No. 15-1122

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT R. REYNOLDS,

Petitioner,

v.

WILLIAM SMITH et. al.,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

Team No. 276

Counsel for the Petitioner

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QUESTIONS PRESENTED

I. Whether Reynolds is a non-Indian for the purposes of exercising Special Domestic Violence Criminal Jurisdiction in the Amantonka Nation as empowered by the 2013 reauthorization of the Violence Against Women Act?

II. Whether Reynolds' attorney satisfied the legal requirements for indigent representation under the Amantonka Nation Code in his status as a non-Indian, or in the alternative as an Indian, and whether that requirement meets the adequacy and equal protection standards under the Indian Civil Rights Act, Violence Against Women Act, and the U.S. Constitution?

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Robert and Lorinda Reynolds met each other while in college at the University of Rogers. R. at 6. After graduation, they married and moved to the Amantonka Nation Reservation in the State of Rogers, where they each gained employment with businesses on tribal land. R. at 6. Lorinda was and is a citizen of the Amantonka Nation, but Robert was not from the Amantonka Nation and did not become a tribal citizen until after their marriage. R. at 6. The naturalization process for citizenship in the Amantonka Nation requires that a candidate first establish eligibility by marrying a citizen of the nation, and the candidate must also live on the reservation for at least two years. 3 Amantonka Nation Code § 201. In order to qualify for citizenship, the individual must complete courses in Amantonkan culture, law, and government, must pass a citizenship test, and must perform one hundred hours of community service under the Amantonka Nation government. 3 Amantonka Nation Code § 202. Reynolds completed these requirements, swore the oath of citizenship, and received an Amantonka Nation ID card. R. at 6.

In June 2017, Robert Reynolds lived with his wife Lorinda Reynolds in a tribal housing apartment on the Amantonka Nation Reservation. R. at 3. On June 15, 2017, an officer responded to a call at the Reynolds' apartment. R. at 6. The officer arrested Robert Reynolds, and Reynolds was transported to the Amantonka Nation Jail. R. at 6. The following day, the Chief Prosecutor of the Amantonka Nation charged Reynolds with domestic violence in violation of the Amantonka Nation Code: "A person commits the offense of partner or family member assault if the person intentionally causes bodily injury to a partner or family member." 5 Amantonka Nation Code § 244(a)(1).

II. STATEMENT OF PROCEEDINGS

On July 5, 2017, the Chief Prosecutor of the Amantonka Nation filed domestic violence charges in the District Court for the Amantonka Nation against Robert R. Reynolds. R. at 3. Reynolds filed three pretrial motions, all of which were denied. In these motions, Reynolds (1) sought to have charges dropped for lack of jurisdiction under *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) as he is a non-Indian, (2) to have an attorney appointed to him as a non-Indian under the Violence Against Women Act of 2013 Special Domestic Violence Criminal Jurisdiction, and (3) that his attorney violated equal protection requirements by being insufficiently qualified to serve as his counsel. R. at 3. In denying these motions, the District Court found that Reynolds was an Indian for the purposes of criminal jurisdiction and that his counsel was sufficiently qualified to represent him under the Amantonka Nation's code and while applying the SDVCJ requirements. R. at 3-4.

On August 23, 2017, the District Court entered judgment against Reynolds after the jury delivered a guilty verdict, and sentenced him to seven months incarceration, $5,300 in restitution, batterer rehabilitation and alcohol treatment, and a $1,500 fine. R. at 5. Reynolds made a motion to set aside the guilty verdict, raising the same three objections as before trial. The Court denied the motion "for the reasons out in the order of July 5, 2017" and with no further explanation. *Id.* Reynolds also moved for bond to continue during his appeals process, and the Court granted that motion. *Id.*

On November 27, 2017, Chief Justice Miller of the Supreme Court of the Amantonka Nation delivered the unanimous opinion affirming Reynolds' conviction, and rejecting all of Reynolds' three grounds for appeal, which paralleled his pretrial motions. The Court ruled against Reynolds argument that the federal definition of "Indian" should control in this case,

citing *Santa Clara Pueblo v. Martinez* that "a tribe has a right to define and control its own membership" and therefore under the Amantonka definition, Reynolds is an Indian. R. at 7 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)). The Court dismissed the second ground for appeal using reasoning relying on the above: as Reynolds is an Indian, the standards of VAWA 2013 do not apply. R. at 7. Finally, the Court dismissed the violation of equal protection argument, stating that Reynolds had not produced facts sufficient to show a violation nor had he pointed to counsel error to justify the claim. *Id.* The Court did not address the substantive differences in the Amantonka Nation Code in attorney qualification differences for Indian as opposed to non-Indians.

