

No. 19-231

IN THE
SUPREME COURT OF THE UNITED STATES
MARCH TERM 2019

ROBERT R. REYNOLDS,
Petitioner,

v.

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

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

BRIEF FOR THE PETITIONER

Team No. 415

Counsel for Petitioner

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QUESTIONS PRESENTED

- I. Whether Mr. Reynolds is a non-Indian for purposes of Special Domestic Violence Criminal Jurisdiction, pursuant to the Violence Against Women Reauthorization Act of 2013, when he does not possess any degree of Indian blood but is a tribal member?
- II. Whether representation by the Amantonka indigent defense counsel appointed to Mr. Reynolds, a non-Indian, met the minimum requirements of representation that would have been offered by a Rogers public defender, or in the alternative, whether representation by the Amantonka indigent defense counsel satisfied the relevant legal requirements for representing an Amantonka tribe member?

STANDARD OF REVIEW

This Court reviews the tribal court's decision to deny Mr. Reynolds' motions to dismiss for ineffective counsel and lack of criminal jurisdiction *de novo*. *United States v. Munoz*, 150 F.3rd 401, 411 (5th Cir. 1998). Generally, a sentence was "imposed in violation of law; imposed as a result of an incorrect application of the sentencing guidelines; or outside the range of the applicable sentencing guideline and is unreasonable, it will not be upheld. *United States v. Garcia*, 962 F.2d 479, 480-81 (5th Cir. 1992). Whether representation by defense counsel was effective is a question of law to be reviewed *de novo*. *In re Pers. Restraint of Cross*, 180 Wn.2d 664 (Wash. 2014).

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

This appeal arises out of the Amantonka Nation's improper assertion of special domestic violence criminal jurisdiction ("SDVCJ") over Robert Reynolds ("Mr. Reynolds") for knowingly striking his wife, causing her injury, in Indian country. It is uncontested that Mr. Reynolds possesses no degree of Indian blood, but is a naturalized citizen of the Amantonka Nation.

Mr. Reynolds attended The University of Rogers, where he met his wife, Lorinda. R. at 6. The two married after graduation and have remained in the State of Rogers since. R. at 6. Following graduation, Mr. Reynolds and Lorinda entered the workforce and moved into a tribal housing apartment located on the Amantonka Reservation. R. at 6. Lorinda is, by blood, a citizen of the Amantonka Nation. R. at 6. Mr. Reynolds does not possess any degree of Indian blood, but subsequently applied to become a naturalized citizen after the couple married. R. at 6. To become a naturalized citizen of the Amantonka Nation, one must be married to a tribal citizen and live on the Reservation for at least two years. R. at 12. Then, the applicant must: complete a course in Amantonka culture; complete a course in Amantonka law and government; pass the Amantonka citizenship test; and perform 100 hours of community service with a unit of the Amantonka Nation government. R. at 12. Mr. Reynolds completed the naturalization process, took the oath of citizenship, and received his Amantonka Nation ID card. R. at 6.

Mr. Reynolds was employed at the Amantonka shoe factory for three years, until the company went out of business. *Id.* While he was unemployed, Mr. Reynolds began drinking

alcohol regularly, which caused tension in his marriage. *Id.* During this incredibly stressful time, Mr. and Mrs. Reynolds engaged in a heated argument that became physical. *Id.* On June 15, 2017, Amantonka Nation Police Department responded to a call regarding the domestic dispute at the Reynolds' apartment. R. at 6. The police noted evidence of trauma to Mrs. Reynolds' face and torso, which was alleged to have resulted from Mr. Reynolds hitting her face with an open palm. *Id.*

Mr. Reynolds was arrested and transported to the Amantonka Nation Jail. *Id.* He was charged with Partner or family member assault, in violation of Title 5, Section 244 of the Amantonka Nation Criminal Code. R. at 7. Since the altercation, Mr. Reynolds found work managing a new warehouse distribution center that opened on the Amantonka Reservation in July of 2017. R. at 6. In addition, Mr. and Mrs. Reynolds are in marriage counseling, and at the victim's request, the Court dropped the protection order issued at his arraignment. R. at 5.

