

No. 19-231

In the Supreme Court of the United States

MARCH TERM 2019

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 WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF FOR PETITIONER

TEAM 223

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QUESTIONS PRESENTED

- I. **Must a tribal court establish positive Indian status to exercise criminal jurisdiction even under Congressional authority?**
- II. **Whether the *Strickland* test for ineffective assistance of counsel applies to a tribal public defender representing a non-Indian defendant in a tribal court criminal proceeding?**

STATEMENT OF THE CASE

A. Statement of the proceedings

On June 16, 2017, the Chief Prosecutor of the Amantonka Nation filed a Complaint against Robert R. Reynolds (“Petitioner”) for Partner or Family Member Assault, charging him of striking his wife causing her injury. (Record 2.) On July 5, 2017, Chief Judge Nelson of the Amantonka Nation denied Petitioner’s three pre-trial motions, and set trial for August 14, 2017. (Record 4.) Following a jury verdict finding him guilty, Petitioner was sentenced on August 23, 2017. (Record 5.) Petitioner timely appealed his conviction to the Amantonka Nation Supreme Court, but the Court affirmed the conviction on November 27, 2017. (Record 7.) Petitioner then timely filed a petition for a Writ of Habeas Corpus under 25 U.S.C. § 1303 in the U.S. District Court for the District of Rogers, which granted his petition on March 7, 2018. (Record 8.) The President of the Amantonka Nation, the Chief Probation Officer of the Amantonka Nation, and Chief Judge Nelson (“Respondents”) timely appealed to the U.S. Court of Appeals for the Thirteenth Circuit, which includes the state of Rogers. On August 20, 2018, the Court of Appeals reversed the District Court, and remanded with instructions to deny the petition for a Writ of Habeas Corpus. (Record 9.) Petitioner now appeals that reversal, and this Court granted certiorari. (Record 10.)

B. Statement of the Facts

Petitioner and his wife Lorinda, an Amantonka citizen, first met at the University of Rogers when they were both college students. (Record 6.) After graduating, they married and both found employment on the Amantonka Reservation within the state of Rogers. (Record 6.) Two years after being married, Petitioner applied to become a naturalized citizen of the Amantonka Nation and successfully completed the requirements for tribal membership.

(Record 6.) Petitioner was laid off from his job a year after becoming an Amantonka naturalized citizen, and was out of work for ten months before finding current employment in July 2017. (Record 6.) On June 15, 2017, Amantonka Nation police responded to a call at the couple's apartment, where they found evidence of physical abuse and injury. (Record 6.) According to evidence presented in the Nation's trial court, Lorinda was slapped across the face by Petitioner and fell to the ground. (Record 6.) In falling, Lorinda hit a coffee table and cracked one rib. (Record 6.) Tribal police arrested Petitioner and transported him to the Tribal jail. (Record 6.)

Petitioner was appointed counsel from the Nation's Public Defender department, and made three pre-trial motions challenging the Nation's jurisdiction over him and the adequacy of the defense counsel appointed to him. (Record 3-4.) In the first motion, Petitioner argued he is a non-Indian for purposes of criminal jurisdiction and therefore the Nation lacks jurisdiction over him. (Record 3.) He also argued that as a non-Indian accused of domestic violence in Indian Country, he has the right to an attorney that meets the Special Domestic Violence Criminal Jurisdiction requirements in the Violence Against Women Act of 2013. (Record 3.) Lastly, Petitioner argued that if he is an Indian for purposes of criminal jurisdiction then his appointed attorney must meet the same standards as appointed counsel for non-Indians. (Record 4.) The trial court denied all three motions. (Record 4.) It is unclear from the record whether Petitioner's appointed defense attorney made those same motions during trial.

A jury trial resulted in Petitioner being convicted under the Nation's criminal code, and at the sentencing hearing, Petitioner sought to have the verdict set aside by making the same arguments he made in his pretrial motions. (Record 5.) Chief Judge Nelson denied the

setting aside of the verdict, and as a first-time offender, Petitioner was sentenced to seven months in the Tribal jail. (Record 5.) He also was ordered to pay \$5,300 in restitution, a \$1,500 fine, and complete Batterer rehabilitation and Alcohol treatment programs through the Nation's Social Services Division. (Record 5.) Petitioner has fully complied with the conditions of his pretrial bond, and agrees to wear an ankle monitor and have regular appointments with the Nation's Probation Services office as conditions for continuing his bond. (Record 5.)

SUMMARY OF ARGUMENT

Since the birth of the United States, tribes have become dependent on the federal government. Tribes ceded much of their land to receive physical and legal protection from state governments and “bad men” who sought refuge on reservations. Congress expressly extended federal jurisdiction over Indian country as far back as 1790 with the passage of the Trade and Intercourse Act. This act stated that all interactions between Indians and non-Indians were under federal control. Congress has continually upheld federal authority over non-Indians within Indian country.

