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 National District Court,

Respondents.

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

BRIEF FOR THE PETITIONER

Attorneys for the Petitioner:

Team 693

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 required under VAWA 2013?

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STATEMENT OF THE CASE

I. Statement of Facts

Petitioner, Mr. Robert R. Reynolds met his wife, Lorinda, while they were both students at the University of Rogers. While Mr. Reynolds is a non-Indian and a naturalized citizen, his wife is a citizen of the Amantonka Nation, which is a federally-recognized tribe. The Amantonka Nation's reservation is located within the State of Rogers, the 51st state in the United States. Mr. Reynolds and his wife married after both graduated from the University of Rogers, and both secured jobs on the Amantonka Nation Reservation. Mr. Reynolds found a job as a manager at the Amantonka shoe factory. Mr. Reynolds and his wife lived in an apartment in the tribal housing complex during this time. Two years after they got married, Mr. Reynolds applied to become a naturalized citizen of the Amantonka Nation and completed the voluntary process. He took the oath of citizenship and received his Amantonka Nation ID card.

One year later, Mr. Reynolds lost his job after the Amantonka shoe factory closed and was out of work for ten months thereafter. During those ten months, the marriage between Mr. Reynolds and his wife became strained. Although the police had been called, there was no evidence of prior physical altercations before the incident in June 2017. On June 17, 2017, the Amantonka Nation police responded to a call at their residence due to a domestic disturbance, and Mr. Reynolds was arrested. The next day, he was charged with violating Title 5 Section 244 of the Amantonka Nation Code. Mr. Reynolds contends that he is a non-Indian for purposes of criminal jurisdiction and is subject to Special Domestic Violence Criminal Jurisdiction. Mr. Reynolds also contends that the attorney appointed to represent him was inadequate as a matter of law.

II. Statement of Proceedings

The Amantonka Nation District Court denied Mr. Reynolds' pretrial motions and set the case for trial. A jury found Mr. Reynolds guilty, and an appeal ensued. Mr. Reynold's conviction was affirmed. Mr. Reynolds then filed a petition for a Writ of Habeas Corpus under 25 USC Sect. 1303, and the U.S. District Court for the District of Rogers granted his petition. The U.S. Court of Appeals for the Thirteenth Circuit then reversed and remanded with instructions to deny the petition for a writ of habeas corpus. In 2018, the U.S. Supreme Court granted certiorari to decide the following: 1) whether Mr. Reynolds is a non-Indian for purposes of Special Domestic Violence Criminal Jurisdiction; and 2) whether Mr. Reynolds' court-appointed attorney satisfied the relevant legal requirements required under the Violence Against Women Act (VAWA) 2013.

SUMMARY OF THE ARGUMENT

This court should reverse the Thirteenth Circuit's decision and grant Petitioner's writ of habeas corpus. Federal law limits criminal jurisdiction over "Indians" and provides a definition of "Indian" that requires some degree of Indian blood. It is undisputed that Mr. Reynolds possesses no Indian blood and merely made an oath of citizenship. Therefore, Mr. Reynolds cannot be an "Indian" for purposes of criminal jurisdiction.

In the VAWA 2013's SDVCJ Five-Year Report, "Indian" is explicitly defined as any person who would be subject to the jurisdiction of the United States as an Indian under The Major Crimes Act 18 U.S.C. § 1153 just as the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1304, as amended by VAWA 2013, defines Indian. The Supreme Court's long-established precedent in *Rogers*, 45 U.S. at 567 of the *Rogers Test*, requires an individual to have both some Indian blood and recognition as an Indian by a tribe or by the federal government in

order to be an Indian for purposes of federal criminal jurisdiction, including The Major Crimes Act 18 U.S.C. § 1153. The *Rogers Test* has not only been adopted, but has become the standard among Federal Circuits for determining Indian status for federal criminal jurisdictional purposes. It is undisputed that Mr. Reynolds fails to satisfy the first prong of the *Rogers Test* by not having Indian blood; his citizenship with the Amantonka Nation is simply not enough to make him an Indian. (R. at 8). Because Mr. Reynolds fails to satisfy the *Rogers Test*, Mr. Reynolds is a non-Indian and is subject to the VAWA 2013's Special Domestic Violence Criminal Jurisdiction.

