No. 19-231

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT R. REYNOLDS,
Petitioner,

v.

WILLIAM SMITH, Chief Probation Officer, Amantonka Nation Probation Services et al.,
Respondent.

ON WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

Team No. 835

Counsel for Petitioner

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QUESTIONS PRESENTED

I. Should Petitioner, who voluntarily became a naturalized citizen of the Amantonka Nation, be considered a "non-Indian" for purposes of the Nation's exercise of Special Domestic Violence Criminal Jurisdiction?

II. Does a Member in Good Standing of the Amantonka Nation Bar Association with a JD Degree from an ABA-accredited school meet the minimal requirements to serve as Petitioner's court-appointed defense counsel?

STATEMENT OF THE CASE

I. STATEMENT OF FACTS:

The Amantonka Nation is a federally-recognized tribe. R. at 6. Its reservation is located in the State of Rogers. R. at 6. Petitioner Reynolds married Lorinda Reynolds, a citizen of the Amantonka Nation. R. at 6. At the time, Petitioner was a "non-Indian." R. at 6. He does not possess any Indian blood. R. at 8. Petitioner and his wife found jobs on the Amantonka Nation Reservation, and moved into the tribal housing complex. R. at 6. Petitioner worked as a manager at the Amantonka shoe factory for three years. R. at 6.

The Amantonka Nation follows a tradition of adopting non-members who marry citizens of the Nation. R. at 7. A person who is married to a citizen of the Amantonka Nation can apply for citizenship after living on the Nation's reservation for two years. Amantonka Nation Code, Title 3 § 201. Petitioner applied to become a naturalized citizen of the Amantonka Nation two years after marrying Lorinda, as soon as he became eligible. R. at 6. After voluntarily completing the naturalization process, Petitioner became a citizen of the Amantonka Nation. R. at 3; R. at 7. He took the oath of citizenship and carries an Amantonka Nation ID card. R. at 7. Petitioner is a member of a federally-recognized tribe. R. at 6.

On or about June 15, 2017, Petitioner knowingly struck his wife Lorinda, causing her injury. R. at 2. The incident occurred at the couple's apartment, located in tribal housing on the Amantonka Reservation. R. at 2. Intentionally causing bodily injury to a partner is a tribal offense under Title 5 § 244 of the Amantonka Nation Code. R. at 6. The Amantonka is vested with special domestic violence jurisdiction. Amantonka Nation Code, Title 2 § 105(b).

The District Court for the Amantonka Nation appointed indigent defense counsel to Petitioner upon his request. R. at 4. Petitioner's defense counsel graduated from an ABA

accredited law school and was a member in good standing of the Amantonka Nation Bar Association. R. at 7.

Petitioner now works at a warehouse distribution center on the Amantonka Reservation. R. at 6. He still lives in tribal housing on the reservation today. R. at 3.

II. STATEMENT OF PROCEEDINGS:

On June 16, 2017, the Chief Prosecutor for the Amantonka Nation filed a criminal complaint against Petitioner, Robert Reynolds for a violation of Title 5 Section 244 of the Amantonka Nation Code. R. at 2. The complaint alleged that Petitioner struck Lorinda Reynolds, his wife, and injured her. R. at 2. The alleged incident occurred in their shared apartment on the Amantonka Reservation. R. at 2. Petitioner was arraigned, at which time he requested and was appointed counsel by the court upon a showing of indigence. R. at 4

Petitioner made three relevant pretrial motions. R. at 3. First, Petitioner moved to dismiss the charges for lack of criminal jurisdiction. R. at 3. Second, Petitioner moved for the court to appoint him an attorney that met the qualifications of Special Domestic Violence Criminal Jurisdiction under the Violence Against Women Reauthorization Act of 2013. R. at 3. Third, Petitioner moved to dismiss the charges on the basis of Equal Protection violations. R. at 4. The Chief Judge of the District Court for the Amantonka Nation denied all three motions. R. at 4. The denial of those motions forms the basis of the questions presented to the Court. R. at 10.

After losing the pretrial motions, Petitioner was tried and found guilty by the jury. R. at 5. Petitioner moved to set aside the verdict on the same grounds as his pretrial motions. R. at 5. The motion to set aside the verdict was denied. R. at 5. Petitioner was sentenced to

seven months incarceration, $5300 in restitution, mandatory batterer and alcohol rehabilitation programs, and $1500 in fines. R. at 5.

Petitioner appealed to the Supreme Court of the Amantonka Nation. R. at 6. Petitioner claimed the denial of his pretrial motions amounted to reversible error. R. at 7. Petitioner presented no evidence that his court-appointed counsel made any error in representing Petitioner. R. at 7. Furthermore, Petitioner presented no facts to support a difference between the Amantonka Nation bar examination and state bar examinations, despite the alleged discrepancy being the basis for his equal protection argument. R. at 7. The Supreme Court of the Amantonka Nation affirmed Petitioner's conviction. R. at 7.

Petitioner then filed a petition for a Writ of Habeas Corpus with the U.S. District Court for the District of Rogers pursuant to 25 U.S.C. § 1303. R. at 8. The District Court granted Petitioner a writ of habeas corpus, finding that his pretrial motions were wrongly decided. R. at 8. The U.S. Court of Appeals for the Thirteenth Circuit then issued a *per curiam* decision reversing the District Court's ruling and remanding the case to the District Court with instructions to deny the petition for a writ of habeas corpus. R. at 9. Petitioner filed for and received a Writ of Certiorari to the Supreme Court of the United States on October 15, 2018. R. at 10.

SUMMARY OF ARGUMENT

This case is about a tribe's right to prosecute its own members for crimes of domestic violence committed on its own territory. Petitioner should not be considered "non-Indian" for purposes of special domestic violence criminal jurisdiction, because he is a citizen of the Amantonka Nation.

According to the Supreme Court in *Rogers*, 45 U.S. 567, and the ensuing two-part test developed by federal circuit courts, a person must have some Indian blood in order to be considered "Indian" for purposes of federal criminal jurisdiction. *See Scrivner v. Tansy*, 68 F.3d 1234, 1241 (10th Cir. 1995). However, the first prong of the *Rogers* test has resulted in unfair results and is contradicted by the principle according to which, for purposes of Federal Indian Law, the term "Indian" does not refer to a racial group but to members of political entities. *See United States v. Antelope*, 430 U.S. 641, 646 (1977).

Even assuming the *Rogers* test does not raise Equal Protection concerns, it should not apply to determine whether a person is "Indian" for purposes of tribal criminal jurisdiction, because a tribe has criminal jurisdiction over all its members, including those who do not have any Indian blood. *See United States v. Wheeler*, 435 U.S. 313, 324 (1978). The Supreme Court has held that tribes do not have criminal jurisdiction over non-Indians. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978). All members of a tribe must therefore be considered "Indian" for purposes of tribal criminal jurisdiction.

