No. 15-420

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

vs.

MICHAEL BRYANT, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

WHETHER RELIANCE ON UNCOUNSELED TRIBAL COURT MISDEMEANOR CONVICTIONS TO PROVE THE PREDICATE OFFENSE ELEMENT OF 18 U.S.C. §117 VIOLATES THE UNITED STATES CONSTITUTION.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The opinion of the Ninth Circuit is published and reported at 769 F.3d 671 (9th Cir. 2014). A copy of that opinion is set forth in the Government's appendix to its petition for a writ of certiorari (Pet'r App. 1a-21a). The order of the Ninth Circuit denying the Government's petition for rehearing en banc is published and reported at 792 F.3d 1042 (9th Cir. 2015). A copy of that order is also set forth in the Government's appendix to its petition for a writ of certiorari (Pet'r App. 33a-54a). The oral ruling of the district court denying Mr. Bryant's motion to dismiss the Indictment is unreported. *See* Pet'r App. 22a-32a.

JURISDICTION

The judgment of the Ninth Circuit was entered on September 30, 2014. The petition for a writ of certiorari was filed on October 5, 2015 and was granted on December 14, 2015. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

> No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty, or property, without due process of law[.]

U.S. Const. Amend. V

> 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 witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI

STATUTORY AND/OR FEDERAL RULE INVOLVED

18 U.S.C. §117. 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.

STATEMENT

As a Native American from the Northern Cheyenne Reservation, Mr. Bryant has never disputed he has prior misdemeanor domestic violence convictions from the Northern Cheyenne Tribal Court. Instead, Mr. Bryant has always disputed the use of those tribal court convictions by the Government in a federal prosecution when those tribal court convictions are used as an element of the federal prosecution and those tribal court convictions are obtained without providing Mr. Bryant one of the core protections United States citizens hold as fundamental to our criminal justice system – the right to counsel. The Ninth Circuit held "tribal court convictions may be used in subsequent prosecutions only if the tribal court guarantees a right to counsel that is, at minimum, coextensive with the Sixth Amendment right." *United States v. Bryant*, 769 F.3d 671, 677 (9th Cir. 2014).

Present Controversy

1. Mr. Bryant was indicted in the United States District Court for the District of Montana, Billings,

Montana, under 18 U.S.C. §117(a) with two counts of felony domestic assault by an habitual offender. J.A. 13, Docket No. 9. Prosecution under §117(a) requires a person to have "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 any assault, sexual abuse, or serious violent felony against a spouse or intimate partner." 18 U.S.C. §117(a)(1) (2006).

2. Mr. Bryant moved to dismiss the Indictment against him, arguing it violated his Fifth and Sixth Amendment rights to the United States Constitution for the Government to rely on uncounseled tribal convictions as an element for prosecution under 18 U.S.C. §117. J.A. 113-114, Docket Nos. 19-20. The district court denied the motion. J.A. 14-15, Docket No. 25. Mr. Bryant ultimately entered into a plea agreement, reserving his right to appeal the pretrial denial of his motion to dismiss. J.A. 27-36. He was sentenced to 46 months imprisonment followed by three years supervised release. J.A. 17-18, Docket No. 33.

3. Mr. Bryant appealed to the Ninth Circuit and a three-Judge Panel analyzing the issue under the Sixth Amendment reversed. *Bryant*, 769 F.3d at 679. Noteworthy at the Ninth Circuit, the Government conceded Mr. Bryant was imprisoned on more than one occasion for his domestic violence tribal court convictions. J.A. 49-50. Mr. Bryant's indigent status thereby has never been questioned nor has his inability to

obtain counsel when he pled guilty in tribal court. *See* Pet'r Br. 7; *Bryant*, 769 F.3d at 673.

4. Mr. Bryant has never contended his tribal court convictions themselves were unconstitutional or in violation of ICRA. *Bryant*, 769 F.3d at 675. Rather, he has consistently argued it violated the Constitution to use the tribal court convictions in federal court to prove an element of the federal prosecution. *Id.*

5. The Ninth Circuit agreed with that argument. The Ninth Circuit held that tribal court convictions in which a defendant was subjected to imprisonment may be used to prove an element in federal court only when he was given counsel. *Bryant*, 769 F.3d at 677. Otherwise as for Mr. Bryant, use of tribal court convictions to establish an element of an offense in a subsequent prosecution is constitutionally impermissible. *Id.*

6. Judge Watford concurred with the *Bryant* decision but believed this Court's decision in *Nichols v. United States*, 511 U.S. 738 (1994), called the Ninth Circuit's decision in *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989), into question. *Bryant*, 769 F.3d at 679. Judge Watford posited *Nichols* undercut the proposition that uncounseled convictions were categorically unreliable. As such, the seemingly contrary holding in *Ant* was difficult to "square with" the notion Mr. Bryant's prior convictions were not obtained in violation of the Sixth Amendment since they occurred in tribal court. *Id.*

7. Relying largely on Judge Watford's concurrence, the Government filed a petition for rehearing en banc in the Ninth Circuit. J.A. 8, 10, Docket Nos. 56, 62. The Ninth Circuit denied the petition. *United States v. Bryant*, 792 F.3d 1042 (9th Cir. 2015).

SUMMARY OF THE ARGUMENT

The use of prior convictions to meet the predicate offense element of §117 violates the Sixth Amendment if the defendant was not afforded the right to counsel during the proceedings that resulted in the prior convictions. This Court has long held reliability is a core concern of the Sixth Amendment right to counsel and convictions obtained without the guiding hand of counsel are insufficiently reliable for a felony conviction or for a sentence that involves the loss of liberty. *See e.g.*, *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Burgett v. Texas*, 389 U.S. 109 (1967).

These Sixth Amendment principles apply here, where Mr. Bryant's uncounseled tribal court convictions are used to establish an element of the Government's §117 prosecution. Although the prior uncounseled tribal court convictions were not themselves unconstitutional because the Constitution does not apply to tribal courts, the Sixth Amendment was violated when these uncounseled convictions were used to establish an element of a felony offense in federal court. Mr. Bryant was deprived of counsel

when he was convicted and sentenced in tribal court, and he was unable to challenge those convictions when he did have counsel in the instant federal court proceeding. He thus faced incarceration based in part on convictions that were uncounseled, in violation of the principles set out in *Burgett* and its progeny. *See Alabama v. Shelton*, 535 U.S. 654 (2002).

This Court's holdings in *Lewis v. United States*, 445 U.S. 55 (1980), and *Nichols v. United States*, 511 U.S. 738 (1994), do not alter the fact a prior conviction turns on whether a defendant had counsel in the prior proceeding. The focus of the Government's prosecution of the defendant in *Lewis* was not on the prior conviction as an element of the offense – as it is in Mr. Bryant's case – nor did *Lewis* overrule *Burgett*. A prior conviction obtained in violation of the Sixth Amendment cannot be used to support guilt in a subsequent offense. Even *Nichols* underscores that for a prior conviction to be used in a sentencing context, a prior conviction must comport with *Scott v. Illinois*, 440 U.S. 367 (1979).

The Government's Due Process challenge is not a separate substantive or procedural due process challenge, nor is it properly preserved. The first time Due Process became a stand-alone issue was in the Government's petition for a writ of certiorari. The Ninth Circuit decided Mr. Bryant's case based on a Sixth Amendment analysis and the Government's petition for rehearing en banc was denied on the same basis. Additionally, the Government now makes an argument for the first time that Mr. Bryant's prior tribal

court convictions are not categorically unreliable, which is not an issue embraced by the Question Presented before this Court. Should this Court, however, reach the Due Process argument, §117 does not comport with Due Process because the use of uncounseled convictions to establish an element dilutes the fundamental constitutional requirement of proof beyond a reasonable doubt.

