**No. 19-231**

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**IN THE**

# SUPREME COURT OF THE UNITED STATES

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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.*

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**On Writ of Certiorari**

**to the U.S. Court of Appeals for the Thirteenth Circuit**

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## BREIF OF PETITIONER

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**Team number: 953**

*Counsel for Petitioner*

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## Questions Presented

**I.** Is Petitioner a non-Indian for purposes of Special Domestic Violence Criminal Jurisdiction ("SDVCJ")?

**II.** Did Petitioner's court-appointed attorney satisfy the relevant legal requirements?

## Statement of the Case

### I. Statement of Proceedings

On June 16, 2017, Robert R. Reynolds ("Petitioner") was charged with violating Title 5 Section 244 of the Amantonka Nation ("tribe") tribal code, "Partner or family member assault." R. at 2. At his arraignment, Petitioner requested and was appointed indigent defense counsel to represent him. R. at 4.

Following his arraignment, Petitioner filed three pretrial motions. R. at 3. The first pretrial motion sought to have the charges dismissed on the grounds that his is a non-Indian, and that the tribe lacked criminal jurisdiction over non-Indians. *Id.* The second pretrial motion sought to have an attorney appointed to him that met the standards of VAWA 2013's Special Domestic Violence Criminal Jurisdiction ("SDVCJ"). *Id.* The third pretrial motion alleged that Petitioner's court-appointed counsel was insufficiently qualified to serve as Petitioner's counsel, and that the assignment of the attorney violated the relevant Equal Protection requirements. R. at 3-4.

On July 5, 2017, all three of Petitioner's pretrial motions were denied by the tribal District Court. R. at 4. In denying the motions, the tribal District Court held that (1) Petitioner was Indian by virtue of his naturalization, (2) that SDVCJ did not apply and, (3) that even if SDVCJ applied, the court-appointed attorney would be sufficiently qualified. R. at 3-4. The case was thus set for trial for August 14, 2017. R. at 4.

A jury returned a verdict of guilty and Petitioner was convicted of violating Title 5 Section 244 of the tribal code. R. at 5. After the jury returned the guilty verdict, Petitioner made a motion to set aside the verdict, reiterating the same arguments he made in his pretrial motions. *Id.* That motion was denied for the same reasons set out in the order of July 5, 2017.

*Id.* Petitioner was sentenced to seven months incarceration, $5300 restitution paid to the victim, rehabilitation and treatment programs through the tribal Social Services Division, and $1500 fine. *Id.* At the victim's request, the tribal District Court dropped the protection order issued at the time of arraignment. *Id.* Petitioner also moved to continue his bond while his appeal was pending, and the court granted that motion. *Id.*

Petitioner appealed his conviction to the tribal Supreme Court, raising the same arguments that were made in Petitioner's pretrial motions. R. at. 7. The tribal Supreme Court held that: (1) Petitioner is an Indian by virtue of his "naturalization," (2) that SDVCJ therefore does not apply, and (3) that no equal protection violation results from the qualification requirements for attorneys representing Indian defendants. *Id.* The tribal Supreme Court therefore affirmed the Petitioner's conviction on November 27, 2017.

Petitioner then filed a petition for a Writ of Habeas Corpus under 25 U.S.C. §1303, alleging that his conviction was a violation of his federal civil rights under the Fifth Amendment to the United States' Constitution, the Indian Civil Rights Act, and the Violence Against Women Act of 2013. R. at 8. The U.S. District Court for the District of Rogers held: (1) that Petitioner is not an Indian for purposes of criminal jurisdiction, as he does not possess any Indian blood, and (2) that although Petitioner falls within SDVCJ, the tribe failed to provide Petitioner with the indigent defense counsel required under VAWA 2013. *Id.* Accordingly, the petition for a writ of habeas corpus was granted on March 7, 2018. *Id.*

On August 20, 2018, for the reasons articulated by the tribal Supreme Court, the U.S. Court of Appeals for the Thirteenth Circuit reversed the decision of the U.S. District Court and remanded with instructions to deny the petition for a writ of habeas corpus. R. at 9. Petitioner thus petitioned for a Writ of Certiorari to the Supreme Court of the United States.

R. at 10. On October 15, 2018, the petition was granted and set for argument in the March term of 2019. R. at 10.

## II. Statement of Facts

This case arises out of an act of domestic violence between Petitioner and his wife Lorinda Reynolds. R. at 2. Lorinda is a citizen of the tribe, which is federally recognized. R. at 6. It is undisputed that when Petitioner and his wife met, Petitioner was a non-Indian. *Id.* After marrying, both Petitioner and his wife found jobs on the tribe's reservation in the state of Rogers and began living in a tribal housing complex. *Id.* Petitioner then applied to become a "naturalized citizen" of the tribe, pursuant to the tribal code. *Id.*

One year after becoming a "naturalized citizen" of the tribe, Petitioner lost his job. *Id.* During that period of unemployment, Petitioner began drinking heavily. R. at 6. Petitioner was verbally abusive towards his wife. *Id.* On June 15, 2017, tribal police responded to a call at the couple's apartment. *Id.* This was not the first time police were called to the apartment, but it was the first time the police saw evidence of physical abuse. *Id.* Based on evidence presented at trial, it was determined that Petitioner struck his wife with an open palm across her face. *Id.* The force of Petitioner's strike caused Lorinda to fall to the ground, resulting in a cracked rib. *Id.*

Petitioner was arrested by the tribal police and transported to the tribal jail. *Id.* The tribe's chief prosecutor filed a complaint on June 16, 2017, charging Petitioner with violating Title 5 Section 244 of the tribal code. R. at 2.

