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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

USCA No. 16-3397

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL LEE LONG, JR.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION
HONORABLE ROBERTO A. LANGE
UNITED STATES DISTRICT COURT JUDGE

APPELLANT'S REPLY BRIEF

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I. Long's tribal court domestic abuse conviction is excluded from the federal definition of "misdemeanor crime of domestic violence."

Long's domestic abuse conviction is excluded from the definition of "misdemeanor crime of domestic violence" because he was neither represented by counsel nor waived the right to counsel in the tribal case. See 18 U.S.C. § 921(a)(33)(B)(i)(I). The government's arguments to the contrary are unavailing.

A. Long was not represented by a licensed attorney in the tribal court proceeding.

Long was not represented by a licensed attorney in the tribal court case. The government's argument that Long failed to meet his burden of production on this question is unavailing. It was undisputed that Long's tribal advocate was not law-trained and was not a licensed member of the state bar. She was not, in other words, "counsel." Long offered to and was prepared to provide testimony regarding the tribal advocate's status, but the district court decided to make a ruling based on the tribal court record and the undisputed information provided at the hearing instead. Under these circumstances, Long cannot be said to have failed to carry his burden of production.

Lisa White Pipe acted as Long's advocate in the tribal court case. This was undisputed. PCH 22-23. White Pipe was not law-trained or licensed as an attorney. PCH 19. This was also undisputed:

> THE COURT: Okay. Is it true she acts as a tribal defender as being a lay advocate and is not law trained?
>
> [AUSA]: I was not previously aware of that, Your Honor. I actually don't know the answer to that.
>
> THE COURT: Okay. If she is a lay advocate who isn't law trained does she qualify as counsel within the meaning of that statutory language?
>
> [AUSA]: Well, Your Honor, if that's true I believe that that – if that's the case that she works under the authority of the – of the public defender at Rosebud.
>
> THE COURT: Is there a public defender at Rosebud who is law trained?
>
> [AUSA]: I believe there is, Your Honor. But I don't have that information in front of me.
>
> THE COURT: That would make it difficult for the Court to rule in your favor at this point.
>
> [AUSA]: I understand, Your Honor.
>
> THE COURT: And Mr. Turner probably wants not to speak if there is in fact a law trained federal public defender at Rosebud we should all know. I don't know if there is or not.
>
> MR. TURNER: What I do know is that my client was represented by Lisa White Pipe and that she has – that I would proffer to this Court

> that I finally got a call back this morning and her – somebody else in the office said she is not a law school graduate; she is an advocate.
>
> THE COURT: All right. I imagine we can all look in our state bar directory under Rosebud and perhaps see. Maybe they live in Martin or wherever else.
>
> MR. TURNER: She's not listed in Rosebud. She's not in alphabetical either. I checked that out too.
>
> [AUSA]: I did look at that as well, Your Honor. That is true. . . .

PCH 20-21.

In this exchange, the district court impliedly proposed using the state bar directory to determine whether White Pipe was a licensed attorney. Neither party objected. Both parties agreed that White Pipe was not listed in the bar directory. In other words, both parties agreed that White Pipe was not a licensed attorney. The government cannot now claim that Long failed to meet his burden of establishing that he was not represented by counsel in the tribal case. A party cannot complain about invited error on appeal. *United States v. Jewell*, 614 F.3d 911, 919-20 (8th Cir. 2010) ("The doctrine of invited error applies when the trial court announces its intention to embark on a specific course of action and . . . counsel specifically approves of that course of action." (internal quotation omitted)).

Moreover, defense counsel repeatedly attempted to present testimony regarding Long's representation (or not) in the tribal case. First, counsel proposed calling Long to lay the groundwork for what happened in tribal court:

> MR. TURNER: It is my understanding that the threshold determination of whether or not that is a crime of misdemeanor violence is for the Court. And, you know, I – I could have my client testify about who represented him and if we're going to have a hearing on this I can get –

PCH 22. But the district court noted that there was no dispute that Long's advocate was White Pipe. PCH 22-23. Defense counsel also proposed having White Pipe testify about whether she was a law-trained, licensed attorney:

> MR. TURNER: And I could certainly have her testify by phone or something to say that she's not an attorney.