Consequently, this Court should affirm the Ninth Circuit's decision, holding Mr. Bryant's tribal court convictions may be used in a subsequent §117 prosecution only where those convictions also comported with the Sixth Amendment per *Scott*.

ARGUMENT

I. PRIOR TRIBAL COURT CONVICTIONS THAT DO NOT COMPORT WITH THE SIXTH AMENDMENT CANNOT BE USED TO MEET THE PRIOR CONVICTION ELEMENT OF §117 BECAUSE THE LACK OF COUNSEL RENDERS THEM UNRELIABLE.

A. This Court's jurisprudence establishes that reliability is a core concern of the Sixth Amendment's right to counsel, both as entry of a conviction in the first instance and as use of that conviction in a later prosecution.

Mr. Bryant was not provided the opportunity for court-appointed counsel in tribal court. The misdemeanor

convictions that resulted from those uncounseled proceedings, therefore, do not meet constitutional requirements as applied in a subsequent federal prosecution. The Government attempts to escape this result by simply proclaiming the United States Constitution does not apply in Indian country. *See* Pet'r Br. 28-29. That proclamation fails to account for longstanding Sixth Amendment jurisprudence that is grounded in reliability concerns, as well as this Court's decisions regarding prior convictions. Mr. Bryant's tribal court convictions violate the Sixth Amendment because he was imprisoned as a result of them and was not provided counsel. This Court's holdings do not change that fact, nor do the holdings permit the Government's use of the uncounseled misdemeanor tribal court convictions as an element in a subsequent federal §117 prosecution.

1. In a series of cases from *Powell v. Alabama* through *Scott v. Illinois*, this Court established that having counsel from the outset of a prosecution is critical to the reliability of any conviction that results.

The Sixth Amendment to the United States Constitution provides "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. The Constitution dictates a fair trial is one where evidence that is subject to adversarial testing is presented to an impartial tribunal for resolution of

elements defined in advance of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Certain safeguards are essential to the criminal justice system. The right to counsel is one of those safeguards. This Court has indicated "the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause[.]" *Id.*

The right to counsel was first challenged in *Powell v. Alabama*, 287 U.S. 45 (1932), where the defendants who faced the death penalty did not have attorneys even on the morning of their trial. *Id.* at 54-56. This Court reversed the Alabama Supreme Court's holding that such a delay in appointing the defendant an attorney did not violate his state constitutional right to counsel. *Id.* at 59-60. Citing the Due Process Clause of the Fourteenth Amendment to United States Constitution, this Court stated that the defendant's right to be heard would be "of little avail if it did not comprehend the right to be heard by counsel." *Id.* at 68-69. A defendant's right to be heard through counsel, therefore, was an "immutable principle[ ] of justice." *Id.* at 68 (citation omitted). Because,

> [e]ven the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with crime, he is

> incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.

Id. at 69.

This Court's decision in *Powell* did not implicate the Sixth Amendment, yet its reasoning that a defendant "lacks both the skill and knowledge adequately to prepare his defense" and thereby "requires the guiding hand of counsel at every step in the proceedings against him" laid the foundation for the decision in *Johnson v. Zerbst*, 304 U.S. 458 (1938), which did rely upon the Sixth Amendment. *Id.*

In *Johnson*, this Court built upon *Powell* to establish the right to counsel as a constitutional mandate under the Sixth Amendment stating the Sixth Amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself." *Johnson*, 304 U.S. at 462-463. Absent waiver, the right to counsel under the Sixth Amendment is a jurisdictional prerequisite to any deprivation of life and liberty. *Id.* at 464-465 (A loss of fundamental rights by acquiescence is not presumed. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.").

More than twenty years later, in a landmark decision, this Court held the United States Constitution requires appointment of counsel for all indigent defendants charged with any felony. *Gideon v. Wainwright*, 372 U.S. 335, 340-341, 345 (1963). In so holding, this Court again returned to the principles established in *Powell*, indicating differences exist between a trained attorney and a layperson and holding that a layperson must have the guiding hand of counsel to assist him with his defense. *Id.* at 343-345.

This Court then established a bright line rule when deciding *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and *Scott v. Illinois*, 440 U.S. 367 (1979), effectively concluding the criminal justice system tolerates less reliability for judgments obtained without counsel where only a fine is imposed. But this Court did not abandon its commitment to the rule that counsel must be provided when a defendant's liberty is lost.

Particularly, the right to counsel was extended to misdemeanor offenses in *Argersinger* because a defendant must be appointed counsel if the defendant receives imprisonment for the offense. *Argersinger*, 407 U.S. at 36-38, 40. Regardless of the severity of the offense, assistance of counsel "has relevance to any criminal trial[ ] where an accused is deprived of his liberty." *Id.* at 32. Similarly, in *Scott* the Court reinforced the distinction that an indigent defendant who is charged with a misdemeanor offense and who receives a sentence of imprisonment – as opposed to just a fine – is entitled to counsel under the Sixth

Amendment to the United States Constitution. *Scott*, 440 U.S. at 373-374.

The Government questions whether the bright line established in *Scott* still holds. *See* Pet'r Br. 49. The line is bright and this Court has been clear why it must be so. That is because "any deprivation of liberty is a serious matter." *Argersinger*, 407 U.S. at 41 (Burger, J., concurring). The deprivation is so serious, in fact, as to require a different process whereby counsel is provided. *Scott*, 440 U.S. at 373. Consequently, when a person is subjected to imprisonment and is not given counsel, the resulting convictions are not reliable because they have not been vetted through a process deemed fundamentally fair.

2. In *Burgett v. Texas*, *United States v. Tucker*, and *Loper v. Beto*, this Court established that an uncounseled conviction cannot be used in a later prosecution for another offense, whether as an element of that offense or for sentencing on it, because the uncounseled conviction is inherently unreliable.

In *Burgett v. Texas*, 389 U.S. 109 (1967), this Court held a conviction that violates the precepts affirmed in *Scott* cannot be relied upon in a prosecution for another offense. *Burgett*, 389 U.S. at 114-115. This holding would seem to end the inquiry on this case. The Government, however, seeks to avoid *Burgett* by arguing that because the Sixth Amendment does not

apply to tribal court proceedings, *Burgett* also does not apply because the defect of not having counsel is not being exploited to Mr. Bryant's detriment in his §117 prosecution. *See* Pet'r Br. 29.

In first confronting the issue of whether uncounseled convictions could be used in a subsequent proceeding, this Court indicated "[t]o permit a conviction obtained in violation of Gideon v. Wainwright to be used against [the defendant] either to support guilt or enhance punishment for another offense is to erode the principle of [*Gideon*]." *Burgett*, 389 U.S. at 115 (citation omitted). Years later, and for the same reasons, this Court remanded the defendant's case in *United States v. Tucker* for re-sentencing because the uncounseled convictions were improperly used during sentencing. 404 U.S. 443, 449 (1972). Then, in *Loper v. Beto*, 405 U.S. 473 (1972), this Court held improper the use of uncounseled convictions to impeach a defendant-witness during cross-examination because such use violates the defendant's Sixth Amendment right and impairs the reliability of those convictions. *Id.* at 483.

Taken together, *Burgett*, *Tucker*, and *Loper* have, at their core, concerns about the reliability of the prior convictions when those convictions are used in subsequent proceedings, as this Court later observed in *Lewis v. United States*, 445 U.S. 55 (1980). Specifically, the *Burgett*, *Tucker*, and *Loper* courts "found that the subsequent conviction or sentence [involved in those cases] violated the Sixth Amendment

because it depended on the reliability of a past uncounseled conviction." *Lewis*, 445 U.S. at 67.