Petitioner voluntarily became a citizen of the Amantonka Nation. The Nation therefore has criminal jurisdiction over him for crimes committed on the Nation's territory. The Nation can prosecute him for violating provisions of the Amantonka Nation Code, such as Title 5, Section 244, which prohibits domestic violence. As a member of a federally-recognized tribe, Petitioner must be considered "Indian" for purposes of tribal criminal

jurisdiction. The Amantonka Nation can prosecute him for domestic violence without exercising special domestic violence criminal jurisdiction. He is therefore not a "non-Indian" for purposes of special domestic violence criminal jurisdiction.

Petitioner's counsel met the relevant requirements for court-appointed counsel. Petitioner is an Indian, and the Nation is able to exercise criminal jurisdiction over him. *Wheeler*, 435 U.S. at 322. Tribal courts exercising criminal jurisdictions over Indians need not provide the full protections of the Bill of Rights or Fourteenth Amendment. *Nevada v. Hicks*, 533 U.S. 353, 383 (2001). Rather, the Nation need only provide Petitioner the protections of the Indian Civil Rights Act (ICRA). 25 U.S.C. § 1302. Due to amendments to the

in the Tribal Law and Order Act of 2010, Pub. L. No. 111-21, 124 Stat. 2258, tribal courts must now provide counsel to indigent defendants when they are imprisoned for more than one year. *Id.* Petitioner was charged under Title 5 Section 244 of the Amantonka Nation Code, which carries a maximum of three year's imprisonment. As a result, the Nation provided Petitioner with counsel that met the requirements of Title 2 Section 607(b) of the Amantonka Nation Code, which states the minimum qualifications for public defenders representing a defendant "imprisoned more than one year." The minimum qualifications of Title 2 Section 607(b) of the Amantonka Nation Code are in accordance with the minimum qualifications of 25 U.S.C. § 1302. Therefore, Petitioner's counsel meets the relevant qualifications under the ICRA.

In the event that the Court finds Petitioner is a non-Indian, Petitioner's court-appointed counsel nonetheless meets the relevant requirements under Special Domestic Violence Criminal Jurisdiction. Violence Against Women Reauthorization Act of 2013, Pub.

L. No. 113-4, 127 Stat. 54. The statute requires tribes to provide all "rights whose protection is necessary under the Constitution to affirm the inherent power" of tribes. 25 U.S.C. § 1304(d)(4). The "inherent power" referred to was previously divested in *Oliphant,* 435 U.S. at 208. In order to meet provide the necessary protections, a tribe must provide "procedural safeguards similar to those required for imposing on Indian defendants sentences in excess of one year, including the right of an indigent defendant to appointed counsel." *United States v. Bryant*, 136 S. Ct. 1954, 1960 (2016). As discussed, *supra*, petitioner's counsel is qualified to serve as a public defender for Indians facing sentences in excess of one year. Therefore, Petitioner's court-appointed counsel met the relevant requirements even if Petitioner was a non-Indian.

Petitioner's alternative argument, violation of equal protection, fails factually because Petitioner was entitled to, and received, court-appointed counsel with identical qualifications regardless of his status as an Indian. *Means v. Navajo Nation*, 432 F.3d 924, 935 (2005). Furthemore, the differential treatment of Indians and Indian tribes is historical and "political rather than racial in nature." *Id.* at 932. To the extent Petitioner is subject to disparate legal standards, it is because of his voluntary decision to join the Nation and become an Indian, and not disparate treatment on the basis of race. *Id.*

ARGUMENT

I. PETITIONER IS "INDIAN" FOR PURPOSES OF SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION, BECAUSE HE IS A CITIZEN OF THE AMANTONKA NATION.

A. Petitioner Is a "Non-Indian" for Purposes of Federal Criminal Jurisdiction According to the Flawed *Rogers* Test.

1. The Meaning of "Indian" for Purposes of Federal Indian Law Varies According to the Legal Context.

The application of many statutes in Federal Indian Law depends on whether a person is "Indian" or "non-Indian." *See* Indian Country Crimes Act of 1854 (ICCA), 18 U.S.C. § 1151 (2018); Major Crimes Act of 1885 (MCA), 18 U.S.C. § 1153 (2018); 25 U.S.C. § 1304 (2018). However, no single statute defines "Indian" for all legal purposes. *See* Felix Cohen, Handbook of Federal Indian Law, § 3.03(4) (2017 ed.). The definition of "Indian" varies according to the legal context. For example, the Indian Self-Determination and Education Assistance Act of 1975 defines an Indian as "a person who is a member of an Indian tribe." *See* 25 U.S.C. § 450b(d) (2018). According to the Indian Child Welfare Act, however, an "Indian child" is "... either (a) a member of an Indian tribe, or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." *See* 25 U.S.C. § 1901 et seq. (2018).

For purposes of 25 U.S.C. § 1304, which implements special domestic violence criminal jurisdiction, the term "Indian" refers to "any person who would be subject to the jurisdiction of the United States as an Indian under [the MCA]." 25 U.S.C. § 1301(4) (2018). However, the MCA does not define "Indian." Courts have had to interpret the term for purposes of federal criminal jurisdiction and prosecutions under the MCA, 18 U.S.C. § 1153, and the ICCA, 18 U.S.C. § 1151.

As the federal government increasingly seeks to advance inherent tribal sovereignty and self-governance, the legal definition of "Indian" as a member of a tribe according to tribal law is now used in many federal statutes. *See* Felix Cohen, Handbook of Federal Indian Law, § 3.03(1) (2017 ed.). However, in *United States v. Rogers*, the Supreme Court held that membership alone was insufficient to qualify a person as "Indian" for purposes of federal criminal jurisdiction. *See United States v. Rogers*, 45 U.S. 567, 572-573 (1846).

2. The *Rogers* Test that a Person who Is "Indian" for Criminal Jurisdiction Purposes Have Some Indian Blood and Be Recognized as an "Indian."

In *Rogers*, 45 U.S. at 572-573, the Supreme Court held that a "white man" who had become a citizen of the Cherokee Nation was not "Indian" for purposes of criminal jurisdiction. Federal courts developed a two-part test based on this decision to determine whether a person is an "Indian" or a "non-Indian" for purposes of criminal jurisdiction. *See Scrivner v. Tansy*, 68 F.3d 1234, 1241 (10th Cir. 1995). In order to be considered "Indian" according to the *Rogers* test, a person must have some Indian blood and be recognized as an "Indian."

Federal circuit courts have listed various factors to be considered in determining whether the person is recognized as an "Indian." The Ninth Circuit looks at four factors to determine whether the second prong is satisfied, in "declining order of importance": 1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying the benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life. *United States v. Cruz*, 554 F.3d 840, 846 (9th Cir. 2009). The Eighth Circuit considers tribal enrollment to be the most important factor. Even though tribal

enrollment is not necessary to be considered "Indian," it is sufficient to satisfy the second prong of the *Rogers* test. *See United States v. Stymiest*, 581 F.3d 759, 764 (8th Cir. 2009).

