No. 19-231

IN THE
SUPREME COURT OF THE UNITED STATES
MARCH TERM 2019

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ROBERT R. REYNOLDS,
Petitioner,

v.

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

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

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BRIEF FOR RESPONDENTS

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Team No. 547

Counsel for Respondents

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QUESTIONS PRESENTED

I. Whether Petitioner is a non-Indian for purposes of Special Domestic Violence Criminal Jurisdiction.

II. Whether Petitioner's court-appointed attorney satisfied the relevant legal requirements.

STATEMENT OF THE CASE

I. Statement of the Facts

This appeal arises out of the improper assertions of Petitioner Robert R. Reynolds. Petitioner is an Indian for the purposes of criminal jurisdiction and that his court-appointed attorney was adequate as a matter of law.

Petitioner met his wife Lorinda at the University of Rogers where, at the time, Petitioner was a non-Indian and Lorinda was (and still is) a citizen of the Amantonka Nation, a federally recognized tribe. Record on Appeal ("ROA") at 6. They married after graduation and were employed on the Amantonka Nation Reservation where they also lived in an apartment in the tribal housing complex. Id. Two years into their marriage, Petitioner successfully applied to become a naturalized citizen of the Amantonka Nation, took an oath of citizenship, and received his Amantonka Nation identification card. Id.

A year later, Petitioner lost his job when it went out of business, which left him unemployed for ten months. Id. During that ten month period, Petitioner began drinking heavily and became verbally abusive towards his wife, to which the police were called. Id. On June 15, 2017, Amantonka Nation police responded to a call at the Reynolds' tribal housing apartment and discovered that Petitioner struck his wife across the face with an open

palm and so much force it caused her to fall where she then struck a coffee table and broke a rib. Id.

The responding officer arrested Petitioner and transported him to the Amantonka Nation Jail where the chief prosecutor filed a complaint charging Petitioner with "Partner or family member assault" under Title 5 Section 244 of the Amantonka Nation Code. Id. at 6-7.

II. Statement of the Proceedings

Following the charges by the chief prosecutor, Petitioner filed three pretrial motions in the District Court for the Amantonka Nation all of which were denied. ROA at 3. His first pretrial motion sought to dismiss the charges because he is a non-Indian and the Amantonka Nation lacks criminal jurisdiction over him. Id. This was denied by Judge Elizabeth Nelson because Petitioner was a citizen of the Amantonka Nation and therefore an Indian. Id.

Petitioner's second pretrial motion sought to have an attorney appointed to him because as a non-Indian accused of domestic violence against an Indian in Indian country, Petitioner claimed he required the Amantonka Nation's exercise of Special Domestic Violence Criminal Jurisdiction as provided for in 25 USC § 1302. Id. Judge Nelson denied this motion on the grounds that Petitioner was a member of the Amantonka Nation and, therefore, an Indian. Id.

Petitioner's third pretrial motion alleged that his court-appointed counsel was insufficiently qualified to serve as his counsel violating Equal Protection requirements. Id. at 3-4. Petitioner argued that Equal Protection required that his attorney possess the same qualifications as an attorney representing a non-Indian in that his court-appointed attorney must be a member of the state bar association. Id. at 4. Judge Nelson denied this motion on the grounds that his defense counsel was sufficiently qualified. Id.

A jury of the District Court for the Amantonka Nation then found Petitioner guilty, and he was sentenced to seven months incarceration, $5300 restitution to his wife, batterer rehabilitation and alcohol treatment programs, and a $1500 fine. Id. at 5 Petitioner appealed to the Supreme Court of the Amantonka Nation where they affirmed his conviction. Id. at 7.

Petitioner filed a petition for a writ of habeas corpus in the U.S. District Court for the District of Rogers. Id. at 8 The U.S. District court granted his petition on the grounds that Petitioner possesses no Indian blood and therefore failed to provided Petitioner with indigent defense counsel as required under the Violence Against Women Act of 2013 ("VAWA 2013"). Id.

Respondents filed an appeal in the U.S. Court of Appeals, and in a per curium decision, the Court reversed the decision of the U.S. District Court and remanded with instructions to deny Petitioner's writ of habeus corpus. Id. at 9.

Petitioner then filed for a writ of certiorari to this honorable court.

SUMMARY OF ARGUMENT

Petitioner qualifies an Indian because of there not being a clear federal definition that he cites which would define his status as an Indian. The Supreme Court's past decisions distinguish the racial definition from the political definition, which allows tribes to define Indian based on membership.