## SUMMARY OF THE ARGUMENT

Petitioner is a non-Indian for purposes of SDVCJ. He has sufficient ties to the tribe in that he lives on the reservation and is married to a member of the tribe, who was the victim of his crime. Contrary to the tribe's assertion, Petitioner is a non-Indian for purposes of criminal jurisdiction.

While VAWA 2013 does not include a definition of "Indian," the Court has repeatedly held that a defendant must have some Indian blood to qualify. Congress provided a statutory, two-prong definition of Indian in the Major Crimes Act, 18 U.S.C. §1153. The first prong of the test requires Indian blood. Petitioner does not meet that requirement. It is undisputed that prior to becoming a "naturalized citizen" of the tribe, Petitioner was a non-Indian.

The second prong of the test requires tribal enrollment or federal recognition of Indian status, and Petitioner satisfies that prong pursuant to his enrollment in the tribe. However, without satisfying both prongs of the test, Petitioner does not qualify as an Indian for purposes of criminal jurisdiction.

Although Petitioner qualifies as a non-Indian for purposes of SDVCJ, exercising SDVCJ in this case would violate his constitutional rights to due process. Even as an Indian defendant, Petitioner has a due process right under the Indian Civil Rights Act ("ICRA") to be aware of the accusations against him. 25 U.S.C. §1302(a)(6). As a non-Indian defendant, the Fifth and Fourteenth amendments to the U.S. constitution guarantee the right of procedural due process to criminal defendants. Because Petitioner was never charged with violating VAWA, but rather charged with violating the tribal code, exercising SDVCJ at this point would be a violation of the Petitioner's right to due process.

Furthermore, an exercise of SDVCJ here would be inconsistent with VAWA's policy. VAWA 2005 specifically applied to crimes within Indian country, criminalizing acts of domestic and dating violence by habitual offenders with prior convictions. Petitioner is not a habitual offender and therefore his one-time offense does not fall within the scope of the crimes VAWA was made to prevent in Indian country.

Because VAWA 2013's grant of SDVCJ must be concurrent with federal and/or state jurisdiction, the tribe's criminal, subject matter jurisdiction under VAWA should not exceed that prescribed by the federal government in VAWA 2005.

Secondly, Petitioner's court-appointed attorney did not meet the relevant statutory requirements. Petitioner was wrongly tried as an Indian, and under ICRA Indian defendants do not have a right to effective indigent counsel. However, ICRA's low standard for legal representation is a violation of the Fourteenth Amendment's equal protection guarantee. Congress has a duty to protect individual Indians' rights. In light of the standards for indigent defense under VAWA 2013, ICRA leaves Indian defendants with less rights than non-Indian defendants in tribal court. Defendants in the same forum should have the same constitutional protections.

If Petitioner were to be tried under SDVCJ, his court-appointed counsel did not meet the high standards set forth in VAWA 2013. Under VAWA 2013, indigent defense counsel must be constitutionally effective and must be licensed by a jurisdiction that applies the proper standards for competence and professional responsibility.

Petitioner's right to effective assistance of counsel was violated both by the tribal government and by the attorney themselves. Furthermore, the tribe does not apply the correct standards for competence or professional responsibility. Their tribal code is full of erroneous

legal standards and does not hold attorneys to the American Bar Association standards for professional responsibility.

In conclusion, although Petitioner is a non-Indian with ties to the tribe, exercising SDVCJ would violate his due process rights and be inconsistent with VAWA's policy. Furthermore, as an Indian defendant he is not guaranteed the same counsel guaranteed to non-Indian defendants in tribal court, and his court-appointed attorney did not meet the requirements for indigent counsel under VAWA 2013.

## ARGUMENT

Both issues addressed on this appeal are questions of law and of first impression which the Court will review de novo. *Ornelas v. United States,* 517 U.S. 690, 699 (1996). The Court will review de novo the lower court's legal conclusions. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 520 (1984).

### I. WHILE PETITIONER MAY MEET THE DEFINITION OF NON-INDIAN UNDER VAWA 2013, EXERCISING SDVCJ WOULD VIOLATE THE PETITIONER'S CONSTITUTIONAL RIGHTS AND WOULD BE INCONSISTENT WITH VAWA'S POLICY.

#### a. Petitioner meets the definition of non-Indian for purposes of SDVCJ.

In the Violence Against Women Act reauthorization of 2013 ("VAWA 2013"), Congress amended the Indian Civil Rights Act ("ICRA"). 25 U.S.C. §1301-1304. The amendment allows tribes to exercise SDVCJ over non-Indians who have sufficient ties to the tribe and commit acts of domestic or dating violence within Indian country against an Indian. 25 U.S.C. §1304.

Petitioner has the necessary ties to the tribe to bring him within the scope of SDVCJ: he resides within the Indian country of the participating tribe and is the spouse of a member of the tribe. Furthermore, contrary to the tribe's assertion, Petitioner is a non-Indian for purposes of criminal jurisdiction.

