No. 19-231

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT R. REYNOLDS,
Petitioner,
v.

WILLIAM SMITH, Chief Probation Officer, Amantonka Nation Probation Services;
JOHN MITCHELL, President, Amantonka Nation,
ELIZABETH NELSON, Chief Judge, Amantonka Nation District Court,
Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR RESPONDENTS

BRIEF FOR RESPONDENTS
NALSA MOOT COURT
TEAM NO. 132

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QUESTIONS PRESENTED

I. Under the VAWA ("Violence Against Women Act") Reauthorization of 2013, Congress acknowledged tribes' authority to prosecute defendants accused of domestic violence, if shown the accused has enough ties to the tribe. Petitioner is a naturalized citizen of the Amantonka Nation, lives on tribal land, and is married to an Amantonka citizen. Did the appeals court correctly determine that the Petitioner is an Indian and the tribe possesses criminal jurisdiction over him?

II. Under Special Domestic Violence Criminal Jurisdiction ("SDVCJ"), which requires that any person charged under the statute have the constitutional rights it delineates for those accused of a domestic violence crime on Indian land, does a tribal defense counsel of an SDVCJ defendant satisfy the relevant legal requirements if SDVCJ standards apply?

STATEMENT OF CASE

I. STATEMENT OF FACTS

The Petitioner, Mr. Robert R. Reynolds, met his wife, Lorinda, while both were attending the University of Rogers. R. at 6. Upon graduating, the two married and began working on the Amantonka Nation Reservation—Lorinda for the casino as an accountant and Petitioner as a manager at the local shoe factory. R. at 6. With their work on the reservation, the couple decided to move into a tribal housing apartment and began saving for a home. R. at 6.

At the time the two married, Petitioner was a non-Indian, but his wife was a citizen of the federally-recognized Amantonka tribe. R. at 6. Two years later, Petitioner began the process of becoming a naturalized citizen of the tribe: he voluntarily applied and completed the application, took the oath of citizenship, and now carries an Amantonka Nation identification card. R. at 3, 6-7. A year after accepting citizenship, Petitioner was laid off from his job when the factory closed its doors. R. at 6. Ten months passed, and during that time, the couple's marriage deteriorated. R. at 6. Petitioner began to drink very heavily and was known to be verbally abusive towards his wife. R. at 6. Amantonka Nation police were called to Petitioner's apartment on multiple occasions, but never took any action. R. at 6.

On or around June 15, 2017, tribal police responded to a call in tribal housing and discovered evidence Petitioner had struck his wife. R. at 2-3, 6. The blow—an open palm across the face—knocked her to the ground. R. at 6. During the fall, Lorinda Reynolds landed on the couple's coffee table, cracking a rib. R. at 6. Tribal police arrested Petitioner and transported him to Amantonka Nation jail. R. at 6. The Nation's chief prosecutor pressed charges, Petitioner was afforded a court-appointed attorney—one who exceeded the tribe's

requirements by holding a law degree from an ABA accredited law school—but was ultimately found guilty. R. at 6-7.

After trial, Lorinda Reynolds requested the District Court for the Amantonka Nation drop the initial protection order. R. at 5. Though Petitioner and his wife are currently undergoing counseling, his behavior continues to be supervised by the tribe's Probation Office and he must wear an ankle brace for monitoring. R. at 5. Petitioner is currently employed as the manager of a distribution center, which began operating several weeks after the domestic dispute. R. at 6.

II. STATEMENT OF PROCEEDINGS

Petitioner filed three pretrial motions against the Amantonka Nation to have the charges dismissed on the grounds that he is a non-Indian, the Amantonka Nation lacked criminal jurisdiction over non-Indians, and his court-appointed counsel was insufficiently qualified to serve as his counsel—violating the relevant equal protection requirements. R. at 3-4. The District Court for the Amantonka Nation denied Petitioner's pretrial motions. R. at 4. The District Court held that Petitioner's argument was unpersuasive and found no equal protection violation as defense counsel was sufficiently qualified even if SDVCJ standards applied. R. at 4. The case was set for trial beginning August 14, 2017. R. at 4. After the jury returned a verdict of guilty, Petitioner submitted a motion to set aside the verdict—reiterating the same arguments in the pretrial motions. R. at 5. The district court denied the motion. R. at 5. Petitioner also submitted a motion to continue his bond while his appeal was pending, and the district court granted the motion with no objection from the Amantonka Nation. R. at 5.

Petitioner appealed the decision of the district court to the Supreme Court of the Amantonka Nation. R. at 5. The tribal supreme court denied Petitioner's three pretrial

motions and affirmed Petitioner's conviction. R. at 7. The Supreme Court of the Amantonka Nation held that as a citizen of a federally-recognized tribe, Petitioner is an Indian, and the Amantonka Nation therefore possesses criminal jurisdiction over him. R. at 7. Additionally, the court rejected his violation of equal protection argument and held that the difference in qualifications was not material or relevant. R. at 7. Lastly, the court held that there were no facts to support a difference between a state bar exam and the Amantonka Nation's bar exam and that Petitioner failed to point to errors committed by his counsel. R. at 7.

Petitioner filed a petition for writ of habeas corpus under 25 U.S.C. §1303 in the United States District Court for the District of Rogers. R. at 8. Petitioner alleged the same argument as before: that his conviction was in violation of his federal civil rights as guaranteed in the United States Constitution's Fifth Amendment, the Indian Civil Rights Act, and the Violence Against Women Act of 2013. R. at 8. The United States District Court for the District of Rogers granted Petitioner's petition for habeas corpus. R. at 8. The court held that Petitioner cannot be an "Indian" for purposes of criminal jurisdiction and that Amantonka Nation failed to provide Petitioner with indigent defense counsel required under VAWA 2013. R. at 8.