Using the Indian Major Crimes Act, Congress further extended federal jurisdiction to include all crimes committed in Indian country, limited only when both the perpetrator and the victim are Indian. In addition to the Congressional Acts explicitly acknowledging federal jurisdiction, the Supreme Court and various lower courts have continually upheld the precedent that Indian tribes do not have criminal jurisdiction over non-Indians absent express Congressional authority.

In *United States v. Rogers*, 45 U.S. 567 (1846), this Court established a two-prong test to determine who can be classified as an Indian for purposes of criminal jurisdiction. First the defendant must have some quantity of Indian blood, and second the defendant must be affiliated with a federally recognized Indian tribe. Petitioner has no Indian lineage, and no Indian blood, and therefore does not meet the requirements for positive Indian status under *Rogers*.

Under the Violence Against Women Act (VAWA), Congress has recognized tribal authority over non-Indians who are involved in intimate partner relationships with an Indian

in Indian country and commit an act of violence against said partner.¹ Under normal circumstances, the Amantonka Nation would be able to exercise jurisdiction over Petitioner using the express authorization provided by VAWA, but the law has expired and cannot currently be enforced. The only appropriate remedy is for the case against Petitioner to be dismissed for lack of jurisdiction. Even if this Court determines that the Amantonka Nation exercised proper jurisdiction over the Petitioner then the Court must evaluate the potential due process violations of the Petitioner's public defender.

When Congress passed the Tribal Law and Order Act of 2010 ("TLOA")², it amended the Indian Civil Rights Act of 1968 ("ICRA") to provide specific rights to tribal court defendants in § 1302(c) which are at least equal to the rights guaranteed to all citizens of the United States. This includes the right to effective assistance of counsel under § 1302(c)(1) which incorporated the two-part test for determining ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984).

Under this test, an attorney's representation must fall below the objective standard of reasonableness, and this representation must have sufficiently prejudiced the client. The decision of the Court of Appeals for the Thirteenth Circuit should be reversed, and the case remanded for review on the merits. Both prongs of the *Strickland* test are satisfied by the ineffective representation by the public defender appointed by the Nation for Petitioner. The performance of Petitioner's public defender falls below the objective standard of reasonableness, which in turn prejudiced Petitioner sufficiently enough to justify a Writ of Habeas Corpus. Further, the public defender did not satisfy the Nation's professional conduct standards of competency, of diligence, and of disclosing a conflict of interest in representing

¹ 25 U.S.C. § 1304 (1968)

² 25 U.S.C. § 2801 et seq. (2010).

Petitioner. This contributed to the fulfillment of the *Strickland* test for ineffective assistance of counsel.

A central purpose of the enactment of ICRA is to "[secure] for the American Indian the broad constitutional rights afforded to other Americans," and thereby to "protect individual Indians from arbitrary and unjust actions of tribal governments." S. Rep. No. 841, 90th Cong., 1st Sess., 5-6 (1967). This purpose was acknowledged by the Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), and the TLOA 2010 amendments to ICRA § 1302(c)(1), further advanced this purpose. The right of a defendant to effective assistance of counsel in § 1302(c)(1) has not been met in this case for three reasons.

First, the public defender only asserted Petitioner's defenses during the pre-trial motion stage, and again at the sentencing hearing, rather than during the trial to the jury. This includes Petitioner using the defense of being non-Indian, which when made, shifts the burden of proof to the prosecution and becomes a question of fact for the jury to decide, not the trial court. By not asserting Petitioner's defense during the trial, the public defender failed the Nation's professional standard of competence and prejudiced Petitioner. Additionally, the public defender did not raise the issue of jury composition in the Nation's trial court to ensure that Petitioner would have a jury of his peers that represented a fair cross-section of the community and did not exclude non-Indians.

Second, the public defender failed the Nation's standard of diligence by not asserting that the Special Domestic Violence Criminal Jurisdiction of 2013³ in VAWA for eligible tribes has a higher standard for representation. The public defender reasonably should have known or had reason to know that this would affect the Due Process rights of Petitioner as a

³ 25 U.S.C. § 1304

non-Indian. This is because the standards for effective assistance of counsel are higher under § 1304 than under *Strickland*. Further, if the Special Domestic Violence Criminal Jurisdiction is reauthorized by Congress before this case is decided, then Petitioner as a non-Indian should have his petition for a Writ of Habeas Corpus granted because the Nation did not fully comply with the relevant requirements of 25 U.S.C. §§ 1302(c) and 1304(d) regarding effective assistance of counsel and a jury that represented a fair cross-section of the community.

