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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner : No. 15-420

v. :

MICHAEL BRYANT, JR., :

Respondent. :

- - - - - x

Washington, D.C.
Tuesday, April 19, 2016

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:15 a.m.

APPEARANCES:

ELIZABETH B. PRELOGAR, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioner.

STEVEN C. BABCOCK, ESQ., Assistant Federal Defender, Billings, Mont.; on behalf of Respondent.

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P R O C E E D I N G S

(10:15 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 15-420, United States v. Bryant.

Ms. Prelogar.

ORAL ARGUMENT OF ELIZABETH B. PRELOGAR

ON BEHALF OF THE PETITIONER

MS. PRELOGAR: Mr. Chief Justice, and may it please the Court:

Congress enacted Section 117 in response to the epidemic of domestic violence in Indian Country. The Ninth Circuit was wrong to strike down the statute as applied to offenders like Respondent who have abused and battered their intimate partners again and again, but whose tribal-court misdemeanor convictions were uncounseled and resulted in a sentence of imprisonment.

The Ninth Circuit's constitutional analysis disconnects the validity of the underlying prior conviction from the permissibility of relying on those convictions to prove the defendant's recidivist status if he commits additional criminal conduct. And that runs counter to this Court's precedence.

In *Nichols v. United States*, this Court held that a conviction that was uncounseled but was valid at

1 the time it was obtained remains valid when it's used in
2 a subsequent prosecution to classify the defendant as a
3 recidivist. As I understand the Court's logic in that
4 opinion, the rationale was that in the absence of an
5 actual Sixth Amendment violation in the underlying
6 proceeding, there's no proceeding in which the defendant
7 had but was denied a right to counsel.

8 He didn't -- he has a right to counsel in
9 the subsequent Federal prosecution, and here, Respondent
10 had that right and it was respected. He was -- he was
11 represented by appointed counsel at every critical
12 stage. But when a defendant doesn't have a right to
13 counsel in the prior proceedings that resulted in that
14 conviction, then there's no defect, no constitutional
15 defect in those underlying convictions that can possibly
16 be carried over or exacerbated through reliance on those
17 convictions in the subsequent proceeding.

18 Now, the Ninth Circuit reasoned, and
19 Respondent's arguing here, that that might apply when
20 the conviction is -- is valid under the Court's
21 rationale in Scott. There, of course, the Court held
22 that there's no right to appointed counsel in a
23 proceeding that doesn't result in imprisonment. And
24 Respondent urges the Court to limit Nichols to that
25 situation, where you have a defendant who -- who wasn't

1 imprisoned in the prior proceeding.

2 But I don't think that makes sense as a
3 matter of the logic under this Court's decision in -- in
4 Nichols, nor do I think it makes sense as a matter of
5 practical reality.

6 Here, for example, Respondent says that if
7 only his Tribal Court had sentenced him to a fine rather
8 than to imprisonment, there would be no constitutional
9 infirmity with relying on those convictions in his
10 Section 117 prosecution.

11 But I can't fathom why it is that the Tribal
12 Court's sentencing determination would make any
13 difference with respect to the validity of those
14 convictions or the permissibility of using them to
15 identify the defendant as among those class of
16 individuals who are properly --

17 JUSTICE KENNEDY: Suppose you had a
18 conviction from a foreign country. Would that -- could
19 that be used for this purpose, assuming the statute
20 allowed it?

21 MS. PRELOGAR: I don't think that there
22 would be any Sixth Amendment problem if Congress
23 chose --

24 JUSTICE KENNEDY: Would there be a due
25 process problem?

1 MS. PRELOGAR: I think it -- I think that it
2 would raise a more serious due process issue, but I
3 think that there are --

4 JUSTICE KENNEDY: Why more serious --

5 MS. PRELOGAR: Because --

6 JUSTICE KENNEDY: -- in England?

7 MS. PRELOGAR: Well, I think that it would
8 be incumbent on a defendant in that situation to try to
9 come forward and make a showing that that foreign
10 conviction was obtained in a proceeding that wasn't
11 fundamentally fair. Tribal courts, I think, are
12 fundamentally different, Justice Kennedy.

13 JUSTICE KENNEDY: Could that showing be
14 attempted in a case like this?

15 MS. PRELOGAR: In a Section 117 prosecution?
16 So that raises the question whether there should be a
17 right to have a collateral challenge to a particular
18 conviction.

19 JUSTICE GINSBURG: I -- are foreign
20 judgments -- are foreign convictions -- I thought it had
21 to be a Federal, State or a tribal court.

22 JUSTICE KENNEDY: I'm assuming the statute
23 was amended.

24 MS. PRELOGAR: That's correct. So -- so
25 just to clarify, it's true, Justice Ginsburg, that

1 Section 117 doesn't cover foreign convictions. And I
2 understood Justice Kennedy to be asking whether there
3 would be a constitutional problem if it did.

4 To the extent that this Court would perceive
5 the need to recognize an as-applied due-process
6 challenge to a foreign conviction, I think tribal
7 convictions are very differently situated.

8 And here's why. Tribal convictions aren't
9 rendered wholly outside the auspices of our Federal
10 system or Federal review. Congress has plenary
11 authority in this area, and it's acted.

12 CHIEF JUSTICE ROBERTS: Well, it's certainly
13 rendered outside the Constitution.

14 MS. PRELOGAR: It's true that the
15 Constitution doesn't govern tribal court proceedings,
16 but Congress has plenary authority, and those
17 proceedings are governed by Federal law through the
18 Indian Civil Rights Act.

19 CHIEF JUSTICE ROBERTS: So this case would
20 come out differently if Congress had not enacted the
21 Indian Civil Rights Act?

