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**Constitutional Law—The Reaffirmation of the Lack of Sixth Amendment Protections for Indigent Native American Defendants in Tribal Court Proceedings United States v. Bryant, 136 S. Ct. 1954 (2016)**

Allyssa Wall

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CONSTITUTIONAL LAW—THE REAFFIRMATION OF THE  
LACK OF SIXTH AMENDMENT PROTECTIONS FOR  
INDIGENT NATIVE AMERICAN DEFENDANTS IN TRIBAL  
COURT PROCEEDINGS

*United States v. Bryant*, 136 S. Ct. 1954 (2016)

ABSTRACT

In *United States v. Bryant*, the United States Supreme Court *held* that tribal court convictions of uncounseled indigent defendants of domestic assault are sufficient to convict under 18 U.S.C. § 117(a), which is the federal offense of domestic assault in Indian country by a habitual offender. The Court found that because the Sixth Amendment does not apply to tribal court proceedings and Bryant's convictions were valid under the Indian Civil Rights Act of 1968 there are no constitutional issues present when relying on such convictions as predicate offenses for an 18 U.S.C. § 117(a) prosecution. *Bryant* illustrates the striking differences that are still present in all levels of today's judicial system, especially where indigent defendants are concerned. Moreover, due to the multiple Federal Indian Reservations within the State, this case will likely impact North Dakota tribal law by reaffirming the lack of Sixth Amendment protections for indigent, Native American defendants in tribal court.

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## I. FACTS

In June 2011, Michael Bryant, Jr., a Native American living on the Northern Cheyenne reservation, was indicted by a federal grand jury with two separate counts of domestic assault by a habitual offender in violation of 18 U.S.C. § 117(a).<sup>1</sup> Section 117(a) criminalizes “domestic assault within . . . Indian country” by anyone “who has a final conviction on at least two 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.”<sup>2</sup> This

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1. United States v. Bryant, 136 S. Ct. 1954, 1963 (2016).

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

law was developed to help combat serial domestic violence issues present in Indian country.<sup>3</sup> Bryant was the type of serial defendant the law aimed to regulate, having pled guilty to domestic abuse on at least five occasions between 1997 and 2007.<sup>4</sup> All of these convictions resulted in a term of imprisonment, but no single conviction exceeded one year.<sup>5</sup> When prosecuting Bryant under 18 U.S.C. §117(a) for two domestic assaults in 2011, the government relied on these prior, domestic assault convictions from the Northern Cheyenne Tribal Court as predicate offenses.<sup>6</sup> Bryant was indigent and unrepresented by counsel during these prior convictions.<sup>7</sup> This lack of counsel was due to the Law and Order Code of the Northern Cheyenne Tribe, Title 5, Chapter III, Rule 22, which allows a defendant in a criminal case to “defend himself . . . by . . . [an] attorney at his own expense” but the Tribe does not guarantee a right to appointed counsel in any case.<sup>8</sup>

Bryant filed a motion to dismiss his indictment under 18 U.S.C. § 117(a) and was represented by court appointed counsel.<sup>9</sup> The motion to dismiss argued that using prior tribal court convictions to satisfy an element of 18 U.S.C. § 117(a) violated Bryant’s Fifth and Sixth Amendment rights for two reasons: (1) he was not appointed counsel during his tribal court proceedings and (2) only Native Americans could be prosecuted under 18 U.S.C. § 117(a) on the basis of a prior conviction that did not satisfy the Sixth Amendment.<sup>10</sup> Both of these arguments were dismissed by the district court.<sup>11</sup> Based on the dismissal, Bryant pled guilty, reserving his right to appeal, and was sentenced to forty-six months’ imprisonment.<sup>12</sup>

On appeal, the Ninth Circuit Court of Appeals reversed Bryant’s conviction,<sup>13</sup> finding that his uncounseled convictions in tribal court were valid when entered, because the Sixth Amendment’s right to counsel does not apply in tribal court proceedings.<sup>14</sup> Relying on *Ant*,<sup>15</sup> however, the Ninth Circuit held that the government could not use tribal court

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3. *Bryant*, 136 S. Ct. at 1958, 1963.

4. *Id.*

5. *Id.* at 1963.

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

7. *Id.*

8. *Id.* at 674 n.4.

9. *Bryant*, 136 S. Ct. at 1963-64.

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

11. *Id.*

12. *Bryant*, 136 S. Ct. at 1957.

13. *Id.*

14. *Bryant*, 769 F.3d at 675.