PCH 23. The district court elected to take the matter under advisement and review the tribal court record (submitted by the government as Exhibits 1 through 7)[1] and the next day issued a written order denying Long's motion on the ground that he

[1] Exhibit 7 includes an audio recording of Long's plea and sentencing on the domestic abuse charge. Motion Hearing Ex. 7, "Arraignments 6/17/11" at 1:06:14. Long waived his right to a trial during this hearing, but he did not waive the right to counsel.

did not have a right to counsel to waive in the tribal case (not on the ground that he had been represented by licensed counsel). PCH 23; DCD 59.

The record is clear that Long was not represented by a law-trained, licensed attorney in the tribal case. He more than met his burden of production on this issue.

B. This Court should follow well-established rules of statutory construction and find that Long must either have been represented by counsel or knowingly and voluntarily waived the right to counsel in the tribal court case.

Long's tribal court domestic abuse conviction is excluded from the definition of "misdemeanor crime of domestic violence" because he was not represented by an attorney and did not waive the right to counsel. *See* 18 U.S.C. § 921(a)(33)(B)(i)(I).[2] Long's reading of § 921(a)(33)(B)(i)(I) is supported by the

[2] For ease of reference, § 921(a)(33)(B)(i) provides:

> A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless—
>
> (I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and
>
> (II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either
>
> (aa) the case was tried by a jury, or

text of the statute and well-established rules of statutory construction. This Court should decline to follow the Ninth Circuit's contrary reading of the statute in *United States v. First*, 731 F.3d 998 (9th Cir. 2013).

The most logical reading of § 921(a)(33)(B)(i)(I) is that the defendant must have done one of the following in the tribal court case: (1) been represented by counsel, or (2) knowingly and intelligently waived the right to counsel. In other words, the phrase "in the case" modifies "knowingly or intelligently waived" rather than "the right to counsel." The government's interpretation of the statute (that "in the case" modifies "the right to counsel") is not the only way to give effect to the phrase "in the case." *See First*, 731 F.3d at 1004 (citing *Duncan v. Walker*, 533 U.S. 167 (2001) for the rule that courts must give effect to every clause and word of a statute).

That the phrase "in the case" modifies "knowingly or intelligently waived" rather than "the right to counsel" is supported, rather than undermined, by *United States v. Smith*, 171 F.3d 617 (8th Cir. 1999). There, the defendant argued that his *waiver* of the right to counsel was not voluntary because his attorney was not

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> (bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

present *at the time of the waiver*. *Id.* at 622. The Court found that Smith's right to counsel arose out of state law, but considered state law entirely in the context of determining whether his waiver was knowing and voluntary despite being executed in the absence of his attorney. Contrary to the Ninth Circuit's reading in *First* and the government's argument in this case, the *Smith* Court did not look to state law to see if there was a right to counsel in the prior case, but rather to determine whether Smith's waiver of the right to counsel in the prior case was knowing and voluntary.

Long's reading of § 921(a)(33)(B)(i)(I) is also the only reading that is consistent with the canon of statutory construction that where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). Congress did that here.

In § 921(a)(33)(B)(i)(II), Congress included language that clearly and unambiguously states that the right to a jury trial must have been a right available to the defendant in the prior case:

> (II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either
>
> (aa) the case was tried by a jury, or

> (bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

18 U.S.C. § 921(a)(33)(B)(i)(II). Had Congress intended for § 921(a)(33)(B)(i)(I) to apply only where the defendant had the right to counsel under the law of the jurisdiction hearing the case, it would have used parallel language to § 921(a)(33)(B)(i)(II).[3] The only reasonable conclusion from Congress's decision to use different language in § 921(a)(33)(B)(i)(I) is that the exception is not limited to situations where the jurisdiction provided the right to counsel.

Further, Congress knew how to include all tribal convictions as predicate offenses without regard to whether the defendant had the right to counsel in the

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[3] As set out in Long's opening brief, had Congress so intended, the section would read:

(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless –

> (I) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to court-appointed counsel in the jurisdiction in which the case was tried, either
>
> > (aa) the person was represented by counsel, or
> >
> > (bb) the person knowingly and intelligently waived the right to counsel in the case. . .

prior case. It did so in 18 U.S.C. § 117. This section makes domestic assault by a habitual offender a federal felony:

> Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country *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 against a child of or in the care of the person committing the domestic assault; 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) (emphasis added). Unlike § 921(a)(33)(B)(i)(I), this section makes no reference to counsel in the underlying case.

