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United States v. Bryant, Federal Habitual Offender Laws, and the Rights of Defendants in Tribal Courts: A Better Solution to Domestic Violence Exists

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ABSTRACT

"If you cannot afford an attorney, one will be appointed for you." Since Miranda v. Arizona*, that popularized phrase has widely been regarded as true in the United States. However, because the Bill of Rights does not apply to Native American tribes, defendants in tribal courts are regularly sentenced to imprisonment without the aid of counsel. One of those defendants was Michael Bryant, who has several convictions for domestic assault and was not appointed counsel even though he was indigent and imprisoned.*

Domestic assault is a terrible problem in Native American communities. Native American women suffer from domestic violence at higher rates than any other racial group. In an effort to reduce domestic violence in the tribes, Congress criminalized domestic assault by a habitual offender. That crime requires two prior convictions, which can be obtained in tribal courts. However, because the Indian Civil Rights Act (ICRA) does not guarantee the same rights as the United States Constitution, a conviction may be valid in tribal court even though it would have been unconstitutional had it been obtained in state or federal court. That conviction may then be used as a predicate offense for domestic assault by a habitual offender.

In United States v. Bryant*, the Supreme Court held that it is permissible to use uncounseled tribal court convictions as predicate offenses. The Court decided the issue, but a sense of injustice remains. It seems backhanded to use uncounseled tribal convictions to prove an element of a federal offense when those same convictions could not be used if they had been obtained in a different court. This Note proposes three solutions. One solution is to amend the Indian Civil Rights Act to make tribal court defendants' rights coexistant with state or federal court defendants' rights. Another is to give tribal courts the authority to impose harsher penalties for domestic assault instead of leaving the federal government as the only court system with the ability to impose adequate penalties. A third proposal is to expand the jurisdiction of tribal courts to*

allow them to prosecute non-members who commit offenses on tribal lands. Each of these solutions preserves the Court's reasoning in United States v. Bryant *while making the process more just for offenders, victims, and the tribes.*

INTRODUCTION

Michael Bryant is a member of the Northern Cheyenne Tribe and lives on its reservation in Montana.[1] He has more than one hundred tribal court convictions, several of which are for domestic assault.[2] In 1999, he attempted to strangle his girlfriend and hit her on the head with a beer bottle.[3] In 2007, he assaulted a different girlfriend by kneeing her in the face, "leaving her bruised, bloodied, and with a broken nose."[4] In 2011, he assaulted another girlfriend, C.L.O.,[5] "by dragging her off the bed, pulling her hair, and punching and kicking her."[6] Bryant also admitted that he had assaulted her five or six times.[7] In 2011, he assaulted yet another girlfriend, D.E.,[8] by choking her "until she almost passed out."[9] He further admitted to assaulting this girlfriend on three different occasions.[10]

Bryant's pattern of violence is not uncommon in Native American communities. While it is often difficult to quantify domestic violence because those crimes are largely unreported,[11] studies have consistently found that Native American women experience domestic violence at higher rates than other racial groups.[12] A Centers for Disease Control (CDC) study found that 45.9% of Native American women are victims of domestic assault, as compared to 31.7% of white women.[13] Likewise, a Department of Justice study found that 30.7% of Native American women and 21.3%

1. United States v. Bryant, No. 15-420, slip op. at 10 (U.S. June 13, 2016).

2. Brief for Petitioner at 7, *Bryant*, No. 15-420 (citing Presentence Investigation Report ¶¶ 26, 81 [hereinafter PSR]).

3. *Id.* (citing PSR ¶ 81).

4. *Id.*

5. United States v. Bryant, 769 F.3d 671, 673 (9th Cir. 2014).

6. Brief for Petitioner, *supra* note 2, at 8 (citing Joint Appendix at 38, *Bryant*, No. 15-420 [hereinafter *J.A.*]); *see* PSR ¶ 11 (quoting victim's affidavit in which she stated defendant "had repeatedly abused her over a four-month period and that the violence escalated with the February 2011 attack")).

7. *Id.* (citing PSR ¶ 35).

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

9. Brief for Petitioner, *supra* note 2, at 8 (citing *J.A.* at 38).

10. *Id.* (citing PSR ¶¶ 28, 33).

11. RONET BACHMAN ET AL., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 104 (2008).

12. *See* MICHELE C. BLACK ET AL., CTR. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR INJURY PREVENTION & CONTROL, DIVISION OF VIOLENCE PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 2010 SUMMARY REPORT 40 (2011).

13. *Id.*

of white women experience domestic assault at some point in their lifetimes.[14]

To reduce domestic assault in Native American communities, Congress amended the Violence Against Women Act (hereinafter referred to as § 117) to criminalize domestic assault by a habitual offender.[15] That Act has a predicate offense element, meaning that prior domestic assault convictions are necessary for conviction of this federal crime.[16] The statute applies to "[a]ny person who commits a domestic assault within . . . Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings" for domestic assault, sexual abuse, or interstate domestic violence.[17] The penalty is a fine and up to five years' imprisonment if the victim does not suffer substantial bodily injury or up to ten years' imprisonment if there is substantial bodily injury.[18]

Since the purpose of this statute was, in large part, to reduce domestic violence in Native American communities,[19] it cannot be viewed in isolation from other federal laws that regulate criminal proceedings in tribal courts. Although the Sixth Amendment has been interpreted to require appointed counsel when a defendant is sentenced to any term of imprisonment,[20] the Bill of Rights does not apply to defendants in tribal courts.[21] Instead, the Indian Civil Rights Act (ICRA) protects those defendants.[22] The ICRA differs from the U.S. Constitution in that it only requires appointed counsel if the defendant is incarcerated for more than a year.[23]

Because of this difference between the ICRA and the Constitution, Native American offenders may be validly convicted of crimes in tribal court proceedings that would be unconstitutional in state or federal court.

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14. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 26 (2000).

15. 18 U.S.C. § 117(a) (Supp. II 2014).

16. *Id.*

17. *Id.*

18. *Id.*

19. *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109–162, sec. 901–02, 119 Stat. 2960, 3077–78 (codified as amended at 42 U.S.C. § 3796gg–10 (2012)).

20. Scott v. Illinois, 440 U.S. 367, 373–74 (1979).

21. *See* Tom v. Sutton, 533 F.2d 1101, 1102–03 (9th Cir. 1976) (explaining that the United States Constitution does not apply to the tribes because they are "quasi-sovereign nations").

22. 25 U.S.C. § 1302(a) (2012).

23. *Id.* § 1302(c).

For example, on several occasions Michael Bryant was convicted of domestic assault in tribal court and imprisoned even though he was without counsel.[24] Those uncounseled convictions would violate the Sixth Amendment if they had been obtained in state or federal court. However, they were nonetheless used for the predicate offense element in the federal habitual offender crime.[25] In his appeal, Bryant argued that because his convictions would have violated the Sixth Amendment had they been obtained in state or federal court, they could not be used as an element of a federal offense.[26]

Bryant's case presents federal courts with a conundrum. On one hand, it seems unfair and unconstitutional to use convictions that would be invalid in state or federal court to prove an element of a federal crime. On the other hand, Congress determined that violent crimes against women in Indian territory are a problem and ought to be reduced,[27] so it provided harsher penalties in § 117. Can tribal court convictions that do not comport with the Sixth Amendment be used as predicate offenses for § 117?

