Case 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

TEAM 471

BRIEF FOR THE PETITIONER

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1. Under Special Domestic Violence Criminal Jurisdiction pursuant to the Violence Against Women Act of 2013 ("VAWA"), Tribal governments have inherent sovereign authority to exercise criminal jurisdiction over non-Indians who commit violence against Indian victims on tribal land, and who show sufficient ties to the tribe. Under this Act, should a person with no Indian blood, who was adopted into a tribe, be considered "Indian" for the sake of criminal jurisdiction?

2. Under the Equal Protection Clause of the Fifth Amendment, the Sixth Amendment right to counsel, and the Indian Civil Rights Act ("ICRA"), did the Petitioner, Mr. Reynolds, receive adequate representation by his court-appointed counsel as a non-Indian in tribal court?

STATEMENT OF THE CASE

I. Statement of the Proceedings

The domestic abuse incident and subsequent charges are not under dispute in this matter, but rather the pretrial motions that were filed and denied in the District Court for the Amantonka Nation. Reynolds is a non-Indian and his wife is an Indian. R. at 6. Indian status is relevant in this matter because there are different jurisdictional procedures and constitutional rights that apply to non-Indians who commit domestic abuse on reservation against Indians. R. at 4. Reynolds sought to have the charges against him dismissed because the Amantonka Nation does not have jurisdiction over non-Indians and Reynolds is a non-Indian. R. at 3. He therefore falls under the Special Domestic Violence Criminal Jurisdiction provision in 25 U.S.C. Section 1302, which gives special jurisdiction over non-Indians in domestic violence situations to the Amantonka Nation. *Id.* When Reynolds was appointed an attorney, his court-appointed attorney was insufficient for a non-Indian defendant. R. at 3,4. Under the amendment to VAWA in 2013, Reynolds' attorney must be a member of a state bar association. R. at 7. His court appointed attorney is only a member of the Amantonka bar. *Id.* His representation of Reynolds is an Equal Protection and Sixth Amendment violation. However, the Amantonka District Court denied these motions. R. at 3, 4.

Reynolds received a guilty verdict in the Amantonka District Court and was denied his motion to set aside the verdict. R. at 4.. He argued the same reasons he presented in his pretrial motions. *Id.* The motion was denied despite the fact he is a non-Indian and his counsel was insufficient. R. at 5. He received seven months incarceration, a restitution of $5300 for the victim's destruction of property, medical bills, and lost income, a fine of $1500, and mandatory attendance to batterer rehabilitation and alcohol treatment programs. *Id.* There was also a protection order issued by the District Court against him but was later dropped at the victim's

request because Reynolds and his wife are currently in counseling. *Id.* The court requested Reynolds' motion to continue his bond while his appeal was pending on the conditions that bail will be reversed post-conviction, he wears an ankle monitor, and has regular appointments with a probation officer. *Id.*

The pretrial motions are the same arguments being raised on appeal. R. at 8. Reynolds filed for habeas corpus relief under 25 U.S.C Section 1303 because his conviction is a violation of the Fifth and Sixth Amendments of the United States Constitution, and the Indian Civil Rights Act. *Id.* The U.S. District Court of Rogers granted habeas relief on the grounds that federal law provides in the definition of "Indian" that an individual must have some degree of "Indian" blood. *Id.* The U.S. District Court ruled based on this definition, therefore, Reynolds cannot be considered an "Indian." *Id.* However, the U.S. Court of Appeals for the Thirteenth Circuit reversed and remanded the previous decision referring back to the ruling by the Amantonka Nation Supreme Court and denied habeas relief. R. at 9. Based off the preceding decisions by the Amantonka courts and the United States' courts, the Petitioner now appeals. R. at 10.

II. Statement of the Facts

On June 16, 2017, Robert R. Reynolds was charged with domestic abuse against his wife Lorinda. R. at 2. The incident happened at their apartment which is located on the Amantonka reservation and is part of tribal housing. *Id.* The incident is undisputed. Reynolds and Lorinda met while students at the University of Rogers. R. at 6. When they began dating, Reynolds was a non-Indian, with no Indian blood, and Lorinda was, and still is, a citizen of the Amantonka Nation. *Id.* The Amantonka is a federally-recognized tribe located in the state of Rogers. *Id.* Reynolds and Lorinda got married after they graduated from the University of Rogers. *Id.* They both work on the reservation, Reynolds as a manager at the shoe factory and Lorinda as an accountant at the casino.

Id. They have been living in the apartment in which the incident took place shortly after finding their jobs. *Id*.

After two years of marriage, Reynolds applied to become a naturalized citizen of the Amantonka Nation. R. at 6. He completed the process, took the oath of citizenship, and received an ID card. *Id*. One year later, Reynolds lost his job and was out of work for ten months because the shoe factory went out of business. *Id*. During this time, marital issues became increasingly worse. *Id*. Due to his increased free time, Reynolds also started drinking more frequently. *Id*. The incident on June 15, 2017, also occurred during his term of unemployment. *Id*. The police were called to the apartment and observed evidence of physical abuse. *Id*. Reynolds had struck Lorinda hard enough across the face to cause her to fall into a coffee table. *Id*. The fall resulted in a cracked rib. *Id*. Based off the preceding decisions by the Amantonka courts and the United States' courts, the Petitioner now appeals. R. at 10.