Additionally, Petitioner's claims regarding adequacy of his appointed attorney should be rejected. First, the Bill of Rights and the Constitution are not the primary sources of law governing criminal procedures. Tribal jurisdiction comes directly from federal statute and tribal code. Second as a matter of law, the Amantonka Nation Code sufficiently ensures that attorneys appointed to indigent, non-Indian defendants meet the minimum requirements of

VAWA 2013. If classified as a non-Indian, Petitioner has sufficient ties to the Amantonka Nation and the Amanatonka Nation Code aligns with VAWA 2013 for non-Indian defendants. Third as a matter of law, the Amantonka Nation Code sufficiently ensures that attorneys appointed to indigent, Indian defendants meet the minimum requirements of ICRA and TLOA and does not violate Petitioner's Equal Protections rights. ICRA and TLOA use specific requirements of the Constitution to determine adequacy of appointed counsel, but the Constitution does not control entirely. Fourth, Petitioner cannot make a Strickland ineffective assistance of counsel claim because he makes no argument of any error committed by his defense counsel is no evidence of such ineffectiveness is apparent.

ARGUMENT

I .The Supreme Court Has Made Distinctions for Defining Indian by Race or Political Association Allowing Tribes to Determine Membership.

Since the inception of Federal Indian Law, the Supreme Court has acknowledged that, in addition to being an ethnic demographic, "Indians" or communities of Indians were also political entities whose powers were distinct from that of the United States of America. Worcester v. Georgia, 31 U.S. 515, 559 (1832) ("Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial"). While the term "Indian" has carried both racial and political connotations since that time, a distinction between the term "Indian" as referring to a racial demographic, and its use as it applies to a political classification was drawn through the seminal case of Morton v. Mancari and its subsequent progeny. 417 U.S. 535 (1974).

In Mancari, the plaintiff class challenged the Bureau of Indian Affairs' Indian preferencing policies for employment opportunities. Id. at 539. Such policies were implemented through the instruction of the Indian Reorganization Act of 1934, which the plaintiffs challenged the validity of in light of both the Fifth Amendment, and the Equal Employment Opportunity Act of 1972, which, inter alia, forbade employment discrimination on the basis of race. Id. at 545-547. Relevantly, the Indian Reorganization Act defines "Indian" not only as being a member of a federally recognized tribe, but also through ancestry as well as blood quantum. 25 USC § 5129 (1934) ("The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood").

Finding in favor of the defendant, the Court held that the statutory provisions constituted neither racial preferencing nor racial discrimination. Mancari, 417 U.S. at 553-554. Despite the definition of "Indian" having been applied to those individuals who both hail from federally recognized tribes and meet the requisite blood quantum requirements, the court still distinguished membership in a federally recognized tribe as being the defining and relevant factor for analysis. Id. at 553 n. 24. Based on the Court's interpretation, the "preference, as applied, [was] granted to Indians not as a discrete racial group, but rather, as members of quasi-sovereign tribal entities[.]" Id. at 554.

The Mancari decision then distinguishes between "Indian" as a racial classification, and "Indian" as a political classification. This delineation was affirmed in the successive case of Rice v. Cayetano. 528 U.S. 495 (2000). In Rice, the plaintiff challenged a state law that

allowed only Hawaiians to vote for the trustees of its Office of Hawaiian Affairs agency, thus leading to his exclusion and infringement upon his constitutional rights. Id. at 510-511. In defense of this law, the then-governor of Hawaii argued that this case was analogous to Mancari on the basis that the "[Office of Hawaiian Affair's] voting structure was valid even if considered to be racial, because native Hawaiians comprised a political group similar to Native Americans, whose 'quasi-sovereign' authority had been recognized by the U.S. Supreme Court." Melody MacKenzie, Native Hawaiian Law: A Treatise, 284-285 (2015) (citing Rice, 528 U.S. at 518). Rejecting this argument, the Court ultimately found that there was no precedential basis for conferring the status of "Indians in organized tribes" to that of native Hawaiians as a racially-identified group, thus invoking constitutional protections. Rice, 528 U.S. at 518-519, 523-524.

