

Case No. 19-231

**IN THE UNITED STATES SUPREME COURT
MARCH 2019 TERM**

ROBERT R. REYNOLDS,

Defendant-Petitioner,

v.

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

Plaintiffs-Respondents

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

**Brief for Respondents
Oral Argument Requested**

January 14, 2019

Attorneys for Respondents

Team Number: 193

QUESTIONS PRESENTED

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

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STATEMENT OF THE CASE

Statement of Proceedings

On July 5, 2017, the District Court for the Amantonka Nation denied all three of Mr. Reynold's pretrial motions. R. at 3. The first, for dismissal on grounds that he is a non-Indian, thus the Amantonka Nation lacks criminal jurisdiction. *Id.* Court denied because Mr. Reynold's is a citizen of the Amantonka Nation and therefore an Indian. *Id.* The second, for appointed attorney under 25 U.S.C. § 1302 requirements. *Id.* Court denied because Mr. Reynold's is an Indian and therefore Indian on Indian crime is not subject to 25 U.S.C. § 1302 requirements. *Id.* The third, for insufficiently qualified court-appointed counsel, which violated Equal Protection Requirements. *Id.* Court denied because the argument is not persuasive and finds no equal protection violation. R. at 4.

On August 23, 2017, the District Court for the Amantonka Nation ordered judgement and sentencing to Mr. Reynold. R. at 5. On November 27, 2017, the Supreme Court of the Amantonka Nation affirmed Mr. Reynold's conviction. R. at 7. On March 7, 2018, the United States District Court for the District of Rogers granted a writ of habeas corpus. R. at 8. On August 20, 2018, the U.S. Court of Appeals for the Thirteenth Circuit reversed and remanded to decision of the United States District Court for the District of Rogers with instructions to deny the petition for a writ of habeas corpus. R. at 9. The issues brought to the Supreme Court of the United States for a Writ of Certiorari are (1) whether Petitioner is a non-Indian for purposes of Special Domestic Violence Criminal Jurisdiction, and (2) whether Petitioner's court-appointed attorney satisfied the relevant legal requirements. R. at 10.

Statement of the Facts

Petitioner Robert Reynolds met his wife Lorinda while they were both students at the University of Rogers. R. at 6. When they met Reynolds was a non-Indian and Lorinda was and is a citizen of the Amantonka Nation, a federally-recognized tribe and located in the State of Rogers. *Id.* After graduating the two married and found work on the Amantonka Nation Reservation. *Id.* They moved to tribal housing on the Amantonka Reservation shortly after. *Id.* Two years after their marriage, Reynolds successfully became a naturalized citizen of the Amantonka Tribe after he applied for the process, took the oath of citizenship, and received a Amanontka Nation ID card. *Id.* One year after becoming a naturalized citizen Reynolds lost his job due to the factory he worked at closing. *Id.* He was unemployed for ten months and in those months his marriage started to fall apart. *Id.* (Currently employed as of July 2017 in a warehouse on the Amantonka Nation’s reservation. *Id.*)

After losing his job and before finding new work ten months later Reynolds started drinking heavily and verbally abusing his wife. *Id.* On June 15, 2017, tribal police responded to a call made from the Reynolds’ apartment. *Id.* This is not the first call the tribal police have responded to a call from the Reynolds’ apartment, but is the first time tribal police saw evidence of physical abuse. *Id.* Petitioner Robert Reynolds, indicated by the evidence, struck his wife, Lorinda, “with an open palm across her face with enough force to cause her to fall to the ground. During the fall, her torso struck a coffee table, resulting in a cracked rib.” *Id.* Responding officers arrested Reynolds and transported him to the Amantonka Nation’s Jail. *Id.* The Amantonka Nation’s chief prosecutor filed a complaint charging shortly after stating that

Reynolds violated Title 5 Section 244 of the Amantonka Nation Code. R. at 7. Jury found Reynold's guilty and an appeal ensued. *Id.*

