No. 19-231

In The Supreme Court of the United States

ROBERT R. REYNOLDS,

Petitioner,

v.

JOHN MITCHELL,
ELIZABETH NELSON,
WILLIAM SMITH,

Respondents.

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

BRIEF FOR PETITIONER ROBERT R. REYNOLDS

TEAM 821
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

FEDERAL STATUTES

AMANTONKA NATION CODE

TRIBAL CODES

REGULATIONS

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

QUESTIONS PRESENTED

1. Is Robert Reynolds, a person with no Indian ancestry but a naturalized citizen of a tribe, a non-Indian for purposes of Special Domestic Violence Criminal Jurisdiction?

2. If Robert Reynolds is considered a non-Indian, does Amantonka Nation satisfy the relevant legal requirements for indigent counsel under Violence Against Women Reauthorization Act of 2013[1] ("VAWA") for supplemental jurisdictional authority to prosecute non-Indians?

   If Robert Reynolds is an Indian, does Amantonka Nation's provision on the right to indigent counsel violate the Indian Civil Right Act's ("ICRA") equal protection clause?

[1] Congress allowed VAWA to expire on December 31, 2018 so it is no longer in place. However, Reynolds was charged and convicted while VAWA was authorized so this expiration does not affect this analysis.

STATEMENT OF THE CASE

I. Statement of the Facts

Reynolds, a non-Indian, met his wife in college at the University of Rogers and the two married after graduation. *Reynolds v. Amantonka Nation*, No. 17-198 6 (Sup. Ct. Amantonka Nat. 2017). Reynolds's wife was, and is, an enrolled member of Amantonka Nation, a federally-recognized Indian tribe. Two years after marrying his wife, Reynolds successfully applied to become a naturalized citizen of Amantonka Nation. *Id.* Reynolds took the oath of citizenship and received an Amantonka Nation Identification Card. *Id.* Reynolds had no Indian ancestry or prior connection to Amantonka Nation before meeting his wife. *Id.*

Reynolds and his wife lived in an apartment in tribal housing on the Amantonka Reservation. *Id.* Reynolds also worked on the reservation, first as a manager of a shoe factory for approximately three years. *Id.* After that, and a period of 10 months of unemployment, Reynolds began working at a warehouse distribution center on the reservation, where he continued to work during the pendency of this case. *Id.*

On July 15, 2017, Amantonka Nation police were called to Reynolds's home with his wife in response to a physical incident where Reynolds struck his wife. *Id.* The police arrested Reynolds. *Id.* The next day, the Chief Prosecutor for Amantonka Nation charged Reynolds under Amantonka Nation Code for partner or family member assault. *Id.* at 6–7; Amantonka Nation Code ("ANC") Title 5 § 244.

II. Statement of the Proceedings.

On June 16, 2017, the chief prosecutor of the Amantonka Nation filed criminal charges against Robert Reynolds for violating Amantonka Code. Compl. 2.

At his first hearing, Reynolds was appointed "indigent defense counsel" under Amantonka Nation Code § 503(3). Opinion and Order Denying Defendant's Pretrial Motion, CR-17-021 (D. Amantonka July 5, 2017); ANC § 503(3). Reynolds's appointed counsel held a "JD degree from an ABA accredited law school" and although it is not required under Amantonka Code, "was a member in good standing of the Amantonka Bar Association." *Reynolds v. Amantonka Nation*, No. 17-1987 (Sup. Ct. Amantonka 2017). In his District Court case, Reynolds filed three pretrial motions:

> (1) he sought to have the charges dismissed because the tribe does not possess jurisdictional authority over him, a non-Indian;
>
> (2) to have an attorney appointed to him, because he falls under supplemental VAWA jurisdiction and as such, the tribe needs to provide sufficient indigent counsel; and
>
> (3) his court appointed counsel violates his Equal Protection requirements because under Amantonka Code, they are less qualified than counsel appointed to represent non-Indians.

All three of Reynolds's pretrial motions were denied.

Reynolds was tried and convicted by a jury of the charged offense. *Reynolds*, No. 17-198 at 7. Reynolds was sentenced to seven months incarceration, restitution, a batterer's rehabilitation program, an alcohol treatment program, and a $1500 fine. Order Entering Judgment and Sentence, CR-17-021 (D. Amantonka Aug. 23, 2017).

Reynolds appealed his conviction to the Amantonka Nation Supreme Court. *See Reynolds*, No. 17-198 (Sup. Ct. Amantonka 2017). Reynolds raised the same arguments on

appeal as in his pretrial motion. *Id.* at 7. The Amantonka Nation Supreme Court rejected all of his arguments and affirmed his conviction. *Id.*

The Amantonka Nation Supreme Court reasoned that Reynolds is an Indian because he is a citizen of a federally recognized Indian tribe. *Id.* Therefore, the Amantonka Nation possessed criminal jurisdiction over him and did not exercise its supplemental VAWA jurisdiction. *Id.* The Amantonka Nation Supreme Court rejected Reynolds's argument that the difference between indigent counsel for Indians and non-Indians violates equal protection by finding that the difference was not material or relevant. *Id.*

After he exhausted tribal remedies, Reynolds filed a petition for Writ of Habeas Corpus under 25 U.S.C.A. § 1303 in the United States Court for the District of Rogers. Reynolds alleged that his conviction is in violation of his federal civil rights under the ICRA and VAWA. *Reynolds v. Smith, et al.*, No. 17-895 (D. Rogers Mar. 7, 2018). The United States District court found that federal law "clearly limits criminal jurisdiction over 'Indians'" and Reynolds is not an Indian for purposes of criminal jurisdiction. *Id.* As a result, the United States District Court for the District of Rogers granted Reynolds's Writ of Habeas Corpus. *Id.*

Respondents appealed to the United States Court of Appeals for the Thirteenth Circuit. *Reynolds v. Smith, et al.*, No. 18-344 (13th Cir. 2018). The Court of Appeals for the Thirteenth Circuit adopted the reasoning of the Amantonka Nation Supreme Court and reversed and remanded with instructions to deny the petition for a writ of habeas corpus.

Reynolds successfully petitioned the Supreme Court of the United States for a Writ of Certiorari. Order Granting Petition for Writ of Certiorari, No. 19-231 (Oct. 15, 2018).

SUMMARY OF THE ARGUMENT

In deciding this case, the court need only address two issues: (1) if Robert Reynolds is an Indian or non-Indian for criminal jurisdiction and; (2) if Reynolds is considered a non-Indian, whether the Amantonka Nation properly exercised supplemental VAWA jurisdiction, and if Reynolds is considered Indian, whether his rights to indigent counsel violate equal protection under ICRA.

In order to exercise its general criminal jurisdiction over Reynolds, Amantonka Nation needs to show that Reynolds is Indian. Amantonka Nation concluded that Reynolds is Indian because he is a naturalized citizen of the tribe. Enrollment in a tribe is not synonymous with Indian status because tribal enrollment criteria vary widely and do not necessarily take into account whether an individual has Indian ancestry. While Indian status is not consistently defined in federal law or across tribes, historically, some Indian ancestry was always required. Enrollment in a tribe is a political classification that can end with disenrollment or termination whereas, Indian ancestry is a racial classification that is based on an enduring lineal quality of an individual. Because Reynolds does not have any Indian ancestry, he should be considered a non-Indian for the purposes of tribal criminal jurisdiction.

If Reynolds if considered a non-Indian, Amantonka Nation cannot exercise general criminal jurisdiction over him. Tribes have no criminal jurisdiction over non-Indians except under supplemental VAWA jurisdiction. In order to determine if Reynolds is an Indian for the purposes of criminal jurisdiction, Amantonka Nation must show two things: (1) that Reynolds has some Indian ancestry; and (2) that Reynolds is recognized as an Indian. Reynolds is recognized as an Indian because he is an enrolled member of Amantonka Nation but Reynolds has no Indian ancestry. Therefore, Reynolds is a non-Indian for the purposes of criminal jurisdiction.