B. The federal definitions

Despite Petitioner's claim that he must possess a certain degree of blood to qualify as an Indian based on federal requirements, federal law varies as to its definitions of "Indian." When examining federal law, the Code of Federal Regulations contain twenty-nine total provisions defining "Indian" in Chapter 25.[1] CFR Chapter 25, Indians. Of these twenty-nine provisions, only four absolutely require fractional blood status, while twelve only require status as a tribal member, and seven allow for either membership or blood status. Id. When federal legislation is taken into consideration, forty-four different provisions of the United States Code either contain or cite to a definition of "Indian." Of these forty-four provisions, only four define the term by blood requirements, while twelve define individuals as Indians by either tribal recognition and fourteen by either blood status *or* tribal membership. USC

[1] The definitions of "individual Indian," "Indian child," and "Indian student" were counted towards this numeric data.

Titles 20 Education, 25 Indians, 29 Labor, 38 Veteran's Benefits, 42 The Public Health and Welfare. For purposes of this case, Title 18, Crimes and Criminal Procedure, discuss the application of the criminal law to Indians, but noticeably does not provide a clear and uniform definition for who qualifies as an Indian. USC Title 18. The defendant additionally cites to the Indian Civil Rights Act of 1968 as being applicable to his rights as a criminal defendant in Indian Country, however, even the ICRA's definition of "Indian" is not clear. 25 USC § 1301(4) ("Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies").[2]

The federal government defines status as an "Indian" in many different ways, primarily through membership. As such, it would not be out of the question for this court to find that he is an Indian, especially in light of the term also being a political classification distinct from race.

The Petitioner has argued he does not qualify as an "Indian" based on the federal definition of the term, which he claims requires "some degree of Indian blood and [recognition] as a member of a tribal community." ROA at 7. No definitions were cited in

[2] 25 USC § 1153 only states the following, without defining the term "Indian": "
Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [18 USCS §§ 2241 et seq], incest, a felony assault under section 113 [18 USCS § 113], an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title [18 USCS § 661] within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense."

support of this claim, leaving which federal definition the Petitioner was referring to open to interpretation. In support of his argument, it ought be acknowledged that other federal circuits have defined "Indian" by both federal recognition and ancestry or fractionalized degrees of blood. See, United States v. Ramirez, 537 F.3d 1075 (9th Cir. 2008); United States v. Diaz, 679 F.3d 1183, 1187 (10th Cir. 2012). However, these decisions are beyond the jurisdiction of the Thirteenth Circuit and are therefore non-binding. Federal statutory law that defines "Indian" by both federal recognition and ancestral or racial ties vary by provision and application, and do not necessarily apply to this particular case. Moreover, as noted above, even where definitions necessitating blood or ancestral requirements apply, this Court has still chosen in the past to distinguish "Indians" based on tribal membership as a political class. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

This Court's decision in Santa Clara Pueblo supports the legitimacy of the Amantonka Nation's policy of integrating its members' spouses into the tribe, thus, further legitimizing the Defendant's Amantonka citizenship and status as an Indian for purposes of a politically-defined relationship. Id. The plaintiffs, a member of the Santa Clara Pueblo and her daughter, brought suit against the Pueblo for tribal membership ordinance that denied matrilineal tribal membership to children of female tribal members who married non-tribal members. Id. at 52-53. The ordinance accordingly did not place the same membership restrictions did not apply to patrilineal lineage wherein the father married someone outside of the tribe. Id. On the merits, the Federal District Court for the District of New Mexico found in favor of the Santa Clara Pueblo, and on appeal, the Tenth Circuit Court of Appeals reversed the decision in favor of the plaintiffs. Id. at 53-55.

On appeal, the Supreme Court primarily analyzed the extent of federal jurisdiction and federal remedies for individual Indian parties granted by the Indian Civil Rights Act, especially when the contentions at issue were based primarily on the Indian nation's tribal law. Id. at 55-72 (citing ICRA, 25 USC §§ 1301-1341 (1968). The Court's reversal of the Tenth Circuit's decision exemplified an implicit agreement with the district court's decision on the merits; that the ordinance embodied the traditional values of the tribe in a way that was "still significant in tribal life," and that it was a form of "self-definition." Santa Clara Pueblo at 54.

The Court's analysis of, and ultimate reluctance to extending federal remedies beyond habeas corpus review to individual Indians against tribal governments further illustrated its recognition of, and inclination towards upholding tribal governments' powers of self-determination. Id. at 52-72. It ultimately stated that a "tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community," and further warned against "rushing" to create causes of action that would interfere with such criteria given the "often vast gulf between tribal traditions and those with which federal courts are more intimately familiar." Id. at 49, 72 n. 32 (1978)(citing Roff v. Burney, 168 U.S. 218 (1897); Cherokee Intermarriage Cases, 203 U.S. 76 (1906).