Argument on appeal claimed that the attorney appointed to represent him was inadequate as a matter of law resting on two alternative theories. *Id.* The first, that as a non-Indian the attorney appointed to represent him must meet the standards established by VAWA 2013. *Id.* And the second, that if he is found to be an Indian then "the fact that the attorney he is entitled to is less qualified than the attorney to which a non-Indian is entitled to, is in and of itself a violation of equal protection." *Id.* Both theories were rejected by the Supreme Court of the Amantonka Nation because the difference in qualifications were not material or relevant. *Id.* The attorney appointed to Petitioner possess a JD degree from an ABA accredited law school and is a member of good standing with the Amantonka Nation Bar Association. *Id.* There are not proven or stated differences between the state and tribal bar exam and Petitioner has alleged no errors committed by his appointed counsel. *Id.*

SUMMARY OF THE ARGUMENT

Because Petitioner is a naturalized member of the Amantonka Nation and therefore an "Indian" for the purposes of tribal criminal jurisdiction, this Court should affirm the decision of the lower court. Furthermore, even if this Court determines that Petitioner is not an Indian, this Court should affirm the decision of the lower court because the Amantonka Nation has lawfully exercised special domestic violence criminal jurisdiction over Petitioner, and Petitioner received appropriate indigent defense counsel as required under the Violence Against Women Act of 2013.

It is clear that Petitioner is an "Indian" for the purposes of establishing tribal criminal jurisdiction. Petitioner is a naturalized citizen of the Amantonka Nation. When Petitioner

voluntarily accepted citizenship with the Amantonka Nation, he acquired all of the rights and privileges of all Amantonka citizens. Upon acceptance of these rights and privileges, Petitioner made himself amenable to the laws of the Amantonka Nation and is therefore subject to the Nation's criminal jurisdiction. The federal government has long recognized that status as an "Indian" is a unique political status not based on impermissible racial classifications. Furthermore, this Court has repeatedly declined to interfere with tribal membership determinations absent congressional legislation or treaty provision. This Court has on multiple occasions recognized that non-Indians may be adopted into a tribe and subject to the tribe's laws. The federal definition of "Indian," which requires some degree of Indian blood and federal or tribal recognition as an Indian, is used for the purposes of determining federal criminal jurisdiction and is not applicable to determining tribal criminal jurisdiction.

Even if this Court declines to recognize Petitioner as an Indian, the Amantonka Nation has rightfully established criminal jurisdiction under the Violence Against Women Act of 2013 and has provided Petitioner with adequate legal representation as required by the Act. Indian tribes may exercise special domestic violence criminal jurisdiction over a non-Indian individual if the individual has some connection to the tribe and commits a domestic violence offense on Indian land. Petitioner, husband of tribal member Linda Reynolds, knowingly struck his wife in tribal housing situated on the Amantonka Indian Reservation, therefore falling within the Nation's special domestic violence criminal jurisdiction. For the Amantonka Nation to assert such jurisdiction, the Nation is required to provide Petitioner with indigent defense counsel licensed in any jurisdiction of the United States. Although Petitioner's defense counsel was not licensed with a state bar, the Petitioner's counsel is licensed with the Amantonka Bar Association. Therefore, Petitioner's counsel is equally qualified to represent Petitioner as an

attorney licensed by a state and may in fact be more qualified due to his familiarity with the Amantonka laws and courts. Furthermore, no equal protection concerns are raised due to the differences in counsel required by the Amantonka Nation Code, which requires different qualifications for counsel representing Indians and non-Indians. These differences survive strict scrutiny because they are narrowly tailored to accomplish the compelling governmental interest of providing culturally appropriate counsel to defendants. The differences in qualifications are inconsequential and provide equally effective counsel to defendants of all races.

For these reasons this Court should affirm the decision of the lower court to deny Petitioner's writ of habeas corpus.

ARGUMENT

Standard of Review

The standard for review for a Writ of Certiorari involving sixth amendment (right to effective counsel) and habeas corpus issues in the Supreme Court of the United States is *de novo*.

I. PETITIONER IS A MEMBER OF THE AMANTONKA NATION AND IS THEREFORE AN "INDIAN FOR THE PURPOSES OF TRIBAL CRIMINAL JURISDICTION.