II. STATEMENT OF THE PROCEEDINGS

The chief prosecutor for the Amantonka Nation charged Mr. Reynolds with Partner or family member assault under Title 5, Section 244 of the Amantonka Criminal Code. R. at 1. Mr. Reynolds filed three pretrial motions. R. at 3. First, he filed a pretrial motion seeking to have the charges dismissed on the grounds that he is a non-Indian, and that the Amantonka Nation lacks criminal jurisdiction over non-Indians pursuant to the U.S. Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe*. R. at 3. Second, Mr. Reynolds filed a pretrial motion seeking to have an attorney appointed to him, alleging that as a non-Indian accused of domestic violence against an Indian within Indian Territory, he falls within the

Amantonka Nation’s exercise of SDVCJ. R. at 3. Finally, Mr. Reynolds filed a third pretrial motion alleging that his court-appointed public defender was insufficiently qualified to represent him, and that the assignment of this attorney violated the relevant Equal Protection requirements. R. at 3-4. The Amantonka Nation district court denied all three motions, and set the case for trial. R. at 4.

At trial, the jury found Mr. Reynolds guilty of the alleged offense. R. at 5. Mr. Reynolds motioned to set aside the verdict, reiterating the arguments he made in his pretrial motions. R. at 5. The Chief Judge denied the motion and sentenced Mr. Reynolds to seven months incarceration; \$5,300 restitution to compensate the victim for the destruction of property, medical bills, and lost income from work as a result of her injuries; Batterer rehabilitation and alcohol treatment programs through Amantonka Nation Social Services Division; and a \$1,500 fine. R. at 5. The Court, at Mrs. Reynolds’ request dropped the protection order and granted Mr. Reynolds’ motion to continue his bond on appeal, as it noted he “faithfully complied with the conditions of the bond” before trial. R. at 5. Mr. Reynolds requests that the Supreme Court decide the questions presented and reverse the guilty verdict, and remand to the appropriate court for a new trial with adequate appointed counsel. R. at 10.

SUMMARY OF ARGUMENT

The Amantonka Nation inappropriately exercised SDVCJ, pursuant to the Violence Against Women Act of 2013 (“VAWA 2013”), because Mr. Reynolds is a non-Indian. For purposes of SDVCJ, Indian status requires that a person possess Indian blood. Since it is undisputed that Mr. Reynolds does not possess any Indian blood, the Amantonka Nation lacked SDVCJ. The lower court erred when it ended its Indian status analysis, and concluded that Mr. Reynolds was an Indian simply because he is a naturalized citizen of the Amantonka Nation. Tribal membership alone is not enough to establish Indian status for purposes of SDVCJ because Supreme Court precedent requires a defendant to possess Indian blood.

In addition, the Amantonka Nation appointed counsel inadequately represented Mr. Reynolds as a matter of law. As a non-Indian, appointed counsel did not meet the standards established by the VAWA 2013 because public defenders are not required to pass a bar examination administered by the American Bar Association (“ABA”). Alternatively, if the Court classifies Mr. Reynolds as an Indian, appointed counsel violated the Equal Protection Clause, a minimum requirement under the VAWA 2013, because his attorney is less qualified than the attorney to which a non-Indian is entitled to. Mr. Reynolds believes a public defender who passed a state bar examination would be more qualified to represent him, whether or not this Honorable Court classifies him as an Indian.

ARGUMENT

I. MR. REYNOLDS IS NON- INDIAN FOR PURPOSES OF SDVCJ BECAUSE HE DOES NOT POSSESS ANY INDIAN BLOOD.

The nature of the relationship between Native American tribes and the United States is unique and often undefined, particularly in regard to criminal jurisdiction. *See Felix S. Cohen's Handbook of Federal Indian Law* § 9.01 (2017). Constitutionally, Congress has “plenary power” over Native Americans in order to carry out the “responsibility for preserving and protecting the Indian people.” *St. Cloud v. United States*, 702 F. Supp. 1456, 1459 (D.S.D. 1988). Despite this responsibility, the United States also recognizes tribal sovereignty. Specifically, Congress has recognized and affirmed that “the powers of self-government of a participating tribe include inherent power . . . to exercise special domestic violence criminal jurisdiction over all persons.” 25 U.S.C. § 1304. However, SDVCJ is limited and only covers particular kinds of criminal conduct, as defined by federal statute including: domestic violence; dating violence, and violations of certain protection orders. *Id.* at § 1304(c). In addition, to exercise SDVCJ over a non-Indian, the victim must be an Indian and the crime must take place in Indian Country of the participating tribe. *Id.* Furthermore, a tribe cannot exercise SDVCJ over a non-Indian who “lacks ties to the Indian tribe.” *Id.* A non-Indian has sufficient ties when he or she: “resides in the Indian country of the participating tribe; is employed in the Indian Country of the participating tribe; or is a spouse, intimate partner, or dating partner of a member of the participating tribe or an Indian who resides in the Indian country of the participating tribe.” *Id.* at § 1304(b)(4)(a)-(b).

