No. 19-231

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT R. REYNOLDS,
Petitioner,

v.

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

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

BRIEF FOR PETITIONER

Team 534

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Is Petitioner a non-Indian for the purposes of Special Domestic Violence Criminal Jurisdiction?

2. Did Petitioner's court-appointed public defender satisfy the requirements for effective assistance of counsel under the Indian Civil Rights Act as amended by the Tribal Law and Order Act of 2010 and Violence Against Women Reauthorization Act of 2013?

STATEMENT OF THE CASE

I. STATEMENT OF THE PROCEEDINGS

In June 2017, Petitioner, Robert R. Reynolds, was charged with violating Title 5 § 244 of the Amantonka Nation Code, the criminal code regarding partner or family member assault. (R. at 3, 6). Petitioner was found guilty of these charges and sentenced by the Amantonka District Court to a seven-month incarceration, $5,300 restitution to compensate the victim, batterer rehabilitation and alcohol treatment services and a $1,500 fine. (R. at 5).

In November 2017, The Supreme Court of the Amantonka Nation affirmed Petitioner's conviction, reasoning that the tribe has the right to define the membership status of its citizens under *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). (R. at 7). The court held that the Amantonka Nation possessed criminal jurisdiction over Petitioner and rejected his claim that the public defender appointed to represent him was inadequate as a matter of law. (R. at 7).

Petitioner's plea for a Writ of Habeas Corpus was granted by the United States District Court for the District of Rogers in March 2018. (R. at 8). The District Court held that the controlling law of the United States requires that to be "Indian" for the purpose of criminal jurisdiction, the defendant must have some degree of Indian blood. (R. at 8). The district court held that the Amantonka Nation failed to provide Petitioner with the defense counsel necessary under the Violence Against Women Reauthorization Act of 2013. (R. at 8).

The United States Court of Appeals for the Thirteenth Circuit reversed this decision in August 2018, agreeing with the reasoning of the Supreme Court of the Amantonka Nation that

Santa Clara Pueblo v. Martinez gave the Amantonka Nation criminal jurisdiction over its naturalized citizens. (R. at 9). This Court granted certiorari in October 2018.

II. STATEMENT OF THE FACTS

Petitioner is a naturalized citizen of the Amantonka Nation under Title 3 § 201 of the Amantonka Nation Code. (R. at 3). It is undisputed that Petitioner has no Indian blood. (R. at 8). Petitioner voluntarily joined the tribe shortly after marrying his wife, Lorinda, a citizen of the Amantonka Nation (R. at 6). He is currently employed by a distribution warehouse on the Amantonka Nation's reservation and was previously employed by the Amantonka shoe factory. (R. at 6). Petitioner moved into the tribal housing complex after marrying his wife and continues to reside within the territory of the Amantonka Nation. (R. at 6).

On June 15, 2017, Amantonka Nation police responded to a call at the apartment shared by Petitioner and his wife. (R. at 6). Petitioner was accused of striking his wife, Lorinda, with an open palm, causing her to fall to the ground and crack one of her ribs. (R. at 6). It was this incident that prompted the domestic violence charge against Petitioner. (R. at 6-7). Petitioner argues that, as a non-Indian charged with a domestic violence offense, the Amantonka Nation's criminal jurisdiction over him could rest solely on the Nation's exercise of Special Domestic Violence Criminal Jurisdiction under the Violence Against Women Reauthorization Act of 2013 (R. at 7).

During Petitioner's arraignment, he requested indigent defense counsel. (R. at 4). The public defender appointed to Petitioner by the Amantonka Nation had never been admitted to any state or federal bar. (R. at 7). The counselor had graduated from an ABA accredited law

school and taken a tribal bar exam. (R. at 7). Petitioner believes that his court-appointed counsel is insufficiently qualified to serve as his counsel and that the appointment of this individual violates his federal civil rights. (R. at 3-4). Petitioner has appealed his conviction as a non-Indian whose court-appointed counsel is insufficient under the Violence Against Women Act Reauthorization of 2013 (VAWA 2013). (R. at 3).

Petitioner is currently in counseling with his wife. (R. at 5). At her request and with the support of their counselor, the District Court for the Amantonka Nation dropped the protection order issued against him at the time of his arraignment. (R. at 5). Petitioner also has complied with all conditions of his bond, and the District Court found it appropriate to grant Petitioner's motion to continue his bond while his appeal is pending. (R. at 5).

SUMMARY OF ARGUMENT

Petitioner, Robert R. Reynolds, is a non-Indian. Despite Petitioner holding an Amantonka membership card and electing to be naturalized with the Amantonka Nation, subject to the tribe's right to adjudicate membership as held in *Santa Clara Pueblo v. Martinez*, he has no Indian ancestry. 436 U.S. 49 (1978). As the petitioner has no Indian blood, he may be included into the tribe's membership for purposes of benefits and community participation, but the tribe has no general criminal jurisdiction over Petitioner. *United States v. Rogers*, 45 U.S. 567, 572 (1846) ("And 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. . .); *Oliphant v. Squamish Indian Tribe*, 435 U.S. 191 (1978). Tribes may not exercise general criminal jurisdiction over non-Indians without any quantum of Indian blood, and the generally accepted judicial tests in federal appellate courts for Indian status all include a similar two prongs. The first prong

includes some quotient of Indian blood, and the second includes as some other determinative factor or factors, such as community acceptance or the holding out of oneself as Indian. *Rogers*, 45 U.S. 567, 572; *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005); *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009).

Prior to the Violence Against Women Reauthorization Act of 2013, which extends special jurisdiction to tribes in order to adjudicate very specific acts of domestic violence, tribes had no jurisdiction to adjudicate a non-Indian defendant. *Oliphant*, 435 U.S. 191. Criminal jurisdiction within Indian Country when the defendant is non-Indian under the meaning of the law is generally only within the state and federal power. *Rogers*, 45 U.S. at 572; *Bruce*, 394 F.3d at 1223.

