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**UNITED STATES V. BRYANT AND THE SUBSEQUENT USE
OF UNCOUNSELED TRIBAL COURT CONVICTIONS
IN STATE OR FEDERAL PROSECUTION**

Nicholas LeTang*

I. INTRODUCTION

The members of Montana's seven tribal reservations share a troubling truth when brought into tribal court: they may be sentenced to prison without the guidance of counsel at trial. This is because tribal courts constitute the only judicial forum in the United States where the Sixth Amendment right to counsel does not apply.¹ Under the Indian Civil Rights Act ("ICRA"), tribes must provide indigent defendants with an attorney only when imposing a prison sentence that is longer than one year.² The absence of full right to counsel protection seems less egregious when one considers that tribal courts administer justice in accordance with tribal customs and are heavily limited on the length of prison sentences they may impose.³ However, a major concern arises when uncounseled tribal convictions are later introduced in a state or federal forum to satisfy elements of a criminal statute. *United States v. Bryant*⁴ is a recent Montana case that demonstrates the complexity of using uncounseled tribal convictions in a subsequent state or federal prosecution.⁵

To date, the United States Supreme Court has not addressed whether the Sixth Amendment bars the use uncounseled tribal convictions in a state or federal prosecution.⁶ While it is clear that uncounseled tribal convictions do not offend the Constitution at their inception,⁷ existing Court jurisprudence does not answer whether these convictions may be introduced in state or federal forums without violating the Sixth Amendment. In the lower courts, two competing arguments have emerged. The majority argument holds that, since the Constitution does not apply to tribes, all uncounseled tribal convictions that comply with ICRA are technically valid and their

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1. *United States v. Kirkaldie*, 21 F. Supp. 3d 1100, 1105 (D. Mont. 2014).

2. 25 U.S.C. § 1302(c) (2012).

3. *Id.* § 1302(b).

4. 769 F.3d 671 (9th Cir. 2014).

5. *Id.* at 673.

6. *Id.* at 676.

7. *Talton v. Mayes*, 163 U.S. 376, 384 (1896).

subsequent use may never invoke a constitutional violation. On the other hand, the minority argument elevates the spirit of the Sixth Amendment and concerns for the reliability of uncounseled tribal convictions over their technical validity, holding these convictions to be constitutionally infirm for use in state or federal court. Of the circuit courts to hear this issue—the Eighth, Ninth, and Tenth Circuit—the Ninth Circuit in *Bryant* is the only court to disallow the use of these convictions in state or federal court.⁸

This note argues the *Bryant* court correctly applied unsettled Court precedent on the issue by rejecting the technical validity argument, instead focusing on the spirit of the Sixth Amendment and its core principle of ensuring reliable convictions. Part II develops the arguments and recounts the factual and procedural background of *Bryant*. Part III summarizes the development of the law prior to *Bryant*. This section gives background on ICRA's limited right to counsel in tribal courts; discusses the Court's key right to counsel cases, including the Court's Sixth Amendment guiding star in *Gideon v. Wainwright*⁹; explains how lower courts have decided the *Bryant* issue; and finishes with background on the recidivist statute, 18 U.S.C. § 117. Part IV explains why *Bryant* was correct to distinguish the prosecution's key authority in *Nichols v. United States*¹⁰ and instead focus on *Gideon*-type concerns for the reliability of *Bryant*'s uncounseled tribal convictions. Part IV discusses *Bryant*'s criticisms. Finally, Part V offers a conclusion urging the Supreme Court to take on the *Bryant* issue and follow its guiding star in *Gideon* by affirming *Bryant*.

II. FACTUAL AND PROCEDURAL BACKGROUND OF *UNITED STATES V. BRYANT*

Michael Bryant, Jr., a member of the Northern Cheyenne Indian Reservation, was charged with two counts of domestic assault in violation of 18 U.S.C. § 117 in United States District Court in Montana.¹¹ A federal recidivist statute, § 117 targets repeat domestic assault offenders in special maritime, territorial, and tribal jurisdictions.¹² Section 117 requires at least two prior domestic assault convictions.¹³ The prosecution relied on two prior domestic assault convictions that were obtained in Northern Cheyenne Tri-

8. *Bryant*, 769 F.3d at 679.

9. 372 U.S. 335, 345 (1963).

10. 511 U.S. 738 (1994).

11. *Bryant*, 769 F.3d at 673.

12. 18 U.S.C. § 117(a) (2012).

13. *Id.*

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bal Court in Lame Deer, Montana.¹⁴ Both of these convictions were uncounseled.¹⁵ At least one of the convictions resulted in prison time.¹⁶

Bryant filed a motion to dismiss the indictment in district court, claiming the use of his uncounseled tribal convictions would violate the Sixth Amendment.¹⁷ The district court denied his motion.¹⁸ Bryant subsequently entered a conditional guilty plea but preserved his right to appeal the district court's ruling on his motion to dismiss.¹⁹ The court sentenced Bryant to two concurrent 46 month terms for his two § 117 domestic abuse counts.²⁰ He appealed his conviction to the Ninth Circuit.²¹

A. *The Parties' Arguments on Appeal*

1. *Bryant's Argument*

Bryant argued that using his prior convictions to establish guilt under § 117 violated the Constitution because, had they been obtained in state or federal court, those convictions would have violated his Sixth Amendment right to counsel.²² Essential to Bryant's argument is the fact that at least one of his uncounseled tribal court convictions resulted in prison time.²³ Bryant did not argue his tribal convictions were unconstitutional merely because he was uncounseled; Bryant was aware that the Sixth Amendment does not apply to tribal court proceedings.²⁴ Instead, Bryant argued his convictions were constitutionally infirm for use in federal court.²⁵ At the core of Bryant's argument is the reliability of convictions obtained without the benefit of counsel.