This conundrum resulted in a circuit split. In 2011, the Eighth Circuit upheld the use of uncounseled convictions for § 117,[28] and the Tenth Circuit followed suit twenty days later.[29] In those circuits, it is permissible to use uncounseled tribal convictions for the predicate offense element. When Michael Bryant's case arrived at the Ninth Circuit, that court reversed his § 117 convictions, deeming use of uncounseled tribal convictions unconstitutional.[30] The Ninth Circuit's holding therefore conflicted with the Eighth and Tenth Circuits' interpretations of § 117. In 2016, the Supreme Court resolved the circuit split.[31] In *Bryant*, the Court unanimously held that it was permissible to use Bryant's uncounseled tribal convictions to establish the predicate offense element of § 117.[32]

The problem is now legally resolved, but a sense of unfairness remains. Defendants are not afforded the same level of protection in tribal court as they receive in state or federal court. Tribal convictions that would not stand under the Sixth Amendment may subsequently be used to convict

24. United States v. Bryant, No. 15-420, slip op. at 1–2 (U.S. June 13, 2016).

25. *Id.* at 11–12.

26. *See id.* at 13.

27. *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109–162, sec. 901–02, 119 Stat. 2960, 3077–78 (codified as amended at 42 U.S.C. § 3796gg–10 (2012)).

28. United States v. Cavanaugh, 643 F.3d 592, 594 (8th Cir. 2011).

29. United States v. Shavanaux, 647 F.3d 993, 1000 (10th Cir. 2011).

30. United States v. Bryant, 769 F.3d 671, 679 (9th Cir. 2014).

31. *See* United States v. Bryant, No. 15-420, slip op. at 16 (U.S. June 13, 2016).

32. *Id*.

defendants of an offense that may result in five or even ten years in federal prison. This Note attempts to offer a solution to that problem while retaining the sound reasoning of Justice Ginsburg's opinion in *Bryant.* Part I summarizes the right to counsel in federal and tribal jurisdictions, along with the epidemic of domestic violence in tribal territories. Part II analyzes Justice Ginsburg's majority opinion and Justice Thomas's concurring opinion in *Bryant*. Part III proposes three viable solutions, each of which would increase fairness to defendants, victims, and the tribes after the Court's decision in *Bryant*.

I. TRIBAL SOVEREIGNTY, FEDERAL LEGISLATION, AND *BRYANT*'S CONUNDRUM

The United States government enacted § 117 to reduce widespread domestic violence, but the balance struck between tribal sovereignty and federal law leaves tribal defendants without key protections. Because the tribes are, to a certain degree, sovereign nations, the Bill of Rights does not apply to criminal defendants in tribal courts.[33] Part A offers a history of tribal sovereignty and federal jurisdiction so as to better explain why Bryant lacked the protection of the Sixth Amendment. Part B then compares the Sixth Amendment and the Indian Civil Rights Act to highlight the differences in the afforded right to counsel. Part C provides an overview of domestic violence statistics in Native American communities for context on why § 117 was enacted, and Part D describes § 117.

A. Tribal Sovereignty and the Extent of Federal Jurisdiction

At the beginning of the nineteenth century and after more than two hundred years of colonization, trade, war, and treaties with Native Americans, the new United States government still had not fully defined its relationship with the diverse Native American tribes.[34] Three Supreme Court opinions authored by Chief Justice John Marshall—*Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v.*

33. *See* Talton v. Mayes, 163 U.S. 376 (1896) (holding that the Fifth Amendment does not apply to the Cherokee tribe because its power to prosecute crimes was not created by the Constitution). *See also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.").

34. *See* Hope M. Babcock, *A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 UTAH L. REV. 443 (2005).

Georgia—attempted to resolve the question of just how much sovereignty the tribes retained after the United States became a nation.[35]

In *Johnson v. M'Intosh*, the Court held that land grants made by Native Americans were invalid.[36] The Court called Native Americans "occupants" of the land, but held that "exclusive title" was conveyed to the discovering Europeans.[37] Chief Justice Marshall adopted the position that "discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise."[38] Thus, Native American tribes were only as sovereign as the United States permitted them to be.

In *Cherokee Nation v. Georgia*, the Cherokee Nation sued for an injunction to prevent Georgia from enforcing its laws within Cherokee territory.[39] The Court held that it lacked jurisdiction because the Cherokee Nation was not a foreign state.[40] Chief Justice Marshall called the Native Americans "domestic dependent nations . . . in a state of pupilage" whose "relation to the United States resembles that of a ward to his guardian."[41] *Johnson* established that Native American sovereignty was to be shaped by the United States, and *Cherokee Nation* further specified the limited character of tribal sovereignty.

In the final case of the trilogy, *Worcester v. Georgia*, Chief Justice Marshall limited the states' rights to regulate Native American territory and confirmed the federal government's authority to do so.[42] Worcester, a missionary sent to Cherokee land in Georgia by the federal government,[43] was arrested under a Georgia law that prohibited white people from living on Cherokee land.[44] The Court deemed the Georgia law unconstitutional, holding the Cherokee nation "is a distinct community, occupying its own

35. Worcester v. Georgia, 31 U.S. 515 (1832); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Johnson v. M'Intosh, 21 U.S. 543 (1823).

36. *M'Intosh*, 21 U.S. at 604–05.

37. *Id.* at 574.

38. *Id.* at 587.

39. *Cherokee Nation*, 30 U.S. at 2, 15.

40. *Id.* at 19–20. The United States Constitution gives the Supreme Court jurisdiction over cases in which a state is sued by a foreign state. U.S. CONST. art. III, § 2. Therefore, in holding that the Cherokee Nation is not a foreign state, the Court held that it lacks jurisdiction. *Cherokee Nation*, 30 U.S. at 20.

41. *Id.* at 17.

42. Worcester v. Georgia, 31 U.S. 515 (1832).

43. *Id.* at 537–38.

44. *Id.* at 539.

territory . . . in which the laws of Georgia can have no force."[45] The reason Georgia lacked authority, however, is not because the Cherokees have any power over the states. Instead, it is because the federal government has the exclusive ability to regulate the United States' relationship with the Native American tribes.[46] The Cherokees are not superior to the state; rather, the federal government is superior to both.

A few decades later, the United States' authority to limit tribal sovereignty was tested.[47] Crow Dog, a member of the Sioux Nation, was convicted under federal law[48] of killing another Sioux within Sioux territory.[49] He was sentenced to death.[50] Crow Dog was prosecuted under a federal statute that imposed death on any person who committed murder on land within exclusive federal jurisdiction.[51] The issue, then, was whether the place where the homicide was committed—Sioux land—was within the exclusive jurisdiction of the United States,[52] or whether the tribes retained jurisdiction when a crime was committed by a member against a member within tribal land. Because of the then existing federal policy, which left each tribe to prosecute crimes "according to its local customs," the Court held that the district court lacked jurisdiction.[53]

In reaction to *Crow Dog* and to ensure that federal courts have jurisdiction over crimes committed within Native American territory, Congress used its authority established by *Johnson*, *Cherokee Nation*, and *Worcester* to pass the Major Crimes Act.[54] The Act provides that any Native American who commits a major crime such as murder, kidnapping, felony assault, arson, burglary, or robbery within Native American land and against any person, including another Native American, "shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."[55]

45. *Id.* at 561.

46. *Id.*; *see also* United States v. Cavanaugh, 643 F.3d 592, 595 (8th Cir. 2011) ("Congress, however, enjoys broad power to regulate tribal affairs and limit or expand tribal sovereignty through the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and the Treaty Clause, art. II, § 2, cl. 2.").

47. *See Ex parte* Crow Dog, 109 U.S. 556 (1883).

48. *Id*. at 557. Crow Dog was convicted in the district court of the Territory of Dakota, which had the authority to enforce United States laws. *Id.* at 560.

49. *Id.* at 557.

50. *Id.*

51. *Id.* at 558.

52. *Id.* at 559–60.

53. *Id.* at 571–72.

54. *See* Major Crimes Act, 18 U.S.C. § 1153 (2012); *See also* Keeble v. United States, 412 U.S. 205, 209 (1973) (noting that the Act was passed in reaction to *Crow Dog*).

55. 18 U.S.C. § 1153(a).

