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

SUPPLEMENTAL BRIEF OF THE UNITED STATES

MICHAEL W. COTTER
United States Attorney

LEIF M. JOHNSON
Assistant U.S. Attorney
District of Montana
U.S. Courthouse
2601 Second Avenue North
Box 3200
Billings, MT 59101
Telephone: (406) 247-4630

Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes

INTRODUCTION

On April 24, 2013, the Court ordered the parties to file simultaneous supplemental briefs "discussing the effect of [*United States v. First*, 731 F.3d 998 (9th Cir. 2013)] on the present appeal," once *First's* mandate issued, which was December 26, 2013.

First has only limited applicability to this case. First objected to the use of an uncounseled, tribal court conviction as a predicate for a later crime—as Bryant does here—but that is where the similarity ends. *First* involved a different statute—18 U.S.C. § 922(g)(9)—that allows the use of a prior, tribal court conviction only where the defendant was represented by counsel or "waived his right to counsel in the case." 18 U.S.C. 921(a)(33)(B)(i). In *First*, the question was whether the right to counsel was the full Sixth Amendment right in federal and state court, or the lesser right to retained counsel applicable in tribal courts. The statute here, 18 U.S.C. § 117(a), contains no similar limitation. It says that any person who has two prior convictions for enumerated offenses in "Federal, State, or Indian tribal court" may be convicted as a habitual offender for a domestic assault.

The question here is whether the Sixth Amendment and the Due Process Clause of the Fifth Amendment prohibit the use of uncounseled tribal court convictions as predicates for liability under § 117(a). In *First,* as here, the defendant relied on *United States v. Ant*, 882 F.2d 1389, 1395 (9th Cir. 1989), which held that it was unconstitutional to use a prior, uncounseled, tribal court guilty plea to prove the underlying facts of a subsequent federal manslaughter charge. The court in *First* held that there was an exception to that "general rule" for firearms statutes as set forth in *Lewis v. United States*, 445 U.S. 55 (1980).

Ant also has no application here. Under, *Nichols v. United States*, 511 U.S. 738 (1994), an uncounseled tribal court conviction can be used later if there was no Sixth Amendment violation. On at least two occasions, Bryant was convicted of domestic abuse in tribal court and sentenced to no prison time. Those convictions would be constitutionally valid in any court. And even where prison time was applied, the Eighth and Tenth Circuits make a compelling case that there was still no constitutional violation because the Bill or Rights does not apply in tribal court. The conviction should be affirmed.

BACKGROUND

Lakota First was convicted of possessing a firearm after having been convicted of a misdemeanor crime of domestic violence in tribal court. In the prior misdemeanor proceeding, First pleaded guilty without the benefit of counsel because he had no means to hire an attorney and none was appointed for him. *First*, 731 F.3d at 1001. He received a suspended sentence of 120 days. *Id.*

On appeal, First argued that the statutory phrase in § 921(a)(33)(B)(i) defining a prior conviction for the purposes of § 922(g)(9) as requiring that "the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case" meant that the prior conviction had to fully comport with the protections of the Sixth Amendment *even though* the Sixth Amendment does not apply in Indian country. Thus, the question in *First* was "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 a predicate misdemeanor offense for a prosecution under § 922(g)(9)." *Id.* at 1003.

In upholding the conviction, the court began by looking at the statute and its legislative history. It held that it was obligated to give meaning to the phrase "in the case." *Id.* at 1004. It found that those words modified the phrase "right to counsel" in such a way as to require adherence to whatever right to counsel existed "in the case." In tribal court, the court explained, there is no right to appointed counsel for misdemeanor crimes, only the right to retained counsel. *Id.* at 1002. Thus, the right to counsel requirement for the purposes of a § 922(g)(9) conviction may, in the tribal court circumstance, require only that the defendant be afforded, or waive, the right to retained counsel. *Id.* at 1007.

Next, the court considered whether that reading of § 922(g)(9) violated the Sixth Amendment and the Due Process Clause of the Fifth Amendment. It held that the issue was controlled by *Lewis* where the Supreme Court decided that the "[u]se of an uncounseled felony conviction as the basis for imposing a civil firearms disability, enforceable by a criminal sanction" did not violate the Sixth Amendment. *Id.* at 1008 (quoting *Lewis*, 445 U.S. 66-67).