To exercise SDVCJ, Congress reauthorized the VAWA 2013 to restore participating tribe’s criminal jurisdiction over non-Indians who commit certain crimes of domestic

violence against Indians in Indian Country. Pub. L. No. 113-4, 127 Stat. 54 (2013). The VAWA 2013 restored tribal criminal jurisdiction for the first time since the Supreme Court's decision in *Oliphant v. Suquamish Tribe*, which held that, absent Congressional action, tribes lack criminal jurisdiction over non-Indians. 435 U.S. 191 (1978). Following *Oliphant*, only the federal government had criminal jurisdiction to prosecute non-Indians, which ultimately lead to a gap in prosecution of non-Indians committing crimes of domestic violence against Native women. See National Congress of American Indians, *VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report* (Mar. 20, 2018)¹; Felix S. Cohen's *Handbook of Federal Indian Law* § 9.01 (2017). Congress responded with the VAWA 2013 to combat high rates of domestic violence against Native women by non-Indians. *Id.*

Again, SDVCJ is limited, and the VAWA 2013 provides additional procedural requirements. Tribes exercising SDVCJ must provide non-Indian defendants Due Process protections, including all rights protected in the Indian Civil Rights Act ("ICRA"). The ICRA provides protection of most civil rights that are provided in state court. 25 U.S.C. § 1304(a)². For any crimes in which imprisonment may be imposed, the VAWA 2013 requires tribes to: "provide to the defendant effective assistance of counsel **at least equal to that guaranteed by the U.S. Constitution**"; provide indigent defendants defense counsel; ensure that the presiding judge has "sufficient legal training to preside over criminal proceedings" and is "licensed to practice law by any jurisdiction"; make tribal criminal laws, rules of evidence, and rules of criminal procedure publically available; and maintain a record of the criminal

¹ http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf.

² See 25 U.S.C.A. § 1302 (a) ("No Indian tribe in exercising powers of self-government shall . . . subject any person for the same offense to be twice put in jeopardy; compel any person in any criminal case to be a witness against himself; deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense.")

proceeding. 25 U.S.C. § 1302 (c)(1)-(5) (emphasis added). In addition, the VAWA 2013 guarantees the right to a trial by an impartial jury drawn from a fair cross section of the community and “all other rights whose protection is necessary under the Constitution.” 25 U.S.C. § 1304(d)(3)-(4).

a. SDVCJ Requires Mr. Reynolds to Possess Indian Blood.

For purposes of SDVCJ, Mr. Reynolds is a non-Indian because it is undisputed that he does not possess any Indian blood. Defining who is an Indian is complex and sometimes, a person can be considered an Indian for one purpose and a non-Indian for another. *See Felix S. Cohen’s Handbook of Federal Indian Law* § 3.03 (2017). The federal definition of an Indian is controlling because historically, Congress has been granted the authority to determine who is an Indian and which groups are considered Indian tribes. *See United States v. Sandoval*, 231 U.S. 28 (1913) (stating “questions whether, to what extent, and or what time they shall be recognized and dealt with as dependant tribes . . . are to be determined by Congress, and not by the courts”). Yet, unfortunately, the VAWA 2013 is silent in this regard. The two-prong test that courts utilize to determine Indian status is rooted in *United States v. Rogers*, which requires (1) some degree of Indian blood; and (2) tribal or governmental recognition as an Indian. 45 U.S. 567 (1846).

