id*. at 596. It then discussed

the United States Supreme Court's interpretations of the Sixth Amendment more fully. It noted a number of cases and came to rest on *Nichols v. United States*, 511 U.S. 738, 748–49 (1994). It observed that *Nichols* overruled *Baldasar v. Illinois*, 446 U.S. 222, 227–28 1980, but also concluded that *Nichols* rejected any inherent reliability concerns an uncounseled conviction might raise. *Id*. at 599-600. *Nichols* held, it said, "that an uncounseled conviction could be used for enhancement purposes." *Id*. at 599. The *Cavanaugh* court noted, however, that as a sentencing case, *Nichols* does "not necessarily answer all questions regarding permissible uses of prior convictions." *Id*. at 601. It further emphasized that *Nichols* "differed from the present case" because it "relied, to a large extent, on the fact that the subsequent use of the prior conviction was merely to determine a sentence pursuant to the Guidelines rather than to establish guilt." *Id*. Specifically,

> [i]t also seems clear that, where the subsequent use is to prove the actual elements of a criminal offense, *Nichols* is of questionable applicability, given that Court's emphasis on the differences between sentencing and guilt determinations.

Id.

Nevertheless, the *Cavanaugh* court relied on *Nichols* in reasoning, "As per *Nichols*, then, we believe it is necessary to accord substantial weight to the fact that Cavanaugh's prior convictions involved no actual constitutional violation." *Id*. at 603-04. Calling its logic "categorical in nature rather than firmly rooted in the

reliability concerns expressed in *Gideon*", the court ultimately held "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." *Id*. at 605.

In reaching this conclusion, the court discussed and dismissed as "difficult, if not impossible, to reconcile with one another, two additional cases," *Lewis v. United States*, 445 U.S. 55, 67 (1980), and *United States v. Mendoza–Lopez*, 481 U.S. 828, 107 (1987). *Id*. at 602-603.

ii. The Tenth Circuit wrongly held that because the Bill of Rights does not constrain Indian tribes, a defendant's prior uncounseled tribal convictions could not violate the Sixth Amendment.

Just weeks after the Eighth Circuit decided *United States v. Cavanaugh*, the Tenth Circuit produced an opinion in *United States v. Shavanaux*, 647 F.3d 993 (10th Cir. 2011).. There, the defendant was a member of the Ute Indian Tribe and lived on the Uintah and Ouray Reservations within Utah. In 2010, Shavanaux was indicted under 18 U.S.C. § 117(a) for assaulting his domestic partner after having been convicted of assaulting a domestic partner on two prior occasions. *Id*. at 995. Ruling upon his motion to dismiss, the district court held "Shavanaux's two convictions for aggravated assault do not violate either the Indian Civil Rights Act or the United States Constitution," but the use of those otherwise-valid tribal court convictions in

a § 117(a) prosecution would violate the Sixth Amendment right to counsel. *Id*. at 996.

On appeal from the district court ruling, the Tenth Circuit held "use of Shavanaux's prior convictions in a prosecution under § 117(a) would not violate the Sixth Amendment, anew or otherwise." *Id*. at 998. Moreover, "tribal convictions obtained in compliance with ICRA are necessarily compatible with due process of law." *Id*. at 1000.

The Tenth Circuit recognized that its holding was "at odd's with the Ninth Circuit" in *United States v. Ant*. *Id*. at 997. The court explained, however, that in its view, this Court, as well as the Eighth Circuit in *Cavanaugh*, overlooked the fact that because the Bill of Rights does not constrain Indian tribes, as described in *Talton v. Mayes*, 163 U.S. 376, 382–85 (1896), a defendant's prior uncounseled tribal convictions could never violate the Sixth Amendment. *Id*. at 998. Therefore, "[u]se of tribal convictions in a subsequent prosecution cannot violate "anew" the Sixth Amendment, see *Burgett*, 389 U.S. at 115, 88 S.Ct. 258, because the Sixth Amendment was never violated in the first instance." *Id*.

