No. 19-231

In the

Supreme Court of the United States

March Term, 2019

ROBERT R. REYNOLDS
Petitioner,

v.

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

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

Brief for Petitioner

Team 745
Counsel for Petitioner
January 14, 2019

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QUESTIONS PRESENTED

1. Does Petitioner meet the definition of an Indian for the purpose of Special Domestic Violence Criminal Jurisdiction despite having no Indian ancestry?
2. Did the attorney appointed to the Petitioner satisfy the legal requirements set out by the Sixth Amendment and the Violence Against Women Reauthorized Act of 2013 ("VAWA")?

STATEMENT OF THE CASE

Statement of Proceeding

Robert Reynolds was charged with violating Title 5 Section 24 of the Amantonka Nation tribal code in the district court of the Amantonka Nation. Mr. Reynolds filed pretrial motions challenging the tribal courts jurisdiction and moving to have the charges dismissed because he is not an Indian. He also requested the court-appointed counsel he was entitled to under Violence Against Women Act. He was appointed indigent defense counsel at his arraignment. He claimed that this appointment constituted a violation of his equal protection rights as his counsel was not a member of the state bar similar to the requirements for indigent counsel in state or federal court, in accordance with Special Domestic Violence Criminal Jurisdiction. His motions were denied. He was subsequently convicted by a jury. He was sentenced to seven months incarceration, $300 in restitution, batterers intervention and alcohol treatment and $1500 fine. He timely appealed his conviction, raising the same issues he did in his pre-trial motions. The Supreme Court of the Amantonka Nation upheld his conviction. Mr. Reynolds filed a writ of habeas corpus with the district court of the state of Rogers. The district court granted the motion. The US. Court of Appeals for the Thirteenth Circuit reversed the decision of the district court and remanded with instructions to deny the

writ. Mr. Reynolds filed a petition for certiorari with this court. It was granted on the questions presented.

Statement of Facts

Robert Reynold is a native to the state of Rogers. Record ("R") at 6. In college he met his now wife, Lorinda. *Id.* They began dating and were married shortly after graduation. *Id.* Lorinda is a lifelong member of the Amantonka nation. *Id.* After getting married, the couple moved to the Amantonka reservation, where they both found jobs. *Id.* Robert Reynolds chose to become a naturalized citizen of the Amantonka Nation. *Id.* He successfully completed the process and was made a member of the Amantonka Nation. *Id.* A year later, Mr. Reynolds lost his job. Overcome with depression he tragically developed a dependence on alcohol. *Id.* On the night of June 17, 2017, police were called to the Reynold's residence. *Id.* Lorinda had been injured during a fight with her husband. *Id.* The police arrested Reynolds and detained him over-night. He was charged with violating Title 5 Section 244 of the Amantonka Nation Code. *Id.* at 7. After this incident, Robert Reynolds was able to secure another job. *Id.* at 6. He and Lorinda are in the process of working to repair their relationship and strengthen their marriage. *Id.* at 5.

SUMMARY OF THE ARGUMENTS

Petitioner is a non-Indian despite his membership in the Amantonka Nation. There is a clearly defined two-part test outlined in *United States v. Rogers* for determining if an individual is an Indian for jurisdiction purposes. 45 U.S. (4 How.) 567 (1846). The test is 1) does the individual have Indian ancestry and 2) is the individual member of a federally recognized Indian tribe. *Id.* Petitioner is a not an Indian because he has no Indian ancestry

and therefore cannot satisfy the first half of the Rogers test. Tribes do not have jurisdiction to prosecute non-Indians for criminal offenses unless they fall under the special jurisdiction created under the Violence Against Women Act. *Oliphant v. Suquamish*, 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978) and 25 U.S.C.S. § 1302. Petitioner was not charged or convicted under this special jurisdiction but was erroneously identified as an Indian and prosecuted under the jurisdiction of the Amantonka Nation.

Petitioner's court-appointed attorney did not satisfy the legal requirements set out by VAWA for defendants. As a non-Indian indigent defendant, Petitioner was entitled to all rights listed under 25 U.S.C.S. § 1304(d). 25 U.S.C.S. § 1304(d) (LexisNexis 2018). Since Petitioner was sentenced to seven months incarceration, according to 25 U.S.C.S. § 1304(d)(2), the Amantonka Nation had to provide effective counsel equal to that assured by the United States Constitution and ensure that the provided counsel was licensed to practice law in a United States jurisdiction that uses the appropriate professionalism, responsibility and competency standards necessary to practice before American courts. 25 U.S.C.S. § 1304(d)(2) (LexisNexis 2018); 25 U.S.C.S. § 1302(c) (LexisNexis 2018). Petitioner's appointed counsel did not meet either of these requirements. In addition, Petitioner should also have been guaranteed equal protection under the law as mandated by the Fourteenth Amendment. 25 U.S.C.S. § 1304(d)(4) (LexisNexis 2018). Under the Amantonka Nation Code, the qualifications for a non-Indian indigent defendant's court-appointed counsel are much higher than they are for an Indian indigent defendant's counsel. 2 Amantonka Nation Code § 607. By mistakenly being categorized as an Indian indigent defendant for jurisdictional purposes, Petitioner was therefore only eligible for the lesser-qualified counsel. This not only violated his rights under VAWA to equal protection under the United States

