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Melissa Dess

Boston College Law School, melissa.dess@bc.edu

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THE RIGHT TO COUNSEL?: THE EIGHTH CIRCUIT ALLOWS UNCOUNSELED TRIBAL COURT CONVICTIONS TO SATISFY ELEMENTS OF FEDERAL OFFENSES

MELISSA DESS*

Abstract: On July 6, 2011, in *United States v. Cavanaugh*, the U.S. Court of Appeals for the Eighth Circuit held that prior, uncounseled tribal court convictions could be used to establish an element of a subsequent federal offense. In so doing, the court deemphasized the importance of reliability concerns in determining the validity of uncounseled convictions.

INTRODUCTION

Roman Cavanaugh, Jr. was charged with the federal offense of domestic assault by a habitual offender based on his previous convictions for domestic abuse in Native American tribal court.¹ The United States District Court for the District of North Dakota dismissed the habitual offender charge because Cavanaugh's tribal court convictions were obtained without the benefit of the right to counsel.² Unlike U.S. federal and state courts, tribal courts are not governed by the Constitution and therefore are not required to provide counsel for indigent defendants like Cavanaugh.³ The district court reasoned that using Cavanaugh's uncounseled tribal court convictions to prove an element of an offense in federal court violated the Sixth Amendment because it "impos[ed] federal punishment . . . based upon the uncounseled conviction."⁴

The government appealed, and the United States Court of Appeals for the Eighth Circuit reversed, holding that Cavanaugh's uncounseled tribal court convictions could be used against him in federal court.⁵ As a matter of first impression, the Eighth Circuit held that such

* Staff Writer, BOSTON COLLEGE JOURNAL OF LAW & SOCIAL JUSTICE (2011–2012).

¹ *United States v. Cavanaugh*, 643 F.3d 592, 593 (8th Cir. 2011), *cert. denied*, 80 U.S.L.W. 3478 (U.S. Feb. 21, 2012) (No. 11-7379).

² *Id.*

³ *Id.* at 595–96.

⁴ *Id.* at 595.

⁵ *Id.* at 594, 605.

convictions may be used to prove the predicate conviction component of the federal habitual offender offense.⁶ In reaching this conclusion, the court recognized that its holding was distinguishable from the Ninth Circuit in *United States v. Ant*, which held that an uncounseled tribal court guilty plea could not be used to prove the underlying facts of a federal charge.⁷ Nevertheless, the Eighth Circuit held that using tribal court convictions in this way was constitutional.⁸ In so doing, the Eighth Circuit gave little weight to the reliability concerns implicated when a conviction is obtained in the absence of counsel.⁹

I. CAVANAUGH'S UNCOUNSELED CONVICTIONS AND APPEAL

On or about July 7, 2008, Cavanaugh assaulted his common-law wife, Amanda L. Luedtke.¹⁰ At the time of the assault, Cavanaugh was driving Luedtke and multiple children, and Cavanaugh and Luedtke were both intoxicated.¹¹ The couple got into a fight, and Cavanaugh slammed Luedtke's head into the dashboard of the car.¹² After Cavanaugh threatened to kill Luedtke, she jumped out of the car and hid.¹³ The police subsequently arrested Cavanaugh and charged him with domestic assault by a habitual offender.¹⁴

One of the elements of a domestic assault by a habitual offender is that the offender has been convicted "on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings" for "assault, sexual abuse, or serious violent felony against a spouse or intimate partner"¹⁵ Cavanaugh is a member of the Spirit Lake Sioux Tribe and was convicted of three misdemeanor domestic abuse offenses in the Spirit Lake Tribal Court prior to the July 2008 incident.¹⁶ Although

⁶ See *Cavanaugh*, 643 F.3d at 593, 605.

⁷ *Id.* at 604; *United States v. Ant*, 882 F.2d 1389, 1395 (9th Cir. 1989).

⁸ See *Cavanaugh*, 643 F.3d at 604–05.

⁹ See *id.*

¹⁰ *United States v. Cavanaugh*, 680 F. Supp. 2d 1062, 1065 (D.N.D. 2009), *rev'd*, 643 F.3d 592 (8th Cir. 2011), *cert. denied*, 80 U.S.L.W. 3478 (U.S. Feb. 21, 2012) (No. 11-7379).