2. *The Prosecution's Argument*

The prosecution began its argument with the premise that the Sixth Amendment did not apply to Bryant's tribal court proceedings.²⁶ Built on this premise, the prosecution concluded Bryant's convictions were per se

14. *Bryant*, 769 F.3d at 673.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Bryant*, 769 F.3d at 673.

21. *Id.*

22. Opening Brief of Defendant-Appellant, *United States v. Bryant*, 2012 WL 3911734 at *10 (C.A.9 Aug. 31, 2012) (No. 12-30177).

23. *Bryant*, 769 F.3d at 673.

24. Opening Brief of Defendant-Appellant, *supra* note 22, at *8.

25. *Id.* at *14. *Bryant*, 769 F.3d at 673.

26. Brief of Appellee United States, *United States v. Bryant*, 2012 WL 5915328 at *8 (C.A.9 Nov. 15, 2012) (No. 12-30177).

valid under the Constitution for subsequent use in federal court.²⁷ As per se valid, any subsequent Sixth Amendment concerns for these convictions were foreclosed.²⁸ This argument is categorical in nature: because Bryant's convictions were valid at inception under the Constitution, the later use of these convictions cannot implicate the Sixth Amendment. The prosecution relied on the Supreme Court's decision in *United States v. Nichols*²⁹ to support its argument that uncounseled tribal convictions may never invoke a Sixth Amendment violation.³⁰ At the core of the prosecution's argument is the technical validity of uncounseled tribal convictions.

B. *The Unanimous Opinion*

In a unanimous decision, the three-judge panel dismissed the § 117 charges against Bryant. The court reasoned that, because Bryant's uncounseled tribal convictions would have violated the Sixth Amendment had they been obtained in state or federal court, using them to establish an element of an offense in a subsequent prosecution was constitutionally impermissible.³¹ Under the Ninth Circuit's rule, tribal convictions may be used in a subsequent state or federal prosecution only if the tribal court provided full Sixth Amendment protection.³² This rule reaffirmed a Sixth Amendment safeguard first established by the Ninth Circuit in *United States v. Ant*³³ that looked beyond the initial validity of uncounseled tribal convictions and reviewed the tribal proceedings to determine if they conformed with Constitutional requirements.³⁴

To reach its holding, the court distinguished *Nichols*³⁵ and determined instead that *Ant* applied.³⁶ Bryant's incarceration upon at least one of his tribal convictions was the determinative fact.³⁷ *Nichols* did not apply because it involved a prior conviction that did not involve incarceration, which comported with the Sixth Amendment.³⁸ The court further explained that, even after *Nichols*, uncounseled convictions that resulted in imprisonment could not be used in subsequent state or federal prosecutions.³⁹ Upon

27. *Id.*

28. *Id.*

29. *Nichols*, 511 U.S. at 748–749.

30. Brief of Appellee United States, *supra* note 26, *4.

31. *Bryant*, 769 F.3d at 677.

32. *Id.*

33. 882 F.2d 1389 (9th Cir. 1989).

34. *Id.*

35. *Nichols*, 511 U.S. at 748–749.

36. *Bryant*, 769 F.3d at 677.

37. *Id.* at 679.

38. *Id.* at 677.

39. *Id.*

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distinguishing *Nichols*, the court determined that the Sixth Amendment safeguard stated in *Ant* prohibited the use of Bryant's tribal convictions in federal court.⁴⁰ Thus, the district court's denial of Bryant's motion to dismiss his indictment had to be reversed.⁴¹

C. *Judge Watford's Concurring Opinion*

Though agreeing that the Ninth Circuit's precedent in *Ant* controlled, Judge Watford stated his reasons for why *Ant* needed reexamination.⁴² First, he felt *Nichols* called *Ant*'s reasoning into question.⁴³ Specifically, Judge Watford felt that *Nichols* demonstrated the Court deemphasizing concerns for the reliability of uncounseled convictions.⁴⁴ His second reason was the impact *Ant* had on the integrity of tribal courts.⁴⁵ Judge Watford thought that questioning the reliability of uncounseled tribal convictions denigrated the integrity of tribal courts.⁴⁶ He further stated that uncounseled tribal court proceedings should not be viewed as inherently suspect,⁴⁷ and respect for the integrity of an independent sovereign's courts should preclude quick judgments against Bryant's prior convictions.⁴⁸

III. DEVELOPMENT OF THE LAW PRIOR TO *UNITED STATES V. BRYANT*

A. *The Limited Right to Counsel in Tribal Court*

Defendants in tribal court receive a limited right to counsel that is not derived from the Sixth Amendment. The Court has long considered Indian tribes as domestic dependent nations that, although not possessing full sovereignty, are capable of regulating their own internal and social affairs.⁴⁹ Under this doctrine of tribal self-determination, the Court in *Talton v. Mayes*⁵⁰ determined tribes are not constrained by the Bill of Rights, including the right to counsel.⁵¹ In the wake of the Civil Rights Movement in the later 1960s, Congress passed IRCA to address perceived civil rights viola-

40. *Id.* at 679.

41. *Id.*

42. *Bryant*, 769 F.3d at 679–681 (Watford, J., concurring).

43. *Id.* at 679–680.

44. *Id.*

45. *Id.* at 680.

46. *Id.*

47. *Id.*

48. *Bryant*, 769 F.3d at 680 (Watford, J., concurring).

49. *Talton*, 163 U.S. at 384.

50. 163 U.S. 376 (1896)

51. *Id.* at 384.

tions occurring in tribal courts.⁵² However, instead of providing full right to counsel protection equal to the Sixth Amendment, ICRA affords tribal defendants a limited statutory right.⁵³ Under this limited right, indigent defendants are entitled to full right to counsel protection only when tribes seek to impose a prison sentence longer than one year;⁵⁴ otherwise, tribal defendants facing prison sentences of one year or less have a right to counsel only at the defendant's expense.⁵⁵ This one-year gap in equal right to counsel protection is the source of the issue underlying *Bryant*.

