No. 19-231

IN THE
THE SUPREME COURT OF THE UNITED STATES
MARCH 2019 TERM

ROBERT R. REYNOLDS,
Petitioner,

vs.

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

Respectfully Submitted by:

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ORAL ARGUMENT REQUESTED

Table of Contents

Document **Page**

Table of Authorities ii

Questions Presented 1

Statement of the Proceedings 2

Statement of the Facts 3

Summary of the Argument 5

Argument 8

I. BECAUSE VAWA AMENDED THE INDIAN CIVIL RIGHTS ACT, THE TERM "INDIAN" IS REQUIRED TO BE DEFINED BY STATUTE FOR PURPOSES OF SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION, THE PETITIONER QUALIFIES AS AN INDIAN AS A MATTER OF STATUTORY GUIDANCE 8

A. *Congress explicitly expanded criminal jurisdiction to the Amantonka Nation to exercise jurisdiction over crimes of domestic violence occurring on tribal land where a defendant charged with domestic violence, like Petitioner, has ties to the participating Indian tribe* 10

B. *The intent of Congress and overall statutory scheme expanded the definition of "Indian" to require only membership to the tribe exercising special domestic violence criminal jurisdiction in place of the judicially created test used to interpret the term "Indian" in prior statutes* 11

II. PETITIONER'S COURT-APPOINTED ATTORNEY SATISFIED ALL REQUIREMENTS SET FORTH BY VAWA AND EXCEEDED ESTABLISHED LEGAL REQUIREMENTS 13

A. *As an Indian, Petitioner's court-appointed attorney satisfied all relevant legal requirements established by VAWA 2013 and ICRA, and therefore, was not a violation of equal protections* 14

B. *Should the Court determine Petitioner is a non-Indian, Petitioner's court-appointed counsel nevertheless met all relevant requirements established by VAWA 2013 and ICRA* 16

C. *Petitioner failed to provide evidence any alleged difference between tribal and state qualifications or errors committed by his counsel, and therefore failed to address any material issue(s)* 17

Conclusion 19

Certificate of Service 21

Table of Authorities

Cases **Page**

Cherokee Intermarriage Cases,
203 U.S. 76 (1906) 12

Cuyler v. Sullivan,
446 U.S. 335 (1980) 18

Jones v. Meehan,
175 U.S. 1 (1899) 18

Negonsott v. Samuels,
507 U.S. 99 (1993) 8

Oliphant v. Suquamish Indian Tribe,
435 U.S. 191 (1978) 11

Plains Com. Bank v. Long Fam. Land and Cattle Co.,
554 U.S. 316 (2008) 14

Roff v. Burney,
168 U.S. 218 (1897) 16

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978) 9, 12, 14, 15

Strickland v. Washington,
466 U.S. 668 (1984) 18

Talton v. Mayes,
163 U.S. 376 (1896) 14

United States v. Broncheau,
597 F.2d 1260 (9th Cir. 1979) 11, 12

United States v. Bryant,
136 S. Ct. 1954 (2016) 6, 14, 15, 16

United States v. Diaz,
679 F.3d 1183 (10th Cir. 2012) 11

United States v. Kagama,
118 U.S. 375 (1886) 14

United States v. Lara,
541 U.S. 139 (2004) 8, 9

United States v. Quiver,
241 U.S. 602 (1916) 18

United States v. Wheeler,
435 U.S. 313 (1978) 8, 14

Vermont Yankee v. Nat. Res. Def. Couns.,
435 U.S. 519 (1978) 13

Constitution and Statutes

U.S. Const. amend. IV 16

U.S. Const. amend. VI 16

AMANTONKA NATION CODE, tit. 2, § 105 10

AMANTONKA NATION CODE, tit. 2, § 105(b) 17

AMANTONKA NATION CODE, tit. 2, § 607 ....3, 16, 17

AMANTONKA NATION CODE, tit. 2, § 607(a)(2) 16

AMANTONKA NATION CODE, tit. 2, § 607(b) 17

25 U.S.C § 1301 ....9, 12

25 U.S.C. § 1302(c) 6, 14, 16, 17

25 U.S.C § 1304 .... *passim*

25 U.S.C § 1304(b)(4) 11

25 U.S.C § 1304(b)(4)(B) 12

25 U.S.C. § 1304(d)(2) 14

Secondary Sources

JAMES D. DIAMON, LAW IN FEDERAL, STATE, AND TRIBAL CRIMINAL COURTS: AN UPDATE ABOUT RECENT EXPANSION OF CRIMINAL JURISDICTION OVER NON-INDIANS 11 (2018) 18