Reynolds filed a petition for a Writ of Habeas Corpus with the U.S. District Court for the District of Rogers to contest his conviction as a violation of his federal civil rights. The respondents were William Smith, Chief Probation Officer of the Amantonka Nation Probation Services; John Mitchell, President of the Amantonka Nation; and Elizabeth Nelson, Chief Judge Amantonka Nation District Court. The U.S. District Court granted his petition on March 7, 2018, stating that Reynolds did not meet the federal definition of an "Indian," that he fell within the jurisdiction under VAWA, and that his counsel did not meet the standard under VAWA 2013. R. at 8. After the Tribe appealed, on August 20, 2018 the U.S. Court of Appeals for the Thirteenth Circuit reversed the District Court ruling "for the reasons articulated by the Amantonka Nation Supreme Court" with no other stated rationale. R. at 9.

Reynolds appealed to the Supreme Court of the United States, and the Court granted certiorari as *Reynolds v. Smith.*

SUMMARY OF ARGUMENT

This case concerns Reynolds' status for purposes of criminal prosecution by the Amantonka Nation Court, and whether, as an Indian or non-Indian, Reynolds attorney satisfied the relevant legal requirements. The Amantonka Nation asserts that Reynolds is an Indian and that as such his attorney was qualified to serve as his public defender as an indigent citizen of the Nation. However, Reynolds fails to meet the basic federal test to be classified as an Indian, and his attorney did not satisfy the relevant requirements regardless of his status as an Indian.

Under the prevailing test for Indian status in federal courts, Reynolds does not meet the two-part standard for classification as an Indian under the implicated federal laws. *United States v. Rogers*, 45 U.S. 567, 573 (1846). Because Reynolds is not of Indian descent, his recognition as a citizen by the Amantonka Nation does not confer upon him Indian status. Tribal nations do not have the authority to unilaterally declare an individual not descended from a recognized tribe as an Indian under federal law.

Asserting Indian status for those not of Indian descent is not without precedent in United States history or judicial proceedings. As of the mid-20th century, adoption and naturalization clauses in tribal constitutions disappeared. *"Indians, in a Jurisdictional Sense": Tribal Citizenship and Other Forms of Non-Indian Consent to Tribal Criminal Jurisdiction*, 1 Am. Indian. L. J., 79, 90 (2012). Allowing the naturalization of outside persons into tribal nations may be permissible under federal law, at the will of the Secretary of the Interior, but authorizing assumption of citizenship to the tribal sovereign implicates the potential loss of some federal rights and privileges that the United States government would surely find troublesome. Rather than force a confrontation over sovereign infringement, there

is a middle ground in acknowledging naturalized citizens as tribal members but not as Indians.

The Amantonka Nation Code sets out two standards for criminal indigent defense attorneys, one for non-Indians and one for Indians. The Violence Against Women Act provides for Special Domestic Violence Criminal Jurisdiction over all persons who commit acts of domestic violence within tribal lands, including non-Indians. 25 U.S.C.A. § 1304(b) (Westlaw through Pub. L. No. 115-281) (excepting crimes by non-Indians against non-Indians). The Indian Civil Rights Act 25 U.S.C.A. § 1302 (Westlaw through Pub. L. No. 115-281) provides for constitutional rights of defendants in tribal court, and all defendants charged under SDVCJ are entitled to those rights. 25 U.S.C.A. § 1304(d). ICRA affirms guarantees of equal protection at least equal to those guaranteed by the U.S. Constitution. 25 U.S.C.A. § 1302(c)(1).

When Reynolds was classified as an Indian by the District Court of the Amantonka Nation, he was deprived of a higher standard of attorney assistance in the preparation of his defense. While the Amantonka Nation Code provides, by its own attestation, an ICRA compliant attorney who has graduated from an ABA-accredited law school and passed a state bar exam to non-Indian defendants, none of these provisions are afforded Indian defendants. 2 Amantonka Nation Code §§ 607(a)-(b) As a result, Reynolds was deprived of an opportunity to the defense to which he was entitled as a non-Indian by his erroneous classification as an Indian by the Court.

