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PREDICATE OFFENSES, FOREIGN CONVICTIONS, AND TRUSTING TRIBAL COURTS

*Alexander S. Birkhold**

Concerns about the reliability of criminal justice systems in foreign countries have resulted in uneven treatment of foreign convictions in U.S. courts.¹ Federal courts, however, have historically accepted tribal court convictions as predicate offenses under recidivist statutes.² But the Ninth Circuit Court of Appeals recently rejected the uncounseled convictions obtained against Michael Bryant, Jr., a serial domestic abuser, in the Northern Cheyenne Tribal Court.³ The court dismissed a federal indictment that had been brought against Bryant under 18 U.S.C § 117, which makes it a felony to commit domestic violence against a spouse or partner in Indian country if the perpetrator has at least two prior domestic abuse convictions,⁴ because Bryant's convictions did "not comport with the Sixth Amendment right to counsel."⁵

The Ninth Circuit decision jeopardizes the health and safety of Native American women and stymies federal efforts to prosecute domestic violence in Indian country. Available studies suggest domestic abuse is a grave concern among indigenous communities. For instance, over half of indigenous women respondents to a Department of Justice survey reported being stalked, physically assaulted, or raped during their lifetimes.⁶ But the stakes of the case also extend to the legitimacy of tribal courts. Because federal courts often allow the use of foreign convictions as predicate offenses or factor them into sentencing decisions, even where those convictions

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1. See Alex Glashauser, *The Treatment of Foreign Country Convictions as Predicates for Sentence Enhancements Under Recidivist Statutes*, 44 DUKE L.J. 134, 137–52 (1994).

2. *E.g.*, *United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011).

3. *United States v. Bryant*, 769 F.3d 671 (9th Cir. 2014), *cert. granted*, 136 S. Ct. 690 (2015).

4. 18 U.S.C. § 117(a) (2012).

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

6. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 22–23 (2000), <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf> [<https://perma.cc/A8PK-TRME>].

would have violated the U.S. Constitution if obtained domestically, the Ninth Circuit's rejection of the uncounseled conviction in *United States v. Bryant* implicitly suggested that tribal courts are less reliable fora than many foreign courts. This year the Supreme Court will have the opportunity to repudiate the Ninth Circuit's distrust of tribal court procedures and affirm its commitment to the integrity of tribal courts.

I. The Ninth Circuit Rejected Uncounseled Tribal Court Convictions in *United States v. Bryant*

Michael Bryant, Jr. was convicted at least six times for domestic abuse in the Northern Cheyenne Tribal Court.⁷ In June 2011, Bryant was indicted by a federal grand jury on two counts of domestic assault by a habitual offender, in violation of 18 U.S.C. § 117(a).⁸ Pursuant to section 117(a), a "person who commits a domestic assault within . . . Indian country . . . who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings" for assault against a spouse or intimate partner shall be subject to fines or imprisonment.⁹ While prosecuting the case, the government relied on two of the domestic abuse convictions obtained against Bryant in the tribal court as the basis for the federal charges.¹⁰

During the district court proceeding, Bryant filed a motion to dismiss the indictment. Because he was not represented by counsel during the tribal court cases, Bryant argued that using those convictions to satisfy an element of section 117(a) violated his Fifth and Sixth Amendment rights.¹¹ The district court denied the motion and Bryant entered a guilty plea.¹² He was subsequently sentenced to forty-six months in prison and appealed.¹³

On appeal, the Ninth Circuit Court of Appeals was asked to determine whether the habitual offender statute, 18 U.S.C. § 117(a), violated the Sixth Amendment right to counsel and the Fifth Amendment right to due process by permitting the use of uncounseled tribal court convictions as the predicate offenses for a federal charge.¹⁴ The Ninth Circuit Court of Appeals disagreed with the lower court and determined the earlier convictions did

7. Brief of Appellee United States at 2, *United States v. Bryant*, 769 F.3d 671 (9th Cir. 2014) (No. 12-30177).

8. *Bryant*, 769 F.3d at 672-73.

