No. 19-231

In the

Supreme Court of the United States

ROBERT R. REYNOLDS,

Petitioner,

v.

WILLIAM SMITH, CHIEF PROBATION OFFICER,

AMANTONKA NATION PROBATION SERVICES;

JOHN MITCHELL, PRESIDENT, AMANTONKA NATION;

ELIZABETH NELSON, CHIEF JUDGE, AMANTONKA NATION DISTRICT COURT

Respondents.

On Writ of Certiorari to the

District Court for the Court of Rogers

BRIEF FOR THE PETITIONER

Team 845

Counsel for Petitioner

January 14, 2019

Table of Contents

Table of Authorities

QUESTIONS PRESENTED

(1) Whether Mr. Reynolds is a non-Indian for purposes of Special Domestic Violence Criminal Jurisdiction.

(2) Whether Mr. Reynold's court appointed attorney satisfied the relevant legal requirements.

STATEMENT OF THE CASE

Statement of the Proceeding

On June 16, 2017, Robert R. Reynolds was charged with assault against his partner under Amantonka Nation Code (A.N.C.) Tit. 5, §244(b)(2). The complaint stated that the assault occurred on or about June 15, 2017.

On July 5, 2017, Chief Judge Elizabeth Nelson, District Court for the Amantonka Nation (Nation), denied all three pretrial motions. Mr. Reynolds first motion sough to have the charges dismissed because he is a non-Indian and the Nation lacked jurisdiction over non-Indians. The District Court found that Mr. Reynolds is a citizen of the Nation and therefore is considered an Indian. Mr. Reynolds' second pretrial motion sought to have an appointed defense attorney qualified under the Nation's expanded Special Domestic Violence Criminal Jurisdiction authority, pursuant to 25 U.S.C. Sec. 1302 et seq. The District Court denied the second motion stating that Mr. Reynolds is an Indian and therefore the offense does not fall within the Nation's expanded Special Domestic Violence Criminal Jurisdiction authority. Mr. Reynold's third pretrial motion alleges that the court-appointed counsel was not qualified and that the Equal Protection Clause requires that his counsel possess the same qualifications as those required by attorneys practicing under the Nation's expanded Special Domestic Violence Criminal Jurisdiction authority. The District Court held that the defense counsel is qualified in all instances.

Mr. Reynolds filed a writ of habeas corpus with the United States District Court for the District of Rogers which was granted by the District Court on the grounds that Mr.

Reynolds was a non-Indian because he did not meet the federal standard. The United States Court of Appeals for the Thirteenth Circuit reversed.

Statement of Facts

Robert Reynolds and his wife Lorinda Reynolds, a citizen of the Amantonka Nation (Nation), met as students of the University of Rogers. Robert and Lorinda both secured jobs and tribal housing on the Nation. The two decided to get married. After their marriage, Robert Reynolds as a non-Indian applied to be a naturalized citizen of the Nation. One year after becoming naturalized, Mr. Reynolds lost his job and his relationship with his wife became troubled. On July 15, Mr. Reynolds was intoxicated and struck his wife with an open palm across her face. Mr. Reynolds was charged with domestic assault. The court appointed Mr. Reynolds counsel. The court determined that because Mr. Reynolds was a naturalized citizen and considered an Indian, his court appointed counsel had to meet the standards granted to him under A.N.C. Tit. 2, Ch. 6, §607(a). These qualifications do not require that counsel have received any higher educational degree. Had Mr. Reynolds been considered an non-Indian, the court is required to appoint him a law-licensed attorney with a juris doctorate degree from an accredited ABA law school.

On or about June 15, 2017

Summary of Argument

I. THE PETITIONER IS A NON-INDIAN FOR PURPOSES OF SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICITON.
   a. THE VIOLENCE AGAINST WOMEN ACT (VAWA) INCORPORATES THE FEDERAL COMMON LAW DEFINITION OF INDIAN
   b. INDIAN TRIBES DO NOT HAVE CRIMINAL JURISIDICTION OVER NON-INDIANS WITHOUT CONGRESSIONAL AUTHORIZATION AND NATURALIZED TRIBAL MEMBERS ARE NON-INDIAN
   c. THE RIGHT TO NATURALIZE TRIBAL MEMBERS DOES NOT GIVE THE TRIBAL GOVERNMENT THE RIGHT TO EXERCISE CRIMINAL JURISDICTION OVER NON-INDIAN TRIBAL MEMBERS
   d. "INDIAN" IS DEFINED BY CONGRESS. "TRIBAL MEMBER" IS DEFINED BY TRIBAL GOVERMENTS.

II. ROBERT REYNOLDS DID NOT RECEIVE A COURT-APPOINTED ATTORNEY THAT SATISFIES RELEVANT LEGAL REQUIREMENTS.
   a. a. AS ROBERT REYNOLDS IS A NON-INDIAN UNDER FEDERAL LAW, HIS COURT-APPOINTED ATTORNEY FAILED TO SATISFY LEGAL REQUIREMENTS FOR PURPOSES OF SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION AND TRIBAL CODE
   b. b. IF ROBERT REYNOLDS IS FOUND TO BE AN INDIAN, QUALIFICATIONS OF COURT-APPOINTED ATTORNEY VIOLATES EQUAL PROTECTION CLAUSE

Argument

I. THE PETITIONER IS A NON-INDIAN FOR PURPOSES OF SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICITON.

The Petitioner, Mr. Reynolds, is a non-Indian Amantonka Nation (hereafter also known as"the Nation") tribal member. When Mr. Reynolds was brought before the Nation on domestic violence charges, he was a non-Indian tribal member. However, the District Court of the Amantonka Nation and the Supreme Court of the Amantonka Nation failed to follow federal law governing tribal criminal jurisdiction and erroneously classified Mr. Reynolds as an Indian. From the point that the court determined he was an Indian, it altered the due process rights Mr. Reynolds had in tribal court. On appeal, the Supreme Court of the Amantonka Nation similarly failed to apply the law property and thus deprived Mr. Reynolds of his due process rights he was entitled to under the U.S. Constitution, the Violence Against Women Act (VAWA), and federal common law. Here, Mr. Reynolds will show that the court's erroneous classification of him as an Indian was beyond the tribal court's jurisdiction, in contravention of federal law, and thus entitling Mr. Reyonds to a writ of habeas corpus under the Indian Civil Rights Act (ICRA).