If classified as an Indian defendant, Reynolds was subject to an equal protection violation within the Amantonka Nation Code. By providing for two separate standards of indigent criminal defense based solely on a classification of Indian or non-Indian, the Code

violates the ICRA requirement of equal protection as least equal to that guaranteed by the U.S. Constitution. 25 U.S.C.A. § 1302(c)(1). As a result, by applying a lesser standard, demonstrated by the Code's own admission by not declaring the Indian public defender qualifications to be ICRA compliant 2 Amantonka Nation Code § 607(a), the District Court violated Reynolds' right as a U.S. citizen to equal protection under the law. This Court has upheld such distinctions for differential treatment of Indians in the past, but typically in administrative decisions, and only when differential treatment has resulted in a preferential outcome for Indians. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 552 (1974). The opposite was true in this case: Reynolds was assured a lower standard of counsel than he would have had he been designated a non-Indian.

ARGUMENT

I. Petitioner Robert Reynolds is a non-Indian for the purposes of Special Domestic Violence Criminal Jurisdiction.

The jurisdiction asserted by the Amantonka Nation over Robert Reynolds must be under the Special Domestic Violence Criminal Jurisdiction (SDVCJ) authorized by the 2013 revision to the Violence Against Women Act (VAWA), since Reynolds is a non-Indian and the Amantonka Nation cannot otherwise prosecute him. VAWA 2013 includes provisions that amend the Indian Civil Rights Act of 1968 to allow tribal courts to assert authority over non-Indians who commit acts of dating or domestic violence against Indians. 25 U.S.C.A. § 1304(a) (Westlaw through Pub. L. No. 115-281).

In order for the Amantonka Nation to assert valid jurisdiction over Reynolds as an Indian, he must fit into the federal legal definition of "Indian" that is in general use. If, as in this case, the test for legal Indian status would exclude Reynolds from jurisdiction by virtue

of being an Indian, the tribal courts can establish jurisdiction under the Violence Against Women Act by showing that the intent of the statute was to expand the definition of Indian to encompass individuals like him.

In this case, the Amantonka Nation has taken the now rare route of allowing individuals not of Indian descent to apply for naturalization. Lastly, the policy issues and definitions in the context of a country that has migrated from the federal Indian policy of the nineteenth century—but for which jurisprudence on the subject is less up to date—will be addressed.

A. Petitioner does not satisfy the general legal definition of "Indian."

Historic legal definitions of "Indian" have rested on a two-part test established in *United States v. Rogers*, 45 U.S. 567, 573 (1846), which requires that an individual have some Indian blood and is recognized as an Indian by a tribe or by the federal government. Reynolds does not satisfy the first prong of this test, and the second prong is not sufficient on its own to establish Indian status. *Id.* This test is used to determine Indian status for the purposes of the Major Crimes Act and the Indian Civil Rights Act, both of which are implicated here. "Taken together, the 1990 Amendments, the Major Crimes Act, and Antelope mean that the criminal jurisdiction of tribes over 'all Indians' recognized by the 1990 Amendments means all of Indian ancestry who are also Indians by political affiliation." *Means v. Navajo Nation*, 432 F.3d 924, 930 (9th Cir. 2005).

Reynolds therefore cannot be considered an "Indian" for general legal purposes. Courts most commonly use the Rogers test in cases featuring defendants or victims that are of Indian descent but are not formal members of a tribe. *See, e.g.*, *Duro v. Reina*, 495 U.S. 676, 702-04 (1990), *United States v. Stymiest*, 581 F.3d 759, 762-63 (8th Cir. 2009), *Scrivner*

v. Tansy, 68 F.3d 1234, 1241 (10th Cir. 1995), *United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir. 1995). In a few notable cases, however, courts have held that affiliation or membership with a tribe are not themselves sufficient to confer Indian status without the existence of a blood relation to a federally recognized tribe. *See*, *e.g.*, *Rogers*, 45 U.S. at 573, *Westmoreland v. United States*, 155 U.S. 545, 548 (1895), *United States v. Maggi*, 598 F.3d 1073, 1080 (9th Cir. 2009).

