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

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PETITIONER'S BRIEF ON THE MERITS

Team Number: 644

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QUESTIONS PRESENTED

I. Whether Petitioner is an Indian for purposes of criminal jurisdiction when he is not an Indian by blood but has some significant ties to a tribal sovereign.

II. If no, whether Petitioner's court-appointed attorney was adequate as a matter of law when Amantonka Nation's criminal jurisdiction rests on the Nation's exercise of Special Domestic Violence Criminal Jurisdiction pursuant to the Violence Against Women Act of 2013 (VAWA), VAWA requires that the Nation provide licensed defense counsel to indignant defendants, and Petitioner's court-appointed defense counsel was not licensed to practice law by a state government.

III. If yes, whether Petitioner's court-appointed attorney was adequate as a matter of law when Equal Protection requires all races to be treated equally and Petitioner's court-appointed defense counsel was not licensed to practice law by a State government.

STATEMENT OF THE CASE

A. Statement of the Facts

The accusation. On June 15, 2017, tribal police responded to a report of domestic violence at the residence of Robert and Lorinda Reynolds. R. at 6. The residence is part of tribal housing and is located on the Amantonka Nation Reservation. R. at 3. The Amantonka Nation Reservation is located within the state of Rogers. R. at 6. This was the first time the police had seen evidence of domestic abuse. R. at 6. The following day, the Chief Prosecutor filed criminal charges in the District Court for the Amantonka Nation, accusing Mr. Reynolds of domestic violence against his wife. R. at 3.

A violation of rights. At his arraignment, Mr. Reynolds requested and was appointed indigent defense counsel. R. at 4. Mr. Reynolds' court-appointed counsel was not a member in good standing of the bar of any state or federal court. R. at 7. Mr. Reynold's court-appointed counsel did satisfy the requirements of a qualified attorney under Title 2, Chapter 6 of the Amantonka Nation Code. R. at 4.

Background. Lorinda is a citizen of the Amantonka Nation, which is a federally-recognized Indian tribe. R. at 6. Robert Reynolds, a non-Indian, met Lorinda while they were both studying at the University of Rogers. R. at 6. After graduation, Robert and Lorinda married and moved to the Amantonka Nation Reservation. R. at 6.

Two years after the couple got married, Robert applied to become a citizen of the Amantonka Nation and successfully completed the process. R. at 6. Both Robert and Lorinda were employed on the Amantonka Nation Reservation until Robert lost his job when his company unexpectedly went out of business. R. at 6. Robert was unable to find work for ten months. R. at 6. The Reynolds' marriage became increasingly troubled. R. at 6.

B. Statement of the Proceedings

On August 23, 2017, the District Court for the Amantonka Nation found that Mr. Reynolds did knowingly strike his wife, Lorinda Reynolds, causing her injury in violation of Title 5 section 244 of the Amantonka Nation Code. R. at 2. The Amantonka District Court reached this conclusion after denying all three of Mr. Reynolds' pretrial motions. R. at 3.

Mr. Reynolds' first pretrial motion sought to have the charges dismissed on the grounds the Amantonka Nation lacked criminal jurisdiction over him as a non-Indian. R. at 3. The Amantonka District Court denied this motion, finding that Mr. Reynolds is an Indian for purposes of criminal jurisdiction. R. at 3.

Mr. Reynolds' second pretrial motion sought the appointment of licensed defense counsel pursuant to his guarantees under VAWA 2013. R. at 3. The motion was denied by the Amantonka District Court on the same grounds as the first motion. R. at 3.

Mr. Reynolds' third pretrial motion alleged that his court-appointed counsel was insufficiently qualified to serve as his counsel because the assignment did not meet Equal Protection requirements. R. at 3. The Amantonka District Court denied this motion on the grounds that Mr. Reynolds' indigent defense counsel was qualified under the Amantonka Nation Code. R. at 3.

Following his conviction, Mr. Reynolds appealed to the Amantonka Supreme Court, reiterating the arguments he made in his pretrial motions. The Amantonka Supreme Court affirmed the conviction. R. at 7.

Mr. Reynolds then filed a petition in the U.S. District Court of Rogers for a writ of habeas corpus. R. at 8. The U.S. District Court of Rogers granted the petition, finding that (1) Mr. Reynold's was not an Indian for purposes of criminal jurisdiction, and (2) Amantonka

Nation failed to provide Mr. Reynolds with the indigent defense counsel required under VAWA 2013. R. at 8. The Thirteenth Circuit Court of Appeals reversed the U.S. District Court of Rogers' decision and remanded with instructions to deny the writ of habeas corpus. R. at 9.

