Ninth Circuit Court of Appeals Number 12-30177
District Court Number CR-11-70-BLG-JDS-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
v.

MICHAEL BRYANT, JR.,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

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

HONORABLE JACK D. SHANSTROM
SENIOR UNITED STATES DISTRICT COURT JUDGE, PRESIDING

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SUBMITTED: December 13, 2012

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ARGUMENT

I. Neither the important Congressional purpose giving rise to the Restoring Safety to Indian Women Act of 2005 nor the fact that Mr. Bryant's uncounseled tribal court conviction was "valid" under ICRA provide grounds to uphold the constitutionality of 18 U.S.C. § 117(a).

The government argues that the use of a valid tribal court conviction to fulfill an element of the habitual offender statute, 18 U.S.C. § 117(a), comports with the statutory language and the statute's legislative intent. (GB 5-6). Mr. Bryant's argument, however, does not rest on statutory construction, nor does he dispute the fact the "Restoring Safety to Indian Women Act" reflects laudable goals, and was

established to address alarming findings.[1] Relevant here, "national studies indicate that Indian women experience domestic and sexual assaults at a far greater rate than other groups of women in the national population." Thus, one Congressional purpose was to "To prevent the serious injury or death of Indian women subject to domestic violence."

Mr. Bryant is fully cognizant of this legislative intent and wholly recognizes courts presume that the legislature intended to enact a constitutional law. *Mistretta v. United States*, 488 U.S. 361, 384 (1989). Nevertheless, the presumption, even coupled with an important goal, is not definitive. *C.F. United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 93 (1921) ("not forgetful of our duty to sustain the constitutionality of the statute if ground can possibly be found to do so, we are nevertheless compelled in this case to say that we think the court below was clearly right in holding the statute void for repugnancy to the Constitution."). Therefore, the fact Congress "was aware that uncounseled tribal convictions" (GB 7), would be used as an element of the newly enacted statute, does not save the law. "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table." *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

Moreover, although not relevant to the underlying analysis, voiding this statute

[1] Restoring Safety to Indian Women Act, S.987, 109th Cong, May 10, 2005.

as unconstitutional does not prevent progress towards the purposes set out in the Act. The new resources, training, jurisdictional fixes and data collection also committed to by this Act would allow strides towards the goal "[t]o prevent the serious injury or death of Indian women subject to domestic violence," because such resources would enable increased prosecution though existing statutes.[2]

II. The federal habitual offender statute violates the Sixth Amendment right to counsel and the Fifth Amendment right to due process because it permits uncounseled tribal court convictions to prove an element of the offense.

The government argues "the Supreme Court has held that prior uncounseled convictions can be considered in subsequent criminal matters so long as the convictions do not involve actual constitutional violations." (GB 9). It suggests that *Nichols v. United States* stands for this proposition. (GB 10). The Supreme Court, however, has never addressed whether an uncounseled conviction may be used as an element in a federal offense. In fact, several lines of Supreme Court cases on these issues have constructed a less than crystal clear rule of law. In addition, the

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[2]United States Code 18 section 113 prohibits assault with intent to commit murder (20 years), assault with intent to commit any felony (10 years), assault with a dangerous weapon (10 years), assault resulting in serious bodily injury (10 years) as well as other forms of simple assault. 18 U.S.C. § 113(a).

The habitual offender statute provides a penalty of five years prison and up to ten years prison if substantial bodily injury occurs. 18 U.S.C. § 117(a)(2). Substantial bodily injury is defined with reference to the assault statute at 18 U.S.C. § 113.

government's entire argument fails to register the difference between a sentencing enhancement and a finding of guilt for another offense. And, as was discussed in his opening brief, the two circuit courts wrongly decided the issue on flawed grounds and with specific disregard for Ninth Circuit law.

