No. 19-231

IN THE

Supreme Court of the United States

ROBERT R. REYNOLDS

Petitioner,

v.

WILLIAM SMITH, CHIEF PROBATION OFFER, AMANTONKA NATION PROBATION SERVICES,
JOHN MITCHELL, PRESIDENT, AMANTONKA NATION,
ELIZABETH NELSON, CHIEF JUDGE, AMANTONKA NATION DISTRICT COURT

Respondents.

**On Writ of Certiorari to
the Supreme Court of the United States**

BRIEF FOR PETITIONER

TEAM 122

TABLE OF CONTENTS

TABLE OF AUTHORITIES 1
QUESTIONS PRESENTED..3
STATEMENT OF THE CASE..4
I. STATEMENT OF THE PROCEEDINGS 4
II. STATEMENT OF THE FACTS.. 5
SUMMARY OF THE ARGUMENT 5
ARGUMENT..8
I. THE STANDARD OF REVIEW IN THIS CASE IS DE NOVO................................ 8
II. MR. REYNOLDS IS A NON-INDIAN FOR THE PURPOSES OF SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION 8
III. MR. REYNOLDS'S DEFENSE COUNSEL WAS INADEQUATE BECAUSE COUNSEL DID NOT MEET THE STANDARDS ESTABLISHED BY VAWA 2013. . 12
A. Pre-TLOA and VAWA: ICRA did not keep up with the federal changes regarding the right to counsel but did compare to the federal standard when it was enacted. 13
B. Mr. Reynolds meets all the requirements for the Amantonka Nation to exercise Special Domestic Violence Criminal Jurisdiction over him as a non-Indian. 14
C. VAWA 2013 requires tribal courts to provide a defendant with procedural protections beyond those required by ICRA's general provisions................................ 15
D. The Amantonka Nation Code does not meet the standards imposed by 25 U.S.C. § 1302(c)(1).. 16
E. The Court must review counsel's performance applying *Strickland.* 18
CONCLUSION..19

TABLE OF AUTHORITIES

CASES

Alvarado v. Table Mountain Rancheria, 509 F.3d 1008, 1016 (9th Cir. 2007) 10
Gideon v. Wainwright 372 U.S. 335 (1963) 13
Jackson v. Tracy, No. CV 11–00448–PHX–FJM, 2012 WL 4120419, at *1 (D. Ariz. Sep. 19, 2012)..16
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 4, 12, 14
Pierce v. Underwood, 487 U.S. 552, 558 (1988)..8
Rice v. Cayetano 528 U.S. 495, 527 (2000)..10
Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978)..6, 10
State v. Reber, 2007 UT 36, 171 P.3d 406, 409 (Utah 2007) 9
Strickland v. Washington, 466 U.S. 668 (1984) 7, 18
Sully v. U.S., 195 F. 113, 117 (C.C.C. S.D. 1912)...9, 11
U.S. v. Antelope, 420 U.S. 641, 645 (1977)..10
U.S. v. Bruce, 394 F.3d 1215, 1224 (9th Cir. 2005) 9, 11
U.S. v. Pemberton, 405 F.3d 656, 660 (8th Cir. 2005) 11
U.S. v. Prentiss, 273 F.3d 1277, 1280 (10th Cir. 2001)...11
U.S. v. Ramirez, 537 F.3d 1075 (9th Cir. 2008) 10, 11
U.S. v. Rogers, 45 U.S. 567, 568 (1846)...6, 8, 10
U.S. v. Stymiest, 581 F. 3d 759, 762 (8th Cir. 2009) 9
U.S. v. Zepeda, 792 F.3d 1103, 113 (9th Cir. 2015)...6, 8
United States v. John, 437 U.S. 634 (1978)...8
Vialpando v. State, 640 P.2d 77, 80 (Wyo. 1982) 9
Williams v. Gover, 490 F.3d 785, 789 (9th Cir. 2007) 10

