No. 15-420

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL BRYANT, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 117(a) of Title 18, United States Code, makes it a federal crime for any person to "commit[] a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country" if the person "has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for" enumerated domestic-violence offenses. 18 U.S.C. 117(a).

The question presented is whether reliance on valid uncounseled tribal-court misdemeanor convictions to prove Section 117(a)'s predicate-offense element violates the Constitution.

PARTIES TO THE PROCEEDING

Petitioner is the United States of America, which was appellee in the court of appeals. Respondent is Michael Bryant Jr., who was appellant in the court of appeals.

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The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 769 F.3d 671. The oral ruling of the district court denying respondent's motion to dismiss (App., *infra*, 32a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 2014. A petition for rehearing was denied on July 6, 2015 (App., *infra*, 33a-54a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this petition. App., *infra*, 55a-64a.

STATEMENT

Following a conditional guilty plea in the United States District Court for the District of Montana, respondent was convicted on two counts of domestic assault by a habitual offender, in violation of 18 U.S.C. 117(a). App., *infra*, 3a. The district court sentenced respondent to 46 months of imprisonment, to be followed by three years of supervised release. D. Ct. Doc. 34, at 2-3 (May 9, 2012) (Judgment). The court of appeals reversed the convictions and directed that the charges against respondent be dismissed because, the court held, the Constitution prohibited reliance on respondent's valid uncounseled tribal-court convictions to prove Section 117(a)'s predicate-offense element. App., *infra*, 1a-16a.

1. When an Indian Tribe criminally prosecutes an Indian in tribal court, it exercises its own sovereign authority and is not governed by provisions of the federal Constitution. See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978). Although "the Bill of Rights does not apply to Indian tribal governments," *Duro* v. *Reina*, 495 U.S. 676, 693 (1990), Congress conferred a range of procedural safeguards on tribal-court defendants in the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301 *et seq.* Under ICRA, a tribal-court defendant is guaranteed due process of law and has the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to

have compulsory process for obtaining witnesses in his favor. 25 U.S.C. 1302(a)(6) and (8). A tribal-court defendant accused of an offense punishable by imprisonment is entitled to a jury trial. 25 U.S.C. 1302(a)(10). ICRA also provides protection from unreasonable searches and seizures, compelled self-incrimination, double jeopardy, excessive bail, excessive fines, and cruel and unusual punishment. 25 U.S.C. 1302(a)(2), (3), (4), and (7). In addition, tribal-court defendants may seek habeas corpus review of their convictions in a federal district court. 25 U.S.C. 1303.

At the time of respondent's tribal-court convictions, ICRA provided that tribal courts could not impose a prison term greater than one year for any criminal offense and specified that a defendant had the right to the assistance of counsel at his own expense. 25 U.S.C. 1302(6) and (7) (2006).[1] ICRA's counsel provision thus differs from the Sixth Amendment. While the Sixth Amendment provides no right to appointed counsel in misdemeanor cases where only a fine is imposed, it does provide a right to appointed counsel to an indigent defendant in a misdemeanor prosecution that results in actual imprisonment. *Scott* v. *Illinois*, 440 U.S. 367, 369, 373-374 (1979); *Argersinger* v. *Hamlin*, 407 U.S. 25, 37 (1972).

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[1] The Tribal Law and Order Act of 2010, Pub. L. No. 111-211, Tit. II, 124 Stat. 2261, amended ICRA to provide that tribal courts may impose sentences of up to three years of imprisonment for any one offense. *Id.* § 234, 124 Stat. 2279. An indigent defendant must be provided with appointed counsel before a sentence of more than one year of imprisonment is imposed. *Ibid.*; see 25 U.S.C. 1302(c)(2).

2. a. Respondent, who is an enrolled member of the Northern Cheyenne Tribe, has numerous tribal-court misdemeanor convictions for domestic assault. App., *infra*, 3a; Presentence Investigation Report (PSR) ¶ 81. Specifically, respondent pleaded guilty on multiple occasions in the Northern Cheyenne Tribal Court to committing domestic abuse. See *ibid.* In 1999, for example, respondent assaulted his live-in girlfriend by strangling her and hitting her on the head with a beer bottle. *Ibid.* In 2007, respondent kneed his girlfriend in the face and struck her with his fist. *Ibid.* The Northern Cheyenne Tribal Court sentenced respondent to various terms of imprisonment for his offenses, never exceeding one year of incarceration. See *ibid.* Respondent did not seek federal habeas corpus review of any of his domestic-violence convictions.

Respondent has alleged, and the courts below have assumed, that he was indigent and that he did not have access to appointed counsel at the time of his tribal-court convictions. See App, *infra*, 5a & n.4. It is undisputed, however, that those convictions are valid and were obtained in compliance with ICRA. *Id.* at 7a-8a, 46a.

b. Respondent's pattern of domestic violence continued in 2011 with assaults on two different victims. In February 2011, respondent attacked his live-in girlfriend by dragging her off the bed, pulling her hair, and repeatedly punching and kicking her. D. Ct. Doc. 29, at 2-3 (Jan. 12, 2012) (Offer of Proof). Three months later, in May 2011, respondent assaulted a different woman who was living with him. *Ibid.* Respondent woke her by yelling at her and then choked her until she almost passed out. *Ibid.* Based on that

conduct, respondent was indicted in the United States District Court for the District of Montana on two counts of domestic assault by a habitual offender, in violation of 18 U.S.C. 117(a). D. Ct. Doc. 9, at 2 (June 20, 2011) (Indictment).

c. Respondent filed a motion to dismiss the indictment, alleging that it would violate the Fifth and Sixth Amendments to use his uncounseled tribal-court misdemeanor convictions to prove Section 117(a)'s predicate-offense element. D. Ct. Doc. 19, at 1-2 (Nov. 7, 2011) (Motion to Dismiss). The district court denied the motion to dismiss. App., *infra*, 32a.

d. Respondent pleaded guilty to both counts in the indictment, reserving his right to appeal the denial of his motion to dismiss. D. Ct. Doc. 27, at 2-3 (Jan. 10, 2012) (Conditional Plea Agreement). The district court sentenced respondent to concurrent terms of 46 months of imprisonment on each count, to be followed by three years of supervised release. Judgment 2-3.

3. a. The court of appeals reversed respondent's convictions, holding that the indictment must be dismissed because its reliance on uncounseled tribal-court misdemeanor convictions to satisfy Section 117(a)'s predicate-offense element violated the Constitution. App., *infra*, 1a-16a.

The court of appeals acknowledged that respondent's uncounseled tribal-court convictions were not constitutionally infirm because "the Sixth Amendment right to appointed counsel does not apply in tribal court proceedings." App., *infra*, 7a-8a. The court observed, however, that respondent's convictions "would have violated the Sixth Amendment had they been obtained in state or federal court" because respondent was incarcerated for his tribal offenses and "indigent

criminal defendants have a right to appointed counsel in any state or federal case where a term of imprisonment is imposed." *Id.* at 8a. The court of appeals concluded that it was "constitutionally impermissible" to use respondent's uncounseled tribal-court convictions to establish the predicate-offense element in his Section 117(a) prosecution because the tribal court had not "guarantee[d] a right to counsel that is * * * coextensive with the Sixth Amendment right." *Id.* at 12a.

In reaching that conclusion, the court of appeals relied heavily on its prior decision in *United States* v. *Ant*, 882 F.2d 1389, 1395 (9th Cir. 1989), which held that it was impermissible to use an uncounseled tribal-court guilty plea that resulted in imprisonment as evidence in a later federal prosecution arising out of the same incident. App., *infra*, 10a-11a. The court rejected the suggestion that *Ant* had been effectively overruled by this Court's decision in *Nichols* v. *United States*, 511 U.S. 738 (1994), which held that an uncounseled state misdemeanor conviction that did not result in imprisonment could be used to enhance a sentence for a subsequent offense, *id.* at 746-747. App., *infra*, 12a-13a. In the court's view, "*Nichols* and *Ant* are easily reconcilable because *Nichols* involved an uncounseled conviction [that was] valid under the Sixth Amendment" because no imprisonment was imposed, "whereas *Ant* involved prior tribal court proceedings that, in state or federal court, would not have been valid under the Sixth Amendment." *Id.* at 13a.

The court of appeals recognized that, in holding that the charges against respondent must be dismissed, it had created a "conflict with two other circuits," both of which had "held that a prior uncoun-

seled tribal court conviction could be used as a predicate offense for a [Section] 117(a) prosecution." App., *infra*, 14a (citing *United States* v. *Shavanaux*, 647 F.3d 993, 997 (10th Cir. 2011), cert. denied, 132 S. Ct. 1742 (2012), and *United States* v. *Cavanaugh*, 643 F.3d 592, 603-604 (8th Cir. 2011), cert. denied, 132 S. Ct. 1542 (2012)). The court disagreed with those decisions, believing that they could not "be reconciled with *Ant*." *Id.* at 15a.

b. Judge Watford concurred. App., *infra*, 16a-21a. He agreed that *Ant* "control[led] the outcome of" respondent's case, but he wrote separately to explain why "*Ant* warrants reexamination." *Id.* at 16a-17a. As Judge Watford observed, "*Nichols* suggests that so long as a prior conviction isn't tainted by a constitutional violation, nothing in the Sixth Amendment bars its use in subsequent criminal proceedings." *Id.* at 17a. Judge Watford found it "odd to say that a conviction untainted by a violation of the Sixth Amendment triggers a violation of that same amendment when it's used in a subsequent case where the defendant's right to appointed counsel is fully respected." *Id.* at 17a-18a.

Judge Watford also explained that *Nichols* had "undermin[ed] the notion that uncounseled convictions are, as a categorical matter, too unreliable to be used as a basis for imposing a prison sentence in a subsequent case." App., *infra*, 17a. And in Judge Watford's view, "respect for the integrity of an independent sovereign's courts should preclude [the] quick judgment" that uncounseled "tribal court convictions are inherently suspect and unworthy of the federal courts' respect." *Id.* at 20a.

Finally, Judge Watford observed that the Eighth and Tenth Circuits had "pointedly disagreed" with *Ant* when holding that uncounseled tribal court convictions may serve as predicate offenses in a Section 117(a) prosecution. App., *infra*, 20a. "Given this circuit split and the lack of clarity in this area of Sixth Amendment law," Judge Watford believed that "the Supreme Court's intervention seems warranted." *Id.* at 21a.

4. The government petitioned for rehearing en banc. The court of appeals denied rehearing in a published order, with eight judges dissenting. App., *infra*, 33a-54a.[2]

a. Judge Paez, who authored the panel opinion, concurred in the denial of rehearing in an opinion joined by Judge Pregerson, who was also a member of the panel. App., *infra*, 34a-39a. "[W]hile recognizing that only the Supreme Court can clarify the meaning and scope of its decision in *Nichols*," Judge Paez continued to adhere to the view that *Nichols* should not be read to "permit[] the use of [respondent's] convictions as long as they do not violate the Sixth Amendment (which tribal court convictions, by definition, never do)." *Id.* at 34a-35a. "[G]iven the sharp division over the important issues at stake in this case," Judge Paez recognized that "Supreme Court review may be unavoidable." *Id.* at 39a.

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[2] When the court of appeals issued its mandate following its denial of rehearing, respondent had finished serving his term of imprisonment and was subject to a three-year term of supervised release. Respondent's completion of his term of incarceration does not moot appellate proceedings seeking to reinstate his convictions and his term of supervised release. See, *e.g.*, *Pennsylvania* v. *Mimms*, 434 U.S. 106, 108 n.3 (1977) (per curiam).

b. Judge Owens, joined by Judges O'Scannlain, Gould, Tallman, Bybee, Callahan, Bea, and M. Smith, dissented from the denial of rehearing en banc. App., *infra*, 40a-43a. Noting that Congress had enacted Section 117(a) to address "the grave problem of domestic violence on tribal lands," Judge Owens criticized the panel for "wip[ing] this important statute off the books." *Id.* at 40a-41a. Judge Owens further noted the panel's acknowledgment that its decision created a circuit split by explicitly disagreeing with the Eighth and Tenth Circuits on whether the Constitution permits the use of uncounseled tribal-court convictions to prove a defendant's status as a habitual offender in a Section 117(a) prosecution. *Id.* at 41a. That holding, Judge Owens emphasized, tears "a massive gap in the fragile network that protects tribal women and their children from generations of abuse." *Ibid.* Judge Owens also pointed out that the decision parted ways with circuits that treat uncounseled misdemeanor convictions as valid even if a sentence of imprisonment is not. *Id.* at 42a. Judge Owens concluded by observing that "only the Supreme Court can rectify this terrible situation." *Ibid.* He "urge[d] the Court to do so as soon as possible, before [respondent], and the many more men like him, terrorize more women and their families." *Id.* at 42a-43a.

c. Judge O'Scannlain, joined by Judges Gould, Tallman, Bybee, Callahan, Bea, M. Smith, and Owens, authored a separate dissent. App., *infra*, 44a-54a. Judge O'Scannlain explained that the panel's decision "contravenes the Supreme Court's decision in *Nichols* v. *United States*, stands in direct conflict with the only two other circuit courts to consider the issue presented, and, ultimately, holds tribal courts in contempt for

having the audacity to follow the law as it is, rather than the law as we think it should be." *Id.* at 45a (citation omitted). As Judge O'Scannlain observed, "[b]oth Nichols's and [respondent's] uncounseled convictions comport with the Sixth Amendment, and for *the same reason*: the Sixth Amendment right to appointed counsel did not apply to either conviction." *Id.* at 50a (citation and internal quotation marks omitted). Judge O'Scannlain deemed it irrelevant that "the prior tribal court proceedings *would* have violated the Sixth Amendment *if* they were in state or federal court" because "using a federal recidivist statute to prosecute [respondent] does not transform his prior, valid, tribal court convictions into new, invalid, federal ones." *Ibid.* (citation and internal quotation marks omitted).