Under the special jurisdiction provided in the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), an Indian tribe that has elected to participate in the extension of jurisdiction and is able to do so under the provisions of the Act may prosecute a non-Indian who commits an act of violence against a dating or domestic partner who is Indian. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-14, § 904 (codified as 25 U.S.C. §1304 (Supp. V 2017)).

The tribe that elects to adjudicate a non-Indian defendant under the VAWA 2013 special jurisdiction must provide to the defendant "all other rights whose protection is necessary under the Constitution of the United States." 25 U.S.C. §1304(d)(4). Petitioner Robert R. Reynolds may only be adjudicated by the Amantonka Nation as a non-Indian and

via the special jurisdiction of the amendments to the Indian Civil Rights Act provided by VAWA 2013, and thus must be provided all substantive rights protected by the Constitution.

As the proceedings that led to Petitioner's conviction are governed by the Indian Civil Rights Act (ICRA) as amended by the Tribal Law and Order Act of 2010 and VAWA 2013, they may only be reviewed by federal courts through the lens of a habeas corpus claim. The United States Court of Appeals for the Thirteenth Circuit erred in reversing the decision of the U.S. District Court for the District of Rogers and instructing that Petitioner's petition for a Writ of Habeas Corpus filed be denied. The protections guaranteed to indigent defendants by VAWA 2013 should be construed coextensively with their constitutional counterparts to create a comprehensive right to effective assistance of counsel. The public defender provided to Petitioner by the Amantonka Nation does not meet the VAWA 2013 requirements of being an effective bar-licensed attorney.

After Petitioner's request for indigent defense counsel to represent him on the charges of domestic violence, the Amantonka Nation appointed a public defender to represent him. Under the legal relevant standards for effective assistance of counsel for an indigent defendant, this public defender is not sufficiently qualified. The Amantonka Nation's exercise of SDVCJ triggers procedural protections beyond those required by ICRA's general provisions.

Rather, this tribal court proceeding is governed by the ICRA as amended by the Tribal Law and Order Act of 2010 (TLOA) and VAWA 2013. The amendments of the TLOA, as incorporated by reference in VAWA 2013 guarantee defendants "the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and

professional responsibility of its licensed attorneys." 25 U.S.C. § 1302(c). Although Petitioner's sentence included only a seven-month incarceration, far below the one-year-plus threshold of the TLOA, VAWA 2013 extends the right to be represented by professional counsel to indigent defendants, such as Petitioner, who would not otherwise be shielded.

The Amantonka Nation failed to provide Petitioner with indigent defense counsel that was appropriately licensed under the relevant legal standards. Through the language stating counsel must be "licensed to practice law by any jurisdiction in the United States," the VAWA 2013 amendment guarantees indigent non-Indian defendants the right to representation by a bar-licensed attorney. 25 U.S.C § 1302(c)(2). This counsel is to be "least equal to that guaranteed by the United States Constitution." 25 U.S.C. 1302(c)(1).

The question of "whether a tribal public defender, who is not a licensed professional attorney but who appears in tribal court, is 'counsel' within the meaning of the Sixth Amendment" has been examined by federal courts before. *United States v. Tools*, No. CR. 07-30109-01-KES, 2008 WL 2595249 at *5 (D.S.D. June 27, 2008). Indeed, the word "counsel" as used in the Sixth Amendment (and later incorporated in VAWA 2103) has been found to be in reference to a "licensed professional attorney" and not to legal assistance of other means. *Id*. The court may find that the right to representation is appropriately met when counsel is a professional attorney who is licensed in both state and tribal court. *United States v. Gillette*, No. 3:17-CR-30122-RAL, 2018 WL 3151642 at *5 (D.S.D. Jan. 29, 2018).

Far from being appointed a professional, licensed attorney who would be able to serve him in state or federal court, Petitioner was saddled with a public defender who is only minimally qualified to practice in tribal court. The minimal requirements for a public defender

under the Amantonka Nation Code are more analogous to a lay counselor than to a professional attorney. This Court has held that "[t]here is a clear distinction between licensed legal counsel and lay representation under the Sixth Amendment." *Wheat v. United States*, 486 U.S. 153, 159 (1988). This Court further stated that "[r]egardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients. . . in court." *Id.* This Court should hold that Petitioner's court-appointed public defender does not satisfy the relevant legal requirements for effective assistance of counsel for an indigent defendant.

ARGUMENT

I. PETITIONER IS A NON-INDIAN FOR PURPOSES OF SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION UNDER THE VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013.

A. Petitioner is not an Indian within the meaning of the law.

Petitioner elected to be naturalized into the Amantonka Nation sometime after marrying a citizen of the Amantonka Nation. The Amantonka Nation is a federally recognized tribe, and as such, may control its membership and has final say over the civil membership status of citizens and applicants. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Non-Indian members of federally recognized tribes may be included into tribal membership for benefits and community participation, but they may not be adjudicated under general criminal jurisdiction by the courts of the tribe. *United States v. Rogers*, 45 U.S. 567, 573 (1846) (He may be by such adoption become entitled to certain privileges in the tribe, . . . yet he is not an Indian.); *Oliphant v. Squamish Indian Tribe*, 435 U.S. 191 (1978); *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir., 2005). The amendments to the Indian Civil Rights Act included in the Violence Against Women Act reauthorization of 2013 include special jurisdiction extension to participating federally recognized tribes. Violence Against Women

Reauthorization Act of 2013, Pub. L. No. 113-14, § 904 (codified as 25 U.S.C. §1304 (Supp. V 2017)). This special jurisdiction is specifically to enable a tribe to adjudicate non-Indian defendants in domestic and dating violence incidents. 25 U.S.C. §1304.