STATUTES

25 U.S.C § 1302..15
25 U.S.C. § 1302..12, 14
25 U.S.C. § 1304..14
25 U.S.C. § 1301..6, 8
25 U.S.C. 1302...16
Amantonka Nation Code, Title 2 16

OTHER AUTHORITIES

Cohen's Handbook of Federal Indian Law § 3.03(4) (2012)..9
Cushner and Sands, *Blood Should Not Tell, The Outdated "Blood" Test Used to Determine Indian Status in Federal Criminal Prosecution*, 59-APR Fed. Law. 32 (2012)..................11
Jordan Gross, *Through a Federal Habeas Corpus Glass, Darkly—Who is Entitled to Effective Assistance of Counsel in Tribal Court Under ICRA and How Will We Know if They Got It?*, 42 Am. Indian. L. Rev. 1, 40 (2017) 13, 18
Pascua Yaqui Tribe, *Considerations in Implementing VAWA's Special Domestic Violence Criminal Jurisdiction and TLOA's Enhanced Sentencing Authority A Look at the Experience of the Pascua Yaqui Tribe*, 27 (2014), http://www.ncai.org/tribal-vawa/getting-started/Practical_Guide_to_Implementing_VAWA_TLOA_letter_revision_3.pdf............17

Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through A Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 522 n.89 (1976)..10
Skibine, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 Alb. Gov't L. Rev 49 (2017)..11
Spruhan, *A Legal Theory of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. Rev. 1, 48 (2006)...9
Violence Against Women Act (VAWA) Reauthorization 2013, U.S. Dep't Just., https://www.justice.gov/tribal/violence-against-women-act-vawa-reauthorization-2013-0 14

QUESTIONS PRESENTED

1) Is Petitioner a non-Indian for purposes of Special Domestic Violence Criminal Jurisdiction?
2) Did Petitioner's court-appointed attorney satisfy the relevant legal requirements?

STATEMENT OF THE CASE

I. STATEMENT OF THE PROCEEDINGS

Prior to trial for the violation of Title 5, Section 244, Mr. Reynolds filed three pretrial motions. R. at 3. The first sought to have the charges dismissed on the ground that he is a non-Indian and that the Amantonka Nation lacks criminal jurisdiction over non-Indians pursuant to *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). *Id.* The second motion sought to have an attorney appointed to him, alleging that as a non-Indian accused of domestic violence against and Indian within Indian country, he falls within the tribe's exercise of Special Domestic Violence Criminal Jurisdiction. *Id.* The third motion alleged that his court-appointed attorney was insufficiently qualified to serve as his counsel, and that the assignment of this attorney violates the relevant Equal Protection requirements. *Id.* at 3–4. The Amantonka Nation District Court denied Mr. Reynolds's pretrial motions given that they classified him as an Indian and that no violation of Equal Protection was found. *Id.* Subsequently, Mr. Reynolds found guilty by a jury on August 23, 2017.

Mr. Reynolds appealed and on November 27, 2017 the Supreme Court of the Amantonka Nation affirmed his conviction and agreed with the Amantonka Nation District Court that Mr. Reynolds is an Indian and thus, his arguments carry no merit. *Id.* at 7.

The U.S. District Court for the District of Rogers granted writ of habeas corpus on March 7, 2018. *Id.* at 8. The court agreed that Mr. Reynolds cannot be an "Indian" for purposes of criminal jurisdiction and that the Amantonka Nation failed to provide him with the indigent defense required under VAWA 2013. *Id.*

On August 20, 2018, the U.S. Court of Appeals for the Thirteenth Circuit reversed the decision of the district court and remanded with instructions to deny the petition for writ of habeas corpus. *Id.* at 9.

Mr. Reynolds appealed, and the Supreme Court of the United States granted writ of certiorari on October 15, 2018. *Id.* at 10.

