No. 19-231

IN THE

Supreme Court of the United States

ROBERT R. REYNOLDS,
Petitioner,
v.

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

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

BRIEF FOR THE PETITIONER

Team 408

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Should Robert R. Reynolds, who is not of Native American ancestry, be classified as a non-Indian[1] for the purposes of establishing Special Domestic Violence Criminal Jurisdiction (SDVCJ) under the Violence Against Women Reauthorization Act of 2013 (VAWA), when the accepted definition of Indian used by federal courts for criminal jurisdiction requires that the defendant be of Native American descent?
2. If considered a non-Indian for the purposes of criminal jurisdiction, did respondents, as representatives of the Amantonka Nation, violate VAWA's due process provisions when they declined to appoint Mr. Reynolds an indigent defense attorney permitted to practice in a state or federal bar?
3. Alternatively, if considered an Indian, did respondents violate the equal protection clause of the Indian Civil Rights Act of 1968 (ICRA) when they declined to appoint Mr. Reynolds an indigent defense attorney who would be qualified under VAWA to represent a non-Indian accused of the same offense?

[1] In this brief, the terms "Indian" and "non-Indian" refer generally to one's status for the purposes of establishing criminal jurisdiction, in adherence with the two-part test set forth in *United States v. Rogers*.

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

The Amantonka Nation Court System

The Amantonka Nation ("Amantonka" or "Nation") is a federally recognized tribe of Native Americans whose reservation is located within the State of Rogers, the 51st state in the United States. R. at 6. The Nation's court system is comprised of a District Court and a Supreme Court. 2 A.N.C. § 101, 2 A.N.C. § 201.[2] The Nation's Executive Board ("Board") appoints public defenders and assistant public defenders to represent indigent defendants in its courts. 2 A.N.C. § 606. An individual does not need a law degree from an American Bar Association (ABA) accredited court to serve as one of the Nation's public defenders. 2 A.N.C. § 607. Rather, an individual need only to have completed the Nation's bar examination, which is also administered by the Board, and have received "training in Amantonka law and culture," among other standard age and character requirements. *Id.* Admission to a state or federal bar is not necessary. *Id.* The Nation also admits lay counselors to practice before the court who have successfully completed the Nation's bar examination. 2 A.N.C. § 501. There are no educational requirements to practice as a lay counselor before the Nation's courts. *Id.*

The Nation's Executive Board also appoints judges and justices to serve on its courts. 2 A.N.C. § 301. The Nation requires that the Chief Judge and Chief Justice of its District Court and Supreme Court, respectively, be admitted to a state or federal bar association and possess a degree from an accredited school. *Id.* Associate justices appointed to these courts must pass

[2] This citation format refers to the select provisions of the Amantonka Nation Code.

a qualifying examination administered by the Board, but are not required to have an accredited law degree. *Id.*

Mr. Reynolds' Background and Arrest

Robert R. Reynolds met his wife, Lorinda (an Amantonka Nation citizen), at the University of Rogers. R. at 6. Mr. Reynolds is not of Native American ancestry, and did not have any tribal affiliation at the time he and Lorinda met. R. at 6-7. Following graduation, the couple married and moved into tribal housing on the Nation's Reservation. R. at 6. Mr. Reynolds was hired as a manager at the Amantonka shoe factory, while Mrs. Reynolds found a job as an accountant at the Amantonka casino. *Id.* Approximately two years after the couple married, Mr. Reynolds applied to become a naturalized citizen of the Amantonka Nation. *Id.* Citizenship in the Nation is available to any person who is married to an Amantonka citizen and has lived on the reservation for a minimum of two years. 3 A.N.C. § 201. Mr. Reynolds completed the process and was issued an Amantonka Nation ID card. R. at 6. There is nothing in the record to indicate that Mr. Reynolds had any further political or social affiliation with the Nation beyond what is stated above, or whether Mr. Reynolds sought or received any federal benefits specially reserved for Native Americans.

In late 2016, Mr. Reynolds lost his job when the Amantonka shoe factory closed. *Id.* Mr. Reynolds was unemployed for 10 months. *Id.* In July 2017, Mr. Reynolds was then hired as a manager at a new warehouse distribution center on the Amantonka Reservation, where has remained continuously employed until the present day. *Id.* In the interim, however, Mr. Reynolds began drinking heavily and became abusive. *Id.* On June 15, 2017, Mr. Reynolds was arrested after police called to the couple's apartment discovered evidence of physical abuse. According to the evidence at trial, Mr. Reynolds hit his wife, who was injured when she

fell and struck her torso against a coffee table. *Id.* The following day, the Nation's chief prosecutor charged Mr. Reynolds with committing partner or family member assault. 5 A.N.C. § 244. R. at 2.

II. STATEMENT OF THE PROCEEDINGS

Before trial, Mr. Reynolds filed three motions, each of which were denied by the court on July 5, 2017. R. at 3-4. First, Mr. Reynolds moved to dismiss his indictment on the grounds that he is a non-Indian, and the Nation lacks criminal jurisdiction over non-Indians pursuant to *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). R. at 3. The court responded that, as a citizen of the nation, Mr. Reynolds qualified as an Indian. Second, Mr. Reynolds requested that a new attorney be appointed to him, contending that, as a non-Indian, his prosecution was dependent on satisfying the criteria for Special Domestic Violence Criminal Jurisdiction (SDVCJ) over non-Indian defendants established by the Violence Against Women Reauthorization Act of 2013 (VAWA). R. at 3. The District Court denied the request, repeating its contention that Mr. Reynolds is an Indian. *Id.* Third, Mr. Reynolds alleged that his court-appointed attorney was insufficiently qualified to represent him and that the assignment of his attorney violated his equal protection rights. R. at 3-4. Specifically, Mr. Reynolds argued that VAWA requires that indigent counsel appointed to represent non-Indians subject to SDVCJ must be members of a state bar association. R. at 4. He contended that equal protection laws require his attorney possess these same requirements. *Id.* The District Court denied this motion and stated that Mr. Reynolds' counsel was sufficiently qualified even if SDVCJ standards were applied. *Id.*