VAWA 2013 § 904 requires tribes to guarantee effective assistance of counsel to indigent defendants. The Amantonka Nation failed to provide Mr. Reynolds with the indigent defense counsel required under VAWA 2013. The attorney appointed is not barred within the state of Rogers, which is a violation of the requirements implemented by VAWA. VAWA requires that attorneys be barred within the state they practice. Mr. Reynolds was therefore not given adequate assistance of counsel because his attorney's qualifications was not to the same standard of the attorneys barred within the state of Rogers.

The Amantonka Nation also violated Mr. Reynolds' equal protection rights. By admitting attorneys to practice within their bar without having them have the same qualifications of attorneys admitted outside the Amantonka Nation, the jurisdiction violates equal protection by appointing attorneys who are less qualified than those who would be appointed to non-Indians.

ARGUMENT

I. INDIAN STATUS FOR PURPOSES OF SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION SHOULD FOLLOW SUPREME COURT PRECEDENT IN MAJOR CRIMES ACT.

The Indian Civil Rights Act, 25 U.S.C. §§ 1301-1304, as amended by VAWA 2013 defines "Indian" to mean "any person who would be subject to the jurisdiction of the United States as an Indian under Section 1153, Title 19, United States Code." The Supreme Court has previously defined Indian status of defendants for criminal jurisdictional purposes to be as requiring both Indian blood and recognition as Indians by either the federal government or an Indian tribe. *United States v. Rogers*, 45 U.S. 567, 11 L. Ed. 1105 (1846). The Supreme Court has long recognized a legal distinction between being a tribal citizen or member versus being an "Indian," which must be directly applied to its determination of Indian for purposes of Special Domestic Violence Criminal Jurisdiction. Such precedent proves Robert Reynolds is a non-Indian for purposes of Special Domestic Violence Criminal Jurisdiction (SDVCJ) because he does not have any established *blood quantum*, thereby failing to satisfy the legal requirements as set by *Rogers*. (R. at 8.)

As previously articulated by the Supreme Court, various Circuit Courts including the Seventh, Eighth, Ninth, and Tenth Circuit, and numerous District Courts and State Supreme Courts, an individual must have Indian blood to be determined an "Indian" for jurisdictional purposes, specifically related to Major Crimes Act U.S.C. § 1153. *United States v. Zepeda*, 738 F.3d 201, 206 (9th Cir. 2013). As recent as 2015, the Ninth Circuit recognized that the Mr. Reynolds' Indian status "operates as a jurisdictional element under § 1153" and is a mixed question of law and fact. *Id*. at 206; *United States v. Bruce*, 394 F.3d 1215, (9th Cir. 2005); *United States v. Cruz*, 554 F.3d 840 (9th Cir. 2009). It is further essential that Mr. Reynolds' Indian status must be proved beyond a reasonable doubt, requiring a jury, need be, to resolve factual disputes arising under the two-step analysis of the *Rogers Test*. *Bruce*, 394 F.3d at 206; *Cruz*, 554 F.3d at 845; *Zepeda*, 738 F.3d at 1218, 1223, 1228, 1229. It is

undisputed that the Mr. Reynolds possesses no Indian blood, and therefore, fails to satisfy the first prong of the *Rogers Test*. (R. at 8.) The position for finding the Petitioner Robert R. Reynolds to be an Indian for the SDVCJ is inconsistent with the Supreme Court and with Congress' intent in passing the 2013 reauthorization of the Violence Against Women Act, authorizing SDVCJ to protect Indian women from non-Indian men. VAWA 2013 § 902.