II. STATEMENT OF THE FACTS

Mr. Robert R. Reynolds, petitioner, is a non-Indian who married his wife Lorinda shortly after graduating from the University of Rodgers. R. at 6. Lorinda is a citizen of the Amantonka Nation and both her and Mr. Reynolds were able to find employment on the reservation. *Id.* Additionally, the couple moved into the tribal housing complex on the reservation. *Id.* Eventually, Mr. Reynolds became a naturalized citizen of the Amantonka Nation. A year after becoming an Amantonka Nation citizen, Mr. Reynolds lost his employment at the Amantonka shoe factory and was unemployed for ten months. *Id.*

On June 15, 2017, police were called to Mr. Reynolds' and his wife's home. Police responded to a domestic violence call. *Id.* Afterwards, police arrested Mr. Reynolds and transported him to the Amantonka Nation Jail. *Id.* Mr. Reynolds was charged with violating Title 5, Section 244 of the Amantonka Nation Code. *Id.* at 7. A jury found Mr. Reynolds guilty and he appealed. *Id.*

SUMMARY OF THE ARGUMENT

The case before the Court concerns the status of non-Indian and standards for adequate counsel under Special Domestic Violence Criminal Jurisdiction of the Violence Against Women Act Authorization of 2013.

Mr. Reynolds is a non-Indian for the purposes of Special Domestic Violence Criminal Jurisdiction because he does not have any racial or ancestral connection to an Indian tribe.

For the purposes of Special Domestic Violence Criminal Jurisdiction, “Indian” is defined as “any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18” of The Major Crimes Act. 25 USC § 1301(4). For the purposes of federal criminal jurisdiction, “Indian” status requires a racial or ancestral connection to an Indian Tribe (Indian descent), *U.S. v. Rogers*, 45 U.S. 567 (1846), as well as recognition as an Indian by a federally recognized tribe. *U.S. v. Zepeda*, 792 F.3d 1103, 113 (9th Cir. 2015). The Court in *Rogers* makes clear that political affiliation with an Indian tribe alone is not sufficient grounds for Indian status for the purposes of federal criminal jurisdiction. 45 U.S. at 573. A person’s status as “Indian” is distinguishable from a person’s status as “tribal member” for the purposes of special domestic violence criminal jurisdiction because the latter is a recognition of enrollment into membership of a recognized Indian tribe, a process of political affiliation that is determined by the tribes themselves. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978)

It its undisputed that Mr. Reynolds does not have a racial or ancestral connection to an Indian tribe. R at 8. None of his ancestors lived in what is now the United States before its colonization by Europeans. *Id.* Not only does Mr. Reynolds fail to meet the generally accepted one eighth blood quantum standard, he also fails to meet to meet more liberal standards that center some sort genealogical connection. Mr. Reynolds, however, is a naturalized citizen of the Amantonka Nation, R at 6, but his tribal membership represents a political affiliation with the tribe—rather than a racial or genealogical affiliation—that is not

enough to obtain "Indian" status for the purposes of special domestic violence criminal jurisdiction.

Therefore, for the purposes of special domestic violence criminal jurisdiction, Mr. Reynolds is a non-Indian.

As a non-Indian, Mr. Reynolds had sufficient ties to the Amantonka Nation for the tribe to exercise special domestic violence criminal jurisdiction under the Violence Against Women Act Reauthorization of 2013 (VAWA 2013). Mr. Reynolds worked and lived on the Amantonka reservation and was married to an Amantonka Nation citizen. In exercising such jurisdiction, Mr. Reynolds would have the right to effective counsel at least equal to the right of counsel guaranteed by the U.S. Constitution. This would require that the tribe provide standards that would guarantee that criminal defendants in tribal court would receive adequate and competent representation during their criminal proceedings. However, the Amantonka Nation failed to meet the standards set out by VAWA 2013. The Amantonka Nation Code provides qualification that are basic and do not ensure that their public defenders or defense counsel have an adequate understanding of the law or procedure. While the Amantonka Nation, and other tribal nations, are free to set its own standard for defense counsel, it would be in the best interest to heighten standards to be more consistent with federal requirements that adhere to the Sixth Amendment's right to counsel. Otherwise, there is a greater likelihood of litigation against the tribes for providing ineffective legal counsel for criminal defendants. Lastly, the ineffectiveness of counsel should have been measured against the standard the U.S. Supreme Court provided in *Strickland v. Washington*, 466 U.S. 668 (1984). Nevertheless, none of the above was done because Mr. Reynolds was erroneously classified as an Indian.