22 MS. PRELOGAR: I think that if Congress
23 hadn't enacted the Indian Civil Rights Act, it's
24 possible that it wouldn't have made tribal court
25 convictions predicates because it wouldn't have the same

1 confidence that there's a baseline level of procedural
2 fairness.

3 CHIEF JUSTICE ROBERTS: Well, what if
4 they -- what if they had? In other words, convictions
5 in a tribal court do count as predicates, and there is
6 no Indian Civil Rights Act.

7 MS. PRELOGAR: In that circumstance, then I
8 think the inquiry would focus on what level of
9 procedural fairness is being applied in tribal courts in
10 the absence of that kind of Federal oversight. And I
11 think that that would also raise the question whether,
12 given the absence of Federal court review or -- or
13 Congress having enacted the Indian Civil Rights Act,
14 whether there should be a collateral challenge that's
15 permissible in that context.

16 CHIEF JUSTICE ROBERTS: So it would be a
17 case-by-case determination?

18 MS. PRELOGAR: Yes, I think that in that
19 situation, there would be no grounds to say that the
20 Constitution categorically prohibits Congress from
21 defining the elements of the crime in that way. So I
22 think that it would be required for the defendant to try
23 to raise some kind of case-specific, individualized
24 objection to that kind of conviction.

25 But just to be clear, Respondent is not

1 attempting to make that kind of argument here. And the
2 Ninth Circuit's rule is a categorical rule that says
3 that all tribal-court convictions that are
4 uncounseled --

5 JUSTICE SOTOMAYOR: We already do that,
6 don't we, in the career armed felony statute because we
7 permit reliance on foreign convictions, correct?

8 MS. PRELOGAR: I -- I'm not sure that the
9 ACCA permits reliance on foreign convictions. I do know
10 that there are a number of Federal statutes that do.
11 The drug statutes, for example.

12 JUSTICE SOTOMAYOR: So that we already put
13 in play the issue of whether an individual in a foreign
14 proceeding follows due process or not.

15 MS. PRELOGAR: That's right. I think this
16 Court has recognized and -- and certainly some of those
17 statutes expressly permit the kind of collateral
18 challenge that I've been talking about with --

19 JUSTICE SOTOMAYOR: And this due process is
20 not raised in this case at all, right --

21 MS. PRELOGAR: That's absolutely correct --

22 JUSTICE SOTOMAYOR: -- by Respondent?

23 MS. PRELOGAR: -- it's not raised here.

24 Respondent never attempted to argue that
25 there was anything wrong with his prior tribal-court

1 convictions. He has acknowledged at every stage that
2 those convictions were obtained in compliance with the
3 Indian Civil Rights Act.

4 He has never suggested that he didn't
5 actually commit those repeated acts of domestic violence
6 that resulted in some five convictions in tribal court
7 for assaulting his intimate partners. And I don't
8 understand him to be trying to raise any kind of
9 collateral challenge in this case.

10 So I don't think that it's properly
11 presented here, and I'd urge the Court to reserve
12 judgment on that issue, which I think raises a number of
13 complexities, and wait for a case in which there has
14 been full briefing on them --

15 JUSTICE GINSBURG: If he hasn't raised it
16 here, are you suggesting by reserving it in this case,
17 that on remand, that issue could be aired?

18 MS. PRELOGAR: I don't think that it would
19 be a live issue on remand, because Respondent has never
20 sought it at any stage of the proceedings to make this
21 kind of claim that there was any unfairness in his
22 tribal-court proceedings or that he was wrongfully
23 convicted in tribal court.

24 And I should emphasize, too, Justice
25 Ginsburg, that if he had that kind of claim, he had

1 alternative channels to raise it previously.

2 JUSTICE KENNEDY: Can you tell me just as a
3 matter of practice, if you know, are these claims of --
4 of unfairness in individual tribes made often or in
5 recent years, in cases like this?

6 MS. PRELOGAR: So --

7 JUSTICE KENNEDY: I just don't know.

8 MS. PRELOGAR: I'm not aware -- I'm not
9 aware of any case in which someone has tried to make
10 this kind of as-applied due process challenge that we've
11 been discussing. And so I don't know of any Section 117
12 prosecution that presents that issue. Obviously, in
13 some other contexts where the Court has recognized a
14 limited right for collateral review, for example, under
15 the Mendoza-Lopez decision, I think that those claims
16 are more commonly made.

17 But -- but here I think that it's quite
18 clear that Respondent hasn't preserved that argument.
19 He doesn't want to press it. He doesn't think there was
20 anything wrong with his tribal-court convictions.
21 Rather, what he's arguing is that all of those
22 convictions should be categorically treated as though
23 they don't exist when you're determining whether the
24 defendant is a recidivist for purposes of prosecution
25 under this statute.

1 CHIEF JUSTICE ROBERTS: I thought the
2 National Association of Criminal Defense Lawyers had
3 discussion of a few prosecutions where those claims were
4 raised.

5 MS. PRELOGAR: Yes. So -- so those are
6 habeas cases, though, where the defendant, following the
7 channels that Congress prescribed to catch those kinds
8 of errors, sought Federal court review from the tribal
9 court judgments. And I think that that actually shows
10 that the habeas remedy is a meaningful safety valve in
11 this context.

12 Obviously, I -- I think that the presumption
13 should be that tribal courts are applying -- complying
14 with the Indian Civil Rights Act, and I think that the
15 studies that have comprehensively looked at this bear
16 that out and show that there isn't any rampant
17 unfairness occurring in those criminal prosecutions.

18 But to the extent that a case slips through
19 the cracks, Congress said in 25 U.S.C. Section 1303 that
20 a defendant in that circumstance can come to federal
21 court and get his conviction overturned if he has a
22 valid claim.