15. *United States v. Ant*, 882 F.2d 1389, 1394-95 (1989).

convictions as predicate offenses for an 18 U.S.C. § 117(a) prosecution.<sup>16</sup> “*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.”<sup>17</sup> The Indian Civil Rights Act of 1968 (“ICRA”), establishes rights and freedoms of Native Americans in Indian country similar to those provided by the United States Constitution to non-Native Americans.<sup>18</sup> The Constitution does not apply to Indian nations, because, at the time of ratification, these nations were acknowledged as sovereign, and thus, did not ratify the Constitution.<sup>19</sup> One aspect of ICRA is governance of criminal proceedings in tribal courts, requiring appointed counsel only when a sentence longer than one year of imprisonment is imposed.<sup>20</sup>

In holding that the government could not use validly reached tribal-court convictions as predicate offenses for 18 U.S.C. §117(a) prosecutions, the Ninth Circuit reasoned that Bryant had not been afforded the same right to counsel as guaranteed by the Sixth Amendment to defendants in state or federal court.<sup>21</sup> Because Bryant had not been afforded the same right to counsel, the convictions would have been unconstitutional in state or federal courts.<sup>22</sup> This decision created a split between the Ninth Circuit and the Eighth and Tenth Circuits, which had upheld similar indictments in *United States v. Cavanaugh*<sup>23</sup> and *United States v. Shavanaux*.<sup>24</sup>

In *Cavanaugh*, the Eighth Circuit reversed a District of North Dakota ruling based on facts that were nearly identical to *Bryant*.<sup>25</sup> The defendant in *Cavanaugh* was a Native American man from the Standing Rock Sioux Tribe who was charged with violating 18 U.S.C. §117(a) based on previous, uncounseled domestic assault convictions in tribal court.<sup>26</sup> Likewise, in *Shavanaux*, the Tenth Circuit faced a nearly identical fact pattern in which a Native American man from the Ute Indian Tribe was charged with violating 18 U.S.C. § 117(a) based on uncounseled domestic assault convictions in

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

17. *Id.* (quoting *United States v. First*, 731 F.3d 998, 1008 n.9 (9th Cir. 2013)).

18. *Indian Civil Rights Act*, TRIBAL L. & POL’Y INST., <http://www.tribal-institute.org/lists/icra.htm> (last visited Nov. 10, 2016).

19. *Id.*

20. *Bryant*, 136 S. Ct. at 1958-59.

21. *Bryant*, 769 F.3d at 678.

22. *Id.*

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

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

25. *Cavanaugh*, 643 F.3d at 592.

26. *Id.* at 594.

tribal court.<sup>27</sup> In both *Cavanaugh* and *Shavanaux*, the district courts' decisions were reversed, holding that tribal-court "convictions, valid at their inception, and not alleged to be otherwise unreliable, may be used to prove the elements of [18 U.S.C.] § 117."<sup>28</sup>

After the Ninth Circuit refused to rehear the case en banc, the Supreme Court granted certiorari to resolve the federal circuits' disagreement as to whether uncounseled tribal court convictions could be used to prosecute individuals under enhancement statutes such as 18 U.S.C. § 117(a).<sup>29</sup> The Court ultimately reversed the Ninth Circuit's decision.<sup>30</sup>

## II. LEGAL BACKGROUND

Approximately forty-six percent of Native American women have been victims of physical violence by an intimate partner, experiencing battery at three times the rate of Caucasian women, and sexual assault at nearly double the rate of the next highest group.<sup>31</sup> Depending on the crime committed, Indian country may be governed by federal, state, or tribal law. For example, federal law, such as the Indian Major Crimes Act or the Indian Country Crimes Act may control; however, state law controls if the offense is not specifically included in federal legislation and the state has been given jurisdiction over Indian country.<sup>32</sup> This "complex patchwork of federal, state, and tribal law"<sup>33</sup> makes it difficult to prevent the persistent domestic violence experienced by Native American women.<sup>34</sup> Not only does the interplay of three judicial systems create confusion over which jurisdiction will prosecute certain crimes, federal law also limits tribes' abilities to enforce criminal sentences for violations of tribal laws.<sup>35</sup> When 18 U.S.C. § 117 was passed, the ICRA limited tribal courts to sentences of only one year.<sup>36</sup> Now, tribal courts can enforce sentences of imprisonment of up to three years so long as the tribe adopts additional procedural requirements.<sup>37</sup>

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27. *Shavanaux*, 647 F.3d at 995.

28. *Bryant*, 136 S. Ct. at 1964 (quoting *Cavanaugh*, 643 F.3d at 594).

29. *Id.*

30. *Id.*

31. *Id.* at 1959.