If Reynolds is considered a non-Indian, then the Amantonka Nation used its supplemental VAWA jurisdiction to prosecute and sentence him. The Amantonka Nation possesses supplemental jurisdiction over non-Indian defendants under VAWA. 25 U.S.C.A. § 1304; ANC § 105(b). After allegedly providing the Congressionally mandated procedural protections, Amantonka Nation was granted supplemental jurisdiction, also known as Special Domestic Violence Criminal Jurisdiction ("SDVCJ"). Amantonka Nation can use this supplemental jurisdiction to charge non-Indians with domestic violence crimes committed on the reservation against Indian defendants. ANC § 105(b). This is the authority Amantonka Nation used to charge Robert Reynolds, a non-Indian.

In order to qualify for supplemental VAWA jurisdiction, the Amantonka Nation must provide the additional procedural protections proscribed by Congress. The Amantonka Nation is not meeting these protections as they are not providing a defense attorney licensed to practice law by a jurisdiction that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys. Robert Reynolds was not offered a sufficiently licensed attorney, but rather a public defender. Therefore, Amantonka Nation should not have exercised supplemental VAWA jurisdiction over Reynolds and his Writ of Habeas Corpus should be granted.

If this Court finds that Reynolds is an Indian, his Writ of Habeas Corpus should still be granted because the provision in the Amantonka Nation Code providing non-Indian defendants with more qualified indigent counsel violates equal protection under ICRA.

ARGUMENT

De novo review is appropriate for questions of statutory interpretation. *Artichoke Joe's Cal. Grand Casino v. Norton,* 353 F.3d 712, 719–20 (9th Cir. 2003) (citing *Lopez v. Wash. Mut. Bank,* 302 F.3d 900, 903 (9th Cir. 2002)). "When de novo review is compelled,

no form of appellate deference is acceptable." *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991).

"The Writ of Habeas Corpus has limited scope; the federal courts do not sit to re-try state cases de novo but, rather, to review for violation of federal constitutional standards." *Milton v. Wainwright*, 407 U.S. 371, 377 (1972).

I. REYNOLDS IS A NON-INDIAN FOR THE PURPOSES OF CRIMINAL JURISDICTION BECAUSE HE HAS NO LINEAL ANCESTRY IN A TRIBE.

The first issue in this case is whether Reynolds's Amantonka Nation membership means he is considered an Indian for purposes of tribal criminal jurisdiction. Indian status is not consistently defined in federal law. Tribes, as an exercise of their sovereignty, each define their own membership criterion. Because of this, tribal membership and racial classification as an Indian are not synonymous and should not be used interchangeably for the purpose of determining tribal criminal jurisdiction.

A. Tribal Membership Should Not Be Erroneously Conflated With Indian Status.

In the Amantonka Nation district court opinion, the court erroneously concludes that Reynolds is Indian because he "is a citizen of the Amantonka Nation." Order Entering Judgment and Sentence, CR-17-021 (D. Amantonka Aug. 23, 2017). The Amantonka Nation Supreme Court opinion also draws this same erroneous conclusion, reasoning that because Reynolds "voluntarily applied for and completed that process . . . as a citizen of a federally-recognized tribe, Appellant is an Indian." *Reynolds v. Amantonka Nation*, No. 17-198 6 (Sup. Ct. Amantonka Nat. 2017).

1. A consistent definition of Indian does not exist in federal law, but rather depends on context.

There is not one consistent definition of "Indian" for all purposes and contexts. "Who counts as an Indian for purposes of federal Indian law varies according to the legal context.

There is no universally applicable definition." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.03[1] (Nell Jessup Newton ed., 2017). Federal law itself contains different definitions of Indian. For example, the Indian Reorganization Act defines Indian as individuals of Indian descent, members of federally-recognized Indian tribes, and individuals with at least one-half Indian blood. 25 U.S.C.A. § 5129. In contrast, the Indian Health Care Improvement Act defines an Indian as someone who is a member of an Indian tribe. 25 U.S.C.A. § 1603(13). Under the Indian Child Welfare Act, an "Indian child" is defined as one enrolled or eligible for enrollment in a federally-recognized Indian tribe. 25 U.S.C.A. § 1903(4). Further, Congress did not define "Indian" in the Indian Crimes Act, the Major Crimes Act, or VAWA. 18 U.S.C.A. §§ 1152-1153; 25 U.S.C.A. § 1304.

A person may be considered an Indian in one context but not another. COHEN'S § 3.03[1]. "It is therefore necessary to determine the specific purpose for which Indian identity is relevant." *Id.* Despite the lack of a unified definition, whether someone is Indian or not matters a great deal for the purposes of tribal and federal law. It dictates "being subject to federal or tribal rather than state criminal jurisdiction; eligibility for federal benefits and employment preferences; exemption from state taxation, child welfare, and other civil authority; participation in distributions of proceeds from tribal economic development, such as gaming; and entitlement to inherit certain trust or restricted lands." *Id.*

In each of these instances, one must be determined to be Indian for benefits or jurisdiction to flow. How this determination is made has been a point of contention for nearly a century. "Before the passage of the IRA in 1934, most tribes did not keep formal, written rolls or have written membership requirements." COHEN'S § 3.03[2]. Since the IRA, most tribes have adopted written membership records. *Id.* "Policies adopted by the Bureau of Indian Affairs . . . promoted tribal membership requirements that both parents be tribal

members, that the parents reside within the reservation, or that children have a minimum degree of ancestry." *Id.* However, these BIA-suggested limitations to enrollment did not dictate tribal membership requirements. *Id.*

2. Defining tribal membership is a crucial exercise of tribal sovereignty.

"Courts have consistently recognized that one of an Indian tribe's most basic powers is the authority to determine questions of its own membership. A tribe has power to grant, deny, revoke, and qualify membership." *Id.* Famously, in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978), this Court noted that "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence. [T]he judiciary should not rush to create causes of action that would intrude on these delicate matters." "Membership requirements are typically defined by a tribal constitution or other tribal law, and implemented by a tribal roll." COHEN'S § 3.03[2].

Generally, federal courts have been reluctant to interfere with tribal determinations in matters pertaining to tribal enrollment. *See, e.g.*, *United States v. Wheeler*, 435 U.S. 313, 322 n.18 (1978) ("unless limited by treaty or statute, a tribe has the power to determine tribe membership"); *Smith v. Babbitt*, 875 F. Supp. 1353, 1360 (D. Minn. 1995) ("tribes have exclusive authority to determine membership issues"); *Lewis v. Norton*, 424 F.3d 959 (9th Cir. 2005) (rejecting a challenge to tribal membership decisions); *Lamere v. Super. Ct.*, 31 Cal. Rptr. 3d 880 (Cal. Ct. App. 2005) (rejecting a challenge to tribe's disenrollment decision).

Since each tribe determines its own, unique tribal membership requirements, they vary significantly from tribe to tribe. Many tribes require a minimum amount of ancestry for enrollment. COHEN'S § 3.03. "Some tribal provisions call for a minimum of one-fourth degree of ancestry of the tribe in question, but a few tribes require as much as one-half

degree of tribal ancestry." COHEN'S § 3.03[2] (citing Am. Indian Pol'y Rev. Comm., 95th Cong., 1st Sess., Final R. 108–09 (Comm. Print 1977)).

"Some Indian nations also permit naturalization or adoption of individuals with close but nonbiological ties to the community." COHEN'S § 3.03[2]. For example, the Fort McDermitt Paiute and Shoshone Tribe permits "any person of one-half or more Indian blood married to a member of the Fort McDermitt Paiute and Shoshone Tribe" to become a tribal member. Const. and Bylaws of the Fort McDermitt Paiute and Shoshone Tribe, Art. II, § 2(b). The Lower Brule Sioux Tribe permits the Tribal Council to promulgate rules allowing "the adoption of new members provided only that no person may be adopted who is not a resident of the reservation." Const. of the Lower Brule Sioux Tribe, Art. II, § 2. Amantonka Nation allows individuals, like Reynolds, with no lineal or blood connection to the Tribe, to become naturalized citizens so long as they meet the marriage and residency requirements and complete the naturalization process. *See* ANC Title 3 §§ 201–203.

