CASE NO. 11-2212
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ALVIN VALENZUELA,	)
	)
Petitioner – Appellant,	)
	)
V.	)
	)
STEVE SILVERSMITH, Warden, McKinley Adult Detention Center, and FRANK HECHT, Corrections Administrator, Tohono O'odham Nation,	)
	)
Respondents – Appellees.	)

On Appeal from the United States District Court
For the District of New Mexico
The Honorable Judge M. Christina Armijo
10-cv-01127-MCA-GBW

RESPONDENT-APPELLEE STEVE SILVERSMITH'S RESPONSE BRIEF

Oral Argument Requested

Respectfully submitted,

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

STATEMENT OF JURISDICTION

Silversmith is satisfied with Valenzuela's statement of jurisdiction.

STATEMENT OF THE ISSUES

I. Whether the trial court correctly applied relevant law as related to Valenzuela's claims against Silversmith who is no longer a custodian of Valenzuela.

II. Whether the trial court correctly determined it lacked jurisdiction over Valenzuela's claims because Silversmith was no longer a custodian of Valenzuela and his claims for relief against Silversmith were therefore moot.

III. Whether the trial court was clearly erroneous in holding that even if Valenzuela had exhausted all tribal court remedies, and the case were not moot, Valenzuela's claims would still be meritless.

Silversmith need not address that section of Appellant Valenzuela's brief as to the requirement of exhaustion of tribal remedies (*Aplt. Opening Brief*, argument sections I and II), because it appears that the only basis for an appeal as to Silversmith is that all of Valenzuela's claims against Silversmith were dismissed due to the mootness of the claims. However, if a response is found to be necessary from Silversmith as to argument sections I and II of Appellant's Opening Brief, Silversmith hereby adopts any response presented to this Court by Appellee Frank Hecht, as a representative of the Tribe.

STATEMENT OF THE CASE

Appellee Silversmith is satisfied with Valenzuela's statement of the case, with the following exception.

Valenzuela states that the Proposed Findings and Recommendations were issued based on the Tribe's motion. *Aplt. Opening Brief* at 2. In fact, it was a Joint Motion to Dismiss between Frank Hecht, as a representative of the Tribe, and Steve Silversmith, as the Warden, upon which Valenzuela failed to file a response.

STATEMENT OF THE FACTS

Appellee Silversmith is satisfied with Valenzuela's statement of the facts, with the following exceptions and additions.

Valenzuela's criminal record (in relation to this incident) reflects no more than four (4) misdemeanor counts of conviction. *Aplt. App.* at 206.

Valenzuela lays out the "meritorious grounds for relief" as stated in his initial Petition for Habeas Corpus in his statement of facts. *Aplt. Opening Brief* at 5. However, he does not include the actual relief requested in the Petition:

> WHEREFORE, Mr. Valenzuela respectfully requests that this Court: (1) *Find* that the conviction is in violation of the Indian Civil Rights Act, and *vacate* the wrongful conviction; (2) *find* the 1260 day sentence illegal and in violation of the Indian Civil Rights Act, and *vacate* the sentence; (3) *issue* the Writ of Habeas Corpus commanding Respondents to *release* Mr. Valenzuela from their custody immediately; (4) and, grant any further relief that the Court deems just and proper.

Aplt. App. at 17 (emphasis added). It is upon this relief that the trial court (through the adoption of the Amended Proposed Findings and Recommendation on Disposition) determined Valenzuela's claims moot as against Silversmith because Silversmith could no longer perform any possible relief requested by Valenzuela (i.e. release Valenzuela from custody). *Aplt. App.* at 179.

Valenzuela states that "On July 13, 2011, the Court held a telephonic hearing on the briefs submitted by the parties." *Aplt. Opening Brief* at 7. However, it was the Magistrate Judge that held the telephonic hearing on April 5, 2011 because of his concern that Valenzuela had been released and the Petition for Habeas Corpus was now moot. *Aplt. App.* at 96. From this telephonic hearing, the Magistrate Judge issued a briefing schedule giving Valenzuela thirty (30) days to brief the issue of mootness and giving Silversmith and Hecht (30) days to respond. *Aplt. App.* at 96. After the conclusion of briefing, the Magistrate Judge entered its Amended Proposed Findings and Recommendation on Disposition (APFRD) on September 1, 2011. *Aplt. App.* at 151.