As mentioned, the Supreme Court has issued somewhat muddled guidance. In *Argensinger v. Hamlin*, 407 U.S. 25 (1972), the Court held that an indigent defendant must be afforded counsel in any misdemeanor case "that actually leads to imprisonment." *Id*. at 373. Seven terms later, in *Scott v. Illinois*, 440 U.S. 367 (1979), it reaffirmed and clarified this pronouncement. In *Scott*, the Court held that the right to counsel extends only to situations involving "actual imprisonment". In misdemeanor cases where the defendant is not actually sentenced to a term of imprisonment, the Sixth Amendment does not require appointment of counsel. Thus, in *Scott*, the Supreme Court established the rule that uncounseled misdemeanors are constitutionally valid, so long as they do not result in jail time. 440 U.S. at 373-74.

The "actual imprisonment" rule of *Scott* was subsequently limited in *Alabama v. Shelton*, 535 U.S. 654 (2002), which held that a suspended sentence that may "end up in the actual deprivation of a criminal defendant's liberty" may not be imposed unless the defendant was accorded the "guiding hand of counsel" in the prosecution for the crime charged. *Id*. at 666. Although *Shelton* established the contours of the

right to counsel in the first instance, it left unanswered a different, albeit related, question -- whether or how a court may make use of a prior uncounseled conviction for enhancement purposes or to prove the elements of a subsequent offense.

This question has, however, been addressed (albeit not completely) in a different line of cases. In *Burgett v. Texas*, 389 U.S. 109 (1967), the Court held that an uncounseled prior felony conviction could not be used "against a person either to support guilt or enhance punishment for another offense." *Burgett*, at 115. Subsequently, in *Baldasar v. Illinois*, 446 U.S. 222 (1980), the Court, in a fractured, per curium opinion, held that an uncounseled misdemeanor conviction that was valid under *Scott* and *Argensinger* could not be used to enhance a subsequent misdemeanor into a felony. Nearly fifteen years later, *Nichols v. United States*, 511 U.S. 738, 114 S. Ct. 1921 (1994), overruled *Baldasar*, if, as Justice Souter questioned in his concurring opinion, an overruling was even possible. 511 U.S. at 750 (Souter, J., concurring).

In *Nichols*, the defendant plead guilty to federal felony drug charges. Several years earlier, he was fined but not incarcerated for a state misdemeanor DUI. He was not represented during his DUI proceedings in state court. The DUI conviction was later used to calculate his sentence under the Sentencing Guidelines following his conviction for the federal drug charges. As a result of the extra criminal history point

attributed to the DUI conviction, the defendant was subject to a sentence "25 months longer than if the misdemeanor conviction had not been considered." *Nichols*, 511 U.S. at 741. The Supreme Court upheld the use of the DUI, concluding that "an uncounseled misdemeanor conviction valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." *Nichols*, 511 U.S. at 749.

Here, we are trying to glean from these cases an answer to whether an uncounseled tribal court misdemeanor conviction which led to the deprivation of liberty may be used as an element in a federal felony conviction. The government suggests *Nichols* holds the plain answer. *Nichols*, however, is distinguishable on important factual and procedural grounds. Unlike Mr. Nichols who received a sentence of a fine, Mr. Bryant received jail time for at least some of his prior convictions, thus engaging the holding in *Scott*.[3] Mr. Bryant's uncounseled tribal

[3] Mr. Bryant was sentenced to jail for several of his prior tribal court convictions. *See* ER 62; PSR paragraph 81: Case No. 426-97 offense domestic abuse, sentence 30 days and $500 fine, etc.; Case No. CRC 716-98 offense domestic abuse, sentence $1000 fine; 60 days flat suspended for 25 days barterer education; Case No. 1367-99, offense domestic abuse, sentence $1500 fine, 60 days flat, 25 sessions barterer education; Case No. 1452-02, offense domestic abuse, sentence 6 months flat-credit for time served, $2500 fine, 1 year probation, etc.; Case No. 2167-03, offense domestic abuse, sentence $5000 fine, 1 year jail, 25 sessions anger management.

convictions would have been unconstitutional had they been in state or federal court.[4] Moreover, unlike in *Nichols*, the uncounseled prior convictions here are not being used as a single factor among many in a sentencing consideration, but as an element of the offense. *Nichols* itself acknowledged such a distinction, reasoning,

> Reliance on [an uncounseled] 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. As a general proposition, a sentencing judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.