The term "Indian' is not statutorily defined in VAWA 2013, but federal courts have "explicated" its meaning. *United States v. Broncheau*, 597 F.2d 1260, 1263, (9th Cir. 1979). The Court has held that the test for Indian, for purposes of criminal jurisdiction, considers "the presence of some Indian blood indicating tribal ancestry; and tribal or government recognition as an Indian." *United States v. Rogers*, 45 U.S. 567, 573 (1846). Subsequently,

the use of the *Rogers* test was adopted and codified by congress in creating the Major Crimes Act, 18 U.S.C. §1153. Criminal defendants must meet both prongs of the test to be considered Indian. *United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005) (Defendant failed to meet the second prong of the test); see also *United States v. Maggi*, 598 F.3d 1073 (9th Cir. 2009).

The first prong requires proof of Native American ancestry before the Europeans arrived. *Bruce*, 394 F.3d 1215 at 1223. The courts have held that the requirement of "some" Indian blood as evidenced from a parent, grandparent, or great-grandparent would be sufficient to satisfy this prong. *Id*.; see also *Vezina v. United States*, 245 F. 411 (8th Cir. 1917) (defendant 1/4 to 3/8 Chippewa Indian held to be Indian); *Sully v. United States*, 195 F. 113 (8th Cir. 1912) (1/8 Indian blood held sufficient to be Indian); *St. Cloud v. United States*, 702 F. Supp. 1456, 1460 (D.S.D. 1988) (15/32 of Yankton Sioux blood sufficient to satisfy the first requirement of having a degree of Indian blood); *Goforth v. State*, 644 P.2d 114 (Okla. Crim. App. 1982) (requirement of Indian blood satisfied by testimony that defendant was slightly less than one-quarter Cherokee Indian); *Makah Indian Tribe v. Clallam County*, 440 P.2d 442 (Wash. 1968) (1/4 Makah blood sufficient to satisfy Indian blood requirement).

The second prong of the test requires that the individual prove tribal or federal recognition as an Indian. The courts consider many evidentiary factors when analyzing this prong, "1) tribal enrollment; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and

participation in Indian social life." *United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir.1995).

The Petitioner cannot hold the status of Indian for purposes of criminal jurisdiction because he does not satisfy the first prong which requires Indian ancestry and some Indian blood. To have some Indian blood the petitioner would have to show his lineage of Indian ancestry from a federally recognized tribe. This would be evidenced by examining the status of his parents, grandparents, and great-grandparents.

Petitioner, prior to becoming a "naturalized citizen," lived his life as non-Indian. Only after the Petitioner and Respondent were married did the petitioner apply for Naturalization under the Amantonka Code. According to Title 3, Chapter 2, section 201 of the tribal code, "there is a historical practice of adopting any person into the tribe who (a) married a member, and (b) lived on the Amantonka reservation for a minimum of two years." If such a person completes a naturalization process, then "(a) the applicant shall be sworn in as a citizen of the Amantonka Nation, (b) have their name added to the Amantonka Nation Roll, (c) issued an Amantonka ID card, and (d) be entitled to all the privileges afforded to Amantonka Citizens."

As it stands, the tribe retains the right to define and control its own membership. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). Petitioner is not disputing his tribal citizenship nor the tribe's naturalization process. However, tribal citizenship alone does not grant Petitioner the status of Indian for purposes of criminal jurisdiction.

The Respondent infers that when the Petitioner successfully completed the tribe's naturalization process, and was granted citizenry under tribal code, that his enrollment granted him the status of Indian. This argument attempts to redefine or sidestep the *Rogers* test by saying enrollment equates to Indian status. Federal courts have addressed this

argument and held that, "we are bound by the body of case law which holds that enrollment, and, indeed, even eligibility therefor, is not dispositive of Indian status." *Broncheau*, 597 F.2d at 1263. If congress meant to expand the tribe's criminal jurisdiction, through the naturalization process, then there would have been a "delegation of such power" *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1886).

Therefore, because Petitioner has necessary ties with the tribe, and because he is a non-Indian for purposes of criminal jurisdiction, he would qualify as a non-Indian defendant for purposes of SDVCJ.

**b. Exercising SDVCJ here would violate the Petitioners constitutional rights to Due Process.**

Generally, the Bill of Rights of the United States Constitution does not apply to crimes over which Indian tribes have jurisdiction. *Talton v. Mayes,* 163 U.S. 376, 383 (1896) (holding that a crime committed by one Cherokee Indian upon another within the jurisdiction of the Cherokee Nation is an offence against the local laws of the Cherokee, not against the United States). The powers of local self-government enjoyed by Indian tribes predate the Constitution. *Id.* at 384; See also *United States v. Kagama,* 118 U.S. 375, 381 (1886) (holding that tribes have the power of regulating their internal and social relations.). These powers of self-government are subject to the plenary power of Congress and can be withdrawn, modified, or repealed through a showing of clear and explicit congressional intent. *Ex Parte Crow Dog,* 109 U.S. 556, 561-62 (1883); See also *Kagama,* 118 U.S. 375 at 379-380.

