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Reliability, That Should be the Question: The Constitutionality of Using Uncounseled Tribal Court Convictions in Subsequent Federal Trials after Ant, Cavanaugh, and Shavanaux

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NOTES

RELIABILITY, THAT SHOULD BE THE QUESTION: THE CONSTITUTIONALITY OF USING UNCOUNSELED TRIBAL COURT CONVICTIONS IN SUBSEQUENT FEDERAL TRIALS AFTER *ANT*, *CAVANAUGH*, AND *SHAVANAUX*

Samuel D. Newton[*]

I. Introduction

It likely would come as a shock to most Americans that Native Americans can be tried in tribal courts and sentenced to jail without the benefit of court-appointed counsel. The "right to the presence of an attorney" and that "one will be appointed" for a defendant if he cannot afford one during police questioning is deeply ingrained in the American psyche.[1] For that reason, it is readily assumed that the right to counsel would extend to a trial within the United States regardless of whether it is held in the Western District of Oklahoma or Indian Country. However, longstanding Supreme Court jurisprudence has held the Bill of Rights and the Constitution do not apply to Indian tribes like they do to the states.[2] Therefore, under United States law, Indians do not have a right to a court-appointed attorney in tribal courts where the possible sentence will not be more than one year.[3] A defendant on trial in tribal court only has the right to an attorney at his or her own expense.[4]

The lack of the right to appointed counsel may make sense when tribal courts sentence Native Americans to tribal sentences, but a serious issue arises when convictions or pleas (hereinafter referred to collectively as "convictions") made in tribal courts, without the benefit of counsel, are introduced in subsequent federal cases and used to support convictions which carry significant prison terms under federal statutes.

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1. Miranda v. Arizona, 384 U.S. 436, 479 (1966).
2. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-57 (1978) (holding that the bill of rights does not fully apply to tribes); Talton v. Mayes, 163 U.S. 376, 383-84 (1896).
3. *See* 25 U.S.C. § 1302(a)(6), (b)-(c) (2006).
4. *Id.* § 1302(a)(6).

This Note discusses the split between the Eighth, Ninth, and Tenth Circuits on whether to allow uncounseled tribal court convictions to be used in subsequent federal prosecutions or as predicate elements in federal cases. Specifically, this Note focuses on the split between the Ninth Circuit, which does not allow the use of tribal court convictions in subsequent federal trials if those convictions would have violated the Sixth Amendment if originally made in federal court,[5] and the Eighth and Tenth Circuits, which allow the use of tribal court convictions in subsequent federal trials because those convictions are valid under the Indian Civil Rights Act and, thus, do not and could not violate the Sixth Amendment.[6]

Part II provides background on the Sixth Amendment and how, if at all, convictions obtained without counsel may be used in subsequent proceedings, the relationship between the Bill of Rights and Native Americans, the Indian Civil Rights Act, and the doctrine of comity. Part III summarizes the relevant portions of *United States v. Ant*, *United States v. Cavanaugh*, and *United States v. Shavanaux*. Part IV analyzes these cases and suggests how courts might better approach the issue. This Note concludes that the question is not whether the Sixth Amendment allows the use of the uncounseled convictions simply because they are valid, but rather the question is whether the convictions are reliable enough to pass through our Sixth Amendment filter.

II. Background

Any analysis of the Sixth Amendment in relation to tribes must start with an understanding of current Supreme Court jurisprudence as it relates to the Sixth Amendment along with jurisprudence and law regarding tribal sovereignty and the Indian Civil Rights Act. This section summarizes the history of the Sixth Amendment right to counsel in the United States, the reason the Sixth Amendment is not applicable to the tribes, the Indian Civil Rights Act, and the doctrine of comity.

A. The Sixth Amendment Right to Counsel

The Sixth Amendment states criminal defendants "have the [right to] Assistance of Counsel for [their] defence."[7] In 1963, the Supreme Court

5. United States v. Ant, 882 F.2d 1389, 1396 (9th Cir. 1989).

6. United States v. Shavanaux, 647 F.3d 993, 998 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012); United States v. Cavanaugh, 643 F.3d 592, 593-94 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012).

7. U.S. CONST. amend. VI.

made the Sixth Amendment right to counsel applicable to the states through the Fourteenth Amendment in *Gideon v. Wainwright*.[8] What the right to counsel actually entailed was interpreted in different ways through the following three decades, with the Court eventually settling on the constitutional principle that a person may not be imprisoned without having an attorney or validly waiving the right to counsel.[9] Further, the Court determined that an uncounseled misdemeanor conviction, which does not result in imprisonment, is valid and may be used to enhance a subsequent conviction.[10] Underlying these constitutional principles, and important to the cases at issue in this Note, are the concepts of the validity of convictions and the reliability of uncounseled versus counseled convictions.[11] Therefore, this section will examine the constitutional principles articulated by the Court regarding right to counsel and the permissible uses of convictions obtained without counsel in subsequent proceedings.

1. No Criminal Defendant May Be Sentenced to Incarceration Unless They Were Afforded the Protection of Counsel or Waived the Right

Gideon v. Wainwright is the landmark case for right to counsel.[12] In 1963, Clarence Gideon was charged with breaking and entering a pool hall, but his request for an attorney to represent him at trial was denied.[13] Thereafter, Gideon was convicted and sentenced to five years in prison.[14] Relying on earlier decisions in *Powell v. Alabama*[15] and *Johnson v. Zerbst*,[16] the Court held the right to the assistance of counsel was essential to life and liberty.[17] Anchoring its holding was the fact that state and federal governments spent large amounts of money on lawyers prosecuting criminals, and those who are accused and can afford it similarly spent large amounts of money on hiring lawyers who advocate for them in court.[18] Thus, the Court reasoned, attorneys are essential to receiving a fair trial.[19]

8. 372 U.S. 335, 342-43 (1963).

9. *See* Scott v. Illinois, 440 U.S. 367, 374 (1979) (establishing the state must afford a defendant the right to counsel, not that the defendant must be represented).

10. Nichols v. United States, 511 U.S. 738, 748-49 (1994).

11. *See Scott*, 440 U.S. at 372-73; Linkletter v. Walker, 381 U.S. 618, 639 n.20 (1965).

12. *See generally Gideon*, 372 U.S. 335.

13. *Id.* at 336-37.

14. *Id.* at 337.

15. 287 U.S. 45 (1932).

16. 304 U.S. 458 (1938).

17. *Id.* at 342-43.

18. *Id.* at 344.

19. *Id.*

Reason and reflection also demonstrated that having counsel is important in criminal cases because one "cannot be assured a fair trial unless counsel is provided."[20] For those reasons, the Court held the Sixth Amendment right to counsel is obligatory upon the states through the Fourteenth Amendment.[21]

Almost ten years later, in *Argersinger v. Hamlin*,[22] the Court clarified its ruling in *Gideon v. Wainwright*.[23] Jon Argersinger was charged with carrying a concealed weapon, a petty crime, and sentenced to ninety days in jail.[24] He was not represented by counsel at trial.[25] The respondent argued counsel should not have to be provided for offenses where the person was incarcerated for less than six months, but the Court was not "convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent [to jail] for six months or more."[26] The Court found counsel was often a predicate to a fair trial and held "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[27]

After *Argersinger,* there was still confusion as to how far the right to counsel went. Did it attach to every case where a person *could* be sentenced to imprisonment or only when a person was actually sentenced to incarceration? In *Scott v. Illinois*, the Court held because imprisonment is such a severe punishment, a defendant should not be sentenced to incarceration unless he has been provided counsel.[28] The Court reasoned:

> Even were the matter *res nova*, we believe that the central premise of *Argersinger* — that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment — is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel.[29]

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20. *Id.*
21. *Id.* at 344-45.
22. 407 U.S. 25 (1972).
23. *See generally id.*
24. *Id.* at 26.
25. *Id.*
26. *Id.* at 30-31, 33.
27. *Id.* at 37.
28. 440 U.S. 367, 372-74 (1979).
29. *Id.* at 373.

Therefore, currently in the United States, for a person to be sentenced to a term of incarceration, he must be provided the right to counsel even if he cannot afford an attorney. While the Court defined the right to counsel in *Scott*, it later addressed how uncounseled convictions could be used in subsequent trials, if at all (e.g., for impeachment purposes or as predicate convictions for recidivist statutes).

2. Uncounseled Convictions That Result in Imprisonment Are Not Reliable and Cannot Be Used in Subsequent Trials, but Convictions Obtained Without Counsel That Do Not Result in Incarceration Are Presumed Reliable and May Be Used in Subsequent Trials

In *Gideon v. Wainwright*, the Supreme Court "recognized a fundamental fact that a layman, no matter how intelligent, could not possibly further his claims of innocence and violation of previously declared rights adequately."[30] Because an uncounseled defendant could not do so, the Court determined judgments obtained without counsel "lacked reliability."[31] Although the Court determined convictions obtained without counsel were unreliable, the Court struggled over the next thirty years to determine whether uncounseled convictions could be used in subsequent trials. The Court eventually decided valid uncounseled decisions (i.e., those which did not result in incarceration) were sufficiently reliable and could be used in subsequent proceedings, but invalid uncounseled convictions could not be used for any purpose.[32]

The Court first confronted the use of uncounseled convictions in *Burgett v. Texas*, where a Tennessee state felony conviction was entered into evidence during trial in Texas state court even though the Tennessee convictions did not show the defendant was provided counsel or had waived the right during the earlier trials.[33] The Court held "[t]o permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against [the defendant] either to support guilt or enhance punishment for another offense is to erode the principle of [*Gideon*]."[34] Furthermore, since Burgett was denied the right to assistance of counsel, to use those earlier convictions again would "in effect [mean he] suffer[ed] anew from the

30. Linkletter v. Walker, 381 U.S. 618, 639 n.20 (1965).

31. *Id.*

32. *See* Nichols v. United States, 511 U.S. 738, 746-47 (1994); Burgett v. Texas, 389 U.S. 109, 115 (1967).