Petitioner Robert R. Reynolds does not have Indian blood and to this standard, fails as a matter of fact to be an Indian. *Bruce*, 394 F.3d at 1217. The legal standard for "Indian" in The Major Crimes Act (MCA) 18 U.S.C. § 1153, which provides Congress the power to extend federal jurisdiction on to crimes committed between American Indians on Indian land, is the proper standard to be applied to the SDVCJ because of its directly applicable conditions of defining federal criminal jurisdiction in matters involving Indians and Indian land. In support of requiring of Indian blood, the Bureau of Indian Affairs "regularly certify blood quantum for the purpose of establishing eligibility for federal programs available only to Indians." *United States v. Rainbow*, No. 15-1936, 2016 WL 683113 (8th Cir. 2016).

A. Defining "Indian" in Federal Criminal Cases in the Supreme Court

Mr. Reynolds fails to satisfy the legal requirements defining "Indian," and so is a non-Indian subject to the SDVCJ. Rooted in over one-hundred and seventy years of legal precedent, the *Rogers Test* continues to find the status of a defendant through a two-prong analysis of: (1) significant amount of Indian blood; and (2) recognition as an "Indian" by a federally acknowledged tribe. In *Rogers,* 45 U.S. at 567, the Supreme Court ruled "we[sic] think it very clear, that a white man who at a mature age is adopted in an Indian tribe does not thereby become an Indian." Mr. Reynolds, like *Rogers*, is not of Indian blood and

voluntarily became a tribal member after intermarrying and settling together on tribal land. *Id*. at 572, 573.

Further, although *Rogers* had "incorporated himself with the said tribe of Indians as one of them, and was so treated, recognized, and adopted by the said tribe, … and exercised all the rights and privileges of a Cherokee Indian in the said tribe," he failed to satisfy a blood requirement. *Id*. at 571. It is the federal government's intent in using the term "Indian" in a statute to "not speak of members of a tribe, but of the race generally." *Id*. at 573. Similarly, Mr. Reynolds is an adopted citizen of the Amantonka Nation, and like Rogers, he does not fit the racial component required by *Rogers*, and is thus, not of the intended "Indians" the federal government intended.

While citizenship or adoption may grant non-Indians certain privileges in the tribe and make the citizen amenable to the tribe's laws and usages, it does not grant upon a non-Indian adoptee a new racial recognition by the federal government. Almost fifty years later, *Westmoreland v. United States*, 155 U.S. 545, 548, 15 S. Ct. 243, 244, 39 L. Ed. 255 (1895) affirmed that a non-Indian's adoption into a tribe does not extend jurisdiction to crimes committed by one Indian against another without the individuals' blood quantum. It is explicitly stated in another Supreme Court case, *Nofire v. United States*, 164 U.S. 657 (1897), "a non-Indian could not, through his adoption into the Cherokee Tribe, bring himself within the federal definition of 'Indian' for purposes of an exemption to a federal jurisdictional provision." Mr. Reynolds' citizenship of the Amantonka Nation is no different than a tribal adoption and it such citizenship does not make him an Indian nor exclude him from the scope of the SDVCJ. Mr. Reynolds would still fail the racial aspect of the *Rogers Test* and is not an Indian the purposes of the SDVCJ.

B. *Antelope* does not overrule the *Rogers Test*

Opposing party may cite *United States v. Antelope*, 395 F.3d 1128 (9th Cir. 2005) as precedent against the racial component of the *Rogers Test* but that position would be mistaken. *Antelope* does not address how an individual is an Indian under statutes determining federal jurisdiction in Indian Country, but rather how if the statutes were based on "impermissible racial classifications"—the defendant's status as Indian was never questioned. *Id*. at 430. The portion of the Supreme Court's opinion that reads "the government maintains that 'proof of one's relationship as a political entity not blood, constitutes the quintessence of what it means to be an 'Indian,'" is using the word "Indian" in the context of Indian *tribes*, not individuals, with federal legislation. *Id*. (citing *United States v. Antelope*, 430 US. 641, 97 S.t. 1395, 51 L.Ed.2d 701 (1977)). Interpreting *Antelope* as a basis for excluding the blood requirement would be inconsistent with *Rogers* and the Seventh, Eighth, Ninth, and Tenth Circuit Courts, various Federal District Courts, and State Supreme Courts, which continue to cite and employ the *Rogers Test*. As best put by the Tenth Circuit, over one-hundred-and-fifty years after *Rogers:*