For the forgoing reasons, the Court should reverse the decision the United States Court of Appeals for Thirteenth Circuit remand with instructions to grant the petition for a writ of habeas corpus.

ARGUMENT

I. THE STANDARD OF REVIEW IN THIS CASE IS DE NOVO

This Court reviews questions of law de novo. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

II. MR. REYNOLDS IS A NON-INDIAN FOR THE PURPOSES OF SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION

Mr. Reynolds is a non-Indian for the purposes of Special Domestic Violence Criminal Jurisdiction because he does not have any racial or ancestral connection to an Indian tribe.

For the purposes of Special Domestic Violence Criminal Jurisdiction, "Indian" is defined as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18" of The Major Crimes Act. 25 U.S.C. § 1301(4). This section of the Major Crimes Act grants jurisdiction to federal courts, exclusive of the states, over Indians who commit any of the listed offenses, regardless of whether the victim is an Indian or non-Indian. 18 U.S.C. § 1153(a); *see United States v. John*, 437 U.S. 634 (1978).

For the purposes of federal criminal jurisdiction, "Indian" status requires a racial or ancestral connection to an Indian Tribe (Indian descent), *U.S. v. Rogers*, 45 U.S. 567, 568 (1846), as well as recognition as an Indian by a federally recognized tribe. *U.S. v. Zepeda*, 792 F.3d 1103, 113 (9th Cir. 2015) (en banc) ("We hold that proof of Indian status under the "Indian Major Crimes Act] requires only two things: (1) proof of some quantum of Indian blood, whether or not that blood derives from a member of a federally recognized tribe, and

(2) proof of membership in, or affiliation with, a federally recognized tribe."); *see also Cohen's Handbook of Federal Indian Law* § 3.03(4) (2012).

In *Rogers*, the Court determined that a white man who moved into the Cherokee nation and who "was treated[,] recognized, and adopted by [] said tribe as one of them," 45 U.S. at 568, was not an Indian and therefore could not be excluded from federal prosecution for "crimes committed by one Indian against the person or property of another Indian." 45 U.S. at 572. The Court reasoned that "the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race" and "does not speak of members of a tribe, but of the race generally,--of *the family of Indians*; and it and other tribes also, to be governed by Indian usages and customs." 45 U.S. at 573 (italics original).

Racial or ancestral connection to an Indian tribe is generally established via blood quantum. While there is no specific percentage of Indian ancestry required to satisfy racial or ancestral connection, *Cohen's Handbook of Federal Indian Law* § 3.03(4) (2012), the most commonly accepted blood quantum is one eighth Indian blood. *U.S. v. Bruce*, 394 F.3d 1215, 1224 (9th Cir. 2005) ("...general requirement is only for 'some' blood…"); *Sully v. U.S.*, 195 F. 113, 117 (C.C.C. S.D. 1912); *see generally* Spruhan, *A Legal Theory of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 48 (2006) (pre-Indian Reorganization Act use of blood quantum to determine "Indian" status is "muddled", with some uses "requiring a threshold blood quantum (without a consistent quantum) an some requiring tribal membership"); *but see Vialpando v. State,* 640 P.2d 77, 80 (Wyo. 1982) ("[o]ne-eighth Indian blood is not a 'substantial amount of Indian blood'" to classify person as Indian under 18 U.S.C.A. 1153).