Judge O'Scannlain concluded that the panel's opinion "must rest on an assumption that tribal court convictions are inherently unreliable," which "trample[s] upon the principles of comity and respect that undergird federal court recognition of tribal court judgments." App., *infra*, 52a (emphasis omitted). The panel's decision, he emphasized, "cries out for [Supreme Court] review." *Id.* at 45a; see *ibid.* (observing that "*every member of the panel* has acknowledged that this case requires the Supreme Court's attention").

REASONS FOR GRANTING THE PETITION

The court of appeals held that the federal domestic-violence recidivist provision, 18 U.S.C. 117(a), is unconstitutional as applied to repeat offenders who have uncounseled tribal-court misdemeanor convictions that resulted in imprisonment. That holding is incorrect, in conflict with other circuits, and highly damag-

ing to federal prosecutorial efforts to combat the serious problem of domestic violence in Indian country.

The court of appeals premised its decision on a decades-old circuit precedent that relied on precedent from this Court that was later overruled. The court's bar against the use of valid, but uncounseled, tribal-court convictions in subsequent federal proceedings cannot be reconciled with this Court's decisions upholding the subsequent use of prior valid, but uncounseled, convictions to support recidivist punishment. The Ninth Circuit's decision also conflicts with the decisions of the two other courts of appeals that have addressed the identical issue and have upheld Section 117(a). The court's decision will impede the effective and uniform enforcement of Section 117(a) by hamstringing the prosecution of recidivist offenders like respondent, who have lengthy records of domestic assault in tribal court but have previously avoided felony-level punishment for their violence. As recognized by all members of the court of appeals panel, and eight judges who dissented from rehearing en banc, this Court's review is warranted.

A. The Court Of Appeals Erred In Holding That Section 117(a) Is Unconstitutional As Applied To Habitual Offenders With Valid Uncounseled Tribal-Court Misdemeanor Convictions

Congress enacted 18 U.S.C. 117 in part "to ensure that perpetrators of violent crimes committed against Indian women are held accountable for their criminal behavior." Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA Reauthorization Act), Pub. L. No. 109-162, § 902(3), 119 Stat. 3078 (42 U.S.C. 3796gg-10 note). For that purpose, Congress authorized prosecution of repeat of-

fenders who commit a domestic assault in Indian country and provided that prior convictions for domestic assaults in "Indian tribal court proceedings" can serve as predicate offenses in a Section 117(a) prosecution. 18 U.S.C. 117(a). Contrary to the Ninth Circuit's decision in this case, nothing in the Constitution prohibits Congress's judgment that prior tribal-court misdemeanor convictions, whether or not they were counseled and whether or not they resulted in imprisonment, support a recidivist prosecution under Section 117(a).

1. The Sixth Amendment does not preclude Congress from subjecting habitual offenders with valid uncounseled tribal-court misdemeanor convictions to prosecution under Section 117(a)

This Court's precedents demonstrate that a prior conviction that did not violate the Sixth Amendment when it was imposed also does not violate the Sixth Amendment when it is used to prove a defendant's recidivist status in a subsequent proceeding. Because respondent's tribal-court convictions were validly entered in accordance with tribal and federal law, the court of appeals erred in holding that the Sixth Amendment prohibited their use in his Section 117(a) prosecution.

a. After this Court held in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), that the Constitution guarantees indigent state defendants the right to appointed counsel in a felony case, the Court addressed whether uncounseled convictions that violated *Gideon* may be used in subsequent proceedings. In *Burgett* v. *Texas*, 389 U.S. 109, 115 (1967), the Court held that they may not. The Court reasoned that if the government could exploit the *Gideon* "defect in the prior conviction" by

using that conviction in a later prosecution, it would cause the defendant to "suffer[] anew from the deprivation of [his] Sixth Amendment right." *Ibid.* In addition, the Court concluded, reliance on an invalid conviction would "erode the principle" of *Gideon*. *Ibid.*

The corollary of those principles is that a conviction that is constitutionally valid despite the absence of counsel may be used in a later proceeding without violating the Sixth Amendment. The use of a valid conviction neither exacerbates a prior constitutional violation nor undermines this Court's case law concerning the right to counsel.

In *Nichols* v. *United States*, 511 U.S. 738 (1994), the Court made those principles clear. In that case, the Court held that an uncounseled state misdemeanor conviction that did not violate the Sixth Amendment (because no term of imprisonment was imposed) could be relied upon to enhance a defendant's sentence for a later offense. *Id.* at 748-749. In so holding, *Nichols* overruled *Baldasar* v. *Illinois*, 446 U.S. 222 (1980) (per curiam), in which a majority of a fractured Court, which could not agree on a rationale, had ruled that a prior uncounseled misdemeanor conviction that was valid for its own purposes could not be used to establish a defendant's recidivist status in a subsequent prosecution. 511 U.S. at 748.

Nichols noted that "the Sixth Amendment right to counsel did not obtain" in the prior prosecution because the defendant was fined but not incarcerated. 511 U.S. at 740, 746 (citing *Scott* v. *Illinois*, 440 U.S. 367, 373-374 (1979)). The "logical consequence," the Court explained, was that the valid uncounseled prior conviction could be used to increase the sentence for a

subsequent offense, "even though that sentence entails imprisonment." *Id.* at 746-747. "Enhancement statutes," the Court reasoned, "whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes that are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction"; instead, the Court "consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant." *Id.* at 747 (internal quotation marks omitted) (citing *Moore* v. *Missouri*, 159 U.S. 673, 677 (1895); *Oyler* v. *Boles*, 368 U.S. 448, 451 (1962)). Thus, the Court held that, "consistent with the Sixth and Fourteenth Amendments of the Constitution, * * * an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." *Id.* at 748-749.

Nichols demonstrates that the Sixth Amendment does not preclude relying on a valid, uncounseled tribal-court conviction in a Section 117(a) prosecution for recidivist domestic violence. Because the "Bill of Rights does not apply to Indian tribes" when they act in their sovereign capacity to prosecute their own members, *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008), "the Sixth Amendment right to counsel d[oes] not obtain" in those proceedings, *Nichols*, 511 U.S. at 746. The use of the tribal-court conviction in a Section 117(a) proceeding accordingly does not inflict harm based on a prior constitutional violation, because no "defect in the prior conviction" exists. *Burgett*, 389 U.S. at 115. Nor does the use of an uncounseled tribal-court misdemeanor conviction in a subsequent prosecution "erode

the principle[s]" articulated in this Court's decisions interpreting the Sixth Amendment right to counsel. *Ibid.* Because those decisions recognize a misdemeanor conviction as valid when rendered in tribal court, even if the defendant was not counseled, no principle in this Court's jurisprudence is undermined.

It would be particularly anomalous to bar the use of a valid but uncounseled tribal court misdemeanor conviction simply because imprisonment was imposed; the Sixth Amendment, even when it applies, does not bar the entry of the *conviction* itself, but only the imprisonment sentence. Accordingly, "[t]he appropriate remedy for a *Scott* violation * * * is vacatur of the invalid portion of the sentence, and not reversal of the conviction itself." *United States* v. *Ortega*, 94 F.3d 764, 769 (2d Cir. 1996); see also *Iowa* v. *Tovar*, 541 U.S. 77, 88 n.10 (2004) (reserving judgment on this issue). Respondent should not be protected against the use of his tribal criminal record based on the sentence he received in tribal court, when that sentence has no relevance to the use of the conviction as a predicate under Section 117(a).

b. The court of appeals relied primarily on its decision in *United States* v. *Ant*, 882 F.2d 1389, 1394-1395 (9th Cir. 1989), which had relied on *Baldasar* in concluding that an uncounseled tribal guilty plea that resulted in imprisonment could not be used as evidence in a later federal prosecution for the same conduct. App., *infra*, 12a, 15a ("we are bound by *Ant*"), 16a ("we reiterate *Ant*'s continued vitality"). But *Nichols* overruled *Baldasar* and thus abrogated *Ant*'s rationale. The court of appeals' attempt to rehabilitate *Ant* fails. The court purported to distinguish *Nichols* on the ground that it "involved a prior conviction that

did comport with the Sixth Amendment, whereas this case involves prior convictions obtained under procedures that, if utilized in state or federal court, would have violated the Sixth Amendment." *Id.* at 12a (citation omitted). But as Judge O'Scannlain observed, "the court's argument is illogical" because "[b]oth Nichols's and [respondent's] uncounseled convictions 'comport' with the Sixth Amendment, and for *the same reason*: the Sixth Amendment right to appointed counsel did not apply to either conviction." *Id.* at 50a.

In sum, nothing in this Court's Sixth Amendment cases supports barring the use of a valid tribal-court conviction because it would have triggered different constitutional protections had it been rendered in a different court. And nothing in logic supports allowing the government to rely on a tribal-court misdemeanor conviction when the tribal court imposed only a fine, but barring it from using the same conviction if the tribal court imposed imprisonment, when nothing in the federal recidivist prosecution turns on the sentence received in tribal court.

2. Due process principles do not preclude Congress from subjecting habitual offenders with valid uncounseled tribal-court misdemeanor convictions to prosecution under Section 117(a)

Although the panel did not ground its decision in the Due Process Clause or concerns about reliability, an opinion concurring in the denial of rehearing suggested that tribal-court convictions do not "pass[] muster at the guilt phase" because of "reliability concerns" See App., *infra*, 36a (Paez, J., concurring in the denial of rehearing en banc). That suggestion is unfounded. Congress's decision to make a tribal misdemeanor conviction an element of a recidivist

domestic-violence crime satisfies due process if it is "rational[]," *Lewis* v. *United States*, 445 U.S. 55, 65 (1980), and Section 117(a) readily passes that test.

a. This Court's decision in *Scott* upheld the constitutional validity of an uncounseled misdemeanor conviction in state and federal court so long as imprisonment was not imposed. If such a conviction does not raise due process reliability concerns, Congress could rationally conclude that reliance on an uncounseled tribal misdemeanor conviction, whether or not imprisonment was imposed, similarly does not raise due process reliability concerns, because the fact of the misdemeanor domestic-violence conviction, not the tribal-court sentence, is the relevant consideration under Section 117(a).

Nichols further establishes that Congress acted rationally in deeming uncounseled tribal-court convictions sufficiently reliable to serve as predicate offenses in a Section 117(a) prosecution. The Court in *Nichols* recognized the argument—pressed by three Justices in *Baldasar* and the dissenting opinion in *Nichols* itself—that "an uncounseled misdemeanor conviction is 'not sufficiently reliable' to support imprisonment" and "'does not become more reliable merely because the accused has been validly convicted of a subsequent offense.'" 511 U.S. at 744 (quoting *Baldasar*, 446 U.S. at 227-228) (opinion of Marshall, J.); *id.* at 757-758 (Blackmun, J., dissenting) (expressing the view that "prior uncounseled misdemeanor conviction[s]" are not "sufficiently reliable to justify additional jail time imposed under an enhancement statute"). But the Court overruled *Baldasar* and permitted an uncounseled misdemeanor conviction to trigger a sentencing enhancement. The *Nichols* Court

thus necessarily rejected the claim that those convictions, though uncounseled, are so unreliable as to violate due process when used to support imprisonment in a later proceeding.