SUMMARY OF THE ARGUMENT

The federal definition of Indian should apply for the purposes of Special Domestic Violence Criminal Jurisdiction because VAWA is a federal statute. There is no universal definition of who is considered "Indian", but looking to other federal criminal statutes such as the Major Crimes Act ("MCA") and the Indian Country Crimes Act ("ICCA"), courts have interpreted "Indian" to mean someone who: (1) has some Indian blood (i.e. be of Indian descent), and (2) be recognized as Indian by a tribe (i.e have tribal recognition). *United States v. Diaz,* 679 F.3d 1183, 1187 (2012); *United States v. Zepeda,* 792 F.3d 1103, 1106 (2015).

Mr. Reynolds possesses no Indian blood but was adopted into the Amantonka Nation. In *United States v. Rogers,* a non-Indian adopted into a tribe was not considered an Indian for the sake of federal jurisdiction. *United States v. Rogers*, 45 U.S. 567 (1846). VAWA is also a federal

statute concerning criminal jurisdiction in Indian Country. Therefore, the holding from *Rogers* should apply.

Looking to the facts of this case, Reynolds does not possess any Indian blood and his adoption into the tribe is not enough to qualify him as Indian for the sake of a federal statute. Further, holding that Reynolds must possess Indian blood, as well as be recognized by the Amantonka Nation, in order to be "Indian," is not an encroachment of tribal sovereignty because the tribe is still able to assume jurisdiction over Reynolds pursuant to VAWA. Reynolds is still considered a tribal member for the sake of tribal affairs.

Additionally, a person has a right to terminate their membership with a tribe, if they so choose, as held in *Standing Bear v. Crook*. *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 699 (1879). Even if Reynolds is determined to be Indian due to his adopted status, he has a right to terminate his membership. If he were to terminate his membership he would no longer be recognized by a tribe, therefore failing both prongs of the two-part test.

The federal definition of Indian should apply for the sake of VAWA, requiring proof of Indian descent (via blood quantum) and recognition as Indian by a tribe. Reynolds has no evidence of Indian descent, therefore failing the first prong of the test. Reynolds should be considered non-Indian for the sake of jurisdiction under VAWA.

Turning to the question of counsel, because Reynolds is a non-Indian, he did not receive adequate representation by his court appointed counsel. His counsel did not satisfy the relevant legal requirements to represent a non-Indian in tribal court violating the Equal Protection Clause of the Fifth Amendment and the Sixth Amendment right to counsel. U.S. Const. Amend. V, VI. Reynolds was denied his Sixth Amendment right to counsel because his court appointed attorney did not meet the relevant requirements to represent a non-Indian defendant in tribal court. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963). Not only is Reynolds non-Indian, he is also indigent, so

counsel must be provided for him. *Id*. The right to counsel is especially important for defendants facing imprisonment. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). Reynolds was sentenced to seven months incarceration without the appropriate counsel. Therefore, he was incarcerated in violation of his Sixth Amendment right to counsel. The rulings against Reynolds in tribal court should not impact the decisions in federal court because Reynolds' Sixth Amendment right to counsel was violated.

Reynolds' court appointed attorney was ineffective due to deficient performance and prejudice against the client. This is also a violation of the Sixth Amendment right to counsel and the Fifth Amendment. The Due Process Clause in the Fifth Amendment guarantees the equal protection of life, liberty, and property through the due process of law. U.S. Const. Amend. V. Reynolds' attorney is not a member of a state or federal bar which led to the ineffective assistance of counsel in tribal court, and a direct violation of his due process of law. Had it not been for his attorney's deficient performance, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Effective counsel would have been aware that the fines given to Reynolds exceeds the limitations set out in ICRA and the Amantonka Nation Code. *Rompilla v. Beard*, 545 U.S. 374, 379 (2005). The rulings against Reynolds in tribal court should not impact the decisions in federal court because Reynolds' court appointed attorney was ineffective and did not meet the relevant legal requirements to represent a non-Indian indigent defendant in tribal court. The Court should reverse and remand accordingly under *de novo* review.

ARGUMENT

I. This Court should hold that the Petitioner (Reynolds) is a non-Indian for the purposes of Special Domestic Violence Criminal Jurisdiction under VAWA because he does not meet the federal definition of Indian, and he is able to terminate his membership with the tribe if he chooses.

The purpose of VAWA is to address the high rates of violence against women, particularly Indian women. A research policy update by the National Congress of American Indians, shows that 84.3% of American Indian/Alaska Native women have experienced violence in their lifetime. *Research Policy Update: Violence Against American Indian Women and Girls*, NCAI Policy Research Center (February 2018), http://www.ncai.org/policy-research-center/research-data/prc-publications/VAWA_Data_Brief__FINAL_2_1_2018.pdf. A majority of Indian women who experience violence are attacked by non-Indian men. *Id*. VAWA, as reauthorized in 2013 via ICRA, reaffirms tribe's power to exercise jurisdiction over non-Indians who commit acts of domestic violence and dating violence against Indian victims on tribal land. 25 U.S.C. § 1302. VAWA only applies when there is a non-Indian perpetrator and an Indian victim.

Neither VAWA nor ICRA defines who is considered Indian for the sake of jurisdiction. Because VAWA is a federal statute, the federal definition of Indian should control, as is the case with other federal statutes concerning criminal jurisdiction in Indian country. While there is no universal definition of who is considered "Indian", looking to other major federal statutes such as the MCA and the ICCA, courts have held that a person must meet two requirements to be considered Indian: (1) they must have some Indian blood (i.e. be of Indian descent), and (2) they must be recognized as Indian by a tribe (i.e. have tribal recognition). *United States v. Diaz,* 679 F.3d 1183, 1187 (2012); *United States v. Zepeda,* 792 F.3d 1103, 1106 (2015). The MCA has held that an individual who is considered a member of a tribe may be considered non-Indian if that tribal member is not native by ancestry. *Alberty v. United States,* 162 U.S. 499, 501 (1896).