> we have not found any federal decisions issued after *Antelope* that have read that opinion to implicitly overrule the two-part test [in *Rogers*] … [i]ndeed, a number of post-*Antelope* decisions, including our decision in *Scrivner*, have continued to apply the two-part test derived from *Rogers*. *United States v. Prentiss*, 273 F.3d 1277, 1279 (10th Cir.2001).

Interestingly enough, *Rogers* is not even discussed nor mentioned in *Antelope*, indicating a clear distinction of its subject matter on pre-identified Indian tribes, not a reworking of the *Rogers Test*. *Rogers* and its two part test for determining Indian status of individuals for federal criminal jurisdiction is fully intact and is the correct application of law as set forth by the Supreme Court.

C. Federal Circuits defining "Indian"

The *Rogers Test* is used by the Seventh Circuit for determining Indian status, along with additional factors to help determine the second prong, whether the person is recognized as an Indian by a federal tribe. After reiterating that "courts have held that uncontradicted evidence of tribal enrollment and a degree of Indian blood constitutes adequate proof that one is an Indian for purposes of *The Major Crimes Act*," the Court in *U.S. v. Torres*, 733 F. 2d 449, 455 (7th Cir. 1984) gave examples for what factors a determination for the second prong may investigate. Factors heeded may include the individual's self-identity, if the person lives on an Indian reservation, if an Indian tribe or the federal government recognizes the individual as an Indian, etc. *Id*. In addition to being listed on the Menominee Tribal Rolls, both appellants also received dividend payments from the Menominee Tribal Enterprises, payments only issued to enrolled members. *Id*. at 455. Considering the "totality of circumstances," the second prong was satisfied. *Id*. at 456. Further, it was found that both appellants were respectively 25/64 and 11/32 degree Menominee Indian blood and had each been listed on the Menominee Tribal Roll; thus, the appellants were Indians for purposes of the *Major Crimes Act*. *Id*. at 455. The *Rogers Test* is the continuing legal core and standard to determine Indian status for federal criminal jurisdictional purposes.

In more, seemingly, straightforward cases where the defendant has tribal membership in addition to proven blood quantum, the *Rogers Test* is more simply applied in the Eighth Circuit. For example, in *U.S. v. Rainbow*, No. 15-1936, 2016 WL 683113 (8th Cir. Feb. 19, 2016) the defendants were enrolled in the Standing Rock Sioux Tribe, proven with certificates and tribal testimony, clearly satisfying the latter criterion in *Rogers*. As for the blood requirement, in this case the tribal membership alone was sufficient to prove that the

defendants were Indians because the "Standing Rock Sioux Tribe requires its members to have at least 'one-fourth Standing Rock blood'." *Id*. The *Rogers Test* allows a quick determination when tribal membership is held in "a tribe that will not accept members without a certain degree of consanguinity." *Id.* As for the circumstances of Reynolds, citizenship in the Amantonka Nation does not require nor signify that the member has Indian blood, and therefore, Reynolds' citizenship is not dispositive of being an Indian under the *Rogers Test*. The *Rogers Test* symbolizes that tribal membership is not indicative of who is an Indian unless such membership into that specific tribe requires a specified blood quantum. Indian blood is a requirement for federal recognition as an Indian and for purposes of determining federal jurisdiction.

The *Rogers Test* is capable of applying to even more complicated cases, as seen in the Eighth Circuit's recitation of the factors in *Torres*, 733 F. 2d in *United States v. Stymiest*, 581 F.3d 759 (8th Cir. 2009). The Eighth Circuit has

> 'gleaned from case law' factors to guide the analysis of the second *Rogers* criterion" and considers the following factors 'in declining order of importance': '1) enrollment in a tribe; 20 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.'