23 When a defendant doesn't exercise that
24 channel of review and doesn't seek to in any way dispute
25 the validity of his tribal court convictions --

1 CHIEF JUSTICE ROBERTS: Well, but how would
2 that work in a case like this? I mean, let's say there
3 are procedural deficiencies in one of the predicate
4 prosecutions. And, you know, the defendant says, okay,
5 well, it was a misdemeanor. He -- he doesn't seem to be
6 terribly troubled by convictions, anyway, but -- so he
7 says, I'm not going to seek review of that.

8 But then later on, the 117 prosecution comes
9 along. Is he just sort of stuck with the prior
10 allegedly deficient prosecution because he didn't bring
11 every challenge he possibly could have at that time?

12 MS. PRELOGAR: Yes, I think he is stuck with
13 the decision he made. And, of course, the same argument
14 could have been made in the Nichols case. The -- the
15 defendant there, because it was just a misdemeanor
16 conviction and because he wasn't incarcerated, wouldn't
17 have had any reason to challenge that conviction.

18 CHIEF JUSTICE ROBERTS: Well, maybe he
19 didn't have any -- maybe he didn't have any reason to
20 challenge it. I mean, my hypothetical assumes a -- a
21 predicate offense conviction that the defendant may not
22 have challenged for whatever reason. And yet when the
23 117 -- if I've got the numbers right -- action comes up,
24 it turns out it's a lot more serious, which often
25 happens in these multiple offenders. You know, it's

1 three -- three strikes and you get it. But you don't
2 necessarily know that the first strike was that -- that
3 big a deal. It's only when it's accumulated with the
4 others that it is.

5 MS. PRELOGAR: Well, that's absolutely the
6 case. But I think, as this Court has recognized in a
7 number of decisions in Nichols and in Daniels, although
8 the stakes might be higher when the defendant commits
9 additional criminal misconduct, and although that might
10 mean that he's exposed to those more severe penalties,
11 that there's nothing unfair in that process. And as
12 well, there's nothing to suggest that those more severe
13 penalties are being imposed for the prior acts.

14 Rather, the Court has reasoned in a long
15 line of precedents, that in those kind of recidivist
16 situations, the penalty is a hundred percent for the
17 most recent act of violence or for the most recent act
18 of crime. And so there's -- there's no constitutional
19 problem with -- with permitting the defendant to be
20 classified as a recidivist.

21 And the Court also noted in Daniels that
22 even if a defendant thinks that there was something
23 unfair about the original proceedings but lacked the
24 incentives to challenge it, or for whatever reason
25 didn't seek review at that time, he knows those

1 convictions are on his record. And it -- it's a basic
2 principle in our criminal justice system that if you do
3 it again, you're going to be treated more harshly.

4 CHIEF JUSTICE ROBERTS: I don't -- I -- I
5 saw that argument in -- in your brief, and I'm not sure
6 I'm quite -- well, I'm not sure I agree with it.

7 I mean, the -- the idea you're saying is
8 that, well, if there's three offenses and on the third
9 one, you get this much enhanced penalty, that that's
10 only for the third one. It doesn't -- it's not being
11 imposed for the prior two.

12 I mean, I understand that, that you're
13 already been convicted and sentenced under the prior
14 two, but it seems to me as a practical matter it's fair
15 to say that the enhancement is based on those prior two.
16 You can't just ignore the prior two and say, no, no,
17 it's all just about this third offense.

18 MS. PRELOGAR: That might be true as a
19 practical matter, but I think this Court has recognized
20 that as a legal matter and as a constitutional matter,
21 the sentence is imposed only for the latest offense.

22 And the Court made this particularly clear,
23 I think, in Nichols where it said that, although
24 obviously the defendant was exposed to additional
25 punishment based on the fact that he had the prior

1 conviction, still, the -- the penalty in the recidivist
2 prosecution was wholly attributable to the instant
3 offense and not to anything that came before it.

4 And -- and I think the contrary ruling would
5 call into question some of the Court's double jeopardy
6 context or ex post facto laws. There's a long line of
7 this Court's precedents that recognize that principle,
8 that the recidivist prosecution is solely for the most
9 recent act, but it's an aggravated act because the
10 defendant falls within that category of offenders who
11 have done it before, who have that criminal history, and
12 should, therefore, be treated more harshly if they don't
13 learn from their prior misconduct and their prior
14 punishment.

15 JUSTICE GINSBURG: Bryant makes -- makes a
16 distinction between a sentence enhancement on the one
17 hand and the case where the prior conviction counts as
18 an element of the current offense.

19 Would you address what that argument was?

20 MS. PRELOGAR: Yes. So I understand that
21 Respondent's making the claim that Nichols should be
22 limited to the sentencing context because it was a
23 sentencing case, and, of course, that case happened to
24 involve a sentencing enhancement. But I don't think
25 that there's any logical difference between the use of

1 the conviction when it's an enhancement in that way and
2 the use of the conviction when it's made an element of a
3 crime.

4 In either instance, the substantive purpose
5 of relying on that prior conviction is simply to
6 establish that the defendant has that criminal history
7 and that he's, therefore, properly classified as among
8 those offenders who should be treated as recidivists if
9 they commit additional misconduct.

10 And I don't think that the placement,
11 whether in a sentencing enhancement or -- or as an
12 element of a crime, should make any difference with
13 respect to the purpose to which that conviction is being
14 put.

15 Now, it's certainly the case the different
16 standards of review apply and that the conviction at the
17 sentencing enhancement needs to be proofed only by a
18 preponderance, whereas at the guilt stage it would have
19 to be proven beyond a reasonable doubt. But in either
20 circumstances, it's the fact of the conviction that
21 matters.

22 And actually --

23 JUSTICE GINSBURG: But the proof would be
24 simply submitting, I suppose, a certified copy of the
25 judgment of conviction.

