

2017

Through a Federal Habeas Corpus Glass, Darkly – Who Is Entitled to Effective Assistance of Counsel in Tribal Court Under ICRA and How Will We Know if They Got It?

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**THROUGH A FEDERAL HABEAS CORPUS GLASS,
DARKLY* – WHO IS ENTITLED TO EFFECTIVE
ASSISTANCE OF COUNSEL IN TRIBAL COURT UNDER
ICRA AND HOW WILL WE KNOW IF THEY GOT IT?**

*Jordan Gross***

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* See E. D. HIRSCH JR. ET AL., THE AMERICAN HERITAGE NEW DICTIONARY OF CULTURAL LITERACY 25 (3d ed. 2005) (“To see ‘through a glass’ — a mirror — ‘darkly’ is to have an obscure or imperfect vision of reality. The expression comes from the writings of the Apostle Paul; he explains that we do not now see clearly, but at the end of time, we will do so.”); see also 1 *Corinthians* 13:12 (King James) (“For now we see through a glass, darkly; but then face to face: now I know in part; but then shall I know even as also I am known.”).

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Introduction

The Bill of Rights does not apply to tribal governments. Instead, restraints on tribal power are imposed exclusively by tribal and federal law. Congress enacted the Indian Civil Rights Act of 1968 (“ICRA”) to require tribes to extend specific civil rights guarantees in Indian Country, including enumerated procedural protections to tribal court criminal defendants.¹ ICRA’s criminal procedure requirements, to some extent, mirror those found in the Bill of Rights. But, the criminal procedure required in tribal court under ICRA is not always equivalent to what the U.S. Constitution requires in state and federal court.

In addition to mandating specific procedural protections in tribal court criminal prosecutions, ICRA limits the sentencing authority of tribal courts. As enacted in 1968, ICRA limited tribal courts’ sentencing authority to misdemeanor-type penalties—six months’ imprisonment and a fine of \$500, later raised to one year and \$5,000—even for the most serious tribal offenses.² In 2010 Congress amended ICRA with the Tribal Law and Order Act (“TLOA”).³ The TLOA amendments to ICRA raised tribal courts’ sentencing authority to three years and \$15,000 and explicitly authorized stacking sentences in certain cases, up to a total of nine years.⁴ Congress amended ICRA again when it passed the Violence Against Women Reauthorization Act of 2013 (“VAWA 2013”).⁵ For the first time since Congress began restricting tribal criminal jurisdiction over non-Indians in the late 1700s,⁶ VAWA 2013 authorized tribes to exercise criminal

1. Pub. L. No. 90-284, tit. II, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301-1303 (2012)).

2. *Id.* § 202, 82 Stat. at 77 (current version at 25 U.S.C. § 1302).

3. Pub. L. No. 111-211, tit. II, 124 Stat. 2261 (codified in scattered sections of 25 U.S.C.).

4. *Id.* § 234, 124 Stat. at 2280 (codified at 25 U.S.C. § 1302 (2012)).

5. Pub. L. No. 113-4, 127 Stat. 54 (codified as amended in scattered sections of U.S.C.).

6. At the founding, tribes had plenary authority to punish anyone who violated tribal law on tribal land, including non-Indians. Congress began delimiting tribes’ criminal jurisdiction in 1790, right after the Constitution was ratified. *See infra* Part II. Thus, it is more accurate to describe the TLOA and VAWA 2013 amendments to have affected a restoration of tribes’ organic authority, rather than a grant or extension of such authority.

jurisdiction over some non-Indians who commit specified domestic violence offenses against Indians⁷ in Indian Country.⁸

Tribes seeking to exercise TLOA increased sentencing authority and VAWA 2013 expanded jurisdiction must first provide tribal court criminal defendants with additional specific procedural protections not required under ICRA's default provisions. In both TLOA and VAWA 2013 proceedings, these additional protections include requirements that tribes appoint counsel at public expense to indigent defendants, ensure defendants receive effective assistance of counsel as defined by the federal constitution, provide law-licensed judges, make tribal criminal laws and rules publicly available, and create a record of tribal court proceedings.⁹ In addition, tribal courts seeking to exercise VAWA 2013 jurisdiction must provide defendants an impartial jury, as defined by the federal constitutional standard, and "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."¹⁰

At first blush, the TLOA and VAWA 2013 amendments to ICRA appear to mirror requirements imposed on state and federal courts by the Bill of

7. The term "Indian" has multiple definitions in federal law. This article uses the term "Indian" as it is defined by the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1301(4) (2012) ("'Indian' means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, [the Major Crimes Act] . . ."). Although ICRA relies on the Major Crimes Act ("MCA") in defining "Indian," the MCA does not define that term. Rather, the meaning of "Indian" for purposes of federal criminal jurisdiction under the MCA has been "judicially explicated." *United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015) (en banc) (noting that an element of a MCA offense is proof that defendant has "Indian blood," whether or not that blood tie is to a federally recognized tribe) (citations and quotations marks omitted); *see also* WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 9-10 (5th ed. 2009); U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL § 686 (1997) ("To be considered an Indian, one generally has to have both 'a significant degree of blood and sufficient connection to his tribe to be regarded [by the tribe or the government] as one of its members for criminal jurisdiction purposes. A threshold test, however, is whether the tribe with which affiliation is asserted is a federally acknowledged tribe.'") (citations omitted).

8. VAWA 2013, tit. IX, § 904, 127 Stat. at 120 (codified at 25 U.S.C. § 1304(b)(4)(B) (Westlaw through Pub. L. No. 115-90)).

9. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, § 234(c), 124 Stat. 2261, 2280 (codified at 25 U.S.C. § 1302(c) (2012)); VAWA 2013, § 904, 127 Stat. at 123 (codified at 25 U.S.C. § 1304(f) (2012)).

10. 25 U.S.C. § 1304(d)(4) (2012).

Rights. On closer examination, however, these new procedural requirements contain some significant departures from what the Constitution requires in state and federal court. This includes a more robust right to appointed counsel and different jury composition rights.¹¹ The focus of this article is ICRA's new requirement that tribes provide criminal defendants with the right to effective assistance of counsel whenever a tribe is exercising TLOA enhanced sentencing authority or VAWA 2013 jurisdiction. Tribal court defendants have had an explicit federal statutory right to assistance of counsel since 1968 when Congress enacted ICRA.¹² But prior to the TLOA of 2010 and VAWA 2013 amendments, ICRA did not require tribes to provide indigents with appointed counsel or provide tribal court defendants with the right to effective assistance of counsel.¹³ Not only does ICRA now require tribes to ensure defendants subject to TLOA's enhanced sentencing and VAWA 2013 expanded jurisdiction provisions have the right to effective assistance of counsel, but it also explicitly tethers the substance of that right to the federal constitutional ineffective assistance of counsel standard.¹⁴ This article analyzes this new federal statutory right to effective assistance of counsel commensurate with the U.S. Constitution in tribal court proceedings and explores how that right will be defined and enforced.

11. I have explored some of these points in earlier articles – *VAWA 2013'S Right to Appointed Counsel in Tribal Court Proceedings – A Rising Tide That Lifts All Boats or a Procedural Windfall for Non-Indian Defendants?*, 67 CASE W. RES. L. REV. 379 (2016), and *Let the Jury Fit the Crime: Increasing Native American Jury Pool Representation in Federal Judicial Districts with Indian Country Criminal Jurisdiction*, 77 MONT. L. REV. 281 (2016).

12. 25 U.S.C. § 1302(c)(1) (2012).

13. Compare 25 U.S.C. § 1302(a)(6) (ICRA's 1968 default provision applicable to non-TLOA and non-VAWA cases, providing that “[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person in a criminal proceeding the right . . . at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b)) [sic “c”]” with 25 U.S.C. § 1302(a)(c)(2) and 25 U.S.C. § 1304(d)(2). Tribes, of course, can and do ensure that defendants receive effective assistance of counsel under tribal law and practice. Further, some tribes have a long history of providing or allowing lay advocates to assist litigants, a practice that dates back to a period in which federal law prohibited licensed attorneys from appearing in tribal court. See *infra* Section II.A.1. Tribal court criminal defendants, however, did not have a federal statutory right to effective assistance of counsel until Congress provided for it in the Tribal Law and Order Act in 2010. See Tribal Law and Order Act of 2010, tit. II, § 234(c), 124 Stat. at 2280 (codified at 25 U.S.C. § 1302(c) (2012)).

14. 25 U.S.C. § 1302(c)(1) (2012) (requiring tribes to “provide” criminal defendants subject to the TLOA and VAWA 2013 amendments to ICRA with “effective assistance of counsel at least equal to that guaranteed by the United States Constitution”).

The Supreme Court defined the federal constitutional right to effective assistance of counsel for state and federal courts over thirty years ago in *Strickland v. Washington*.¹⁵ *Strickland*'s parameters have been fleshed out almost exclusively through federal court habeas review of state court convictions.¹⁶ Ineffective assistance of counsel claims brought by state court prisoners in federal court are subject to two layers of deference. The first is required by title 28, the federal habeas corpus statute authorizing federal court review of state court conviction.¹⁷ Title 28 limits federal court jurisdiction over state prisoner claims to challenges brought under federal law and precludes federal court review of any state prisoner claim that was not first presented to the state courts.¹⁸ And, importantly, Title 28 further requires federal courts to extend considerable deference to previous determinations made by state courts in resolving state prisoners' claims.¹⁹ The second layer of deference is built into *Strickland*'s two-pronged ineffective assistance of counsel test, which requires courts to determine (1) whether counsel's performance was deficient and, if so, (2) whether counsel's deficient performance prejudiced the defendant.²⁰ Whether counsel's performance was deficient turns on whether her conduct and choices were objectively reasonable under the circumstances.²¹ Under *Strickland*, this "objectively reasonable" inquiry requires almost complete deference to any choice by counsel that can fairly be characterized as tactical or strategic.²² The result is that federal courts considering state prisoner *Strickland* claims under Title 28 must employ a "double deference" review.²³

Like state prisoners, tribal prisoners can seek post-conviction review of their convictions in federal court through habeas corpus petitions. As noted,

15. 466 U.S. 668 (1984).

16. As discussed, *infra*, this dynamic is a function of the nature of the claim and the respective number of prosecutions brought in state and federal court. Reviewing courts (whether state or federal) rarely entertain ineffective assistance of counsel claims on direct appeal because resolution of those claims almost always requires development of facts outside the trial court record. The vast majority of criminal prosecutions in the U.S. occur at the state, not the federal, level. As a result, most prisoners in the United States are incarcerated by the states, not the federal government.

17. 28 U.S.C. § 2254 (2012).

18. *Id.*

19. *Id.* § 2254(e)(1).

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

21. *Id.* at 688.

22. *Id.*

23. *Id.*

there was no explicit federal statutory right to effective assistance of counsel in tribal court before TLOA was enacted. TLOA imported *Strickland's* constitutional effective assistance of counsel standard into ICRA.²⁴ In doing so, tribal court convictions were made subject to Sixth Amendment-style ineffective assistance of counsel challenges in federal court through habeas review.²⁵ Although tribal prisoners, like state prisoners, have a statutory right to federal post-conviction review through a writ of habeas corpus, the law governing petitions brought by tribal prisoners is very different from that governing petitions brought by state prisoners. Tribal prisoner petitions are authorized under ICRA, not Title 28, the federal habeas corpus statute.²⁶ As habeas review of tribal convictions is authorized by a different statute and informed by a different history, federal review of tribal convictions has a separate and unique federal jurisprudence. Further, compared to Title 28's detailed statutory scheme governing federal habeas review of state prisoners' claims, ICRA's habeas provision is startlingly bare-boned. It consists of a single sentence and it contains none of the procedural or substantive barriers to federal court review of state court convictions found in Title 28.²⁷

It is this habeas filter, or more specifically the level of deference federal courts must extend to the dispositions of state and tribal courts, that delineates when the denial of a federal right by states or tribes is federally intolerable. This article explores questions that will likely arise when federal courts encounter tribal prisoners' ineffective assistance of counsel claims now that they are explicitly cognizable in federal habeas review. Specifically, it asks whether federal courts will subject tribal prisoner ineffective assistance of counsel claims to the same double deference review they are required to apply to state prisoner *Strickland* claims, or whether federal courts will be more solicitous of tribal prisoners' ineffective assistance of counsel claims now that non-Indians are subject to prosecution in tribal court under VAWA 2013.

24. 25 U.S.C. § 1302 (2012).

25. As discussed, *infra*, before the Supreme Court incorporated the Sixth Amendment right to counsel into the Fourteenth Amendment and extended Sixth Amendment protections to the states, state court right to counsel violations were cognizable as Fourteenth Amendment due process deprivations. The significance of linking ICRA's right to effective assistance of counsel to *Strickland's* Sixth Amendment standard is that tribal prisoners' claims would now appear to be governed exclusively by the Sixth Amendment standard as articulated in *Strickland*, and not subject to any due process analysis.

26. See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218-19 (codified at 28 U.S.C. § 2254(b)(2) (2012)).

27. 25 U.S.C. § 1303 (2012).

Part I of this article is a history and analysis of the federal constitutional right to effective assistance of counsel. It explains how federal ineffective assistance of counsel jurisprudence has developed almost exclusively in the context of federal habeas review of state court convictions and rendered most federal ineffective assistance of counsel claims unviable. Part II explains the right to counsel in tribal court and the habeas corpus remedy available to tribal prisoners under ICRA. Part III identifies issues that will need to be addressed now that Congress has created a statutory ineffective assistance of counsel claim for tribal prisoners tied to the federal constitutional standard and subject to federal habeas review under ICRA. I conclude that by creating a right to effective assistance of counsel for TLOA and VAWA 2013 tribal court defendants and specifying that it must be “at least equal to that guaranteed by the U.S. Constitution,” Congress has unequivocally bound federal court habeas review of tribal prisoners’ ineffective assistance of counsel claims to the *Strickland* analysis.²⁸ That change, I submit, will make most tribal prisoner ineffective assistance of counsel claims a foregone conclusion, as is the case for *Strickland* claims brought by state prisoners in federal habeas review. To resolve any ambiguities on this point, I propose that Congress take the next logical step and require federal courts to extend tribal court dispositions of tribal prisoners’ claims the same high level of deference federal courts are currently required to extend to state court determinations on habeas review. Absent this safeguard, ICRA’s new right to effective assistance of counsel can easily and unwittingly become a vehicle for unwarranted heightened scrutiny and micromanagement of tribal court proceedings by federal courts.

I. Constitutional Regulation of Defense Counsel in State and Federal Court

A. An Evolving Standard – From Due Process “Farce and Mockery” to Sixth Amendment Effectiveness

The Constitution guarantees criminal defendants the right to assistance of counsel²⁹ and protects from deprivations of life, liberty, and property

28. 25 U.S.C. § 1304(c)(1) (2012).

29. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic].”). The Sixth Amendment right to counsel guarantee, like other parts of the Bill of Rights, was not understood to extend to the states until the Court incorporated it into the Fourteenth Amendment. The Court first recognized the right to counsel protected by the Sixth Amendment as a fundamental right protected by the Fourteenth Amendment in *Gideon v. Wainwright*, 372

without due process of law.³⁰ The Constitution says nothing about the *quality* of the assistance of counsel to which criminal defendants are entitled or about the role of defense counsel in guarding against deprivations of due process in criminal prosecutions. Federal courts, however, have long held that the Constitution requires more than just a “warm body” to accompany a criminal defendant to court.³¹ Rather, it requires that criminal defendants receive some level of competent assistance to protect their rights.³²

Under contemporary jurisprudence, a criminal defendant’s right to effective assistance of counsel is understood to derive from the Sixth

U.S. 335 (1963). *Gideon*, of course, held that the Constitution requires appointment of counsel at public expense for indigent defendants charged with serious offenses. *Id.* at 339.

30. U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV (applying the same prohibition to the states).

31. Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 16 (1986) (“Where the right to counsel existed . . . it clearly included more than the privilege of having a warm body at one’s side. Early cases . . . noted the imperative of making an ‘effective’ rather than merely ‘formal’ appointment.”) (citing *Powell v. Alabama*, 287 U.S. 45, 58 (1932) (“The record indicates that the appearance [of counsel] was rather pro forma than zealous and active Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense.”); *Avery v. Alabama*, 308 U.S. 444, 446 (1940) (“The Constitution’s guarantee of assistance of counsel cannot be satisfied by mere formal appointment.”)).

32. *Id.* (citing *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980)). Defense counsel technically is not a state actor, particularly if counsel is retained and not appointed by the court. But because courts historically linked the right to competent counsel to a defendant’s due process right to a fair trial, something courts and prosecutors (who *are* state actors) are bound to protect, the Court has rejected the notion that there is any constitutional significance between retained and appointed counsel in regulating defense counsel conduct. *See Cuyler*, 446 U.S. at 344-45 (“A proper respect for the Sixth Amendment disarms [the] contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant’s entitlement to constitutional protection. Since the State’s conduct of a criminal trial itself implicates the State in the defendant’s conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers.”). This is consistent with the Court’s application of constitutional jury selection jurisprudence to defense counsel—although defense counsel is not a state actor, she is nonetheless subject to regulation in jury selection practice under the *Batson* line of cases. *See Georgia v. McCollum*, 505 U.S. 42 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (state action requirement for *Batson* Equal Protection claim can be based in judicial system’s close supervision of jury selection).

Amendment right to assistance of counsel clause.³³ It is a right that the Court has extended to state court defendants by incorporation into the Fourteenth Amendment.³⁴ Earlier, however, federal courts identified due process guarantees, not the Sixth Amendment, as the constitutional basis for regulating defense counsel's performance in both state and federal prosecutions.³⁵ Federal courts' due process inquiry into defense counsel's performance was extremely deferential, denying relief unless the defendant's trial resulted in a "farce and mockery" of justice.³⁶

It is difficult to pinpoint just when the center of gravity of the constitutional standard for defense counsel performance shifted from due process to the Sixth Amendment. The farce and mockery standard was the prevailing test in federal courts in 1970, when the Supreme Court decided *McMann v. Richardson*.³⁷ In *McMann*, the Court explicitly recognized that the constitutional "right to counsel is the right to the effective assistance of counsel."³⁸ This passage is frequently cited, including recently by the Supreme Court, for the proposition that the Sixth Amendment assistance of counsel guarantee encompasses the right to effective assistance of counsel.³⁹ But whether the right to counsel encompasses some basic level of competence was not at issue in *McMann*, nor did it link this right to the Sixth Amendment, making this observation read more like an off-handed reference to a long-standing obvious truth rather than a holding.

33. U.S. CONST. amend. XI.

34. U.S. CONST. amend. XIV. Even before the Court incorporated the Sixth Amendment right to counsel guarantee into the Fourteenth Amendment, state court defendants were understood to have a federal due process right to meaningful assistance of counsel under the Fourteenth Amendment. *See* *Reece v. Georgia*, 350 U.S. 85, 90 (1955) ("The effective assistance of counsel in such a case is a constitutional requirement of due process which no member of the Union may disregard."); *see also* *Glasser v. United States*, 315 U.S. 60, 69-70 (1942); *Powell v. Alabama*, 287 U.S. 45 (1932).

35. *See, e.g.*, *Diggs v. Welch*, 148 F.2d 667, 668-69 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945) (holding that the Sixth Amendment does not guarantee effective counsel, and that the defendant's only source for relief is the due process fair trial guarantee).

36. *Id.*; *see* *Trapnell v. United States*, 725 F.2d 149, 151 (2d Cir. 1983). The *Diggs* court stated that a due process claim would only lie "where the circumstances surrounding the trial shocked the conscience of the court and made the proceedings a farce and a mockery of justice." *Diggs*, 148 F.2d at 670.

37. 397 U.S. 759 (1970).

38. *Id.* at 771 n.14 (emphasis added).

39. In the recent case of *Buck v. Davis*, for example, the Court stated: "The Sixth Amendment right to counsel 'is the right to the effective assistance of counsel.'" 137 S. Ct. 759, 775 (2017) (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting in turn *McMann*, 397 U.S. at 771 n.14)).