Id. at 763. These considerations are to be viewed by the Court as useful guides to understanding the second part of *Rogers,* absent evidence that defendant is an enrolled tribal member, but said list is not meant to be exhaustive. *Id*. at 764. Because Stymiest is not enrolled in an tribe, his relations to any Indian tribes was closely examined; records indicated that despite not being eligible for free non-emergency services, Rosebud Indian Health Services hospital never billed Stymiest for his out-patients visits and emergency visits. *Id*. at 765. Symiest repeatedly self-identified as an Indian, socialized with his Indian girlfriend and

other Indians, lived on the Rosebud reservation and worked on the Rosebud reservation as well. *Id*. Lastly, the Court also considered that Symiest repeatedly submitted to tribal arrests and prosecutions in addition to his hospital treatments, concluding that Stymiest had sufficient evidence that he received forms of official tribal recognition—thereby satisfying the second requirement of the *Rogers Test*. *Id*. at 766.

As for the required condition of Indian blood, Stymiest also satisfied this condition as his grandfather was an enrolled member and medicine man of a Minnesota Band. *Id*. The Eighth Circuit thus concluded that Stymiest was indeed an Indian using the *Rogers Test*, finding it an adequate solution to determining the defendant's status despite a series of complicating facts. *Id*. The *Rogers Test* is not only used by the Seventh and Eighth Circuits, but has held up to multiple challenges of fact, proving that the test is applicable to difficult cases without problems of ambiguity in practice.

The Ninth Circuit has also adopted these extra factors to *Rogers* from the Eighth Circuit, employing their use in *U.S. United States v. Bruce,* 394 F.3d at 1218, known as the *Bruce Factors*. With these same elements, the Ninth Circuit has set precedent for declaring that blood quantum is not enough for an Indian status under The Major Crimes Act, 18 U.S.C. § 1153, the standard specified by the SDVCJ. In *United States v. Cruz*, 554 F.3d 1215 (9th Cir. 2005), although the defendant was 29/128 Blackfeet Indian, a federally recognized tribe, and 32/128 Blood Indian, a Canadian tribe, and had lived for four years of his childhood on the Blackfeet Reservation, he lacked satisfactory ties to the tribe under the second prong of *Rogers*. *Cruz*, 554 F.3d at 842, 843. Using the same factors as the Eighth Circuit in *Stymiest*, Cruz was found not to be an enrolled tribal member, even though his descendent status entitled him to use Indian health Services, certain educational grants and

fish and game licenses on the reservation, he never utilized those benefits. *Id*. at 846, 847. Further, although he was employed as a firefighter for the Bureau of Indian Affairs, the job was open to non-Indians and he did not attend nor participate Blackfeet cultural events. *Id*. at 847. Accordingly, the Ninth Circuit found Cruz a non-Indian for purposes of *The Major Crimes Act*. *Id*. at 842, 843. Just as tribal enrollment may not always be dispositive of Indian status, neither is ethnicity alone.

The Tenth Circuit reiterates the *Rogers Test* as the standard for ascertaining whether a person is an Indian under *the General Crimes Act*, requiring the court to make factual findings for each prong, though membership of a tribe that requires a certain degree of blood relation may be dispositive. *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012). Following the same logic, it prescribes that "the government can prove that a person is not Indian by showing that he fails either prong." *Id*.

D. Policy

The *Rogers Test* clarifies the legal difference between an individual having tribal membership or citizenship versus an individual being classified as an "Indian" for purposes of federal jurisdiction. The SDVCJ was also created with this difference in mind. "Domestic violence" is specified in the act to include violence "committed by a current or former spouse." VAWA § 1304. Tribal Jurisdiction over Crimes of Domestic Violence (2). In *Rogers*, the Supreme Court specifically expressed its concern that non-Indian men would:

> by one of the tribes, throw off all responsibility to the laws of the United States, and claim to be treated by the government and its officers as if they were Indians born. It can hardly be supposed that Congress intended to grant such exemptions, especially to men of that class who are most likely to become Indians by adoption, and who will generally be found the most mischievous and dangerous inhabitants of the Indian country.