To reach that conclusion, the Court in *Lewis* distinguished *United States v. Burgett*, 389 U.S.109, 115 (1967), where it held 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.* (internal marks omitted). Similarly, the court in *First* distinguished *Ant*, 882 F.2d at 1393, which held that if the denial of counsel in the tribal court proceeding violates principles of constitutional law, it "may not be used to support a subsequent federal prosecution." *First*, 731 F.3d at 1008 n. 9. *Lewis*, it observed, "demonstrates that the federal firearm statute is an exception from this general rule." *Id.*

Ultimately, the court in *First* found that it was "of no moment" that First had no counsel in the predicate offense. *Id.* at 1009. "The use of such a conviction to trigger the civil disability of possessing a firearm does not violate [the Constitution.]" *Id.*

ARGUMENT

First is distinguishable from this case because 1) it involved a different statutory scheme—one that allows the use of only select tribal court convictions—and 2) the tribal court conviction at issue in

First would have violated the Sixth Amendment if it had been brought in state or federal court. *See Id.* at 1001 (explaining that First received a suspended sentence of incarceration for the tribal court conviction, which would be a Sixth Amendment violation in federal court under *Alabama v. Shelton*, 535 U.S. 654, 658 (2002)).

That is not the case here. The habitual offender statute, § 117(a), broadly includes all manner of tribal court convictions to "enhance punishment." *See Burgett,* 389 U.S. at 115. It is subject to a different constitutional analysis than a gun enforcement statute. In that analysis, the key issue is whether the tribal court conviction violated the Sixth Amendment, which the convictions at issue in this case did not.

I. Congress intended to rely on uncounseled tribal court convictions in both § 117(a) and § 922(g)(9) because the Sixth Amendment does not apply in Indian country.

Regarding the *First* court's construction of § 922(g)(9) and whether Congress intended to include uncounseled tribal court misdemeanor convictions, the statute here is much broader. Section 922(g)(9) and its definitional provisions limit the use of tribal court convictions to those where the right to counsel "in the case" was

either observed or properly waived. *See First*, 731 F.3d at 1004-05. Section 117(a) contains no such limitation. It provides:

> Any person who commits a domestic assault within . . . 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 [prohibiting interstate stalking and domestic violence] [shall be guilty of an offense].

Thus, on its face, § 117(a) draws in all tribal court convictions, whether or not the right to counsel "in the case" was observed or not.

As *First* teaches, the right to counsel Indian country means only the right to retained counsel in misdemeanor proceedings. Indian tribes are not constrained by the Bill of Rights; civil rights in Indian country are protected by the Indian Civil Rights Act, 25 U.S.C. §§1302 *et seq*. *First*, 731 F.3d at 1002. A defendant in tribal court enjoys only the lesser right to his choice of retained counsel where a sentence of less than one year is imposed. *Id.*

Many of the convictions used as predicates for liability under §§ 922(g)(9) and 117(a) will be uncounseled because the defendants are

indigent and have no right to appointed counsel. *See id.* at 1007. And as the court in *First* observed, Congress knew that when it enacted the statute. *Id.* ("[W]e conclude that Congress was aware that by including tribal court convictions in § 921(a)(33)(B), it was allowing convictions obtained without constitutional protections to qualify as misdemeanors capable of triggering prosecution under 922(g)(9)."). For the same reason, Congress knew that § 117(a) would also draw in tribal court convictions obtained without counsel, even where sentences of incarceration were imposed.

II. Bryant's prior, tribal court convictions can be used where there was no Sixth Amendment violation.

On the issue of whether it was constitutional for Congress to draw in uncounseled tribal court misdemeanors for the purposes of § 922(g)(9), First argued that, under *Ant*, 882 F.2d at 1395-96, the Sixth Amendment and the Due Process clause prohibit any use of prior convictions where the denial of counsel in tribal court violated federal constitutional law. *First,* 731 F.3d at 1008 n. 9.[1] Although the court in *First* stated that it did not "question Ant's continued

[1] Ant received six months in jail. *Ant*, 882 F.2d at 1391.

vitality," it found that the Supreme Court in *Lewis*, 445 U.S. at 60, announced an exception to that "general rule." *Id.* Thus, it held that, under *Lewis*, the use of an uncounseled conviction—even an uncounseled felony conviction—could be used "as the basis for imposing a civil firearms disability, enforceable by a criminal sanction" without violating the Sixth Amendment "even when the underlying conviction did." *Id.* at 1008 (citing *Lewis*, 445 U.S. at 66-67).

