

No. 19-231

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IN THE  
SUPREME COURT OF THE UNITED STATES

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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.*

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

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**BRIEF FOR PETITIONER**

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Team No. 336

*Counsel for Petitioner*

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## QUESTIONS PRESENTED

- I. Whether the Petitioner, Robert R. Reynolds, is a non-Indian for purposes of Special Domestic Violence Jurisdiction afforded by the Violence Against Women Act (VAWA) 2013.
- II. Whether the Petitioner's court-appointed attorney satisfied the relevant legal requirements afforded a non-Indian who falls within the Amantonka Nation's exercise of Special Domestic Violence Criminal Jurisdiction (i.e. a non-Indian accused of domestic violence against an Indian within Indian country), as provided for in 25 USC § 1302.

## STATEMENT OF THE CASE

### I. Statement of the Facts

This petition arises out of the violation of a non-Indian, Mr. Robert Reynolds' (Reynolds), federal rights as provided for in the Violence Against Women Act (VAWA) 2013 specifically and by federal law generally.

Reynolds, a non-Indian, met his wife, Lorinda, an Indian citizen of the Amantonka Nation, when they were both students at the University of Rogers. Record on Appeal ("ROA") at ¶ 1. The couple married soon after graduation and both found employment on the Amantonka reservation. Id. The reservation is located within the State of Rogers. Id. As an Indian citizen of the Amantonka nation, Lorinda was able to provide access to a home for the couple in an apartment in the tribal housing complex, where Mr. Reynolds and Lorinda began saving to buy a house. Id. Despite Mr. Reynolds' non-Indian status, his marriage to Lorinda afforded him the opportunity to enjoy the unique opportunities and securities afforded to members of the Amantonka Nation. Id. After two years of marriage, Reynolds completed the process to become a citizen of the Amantonka Nation. Id. Reynolds maintained pre-citizenship job at the Amantonka shoe factory for one year after his citizenship, when the shoe factory went out of business. Id. at ¶ 2. Ten months passed before Reynolds was able to secure work, and during that time, his marriage to Lorinda

suffered. Id. Throughout those challenging months, the police visited the Reynolds' home periodically, but never for claims of physical abuse. Id. at ¶ 3. Although Mr. Reynolds secured a job at the newly opened warehouse distribution center on the Amantonka reservation in July 2017, the stress and discontent that began when he first lost his job still plagued him in June of 2017. Id. ¶ 2. On June 15, 2017, weeks before Reynolds secured a new job and began to decrease the stress caused by unemployment, the Amantonka Nation police responded to a call at the Reynolds' tribal housing complex apartment. Id. at ¶ 3. This was the first time the police saw evidence of physical abuse when responding to a call at the Reynolds' home. Id. The Amantonka Nation alleges that Lorinda was struck by Mr. Reynolds in the face. Id. Upon being struck, Lorinda fell. Id. Unfortunately, Lorinda did not brace her fall and when she fell, she fell into a coffee table. Id. Having no buffer between her body and the coffee table, Lorinda's fall into it yielded a cracked rib. Id. Having already been called to the scene and taking note of Lorinda's injury, the police arrested Reynolds and transported him to the Amantonka Nation Jail. Id. at ¶ 4. After Reynolds remained in jail for the remainder of the day and into the following morning, the Amantonka Nation's chief prosecutor determined to file a complaint. Id. The chief prosecutor charged Reynolds with violating Title 5, Section 244 of the Amantonka Nation Code, Partner or family member assault. Reynolds, noting his non-Indian ancestry and insufficiency of counsel, filed pretrial motions seeking dismissal of the charge. Id. The motions were denied, and a jury found him guilty. Id. Thereafter, Reynolds appealed. Id.

Reynolds does not have the requisite blood quantum to be recognized by the federal government as an Indian, despite him having chosen to become a naturalized citizen of the Amantonka Nation. U.S. District Court Record at ¶ 1.