¹¹ *United States v. Cavanaugh*, 643 F.3d 592, 594 (8th Cir. 2011), *cert. denied*, 80 U.S.L.W. 3478 (U.S. Feb. 21, 2012) (No. 11-7379).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 593–94. Cavanaugh was charged pursuant to 18 U.S.C. § 117. *Id.*

¹⁵ 18 U.S.C. § 117 (2006). There are two other elements for the offense of a domestic assault by a habitual offender: (1) a domestic assault as defined by 18 U.S.C. § 117(b); and (2) committed "within the special maritime and territorial jurisdiction of the United States or Indian country" *Id.*

¹⁶ *Cavanaugh*, 643 F.3d at 594.

Cavanaugh was indigent, he did not have the right to court-appointed counsel to defend himself against those charges.¹⁷

The Constitution's Sixth Amendment right to counsel does not always apply to Indian tribal courts because Indian tribes are quasi-sovereign entities.¹⁸ Although the Indian Civil Rights Act extends some constitutional protections "to situations where an Indian tribe is the governmental actor," it does not require tribal courts to provide counsel for indigent criminal defendants unless the prosecution results in a term of imprisonment greater than one year.¹⁹ Therefore, unless tribal law specifically provides for the right to counsel, indigent defendants who are sentenced to a term of incarceration of less than one year have neither a Constitutional nor a statutory basis for exercising this right.²⁰ As Cavanaugh was sentenced to less than one year in prison and did not have a right to counsel under the Spirit Lake Nation Law and Order Code, he did not have the right to court-appointed counsel.²¹

The district court determined that using uncounseled tribal court convictions to prove an element of a federal crime is unconstitutional because it violates a defendant's due process rights and right to counsel.²² While the court acknowledged that the Constitution does not apply to tribal courts, the district court reasoned that the use of uncounseled convictions to prove an element of a crime in a federal court where the Constitution *does* apply is a Sixth Amendment violation.²³ The court based its conclusion on issues of fairness and equality, stating that "[a]s it stands now, American Indians are the only group of defendants that could face conviction under [this habitual offender statute] as a result of underlying convictions for which they had no right to court-appointed counsel."²⁴ Accordingly, the district court granted Cavanaugh's motion to dismiss the indictment.²⁵

The government appealed to the Eighth Circuit, emphasizing that Cavanaugh's convictions were valid because they complied with the Indian Civil Rights Act and the Constitution and could therefore be used

¹⁷ *Id.*; *Cavanaugh*, 680 F. Supp. 2d at 1074.

¹⁸ *See Cavanaugh*, 643 F.3d at 595–96.

¹⁹ *See* 25 U.S.C. §§ 1302(a)(6), (b), (c)(2) (2010); *Cavanaugh*, 643 F.3d at 596.

²⁰ *See* 25 U.S.C. §§ 1302(a)(6), (b), (c)(2) (2010); *Cavanaugh*, 643 F.3d at 596.

²¹ *See Cavanaugh*, 680 F. Supp. 2d at 1074.

²² *Id.* at 1076.

²³ *See id.* at 1073, 1076–77.

²⁴ *Id.* at 1077.

²⁵ *Id.*

in federal court.²⁶ In contrast, Cavanaugh argued that his prior tribal court convictions should not be used to establish the habitual offender elements of the statute because they would have been invalid if obtained in a state or federal court where the Sixth Amendment applies.²⁷

The Eighth Circuit reviewed the Supreme Court's treatment of the right to counsel to determine whether using uncounseled convictions to establish elements of a federal offense violates the Sixth Amendment.²⁸ The court noted that although the 1963 Supreme Court case *Gideon v. Wainwright* held that the Sixth Amendment right to counsel applies against the states, that right does not always preclude prior uncounseled convictions from being used against a party.²⁹ Rather, it is only the presence of a constitutional violation in the underlying proceeding that should determine whether a prior conviction may be used in a subsequent proceeding.³⁰

In reaching this conclusion, the Eighth Circuit deemphasized the concern in *Gideon* about the unreliability of convictions obtained in the absence of counsel.³¹ The *Gideon* Court warned that without counsel, though a defendant "be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."³² The Eighth Circuit in *Cavanaugh* nonetheless determined that the presence of an actual constitutional violation in the underlying proceeding was more important than the reliability concerns expressed in *Gideon*.³³

The Eighth Circuit ultimately concluded that Cavanaugh's uncounseled tribal court convictions could be used to establish elements of the federal habitual offender offense.³⁴ The court reasoned that the subsequent use of Cavanaugh's tribal court convictions in federal court was constitutional because the convictions were obtained in compliance

²⁶ See *Cavanaugh*, 643 F.3d at 596; Reply Brief for the United States at 2, United States v. Cavanaugh, 643 F.3d 592 (8th Cir. 2011) (No. 10-1154), 2010 WL 2157020.