In this case, the Amantonka Nation, within its rights as a quasi-sovereign, self-governing entity, has established a means of defining its membership. Similar to that of the Santa Clara Pueblo, the Amantonka Nation has defined its terms of membership through its tribal code, and through its naturalization process, it has sought to do so in a way that it has deemed culturally and traditionally appropriate to its cultural identity. See, Reynolds v.

Amantonka Nation, No. 17-198 at 2 ("The Amaontonka Nation has a long history of welcoming into the tribe those who marry tribal members"); Amantonka Nation Code Title 3, Chapter 2 Naturalization, §§ 201-203. Under facts analogous to that of the Santa Clara Pueblo case, precedent then favors a finding that the Amantonka Nation's terms of membership and naturalization have been legitimately determined. Furthermore, this interpretation of "Indian" as a political status rather than a racial classification is legitimized through this Court's past decisions in both Morton and Rice.

II. Petitioner's Court-Appointed Attorney Satisfies the Requirements for Effective Assistance of Counsel Under Both the Non-Indian Indigent Defendant Classification of the Violence Against Women Act of 2013 and the Indian Indigent Defendant Classification of the Indian Civil Rights Act as Amended by the Tribal Law and Order Act.

A. Federal Statutes and Tribal Code Control A Tribe's Criminal Jurisdiction and Procedure Not the Bill of Rights and the Constitution.

The Sixth Amendment of the Constitution makes it seemingly simple; "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic]." U.S. Const. amend. VI. The Supreme Court in Powell v. State of Ala. established the right to effective counsel as fundamental calling it "vital and imperative." 287 U.S. 45, 71 (U.S. 1932) . So fundamental is this right, that the Supreme Court in Gideon v. Wainwright extended it to indigent defendants at public expense. 372 U.S. 335, 344-45 (1963).

The right immediately becomes more complicated, however, with its limitations as the Supreme Court applies the right only to cases in which defendants may be imprisoned for any amount of time and not all manners of crime. See Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.").

Further, the right to effective counsel becomes outrightly complicated with tribes. The Constitution and therefore the Sixth Amendment do not directly apply in Indian country as "Indians are acknowledged to have an unquestionable, and heretofore an unquestioned right to the lands they occupy" extinguished only by a "voluntary cession" to the United States. Cherokee Nation v. State of Ga., 30 U.S. 1, 2, (U.S.,1831). See also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 509 112 L.Ed.2d 1112 (1991) ("Indian tribes are domestic dependent nations that exercise inherent sovereign authority (quotations and citations omitted).") Tribes never ratified the Constitution, and they existed prior to the Constitution's existence. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). As the Supreme Court in Michigan v. Bay Mills Indian Community held, "unless and "until Congress acts, the tribes retain" their historic sovereign authority." 572 U.S. 782, 788 (U.S., 2014) citing United States v. Wheeler, 435 U.S. 313, 323 (1978). As held in United States v. Bryant, "[a]s separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. The Bill of Rights ... therefore, does not apply in tribal-court proceedings. 136 S. Ct. 1954, 1962 (2016). The right to appointed counsel in tribal court is controlled instead by tribal code and federal law. Jordon Gross,

VAWA 2013's Right To Appointed Counsel in Tribal Court Proceedings--A Rising Tide That Lifts All Boats or a Procedural Windfall for Non-Indian Defendants? 67 Case W. Res. L. Rev. 379, 380 (2016).

The federal laws controlling are the Violence Against Women Act of 2013 ("VAWA 2013") and the Indian Civil Rights Act ("ICRA") as amended by the Tribal Law and Order Act ("TLOA"). The Supreme Court of the Amantonka Nation's decision should be affirmed as Petitioner's appointed attorney was adequate as a matter of law under the federal standards established by VAWA in the event this court characterizes Petitioner as a non-Indian and under ICRA and TLOA in the event this court characterizes Petitioner as Indian. Furthermore, Petitioner's appointed counsel meets the standard of effective counsel as established by Strickland v. Washington.

B. Petitioner's Appointed Attorney Was Adequate As A Matter of Law Under VAWA 2013.

Petitioner's first argument is that as a non-Indian, "the Amantonka Nation's criminal jurisdiction over him must rest on the Nation's exercise of Special Domestic Violence Criminal Jurisdiction" pursuant to VAWA. ROA at 7. Despite, our first argument above establishing him as an Indian for purposes of jurisdiction, even if Petitioner is characterized as a non-Indian, his appointed attorney was adequate as a matter of law under VAWA.