NATIONAL CONFERENCE OF BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2018 1-18 (Judith A. Gundersen et al. eds., 2018) 16, 17, 18

Native Oklahoma, *Sac and Fox: Oklahoma's Oldest Tribal Court* (last visited Jan. 9, 2019, 2:56 PM), https://nativeoklahoma.us/index.php/news/689-sac-and-fox-oklahoma-s-oldest-tribal-court (Creation in 1985) 18

Native American History Timeline (March 2018), http://www.datesandevents.org/events-timelines/27-native-american-history-timeline.html 8

Bureau of Indian Affairs, *United States History* (last visited Jan. 10, 2019, 2:06 PM), https://www.u-s-history.com/pages/h3577.html 8

Questions Presented

1) Under the Violence Against Women Act of 2013, does Petitioner qualify as an Indian for the purposes of special domestic violence criminal jurisdiction, when Petitioner successfully applied for and completed the citizenship process prior to being awarded citizenship by the Amantonka Nation, the same tribe participating in exercising special domestic violence criminal jurisdiction?
2) Under the Violence Against Women Act of 2013, does Petitioner's court-appointed attorney satisfy the relevant legal requirements when the attorney appointed to represent Petitioner in the Amantonka Nation Court was a graduate from an American Bar Association accredited law school and passed the Amantonka Nation bar exam prior to representing Petitioner?

Statement of the Proceedings

A trial by jury found Petitioner guilty of knowingly striking his wife. R. at 5. The Amantonka Nation District Court entered judgment against Petitioner. R. at 5. On August 23, 2017, Petitioner was sentenced to seven (7) months incarceration, $5,300 restitution to compensate the victim, batterer rehabilitation and alcohol treatment program through the Amantonka Nation Social Services Division, and a $1,500 fine. R. at 5.

Petitioner appealed the judgment of the Amantonka Nation District Court, raising the same arguments that were denied pre-trial. R. at 7. The Supreme Court of the Amantonka Nation affirmed the lower court's decision rejecting Petitioner's claims that he was a non-Indian and the appointed attorney to Petitioner was not inadequate as a matter of law. R. at 7.

On March 7, 2018, the United States District Court for the District of Rogers rejected the ruling of the Amantonka Nation Supreme Court and granted the petition for a writ of habeas corpus on the grounds that Petitioner was not an "Indian" for the purposes of criminal jurisdiction. R. at 8. The District of Rogers court further opined that Petitioner's defense counsel did not meet the requirements set forth under the Violence Against Women Act of 2013. R. at 8. On appeal, the United States Court of Appeals for the Thirteenth Circuit held the grounds set forth by the Amantonka Supreme Court. R. at 9. The Thirteenth Circuit reversed the decision of the District of Rogers and remanded with instructions to deny the petition for writ of habeas relief on August 20, 2018. R. at 9. This Court granted Certiorari.

Statement of the Facts

Lorinda Reynolds' marriage has not always suffered from physical abuse at the hands of Petitioner. Lorinda Reynolds, a citizen of the federally recognized Amantonka Nation Tribe, and Robert Reynolds, Petitioner in this case, met while attending the University of Rogers. R. at 6. The two (2) eventually wed, then moved to the Amantonka Nation Reservation and found employment working for the Nation – Mrs. Reynolds as an accountant for the Nation's casino and Petitioner worked as a manager of the Nation's shoe factor. R. at 6. The couple moved into an apartment and began working towards their future by saving money to buy a house. R. at 6. Two (2) years after moving onto the Nation's reservation, the minimum time period required to be eligible to apply for citizenship, R. at 6; AMANTONKA NATION CODE, tit. 3, § 201, Petitioner began to work towards becoming a naturalized citizen of the Nation[1]. After meeting the requirements set forth by the Amantonka Nation Code, Petitioner successfully completed his enrollment in citizenship requirements and received his Amantonka Nation ID card – symbolizing the success of his hard work. R. at 6. However, their future would soon take a drastic turn.

After enjoying all benefits of being a citizen for over a year, the shoe factory went out of business, and Petitioner became unemployed. R. at 6. Lorinda Reynolds' marriage took an unexpected turn in September 2016 when Petitioner began to drink excessively and was often verbally abusive toward Mrs. Reynolds. R. at 6. During the ten (10) months of Petitioner's unemployment, police were called to the couple's home multiple times. R. at 6. However, on July 15, 2017, the physical abuse inflicted by Petitioner left physical evidence of abuse.

