C.A. Nos. 10-15167 &10-15308
(Consolidated)
Published Opinion Filed August 17, 2011
(Schroeder, Bea, Sammartino (S.D. Cal.))

D. Ct. No. CV-09-08065-PCT-PGR

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BEATRICE MIRANDA,

Petitioner-Appellee,

v.

VINCENTE ANCHONDO, Supervisory Correctional Specialist, Bureau of Indian Affairs, Office of Justice Services, Division of Corrections, District 3, et al.,

Respondents-Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

RESPONSE TO PETITION FOR REHEARING EN BANC

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This Court properly reversed the district court's order granting Miranda's amended petition for writ of habeas corpus. The panel's determination that Respondents did not waive their right to appeal by filing untimely objections to the magistrate judge's report and recommendation is consistent with this Circuit's precedent. Contrary to Miranda's argument, the panel's decision does not conflict with *United States v. Hardesty*, 977 F.2d 1347 (9th Cir. 1992) (en banc), because no intra-circuit conflict exists about whether the failure to timely object to a magistrate judge's report and recommendation waives the right to appeal legal conclusions.

In addition, the panel correctly determined that the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1302(7), permits imposition of up to a one-year term of imprisonment for each criminal violation. Because the panel decision was correct and does not conflict with any other precedent, Miranda's petition should be denied.

IV. STATEMENT OF THE CASE

A. Nature of the Case; Course of Proceedings.

On August 27, 2009, Miranda filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, arguing that the Pascua Yaqui Tribal Court violated the

[1] Although Respondents Anchondo and Neilsen filed separate notices of appeal and briefs in this matter, they are filing a joint response to Miranda's petition for panel or en banc rehearing.

maximum sentence permitted under § 1302(7)[2] when it imposed a cumulative sentence of 910 days for her multiple offenses. (CR 18; ER 153-164.) The magistrate judge issued a report and recommendation agreeing with Miranda and recommending that the habeas petition be granted. (CR 46; ER 36-44.) Respondents filed untimely objections to the report and recommendation. (CR 56, 57; ER 14-35.) The district court adopted the magistrate's report and recommendation, granted Miranda's habeas petition, and ordered the tribal court to reduce Miranda's sentence to one year and release her from custody. (CR 58; ER 11-13.) Pursuant to the court's order, Miranda was released from custody the next day. (CR 58; ER 11-13.)

On appeal, this Court reversed the district court's order granting Miranda's amended petition for writ of habeas corpus. *Miranda v. Anchondo*, 654 F.3d 911 (9th Cir. 2011). Miranda filed a petition for rehearing en banc, and this Court has ordered Respondents to respond.

B. Statement of Facts.

On the evening of January 25, 2008, Beatrice Miranda was intoxicated and wandering the Pascua Yaqui Reservation when she came across a minor Yaqui teenager, M.V. (CR 32-2 at 6, 25-26; ER 87, 106-107.) Believing that M.V. was

[2] ICRA § 1302(7) provides that no Indian tribe shall "impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year."

laughing at her, Miranda pulled a knife, and began chasing M.V. across the reservation while screaming obscenities. (CR 32-2 at 26; ER 107.) M.V. ran home and told her older sister Bridget that Miranda was in their yard yelling and waving a knife around. (CR 32-2 at 13, 26; ER 94, 107.) When the girls went outside, Miranda brandished the knife again and threatened to kill both girls. (CR 32-2 at 13-17; ER 94-98.) After Bridget called the Pascua Yaqui tribal police, the police found Miranda near the girls' home with a knife on her, which the girls identified. (CR 32-2 at 5-8, 21-23, 29-31; ER 86-89, 102-104, 110-112.)

The Pascua Yaqui Tribe charged Miranda with two counts of endangerment, two counts of threatening and intimidating, two counts of aggravated assault, and two counts of disorderly conduct—all violations of the Pascua Yaqui Tribal Criminal Code. (CR 32-7 at 2; ER 116.) One count of each type applied to Miranda's conduct toward M.V., and one of each type to Bridget. (CR 32-7 at 2; ER 116.)