Fulfilling the ancestral component necessary for Indian status has proven troublesome for individuals who fall well below the one eighth quantum standard. *See State v. Reber*, 171 P.3d 406, 409 (Utah 2007) ("we have found no case in which a court has held that 1/16th Indian blood . . . qualifies as a 'significant amount of Indian blood'"); *but see U.S. v. Stymiest*, 581 F. 3d 759, 762 (8th Cir. 2009) ("parties agree that blood quantum requirement is met because defendant had "three thirty-seconds Indian blood"). The Supreme Court has underscored the need for some federal common law limit on "Indian" status: Justice Breyer observed in *Rice v. Cayetano* that to "define membership in terms of one possible ancestor out of 500 . . . goes well beyond any reasonable limit." *Rice v. Cayetano* 528 U.S. 495, 527 (2000) (Breyer, J., concurring). In *U.S. v. Ramirez*, 537 F.3d 1075 (9th Cir. 2008), the court held " 'some' Indian blood" to be "generally sufficient" at least when combined with evidence that a "parent, grandparent, or great grandparent" is "clearly identified as an Indian." *Ramirez*, 537 F.3d at 1082.

The Court in *Rogers* makes clear that political affiliation with an Indian tribe is not sufficient grounds for Indian status for the purposes of federal criminal jurisdiction. 45 U.S. at 573; *see generally* Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through A Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 522 n.89 (1976). Therefore, a person's status as "Indian" is distinguishable from a person's status as "tribal member" for the purposes of special domestic violence criminal jurisdiction because the latter is a recognition of enrollment into membership of a recognized Indian tribe, a process of political affiliation that is determined by the tribes themselves. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) (describing a tribe's authority to grant or revoke membership as "central to its existence as an independent political community."); *accord Alvarado v. Table*

Mountain Rancheria, 509 F.3d 1008, 1016 (9th Cir. 2007); *see also Williams v. Gover*, 490 F.3d 785, 789 (9th Cir. 2007) ("[a]n Indian tribe has the power to define membership as it chooses, subject to the plenary power of Congress"); *but see Rice v. Cayetano*, 528 U.S. 495, 527 (2000) ("Of course, a Native American tribe has broad authority to define its membership . . . There must, however, be some limit on what is reasonable . . .") (citation omitted).

While the United States Supreme Court has not answered definitively whether political affiliation is necessary element of "Indian" status for the purposes of federal criminal jurisdiction, *see U.S. v. Antelope*, 420 U.S. 641, 645 (1977), lower federal courts have determined that political affiliation in addition to blood quantum is necessary to obtain "Indian" status for the purposes of federal criminal jurisdiction. *See e.g.*, *U.S. v. Pemberton*, 405 F.3d 656, 660 (8th Cir. 2005); *U.S. v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005); *U.S. v. Prentiss*, 273 F.3d 1277, 1280 (10th Cir. 2001).

It its undisputed that Mr. Reynolds does not have a racial or ancestral connection to an Indian tribe. R. at 8. None of his ancestors lived in what is now the United States before its colonization by Europeans. *Id.* Not only does Mr. Reynolds fail to meet the generally accepted one eighth blood quantum standard, such as that which is articulated in *Bruce* and *Sully*, 394 F.3d at 1124; 195 F. at 117, he also fails to meet to meet more liberal standards that center some sort genealogical connection, such as in *Ramirez*. 537 F.3d at 1082 ("parent, grandparent, or great grandparent" is "clearly identified as an Indian.")

Therefore, even if we are to do away with rigid blood quantum requirements, which some have deemed problematic, *see* Skibine, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 ALB. GOV'T L. REV 49 (2017) (analyzing whether having some Indian

blood should be eliminated); Cushner and Sands, *Blood Should Not Tell, The Outdated "Blood" Test Used to Determine Indian Status in Federal Criminal Prosecution*, 59-APR FED. LAW. 32 (2012)("Blood should no longer play a leading role in determining whether a person in an Indian for purposes of federal criminal jurisdiction"), Mr. Reynolds fails to meet any sort of ancestral or genealogical connection to any Indian tribe and is thusly non-Indian. *Accord Ramirez* at 1082.

Mr. Reynolds, however, is a naturalized citizen of the Amantonka Nation, R. at 6, but his tribal membership represents a political affiliation with the tribe—rather than a racial or genealogical affiliation—that is not enough to obtain "Indian" status for the purposes of special domestic violence criminal jurisdiction. Therefore, for the purposes of special domestic violence criminal jurisdiction, Mr. Reynolds is a non-Indian.