[1] "To become a naturalized citizen of the Amantonka Nation, applicants must: (a) Complete a course in Amantonka culture; (b) Complete a course in Amantonka law and government; (c) Pass the Amantonka citizenship test; and (d) Perform 100 hours of community service with a unit of the Amantonka Nation government." AMANTONKA NATION CODE, tit. 2, § 607(a)(2)

Petitioner was arrested and transported to the Amantonka Nation jail. The chief prosecutor for the Amantonka Nation filed a criminal complaint alleging Petitioner "did knowingly strike his wife, Lorinda Reynolds, causing her injury." R. at 2. Petitioner was tried and convicted by jury of domestic violence. R. at 7.

Petitioner now appeals to the United States Supreme Court.

Summary of the Argument

The United States Constitution awarded Congress with broad powers to regulate Native Americans. After a long history of unfair and inconsistent treatment, Congress chose to focus on tribal sovereignty when conducting rulemaking. This modern approach led to the Violence Against Women Act ("VAWA") of 2013. Congress explicitly chose to extend jurisdiction of crimes of domestic violence occurring on Indian land to the tribes.

Prior to passing VAWA, Congress established tribal sovereignty under the Indian Civil Rights Act ("ICRA") to insure protection of Native American rights. While VAWA did not expand every section of ICRA, VAWA extended the ability of tribal courts to hear claims of domestic violence occurring on tribal land.

Currently, VAWA qualifies an "Indian" as a member of a participating tribe when prosecuted under the Special Domestic Violence Criminal Jurisdiction. 25 U.S.C. § 1304. VAWA also requires one (1) party, whether defendant or the victim, to be an Indian. 25 U.S.C. § 1304 (b)(4)(A). If the defendant is a non-Indian, he must have a significant connection to the tribe – a "spouse, intimate partner, or dating partner" who is a member of a participating tribe. 25 U.S.C. § 1304 (b)(4)(B). Under the statutory scheme established by VAWA, a person who is a member of the tribe exercising special domestic criminal jurisdiction must be an Indian.

Previous statutes did not include a definition for the word "Indian", consequently, courts would determine if an individual was an Indian by a judicially created two-part evidentiary test, *United States v. Rogers,* 45 U.S. 567 (1846), requiring the individual to possess a degree of Indian blood and to be a member of a federally recognized tribe. However, after VAWA, Congress provided a statutory definition for the purpose of prosecuting crimes of domestic violence occurring on Indian lands. 25 U.S.C. § 1304 (b)(4)(B). While Petitioner was not a

natural born Native American, Petitioner applied and became a member of the Amantonka Nation. R. at 6. Petitioner's residence remained on the Amantonka Nation Reservation for over three (3) years. R. at 6. By the statutory scheme of VAWA and legislative intent, Petitioner is an Indian for the purposes of special domestic violence criminal jurisdiction.

Further, there is not an equal protection violation when counsel appointed to Petitioner provided assistance to Petitioner, passed the required bar exam, and graduated from an ABA accredited school. Appointment of such counsel satisfies the requirements set forth in ICRA and VAWA.

In *Bryant*, the Court held Native American tribes are not covered by the protections guaranteed by the United States Constitution. 136 S. Ct. 1954, 1957 (2016). Criminal defendants under state jurisdiction are awarded rights that are explicitly set forth in the United States Constitution; however, tribal members are protected by rights and procedures established by ICRA. *Id.* Because Petitioner is a member of the Amantonka Nation Tribe, he is awarded the protections of "effective assistance of counsel at least equal to that guaranteed by the United States Constitution." 25 U.S.C. § 1302(c).

Petitioner's counsel not only met the requirements set forth in ICRA but also met all requirements of counsel normally obtained within a state proceeding. Counsel held a Juris Doctorate degree from an ABA accredited school, received significant training within the Amantonka Nation law and culture, and passed the Amantonka Nation bar examination. Alternatively, even if Petitioner was found to be a non-Indian, his counsel has obtained all necessary qualifications set forth in VAWA. Counsel met all requirements established by the Amantonka Nation to serve as a public defender. Petitioner's counsel received the

qualifications necessary to be appointed by a state in addition to receiving specialized training to preserve the cultural identity of the Amantonka Nation.

Argument

I. BECAUSE VAWA AMENDED THE INDIAN CIVIL RIGHTS ACT, THE TERM "INDIAN" IS REQUIRED TO BE DEFINED BY STATUTE FOR PURPOSES OF SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION, PETITIONER IS QUALIFIED AS A MATTER OF STATUTE AS AN INDIAN.