Mr. Reynolds is a non-Indian for purposes of criminal law, irrespective of his tribal membership. This brief will show he legally non-Indian, thus beyond the Nation's criminal jurisdiction. First, this section will discuss VAWA and VAWA's incorporation of a definition of "Indian" rooted in federal common law. Second, this brief will show that common law defines Mr. Reynolds as a non-Indian and precludes a classification of Mr. Reynolds as Indian. Third,

a. THE VIOLENCE AGAINST WOMEN ACT (VAWA) INCORPORATES THE FEDERAL COMMON LAW DEFINITION OF INDIAN

The Violence Against Women Act (VAWA) Special Domestic Violence Criminal Jurisdiction (SDVCJ) provision is found in 25 U.S.C. §1304(a)(6). In this subchapter, "Indian" is defined as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies." 25 U.S.C. §1301(4). Here, the definition of Indian for VAWA relies on the definition of Indian for the Major Crimes Act (MCA) yet the MCA also fails to expressly define Indian. 18 U.S.C. §1153.[1] Rather, the MCA gives the United States exclusive jurisdiction over Indians who commit the enumerated crimes against another Indian or the property of another Indian. *Id.* Without an express definition, the MCA left "Indian" to be defined by the courts. By defining "Indian" in VAWA as those subject to the jurisdiction of the MCA, Congress chose to define "Indian" in VAWA as "Indian" has been defined by the federal common law under the MCA. Felix Cohen's Handbook of Federal Indian Law 746 n.49 (2012). Thus, to define who is an "Indian" and "non-Indian" under VAWA we must examine the common law definition of Indian which started to develop after the passage of the Indian Trade and Intercourse Act of 1834.[2] *Id.* At 177.

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[1] "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. §1153(a)

[2] The definition of Indian for purposes of the MCA is the same as the definition of Indian for the Indian Country Crimes Act (18 U.S.C. §1152) Cohen's Handbook of Federal Indian Law 751 (2012).

This section will address (1) the extent of tribal court jurisdiction over non-Indians, (2) the federal common law definition of Indian that Congress has incorporated in VAWA, (3) how the right to define membership does not per se include the right to exercise criminal jurisdiction, and (4) the difference between "Indian" and "tribal member," the importance of that distinction, and how Congress possess the power to define Indian for the purposes of criminal jurisdiction. Mr. Reynolds is a non-Indian member of the Amantonka Nation, that the tribe did not have inherent criminal jurisdiction over him because he is a non-Indian, that the right to define Mr. Reynolds as a tribal member does not give the tribal government the right to define him as a non-Indian, and that Congress holds the power to define Indian under VAWA, and other federal law, and that tribal governments cannot redefine Indian. Thus, the writ of habeas corpus should be granted because Mr. Reynolds was unlawfully tried and detained in contradiction of established federal law.

b. INDIAN TRIBES DO NOT HAVE CRIMINAL JURISIDICTION OVER NON-INDIANS WITHOUT CONGRESSIONAL AUTHORIZATION AND NATURALIZED TRIBAL MEMBERS ARE NON-INDIAN

Mr. Reynolds is a non-Indian and as a non-Indian, the Amantonka Nation tribal court does not possess inherent jurisdiction over him. Indian tribes do not have criminal jurisdiction over non-Indians without authorization from Congress to exercise such jurisdiction. *Oliphant v. Squamish Indian Tribe,* 453 U.S. 191 (1978). There must be Congressional authorization, through treaty or statute, for an Indian tribe to exercise jurisdiction over a non-Indian. *Id.* Mr. Reynolds did not become an Indian under criminal law when he was naturalized as an Amantonka Nation citizen because non-Indians cannot become "Indian" through adoption or naturalization in criminal proceedings. *United States v.*

Rogers, 45 U.S. 567 (1846). VAWA incorporated federal common law definitions of "Indian" that cannot include Mr. Reynolds.

In *Oliphant*, the Squamish Indian Tribe's police arrested Mark Oliphant, a non-Indian, and charged him with assaulting a tribal officer and resisting arrest in addition to arresting Daniel Belgarde, a non-Indian, and charging him with "recklessly endangering another person" as well as damaging tribal property. 453 U.S 194. Oliphant and Belgarde applied for a writ of habeas corpus in the United States District court for the Western District of Washington. *Id.* They argued that the Squamish Indian Provisional Court lacked criminal jurisdiction over non-Indians. *Id.* The Squamish Indian Tribe argued that their jurisdiction over Oliphant and Belgarde stemmed from their inherent powers of government over the Port Madison reservation where the offenses took place. *Id.* at 195. The Supreme Court ultimately held that Indian tribe does not have inherent jurisdiction to try and punish non-Indians and such jurisdiction must come from Congress. The court invited Congress to weigh in on the issue. Cohen's Handbook on Federal Indian Law, 242 (2012). After *Oliphant*, the Court held in *Duro v. Reina* that tribal governments lacked the inherent sovereignty to exercise criminal jurisdiction over non-member Indians. *Id.* After the court delivered the *Duro* decision, Congress quickly enacted what is known as the "*Duro* fix," which gave tribal courts jurisdiction over non-member Indians under ICRA. *Id.* at 244. The Supreme Court in *United States v. Lara*, 541 U.S. 193, 200 (2000) later upheld the *Duro* fix as a relaxation of the restrictions imposed on the tribes' exercise of inherent prosecutorial power. *Id.* at 246. Congress through the *Duro* fix rejected the conclusion that a tribes' criminal jurisdiction is defined by membership. Margaret H. Zhang, *Special Domestic Violence Criminal*

Jurisdiction for Indian Tribes: Inherent Tribal Sovereignty Versus Defendants' Complete Constitutional Rights, 164 U. Pa. L Rev. 243, 269 (2015).

Oliphant holds as a matter of law, tribal courts have no criminal jurisdiction over non-Indian defendants. Congress must give tribes criminal jurisdiction over non-Indian defendants either through statute or through treaty. Cohen's Handbook on Federal Indian Law, 242 (2012). In VAWA, Congress delegated a limited authority of tribal courts to exercise criminal jurisdiction (SDVCJ) in cases that meet certain factual requirements and guarantee certain procedural minimums for non-Indian defendants. 25 U.S.C. §1304. This authority is a delegated authority because (1) the statute refers to this jurisdiction as jurisdiction the tribe "may exercise under this section but could not otherwise exercise"[3] and (2) it delegates to the tribes a power to prosecute non-Indians who commit crimes in Indian Country which is a power historically reserved to the United States. First, VAWA explicitly states that without the federal law the tribe would have no authority to exercise criminal jurisdiction. This language favors the theory that the SDVCJ is a delegated authority rather than inherent in a tribe because the law cites itself as the only source of this jurisdiction, thus Special Domestic Violence Criminal Jurisdiction provides a statutory basis for criminal jurisdiction as opposed to affirming an inherent power that has laid dormant.

This rationale is consistent with history which is the second point. Historically, Congress has reserved criminal jurisdiction over non-Indians who commit crimes in Indian Country for itself. During the treaty making period, Congress often included provisions to reserve federal criminal jurisdiction over offenses committed by non-Indians against Indians

[3] 25 U.S.C. §1304(a)(6)

or vice versa. Cohen's Handbook of Federal Indian Law, 27 (2012). Some treaties during the period included provisions of tribes exercising criminal jurisdiction over non-Indians but federal jurisdiction over crimes involving non-Indians in Indian country grew during the treaty making period and Congress passed the complimentary statutes[4] to maintain criminal jurisdiction over non-Indians who committed crimes in Indian country. *Id.* at 35. This history reasonably supports a conclusion that Congress retains criminal jurisdiction over non-Indians in Indian country, that it is not inherent to tribes, and that instances where tribes did previously exercise criminal jurisdiction over non-Indians through treaties were actually concessions of jurisdiction from the United States in exchange for the lands ceded via treaties. Thus, because SDVCJ is a delegated power tribes can exercise only through the statute then that means non-Indian defendants retain federal constitutional rights and the tribal court exercising authority is beholden to federal precedent.