The case proceeded to trial, and a jury returned a guilty verdict. R. at 5. Mr. Reynolds moved to set aside the verdict, citing the three arguments from his pre-trial motion. *Id*. The District Court judge denied the request in a sentencing order dated August 23, 2017. *Id*. Although the court noted that that this was Mr. Reynolds' first conviction, he was sentenced to seven months in prison. *Id*. The court also ruled that Mr. Reynolds must pay $5,300 in

restitution, attend batterer rehabilitation and alcohol treatment programs, and pay a $1,500 fine. *Id.* In the sentencing order, the judge noted that Mr. Reynolds had "faithfully complied" with the conditions of his bond and entered into counseling with Mrs. Reynolds. *Id.* At his wife's request, the District Court dropped the protection order that was issued against Mr. Reynolds at the time of his arraignment. *Id.*

Following his conviction, Reynolds appealed to the Nation's Supreme Court. R. at 6. Mr. Reynolds raised the same three arguments from his District Court motion. R. at 7. On November 27, 2017, the Supreme Court affirmed the District Court's conviction. *Id.* On the question of whether Mr. Reynolds should be considered a non-Indian, the judge cited *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), in concluding that membership in a tribe is sufficient to classify one as an Indian for the purposes of federal criminal jurisdiction. *Id*. Regarding Mr. Reynolds' request for a new attorney, the court reiterated that because Mr. Reynolds is an Indian, it need not consider whether it was necessary for Mr. Reynolds' appointed attorney to meet the standards mandated by VAWA. *Id.* The court also rejected Mr. Reynolds' equal protection argument. *Id*. In doing so, the court noted that Mr. Reynolds' indigent defense counsel possessed a degree from an ABA accredited law school and was a member of the Nation's bar association. *Id.*

Mr. Reynolds filed a petition in the U.S. District Court for the District of Rogers for a writ of habeas corpus pursuant to 25 U.S.C. § 1303 (2018), alleging that his conviction violated his federal civil rights under the Fifth Amendment, the Indian Civil Rights Act of 1968 (ICRA), and VAWA. R. at 8. On March 7, 2018, the court granted Mr. Reynolds' petition. *Id.* The court concluded that federal law "clearly limits criminal jurisdiction over 'Indians' and provides a definition of 'Indian' that requires some degree of Indian blood." The court then

stated that the Nation failed to provide Mr. Reynolds with indigent defense counsel possessing the required qualifications to represent him as a non-Indian subject to SDVCJ. *Id.*

On August 20, 2018, the U.S. Court of Appeals for the Thirteenth Circuit reversed the decision of the District Court, remanding the case with instructions to deny Mr. Reynolds' petition. R. at 9. On October 15, 2018 the Supreme Court granted review.

SUMMARY OF THE ARGUMENT

Respondents, acting on behalf of the Amantonka Nation, violated Mr. Reynolds due process and equal protection rights when they declined to appoint him an indigent defense counsel who would be qualified to represent non-Indians in tribal court under the Special Domestic Violence Criminal Jurisdiction (SDVCJ) exception established by the Violence Against Women Reauthorization Act of 2013 (VAWA).

First, the Nation's District Court Judge erred in ruling Mr. Reynolds an Indian for the purposes of exercising criminal jurisdiction. Established federal court precedent holds that an individual who is not of Native American ancestry cannot be considered an Indian in a criminal jurisdiction context. *United States v. Rogers*, 45 U.S. 567, 572 (1846). This ancestral requirement has been widely applied by both Congress and the courts, including in the Indian Major Crimes Act (IMCA), 18 U.S.C. § 1153 (2018). Notably, the ICRA, which codifies the individual rights of Native Americans with respect to tribal governments, defines "Indian" as anybody who would be subject to jurisdiction under the IMCA. 25 U.S.C. § 1301 (2018). While tribes retain their sovereign right to determine their own membership, tribal citizenship is not sufficient for the purposes of establishing criminal jurisdictional. Since Mr. Reynolds has no Native American ancestry, he should therefore be considered a non-Indian for the purposes of establishing SDVCJ.

Secondly, if Mr. Reynolds is found to be a non-Indian, his due process rights were violated when the respondents denied him the right to indigent defense counsel admitted to a state or federal bar. Native American tribes cannot prosecute non-Indians without an affirmative recognition of such authority by Congress. *Oliphant*, 435 U.S. at 208. Therefore, the Nation may only charge Mr. Reynolds by exercising SDVCJ, which in turn requires

meeting the heightened due process requirements for non-Indian defendants included in VAWA. The legislative history of VAWA and the language of its defendants' rights provisions support the conclusion that a court-appointed attorney representing non-Indian SDVCJ defendants must be admitted to practice in a state or federal court. Because Mr. Reynolds' attorney did not meet these standards, his due process rights were infringed and the court should grant his petition for a writ of habeas corpus.

Alternatively, if Mr. Reynolds is deemed to be an Indian for criminal jurisdiction purposes, respondents' refusal to appoint an indigent counsel qualified to represent a non-Indian accused of the same offense constitutes a violation of the equal protection clause of the ICRA. As established above, the indigent counsel appointed to Mr. Reynolds lacked state or federal bar membership, and therefore would not have been qualified to represent a non-Indian charged by the Nation for the same offense. The fact that respondents denied Mr. Reynolds the same quality of representation guaranteed to non-Indians within its jurisdiction thus entitles Mr. Reynolds to relief even if he is found to be an Indian.

ARGUMENT

I. Mr. Reynolds Should be Considered a Non-Indian for the Purposes of Special Domestic Violence Criminal Jurisdiction Because Long-Standing Federal Precedent Holds that Individuals Who Lack Native American Ancestry Cannot be Considered Indians in a Criminal Jurisdiction Context

a. Congress and U.S. Courts Have Distilled a Two-Pronged Test for Determining Indian Status for the Purposes of Criminal Jurisdiction

Federal precedent has established that an individual who is not of Native American ancestry cannot be considered an "Indian" for the purposes of criminal proceedings. *Rogers*, 45 U.S. at 567. This requirement has been widely applied by federal courts, and Congress has neither amended this long-standing precedent nor has it supplied an alternate definition of the term "Indian" for the purposes of criminal jurisdiction to supplant the method employed by the courts. Significantly, this is the test that federal circuit courts have applied in interpreting the IMCA. *See United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005). Additionally, the ICRA, which codifies the personal rights of Native Americans with respect to tribal governments, defines "Indian" as any person who would be subject to jurisdiction under the IMCA. 25 U.S.C. § 1301.