1. Reynolds has no degree of Indian blood.

According to the Ninth Circuit Court of Appeals, while "the 'blood' terminology may sound anachronistic, this long-standing requirement retains a current purpose. The blood element excludes individuals, like the defendant in Rogers, who may have developed social and practical connections to an Indian tribe, but cannot claim any ancestral connection to a formerly-sovereign community." *Maggi*, 598 F.3d at 1080. Even in situations where the individual has chosen to take on the citizenship of a tribe, the court has held that his citizenship to the United States is still paramount when that individual is not descended from a federally recognized tribe. "Whatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibility to the laws of the United States remained unchanged and undiminished." *Rogers*, 45 U.S. at 573. Rogers was adopted into the Cherokee tribe as an adult, much as Reynolds was.

While the standard for blood quantum needed in order to qualify as possessing "some Indian blood" has not been established, we need not consider it for Reynolds. *Lawrence*, 51 F.3d at 152. The petitioner is not of Indian descent and more specifically does not claim any ancestral link to a federally recognized tribe. Without satisfying the first prong of the Rogers

test, Reynolds cannot be considered an Indian for the purposes of avoiding SDVCJ in the Amantonka Nation.

2. Reynolds is recognized as a citizen by the Amantonka Nation, but his citizenship does not make him an Indian.

Reynolds is a citizen of the Amantonka Nation, which is a federally recognized tribe. The Amantonka Nation Supreme Court held that following *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), "a tribe has the right to define and control its own membership," in support of the argument that recognition of a tribal member confers Indian status. R. at 7. The cited case concerned potential discrimination in the extension of citizenship rights only through patrilineal descent. *Santa Clara Pueblo*, 436 U.S. at 51. It can, in fact, be considered nearly the opposite of Reynolds' situation. In *Santa Clara Pueblo*, individuals of Indian descent were denied tribal recognition, whereas Reynolds has been extended tribal citizenship despite his lineage.

The tribe may indeed have the right to determine its own membership, but *Santa Clara Pueblo* does not establish a right for the tribe to expand the federal definition of "Indian." An examination of statutory intent is necessary to determine whether an expansion of the term for the purposes of VAWA is permissible. The purpose of VAWA 2013 was to allow the extension of tribal criminal jurisdiction in precisely this manner. The text of the statute allows for the assumption of jurisdiction over non-Indians in cases of dating/domestic violence or in violation of a protection order when the victim is an Indian. If Congress had intended to expand the definition of "Indian" to include those who live on Indian land or take part in tribal matters, there would be no need for the statute to specify that it applies to non-Indians, since the exceptions to the SDVCJ are for defendants who do not have ties to the

land or the tribe. 25 U.S.C.A. § 1304(a)(4)(B) (Westlaw through Pub. L. No. 115-281). In this case, the petitioner was able to become a citizen of the Amantonka Nation through a naturalization process that is not common to other tribal nations. Here, Reynolds falls squarely into the categories set out in VAWA 2013, in that he is a non-Indian involved in a domestic violence incident with an Indian and has significant ties to Indian land. § 1304(a).

B. Allowing tribes to assert Indian status for those not of Indian descent will tempt federal regulation and threaten tribal sovereignty.

The Amantonka Nation may be able to extend citizenship to persons not of indigenous descent, but it cannot confer Indian status for the purpose of jurisdiction. Blurring the lines by allowing individuals not of Indian descent to obtain tribal citizenship is likely to bring the looming specter of federal interference into the sphere of tribal influence once again. Because these persons cannot be considered to have been originally under the tribe's authority, they must have made the choice to forego some of the rights and privileges as a United States citizen in favor of the rights and privileges under the tribal nation. Since they would still be United States citizens, there is a question of competing sovereignties. For those of Indian descent, federal policy has pivoted to accept that the tribal government has the legitimate authority due to the preexisting relationship of the tribe to its people. If that preexisting relationship does not exist, what argument can be made that tribal authority is paramount?

Historically, several tribes explicitly authorized naturalization or adoption of white people into the nations, including the Cherokee, Choctaw, and Chickasaw. Paul Spruhan, *"Indians, in a Jurisdictional Sense": Tribal Citizenship and Other Forms of Non-Indian Consent to Tribal Criminal Jurisdiction*, 1 Am. Indian. L. J., 79 (2012). In most cases

intermarriage between a white person and a tribal citizen was the cited juncture for allowing naturalization, and the nation explicitly authorized jurisdiction under all tribal laws against those individuals accepting citizenship. *Id.* at 84. However, this authorization of non-Indian citizenship has not been recognized by federal courts for the determination of Indian status except in a few matters. *Id.* at 89. In one case, the Supreme Court held that the Secretary of the Interior had the discretionary right to approve or deny white people as tribal citizens regardless of tribal intent. *United States ex rel. West v. Hitchcock*, 205 U.S. 80, 85-86 (1907).