Judge Paez believed that *Nichols* could be distinguished because it "is a sentencing case." App., *infra*, 35a. *Nichols* did observe that "[r]eliance on [an uncounseled misdemeanor] conviction is * * * consistent with the traditional understanding of the sentencing process, which [the Court] ha[s] often recognized as less exacting than the process of establishing guilt." 511 U.S. at 747. But whether a prior conviction is used to enhance a sentence or to satisfy a predicate-offense element, Congress could rationally conclude that the conviction represents a sufficiently reliable indicator of prior criminal conduct. In both contexts, the government is entitled to rely on the fact of the prior conviction and need not relitigate whether the underlying conduct occurred. While the government must establish the fact of the prior conviction beyond a reasonable doubt in a Section 117(a) prosecution, that procedural difference does not alter the substantive use of the conviction to demonstrate that the defendant is a repeat offender.

b. Although the Bill of Rights does not apply to tribal governments, Congress has exercised its power to provide an array of protections to promote the reliability of tribal-court criminal proceedings through ICRA. See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 57-58 & n.8 (1978). A "central purpose" of ICRA was "to 'secur[e] for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments.'" *Id.* at 61

(quoting S. Rep. No. 841, 90th Cong., 1st Sess., 5-6 (1967)).

ICRA's counsel provision does diverge from the Sixth Amendment, but Congress could rationally conclude that appointed counsel is not essential to an accurate determination of guilt in tribal-court misdemeanor proceedings, particularly in light of the other procedural protections that help ensure the reliability of tribal-court convictions. ICRA guarantees that a tribal-court defendant will not be "deprive[d] * * * of liberty or property without due process of law." 25 U.S.C. 1302(a)(8). A defendant accused of an offense punishable by imprisonment has the right to a jury trial, and ICRA further grants a defendant "the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense." 25 U.S.C. 1302(a)(6) and (10). In addition, tribal-court defendants are empowered to seek habeas corpus review of their convictions in federal court. 25 U.S.C. 1303. Congress accordingly had a rational basis to criminalize a third act of domestic violence by a habitual offender with two valid tribal-court convictions.

B. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals

The Ninth Circuit's holding that Section 117(a) is unconstitutional as applied to habitual offenders with uncounseled tribal-court convictions resulting in imprisonment conflicts with the published decisions of two other courts of appeals. App., *infra*, 14a. In square conflict with the decision below, the Eighth

and Tenth Circuits have held that it does not violate the Constitution to rely on uncounseled tribal-court misdemeanor convictions to satisfy Section 117(a)'s predicate-offense element.

In *United States* v. *Cavanaugh*, 643 F.3d 592 (2011), cert. denied, 132 S. Ct. 1542 (2012), the Eighth Circuit held that the Constitution did not "preclude use of" an uncounseled tribal-court conviction in a Section 117(a) prosecution "merely because [the conviction] *would have been* invalid had it arisen from a state or federal court." *Id.* at 604. Like respondent, the defendant in *Cavanaugh* had multiple uncounseled tribal-court convictions for domestic violence that had resulted in incarceration. See *id.* at 593-594 & n.1. Also like respondent, the defendant in *Cavanaugh* "allege[d] no irregularities with his tribal-court proceedings other than the denial of counsel (which was not a violation of any tribal or federal law)." *Id.* at 603 n.7. Relying on *Nichols*, the Eighth Circuit rejected the defendant's argument that it would violate the Constitution to use his uncounseled tribal-court convictions to prove Section 117(a)'s predicate-offense element. See *id.* at 603-604. "[N]ot only did *Nichols* reject the theory that some portion of a subsequent punishment could be viewed as having been 'caused' by a prior conviction," the Eighth Circuit explained, but "the majority in *Nichols* [also] appears to have rejected * * * arguments based on concerns about prior convictions' reliability." *Id.* at 600. Accordingly, the Eighth Circuit held that "predicate [tribal-court] convictions, valid at their inception, and not alleged to be otherwise unreliable, may be used to prove the elements of [Section] 117." *Id.* at 594.

The Tenth Circuit reached the same conclusion in *United States* v. *Shavanaux*, 647 F.3d 993 (2011), cert. denied, 132 S. Ct. 1742 (2012). The court observed that the defendant's uncounseled tribal-court domestic-violence convictions did not violate the Sixth Amendment "[b]ecause the Bill of Rights does not constrain Indian tribes." *Id.* at 997. Thus, the use of those convictions "in a subsequent prosecution c[ould] not violate 'anew' the Sixth Amendment, because the Sixth Amendment was never violated in the first instance." *Id.* at 997-998 (citation omitted) (quoting *Burgett*, 389 U.S. at 115). The court further held that the Due Process Clause did not prohibit the use of uncounseled tribal-court convictions in a Section 117(a) proceeding. *Id.* at 998-1001. The court emphasized that tribal-court convictions must be "obtained in compliance with ICRA," which rendered them "compatible with due process of law." *Id.* at 1000. Therefore, under "principles of comity," federal courts in Section 117(a) proceedings do not violate the Constitution when they rely on valid tribal-court convictions as predicate offenses. *Id.* at 1001; see *id.* at 1000 (noting that courts may credit foreign convictions obtained "through means that deviate from our constitutional protections" so long as they "comport[] with our notion of fundamental fairness") (internal quotation marks omitted).

In the decision below, the court of appeals acknowledged that its "holding place[d] [it] in conflict with" the Eighth and Tenth Circuits. App., *infra*, 14a; see *id.* at 21a (Watford, J., concurring) (noting the "circuit split"). Judge Owens and Judge O'Scannlain likewise emphasized the division among the circuits in their dissents from the denial of rehearing en banc. See *id.*

at 41a (Owens, J.) (lamenting "the split [the panel's decision] creates with the Eighth and Tenth Circuits," which "has torn a massive gap in the fragile network that protects tribal women and their children from generations of abuse"); *id.* at 54a (O'Scannlain, J.) (observing that the panel's decision "creates a circuit split by disagreeing with all other circuit courts which have addressed the very issue presented").

The United States opposed certiorari in *Cavanaugh* and *Shavanaux*, reasoning that those decisions did not squarely conflict with the Ninth Circuit's decision in *Ant*, which was in any event of "doubtful continuing validity because it was decided before *Nichols* overruled *Baldasar*." Br. in Opp. 14, *Shavanaux*, *supra* (No. 11-7731) (explaining that review would be premature because "the Ninth Circuit may well reconsider its holding [in *Ant*] if the opportunity arises"). Now that the Ninth Circuit has affirmed "*Ant's* continued vitality" and relied on that decision to create a square conflict on the constitutionality of Section 117(a) as applied to habitual offenders with uncounseled tribal-court convictions, an intractable division of authority exists. App., *infra*, at 16a.

That conflict alone warrants review. But the Ninth Circuit's decision also creates serious tension with a line of cases holding that an uncounseled misdemeanor conviction may be used in a subsequent proceeding, even if a term of imprisonment was impermissibly imposed, because it is the sentence of imprisonment that violates *Scott,* not the underlying adjudication of guilt. Several courts have held that the remedy for a *Scott* violation is to vacate the imprisonment sentence, but

affirm the conviction.[3] See, *e.g.*, *United States* v. *Reilley*, 948 F.2d 648, 654 (10th Cir. 1991) (striking sentence of imprisonment imposed on uncounseled misdemeanant, but affirming his conviction and fine); *United States* v. *White*, 529 F.2d 1390, 1391, 1394 (8th Cir. 1976) (same); *Alabama* v. *Shelton*, 851 So. 2d 96, 102 (Ala. 2000) (same), aff'd, 535 U.S. 654 (2002); but see *United States* v. *Eckford*, 910 F.2d 216, 218 (5th Cir. 1990) (stating in dicta without analysis that "if an uncounseled defendant is sentenced to prison, the conviction itself is unconstitutional"). And three courts of appeals have held that an uncounseled misdemeanor conviction may be counted in a defendant's criminal history at sentencing for a subsequent offense, even if the defendant was impermissibly sentenced to a term of imprisonment in the prior proceeding. See *United States* v. *Acuna-Reyna*, 677 F.3d 1282, 1284-1285 (11th Cir.), cert. denied, 133 S. Ct. 342 (2012); *United States* v. *Jackson*, 493 F.3d 1179, 1183-1184 (10th Cir. 2007); *Ortega*, 94 F.3d at 769-770. As Judge Owens observed, "[b]y holding that an unquestionably valid misdemeanor conviction is invalidated by the imposition of a prison sentence, the panel splits with every circuit to seriously consider this issue." App., *infra*, 41a.

C. The Question Presented Is Significant And Warrants This Court's Review

The Ninth Circuit's invalidation of 18 U.S.C. 117 as applied in this case, and its creation of a circuit conflict on that issue, warrants this Court's review. Section 117(a) serves a vital function in addressing the

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[3] This Court noted but reserved this question in *Iowa* v. *Tovar*, 541 U.S. at 88 n.10.

"grave problem of domestic violence on tribal lands." App., *infra*, 40a (Owens, J., dissenting from denial of rehearing en banc). The Ninth Circuit's ruling substantially limits the government's ability to "remove these recidivists from the communities that they repeatedly terrorize." *Id.* at 41a. Because the court's decision frustrates Congress's goal in enacting Section 117(a) and detrimentally affects the administration of the federal criminal justice system, this Court's review is warranted. Moreover, the circuit conflict on this issue has considerable practical significance because tribal lands are particularly concentrated in the three jurisdictions that have considered the question presented. Of the 567 federally recognized tribes, more than 500 are located in the Eighth, Ninth, and Tenth Circuits.[4] This Court should grant certiorari to ensure that habitual domestic-violence offenders with tribal-court convictions are treated the same way under Section 117(a) no matter where they reside.

Domestic violence against Indians is a pressing problem of alarming magnitude. More than forty percent of Indians have been victims of physical violence, rape, or stalking by an intimate partner in their lifetimes. See Nat'l Ctr. for Injury Prevention and Control, Ctrs. for Disease Control and Prevention, *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* 3, 39-40 & tbls. 4.3 and 4.4 (Nov. 2011), http://www.cdc.gov/ViolencePrevention/pdf/NISVSReport2010-a.pdf. Moreover, recidivism represents a severe threat because "[d]omestic violence often escalates in severity over time." *United States* v. *Castleman*, 134 S. Ct. 1405, 1408 (2014). In

[4] See 80 Fed. Reg. 1942 (Jan. 14. 2015); 80 Fed. Reg. 39,144 (July 8, 2015).

legislative findings accompanying Section 117, Congress found that "during the period 1979 through 1992, homicide was the third leading cause of death of Indian females aged 15 to 34, and 75% were killed by family members or acquaintances." VAWA Reauthorization Act § 901(4), 119 Stat. 3077 (42 U.S.C. 3796gg-10 note).

Before Section 117's enactment, Indian habitual offenders who committed repeated acts of domestic violence on tribal lands frequently escaped felony-level punishment. The federal government generally could not prosecute those recidivist offenders unless their violence caused death or serious bodily injury and so rose to the level of a major crime. See 18 U.S.C. 1152, 1153. Most States have no criminal jurisdiction over crimes involving Indians in Indian country, and those that do often face funding constraints that substantially limit their efforts to combat crime on tribal land. See Sarah Deer et al., Tribal Law and Pol'y Inst., *Final Report: Focus Group on Public Law 280 and the Sexual Assault of Native Women* 7-8 (2007), http://www.tribal-institute.org/download/Final%20280%20FG%20Report.pdf; see also *Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-474 (1979) (summarizing jurisdiction of States over crimes occurring on tribal land). And at the time Congress enacted Section 117, ICRA precluded the tribes themselves from imposing felony punishment on repeat offenders. See 25 U.S.C. 1302(7) (2006) (preventing tribal courts from imposing "punishment greater than imprisonment for a term of one year").[5]

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[5] More than four years after Section 117 was enacted, Congress amended ICRA to authorize tribal courts to impose sentences of

In enacting Section 117, Congress recognized the inadequacy of efforts to punish domestic violence on tribal lands and sought to close that gap. Emphasizing that "Indian tribes require additional criminal justice * * * to respond to violent assaults against women," Congress passed Section 117 "to ensure that perpetrators of violent crimes committed against Indian women are held accountable for their criminal behavior." VAWA Reauthorization Act §§ 901(5), 902(3), 119 Stat. 3078 (42 U.S.C. 3796gg note). Section 117's inclusion of tribal-court domestic-violence convictions as predicate offenses is essential to accomplishing that goal. See 151 Cong. Rec. 9062 (2005) (statement of Sen. McCain introducing bill containing precursor to Section 117) (observing that perpetrators of domestic violence on tribal lands "may escape felony charges until they seriously injure or kill someone" and that Section 117 addresses that problem by "creat[ing] a new Federal offense aimed at the habitual domestic violence offender and allow[ing] tribal court convictions to count for purposes of Federal felony prosecution").