Petitioner Robert Reynolds is a naturalized citizen of the Amantonka Nation, with all of the rights and privileges of an Amantonka citizen, and is therefore legally considered an "Indian" for the purposes of tribal criminal jurisdiction. The federal government has repeatedly confirmed that an individual's status as "Indian" is not based on racial classifications, but is based on the "unique status of Indians as 'a separate people' with their own political institutions." *United States v. Antelope*, 430 U.S. 641 (1977). Furthermore, absent treaty provision or Congressional legislation, the federal government has never sought to interfere with tribal membership determinations. Stephen L. Pevar, *The Rights of Indians and Tribes* 90-91 (Oxford Univ. Press

ed., 4th ed. 2012). In fact, there have been multiple occasions where the courts have recognized that a tribe's inherent right to make membership determinations includes the right to adopt non-Indians into the tribe and assert jurisdiction over them. *Cf., e.g., Roff v. Burney*, 168 U.S. 218 (1897).

A. The United States Government Has Repeatedly Confirmed That Classification As “Indian” is Based On Unique Political Status Rather Than Race.

Indian status is based on unique political status rather than racial classification. To hold otherwise would raise significant equal protection concerns and undue years of judicial precedent and legislation targeted to Indians. *Morton v. Mancari*, 417 U.S. 535, 553 (1974). In *Mancari*, this Court upheld the constitutionality of a Bureau of Indian Affairs hiring preference, on the basis that the preference was “granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.” *Id.* at 553. In *Mancari*, a group of non-Indian BIA employees contended that the hiring policy, which gave preference to Indians, violated the Due Process Clause of the Fifth Amendment and the anti-discrimination provisions of the Equal Employment Opportunity Act of 1972. *Id.* at 539-40. The Court disagreed, reasoning that Indians possess a unique legal status with the federal government based on a history of treaties and the guardian-ward relationship that Congress has assumed with the Indian tribes. *Id.* at 552. In fact, the Constitution expressly provides Congress with the power to single Indians out in the Indian Commerce Clause. *Id.* at 553. The hiring preference was “reasonably and directly related to [the] legitimate, nonracially based goal” of promoting Indian self-governance. *Id.* at 555.

In *United States v. Antelope*, 430 U.S. 641, 648 (1977), the Supreme Court held that federal jurisdiction over Indians in Indian Country was not based on “impermissible racial classifications.” Two members of the Coeur d’Alene Indian tribe robbed and killed a non-Indian

woman within the boundaries of their reservation. *Id.* at 643. The defendants were convicted of first-degree felony murder in federal court under the Major Crimes Act. *Id.* at 643-44. The defendants claimed that their convictions violated the Fifth Amendment Due Process Clause because had they been non-Indians, they would have been subject to state jurisdiction, which did not recognize felony-murder. *Id.* at 645. Citing *Mancari*, this Court reasoned that regulation over Indians is based on their legal status as “once-sovereign political communities” – not their status as a racial group. *Id.* at 647. This Court held that the defendants “were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d’Alene Tribe.” *Id.* Because Indians are treated the same as any other individual who falls under the jurisdiction of federal law, equal protection was not violated. *Id.* at 647-48.

In *Fisher v. Dist. Court of Sixteenth Judicial Dist. Of Mont.*, 424 U.S. 382, 391 (1976), this Court held that denial of an Indian’s access to state courts did not constitute impermissible racial discrimination. In *Fisher*, the Northern Cheyenne tribal court awarded temporary custody of a child to the plaintiff, who initiated adoption proceedings in Montana state court. *Id.* at 384. The child’s mother moved to dismiss, asserting that the tribal court had exclusive jurisdiction because all of the parties were tribal members residing on the reservation. *Id.* at 384-85. The plaintiff argued that the denial of access to state courts violated her right to equal protection under the law. *Id.* at 386. This Court held that the tribe had exclusive jurisdiction over the matter. *Id.* at 390. Furthermore, this Court rejected the argument that the denial of access to state court constituted impermissible racial discrimination because the tribe’s exclusive jurisdiction was based on the quasi-sovereign status of the tribe, not the plaintiff’s race. 391.

In *Mancari*, this Court upheld the constitutionality of a BIA hiring preference for Indians because the preference was intended to benefit Indians not as a racial group, but as “members of

quasi-sovereign tribal entities.” 417 U.S. at 555. Likewise, the Amantonka Nation is a self-governing quasi-sovereign nation. This Court determined in *Mancari* that the unique political status of Indians is based on treaties and the guardian-ward relationship with the federal government. *Id.* at 552. The Amantonka Nation is a federally recognized tribe with which the federal government has assumed a trust responsibility. Finally, this Court recognized that the hiring preference in *Mancari* was intended to achieve a “legitimate, nonracially based goal” of promoting Indian self-governance. *Id.* at 555. The federal government to this day continues the policy of enabling Indian tribes govern themselves. The goal of tribal self-governance may only be achieved by allowing tribes to assert jurisdiction over their members. Because this Court determined in *Mancari* that tribal self-governance is not a racially based goal, it follows that tribal criminal jurisdiction over Petitioner is based on his political status as a member of the Amantonka Nation rather than his racial classification.