Constitution as an American indigent defendant, but also is arguably a violation of the Indian Civil Rights Act of 1968 as a matter of public policy.

ARGUMENT

A. Petitioner Is A Non-Indian and Does Not Satisfy the Federal Test for Defining an Indian.

1. There is a clear test established by this Court which dictates whether someone is an Indian for jurisdiction purposes.

Petitioner was charged under the tribal code of the Amantonka Nation. He contends that this was inappropriate because the tribe lacks jurisdiction over him as a non-Indian. Petitioner lacks any ancestral connection to any federally recognized Indian tribe. This lack of Indian ancestry means that, despite his choice to become a member of the Amantonka Nation, he is not an Indian. His registration as a member of the tribe does not make him an Indian for the purpose of asserting jurisdiction.

The concept of a non-native being adopted into a tribe is not a new concept. In *United States v Rogers,* this Court found that a white man adopted by the Cherokee nation in the 1840's was not a native. 45 U.S. (4 How.) 567, 573 (1846). Rogers was a man who voluntarily lived amongst the Cherokee tribe as one of their members. *Id.* He married a Cherokee woman and had several children with her. *Id.* He considered himself to be a member of the Cherokee nation and purportedly was treated as such. *Id.* When he objected to the federal government's jurisdiction, this Court found that his status as a white man could not be changed by his adoption into a tribe. *Id.* While Justice Taney's choice of words throughout the opinion is regrettable, the ruling is clear. There is an ancestry component to being classified as an Indian under federal law. Rogers, much like our Petitioner, chose to join a tribe and live as one of its members but that does not make him an Indian.

When interpreting *Rogers* through subsequent cases, this Court has consistently read the opinion as creating a clear two-part test. *See,* United States v. Lawrence, 51 F.3d 150, 152 (8th Cir. 1995); United States v. Prentiss, 273 F.3d 1277, 1280 (10th Cir. 2001); United States v. Torres, 733 F.2d 449, 456 (7th Cir.), cert. denied, 469 U.S. 864, 83 L. Ed. 2d 135, 105 S. Ct. 204 (1984); United States v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976), cert. denied, 429 U.S. 1099 (1977); St. Cloud v. United States, 702 F. Supp. 1456, 1460-61 (D.S.D. 1988). Each of these cases articulate the Court's test in *United States v. Rogers* and deferred to the precedent set by this Court. *Id.* The generally accepted test is that an Indian can be defined as an individual who, "(1) has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government or both." *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009). Additionally, tribal courts have also adopted this test. In *Navajo Nation v. Hunter*, the Navajo Nation Supreme Court looked to the Federal definition for guidance on a question regarding jurisdiction. 1996 Navajo Sup. LEXIS 4. Defendant, Hunter, challenged her conviction on the basis that the district court failed to prove that she was an Indian beyond a reasonable doubt, as this was an element of the criminal charges for which she was convicted. *Id* at *3-4. The Navajo Nation Supreme Court began their analysis by looking to how to define an Indian. Instead of trying to develop a new definition, the court relied on an already recognized approach.

> "Recognizing the possible diversity of definitions of 'Indian-hood,' we may nevertheless find some practical value in a definition of 'Indian' as a person meeting two qualifications: [*6] (a) that some of his ancestors lived in America before its discovery by the white race, and (b) that the individual is considered an Indian' by the community in which he lives. Felix S. Cohen, Handbook of Federal Indian Law 2 (University of New Mexico Ed., n.d.)."

Navajo Nation v. Hunter, 1996 Navajo Sup. LEXIS 4, *5-6

By embracing this definition of Indian, the Navajo Nation acknowledged that there is an ancestral requirement to acknowledging an Indian. The Petitioner in this case has no native blood or ancestral tie to America before its discovery by the white race. When applying the federal test in this case, Petitioner does not meet the definition of an Indian despite his membership in the Amantonka Nation.