The constitutional protections afforded to these defendants are more similar in nature to defendants in federal or state court than defendants otherwise in courts of tribes. *Id*. Therefore, the defendant's status as Indian or non-Indian is still pertinent to the constitutional safeguards the defendant must receive. S. Rep. 112-53, at 10 (2012). There is no statutory definition of Indian. Thus, it has been judicially determined by the various circuit courts. *Bruce*, 394 F. 3d at 1223. To be Indian under the meaning of the law, all judicial tests which have heretofore been adhered to include two prongs: (1) a quotient of Indian blood and (2) some other attending circumstance, such as association with the Tribe in question, an acceptance by the Tribe, or a voluntary holding out of oneself as Indian. *Rogers*, 45 U.S. at 572; *Bruce*, 394 F.3d at 1223.

The political adoption of non-Indian person by a tribe does not make the adoptee an Indian. *Rogers*, 45 U.S. at 572. This precedent is still the applicable law of the United States and has not been superseded by statute or later holdings of this Court. In 1845, William S. Rogers was indicted for murder. *Id.* at 571. Rogers was an adult white male who married into the Cherokee tribe in 1836 and had lived within Indian Country since that time. *Id.* It was Rogers' claim that, as a Cherokee man, only the Cherokee nation had jurisdiction over him. *Id.* This Court clearly stated that while white men may be adopted into tribes for the purpose of benefits and privileges, the adoptee is not Indian. *Id*.

In *United States v. Diaz*, the defendant committed a hit-and-run after a night of drinking alcohol. 679 F.3d 1183, 1187 (10th Cir. 2012). The defendant hit a man walking on the side of the road in Indian Country, and after calling friends in tears about hitting "something," and contacting police the next day, was determined to have struck and killed the pedestrian. *Id.* at 1186. The defendant was a member of the Pueblo of Pojoaque and the pedestrian was proven by testimony of his father to be a non-Indian. *Id.* The defendant's appeal in part regarded the criminal element of the victim's status being non-Indian, and the Tenth Circuit's opinion demonstrates the high threshold of Indian status. *Id.* at 1187. The court held that if the victim had Indian blood, he would not be an Indian for the purpose of the law without the second prong of the test, which is some attenuate circumstance like tribal recognition. *Id.* The court also makes a point specific to the Petitioner Robert Reed's case, "[e]ven if [victim] were a member of a tribe or pueblo, this would not make him an Indian for the purposes of federal jurisdiction unless he had Indian ancestors." *Id.* at 1188.

Indians may be recognized as such without carrying a card or being enrolled. *Bruce*, 394 F.3d at 1223. Violet Bruce was charged under 18 U.S.C. 1152, a statute that determines crimes committed within Indian Country, except when the victim and defendant are both Indian, may be prosecuted by the federal government. *Id.* at 1215. Bruce appealed that, because she was Indian, the charge should have been properly brought under the Major Crimes Act, as the victim (her son) was an enrolled Indian. *Id*. Bruce was not an enrolled member of the tribe, but was one-eighth Chippewa, lived on a reservation, had two children who were enrolled members, benefitted from the healthcare clinic on the reservation, and had been arrested by the police of the tribe all her life. *Id.* The court held that Bruce had carried her burden of proof in

showing that she was Indian under the law and satisfied the two-prong test used by other circuit courts and rooted in *United States v. Rogers*. *Id*. at 1223. The test, now known as the "*Rogers*/*Bruce*" test, asks whether the defendant (1) has some quantum of Indian blood; and (2) has a "significant non-racial link" to the tribe. *Id*. at 1223-24. This link can be evidenced not only by enrollment, but by enjoying benefits of tribal membership and social recognition as Indian. *Id*.

The Amantonka Supreme Court relies on *Santa Clara Pueblo v. Martinez*, a holding unrelated to the issue of tribal court jurisdiction on criminal defendants. 436 U.S. 49. The issues dealt with by the Court in *Santa Clara Pueblo* are the immunity of a tribe from suit and the ability of a tribe to finally adjudicate issues of membership; it does not relate to criminal jurisdiction. *Id*. Following the Indian Civil Rights Act, plaintiff Martinez sought equitable relief against the Santa Clara Pueblo. *Id*. at 51-53. The Santa Clara Pueblo's policy of allowing enrollment of the children of male members who married outside the tribe and not the children of female members who married outside the tribe did not allow Martinez's children to become enrolled members, and Martinez brought the suit against the tribe as a violation of ICRA's "equal protection under the law" provision. *Id*. The Court held that the Congressional purpose of ICRA was a dual one: to protect against injustices encountered by criminal defendants in Indian Country and to further enable tribal self-governance. *Id*. at 62. Thus, the Santa Clara Pueblo was immune from suit, and in the interests of furthering self-governance, was the final arbiter of civil matters such membership in the tribe for the purposes of benefits and inheritance. *Id.* at 68. The instant case regarding Petitioner Reynolds is a criminal one, and the holding of *Santa Clara Pueblo* does not have effect on criminal jurisdiction of tribal courts.

The Petitioner cannot be determined as Indian by the controlling case law. Petitioner is not Indian by blood, but by naturalization. Just as the defendant in *Rogers* married into the Cherokee nation, lived within the territory of the Cherokee and held himself out as Cherokee, he was no more an Indian under the law than Petitioner is. The Court has unequivocally stated that a man does not become Indian by adoption of the tribe; he must have some quantum of Indian blood. To hold that tribes may determine membership not only for matters of civil law, but also criminal adjudication, is to fly in the face of the intent of the Indian Civil Rights Act and also the congressional intent of the Violence Against Women Reauthorization Act of 2013. ICRA was enacted to not only further enable tribal self-governance in matters of civil law, but to provide habeas relief to criminal defendants in order to prevent "injustices perpetuated by tribal justice." *Santa Clara Pueblo*, 436 U.S. at 66. There is concern for individual rights as well as tribal sovereignty, especially in the criminal context.