33. *Burgett*, 389 U.S. at 112-13.

34. *Id.* at 115 (citation omitted).

deprivation of that Sixth Amendment right."[35] Thus, earlier felony convictions obtained in violation of the Sixth Amendment cannot be used in subsequent trials to enhance the penalty under recidivist statutes.

A few years later in *United States v. Tucker*,[36] the Court held that the use of uncounseled felony convictions during sentencing by a judge would erode the principles of *Gideon* as well, and the only way to remedy the erosion would be to remand the case to the district court for re-sentencing.[37] In the next term the Court went even further, ruling previous uncounseled felony convictions may not be used to impeach the defendant-witness during cross-examination because the use of those convictions would violate the defendant's Sixth Amendment rights "anew."[38]

Although it appeared the Court was headed toward disallowing the use of uncounseled convictions in subsequent trials for all purposes, in *Lewis v. United States,* the Court muddied the waters when it explained it had "never suggested that an uncounseled conviction is invalid for all purposes."[39] At issue in *Lewis* was a federal firearms statute that prohibited a convicted felon from having a firearm in his possession.[40] Lewis, a convicted felon, was found to be in unlawful possession of a firearm and at trial his prior uncounseled convictions were allowed into the record.[41] The Court reasoned that *Burgett*, *Tucker*, and *Loper* had all focused on reliability as the reason for their reversal of the lower courts. But in Lewis's case, the firearms statute was not focused on reliability; its purpose was to keep the firearms away from criminals.[42] Thus, the Court allowed the use of the uncounseled prior convictions. The Court, however, returned to its stance of disallowing all uncounseled prior convictions in subsequent trials when it decided *Baldasar v. Illinois*.[43]

Baldasar was a splintered *per curiam* decision about whether an uncounseled misdemeanor conviction, constitutionally valid because the defendant was not incarcerated, could be used under an enhancement statute to raise a subsequent misdemeanor to a felony, which carried a

35. *Id.*
36. 404 U.S. 443 (1972).
37. *Id.* at 449.
38. Loper v. Beto, 405 U.S. 473, 483-84 (1972).
39. 445 U.S. 55, 66-67 (1980).
40. *Id.* at 57.
41. *Id.*
42. *Id.* at 67.
43. *See generally* 446 U.S. 222 (1980) (per curiam), *overruled by* Nichols v. United States, 511 U.S. 738 (1994).

prison term.[44] Justice Stewart, joined by Justices Brennan and Stevens, found the defendant was sentenced to prison *only* because of his prior conviction, which Justice Stewart found violated the principles of *Scott*.[45] Thus, Justice Stewart found an uncounseled misdemeanor conviction, although it may be constitutionally valid because there was no incarceration, could not be used to enhance a subsequent misdemeanor to a felony.[46]

Justice Marshall, joined by Justices Brennan and Stevens, also found the defendant's conviction was invalid for all purposes, imprisonment being one, because the earlier conviction, although constitutionally permissible, was not reliable.[47] Justice Marshall reasoned the prison sentence imposed after the enhancement was imposed "as a direct consequence of [the] uncounseled conviction and is therefore forbidden under *Scott* and *Argersinger*."[48]

Although Justice Blackmon voted to overturn the conviction, he did not join the opinions of the other justices in the plurality and argued instead for a bright line rule.[49] He favored a rule whereby a defendant would be required to have appointed counsel if prosecuted for an offense punishable by more than six months in prison or when imprisonment is actually imposed.[50] Thus, the Court was left without a unified rationale for why the earlier constitutionally valid uncounseled misdemeanor conviction could not be used for sentence enhancement under a recidivist statute. Although the plurality won the day in *Baldasar*, the dissent would later play a much more important role in shaping this area of law.

Written by Justice Powell and joined by Chief Justice Burger and Justices White and Rhenquist, the dissent in *Baldasar* argued that the repeat offender laws do not penalize the first crime but are only punishment for the second crime.[51] Furthermore, Justice Powell argued the approach advocated by the plurality would confuse the courts because what was a constitutional conviction would suddenly become unconstitutional if it were used to enhance a penalty under a recidivist statute.[52] While invalid felony

44. *Id.* at 222.
45. *Id.* at 224 (Stewart, J., concurring).
46. *See id.* at 224.
47. *Id.* at 226-27 (Marshall, J., concurring).
48. *Id.* at 227.
49. *Id.* at 229-30 (Blackmon, J., concurring).
50. *Id.*
51. *Id.* at 232 (Powell, J., dissenting).
52. *Id.* at 231.

convictions could not be used to enhance a sentence, misdemeanors, the dissent argued, were usable.[53] Furthermore, in Baldasar's case, "the uncounseled conviction [was] conceded to be valid and thus must be presumed reliable."[54]

Fourteen years later, recognizing the *Baldasar* decision caused confusion among the circuits, Chief Justice Rehnquist, writing for the majority in *Nichols v. United States,* held an "uncounseled conviction valid under *Scott* may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment."[55] Nichols was convicted in federal court of conspiracy to distribute cocaine and, under the United States Sentencing Guidelines, had his sentence increased by one point for a prior uncounseled DUI conviction.[56] That one point increased his sentence by twenty-five months.[57] Thus, the Court was confronted, again, with whether the Constitution prohibits a court from considering a defendant's previous uncounseled misdemeanor conviction in sentencing him for a subsequent offense.[58] The Court decided to adhere to *Scott*, and if the original uncounseled conviction did not result in actual imprisonment, then there was no violation of the Sixth Amendment.[59]

Relying on the dissent in *Baldasar*, the Court found that use of an earlier conviction in a subsequent trial does not change the penalty imposed for that earlier conviction.[60] Thus, it was logical that a conviction valid at its inception could also be used to support enhancement.[61] The Court also stated that use of the uncounseled misdemeanor conviction was consistent with the less rigorous standards employed during a sentencing hearing to determine the sentence.[62] As such, the Court overruled its earlier decision in *Baldasar*, and today it is constitutionally permissible to use uncounseled misdemeanor convictions in determining sentence enhancements, either through the sentencing guidelines or as part of recidivist statutes.[63]

The circuit courts of appeals have applied a broader reading of *Nichols*. For example, in *United States v. Lonjose*, the Tenth Circuit was confronted

53. *Id.* at 233.
54. *Id.* at 233 n.2.
55. 511 U.S. 738, 746-47 (1994).
56. *Id.* at 740-41.
57. *Id.*
58. *Id.* at 740.
59. *Id.* at 746.
60. *Id.* at 747.
61. *Id.* at 746-47.
62. *Id.* at 747-48.
63. *Id.* at 748.

with an issue similar to those presented in the cases that are the subject of this Note.[64] Lonjose was charged under a federal statute for child abuse, and his prior uncounseled tribal court convictions, some of which resulted in incarceration, were used as "permissible departure factors" to enhance his sentence under the Federal Sentencing Guidelines.[65] The Tenth Circuit allowed the use of the uncounseled convictions because they concluded that the Supreme Court's decision in *Nichols* permitted the use of prior convictions *for all purposes* if those prior convictions were *valid at their inception.*[66] The Tenth Circuit cited opinions holding the same from the Second, Fourth, Fifth, and Eighth Circuits stating, "it appears that only the Ninth Circuit continues to question the use of initially valid uncounseled convictions to enhance subsequent federal sentences . . . ."[67]

While the Court's decision in *Nichols* appeared to end the debate over the use of valid, uncounseled convictions in subsequent proceedings, the Court is still defining the limits of the right to counsel. In *Alabama v. Shelton*, the Court recently held a suspended sentence, which "may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded the 'guiding hand of counsel' in the prosecution of the crime charged."[68] The Court ruled a suspended sentence was still a prison term and could not be imposed without counsel.[69] The Court rejected the respondent's argument that a probation hearing, which would decide whether to activate the suspended sentence, was sufficient to remove the taint of not having counsel because "it does not even address the key Sixth Amendment inquiry: whether the adjudication of guilt corresponding to the prison sentence is sufficiently reliable to permit incarceration."[70] Thus, it would appear that the Court has again returned to the concern with reliability of the conviction rather than a focus on technical validity.[71]

Today, a conviction and sentence of incarceration is invalid if a person is not afforded the right to counsel, whether this is for a misdemeanor or felony conviction. While an uncounseled felony can never be used in

64. *See generally* United States v. Lonjose, 42 F. App'x 177 (10th Cir. 2002).

65. *Id.* at 178-79, 181-82.

66. *Id.* at 181.

67. *Id.* at 182 (comparing Ninth Circuit cases concerning uncounseled convictions); *see also id.* at 181-82.

68. 535 U.S. 654, 658 (2002) (quoting Argersinger v. Hamlin, 407 U.S. 25, 40 (1972)).

69. *Id.* at 662.

70. *Id.* at 667.

71. *See* United States v. Cavanaugh, 643 F.3d 592, 600-01 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012).

subsequent prosecutions,[72] an uncounseled misdemeanor conviction is valid and may be used in a subsequent prosecution.[73] In Indian tribal courts, however, because of the unique history and characteristics of the tribal system, the right to counsel does not apply the same way it does in federal and state courts.

B. Inapplicability of the Bill of Rights to the Indian Tribes

In *Worcester v. Georgia*,[74] an opinion dealing with the right of the state of Georgia to regulate those who could reside inside the boundaries of the Cherokee Nation, Chief Justice John Marshall recognized that Indian tribes were distinct from the United States: "[t]he Indian nations ha[ve] always been considered as distinct, independent, political communities, retaining their original natural rights. . . . The very term 'nation,' so generally applied to them, means 'a people distinct from others.'"[75] Further, in *United States v. Kagama*,[76] the Court reaffirmed this principle when they wrote Indians are "a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union, or of the state within whose limits they resided."[77]

In *Talton v. Mayes* the Court held that although the tribes are "subject to the supreme legislative authority of the United States," the Constitution does not apply to them in Indian Country in the same way it does to the federal or state governments.[78] The principle that Indian tribes are distinct, and therefore neither the Constitution nor the Bill of Rights is applicable to the tribes, has been affirmed time and time again.[79] "The powers of self-government which an Indian tribe may possess and exercise are inherent, therefore, in the sovereign character of the tribe not derived by grant or cession from Congress or the States."[80] In the late 1960s, however,

72. *Id.* at 598.