Similarly, in *Antelope*, this Court upheld federal jurisdiction on the basis of Indian status because classification as an Indian is based on tribal membership rather than race. 430 U.S. at 647. The petitioner is an enrolled member of the Amantonka Nation. His status as an Indian is not based on his race, but on his membership with the tribe. This Court held that so long as federal laws are applied in an even-handed manner to everyone under federal jurisdiction, equal protection is not violated. *Id.* at 647-48. Similarly, the petitioner is a naturalized citizen of the Amantonka Nation, with all of the rights and privileges afforded to all Amantonka citizens.

Finally, in *Fisher*, this Court determined that denial of access to state courts based on Indian status was not impermissible racial discrimination because the tribe’s jurisdiction stemmed from the quasi-sovereign status of the tribe. 424 U.S. at 391. As previously stated, the

Amantonka Nation is a quasi-sovereign nation recognized by the federal government. The Tribe's jurisdiction over is inherent and is not based on the racial classifications of its members.

B. Absent Congressional Statute Or Treaty Provision, Tribes Have the Absolute Inherent Right to Determine Membership.

The federal government has repeatedly declined to intrude on purely intramural tribal affairs, specifically membership determinations, in the interest of promoting self-government. For example, in *Santa Clara Pueblo v. Martinez*, 436 U.S. 47, 72 (1978), this Court held that no federal cause of action existed to dispute a tribe's membership rules under the Indian Civil Rights Act. In *Santa Clara Pueblo*, a female tribal member brought suit against the tribe in federal court. *Id.* at 52. She claimed that the tribe's membership rule, which denied membership to the children of women who married outside the tribe, discriminated by sex and ancestry in violation of the ICRA. *Id.* This Court reasoned that Congress passed ICRA for two reasons – to protect the rights of individual tribal members and to promote tribal self-government. *Id.* at 67. Congress intentionally provided habeas corpus as the only cause of action under ICRA to avoid “unnecessary intrusions on tribal governments.” *Id.* at 68. Furthermore, this Court cited the district court opinion, which stated, “To abrogate tribal decisions, particularly in the delicate area of membership, for whatever ‘good’ reasons, is to destroy cultural identity under the guise of saving it.” *Id.* at 55. That this Court saw fit to cite this passage shows that membership is exactly the type of issue that should be determined by the tribe.

In *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 895 (2d Cir. 1996), the Second Circuit held that disenrollment and banishment from an Indian tribe constituted a significant restraint on liberty sufficient to invoke a habeas corpus petition under the Indian Civil Rights Act. In this case, members of the Tonawanda Band of Seneca Indians were accused of treason and sentenced to banishment and disenrollment from the tribe. *Id.* at 876. The petitioners

filed for writs of habeas corpus claiming that several of their rights were violated under ICRA. *Id.* at 879. The court determined that that banishment and denationalization were both sufficient to establish habeas review. *Id.* at 895-96. The court found that under these circumstances, ICRA provided a narrow limitation on tribes to expel their members. *Id.* at 898.

As *Santa Clara Pueblo* illustrates, membership determinations should be made by tribes, not the federal government. When passing ICRA, Congress intentionally declined to provide a federal cause of action to enforce the provisions of ICRA, apart from habeas corpus relief, in the interest of promoting tribal self-government. 436 U.S. at 68. This Court agreed that membership determinations are an important part of a tribe's cultural identity which federal government should not intrude upon. *Id.* at 55. The Amantonka Nation has a long history of adopting the spouses of tribal members into the tribe. To force the Tribe to adopt the federal definition of "Indian" would be an "unnecessary intrusion" on the Tribe's ability to self-govern and maintain its cultural identity.