With the passage of VAWA in 2013, Congress affirmed the inherent sovereign authority of Indian tribal governments to exercise special criminal jurisdiction over non-Indians with "requisite ties to the Indian tribe" who commit domestic or dating violence against Indians on tribal lands. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 53, 55 (2013). The creation of SDVCJ was hailed as a significant victory forward for tribes and for Native American women subject to high rates of domestic abuse, since prior to the law's passage tribes had not been able to prosecute non-Indians who committed domestic abuse on tribal lands. Congress did not provide an alternate definition of "Indian" as it is relates to VAWA's criminal jurisdiction, and therefore this Court's analysis in

Rogers remains determinative.[3] In *Rogers*, the Court held that an American citizen with no Indian blood who became a naturalized citizen of the Cherokee nation did not establish that he was an Indian for the purposes of criminal jurisdiction. Since then, federal courts have distilled and widely applied a two-pronged test suggested by the Court in *Rogers*. To satisfy the first prong, the Nation must prove, beyond a reasonable doubt, that defendant has some degree of Native American ancestry ("the ancestral" requirement); to satisfy the second prong, a defendant must be recognized as an Indian by both an Indian tribe and the federal government ("the political affiliation" requirement). *See Bruce*, 394 F.3d at 1223; *United States v. Stymiest*, 581 F.3d 759 (8th Cir. 2009); *United States v. Torres*, 733 F.2d 449, 456 (7th Cir. 1984).

Because the term "Indian" is found in similar, complimentary statutes, "courts and scholars have applied the *Rogers* definition of Indian status to both" the Indian Country Crimes Act (ICCA), 18 U.S.C. § 1152 and the IMCA, 18 U.S.C. § 1153. *United States v. Prentiss*, 273 F.3d 1277, 1280 n.2 (10th Cir. 2001). We see no reason for departing from this long-standing manner of determining Indian status.

The *Rogers* framework is "in the nature of an affirmative defense." *Bruce*, 394 F.3d at 1222-23. The Nation thus "retains the ultimate burden of persuasion" and must prove, beyond a reasonable doubt, that Mr. Reynolds does qualify as an Indian. *Bruce*, 394 F.3d at 1223. In this case, it is "undisputed" that Mr. Reynolds has no Native American ancestry. R. at 8.

i. Ancestral Requirement

[3] Congress has defined the term "Indian" for a wide array of purposes; different uses employ different definitions. However, in the absence of a unifying definition of the term "Indian" for the purposes of federal criminal jurisdiction, federal courts have historically used a two-pronged analysis stemming from the Court's holding in *Rogers* which considers "Indian descent, as well as recognition as an Indian by a federally recognized tribe." *Cohen's Handbook of Federal Indian Law*, § 3.03 (2017). "Both prongs must be satisfied to establish Indian status." *United States v. Maggi*, 598 F.3d 1073, 1075 (9th Cir. 2010).

To determine whether a particular defendant is or is not an Indian for the purposes of federal criminal jurisdiction, the government must first show that the defendant has ancestral ties to an Indian tribe. In considering this question, federal courts have found the method employed in *Rogers* to be persuasive. In that decision, the Court held that a man adopted into an Indian tribe as an adult did not establish that he was an "Indian" despite being recognized as such by the tribe. The term "Indian," for the purposes of criminal proceedings, "does not speak of members of a tribe, but of the race generally, of the family of Indians." *Id*. at 573. The Court held that a non-Indian who is, as an adult, adopted into an Indian tribe does not by doing so become an Indian. *See also Kahawaiolaa v. Norton*, 386 F.3d 1271, 1272 (2004) (recognizing that members of a tribe are of the same or similar race). This carries an important function, as it excludes those individuals who have established certain connections to a tribe, but cannot show ancestral ties to any of the "once-sovereign political communities" recognized as Indian tribes by the federal government. *United States v. Antelope*, 430 U.S. 641, 646 (1977) (quoting *Morton v. Mancari*, 417 U.S. 535, 553 (1974)); *see also United States v. Zepeda* 792 F.3d 1103 (9th Cir. 2015) (holding that a conviction under the IMCA required the government to show that defendant has some quantum of Indian blood).

In *Duro v. Reina*, the Supreme Court concluded that tribes lacked criminal jurisdiction over nonmember Indians because "regardless of whether tribes were assumed to retain power over nonmembers as a historical matter, the tribes were implicitly divested of this power...when Indians became full citizens." *Duro v. Reina*, 495 U.S. 676, 706 (1990), *superseded by statute,* Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1856, 1892-93 (1990). Shortly thereafter, Congress amended the ICRA to affirm the exercise of tribal jurisdiction in cases like *Duro*, defining "powers of self-government" for Indian tribes

as "the inherent power of Indian Tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2). The "*Duro* fix" was subsequently upheld in *United States v. Lara*, 541 U.S. 193, 212 (2004). At the same time, Congress for the first time gave a broadly applicable definition for the term "Indian" as "any person who would be subject to the jurisdiction of the United States as an Indian" under the IMCA. 25 U.S.C. § 1301(4). In doing so, Congress affirmed that the expansion of sovereign authority to nonmember Indians via the "*Duro* fix" applies only to those with Indian ancestry, since only those who are able to trace their lineage to one of the discreet, political entities that now have special status as federally recognized Indian tribes can be considered "Indians."[4]

ii. The Political Affiliation Requirement

The question of ancestry in an Indian tribe is not dispositive; the government must also prove that a defendant has a political affiliation with that tribe. All federal circuits to consider the question have recognized that political affiliation is an essential component for a defendant to qualify as an Indian. *See Bruce*, 394 F.3d at 1223; *Stymiest*, 581 F.3d at 762; *Prentiss*, 273 F.3d at 1280; *Torres*, 733 F.2d at 456. This is necessary in order to remove from consideration "individuals who may have an Indian ancestral connection, but do not possess sufficient current social and practical connections to a federally recognized tribe." *United States v. Maggi*, 598 F.3d 1073, 1075 (9th Cir. 2010).

b. Mr. Reynolds Qualifies as a Non-Indian for the Purposes of Special Domestic Violence Criminal Jurisdiction

[4] Congress has affirmed that the Court's treatment of Indian status on the basis of this two-part test is not a racial classification but rather "part of an overall effort to limit the scope of what the Court views as special rights...for Indian tribes and to make sure that that realm of special rights, as they see it, doesn't include or affect any non-Indians, non-members of that tribe." *Rulings of the U.S. Supreme Court as They Affect the Powers and Authorities of the Indian Tribal Governments*, 107th Cong., 2nd Sess. (2002). The choice to delineate between nonmember Indians and non-Indians is important, as it affirms Congressional intent to accord a special set of rights to Indians and Indian tribes, and that a basic tenet of tribal sovereignty is that these privileges are reserved solely for those with ancestral ties to federally-recognized tribes.