B. *The Sixth Amendment Right to Counsel*

In 1963, the landmark case *Gideon v. Wainwright* expanded the Sixth Amendment right to counsel to state courts.⁵⁶ Clarence Gideon was charged in Florida state court with felony breaking and entering a poolroom with intent to commit a misdemeanor.⁵⁷ His requests for court-appointed counsel ended with a sympathetic denial by the state court,⁵⁸ to which Gideon boldly responded, "The United States Supreme Court says I am entitled to be represented by Counsel."⁵⁹ Indeed, the Court would rule in Gideon's favor nearly two years later.⁶⁰

The Court's focus in *Gideon* was on the fairness and reliability of uncounseled convictions.⁶¹ At trial, Gideon represented himself "as well as could be expected from a layman."⁶² Nonetheless, the Court recognized an imbalance existed in our adversarial justice system.⁶³ To the Court, even intelligent and educated laymen are no match to governments that "spend vast sums of money to establish machinery to try defendants accused of crime."⁶⁴ The Court thought this imbalance threatened our nation's noble ideal of conducting fair trials in which every defendant stands equal before the law, writing:

[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a

52. Samuel D. Newton, Note, *Reliability, That Should Be the Question: The Constitutionality of Using Uncounseled Tribal Court Convictions in Subsequent Federal Trials After Ant, Cavanaugh, and Shavanaux*, 36 AM. INDIAN L. REV. 489, 499 (2012).

53. 25 U.S.C. § 1302(c).

54. *Id.*

55. *Id.*

56. *Gideon*, 372 U.S. at 345.

57. *Id.* at 336.

58. *Id.* at 337.

59. *Id.*

60. *Id.* at 345.

61. *Id.* at 344–345.

62. *Gideon*, 372 U.S. at 337.

63. *Id.* at 344.

64. *Id.*

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lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.⁶⁵

Closer to its point on reliability, the Court warned that uncounseled defendants could be put on trial without a proper charge or convicted upon evidence that may be incompetent, irrelevant, or inadmissible.⁶⁶ Further, the Court asserted that defendants alone lack the skill and knowledge to adequately prepare a defense and establish their innocence.⁶⁷ Faced with these concerns, expanding Sixth Amendment protection to state court proceedings was necessary to insuring the fundamental rights of life and liberty.⁶⁸

With *Gideon* as its guiding principle, the Court later clarified when a defendant's Sixth Amendment right to counsel is violated. In *Scott v. Illinois*,⁶⁹ the Court determined an indigent defendant's right to counsel is not violated unless the defendant's uncounseled conviction results in prison time.⁷⁰ *Scott* clarifies that a defendant's right to counsel is not violated merely because counsel was not provided at trial. Instead, the Sixth Amendment is violated only upon an uncounseled defendant's imprisonment.⁷¹ The Court recognized actual deprivation of liberty is a substantially different penalty than a fine or the mere threat of imprisonment.⁷² As a result, imprisonment became the Court's bright line to define when a defendant's Sixth Amendment right to counsel has been violated.⁷³

C. *The Supreme Court and the Subsequent Use of Uncounseled Convictions*

After *Gideon* but before *Scott*, the Court determined a line of cases that established its general rule barring the use of uncounseled convictions in subsequent prosecutions.⁷⁴ Included in this line of cases is *Burgett v. Texas*,⁷⁵ the Court's seminal case on the use of uncounseled convictions to fulfill an element of a recidivist statute. In *Burgett*, the prosecution submitted the defendant's multiple uncounseled convictions into evidence at trial.⁷⁶ The Court reversed the defendant's conviction, reasoning that to allow prior convictions obtained in violation of *Gideon* to support an element

65. *Id.*

66. *Id.* at 345.

67. *Id.* at 345.

68. *Gideon*, 372 U.S. at 343.

69. 440 U.S. 367 (1979).

70. *Id.* at 373–374.

71. *Id.*

72. *Id.* at 373.

73. *Id.* at 373–374.

74. *Burgett v. Texas*, 389 U.S. 109, 115 (1967); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Loper v. Beto*, 405 U.S. 473, 476 (1972).

75. 389 U.S. 109 (1967).

76. *Id.* at 118.

of a recidivist statute is to erode the principles of [*Gideon*].”⁷⁷ Furthermore, by allowing an uncounseled conviction to be used at a subsequent trial, the defendant “suffer[s] anew” from the earlier absence of counsel.⁷⁸

Though the general rule is that the Sixth Amendment bars the subsequent use of uncounseled convictions, the Court identifies two exceptions, only one of which is relevant to the *Bryant* issue.⁷⁹ The relevant exception is found in *United States v. Nichols*.⁸⁰ *Nichols* held that an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, may be used to enhance punishment in subsequent prosecution.⁸¹ In *Nichols*, the sentencing court used an uncounseled misdemeanor DUI conviction to enhance the defendant’s sentence.⁸² The defendant argued that, under the per curiam decision in *Baldasar v. Illinois*,⁸³ the prosecution could not use an uncounseled conviction regardless of the fact that the defendant was not imprisoned upon his DUI conviction.⁸⁴ Recognizing the confusion that resulted from its decision in *Baldasar*, the Court overruled *Baldasar* and aligned the constitutionality of using uncounseled convictions with its holding in *Scott*.⁸⁵ Now, just as the Sixth Amendment right to counsel is not violated unless an uncounseled defendant is imprisoned,⁸⁶ prior uncounseled convictions that did not result in imprisonment may be used to enhance sentences.⁸⁷

D. How Lower Courts Have Handled the Bryant Issue

Prior to *Bryant*, four courts had decided the *Bryant* issue, including three circuit courts and the Montana Supreme Court.⁸⁸ Of these four courts, only the Ninth Circuit in *Ant* determined that the Sixth Amendment barred the subsequent use of uncounseled tribal convictions.⁸⁹ *Ant* would later become the precedent for which *Bryant* relies upon.⁹⁰

77. *Id.* at 115.