This Court has granted Certiorari with argument limited to two issues. The first is whether Mr. Reynolds is a non-Indian for purposes of Special Domestic Violence Criminal Jurisdiction. The second is whether Mr. Reynolds' court-appointed attorney satisfied the relevant legal requirements. R. at 10.

SUMMARY OF THE ARGUMENT

There can be no debate that tribal courts are valid courts of law, but tribal sovereignty cannot prevail at the expense hallowed Constitutional protections. This Court has affirmed and reaffirmed that Indian tribal courts do not have inherent criminal jurisdiction to try and to punish non-Indians. Therefore, an Indian tribe cannot assume such jurisdiction unless specifically authorized to do so by Congress. Likewise, this Court has long recognized that Indian tribes have inherent criminal jurisdiction over crimes committed in Indian Country by one Indian against another.

Thus, the question of whether or not Mr. Reynolds is an Indian for purposes of criminal jurisdiction is imperative to a proper application of the law. This Court set-forth the proper test for determining who is an Indian for purposes of criminal jurisdiction in *Rogers v. United States*. The *Rogers* test is a two-prong test which first looks to whether the accused has some degree of Indian blood and then to whether the accused has sufficient ties to the tribe. Both prongs must be satisfied for the accused to be considered an Indian for purposes of criminal jurisdiction.

The *Rogers* test is not only the dominant test for determining criminal jurisdiction across federal circuits, but it is the fairest test because it recognizes both racial and cultural

ties. Although the Amantonka Nation argues that the *Rogers* test was superseded by this Court's decision in *Santa Clara Pueblo v. Martinez*, such an interpretation fails to recognize that this Court intended for the decisions to be read together. A tribe's right to determine membership, as recognized in *Martinez*, is considered in the second prong of the *Rogers* test. Mr. Reynold's concedes that he likely satisfies the second prong.

Despite having significant ties to the Amantonka Nation, Mr. Reynolds is not an Indian for purposes of criminal jurisdiction, because there is no evidence that he has any degree of Indian blood. Jurisdictions that have supplanted the *Rogers* test for their own tests ignore this Court's distinction between race and membership. As this Court explained in *Rogers*, race is determined by an ancestral link through blood. Therefore, a defendant must have some degree of Indian blood to be considered an Indian for purposes of criminal jurisdiction.

Because Mr. Reynolds is not an Indian, Amantonka Nation's criminal jurisdiction rests on the Nation's exercise of Special Domestic Violence Criminal Jurisdiction pursuant to the Violence Against Women Act of 2013 (VAWA 2013). VAWA 2013 was enacted to address congressional concerns about violent crime in Indian country and violent crime against women in particular. Congress intended to grant criminal jurisdiction to Indian tribes over non-Indians to address this concern. This grant of authority gave rise to another concern – Constitutional due process rights.

VAWA 2013 attempted to strike a balance between these competing congressional concerns by limiting a tribe's criminal jurisdiction authority over a non-Indian defendant. In order to exercise Special Domestic Violence Criminal Jurisdiction, a tribe must first guarantee that defendants will not be deprived of certain rights. Among these rights is the right of an

indignant defendant to be provided with the "effective assistance of a licensed defense counsel." *VAWA* 2013.

The clear and unambiguous meaning of the word "licensed" as used in the statute is licensed by a state bar association. This is clear when interpreting the word in light of its intended purpose. These qualifications imposed on tribes work as a limitation on tribal criminal jurisdiction authority for the purpose of protecting non-Indian defendants.

Congress could not have intended for each of the 573 federally recognized Indian tribes to have unfettered authority to define what it means for an attorney to be licensed. Such an interpretation would run contrary to the purpose of the limitation as it would do nothing to protect non-Indian defendants. In fact, such an interpretation would render the use of the word "licensed" meaningless.

Further, when this Act was adopted in 2013, the majority of tribes did not have written licensing standards for attorneys. As this Court highlighted in *Oliphant*, formal tribal judicial systems are relatively new in United States history. A key feature of the United States justice system is that the legal profession is regulated by the supreme courts of the states. Thus, an attorney licensed through a state bar association is the only definition reasonably contemplated by Congress when they intentionally chose to include the word "licensed."

Finally, the federal government does not have the power to regulate the legal profession. Historically, state governments have the sole authority to determine licensing standards for attorneys pursuant to the Tenth Amendment. The federal government cannot grant to the Amantonka Nation a power that it does not have.

Therefore, Amantonka Nation was required to provide Mr. Reynold's with an attorney licensed by a state bar association to practice law under VAWA 2013. Because Amantonka Nation failed to do so, this Court should reverse the decision of the lower courts.