2. This Court should defer to its previous definition of what constitutes an Indian.

The doctrine of *stare decisis* necessitates the adoption of the two-part test. The doctrine of *stare decisis* is one of the bedrocks of the judicial system. Without finality, there can be no real confidence in the system. Once an issue has been resolved, it is important to rely on that resolution. It is that definitive basis that dictates that this court should use its previous test to determine if the Petitioner is an Indian. In *United States v. Rogers*, the Supreme Court found that the federal definition of an Indian must include an ancestral component. *Rogers*, 45 U.S. (4 How.) 567. It is imperative to preserve this system by deferring to the Court's previous judgment.

The federal statutes as they exist now offer no better guidance for how to assess whether an individual is an Indian. Originally adopted in 1934, the section of legislation currently known as Title 25 deals with the federal government's delegation of authority over Indian affairs to the Bureau of Indian Affairs. Since that time, it has been appropriately amended. The definitions of Indian have not changed too much in that time. The relevant statutes defining what makes an individual an Indian tend to vary as to whether they require an ancestry component to or simply membership in a tribe. The definition differs throughout Title 25. All the definitions include the requirement that an individual should be a member of the tribe, but some sections additionally require that an individual also have some amount of

Indian blood ancestry. This apparent inconsistency can be easily explained. An examination of the membership criteria for most tribes that were in existence when the statute was originally passed required some measurable blood relation to the tribe before the tribe will permit membership.

For example, 25 U.S.C.S. § 1301(4) defines an Indian as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies." But when reviewing 18 U.S.C.S. § 1153 there is no definition of Indian. Instead, section 1153 lists many offenses that grant exclusive jurisdiction over an Indian to the Federal government. These include crimes such as murder and kidnapping but not domestic violence. 18 U.S.C.S. § 1153. These statutes provide confusing, circular, and often inconsistent guidance to ascertain a uniform definition of what constitutes an Indian. This makes it extremely important to defer to the clear definition established by the Supreme Court.

Furthermore, a ruling in Petitioner's favor is consistent with this court's affirmation of support for tribal sovereignty. The Supreme Court has acknowledged the importance of recognizing tribal sovereignty in many instances. In *Santa Clara Pueblo v. Martinez,* the Supreme Court held that tribes have absolute authority over their membership. 436 U.S. 49, 98 S. Ct. 1670 (1978). A ruling in accordance with established precedent derived from *Rogers* would complement the ruling in *Santa Clara Pueblo.* It would in no way infringe on the tribe's ability to determine their membership. Tribal sovereignty is not in any way diminished by a ruling in Petitioner's favor. All tribes would maintain absolute authority over their membership. The two-part test devised by the Supreme Court in *Rogers* looks to the

tribe's exercise of their sovereignty as part of the test. The second prong of the Rogers test is whether an individual is a member of the tribe. By acknowledging that only tribes have the authority to determine their membership under *Santa Clara Pueblo* and establishing that determination as one of the factors in defining what an Indian is, the Supreme Court has affirmed tribal authority to self-determine their membership. The Rogers test allows the tribes to maintain control over the one branch of the test for what constitutes an Indian. Tribes retain a strict level of control regardless of how the courts define an Indian for jurisdiction purposes.

Additionally, Congress has recognized the inherent authority of tribes to prosecute all Indians, even non-members. 25 U.S.C.S. § 1301(2). In United States v. Lara, this Court held that tribes have jurisdiction to prosecute non-member Indians in their courts. 541 U.S. 193 (2004). This ruling was important, as it acknowledged the shared experience and understanding of the unique independent sovereign nations that make up Indian Country. Neither the Court, nor the legislature, have expanded that recognition of authority to non-Indians. The statutory and common law in this area suggest that while membership in a tribe is an important component to defining an Indian, it is not the complete picture of what defines an Indian. There is an extra-tribal element needed to be an Indian. Both Congress and the Supreme Court have recognized this distinction and its inherent ancestral component.

3. As a non-Indian, Petitioner's prosecution under the law of the tribe must comport with VAWA jurisdiction.

Oliphant v. Suquamish Tribe is credited with being the landmark case that decided that as domestic dependent nations, tribes do not have authority to prosecute non-Indian citizens of the United States. 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978). This decision had far reaching consequences that negatively impacted Indian Country. Indians in

romantic relationships with non-Indians on Indian land were left with no recourse for domestic violence assaults. Most relevant to this case was the inability to address violence in Indian Country. Indian women suffer staggeringly high rates of domestic violence, which historically has gone unprosecuted due to these complex jurisdictional issues. Center for Disease Control, National Center for Injury Prevention and Control, Division of Violence Prevention, *National Intimate Partner and Sexual Violence Survey* (2010). *available at* https://www.cdc.gov/violenceprevention/pdf/NISVS_Report2010-a.pdf. One of the tools used to address the negative effects of *Oliphant* was the implementation of the Violence Against Women Reauthorization Act 2013. With the implementation of VAWA, tribes are able to assert their jurisdiction over non-Indians who commit domestic violence offenses against Indians. 25 USCS § 1304(b). This legislation has allowed tribes to repair some of the damage done by *Oliphant*.