78. *Id.*

79. *Lewis v. United States*, 455 U.S. 55, 67 (1980); *Nichols*, 511 U.S. at 748–749.

80. *Nichols*, 511 U.S. at 748–749.

81. *Id.*

82. *Id.* at 740.

83. 446 U.S. 222, 228 (1980).

84. *Nichols*, 511 U.S. at 741.

85. *Id.* at 748–749.

86. *Scott*, 440 U.S. at 373–374.

87. *Nichols*, 511 U.S. at 748–749.

88. *Ant*, 882 F.2d at 1389; *United States v. Cavanaugh*, 643 F.3d 592, 604 (8th Cir. 2011); *United States v. Shavanaux*, 647 F.3d 993, 998 (10th Cir. 2011); *State v. Spotted Eagle*, 71 P.3d 1239, 1245 (Mont. 2003).

89. *Ant*, 882 F.2d at 1396.

90. *Bryant*, 769 F.3d at 677.

2016 *USE OF UNCOUNSELED TRIBAL COURT CONVICTIONS* 2191. *The Ninth Circuit*

Ant was the first circuit court case to address the *Bryant* issue.⁹¹ Unable to afford an attorney, the defendant in *Ant* lacked counsel when he pled guilty to assault and battery in Northern Cheyenne Tribal Court.⁹² Later, federal prosecutors introduced the defendant's guilty plea as evidence of guilt in a subsequent prosecution for manslaughter for the same crime.⁹³ The Ninth Circuit reversed the conviction on appeal, reasoning that the tribal court guilty plea was made under circumstances which would have violated the Sixth Amendment had it been obtained in federal court.⁹⁴ When evaluating the defendant's tribal guilty plea under a hypothetical federal court setting,⁹⁵ *Ant* looked beyond the initial validity of the conviction and reviewed the tribal proceedings to determine if they conformed with the Sixth Amendment.⁹⁶

2. *The Montana Supreme Court and the Eighth and Tenth Circuit*

When faced with the *Bryant* issue, the Montana Supreme Court and the Eighth and Tenth Circuit all held that uncounseled tribal convictions could be used in subsequent state or federal prosecutions.⁹⁷ The technical validity of tribal convictions was determinative to these courts.⁹⁸ All three declined follow *Ant*.⁹⁹ The Montana Supreme Court further reasoned in *State v. Spotted Eagle*¹⁰⁰ that it was judicial policy in Montana to avoid interfering with tribal courts, and that to disregard a valid tribal court conviction would "indirectly undermine the sovereignty" of Montana's tribes.¹⁰¹

E. *The Restoring Safety to Indian Women Act*

The Restoring Safety to Indian Women Act, 18 U.S.C. § 117, is the catalyst for the *Bryant* issue. A federal recidivist statute, § 117 was the underlying charge in each of the three circuit court cases that examined the *Bryant* issue.¹⁰² Congress enacted § 117 to address domestic violence in

91. *Ant*, 882 F.2d at 1389.

92. *Id.* at 1390–1391.

93. *Id.* at 1391.

94. *Id.* at 1396.

95. *Id.*

96. *Id.*

97. *Cavanaugh*, 643 F.3d at 604; *Shavanaux*, 647 F.3d at 998; *Spotted Eagle*, 71 P.3d at 1245.

98. *Cavanaugh*, 643 F.3d at 604; *Shavanaux*, 647 F.3d at 998; *Spotted Eagle*, 71 P.3d at 1245.

99. *Cavanaugh*, 643 F.3d at 604; *Shavanaux*, 647 F.3d at 998; *Spotted Eagle*, 71 P.3d at 1244.

100. 71 P.3d 1239 (Mont. 2003).

101. *Id.* at 1245.

102. *Cavanaugh*, 643 F.3d at 604; *Shavanaux*, 647 F.3d at 997; *Ant*, 882 F.2d at 1396.

Indian country.¹⁰³ Passed in 2006, § 117 created a new federal offense to impose harsher criminal punishment on repeat domestic violent offenders in Indian country and to use tribal convictions for domestic violence for that purpose.¹⁰⁴ According to the Department of Justice's Office on Violence Against Women, Indian women report higher rates of domestic partner violence than women of any other ethnic or racial background.¹⁰⁵ Since 2006, Congress has passed three key pieces of legislation to address this issue.¹⁰⁶ Of these three laws, § 117 is the primary tool used by the federal government to address domestic violence in Indian country.¹⁰⁷

Section 117 was a necessary extension of federal prosecutors' ability to charge domestic abusers in Indian country for two important reasons. First, prior to § 117, federal prosecutors were restricted to handling felony-level assault cases enumerated in the Indian Major Crimes Act.¹⁰⁸ This meant prosecutors were unable to charge repeat domestic violence offenders absent substantial bodily harm to the victim.¹⁰⁹ Second, ICRA restricts tribes to imposing sentences of three years or less.¹¹⁰ Further, before a tribe can impose a sentence longer than one year, the tribe must provide defendants a right to counsel equal to the Sixth Amendment¹¹¹ and adjudicate these trials with a tribal judge who has "sufficient legal training to preside over criminal proceedings"¹¹² and is "licensed to practice law by any jurisdiction in the United States."¹¹³ Because many tribal courts are significantly underfunded and unable to afford full right to counsel protection for defendants,¹¹⁴ tribal courts are fixed to imposing prison terms of one year or less.¹¹⁵ With the passage of § 117, federal prosecutors now have the ability to prosecute repeat domestic abusers and seek prison sentences significantly longer than those available in tribal courts. In this way, § 117 fulfills Congress's goal of removing repeat domestic abusers from tribal reservations and avoiding further violence to Indian women.