Alternatively, even if this Court finds that Mr. Reynolds is an Indian for purposes of criminal jurisdiction, Equal Protection requires that his attorney possess the same qualifications as is required by law to represent non-Indians. Mr. Reynolds' counsel was not a member in good standing of the bar of any state or federal court. He was deprived of the right to be provided with licensed defense counsel on the sole basis that he is an Indian. Because this is an unreasonable violation of the Fifth Amendment and Equal Protection, this Court should reverse.

STANDARD OF REVIEW

Writ of habeas corpus is subject to *de novo* review. *Bonney v. Wilson*, 817 F.3d 703, 711 (10th Cir. 2016). The facts of this case are not in dispute. Because the Court reviews this case *de novo*, the Court is not bound by any legal determinations made by the lower courts.

ARGUMENT

I. Because this Court's decision in *Rogers* is controlling, Mr. Reynolds is not an Indian for purposes of federal criminal jurisdiction.

A. Without an express grant of authority from Congress, the Amantonka tribe may only exercise criminal jurisdiction over persons who are Indians.

In *Oliphant v. Suquamish Indian Tribe*, the Suquamish Indian Provisional Court sought to exercise criminal jurisdiction over two non-Indian residents of Suquamish reservation. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 192 (1978). Both criminal defendants sought writs of habeas corpus. *Id*. The Supreme Court upon appeal from the Ninth Circuit granted certiorari. *Id*. The Court found that tribal court did not have criminal jurisdiction over non-Indians in this case. *Id*. at 212. The Court held that due to the overriding sovereignty of

the United States, Indian tribes do not possess the power to try non-Indian citizens of the United States except through a means acceptable to Congress. *Id*. Therefore, in order to exercise jurisdiction without congressional authorization, the person must be an Indian. *Id*.

The question then becomes in our present case which test should be utilized to determine whether Mr. Reynolds is an Indian. If he is an Indian, then the Amantonka tribe may exercise jurisdiction without a grant of congressional authority. Under the *Rogers* test set forth by this Court, Reynolds is not an Indian for purposes of federal criminal jurisdiction. Without being classified as an Indian, the Amantonka tribe may not exercise criminal jurisdiction without an express grant of authority. *Id*.

B. Mr. Reynolds has no Indian blood and is therefore not an Indian under the *Rogers* test.

The *Rogers* test has long been used in establishing who is an Indian for purposes of criminal jurisdiction. *United States* v. *Rogers*, 45 U.S. 567, 568 (1846). In *Rogers*, a non-Indian defendant was accused of murdering a man in Indian Territory. *Id*. at 567. The defendant was indicted and convicted in a federal district court in Arkansas. *Id*. The defendant argued that because he had been adopted into the Cherokee Nation and the crime occurred in Indian Territory, a tribal court was the proper court for criminal jurisdiction. *Id*. *at 568*.

The Supreme Court of the United States established a two-part test, finding that the defendant was not an Indian for purposes of criminal jurisdiction. *Id*. at 570. The *Rogers* test requires that a person must have (1) a degree of Indian blood and (2) sufficient ties to a tribe to be considered an Indian for criminal jurisdiction purposes. *Id*.

Rogers is the most common test used among federal circuits. The test recognizes that jurisdiction is exercised only when an individual is Native American by blood and has

sufficient ties to a tribal community. *See* Katharine Oakley, *Defining Indian Status for the Purpose of Federal Criminal Jurisdiction*, 35 Am. Indian L. Rev. 177, 178.

The first prong of the *Rogers* test is that an individual possesses a degree of Indian blood. *Id*. Rogers does not specify a particular degree of Indian blood. Some cases have allowed for a blood level as low as 3/32. *United States v*. *Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009). However, in our present case, there is nothing in the record to indicate that Mr. Reynolds has any Indian blood whatsoever. Therefore, under the *Rogers* test, he fails the first prong.

In *St*. *Cloud*, the district court described the second prong of the *Rogers* test as "a sufficient non- racial link to a formerly sovereign people." *St*. *Cloud v*. *United States*, 702 F. Supp. 702 F. Supp. 1456, 1461 (D.S.D. 1988). It has been made abundantly clear that merely having Indian heritage is not sufficient to exercise criminal jurisdiction. *See* Oakley, *supra* at 180. In analyzing the second prong courts have taken into account a variety of factors. *Id*.

In *St*. *Cloud*, the court analyzed the second prong using the following factors, "1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life." *St*. *Cloud*, 702 F. Supp. at 1461.