Pursuant to Title 3, Chapter 2 of the Amantonka Nation Code, Petitioner is a naturalized citizen of the Amantonka Nation. He is therefore enrolled in a federally recognized tribe. He enjoys benefits of his affiliation with the Amantonka Nation as he has lived in the tribal housing complex for several years and works on the Amantonka Reservation. The Amantonka Nation follows a tradition of adopting non-members who marry citizen of the Nation. Amantonka Nation Code, Title 3 § 201. Petitioner is recognized as "Indian" by the Supreme Court of the Amantonka Nation. *See Reynolds v. Amantonka Nation* (Amantonka 2017). Petitioner satisfies the second of the *Rogers* test. However, Petitioner does not possess any Indian blood. He therefore does not satisfy the first prong of the *Rogers* test.

Even though Petitioner is a member of a federally recognized tribe, he is not an Indian for purposes of federal criminal jurisdiction under the *Rogers* test, because he has no Indian blood.

3. The *Rogers* Test Is Flawed in Its Application and in Its Principle.

a. <u>The First Prong of the *Rogers* Test Warrants an Uneven and Unfair Application.</u>

Because the Supreme Court did not develop a clear test to determine whether a person is "Indian" for purposes of criminal jurisdiction, courts have had to specify how to apply the test derived from *Rogers*, 45 U.S. at 572-573, and it has been applied in different ways.

The first prong of the *Rogers* test has generally been interpreted by federal circuit courts and state courts as requiring some degree of Indian blood. See *United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir. 1995) (11/128ths Oglala Sioux Indian blood satisfied the first part of the *Rogers* inquiry); *State v. Nobles*, 818 S.E.2d 129, 136 (N.C. Ct. App. 2018) (an Indian blood quantum of 11/256 or 4.29% was sufficient). However, some state courts have held that a person must have "a significant amount of Indian blood" in order to satisfy the first requirement. *See State v. LaPier*, 242 Mont. 335, 340 (1990); *State v. Sebastian*, 243 Conn. 115, 162 (1997). Presumably, a defendant with a very small amount of Indian blood could be considered "Indian" by the Ninth Circuit Court of Appeals, but not by the Supreme Court of Montana.

The Ninth Circuit first held that to satisfy the first prong of the test, a person must have Indian blood from a federally recognized Indian tribe. *United States v. Maggi*, 598 F.3d 1073, 1078 (9th Cir. 2010). Five years later, the Ninth Circuit overruled its decision, holding that the defendant's quantum of Indian blood does not have to be traced to a federally recognized Indian tribe for MCA, 18 U.S.C. § 1153, purposes. *See United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015). However, the following year, the Ninth Circuit held that a Certificate of Indian Blood was not sufficient to prove that a defendant was "Indian" for MCA, purposes. *See United States v. Alvirez*, 831 F.3d 1115 (9th Cir. 2016).

Because it is important for people to understand the laws that apply to them in the area of criminal jurisdiction, "bright lines and clear rules are preferred." Felix Cohen, Handbook of Federal Indian Law, § 9.02(1)(d)(i) (2017 ed.). It would be clearer to overrule *Rogers,* 45 U.S. 567, and state that all members of Indian tribes are to be considered "Indian" for purposes of criminal jurisdiction, regardless of their degree of Indian blood. In this case,

Petitioner would be considered Indian for all purposes of criminal jurisdiction, as he is a naturalized citizen of the Amantonka Nation.

Eliminating the first prong of the *Rogers* test would also allow for a fairer determination of who is "Indian" for purposes of federal criminal jurisdiction. As it is currently formulated and applied, the *Rogers* test could lead to a person who is not a member of a tribe but has certain tribal affiliations and a very small amount of Indian blood being considered "Indian," while another, such as Petitioner, who has lived and worked on a reservation for several years and is a tribal member, would not be considered "Indian" if he or she had no Indian blood.

b. The *Rogers* Test Relies on a Racial Definition of the Term "Indian."

The *Rogers* test is flawed in its principle, because it relies on a racial definition of the term "Indian." In holding that a person who is "Indian" for purposes of criminal jurisdiction must have some Indian blood, the Supreme Court stated that the statute at issue, when referring to "Indians," "does not speak of members of a tribe, but of the race generally,—of the family of Indians." *Rogers*, 45 U.S. at 573.

However, courts have held that for purposes of Federal Indian Law, the term "Indian" does not refer to a racial group but to members of political entities. If the term "Indian" were simply a racial classification, it would raise equal protection concerns. *See Morton v. Mancari*, 417 U.S. 535, 551-555 (1974).

In *United States v. Antelope*, 430 U.S. 641 (1977), the Supreme Court held that the respondents were not subjected to federal criminal jurisdiction as persons of the Indian race but as enrolled members of the Coeur d'Alene Tribe. *Id.* at 646. The Court relied on

precedent to determine that the term "Indian" referred to a political, rather than racial, classification:

> But the principles reaffirmed in Mancari and Fisher point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions. Federal regulation of Indian tribes, therefore, [...] is not to be viewed as legislation of a "'racial' group consisting of 'Indians'…." *Morton v. Mancari*, supra, [***708] at 553 n. 24.

Antelope, 430 U.S. at 646.

The Supreme Court's more recent decisions justifying the distinct treatment of "Indians" under Federal Indian Law are not reconcilable with the holding in *Rogers* that a "white man" "adopted" by a tribe does not become "Indian" for purposes of federal criminal jurisdiction. See *Rogers*, 45 U.S. at 572. If the term "Indian" is a political classification, then being a member of a federally recognized tribe should be sufficient to be considered "Indian" for purposes of criminal jurisdiction, and the first prong of the *Rogers* test should no longer be required.

Although Petitioner cannot be considered "Indian" under the *Rogers* test because he has no Indian blood, the test should be reformed for membership in a federally recognized tribe to be a sufficient factor to be considered "Indian." Petitioner should therefore be considered "Indian" for purposes of criminal jurisdiction. Furthermore, *Rogers*, 45 U.S. 567, should not apply for purposes of tribal criminal jurisdiction.

B. Petitioner Is "Indian" for Purposes of Tribal Criminal Jurisdiction, Because He Is a Member of a Tribe.

1. The *Rogers* Test Is Applicable Only for Purposes of Federal Criminal Jurisdiction.

All the cases that we have cited applied the *Rogers* test in order to determine whether federal courts had jurisdiction over the defendant. In *Rogers*, 45 U.S. 567, the Court had to determine whether the defendant was "Indian" for purposes of the statute now known as the ICCA, 18 U.S.C. § 1151. If he had been considered an "Indian," the federal courts would not have had jurisdiction over him. In *Scrivner*, 68 F3d 1234, the defendant claimed that he was Native American in order to avoid prosecution in state court, claiming that the federal courts had jurisdiction over his crime under the MCA, 18 U.S.C. § 1153. In *Antelope*, 430 U.S. 641, the Supreme Court held that "Indians" could be subjected to federal criminal jurisdiction under the MCA, rather than state court jurisdiction, without violating the equal protection requirements of the Fifth Amendment.