Rogers, 45 U.S. 567 at 572, 573.

Today, this fear has now been legitimized as ninety-percent of female and eighty-five percent of male American Indian and Alaska Native victims of intimate partner physical violence report a non-Indian perpetrator. VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT, National Congress of American Indians (2018), http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf. The SDVCJ is designed to address this issue and protect Indian women from non-Indian abusers and the Amantonkan Nation's *Title 2 Chapter 1 Section 105(b)* reiterates the SDVCJ's language. *Compare* Section 105 of the Amantonka Nation's Code with VAWA 2013 Section 904.

E. Naturalization process of tribal citizenship does not grant "Indian" status

Mr. Reynolds' voluntary naturalization into the Amantonka Nation, requiring extensive learning and knowledge of Amantonkan culture, history, government, and performing community service does not alter his racial status from a non-Indian to an Indian under *Rogers*. The modern naturalization process of the Amantonka Nation is held to this principle regarding adoption due to the naturalization process' clear purpose in continuing "the historical practice of adopting into our community" the spouses of its citizens. § 203 of the Amantonka Code affirms that after completing the required law and culture classes, community service, and a satisfactory citizenship test that Mr. Reynolds is now a citizen and thereby "entitled to all the privileges afforded all Amantonka citizens." Although such privileges allow Reynolds to satisfy the second prong of the *Rogers Test* in accordance with the *Bruce Factors*, his lack of any Indian blood bars him from being an Indian for jurisdictional purposes.

Lastly, the naturalization process described above in Amantonkan code Process in Section 202 of the Amantonka Code never grants the title or status to the individual as an "Indian." Further, in TITLE 3, Chapter 2 Naturalization, the word "Indian" fails to appear anywhere in the section—there is no language that supports the position that becoming a naturalized Amantonkan citizen also makes one an Indian. If the naturalization process was intended to infer Indian status on its new citizens, then the Amantonka Nation would have been explicit in this sense. The Amantonka Nation is explicit however with using the terms "Indian" and "non-Indian" in its code when addressing VAWA related sections of its code. Title II Section 5 of the Amantonka Code. Comparing these sections of the Amantonka Code, the criminal code exclusively uses "Indian" and "Non-Indian" without any mention of citizenship relating to criminal jurisdiction and domestic violence, indicating that "Indian" and "citizen" do not hold the same meaning. Nowhere in the Amantonka Nation's code are the two used interchangeably or even in the same section. It is also significant that Title 5 of the Criminal Code § 244 "Partner or family member assault" neither includes the words "Indian" nor "citizen." Lastly, while Reynolds does enjoy benefits of his citizenship, he still does not satisfy the blood quantum requirement set in *Rogers*, having no native blood. (R. at 8.)

Reynolds is not an Indian under the *Rogers Test*, a creation of the Supreme Court, which determines Indian status for means of The Major Crimes Act U.S.C. § 1153 and the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1304, as amended by VAWA 2013 defines "Indian" to mean "any person who would be subject to the jurisdiction of the United States as an Indian under Section 1153;" thus, Reynolds is not an Indian according to the Indian Civil Rights Act. Such definition of Indian is explicitly recited in the VAWA 2013'S SPECIAL

DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT and so is the intended definition of Indian for the SDVCJ. As Reynolds is not an Indian under the Indian Civil Rights Act, he is not an Indian for purposes of the Special Domestic Violence Criminal Jurisdiction.

II. THE AMANTONKA NATION FAILED TO PROVIDE PETITIONER WITH THE INDIGENT DEFENSE COUNSEL REQUIRED UNDER VAWA 2013, AND WAS SUBSEQUENTLY A VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL.

The Tribal Law and Order Act (TLOA) and the VAWA both require tribes to guarantee effective assistance of counsel. Under the TLOA, tribal courts must "provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution." In addition, the Department of Justice has stated that "[t]he tribal courts' application of the federal statutory rights described in [the VAWA] should be comparable to state courts' applications of the corresponding federal constitutional rights in similar cases."