Unlike in *Poodry*, where the court held the federal courts could review a tribe's disenrollment determination under ICRA where the disenrollment was a criminal penalty, the Amantonka Nation is not seeking to disenroll Petitioner. 85 F.3d at 895. The Amantonka Nation's decision to enroll Petitioner was obviously not a criminal penalty, and therefore the federal courts may not review his enrollment status. The *Poodry* court established that determinations on tribal membership were subject to limitation by Congressional statutes such as ICRA. *Id.* at 879. However, *Poodry* illustrated a narrow exception to the general rule that tribes determine membership, where disenrollment was a criminal penalty. *Id.* at 895. However, because Petitioner's criminal penalty does not affect his enrollment status, Petitioner's status as a tribal member may not be reviewed under ICRA.

C. While Some Degree of Indian Blood is Required For Recognition as an Indian For Federal Purposes, the Federal Government Has Recognized the Validity of Adoption of Non-Indians Into Tribes For Tribal Purposes.

In *United States v. Rogers*, 45 U.S. 567, 572 (1846), this Court held that for purposes of *federal* jurisdiction, a person required some degree of Indian blood to be classified as an Indian. In that case, the defendant was a United States citizen who had been adopted into the Cherokee tribe, with all of the rights and privileges of a Cherokee Indian. *Id.* at 568. The defendant resided on Cherokee land, married a Cherokee woman, and lived his life as a Cherokee citizen with no intention of returning to the United States. *Id.* The defendant was charged with the murder of another United States citizen who had similarly been adopted into the tribe. *Id.* at 567. The defendant claimed that the federal government did not have jurisdiction to prosecute him, because he was an Indian, the victim was an Indian, and the crime occurred in Indian country. *Id.* at 568. This Court held that a U.S. citizen who was not Indian by blood could not escape the jurisdiction of the United States simply by being adopted into a tribe. *Id.* at 573. However, this Court noted that the defendant was indeed able to become a Cherokee citizen, subject to their laws. *Id.* “He may by such adoption become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages.” *Id.*

In *Roff v. Burney*, 168 U.S. 218, 223 (1897), this Court declined to intervene when a tribe refused to allow an adopted member, who had been disenrolled, to bring suit in the tribe’s court. The plaintiff in that case was a non-Indian who had been adopted into the Chickasaw Nation. *Id.* However, his citizenship with the tribe was cancelled when the Chickasaw Nation passed legislation to revoke his wife’s citizenship. *Id.* This Court recognized that the Chickasaw Nation had the power both to confer and withdraw the citizenship of its members. *Id.* at 222. This Court further found that the plaintiff had acquired the rights and privileges of a member of the tribe

when he became a citizen by marriage, but the act of legislation revoking the plaintiff's citizenship was valid and would not be disturbed. *Id.* at 223.

In *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 140 (D.D.C. 2017), the United States District Court for the District of Columbia interpreted an 1866 treaty to guarantee citizenship rights to the emancipated slaves of the Cherokee Nation, known as the Cherokee Freedmen, and their descendants. In 2007, the Cherokee Nation voted to limit citizenship to people who were Cherokee, Shawnee, or Delaware by blood, excluding the Freedmen's descendants from membership. *Id.* at 111. The court determined that under the language of the treaty, the Freedmen and their descendants had a right to citizenship in the Cherokee Nation so long as native Cherokees possessed that right. *Id.* at 127, 140. Importantly, the court stated that, "[t]he Cherokee Nation's sovereign right to determine its membership is no less now, as a result of this decision, than it was after the Nation executed the 1866 Treaty. The Cherokee Nation concedes that its power to determine tribal membership can be limited by treaty." *Id.* at 140.

In *Rogers*, this Court held that a U.S. citizen adopted into a tribe who was not Indian by blood was not considered an Indian for federal jurisdictional purposes. 45 U.S. at 572. However, this definition was limited to federal purposes, and did not imply that a former non-Indian adopted into a tribe was not an Indian for *tribal* purposes. Quite the contrary, this Court recognized that an adopted member would be subject to tribal law. *Id.* at 573. Similarly, Petitioner's adoption into the Amantonka tribe may not make him an Indian for federal purposes. The petitioner is, however, an Indian for tribal purposes. Petitioner is entitled to the same rights and privileges of any other tribal member, and he is therefore subject to the laws of the Amantonka Nation.