Miranda appeared pro per at her trial and was found guilty on all eight counts. (CR 32-7 at 4-5; ER 118-119.) The tribal court revoked Miranda's pending probation from a former tribal conviction and sentenced her in the new matter to the following terms of imprisonment: (1) two consecutive 365-day terms for the aggravated assault convictions; (2) two concurrent 60-day terms for the endangerment convictions; (3) two consecutive 90-day terms for the threatening/intimidating convictions; and (4)

two concurrent 30-day terms for the disorderly conduct convictions—for a total of 910 days. (CR 32-8 at 10; ER 145.)

Miranda unsuccessfully appealed to the Pascua Yaqui Court of Appeals, the tribe's highest court. (CR 32-7; ER 115-40.) Miranda subsequently filed an amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, arguing that her sentence violated the maximum sentence permitted under the ICRA § 1302(7). (CR 18; ER153-164.) The magistrate judge issued a report and recommendation, concluding that the ICRA prohibited the tribal court from imposing a sentence totaling more than one year for offenses arising out of the same transaction. (CR 46 at 4-7; ER 39-42.) He further concluded that because Miranda's actions constituted a single criminal transaction, the ICRA prohibited any portion of her 910-day sentence above one year. (CR 46 at 8; ER 43.) He accordingly recommended that the district court grant Miranda's amended habeas petition. (CR 46 at 8; ER 43.)

Respondents filed objections to the report and recommendation four to five hours after the noon deadline set by the magistrate judge. (CR 56, 57, 58.) The next day, the district court adopted the magistrate judge's report and recommendation, and granted Miranda's amended habeas petition. (CR 58; ER 11-13.) The court noted the untimely filing of Respondents' objections, but nevertheless considered the objections and found them unpersuasive. (CR 58; ER 11-12.) Without further analysis, the

district court agreed with the magistrate judge that "the 'any one offense' language of 25 U.S.C. § 1302(7) is properly interpreted to include all tribal code violations committed during a single criminal transaction." (CR 58; ER 11-12.)

C. Panel Decision.

On appeal, Respondents argued that the district court erred in interpreting §1302(7), to prohibit tribal courts from imposing consecutive sentences cumulatively exceeding one year for multiple offenses arising out of the same criminal transaction. Miranda responded that Respondents had waived their right to appeal the district court's adoption of the magistrate judge's report and recommendation because they had filed untimely objections to the report and recommendation, and this Court should therefore dismiss their appeals. Miranda then argued that the district court properly determined that Miranda's sentence violated § 1302(7).

The panel first found that Respondents did not waive their right to appeal by filing untimely objections to the magistrate judge's report and recommendation. *Miranda*, 654 F.3d at 915. The panel stated that "[a]lthough the failure to object to a magistrate judge's factual findings waives the right to challenge those findings, '[i]t is well settled law in this circuit that failure to file objections . . . does not [automatically] waive the right to appeal the district court's conclusions of law.'" *Id.* (quoting *Lisenbee v. Henry*, 166 F.3d 997, 998 n.2 (9th Cir. 1999)). Rather, a party's

failure to file objections "'is a factor to be weighed in considering the propriety of finding waiver of an issue on appeal.'" *Id.* (quoting *Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1991)). The panel noted that Respondents filed objections to the report and recommendation, although "a little late," and the district court addressed the objections on their merits, concluding that it was "unpersuaded by the respondents' objections." *Id.* The panel then stated that Respondents' arguments on appeal implicated the district court's legal conclusions regarding the meaning of § 1302(7), and that they did not challenge the magistrate judge's factual findings. *Id.* The panel determined that because Respondents raised their arguments in their opening appellate briefs, they were "entitled to the ordinary presumption that failure to object to the magistrate judge's report, standing alone, does not constitute waiver." *Id.* (quoting *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007) (internal quotations marks omitted)).

The panel then disagreed with the district court on the merits, holding that § 1302(7) unambiguously permits tribal courts to impose up to a one-year term of imprisonment for each discrete criminal violation. *Id.* at 917-18. The panel determined that the term "offense" had an established meaning in 1968 when the ICRA was enacted, which is consistent with the meaning of that term in the ICRA's double jeopardy provision. *Id.* at 916-17. The panel further held that the phrase "any

one offense" in § 1302(7) is not ambiguous as evidenced by the contemporary usage of "offense" to uniformly refer to a violation of a criminal law and its similar meaning in the ICRA's double jeopardy provision. *Id*. at 917. The panel therefore concluded that "[s]ection 1302(7)'s one-year sentencing cap for 'any one offense' means that a tribal court may impose up to a one-year sentence for each violation of criminal law." *Id*. Accordingly, because Miranda undisputably committed multiple criminal violations, the district court erred in concluding that Miranda's 910-day sentence violated § 1302(7). *Id*.