B. Special Domestic Violence Criminal Jurisdiction is the only jurisdiction available to the Amantonka Nation for the purpose of prosecuting the Petitioner.

Prior to the enactment of the Violence Against Women Reauthorization Act of 2013, non-Indian defendants could not be adjudicated in tribal courts. *Oliphant v. Squamish Indian Tribe*, 435 U.S. 191 (1978); *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir., 2005). The holding in *Oliphant v. Squamish Indian Tribe* unequivocally held that non-Indians may not be criminally prosecuted in tribal courts. 435 U.S. at 196. While many federally recognized tribes include a clause in their respective constitutions reserving for the tribe jurisdiction over all persons within their territory, this does not abrogate the congressional mandate and the judicial holdings of the United States. *Id.* at 202-04. The inverse was true of Indians for all crimes prior to the Major Crimes Act: only tribal courts could prosecute Indians for crimes committed

against Indians within Indian Country. *Ex parte Kan-gi-shun-ca (otherwise known as Crow Dog),* 109 U.S. 556, 572 (1883); 18 U.S.C. § 1152 (2012). Currently, Indians, as judicially defined by the two-prong *Rogers*/*Bruce* test may be prosecuted by the federal government as per the respective and applicable laws of the state in which the crime occurred. 18 U.S.C. § 1153 (2012). In a similar way that the Major Crimes Act gives the federal government special jurisdiction for several specific major felony crimes, the Violence Against Women Act of 2013 (VAWA 2013) gives participating tribes Special Domestic Violence Criminal Jurisdiction (SDVCJ) to prosecute offenders for some specific crimes of domestic violence. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904 (codified as 25 U.S.C. §1304 (Supp. V 2017)).

In order for a tribe to prosecute a defendant under the SDVCJ, the defendant must be a non-Indian who has committed a crime against an Indian and the defendant must have certain voluntary ties with the tribe community. 25 U.S.C. § 1304 (4)(B). The defendant must work in a tribe business, live in the Indian Country of a tribe, or be a spouse or dating partner of either a member of the tribe or an Indian residing within the "Indian country of the participating tribe." *Id.* If both the victim and defendant are non-Indians, there is no jurisdiction for the tribe to apply at all, and the tribe may not prosecute. *Id.* § (4)(A). The SDVCJ applies only to domestic or dating violence acts and violations of protective orders in which the act took place in the Indian country of the participating tribe. *Id.*

The federal government could concurrently exercise jurisdiction and criminally prosecute the Petitioner. Under the General Crimes Act, a crime committed within Indian Country by a non-Indian may be prosecuted by the federal government instead of the tribe. 18

U.S.C. § 1152. The General Crimes Act also permits the federal government to charge an Indian if the victim is a non-Indian. *Id*.; *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012). VAWA 2013 uses the same judicial standard for determining Indian status as the General Crimes Act and the Major Crimes Act. *Diaz*, 679 F.3d at 1187.

Adoption of a non-Indian by an Indian tribe does not confer upon the tribe criminal jurisdiction of the adoptee. *United States v. Rogers*, 45 U.S. 567, 572 (1846). To revisit *Rogers* briefly, it was the defendant's claim that as a Cherokee man, only the Cherokee nation had jurisdiction over him. *Id.* In the Court's holding, the 1834 Act of Congress excluding crimes of one Indian against another from federal jurisdiction did not include white men adopted by the tribe. *Id.* at 572-73. The Court clearly stated that while white men may be adopted into tribes for the purpose of benefits and privileges, the adoptee is not Indian. *Id*. The white men who become adopted into tribes are not the intended parties in the 1834 Act of Congress and are not therefore excluded from criminal jurisdiction of the United States. *Id*.

Oliphant built on this theory. While *Rogers* held that the United States and the respective states retained jurisdiction over non-Indian defendants, *Oliphant* excluded the tribes from exerting jurisdiction over non-Indians. *Rogers*, 45 U.S. 567; *Oliphant*, 435 U.S. 191. Mark David Oliphant and Daniel Belgarde committed crimes against tribal police while within the Indian Country of the Squamish Indian Tribe. *Oliphant*, 435 U.S. at 194. Both were residents of the Port Madison Reservation, and both were non-Indian. *Id.* While the Squamish Indian Tribe and several other tribes at the time purported in their codes and constitutions to exert jurisdiction over all individuals within their respective territories, the Court held that this could not be so. *Id.* at 196-98. The opinion references legislative and judicial history regarding

the exertion of jurisdiction, and the same 1834 Act of Congress that the Court in *Rogers* references. *Id.* While the Court finds no Congressional act forbidding the jurisdiction of the tribes, the implicit nature of all of the legislation reviewed together hinged on the intent that the tribes practice self-governance without adjudicating non-Indians. *Id.* at 204.

Petitioner is exactly the type of defendant Congress envisioned when penning § 904 of VAWA 2013. He is married to a citizen of the Amantonka Nation, works in one of the businesses owned by the Nation, and lives within the Indian Country of the Amantonka Nation. He is not Indian by blood, and would have been unreachable by the tribe's judicial system prior to the enactment of VAWA 2013 and the extension of the SDVCJ. The congressional intent of the legislation is to address the widespread endemic violence that women in Indian Country experience. S. Rep. 112-53, at 9 (2012). The legislation is drafted in such a way as to include in the special jurisdiction of the tribe only those defendants who have voluntarily made ties with the community of the tribe via a relationship with a member of the tribe or an Indian residing in the participating tribe's Indian Country or work or live in Indian Country. Petitioner is a non-Indian under the controlling case law of the United States, even though he is a naturalized member of the tribe. Petitioner is accused of an act of violence against his wife, is a member of the tribe, and is subject to the concurrent jurisdiction of the federal government under the General Crimes Act and SDVCJ of the participating tribe. 18 U.S.C. § 1152; 25 U.S.C. § 1304.