William Rogers was a white, United States citizen indicted for a murder in Indian Country. *Id.* at 567. Rogers claimed that as an Indian, the federal court lacked jurisdiction pursuant to a statutory exception regarding crimes committed by one Indian against another. *Id.* Rogers argued that he was an Indian because, although he did not possess any Indian blood, he voluntarily became a naturalized citizen of the Cherokee nation. *Id.* at 568. In

addition, Rogers incorporated himself with the tribe, was recognized and treated as a member of the tribe, and exercised the rights and privileges of a Cherokee Indian. *Id.*

The Supreme Court rejected Rogers' argument stating, "[a]nd we think it very clear, that a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian." *Id.* at 572. The Court found the fact that Rogers enjoyed all of the rights and privileges associated with Indian status as a naturalized citizen, ultimately irrelevant. *Id.* The Court recognized that tribes are free to grant citizenship and the entitlement to certain privileges, but regardless "he is not an Indian; and the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally . . ." *Id.* at 573. Furthermore, the Court explicitly declined tribal membership, absent any Indian blood, as a valid objection to the jurisdiction of the Court. *Id.* Thus, the Court held that Rogers was not an "Indian within the meaning of the law." *Id.* at 571.

Rogers is analogous in the present case because Mr. Reynolds is also a United States citizen who later in his adult life became a naturalized tribal citizen. Additionally, this case involves an alleged crime committed in Indian country, as well as a defendant that does not possess any Indian blood. Mr. Reynolds did voluntarily become a citizen and he does enjoy all of the rights and privileges associated with Indian status. However, as in *Rogers*, tribal membership and exercising tribal privileges is irrelevant for purposes of Indian status and federal criminal jurisdiction.

Mr. Reynolds is a non-Indian for purposes of SDVCJ because it is undisputed that he does not possess any Indian blood. Due to Mr. Reynolds' non-Indian status, the Amantonka Nation inappropriately exercised SDCVJ pursuant to the VAWA 2013. Further, the lower

court erred when it ended its inquiry as to whether Mr. Reynolds was a non-Indian based on tribal membership alone. While tribal enrollment can be a relevant inquiry, as provided below, the Court should follow the precedent provided in *Rogers*. Since Mr. Reynolds does not possess **any** Indian blood, he does not satisfy the first *Rogers* prong, and the Court should find that he is a non-Indian for purposes of SDVCJ.

b. Subsequent Lower Court Decisions Do Not Affect Mr. Reynolds' Status as a Non-Indian.

The Supreme Court has not addressed the question of what constitutes an Indian for purposes of federal criminal jurisdiction since 1846. Thus, *Rogers* is the controlling precedent and provides the test to determine Indian status for purposes of SDVCJ. But, lower courts have refined both prongs of the *Rogers* test. Nevertheless, lower court clarifications and applications require substantial, sufficient, significant, or some degree of Indian blood to be considered an Indian for purposes of federal criminal jurisdiction. Since all subsequent decisions still **require** Indian blood (however much that may be) and it is undisputed that Mr. Reynolds does not possess **any** Indian blood, lower courts refining *Rogers* has no effect in this case.

However, it is worth noting that lower courts have addressed issues with the first prong. *Rogers* simply requires a showing of Indian blood, but the Court did not indicate exactly how much. Courts have since used inconsistent language when describing the requisite amount of Indian blood. See *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009) (requiring “some” degree of Indian blood); *United States v. Cruz*, 554 F.3d 840, 845 (9th Cir. 2009) (requiring “sufficient” degree of Indian blood); *Vialpando v. State*, 640 P.2d

77, 88 (Wyo. 1982) (requiring “substantial” Indian blood); *State v. Reber*, 171 P.3d 406, 410 (Utah 2007) (requiring “significant” Indian blood). In *United States v. Bruce*, the Ninth Circuit provided that because the first *Rogers* prong “requires ancestry living in America before the Europeans arrived . . . evidence of a parent, grandparent, or great-grandparent who is clearly identified as an Indian is generally sufficient to satisfy this prong.” 394 F.3d 1215, 1223 (2005) (holding that one-eighth Indian blood satisfied the first *Rogers* prong). Despite any inconsistent language, one-sixteenth Indian blood seems collectively sufficient to satisfy the first *Rogers* prong. *Cruz*, 554 F.3d at 846; *Stymiest*, 581 F.3d at 762; *Reber*, 171 P.3d at 410; *State v. LaPier*, 790 P.2d 983, 986-87 (Mont. 1990). Nevertheless, once again, these subsequent decisions have no relevance in this case because it is undisputed that Mr. Reynolds does not possess any Indian blood.