3. Reynolds is politically Indian but not racially Indian.

In *United States v. Rogers*, 45 U.S. 567, 571 (1846), this Court concluded that a white man adopted into the tribe was not Indian for the purpose of tribal criminal jurisdiction. "[W]e think it very clear, that a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian." *Id.* at 573. Though, "[h]e may by such adoption become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages. Yet he is not an Indian." *Id*. The Court reasons this because the applicable statute "does not speak of members of a tribe, but of the race generally . . . and it intended to leave them . . . to be governed by Indian usages and customs." *Id.* In *Rogers*, the Court recognized Indian status as a racial classification separate from Indian status as a political classification. *Id.*

Some argue that enrollment in a tribe should be the single, unified indicator of Indian status. This Court admits that a definition of Indian including only members of federally-recognized tribes "operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature." *Morton v. Mancari*, 417 U.S. 535, 555 n.24 (1974). The Court again distinguishes between Indian as a racial classification—with lineal and blood requirements—as opposed to a political classification—with tribal enrollment requirements.

True to the Court's concern, there are a number of instances where individuals not enrolled in a federal-recognized Indian would be considered Indian racially. First, consider an instance where an individual terminates their tribal membership. "A member of any Indian tribe is at liberty to terminate the tribal relationship whenever the member so chooses." COHEN'S § 3.03[3]. "Tribal membership is a bilateral political relationship." *Masayesva ex rel. Hopi Indian Tribe v. Zah*, 792 F. Supp. 1178, 1188 (D. Ariz. 1992). For example, in *United States v. Antelope*, 430 U.S. 641, 646–47 (1977), the Court found that a member of an Indian tribe that was terminated was not considered Indian for the purposes of federal criminal jurisdiction because jurisdiction was based on political classification, not racial. *See also United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974) ("While anthropologically a Klamath Indian even after the Termination Act obviously remains an Indian, his unique status vis-a-vis the Federal Government no longer exists").

There are a number of other instances where Indian status should not be conflated with tribal membership. If tribal members are forcibly disenrolled from their tribe, they still maintain the lineal and cultural connections to that tribe but are no longer enrolled members. These individuals would be racially Indian because their disenrollment does not negate their

culture, upbringing, and blood. However, politically, these individuals are no longer considered Indian.

Consider another example: some tribes have matrilineal or patrilineal requirements for enrollment. If this is a matrilineal tribe and an individual's mother is not enrolled in the tribe but the child's father is, the child may not be eligible for enrollment in the tribe despite likely identifying as an Indian, being raised on the reservation, and living in tribal culture. This child, while racially Indian, may not be considered Indian in a political sense because of the child's inability to enroll in the tribe.

Moreover, there are instances where individuals reside on a tribal reservation and have lineal or blood ties to the tribe but choose not to enroll in the tribe based on their personal preference. Again, this individual would be racially Indian but not politically Indian.

An individual enrolled in a tribe that is not federally recognized may not be considered an Indian politically in some contexts despite enrollment, regardless of whether or not they have lineal descent. In contrast, consider these political non-Indians in juxtaposition with an individual like Reynolds who has no lineal or blood connection to a tribe but was able to enroll because of marriage and residency. These comparisons serve not to encourage some competition over who is "more Indian" in these circumstances but rather to illustrate the nuances of the political and racial determinants that go into an Indian's classification.

For these reasons, enrollment in a federally-recognized Indian tribe is not and should not be the sole determinant of Indian status for the purposes of criminal jurisdiction. While Reynolds is enrolled in Amantonka Nation and is an Indian for political purposes, he is not an Indian racially. It is undisputed that Reynolds has no Indian descent, blood, or lineage. His only connection to Amantonka Nation arises from his relationship with his wife. Conflating Reynolds's membership in the tribe with his status as an Indian is erroneous.

B. Amantonka Nation Cannot Exercise General Criminal Jurisdiction Over Reynolds Because Reynolds is Not Racially an Indian.

Tribes have no criminal jurisdiction over non-Indian defendants, except under supplemental VAWA jurisdiction. Because Reynolds is not racially an Indian, he does not qualify as an Indian for the purposes of tribal criminal jurisdiction. Amantonka Nation cannot exercise general criminal jurisdiction over Reynolds as a non-Indian. Reynolds should be considered a non-Indian if prosecuted by Amantonka Nation under supplemental VAWA jurisdiction because he does not meet the racial classification of Indian.

1. Under *Oliphant*, tribes have no criminal jurisdiction over non-Indian defendants except when exercising supplemental VAWA jurisdiction.

"Native American tribes generally have exclusive jurisdiction over crimes committed by Indians against Indians in Indian country." *United States v. LaBuff*, 658 F.3d 873, 876 (9th Cir. 2011). In *Oliphant v. Squamish Indian Tribe*, 435 U.S. 191 (1978), this Court considered whether tribes could exercise criminal jurisdiction over non-Indians. In *Oliphant*, two non-Indians were arrested by tribal authorities for each committing crimes in tribal territory. *Id.* at 193–94. The Court held that tribes do not have criminal jurisdiction over non-Indians, giving voice to an "unspoken assumption" "evident in other Congressional actions." *Id.* at 195, 203. The Court considered its earlier decision in *In re Mayfield*, 141 U.S. 107, 115–16 (1891), noting

> [t]he 'general object' of the congressional statutes was to allow Indian nations criminal 'jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side.

435 U.S. at 204. In concluding its opinion, the Court noted that it is a "consideration[] for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians." *Id.* at 212.

In 2013, Congress weighed this and carved out an exception to this rule when it created a special jurisdiction over crimes of domestic violence against an Indian by a non-Indian perpetrator under the VAWA. 25 U.S.C.A. § 1304. Unfortunately, Congress failed to include a definition for "Indian" or "non-Indian" in VAWA which prompts the issue before the Court in this case—is an enrolled tribal member with no lineal or blood ancestry in a tribe a non-Indian under VAWA?

2. Federal courts use a two-part test to determine if a defendant is Indian for criminal jurisdiction purposes.

Courts have struggled to articulate a uniform, bright-line test to determine if someone is an "Indian." But "[t]he common test that has evolved after *United States v. Rogers*, for use with both of the federal Indian country criminal statutes, considers Indian descent, as well as recognition as an Indian by a federally recognized tribe." COHEN'S § 3.03[4]. "A person claiming Indian status must prove both prongs." *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005). In considering the first prong, Indian descent, there is "no specific percentage of Indian ancestry" that has been articulated. COHEN'S § 3.03[4]. Courts have ruled that as little as three thirty-seconds Indian blood is sufficient to satisfy this prong. *See United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009).

In considering the second prong, the federal circuits have struggled to articulate a consistent rule to establish "recognition as an Indian." COHEN'S § 3.03[4]. The second prong serves to "probe[] whether the Native American has a sufficient non-racial link to a formerly sovereign people." 394 F.3d at 1224 (citing *St. Cloud v. United States*, 702 F. Supp. 1456, 1461 (D.S.D. 1988)). In *Bruce*, the Ninth Circuit articulated four factors, of declining importance, to be considered in determining recognition as an Indian: "(1) tribal enrollment; (2) government recognition formally and informally through receipt of assistance reserved only to Indians; (3) enjoyment of the benefits of tribal affiliation; and (4) social recognition

as an Indian through residence on a reservation and participation in Indian social life." 394 F.3d at 1224 (citing *United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir. 1995)); *see also United States v. Cruz*, 554 F.3d 840, 846 (9th Cir. 2009); *LaBuff*, 658 F.3d at 877. Here, Reynolds is an enrolled tribal member and is recognized by tribal government through that enrollment. As such, Reynolds likely satisfies the second prong of the *Bruce* test in the Ninth Circuit to be considered an Indian but he does not satisfy the first prong because he does not have any Indian ancestry.