V. ARGUMENTS

A. Rehearing En Banc is Not Required Because No Intra-Circuit Conflict Exists Regarding Failing to Timely File Objections to a Magistrate Judge's Conclusions of Law and Waiving Appeal of Those Rulings.

Rehearing en banc is not required. This panel's opinion does not conflict with this Court's opinion in *United States v. Hardesty*, 977 F.2d 1347 (9th Cir. 1992) (en banc), because no intra-circuit conflict exists in this case. This Court has long held that a party's failure to object to a magistrate judge's conclusions of law does not, standing alone, ordinarily constitute a waiver of the issue. *Robbins*, 481 F.3d at 1146; *Martinez*, 951 F.2d at 1156. Rather, the failure to object to a magistrate judge's conclusions of law "is a factor to be weighed in considering the propriety of finding

waiver of an issue on appeal." *Martinez*, 951 F.2d at 1156 (citing *McCall v. Andrus*, 628 F.2d 1185, 1187 (9th Cir. 1980)).

Miranda contends that this Court's opinions in *McCall v. Andrus*, 628 F.2d 1185 (9th Cir. 1980) and *Britt v. Simi Valley Unified School District*, 708 F.2d 452 (9th Cir. 1983)—both concerning whether a party waived its right to appeal when the party failed to object to the magistrate judge's report and recommendation—conflict, such that the panel in this case should have called for en banc review of the issue pursuant to this Court's opinion in *Hardesty*, 977 F.2d at 1347. In *McCall*, the plaintiff challenged a decision by the Interior Board of Land Appeals. 628 F.2d at 1187. The magistrate judge recommended granting the Board's motion for summary judgment. *Id*. The plaintiff did not object to the magistrate judge's recommendation, and the district court adopted the magistrate judge's findings. *Id*.

In his reply brief on appeal, the plaintiff raised an issue concerning the Board's statutory authority and findings for the first time. *Id*. The *McCall* panel held that the plaintiff waived this argument because he failed to raise it in his opening brief and failed to object to the magistrate judge's report and recommendation. *Id*. The panel, however, still addressed the waived argument and found it meritless. *Id*. at 1188-89.

A few years later, in *Britt v. Simi Valley Unified School District*, 708 F.2d 452 (9th Cir. 1983), this Court again considered the ramifications of failing to object to a magistrate's report and recommendation. The plaintiff in *Britt* had brought a civil rights action under 42 U.S.C. § 1983, challenging his dismissal from his teaching job. *Id*. at 453. The magistrate judge recommended granting the defendant's motion to dismiss because the plaintiff's failure to exhaust his administrative remedies precluded suit. *Id.* The parties filed no objections to the report and recommendation, and the district court dismissed the action. *Id*.

The plaintiff appealed the district court's decision, and the defendant contended that the plaintiff waived any right to appeal the court's decision because he failed to the object to the magistrate's recommendation. *Id.* The *Britt* panel analyzed the language of the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(B), and determined that "[t]he language of the statute does not indicate that failure to object to a magistrate's recommendation will be an absolute bar to the appeal from the district court's decision." *Id*. at 454. Rather, it specified only "that a judge shall make a de novo determination of findings or recommendations to which objection has been made." *Id*. The *Britt* panel noted that the Court had previously held that the failure to object to a magistrate's findings of fact waives the right to contest those findings on appeal. *Id*. (citing *McCall*, 628 F.2d at 1187). It then concluded that the failure to

file objections to a magistrate judge's recommendation does not waive the right to appeal the district court's conclusions of law. *Id*.