3. *Lewis v. United States*, which permits the use of a prior uncounseled conviction to establish an element of the offense of possession of a firearm by a convicted felon, creates only a narrow exception to the principle that reliability is a fundamental concern of the Sixth Amendment right to counsel.

The defendant in *Lewis* was a convicted felon who was found to be in unlawful possession of a firearm. *Lewis*, 445 U.S. at 56-57. The federal firearms statute at issue in *Lewis* (18 U.S.C. §1202(a)(1)) prohibited a convicted felon from having a firearm in his possession. *Id.* at 57. At his trial, Lewis's prior uncounseled convictions were allowed into the record. *Id.* This Court ultimately held "that §1202(a)(1) prohibits a felon from possessing a firearm despite the fact that the predicate felony may be subject to collateral attack on constitutional grounds." *Id.* at 65. In so holding, this Court recognized a class of persons who could not possess firearms regardless of whether the convictions that prevented them from possessing firearms were counseled or not. *Id.* at 67.

The *Lewis* holding does not, however, alter the fact a prior conviction turns on whether a defendant had counsel in the prior proceeding. First, enforcement of the federal firearm law in *Lewis* was just that

– enforcement. Being unable to possess a firearm was a "civil disability." *Id.* The focus of the prosecution in *Lewis* was not on the prior conviction as an element of the offense as it is in Mr. Bryant's case. It was on the defendant possessing an item he was not legally supposed to possess. *Id.*

Second, *Lewis* did not overrule *Burgett*. Rather, *Burgett* still holds an earlier felony conviction obtained in violation of the Sixth Amendment cannot be used to support guilt in a subsequent offense. *Burgett*, 389 U.S. at 114-115. *Lewis* is also undercut by *Custis v. United States*, 511 U.S. 485 (1994) – a decision that even relies on *Lewis*. *Custis* made clear a defendant may collaterally attack the use of an uncounseled prior conviction in the context of a later prosecution when it is used to enhance his sentence. *Custis*, 511 U.S. at 497.

Third, this Court's focus in *Lewis* was not on reliability as it was in *Burgett*, *Scott*, and *Loper*. *Id.* at 66-67. Rather, the analysis undertaken in *Lewis* concerned a statutory interpretation for which no legislative history existed to suggest Congress was willing to permit a defendant to question the validity of his prior conviction as a defense under §1202(a). *Lewis*, 445 U.S. at 60-62.

Fourth, this Court indicated the defendant in *Lewis* was not without relief by this Court's holding because he could seek relief from the civil disability by pardon or with the Secretary's consent. *Id.* at 64. He could also seek habeas relief in federal court

under a 28 U.S.C. §2255 petition. Mr. Bryant, however, has no further remedy in federal court. Even though he has a right to pursue habeas relief under 25 U.S.C. §1303, he does not meet the threshold requirement to pursue such relief to challenge his tribal court convictions obtained without counsel because he did not have counsel initially. Habeas corpus relief, therefore, is a right rendered virtually meaningless without the benefit of counsel – a benefit Mr. Bryant did not have and, apparently, was never advised of. *Id.*; Brief of National Congress of American Indians as *Amicus Curiae* at 10.

Accordingly, reliance on *Lewis* is misplaced.

B. Because reliability is the core concern underlying the exclusion in subsequent prosecutions of prior convictions that do not meet the Sixth Amendment standards for right to counsel, the *Burgett* rule of exclusion must apply to all prior uncounseled convictions regardless of the court from which they arise even when applying *Nichols*.

Faced with the issue of whether a defendant's uncounseled misdemeanor conviction could be used to enhance a subsequent misdemeanor to a felony, this Court decided *Baldasar v. Illinois*, 446 U.S. 222 (1980). In this per curiam decision, Justice Stewart was joined in concurrence by Justice Brennan and Justice Stevens indicating that an uncounseled misdemeanor conviction could not be used to enhance a

subsequent misdemeanor to a felony because the defendant was sentenced to an increased term of imprisonment solely due to his prior conviction that was obtained in violation of *Scott*. *Id.* at 224 (Stewart, J., concurring).

The fractured *Baldasar* decision created confusion among the circuit courts. Realizing as much, this Court decided *Nichols v. United States*, 511 U.S. 738 (1994), holding an "uncounseled conviction valid under *Scott* may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment." *Nichols*, 511 U.S. at 746-747.

The issue in *Nichols* concerned the defendant's sentence and the fact that under the United States Sentencing Guidelines (USSG), his sentence was increased by one point due to a prior uncounseled DUI conviction. *Id.* at 740-741. That one point made a difference in his sentence of 25 additional months. *Id.* at 741. Adhering to *Scott*, this Court noted if the defendant's original uncounseled conviction did not result in actual imprisonment then no violation of the Sixth Amendment inhered. *Id.* at 746.

This Court overruled *Baldasar* in *Nichols*, leaving as guidance that a misdemeanor conviction, valid under *Scott*, can be used in a subsequent proceeding when determining a sentence enhancement through the sentencing guidelines or as part of a recidivist statute. *Id.* at 748-749. "Reliance on such a conviction is . . . consistent with the traditional understanding of the sentencing process[.]" *Id.* at 747.

Such a sentencing process includes a "wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant." *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993).

Although this Court did not say that its rule applied to proof of an element of a federal offense, the Government seeks such an application. *See* Pet'r Br. 38. However, the citation the Government provides to support extending *Nichols* underscores this Court's consideration of the issue as it concerns – not the guilt phase of a case – but the sentencing phase of a case. *See Nichols*, 511 U.S. at 747. This Court discussed recidivist statutes and sentencing enhancements in the context of whether a prior uncounseled conviction, which is valid under *Scott*, can be used to enhance a defendant's *punishment* under a subsequent prosecution. *Id. Nichols* does not hold that reliance on prior convictions cannot create a Sixth Amendment violation where one did not previously exist. *See* Pet'r Br. 39. The holding in *Nichols* is actually contingent upon a valid prior conviction under *Scott*.

The Government leans on the fact that *Nichols* overruled *Baldasar* and *Ant* cited to *Baldasar*. Pet'r Br. 31. However, *Ant* did not rely on *Baldasar* in ultimately holding the defendant's guilty plea, which was constitutionally infirm because he did not have counsel, was inadmissible in a subsequent federal prosecution. In fact, *Ant* made only a passing reference to *Baldasar* in the overarching discussion of an

individual's Sixth Amendment right to counsel at the time the person pleads guilty. *See Ant*, 882 F.2d at 1394.

Overruling *Baldasar* in the context of sentencing does not equate to a complete disregard of all reasoning contained within the separate opinions of the *Baldasar* per curiam decision. This is especially true where *Ant* and *Bryant* establish fundamentally different contexts for use of the prior convictions. *Nichols* overruled *Baldasar* because *Baldasar* incorrectly concluded the defendant's prior misdemeanor conviction in that case was invalid under *Scott*. *See Nichols*, 511 U.S. at 746-747. The defendant's prior misdemeanor conviction in *Baldasar* was actually valid under *Scott* (because he received no sentence of incarceration) which is why under *Nichols*' rationale, it could have then been used to enhance the defendant's punishment in the subsequent recidivist prosecution. *Id.*

Here, Mr. Bryant was not given counsel on the tribal court proceedings for which he was convicted and incarcerated. Using the prior convictions to prove an element of a federal offense thus violates *Scott* and *Argersinger*.

C. This Court's precedent after *Lewis* and *Nichols* establishes the Government's arguments – that Mr. Bryant's uncounseled tribal court convictions can be used to establish an element of §117 – fail in light of the Sixth Amendment's continued core concern about the reliability of the prior convictions.