Mr. Reynolds possesses no Indian blood but was adopted into the Amantonka Nation. As was held in *United States v. Rogers*, a non-Indian adopted into a tribe was not considered an Indian for the sake of ICCA. *United States v. Rogers*, 45 U.S. 567 (1846). VAWA is also a federal statute concerning criminal jurisdiction in Indian Country, and therefore the holding from *Rogers* should apply. Looking to the facts of this case, Reynolds does not possess any Indian blood and his adoption into the tribe is not enough to qualify him as Indian for the sake of a federal statute.

Requiring that Reynolds must possess Indian blood and be recognized by the Amantonka Nation in order to be "Indian", is not an encroachment of tribal sovereignty. It is not an encroachment because the tribe is still able to assume jurisdiction over Reynolds pursuant to VAWA. Reynolds is also still considered a tribal member for the sake of tribal affairs. Requiring the two-prong test be met does not change the status of Reynolds within the Amantonka Nation, it merely requires that for federal criminal jurisdiction he demonstrate proof of Indian descent in order to be considered Indian, which he is unable to do.

Additionally, a person has a right to terminate their membership with a tribe, if they so choose, as held in *Standing Bear v. Crook*. *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 699 (1879). Felix S. Cohen outlined in the *Handbook of Federal Indian Law*, that tribal membership is "a bilateral relation" wherein a person has a right to terminate their tribal membership whenever they so choose Felix S. Cohen, *Handbook of Federal Indian Law*, § 3.03[3] at 176 (Nell Jessup Newton ed., 2012). Even if Reynolds is determined to be Indian due to his adopted status, he has a right to terminate his membership. Therefore, his status would default back to non-Indian as he would no longer be recognized by a tribe, and still possesses no Indian blood.

Reynolds should be considered non-Indian for the sake of jurisdiction under VAWA because the federal definition of Indian should apply, requiring proof of Indian descent (via blood quantum) and recognition as Indian by a tribe. Reynolds has no evidence of Indian descent, and therefore fails the first prong of the test. Reynolds also has the ability to terminate his adopted membership status with the Amantonka Nation at any time.

A. The Federal definition of Indian, requiring proof of Indian descent and tribal recognition, applies to VAWA and therefore Reynolds is not considered Indian for the sake of jurisdiction under the Act.

Congress reauthorized VAWA in 2013 to address the issue of non-Indian offenders in Indian country regarding domestic violence. As part of the reauthorization, Congress amended ICRA to authorize tribal courts to exercise Special Domestic Violence Criminal Jurisdiction over non-Indians who commit (1) domestic violence, (2) dating violence, or (3) violate a protection order. 25 U.S.C. § 1304 (1968). *Oliphant v. Suquamish* holds that tribal courts do not have inherent criminal jurisdiction to prosecute non-Indians but may assume jurisdiction when specifically authorized by Congress. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). VAWA provides that specific authorization.

ICRA defines "Indian" to mean any person who would be subject to jurisdiction as an Indian under 18 USC Sec. 1153, also known as the MCA. Major Crimes Act, 18 USC § 1153 (1885). Under both the MCA and the ICCA, another federal Indian country criminal statute, the term "Indian" is not defined, leaving interpretation up to the courts.

Several cases have been decided concerning the definition of Indian for the sake of criminal jurisdiction in Indian country. In *United States v. Diaz*, the court was defining who was an "Indian" for the sake of the MCA. *Diaz*, 679 F.3d 1187. The court held that although the term Indian was not defined in the statute, or in other related statutes addressing criminal jurisdiction in

Indian country, a two-part test as adopted by previous courts, stemming from *United States v. Rogers*, was the correct way to determine whether someone is Indian. *Id.* In order to determine if a person is an Indian the court must find that the person possesses Indian blood and that they are "recognized as Indian by a tribe or by the federal government." *Id.* Both parts of the test must be met in order to prove someone is Indian. The court notes that this test applies to both the victim or the perpetrator of crime in Indian Country.

In *United States v. Bruce*, the court reaffirms and elaborates on the two-part test from *Diaz* holding that because the first prong calls for "some degree of Indian blood," evidence of a "parent, grandparent, or great-grandparent who is clearly identified as an Indian" would be sufficient to satisfy this prong. *United States v. Bruce*, 394 F.3d 1215, 1223 (2005).

Alberty v. United States similarly held that tribal members who are not Indians by ancestry cannot be prosecuted under the MCA. *Alberty*, 792 F.3d at 501. In this case, the defendant, an African American who was born into slavery and later became a member of the Cherokee nation, was convicted of murder. *Id*. The court held that the defendant had "the rights of a native Cherokee" but he was not an Indian within the meaning of the MCA. *Id.* Ultimately, he was considered to be a member of the Cherokee Nation, but not an Indian because he did not have Indian blood. *Id.*

In *United States v. Prentiss*, the 10th Circuit Court reaffirmed that in the absence of a statutory definition of "Indian," the two-part test derived from *Rogers* is the correct approach. *United States v. Prentiss*, 273 F.3d 1277, 1280 (2001). The court explicitly stated that dispensing with the "some Indian blood" part of the test would be a mistake as it remains an important component in determining Indian status. *Id.* In explaining this decision, the court held that because *Rogers* had not been overruled there remains a precedent of applying the two-part test. Along with

scholars holding the view that a “demonstrable biological identification” is an important component, the two-prong test remains the rule. *Id.* See also *United States v. Stymiest*, 581 F.3d 759 (2009) (holding that the two-part test provides the essential elements for instructing a jury on determining the Indian status of someone); *State v. Sebastian*, 243 Conn. 115 (1997) (holding that the proper determination of whether someone is Indian under MCA, ICCA, and ICRA is when the two-prong test is applied).