103. Jeana Petillo, *Domestic Violence in Indian Country: Improving the Federal Government's Response to This Grave Epidemic*, 45 CONN. L. REV. 1841 (2013).

104. 151 CONG. REC. S4873-74 (2005).

105. U.S. DEP'T OF JUSTICE, OFFICE ON THE VIOLENCE AGAINST WOMEN, 2014 BIENNIAL REPORT TO CONGRESS ON THE EFFECTIVENESS OF GRANT PROGRAMS UNDER THE VIOLENCE AGAINST WOMEN ACT 47 (2014).

106. Petillo, *supra* note 103, at 1862.

107. *Id.* at 1862.

108. 18 U.S.C. § 1153 (2012).

109. *Id.*

110. 25 U.S.C. § 1302(b).

111. *Id.* § 1302(c)(2).

112. *Id.* § 1302(c)(3)(A).

113. *Id.* § 1302(c)(3)(B).

114. *Id.* § 3601

115. *Id.*

IV. ANALYSIS

The Supreme Court has not addressed whether the Sixth Amendment bars the use of uncounseled tribal convictions in a state or federal prosecution. It is clear Bryant's uncounseled convictions would have violated the Sixth Amendment if they had been obtained in state or federal court.¹¹⁶ Likewise, Court precedent in *Burgett v. Texas* would normally disallow the introduction of Bryant's convictions in federal court to fulfill an element of a recidivist statute.¹¹⁷ However, *Talton v. Mayes* makes equally clear that Bryant's uncounseled convictions were constitutionally valid at their inception since the Sixth Amendment does not apply to tribal court proceedings.¹¹⁸ Thus, Court precedent appears to label Bryant's convictions as technically valid at inception yet seemingly unconstitutional in substance for subsequent use in state or federal court. In a maze of Sixth Amendment and Indian law jurisprudence, there was no clear path for the *Bryant* court. Faced with unclear Court precedent, the Ninth Circuit in *Bryant* was the only circuit court to correctly reject *Nichols* and instead focus on the *Gideon*-type concerns for the reliability of uncounseled tribal convictions.

A. *Bryant Correctly Applied Unsettled Supreme Court Jurisprudence*

In any event, the most we take from these cases is that 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.

—Eighth Circuit in *Cavanaugh*¹¹⁹

The *Bryant* court correctly focused on the *Gideon*-type concerns for the reliability of Bryant's uncounseled tribal convictions when it held “tribal court convictions may be used in subsequent prosecutions only if the tribal court guarantees a right to counsel that is, at minimum, coextensive with the Sixth Amendment right.”¹²⁰ To support its reasoning, the court needed to properly distinguish *Nichols*, which stood to undermine the *Bryant* court's focus on the reliability of Bryant's uncounseled tribal convictions.

116. *Gideon*, 372 U.S. at 345.

117. *Burgett*, 389 U.S. at 109.

118. *Talton*, 163 U.S. at 384.

119. *Cavanaugh*, 643 F.3d at 605.

120. *Bryant*, 769 F.3d at 677.

1. *Inapplicability of the Nichols's Valid Uncounseled Conviction Exception*

The *Bryant* court was correct to not be persuaded by the prosecution's flawed argument that *Nichols* should control Bryant's case. In *Nichols*, the Court held that a defendant's prior uncounseled convictions may be used to enhance a subsequent sentence if the convictions were *valid* under *Scott*.¹²¹ An uncounseled conviction is valid under *Scott* when the conviction did not result in imprisonment.¹²² The prosecution argued a very broad reading of *Nichols* when it asserted that "prior uncounseled convictions can be considered in subsequent criminal matters so long as the convictions do not involve actual constitutional violations."¹²³ Recognizing constitutional protections do not apply in tribal court proceedings,¹²⁴ the prosecution stretched *Nichols*'s holding to make its technical validity argument. In doing so, the prosecution neglected a key fact in Bryant's case: unlike the defendant in *Nichols*, Bryant was imprisoned as a result of his prior uncounseled convictions.¹²⁵

The prosecution's use of *Nichols* stretches well beyond its context and distorts the Court's reasoning. The Court in *Nichols* created the exception allowing the subsequent use of valid uncounseled convictions precisely because valid uncounseled convictions carry no prison time.¹²⁶ The *Nichols* exception is narrow, only reaching cases where personal liberty is not at stake.¹²⁷ The Court in *Scott* showed that convictions not imposing prison sentences are categorically different from convictions resulting in imprisonment.¹²⁸ Trials involving prison sentences are more involved and risk the most valuable right our society offers: freedom. The key fact in *Nichols* was that the defendant's valid uncounseled DUI conviction did not result in imprisonment.¹²⁹ Unlike the defendant in *Nichols*, Bryant was imprisoned for at least one of his prior uncounseled convictions.¹³⁰ For the prosecution to cite *Nichols* for the purpose of making its technical validity argument was opportunistic and disregarded a key fact in Bryant's case: his incarceration.¹³¹

121. *Nichols*, 511 U.S. at 748–749.

122. *Id.*

123. Brief of Appellee, *supra* note 26 at *9.

124. *Id.* at *8.

125. *Bryant*, 769 F.3d at 673.

126. *Nichols*, 511 U.S. at 748–749.

127. Newton, *supra* note 52, at 516.

128. *Scott*, 440 U.S. at 373–374.

129. *Nichols*, 511 U.S. at 748–749.

130. *Bryant*, 769 F.3d at 673.