III. MR. REYNOLDS'S DEFENSE COUNSEL WAS INADEQUATE BECAUSE COUNSEL DID NOT MEET THE STANDARDS ESTABLISHED BY VAWA 2013.

Until the enactment of VAWA 2013, tribal courts had no jurisdiction over non-Indians. In 1978, the U.S. Supreme Court ruled that Tribal courts do not have inherent sovereign authority over non-Indian residents who commit crimes on the reservation. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). What the tribes did have was the authority over Indian residents who commit crimes on Indian land. *Id.* Under the Indian Civil Rights Act of 1968 (ICRA), tribal court criminal defendants had the right to assistance of counsel. However, prior to the enactment of the Tribal Law and Order Act of 2010 (TLOA) and VAWA 2013, ICRA did not require tribes to provide defense counsel to defendants, it merely gave them the right to obtain counsel. 25 U.S.C. § 1302(a)(6) (2012)[1]. VAWA 2013

[1] Subsections (b) and (c) were added following enactment of TLOA.

expanded the jurisdiction of tribes to non-Indians accused of domestic violence crimes. As such, non-Indian defendants were now entitled to the rights provided in ICRA, along with amendments to those rights which were created by VAWA 2013—including the right to effective counsel provided by the tribes.

As a non-Indian, under VAWA 2013, Mr. Reynolds not only had the right to counsel, but also the right to an effective defense counsel. VAWA 2013 required that the protection provisions of the rights of non-Indian criminal defendants go beyond those given to Indian criminal defendants under ICRA and be at least equal to that guaranteed by the U.S. Constitution. However, the Amantonka Nation Code does not do enough to protect the right of assistance of counsel for non-Indians. The provisions are basic and do not live up to the standards of effective counsel provided at the federal level.

A. Pre-TLOA and VAWA: ICRA did not keep up with the federal changes regarding the right to counsel but did compare to the federal standard when it was enacted.

When ICRA was enacted in 1968, *Gideon v. Wainwright* had been decided five years prior. *Gideon v. Wainwright* 372 U.S. 335 (1963). At that time ICRA's general provision, which applied only to Indians, only gave defendants the right to counsel but at their own expense. Jordan Gross, *Through a Federal Habeas Corpus Glass, Darkly—Who is Entitled to Effective Assistance of Counsel in Tribal Court Under ICRA and How Will We Know if They Got It?*, 42 AM. INDIAN. L. REV. 1, 40 (2017). The *Gideon* decision held that the Sixth Amendment required appointment of counsel to indigent defendants at public expense in state and federal cases. 372 U.S. at 335. While on the surface ICRA departs from this holding, the fact that Congress did not include a Gideon-type provision in ICRA does not mean that there was in intent to have the right to counsel of tribal court defendants differ

from the constitutional right to counsel. Gross at 41. At the time when ICRA was enacted, the Gideon holding only extended to felony cases. ICRA's provisions only allowed for a penalty or punishment of no more than one year and a fine of $5000 for any one crime, like that of a misdemeanor. Thus, under ICRA at that time, indigent tribal court defendants were in essentially the same position as defendants under the federal constitution. *Id.* ICRA was consistent with the federal standards of 1968 which could indicate that Congress had the intention of it being consistent with federal standards all along. However, this did not happen as ICRA did not keep up with the changes with regards to the right of counsel as time went on, that is until the enactment of TLOA and VAWA 2013.

B. Mr. Reynolds meets all the requirements for the Amantonka Nation to exercise Special Domestic Violence Criminal Jurisdiction over him as a non-Indian.