United States v. Zepeda lays out the current rule for determining the Indian status of a defendant under the MCA. This court held that the "Indian blood" prong of the two-part test would be satisfied by a showing that the defendant has "some quantum of Indian blood, whether or not traceable to a federally recognized tribe." *Zepeda*, 792 F.3d at 1113.

The court should follow the precedent set by other courts and adopt the two-prong test requiring Indian descent and tribal recognition. VAWA is a federal statute dealing with criminal jurisdiction, related to MCA and ICCA, therefore requiring the same treatment by the Court in interpreting the term Indian. Additionally, it is clear from the purpose of VAWA that the intent of Congress in laying out jurisdiction over non-Indians is to ensure that the high rates of domestic violence against Indian women by non-Indian perpetrators is addressed.

In *Rogers*, the court clarified that for the sake of federal jurisdiction often the statute is not speaking about members of a tribe, but of the race “Indian” generally. *Rogers*, 45 U.S. at 572. The court further held that it would be contrary to what Congress intended if “white men of every description might at pleasure settle among [the tribe], and, by procuring an adoption by one of the tribes, throw off all responsibility to the laws of the United States.” *Id.* at 573. This argument still rings true today. In order to ensure that non-Indians are held responsible under federal criminal law, the court needs to hold that federal criminal law statutes require proof of Indian descent. This

is especially important when there are such high rates of domestic violence by non-Indian perpetrators. Having a way to bypass federal criminal jurisdiction would be detrimental to addressing violence against Indian women.

It will be argued that instead of proving Indian descent via blood quantum, all that should be required is evidence of one's relationship with a tribe, and that requiring blood quantum is racial classification and therefore unlawful. *Id* at 1119. However, the Court rejected that argument and held that federal regulation of Indian affairs is based on the "unique status of Indians as a separate people with their own political institutions" rather than on racial classification. *Id.* at 1113. Further, proof of Indian blood is not enough to warrant federal criminal jurisdiction over Indians, without also showing recognition of a tribe. This is because said jurisdiction "does not derive from a racial classification but from the special status of a formerly sovereign people." *St. Cloud v. United States*, 702 F. Supp. 1456, 1459 (1988). The second prong of the test from *Rogers* asks whether there someone has a "sufficient non-racial link to a formerly sovereign people," therefore ensuring that the test to determine Indian status is not solely based on racial classification. *Id.* Thus far *Rogers*, and the two-prong test as laid out by the court, has not been overruled for impermissible racial classification.

Looking to Mr. Reynolds, he has no Indian ancestry or Indian blood. It is not disputed that he was born non-Indian. Because Reynolds has no way to prove Indian ancestry, he does not satisfy the first-prong of the test as laid out by previous courts requiring proof of Indian descent via blood quantum (of any amount as pursuant to *Bruce*). Reynolds satisfies the second-prong of the test by being recognized by the Amantonka Nation as a member, but the test requires that both prongs be met before someone is considered Indian. Therefore, Reynolds is considered non-Indian for the sake of jurisdiction under VAWA.

1. Reynolds' adoption into the Amantonka Nation is not enough for him to be "Indian" for the purposes of criminal jurisdiction under VAWA, because he lacks proof of Indian descent.

Felix S. Cohen, in the *Handbook of Federal Indian Law*, explains that someone can be considered "Indian" for one purpose, but not for another. Felix S. Cohen, *Handbook of Federal Indian Law*, § 3.03[2] at 172 (Nell Jessup Newton ed., 2012). He further elaborates that "a person of little Indian ancestry might become a tribal member by adoption for some purposes, such as voting and participation in tribal government, but not be an Indian for the purposes of federal criminal jurisdiction." *Id.* A person's status as Indian depends on the circumstances.

In *Rogers*, the court held that the defendant's adoption into an Indian tribe did not make him an Indian for the sake of federal criminal jurisdiction for a crime committed in Indian country. *Rogers*, 45 U.S. at 572. The fact that the defendant is recognized by the tribe is not sufficient to demonstrate his status as Indian, as the court held that he must show he is part of the "race" (indicating that there must be proof of Indian blood). *Id.* at 573. The court further stated that through adoption a person may "become entitled to certain privileges in the tribe, and make himself amenable to their laws", but still will not be considered "Indian." *Id.* Ultimately, the court thought it clear that "a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian," and that "his responsibility to the laws of the United States remained unchanged and undiminished. He was still a white man, of the white race." *Id.*

Similarly, in *Alberty* the defendant was not born Cherokee but was later adopted into the tribe. *Alberty* 162 U.S. at 500. The court held that while adoption into the tribe gave him rights of being Cherokee, it did not make him an Indian for the sake of the federal statute in question, nor did it "absolve him from responsibility to the criminal laws of the United States." *Id.* at 501.

Therefore, as upheld by both *Rogers* and *Alberty*, adoption of someone with no Indian blood into an Indian tribe is not sufficient to meet the requirements of the federal definition of Indian. Looking to Reynolds, it is undisputed that he is lacks proof of Indian descent. He was born non-Indian and was adopted as an adult into the Amantonka Nation. He applied to become a naturalized citizen, took the oath of citizenship, and received his Amantonka Nation ID card. Looking to Title 3, Chapter 2, Section 203 of the Amantonka Nation Code, if an applicant is sworn in as a citizen of the Amantonka Nation, their name shall be added to the Amantonka Nation roll, they will be issued an ID card, and shall be entitled to all the privileges afforded to all Amantonka citizens. However, his adoption into the tribe, and the "privileges afforded" are related to the tribe directly, not federal statutes.