It is also worth acknowledging that lower courts have refined the second *Rogers* prong, as it is anticipated that Respondents will incorrectly consider subsequent lower court decisions applicable for determining Mr. Reynolds’ Indian status. For example, the Ninth Circuit refined the second *Rogers* prong to determine tribal or government recognition as an Indian with a four factor test. *Bruce*, 394 F.3d 1215. The four *Bruce* factors include: “1) tribal enrollment; 2) government recognition formally and informally through assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life.” *Id.* at 1224 (citing *United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir. 1995)). In *Cruz*, the Ninth Circuit further clarified that the *Bruce* factors were to be considered in descending order of importance. 554 F.3d at 846. In *Stymiest*, the Eighth Circuit also refined the second *Rogers* prong, concluding that the *Bruce* factors were not exhaustive, “[n]or

should they be tied to an order of importance. . .” 581 F.3d at 762. The court also considered additional factors, such as whether a defendant self-identified as an Indian and whether a defendant subjected themselves to tribal court jurisdiction, as important in the analysis. *Id.* at 763-764. However, once again, these subsequent decisions are irrelevant because they involve the second *Rogers* prong. The first *Rogers* prong still requires a defendant to possess Indian blood, and it is undisputed that Mr. Reynolds has none.

The two prong *Rogers* test, absent some statutory definition articulated by Congress, is the controlling precedent in this case. The blood requirement is the only seemingly objective inquiry when determining who is an Indian for purposes of SDVCJ. Ruling in the contrary would disturb 173 years of decisions, and further interject the courts into the process of weighing a number of factors to conclude Indian status. Thus, the Court should apply the precedent provided in *Rogers*. Subsequent lower court decisions do not affect Mr. Reynolds’ status as a non-Indian because Indian blood is still required. Since it is undisputed that Mr. Reynolds does not possess any Indian blood, and subsequent lower court decisions are not relevant, the Court should find that he is a non-Indian for purposes of SDVCJ.

II. THE AMANTONKA NATION APPOINTED COUNSEL WAS INEFFECTIVE BECAUSE MR. REYNOLDS IS A NON-INDIAN WHO SHOULD BE REPRESENTED BY A STATE BAR-LICENSED ATTORNEY.

The Constitution provides all persons within the United States Equal Protection of the laws. U.S.C.S. Const. Amend. 14. Further, the VAWA 2013 establishes Fourteenth Amendment Equal Protection as a minimum requirement for SDVCJ. Pub. L. No. 113-4, 127 Stat. 54 (2013). Embedded within Equal Protection is the Constitutional right to effective

assistance of counsel, which guarantees a defendant representation from counsel with the requisite “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Model Rules of Professional Conduct 1.1. Effective assistance of counsel when representing a non-Indian defendant, such as Mr. Reynolds, inherently implies that counsel is familiar with the laws that govern non-Indians, and is bar licensed by a state, not a tribe. Alternatively, if the Court finds that Mr. Reynolds is an Indian for purposes of SDVCJ, the Amantonka Nation unconstitutionally provides Indians with a lesser qualified public defender than those who represent non-Indian defendants.

a. Mr. Reynolds’ Appointed Counsel Must Meet the Standards Established by the VAWA 2013.

The VAWA 2013 establishes a right to counsel provision and provides the requirements in which a tribe must provide to exercise SDVCJ. The purpose of this provision is to ensure non-Indian defendants, subject to tribal jurisdiction, are provided adequate representation. The VAWA 2013 lays the qualification foundation for appointed counsel to comply with the Equal Protection requirements of the Fourteenth Amendment. Specifically, the Constitution ensures that the government will not “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S.C.S. Const. Amend. 14. Thus, appointed counsel in tribal courts, at a minimum, cannot be any less stringent than the requirements for effective assistance of counsel in state or federal courts. Tribes wishing to take advantage of the VAWA 2013’s SDVCJ may need to amend tribal laws, and/or hire public defenders and judges who meet the standards guaranteed under the Constitution. As previously discussed, the VAWA 2013

provides tribes with very limited jurisdiction over non-Indians who commit crimes against Indians in Indian Country. Thus, there are still significant limitations on who can be prosecuted in tribal courts. James Diamond, *Practicing Indian Law in Federal, State, and Tribal Criminal Courts: An Update About Recent Expansion of Criminal Jurisdiction Over Non-Indians*, Criminal Justice 9 (2018).