Generally, the U.S. Supreme court has consistently held that Tribes had no inherent criminal jurisdiction over non-Indians. *Oliphant*, 435 U.S. at 191. That changed with the enactment of TLOA and VAWA 2013. TLOA expanded the punitive abilities of tribal courts by allowing sentencing authority to up to three years in jail per offense and allowing sentencing on multiple charges—up to 9 years maximum. 25 U.S.C. § 1302(b). VAWA 2013 recognized the inherent authority of tribes to exercise "special domestic violence criminal jurisdiction" (SDVCJ) over non-Indians who commit acts of domestic violence or dating violence or violate certain protection orders in Indian country. *Violence Against Women Act (VAWA) Reauthorization 2013*, U.S. DEP'T JUST., https://www.justice.gov/tribal/violence-against-women-act-vawa-reauthorization-2013-0. For a tribe to assert SDVCJ against a non-Indian, they must prove that the defendant has sufficient ties to the Indian tribe. Specifically, the tribe must point to as to whether the defendant: 1) resides on the reservation; 2) is

employed on the reservation; and 3) whether the defendant is a spouse or intimate partner of a tribal member. 25 U.S.C. § 1304(b)(4)(B)(i)–(iii).

In this case, Mr. Reynolds meets all the requirements for the Amantonka Nation to exercise SDVCJ. First, Mr. Reynolds is married to a citizen of the Amantonka Nation. R. at 6. Second, Mr. Reynolds was employed by the Amantonka shoe factory and, while he lost his job at this establishment, he found work at a warehouse distribution center on the reservation as a manager. *Id.* Lastly, both Mr. Reynolds and his wife reside in the tribal housing complex on the Amantonka Nation reservation and did so when the domestic disturbance occurred. *Id.*

C. VAWA 2013 requires tribal courts to provide a defendant with procedural protections beyond those required by ICRA's general provisions.

Under VAWA, tribes were to provide defendants with certain rights. These rights include: 1) protect the rights of defendants under ICRA; 2) protect the rights of defendants as described in TLOA; 3) include a fair jury pool which does not systematically exclude non-Indians; and 4) inform defendants ordered detained by tribal court of the right to file federal habeas corpus petitions. *Id.* Two important rights provided to defendants under TLOA are 1) provide effective assistance of counsel for defendants "at least equal to that guaranteed by the United States Constitution" and 2) provide indigent defendants a defense attorney "licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys" at tribal expense. 25 U.S.C § 1302(c)(1) and (2).

Given this evidence, VAWA not only affirmed inherent tribal authority to assert jurisdiction over non-Indians in domestic violence matter, but also imposed procedural safeguards beyond those required by ICRA's general provisions. As such, tribes should

provide higher standards and qualifications for defense attorneys so as to protect the rights of non-Indian defendants and match the standards that are provided by the federal government.

D. The Amantonka Nation Code does not meet the standards imposed by 25 U.S.C. § 1302(c)(1)

While tribes are free to create their own standards of assistance of counsel, such standards must guarantee rights and protection given under the U.S. constitution. This includes, as mentioned before, a defense attorney "licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys" at tribal expense. 25 USC 1302(c)(1) and (2).

Under the Amantonka Nation Code, the qualifications needed to become a public defender, or an assistant public defender, are not enough to provide effective assistance to defendants. In order to be a public defender in the Amantonka Nation a person needs to: 1) be at least 21 years old; 2) be of high moral character and integrity; 3) not have been dishonorably discharged by the Armed Services; 4) be physically able to carry out the duties of the office; 5) successfully completed, during their probationary period, a bar exam administered as prescribed by the Amantonka Nation's Executive Board; and 6) have training in Amantonka law and culture. AMANTONKA NATION CODE tit. 2 §607(a)(1)– (6). These requirements do not impose a stringent enough standard. They are essentially the same as those imposed of lay counselors in the Amantonka Nation Code. tit. 2 §501(b)(1)– (5). A lay counselor is a non-attorney who can represent defendants in tribal court. *Jackson v. Tracy*, No. CV 11–00448–PHX–FJM, 2012 WL 4120419, at *1 (D. Ariz. Sep. 19, 2012). Having a similar standard for both a public defender and lay counselor presents an issue as to whether

the effectiveness of representation provided by defense counsel is reasonable. Defendants who choose to have a counselor represent them, do so assuming the risk of deficiencies in performance. *Id.* However, when defendants are represented by attorneys, they expect a reasonable level of competency and representation. Given that both defense counsel and lay counselors are held to the same standard in this tribal court, defendants are not assured a level of assistance that is comparable with the constitutional right of assistance of counsel. Defendants are instead risking having an incompetent and ineffective defense, a risk that they are not voluntarily assuming.