Therefore, the federal government can prosecute the crimes enumerated in the Major Crimes Act even if they occur within tribal land and between tribal members.

The Supreme Court upheld federal jurisdiction of major crimes in *United States v. Kagama*.[56] In *Kagama*, the Native American defendant was indicted for killing a Native American victim on the Hoopa Valley Reservation.[57] The Court held that the United States government is sovereign and can legislate over Native American reservations because they are within the boundaries of the United States.[58] Prosecuting the crimes listed in the Major Crimes Act is "within the competency of Congress."[59] Invoking *Cherokee Nation* and *Worcester*, the Court called the tribes "wards of the nation" that are "*dependent* on the United States"[60] and held that "[t]he power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell."[61]

Kagama leaves no question as to the United States' jurisdiction to prosecute crimes authorized by Congress in tribal areas. The remaining issue is the extent of the tribes' jurisdiction. Tribal courts can and do prosecute crimes that are not covered by the Major Crimes Act, including domestic assault.[62] Whether a crime is prosecuted in a United States court or in a tribal court is a key question given the differing levels of constitutional and state protection afforded to defendants in the two systems.

B. Defendants in Tribal Courts Do Not Have the Same Level of Protection that the Bill of Rights Provides

Congress can pass legislation regarding Native American tribes, but because tribes are "quasi-sovereign nations,"[63] the Bill of Rights does not apply to criminal proceedings in tribal courts.[64] In its place, Congress enacted the Indian Civil Rights Act.[65] Although the ICRA has many

56. United States v. Kagama, 118 U.S. 375 (1886).
57. *Id.* at 376.
58. *Id.* at 378–80.
59. *Id.* at 383.
60. *Id.* at 383–84.
61. *Id.* at 384.
62. *See, e.g.*, United States v. Bryant, 769 F.3d 671, 679 (9th Cir. 2014).
63. Tom v. Sutton, 533 F.2d 1101, 1103 (9th Cir. 1976) (citations omitted).
64. *Id.*
65. *See* 25 U.S.C. § 1302 (2012).

familiar protections for defendants, such as prohibitions against double jeopardy[66] and self-incrimination,[67] as well as the right to a speedy and public trial,[68] it offers a lower level of protection regarding appointed counsel than the Sixth Amendment.

1. The Sixth Amendment Right to Appointed Counsel

The Sixth Amendment states that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[69] The seminal right to counsel case is *Gideon v. Wainwright*.[70] Gideon was charged with the felony offense of breaking and entering with intent to commit a misdemeanor.[71] He was indigent but was not appointed counsel. At trial, Gideon was convicted and sentenced to five years of imprisonment.[72] Holding that the assistance of counsel is a necessity in the adversarial system, the court deemed his uncounseled felony conviction unconstitutional, reasoning he could not be given a "fair trial unless counsel is provided for him."[73]

Nine years later, the Court required appointed counsel for a misdemeanor conviction for unlawfully carrying a concealed weapon.[74] In *Argersinger v. Hamlin*, the defendant had received a ninety day sentence.[75] The Court held that appointed counsel is required for any charge which results in imprisonment, whether it is a felony or a misdemeanor.[76] Like in *Gideon*, the Court reasoned that a fair trial or plea could not occur in such cases unless the defendant was represented.[77] If unrepresented, the

66. *Id.* § 1302(a)(3).

67. *Id.* § 1302(a)(4).

68. *Id.* § 1302(a)(6).

69. *Compare* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy . . . the assistance of counsel for his defense."), *with* 25 U.S.C. § 1302(c) (providing that "[i]n a criminal proceeding in which an Indian tribe . . . imposes a total term of imprisonment of more than 1 year on a defendant," defendants will have the right to effective assistance of counsel equal to that provided by the constitution and indigent defendants will have a defense attorney provided at the expense of the tribal government).

70. Gideon v. Wainwright, 372 U.S. 335 (1963).

71. *Id.* at 336.

72. *Id.* at 337.

73. *Id.*

74. Argersinger v. Hamlin, 407 U.S. 25, 26–27 (1972).

75. *Id.* at 37.

76. *Id*. *See also* Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (clarifying that the holding in *Argersinger* only applies to cases that result in actual imprisonment, not merely the possibility).

77. *Argersinger*, 407 U.S. at 36–37.

defendant would likely become the victim of the rushed, "assembly-line justice" of an overburdened court system.[78]

These Sixth Amendment cases, taken together, establish the rule that appointed counsel is required in cases where the defendant faces actual imprisonment. If there is a violation of that right—if the defendant is convicted, imprisoned, and did not receive appointed counsel or waive his right to counsel—those convictions cannot be used for certain purposes in later proceedings. For example, uncounseled convictions that result in imprisonment cannot be used in subsequent proceedings to convict the defendant under a recidivist statute[79] or to impeach his credibility.[80] However, uncounseled convictions that result in imprisonment *can* be used as a predicate conviction for possession of a firearm by a felon.[81] Furthermore, uncounseled convictions for which the defendant was not imprisoned can be used to enhance sentencing for subsequent convictions.[82]

2. The Right to Counsel in Tribal Court Proceedings

While the Sixth Amendment requires appointed counsel if the defendant faces any term of imprisonment, the Indian Civil Rights Act does *not* require appointed counsel in all cases where the defendant is imprisoned.[83] Tribal courts may impose punishment of up to three years of incarceration,[84] but they are only required to appoint counsel when a defendant is imprisoned for more than one year.[85] Therefore, if an indigent defendant faces, for example, six months' imprisonment for a charge in tribal court, he does not have the right to appointed counsel. If he had been indicted in state or federal court, he *would* have had the right to appointed counsel.

3. The Conundrum Created by the Difference in the Right to Counsel

Valid prior convictions can be used in subsequent proceedings for a variety of purposes. As referenced above, they could potentially be used in recidivist statutes,[86] to impeach a defendant's credibility,[87] or to enhance

78. *Id.* at 36.
79. Burgett v. Texas, 389 U.S. 109, 115 (1967).
80. Loper v. Beto, 405 U.S. 473, 483 (1972).
81. *See* Lewis v. United States, 445 U.S. 55, 65–67 (1980).
82. Nichols v. United States, 511 U.S. 738, 748–49 (1994).
83. 25 U.S.C. § 1302(a)(6) (2012).
84. *Id.* § 1302(b).
85. *Id.* §§ 1302(c)(1)–(2).
86. Burgett v. Texas, 389 U.S. 109, 115 (1967).
87. Loper v. Beto, 405 U.S. 473, 483 (1972).

sentences.[88] However, issues arise when uncounseled tribal convictions that resulted in imprisonment are subsequently used in federal or state proceedings. Such convictions would have been unconstitutional if obtained in a federal or state court, but are they valid in later United States proceedings because they were validly obtained in tribal court? Or are federal courts prohibited from using these convictions for any purpose because they violate the Sixth Amendment?

This conundrum is particularly troublesome in the wake of § 117, which criminalizes domestic assault by a habitual offender and permits the use of tribal court convictions as predicate offenses. Before discussing that statute, it is helpful to understand why it was enacted.

C. The Epidemic of Domestic Violence in Tribal Territory

Accurate statistics regarding domestic violence and its prosecution are often difficult to obtain because those crimes are "widely believed to be underreported."[89] One study estimated that only 53% of victimizations of American Indian and Alaskan Native women are reported to the police.[90]

Despite challenges in measuring domestic violence, studies consistently rank Native American women as the racial group most victimized by domestic assault and rape. One in three Native American women are raped at some point in their lives.[91] The Congressional findings for § 117 state that every year, "Indian women experience 7 sexual assaults per 1,000, compared with 4 per 1,000 among Black Americans, 3 per 1,000 among Caucasians, 2 per 1,000 among Hispanic women, and 1 per 1,000 among Asian women."[92] Native American women are also nearly three times more likely to be victims of a battery than white women.[93]

This premise is corroborated by three other studies, which also rank Native American women as the group most often victimized by sexual assault and domestic violence. First, a CDC study found that 45.9% of Native American women experience physical violence by an intimate partner, compared to 40.9% of black women, 35.2% of Hispanic women,

88. Nichols v. United States, 511 U.S. 738, 748–49 (1994).

89. Brief for Dennis K. Burke, Former United States Attorney et al. as Amici Curiae Supporting Petitioner, United States v. Bryant, No. 15-420 (U.S. June 13, 2016).

