

Tribal Court Authority After *Dollar General* and *Bryant*.

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Dollar General

- Background.
 - *Montana v. United States*, [450 U.S. 544](#) (1981).
 - *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, [554 U.S. 316](#) (2008).
 - *Dollar General v. Miss. Band of Choctaw Indians*, [732 F.3d 409](#) (5th Cir. 2013).
 - SCOTUS *per curium* decision.
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Montana v. United States, 450 U.S. 544 (1981)

- The Crow Tribe sought to regulate the conduct of non-Indians hunting and fishing on non-tribal land located within their Reservation in Montana, including on the Bighorn River.
 - The 9th Circuit largely affirmed the Tribe's jurisdiction.
 - The U.S. Supreme Court granted cert. and reversed, establishing a two prong test for the assessment of Tribal jurisdiction over non-members conduct – which became known as “the Montana Test.”
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Underpinnings of the Montana Test

- “Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”
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The Montana Test

- Tribes lack civil authority over non-member conduct on fee lands within their territories, unless:
 - 1) nonmember enters into a consensual relationship with the tribe that subjects them to the tribe's jurisdiction; or
 - 2) conduct of nonmember threaten the political integrity, economic security, or health/welfare of the tribe.

Montana v. U.S., 450 U.S. 544 (1981).

Plains Commerce Bank, 554 U.S. 316 (2008)

- Plaintiff, a non-Indian bank, sold land it owned in fee simple on a tribal reservation to non-Indians. An Indian couple who had been leasing the land with an option to purchase, sued the bank in tribal court, contending the Bank discriminated against them by selling the land to nonmembers of the Tribe on terms more favorable than the Bank offered to sell it to them.
 - The district court and Eighth Circuit found that tribal jurisdiction was proper under Montana's "consensual relationship" exception, holding that the Tribe had authority to regulate the business conduct of persons voluntarily dealing with tribal members, including a nonmember's sale of fee land.
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Plains Commerce Bank

- The Supreme Court reversed, holding that *Montana* does not permit Indian tribes to regulate the sale of non-Indian fee land.
- *Montana* and its progeny permit tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests. *Montana* expressly limits its first exception to the "activities of nonmembers," to the extent necessary "to protect tribal self-government [and] to control internal relations,"

Plains Commerce Bank

- In distinguishing between "sale of the land and conduct on it," the Court acknowledged that certain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight. While tribes generally have no interest in regulating the conduct of nonmembers, then, they may regulate nonmember behavior that implicates tribal governance and internal relations.

Dollar General: Facts

- DG operates a store on the Tribes reservation on land held by the United States in trust for the Mississippi Band of Choctaw Indians, and operates pursuant to a lease agreement with the Tribe and a business license issued by the Tribe.
- Under the lease, the Tribal Court was the exclusive venue for disputes related to the lease.
- DG Manager participated in Tribe's Youth Opportunity Program.
- In the spring of 2003, John Doe, a thirteen-year-old tribe member, was assigned to the Dollar General store under this program.
- Doe alleges that Townsend sexually molested him while he was working at the Dollar General store.

Dollar General: Procedural Background

- Plaintiffs filed suit in 2005 and Tribal Court found that it had jurisdiction under both prongs of the *Montana* test.
- DG appealed to the Tribal Supreme Court, which affirmed the Trial Court's jurisdiction.
- In 2008, DG brought action in federal district court challenging the assertion of tribal court jurisdiction over a non-Indian (a federal question). District Court granted Tribe's motion for summary judgment concluding that the Tribal Court had jurisdiction ([846 F.Supp.2d 646](#) (2011)).
- DG appealed to the 5th Circuit, which affirmed.

Dollar General v. Miss. Band of Choctaw Indians, 732 F.3d 409 (5th Cir. 2013)

The 5th Circuit's Holding: Tribal Court has jurisdiction to adjudicate the tort claim against DG under the “consensual relationship” prong of the *Montana* test.

- Nexus: Regulate conduct of DG to protect the safety of a minor member child's workplace.
 - Rejects DG argument that a Tribe's ability to regulate a consensual relationship is predicated on a specific relationship that implicates tribal governance and internal relations.
 - The Supreme Court granted cert.
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Dollar General

- Question Presented: Whether tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, including as a means of regulating the conduct of nonmembers who enter into a consensual relationship with the tribe or its members.
- Dollar General Corp. asked the Court to revisit the “*Montana* test.”