The *Rogers* test was developed in order to determine whether a person was "Indian" "for use with both of the federal Indian country criminal statutes," the ICCA, 18 U.S.C. § 1151, and the MCA, 18 U.S.C. § 1153. *See* Felix Cohen, Handbook of Federal Indian Law, § 3.03(4) (2017 ed.). The ICCA states that federal courts have jurisdiction over crimes committed in Indian Country between an "Indian" and a "non-Indian." *See* 18 U.S.C. § 1151. The MCA gives federal courts jurisdiction over certain specified crimes committed by an "Indian" against another "Indian" in Indian Country. *See* 18 U.S.C. § 1153. The test is therefore used in order to determine whether federal courts have jurisdiction over the acts committed, not whether a tribe has jurisdiction.

In *Rogers*, the Supreme Court distinguished between federal and tribal jurisdiction, suggesting that an Indian nation has criminal jurisdiction over its naturalized citizens:

> We held in *United States v. Rogers*, 4 How. 567 (1846), that a non-Indian could not, through his adoption into the Cherokee Tribe, bring himself within the federal definition of "Indian" for purposes of an exemption to a federal jurisdictional provision. But we recognized that a non-Indian could, by adoption, "become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages." *Id*., at 573.

Duro v. Reina, 495 U.S. 676, 694 (1990).

The Amantonka Nation argues that Petitioner is "Indian" and that it can therefore prosecute him for acts of domestic violence that he committed against another citizen. Petitioner argues that he is a "non-Indian" for all purposes of criminal jurisdiction, and that the Amantonka Nation must therefore satisfy the requirements of special domestic violence criminal jurisdiction in order to prosecute him. The issue, however, is not whether Petitioner is "Indian" for purposes of federal criminal jurisdiction under the ICCA or the MCA, but whether he is "Indian" for purposes of tribal criminal jurisdiction.

In *Navajo Nation v. Hunter*, 7 Navajo Rptr. 194 (Navajo 1996), the Navajo Nation Supreme Court recognized that there was "some practical value" in the 2-prong definition of "Indian" developed in *Rogers*, 45 U.S. at 572-573. *See Navajo Nation*, 7 Navajo Rptr. at 196. However, the Court added to the *Rogers*-inspired definition that a non-Navajo who "assumes tribal relations with Navajos or the Navajo Nation in [Navajo] territorial jurisdiction [...] is deemed to be an Indian for purposes of jurisdiction." *Id.* at 6. For purposes of tribal criminal jurisdiction, tribes do not necessarily follow the *Rogers* definition of "Indian," which was created to apply to federal criminal jurisdiction. *Rogers*, 45 U.S. at 573.

The Amantonka Nation should be able to assert jurisdiction over crimes committed by its own members on its own territory.

2. Members of a Tribe Must Be Considered "Indian" for Purposes of Tribal Criminal Jurisdiction, Because a Tribe Has Criminal Jurisdiction over Its Own Members.

a. Inherent Tribal Sovereignty Is the Basis for a Tribe's Criminal Jurisdiction over Its Own Members.

According to the Supreme Court, tribes have traditionally had power "over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). In 2004, the Court affirmed its "traditional understanding" of each tribe as " 'a distinct political society, separated from others, capable of managing its own affairs and governing itself.' " *United States v. Lara*, 541 U.S. 193, 204-205 (2004), quoting *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). In the 19th century, the Court held that the authority of an Indian nation was exclusive within its territorial boundaries. *Worcester v. Georgia*, 31 U.S. 515, 557 (1832).

Tribal power over non-Indians has been limited since 1978. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978) (Tribes lack criminal jurisdiction over non-Indians). However, the Supreme Court has also affirmed the importance of tribal sovereignty and Congress' intent to protect it. *See Santa Clara Pueblo v. Martinez*, 436 U.S. at 63 (1978) (Tribes have the right to control their own membership). Furthermore, the 2013 amendments to the Violence Against Women Act creating special domestic violence criminal jurisdiction manifest Congress' affirmation of tribal sovereignty by allowing tribes to exercise jurisdiction over non-Indians who commit specified crimes of domestic or dating violence. *See* Felix Cohen, Handbook of Federal Indian Law, § 4.03(1) (2017 ed.); Violence Against Women Reauthorization Act of 2013 (VAWA 2013), Pub. L. No. 113-4, 127 Stat. 54.

In *United States v. Wheeler,* decided the same year as *Oliphant*, 435 U.S. 191, the Supreme Court distinguished between member and nonmember Indians, holding that tribes have the power to punish tribal offenders, as a "continued exercise of retained tribal sovereignty." *United States v. Wheeler*, 435 U.S. 313, 323-324 (1978). The Court stated that "the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status." *Wheeler*, 435 U.S. at 326.

The acts of domestic violence committed by Petitioner are tribal offenses under Title 5, Section 244 of the Amantonka Nation Code. The Amantonka Nation should therefore be able to prosecute Petitioner, a citizen of the Nation, for the acts of domestic violence he committed.

Federal law and policy have historically directed and influenced the citizenship requirements of Indian nations. *See* Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 Kan. L. Rev. 437, 446. The Secretary of the Interior urged tribes to only bestow tribal membership upon people of Indian descent, or who had a certain quantum of Indian blood. *Id.* at 446-447. However, since the late 1960's, federal policy has "formally aligned itself with ideals of tribal self-determination." *Id.* at 447. Because tribes have the right to control their own membership, they can choose to allow people with no Indian blood, such as Petitioner, to become members. *See Santa Clara Pueblo*, 436 U.S. 49. Since 1978, tribes do not have criminal jurisdiction over "non-Indians." *See Oliphant*, 435 U.S. at 208. Members must therefore be considered "Indians" for purposes of tribal criminal jurisdiction.

b. A Tribe's Jurisdiction over Its Members Is Justified by the Voluntary Character of Tribal Membership.

The Supreme Court has held that "retained criminal jurisdiction over members is [...] justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent." *Duro*, 495 U.S. at 694 (1990).

Petitioner consented to becoming a citizen of the Amantonka Nation, as he voluntarily applied for citizenship as soon as he became eligible. He took the oath of citizenship. As a naturalized citizen, he is entitled to all the privileges afforded to all Amantonka citizens. Amantonka Nation Code, Title 3 § 203. He should therefore be subjected to the tribe's criminal jurisdiction.