1 MS. PRELOGAR: That's correct. I think
2 what's relevant, whether in the Nichols situation or
3 in -- under Section 117 is -- is that the defendant, in
4 fact, was previously committed of that domestic violence
5 offense.

6 JUSTICE KENNEDY: Should there be
7 distinctions between prior, A, acts; B, convictions,
8 that in one case would result in a -- the commission of
9 a crime, and in another case, just enhance the sentence?
10 Should there ever be a distinction?

11 MS. PRELOGAR: I can't think of one in the
12 context of -- of this kind of recidivist prosecution
13 that would require a distinction. Nichols --

14 JUSTICE KENNEDY: Could you use the
15 existence of a civil judgment for domestic assault to
16 enhance a criminal sentence?

17 MS. PRELOGAR: I don't think there would be
18 any constitutional problem with that. And, in fact,
19 there are --

20 JUSTICE KENNEDY: Okay. And then you could
21 use a previous criminal -- a previous civil adjudication
22 for domestic assault as the basis for a Federal crime.

23 MS. PRELOGAR: Yes, I think that's right.
24 And I don't think that anything in the Constitution
25 would prohibit that.

1 JUSTICE KENNEDY: That's a very extensive --
2 that's a very extensive argument you're making.

3 MS. PRELOGAR: Well, there are -- I think
4 that the reason why that's not constitutionally
5 problematic is because those civil adjudications are --
6 are valid. They're entitled to the same presumption of
7 regularity and validity as any other valid adjudication
8 that's obtained.

9 And in fact, a number of States have laws
10 that function somewhat like that in the drunk driving
11 context where the first infraction, the first drunk
12 driving incident is prosecuted as a civil offense, and
13 then a second drunk driving offense is treated as a
14 crime that requires proof of that civil adjudication.
15 And courts that have considered the constitutionality of
16 those schemes have reasoned that there's nothing
17 inherently problematic with giving effect to that civil
18 adjudication.

19 I think this reflects too that the States
20 and jurisdictions have broad leeway to structure their
21 recidivist statutes, whether they make them elements,
22 whether they make them sentencing factors. Recidivism
23 is a -- a large problem, and the Court has recognized in
24 a variety of contexts that States have a lot of leeway
25 in choosing how to deal with that problem. But I don't

1 think that there's any inherent problem with the use
2 of -- of a valid conviction.

3 And again, just focusing back on the logic
4 of this Court's decision in Nichols, what the Court was
5 looking at there was whether there had been an actual
6 violation, because if you don't have a right-to-counsel
7 defect in that prior adjudication, whether it's civil,
8 whether it's -- it's criminal and uncounseled because
9 it's a misdemeanor that didn't result in imprisonment,
10 whatever the reason, the range of reasons why you might
11 be able to validly adjudicate guilt without the
12 assistance of counsel, there is simply no constitutional
13 infirmity in that conviction that would preclude its use
14 in a subsequent proceeding.

15 JUSTICE GINSBURG: Do we know why -- why
16 Congress, in the Indian Civil Rights Act, made the right
17 to counsel narrower than the right in the Sixth
18 Amendment?

19 MS. PRELOGAR: I think that Congress, when
20 it enacted the Indian Civil Rights Act, after years of
21 studying this issue, was sensitive to balancing autonomy
22 for tribes and tribal sovereignty against individual
23 rights. And I think that Congress must have made the
24 judgment that, given the other protections in the Indian
25 Civil Rights Act, tribal-court defendants could be

1 fairly and reliably adjudicated guilty without the
2 assistance of counsel.

3 And that's actually something that's echoed
4 in this Court's precedents, because of course in Scott
5 and in Argersinger, this Court recognized that the
6 assistance of counsel under the Federal Constitution
7 isn't required in order to validly adjudicate the guilt
8 of a misdemeanor defendant.

9 In that circumstance, I think the Court --
10 what underlies that decision has to be a recognition
11 that there's something fundamentally different about
12 misdemeanor prosecutions, and that the assistance of
13 counsel isn't essential in that circumstance to validly
14 adjudicate a -- a defendant's guilt.

15 CHIEF JUSTICE ROBERTS: So -- so they knew
16 better than Madison?

17 MS. PRELOGAR: Well --

18 CHIEF JUSTICE ROBERTS: Madison -- the
19 drafters of the bill, they thought, well, maybe the
20 right to counsel was necessary here but Congress think
21 it's not that necessary.

22 MS. PRELOGAR: But as I was just saying,
23 even under the Sixth Amendment, even where it applies it
24 doesn't preclude adjudicating the guilt of a defendant
25 in State or Federal court. This Court's decision in

1 Scott recognizes there's -- there's nothing wrong with
2 that.

3 And actually, I -- I think that the
4 on-the-ground practical realities bear out that
5 judgment, because even those defendants who aren't
6 indigent and aren't entitled to appointed counsel,
7 generally, in a large number of cases, decline to hire
8 counsel to represent them in misdemeanor cases, whereas
9 when you look at felony prosecutions, almost everybody
10 hires counsel if they're not entitled to appointed
11 counsel.

12 So I think that the nature of the proceeding
13 here really is critical in helping to understand why
14 Congress's judgment was rational, why the -- why the
15 Indian Civil Rights Act represents a reasonable baseline
16 level of -- of procedural fairness that's guaranteed to
17 tribal-court defendants, and why there's nothing wrong,
18 then, with giving effect to those tribal-court judgments
19 if the defendant fails to learn from his past behavior
20 and his past punishment.

21 These are offenders who have been repeatedly
22 punished by their tribal courts. It requires at least
23 two prior convictions. And the problem is, is that the
24 tribal courts, for the most part, are limited to
25 misdemeanor punishment, and that, for this class of

1 offenders, has proven to be an ineffective remedy; it
2 hasn't deterred the additional misconduct.