After deciding *Lewis*, this Court returned to a reliability analysis in *Alabama v. Shelton*, 535 U.S. 654 (2002), and affirmed the limited reach of *Nichols*. The defendant in *Shelton* was convicted of a class A misdemeanor offense which had a possible maximum punishment of one year imprisonment. *Shelton*, 535 U.S. at 658. He was not afforded an attorney during his proceedings, was convicted of the misdemeanor offense, and was sentenced to a 30-day suspended sentence. *Id.* The defendant in *Shelton* challenged his conviction on Sixth Amendment grounds, arguing that he had a constitutional right to an attorney even though he received a suspended sentence. *Id.* at 658-659.

This Court agreed, holding a suspended sentence that "may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded the 'guiding hand of counsel' in the prosecution for the crime charged." *Id.* at 658 (quoting *Argersinger*, 407 U.S. at 40). This Court in *Shelton* actually distinguished *Nichols* on the very basis Mr. Bryant argues herein, that is "[o]nce guilt has been established, [as] we noted in *Nichols*, sentencing

courts may take into account not only 'a defendant's prior convictions, but . . . also [his] past criminal behavior, even if no conviction resulted from that behavior.'" *Shelton*, 535 U.S. at 665 (quoting *Nichols*, 511 U.S. at 747).

The Government is incorrect in arguing under *Nichols* "the validity of the prior conviction under the Sixth Amendment determines whether that Amendment constrains the subsequent use of the conviction." Pet'r Br. 31. As indicated in *Shelton*, *Nichols* does not alter or diminish "*Argersinger*'s command" that a defendant shall not be imprisoned for an offense unless he is represented by counsel. *Shelton*, 535 U.S. at 664.

In fact, the same reasoning as articulated in *Shelton* applies. Mr. Bryant was "[d]eprived of counsel when . . . convicted[ ] and sentenced" in tribal court. *Shelton* 535 U.S. at 667. When those tribal court convictions are used as an element in a subsequent federal prosecution under §117, Mr. Bryant is unable to challenge those convictions, thereby facing federal conviction based on an element that has "never been subjected to 'the crucible of meaningful adversarial testing.'" *Id.* (quoting *United States v. Cronic*, 466 U.S. 648, 656 (1984)). Because uncounseled prior convictions resulting in imprisonment violate the Sixth Amendment, which is grounded in reliability, use of uncounseled tribal court convictions that result in imprisonment as an element in a subsequent prosecution is impermissible even under *Nichols*.

1. The Government is incorrect that because the Sixth Amendment does not apply to tribal courts, it does not matter that Mr. Bryant's prior convictions did not comply with the Sixth Amendment's right to counsel standards in a subsequent federal prosecution.

The uncounseled tribal court convictions the Government seeks to use in its §117 prosecution of Mr. Bryant are necessary to prove an essential element of the federal crime and, as such, must comport with the Sixth Amendment. The Government argues, however, the Sixth Amendment does not apply to Mr. Bryant's case much the same as it did not apply in *Nichols*. *See* Pet'r Br. 28-30. Even if Mr. Bryant's prior uncounseled tribal court convictions are valid under the Sixth Amendment for sentencing enhancement purposes (the *Nichols* situation), they cannot, under *Johnson* and *Gideon* be used to establish an element of the offense giving rise to that prosecution.

Burgett and *Nichols* both stand for the proposition that prior convictions must be vetted to ensure their reliability before they can be used as proof in a subsequent federal prosecution. *See Burgett*, 389 U.S. at 115; *Nichols*, 511 U.S. at 752 (Souter, J., concurring). Without such vetting, those prior convictions are defective and cannot thereafter be used as substantive proof. An uncounseled misdemeanor conviction used to enhance the defendant's sentence, as addressed in *Nichols*, is proper because the defendant, while

represented, has the opportunity to convince the judge before sentencing that his prior uncounseled conviction is unreliable. *Nichols*, 511 U.S. at 752 (Souter, J., concurring). A lesser standard of proof by the government concerning the prior conviction applies and the proof occurs during sentencing. *Nichols*, 511 U.S. at 747.

More than twenty years have passed since this Court's decision in *Nichols*. Opinions written by this Court since *Nichols* reinforce and supplement Mr. Bryant's arguments. Particularly, in his concurrence in *Apprendi v. New Jersey*, Justice Thomas discussed at length how courts have considered recidivism in sentencing since the country was founded. *Apprendi v. New Jersey*, 530 U.S. 466, 500-518 (2000) (Thomas, J., concurring). A longer sentence under a recidivist statute is "not to be viewed as . . . [an] additional penalty for the earlier crimes," but as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger v. Burke*, 334 U.S. 728, 732 (1948) (recidivist punishments do not subject defendants to double punishment in violation of the Double Jeopardy Clause of the Fifth Amendment).

As indicated in *Apprendi*, the demarcation between an element and a sentencing factor was present in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In that case, the defendant was charged with violating a federal law that made it a crime for a deported alien to return to the United States. *Almendarez-Torres*, 523 U.S. at 226. In order to

establish the offense, the prosecutor had to prove two elements. *See* 8 U.S.C. §1326(a). The criminal penalty section for his offense then provided for an increased penalty where Mr. Almendarez-Torres's "removal was subsequent to a conviction for commission of an aggravated felony" and thereby faced imprisonment of not more than 20 years. *See* 8 U.S.C. §1326(b)(2). This portion of the statute, defendant argued, was an element of the crime thereby entitling him to heightened procedural protections including the right to counsel. *See Almendarez-Torres*, 523 U.S. at 239.

This Court rejected defendant's argument and distinguished sentencing factors from elements of a crime. *Id.* at 243-247. Where a statute incorporates a defendant's criminal past as part of increasing that defendant's sentence – rather than as part of establishing a crime was in fact committed – such incorporation does not create a separate offense within the law. *Id.* at 243. This is true because "recidivism 'does not relate to the commission of the offense, but goes to the punishment only.'" *Id.* at 244 (quoting *Graham v. West Virginia*, 224 U.S. 616, 629 (1912)).

Justice Thomas with whom Justice Scalia joined, indicated the Constitution required a broader rule than adopted by this Court in *Apprendi*. Namely, the definition of a "crime" includes "every fact that is by law a basis for imposing or increasing punishment." *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring). If a crime includes every fact that is a basis for imposing or increasing punishment, then Mr. Bryant's prior tribal court convictions referenced in §117 are an

integral part of the Government's proof of the crime. *Apprendi* held any fact other than a prior conviction that is used to increase the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. *Apprendi*, 530 U.S. at 476.

That holding is guided by the fundamental principles of a defendant's right to counsel, because a defendant's right to a jury trial includes his right to counsel. *See Argersinger*, 407 U.S. at 46 (Powell, J., concurring "If there is not an accompanying right to counsel, the right to trial by jury becomes meaningless."). The prior conviction exception exists because it is premised on the prior conviction having been "obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt." *United States v. Tighe*, 266 F.3d 1187, 1194 (9th Cir. 2001).

It follows if Mr. Bryant's prior tribal court convictions were not obtained through proceedings that included the right to counsel, those prior convictions cannot later be used as an integral part of the Government's proof of the §117 crime. The uncounseled misdemeanor tribal court convictions here are being used as evidence to establish guilt of the §117 offense. Moreover, while the Government has relied heavily upon this perceived analysis of *Nichols*, if the facts of Mr. Bryant's case were applied to *Nichols*, his prior uncounseled domestic violence convictions in tribal court would not apply in the sentencing context of *Nichols*. Tribal court convictions are not assessed

criminal history points. USSG §4A1.2(i). It is illogical under the Government's argument to be able to use uncounseled tribal court convictions at the guilt phase, yet unable to use the tribal court convictions to assess criminal history points at the sentencing phase.

