

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

NO. _____

MICHAEL LEE LONG, JR.,

PETITIONER,

-vs.-

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

Neil Fulton, Federal Public Defender, *Counsel of Record*
Randall B. Turner, Assistant Federal Public Defender
Molly C. Quinn, Research and Writing Attorney
Office of the Federal Public Defender
Districts of South Dakota and North Dakota
101 South Pierre Street, Third Floor
Pierre, South Dakota 57501
Telephone: 605-224-0009; Fax: 605-224-0010

ATTORNEYS FOR PETITIONER

QUESTION PRESENTED

18 U.S.C. § 922(g)(9) prohibits possession of firearms or ammunition by any person previously convicted of a “misdemeanor crime of domestic violence.” 18 U.S.C. § 921(a)(33) imposes certain requirements for any conviction to bar such possession, including that the defendant, “was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case.”

The question presented is whether representation by a nonlawyer constitutes representation “by counsel” in the conviction used to support a prosecution for possession of a firearm by a prohibited person under 18 U.S.C. § 922(g)(9)?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

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PETITION FOR A WRIT OF CERTIORARI

Michael Lee Long, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App. 1a-13a) is reported at 870 F.3d 741. The district court's order denying Long's motion to dismiss (App. 14a-15a) is unpublished. The district court's order deferring ruling on Long's motion to dismiss (App. 16a-28a) is reported at 187 F. Supp. 3d 1116.

JURISDICTION

The court of appeals entered judgment on August 29, 2017. Long's timely petition for rehearing was denied by the court of appeals on October 20, 2017.

This court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 921(a)(33) provides:

(A) Except as provided in subparagraph (C), the term “misdemeanor crime of domestic violence” means an offense that—

(i) is a misdemeanor under Federal, State, or Tribal law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

(B)

(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless—

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 922(g) provides:

(g) It shall be unlawful for any person—

...

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

1. Long was convicted by a jury of being a prohibited person in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(9), 924(a)(2), and 924(d) and sentenced to 30 months in prison on that count. App. 1a-2a. He was also convicted of assault with a dangerous weapon, simple assault, and using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 1153 and 113(a)(3), 18 U.S.C. § 1153 and 113(a)(5), and 18 U.S.C. § 924(c)(1)(A), respectively. *Id.* His combined sentence on all counts was 150 months. *Id.* at 2a.

2. The prohibited-person charge was based on Long's 2011 Rosebud Sioux Tribe conviction for domestic violence. *Id.* at 4a. Long moved to dismiss this count because this tribal conviction did not comply with the procedural safeguards in the definition of "misdemeanor crime of domestic violence." *Id.* In particular, the statute requires that in the predicate conviction, "the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case." 18 U.S.C. § 921(a)(33)(B)(i)(I). Long was neither represented by counsel nor did he waive that right. App. 4a-5a. Instead, he was represented by a nonlawyer "lay counsel" as allowed under the tribal code. *Id.* This was not "represented by counsel" as the statute calls for. Long's conviction therefore is not a valid predicate misdemeanor crime of domestic violence for purposes of the federal firearms ban.

3. The district court initially deferred Long’s motion to dismiss the prohibited-person count until after the pretrial conference. *Id.* at 24a-26a. At the pretrial conference, the parties agreed that Long’s advocate in the tribal proceeding was Lisa White Pipe, a nonlawyer tribal advocate; she was not listed as a licensed attorney with the state bar. *Id.* at 4a-5a. After the pretrial conference, the district court issued a written order denying Long’s motion, adopting the reasoning of *United States v. First*, 731 F.3d 998 (9th Cir. 2013). *Id.* at 15a. Long renewed his motion to dismiss the prohibited-person count at the close of the government’s case at trial. *See id.* at 30a. The district court denied his motion, again citing *First*. *Id.* at 30a-31a.

4. A divided panel of the United States Court of Appeals for the Eighth Circuit affirmed Long’s conviction on the prohibited-person count. *Id.* at 1a-13a. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

a. Two members of the panel found that the term “represented by counsel,” in § 921(a)(33)(B)(i)(I) referred to the right to counsel as it existed in the tribal court proceeding. App. 6a-7a. The panel found that because the Rosebud Sioux Tribe allowed lay persons to appear in tribal court, Long was represented by “counsel” within the meaning of § 921(a)(33)(B), and his conviction was thus a valid predicate offense. *Id.* at 8a.

b. Judge Colloton dissented. *Id.* at 10a-13a. According to Judge Colloton, the panel’s conclusion that Long was represented by “counsel” was inconsistent with the meaning of that term:

It is undisputed that Long did not waive the right to counsel and that he was not represented by a lawyer in the case. The court concludes, however, that because Long was represented in the case by a nonlawyer, dubbed a “lay counsel” by the Rosebud Sioux Tribe, he was “represented by counsel in the case.” I believe that this conclusion is inconsistent with the meaning of the word “counsel” in the statute