Per Curium Decision

- SCOTUS's willingness to revisit *Montana* generated uncertainty.
- Amici:
 - Petitioners: Oklahoma, Wyoming, Utah, Michigan, Arizona, Alabama, South Dakota Bankers Assoc., American Railroads.
 - Respondents: United States, Mississippi, Colorado, New Mexico, North Dakota, Oregon, Washington, NCAI, ACLU.

Per Curium Opinion

- Equally divided, SCOTUS issued its *per curium* opinion on June 23, 2016.
- Fifth Circuit's decision—and its interpretation of *Montana's* consensual relationship test—is affirmed and governs the Fifth Circuit.
- *Montana* remains law of the land.

Subsequent Proceedings

The Smith John Justice Center opened in 2007 and houses the Tribe's Department of Public Safety, which includes law enforcement, an adult detention center, youth justice center, and the wildlife and parks department.



It also houses the Tribal Courts, Choctaw Legal Defense, a satellite office for the Tribal Attorney General, and offices for a federal magistrate, U.S. Marshal, and U.S. Attorney.

Subsequent Proceedings

- The Choctaw Trial Courts consist of four separate courts: civil, criminal, youth, and the Itti-kana-ikbi (Peacemaker) courts. The Choctaw courts are courts of general jurisdiction. The Civil Court consists of two divisions—the Regular Civil Division and the Small Claims Division.
- The Mississippi Choctaw Tribal Code is comprehensive and contains 32 separate Titles. It includes the Criminal and Civil Rules of Procedure, Criminal Code, and various individual Titles governing such diverse topics as extradition, probate, foreign money judgments, and membership. The Tribe maintains a current version of the Choctaw Tribal Code on its website.

Subsequent Proceedings

- The Tribal Court currently consists of nine judges and 12 staff. Judges are not required to be law-trained, but there is a movement towards law-trained judges, as well as a longstanding prioritization of having Tribal members as judges. The Supreme Court consists of three Justices. The Chief Judge, who heads the Court overall, is not an attorney but has worked with the Court for 11 years. The two other Supreme Court Justices are attorneys and appear on an as-needed basis for appellate cases.
- The Court staff includes a Court Administrator, who has worked with the Court in various capacities for the past 14 years and has a two-year degree, 8 clerks (assigned to various dockets), and other essential staff, such as a dedicated process server and receptionist.

Subsequent Proceedings

- Active Court with civil, criminal and juvenile dockets and thousands of cases processed annually.

Practical Considerations

- Implications of a Per Curium decision.
- Lessons Learned from the facts of the case and the analysis. Consent provisions. Business licensing.
- 13 years since the alleged conduct and 8 years since the lawsuit was filed, what is the status of the tribal court case?

Tribal Court Authority After *United States v. Bryant*, 136 S. Ct. 1954 (2016)

Overview

- Facts of the Case
- Legal Bases for the Decision
- Underlying Bases for the Decision
- Practical Considerations

Essential Facts

- 18 U.S.C. s. 117(a): any person who commits domestic assault in Indian country and has two prior convictions for domestic violence in a federal, state, or tribal court commits a federal felony offense.
- Michael Bryant Jr., a Northern Cheyenne Tribe member, was convicted in tribal court of committing several misdemeanor acts of domestic violence.
- Because ICRA requires defendants to be represented by an attorney when the sentence imposed exceeds one year, 25 U.S.C. s. 1302(c), Bryant was not represented by an attorney.
- Based on the tribal court domestic violence convictions, the U.S. prosecuted Bryant on two counts of domestic assault by a habitual offender under 18 U.S.C. s. 117(a).

Question Presented

Can the U.S. use uncounseled tribal-court convictions—obtained in compliance with the Indian Civil Rights Act (ICRA)—to establish the prior-crimes predicate of section 117(a)?