The court below erred in determining that Reynolds was an Indian for the purposes of federal criminal jurisdiction. Although the court correctly concluded that Indian tribes have the right to define and control their own membership pursuant to the Supreme Court's decision in *Martinez*, attaining tribal membership through naturalization is not the same as being an Indian for the purposes of federal criminal jurisdiction. Additionally, the court erred by ignoring the fact that, as a naturalized member of the Nation with no ancestral ties to any Indian tribe, Reynolds cannot be considered an Indian under the litmus test employed by all federal courts.

i. The Court's Reliance on Santa Clara Pueblo v. Martinez is Misguided

In *Martinez*, an individual sought declaratory and injunctive relief against "enforcement of a tribal ordinance denying membership in the tribe to children of female members who marry outside the tribe, while extending membership to children of male members who marry outside the tribe." *Id.* at 51. The issue in that case was whether Title I of the ICRA, which provides that "[n]o Indian tribe in exercising powers of self-government shall…deny to any person within its jurisdiction the equal protection of its laws," authorizes a civil cause of action by individuals against tribes or tribal officers in federal courts. 25 U.S.C. § 1302 (a)(8).

In affirming tribal right to self-determine membership, the court also acknowledged that "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Martinez*, 436 U.S. at 56. Thus, the Court's recognition of tribal powers in this case was limited to the civil context, relating specifically to the issue of sovereign immunity for Indian tribes. That is not the issue here, where the question of petitioner's status as a non-Indian does not impinge on tribal sovereignty. When Congress established SDVCJ for Indian tribes, it exercised its plenary power to extend tribal

criminal jurisdiction over non-Indians who have close ties to the tribe. Here, Congress has affirmed a more expansive view of tribal sovereignty by explicitly defining tribes' powers to adjudicate domestic violence claims against non-Indians — albeit with accompanying due process protections.

ii. It was Error for the Court to Rule that Mr. Reynolds is an Indian Given his Lack of Native American Ancestry

The Court of Appeals for the Thirteenth Circuit relied on the logic articulated by the Nation's Supreme Court to deny Mr. Reynold's petition for a writ of habeas corpus. R. at 9. In doing so, it ignored the conclusion of the District Court for the District of Rogers that Mr. Reynolds cannot be considered an Indian for the purposes of federal criminal jurisdiction as he lacks the requisite blood ties to an Indian tribe. R. at 8. At each stage in the proceedings, Mr. Reynolds has asserted that his status is that of a non-Indian. The record clearly shows that:

- In his trial at the District Court for the Amantonka Nation, Mr. Reynolds asserted that he was a non-Indian and that the Nation lacks jurisdiction over him pursuant to the U.S. Supreme Court's holding in *Oliphant*;
- In his trial at the Supreme Court of the Amantonka Nation, Mr. Reynolds reasserted that he is a non-Indian and that the Nation lacks jurisdiction;
- Mr. Reynolds filed a petition for a writ of habeas corpus alleging the same in the U.S. District Court for the District of Rogers.

From the outset of his trial in tribal court, Mr. Reynolds has asserted that he is a non-Indian and that the Nation lacks jurisdiction over him. The respondents have submitted no evidence to support the conclusion that Mr. Reynolds is of Native American descent, and as a result he cannot be an Indian for the purposes of federal criminal jurisdiction. *See* R. at 3-4, 6-8.

The court below rested its conclusion that Mr. Reynolds is an Indian on a flawed interpretation of the Supreme Court's decision in the *Martinez* case, but for the reasons mentioned above this does not satisfy the requirement, necessitated by this court and every federal circuit, that to qualify as an "Indian" for the purposes of federal criminal jurisdiction, the Nation must show that Mr. Reynolds has some ancestral connection to a federally recognized tribe. *See United States v. Reza-Ramos*, 816 F.3d 1110 (9th Cir. 2010); *United States v. A.W.L.,* 117 F.3d 1423 (8th Cir. 1997). While respondents may point to that VAWA, which simply defines the term "Indian" as "a member of an Indian tribe," allows tribes to craft their own definition of who qualifies as an Indian for the purposes of criminal jurisdiction, this runs against precedent as well as Congress' definition of "Indian" under the ICRA and the IMCA. 34 U.S.C. § 12291.

iii. We Do Not Contest that Mr. Reynolds has Sufficient Political Ties to the Amantonka Nation

The second prong of the *Rogers* analysis requires that an individual possess sufficient political ties to a federally-recognized tribe. We acknowledge that where, as is the case here, an individual has taken the step of becoming a naturalized citizen of a tribe, it is likely that, in the absence of strong evidence to the contrary, they have established sufficient political or social ties to a tribe to satisfy the second prong of the test. The record shows that Mr. Reynolds was eligible to become a naturalized member of the Nation and took the steps necessary in order to satisfy the requirements set forth in Title 3, Chapter 2 of the Amantonka Nation Code. 3 A.N.C. § 202. Mr. Reynolds has lived and worked on the Amantonka Reservation for a number of years and has never contested his status as a naturalized citizen of the Nation. R. at 6.

Respondents argue, in part, that because Mr. Reynolds voluntarily chose to become a naturalized citizen of the Amantonka, he cannot now assert that he is a non-Indian. *Id*. This argument is misplaced because it assumes that the enjoyment of certain social benefits attached to the status of citizenship in an Indian tribe is coextensive with a tribe's ability to assert criminal jurisdiction over an individual. This line of reasoning is not supported by precedent, as Congress has authorized no law extending criminal jurisdiction to Indian tribes over individuals whose only connection to a tribe is a political or social affiliation. Furthermore, the statutory and case law presented above affirms that tribal membership alone is insufficient to establish criminal jurisdiction; *both* factors of the Rogers test must be satisfied in order to confer criminal jurisdiction. *Bruce*, 394 F.3d at 1223.

