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United States v. Kirkaldie: To Recognize or Not to Recognize Uncounseled Tribal Court Convictions?

Madison Mattioli
Alexander Blewett III School of Law

UNITED STATES V. KIRKALDIE:[1] TO RECOGNIZE OR NOT TO RECOGNIZE UNCOUNSELED TRIBAL COURT CONVICTIONS?

Madison Mattioli

I. INTRODUCTION

In February of 2014, a grand jury returned an indictment charging William Kirkaldie with domestic abuse by a habitual offender under 18 U.S.C. § 117(a),[2] a federal statute enacted to promote safety for Native American women.[3] Congress enacted Section 117 to address the issue of assault in "Indian Country" by attaching "a federal penalty to the commission of a domestic assault when the actor has had at least two prior, similar convictions in another jurisdiction."[4] The prior convictions can arise from state, federal, or tribal court.[5] Kirkaldie pled guilty to two prior charges of domestic violence in tribal court without an attorney, and had served jail time as part of these prior convictions.[6] In granting the defendant's motion to dismiss the indictment, Judge Morris for the District Court of Montana held that Kirkaldie's uncounseled tribal court convictions could not be admitted to establish an element of the offense under the federal recidivist statute.[7]

Kirkaldie's holding falls in line with Ninth Circuit precedent as stated in *United States v. Ant*,[8] and is a correct application of the law in this jurisdiction. The District Court came to the right conclusion based on the facts and the law presented to it. However, the Supreme Court of Montana along with the Eighth and Tenth Circuit Courts disagree with the Ninth Circuit's holding in *Ant*.[9] The United States Supreme Court has never entertained argument on this precise constitutional issue,[10] but recent decisions perpetuating a significant Circuit split may require it to do so in the near future. Part II of this note summarizes the legal history

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[1] *U.S. v. Kirkaldie*, __ F.Supp.2d __, 2014 WL 2119860 (D. Mont. 2014). An exhaustive analysis of this decision involves several complicated issues of Federal Indian and Constitutional law, the use of collateral attacks upon prior convictions, Congress's plenary authority to regulate Indian tribes, statutory construction, and *stare decisis*. This short note will only focus on the validity of uncounseled tribal court convictions, where actual imprisonment was imposed, being used as predicate offenses in recidivist prosecutions.

[2] *Id*. at *1.

[3] *Id*. at *2.

[4] *Id*.

[5] *Id*.

[6] *Id*.

[7] *Kirkaldie*, 2014 WL 2119860 at *8.

[8] *U.S. v. Ant*, 882 F.2d 1389 (9th Cir.1989).

[9] *Kirkaldie*, 2014 WL 2119860 at **6–8.

[10] *State v. Spotted Eagle*, 71 P.3d 1239 (Mont. 2003), *cert. denied* 540 U.S. 1008 (2003); *Cavanaugh v. U.S.*, 643 F.3d 592 (8th Cir. 2011), *cert. denied* 132 S. Ct. 1542, (2012); *Shavanaux v. U.S.*, 647 F.3d 993 (10th Cir. 2011), *cert. denied* 132 S. Ct. 1742 (2012).

prior to *U.S. v. Kirkaldie*, Part III explores the differences in reasoning among the circuits, Part IV summarizes the opinion in *U.S. v. Kirkaldie*, Part V analyzes the different Circuit approaches to this issue, and Part VI concludes the note by exploring possible consequences of the continuing Circuit split.

II. HISTORY

A. Ninth Circuit Precedent

Ant is controlling precedent in the Ninth Circuit. Ant was indicted and charged with manslaughter in federal court and moved to suppress evidence of a prior uncounseled guilty plea in tribal court of assault and battery.[11] Both the federal prosecution and the tribal court conviction arose from the same alleged incident.[12] Ant served a sentence of six months in jail as a result of the tribal court conviction.[13] The issue in *Ant* was whether the uncounseled guilty plea, validly entered in tribal court but which would have been unconstitutional if made in federal court, could be admitted as *evidence of guilt* in the subsequent federal prosecution involving the same acts.[14] Even though Ant's guilty plea in tribal court was entered in accordance with tribal code and the Indian Civil Rights Act (ICRA), the Ninth Circuit held that acceptance of the guilty plea violated the defendant's Sixth Amendment rights and was not admissible in the federal prosecution.[15] The Court based its reasoning in part on *Baldasar v. Illinois*,[16] a case which the United States Supreme Court explicitly overruled in *U.S. v. Nichols*.[17]