The United States Court of Appeals for the Thirteenth Circuit reversed and remanded the decision of the United States District Court for the District of Rogers with instructions to deny the petition for a writ of habeas corpus and ruled for the reasons articulated by the Amantonka Nation Supreme Court. R. at 9.

Petitioner filed a timely petition for writ of certiorari to the Supreme Court of the United States and the Court granted the petition on October 15, 2018. R. at 10. In reviewing

the lower court's decision, this Court should apply a rational basis standard of review to VAWA 2013.

SUMMARY OF THE ARGUMENT

The Respondents' reply arises from Petitioner's certiorari petition requesting this Court apply the federal definition of "Indian" in defining his status and also find the counsel afforded him through a court-appointed attorney inadequate as a matter of law. The relevant statutory provision from VAWA Reauthorization of 2013 grants tribes criminal jurisdiction over non-Indians and Indians alike in certain situations limited by specific requirements. Defendants must be found to maintain clear ties to the tribe claiming jurisdiction by either living within their reservation lands, being employed there, or having spousal, intimate, or dating partner relationships with an Indian who lives on the reservation or is a member of that tribe. Congress enumerated these requirements—to show sufficient ties to the tribe—in order to trigger SDVCJ. This mechanism acts as another sign of Congress' intent to allow tribes authority to handle their own affairs.

As briefly highlighted above, VAWA also recognizes Indian tribes' inherent powers of self-government. Language in the statute clearly states these powers and defines the scope of tribe's authority for offenses arising under VAWA as well. When Petitioner challenges whether the Amantonka Nation may classify him as an Indian, he brings to issue whether tribes may exert their authority to define their own membership. This also becomes an issue of who can best carry out what VAWA was created to do in protecting Native women: federal prosecutors or tribal courts. Since this is an area of core interest for the tribe, its courts are better suited to handle these issues.

Petitioner also requests that the Court prescribe the federal definition of "Indian" when determining his status in relation to VAWA. The Court's decision in this case hinges on whether they want to classify Indians by race or political affiliation. It should be noted

that Petitioner is a naturalized citizen of the Amantonka Nation who voluntarily applied for citizenship, received its benefits, and continues to hold himself out as a member of the tribe. A finding that Petitioner remains a member but does not classify as an "Indian" will only continue to confuse the definition for years to come and impede tribal authority.

Amantonka Nation provided Petitioner the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution as required in the statutory constitutional rights listed in VAWA 2013. When analyzing Petitioner's claim of inadequate representation pursuant to the VAWA 2013 attorney requirements, Petitioner fails to point to any procedural failures that his counsel failed to perform, or any unprofessional errors committed by his counsel. Additionally, Petitioner fails to show that but for counsel's failures or unprofessional errors, the result of the proceeding would have been different.

Secondly, Amantonka Nation provided Petitioner a defense attorney licensed to practice law in a jurisdiction in the United States as constitutionally required in VAWA 2013. Petitioner relies on the argument that his indigent defense counsel in the tribal court failed to meet the standards established by VAWA 2013 by failing to maintain the same qualifications as a court-appointed attorney in state court. However, this argument requires the Court to conclude that a material difference exists between a state court indigent defense counsel and a tribal court indigent defense counsel. Pursuant to the VAWA 2013 provision, Amantonka Nation complied with the attorney requirement by affording Petitioner a defense counsel that possessed a license to practice law in a jurisdiction in the United States during the criminal proceedings. Therefore, the facts in the case at bar do not support Petitioner's claim of inadequate representation and the Court should not entertain it.

Petitioner's collateral attack on the tribal court conviction damages tribal sovereignty. Any holding in the case at bar implying that tribal courts lack the ability to convict persons pursuant to VAWA 2013 without violating federal civil rights—or without having to completely innovate their tribal court system to avoid this possibility—damages tribal sovereignty. Amantonka Nation's ability to prosecute and convict individuals pursuant to VAWA 2013 is essential to tribal sovereignty and furthers the tribe's interest in reducing domestic violence on Indian land. In this case of first impression, the Court should weigh the Petitioner's individual rights to fair treatment against the Amantonka Nation's interest in implementing the VAWA 2013 standards.

Regardless of this Court's decision on whether Petitioner is a non-Indian for purposes of SDVCJ, the Thirteenth Circuit did not error in reversing the District Court's grant of Petitioner's writ of habeas corpus because Amantonka Nation complied with all standards established by VAWA. This Court should affirm the Thirteenth Circuit's decision and deny the petition for a writ of habeas corpus.

ARGUMENT

Respondents request this Court uphold the United States Court of Appeals for the Thirteenth Circuit's finding that the Amantonka Nation tribal court exercised proper jurisdiction pursuant to VAWA's SDVCJ and correctly classified Petitioner as an Indian. The issue before this Court—whether Petitioner is a non-Indian for purposes of SDVCJ—contains much broader implications than the immediate jurisdictional issue at-hand. The Court now has the opportunity to bring clarity into this complex body of law by adhering to a uniform definition of "Indian," and acknowledge tribes' inherent sovereignty to govern the affairs occurring within tribal boundaries. When determining whether a party is an Indian,

this Court should eliminate the first prong of the *Rogers* test and focus on the remaining factors rather than base an individual's status on racial requirements. *United States v. Rogers*, 45 U.S. 567 (1846). Following this proposed modification would bring more clarity to federal Indian law, remain consistent with Congress' policy of self-determination, and allow tribes greater power to self-govern.