90. BACHMAN ET AL., *supra* note 11, at 52.

91. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, sec. 901, 119 Stat. 2960, 3077–78 (codified as amended at 42 U.S.C. § 3796gg–10 (2012)).

92. *Id.*

93. *Id.*

and 31.7% of white women.[94] A Department of Justice study similarly found, "American Indians/Alaska Native women report significantly higher rates of intimate partner violence."[95] The study found that 30.7% of Native American women experience physical assault, compared to 26.3% of African American women, 21.3% of white women, and 12.8% of Asian and Pacific Islander women.[96] Further, a National Crime Victimization Survey measured rates of intimate partner violence, which includes rapes, robberies, and assaults, and found that "American Indian and Alaska Native women have the highest rate of victimization (18.2) compared to either African American (8.2), white (6.3), or Asian American (1.5) women."[97]

Assaults against Native American women are also likely to be more severe than assaults against women of other races.[98] In 70% of assaults against American Indian and Alaska Native women, the perpetrator injured the victim, and 56% of those injuries suffered required medical care.[99] Sixty-three percent of assaulted African American women experienced physical injuries, 49% of which required medical care.[100] Finally, 60% of assaults on white women resulted in injury, and 38% of those injuries required medical care.[101]

Some scholars attempt to explain Native Americans' higher rate of victimization by looking to their history of oppression. One theory is that "domination and oppression of native peoples increased both economic deprivation and dependency through retracting tribal rights and sovereignty," placing them "at greater risk for victimization than other groups who did not share similar historical inequalities."[102] A resource for federal prosecutors and law enforcement lists several causes of domestic violence in Native American communities, including "historical trauma, geographic isolation, drug and alcohol abuse, the threat of homelessness, pressure from friends and family, too few law enforcement officials policing a vast amount of land, and an unwillingness to report offenses due to dissatisfaction with the criminal justice system."[103]

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94. BLACK ET AL., *supra* note 12, at 40.
95. TJADEN & THOENNES, *supra* note 14, at 26.
96. *Id.*
97. BACHMAN ET AL., *supra* note 11, at 47.
98. *Id.* at 49.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 67.
103. U.S. DEP'T. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, USING FEDERAL LAW TO PROSECUTE DOMESTIC VIOLENCE CRIMES IN INDIAN COUNTRY 9.

While tribal governments have made important efforts to combat domestic violence, the court systems' structures and available resources impact how those courts handle domestic violence cases. Tribal courts often face "practical problems of funding, training, coordination, and jurisdictional complexities."[104] They also have "scarce resources [that] must be stretched across vast geographic areas," and "[t]he victims face even greater challenges, as many live in small, isolated communities where they may feel intense pressure to remain silent, or fear violent retaliation."[105] Therefore, a history of oppression, poverty, substance abuse, and isolation, combined with poorly resourced court systems, likely explains Native Americans' higher rates of domestic violence.

D. Domestic Assault by a Habitual Offender

Congress enacted 18 U.S.C. § 117 in response to the epidemic of domestic violence in Native American communities. The stated purposes of the law are:

> (1) to decrease the incidence of violent crimes against Indian women; (2) to strengthen the capacity of Indian tribes to exercise their sovereign authority to respond to violent crimes committed against Indian women; and (3) to ensure that perpetrators of violent crimes committed against Indian women are held accountable for their criminal behavior.[106]

In practice, the law targets domestic violence in Native American communities. A group of former United States Attorneys filed an amicus brief in *Bryant*, writing that § 117 is an "important tool" to stop the pattern of escalating domestic violence on tribal lands.[107] The facilitator guide for prosecutors and law enforcement also encourages the use of § 117 to prosecute domestic assaults in tribal lands.[108]

The statute itself is fairly straightforward. If a person commits a domestic assault and already has two or more prior convictions for domestic assault in any federal, state, or tribal court, the statute provides that he may be convicted of domestic assault by a habitual offender and imprisoned for up to five years, or up to ten years if the victim suffers substantial bodily injury.[109]

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104. BACHMAN ET AL., *supra* note 11, at 69.

105. U.S. DEP'T OF JUSTICE, *supra* note 103, at 5.

106. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, sec. 901, 119 Stat. 2960, 3078 (codified as amended at 42 U.S.C. § 3796gg–10 (2012)).

107. Brief for Dennis K. Burke, *supra* note 89, at 10.

108. U.S. DEP'T OF JUSTICE, *supra* note 103, at 28–29.

109. 18 U.S.C. § 117(a) (Supp. II 2014).

The problem with the statute is that it allows tribal convictions to be used as predicate offenses for federal proceedings. A § 117 conviction requires at least two prior domestic violence or sexual assault convictions in federal, state, or tribal court proceedings.[110] As described above, defendants in tribal courts do not have the same right to counsel as defendants in United States courts. A defendant may be convicted under § 117 using a conviction that was valid in tribal court but would not have been valid if obtained in state or federal court.

II. RESOLVING THE CIRCUIT SPLIT: *UNITED STATES V. BRYANT*

The applicability of uncounseled tribal convictions to § 117 created a circuit split among the Sixth, Eighth, and Tenth Circuits, which the Supreme Court resolved in *United States v. Bryant*.

A. The Circuit Split

Three circuits have addressed whether uncounseled tribal convictions may be used as predicate offenses for § 117. The Ninth Circuit held prosecutors may not use prior convictions that do not comport with the Sixth Amendment.[111] However, the Eighth and Tenth Circuits upheld the use of uncounseled tribal convictions to fulfill the predicate offense element of § 117.[112]

In *United States v. Ant*, the Ninth Circuit held that uncounseled tribal court pleas could not be used as evidence of guilt in subsequent federal proceedings for charges based on the same conduct.[113] Ant, unrepresented by counsel, confessed and pleaded guilty in tribal court to killing his niece. His confession and plea were subsequently used against him in a federal trial for voluntary manslaughter.[114] Since he was unrepresented by counsel when he initially pleaded guilty, the Ninth Circuit held that it was error for the federal prosecution to use that plea.[115] This holding was not intended to violate principles of comity or "disparage the tribal proceedings;" the tribal

110. *Id.*

111. United States v. Bryant, 769 F.3d 671, 673 (9th Cir. 2014); United States v. Ant, 882 F.2d 1389 (9th Cir. 1989).

112. United States v. Cavanaugh, 643 F.3d 592 (8th Cir. 2011); United States v. Shavanaux, 647 F.3d 993 (10th Cir. 2011).

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

114. *Id.* at 1390–91.

