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Montana Standard interviews Barbara Creel on the Violence Against Women Act and Double Standards

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AND

https://missoulian.com/news/state-and-regional/law-to-fight-domestic-violence-in-indian-country-at-stake/article_1a5a9923-8820-5143-8b97-7859e3bbff9a.html

Law to fight domestic violence in Indian Country at stake in Montana case before Supreme Court

By Jayme Fraser

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Attorney Steven Babcock (left) will be arguing on behalf of Michael Bryant Jr. (right) in the case before the U.S. Supreme Court Tuesday. Photo: Casey Page, for The Montana Standard

Michael Bryant Jr. choked, bit, beat, kicked, pulled hair, threw women to the floor, and hit them over the head with a bottle.

Despite admitting to multiple assaults during misdemeanor prosecutions in Northern Cheyenne Tribal Court, Bryant's 2011 federal habitual-offender conviction was reversed in a Ninth Circuit decision that will be argued before the Supreme Court of the United States on Tuesday. The case could have significant implications for

prosecuting domestic violence in Indian Country, the rights of American Indian defendants in U.S. courts, and whether tribal convictions can later be used in federal prosecutions.

“It will have a lasting impact on Indian communities, on women and children and families, and on public safety,” U.S. Attorney for Montana Mike Cotter said. “It’s important because Congress enacted Section 117 to fill a void.”

Section 117 refers to a segment of the Violence Against Women Act that allows tribal convictions to count toward the number of domestic assault offenses required to be charged as a felony habitual offender.

Along with other provisions, the law is widely regarded as an important tool to fight domestic violence on American Indian reservations, where cracks had long existed in the criminal jurisdiction shared between tribal, federal and sometimes state authorities.

Federal prosecutors have a mixed record of taking up cases from Indian Country. Until 2010, tribal courts could only impose sentences of up to one year regardless of the crime’s severity and were limited to handling misdemeanor offenses. Today some tribes can issue sentences of up to three years, or nine years under limited circumstances. Since 1978, tribes also have not had jurisdiction to prosecute non-Indians for on-reservation crimes.

That meant many domestic abusers quickly returned to the community and reoffended again and again, like Bryant, with little legal recourse available to victims. The U.S. Centers for Disease Control and Prevention have estimated that 46 percent of American Indian women have experienced violence or been raped or stalked by an intimate partner, more than double the rate of all other races.

Updates to the Violence Against Women Act also allowed tribes to prosecute non-Indians for a narrow list of crimes against some women so long as the courts met rules outlined in the legislation designed to guarantee Constitution-style protections, such as paying for the legal counsel of non-Indian defendants who cannot afford their own attorney.

The requirement for U.S. courts to provide legal counsel to poor adult defendants facing felonies in state court was recognized as an extension of the Constitutional right to due process by the Supreme Court in the unanimous 1963 opinion *Gideon v. Wainwright*. In several more rulings over the next decade, that right was expanded to additional types of crime, to children, and to other stages of the judicial process.

Tribal governments pre-date the U.S. Constitution and the Bill of Rights. Unless specified by Congress, the principles of the foundational American documents do not apply to tribes. Federal leaders approved the Indian Civil Rights Act of 1968 to outline protections for defendants in tribal courts. The accused have a right to counsel under the legislation, but only at their own expense. Although some tribes do pay for indigent defense, others do not.

There, at the intersection of American and Indian law, lies the core question of the Bryant case: Can a federal court recognize tribal convictions from cases where defendants did not have legal counsel? Congress says yes. So did the judges of the Eighth and Tenth Circuit Courts. The Ninth Circuit, however, disagreed in a 2014 opinion on the Bryant case.

“Tribal court convictions may be used in subsequent prosecutions only if the tribal court guarantees a right to counsel that is, at minimum, coextensive with the Sixth Amendment right,” wrote the justices. “Because the defendant’s tribal court domestic abuse convictions would have violated the Sixth Amendment had they been obtained in federal or state court, the panel concluded that it was constitutionally impermissible to use them.”

Steven Babcock, the federal defender representing Bryant, echoed the circuit justices.

“We are not challenging the Constitutionality of the tribal court convictions,” he said. “We’re dealing with the usage of them in a subsequent federal proceeding where the Sixth Amendment clearly applies.”

John Robinson, who served as a justice on the Northern Cheyenne Court for 15 years, disagreed.

“The issue appears to challenge the criminal justice system in Indian Country,” he said. “It seems they are saying individuals are not competent to plead to certain issues unless they have a legal interpreter whose job is to accept the admission then attempt to plead it out to a lower offense.”

Justice Paul Watford, who wrote that he felt pushed to the majority opinion by existing case law, agreed the ruling might be interpreted more broadly.

“The implication is that, if the defendant lacks counsel, tribal courts are inherently suspect and unworthy of the federal courts’ respect,” he wrote.

Some legal scholars wonder if the justices will leverage the case to opine on tangential topics such as tribal court sovereignty or the power of Congress in the trust relationship. Some wonder if the opinion will kickstart a new arc of rulings on the interplay of federal and tribal courts first created under the Violence Against Women Act or perhaps on the judicial rights of American Indians. At minimum, some legal scholars said the tone of the majority opinion in the Bryant case is likely to influence future Congressional legislation on criminal justice in Indian Country.

“The importance of the court’s decision will be what the court actually says in its opinion on the viability of tribal court convictions,” Michigan State Professor of Indigenous Law Matthew Fletcher said. “This case is going to serve as a footstool to future cases.”

Barbara Creel, Southwest Indian Law Clinic Director Professor at the University of New Mexico, agreed with Babcock that the case was not about tribal sovereignty.

Yet she said the case reveals inequities in the criminal justice system of tribes created when Congress told them how to structure their governments under the Indian Reorganization Act but did not provide sufficient funding or additional legal protections to make those systems function as intended.

Additionally, in a brief she and colleagues filed to the court, Creel argues that the Violence Against Women Act creates a discriminatory double standard.

“When you drill down, you really do have a race problem saying it’s OK for Indians to have uncounseled convictions, and for non-Indians that would be a scourge. That’s inherently unfair,” she said.

Cotter said he had no issue using Bryant’s tribal convictions to charge him as a habitual offender.

“He is what the statute targeted,” he said. “He had admitted to domestic violence on numerous separate occasions in tribal court. He subjected his victims to violent and brutal attacks. This is admitted conduct.”

Bryant did not return a request for comment made through his attorney.

Cotter said the 2014 Bryant opinion had “a chilling effect” in the Ninth Circuit, where records show federal prosecutors had filed dozens of habitual offender charges before the ruling. Stretching from Arizona to Alaska, the nine-state region includes more tribal nations than any other.

The U.S. Department of Justice asked the Supreme Court of the United States to reconcile the conflicting decisions so that “that habitual domestic violence offenders with tribal court convictions are treated the same way ... no matter where they reside.”

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