Following the Indian Reorganization Act, this power to deny tribal citizenship requirements was formalized through the ability of the Bureau of Indian Affairs (BIA) to approve tribal constitutions. Spruhan, *supra* at 90. The then-Commissioner of Indian Affairs instructed that adoption or naturalization provisions in proposed constitutions should only be approved if they allowed for review by the Secretary of the Interior for any individual not related by descent to members of the tribe. *Id.* The Indian Reorganization Act (IRA) defined "Indian" as:

> (A)ll persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

25 U.S.C.A. § 5129 (Westlaw through P.L. 115-281). Following passage of the IRA, naturalization clauses disappeared from approved tribal constitutions across the United States. Spruhan, *supra* at 91.

Allowing the extension of rights through tribal citizenship to a person not of Indian descent does not pose a problem so long as those rights and privileges do not infringe upon

the rights and privileges set out as a citizen of the United States. Here, Reynolds is not an Indian and a denial of this fact would necessarily impact his rights in tribal court.

II. The Petitioner's attorney did not sufficiently satisfy the relevant legal requirements, regardless of the Petitioner status as a non-Indian or Indian.

Reynolds, for the purposes of prosecution in Amantonka District Court, is a non-Indian whose attorney did not meet the standards outlined in the Tribal Code, and his attorney therefore did not meet the statutory requirements described under the VAWA. Additionally, the Amantonka Nation Code's requirements, as written, pose a potential equal protection violation for Indian defendants.

A. Counsel qualifications are based on the Amantonka Nation Code, federal statutory requirements, and the United States Constitution.

In order to establish whether the Amantonka Nation is violating Reynolds' equal protection right, a comparison of the rules and practices across tribal and federal jurisdiction is necessary. To defend an indigent defendant in the Amantonka Nation District Court, the counsel needs to satisfy the requirements enumerated in the tribal code, as well as statutory and U.S. Constitutional requirements.

1. Amantonka Nation requirements differentiate between Indian and non-Indian defendants.

Under the 2 Amantonka Nation Code § 503(1), the right to counsel is awarded to all indigent defendants, but the requirements governing the qualifications of the attorneys is dependent on the non-Indian or Indian status of the defendant. 2 Amantonka Nation Code §§ 503(2)-(3).

a. The non-Indian defendant's counsel standard includes a substantively different requirement from the Indian defendant's counsel standard.

The Amantonka Nation Code sets out the qualifications to be eligible to serve as a public defender for a non-Indian facing more than one year of imprisonment or "any defendant charged under the Nation's Special Domestic Violence Criminal Jurisdiction." 2 Amantonka Nation Code § 607(b). The public defender must (1) hold a JD from an ABA accredited law school, (2) have passed the Amantonka Nation Bar Exam, (3) have taken the oath of office, and (4) have passed a background check. The Code further states that this is sufficient to qualify under the Indian Civil Rights Act. 2 Amantonka Nation Code § 607(b).

b. Requirements for an Indian defendant do not include any formal form of accreditation recognized outside of the Amantonka Nation's courts.

The Amantonka Nation Code sets out the qualifications to be eligible to serve as a public defender for an Indian without regard to the type or severity of crime being charged. The public defender must:

> (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.

2 Amantonka Nation Code § 607(a).

2. The statutory requirement under The Violence Against Women Act, the Tribal Law and Order Act, and the Indian Civil Rights Act provides for prosecution of non-Indians in tribal court for domestic violence offenses.