This distinction is why *United States v. Bryant*, 136 S. Ct. 1954 (2016) does not control here. *Bryant* held that the use of an uncounseled tribal misdemeanor conviction as a predicate offense under 18 U.S.C. § 117(a) did not offend the Sixth Amendment because there was no Sixth Amendment right to counsel in the tribal court case. 136 S. Ct. at 1959. Here, the text of the federal statute provides that a prior conviction does not count unless the defendant was represented by counsel or

waived the right to counsel in the underlying case. Long's argument is a statutory argument, not a constitutional argument, and *Bryant* does not control.

It follows from Congress's specific reference to counsel in § 921(a)(33)(B)(i)(I) (as opposed to its silence regarding counsel in § 117(a)) that this requirement applied to all prior convictions, tribal or otherwise, regardless of whether there was a constitutional right to counsel in the prior case. *See Russello*, 464 U.S. at 23 (reasoning that where Congress includes particular language in one section but omits it in another section, it is presumed that Congress acted intentionally in the disparate inclusion or exclusion).

C. The government's argument that Long must have been represented by counsel because the tribal constitution provides for a right to counsel undermines its statutory argument.

The government argued to the district court that the Rosebud Sioux Tribe Constitution provides for the right to counsel in criminal cases and therefore Long must have been represented by counsel in his tribal case. DCD 39, p. 4. The government persists with that argument here. GB, p. 16.[4] It is true that the Rosebud Sioux Tribe Constitution appears to protect some sense of the right to counsel. *See* Const. and Bylaws of the Rosebud Sioux Tribe of South Dakota, art. X, § 1(f) ("The government of the Tribe including the community shall not . . .

[4] Long will cite to the appellee's brief as "GB," followed by the page number.

[d]eny to any person . . . in a criminal proceeding . . . to have the assistance of counsel for his or her defense including the right to have counsel provided subject to income guidelines."). It is not clear that this right is coextensive with the Sixth Amendment right to counsel. Under Rosebud Sioux Tribe law, "counsel" encompasses both professional attorneys and lay counsel, and there are limitations on the provision of court-appointed advocates. *See* Rosebud Sioux Tribe Law and Order Code § 9-2-6 ("Every person appearing as a party in any judicial procedure before a Tribal court shall have the right to be represented either by lay counsel or professional attorneys and have such counsel and attorneys assist in the preparation and presentation of his case. The Rosebud Sioux Tribe shall have no obligation to provide or pay for such lay counsel or professional attorneys and only those persons who have first obtained admission to practice before the Tribal Courts shall appear therein."). *See also, United States v. Killeaney*, No. CR-07-30063-01-KES, 2007 WL 4459348, at **4-9 (D.S.D. Dec. 17, 2007) (unpublished) (contrasting the right to counsel under Rosebud Sioux Tribe law with the Sixth Amendment right to counsel).

Moreover, Article 10, Section 1(f) of the Rosebud Sioux Tribe Constitution does not necessarily mean that Long actually was represented by law-trained, licensed counsel in his tribal case. (As set forth above, he was not.). But if the

government is correct in its assertion that the Rosebud Sioux Tribe provides for the right to court-appointed counsel in criminal cases, the government's statutory argument is irrelevant. In other words, accepting the government at its word, Long had the right to counsel in the tribal case. Because he neither waived that right nor was represented by a licensed attorney, he falls squarely within the exclusion from the definition of "misdemeanor crime of domestic violence" regardless of the interpretation of the phrase "in the case." *See* 18 U.S.C. § 921(a)(33)(B)(i)(I).

II. The late disclosure of Sergeant Reynold's report listing previously unknown eyewitnesses violated *Brady* and warranted a new trial.

The district court erred in denying Long's motions to dismiss, for a mistrial, for a continuance, or for a new trial based on the untimely disclosure of Sergeant Reynold's report identifying, for the first time on the morning of trial, multiple eyewitnesses to the alleged assault.

A. The United States' *Brady* obligations extend to tribal officers working under 638 contracts between the tribe and the Bureau of Indian affairs.

The Bureau of Indian Affairs contracted with the Rosebud Sioux Tribe to fulfill the BIA's law enforcement responsibilities on the reservation. Because Rosebud Sioux tribal officers perform what otherwise would be federal law enforcement functions, evidence in the control of these officers is evidence within the control of the federal government and subject to the disclosure requirements of

Brady v. Maryland, 373 U.S. 83 (1963). *Cf. Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police.").