Third, the public defender is employed and paid by the Nation, but was representing Petitioner whose defense would likely limit the Nation's trial court jurisdiction over him. This could have affected the performance of the public defender to the prejudice of Petitioner because the interests of the public defender likely conflict with those of Petitioner, despite any belief the public defender may have had that they could provide effective counsel. While the public defender appointed for Petitioner does have a *juris doctorate* from an ABA accredited law school, and is a member in good standing with the Amantonka Nation bar, they still did not meet the three standards of professional conduct in the Nation's Code. This supports Petitioner's receiving a Writ of Habeas Corpus from the District Court, and supports the *Strickland* test for Petitioner showing a claim of ineffective assistance of counsel.

ARGUMENT

I. INDIAN STATUS IS A QUESTION OF FACT THAT MUST BE PROVED BEYOND A REASONABLE DOUBT.

A. *Rogers* established that a non-Indian cannot become an Indian for purposes of jurisdiction.

On June 30, 1834 Congress passed a supplement to the Indian Intercourse Act that extended Federal law to Indian Country, except where the victim and perpetrator are both Indian. *Rogers*, 45 U.S. at 571. The exception carved out does not include an instance “of a white man who, at mature age, is adopted into an Indian tribe. He is not an ‘Indian,’ within the meaning of the law.” *Id.* In *Rogers*, the defendant claimed that he had voluntarily moved to Cherokee country, developed ties to the community and in every sense exercised the rights and privileges of a tribal member, making him a citizen of the Cherokee nation and an Indian under Congressional definition. *Id.*

The court rejected *Rogers*’ argument based on the language of the Act and the legislative intent behind it. “We think it very clear, that a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian, and was not intended to be embraced in the exception above mentioned. He may by such adoption become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages. Yet he is not an Indian; and the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race.” *Id.* at 573. The court determined that the Congressional intention behind the act could not permit adults to become Indian through adoption or association, as this would create a jurisdictional gap over United States citizens. *Id.*

The court concluded that no matter what obligations the defendant might have willingly adopted by joining the Cherokee Nation, he did not thereby exclude himself from federal jurisdiction and was still bound by federal law. *Id.* In the words of the court “He was still a white man, of the white race.” *Id.*

Though Petitioner voluntarily applied for citizenship with the Amantonka Nation, lived on the reservation, worked for a tribal entity, and was married to an Amantonka citizen none of those actions grant him Indian status for purposes of criminal jurisdiction. (Record 6.) None of Petitioner’s actions are sufficient to emancipate him from United States laws and jurisdiction.

B. The two-prong *Rogers* test applies to this case and the first prong cannot be met.

Congress has not provided a definition of “Indian” for purposes of criminal jurisdiction and has instead left the issue to the courts. *St. Cloud v. United States*, 702 F.Supp. 1456 (D.S.D. 1988). Multiple federal circuit court, in addition to other courts, have agreed that the test established by *Rogers* is accurate and effective.⁴ *United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005). The test requires that the defendant have a significant amount of Indian blood, and they must have federal or tribal recognition as an Indian. *Montana v. LaPier*, 242 Mont. 335, 340 (1990). Other courts have determined that the defendant need only have some quantum of Indian blood and it need not be traceable to a federally recognized tribe. *U.S. v. Zepeda*, 792 F.3d 1103 (2015).

⁴ Courts from every level, including tribal supreme courts, have consistently upheld the Indian status test created by the *Rogers* case in 1846. To date the Indian status test has not been overturned and is currently still upheld by all the courts within the nation as being the authority when determining criminal jurisdiction that relies on positive Indian status. *United States v. Dodge* 538 F.2d 770, 786 (8th Cir. 1976), *Makah Indian Tribe v. Clallam County*, 73 Wash.2d 677, 440 P.2d 442 (1968), *Arizona v. Attebery*, 110 Ariz. 354, 355, 519 P.2d 53, 54 (1974), *Means v. District Court of Chinle Judicial Dist.*, 2 Am. Tribal Law 439, 449 (1999).

1. Indian status is an element of the offense in criminal prosecutions.

“Where positive Indian status is required for criminal jurisdiction, the prosecution properly bears the burden of production on the Indian-status issue. That will be the default rule in tribal prosecutions, because, absent Congressional exceptions, Indian tribes may only prosecute Indians.” *Las Vegas Tribe of Paiute Indians v. Phebus*, 5 F.Supp.3d 1221, 1233 (D. Nev. 2014), *Eagle v. Yerington Paiute Tribe*, 306CV00563LRHRAM, 2008 WL 11384201 at 5 (D. Nev. July 14, 2008), aff’d, 603 F.3d 1161 (9th Cir. 2010). Under the Indian Major Crimes Act a defendant’s Indian status is an essential element that must be proved beyond a reasonable doubt. *U.S. v. Zepeda*, 792 F.3d 1109. The first prong established under *Rogers* requires that the defendant must have “ancestry living in America before the Europeans arrived.” *Zepeda*, 792 F.3d 1109. The second prong is the only element that requires ties to a federally recognized tribe. *Id.* A defendant need not be affiliated with the same tribe that their lineage is from. *Id.*

