Ninth Circuit Court of Appeals No. 12-30177
District Court Number CR-11-70-BLG-JDS

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
v.

MICHAEL BRYANT, JR.,

Defendant-Appellant.

SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT

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

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UNITED STATES DISTRICT COURT JUDGE, PRESIDING

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SUBMITTED: January 27, 2014

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I. INTRODUCTION

In his initial briefing, Defendant Appellant Michael Bryant, Jr., raised the following questions on appeal:

> 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?

After the parties fully briefed the case, this Court stayed consideration of the appeal pending the issuance of the mandate in *United States v. First*, 731 F.3d 998 (9th Cir. 2013). This Court ordered the filing of supplemental briefs within 30 days of the mandate in *First*, "discussing the effect of *First* on the present appeal". The mandate issued December 26, 2013.

Although *First* is not on all fours with this case due to the different statutory schemes governing the questions presented, significant aspects of the reasoning in *First* support Mr. Bryant's arguments on appeal. Indeed, like in *First*, where the tribal court conviction at issue would have violated the Sixth Amendment if it had been brought in state or federal court, Mr. Bryant had been convicted under circumstances that would have violated the Sixth Amendment. *See* ER 62; PSR ¶ 81. The relevance of *First* to this case can be summarized by three important points and will be articulated more fully below:

First, the Court clarified that *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989) has "continued vitality." *First*, 731 F.3d at 1008 n.9. The Court reiterated the standard in this Circuit that, "*Ant* stands for the general proposition that even when tribal court proceedings comply with ICRA and tribal law, if the denial of counsel in that proceeding violates federal constitutional law, the resulting conviction may not be used to support a subsequent federal prosecution." *Id.*

Second, the Court's analysis of *Lewis v. United States*, 445 U.S. 55 (1980) simultaneously showed why *Lewis* is distinguishable from Mr. Bryant's case and also reaffirmed the general rule that where denial of counsel in a proceeding could violate federal constitutional law, the resulting conviction may not be used to support a subsequent federal prosecution. *First*, 731 F.3d at 1008. *Lewis*, this Court explained, was an exception to this general rule. *Id*.

Third, the specific language and analysis of the statutory construction in *First* has limited, if any, applicability to the statute at issue in Mr. Bryant's case. The *First* decision, therefore, that the right to counsel refers to the "right to counsel that existed in the underlying domestic violence misdemeanor proceeding," does not control the outcome here. *Id.* at 1006. By contrast to the key importance of the statutory construction of the statute in *First*, the issues raised here do not require a textual analysis, rather they offer a Constitutional challenge.

II. BACKGROUND

Lakota Thomas First was indicted under 18 U.S.C. § 922(g)(9), which makes it unlawful for a person convicted of a "misdemeanor crime of domestic violence" to possess a firearm. *First*, 731 F.3d at 1000-1001. After the district court dismissed the indictment on Sixth Amendment grounds, the government appealed. *Id*. at 1001. The issue before the Court concerned "whether a conviction for a misdemeanor crime of domestic violence that was validly obtained in tribal court, under circumstances that would have violated the Sixth Amendment in state or federal court, may qualify as the predicate misdemeanor offense for a prosecution under § 922(g)(9)." *Id*. at 1003.

The Court first examined the statutory language of the gun prohibition. The relevant statutes defined misdemeanor crime of violence as an offense that "is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, [domestic violence]. . . ." *Id*. at 1003 (citations ommitted). They also explained, "[a] person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless . . . the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case." 18 U.S.C. § 921(a)(33).

The Court held "the "right to counsel" in § 921(a)(33)(B)(i)(I) refers to the

right to counsel that existed in the underlying domestic violence misdemeanor proceeding." *Id*. at 1006-07. It reached this conclusion based on the plain language of the statute as well as the legislative history. It further reasoned that Congress would have been aware "that by including tribal court convictions in § 921(a)(33)(A), it was allowing convictions obtained without constitutional protections to qualify as misdemeanors capable of triggering prosecution under § 922(g)(9)." *Id*. at 1007.

In next considering whether the statute violated the Fifth and Sixth Amendments of the United States Constitution, the Court recognized the continued vitality of *United States v. Ant*, but concluded that the case was controlled by *Lewis v. United States*. *Lewis* held that a prior conviction, flawed because the defendant lacked counsel, could serve as a predicate for a subsequent conviction under the firearms statute. *First*, 731 F.3d at 1008-1009. The Court recognized that *Lewis* dealt with the use of such a prior conviction in relation to a civil disability rather than in support of guilt or to enhance a punishment. *Id*. Concluding that the prohibition on gun possession at issue in *First* was, too, a civil firearms disability enforceable by a criminal sanction, the Court held "[t]he use of such a conviction to trigger the 'civil disability' of possessing a firearm does not violate the Sixth Amendment, the Due Process Clause of the Fifth Amendment, nor the Equal Protection Clause of the Fourteenth Amendment." *Id*.

III. ARGUMENT

1. It is the vital law of this Circuit after *United States v. First,* that "even when tribal court proceedings comply with ICRA and tribal law, if the denial of counsel in that proceeding violates federal constitutional law, the resulting conviction may not be used to support a subsequent federal prosecution."