Mr. Reynolds concedes that he likely satisfies the second prong as he has significant ties to the Amantonka Nation. He lives on the reservation in tribal housing. R. at 6. While living on the reservation, he has integrated into Indian social life, and he married a tribal member. R. at 6. Reynolds has become an enrolled member of the Amantonka Tribe. R. at 6. Some courts, including the district court in *St*. *Cloud*, have acknowledged that tribal enrollment is often alone sufficient to satisfy the second prong. *Id*. at 1462.

While conceding that the second prong is satisfied, however, Mr. Reynolds asserts that Amantonka Nation failed to provide any evidence to satisfy the first prong. Mr. Reynolds lacks the requisite Indian ancestry to meet the requirements for the first prong of the *Rogers* test. Throughout this entire litigation, Amantonka Nation has presented no evidence that Reynolds has any degree of Indian blood. R. at 6-7. Under the dominant test and proper test, Amantonka Nation fails to establish that Mr. Reynolds is an Indian for purposes of criminal jurisdiction.

C. The first prong of the *Rogers* test is determined by race and not tribal membership, and therefore the lower court erred in relying on this Court's decision in *Santa Clara Pueblo*.

It is vital to note that the case relied upon by the Amantonka Supreme Court presented a question of the power a tribe has to determine citizenship and not jurisdiction. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). In *Santa Clara Pueblo*, Martinez sought to challenge a statute that excluded her from tribal membership. *Id*. Martinez challenged the exclusion of children born to women who married outside of the tribe under Equal Protection grounds. *Id*. Children of men who married outside of the tribe were not excluded. *Id*. The Court in *Santa Clara Pueblo* rejected this challenge holding that tribal governments have wide latitude to set citizenship requirements and only when explicitly altered by Congress should the courts intervene in their formulation. *Id*. at 79.

The Court did not address citizenship as a means for establishing criminal jurisdiction, but merely upheld a tribe's right to set its membership requirements. *Id*. at 52. The respondent's wish to equate citizenship with the ability to exercise criminal jurisdiction, but these are separate and distinct legal concepts. Although they are distinct legal concepts, this does not mean that a tribe's determination of citizenship plays no role in establishing criminal

jurisdiction. It simply means that citizenship doesn't automatically equate to a tribe having criminal jurisdiction over an individual.

However, some courts have chosen to give this citizenship determination great weight in establishing criminal jurisdiction. These courts have incorrectly chosen to use this Court's decision in *Santa Clara Pueblo* to supplant the *Rogers* test instead of supplement it.

In *LaPier v. McCormick*, the court utilized the tribal membership approach. Under this approach, the court asks if the individual is a member of a federally recognized tribe. *LaPier v. McCormick*, 986 F.2d 303, 304-05 (9th Cir. 1993). If so the tribe has criminal jurisdiction, if not, then the court goes through the two-prong *Rogers* test. *Id*. at 304. A second test that allows criminal jurisdiction based on solely tribal membership is the bright-line approach. Under this test, criminal jurisdiction is determined solely be a person's membership in a federally recognized tribe. *See* Oakley, *supra* at 206.

Few courts have utilized these two tests. *Id*. These tests have a variety of weaknesses. Among them are that not all persons of Indian blood choose to enroll or despite their ties to the community are unable to do so due to restrictions set by the tribe. In addition, an individual may lose this status of enrollment if the tribal government is ever terminated. *Id*. at 209. It also results in a tribe potentially exercising criminal jurisdiction over a person with no ties to the tribe besides being enrolled as a member.

In addition, the importance of the precedent of *Santa Clara Pueblo* allowing for tribes to set their standards for membership is integrated into the *Rogers* test under the second prong. *St. Cloud*, 702 F. Supp. at 1462. Several courts have utilized tribal membership as a factor in determining jurisdiction within the second prong. Oakley, *supra* at 206. Some courts have even held that tribal membership as one of the primary factors in evaluating tribal ties under the

second prong. *St. Cloud*, 702 F. Supp. at 1462. Some courts even find that tribal enrollment in and of itself is sufficient to satisfy the second prong. *Id*. at 1464. That is to say that courts do not recognize tribal sovereignty over setting their membership standards under the *Rogers* test. It is just not sufficient to establish criminal jurisdiction.

D. Other approaches fail to adequately take into account that non-racial ties and heritage should be distinct requirements in exercising criminal jurisdiction.

In addition to the bright-line rule of tribal membership, a minority of lower courts have supplanted the *Rogers* test with two other approaches to determining who is an Indian for purposes of criminal jurisdiction. The first approach is the individual- identification approach and the second is a totality-of-the-circumstances approach.