3 JUSTICE GINSBURG: The tribal -- there was a
4 limit -- I think has been raised -- there is a limit on
5 the punishment, the incarceration that a tribal court
6 could order. I think it was -- wasn't it originally one
7 year?

8 MS. PRELOGAR: Originally, I believe it was
9 six months, and then it was lengthened to one year. And
10 it was one year at the point that respondent was
11 convicted.

12 JUSTICE GINSBURG: One year, and now it's
13 three years?

14 MS. PRELOGAR: That's correct, yes.
15 Actually, I think this is notable because I think it
16 shows that Congress, in recent years, every time it's
17 looked at how tribal courts are functioning and has made
18 a determination about the rights and -- and what to
19 recognize in those tribal-court proceedings, it's acted
20 to recognize expanded authority for tribal courts, both
21 with their sentencing authority, with respect to their
22 jurisdiction.

23 So I do think that that reflects legislative
24 judgment that tribal courts are sufficiently protective
25 of individual rights, and that there's no fundamental

1 unfairness that's occurring in those proceedings that
2 would cause, I think, this Court to question the
3 reliability of those determinations.

4 And I would point again to Respondent's
5 concession that if he had simply been fined in tribal
6 court and had not received a sentence of imprisonment,
7 then there would be no problem with giving effect to
8 those tribal-court convictions. That shows, I think,
9 that Respondent's suggestion that there might be some
10 kind of a reliability concern with this conviction is
11 really unmoored from the constitutional analysis that
12 he's asking the Court to adopt in this case.

13 If there are no further questions, I'll
14 reserve the remainder of my time.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Babcock.

17 ORAL ARGUMENT OF STEVEN C. BABCOCK

18 ON BEHALF OF THE RESPONDENT

19 MR. BABCOCK: Mr. Chief Justice, and may it
20 please the Court:

21 The right to counsel is fundamental and
22 essential in our country, and that is something that
23 needs to be adhered to.

24 Using the tribal-court convictions in which
25 Mr. Bryant was not afforded counsel, then turning them

1 into an essential element of a 117(a) prosecution, runs
2 afoul what -- what this Court has stated is a
3 fundamental right for 53 years.

4 If we take a look at the cases that deal
5 with the Sixth Amendment analysis, from Johnson, to
6 Gideon, to Burgett, to Tucker, to Loper, reliability has
7 been the core concern of every single one of those
8 decisions.

9 JUSTICE GINSBURG: Do you do -- disagree
10 with -- I think Ms. Prelogar said that you -- you
11 acknowledged that if the only sentence had been a fine,
12 no jail time, that these -- these two prior battery
13 misdemeanors, if the -- the tribal court gave only a
14 fine and no jail time, then those convictions could be
15 used under for a 117 prosecution.

16 MR. BABCOCK: Correct. And the reason that
17 we've stated that, and we don't believe that does
18 anything besides strengthen our argument in this case,
19 because the reason why there is no violation of the
20 Sixth Amendment is simply because the Sixth Amendment
21 doesn't exist. If this case would have been in a State
22 or Federal court, the only court in the United States in
23 which it would not run afoul of the Sixth Amendment is
24 tribal court.

25 Mr. Bryant is not only a tribal member. He

1 of course is a United States citizen. But in taking a
2 look at the Nichols case, which relied upon Scott, and
3 Scott specifically stated that they drew a bright line
4 with incarceration in dealing with the adjudication of
5 guilt, Mr. Bryant was incarcerated for his underlying
6 tribal-court convictions.

7 The defendant in Nichols, the uncounseled
8 DUI which he was convicted of, and the exact holding in
9 Nichols I think is extremely important in this case
10 where this Court stated that the Sixth and Fourteenth
11 Amendment are not violated when in fact there is an
12 adherence to Scott; in other words, there's no
13 incarceration, and they are valid to enhance punishment
14 in a subsequent proceeding.

15 So if we take a look at the individual in
16 Nichols, if he was incarcerated for the uncounseled
17 misdemeanor conviction, that case would not adhere to
18 Scott. So it comes to reason, Mr. Bryant himself being
19 incarcerated, that violates Scott.

20 JUSTICE SOTOMAYOR: I'm sorry. I -- I --

21 JUSTICE KENNEDY: My thought is this is
22 quite formalistic. It doesn't have anything to do with
23 inherent reliability or unreliability. In fact, if it
24 were an uncounseled felony conviction, it might well
25 have been that the trial judge was much more careful

1 than he would be in a misdemeanor case. It's almost the
2 opposite.

3 I -- I understand your -- the efficacy of
4 the clear line, but it's more formalistic than
5 functional, it does seem to me.

6 MR. BABCOCK: Well, and I think it's the way
7 that we take a look at it -- and I think it's important
8 if we take a look at what Justice Scalia stated in the
9 Crawford case. And that, of course, had to do with the
10 Confrontation Clause issue, but it specifically dealt
11 with the Sixth Amendment analysis based upon
12 reliability. His statement was it's not whether or not
13 it's reliable, but how reliability is assessed.

14 The tribal court convictions in this case
15 were not subject to the crucible of meaningful
16 adversarial testing. And that goes right back to what
17 Justice Ginsburg stated in Shelton in 2002, that
18 element. And it is an element of the offense. It is
19 being used to establish guilt.

20 JUSTICE KENNEDY: But as Justice Ginsburg
21 pointed out, you could make the same argument if it had
22 been just a fine and no Sixth Amendment violation.

23 MR. BABCOCK: Exactly, but what we're asking
24 this Court --

25 JUSTICE KENNEDY: So I don't understand why

1 one is reliable and the other is not reliable, other
2 than the formalistic argument which I can understand.