²⁷ *Cavanaugh*, 643 F.3d at 596. Cavanaugh also argued on appeal that: (1) the tribal court convictions were "invalid from their inception" because he did not have the right to counsel; and (2) the habitual offender statute "singles out Indians because of their race," thus violating the right to equal protection inherent in the Fifth Amendment. *Id.* at 595, 605.

²⁸ *Id.* at 597–603.

²⁹ *Id.* at 597, 602 (citing *Lewis v. United States*, 445 U.S. 55, 67 (1980) (holding prior uncounseled felony conviction could be used for later federal conviction)); see *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

³⁰ See *Cavanaugh*, 643 F.3d at 601.

³¹ *Id.* at 604; see *Gideon*, 372 U.S. at 345.

³² 372 U.S. at 345 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

³³ *Cavanaugh*, 643 F.3d at 604.

³⁴ See *id.* at 605.

with the tribal court's requirements.³⁵ It was irrelevant that the convictions "*would have been* invalid had [they] arisen from a state or federal court" because they did not arise in state or federal court.³⁶ The court emphasized that the Sixth Amendment is not implicated in tribal court, and therefore state and federal courts may subsequently use uncounseled tribal court convictions without violating the Sixth Amendment.³⁷

II. CONFLICTING APPLICATIONS OF THE SIXTH AMENDMENT IN *CAVANAUGH* AND *ANT*

The Eighth Circuit's decision in *Cavanaugh* conflicts with the Ninth Circuit's decision in *Ant*.³⁸ In *Ant*, the Ninth Circuit held that an uncounseled tribal court guilty plea could not be used to prove the facts of a subsequent federal manslaughter charge.³⁹ The court decided that the plea should have been suppressed because it would have violated the Sixth Amendment had it been entered in federal court.⁴⁰ In contrast, the Eighth Circuit in *Cavanaugh* held that tribal proceedings need not comply with the same constitutional requirements as those in federal court in order to be used to establish elements of a subsequent federal offense.⁴¹

The contentious issue between the courts in *Cavanaugh* and *Ant* is not whether the uncounseled tribal court proceedings were valid at inception; both courts agree that the respective proceedings were valid in tribal court because they were obtained in compliance with the Indian Civil Rights Act and tribal law.⁴² Rather, the Eighth and Ninth Circuits diverge on the issue of whether these tribal court proceedings can be used in federal or state court to establish an element of a federal offense.⁴³ The Eighth Circuit decided that an uncounseled conviction could be used to establish an element of a federal offense, while the Ninth Circuit determined that an uncounseled guilty plea could not.⁴⁴ The key difference was that the *Cavanaugh* court analyzed the constitu-

³⁵ *Id.* at 603–04.

³⁶ *See id.* at 604.

³⁷ *See id.* at 595–96, 603–05.

³⁸ *See* United States v. Cavanaugh, 643 F.3d 592, 604 (8th Cir. 2011), *cert. denied*, 80 U.S.L.W. 3478 (U.S. Feb. 21, 2012) (No. 11-7379); United States v. Ant, 882 F.2d 1389, 1395 (9th Cir. 1989).

³⁹ 882 F.2d at 1395.

⁴⁰ *Id.* at 1396.

⁴¹ *See* 643 F.3d at 605.

⁴² *Id.* at 595–96; *Ant*, 882 F.2d at 1392.

⁴³ *See Cavanaugh*, 643 F.3d at 605; *Ant*, 882 F.2d at 1396.