Because Petitioner can only be prosecuted by the tribe under the SDVCJ, he is entitled to the same substantive rights as a criminal defendant in state or federal court. S. Rep. No. 112-53, at 10 (2012). Petitioner is among the group of defendants described by § 904 of VAWA

2013, a person who has "voluntarily and knowingly" established significant ties to the tribe and not of Indian blood himself. *Id*. Tribes are able to respond to the issue of domestic violence in their own courts but must do so under the law of the United States, and thus must apply the special jurisdictional rules of § 904 of VAWA 2013 as codified in 25 U.S.C. § 1304.

C. The appropriate standard of review for jurisdictional issues is de novo.

Jurisdictional issues require *de novo* review, "[t]he extent of tribal court subject matter jurisdiction over claims against nonmembers of the Tribe is a question of federal law which we review *de novo*." *Belcourt Pub. Sch. Dist. v. Davis*, 786 F.3d 653, 657 (8th Cir. 2015). The jurisdiction the Amantonka Nation may properly proceed under stems only from the congressional authorization for Special Domestic Violence Criminal Jurisdiction (SDVCJ) found in VAWA 2013. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904 (codified as 25 U.S.C. §1304 (Supp. V 2017)) ("A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct.").

Because criminal jurisdiction has been unavailable to tribes over non-Indians for most of recent history, there is little case law regarding the SDVCJ. While tribes do have some jurisdiction over civil matters involving non-Indians, these are also slim and generally explicit exceptions to the larger rule. *Belcourt Pub. Sch. Dist*, 786 F.3d at 657. These exceptions include some authority to tax, license, or regulate those who enter into voluntary commercial transactions with tribes or those whose actions threaten the "political integrity, the economic security, or the health or welfare of the tribe." *Id.* This second exception is narrowed by the courts so as to not make irrelevant the general rule that tribes do not retain inherent jurisdiction over non-Indians. *Id.* at 660.

Courts carefully scrutinize tribal authority to adjudicate non-Indians in civil matters. *Id*. at 661. In *Belcourt Public School District v. Davis*, the Belcourt School District objected to the tribe asserting jurisdiction under the exceptions to the general rule. *Id*. at 655. The Eighth Circuit Court reviewed the case de novo as the proper review standard of a tribal jurisdictional issue. *Id*. at 657. The court found that neither exception had been proved by the tribe, and thus the tribe did not have jurisdiction over the non-Indian Belcourt School District. *Id.* at 661.

In federal courts, issues of Indian status have been recently treated as elements of the offense, although also essential for subject-matter jurisdiction. *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009). The defendant in *Stymiest* claimed that because he was not an Indian, he could only be properly prosecuted in state court, and not under the Major Crimes Act governing certain offenses against Indian victims by Indians. *Id.* at 763. The Eighth Circuit reviewed the appeal *de novo* not based on jurisdiction, but on the sufficiency of the evidence of a criminal element. *Id.* at 764. The defendant was an Indian under the *Rogers/Bruce* test, and it was shown in the record that the defendant had (1) Indian blood and (2) held himself out as Indian, as well as made use of the tribe's healthcare.

De novo review is proper in the instant case as a jurisdictional issue. Petitioner is not Indian under the law, and the Amantonka Nation courts did not appropriately apply the SDVCJ as per VAWA 2013 as codified by 25 U.S.C. § 1304. The status of Petitioner excludes him from the tribe's jurisdiction under all other statutes and case law.

If the Court finds that this issue is one of a criminal element and not of jurisdiction, the standard of review remains *de novo*. Petitioner argued from the outset that he was not Indian and has properly appealed his conviction on the matter of his status as non-Indian. That

Petitioner has no Indian ancestry is undisputed (R. at 8), and therefore he cannot be Indian in light of all of the evidence, even viewed in a light most favorable to the Amantonka Nation.

II. THE PUBLIC DEFENDER PROVIDED TO PETITIONER BY THE AMANTONKA NATION DOES NOT SATISFY THE LEGAL REQUIREMENTS FOR EFFECTIVE ASSISTANCE OF COUNSEL FOR AN INDIGENT DEFENDANT.

The United States Court of Appeals for the Thirteenth Circuit erred in reversing the decision of the U.S. District Court for the District of Rogers and instructing that Petitioner's petition for a Writ of Habeas Corpus filed be denied. The proceedings that led to Petitioner's conviction are governed by the Indian Civil Rights Act (ICRA) as amended by the Tribal Law and Order Act of 2010 and the Violence Against Women Reauthorization Act of 2013, and as such may only be reviewed by federal courts through the lens of a habeas corpus claim. The protections guaranteed under the Violence Against Women Reauthorization Act (VAWA 2013) should be construed coextensively with their constitutional counterparts to create a comprehensive right to effective assistance of counsel for indigent defendants. The public defender provided to Petitioner by the Amantonka Nation does not meet the VAWA 2013 requirements of being an effective bar-licensed attorney. Petitioner's conviction is in violation of his federal civil rights, and this Court should hold that his court-appointed public defender does not satisfy the relevant legal requirements for effective assistance of counsel for an indigent defendant.

This Court has long held that "review by way of habeas corpus would adequately protect the individual interests at stake" in civil rights claims following tribal court convictions "while avoiding unnecessary intrusions on tribal governments." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 67 (1978). However, as Justice White noted in his *Santa Clara Pueblo*

dissent, "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." 436 U.S. at 73 (White, J., dissenting) (internal citations omitted).