3 MR. BABCOCK: And we are certainly not
4 saying that an uncounseled misdemeanor conviction is
5 reliable, and neither does Nichols. If we take a look
6 at Justice Souder's concurrence in Nichols,
7 realistically what's being stated here is that because
8 if there is no deprivation of liberty, that the
9 unreliability is essentially tolerated. But in this
10 particular case, Mr. Bryant was incarcerated.

11 JUSTICE BREYER: But did anybody object at
12 that time and say this sentence is unconstitutional?

13 MR. BABCOCK: No. Mr. Bryant --

14 JUSTICE BREYER: Okay, so --

15 MR. BABCOCK: -- did not have a right to
16 counsel.

17 JUSTICE BREYER: Fine. But, I mean, is
18 anybody here now claiming that the sentence was
19 unconstitutional at the time?

20 MR. BABCOCK: I a.m., Your Honor.

21 JUSTICE BREYER: You have? Where did you
22 say that in your brief? Because they say you didn't.

23 MR. BABCOCK: I -- I, of course, I filed a
24 motion to dismiss on --

25 JUSTICE BREYER: No, no. I'm saying in your

1 brief in this Court, have you claimed that the sentence,
2 the proceeding in the Indian court violated the Federal
3 Constitution?

4 MR. BABCOCK: We have not.

5 JUSTICE BREYER: Okay. Well, then, I take
6 it that for purposes here, you concede that. I don't
7 see how you can get around the fact you haven't
8 complained.

9 So if it's a valid conviction, why can't you
10 use it? I mean, you could -- you could sentence people
11 to more; that's what Nichols says. You could sentence
12 them to three times the sentence without any conviction.
13 You would just introduce some evidence that he hit his
14 wife before badly.

15 You could -- you could raise the sentence if
16 it was a civil -- if it was a civil case. And -- and
17 there was a judgment in favor of the wife, I take it.
18 So why can't you raise the sentence on the ground that
19 there is a valid conviction, period? End of the case.
20 Which is, I think, what Nichols said.

21 MR. BABCOCK: Well, Nichols also dealt with
22 an underlying conviction in which the Sixth Amendment
23 did exist. And in this particular case, once we --

24 JUSTICE BREYER: Yeah. But you have told me
25 that you have not -- I don't see how you could send a

1 person to prison on the basis of the -- the lack --
2 where there's no counsel. If the Indian tribes can do
3 that, then I don't see why the Federal government can't
4 later use it if that's valid.

5 MR. BABCOCK: Well, I think the reason why
6 is because of the United States District Court, and
7 certainly, in this Court, the Sixth Amendment does
8 exist. And the only --

9 JUSTICE BREYER: And then we should hold
10 that -- I guess, that all of the convictions in all the
11 tribes that are using, going to jail where people might
12 go to prison for more than six months or at all, for a
13 day, all those are invalid.

14 MR. BABCOCK: If they're --

15 JUSTICE BREYER: Then the law of Congress is
16 unconstitutional. Is that -- is that -- but no one's
17 asked us to hold that, so I don't know that we should
18 hold that in this case.

19 MR. BABCOCK: Well, we're certainly not
20 challenging the constitutionality of the Indian Civil
21 Rights Act, but we are certainly --

22 JUSTICE SOTOMAYOR: Well, that's the
23 question, which is: Standing alone, was that earlier
24 conviction violative of the Constitution?

25 MR. BABCOCK: It was not, because it was in

1 tribal court. Any other court, it would be.

2 JUSTICE SOTOMAYOR: Right. And so you're
3 not challenging that the Bill of Rights do not apply --
4 because we've long held that -- don't apply to Indian
5 courts, correct?

6 MR. BABCOCK: Correct.

7 JUSTICE SOTOMAYOR: They don't apply to
8 English courts --

9 MR. BABCOCK: Correct.

10 JUSTICE SOTOMAYOR: -- and other foreign
11 courts.

12 MR. BABCOCK: Correct.

13 JUSTICE SOTOMAYOR: And there are plenty of
14 foreign courts, like England for a time -- I think it's
15 changing it now -- where they would convict people after
16 a magisterial inquisition where the defendant didn't
17 have counsel. You're not saying that process violates
18 the Constitution?

19 MR. BABCOCK: No, I'm not saying that
20 process violates the Constitution.

21 JUSTICE SOTOMAYOR: You're saying simply
22 because we're using that conviction, we now violated.
23 Why?

24 Nichols, as I understand it, had two
25 rationales: One that says using a prior constitutional

1 conviction, one that doesn't violate the Constitution,
2 is not enhancing a sentence, is not changing that
3 earlier conviction. It's not enhancing a sentence for
4 that earlier conviction, so you can use it, because it's
5 just setting the platform for the current punishment,
6 for the conduct now.

7 How does your argument -- why does your
8 argument change that rationale?

9 MR. BABCOCK: I think a big reason why is
10 our fundamental difference between guilt phase and
11 sentencing phase. And certainly if we take a look at
12 the offer --

13 JUSTICE SOTOMAYOR: Well, we -- Nichols
14 itself said enhancement statutes, whether in the nature
15 of criminal history provisions, such as those contained
16 in the Sentencing Guidelines, or recidivist statutes
17 that are commonplace in State criminal law, those
18 recidivist statutes make prior convictions an element,
19 do not change the penalty imposed for an earlier
20 conviction. That's what Nichols said. So the Nichols
21 rationale covered both.

22 MR. BABCOCK: I read --

23 JUSTICE SOTOMAYOR: Covered sentencing
24 guidelines and covered recidivist statutes.

25 MR. BABCOCK: I think the difference here is

1 that it's being used to establish an essential element
2 of the offense.