By invalidating Section 117 as applied to recidivist domestic-violence offenders with uncounseled tribal-court convictions that resulted in imprisonment, the court of appeals has "stripped Congress * * * of the power to meaningfully punish" individuals like re-

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up to three years of imprisonment for a single offense, provided the courts comply with additional procedural requirements. 25 U.S.C. 1302(b) and (c). As of August 14, 2015, only ten tribes were relying on that enhanced sentencing authority. See Tribal Law and Policy Institute, *Implementation Chart: VAWA Enhanced Jurisdiction and TLOA Enhanced Sentencing* (Aug. 14, 2015), http://www.tribal-institute.org/download/VAWA/VAWA ImplementationChart.pdf.

spondent and to "protect their victims from another beating (or worse)." App., *infra*, 42a (Owens, J., dissenting from denial of rehearing en banc). Because the Ninth Circuit has nullified a central application of Section 117, and created disuniformity in the national enforcement of the important statute, this Court should grant review.

Indeed, every member of the panel recognized the need for this Court's intervention. See App., *infra*, 39a (Paez, J., concurring in denial of rehearing en banc) (acknowledging that "Supreme Court review may be unavoidable" in light of "the sharp division over the important issues at stake in this case"); *id.* at 21a (Watford, J., concurring) ("Given th[e] circuit split and the lack of clarity in this area of Sixth Amendment law, the Supreme Court's intervention seems warranted."). The eight judges who dissented from the denial of rehearing en banc likewise emphasized the need for this Court to resolve the issue of Section 117(a)'s constitutionality, "urg[ing] the Court" to intervene "as soon as possible, before [respondent], and the many more men like him, terrorize more women and their families." *Id.* at 42a-43a. As one judge concisely stated, the Ninth Circuit's erroneous holding that the Constitution precludes Congress's method for combatting recidivist domestic violence on tribal land is "a decision [that] cries out for [this Court's] review." *Id.* at 45a (O'Scannlain, J., dissenting from denial of rehearing en banc).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2015

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-30177
D.C. No. 1:11-cr-00070-JDS-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL BRYANT, JR., DEFENDANT-APPELLANT

Argued and Submitted:
July 10, 2014—Portland, Oregon
Filed: Sept. 30, 2014

OPINION

Appeal from United States District Court
for the District of Montana
Jack D. Shanstrom, Senior District Judge, Presiding

Before: HARRY PREGERSON, RICHARD A. PAEZ, and PAUL J. WATFORD, Circuit Judges.

PAEZ, Circuit Judge:

Michael Bryant, Jr., an Indian, was indicted on two counts of domestic assault by a habitual offender, in

violation of 18 U.S.C. § 117(a).[1] In support of the charges, the government relied on two prior tribal court convictions for domestic abuse. These convictions were uncounseled and at least one resulted in a term of imprisonment. The Sixth Amendment guarantees indigent defendants in state and federal criminal proceedings appointed counsel in any case where a term of imprisonment is imposed. *Scott v. Illinois*, 440 U.S. 367, 369, 373-74 (1979). But the Sixth Amendment does not apply to tribal court proceedings. *United States v. First*, 731 F.3d 998, 1002 (9th Cir. 2013), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Mar. 20, 2014) (No. 13-9435). In this case, we must decide whether, in a prosecution under § 117(a), the government may use prior tribal court convictions that, although not obtained in violation of the Constitution, do not comport with the Sixth Amendment right to counsel to prove an element of the offense. We hold that *United States v. Ant*, 882 F.2d 1389, 1395 (9th Cir. 1989), prohibits the use of such convictions in a § 117(a) prosecution. We therefore reverse the district court's denial of Bryant's motion to dismiss the indictment.

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[1] Although we are mindful that the term "Native American" or "American Indian" may be preferable, we use the term "Indian" throughout this opinion because that is the term used throughout the United States Code. We also use the term "tribal," as that is the term used in 18 U.S.C. § 117(a).

I. BACKGROUND

In June 2011, Michael Bryant, Jr. was indicted on two counts of domestic assault by a habitual offender, in violation of 18 U.S.C. § 117(a). Section 117(a) criminalizes the commission of "domestic assault within . . . Indian country" by any person "who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction[,] . . . assault . . . against a spouse or intimate partner." Count I charged that in February 2011, Bryant assaulted C.L.O., his previous girlfriend, "after having been convicted of at least two separate prior domestic assaults." Count II charged that in May 2011, Bryant assaulted his new live-in girlfriend, D.E., "after having been convicted of at least two separate prior domestic assaults."[2] The prior domestic assaults the government relied upon were domestic abuse convictions obtained in the Northern Cheyenne Tribal Court.

Bryant filed a motion to dismiss the indictment. He argued that using his tribal court convictions to satisfy an element of § 117(a) violates his Fifth and Sixth Amendment rights because (1) he was not appointed counsel during his tribal court proceedings and (2) only Indians may be prosecuted under § 117(a) on the basis of a prior

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[2] The February 2011 and May 2011 assaults both occurred at Bryant's residence, which was located within the Northern Cheyenne Indian Reservation.

conviction that does not comport with the Sixth Amendment. The government did not contest Bryant's representation that he lacked the assistance of counsel during his prior tribal court proceedings and that his convictions would have violated the Sixth Amendment had they been obtained in state or federal court. The district court denied the motion in a brief oral ruling. Bryant then entered a guilty plea pursuant to a conditional plea agreement that preserved his right to appeal the district court's ruling on the motion to dismiss. The district court sentenced Bryant to forty-six months' imprisonment on each count, to run concurrently.

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction to review a final judgment of the district court pursuant to 28 U.S.C. § 1291. We review de novo a district court's denial of a motion to dismiss an indictment on constitutional grounds. *United States v. Chovan*, 735 F.3d 1127, 1131 (9th Cir. 2013); *United States v. McCalla*, 545 F.3d 750, 753 (9th Cir. 2008).

III. DISCUSSION

Bryant argues that using his prior tribal court convictions as the predicate offenses in a § 117(a) prosecution violates the Sixth Amendment right to counsel and the Fifth Amendment guarantee of due process because these convictions were obtained through procedures that, if utilized in state or federal court, would violate the Sixth Amendment. As an initial matter, the government argues that Bryant failed to make an evidentiary showing

that his tribal court convictions were uncounseled. The government also argues that tribal court proceedings are not governed by the Sixth Amendment and convictions that were not obtained in actual violation of the Constitution may be used in subsequent prosecutions.[3]

We may easily dispose of the government's first argument. In district court, Bryant repeatedly represented that he lacked counsel during the relevant tribal court proceedings. Yet, the government never objected that Bryant had not met his evidentiary burden on this point, even when Bryant characterized the issue as "undisputed." Accordingly, the issue is waived, *United States v. Carlson*, 900 F.2d 1346, 1349-50 (9th Cir. 1990), and we assume that Bryant did not have the benefit of counsel during his prior tribal court domestic abuse proceedings.[4]

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[3] In its supplemental brief addressing the impact of *First* on this case, the government argued that it could rely on Bryant's tribal court convictions for another reason: at least two of his tribal court domestic abuse convictions did not result in a term of imprisonment, and therefore, did comport with the Sixth Amendment. The government has since conceded that Bryant does not have two prior tribal court domestic abuse convictions that did not result in a sentence of incarceration.

[4] Moreover, there is no serious doubt that Bryant was not appointed counsel during his tribal court domestic abuse proceedings. The Law and Order Code of the Northern Cheyenne Tribe, Title 5, Chapter III, Rule 22 provides that a defendant in a criminal case has the right to "defend himself . . . by . . . [an] attorney at

The merits of this case pose a more difficult question. The United States Constitution guarantees criminal defendants the right to assistance of counsel for their defense. U.S. Const. amend. VI; *see also Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963). The right to appointed counsel for indigent criminal defendants is a "logical corollary" of this guarantee. *Powell v. Alabama*, 287 U.S. 45, 72 (1932).

In a line of cases beginning with *Powell*, the Supreme Court has set forth when the right to appointed counsel is triggered. *See id.* at 68-69, 71-72 (holding that the Fourteenth Amendment provides capital defendants with a right to appointed counsel because the due process right to be heard encompasses a right to be heard by counsel). In *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938), the Court recognized that the Sixth Amendment guarantees indigent criminal defendants the right to appointed counsel in federal proceedings. The Court subsequently held that the Sixth Amendment right to appointed counsel applies to the states as well through the Fourteenth Amendment. *Gideon*, 372 U.S. at 342-45.

Johnson and *Gideon* involved felony prosecutions, but the Court later clarified that the right to appointed counsel for indigent defendants attaches in all criminal cases "where loss of liberty is . . . involved," regardless of how a crime is classified. *Argersinger v. Hamlin*, 407

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his own expense." The Tribe does not guarantee a right to appointed counsel in any case.

U.S. 25, 37 (1972). In *Scott*, the Court further refined the right, holding that indigent defendants are entitled to appointed counsel only in those cases where a term of imprisonment is actually imposed, and not in every case where a term of imprisonment could be imposed. 440 U.S. at 369, 373-74. Finally, in *Alabama v. Shelton*, 535 U.S. 654, 658, 662, 674 (2002), the Court concluded that imposition of a suspended sentence constitutes a term of imprisonment that triggers the Sixth Amendment right to appointed counsel.

However, the Sixth Amendment right to appointed counsel does not apply in tribal court proceedings, *First*, 731 F.3d at 1002; *United States v. Percy*, 250 F.3d 720, 725 (9th Cir. 2001); *Tom v. Sutton*, 533 F.2d 1101, 1102-03 (9th Cir. 1976), because the Constitution is generally inapplicable to tribal courts, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *Talton v. Mayes*, 163 U.S. 376, 382-83 (1896).[5] Consequently, Bryant's prior un-

[5] "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." *Santa Clara Pueblo*, 436 U.S. at 56. Congress nonetheless has plenary authority to impose limits on tribal self-government. *Id.* Acting under its plenary authority, Congress has required tribal courts to provide a limited right to counsel in criminal tribal court proceedings through the Indian Civil Rights Act ("ICRA"), which mandates that criminal defendants in tribal court be permitted to retain counsel at their own expense, and the Tribal Law and Order Act of 2010, which requires tribes to provide indigent defendants with appointed counsel in those cases where

counseled tribal court convictions that resulted in terms of imprisonment are not unconstitutional, and Bryant does not contend otherwise. Rather, Bryant argues that, because his convictions would have been unconstitutional had they been obtained in state or federal court, they may not be used to prove his guilt in a § 117(a) prosecution.

We agree that Bryant's prior tribal court domestic abuse convictions would have violated the Sixth Amendment had they been obtained in state or federal court. Under *Argersinger* and *Scott*, indigent criminal defendants have a right to appointed counsel in any state or federal case where a term of imprisonment is imposed. *Scott*, 440 U.S. at 369, 373-74; *Argersinger*, 407 U.S. at 37. We must examine another line of cases, however, to determine whether convictions arising from proceedings that neither violate the Sixth Amendment nor provide an equivalent right to counsel may be used to prove an element of the offense in a later federal prosecution.

In a series of cases following *Gideon*, the Supreme Court addressed whether prior convictions obtained in violation of the Sixth Amendment right to counsel may be used in subsequent proceedings. In the first few such cases, the Court consistently held that uncounseled convictions obtained in violation of *Gideon* could not be used

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the tribal court imposes a term of imprisonment that exceeds one year. *See First*, 731 F.3d at 1002 & n.3. Indian tribes are, or course, free to grant additional rights through their own laws. *See id.* at 1003 & n.4.

in subsequent proceedings to (1) prove the prior felony conviction element of a recidivist statute, *Burgett v. Texas*, 389 U.S. 109, 111, 114-16 (1967), (2) impose a higher sentence based on a prior conviction, *United States v. Tucker*, 404 U.S. 443, 447, 449 (1972), or (3) impeach a defendant's credibility, *Loper v. Beto*, 405 U.S. 473, 476, 482-83 (1972) (plurality opinion).

In *Lewis v. United States*, 445 U.S. 55, 66-67 (1980), the Court held, for the first time, that a prior conviction that violated the Sixth Amendment could be used in a subsequent prosecution. In *Lewis*, the defendant was convicted under a predecessor felon-in-possession-of-a-firearm statute. *Id.* at 57-58. He challenged the government's use of a prior conviction obtained in violation of *Gideon* to prove he was a felon. *Id.* The Court acknowledged *Burgett*, *Tucker*, and *Loper*, but did not read those cases to stand for the proposition that "an uncounseled conviction is invalid for all purposes." *Id.* at 66-67. It concluded that Lewis's prior uncounseled conviction could be used in a subsequent prosecution because the conviction was providing a basis for imposing only a firearms prohibition—an "essentially civil disability," albeit one that was "enforceable by a criminal sanction." *Id.* at 67.