Congress exercised its plenary power in passing the Indian Civil Rights Act of 1968 ("ICRA"). 25 U.S.C. §1301. ICRA applies to the federally recognized Indian tribes of the United States and makes many guarantees of the Bill of Rights applicable in Indian Country.

Although Petitioner does not qualify as an Indian for purposes of criminal jurisdiction, the tribe wrongfully asserted jurisdiction over him as an Indian and tried him as an Indian, for violating a provision of the tribal code. An Indian defendant is protected by the quasi-constitutional rights conferred in ICRA.

ICRA guarantees due process rights, including "the right to defendants to be aware of the accusations against them." 25 U.S.C. §1302(a)(6). The tribe charged Petitioner on the basis of violating the tribal code. The tribe did not charge Petitioner with violating VAWA, a federal statute. Therefore, asserting SDVCJ at this point in the court proceeding would violate Petitioner's federal rights under ICRA.

Although Petitioner was tried as an Indian defendant erroneously, and ICRA typically does not apply to Indian defendants, Petitioner as a non-Indian is protected by the United States' Constitution. The Fifth and Fourteenth Amendments guarantee the right of a defendant to be given adequate notice of the offense charged against him and for which he is to be tried.

In *Smith v. O'Grady,* 312 U.S. 329 (1941), a defendant plead guilty to a crime of simple burglary but was charged with a crime of burglary with explosives. His conviction was voided as it was obtained in violation of the defendant's due process rights. See also *Cole v. Arkansas,* 333 U.S. 196 (1948) (holding that a conviction and sentence on the ground that evidence showed defendant guilty under a section of the statute not charged violated due process). Similarly, in *Rabe v. Washington,* 405 U.S. 313 (1972), the Court found that an obscenity conviction violated due process as none of the grounds for conviction were covered in the statute or listed in the charge.

Here, the Petitioner was charged with and convicted of violating tribal code. The tribe cannot now assert SDVCJ and charge Petitioner with violating federal law. To do so would violate an Indian defendant's rights under ICRA and a non-Indian defendant's rights under the United State's Constitution. Therefore, exercising SDVCJ in this case would be improper.

**c. Exercising SDVCJ in this case would be inconsistent with VAWA's policy which targets habitual offenders.**

VAWA has always been aimed at targeting habitual offenders. VAWA was originally enacted in 1994 as Title IV of P.L. 103-322 to address congressional concerns about violent crime against women. 18 U.S.C. §2247. VAWA 1994 focused primarily on repeat offender and was enacted as an amendment to Chapter 109A of title 18. The text of the statute reads:

> Any person who violates a provision of this chapter, after one or more prior convictions for an offense punishable under this chapter, or after one or more prior convictions under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual contact have become final, is punishable by a term of imprisonment up to twice that otherwise authorized.

*Id.* This enhanced sentencing provision for repeat offenders was the central component of VAWA 1994.

In 2000, Congress reauthorized VAWA through the Victims of Trafficking and Violence Protection Act (P.L. 106-386). VAWA 2000 amended the definition of interstate stalking and domestic violence to include acts that intend to violate preexisting protection orders and courses of conduct that place a person in reasonable fear of harm. 18 U.S.C. §§2261-62. This language again demonstrates the focus on habitual acts.

In 2005, Congress reauthorized VAWA through the Violence Against Women and Department of Justice Reauthorization Act (P.L. 109-162). In VAWA 2005, specific provisions were made to target VAWA crimes within Indian country. 18 U.S.C. §117(a). To

charge someone under the section of VAWA 2005 that pertains to Indian country, it is necessary to prove predicate offenses. Specifically entitled "Domestic assault by a habitual offender," this new law made it a federal crime for any person to commit a domestic assault within Indian country if the person has at least two prior final convictions for domestic violence rendered in Federal, State, or Indian tribal court proceedings. *Id.*

VAWA 2005 was based on a finding that domestic abusers exhibit high rates of recidivism and that their violence often escalates in severity over time. *United States v. Bryant,* 136 S. Ct. 1954, 1959 (2016); *United States v. Castleman,* 572 U.S. 157, 160 (2014). By federally criminalizing habitual offenses in Indian country, Congress sought to address the complex jurisdiction schemes that had "made it difficult to stem the tide of domestic violence experienced by Native American women. *Bryant,* 136 S. Ct. 1954 at 1960. Thus, the scope of VAWA within Indian country was specifically limited to crimes by habitual offenders.

VAWA 2013's amendment to ICRA (25 U.S.C. §1304) built upon VAWA 2005 by allowing tribes to exercise criminal jurisdiction over non-Indian perpetrators. It used the same definitions for domestic and dating violence and did not change the policy or scope of VAWA 2005.

Furthermore, VAWA 2013 states that a tribe's exercise of SDVCJ must be concurrent with federal and/or state jurisdiction. 25 U.S.C. §1304(b)(2). While the grant of SDVCJ pointedly expanded personal jurisdiction of tribes, it did not alter the subject matter jurisdiction of crimes covered by VAWA. The phrase "concurrent jurisdiction" is a well-known term of art long employed by Congress to refer to subject matter jurisdiction, not personal jurisdiction. *BNSF Ry. Co. v. Tyrell,*137 S. Ct. 1549, 1557 (2017). SDVCJ is a

grant of unique personal jurisdiction, but the subject matter jurisdiction of tribes must remain concurrent with extra-tribal VAWA convictions. Because VAWA 2005 limited VAWA crimes within Indian country to those of habitual offenders, the only way for tribes to exercise SDVCJ concurrently would be to limit prosecutions to habitual offenders as defined in VAWA 2005.