Looking back to *Cohen*, someone can be a tribal member for some purposes, presumably such as voting and being involved in tribal government, but not for the purposes of federal criminal jurisdiction. This is the situation with Reynolds. He is a member of the Amantonka Nation for the purposes of tribal government, but this does not inherently make him Indian for the sake of federal jurisdiction. He can participate in voting for tribal government and other matters that concern tribal citizens, but this does not automatically make him Indian when it comes to federal statutes. Rather, federal jurisdiction relies on the two-part test derived from *Rogers* and outlined in *Diaz* and *Zepeda*. Reynolds does not satisfy the Indian descent component, and therefore is not considered Indian for the sake of federal criminal jurisdiction, similar to the defendants in *Rogers* and *Alberty*. His adoption status is not sufficient to meet the requirements of the federal definition of Indian for the sake of VAWA jurisdiction because he possesses no Indian blood.

B. Reynolds being considered non-Indian for the sake of VAWA jurisdiction is not an encroachment on tribal sovereignty.

It was held in *Santa Clara Pueblo v. Martinez* that Indian tribes possess inherent sovereignty to determine questions about its own membership. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). However, having Reynolds be considered non-Indian for the sake of federal criminal jurisdiction does not encroach on this tribal sovereignty because the tribe is still able to determine tribal membership for the sake of tribal affairs. The two-prong test derived from *Rogers* only applies in instances of federal criminal jurisdiction. Applying the test requiring proof of descent as well as tribal recognition does not alter Reynolds' status as a member of the Amantonka Nation, it only determines that he is non-Indian for the sake of VAWA and other federal criminal statutes.

Additionally, having Reynolds be considered non-Indian for the sake of VAWA does not limit the tribe's jurisdiction over him. Under VAWA the tribe is still able to prosecute Reynolds for domestic violence against an Indian victim on tribal land. There is no loss of jurisdiction for the tribe. Indeed, VAWA is a reaffirmation of tribal sovereignty to retain jurisdiction over both Indians and non-Indians on their land. The requirement that a defendant meet the federal definition of Indian by proving Indian descent does not take away from this sovereignty. As held in *Alberty,* a person adopted into the Cherokee Nation gave him the rights of a Cherokee citizen but did not make him an Indian within the meaning of a federal statute. *Alberty* 162 U.S. at 501. Similarly, the Amantonka Nation can choose who they want to adopt as a member, but that adoption does not mean they are automatically an Indian under federal law.

C. Reynolds has a right to terminate his relationship with the Amantonka Nation, reverting back to his status of non-member and therefore non-Indian.

In the *Handbook of Federal Indian Law,* Cohen explains that tribal membership is a bilateral relationship, depending not only on the action of a tribe, but also on the action of the

individual. Felix S. Cohen, *Handbook of Federal Indian Law*, § 3.03[3] at 176 (Nell Jessup Newton ed., 2012). Further, any member of a tribe is at full liberty to terminate their tribal relationship whenever they so choose. Accordingly, Reynolds should be able to end his membership with the Amantonka Nation and be considered a non-member, and therefore non-Indian because of his lack of Indian blood.

In *Standing Bear v. Crook*, relators claimed that they formerly belonged to a tribe, but had completely severed their tribal relationship. *Standing Bear*, 25 F. Cas. at 699. The court held that expatriation is a right that has long been secured and supported by the federal government, and that this right applies to tribal members as well. *Id*. Ultimately someone who is Indian "possesses the clear and God-given right to withdraw from his tribe." *Id. Thompson v. County of Franklin* reaffirmed this right of an individual tribal member to sever her relationship with the tribe. *Thompson v. County of Franklin*, 180 F.R.D. 216 (1998). *Smith v. Bonifer* also holds that "Indian members of one tribe can sever their relations as such." *Smith v. Bonifer*, 154 F. 883, 886 (1907)

Applying the federal definition of Indian, Reynolds is non-Indian because he lacks Indian descent, regardless of his status as an adopted member of the Amantonka Nation. However, even if this were not the case, Reynolds would still be able to assert he is non-Indian by severing his relationship with the Amantonka nation and reverting back to his non-Indian status. His voluntary act of becoming a naturalized citizen does not prevent him from ending that citizenship if he so chooses.

II. Reynolds did not receive adequate representation by his court appointed counsel because his counsel did not satisfy the relevant legal requirements to represent a non-Indian in tribal court violating both the Equal Protection Clause of the Fifth Amendment and the Sixth Amendment right to counsel.

Reynolds' original motions should be granted because he is a non-Indian indigent defendant being charged in tribal court. Reynolds' right to counsel was violated by having an unqualified court appointed attorney. This is equivalent to not having counsel at all. As a non-Indian defendant in tribal court, his counsel should be a member of a state or federal bar. Having an attorney provided for him that does not meet this qualification is a direct violation of the Sixth Amendment right to counsel. As a result of this oversight, Reynolds' tribal court conviction should not be considered in federal court. The Court should take into consideration that Reynolds is a first-time offender who was denied his right to counsel.

Reynolds received ineffective assistance of counsel because his court appointed attorney is not a member of any state or federal bar. His court appointed attorney is only a member of the Amantonka Nation bar which does not satisfy the relevant legal requirement for a non-Indian defendant in tribal court. The lack of state or federal bar membership is also a violation of the Equal Protection Clause of the Fifth Amendment. Due to the ineffectiveness of the court appointed counsel, Reynolds was fined a total of $6800, which is $1800 over the limit of $5000 set out in ICRA and the Amantonka Nation Code. The VAWA amendments to ICRA clearly lay out the limitations for tribal courts in regards to sentencing and fines. The rulings and fines given in tribal court should not be upheld in federal court due to the ineffective assistance of counsel. Reynolds' court appointed attorney does not meet the relevant legal standards to represent a non-Indian indigent defendant in tribal court. On these grounds, the Court should reverse and remand Reynolds' conviction, so that he may have the appropriate counsel.