McMann involved a guilty plea. It cites *Gideon v. Wainwright*, a case brought up on a state habeas petition seven years earlier and decided squarely under the Sixth Amendment, for the proposition that a “defendant pleading guilty to a felony charge has a federal right to the assistance of counsel.”⁴⁰ However, the authorities the *McMann* Court cites in support of its statement that defendants are entitled to *effective* assistance of counsel are due process, rather than Sixth Amendment, cases.⁴¹ Thus, although the proposition that the Sixth Amendment “assistance of counsel” guarantee requires some basic level of competence is accepted wisdom, it appears that the Court has never squarely addressed this precise issue under the Sixth Amendment. It certainly did not address it as a Sixth Amendment issue in *McMann*, because the source of the right simply was not at issue there.⁴² Nor did the *McMann* Court address the standard by which federal courts should evaluate whether defense counsel had rendered constitutionally deficient assistance. In fact, it explicitly demurred on this issue.⁴³

In *Strickland*, decided in 1984, the Court unequivocally grounded the constitutional inquiry into the quality of defense counsel’s performance in the Sixth Amendment.⁴⁴ It also picked up the question the *McMann* Court left unanswered: what is the constitutional standard for resolving a Sixth Amendment claim of ineffective assistance of counsel?⁴⁵ Before *Strickland*, lower courts struggled to discern the Court’s authority for the federal constitutional effective assistance of counsel guarantee and to articulate the standard by which federal courts were to evaluate claims of defense counsel

40. *McMann*, 397 U.S. at 771 n.14.

41. See *Reece v. Georgia*, 350 U.S. 85, 90 (1955); *Glasser v. United States*, 315 U.S. 60, 69-70 (1942); *Avery v. Alabama*, 308 U.S. 444, 446 (1940); *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

42. *McMann*, 397 U.S. at 770-71. Similarly, in *Cuyler v. Sullivan*, the Court said that “[a] guilty plea is open to attack on the ground that counsel did not provide defendant with ‘reasonably competent advice.’” 446 U.S. 335, 344 (1980); see also *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (holding a defendant may attack a plea by showing that counsel’s advice did not meet the *McMann* standards).

43. *McMann*, 397 U.S. at 771 (“On the one hand, uncertainty is inherent in predicting court decisions; but on the other hand defendants facing felony charges are entitled to the effective assistance of competent counsel. Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.”).

44. *Strickland*, 466 U.S. at 685-86.

45. *Id.* at 687-88.

incompetence.⁴⁶ *Trapnell v. United States*,⁴⁷ decided a year before *Strickland* in 1983, is a good example of how the lower federal courts resolved these issues in the void created by the Court's silence on this point. In *Trapnell*, the Second Circuit Court of Appeals concluded, notwithstanding the lack of direct authority from the Supreme Court, that the focus for questions concerning defense counsel competence had shifted from due process to the Sixth Amendment.⁴⁸ This shift, the Second Circuit concluded, required it to abandon the due process "farce and mockery" standard and adopt a reasonable competence standard, which it concluded better aligned with the Supreme Court's post-*Gideon* Sixth Amendment jurisprudence.⁴⁹

46. Berger, *supra* note 31, at 67-68 ("In contrast to the Supreme Court, which had said little or nothing of help in defining a constitutional floor for attorney conduct—in terms of either specific representational tasks or an overall level of tolerable performance—the lower courts, both federal and state, had had to deal with the gamut of incompetence claims and thus been forced to articulate standards for judging these multifold client complaints. Under traditional tests of competence, only the most egregious errors by defense counsel could provide the basis for upsetting a conviction. . . . After-the-fact constitutional appraisal of attorney conduct rested solely on the vague, residual due process right to a fair trial. A defendant challenging counsel's performance could prevail only if the representation had been so shoddy as to constitute a 'farce and a mockery of justice,' a miscarriage so blatant that the judge and the prosecutor had a duty to observe and correct it.") (footnotes omitted) (quoting *Diggs v. Welch*, 148 F.2d 667, 669 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945)).

47. 725 F.2d 149, 154 (2d Cir. 1983).

48. *Id.* at 154-55 ("[A]lthough the Court has never directly addressed the question of whether 'reasonably competent assistance' at trial is constitutionally required, both the holding in [*Tollett v. Henderson*, 411 U.S. 258, 267 (1973)] and the dictum in [*Engle v. Isaac*, 456 U.S. 107, 134 (1982)] clearly suggest that this standard is consistent with, and may in fact be required by, the Court's interpretation of the Sixth Amendment.").

49. *Id.* at 155. In *Trapnell*, the court noted that the farce and mockery standard "first formulated eighteen years before *Gideon*[] was based on the due process clause of the Fifth Amendment." *Id.* at 154. The Sixth Amendment, further, was viewed narrowly by the court that first adopted the farce and mockery standard and had been interpreted to be "concerned only with assuring the presence of counsel, leaving the performance of counsel to be tested against the more general 'fair trial' standard of the Fifth Amendment's due process clause." *Id.* (citing *Diggs*, 148 F.2d at 668-69). "More recently," the court continued, "the Sixth Amendment has become the source not only of the right to counsel but also of the standard to be used in determining whether the assistance of counsel is 'effective.'" *Id.* (citing *United States v. DeCoster*, 487 F.2d 1197, 1202 (D.C. Cir. 1973)).

B. Strickland v. Washington – The Court Settles on a Sixth Amendment Standard

In 1984, fourteen years after the Court in *McMann* said that the right to assistance of counsel includes the right to effective assistance of counsel and asserted that courts have an affirmative obligation to police this right, it decided *Strickland v. Washington*.⁵⁰ *Strickland* involved a federal post-conviction challenge to a state death sentence based on defense counsel's failure to adequately investigate and develop mitigating evidence that might have spared his client the death penalty.⁵¹ In *Strickland*, the Court considered the question it declined to address in *McMann*—what standard federal courts should use to evaluate claims of a denial of assistance of counsel based on defense counsel incompetence.⁵² Now over thirty years old, the *Strickland* standard continues to govern federal constitutional ineffective assistance of counsel claims brought by state and federal petitioners.

In 1976, David Washington and two accomplices went on a ten-day crime spree in Florida that included three stabbing murders, torture, kidnapping, assaults, attempted murders, attempted extortion, and theft.⁵³ Washington confessed to his involvement and pleaded guilty to multiple offenses, including three capital murder charges.⁵⁴ At his plea colloquy, Washington told the trial court that at the time of the crimes he was under extreme stress because he was unable to support his family.⁵⁵ The trial judge told Washington that he had “a great deal of respect for people who are willing to step forward and admit their responsibility.”⁵⁶ As part of the

50. 466 U.S. 668 (1984).

51. *Id.* at 678. Washington raised numerous issues in the lower state and federal courts. *Id.* By the time he got to the Supreme Court, however, this was the focus of his challenge. *Id.*

52. *Id.* at 683 (“The petition presents a type of Sixth Amendment claim that this Court has not previously considered in any generality. The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused. With the exception of *Cuyler v. Sullivan*, however, which involved a claim that counsel's assistance was rendered ineffective by a conflict of interest, the Court has never directly and fully addressed a claim of ‘actual ineffectiveness’”). (citing *United States v. Cronin*, 466 U.S. 648 (1984); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *United States v. Agurs*, 427 U.S. 97, 102 n.5 (1976)) (citations omitted).

53. *Id.* at 671-72.

54. *Id.* at 672.

55. *Id.*

56. *Id.*

sentencing investigation, defense counsel interviewed Washington about his background, and spoke with Washington's wife and mother.⁵⁷ Counsel did not seek character witnesses for Washington or obtain a psychiatric examination.⁵⁸ Based on counsel's judgment, he considered Washington's best chance to avoid the death penalty to be appealing to the trial court, who believed it was important for defendants to accept responsibility for their crimes, rather than argue for mitigation.⁵⁹ Counsel forewent a psychiatric examination to prevent the prosecution from cross-examining Washington or from introducing its own psychiatric evaluation.⁶⁰ In addition, counsel did not request a presentence report because it would have undermined Washington's claim that he had no significant criminal record.⁶¹ Following a hearing at which defense counsel presented no mitigating evidence, the trial judge sentenced Washington to death on the three capital murder counts and prison time for the other offenses.⁶² The Florida Supreme Court affirmed Washington's convictions and sentence.⁶³ He then sought post-conviction relief in state court arguing that he had been denied effective assistance of counsel at the sentencing hearing.⁶⁴ The trial court denied Washington's petition for post-conviction relief and the Florida Supreme Court affirmed that denial.⁶⁵

Washington filed a federal habeas petition forwarding a number of claims, including ineffective assistance of counsel.⁶⁶ The federal district court denied relief.⁶⁷ It concluded that although trial counsel failed to adequately investigate evidence of mitigation, Washington had not been prejudiced by counsel's decision.⁶⁸ The court of appeals⁶⁹ reversed the district court and remanded for further proceedings.⁷⁰ Florida obtained en

57. *Id.* at 672-73.

58. *Id.* at 673.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 675.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 675, 678.

67. *Id.* at 679.

68. *Id.* at 678-89.

69. While Washington's appeal was pending, Congress split the Fifth Circuit and created the new Eleventh Circuit; the panel decision in his case was issued by the Fifth Circuit, but his en banc petition was heard by the Eleventh Circuit. *Id.* at 679.

70. *Washington v. Strickland*, 693 F.2d 1243, 1250 (5th Cir. 1982) (Vance, J.). On the issue of trial counsel's competence, the majority of the panel remanded Washington's

banc review.⁷¹ The en banc court reversed the panel, rejected the panel's ineffective assistance of counsel standard, and set out a different standard to govern Sixth Amendment ineffective assistance of counsel claims in the newly created Eleventh Circuit.⁷² The en banc court remanded Washington's petition to the district court with directions to apply this standard to his claim.⁷³

As discussed, the Supreme Court had recognized in *McMann* (but not directly held) that effective assistance of counsel is part of the assistance of counsel guaranteed by the Sixth Amendment, and held in *Gideon* that the Sixth Amendment right to assistance of counsel is incorporated into the Fourteenth Amendment.⁷⁴ As demonstrated by the inconsistent disposition of Washington's claim at the federal level, there was considerable disagreement among the lower courts about the proper standard for evaluating claims of ineffective assistance of counsel at trial. The Supreme Court granted certiorari in *Strickland* to address this unsettled area of law.⁷⁵

petition with instructions to the district court to determine whether Washington's trial counsel was ineffective, without regard to the prejudicial effect of counsel's errors. If the district court found counsel was ineffective, it was instructed to grant Washington relief if he showed that but for counsel's ineffectiveness, the state court proceedings (but not necessarily the outcome of the proceedings, i.e., the death sentence) "would have been altered in a way helpful to [Washington]." *Id.* (internal quotation mark omitted).

71. *Strickland*, 466 U.S. at 679.

72. *Strickland*, 693 F.2d at 1250 (Vance, J.). The en banc court adopted the following standard:

We determine that under some circumstances when a strategic choice by counsel makes unnecessary a certain line of investigation, it is not required that effective counsel pursue that investigation. We also determine that a habeas petitioner must show that his counsel's ineffectiveness caused "actual and substantial disadvantage" to the conduct of his defense.

Id.

73. *Id.*

74. *Strickland*, 466 U.S. at 684-85, 687.

75. *See id.* at 671 ("This case requires us to consider the proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence to be set aside because counsel's assistance at the trial or sentencing was ineffective."); *id.* at 683-84 ("In assessing attorney performance, all the Federal Courts of Appeals and all but a few state courts have now adopted the 'reasonably effective assistance' standard in one formulation or another. Yet this Court has not had occasion squarely to decide whether that is the proper standard. With respect to the prejudice that a defendant must show from deficient attorney performance, the lower courts have adopted tests that purport to differ in more than formulation. In particular, the Court of Appeals in this case . . . adopted . . . a standard that requires a showing that specified deficient conduct of counsel was likely to have affected the outcome of the proceeding. For these reasons, we granted certiorari to

How the *Strickland* Court characterizes the role of counsel and the purpose of the Sixth Amendment is key to understanding the standard it settled on. First, it identified the purpose of the right to counsel as necessary to protecting the “fundamental right to a fair trial.”⁷⁶ It even went a step further by defining a “fair trial” as one in which “evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.”⁷⁷ Second, it characterized the role of counsel as “ensur[ing] that the adversarial testing process works to produce a just result under the standards governing decision.”⁷⁸ To show a denial of a right to counsel under this construct requires showing “that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.”⁷⁹ On this platform, the Court constructed a two-part standard a petitioner⁸⁰ must meet to show he was deprived of his federal right to counsel based on a claim of

consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel.”) (citations omitted). In framing the issue, the Court distinguished between trials and death penalty sentencing proceedings, on one hand, and non-capital sentencing proceedings, on the other, and specifically declined to address the standard for defense counsel outside the trial and death penalty context. *Id.* at 686-87 (“The same principle applies to a capital sentencing proceeding such as that provided by Florida law. We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance. A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision, that counsel’s role in the proceeding is comparable to counsel’s role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision. For purposes of describing counsel’s duties, therefore, Florida’s capital sentencing proceeding need not be distinguished from an ordinary trial.”) (citations omitted).

76. *Id.* at 684.

77. *Id.* at 685.

78. *Id.* at 687; *see also id.* at 690 (“In making [a] determination [about counsel’s effectiveness], the court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.”).

79. *Id.*

80. A *Strickland* claim can be raised by a defendant/appellant on direct review, or by a petitioner on collateral review. For clarity, I have attempted to use the term “petitioner” throughout to designate the criminal defense client who is alleging ineffective assistance of counsel at either juncture. I also use the term “prisoner” to designate an individual seeking habeas corpus relief, which reflects the requirement that a habeas petitioner be in custody to seek relief. *See infra* note 126 and accompanying text.

ineffectiveness.⁸¹ First, the petitioner needs to show that his attorney's performance was deficient.⁸² Second, the petitioner must show counsel's deficient performance prejudiced him.⁸³

I. Strickland Deficient Performance

Deficient performance under *Strickland* means counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment."⁸⁴ To evaluate counsel's performance, *Strickland* asks whether counsel's conduct fell "below an objective standard of reasonableness"⁸⁵ as measured against the prevailing practice in the

81. Most states have adopted the *Strickland* standard to evaluate ineffective assistance of counsel claims brought under their respective state constitutions. Gregory J. Sarno, Annotation, *Modern Status of Rules and Standards in State Courts as to Adequacy of Defense Counsel's Representation of Criminal Client*, 2 A.L.R. 4th 27 (1980). *Strickland*, therefore, has become the coin of the realm for evaluating ineffective assistance of counsel claims under both state and federal constitutions. States, of course, can and do offer defendants broader remedies to address defense counsel incompetence under their own laws and constitutions. *See, e.g.*, *State v. Aplaca*, 837 P.2d 1298, 1305 (Haw. 1992) (holding that a defendant raising ineffective assistance of counsel claim under Hawaii State Constitution has burden of establishing 1) specific errors or omissions occurred reflecting counsel's lack of skill, judgment, or diligence, and 2) the errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense); *id.* at 1305 n.2 ("[T]he test for measuring ineffective assistance of counsel [under the state constitution] . . . differs from the federal standard enunciated by the Supreme Court in *Strickland v. Washington*. Because the *Strickland* test has been criticized as being unduly difficult for a defendant to meet, we continue to follow [this] standard . . . under Hawaii's Constitution, defendants are clearly afforded greater protection of their right to effective assistance of counsel."); *see also* Jan Lucas, *A Cumulative Approach to Ineffective Assistance: New York's Requirement That Counsel's Cumulative Efforts Amount to Meaningful Representation: Supreme Court of New York Appellate Division, Second Department*, 28 *TOURO L. REV.* 1073, 1083-86 (2012) (stating that New York, Alaska, Oregon, Hawaii, and Massachusetts have adopted an ineffective assistance of counsel standard with a prejudice requirement that is easier to meet than *Strickland*).

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

83. *Id.*

84. *Id.*

85. *Id.* at 688. Before *Strickland*, lower courts were using different standards to determine whether defense counsel's performance had deprived the client of constitutionally effective assistance of counsel, including the extremely forgiving "farce-and-mockery" standard and different versions of a "reasonable competence" standard. *Id.* at 714 (Marshall, J., dissenting). It is a fair question, however, whether there was an appreciable difference in the results obtained under the different standards. *Id.* at 697; *cf. Trapnell v. United States*, 725 F.2d 149, 153 (2d Cir. 1983) (stating that in several years of applying "farce and mockery" standard along with "reasonable competence" standard, court "never found that

community.⁸⁶ Cognizant that constitutionalizing a professional performance standard meant it was placing defense counsel conduct under judicial scrutiny, the Court also mandated that reviewing courts extend defense counsel decisions “wide latitude” to make reasonable “tactical decisions.”⁸⁷ Otherwise, the specter of reviewing courts later labeling defense counsel conduct as ineffective in hindsight would “distract counsel from the overriding mission of vigorous advocacy of the defendant’s cause.”⁸⁸

To address this concern, *Strickland*’s deficient performance standard distinguishes between strategic or tactical decisions, on one hand, and non-strategic choices, on the other.⁸⁹ Where an attorney’s strategic decision or choice is at issue on review, courts are required to extend deference to that choice and will treat it as presumptively competent.⁹⁰ In this way, the *Strickland* test itself insulates most attorney decisions from judicial review by cloaking them with a presumption of reasonableness if those decisions

the result of a case hinged on the choice of a particular standard”); *see also* Berger, *supra* note 31, at 67-71. “[I]t is doubtful that semantic substitution of the ‘reasonable’ lawyer for the lawyer who barely managed to avoid reducing the trial to a farce and mockery accomplished very much in the way of practical reform.” *Id.* at 70.

86. *Strickland*, 466 U.S. at 688. Although the Rules of Professional Conduct may inform analysis of post-conviction ineffective assistance of counsel claims, they are not dispositive, or even binding. *See* 3 WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* § 11.10(b) (4th ed. 2015) (“In *Nix v. Whiteside*, the Court reaffirmed that what constitutes reasonably effective assistance is not necessarily controlled by standard patterns of practice. The Court there acknowledged that an attorney’s performance could conceivably meet the reasonably competent attorney standard even where the attorney breached an ‘ethical standard of professional responsibility.’” (footnotes omitted)); *United States v. Nickerson*, 556 F.3d 1014, 1019 (9th Cir. 2009) (“[W]e hold that an attorney’s violation of a rule of ethics or professional conduct before trial does not constitute per se ineffective assistance of counsel.”).

87. *Strickland*, 466 U.S. at 690 (concluding that harsh scrutiny “would encourage the proliferation of ineffective [assistance claims]” and “dampen the ardor and impair the independence of defense counsel”).

88. *Id.* at 689.

89. An example of a strategic choice might be the decision not to call a witness or cross examine a government witness at trial. *United States v. Miller*, 643 F.2d 713, 714 (10th Cir. 1981) (“Whether to call a particular witness is a tactical decision and, thus, a ‘matter of discretion’ for trial counsel.”) (quoting *United States v. Dingle*, 546 F.2d 1378, 1385 (10th Cir. 1976)); *see, e.g.*, *United States v. Snyder*, 787 F.2d 1429, 1432-33 (10th Cir. 1986) (stating that the decision not to cross examine a government witness at trial is a strategic choice); *see also* *United States v. Glick*, 710 F.2d 639, 644 (10th Cir. 1983) (stating that the selection of questions is a matter of “strategic choice”). Non-strategic choices would include conduct that breaches the fiduciary duty to the client, such as an unwaived or undisclosed conflict of interest. *See infra* note 110 and accompanying text.

90. *Strickland*, 466 U.S. at 689.

are classified as strategic or tactical in nature. As a practical matter, this deferential standard makes any attorney decision that can be labeled strategic or tactical virtually unreviewable.⁹¹

Applying the test to Washington's case, the Court concluded that counsel did not perform deficiently and that Washington was not prejudiced.⁹² Counsel's decision to forgo developing mitigating evidence, the Court found, was a reasonable strategic decision in light of the seriousness of Washington's crimes, counsel's conversations with Washington, and counsel's judgment that the trial court would look more favorably on Washington at sentencing if Washington expressed remorse and took responsibility for his actions.⁹³ In light of these factors, the majority found no reasonable probability that the trial court would have sentenced Washington to life in prison instead of death.⁹⁴ Washington, therefore, was denied relief from his death sentence without further review.⁹⁵

In dissent, Justice Marshall (presciently) objected that the majority's performance standard was "so malleable that, in practice, it [would] either have no grip at all or [would] yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts."⁹⁶ Justice Marshall also challenged the notion that defense counsel was entitled to the wide latitude granted by the Court's standard. Much of criminal counsel's work, he argued, such as trial preparation, seeking bail, consulting with the client, making objections and filing a notice of appeal "could profitably be made the subject of uniform standards."⁹⁷

Like any standard focused on reasonableness-under-the-circumstances, as opposed to a bright-line test, the *Strickland* inquiry is necessarily fact-

91. There are good reasons for this standard, as explained in *Strickland*. It prevents reviewing courts from micro-managing lawyer conduct in hindsight and it avoids constitutionalizing a code of professional conduct. On the other hand, of course, a highly deferential standard insulates bad lawyering from redress by clients and courts even where, as in Washington's case, a prisoner's life hangs in the balance.