In *United States v. Pemberton*, the court utilized the individual identification approach, which has a first prong that requires some Indian blood. *United States v. Pemberton*, 405 F.3d 656, 660 (8th Cir. 2005). But the identification approach differs from *Rogers* in that it asks whether the person self identifies as an Indian based on his actions. *Id*. In this case, certain factors weigh in favor of the second prong as Mr. Reynolds is a tribal member and lives on the reservation. R. at 6. However, much like the *Rogers* test, Mr. Reynolds fails to satisfy the first prong under the self-identification approach. *Id*. at 660.

The totality of circumstances approach allows courts to consider all the facts before them, with no one factor being dispositive. *See* Oakley, *supra* at 208. The individual's ancestors, his tribal identification, and his lifestyle are the factors that courts utilize under the totality of the circumstance approach. *Id*. This test leads a court to have complete discretion in determining who is and who is not Indian. It has the potential to deny jurisdiction over full-blooded Indians simply because a court places a great deal of weight on the lifestyle component

and an individual has chosen to enter mainstream society. It also allows an individual without any ancestral ties to be under a tribe's jurisdiction.

The *Rogers* test seeks to discern those with sufficient ancestral and tribal ties to warrant a tribe exercising criminal jurisdiction. Other approaches, particularly the totality of the circumstances approach, do not view ancestry and heritage as separate and distinct requirements. *Id*. Instead, it favors a balancing of a set of factors, which may lead a court to disregard an individual's lack of Indian ancestry in favor of simply looking at factors that would constitute the second prong of the *Rogers* test.

The *Rogers* test does not disregard what these other approaches value in their analysis. The *Rogers* test assures that a court will weigh the various factors in the second prong while acknowledging the blood requirement as a vital requirement for a tribe to exercise criminal jurisdiction.

Congress has historically not sought to grant criminal jurisdiction over those that were not ancestral members of a tribe. They have, however, carved out exceptions for domestic violence. In 2013, Congress delegated Special Domestic Violence Criminal Jurisdiction over non-Indians who commit acts of domestic violence on Indians living in Indian country. *VAWA 2013; P.L. 113-4*

Furthermore, it is not as though a tribe can never exercise criminal jurisdiction without meeting the *Rogers* test. Congress has recognized circumstances where a tribe has been given criminal jurisdiction over non-Indians because the *Rogers* test is so narrow. In this particular set of circumstances, Congress has recognized that a tribe can exercise criminal jurisdiction over non-Indians in domestic violence disputes. A tribal government may exercise jurisdiction by meeting the requirements of VAWA. But as we will demonstrate in our second point, the

Amantonka Nation has failed to meet statutory and constitutional requirements. As a result, Amantonka Nation does not have jurisdiction.

II. Amantonka Nation failed to provide Mr. Reynolds with licensed indigent defense counsel in violation of his federal civil rights as guaranteed in the Violence Against Women Act of 2013, and therefore this Court should reverse.

Indian tribal courts do not have inherent criminal jurisdiction to try and to punish non-Indians, and hence may not assume such jurisdiction unless specifically authorized to do so by Congress. *Oliphant*, 435 U.S. at 192. From the earliest treaties with Indian tribes, it was assumed that the tribes, few of which maintained any semblance of a formal court system, did not have such jurisdiction absent a congressional statute or treaty provision to that effect, and at least one court held that such jurisdiction did not exist. *Id*.

Congress' actions during the 19th century reflected that body's belief that Indian tribes do not have inherent criminal jurisdiction over non-Indians. *Id*. This Court concluded that by joining forces with the United States, Indian tribes necessarily yielded the power to try non-Indians except in a manner acceptable to Congress. *Id*.

Justice Rehnquist, writing on behalf of the majority, stated that "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status' as dependent Indian tribes." *Id*.

As held in *Oliphant*, non-Indian perpetrators are under the exclusive jurisdiction of the United States government, even if they committed a crime on tribal land. Under 18 U.S.C. § 1152, the "general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States except in the District of Columbia. . .extend to the Indian country." 18 U.S.C. § 1152.

The "laws" thus extended are defined in 18 U.S.C. § 7 and are commonly referred to as the "federal enclave laws." *See United States v. Markiewicz*, 978 F.2d 786 (2d Cir. 1991), *cert. denied, sub nom. Beglen v. United States*, 113 S. Ct. 1065 (1993). Assault is among these federal statutes. *See* 18 U.S.C. § 13.

With very limited exceptions, tribal courts do not have criminal jurisdiction over non-Indians, unless Congress delegates such power to them. *Oliphant*, 435 U.S. 191. Because of the rampant domestic violence occurring in Indian country, Congress enacted VAWA 2013 as a limited grant of criminal jurisdiction to tribal nations over non-Indians with non-Indians' Constitutional concerns in mind.