In general, tribes lack criminal jurisdiction over non-Indian defendants even if crime has occurred in Indian country. 1-9 Cohen's Handbook of Federal Indian Law § 9.04 (2017) (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)). However "[i]n 2013, Congress enacted amendments to the Violence Against Women Act that restored inherent tribal criminal jurisdiction over non-Indians who commit specified crimes of domestic

violence, dating violence, or violation of domestic violence restraining orders against Indian victims. 1-9 Cohen's Handbook of Federal Indian Law § 9.02 (2017); 25 U.S.C. § 1304. In order for tribes to exercise VAWA 2013 criminal jurisdiction over a non-Indian defendant, the defendant must have a sufficient "ties" to the tribe through one of the three following requirements: the defendant "resides in the Indian country of the participating tribe; is employed in the Indian country of the participating tribe; or is a spouse, intimate partner, or dating partner of [either] a member of the participating tribe . . . or an Indian who resides in the Indian country of the participating tribe." 25 U.S.C. § 1304(b)(4)(B).

In exercising VAWA 2013 jurisdiction, the "prosecuting tribe must include non-Indians in the jury pool and afford the defendant the rights provided under the Tribal Law and Order Act and all those constitutional 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 . . . .'" 1-9 Cohen's Handbook of Federal Indian Law § 9.02 (2017) (citing 25 U.S.C. § 1304(b)(4)(B)). Relevantly, so long as indigent defendants face any length of incarceration, they are entitled to "effective assistance of counsel . . . at the expense of the tribal government" under ICRA as amended by TLOA. 25 U.S.C. § 1302(c). ICRA further stipulates that the defense attorney be "licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys." Id.; see also Cross, 67 Case W. Res. L. Rev. 379, 427. It is worth noting that the Constitutional requirements and federal statutes provide a baseline threshold for indigent defendants' rights, and tribes are free to require more stringent requirements for their appointed counsel. Still, "indigent non-Indian tribal court defendants have a more robust

right to counsel at public expense than other tribal court defendants (namely, Indians) . . . ." Cross, 67 Case. W. Res. L. Rev. 379, 429.

Despite these greater hurtles, the attorney appointed to Petitioner was adequate as a matter of law. First, if Petitioner is characterized as a non-Indian, Petitioner satisfies all three sufficient ties requirements under VAWA 2013: he was living in an apartment in the tribal housing complex; he was employed on the Amantonka Nation Reservation; and he was a spouse to a member of the prosecuting tribe.

Because his sentence included the potential of incarceration (and resulted in seven months incarceration), Petitioner as an indigent, non-Indian, would have been entitled to effective assistance of counsel at tribal expense. Petitioner's argument that the Amantonka Nation's tribal code does not meet the minimum requirements as established by VAWA 2013 are without merit. Title 2, Chapter 6 of the Amantonka Nation Code establishes the requirements of tribal public defenders. Selected Provisions of the Amantonka Nation Code, § 607. Public defenders must "[b]e at least 21 years of age; [b]e of high moral character and integrity; [n]ot have been dishonorably discharged from the Armed Services; [b]e physically able to carry out the duties of the office; [s]uccessfully completed, during their probationary period, a bar examination administered as prescribed by the Amantonka Nation's Executive Board; and [m]ust have training in Amantonka law and culture." Id. At a minimum, the Amantonka nation need only provide 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" which they did. 25 U.S.C. § 1302(c).

C. Petitioner's Appointed Attorney Was Adequate As A Matter of Law Under ICRA As Amended by TLOA and Does Not violate Equal Protection.

Contrary to Petitioner's argument, the attorney appointed to Petitioner was adequate as a matter of law and did not violate his equal protection rights.

Despite having their jurisdiction over non-Indians taken away, tribes have consistently had authority over Indian defendants. Ex parte Kan-gi-shun-ca, 109 U.S. 556, 568 (U.S. 1883). That authority today exists outside of the Constitution and allows tribes to prosecute and punish criminal conduct on tribal land. Cross, 67 Case W. Res. L. Rev. 379, 418; see also Talton v. Mayes, 163 U.S. 376, 383–84 (U.S. 1896); Bryant, 136 S.Ct. at 1958 ("[T]he Sixth Amendment does not apply to tribal-court proceedings.").