73. *See* Nichols v. United States, 511 U.S. 738, 748-49 (1994).

74. 31 U.S. (6 Pet.) 515 (1832).

75. *Id.* at 559.

76. 118 U.S. 375 (1886).

77. *Id.* at 381.

78. Talton v. Mayes, 163 U.S. 376, 384 (1896).

79. *See, e.g.*, Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 337 (2008); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978).

80. STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE S. COMM. ON THE JUDICIARY, 89TH CONG., CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN 1 (Comm. Print 1966).

Congress extended many rights contained in the Bill of Rights to the tribes through federal legislation.[81]

C. The Indian Civil Rights Act

Enacted in the 1960s, an era marked by the concern for civil rights of minorities,[82] the Indian Civil Rights Act (ICRA)[83] was passed as "a means to 'grant the American Indians the rights which are secured to other Americans.'"[84] The ICRA was championed by Senator Sam Ervin of North Carolina who "concluded that the rights of Indians were 'seriously jeopardized by the tribal government's administration of justice,'" which was a result of the "'tribal judges' inexperience, lack of training, and unfamiliarity with the traditions and forms of the American legal system.'"[85]

Native Americans objected to the passage of the ICRA because "tribal traditions of fairness and justice made the ICRA an unnecessary intrusion on tribal sovereignty."[86] Those Indians who opposed the ICRA believed the bill would amount to an "imposition of foreign principles of government and limitations on their sovereign power."[87] The use of a court system to solve disputes was a foreign idea to Indians who traditionally viewed "law and justice as personal and clan affairs."[88]

Thus, although the original ICRA, as put forth by Senator Ervin, extended exactly the same protections to the tribes as the Bill of Rights did to the rest of the nation, the version which was eventually passed was a compromise between the preservation of tribal sovereignty (i.e., protection of custom and tradition) and Senator Ervin's desire to extend the Bill of Rights to the tribes.[89] The major differences between the final version of the

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81. *Id.* at 5.

82. JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 247 (2004).

83. 25 U.S.C. §§ 1301-1303 (2006). The ICRA is also referred to as the Indian Bill of Rights. Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 470 (1998).

84. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 101 (Nell Jessup Newton et al. eds., LexisNexis 2005).

85. McCarthy, *supra* note 77, at 469.

86. *Id.* at 470.

87. Richland & Deer, *supra* note 76, at 237.

88. McCarthy, *supra* note 77, at 483.

89. *See* Barbara Creel, *Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing*, 46 U.S.F. L. REV. 37, 65 (2011).

ICRA and the Bill of Rights are those relating to the establishment of religion, grand juries and indictments, and the right to appointed counsel.[90]

The ICRA extends to Indians charged in tribal courts the right to counsel, but only at his or her own expense.[91] If the defendant cannot afford an attorney, the tribes do not have to supply an attorney.[92] In promulgating the bill, Congress deliberately chose not to extend a right to appointed counsel because there were no attorneys present in tribal areas, leaving the court no attorneys to appoint as counsel.[93] Furthermore, Indian tribes did not have "adequate resources" to provide counsel for indigent defendants.[94]

Approximately a decade after the passage of the ICRA, the Ninth Circuit, in *Tom v. Sutton*, was confronted with whether the defendant, a member of the Lumni Tribe, had the right to appointment of counsel in his tribal court proceeding.[95] The court examined the ICRA and found the right to appointment of counsel had specifically been omitted from the bill because of the lack of a bar from which to appoint attorneys in Indian Country.[96] Furthermore, when the Lumni adopted the ICRA as their constitution, the tribe also did not extend the right of appointment of counsel to indigent defendants.[97] Thus, the court held the defendant did not have the right to the assistance of appointed counsel in tribal court.[98]

Despite the fact that the ICRA as passed did not include any requirement to appoint counsel, in 2010, Congress passed the Tribal Law and Order Act, which allows tribal courts to impose sentences of up to three years.[99] In order to impose a prison term of more than one year, the Act said tribes must provide defendants with "effective assistance of counsel at least equal to that guaranteed by the United States Constitution."[100] Below the one-year

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90. *See* McCarthy, *supra* note 76, at 471.

91. 25 U.S.C. § 1302(a)(6) (2006).

92. *Id.*

93. Tom v. Sutton, 533 F.2d 1101, 1104 (9th Cir. 1976) (quoting *To Protect Constitutional Rights of American Indians: Hearing on S. 961, S. 962, S. 963, S. 964, S. 965, S. 965, S. 967, S. 968, and S.J. Res. 40 Before the Subcomm. on Constitutional Rights. of the S. Comm. on the Judiciary*, 89th Cong. (1965)).

94. John R. Wunder, *The Indian Bill of Rights*, *in* NATIVE AMERICANS AND THE LAW: THE INDIAN BILL OF RIGHTS, 1968, at 16 (John R. Wunder ed., 1996).

95. *Sutton*, 533 F.2d at 1102.

96. *Id.* at 1104.

97. *Id.* at 1105-06.

98. *Id.* at 1106.

99. 25 U.S.C. § 1302(b) (Supp. IV 2010); United States v. Cavanaugh, 643 F.3d 592, 596 n.2 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012).

100. 25 U.S.C. § 1302(c)(1).

threshold, a tribal member may be sentenced to jail in a tribal court proceeding where he did not have assistance of counsel.[101] Today a tribal member may be tried in tribal court in Indian Country and sentenced to up to one year of imprisonment without the assistance of counsel. In order to hand down a sentence of greater than one year, the defendant must either have counsel present or have waived the right. Since the tribes are distinct, independent communities, in order for judgments or convictions entered in tribal courts to be enforced outside tribal jurisdiction, the United States' courts must extend comity to those decisions.

D. Comity

In *Hilton v. Guyot*[102] the Supreme Court determined comity "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will upon the other."[103] Rather, it is a balancing act between recognizing the legislative, executive and judicial acts of other nations and the rights of citizens of the recognizing countries.[104] Comity, in relation to the Indian tribes, has chiefly been concerned with ensuring tribal court remedies are exhausted before federal courts become involved.[105] Furthermore, it is proper to use principles of comity to decide whether to recognize and enforce tribal court judgments because tribes are considered separate political entities.[106] Federal courts have stated "comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect,"[107] and federal courts should respect the "special customs and practical limitations" of tribal courts.[108]

Generally, courts recognize the judgments of foreign courts so long as (1) those judgments are rendered by impartial tribunals and do not violate due process and (2) the rendering court had the proper jurisdiction over the person, according to the foreign state's laws.[109] According to the Restatement (Third) of Foreign Relations, evidence a person was "unable to

101. *See generally Sutton*, 533 F.2d 1101.
102. 159 U.S. 113 (1895).
103. *Id.* at 163-64.
104. *See id.* at 164.
105. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987); Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985).
106. Wilson v. Marchington, 127 F.3d 805, 810 (9th Cir. 1997).
107. Somportex Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971).
108. *Wilson*, 127 F.3d at 811.
109. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 482 (1987).

obtain counsel . . . would support a conclusion that the legal system was one whose judgments are not entitled to recognition."[110]

Foreign judgments will generally only be overturned if they were not a product of "civilized jurisprudence,"[111] but there is a public policy exception to comity. It is a "well-recognized danger" the public policy exception could be overused and thus "'swallow the whole rule of comity' especially in a tribal setting."[112] The "danger" of the overused public policy exception relates to different cultures and how a country is less apt to give recognition to a foreign judgment where the process used to arrive at the judgment is not similar to their own.[113]

Accordingly, while comity allows a court to recognize a foreign judgment, it does not compel the recognition.[114] However, courts have repeatedly recognized the power of Indian tribes to punish tribal members for violations of tribal law and have not been inclined to interfere with that power.[115]

Generally, tribal convictions imposing less than a one-year sentence and obtained without counsel do not pose a threat of being overturned because tribal members are not guaranteed counsel in those instances, according to the ICRA and the Tribal Law and Order Act.[116] If the same cases were to be tried in federal or state court, however, those defendants would have a right to counsel for any sentence of incarceration.[117] Therefore, the question is whether the subsequent use of an uncounseled tribal court conviction to support a federal crime is constitutionally appropriate.

Of the three circuit courts of appeals that addressed the issue, only one, the Ninth Circuit in *United States v. Ant*, has found it a violation of the Sixth Amendment.[118] The Eighth Circuit in *United States v. Cavanaugh*, and the Tenth Circuit in *United States v. Shavanaux* found there was no

110. *Id.* § 482 cmt. b.

111. Hilton v. Guyot, 159 U.S. 113, 205-06 (1895).

112. Lindsay Louden Vest, Comment, *Cross-Border Judgments and the Public Policy Exception: Solving the Foreign Judgment Quandary by Way of Tribal Courts*, 153 U. PA. L. REV. 797, 804 (2004).

113. *See id.* at 800-01.

114. *Id.* at 804.

115. *See* United States v. Wheeler, 435 U.S. 313, 325 (1978), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as recognized in* United States v. Lara, 541 U.S. 193 (2004).

116. *See* Tom v. Sutton, 533 F.2d 1101, 1102 (9th Cir. 1976).

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

118. United States v. Ant, 882 F.2d 1389, 1396 (9th Cir. 1989).

Sixth Amendment violation.[119] The next section of this Note will more closely examine the approaches taken by the three circuits in deciding whether to allow uncounseled tribal court convictions or pleas in subsequent federal trials.