VAWA acknowledges the inherent power of the tribe to "exercise special domestic violence criminal jurisdiction over all persons" with few exceptions. 25 U.S.C.S. § 1304(b). Specifically, the tribe cannot exercise jurisdiction if both the victim and the defendant are non-Indians or if the defendant has no ties to the Indian tribe. 25 U.S.C.S. § 1304(b)(4). This jurisdiction applies to defendants who reside or are employed in the Indian country of the participating tribe or who have an intimate partner relationship with one of its members. 25 U.S.C.S. § 1304(b)(4)(B). As a non-Indian, the Petitioner would fit under this definition had the tribe chosen to exercise its special jurisdiction.

Tribes are given full discretion as to whether they want to comply with the statutory requirements in order to opt into VAWA. National Congress of American Indians, VAWA 2013 Special Domestic Violence Criminal Jurisdiction (SDVCJ) Overview. *available at*

http://www.ncai.org/tribal-vawa/overview/VAWA_Information_-_Technical_Assistance_Resources_Guide_Updated_November_11_2018.pdf. These requirements necessitate that tribes conform their tribal codes to allow for clear protections under the law that are in line with Federal requirements. *Id.* There is no current formal acceptance requirement. *Id.* It is solely under VAWA that the Amantonka Nation would have jurisdiction to prosecute the Petitioner. The distinctions between the requirements for Indians versus non-Indian defendants is so important because Indians are not entitled to the same constitutional protections that their non-Indian counterparts are given. As separate governing bodies, tribes are not required to draft their codes to conform with the Bill of Rights. But non-Indians being tried in tribal court are still entitled to the constitutional protections that guard their rights in state and federal courts. As such, to comply with VAWA special jurisdiction, tribal courts must ensure that they are conducting their judicial proceedings in a way that would not violate the constitutional protection of non-Indians in tribal courts. Should the Amantonka Nation fail to comport with the requirements to participate in VAWA, then they would fully lack jurisdiction to prosecute the Petitioner, as he is a non-Indian. This leads us to our second argument, that the Amantonka Nation did not conform with the VAWA requirements for court appointed counsel.

B. Petitioner's Status as A Non-Indian Means That Petitioner's Court-Appointed Attorney Does Not Satisfy the Legal Requirements Laid Out in The Violence Against Women Reauthorization Act 2013.

Under VAWA 2013, the Amantonka Nation has the power to exercise special domestic violence criminal jurisdiction over all persons, including non-Indians. 25 U.S.C.S. § 1304(b)(1) (LexisNexis 2018). Since Petitioner's conduct occurred in the Indian country of the participating tribe, the Amantonka Nation could have chosen to exercise special domestic

violence criminal jurisdiction over petitioner. 25 U.S.C.S § 1304(c)(1) (LexisNexis 2018). As a defendant being prosecuted under special domestic violence criminal jurisdiction, Petitioner would have been guaranteed specific rights under VAWA. 25 U.S.C.S. § 1304(d) (LexisNexis 2018). The prosecuting tribe must provide to the defendant: "(1) all applicable rights under VAWA; (2) all rights under 25 U.S.C.S. § 1302(c) if a term of imprisonment of any length may be imposed; (3) the right to trial by an impartial jury; and (4) all other rights whose protection is necessary under the United States Constitution in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise the special domestic violence criminal jurisdiction over the defendant." *Id*. Since Petitioner was sentenced to seven months incarceration, according to 25 U.S.C.S. § 1304(d)(2), the Indian tribe must: "(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and (2) at the expense of the tribal government, provide 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." 25 U.S.C.S. § 1302(c) (LexisNexis 2018).