Nichols, at 748 (quotations and citations omitted). Thus, *Nichols*, does not squarely address the issue now before this Court. The question is simply unsettled with the Supreme Court issuing numerous, sometimes conflicting comments. Arguably, however, when considered together, *Scott*, *Shelton* and *Nichols* stand for the principle that uncounseled misdemeanor convictions which resulted in a sentence of imprisonment or the imposition of a suspended sentence may not be used for

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[4] Mr. Bryant did not receive appointed counsel. The government did not dispute this below. According to the Northern Cheyenne Law and Order Code, defendants in criminal prosecutions shall have "The right to be present throughout the proceeding and to defend himself in person, by lay counsel or professional attorney **at his own expense**." 1998 Law and Order Code of the Northern Cheyenne Tribe, Title V. Rules of Criminal Procedure, Rule 22 (emphasis added).

Mr. Bryant would have been deemed eligible for counsel. See PSR ¶¶ 97-101, and ¶¶ 103-108 (From 1996-2010 the defendant did odd jobs for his sister and mother receiving approximately $289 per month, among other low paid odd jobs over the years).

collateral purposes because they are constitutionally invalid under *Scott* and *Shelton*.

The government then turns to the distinct reasoning embraced by the Eighth and Tenth Circuit in deciding this question. But as Mr. Bryant discussed fully in his opening brief, those courts tolerated large gaps in logic to reach their conclusions. For example, *United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011) recognized "*Nichols* is of questionable applicability, given that Court's emphasis on the differences between sentencing and guilt determinations" yet surprisingly *Cavanaugh* still relied on it. *Cavanaugh*, 643 F.3d at 601.

The government explains that tribal convictions can never violate the constitution because the Sixth Amendment has not been incorporated against the Indian tribes. (GB at 14). The United States Constitution, however, must not so easily be avoided on those terms, where the person convicted in federal court is also a citizen of the United States and subsequently is pulled into federal court. C.F. *Small v. United States*, 544 US 385, 389 (2005) (reaching holding on grounds of statutory construction, but concluding foreign convictions will not fulfill element of "convicted in any court" for felon-in-possession-of-firearm statute and reasoning "foreign convictions differ from domestic convictions in important ways" including that "a conviction [may be] from a legal system that is inconsistent with an American understanding of fairness."). Mr. Bryant is not now arguing that the Sixth

Amendment must apply to Indian Tribes, rather the tribal conviction requires additional scrutiny when used as an element of a federal offense.

While the Supreme Court's decisions leave a vague path, this Court's decision, *United States v. Ant,* is applicable here and has not been overruled. In *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989), the defendant was charged with a tribal offense of assault and battery after confessing to tribal authorities that he killed his niece. Following his confession, he was taken to tribal court where he entered a guilty plea. He was later charged in federal court with the crime of voluntary homicide. He moved to suppress his confession and his tribal court guilty plea on the ground that they were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The court granted his motion to suppress the confession, but denied his request to suppress the guilty plea. Ant renewed his motion to suppress the guilty plea on the ground that it was obtained in violation of his Sixth Amendment right to counsel. The district court denied the renewed motion, finding that the guilty plea proceedings were consistent with both tribal law and the ICRA.