92. *Strickland*, 466 U.S. at 700.

93. *Id.* at 698-700.

94. *Id.* at 700.

95. *Id.* at 700-01.

96. *Id.* at 707-08. What, Justice Marshall asked, does "reasonable" mean? Is defense counsel's performance judged by reference to a reasonable paid attorney or a reasonable appointed one? *See id.* at 708 ("[A] person of means, by selecting a lawyer and paying him enough to ensure he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case.").

97. *Id.* at 709.

specific. This makes it hard to generalize about what lawyer missteps will be considered constitutionally deficient on review. In *Strickland*, the Court did identify some basic professional duties any lawyer owes his client, such as providing assistance and undivided loyalty.⁹⁸ In a criminal case, the Court added, counsel is required to advocate for the defendant's interest, consult with him, and keep him informed of important developments in his case.⁹⁹ But the Court specifically declined to create a "checklist" for evaluating counsel's performance because of the complexity and variety of issues that will confront defense counsel and the fact that there is a "range of legitimate decisions regarding how best to represent a criminal defendant."¹⁰⁰ Further, since it is a two-part conjunctive test that places the burden on the petitioner, courts can dispose of the claim by way of whichever prong is easier to resolve, which the Supreme Court invited lower courts to do.¹⁰¹ This has led to a lack of development of the law on the *Strickland* performance prong.¹⁰²

2. *Strickland Prejudice*

In addition to establishing counsel's deficient performance, *Strickland* requires a petitioner to show that counsel's deficient performance prejudiced him. Under *Strickland*, prejudice is measured by whether, but for counsel's unprofessional errors, "there is a reasonable probability that . . . the result of the proceeding would have been different."¹⁰³ Under this standard, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome."¹⁰⁴ *Strickland* is a "totality of the

98. *Id.* at 688.

99. *See* *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (identifying a duty to conduct a reasonable investigation in criminal cases) ("Because that testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies, we noted that 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" (quoting *Strickland*, 466 U.S. at 691).

100. *Strickland*, 466 U.S. at 688-89.

101. *Id.* at 670 ("A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.").

102. Jenny Roberts, *Proving Prejudice, Post-Padilla*, 54 *How. L.J.* 693, 711 (2011) ("If courts never get to the attorney error analysis, then constitutional norms of unacceptable attorney practice will not develop.").

103. *Strickland*, 466 U.S. at 694.

104. *Id.*; *see id.* at 714 (explaining that before *Strickland*, lower courts developed and adopted a variety of approaches for determining the level of prejudice required to receive a

evidence” standard and it incorporates presumptions against which defense counsel’s performance will be measured, including a presumption that the proceedings were conducted with regularity and fairness.¹⁰⁵

As noted, Sixth Amendment jurisprudence distinguishes between two broad categories of right to counsel violations—one where the denial results from state action (by the trial court or the prosecution), the other where the denial results from the conduct of defense counsel. For violations in the first category, such as when the state either actually or constructively denies a defendant assistance of counsel or interferes with counsel’s assistance, prejudice will be presumed.¹⁰⁶ Like the clear error standard of review, the Court has reasoned that prejudice under these circumstances is “so likely that case-by-case inquiry into prejudice is not worth the cost.”¹⁰⁷ Furthermore, because these violations are easy to identify and the state is responsible for them, they are denials that are “easy for the government to prevent.”¹⁰⁸

In the other category, deprivations of the Sixth Amendment right to assistance of counsel caused by counsel’s performance (*Strickland*’s concern), the Court has identified limited instances in which prejudice will be presumed. This includes representation by a defense counsel with an actual conflict of interest.¹⁰⁹ But even where defense counsel has a conflict

new trial or new sentencing hearing, ranging from a demanding “outcome-determinative” test to an automatic reversal rule regardless of injury). *Strickland* struck a balance by adopting a prejudice standard that is less demanding than the outcome-determinative test, but that still imposes a high bar for petitioners. *Id.* at 697. (“With regard to the prejudice inquiry, only the strict outcome-determinative test, among the standards articulated in the lower courts, imposes a heavier burden on defendants than the tests laid down today.”).

105. *Id.* at 694-95 (“In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, ‘nullification,’ and the like.”).

106. See *United States v. Cronin*, 466 U.S. 648, 659 (1984).

107. *Strickland*, 466 U.S. at 692.

108. *Id.*

109. *Id.* (citing *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980)) (“In *Cuyler v. Sullivan*, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel’s duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, it is reasonable for the criminal justice system to maintain a

of interest, the Court has not adopted a per se rule as it has done for the other category of right to counsel violations. Rather, the Court has adopted a “more limited . . . presumption of prejudice” under which prejudice is presumed only if counsel “actively represented conflicting interests” and “an actual conflict of interest adversely affected [the] lawyer’s performance.”¹¹⁰ Other than conflicts of interest meeting this standard, a court will presume prejudice only where defense counsel’s failure to subject a case to adversarial scrutiny is “entire.”¹¹¹ These circumstances aside, claims alleging a deficiency in attorney performance are subject to the general requirement that the petitioner affirmatively prove prejudice.¹¹²

The *Strickland* prejudice prong requires a showing that the “result” of the proceeding would have been different. But *Strickland* is not entirely clear or consistent in identifying what a petitioner must demonstrate would have been different but for counsel’s deficient performance. There are two possible questions that could be asked in this context: whether the ultimate decision in the case (i.e., the verdict, plea, or sentence) was affected by counsel’s errors, or, alternatively, whether counsel’s errors undermined the procedural fairness by which the verdict or sentence was obtained.¹¹³ The

fairly rigid rule of presumed prejudice for conflicts of interest.”) (citations omitted)); see also FED. R. CRIM. P. 44(c).

110. *Strickland*, 466 U.S. at 693; *Cuyler*, 446 U. S. at 348-50 (footnote omitted).

111. *Cronic*, 466 U.S. at 659 (establishing the “*Cronic* presumed prejudice” rule). *Cronic* was decided before *Strickland*, and the Court revisited the *Cronic* rule in *Bell v. Cone*, 535 U.S. 685 (2002). Although the *Cronic* rule remains intact, analysts disagree on *Bell*’s impact on *Cronic* post-*Strickland*. See Justin Rand, Comment, *Pro Se Paternalism: The Contractual, Practical, and Behavioral Cases for Automatic Reversal*, 163 U. PA. L. REV. 283, 291-92 (2014) (stating that *Bell* was significant because it clarified prejudice will only be presumed in the three circumstances outlined in *Cronic* and that all other cases will be analyzed under *Strickland*’s prejudice standard); Jennifer Williams, Note, *Criminal Law—The Sixth Amendment Right to Counsel—The Supreme Court Minimizes the Right to Effective Assistance of Counsel by Maximizing the Deference Awarded to Barely Competent Defense Attorneys*, 28 U. ARK. LITTLE ROCK L. REV. 149, 170 (2005) (stating that *Bell* was intended to limit presumptions of prejudice to cases where defense counsel fails completely to perform adversarial function challenge the prosecution).

112. *Strickland*, 466 U.S. at 693.

113. The prejudice test adopted by the circuit court in *Strickland*, for example, required the petitioner to show that defense counsel’s error “resulted in actual and substantial disadvantage to the course of his defense.” *Strickland*, 693 F.2d at 1262. Under this test, if petitioner made this showing, the burden then shifted to the prosecution to show that the deficient performance was harmless beyond a reasonable doubt in light of the entire record. *Id.* at 1260-62; see also *Strickland*, 466 U.S. at 682. The Supreme Court crafted a compromise based on the various standards then being used by federal circuit and state supreme courts, with the main point of disagreement being what level of prejudice a

first inquiry looks at whether the decision-maker reached a verdict or sentence supported by the evidence; the second asks whether the verdict or sentence was obtained in a fair manner. The *Strickland* majority clearly identified the bottom-line outcome in that case as the fairness of Washington's death sentence (rather than the fairness of the proceeding).¹¹⁴ But in reaching that point, it seems to conflate the two concepts. For example, in providing guidance to the lower courts on application of the standard, the *Strickland* majority adopted what looks like a harmless error standard that evaluates the impact of an error on the verdict or decision at issue in light of all the evidence of guilt in the record (or, in a death penalty challenge, evidence of aggravation and mitigation).¹¹⁵ At the same time, the

petitioner needed to show and who would carry the burden. See JOHN M. BURKOFF & NANCY M. BURKOFF, *INEFFECTIVE ASSISTANCE OF COUNSEL* § 4:10 (2017 ed.). The Court rejected burdens of proof that required too little—such as a test requiring only a showing of a “conceivable effect on the outcome of the proceeding—or too much—such as requiring that counsel’s error more likely than not impacted the outcome. Instead, the Court took a middle ground requiring the defendant to “show that there is a *reasonable probability* that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”

Id. (footnotes and citations omitted).

114. *Strickland*, 466 U.S. at 698-99 (applying the standard to Washington’s case, the Court analyzed the prejudice prong to require a showing that the decision-maker would have reached a different conclusion on the evidence, i.e., the decision-maker would have concluded that Washington should not have received a death sentence); *id.* at 695 (“When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.”). In dissent, Justice Marshall disputed that it should be the defendant’s burden to show prejudice from an allegedly incompetent attorney’s performance, and he challenged the notion that prejudice should be measured solely with respect to the fairness of the outcome of the trial without also considering the fairness of the procedure by which the outcome was obtained. *Id.* at 711 (“The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. I cannot agree.”).

115. *Id.* at 695-96. The majority’s approach, in the end, really is about the accuracy of the guilt determination or appropriateness of the sentence, not the fairness of the process. *Id.* at 696 (“[A] court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached [by the verdict] would reasonably likely have been different absent the errors.”); see also JOSH BOWERS, *ABA POLICY ON THE STRICKLAND PREJUDICE PRONG 4* (n.d.), https://www.americanbar.org/content/dam/aba/administrative/criminal_justice/ABApolicy_StricklandPrejudiceProng.authcheckdam.pdf. The *Strickland* Court’s “focus was on the substantive outcome. In the Court’s estimation, an inaccurate result was not an unjust result. In other words, a manifestly guilty defendant could have no claim even if he were represented by manifestly incompetent counsel.” *Id.*

Court emphasized that the focus of the inquiry in adjudicating a claim of actual ineffectiveness of counsel must be “the fundamental fairness of the proceeding whose result is being challenged.”¹¹⁶

These are more than semantic differences regarding the definition of “result.” A test that asks only if the verdict or sentence is reliable because the evidence supports a guilty finding or sentence will tolerate more attorney errors because it denies relief to petitioners regardless of the impact of counsel’s errors on the quality and quantity of evidence considered by the decision-maker. In contrast, a test that looks to the fairness of a proceeding in evaluating the reliability of a guilty verdict or sentence will grant more relief to petitioners because it looks beyond the quantum of evidence of petitioner’s guilt and concentrates on the fairness with which the petitioner’s conviction or sentence was obtained.

C. Double Deference – The High Hurdle Faced by State Prisoners Seeking Federal Review of Strickland Claims

The right to post conviction relief is grounded in the right to habeas review found in the U.S. Constitution,¹¹⁷ and it traces its origins to the Magna Carta.¹¹⁸ It encompasses the right of a prisoner to challenge the legality of his detention pursuant to a criminal conviction through a separate proceeding against the person with the authority to detain him (usually a prison warden).¹¹⁹ Congress first codified the writ for federal

116. *Strickland*, 466 U.S. at 696 (“[T]he principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.”); see *Commonwealth v. Kimball*, 724 A.2d 326, 331 (Pa. 1999) (“We thus see in *Strickland* . . . a tension between two principles On the one hand, the United States Supreme Court gives a clear standard for determining . . . ineffectiveness . . . , namely, where there is a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’ . . . Yet at the same time [the *Strickland* Court] . . . rejected as ‘not quite appropriate’ a prejudice test based on a defendant’s proving that ‘counsel’s deficient conduct more likely than not altered the outcome in the case.’”).

117. U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

118. *Magna Carta 1215*, YALE L. SCH.: THE AVALON PROJECT, ¶ 39, <http://avalon.law.yale.edu/medieval/magframe.asp> (last visited Mar. 1, 2018) (“No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.”).

119. *Id.*

prisoners in section 14 of the Judiciary Act of 1789.¹²⁰ In the Habeas Corpus Act of Feb. 5, 1867,¹²¹ it authorized federal courts to hear habeas petitions brought by state prisoners challenging the legality of their detention under federal law.¹²²

Congress and the Court have since developed a number of procedural and substantive limitations on the Writ. Federal law, for example, has long required state prisoners to exhaust all state court remedies before seeking federal habeas relief by first presenting and litigating federal constitutional claims in the state courts.¹²³ In addition, a habeas petitioner must be in custody to file a writ of habeas corpus.¹²⁴ The “in custody” requirement bars a habeas challenge to a conviction once a prisoner has served the

120. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82.

121. Ch. 28, 14 Stat. 385 (codified at 28 U.S.C. §§ 2241-2255).

122. 28 U.S.C. §§ 2254(a) (2012) (authorizing federal courts to issue habeas corpus writs for “any person . . . restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States”); *see also* 17B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE JURIS. § 4261 (3d ed. 1998) (stating that in 1867 Congress made “habeas corpus from a federal court available to state prisoners. This is the most important and most controversial use of habeas corpus[.]” . As discussed *infra*, a different federal statute, the Indian Civil Rights Act of 1968 (ICRA), provides for federal court habeas review of tribal court convictions.

123. WRIGHT & MILLER, *supra* note 122, § 4264 (“A state prisoner is ordinarily not able to obtain habeas corpus from a federal court unless he has exhausted the remedies available in the courts of the state. Although this principle was written into the Judicial Code in 1948, it had been applied for many years before as a judge-made limit on the 1867 statute that made habeas corpus generally available for state prisoners.”); *see also Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1094 (1970) (“The significant interests protected by the exhaustion requirement are of two types. First, exhaustion preserves the role of the state courts in the application and enforcement of federal law. Early federal intervention in state criminal proceedings would tend to remove federal questions from the state courts, isolate those courts from constitutional issues, and thereby remove their understanding of and hospitality to federally protected interests. Second, exhaustion preserves orderly administration of state judicial business, preventing the interruption of state adjudication by federal habeas proceedings. It is important that petitioners reach state appellate courts, which can develop and correct errors of state and federal law and most effectively supervise and impose uniformity on trial courts.”) (quoted with approval in *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 490-91 (1973)).

124. WRIGHT & MILLER, *supra* note 122, § 4262 (“At common law the function of the writ of habeas corpus . . . was to provide a judicial test of ‘the legality of the detention of one in the custody of another’ Thus it is not surprising that the habeas corpus provision of the Judiciary Act of 1789 used the words ‘in custody’ nor that the requirement that a prisoner be ‘in custody’ is now stated in every section of the statute”).

entirety of his sentence.¹²⁵ In addition to procedural bars, some substantive claims are not cognizable on habeas review. A claim based on an alleged violation of the Fourth Amendment prohibition against unreasonable searches and seizures, for example, cannot be raised in a habeas corpus petition, except as an underlying claim when a petitioner asserts counsel was deficient in failing to litigate a Fourth Amendment issue.¹²⁶

Congress undertook a major overhaul of federal habeas review with the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).¹²⁷ One of the outcomes of this overhaul was to limit the reach of the writ and codify the process federal courts are required to follow in reviewing state and federal prisoners’ habeas petitions.¹²⁸ AEDPA changed federal habeas

125. *Id.* (“The kind of custody that will suffice is judged by a very liberal standard, and any restraint on a petitioner’s liberty because of his conviction that is over and above what the state imposes on the public generally will suffice.”); *see also* *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973) (“[C]ustody requirement . . . designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty” because it is an “extraordinary remedy whose use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate.”); *Jones v. Cunningham*, 371 U.S. 236, 240 (1963) (“History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man’s liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus.”); *Quair v. Sisco*, 359 F. Supp. 2d 948, 967-68 (E.D. Cal. 2004) (holding that banishment imposed against the tribal members constituted “detention” within the meaning of § 1303, ICRA’s habeas corpus provision). *But see* *Williamson v. Gregoire*, 151 F.3d 1180, 1182-83 (9th Cir. 1998) (holding that a state law requiring a sex offender to register is a collateral consequence and not “custody”).

126. *Stone v. Powell*, 428 U.S. 465, 494 (1976) (holding that a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial); *Kimmelman v. Morrison*, 477 U.S. 365, 368, 375 (1986) (holding that restrictions on federal habeas review of Fourth Amendment claims announced in *Stone v. Powell* do not extend to Sixth Amendment claims of ineffective assistance of counsel where “the principal allegation and manifestation of inadequate representation is counsel’s failure to file a timely motion to suppress evidence allegedly obtained in violation of the Fourth Amendment”) (“Where defense counsel’s failure to litigate Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.”).

127. Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218-19 (codified at 28 U.S.C. § 2254(b)(2) (2012)). The Court upheld the constitutionality of the AEDPA in *Felker v. Turpin*, 518 U.S. 651 (1996).

128. WRIGHT & MILLER, *supra* note 122, § 4261.1 (“Congress made many important changes in habeas corpus in 1996 The changes made by the 1996 legislation are the end

law by: (1) establishing a one-year statute of limitations for filing a federal habeas petition,¹²⁹ (2) authorizing federal courts to deny on the merits any claim a petitioner failed to exhaust in state court,¹³⁰ (3) prohibiting federal courts from holding an evidentiary hearing when the petitioner failed to develop facts in state court, except in limited circumstances,¹³¹ (4) barring successive petitions, except in limited circumstances,¹³² and (5) imposing a new standard of review for federal court evaluation of state court

product of decades of debate about habeas corpus and the drafting in the new statute has been criticized. The changes restrict habeas corpus but they do not virtually eliminate it, as some critics would have preferred.”).

129. 28 U.S.C. § 2244(d)(1) (2012).

130. WRIGHT & MILLER, *supra* note 122, § 4261.1 (“The new statute preserves the requirement of exhaustion of state remedies [contained in the earlier federal habeas statute], but two significant innovations [were] . . . introduced. An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the state. In addition, a state shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the state, through counsel, expressly waives the requirement.”); *see also* 28 U.S.C. § 2254(b)(1)(A), (b)(1)(B)(ii) (2012) (explaining that petitioner can avoid exhaustion only if there is no available state remedy or the remedy is ineffective to protect the petitioner’s rights; if there is no state remedy because of a procedural default, federal review is still prohibited); *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (finding that because exhaustion doctrine is designed to give state courts a full and fair opportunity to resolve federal constitutional claims before claims are presented to federal courts, “state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process”); *McCool v. New York State*, 29 F. Supp. 2d 151, 158 (W.D.N.Y. 1998) (“Claims for ineffective assistance of trial or appellate counsel raised in a petition brought pursuant to []§ 2254 are subject to the exhaustion requirement if the state has provided a post-conviction remedy by which the petitioner may present the claim independent of any reliance upon his appellate counsel.”) (citing *Caballero v. Keane*, 42 F.3d 738, 740, 741 (2d Cir. 1994)).

131. AEDPA carried over a statutory presumption in the earlier version of the habeas statute requiring federal courts to treat state court fact-findings as presumptively correct unless rebutted by the petitioner by clear and convincing evidence. 28 U.S.C. § 2254(e)(1)(2012); *see also* Larry Yackle, *Federal Evidentiary Hearings Under the New Habeas Corpus Statute*, 6 B.U. PUB. INT. L.J. 135 (1996) (stating that to obtain an evidentiary hearing, petitioner must show claim relies on a new rule made retroactive by the Supreme Court, or that the factual predicate could not have been discovered earlier through due diligence; in all cases, a petitioner must show by clear and convincing evidence that but for the alleged error for which a hearing is sought, no reasonable factfinder would have found petitioner guilty of the underlying offense).