Congress is constitutionally granted plenary, exclusive, and broad powers to legislate Indian tribes, including the abilities to restrain and expand sovereign tribal authority. *United States v. Lara*, 541 U.S. 139, 200 (2004) (citing *Washington v. Confederated Bands*, 439 U.S. 463, 470-71 (1979); *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993); *United States v. Wheeler,* 435 U.S. 313, 323 (1978)). After more than a century of inconsistent congressional treatment toward Indians, the modern period of congressional treatment has focused on tribal sovereignty.[2] "Congressional policy, for example, initially favored 'Indian removal,' then

[2] American Indians have undergone an extreme history dating back before the US Constitution existed. While Americans began their new life in North America, the Native Americans continued to live and flourish within their lands. However, as the federal government became interested in westward expansion, it viewed the Native Americans as a threat that must be resolved. Rather than peacefully negotiating with the tribes, the federal government began to fight and eventually concurred the tribes.
The abuse continued as the federal government passed legislation to remove, take land, and change cultural history of the Native Americans. *Native American History Timeline* (March 2018), http://www.datesandevents.org/events-timelines/27-native-american-history-timeline.htm. In 1830, the government passed the Removal Act; authorizing the removal of tribes from tribal land in exchange for federal land west of the Mississippi River. Shortly after the act was passed, however, the government forced the majority of tribes from their ancestral homelands in the Southern United States to west of the Mississippi River. This eventually became known as the Trail of Tears that resulted in a catastrophic amount of Native American deaths. *Id.*
Once moved and attempting to settle in the new lands, the tribes were forced once again to become part of the American society. Later, this period became known as the Assimilation Period (1790-1920). Bureau of Indian Affairs, *United States* History (last visited Jan. 10, 2019, 2:06 PM), https://www.u-s-history.com/pages/h3577.html. Native Americans were forced to move, to act and dress like American settlers. Tribes were forced to give up their culture and lands once again by the federal government. This was made possible by the General Allotment Act of 1887. *Id.* This act broke up native lands, giving Americans over half of the lands once resided on by Native Americans.
In an attempt to right the wrongs done, John Collier along with President Roosevelt stopped the allotment of native lands, and the Indian Reorganization Act was passed in 1934 as well as the Citizenship Act of 1924. *Id.* But grief did not stop, in the mid-1940s, the Termination Era began. Legislation that favored assimilation was again being passed. This era continued until 1970 – taking lands and families away from the tribes. *Id.*
Finally, the federal government shifted significantly and began passing legislation that awarded Native Americans their sovereignty and rights they deserve. The Self-Determination Era began. Nation changing legislation, such as the Indian Civil Rights Act and the Indian Child Welfare Act, was passed. *Id.* The federal government returned slowly to its original role as the tribes' negotiator and protector in place of the entity causing the harm and grief. Congressional enactments empowering tribal sovereignty continued to take place in the nation by the passing of the Tribal Law and Order Act, and the protection of women against domestic violence through Violence Against Women Act of 2013. *Id.*

'assimilation' and the break-up of tribal lands, then protection of the tribal land base . . . and now it seeks greater tribal autonomy within the framework of 'government-to-government relationship' with federal agencies." *United States v. Lara*, 541 U.S. at 202 (2004) (citations omitted).

Corresponding with the modern view of tribal sovereignty, Congress expanded the jurisdiction of tribes in VAWA. In 2013, in an act of explicit congressional direction, VAWA amended ICRA to expand tribal jurisdiction over crimes of domestic violence. 25 U.S.C. 1301 et seq.

Before VAWA's enactment, which further expands tribal sovereignty, ICRA has long been held to represent a deference toward tribal sovereignty. The Supreme Court, in its analysis of a claim brought forth under ICRA, stated that the "[m]anifest congressional purpose [was] to protect tribal sovereignty from undue interference." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 63 (1978). "[A] judicially sanctioned intrusion into tribal sovereignty is [not] required to fulfill the purposes of ICRA, but to the contrary, the structure of the statutory scheme and the legislative history of Title I suggest that Congress' failure to provide remedies other than habeas corpus was a deliberate one." *Id.* at 61 (citations omitted).

ICRA, as amended by VAWA, requires that Petitioner is qualified as an Indian by way of membership when examining tribal jurisdiction claims for the purposes of special domestic violence criminal jurisdiction. The statutory scheme of VAWA defines an "Indian" as a member of the tribe participating in jurisdiction. VAWA introduces two (2) essential exceptions under the section "tribal jurisdiction over crimes of domestic violence:"

4) Exceptions.
(A) Victim and Defendant are both non-Indians.
(i) In general. *A participating tribe may not exercise special domestic violence criminal jurisdiction over an alleged offense if neither the defendant nor the alleged victim is an Indian*.
(B) Defendant lacks ties to the Indian tribe. A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant—
(i) resides in the Indian country of the participating tribe;
(ii) is employed in the Indian country of the participating tribe; *or*
(iii) is a spouse, intimate partner, or dating partner of—
(I) *a member of the participating tribe*; *or*
(II) an Indian who resides in the Indian country of the participating tribe.