The most likely counter to this conclusion is that the language in VAWA[5] that "the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed" is evidence that Congress was not delegating power from itself but affirming inherent tribal power. However, this language must be taken in the full context of the chapter. The aforementioned language that SDVCJ pplies in cases where there would otherwise be no basis for the exercise of that jurisdiction. 25 U.S.C.

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[4] "An Act to regulate the trade and intercourse with the Indians tribes" was passed on July 22, 1790 and sections 5 and 6 provided that non-Indians who committed crimes or trespasses against Indians within tribal lands were subject to the same punishment as if the offense had been committed against a non-Indian within the offender's sate or district. Federal criminal procedure was made applicable to those offenders. Cohen's Handbook on federal Indian Law, 35 (2012).

[5] "Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 1301 and 1303 of this title 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." 25 U.S.C. §1304(b)(1).

§1304(a)(6). If the power was inherent, there would be some other basis for that jurisdiction. One of the fundamental cannons of construction in federal Indian law is that ambiguities must be construed liberally in favor of the tribes. Cohen's Handbook of Federal Indian Law, 113 (2012). If the power was inherent then it would have had to been expressly abrogated because sovereignty is preserved unless Congress's intent to the contrary is clear and unambiguous. *Id.* if a tribe never had it. The court found in *Oliphant* that there was no previous power of criminal jurisdiction over non-Indians, so the court could not affirm an "inherent power" if that power never existed. . 435 U.S. 191Similarly, here, without VAWA (as stated within the statute) there would be no other basis for jurisdiction exercised as part of the SDVCJ. Second, Congressional delegation can apply to powers already exercised as inherent power. Cohen's Handbook of Federal Indian Law, 243 (2012).

In Mr. Reynolds case, the Nation claimed that because Mr. Reynolds is a tribal member the court was not exercising SDVCJ over him. Thus, the court claims it has not exercised a delegated power but rather an inherent power therefore the court does not have to meet the conditions of VAWA. In reaching this conclusion, the court disclaimed the only statutory basis that would give them jurisdiction over Mr. Reynolds should this court find that he is a non-Indian, under *Oliphant.*

The federal common law defining "Indian" for purposes of criminal jurisdiction does not include naturalized or adopted tribal members within the category of "Indian." Non-Indians, even when naturalized tribal members, are legally non-Indian when it comes to tribal criminal jurisdiction. In *Rogers,* William Rogers was tried for the murder of Jacob Nicholson. 45 U.S. 571. Both Rogers and Nicholson were white men living within the Cherokee Nation, adopted by the Cherokee Nation, and exercised all the rights of privileges

of the Cherokee Nation citizens. *Id.* Rogers argued that legally he and Nicholson were naturalized Cherokee Indians and because the offense took place on Cherokee Nation land they were beyond the District Court of Arkansas' jurisdiction. *Id.* The Supreme Court rejected Rogers' argument and held that "the fact that Rogers had become a member of the tribe of Cherokees is no obligation to the jurisdiction of the court, and no deference to the indictment, provided the case is embraced by the provisions of the act of Congress" *Id.* at 572. The court further explained, "a white man who at mature age is adopted in an Indian tribe does not thereby become Indian…He may by such adoption become entitled to certain privileges in the tribe and make himself amendable to their laws and usages. Yet he is not an Indian…" *Id.* at 573. Opponents of this holding would likely argue that this case impermissibly relies on racial classification of the defendant and victim as "white men" and such a classification should not be sustained. However, this rule was affirmed in *Alberty v. United States,* 162 U.S. 449, 501(1896) where the Supreme Court held that the defendant, a Cherokee Freedman[6], who was a Cherokee Nation member via treaty "must be treated as a member of the Cherokee Nation, but not an Indian." These two cases stand for the proposition that "Indian" and "tribal member" are not coextensive legal statuses and in the realm of criminal jurisdiction adopted or naturalized tribal members are not categorically Indian.

In light of *Rogers*, federal courts developed two-part test to determine whether the defendant or the victim was "Indian." Cohen's Handbook of Federal Indian Law, 746 (2012). First, the test asks whether the person has "some Indian blood" and second whether the

[6] Cherokee Freedmen are the formerly enslaved people of the Cherokee Nation, and their descendants, who were granted membership within the Cherokee Nation through the treaty of 1866 between the United States and the Cherokee Nation post Civil War. The treaty states that the Freedmen and their descendants "shall have all the rights of the native Cherokee." *Alberty*, 162 U.S. 500

person is recognized as "Indian." *Id.* The first prong is largely self-explanatory, with lower courts only disagreeing on how much Indian blood is sufficient and whether or not that blood has to come from a federally recognized tribe. *Id.* The second prong, has led to more case law regarding how to determine "affiliation" with a tribe because the MCA is clear that "Indian" was meant to encompass members and non-members. *Id.* at n.49.

In *United States v. Antelope*, two Indian defendants challenged the Indian/non-Indian distinction that governs criminal jurisdiction on the reservation as violation of the Fifth Amendment of the United States Constitution's due process clause because the non-Indian defendant was subject to Idaho law which had an additional element to the crime of murder. 430 U.S. 641, 644. The defendants argued this was a due process violation because the Federal charge did not require the additional elements, which according to the lower court put them at a disadvantage based on race. *Id.* The court held that it was not a violation of the due process clause as a race-based legal difference, rather the difference is politically rooted in the existence of Indians as separate peoples with their own political institutions. *Id.* at 646. The court references the defendant's enrollment in the Couer d'Alene Tribe as a source of the political relationship, while also stating in footnote 7 that "enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction." *Id.* at n. 7. The holding in *Antelope* supports the *Rogers* test's consideration of Indian blood because that affiliation is not an impermissible racial classification and that Indian status is not entirely dependent on tribal membership.