Relief is much needed in the present case. As shown above, Petitioner is non-Indian for the purposes of criminal jurisdiction, so the District Court for the Amantonka Nation was able to adjudicate the case against him solely by exercising Special Domestic Violence Criminal Jurisdiction (SDVCJ). Petitioner requested indigent defense counsel to represent him on the charges of domestic violence. The Amantonka Nation appointed a public defender to represent Petitioner. Under the relevant legal standards for effective assistance of counsel for an indigent defendant, this public defender is not sufficiently qualified. The Amantonka Nation's exercise of SDVCJ triggers procedural protections beyond those required by ICRA's general provisions. Rather, this tribal court proceeding is governed by the ICRA as amended by the Tribal Law and Order Act of 2010 (TLOA) and VAWA 2013. The amendments of the TLOA, as incorporated by reference in VAWA 2013, specifies the type of legal assistance required for indigent defendants: effective assistance of bar-licensed attorneys.

The first section below will examine the governance of the ICRA, VAWA 2013, and the Unites States Constitution over this matter and identify which of Reynolds' federal civil rights were violated by his conviction. The following section will demonstrate how the public defender appointed to represent Petitioner was not qualified to serve as counsel under the terms set out in VAWA 2013 and defined by federal courts.

A. This tribal court proceeding is governed by the Indian Civil Rights Act as amended by the Tribal Law and Order Act of 2010 and Violence Against Women Reauthorization Act of 2013.

Although the Amantonka Nation was able to exercise jurisdiction over a non-Indian in this matter, the tribal court proceeding is still subject to the federal guidelines of the ICRA. Prior to the 1968 introduction of the ICRA, tribes were "regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority" and it was thought that "[t]he Bill of Rights ... therefore, does not apply in tribal-court proceedings." *United States v. Bryant*, 136 S.Ct. 1954, 1962 (2016) (quoting *Santa Clara Pueblo*, 436 U.S. 49). The ICRA included some, but not all, of the protections of the Bill of Rights and, for the first time, imposed limitations on tribal governments. *See Santa Clara Pueblo*, 436 U.S. at 57. Ten years after the introduction of ICRA, this Court sustained Congress's authority to impose ICRA limitations on tribal government powers. *Id*. at 58-59.

The ICRA was not dramatically amended until 2010, with the passage of the TLOA. Prior to the TLOA of 2010 and subsequent VAWA 2013 amendments, the ICRA did not require tribes to provide indigent defendants with appointed counsel or guarantee tribal court defendants the right to effective assistance of counsel. *Compare* 25 U.S.C. § 1302 (2006) *with* 25 U.S.C. § 1302 (2012). The TLOA modified the ICRA to grant criminal defendants the right to assistance of counsel, and to provide indigent defendants with counsel in the event they are sentenced to a term of imprisonment longer than a year. 25 U.S.C. § 1302(c) (2012).

1. Although Petitioner was sentenced to incarceration for a period less than one year, the Amantonka Nation's exercise of Special Domestic Violence Criminal Jurisdiction triggers procedural protections beyond those required by ICRA's general provisions.

Petitioner's sentence included only a seven-month incarceration, far below the one-year-plus threshold of the TLOA, but he is entitled to the same enhanced procedural protections all the same. This is because the ICRA was amended again when Congress passed VAWA 2013. Under this new amendment, tribes must ensure that VAWA 2013 defendants are provided with effective assistance of bar-licensed counsel, and, if a defendant is indigent, they must also provide said counsel at tribal expense if a term of imprisonment of *any* length may be imposed. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904 (codified as 25 U.S.C. §1304 (Supp. V 2017)). VAWA 2013 specifically guarantees defendants "the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys." 25 U.S.C. § 1302(c). This extends the right to be represented by professional counsel to indigent defendants, such as Petitioner, who would not otherwise be shielded.

Until the VAWA 2013 amendment, the ICRA required the appointment of counsel for indigent defendants in tribal court for prosecutions that resulted in incarceration for greater than one year. *United States v. Gillette*, No. 3:17-CR-30122-RAL, 2018 WL 3151642 at *4 (D.S.D. Jan. 29, 2018). Therefore, "if a tribe decide[d] not to provide for a right to appointed counsel through its own laws, indigent defendants ha[d] no constitutional or statutory right to the appointment of counsel" unless the sentence imposed by the tribal court was greater than one year." *Id*.

As discussed above, the special jurisdiction granted to tribes in VAWA 2013 is the only avenue through which the Amantonka Nation has any jurisdiction over Petitioner. Therefore, it is the procedural protections of this special jurisdiction that must be granted. The VAWA 2013 amendments to the ICRA govern all SDVCJ proceedings. As such, the right to effective assistance of bar-licensed counsel is guaranteed, at government expense, to all indigent defendants. Despite exercising SDVCJ, the Amantonka Nation did not comply with the duties articulated in VAWA 2013, however. The public defender provided to Petitioner does not satisfy the legal requirements for effective assistance of counsel for an indigent defendant.

2. The heightened procedural requirements of the VAWA 2013 amendment should be construed coextensively with their constitutional counterparts to ensure that non-Indian defendants subject to tribal jurisdiction will not be procedurally disadvantaged by being tried in tribal court.

While it is true that tribes are generally regarded as unconstrained by the provisions of the United States Constitution and its amendments, these federal protections of individual liberties cannot be entirely ignored when examining the VAWA 2013 amendment to the ICRA. Indeed, the protections of the Constitution are invoked not once, but twice, while laying out the protections guaranteed to VAWA 2013 defendants. Petitioner's prosecution under VAWA 2013 special jurisdiction entitles him to the same substantive rights as a criminal defendant in state or federal court, and it should be understood as such. S. Rep. No. 112-53, at 10 (2012).