32. *Duro v. Reina*, 495 U.S. 676, 680 n. 1 (1990).

33. *Bryant*, 136 S. Ct. at 1959-60 (citing *Duro* 495 U.S. at 680 n. 1 (1990)).

34. *Id.* at 1960.

35. *Id.*

36. *Id.*

37. *Id.*

Exasperating the issue of domestic violence upon Native American women, many tribal courts are unable to prosecute non-Native Americans for crimes that occur on tribal lands without substantial restrictions.<sup>38</sup> This lack of jurisdiction stems from the Supreme Court's 1978 decision in *Oliphant v. Suquamish Tribe*.<sup>39</sup> In *Oliphant*, the Court held that tribal courts "do not have inherent criminal jurisdiction to try and punish non-Indians, and hence may not assume such jurisdiction unless specifically authorized to do so by Congress."<sup>40</sup> While Congress did pass legislation in 2013, to give tribal courts jurisdiction over certain domestic violence offenses committed by non-Indians, this limited jurisdiction requires each tribe to implement even more procedures.<sup>41</sup> One such requirement is providing appointed counsel for non-Native American, indigent defendants.<sup>42</sup> Few tribes, however, have implemented these procedures.<sup>43</sup>

In response to the alarmingly high rates of domestic violence among Native American women, Congress enacted 18 U.S.C. § 117(a).<sup>44</sup> Section 117(a)(1) makes it a federal crime for any person "who has a final conviction on at least [two] 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" to commit a "domestic assault within . . . Indian country."<sup>45</sup> Having at least two previous convictions for domestic violence crimes is a predicate for 18 U.S.C. § 117(a) because it is intended to provide felony-level punishment for serial domestic violence offenders.<sup>46</sup> The passage of this statute was the first true effort to remove repeat offenders "from the communities that they repeatedly terrorize."<sup>47</sup> This Section, however, has also raised the question of whether 18 U.S.C. § 117(a)'s inclusion of previous, uncounseled, tribal court convictions as predicate offenses is compatible with the Sixth Amendment's right to counsel, as highlighted in *United States v. Bryant*.<sup>48</sup>

The Sixth Amendment guarantees indigent defendants appointed counsel in any state or federal criminal proceedings in which a term of

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38. *Id.* at 1960 n. 1, n. 4 (citing *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 195 (1978)).

39. *Oliphant*, 435 U.S. at 195.

40. *Id.* at 191.

41. *Bryant*, 136 S. Ct. at 1960 n.4.

42. *Id.*

43. *Id.*

44. 18 U.S.C. § 117(a) (2016); *Bryant*, 136 S. Ct. at 1958.

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

46. *Bryant*, 136 S. Ct. at 1961.

47. *Id.*

48. *Id.* at 1959.

imprisonment is imposed.<sup>49</sup> However, the Court has consistently found that neither this Sixth Amendment protection, nor the Constitution as a whole, apply to tribal court proceedings.<sup>50</sup> This lack of constitutional protections in tribal court is due to tribes being “separate sovereigns pre-existing the Constitution.”<sup>51</sup> Because the Constitution was framed to place limitations on federal and state authority, the Supreme Court has found that these constitutional constraints do not apply to tribal courts.<sup>52</sup> Instead, rights provided to Native American defendants in tribal court are governed by the ICRA.<sup>53</sup>

Congress designed the ICRA to extend to tribal governments certain rights and liberties guaranteed by the United States Constitution.<sup>54</sup> The ICRA imposes limits on tribal self-governance through procedural and safeguard requirements for tribal court proceedings.<sup>55</sup> These procedures and safeguards are “similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment.”<sup>56</sup> An example of such a safeguard is the limitation placed on a defendant’s right to counsel in tribal court.<sup>57</sup> If a tribal court imposes a sentence longer than one year, the ICRA requires the court to provide the defendant counsel “ . . . at least equal to that guaranteed by the United States Constitution. . . .”<sup>58</sup> However, if the sentence is one year or less, the tribal court must give the “ . . . defendant only the opportunity to obtain counsel ‘at his own expense.’”<sup>59</sup> As such, unlike indigent defendants in federal or state court, indigent Native American defendants face up to one year of imprisonment without the right to appointed counsel.<sup>60</sup> While the ICRA was designed to “ . . . fit the unique political, cultural, and economic needs of tribal governments[,]”<sup>61</sup> the result has been that “[t]he right to counsel under ICRA is not

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49. *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979).