In 1990, Congress amended the Indian Civil Rights Act to overturn the Supreme Court's decision that tribal courts lacked criminal jurisdiction over non-member Indians. *See Duro*, 495 U.S. at 679; Indian Civil Rights Act of 1968, Pub. L. No. 101-511, 104 Stat. 1893 (1990) (codified as amended at 25 U.S.C. § 1301 (2018)). It would be senseless for a tribal court to have criminal jurisdiction over all Indians, including Indians who are not members of any tribe, and not over its own tribe's naturalized citizens, who chose to become members. Being a member of the tribe must therefore be a sufficient, albeit not necessary, condition for being subjected to the tribe's criminal jurisdiction.

However, tribes do not have criminal jurisdiction over acts committed by non-Indians on their territory. *See Oliphant*, 435 U.S. at 208. All members of the tribe, including naturalized citizens such as Petitioner, must therefore be considered "Indian" for purposes of tribal criminal jurisdiction by virtue of their citizenship.

In *Wheeler*, the Supreme Court assumed that all members of a tribe are "Indians" for purposes of the tribe's criminal jurisdiction over them, stating:

> Statutes establishing federal criminal jurisdiction over crimes involving Indians have recognized an Indian tribe's jurisdiction over its members. […] Thus, far from depriving Indian tribes of their sovereign power to punish offenses against tribal law by members of a tribe, Congress has repeatedly recognized that power and declined to disturb it.

Wheeler, 435 U.S. at 324.

Furthermore, the Supreme Court has long recognized that naturalized citizens of Indian nations could be considered "Indians." In 1897, it stated that the Cherokee Nation had jurisdiction "over offences committed by one Indian upon the person of another," including "both Indians by birth and Indians by adoption." *Nofire v. United States*, 164 U.S. 657, 658 (1897).

As a citizen of the Amantonka Nation, Petitioner is "Indian" for purposes of tribal criminal jurisdiction.

C. Petitioner Is "Indian" for Purposes of Special Domestic Violence Criminal Jurisdiction.

1. Petitioner Is "Indian" for Purposes of Special Domestic Violence Criminal Jurisdiction, Because the Amantonka Nation Has General Jurisdiction Over Him for Acts of Domestic Violence Committed on Its Territory.

In 2013, Congress enacted amendments to the Violence Against Women Act in order to allow tribes to prosecute crimes of domestic and dating violence committed by non-Indians in Indian Country. *See* VAWA 2013. Special domestic violence criminal jurisdiction is the only form of inherent criminal jurisdiction that tribes may exercise over non-Indians, pursuant to the Supreme Court's decision in *Oliphant*, 435 U.S. at 208. *Supra* Section I.B.2.a.

The creation of special domestic violence criminal jurisdiction was not meant to allow tribes to prosecute its own members who lacked Indian blood, because tribes already had criminal jurisdiction over their members for acts committed on tribal land.

According to the Supreme Court, a tribe has criminal jurisdiction over all its members for crimes committed on its territory. *See Wheeler*, 435 U.S. at 323-324. A tribe therefore has general criminal jurisdiction over acts of domestic violence committed by its members on its territory, and does not have to exercise special domestic violence criminal jurisdiction in order to prosecute them. Members of the prosecuting tribe are therefore not "non-Indian" for purposes of special domestic violence criminal jurisdiction.

The Amantonka Nation had general criminal jurisdiction over Petitioner, because he is a naturalized citizen of the Nation. The Nation can therefore prosecute him for the acts of domestic violence he committed on the reservation without exercising special domestic violence criminal jurisdiction. Petitioner is not a "non-Indian" for purposes of special domestic violence criminal jurisdiction.

2. Petitioner Is "Indian" for Purposes of Special Domestic Violence Criminal Jurisdiction, Because 25 U.S.C. § 1304 Implies That Members of the Prosecuting Tribe Are Not "Non-Indians."

According to 25 U.S.C. § 1301(4), for purposes of 25 U.S.C. §§ 1301 et seq., the term "Indian" refers to "any person who would be subject to the jurisdiction of the United States as an Indian" under the MCA, 18 U.S.C. § 1153. This provision could be interpreted to mean that the *Rogers* test must be applied to determine whether a person is "Indian" for purposes of special domestic violence criminal jurisdiction. However, according to Cohen's Handbook of Federal Indian Law, 25 U.S.C. § 1301(4) was designed to make clear that the term "Indian" does not only refer to members of the tribe exercising criminal jurisdiction, but to

all Indians within Indian Country. *See* Felix Cohen, Handbook of Federal Indian Law, § 9.02(1)(d)(i), n. 49 (2017 ed.). The provision was therefore meant to provide a more inclusive definition of the term "Indian" to include non-members, not to restrict it to persons with Indian blood. The *Rogers* definition of "Indian" does not have to be followed.

A closer look at the language of 25 U.S.C. § 1304 reveals that Congress assumed that the term "non-Indian" would not refer to members of the prosecuting tribe for purposes of special domestic violence criminal jurisdiction, as they are already considered "Indians" for purposes of tribal criminal jurisdiction. 25 U.S.C. § 1304(b)(4)(B) lists three alternative factors to show that the defendant has sufficient ties to the tribe to allow the tribe to exercise special domestic violence criminal jurisdiction. Being a member of the tribe is not listed as one of these factors. If being a member of a tribe were not sufficient for the tribe to exercise general criminal jurisdiction, it should certainly be sufficient for the tribe to exercise special domestic violence criminal jurisdiction. The provision implies that tribes already possess jurisdiction over their members for all crimes committed on their territory, including acts of domestic violence. Tribes do not have inherent criminal jurisdiction over non-Indians. *Oliphant*, 435 U.S. at 208. Members of the tribe, including naturalized citizens that possess no Indian blood, must therefore be considered "Indian" for purposes of special domestic violence criminal jurisdiction.

Furthermore, according to 25 U.S.C. § 1304(b)(4)(A), a tribe cannot exercise special domestic violence criminal jurisdiction over acts committed by a non-Indian against a non-Indian victim. If some members of the tribe were to be considered non-Indian for purposes of special domestic violence criminal jurisdiction, the tribe would be unable to protect them from domestic violence committed by non-Indians. Congress created special domestic

violence criminal jurisdiction to allow tribes to protect their own members and other Indians against acts of domestic violence, including those committed by non-Indians. All members of the prosecuting tribe must therefore be considered "Indian" for purposes of special domestic violence criminal jurisdiction.

Petitioner is not a "non-Indian" for purposes of special domestic violence criminal jurisdiction, because he is a citizen of the Amantonka Nation.

II. PETITIONER'S COURT-APPOINTED COUNSEL MET THE RELEVANT LEGAL REQUIREMENTS REGARDLESS OF PETITIONER'S INDIAN STATUS

A. The Requirements for Indigent Defense Counsel Under Title 2 Section 607(b) of the Amantonka Nation Code Satisfy 25 U.S.C. § 1302(c)(2), and Petitioner's Court-Appointed Counsel Met Those Requirements.