In *Roff*, this Court found that the Chickasaw Nation had validly conferred and withdrawn citizenship of the plaintiff, who did not possess any Indian blood. 168 U.S. at 222. Similarly, the Amantonka Nation has the power to confer citizenship on a person who is not Indian blood. In *Roff*, the plaintiff possessed all of the rights and privileges of a member of the Chickasaw Nation while he was a member. *Id.* at 223. In the present case, Petitioner obtained all of the rights and privileges of a member of the Amantonka Nation when he voluntarily became a tribal citizen. Since *Roff* was decided, there has not been any congressional legislation since that has limited a tribe's inherent power to adopt members into a tribe. This Court should therefore recognize today the validity of the Amantonka Nation's decision to adopt the petitioner into the tribe.

Unlike the circumstances in *Nash*, the Amantonka Nation does not have a treaty with the United States limiting its power to determine membership. Furthermore, the *Nash* decision suggests no limitations on the Cherokee Nation's sovereign right to determine its membership, apart from the 1866 treaty. 267 F. Supp. 3d at 140. The case *certainly* does not suggest that a tribe may not grant citizenship to a person who is not Indian by blood – quite the opposite, actually. To this day, Congress has not passed legislation limiting a tribe's right to determine membership. Therefore, the Amantonka Nation retains the inherent right to adopt non-Indians as members of the tribe. Furthermore, Indian tribes retain the inherent right to punish their members. *United States v. Wheeler*, 435 U.S. 313, 325 (1978). The petitioner, as a tribal citizen with all the rights and privileges of every other citizen, is subject to the laws and criminal jurisdiction of the Amantonka Nation, just as if he were Amantonka by blood.

II. PETITIONER'S COURT-APPOINTED ATTORNEY MET THE RELEVANT LEGAL REQUIREMENTS.

Petitioner's court-appointed attorney met the relevant legal requirements as an Indian and as a non-Indian. The differences between Indian appointed attorneys and non-Indian are not

relevant or legally significant when it comes to tribal court. Both types of attorneys are qualified, competent, and professionally responsible to practice law in tribal court. There are no cases or laws that state a tribal attorney licensed to practice law by a tribal bar exam is ineffective counsel and do not meet legal requirements. In fact, this is immaterial since the outcome of the case would not have been any different if it was deemed that the attorney appointed to petitioner did not meet the relevant legal requirements.

A. If a Non-Indian, Petitioner’s Court Appointed Attorney Would Have Satisfied All Necessary Requirements In Order for the Amantonka Nation to Have Special Domestic Violence Criminal Jurisdiction Over Petitioner.

In order for a tribe to exercise limited criminal jurisdiction over a non-Indian under the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), the Petitioner must have some connection to the tribe and committed a domestic violence offense against an Indian victim on tribal land. 25 U.S.C. § 1304(c). In this case the petitioner knowingly struck his wife, Lorina Reynolds who is an enrolled member of the tribe, in tribal housing on the Amantonka Reservation. R. at 2. If deemed to be a non-Indian, Petitioner based on these facts meets all the requirements for a tribe to exercise limited criminal jurisdiction under VAWA 2013 over him, which means that he is entitled to the protections and rights established in VAWA 2103 if he is found to be a non-Indian.

Under VAWA 2013, tribal courts must provide non-Indian defendants with “all other rights whose protection is necessary under the constitution...in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction ...” 25 U.S.C. § 1304(d)(4). Basically, a non-Indian is entitled to all the rights guaranteed to them under federal law when they are facing trial in tribal court. In tribal

court petitioner, if found to be a non-Indian, would be entitled to constitutional rights and protections he would normally have in federal court.

One of these constitutional rights outlined in VAWA 2013 requires tribes to provide "... the right to constitutionally effective assistance of counsel, and, for indigent defendants, the right to licensed counsel at tribal expense--"if a term of imprisonment of any length may be imposed." 25 U.S.C. § 1304(d)(2). In this case, petitioner faces an approximate seven months in incarceration so he does have the right to counsel because he faces probable incarceration.

Furthermore, VAWA 2013 states that a tribal government must "provide 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(c)(2). In this case, petitioner's counsel is not licensed in any jurisdiction in the United States. However, this requirement seems inconsequential since there is no indication that a defendant's counsel is ineffective, incompetent, or did not meet professional standards.