In *Stymiest*, 581 F.3d at 763–66, the Eighth Circuit articulated a somewhat more flexible test for "Indian." *See also St. Cloud*, 702 F. Supp. at 1461; *Lawrence*, 52 F.3d at 152. The *Stymiest* test considers the Ninth Circuit's *Bruce* factors and "allowed the addition of other relevant factors, such as whether the defendant has been subjected to tribal court jurisdiction and whether the defendant has held himself or herself out as an Indian." COHEN'S § 3.03[4] (citing *Stymiest*, 581 F.3d at 766). *Stymiest* again differs from *Bruce* in that the factors "should not be tied to an order of importance, unless the defendant is an enrolled tribal member, in which case that factor becomes dispositive." 581 F.3d at 764. Here, Reynolds is an enrolled member of the tribe so would satisfy the *Stymiest* test in the Eighth Circuit, but again does not satisfy the first prong due to no Indian ancestry.

"Given these variations in the articulation of relevant factors, as well as the difficulty of applying any multipart test, case outcomes have not formed a consistent pattern." COHEN'S § 3.03[4]. In *Stymiest*, the tribal recognition requirement was satisfied by defendant having lived and worked on the reservation, defendant having been arrested by tribal authorities in the past, and defendant holding himself out as an Indian to others." 581 F.3d at 764. Whereas in *Cruz*, the court determined that a defendant who had attended school and worked on the reservation, was eligible for tribal benefits based on his descendent status but had never taken

advantage of them, had never participated in religious ceremonies or dance festivals, and had lived on the reservation as a child was not an Indian. 554 F.3d at 846–47. Then, in *Labuff*, 658 F.3d at 878, a court found that defendant was Indian despite not being enrolled because he lived on the Indian reservation, was a descendant of a tribal member, was eligible for free health care at an Indian hospital, and had previous prosecutions and convictions by a tribal court. This inconsistent determination begs for a uniform articulation of what determines Indian status for the purposes of tribal criminal jurisdiction.

Despite the different factors considered in the second prong, in both the Eighth and Ninth Circuits, one must meet both prongs of the test to be considered Indian, that is to have Indian descent and recognition as an Indian. *See United States v. Zepeda*, 792 F.3d 1103, 1110 (9th Cir. 2015) (*en banc*); *Lawrence*, 52 F.3d at 152. Here, it is undisputed that Reynolds has zero Indian ancestry or blood. Reynolds fails to satisfy this first prong under either circuit's formulation. Therefore, Reynolds cannot be considered an Indian for the purposes of tribal criminal jurisdiction.

II. THE AMANTONKA NATION DID NOT PROPERLY PROSECUTE ROBERT REYNOLDS.

A. The Amantonka Nation Does Not Provide the Necessary Procedural Protections to Exercise Supplemental VAWA Jurisdiction Over Reynolds, a Non-Indian.

Under supplemental VAWA jurisdiction, Amantonka Nation needs to provide Robert Reynolds with a defense attorney licensed by a jurisdiction applying appropriate standards to effectively ensure the lawyer's competence and professional responsibility. Amantonka Nation did not provide Reynolds with such a qualified attorney. Instead, Amantonka Nation provided Reynolds with an unlicensed, unregulated public defender. Therefore, Amantonka Nation did not satisfy the relevant legal requirements for indigent counsel under VAWA and Reynolds's petition for a writ of habeas corpus should be granted.

1. Under supplemental VAWA jurisdiction, tribes are required to provide additional procedural protections to non-Indians.

Federally recognized Indian tribes generally lack criminal jurisdiction over non-Indians in Indian country. *Oliphant*, 435 U.S. at 210 (1978) ("[b]y submitting to the overriding sovereignty of the US, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the US"); *Wheeler*, 435 U.S. at 326. Only Congress can increase a tribe's criminal jurisdictional authority. *See* 25 U.S.C.A.§ 1301(2) ("Duro Fix") (reauthorizing tribal governments to prosecute non-member Indians), *United States v. Lara*, 541 U.S. 193, 216, 124 S. Ct. 1628, 1642 (2004); 25 U.S.C.A. § 1302 (Tribal Law and Order Act) ("TLOA"); 25 U.S.C.A. § 1304 (VAWA).

Although, Congress is hesitant to grant tribes additional criminal authority because historically, defendants have not had the same procedural protections in tribal court as state and federal court. Tribal courts have not recognized the right to indigent counsel, or even counsel at all. *See United States v. First*, 731 F.3d 998, 1003 (9th Cir. 2013) (there is no right to indigent counsel in tribal courts); Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317, 340 (2013) (the Code of Federal Regulations prohibited attorneys in tribal court until 1961).

Therefore, under TLOA and VAWA, Congress mandated that tribal governments provide defendants additional procedural protections. These procedural protections are necessary because "[t]he exercise of criminal jurisdiction subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe, and involves a far more direct intrusion on personal liberties." *Duro v. Reina*, 495 U.S. 676, 688 (1990). For supplemental jurisdiction under VAWA, tribal governments have to provide, at a minimum:

- 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.A.§ 1302(c)(2).

2. Amantonka Nation does not provide the minimum procedural protections for supplemental VAWA jurisdiction.

Amantonka Nation should not have qualified for supplemental jurisdiction because they do not provide licensed attorneys to indigent counsel that meet the Congressionally mandated procedural minimum for supplemental jurisdiction.

a. Amantonka Nation is not providing licensed attorneys, but rather public defenders.

In order to qualify for supplemental jurisdiction, tribes have to provide "a defense attorney licensed to practice law." 25 U.S.C.A. § 1302. This additional protection is meant to be more protective of defendants' rights by requiring tribes provide licensed attorneys, which contrasts with the practice of tribes providing lay advocates. *See* Seth Fortin, *The Two-Tiered Program of the Tribal Law and Order Act*, 61 UCLA L. REV. DISC. 102 (2013) (discussing the role of lay advocates in tribal court systems); David Patton, *Tribal Law and Order Act of 2010: Breathing Life into the Miner's Canary*, 47 GONZ. L. REV. 767, 786 (2011) ("Currently much of the defense work in Indian Country is provided . . . by lay advocates . . . ."); Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1611 (2016) ("[T]ribes often have provided lay advocates–those who are authorized to provide defense services to defendants, but who may not otherwise be legally trained"); Thais-Lyn Trayer, *Elementary Unfairness: Federal Recidivism Statutes and the Gap in Indigent American Indian Defendants' Sixth Amendment Right to Counsel*, 63 AM. U.L. REV. 219, 245 (2013) ("Although much of the language is unclear, defense counsel under this provision must be a licensed attorney, not a lay advocate as is the practice in many tribes.").

The Amantonka Nation Code distinguishes between public defenders, lay counselors, and attorneys. The Amantonka Nation does not provide licensed attorneys, or even lay advocates, as indigent counsel, rather they provide public defenders. This Court should apply the "plain meaning rule" to interpret the classification between attorneys, lay counselors, and public defenders in Amantonka Nation Code. *See Sebelius v. Cloer*, 569 U.S. ___, No. 12-236, slip op. (May 20, 2013) ("If the language of the statute is plain and unambiguous, it must be applied according to its terms."); *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("where [tribe] includes particular language in one section of a statute but omits it in another . . . it is generally presumed that [tribe] acts intentionally. . . .") (internal citations omitted).

Under Amantonka Nation Code, indigent defendants are not entitled to attorneys or lay counselors—but public defenders. *See* ANC § 503(2). The Amantonka Nation sets forth its qualifications for admission as an "attorney or lay counselor" in a different section then its qualifications for public defenders. Unlike attorneys, public defenders do not have to be a member in good standing of any bar organization, but rather just have to hold a JD from an ABA accredited law school, taken and passed the Amantonka Nation bar, taken an oath of office, and passed a background check. ANC § 607.

Although Amantonka Nation may argue classifying public defenders in a different section then attorneys is merely a matter of semantics, that is not the case as it is well recognized that "an attorney at law, as distinguished from a layman, has both public and private obligations, being sworn to act with all good fidelity toward both his client and the court." *United States v. Onan*, 190 F.2d 1, 6 (8th Cir. 1951).