The tribal court can determine the test and standards to apply as a matter of law, but the facts regarding whether an individual meets those standards are a question of fact to be decided by a jury. *Id.* at 1234. In the *Phebus* case, the court explained that the tribal court erred by not allowing a jury to find Indian status beyond a reasonable doubt. “The Court is convinced that an Indian court asserting criminal jurisdiction over a person who objects to his alleged Indian status must submit the question of Indian status to a jury if the defendant faces incarceration, and the jury must then find Indian status beyond a reasonable doubt.” *Phebus*, 5 F.Supp.3d at 1233. The court determined that when criminal jurisdiction is dependent on positive Indian status, that status becomes an element of the offense and the burden of proof rests with the prosecutor. *Id.* at 1235.

The *Rogers* test must be presented to the jury, unless the right to trial by jury has been appropriately waived. *Zepeda*, 792 F.3d at 1114. A court ‘should instruct the jury that it has to find beyond a reasonable doubt that the defendant has some quantum of Indian blood. On the second prong, the court should instruct the jury that it has to find beyond a reasonable doubt that the defendant was a member of, or affiliated with, a federally recognized tribe at the time of the offense.’ *Id.*

The Amantonka tribal courts did not require the prosecution to prove beyond a reasonable doubt to a jury, or to anyone else, that Petitioner’ is in fact an Indian for purposes of criminal jurisdiction. The Amantonka courts determined that they had the right to determine citizenship for their tribe under *Santa Clara*, 436 U.S. 49. They claim that given this recognition of their inherent sovereignty and their cultural tradition of adopting those who marry into the tribe gives them the right to exercise jurisdiction over any tribal member, whether they have any ethnic connection to any tribe. (Record 7.) The Amantonka Nation does not have the ability to extend their jurisdiction beyond what Congress has limited it to. The Tribe can determine who qualifies as a member and what benefits that individual is entitled to as such, but the Tribe cannot ignore a Congressional directive that states they do not have criminal jurisdiction over non-Indians.

Tribes are dependent sovereign nations and have surrendered certain aspects of their sovereignty to receive protection and stewardship under the United States. *Worcester v. Georgia*, 31 U.S. 515, 555 (1832). The issue of Indian status for the purposes of criminal prosecution has been decided by Congress. Since the Tribe is a dependent sovereign, they must submit to Congress’ legislative choice in this matter. Congress has said that Indian status, both in federal court and in tribal court is a prerequisite for prosecution. *Phebus*, 5

F.Supp.3d at 1236. The District Court of Nevada declared that a tribe can assert criminal jurisdiction over anyone who meets the definition requirements of the Indian Civil Rights Act, but that the tribe must prove Indian status beyond a reasonable doubt by submitting the question to a jury whenever there is possibility of imprisonment. *Id.* at 1237.

The court in *Phebus*, further discusses that even if Indian status were not an element of the offense, once it is raised as a defense to jurisdiction, the burden then shifts to the prosecution to prove beyond a reasonable doubt to a jury that the defendant is in fact Indian. *Id.*, *Eagle* 2008 WL 11384201 at 3, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 547, 586 (1986).

There is nothing in the record from the lower courts of the Amantonka Nation to indicate that the question of Petitioner's Indian status was submitted to the jury. The issue was decided by a judge in a pretrial motion. (Record 3.) Indian status is not an issue of law, but rather one of fact and is clearly being disputed in this case. Even if the appellate courts had determined that Indian status is not an element of the offense, Petitioner's timely raised his objection that he is not an Indian. This means that the burden then shifted to the tribal prosecutor to prove that Petitioner is in fact an Indian under the *Rogers* test. There is no evidence in the record to show that the prosecutor ever alleged Petitioner's Indian status, the only discussion of this issue is based on the pretrial motions that the judge denied. (Record 3.) The above cases demand that the issue of Indian status be proved beyond a reasonable doubt to a jury. Neither of these was done regarding Petitioner.