115. *Id.* at 1396.

conviction remained valid even though it could not be used in the subsequent federal proceeding.[116]

In contrast, the Eighth Circuit held in *United States v. Cavanaugh* that "the predicate convictions, valid at their inception, and not alleged to be otherwise unreliable, may be used to prove the elements of § 117."[117] While driving in a car with his children, Cavanaugh slammed his wife's head into the dashboard and threatened to kill her.[118] He was charged under § 117, but the district court dismissed the indictment because the predicate offenses were uncounseled.[119] In reversing the district court, the Eighth Circuit emphasized that the prior, predicate convictions were constitutionally sound because they were obtained in tribal court in compliance with the ICRA.[120] The court held it could not "preclude use of the prior conviction merely because it would have been invalid had it arisen from a state or federal court."[121] The court distinguished its holding from *Ant* based on the conduct at issue in each case. In *Ant*, the tribal conviction was used to prove a federal offense based on the same conduct. However, in § 117, the domestic assault for which defendant is tried is based on conduct different from that in the predicate offenses.[122]

The Tenth Circuit issued an opinion in *United States v. Shavanaux* twenty days after *Cavanaugh*, also holding that prior uncounseled convictions could be used as predicate offenses under § 117.[123] In *Shavanaux*, the indigent defendant was not appointed counsel but was represented in his tribal cases by a lay advocate that he hired himself.[124] On appeal, the defendant raised Sixth Amendment, Due Process, and Equal Protection claims.[125] The court held that the Sixth Amendment was not violated when the convictions were obtained because it did not apply to the tribal court proceedings. Therefore, it could not be violated when those valid convictions were used in federal court.[126] Additionally, the court held there was no Due Process violation because the tribal convictions complied with the ICRA.[127] Shavanaux argued that because § 117 targets Native

116. *Id.*
117. *Cavanaugh*, 643 F.3d at 594.
118. *Id.*
119. *Id.*
120. *Id.* at 603–05.
121. *Id.* at 604 (emphasis omitted).
122. *Id.*
123. United States v. Shavanaux, 647 F.3d 993, 1000 (10th Cir. 2011).
124. *Id*. at 996.
125. *Id.*
126. *Id.* at 998.
127. *Id.* at 1000.

American communities, it violates his right to equal protection under the law.[128] The court disagreed, holding that his status as a Native American "is not a racial classification, but a political one."[129] In fact, "Shavanaux was not subjected to differential treatment in federal court because of his ancestry, but because of his voluntary association with an Indian tribe. Through his tribal membership and residence in Indian country, Shavanaux chose to submit himself to tribal jurisdiction and the criminal procedures of the Ute tribe."[130] Applying a rational basis test, the Tenth Circuit found that § 117 is rationally related to the legitimate interest of reducing domestic violence in Native American communities.[131] Therefore, there was no equal protection violation.[132]

Unconvinced, the Ninth Circuit went in a different direction with *United States v. Bryant*.[133] Bryant had at least five prior convictions of domestic assault in tribal court, and although he was indigent, he was never represented by appointed counsel.[134] He did not receive more than one year imprisonment for any of his uncounseled tribal court convictions.[135] Therefore, his tribal convictions were in compliance with the ICRA but not the Sixth Amendment.

In 2011, Bryant was indicted for two counts of domestic assault by a habitual offender.[136] He moved to dismiss the indictment, but the district court denied the motion.[137] He pleaded guilty, reserving the right to appeal the denial of his motion to dismiss.[138] The court sentenced Bryant to forty-six months in prison for each count, with the sentences to run concurrently.[139]

On appeal, Bryant argued that his federal conviction violated the Sixth Amendment's right to counsel and the Fifth Amendment's Due Process Clause.[140] The Ninth Circuit agreed that the convictions violated the Sixth Amendment, stating that "tribal court convictions may be used in subsequent prosecutions only if the tribal court guarantees a right to

128. *Id.* at 1001.
129. *Id.* (citing Morton v. Mancari, 417 U.S. 535, 554 n.24 (1974)).
130. *Id.* at 1002.
131. *Id.*
132. *Id.* at 1001–02.
133. United States v. Bryant, 769 F.3d 671 (9th Cir. 2014).
134. United States v. Bryant, No. 15-420, slip op. at 10 (U.S. June 13, 2016).
135. *Id.*
136. *Bryant*, 769 F.3d at 672–73.
137. *Id.* at 673.
138. *Id.*
139. *Id.* at 673–74.
140. *Id.* at 674.

counsel that is, at minimum, coextensive with the Sixth Amendment right."[141]

The Ninth Circuit distinguished its holding from the Supreme Court's precedent in *Lewis v. United States* and *Nichols v. United States*.[142] In *Lewis*, the defendant, without counsel, was convicted and imprisoned for a felony in 1961.[143] Lewis's uncounseled conviction was valid because *Gideon* had not yet been decided.[144] In 1977, Lewis was convicted of possession of a firearm by a felon with the 1961 uncounseled conviction permissibly serving as the underlying felony.[145] In *Bryant*, the Ninth Circuit distinguished *Lewis* by deeming the prohibition on felons in possession of firearms more akin to "a criminal enforcement scheme for a civil disability," while § 117 is "an ordinary recidivist statute."[146] The court called *Lewis* a "narrow exception" to the general rule that an uncounseled conviction may not be used in later proceedings.[147]

In *Nichols*, the defendant "pleaded guilty to conspiracy to possess cocaine with intent to distribute" in 1990.[148] He received one criminal history point for a 1983 misdemeanor driving while intoxicated conviction.[149] Nichols was not imprisoned for the 1983 conviction, so he was not appointed counsel.[150] However, the extra point for that conviction increased the minimum sentence of his 1990 drug conviction by twenty months.[151] The Supreme Court deemed it permissible to use the 1983 uncounseled conviction to add a criminal history point, and thereby add more prison time, to the 1990 conviction because the punishment was solely for the 1990 conviction.[152] The twenty months added to his minimum sentence was not punishment for the 1983 offense; it was merely part of the punishment for the 1990 conviction, which did not violate the Sixth Amendment.[153] The Ninth Circuit distinguished *Nichols* by stating

141. *Id.* at 677.
142. *Id*. at 678.
143. Lewis v. United States, 445 U.S. 55, 56–57 (1980).
144. *Lewis*, 445 U.S. at 57 n.3.
145. *Id*. at 57–58.
146. *Bryant*, 769 F.3d at 677.
147. *Id.*
148. Nichols v. United States, 511 U.S. 738, 740 (1994).
149. *Id.*
150. *Id.* at 740–41.
151. *Id.* at 740.
152. *See id.* at 749.
153. *See id.*

that his prior conviction was valid under the Sixth Amendment[154] while Bryant's predicate offenses were not.[155] In *Nichols*, the Ninth Circuit recognized its conflict with *Cavanaugh* and *Shavanaux* but nonetheless held that it is "bound by *Ant*," which held that an uncounseled tribal court plea could not be used in federal proceedings.[156] Accordingly, the court concluded that Bryant's charges ought to be dismissed.[157]

B. Bryant *at the Supreme Court*

To resolve this circuit split, the United States Supreme Court heard Bryant's case and unanimously reversed the Ninth Circuit.[158] Justice Ginsburg wrote the opinion for the Court, and Justice Thomas wrote a concurring opinion.[159]

1. Uncounseled Tribal Court Convictions May Be Used as Predicate Offenses for § 117

Justice Ginsburg's opinion began by summarizing statistics of domestic violence in Native American communities.[160] She cited the high rates of domestic assault against Native Americans as compared to other racial groups, and she cited the high rates of recidivism among offenders.[161] Justice Ginsburg then discussed the limited authority of tribal courts to impose punishment.[162] Although Congress amended the ICRA to allow tribal courts to sentence defendants to three years of incarceration instead of only one, Ginsburg noted, "few tribes have employed this enhanced sentencing authority,"[163] and "[s]tates are unable or unwilling to fill the enforcement gap."[164] She opined that a sentence of only one year is "insufficient to deter repeated and escalating abuse."[165] In structuring her opinion this way, Justice Ginsburg described an insidious problem that the

154. Appointed counsel is only required when the conviction actually results in imprisonment. Scott v. Illinois, 440 U.S. 367, 373–74 (1979). Nichols's misdemeanor conviction did not result in imprisonment, so failing to appoint counsel was not a Sixth Amendment violation. *See Nichols*, 445 U.S. at 740, 749.

155. United States v. Bryant, 769 F.3d 671, 677 (9th Cir. 2014).

156. *Id.* at 678–79.