Tribal courts may exercise inherent powers of self-government over non-Indian defendants, but only to the degree that Congress has statutorily granted. 25 U.S.C. §1302-1304. Tribal courts imposing a term of imprisonment of **any** length, pursuant to the VAWA 2013, shall “provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution.” 25 U.S.C. § 1302(c); 25 U.S.C. § 1304(d). Further, appointed counsel must be 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(d). A frequent point of contention involves the definition of “appropriate professional licensing standards.” The legal profession should seek to implement the same minimum licensing requirements as all bar associations. However, until that is achieved, the Court should view the “appropriate professional licensing standards” as the same required by the ABA.

The legal requirements to practice before tribal courts are defined by each individual tribal council, not by Congress or even the ABA. Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M. L. Rev. 49 (1988). Alternatively, the legal requirements to practice before a state or federal court are defined by Congress. Appellate Courts follow Rule

46 of the Federal Rules of Appellate Procedure regarding the admission of attorneys, which states: “[a]n attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court . . .” John Okray, *Attorney Admission Practices in the U.S. Federal Courts*, *The Federal Lawyer* 41 (Sept. 2016). Attorneys who meet Rule 46 requirements may represent non-Indians at the appellate level, while those only admitted to practice in tribal courts do not meet the same requirements. *Id.* Appointed counsel representing a non-Indian in tribal court, who does not meet the minimum qualifications set forth by Congress, violates the defendant’s Constitutional rights. Pursuant to the VAWA 2013 and SDVCJ, Mr. Reynolds is entitled to the same level of competent legal representation in a tribal court as he would receive in a state or federal court.

The Sixth Amendment guarantees indigent defendants appointed counsel in any case in which a term of imprisonment is imposed. *Scott v. Illinois*, 440 U. S. 367 (1979). In addition, the Sixth Amendment requires courts to provide indigent defendants effective assistance of counsel **unless** the right was competently and intelligently waived. *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963). In *Gideon*, the defendant was charged with a felony and appeared in Florida state court without funds or representation. *Id.* at 337. Gideon requested an appointed attorney, but the court denied him access to a court-appointed attorney. Gideon subsequently argued that, as an indigent defendant, “the Supreme Court says [he is] entitled to be represented by Counsel.” *Id.* Ultimately, Gideon conducted his defense without counsel in which he gave an opening statement and closing argument, presented witnesses, cross-examined the opposing party’s witnesses, and declined to testify

himself. *Id.* Gideon was found guilty and sentenced to five years in prison. The Supreme Court of Florida affirmed the trial court's decision to withhold indigent counsel. *Id.*

On appeal, the Supreme Court emphasized the safeguards provided by the Sixth Amendment, noting that effective assistance of counsel is necessary to ensure the fundamental human rights of life and liberty. *Id.* at 340. The Court looked to its decision in *Powell v. Alabama*, which provided that even an intelligent layman has little to no skill in the science of law. 287 U.S. 45, 58 (1932). The Court reasoned that the layman is not equipped to know whether his charge is appropriate, whether evidence against him is relevant or competent, or how to prepare a winning defense. *Id.* Further, the Court stated, "[h]e requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Id.* Appreciating the unfair nature of hailing a person into court without competent counsel, the Supreme Court reversed the lower court's decision, and remanded the matter to the Supreme Court of Florida. *Gideon*, at 345.

Representation by ineffective counsel is synonymous to forcing a layman to represent himself. *Gideon* is analogous because Mr. Reynolds was also charged with a crime and was not provided with the zealous advocacy as required by the Model Rules of Professional Conduct 1.3. In addition, after the jury found him guilty, Gideon was sentenced to five years in prison. The lower court sentenced Mr. Reynolds to seven months incarceration, thus obstructing the liberty that effective and zealous counsel would have protected. Because Mr. Reynolds is a non-Indian who is guaranteed Equal Protection of the laws, the Court should reverse the lower court's decision and remand the matter, to provide Mr. Reynolds effective assistance of counsel.

- b. Alternatively, Providing Mr. Reynolds with Counsel that is Less Qualified than Appointed Counsel in State or Federal Court Violates Equal Protection.