B. Supreme Court Precedent

The fractured Court in *Baldasar* held that an uncounseled misdemeanor conviction could not be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term.[18] In *Nichols*, the Court held that consistent with Sixth Amendment doctrine, an uncounseled misdemeanor, valid under *Scott v. Illinois*[19] due to absence of incarceration, could be used to enhance punishment at a subsequent conviction.[20] The *Nichols* Court concluded that the right to

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[11] *Ant*, 882 F.2d at 1390.
[12] *Id.*
[13] *Id.*
[14] *Id.* at 1391 (emphasis added).
[15] *Id.* at 1396.
[16] *Baldasar v. Illinois*, 446 U.S. 222 (1980).
[17] *U.S. v. Nichols*, 511 U.S. 738 (1994).
[18] *Baldasar*, 446 U.S. at 223.
[19] *Scott v. Illinois*, 440 U.S. 367 (1979) (Holding that actual imprisonment is the bright line test as to when the right to counsel attaches under the Sixth Amendment).
[20] *Nichols*, 511 U.S. at 738.

counsel had not attached because no jail time was imposed in the first proceeding.[21] *Baldasar* and *Nichols* lay the foundation for *Ant*, yet neither case deals specifically with the factual situation presented in *Ant* or *Kirkaldie*.

III. EIGHTH AND TENTH CIRCUIT REASONING

The Eighth Circuit ruled on a factual situation almost identical to the one posed in *Kirkaldie* in *United States v. Cavanaugh*.[22] The District Court determined that "the introduction of uncounseled tribal court convictions in federal court as proof of an essential element of a federal crime violate a defendant's right to counsel and due process."[23] The Eighth Circuit reversed however, deeming the Sixth Amendment analysis inapplicable.[24] In reversing, it reasoned that "the use of prior uncounseled tribal court convictions failed to violate the federal defendant's right to counsel because the federal constitutional right to appointed counsel did not apply in tribal court."[25]

A mere twenty days after the decision in *Cavanaugh*, the Tenth Circuit also ruled on the same factual situation in *United States v. Shavanaux*.[26] The Tenth Circuit also found the Sixth Amendment analysis inapplicable to tribal court proceedings.[27] In reversing the District Court, it reasoned that based on *Talton v. Mayes*[28] the Bill of Rights does not apply to Indian tribes and "[t]hus, rather than being subject to the United States Constitution, the tribal exercise of inherent power is constrained only by the 'supreme legislative authority of the United States.'"[29] The Tenth Circuit claimed that *Ant* overlooked the *Talton* line of cases, and it "therefore disagree[d] with *Ant*'s threshold determination that an uncounseled tribal court conviction is constitutionally infirm."[30]

The Tenth Circuit focused largely on principles of comity and due process "to conclude that the uncounseled tribal court convictions failed to comply with the constitution, yet simultaneously did not violate the Constitution."[31] Absent a due process violation, the principle of comity applies and federal courts are required to recognize tribal convictions,

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[21] *Id.*
[22] *Cavanaugh*, 643 F.3d 592.
[23] *Id.* at 595.
[24] *Id.*
[25] *Kirkaldie*, 2014 WL 2119860 at *6 (analyzing *Cavanaugh*, 643 F.3d at 604–605).
[26] *Shavanaux*, 647 F.3d 993.
[27] *Id.* at 998.
[28] *Talton v. Mayes*, 163 U.S. 376 (1896).
[29] *Shavanaux*, 647 F.3d at 997 (The Tenth Circuit, citing the holding in *Talton*, 163 U.S. at 364, indicated "Congress has plenary power of Indian affairs and exercised this power by passing ICRA.").
[30] *Id.* at 998.
[31] *Id.*

whether counseled or not.[32] This is largely the reasoning of the Montana Supreme Court as stated in *State v. Spotted Eagle*, [33] which the Circuit Court opinions note.[34]

IV. THE DISTRICT COURT'S REASONING IN *KIRKALDIE*

The Government in *Kirkaldie* urged the District Court to abandon *Ant* in favor of the reasoning of the other Circuits.[35] The District Court instead stated that "*Ant* remains binding law in the Ninth Circuit" and "[t]he Court must follow precedent."[36] The court focused its analysis upon the fact that Kirkaldie was actually incarcerated as a result of his prior tribal court convictions, [37] because under *Scott* actual imprisonment is the bright line test as to when the right to counsel attaches under the Sixth Amendment. [38] The court reasoned "the use of evidence obtained 'outside the Constitution' as integral evidence in a federal prosecution would violate Kirkaldie's right 'to have the assistance of counsel for his defense.'"[39] In following the reasoning down the rabbit hole, the Court offered that "[a]n issue of constitutional moment arises when an uncounseled tribal court proceeding serves as evidence of a federal crime. The statutory lack of counsel in a tribal court proceeding would sustain a federal prosecution."[40]