Additionally, the Government appears to argue federal courts should be required to accept tribal court convictions as predicates for §117 offenses on a blanket basis – that is, with no inquiry into the fairness of the particular tribe's criminal adjudicatory process or the procedures underlying a particular prior conviction. *See* Pet'r Br. 30-35. The Government's focus is unclear, however, whether it rejects the Ninth Circuit's holding in *Bryant* in favor of an opposite blanket rule or whether it seeks individualized review. What is clear, however, is that any approach permitting uncounseled tribal court convictions to be used as §117 predicates is fraught with unfairness and practical difficulties.

If this Court construes §117 to require blanket acceptance of tribal court convictions, Indians with convictions obtained in a summary proceeding presided over by a tribe's governor and counsel will be bootstrapped into elements of a new federal crime punishable by up to ten years in prison. So, too, will this occur for other Indians who are convicted and sentenced but who do not comprehend what occurs at trial or during a change of plea hearing because they do not have the guiding hand of counsel to assist

them. This Court need not articulate a rule treating tribal courts differently from other courts because under this Court's precedent no uncounseled conviction may be used as an element of a federal crime leading to imprisonment. *See Johnson*, 304 U.S. at 464-465; *Gideon*, 372 U.S. at 345.

Tremendous variation in the size, resources, and governmental structure exists in the 566 federally-recognized Indian tribes. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 79 F.R. 4748-02. A correspondingly enormous variation also exists in the nature and functioning of the hundreds of courts the 566 federally-recognized Indian tribes operate.[1] A rule treating tribal courts as a monolithic unity, whose judgments are uniformly fit to become elements of a federal crime, would be no less absurd than a similar rule blindly accepting the judgments of the courts of any and all foreign nations as elements of a federal crime.

Indeed, an approach authorizing federal courts to review the fairness of tribal court procedures underlying §117 predicates seems, at first blush, like a reasonable compromise. But such an approach, while clearly preferable to a rule of blanket acceptance,

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[1] This diversity helps explain the widely varying approach that states have taken to the recognition of tribal civil judgments. Kevin K. Washburn, *A Different Kind of Symmetry*, 34 N.M. L. Rev. 263, 268-270 (Spring 2004).

begs a number of vexing questions, including whether a court should review the particular tribe's criminal procedures in general; and, if so, how that is accomplished since many of the tribes' codes and rules are not publicly available. Such realities underscore why uncounseled tribal court convictions should not be used to support federal sentences of incarceration. As former federal prosecutor (and Chickasaw Nation of Oklahoma member) Kevin Washburn has observed with respect to the federal sentencing guidelines, declining to permit uncounseled tribal convictions to be used in support of federally-imposed prison sentences treats these convictions "in a manner that is not disrespectful to tribal courts," by effectively extending the duty to supply appointed counsel only to "tribes wishing to have their tribal court sentences counted in federal sentencing." Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 Ariz. St. L.J. 403, 448 (Spring 2004).

2. The Government's reliance on *Nichols* and related cases to argue that recidivist statutes "penalize only the last offense committed by the defendant" is misplaced in regards to Mr. Bryant.

Unlike a true recidivist statute, §117 does not increase punishment based on prior convictions. Instead, prior convictions are an element of the offense the Government must prove beyond a reasonable doubt. Remembering that *Nichols* is a punishment

case and Mr. Bryant's case is a guilt phase case is essential to this analysis as pointed out by Judge Paez. *Bryant*, 792 F.3d at 1043.

The Government's duty to establish guilt beyond a reasonable doubt is "a requirement and a safeguard . . . in the historic, procedural content of 'due process.'" *Leland v. Oregon*, 343 U.S. 790, 802-803 (1952) (Frankfurter, J., dissenting); *Brinegar v. United States*, 338 U.S. 160, 174 (1949) ("[g]uilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition[ ] . . . has crystalized into rules of evidence[.] . . . These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.").

In order to establish the offense of an habitual offender in federal court, a prosecutor must prove beyond a reasonable doubt that (1) a present offense of domestic assault; (2) was committed within the maritime and territorial jurisdiction of the United States or Indian country; (3) by someone with at least two final convictions on separate prior occasions in federal, state, or Indian tribal court proceedings; (4) when that prior offense, if subject to federal jurisdiction, was one of assault, sexual abuse, a 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. 18 U.S.C. §117(a)

(2014).[2] The Government must prove these elements beyond a reasonable doubt.

The Government's argument, however, appears to equate its burden to the less exacting standard required at sentencing much the same as the Amicus did in *Shelton*. *See* Pet'r Br. 34-35; *Shelton*, 535 U.S. at 665. In *Shelton*, however, this Court noted the "relaxed standard [in *Nichols*] has no application . . . where the question is whether the defendant may be jailed absent a conviction credited as reliable because the defendant had access to 'the guiding hand of counsel.'" *Shelton*, 535 U.S. at 665 (quoting *Argersinger*, 407 U.S. at 40).

Under *Nichols*, a valid misdemeanor conviction is one that complies with the Sixth Amendment. *Nichols*, 511 U.S. at 748-749. The defendant's conviction in *Nichols* comported with the Sixth Amendment because the defendant in that case did not receive a sentence of incarceration. *Id.* at 740. The defendant in *Nichols* need not, under *Scott*, be appointed counsel, so the defendant's sentence was consequently properly enhanced using the prior uncounseled misdemeanor conviction to do so. *Id.* at 748-749.

The Government has relied upon *Nichols* to argue that recidivist statutes "penalize only the last

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[2] The version applicable at the time of Mr. Bryant's indictment omits qualification of the offense based on it being a felony against a child of or in the care of the person committing the domestic assault.

offense committed by the defendant." Pet'r Br. 24. However, not one of the cases cited by the Government regarding recidivist statutes actually involves a situation, as here, where the prior conviction is an essential element in a subsequent prosecution.

Moreover, this Court has already adopted a similar view of another Sixth Amendment right – that of confrontation. In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court held that out-of-court statements cannot be used at a defendant's trial unless the defendant had a prior opportunity to cross-examine the witness. Put differently, an earlier testimonial statement that the defendant had no opportunity to challenge cannot be used against him in a later prosecution because it violates the Sixth Amendment in that later proceeding. *Id.* at 68. Because Mr. Bryant did not have the benefit of counsel during his tribal court proceedings, the admission of those prior convictions as an element in his subsequent §117 prosecution is alone sufficient to violate the Sixth Amendment. A critical "indicium of reliability" necessary to satisfy the Constitution in the §117 prosecution is the right to counsel – a right established by the Constitution.

3. The Government's argument that the Sixth Amendment does not bar entry of an uncounseled misdemeanor conviction, but only an accompanying sentence of imprisonment misses the point.

The Government's argument that "whether obtained in tribal, state, or federal court, an uncounseled misdemeanor conviction is constitutionally valid, both in its own right and for use in a subsequent proceeding, even if the sentence of imprisonment is not" is both illogical and unsupported by this Court's precedent. *See* Pet'r Br. 33. The argument is counter to the concession the Government made before the Ninth Circuit during oral argument, where the Government agreed if Mr. Bryant's convictions were obtained in state or federal court they would be invalid. *See Bryant*, 769 F.3d at 673 ("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."). That point aside, the Government is arguing what matters to the analysis before this Court now is Mr. Bryant's conviction and not the jail time he served for both of his uncounseled misdemeanor tribal court convictions. *See* Pet'r Br. 34.