The court then addressed whether "under the Due Process Clause of the Fifth Amendment, prior convictions which were obtained through procedures which did not comply with, but also did not violate, the Constitution may be introduced in

subsequent prosecutions in federal court." *Id*. at 998. It turned to law governing the treatment of comity for foreign judgments, recognizing that tribes are different. It observed that the defendant's convictions followed ICRA, and held that the convictions were, therefore, "necessarily compatible with due process of law" unless it was vacated by a habeas proceeding. *Id*. at 1000.

iii. This Court should not follow the unpersuasive out of circuit precedent that rests on questionable rationale and contradicts existing Ninth Circuit law.

This Court need not follow the Eighth Circuit in placing the technical, categorical violation over the reliability concerns firmly rooted in *Gideon* and named in *Alabama v. Shelton*, 535 U.S. 654, 667 (2002). As the Eighth Circuit very openly recognized in *Cavanaugh*, its decision rested rather unsteadily on unclear signals from the United States Supreme Court. And as the *Cavanaugh* dissent urged, the Ninth Circuit's decision in *United States v. Ant* is persuasive. *Cavanaugh*, 643 F.3d at 607 (Bye, J., dissenting).

Moreover, the Eighth Circuit decision inexplicably relies heavily on *Nichols,* a sentencing case, in reaching its conclusion. As the Eighth Circuit, and *Nichols* itself point out, a sentencing context is unique: "reliance on such a conviction is also consistent with the traditional understanding of the sentencing process, which we

have often recognized as less exacting than the process of establishing guilt." *Nichols*, 511 U.S. at 747. Mr. Bryant urges that this context is far different.

Perhaps surprisingly, the Sentencing Guidelines provide an alternative framework for putting into focus the issue before this Court because they illustrate both recognition of the right to counsel and the conclusion that sentencing is treated differently than other stages of the criminal justice process. The Guidelines have adopted policies that recognize the problematic nature of uncounseled misdemeanors and tribal court adjudications. More specifically, USSG § 4A1.2, the Sentencing Guideline discussing the use of prior sentences in increasing a term of imprisonment, will not count sentences resulting from tribal court convictions. And the Sentencing Guidelines count a prior uncounseled conviction misdemeanor only "where imprisonment was not imposed." USSG §4A1.2, Comment. Background; *United States v. Ortega*, 94 F.3d 764, 771 (2d Cir. 1996) (holding that §4A1.2 "excludes from criminal history computations all uncounseled misdemeanor sentences of imprisonment"); see also USSG App'x C, Amend. 353 (explaining that this commentary to §4A1.2 was added to clarify "the circumstances under which prior sentences are excluded from the criminal history score"). While the sentencing guidelines do not allow criminal history points to be assessed for tribal court convictions, they do allow a court to find that a criminal history score is understated

because of a significant tribal court record. See § 4A1.3 (Adequacy of Criminal History Category).

These policies are interesting to consider in this appeal, because they express a fundamental understanding about the right to counsel: no matter whether the problem is with the reliability of such convictions or with the potential or categorical Constitutional concerns; uncounseled cases must be recognized as different.

Given the Eighth Circuit's own recognition that minds may differ given the patchwork nature of law in this area, coupled with its reliance on a sentencing case, this Court should reach a conclusion different from the holding in *United States v, Cavanaugh*. The Ninth Circuit should stand uncompromising in its protection of a defendant's Sixth Amendment right to counsel when he is pulled into the federal court.

Nor should this Court ignore its own precedent in order to adopt the rationale offered by the Tenth Circuit. Instead Mr. Bryant urges this Court to use as its starting point *United States v. Ant*, where, as discussed above, this Court suppressed an uncounseled tribal court plea because the defendant was not provided the opportunity for court-appointed counsel in tribal court and thus the proceedings did not meet constitutional requirements. *Ant*, at 1395–96. While there are permissible uses of tribal convictions in federal court, section 117(a) goes beyond their historical use.