Not long after *Lewis*, the Court considered whether an uncounseled conviction that did not result in imprisonment—and therefore did not run afoul of the Sixth Amendment—could be used in a subsequent prosecution under a recidivist statute. *See Baldasar v. Illinois*, 446 U.S. 222, 223-24 (1980), *overruled by Nichols v. United*

States, 511 U.S. 738 (1994). In a splintered decision, five justices, in three separate opinions, ruled that it could not. Lower courts struggled to interpret and apply *Baldasar*, *see Nichols*, 511 U.S. at 745, and, ultimately, the Court revisited a similar question in *Nichols*. In *Nichols*, the defendant pled guilty to conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. § 846. *Id.* at 740. When calculating Nichols's criminal history points during sentencing, the district court considered a prior uncounseled state court conviction for which Nichols received a fine but was not incarcerated. *Id.* The Court held that an uncounseled prior conviction valid under *Scott*—as Nichols's was—"may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment." *Id.* at 746-47.

The Supreme Court has never addressed whether a conviction obtained in a forum not governed by the Constitution under procedures that do not comport with the Sixth Amendment right to counsel may be used in a subsequent prosecution. Our court, however, has twice addressed this issue. In *Ant*, we considered whether an uncounseled tribal court guilty plea to charges of assault and battery, which resulted in a six-month term of imprisonment, could be introduced as evidence of guilt in a subsequent federal prosecution for manslaughter arising out of the same incident. 882 F.2d at 1390-91. We held that it could not, reasoning that "if Ant's earlier guilty plea had been made in a court other than in a tribal court, it would not be admissible in the subsequent federal pro-

secution absent a knowing and intelligent waiver" of his right to counsel. *Id.* at 1394. This fact rendered the plea "constitutionally infirm" and inadmissible in a later federal prosecution. *Id.* at 1395.

More recently, in *First*, we considered whether a prior uncounseled tribal court conviction that resulted in a term of imprisonment could be used as the predicate offense in a prosecution under 18 U.S.C. § 922(g)(9). 731 F.3d at 1000-01, 1003. Section 922(g)(9) makes it unlawful for a person convicted of a misdemeanor domestic violence offense to possess a firearm. Noting the similarity between § 922(g)(9) and the statute in *Lewis*, we concluded that "it is of no moment that First's misdemeanor conviction was obtained without complying with the Sixth Amendment," because the government sought to use the conviction only to enforce a civil firearms disability. *Id.* at 1008-09. In so holding, we discussed *Ant*, stating as follows:

> We do not question *Ant*'s continued vitality. *Ant* stands for the general proposition that even when tribal court proceedings comply with ICRA and tribal law, if the denial of counsel in that proceeding violates federal constitutional law, the resulting conviction may not be used to support a subsequent federal prosecution. *Lewis*, however, demonstrates that the federal firearms statute is an exception from this general rule.

Id. at 1008 n.9 (internal citations omitted).

We agree that, as a general rule, *Ant* holds that a conviction obtained in a tribal court that did not afford a right to counsel equivalent to the Sixth Amendment right may not be used in a subsequent federal prosecution. Accordingly, we hold that, subject to the narrow exception recognized in *Lewis* and *First* for statutes that serve merely as enforcement mechanisms for civil disabilities, 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. Section 117(a) is an ordinary recidivist statute and not a criminal enforcement scheme for a civil disability. Accordingly, the general rule announced in *Ant* applies. Because Bryant's tribal court domestic abuse convictions would have violated the Sixth Amendment right to counsel had they been obtained in federal or state court, using them to establish an element of the offense in a subsequent § 117(a) prosecution is constitutionally impermissible. *See Ant*, 882 F.2d at 1394-95.

We reject the government's arguments to the contrary. The government contends this case is controlled by *Nichols*, not *Ant*. But *Nichols* involved a prior conviction that did comport with the Sixth Amendment, 511 U.S. at 740, 746-47, whereas this case involves prior convictions obtained under procedures that, if utilized in state or federal court, would have violated the Sixth Amendment. *Ant* is the relevant authority.

The government also argues that *Ant* is no longer good law because it relied on *Baldasar*, which *Nichols*

overruled. *Ant* cited *Baldasar* only once, and for the general proposition that an uncounseled conviction could not be used to prove an element of a recidivist statute. *Ant*, 882 F.2d at 1394. *Nichols* did overrule *Baldasar*'s holding that an uncounseled conviction valid under *Scott* could not be used in a subsequent prosecution. *Nichols*, 511 U.S. at 746-47. But even after *Nichols*, uncounseled convictions that resulted in imprisonment generally could not be used in subsequent prosecutions. *See id.* *But see Lewis*, 445 U.S. at 66-67. Because *Ant* involved the latter scenario, *see* 882 F.2d at 1390-91, it remains good law notwithstanding its citation to *Baldasar*.

Moreover, for us to overrule our own precedent, a Supreme Court decision "must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc); *see also Gonzales v. Dep't of Homeland Sec.*, 508 F.3d 1227, 1235 (9th Cir. 2007) (explaining that where a Supreme Court case did not actually address the issue raised in a prior Ninth Circuit case, a three-judge panel remained bound by circuit precedent notwithstanding the implications of the subsequent Supreme Court case). *Nichols* and *Ant* are easily reconcilable because *Nichols* involved an uncounseled conviction valid under the Sixth Amendment, whereas *Ant* involved prior tribal court proceedings that, in state or federal court, would not have been valid under the Sixth Amendment. Accordingly, we read *Nichols* and *Ant* to stand for the proposition that,

subject to the limited exception recognized in *Lewis* and *First*, the Sixth Amendment permits using a prior conviction in a later prosecution only if, in the prior proceeding, the defendant was afforded, at a minimum, the same right to counsel as guaranteed by the Sixth Amendment. Nothing in *Nichols* mandates adopting the government's position that, as long as the conviction does not violate the Constitution, it may be used in a later prosecution.

We recognize that our holding places us in conflict with two other circuits. *See United States v. Shavanaux*, 647 F.3d 993 (10th Cir. 2011); *United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011). *Shavanaux* and *Cavanaugh* held that a prior uncounseled tribal court conviction could be used as a predicate offense for a § 117(a) prosecution. *Shavanaux*, 647 F.3d at 997; *Cavanaugh*, 643 F.3d at 603-04. The *Shavanaux* court reasoned that, because the Sixth Amendment does not apply in tribal court, using a tribal court conviction in a subsequent prosecution cannot violate the Sixth Amendment. 647 F.3d at 996-98. The *Cavanaugh* court read *Nichols* as establishing a bright-line rule that so long as a conviction did not violate the Constitution, it could be used in a subsequent proceeding. 643 F.3d at 603-04.

Shavanaux and *Cavanaugh* cannot be reconciled with *Ant*, and we are bound by *Ant*.[6]

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[6] In fact, both the Eighth Circuit and the Tenth Circuit recognized that their holdings were at odds with *Ant*. *Shavanaux*, 647 F.3d at 997-98; *Cavanaugh*, 643 F.3d at 604-05.

The *Shavanaux* court rejected *Ant* as wrongly decided. 647 F.3d at 997-98. It disagreed with *Ant*'s "threshold determination that an uncounseled tribal conviction is constitutionally infirm," believing that this determination was a consequence of having "overlook[ed]" the *Talton* line of cases establishing that tribal courts are not governed by the Constitution. *Id.* But *Ant* did not overlook this case law. Although *Ant* did not cite *Talton*, it recognized repeatedly that tribal court proceedings are limited only by the ICRA and tribal law. *See* 882 F.2d at 1391-92, 1395. In describing Ant's guilty plea as "constitutionally infirm," the *Ant* court used a convenient shorthand term to refer to the fact that Ant's guilty plea, although not obtained in violation of the Constitution, was obtained through procedures that, had they been employed in state or federal court, would have been unconstitutional. Read in context, the term does not suggest that *Ant*'s holding is based on the faulty premise that the Constitution applies to tribal court proceedings.

The *Cavanaugh* court distinguished *Ant*, because in *Ant*, the subsequent federal proceeding arose out of the same incident as the tribal court proceeding and the government sought to use a guilty plea that did not comport with the Sixth Amendment to prove, not merely the fact of a prior conviction, but the truth of the matter asserted in the plea. *See* 643 F.3d at 604-05. This is a distinction without a difference. As the *Cavanaugh* dissent explained, the key factor in both *Ant* and *Cavanaugh* was the government's reliance on prior tribal court proceedings, that, if governed by the Constitution, would have violated the Sixth Amendment right to counsel to prove an element of the offense. *Id.* at 607 (Bye, J., dissenting).

As we did in *First*, we reiterate *Ant*'s continued vitality. *See* 731 F.3d at 1008 n.9. Under *Ant*, the government may not rely on tribal court convictions as predicate offenses in § 117(a) prosecutions unless the tribal court afforded the same right to counsel as guaranteed by the Sixth Amendment in federal and state prosecutions. *See* 882 F.2d at 1394-95. Bryant's relevant tribal court convictions do not meet this standard. Consequently, the charges against him must be dismissed.[7]

IV. CONCLUSION

We hold that the § 117(a) charges against Bryant must be dismissed because at least one of his predicate tribal court domestic abuse convictions was uncounseled and resulted in a term of imprisonment.

REVERSED.

WATFORD, Circuit Judge, concurring:

I agree with the majority that *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989), remains binding and controls the outcome of this case. I write separately to

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[7] Bryant also argues that using his tribal court convictions as predicate offenses is a violation of the Fifth Amendment's guarantee of equal protection because only Indians are subject to prosecution based on prior convictions that do not comport with the Sixth Amendment right to counsel. Given the result we reach, we need not address Bryant's equal protection argument.

highlight three reasons why, in my view, *Ant* warrants reexamination.

1. The Supreme Court's decision in *Nichols v. United States*, 511 U.S. 738 (1994), doesn't squarely overrule *Ant*, but it does call *Ant*'s reasoning into question. *Nichols* held that an uncounseled misdemeanor conviction valid under *Scott v. Illinois*, 440 U.S. 367 (1979)—because no term of imprisonment was imposed—may be used "to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment." 511 U.S. at 746-47. The Court's holding undermines the notion that uncounseled convictions are, as a categorical matter, too unreliable to be used as a basis for imposing a prison sentence in a subsequent case. *Nichols* suggests that so long as a prior conviction isn't tainted by a constitutional violation, nothing in the Sixth Amendment bars its use in subsequent criminal proceedings.

That principle is hard to square with the result we reach today by applying *Ant*. It's true that Michael Bryant's prior domestic abuse convictions would have been obtained in violation of the Sixth Amendment had he been tried in state or federal court, since he lacked appointed counsel and appears to have received a term of imprisonment following those convictions. *See Scott*, 440 U.S. at 373-74. But the fact remains that his prior convictions were *not* obtained in violation of the Sixth Amendment because they occurred in tribal court, where the Sixth Amendment doesn't apply. *United States v. Percy*, 250 F.3d 720, 725 (9th Cir. 2001). It seems odd to say that a

conviction untainted by a violation of the Sixth Amendment triggers a violation of that same amendment when it's used in a subsequent case where the defendant's right to appointed counsel is fully respected. As the Tenth Circuit stated, "Use of tribal convictions in a subsequent prosecution cannot violate 'anew' the Sixth Amendment, because the Sixth Amendment was never violated in the first instance." *United States v. Shavanaux*, 647 F.3d 993, 998 (10th Cir. 2011) (citation omitted). The contrary rule we adopted in *Ant* would make sense if uncounseled convictions were deemed insufficiently reliable to warrant giving them any weight in subsequent criminal proceedings. But, as I've noted, *Nichols* undercuts the proposition that uncounseled convictions are categorically unreliable.

Further doubt is cast on *Ant*'s vitality when we consider the exception carved out in *Lewis v. United States*, 445 U.S. 55 (1980), and *United States v. First*, 731 F.3d 998 (9th Cir. 2013). In *Lewis*, the Supreme Court held that a felony conviction obtained in violation of the Sixth Amendment could nevertheless be used as a predicate for a felon-in-possession charge. 445 U.S. at 67. The Court reasoned that the firearms prohibition relied "on the mere fact of conviction," not the reliability of that conviction, to enforce through criminal sanctions what amounted to only "a civil disability." *Id.* We felt compelled to follow this precedent in *First*, where we held that an uncounseled tribal court conviction that would have violated the Sixth Amendment if obtained in state or federal

court could also be used as a predicate for a similar firearms possession statute. 731 F.3d at 1008-09.

The resulting asymmetry is striking. In *Lewis* and *First*, the "mere fact of conviction," even if unreliable and unconstitutionally obtained, could be used to criminalize an act that might otherwise be lawful—firearms possession. *Lewis*, 445 U.S. at 67; *First*, 731 F.3d at 1008-09. Here, however, the "mere fact" of a domestic violence conviction cannot be used to support punishment for an act that is already criminal—domestic violence. That seems illogical. If anything, we would want to be more cautious about the use of uncounseled prior convictions in prohibiting firearms possession, because that prohibition impinges upon what would otherwise be a fundamental right. We aren't impinging upon anyone's rights when we prohibit (or enhance penalties for) domestic violence, since no one has the right to abuse a spouse or intimate partner to begin with. The reason for holding that the Sixth Amendment is violated in this case but not in *Lewis* and *First* isn't easy to grasp.