9. 18 U.S.C. § 117(a).

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

11. *Id.* at 673-74.

12. *Id.* at 673.

13. *Id.* at 673-74.

14. *Id.*

not comport with the Sixth Amendment right to counsel.¹⁵ Even though section 117 explicitly recognizes tribal court convictions, the court held Bryant's convictions from the Northern Cheyenne Tribal Court could not be the basis for the federal offense and dismissed the indictment against him.¹⁶ The Ninth Circuit's decision represents a disturbing departure from the usual treatment of tribal court convictions by its sister circuits.

II. Other Circuit Courts Have Recognized Tribal Court Convictions When Faced With Nearly Identical Facts

Other Circuit Courts of Appeals have accepted the use of uncounseled tribal court convictions as predicate offenses under section 117(a).¹⁷ For example, in *United States v. Cavanaugh*, the Eighth Circuit considered whether Roman Cavanaugh, Jr. could be indicted under section 117(a) when his three earlier misdemeanor abuse convictions in tribal court had been obtained without counsel.¹⁸ Following a district court's dismissal of the indictment against Cavanaugh, the Eighth Circuit was asked to determine "whether the Fifth or Sixth Amendments to the United States Constitution preclude the use of these prior tribal-court misdemeanor convictions as predicate convictions to establish the habitual-offender elements of § 117."¹⁹

The Eighth Circuit explained that Congress "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."²⁰ Importantly, the court noted that in federal legislation mandating certain procedural safeguards in tribal courts, Congress only provided for a right to counsel for indigent criminal defendants for prosecutions that could result in imprisonment of more than one year.²¹ Cavanaugh, however, was convicted of misdemeanors.²² The Court concluded that "Indian defendants in tribal court have no [c]onstitutional or statutory right to appointed counsel unless sentenced to a term of incarceration greater than one year"²³ and ultimately found that

15. *Id.* at 677.

16. *Id.* at 679.

17. *E.g.*, *United States v. Shavanaux*, 647 F.3d 993, 997 (10th Cir. 2011); *United States v. Cavanaugh*, 643 F.3d 592, 603–04 (8th Cir. 2011).

18. *Cavanaugh*, 643 F.3d at 593.

19. *Id.*

20. *Id.* at 595–96 (citing *United States v. Lara*, 541 U.S. 193, 200 (2004)).

21. *Id.* at 596; *see also* 25 U.S.C. § 1302(a)(6), (b), (c)(2) (2012).

22. *Cavanaugh*, 643 F.3d at 593.

23. *Id.* at 596.

Cavanaugh's conviction did not violate the Constitution.²⁴ Even though the prior convictions would have been invalid had they been obtained in state or federal courts, the Eighth Circuit determined they could still be used to prove the section 117 violation.²⁵ Respecting Congress's power to regulate tribal affairs and recognizing the sovereignty of the tribes to administer justice, the court reversed the district court's dismissal of the indictment.

III. Federal Legislation and Tribal Court Rules Provide Ample Procedural Safeguards

Congress has general powers to legislate with respect to Indian tribes²⁶ and has implemented laws addressing criminal procedure in Indian courts. Although there is no constitutionally guaranteed right to counsel in tribal courts—Congress, through the Indian Civil Rights Act of 1968 (“ICRA”)—provided numerous procedural safeguards to defendants in tribal court cases.²⁷ Among other protections, the Act shields defendants against self-incrimination, unreasonable searches and seizures, and double jeopardy; provides for a trial by jury upon request; and offers a right to counsel at the defendant's expense. Defendants may also confront unfavorable witnesses and have access to favorable witnesses.²⁸ As the Supreme Court noted in *Santa Clara Pueblo v. Martinez*, Congress selectively incorporated and modified the “safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments” when it implemented the Indian Civil Rights Act.²⁹

Tribal courts, including the courts of the Northern Cheyenne Tribe that convicted Bryant, must follow the procedures outlined in the ICRA. Moreover, the Northern Cheyenne courts have their own code of criminal procedure.³⁰ The Tribal Code of the Northern Cheyenne Reservation, Title V, Rules of Criminal Procedure gives criminal defendants a number of rights, including: the right to be present throughout the proceeding and defend himself in person, by lay counsel or professional attorney at his own expense; the right to meet witnesses face to face; the right to a speedy public

24. *Id.* at 604–05.