Assuming without conceding for the sake of the Government's argument Mr. Bryant's convictions in tribal court are valid when used in his subsequent

§117 prosecution, the Government fails to address how the sentence he received comports with *Shelton* and *Scott*. A sentence that risks deprivation of liberty cannot be imposed unless that defendant is given counsel. *See Shelton*, 535 U.S. at 658.

Sixth Amendment jurisprudence has its focus on a defendant's sentence only insofar as determining whether the defendant's crime imposes incarceration. The resulting sentence, therefore, is not what triggers reliability concerns as the Government asserts. *See* Pet'r Br. 40 ("A Sixth Amendment holding that a tribal-court misdemeanor conviction is deemed unreliable if tribal court imposed a sentence of imprisonment, but not if the court imposed a lesser sentence such as a fine, would . . . yield insupportable and incongruous results.").

Rather, if a defendant receives a prison sentence, that defendant is entitled to counsel. Failure to provide counsel renders any conviction and subsequent sentence invalid and unreliable. *Argersinger*, 407 U.S. at 34 ("Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor as well as in felony cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution."). Interpreting the Sixth Amendment in such a manner will actually yield results that conform to this Court's constitutional precedent dating as far back as *Powell*.

4. The Government's argument that uncounseled convictions may be used in later prosecutions without creating Sixth Amendment concerns if the defendant waived counsel in the earlier proceedings or was not indigent and elected to retain counsel is beside the point.

The Government also suggests if this Court does not adopt an expansive view of *Nichols*, "the use of *any* uncounseled conviction in a subsequent proceeding, without regard to whether the absence of counsel violated the defendant's Sixth Amendment rights" would be called into question. Pet'r Br. 37, n.8 (emphasis in original). The Government cites to examples including a defendant who has waived his right to counsel or a defendant who can afford to hire counsel but chooses not to do so. *Id.* The inherent problem with the Government's argument is that under those examples the defendant has made a knowing, intelligent, and voluntary decision not to exercise his right to counsel thereby accepting the present and future ramifications of his decision. Mr. Bryant here did not have a similar choice. A defendant cannot intelligently waive something that does not exist. *See Johnson*, 304 U.S. at 464-465.

Even under *Nichols*, this Court has required the prior conviction to be obtained in accordance with *Scott*. The Government should not be able to sidestep away from a fundamental requirement by simply proclaiming the Constitution does not apply to tribes

and ICRA controls. Doing so actually ignores this Court's holding in *Nichols*. *See Nichols*, 511 U.S. at 749 (an uncounseled misdemeanor conviction may be used for subsequent sentencing enhancement purposes, so long as the prior conviction comports with *Scott*).

D. This Court should hold the Sixth Amendment forbids the use of an uncounseled prior misdemeanor conviction resulting in a term of imprisonment to satisfy the prior convictions element of a subsequent §117 offense.

The Government contends "[s]ection 117(a) is concerned with the fact of the tribal-court conviction, not the sentence [Mr. Bryant] received, and his misdemeanor *convictions* would be valid in state and federal court, even if the accompanying sentences of imprisonment would not." Pet'r Br. 35 (emphasis in original). The Government cannot prove, however, that Mr. Bryant has two final convictions that would each qualify as an assault "if subject to Federal jurisdiction," without also considering whether those convictions "if subject to Federal jurisdiction" are valid in federal court as the Ninth Circuit held in *Bryant*. *See* 18 U.S.C. §117(a)(1); *Bryant*, 769 F.3d at 677. Since Mr. Bryant received sentences of incarceration for his misdemeanor convictions, if subject to Federal jurisdiction for those offenses, he would have been entitled to counsel under *Scott*. Since he did not have counsel, his convictions when used in federal

court are invalid because they violate the Sixth Amendment.

The Government argues "[u]nder *Nichols*, the validity of the prior conviction under the Sixth Amendment determines whether that Amendment constrains the subsequent use of the conviction." Pet'r Br. 31. The Government wants the focus just to be on validity so the Government can argue that, because Mr. Bryant's convictions were valid under ICRA, they can be used as proof in a subsequent prosecution without question. Inclusive in a validity analysis of a prior conviction is the Sixth Amendment and its attendant jurisprudence like *Scott* and its progeny.

The holding in *Scott* is not about adjudicating guilt. *See* Pet'r Br. 33. It is about determining when counsel must be afforded to a defendant before adjudication. A defendant does not need the guiding hand of counsel if the crime to which he is subject does not result in incarceration. *See Scott*, 440 U.S. at 373-374. Misdemeanor convictions and corresponding sentences in those situations are thereby valid and reliable only if they comport with *Scott* and its progeny. *Id.* However, when a defendant receives jail time for his misdemeanor offense without the guiding hand of counsel, the resulting misdemeanor conviction is invalid and unreliable because the conviction does not comport with *Scott* and its progeny.

Again, even under this Court's holding in *Nichols*, the prior misdemeanor conviction must be valid under *Scott* which has its basis in the Sixth Amendment.

This Court should hold the same is true for Mr. Bryant's misdemeanor tribal court convictions when those convictions are later used as an element in a §117 federal prosecution.

II. THE GOVERNMENT'S DUE PROCESS CHALLENGE IS NOT A SEPARATE SUBSTANTIVE OR PROCEDURAL DUE PROCESS CHALLENGE, NOR IS IT PROPERLY PRESERVED.

A Sixth Amendment analysis governs this case and should be applied accordingly. If this Court holds against Mr. Bryant on the Sixth Amendment argument, however, this Court should not decide this issue based on Due Process but rather remand Mr. Bryant's case to the Ninth Circuit for its decision on that basis.

A. Any Due Process discussion was intermingled with the Sixth Amendment challenge.

Mr. Bryant did not make a separate substantive or procedural due process challenge in his motion to dismiss before the district court. Rather, to the extent he challenged Due Process, it was based on the Government using uncounseled tribal court convictions that violated the Sixth Amendment in his current federal prosecution. Defendant's Brief in Support of Motion to Dismiss Indictment, United States v. Bryant, Case No. CR-11-70-BLG-JDS, ECF Doc. 20,

at 5 (D. Mont. 11/07/11) ("Relying on un-counseled tribal convictions violates 'anew' the Sixth Amendment right to counsel and Due Process in this case."). Any Due Process violation came, therefore, as a result of the Sixth Amendment violation and Mr. Bryant's argument continued in that vein. He then focused his argument, alternatively, on an Equal Protection challenge. *Id.* at 8-11.

In the Government's five-page response to his motion to dismiss, the Government argued no Sixth Amendment violation existed due to tribal courts being judicial branches of sovereign bodies. United States' Response to Defendant's Motion to Dismiss Indictment, United States v. Bryant, Case No. CR-11-70-BLG-JDS, ECF Doc. 21, at 1-3 (D. Mont. 11/14/11). The Government continued that the prosecution of Mr. Bryant under 18 U.S.C. §117 did not violate Equal Protection because distinctions based on tribal affiliations were not invidious race-based distinctions. *Id.* at 3-4.

At the motion hearing, Mr. Bryant never once discussed Due Process as a stand-alone violation. Instead, Mr. Bryant's core argument was on the Sixth Amendment violation inherent in the Government's prosecution of him, as was the Government's focus in its response. *See* Pet'r App. at 23a-26a, 29a-31a. The district court ruled from the bench denying Mr. Bryant's motion, indicating "the convictions and the pleas do not meet the criteria for the charge that's been filed here." Pet'r App. at 32a.