2. So why *are* we refusing to recognize the validity of Bryant's prior domestic abuse convictions in this case, given that the convictions themselves aren't constitutionally infirm? Presumably it's because of concerns over the reliability of those convictions. As discussed above, though, that concern apparently doesn't exist across the board with respect to uncounseled convictions obtained in state or federal courts. So aren't we really saying that the right to appointed counsel is necessary to ensure the

reliability of all *tribal* court convictions? If that's true, we seem to be denigrating the integrity of tribal courts, as discussed in the dissent in *Ant*. *See* 882 F.2d at 1397-98 (O'Scannlain, J., dissenting). The implication is that, if the defendant lacks counsel, tribal court convictions are inherently suspect and unworthy of the federal courts' respect. While in our adversarial system we've concluded that the lack of counsel detracts from the accuracy and fairness of a criminal proceeding, *see Gideon v. Wainwright*, 372 U.S. 335, 342-44 (1963), respect for the integrity of an independent sovereign's courts should preclude such quick judgment. *See Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997).

3. It's perhaps unsurprising that our decision in this case conflicts with decisions from two of our sister circuits. Faced with almost identical scenarios—prior, uncounseled tribal court convictions that would have violated the Sixth Amendment in state or federal court and that were used as predicate offenses under 18 U.S.C. § 117—the Eighth and Tenth Circuits pointedly disagreed with us. *See United States v. Cavanaugh*, 643 F.3d 592, 595, 604 (8th Cir. 2011); *United States v. Shavanaux*, 647 F.3d 993, 995-98 (10th Cir. 2011). As our colleagues on the Eighth Circuit noted, "Supreme Court authority in this area is unclear; reasonable decisionmakers may differ in their conclusions as to whether the Sixth Amendment precludes a federal court's subsequent use of convictions that are valid because and only because they arose in a court where the Sixth Amendment did not apply."

Cavanaugh, 643 F.3d at 605. Given this circuit split and the lack of clarity in this area of Sixth Amendment law, the Supreme Court's intervention seems warranted.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CR-11-70-BLG-JDS

UNITED STATES OF AMERICA, PLAINTIFF
v.
MICHAEL BRYANT, JR., DEFENDANT

Wed., Dec. 21, 2011
10:21:44 to 10:36:59

TRANSCRIPT OF HEARING ON MOTION

APPEARANCES:

FOR THE PLAINTIFF:

MR. E. VINCENT CARROLL
Assistant U.S. Attorney
P.O. Box 1478
Billings, Montana 59103

FOR THE DEFENDANT:

MR. STEVEN C. BABCOCK
Attorney at Law
Federal Defenders of Montana
2702 Montana Avenue, Suite 101
Billings, Montana 59101

[3]

PROCEEDINGS

(Open court.)

(Defendant present.)

THE COURT: We'll hear the matter of *Michael Bryant*.

This is the motion to dismiss the indictment.

Mr. Babcock, you have filed a motion to dismiss the indictment on the basis that the violations that were used in the indictment were before a tribal court where he did not have the right to counsel and that he entered a guilty plea, apparently, to two different violations that occurred on the Northern Cheyenne Indian Reservation without the benefit of counsel.

MR. BABCOCK: That's correct, Your Honor.

THE COURT: And you set out, in your motion, the cases that you rely upon, and I will allow you to expound on that, and then I will have the government's response.

MR. BABCOCK: Thank you, Your Honor.

There's two different claims that I've made in this case as set forth in my brief in support of the motion. First is that this is in violation of the Sixth Amendment and the indictment should be dismissed,

and also this particular situation is in violation of the Equal Protection Clause of the Constitution.

In taking a look at the Sixth Amendment violation, I believe that it is undisputed that the prior convictions that [4] are used in this case to form the predicate convictions for 18 U.S.C. 117 were without counsel, and that is because the Sixth Amendment does not attach, the Bill of Rights does not attach to the Indian Civil Rights Act.

Mr. Bryant has previous convictions—we are not disputing that—in Northern Cheyenne Tribal Court, but he was not afforded counsel at that particular time. I do believe that he has either four or five convictions in Northern Cheyenne Tribal Court. I think it's undisputed that he was not provided counsel on any one of those convictions. It appears to me, from the records that I've been able to obtain, that on the majority of those convictions, he pled guilty at arraignment. He was either released or he was sent to a voluntary work program on the case. I don't have any transcripts from those, and I do believe that the most recent conviction was back from 2007.

In taking a look at the case law on this case, Your Honor, this issue has been decided in two other circuits. I believe that it's a matter of first impression in this district and also in this circuit. There's no Ninth Circuit law on this. There is a case out of the Eighth Circuit and also out of the Eleventh Circuit,

but I think that those cases can be distinguished because of current Ninth Circuit law that we do have.

The Eighth Circuit case in *Cavanaugh* and the [5] Eleventh Circuit case in *Shavanaux* have stated, because the Indian Civil Rights Act was not violated with the prior tribal conviction, that it would not be a violation of the Sixth Amendment when used as a predicate offense to form the basis of 18 U.S.C. 117.

I do find that logic amazing when taking a look at the current case law in the Ninth Circuit in *United States v. Ant*. *United States v. Ant* is a case that is controlling—it is out of the Ninth Circuit—that held that a guilty plea in tribal court could not be used to prove the underlying facts of a subsequent federal charge. Why? Because the Ninth Circuit held that it was a violation of the Sixth Amendment.

The Eighth Circuit in *Cavanaugh* tried to distinguish it because they're saying that it happened with the same offense. I would say to this Court that that is a difference without distinction. You are still using a conviction that could have been in violation of the United States Constitution to prove a case in federal court. The Eleventh Circuit just more or less sidesteps that issue.

So what we have in this case is we have an individual that was convicted in tribal court with a conviction that—it's undisputed—would have been in violation of the Sixth Amendment if it would have been in

any other court besides tribal court, but then we use that conviction to prove an essential element of 18 U.S.C. 117.

[6]

I do believe, in taking and relying upon the logic that was set forth in *United States v. Ant*, that this charge, as it stands, because of the prior uncounseled convictions, is in direct violation of the Sixth Amendment and the indictment should be dismissed.

The other basis for the motion to dismiss was the violation of equal protection. Now the case that is always cited to on an equal protection claim as it relates to Native Americans is *United States v. Antelope*. In *United States v. Antelope*, to summarize the holding, the Ninth Circuit held that a prosecution of Indians for a felony and murder was not a violation of the Equal Protection Clause because Indians were treated the same as everyone else prosecuted in a federal enclave.

The situation in this particular case is far different than in *Antelope*, because I know of no other group of individuals that would be in this situation besides Native Americans. The statute requires that there be two prior convictions in either federal, state, or Indian tribal court proceedings. Any white person, any African-American, any Latino, any other person of any other race is not going to be prosecuted in tribal court, because in order to be in tribal court, you have

to be a member of the tribe; hence, you have to be Native American.

I would say that because of the fact that only [7] Native Americans are going to be in a situation that they have a prior conviction from an uncounseled predicate conviction, in other words, a violation of the Sixth Amendment, that it is different than *Antelope*, and the Court should also find that this is a violation of the Equal Protection Clause.

In *Cavanaugh*, in taking a look at the reason as set forth in that case, they say that reasonable decisionmakers may differ in their conclusions as to whether the Sixth Amendment precludes a federal court's subsequent use of convictions that are valid because and only because they arose in a court where the Sixth Amendment did not. That's their holding on the case, "reasonable decisionmakers may differ."

Well, I certainly think, when you take a look at the law in the Ninth Circuit, in applying it with *United States v. Ant*, that we are in a situation that we are reasonable decisionmakers that must differ from the holding in that case.

So based upon those reasons, Your Honor, as stated today in open court and also the briefing that has been provided to the Court, we ask respectfully on two grounds—that it's a violation of the Sixth Amendment and also a violation of the Equal Protection Clause—that the indictment in this case be dismissed.

THE COURT: I will ask you, did the defendant ever—was he incarcerated for any of his tribal court domestic assault convictions?

[8]

MR. BABCOCK: Yes, he was, Your Honor. He was held, and that's one of the things that was brought out in *Cavanaugh*. In taking a look at it, they said that in their holding, if I may expound on that, in that, they're saying according as a matter of first impression, they hold that, "In the absence of any other allegations or irregularities or claims of actual innocence surrounding the prior conviction, we cannot preclude the use of such a conviction in the absence of an actual constitutional violation." Your Honor, I find that odd because the Sixth Amendment violation is certainly an actual constitutional violation.

However, in taking a look at that case, this is very difficult because we have to go back and determine what exactly happened at an arraignment in 2007 or 2005 in tribal court. All we have is the judgments from those cases that said he pled guilty at arraignment. In some of those cases, he was actually incarcerated. He either had to work, get out in a voluntary work program, or he had to sit out his fine. The fine on a couple of them, I believe, was $500; other ones, he actually was sentenced to some incarceration.

But whether or not the proceeding had any other irregularities or actual claims of innocence, I really

can't expound on that because I can't go back over four years and find a transcript that doesn't exist.

In Mr. Bryant's situation, as he's told me—and [9] the only thing I can proffer to the Court on these cases is that a lot of the individuals, they will plead guilty if there's a chance for them just to get out of jail.

And on a whole different issue, being incarcerated in the Northern Cheyenne Tribal Detention Facility at that time, or as they now are combined with the Crow Detention Facility, it's not exactly a fantastic place for an individual to be serving their time at, so a lot of people will just plead guilty with the chance of getting out.

So he was incarcerated on some, but, once again, the records are hard to obtain, and all that we have are the convictions on the case, and the newest, from what I can find, is over four years old.

Thank you.

THE COURT: I'll hear from the government.

MR. CARROLL: Your Honor, the analysis or the rationale both in the *Cavanaugh* case and the *Shavanaux* case, as I set out in the government's brief, warrants this Court dismissing—or not dismissing but overruling the defendant's motion to dismiss the indictment in this case.

Counsel has proffered two arguments, that the violation of the Sixth Amendment and violation of Equal Protection justify dismissing the indictment, and as the government set out in its brief, the rationale of the two cases, the one from the Eighth Circuit and the one from the [10] Tenth Circuit, support this Court denying the defendant's motion.

And, Your Honor, in preparing for this hearing, I came across another case that I think is appropriate. I will be glad to provide the Court with a supplemental, supplemental authority or briefing on this particular case. It's *Lewis v. United States*, 445 U.S. 55. It's a 1980 case. By analogy, Your Honor, this case dealt specifically with a felon in possession, federal statute, under 922(g)(1), and the Court in that case held that Congress may constitutionally use a prior conviction as an element of an offense even if the prior conviction was invalid under *Gideon*. *Gideon* had held that prior conviction can't be used unless they, the defendant, had counsel. And the Court held that, even if there's some rational basis for the statutory distinctions made or they have some relevance to the purpose for which the classification is made.

And by analogy, Your Honor, you can compare a recidivist domestic violence offender to a person who is prohibited from owning a firearm because of the felony conviction. And by analogy, Your Honor, we would also argue that *Lewis* supports the upholding of this statute or the charge in this particular circumstance

given the defendant's prior history of domestic violence as applied in the context of the indictment charging a violation of Section 117.

[11]

Your Honor, for those reasons, we would just ask that the defendant's motion to dismiss the indictment be overruled.

THE COURT: I will give you just a couple minutes to respond, if you want.

MR. BABCOCK: Just briefly, Your Honor.

I would just ask the Court to concentrate on the analysis set forth in *United States v. Ant*, which is after the Supreme Court case that Mr. Carroll has cited.

And I think in this particular case there is great emphasis that the Eighth Circuit put on the status of Native Americans as being quasi-sovereign, and we are not at all saying that they need to provide representation on their tribal court proceedings. That's not at all what we're saying.

What we're saying, though, is that those constitutionally infirm convictions in tribal court—and that's undisputed. Everybody will admit as though that the Sixth Amendment was violated—that they should not be then able to be used for a predicate offense in the

United States federal court where the Constitution certainly applies.

Thank you.

THE COURT: I'm amazed, the little record on this as there is as far as previous appeals to different circuits. I would think that this would be a matter that would come up [12] very frequently and there would be a string of cases on it.

But I am going to deny the motion, that the convictions and the pleas do meet the criteria for the charge that's been filed here in the indictment.

MR. BABCOCK: (Nodded head affirmatively.)

THE COURT: So you can make some new ground here in the Ninth Circuit by appealing, if you want, but I'm going to deny the motion.

MR. BABCOCK: Thank you for your consideration, Your Honor.

THE LAW CLERK: All rise.

(Proceedings were concluded at 10:36:59.)

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-30177
D.C. No. 1:11-cr-00070-JDS-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL BRYANT, JR., DEFENDANT-APPELLANT

Filed: July 6, 2015

ORDER

Before: HARRY PREGERSON, RICHARD A. PAEZ, and PAUL J. WATFORD, Circuit Judges.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**.