A. Congress enacted VAWA 2013 as a limited grant of criminal jurisdiction to tribal nations over non-Indians to meet a specific need in Indian Country.

The Violence Against Women Act (VAWA) was originally passed by Congress in 1994 as part of the Federal Crime Control Bill. *P.L. 103-322*. This act addressed congressional concerns about violent crimes against Indian women by providing federal support to develop and strengthen law enforcement in Indian country. *See* Lisa Sacco, *The Violence Against Women Act: Overview, Legislation, and Federal Funding*, CRS Report No. R42499 (2015).

Studies following the Act revealed that Native American women residing on Indian reservations were more likely than any other race or ethnicity in the United States to be a victim of a violent crime. *See Adverse Health Conditions and Health Risk Behaviors Associated with Intimate Partner Violence*, United States, 2005, MMWR February 8, 2008, 57(05); 113-117. A study conducted by the Bureau of Justice Statistics in 1999 found that at least 70% of the violent crimes committed against American Indians at that time were committed against persons, not of the same rate. This represented the highest rate of interracial violence in the

country. *See* Greenfeld, Lawrence & Smith, Steven, *American Indians and Crime*, Bureau of Justice Statistics, US Department of Justice, Office of Justice Programs, February 1999. NCJ 173386.

Despite these statistics, Congress was slow to grant criminal jurisdiction to Indian tribes over non-Indians. In 2013, nearly fifteen years after the publication of the study conducted by the Bureau of Justice Statistics, Congress reauthorized VAWA through the Violence Against Women Reauthorization Act. *Id*. *See also, VAWA 2013; P.L. 113-4*. The reauthorization granted authority to Indian tribes to exercise Special Domestic Violence Criminal Jurisdiction to issue and enforce protection orders over any person, both Indian and non-Indian.

The Act represented a balance of competing congressional concerns. On one hand, Congress was concerned about interracial violent crime in Indian country, and violent crime against women in particular. *See* Sacco, *supra*. On the other hand, Congress was concerned about protecting Constitutional due process for non-Indian defendants. *VAWA*, 2013.

To address congressional concerns of domestic violence, the act created a voluntary two-year pilot program for Indian tribes that make a request to the Attorney General to exercise Special Domestic Violence Criminal Jurisdiction. *See* Sacco, *supra*. To address congressional concerns of depriving non-Indians of due process, the act mandated that non-Indian SDVCJ defendants have certain rights. *Id*. In order to be designated as a participating tribe and to exercise special criminal jurisdiction over non-Indians, VAWA 2013 requires that the tribe provide indignant defendants with "effective assistance of a licensed defense counsel," among other requirements. *VAWA 2013; P.L. 113-4*.

To be granted Special Domestic Violence Criminal Jurisdiction, a tribe must protect the rights of defendants under the Indian Civil Rights Act of 1968, which largely tracks the

U.S. Constitution's Bill of Rights, including the right to due process. Additionally, a tribe must protect the rights of defendants described in the Tribal Law and Order Act of 2010, by providing: "(1) the effective assistance of counsel for defendants; (2) free, appointed, licensed attorneys for indigent defendants at no cost; (3) law-trained tribal judges who are also licensed to practice law; (4) publically available tribal criminal laws and rules; and (5) recorded criminal proceedings." *Tribal Law and Order Act* at *supra*; *see also VAWA 2013*; *P.L. 111*. Additionally, tribes must not systematically exclude non-Indians from jury pools and must inform defendants of their right to file federal habeas corpus petitions. *VAWA 2013*.

That Congress may have intended only to address particular concerns in a statutory amendment or may not have foreseen all consequences of its statutory enactment is an insufficient reason for refusing to give effect to a statute's plain meaning. *Union Bank v. Wolas*, 502 U.S. 511 (1991). VAWA 2013 was a compromise intended to ensure the protection of women as well as the protection of non-Indians accused of committing a violent crime in Indian country.

The purpose of amending VAWA was not to grant licensing authority to Indian tribes. While the Act does promote tribal sovereignty, the purpose of the Act is not to grant unfettered tribal sovereign criminal jurisdiction authority over all people living in Indian country. In fact, all of the restraints on tribal authority are to ensure that defendants receive a fair trial and due process of law. The restraints are also to address a concern of inherent bias against non-Indians in a tribal legal system, because non-Indians do not have a right to vote in tribal affairs. See generally Karst, *Equal Citizenship under the Fourteenth Amendment*, 91 Harv. L. Rev. 1 (1977). Thus, VAWA 2013 requires that Indian tribes provide defendants with the same protections afforded them by the United States government.