I. Since VAWA recognizes Indian tribes' power to exercise jurisdiction "over all persons" and Petitioner has sufficient ties to the Amantonka Nation, the tribal court was correct to utilize SDVCJ.

A simple reading of the VAWA Reauthorization of 2013 shows Petitioner maintains enough ties to the Amantonka Nation for criminal jurisdiction purposes. In the applicable provisions of the statute, Congress requires several categories a defendant must fall into for jurisdiction to be proper. The defendant must either reside in the Indian country of the participating tribe, work in the Indian country of that tribe, or be a spouse, intimate partner, or dating partner of a member of the tribe or an Indian residing in the Indian country of the participating tribe.[1] In this case, Petitioner resides in a tribal housing apartment on the reservation and his spouse is a member of the participating tribe—residing in the Indian country of that tribe—and thus satisfies two requirements of the statutory provision.[2] This particular section of the statute fails to provide a definition of Indian, but defines the ties necessary for tribes to exercise jurisdiction over defendants. Petitioner would meet these requirements regardless of a determination on his Indian status.

Even in the event this Court views the statute as unclear, the Court should follow the Ninth Circuit's recent ruling that ambiguous provisions should be interpreted to favor tribes.

[1] 25 U.S.C. § 1304(b)(4)(B) (2013).
[2] § 1304(b)(4)(B)(i)-(iii) (2013).

Gila River Indian Cmty. v. United States, 729 F.3d 1139, 1148 (9th Cir. 2013). While *Gila River* involved an action of the Department of Interior, the canon of construction referenced in the decision went back to this Court's decision in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), where the Court resolved inconsistencies in statutory text by construing them in favor of Indians. 502 U.S. at 269. Though the text of VAWA seems straight-forward regarding jurisdictional reach, Court precedent shows statutes should be read favorably for the Indians if any sections are found as ambiguous.

The text of VAWA provides further safeguards to ensure tribes maintain proper jurisdiction over their affairs. The statute maintains that tribes may not exercise SDVCJ if neither the defendant nor the victim are Indian.[3] The parties' statuses for the purpose of this statute are further defined in a later section, prohibiting use of SDVCJ should the defendant lack the necessary ties to the participating tribe.[4] And finally, the text acknowledges the "inherent power" of the tribe—through its self-government—to exercise this jurisdiction "over all persons."[5] This language displays Congress' response to criticism of *Oliphant* and its effects on tribal authority by restoring inherent tribal criminal jurisdiction over non-Indians in certain circumstances. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

A. Recent federal statutes and caselaw reaffirm tribes' inherent power to exercise criminal jurisdiction over all persons within their territories.

The reauthorization of VAWA in 2013 included provisions highlighting Congress' intent to recognize and affirm tribes' power to self-govern. In particular, VAWA states:

[3] 25 U.S.C. § 1304(b)(4)(a)(i) (2013).
[4] § 1304(b)(4)(B) (2013).
[5] § 1304(b)(1) (2013).

> Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 201 and 203, *the powers of self-government* of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction *over all persons*.[6]

Further, "powers of self-government" is defined as "all governmental powers possessed by an Indian tribe, . . . and judicial, . . . and tribunals by and through which they are executed, *including courts of Indian offenses*; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians . . . ."[7] This Court has found that the signaling of congressional intent regarding inherent tribal sovereignty should not be dismissed lightly. Justice Kennedy, writing in concurrence in *United States v. Lara*, 541 U.S. 193 (2004), stated that "Congress was careful to rely on the theory of inherent sovereignty, and not on a delegation. . . . I would take Congress at its word" when referring to an amendment of the Indian Civil Rights Act of 1968 ("ICRA") enacted after the Court's decision in *Duro v. Reina*, 495 U.S. 676 (1990), demonstrating "Congress' clear intention to restore to the tribes an inherent sovereign power to prosecute nonmember Indians." *United States v. Lara*, 541 U.S. 193, 199 (2004) (Kennedy, J. concurring). The language Congress inserted into VAWA should be viewed as remaining consistent with that intent.

Even if congressional intent for exercising inherent tribal power were absent, caselaw supports finding shared power between the federal government and Indians. Lower courts have found tribes to possess concurrent jurisdiction to punish conduct that falls under the Indian Major Crimes Act ("IMCA"). *Wetsit v. Stafne*, 44 F.3d 823 (9th Cir. 1995). It is important to note that this Court has not decided the issue of concurrent jurisdiction under the

[6] § 1304(b)(1) (2013) (emphasis added).
[7] § 1301(2) (2013) (emphasis added).

IMCA yet, but still highlighted the tribes' powers as "inherent powers of a limited sovereignty which has never been extinguished." 44 F.3d at 825 (quoting Felix Cohen, Handbook of Federal Indian Law 122 (1945) (citing *United States v. Wheeler*, 435 U.S. 313, 325 n. 22 (1978)). This Court, if necessary, could apply the analogous jurisdictional findings from the IMCA to actions arising under VAWA.

Consistent with rationale from *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), federal courts should act with caution when considering causes of action involving tribal affairs. In remaining consistent with previously mentioned instances of this Court's canons of construction, federal statutes should not be interpreted to interfere with tribal autonomy in the absence of clear indications of legislative intent. 436 U.S. at 55. The issue before Justice Marshall and the *Santa Clara* Pueblo Court revolved around the federal government's authority to strike down a tribal provision denying membership to children of female members who marry outside the tribe. *Id.* at 51. The Court reversed the appeals court's decision against the tribe with Justice Marshall writing that a "tribe's authority to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." 436 U.S. at 72 n. 32. This axiom continues to apply and should eliminate Petitioner's appeal implying otherwise.