131. *Id.*

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The *Bryant* court's analysis should have further differentiated *Nichols* by emphasizing that the Court in *Nichols* was deciding whether valid uncounseled convictions could be used in the sentencing phase of the defendant's case, not the guilt phase.¹³² The sentencing phase is repeatedly recognized by the Court as "less exacting" than the process of establishing guilt.¹³³ For instance, when imposing a sentence, a judge may consider past criminal behavior even if no conviction resulted from that particular criminal behavior.¹³⁴ Unlike the defendant in *Nichols*, *Bryant* was not in the sentencing phase of his case when the federal court considered his prior convictions.¹³⁵ Instead, federal prosecutors used *Bryant*'s uncounseled convictions to establish an element of § 117.¹³⁶ Because the concerns for reliability of past convictions are lessened during the sentencing phase—where judges are at liberty to consider a wider range of criminal behavior—the *Bryant* court should have further distinguished *Nichols* as inapplicable to the adjudication of *Bryant*'s guilt. Even the Eighth Circuit in *United States v. Cavanaugh* questioned the validity of *Nichols* under the same factual scenario as *Bryant*,¹³⁷ despite holding that *Nichols* controlled.¹³⁸ The Eighth Circuit's unease about applying *Nichols* was apparent in its majority opinion: "It also seems clear that, where the subsequent use is to prove the actual elements of a criminal offense, *Nichols* is of questionable applicability, given the Court's emphasis on the differences between sentencing and guilt determination."¹³⁹

2. *Guiding Principles of Gideon*

Having reasoned that the Court's exception to allowing the use of uncounseled convictions in *Nichols* did not apply, the *Bryant* court was correct to apply its precedent in *Ant*.¹⁴⁰ Despite being the only circuit court to do so, *Bryant* correctly followed *Gideon*'s guiding principles of fairness and reliability.¹⁴¹ In *Gideon*, the Court stated, "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."¹⁴² Allowing the subsequent use of uncounseled tribal convictions in state or federal court ignores the fairness

132. *Nichols*, 511 U.S. at 747.

133. *Id.*

134. *Cavanaugh*, 643 F.3d at 601.

135. *Bryant*, 769 F.3d at 673.

136. *Id.*

137. *Cavanaugh*, 643 F.3d at 601.

138. *Id.* at 604.

139. *Id.* at 601.

140. *Bryant*, 769 F.3d at 677.

141. *Id.* at 678–679.

142. *Gideon*, 372 U.S. at 344.

and reliability concerns that are inherent when indigent defendants do not have the assistance of counsel. The Court in *Gideon* explained that the assistance of counsel was fundamental to the interests of justice, writing, “The Sixth Amendment stands as a constant admonition that if the constitutional safeguard it provides be lost, justice will not still be done.”¹⁴³ These words stand as a warning that, by allowing uncounseled tribal convictions into state or federal court based on their technical validity, justice will be lost.

B. *The Bryant Decision: Criticisms and Their Rebuttals*

Though the *Bryant* court correctly applied unclear Supreme Court jurisprudence, *Bryant* is not without valid criticisms. This section addresses three criticisms, including: (1) *Bryant*’s reliance on vulnerable Ninth Circuit precedent in *United States v. Ant*; (2) *Bryant*’s potential violation of tribal sovereignty; and (3) *Bryant*’s omission of an analysis concerning whether § 117 violates the Fifth Amendment’s guarantee of equal protection.

1. *Bryant Relies on Vulnerable Precedent in Ant*

Arguments questioning the vitality of *Ant* are not without merit. Critics may argue that to bypass the technical validity argument and attach a Sixth Amendment violation, *Ant* must rely on a hypothetical: the defendant’s uncounseled tribal conviction *would have* violated the Sixth Amendment *had it been obtained in state or federal court*.¹⁴⁴ This premise is vital to the Ninth Circuit’s holding. Had the *Ant* court not considered the defendant’s tribal conviction in a hypothetical nontribal setting, it would not have reached a constitutional violation. Since *Ant* considers the defendant’s prior conviction as existing outside of its true tribal court setting, its reasoning is counterfactual.

As *Ant* demonstrates, articulating how a constitutional violation attaches during the subsequent use of an uncounseled tribal conviction is problematic. The existing Sixth Amendment framework does not explain how a Sixth Amendment violation can attach to uncounseled tribal convictions that are constitutionally valid at inception. Current Court precedent holds that a defendant’s right to counsel is invoked “at or after the time that judicial proceedings have been initiated”¹⁴⁵ and is not violated unless an uncounseled defendant is convicted and imprisoned.¹⁴⁶ Under this framework, *Bryant*’s constitutional right to counsel was invoked and violated precisely at moments when the Constitution did not apply. By determining that

143. *Id.* at 343 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938)).

144. *Ant*, 882 F.2d at 1393.

145. *Brewer v. Williams*, 430 U.S. 387, 398 (1977).

146. *Scott*, 440 U.S. at 373–374.

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a constitutional violation would result from the subsequent use of *Ant*'s tribal conviction, critics may argue that *Ant* impliedly read a Sixth Amendment right into ICRA—a right that does not exist. For this reason, the Ninth Circuit's precedent in *Ant* is vulnerable. The vulnerability of *Ant* is apparent when considering the Montana Supreme Court and the Eighth and Tenth Circuits all declined to follow *Ant*.¹⁴⁷ These courts determined the technical validity of uncounseled tribal convictions was dispositive to the *Bryant* issue.¹⁴⁸ Since the technical validity of tribal convictions was determinative to these courts, no analysis was done on *Gideon*-type concerns for reliability.¹⁴⁹

Although the reasoning seen in the Montana Supreme Court and the Eighth and Tenth Circuits has merit, the *Bryant* court was correct to look beyond the technical validity of *Bryant*'s tribal convictions and focus on the *Gideon*-type concerns for reliability. Analyses solely focusing on the technical validity of uncounseled tribal convictions are deficient. A complete Sixth Amendment analysis on the *Bryant* issue examines whether tribal convictions obtained without counsel¹⁵⁰ can be properly used in state and federal courts without eroding the principle of *Gideon*.¹⁵¹ The technical validity of uncounseled tribal convictions is not a measure of their reliability, and reliability is the touchstone of a Sixth Amendment analysis.¹⁵² Even the Eighth Circuit in *Cavanaugh* noted that the absence of a reliability analysis weakened its holding.¹⁵³ The Eighth Circuit described its decision to focus on the technical validity of uncounseled tribal convictions as “categorical in nature rather than firmly rooted in the reliability concerns expressed in *Gideon*.”¹⁵⁴