50. *Bryant*, 769 F.3d at 675 (citing *United States v. First*, 731 F.3d 998, 1002 (9th Cir. 2013); *United States v. Percy*, 250 F.3d 720, 725 (9th Cir. 2001); *Tom v. Sutton*, 533 F.2d 1101, 1102-03 (9th Cir. 1976); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *Talton v. Mayes*, 163 U.S. 376, 382-83 (1896)).

51. *Bryant*, 136 S. Ct. at 1962 (quoting *Martinez*, 436 U.S. at 56).

52. *Bryant*, 769 F.3d at 675 n.5 (quoting *Martinez*, 436 U.S. at 56).

53. *Id.*

54. Steve Russell, *Indian Civil Rights Act (1968)*, THE GALE GROUP INC. (2004), <http://www.encyclopedia.com/history/united-states-and-canada/north-american-indigenous-peoples/indian-civil-rights-act-1968#3407400162>.

55. *Bryant*, 769 F.3d at 675 n.5.

56. *Bryant*, 136 S. Ct. at 1962 (quoting *Martinez*, 436 U.S. at 57).

57. *Id.*

58. *Id.* (quoting 25 U.S.C. § 1302(c)(1)-(2) (2016)).

59. *Id.* (quoting 25 U.S.C. § 1302(a)(6) (2016)).

60. *Id.* at 1962.

61. *Martinez*, 436 U.S. at 62-63.



coextensive with the Sixth Amendment right” present in state and federal courts.<sup>62</sup>

### III. ANALYSIS

In *United States v. Bryant*, with Justice Ginsburg writing for the majority, the Supreme Court explained that the Sixth Amendment does not apply in tribal court proceedings and that valid convictions under the ICRA retain their validity in subsequent prosecutions.<sup>63</sup> Justice Thomas concurred with the judgment, but he felt the need to write separately to express his concern over the extent to which precedent has extended Congress’ control over tribes.<sup>64</sup> Both the majority and concurrence agreed that Court precedent in *Burgett v. Texas*,<sup>65</sup> and *Nichols v. United States*,<sup>66</sup> allows for uncounseled, tribal court convictions to be used as predicate offenses in a federal prosecution.<sup>67</sup>

#### A. THE MAJORITY OPINION

The majority opinion in *United States v. Bryant*, relied heavily on *Burgett* and *Nichols* to find that previous, uncounseled, tribal court convictions could be used as predicate offenses for prosecution under 18 U.S.C. §117(a).<sup>68</sup> While Bryant argued that tribal court convictions should be treated as though they had been entered by a federal or state court for purposes of 18 U.S.C. §117(a), the Supreme Court declined to do so.<sup>69</sup>

##### 1. *Explaining Precedent: Burgett and Nichols*

A state or federal court conviction that violates a defendant’s Sixth Amendment rights cannot be used in a later proceeding to support guilt or to enhance the punishment given for a separate offense.<sup>70</sup> Using such a “constitutionally infirm conviction . . . would cause ‘the accused in effect [to] suffe[r] anew from the [prior] deprivation of [his] Sixth Amendment right.’”<sup>71</sup> This rationale, however, was limited by the Supreme Court in *Nichols* which stated, “an uncounseled misdemeanor conviction, valid

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62. *Bryant*, 136 S. Ct. at 1962.

63. *Id.* at 1958.

64. *Id.* at 1967.

65. *Burgett v. Texas*, 389 U.S. 109, 115 (1967).

66. *Nichols v. United States*, 511 U.S. 738 (1994).

67. *Bryant*, 136 S. Ct. at 1962-63, 1967.

68. *Id.* at 1965-66.

69. *Id.* at 1965.

70. *Burgett*, 389 U.S. at 115.

71. *Bryant*, 136 S. Ct. at 1962 (citations omitted).

under *Scott*<sup>72</sup> because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.”<sup>73</sup> In *Nichols*, an uncounseled conviction resulting in a fine was found to be validly used under the Sixth Amendment to invoke a subsequent conviction.<sup>74</sup>

The Supreme Court reasoned that “[e]nhancement statutes, . . . do not change the penalty imposed for the earlier conviction[,]” instead, penalizing only the latest offense committed by the defendant.<sup>75</sup> As stated in *United States v. Rodriguez*, “100% of the punishment is for the offense of conviction. None is for the prior convictions or the defendant’s status as a recidivist.”<sup>76</sup> *Bryant* followed *Nichols* precedent, finding that convictions that were valid when entered retain their constitutional status when used in later proceedings.<sup>77</sup>