VAWA 2013 first requires that tribes appoint counsel at public expense to indigent defendants, to ensure defendants receive effective assistance of counsel "at least equal to that guaranteed by the United States Constitution" 25 U.S.C. § 1302(c). Additionally, Congress included a second catch-all provision in the VAWA 2013 amendments to ICRA, extending to

VAWA 2013 defendants "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant." 25 U.S.C. § 1304(d)(4). This Congressional incorporation of constitutional provisions into the VAWA 2013 indicates that the protected rights should be construed coextensively with their constitutional counterparts to ensure that non-Indian defendants subject to tribal jurisdiction will not be disadvantaged by receiving fewer protections in tribal court than they would in state or federal court.

A VAWA defendant's right to counsel should therefore be understood in the terms of the Sixth Amendment as interpreted by this Court. This Court first recognized the right to counsel protected by the Sixth Amendment as a fundamental right protected by the Fourteenth Amendment in 1963 with *Gideon v. Wainwright*. 372 U.S. 335 (1963). *Gideon*, of course, held that the Constitution requires appointment of counsel at public expense for indigent defendants charged with serious offenses. 372 U.S. at 339. Later, this Court extended the Gideon right to counsel at public expense to indigents in misdemeanor cases that result in either actual imprisonment, no matter how brief, or in a suspended sentence that includes a term of imprisonment. *See Argersinger v. Hamlin*, 407 U.S. 25, 33 (1972) ("We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more."); *Scott v. Illinois*, 440 U.S. 367 (1979) (affirming *Argersinger*).

The intentional incorporation of constitutional protections into the VAWA 2013 amendment to the ICRA is a strong indication that Congress meant for the indigent defendant's

right to assistance of counsel to be interpreted hand-in-hand with the Sixth Amendment. This ensures that non-Indian defendants, such as Petitioner, are not procedurally disadvantaged by being tried in tribal court rather than in state or federal court where their rights would be guaranteed by the United States Constitution.

B. The TLOA, as incorporated by reference in VAWA 2013 guarantees effective assistance of bar-licensed attorneys to indigent defendants.

VAWA 2013 defendants such as Petitioner, who face any length of incarceration for domestic violence charges, are entitled to the same right to counsel as defined by the TLOA amendments to ICRA. This effective assistance of counsel must be "least equal to that guaranteed by the United States Constitution" and is defined as an "attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys." 25 U.S.C § 1302(c)(1) – (2) (2012). Petitioner has a right to assistance to a defense from a professional attorney who satisfies the requirements of the referenced constitutional standards. The public defender provided to Petitioner by the Amantonka Nation is not appropriately licensed under the relevant legal requisites, and the minimal requirements to serve as a public defender under the Amantonka Nation Code are more analogous to a lay counselor than a professional attorney.

1. The public defender provided to Petitioner by the Amantonka Nation is not appropriately licensed under the relevant legal requirements.

The Amantonka Nation failed to provide Petitioner with indigent defense counsel that was appropriately licensed under the relevant legal standards. Through the language stating counsel must be "licensed to practice law by any jurisdiction in the United States," the VAWA

2013 amendment guarantees indigent non-Indian defendants the right to representation by a bar-licensed attorney. 25 U.S.C § 1302(c)(2). During his prosecution however, Petitioner was not granted the assistance of an appropriately-licensed defense counsel.

Judge Colloton of the Eight Circuit provided a clear and practicable definition of licensed counsel in his partial dissent in *United States v. Long*. 870 F.3d 741, 749 (8th Cir. 2017) (Colloton, J., concurring in part and dissenting in part). He first noted that the "ordinary meaning of 'counsel' in the legal context conveyed by the phrase 'represented by counsel' is a lawyer." *Id*. He then cited Webster's definition of the term "counsel" as "'a lawyer engaged in the trial or management of a cause in court.'" *Id*. (citing *Webster's Third New International Dictionary* 518 (1993)). Finally, he references Black's Law Dictionary stating that "counsel" means "[o]ne or more lawyers who represent a client," and that "lawyer" means "[o]ne who is licensed to practice law." *Id*. (citing *Black's Law Dictionary* 352, 895 (7th ed. 1999)). Judge Colloton ultimately asserted that "[c]ourts ordinarily use the term in the same way." *Id*.

This issue was examined in *United States v. Tools*, when the question before the court was "whether a tribal public defender, who is not a licensed professional attorney but who appears in tribal court, is 'counsel' within the meaning of the Sixth Amendment." No. CR. 07-30109-01-KES, 2008 WL 2595249 at *5 (D.S.D. June 27, 2008). The court held that that the word "counsel" as used in the Sixth Amendment (and later incorporated in VAWA 2103) is in reference to a "licensed professional attorney" and not to legal assistance of other means. *Id*. at *8. The court drew attention to the key differences between the lack of qualifications of Tools' counsel and the credentials of counsel in previously decided case, *United States v. Red Bird*. *Id*. at 7 (referencing 146 F. Supp. 2d 993 (D.S.D. 2001) aff'd sub nom. *United States v.*

Bird, 287 F.3d 709 (8th Cir. 2002)). While the defendant in *Red Bird* "had been appointed an attorney who was licensed to serve him in both tribal and federal court," Tools was appointed "counsel who is not licensed to practice law and therefore, could only serve him in tribal court and not federal court." *Id*. It was this disparity in the licensing of the two individuals serving as counsel that caused the court to draw such a distinction between the two cases. *Id*.