II. Mr. Reynolds' Due Process Rights Were Violated When Respondents Failed to Provide Indigent Counsel with the Legal Qualifications Necessary to Represent Non-Indian Defendants Under SDVCJ

a. The Nation Lacks General Criminal Jurisdiction in the Present Case Because Tribes May Not Exercise Prosecutorial Power over Non-Indians Absent an Affirmative Recognition of Such Authority by Congress

i. Respondents Denied Mr. Reynolds Motion to Dismiss on Incorrect Grounds When It Ruled Him an Indian

Tribal courts may not exercise jurisdiction over non-Indians absent the affirmative delegation of such power by Congress. *Oliphant*, 435 U.S. at 208. The court's ruling in *Oliphant* is grounded in the long-held consensus that tribes, despite possessing "attributes of sovereignty over both their members and their territory," are nonetheless subject to overriding federal authority. *United States. v. Wheeler*, 435 U.S. 313, 322-23 (1978) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1974)). Absent action by the federal government, tribes retain their inherent sovereign powers, including the general ability to prescribe and enforce

criminal laws in their territory. *Wheeler*, 435 U.S. at 323; *see also Worcester v. Georgia.*, 31 U.S. 515, 519 (1832) (referring to tribes as "retaining their original natural rights" in matters of local self-government). However, these sovereign powers may be abrogated by treaty or statute, or by implication as a result of tribes' dependent status. *Wheeler*, 435 U.S. at 323. Thus, in *Oliphant*, two non-Indians accused of violent and reckless conduct toward tribal police authorities filed a writ of habeas corpus alleging that, as non-Indians, the tribe's court did not have criminal jurisdiction over them. *Oliphant*, 435 U.S. at 194. The court agreed, citing a number of historical factors in reaching its conclusion. The court also expressed a prevailing concern for protecting the due process rights of citizens who may otherwise be haled into tribal courts:

> "[F]rom the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."

Id. at 210. Subsequent court rulings have cited *Oliphant* to affirm and expand the proposition that, in general, the sovereign power of tribes does not apply to non-member activities. See, e.g., *Nevada v. Hicks*, 533 U.S. 353 (2001) (finding tribes lack authority to regulate efforts by state officials to investigate off-reservation violations of state law); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (ruling the tribal court had no civil jurisdiction over non-Indian parties arising out of an accident on a state highway traversing tribal lands); *Montana v. United States.*,

450 U.S. 544 (1981) (holding that a tribe could not regulate hunting and fishing by non-members on reservation land held in fee simple by non-members).

The due process concerns for criminal defendants cited by *Oliphant* have been echoed in subsequent court decisions. *See, e.g., Duro*, 495 U.S. at 688 (denying tribal criminal jurisdiction over Indian non-members on the grounds that doing so "subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe, and involves a far more direct intrusion on personal liberties"); *Lara*, 541 U.S. at 212 (2004) (Kennedy, J., concurring) ("To hold that Congress can subject [a non-member Indian], within our domestic borders, to a sovereignty outside the basic structure of the Constitution is a serious step"). Such concerns stem in part from the fact that the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C § 1301-1303, which governs tribal court proceedings, accords procedural safeguards to defendants that are "similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Martinez*, 436 U. S. at 57. This is in recognition of "the unique political, cultural, and economic needs of tribal governments." *Id*. at 62. For example, the ICRA provides for a right to indigent counsel only when certain criteria are met, and thus is not coextensive with the Sixth Amendment. 25 U.S.C. §1302(c)(2). *See also*, *United States v. Bryant*, 136 U.S. 1954, 1958 (2016) (the Sixth Amendment "does not apply to tribal-court proceedings").

Turning to the present case, we have previously argued that Mr. Reynolds should be considered a non-Indian for the purposes of criminal jurisdiction. Under this scenario, the Amantonka Nation may not bring charges against him absent the recognition of such authority by Congress. *Oliphant*, 435 U.S. at 191. Instead, the Nation's District Court judge denied Mr. Reynolds' pretrial motion for dismissal on the grounds that he is a non-Indian. R. at 3. On

appeal, the Nation's Supreme Court again erroneously concluded that Mr. Reynolds should be considered an Indian for the purposes of criminal jurisdiction, this time on the grounds that tribes retain the right to define their own membership. R. at 7. However, as stated previously, established court precedent supports the conclusion that one must be of Native American descent to qualify as an Indian for the purposes of tribal criminal jurisdiction — tribal membership alone is not sufficient. *Rogers*, 45 U.S. at 572-73. Subjecting Mr. Reynolds to jurisdiction, absent the express delegation of authority by Congress to do so, would thus trigger the same due process concerns this court raised in *Oliphant*, *Duro* and *Lara*.

In summary, the Amantonka Nation based the exercise of its tribal jurisdiction over Mr. Reynolds on the incorrect conclusion that he is an Indian. Pursuant to *Oliphant*, tribal criminal jurisdiction was lacking in this case, and the denial of Mr. Reynolds' motion to dismiss must be overturned, absent respondent's ability to satisfy the terms of the SDVCJ delegated by the federal government in VAWA.

ii. The Amantonka Nation's Prosecutorial Power Over Mr. Reynolds Depends on Its Ability to Satisfy VAWA's Exception to Oliphant Because No Other Law Permits the Extension of Tribal Criminal Jurisdiction over Non-Indians

Tribes may only exercise prosecutorial power over non-Indians through the special domestic violence criminal jurisdiction exception approved by Congress as part of VAWA.[5] In the 40 years since *Oliphant*, Congress has passed no other law reversing in part or whole this Court's conclusion that tribes do not possess inherent criminal jurisdiction over non-Indians. This is significant, because Congress possesses broad general power to "limit, modify

[5] Other limited scenarios where tribal criminal jurisdiction may remain intact; for example, in the context of criminal contempt. *Cohen's Handbook of Federal Indian Law* § 9.04 (2017). However these scenarios are not applicable to the case at hand.

or eliminate" tribal powers of self-government. *Martinez*, 436 U.S. at 56; *see also United States v. Kagama*, 118 U.S. 375, 379-381, 383-384 (1886). This power has been described as "plenary and executive." *Lara*, 541 U.S. at 200. Congress' authority in this regard flows from Indian Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, and the Treaty Clause, U.S. Const. Art. II, § 2, cl. 2. *Lara*, 541 U.S. at 200. The court has generally deferred to Congress' broad authority to define the limits of tribal criminal jurisdiction, including the ability to lift restrictions on tribe's prosecutorial power. *Id*. Notably, *Lara* upheld legislation overturning the court's decision in *Duro* and affirmed inherent power to "exercise criminal jurisdiction over all Indians." *Id.* (Codified at 25 U.S.C §1301(b)). Indeed, this Court concluded its opinion in *Oliphant* by citing the increased sophistication of tribal courts and high prevalence of crime by non-Indians on reservations as considerations Congress may weigh in "deciding whether Indian tribes should finally be authorized to try non-Indians." *Oliphant*, 435 U.S. at 211-12.