1. Defendants prosecuted under VAWA are entitled to effective counsel equal to that guaranteed by US constitution.

Under the Sixth Amendment to the United States Constitution, it is stated that in all criminal prosecutions the accused shall have the Assistance of Counsel for his defense. U.S. Const. amend. VI. In *Strickland v. Washington*, the United States Supreme Court clarified that the sixth amendment's right to assistance of counsel means the right to effective counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). *Stickland* further explained that the right to effective counsel was necessary so that the attorney could play the role required to ensure

that criminal defendants received fair trials. *Id*. at 688. The legal profession in the United States maintains and polices itself via a mostly universal set of professional rules and ethics. American Bar Association, Legal Education and Admissions to the Bar, *Bar Admissions Basic Overview, available at* https://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview/ (June 26, 2018); American Bar Association, Center for Professional Responsibility, *About the Model Rules of Professional Conduct, available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ (Oct. 25, 2018). It is therefore presumed that since all licensed American legal counsel are held to these standards, then the effective level of assistance that the sixth amendment requires will be satisfied. *Strickland*, 466 U.S. at 688. In *Faretta v. California*, this Court described the assistance of a lawyer as essential to a defendant receiving a fair trial. *Faretta v. California*, 422 U.S. 806, 833 (1975). The United States Supreme Court later held in *Wheat v. United States* that an advocate who is not a member of the bar may not represent clients in court, unless they are representing themselves. *Wheat v. United States*, 486 U.S. 153, 159 (1988). In *Jackson v. Tracy*, the Arizona District Court quoted the Ninth Circuit stating that one who was "never admitted to practice law and therefore who never acquired the threshold qualification to represent a client in court cannot be allowed to do so" for it will "not constitute effective representation of counsel for purposes of the Sixth Amendment." *Jackson v. Tracy*, 2012 U.S. Dist. LEXIS 121883, 8 (Ariz. 2012). The Hopi Appellate Court, in discussing the importance of the Sixth Amendment's right to counsel, described it as a fundamental right protecting the defendant "against the power of the Tribe" by giving the defendant a "qualified advocate that has

knowledge of criminal procedures and skill at presenting evidence" thereby forcing the Tribe to "prove the case against the defendant and not coerce a guilty plea from an innocent defendant." *Ami v. Hopi Tribe*, 1996 Hopi App. LEXIS 1, 5.

With very few exceptions, the only way to practice law in any United States court is to pass a state bar exam. S*upra* at Legal Education and Admissions to the Bar. Although the eligibility requirements vary from state to state, the clear majority of bar associations require an applicant for a state bar exam to provide proof of a J.D. from a law school that meets the American Bar Association's standards so as to establish the applicant's competence to practice law. *Id*. Just about every United States jurisdiction additionally requires an applicant to pass the Multistate Professional Responsibility Exam and have a satisfactory Character and Fitness determination as well. *Id*. As a result, only upon completing these requirements and receiving a passing score on a state bar examination can a person become licensed to practice law in the United States, thereby ensuring that their legal representation will be considered effective counsel as set forth by the Sixth Amendment. Courts have held again and again that the American Bill of Rights is not applicable to tribal law, meaning that the Sixth Amendment right to effective counsel as it pertains to American court proceedings does not have any weight in a tribal court. *Jackson*, 2012 U.S. Dist. LEXIS 121883, 6-7. *Talton v. Mayes*, 163 U.S. 376, 385 (1896). Therefore, in order to be considered effective counsel under the Sixth Amendment of the United States Constitution, legal counsel is expected to have passed a state bar examination in a United States jurisdiction.

Many Tribal Bar Examinations require all applicants to be members in good standing of a state or federal bar, thus ensuring that those who will practice before the tribal courts will bring the same level of effective counsel to Indian representation as they would be

expected to bring to any jurisdiction in the United States. Cherokee Nation Judicial Branch, *Cherokee Nation Bar Association, available at* http://www.cherokeecourts.org/Bar-Association (last visited Jan. 13th, 2019); Law and Order Code of the Rosebud Sioux Tribe, §9-2-2 (Code of Rosebud Sioux Tribe 2012); Choctaw Nation Bar Association Code of Ethical Conduct, 1 § 1(B)(3); Hopi Judicial Branch, *Application to Practice Law, available at* https://docs.google.com/file/d/0B5iJZdagMNhTUEpnYmZDQkZuT1U/edit (Hopi Tribal Courts 2013). The Amantonka Nation, however, does not require all applicants to be members in good standing of a state bar prior to sitting the Amantonka Nation Bar Examination. 2 Amantonka Nation Code §501. As a result, Petitioner's right to effective counsel under the Sixth Amendment cannot be guaranteed to be at least equal to the level of effective counsel that would be provided to him within a United States jurisdiction. Petitioner's appointed counsel therefore did not satisfy 25 U.S.C.S § 1302(c)(1).