Tribal officers employed under a 638 contract act on the federal government's behalf. The federal government has an obligation to provide law enforcement services on reservations. *See* 25 U.S.C. § 2802(a) (BIA is responsible for providing law enforcement services in Indian Country). When a tribe enters into a 638 contract with the BIA, it agrees to provide tribal officers to perform this federal law enforcement function. In other words, a tribal officer employed under a 638 contract fulfills a role that otherwise would be performed by a federal officer. Indeed, tribal officers frequently investigate cases that will become federal cases prosecuted in federal court. Accordingly, tribal officers are held to the same standards and offered the same protections as federal officers in a number of contexts. *See, e.g.*, *United States v. Lester*, 647 F.2d 869 (8th Cir. 1981) (holding tribal officers to federal constitutional standards); *United States v. Janis*, 810 F.3d 595 (8th Cir. 2016) (holding that tribal officer was afforded the same protections as BIA officer based on 638 contract). And they ought to be treated as such here.

The government asserts that the BIA's 638 contract with the Rosebud Sioux Tribe does not transform an officer employed by the tribal police department into a federal law enforcement officer. GB, p. 19. Neither case cited by the government supports this proposition in the context of the government's disclosure obligations under *Brady*.

United States v. Schrader, 10 F.3d 1345 (8th Cir. 1993) held that when a 638 contract also meets the requirements of 25 U.S.C. § 2804(a) and when the tribal officer is also enforcing a law that BIA officers would otherwise enforce, tribal officers are considered to be employees of the Department of the Interior for the purposes of particular statutes. *See* 25 U.S.C. § 2804(f). Long is not arguing that Sergeant Reynolds was considered an employee of the Department of the Interior under § 2804(f). *Schrader* did not address the question here – when tribal officers are considered to be acting on behalf of the government so that evidence they gather triggers the government's disclosure obligations.

Locke v. United States, 215 F. Supp. 2d 1033 (D.S.D. 2002) also addressed a distinct statutory question – whether a tribal officer was an "investigative or law enforcement officer" within the meaning of the Federal Tort Claims Act (FTCA). The FTCA sets out a limited waiver of sovereign immunity and as such must be strictly construed. *Id.* at 1038. The tribal officer in *Locke* was considered a

"federal employee" under the FTCA. *Id.* The only issue was whether that officer was also in the subclass of federal employees designated as "investigative or law enforcement officers" under the FTCA. *Id.* Strictly construing the statute, the court found that he was not. *Locke*'s finding that the tribal officer did not meet the definition of "investigative or law enforcement officer" does not mean that evidence gathered by a tribal officer pursuant to a 638 contract is outside the control of the government for the purposes of *Brady*. Neither the required strict construction nor the statutory definition apply here.

B. The late disclosure of Sergeant Reynold's report warrants a new trial.

The government provided Sergeant Reynold's report after the trial began. While the report itself was disclosed just inside the deadline for *Brady*, the evidence it mentioned – the eyewitness statements of Jennifer Young and James Bordeaux – was not disclosed in time for Long to make use of it for trial. *See United States v. Gonzalez*, 90 F.3d 1363, 1369 (8th Cir. 1996) (stating that there is no *Brady* violation if the evidence is disclosed during trial). Neither Bordeaux nor the additional eyewitness identified by Young could be located and subpoenaed before the end of the trial.

Long was prejudiced by the delayed disclosure of Sergeant Reynold's report and his inability to interview and call all of the eyewitnesses to the alleged assault.

The competing versions of the number of shots fired went to the reliability of the victims' testimony and to Long's intent, both key issues in the case. The testimony of the newly-disclosed eyewitnesses could have cast the government's case in "such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. The district court erred in denying Long's requests for relief.

CONCLUSION

For the reasons set forth above and in his opening brief, Long requests that the Court reverse the order denying his motion to dismiss the Prohibited Person in Possession of a Firearm offense and the order denying his motions to dismiss, for a continuance, for a mistrial, and for a new trial based on the government's *Brady* violation.

Dated this 9th day of February, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of February, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

In addition, I certify the electronic version of the foregoing has been scanned for viruses using Norton Anti Virus, and that the scan showed the electronic version of the foregoing is virus-free.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that WordPerfect X7 was used in the preparation of Appellant's Reply Brief and that the word count done pursuant to that word processing system shows that there are 3,665 words in Appellant's Reply Brief.

Dated this 9th day of February, 2017.

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