2. The failure of the Amantonka Nation courts to submit Petitioner Indian status to a jury is not harmless error.

In *U.S. v. Prentiss*, 273 F.3d 1277, 1279 (10th Cir. 2001), the court determined that if a court does not submit the elements of Indian status to a jury then they must be "uncontested

and support by overwhelming evidence, such that the jury verdict would have been the same absent the error.” The Tenth Circuit Court of Appeals upheld the *Rogers* test and the determination that adoption into an Indian tribe as an adult did not fulfill those requirements. *Id.* at 1280. The court further explained that being recognized by a tribe as one of its members was not conclusive and that a determination of Indian blood must still occur to prove Indian status. *Id.*

The court acknowledged that allowing a membership based test might promote tribal sovereignty, but could not be done so without depriving states of jurisdiction over their citizens who are not generally considered “Indian.” *Id.* at 1281. The issue of criminal jurisdiction brings into conflict the sovereign status of states versus tribes. The court in *Prentiss* determined that granting tribes criminal jurisdiction over non-Indians, without Congressional authority, would constitute a violation of states’ rights. *Id.*

3. Petitioner does not meet the standards of the first prong of the *Rogers* test, and is therefore not an Indian for purposes of criminal jurisdiction.

No one disputes the fact that Petitioner’ is a member of the Amantonka Nation and is a card-carrying citizen. It is also uncontested that Petitioner has no Indian blood. (Record 8.) Under the first prong of the *Rogers* test, it would extremely difficult for a jury to determine that Petitioner is an Indian for the purposes of criminal jurisdiction since he has no lineal descendency nor any amount of Indian blood. Petitioner automatically fails the first prong of the test.

The second prong has also been expressed as “a sufficient non-racial link to a formerly sovereign people.” *St. Cloud*, 702 F.Supp. at 1461. The simplest way to determine either federal or tribal recognition is through membership, but enrollment in a tribe is not a dispositive factor. *LaPier*, 242 Mont. 342. The court in this case decided that receiving

federal funding or money judgements disbursed based on descendancy does not necessarily mean that the recipient is an Indian for purposes of criminal jurisdiction. *Id.*

The second prong of the test might be met by Petitioner's actions. The fact that the tribe recognizes him as an enrolled member in conjunction with the fact that he is domiciled on the reservation likely more than meets the standards set by the second prong of the *Rogers* test. However, both prongs of the test must be met to prove Indian status.

The facts in *Stiff v. McLaughlin*, 19 Mont. 300, 48 P. 232, 234 (1897), are extremely similar to the case at hand. A non-Indian man married a Flathead woman and lived amongst her community. The court concluded that "the marriage of a man not an Indian to an Indian woman does not give him the status of a tribal Indian, nor does he acquire such a status from the fact that he resides upon an Indian reservation with an Indian wife." *Id.* The fact that the United States government and the tribal government permitted the defendant to reside on the reservation does not mean that he acquired the status of a tribal Indian. *Id.*

Since Petitioner is not an Indian, the Amantonka Nation cannot exercise criminal jurisdiction over him except where Congress expressly extended their jurisdiction. The Amantonka Nation has no treaty provisions preserving their jurisdiction over non-Indians. The only avenue that the Tribe may have to prosecute Petitioner is under VAWA.⁵ VAWA only provides very limited jurisdiction over non-Indians who are involved in an intimate partner relationship with significant ties to the tribe.⁶ Petitioner meets the requirements for exercising criminal jurisdiction over non-Indians as laid out in VAWA, but the tribal courts did not use VAWA to exert jurisdiction over Petitioner, rather they merely prosecuted him under their tribal code. If the case were remanded the Amantonka Nation might have been

⁵ 25 U.S.C. § 1304 (2013).

⁶ *Id.*

able to assert jurisdiction over Petitioner using VAWA, this point is now moot as VAWA was not reauthorized and has since expired.

4. Tribes do not retain inherent sovereignty over non-Indians.

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Supreme Court decided that Indian tribal courts do not have inherent criminal jurisdiction over non-Indians, and can only obtain said jurisdiction except through a Congressional act. The court cites historical laws and Congressional intent to back up their opinion. Historically, most tribes did not have a formal court system and handled legal punishments using traditional cultural methods such as banishment. *Id.* Perhaps one of the best examples regarding criminal jurisdiction of non-Indians, is the 1830 Treaty with the Choctaw Indian Tribe. This particular tribe did in fact have an enlightened governance structure including a court system resembling that of the Anglo courts. *Id.* at 197. The Treaty reserved to the Tribe “the jurisdiction and government of all the persons and property that may be within their limits.” *Id.* However, the treaty also includes a provision stating that the Choctaws “express a *wish* that Congress *may grant* to the Choctaws the right of punishing by their own laws any white man who shall come into their nation, and infringe any of their national regulations.” *Id.*

This second section shows that it was not the intent of Congress to include non-Indians in the Choctaw reservation of inherent jurisdiction. In 1834 and again in 1855, the United States Attorneys General issued an opinion that the Choctaws did not have criminal jurisdiction over non-Indians except where expressly authorized by Congress. *Id.* at 199. The reasoning behind this conclusion was that it would be averse to the treaty provisions recognizing the sovereignty of the United States and the tribe’s dependent status. *Id.*

In 1878, Judge Isaac C. Parker in the Western District of Arkansas determined that

tribal courts only have jurisdiction over Indians. *Id.* at 200. Judge Parker’s decision was upheld by a 1970 opinion issued by the Solicitor of the Department of the Interior. *Id.* The court in *Oliphant* concluded that through their legislative actions, Congress has always intended that tribes do not have criminal jurisdiction over non-Indians. *Means v. District Court of Chinle Judicial Dist.* at 446.