It is uncontested that the Mr. Reynolds is a member of the Amantonka Nation through naturalization. Record at 3. Mr. Reynolds first came into contact with the Nation through marriage and then became formally naturalized under tribal law. *Id.*. Mr. Reynolds contested

the Nation's exercise of jurisdiction over him as a non-Indian and he never refuted his membership. *Id.* Mr. Reynolds arguments are consistent with federal Indian law that being a naturalized tribal member does not make you an Indian. Under *Rogers* and *Oliphant*, Mr. Reynolds is a non-Indian and the tribal court could not exercise criminal jurisdiction over him unless authorized by statute, which the tribal court expressly stated that Mr. Reynolds was not tried pursuant to *any* federal statute. This was an unlawful exercise of power. Naturalization does not make Mr. Reynolds an Indian in criminal law matters, the tribe does not have inherent criminal jurisdiction over non-Indians, and the tribe refused to follow the only federal law that would potentially give the court jurisdiction over Mr. Reynolds. For these reasons, Mr. Reynolds writ of habeas corpus should be granted.

c. THE RIGHT TO NATURALIZE TRIBAL MEMBERS DOES NOT GIVE THE TRIBAL GOVERNMENT THE RIGHT TO EXERCISE CRIMINAL JURISDICTION OVER NON-INDIAN TRIBAL MEMBERS

The right of a tribe to define membership and enroll members does not give the tribe criminal jurisdiction over its non-Indian members. Despite contradictory federal common law, the District Court of the Nation rejected Mr. Reynolds' argument that he was a non-Indian beyond the tribe's inherent criminal jurisdiction by stating that "as Defendant is a citizen of the Amantonka Nation and is therefore an Indian." Record at 3. Further, the District Court stated that "Defendants decision to become a naturalized citizen was a voluntary act, and he cannot now change his mind and assert he is non-Indian." Record at 3. The Supreme Court of the Amantonka Nation similarly rejected the argument on appeal stating that "As a citizen of a federally recognized tribe, Appellant is an Indian and the Amantonka Nation therefore possesses criminal jurisdiction over him" and relied on *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978) Record at 7. However, *Santa Clara Pueblo*

does not justify the exercise of criminal jurisdiction over non-Indian tribal members nor does it stand for the proposition that non-Indians can become Indian through membership. In short, the right of the Nation to define its member under tribal law does not give the Nation the right to exercise criminal jurisdiction over non-Indians.

The Nation's reliance on *Santa Clara Pueblo v. Martinez* is insufficient to justify the exercise of criminal jurisdiction over Mr. Reynolds for a number of reasons. First, *Santa Clara Pueblo* is a civil case regarding tribal rights under tribal law. A female Santa Clara Pueblo tribal member, Julia Martinez, sued the tribal officials challenging a membership ordinance that prevented her children from enrolling in the tribe because their father was Navajo and not a Santa Clara Pueblo tribal member. 436 U.S. 52. The membership ordinance did not allow children of Santa Clara Pueblo women and non-Santa Clara Pueblo fathers to enroll, whereas children of non-Santa Clara Pueblo mothers and Santa Clara Pueblo fathers could enroll. *Id.* Without membership, Martinez's children could not vote in tribal elections, hold office, or inherit property. *Id.* The children also had no right to remain on the reservation after their mother died. *Id.* Martinez sued the tribal officials claiming that the ordinance violated the equal protection provision of the Indian Civil Rights Act (ICRA) on the basis of sex. *Id.* The court ultimately held that ICRA did not provide a private right of action

This case is starkly distinct from Mr. Reynolds' case at issue. Mr. Reynolds' case is criminal, not civil. The matter in *Santa Clara Pueblo* was not about a tribe's unlawful exercise of jurisdiction over a party beyond their jurisdiction, it was the opposite. *Santa Clara Pueblo* was about a tribal member and a member's child *wanting* the tribe to exercise jurisdiction (enrolling the children) when the tribe had declined jurisdiction not enrolling the

children. This is a serious distinction when the consequences of a tribe unlawfully exercising jurisdiction over Mr. Reynolds will lead to his incarceration, whereas the consequences of *Santa Clara Pueblo* only exclude descendants from tribal benefits.

Citing *Santa Clara Pueblo* in a civil context where the tribe wanted to exercise jurisdiction would be more appropriate. Consistent with the power to determine membership is the power to regulate domestic retains among members, and to proscribe rules of inheritance to members. Cohen's Handbook of Federal Indian Law, 220 (2012). However, the theory of tribal membership as coextensive with criminal jurisdiction was rejected after *Duro v. Reina* was overturned by Congress' "*Duro* fix." Congress responded to *Duro*'s reliance on "membership" in determining criminal jurisdiction and instead relied on classifications of "Indian." Margaret Zhang, *Special Domestic Violence Criminal Jurisdiction for Indian Tribes: Inherent Tribal Sovereignty Versus Defendants' Complete Constitutional Rights*, 164 U. Pa. L Rev. 243, 269 (2015). The *Duro* fix is consistent with prior U.S. Supreme Court jurisprudence that defines "Indian" consistent with *Rogers* and *Alberty*, which held naturalized tribal members are not "Indian."

In certain civil contexts, non-Indian tribal members would be considered if Congress chose to define Indian based on tribal membership only. Congress has defined "Indian" based on tribal membership in multiple civil statutes where a person with no Indian blood could be considered legally Indian under that specific law. [7] Congress had the opportunity to define

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[7] Federal civil law defines "Indian" in a number of ways. For example, The India Child Welfare Act (ICWA) defines "Indian" as "any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43." (25 U.S.C. §1903(3)). The Indian Mineral Development Act defines "Indian" as "any individual Indian or Alaska Native who owns land or interests in land the title to which is held in trust by the United States or is subject to a restriction against alienation imposed by the United States." (25 U.S.C. §2101(1)). The Augustus F. Hawkins–Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 defines "Indian" as "a member of an Indian tribe,

"Indian" in VAWA as coextensive with tribal membership but chose not to. Instead, Congress incorporated the common law definition of Indian established by federal courts. The governing definition of Indian for criminal matters is reliant on federal common law and the common law does not define "Indian" as member of an Indian tribe, it defines "Indian" according to the *Rogers* test (some degree of Indian blood and affiliation with a tribe). *Rogers*, 45 U.S. 573.

The *Santa Clara* decision does not say that every person who is a tribal member is therefore an Indian. The opinion stands for the principle that tribal governments, as separate political entities with the power of regulating their internal affairs but Congress has the authority to limit, modify or eliminate the powers of local self-government. *Santa Clara,* 436 U.S. 55-56. Criminal jurisdiction over non-Indian are not matters of tribal self-regulation but are matters of federal regulation of criminal conduct within Indian Country. *Antelope*, 430 U.S. 648.

VAWA's definition of Indian through incorporation of common law definition of Indian means that Congress has modified the power of the Nation to regulate their internal and social relations of their members through criminal law. The Nation must exercise this power in a manner that is not inconsistent with the United States' exercise of sovereignty. *Oliphant*, 435 U.S. 209. In Mr. Reynolds case, the tribal courts definition of Indian as a tribal member conflicts with VAWA's definition of Indian (some degree of Indian blood and tribal affiliation). Under VAWA's definition, Mr. Reynolds is a non-Indian. Under the tribal court's definition that all tribal members are Indian, which is inconsistent with the *Rogers*

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and includes individuals who are eligible for membership in a tribe, and the child or grandchild of such an individual." (25 U.S.C. §2511(3)).

test, Mr. Reynolds would be an Indian. This redefinition is an exercise of power inconsistent with the United States' exercise of sovereignty because it allows the tribal court to deny Mr. Reynolds his rights under the United States Constitution because tribal law is not subject to the United States Constitution, unless delegated to the tribe by Congress. Zhang, *Special Domestic Violence Criminal Jurisdiction for Indian Tribes: Inherent Tribal Sovereignty Versus Defendants' Complete Constitutional Rights*, 164 U. Pa. L Rev. 243, 269 (2015). It is especially contradictory because VAWA provides a mechanism for the Nation to have jurisdiction over non-Indians through the Special Domestic Violence Criminal Jurisdiction provision provided the tribal court provides minimum due process protections to non-Indian defendants. 25 U.S.C. §1304(a)(6).