132. *See* 28 U.S.C. § 2244(b) (2012) (limiting the number of times a prisoner may ask for a writ by requiring authorization of a three-judge panel to file a successive habeas petition).

determinations of fact and applications of constitutional law.¹³³ AEDPA also requires a certificate of appealability from a court of review before a petitioner may appeal from a district court's denial of habeas relief.¹³⁴

As noted, the federal constitutional right to counsel incorporates two related, yet distinct, guarantees. The first implicates government action or inaction.¹³⁵ This guarantee incorporates the right to have the assistance of counsel at all critical stages of a prosecution,¹³⁶ the requirement that the state appoint counsel to indigents at public expense before they can be incarcerated,¹³⁷ and the prohibition on state interference with defense counsel's ability to assist his client.¹³⁸ The second guarantee is concerned with defense counsel's performance—the right to have effective assistance of counsel.¹³⁹ Judicial review of alleged right to counsel violations takes different forms depending on the nature of the violation and the court in which the violation originated. A defendant's claim that he was deprived entirely of assistance of counsel because a trial court failed to appoint counsel at public expense or that a trial court interfered with a defendant's access to counsel are generally cognizable on direct review.¹⁴⁰ In contrast, a defendant's claim that he was denied effective assistance of counsel is

133. 28 U.S.C. § 2254(d) (2012); *see* WRIGHT & MILLER, *supra* note 122, § 4261.1 (describing this provision as “[p]robably the most important change made by the 1996 statute” and noting that clause (1) (pertaining to decisions contrary to, or involving and unreasonable application of, clearly established federal law) “clearly makes a significant change in referring only to law determined by the Supreme Court”).

134. 28 U.S.C. § 2253(c)(2012); *see also* WRIGHT & MILLER, *supra* note 122, § 4261.1 (“The statute amends both 28 U.S.C. § 2253 and Appellate Rule 22 with regard to appeals. A state prisoner wishing to appeal the denial of habeas corpus had previously been required to obtain a certificate of probable cause. This is now called a certificate of appealability. It may issue only if the applicant has made a substantial showing of the denial of a constitutional right and it must indicate which specific issue or issues satisfy that requirement.”).

135. *See* U.S. CONST. amend. VI.

136. *United States v. Wade*, 388 U.S. 218, 226-27 (1967) (“[I]n addition to counsel’s presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial. The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment . . .”).

137. *See* *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

138. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (“Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”); *see also* *Perry v. Leeke*, 488 U.S. 272 (1989); *Geders v. United States*, 425 U.S. 80 (1976).

139. *See* U.S. CONST. amend. VI.

140. *See* 28 U.S.C. § 2254(e)(2)(A) (2012); *Martinez v. Ryan* 566 U.S. 1 (2012).

generally not cognizable on direct review.¹⁴¹ This is because these claims typically require development of facts outside the record in the underlying proceeding.¹⁴² This second category of right to counsel violations, therefore, must typically be brought in a collateral challenge to a conviction.¹⁴³

The most common claim, by a wide margin, brought by state and federal prisoners in habeas petitions is ineffective assistance of counsel.¹⁴⁴ And, as these claims generally require development of facts outside the record, the vast majority of *Strickland* claims are funneled through a post-conviction review process.¹⁴⁵ Most criminal convictions in the United States result from state (not federal) prosecutions. As a result, most federal habeas petitions are filed by state (not federal) prisoners.¹⁴⁶ The upshot is that *Strickland* jurisprudence has developed almost exclusively in the context of federal court review of state court convictions.

Pertinent to this article, when reviewing a petition from a state prisoner, AEDPA requires federal courts to apply a highly deferential standard of review. In reviewing a prisoner's habeas claim that a state court violated his federal constitutional rights, a federal court asks whether the state court decision was (1) contrary to, or involved an objectively unreasonable application of, clearly established federal law as determined by the Supreme Court or (2) was based on an unreasonable determination of the

141. See *United States v. Cronin*, 466 U.S. 648 (1984).

142. See *Buck v. Davis*, 137 S. Ct. 759, 770-71 (2017) (noting that ineffective assistance of counsel issues must nonetheless be raised on state direct appeal and in the state post-conviction petition to preserve them for federal habeas review and to avoid a federal procedural default on collateral review unless the state process formally excludes those claims from direct review); *Johnson v. Lee*, 136 S. Ct. 1802, 1805 (2016) (“The general rule in federal habeas cases is that a defendant who fails to raise a claim on direct appeal is barred from raising the claim on collateral review.” Likewise, state postconviction remedies generally ‘may not be used to litigate claims which were or could have been raised at trial or on direct appeal.’”) (citations omitted).

143. See *Buck*, 137 S. Ct. at 771.

144. Brandon L. Garrett, *Validating the Right to Counsel*, 70 WASH. & LEE L. REV. 927, 936-37 (2013) (“Ineffective assistance of counsel claims are the most commonly litigated claims during postconviction proceedings.”) (citation omitted).

145. See *id.* at 938-40.

146. See *Table C-2. U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending September 30, 2014 and 2015*, http://www.uscourts.gov/sites/default/files/data_tables/C02Sep15.pdf (last visited Mar. 1, 2018) (showing that in 2015, 18,448 habeas corpus petitions were filed in federal court, and of these only 2417 were brought by federal prisoners).

facts.¹⁴⁷ The extremely circumscribed nature of federal review of state prisoners' claims reflects the status of individual states as separate sovereigns with a primary authority over and superior interest in resolving challenges to state court convictions.¹⁴⁸

By the time a state prisoner asserting a Sixth Amendment claim of ineffective assistance of counsel is before a federal court, all state court rulings on her claim are practically untouchable. *Strickland* requires a petitioner to show that counsel committed a prejudicial, unprofessional error that is not entitled to deference;¹⁴⁹ federal habeas law requires the

147. 28 U.S.C. § 2254(d) (2012) (providing that a writ of habeas corpus “shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication”: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding”); *see also* *Harrington v. Richter*, 528 U.S. 86, 96-99 (2011); *Richardson v. Branker*, 668 F.3d 128, 138 (4th Cir. 2012); *Buckner v. Polk*, 453 F.3d 195, 198 (4th Cir. 2006) (“A decision is an ‘unreasonable application’ of clearly established federal law if it ‘unreasonably applies’ a Supreme Court precedent to the facts of the petitioner’s claim.”) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)); *Winston v. Kelly*, 592 F.3d 535, 554 (4th Cir. 2010) (“For a state court’s factual determination to be unreasonable under § 2254(d)(2), it must be more than merely incorrect or erroneous. It must be sufficiently against the weight of the evidence that it is objectively unreasonable.”) (citation omitted).

148. *Richardson*, 668 F.3d at 138 (“The limited scope of federal review of a state petitioner’s habeas claims . . . is grounded in fundamental notions of state sovereignty.”) (citation omitted); *Harrington*, 528 U.S. at 103 (stating that because “[f]ederal habeas review frustrates both the States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights,” § 2254(d) is “designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions”) (quotation omitted). *But see* Lee Kovarsky, *AEDPA’s Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 507 (2007) (“Whatever the role for perceived congressional purposes in statutory interpretation, courts—as faithful interpreters of legal texts—may legitimately rely on that perception only to the extent that it is accurate. Based on what we know about AEDPA, the 104th Congress had no interpretively meaningful purposes beyond the words it ratified ‘Comity, finality, and federalism’ is now the favored idiom for erroneously invoking a legislative mood; it has become the means by which courts express an illegitimate hostility towards exacting standards of criminal procedure.”).

149. *Kimmelman v. Morrison*, 477 U.S. 365, 381-82 (1986) (“[R]easonableness of counsel’s performance is . . . evaluated from counsel’s perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential [I]n determining the existence *vel non* of prejudice, the court ‘must consider the totality of the evidence before the judge or jury.’ As is obvious, *Strickland*’s standard, although by no means insurmountable, is highly demanding.”) (citations to *Strickland*

petitioner to show that the state court applied *Strickland* in an objectively unreasonable manner when it rejected her federal ineffective assistance of counsel claim.¹⁵⁰ When the federal habeas standard of review of state court resolutions of federal constitutional claims is merged with the *Strickland* standard, the result is a double deference hurdle that state prisoners must clear to obtain federal relief for *Strickland* right to counsel violations. This “double deference” review requires the federal court to determine “not whether counsel’s actions were reasonable,” but “whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.”¹⁵¹

Under this standard, when a state prisoner presents an ineffective assistance of counsel claim in federal court, the “pivotal question is whether the state court’s application of the *Strickland* standard was unreasonable.”¹⁵² This inquiry is a much different question from whether a state court erred in applying *Strickland* because an erroneous application of federal law is not the same thing as an unreasonable application of federal law.¹⁵³ Under AEDPA, therefore, a state court determination that a petitioner’s *Strickland* claim is without merit bars federal habeas relief if “‘fairminded jurists could disagree’ on the correctness of the state court’s

omitted); *id.* at 384 (presuming counsel’s competence and stating that the petitioner must “rebut this presumption by proving that his attorney’s representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy”); *id.* at 384 (stating that counsel is required to investigate, but “a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments”) (quotation omitted).

150. *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (stating that when determining whether counsel’s behavior was deficient, “a court must indulge a strong presumption that counsel’s representation was within the wide range of reasonable professional assistance”); *Bell v. Cone*, 535 U.S. 685, 687 (2002) (explaining that to be entitled to relief based on ineffective assistance of counsel in violation of federal constitutional right to counsel, state prisoner needs to show not only that *Strickland* standard is met, but also that Tennessee court “applied *Strickland* to the facts of his case in an objectively unreasonable manner”).

151. *Harrington*, 562 U.S. at 105; *see also Richardson*, 668 F.3d at 139 (stating that ineffective assistance of counsel claims are reviewed not only through the limitations of AEDPA, but also “through the additional lens of *Strickland* and its progeny,” and that, taken together, AEDPA and *Strickland* provide “dual and overlapping” standards that are applied “simultaneously rather than sequentially”) (citation omitted).

152. *Harrington*, 562 U.S. at 99-10; *see also Cullen v. Pinholster*, 563 U.S. 170 (2011).

153. *Harrington*, 562 U.S. at 101 (“[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law.”) (quoting *Williams v. Taylor*, 529 U.S. 362, 410 (2000)).

decision.”¹⁵⁴ At least as articulated by the Fourth Circuit Court of Appeals, a federal court’s habeas review of a state prisoner’s claim is limited to whether the state court’s determination ““was so lacking in justification that [it] was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.””¹⁵⁵ If the answer is “no,” federal courts must deny even meritorious *Strickland* claims brought by state prisoners.¹⁵⁶ Since the most common state prisoner habeas claim brought in federal court is an allegation of the denial of effective assistance of counsel in violation of the Sixth Amendment, this double deference review is implicated in and will be dispositive of the vast majority of state prisoners’ federal habeas claims.¹⁵⁷ The interplay of this statutory and doctrinal deference render state court prisoners’ *Strickland* claims virtually unreviewable in federal court.¹⁵⁸

Where the claim of ineffective assistance of counsel stems from a plea deal, habeas petitioners may also need to clear yet a third deference hurdle. The Court most recently applied *Strickland* to plea bargaining in *Missouri v. Frye*¹⁵⁹ and *Lafler v. Cooper*.¹⁶⁰ In those cases, the Court held that where

154. *Id.* (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

155. *Richardson*, 668 F.3d at 141 (quoting *Harrington*, 562 U.S. at 103); *see also* *Ouska v. Cahill-Masching*, 246 F.3d 1036 (7th Cir. 2001) (stating that only clear error in applying *Strickland* standard will support federal writ of habeas corpus because *Strickland* builds in elements of deference to counsel’s choices in conducting the litigation, and AEDPA adds a layer of respect for a state court’s application of the legal standard) (citation omitted).

156. *Richardson*, 668 F.3d at 139 (quoting *Harrington*, 562 U.S. at 102) (finding that a state prisoner’s petition has merit does not warrant federal habeas relief because “even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable”).

157. Garrett, *supra* note 144, at 935-37 (noting *Strickland*’s central role in “redefining criminal trial practice and postconviction review” due, in part to its “chameleon-like adaptability” and the fact that *Strickland* claims “can broadly incorporate all sorts of theories about what went wrong at the criminal trial—just so long as those failures can be attributed to defense counsel.”).

158. Stuart E. Walker, *What We Meant Was . . . The Supreme Court Clarifies Two Ineffective Assistance Cases in Bell v. Cone*, 54 MERCER L. REV. 1271, 1288 (2003) (stating that the Court’s narrow interpretation of standards for federal habeas relief present a “formidable barrier” to habeas petitioners, and after *Bell* “many state prisoners seeking federal habeas relief for ineffective assistance claims may face a dim future”); Wayne M. Helge, *Know Your Client: The Mundane Case of Wiggins v. Smith*, 10 ROGER WILLIAMS U. L. REV. 581, 594 (2005) (“[V]iewed in light of *Strickland*’s presumption of reasonable professional conduct by counsel,” *Bell* makes “state court holdings practically unchallengeable on the merits.”).

159. 566 U.S. 134 (2012).

160. 566 U.S. 156 (2012).

a plea offer has lapsed or is rejected due to defense counsel's error, *Strickland* requires petitioner to show, among other things, that the trial court would have accepted a re-offered or rejected plea.¹⁶¹ Whether to accept or reject a plea offer, of course, is a decision that is generally left to a trial court's wide discretion.¹⁶² Thus, to the extent acceptance or rejection of a plea offer is a discretionary decision with the trial court, *Lafler* and *Frye* inject yet another layer of deference into the *Strickland* analysis in the context in which the vast majority of criminal cases in the United States are resolved.¹⁶³

II. Statutory Regulation of Defense Counsel in Tribal Court

Tribal nations did not participate in the ratification or amendment of the Constitution. Tribal governments, therefore, are not constrained by the federal Constitution.¹⁶⁴ The procedural safeguards mandated by the Bill of

161. *Frye*, 566 U.S. at 148 (stating that where a plea lapses or is rejected due to counsel's incompetence, under *Strickland* prejudice, petitioners must show (1) a reasonable probability they would have accepted the earlier plea offer and, (2) a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented if, under that jurisdiction's laws, the prosecution had the discretion to withdraw it, or the trial court had the discretion to refuse to accept it); see also *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (holding that the failure of a lawyer accurately to inform a criminal defendant of the immigration consequences of a guilty plea constitutes ineffective assistance of counsel); *Cooper*, 566 U.S. at 172-73 (finding that a plea rejected on counsel's erroneous legal advice, whether the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States under 28 U.S.C. § 2254(d)(1)" was not a stumbling block because the state court had failed to apply the clearly established law set forth in *Strickland*) (quotation omitted) ("[T]he Michigan Court of Appeals identified respondent's ineffective-assistance-of-counsel claim but failed to apply *Strickland* to assess it. Rather than applying *Strickland*, the state court simply found that respondent's rejection of the plea was knowing and voluntary By failing to apply *Strickland* to assess the ineffective-assistance-of-counsel claim respondent raised, the state court's adjudication was contrary to clearly established federal law.").

162. *Frye*, 566 U.S. at 150 (finding that after the plea offered to Frye lapsed, he was arrested on a new offense while out on bond). In addressing the *Strickland* prejudice prong, the *Frye* Court observed that "there [wa]s reason to doubt that the prosecution would have adhered to the agreement or that the trial court would have accepted it . . . unless they were required by state law to do so." *Id.*

163. *Id.* at 143 (noting that ninety-four percent of state convictions are the result of guilty pleas).

164. See *Talton v. Mayes*, 163 U.S. 376, 381-82 (1896) (stating that Indian tribes established and were recognized as sovereign nations prior to adoption of Constitution and had not ratified Constitution as the states had; tribes, therefore, not constrained by

Rights for individuals accused of crimes, therefore, do not apply to defendants in tribal court proceedings.¹⁶⁵ Specifically, tribal governments are not bound to extend criminal procedure guarantees set out in the Fourth, Fifth, and Sixth Amendments of the U.S. Constitution in tribal court criminal investigations and proceedings.¹⁶⁶ Nor are tribal courts bound by state and federal interpretations of the protections in the Bill of Rights dealing with tribal court criminal defendants.¹⁶⁷ Although tribal courts are not bound by the federal Constitution, federal statutory law imposes a

Constitution when dealing with tribal members); *see also* *Duro v. Reina*, 495 U.S. 676 (1990); Samuel E. Ennis & Caroline P. Mayhew, *Federal Indian Law and Tribal Criminal Justice in the Self-Determination Era*, 38 AM. INDIAN L. REV. 421 (2013-2014) (“Since Indian tribes ‘did not participate in the Constitutional Convention and did not “sign on” by joining the federal union,’ they are not bound by the Constitution, absent affirmative congressional action to the contrary. Rather, federal and state courts have recognized that tribal courts generally retain inherent civil and criminal jurisdiction over Indian reservations by virtue of their sovereign status.”) (footnotes omitted); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 680 (1989) (“Blurring the lines between ‘state’ and ‘Indian tribe’ may obscure the political differences between the two ‘sovereigns.’ At least in theory, states have entered into a compact, called the United States Constitution, and willfully ceded powers to a central government. At least in theory, states participate via their representatives in Congress in the decisions of the national government. Such claims cannot be made, even in theory, for the Indian tribes, whose representatives neither signed the Constitution nor sit in Congress.”).

165. *United States v. Bryant*, 136 S. Ct. 1954, 1962 (2016) (“As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. The Bill of Rights . . . therefore, does not apply in tribal-court proceedings.”) (quotation omitted); *see also Talton*, 163 U.S. 376; *United States v. Doherty*, 126 F.3d 769, 777 (6th Cir. 1997) (“Of course, *Talton* was decided decades before most of the protections of the Bill of Rights were held to be binding on the states through the Fourteenth Amendment. . . . Nonetheless, *Talton* has come to stand for the proposition that neither the Bill of Rights nor the Fourteenth Amendment operates to constrain the governmental actions of Indian tribes, and the Supreme Court has consistently decided cases with that understanding.”); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (“As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority [T]he lower federal courts have extended the holding of *Talton* to other provisions of the Bill of Rights, as well as to the Fourteenth Amendment.”) (internal citations omitted).

166. *See Santa Clara Pueblo*, 436 U.S. 49; Ennis & Mayhew, *supra* note 164.

167. *See Ennis & Mayhew*, *supra* note 164, at 436-37. That does not mean tribal court defendants are without protection from tribal government overreach or unfairness. On the contrary, tribal governments, through tribal law, provide procedural protections to tribal court criminal defendants. *See generally* CARRIE E. GARROW & SARAH DEER, *TRIBAL CRIMINAL LAW AND PROCEDURE* (2d ed. 2015).

number of restraints on tribal governments similar, but not identical to, the limitations on state and federal power found in the Bill of Rights.¹⁶⁸ The source of tribal court defendants' federal statutory procedural rights is the Indian Civil Rights Act of 1968 ("ICRA").¹⁶⁹ ICRA incorporates some, but not all, of the specific guarantees found in the Bill of Rights. Some are identical to the language in the Bill of Rights, while others are not.¹⁷⁰

168. As the Constitution does for states, ICRA sets the floor, not the ceiling, for tribal court criminal procedure. Like states, tribes can provide more expansive protections to criminal defendants than what is required by federal law. Notwithstanding the commonly-invoked floor-ceiling analogy, it is important to acknowledge the extraordinarily outsized influence federal criminal procedure law has on process in the courts of other sovereigns. See Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 S. CT. REV. 65, 79 ("[W]herever federal criminal procedure law exists today, that law dominates the landscape. Federal constitutional criminal procedure law no longer serves as a vaguely defined 'floor,' above which the states are free to develop and administer their criminal justice systems with relative independence. Rather, federal law today serves as a floor and a ceiling and everything in between . . .").