III. Principal Cases at Issue

A. United States v. Ant*: Convictions Which Would Not Be Valid if Originally Entered in United States Courts Cannot Then Be Used in a Subsequent Federal Case*

In October of 1986 the body of Francis Ant's niece was found on the Northern Cheyenne Indian Reservation.[120] After obtaining a confession without *Miranda* warnings, tribal police arrested Ant for Assault and Battery.[121] Ant was arraigned in tribal court,[122] where the judge advised him he had a right to a court-appointed attorney, but the judge never asked if Ant had or wanted an attorney.[123] Instead, according to Ant, the judge proceeded to ask Ant to enter a plea of guilty or not guilty.[124] Ant pled guilty and was sentenced to six months in jail.[125]

Less than a month after his guilty plea, Ant was indicted in federal court on charges of voluntary manslaughter under the Indian Major Crimes Act.[126] During his federal trial, where he was furnished with counsel, Ant moved to suppress his earlier confession to tribal police because it was obtained in violation of *Miranda* and to suppress the guilty plea because it was obtained in violation of the Sixth Amendment.[127] The district court suppressed the confession, but found the tribal court arraignment was

119. United States v. Shavanaux, 647 F.3d 993, 998 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012); United States v. Cavanaugh, 643 F.3d 592, 605 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012).

120. *Ant*, 882 F.2d at 1390.

121. *Id.*

122. *Id.* Ant asserted that the judge went straight from reading him his right to asking him to enter a plea. It was the judge's practice to inform defendants about their right to counsel, including appointed counsel, but not to ask about whether they could actually afford counsel. *Id.* at 1390-91.

123. *Id.* at 1391.

124. *Id.*

125. *Id.*

126. *Id.* The Indian Major Crimes Act, 18 U.S.C. § 1153 (2006), provides the federal government with exclusive jurisdiction over major crimes that are committed against Indians or others within the bounds of Indian Country including: murders, assaults resulting in serious bodily injury, kidnappings, and other similar serious crimes.

127. *Ant*, 882 F.2d at 1391.

consistent with both tribal law and the ICRA.[128] The district judge ruled that comity and respect for legitimate tribal proceedings required him to deny the motion to suppress the guilty plea.[129] Ant was convicted and sentenced to three years in prison and a $50 fine.[130]

On appeal to the Ninth Circuit, the court did not agree with the district judge that comity and respect for tribal proceedings were sufficient reasons to allow the guilty plea. As the Ninth Circuit saw it, the issue was "whether an uncounseled guilty plea, made in tribal court in accordance both with tribal law and the ICRA, but which would have been unconstitutional if made in a federal court, can be admitted as evidence of guilt in a subsequent federal prosecution involving the same criminal acts."[131] In examining the issue, the court looked at the following: first, whether Ant's guilty plea was valid under tribal law and the ICRA; second, whether the guilty plea could even be used as evidence in a subsequent prosecution; and third, whether Ant's plea, if made in federal court originally, would have been constitutionally permissible.[132]

1. Validity of Ant's Conviction in Tribal Court and Under the ICRA

In determining whether the conviction was valid in tribal court and under the ICRA, the Ninth Circuit relied on the text of the ICRA and its previous holding in *Tom v. Sutton*.[133] The court recognized the ICRA only provides for the right to counsel at the defendant's own expense.[134] The court also acknowledged that even though there was confusion about exactly what was said during the arraignment in tribal court, the district court's decision was not "clearly erroneous," and because "[f]ederal courts must avoid undue or intrusive interference in reviewing Tribal Court procedures," the district court's determination that the guilty plea was valid under tribal law and the ICRA would stand.[135] With the validity question decided, the court turned to the question of whether an earlier guilty plea could be used in a subsequent federal prosecution.

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128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 1392.
134. *Id.*
135. *Id.* (quoting Smith v. Confederated Tribes of Warm Springs Reservation, 783 F.2d 1409, 1412 (9th Cir. 1986)).

2. Using an Earlier Guilty Plea in Subsequent Federal Prosecution

The Ninth Circuit determined if an earlier guilty plea had no constitutional infirmities, the plea could be used in subsequent trials if the plea was "made under conditions consistent with the United States Constitution."[136] The court did note that although the admission in *Riley* was allowed, there "were no claims that the earlier guilty plea was in any way invalid." [137]

The Ninth Circuit found it was another matter entirely when the plea was obtained in violation of the Constitution. The court found when a plea was obtained in violation of the Constitution, it could not be used in a subsequent federal prosecution.[138] The Ninth Circuit also noted that Ant was not advised during his tribal court proceeding that it was possible for his plea and conviction to be used against him in federal court.[139] Thus, the court established its baseline that an earlier guilty plea could be used in a subsequent trial, but not if the plea had constitutional infirmities.[140]

3. What If Ant's Guilty Plea Had Been Made in Federal Court?

In determining whether Ant's plea from tribal court could be used in the subsequent federal manslaughter case, the Ninth Circuit found the right to counsel attaches at "critical stages."[141] Therefore, since Ant was sentenced immediately after his arraignment and guilty plea, the arraignment was the "critical stage," and Ant was entitled to counsel under the Sixth Amendment.[142] The Court held if Ant's plea had been made in federal court, it would have not only been "constitutionally infirm, but . . . also [would have been] inadmissible in a subsequent federal prosecution."[143]

In reaching its decision, the Ninth Circuit relied on the Supreme Court's decision in *Argersinger v. Hamlin*, which found if a defendant was not represented by counsel at trial he could not be imprisoned.[144] Additionally,

136. *Id.* (citing United States v. Riley, 682 F.2d 542 (8th Cir. 1982)).
137. *Id.* at 1393.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 1393-94 (citing Mempa v. Rhay, 389 U.S. 128 (1967); Hamilton v. Alabama, 368 U.S. 52 (1961)).
142. *Id.*
143. *Id.* at 1393.
144. *Id.* at 1394 (citing Argersinger v. Hamlin, 407 U.S. 25, 37 (1972)).

the Ninth Circuit relied upon the Supreme Court's holding in *Baldasar v. Illinois* that uncounseled misdemeanor convictions could not be used to enhance a subsequent misdemeanor into a felony with prison time.[145] Therefore, the Ninth Circuit reasoned the only way Ant's plea could be admitted in a subsequent trial in federal court would be if Ant had waived his right to counsel.[146]

The burden to show waiver falls on the government and the government's argument, that Ant acknowledged his rights and failed to request an attorney in tribal court, was not persuasive.[147] In rejecting the government's argument, the court stated Ant was neither given the opportunity for appointed counsel nor was he aware his tribal court plea could be used against him in a subsequent federal trial.[148]

4. Was Ant's Tribal Court Plea Properly Admitted in the Subsequent Federal Trial?

Because Ant's tribal plea would not have been admissible if originally made in federal court, the Ninth Circuit held it was improper for it to be used in a subsequent federal trial.[149] The court noted the district court's reasons for allowing the plea, but dismissed them each in turn. First, the Court labeled the district court's concern about comity "novel," and emphasized that comity was previously used to "prevent direct attack on tribal proceedings in federal courts, and to require exhaustion of tribal remedies before going to federal court."[150] The Ninth Circuit distinguished Ant's federal prosecution and found that the decision of whether to allow tribal convictions in federal court does not constitute a direct attack on tribal court proceedings, and comity is not at issue.[151] Second, the district judge's concern that the suppression of the guilty plea would "disparage the tribal proceedings" was likewise without foundation.[152] Here, the Ninth Circuit explained, the ruling is not about the validity of the tribal court conviction, but rather about whether the guilty plea meets federal

145. *Id.* (citing Baldasar v. Illinois, 446 U.S. 222 (1980) (per curiam), *overruled by* Nichols v. United States, 511 U.S. 738 (1994)).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 1395.

150. *Id.* at 1396 (citing Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985)).

151. *Id.*

152. *Id.*

standards.[153] In this case, the court only examined the tribal court proceedings, determined they were not in compliance with the necessary protections for federal prosecutions, and refused to allow the guilty plea.[154]

Therefore, because the tribal court guilty plea was made under circumstances that would have violated the Constitution if it was applicable to the tribal proceedings, and because suppression would not violate comity, disparage the tribal court, or prejudice the government, the plea should have been suppressed.[155] The district judge's decision not to suppress the guilty plea and the federal manslaughter conviction were reversed.[156]

5. Dissent of Judge O'Scannlain

Judge O'Scannlain agreed with the district judge that the suppression of the plea entered in tribal court would "disparage the integrity of the tribal courts."[157] Judge O'Scannlain admits if the plea had originally been filed in federal or state court, then suppression of the plea would be proper; but he took exception with the majority because those were not the facts before the court.[158]

Instead, he relied upon the fact that tribal courts are entitled to the same "dignity shown to foreign courts" and foreign convictions are generally admissible in federal court.[159] Judge O'Scannlain, relying on Fourth Amendment jurisprudence, found Ant's plea would not have been admissible if it was coerced, shocking, not valid in the jurisdiction where it was secured, or if the jurisdiction handing down the conviction was not as equally civilized as the United States.[160] Thus, he argued the majority was not honoring the plea because the majority did not feel the tribal court system was as civilized as the federal system.[161] Furthermore, Congress was more properly suited than the court to determine whether or not to apply the Sixth Amendment right to the tribes, and Congress had already determined the right did not apply in the same way.[162]

153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 1390.
157. *See id.* at 1396 (O'Scannlain, J., dissenting).
158. *Id.*
159. *Id.* at 1396-97.
160. *See id.* at 1397.
161. *Id.*
162. *Id.* at 1398.

Notwithstanding the dissent, the Ninth Circuit held Ant's guilty plea and conviction were not admissible in federal court because, if originally made in federal court, it would have violated the Sixth Amendment, and suppression of the plea on those grounds would not violate the principles of comity or disparage tribal courts.[163] The following case views the use of uncounseled tribal convictions in a subsequent federal case in a different light.