## 2. *The Sixth Amendment Does Not Apply to Tribal Courts*

*Bryant* did not argue that his tribal court convictions were invalid when entered.<sup>78</sup> Instead, *Bryant* challenged the *Nichols* precedent which held that these uncounseled, tribal court convictions retained their validity when used as part of a 18 U.S.C §117(a) prosecution.<sup>79</sup> The Supreme Court stated that “[i]t is undisputed that a conviction obtained in violation of a defendant’s Sixth Amendment right to counsel cannot be used in a subsequent proceeding.”<sup>80</sup> However, as previously discussed, the United States Constitution and Bill of Rights do not apply to tribal courts.<sup>81</sup> While the Court discussed the rationale of not allowing the use of convictions that violated the Sixth Amendment, it emphasized that both *Burgett* and *Nichols* had occurred in either state or federal court.<sup>82</sup>

Because *Bryant*’s previous convictions for domestic assault had occurred in tribal court, the Sixth Amendment did not apply.<sup>83</sup> This meant that under the ICRA, *Bryant* was not denied the right to counsel in tribal court, and under the Bill of Rights, his Sixth Amendment right to counsel was honored in federal court when he was tried for violating 18 U.S.C. §

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72. *Scott v. Illinois*, 440 U.S. 367, 369 (1979).

73. *Nichols v. United States*, 511 U.S. 738, 749 (1994).

74. *Bryant*, 136 S. Ct. at 1965 (citing *Nichols*, 511 U.S. at 748-49).

75. *Id.* (quoting *Nichols*, 511 U.S. at 747).

76. *Id.* (quoting *United States v. Rodriguez*, 553 U.S. 377, 386 (2008)).

77. *Id.*

78. *Id.* at 1959.

79. *Id.*

80. *Bryant*, 136 S. Ct. at 1962.

81. *Id.*

82. *Id.* at 1962-63.

83. *Id.* at 1965.

117(a).<sup>84</sup> “Because a defendant convicted in tribal court suffers no Sixth Amendment violation in the first instance, ‘[u]se of tribal convictions in a subsequent prosecution cannot violate [the Sixth Amendment] “anew.”’<sup>85</sup>

3. *ICRA: “Need Merely Afford the Opportunity to Obtain Counsel”*

It is important to note that when the ICRA was passed, it “limited sentences in tribal court to a maximum of one year’s imprisonment.”<sup>86</sup> While Congress has since expanded tribal courts’ sentencing authority to “impose up to three years’ imprisonment, *contingent on* adoption of additional procedural safeguards[,]” very few tribes have adopted these additional procedures.<sup>87</sup> This essentially means that the protections regarding appointed counsel afforded to indigent defendants under the ICRA are moot. It is because of this that no matter what crime a defendant commits, if the case is heard before a tribal court, it is highly unlikely that the tribal court would be able to implement a sentence greater than one year’s imprisonment. Because the ICRA states that a defendant need merely be afforded the opportunity to obtain counsel for less than a year’s imprisonment, and most tribal courts only have the authority to impose sentences of up to one year’s imprisonment, indigent Native American defendants are not provided the right to counsel for crimes committed on tribal lands.<sup>88</sup>

Bryant’s previous prison sentences, including those for domestic assault convictions, were less than one-year.<sup>89</sup> These short sentences meant that Bryant did not have the right to appointed counsel.<sup>90</sup> However, because ICRA requirements do not mandate appointed counsel for sentences one year or shorter, these tribal court proceedings complied with the ICRA and thus, were valid.<sup>91</sup>

The Supreme Court reversed the Ninth Circuit’s ruling, relying on *Nichols* to reason that using ICRA-compliant, uncounseled, tribal court convictions as predicate offenses for federal 18 U.S.C. § 117(a) prosecutions did not invalidate previously valid convictions.<sup>92</sup> The

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84. *Id.*

85. *Id.* at 1966 (quoting *U.S. v. Shavanaux*, 647 F.3d 993, 998 (10th Cir. 2011)).

86. *Bryant*, 136 S. Ct. at 1960.

87. *Id.* (emphasis added).

88. *Id.* at 1960.

89. *Id.* at 1963.

90. *Id.*

91. *Id.*

92. *Bryant*, 136 S. Ct. at 1966.