State courts require their attorneys to be barred by a state bar exam. By not requiring the same of the attorneys practicing in the Amantonka Nation, there is an unequal standard of qualifications required by the jurisdiction. In addition, unqualified attorneys are not considered as "counsel." Title 2 Sect. 607(b) of the Amantonka Nation requires for eligibility of serving as a public defender, the person must have taken and passed the Amantonka Nation Bar Exam. This qualification is inconsistent with the requirements for the state, as every state requires attorneys to be admitted to its bar association prior to practicing law. While the public defender may be working under the jurisdiction of the Amantonka Nation, the public defender should also be admitted to the State of Rogers in order to be

considered qualified to represent the Petitioner and ensure equal qualifications of representation.

A. VAWA 2013 requires tribes to provide criminal defendants with the rights necessary under the Constitution.

VAWA 2013 § 904 requires tribes exercising special domestic violence criminal jurisdiction to provide criminal defendants with "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant." The Office of the Attorney General has interpreted this section to "give[] courts the flexibility to expand the list of protected rights to include a currently unforeseen right whose protection the 113th Congress did not believe was essential to the exercise of [the expanded VAWA jurisdiction]."

The Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-1303 states that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person in a criminal proceeding the right . . . at his own expense to have the assistance of counsel for his defense . . . .". The Court has previously held the Sixth Amendment entitles a person charged with crime in a federal court to the assistance of counsel for his defense. *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Walker v. Johnston*, 312 U.S. 275 (1941); and *Glasser v. United States*, 315 U.S. 60 (1942). The Sixth Amendment demands that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The U.S. Supreme Court interprets the Sixth Amendment as requiring"reasonably effective assistance," *Strickland v. Washington*, 466 U.S. 668, 687 (1984), by "an advocate who is . . . a member of the bar." *Wheat v. United States*, 486 U.S. 153, 159 (1988).

The Court has unequivocally declared that the right of indigent criminal defendants to appointed counsel is a fundamental right. *Gideon v. Wainwright*, 372 U.S. 335 (1963). The Sixth Amendment affords an individual with effective assistance who is a member of the bar. However, if there are different standards for attorneys then the Indian defendant is not getting the same representation on the reservation. Equal Protection requires that the governing body state must treat an individual in the same manner as others in similar conditions and circumstances and thus the an attorney must possess the same qualifications as is required by law to represent non-Indians.

While opposing party may allege there is not a difference between a state and a tribal bar exam, the mere existence of such a dichotomy is itself a equal protection violation, as Indian and non-Indian defendants are not appointed attorneys with the same credentials and qualifications. The ABA Model Rules states that if a public defender or a private attorney does not have "sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter," then the attorney is obligated to move to withdraw from the case or refuse the appointment at the time of appointment.

In this case, Mr. Reynolds was provided an attorney that was inexperienced and unqualified to practice law in the state of Rogers. An attorney for a non-Indian would have to be barred within the state they practice thus Mr. Reynolds is being treated differently as an Indian, as the Amantonka Nation does not require its public defenders to be barred within the state. Treating Mr. Reynolds differently than a non-Indian violates his Equal Protection rights. While Mr. Reynolds contends that he is not an Indian, he argues that if he were to be considered an Indian for the purposes of the statute, he would not be entitled to the same representation as a non-Indian and is therefore treated discriminately. By not appointing him

a qualified attorney under the statute, Mr. Reynolds is denied the chance to succeed in his case from the onset.

The distinction rests on whether Petitioner is an Indian or a non-Indian which itself is dependent on an individual's national origin, which creates a different standard for Indian defendants. The Court has held that an attorney admitted to federal district court but not to state bar may be enjoined from practice of law. *Ginsburg v. Kovrak*, 392 Pa. 143, 139 A.2d 889 (1958). VAWA 2013 requires tribes "provide indigent criminal defendants with the effective assistance of licensed defense counsel." The fact that appointed counsel is merely an attorney within *a* jurisdiction does not satisfy these requirements. A state licensed attorney must be the Counsel provided to ensure that Indian defendants have the same access to justice as non-Indian defendants.