B. United States v. Cavanaugh*: Technical Validity of a Conviction Determines Whether It May Be Used in a Subsequent Trial*

The next circuit court to engage the issue of uncounseled tribal court convictions was the Eighth Circuit in *United States v. Cavanaugh*.[164] Although the Eighth Circuit was also examining the use of uncounseled tribal court decisions in a subsequent trial, in Cavanaugh's case, the convictions were being used as predicate elements to meet the requirements of a habitual offender under 18 U.S.C. § 117.[165]

Cavanaugh had been driving drunk with his common-law wife and child when he and his wife started to fight.[166] In the midst of the fight, Cavanaugh violently jerked his wife's head back and forth eventually slamming her head into the car's dashboard.[167] Since he had three prior tribal court convictions for misdemeanor domestic assault, Cavanaugh was charged under the federal statute.[168] At trial, he informed the district judge he had not had the assistance of counsel in any of his three prior convictions and although he had been informed of his right to have counsel, he was financially unable to hire counsel.[169] Each of his prior convictions resulted in jail time, and thus, if he had been charged in federal or state court, he would have been entitled to counsel under the Sixth Amendment.[170]

In reaching its decision of whether to allow the prior convictions in tribal court to provide the predicate convictions required under federal statute, the

163. *Id.* at 1396.

164. 643 F.3d 592 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012).

165. 18 U.S.C. § 117 (2006); *Cavanaugh*, 643 F.3d at 593. Under the habitual offender statute, anyone in Indian Country who commits a domestic assault and has at least two prior convictions for assault, sexual abuse, or a serious violent felony against their spouse or intimate partner in either federal, state, or Indian tribal court can be tried in federal court. 18 U.S.C. § 117.

166. *Cavanaugh*, 643 F.3d at 594.

167. *Id.*

168. *Id.* at 593.

169. *See id.* at 594.

170. *See id.* at 593.

district court recognized failure to provide counsel in tribal court was not a violation of the Sixth Amendment.[171] However, the district judge ruled that the prior "uncounseled convictions were infirm for the purpose of proving the habitual-offender, predicate-conviction elements of the . . . offense in [the] subsequent federal court proceedings."[172] The district judge relied, in part, on the Ninth Circuit's decision in *Ant*.[173] The government appealed the district judge's decision to the Eighth Circuit.[174]

The issue before the Eighth Circuit was whether the use of Cavanaugh's tribal court convictions in a federal trial violated the Sixth Amendment. The court addressed the question in two parts. First, the Eighth Circuit examined whether the convictions, if originally entered in state or federal court, would have been usable as predicate elements for the habitual offender statute.[175] Second, the court examined whether — assuming the convictions were infirm and could not be used as predicate offenses for the habitual offender statute if originally entered in state or federal court — "otherwise valid tribal court conviction[s] should be treated as infirm for such purposes even though [they] technically [were] not unconstitutional."[176]

1. Use of Uncounseled Federal or State Convictions as Predicate Elements

In a much deeper analysis than the one conducted by the *Ant* court, and with the benefit of twenty-plus years of Supreme Court jurisprudence, the Eighth Circuit began its analysis using the baselines of *Gideon* and *Scott*: appointing counsel is not required unless there is actual incarceration.[177]

The Eighth Circuit found that prior to *Scott,* in *United States v. Tucker* and *Burgett v. Texas,* the Supreme Court had held prior uncounseled felony convictions could not be used to enhance sentences; and in *Loper v. Beto,* the Supreme Court had held prior uncounseled felony convictions could not be used for purposes of impeachment.[178] Therefore, the Eighth Circuit explained that *Tucker*, *Burgett*, and *Loper* "seem to have reflected a general belief that it was necessary to prevent erosion of the 'principle' of *Gideon*

171. *Id.* at 594.

172. *Id.*

173. United States v. Cavanaugh (*Cavanaugh II*), 680 F. Supp. 2d 1062, 1075-76 (D.N.D. 2009), *rev'd*, 643 F.3d 592 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012).

174. *Cavanaugh*, 643 F.3d at 594.

175. *Id.* at 596.

176. *Id.*

177. *Id.* at 597.

178. *Id.* at 598 (citing Burgett v. Texas, 389 U.S. 109, 115 (1967); United States v. Tucker, 404 U.S. 443, 444 (1972); Loper v. Beto, 405 U.S. 473, 484 (1972)).

and that the earlier deprivation of counsel, essentially, flowed through to the subsequent proceeding . . . ."[179] While the Eighth Circuit noted the holdings of *Tucker*, *Burgett*, and *Loper*, it based its decision mostly on *Nichols*.[180]

Before discussing *Nichols* in depth, the court admitted that if *Nichols* had not overturned *Baldasar*, Cavanaugh's argument would have been much stronger.[181] The Eighth Circuit noted, however, the *Nichols* rationale — that use of the earlier conviction does not change the penalty for that conviction, only the current conviction — was not easily, if at all, squared with the ideas gleaned from the pre-*Baldasar/Scott* holdings that the Sixth Amendment violation flowed through to the subsequent case.[182] Furthermore, the Eighth Circuit found that *Nichols* seemed to reject the reliability concern, which undergirded the holding in *Gideon*.[183] The Eighth Circuit also believed the Supreme Court's decision in *Alabama v. Shelton*[184] further complicated the prior-conviction-use landscape by ostensibly bringing back the reliability concern.[185]

The court reasoned "regardless of whether reliability-based concerns exist, it is the fact of a constitutional violation that triggers a limitation on using a prior conviction in subsequent proceedings."[186] The Eighth Circuit continued, saying "[i]t is arguable that the fact of an actual constitutional violation is, perhaps, not only an important factor for determining when a prior conviction may be used for sentence enhancement purposes, but a required or controlling, factor."[187] Before concluding this section, however, the Eighth Circuit analyzed two other Supreme Court decisions it thought could not easily be reconciled with the existing Sixth Amendment jurisprudence, or each other for that matter.[188]

The Eighth Circuit noted the holding in *United States v. Lewis*,[189] where the Supreme Court was not concerned about the reliability of the earlier conviction because the purpose of the statute was to prevent convicted

179. *Id.*
180. *Id.* at 603-04.
181. *Id.* at 599.
182. *Id.*
183. *Id.* at 600.
184. 535 U.S. 654 (2002).
185. *Cavanaugh*, 643 F.3d at 600-01.
186. *Id.* at 601.
187. *Id.*
188. *Id.* at 602-03.
189. 445 U.S. 55 (1980).

felons from having guns.[190] The second case the Eighth Circuit cited in this section was *United States v. Mendoza-Lopez*,[191] and the court found a broad reading of the decision lent credence to the fact that "certain constitutional infirmities in underlying proceedings make use of the judgment from such a proceeding infirm for the purpose of proving an element of a subsequent criminal charge."[192] Ultimately, the Eighth Circuit concluded the cases "fail to provide clear direction" as to whether uncounseled convictions can be used.[193] The only thing that is clear from the Eighth Circuit's analysis on the use of infirm prior convictions is that this area of law is unclear.

2. Should Uncounseled Tribal Convictions Be Allowed in Subsequent Federal Trials?

The Eighth Circuit admitted, based on the decisions of the Supreme Court, that the use of uncounseled prior convictions is debatable, but in any event, the ultimate question in the case "[was] whether an uncounseled conviction resulting in a tribal incarceration that involved no actual constitutional violation may be used later in federal court."[194] The court noted "none of the previously discussed cases precluded the use of a prior conviction for any purpose in the absence of an actual violation of the United States Constitution."[195] Correspondingly, following *Nichols*, the Eighth Circuit concluded that Cavanaugh's conviction was not unconstitutional because the Sixth Amendment does not apply to Indians, and that this fact should be given the greatest weight in deciding the case.[196]

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190. *Cavanaugh*, 643 F.3d at 602 (citing *Lewis*, 445 U.S. at 67).

191. 481 U.S. 828 (1987).

192. *Cavanaugh*, 643 F.3d at 603 (citing *Mendoza-Lopez*, 481 U.S. 828). *Mendoza-Lopez* disallowed the use of a deportation hearing in a subsequent criminal case because the defendants were not only "deprived of their rights to appeal," but also "any basis to appeal" because their ability to appeal was not "adequately explained to them." *Mendoza-Lopez*, 481 U.S. at 842. The Eighth Circuit believed a broad reading would support the argument not to allow uncounseled tribal court convictions in subsequent trials, but *Mendoza-Lopez* did not appear to be concerned with the right to counsel; instead, it focused on how the deportation hearings violated due process because there was no right to a collateral review, an issue not presented by the cases under examination. *Id.* at 839-40. Thus, this case was not mentioned in the background nor will it be examined further. It is included, however, in order to provide the reader with the complete picture of the Eighth Circuit's reasoning.

193. *Cavanaugh*, 643 F.3d at 603.

194. *Id.* (footnote omitted).

195. *Id.*

196. *Id.* at 603-04 ("As per *Nichols*, then, we believe it is necessary to accord substantial weight to the fact that Cavanaugh's prior convictions involved no actual constitutional violation.").

The court conceded it was not giving any "special weight to the unique reason for why there was no constitutional violation" in the earlier proceedings.[197] In other words, the court did not attach importance to the fact that the earlier convictions were in tribal courts, where the right to counsel did not exist. Yet, the court still felt the "technical validity of a conviction was a more important factor than the *Gideon*-type reliability concerns that always arise when counsel is absent."[198]

Furthermore, the Eighth Circuit distinguished *Cavanaugh* from *Ant*. In *Ant* the government attempted to use the guilty plea to prove the same offense, whereas in the *Cavanaugh* case, the prior convictions were used as the predicates for the federal charge.[199] The Eighth Circuit dismissed the defendant's argument, that the convictions were invalid from the outset, because no counsel was provided. The court noted that the prior convictions were in tribal court where there is no Sixth Amendment right to appointed counsel.[200] Thus, the Eighth Circuit stated it agreed with the Montana Supreme Court opinion, that principles of comity should be accorded great deference.[201] Therefore, the Eighth Circuit concluded the convictions could be used.[202]

It is interesting to note, that Judge Bye (dissenting) found the Supreme Court does not condone using an uncounseled conviction to support guilt for another offense.[203] Judge Bye distinguished *Lewis* from *Cavanaugh* because § 117 "is clearly aimed at recidivist criminal behavior where prior offenses are necessary and integral elements of a subsequent federal offense."[204] According to Judge Bye, *Mendoza-Lopez* would control because the earlier uncounseled convictions were essential to a claim under § 117 and thus, under *Mendoza-Lopez*, they could not be relied upon in making the case.[205] Furthermore, Judge Bye found *Ant* persuasive because

197. *Id.* at 604.