Title 2, Section 607 of the Amantonka Nation Criminal Code provides the requirements for tribal public defenders appointed to indigent defendants, both Indian and non-Indian. To be eligible to represent an indigent **Indian** defendant, a person shall be “at least 21 years of age; Be of high moral character and integrity; Not have been dishonorably discharged from the Armed Services; Be physically able to carry out the duties of the office; Successfully completed. . . a bar examination administered as prescribed by the Amantonka Nation’s Executive Board; and must have training in Amantonka law and culture.” *Id.* Such requirements are less stringent than appointed counsel for non-Indian defendants. To represent a **non-Indian** defendant imprisoned more than one year, pursuant to SDVCJ and the VAWA 2013, appointed counsel must: hold a Juris Doctor from an ABA accredited law school; have taken and passed the Amantonka Nation Bar Exam; have taken the oath of office; and passed a background check. If Mr. Reynolds is classified as an Indian, he is not guaranteed counsel who possesses a Juris Doctor, has taken a state bar examination, and has taken an oath of office and passed a background check. *Id.* Subjecting an Indian to prosecution by an attorney that is more qualified than appointed counsel would be unfair, and in Mr. Reynolds’ case, it was.

Respondent will likely assert that the public defender appointed to represent Mr. Reynolds at trial graduated with a Juris Doctor from an ABA accredited law school. While this is factually represented in the record, there is no evidence that appointed counsel took a state bar examination administered by the ABA. Bar examinations administered by the ABA contain a Professional Responsibility section, wherein future advocates must attest to the

competency and zealous advocacy requirements of representation. Further, there is no evidence to indicate that the Amantonka Nation's bar examination includes a Professional Responsibility section. Respondent may also argue that appointed counsel was a member in good standing of the Amantonka Nation Bar Association. However, again, this does not indicate that Mr. Reynolds' appointed counsel was held to the same competency and zealous advocacy standards as a state-licensed attorney in good standing with his or her bar association.

In addition, Respondent will likely argue that tribal courts are not bound by the Fifth Amendment Due Process guarantees or the Sixth Amendment right to counsel, but instead the ICRA. 25 U.S.C. §§ 1301-1303 (1970). It is well recognized that ICRA does apply to the adjudication of an Indian, as the VAWA 2013 was an amendment to ICRA. Since the reauthorization of the VAWA 2013, Indian defendants have been provided the minimum procedural safeguards within the Constitution. National Congress of American Indians, *The Indian Civil Rights Act, as Amended by the Violence Against Women Reauthorization Act of 2013*.

Due Process requires that criminal defendants have the right to counsel both at trial, and in the time leading up to trial when consultation and preparation take place. *Powell v. Alabama*, 287 U.S. 45, 58 (1932). In *Powell*, nine young, illiterate, African American men were charged in an Alabama trial court with the rape of two white women. *Id.* at 49. The trial judge failed to give the men adequate time to secure defense counsel, and denied them the reasonable opportunity to communicate with their families in neighboring states. *Id.* at 52. Instead, the judge appointed "all members of the bar" to represent the defendants for their arraignment. *Id.* at 56. Only on the morning of trial were the defendants provided counsel

when attorneys from neighboring states volunteered. *Id.* Each trial was completed within one day and all three juries rendered guilty verdicts, sentencing each defendant to the death penalty. *Id.* at 50. All nine defendants filed a motion for a new trial, but were denied. *Id.* The Supreme Court of Alabama affirmed the judgments on appeal. *Id.* The cases were argued and submitted to the Supreme Court as one case. *Id.* at 49.

The *Powell* court noted that “lower court records indicated the appearance [of counsel] was rather pro forma than zealous and active . . .” *Id.* at 58. The Court reasoned that the right to counsel includes the ability to consult with one’s attorney prior to trial in order to properly prepare a defense. *Id.* The out-of-state attorneys were unable to give their clients’ very serious case the attention it deserved, resulting in a sentence that deprived them of life and liberty. The Supreme Court held that the defendants were not accorded the right of counsel in any substantial sense, and reversed the lower court’s decision. *Id.* at 58.

Powell is analogous to Mr. Reynolds’ case, in that each defendant was tried in a criminal court where a sentence of imprisonment was possible. The defendants in *Powell* were not provided legal representation until the morning of trial, resulting in ineffective assistance of counsel. Similarly, Mr. Reynolds’ appointed counsel was ineffective and resulted in unreasonable imprisonment. Taking note of the *Powell* Court’s decision, this Court should reverse Mr. Reynolds’ sentence and provide him effective assistance of counsel.