Judge McKeown did not participate in the deliberations or vote in this case.

PAEZ, Circuit Judge, joined by PREGERSON, Circuit Judge, concurring in the denial of rehearing en banc:

The conflict that presents itself again and again in this case is how to apply *Nichols v. United States*, 511 U.S. 738 (1994), to cases like *Bryant*, where the government seeks to use uncounseled tribal court misdemeanor convictions as an essential element of a felony prosecution under 18 U.S.C. § 117(a).[1] The dissents from denial of rehearing en banc, along with two other circuits, urge a bright-line reading of *Nichols* that permits the use of these convictions as long as they do not violate the Sixth Amendment (which tribal court convictions, by definition, never do). We write to explain why *Bryant* does not apply this

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[1] The full text of § 117(a) reads:

> Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction—
>
> (1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner, or against a child of or in the care of the person committing the domestic assault; or
>
> (2) an offense under chapter 110A,
>
> shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.

bright-line rule, while recognizing that only the Supreme Court can clarify the meaning and scope of its decision in *Nichols*.

I

Nichols permits the use of a prior uncounseled misdemeanor conviction to enhance a sentence, so long as the conviction does not violate the Sixth Amendment. *Nichols*, 511 U.S. at 746-47 (citing *Scott v. Illinois*, 440 U.S. 367 (1979)). That *Nichols* is a sentencing case is significant. The most salient difference between the guilt and punishment phases of criminal adjudication is that prosecutors must prove each element of an offense beyond a reasonable doubt, *In re Winship*, 397 U.S. 358, 364 (1970), while they generally need only prove the existence of a sentence enhancement factor by a preponderance of the evidence, *see Nichols*, 511 U.S. at 748. Nothing in *Nichols* purports to sanction the use of an uncounseled conviction for *Winship* purposes. Indeed, to permit the use of those misdemeanor convictions to establish an essential element of a § 117(a) felony prosecution would conflict with our long-held axiom that we hold the government to a *higher* burden when it seeks to prove an essential element of an offense. *See, e.g.*, *Medley v. Runnels*, 506 F.3d 857, 862 (9th Cir. 2007) (citing *Winship*, 397 U.S. at 364, and *Middleton v. McNeil*, 541 U.S. 433, 437 (2004)).

The Court in *Nichols* acknowledged the reliability concerns that inhere in the Sixth Amendment right to counsel. Critically, the Court affirmed the sentencing

court's assessment of criminal history points under the United States Sentencing Guidelines because the sentencing court used the predicate uncounseled conviction during the sentencing phase, rather than the guilt phase. The Court concluded that the sentencing scheme in that case "accommodated" its reliability concerns because (1) under the Sentencing Guidelines, a defendant may "convince the sentencing court of the unreliability of any prior valid but uncounseled convictions"; and (2) the preponderance of the evidence standard used at sentencing necessarily connotes a less stringent reliability requirement. *Nichols*, 511 U.S. at 747-48; *id.* at 752 (Souter, J., concurring).

Nichols does not hold that an uncounseled conviction is sufficiently reliable to support a conviction in a future prosecution where, as in *Bryant* and *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989), these accommodations are absent. It follows that *Nichols* does not invalidate the reliability concerns that underpin this court's precedent in *Ant*. Rather, *Nichols* leaves open the question of whether a potentially unreliable uncounseled misdemeanor conviction passes muster at the guilt phase. *Ant* fills this gap by holding that the government may not use prior tribal court misdemeanor convictions that do not provide an equivalent right of counsel as evidence of guilt in a subsequent federal prosecution. *See Ant*, 882 F.2d at 1396. This approach adheres to the Sixth Amendment's core interest in reliability.

II

Further complicating our reading of *Nichols* is the unique reason why Bryant's uncounseled convictions were constitutionally valid: the predicate convictions all occurred in tribal court, where the Sixth Amendment does not apply.[2] Statutes like § 117(a) affect both tribal and federal enforcement of serious crimes and raise difficult questions of tribal sovereignty. *Compare United States v. Wheeler*, 435 U.S. 313, 323-24 (1978) (affirming "the sovereign power to punish tribal offenders" as "the continued exercise of retained tribal sovereignty"), *with United States v. Lara*, 541 U.S. 193, 200 (2004) (describ-

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[2] Notably, *Nichols* involved the use of prior uncounseled convictions in the sentencing court's assessment of additional criminal history points under section 4A.1.1 of the Sentencing Guidelines. However, sentencing courts cannot consider tribal court convictions to compute a defendant's criminal history category. U.S.S.G. § 4A1.2(i). A sentencing court may depart from a defendant's criminal history category "[i]f reliable information indicates that the defendant's criminal history categorically substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes[.]" *Id.* § 4A1.3(a)(1). The court must specify in writing the reasons why an upward departure is warranted under this standard. *Id.* § 4A1.3(c)(1). Only then may the court consider "sentences for foreign and tribal offenses." *Id.* § 4A1.3(a)(2)(A). Nothing in *Nichols* contemplates extending its holding to uncounseled tribal court convictions, however, because the Court affirmed the use of Nichols's uncounseled convictions under section 4A1.1, not section 4A1.3.

ing Congress's plenary power to pass legislation affecting Indian tribes). In enacting § 117(a), Congress exercised its plenary power to permit more vigorous federal prosecution of serious crimes against women that tribes may not have the resources to address. The importance and urgency of these efforts, as emphasized by amicus curiae the National Congress of American Indians, are beyond dispute.

Congress, however, has readily coupled expanded tribal court jurisdiction with a commensurate right to counsel when due process so dictates. The Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301-1303, does not provide a right to counsel that is coextensive with the Constitution. Yet, as Congress has endeavored to curb domestic violence in Indian territory more aggressively, it also has moved toward expanding the right to counsel for tribal court defendants. *See id.* § 1302(a)-(c) (codifying the Tribal Law and Order Act of 2010, which allows tribal courts to prosecute felonies and increases tribal courts' sentencing authority, but also requires tribal courts to provide procedural safeguards, including an equivalent right to counsel, when they prosecute cases under such expanded jurisdiction); *id.* § 1304 (establishing a new "special domestic violence jurisdiction" to allow tribes to prosecute non-Indians who commit acts of domestic violence within the tribe's jurisdiction and requiring tribal courts to provide counsel to those defendants).

No part of the decision in *Bryant* is intended to express contempt for tribal courts. Nor does our decision

frustrate the purpose of § 117(a) simply because it conditions the use of prior tribal court misdemeanor convictions that result in imprisonment on the provision of counsel. Rather, it is consistent with Congress's dual interest in respecting tribal courts and ensuring due process for tribal court defendants.

For the reasons explained in the opinion and here, we concur in the decision not to take the case en banc. That said, given the sharp division over the important issues at stake in this case, Supreme Court review may be unavoidable.

OWENS, Circuit Judge, joined by O'SCANNLAIN, GOULD, TALLMAN, BYBEE, CALLAHAN, BEA, and M. SMITH, Circuit Judges, dissenting from the denial of rehearing en banc:

Michael Bryant likes to beat women. Sometimes he kicks them. Sometimes he punches them. Sometimes he drags them by their hair. He punched and kicked one girlfriend repeatedly, threw her to the floor, and even bit her. When he could not find his keys, he choked another woman to the verge of passing out. Although his violence varies, his punishment never does. Despite Bryant's brutality—resulting in seven convictions for domestic violence—his worst sentence was a slap on the wrist: one year imprisonment, or what someone who "borrows" a neighbor's People magazine from the mailbox on two separate occasions could face. *See* 18 U.S.C. § 1701 (retarding the passage of mail).

There are many, many men like Michael Bryant. And there are even more victims of men like Michael Bryant. American Indian and Alaska Native women are 2.5 times more likely to be raped or sexually assaulted than women in the United States in general. Att'y Gen.'s Advisory Comm. on Am. Indian/Alaska Native Children Exposed to Violence, *Ending Violence so Children Can Thrive* 38 (2014). In light of the grave problem of domestic violence on tribal lands, Congress stepped up by passing the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, tit. IX, § 909, 119 Stat. 2960, 3084 (codified at 18 U.S.C.

§ 117). Tailored to the unique problems and scenarios that American Indian and Alaska Native Tribes face, § 117(a) provides felony-level punishment for serial domestic violence offenders, and it represents the first true effort to remove these recidivists from the communities that they repeatedly terrorize.

Yet a panel has wiped this important statute off the books. It interprets the Sixth Amendment as prohibiting the use of an uncounseled misdemeanor conviction in a recidivist statute. The panel acknowledges the split it creates with the Eighth and Tenth Circuits.[1] The result is to cut the Navajo Nation in half when it comes to combating this plague, as the border between the Ninth and Tenth Circuits divides its land. The Michael Bryants in Utah and New Mexico face the music of § 117(a), while the Bryants in Arizona play musical chairs, moving from one brutal beating to the next with virtual impunity. This decision has torn a massive gap in the fragile network that protects tribal women and their children from generations of abuse.

This decision creates another even larger split that the panel does not acknowledge. By holding that an unquestionably valid misdemeanor conviction is invalidated by the imposition of a prison sentence, the panel splits with every circuit to seriously consider this issue. The panel's

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[1] *United States v. Shavanaux*, 647 F.3d 993, 997-98 (10th Cir. 2011); *United States v. Cavanaugh*, 643 F.3d 592, 595, 604 (8th Cir. 2011).

decision is clearly wrong, as the Supreme Court showed in *Alabama v. Shelton*: A prison sentence in these circumstances may be invalid, but the underlying misdemeanor conviction surely is not.[2]

Our justification for this legal and practical mess? *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989), a case that my colleagues have described as "odd," "illogical," *United States v. Bryant*, 769 F.3d 671, 680-81 (9th Cir. 2014) (Watford, J., concurring), and "regrettabl[e]," *Ant*, 882 F.2d at 1397 (O'Scannlain, J., dissenting). It was wrong when decided, and it is really wrong now.

Bryant's victims are vulnerable enough, but this decision leaves them even worse off. It has stripped Congress and the American Indian and Alaska Native Tribes of the power to meaningfully punish the Bryants of the world and protect their victims from another beating (or worse). As our court has refused to take this case en banc, only the Supreme Court can rectify this terrible situation. I urge the Court to do so as soon as possible, be-

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[2] *Alabama v. Shelton*, 535 U.S. 654, 661-62 (2002); *see also United States v. Acuna-Reyna*, 677 F.3d 1282, 1284-85 (11th Cir. 2012) (noting that *Shelton* "affirmed in entirety" the decision of the Alabama Supreme Court to invalidate part of Shelton's sentence, but leave his misdemeanor conviction intact); *United States v. Ortega*, 94 F.3d 764, 769 (2d Cir. 1996); *United States v. Moskovits*, 86 F.3d 1303, 1309 (3d Cir. 1996); *United States v. White*, 529 F.2d 1390, 1394 & n.4 (8th Cir. 1976). *But see United States v. Eckford*, 910 F.2d 216, 218 (5th Cir. 1990) (holding otherwise without the benefit of *Nichols* or *Shelton*); *Bryant*, 769 F.3d at 677.

fore Michael Bryant, and the many more men like him, terrorize more women and their families.

For these reasons, I respectfully dissent from the denial of rehearing en banc in this case.

O'SCANNLAIN, Circuit Judge, joined by GOULD, TALLMAN, BYBEE, CALLAHAN, BEA, M. SMITH, and OWENS, Circuit Judges, dissenting from the denial of rehearing en banc:

Judge Owens passionately reveals this opinion's pernicious impact on domestic violence victims, and I share his concern. I also write to explain why the legal errors that corrupt this opinion, and its predecessor *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989), should have been corrected by our court sitting en banc.

Following *Ant*, the court decides that indisputably valid tribal court proceedings are "constitutionally infirm" because they do not afford the right to appointed counsel required by the Sixth Amendment. *United States v. Bryant*, 769 F.3d 671, 677 (9th Cir. 2014) (citing *Ant*, 882 F.2d at 1394-95). A sensible result, perhaps, were it not for the fact that the Indian Civil Rights Act ("ICRA")—*not* the Sixth Amendment—governs tribal court proceedings. The court grudgingly acknowledges this fact. *Id.* at 675. Yet—undeterred in its quest to punish the tribal court for complying with the procedures that govern it—the court concludes that convictions procured in that venue are so defective that the federal government is barred from even proving the mere *existence* of such convictions in a later prosecution.

Such a decision cries out for review—indeed, with the concurral,[1] *every member of the panel* has acknowledged that this case requires the Supreme Court's attention.[2] It contravenes the Supreme Court's decision in *Nichols v. United States*, 511 U.S. 738 (1994), stands in direct conflict with the only two other circuit courts to consider the issue presented, and, ultimately, holds tribal courts in contempt for having the audacity to follow the law as it is, rather than the law as we think it should be.