25 U.S.C. § 1304 (emphasis added) (section omitted)

For participating tribes to exercise special domestic violence criminal jurisdiction, VAWA requires that either the defendant or the victim is Indian. 25 U.S.C. § 1304 (b)(4)(A); *see also* AMANTONKA NATION CODE, tit. 2, § 105. However, where the defendant is a non-Indian — but is a "spouse, intimate partner, or dating partner of [] a member of the participating tribe; or an Indian who resides in the Indian country of the participating tribe[,]" 25 U.S.C. § 1304 (b)(4)(B), the tribe may exercise special domestic violence criminal jurisdiction over the defendant. Accordingly, under the statutory scheme established by VAWA, a defendant who is a member of the tribe exercising special domestic violence criminal jurisdiction must be an Indian. Petitioner was a member of the Amantonka Nation, a tribe participating in the statutory exercise of special domestic violence criminal jurisdiction. R. at 3, 6-7. Petitioner qualifies as an Indian for purposes of establishing whether the Amantonka Nation may exercise jurisdiction over a domestic violence claim occurring on the reservation.

A. *Congress explicitly expanded criminal jurisdiction to the Amantonka Nation to exercise jurisdiction over crimes of domestic violence occurring on tribal lands where Petitioner has ties to the participating Indian tribe.*

Though there is generally no presumption in favor of tribal criminal jurisdiction for offenses committed on tribal lands by non-Indians, Congress expanded the criminal

jurisdiction of tribes by the passage of VAWA to include jurisdiction over domestic violence offenses occurring on Indian land. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978); *but see* 25 U.S.C. § 1304. For a tribe to establish special domestic violence criminal jurisdiction, the offense must meet a list of criteria. A crime of domestic violence must occur in Indian country, and the tribe electing to exercise special domestic violence criminal jurisdiction must be the participating tribe that is the sovereign over the land. See 25 U.S.C. § 1304. Petitioner does not dispute that the domestic violence charge he was convicted of occurred in Indian country. R. at 6. The only two exceptions statutorily enumerated to a tribe's exercise of special domestic violence criminal jurisdiction occurs when (1) the victim and defendant are non-Indian; or (2) where the defendant can be shown to lack ties to the Indian tribe. 25 U.S.C. § 1304(b)(4). Petitioner has a clear nexus to the Amantonka Nation. Petitioner did apply for and complete the enrollment process to become a naturalized citizen of the Amantonka Nation. R. at 3, 6-7. Only after a verdict in favor of the tribe did Petitioner file an appeal on these jurisdictional grounds. R. at 3, 7.

B. *The intent of Congress and overall statutory scheme expanded the definition of "Indian" to only require membership of the tribe exercising special domestic violence criminal jurisdiction which displaced the judicially created test used for interpreting the term "Indian" in prior statutes*.

Before VAWA, there was no statutory definition for what constituted an "Indian" for purposes of establishing tribal criminal jurisdiction. *See United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979). Without a guiding statutory definition, a judicially created test was used, for over a century, to determine whether a person was an Indian. The test, first suggested in *Rogers* and generally followed by the courts, "considers (1) the degree of Indian blood; and (2) tribal or governmental recognition as an Indian." 45 U.S. 567 (1846) (citations omitted); *See also United States v. Diaz,* 679 F.3d 1183, 1187 (10th Cir. 2012) ("The term 'Indian' is "not defined . . . in related statutes addressing criminal jurisdiction in Indian

country," so we have adopted a two-part evidentiary test to determine whether a person is an Indian for the purposes of federal law" (quoting *States v. Prentiss,* 273 F.3d 1277, 1279 (10th Cir. 2001)). Unlike the previous non-statutory based judicial process for determining what constitutes an "Indian," VAWA provides a statutory definition of "Indian" for special domestic violence criminal jurisdiction only requiring membership to a tribe participating in the exercise of such jurisdiction. *Compare* 25 U.S.C. § 1301 (4), *with* 25 U.S.C. § 1304(b)(4)(B).

A tribe, including the Amantonka Nation, is allowed to determine its membership requirements where Congress has not explicitly spoken to the issue. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 ("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"); *see generally Cherokee Intermarriage Cases*, 203 U.S. 76 (1906) (affirming the decree of the Court of Claims holding that a tribe is able to determine membership of their own tribe absent direction from Congress). The Amantonka Nation Code explicitly defines who might become eligible to become a citizen of the Nation, and further codifies the process applicants must successfully complete to do so. AMANTONKA NATION CODE, tit. 3, §§ 201, 203.