⁴⁴ *Cavanaugh*, 643 F.3d at 605; *Ant*, 882 F.2d at 1396.

tionality of the uncounseled tribal proceeding according to tribal court standards while the *Ant* court analyzed the uncounseled proceeding according to federal court standards.⁴⁵

In *Cavanaugh*, the Eighth Circuit concluded that the decisive question in determining whether an uncounseled tribal conviction may be used in a subsequent federal proceeding is whether there is a constitutional violation in the underlying conviction.⁴⁶ The court found that the presence of a constitutional violation should be emphasized in lieu of the Supreme Court's concern in *Gideon* about the convictions' reliability in the absence of counsel.⁴⁷ The court relied primarily on *Nichols v. United States* in which the Supreme Court held that an uncounseled conviction that did not result in imprisonment could be used to enhance the punishment for a federal drug offense.⁴⁸ The *Nichols* Court reasoned that the uncounseled conviction could be used because it was obtained in the absence of a constitutional violation.⁴⁹ *Nichols* did not have the right to counsel during the proceedings because the Constitution only guarantees that right when the defendant is sentenced to a term of imprisonment.⁵⁰ The Eighth Circuit relied on the fact that the *Nichols* Court did not explicitly mention *Gideon* reliability concerns and instead chose to focus on the constitutionality of the underlying proceeding.⁵¹

In applying this logic to *Cavanaugh's* case, the Eighth Circuit stressed that *Cavanaugh's* convictions did not involve a constitutional violation in the underlying tribal court proceeding.⁵² The court reasoned that it could not "preclude use of [a] prior conviction merely because it *would have been* invalid had it arisen from a state or federal court."⁵³ *Cavanaugh's* convictions were valid because they were obtained in tribal court, not federal or state court where such a lack of court-appointed counsel may well have been a constitutional viola-

⁴⁵ See *Cavanaugh*, 643 F.3d at 604; *Ant*, 882 F.2d at 1396.

⁴⁶ 643 F.3d at 601, 604.

⁴⁷ See *id.* at 604.

⁴⁸ See *Nichols v. United States*, 511 U.S. 738, 748–49 (1994); *Cavanaugh*, 643 F.3d at 599–600.

⁴⁹ See 511 U.S. at 748–49.

⁵⁰ See *id.*; *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979) (holding that "the Sixth and Fourteenth Amendments . . . require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.").

⁵¹ See *Cavanaugh*, 643 F.3d at 600; see also *Nichols*, 511 U.S. at 748–49 (focusing on the constitutionality of the underlying proceedings in its decision rather than reliability concerns).

⁵² See *Cavanaugh*, 643 F.3d at 603–04.

⁵³ *Id.* at 604.

tion.⁵⁴ The presence or absence of a constitutional violation, the court furthered, should be emphasized in lieu of concerns about the convictions' reliability in the absence of counsel.⁵⁵ The court recognized the difficulty in comparing *Nichols*, where there was no sentence of imprisonment, to *Cavanaugh*, where the uncounseled convictions led to imprisonment.⁵⁶ Ultimately, however, the court held that Cavanaugh's prior, uncounseled tribal court convictions could be used to establish elements of the federal habitual offender offense.⁵⁷

In *Ant*, the Ninth Circuit held the opposite—that the use of an uncounseled tribal court proceeding in a subsequent federal case is unconstitutional.⁵⁸ The court decided that Ant's uncounseled tribal court guilty plea could not be used in a federal manslaughter charge because it did not satisfy the constitutional requirements for use in federal court.⁵⁹ The Ninth Circuit based its holding on the notion that the Sixth Amendment right to counsel is implicated “at ‘critical’ stages in a criminal prosecution where ‘substantial rights of a criminal accused may be affected.’”⁶⁰ In Ant's case, the court added that the need for counsel during the arraignment was especially critical because Ant was sentenced to prison after pleading guilty and his freedom was at stake.⁶¹

In reaching its decision, the Ninth Circuit in *Ant* considered whether the tribal proceedings would have been infirm had they taken place in federal court rather than whether the proceedings were valid at inception in tribal court.⁶² The court recognized that Ant's tribal court guilty plea was valid at inception because the Sixth Amendment does not apply in tribal court.⁶³ However, the court decided that the plea was inadmissible for use in federal court because the Sixth Amendment applied at the “critical stage” of Ant's arraignment.⁶⁴

The Ninth Circuit essentially decided that when uncounseled proceedings are used for prosecutorial purposes in federal court, those proceedings must be afforded the same constitutional protections as

⁵⁴ See *id.* at 597, 603–05.