First affirms the holding in *United States v. Ant*, 882 F.2d 1389, 1395 (9th Cir. 1989), that it is impermissible to use a prior, uncounseled, tribal-court guilty plea to prove the underlying facts for a subsequent federal conviction, has "continued vitality." *First*, 731 F.3d at 1008 n.9. Mr. Bryant discussed the importance of *Ant* in his opening and reply briefs, thus the affirmation of the continued vitality of *Ant* in this Circuit puts to rest any legal argument that the precedent has somehow been weakened. *Ant* continues to be a strong, valid, legally binding statement by this Court that forms an underlying principle required to analyze the habitual offender statute.

The relevance of *Ant* has even been recognized by the only two Circuits to have decided the issues presented in Mr. Bryant's case. *United States v. Shavanaux*, 647 F.3d 993 (10th Cir. 2011), noted the relevance of this Court's decision in *Ant*. *Shavanaux* concluded "because the Bill of Rights does not apply to Indian tribes, tribal convictions cannot violate the Sixth Amendment," but "[i]n reaching this conclusion, we recognize we are at odds with the Ninth Circuit," citing *Ant*. *Shavanaux*, 647 F.3d at 997-98. Similarly, after discussing *Ant*, the Eighth Circuit

surprisingly stated, "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." *United States v. Cavanaugh*, 643 F.3d 592, 605 (8th Cir. 2011). This Court has the power to, and should, apply *Ant* to hold 18 U.S.C. § 117(a) unconstitutional.

2. *United States v. First* reaffirms why *Lewis v. United States* is easily distinguishable from the case before this Court.

The Court in *First*, relied on *Lewis v. United States*, 445 U.S. 55 (1980) to support its decision that the statute prohibiting the possession of firearms by individuals with a conviction for domestic violence was essentially a civil disability. The Court's analysis simultaneously showed why *Lewis* is distinguishable from Mr. Bryant's case and also reaffirmed the general rule that where denial of counsel in a proceeding could violate federal constitutional law, the resulting conviction may not be used to support a subsequent federal prosecution. *First*, 731 F.3d at 1008.

Lewis, this Court explained, was an exception to this general rule. The exception in *Lewis* was carved out to apply to a statute prohibiting certain individuals from possessing firearms because that statute simply created a civil disability. *Id*. The Court explained, "'*Lewis* distinguished a line of cases holding that a conviction obtained in violation of the Sixth Amendment could not be used in a subsequent

prosecution to "support guilt or enhance punishment.'" *Id*. A statute creating a civil disability may be treated differently because "[e]nforcement of that essentially civil disability through a criminal sanction does not 'support guilt or enhance punishment'" and does not violate the Constitution. *First*, 731 F.3d at 1008. In its description of *Lewis, First*, clarifies the precise reasons why *Lewis* does not control this case.

Distinctively, the habitual offender statute at issue here uses prior uncounseled convictions as an element of the offense leading to a finding of guilt and subsequent punishment in federal court. The flawed prior convictions are not being offered for purposes of a civil disability, a sentencing enhancement, impeachment, or as evidence under FED.R.EVID. 404(b). To permit a conviction that would violate the Sixth Amendment to be used against a person to support guilt for another offense would erode the very principles set forth in the United States Constitution.

3. Although *United States v. First* does offer useful analytical parameters, conclusions based on statutory construction is not binding here due to the critical difference in statutory language.

Finally, the decision in *First*, that the right to counsel refers to the "right to counsel that existed in the underlying domestic violence misdemeanor proceeding," has no relevance to Mr. Bryant's case because it was substantially based on the textual reading and analysis of the statutory language "represented by counsel in the case". 18 U.S.C. § 921(a)(33); *First*, 731 F.3d at 1004-1006. Legislative history analysis, too, focused on the words "in the case" *Id*. at 1006-1007. Focusing on the text, the Court found that "in the case" modified the phrase "right to counsel" in a manner that required the court to look at the right applied "in the case." In *First*, the analysis therefore reflected the absence of a right to counsel. None of that language is present in the statute at issue here. That specific ruling in *First*, therefore, does not control the decision to be made here, under a different statute.

Unlike in *First*, the issue Mr. Bryant brings is not one of statutory interpretation. He raises purely constitutional questions. This Court has the power to declare a statute void as unconstitutional. When the issue is a constitutional one, the federal courts have a role to fulfill. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since [*Marbury v. Madison*] been respected by this Court

and the Country as a permanent and indispensable feature of our constitutional system."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). "Clearly Congress could not require judicial enforcement of an unconstitutional statute." *Yakus v. United States*, 321 U.S. 414, 469 (1944).

IV. CONCLUSION

United States v. First, supports Mr. Bryant's request that this Court find 18 U.S.C. § 117(a) unconstitutional.

RESPECTFULLY SUBMITTED this 27th day of January, 2014.

MICHAEL BRYANT, JR.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to this Court's Order and Ninth Circuit Rule 32-1, this Supplemental Brief complies with the type-volume limitations in the April 24, 2013 Order, (Doc. # 29) because it contains no more than 4,000 words, excluding parts of the brief exempted by Fed.R.App.P.32(a)(&)(B)(iii). Specifically, the brief contains 1,968 words.

This brief complies with the typeface requirements of Fed.R.App.P.32(a)(5) and the type style requirements of Fed.R.App.P.32(a)(6) because this brief has been prepared in a proportionally spaced type face using Word Perfect, Version 15, in Times New Roman 14.

DATED this 27th day of January, 2014.

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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 27th day of January, 2014.

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

I hereby certify that on January 27, 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.

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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