B. The Amantonka Nation fails to employ an appropriate licensing standards for attorneys practicing within its jurisdiction.

While all public defenders in the Amantonka Nation do happen to have a JD, the Amantonka Nation does not require its public defenders to hold a JD degree. The plain language of statute 25 U.S.C 1302 (c)(2) states that tribes must "provide an indigent defendant 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." The statute requires that the jurisdiction apply an appropriate professional licensing standard. By not requiring all public defenders to hold a JD, the Amatonka Nation fails to apply the appropriate professional licensing standard. Therefore, the jurisdiction as a whole does not meet the standard under 25 U.S.C 1302 (c)(2).

The states ensure their attorneys are properly trained by requiring their public defenders to hold a JD degree. In comparison, the Amantonka Nation is appointing unqualified attorneys for indigent defendants—failing to apply the appropriate professional licensing standard.

The Amantonka Nation Code also states that the term "attorney" includes lay counselors. However, the Court has cautioned against this practice, as they have rejected a defendant's request for lay representation reasoning that such a request "would amount to a wholesale authorization of the lay to practice law." *Turner v. American Bar Association*, 407 F. Supp. 451 (S.D. Ala. 1975). As thus, the term "attorney" does not include lay counselors. Further, lay counselors are not properly considered counsel.

C. Indigent defendants possess a fundamental right to choose his or her own attorney.

The Supreme Court has held that the right to counsel is a "fundamental" constitutional guarantee as it is "necessary to insure ... life and liberty." *Johnson*, 304 U.S. at 458. The Court has also held that a defendant cannot be incarcerated for any conviction unless he or she either receives the assistance of counsel or waives the right to a lawyer. *Alabama v. Shelton*, 535 U.S. 654 (2002). This fundamental right applies to defendants who can hire lawyers with their own means as well as defendants who need government-paid counsel because they cannot afford an attorney. *Gideon*, 372 U.S. at 335.

As earlier discussed, the Sixth Amendment protects the right of those who could procure counsel to have an attorney. *Bute v. Illinois*, 333 U.S. 640, 663 (1948). Moreover, the Sixth Amendment guarantees "the assistance of counsel of the accused's own selection." *Anderson v. Treat*, 172 U.S. 24, 29 (1898); *Powell*, 287 U.S. at 53, 60-65. Thus, jurisdictions do not get to dictate who the accused retains. Mr. Reynolds believes the attorney appointed

was inadequate to represent him due to his qualifications and therefore, Mr. Reynolds should have been afforded the right to choose another attorney who he felt was more qualified to handle his case.

The Sixth Amendment right to counsel is a fundamental right incorporated through the Due Process Clause of the Fourteenth Amendment. *Kimmelman v. Morrison*, 477 U.S. 365 (1986). The Court has found the Sixth Amendment grants this right. *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2016). A defendant's status as indigent does not set him or her apart in any relevant way from defendants with the means to hire attorneys of their choosing.

Similar to a poll tax, a wealth-based rule excludes indigent individuals from exercising a right on the same terms as those with the means to pay for their own counsel. The Court has held that a poll tax is unconstitutional as "wealth or fee paying has . . . No relation to voting qualifications." *Harper v. Virginia State Board of Elections*, 383 U.S. 670. Just as "the right to vote is too precious, too fundamental to be so burdened or conditioned," it can be similarly argued for the Sixth Amendment right to choose an attorney. *Id*. Discriminating against individuals because of their wealth deprives them of their rights. Mr. Reynolds was not represented by an attorney of his own choosing—who he believes will best represent him—thereby depriving him of his fundamental right to choose his counsel.

CONCLUSION

The U.S. Supreme Court should reverse the Thirteenth Circuit's decision, and follow the *Rogers* test as set forth by the U.S. Supreme Court for determining Indian status for criminal jurisdictional purposes.