198. *Id.*

199. *Id.*

200. *Id.* at 595.

201. *Id.* at 605; *see also* State v. Spotted Eagle, 71 P.3d 1239, 1245-46 (Mont. 2003) (holding that Spotted Eagle's prior convictions for drunk driving in tribal court were valid at their inception under the ICRA and that due to comity, ICRA, and "deference to tribal sovereignty," the prior convictions could be used to enhance the state DUI to a felony).

202. *Cavanaugh*, 643 F.3d at 605.

203. *Id.* at 607 (Bye, J., dissenting).

204. *Id.*

205. *Id.* (citing United States v. Mendoza-Lopez, 481 U.S. 828, 833 (1987)).

it was crucial that the uncounseled conviction was used to prove an element of the subsequent federal offense.[206]

Despite the exhaustive Sixth Amendment analysis, the Eighth Circuit concluded Cavanaugh's prior convictions involved no constitutional violations because they were entered in tribal court where appointed counsel is not mandated.[207] Furthermore, the Eighth Circuit did not "believe [it was] free to preclude use of the prior conviction merely because it *would have been* invalid had it arisen from a state or federal court."[208] The court specifically held "in the absence of any other allegations of irregularities or claims of actual innocence surrounding the prior conviction," the prior conviction may be used in subsequent proceedings in the "absence of an actual constitutional violation."[209] It would appear if Cavanaugh had made claims of actual innocence or irregularities in the tribal court proceedings, the Eighth Circuit might have been willing to give greater weight to the absence of the Sixth Amendment protection and perhaps deny use of the convictions.[210]

Thus, while the *Ant* court would not allow the uncounseled tribal court conviction because it would have been invalid if entered in a federal or state court, the *Cavanaugh* court allowed the earlier convictions because there was no actual constitutional violation. The Tenth Circuit in *Shavanaux* follows a similar path of reasoning as the *Cavanaugh* court, but does not engage in any analysis of the Sixth Amendment because, in its opinion, it is a moot point.

C. United States v. Shavanaux*: The Sixth Amendment Does Not Apply to Tribal Courts, So There Was No Violation in the First Instance*

Shavanaux, a Ute Tribe member, was charged, like Cavanaugh, under the habitual offender statute for domestic assault.[211] He had already been convicted in tribal court twice for assaulting his domestic partner.[212] In his prior two convictions, Shavanaux had a lay advocate present in court but he

206. *Id.*

207. *Id.* at 603-04 (majority opinion).

208. *Id.* at 604.

209. *Id.* at 605.

210. *See id.* The Eighth Circuit also dismissed Cavanaugh's equal protection claim because distinctions based on tribal affiliations are not race based, and he did not fully argue his equal protection claim, giving the court no opportunity to fully analyze the issue. *See id.* at 605-06.

211. United States v. Shavanaux, 647 F.3d 993, 995 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012).

212. *Id.* at 996.

did not have the benefit of legal counsel.[213] In district court, Shavanaux moved to dismiss the charge, arguing the Sixth Amendment and Due Process Clause did not allow the use of his two prior uncounseled tribal convictions to meet the habitual offender statute requirements.[214] The district judge, relying heavily on the district court's analysis in *Cavanaugh*, found that although the uncounseled convictions did not violate the ICRA or the United States Constitution, the use of those convictions in the habitual offender statue would violate the Sixth Amendment.[215]

The issue before the Tenth Circuit was whether the use of the tribal convictions in a subsequent habitual offender prosecution would violate the Sixth Amendment.[216] As in *Ant*, the Tenth Circuit began its analysis with an examination of tribal independence.[217] Citing *Talton*, the court found the Sixth Amendment does not apply to the tribes because they are separate, independent political communities.[218] The court concluded: "Because the Bill of Rights does not constrain Indian tribes, Shavanaux's prior uncounseled tribal convictions could not violate the Sixth Amendment."[219]

Unlike the Eighth Circuit, the Tenth Circuit stated it was in direct conflict with *Ant*, but that *Ant* was distinguishable because *Ant* overlooked the *Talton* line of cases that held Indian tribes were sovereign and outside the scope of the Bill of Rights.[220] For that reason, the court explained, "*Ant's* threshold determination — that an uncounseled tribal conviction is constitutionally infirm" — was incorrect and the *Ant* court's reliance on *Burgett* was wrong.[221] The court reasoned, because the Bill of Rights did not apply to the tribes, the Sixth Amendment could not be violated "anew" because it "was never violated in the first instance." [222] The court concluded that the use of the prior uncounseled convictions was permissible in a habitual offender statute.[223] Interestingly, since the court held the Sixth Amendment was never violated in the first instance and thus could not be violated anew, the court stated it likewise found the Eighth Circuit's

213. *Id.*
214. *Id.*
215. Order and Memorandum Decision at 1-2, United States v. Shavanaux, No. 2:10 CR 234 TC, 2010 WL 4038839, at *1-2 (D. Utah 2010), *rev'd*, 647 F.3d 993 (10th Cir. 2011).
216. *Shavanaux*, 647 F.3d at 995.
217. *Id.* at 996-97.
218. *Id.* (citing Talton v. Mayes, 163 U.S. 376, 384, 386 (1896)).
219. *Id.* at 997.
220. *Id.* at 997-98.
221. *Id.* at 998.
222. *Id.*
223. *See id.*

analysis of the Supreme Court's jurisprudence on use of uncounseled convictions "unnecessary."[224] The Tenth Circuit concluded its Sixth Amendment analysis, reiterating:

> [B]ecause the Bill of Rights does not apply to Indian tribes, tribal convictions cannot violate the Sixth Amendment. Shavanux's convictions complied with ICRA's right to counsel provision . . . . Thus, use of Shavanaux's prior convictions in a prosecution under [the habitual offender statute] would not violate the Sixth Amendment, anew or otherwise.[225]

Following *Shavanaux*,[226] it is clear there is a split between the circuits about the use of uncounseled tribal court convictions in subsequent federal prosecutions. What is less clear, however, is which one, if any, of the circuit courts is correct.

IV. The Reliability Concerns Underlying Uncounseled Convictions Are More Acute with Tribal Convictions, and Federal Courts Should Carefully Consider Whether Uncounseled Tribal Convictions Should Be Allowed in Federal Courts

Before analyzing *Ant*, *Cavanaugh*, and *Shavanaux* it is important to note the areas in which the opinions are in agreement. First, all of the circuit courts found that the Bill of Rights does not apply to the Indian Tribes, and second, the verdicts are valid in tribal court. The circuit courts correctly applied the Supreme Court's decision in *Talton*, among other cases, in reaching the decision that the Bill of Rights does not apply, and the convictions are valid in the tribal court.

The greatest differences between the three circuits include: (1) In *Cavanaugh* and *Shavanaux,* the courts focused on how the failure to appoint counsel was not an actual violation; but, *Ant* focused on the fact it *would have been* an actual violation if *first entered in federal court*; and (2) while *Cavanaugh* examined the reliability issue as it pertained to the Supreme Court's jurisprudence of the Sixth Amendment, *Shavanaux* completely dismissed this concern, and *Ant* only tangentially examined

224. *Id.* at 998 n.5.

225. *Id.* at 998 (citations omitted).

226. The Tenth Circuit also dismissed Shavanaux's due process claims holding, "tribal convictions obtained in compliance with ICRA are necessarily compatible with due process of law." *Id.* at 1000. Additionally, the Tenth Circuit dismissed the equal protection argument because Congress had a rational basis for enacting the habitual offender statute due to the rates of abuse of Indian women. *Id.* at 1002.

reliability. The analysis of the cases will demonstrate that the *real* question is whether the valid, yet uncounseled, convictions should be allowed in federal court in light of the Supreme Court's strong jurisprudence concerning the fundamental importance of the Sixth Amendment right to counsel.

A. Valid Uncounseled Convictions May Be Used in Subsequent Trials

It is clear that uncounseled misdemeanor convictions, where the person was not sentenced to a term of incarceration, may be used to enhance the penalty or as predicate elements for a subsequent offense.[227] If there was not actual imprisonment, then under *Scott,* there was not any violation of the Sixth Amendment and the conviction may also be used to support enhancement.[228] The main rationale behind allowing use of the uncounseled convictions to enhance a sentence is the fact that the defendant is punished for the current crime rather than for the earlier conviction(s).[229] Additionally, any concern the court may have over reliability is tolerable when there is no deprivation of liberty.[230] Thus, following *Nichols*, the use of uncounseled misdemeanor convictions in subsequent trials seems somewhat clear.[231] The Ninth Circuit, in *Ant*, did not have the benefit of the twenty-plus years of jurisprudence as did the *Cavanaugh* and *Shavanaux* courts.

The *Ant* court mainly based its decision to not use uncounseled pleas on *Baldasar v. Illinois*.[232] However, roughly five years after *Ant*, the Supreme Court overturned *Baldasar* in *Nichols*.[233] Thus, although the Ninth Circuit did not know it at the time (because perhaps they should have anticipated *Baldasar* would not stand, considering it was a *per curiam* opinion with three separate concurrences), relying on *Baldasar* seriously undermined the soundness of the *Ant* decision. But, there is one distinction that is important to point out.