Tribal criminal jurisdiction is generally governed by the Tribal Law and Order Act (TLOA), which stipulates that no Indian tribe shall "impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year," 25 U.S.C.A. § 1302(a)(7)(B) (Westlaw through Pub. L. No. 115-281), unless the defendant has been previously convicted of a comparable offense or is being prosecuted for an offense that would be punishable by a longer period of imprisonment if prosecuted in a federal or state court. §§ 1302(b)(1)-(2). Tribal criminal jurisdiction has not been presumed to extend to non-Indians since 1978. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 205-206 (1978) (Indian courts do not have criminal jurisdiction against non-Indians unless expressly authorized by Congress). However, the Violence Against Women Reauthorization Act of 2013 (VAWA) amended the Indian Civil Rights Act (ICRA) to affirm the sovereignty of tribes that participate in special protections for victims of domestic violence "to exercise special domestic violence criminal jurisdiction over all persons," including non-Indians. 25 U.S.C.A. § 1304(b)(1) (Westlaw through Pub. L. No. 115-281). While there are certain exclusions to this jurisdiction, they do not apply in this case.

If a tribe exercises jurisdiction under VAWA, in conjunction with ICRA, every defendant who is facing imprisonment is entitled to effective assistance of counsel, and indigent defendants are entitled to a public defender. 25 U.S.C.A. § 1302(c). While ICRA only explicitly extends those rights to defendants upon whom a sentence of more than one year is imposed, VAWA has a much broader grant, requiring those rights to be extended to a defendant "if a term of imprisonment of any length may be imposed." 25 U.S.C.A. § 1304(d)(2). VAWA also requires that applicable rights under VAWA be granted to all

defendants facing special domestic violence criminal jurisdiction prosecutions in tribal court. § 1304(d)(1).

3. The equal protection requirement as read under ICRA and VAWA guarantees Indians and non-Indians a right that is at least equal to the U.S. Constitutional requirement.

VAWA's final requirement acts as an additional reminder that constitutional due process requirements deserve an independent look: the statute states that such defendants are entitled to "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.A. § 1304(d)(4) (Westlaw through Pub. L. No. 115-281). The right to counsel attaches to tribal courts via ICRA and VAWA, not directly through the Sixth Amendment as it does in federal court or under *Gideon v. Wainwright*, 372 U.S. 335 (1963) as in state courts. However, the requirement when it does attach is "at least equal to" the constitutional requirement. 25 U.S.C.A. § 1304(d)(2).

There is an inherent contradiction in the law as to when the right attaches, and the Supreme Court has not yet examined the equal protection guarantee under ICRA. In *Kirby v. Illinois*, 406 U.S. 682, 689 (1972), and affirmed in *Brewer v. Williams*, 430 U.S. 387 (1977), the Court states that the right to counsel is not merely for the trial, but attaches at the point where adversarial proceedings begin, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." The ICRA requirement however, extends only to those who have a sentence of greater of one year imposed—which can only be known after a trial. VAWA allows for a greater application of the right to counsel, and since it

attaches when imprisonment may be imposed, should be read to extend Sixth Amendment equal protection rights to all persons charged under VAWA.

ICRA embeds to extension of equal protection guarantees to tribal courts: "No Indian tribe in exercising powers of self-government shall…deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C.A. § 1302(a)(8) (Westlaw through Pub. L. No. 115-281). VAWA, by invoking "all other rights" suggests a preservation of the rights available in federal court when special domestic violence criminal jurisdiction is exercised in tribal court over any defendant. Adequate representation of defendants in federal court is described as: "Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan." 18 U.S.C.A. § 3006A (Westlaw through Pub. L. No. 115-281). While not defined under the statute, Black's Law Dictionary defines attorney as "someone who practices law; Lawyer" and lawyer as "someone who, having been licensed to practice law, is qualified to advise people about legal matters, prepare contracts and other legal instruments, and represent people in court." *Attorney, Lawyer*, Black's Law Dictionary (10th ed. 2014).

The conventional test for satisfying the right to effective counsel is laid out in *Strickland v. Washington*, and, to establish breach, requires the defendant to prove both (1) error on the part of the attorney in light of prevailing customs and (2) that the error was prejudicial, and but for the error, the outcome would have likely been different. *Strickland v. Washington*, 466 U.S. 668, 682 (1984).

B. As Reynolds is a non-Indian, the Amantonka District Court avoided invoking jurisdiction under VAWA and accompanying protections that would have entailed.