3 JUSTICE SOTOMAYOR: I know, but --

4 MR. BABCOCK: And it -- it's not technically
5 --

6 JUSTICE SOTOMAYOR: Nichols said that's
7 okay.

8 MR. BABCOCK: It's not technically, we
9 argue, a typical recidivist statute. It's not --
10 example -- for, like, 21 U.S.C. 851, in a controlled
11 substance, doubling the mandatory minimum.

12 JUSTICE SOTOMAYOR: No, it says it was
13 relying on recidivist statutes that are commonplace in
14 State criminal laws.

15 MR. BABCOCK: Correct.

16 JUSTICE SOTOMAYOR: All right. And those
17 make them an element of the crime.

18 MR. BABCOCK: They make them an element of
19 the crime, but -- but Chief Justice Rehnquist also went
20 on to talk about the less exacting standard that is
21 attached to the sentencing proceeding than at the guilt
22 phase. Also, what --

23 JUSTICE SOTOMAYOR: That's the second prong
24 of Nichols.

25 MR. BABCOCK: It is. And in talking about

1 that, if you're taking a look at the less exacting
2 standard, of course, what we have to do is rely upon the
3 preponderance of the evidence in a sentencing scheme.
4 If we take a look at the determination at the guilt
5 phase, which Justice Ginsburg brought out in Shelton,
6 the big difference is that has to be proven beyond a
7 reasonable doubt. And if it was not subjected to the
8 meaningful adversarial system that this Court holds as a
9 fundamental right since Gideon, the entire --

10 JUSTICE SOTOMAYOR: But isn't that a due
11 process argument?

12 MR. BABCOCK: I believe that the due process
13 and the Sixth Amendment argument are certainly
14 intertwined in this case. And if there is a procedural
15 due process error, we have been stating the entire time
16 that's because Mr. Bryant is having an uncounseled
17 conviction being used as an essential element in a
18 subsequent Federal prosecution.

19 JUSTICE GINSBURG: I can see --

20 JUSTICE SOTOMAYOR: Well, that's --

21 JUSTICE GINSBURG: -- the distinction
22 between -- that you made between beyond a reasonable
23 doubt and preponderance of the evidence, but
24 practically, I mean, what's involved here is proof of a
25 conviction entered by a court. And so you -- you

1 present the certified copy of the judgment, and that's
2 it. That satisfies proof beyond a reasonable doubt.

3 MR. BABCOCK: I think that this Court, in
4 taking a look at convictions themselves, if you want to
5 take a look at cases such as Tucker and as Loper, it
6 wasn't enough. The actual process and how those
7 convictions were obtained and whether or not the
8 procedural safeguards of the Sixth Amendment right to
9 counsel was adhered to was of the utmost importance.

10 If we take a look at the case in Loper, that
11 was being used for impeachment purposes. In impeachment
12 purposes, the Court held that that fell into that -- a
13 different stage under the determination of guilt. And
14 even for impeachment purposes -- and I do understand
15 that the difference is that has to deal with a felony
16 conviction. This is a misdemeanor conviction. But even
17 for impeachment purposes, it wasn't enough for the trial
18 judge to be able to just take a look at the conviction
19 and let that in. This Court held that that
20 impermissibly went afoul with the Sixth Amendment right
21 to counsel and went to the -- to the determination of
22 guilt.

23 Clearly, this is more than a sentencing
24 enhancement situation. The offer of proof itself sets
25 forth what needs to occur. And one of the elements has

1 to be a conviction, at least two or more convictions,
2 from tribal court. We certainly know Petitioner has
3 conceded since day one that the Indian Civil Rights Act
4 does not afford native Americans the right to counsel.

5 So if we take a look at the waivers that we
6 would now have for an uncounseled misdemeanor
7 conviction, we would have actually waiving your right to
8 counsel. Certainly Mr. Bryant didn't do that. He can't
9 waive a right he didn't possess.

10 Second, he's not indigent. Well, there's no
11 reason to do a financial affidavit, because there's no
12 right to counsel so we don't have to determine that
13 eligibility.

14 Third, whether or not he was incarcerated
15 based upon an adjudication of guilt as set forth by
16 Scott.

17 And, now, fourth, we would have one final
18 exception to an uncounseled misdemeanor conviction, and
19 that would be if it came from tribal court. Because
20 there is no other court in the United States,
21 misdemeanor-wise or not, that an individual is not
22 afforded a fundamental right to counsel.

23 JUSTICE GINSBURG: What are the -- the cases
24 both Justice Kennedy and Justice Scalia suggested that
25 in -- not in this statute, but there are criminal

1 statutes that allow the use of a foreign conviction to
2 count for recidivism purposes, for -- for a variety of
3 purposes. And many of our partners in the world don't
4 have the same -- same rights as -- that are in our Bill
5 of Rights, and yet we -- we credit those convictions.

6 MR. BABCOCK: We do credit those -- those
7 convictions, but we do take a look at whether or not
8 they adhered to the procedural safeguards that we deem
9 as fundamental in this country.

10 And a lot of countries, of course, do not
11 deem the right to counsel as fundamental or essential.
12 We certainly do. And if we take a look at the right to
13 counsel case from 2006, in the dissent, Justice Alito
14 stated that the complete lack of counsel is the epitome
15 of unfairness. That would be triggered essentially as
16 structural error.

17 So if we take a look in this situation, the
18 only reason why the conviction doesn't run afoul,
19 reliability can't be based upon nonexistence. If you're
20 an employee in a company, you never show up to work,
21 they don't deem you reliable. And that's exactly what's
22 happened in this situation. The only reason why it does
23 not run afoul is because the Sixth Amendment doesn't
24 exist.

25 If we take a look at what counsel has talked

1 about as a remedy to fix this situation, which should be
2 Federal habeas, it is my opinion that Federal habeas
3 has -- provides no assistance whatsoever to an
4 individual like Mr. Bryant.

