

No. 14-30109

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

WILLIAM TAYLOR KIRKALDIE
DEFENDANT-APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
D.C. No. CR-14-12-GF-BMM

OPENING BRIEF OF THE UNITED STATES

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TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities.....	ii
Statement of Jurisdiction	1
Statement of the Issue.....	1
Statement Regarding Oral Argument	1
Statement of Case and Argument	2
Conclusion	2
Statement of Related Cases.....	4
Certificate of Compliance.....	5
Certificate of Service	6

TABLE OF AUTHORITIES

Cases

<i>United States v. Bryant</i> , 136 S. Ct. 1954 (2016).....	1, 2
---	------

Statutes

18 U.S.C. § 117.....	1
18 U.S.C. § 117(a)	2
18 U.S.C. § 3231.....	1
28 U.S.C. § 1291.....	1

Federal Rules

Fed. R. App. P. 32(a) (7) (C).....	5
Fed. R. App. P. 34(a).....	1

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291. The district court entered its order dismissing the indictment on May 22, 2014. ER 1-21. The United States filed a timely notice of appeal on June 5, 2014. ER 29 (Doc. 40).

STATEMENT OF THE ISSUE

United States v. Bryant, __ U.S. __, 136 S. Ct. 1954 (2016), sanctioned the use of tribal court convictions in a prosecution under 18 U.S.C. § 117 in federal court to prove the element that the defendant has two previous convictions for domestic assault. The district court's order, which held that the use of tribal court convictions in a § 117 prosecution violates the Sixth Amendment's right to counsel, is contrary to the controlling authority of *Bryant*. Consequently, the United States requests that this Court remand the case back to the district court for further proceedings.

STATEMENT REGARDING ORAL ARGUMENT

Under Federal Rules of Appellate Procedure 34(a), the United States advises the Court of its view that oral argument is unnecessary because the case is controlled by *Bryant*.

STATEMENT OF CASE AND ARGUMENT

In February 2014, Kirkaldie was charged in a one-count indictment with a violation of 18 U.S.C. § 117(a), domestic assault by a habitual offender. ER 22-23. Kirkaldie filed a motion to dismiss the indictment, and the district court granted that motion, holding that the use of tribal court convictions in federal court to prove an element of the offense violates the Sixth Amendment right to counsel. ER 1-21.

Subsequent to the district court's order, the United States Supreme Court decided *United States v. Bryant*, ___ U.S. ___, 136 S. Ct. 1954 (2016). In *Bryant*, the Court considered the same question raised by this appeal – whether the use of tribal court convictions in a § 117 prosecution in federal court violates the Sixth Amendment's right to counsel. *Id.* at 1961-62. The Court held, contrary to the district court in its order dismissing the indictment, that the use of tribal court convictions in a § 117 prosecution does not violate the Sixth Amendment's right to counsel. *Id.* at 1966.

CONCLUSION

Therefore, under the controlling authority of *Bryant*, this Court should remand to the district court for further proceedings.

DATED this 23rd day of August, 2016.

Respectfully submitted,

MICHAEL W. COTTER
United States Attorney

s/ Lori Harper Suek

LORI HARPER SUEK
Assistant United States Attorney

STATEMENT OF RELATED CASES

United States v. Rodney Tommie Stewart, CA 14-30108 raises the same issue as in this appeal.

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 376 words.

DATED: August 23, 2016

s/ Lori Harper Suek

LORI HARPER SUEK

Assistant United States Attorney

CERTIFICATE OF SERVICE

I certify that on August 23, 2016, 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.

s/ Lori Harper Suek
LORI HARPER SUEK
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