The Amontonka Nation does not have criminal jurisdiction over a non-Indian, as defined under 25 U.S.C. § 1153, § 1152, or the Indian Civil Rights Act⁷. As discussed above, the *Rogers* court laid out the test courts should apply to determine Indian status, and Petitioner clearly does not meet the requirements necessary to be considered Indian for the purposes of criminal jurisdiction. This means that, without express Congressional authority, the Amantonka Nation cannot prosecute Petitioner and their decisions must be reversed.

II. NONE OF THE RELEVANT LEGAL REQUIREMENTS UNDER ICRA OR VAWA FOR APPOINTED LEGAL COUNSEL FOR PETITIONER WERE MET.

A. The *Strickland* Test applies to ICRA and to the Nation’s conviction of Petitioner.

When TLOA was passed in 2010, it amended ICRA to include the right of tribal court defendants to effective assistance of counsel at least equal to that guaranteed to all citizens of the United States, and this incorporated the two-prong test for ineffective assistance of counsel as laid out in *Strickland*.⁸ This equalized the standard for effective assistance of counsel for both Indians and non-Indians. Using this test to prove ineffective assistance of counsel, the defendant must show 1) their attorney’s representation fell below the objective standard of reasonableness, and 2) this deficient representation sufficiently prejudiced the

⁷ 25 U.S.C. §§ 1301-03 (1968).

⁸ 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, 44 (2017).

defendant so as to deprive them of a fair trial. *Strickland*, 466 U.S. at 687. The representation of the public defender appointed for Petitioner fell below the objective standard of reasonableness for the following three reasons, and this sufficiently prejudiced Petitioner to the point of depriving him of a fair trial.

1. The court-appointed counsel did not meet the professional standard of competence in representing Petitioner.

The first rule of professional conduct regarding attorneys in the Amantonka Nation Code is competence.⁹ The rule states:

An attorney shall provide competent representation to a client. Competent legal representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. As employed in this Code, the term "attorney" includes lay counselors.

This includes having the knowledge, skill, thoroughness, and preparation to present Petitioner's defense under the federal definition of "Indian" as set out in *Zepeda*, 792 F.3d at 1114. The federal definition has two prongs, and both are questions of fact for a jury. First, the defendant must have some quantum of Indian blood. Second, the defendant must have been a member of, or affiliated with, a federally recognized tribe at the time of the offense. *Id.*

Additionally, competence includes having the knowledge, skill, thoroughness, and preparation to meet the federal standard for jury composition under *Duren v. Missouri*, 439 U.S. 357 (1979), which sets a three-part test for determining when a jury does not constitute a fair cross-section of the defendant's peers as guaranteed by the Sixth Amendment.¹⁰ First, the defendant must show that the group alleged to be excluded is a "distinctive" group in the

⁹ Amantonka Nation Code § 2-7-1.

¹⁰ U.S. Const. amend. VI, cl. 6.

community. Second, the defendant must show that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community. Third, the defendant must show that this underrepresentation is due to systematic exclusion of the group in the jury selection process. *Id.* at 364. The *Duren* test applies to all jury trials that fall under the Constitution, including non-Indian prosecutions by tribal courts, and is the model for jury composition in Special Domestic Violence Criminal Jurisdiction under VAWA.¹¹

Here, the public defender was appointed to represent Petitioner at his arraignment, and thus was aware of Petitioner's pre-trial motion based on his non-Indian status. (Record 3-4.) The public defender reasonably should have represented Petitioner's defense during the trial stage, and reasonably should have known that when non-Indian status is raised as a jurisdictional defense in a criminal proceeding, the burden of proving it shifts to the prosecution, and it is a question of fact for a jury to decide beyond a reasonable doubt. *Zepeda*, 792 F.3d at 1113. The record neither indicates that the public defender followed Petitioner's wishes in raising the defense at trial, nor indicates that the public defender asserted that the federal definition of "Indian" is controlling for criminal jurisdiction to the trial court. The federal definition of "Indian" was raised only on appeal to the Amantonka Nation Supreme Court. (Record 7.) The public defender reasonably should have represented to the jury that the federal definition of "Indian" applies to this case, and should have asked the court to instruct the jury to use that definition for determining Petitioner's Indian status. Because the public defender did not, the professional conduct standard of competence was not met.