The tribal courts' exercise of criminal jurisdiction over Mr. Reynolds is an exercise of sovereignty inconsistent with the United States' exercise of sovereignty under *Oliphant* because (1) it redefines Indian contrary to federal criminal law definitions in order to classify a non-Indian as an Indian and (2) it contradicts federal criminal law unnecessarily because Congress provided the Nation an avenue to exercise criminal jurisdiction which the court could have utilized. The District Court and the Supreme Court both said that because they classified Mr. Reynolds as an Indian, that the due process requirements in VAWA did not apply. Record at 3 and 7. Thus, the tribal court circumvented the available legal avenue to exercise jurisdiction over Mr. Reynolds and in doing so circumvented the minimum due process requirements that Congress explicitly included in VAWA to protect non-Indians. This is inconsistent with the United States' exercise of sovereignty and unlawful under *Oliphant*.

Upholding the tribes' classification of Mr. Reynolds as an Indian, despite federal law to the contrary, simply because the tribe has the inherent power to define members would set a precedent that tribal governments and courts can define anyone as an Indian to assert jurisdiction. This would be an astonishingly broad reading of *Santa Clara Pueblo.* In the criminal context, this would be highly disruptive to contemporary understanding of criminal jurisdiction and allow the tribe to disregard rights under the U.S. Constitution, despite ICRA's intent, simply because the tribe has the right to define membership and they defined the defendant as an Indian.

Lastly, the District Court and the Supreme Court of the Nation both include a theory of voluntariness that Mr. Reynolds consented to the Nation's criminal jurisdiction as an Indian because he voluntarily became a naturalized citizen of the nation. However, neither the Nation's code nor federal law supports the conclusion that naturalized tribal members become Indian or consent to being classified as legally Indian in criminal proceedings. The Nation's District Court stated that "Defendant's decision to become a naturalized citizen was a voluntary act, and he cannot now change his mind and assert he is a non-Indian." Record at 3. Similarly, the Nation's Supreme Court wrote that "Appellant voluntary applied for and completed [the naturalization] process, the culmination of which is citizenship in the Amantonka Nation. As a citizen of a federally recognized tribe, Appellant is an Indian, and the Amantonka Nation therefore possesses criminal jurisdiction over him." Record at 7. This theory of voluntariness fails for the following reasons.

First, nothing in the Nation's code states that naturalized Amantonka Nation members consent to being classified as an Indian in criminal proceedings. Title 3, Chapter 2, Section 203 governs the citizenship status of naturalized tribal members and says that once

the process is done the naturalized member is sown in, their name is added to the Nation's roll, they are issued an I.D. card and thereafter they are "entitled to all the privileges afforded all Amantonka citizens." 3 A.N.C. Chapter 2 §203. This provision makes no mention of the naturalized member becoming legally Indian for the purpose of criminal jurisdiction or forfeiting any existing rights they have as a non-member or non-Indian. *Id.* The District Court's comment about Mr. Reynolds "changing his mind" is a mischaracterization; Mr. Reynolds cannot change his mind about being an "Indian" if never had notice that becoming a naturalized member would make him legally Indian.

Second, nothing in the Nation's available code equates tribal membership to Indian status. In fact, only one provision of the code includes the terms "Indian," "non-Indian," Amantonka Nation member, and non-member Indian. Amantonka Nation Code, Chapter 2, §105. This provision of the code governs criminal jurisdiction of the Amantonka Nation court. *Id.* This provision acknowledges limited jurisdiction over non-Indians to enforce protection orders in cases of dating violence or domestic violence when that non-Indian has sufficient ties to the nation, including being involved with "a member of the Amantonka Nation" or "A non-member Indian who resides in the Amantonka Nation's Indian Country." *Id.* This expression of criminal jurisdiction is consistent with VAWA. This code indicates (1) the Nation is aware of its limited jurisdiction over non-Indians and (2) tribal member and "Indian" are not synonymous as evidenced by the phrase "non-member Indian." *Id.*

Legally, a person can be an Indian without being a tribal member and, under *Rogers* and *Alberty*, a person can be a tribal member without being an Indian. If the Nation's code supported the court's conclusion that tribal membership is the determinative element in deciding if someone, then why would the tribe define its own criminal jurisdiction by

"Indian" and "non-Indian?" Why not define criminal jurisdiction in terms of "member" and "non-member?" The logical conclusion is that the Nation's legislative branch was aware that criminal jurisdiction turns on the question of "Indian" versus "non-Indian" as opposed to "member" versus "non-member." The counter argument would be that the stand alone phrase "member of the Amantonka Nation" could reasonably support the proposition that tribal members are Indian, however, this would be a generous inference and insufficient to support the District Court and Supreme Court opinions that failed to cite to specific authority supporting their conclusion that tribal membership is coextensive with "Indian" status beyond *Santa Clara Pueblo*, which is insufficient alone to justify criminal jurisdiction over a non-Indian.

d. "INDIAN" IS DEFINED BY CONGRESS. "TRIBAL MEMBER" IS DEFINED BY TRIBAL GOVERMENTS.

The Nation's court confused the status of tribal member with the status of Indian. "Indian" is a legal status that Congress has the principal authority to define; tribal member is a legal status that individual tribal nations generally have the authority to define. The tribal court, nor the tribe, has the power to redefine Indian under federal law.

"Indian" as a term exists in United States Constitution in Article I Section 2 through the Indian tax clause and the Article I Section 8 through the Indian Commerce clause. Congress' broad authority in Indian affairs comes through the Indian commerce clause which reserves for Congress the ability to regulate commerce with the Indian tribes. Cohen's Handbook on Federal Indian Law, 23 (2012). From 1776 to 1849, Congress exercised its power under the Indian commerce clause to negotiate treaties with Indian tribes that governing the political relationship between the United States and Congress left internal tribal affairs to the tribes. *Id.* at 29. All the treaties made at this time-included provisions

relating to intercourse between Indians and non-Indians. *Id.* In addition to the treaty provisions concerning Indian and non-Indian intercourse, Congress passed statutes to regulate non-Indian intercourse with Indians. *Id.* at 35.