Based off recent appellate-level caselaw, the Amantonka Nation may exercise criminal jurisdiction over its members. Most recently, the Sixth Circuit ruled Indian tribes maintain inherent sovereign authority to punish members based on tribal membership. *Kelsey v. Pope*, 809 F.3d 849, 859 (6th Cir. 2016). The court based its holding in large part from language in *Duro*, finding that a tribe's authority in prosecuting its members is "justified by the *voluntary character of tribal membership* and the concomitant right of participation in a

tribal government." 495 U.S. at 677-78 (emphasis added). Such powers allow the tribes to directly deal with the problems facing their communities and help bring justice for their members.

B. This Court should discard the first prong of the *Rogers* test because it perpetuates classification of Indians by race rather than political definition and impedes tribes from having full authority to determine their citizenship.

Over the past one hundred and fifty years, tribes continue to wrestle with the U.S. government over what is best for their interests. As federal policy shifts from relocation and termination to self-determination, the definition of the individual the government is tasked to maintain a trustee role for remains unclear. Courts struggle defining "Indian," often differing from statute-to-statute and creating a federal definition that sometimes adversely impacts tribal interests. Petitioner would maintain this Court's precedent in *United States v. Rogers*, 45 U.S. 567 (1846), should continue to control today. This test over the years has come to require some Indian blood in the individual for recognition under the federal definition of "Indian," followed by tribal or governmental recognition as an Indian. This second prong, by the Ninth Circuit's determination, consists of four factors, in declining order of importance, including: tribal enrollment, government recognition through assistance reserved only to Indians, enjoyment of benefits from tribal affiliation, and social recognition as an Indian through living on a reservation and participating in Indian social life. *United States v. Bruce*, 394 F.3d 1215, 1224 (9th Cir. 2005). The *Bruce* factors, applied later in *United States v. Cruz*, 554 F.3d 840 (9th Cir. 2009), heavily weigh in favor of finding the individual classified as an Indian if any of the factors exist. *Cruz*, 554 F.3d at 846. Under the theory of tribal self-government, the Court should need only to apply the factors in determining Petitioner's Indian status.

A determination of an individual's Indian status is best made from the tribes' own membership rolls. Most tribes maintain rolls, but in the unusual circumstance they do not, the Eighth Circuit's factors in *United States v. A.W.L.*, 117 F.3d 1423 (8th Cir. 1997)—comparable to those in *Bruce*—would suffice in establishing whether the party in question is an Indian. *United States v. A.W.L.*, No. 96-4035, 1997 WL 397168, at *1 (8th Cir. July 16, 1997). These factors include looking to whether the person holds themselves out to be an Indian, lives on the reservation, attends Indian schools, or receives tribal or federal benefits as an Indian. *Id*. Factoring in that Petitioner voluntarily applied and accepted citizenship would create a strong presumption that he is an Indian under these factors.

Though most of the cited cases involve parties with Indian blood, this requirement loses strength when comparing racial classification to politically defined classes. As time has progressed, it has become more and more difficult for tribes to maintain their blood ties. Many tribes are now combinations of ethnically defined tribes, so blood connections to the combined, officially recognized tribe may not exist. The federal court out of the Northern District of Texas recently handed down a decision with possible ramifications for this ongoing discussion. Judge Reed O'Connor found that under the Indian Child Welfare Act ("ICWA"), federal racial classifications must serve a compelling state interest and be narrowly tailored to further that interest. *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 531-32 (N.D. Tex. 2018). Additionally, by "deferring to tribal membership eligibility standards based on ancestry, rather than actual tribal affiliation, the ICWA's jurisdictional definition of 'Indian children' uses ancestry as a proxy for race," and thus, is subject to strict scrutiny. *Id.* at 534. Should this Court find *Brackeen* sufficiently similar to this case, the results would warrant discarding of the *Rogers* blood prong in determining Indian status.

Allowing tribes to exercise criminal jurisdiction over even nonmember Indians is seen as furthering self-government. *Means v. Navajo Nation*, 432 F.3d 924, 933 (9th Cir. 2005). When Russell Means, a well-known political activist, was found by the Navajo tribal courts to have committed a misdemeanor on their reservation, Means petitioned for habeas corpus under due process and equal protection claims. *Id.* at 935. The Ninth Circuit found no violation, ruling that the criminal jurisdiction of tribes over "all Indians" means those of Indian ancestry who are also Indians by political classification, not racial class.[8] Following the rationale and outcome of *Means*, Indian tribes should exercise inherent sovereign judicial power in criminal cases against Indians—regardless of their enrollment status—for crimes committed on the reservation. *Id*. at 931.

Petitioner's argument heavily leans on the idea that Congress possesses plenary power in the area of federal Indian policy—not allowing for tribes to punish non-Indians unless specifically authorized by Congress. This contention is largely based off the Court's decision in *Oliphant*, where Justice Rehnquist wrote that should tribal courts be able to try non-Indians, they would be free to try them for major offenses as well, where Congress gave federal courts exclusive jurisdiction. 435 U.S. at 203. Yet, Congress noted *Oliphant* as a major reason why they amended VAWA in 2013, specifically adding SDVCJ to acknowledge tribal court jurisdiction in the circumstances delineated under the statute. This narrow modification spells out Congress' intent to recognize tribal sovereignty.