⁵⁵ See *id.* at 604.

⁵⁶ See *id.* at 601–03.

⁵⁷ See *Cavanaugh*, 643 F.3d at 605.

⁵⁸ See 882 F.2d at 1396.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1393 (quoting *Mempa v. Rhay*, 389 U.S. 128, 134 (1967)).

⁶¹ See *id.* at 1393–94.

⁶² See *id.* at 1393–95.

⁶³ See *Ant*, 882 F.2d at 1396.

⁶⁴ See *id.* at 1393–94, 1396.

they would have had if they had initially taken place in federal court.⁶⁵ This position is at odds with the Eighth Circuit opinion in *Cavanaugh*, which held that tribal court proceedings can be used to establish elements of a subsequent federal offense so long as they are not in violation of the Constitution at *the time tried*.⁶⁶ In order to reconcile these divergent holdings, the Eighth Circuit distinguished *Ant* on two grounds: in *Ant*, (1) the tribal and federal cases arose out of the same alleged incident; and (2) the government used the tribal court proceedings to prove the truth of what was asserted in a guilty plea, rather than the fact of a prior conviction.⁶⁷ The Eighth Circuit did not elaborate as to why those distinctions make a difference in determining whether an uncounseled tribal court proceeding is admissible in federal court.⁶⁸

The dissent in *Cavanaugh* questioned the majority's attempt to distinguish itself from *Ant*.⁶⁹ The crucial point in both cases, according to the dissent, is that they "involve[d] the use of the prior proceeding to prove an element of a subsequent federal offense."⁷⁰ So too did the majority recognize a possible weakness in its argument, stating that "reasonable decision-makers may differ in their conclusions as to whether the Sixth Amendment precludes a federal court's subsequent use of convictions that are valid because and only because they arose in a court where the Sixth Amendment did not apply."⁷¹

III. CONSIDERING THE RELIABILITY OF UNCOUNSELED CONVICTIONS

The Eighth Circuit recognized two important considerations in determining the scope of the Sixth Amendment right to counsel: (1) the presence of a constitutional violation in the underlying proceeding; and (2) reliability concerns of a resulting conviction in the absence of court-appointed counsel.⁷² Ultimately, however, the Eighth Circuit in *Cavanaugh* determined that a consideration of constitutional violations, not reliability concerns, is the controlling consideration in deciding whether a prior conviction may be used in a subsequent proceeding.⁷³

⁶⁵ See *id.* at 1396.

⁶⁶ See *Cavanaugh*, 643 F.3d at 605; *Ant*, 882 F.2d at 1396.

⁶⁷ See *Cavanaugh*, 643 F.3d at 604.

⁶⁸ *Id.*

⁶⁹ *Id.* at 607 (Bye, J., dissenting).

⁷⁰ *Id.*

⁷¹ See *id.* at 605.

⁷² *United States v. Cavanaugh*, 643 F.3d 592, 604 (8th Cir. 2011), *cert. denied*, 80 U.S.L.W. 3478 (U.S. Feb. 21, 2012) (No. 11-7379).

⁷³ See *id.*

The court specifically analyzed whether there was a constitutional violation in the forum in which the underlying proceeding took place.⁷⁴ In so doing, the court disagreed with the Ninth Circuit's decision in *Ant*, which found that the infirmity of a prior proceeding should be determined by evaluating whether the proceeding satisfied the Constitutional requirements for use in federal court.⁷⁵ Unlike the Ninth Circuit in *Ant*, the Eighth Circuit in *Cavanaugh* did not consider whether the proceeding "would have been in violation of the Sixth Amendment had it been made in federal court" because, quite simply, *Cavanaugh*'s convictions did not arise in federal court.⁷⁶ Although the Eighth Circuit's approach sufficiently addresses the Supreme Court's concerns about the constitutionality of the underlying conviction in *Gideon*, it does not fully answer the *Gideon* Court's worry about the potential unreliability of uncounseled convictions.⁷⁷