B. The clear and unambiguous intent of Congress was to accord indignant defendants with the right to an attorney licensed to practice law through a state bar association.

Statutory interpretation begins with the language of the statute itself. *Ross v. Blake*, 36 S. Ct. 1850 (2016). In construing statutes, the court begins with the language of the statute and asks whether Congress has spoken on the subject; if the intent of Congress is clear, that is the end of the matter for the court must give effect to unambiguously expressed intent of Congress. *Sebelius v. Cloer*, 133 S. Ct. 1886 (2013).

VAWA 2013, in relevant part, provides that indignant defendants must be provided with the "effective assistance of a licensed defense counsel." *VAWA* 2013. The Sixth Amendment requires that "In all criminal prosecutions, the accused shall enjoy the right… to have the Assistance of Counsel for his defense." Amendment VI. Congress could have used the same language, but instead chose to require that indignant defendants be provided with *licensed* defense counsel. The clear and unambiguous meaning of the word "licensed" in this context is licensed through a state bar association.

In the United States, state governments have historically set the licensing requirements for attorneys. When this Act was adopted in 2013, the majority of tribes did not have written licensing standards for attorneys. As this Court highlighted in *Oliphant*, formal tribal judicial systems are relatively new in United States history. Thus, licensing through the State is the only definition reasonably contemplated by Congress.

Further, Congress' purpose in adding the word "licensed" to the Sixth Amendment right to counsel was to ensure adequate due process for non-Indian defendants in tribal court. With this purpose in mind, it is implausible that Congress intended for Indian tribes to create

their own licensing requirements for attorneys which are neither regulated by nor subject to the review of the Congress.

C. Amantonka Nation's interpretation of VAWA 2013 runs contrary to the plain meaning of the statute and ignores the concerns that Congress intended to address through express limitations of tribal authority.

The Amantonka Nation does not contend that their authority to license attorneys stems from an affirmative congressional authorization or treaty provisions. Instead, like the Suquamish Indian Tribe in *Oliphant*, the Amantonka Nation urges that such authority flows automatically from the Nation's retained tribal sovereign authority.

The lower courts erred in accepting Amantonka Nation's argument, however, for two primary reasons. First, Amantonka Nation has no tribal sovereign authority over non-Indians, and thus, all authority granted to the tribe must come expressly from Congress or by Treaty. Second, Congress included these restraints on tribal authority for the purpose of protecting defendants from inequality and unfairness, and thus, any ambiguity in the terms should be construed in light of such purpose.

As this Court has held in several cases, there are "inherent limitations on tribal powers that stem from their incorporation into the United States." *Oliphant*, 435 at 209. For example, in *Cherokee Nation v. Georgia*, *supra*, the Chief Justice observed that since Indian tribes are "completely under the sovereignty and dominion of the United States. . . any attempt [by foreign nations] to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility." 5 Pet., at 17-18.

As stated by this Court, "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Oliphant*, 435 at 209.

Through VAWA 2013, Congress gave Amantonka Nation the power to exercise Special Domestic Violence Criminal Jurisdiction over Mr. Reynolds. This jurisdiction was conditional, however, on Amantonka Nation providing Mr. Reynolds with *licensed* defense counsel.

Amantonka Nation argues that because Congress did not specify that counsel must be licensed through the State that Congress intended for tribes to create their own licensing standards for attorneys. Such an interpretation runs contrary to the plain meaning of the statute. Congress intended to ensure indignant defendants were represented by adequate defense counsel by requiring that counsel was licensed through a state government.

Amantonka Nation's interpretation renders the word "licensed" meaningless. A statute should be construed so that every word has some operative effect. *Setser v. U.S.*, 132 S.Ct. 1463 (2012). If every Indian tribe that exercises Special Domestic Violence criminal jurisdiction has the inherent power to create their own licensing requirements, then Congress could have omitted the word entirely. Under such an interpretation, each tribe has complete control over what constitutes adequate defense counsel. Given that there are 573 federally recognized tribes in the United States, Congress could not have intended for all tribes to have unfettered power to create licensing requirements for attorneys. Such an interpretation of Congress' intent would do nothing to protect non-Indian defendants in tribal court.

Finally, a key feature of the United States justice system is that the legal profession is regulated by the supreme courts of the states rather than the federal government. This power is retained by state governments under the Tenth Amendment. U.S. Const. Amend. 10. Therefore, the federal government cannot grant to the Amantonka Nation a power that it does not have.

Amantonka Nation failed to provide Mr. Reynolds with licensed indigent defense counsel in violation of his federal civil rights as guaranteed in the Violence Against Women Act of 2013. Therefore, this Court should reverse.