169. Pub. L. No. 90-284, tit. II, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301-1303 (2012)).

170. See *Alvarez v. Lopez*, 835 F.3d 1024, 1032 (9th Cir. 2016) ("ICRA, 'rather than providing in wholesale fashion for the extension of constitutional requirements to tribal governments, as had been initially proposed, selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments.' Thus, in ICRA, 'Congress accorded a range of procedural safeguards to tribal-court defendants "similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment.'"") (citations omitted). Like the Bill of Rights, ICRA provides for the right to be free from unreasonable searches and seizures; requires probable cause and particularity for warrants; prohibits double jeopardy and compelled self-incrimination; provides rights to a speedy and public trial, notice of charges, confrontation of witness, compulsory process, and counsel; prohibits excessive bail, fines and cruel and unusual punishment; requires equal protection and due process; prohibits bills of attainder and ex post facto laws. It also provides for six-person juries. See 25 U.S.C. § 1302(a)(2012); see also Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 478 (2005) (identifying "the two primary rights 'missing' from ICRA [as] free representation for indigent defendants and a jury that includes nonmembers"); CONFERENCE OF W. ATTORNEYS GEN., AMERICAN INDIAN LAW DESKBOOK § 7:5 (May 2017 update) [hereinafter AMERICAN INDIAN LAW DESKBOOK] ("The ICRA extends to tribal governments certain protections guaranteed under the Bill of Rights with respect to federal and state governments. The need to provide such rights statutorily can be traced back to *Talton v. Mayes*, where the Supreme Court concluded that the Cherokee Nation could use grand juries whose number of members did not meet the requirements of the United States Constitution in connection with the prosecution of one tribal member for a crime against another member. The Court reasoned that, while the involved tribe was subject to the dominant authority of Congress, its powers were those of a 'local,' or nonfederal, government, unconstrained by the Fifth Amendment. This conclusion means that citizens of

Important here, ICRA provides for a right to counsel in tribal court criminal prosecutions.¹⁷¹ But the scope of what the ICRA right to counsel provisions require differs depending on the status of the defendant as an Indian or non-Indian, and on the defendant's potential sentence.¹⁷²

In some instances, ICRA clearly and intentionally departs from the federal constitutional right to counsel standard, and in others it purports to mirror it. Of particular note, where a tribal court exercises criminal jurisdiction over non-Indians, as recently authorized by the Violence Against Women Reauthorization Act of 2013 ("VAWA 2013"), ICRA requires a more expansive right to appointed counsel for indigent defendants than the Sixth Amendment requires in state and federal courts.¹⁷³

To understand ICRA's differentiated right to counsel provisions, it is necessary to understand tribal criminal jurisdiction.¹⁷⁴ At the founding, tribes had criminal jurisdiction over anyone who violated tribal law on tribal land, just as states have criminal jurisdiction over anyone who violates state law within their geographic boundaries. Shortly after the states ratified the Constitution, Congress began limiting tribes' jurisdiction over non-Indians who committed crimes in Indian Country.¹⁷⁵ Tribes

the United States, by virtue of their tribal membership, are subject to the commands of a government within United States territory that is not fundamentally constrained by constitutional norms. Since its first articulation, this core principle has never been questioned.") (footnotes omitted).

171. 25 U.S.C. § 1302(c)(1) (2012).

172. *See infra* Section II.A.

173. *See infra* Section II.A.3.

174. What follows is a very simplified overview of the legal history of tribal court jurisdiction to allow the reader to track the discussion in this article; it does not purport to be a comprehensive explanation of this very complex topic.

175. The Constitution was ratified on May 29, 1790. Congress began legislating tribes' criminal jurisdiction with the Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137. The 1790 Act and amendments to it formed the foundation for the current version of the Indian Country Crimes Act (ICCA), 18 U.S.C. § 1153 (2012). The 1790 Act placed all interactions with Indians under federal law and provided for federal jurisdiction over crimes committed by non-Indians against Indians in Indian country. Trade and Intercourse Act of 1790, § 5, 1 Stat. at 138. The Indian Country Crimes Act of 1817 subsequently reaffirmed federal jurisdiction over all crimes committed by non-Indians in Indian country and explicitly acknowledged that tribes retained jurisdiction over crimes committed in Indian country by one Indian against the person or property of another Indian. Pub. L. No., § 2, 3 Stat. 383, 383 (repealed 1834). The relevant provisions of the 1817 Act are now codified in the General Crimes Act, 18 U.S.C. § 1152 (2012). The Indian Trade and Intercourse Act of 1834, Pub. L. No. 23-161, § 25, 4 Stat. 729, 733, repealed the Indian Country Crimes Act of 1817, but incorporated the latter's criminal jurisdiction provision. *Id.* § 29, 4 Stat. at 733.

retained their inherent authority over Indians who committed crimes on tribal land¹⁷⁶ until 1885, when Congress enacted the Major Crimes Act.¹⁷⁷ The Major Crimes Act grants the federal government authority to prosecute Indians who commit certain serious crimes in Indian Country, by making those enumerated offenses federal crimes¹⁷⁸ if committed by an Indian,¹⁷⁹ in Indian Country. This federal jurisdiction is concurrent with a tribe's power to prosecute and punish Indians who commit crimes within the tribe's territorial jurisdiction.¹⁸⁰ Thus, with the Major Crimes Act, the federal

176. This understanding was confirmed by the Supreme Court in 1883 in *Ex parte Kangi-Shun-ca (Crow Dog)*, where the Supreme Court held that under federal treaty and statutory law, tribes had inherent authority over violations of tribal law committed by Indians on tribal land. 109 U.S. 556, 572 (1883); *see also* *Keeble v. United States*, 412 U.S. 205, 209-12 (1973); *United States v. Kagama*, 118 U.S. 375, 383 (1886).

177. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. §§ 1153).

178. *See* 18 U.S.C. § 3242 (2012) ("All Indians committing any offense listed in the first paragraph of and punishable under section 1153 (relating to offenses committed within Indian country) of this title shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States."); Act of Mar. 3, 1885, § 9, 23 Stat. at 385 (codified as amended at 18 U.S.C. § 1153 (2012)). It is not clear whether Congress intended the language "within the exclusive jurisdiction of the United States" to extinguish tribal jurisdiction over enumerated crimes committed by Indians in Indian country in favor of exclusive federal jurisdiction or, rather, in favor of concurrent federal/state jurisdiction. *See* Troy Eid & Carrie Covington Doyle, *Separate But Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. COLO. L. REV. 1067 (2010). The Major Crimes Act, however, has been interpreted to completely divest state courts of jurisdiction over the crimes enumerated in the statute in Indian country that is subject to federal criminal jurisdiction. *Id.* at 1082-83.

179. The current version of the Major Crimes Act enumerates fifteen offenses. These enumerated offenses are, for the most part, defined by distinct federal statutes. Offenses that are not defined by federal law are defined and punished in accordance with the law of the state where the crime was committed. *See* 18 U.S.C. § 1153(b) (2012). The crimes enumerated in the Major Crimes Act are offenses against the person, such as murder and assault that, if committed in a state jurisdiction, have traditionally and historically been left to state governments to prosecute and punish. *Id.* § 1153(a).

180. Before Congress passed the Major Crimes Act, offenses committed by Indians in Indian country were tried exclusively in tribal courts. According to the U.S. Department of Justice, whether tribal courts have concurrent jurisdiction with federal courts over offenses covered by the Major Crimes Act remains an "open question." *U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL* tit. 9 (1997). In this writer's view, there is no question that tribes have concurrent jurisdiction with the federal government over the offenses covered by the Major Crimes Act, albeit subject to congressionally mandated restrictions on the severity of the punishment tribes can impose. Thus, tribes can, and do, independently criminalize, prosecute and punish the types of crimes enumerated in the Major Crime Act under tribal codes, albeit subject to the sentencing restrictions in ICRA discussed below. *See* Timothy J. Droske,

government gave itself authority to prosecute and punish most serious offenses of personal violence committed by Indians in Indian Country, while tribes retained inherent authority to prosecute and punish both member and non-member Indians for all crimes, including those described in the Major Crimes Act, committed on tribal land.¹⁸¹ The result is that, through a series of congressional acts and Supreme Court holdings, tribal jurisdiction over crime in Indian Country is dependent on the status of the defendant or victim as an Indian or non-Indian, and the nature of the crime charged. Absent an explicit grant from Congress, tribes do not have criminal jurisdiction to prosecute non-Indians who commit offenses on tribal land.¹⁸²

Congress has also limited tribes' authority to punish Indians who commit crimes in their jurisdictions. ICRA's general provisions (i.e., the non-TLOA and non-VAWA 2013 provisions) limit the sentencing authority of tribal courts.¹⁸³ Even for serious offenses, ICRA's general provisions limit the penalty a tribal court can impose for a single offense to one-year incarceration and a \$5000 fine.¹⁸⁴

Correcting Native American Sentencing Disparity Post-Booker, 91 MARQ. L. REV. 723, 737 (2008) ("Tribes . . . share concurrent jurisdiction with the federal government over Indian defendants who have violated the Major Crimes Act although tribal courts are subject to the sentencing limitations imposed by the Indian Civil Rights Act."); *see also* *Wetsit v. Stafne*, 44 F.3d 823 (9th Cir. 1995) (stating that tribes retain concurrent jurisdiction over crimes enumerated in the Major Crimes Act).

181. 42 C.J.S. *Indians* § 180 (2017) ("A tribe has the inherent power to punish its members, as an aspect of its sovereignty. Further, Congress enacted legislation specifically authorizing a tribe to prosecute Indian members of a different tribe. Thus, under the statutory definitions regarding constitutional rights of Indians, 'powers of self-government' means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians. Accordingly, an Indian tribe may exercise inherent sovereign judicial power in criminal cases against nonmember Indians for crimes committed on the tribe's reservation. The source of an Indian tribe's power to prosecute and punish an Indian, who is not a member of the tribe is, in view of this federal statute, inherent tribal sovereignty rather than delegated federal authority.") (footnotes omitted). As noted below, although tribes have inherent authority to prosecute and punish Indians for tribal offenses, tribal courts cannot impose a punishment over one year even for the most serious crimes committed in their jurisdictions unless they comply with the requirements of TLOA.

182. *Id.* ("[T]he inherent sovereignty of Indian tribes does not extend to criminal jurisdiction over non-Indians who commit crimes on a reservation. Tribal courts have no criminal jurisdiction over non-Indians unless specifically authorized to assume such jurisdiction by Congress.") (footnotes omitted).

183. 25 U.S.C. §§ 1301-1304 (2012).

184. *Id.* § 1302(a)(7)(B).

In 2010, Congress amended the sentencing provisions in ICRA to authorize tribal courts to impose a sentence over one year and up to three years, and a fine of up to \$15,000,¹⁸⁵ but only if: (1) the defendant has been previously convicted of, or is being prosecuted for, the same or a comparable offense or if the defendant is convicted of a felony-type offense;¹⁸⁶ and (2) the tribal court extends specific procedural protections to the defendant.¹⁸⁷ For related offenses, ICRA permits stacking offenses up to a total sentence of no more than nine years.¹⁸⁸

Congress amended ICRA again when it passed the VAWA 2013. Under the VAWA 2013 amendments to ICRA, for the first time since Congress limited tribes' criminal jurisdiction over non-Indians, it authorized some tribes¹⁸⁹ to exercise criminal jurisdiction over some non-Indians¹⁹⁰ for some

185. Pub. L. No. 111-211, tit. II, § 234, 124 Stat. 2258, 2280 (codified at 25 U.S.C. § 1302 (2012)).

186. 25 U.S.C. § 1302(b)(2012). Before TLOA, tribal court sentencing authority was capped at one year for all offenses. Title 25 U.S.C. § 1302(b) currently provides:

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than \$5,000 but not to exceed \$15,000, or both, if the defendant is a person accused of a criminal offense who—(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or (2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

Id.

187. For example, § 1302(c) of ICRA requires tribes to provide the right to effective assistance of counsel (at public expense if indigent) to all defendants who receive a sentence of more than one year:

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—(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.

Id. § 1302(c).

188. *Id.* § 1302(a)(7)(D).

189. Tribes initially needed to be approved by the Department of Justice to exercise VAWA 2013 jurisdiction. *United States v. Bryant*, 136 S. Ct. 1954, 317 (2016).

190. The VAWA 2013 amendments to ICRA are codified at 25 U.S.C. § 1304. Section 1304(b)(1) describes the nature of tribal courts' VAWA 2013 jurisdiction "to exercise

domestic violence offenses committed on tribal land.¹⁹¹ As with the TLOA amendments to ICRA, for a tribal court to exercise jurisdiction under VAWA 2013, it is required to provide the defendant with procedural protections beyond those required by ICRA's general provisions.¹⁹²

special domestic violence criminal jurisdiction” as extending “over all persons” (i.e., not just Indians):

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). Section 1304(a)(6) defines “special domestic violence criminal jurisdiction” as “the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.” *Id.* § 1304(a)(6). Indian defendants are also subject to prosecution for domestic violence offense enumerated in VAWA 2013. However, the primary aim of the “special domestic violence criminal jurisdiction” created by VAWA 2013 was to increase safety in Indian Country by authorizing tribes to exercise jurisdiction over non-Indians living or working in Indian Country who commit domestic violence offenses against Indians in tribal communities because non-Indian offenders often fell into the void between a lack of tribal jurisdiction and a lack of federal prosecution. *See* Cynthia Castillo, *Tribal Courts, Non-Indians, and the Right to an Impartial Jury After the 2013 Reauthorization of VAWA*, 39 AM. INDIAN L. REV. 311, 314 (2014-2015) (citing under-enforcement of crimes of sexual violence as the impetus for VAWA 2013 special domestic violence jurisdiction over some non-Indians). To fall within a tribe's VAWA 2013 criminal jurisdiction, a non-Indian must have some connection to the tribe—such as working or living in the community; or being married to, or in an intimate or dating relationship with an Indian who is a member of the tribe, or with a non-member Indian living in the community. 25 U.S.C. § 1304(a)(6).

191. VAWA 2013 added a section to ICRA titled “Tribal Jurisdiction Over Crimes of Domestic Violence”, authorizing “participating” tribes “to exercise special domestic violence criminal jurisdiction over all persons” (i.e., over Indians and non-Indians) who commit specific offenses in Indian country. 25 U.S.C. § 1304. The offenses are limited to domestic violence, dating violence, and violations of protection orders involving an Indian victim. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54. The driving force behind VAWA 2013 was the federal government's failure to adequately prosecute domestic violence crimes in Indian country.

192. 25 U.S.C. § 1304(d). TLOA and VAWA 2013 create an opt-in scheme—tribes that cannot or do not want to tailor their tribal court criminal procedure to satisfy the requirements of TLOA and VAWA 2013 remain subject only to ICRA's pre-TLOA and pre-VAWA 2013 requirements.

A. ICRA's Differentiated Right to Counsel

1. Pre-ICRA: No Federal Right to Counsel in Tribal Court

Before Congress enacted ICRA in 1968, there was no federal statutory right to counsel in tribal court. In addition, until 1961, federal law actually prohibited attorneys from appearing in tribal court.¹⁹³ This federal policy dates its origin to 1824, with the establishment of the Bureau of Indian Affairs ("BIA").¹⁹⁴ The BIA was originally housed in the War Department, and, in 1849, was transferred to the Department of the Interior ("DOI").¹⁹⁵ In 1883, after the BIA was transferred to the DOI, the DOI created the Courts of Indian Offenses to "establish and impose an adversarial justice system" in Indian Country.¹⁹⁶ In establishing these courts, the DOI created a civil and criminal code and "mandated the adversary system on the reservation for criminal matters."¹⁹⁷ From its inception, the Courts of Indian Offenses prohibited participation by attorneys to make sure there would be "[n]o lawyers to perplex the judges."¹⁹⁸

2. ICRA of 1968: Right to Retained Counsel for (Indian) Defendants

Under ICRA's general provisions, which only apply to Indians, a defendant has a right to counsel, but only at his own expense.¹⁹⁹ This, of course, differs from the federal constitutional guarantee of right to counsel

193. See Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317, 341 (2013) (noting that the Code of Federal Regulations prohibited attorneys in tribal court until 1961).

194. *Id.* at 339.

195. *Id.*

196. *Id.* at 340.

197. *Id.*

198. *Id.* ("As blatant federal instrumentalities, one would assume that the Courts of Indian Offenses provided a right to counsel at least consistent with the federal Constitution and provide for Sixth Amendment jurisprudence. In fact, the opposite was true. Courts of Indian Offenses prohibited the appearance of attorneys.")

199. 25 U.S.C. § 1302(a)(6) (2012) ("No Indian tribe in exercising powers of self-government shall . . . deny to any person in a criminal proceeding the right . . . at his own expense to have the assistance of counsel for his defense (except as provided in subsection [c])."). Subsections (b) and (c) were added following enactment of TLOA. The reference to subsection (b) in 25 U.S.C. § 1302(a)(6) appears to be a typo since subsection (b) is an enhanced sentencing provision and subsection (c) covers the procedural protections (including the right to counsel at public expense for indigents) that a tribal court must provide if it seeks to exercise the enhanced sentencing powers described in subsection (b). See also Creel, *supra* note 193, at 341 (citing 25 C.F.R. § 11.9 (1958) (repealed by 26 Fed. Reg. 4360-61 (proposed May 19, 1961))).

at public expense for indigent defendants charged with a felony²⁰⁰ or with a misdemeanor for which the defendant is incarcerated.²⁰¹ Congress enacted ICRA in 1968, five years after *Gideon*, where the Supreme Court held that the Sixth Amendment required appointment of counsel to indigent defendants at public expense in state and federal felony cases.²⁰² Despite the chronology, the fact that Congress did not include a *Gideon*-type provision in ICRA should not necessarily be interpreted as an intent to create a right to counsel with a scope different from the Constitution. As enacted, ICRA limited the punishment tribal courts could impose to misdemeanor-type penalties. In 1968 when ICRA was enacted, the *Gideon* right to appointed counsel extended only to felony cases.²⁰³ Thus, when Congress enacted

200. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

201. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *see also* *United States v. Doherty*, 126 F.3d 769, 778 (6th Cir. 1997), *abrogated on other grounds by* *Texas v. Cobb*, 532 U.S. 162 (2001) (“ICRA provides for a right to counsel, but does not extend that right to the limits of the Sixth Amendment . . . [and] the tribes are not required to provide counsel to the indigent accused in felony prosecutions, despite the Sixth Amendment holding to the contrary in *Gideon v. Wainwright*.”).

202. *Gideon*, 372 U.S. at 339.

203. As enacted, ICRA limited tribes’ sentencing authority to a maximum of six months’ imprisonment and/or a \$500 fine: “No Indian tribe in exercising powers of self-government shall . . . impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of \$500, or both . . .” Indian Civil Rights Act of 1968, Pub. L. No. 90-284, tit. II, § 202, 82 Stat. 77, 77 (codified at 25 U.S.C. § 1302(a)(7)(B) (1970)). Congress amended ICRA in 1986 to increase the maximum sentence to one-year imprisonment and/or a \$5000 fine. Act of Oct. 27, 1986, Pub. L. No. 99-570, tit. IV, § 4217, 100 Stat. 3207-001, 3207-146. Following enactment of TLOA in 2010, the section was revised to raise the one-year incarceration cap for each offense to three years, the \$5000 fine cap to \$15,000, and to allow tribal courts to stack offenses to impose a term of incarceration of up to nine years for some offenses in proceedings complying with TLOA’s procedural requirements, including the provision of bar-licensed counsel at public expense to indigents sentenced to more than a year or more than \$5000. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, § 234, 124 Stat. 2261, 2280. These ICRA provisions currently read:

No Indian tribe in exercising powers of self-government shall—

.....

[(7)](B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of \$5,000, or both;

(C) subject to subsection (b) [providing for enhanced penalties in specific cases], impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of \$15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years.

ICRA, indigent tribal court defendants (at this time, limited to Indians)²⁰⁴ were in no different position under ICRA than indigent state defendants under the federal Constitution.²⁰⁵

In 1972, post-ICRA, the Supreme Court extended the *Gideon* right to counsel at public expense to indigents in misdemeanor cases that result in either actual imprisonment, no matter how brief,²⁰⁶ or in a suspended sentence that includes a term of imprisonment.²⁰⁷ Congress amended ICRA in 1986 to increase tribal court sentencing authority from six months and \$500, to one year and \$5000.²⁰⁸ But it did not re-visit ICRA's right to counsel provisions despite the change in the federal constitutional right to counsel at public expense, which now required that counsel be appointed not just in all felony cases, but also in misdemeanors involving actual imprisonment. The constitutional rights of indigent state and federal court defendants, therefore, were expanded to cover some misdemeanors, but the federal statutory rights of tribal court defendants under ICRA remained unchanged. Unlike indigent state and federal court defendants who are entitled to counsel at public expense in any felony case or in any misdemeanor case that results in actual imprisonment or a suspended sentence of imprisonment, indigent tribal court defendants outside TLOA and VAWA 2013 prosecutions (i.e., Indian defendants facing incarceration of one year or less) still have the right only to the assistance of retained counsel.²⁰⁹

25 U.S.C. § 1302(a)(7)(B)-(D) (2012).

204. Under the 1968 version of ICRA, this provision applied only to Indians because, at the time, only Indians were subject to tribal jurisdiction.

205. Creel, *supra* note 193, at 347 (“[I]n 1968, the Supreme Court had not yet extended the right to counsel to . . . misdemeanor offenses Thus, with regard to the right to counsel debate of the time, ICRA’s provision of a right to counsel at the Indian’s own expense was equivalent to the right to counsel in the states.”) (footnotes omitted).

206. *Argersinger*, 407 U.S. at 33 (“We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more.”).

207. *Scott v. Illinois*, 440 U.S. 367 (1979).

208. *See supra* note 203.

209. *Tom v. Sutton*, 533 F.2d 1101, 1105 (9th Cir. 1976) (noting that procedural safeguards of ICRA largely mirror those of the federal constitution, both in content and the levels of generality of their protections, but declining to construe ICRA’s due process requirement to find a right to appointed counsel for indigent defendants because ICRA specifically addressed the right to counsel).