In *Nichols,* the Court allowed the use of an uncounseled misdemeanor conviction where the defendant was not sentenced to incarceration.[234] In Ant's case, as in *Cavanaugh* and *Shavanaux*, the defendant was

227. *See* Nichols v. United States, 511 U.S. 738, 748-49 (1994).
228. *Id.* at 746-47.
229. *Id.* at 747.
230. *See* Scott v. Illinois, 440 U.S. 367, 372-74 (1979).
231. *See* discussion *supra* Part II.B.1.
232. *See generally* United States v. Ant, 882 F.2d 1389, 1393-96 (1989).
233. *Nichols*, 511 U.S. at 748-49.
234. *Id.* at 749.

incarcerated in tribal jail. Thus, it begs the question: Is the Ninth Circuit's ruling still valid, even though based on *Baldasar,* because Ant was incarcerated? The answer would appear to be no.

As the Tenth Circuit points out in *Lonjose*, the key inquiry in *Nichols* is whether the conviction was valid at its inception.[235] In *Ant*, *Cavanaugh*, and *Shavanaux* the initial tribal convictions were valid; not even the *Ant* court disputes their validity. Additionally, in *Lonjose*, the court points out some "confusion" within the Ninth Circuit on whether valid uncounseled convictions may be used in subsequent trials.[236] Thus, it appears the Ninth Circuit is not in the majority in prohibiting the tribal court convictions. Although there may be more liberal rules of admissibility during sentencing, the Supreme Court does not appear troubled by that fact; instead, the Court seemingly lumps both sentence enhancement and recidivism statutes together, and does not draw any distinction between the two with regard to the use of uncounseled, but valid, convictions.[237] Furthermore, the permissibility of using uncounseled tribal court convictions becomes even stronger when coupled with the fact that the Sixth Amendment does not apply to the tribes.

B. The Sixth Amendment Right to Counsel Is Not Applicable to the Tribes in the Same Way It Is Applicable to the States or the Federal Government

Both *Cavanaugh* and *Shavanaux* base their holdings on the fact that the convictions were valid in tribal court where, under the ICRA, there is no requirement for the appointment of counsel when the defendant is not sentenced to more than a year of incarceration.[238] The *Ant* court, on the other hand, based its holding on the fact that the conviction would have been unconstitutional if rendered originally in federal court.[239]

Congress extended a certain number of rights to the Indians through the ICRA, as noted *supra.* Although most of those rights were mirror images of the first ten amendments, the Sixth Amendment right to appointed

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235. *See* United States v. Lonjose, 42 F. App'x 177, 181 (10th Cir. 2002).

236. *Id.* at 182 (comparing United States v. Brady, 928 F.2d 844, 854 (9th Cir. 1991); United States v. Hookano, 957 F.2d 714, 716 (9th Cir. 1992); United States v. Devine, No. 95-30014, 1996 WL 5339, at *1 (9th Cir. Jan. 5, 1996), with United States v. Smith, No. 93-30435, 1994 WL 424659, at *1 (9th Cir. Aug. 15, 1994); United States v. Early, No. 94-10543, 1996 WL 337206, at *2 (9th Cir. June 18, 1996)).

237. *See Nichols*, 511 U.S. at 746-48.

238. United States v. Cavanaugh, 643 F.3d 592, 604-05 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012); United States v. Shavanaux, 647 F.3d 993, 998 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012); 25 U.S.C. §§ 1302(a)(6) (2006).

239. United States v. Ant, 882 F.2d 1389, 1396 (9th Cir. 1989).

counsel in cases where the person was going to be sentenced to incarceration was curtailed.[240]

The *Ant* court relied on *Burgett*, which reasoned that the use of uncounseled tribal conviction would violate "anew" the Sixth Amendment.[241] It is important to note *Burgett* dealt with the use of uncounseled state court convictions and as the Supreme Court noted the "right to counsel guaranteed by the Sixth Amendment was applicable *to the States* by virtue of the Fourteenth [Amendment] . . . ."[242] As the court in *Cavanaugh* ultimately concluded,[243] and the *Shavanaux* court stated, "[u]se of tribal convictions in a subsequent prosecution cannot violate 'anew' the Sixth Amendment because the Sixth Amendment was never violated in the first instance."[244] Although it may appear simplistic, and simplicity may be confused with lack of foundation, it would be impossible to say Ant, Cavanaugh, or Shavanaux's Sixth Amendment rights were violated by the use of the uncounseled tribal court convictions. The reason there was no violation was because the Sixth Amendment does not apply to the tribes and thus was never violated in the first place.

As was noted *supra*, the Sixth Amendment does not apply in tribal courts the same way it does in federal or state court. The ICRA extended the Sixth Amendment right to counsel only so far as to require the tribal courts to accept the attorney hired by the defendant, but the ICRA does not require the tribal courts to appoint an attorney for the defendant if they cannot afford one.[245]

Therefore, the fact remains that the convictions were valid in the first instance. The *Cavanaugh* and *Shavanaux* courts rested their decision on this fact.[246] This analysis, however, was rather bare. A fuller analysis would have examined whether these convictions obtained without the "guiding hand of counsel,"[247] although valid in tribal court, were reliable enough to be used in federal court without eroding the principle of *Gideon*.[248]

240. 25 U.S.C. § 1032(a)(6).
241. Burgett v. Texas, 389 U.S. 109, 115 (1967); *Ant*, 882 F.2d at 1393.
242. *Burgett*, 389 U.S. at 114 (emphasis added).
243. *Cavanaugh*, 643 F.3d at 603-04.
244. United States v. Shavanux, 647 F.3d 993, 998 (10th Cir. 2011) (citations omitted).
245. 25 U.S.C. § 1302(a)(6).
246. *Cavanaugh*, 643 F.3d at 603-04; *Shavanaux*, 647 F.3d at 999-1000.
247. *See* Powell v. Alabama, 287 U.S. 45, 69 (1932).
248. *See* Burgett v. Texas, 389 U.S. 109, 115 (1967).

C. Valid Tribal Court Convictions May Not Be Reliable Enough for Use in Federal Court

The concern in allowing uncounseled convictions is reliability, because the defendants did not have the experience or education to adequately represent themselves.[249] In *Gideon,* the Court was concerned that a person "who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[250] In *Argersinger* the Court commented, "[a]ssistance of counsel is often a requisite to the very existence of a fair trial."[251] In essence, a trial is reliable when it is fair, and a trial is fair when the defendant has counsel to guide him through the process.

In fact, the "key Sixth Amendment inquiry [is] whether the adjudication of guilt . . . is sufficiently reliable to permit incarceration."[252] Neither Ant, nor Cavanaugh, nor Shavanaux were afforded the protection that counsel would have provided.[253] They were brought before the local tribal judge, tried, and sentenced.[254] But, "[c]ounsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution."[255] It is possible, although not reflected in the record, that none of the defendants in these cases had any idea that the conviction they received could eventually be used against them outside of the tribal justice system and result in a much larger sentence than they would receive in tribal court. Therefore, the issue once again is with the reliability of the tribal convictions.

Beyond the technical importance of counsel, the capacity of the tribal court system is instructive in examining the reliability of their convictions. In fiscal year 2010, the 184 tribes with court systems received only $24.7

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249. *See* Linkletter v. Walker, 381 U.S. 618, 639 n.20 (1965) ("In Gideon v. Wainwright . . . we recognized a fundamental fact that a layman, no matter how intelligent, could not possibly further his claims of innocence and violation of previously declared rights adequately. Because of this the judgment lacked reliability.").

250. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

251. Argersinger v. Hamlin, 407 U.S. 25, 31 (1972).

252. Alabama v. Shelton, 535 U.S. 654, 667 (2002).

253. *See* United States v. Ant, 882 F.2d 1389, 1392 (9th Cir. 1989); United States v. Cavanaugh, 643 F.3d 592, 593-94 (8th Cir. 2011), *cert. denied,* 132 S. Ct. 1542 (2012); United States v. Shavanaux, 647 F.3d 993, 995-96 (10th Cir. 2011), *cert. denied,* 132 S. Ct. 1742 (2012).

254. *See Ant,* 882 F.2d at 1392; *Cavanaugh,* 643 F.3d at 593-93; *Shavanaux,* 647 F.3d at 995-96.

255. *Argersinger,* 407 U.S. at 34.

million in federal funding,[256] whereas federal courts received $6.8 billion in the same fiscal period.[257] In light of the Court's concern in *Argersinger* about the reliability of "assembly-line justice" resulting from an overworked court system,[258] it stands to reason that the concerns the Court had in *Argersinger* are magnified in a court system as poorly funded as the tribal court system. Even Chief Judge Erickson of the District of North Dakota in his opinion in *Cavanaugh* found tribal courts "provid[e] uneven legal services, at best."[259] Taken together with the reliability concerns the Supreme Court has continuously articulated, it seems more than a little disingenuous to hold that an uncounseled tribal court conviction does not violate the Sixth Amendment simply because it was *valid at its inception.* The tribal court decision may be valid. But validity is not equivalent to reliability, and reliability is the true feature of any Sixth Amendment analysis.[260]

Be that as it may, when reviewing Indian matters, federal courts have the responsibility to respect the "special customs and practical limitations of tribal court systems."[261] Respecting these "special customs and practical limitations" of tribal courts does not mean federal courts are required to accept the judgments of those courts.[262] Thus, the question becomes whether the convictions obtained without the "guiding hand of counsel," which result in incarceration, should be allowed through the United States' constitutional filter.[263]

Although not fully discussed in relation to the Sixth Amendment in any of the majority opinions, the doctrine of comity should have been examined by the circuit courts because of the significance placed on the right to

256. *Interior, Environment, and Related Agencies Appropriations for 2012*, 112th Cong. (2011) (statement of Elbridge Coochise, Independent Review Team on Tribal Courts), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg66982/html/CHRG-112hhrg66982.htm.

257. GARRETT HATCH, CONG. RESEARCH SERV., R 42008, FINANCIAL SERVICES AND GENERAL GOVERNMENT: FY2012 APPROPRIATIONS 2 (2011).

258. *See Argersinger*, 407 U.S. at 35-36.