This Court subsequently noted the conflict between *McCall* and *Britt*. *See Smith v. Frank*, 923 F.2d 139, 141 (9th Cir. 1991); *Greenhow v. Sec'y of Health and Human Servs.*, 863 F.2d 633, 635-36 (9th Cir. 1988). In *Greenhow*, the panel noted that the Court had applied the rule in *Britt* on three subsequent occasions, each time without mentioning the contrary rule in *McCall*. 863 F.2d at 635. The *Greenhow* panel held that despite *Britt*'s failure to follow *McCall*, *Britt* had "successfully posed as law of the circuit for long enough to be relied upon by the parties, including the plaintiff." *Id*. at 636. "To avoid surprise and unjust forfeiture of rights believed to have been established by *Britt*," the panel therefore followed the rule in *Britt* and held that the plaintiff's failure to object to the magistrate judge's conclusions of law did not constitute a waiver of those claims. *Id*.

A few years later, in *Martinez*, this Court reconciled the holdings of *McCall* and *Britt*. 951 F.2d at 1156 & n.4. The defendant, after being convicted in state court and exhausting his state appeals, filed a habeas petition in federal court. *Id*. at 1154-55. The magistrate judge determined that the state had committed a constitutional error, but that the error was harmless. *Id.* at 115. The defendant filed objections to the report and recommendation, but the state did not file any objections and did not

challenge the finding of constitutional error or the application of the harmless error standard. *Id*. The district court reviewed the magistrate's decision *de novo*, and found that the state's error was not harmless. *Id*. The state appealed, but did not raise as a claim of error the magistrate's finding that the state had committed constitutional error. *Id*. Instead, the state only argued that the district court erred in finding the error not harmless. *Id*. In its reply brief, the state for the first time argued that the trial court did not commit a constitutional error, and thus, the claim was not cognizable on federal habeas corpus. *Id*. at 1156.

The *Martinez* panel first held that because the finding of constitutional error constituted a determination of law, which both the district court and court of appeals reviews *de novo*, "the failure to object would not, standing alone, ordinarily constitute a waiver of the issue." *Id*. (citing *Britt*, 708 F.2d at 454). "However, such a failure is a factor to be weighed in considering the propriety of finding waiver of an issue on appeal." *Id*. (citing *McCall*, 628 F.2d at 1187). The court then noted that it had been suggested that under a strict reading of *McCall*, a failure to object would automatically constitute a waiver, (citing *Greenhow*, 862 F.2d at 635); however, such a strict reading ignored the finding in *McCall* that the appellant had failed both to object to the magistrate's finding and to raise the issue in his opening brief, not to mention that the *McCall* court decided the issues that the appellant supposedly waived. 951 F.2d at

1156 n.4. The *Martinez* panel therefore read *McCall* as "standing for the proposition that a failure to object is a factor to be considered in determining waiver but is not necessarily dispositive." *Id.* The court further stated that the panel in *Greenhow* ultimately applied the rule in *Britt*—"failure to object without more will not ordinarily constitute waiver." *Id.* "The rule we have stated is thus consistent with the holdings of *McCall*, *Britt*, and *Greenhow*." *Id.*

The following year, this Court stated in *Hardesty* that "[u]nless an alternative method is provided by rule of this court, [a] panel faced with [an irreconcilable] conflict must call for en banc review, which the court will normally grant unless the prior decisions can be distinguished." 977 F.2d at 1348 (internal quotation marks and end citations omitted). The court therefore overruled the portion of *Greenhow* that in cases involving two opposing lines of authority, a panel may, without calling for en banc review, follow the rule that has successfully posed as the law of the circuit long enough to be relied upon. *Id.*

Although *Hardesty* overruled the reasoning underlying the *Greenhow* panel's decision to follow *Britt*, subsequent cases dealing with this waiver issue never called for *en banc* review or held that the *Britt* and *Martinez* decisions were no longer good law in light of *Hardesty*. In *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174 n.2 (9th Cir. 1996), the Court stated that the *Greenhow* panel had noted the inconsistency