The Supreme Court in *Gideon* expressed concern about the unreliability of uncounseled convictions, noting that a defendant "requires the guiding hand of counsel at every step in the proceedings."⁷⁸ The Court deemed the right to counsel as fundamental and essential to a fair trial.⁷⁹ Although the *Gideon* Court recognized a fundamental right to counsel, this right does not always apply to tribal courts.⁸⁰ This issue is further complicated when an uncounseled tribal court conviction is used to enhance or establish a federal offense in federal court where defendants have a right to counsel.⁸¹ Whether these convictions are considered a violation of the Sixth Amendment when they are used in federal court to establish a federal offense is uncertain and varies by circuit.⁸² Although the Eighth Circuit determined that it was constitutional to use *Cavanaugh*'s uncounseled tribal court convictions, the court failed to adequately address one of the bases upon which the right to counsel was founded—the potential for unreliability in an uncounseled conviction.⁸³

⁷⁴ See *id.* at 603–05.

⁷⁵ See *id.* at 604–05; *United States v. Ant*, 882 F.2d 1389, 1396 (9th Cir. 1989).

⁷⁶ *Ant*, 882 F.2d at 1396; see *Cavanaugh*, 643 F.3d at 604.

⁷⁷ See *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (quoting *Powell v. Alabama*, 287 U.S. at 45, 68–69 (1932)); *Cavanaugh*, 643 F.3d at 599–601, 604.

⁷⁸ 372 U.S. at 345 (quoting *Powell*, 287 U.S. at 68–69).

⁷⁹ See *id.* at 343–44.

⁸⁰ See *id.*; *Cavanaugh*, 643 F.3d at 595–96.

⁸¹ See *Cavanaugh*, 643 F.3d at 593–94; *Ant*, 882 F.2d at 1396.

⁸² See *Cavanaugh*, 643 F.3d at 604–05; *Ant*, 882 F.2d at 1396; see also *United States v. Shanvaux*, 647 F.3d 993, 998 (10th Cir. 2011) (finding no Sixth Amendment violation when uncounseled tribal court convictions were used in subsequent federal prosecution).

⁸³ See *Cavanaugh*, 643 F.3d at 600, 604.

The Eighth Circuit recognized that the Supreme Court relied heavily on reliability concerns when deciding *Gideon*.⁸⁴ Nevertheless, the Eighth Circuit reasoned that the Supreme Court mostly abandoned this line of reasoning in *Nichols* “because the *Nichols* majority made no express reference to reliability concerns,” and “a separate concurrence by Justice Souter discussing such concerns garnered no support from any of the other Justices.”⁸⁵ Eight years after deciding *Nichols*, however, the Supreme Court again referenced reliability concerns in *Alabama v. Shelton*.⁸⁶ The Eighth Circuit downplayed the Supreme Court’s reiteration of this concern, stating that “[a]lthough *Shelton* emphasized reliability concerns, it also emphasized the presence of an actual Sixth Amendment violation.”⁸⁷ In spite of the Eighth Circuit’s reasoning, the Supreme Court’s decision in *Shelton* may suggest that both constitutionality and reliability should be considered in determining the use of uncounseled convictions—a proposition for which the *Cavanaugh* court does not fully account.⁸⁸

CONCLUSION

The divergence between the Eighth Circuit in *United States v. Cavanaugh* and the Ninth Circuit in *United States v. Ant* is based on a disagreement about whether courts should analyze the constitutionality of the tribal court proceedings or the federal court proceedings. In *Cavanaugh*, the Eighth Circuit chose the former approach and allowed the use of *Cavanaugh*’s uncounseled tribal court convictions in federal court. The Eighth Circuit’s decision was based primarily on whether the prior conviction was obtained in violation of the Constitution, and not on whether the uncounseled convictions were reliable. As the Supreme Court has suggested that both constitutionality and reliability should be carefully considered when deciding cases involving uncounseled convictions, the Eighth Circuit’s Sixth Amendment analysis is arguably incomplete.

⁸⁴ See *id.* at 597, 600.

⁸⁵ *Id.* at 600.

⁸⁶ See *id.*; *Alabama v. Shelton*, 535 U.S. 654, 667 (2002).

⁸⁷ *Cavanaugh*, 643 F.3d at 601.

⁸⁸ See *Shelton*, 535 U.S. at 667; *Cavanaugh*, 643 F.3d at 600–01, 604.