## **II. Statement of the Proceedings**

The Amantonka Nation filed criminal charges against Reynolds in the District Court for the Amantonka Nation (a Tribal Court), accusing Robert Reynolds of domestic violence against his wife, Lorinda Reynolds. District Court for the Amantonka Nation Record at ¶ 1. The Nation alleged Reynolds' action constituted a violation of Title 5 § 244 of the Amantonka Nation Code, Partner or Family Member Assault. Id. Reynolds, as Defendant, filed three pre-trial motions. District Court for the Amantonka Nation Opinion and Order Denying Defendant's Pretrial Motions at ¶ 1. The first motion was to dismiss the charge on the ground that the Defendant is a non-Indian and that the Amantonka Nation lacks criminal jurisdiction over non-Indians. Id. at ¶ 3. Second, the Defendant sought to have an attorney appointed to him, a right afforded a non-Indian accused of domestic violence against, which would fall within the Amantonka Nation's exercise of Special Domestic Violence Criminal Jurisdiction. Id. at ¶ 4. Third and finally, the Defendant claimed that the court appointed counsel is insufficiently qualified to serve as the Defendant's attorney. Id. at ¶ 6. The trial court denied all three pretrial motions. Id. at ¶ 1. The Defendant requested and was appointed indigent defense council for the afore mentioned charges, which proceeded to trial. Id. At trial, the jury returned a verdict of guilty and the Defendant motioned to set aside the verdict on the grounds of the same contentions identified in his pretrial motions. District Court for the Amantonka Nation Order Entering Judgment and Sentence at ¶ 1. The trial court declined to adopt the Defense's argument and maintained the jury's guilty conviction. Id.

A timely appeal to the Supreme Court of the Amantonka Nation followed. ROA at ¶ 1. On appeal, the Appellant raised the same three issues raised in pretrial motions. Id. at ¶ 5. The appellate Tribal Court affirmed the conviction. Id. at ¶ 9. The Defendant then petitioned

the U.S. District Court for the District of Rogers, seeking a Writ of Habeus Corpus under 25 USC § 1303, claiming a violation of his federal civil rights as guaranteed in the Fifth Amendment of the U.S. Constitution, the Indian Civil Rights Act, and the Violence Against Women Act of 2013. U.S. District Court Record at ¶ 1. The U.S. District Court granted the writ of habeus corpus, asserting that the Amantonka Nation had exercised its special domestic violence criminal jurisdiction, but had failed to provide the Defendant/Appellant/Petitioner with the indigent counsel required under VAWA 2013. Id. at 3. The Nation appealed this decision in the U.S. Court of Appeals for the 13th Circuit where, per certium, citing the reasons provided in the Amantonka Nation Supreme Court decision, the court denied the petition for a writ of habeus corpus. U.S. Court of Appeals Opinion at ¶ 1. The Defendant then petitioned the Supreme Court of the United States for a Writ of Certiorari, which was granted, yielding the present argument. The Supreme Court of the U.S. Order Granting Petition for Writ of Certiorari at ¶ 1.

### **SUMMARY OF ARGUMENT**

This Court should vacate the appellate court's decision on the Petitioner, Robert R. Reynolds' claim and uphold the decision of the U.S. District Court for the District of Rogers, granting Reynolds a writ of habeus corpus. The rule regarding tribal court criminal jurisdiction in matters concerning non-Indians is clear. The rule directs that tribal courts lack criminal jurisdiction over non-Indians, unless Congress affirmatively delegates otherwise.

The U.S. Court of Appeals for the Thirteenth Circuit erred in denying Reynolds' petition for a writ of habeus corpus. First, the appellate court failed to accept that Reynolds is a non-Indian. The federal government has consistently identified Indians by the



determination of their racial composition as an individual in addition to their citizenship in a tribal nation. Blood quantum has been an integral component of the evidence needed to prove that a person is an Indian. The willingness of a tribe to permit a non-Indian to become a naturalized citizen of a tribal nation is of little consequence to the federal definition of Indian, especially if that person has no Indian ancestry. If a person is to be treated as an Indian by the federal government, proof of their Indian status must be established in order to justly apply the appropriate rule of law. In denying Reynolds' writ of habeus corpus, the appellate court ignores the long history shared with Indians and Indian tribes, ungirding the relationship that the federal government has built, and extends that relationship to an underserving recipient, a non-Indian.

Because Reynolds lacks any Indian blood and cannot meet the federal definition of Indian, he can be tried as nothing other than a non-Indian. Failure to afford Reynolds the appropriate legal venue dictated by his birthright would expand the quasi-sovereign authority of tribes such that it would undermine the territorial sovereignty and dominion of the United States over Indian tribes. The United States has not, in neither its executive power nor its legislative power, abdicated its authority in matters of criminal jurisdiction over non-Indians and the Court must not either. Reynolds is a non-Indian and subject to the authority of the sovereign first, and secondarily to that of the quasi-sovereign, if and only if the sovereign grants such authority.