3. *TLOA and VAWA 2013: Jurisdiction over Non-Indians and ICRA's New Right to Counsel*

As noted, the TLOA amendments to ICRA authorize tribal courts to exceed the one year, \$5000 sentencing cap under ICRA's general provisions, and impose a sentence up to three years and \$15,000 if the defendant: (1) has a prior conviction for the same or comparable offense in a court of any jurisdiction within the United States; or (2) is being prosecuted for an offense comparable to an offense punishable by more than one-year "imprisonment if prosecuted by the United States or any of the States."²¹⁰ It also authorizes tribal courts to stack sentences and impose a sentence of up to nine years for offenses that are part of the same transaction.²¹¹ To exercise the enhanced sentencing authority under the TLOA amendments to ICRA,²¹² a tribal court must provide the following specific procedural protections beyond those required by ICRA's general provisions:

- the "right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution,"²¹³

210. 25 U.S.C. § 1302(b) (2012). TLOA does not define "comparable offense" or indicate whether "any of the States" includes Indian nations—both issues that will need to be determined by courts. *See* Quintin Cushner & Jon M. Sands, *Tribal Law and Order Act of 2010: A Primer, with Reservations*, CHAMPION, Dec. 2010, at 38, 39 ("What constitutes a 'comparable offense' will be a subject for future litigation. Further, defense attorneys may wish to challenge whether the "or any of the States" language means that, for example, a Navajo Indian defendant could face more than one-year imprisonment in a tribal court within Utah's boundaries for activity that is only punishable by more than one-year imprisonment in Hawaii.").

211. 25 U.S.C. § 1302(b).

212. Ironically and perhaps, tellingly, although the U.S. Constitution does not extend to Indian Country and although the sole source of a tribal court defendant's federal procedural rights is ICRA, the section of ICRA that lists the federal statutory rights tribal courts must extend to defendants, 25 U.S.C. § 1302, is titled "Constitutional rights."

213. 25 U.S.C. § 1302(c)(1). The general provisions of ICRA provide for the right to assistance of counsel; they do not contain a right to effective assistance of counsel. That does not mean, of course, that tribes cannot or do not guarantee defendants effective assistance of counsel. *See, e.g.,* Taylor v. Hopi Tribe, No. 00AC000002 (Hopi Tribe App. Ct. 2000), *reprinted in* GARROW & DEER, *supra* note 167, at 443 ("The right to counsel implies effective counsel. If an attorney's performance in representing an accused is such as to amount to no representation at all, the accused has clearly been deprived of effective representation."). It only means that effective assistance of counsel is not set out as a specific right in the text of ICRA's general provisions.

- for indigent defendants, “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” at tribal expense;²¹⁴
- a judge with “sufficient legal training to preside over criminal proceedings” who is licensed to practice law;²¹⁵
- publicly available criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances),²¹⁶ and
- a record of the criminal proceeding, including an audio or other recording of the trial proceeding.²¹⁷

The TLOA additions to ICRA in 2010 reflect due process requirements the Supreme Court imposed on states after Congress enacted ICRA in 1968. This includes the right to counsel at public expense for indigent defendants who receive a sentence of incarceration, as recognized in *Argersinger v. Hamlin* in 1972,²¹⁸ and the standard for effective assistance of counsel, established in *Strickland* in 1984. These requirements, particularly the requirements that tribal judges in TLOA proceedings be bar-licensed and that tribes provide indigent TLOA defendants bar-licensed counsel at tribal expense, impose “both a great cost on tribes interested in extending their sentencing powers and a pressure to conform their systems to match federal or state justice systems.”²¹⁹

VAWA 2013, which authorizes tribal courts to exercise jurisdiction over some non-Indians who commit some domestic violence offenses against Indians on tribal land, was passed after TLOA; it incorporated TLOA’s heightened procedural requirements, and added new, different ones. VAWA 2013 added a new section to ICRA—§ 1304²²⁰ to implement and

214. 25 U.S.C. § 1302(c)(2). The general provisions of ICRA do not require that counsel be bar-licensed.

215. *Id.* § 1302(c)(3)(A), (B).

216. *Id.* § 1302(c)(4).

217. *Id.* § 1302(c)(5).

218. 407 U.S. 25 (1972).

219. *ICRA Reconsidered: New Interpretations of Familiar Rights*, 129 HARV. L. REV. 1709, 1717 (2016) [hereinafter *ICRA Reconsidered*].

220. Title 25 U.S.C. § 1304(d) sets out the “Rights of defendants” in VAWA 2013 prosecutions:

authorize tribal criminal jurisdiction over non-Indians. This new section imposes procedural requirements on tribes seeking to exercise what VAWA 2013 refers to as “special domestic violence criminal jurisdiction.”²²¹ To exercise jurisdiction over VAWA 2013 defendants (anticipated to be non-Indians), tribes must provide them all the procedural protections required under the general provisions of ICRA (found in 25 U.S.C. § 1302(a)) and the heightened protections under the TLOA amendments to ICRA, found in 25 U.S.C. § 1302(c) (set out above).²²² In addition, tribes seeking to exercise VAWA 2013 jurisdiction must provide defendants with two guarantees not found in either ICRA’s general provisions or the TLOA amendments. The first guarantee is a right to an “impartial jury,” which Congress specifically defined for purposes of VAWA 2013 jurisdiction using the language the Supreme Court developed to define an impartial jury

In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant—

- (1) all applicable rights under this Act [i.e., the rights set out in the general provisions of ICRA found at §1302(a)];
- (2) if a term of imprisonment of any length may be imposed, all rights described in section 1302(c) of this title [the TLOA amendments to ICRA];
- (3) the right to a trial by an impartial jury that is drawn from sources that—
 - (A) reflect a fair cross section of the community; and
 - (B) do not systematically exclude any distinctive group in the community, including non-Indians; and
- (4) 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 U.S.C. § 1304(d). As set out above, under the TLOA amendments to ICRA incorporated into the VAWA 2013 provisions of ICRA, before a tribe can sentence a defendant to more than one year or impose a fine over \$5000, it must provide the right to constitutionally effective assistance of counsel, and provide indigent defendants licensed counsel at tribal expense; provide licensed and trained judges; make tribal laws and rules publicly available before prosecuting a defendant; and ensure that courts are of record. *Id.* § 1302(c)(3)- (5).

221. *Id.* § 1304(d).

222. The TLOA amendments differ from the VAWA 2013 amendments to ICRA in what triggers their respective heightened procedural rights. TLOA rights are triggered if a tribe seeks to “impose” a sentence over one year or \$5000; in contrast, VAWA 2013 rights are triggered when “a term of imprisonment of any length *may be* imposed.” The former reflects an actual incarceration standard, the latter an authorized incarceration standard, representing a dividing line in Sixth Amendment jurisprudence addressing the right to appointed counsel for misdemeanors. *See Argersinger v. Hamlin*, 407 U.S. 25 (1972) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the right for indigent misdemeanants is triggered by actual incarceration, not authorized incarceration).

under the Constitution.²²³ The second guarantee includes “all other rights whose protection is necessary under the Constitution . . . in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction.”²²⁴

In summary, the TLOA and VAWA 2013 amendments to ICRA, *inter alia*, require tribes to ensure that defendants subject to ICRA’s TLOA provisions (i.e., Indian defendants sentenced to more than one-year incarceration or more than a \$5000 fine), and to the VAWA 2013 amendments (defendants facing incarceration of any length for a VAWA 2013 offense) receive effective assistance of counsel at least equal to that required by the Constitution and, if indigent, of bar-licensed counsel at tribal expense. In addition, VAWA 2013 tribal court defendants (which includes non-Indians) are entitled to an impartial jury, defined by reference to the Sixth Amendment standard, and they are entitled to every other (unspecified) federal constitutional right necessary for Congress to recognize and affirm the tribes’ exercise of jurisdiction over non-Indians.²²⁵

B. Enforcing the Right in Federal Court: Habeas Review Under ICRA

ICRA provides all tribal court defendants the right to federal habeas review of their tribal court convictions.²²⁶ It is an understatement to say that, in comparison to AEDPA (the federal statute governing habeas review of state and federal court convictions), the habeas provision applicable to tribal court convictions under ICRA is astonishingly brief. It provides, in its entirety: “The privilege of the writ of habeas corpus shall be available to

223. 25 U.S.C. § 1304(d) (mirroring the constitutional guarantee to a jury drawn from a fair cross-section of the community using a procedure that does not systematically exclude any distinctive group in the community).

224. *Id.*

225. These tiered rights for defendants charged under the general provisions of ICRA (limited to Indians) and the VAWA 2013 provisions (which could include Indians, but which is clearly intended for the benefit of non-Indians) raises the question of whether an Indian in a VAWA 2013 tribal jurisdiction who is charged with a crime of domestic violence under the non-VAWA 2013 provisions of ICRA might have an Equal Protection claim because s/he would have been entitled to these greater protections had the tribal prosecutor charged the conduct as a VAWA 2013 offense and thereby triggered the VAWA 2013 heightened right to appointed counsel and the VAWA 2013 fair cross section/impartial jury rights.

226. 25 U.S.C. § 1303 (2012) (“The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.”); *Bressi v. Ford*, 575 F.3d 891, 896 (9th Cir. 2009) (holding that the exclusive means to enforce ICRA’s civil rights protections in federal court is through a petition for writ of habeas corpus under § 1303) (“[E]xcept for habeas corpus challenges, any private right of action under [the Indian Civil Rights] Act lies only in tribal court.”)

any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.”²²⁷

As with the heightened procedural requirements ICRA imposes in TLOA and VAWA 2013 prosecutions, ICRA habeas procedure is also more protective of VAWA 2013 tribal court habeas petitioners. As part of the VAWA 2013 amendments, ICRA allows a tribal prisoner who is challenging a sentence of incarceration in a federal habeas petition to ask the federal court who will hear the petition to stay the tribal court order of detention pending federal habeas review.²²⁸ Under this new provision, the federal court must grant a stay if it finds a substantial likelihood that the habeas corpus petition will be granted, and if, after notice to the alleged victims, it finds, by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.²²⁹

As a textual matter, ICRA’s new stay-of-detention provision could be read to apply to all tribal court habeas petitioners, not just petitioners convicted of a VAWA 2013 offense in tribal court. The stay of detention provision is found in § 1304 of ICRA, which is the section implementing the protections required of tribes exercising VAWA 2013 jurisdiction over non-Indians. However, § 1304 refers to habeas petitions brought “under section 1303,” the section of ICRA that authorizes federal court habeas review over all tribal court convictions.²³⁰ Given the placement of the stay of detention provision in § 1304, which is the VAWA 2013 section of ICRA, it is likely Congress intended the stay of detention provision to benefit non-Indians detained pursuant to a tribal court conviction pending habeas review in federal court,²³¹ not Indian petitioners.²³²

227. 25 U.S.C. § 1303.

228. *Id.* § 1304(e)(1).

229. This mirrors the federal bail statute, which requires release pretrial on conditions unless the court finds, based on clear and convincing evidence, that the defendant poses a risk of flight or a danger to the community. Bail Reform Act of 1984, 18 U.S.C. § 3142 (2012).

230. . 25 U.S.C. § 1304(e)(1).

231. Carrie E. Garrow, *Habeas Corpus Petitions in Federal and Tribal Courts: A Search for Individualized Justice*, 24 WM. & MARY BILL RTS. J. 137, 150-53 (2015) (stating that the concept of citizenship as a “limiting principle on tribal powers . . . is found again in the VAWA amendments to ICRA that allow non-Indians to seek a stay of detention when filing a habeas petition”) (“Indians do not receive this same protection. The federal government perceives their right to vote as enough protection against civil rights violations by tribal governments. Fearful of civil rights violations, the government affords non-Indians to use

The right to seek a stay of detention pending habeas review is not a right available to petitioners seeking habeas review of a state or federal court conviction. As with the right to counsel at public expense, ICRA's habeas corpus provisions provide procedural protections for tribal court defendants greater than those the Constitution or federal law require for their state or federal court counterparts.²³³ One of the animating forces for enacting ICRA and imposing procedural requirements on tribes like those found in the Constitution was an unease with tribal self-government, including a skepticism about tribal courts' competence and ability to be fair.²³⁴ This is a theme Congress apparently revisited in its recent TLOA and VAWA 2013 amendments to ICRA.²³⁵

their U.S. citizenship as a cloak and request a stay of detention while their federal habeas petition is pending.”)

232. A VAWA 2013 petitioner could, of course, be Indian or non-Indian. But in light of VAWA 2013's special domestic violence jurisdiction primary purpose—to allow tribal courts to exercise jurisdiction over non-Indians—it is a fair characterization of the VAWA 2013 amendments to ICRA as procedural protections intended primarily for the benefit of non-Indian tribal court defendants.

233. As noted *supra*, the federal writ of habeas corpus was originally only available to challenge detention by federal authorities. Following the Civil War, “fearful that the states of the former Confederacy would undermine federal rights—especially the rights of the freedmen and their allies—during Reconstruction,” Congress, by statute, authorized challenges to state detention as well. See Michael C. Dorf, *A Unanimous Supreme Court Ruling Underscores the Limits of Habeas Corpus as a Remedy for State Prisoners*, VERDICT (May 22, 2013), <https://verdict.justia.com/2013/05/22/a-unanimous-supreme-court-ruling-underscores-the-limits-of-habeas-corpus-as-a-remedy-for-state-prisoners>. It appears that this same fear and distrust animates the recent TLOA and VAWA 2013 amendments to ICRA, especially the new provision permitting release of a tribal court prisoner pending federal review of his tribal court conviction.

234. *ICRA Reconsidered*, *supra* note 219, at 1718 (“As has been shown, throughout European—and federal—Indian relations there has been a history of suspicion of Indian law and self-government. And although Congress came to accept that tribal courts would have jurisdiction over some cases, it became concerned with reports of abuse and the lack of Bill of Rights protections for tribal members. Congress passed ICRA to bring (most of) the Bill of Rights to tribal lands, but the Court in *Santa Clara Pueblo* limited the available remedies for ICRA violations [to the habeas petition].”)

235. A distrust of tribal courts' ability to be fair in dealing with persons outside their own tribes is also reflected in the Court's jurisprudence. See Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1053-54 (2005) (“Since 1978, the Supreme Court has decimated tribal jurisdiction over those that are not members of their tribes. Scholars . . . almost uniformly agree that the decisions are not accurate reflections of established Indian law doctrine One might simply dismiss this trend as racism or hostility to tribes. . . . But such accounts do not fully explain why, within the same period, the Court has been relatively consistent in protecting

The procedure governing federal habeas review of tribal court convictions under ICRA is also more lenient than that governing review of state or federal court convictions. As noted, petitioners seeking habeas review of a state or federal conviction are subject to a one-year statute of limitations in non-capital cases, to promote finality of state and federal criminal judgments.²³⁶ There are no time limitations under the ICRA habeas provision.²³⁷ As noted, AEDPA contains an exhaustion requirement—under it, petitioners seeking review of state court convictions must exhaust their state court remedies before seeking federal court review—and a doctrine of extreme deference to state court determinations, even when they are applying federal constitutional law.²³⁸ ICRA, on its face, does not impose any limitations on petitioners seeking federal review of tribal court convictions, except the requirement that the prisoner is limited to challenging his “detention.”²³⁹ ICRA contains no statute of limitations,²⁴⁰ no bar on successive petitions,²⁴¹ no exhaustion requirement, and no standards of review.²⁴² In the absence of statutory guidance, federal courts have developed a common law for tribal court habeas review that imposes some concepts familiar in the state habeas arena. For example, all federal courts that have addressed the issue require tribal court petitioners, at minimum, to establish that they are “in custody” and that they have exhausted their tribal remedies.²⁴³

tribes and their members from state and federal jurisdiction These conflicting trends are best explained by justices’ assumptions regarding what jurisdiction over outsiders means both for outsiders and for tribes. More specifically, the decisions are rooted in the sense that tribal courts will not be fair to nonmembers”).

236. 28 U.S.C. § 2244(d)(1) (2012) (“A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.”); *id.* § 2244(d)(2) (sets out a tolling period, and § 2244(d)(1) provides for four possible starting dates for the limitation period).

237. *See* Cushner & Sands, *supra* note 210, at 39.

238. 25 U.S.C. § 1303 (2012).

239. *Id.* §§ 1301-1303.

240. *See generally id.* Given that pre-TLOA, tribal sentences were limited to one year, it is not surprising that ICRA has no statute of limitations for tribal prisoner petitioners.

241. *See generally id.* Since a tribal court cannot, under any circumstances, sentence a defendant to a term of incarceration longer than nine years, tribal court petitions have a natural shelf life and successive petitions are, therefore, less of a concern than in the state and federal system where sentences of life imprisonment and execution are possible.

242. *See generally id.*

243. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 9.09, at 780 (Nell Jessup Newton et al. eds., 2012) [hereinafter COHEN] (“All federal courts addressing the issue mandate that two prerequisites be satisfied before they will hear a habeas petition filed under the ICRA:

1. The “In Custody” Requirement

The writ of habeas corpus, by its nature, requires that the habeas petitioner be “in custody.” The remedy for a successful writ of habeas corpus is release from custody, a reduction in sentence, or a remand for further proceedings, such as an evidentiary hearing, new trial, or new sentencing hearing.²⁴⁴ If a petitioner is not being detained and is not a prisoner, there is no basis for habeas relief.²⁴⁵ Accordingly, AEDPA requires that a petitioner be “in custody” to bring a federal habeas petition.²⁴⁶ ICRA, similarly, is limited to challenges to tribal court “detention,” and the Supreme Court has defined ICRA’s “detention” language as a jurisdictional prerequisite for federal courts to hear a tribal court habeas petition.²⁴⁷ To invoke a federal court’s § 1303 jurisdiction, a tribal court petitioner must show he is subject to “conditions and restrictions . . . [that] significantly restrain [his] liberty.”²⁴⁸ ICRA does not define “detention,” but federal courts interpreting ICRA’s habeas provision have interpreted the term “detention” similarly to the “in custody” requirement in other habeas contexts.²⁴⁹ What restraints short of physical incarceration amount to “detention” in the tribal context has not always

[(1)] The petitioner must be in custody, and [(2)] the petitioner must first exhaust tribal remedies.”); *see also* *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010) (“We therefore have no jurisdiction to hear a petitioner’s claim for habeas corpus, unless both [exhaustion and the in custody] conditions are met. Any expansion of this jurisdiction must come from Congress, not by decision of this court.”).

244. *See generally* COHEN, *supra* note 243, § 9.09, at 778-81.

245. *Id.*

246. 28 U.S.C. § 2254(a) (2012).

247. *See Jeffredo*, 599 F.3d at 918.

248. *Jones v. Cunningham*, 371 U.S. 236, 243 (1963); *see also* *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 880 (2d Cir. 1996) (citing *Jones v. Cunningham*, 371 U.S. 236 (1963) (“[U]nder Jones and its progeny, a severe actual or potential restraint on liberty” is necessary for jurisdiction under § 1303.”); *Shenandoah v. Halbritter*, 275 F. Supp. 2d 279, 285 (N.D.N.Y. 2003) (quoting *Poodry* for the same proposition); *Jeffredo*, 599 F.3d at 919 (“We agree with our colleagues on the Second Circuit and hold that § 1303 does require ‘a severe actual or potential restraint on liberty.’”).

249. *See Moore v. Nelson*, 270 F.3d 789, 791 (9th Cir. 2001) (“There is no reason to conclude that the requirement of ‘detention’ set forth in the Indian Civil Rights Act § 1303 is any more lenient than the requirement of ‘custody’ set forth in the other habeas statutes.”); *Jeffredo*, 599 F.3d at 918 (“ICRA habeas petition is only proper when the petitioner is in custody.”); *Poodry*, 85 F.3d at 890 (holding that the ICRA habeas provision was not intended to empower district courts to entertain petition for habeas relief in wider range of circumstances than permitted by analogous provisions for relief from state and federal custody).

been clear. In applying this standard, lower federal courts have concluded, for example, that revocation of a tribal permit,²⁵⁰ imposition of a fine,²⁵¹ enforcement of a housing ordinance,²⁵² and exclusion from tribal employment and services²⁵³ do not constitute detention. The use of banishment as a punishment, however, has been found to be a sufficient restraint on liberty to trigger ICRA's habeas jurisdiction.²⁵⁴

2. Exhaustion

Federal courts, similarly, have created common law standards for petitions seeking review of tribal court proceedings in federal court.²⁵⁵ This includes a requirement that parties to a lawsuit implicating tribal interests first exhaust their remedies in tribal court before pursuing an action in federal court.²⁵⁶ Absent exceptional circumstances, federal courts will

250. *Walton v. Tesuque Pueblo*, 443 F.3d 1274, 1279-80 (10th Cir. 2006) (holding that ICRA habeas provision did not confer jurisdiction on district court in action arising out of revocation of flea market vendor's permit, and that the revocation did not amount to a restraint on liberty).