Here, Petitioner is not a habitual offender as defined in VAWA 2005. While it is undisputed that verbal disputes arose between Petitioner and his wife, there is no evidence of prior domestic violence. When Petitioner was arrested, it was the first time police had seen any evidence of physical abuse. Petitioner's crime, which took place in Indian country, is controlled by the policy of VAWA 2005. Because Petitioner is not a habitual offender as defined by VAWA 2005, exercising SDVCJ in this case would be inconsistent with VAWA's policy.

## II. PETITIONER'S COURT-APPOINTED ATTORNEY DID NOT SATISFY THE RELEVANT LEGAL REQUIREMENTS.

### a. ICRA, which should not apply to this case involving a non-Indian defendant, includes unconstitutionally low standards for legal representation.

ICRA did not incorporate the Sixth Amendment requirement for appointment of counsel for indigents in criminal cases. 25 U.S.C. §1302(a)(6). Tribal courts are only required to provide indigent defense counsel when a sentence of more than one year's imprisonment is imposed under the Tribal Law and Order Act of 2010 ("TLOA") 25 U.S.C. §1302(c)(2).

ICRA applies to crimes over which tribes have jurisdiction. As previously discussed, Indian tribes have criminal jurisdiction over crimes committed by Indians in Indian Country. Therefore, when an Indian commits a crime in Indian country, the tribe need only appoint indigent defense counsel when imposing a sentence exceeding one year's imprisonment.

Other uncounseled convictions violate neither ICRA nor the Sixth Amendment. *Bryant*, 136 S. Ct. 1954 at 1959.

Petitioner's crime took place in Indian country, as defined under 18 U.S.C. §1151. He was sentenced to seven months incarceration. Under ICRA, the tribe would not be legally required to provide Petitioner with any indigent counsel whatsoever. This discrepancy violates an Indian defendant's rights to due process under the Fourteenth amendment.

In *Morton v. Mancari,* the Court held that different treatment of Indians by the federal government is not subject to strict scrutiny. *Morton v. Mancari,*, 535 U.S. 353, 555 (2001). Rather, federal laws that treat Indians differently will be upheld if they "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Id.* This "unique obligation" refers to Congress's responsibility to ensure the protection of tribal and individual Indian rights. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

ICRA treats Indians differently in terms of legal representation because it does not guarantee Indian defendants the constitutional right to effective, indigent defense counsel. The denial of a right cannot be rationally tied to the fulfillment of a Congressional obligation to protect rights. Congress's declared purpose in passing ICRA was to strengthen the position of individual tribal members by extending certain constitutional requirements to tribal governments. *Santa Clara Pueblo,* 436 U.S. 49 at 62. However, ICRA's effect does not match its purpose.

In the VAWA reauthorization of 2013, Congress implicitly recognized tribes' ability to provide effective assistance of indigent defense counsel. In light of VAWA's high standard for legal representation for non-Indian defendants, ICRA's low standard violates Indian defendants' equal protection rights under the Fourteenth Amendment. If tribal courts are to

be bound by Sixth Amendment standards in any context, they should be bound by that standard in all contexts.

However, as previously discussed, Petitioner is not an Indian as defined in 18 U.S.C. §1153, and therefore ICRA does not apply to this court proceeding. Petitioner's court-appointed attorney should not be scrutinized under the ICRA standards for legal representation.

**b. The court-appointed attorney did not meet either of the legal requirements under VAWA 2013.**

Because Petitioner is not an Indian for purposes of criminal jurisdiction, the tribe cannot exercise criminal jurisdiction over him absent affirmative, congressional delegation of such power. *Oliphant,* 435 U.S. 191 at 209 (holding that tribes have lost this right by virtue of their incorporation into the United States). VAWA is the only existing legal mechanism for tribes to exercise criminal jurisdiction over non-Indians, such as Petitioner. Congress enacted VAWA as an amendment to ICRA in 2013 to authorize tribal courts to exercise SDVCJ over certain domestic violence offenses committed by a non-Indian against an Indian. 25 U.S.C. §1304.

While Petitioner may fit the definition of non-Indian under VAWA, his isolated crime is not the sort VAWA was meant to prevent. The tribe failed to bring a VAWA claim when they prosecuted Petitioner, in violation of his constitutional rights to due process. However, even if Petitioner's case were heard under VAWA, his court-appointed attorney did not satisfy the legal requirements therein.

Tribal courts' exercise of SDVCJ under VAWA requires procedural safeguards greater than those required by TLOA, including the unqualified right of an indigent defendant to appointed counsel if a term of imprisonment of any length *may* be imposed. 25 U.S.C.