A. The right to counsel for indigent non-Indian defendants in tribal court is guaranteed under the Sixth Amendment.

Reynolds was denied his Sixth Amendment right to counsel. The Sixth Amendment states, "the accused shall enjoy the right… to have the Assistance of Counsel for his [defense]." U.S. Const. Amend. VI. The Sixth Amendment guarantees that any individual citizen of the United States being charged with a crime has the absolute guarantee of the assistance of counsel at all critical stages of the process. *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008). The right to counsel attaches when adversarial proceedings begin against a defendant. *Id*. The right to counsel extends to all critical stages from arrest to sentencing. *Massiah v. United States*, 377 U.S. 201, 206 (1964). To deny a defendant their right to counsel during any of the critical stages is a violation of the Sixth Amendment. *Id*. To deny Reynolds adequate counsel during his tribal court proceedings is to deny him his right to counsel during a critical stage in the trial process. Since Reynolds is a non-Indian, his Sixth Amendment right extends to tribal court. His right to counsel attached when the domestic assault charges were filed against him. Although he received counsel as an indigent defendant, this counsel was not satisfactory for a non-Indian defendant in tribal court.

Reynolds is indigent and has the right to have counsel provided for him. Indigent defendants are guaranteed this right. *Miranda v. Arizona*, 384 U.S. 436, 473 (1966). Although the Sixth Amendment does not expressly state this right for indigent defendants, the Supreme Court ruled that it would be a violation of the Constitution to give the right to counsel to those who can afford an attorney and deny the right to those who cannot. *Id*. The government must at its own expense provide counsel for those who cannot afford to obtain their own. *Id*. For Indian defendants, there is no right to counsel if indigent, but they do have the right to counsel at their own expense. *Toya v. Toledo*, 2017 U.S. Dist. LEXIS 160173, 12 (2017).

There are several reasons why indigent Indian defendants are not provided with the right to counsel in tribal court. The main reason is tribes do not have the funds to be able to afford to

provide an attorney for every indigent defendant. *United States v. Bryant*, 136 S. Ct. 1954, 1956 (2016). The Court's found no issue in this because before the 1963 ruling in *Gideon v. Wainwright*, no indigent defendant in the country was provided an attorney if facing imprisonment for less than one year. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963). In 1968, Congress passed ICRA, which limited tribal courts' sentencing to less than one year. 25 U.S.C. §1302. At this time, tribes did not have any criminal jurisdiction over non-Indians, so the courts were not concerned with the proceeding provisions in regards to indigent right to counsel. *Oliphant*, 435 U.S. at 205. Even more so because the rights laid out in the Sixth Amendment do not extend to Indians in Indian Country. *United States v. Shavanaux*, 647 F.3d 993, 998 (2011).

Nonetheless, an indigent Indian defendant can still be convicted in tribal court without an attorney. *Tom v. Sutton*, 533 F.2d 1101, 1106 (1976). These convictions are not violations of the Sixth Amendment, and habeas corpus relief will not be granted under these circumstances. *Id*. See also *United States v. First*, 731 F.3d 998 (2013). In *Gideon v. Wainwright*, the court ruled that the Sixth Amendment guaranteed right to counsel extends especially to indigent defendants and is obligatory to the states per the Fourteenth Amendment. 372 U.S. at 344. However, this ruling does not extend to Indians in tribal court for the reasons discussed above. *Tom*, 533 F.2d at 1106.

Even after the passing of ICRA, the inability to provide counsel for indigent defendants was not highly contested until the 2013 VAWA amendments to ICRA gave tribal court jurisdiction over non-Indians in domestic violence offenses. 25 U.S.C. §1302. In order for tribal courts to have jurisdiction, the rights of non-Indians must extend to tribal court. *United States v. First*, 731 F.3d 998, 1009 (2013). Be that as it may, all judges, including tribal court judges, have the authority and discretion to take imprisonment off the table. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). When a judge chooses to do so, there is no longer a guarantee to the right to counsel. *Id*. at 40. When a judge takes away the right to counsel, he may not then change his mind

and sentence an offender to any amount of incarceration. *Id*. Since Reynolds was given seven months incarceration he is guaranteed the right to counsel, even in tribal court.

1. The rulings against Reynolds in tribal court should not impact the decision of federal courts because Reynolds' Sixth Amendment right to counsel was violated.

The rulings against Reynolds in tribal court should not be taken into consideration for decisions made in federal court because of the discrepancies regarding the right to counsel. Under ICRA, indigent defendants are not guaranteed the right to counsel unless facing imprisonment for over one year. 25 U.S.C. §1302(a). On the other hand, under the Sixth Amendment, citizens who are indigent are guaranteed the right to counsel when facing any amount of jail time. *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972). Non-Indian defendants in tribal court are not only governed by ICRA, but more importantly, the U.S. Constitution. *Oliphant*, 435 U.S. at 205. Therefore, the right to counsel extends to non-Indian indigent defendants in tribal court, especially when facing incarceration.