Valenzuela states that with entering its APFRD "[t]he Magistrate Judge found that Mr. Valenzuela had failed to exhaust his tribal remedies and recommended dismissal of the case." *Aplt. Opening Brief* at 8. While this is partly true in that the Magistrate Judge found an independent ground of dismissal on the issue of failure to exhaust tribal remedies; the Magistrate Judge also found another

independent ground of dismissal on the issue of the case becoming moot. *Aplt. App.* at 211. It was not that the Magistrate Judge narrowed Valenzuela's claim to that of vacating the sentence that caused the case to become moot, but rather, two independent grounds for dismissal existed that caused the Magistrate Judge's proposal for dismissal. *Aplt. App.* at 211. Further, the Magistrate Judge in his APFRD analyzed Valenzuela's Petition on the merits and found that even if the case were not moot, and Valenzuela had exhausted all tribal court remedies, the Petition would still be found meritless as to Silversmith. *Aplt. App.* at 210. After the trial court reviewed *de novo* the APFRD as to Valenzuela's objections of the APFRD, the trial court adopted the two proposed independent grounds for dismissal and the findings on the merits, and thereafter dismissed all of Valenzuela's claims with prejudice. *Aplt. App.* at 227.

STATEMENT OF THE STANDARD OF REVIEW

On appeal from denial of habeas corpus petition, the court of appeals reviews a district court's factual findings under the clearly erroneous standard and its legal conclusions de novo. *Matthews v. Price*, 683 F.3d 328, 331(10th Cir. 1996). Additionally, a reviewing court will "apply a *de novo* standard of review [where] the case presents a question of *constitutional* mootness." *Jordan v. Sosa,*

654 F.3d 1012, 1023 n. 14 (10th Cir. 2011) (*quoting Rio Grande Silvery Minnow v. Bureau of Reclamation,* 601 F.3d 1096, 1123 (10th Cir.2010)) (emphasis added).

SUMMARY OF THE ARGUMENT

Valenzuela's Opening Brief Conclusion requests the following relief on appeal: "For the foregoing reasons, Mr. Valenzuela asks this Court to remand his Petition to the district court to vacate the conviction or be heard on the merits." *Aplt. Opening Brief* at 26. Thus, the only relief sought on appeal is the vacating of the conviction or the Petition to be heard on its merits. However, Valenzuela's Petition for Habeas Corpus and its underlying claims against Silversmith became moot upon the release of custody of Valenzuela. Valenzuela's arguments regarding "jurisdiction attachment" and "presumed collateral consequences" are meritless as the Magistrate Judge and the trial court outlined the case law analyzing such arguments. Because the trial court reviewed and relied on relevant law, the trial court was correct to decide it lacked jurisdiction because the Petition was entirely moot as to Silversmith, and alternatively, the trial court was within its discretion to determine that Valenzuela's claims against Silversmith were meritless, this Court should deny Valenzuela's requested relief.

APPELLEE SILVERSMITH'S RESPONSE BRIEF ARGUMENT

I. The Trial Court Correctly applied all Relevant Law as related to Valenzuela's Claims Against Silversmith

Initially in this case a Joint Motion to Dismiss was filed with the trial court upon which Valenzuela failed to file a response. However, because of the later release of Valenzuela, the Magistrate Judge afforded all parties the opportunity to brief the court as to the issues of mootness. After the briefing was complete, the Magistrate Judge issued its APFRD. After the trial court reviewed *de novo* the APFRD as to Valenzuela's objections, the trial court adopted the two proposed independent grounds for dismissal including, and primarily, dismissal for mootness as to Silversmith.