A defendant has suffered from the ineffective assistance of counsel when his attorney has not acted as a reasonably competent attorney, and there is a reasonable probability that absent those errors the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). At a minimum, effective assistance necessitates competent

representation, which requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. Model Rule of Professional Conduct 1.1. In *Strickland*, the defendant committed burglary, robbery, stabbing, kidnapping, and multiple murders over a ten-day period. *Id.* at 671-672. Once charged, the defendant rejected appointed counsel's advice on multiple occasions. *Id.* at 672. He waived his right to a jury trial and plead guilty to each crime before the judge, and was sentenced to death for the murder convictions and to prison for the remaining. *Id.* The defendant told the judge that when he committed the crimes, he was under extreme stress because of an inability to support his family. *Id.* at 677. On appeal the Florida Supreme Court upheld the convictions and the sentences. *Id.* at 675. The defendant filed a petition to the Supreme Court for collateral relief, claiming ineffective assistance of counsel at the sentencing proceeding. *Id.*

The Supreme Court stated that no set of rules exists to establish whether an attorney acted reasonably. *Id.* at 688. Instead, all of the facts, as they existed at the time counsel made his decision, must be considered. *Id.* Any defendant, upon conviction, may challenge his attorney's strategy and competency, and request a court to deem that an unsuccessful act or omission was unreasonable. *Id.* The Court ruled any error on the part of counsel must be prejudicial to the defendant to constitute the ineffective assistance of counsel, with the burden on the defendant to prove that he was harmed by his attorney's conduct and that there is a reasonable probability that the outcome would have been different if not for counsel's errors or lack of competence. *Id.* at 700. The Court held that the defendant failed to make such a showing, and denied him a new trial. *Id.* at 701.

Strickland is distinguishable from Mr. Reynolds' case in many ways. The defendant in *Strickland* admitted to committing a series of gruesome crimes, including multiple

murders. Conversely here, Mr. Reynolds is charged with, but has not admitted to, one count of assault. The defense attorney in *Strickland* made a concerted effort to advise the defendant of decisions in his best interest, though the advice was not heeded. In Mr. Reynolds' case, no record has been presented to establish that counsel gave any advice whatsoever.

The VAWA 2013 requires a tribal court to provide counsel to indigent defendants, ensure competent judicial supervision over the proceedings, make the tribe's criminal law and rules of evidence public, and maintain a record of the criminal proceedings. Pub. L. No. 113-4, 127 Stat. 54 (2013). The Amantonka Nation did not, however, present a record of the criminal proceeding held on August 23, 2017. The only item representing the proceeding was a sentencing order signed by Judge Nelson. R. at 5. A record or transcript of how Mr. Reynolds' defense counsel performed in court is imperative to analyze appointed counsel's level of competency in the courtroom. Without the record, all that can be presented is the unwarranted sentence handed to Mr. Reynolds at the close of the proceedings.

Strickland stands for the proposition that even in a case involving a sentence as serious as the death penalty, counsel will be found to be competent if his or her assistance and strategy is at least reasonably effective. Because Mr. Reynolds' appointed counsel overlooked the threshold issue of whether Mr. Reynolds is an Indian for jurisdictional purposes, the Amantonka Nation appointed counsel was not reasonably effective. Further, because the attorney Mr. Reynolds was entitled to is less qualified than the attorney a non-Indian is entitled to is in and of itself a violation of the Equal Protection clause guaranteed by VAWA 2013.

CONCLUSION

The Amantonka Nation inappropriately exercised SDVCJ over Mr. Reynolds because it is undisputed that he does not possess any degree of Indian blood. Further, Mr. Reynolds was not appointed adequate counsel leading up to and during his trial, and was therefore unable to properly defend himself. For the foregoing reasons, we ask this Honorable Court to reverse the decision of the lower court and remand for a new trial, appointing adequate defense counsel to represent Mr. Reynolds.

REQUEST FOR ORAL ARGUMENT

Oral argument is requested. Mr. Reynolds' own assessment of the case is that the Amantonka tribal court did not have jurisdiction over him, and that, in the alternative, if the tribal court did have jurisdiction, that the attorney provided to him by the tribe rendered ineffective assistance of counsel. But given the position of the Amantonka tribe that Mr. Reynolds is an Indian for jurisdictional purposes and that his counsel provided effective assistance, the stark contrast in positions justifies oral arguments, should this Court think those aspects merit in-depth consideration.

Respectfully Submitted,

Team 415
Counsel for Defendant/Petitioner