Id. at 10a. Judge Colloton would have reversed Long’s prohibited-person conviction. *Id.*

Because Long did not waive the right to counsel in his tribal case, Judge Colloton focused on the first prong of § 921(a)(33)(B)(i)(I): whether Long was “represented by counsel in the case.” *Id.* at 11a. The ordinary meaning of the term “counsel” in the context of the phrase “represented by counsel” is a lawyer. *Id.* Judge Colloton rejected the panel’s reasoning that the phrase “in the case” modified the meaning of “counsel.” *Id.* The natural meaning of “represented by counsel in the case” is that the person was represented by a lawyer in the particular prosecution giving rise to the conviction, as opposed to in some other context like business affairs, estate planning, or civil litigation. *Id.*

Judge Colloton also criticized the majority’s finding that the phrase “knowingly and intelligently waived the right to counsel in the case” created a

jurisdiction-specific definition of counsel. *Id.* at 12a. He noted that absent a plain indication to the contrary, courts must assume that Congress intended a uniform national definition of statutory terms. *Id.* The court “should therefore assume that ‘counsel’ carries the ordinary meaning of ‘lawyer’ in all jurisdictions where misdemeanants might be prosecuted.” *Id.* He further noted that the phrase “in the case” means that the defendant must have waived the right to a lawyer in the case in which he sustained the conviction. *Id.* If neither federal law nor the prosecuting jurisdiction provides the right to a lawyer, there could be no waiver that would satisfy § 921(a)(33)(B)(i)(I). *Id.*

Judge Colloton warned, “[t]o read more into the phrase ‘in the case’ would dilute the procedural protections that Congress included when it added a new category of prohibited persons under § 922(g)(9).” *Id.* Because Long was not represented by a lawyer in his tribal case, he “shall not be considered to have been convicted” of a qualifying offense for the purposes of § 922(g)(9). *Id.* at 12a-13a (quoting 18 U.S.C. § 921(a)(33)(B)(i)(I)).

5. Long timely filed a petition for rehearing en banc or by the panel. The court of appeals denied his motion in a summary order. *Id.* at 32a. This petition for writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

When Congress expanded the federal firearms ban to cover individuals

convicted of misdemeanor crimes of domestic violence, it required that two fundamental procedural rights were protected in the underlying proceeding. *See* 18 U.S.C. § 921(a)(33)(B)(i). First, the person must have been “represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case.” 18 U.S.C. § 921(a)(33)(B)(i)(I). Second, the person must either have had a jury trial or knowingly and intelligently waived that right if there was a right to a jury trial for the offense in the jurisdiction in which it was tried. 18 U.S.C. § 921(a)(33)(B)(i)(II). If both rights were not protected, the defendant “shall not be considered to have been convicted” of a qualifying offense. 18 U.S.C. § 921(a)(33)(B)(i).

This case concerns the counsel requirement. The phrase “represented by counsel” is commonly understood to refer to a lawyer. Nevertheless, the court of appeals held that “counsel” does not mean “lawyer” or “attorney,” but any person the underlying jurisdiction allows to appear in court on behalf of litigants, even if they are not lawyers. The court of appeals also found that the counsel requirement only applies when the jurisdiction provided a right to counsel in the underlying case. This interpretation is inconsistent with the statutory language and the common meaning of the term “counsel,” basic principles of statutory construction, and Congressional intent that only convictions that comply with basic procedural requirements can give rise to federal prosecution for exercise of the constitutional

right to keep and bear arms.

Whether a person can be subject to federal prosecution for possession of a firearm on the basis of a misdemeanor conviction without either being represented by a licensed attorney or waiving that right is an important question of federal law that should be settled by this Court.

A. Representation by a nonlawyer does not satisfy the requirement that “the person was represented by counsel in the case.”

The defendant must have been “represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case” for a misdemeanor domestic violence conviction to qualify as a predicate offense. 18 U.S.C. § 921(a)(33)(B)(i)(I). The court of appeals held that Long was “represented by counsel in the case” because he was represented by a layperson the Rosebud Sioux Tribe allowed to practice in tribal court.

The reading of “represented by counsel” as meaning anything other than representation by a licensed attorney is inconsistent with the common meaning of “counsel” and its use in federal law. “Counsel” is commonly defined as “lawyer,” or in other words, a person who is licensed to practice law. *See* Black’s Law Dictionary (10th ed. 2014) (defining counsel as “[o]ne or more lawyers who, having the authority to do so, give advice about legal matters; esp., a courtroom advocate”); *see also* Black’s Law Dictionary (10th ed. 2014) (defining “lawyer” as

“[s]omeone who, having been licensed to practice law, is qualified to advise people about legal matters, prepare contracts and other legal instruments, and represent people in court”). Courts draw a clear line between representation by “legal counsel” on the one hand and “third-party lay representation” on the other. *See Herrera-Venegas v. Sanchez-Rivera*, 681 F.2d 41, 42 (1st Cir. 1982) (interpreting “counsel” in 28 U.S.C. § 1654 to mean “legal counsel”). Nothing in federal law suggests that “counsel” typically means anything other than a lawyer.