¹¹ Julia M. Bedell, *The Fairness of Tribal Court Juries and Non-Indian Defendants*, 41 Am. Indian L. Rev. 253, 266 (2017).

Further, the public defender had a duty under the *Duren* standard to ensure that his client as a non-Indian defendant in tribal court received a jury that was made up of a fair cross-section of the community and did not exclude a particular group, specifically non-Indians. It is unclear from the record whether the public defender did so. Together, these failures of competence contributed to the objective standard of reasonableness under the first prong of *Strickland* not being met.

2. The court-appointed counsel did not meet the professional standard of diligence in representing Petitioner.

The third rule of professional conduct regarding attorneys in the Amantonka Nation Code is diligence.¹² The rule states:

An attorney shall act with reasonable diligence and promptness in representing a client. Unless the client agrees to modify the scope of representation, the attorney shall complete all matters undertaken on the client's behalf.

This includes being reasonably aware of the current laws and any pending legislation, including the pending reauthorization of Special Domestic Violence Criminal Jurisdiction under the Violence Against Women Act of 2013.¹³ Because the Special Domestic Violence Criminal Jurisdiction has currently not been reauthorized, Petitioner's jurisdictional status as a non-Indian is affected under *Oliphant*, 435 U.S. 191. Additionally, the rule includes the attorney diligently acting to ensure the client receives an impartial jury, and the attorney raising any issues of possible jury bias with the trial court.

Here, the public defender had reason to know or reasonably should have known that the Special Domestic Violence Criminal Jurisdiction has a higher standard for representation, and that this would affect Petitioner's Due Process rights as a non-Indian. This is because

¹² Amantonka Nation Code § 2-7-3.

¹³ 25 U.S.C. § 1304 (2013).

under § 1304, a non-Indian criminal defendant in tribal court must be afforded all the rights under § 1302(c) of ICRA regarding ineffective assistance of counsel, and the right to an impartial jury drawn from a fair cross-section of the local community that does not systematically exclude any distinct group, including non-Indians. Under the *Strickland* test, the public defender should have acted diligently in raising this on appeal. However, nothing in the record suggests the public defender did so.

Further, the public defender reasonably could have known that Petitioner renouncing his status as an Amantonka citizen would likely bias the jury against him. The public defender should have raised this issue with the trial court during jury selection, and been allowed to ask potential jurors if they could remain impartial despite Petitioner seeking to renounce his tribal status. Again, nothing in the record suggests the public defender did so. Therefore, the standard of diligence was not sufficiently met because of these two failures, and this also contributed to the objective standard of reasonableness under the first prong of *Strickland* not being met.

3. The court-appointed counsel did not meet the professional standard of disclosing a potential conflict in representing Petitioner.

The seventh rule of professional conduct regarding attorneys in the Amantonka Nation Code addresses conflicts of interest.¹⁴ The rule states in relevant part:

(1) An attorney should not represent a client if that representation will be adverse to the interests of another client, or if the attorney's own interests conflict with those of a client, unless: (a) the attorney reasonably believes the representation will not adversely affect his or her ability to represent each client fully and competently.

When an attorney's own interests can conflict with those of a client, the attorney should disclose this to both the client and the court. This can include a situation where a court-

¹⁴ Amantonka Nation Code § 2-7-7.

appointed public defender that is paid by the government has a client who wants to raise a defense that would limit the jurisdiction of the court, because the public defender would then be trying to diminish the court's ability to appoint public defenders.

Here, the public defender appointed to Petitioner is paid by the Nation. The Petitioner wants to raise the defense that the Nation's trial court lacks jurisdiction over him, and the public defender is representing him against the Nation. To assert this defense would likely limit the jurisdiction of the Nation to operate its courts, which would affect the public defender's ability to work there. Thus, the public defender would have an interest in not adversely impacting his employment for the Nation, which goes against the interests of Petitioner. Not raising the defense that Petitioner wants during trial causes the public defender's representation to be deficient and constitutes a conflict of interest for the public defender. This prejudiced Petitioner and adversely impacted his ability to get a fair trial under the second prong of *Strickland*.

By failing to meet these three standards of professional conduct for attorneys licensed to practice by the Nation, the court-appointed public defender's representation fell below the objective standard of reasonableness under the first prong of *Strickland*, and it sufficiently prejudiced Petitioner to hinder his ability to have a fair trial under the second prong of *Strickland*. Combined with Petitioner's non-Indian status being a question of fact for a jury to decide, Petitioner can make a claim of ineffective assistance of counsel under § 1302(c)(1) of ICRA, and he can petition for a Writ of Habeas Corpus available to all persons under § 1303 of ICRA. This follows one of the central purposes of ICRA as recognized in *Santa Clara*: to "[secure] for the American Indian the broad constitutional rights afforded to other

Americans," and thereby to "protect individual Indians from arbitrary and unjust actions of tribal governments."¹⁵

B. If the Special Domestic Violence Criminal Jurisdiction under VAWA is reauthorized, the Nation still did not meet the relevant legal requirements for it.