Petitioner is subject to the Amantonka Nation's (the Nation's) power to "enforce [its] criminal laws against tribe members." *Wheeler*, 435 U.S. 313, 322 (1978). Petitioner is an Indian and gained citizenship in the Nation of his own volition. Petitioner was charged with striking his wife, also a member of the Nation, in violation of Title 5 Section 244 of the Amantonka Nation Code. The incident occurred on the Amantonka Reservation. Therefore, Petitioner's actions fit within the Nation's jurisdiction over crimes committed "by one Indian against another, within any Indian boundary." *Wheeler,* 435 U.S. 435 at 324.

Generally, tribal courts are not required to provide indigent defendants with counsel. *Tom v. Sutton*, 533 F.2d 1101, 1104 (1976). Indian tribes' sovereign power over tribe members who commit crimes against other tribe members on tribal land is not limited by the Bill of Rights or Fourteenth Amendment. *Nevada v. Hicks*, 533 U.S. 353, 383 (2001). The Indian Civil Rights Act of 1968 (ICRA), Pub. L. No. 90-284, 82 Stat. 77, 78-9, was enacted to guarantee Indians many, but not all, of the due process protections afforded by the

Constitution. 25 U.S.C. § 1302 et. seq. *See also* STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE S. COMM. ON THE JUDICIARY, 89TH CONG., 2D SESS., SUMMARY REPORT OF HEARINGS AND INVESTIGATIONS ON THE CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN (Comm. Print 1965). While federal and state courts are obligated to provide indigent defendants with counsel under the Sixth and Fourteenth Amendments, *Gideon v. Wainwright*, 372 U.S. 335, 340-1 (1963), Indian courts are not so obligated. *Sutton*, 533 F.2d at 1104.

1. Petitioner Was Entitled to Indigent Defense Counsel that Meets 25 U.S.C. 1302(c) Requirements Because Petitioner Was Charged with a Violation That Carries a Maximum Sentence of Over One Year Imprisonment.

Prior to the passage of the Tribal Law and Order Act of 2010 (TLOA), Pub. L. No. 111-211 § 234(a), 124 Stat. 2258, 2279-81, tribal courts were unable to sentence defendants to over one year of imprisonment. The TLOA increased tribal courts' maximum sentencing authority from one year to three years of imprisonment. *Id.* Correspondingly, it also amended ICRA to require tribes to provide indigent defendants with counsel at the tribe's expense when the defendant is imprisoned for more than one year. 25 U.S.C. § 1302(c). Specifically, the Indian court must "provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys." *Id*.

Petitioner was tried for a single violation of Title 5 Section 244 of the Amantonka Nation Code which carries a maximum penalty of "three years imprisonment." Title 5 Section 244(c). Such a maximum penalty was not allowed under pre-TLOA sentencing authority. Therefore, the Petitioner was entitled to TLOA protections for defendants,

including the right to request qualified indigent defense counsel. 25 U.S.C. § 1302(c)(2). This is true despite the fact that the District Court for the Amantonka Nation ultimately sentenced Petitioner to less than one year of imprisonment.

2. Public Defenders Qualified Under Title 2 Section 607(b) of the Amantonka Nation Code Meet the Relevant Requirements of 25 U.S.C. § 1302(c)(2).

Title 2 Section 607(b) of the Amantonka Nation Code provides defendants the protections necessary for the Nation to avail itself of the enhanced sentencing authority of the TLOA.

First, the provision that "a public defender who holds a JD degree from an ABA accredited law school, [and] has taken and passed the Amantonka Nation Bar Exam … is sufficiently qualified ... to represent a defendant imprisoned more than one year," Title 2 Section 607(b) of the Amantonka Nation Code, meets the TLOA requirement that indigent defendants be afforded " a defense attorney licensed to practice law by any jurisdiction in the United States." 25 U.S.C. § 1302(c)(2). Contrary to Petitioner's assertion, "any jurisdiction in the United States" is not limited to states and state bar associations. *See* David Patton, *Tribal Law and Order Act of 2010: Breathing Life into the Miner's Canary*, 47 Gonz. L. Rev. 767, 786 (2011) ("the language [of the TLOA] leaves open the possibility that the [indigent defendant's] attorney could be licensed only by the tribal bar").

Second, the Nation "applies appropriate professional licensing standards" that are substantially similar to the standards of other jurisdictions and that ensure "competence and professional responsibility." 25 U.S.C. § 1302(c)(2). The Nation requires attorneys to pass its bar examination in order to practice in the Nation's courts. Title 2 Section 501 of the Amantonka Nation Code. Petitioner has heretofore been unable to point to any evidence that

a tribal bar exam is inferior to a state bar exam. Also, the Code of Ethics for Attorneys, Title 2 Chapter 7 of the Amantonka Nation Code, is clearly drawn from the ABA Model Code of Professional Responsibility. *Compare* Title 2 Chapter 7 Cannon 1 of the Amantonka Nation Code *with* MODEL CODE OF PROF'L RESPONSIBILITY EC 6-1 (Am. bar Ass'n 1980) (competence to represent a client); Cannon 2-3 *with* MODEL CODE OF PROF'L RESPONSIBILITY EC 4-2 (honoring clients' wishes); Cannon 5 *with* MODEL CODE OF PROF'L RESPONSIBILITY EC 2-17 (reasonable fees); Cannon 7 *with* MODEL CODE OF PROF'L RESPONSIBILITY EC 5-14 – 5-20 (conflicts of interest); Cannon 11 *with* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-4 (candid and meritorious advice); Cannon 15 *with* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-29 (impartiality). There is no basis on which to claim that attorneys in good standing with the Amantonka Bar Association are, as a matter of law, less qualified than attorneys licensed by state bar associations

Furthermore, tribal court judges are not required to meet a baseline standard of competence and responsibility in order to preside over criminal proceedings under the TLOA enhanced sentencing authority. 25 U.S.C. § 1302(c)(3). It is unlikely the Congress intended, in enacting the TLOA, to require defense attorneys licensed by state bar associations, but allow judges only licensed by tribal bar associations. *See* Patton, *supra* at 787.

Therefore, there is no legally cognizable reason why an attorney qualified under Title 2 Section 607(b) of the Amantonka Nation Code is not qualified under 25 U.S.C. § 1302(c)(2) to represent an indigent defendant facing over one year of imprisonment.

3. Petitioner's Court Appointed Attorney Satisfied the Relevant Legal Requirements of 25 U.S.C. 1302(c)(2).

Petitioner requested, and was appointed, indigent defense counsel. Petitioner's counsel graduated from an ABA accredited law school and passed the Nation's bar examination. Petitioner's counsel is a member in good standing of the Amantonka Nation Bar Association. Petitioner has never produced evidence in any lower court proceedings to support a claim that tribal bar exams are inferior to state bar exams. Petitioner has not pointed to any error, whether attributable to lack of qualifications or otherwise, made by his court-appointed counsel in representing Petitioner. As a matter of law, Petitioner's counsel met the requirements of Title 2 Section 607(b) of the Amantonka Nation Cody, and, by extension, met the relevant requirements of 25 U.S.C. § 1302(c)(2).