§1304(d)(2). Indigent counsel under VAWA must meet the standards set forth in TLOA (25 U.S.C. §1302(c)). Therefore, under VAWA, the tribe must:

> (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
> (2) at the expense of the tribal government, provide 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;

25 U.S.C. §1302(c)(1)-(2). Petitioner's court-appointed attorney did not satisfy these strict legal requirements.

First, both the tribe and the attorney deprived Petitioner of the right to effective assistance of counsel guaranteed by the United States Constitution. The right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right. *Gideon v. Wainwright,* 372 U.S. 335, 344 (1963). This Sixth Amendment right is "necessary to insure fundamental human rights of life and liberty" and "stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done." *Johnson v. Zerbst,* 304 U.S. 458, 462 (1938).

The right to counsel includes the right to effective assistance of counsel. *McMann v. Richardson,* 397 U.S. 759, 771 (1970). This right can be violated by the government or by the attorney themselves. *Strickland v. Washington,* 466 U.S. 668, 686 (1984). Government violates the right to effective assistance when it interferes with the ability of counsel to make independent decisions about how to conduct the defense. *Id.*

Here, the tribe asserted an incorrect legal standard in defining "Indian" for purposes of criminal jurisdiction and demanded adherence to a tribal code that is preempted by federal law. Because the attorney is bound by the tribal code, he was unable to provide Petitioner with adequate legal counsel. This is similar to *Brooks v. Tennessee*, where the government

demanded adherence to a rule of criminal procedure that violated federal law. *Brooks v. Tennessee,* 406 U.S. 605, 612 (1972). Because the government in *Brooks* bound the attorney by a rule that lacked legal justification, they deprived the attorney's client of his right to effective assistance of counsel. *Id.*

Like *Brooks,* the tribe has bound the attorney to laws that are legally inaccurate and invalid. The tribe has therefore interfered with the ability of the attorney to make independent decisions about how to conduct the defense and violated Petitioner's right to effective assistance of counsel.

An attorney deprives a defendant of the right to effective assistance by failing to provide "adequate legal assistance." *Cuyler v. Sullivan,* 446 U.S. 335, 344 (1980). The right to effective assistance of counsel applies to "all critical stages of the criminal proceedings." *Montejo v. Louisiana,* 556 U.S. 778, 786 (2009). *Strickland* provides a two-part test for a defendant's claim of ineffective counsel:

> "First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the *Sixth Amendment.* Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

*Strickland,* 466 U.S. 668 at 687.

The first prong of the *Strickland* test, constitutional deficiency, is satisfied here. While the attorney argued that the tribe lacked jurisdiction because Petitioner did not meet the definition of "Indian" under 18 U.S.C. §1153, the attorney failed to raise the argument that Petitioner does not meet the criteria for the tribe to exercise SDVCJ under VAWA. The attorney failed to make important procedural and policy-based arguments that VAWA jurisdiction cannot be exercised here. This omission was a serious error as VAWA is the only

legal avenue for the tribe to assert criminal jurisdiction over Petitioner, absent a finding that he is legally an Indian.

The first prong of the *Strickland* test is "necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance is reasonableness under prevailing professional norms." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). Thus, to show that Petitioner's attorney was constitutionally deficient within the meaning of *Strickland,* it is necessary to show that the attorney acted unreasonably. A showing of unreasonableness hinges on whether the error was based on strategy or mistake. *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986).

Here, the attorney's error was based on mistake, and therefore constitutionally deficient. Failing to assert that the tribe lacked jurisdiction over Petitioner under VAWA was not based on strategy. A strategic attorney, in arguing that his client is not Indian, would anticipate the singular alternative avenue for the tribe to assert criminal jurisdiction. Petitioner's attorney failed to do so. This constitutes an inexcusable mistake of law.

In *Hinton v. Alabama*, the Court found that "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland.*" *Hinton v. Alabama,* 571 U.S. 263, 274 (2014). There, the defendant's ineffective assistance of counsel claim was successful because the attorney failed to seek funding for adequate expert witnesses based on the mistaken belief that there was no such funding available. *Id.* at 266. The error in *Hinton* was based on mistake, rather than strategy, because it showed the attorney's ignorance as to the fundamental law involved in the case. *Id.* at 274.

Here, like *Hinton*, the attorney's error showed his ignorance as to the fundamental law governing tribal criminal jurisdiction over cases of domestic violence. An attorney familiar with VAWA would have easily asserted the alternative argument that SDVCJ cannot be exercised here. The attorney's failure to do so was an inexcusable mistake of law.

Attorneys must meet the professional standards for investigation in defending their clients. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). In *Porter v. McCollum*, an ineffective assistance of counsel claim was successful because the attorney "ignored pertinent avenues for investigation of which he should have been aware." *Porter v. McCollum*, 558 U.S. 30, 40 (2009). There, the attorney failed to investigate their client's personal background and psychological state at the time the crime took place. *Id.* That decision did not reflect professional judgment, and thus satisfied the first prong of the *Strickland* test. *Id.*

Like *Porter*, Petitioner's attorney ignored crucial avenues of investigation of which he should have been aware. An attorney whose main argument is that their client is non-Indian should be aware of the only statutory grounds under which a non-Indian can be prosecuted by a tribe. The attorney's failure to investigate the fundamental controlling law did not reflect professional judgment or strategy, and therefore was constitutionally deficient.