Unlike the Ninth Circuit's holding in *United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015), classifying Petitioner based off blood quantum should not stand. That court's general

[8]*Means*, 432 F.3d at 930. The Ninth Circuit further cited language from the Supreme Court's holding in *Morton v. Mancari*, 417 U.S. 535 (1974), stating that federal statutory recognition of Indian status is "political rather than racial in nature." *Means*, 432 F.3d at 932 (quoting *Morton v. Mancari*, 417 U.S. 535, 553 n. 24 (1974)).

rule requires both proof of some quantum of Indian blood and membership or affiliation with a federally recognized tribe. *Id.* at 1113. But as Judge Ikuta points out while concurring in judgment, the first prong "serves no purpose, because the second prong of the *Bruce* test adequately defines an Indian based on his 'tribal or government recognition as an Indian.'" *Id*. at 1119, (Ikuta, J., concurring) (quoting *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005)). Ikuta further states that when federal courts determine an acceptable blood quantum, they "disrespect the tribe's sovereignty by refusing to defer to the tribe's own determination of its membership rolls." *Zepeda*, 792 F.3d at 1119 (Ikuta, J., concurring). As a practical matter, this would create an irony of acknowledging tribes' rights to prosecute non-Indians under VAWA but reserve exclusive jurisdiction to federal courts when the case involves Indians on both sides. The Court should affirm the Thirteenth Circuit's finding that, consistent with *Santa Clara Pueblo*, a tribe has the right to define and control its own membership—not allowing the Petitioner from escaping the jurisdiction of the tribe he voluntarily joined. 436 U.S. at 72 n. 32.

As a general matter, expanding tribal criminal jurisdiction under VAWA is in line with Congress' policy of self-determination. But, the effects of the *Oliphant* decision not only hampered this policy but placed Native women in a spot where many cannot seek justice. Recent statistics revealed that 88% of sexual violence committed against Native women was committed by non-Indians.[9] A U.S. Department of Justice report discovered that Native American and Alaska Native women experience sexual violence at a rate two and a

[9] Jessica Greer Griffith, *Too Many Gaps, Too Many Fallen Victims: Protecting American Indian Women from Violence on Tribal Lands*, 36 U. Pa. J. Int'l L. 785, 791 n. 21 (2015).

half times greater than other women in the United States.[10] VAWA's SDVCJ was clearly intended to help stem the tide of these trends.

The failure to prosecute crimes of violence against Native women at the federal-level should allow for tribes to step in and protect their own citizens. From the 2005 fiscal year through fiscal year 2009, 67% of sexual abuse and related offenses committed and charged within Indian country were left unprosecuted by the federal government.[11] With federal courts being courts of limited jurisdiction, thus requiring specific constitutional or statutory authority to initiate prosecution, it is by nature much more difficult to prosecute these crimes compared to tribal courts with general jurisdiction. Since these matters are closely related to core tribal interests—to protect a vulnerable part of their population—there is a strong case to recognize jurisdiction based on the nature of the crime.

The Court should look at how SDVCJ has worked for tribes—like the Pascua Yaqui—who participated in the VAWA pilot program to see the before-and-after effects of this law. Since VAWA reauthorization in 2013, the Pascua Yaqui have seen a vast majority of their criminal cases involve offenses arising under SDVCJ.[12] At the time of the bill's signing, then-Vice President Joe Biden stated that "once this authority is restored, tribes have a responsibility to use it. To enforce it. Enforce the law. Prosecute. Stand for the women, who have for too long endured not just injustice, but indifference."[13] The officials who passed this legislation seek to afford tribes the inherent power to prosecute non-Indian

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[10] U.S. Dep't of Justice, Public Law 280 and Law Enforcement in Indian Country—Research Priorities (2005), https://www.ncjrs.gov/pdffiles1/nij/209839.pdf.

[11] Margaret H. Zhang, *Special Domestic Violence Criminal Jurisdiction for Indian Tribes: Inherent Tribal Sovereignty Versus Defendants' Complete Constitutional Rights*, 164 U. Pa. L. Rev. 243, 246 n. 9 (2015).

[12] *SDVCJ Implementing Tribes*, ncai.org, http://www.ncai.org/tribal-vawa/for-tribes/vawa-sdvcj-implementing-tribes/pascua-yaqui-tribe (last visited January 13, 2019).

[13] Katie Zezima, *Biden: Violence Against Women is an 'Epidemic,'* Washington Post (December 3, 2014), https://www.washingtonpost.com/news/post-politics/wp/2014/12/03/biden-violence-against-women-is-an-epidemic/?noredirect=on&utm_term=.bca803511601.

offenders who had largely avoided consequences to this point. A Court ruling in favor of Respondents places tribes on the road back to protecting their people.

II. The Thirteenth Circuit did not error in reversing the district court's grant of Petitioner's writ of habeas corpus because the Amantonka Nation complied with all standards established by VAWA 2013.