Procedural Posture

- District Court denied the motion to dismiss; Bryant pled to a 46-month sentence, 3 year parole.
- The Ninth Circuit reversed and directed dismissal of the indictment.
 - The Eighth and Tenth Circuits found no Sixth Amendment violation.
- The Supreme Court granted *cert.* to resolve the circuit split.

Holding (Unanimous)

Because Bryant's tribal-court convictions did not violate the Sixth Amendment when obtained—as they complied with the ICRA and infringed no constitutional right given the well-established principle that tribes are not subject to the U.S. Constitution—they retain their validity when involved in a section 117(a) prosecution. *Bryant*, 139 S. Ct. at 1965.

Legal Bases

- As sovereigns pre-existing the Constitution, tribes are not subject to the Constitution's limitations on government authority. *Id.* at 1962, citing *Santa Clara*, [436 U.S. 49](#), 56 (1978).
- So, the Sixth Am. does not apply in tribal court proceedings. *Id.*, citing *Plains Commerce*, [554 U.S. 316](#), 337 (2008).

Legal Bases

- ICRA provides a range of procedural safeguards to tribal court defendants that are similar, but not coextensive with, the U.S. Bill of Rights. *Id.*
- If a tribal court imposes a sentence in excess of one year, ICRA requires the court to appoint a defense counsel to the defendant at the tribe's expense. *Id.*
- Because the tribal court did not sentence Bryant to a term of imprisonment that exceeded one year, Bryant's uncounseled convictions accorded with ICRA. *Id.* at 1965.

Legal Bases

- *Nichols*, 511 U.S. 738, 748-49 (1994):
Convictions that are valid when entered retain that status when invoked in subsequent proceedings.
- Because Bryant had no Sixth Am. right to counsel for his misdemeanor tribal court convictions, the use of those convictions in and of itself cannot violate the Sixth Am. anew.
Bryant, 136 S.Ct. at 1965.

Underlying Basis: Domestic Violence in Indian Country

- Bryant's record included over 100 convictions, including 5 for domestic violence.
- 46% of Native woman have been victims of domestic violence. *Id.* at 1959.
- Native women are 2.5 times more likely to be raped or sexually assaulted than women in the U.S. in general. *Id.*

Underlying Basis: Domestic Violence in Indian Country

- At the time s. 117(a) was passed, ICRA limited sentencing authority to 1 yr. *Id.* at 1960.
Now, sentencing authority is 3 yrs., conditioned on tribes providing certain procedural safeguards, including public defender.
- “States are unable or unwilling to fill enforcement gap... [Specifically, PL 280] States have not devoted limited criminal justice resources to crimes committed in Indian country. *Id.*”
- Until s. 117(a), Indian domestic violence offenders escaped U.S. felony charges until they seriously injured or killed a victim. *Id.*

Underlying Basis: Respect for Tribal Courts

- Citing due process and fundamental fairness concerns, Bryant argued that tribal court convictions should not be used as predicate offenses because such convictions are not reliable. *Id.* at 1966.
- “There is no reason to suppose that tribal court proceedings are less reliable when a sentence of a year’s imprisonment is imposed than when the punishment is merely a fine.” *Id.*

Practical Considerations

- Leveraging *Bryant*:
 - Tribal Prosecutors, both lay and law-trained, are tracking the records of habitual domestic violence offenders for federal prosecution under s. 117(a).
 - Now that there is a federal hook for curbing domestic violence in Indian country, U.S. Attorneys are working (closer) with Tribal Prosecutors to target repeat offenders.

Practical Considerations

- Increase in tribal court sentencing authority correlates with increase in scrutiny of tribal courts.
- U.S. Public Defenders are consistently challenging tribal court convictions under the U.S. Constitution and ICRA. *See e.g., Alvarez v. Lopez*, (9th Cir. 2016) (granting habeas relief because tribe violated ICRA's jury right requirement by failing to inform defendant that he would only receive jury on request).
- A Constitutional challenge of the VAWA's Special Domestic Violence Criminal Jurisdiction provisions is inevitable.

Practical Considerations: Public Defense in Tribal Courts

- Tribally-Trained Lay Advocates
- Public Defenders
- Pro Bono Model
- Contract Attorneys
- Regional Legal Services
- Law School Clinics
- Diversion and Healing Programs

Questions?

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