251. *Moore*, 270 F.3d at 790 (holding that the imposition of a fine alone does not satisfy ICRA's "detention" requirement).

252. *Shenandoah v. Halbritter*, 366 F.3d 89, 92 (2nd Cir. 2004) (holding that the tribe's enforcement of housing ordinance, resulting in destruction of some homes, did not constitute sufficiently severe restraint on liberty to invoke federal court's ICRA habeas corpus jurisdiction).

253. *Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708, 713 (2nd Cir. 1998) (holding that the members of Oneida Nation did not suffer severe actual or potential restraint on liberty, as required for ICRA habeas jurisdiction, when they were allegedly suspended or terminated from employment positions and lost tribal privileges and benefits).

254. *Poodry*, 85 F.3d at 895 (stating that banishment notices served on members of Tonawanda Band of Seneca Indians who had been "convicted of treason" a sufficient "restraint on liberty" to permit district court to entertain ICRA habeas petition; Congress could not have intended to permit tribe to circumvent ICRA's habeas provision by permanently banishing, rather than imprisoning, members "convicted" of offense of treason); *see also Quair v. Sisco*, 359 F. Supp. 2d 948, 971 (E.D. Cal. 2004) (holding that the disenrollment of tribal members and subsequent banishment from reservation constituted "detention" under ICRA, even though the disenrolled members were already physically banished from reservation).

255. COHEN, *supra* note 243, § 9.09, at 778-81; *see also Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 953 (9th Cir. 1998) (exhaustion requirement); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

256. COHEN, *supra* note 243, § 7.04[3], at 630 ("Even when a federal court has jurisdiction over a claim, if the claim arises in Indian country, the court is required to stay its hand until the party has exhausted all available tribal remedies.") (citing *LaPlante*, 480 U.S. at 16; *Crow Tribe*, 471 U.S. at 857; *Selam*, 134 F.3d at 953 (stating that "[t]he Supreme

abstain from hearing cases that challenge tribal court authority until tribal remedies, including tribal appellate review, are exhausted.²⁵⁷ The tribal exhaustion doctrine applies to habeas corpus proceedings brought pursuant to ICRA.²⁵⁸

The tribal exhaustion doctrine has three narrow exceptions in which a federal court will not require a petitioner to establish that she has exhausted her tribal court remedies before exercising jurisdiction: (1) where harassment motivated a tribe's exercise of jurisdiction; (2) if the tribal court action violated an express jurisdictional prohibition; or (3) if requiring resort to tribal remedies would be futile.²⁵⁹ Absent one of these exceptions, a petitioner must exhaust her tribal remedies before seeking relief in federal court.²⁶⁰

At first blush, the tribal exhaustion doctrine seems similar to its state analog. But, unlike federal court review of state court decisions, at least post-AEDPA, federal courts reviewing tribal court decisions do go behind the exhaustion standard. And they ask not just whether the tribal court had a procedure in place and whether it was exhausted, but also whether the

Court's policy of nurturing tribal self-government strongly discourages federal courts from assuming jurisdiction over unexhausted claims" unless party can show exhaustion would be futile or that tribal courts offer no adequate remedy)); *see also* *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1507 (10th Cir. 1997).

257. *See* *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1149 (10th Cir. 2011); *Sweet v. Hinzman*, 634 F. Supp. 2d 1196, 1199-1200 (W.D. Wash. 2008) (holding that absent contrary evidence, allegation that no tribal remedies existed for banished tribe members to exhaust was sufficient to survive motion to dismiss ICRA habeas corpus petition challenging banishment); *Quair*, 359 F. Supp. 2d at 971-72 (holding that the former tribal members demonstrated exhaustion of remedies of their disenrollment and banishment; tribe had no tribal court to which to appeal).

258. *See, e.g., Selam*, 134 F.3d at 954; *Lyda v. Tah-Bone*, 962 F. Supp. 1434, 1435-36 (D. Utah 1997); *see also* *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978) (stating that in evaluating a habeas petition, the Court is obligated to avoid needless intrusion on tribal self-government).

259. *See* *Crow Tribe*, 471 U.S. at 851; *Wounded Knee v. Andera*, 416 F. Supp. 1236, 1239 (D.C.S.D. 1976) (holding that a petitioner is not required to go through motions of exhaustion if resort to tribal remedies would be futile).

260. *See* *Valenzuela v. Silversmith*, 699 F.3d 1199, 1206-07 (10th Cir. 2012) (holding that a member of an Indian tribe is required to exhaust tribal court remedies before filing federal habeas petition, and that ignorance of the law is not a sufficient excuse for failing to satisfy tribal procedural requirements); *Navajo Nation v. Intermountain Steel Bldgs., Inc.*, 42 F. Supp. 2d 1222, 1226 (D.N.M. 1999); *Jeffredo v. Macarro*, 599 F.3d 913, 917-18 (9th Cir. 2010) (holding that a federal court has no jurisdiction to hear a tribal court petitioner's habeas corpus claim unless both in custody and exhaustion conditions both met) ("Any expansion of this jurisdiction must come from Congress, not by decision of this court.").

process was fair.²⁶¹ In *Greywater v. Joshua*, for example, the Eighth Circuit Court of Appeals did not require exhaustion where there was no record of the tribal court's ruling on a motion, but where, notwithstanding the lack of a record, the Eighth Circuit found there was other evidence in the record that the petitioner had not received a fair hearing.²⁶² More to the point, whether federal courts require a tribal court petitioner to exhaust his tribal court remedies before seeking federal relief may depend on whether the petitioner is Indian or not.²⁶³ Given this background, there is a real question as to whether federal courts will apply the exhaustion requirement to a

261. This raises a secondary question of how formal a tribal court procedure needs to be to qualify for the exhaustion requirement. *See* *Necklace v. Tribal Court of Three Affiliated Tribes of Fort Berthold Reservation*, 554 F.2d 845, 846 (1977) (holding that an Indian committed to state hospital pursuant to tribal court order is not required to exhaust tribal remedies before seeking habeas corpus where there appeared to be informal procedures by which to seek relief in tribal court, but tribal law had no formal habeas corpus procedure).

262. *Greywater v. Joshua*, 846 F.2d 486, 489 (1988) (holding that exhaustion of tribal remedies is not required before petitioning for habeas corpus to challenge jurisdiction of tribal court where trial court denied motion to dismiss without a record and, according to the federal court, there were "strong grounds in the record" suggesting that the petitioners did not receive fair hearing in the tribal court). Oddly, the *Greywater* court criticized the tribal court for failing to make a record, yet relied on extra record evidence to find strong grounds in the record that the tribal court proceeding was unfair, rather than remand the matter to the tribal court to create a record. The "strong grounds in the record" relied on by the *Greywater* court was an allegation (which was not in the record) about the arrest at issue, and the facts surrounding the t . *Id.* at 489 ("Furthermore, there are strong grounds in the record to suggest that Petitioners did not receive a fair hearing in the Tribal Court The tribal court judge, moreover, allegedly chided Petitioners that as nonmembers of the Sioux Tribe they would not receive a fair trial because only Sioux would be on the jury. The facts surrounding the arrest and charges lend additional corroboration to this concern. The person driving the car at the time of the arrests was a member of the Devils Lake Sioux Tribe as were the arresting officers. The passengers all were nonmember Chippewa Indians; only the nonmembers were arrested.")

263. *See* Garrow, *supra* note 231, at 150-53. In her article, Professor Garrow describes a survey that found only five cases where federal courts did not require exhaustion of tribal remedies. Four involved either non-Indian petitioners or Indians who were not members of the prosecuting tribe that were decided at a point when the Supreme Court treated non-member Indians the same as non-Indians for tribal court jurisdictional purposes. Those cases, as the author explains, would be treated different today. The remaining case in which the federal reviewing court did not require exhaustion requirement involved an Indian petitioner. But in that case, Professor Garrow notes, the Tribe appears to have waived the issue because it did not raise exhaustion as a bar. *Id.* (citing *Connor v. Conklin*, No. A4-04-50, 2004 WL 1242513 (D.N.D. June 2, 2004)).

petition brought by a non-Indian seeking to challenge a tribe's assertion of VAWA 2013 jurisdiction.²⁶⁴

Under AEDPA, federal courts may not review a state court's denial of a federal constitutional claim if the state court's decision rests on a state procedural ground that is independent of the federal question, and adequate to support the judgment. The doctrine of "adequate and independent" grounds is frequently invoked to bar federal review of state court convictions as an expression of deference to the other sovereign's superior interest in disposing of challenges of criminal convictions under its own laws.²⁶⁵

The deference extended to states under this doctrine is not always extended to tribal court decisions in federal habeas review. In *Alvarez v. Tracey*, for example, the Ninth Circuit Court of Appeals granted habeas relief to a petitioner who contended that a tribe had denied him the right, upon request, to a jury trial (a right guaranteed by ICRA).²⁶⁶ Although the tribe had a procedure in place for providing a jury trial upon request to defendants, the petitioner claimed he was denied that right because the tribe failed to inform him that he needed to request a jury.²⁶⁷ Although neither ICRA nor the tribe's procedure required notice of the right to a jury trial upon request, the Ninth Circuit, instead of deferring to the tribal court judgment on this point, resolved the issue under a due process balancing test.²⁶⁸ Applying that test, the Ninth Circuit concluded that the petitioner's interest in fair treatment outweighed the tribe's procedural interests, the lack of notice amounted to the denial of the jury, and that denial of a jury

264. Compare *In re Garvais*, 402 F. Supp. 2d 1219 (E.D. Wash. 2004) (holding that a criminal defendant contesting tribal detention jurisdiction on ground that he was not an Indian is not required to exhaust tribal court remedies before seeking federal habeas relief) with *Tah-Bone*, 962 F. Supp. at 1434 (holding that a member of the Cherokee Tribe is not relieved from ICRA's requirement that he exhaust remedies available in Ute Tribal Court of Appeals, and that it is sufficient that tribal court have "apparent" or "colorable" jurisdiction).

265. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991), modified, *Martinez v. Ryan*, 566 U.S. 1 (2012) ("In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism. Without the rule, a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.").

266. 835 F.3d 1024 (2016).

267. *Id.* at 1029.

268. See *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897 (9th Cir. 1988).

right was a structural error that required automatic reversal.²⁶⁹ It is hard to imagine a federal court reaching the same result in habeas review of a state court conviction under the AEDPA.

*III. The Constitutional Ineffective Assistance of Counsel Standard
Interpreted Through ICRA Habeas Review: Parallel Universe
or Unchartered Territory?*

Along with requiring tribal courts to provide counsel to indigent defendants at public expense on similar, but not identical, terms as the Sixth Amendment, the TLOA and VAWA 2013 amendments to ICRA further require tribal courts “provide” TLOA and VAWA 2013 defendants “the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution.”²⁷⁰ As explained, under contemporary jurisprudence, the “right to effective assistance of counsel guaranteed by the United States Constitution” is grounded in a criminal defendant’s Sixth Amendment right to enjoy the assistance of counsel, not due process.²⁷¹ Additionally, it is measured exclusively by the two-prong test the Supreme Court adopted in its 1984 *Strickland* decision. By referencing an established and long-standing federal constitutional standard, Congress has unmistakably tethered ICRA’s right to effective assistance of counsel provision to the Sixth Amendment standard articulated in *Strickland*.²⁷²

In considering whether Congress intended ICRA’s new right to effective assistance of counsel to be co-extensive with the Sixth Amendment, it should be noted that, unlike provisions in ICRA that Congress imported word for word from the Bill of Rights,²⁷³ the wording of the new ICRA

269. In dissent, Judge O’Scannlain contended that the balancing due process test of *Randall* was inappropriate, and that the claim should be resolved exclusively under ICRA, which contains no affirmative duty to inform a defendant of his right to a jury trial upon request. 835 F.3d at 1031-37.

270. 25 U.S.C. § 1302(c)(1) (2012).

271. See *supra* text accompanying note 33.

272. It remains to be seen how much of the secondary jurisprudence and issues that inhabit *Strickland*’s margins came with it into ICRA, or how this new ICRA guarantee will intermesh with existing tribal court procedures and custom.

273. *United States v. Doherty*, 126 F.3d 769, 778 (6th Cir. 1997), *abrogated on other grounds*, *Texas v. Cobb*, 532 U.S. 162 (2001) (“ICRA[] imposes obligations on the Indian tribes that are substantially similar to those imposed on the states by the Bill of Rights and the Fourteenth Amendment [some of which] . . . tracks the language of some Constitutional provisions word for word—for example, Indian tribes are prohibited from ‘abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances’”).

provision does not track the Sixth Amendment. Rather, the text of ICRA's new effective assistance of counsel provision requires tribal courts to "provide" TLOA defendants "the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution."²⁷⁴ By doing so, Congress appears to have created a tribal court right to effective assistance of counsel that will contract and expand with, and be delimited by, Sixth Amendment jurisprudence.²⁷⁵ If nothing else, the fact that Congress explicitly linked the new right to effective assistance of counsel in tribal court to an existing federal constitutional standard lends support to the argument that other provisions not so linked should be decoupled from federal constitutional analysis.²⁷⁶

On its face, a requirement that a tribe provide criminal defendants the right to effective assistance of counsel is not very controversial. There is not much of a lobby for incompetent attorneys and, generally speaking, leveling the playing field for litigants in court proceedings appeals to basic

274. 25 U.S.C. § 1302(c)(1).

275. This is consistent with Congress's approach to the statutory right to appointed counsel in federal court, which it expressly linked to the Sixth Amendment. The federal Criminal Justice Act of 1964 ("CJA") requires appointment of counsel for indigent federal defendants charged with felonies or Class A misdemeanors. 18 U.S.C. § 3006A (2012). Congress passed the CJA on the heels of the Court's 1963 decision in *Gideon v. Wainwright*. Under the CJA, federal district courts must provide counsel to any financially eligible person who "is entitled to appointment of counsel under the sixth amendment to the Constitution." 18 U.S.C. § 3006A(a)(1)(H). This provision requires federal district courts to appoint counsel to indigents guided by the U.S. Supreme Court's determination of when an indigent federal defendant is entitled to counsel at public expense without further statutory intervention by Congress. Since Congress linked the statutory right to the constitutional right in federal court by statute, issues concerning the constitutional entitlement to counsel at public expense almost invariably arise in the context of challenges to state, not federal, convictions. As with *Strickland* claims, most Sixth Amendment jurisprudence fixing the parameters of the right to counsel at public expense has developed in the context of federal habeas review of state court convictions.

276. *ICRA Reconsidered*, *supra* note 219, at 1730 ("[T]raditional statutory interpretation also tends to show that the provisions of ICRA are intentionally left ambiguous for tribes to imbue with their own meanings. By way of illustration, the TLOA added a provision to ICRA requiring that, in cases involving terms of imprisonment greater than one year, tribes must provide 'the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution.' No other provision directly ties the rights in ICRA to those in the Federal Constitution."). ICRA's catch-all provision, of course, complicates this analysis because it requires tribal courts seeking to impose a term of imprisonment of any length to extend "all other rights whose protection is necessary under the Constitution . . . in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction." 25 U.S.C. § 1304(d).

notions of fair play. If one agrees that, once a government charges a person with a crime, the government should not be able to prevent her from employing an agent to advocate for her in answering the allegations against her, and if one further ascribes to the *Strickland* adversarial construct of justice, in which justice is achieved when criminal allegations are put to the test by vigorous advocacy, it is not a huge leap to require the government who brought the accusations to pay for advocates for defendants too poor to pay for one, so they too can secure justice. Once one embraces the proposition that poor people should not be deprived of the opportunity to challenge the government's allegations by virtue of their poverty, it follows that the government should not be able to dilute the right to assistance of counsel by providing incompetent advocates. However, this is not what ICRA says. Instead, all it says is that tribes must provide TLOA and VAWA 2013 defendants the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution. "Effective assistance of counsel" is a constitutional term of art, with the very precise meaning given to it in *Strickland*. *Strickland* does not deem counsel ineffective unless the defendant shows *both* that counsel's conduct fell below an objective standard of reasonableness in making a decision that is not entitled to deference, *and* that the defendant was prejudiced thereby to such an extent that it calls into question the reliability of the result of the adversarial process. Thus, "the right to effective assistance of counsel at least equal to that guaranteed by the . . . Constitution," as currently interpreted by the Supreme Court, actually tolerates incompetence and inactivity by defense counsel, as long as it does not seriously undermine confidence in the outcome of the proceeding.²⁷⁷ By importing the *Strickland* standard into ICRA, Congress has set the minimum requirement in tribal court as non-seriously prejudicial incompetent counsel, precisely what the Constitution guarantees state and federal court defendants.²⁷⁸

277. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 20-21 (1997) ("To put it another way, ineffective assistance doctrine tolerates a very low activity level by defense attorneys. The law operates from the premise that effective representation can be minimal—as in many cases it can. (Think about the many plea-bargained cases that are resolved based on a few minutes' meeting between defense counsel and her client and a similarly brief meeting between defense counsel and the prosecutor.) Once that proposition is granted, it becomes difficult to separate low-activity but good representation from laziness or incompetence. Current Sixth Amendment doctrine responds by basing findings of ineffective assistance mostly on identifiable gross errors rather than on inactivity.")

278. See *McFarland v. Scott*, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting on denial of writ of certiorari) ("Ten years after the articulation of [the *Strickland*] standard,

As with the constitutional right to effective assistance of counsel, the contours of ICRA's new federal right to effective assistance of counsel in tribal court will eventually be shaped through federal habeas litigation. Thus, the availability of relief and the level of scrutiny to which federal courts will subject tribal court dispositions of ineffective assistance of counsel claims will ultimately determine what effective assistance of counsel in tribal court looks like. Under the federal double deference review of state *Strickland* claims, federal courts will not grant relief on a state prisoner's claim of ineffective assistance of counsel if there is at least "any reasonable argument that counsel satisfied *Strickland's* deferential standard."²⁷⁹

Depending on whether federal courts approach petitions from tribal convictions with the same hands-off attitude with which they currently approach state prisoner petitions, the result for tribal court prisoners may be indistinguishable from those of state court prisoners. If, however, federal courts apply more lenient post-conviction review standards and procedures to petitions challenging tribal court convictions, tribal prisoners will be able to obtain relief more readily than their state counterparts for ineffective assistance of counsel claims. In this way, federal court habeas review of tribal court ineffective assistance of counsel claims may produce a more robust, or at least a different, right to effective assistance counsel for tribal court defendants, notwithstanding Congress's clear intent that ICRA's new tribal court right to effective assistance of counsel would be tied to the federal constitutional standard.

Putting aside the technical question of the extent to which *Strickland's* deference and extreme prejudice requirements will drive federal habeas review of tribal convictions in the same way it has dominated federal review of state convictions, Congress's wholesale importation of the *Strickland* standard into ICRA presents a much weightier substantive question: what is effective lawyering in the tribal context under ICRA? Or, in *Strickland*-speak: what does it mean to be a lawyer whose conduct does not fall below an objective standard of reasonableness as measured against the prevailing practice in the community? Applying this standard requires, as a threshold matter, identification of the reference "community" whose

practical experience establishes that the *Strickland* test, in application, has failed to protect a defendant's right to be represented by something more than 'a person who happens to be a lawyer.'").

279. *Harrington v. Richter*, 528 U.S. 86, 105 (2011); *see also* *Moore v. Hardee*, 723 F.3d 488, 495-97 (4th Cir. 2013).

“prevailing practices” will inform the analysis.²⁸⁰ Is the “community” just advocates of a particular tribe?²⁸¹ Does it include lay advocates? Can the community include neighboring or nearby tribes? All tribes in a given region? In the United States? Is it limited to related tribes or tribes with compatible notions of justice? Given that federal courts routinely exercise jurisdiction over serious crimes in Indian Country under the Major Crimes Act, including some of the types of crimes that also fall under tribes’ concurrent VAWA 2013 jurisdiction, does the “community” include the federal bar? Does the “community” include the bar of the state in which a tribal reservation is physically located? And, critically, what happens when a nearby tribe or state follows different practices?²⁸² By adopting a nationalized standard that also incorporates local notions of professional competence, it appears Congress left room for individualized tribal approaches in evaluating what will be deemed objectively reasonable under the circumstances.²⁸³ It remains to be seen what level of deference federal

280. Identifying the reference “community” is the threshold issue in fair jury rights analysis as well. See Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 757 (2006) (“Attempting to achieve “a fair cross-section of the community” begs the most important question: what community?”).

