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Supreme Court Brief interviews Creel

Barbara L. Creel

University of New Mexico - School of Law

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Justices Examine Right to Counsel in Indian Domestic Abuse Cases

By Marcia Coyle

Supreme Court Brief (Online)
April 13, 2016

For the second time this term, the U.S. Supreme Court will put tribal courts under its microscope, this time in a case pitting the right to counsel against an epidemic of domestic violence.

United States v. Bryant, to be argued April 19, and Dollar General v. Mississippi Band of Choctaw Indians, argued Dec. 7, are, in a sense, the flip side of each other. The former is a criminal case and the latter is a civil case. But they share a common theme: a vigorous defense of tribal sovereignty, including the progress made by tribal courts during the past decade.

Dollar General asks whether tribal courts can hear tort claims against non-Indians. At stake, the company and its supporters claim, is the willingness of corporations to do business with and invest in tribes—a key to tribal economic development.

The United States asks whether tribal court convictions can be used in subsequent federal domestic violence prosecutions when the Indian defendants had no right to counsel in the tribal courts. At stake, former and current federal prosecutors claim, is simply a matter of life or death.

Forty-six percent of Native American women report having experienced rape, physical violence and/or stalking by an intimate partner in their lifetime, said former North Dakota U.S. attorney Timothy Purdon, a partner at Robins Kaplan and co-chairman of the firm's American Indian Law & Policy group.

"Given the domestic violence problems we see on the reservations and loopholes that present themselves, if a U.S. attorney is not able to use those prior uncounseled convictions, he or she has to sit on their hands and tell the victim that she is not injured seriously enough to make it a federal crime," he added. "I don't want to live in a society that tells them that."

As separate sovereigns pre-existing the U.S. Constitution, tribes and tribal prosecutions are not governed by the Constitution. But Congress, through the Indian Civil Rights Act, has extended to tribal court defendants certain procedural safeguards, such as rights to due process, a speedy trial and trial by jury for certain offenses, among others. There is also a path to habeas review in federal courts.

However, Congress neither funded nor required a right to counsel for indigent Indian defendants in tribal courts when a sentence of less than a year is imposed. But the

Sixth Amendment guarantees counsel to non-Indians facing any length of incarceration in tribal courts.

In 2006, Congress responded to rampant domestic violence against Indian women by enacting *18 U.S.C. 117(a)*, known as Domestic Assault by An Habitual Offender. Under this provision, it is a federal crime for any person to "commit a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country" if the person "has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for" enumerated domestic violence offenses.

Michael Bryant Jr., a member of the Northern Cheyenne Tribe in Montana, pleaded guilty in tribal court on at least five occasions to committing domestic abuse in violation of the tribal code. He was sentenced to various terms of imprisonment never exceeding one year. All convictions were valid and complied with the Indian Civil Rights Act. His pattern was continuing in 2011 when federal and tribal authorities interviewed him about two recent assaults. He was indicted that year by a federal grand jury and charged with two counts of domestic assault by a habitual offender.

Bryant argued then and now that relying on his uncounseled misdemeanor convictions to satisfy the requirement of at least two separate prior convictions under the habitual-offender provision violates the Constitution. The U.S. Court of Appeals for the Ninth Circuit agreed, holding that it was "constitutionally impermissible" to use Bryant's uncounseled tribal-court convictions as predicate offenses under Section 117(a) because the tribal court had not "guaranteed a right to counsel that is coextensive with the Sixth Amendment right."

The appellate court's decision created a circuit split with the Eighth and Tenth circuits.

The United States and its supporters argue that the high court's precedents hold that if an uncounseled conviction did not violate the Sixth Amendment when it was obtained, it also does not violate the Sixth Amendment when it is used to prove a defendant's recidivist status in a prosecution for a subsequent offense. The Bill of Rights did not apply to Bryant's tribal convictions.

The National Congress of American Indians, supporting the government, urges the justices to respect the scope of the right to counsel in Indian Country as well as the reliability and fairness of tribal courts.

But in an amicus brief on behalf of herself and the Tribal Defender Network, Barbara Creel, director of the Southwest Indian Law clinic at the University of New Mexico School of Law, says the law designed to combat domestic violence in Indian country also guarantees that non-Indians in tribal courts have greater rights to due process and representation by counsel than do Indians charged with the same crimes and facing the same terms of incarceration.

"This constitutional injury to Indian people is especially grave in light of the fact that, statistically, non-Indians are far more likely to be the perpetrators of violence against

Indian women than are other Indians, and this was the primary problem Congress sought to address," she writes.

If tribal courts provided competent counsel to indigent Indian defendants, Creel said, "Then I would say, 'Prosecute all day long.' But [federal prosecutors] are trying to short-circuit that. They're saying because we have this epidemic, let's make it easier for everyone involved. That's against constitutional values and tribal values."

Creel asks the justices to hold that all persons facing incarceration must have the same protections in place. "That wouldn't apply the Constitution to tribes but it would disallow federal prosecutors from using uncounseled convictions."

Nothing prevents a tribe from establishing a public defender system, Robins Kaplan's Purdon said. "The solution here, looking forward, is more funding for tribal courts for their continued growth and eventually for public defenders being the norm."

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