Of relevance to the present domestic dispute case is the determination of criminal jurisdiction over non-Indians, which is granted to tribal courts by Congress in the Violence Against Women Reauthorization Act (VAWA) of 2013. The 2013 VAWA Reauthorization act dealt specifically with this grant of authority as related to crimes of domestic violence.

The 2013 VAWA Reauthorization extended the right to exercise criminal jurisdiction, a right generally reserved for the United States, to tribes. However, in doing so, the Act still limited this expansion of jurisdiction specifically to crimes of domestic violence, creating the tribal exercise of Special Domestic Violence Criminal Jurisdiction (SDVCJ). SDVCJ presented tribes with the opportunity to exercise criminal jurisdiction over all persons, excepting only instances where both defendant and victim are non-Indians or the defendant lacks ties to the Indian tribe.

All persons in this expansion of authority includes non-Indians. While the 2013 VAWA Reauthorization expanded criminal jurisdiction for tribes, it did so with certain requirements which were meant to ensure that federal constitutional provisions were not violated in this expansion of authority. A tribe must apply to and be authorized by the U.S. Attorney General, who upon review of the tribal court's composition may choose to accept or deny the tribes request to be empowered to exercise SDVCJ.

Reflective of the constitutional provisions that afford a defendant a right to counsel at critical stages in a criminal trial, VAWA requirements dictate that when a tribe is exercising its SDVCJ authority, it must provide a defendant the right to effective assistance of counsel, at least equal to the right guaranteed by the U.S. Constitution, and must provide an indigent defendant the assistance of a competent and professionally responsible defense attorney. Tribes must adhere to the congressionally mandated standards articulated in 25 USC § 1302 and § 1304 when exercising SDVCJ.

The verbiage of § 1302 additionally requires that at the expense of the tribal government, the tribal court 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. This standard is one that Reynolds contends can be evidenced by the attorney's bar certification obtained from any state in the union. Lacking such certification, an attorney cannot be presumed legally considered to have met the § 1302 requirement.

In the alternative, if Reynolds is found to be an Indian for purposes of criminal jurisdiction, he would readily, within invocation of SDVCJ, be subject to the authority of the tribe. Criminal jurisdiction over Indians, while afforded to tribal courts, does not permit the circumvention of the rights afforded to all citizens by the U.S. constitution. As an Indian, Reynolds would still be afforded the rights provided for in the constitution, as directed by Congress in the establishment of the Indian Civil Rights Act (ICRA). The ICRA in essence ensured that the rights contained in the Bill of Rights were extended to Indians as well. If the court refuses to follow precedent and commits to trying Reynolds as an Indian, the appellate court has still erred in denying the writ of habeus corpus. If Reynolds is classified as an Indian, the attorney assigned to him was less qualified than an attorney to which a non-Indian would be entitled. This disparate treatment is a violation of the Reynolds's equal protection rights and merits the Court's intervention to correct the error.

## **ARGUMENT**

### **I. The Nation Court does not have jurisdiction over Reynolds because Reynolds is a non-Indian, and criminal jurisdiction over non-Indians is reserved to the federal government, unless Congress grants otherwise.**

The general rule is that Indian tribes in the United States (U.S.) do not have inherent criminal jurisdiction over non-Indians. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978). This criminal jurisdiction rule developed from a rich history between the

United States and Indian tribes, which has for years reflected the continued sovereignty of the United States over the territory assigned to the Indian Nation. Oliphant, 435 U.S. 191 at 216. Criminal jurisdiction, while only a facet of a diverse and complicated legal system, is exemplary in identifying the manner in which tribes and the U.S. relate and interact. The current body of caselaw on the topic of sovereignty reflects the longstanding disposition that Indian nations remain dependent on the United States. See Oliphant, 435 U.S. 191 at 216 As far back as 1834, tribal criminal jurisdiction over non-Indians would be in circumvention of agreements provided for in early treaty provisions, which recognized the sovereignty of the United States over the territory assigned to the Indian nation. See Oliphant, 435 U.S. 191 at 216.