ICRA was enacted in 1968, five years after Gideon, but four years before Argersinger meaning that "ICRA provides for a right to counsel but does not extend that right to the limits of the Sixth Amendment." U.S. v. Doherty, 126 F.3d 769, 778 (C.A.6 (Mich.),1997). Congress excluded tribal courts from the requirements in Gideon that entitled indigent defendants to counsel for only felony offenses. Cross, 67 Case W. Res. L. Rev. 379, 418. So long as defendants were sentenced to one year or less incarceration, indigent Indian defendants are not entitled to counsel at public expense. Id.; 25 U.S.C. § 1302(c).

When Congress amended ICRA with TLOA, it gave tribes the ability to impose heftier sentences upon Indian criminal defendants so long as they expanded defendants' procedural protections by specifically providing indigent defendants "the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys." 25 U.S.C. § 1302(c)(2). Should a

defendant be sentences to more than a year of incarceration, "the Indian tribe shall provide . . . effective counsel as guaranteed by the U.S. Constitution." 25 U.S.C. § 1302 (c)(1).

Petitioner's argument is that if he is classified as an Indian, the fact that the attorney he is entitled to is less qualified than the attorney to which a non-Indian is entitled to violates Equal Protection. This claim is without merit because, as mentioned above, the Constitution does not apply to Indian Nations, and despite that, Petitioner was appointed counsel that does meet the federal requirement for Indians. Petitioner as an Indian would not be entitled to counsel under ICRA as Petitioner was given a sentence of seven months which is does not meet the greater than one-year requirement that triggers an indigent Indian defendant's right to effective counsel. Furthermore, Petitioner was appointed attorney who surpassed the requirements of qualification under the Amantonka Nation Code for defendants sentenced to one year or less incarceration. In fact, as established above, his appointed attorney qualified as adequate under the stricter VAWA 2013 standard.

D. The Attorney Appointed to Petitioner Meets the Requirements of Effective Counsel Under the Strickland Standard.

Because Petitioner has failed to demonstrate that the Amantonka Nation Code's qualifications for public defender standards do not satisfy VAWA 2013's requirements for non-Indian defendants and ICRA and TLOA's requirements for Indian defendants, his only course for demonstrating that his counsel was inadequate is to establish ineffective assistance of counsel as determined by Strickland v. Washington. 466 U.S. 668 (U.S.,1984).

Under Strickland "[f]irst, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the

defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Id. at 687.

Under the first prong, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." Id. at 688. In order to ensure that defenders were not subject to burdensome judicial scrutiny, the Court specifically provided for "wide latitude" for counsel and acknowledged that countless ways attorneys can make tactical decisions. Id. at 689.

Under the second prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. The Court goes on to define a reasonable probability as "a probability sufficient to undermine confidence in the outcome." Id. Much like the first prong, the Court was hesitant to apply a "checklist for judicial evaluation of attorney performance" and the bar allowing dismissal of this claim on this prong was also set low. Id. at 688. In fact, the Court encouraged lower courts to dispose of these claims by allowing lower courts to choose the easier claim. Id. at 670. ("A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.").

Petitioner makes no effort to argue against his appointed attorney's credentials or any errors committed by his defense counsel. Further, Petitioner's appointed attorney "possessed a JD degree from an ABA accredited law school and was a member in good standing of the Amantonka Nation Bar Association. Justice Ginsberg in Bryant summarizes the law best:

"The right to counsel under ICRA is not coextensive with the Sixth Amendment right. If a tribal court imposes a sentence in excess of one year, ICRA requires the court to accord the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution, including appointment of counsel for an indigent defendant at the tribe's expense. If the sentence imposed is no greater than one year, however, the tribal court must allow a defendant only the opportunity to obtain counsel at his own expense. 136 S.Ct. 1954, 1962 (U.S.,2016) (quotations and citations omitted). As mentioned above, the attorney appointed to Petitioner has satisfied all requirements of adequate counsel for an indigent, non-Indian criminal defendant under VAWA 2013, an indigent, Indian defendant under ICRA and TLOA, and under the Strickland prongs of effective assistance of counsel.

CONCLUSION\

For the foregoing reasons, Respondents William Smith, John Mitchell, and Elizabeth Nelson respectfully request that this Court hold that Petitioner is an Indian for purposes of Special Domestic Violence Criminal Jurisdiction and that Petitioner's court-appointed attorney satisfied the relevant legal requirements under VAWA, ICRA, TLOA, and Strickland.

Respectfully Submitted,

January 2019

Counsel for Respondents
WILLIAM SMITH, Chief Probation Officer,
Amantonka Probation Services

JOHN MITCHELL, President, Amantonka Nation

ELIZABETH NELSON, Chief Judge, Amantonka Nation District Court