If the Special Domestic Violence Criminal Jurisdiction under VAWA is reauthorized, then the Nation must meet all the requirements under 25 U.S.C. 1304(d) for ensuring the rights of non-Indian defendants. This includes all the requirements for § 1302(c) when a prison sentence of any length is imposed. It also includes the right to a trial by an impartial jury that is drawn from sources that reflect a fair cross-section of the community, and do not systematically exclude any distinctive group in the community, including non-Indians. The jury composition requirements are based on the *Duren* test discussed above.¹⁶ If these requirements are not all met, then the defendant will be able to petition for a Writ of Habeas Corpus under § 1303.

Here, the record indicates that Petitioner's right to effective assistance of counsel under § 1302(c) was not met for the reasons discussed above. This means that the Nation's compliance with § 1304(d) is incomplete, despite Petitioner being sentenced to less than one year in tribal prison. Further, the record does not indicate that the Nation satisfied the requirements of § 1304(d)(3) regarding the composition of the jury. If the trial court and Respondents did not use best efforts to comprise the jury of a fair cross-section of the community, including non-Indians, then under the *Duren* standard they would have violated Petitioner's Due Process rights to a fair jury trial. Therefore, even if the Special Domestic

¹⁵ S. Rep. No. 841, 5-6 (1967).

¹⁶ Bedell, *supra*, at 266.

Violence Criminal Jurisdiction is reauthorized and would apply in this case, the Nation has not satisfied all the relevant legal requirements for exercising it over Petitioner.

III. VAWA EXTENDED TRIBAL CRIMINAL JURISDICTION TO INCLUDE NON-INDIANS INVOLVED IN INTIMATE PARTNER VIOLENCE.

A. VAWA is not current law and this point is therefore moot.

The only express extension of tribal jurisdiction over non-Indians that might qualify in this situation is under Special Domestic Violence Criminal Jurisdiction that Congress created through VAWA.¹⁷ However, this legislation came up for reauthorization on September 30, 2018 and was granted a three-month extension, but due to the government shut-down the law expired on December 22, 2018 and has yet to be renewed. At this time, VAWA is not current law and cannot be used to extend criminal jurisdiction over non-Indians to the Amantonka Nation.

1. Even though VAWA was current law at the time of the incident, it still does not apply in this case.

VAWA was originally passed in 1994 and consistently reauthorized through 2013. Under the 2013 Amendment to VAWA, a tribe can prosecute non-Indians who are or have been involved in an intimate partner relationship with an Indian.¹⁸ A tribe must adopt § 1304 of VAWA into its own code and abide by the standards imposed under both VAWA and the TLOA.¹⁹ The Amantonka Nation has codified VAWA and could have exercised jurisdiction over Petitioner as a non-Indian, but did not do so. The tribal prosecutor instead only charged Petitioner under tribal law. If the case were remanded the Amantonka Nation would normally

¹⁷ 25 U.S.C. § 1304 (2013).

¹⁸ 25 U.S.C. § 1304 (a).

¹⁹ *Id.* at (d), 25 U.S.C. § 2801.

be able to prosecute Petitioner under VAWA. However the law has changed and the Amantonka Nation can no longer exercise criminal jurisdiction over non-Indians under VAWA.

2. VAWA is not current law and the issue of exercising jurisdiction over non-Indians under VAWA is now moot.

As of December 22, 2018, VAWA was not reauthorized. This means that VAWA is no longer current law and cannot be exercised by the Amantonka Nation even if the court were to remand the case. Under Article III Clause 2 of the United States Constitution, a change in the law renders a case moot. If the Amantonka Nation prosecuted Petitioner under VAWA they would have been acting in good faith according to current law. The Amantonka Nation failed to exercise appropriate jurisdiction over Petitioner. Therefore, their case must be dismissed. The Nation no longer has recourse to request a retrial under VAWA, because the law is currently not authorized.

If during this trial, VAWA is reauthorized and signed back into law then the court could appropriately consider remanding the case for a retrial under the extended jurisdiction of VAWA. If VAWA fails its reauthorization, however, this Court has no choice but to dismiss the case for lack of jurisdiction.

CONCLUSION

This Court has a duty to protect the rights of all citizens under the Constitution of the United States and must find that the Amantonka Nation improperly prosecuted Petitioner under their Tribal Code. For all the reasons stated above, we respectfully request that the Court dismiss the case against Petitioner due to lack of jurisdiction. If the Court decides that the Amantonka Nation properly exercised jurisdiction over Petitioner then we respectfully request that the case be remanded for review of the above listed due process violations.