Reynolds was convicted to seven months of imprisonment, and as a non-Indian is guaranteed the right to counsel. In *Argersinger v. Hamlin*, the Court ruled defendants are guaranteed the right to counsel if facing imprisonment. *Argersinger*, 407 U.S. at 39. Reynolds was given seven months of incarceration. As a non-Indian, Reynolds' counsel should have been a member of a state or federal bar. Because his counsel was only a member of the Amantonka Nation bar, he did not have counsel that meets the relevant legal requirements. His counsel was equivalent to not having counsel at all. For this reason, incarceration should be off the table. *Argersinger*, 407 U.S. at 39. By sentencing Reynolds to seven months of incarceration, his Sixth Amendment right to counsel was violated. To provide a non-Indian with a court appointed attorney who is not a member of a state or federal bar is a guaranteed violation of the Sixth Amendment right to counsel.

Due to the violation of the Sixth Amendment right to counsel, Reynolds' tribal court conviction should not be taken into consideration in federal court. In *United States v. Gillette*, the District Court denied the defendant's motion to have his tribal court guilty plea suppressed because he's an Indian and all proceedings complied with ICRA. *United States v. Gillette*, 2017 U.S. Dist. LEXIS 49490, 9 (2017). Even though Reynolds' court appointed counsel was qualified under ICRA and the Amantonka Nation's Code, he is a non-Indian and primarily governed by the Constitution. If he was considered an Indian or even a repeat offender, then it would be proper to take his tribal court conviction into consideration. *Bryant,* 136 S. Ct. at 1961. However, he is non-Indian, and this is his first domestic violence conviction. The federal courts should only determine whether his counsel meets the relevant legal requirements for non-Indian defendants in tribal court, and his tribal court conviction should have no impact on this decision.

Vacating a defendant's tribal court conviction and sentence in federal court is not a new concept, and more recently it has come into focus. The District Court of New Mexico did just that in regards to the denial of assistance of counsel. *Tortalita v. Geisen*, 2018 U.S. Dist. LEXIS 91789, 2 (2018). The Court ruled the denial of the right to counsel is sufficient for habeas relief. *Id*. at 2. Although the petitioner in this instance thought his conviction should have been reversed, the Court found vacating his conviction and granting habeas relief was appropriate. *Id*. at 4. This Court should apply the same rationale as the New Mexico District Court because Reynolds was denied adequate counsel in tribal court. Reynolds' court appointed attorney did not meet the relevant legal requirements for non-Indian indigent defendants in tribal court, but counsel was also ineffective.

B. Ineffective assistance of counsel is a violation of the Fifth Amendment Equal Protection Clause and the Sixth Amendment right to counsel.

Reynolds' court appointed counsel in tribal court was ineffective because of deficient performance and prejudice against Reynolds. Ineffective assistance of counsel is a violation of the Equal Protection Clause of the Fifth Amendment and the Sixth Amendment right to counsel. The Fifth Amendment states, "no person shall be… deprived of life, liberty, or property, without due process of the law." U.S. Const. Amend. V. Due Process guarantees equal protection under the law and assures that all legal proceedings will be reasonable and fair. *Gideon*, 372 U.S. at 339. When a defendant is given counsel that is ineffective, the resulting legal proceedings are inherently unreasonable and unfair. *Id.* at 340. Lawyers are required to pass state or federal bars in order to guarantee proficiency of the law and the ability to maintain a client's life, liberty, and property with due process of the law. *Id.* No lawyer can effectively represent a client in court without having passed a state or federal bar examination. *Keller v. State Bar of Cal*, 496 U.S. 1, 8 (1990). Reynolds' court appointed counsel does not meet the relevant legal requirements to represent a non-Indian in tribal court because he is not a member of a state or federal bar.

Despite the ability of tribes to determine the laws of their nation and the regulations of their tribal courts, Reynolds, a non-Indian, is primarily governed by the U.S. Constitution. The IRA gave tribes the authority to establish tribal courts, governments, and constitutions, and with that the authority to determine rules and regulations in regards to establishing and maintaining these systems. *Morton v. Mancari*, 417 U.S. 535, 542 (1974). For instance, the Amantonka Nation does not require members of its bar association to be members of any state or federal bar association according to Title 2, Chapter 6, Section 607. However, this becomes an issue when it comes to non-Indian defendants in tribal court. Tribal courts do not have criminal jurisdiction over non-Indians except specifically authorized by Congress. *Oliphant*, 435 U.S. at 205. The VAWA amendments to ICRA give criminal jurisdiction to tribal courts over non-Indians in domestic

violence issues. *United States v. Bryant*, 136 S. Ct. 1954, 1956 (2016). Nonetheless, the inherent rights of non-Indians still apply in tribal court, such as the right to counsel and the due process of law. *Oliphant*, 435 U.S. at 205. Not only is Reynolds guaranteed the right to counsel in tribal court, he is also guaranteed effective assistance of counsel.

Reynolds' court appointed attorney is not a member of a state or federal bar, which resulted in ineffective assistance of counsel in tribal court. Counsel who have passed a tribal bar examination are sufficient for an Indian defendant in tribal court but not sufficient for a non-Indian defendant. *United States v. Ant*, 882 F.2d 1389, 1392 (1989). The United States Constitution does not primarily apply to Indians on reservation, tribes, or tribal courts because tribes are semi-sovereign nations. *United States v. First*, 731 F.3d 998, 1007 (2013). To do so, would infringe on tribal sovereignty. *Id*. However, the same rationale does not apply to non-Indians on reservation because as non-Indians they are governed primarily by the Constitution despite being on reservation land. *Id*. By denying Reynolds appropriate counsel, the tribal court infringed on his Constitutional rights as a non-Indian which resulted in ineffective assistance of counsel.