B. The Relevant Requirements for Court-Appointed Counsel Under VAWA 2013 Are the Same as the Requirements Under 25 U.S.C. § 1302(c)(2), and Petitioner's Defense Counsel Was Qualified Even if the Petitioner Is Adjudicated as Non-Indian and Tribal Jurisdiction Rested on Special Domestic Violence Criminal Jurisdiction.

In the alternative, if Petitioner is a non-Indian, then the Nation' could only have jurisdiction over Petitioner under the Special Domestic Violence Criminal Jurisdiction defined in the Violence Against Women Act Women Reauthorization Act of 2013 (VAWA 2013), Pub. L. No. 113-4, 127 Stat. 54, 121. Absent a specific act of Congress, tribal courts do not have criminal jurisdiction over non-Indian defendants. *Oliphant*, 435 U.S. at 212. VAWA 2013 empowers the tribal court to try non-Indian defendants for, inter alia, domestic violence against a spouse that is an Indian. 25 U.S.C. § 1304(b)(4)(B). In order to impose a term of imprisonment pursuant to special domestic criminal jurisdiction, a tribal court must afford defendants all of the rights in ICRA. § 1304(d)(2). Furthermore, defendants are entitled to "all other rights whose protection is necessary under the Constitution to affirm the

inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant." § 1304(d)(4). Petitioner was tried for striking his wife, whose status as an Indian and member of the Nation are not in dispute. Therefore, if petitioner is a non-Indian, the Nation still could have criminal jurisdiction over him, as long as the Nation provided Petitioner the protections defined in § 1304(d)(2)-(4).

1. VAWA 2013 Affirms an Inherent Tribal Power Rather than Delegates Federal Power.

Recent decisions by the Court have limited inherent tribal sovereign powers, especially with respect to criminal jurisdiction over non-Indians and non-Members. *See Oliphant*, 435 U.S. at 212 (non-Indians); *Duro*, 495 U.S. at 698 (non-members). *See also* Felix Cohen, Handbook of Federal Indian Law, § 4.03(1) (2017 ed.) ("[*Oliphant*] initiated an era of judicial curtailment of inherent tribal sovereignty with respect to nonmembers"). However, the Court has also recognized that Congress "has the ultimate authority over Indian affairs." *Duro*, 495 U.S. at 698. Congress has given authority to tribes through two methods, first, by affirming inherent tribal powers that have been divested by courts, and, second, by delegating federal authority to tribal governments. Felix Cohen, Handbook of Federal Indian Law, § 4.03(1) (2017 ed.). The Court has upheld both affirmation and delegation by Congress. *See Mazurie*, 419 U.S. at 557 (delegation of federal authority); *Lara*, 541 U.S. at 193 (affirmation of judicially divested tribal sovereign powers).

Congress followed the pattern of previous affirmations of inherent tribal powers when it passed VAWA 2013. Felix Cohen, Handbook of Federal Indian Law, § 4.03(1) (2017 ed.) ("The recent amendments to the Violence Against Women Act constitute another example of Congress's affirmation of tribal sovereignty").

In *Duro*, for instance, tribal courts were divested of criminal jurisdiction over non-member Indians. *Duro*, 495 U.S. at 694. In response, Congress amended ICRA to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2). The fact that Congress was reacting to judicially made law, and the explicit statutory language referring to the "inherent power of Indian tribes," sufficiently manifested Congress' intent to affirm tribal sovereignty rather than delegate federal power. *Lara*, 541 U.S. at 193.

Similarly, the inherent sovereign power to exercise criminal jurisdiction over non-Indians was divested by the Court in *Oliphant*. *Oliphant*, 435 U.S. at 212. In passing VAWA 2013, Congress sought to affirm tribal criminal jurisdiction over non-Indian defendants who upheld commit domestic violence against Indians. Violence Against Women Reauthorization Act of 2013, 113 CIS Legis. Hist. P.L. 4. The statutory language mimics the § 1301(2) language in *Lara*. 25 U.S.C. § 1304(b)(1) ("the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons"). The parallel procedural history from *Duro* to 25 U.S.C § 1301(2) and from *Oliphant* to 25 U.S.C. § 1304(b)(1) strongly support the conclusion that, for the same reasoning as in *Lara*, Congress properly affirmed inherent tribal sovereignty in passing VAWA 2013.

2. The Relevant Requirements of 25 U.S.C. § 1304(d)(4) Are Met By the ICRA and Title 2 Section 607(b) of the Amantonka Nation Code.

Whether a power held by tribal governments is affirmed or delegated by Congress affects the Constitutional restrictions on tribes. Felix Cohen, Handbook of Federal Indian Law, § 4.03(2) (2017 ed). Delegations of federal authority from Congress to tribal

governments are "subject to the constraints of the Constitution." *Duro*, 495 U.S. at 686. Affirmation by Congress changes "judicially made federal Indian Law" to "relax restriction on the bounds of the inherent tribal authority." *Lara*, 541 U.S. at 207. In dismissing the due process and equal protection claims on other grounds, the *Lara* court implicitly concludes that when Congress affirms inherent tribal authority ICRA applies even though "it lacks certain constitutional protections for criminal defendants." *Lara,* 541 U.S. at 208. In contrast to delegated federal authority, tribal governments exercising affirmed inherent tribal authority need not adhere to the Bill of Rights, but rather the more limited requirements of ICRA. *Id.*

A tribal court must afford a defendant all "rights whose protection is necessary under the Constitution to affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant." 25 U.S.C. § 1304(d)(4). Since VAWA 2013 affirms inherent tribal sovereignty, tribal courts exercising special domestic violence criminal jurisdiction need only extend those rights required under ICRA in order to meet the constitutional minimum for affirmed inherent tribal sovereignty. *Supra*.