Under VAWA, Congress intended for indigent counsel to be attorneys and not lay counselors, or as Amantonka Nation refers to them—public defenders. There is a difference

between attorneys and lay counselors, not only in the Amantonka Nation Code, but also in the law. It is well settled that the term "counsel," as it is used in the state and federal constitutional provisions guaranteeing an accused the right to counsel, means a duly licensed attorney, not an attorney in fact or a layperson. 19 A.L.R. 5TH 351 (1994). There is a difference not only in the definition of layperson and a duly licensed attorney, but also in the right to an attorney versus a layperson. *See United States v. Taylor*, 569 F.2d 448 (7th Cir.), *cert. denied*, 435 U.S. 952 (1978) (federal courts have consistently rejected attempts at third-party lay representation). This difference also manifests itself in the "remedies and sanctions . . . available against the lawyer that are not available against the fellow inmate, including misconduct sanctions and malpractice suits." *Herrera-Venegas v. Sanchez-Rivera*, 681 F.2d 41, 42 (1st Cir. 1982).

If Congress intended to allow for lay counselors, or even nonlawyer agents, similar to what Amantonka Nation calls public defenders, then they could have provided that language—as they have in other federal legislation. *See* 37 CFR § 1.341(c) (creating categories of attorneys at law and nonlawyer agents to assist with patent applications); *Sperry v. State of Fla. ex rel. Fla. Bar*, 373 U.S. 379, 384–85 (1963) (holding that nonlawyer agents are allowed to represent clients in preparing patents for the United States patent office). Allowing an attorney or a lay counselor would have been consistent with what tribal courts were already doing by providing lay counsel, but instead Congress definitively calls for a "defense attorney."

Amantonka Nation is not providing lay counselors to its indigent defendants though, which would still not meet the statutory minimum for supplemental VAWA jurisdiction—instead it is providing people even less qualified in character and fitness than lay counselors. Amantonka Nation lay counselors must meet all the same requirements as public defenders,

but they also must not have committed a felony in any jurisdiction—a requirement public defenders do not need to meet. *Cf.* ANC § 501(b); *with* ANC § 607.

Nineteen tribes, including Amantonka Nation, have been granted supplemental VAWA jurisdiction. THE NAT'L CONG. OF AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICITON FIVE-YEAR REPORT 1, (March 20, 2018). All of these tribes provide indigent counsel through licensed attorneys—people both referenced as "attorneys" in the tribal code and licensed to practice law. *Id.* Tribes can provide attorneys to indigent counsel in different ways and "the three most common systems are a public defender office, a contract system, and a pro bono or required service system." TRIBAL LAW AND POLICY INST., TRIBAL LEGAL CODE RESOURCE: TRIBAL LAWS IMPLEMENTING TLOA ENHANCED SENTENCING AND VAWA ENHANCED JURISDICITON 54 (Feb. 2015). Although it seems like the Amantonka Nation has set up a public defenders office, it has not successfully done so because not only are the public defenders not attorneys admitted to practice in Amantonka Nation Courts, but there are no appropriate licensing standards or professional responsibility codes they need to abide by.

b. Amantonka Nation does not apply appropriate professional licensing standards.

Congress mandated that attorneys under VAWA needed to be licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards. 25 U.S.C.A. § 1302. Despite this requirement for supplemental jurisdiction, Amantonka Nation does not mandate its public defenders are licensed in any jurisdiction in the United States. Only the attorneys practicing in Amantonka Nation courts need to be licensed and a member in good standing with a bar organization.

Amantonka Nation might argue that requiring its public defenders to take its bar and meet the other five requirements is a licensing system. But this is not a licensing system

because it does not require public defenders to be in good standing with a bar organization. Being in good standing with a bar organization is a necessary requirement for an effective licensing system because it ensures attorney's continual character and fitness.

Congress intentionally made the licensing requirement vague and tribes have the broad authority to control their standards for entry into the legal profession. In the state and federal system, state and federal bars have taken on the responsibility of licensure systems. In the tribal justice system, there is an extensive tribal bar that can ensure proper licensing of tribal lawyers.

This licensing authority is important because, as this Court has recognized, "the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975). This regulation is important for lawyers because lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the courts." *Id.* (quoting *Sperry*, 373 U.S. at 383 (1963)).

Of the tribes that have assumed supplemental VAWA jurisdiction, they have approached the licensing system in a variety of different ways. Some tribes recognize good standing in a state or federal bar membership as adequate. *See* Hopi Code, Title 1, Chapter 6 (2012), http://www.hopi-nsn.gov/wp-content/uploads/2013/05/Hopi-Code.pdf ("Attorneys may become a member of the Bar of the Courts, if they are admitted to practice before the Supreme Court of the United States, a United States Circuit Court of Appeals, U.S. District Court, or the Supreme Court of any state, and are in good standing.").

Other tribes have diverged from the state and federal system and created tribal bars with their own licensing standards. *See* Confederate Tribes of the Umatilla Reservation Rules of Ct., Rule 11 (2014), http://ctuir.org/system/files/RulesOfCourt.pdf (establishing tribal bar association); Navajo Nation Bar Ass'n, Bylaws of Navajo Nation Bar Ass'n (2015), http://www.navajolaw.info/bylaws; Oglala Sioux Tribe: Law & Order Code, Chapter 45 (1996), https://www.narf.org/nill/codes/oglala_sioux/chapter45-bar.html (establishing tribal bar association and requirements).

These tribal bars generally proscribe their own requirements for admission and procedures to be admitted. For example, in the Umatilla Tribal Court, application for admission "shall be made by filing an admission fee of $100.00 and a petition setting forth: name, birth date, sex, residence/office address, general and specific legal education and experience, reference from one bar association member with whom they are personally acquainted, any past or pending disciplinary actions to which she may be subject, any other information as required by the court." *Id.*

These systems of licensure can function together and reciprocally recognize the licenses of another. For example, the American Bar Association recognizes lawyers in tribal bar organizations. Am. Bar Ass'n, Const. & Bylaws Rule 3.1 (2016), https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/constitution-and-bylaws/aba_constitution_and_bylaws_2015.pdf ("Any person of good moral character in good standing at the bar of a state, territory, possession, or tribal court of any federally recognized tribe of the United States is eligible to be a member of the Association in accordance with the Bylaws.").

Although Amantonka Nation has broad authority to control its own legal licensing system, it does not have a legal licensing system for public defenders. The Amantonka

Nation has a licensing system for attorneys that recognizes any attorney at law who is a member in good standing of "the bar of any tribal, state, or federal court." They do not pass these same requirements onto public defenders, who do not need to be a member of any bar and have no licensing system.

The closest thing to a licensing system Amantonka Nation public defenders have is to take an oath of office. This is not an adequate licensing system because it does not dictate that lawyers apply or meet any qualifications. The Amantonka Nation's lack of licensing system leads to the lack of the ability to effectively ensure the competence and professional responsibility of its licensed attorneys. This is a necessary requirement under VAWA that the Amantonka Nation is not meeting.

c. Amantonka Nation does not effectively ensure the competence and professional responsibility of its licensed attorneys.

Similar to licensing systems, there are multiple different avenues to effectively ensure lawyers are fulfilling their duties to their client and the court. Since the beginning of the lawyer as a regulated profession, there have been discussions of how to regulate lawyers to ensure they effectively uphold the duties and morals of the profession. "Some States had stringent standards of admission, whereas other States eventually eliminated all requirements for admission to the Bar, except good moral character. Notwithstanding the apparent ease with which one could enter the practice of law in some States, one did not do so except by permission of some governing body, and laymen did not practice law." *See, generally,* LAWRENCE M. FRIEDMAN, A HIST. OF AM. LAW 276–77 (1973).

Rules of professional conduct have been adopted by all fifty-one states and many tribal courts to ensure lawyers are fully upholding the duties and morals of the profession. *See* GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, THE LEGAL PROF.: RESP.

& REG. 118 (3d ed. 1994). The competence of lawyers is a well-regulated area with case law dictating how lawyers should behave and conduct themselves. *See*, *generally*, CHARLES W. WOLFRAM, MOD. LEGAL ETHICS § 2.6.3, at 56–57 (1986). Congress mandates that for supplemental VAWA jurisdiction, tribes need to effectively ensure the competence and professional responsibility of its licensed attorneys. Tribal courts have the ability to adapt this case law and decide what works with their own standards of their community and notions of justice. These standards are vague, so that tribes can meet them in a variety of different ways that will work best for their communities and governing structures.