Mr. Bryant's opening brief before the Ninth Circuit mentioned Due Process only in passing in delineating the issue presented but did not discuss a stand-alone Due Process violation. Brief of Appellant, United States v. Bryant, Case No. 12-30177, ECF Doc. 4, at 9, 13-31 (9th Cir. 08/31/12). Rather, Mr. Bryant centered his argument on the Sixth Amendment and Equal Protection challenges made before the district court. *Id.* The Government also mentioned Due Process in its heading, but its response too was on the Sixth Amendment and Equal Protection. Brief of Appellee, United States v. Bryant, Case No. 12-30177, ECF Doc. 15, at 7-8, 11-18 (9th Cir. 11/15/12). Mr. Bryant's reply brief indicated §117 violated the Fifth and Sixth Amendments because it permitted the Government to use uncounseled tribal court convictions as an element to prove commission of the crime, again evidencing a Due Process discussion that was intermingled with the Sixth Amendment challenge. Reply Brief of Appellant, United States v. Bryant, Case No. 12-30177, ECF Doc. 20, at 7-16 (9th Cir. 12/13/12). The Sixth Amendment was pivotal for both parties in supplemental briefing.

The Ninth Circuit then decided Mr. Bryant's case based on a Sixth Amendment analysis and denied the Government's petition for rehearing en banc on the same basis. *See Bryant*, 769 F.3d 671; *Bryant*, 792 F.3d 1042. The petition for rehearing briefing, again, did not focus on a Due Process challenge by itself. *See* Petition for Rehearing En Banc of Appellee, United States v. Bryant, Case No. 12-30177, ECF Doc. 56

(9th Cir. 12/15/14); Response to Petition for Rehearing En Banc of Appellee, United States v. Bryant, Case No. 12-30177, ECF Doc. 62 (9th Cir. 03/17/15). The first time Due Process became a separate issue was the Government's petition for a writ of certiorari before this Court, which Mr. Bryant argued this Court should decline to review. *See* Pet'r Pet. at 16-19; Resp. Opp. at 22.

Mr. Bryant reiterates here this Court should reject any attempt by the Government to reverse the Ninth Circuit's decision in this case based on a constitutional provision not addressed by the court of appeals. This Court has emphasized it "is a court of final review and not first review." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (citation omitted); *See also Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945) ("It has long been its considered practice [for this Court] not . . . to decide any constitutional question in advance of the necessity for its decision, or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, or to decide any constitutional question except with reference to the particular facts to which it is to be applied.") (citations omitted).

The Government has presented this Court with "no reason to abandon [its] usual procedures in a rush to judgment without a lower court opinion." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009); *See also e.g.*, *United States v. Apel*, 134 S. Ct. 1144, 1153 (2014) (declining to reach respondent's

alternative constitutional argument in support of judgment below where "the Court of Appeals never reached [respondent's] constitutional arguments").

To the extent this Court entertains Due Process principles, this Court should do so as Mr. Bryant addressed them in the preceding argument when those principles interplay with the Sixth Amendment analysis.

B. This Court should not address the Due Process issue the Government now presents in its merits brief because that issue was not embraced by the Question Presented before this Court in the Government's petition for a writ of certiorari.

Regarding the Due Process Clause, the Government takes the position for the first time in its merits brief that Mr. Bryant's prior tribal court convictions are not categorically unreliable because Mr. Bryant did not object to certain paragraphs in the presentence report (PSR).[3] *See* Pet'r Br. 55. This argument

[3] In its petition for a writ of certiorari, the Government discussed *Lewis* as it targeted Congress's rationale in drafting a statute. *See* Pet'r Pet. at 17; *see also Lewis*, 445 at 62. The Government then expanded its Due Process argument in its merits brief arguing under *Lewis* the mere fact of Mr. Bryant's tribal court convictions is sufficient for use in the §117 prosecution without having to consider Mr. Bryant's prior convictions under the categorical approach doctrine. *See* Pet'r Br. 41; *Lewis*, 445 U.S. at 66.

warrants scrutiny for several reasons, chief among them being the Government appears to be arguing either that the categorical approach does not apply to alleged prior tribal court convictions in a §117 prosecution; or that Mr. Bryant has knowingly and intelligently waived the protections the categorical approach was designed to afford.

Neither of these assertions is correct and/or supported by the record in this case. Furthermore, determination of categorical reliability of a prior conviction for use at the guilt phase or the sentencing phase of a proceeding involves application of settled principles established by this Court. *See e.g.*, *Taylor v. United States*, 495 U.S. 575, 602 (1990) (an offense constitutes "burglary" under the federal statute if it has the basic elements of a "generic" burglary or if the charging document and the jury instructions actually require the jury to find all the elements of generic burglary in order to convict). The very scope of the Government's argument on this point suggests this case may become moot. *See Arizonans For Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997) (It is the duty of counsel to bring to the federal tribunal's attention, "*without delay*," facts that may raise a question of mootness.) (emphasis in original).

In Cause No. 14-10154, this Court will determine whether a defendant's prior conviction for domestic assault can serve as a predicate for criminal liability in a proceeding for unlawful firearm possession under 18 U.S.C. §921(a)(33)(A) and §922(g)(9). More specifically in *Voisine v. United States*, U.S. Sup. Ct.

Docket No. 14-10154, this Court will resolve whether a prior conviction for domestic assault committed with a *mens rea* of recklessness can serve as a predicate in a §922(g)(9) prosecution. *Cf. United States v. Castleman*, 134 S. Ct. 1405, 1414 n.8 (2014) (recognizing under this Court's decision in *Leocal v. Ashcroft*, 125 S. Ct. 377 (2004), the courts of appeals have almost uniformly held recklessness is not sufficient).

Here, the tribal code section under which Mr. Bryant was convicted for domestic assault authorizes conviction – not only for intentional conduct – but for reckless and negligent conduct as well.[4] The Government acknowledges as much. Pet'r Br. 7, n.4. Yet, the Government appears to seek a rule from this Court holding tribal court convictions exempt from application of the categorical approach whereby the tribal court convictions can be proved at trial anew like the circumstances-based approach for prior convictions under *United States v. Hayes*, 555 U.S. 415 (2009), and *Nijhawan v. Holder*, 557 U.S. 29 (2009); *See also United States v. Berry*, ___ F.3d ___, 2016 WL 682978 (4th Cir. 2016) (distinguishing between categorical and non-categorical approach to prior sex convictions).

[4] "Any person who purposefully, knowingly, recklessly, or negligently abuses their spouse, family member, or household member shall be prosecuted for committing the offense of domestic abuse." Northern Cheyenne Tribal Code 7-5-10(A).

The tribal code at issue here (7-5-10) is non-divisible and thereby not subject to the modified categorical approach. *See Descamps v. United States*, 133 S. Ct. 2276, 2285 n.2 (2013) (Indivisible statutes may contain alternative means of committing the crime. Divisible statutes may contain alternative elements of functionally separate crimes.). And, regardless of whether the categorical approach applies, the more concerning aspect of the Government's contention is its attempt to have this Court create a *Lewis*-type rule as applied to tribal court convictions. That is, the Government seeks a decision from this Court holding the mere fact of a tribal court conviction – whether counseled or not, whether reliable or not, whether proven or not – matters not to the Government's subsequent §117 prosecution, even though the tribal court convictions are used as an element in that §117 prosecution. Mr. Bryant has argued why the outcome of this case is dictated by *Burgett* and not by *Lewis* and reiterates those arguments here.

Finally, if Mr. Bryant's prior tribal court charges are to be tried anew as a non-categorical matter in the district court in the context of his §117 prosecution, Mr. Bryant has appointed counsel in that proceeding rendering the Sixth Amendment issue in this case moot. And, in any case, none of this was argued by either party in the courts below and whether the *Taylor* categorical approach applies to tribal court prior convictions in a §117 prosecution is not fairly raised in the Question Presented by the Government's petition for a writ of certiorari.