The backbone of the United States' position of maintaining criminal jurisdiction of non-Indians within the realm of federal jurisdiction is rooted in the historical dependence of the Indians on the United States. See Oliphant, 435 U.S. 191 at 220. To provide beyond this grounding allowance of authority is a consideration that must be acted upon by Congress, the absence of such action limits the discretion of the Court to what has otherwise been provided for. This point is made most clear in Oliphant v. Suquamish Indian Tribe, where the Court held that the offenses of two non-Indian defendants should not be prosecuted in a tribal court. 435 U.S. 191, 212 (1978). The Court held that despite the Suquamish nation's assertion of national sovereignty, their actual authority reflected at best that of a quasi-sovereign, because Indian tribes "hold an occupy [the reservations] with the assent of the United States, and under their authority". Oliphant, 435 U.S. 191 at 222 (quoting United States v. Rogers, 45 U.S. 567, 572 (1846)). Under this quasi-sovereign territorial jurisdiction, tribes cannot be permitted to exercise criminal jurisdiction over a non-Indian, unless Congress (of the

sovereign) grants such authority. Oliphant, 435 U.S. 191 at 222. Any tribal assertion of criminal jurisdiction, in essence, supersedes the authority of the federal government, unless that expansion of authority is awarded to the tribes by Congress. See, e.g. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 328 (2008); Duro v. Reina, 495 U.S. 676, 682, (1990). The decision in Oliphant clearly articulates the law on the matter of tribal criminal jurisdiction is the guidance which this court should employ in the present case.

- A. Reynolds, although a citizen of the Amantonka Nation, is a non-Indian for purpose of Federal Criminal Jurisdiction.

The federal definition of Indian preempts any tribal nation citizenship designation for the purposes of determining criminal jurisdiction. Federal recognition of an Indian tribe is a voluntarily sought designation that an Indian tribe may seek to formalize the relationship between the United States and the applying tribe. Formalizing this relationship extends certain rights and opportunities to the tribe from the federal government and defines obligations of the federal government to that tribe. A federally recognized tribe upon acceptance is thereafter recognized as a distinct political society. See 1-3 Cohen's Handbook of Federal Indian Law § 3.02 (2017).

While federal recognition results in a tribe's designation as a distinct political entity, the recognition process does not yield a definition of "Indian" that is accepted for all federal purposes. In fact, there is no single statute that governs the definition of "Indian" for all federal purposes. See 1-3 Cohen's Handbook of Federal Indian Law § 3.03 (2017). Federal statutes vary on how "Indian" is defined, which is often resultant of variances in the circumstances that yielded the statute. Id. The Court has consistently considered both the particular situation which gave rise to the need to determine who qualified as an "Indian" as

well as the context and background of federal Indian law generally. Despite the lack of consistency across federal statutes, this Court has contributed to the standardization of the definition of “Indian”, especially in consideration of federal criminal jurisdiction.

In United States v. Rogers, 45 U.S. 567, 573 (1846), this Court asserted that a race-based consideration was integral to determining whether a defendant was an Indian for the purposes of determining federal criminal jurisdiction. 1-3 Cohen’s Handbook of Federal Indian Law section 3.03 (2017). In United States v. Rogers, the Court was asked to define “Indian” for the purposes of determining whether a defendant, a white man, qualified to be covered by an exception to the extension of federal criminal jurisdiction into the Indian tribes residing within the territorial limits of the United States. 45 U.S. at 571. The Court held that despite a white man’s adoption (at an adult age) into an Indian tribe, the white man was not an Indian, and therefore not permitted to escape federal criminal jurisdiction. United States v. Rogers, 45 U.S. at 573. The test the Court employed in the United States v. Rogers rejected the defendant’s plea to consider his adoption into the Cherokee nation as grounds to “ignore the responsibility to the laws of the United States” [that the defendant maintained as a white citizen of the United States]. 45 U.S. at 573.

This early engagement with defining “Indian” for the purpose of federal criminal jurisdiction maintained a race-based component as integral to the determination of who is an “Indian”. In future cases challenging criminal jurisdiction of individuals who claim “Indian” status by virtue of membership in an Indian tribe, the Court has held that enrollment in a tribe is not enough on its own. The generally accepted test, adapted from United States v. Rogers “asks whether the defendant (1) has some Indian blood, and (2) is recognized as an Indian by

a tribe or the federal government or both.” United States v. Stymiest, 581 F.3d 759, 762 (2009), see, e.g., United States v. Bruce, 394 F.3d 1215, 1223 (2005).