In a criminal proceeding in which a participating tribe exercises SDVCJ of any person under VAWA, the participating tribe must afford certain rights to SDVCJ defendants.[14] Although the Act creates statutory rather than constitutional rights, the provisions and amendments in the Act support a compelling argument that Congress intended to place VAWA 2013's procedural protections in the same constitutional arena as those afforded U.S. citizens.[15] Jordan Gross, *VAWA 2013's Right to Appointed Counsel On Tribal Court Proceedings- A Rising Tide That Lifts All Boats Or A Procedural Windfall For Non-Indian Defendants*, 67 Case W. Res. L. Rev. 379, 435 (2016) (discussing ICRA's right to counsel provisions being co-extensive with the Sixth Amendment). Since this is a case of first impression, the Court should look to Sixth Amendment precedent which firmly states in regard to habeas corpus proceedings, "asserted denial of due process is to be tested by an appraisal of the totality of facts in a given case, that which may, in one setting, constitute a

[14] VAWA 2013 requires that non-Indian SDVCJ defendants have certain rights. Implementing tribes must guarantee all rights under the Indian Civil Rights Act of 1968 (ICRA), which largely tracks the U.S. Constitution's Bill of Rights, and protect the rights of defendants described in the Tribal Law and Order Act of 2010 by providing indigent defendants with the following: 1) effective assistance of a licensed defense counsel; 2) law-trained tribal judges who are licensed to practice law; 3) publicly available tribal criminal laws, rules of evidence and rules of criminal procedure; 4) maintain a record of the criminal proceedings; 5) inform defendants ordered detained by a tribal court of their right to file federal habeas corpus petitions. Department of Justice, *VAWA 2013 And Tribal Jurisdiction Over Crimes of Domestic Violence*, https://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/vawa-2013-tribal-jurisdiction-overnon-indian-perpetrators-domesticviolence.pdf (last visited 1/14/19).

[15] Congress included a catch-all residual provision in the VAWA 2013 amendments to ICRA extending to VAWA 2013 tribal court defendants: "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant." 25 U.S.C. § 1304(d)(4) (2013).

denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." *Gideon v. Wainwright*, 372 U.S. 335 (1963).

A. Amantonka Nation provided Petitioner the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution.

Petitioner wrongfully asserts that the attorney representing him was inadequate as a matter of law because he failed to state any facts or procedural deficiencies to prove that his counsel acted inadequately. Pursuant to VAWA 2013, an Indian tribe shall provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution. 25 U.S.C. § 1302 (2013). Since this is a case of first impression, Respondent urges this Court to analyze Petitioner's claim of inadequate representation using the *Strickland* test which states that when a convicted defendant complains of the ineffectiveness of counsel's assistance the defendant must show the following: the lawyer's performance fell below an objective standard of reasonableness ("the performance prong") and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different ("the prejudice prong"). *Strickland v. Washington*, 466 U.S. 668 (1984). In assessing deficiency, a court asks whether defense counsel's representation fell below an objective standard of reasonableness. *Id.* at 671. The benchmark for judging any claim of ineffectiveness of counsel must be whether counsel's conduct so undermined proper functioning of the adversarial process that the trial decision must be thrown out. Id. at 671. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. *Id.* at 672.

Although tribes are not bound entirely by this two-prong test, it is a good idea for tribes to understand the federal test and to develop a means for determining effective assistance of counsel that is equal to or greater than this federal requirement.[16] The performance of Petitioner's counsel did not fall below an objective standard of reasonableness. In *Strickland*, the state of Florida indicted a defendant for kidnapping and murder and appointed an experienced criminal defense counsel to represent defendant. The defendant in the case filed a habeas corpus petition in federal district court claiming ineffective assistance of counsel because his counsel failed to request a psychiatric report, investigate and present character witnesses, and seek a pre-sentencing report. This Court held that defense counsel's strategy at the sentencing hearing was not unreasonable and that even if his strategy were unreasonable, the actions did not cause prejudice to defendant because counsel made reasonable decisions based upon facts at the time of the hearing. As a result, defendant was not denied effective assistance.

The case at bar is distinguishable from *Strickland* because Petitioner fails to point to any similar facts or procedural failures, like the counsel failing to request any documents or present any evidence in his district court proceedings. Instead, Petitioner asserts that the difference between a state and tribal bar exam proves a deficiency in qualifications when, in fact, counsel possessed a JD degree from an ABA accredited law school at the time of representation of the Petitioner. R. at 7. As a result, Petitioner fails to satisfy the first prong of the Strickland test.

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[16]Michelle Rivard Parks and Deborah Flute, *Tribal Law and Order Act: Enhanced Sentencing Authority, Tribal Code Development Considerations Quick-Reference Overview & Checklist* 7 (2015), https://www.bja.gov/Publications/TLOAESAQuickReferenceChecklist.pdf.

As to the second prong of the *Strickland* test—the prejudice prong—Petitioner wholly failed to show a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. Petitioner was convicted by a jury of domestic violence pursuant to Title 5, Section 244 of the Amantonka Nation Code. R. at 2-5. Petitioner fails to cite to any procedural deficiencies or unprofessional errors made during his jury trial. Therefore, Petitioner remains far from the low bar set in *Strickland*. Pursuant to the guidance from *Gideon,* Petitioner also fails to assert a totality of the facts that constitute a denial of fundamental fairness in his tribal court proceedings.

B. Amantonka Nation provided Petitioner a defense attorney licensed to practice law in a jurisdiction in the United States.

To the extent that Petitioner relies on the argument that his indigent defense attorney in the tribal court failed to meet the standards established by VAWA 2013 by failing to maintain the same qualifications as a court-appointed attorney in state court, he requires the assertion that a material difference exists between a state court indigent defense counsel and a tribal court indigent defense counsel. However, according to the standards set in the VAWA 2013 provisions, the Indian Tribe shall provide to an indigent defendant the assistance of 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. 25 U.S.C. § 1302 (2013).