Under VAWA, Amantonka Nation was granted the flexibility to develop standards that work for it. Instead it developed no standards for its public defenders. Like other tribal court systems, the Amantonka Nation has adopted a Code of Ethics and might argue that it effectively ensures the competence and professional responsibility of its licensed attorneys through this Code of Ethics. ANC § Title 2, Chapter 7. Although, this Code of Ethics only applies to "Attorneys and Lay Counselors." *Id.* The principles of statutory interpretation dictate that this Court should interpret Amantonka Nation's Code of Ethics as only applying to attorneys and lay counselors. There is no Code of Ethics for public defenders.

Even if the Code of Ethics is applied to public defenders, there is no way to lodge a complaint against a public defender and there are no provisions for punishment or disbarment of a public defender. Under its Code, the Amantonka Nation sets forth a standard procedure to handle complaints against "Attorneys and Lay Advocates." ANC Canon 22. These rules do not apply to public defenders and under Amantonka Nation Code, there is no procedure to lodge a complaint against a public defender. Amantonka Nation has not provided an adequate licensing system to effectively ensure the initial and continued competence of its public defenders that it provides to indigent counsel for VAWA jurisdiction.

d. Amantonka Nation incorrectly exercised supplemental VAWA jurisdiction over Reynolds and as a result, his conviction should be reversed and remanded.

Amantonka Nation has not met the requirements for supplemental jurisdiction under VAWA because they are not providing licensed attorneys to indigent counsel. Not only is Amantonka Nation not providing licensed attorneys to indigent counsel, but they did not provide Reynolds with a properly licensed attorney that would meet the statutory minimum. The Amantonka Nation should not have been granted supplemental jurisdiction under VAWA and therefore, improperly exercised jurisdiction in its prosecution of Reynolds. As a result, this court should grant Reynolds's petition for habeas corpus review.

B. If Reynolds Is Considered Indian, Amantonka Nation's Indigent Counsel Provision Violates Equal Protection Under The ICRA.

The federal government has long recognized that Indians are American citizens who enjoy the same constitutional rights as any other United States citizen. *See* The Indian Citizenship Act of 1924, Pub. L. No. 68-176, 43 Stat. 253 (granting Indians American citizenship while maintaining their tribal property rights) (8 U.S.C.A.§1401(b)). The Supreme Court of the United States has held since 1896 that the Constitution does not apply to tribal nations. *See Talton v. Mayes*, 163 U.S. 376, 384 (1896) (the Fifth Amendment does not apply to the Cherokee Nation because the Cherokee government existed prior to the formation of the Constitution); *Santa Clara Pueblo*, 436 U.S. at 56 ("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."); Samuel E. Ennis & Caroline P. Mayhew, *Fed. Indian Law & Tribal Crim. Just. in the Self-Determination Era*, 38 AM. INDIAN L. REV. 421, 428 (2014) ("Since Indian tribes did not participate in the Constitutional Convention and did not 'sign on' by joining the federal

union, they are not bound by the Constitution, absent affirmative congressional action to the contrary.").

As a result, tribal governments do not need to apply the Bill of Rights protections to its members. Unless exercising supplemental jurisdiction under TLOA or VAWA, tribal governments do not need to provide some protections, including the sixth amendment. *See Plains Com. Bank v. Long Family Land & Cattle Co*., 554 U.S. 316, 337 (2008); *United States v. Bryant*, 136 S. Ct. 1954, 1962 (2016), *as revised* (July 7, 2016) ("[ICRA] which governs criminal proceedings in tribal courts, requires appointed counsel only when a sentence of more than one year's imprisonment is imposed."). Although tribal citizens enjoy the same rights when the federal government is acting, they have a different set of rights when the tribal government is acting.

1. The Constitution does not apply to tribal governments, but tribal governments are constrained by the ICRA.

While not constrained by the Bill of Rights, tribal governments are constrained by the Indian Civil Rights Act—which includes an equal protection clause. 25 U.S.C.A. § 1301. These rights were designed to provide statutory protections mimicking the rights under the Bill of Rights. *See* Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 198 (2002) ("ICRA was designed to impose by statute on the operation of tribal governments many of the constitutional guarantees found in the Bill of Rights, as a well as an equal protection clause.").

The Indian Civil Rights Act is different from the Bill of Rights because it does not contain all the same protections. Notably, it does not contain a right to indigent counsel. *United States v. Doherty*, 126 F.3d 769, 778 (6th Cir. 1997) ("ICRA provides for a right to counsel, but does not extend that right to the limits of the Sixth Amendment . . . . Thus, the tribes are not required to provide counsel to the indigent accused in felony prosecutions,

despite the Sixth Amendment holding to the contrary in *Gideon* . . . ." (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963), *abrogated on other grounds by Texas v. Cobb*, 532 U.S. 162 (2001)); *see also First*, 731 F.3d at 1002; Trayer, *supra* at 244 (ICRA does not contain a parallel sixth amendment right to counsel for indigent defendants out of a concern for lack of resources and "[i]t is unclear whether tribes themselves were concerned about their inability to provide attorneys in criminal proceedings, or if the Bureau of Indian Affairs advocated against this inclusion, fearful that the expense would fall to the Bureau.").

Although ICRA does not mandate a right to counsel—many tribes do provide a right to counsel. *See Riley*, *supra* 1610–11 (2016) ("when tribes have had the financial resources to provide lawyers for indigent defendants in adversarial style proceedings, they largely have done so"). Even if tribes are providing more procedural protections then necessary under ICRA, these procedural protections still have to conform with the other rights in ICRA—notably the right to equal protection.

Although the Constitution does not apply to tribes, tribes are constrained by the ICRA. *Santa Clara Pueblo*, 436 U.S. at 60–61 (1978) ("a central purpose of the ICRA and in particular of Title I was to 'secur[e] for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments.') (citing S. Rep. No. 841, 90th Cong., 1st Sess., 5–6 (1967). ICRA was intended to selectively incorporate and in some instances modify "the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments." *Santa Clara Pueblo*, 436 U.S. at 63. There are notable omissions from ICRA (for example, the right to a republican form of government and the prohibition of an established religion) that reflect a deliberate choice by Congress to limit its intrusion into traditional tribal independence. *See* Donald L. Burnett Jr., *An Historical Analysis of the 1968*

Indian Civil Rights Act, 9 HARV. J. ON LEGIS. 557 (1972). Congress did include a right to equal protection provision in ICRA. 25 U.S.C.A. § 1302(a)(8) ("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").

2. ICRA's equal protection provision should be interpreted in the same way as the Constitution's provision for equal protection.

Amantonka Nation may argue that "those courts that have considered ICRA have held that constitutional law precedents applicable to the federal and state governments do not necessarily apply 'jot-for-jot' to the tribes." *Doherty*, 126 F.3d at 779. Courts have interpreted ICRA protections differently from federal protections, but those interpretations have primarily been in the interpretation of the sixth amendment right to counsel and deciding that tribal indigent counsel do not possess the same right to counsel as state or federal defendants. *See, e.g.*, *Bryant*, 136 S. Ct. at 1962; *United States v. Shavanaux*, 647 F.3d 993, 998 (10th Cir. 2011); *United States v. Long*, 870 F.3d 741, 749 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 1034 (2018); *United States v. Gillette*, 3:17-CR-30122-RAL, 2018 WL 3151642, at *4 (D.S.D. Jan. 29, 2018). This interpretation is consistent with the legislative intent of ICRA to not provide indigent defendants with the right to counsel.

Courts have also held that ICRA's provisions should not be interpreted with the Constitution when that interpretation would infringe on tribal sovereignty and the right of tribal Indians to govern themselves. *Santa Clara Pueblo*, 436 U.S. at 57 (1978) (ICRA's rights are not identical to those in the fourteenth amendment); *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation*, 507 F.2d 1079, 1081 (8th Cir. 1975) (the equal protection and twenty sixth amendment does not apply to internal tribal elections because "the form of government and the qualifications for voting and holding

office were left to the individual tribes."); *White Eagle v. One Feather,* 478 F.2d 1311 (8th Cir. 1973); *see also Oregon v. Mitchell*, 400 U.S. 112 (1970) (states have the power to control their own elections).