The *Bryant* court was correct to not elevate form over substance when considering the constitutionality of allowing *Bryant*'s convictions into federal court. Courts should not use the technical validity argument to turn a blind eye toward the reliability concerns that are inherent in tribal convictions where an indigent defendant was convicted and imprisoned without the “guiding hand of counsel.” *Gideon* shows that the Sixth Amendment and the integrity of our criminal justice system require an adversarial process that is both meaningful and balanced.¹⁵⁵ *Gideon* and *Scott* together stand for the proposition that the parties to an adversarial system are not on

147. *Cavanaugh*, 643 F.3d at 604–605; *Shavanaux*, 647 F.3d at 998; *Spotted Eagle*, 71 P.3d at 1244.

148. *Cavanaugh*, 643 F.3d at 604; *Shavanaux*, 647 F.3d at 998; *Spotted Eagle*, 71 P.3d at 1245.

149. *Cavanaugh*, 643 F.3d at 604; *Shavanaux*, 647 F.3d at 998; *Spotted Eagle*, 71 P.3d at 1245.

150. *Gideon*, 372 U.S. at 345.

151. Newton, *supra* note 52, at 518.

152. *Id.* at 520.

153. *Cavanaugh*, 643 F.3d at 604.

154. *Id.*

155. *Gideon*, 372 U.S. at 344.

equal footing when an uncounseled defendant is convicted and imprisoned.¹⁵⁶ In *Alabama v. Shelton*,¹⁵⁷ the Court explained the Sixth Amendment does not permit the incarceration of a defendant who was deprived of counsel at trial since his conviction has “never been subjected to the crucible of meaningful adversarial testing.”¹⁵⁸ Although uncounseled tribal convictions resulting in imprisonment are technically valid at inception, the Ninth Circuit was correct to extend their analysis in *Ant* to include concerns for reliability when using these convictions in subsequent prosecution. By doing so, the Ninth Circuit ensured that the balance of the adversarial justice system in *Ant* was not misaligned with the Court’s decision in *Gideon*.

2. *Bryant May Indirectly Undermine Tribal Sovereignty*

By disallowing the subsequent use of valid tribal convictions, *Bryant* is open to criticism that it indirectly violates the sovereignty of tribal courts. The majority opinion in *Bryant* did not consider tribal court sovereignty.¹⁵⁹ Only Judge Watford’s concurrence discusses how *Bryant* affects tribal sovereignty.¹⁶⁰ To Judge Watford, suppressing the use of valid tribal convictions in state or federal court seemed to undermine tribal court integrity.¹⁶¹ Similarly, the Montana Supreme Court in *State v. Spotted Eagle* determined that to disregard a valid tribal conviction based on Sixth Amendment concerns would “indirectly undermine the sovereignty of [Montana’s tribes]” and would “imply that Montana only recognizes [a tribe’s] right to self-government until it conflicts with Montana law.”¹⁶²

When contemplating how *Bryant* may indirectly undermine tribal court sovereignty, it is important to note that the Northern Cheyenne Tribal Court afforded Michael Bryant all the protections necessary under ICRA during his two prior domestic assault convictions.¹⁶³ The *Bryant* court nevertheless labeled these convictions as constitutionally infirm for use in a subsequent state or federal prosecution.¹⁶⁴ Because Bryant’s tribal court convictions were valid under ICRA, it is not a stretch to conclude that the *Bryant* court viewed the Northern Cheyenne Tribal Court’s process of establishing guilt as not sufficiently exacting absent full Sixth Amendment protection. By not validating Bryant’s tribal convictions, *Bryant* risks mark-

156. *Id.*; *Scott*, 440 U.S. at 373–374.

157. 535 U.S. 654 (2002).

158. *Id.* at 667.

159. *Bryant*, 769 F.3d at 673.

160. *Id.* at 679–681 (Watford, J., concurring).

161. *Id.* at 680.

162. *Spotted Eagle*, 71 P.3d at 1245.

163. Opening Brief of Defendant-Appellant, *supra* note 22, at *8.

164. *Bryant*, 769 F.3d at 676–677.

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ing such convictions as illegitimate and inferior to those obtained in state and federal courts.

While acknowledging that *Bryant* may indirectly undermine the sovereignty of the tribes, there are reasons that may support the *Bryant* court's decision to focus on preserving the Bryant's constitutional rights. First, the *Bryant* court did not question the validity of Bryant's tribal convictions or the internal workings of tribal courts. Rather, the court evaluated whether Bryant's convictions satisfy the Sixth Amendment requirement for subsequent use in state or federal forums where the Constitution—not ICRA—governs the rights of a defendant.¹⁶⁵

Second, the *Bryant* decision does not impose upon tribal courts any burdens beyond ICRA. As the Eighth Circuit in *Cavanaugh* stated, “Precluding the use of an uncounseled tribal conviction in federal court would in no manner restrict a tribe's own use of that conviction; it would simply restrict a federal court's ability to impose additional punishment at a later date in reliance on that earlier conviction.”¹⁶⁶ Contrary to the Montana Supreme Court's assertion in *Spotted Eagle*, precluding the use of uncounseled tribal convictions in state and federal courts will not impose upon tribal courts the “insurmountable financial burden”¹⁶⁷ of providing counsel to all indigent defendants in accordance with the Sixth Amendment. After *Bryant*, tribal courts still need only comply with ICRA to issue valid tribal convictions, meaning tribes must afford indigent defendants a right to counsel equal to the Sixth Amendment right only when imposing a term of imprisonment greater than one year.¹⁶⁸

Lastly, *Bryant* does not preclude the subsequent use of all valid tribal convictions. A conviction obtained in tribal court where an indigent defendant was afforded a right to counsel equal to the Sixth Amendment may still be used in state and federal prosecutions.¹⁶⁹ Also, under the Court's holding in *Nichols*, uncounseled tribal convictions that did not result in imprisonment are theoretically valid for subsequent use in state and federal prosecutions.¹⁷⁰

3. *Bryant Did Not Address Equal Protection*

The *Bryant* court did not address whether § 117 violates the Fifth Amendment's guarantee of equal protection.¹⁷¹ The *Bryant* court explained

165. *Id.* at 673.