There is a difference between making someone a criminal and giving a criminal a more harsh penalty. While certain convictions can be used to enhance the punishment for someone already convicted of a crime, see *Nichols v. United States*, 511 U.S. 738 (1994), this is quite different from the nature of the habitual offender statute.

The uncounseled tribal court convictions in the present case are being used to prove an essential element of a federal crime. They are not being offered for purposes of sentencing enhancement, for purposes of impeachment, or as evidence under Fed.R.Evid. 404(b). There is no situation in which a party could introduce evidence obtained in violation of the United States Constitution and allow it to be offered as substantive evidence to prove an essential element of a federal offense. Adherence to the requirements of the United States Constitution is just as compelling as the circumstances in *Ant*. To permit a conviction that violates the Sixth Amendment to be used against a person to support guilt for another offense would erode the very principle set forth in *Gideon*.

II. Allowing Native Americans to be prosecuted in federal court based on uncounseled tribal convictions violates Equal Protection.

In addition to violating the Sixth Amendment and Due Process, the statute violates the Equal Protection Clause of the United States Constitution because it

deprives a certain class of citizens of their constitutional right to have counsel appointed based on their race, ethnic origin and political class.

This statute should be found to violate equal protection because it differs from protective legislation or regulatory actions meant to aid Native Americans that have survived equal protection challenges. One such case is *Morton v. Mancari*, 417 U.S. 535, 554-555 (1974). In that case, the United States Supreme Court applied a rational basis test to uphold an employment preference for Indians in the Bureau of Indian Affairs. The "special treatment" at issue was preferential hiring within the Bureau of Indian Affairs, which was justified as being "reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups." *Id*. at 554.

As one Ninth Circuit case commented,

> Legislation that relates to Indian land, tribal status, self-government or culture passes *Mancari*'s rational relation test because "such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions." *United States v. Antelope*, 430 U.S. 641, 646, 97 S. Ct. 1395, 1399, 51 L. Ed. 2d 701 (1977). As "a separate people," Indians have a right to expect some special protection for their land, political institutions (whether tribes or native villages), and culture.

Williams v. Babbitt, 115 F.3d 657, 664 (9th Cir. 1997). The Court further explained, "[w]hile *Mancari* is not necessarily limited to statutes that give special treatment to

Indians on Indian land, we do read it as shielding only those statutes that affect uniquely Indian interests." *Id*. at 665.

As hinted at in this Court's comments in *Williams v. Babbitt*, it is one thing to give preferential treatment within an agency whose mission is to improve the lives of Native Americans in this country. It is a much different thing to deprive members that class-- because of their race, or even political unit--of the most important benefit this country offers: the protection of the Constitution. Had Congress passed legislation that gave "special treatment" to the victims of domestic violence on an Indian reservation, that benefit would undoubtedly survive equal protection analysis under *Mancari*.

Rather than giving Indians special treatment to foster self-government, Congress has singled out Indian defendants who are already disadvantaged by the lack of appointed counsel in the first place and then subjected them to enhanced penalties in federal court outside of those tribal governments. For this reason the habitual offender statute should not withstand testing under the Equal Protection Clause of the United States Constitution.

The statute and resultant claim now before the Court should also be distinguished from that resolved in *United States v.*, 430 U.S. 641 (1977). In *Antelope*, the Court considered whether a federal murder prosecution of an Indian for

a crime that occurred on tribal land violated Equal Protection because a non-Indian could not have been prosecuted under that statute. In summary, the Court held that the statute did not discriminate against Indians because it applied equally to any defendant who committed the offense in a federal enclave. The Court noted that the defendants were "subjected to the same body of law as any other individual, Indian or non-Indian, charged with first-degree murder committed in a federal enclave." *Id*. at 648. The Court concluded: "Under our federal system, the National Government does not violate equal protection when its own body of law is evenhanded, regardless of the laws of States with respect to the same subject matter." *Id*. at 649.