One of the earliest statutes passed in 1790 provided that non-Indians who committed a crime on tribal lands were subject to punishment as if the offense had been committed against a non-Indian within the offender's state or district. *Id.* In 1796, the Act was amended to include criminal provisions subjecting Indians who committed crimes off tribal lands to punishment under federal law. *Id* at 37. Managing the relationship between Indians and non-Indians has always been within Congress' purview, especially the issue of criminal jurisdiction in Indian and non-Indian crimes. The Indian versus non-Indian distinction has consistently been there, especially for Congressional statutes that apply to Indians broadly because "Indian" is a status created by the United States Constitution and defined by the United States' Government. At various times, Congress has defined "Indian" in various ways and there is no singular definition. John W. Gillingham, *Pathfinder: Tribal, Federal, and State Court Subject Matter Jurisdictional Bounds: Suits Involving Native American Interests*, 18 Am. Indian L. Rev. 73, 80 (1993). The plenary power gives Congress a broad scope in legislating Indian affairs, including the power to recognize and terminate the federal relationship with tribes. Cohen's Handbook on Federal Indian Law, 393 (2012).

In fact, in the context of the federal common law definition of Indian in criminal cases, Indians from terminated tribes have been held to no longer be "Indian" because Congress terminated the federal trust relationship. See *Antelope*, 430 U.S. 646 at n.7 ("members of tribes whose official status has been terminated by congressional enactment

are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act.")

Congress' chosen definitions of "Indian" are usually intentional. In the case of termination, terminated tribes are intentionally no longer "Indian" because Congress intended to terminate the federal trust relationship. In the same manner, VAWA by incorporating federal common law definition of "Indian" intentionally defines Indian as (1) some degree of Indian blood and (2) affiliation with a tribe because Congress intentionally did not want to define "Indian" as a tribal member. This definition of Indian includes non-member Indians and excludes naturalized Indians who do not have some Indian blood. Thus, this definition excludes Mr. Reynolds.

Given Congress' plenary power and history of regulating intercourse between "Indians" and "non-Indians," to preserve the health of the political relationship between the tribes and the federal government, it is contrary to Congressional intent for tribal courts to redefine Indians according to their own terms. "Indian" has always been a Constitutional status for the federal government to decide as part of the plenary power and Congress can, but does not have to, defer to tribal membership status. Cohen's Handbook of Federal Indian Law, 171 (2012). When and how Congress defines "Indian" and "Indian tribe" is within the plenary power and has been a cornerstone of federal Indian policy since the Republic began. For the tribal court to override Congress' definition of Indian under the MCA, ICRA, and VAWA disrupts the law and distorts Congressional intent. The tribe thusly redefines an "Indian" under federal law, which is an exercise of power the tribe has never had.

The tribal power is limited to defining tribal members but Congress does not have to define "Indian" according to an individual tribes' definition of Indian. One of a tribe's most

basic rights is to define its own membership and the related power to grant, deny, revoke, and qualify membership. *Id.* at 175. The Nation's Supreme Court's reliance on *Santa Clara* to the extent that the case does stand for the proposition that tribes have a right to define their own membership for "tribal purposes," however, Congress does not have to define Indian under federal law in a manner consistent with an individual tribe's definition. If Congress had to accept every tribal member as an Indian under every law that applies to Indians, then Congress would have no way to accurately gauge their trust obligations. For example, if being a naturalized tribal member meant that a person was automatically an Indian under all federal law, then a tribe could naturalize any number of people and Congress would thereby have a trust obligation to those people and it would lead to an unpredictable financial strain on the Indian Health Service, the Bureau of Indian Affairs police force, and United States prosecutors who would become responsible with the an enlarged criminal docket in reservation communities. As long as Congress maintains the power to define "Indian" under federal law, Congress can reasonably predict the size of Indian Country and appropriate funds accordingly to meet its trust obligation.

II. ROBERT REYNOLDS DID NOT RECEIVE A COURT-APPOINTED ATTORNEY THAT SATISFIES RELEVANT LEGAL REQUIREMENTS.

In determining whether Mr. Reynolds received a court-appointed attorney that satisfies relevant legal requirements, requires the determination of whether Mr. Reynolds is an Indian or a non-Indian. Should the Court find that Mr. Reynolds is a non-Indian, Mr. Reynolds argues that his court appointed counsel failed to meet the standards required by ICRA, VAWA 2013 amendments, and the professional standards set by the Amantonka Nation Code. The ineffective assistance of counsel prejudiced his trial proceedings, therefore, Mr. Reynolds was denied a fair and reliable trial. If the Court finds that Mr. Reynolds is an

Indian, Mr. Reynolds argues that as a matter of law, non-Indian defendants are granted rights to a heightened level of assistance of counsel that he is not afforded. This is gross imbalance of the equal protection rights under ICRA and the U.S. Constitution.

a. AS ROBERT REYNOLDS IS A NON-INDIAN UNDER FEDERAL LAW, HIS COURT-APPOINTED ATTORNEY FAILED TO SATISFY LEGAL REQUIREMENTS FOR PURPOSES OF SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION AND TRIBAL CODE

Should this court find that Mr. Reynolds is a non-Indian, then this court should find that his court-appointed attorney failed to satisfy the legal requirements under VAWA.

The constitutional rights granted to all defendants in tribal court under ICRA, at first only included the right of assistance of counsel as the defendant's own expense. 25 U.S.C. § 1302(a)(6). Congress further expanded this right with the passage of Tribal Law and Order Act (TLOA) in 2010 by granting a defendant in tribal court criminal proceedings with the imposed imprisonment of more than one year, the "right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution" and the attorney provided by the tribal government to the indigent defendant must be "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 attorney." 25 U.S.C. § 1302(c). The expansion of the right to counsel in tribal court signals the Congressional intent that with the increase in tribal sentencing authority must come increased protections for criminal defendants in tribal courts.

In passing the VAWA 2013 amendments, Congress defined the rights of non-Indian defendants appearing in a tribal court exercising Special Domestic Violence Criminal Jurisdiction. In a criminal proceeding that imposes any length of imprisonment, the defendant

is granted all the rights under TLOA. 25 U.S.C. § 1304(d)(2). Congress further defined the right to a defense attorney as a right to "effective assistance of licensed defense counsel" 25 USC § 1304(f)(2). As a catch-all provision, Congress also expressed that a defendant's rights also includes "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant." 25 USC § 1304(d)(4). Through these provisions Congress included additional safeguards and expanded the rights of criminal defendants contemporaneously with delegating to tribal courts the power to exercise criminal jurisdiction over non-Indians.

The U.S. Supreme Court defined the term "effective assistance" under terms of a criminal defendant's rights under the Sixth Amendment of the U.S. Constitution. Strickland v. Washington, 466 U.S. 668, 680 (1984). In Strickland, David Washington pled guilty to murder in Florida. Id. At his sentencing hearing, his attorney failed to seek a character witness or a psychiatric evidence to try and mitigate his sentence. Id. As a result, Mr. Washington was sentenced to death. On appeal, Washington argued that his Sixth Amendment right to counsel was violated because his counsel was ineffective at his sentence. Id. The court ultimately held that Mr. Washington's Sixth Amendment right was not violated according to the court's two prong test to determine effective assistance of counsel. Id. at 688.