166. *Cavanaugh*, 643 F.3d at 605.

167. *Spotted Eagle*, 71 P.3d at 1245.

168. 25 U.S.C. § 1302(c).

169. *Bryant*, 769 F.3d at 673.

170. *Nichols*, 511 U.S. at 748–749.

171. *Bryant*, 769 F.3d at 679 n.7.

in a footnote stating that it need not address the Bryant's equal protection argument given the result reached.¹⁷² It was Bryant's argument that, in addition to a Sixth Amendment violation, using his uncounseled tribal convictions to establish guilt under § 117 violates the Fifth Amendment's guarantee of equal protection because only Indians are subject to prosecution based on prior convictions that do not comport with the Sixth Amendment.¹⁷³ Bryant argued that "Congress has singled out Indian defendants who are already disadvantaged by the lack of appointed counsel in the first place and then subjected them to enhanced penalties in federal court outside of those tribal governments."¹⁷⁴

Had the *Bryant* court addressed the equal protection issue, Bryant's argument would certainly have failed. The Court has repeatedly recognized "Indian" status not as a racial classification, but a political one.¹⁷⁵ In *Worcester v. Georgia*,¹⁷⁶ one of the Court's landmark cases on tribal self-governance, Chief Justice John Marshall described Indian nations as "distinct, independent political communities, retaining their original natural rights."¹⁷⁷ Since *Worcester*, the Court has maintained "federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications."¹⁷⁸ Because "Indian" status is treated as a political classification, any differential treatment by a federal statute is said to be a result of an Indian's voluntary association with his or her tribe.¹⁷⁹ This results in courts applying the rational basis test to statutes like § 117, rather than a stricter race-based level of scrutiny.¹⁸⁰ Both the Eighth Circuit in *Cavanaugh* and the Tenth Circuit in *Shavanaux* held that § 117 did not violate the Fifth Amendment's guarantee of equal protection.¹⁸¹ These circuit courts found that protecting Indian women was unquestionably a legitimate government interest.¹⁸² Had the *Bryant* court decided this issue, it likely would have reached a similar conclusion.

172. *Id.*

173. Opening Brief of Defendant-Appellant, *supra* note 22, at *8–10.

174. *Id.* at *26.

175. *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974).

176. 31 U.S. 515 (1832).

177. *Id.* at 519.

178. *United States v. Antelope*, 430 U.S. 641, 645 (1977).

179. *Shavanaux*, 647 F.3d at 1002.

180. *Cavanaugh*, 643 F.3d at 606.

181. *Id.* at 605–606; *Shavanaux*, 647 F.3d at 1002.

182. *Shavanaux*, 647 F.3d at 1002.

V. CONCLUSION

In July of 2015, the Ninth Circuit denied to rehear *Bryant* en banc.¹⁸³ In the en banc opinion, the majority bolstered its reasoning for distinguishing *Nichols* and focusing on the reliability of *Bryant*'s uncounseled tribal convictions.¹⁸⁴ For now, *Bryant* and its precedent in *United States v. Ant* stand. However, just prior to publication of this article the Supreme Court granted certiorari to review *Bryant* in light of the circuit split.¹⁸⁵ Previous petitions to review the *Bryant* issue were denied in 2012 for the Eighth Circuit's *Cavanaugh* and the Tenth Circuit's *Shavanaux*.¹⁸⁶ With ICRA's one-year gap in equal right to counsel protection¹⁸⁷ and § 117's permissible use of uncounseled tribal convictions,¹⁸⁸ the *Bryant* issue cannot be ignored. Until the Court settles the *Bryant* issue, the application of Sixth Amendment protection will continue to differ amongst defendants of differing states. For tribes like the Navajo Nation, whose territory spans multiple states, the circuit split means constitutional rights may differ even amongst members to the same tribe.¹⁸⁹ Given this untenable application of Sixth Amendment rights, Supreme Court review is overdue.

Upon reviewing *Bryant*, the Court should follow the Ninth Circuit's lead. It should focus on the *Gideon*-type concerns for reliability rather than the mere technical validity of uncounseled tribal convictions. To not do so would elevate form over substance. Consequently, uncounseled tribal convictions that resulted in imprisonment should be held as constitutionally infirm for use in state or federal prosecutions. Though § 117 and its policy of curbing domestic violence against Indian women is noble, courts cannot look past the reliability concerns for prior convictions obtained against indigent defendants not afforded counsel in tribal court. To disallow the subsequent use of these convictions in state and federal prosecutions is not a call for skepticism of tribal court judgments, but a recognition that these particular convictions do not pass the Sixth Amendment filter that should be afforded to all citizens brought into state or federal court.

183. *Bryant*, 792 F.3d at 1042.

184. *Id.*

185. *United States v. Bryant*, 84 USLW 3200 (U.S. Dec. 14, 2015).

186. *Cavanaugh v. United States*, 132 S. Ct. 1542 (2012); *Shavanaux v. United States*, 132 S. Ct. 1742 (2012).

187. 25 U.S.C. § 1302(c).

188. 18 U.S.C. § 117(a).

189. *Bryant*, 792 F.3d at 1045 (Owens, J., dissenting).