Courts reviewing federal statutes previously had no direction from Congress to determine how tribal or governmental agencies recognized an individual as an "Indian." *Broncheau*, 597 F.2d at 1263. Accordingly, a judicial test further elaborated what constituted tribal or governmental recognition as an Indian. One such test considered the following in declining order of importance to determine whether a person held recognition as an Indian:

1) tribal enrollment;
2) government recognition formally and informally through receipt of assistance reserved only to Indians;
3) enjoyment of the benefits of tribal affiliation; and
4) social recognition as an Indian through residence on a reservation and participation in

Indian social life.

United States v. Bruce, 394 F.3d 1215, 1224 (9th Cir. 2005) (citing *United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir. 1995).

Petitioner was awarded membership to the Amantonka Nation prior to his conviction for domestic violence. R. at 3, 6. Petitioner lived in a tribal housing complex prior to the assault and enjoyed the benefits of working on the land owned by a federally recognized tribe. R. at 6. Even applying the factors of this outdated test to determine membership, Petitioner should still be found to have been a member of the Amantonka Nation.

Fortunately, this Court is not constrained by judicially created factors defining membership to a tribe in the absence of explicit congressional direction. Where Congress has established discretion in a separate entity, reviewing courts are generally not free to impose additional procedural requirements. *See Vermont Yankee v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978) (reversing the lower court's requirement that an agency must add additional procedures not found in the text of the Administrative Procedures Act to the comment portion when the agency was engaged in informal rulemaking). Similarly, for a tribe to determine whether they can exercise special domestic violence criminal jurisdiction, Congress has vested the determination of membership in the tribes themselves. *See* 25 U.S.C. § 1304. The sovereignty of every tribe is enriched by allowing the tribe to preserve its unique identity and bestow membership on those the tribe deems worthy.

II. PETITIONER'S COURT-APPOINTED ATTORNEY SATISFIED ALL REQUIREMENTS SET FORTH BY VAWA AND EXCEEDED ESTABLISHED LEGAL REQUIREMENTS.

Under VAWA, criminal defendants' rights have been expanded from previous rights and procedures given by ICRA. Currently, Congress expanded VAWA to include a constitutional provision that is guaranteed by ICRA. 25 U.S.C. § 1304(d)(2). If a defendant is imprisoned for any length of time, VAWA requires the participating Indian tribe to provide "the right of

effective assistance of counsel at least equal to that guaranteed by the United States Constitution." 25 U.S.C. § 1302(c).

A. *As an Indian, Petitioner's court-appointed attorney satisfied all relevant legal requirements established by VAWA's amendments to ICRA, and therefore, no harm occurred in the appointment to Petitioner.*

Petitioner alleges the "less qualified" attorney he is entitled to is a violation of equal protection. R at 7. However, Petitioner is an Indian and is not awarded the same protections as that of a citizen of an individual state.

Each individual Indian tribe is a "distinct, independent political communit[y]" possessing inherent tribal sovereignty that preexisted the United States Constitution. *Plains Com. Bank v. Long Fam. Land and Cattle Co.,* 554 U.S. 316, 327 (2008) (quoting *Worcester v. Georgia,* 31 U.S. 515, 559 (1832)); *Wheeler,* 435 U.S. at 323 (quoting *United States v. Kagama,* 118 U.S. 375, 381 (1886)). Tribes thus have been regarded as "unconstrained by . . . constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo*, 436 U.S. at 56; *Bryant*, 136 S. Ct. at 1962 ("The right to counsel under ICRA is not coextensive with the Sixth Amendment right."). *Talton* furthered extended the limitation by holding other provisions, such as the Bill of Rights, the Fourteenth Amendment, and the Fifth Amendment, do not "operat[e] upon" the power of the sovereign. 163 U.S. 376, 384 (1896); *Santa Clara Pueblo,* 436 U.S. at 56; *Bryant*, 136 S. Ct. at 1959 ("[S]ixth Amendment does not apply to tribal-court proceedings"); *Plains Com. Bank,* 554 U.S. at 337.