The first prong determines whether the counsel's performance was deficient. Id. Under the first prong, the defendant must use an objective standard of the prevailing practice of the community. Id. In further defining the first prong, courts have diverged on whether the failure to be admitted to or the disbarment from a bar examination shows the lack of

performance of appointed counsel. See United States v. Merritt, 528 F.2d 650 (7th Cir.1976) (Holding that defense attorney's failure to pass the bar exam of the court he was appointed to represent the defendant in, but passed a sister's state bar exam, did constitute ineffective assistance of counsel.); United States v. Mouzin, 785 F.2d 682, 698 (9th Cir. 1986) (Holding that neither suspension nor disbarment triggers the first prong as showing ineffective assistance of counsel).

The second Strickland prong is whether these errors deprived the defendant of a fair and reliable trial. Strickland at 688. In determining whether the defendant was deprived of a fair and reliable trial, the court must find there is a reasonable probability that the result of the proceeding would have been different had the appointed attorney's error had not prejudiced the case. Id. at 694. In the event a defendant's claim of ineffective assistance of counsel meets the first prong it is assumed that the proceeding was unfair and unreliable. United States v. Cronic, 466 U.S. 648, 659 (1984).

Federal courts have yet to determine how to apply the federal Strickland standard in tribal courts exercising Special Domestic Violence Criminal Jurisdiction. Courts have routinely found that the Sixth Amendment does not apply to tribal court proceedings. United States v. Percy, 250 F.3d 720, 725 (9th Cir.2001). However, Congress applied a provision similar to the Sixth Amendment to tribal courts in ICRA. 25 U.S.C. §1302(a)(6). In Arizona, a defendant claimed that his rights to effective assistance under ICRA were denied when he retained a tribal advocate with no law degree. Jackson v. Tracy, No. CV 11-00448-PHX-FJM, 2012 WL 4120419, at *1 (D. Ariz. Sept. 19, 2012), aff'd, 549 F. App'x 643 (9th Cir. 2013). The court, however, was not apt to apply the Strickland federal standard to a tribal court proceeding because the defendant chose his own counsel. Id. at *2. The court noted that

if it were to assume that Strickland applied, the court would have to consider that the tribal court utilized tribal advocates rather than licensed attorneys and this was a norm in the profession within that particular community. Id. at *3.

In analyzing the balance, unlike the Jackson court's view of assistance under ICRA, Congress clearly used Strickland's term-of-art "effective assistance" in legislating the SDVCJ within VAWA. Congress, in enacting the SDVCJ, took a large step in delegating authority to tribal courts to exert criminal jurisdiction over non-Indians committing dating or domestic violence offenses against an Indian victim. Since the U.S. Supreme Court's decision in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978), tribal courts cannot exercise criminal jurisdiction over non-Indian defendants unless authorized by Congressional statute. The enumerated rights in VAWA for defendants subject to SDVCJ, including effective assistance of counsel, shows that Congress intended for there to be a high standard of defendant's due process right than the minimum rights provided under ICRA. In this unexplored area of law, if Mr. Reynolds is subject to the Nation's courts under SDVCJ then Congressional intent mandates a heightened standard of effective assistance of counsel. Congress in requiring tribal courts to provide license attorney, surpasses the qualifications set by the U.S. Constitution for rights to counsel.

In Mr. Reynolds case, the court-appointed public defender of the community fails to meet the objective standards under the first prong by failing to meet the community standards set by the Amantonka Nation. Congress explicitly requires that the any tribal court exercising SDVCJ must provide the defendant a "defense attorney licensed to practice law by any jurisdiction." 25 USC § 1302(c)(2). The Amantonka Nation clearly states that no person may practice as an attorney in tribal court unless the person meets two requirements: (1) prior to

admittance be in "good standing of the bar of any tribal, state, or federal court", and (2) successfully complete the Amantonka Nation bar examination. A.N.C. Tit 2, Ch. 5, §501(a). In addition, the Nation's court requires that a public defender appointed to represent a non-Indian defendant must hold a juris doctorate degree from an ABA accredited law school, passed the Nation's bar exam, and passed a background check. A.N.C. Tit 2, Ch. 6, §607(b).

The Amantonka Nation Supreme Court noted that the public defender appointed to represent the Petitioner possessed a Juris Doctor degree from an ABA accredited law school and was a member in good standing of the Nation's bar exam. Record at 7. However, the appointed counsel has not been additionally barred at "any tribal, state, or federal court." This is in direct violation of the qualifications of an attorney under the Nation's code which requires that attorneys be licensed in "any tribal, state, or federal court" prior to being admitted to the Amantonka Nation's bar. In effect, the tribal code requires that attorneys be admitted to at minimum one bar other than Amantonka Nation and Mr. Reynolds defense counsel was appointed only to the Amantonka Nation bar. Thus, Mr. Reynolds' defense counsel cannot be considered an attorney under the Nation's code, counsel cannot be an attorney as required under SDVCJ and fails to meet the tribal bar's codified standards which clearly violates the standards of community under Strickland.

In addition to failing to meet the professional standards of the community, Mr. Reynolds' counsel committed substantial errors. During trial courts, counsel alleged differences between the state and tribal bar exam. Record at 7. However, counsel failed to provide any evidence of either the difference or even similarities of the two bar examinations. The court was essentially precluded from ruling in Mr. Reynolds favor because the court had no evidence to support the conclusion that the bar exams were different. Record at 8. Due to the

counsel's failure to provide evidence and his ineffectiveness denied a fair and reliable trial. The courts were unable to evaluate the two bar examinations due to the lack of an adequate record. Had Mr. Reynolds's attorney provided evidence on his claim then the court could have reasonably ruled in his favor that the difference in licensing standard was substantial, did violate equal protection, and thus afforded Mr. Reynolds the higher due process standard that the Nation's code affords to non-Indians. However, the lack of a favorable ruling meant that Mr. Reynolds at his trial received the minimal due process rights under the tribal code which likely contributed to his conviction. Thus, the Petitioner's lack of substantial evidence denied him a fair and reliable trial.