I

To summarize briefly the necessary facts: Bryant, a Native American, was convicted of domestic assault in several uncounseled tribal court proceedings. *Bryant*, 769 F.3d at 673. Because the Sixth Amendment right to counsel does not apply to tribal courts, the resulting convictions under tribal law were indisputably valid. *Id.* at 675.

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[1] As explained by another member of this Court, the term "concurral" refers to a concurrence from denial of rehearing en banc. *See* Alex Kozinski & James Burnham, *I Say Dissental, You Say Concurral*, 121 Yale L.J. Online 601, 626 n.57 (2012).

[2] First, Judge Watford—who concluded that *Ant* afforded him no choice but to concur—wrote persuasively that *Ant* warrants reexamination and pleaded for "the Supreme Court's intervention." *Bryant*, 769 F.3d at 679, 681 (Watford, J., concurring). Now, the other two panel members also admit that "Supreme Court review may be unavoidable." Concurrence in Denial of Rehearing En Banc at 9.

Later, after Bryant again assaulted two women in 2011, the federal government sought to prosecute Bryant for these new assaults under 18 U.S.C. § 117, which criminalizes "domestic assault by an habitual offender." Under section 117, the prosecution not only had to prove Bryant had "commit[ted] a domestic assault" in 2011, but also that he had been convicted of domestic assault "on at least 2 separate prior occasions in Federal, State, or Indian tribal court." 18 U.S.C § 117. To satisfy this recidivism element, the government sought to rely on Bryant's prior tribal court convictions. *Bryant*, 769 F.3d at 673-74.

Bryant conceded such convictions were valid and obtained in compliance with the ICRA, but argued that they could not be used to satisfy an element of section 117 because they *would* have violated the Sixth Amendment *if* they had been obtained in state or federal court. *Id.* at 674-75. The district court rejected Bryant's argument, and he appealed. *Id*. at 673-74.

A

Our Court was not the first to consider the use of an uncounseled tribal court conviction in a section 117 prosecution. Exactly the same question was posed to the Eighth and Tenth Circuits, and they concluded that using the prior convictions posed no constitutional difficulty. *See United States v. Shavanaux*, 647 F.3d 993 (10th Cir. 2011); *United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011).

Yet the court flatly disagreed with our sister circuits, and held that the government could not rely on tribal court convictions unless they afforded the same right to counsel required by the Sixth Amendment—notwithstanding the inapplicability of the Sixth Amendment to tribal courts. *Bryant*, 769 F.3d at 679.

Why did the court toss aside the reasoning of our sister circuits and turn up its nose at completely valid tribal court proceedings? Because of *Ant*. In that case we derided a tribal court guilty plea as "constitutionally infirm" because it merely "was made in compliance with tribal law and with the ICRA," rather than the Sixth Amendment. *Ant*, 882 F.2d at 1395. We considered it but a trifle that the Sixth Amendment does not in fact apply to tribal proceedings—because the uncounseled plea would have been invalid in *our* Court, we ordered it be suppressed. *Id.* at 1396.

B

Relying on *Ant*, the court here held that "the government may not rely on tribal court convictions as predicate offenses in § 117(a) prosecutions unless the tribal court afforded the same right to counsel as guaranteed by the Sixth Amendment in federal and state prosecutions." *Bryant*, 769 F.3d 671, 679 (9th Cir. 2014) (citing *Ant*, 882 F.2d at 1394-95). As in *Ant*, it was apparently of little consequence to the court that imposing the Sixth Amendment's requirements on tribal courts conflicts with the procedures Congress laid out in the ICRA.

The court reinforces and repeats *Ant*'s error in trampling on tribal court proceedings and in disregarding the ICRA. But that is not all. Its error in applying *Ant* is magnified by the fact that *Nichols*—which post-dated *Ant*—stripped *Ant* of any legitimacy and exposed it as a naked assault on tribal courts and the ICRA.

II

At the time of *Ant*, we tried to conceal our contempt for tribal courts in the tangled thicket of *Baldasar v. Illinois*, 446 U.S. 222 (1980) (per curiam), in which a hopelessly fractured[3] Court held that a valid but uncounseled *state* misdemeanor conviction could not be used in a subsequent federal prosecution. *See Ant*, 882 F.2d at 1394 (relying on *Baldasar* for the proposition "that if Ant's earlier guilty plea had been made in a court other than in a tribal court, it would not be admissible in the subsequent federal prosecution"). *Baldasar* appeared to provide us with some cover—if state court proceedings that were valid but uncounseled could not be used in subsequent federal proceedings, then perhaps valid but uncounseled tribal court proceedings could not be so used either.

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[3] *Baldasar* was a mess—providing no rationale for its result, the per curiam opinion instead rested on the varying "reasons stated in [its] [three] concurring opinions." *Nichols*, 511 U.S. at 743-44 (quoting *Baldasar*, 446 U.S. at 224). With nothing resembling a clear holding, *Baldasar* "baffled and divided the lower courts that [] considered it." *Id.* at 746.

Fortunately, *Nichols* cleared out the underbrush of *Baldasar* and overruled it. Adopting the reasoning of the *Baldasar* dissenters, *Nichols* held that "an uncounseled conviction valid under *Scott* [*v. Illinois*][4] may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment." *Nichols*, 511 U.S. at 746-47.

A

Unfortunately, at least for our Court, *Nichols*'s overruling of *Baldasar* exposes our decision in *Ant*—and now this opinion—as based on nothing more than a persistent distrust for tribal courts and a failure to accept that the Sixth Amendment does not apply to tribal proceedings. Viewing *Ant* in light of *Nichols*, one is immediately faced with a puzzling conundrum: If an uncounseled but valid *state* court conviction can support a later federal prosecution under a recidivist statute, then why is it that an uncounseled but valid *tribal* court conviction cannot do the same?

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[4] Under *Scott*, the Sixth Amendment right to counsel does not apply to uncounseled state or federal proceedings in which a sentence of imprisonment is not imposed. *Scott v. Illinois*, 440 U.S. 367, 372 (1979). *Scott* was relevant to *Nichols* because Nichols challenged a sentencing enhancement that was based on a prior uncounseled misdemeanor DUI conviction—and, under *Scott*, because Nichols's conviction did not include a sentence of imprisonment, "the Sixth Amendment right to counsel did not obtain." *Nichols*, 511 U.S. at 741, 746.

B

The court struggles to explain this anomaly without success.

Its arguments are but slightly rephrased repetitions of a common theme: that "*Nichols* involved a prior conviction that did comport with the Sixth Amendment, whereas this case involves prior convictions obtained under procedures that, if utilized in state or federal court, would have violated the Sixth Amendment." *Bryant*, 769 F.3d at 677 (internal citations omitted).

Yet the court's argument is illogical. Both Nichols's and Bryant's uncounseled convictions "comport" with the Sixth Amendment, and for *the same reason*: the Sixth Amendment right to appointed counsel did not apply to either conviction.

C

Further, the fact that the prior tribal court proceedings "*would* have violated the Sixth Amendment" *if* they were "in state or federal court" is irrelevant—using a federal recidivist statute to prosecute Bryant does not transform his prior, valid, tribal court convictions into new, invalid, federal ones. *Bryant*, 769 F.3d at 678.[5]

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[5] Indeed, as the Supreme Court has "consistently" made clear, recidivist statutes "penaliz[e] only the last offense committed by the defendant"—here, Bryant's 2011 offenses, not the prior abuses for which he was tried in tribal court. *Nichols*, 511 U.S. at 747; *see also United States v. Rodriquez*, 553 U.S. 377, 386 (2008) ("When a

Of course, Bryant could not be punished for recidivism if his prior convictions *actually* contravened the Sixth Amendment, because he then would "in effect suffer[] anew from the deprivation of that Sixth Amendment right." *Burgett v. Texas*, 389 U.S. 109, 115 (1967). But here there is no Sixth Amendment violation for Bryant to "suffer anew." *See Bryant*, 769 F.3d at 679 (Watford, J., concurring) (citing *United States v. Shavanaux*, 647 F.3d 993, 998 (10th Cir. 2011)).

Just like Nichols—whose state proceedings were valid but uncounseled, and certainly did not "afford" him the right to appointed counsel guaranteed by the Sixth Amendment—Bryant has never suffered through any constitutionally deficient proceeding, and thus, just like Nichols, his uncounseled but valid convictions can be used to satisfy a federal statute's recidivism element.

III

It seems that this should have been an easy case. After *Nichols*, an uncounseled but valid conviction can be used in a subsequent prosecution under a recidivist statute. Bryant's uncounseled tribal convictions are valid, and the government is seeking to use them in a subsequent prosecution under a recidivist statute.

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defendant is given a higher sentence under a recidivism statute . . . 100% of the punishment is for the offense of conviction. None is for the prior convictions or the defendant's 'status as a recidivist.'").

Why then, does the court refuse to allow the government to rely on the tribal court convictions?

A

There can only be one answer—the court is uncomfortable with tribal court procedures and the ICRA.

If, as *Nichols* holds, uncounseled convictions in general *are not* unreliable, then *Ant*'s outcome—and this opinion's—must rest on an assumption that tribal court convictions *are* inherently unreliable. Such an assumption runs directly counter to the Supreme Court's command to respect Indian tribes as "distinct, independent political communities," *Worcester v. State of Georgia*, 31 U.S. 515, 559 (1832), whose judicial systems must be assessed based on their compliance with the ICRA, not the federal constitution. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008) (explaining that it is beyond dispute that the "Bill of Rights does not apply to Indian tribes").

B

By concluding that tribal court decisions are inherently suspect even when they comply with the ICRA, *Ant* and this opinion trample upon the principles of comity and respect that undergird federal court recognition of tribal court judgments. *See Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997); *see also Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987) (extending comity to tribal courts).

As *Wilson* observed:

> Comity does not require that a tribe utilize judicial procedures identical to those used in the United States Courts. Foreign-law notions are not per se disharmonious with due process by reason of their divergence from the common-law notions of procedure . . . . Federal courts must also be careful to respect tribal jurisprudence along with the special customs and practical limitations of tribal court systems. Extending comity to tribal judgments is not an invitation for the federal courts to exercise unnecessary judicial paternalism in derogation of tribal self-governance.

Id. at 811 (citing *Hilton v. Guyot*, 159 U.S. 113, 205 (1895)) (internal quotation marks omitted).

Yet, here the court holds 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," *Bryant*, 769 F.3d at 677 (emphasis added), imposing "judicial procedures identical to those used in the United States Courts." *Wilson*, 127 F.3d at 810. The court exercises the very judicial paternalism warned against in *Wilson*, and acts in derogation of tribal self-governance.

Sadly, distaste for the ICRA and contempt for tribal courts has led the court to disregard the critical comity interest that undergirds respect for tribal courts and their criminal procedures and, contrary to the dictates of

Congress, the court "intrude[s] needlessly on tribal self-government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978). This we cannot do.

IV

Both this opinion and *Ant* are contrary to Supreme Court precedent, invent a Sixth Amendment violation where none exists, erode tribal sovereignty, and disregard the ICRA. If that were not enough, this opinion creates a circuit split by disagreeing with all other circuit courts which have addressed the very issue presented. The concurrence and the concurral ask for Supreme Court intervention. It appears we need it.

I respectfully dissent from our regrettable decision not to rehear this case en banc.

APPENDIX D

1. U.S. Const. Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law, nor shall private property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. U.S. Const. Amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

3. 18 U.S.C. 117 provides:

Domestic assault by an habitual offender

(a) IN GENERAL.—Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction—

(1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner; or

(2) an offense under chapter 110A,

Shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.

(b) DOMESTIC ASSAULT DEFINED.—In this section, the term "domestic assault" means an assault committed by a current or former spouse, parent, child, or guardian of the victim, by a person with whom the victim share a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, child, or guardian, or by a person similarly situated to a spouse, parent, child, or guardian of the victim.

4. 25 U.S.C. 1302 (2006) provides:

Constitutional rights

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, house, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his

favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and[1] a fine of $5,000, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

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[1] So in original. Probably should be "or".

5. 25 U.S.C. 1302 provides:

Constitutional rights

(a) In general

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have

compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));

(7)(A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year of a fine of $5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who—

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United State or any of the States.

(c) Rights of defendants

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effec-

tively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding—

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) Sentences

In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant—

(1) to serve the sentence—

(A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of In-

dian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;

(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c)[1] of the Tribal Law and Order Act of 2010;

(C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or

(D) in an alternative rehabilitation center of an Indian tribe; or

(2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

(e) Definition of offense

In this section, the term "offense" means a violation of a criminal law.

(f) Effect of section

Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country .

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[1] See References in Text note below.

6. 25 U.S.C. 1303 provides:

Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.