Congress carefully crafted the constitutional rights of SDVCJ defendants in VAWA 2013 to withstand constitutional due process challenges that any SDVCJ defendants may raise in a federal court. To date, no due process challenges exist in the courts and scholars agree that the statute should withstand due process challenges. Julia Bedell, *The Fairness of*

Tribal Court Juries and Non-Indian Defendants, 41 Am. Indian L. Rev. 253, 260 & n.47 (2017) (discussing due process protections under VAWA 2013). As a result, Respondent urges the Court to evaluate on a practical level the methods in which tribal courts across the country are meeting the VAWA 2013 attorney requirement through evaluation of criminal tribal case law. While the case law remains merely persuasive, an evaluation of practical methods carried out by the tribes pursuant to VAWA 2013 illustrates that SDVCJ defendants continue to receive the constitutional rights listed in the VAWA 2013 provisions.

Although SDVCJ took effect nationwide on March 7, 2015, VAWA 2013 authorized "pilot projects" which allowed five tribes to exercise jurisdiction on an accelerated basis before the nationwide start date.[17] In *Pascua Yaqui Tribe v. Jaimez* (No. 16-236) (Pascua Yaqui Ct. App.), the Pascua Yaqui tribe successfully tried a defendant pursuant to SDVCJ for malicious mischief and committing domestic violence upon his wife. The tribe carried out the jury trial of tribal and non-tribal members while satisfying all statutory constitutional rights afforded to SDVCJ defendants. Defendant did not file a writ of habeas corpus upon conclusion of the proceeding. In fact, the defendant received an acquittal of the charges. Tribal courts continue successfully carrying out criminal proceedings pursuant to SDVCJ without any due process violations against defendants.[18] Petitioner attempts to make the connection that the difference in public defender credentials between that of a United States public defender and that of an Amantonka Nation public defender creates an inadequacy as a

[17] The five tribes that participated in the pilot project were the following: Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in Montana, the Confederated Tribes of the Umatilla Indian Reservation in Oregon, the Pascua Yaqui Tribe of Arizona, the Sisseton Wahpeton Oyate of the Lake Traverse Reservation in South Dakota, and the Tulalip Tribes of Washington. National Congress of American Indians (NCAI), *SDVCJ Pilot Project*, http://www.ncai.org/tribal-vawa/for-tribes/pilot-project (last visited January 10, 2018).

[18] "We can now show five different ways that tribes have successfully updated their laws and procedures to do implementation," Indianz.Com, *Tribes in Pilot Project Filed 26 VAWA Cases Against Non-Indians*, http://www.indianz.com/News/2015/016691.asp, (last visited January 10, 2018).

matter of law. However, Petitioner's indigent defense counsel satisfied all the following qualifications required by the Amantonka Nation Code to be eligible to serve as a public defender:

> (1) be at least 21 years of age; (2) be of high moral character and integrity; (3) not have been dishonorably discharged from the Armed Services; (4) be physically able to carry out the duties of the office; (5) successfully completed, during their probationary period, a bar examination administered as prescribed by the Amantonka Nation's Executive Board; and (6) must have training in Amantonka law and culture. A public defender who holds a JD degree from an accredited law school[19], has taken and passed the Amantonka Nation Bar Exam, and who has taken the oath of office and passed a background check, is sufficiently qualified under the Indian Civil Rights Act to represent a defendant imprisoned more than one year and any defendant charged under the Nation's Special Domestic Violence Criminal Jurisdiction.

2 Amantonka Nation C. § 607.

Moreover, as stated above, tribes are taking steps to ensure that the VAWA 2013 requirements are being met.[20] The fact that the first two jury trials handled by the Pascua Yaqui using the expanded VAWA 2013 authority resulted in acquittals demonstrates the tribes' ability to treat non-Indian defendants fairly—especially when evaluating whether the tribal attorneys are applying appropriate professional licensing standards and effectively ensuring competence and professional responsibility pursuant to 25 U.S.C. § 1302 (2013).

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[19] Notably, some states in the United States do not require graduation from an American Bar Association ("ABA") approved law school, Wisconsin does not require a state bar exam, 16 states allow law students to take the bar examination prior to the completion of law school and some states with reciprocity allow attorneys to practice law in their state without taking the respective state bar exam. American Bar Association, *Comprehensive Guide to Bar Admission Requirements* (2017), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/ComprehensiveGuidetoBarAdmissions/2017_comp_guide_web.authcheckdam.pdf.

[20] Some tribes hired a licensed attorney full time to serve as tribal public defender, while others contracted with outside attorneys to represent their defendants as needed. Fort Peck, Pascua Yaqui, Sisseton, EBCI, and Chitimacha have hired full-time tribal public defenders, while CTUIR, Tulalip, Muscogee, and Sac and Fox rely on contract arrangements with licensed attorneys. http://www.ncai.org/tribal-vawa/resources/code-development/judicial-court-resources/defendants-rights/contrasting-the-first-18-implementing-tribes-on-right-to-counsel.

Setting aside the fact that the tribal public defender satisfied the VAWA 2013 requirements and adopting the analysis from this Court's Sixth Amendment precedent, the core concern when analyzing representation of a defendant is an appraisal of the totality of facts in a given case that may constitute a denial of fundamental fairness, shocking to the universal sense of justice, or fall short of such denial. Petitioner fails to point to a totality of facts showing a denial of fundamental fairness aside from the mere credentials of the Amantonka Nation public defender.

If the Court requires tribal courts to mirror the requirements of a United States public defender in addition to satisfying all tribal code requirements, the Court undermines the authority of the tribal courts over Reservation affairs and hence, infringes on the right of the Indians to govern themselves. As a policy matter, the Court should consider the overarching point that Justice Stephen Breyer stated in oral argument in *United States v. Bryant* argument when discussing a potential habeas corpus challenge in a criminal tribal court proceeding in which he stated, "And then we should hold that – I guess, that all of the convictions in all the tribes. . . all those are invalid." Transcript of Oral Argument at 30, *United States v. Bryant*, 136 S. Ct. 1954 (2016) (No. 15-420).