In *Bryant*, the defendant argued since he did not receive the assistance of counsel, it was a violation of his Sixth Amendment right, and therefore, precluded the use of any prior tribal court convictions to apply to the current prosecution of his domestic violence claims. 136 S. Ct. at 1957. While criminal defendants are entitled to assistance of counsel guaranteed by the

United States Constitution, "the right to counsel under ICRA is not coextensive with the Sixth Amendment." *Id.* at 1962. The defendant was an "enrolled member of the Northern Cheyenne Tribe" and lived on the tribal reservation in Montana. *Id.* While the defendant was not prosecuted under VAWA, the Court determined that as an enrolled member of a tribal nation, the defendant was not entitled to the provisions and protections guaranteed under the United States Constitution but instead was protected under ICRA. *Id.* at 1964. Because the term of imprisonment was less than one (1) year, ICRA did not require the tribe to provide the defendant with assistance of counsel. 25 U.S.C. § 1302. The Court did note, however, "had the conviction been obtained in state or federal court, they would have violated the Sixth Amendment because Bryant had received sentences of imprisonment although he lacked the aid of appointed counsel." *Id.*

As previously established, tribes and tribal members' rights are protected under ICRA. ICRA provides Petitioner the "right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution[3]" and provides 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) (emphasis added); *Bryant*, 136 S. Ct. at 1962 (ICRA provides a range of procedural protections similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment); *Santa Clara Pueblo,* 436 U.S. at 57. Petitioner argues the court-appointed counsel awarded to him did not meet the requirements set forth in § 1302. R. at 7. However, counsel met all requirements of not only the Amantonka Nation Code but also ICRA and the United States Constitution.

[3] Under the United States Constitution, specifically the Fourth and Sixth Amendment, defendants are guaranteed the "right to assistance of counsel." U.S. Const. amend. IV, VI.

Unlike *Bryant,* Petitioner received assistance of counsel during all proceedings. R. at 3. Because Petitioner was an enrolled member of the Amantonka Tribe, he was protected only by the regulations set forth in ICRA. *Bryant,* 136 S. Ct. at 1962, 1964-65. Counsel was licensed to practice law in the Amantonka Nation[4] therefore satisfying the requirement set forth in ICRA. The Amantonka Nation also requires all public defenders to be of high moral character and integrity – satisfying the requirement of § 1302(c). AMANTONKA NATION CODE, tit. 2, § 607(a)(2).

B. *Should the Court determine Petitioner was a non-Indian, Petitioner's court-appointed counsel nevertheless met all relevant legal requirements established by VAWA and ICRA.*

When a tribe exercises special domestic violence criminal jurisdiction under VAWA, a defendant will be provided all rights under VAWA in addition to the rights expressed in § 1302(c). 25 U.S.C § 1304. 25 U.S.C. § 1302(c) provides defendants the right to effective assistance of counsel at least equal "to that guaranteed by the United States Constitution" and requires the tribe to "provide 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).

Petitioner argues that, as a non-Indian, his counsel does not meet the requirements set forth in § 1304. R. at 7. Even if he was found to be a non-Indian, Petitioner's counsel has met all requirements of both § 1302 and § 1304.

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[4] Similar to that of state bar admission, counsel "successfully completed the bar examination administered as prescribed by the Amantonka Nation's Executive Board," AMANTONKA NATION CODE, tit. 2, § 607(a); NATIONAL CONFERENCE OF BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2018 1-18 (Judith A. Gundersen et al. eds., 2018), thus licensing counsel to practice law in the jurisdiction of the Amantonka Nation which is in the United States. Secondly, counsel held a Juris Doctorate from an ABA accredited school and was a member in good standing of the Amantonka Bar Association. R. at 7.

Under the Amantonka Nation Code, any non-Indian prosecuted under Title 2 § 105(b) "is entitled to appointment of a public defender qualified under Title 2 Section 607(b)." AMANTONKA NATION CODE, tit. 2, § 607(b). To hold the title of "public defender" in the Amantonka Nation, counsel must (1) hold a Juris Doctorate degree from an ABA accredited law school, (2) taken and passed the Amantonka Nation bar examination, (3) taken the oath of office, and (4) passed a background check. *Id.* Similarly, to be licensed under an individual state, an individual must (1) hold a Juris Doctorate degree from either an ABA accredited law school or a non-ABA accredited law school, (2) taken and passed the state bar examination, (3) passed a background check, and (4) taken the oath of office. NATIONAL CONFERENCE OF BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2018 1-18 (Judith A. Gundersen et al. eds., 2018). Not only has Petitioner's appointed counsel met all standards required by VAWA 2013, Petitioner's counsel has also met the national standard required by the United States.