Supreme Court, relying on precedent, “resist[ed] creating a ‘hybrid’ category of tribal-court convictions, ‘good for the punishment actually imposed but not available for sentence enhancement in a later prosecution.’”<sup>93</sup>

## B. THE CONCURRING OPINION

In his concurrence, Justice Thomas explained that he joined the majority based on precedent, although he was concerned about how far the Court’s Sixth Amendment and Indian-law precedent has gone.<sup>94</sup> Justice Thomas expressed additional concerns over the idea that Congress has unlimited power over all Indian affairs. These concerns stemmed from Justice Thomas’ view that Congress’ plenary power over Indian affairs was not a right granted in the Constitution, but was instead created by Court precedent.<sup>95</sup>

### 1. *Existing Precedent: Where Does It Leave Our Legal System?*

As previously described, in his concurring opinion Justice Thomas raised the issue of how “far afield our Sixth Amendment and Indian-law precedents have gone.”<sup>96</sup> Justice Thomas raised doubts regarding the three basic assumptions that underlie *Bryant*: (1) that the Sixth Amendment ordinarily bars using convictions obtained in violation of a defendant’s right to counsel; (2) that tribes’ retained sovereignty entitles them to prosecute tribal members without being subject to the United States Constitution; and (3) that Congress can punish tribal members for assault that they commit against each other on tribal land.<sup>97</sup> While Supreme Court precedent has endorsed all of these assumptions, Justice Thomas suggests that the Court has “never identified a sound constitutional basis for any of them” and he cannot identify one.<sup>98</sup>

No enumerated power gives Congress plenary power over Native American tribes.<sup>99</sup> There is nothing in Congress’ power to regulate commerce with tribes or in the Senate’s role to approve treaties with the tribes that even begins to suggest that there is such a sweeping power.<sup>100</sup> In his concurrence, Justice Thomas suggested that the Court created this power

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93. *Id.* (quoting *Nichols v. United States*, 511 U.S. 738, 744 (1994)).

94. *Id.* at 1967.

95. *Id.* at 1968-69.

96. *Id.* at 1967.

97. *Bryant*, 136 S. Ct. at 1967.

98. *Id.*

99. *Id.* at 1968.

100. *Id.*

for Congress when it was unable to find an enumerated power to justify a the Major Crimes Act,<sup>101</sup> suggesting that it was for the tribes' protection.<sup>102</sup> Despite such a weak foundation for this precedent, Congress' unfettered power over tribes continues despite the Court's inability to find any "valid constitutional justification" for the power.<sup>103</sup>

## 2. *Unintended Consequences: Should Precedent Be Reconsidered?*

Congress' plenary power over the tribes was not the only Supreme Court decision that Justice Thomas critiqued.<sup>104</sup> Justice Thomas also suggested that "the Court was likely wrong in *Burgett*" when it created the "exclusionary rule" and would be open to reconsidering *Burgett* in the future.<sup>105</sup> The *Burgett* exclusionary rule prohibits the government from using prior convictions obtained in violation of the Sixth Amendment in subsequent proceedings.<sup>106</sup> Unfortunately, Justice Thomas did not provide further clarification as to what portions of *Burgett*'s exclusionary rule should be reconsidered.<sup>107</sup>

The concurrence then goes on to weigh "the central tension within our Indian-law jurisprudence."<sup>108</sup> On one hand, precedent states that tribes have a sovereignty that pre-exists the Constitution and need not comply with the same rules and regulations that govern federal and state authority.<sup>109</sup> On the other hand, precedent has also "endowed Congress with an 'all-encompassing' power over all aspects of tribal sovereignty."<sup>110</sup> Furthermore, Congress has continually treated all tribes as "possessing an identical quantum of sovereignty," completely ignoring the various origins, treaties, and changes within the cultures of the distinct tribes.<sup>111</sup>

## IV. IMPACT

National domestic abuse trends for Native Americans hold true in North Dakota, with Native Americans comprising fourteen percent of

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101. The Major Crimes Act, 18 U.S.C. § 1153, allowed Congress, for the first time in history, to punish crimes committed by Native Americans against Native Americans on tribal land. 18 U.S.C. § 1153 (2016).

102. *Bryant*, 136 S. Ct. at 1968.

103. *Id.*

104. *Id.* at 1967.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Bryant*, 136 S. Ct. at 1967.

109. *Id.* (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)).

110. *Id.* at 1968.

111. *Id.*

reported sexual assaults, but only 5.5% of the population.<sup>112</sup> Nearly twenty-five percent of family violence and seventy percent of other crimes against Native Americans involve a non-Indian perpetrator: a rate drastically higher than other groups.<sup>113</sup> While these statistics are disheartening, the North Dakota bar has the ability to improve this situation.