25. *Id.* at 604.

26. *United States v. Lara*, 541 U.S. 193, 200 (2004).

27. 25 U.S.C. § 1302 (2012).

28. *Id.* at § 1302(a).

29. 436 U.S. 49, 62 (1978).

30. Tribal Code of the Northern Cheyenne Reservation, Title V: Rules of Criminal Procedure Code (1987) (amended 2008), http://indianlaw.mt.gov/content/northerncheyenne/codes/tribal_code.pdf [<https://perma.cc/8PP8-D6DJ>].

trial by an impartial jury if a prison sentence is possible; the right to testify; the right not to testify; and the right to appeal.³¹ The Rules of Criminal Procedure Code also addresses arrest and search and seizure procedures and³² rules for discovery, motion practice,³³ pre-trial proceedings, and trial.³⁴

Tribal court convictions result from fair and reliable proceedings; Congress and tribes have guaranteed criminal defendants in tribal courts the right to due process. Federal courts should recognize the legitimacy of these convictions and allow prosecutors to use them as the bases for federal charges.

IV. Congress Explicitly Recognized Tribal Court Convictions in Section 117

All federal courts, including the Supreme Court, should defer to Congress's intentional decision not to require a right to counsel in all tribal court proceedings. Congress enjoys broad authority over Indian affairs³⁵ and a "fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty."³⁶ Congress enacted section 117 pursuant to its authority over Indian affairs. Significantly, Congress did not impose a right-to-counsel requirement in order for a tribal court conviction to qualify as a predicate offense under the statute.³⁷

Nor has Congress granted criminal defendants in Indian courts a right to counsel in all cases. Since the ICRA grants criminal defendants a qualified right to counsel,³⁸ it stands to reason that Congress considered and rejected granting an unqualified, mandatory right to counsel to defendants in tribal courts when it passed ICRA. Further, when Congress amended the ICRA with the Tribal Law and Order Act of 2010, it did not add a right to counsel in all tribal cases.³⁹ Instead, the Tribal Law and Order Act provides a right to counsel only in cases where a tribe imposes a term of imprisonment of more

31. *Id.* at 171–176.

32. *Id.* at 17–18.

33. *Id.* at 25–26.

34. *Id.* at 13–25.

35. *See* *United States v. Antelope*, 430 U.S. 641, 648 (1977).

36. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2039 (2014) (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758–60 (1998)); *see also* *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978) (“[A] proper respect . . . for the plenary authority of Congress in this area cautions that [the courts] tread lightly.”).

37. 18 U.S.C. § 117(a) (2012).

38. *See supra* note 28 and accompanying text.

39. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234, 124 Stat. 2258, 2279–82 (codified at 25 U.S.C. § 1302(a)–(b) (2012)).

than one year on a criminal defendant.⁴⁰ For those defendants facing terms of imprisonment of less than one year, however, Congress did not extend any right to counsel. Congress has had ample opportunity to reflect on the right to an attorney in tribal court proceedings. Nonetheless, as part of its plenary authority over Indian matters, Congress has purposefully and thoughtfully chosen not to require a right to counsel.

The Ninth Circuit suggested its decision in *Bryant* was “consistent with Congress’s dual interest in respecting tribal courts and ensuring due process for tribal court defendants.”⁴¹ But Congress has already explicitly outlined procedural protections for defendants in criminal courts and has chosen not to include a right to counsel in all cases.⁴² The Ninth Circuit should not be permitted to impinge on Congress’s authority by rejecting the established criminal procedures in tribal courts.