Although in other instances courts have found ICRA does not track with the Constitution, the equal protection issue should be analyzed using the federal equal protection framework. Situations in which the court has declined to adopt this framework in the past are situations in which doing so would infringe on tribal sovereignty. The decision to provide non-Indians with less qualified indigent defendants is not a fundamental decision that infringes on a tribes' ability to govern themselves, unlike tribal elections for example.

ICRA's statutory mandates have not been extensively interpreted in federal or state courts like the Bill of Rights. *Doherty*, 126 F.3d at 779 ("[t]here is a paucity of case law under ICRA").

3. The Amantonka Nation's right to indigent counsel provisions violate ICRA's right to equal protection.

The federal equal protection limitation requires that people who are similarly situated be treated similarly and legislative classifications based on an innate group characteristic, such as race, ancestry, or national origin are inherently suspect and subject to strict scrutiny. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); Ronald D. Rotunda & John E. Nowak, TREATISE ON CONSTITUTIONAL LAW § 18.03(a)(iii) (West, 4th ed. 2007); COHEN'S § 14.03. In order to satisfy strict scrutiny, a government must show the classification is necessary to achieve a compelling governmental interest and narrowly tailored to achieve that interest.

Although, under federal Indian law there is a unique status for classifications based on Indian and "subjecting this entire body of law to strict scrutiny would be inconsistent with the unique constitutional and historical status of the federal-Indian relationship, and violate fundamental obligations to the Indians." COHEN'S § 14.03.

Strict scrutiny has not been applied to federal action towards Indians because of the unique trust relationship between Indians and the federal government. *Worcester v. Georgia*, 31 U.S. 515 (1832). Therefore, strict scrutiny is not applied to federal actions towards Indians and "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Morton*, 417 U.S. at 555 (1974).

This should not be the standard applied to the Amantonka Nation in their legislation about Indians. The unique relationship of the federal government to Indians is different in its responsibilities towards Indians than the relationship of a tribal government towards its citizens. The Amantonka Nation's distinguishment between non-Indians and Indians and their respective rights should be held to strict scrutiny because ICRA contemplated it would provide additional protections to Indians under tribal governments. If the tribal government was held to the same standard as the federal government for legislating about Indians, then the equal protection clause of ICRA would have no meaning as they could make broad and sweeping differences based on their ability to legislate for Indians.

The Amantonka Nation should be held to the federal standard for equal protection as the Amantonka Nation cannot rationally tie the special treatment of non-Indians to the fulfillment of a unique obligation towards Indians. Under the federal standard, the Amantonka Nation cannot show there is a compelling interest to provide better qualified counsel to non-Indian indigent defendants.

Although the Amantonka Nation may argue that its compelling reason for providing less qualified counsel for Indian indigent defendants is financial, the Supreme Court has never upheld a financial reason as a compelling interest. A financial interest may only meet rational basis review, which is not the standard that should be used here. The Amantonka

Nation also may argue that they are furthering the health, safety, and welfare of the tribe by providing more qualified indigent counsel to non-Indian defendants and therefore, qualifying for supplemental VAWA jurisdiction, but this also would not satisfy strict scrutiny as it could be accomplished in a less restrictive means.

Under ICRA's right to equal protection, the Amantonka Nation's right to indigent counsel provision should be held to strict scrutiny. This provision is not upheld under strict scrutiny because there is no compelling interest and even if there was a compelling interest, the means are not narrowly tailored to the interest. Therefore, Amantonka Nation violated Robert Reynolds's right to equal protection and his Writ of Habeas Corpus should be granted.

If this Court does not want to apply the federal equal protection framework, ICRA can be also interpreted given tribal history and norms of the community. *See, e.g.*, *Hopi Tribe v. Kahe*, 21 Indian L. Rep. 6079 (Hopi Tribal Ct. 1994) (finding officer's stop of defendant's vehicle for a "welfare check" was appropriate given Hopi practice of looking out for friends and neighbors). "Essential fairness in the tribal context, not procedural punctiliousness, is the standard against which the disputed actions must be measured." *McCurdy v. Steele*, 353 F. Supp. 629, 640 (D. Utah 1973), *rev'd on other grounds*, 506 F.2d 653 (10th Cir. 1974). Even using these principles of interpretation, allowing tribal governments to interpret the meaning of equal protection given its history and meaning within the context of the Amantonka Nation should not restrain this Court from deciding the indigent counsel provided to Reynolds is not a violation of equal protection. There is nothing in the record to indicate that Amantonka Nation historically denied Indians less rights to indigent counsel.

CONCLUSION

Robert Reynolds should be considered a non-Indian for the purpose of criminal jurisdiction. While he is a naturalized citizen of Amantonka Nation, Reynolds has no Indian ancestry or lineal connection. Because he is a non-Indian, Amantonka Nation can only prosecute Reynolds under its supplemental VAWA jurisdiction. In order to qualify for supplemental VAWA jurisdiction, the Amantonka Nation must provide the additional procedural protections proscribed by Congress. The Amantonka Nation is not meeting these standards with regard to indigent counsel so the Writ of Habeas Corpus should be granted.

APPENDIX

Selected Provisions of the Amantonka Nation Code

Sec. 105. Criminal Jurisdiction of the Court.

(a) *Generally*. The Amantonka Nation District Court is vested with jurisdiction to enforce all provisions of this Code, as amended from time to time, against any person violating the Code within the boundaries of the Amantonka Nation's Indian country. The Court is also vested with the power to impose protection orders against non-Indians in accordance with the provisions of this Code.

(b) *Criminal jurisdiction over non-Indian domestic or dating violence.* The Amantonka Nation District Court is vested with jurisdiction to enforce all provisions of this Code against a non-Indian who has committed an act of dating violence or domestic violence against an Indian victim within the Amantonka Nation's Indian country provided the non-Indian has sufficient ties to the Amantonka Nation.

(1) A non-Indian has sufficient ties to the Amantonka Nation for purposes of jurisdiction if they:

(A) Reside in the Amantonka Nation's Indian country;
(B) Are employed in the Amantonka Nation's Indian country; or
(C) Are a spouse, intimate partner, or dating partner of either:
(i) A member of the Amantonka Nation, or
(ii) A non-member Indian who resides in the Amantonka Nation's Indian country.

(c) *Criminal jurisdiction over non-Indian protection order violations*. The Amantonka Nation District Court is vested with criminal jurisdiction to enforce all provisions of this Code related to

(1) The protection order was issued against the non-Indian, violations of protection orders against a non-Indian who has sufficient ties to the Nation as identified in Section 105(b)(1) and who has violated a protection order within the Amantonka Nation's Indian country provided the protected person is an Indian, and the following conditions are met:
(2) The protection order is consistent with 18 U.S.C.A. 2265(b), and
(3) The violation relates to that portion of the protection order that provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, the protected person.

Title 2, Chapter 5. Attorneys and Lay Counselors

Sec. 501. Qualifications for admissions as attorney or lay counselor.

(a) Attorneys. No person may practice as an attorney before the District Court or Supreme Court unless admitted to practice and enrolled as an attorney of the District Court upon written application. Any attorney at law who is a member in good

standing of the bar of any tribal, state, or federal court shall be eligible for admission to practice before the District Court upon approval of the Chief Judge, and successful completion of a bar examination administered as prescribed by the Amantonka Nation's Executive Board.

(b) Lay counselor. Any person who meets qualifications established in this Section shall be eligible for admission to practice before the Court as a lay counselor upon written application and approval of the Chief Judge. To be eligible to serve as a lay counselor, a person

(1) Must be at least twenty-one (21) years of age;
(2) Must be of high moral character and integrity;
(3) Not have been dishonorably discharged from the Armed Services;
(4) Must have successfully completed a bar examination administered as prescribed by the Amantonka Nation's Executive Board;
(5) Must not have been convicted of a felony in any jurisdiction.