Respondents will argue that membership in a local bar examination is not sufficient in finding ineffective counsel. In United States v. Butler, 504 F.2d 220, 223 (D.C.Cir.1974), the court held that the lack of membership was not substantial in showing that the counsel was not competent. The defendant was required to also show significant trial errors. Id. The Respondents will also argue that the decision to not provide evidence regarding the differences of the bar examinations, was a tactical decision, and therefore not significant trial error. See United States v. Miller, 643 F. 2d 713, 714 (10th Cir. 1981) (the decision not to call a witness to testify was a tactical, discretionary decision made by counsel). However, the evidence showing the alleged discrepancy is both material and relevant to the Mr. Reynolds' trial. It cannot be considered merely tactical because had the court found that there was a due process violation between the rights afforded to non-Indians versus Indians then the tribal court could have equalized the discrepancy and Mr. Reynolds would have been afforded the rights he is entitled to as a non-Indian in tribal court. The failure to succeed on this claim was

not tactical because Mr. Reynolds had to face trial with lesser due process rights under the tribal code than VAWA actually entitles him to.

b. IF ROBERT REYNOLDS IS FOUND TO BE AN INDIAN, QUALIFICATIONS OF COURT-APPOINTED ATTORNEY VIOLATES EQUAL PROTECTION CLAUSE

If the court finds the Petitioner to be an Indian, the qualifications of his court-appointed attorney violate his equal protections under ICRA. ICRA prohibits tribes from denying equal protection of the law to any person or from depriving any person of life, liberty, or property without due process of law. 25 U.S.C. § 1302(a)(8). An equal protection claim under ICRA, absent other federal law, is not judged against the U.S. Constitution. Rather, ICRA guarantees a different standard by providing equal protection of the tribe's laws rather than federal laws. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 63 (1978). Thus, the court must review Mr. Reynolds' equal protection in light of what is provided to him under tribal law.

The Nation's code provides that a non-Indian defendant being prosecuted pursuant to SDVCJ has the right to a public defender that has been required to establish a higher standard of legal competency than a public defenders that the court appointed to an Indian defendant. A.N.C. Tit. 2, Ch. 5, §503. For public defenders appointed to Indian defendants in Amantonka Nation court, a person is not required to meet any educational requirement or have any degree, diploma, or certification. A.N.C. Tit. 2, Ch. 6, §607(a). The Nation only requires that counsel appointed to an Indian complete and pass the Nation's bar examination. A.N.C. Tit. 2, Ch. 6, §607(a)(5). On the other hand, if a non-Indian were to commit the same crime, and the court has jurisdiction under SDVCJ, the court is required to provide the non-Indian defendant an attorney that holds a Juris Doctor degree from a law school accredited by the American Bar Association, that is in "good standing of the bar of any tribal, state, or

federal court," has successfully completed the Nation's bar examination, and has passed a background check. A.N.C. Tit 2, Ch. 5, §501(a) and A.N.C. Tit 2, Ch. 6, §607(b). The code itself enshrines unequal protection of law simply by affording non-Indian defendants with public defenders who meet criteria far more rigorous than Indian public defender. As a matter of law, the Nation has expressly created a tiered system of rights in its tribal courts based solely on whether the defendant is an Indian or a non-Indian. Here, Mr. Reynolds, if considered a non-Indian, would be appointed counsel that must have a Juris Doctor degree. If the Petitioner is considered an Indian, having committed the same crime and before the same court, the Petitioner may be afforded counsel that may not have a high school degree or a General Educational Development (GED) certification.

The opposing party will argue that the Petitioner was appointed counsel that had a Juris Doctor degree from an ABA accredited law school and thus the difference is immaterial. However, Mr. Reynolds' argument is based on the fact that as a matter of law he was not afforded the rights equal to other defendants once the court erroneously classified him as an Indian. Additionally, as a matter of fact his public defender was not licensed in another jurisdiction as required the Nation's code when we can assume a public defender appointed to a defendant classified as non-Indian would have been. This shows the Nation has created a system that provides a certain group of individuals more worthy of heightened protections before the law in violation of the equal protection clause of ICRA. 25 U.S.C. §1302(a)(8).

Mr. Reynolds also raises that the issue that Congress in delegating power to tribal courts to prosecute non-Indians under VAWA 2013 amendments and granting additional guarantees to non-Indian parties but not to Indians committing similar crimes, has created a

gross imbalance of equal protection of rights for an Indian defendant. See Cohens Handbook at 251. In United States v. Antelope, 97 S. Ct. 1395, 1397 (1977), two Indian defendants robbed and killed a non-Indian within the boundaries of their reservation. The defendants were subject to federal jurisdiction under the Major Crimes Act. Id. The defendants argued that the denial of state jurisdiction violated their equal protection rights. The Court held that an equal protection claims was not warranted because the "body of law is evenhanded." Id. at 1400. The Court further noted that the defendants received the "same procedural benefits and privileges as all other persons within federal jurisdiction." Id. at 1399.

Unlike the findings in Antelope, here, the body of law is not evenhanded to all defendants. The Petitioner and all defendants appearing in the Amantonka Nation's tribal court are not equally afforded the same footing of rights to effective counsel. In addition, an Indian defendant's right to a licensed defense attorney, hinges on if the court imposes a term of imprisonment of more than a year. The U.S. Supreme Court has held that the Sixth Amendment right to counsel is only triggered when court actually imposes the defendant to be incarcerated for any length of time. Argersinger v. Hamlin, 407 U.S. 25 (1972). Unlike the Sixth Amendment trigger, under ICRA, an Indian is guaranteed a law-licensed attorney only if the court imposes actually imprisonment of more than a year sentence. 25 U.S.C. § 1302(c). Mr. Reynolds has been sentenced to seven months of incarceration. Record at 5. Therefore, as an Indian, Mr. Reynolds is guaranteed the least amount of rights in his tribal court proceedings. To make the law evenhanded, as the court cited in Antelope, this court should read ICRA's equal protection clause as a requirement that tribal courts with SDVCJ are prosecuting Indians for crimes similar to those under VAWA SDVCJ that the tribal court has to afford Indian defendants the same due process minimums that VAWA ensures for

non-Indian defendants. 25 U.S.C. §1302(a)(8). Otherwise, tribal courts will continue to create tiered systems of rights favoring non-Indian defendants over Indian defendants which is in clear contradiction to the spirit and purpose of ICRA.

The opposing party will argue that Congress's purpose in enacting TLOA and VAWA 2013 amendments was to provide and fulfill its obligations to tribal governments to ensure the safety of its tribal members. In Morton v. Mancari, 417 U.S. 535, 555 (1974), the U.S. Supreme Court found that a congressional statute that granted special treatment did not violate the Constitution if Congress was able to tie its purpose rationally to the fulfillment of obligations to tribes. Id.

Here, the special treatment is granted to a non-Indian, and therefore does not fulfill Congress' obligations to Indians. It is not disputed that the purpose of VAWA 2013 amendment was to reduce the crime against Indian women on tribal lands. S. Rep. No. 112-265, at 1 (2012). However, the dispute remains that providing a higher level of rights to non-Indians over Indians on in tribal courts does not tie rationally to VAWA's purpose. Thus, Mr. Reynolds has been denied a heightened right to a law-licensed appointed counsel under the tribal code because once the court classified him as Indian he was denied the right to the highest standard of public defender that the Nation's code affords non-Indians.

CONCLUSION

Mr. Reynolds is a non-Indian irrespective of his tribal membership status. As a non-Indian, the Amantonka Nation lacked the inherent power to try him in tribal court without Congressional authorization. If Mr. Reynolds is found to be a non-Indian, his court appointed attorney failed to satisfy the relevant legal requirements. If he is Indian, then the tribal

government violated his equal protection rights under the Indian Civil Rights Act. For these reasons, the writ of habeas corpus should be granted.