5 First of all, you have to attach -- you have
6 to challenge the legality of your detention. How can
7 you challenge the legality of his detention based upon
8 lack of counsel when he possesses no such right? Also,
9 there has to be detention at the time, or there has to
10 be a filing of the habeas at that crime.

11 We know that the prior conviction, the last
12 one, was from 2007. He certainly did not file a habeas
13 petition back then, and they're extremely uncommon, and
14 there has to be some tie to detention. That is
15 completely moot in this case. He has no way to
16 challenge this. And we know taking a look at the
17 Supreme Court case in Custis. In Custis, which was
18 decided just two weeks before Nichols, and that has to
19 do with an armed career criminal analysis, and they say
20 that the lack of counsel is a fundamental right. You
21 have the ability to challenge a predicate for an ACCA
22 enhancement based upon the lack of counsel. That's what
23 we're doing here, but we have no other forum whatsoever
24 to come before this Court and challenge the
25 constitutionality of using those as a predicate offense

1 establishing an essential element.

2 I do also believe that in taking a look at
3 the difference between sentencing and the guilt phase,
4 it's taken on a different trend in this Court when we
5 take a look at the Apprendi line of cases. And
6 certainly we know that there is an exception based upon
7 a prior conviction, based upon Almendarez-Torres, but
8 that premise is based upon, once again, that the
9 procedural safeguards that we hold important in this
10 country are adhered to.

11 In those particular cases, specifically in
12 Blakely, the reliance that a judge had to do wasn't
13 enough. They essentially turned those element -- turned
14 those situations into elements. And in this case, we
15 don't have to do anything such as that. This is an
16 element. We don't have to say that this is increasing a
17 mandatory minimum. We do not have to say that it's
18 putting something on the guidelines more. Essentially,
19 what we're doing is we're saying we have an uncounseled
20 conviction that has never been subjected to a
21 fundamental right. The crucible of adversarial testing
22 in this country mandates we're just going to let that
23 slide, because Congress itself passed a law upon native
24 Americans that didn't adopt the full Sixth Amendment
25 protections.

1 If there's nothing further, thank you, Your
2 Honor.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 Ms. Prelogar, eight minutes.

5 REBUTTAL ARGUMENT OF ELIZABETH B. PRELOGAR
6 ON BEHALF OF THE PETITIONER

7 MS. PRELOGAR: Thank you, Mr. Chief Justice.
8 I'd like to begin by responding to
9 Respondent's point that there is a less exacting
10 standard that's applied at sentencing. Nichols did
11 include that language, but as I read the Court's opinion
12 there, Nichols was actually drawing a contrast between
13 trying to relitigate the underlying facts that led to
14 that prior conviction versus relying on the prior
15 conviction itself. And Nichols observed that a
16 defendant is in some respects better on when you look at
17 just the fact of the prior conviction because that
18 conviction represents an adjudication of guilty beyond a
19 reasonable doubt.

20 Well, that's the same representation that
21 the prior conviction has when it's used at the guilt
22 stage. Thereto, that prior misconduct had to be proven
23 beyond a reasonable doubt.

24 The kind of distinction that Respondent
25 would have this Court draw would resurrect essentially

1 what -- what prevailed under this Court's decision in
2 Baldasar, where you would have a hybrid conviction that
3 would be good for its own purposes and valid and
4 constitutional in the original proceeding, but would
5 lapse into unconstitutionality and become invalid when
6 you tried to use it subsequently. The Court obviously
7 overruled Baldasar and Nichols, and we'd urge the Court
8 not to return to that kind of hyperconviction.

9 And finally, I don't understand Respondent
10 himself to actually be adhering to this sentencing
11 versus elements line, because again, he's conceded. If
12 the tribal court had fined him, it would be perfectly
13 fine to use those prior tribal court convictions as an
14 element of the Section 117 offense.

15 I'd also like to respond to Respondent's
16 suggestion that all uncounseled misdemeanor convictions
17 are unreliable. I think that that's wholly at odds with
18 the line this Court drew in Scott and Argersinger. It
19 just cannot be the case that this Court was willing to
20 interpret the Sixth Amendment to tolerate wholly
21 unreliable convictions in that context. Rather, I think
22 that the Scott-Argersinger line reflects that the
23 assistance of counsel is not essential to an accurate
24 and reliable determination of guilt in that context.

25 And to the extent that that was left in any

1 doubt, I think Nichols confirms the point. Because in
2 Nichols, the argument was made that although those prior
3 uncounseled convictions might have been sufficiently
4 reliable when there was less at stake, they should not
5 be relied upon in a subsequent proceeding where the
6 stakes are much higher. But this Court wasn't persuaded
7 by that, and I think rightly accepted the line that if
8 the conviction was obtained in a proceeding that was
9 sufficiently reliable to adjudicate the defendant's
10 guilt in the first instance, then there is no way to say
11 that that proceeding suddenly becomes fundamentally
12 unfair and unreliable when you're giving effect to that
13 valid, constitutional prior conviction subsequently.

14 And then the final thing I would note is
15 that although there's been a lot of talk about fairness
16 here, I think it is important to recognize that
17 Respondent had it entirely within his power to not have
18 a Federal court consider these prior tribal court
19 convictions. If he didn't want that to occur, then what
20 he should have done is stop abusing his domestic
21 partners. But because he didn't learn from those prior
22 tribal convictions, because he kept battering women in
23 Indian country and contributed to that epidemic of
24 domestic violence, I don't think he should be heard to
25 complain that he's being prosecuted under Section 117.

1 If there are no further questions, we would
2 ask the Court to reverse.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 The case is submitted.

5 (Whereupon, at 10:59 a.m., the case in the
6 above-entitled matter was submitted.)

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