157. *Id.* at 679.

158. United States v. Bryant, No. 15-420 (U.S. June 13, 2016).

159. *See id.* (Thomas, J., concurring).

160. *Id.* at 2–4.

161. *Id.*

162. *Id.* at 4.

163. *Id.*

164. *Id.* at 5.

165. *Id.* at 6.

tribes and states are unable to remedy. She framed § 117 as the federal government's solution.

Justice Ginsburg then focused on Bryant's history of domestic assault. She wrote that his "conduct is illustrative of the domestic violence problem existing in Indian country"[166] and that Bryant committed "repeated brutal acts of domestic violence."[167] Justice Ginsburg described the most shocking facts of Bryant's prior convictions, such as the fact that he used a beer bottle to hit a woman in the head and tried to strangle her, and that he assaulted a different woman by kneeing her in the face and breaking her nose.[168] She then described the 2011 assaults for which Bryant was convicted of two counts of domestic assault by a habitual offender.[169] She wrote that in one attack, Bryant repeatedly punched and kicked a woman, and in the other incident, he choked a woman "until she almost lost consciousness."[170] Justice Ginsburg likely chose to include these horrific details to paint Bryant's case as exemplary of the necessity of § 117.

In analyzing the constitutionality of using uncounseled tribal convictions for § 117, Justice Ginsburg began by stating that Bryant's prior convictions *were* valid in tribal court.[171] She wrote, "Bryant urges us to treat tribal-court convictions, for § 117(a) purposes, as though they had been entered by a federal or state court,"[172] meaning that the Sixth Amendment would apply and invalidate those convictions. By framing Bryant's argument in this way, Justice Ginsburg made it seem as if Bryant was asking the Court to adopt a fiction. The convictions were not obtained in federal or state court, so by stating that Bryant was asking the Court to view them as if they were, Justice Ginsburg set up a good reason to disagree with Bryant.

Justice Ginsburg then traced the reasoning of *Nichols*.[173] *Nichols* deemed use of an uncounseled conviction as a sentencing enhancement constitutional because the punishment was imposed only for the latter offense, not for the uncounseled conviction.[174] Likewise, here, "Bryant's 46-month sentence for violating § 117(a) punishes his most recent acts of domestic assault, not his prior crimes prosecuted in tribal court."[175] Bryant

166. *Id.* at 10.
167. *Id.*
168. *Id.*
169. *Id.* at 10–11.
170. *Id.* at 11.
171. *Id.* at 2.
172. *Id.* at 13.
173. *Id.*
174. Nichols v. United States, 511 U.S. 738 (1994).
175. *Bryant*, slip op. at 13.

was represented by counsel for his federal conviction, so there was no Sixth Amendment violation.[176] Bryant's convictions were valid in tribal court, so they should not somehow become invalid in federal court.[177]

Justice Ginsburg then quickly dispensed with Bryant's Due Process argument.[178] Citing *Shavanaux*, she held that there was no Due Process violation because Bryant's prior convictions comported with the ICRA.[179] Finding no Sixth Amendment or Due Process violation, the Court reversed the Ninth Circuit's judgment.[180] Therefore, based on *Bryant*, tribal convictions will continue to be used as predicate offenses under § 117.

2. The Majority Opinion Glosses Over Tribal Sovereignty Concerns

In his concurring opinion, Justice Thomas wrote that he joined the Court's opinion because it was soundly based on precedent. However, he also wrote, "[t]he fact that this case arose at all, however, illustrates how far afield our Sixth Amendment and Indian-law precedents have gone."[181] Justice Thomas then addressed three premises upon which the Court based its holding and wrote that while they are deeply rooted in precedent, there is no "sound constitutional basis for any of them."[182]

The Court's first premise was that prior convictions obtained in violation of the Sixth Amendment generally cannot be used in subsequent proceedings.[183] However, the Sixth Amendment only requires that the defendant be represented by counsel in the present proceeding.[184] In Justice Thomas's view, there should be no "Sixth Amendment 'exclusionary rule' that prohibits the government from using" unconstitutional convictions as predicates for habitual offender laws.[185]

The second premise was that the tribes can prosecute their own members in courts not governed by the Constitution, and the third assumption was that Congress may authorize United States courts to prosecute tribal members who commit crimes against other members on tribal land.[186] Justice Thomas wrote that these two assumptions are

176. *Id.* at 13–14.
177. *Id.* at 14.
178. *Id.* at 15–16.
179. *Id.* at 16.
180. *Id.*
181. *Bryant*, slip op. at 1 (U.S. June 13, 2016) (Thomas, J., concurring).
182. *Id.* at 2–3.
183. *Id.* at 1.
184. *Id.* at 2.
185. *Id*. (quoting Burgett v. Texas, 389 U.S. 109 (1967)).
186. *Id.* at 2–3.

somewhat contradictory and "exemplify a central tension within our Indian-law jurisprudence."[187] Bryant's tribal convictions were premised on the idea that the tribes are sovereign and may prosecute their own members without the restraints of the Constitution, but his federal conviction was premised on the federal government's sovereignty to prosecute tribal members.[188] As Justice Thomas observed, "even though tribal prosecutions of tribal members are purportedly the apex of tribal sovereignty, Congress can second-guess how tribes prosecute domestic abuse perpetrated by Indians against other Indians on Indian land by virtue of its 'plenary power' over Indian tribes."[189]

In Justice Thomas's opinion, it is impossible to definitively say that either Congress or the tribes have sovereignty because a rule cannot be generalized and applied to each and every tribe.[190] Because "Indian tribes have varied origins, discrete treaties with the United States, and different patterns of assimilation and conquest," they have retained different levels of sovereignty.[191] Justice Thomas posited a problem: United States precedence has long treated the individual tribes as possessing equal amounts of sovereignty, so it would be very difficult to now distinguish the tribes and calculate the degree of sovereignty that each possesses.[192] It would be much easier to start with the sovereignty that the federal government has over the tribes. However, Justice Thomas contends that nothing in the Constitution gives Congress plenary authority over Native Americans—neither the Indian Commerce Clause nor the power to approve treaties allows Congress to prosecute crimes like § 117.[193] Although Justice Thomas posed this problem, he did not offer a solution. He concluded by urging the Court to "reconsider these precedents,"[194] but as he acknowledged, the precedents supporting the three premises are numerous and entrenched.[195]

187. *Id.* at 2.
188. *Id.* at 2–3.
189. *Id.* at 3.
190. *See id.* at 3.
191. *Id.*
192. *Id.*
193. *See id.* at 3–4.
194. *Id.* at 4.
195. *See id.* at 1–2.

C. Precedent and Policy Concerns Required that the Court Uphold Bryant's § 117 Convictions

Justice Ginsburg relied heavily on *Nichols* to support her conclusion that validly obtained convictions are admissible in subsequent federal court proceedings.[196] Although *Bryant* seems distinguishable from *Nichols* at first blush,[197] the Court relied on *Nichols* as a matter of precedent and as a matter of policy. *Nichols* appears distinguishable because Nichols's prior conviction, while uncounseled, comported with the Sixth Amendment.[198] It was a misdemeanor for which he received no imprisonment, and it was used as a sentencing enhancement in a later offense.[199] Since the Sixth Amendment has been interpreted to require appointed counsel only where actual imprisonment results,[200] counsel was not required for Nichols's misdemeanor, and there was no Sixth Amendment violation.[201] Bryant's convictions, on the other hand, were valid because of the inapplicability of the Sixth Amendment, not because of compliance with it.