We acknowledge and support the urgent need to address the threat of violence faced by Native American women, a reality this Court has also shed light on.[6] However, Congress' refusal to overturn *Oliphant* except in the limited context of VAWA supports the view that any expansion of tribal jurisdiction over non-Indians must be weighed carefully against the due process concerns raised by *Oliphant* and echoed in subsequent opinions. Therefore, we must confine our discussion to the narrow terms of the jurisdictional expansion granted by VAWA, and whether respondents have satisfied the heightened due process safeguards set forth by Congress as part of the act.

[6] See *Bryant*, 136 S. Ct. at 1958-59 (noting the "high incidence of domestic violence against Native American women" and citing CDC statistics on the prevalence of such abuse).

b. The Indigent Defense Counsel Provided to Mr. Reynolds Failed to Meet the Legal Standards Required by VAWA Because the Attorney Was Not a Member of a State Bar Association

i. The Language of VAWA and Its Legislative History Support an Interpretation that the Provision's Due Process Protections Require Indigent Defense Attorneys to Be Licensed to Practice in a U.S. Court

The Nation's ability to exercise criminal jurisdiction over Mr. Reynolds must fail in this case because the indigent defense counsel provided to Mr. Reynolds was not a member of any state bar association, thus violating the due process protections established by VAWA. The special criminal jurisdiction established by VAWA may only be exercised in specific instances of domestic and dating violence by tribes that are able to meet the relevant due process requirements. 25 U.S.C. § 1304. Of particular note, tribes must provide all defendants subject to special domestic violence jurisdiction with the enhanced procedural rights guaranteed by the Tribal Law and Order Act of 2010 (TLOA), Pub. L. No. 111-211, Title II, §234(a), 124 Stat. 2279 (2010), which amended the ICRA to include:

- The right to counsel at least equal to that guaranteed by the Constitution, and;
- For indigent defendants, the assistance of a defense attorney "licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys."

25 U.S.C. § 1302(c). In addition to these protections previously established in ICRA, VAWA also requires that non-Indian defendants accused of domestic violence crimes by tribes be guaranteed "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant." 25 U.S.C.

§ 1304(d)(4). This Constitutional "catch all" provision can be seen as bridging the gap between those rights afforded in state and federal court and those more limited rights guaranteed by the ICRA for defendants in tribal court. Shefali Singh, *Closing the Gap of Justice: Providing Protection for Native American Women Through the Special Domestic Violence Provision of VAWA*, 28 Colum. J. Gender & L. 197, 225 (2014).

The legislative history accompanying VAWA makes clear that these protections and others included in the final legislation — such as the right to an impartial jury that reflects a fair cross-section of the community, 25 U.S.C. § 1304(d)(3) — reflect Congress' desire to balance the expansion of tribes' criminal jurisdiction with the due process concerns that may result from subjecting non-Indians to tribal prosecution. The Senate majority report states that VAWA's expanded jurisdiction is predicated on tribes' ability to "provide non-Indian defendants with the rights required under law. If a tribe cannot do so, it may not exercise this jurisdiction." S. Rep. 112-153, at 213 (2012). The report added that the due process safeguards in VAWA "effectively guarantee[] that defendants *will have the same rights in tribal court as in State court*, including due-process rights and an indigent defendant's right to free appointed counsel meeting *Federal constitutional standards*." S. Rep. 112-153, at 32 (emphasis added).

We acknowledge, as has this Court, that Native American courts are distinct from state and federal forums, and reflect the unique customs and traditions of each tribe. See, e.g., *Tom v. Sutton*, 533 F.2d 1101, 1104 n. 5 (9th Cir. 1976) ("courts have been careful to construe the term[] 'due process' . . . with due regard for the historical, governmental and cultural values of an Indian tribe"); *Duro*, 495 U.S. at 693 (noting that tribal courts "are influenced by the unique customs, languages, and usages of the tribes they serve"). While this aspect of Native American courts is linked with deep-rooted concepts of tribal identity, it also poses a challenge to the due

process concerns articulated in VAWA's legislative history. There are currently more than 570 federally recognized Indian tribes.[7] While many have highly sophisticated court systems capable of meeting the due process protection requirements laid out by VAWA, inevitably the size and professional employment standards for public defenders across these tribes will vary widely. What type licensure will ensure that one is practicing in a jurisdiction that upholds "appropriate professional licensing standards?" 25 U.S.C. §1302(c)(2). Is membership in any tribal bar association adequate, or only those whose minimum qualifications for admittance mirror those of state and federal bars? Failure to ensure a clear and uniform standard in this area will only open VAWA up to continued challenges from non-Indian defendants who allege that their attorneys failed to meet the law's requirements.

We believe the above considerations, along with Congress' stated concerns over ensuring adequate protection for non-Indian defendants, lead to the conclusion that the most effective and administrable standard is to require that indigent defense counsel be admitted to a state or federal bar in order to represent VAWA defendants. At least one tribe has already implemented this approach by requiring its public defenders to be licensed in state and federal court in order to represent defendants charged under VAWA's Special Domestic Violence Criminal Jurisdiction. Lindsay Cutler, *Tribal Sovereignty, Tribal Court Legitimacy, and Public Defense*, 63 UCLA L. Rev. 1752, 1801 (2016) (interviewing the chief public defender of the Pascua Yaqui tribe, one of three tribes chosen in 2013 to take part in the VAWA pilot program).