In contrast to the generally-applicable statute at issue in *Antelope*, the statute at issue here was enacted to address the serious problem of domestic violence in Indian country. Although § 117(a) on its face applies to any domestic violence committed on a federal enclave, the legislative history makes clear that this statute was not adopted as a statute of general applicability but was specifically targeted towards Native Americans. Moreover, given the widespread recognition in state and federal courts that the Sixth Amendment requires appointment of counsel even in misdemeanors where jail is possible, the possibility that a defendant's prior convictions will be uncounseled rests exclusively with Indians. It is highly unlikely that a person of any other race or class will be prosecuted under § 117(a) based on

uncounseled prior misdemeanors. And it is a legal certainty that they will not be charged based on uncounseled tribal convictions. Yet Indians across the country are being charged with violations of § 117(a) based on uncounseled tribal convictions. This cannot survive strict scrutiny or a rational basis test.

Given the important nature of the right to counsel, there is not even a rational basis to use an uncounseled tribal conviction in federal court. As the Supreme Court has stated, under rational basis review:

> the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

Nordlinger v. Hahn, 505 U.S. 1, 11–12 (1992) (citations omitted). Here, while recognizing the unique status of tribes and tribal sovereignty, Indians should not be accorded less than the minimum protections guaranteed by the Constitution. After all, Indians indicted under the Indian Major Crimes Act enjoy the same procedural benefits and privileges as all other persons within federal jurisdiction, so should they under 18 U.S.C. § 117.

And as empirical support for this claim, the relatively newly enacted Tribal Law and Order Act of 2010 increased tribal court sentencing authority--from $5000 in fines and one-year maximum imprisonment under ICRA--to $15,000 in fines and

three-years imprisonment per offense where certain heightened constitutional protections are met. Tribal Law and Order Act of 2010 §234(a), 124 Stat. at 2279-80 (codified at 25 U.S.C. §1302(a)(7)(D), (c)(1)-(3) (Supp. IV 2010)). Defendants, however, must be afforded "the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution . . . ." *Id*. This change allows the inference that lack of counsel accorded previously provided unequal treatment.

A finding that this statute violates the Equal Protection Clause not only adheres to the protections guaranteed to individual citizens by the Constitution but puts all defendants indicted under 18 U.S.C. § 117(a) on the same playing field. As it stands now, Indians are the only group of defendants that could face conviction under 18 U.S.C. § 117(a) as a result of underlying convictions for which they had no right to court-appointed counsel. See Troy Eid & Carrie Doyle, Separate but Unequal: The Federal Criminal Justice System in Indian Country, 81 U. Colo. L. Rev. 1067 (2010) (arguing that constitutional "first principles" call for reforms to ameliorate the discrimination against Native Americans under the federal criminal justice system).

VII. CONCLUSION

"[A]n indictment sought under a statute that is unconstitutional on its face or as applied will also be dismissed. See *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995)." *United States v. Mayer,* 503 F.3d 740, 747 (9th Cir. 2007). For all the above reasons, in particular the reasoning the Ninth Circuit employed in *United States v. Ant* , this Court should find § 117(a) to be unconstitutional.

RESPECTFULLY SUBMITTED this 31st day of August, 2012.

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VIII. CERTIFICATE OF COMPLIANCE

I hereby certify that this Opening Brief of Defendant-Appellant is in compliance with Ninth Circuit Rule 32(a). The Brief's line spacing is double spaced. The brief is proportionately spaced, the body of the argument has a Times New Roman typeface, 14 point size and contains less than 14,000 words at an average of 280 words (or less) per page, including footnotes and quotations. (Total number of words: 6,761excluding tables and certificates).

DATED this 31st day of August, 2012.

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IX. STATEMENT OF RELATED CASES

The undersigned, counsel of record for the Defendant-Appellant, certifies, pursuant to Rule 28-2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, that to his knowledge there are no related cases.

DATED this 31st day of August, 2012.

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X. CERTIFICATE OF SERVICE
Fed.R.App.P. 25

I hereby certify that on August 31, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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