281. See Creel, *supra* note 193, at 357-58 (“The adversary system was a foreign system imposed on tribes ... Unfortunately, outside counsel often do not have the requisite training or advocacy skill necessary for a competent criminal defense because the practice of criminal law and Indian law are highly specialized. No matter how competent an attorney may be in his or her field, there is no guarantee of transferable skills to provide competent assistance in a criminal proceeding.”) (footnote omitted).

282. LAFAVE ET AL., *supra* note 86, § 11.10(b) (“This is not to suggest that what constitutes reasonably effective assistance might not vary from one jurisdiction to another, as obligations imposed by local law may well be considered in determining what is needed to provide effective assistance. Thus, state courts have divided as to whether counsel’s failure to advise defendant that his guilty plea could result in deportation constitutes ineffective assistance.”) (citing *Mott v. State*, 407 N.W.2d 581 (Iowa 1987)). But see *Padilla v. Kentucky*, 559 U.S. 356 (2010) (subsequently holding that when “the deportation consequence is truly clear . . . the duty to give correct advice is equally clear”); *Lee v. United States*, 137 S. Ct. 1958 (2017) (recently holding that when a petitioner pleads guilty based on incompetent advice regarding the immigration consequences of his plea, *Strickland’s* prejudice prong is met).

283. The legislative history for this provision provides some insight into Congress’s intention, but still does not indicate how differences will be resolved. See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120-23; Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence, 78 Fed. Reg. 71,645, 71,655 (proposed Nov. 29, 2013) (stating that tribal lawyers “will compare favorably to ... the state or local . . . defense attorneys who participate in similar criminal proceedings”). Given this, and in light of *Strickland’s* mandate to look to prevailing professional norms in

courts will extend to tribes' own assessment of what constitutes effective lawyering in their own courts.

Strickland offers a very clear vision of the proper role of counsel under the Constitution—to ensure the proper functioning of the American criminal justice system by testing the prosecution's case through vigorous and adversarial advocacy.²⁸⁴ It is the abandonment or incompetent

the community, tribal governments operating under the VAWA 2013 provisions who have not done so would be well-advised to develop and document defense standards for their respective jurisdictions so there is no confusion about what that community considers to be acceptable professional practice. See LAFAYE ET AL., *supra* note 86, § 11.10(b) (“As the Court noted in [*Harrington v. Richter*, 562 U.S. 86 (2011)] ‘the [critical] question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviates from best practices or *most common custom*.’ Insofar as customary practice and professional norms overlap, the performance guidelines most helpful in establishing customary practice are likely to be those prescribed on a state level rather than on national level, especially the ‘performance standards’ prescribed by agencies having supervisory authority over all government-funded counsel for indigent defendants.”) (footnotes and citations omitted); see also Blackburn & Marsh, *The New Performance Guidelines in Criminal Cases: A New Step for Texas Criminal Justice*, 74 TEX. B.J. 616 (2011) (listing state-level guidelines and standards) (cited in LAFAYE ET AL., *supra* note 86).

284. In the holding portion of the *Strickland* opinion, the Court uses the terms “adversary” and “adversarial” repeatedly to describe defense counsel’s role in a criminal prosecution and the type of prejudice the constitutional standard is concerned with. See *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (“Thus, a fair trial is one in which evidence subject to *adversarial* testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the *adversarial* system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.”); *id.* (“The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the *adversarial* system to produce just results.”); *id.* at 686 (“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the *adversarial* process that the trial cannot be relied on as having produced a just result.”); *id.* at 687 (“A capital sentencing proceeding like the one involved in this case . . . is sufficiently like a trial in its *adversarial* format and in the existence of standards for decision that counsel’s role in the proceeding is comparable to counsel’s role at trial—to ensure that the *adversarial* testing process works to produce a just result under the standards governing decision.”) (citation omitted); *id.* at 687 (“Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the *adversary* process that renders the result unreliable.”); *id.* at 688 (“The Sixth Amendment refers simply to ‘counsel,’ not specifying particular requirements of effective assistance. It relies instead on the legal profession’s maintenance of standards sufficient to justify the law’s presumption that counsel will fulfill the role in the *adversary* process that the Amendment envisions.”); *id.* (“Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable *adversarial* testing process.”); *id.* at

performance of this role in such a way that it seriously impacts the result of the proceedings that offends the Constitution. Thus, *Strickland* identifies the “problem” of ineffective assistance of counsel not as a betrayal of the client, but as a failure of counsel to adequately fulfill an assigned role in an adversarial process to such an extent that it produces unreliable results.²⁸⁵ Arguably, that construct works where a community agrees that an adversarial process in which the defense counsel and the prosecutor battle under the supervision of a neutral and disinterested umpire will produce just and reliable results.²⁸⁶ But what if a community does not share the same concept of fairness and justice that informs the federal constitutional standard? What if a community’s approach to justice does not rely on an

690 (stating that, in evaluating defense counsel’s effectiveness, “court[s] should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the *adversarial* testing process work in the particular case”); *id.* at 696 (“In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the *adversarial* process that our system counts on to produce just results.”); *id.* at 700 (“[R]espondent has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the *adversary* process caused by deficiencies in counsel’s assistance.”) (emphasis added).

285. *Id.* at 685-86 (“The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results . . . the benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”); *see also* *United States v. Cronin*, 466 U.S. 648, 655-56 (1984) (“The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.”) (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)); *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (advising that, in making competency determinations, a court “should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case”).

286. The *Merriam-Webster Dictionary* defines “adversary” as one that contends with, opposes, or resists: an enemy or opponent. *Adversary*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/adversary> (last visited Mar. 2, 2018). It derives from the Latin adjective *adversaries*, which means “turned toward” or “antagonistic toward”. *Id.* It defines “adversarial” as “involving two people or two sides who oppose each other: of, relating to, or characteristic of an adversary or adversary procedures. *Id.* Of interest, this dictionary uses the example of the American juvenile justice system as an example of “adversarial” in a sentence. *Id.* (“As a result, the juvenile-court system operates according to a parental rather than *adversarial* process, an informal, ad hoc judicial process governed by a supposedly benevolent and paternal juvenile court.”) (citing Jessica Lahey, *The Children Being Denied Due Process*, ATLANTIC (May 22, 2017), <https://www.theatlantic.com/education/archive/2017/05/the-children-being-denied-due-process/527448/>).

adversarial resolution of disputes or an adversarial model of criminal justice?²⁸⁷ What if, as is the case with some tribal courts, an advocate is not required to be a licensed lawyer to be considered competent to assist an accused?²⁸⁸ How a community defines reliable results, the proper role of advocates and decision-makers, and ultimately, what it considers “justice,” goes to deep questions of community self-identity and self-determination. The extent to which federal courts accommodate and respect the choices, determinations, and practices of state and tribal governments in their efforts to achieve justice for people under their jurisdiction ultimately relates back to the ongoing discussion about the proper role of the federal government vis-à-vis other sovereigns.

Another open question is what tribal and federal courts will do with the requirement that a tribal court exercising VAWA 2013 jurisdiction provide the defendant “all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and

287. See Creel, *supra* note 193, at 341 (“The adversary system was a foreign system imposed on tribes.”); *ICRA Reconsidered*, *supra* note 219, at 1717 (“Many tribes have nontraditional (in the sense of being unlike their federal or state counterparts) justice systems that include restorative justice schemes, where the presence of a lawyer may serve to antagonize or heighten tensions.”); see also *United States v. Doherty*, 126 F.3d 769, 780 (6th Cir. 1997) (“[U]ntil the middle of this century, few Indian tribes maintained any semblance of a formal court system. Offenses by one Indian against another were usually handled by social and religious pressure and not by formal judicial processes; emphasis was on restitution rather than punishment.” The underlying premise of an adversarial system is simply absent throughout many of the tribes [In enacting ICRA,] Congress had testimony before it that many tribal courts do not even hire prosecutors. The right to counsel created by ICRA should not be interpreted in a way that would cause considerable damage to such informal systems; therefore, we consider it highly unlikely that Congress wished that such systems be subject to [a] . . . rule that presumes the existence of an adversarial method of trying criminal cases.”) (citations omitted).

It is also fair to ask whether *Strickland* analysis is even coherent in the plea-bargaining context, the forum in which the vast majority of criminal cases in the United States are resolved. Unlike a trial or contested sentencing hearing, plea bargaining is a negotiation process (albeit a lopsided one), with compromise as its objective that takes place outside the courtroom and under the judiciary’s radar, not the adversarial showdown under the supervision of a trial court described in *Strickland*.

288. *Jackson v. Tracy*, No. CV 11-00448-PHX-FJM, 2012 WL 3704698 (D. Ariz. Aug. 28, 2012) (holding ICRA’s general assistance-of-counsel guarantee requires neither that one’s advocate be a licensed attorney nor that the advocate be held to the *Strickland* standard of a reasonably effective attorney) (“[I]n a system that permits representation of criminal defendants by non-lawyers with no legal training, [a non-lawyer’s] performance should be compared, if at all, to the standards for other non-lawyers appearing in tribal court.”).

affirm the inherent power of the participating tribe.”²⁸⁹ The legislative history of this “constitutional catch-all” provision sheds some light on its intended purpose, to wit, to preserve some flexibility to courts in tailoring procedural protections to special or unanticipated issues that may arise as tribal courts begin to exercise jurisdiction over non-Indians for the first time in generations.²⁹⁰ This flexibility, however, carries with it the risk that federal courts will interpret the provision as an invitation to exercise a heightened level of scrutiny over tribal court decisions relative to state court decisions.

Conclusion

One of the single most important and enduring questions under ICRA is whether and to what extent the protections Congress requires tribes to extend to tribal court defendants must mirror federal constitutional counterparts.²⁹¹ This includes questions of substantive law, such as whether ICRA’s protections against unreasonable searches and seizures are co-extensive with the Fourth Amendment. But it also includes procedural

289. 25 U.S.C. § 1304(d)(4) (2012).

290. The legislative history for § 1304 provides some insight into Congress’s intent in including paragraph (4) of § 1304(d), the “constitutional catch-all” provision. *See* Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence, 78 Fed. Reg. 71645, 71649 (proposed Nov. 29, 2013) (stating that, in including § 1304(d), “Congress recognized . . . that the understanding of which rights are fundamental to our justice system can evolve over time”) (“This provision does not require tribal courts to protect all federal constitutional rights that federal courts are required to protect (for example, the Fifth Amendment’s grand-jury indictment requirement, which state courts are also not required to protect). Rather, paragraph (4) gives courts the flexibility to expand the list of protected rights to include a right whose protection the 113th Congress did not foresee as essential to the exercise of [special domestic violence jurisdiction].”).

291. *Compare, e.g., Alvarez v. Tracy*, 773 F.3d 1011, 1022 (9th Cir. 1994) (“Because the ICRA, by its plain language, requires a defendant to request a jury, it differs significantly from the Sixth Amendment right to a jury trial.”) *with id.* at 1035 (Kozinski, J., dissenting) (preferring to apply Sixth Amendment precedent as opposed to the tribe’s “rough and tumble justice”); *see also Doherty*, 126 F.3d at 779-80 (“[T]hose courts that have considered ICRA have held that constitutional law precedents applicable to the federal and state governments do not necessarily apply ‘jot-for-jot’ to the tribes. The Bureau of Indian Affairs, which is charged . . . with ensuring that the tribes perform their obligations under federal contracts in accordance with ICRA, has also recognized that a wholesale incorporation of federal constitutional standards would be unwise. Furthermore, those courts charged under *Santa Clara Pueblo* with the primary responsibility for interpreting ICRA, the tribal courts, have also declined to import federal standards into the tribal context wholesale.”) (citations omitted).

questions, such as the level of deference federal courts should, or must, extend to tribal court determinations on habeas review. In the absence of statutory guidance, federal courts have been left to develop a tribal court habeas common law jurisprudence around these questions,²⁹² a jurisprudence that sometimes appears to mirror federal pre-AEDPA common law.²⁹³

Congress has conferred broader rights to non-Indian tribal court defendants under the TLOA and VAWA 2013 amendments to ICRA than those required for Indian tribal court defendants under the general provisions of that same statute. In some instances, it has also granted TLOA and VAWA 2013 defendants rights greater than those enjoyed by state and federal court defendants under the U.S. Constitution. The question now is whether federal courts, in interpreting these ICRA amendments through the ICRA habeas provision, will show the same solicitousness to non-Indian

292. *ICRA Reconsidered*, *supra* note 219, at 1709 (“Among the motivations behind ICRA were desires to protect individual Indians from “[p]ower hungry” tribal governments and to bring the protections of the Bill of Rights to Indians on reservations. In crafting the legislation, Congress made a number of adjustments in an attempt to respect tribes, including abandoning the explicit demand that tribes follow federal constitutional norms and restricting review to habeas corpus applications. After *Santa Clara Pueblo*, an uneasy compromise was struck: federal review persisted but was limited to habeas review, leaving tribal courts as the primary fora for rights claims.”).

293. *See Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 900-01 (2d Cir. 1996) (“[T]here is simply no room in our constitutional order for the definition of basic rights on the basis of cultural affiliations, even with respect to those communities whose distinctive ‘sovereignty’ our country has long recognized and sustained.”); *Alvarez*, 773 F.3d at 1021 (“[R]esolution of statutory issues under the ICRA will ‘frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts.’” (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978))); *cf. United States v. Lester*, 647 F. 2d 869, 872 (8th Cir. 1981) (“In light of the legislative history of the Indian Civil Rights Act and its striking similarity to the language of the Constitution, we consider the problem before us under Fourth Amendment standards.” (citation omitted)). In *Santa Clara Pueblo*, the Supreme Court cautioned against the danger of unintended consequences in interpreting federal laws in the context of tribal traditions unfamiliar to federal courts: “Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters.” 436 U.S. at 72 n.32. Professor Garrow notes that the concept of “[t]he privilege of habeas corpus” as a right of citizenship “has been vigorously debated;” citing Congress’s unsuccessful attempt to deprive federal courts of habeas corpus jurisdiction over non-citizen enemy combatants being detained outside the sovereign territory of the United States. *See Garrow*, *supra* note 231, at 150-53.

petitioners seeking review of tribal court convictions in federal court.²⁹⁴ Regardless of Congress's intent, apart from the new stay of detention provision, ICRA post-VAWA 2013 habeas procedure contains no guidance or limitations on federal courts' ability to apply habeas doctrines such as default, deference, exhaustion, or time limitations, or definitions of critical concepts, such as "custody." This leaves federal courts to their pre-VAWA 2013 tribal habeas common law. It is an open question whether some of those habeas doctrines, which reflect a deference to tribal dispositions of claims brought by Indians, will be applied equally to habeas petitions brought by non-Indians.

ICRA's habeas provision was part of the original statute passed in 1968. When Congress enacted ICRA's habeas provision it did so against a background of federal court habeas review of state court convictions radically different from that which exists today. The most important change, for the purposes of the issues identified in this article, is the evolution of the state deference doctrine. When the habeas statute was first enacted, federal courts extended nearly absolute deference to state court judgments.²⁹⁵ The Supreme Court incrementally and eventually relaxed this standard and opened federal court review of state court convictions by employing less deferential standards of review. At one point, the Court permitted federal court review of state court convictions unless the prisoner had been given a "full and fair opportunity" to litigate his federal constitutional claims.²⁹⁶ Beginning in 1953 and until Congress passed AEDPA in 1996, although deference was given to state court resolution of factual issues, federal courts reviewed federal constitutional claims de

294. Professor Garrow concludes that in the habeas context, the federal courts' deference to tribal courts is citizenship based. *See* Garrow, *supra* note 231, at 152-53 ("The federal courts' failure to require tribal remedies when the defendants are non-Indian stems from [a] concept of citizenship" as a limitation on tribal power articulated by the U.S. Supreme Court in *Oliphant*) (citing and quoting *Duthu*, who likened this concept of citizenship and reliance on the notion of individual rights of personal liberty to the "'protective cloak' of nationality that early colonizers used to insulate themselves from the laws of indigenous peoples. . . . The nationality that clung like a protective cloak to these settlers also brought with it the jurisdiction of their sovereigns wherever they happened to settle.").

295. *See* Dorf, *supra* note 233 ("Habeas relief was available if a prisoner was subject to state executive detention, but if the prisoner had had a state trial—even a flawed one—federal courts were reluctant to grant habeas relief, so long as the state court had had proper jurisdiction over the case.").

296. *Id.*

novo.²⁹⁷ AEDPA, as noted, resuscitated a highly deferential standard of review and represented a major recalibration of the federal-state judicial equilibrium.²⁹⁸ Thus, a lot has happened in the habeas landscape since Congress passed ICRA's habeas provision. TLOA imported the single most important claim in habeas jurisprudence—ineffective assistance of counsel—and tethered it to the federal constitutional standard. But it left open how federal courts must approach those claims on habeas review in a post-AEDPA world.²⁹⁹

Until now, habeas review of tribal court convictions was relatively rare as a result of tribal court's limited sentencing power and the relatively small number of tribal court convictions in the United States (as compared with the number of state convictions).³⁰⁰ Since tribal courts could not impose a sentence of more than one year and only a person who is being detained can seek habeas relief, there was a good chance that a tribal prisoner would serve out his sentence before he could exhaust his tribal court remedies and

297. *Id.* (“[F]or a roughly forty-year period beginning with the 1953 ruling in *Brown v. Allen* [until the Supreme Court began reining in federal court review and Congress passed AEDPA in 1996], federal courts decided legal questions on their own.”).

298. *Id.* (“Perhaps the most significant new limit was AEDPA's overruling of *Brown v. Allen*. Under AEDPA, federal courts no longer determine whether state courts *correctly* rejected a habeas petitioner's federal claims; they only grant relief if the state courts applied federal law *unreasonably*—a deferential standard.”).

299. *ICRA Reconsidered*, *supra* note 219, at 1719-20 (“The question of who the ultimate determiner of rights should be cannot remain an ominous sword of Damocles, dangling over tribal courts and threatening at any moment to destroy their jurisprudence. If Congress is seeking to provide federal rights in the same way to Indians as to non-Indians, it is failing. In the same vein, if Congress instead is trying to empower tribes to protect civil rights in their own way, the uncertainty surrounding ICRA is causing tribes to hesitate and some federal courts to return to federal jurisprudence as a guide to ICRA's provisions.”) (citing *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 900 (2d Cir. 1996) (rejecting influence of “cultural relativism” on ICRA interpretation in favor of “general American legal norms [and] certain universal principles”)); *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 900 (9th Cir. 1988) (suggesting a balancing approach “[w]here the tribal court procedures under scrutiny differ significantly from those ‘commonly employed in Anglo-Saxon society’” (quoting *Howlett v. Salish & Kootenai Tribes of Flathead Reservation*, 529 F.2d 233, 238 (9th Cir. 1976))).

300. AMERICAN INDIAN LAW DESKBOOK, *supra* note 170, § 7:7 (“Since *Martinez*, there have been a relatively small number of decisions addressing the scope of or the entitlement to the habeas corpus remedy.”). As noted, *Martinez* established that ICRA's habeas provision is the sole avenue for challenging tribal court decisions in federal court. *See supra* note 82.

seek federal habeas review.³⁰¹ Now that Congress has authorized tribal sentences of up to nine years and jurisdiction over non-Indians, as well as created a claim for ineffective assistance of counsel, the issues identified here will likely reach the federal courts more often. When it passed TLOA and VAWA 2013 to update and constitutionalize ICRA, Congress left some unfinished business—namely, explaining how those new protections should be reviewed by federal courts consistent with the federal commitment to tribal sovereignty and self-determination. As it has done in the context of federal habeas review of state court convictions with AEDPA, Congress has both the prerogative and the responsibility to ensure that federal courts will extend the deference necessary to tribal court determinations to protect and promote those federal policies.

301. Pre-TLOA tribal courts often worked around the one-year cap by stacking multiple one-year sentences to produce a longer sentence. But the resulting sentences were still relatively short compared to state court sentences. *See, e.g., Bustamante v. Valenzuela*, 715 F. Supp. 2d 960, 965 (D. Ariz. 2010) (“ICRA’s limitation of a one-year imprisonment for ‘any one offense’ means a tribe may impose a one-year term of imprisonment for each violation of a criminal statute. As it is undisputed that Petitioner committed multiple criminal violations, and that he was not sentenced to more than one year on any individual violation, his eighteen month sentence did not violate ICRA.”).