As required under 25 U.S.C.S. § 1302(c), not only must a tribe provide defendants with the right to effective counsel equal to that bestowed by the United States Constitution, but the tribe must also provide licensed defense attorneys to indigent defendants at the tribe's expense. 25 U.S.C.S. § 1302 (LexisNexis 2018). In order to satisfy this VAWA requirement, the attorney must be licensed in any United States jurisdiction that applies the appropriate standards needed to guarantee the professional responsibility and competency standards expected of effective counsel. *Id*. As previously discussed, to practice as a licensed attorney in the United States one needs to show proof of a J.D. from an ABA accredited law school, a passing MPRE score, a satisfactory Character and Fitness determination and ultimately pass a state bar examination. S*upra* at Legal Education and Admissions to the Bar. Although Petitioner's court-appointed counsel is a member of the Amantonka Nation Bar Association

and possesses a J.D. degree from an ABA accredited law school, they are not a member of a state bar association. Therefore, Petitioner's court-appointed counsel is not licensed to practice law in any United States jurisdiction and fails to fulfill the necessary requirements under 25 U.S.C.S. § 1302(c). The Amantonka Nation only has the right to try Petitioner under their jurisdiction if they comply with the requirements set forth under VAWA. As this Court has made clear, Petitioner, as a non-Indian American citizen, is entitled to the same high standard of legal assistance that all American citizens are indubitably born with. Since the Amantonka Nation failed to adhere in entirety to 25 U.S.C.S. § 1304(d)(2) under VAWA, Petitioner's court-appointed counsel did not satisfy the relevant legal requirements mandated under VAWA 2013 in order for the Amantonka Nation to be able to exercise special domestic violence criminal jurisdiction over Petitioner.

2. All Americans being prosecuted for crimes are entitled to Equal Protection under the law, regardless of the jurisdiction prosecuting them.

The final right owed to defendants under 25 U.S.C.S § 1304(d) states that the tribe shall provide to them "all other rights whose protection is necessary under the United States Constitution in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise the special domestic violence criminal jurisdiction over the defendant." 25 U.S.C.S § 1304(d)(4) (LexisNexis 2018). In addition to the United States Constitution guaranteeing defendants effective counsel under the Sixth Amendment, the Fourteenth Amendment promises due process of the law and equal protection of the law to all citizens of the United States. U.S. Const. amend. XIV, § 1. This Court has made clear in its holding for *Santa Clara Pueblo* that in order to preserve Tribal sovereignty and Indian's inherent right to regulate themselves, Indians may not petition the United States Federal Government regarding equal protection violation disputes against a Tribe. *Santa Clara*

Pueblo, 436 U.S. at 59. Petitioner, however, is not an Indian arguing against the Tribe but is a non-Indian American citizen and as such retains his right to Equal Protection under VAWA. Since Petitioner was given court-appointed counsel based on being incorrectly charged as an Indian indigent defendant, his rights to due process and equal protection under the United States Constitution were violated as a result.

According to the Amantonka Nation Code, attorneys who are members in good standing of the bar of any tribal, state or federal court shall be eligible to practice before Amantonka Nation courts upon successful completion of the Amantonka Nation's bar examination. 2 Amantonka Nation Code §501(a). However, applying lay counselors do not need to be members of any bar association as a prerequisite. 2 Amantonka Nation Code §501(b). An applicant for lay counsel is eligible to practice before the court without even proof of a degree from high school or college, so long as they are over twenty-one years old, are of high moral character and integrity, have not been dishonorably discharged from the Armed services, have not have been convicted of a felony in any jurisdiction, and have successfully completed the Amantonka Nation's Bar Exam. *Id*. In the Amantonka Nation, non-Indian indigent defendants accused of crimes pursuant to the Nation's criminal jurisdiction under Title 2 Section 105(b) are entitled to appointment of a public defender qualified under Title 2 Section 607(b), whereas Indian indigent defendants accused of crimes pursuant to the Nation's criminal jurisdiction are entitled to appointment of public defenders qualified under Title 2 Section 607(a). 2 Amantonka Nation Code §503(1); 2 Amantonka Nation Code §607. The differences in mandatory qualifications between 607(a) and 607(b) are vast. A non-Indian indigent defendant's appointed public defender must hold a J.D. degree from an ABA accredited law school, have taken and passed the Amantonka Bar