Membership to a tribal bar is shown to be a secondary qualification to being a licensed attorney in *United States v. Gillette*. No. 3:17-CR-30122-RAL, 2018 WL 3151642 (D.S.D. Jan. 29, 2018). The defendant here was found to have been granted effective assistance of counsel because he "had been appointed a licensed attorney and member of the tribal bar to represent him." *Id*. at *5. The court held that the defendant's counsel was appropriately qualified because counsel was a professional attorney who was licensed in both state and tribal court. *Id*. The court further stated that it matters less which state the attorney is licensed in, and more that the attorney is bar licensed in accordance with the ICRA. *Id*.

Upon Petitioner's request for indigent defense counsel, the Amantonka Nation appointed one of its own public defenders to represent him. This public defender possesses a JD degree from an ABA accredited law school, but is not a member in good standing of any state or federal bar. Rather, Petitioner's counsel was administered an exam by the Amantonka Nation's Executive Board. These credentials are most similar to those of the counsel in *Tools*. Far from being appointed a professional, licensed attorney who would be able to serve him in state or federal court, Petitioner was saddled with a public defender who is only minimally qualified to practice in tribal court. Without a state or federal bar membership, this public defender is not "licensed to practice law by any jurisdiction in the United States that applies

appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys." 25 U.S.C § 1302(c)(2). As such, the public defender provided to Petitioner by the Amantonka Nation is not appropriately licensed under the relevant legal requirements.

2. The minimal requirements for a public defender under the Amantonka Nation Code are more analogous to a lay counselor than to a professional attorney.

The requirements to serve as a lay counselor and as a public defender under the Amantonka Nation Code are substantially similar. These minimal requirements render Amantonka Nation public defenders more akin to lay counselors than to attorneys. VAWA 2013 guarantees "effective assistance of counsel at least equal to that guaranteed by the United States Constitution." 25 U.S.C § 1302(c)(1). This guarantees Petitioner the right to a professional attorney, but the public defender appointed to him by the Amantonka Nation is more analogous to a lay counselor.

It has long been recognized that that the term "counsel" as referenced in the Sixth Amendment, Sixth Amendment "does not include a lay person, rather 'counsel' refers to a person authorized to the practice of law." *See United States v. Grismore*, 546 F.2d 844 (10th Cir.1976); *United States v. Cooper*, 493 F.2d 473 (5th Cir. 1974); *Guajardo v. Luna*, 432 F.2d 1324 (5th Cir. 1970); *Harrison v. United States*, 387 F.2d 203 (1967); *McKinzie v. Ellis*, 287 F.2d 549 (5th Cir. 1961). This Court held that "[t]here is a clear distinction between licensed legal counsel and lay representation under the Sixth Amendment." *Wheat v. United States*, 486 U.S. 153, 159 (1988). This Court further stated that "[r]egardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients. . . in court." *Id*.

The issue of representation by professional attorney rather than lay counsel in tribal court was heard by the Ninth Circuit in 1974. In *Settler v. Lameer*, the petitioner contended that "the Tribal Court had violated his constitutional rights by denying him the right to professional counsel" 507 F.2d 231, 240 (9th Cir. 1974). At the time of his prosecution, the Law and Order Code of the Yakima Indian Nation prohibited representation by "professional attorneys" in Tribal Court. *Id*. Defendants were instead offered lay counsel representation by members of the tribe. *Id*. The court held that, because the criminal proceedings took place before the enactment of the original ICRA there could be no violation of a defendant's right to counsel. *Id*. at 242. This opinion nonetheless drew a distinction between proper representation by a professional attorney and representation by a lay person. *Id*. at 240.

Conversely, the court in *United States v. Red Bird*, held that representation by a licensed attorney from the tribal public defenders' office was sufficiently qualified under the ICRA. 146 F.Supp. 2d at 995. The court made an important observation in this opinion, that "the Rosebud Sioux Tribe is unusual in providing an attorney admitted to practice." *Id*. at 997. More often, tribes do not provide this right, and "[d]efendants in these other tribal courts are 'represented' by an 'advocate', a non-lawyer." *Id*. The court took great notice of this exception to the norm in its holding. *Id*.

In the case at hand, Petitioner was appointed representation from the Amantonka Nation Public Defenders' Office. The Amantonka Nation Code lists only six requirements for serving as a public defender, four of which are identical to the qualifications needed to practice as a lay counselor. The Amantonka Nation requires all of its lay counselors and public defenders to be at least twenty-one years of age, be of high moral character, not have been

dishonorably discharged from the Armed services, and to have successfully completed an exam set by the Amantonka Nation's Executive Board. Amantonka Nat. Code Tit. 2 §§ 501(b), 607(a). The Amantonka Nation's additional requirements are that all public defenders be physically able to carry out the duties of office and that they must have training on Amantonka law and culture. Amantonka Nat. Code Tit. 2 § 607(a).

The Amantonka Nation Code self-certifies that:

> A public defender who holds a JD degree from an ABA accredited law school, has taken and passed the Amantonka Nation Bar Exam, and who has taken the oath of office and passed a background check, is sufficiently qualified under the Indian Civil Rights Act to represent a defendant imprisoned more than one year and any defendant charged under the Nation's Special Domestic Violence Criminal Jurisdiction.

Tit. 2 § 607(b). This is a statement that simply is not true. The requirements to serve as a public defender in the Amantonka Nation do not include individuals being appropriately licensed as attorneys. In fact, these public defenders are not required to be attorneys at all. They share qualifications with lay counselors, and as such do not meet the definition of counsel as referenced in the Sixth Amendment and promised to VAWA 2013 defendants. Petitioner is guaranteed the right to representation by a professional attorney, and the lay counselor provided by the Amantonka Nation is not adequate.

CONCLUSION

This Court should REVERSE the lower court's judgment, as the Petitioner is a non-Indian for the purposes of criminal jurisdiction, and therefore, the public defender appointed by the Amantonka Nation is insufficient counsel under the standard required by the Violence Against Women Reauthorization Act of 2013.