If Congress had intended to incorporate a different or jurisdiction specific definition of “counsel” here, it would have done so. Congress could have said “the person was represented by counsel *as that term is defined by the jurisdiction in which the case was tried.*” That is apparent from the next subsection which requires that there was a jury trial or a knowing and intelligent waiver of one for any “prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried.” But it did not. Where “Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983).

Finally, the phrase “in the case” at the end of the represented-by-counsel clause does not create a jurisdiction specific definition of “counsel.” The most

natural reading of the phrase “the person was represented by counsel in the case” is that it requires that the person was represented by counsel in the particular criminal case supporting the current prosecution for possession by a prohibited person. App. 11a-12a (Colloton, J., dissenting). The “in the case” language does not transform the meaning of “counsel” from “lawyer” or “attorney” into “any person authorized to appear in court on behalf of a litigant in the convicting jurisdiction.”

The court of appeals found that Long was “represented by counsel” within the meaning of federal law because he was represented by nonlawyer advocate, dubbed “lay counsel,” in his tribal case. This conclusion is inconsistent with the procedural protections set out in § 921(a)(33).

B. The counsel requirement in § 921(a)(33)(B)(i)(I) is not limited to cases where the underlying jurisdiction provided a right to counsel.

The court of appeals also found that the waiver of counsel clause referred to the right to counsel as it existed in the underlying case, adopting the reasoning of *United States v. First*, 731 F.3d 998 (9th Cir. 2013). Long did not waive any right to counsel. The court of appeals analyzed the waiver clause simply to bolster its conclusion that the represented-by-counsel clause also referred to the meaning of counsel in the underlying jurisdiction. This is a misreading of the text.

The text of the waiver clause makes clear that “in the case” simply means that the defendant executed a knowing and intelligent waiver of the right to have a

lawyer represent him in the course of his criminal case, not some other setting.

This language does not mean that the defendant waived the right to counsel however the underlying jurisdiction defined that right.

Had Congress intended for the waiver clause to apply only to whatever form of representation provided by the jurisdiction hearing the case, it would have used language like it used in the jury trial clause. *See* 18 U.S.C. § 921(a)(33)(B)(i)(II) (“in the case of a prosecution *for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried . . .*” (emphasis added)). Because Congress did not use similar language as to the term “counsel” in 18 U.S.C. § 921(a)(33)(B)(i)(I), the reasonable conclusion is that Congress did not intend to tie the counsel requirement to whatever definition was adopted by the underlying jurisdiction. *See Russello* 464 U.S. at 23. It intended to adopt the standard meaning of counsel—a licensed attorney.

C. This case involves statutory safeguards; the constitutional finding in *United States v. Bryant* does not control here.

Codification of the procedural requirements in § 921(a)(33) distinguishes this case from *United States v. Bryant*, 136 S. Ct. 1954 (2016). There, the Court held that the use of an uncounseled tribal misdemeanor conviction as a predicate offense under 18 U.S.C. § 117(a) did not offend the Sixth Amendment because there was no Sixth Amendment right to counsel in a tribal court case. 136 S. Ct. at

1959. Here, the statute itself contains such procedural requirements. *Compare* 18 U.S.C. § 921(a)(33)(B)(i) *with* 18 U.S.C. § 117(a) (making domestic assault by a habitual offender a federal felony and defining qualifying predicate offenses without addressing procedural rights in the underlying proceeding). These procedural safeguards apply to federal, state, and tribal predicates alike. *See* 18 U.S.C. § 921(a)(33)(A)(i).

Long is not making a Sixth Amendment claim. He does not have to. Congress defined “misdemeanor crime of domestic violence” to ensure that he will not face a federal felony prosecution for exercising his right to bear arms on the basis of a misdemeanor conviction unless his right to counsel was protected in the underlying case.

CONCLUSION

Long was convicted of a federal felony for exercising his Second Amendment right to bear arms on the basis of a misdemeanor conviction for which he did not have an attorney because tribal law defined “counsel” more broadly than any common understanding of the term. This result is contrary to the statutory safeguards Congress put in place for misdemeanor predicates. Because this case involves an important question of federal law that should be settled by this Court, the petition for a writ of certiorari should be granted.

Dated this 12th day of January, 2018.

Respectfully submitted,

/s/ Neil Fulton

Neil Fulton

Federal Public Defender

Attorney for Petitioner

Office of the Federal Public Defender

Districts of South Dakota and North Dakota

101 South Pierre Street, Third Floor

Pierre, South Dakota 57501

Telephone: 605-224-0009

Facsimile: 605-224-0010