(c) Any person whose application to practice as an attorney or lay counselor is denied by the Chief Judge may appeal that determination to the Amantonka Nation's Supreme Court within fifteen (15) days of the denial. The Supreme Court shall request a statement of the reasons for the denial from the Chief Judge, and after receiving such statement shall review the application and any other record which was before the Chief Judge and may, in its discretion, hear oral argument by the applicant. The Supreme Court shall determine de novo whether the applicant shall be admitted, and its determination shall be final.

Sec. 503. Right to counsel.

(1) Any person at his/her own expense may have assistance of counsel in any proceeding before the District Court.
(2) Any non-Indian defendant accused of a crime pursuant to the Nation's criminal jurisdiction under Title 2 Section 105(b), who satisfies the Nation's standard for indigence, is entitled to appointment of a public defender qualified under Title 2 Section 607(b).
(3) Any Indian defendant accused of a crime pursuant to the Nation's criminal jurisdiction, who satisfies the Nation's standard for indigence, is entitled to appointment of a public defender qualified under Title 2 Section 607(a).
(4) The District Court in its discretion may appoint counsel to defend any person accused of a crime.

Sec. 504. Disbarment.

(a) The District Court or the Supreme Court may disbar an attorney or lay counselor from practice before the courts or impose suspension from practice for such time as the Court deems appropriate, pursuant to rules adopted by the Court, provided that the Court shall give such attorney or lay counselor reasonable prior notice of the charges against him/her and an opportunity to respond to them. The rules shall include significant violations of the Code of Ethics of the Amantonka Nation as grounds for disbarment.

(b) Any person who is disbarred or suspended by the District Court may appeal that determination to the Amantonka Nation Supreme Court within fifteen (15) days of the

disbarment or suspension. The Supreme Court shall request a statement of the reasons for the disbarment or suspension from the Chief Judge, and after receiving such statement shall review the record which was before the District Court and may, in its discretion, hear oral argument by the applicant. The Supreme Court shall determine de novo whether the applicant shall be disbarred or suspended, and its determination shall be final.

(c) Any person who is disbarred or suspended by a justice of the Supreme Court may appeal that determination to the Amantonka Nation Supreme Court within fifteen (15) days of the disbarment or suspension. The appeal shall be determined by those justices of the Court not involved in the initial determination. The Court shall request a statement of the reasons for the disbarment or suspension from the justice who took the initial action, and after receiving such statement shall review the record which was before the justice and may, in its discretion, hear oral argument by the applicant. The Supreme Court shall determine de novo whether the applicant shall be disbarred or suspended, and its determination shall be final.

(d) Any person who has been disbarred or suspended in excess of one (1) year from the practice of law before the Amantonka Nation District Courts may reapply for admission before the Chief Judge of the Amantonka Nation District Court. If the Chief Judge had previously disbarred or suspended the applicant, then the application shall be filed with an Associate Judge of the District Court. The person must submit a statement for readmission to the appropriate judge of the District Court. After receiving such statement, the appropriate judge shall determine whether there is good cause for the applicant to be readmitted to practice before the Amantonka Nation District Court. If the applicant for readmission is denied by the judge, the applicant may appeal such decision to the Amantonka Nation Supreme Court within ten (10) working days from receipt of such denial in writing. The decision of the Supreme Court shall be final.

Sec. 606. Office of public defender.
The Amantonka Nation’s Executive Board may appoint a public defender and any assistants it deems necessary by majority vote of those voting at a meeting of the Amantonka Nation’s Executive Board at which a quorum is present.

Sec. 607. Qualifications.
(a) To be eligible to serve as a public defender or assistant public defender, a person shall:
(1) Be at least 21 years of age;
(2) Be of high moral character and integrity;
(3) Not have been dishonorably discharged from the Armed Services;
(4) Be physically able to carry out the duties of the office;
(5) Successfully completed, during their probationary period, a bar examination administered as prescribed by the Amantonka Nation’s Executive Board; and
(6) Must have training in Amantonka law and culture.

(b) A public defender who holds a JD degree from an ABA accredited law school, has taken and passed the Amantonka Nation Bar Exam, and who has taken the oath of office and passed a background check, is sufficiently qualified under the Indian Civil Rights Act to represent a defendant imprisoned more than one year and any defendant charged under the Nation's Special Domestic Violence Criminal Jurisdiction.

Sec. 609. Oath of office.
Before entering upon the duties of office, the public defender and assistant defenders shall take the following oath or affirmation:

"I, .., do solemnly swear (or affirm) that I will truly, faithfully and impartially discharge all duties of my office as defender to the best of my abilities and understanding. So help me God."

Title 2, Chapter 7 Code of Ethics for Attorneys and Lay Counselors

Canon 1. Competence.
An attorney shall provide competent representation to a client. Competent legal representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. As employed in this Code, the term "attorney" includes lay counselors.

Canon 22. Rule of Court for Handling Complaints against Attorneys and Lay Advocates.
The initial complaint must be written and submitted to the District Court Administrator. The District Court Administrator will review the complaint and request that the complaining party submit an affidavit to support the complaint. The District Court Administrator will forward the complaint to the respondent attorney/ lay advocate and request a response within 10 working days. The District Court Administrator will forward the written complaint, affidavit and response to the Tribal attorney for review. The Tribal attorney will investigate the complaint. If the Tribal attorney decides that the allegations lack probable cause, the complaint will be dismissed. If the Tribal attorney decides that there is probable cause, a hearing will be set. The Tribal attorney or his designee within the prosecutor's office, as long as there is no conflict between the parties, will prosecute the complaint, with all parties present, at a hearing before the Chief Judge. If the Chief Judge initiated the complaint, the judge with the most seniority as a tribal court judge will preside at the hearing. If the complaint is filed against the Tribal attorney, the Chief Prosecutor will investigate the complaint to determine if probable cause exists. If probable cause exists, the Chief Prosecutor or her designee will prosecute the complaint. A final decision by the Chief Judge can be appealed to the Amantonka Nation Supreme Court.

Title 3 - Citizenry
Title 3, Chapter 2 Naturalization

Section 201. Eligibility
In recognition of and accordance with the Amantonka Nation’s historical practice of adopting into our community those who marry citizens of the Amantonka Nation, the Amantonka National Council has hereby created a process through which those who marry a citizen of the Amantonka Nation may apply to become a naturalized citizen of the Amantonka Nation. Any person who has
(a) Married a citizen of the Amantonka Nation, and
(b) Lived on the Amantonka reservation for a minimum of two years May apply to the Amantonka Citizenship Office to initiate the naturalization process.

Section 202. Process
To become a naturalized citizen of the Amantonka Nation, applicants must
(a) Complete a course in Amantonka culture;
(b) Complete a course in Amantonka law and government;
(c) Pass the Amantonka citizenship test;
(d) Perform 100 hours of community service with a unit of the Amantonka Nation government.

Section 203. Citizenship Status
Upon successful completion of the Naturalization process, the applicant shall be sworn in as a citizen of the Amantonka Nation. The name of each new citizen shall be added to the Amantonka Nation roll, and the new citizen shall be issued an Amantonka Nation ID card. Each new citizen is thereafter entitled to all the privileges afforded all Amantonka citizens.

Title 5 - Criminal code

Sec. 244. Partner or family member assault.
(a) A person commits the offense of partner or family member assault if the person:
(1) intentionally causes bodily injury to a partner or family member;
(2) negligently causes bodily injury to a partner or family member with a weapon; or
(3) intentionally causes reasonable apprehension of bodily injury in a partner or family member.

(b) For the purpose of this section, the following definitions apply:
(1) *Family member* means mothers, fathers, children, brothers, sisters, and other past or present family members of a household. These relationships include relationships created by adoption and remarriage, including stepchildren, stepparents, in-laws, and adoptive children and parents. These relationships continue regardless of the ages of the parties and whether the parties reside in the same household.
(2) *Partners* means spouses, former spouses, persons who have a child in common, and persons who have been or are currently in a dating or ongoing intimate relationship.

(c) Violation of this section carries with it a penalty of
• a minimum of 30 days imprisonment and a maximum of three years imprisonment; and/or
• a fine of up to $5000; and/or
• restitution in an amount determined by the District Court; and/or
• participation in a rehabilitation program; and/or
• a term of community service as established by the District Court.