The Bar licensing requirement is only to ensure that indigent defendants receive services that meet professional licensing standards. It is also to ensure that an indigent defendant's counsel is competent and professionally responsible. Petitioner's counsel in this case is licensed and a member in good standing with the Amantonka Nation Bar Association. R. at 7. There are no stated or proven differences between a State bar and the Amantonka Nation's bar exam. *Id.* In addition, petitioner's counsel also graduated from an ABA accredited law school. *Id.* Having a license with the Amantonka Nation and not a State, does not make those licensed with the Amantonka any less professional or competent. In fact, a counsel licensed with a tribe court in which the case is taking place would be more effective and competent than a state bar licensed

attorney because they would be more familiar with the tribe's unique laws and codes that the state bar licensed attorney may not be familiar with.

If petitioner is determined to be a non-Indian, he is entitled to counsel that meets the standards set out in VAWA 2013. Counsel in this case does not meet the standard requirement of holding a state bar license, however, that did not make them any less qualified, less effective, or less competent as counsel. The differences are immaterial and should be disregarded because anything else would undermine the Amantonka Nations Bar Association if their attorneys are deemed less qualified than those in a state bar association. Furthermore, it would be unwise to say that state bar attorney is more qualified to practice law in tribal court than a tribal attorney in that tribes bar association.

B. If an Indian, Petitioner's Required Court Appointed Attorney is Not Less Qualified Than a Non-Indian's Attorney, Thus Not a Violation of Equal Protection.

The Fourteenth Amendment asserts that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Const. amend XIV. Meaning that States must treat all persons equally and may not discriminate against a particular group of people. In order to prove that there has been a violation of equal protection rights an individual must prove that the governing body discriminated against him and that there was actual harm to him. This is determined by the court through three methods: strict scrutiny, intermediate scrutiny, and rational basis scrutiny.

Strict scrutiny would apply in this case because the Supreme Court held that all race-based law would be under strict scrutiny in *Adarand Construction v. Peña*, 515 U.S. 200 (1995). To pass strict scrutiny the government had to have passed the law to further a compelling governmental interest; the law must be narrowly tailored to meet that interest; and the law was

the least restrictive means of achieving that interest. *Korematsu v. United States*, 323 U.S. 214 (1944).

First, the law in question would be Title 2, Chapter 6 of the Amantonka Nation Code that states that non-Indians are entitled to:

[a] public defender who holds a JD degree from an ABA accredited law school, 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.

BLOCK QUOTATION Amantonka Nation Code Title 2, Ch. 6 § 607(b). On the other hand, Indian defendants are entitled to someone who is at least 21 years of age; of high moral character and integrity; has not been dishonorably discharged from the Armed Services; is physically able to carry out the duties of the office; has successfully completed, during their probationary period, a bar examination administered as prescribed by the Amantonka Nation's Executive Board; and has training in Amantonka law and culture. Amantonka Nation Code Title 2, Ch. 6 § 607 a.

The tribe has a governmental interest in having these specifications because an Indian defendant should be entitled to someone who has training in Amantonka law and culture. The tribe has an interest in providing culturally sensitive and competent counsel to tribal defendants. That does not make the counsel for Indians any less qualified or professional. In addition, the tribe also has an interest in providing non-Indian defendants with attorneys that defendants can identify with and are also familiar with tribal law. This does not make non-Indian attorneys any more qualified than Indian appointed attorneys.

Second, the law is narrowly tailored to meet these tribal interests. The tribal provision is very clear in stating which public defenders non-Indians and Indians are entitled to. However, the law may not be the least restrictive way to achieve the tribes interest. While it might be a

tribal interest, why restrict what kind of qualifications a non-Indians attorney and an Indians attorney can have. Why not leave it up to the indigent defendant? If it does not make one more or less qualified as an attorney, why not leave it up to defendants? Despite these questions, the tribal provisions are not a violation of equal protection. The petitioner in this case was as equally protected as he would have been with a non-Indian attorney. In fact, based on an ineffective counsel test, his sentencing with an attorney qualified for non-Indians would not have come out in a different or better way. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Regardless of this analysis, there is no violation because defense counsel is sufficiently qualified even if SDVCJ standards apply. R. at 4.

CONCLUSION

For foregoing reasons, this Court should uphold the decision of the lower court to deny the petitioner's writ of habeas corpus.