This case differs from *Bobby v. Van Hook*, where the attorney made reasonable efforts in pre-trial investigation, and therefore was not deemed constitutionally deficient. *Bobby v. Van Hook*, 558 U.S. 4, 10 (2009). The Court held that an attorney's performance is not deficient when counsel gathers substantial information and makes a reasonable decision not to pursue additional sources. *Id.* at 11. Unlike *Bobby*, the attorney's error here in failing to investigate the sole alternative grounds for tribal jurisdiction was not reasonable but demonstrated an unprofessional ignorance of the law.

The Sixth Amendment guarantees that no criminal defendant is left to the "mercies of incompetent counsel." *McMann,* 397 U.S. 759 at 771. An assertion of tribal jurisdiction under VAWA could have easily been argued and settled in the initial trial court proceedings. Petitioner's attorney was ignorant to the law and failed to make reasonable investigatory efforts that could have saved Petitioner from further court proceedings. This inexcusable mistake of law was not based on strategy. Petitioner's court-appointed attorney was therefore constitutionally deficient and satisfies the first prong of the *Strickland* test.

The second prong of the *Strickland* test requires a showing that the attorney's deficient performance prejudiced the defense. This does not require a showing that the deficient conduct more likely than not altered the outcome of the case. *Porter,* 558 U.S. 30 at 44. Prejudice under *Strickland* demands only that a defendant establish a "probability sufficient to undermine confidence in that outcome." *Id.*

Prejudice can be presumed when there is a breakdown of the adversarial process resulting from the attorney's constitutional deficiency. *United States v. Cronic*, 466 U.S. 648, 658 (1984). The Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." *Anders v. California,* 386 U.S. 738, 743 (1967). If the process loses its character as a "confrontation between adversaries," the constitution is violated. *Cronic,* 466 U.S. 648 at 657. An indispensable element of the adversarial process is an attorney's ability to act independently of and in opposition to the government. *Polk County v. Dodson,* 454 U.S. 312, 322 (1981).

Here, the court-appointed attorney did not act independently of or in opposition to the tribal government. According to title 2, chapter 6, section 607 of the Amantonka Nation's Code, public defenders appointed by the tribe are trained in Amantonka law and culture and

licensed by the tribal bar exam. These criteria and licensing standards are appropriate when representing Indian defendants who do not have a constitutional right to effective assistance of counsel under ICRA. However, such standards are not appropriate when representing non-Indian defendants, such as Petitioner, who do have a constitutional right to effective assistance of counsel.

Petitioner's attorney failed to raise the argument that the tribe could not assert VAWA jurisdiction. This differs from *Florida v. Nixon,* where no presumption of prejudice was found because the attorney had acted based on a tenable strategy. *Florida v. Nixon,* 543 U.S. 175, 179 (2004). Unlike *Nixon,* the attorney's deficiency here was not the product of strategy. A public defender who is only required to know tribal law cannot, and in this case did not, properly defend a non-Indian defendant accused of violating a federal law. The tribal code's requirements for public defenders prevent an adversarial process in this context in that they do not guarantee an attorney's independence from or opposition to the tribal court. Therefore, prejudice can be presumed, and the second prong of the *Strickland* test is satisfied.

Even if prejudice is not presumed in this case, there is a reasonable probability that absent the attorney's deficiency, the outcome would have been different. This probability entitles Petitioner to a new trial. *Hinton,* 571 U.S. 263 at 276. Had the attorney raised the argument VAWA jurisdiction was improper, the tribal court would have hesitated in their conviction, knowing that they lacked any alternative basis for criminal jurisdiction. Like *Porter,* this is not a case where missing information "would barely have altered" the case. *Porter,* 558 U.S. 30 at 41. The omission of such a fundamental legal argument undermines confidence in the outcome. Therefore, the second prong of the *Strickland* test is satisfied.

Because the court-appointed attorney was constitutionally deficient, and because that deficiency prejudiced the defense, Petitioner's constitutional right to effective assistance of counsel was violated. Because VAWA requires constitutionally effective assistance of counsel, the court-appointed attorney did not meet the statutory requirements.

Even if Petitioner's attorney did not violate Petitioner's right to effective assistance of counsel, the second prong of criteria for indigent defense under VAWA, 25 U.S.C. §1304(c)(2), requires 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." Petitioner's court appointed attorney did not meet that standard.

Petitioner's attorney was licensed by the tribe. While an Indian tribe constitutes a jurisdiction in the United States, the Amantonka tribe does not apply the appropriate licensing standards in this context. Under title 2, section 607 of the tribal code, the tribe does not require that public defenders in SDVCJ cases be licensed by a state or federal bar, even though VAWA is a federal, not tribal, law. VAWA's strict rules for protecting the rights of non-Indian defendants dragged into tribal court are aimed at providing such defendants with the type of legal protections they would receive in typical, non-tribal court proceedings. Therefore, a tribe must require that attorneys working in SDVCJ cases are licensed outside of the tribe's jurisdiction.