C. If this Court reaches the Government's Due Process argument, §117 deprives Mr. Bryant and others like him of Due Process.

The Government jumps into a discussion about Congress's intent in enacting §117 as its first point under the Due Process heading, arguing Congress could rationally conclude uncounseled tribal court convictions could be used to prove guilt of the §117 crime because the mere fact of his conviction is all that is concerned. *See* Pet'r Br. 41-43, citing *Lewis*. The Government does not articulate what substantive or procedural due process violation exists in this case that it is attempting to defend. The Government instead uses rationality discussion to discuss the policies underlying the statute – a discussion that injects a factual dissertation about domestic violence that need not be addressed when looking at the Sixth Amendment violation here.

Mr. Bryant is fully cognizant of the legislative intent of §117 and wholly recognizes courts presume the legislature intended to enact a constitutional law. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). Nevertheless, the presumption, even coupled with an important goal, is not definitive. *Cf. United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 92-93 (1921) ("not forgetful of our duty to sustain the constitutionality of the statute if ground can possibly be found to do so, we are nevertheless compelled in this case to say that we think the court below was clearly right in holding the statute void for repugnancy to the Constitution").

For the Government to use the *Lewis* decision to argue this Court must focus on the mere fact of conviction is to disregard the limitations inherent in *Lewis*. In the limited context of the civil disability ban on possession of firearms, the fact a person was convicted with or without counsel is not dispositive because even where not explicitly proscribed by the Bill of Rights, criminal procedures violate Due Process where they "offen[d] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California*, 505 U.S. 437, 445 (1992) (citations omitted). Section 117 fails this test in several ways.

As this Court has held, Due Process requires a defendant to be convicted only upon reliable evidence – one component that is met with effective assistance of counsel. "The requirement that a jury's verdict 'must be based on the evidence developed at the trial' goes to the fundamental integrity of all that is embraced by the constitutional concept of trial by jury." *Turner v. Louisiana*, 379 U.S. 466, 472 (1965). "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right to confrontation, of cross-examination, ***and of counsel***." *Id.* at 472-73 (emphasis added).

Under the Government's view, an essential element of the new §117 offense may be conclusively established by the result of a prior proceeding where

the defendant did not have counsel. The absence of counsel raises reliability problems with respect to that result. Of course, where the defendant had the right to counsel in the previous proceeding, the evidentiary use of the result of that proceeding does not offend Due Process. But, where the prior conviction was obtained without the assistance of counsel, the use of the prior conviction as "evidence" means that an essential element of the new offense has been established without "full judicial protection of the defendant's right . . . of counsel." *Id.* at 473.

Even before this Court held the Sixth Amendment applied directly to the states, this Court held the right to counsel was so fundamental as to constitute a component of Due Process. *See Powell*, 287 U.S. at 69 (a defendant who lacks the skills and knowledge to prepare his defense "requires the guiding hand of counsel at every step in the proceedings against him"); *Gideon*, 372 U.S. at 340 (the Sixth Amendment right to counsel is "so fundamental and essential to a fair trial, and so, to due process of law, such that it is obligatory on the states by the Fourteenth Amendment").

The use of uncounseled convictions to establish an essential element of §117 impermissibly dilutes the fundamental constitutional requirement of proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 363 (1970) ("The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The

standard provides concrete substance for the presumption of innocence – that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' ") (quoting *Coffin v. United States*, 153 U.S. 432, 453 (1895)). Where an unreliable uncounseled prior conviction is allowed to establish an essential element of a new felony offense (as a proxy for the dangerousness of the defendant), the reasonable doubt standard cannot serve its function as "a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. at 363.

For any, or all, of the foregoing reasons, §117 does not comport with Due Process

D. Section 117 is not the only tool available to combat domestic violence nor has Mr. Bryant advocated for its complete non-use.

This Court should note 25 U.S.C. §1304(d)(4) requires a defendant to receive "all other rights whose protection is necessary under the Constitution of the United States," including the right to court-appointed counsel. Any concerns that this Court's decision affirming the Ninth Circuit will all but write §117 off the books is availed by §1304. The Government and Amici Curiae treat the Ninth Circuit's holding in

Bryant as though a §117 prosecution can never occur again.[5]

Section 117 is not rendered obsolete by the Ninth Circuit's holding in *Bryant*. Mr. Bryant has never argued – nor did the Ninth Circuit hold – that tribal court convictions can never be used in a subsequent federal §117 prosecution by the Government. Rather, Mr. Bryant has always maintained – and the Ninth Circuit agreed – that if the Government seeks to use prior tribal court convictions as an element in a subsequent federal §117 prosecution, the tribal court convictions must have been obtained in accordance with *Scott*. That is, (1) if a defendant was imprisoned for the tribal court offenses, he must have received counsel during the proceedings for those offenses; or (2) if a defendant was not imprisoned for the tribal offenses, he need not have received counsel.

The Government can use §117 as a tool so long as its use of the prior tribal court convictions comport

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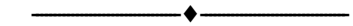
[5] *See* Brief of Dennis K. Burke, Former United States Attorney, District of Arizona, et al., as *Amici Curiae* at 14 ("We . . . urge the Court to preserve this tool [§117] as a necessary component of the comprehensive efforts to reduce violent crime on reservations."); Brief of National Indigenous Women's Resource Center and Additional Advocacy Organizations for Survivors of Domestic Violence and Assault as *Amici Curiae* at 29 ("[Mr. Bryant's] attempt to eviscerate the application of §117(a) to repeat offenders such as himself . . . threatens not only the safety of Native women, but the integrity and ability of Congress to fully effectuate its trust responsibility to Indian Nations and their citizens.").

with the Sixth Amendment. In fact, Amicus states §117 "gives federal prosecutors an additional tool to ensure that victims of domestic violence living on reservations are afforded similar protection against their abusers to victims who live in non-Indian Country jurisdictions." Brief for Dennis K. Burke, Former United States Attorney, District of Arizona, et al., as *Amici Curiae* at 11. If the Government seeks to give Indians similar protections under §117 prosecutions, it fails to do so by affording them less protections when using their uncounseled misdemeanor tribal court convictions in violation of *Scott*, because non-Indians' prior misdemeanor convictions when used as an element under §117 prosecutions comport with the Sixth Amendment.

Comity "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Hilton v. Guyot*, 159 U.S. 113, 163-164 (1895). Rather, "comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect." *Somportex Limited v. Philadelphia Chew Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971). In general, courts recognize the judgments of foreign courts so long as (1) those judgments are rendered by impartial tribunals and do not violate due process, or (2) the rendering court had the proper jurisdiction over the person, according to the foreign state's laws. Restatement (Third) of Foreign Relations §482 (1987). Comity, therefore, may be extended to foreign judgments but does not have to be so extended. The decision not to extend comity to a foreign judgment

may be based on public policy. *Hilton*, 159 U.S. at 170.

The importance of the right to counsel under the Sixth Amendment for the reasons already articulated is *the* policy reason not to extend comity to misdemeanor tribal court convictions obtained in violation of *Scott*. Because, without such a holding by this Court preventing use of uncounseled misdemeanor tribal court convictions as an element in a subsequent §117 prosecution, the Government will be able to proceed with convicting an Indian in federal court without meeting its burden of proof. Committing violence to the United States Constitution cannot stand in this regard.



CONCLUSION

This Court should affirm the Ninth Circuit's judgment. A categorical rule should be declared that tribal court convictions obtained in violation of *Scott* shall not be used by the Government in a subsequent habitual offender prosecution. Should this Court not declare such a categorical rule, however, this Court should at a minimum place the burden on the Government to prove the prior tribal court convictions

upon which it relies are reliable in prosecuting a defendant as an habitual offender.

Respectfully submitted,

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