In the present case, the federal law that provides generally for the definition of “Indian” is 25 USCS § 1301 (4), which reads: “Any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, United States Code, if that person were to commit an offense listed in that section in Indian country to which that section applies.” 18 USCS §1853 reads as follows:

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [18 USCS § 2241 et seq], incest, a felony assault under section 113 [18 USCS § 113], an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title [18 USCS § 661] within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

This definition does not lend itself to the facts of the case at hand which relate to special domestic violence criminal jurisdiction, which is not enumerated in the statute. Thus, the Petitioner urges the Court to rely on case law and the historical context of existing federal statutes that define the term “Indian” to decide the status of Mr. Reynold. One such statute would be 25 U.S.C.S. § 5129. Here, the statutory definition of “Indian” reads as follows:

The term "Indian" as used in this Act shall include all 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. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. individual with some degree of Indian blood.

25 U.S.C.S. § 5129. In conjunction with federal statutory examples, the Court is urged to apply the two-part test adapted from decisions of this very court. When applied to the facts in the present case, the Court will surely draw the most reasonable conclusion and that is that Reynolds, although a naturalized member of the Amantonka Nation, is not for the purposes of federal criminal jurisdiction an Indian. Reynolds, having no Indian blood, is a non-Indian.

**II. Reynolds’ petition for a writ of habeas corpus should be granted because as a non-Indian, his court-appointed attorney did not satisfy the relevant legal requirements of the Violence Against Women Act of 2013 (VAWA).**

In general, tribal governments may not exert criminal jurisdiction over non-Indians who commit crimes in Indian territory. See United States v. Bryant, 136 S. Ct. 1954, 1960 (2016), Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195, 98 (1978). Federal law defines the term “Indian” as an individual with some degree of Indian blood. (25 USCS § 5129). It is undisputed that Reynolds has no Indian blood. U.S. District Court Record at ¶ 1. Thus, Reynolds should be recognized as a non-Indian for the sake of tribal government criminal jurisdiction. As a non-Indian, VAWA would apply, which would guarantee Reynolds the benefit of a lawyer that meets Constitutional standards, as opposed to one who only meets the Amantonka Nation Code standards. 25 USCA § 1302 (C)(1).

- A. Reynold’s was subject to VAWA at the Amantonka District Court level because the crime he was charged with holds a penalty of up to 3 years imprisonment, and the rights afforded criminal defendants should attach at the onset of prosecution.

In passing VAWA, Congress amended ICRA to allow tribal governments to “exercise special domestic violence jurisdiction” in situations where a non-Indian commits certain domestic violence crime against an Indian. 25 U.S.C. § 1304 (2012). In addition to providing tribes with special jurisdiction over non-Indians, VAWA also provides procedural



safeguards to tribal-court defendants that are similar to those enjoyed by defendants in the United States under the Bill of Rights. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57, 98 (1978); *United States v. Bryant*, 136 S. Ct. 1954, 1956, 195 (2016). VAWA states:

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall— (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and (2) at the expense of the tribal government, 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 USCA § 1302 (C) (1-2). These particular rights are very similar to the Sixth Amendment to the Constitution of the United States which guarantees indigent criminal defendants the right to appointed counsel. *Scott v. Illinois*, 440 U.S. 367, 373–374, (1979).

It is important to note that the Sixth Amendment itself does not inherently extend to tribal courts. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008). Instead, tribal courts can look to application of the sixth amendment for guidance on how the ICRA can be similarly applied. It is understood that the Sixth Amendment right to indigent counsel attaches “[when] a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” *McNeil v. Wisconsin*, 501 U.S. 171, (1991); *See Texas v. Cobb*, 532 U.S. 162, 166–68, (2001). Here, the tribal government charged Reynolds with Partner or family member assault, which carries a penalty of up to three years in prison. Since the potential maximum penalty exceeds one year, Reynolds should fall under VAWA for purposes of indigent counsel appointment at the onset of prosecution, and should thus be appointed counsel which meets the standards of VAWA.

It may be incorrectly argued that because the penalty ultimately imposed was imprisonment for seven months, VAWA does not apply and Reynolds did not actually need indigent counsel to comply with VAWA. This interpretation of the word “imposed” is incorrect and would set a dangerous precedent that Congress, in passing the ICRA, did not intend to garner. While in certain situations VAWA can potentially be applied retroactively to determine whether a conviction was sound in regards to receiving indigent defense counsel, the Supreme Court’s willingness to apply VAWA in this manner does not change the idea that VAWA should correctly be applied at the onset of prosecution for defendants who are charged with crimes carrying maximum sentences of over one year. A decision guiding this incorrect line of thinking can be found in United States vs. Bryant.