This distinction—inapplicability versus compliance—could be significant in a discussion of reliability. Convictions that comport with the Sixth Amendment are deemed reliable, and convictions that do not, like Bryant's tribal court convictions, may be unreliable in some cases.[202] However, Justice Ginsburg offers an explanation of why Bryant's prior convictions are in fact as reliable as Nichols's conviction. Compliance with the Sixth Amendment hinges on whether an uncounseled conviction results in imprisonment, but the outcome of the proceedings alone should not determine the reliability of the proceeding itself. For example, if Bryant's trial had been exactly the same but he had been given a fine instead of an active sentence, his conviction would not automatically become more reliable. All else being equal, the difference between a fine

196. *Bryant*, slip op. at 13–15.

197. *See* United States v. Bryant, 769 F.3d 671, 677 (9th Cir. 2014) (distinguishing its holding from that of *Nichols*).

198. *See* Nichols v. United States, 511 U.S. 738, 740–41 (1994).

199. *Id.*

200. *See* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.").

201. *Nichols*, 511 U.S. at 741–42.

202. *See* Samuel D. Newton, *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 (2012). *See also* Nicholas LeTang, United States v. Bryant *and the Subsequent Use of Uncounseled Tribal Court Convictions in State or Federal Prosecution*, 77 MONT. L. REV. 211, 229 (2016) (arguing that the Supreme Court should hear Bryant's case and analyze reliability concerns).

and imprisonment should not translate into a reliable conviction in one instance but an unreliable conviction in the other.

Additionally, because the federal government extends comity to tribal court convictions;[203] deeming them unreliable could be an insult to the tribes and an intrusion on tribal sovereignty. Both Bryant's and Nichols's prior convictions were reliable, so the distinction between inapplicability of the Sixth Amendment and compliance with it is immaterial in this case.

Because *Nichols* was on point, the Court was correct in following its holding. Convictions that are reliable and constitutional at their inception are also reliable and constitutional when used in subsequent proceedings.[204] This rationale also serves an important policy goal. As Justice Ginsburg mentions, confusion would have resulted if the Court had created a "hybrid" set of offenses that are deemed reliable in one court system but not another.[205] It is better policy to give full effect to tribal court convictions when they comply with the ICRA and to not doubt their reliability. The ICRA is easier to understand and administer, maintains comity with the tribal courts, and does not reduce tribal sovereignty.

The Court reached the correct result using the precedent that was available, but a problem remains. It still seems unfair to allow uncounseled convictions to be used in federal offenses because defendants in tribal courts do not have the same level of constitutional protection as defendants in state courts. Therefore, the proposals asserted in Part III do not argue against Justice Ginsburg's reasoning, but attempt to add to it and find a just and fair way to reduce domestic violence in Native American communities.

III. PROPOSED SOLUTIONS TO IMPROVE FAIRNESS TO DEFENDANTS AFTER *BRYANT*

With *Bryant*, the Supreme Court resolved the circuit split. Uncounseled tribal court convictions that would be unconstitutional if obtained in a United States court can be used as predicate offenses for § 117. Even though this legal issue is now resolved, it is not entirely satisfactory. While Justice Ginsburg's opinion is logically grounded in the precedent of *Nichols*, it does little to address the unfairness created by an under-resourced court system. Tribal court systems are often unable and unrequired to provide attorneys for domestic violence defendants who may later be sentenced to up to ten years in federal prison based on these

203. Newton, *supra* note 202, at 501–02.

204. *Nichols*, 511 U.S. at 748–49.

205. United States v. Bryant, No. 15-420, slip op. at 14 (U.S. June 13, 2016) (citing *Nichols*, 511 U.S. at 744).

uncounseled convictions. Justice Ginsburg's opinion recognizes the problem of domestic violence in Native American communities, but it does not address whether § 117 is the *best* option for combatting it. Three solutions address concerns of fairness to defendants, victims, and tribes. First, amend the ICRA to require appointed counsel for any domestic violence conviction. Alternatively, repeal § 117, amend the ICRA to allow harsher penalties in tribal courts, and require appointed counsel if harsher penalties are imposed. In addition to either of these alternatives, federal tribal jurisdiction should be expanded to allow tribal courts to prosecute non-members who commit offenses within tribal territory.

A. Amend the ICRA to Require Appointed Counsel For Any Conviction Applicable to § 117

Congress and federal prosecutors agree that enacting and implementing a domestic assault by a habitual offender statute is the most effective way to combat domestic violence in Native American territory.[206] Section 117 seems to narrowly target the problem; domestic violence is widespread in part because the recidivism rate is high, so by imposing harsh penalties only for repeat offenders, the problem may be reduced without unnecessarily ruining the lives of defendants who are sufficiently deterred from reoffending by one conviction. Section 117 may be the best way to reduce domestic assault. However, it still seems unjust for an uncounseled tribal conviction to be used as a predicate offense.

Congress already amended the ICRA to allow tribes to impose up to three years of imprisonment.[207] It could again amend that statute to require appointed counsel in all domestic assault cases.[208] The Ninth Circuit hinted at this idea in *Bryant* when it held that "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."[209] If the ICRA is amended to require appointed counsel in all domestic assault proceedings, tribal court defendants would receive the same assistance of counsel as any other defendant in state or federal court. For that reason, this solution is fair to defendants. It is also fair to victims

206. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109–162, sec. 901–902, 119 Stat. 2960, 3077–78 (codified as amended at 42 U.S.C. § 3796gg–10 (2012)); *see generally* Brief for Dennis Burke, *supra* note 89, at 10.

207. 25 U.S.C. § 1302(b) (2012).

208. Katherine Robillard, *Uncounseled Tribal Court Convictions: The Sixth Amendment, Tribal Sovereignty, and the Indian Civil Rights Act*, 2013 U. ILL. L. REV. 2047, 2081–84 (2013).

209. United States v. Bryant, 769 F.3d 671, 677 (9th Cir. 2014).

because it allows the federal government to continue prosecuting repeat offenders.

A counterargument to this solution is that it is not fair to the tribes. Amending the ICRA to require appointed counsel in all domestic assault proceedings would trample on tribal sovereignty. If they are to be truly sovereign and not "domestic dependent nations,"[210] they ought to be able to decide for themselves what rights to give to defendants. Justice Thomas would likely take this stance; he wrote that the tribes historically gave up different amounts of sovereignty, and they should not be treated as an "undifferentiated mass."[211] He would likely agree that allowing the tribes to make their own rules, in accordance with the amount of sovereignty that each possesses, is the fair thing to do.

Although this solution is still better than leaving the ICRA un-amended in the wake of *Bryant*, the next proposed solution does more to preserve tribal authority.

B. Amend the ICRA to Give Tribal Courts Discretion Over Domestic Assault Penalties and Resources for Appointed Counsel

Currently, tribal courts can only impose penalties of up to three years of imprisonment.[212] If they impose more than one year of imprisonment, tribal courts must appoint counsel for indigent defendants.[213] If the tribes could realistically impose penalties for domestic violence as harsh as the federal penalties—under § 117, up to five years of imprisonment if there is no resulting serious bodily injury and up to ten years if there is serious bodily injury[214]—federal intervention would not be needed.[215]

In order for the tribes to realistically be able to impose harsher penalties, not only does the ICRA need to be amended to allow for harsher penalties, but it also needs to be amended to either (1) not require appointed counsel for sentences longer than one year or (2) appropriate federal funds to provide counsel for indigent defendants in tribal court. This is because, as Justice Ginsburg mentioned in her opinion, although

210. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

211. United States v. Bryant, No. 15-420, slip op. at 4 (U.S. June 13, 2016) (Thomas, J., concurring).

212. 25 U.S.C. § 1302(b).

213. 25 U.S.C. § 1302(c).

214. 18 U.S.C. § 117(a) (Supp. II 2014).