A. WHAT DOES “THE CONSTITUTION DOES NOT APPLY TO THEM”  
MEAN FOR NORTH DAKOTA?

Even for attorneys with no intention of practicing law on tribal land, the large Native American population in North Dakota means that, at some point, almost every North Dakota attorney will have some dealings with tribal law. In December 2015, roughly 5.5% of the population considered themselves Native American.<sup>114</sup> Comparatively, Native Americans comprise just under one percent of the United States’ population.<sup>115</sup> North Dakota is one of only five states with a Native American population above five percent, and contains all, or part of, five federal reservations within its borders.<sup>116</sup>

The North Dakota United States Attorney’s Office (“the USA’s Office”) is responsible for prosecuting all violent crimes that occur on these reservations.<sup>117</sup> While sexual assault is listed as a violent crime prosecuted by the USA’s Office, simple domestic assault is not.<sup>118</sup> Limitations to the Violence Against Women Reauthorization Act of 2013, allow many perpetrators to evade felony charges unless they cause “substantial bodily injury. . . .”<sup>119</sup> Satisfying this level of injury is difficult, requiring “‘temporary but substantial disfigurement’ or ‘temporary but substantial

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112. ND COUNSEL ON ABUSED WOMEN’S SERVICES & N.D. DEP’T OF HEALTH, North Dakota Intimate Partner & Sexual Violence Prevention Plan (March 2010), <https://www.ndhealth.gov/injury/publications/ND%20State%20Prevention%20Plan-2010-March%20FINAL.pdf>

113. FUTURES WITHOUT VIOLENCE, *The Facts on Violence Against American Indian/Alaskan Native Women*, <https://www.futureswithoutviolence.org/userfiles/file/Violence%20Against%20AI%20AN%20Women%20Fact%20Sheet.pdf> (citing Greenfeld & Smith, *American Indians and Crime*, BUREAU OF JUSTICE STATISTICS (Feb. 1999), <http://www.bjs.gov/content/pub/pdf/aic.pdf>).

114. *Indian Country*, U.S. DEP’T OF JUST.: THE U.S. ATTORNEY’S OFF. – DISTRICT OF N.D., <https://www.justice.gov/usao-nd/indian-country> (last updated Oct. 28, 2015).

115. Joe Cicha, *Growing ND by the Numbers*, N.D. CENSUS OFF. (Dec. 2015), <https://www.commerce.nd.gov/uploads/8/CensusNewsletterDec2015.pdf>.

116. *Id.*; *Indian Country*, *supra* note 114.

117. *Indian Country*, *supra* note 114.

118. *Id.*

119. *United States v. Bryant*, 136 S. Ct. 1954, 1961 n.5 (2016) (quoting 18 U.S.C. § 113(a)(7) (2013)).

loss or impairment of the function of any bodily member, organ, or mental faculty.’”<sup>120</sup>

Such a high injury requirement means that many domestic assault cases, if reported, do not meet the federal requirements, and thus, are tried in tribal court. Because the ICRA does not require the appointment of counsel for less than one year’s imprisonment, defendants in these tribal cases must find their own counsel.<sup>121</sup> With unemployment and poverty continuing to be an issue in tribes throughout the State, many defendants find themselves unable to afford representation.<sup>122</sup> If they were facing imprisonment in any other court system, these defendants would be guaranteed representation.<sup>123</sup> Were these defendants non-Native Americans, they would have a guaranteed right to counsel while facing imprisonment, even in tribal court.<sup>124</sup>

B. CATCH 22: HOW DOES NORTH DAKOTA PROTECT THE PEOPLE IT  
DOES NOT GOVERN BECAUSE THEY CANNOT PROTECT  
THEMSELVES?

The holding in *United States v. Bryant*, will require North Dakota to take notice of the complex system that governs the reservations within its borders and ask how it can protect one of its most vulnerable classes, even if such action is outside the judicial system. The ICRA allows a tribal court to impose a maximum one-year or \$5000 sentence per crime in tribal court.<sup>125</sup> The maximum three years’ imprisonment and \$15,000 fine are imposed only for select crimes.<sup>126</sup> Only tribes that accept the additional federal safeguards and procedures of the Tribal Law & Order Act of 2010, such as guaranteeing the right to counsel for sentences longer than one year, have the ability to impose these maximum penalties.<sup>127</sup> Most tribes, however, have not done so.<sup>128</sup> This means that unless the defendant is charged under the federal habitual offender statute, most domestic assault convictions will result in, *at most*, one year in prison.<sup>129</sup> However, for

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120. *Id.* (quoting 18 U.S.C. § 113(b)(1)(A)(B)).

121. *Id.* at 1962 (citing 25 U.S.C. § 1302(a)(6) (2010)).

122. Cicha, *supra* note 115.

123. *Bryant*, 136 S. Ct. at 1961-62.

124. *Id.* at 1960 n.4 (citing 25 U.S.C. § 1304(d) (2016)).