Respondent urges this Court to consider the legal ramifications that will inevitably result if this Court finds that Petitioner's counsel was inadequate as a matter of law. The Court risks declaring to tribal courts that the convictions were invalid if the tribe afforded SDVCJ indigent defendants with a public defender of similar credentials as the Amantonka Nation public defender.

C. Petitioner's collateral attack on the tribal court conviction damages tribal sovereignty.

Indian tribes are "distinct, independent political communities, retaining their original and natural rights." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). The Bill of Rights and the Fourteenth Amendment do not apply to Indian criminal defendants in tribal court proceedings. *Talton v. Mayes*, 163 U.S. 376, 382-385 (1986) (quoting Felix Cohen, Handbook of Federal Indian Law 384 (1982)). However, under the Indian Civil Rights Act of 1968 ("ICRA")—as amended by VAWA 2013—the privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe. 25 U.S.C. § 1303 (2013). The Indian Civil Rights Act of 1968, which governs tribal court proceedings, accords a range of procedural safeguards to tribal court defendants "similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978). ICRA permits a prisoner to challenge the fundamental fairness of tribal court proceedings in federal habeas corpus proceedings. *Bryant,* 136 S. Ct. at 1954. Similarly, VAWA 2013 contains a federal habeas corpus section. 25 U.S.C. § 1303 (2013). Federal habeas corpus relief provides "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action and insures that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969).

The Court damages tribal sovereignty when asserting that the tribal court cannot, under VAWA 2013, convict persons when they engage in domestic violence against an Indian on tribal land without violating federal civil rights. Unfortunately, the discussion for tribes is

already shifting to concerns over the habeas corpus relief provision in the VAWA 2013 provisions.[21]

Amantonka Nation's ability to prosecute and convict Petitioner under VAWA 2013 while protecting his constitutional rights as a United States citizen maintains tribal sovereignty and furthers the interest in maintaining order and reducing violence and crime in Indian country. *Miner Electric, Inc.* held that tribal courts authority over non-Indians on Indian land cannot violate the non-Indian's rights and protections under the Federal Constitution. *Miner Electric, Inc. v. Muskogee Creek Nation*, 505 F.3d 1007 (10th Cir. 2007).

However, Respondent requests that when analyzing whether a tribal court convicted a person under VAWA 2013 while upholding the defendant's constitutional rights under ICRA, as amended by VAWA 2013, this Court should adopt the balancing approach taken in *Randall v. Yakima Nation Tribal Court*. In *Randall*, the Ninth Circuit determined whether the Yakima Nation Court of Appeals violated the petitioner's due process rights under the ICRA when the court dismissed the petitioner's appeal because the tribal district court failed to timely rule on the petitioner's motion. *Randall v Yakima Nation Tribal Court*, 841 F.2d 897 (9th Cir. 1988). When the Ninth Circuit analyzed the issue, the court stated that, "where the tribal court proceedings under scrutiny differ significantly from those commonly employed in Anglo-Saxon society . . . courts weigh the individual right to fair treatment against the magnitude of the tribal interest in employing those procedures to determine whether the procedures pass must under the ICRA." *Id.* at 900. However, "where the tribal court

[21] Legislative Hearing on S. 2785, A Bill to Protect Native Children and Promote Public Safety in Indian Country; S. 2916 A Bill to Provide that the Pueblo of Santa Clara May Lease for 99 Years Certain Restricted Land and for Other Purposes; and S. 2920, The Tribal Law and Order Reauthorization Act of 2016 Before the S. Comm. on Indian Affairs, 114th Cong. (2016) (Written Testimony of Alfred L. Urbina, Attorney General of Pascua Yaqui).

procedures parallel those found in Anglo-Saxon society . . . courts need not engage in those complex weighing of interests." *Id.* at 900.

The Court must analyze whether the Amantonka Nation's minimum requirements for their public defenders complies with the standards established by VAWA 2013. The Court should weigh the Petitioner's individual right to fair treatment against the magnitude of Amantonka Nation's interest in employing those attorney standards to determine whether the standards pass must under the ICRA, as amended by VAWA 2013. Additionally, the Court must consider the extent that the Amantonka Nation attorney standards parallel those found in Anglo-Saxon society. According to *Randall*, if the standards parallel those found in Anglo-Saxon society, the Court need not engage in the complex weighing of interests. Otherwise, SDVCJ will eventually "create the system that Senator Sam Ervin of North Carolina originally conceived of where ICRA provides a vehicle for further assimilation of tribes." Robert Berry, *Civil Liberties Constraints on Tribal Sovereignty after the Indian Civil Rights Act of 1968*, 1 J.L. & POL'Y 20 (1993) (discussing a bill proposed by Senator Sam Ervin to make tribes subject to the same limitations and restraints of the Constitution).

CONCLUSION

The Amantonka Nation District Court, Supreme Court, and U.S. Court of Appeals for the Thirteenth Circuit correctly ruled that Petitioner is subject to tribal court jurisdiction as an Indian. These lower court decisions are in-line with this Court's ruling in *Santa Clara Pueblo* that tribes have the right to define and control their own membership. 436 U.S. at 72 n. 32. And the Amantonka Nation tribal courts were within their statutorily recognized sovereign authority to prosecute Petitioner pursuant to VAWA's provisions. Thus, this Court should

affirm the judgment of the United States Court of Appeals for the Thirteenth Circuit finding Petitioner as an Indian subject to the tribal court's determination under VAWA's SDVCJ.