215. *See* Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CALIF. L. REV. 185, 228 (briefly advocating for a waiver of the ICRA sentencing requirements for domestic assault cases).

they *can* sentence defendants to up to three years in prison, tribes do not often impose more than one year of imprisonment because any sentence longer than one year requires appointed counsel, and many tribes do not have sufficient resources to appoint counsel for every defendant.[216]

The first way around that problem—removing the requirement to appoint counsel for long sentences—would be unfair to defendants. They already have a different level of protection in tribal court, and sharpening the difference between tribal courts and United States courts would only exacerbate that imbalance. Instead, the better solution is for the federal government to provide funds and resources to the tribes so that they may appoint counsel and fairly impose harsher sentences for domestic violence.

This solution is fair to defendants because, like the first solution, it gives them the same level of right-to-counsel protection as defendants in state or federal courts. It is fair to the tribes because it gives them a higher degree of sovereignty; allowing them to impose harsher penalties grants them authority that they do not have now.[217]

One counterargument is that this solution is not fair to victims because there is no guarantee that tribal courts would actually impose harsh penalties for repeat offenders in the same way that § 117 does. However, in its amicus brief, the National Congress of American Indians expressed confidence in tribal courts, drawing similarities to United States courts.[218] Tribal courts operate under a system of checks and balances,[219] offer appellate review,[220] provide protections for defendants,[221] require training for judges,[222] and the Northern Cheyenne Tribes "have adopted the American Bar Association Code of Judicial Conduct"[223] and "adhere to robust and detailed codes of criminal procedure and evidence."[224] The National Congress posits that "tribes have no interest in error-prone

216. *See Bryant*, slip op. at 4.

217. For a discussion on the importance of tribal sovereignty in this arena, see Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317, 321 (2013) ("[I]t is simply not acceptable to address the problem by announcing that Indian people deserve the same rights as a person coming before state or federal court . . . . [A] sovereign tribe's right to define due process under the tribal internal system must also be acknowledged.").

218. Brief for National Congress of American Indians as Amicus Curiae Supporting Petitioner at 10–14, United States v. Bryant, No. 15-420 (U.S. June 13, 2016).

219. *Id.* at 11.

220. *Id.*

221. *Id.* at 13.

222. *Id*.

223. *Id.*

224. *Id.*

courts."[225] Therefore, there is no reason to distrust that the tribes will prosecute repeat offenders with the same level of success as the federal government if they are given the chance.

C. Expand Tribal Jurisdiction to Prosecute Non-Members Who Commit Offenses on Tribal Land

Even implementing one of the above solutions, larger jurisdictional questions remain unresolved. Tribal courts are limited in jurisdiction.[226] Jurisdiction depends on the identity of the defendant, the identity of the victim, and the nature of the crime.[227] Tribes cannot prosecute non-members, even when they commit acts of violence against victims who *are* members and who live within tribal territory.[228]

As Justice Thomas described, the tribes are not one entity; they are diverse, and they have diverse needs and capabilities.[229] The Eastern Band of Cherokee Indians (hereinafter referred to as the EBCI), located in western North Carolina, provides an example of a tribe willing and able to effectively prosecute domestic violence offenses.

The EBCI is a relatively small tribe with approximately 12,000 enrolled members.[230] It also occupies a relatively small geographic area.[231] It receives stable income from a casino.[232] Because of its financial resources and small territory, the EBCI has not experienced the problem of being too under-resourced to provide counsel to defendants.[233] In fact, the EBCI requires appointed counsel for any charge that could result in imprisonment.[234] Every conviction therefore comports with the Sixth Amendment.

An EBCI ordinance criminalizes domestic violence.[235] The ordinance states that "the official response to cases of domestic violence is that violent crime will not be excused or tolerated."[236] Eighty-eight criminal

225. *Id.* at 12.

226. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978).

227. *Id.* at 208–10.

228. Duro v. Reina, 495 U.S. 676 (1990).

229. *See* United States v. Bryant, No. 15-420, slip op. at 3 (U.S. June 13, 2016) (Thomas, J., concurring).

230. Telephone Interview with Justin Eason, Tribal Prosecutor, Cherokee, N.C. (Oct. 4, 2016).

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. EASTERN BAND CHEROKEE INDIANS CODE § 14-40.1 (2010).

236. *Id.*

domestic violence charges were filed in fiscal year 2015.[237] Of those, 14% pled guilty, 40% were dismissed (80% of dismissals were pursuant to a plea), and 35% are still pending.[238] For such a small population, this number of charges filed is significant.

The EBCI has a robust and capable system for addressing domestic violence. However, it is not immune to the problems associated with repeat offenders, the defendants that § 117 is designed to target.[239] These repeat offenders are not sufficiently deterred by the limited punishments the tribal court can give. When asked if § 117 is a useful and needed law, Tribal Prosecutor Justin Eason responded that it absolutely is.[240] He described the "overlapping patchwork system" of jurisdiction and said that federal courts are not well-equipped to handle day-to-day, petty crime, such as simple assaults.[241] "While the Violence Against Women Act[242] of 2013 is a step in the right direction," Mr. Eason said, "it goes to highlight the gaps in criminal jurisdiction over offenders who violate laws on the reservation, and these gaps need to be addressed . . . [t]he best forum for them is the community in which the crimes occurred."[243] Mr. Eason supports expanded jurisdiction for tribal courts, particularly in cases of domestic violence where non-members assault EBCI members.[244]

Like the proposal to amend the ICRA to allow for harsher punishments by tribal courts, Mr. Eason's solution would be immensely fair to the tribes, because it gives them a greater degree of sovereignty. It would also be fair to victims, who would be assured that their own community possesses the jurisdiction to successfully prosecute cases of domestic violence. Finally, at least in the case of the EBCI, it would be fair to defendants, who have a right to counsel coextensive with the Sixth Amendment right.

This solution, however, may not be as feasible in larger tribes that do not possess the resources necessary to appoint counsel for all defendants facing imprisonment. Many tribes likely choose not to impose more than a

237. Telephone Interview with Justin Eason, Tribal Prosecutor, Cherokee, N.C. (Oct. 4, 2016).

238. *Id.*

239. Tribal Prosecutor Justin Eason noted, "We have some folks on the reservation who are infamous." *Id.*

240. *Id.*

241. *Id.*

242. In this instance, Mr. Eason refers to § 117 as the Violence Against Women Act.

243. Telephone Interview with Justin Eason, Tribal Prosecutor, Cherokee, N.C. (Oct. 4, 2016).

244. *Id.*

year of imprisonment because they cannot provide appointed counsel.[245] If all tribes had the resources of the EBCI, or if the federal government were to assist the tribes in appointing counsel, expanding the jurisdiction of tribes would be a viable solution because it would enable more prosecutions in the local courts and communities that are best able to combat domestic violence.

CONCLUSION

Bryant resolved a circuit split regarding the use of uncounseled tribal court convictions when prosecuting defendants under federal habitual offender laws. Because the tribal convictions are valid at their inception, they may be used in subsequent federal court proceedings, regardless of whether they are in compliance with the Sixth Amendment. The logic is sound, but the result is unfair to defendants.

One solution is for the United States to continue prosecuting habitual offenders under § 117 but to amend the ICRA to require appointed counsel for all domestic assault cases in tribal court. That way, defendants are treated fairly because they receive the same level of protection in tribal court as defendants in state or federal court.

Another, and perhaps better, solution is to amend the ICRA to allow tribes to impose harsher punishments for domestic violence and to provide federal funds for appointing counsel for indigent defendants. This solution is fair to defendants, who receive appointed counsel, and to the tribes, who are given more sovereignty. Both solutions are fair to victims, for repeat offenders would be still prosecuted.

A third solution, which may be implemented in addition to the other two, is to expand the jurisdiction of tribal courts to enable them to prosecute domestic assaults by non-members. Justice Ginsburg's opinion in *Bryant* is soundly grounded in precedent, but amending the ICRA according to any of the three solutions would be even better for defendants, victims, and tribes.

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245. *See* United States v. Bryant, No. 15-420, slip op. at 4 (U.S. June 13, 2016).

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