Using state or federal bar admittance as a threshold standard, the Court should find that Mr. Reynolds' court-appointed defense was not qualified to represent defendants charged

[7] National Conference of State Legislatures, *Federal and State Recognized Tribes*, http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx (last updated Nov. 2018)

under VAWA's special domestic violence jurisdiction. Mr. Reynolds court-appointed attorney had only been admitted to the Amantonka Nation Bar — not any state or federal bar. R. at 7. Furthermore, Mr. Reynolds requested in his pretrial motion to have appointed to him a new attorney qualified to represent defendants who fall within the tribe's exercise of SDVCJ. R. at 3. The Amantonka Nation Code permits the District Court to appoint counsel at its discretion. 2 A.N.C § 503(4). However, the Chief Judge denied Mr. Reynolds motion on the incorrect grounds that he should be considered an Indian for the purposes of criminal jurisdiction. R. at 3. The fact that Mr. Reynolds cannot point to any specific error by his attorney is irrelevant, since the Chief Judge's refusal to appoint appropriately qualified counsel was itself a violation of Mr. Reynolds due process rights.

ii. The Nation Failed to Ensure the Appropriate Professional Licensing Standards for Its Public Defenders, And Thus Mr. Reynolds' Indigent Counsel Was Not Qualified to Represent Him

In the alternative, the court should find that the Nation failed to ensure appropriate professional licensing and competency standards for its public defenders, 25 U.S.C § 1302(c)(2), and thus the indigent counsel appointed to Mr. Reynolds by respondents violated VAWA's due process rights. The Nation's Executive Board appoints its tribal court's prosecutors and public defenders, and it also administers the Amantonka Nation Bar exam. 2 A.N.C. § 501(a). However, respondents have provided no evidence that the Executive Board has the requisite legal background and expertise to handle these tasks. The minimum qualifications for the Nation's public defenders require no formalized educational training, only a vague requirement that applicants have "training in Amantonka law and culture." 2 A.N.C. § 607(a). Applicants must also pass the tribal bar exam, along with other minimal

requirements. *Id*. Such facts undercut any contention that the Nation practices appropriate licensing standards, notwithstanding the Code's provision that only public defenders with a degree from an ABA accredited law school can represent defendants charged under VAWA. *Id.* at § 607(b). Furthermore, while the Nation does have a code of ethics for attorneys and lay counselors, the code notably lacks any requirement for continuing education after admission to the Nation's bar. Currently, all but five current state bars require mandatory continuing legal training courses after admission. National Conference of Bar Examiners & the American Bar Association, *Comprehensive Guide to Bar Admission Requirements 2018*, 18 (2018). Lastly, we note that the Nation's questionable licensing and professional standards for its courts extend to judicial appointments, as well. Associate judges and justices on the Nation's courts are not required to possess an accredited law degree.

Respondents may argue against such heightened requirements for VAWA-qualified indigent defense attorneys on the grounds that the use of strict standards may limit the ability of many tribes to bring special domestic violence jurisdiction claims, due to both budgetary concerns and a lack of access to qualified attorneys. Such contentions are ultimately not convincing in the present case. The *Oliphant* court noted the potential jurisdictional gaps its denial of tribal criminal jurisdiction over non-Indians may create, but ultimately decided that the consequences of such decisions were better weighed by the legislature. *Oliphant*, 435 U.S. at 212. The fact that Congress has allowed only VAWA's limited exception to *Oliphant*, coupled with act's strengthened due process protections, reflects a desire to balance needed reforms with a guarantee that defendants receive the same rights as they would in state court. S. Rep. 112-153, at 32. Furthermore, we note that adherence to heightened and uniform due process standards — such as the indigent defense and fair jury guarantees in VAWA — may

in the long-term help tribes secure full criminal jurisdiction over all individuals who commit crimes on tribal lands (although this may come at the expense of tribes' efforts to uphold traditional aspects of their court systems).

In summary, the court should grant Mr. Reynolds' petition for a writ of habeas corpus. As a non-Indian, Mr. Reynolds cannot be prosecuted by the Nation except through its exercise of SDVCJ. Respondents failed to meet the due process protections required by VAWA and the ICRA when it provided an indigent defense counsel who was not admitted to a state bar association. Alternatively, the Nation's failure to meet the required licensing and professional competency standards for its attorneys independently violated the requirements of VAWA, and thus the indigent counsel appointed to Mr. Reynolds was not qualified to represent him.

III. Alternatively, if Mr. Reynolds is Classified as an Indian, Respondents Violated the Equal Protection Clause of the ICRA When They Failed to Provide Him with Counsel Qualified to Represent a Non-Indian in the Same Case

a. Case Law Supports the Application of a Constitutional Standard in Determining Whether Respondents Violated the ICRA

In the alternative, if Mr. Reynolds is classified as an Indian for the purposes of criminal jurisdiction, this court should nonetheless grant his writ for habeas corpus on the grounds that respondents violated the equal protection clause of the ICRA when they denied him indigent counsel that would be qualified to represent a non-Indian in the same case. As separate sovereigns pre-existing the United States, tribes are not subject to the full reach of the Constitution's laws. *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (Finding that a Cherokee court was not bound by the Fifth Amendment requirement to a grand jury); *see also Hicks*, 533 U.S. at 383 (Souter, J., concurring) ("it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes"). However, while tribes retain local powers of self-government, they are still subject to the

supreme legislative authority of the United States. *Mayes*, 163 U.S. at 384. The individual rights of tribal members are thus protected by the ICRA, 25 U.S.C § 1301-1303, which "modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments" *Martinez*, 436 U.S. at 62-63. Tribal courts, for example, are not required to provide indigent Indian defendants with a court-appointed attorney unless they face imprisonment of more than one year, 25 U.S.C § 1302(c). This conflicts with the Sixth Amendment's guarantee of right to defense counsel for any defendant facing jail time. *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963).

The ICRA does, however, contain an equal protection clause, 25 U.S.C § 1302(c)(8), which states:

> "No Indian tribe exercising 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."

Id (emphasis added). Furthermore, the ICRA guarantees tribal members the right to petition for a writ of habeas corpus to test the legality of their detention by an Indian tribe 25 U.S.C. § 1303. A petitioner generally must exhaust all remedies in tribal court before seeking relief in federal court. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985); *but see Wetsit v. Stafne*, 44 F.3d 823, 826 (9th Cir. 1995) (no exhaustion requirement necessary when a tribal court attempts to exercise criminal jurisdiction over a person not a member of a tribe).