between *Britt* and *McCall*, but that the *Martinez* panel found the cases reconcilable. This Court has subsequently upheld the rule set forth in *Martinez* and *Britt* in multiple decisions. *See e.g., Robbins*, 481 F.3d at 1146-47 (citing *Martinez* and holding that the failure to object to a magistrate judge's conclusions of law does not automatically waive a challenge on appeal but is a factor to be weighed in considering the propriety of finding waiver of an issue on appeal); *United States v. Willis*, 431 F.3d 709, 713 n.4 (9th Cir. 2005) (stating that although *Britt* and *McCall* are "to some degree in tension, *Britt*'s core holding—that a prevailing party need not object to a magistrate judge's conclusions of law in order to preserve those grounds for appeal—remains good law, at least where the objections are raised on appeal in either the prevailing party's opening or answer brief."); *Lisenbee,* 166 F.3d at 998 n.2 (holding that "failure to file objections [to a magistrate judge's findings] does not waive the right to appeal the district court's conclusions of law") (quoting *Britt*, 708 F.2d at 454)); *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998) (holding that failure to object to the magistrate judge's purely legal conclusions does not ordinarily constitute waiver, but "is a factor to be weighed in considering the propriety of finding waiver of an issue on appeal" (quoting *Martinez*, 951 F.2d at 1156)). Because the panel in *Martinez* reconciled *McCall* and *Britt*, no intra-circuit conflict exists such that *en banc* review is warranted.

Defendant contends that both the Supreme Court's decision in *Thomas v. Arn*, 474 U.S. 140 (1985), and this Court's decision in *United States v. Reyna-Tapia*, 328 F.3d 1114 (9th Cir. 2003) effectively abrogated *Britt*; thus, the post-*Britt* decisions relying on *Britt*—including the panel's decision at issue here— are wrong. But *Britt* is still good law despite *Thomas* and *Reyna-Tapia*. In *Thomas,* the Supreme Court held that a court of appeals *may* exercise its supervisory powers to establish a rule that the failure to file objections to the magistrate's report waives the right to appeal the district court's judgment, but a court is not required to do so. 474 U.S. at 142, 149. Moreover, *Thomas* supports the panel's decision because it acknowledged this Court's rule that "the failure to file objections waives only factual issues on the appeal." *Id*. at 146 n.4. (citing *Britt*, 705 F.2d at 454).

In *Reyna-Tapia*, this Court held that a district court judge is not required to review *de novo* the findings and recommendations that the parties themselves accept as correct; it never held that failure to object to a magistrate judge's report waives the issue altogether on appeal. 328 F.3d at 1121-22. Furthermore, in *Robbins*, a case this Court decided after *Reyna-Tapia*, this Court reiterated the rule set forth in *Martinez*—the "ordinary" presumption is that the failure to object to the magistrate judge's report, "standing alone," does not constitute waiver. 481 F.3d at 1146-47.

Because *Britt* and *Martinez* are still good law and no intra-circuit conflict exists, this Court should deny Miranda's petition for panel or en banc rehearing.

B. The Panel Correctly Determined that § 1302(7) of the Indian Civil Rights Act Unambiguously Permits Tribal Courts to Impose Up To a One-Year Term of Imprisonment for Each Criminal Violation.

The panel correctly determined that § 1302(7) does not prohibit a tribal court from imposing multiple prison terms as punishment for multiple offenses. As the panel recognized, the term "offense" had an established meaning when the ICRA was adopted in 1968: a single violation of criminal law. *Miranda*, 654 F.3d at 916-17. A defendant's commission of multiple criminal violations during a single factual episode does not transform the multiple violations into one offense. *See id.* at 917 (citing examples from previous cases). This established meaning is consistent with the meaning of "offense" in the ICRA's "double jeopardy" provision, 25 U.S.C. § 1302(3): "a criminal violation with separate elements of proof, not a single criminal transaction." *Miranda*, 654 F.3d at 917. Nothing indicates that Congress meant "offense" in § 1302(7) to have a different meaning than "offense" in § 1302(3). Thus, the panel correctly ruled that the tribal court did not violate § 1302(7) in imposing consecutive sentences on Miranda for committing multiple offenses.

VI. CONCLUSION

For the foregoing reasons, Respondents respectfully ask this Court to deny Miranda's petition for panel or en banc rehearing.

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VII. STATEMENT OF RELATED CASES

To the knowledge of counsel, there are no related cases pending.

VIII. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 35-4 AND 40-1 FOR CASE NOS. 10-15167 & 10-15308

I certify that pursuant to Circuit Rule 40-1, the attached response to petition for panel rehearing is: (check applicable option)

√ This brief complies with a page or size-volume limitation established by separate court order dated 10/6/11 and is no more than 15 pages.

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October 27, 2011
Date

s/ Karla Hotis Delord
Signature of Attorney

IX. CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ *Karla Hotis Delord*
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