125. 25 U.S.C. § 1302(a)(7)(B).

126. 25 U.S.C. § 1302(b)(1), (2).

127. *Bryant*, 136 S. Ct. at 1960 (citing 25 U.S.C. § 1302(a)(7)(C), (c) (2016)).

128. *Id.*

129. *Id.*

habitual offender statutes to be utilized, predicate offenses must be reported.<sup>130</sup> In this requirement, a major issue lies.

The underreporting of domestic violence on tribal lands is well documented.<sup>131</sup> Underreporting could have numerous causes, including difficulties in finding shelters or safe places to go after leaving abusive situations, limitations on police and healthcare services on reservations, and feelings of pointlessness in reporting.<sup>132</sup> While defendants' due process rights are important, it is at least equally important to ensure the safety of our fellow citizens. The drastic differences in lives within North Dakota's borders are highlighted by the statistics showing Native American women face a one in three chance of being sexually assaulted in their lifetimes, compared to a one in five chance for Caucasian women.<sup>133</sup>

North Dakota is in a unique position to lead the change against domestic violence on reservations within our State. Both the Standing Rock Sioux Tribe and the Three Affiliated Tribes of the Fort Berthold Reservation have adopted sentencing guidelines that are close to the Tribal Law & Order Act of 2010, which will provide their tribal courts with more sentencing authority.<sup>134</sup> This shows the tribes' desire to protect those that are unable to protect themselves. North Dakota could further build on this by establishing pro bono or reduced-rate legal networks specifically for those on tribal lands. These affordable sources of legal assistance would help to ensure that tribes can afford to provide defendants with the legal services required for increased sentences. Once increased sentences are imposed for crimes that currently receive less than one year's imprisonment, victims of abuse may feel safer and more secure, potentially leading to more frequent reporting of assaults. By simply volunteering their time and knowledge, members of the North Dakota bar could ensure that Native American defendants in tribal court receive adequate legal counsel, that convicted defendants are justly punished for their crimes, and that victims can feel safer and more willing to come forward.

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130. *Id.* at 1961.

131. See Kathy Dobie, *Tiny Little Laws*, HARPER'S MAG. (Feb. 2011), <http://indianlaw.org/sites/default/files/HarpersMagazine-2011-02-0083300%5B1%5D.pdf>; see also Dave Kolpack, *Rulings Could Bring Crackdown on Domestic Violence*, ASSOCIATED PRESS (Dec. 12, 2011), [http://archive.boston.com/news/nation/articles/2011/12/12/rulings\\_could\\_bring\\_crackdown\\_on\\_domestic\\_violence/](http://archive.boston.com/news/nation/articles/2011/12/12/rulings_could_bring_crackdown_on_domestic_violence/).

132. Michelle Rivard Parks, *2012 Tribal Victim Safety Roundtable: Responding to Sexual Violence Against Native Victims*, TRIBAL JUD. INST. (2012), [https://law.und.edu/tji-old/\\_files/docs/2012-tvs-exec-summary.pdf](https://law.und.edu/tji-old/_files/docs/2012-tvs-exec-summary.pdf).

133. *Id.*

134. *Bryant*, 136 S. Ct. at 1960 (citing *Violence Against Women Act Implementation Chart*, TRIB. L. & POL'Y INST., <http://www.tribal-institute.org/download/VAWA/VAWAImplementationChart.pdf>).



## V. CONCLUSION

In *United States v. Bryant*, the United States Supreme Court overturned the Ninth Circuit Court of Appeals' ruling that prior convictions in tribal court could not be used as predicate offenses for federal enhancement statutes.<sup>135</sup> The Court reasoned that the Sixth Amendment does not apply in tribal court proceedings and Bryant's uncounseled, tribal court convictions were valid under the Indian Civil Rights Act of 1968.<sup>136</sup> After discussing requirements for appointed counsel in state and federal criminal proceedings, the Court upheld precedent allowing valid, uncounseled convictions to be used as predicate offenses for enhancement statutes.<sup>137</sup> The Court held that the Sixth Amendment does not apply to tribal courts; thus, defendants prosecuted in federal court based on tribal court convictions cannot "suffer anew" when these convictions are used as predicate offenses.<sup>138</sup>

*Allyssa Wall\**

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135. *Id.* at 1964.

136. *Id.* at 1965.

137. *Id.* at 1965-66.

138. *Id.* at 1966.

\* 2018 J.D. Candidate at the University of North Dakota School of Law. I would like to thank my family, friends, and professors for all of their support. Specifically, I would like to thank my brother, Jared, and sister-in-law, Sarah, for their candid advice and reflection during this process.