The Court recognized that it was faced with "an unpalatable decision: dilute a defendant's constitutional rights due to the defendant's membership in a sovereign tribal nation; or foreclose the prosecution of an alleged habitual domestic violence offender due to the unique structure of tribal courts."[41] Recognizing Congress's "shortcoming" in enacting 28 U.S.C. § 117,[42] the court nonetheless asserted there are tribes that "presently possess the resources to convict defendants in a manner that would allow those convictions to be introduced properly as evidence in federal court."[43]

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[32] *Id*. at 999.
[33] *Spotted Eagle*, 71 P.3d 1239.
[34] *Shavanaux*, 647 F.3d at 999; *Cavanaugh*, 643 F.3d at 604.
[35] *Kirkaldie*, 2014 WL 2119860 at *14.
[36] *Id.* at *13.
[37] *Kirkaldie*, supra. n. 6.
[38] *Scott*, 440 U.S. at 373–374.
[39] *Kirkaldie*, 2014 WL 2119860 at *19.
[40] *Id.* at *17.
[41] *Id*.
[42] Through the statute's explicit allowance for the use of evidence obtained in violation of the constitution to fulfill an element of the offense.
[43] *Kirkaldie*, 2014 WL 2119860 at **17–18 (The Court also addressed the supplemental jurisdiction issue under 25 U.S.C. § 1304(d)(4) which requires that a defendant in tribal court receive all other rights whose protection is necessary under the Constitution of the United States, including the right to court-appointed counsel.).

V. ANALYSIS OF THE SIXTH AMENDMENT ISSUE PRESENTED IN *KIRKALDIE*

The decision reached by the District Court in *Kirkaldie* is supported by the Supreme Court's holding in *Nichols*. Kirkaldie was sentenced to and actually served six months in jail as a result of his tribal court convictions of domestic violence. *Nichols*'s holding was limited to convictions *valid under Scott because no imprisonment was imposed*.[44] Because Kirkaldie was not represented by counsel and imprisoned those convictions were sufficiently unreliable to warrant their use to enhance punishment in subsequent proceedings. However, the convictions being challenged in both *Baldasar* and *Nichols* were challenged for their use at sentencing rather than at trial, as was the attempted use in *Ant*. The Eighth Circuit recognized this, and cautioned practitioners in that Circuit that *Nichols* may have limited applicability to convictions being utilized in the guilt phase as opposed to at sentencing.[45] If *Nichols* were to apply, the issue remains that Kirkaldie's prior uncounseled conviction arose in tribal court where the Sixth Amendment does not apply, as opposed to in state or federal court where the Sixth Amendment applies.

As explored previously, the Eighth and Tenth Circuits decisions stand for the proposition that the Sixth Amendment does not apply to tribal court proceedings.[46] However, "[t]he Sixth Amendment's guarantee of the right to assistance of counsel is plainly not limited to citizens, but rather provides protection to the broader category of "the accused.'"[47] The Supreme Court has even afforded the right to effective assistance of counsel to non-citizens[48] stating, "[i]t is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the "mercies of incompetent counsel."[49]

An interesting dichotomy emerges as enrolled Native Americans enjoy dual-citizenship, and at all times remain citizens of both the United States and the sovereign Indian nations. Yet "[t]ribal courts constitute the only judicial forum in the United States where the constitutional right to counsel does not exist for a United States citizen."[50] The District Court in *Kirkaldie* concluded that the decisions reached in the Eighth and Tenth Circuits "fail[ed] to reconcile the unique dual rights that every individual Indian holds: the rights of a United States citizen under the United States

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[44] *Nichols*, 511 U.S. at 748 (emphasis added).
[45] *Cavanaugh*, 643 F.3d at 601 (recognizing the Supreme Court's emphasis on the differences between the sentencing and guilt determination phases).
[46] *Kirkaldie*, 2014 WL 2119860 at **14–15.
[47] Amicus Curiae Br. of the Const. Accountability Ctr. in Support of Petrs., *Chaidez v. U.S.*, http://perma.cc/BH6Y-FZ8V at **2–3 (No. 11-820, 112 S. Ct. 209 (2012)).
[48] *Padilla v. Kentucky*, 559 U.S. 356 (2010).
[49] *Id.* at 374.
[50] *Kirkaldie*, 2014 WL 2119860 at *10 (analyzing *U.S. v. First*, 731 F.3d 998, 1002 (9th Cir. 2013).