Reynolds' court appointed counsel was ineffective because of the presence of deficient performance and clear prejudice against the client. The Sixth Amendment guarantees the right to counsel, which also includes the right to effective assistance to counsel. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The Supreme Court in *Strickland v. Washington* set up a two-part test to determine ineffective assistance of counsel. *Id*. First, the defendant must show that his counsel's performance was deficient due to the inability to act as a competent attorney. *Id*. The defendant must also show that he was prejudiced by his attorney's deficiency because there is a reasonable probability the outcome of the case would have been different. *Id*. Reynolds' counsel is not a member of a state or federal bar, which is required to represent non-Indian defendants in tribal court. His counsel's performance was deficient in part to the lack of relevant legal requirements,

as well as his performance in tribal court. Reynolds' court appointed counsel was unable to act as a competent lawyer. Due to his deficiency, Reynolds was fined $6800, which is $1800 over the $5000 fine limitation set out in ICRA. 25 U.S.C. § 1302 (2013). Reynolds was prejudiced by his attorney's deficiency because there is a reasonable probability that if his counsel was competent he would not have been fined an incorrect fee.

Understanding the intricacies of the law is no easy task. The reason that the Sixth Amendment guarantees the right to counsel is because any layperson could get overwhelmed by the complexity of the law. *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938). Law school and the bar examination contribute to the qualifications of lawyers. These vital steps give clients confidence in the fact that their lives rest in qualified individuals and not just any layperson. An efficient and competent lawyer would have thoroughly reviewed the statute in which their client was being convicted under and would have had the sense to point out any wrongdoings by the court. *Rompilla v. Beard*, 545 U.S. 374, 379 (2005). Reynolds' lawyer was deficient in reviewing the statute in which his client was being charged under. To provide a non-Indian with a court appointed attorney who is not a member of a state or federal bar is a guarantee for ineffective assistance of counsel. This is a violation of the Fifth Amendment Equal Protection Clause and the Sixth Amendments right to counsel because it infringes on the defendant's right to life, liberty, and property without due process of the law.

1. Effective counsel would know Reynolds' fine and restitution totals $6800 which is above the limit of a $5000 fine set out in the Indian Civil Rights Act.

Reynolds' fines exceed the limitations set out in ICRA for convicted offenders. Sentencing and fee guidelines are laid out in Section 1302(a)(7). Defendants being charged in tribal court cannot be sentenced for longer than one year and fines cannot exceed $5000. 25 U.S.C. §1302(a). There are two exceptions for sentencing greater than a year and fining over $5000, neither of which Reynolds satisfies. The first exception to exceed imprisonment or fine limitations is if the

defendant "has been previously convicted of the same or comparable offense by any jurisdiction in the United States." 25 U.S.C. §1302(b). This is Reynolds' first conviction of domestic violence and he therefore does not satisfy the first exception. The second exception is if the defendant is being charged with an offense in which other United States jurisdictions would normally sentence greater than a year or fine greater than $5000. 25 U.S.C. §1302(b). There is no evidence of U.S. jurisdictions fining offenders greater than $5000 for a first-time domestic violence offense. Therefore, charging Reynolds more than $5000 does not meet the second exception.

Effective counsel would read the statute that their client is being charged under. Not only did counsel misread the fine limitations in ICRA, he also misread the Amantonka Nation's Code. Title 5, Section 244(c) of the criminal code has a $5000 maximum limitation as a penalty for violating partner assault. The court appointed attorney is a member of the Amantonka Nation bar yet is unfamiliar with the code. This suggests that the bar examination is not as rigorous or as in-depth as a state or federal bar examination.

The deficient performance and prejudice against Reynolds satisfy the test for ineffective assistance of counsel because the Amantonka Nation bar examination is not as intensive or at the same level as the other state and federal bar examinations, as seen in Title 2, Chapter 5, Section 501 of the Amantonka Nation Code. Had Reynolds' court appointed counsel been a member of a bar other than the Amantonka Nation, he would have been aware of the fine limitations set forth in both the statute and the criminal code. By failing to do so, Reynolds was left with a fine that exceeds the limitations of ICRA and the Amantonka Nation Code. This is a textbook example of ineffective assistance of counsel. The Court should reverse and remand accordingly.

2. The rulings against Reynolds in tribal court should not impact the decisions of federal courts because Reynolds' appointed counsel was ineffective and did not satisfy the relevant legal requirements.

Reynolds' conviction should not be taken into consideration in federal court. The issue of whether tribal court rulings should be considered in federal court proceedings is highly contested. *United States v. Ant*, 882 F.2d 1389, 1396 (1989). In some instances, it makes sense to take tribal court rulings into consideration, especially for repeat and habitual offenders. *Bryant*, 136 S.Ct. at 1961. In instances where ineffective assistance of counsel took place, tribal court rulings should not be taken into consideration.

The Court in *United States v. Bryant* concluded it is acceptable to convict habitual domestic violence offenders in tribal court without counsel and it is not a Due Process or Sixth Amendment right to counsel violation. *Id*. at 1963. Be that as it may, Bryant is an Indian and a habitual offender, whereas Reynolds is neither. Therefore, Reynolds' conviction with ineffective assistance of counsel is a Due Process and Sixth Amendment violation and should not be taken into consideration in federal court.

CONCLUSION

For the foregoing reasons, this court should reverse and remand to the U.S. District Court of Rogers. Reynolds is considered non-Indian for the sake of jurisdiction under VAWA because he does not possess Indian blood, and therefore cannot prove Indian descent. Additionally, Reynolds' court appointed counsel did not satisfy the relevant legal requirements to represent a non-Indian in tribal court, which violates the Equal Protection Clause of the Fifth Amendment and the Sixth Amendment right to counsel. Habeas corpus relief should be granted under *de novo* review.