The issue presented on appeal was "whether an uncounseled guilty plea, made in tribal court in accordance both with tribal law and the ICRA, but which would have been unconstitutional if made in a federal court, can be admitted as evidence of guilt in a subsequent federal prosecution involving the same criminal acts." *Ant*, 882 F.2d

at 1391. In determining that Ant's guilty plea was inadmissible, the Ninth Circuit noted that it was not made pursuant to a valid waiver of his constitutional right to counsel. In particular, there was nothing in the record to establish that he waived his rights and entered his guilty plea "knowingly and intelligently, with an understanding of the charges, the possible penalties, and the dangers of self-representation." *Ant*, 882 F.2d at 1394. Ant's plea, if it had been made in federal court under identical circumstances, would not be admissible in a subsequent federal proceeding. The fact that the guilty plea had been made in tribal court made no difference. Although the guilty plea was made in compliance with tribal law and with the ICRA, it was not admissible in the later federal prosecution. *Ant*, 882 F.2d at 1395.

In *Ant*, the government argued that failure to admit the guilty plea would violate principles of comity and disparage the tribal court proceedings, but this Court dismissed its argument as novel. The principle of federal-tribal comity, it noted, had generally been limited to prevent direct attacks on tribal court proceedings in federal courts, and to require exhaustion of tribal remedies before going to federal court. The question surrounding the admissibility of Ant's guilty plea did not implicate either of these concerns. The question, rather, was whether the plea met the requirements of the United States Constitution for use in prosecution in federal court. Because the tribal guilty plea did not meet these requirements it was not admissible in Ant's

federal prosecution, notwithstanding the fact that it was valid under tribal law and the ICRA. *Ant,* 882 F.2d at 1396.

Ant has not been overruled. Mr. Bryant's conviction may have been validly obtained under tribal law and the ICRA. This does not mean that it is admissible in a subsequent prosecution to establish his guilt of a federal crime. There is no indication that Mr. Bryant knowingly and intelligently waived his right to counsel prior to entering his guilty plea and, therefore, the resulting conviction cannot, consistent with the holding of *Ant,* be used to establish his guilt of the instant offense.

As *Ant* suggested, principles of comity do not require a different result in evaluating the question of due process. The Tenth Circuit in *United States v. Shavanaux*, 647 F.3d 993, 998 (10th Cir. 2011) relied on the Restatement (Third) of Foreign Relations § 482 (1987) ("the Restatement") to consider the idea of comity and due process. The Restatement lists two grounds upon which a court in the United States must refuse to recognize the judgment of a foreign court: (1) "the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law"; or (2) "the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 421." Restatement (Third) of Foreign Relations, § 482(1). The Tenth Circuit found that because the uncounseled

conviction was appropriate under ICRA it was necessarily compatible with the due process of law. *Id*. at 999. That court, however, failed to appropriately apply the balancing test inherent within such a comity analysis: recognizing sovereignty, balanced against ensuring that American courts only enforce judgments that comport with fundamental due process. The right to counsel is a fundamental component of due process. While the original conviction did not itself violate the constitution, the subsequent use of the conviction did.

The bottom line is that there is no clear Supreme Court guidance on this issue. This Court should therefore adhere to its precedent in *United States v. Ant*, and by so doing affirm the rights highlighted in *Gideon v. Wainwright*. Even if some rationale given in *Ant* is no longer sound, a careful analysis of this issue requires the result urged. To 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.

CONCLUSION

For the reasons asserted here and in his opening brief, Mr. Bryant respectfully urges this Court to find 18 U.S.C. § 117(a) to be an unconstitutional violation of the Sixth Amendment. In the alternative and resting on the argument made in his opening brief, Mr. Bryant urges the statute be found to violate the Fifth Amendment equal protection clause.

RESPECTFULLY SUBMITTED this 13th day of December, 2012.

MICHAEL BRYANT, JR.

s/Steven C. Babcock

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply 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 7,000 words at an average of 280 words (or less) per page, including footnotes and quotations. (Total number of words: 2,894 excluding tables and certificates).

DATED this 13th day of December, 2012.

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STATEMENT OF RELATED CASES

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

DATED this 13th day of December, 2012.

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

I hereby certify that on December 13, 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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