Constitution, and the distinct rights as a tribal citizen under ICRA."[51] However, the Tenth Circuit cited *Talton*, which stands for the proposition that "[w]hile Native Americans are citizens of the United States, the United States Constitution does not apply to Indian tribes."[52]

The *Cavanaugh* Court, while ultimately disagreeing with the Ninth Circuit's holding in *Ant*, concluded its opinion by stating that at best, "Supreme Court authority in this area is unclear; *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."[53] This statement does not inspire confidence that after a thorough review of the record and analysis the Eighth Circuit reached the correct legal decision. The Sixth Amendment right to counsel exists to ensure the reliability of convictions. Where uncounseled convictions can be used to fulfill substantial elements of federal crimes, the guarantee of counsel under the Sixth Amendment has been violated. This is an admittedly difficult issue to decide because the United States Supreme Court has not made it clear what the law is in this area.

VI. CONCLUSION

The arbitrary legal difference between the Circuit approaches to this issue can lead to other negative consequences for Native American defendants. For example, the Turtle Mountain Band of Chippewa Indians (TMBCI) Reservation sits in Rolette County, North Dakota, which is in the Eighth Circuit. However, a large number of off-reservation Turtle Mountain trust lands sit in Montana,[54] which is in the Ninth Circuit. This situation could lead to the same individual committing the same offense in North Dakota and Montana being treated entirely differently in federal courts sitting in the respective Circuits, which are geographically less than 500 miles apart.

This issue, made difficult because of the unique status of the defendant, requires a District Court judge sitting in the Ninth Circuit to wrestle with a difficult policy decision. By adhering to precedent, an alleged habitual domestic violence offender can walk out of federal court unpunished. By abandoning and reversing precedent, a U.S. citizen deprived of the right to counsel will have an uncounseled conviction used to fulfill an element of a federal offense. The vitality of *Ant* is currently being litigated in Montana in three cases involving the use of

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[51] *Id.* at *16 (citing U.S. Const. amend. VI and 25 U.S.C. § 1302(a)(6)).
[52] *Talton*, 163 U.S. at 384.
[53] *Cavanaugh*, 643 F.3d at 605 (emphasis added).
[54] U.S. Department of the Interior, Bureau of Indian Affairs, *Information on Chippewa Indians: Turtle Mountain Reservation*, http://perma.cc/3YLB-K2UV (accessed Sept. 16, 2014).

uncounseled tribal court convictions as predicate offenses under § 117(a),[55] and oral argument was heard in the Ninth Circuit Court of Appeals sitting in Portland in July of 2014 in *United States v. Bryant*.[56] The Government continues to urge the Ninth Circuit to overrule *Ant*, and to adopt law similar to that of the Eighth and Tenth Circuits and the Montana Supreme Court, while criminal defendants remain adamant that the use of uncounseled convictions as evidence in federal court is an impermissible Sixth Amendment violation.

After hearing oral argument in *Bryant*, the Ninth Circuit will revisit its decision in *Ant* and will likely affirm its vitality. This is an area ripe for review by the Supreme Court in order to provide both conformity and clarity to an increasingly confusing body of law. It is the job of the nation's highest court to instruct the lower courts on what the law is, and they should choose to do so here. Absent a direct ruling from the Supreme Court, there is no reason for the Ninth Circuit to abandon precedent and adopt the reasoning of other Circuit courts.

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[55] *U.S. v. Kirkaldie*, 2014 WL 2119860 (9th Cir. May 22, 2014); Or. Granting Defendant's Motion to Dismiss the Indictment, *United States v. Stewart*, https://ecf.mtd.uscourts.gov/doc1/11111509947 (D. Mont. May 22, 2014) (CR 14-20-BLG-SPW, available on PACER); Oral Argument Audiofile, *United States v. Bryant*, http://perma.cc/99EC-KFMR (July 10, 2014) (No. 12-30177).

[56] Oral Argument Audiofile, *U.S. v. Bryant*, http://perma.cc/99EC-KFMR (July 10, 2014) (No. 12-30177).