Here, Bryant also raises *Ant* and suggests that this Court should apply its "general rule" in this case, even though the Eighth and the Tenth Circuits have held to the contrary. Opening Br. at 15-21. Upon closer inspection, however, this case is controlled by *Nichols,* 511 U.S. at 746, not *Ant*.

While the court in *First* did not question the "continued vitality" of *Ant,* its constitutional underpinnings have been eroded. *Ant* relied heavily on an earlier Supreme Court case called *Baldasar v. Illinois*, 446 U.S. 222 (1980), where the Court held that a "prior uncounseled misdemeanor conviction, constitutional under *Scott [v. Illinois*, 440 U.S. 367 (1979) because no penalty of imprisonment was

imposed], could nevertheless *not* be collaterally used to convert a second misdemeanor conviction into a felony under the applicable Illinois sentencing enhancement statute." *Nichols*, 511 U.S. at 743 (summarizing *Baldasar*). *Nichols* expressly overruled *Baldasar*, and held that an "uncounseled misdemeanor, valid under *Scott* because no prison term was imposed" could be used to "enhance punishment at a subsequent conviction." *Id.* at 749. That rule applies to the use of uncounseled, tribal-court convictions under § 117(a).[2]

Here, there was no violation of the rule of *Nichols* because Bryant's prior convictions were "valid under *Scott,"* that is, at least two of Bryant's prior uncounseled tribal misdemeanor convictions did not result in sentences of incarceration. Bryant has 113 prior tribal offenses. PSR ¶ 81. He was charged with domestic abuse 11 times. *Id.* Of those 11 instances of domestic abuse, he was sentenced without prison time on several occasions:

---

[2] Given the reach of *Nichols* and *Lewis, Ant's* precedential value is best limited to the circumstances it presented: where the tribal court imposed a sentence of incarceration without counsel *and* the offense involved the same criminal transaction such that "the admission of Ant's tribal court guilty plea in federal court could also be seen as tantamount to a directed verdict against him." *Ant*, 882 F.2d at 1393.

- January 30, 1998—Bryant was "released O/R -$ 500 bond;"
- July 13, 1998—Bryant forfeited bond of $870 and was released;
- March 20, 2002—Bryant got "time served" and a fine;
- February 23, 2007—Bryant received a $500 fine and 25 sessions of "anger management;"
- February 25, 2011—Bryant forfeited $3,000 and was "restrained from the victim."

Id. Thus, on at least two prior occasions, the tribal court convicted Bryant under circumstances that could not violate the Sixth Amendment *in any court*. That is enough to satisfy his conviction under § 117(a).

Section 117(a) also arguably allows the government to rely on prior uncounseled misdemeanor convictions where prison time was imposed. Under the reasoning of the Eighth and Tenth Circuits, there would still be no Sixth Amendment violation under *Nichols* where prison time was imposed because the Bill of Rights does not apply in Indian Country. *United States v. Cavanaugh*, 647 F.3d 592,

997 (8th Cir. 2011) ("[I]t is the fact of a constitutional violation that triggers a limitation on using a prior conviction in subsequent proceedings."); *United States v. Shavanaux*, 643 F. 3d 993, 998 (10th Cir. 2011) ("Use of tribal convictions in a subsequent prosecution cannot violate "anew" the Sixth Amendment because the Sixth Amendment was never violated in the first instance.") (citation omitted). To the extent the issue arises here, this Court should follow the same reasoning.

Finally, *First* addressed the Equal Protection issue raised here. It reached the same conclusion as the courts in *Cavanaugh* and *Shavanaux*: "[C]lassifications based on status as a member of a recognized Indian tribe do not violate the Equal Protection Clause." *First*, 731 F.3d at 1007 n. 8; *see Cavanaugh*, 643 F.3d at 605-06; *Shavanaux*, 647 F.3d at 1001-02. That reasoning applies with equal force in this case.

CONCLUSION

Bryant's conviction under § 117(a) should be affirmed.

DATED this 21st day of January, 2014.

Respectfully submitted,

MICHAEL W. COTTER
United States Attorney

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

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and the body of the argument contains 3,243 words.

DATED: January 21, 2014

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

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 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
LEIF M. JOHNSON
Assistant United States Attorney