The relatively limited case law available related to the ICRA reveals a case-by-case approach for interpreting the act's equal protection clause, with respect for whether enforcement of the clause would "significantly impair a tribal practice or alter a custom firmly

embedded in Indian culture." *Howlett v. Salish & Kootenai Tribes of Flathead Reservation*, 529 F.2d 233, 238 (9th Cir. 1976). Where the rights at stake are the same under either legal system, however, federal Constitutional standards are applied to determine whether the ICRA has been violated. *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 900 (9th Cir. 1988). In *Randall*, the Ninth Circuit ruled that a tribal appellate court violated the petitioner's right to due process when it dismissed her appeal of a criminal conviction as untimely because of the trial court's failure to rule on her motion to waive a filing fee. *Id.* at 901-02. The court noted that the tribal court procedures at issue paralleled those used in United States courts. *Id.* at 902. *Randall's* Constitutional approach to interpreting the ICRA's equal protection clause has also been used with regards to voting rights in tribal elections. *Howlett*, 529 F.2d at 238; *White Eagle v. One Feather*, 478 F.2d 1311, 1314 (8th Cir. 1973). Recently, the Sixth Circuit cited *Randall* in applying a Constitutional standards approach to determine whether a tribe's exercise of criminal jurisdiction over a member whose criminal conduct occurred beyond the tribe's territory violated due process. *Kelsey v. Pope*, 809 F.3d 849, 864 (6th Cir. 2016).

The specific circumstances of our case likewise support an interpretation of the ICRA's equal protection provisions that is coextensive with the Fifth Amendment. The passage of VAWA, though important in many respects, creates a clear equal protection disparity. Non-Indian individuals accused of domestic violence, who were not *within the jurisdiction* of tribes' criminal courts prior to VAWA's passage, are now subject to prosecution. Non-Indians subjected to SDVCJ have simultaneously been guaranteed a right to qualified indigent counsel in any case where a prison sentence may be imposed. 25 U.S.C. 1304(d)(2). Meanwhile, Indian defendants within the same jurisdiction and accused of the same crimes would not be entitled to indigent counsel at all unless faced with a prison term greater than one year. 25 U.S.C. §

1304(c). Applying the standard referenced in *Randall*, the basic right at stake — whether or not one is entitled to indigent counsel — is one common to both tribal and U.S. legal systems.

The possible ancillary consequences of this inequitable approach are highlighted by *Bryant*. In that case, the court found that tribal court convictions against an indigent defendant who was not entitled to counsel under the ICRA could nonetheless be used as predicate offenses to support a felony domestic violence charge in federal court. *Bryant*, 136 U.S. at 1964-66. The court concluded that using the tribal court's convictions as predicate offenses did not violate the Sixth Amendment. *Id*. at 1964. Rather, because the tribal court proceedings met the standards of the ICRA, they were valid and should be recognized by federal courts. *Id*. at 1965-66. Under the current approach then, Indian defendants accused of domestic violence offenses covered by VAWA could see their lack of equal protection carried into federal court as well. They could be convicted based on predicate offenses for which they were not entitled to any representation, whereas a non-Indian charged with the same crime in in the same tribal court would be guaranteed counsel under VAWA.

b. Respondents Violated the ICRA Because They Failed to Provide an Indigent Defense Attorney Qualified to Represent a Non-Indian in VAWA Cases

As noted above and in the record, the parties do not contest that the circumstances of Mr. Reynolds' case would meet the criteria necessary to qualify for SDVCJ. Mr. Reynolds lived and worked on the Nation's reservation and married a tribal citizen. Thus, Mr. Reynolds would qualify for SDVCJ under his alleged offense, were he found to be a non-Indian. Secondly, while Mr. Reynolds did receive indigent counsel, this does not remedy the equal protection issue our case. As established previously, Mr. Reynolds' attorney lacked membership in a state or federal bar — a necessary qualification to represent non-Indians prosecuted under SDVCJ. Thus, Mr. Reynolds' equal protection rights under the ICRA were

violated when he was denied a more qualified attorney than he would have been entitled to were he a non-Indian in the same situation. Additionally, while we acknowledge that the Amantonka Nation Code guarantees indigent counsel for all defendants, 2 A.N.C. § 503, this fact is irrelevant to our case. The only issue at stake is whether Mr. Reynolds' equal protection and due process rights have been violated in this specific instance. As we have established above, Mr. Reynolds' attorney lacked the qualifications to represent a non-Indian charged under SDVCJ.

Respondents may counter that such disparities in representation are inherent in the ICRA, which states that only Indian defendants accused of sufficiently severe crimes are entitled to indigent defense counsel. Such a contention misses the point. Whereas under the ICRA one's right to defense counsel is dictated by length of prison sentence, the addition of VAWA creates a situation in which the right to defense may turn solely on whether the defendant is an Indian or non-Indian for the purposes of criminal jurisdiction. We also acknowledge that a ruling in Mr. Reynolds' favor would effectively require that any tribes exercising SDVCJ grant increased procedural protections (presumably at extra cost) to Indian defendants accused of VAWA crimes. We believe this added burden is worthwhile to ensure equal protection, particularly in light of the concerns illustrated by our reference to *Bryant*. Finally, any argument that the ICRA's provisions be construed in a way that minimizes intrusions on tribal governments, as suggested by Martinez (*see Id.* at 67), is cancelled out by the ICRA's other dual purpose, which is to protect individual rights of Native Americans against their governments. *Id.* at 61.

Thus, even if Mr. Reynolds is classified as an Indian, his writ of habeas corpus should nonetheless be granted because the tribal court denied him the same standard of defense

counsel as non-Indians facing the same crime would be entitled to, thus violating the equal protection clause of the ICRA.

CONCLUSION

For the foregoing reasons, the Court should (1) affirm the decision of the District Court for the District of Rogers that Mr. Reynolds is a non-Indian for the purpose of criminal jurisdiction; and (2) overturn the decision of the Court of Appeals for the Thirteenth Circuit and grant Mr. Reynolds' petition for a writ of habeas corpus.

Respectfully submitted,

Counsel for Petitioner January 2018