259. *Cavanaugh II*, 680 F. Supp. 2d 1062, 1072 (D.N.D. 2009), *rev'd*, 643 F.3d 592 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012).

260. *See* Alabama v. Shelton, 535 U.S. 654, 667 (2002) ("We think it plain that a hearing so timed and structured cannot compensate for the absence of trial counsel, for it does not even address the key Sixth Amendment inquiry: whether the adjudication of guilt corresponding to the prison sentence is sufficiently reliable to permit incarceration.").

261. Wilson v. Marchington, 127 F.3d 805, 811 (1997).

262. *Id.*

263. *See supra* text accompanying note 247.

counsel.[264] A more developed discussion of the principles of comity in relation to the Sixth Amendment would have served to better anchor the holdings in each of the cases. Comity provides a framework to decide whether the convictions should be allowed through our constitutional filter.

D. Comity Provides a Strong Analytical Framework to Decide Whether Uncounseled Tribal Court Convictions Should Be Allowed in the United States Judicial System

In his dissent, Judge Bye wrote, "[t]he district court correctly observed, '[t]he issue before the Court is not to question the validity of the tribal court proceedings or question the tribal justice system, but instead to evaluate whether the convictions satisfy the constitutional requirements for use in a federal prosecution in federal court.'"[265] Comity provides only one avenue for this examination.

In the three principal cases in this Note, there is no question about the impartiality of the tribes or of proper jurisdiction — the usual reasons to not extend comity to a foreign judgment. The decision not to extend comity to a foreign judgment may also be based on public policy,[266] and the inability of a defendant to obtain counsel is a policy reason not to extend comity.[267] The United States, however, "should deny recognition based on internal public policy only where a violation is so severe as to interfere with the ability of the country to maintain its legal culture."[268]

The importance of the right to counsel as an overriding factor is an integral part of our "legal culture," and thus a reason not to allow the tribal court convictions, as directly discussed by *Ant*.[269] A more developed discussion of the importance of the right to counsel by all the circuit courts might have led to a conclusion that the right to counsel is an incredibly essential right in our system of justice. To allow a judgment entered in

264. *See* Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963).

265. United States v. Cavanaugh, 643 F.3d 592, 607 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012) (Bye, J., dissenting) (quoting *Cavanaugh II*, 680 F. Supp. 2d 1062, 1075 (D.N.D. 2009)).

266. *See* Vest, *supra* note 112, at 804.

267. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 482 (1987). Interestingly, the *Shavanaux* court somewhat examines comity in its discussion of due process, but rejects any argument to not recognize the judgment on that ground because Shavanaux's conviction did not violate either of the Restatement's two mandatory factors. The court never considers the public policy exception. United States v. Shavanaux, 647 F.3d 993, 999 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012).

268. *See* Vest, *supra* note 112, at 820.

269. *See* United States v. Ant, 882 F.2d 1389, 1393-94 (1989).

federal court without counsel to go forward would contravene the public policy of the United States.

To support the decision not to allow the uncounseled convictions or pleas, the courts need only look to the Supreme Court's jurisprudence of the Sixth Amendment. For example, in *Johnson v. Zerbst* the Supreme Court explained that the assistance of counsel "is one of the safeguards of the Sixth Amendment deemed necessary to insure *fundamental human rights of life and liberty* . . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'"[270] Additionally and perhaps most persuasive, is the Court's admission:

> The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.[271]

Consequently, the question *really* is whether the courts should allow the uncounseled convictions from tribal courts to be used in subsequent prosecutions, even though they may be valid at their inception. As this Note has demonstrated, the Supreme Court has long held that the assistance of counsel is fundamental to our justice system and convictions obtained without the presence of counsel or a valid waiver of counsel should be viewed with suspicion.[272] Thus, uncounseled tribal convictions must not be allowed in subsequent federal cases.

Additional support for the importance of the assistance of counsel can be found in the prevalence of the right to counsel throughout the United States. As of 2009, "forty-six states provide counsel in all, or virtually all, criminal cases."[273] In fact, many of the states provide more protection than the United States Constitution demands.[274]

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270. Johnson v. Zerbst, 304 U.S. 458, 462 (1938) (emphasis added).

271. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

272. *See supra* note 27 and accompanying text.

273. *See* Paul Marcus, *Why the United States Supreme Court Got Some (But Not a Lot) of the Sixth Amendment Right to Counsel Analysis Right*, 21 ST. THOMAS L. REV. 142, 164 (2009).

274. *Id.* at 149-151, 150 n.68 (citing state statutes from California, New York, North Carolina, Vermont, and Idaho all which give broader right to counsel protections).

Furthermore, recognizing the importance of the constitutional right to counsel, and thereby denying recognition to foreign judgments obtained without the protection of that right, is in line with current trends. For example, in 2010, the Securing the Protection of our Enduring and Established Constitutional Heritage Act (SPEECH Act) was signed into law.[275] The act prohibits state and federal courts from enforcing foreign judgments for defamation unless they are consistent with the United States Constitution and other federal laws.[276] With the passage of the SPEECH Act, Congress signaled the importance of the First Amendment in American life.[277]

Taking into account the strong emphasis the Court places on the right to counsel as fundamental to life and liberty, the reliability concerns associated with uncounseled convictions generally, and the specific concerns related to uncounseled tribal convictions' reliability, the right to counsel seems particularly proper for the invocation of the public policy exception to the doctrine of comity.

Finally, invocation of comity would not be disparaging to the tribal courts.[278] Instead, as the Eighth Circuit explains, "[p]recluding the use of an uncounseled tribal conviction in federal court would in no matter restrict a tribe's own use of that conviction; it would simply restrict a federal court's ability to impose additional punishment at a later date in reliance on that earlier conviction."[279] Furthermore, as the *Ant* court points out, the courts utilizing the comity approach would not be reviewing the tribal court proceedings and the validity of the conviction in tribal court. The courts would only be holding the convictions did not meet the standards of the United States Constitution for use in a subsequent trial.[280] Ergo, not allowing the uncounseled convictions into federal court would not be disparaging to the tribal courts nor impose on the tribes additional burdens they may not have the capacity to handle.

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275. 28 U.S.C. §§ 4101-4105 (Supp. IV 2010); EMILY C. BARBOUR, CONG. RESEARCH SERV., R 41417, THE SPEECH ACT: THE FEDERAL RESPONSE TO "LIBEL TOURISM" Summary (2010).

276. BARBOUR, *supra* note 275, at summary.

277. *Id.* at 14.

278. *See* United States v. Ant, 882 F.2d 1389, 1395-96 (9th Cir. 1989); State v. Spotted Eagle, 71 P.3d 1239, 1245 (Mont. 2003).

279. United States v. Cavanaugh, 643 F.3d 592, 605 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012).

280. *Ant*, 882 F.2d at 1396.

V. Conclusion

The Eighth and Tenth Circuits' decisions seem to comport with the letter of the law in that a conviction valid at its inception can be used in a subsequent trial, and the Ninth Circuit's holding seems anachronistic in light of the Supreme Court's evolving Sixth Amendment jurisprudence. However, the Eighth and Tenth Circuits completely overlook the importance of the right to counsel in our system of justice, preferring instead to rely on the technical validity of the conviction at the expense of the reliability of the conviction.[281] Never fully addressing the reliability concerns inherent in an uncounseled conviction, the Ninth Circuit withheld the use of the conviction because if originally entered in United States courts, it would have been invalid.[282]

In light of the Supreme Court's traditional concern for reliability, a better question to ask is whether, even though valid, the tribal convictions are sufficiently reliable for use in subsequent federal trials and should be allowed through our constitutional filter.[283] In light of the importance of the right to counsel and reliability of convictions, by using the doctrine of comity, courts would be more than justified in denying the admission of tribal court judgments in subsequent federal trials on public policy grounds. After all, allowing the use of uncounseled convictions in subsequent trials is a "classic example of how a rule eroding the procedural rights of a criminal defendant on trial for his life or liberty can assume avalanche proportions, burying beneath it the integrity of the fact-finding process."[284]

Some may argue, as important as the right to counsel may be considered by the courts, perhaps deciding whether to extend federal recognition to tribal convictions obtained without counsel is a task best left to Congress. After all, Congress passed the ICRA, without extending the necessary

281. *Cavanaugh*, 643 F.3d at 603-04; United States v. Shavanaux, 647 F.3d 993, 998 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012).

282. *Ant*, 882 F.2d at 1394.

283. Although the main scope of this paper is about whether uncounseled tribal court convictions should be allowed in subsequent federal trials, an equally important and related point concerns the possible "silver platter" cooperation between the tribal police, tribal court systems, and federal law enforcement. There is no current indication that tribal law enforcement cooperates with federal authorities by getting a quick conviction in tribal court — without the benefit of counsel — and then delivering the tribal conviction to the federal authorities on a silver platter to utilize under the habitual offender statutes, which carry significantly more jail time. The failure to provide the assistance of counsel protection in tribal court enables this silver platter cooperation. For an example of cooperation between state and federal authorities, see Elkins v. United States, 364 U.S. 206 (1960).

284. Burgett v. Texas, 389 U.S. 109, 117 (1967) (Warren, C.J., concurring).

appointment of counsel for indigent defendants in tribal courts because tribal courts did not have the necessary capacity. On the other hand, Congress has recently extended the ability of tribal courts to impose longer sentences, provided defendants who cannot afford counsel are appointed counsel. Thus, perhaps the tribal courts now have the necessary capacity, and it is time to make sure the right to counsel is extended in all cases in which a defendant is incarcerated.

As long as federal prosecutors continue to utilize the habitual offender statutes, the courts will have to decide whether to place more importance on technical validity or reliable validity. In any event, the courts should not forget the importance of the right to counsel and the liberty interests it protects. Using comity to filter out uncounseled tribal court convictions that resulted in incarceration would not disparage the tribal courts. Instead, it will simply underline the importance of the right to counsel in the United States and not further "erode the principle of [*Gideon*]."[285]

285. *Id.* at 115 (majority opinion).