III. Even if Mr. Reynold's is an Indian for purposes of criminal jurisdiction, Equal Protection requires that Mr. Reynold's attorney possess the same qualifications as is required by law to represent non-Indians.

25 U.S.C. § 1302(8) provides in pertinent part as follows:

> No Indian tribe in exercising powers of self-government shall: deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

Generally, constitutional restrictions that apply to the federal government and political units do not apply to the states. This Court stated in *Santa Clara Pueblo* that ''as 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.'' *Santa Clara Pueblo*, 436 U.S. at 106.

However, the Indian Civil Rights Act requires that tribes provide certain safeguards that are similar to the guarantees within the United States Constitution. The Indian Civil Rights Act requires that a tribe shall not, "deny to any person within its jurisdiction the Equal Protection of its law or deprive any person of liberty or property without due process of law." 24 U.S.C. § 1302(8). It makes applicable to Indian tribes the guarantees of the Fourteenth Amendment as are applicable to other political subdivisions. See generally Karst, *Equal Citizenship under the Fourteenth Amendment*, 91 Harv. L. Rev. 1 (1977).

Within the Indian Civil Rights Act, there is an even more specific provision that applies to effective counsel. If a tribal court imposes a sentence in excess of one year, the act requires

the court to provide the defendant ‘‘the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution,’’ including the appointment of counsel for an indigent defendant at the tribe’s expense. 24 U.S.C. § 1302(c)(1). Equal protection requires that tribal governments must provide the same guarantees to non-Indians as they would receive in state or federal court.

Effective assistance of counsel was defined by the Seventh Circuit Court of Appeals in *Williams v. Twomey* as that level of performance "which meets a minimum standard of professional representation." *Williams v. Twomey*, 510 F.2d 634, 641 (7th Cir. 1975). A defendant in any other state or federal court would be entitled to a state bar licensed attorney. Based on the Amantonka Nation’s argument Mr. Reynolds is not entitled to that same professional standard.

Furthermore, although Mr. Reynolds attorney did attend an ABA accredited law school, the Amantonka bar does not require that its public defenders attend any law school to sit to take the bar. This showcases that the requirements to be before the court are far from that of the requirements of other jurisdictions. Although some states also do not require attendance at a law school, those states do require an apprenticeship under a licensed attorney for an extended period. *See* Claire Guback, Erica Moeser, *Comprehensive Guide to Bar Admission Requirements 2017*, American Bar Association (2017).

Without debate, if both Mr. Reynolds and Mrs. Reynolds were non-Indians, Mr. Reynolds would be entitled to an attorney licensed by a state to practice law. *See generally* Karst, *supra*. Affording lesser protection to Indian defendants, on no basis other than race, is a violation of equal protection guaranteed by the Fifth Amendment. This Court’s decision in *United States v. Bryant* does not change this conclusion.

In *United States v. Bryant*, the Supreme Court was analyzing the constitutionality of using uncounseled tribal convictions to prove criminality under federal statute 18 U.S.C. § 117. *United States v. Bryant*, 136 S. Ct. 1954 (2016). Section 117 allows for harsher sentences for domestic assault by a habitual offender. *Id*. at 1956. The defendant argued that because uncounseled tribal convictions would be an unconstitutional violation of the Sixth Amendment in State and Federal court, those convictions could not be used as a predicate of the new offense. *Id*. at 1966.

The Court rejected the defendant's argument, finding that because his uncounseled tribal convictions were valid when entered, those convictions could be used to prove criminality under section 17. *Id*. In reaching this decision, the Court spent considerable time discussing why such convictions were valid in tribal court. The Bill of Rights are "constitutional provisions framed specifically as limitations on federal or state authority." *Id*. at 1962 (quoting *Santa Clara Pueblo*, 436 U. S. at 56). Therefore, the Sixth Amendment right to counsel does not apply in tribal-court proceedings. *Id*.

Congress enacted the Indian Civil Rights Act (ICRA) to provide procedural safeguards to tribal-court defendants "similar, but not identical to those contained in the Bill of Rights and the Fourteenth Amendment." *Id*. (quoting *Martinez*, 436 U.S. at 57). In particular, ICRA only requires that tribes provide indignant defendants with counsel if the tribe intends to sentence the defendant to more than one year in prison. *Id*. at 1959.

According to Title Five, Section 244 of the Amantonka Nation Code, Mr. Reynolds could have been sentenced to three years imprisonment for his intentional act of domestic violence. R. at 13. Therefore, Amantonka Nation was required by ICRA to provide Mr.

Reynolds with counsel that met the standards of Equal Protection. Failing to do so was an unreasonable violation of Mr. Reynolds' rights.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the lower courts.