In assigning Reynolds an attorney under 2 Amantonka Nation Code § 503(3) (for Indian defendants) instead of properly under § 503(2) (for non-Indian defendants), the Nation did not need to invoke SDVCJ and afford protections enumerated under VAWA. His lawyers as appointed under the Code may therefore not have pursued avenues of defense available under VAWA, as Reynolds was not guaranteed attorneys who were admitted to a U.S. state bar. 2 Amantonka Nation Code § 607(a). Had Reynolds been prosecuted as a non-Indian under SDVCJ, he would have been entitled to additional statutory protections than he was when he was erroneously designated an Indian defendant: "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." 25 U.S.C.A. §§ 1304(d)(3)(A)-(B). The ability to define the injury caused to Reynolds was thereby infringed by the insufficiency of the attorney, which makes the test under *Strickland* difficult to administer.

In *United States v. Bryant*, 136 S. Ct. 1954, 1962 (2016) (citing 25 U.S.C.A. § 1302(c)(1)), this Court upheld that while ICRA does not automatically afford rights to counsel that are "coextensive with the Sixth Amendment right," in cases where the defendant faces in excess of a year of imprisonment, the right is "at least equal to that guaranteed by the United States Constitution." In the application of ICRA rights to defendants charged under VAWA, however, the floor of one year's incarceration was eliminated, so even though Reynolds was only sentenced to seven months imprisonment, he was entitled to U.S.

Constitutional due process rights. *See* 25 U.S.C.A. § 1304(d)(2) (Westlaw through Pub. L. No. 115-281).

Both statutes rely on the terminology "counsel" and "attorney" to describe the assistance Reynolds is entitled to as an indigent defendant, the latter of which is defined as someone who is licensed to practice law. *Attorney, Lawyer*, Black's Law Dictionary (10th ed. 2014). In order to be a licensed attorney, eighteen states require graduation from an ABA-accredited law school—while forty-three require attendance at some law school—and all require passage of the state bar or bar passage in another state. National Conference of Bar Examiners, *Comprehensive Guide to Bar Admission Requirements (2018)*, http://www.ncbex.org/pubs/bar-admissions-guide/2018/mobile/index.html. By allowing for counsel who did not necessarily graduate from a law school or pass a state bar examination for a non-Indian defendant, the Amantonka Nation Code falls below the conventional standard of "attorney."

1. **In asserting his right to a higher standard of legal assistance as a non-Indian, Reynolds does not infringe on the Amantonka Nation's sovereignty.**

Reynolds' ability to assert his federal statutory and U.S. Constitutional rights would not impinge on tribal sovereignty: the Amantonka Nation was undoubtedly within its jurisdictional rights to prosecute Reynolds. In *Wolf Point Organization v. Investment Centers of America, Inc.*, Mont. Fort Peck Tribe 2001 (LEXIS 3, 18) from the Fort Peck Tribal Court in Montana, the Court noted that the Tribe had power limited to its constitution, but that this power did extend to enumerated civil and criminal disputes, including that of jurisdiction over non-Indians. However, in an affirmation of *Raymond v. Raymond*, 83 F. 721, 721-722 (1897)—where the Eighth Circuit Court of Appeals found that "Cherokee courts were

effective only as to the rights of the persons and property of members of the Cherokee Nation as against each other,"—the Fort Peck Tribal Court found that even the *Raymond* court found certain civil actions against non-Indians enforceable. *Wolf Point Organization v. Investment Centers of America, Inc.* at 18.

C. In the alternative, if Reynolds is found to be an Indian, the attorney requirements in the Amantonka Tribal Code fail to meet the equal protection standard.

The Amantonka Nation Code sets out requirements for indigent defense of non-Indians that provide greater assistance of counsel to those charged under SDVCJ, as it is not subject to a minimum sentence requirement for other types of criminal jurisdiction. The distinction between two types of criminal jurisdiction over non-Indians is confusing as, after *Oliphant*, the only type of criminal jurisdiction a tribe can exercise over non-Indians is that of SDVCJ. When the District Court for the Amantonka Nation labeled Reynolds an Indian for the purposes of prosecution, it circumvented the explicit additional attorney requirement under its Code—holding a JD degree from an ABA accredited law school—and those required under ICRA. 25 U.S.C.A. § 1302(c) (Westlaw through Pub. L. No. 115-281). The Amantonka Nation Code has separate provisions for Indian and non-Indian defendants, and that the provision under Amantonka Nation Code Title 2 § 607(b) expressly adopts the language of "sufficiently qualified under the Indian Civil Rights Act to represent a defendant" while § 607(a), for Indian defendants, does not. This difference by omission suggests that there is a substantive difference in the qualifications of attorneys being authorized under the Code, even though the express purpose of ICRA as amended by the Tribal Law and Order Act of 2010 was to allow tribal courts to impose longer sentences on

Indian defendants. 25 U.S.C.A. §§ 1302(a)(7)(B)-(D) (Westlaw through Pub. L. No. 111-211). This is in contradiction to the formulation of ICRA itself, which extends rights of representation to all defendants, regardless of Indian status, to be "at least equal to that guaranteed under the United States Constitution," § 1302(c)(1).