Exam, taken the oath of office and passed a background check. 2 Amantonka Nation Code §607(b). On the other hand, an Indian indigent defendant is only entitled to an appointed public defender who is physically capable of carrying out the duties of the office, has training in Amantonka law and culture and has satisfied the same qualifications as a lay counselor under the Code's Section 501(b). 2 Amantonka Nation Code §607(a). Based on the Amantonka Nation's Code and qualifications it sets forth for counselors practicing before the Court, it is highly likely that a lay counselor could be appointed to be an indigent Indian's public defender. Therefore, in theory, an Indian indigent defendant could be given a counselor without so much as a high school diploma to be their advocate at trial whereas a non-Indian indigent defendant, as a matter of law, must always be given a public defender with an ABA accredited J.D. for the same conviction. Seeing as a prosecutor in the Amantonka Court will at bare minimum always have an AA or BA degree, it begs the question of why an indigent Indian defendant is not entitled to, at the very least, an equally qualified advocate while a non-Indian indigent defendant undoubtedly is. 2 Amantonka Nation Code §602. Petitioner's rights under VAWA as a non-Indian defendant aside, one could stress that this inequality between representation for Indians versus non-Indians also violates the Indian Civil Rights Act. Although Petitioner's appointed-counsel did happen to possess a J.D. from an ABA accredited school of law, the fact that Petitioner was nonetheless categorized as an Indian indigent defendant and therefore entitled only to counsel qualified under Title 2, Section 607(a) means that he just as easily could have been given a public defender without the VAWA requirements mandated for a non-Indian indigent defendant. Petitioner was entitled under VAWA to receive due process and equal protection as guaranteed under the Fourteenth Amendment to the United States constitution. By being

given a public defender qualified under Title 2, Section 607(a) of the Amantonka Nation Code to only represent Indian indigent defendants, our non-Indian indigent Petitioner's right to due process was violated seeing as this mistake in providing him with inadequate counsel should have invalidated the entire trial proceedings. Petitioner did not receive the equal protection he was due since his mistaken status as an Indian indigent defendant meant his counsel's qualifications, as a matter of law, were not guaranteed to be equal to that of a non-Indian indigent defendant's counsel.

The United States has made an effort to base its laws and institutions upon the "doctrine of equality." *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995). As such, the United States Supreme Court has continuously emphasized that a person's race should never dictate how they are treated under the law. *Id.* Any race-based government action that is not already prohibited must therefore be meticulously analyzed in order to ensure that there is no violation of the individual's indivisible right to equal protection under the law. *Id.* Alleged race-based classifications are to be reviewed under the strict scrutiny test, and such classifications can only be upheld if proven to be imperative in accomplishing or furthering a legitimate goal in the state's interest. *State v. Shawn*, 859 P.2d 1220, 1224 (Wash. 1993). *State v. Schaaf*, 743 P.2d 240, 248 (Wash. 1987). The Amantonka Nation provides no legal reasoning or justification as to how appointing an Indian indigent defendant with a less qualified advocate than a non-Indian indigent defendant's advocate in any way benefits the tribe's interests. As a result, the court cannot legally uphold such racial discrimination because, under VAWA, Petitioner is entitled to the same level of equal protection under the law that he would receive in an American court. The fact that Petitioner's appointed counsel happened to hold a J.D. degree from an ABA accredited law school is irrelevant. The

Amantonka Nation's code makes it clear that Indian indigent defendants are only entitled to receive counsel under Title 2, section 607(a). 2 Amantonka Nation Code §607(a). Therefore, as a matter of course, Petitioner was not given the same equal treatment that he would have received had he been categorized as a non-Indian, which definitively violated his rights under the Fourteenth amendment.

According to *State v. Schaaf*, when people are "similarly situated with respect to the legitimate purpose of the law," then equal protection under the Fourteenth Amendment insists that they should "receive like treatment." *Schaaf*, 743 P.2d at 248. In another Washington State Supreme Court case, *State v. Shawn*, Justice Madsen pointed out in her dissent that the majority failed to provide any constitutionally sound reasoning as to why the court should treat seventeen-year-olds different from eighteen-year-olds other than the fact that such a distinction between those ages had been justified in previous cases. *Shawn*, 859 P.2d at 1228. She argued that the court's equal protection analysis should instead have focused on exactly why an eighteen-year old was any less likely to cause harm in the context of drunk driving than a seventeen-year old was for the purposes of that case. *Id*. According to the highest court in Washington state, there is no basis whatsoever under the equal protection of the Fourteenth amendment to discriminate against Petitioners by requiring fees only from Petitioners who were suing the government and not Petitioners suing private parties. *Peterson v. State*, 671 P.2d 230, 246 (Wash. 1983). Seeing as it has been expressly stated that there is no validity in allowing for different rules to apply to Petitioners based on whom they are filing against, it should follow that the Fourteenth amendment cannot allow for different rules to apply to indigent defendants based solely on their race. It is contrary to the spirit of American equality to ignore these injustices in Indian country, despite this Court's prior

ruling in *Santa Clara Pueblo*. The Amantonka Nation Code does not offer any explanation as to why Indian indigent defendants should require a less qualified public defender than a non-Indian defendant. By allowing for race-based treatment to be given to Indian and non-Indian indigent defendants charged for the same crime, the Amantonka Nation Code therefore violates the Fourteenth Amendment rights that Petitioner is entitled to receive under VAWA.