Although tribes have the authority and freedom to create their own standards for attorneys to practice within the reservations, these standards can vary significantly from tribal government to tribal government. Both federal and state courts have developed a large body of law defining what effective counsel is, and tribes are free to choose to adopt the standard used by the federal and state courts or to create its own standard. PASCUA YAQUI TRIBE, CONSIDERATIONS IN IMPLEMENTING VAWA'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION AND TLOA'S ENHANCED SENTENCING AUTHORITY A LOOK AT THE EXPERIENCE OF THE PASCUA YAQUI TRIBE 27 (2014), http://www.ncai.org/tribal-vawa/getting-started/Practical_Guide_to_Implementing_VAWA_TLOA_letter_revision_3.pdf. As mentioned by the Pascua Yaqui of Arizona, "the required quality of legal assistance may be an area in which the tribe may want to depart from the federal minimum standards and impose a higher standard as a matter of tribal law." *Id.* The differences in standards amongst the tribes are likely to produce differences in the quality of representation afforded to criminal defendants under the tribes' jurisdictions. By not imposing higher standards, the Amantonka Nation, or any tribal nation, potentially exposes themselves to contentious

litigation. Complying to a common law federal standard or imposing higher standards ensures that not only defendants are adequately represented in criminal matters, but also that the tribes are not subject to future litigation regarding the standards of representation required by the constitution.

Furthermore, while the qualifications require that defense counsel take the Amantonka Nation bar exam, passage of the bar exam may not be enough to indicate competence in the law if even a lay counselor, who does not have a J.D. from an ABA accredited law school, is able to pass it. Therefore, passage of a state bar exam would require a greater understanding of the law and legal procedure given that state bar exams tend to impose a higher standard that is constant with federal requirements. Thus, increasing the chances of having an effective and competent defense counsel.

E. The Court must review counsel's performance applying *Strickland.*

Not only does ICRA now require that defendants subject to TLOA's enhancing sentencing and VAWA 2013 expanded jurisdiction have the right to effective assistance of counsel, "but it also explicitly tethers the substance of the right to the federal constitutional ineffective assistance of counsel standard." Gross at 44. The Supreme Court defined the federal constitutional right to effective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984).

The Court established a two-part test for an ineffective assistance of counsel claim. For counsel to be found to have been ineffective, a criminal defendant must show that 1) counsel's performance fellow the objective standard of reasonableness and 2) counsel's performance gives rise to a reasonable probability that if counsel had performed adequately, the result would have been different. *Id.* at 669. While states were free to create their own

tests, they could do so if it was more favorable to a petitioner. For defense counsel's performance to be "deficient," an appellant must demonstrate that counsel's errors were so serious that counsel was not functioning as is guaranteed by the Sixth Amendment. *Id.* at 687. Specifically, the court in *Strickland* asks whether counsel's performance fell below an objective standard of reasonableness measured against the prevailing practice in the community. *Id.* at 688. As for the second factor, *Strickland* requires that a petitioner demonstrate counsel's deficient was prejudicial. *Id.* at 692. Prejudice is measures by whether, but for counsel's errors, it is reasonable to believe that the result of the proceeding against the defendant would have been different. *Id.* at 694.

The Supreme Court of the Amantonka Nation should have reviewed the effectiveness of Mr. Reynolds's defense under the *Strickland* standard. The requirements imposed by the Amantonka Nation Code for their defense attorneys ensures that they might not be able to reasonably and competently represent their clients in criminal proceedings. If that is the case, the courts should review whether there have been significant errors committed by using the Strickland standard so to guarantee fairness and justice.

CONCLUSION

For the reasons stated above, the Petitioner requests that the judgement of the United States Court of Appeals for Thirteenth Circuit be reserved and remanded with instructions to grant the petition for a writ of habeas corpus.