

United States v. First¹
731 F.3d 998 (9th Cir. 2013)
By Shane Hill

In *United States v. First*,² the Ninth Circuit Court of Appeals reversed the United States District Court for the District of Montana's dismissal of the government's indictment of Lakota Thomas First for misdemeanor firearms possession.³ The Ninth Circuit held that misdemeanor convictions obtained in tribal courts may qualify as predicate offenses to a prosecution under 18 U.S.C. § 922(g)(9)⁴ if the defendant was provided whatever right to counsel existed in the misdemeanor proceeding. This case is significant because it reinforces circuit precedent that any right to counsel in tribal courts may vary from the Sixth Amendment constitutional minimum in state and federal proceedings. Furthermore, this case also stands for the notion that predicate offenses obtained in tribal court may be valid for further prosecutions if existing safeguards at the tribal court level were provided.

In 2003, Lakota Thomas First, an Indian, was charged for misdemeanor domestic abuse in the Fort Peck Tribal Court in Montana.⁵ First pled guilty and was sentenced to thirty days in jail, which was suspended for 120 days probation.⁶ In that proceeding, Mr. First was unable to afford a lawyer and was not offered court-appointed counsel.⁷ In August 2011, the government indicted Mr. First for one count of violating 18 U.S.C. § 922(g)(9)⁸ for possession of a firearm after his 2003 conviction of domestic violence.⁹ Under § 922(g)(9), "[a] person shall not be

¹ 731 F.3d 998 (9th Cir. 2013).

² *Id.*

³ *See id.* at 1001, 1009.

⁴ 18 U.S.C. § 922(g)(9) (2012).

⁵ *First*, 731 F.3d at 1001.

⁶ *Id.*

⁷ *Id.*

⁸ 18 U.S.C. § 922(g)(9).

⁹ *First*, 731 F.3d at 1001.

considered to have been convicted of [a misdemeanor crime of domestic violence]"¹⁰ unless "the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case."¹¹ Mr. First moved to dismiss the 2011 indictment because he had neither been represented by counsel nor waived his right to appointed counsel in his 2003 tribal court proceeding.¹² The district court granted Mr. First's motion and held that he could not be charged with violating § 922(g)(9) via a predicate misdemeanor because he had been denied his Sixth Amendment right to counsel in that proceeding.¹³

The Ninth Circuit, in its review of the district court's dismissal of Mr. First's indictment, first noted that the Sixth Amendment right to counsel does not apply in tribal court criminal proceedings.¹⁴ The issue before the court was whether the misdemeanor conviction obtained in tribal court under circumstances that would have violated the Sixth Amendment in state or federal court could qualify as a predicate misdemeanor offense for § 922(g)(9).¹⁵ The Ninth Circuit interpreted the statutory language and legislative history of § 921(a)(33)(B)(i)(I) before determining that the statute's use of "right to counsel" referred to whatever right as it existed in the underlying domestic violence misdemeanor proceeding rather than a general constitutional right.¹⁶ Finally, the Ninth Circuit invoked existing Supreme Court precedent¹⁷ to cast the statute as one which imposed a civil disability rather than a criminal punishment or enhancement.¹⁸ As a result, the Ninth Circuit held that it did not matter that Mr. First's misdemeanor conviction was

¹⁰ 18 U.S.C. § 921(a)(33)(B)(i).

¹¹ *Id.* § 921(a)(33)(B)(i)(I).

¹² *First*, 731 F.3d at 1001.

¹³ *Id.*

¹⁴ *Id.* at 1002 (citing *United States v. Percy*, 250 F.3d 720, 725 (9th Cir. 2001)).

¹⁵ *First*, 731 F.3d at 1003.

¹⁶ *See id.* at 1004-08.

¹⁷ *See Lewis v. United States*, 445 U.S. 50, 66-67 (1980).

¹⁸ *See First*, 731 F.3d at 1008-09.

obtained without complying with the Sixth Amendment because he only needed to be provided whatever right to counsel was necessary at the tribal court level.¹⁹

This case is significant because it reveals the distinction between tribal courts and state and federal courts. The Ninth Circuit has held that the United States Constitution is generally inapplicable to Indian tribes, Indian courts, and Indians on tribal lands because Indian tribes are quasi-sovereign nations.²⁰ As a result, criminal defendants in tribal criminal proceedings are not necessarily guaranteed the safe procedural safeguards as they would be in state or federal courts. This in turn may become significant because these tribal court proceedings may then be used as predicate offenses for later prosecutions in state or federal courts. Depending on the nature of the later prosecution, it may be of no matter that the defendant was not provided with constitutional safeguards in the predicate offense proceeding.

¹⁹ See *First*, 731 F.3d at 1009.

²⁰ See *United States v. Percy*, 250 F.3d 720, 725 (9th Cir. 2001).