As a matter of public policy, an argument can be made that treating defendants differently based on race negatively impacts not only VAWA protected non-Indian defendants, but also severely hurts tribes and tribal members in violation of the Indian Civil Rights Act of 1968 (ICRA). Title I of the ICRA mandates that no Indian tribe shall deny to any person within its jurisdiction the equal protection of its laws and shall not "deprive any person of liberty or property without due process." 25 U.S.C.S. § 1302(8) (LexisNexis 2018). The holding in *Santa Clara Pueblo* has resulted in longstanding repercussions felt mostly by the very people the ICRA was intended to protect; Indians. As Justice White declared in his dissent, to deny the Indian their only procedure in which they have the chance to gain relief for rights denied to them by their tribes goes against the purpose of Title I of the ICRA. *Santa Clara Pueblo*, 436 U.S. at 73. The Colville Confederated Tribes Court of Appeals stated that if the state enforces the law with an "unequal hand," then the defendant has been denied his equal protection under the law. *Davisson v. Colville Confederated Tribes*, 2012 Colville App. LEXIS 5, 12. In *Randall v. Yakima Nation Tribal Court*, the Ninth Circuit Court of Appeals said that when Tribal court procedures at issue differed drastically from United States court procedures, courts were to weigh the "individual right to fair treatment against the magnitude of the tribal interest in employing those procedures." *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 900 (9d Cir. 1988). It would be

difficult to prove there is any positive Tribal interest in the Amantonka Nation discriminating against all Indian indigent defendants by appointing them a less qualified counsel than their non-Indian counterparts. Not only does this give non-Indians better treatment under the law than Indians, but it has the potential to directly affect the outcome of an Indian's trial seeing as an Indian indigent defendant's appointed public defender's qualifications are not even equal to that of the Tribal prosecutors.

In *Santa Clara Pueblo v. Martinez*, the court discussed two purposes of the ICRA: its goal of strengthening individual tribe member's positions in regard to the tribe and Congress' intention of promoting the furtherance of Indian self-government. *Santa Clara Pueblo*, 436 U.S. at 62. The intended central point of Title I of the ICRA was to "secure for the American Indian the broad constitutional rights afforded other Americans and thereby to protect individual Indians from arbitrary and unjust actions of tribal governments." *Id*. at 61. Several Tribal courts have incorporated sections of the United States Bill of Rights into their own laws and codes. The Navajo Nation's Bill of Rights tracks the Fourteenth Amendment stating that no person under Navajo jurisdiction shall be denied equal protection or due process of the law. *Atcitty v. Dist. Court for the Judicial Dist. Of Window Rock,* 1996 Navajo Sup. Lexis 8, 6. The Navajo Supreme Court goes on to describe due process as a "fundamental fairness" that is to be applied strictly in accordance with respect and equality resembling that of American due process in order for all Navajo members to benefit from equal protection before the law. *Id*. at 7-11. This Court has stated that because a defendant's counsel has the power to make binding decisions that will directly affect the outcome of defendant's case, it is up to the defendant's judgment as to whether or not taking on counsel would be to his advantage. *Faretta,* 422 U.S. at 820, 834. However, the court made it clear that even though

a defendant had the right to self-represent, the waiver of counsel could only be upheld as valid if the defendant clearly understood the "dangers and disadvantages of self-representation" since it is unlikely that a defendant would have the "skill and experience of a lawyer in order to competently" represent oneself. *Id*. at 835. By default, an indigent defendant has no say in who the court appoints to act as their advocate. If the Amantonka Nation's qualifications for an Indian indigent defense counsel paralleled the requirements for a non-Indian indigent defense counsel, there would be no equal protection violation. However, because an Indian indigent defendant can potentially be given an advocate who is not only unequal to a non-Indian's counsel but who is also less qualified than the Tribal prosecutor, the Amantonka Nation is intentionally placing Indian defendants in the unfortunate position of having to gamble between keeping their less-qualified appointed counsel or representing themselves against the Tribe. Instead of strengthening and protecting individual Indian's positions in regard to the tribe, the Amantonka Nation is denying Indians their equal protection and due process under 1302(8) of the ICRA and placing them at a major disadvantage in court.

CONCLUSION

It is for the reasons stated above that this Court should find for the Petitioner and vacate the conviction of the Petitioner.