C. *Petitioner failed to provide evidence of any alleged differences between tribal and state qualifications or error committed by his counsel, and therefore, failed to address any material issue(s).*

Petitioner's argument is further based on the alleged differences between a state and tribal bar examination. For many years, tribal courts have offered admission into its own tribal bar as well as offered and administered tribal bar examinations. Native Oklahoma, *Sac and Fox: Oklahoma's Oldest Tribal Court* (last visited Jan. 9, 2019, 2: 56 PM), https://nativeoklahoma.us/index.php/news/689-sac-and-fox-oklahoma-s-oldest-tribal-court (Creation in 1985). Similar to each individual state in the United States, tribes often draft the bar examination to meet its own specific standards and needs. JAMES D. DIAMON, LAW IN FEDERAL, STATE, AND TRIBAL CRIMINAL COURTS: AN UPDATE ABOUT RECENT EXPANSION OF CRIMINAL JURISDICTION OVER NON-INDIANS 11 (2018); *Roff v. Burney*, 168 U.S. 218 (1897);

Jones v. Meehan, 175 U.S. 1, 29 (1899); *United States v. Quiver,* 241 U.S. 602 (1916). A tribe can allow ABA approved and non-ABA approved law school graduates to sit for the bar examination in the same manner an individual state allows a student in the similar situation. NATIONAL CONFERENCE OF BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2018 1-18 (Judith A. Gundersen et al. eds., 2018). Each state is also given the freedom to include different aspects to be tested on its exam (e.g. Texas Civil Procedure on the Texas state bar examination). *Id.* The Amantonka Nation exercised its interest in crafting an exam to meet its specific needs. Though not required, the Amantonka Nation has hired all public defenders who hold a Juris Doctorate degree from an ABA accredited law school. R. at 7.

Further, Petitioner did not support his claims of either an alleged difference of the bar examinations or produce evidence of an error committed by counsel. R. at 7. To allege a claim of ineffective counsel, Petitioner "must show that counsel's performance was deficient" as well as demonstrate counsel's performance "prejudiced the defense." *Strickland v. Washington,* 466 U.S. 668, 687 (1984). Petitioner was found guilty and cannot attack the judgment "based on inadequate legal advice" unless counsel was not "a reasonably competent attorney" and the advice was not "within the range of competence demanded by attorneys." *Id.* at 667*; See Cuyler v. Sullivan,* 446 U.S. 335, 344 (1980). Petitioner raises an issue without producing any evidence to support his claim.

Conclusion

Under the Amantonka Nation Code, an individual has the opportunity to become a citizen and enjoy full benefits that the Amantonka Nation has to offer. AMANTONKA NATION CODE, tit. 3, §§ 201-03. Petitioner, after marrying his Native wife, moving onto the Amantonka Nation Reservation, and working for the Amantonka Nation, ultimately applied and completed the naturalization process. R. at 6. Petitioner successfully completed a course specifically focused on Amantonka law and government. R. at 12. The same government Petitioner took an oath of citizenship to join. R. at 7. Petitioner applied to enjoy the benefits of being a member of the Amantonka Nation and asked to be governed by the Amantonka Nation until it became inconvenient.

Tribes enjoy the privilege to construct how membership is defined and which individuals are qualified to obtain it. Under the Amantonka Nation Code, the tribe defined the qualification as marriage to a citizen of the Amantonka Nation and residence on the reservation for a minimum of two (2) years. AMANTONKA NATION CODE, tit. 3, § 201. After completing a course in Amantonka Nation culture, law, and government as well as passing the citizenship test and completing 100 hours of community service within the Nation, Petitioner completed the naturalization process and became a citizen of the Amantonka Nation. R. at 6. Petitioner met all requirements to become a citizen of the Nation, and in doing so, met the definition of membership under ICRA and VAWA.

By the definition established by VAWA, Petitioner is well within the bounds of qualifications of an Indian for purposes of the special domestic violence criminal jurisdiction. After unfair treatment and ambiguous acts, Congress explicitly provided a statutory definition of an "Indian" for prosecuting crimes against women that occur within Indian country. Petitioner met all requirements of membership set forth by the Amantonka Nation, and the

Amantonka Nation bestowed citizenship upon him. Therefore, by statutory definition, Petitioner is an Indian.

Additionally, Petitioner's court-appointed attorney met all requirements of not only the Amantonka Nation Code but also ICRA and VAWA. Counsel held a Juris Doctorate degree from an ABA accredited school as well as successfully passing the Amantonka Nation bar examination. R. at 7. By the standards established in VAWA and ICRA, the counsel appointed to represent Petitioner exceeded the requirements to receive effective representation.

For the foregoing reasons, Respondents respectfully request that this Court affirm the judgment of the Thirteenth Circuit and the judgment of the courts of the Amantonka Nation.

Respectfully submitted,

/s/582
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Attorney for
Plaintiff/Respondent