V. Federal Courts Rely on Foreign Court Convictions That Would Violate the U.S. Constitution if Obtained in U.S. Courts

The problematic nature of the Ninth Circuit’s decision in *Bryant* is brought into sharper relief when compared to prosecutors’ regular use of foreign convictions. Federal courts “have repeatedly recognized foreign convictions and accepted evidence obtained overseas by foreign law enforcement through means that deviate from . . . constitutional protections.”⁴³

Federal courts, for instance, have allowed the introduction of evidence of prior convictions that were obtained in courts sitting without juries. In *United States v. Wilson*, the Fourth Circuit determined a conviction in Germany was admissible because that defendant did not show “that the German legal system lacks the procedural protections necessary for fundamental fairness.”⁴⁴ The court concluded the conviction obtained in a West German court without a jury could be used to impeach the defendant’s credibility.⁴⁵ The Third Circuit has similarly held that the admission into evidence of a non-jury criminal conviction from the Philippines did not violate due process.⁴⁶ Courts have also permitted statements made to foreign

40. § 234, 124 Stat. 2258 at 2280.

41. *United States v. Bryant*, 792 F.3d 1042, 1044 (9th Cir. 2015), *cert. granted*, 136 S. Ct. 690 (2015) (*denying reh’g en banc to United States v. Bryant*, 769 F.3d 671 (9th Cir. 2014)).

42. 25 U.S.C. §§ 1301–1302, 1304 (2012).

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

44. 556 F.2d 1177, 1178 (4th Cir. 1977).

45. *See Wilson*, 556 F.2d at 1178.

46. *United States v. Kole*, 164 F.3d 164, 165–66, 172 (3rd Cir. 1998).

law enforcement to be used at trial in the United States even though Miranda warnings were not given.⁴⁷

The Ninth Circuit has even permitted the use of evidence obtained by foreign law enforcement where the searches and seizures that produced the evidence would have violated the Fourth Amendment if they had been performed by agents of the United States. In *United States v. Rose*, a Canadian officer searched the appellant's luggage in the course of a routine U.S. Customs stop and found illegal drugs.⁴⁸ The Ninth Circuit held that the trial court had not erred in permitting introduction of the evidence, noting that "[t]he Fourth Amendment exclusionary rule does not apply to foreign searches by foreign officials in enforcement of foreign law, even if those from whom evidence is seized are American citizens."⁴⁹

Finally, federal courts regularly use foreign convictions to make sentencing determinations. Under the Federal Sentencing Guidelines, foreign convictions are not counted in a defendant's criminal history score. Nevertheless, they may be considered when departing from the otherwise mandated range of punishment.⁵⁰ The guidelines mandate that "[i]f reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted."⁵¹ This "reliable information" includes "sentences for foreign and tribal offenses."⁵² The Ninth Circuit has used such foreign convictions to justify upward departures from the federal sentencing guidelines.⁵³

Federal courts readily rely on evidence and convictions that would have violated a defendant's constitutional rights had they been obtained in the United States. Yet, the Ninth Circuit dismissed the indictment against

47. *United States v. Mundt*, 508 F.2d 904, 906 (10th Cir. 1974); *United States v. Welch*, 455 F.2d 211, 213 (2d Cir. 1972); *United States v. Chavarria*, 443 F.2d 904, 905 (9th Cir. 1971) (per curiam); see *United States v. Conway*, No. 93-8124, 1995 WL 339403, at *3 (10th Cir. June 8, 1995); *United States v. Nagelberg*, 434 F.2d 585, 588 n. 1 (2d Cir. 1970) (dictum).

48. 570 F.2d 1358, 1360 (9th Cir. 1978).

49. *Id.* at 1361; see also *United States v. Hawkins*, 661 F.2d 436, 455-56 (5th Cir. 1981) ("[T]he general rule is that the Fourth Amendment does not apply to arrests and searches made by foreign authorities in their own country and in enforcement of foreign law.").

50. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(h) (U.S. SENTENCING COMM'N 2015).

51. *Id.* § 4A1.3(a)(1).

52. *Id.* § 4A1.3(a)(2)(A).