In Bryant, uncounseled tribal court decisions were used to affirm a conviction for a crime requiring repeat offenses. United States v. Bryant, 136 S. Ct. 1954, 1957 (2016). The Bryant court’s application of VAWA can be differentiated from the case at hand because here, the crime requiring counsel is the case itself, and not merely prior convictions being used to establish a pattern of offenses. Id. Further, in Bryant, the conviction that was upheld despite lack of counsel was simply a guilty admission by the Defendant as opposed to a jury trial. Id. Bryant only validates uncounseled predicate-offense convictions of less than one-year imprisonment from tribal courts to be used strictly to establish a repeat-offense crime found later in Federal Court. Id. The fact that the case at hand is not based on predicate offenses and that it went to trial by jury distinguishes the instant case from Bryant.

- B. The counsel provided to Reynolds did not meet the standards required under VAWA 2013.

VAWA specifically states that criminal defendants subject to 25 USCA § 1302 (C) have a right to “effective assistance of counsel at least equal to that guaranteed by the United

States Constitution”. 25 USCA § 1302 (C)(1). VAWA can make such a requirement because the reach of 25 USCA § 1302 (C) specifically applies to non-Indians, like Reynolds, being tried in tribal court. Since it has already been established that Reynolds should be subject to VAWA, it follows that according to 25 USCA § 1302 (C)(1), Reynolds should have received counsel at least equal to what would have been received under the Constitution.

The Sixth Amendment has been interpreted to require that criminal defendants be provided an option for legal counsel by an attorney who has been admitted to practice law. United States v. Hoffman, 733 F.2d 596, 599 (9th Cir. 1984); See United States v. Crawford, 33 Fed. Appx. 900, 901 (2002). Being admitted to practice law implies that one has passed the relevant State exam and is in good professional standing. The Constitution is silent on expanding the federal definition of being “admitted to practice law” to extend to Indian tribal bar certifications.

Courts have, instead, provided examples where individuals who have not been certified by the relevant State bar have been considered insufficient legal counsel. In Solina v. United States, the United States Court of Appeals decided that counsel was in violation of the Sixth Amendment where, “unbeknown to the defendant, his representative was not authorized to practice law in any state, and the lack of such authorization stemmed from failure to seek it or from its denial for a reason going to legal ability, such as failure to pass a bar examination.” Solina v. United States, 709 F.2d 160, 167 (2d Cir. 1983). In summation, the Solina court decided it would be a violation of a defendant’s right to effective counsel where he was represented by counsel posing as a competent lawyer who had not actually been admitted to any bar. Id. See United States v. Mouzin, 785 F.2d 682 (9th Cir. 1986).

The situation at hand is analogous because, although no ill-intent is necessarily involved, the court-appointed counsel provided to Reynolds had not passed any relevant bar examination which would certify him to try cases under the Constitution.

It is noteworthy that there is a general standard for establishing ineffective assistance of counsel, as laid out in Strickland v. Washington, 466 U.S. 668, 690 (1984). “To prevail on a claim of ineffective assistance of counsel, defendant must show both that counsel’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. Smith v. Spisak, 558 U.S. 139 (2010). However, this test is withheld for situations where counsel is deemed ineffective on the basis of their performance, as opposed to a *per se* violation of the rights afforded to criminal defendants by the Constitution, which is the situation here. Id.

As previously stated, an attorney must have passed a relevant bar exam in order to represent a criminal defendant. United States v. Mouzin, 785 F.2d 682, 697 (9th Cir. 1986). The Supreme Court of the United States has gone so far as to state that a defendant has no right to an attorney that is not a member of the bar. Wheat v. United States, 486 U.S. 153, 159, (1988) (exploring the idea that an indigent defendant does not have a right to simply choose anyone as their counsel). See Luis v. United States, 136 S. Ct. 1083, 1089 (2016). Where a defendant is afforded constitutional rights to adequate counsel, and the constitution is found to disallow counsel that is not a member of the bar, it follows that a defendant cannot be found to have a constitutional right to counsel that is not a member of the bar.