Even if the tribal licensing was sufficient, the tribe does not effectively ensure the competence and professional responsibility of its licensed attorneys. The Supreme Court has repeatedly cited American Bar Association ("ABA") standards as the guide for evaluating and upholding norms of legal practice. For example, in *Wiggins,* the Court declared that the

ABA standards are the appropriate guides for evaluating an attorney's effectiveness. *Wiggins,* 539 U.S. 510 at 524. In *Rompilla v. Beard,* the Court found a lawyer ineffective who failed to meet the ABA standards for Criminal Justice. *Rompilla v. Beard,* 545 U.S. 374, 387 (2005); See also *Williams v. Taylor,* 529 U.S. 362, 396 (2000) (applying ABA standards to determine whether trial counsel fulfilled their professional obligations to the defendant). The ABA standards are also cited in Federal Rules of Criminal Procedure. Specifically, Fed. R. Crim. P. 44, which governs the right to and appointment of counsel, references the ABA standards seven times in its notes section. This reliance illustrates that the appropriate standards for competence and professional responsibility are the ABA standards.

The tribal code of ethics is significantly shorter and less thorough than the ABA standards. The tribal code does not cover several important topics, including but not limited to: Special Conflicts of Interest for Former & Current Government Employees & Officers (Model Rules of Prof'l Conduct R. 1.11 (2018); Client with Diminished Capacity (Model Rules of Prof'l Conduct R. 1.14 (2018); Duties to Prospective Client (Model Rules of Prof'l Conduct R. 1.18 (2018); Bar Admissions & Disciplinary Matters (Model Rules of Prof'l Conduct R. 8.1 (2018).

Other sections of the tribal code also give rise for concern. For example, Section 105[1] and Sections 106-7[2] of Title 2, Chapter 1, provide significantly incorrect legal standards for the scope of the tribe's criminal and civil jurisdiction, respectively. The incomplete nature of the code of ethics paired with the various erroneous legal standards indicate that tribe is not enforcing appropriate standards, or even appropriate boundaries, for its attorneys. Therefore, while Petitioner's attorney was licensed by the tribe, the tribe is not a jurisdiction that "effectively ensures the competence and professional responsibility of its licensed attorneys." 25. U.S.C. §1304(c)(2). In conclusion, the court-appointed attorney does not meet either of the legal requirements under VAWA.

The legal requirements for indigent defense counsel under VAWA should be strictly and vigorously enforced. The Court has long been concerned with the fairness of trying non-Indians in tribal court. The Court first emphasized the differences between tribal and federal court in *Ex Parte Crow Dog. Crow Dog,* 109 U.S. 556 at 571. In *Oliphant,* the Court highlighted those differences in holding that tribes lack criminal jurisdiction over non-

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[1] Sec. 105, "Criminal Jurisdiction of the Court," states:

> (a) *Generally.* The Amantonka Nation District Court is vested with jurisdiction to enforce all provisions of this Code, as amended from time to time, against *any person* violating the Code within the boundaries of the Amantonka Nation's Indian Country. (emphasis added).

This is an incorrect statement of the tribe's criminal jurisdiction, which extends not to "any person," but rather only to Indians who commit crimes within the tribe's reservation. 25 U.S.C. §1301(2).

[2] Sec. 106, "Civil Jurisdiction of the Court," states:

> The Court shall have jurisdiction over any action where one party to the action shall be an Indian, or a corporation or entity owned in whole or in substantial part by an Indian or the Amantonka Nation or a corporation or entity chartered by the Amantonka Nation; and
>
> (a) The cause of action arises under the Constitution or laws of the Amantonka Nation; or
>
> (b) An Indian party to the action resides on the Amantonka Nation's Reservation.

This is an incorrect statement of the tribe's civil adjudicatory jurisdiction, which typically only extends to civil suits in which the defendant is an Indian tribal member, with very limited exceptions made for suits against non-Indians in tribal court, regardless of the identity of the plaintiff. *Montana v. United States,* 450 U.S. 544, 564 (1981).

Additionally, Sec. 107, "Jurisdiction over persons outside the Reservation" purports to extend civil jurisdiction over anyone who "commits an act on the Reservation that causes injury." This is an incorrect statement of the tribe's civil authority which does not hinge on the injurious nature of an on-reservation act, but rather on the identity of the perpetrator and the status of the specific parcel of land on which the act took place. *Id.* at 564-65.

Indians. *Oliphant,* 435 U.S. 191. The Court explained that "from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty." *Id.* at 210. Because non-Indians are not guaranteed such constitutional protections in tribal court, it would be unfair to subject non-Indians to tribal jurisdiction. *Id.* Additionally, in Justice Souter's concurrence in *Nevada v. Hicks,* he emphasized how difficult it is for an outsider to understand tribal law and tribal court proceedings, thus justifying tribes' limited jurisdiction over non-Indians. *Nevada v. Hicks,* 535 U.S. 353, 384 (2001).

Considering these important concerns, Congress carefully expanded tribal jurisdiction in VAWA by conditioning the exercise of that jurisdiction on the fulfillment of several specific procedural safeguards, intended to protect the rights of non-Indian defendants. Criminal defendants must be afforded constitutional guarantees that protect their rights and uphold justice. A denial of a defendant's constitutional rights is "the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. California,* 314 U.S. 219, 236 (1941). Therefore, the requirements of SDVCJ under VAWA must be strictly upheld, and Petitioner's court-appointed attorney did not satisfy those requirements.

## CONCLUSION

For all of the foregoing reasons, we respectfully request that the Court reverse the decision of the U.S. Court of Appeals for the Thirteenth Circuit and grant the petition for writ of habeas corpus.