1. **In providing two separate standards, the Amantonka Nation has created a statutory violation of equal protection for all Indian and non-Indian U.S. citizens, including Reynolds.**

By providing two separate standards, this substantive difference constitutes an equal protection violation not only of Reynolds' rights as a non-Indian, but potentially the rights of all Amantonka citizens in their dual status as U.S. citizens. In order for tribal governments, and Amantonka specifically, to avoid the further intervention of Congress in self-governance, the provision of a single, equal right to counsel would likely allay fears from non-Indian legislators. While the Supreme Court has upheld versions of differential treatment for Indian and non-Indian citizens, it has typically only been upheld when the difference is due to Congress' special relationship with Indian tribes. In *Morton v. Mancari*, 417 U.S. 535, 552 (1974), the Court established that the purpose of such legislation was borne out of a specific historic context and designed to help Indians, not to relegate Indians or non-Indians to a secondary status in relation to the other:

> Literally every piece of legislation dealing with Indian tribes and reservations … single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U. S. C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

In *Morton*, which dealt with preferential hiring of Indians at the Bureau of Indian Affairs, the Court found that this preference did not have to do with racial criteria. *Id.* Instead, it was an "employment criteria reasonably designed to further the cause of Indian self-government" and similar to the constitutional requirement that a Senator be from the state she is to represent. *Id.* at 554. In other circumstances relating to minority groups within the United States, the Court has upheld this only in relation to administrative solutions to a previous finding of discrimination, and only as this benefits the minority group. *See United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144 (1977) (upholding New York State's reapportionment to increase Jewish and minority voting power in light of the Voting Rights Act); *Lau v. Nichols*, 414 U.S. 563 (1974) (finding that California violated non-English-speaking Chinese-American students' Fourteenth Amendment equal protection rights to an equal education by not providing adequate supplemental English instruction).

2. The Amantonka Nation increases the risk of the U.S. Congress interfering in tribal criminal jurisdiction by allowing distinctions in public defender accreditation procedures to exist, as happened to Reynolds.

This rationale is in stark contrast to Reynolds' ability to acquire effective counsel for his defense against losing his liberty. A separate, lower standard—as is alluded to in the Amantonka Nation Code by only describing the non-Indian standard of defense as ICRA compliant—for Indians does not meet the *Morton* standard. *Morton* justifies the application of a different standard to Indians because it assists tribes in the furtherance of tribal self-government, and contextualizes this rationale by the unique historical circumstances that led to the erosion of self-governance. Tribal sovereignty has already been eroded for criminal jurisdiction after the *Oliphant* decision. Were Reynolds to receive a lower standard for

assistance of counsel, in deviation from past cases where only preferential treatment was tolerated, the threat of further federal interference in tribal sovereignty by removing other areas of criminal jurisdiction from tribal control becomes a reality.

Additionally, the right of U.S. citizens to effective counsel as extended to Indian citizens under VAWA and ICRA is absolute under the Sixth Amendment. *See Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him"). Reynolds did not abdicate his right to equal protection when he became a citizen of the Amantonka Nation. The Congressional grant of certain constitutional protections under ICRA and affirmed under VAWA does not differentiate the right of an indigent defendant to assistance of counsel by their status as an Indian or non-Indian. Therefore, the grant of equal protection, is just that: equal. There is no basis for a different standard of legal assistance, and the tribal code therefore needs to reflect an equal status of Indian and non-Indian defendants to a right to counsel.

CONCLUSION

For the foregoing reasons, the Thirteenth Circuit Court of Appeals judgment in *Reynolds v. Smith* should be reversed, and the U.S. District Court for the District of Rogers judgment should be affirmed, granting the Petitioner's petition for a Writ of Habeas Corpus.

Respectfully submitted,

January 2018 *Counsel for the Petitioner-Appellee*