53. *E.g.*, *United States v. Spencer*, No. 94-10266, 1995 WL 40320, at *1 (9th Cir. Feb. 1, 1995) (upholding upward departure from sentencing guidelines for a charge of interstate transportation of stolen goods under 18 U.S.C. § 2314 based on defendant's twenty-six prior convictions in England for "theft and theft-related offenses").

Bryant because the tribal court convictions did not comport with the Sixth Amendment. The decision in *U.S. v. Bryant* reveals a mistaken distrust of convictions obtained in tribal courts that does not extend to the operations of foreign courts and law enforcement, even though tribal courts (and Congress) provide criminal defendants myriad procedural safeguards.

VI. Convictions, Immigration Laws, and Congress

In immigration cases, courts have been similarly willing to consider foreign judgments. Generally speaking, “[u]nless Congress intended the ground of inadmissibility to apply only to U.S. convictions, a conviction by a foreign country may bring about the same immigration consequences as a conviction inside the U.S. . . . If there is a conviction, the U.S. courts will not look behind the conviction to see if the proceedings violated U.S. constitutional guarantees.”⁵⁴

In *Brice v. Pickett*, the Ninth Circuit considered whether Congress intended for a statute to apply to foreign convictions obtained against a defendant.⁵⁵ The defendant in *Brice* appealed an order of the district court denying his petition for a writ of habeas corpus.⁵⁶ Brice had been detained by the immigration authorities following a hearing in which he was “found deportable under 8 U.S.C. § 1251(a)(11), which provides, in part, that an alien may be deported who ‘at any time has been convicted of a violation of . . . any law or regulation relating to the illicit possession of . . . marijuana.’”⁵⁷ At the hearing, Brice had admitted that he was an alien and that a Japanese court convicted him, upon a guilty plea, of unlawful possession of marijuana.⁵⁸ The district court had determined the “evidence supporting the finding of deportability to be clear, convincing and unequivocal.”⁵⁹

On appeal, Brice argued that Congress did not intend 8 U.S.C. § 1251(a)(11) to apply to foreign convictions.⁶⁰ The Ninth Circuit disagreed and noted “[t]he wording of that statute . . . strongly indicates that Congress did intend to include foreign convictions. A plain reading of ‘any law or regulation’ would include foreign laws or regulations.”⁶¹ The Ninth Circuit

54. DANIEL LEVY & CHARLES ROTH, NATIONAL LAWYERS’ GUILD, NATIONAL IMMIGRATION PROJECT, U.S. CITIZENSHIP AND NATURALIZATION HANDBOOK § 8:3 (2015–2016 ed. 2015).

55. 515 F.2d 153 (9th Cir. 1975).

56. *Id.* at 153.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 153–54.

61. *Id.* at 154.

could have questioned the validity and reliability of the foreign conviction. Instead, the court simply looked at Congress's decision to include foreign convictions in the statute and determined the statute was applicable to foreign convictions.

In contrast, despite the clear Congressional intent to include "tribal courts" in section 117, the Ninth Circuit curiously refused to accept the Northern Cheyenne Tribal Court convictions in *U.S. v. Bryant*. This unwillingness to recognize the validity of tribal court convictions as predicate offenses erroneously suggests criminal justice in other countries is more fair and reliable than the procedures in tribal courts.

Conclusion

The Ninth Circuit's decision to reject the tribal court convictions reveals an alarming distrust of tribal courts and suggests they are undependable and unfair. Since the early nineteenth century, the Supreme Court has treated Indian sovereigns as "distinct, independent political communities" deserving respect.⁶² If federal courts are willing to use foreign evidence and convictions, tribal courts should be afforded the same deference, particularly considering Congress and the tribes have already provided robust procedural safeguards. The Supreme Court should overturn the Ninth Circuit's ruling in *U.S. v. Bryant*. To hold otherwise would undermine the integrity of the tribal courts and threaten the rights of Native Americans to administer justice as a sovereign community.

62. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519 (1832), *abrogated by*, *Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28 (1885).