Federal case law affirms the proposition that protections for defendants required by 25 U.S.C. § 1304(d)(4) is no more expansive than those required by § 1302(c)(2). In *United States v. Kirkaldie*, 21 F. Supp. 3d 1100 (D. Mont. 2014), the District Court of Montana granted a motion to dismiss defendant's federal court indictment under 18 U.S.C. § 117(a), which requires prior convictions for domestic abuse as a predicate. *Kirkaldie*, 21 F. Supp. 3d at 1102. The District Court of Montana found that it would violate the Sixth Amendment to use an uncounseled conviction in a tribal court as a predicate offense. *Id.* at 1109. In dicta, the District Court reasoned that VAWA 2013, which had passed before defendant's federal

indictment but after his tribal conviction, would have alleviated Sixth Amendment concerns because 25 U.S.C. § 1304(d)(4) would have required access to counsel. *Kirkaldie*, 21 F. Supp. 3d at 1108. Subsequently, an unrelated decision ruled that uncounseled tribal convictions were constitutional predicate offenses for sentencing enhancements as a matter of law, *Bryant*, 136 S. Ct. at 1965-6, and the 9th Circuit reversed and remanded on those grounds. *United States v. Kirkaldie*, 670 Fed. Appx. 452, 452 (9th Cir. 2016). The Court in *Bryant*, also commented in dicta about the enactment of 25 U.S.C. § 1304(d)(4), stating that "tribal courts' exercise of [special domestic violence criminal jurisdiction] requires procedural safeguards similar to those required for imposing on Indian defendants sentences in excess of one year, including the unqualified right of an indigent defendant to appointed counsel." *Bryant*, 136 S. Ct. at 1960 n. 4. Thus, *Bryant* indicates that satisfying 25 U.S.C. § 1304(d)(4) protections for defendants does not require the full protections of the Bill of Rights, as the District Court argued in *Kirkaldie*, but rather requires the protections granted in 25 U.S.C. § 1302(c)(2) for defendants facing sentences "in excess of one year." *Id.*

Petitioner's counsel met the relevant requirements to be qualified as indigent defense council for special domestic violence criminal jurisdiction under VAWA 2013. Defendants tried in tribal courts pursuant to special domestic violence criminal jurisdiction are entitled to court-appointed counsel that meets the requirements of 25 U.S.C. § 1302(c)(2), *supra*. The required qualifications for court appointed counsel under § 1302(c)(2) is met by attorneys that meet the qualifications of Title 2 Section 607(b) of the Amantonka Nation Code. *Supra* Section I.B. Petitioner's court-appointed defense counsel met the qualifications of Title 2 Section 607(b) of the Amantonka Nation Code. *Supra* Section I.C. Thus, in the event the

Court finds that Petitioner is not an Indian, the Nation was nonetheless within its rights to try and convict him pursuant to VAWA 2013.

C. There was neither a violation of equal protection as a matter of fact nor as a matter of law.

Petitioner's alternative argument asserts that, as an Indian, he is entitled to less qualified counsel than he would be entitled to as a non-Indian. Further, Petitioner asserts this discrepancy is a violation of his equal protection rights because he is subject to less qualified counsel on the basis of his race. The Nation disputes both of these assertions.

1. Petitioner Was Entitled to Equally Qualified Counsel Regardless of Indian Status.

In *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005), appellant's due process claims were denied based on the fact that the Navajo Nation Bill of Rights conferred the right to appointed counsel. *Means*, 432 F.3d at 935. The 9th Circuit found appellant was not "deprived of any constitutionally protected rights despite being tried by a sovereign not bound by the Constitution." *Id.* If, as a factual matter, a defendant before a tribal court is given the same protections as they would receive under a sovereign bound by the Constitution, then the defendant cannot validly assert that a right to those protections has been violated. *Id.*

Petitioner, as an Indian being charged with a crime under TLOA enhanced sentencing authority, is entitled to counsel "licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards." 25 U.S.C. § 1302(c)(2). Attorneys that meet the criteria of Title 2 Section 607(b) of the Amantonka Nation Code satisfy the federal requirements. *Supra* Section I.B. Had Petitioner not been classified as an Indian, the Nation would have exercised special domestic violence criminal jurisdiction over

him. 25 U.S.C. § 1304(b). Petitioner would have been entitled to counsel that met the requirements of § 1304(d)(4). However, § 1304(d)(4) requires no greater access or qualification for indigent counsel than is required by § 1302(c)(2). *Supra* Section II.B. Petitioner's court-appointed counsel, therefore, met the requirements of Title 2 Section 607(b) of the Amantonka Nation Code, 25 U.S.C. § 1302(c)(2), and 25 U.S.C. § 1304(d)(4), in turn. *Id.*

Petitioner received indigent defense counsel that was sufficiently qualified to represent him regardless of his Indian status. Petitioner's equal protection claim fails because he received adequate counsel through the laws of the Nation "despite being tried by a sovereign not bound by the Constitution." *Means* 432 F.3d at 935. An Indian defendant who faced less than one year imprisonment would not have qualified for indigent defense counsel under Title 2 Section 607(a) of the Amantonka Nation Code, which carries substantially lower requirements for indigent defense counsel. However, Petitioner was entitled to as a matter of law, and was given as a matter of fact, counsel qualified under Section 607(b). The Court need not rule on the equal protection implications of the differences between Section 607(a) and 607(b) in order to decide this matter because that question is not implicated by the facts.

2. Equal Protection Claims Pertaining to Tribal Authority Are Based on Political Affiliation and Are Interpreted Differently Than Other Equal Protection Claims.

Congress has passed numerous statutes that single out native peoples for special treatment. *Williams v. Babbitt*, 115 F.3d 657, 664 n. 6 (9th Cir. 1997). The basis for these laws stem from Congress's power "to regulate commerce … with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. Thus, many laws that effectuate disparate treatment Indians and non-

Indians are nonetheless constitutional because "federal statutory recognition of Indian statues is political rather than racial in nature." *Means*, 432 F.3d at 932 (internal quotations omitted). *See also Mancari*, 417 U.S. at 535 (upholding an employment preference for Indians in the Bureau of Indian Affairs); *Del Tribal Bus. Comm. v. Weeks*, 430 U.S. 73 (1977) (rejecting equal protection claim of Indian tribe members excluded from fund awarded to Delaware Indians); *Antelope*, 430 U.S. at 641 (allowing statutory scheme that subjected Indians to federal prosecution but non-Indians to state prosecution for specified crimes); *Washington v. Confederated Tribes & Bands of the Yakima Nation*, 439 U.S. 463 (1979) (upholding Public Law 280 plan that extended jurisdiction only to Indians on fee land).

Petitioner, similarly, claims a violation of equal protection rights because he believes his Indian status strips him of a right to counsel he would otherwise have. Assuming this were true, the disparate treatment is "political rather than racial in nature" and flows directly from the Nation's status as a sovereign political entity. *Means*, 432 F.3d at 932. Moreover, Petitioner acted affirmatively to join the political entity by applying to become a member of the Nation. By doing so Petitioner chose to subject himself to the law of the Nation and to the disparate treatment by Congress through laws respecting Indians and Indian tribes. In that sense he is no different than a person moving from Texas to Rogers and complaining of being subject to the law of Rogers rather than the law of Texas. The Court should not give petitioner a windfall now that he regrets his decision to join the Nation.

CONCLUSION

For all of the foregoing reasons, the judgment of the U.S. Court of Appeals for the Thirteenth Circuit in *Reynolds v. Amantonka Nation et al.* should be affirmed and the petition for a writ of habeas corpus denied.

Respectfully Submitted,

January 2019 *Counsel for the Respondent*