The indigent defense counsel that was provided to Reynolds was done so subject to Title 2, Chapter 6, of the Amantonka Nation Code. Section 607 (b) states:

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.

Amantonka Nation Code, Title 2, Chapter 6, Section 607 (b). While the Amantonka Nation Code requirements include passing the Amantonka Nation Bar Exam, there is no requirement that defense counsel pass a State bar exam as is expected for adequate counsel under the Constitution. Therefore, since the Amantonka Nation Code does not have a State bar requirement, while the Constitution does have such a bar requirement while remaining silent on the issue of recognition of tribal bar certification, counsel provided by the Amantonka Nation Code is insufficient when VAWA is applied to a non-Indian criminal defendant who needs indigent counsel. The U.S. Court of Appeals erred in reversing the decision made by the U.S. District Court.

- C. Where Reynolds is found to be an Indian, he would be provided counsel whom does not meet the standards that a non-Indian would receive, which would be a violation of equal protection rights.

It has been established that as a non-Indian, Reynolds should receive counsel that meets the standards set forth by the Constitution. 25 USCA § 1302 (C)(1). These standards would yield an attorney who is at least bar-certified in one of the States of the U.S. Id. In the alternative scenario, where the court finds that Reynolds is indeed an Indian, he would be provided with an attorney that simply meets the standards set forth by the Amantonka Nation Code. Following the Amantonka Nation Code would yield an attorney who is at least bar certified by the Amantonka Nation Bar Exam, and not necessarily by one of the States. Since treating a defendant as an Indian in the context of VAWA does not diminish underlying

rights guaranteed by the Constitution, this disparity in results is the foundation for a violation of equal protection rights.

In general, “the crux of the constitutional promise of equal protection is that persons similarly situated shall be treated equally by the laws.” In re Evans (1996) 57 Cal.Rptr.2d 314 (1996); People v. Delacy, 122 Cal. Rptr. 3d 216, 226 (2011). Conversely, “showing that different persons are treated differently is not enough, without more, to show a denial of equal protection.” Griffin v. County Sch. Bd. of Prince Edward Co., 377 U.S. 218, 230 (1964); See State v. Smith, 681 P.2d 1374, 1383 (1984). An equal protection violation requires more than simply being the least efficient system which is producing some insufficient results. See Smith, at 1383. Further, the Constitution does not prohibit Congress from making classifications; it simply requires that the action be justified by sufficient reason. Delacy at 226. The weight required of a given reason varies depending on the nature of the classification. Id. Classifications based on race or national origin, and classifications affecting fundamental rights, are given the most exacting scrutiny. Id. This important distinction is what drives the equal rights analysis in the case at hand.

Reynolds’ situation, along with any other similarly situated criminal defendant in the Amantonka tribal court receiving constitutionally inadequate counsel, is both based on Indian origin and affects a fundamental right to counsel. This action should be subject to strict scrutiny. “A law will not survive strict scrutiny unless it is necessary to promote, and is narrowly tailored to serve, a compelling state interest.” In re Adoption of K.L.P., 735 N.E.2d 1071, 1080 (2000). There is no readily apparent State interest served by providing Indian people with counsel that has satisfied only the Amantonka tribal bar requirement while the Constitutional standard guaranteed to non-Indians in the exact same situation would require

passing a State bar. An argument can be made that the lower threshold is established to increase the pool of attorneys that can appear in the Amantonka courts, but that argument is hardly compelling enough, without more data, to offset the notion that an entire class of Indian people are not receiving their fundamental right to sufficient counsel while non-Indian defendants enjoy such benefits in the same court system. There is no argument that indigent Indian defendants are not going to receive counsel altogether; instead the focus is on the disparity in the quality of counsel provided as compared to the Constitutional requirements. The problem is that the Amantonka Nation Code does not require court-appointed defense counsel to have passed any State bar exam. The Court should find that the US Court of Appeals erred in reversing the District Court's decision.

### **CONCLUSION**

For the foregoing reasons, Petitioner Robert R. Reynolds respectfully requests that this Court hold that the Intermediate Court of Appeals erred in the reversing the decision of the US District Court for the District of Rogers because Petitioner is a non-Indian for purposes of Special Domestic Violence Criminal Jurisdiction and Petitioner's court-appointed attorney did not satisfy the relevant legal requirements.

Respectfully Submitted,

January 14, 2019

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