A. The Jurisdictional Requirement to have a Case or Controversy.

The trial court correctly acknowledged its jurisdictional limitations as Article III of the United States Constitution only extends federal judicial power to cases or controversies. U.S. CONST. art. III, § 2, cl. 1. "The case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate… The parties must continue to have a personal stake in the outcome of the lawsuit." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (quotation omitted). To do so in the habeas context, "[t]he federal habeas corpus statute requires that [a prisoner] must be 'in custody' when the application for habeas corpus is filed."

Carafas v. LaVallee, 391 U.S. 234, 238 (1968).[1] More particularly, the Supreme Court has interpreted this "in custody" language "as requiring that the habeas petitioner be 'in custody' under the conviction or sentence under attack at the time his petition is filed." *Maleng v. Cook*, 490 U.S. 488, 490 (1988) (per curiam) (citation omitted). Because Valenzuela was no longer in Silversmith's custody, the trial court properly adopted the APFRD and correctly held that there was no longer a case or controversy and the Petition was moot as to Silversmith.

B. The Requirement that the Writ of Habeas Corpus be Directed to the Person holding the Party "In Custody"

Further, the trial court (through the adoption of the APFRD) correctly analyzed that the writ of habeas corpus must be directed to the person in whose custody the party is being held. In the context of tribal habeas petitions, the Supreme Court has not wavered from its holding that the proper "respondent in a habeas corpus action is the individual custodian of the prisoner." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). For its part, the Tenth Circuit has also held, "[t]he law is well established that the proper respondent to a habeas action is the habeas petitioner's custodian." *Harris v. Champion*, 51 F.3d 901, 906 (10th Cir. 1995), *superseded by statute on other grounds*, Federal Courts Improvement

[1] Section 1303 of the ICRA provides: "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." 25 U.S.C. § 1303. "The term 'detention' in the statute must be interpreted similarly to the 'in custody' requirement in other habeas contexts." *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010) (*citing 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.")).

Act of 1996, Pub. L. No. 104-317, 110 Stat 3847, *as recognized in Knox v. Bland*, 632 F.3d 1290, 1292 (10th Cir. 2011). In its review of case law the trial court (through the adoption of the APFRD) analyzed case law finding that "through both Supreme Court and Tenth Circuit jurisprudence, the courts have articulated the notion that the proper respondent to a habeas petition is the custodian who can 'bring the party before the judge,' or in other words, facilitate whatever habeas relief a court might grant." *Aplt. App.* at 178. Because Valenzuela was no longer in the custody of Silversmith, the trial court properly adopted the APFRD and held that Silversmith was no longer the proper party respondent and the Petition was subsequently moot as to Silversmith.

C. The Doctrine of Collateral Consequences

The trial court correctly analyzed Valenzuela's argument on the doctrine of collateral consequences. *Aplt. App.* at 235. Once the prisoner's sentence has expired, "some concrete and continuing injury other than the now-ended incarceration or parole - some 'collateral consequence' of the conviction – must exist if the suit is to be maintained." *Spencer*, 523 U.S. at 7 (citing *Carafas*, 391 U.S. at 237- 38). *Aplt. App.* at 233. This rule, known as the collateral consequences doctrine, recognizes that the law naturally imposes future *indirect* consequences when a previous judgment, conviction, or sentence affects a prisoner's civil liberties following release. *Sibron v. New York*, 392 U.S. 40, 55

(1968); *see also Carafas*, 391 U.S. at 237. Such consequences include, among others, legal ineligibility to serve on a jury, vote, hold office or operate certain businesses. *Spencer*, 523 U.S. at 8.

At the inception of this doctrine, the Supreme Court held that the "mere possibility" of an adverse legal collateral consequence was "enough to preserve a criminal case from ending ignominiously in the limbo of mootness." *Sibron*, 392 U.S. at 56 (citation omitted). "Thereafter, and in summary fashion, [the Supreme Court] proceeded to accept the most generalized and hypothetical of consequences as sufficient to avoid mootness in challenges to conviction." *Spencer*, 523 U.S. at 10. However, the circumscription of the collateral consequences doctrine began in 1982 and has progressed gradually ever since.

Rather than a blanket presumption of collateral consequences, "the Supreme Court held (in *Spencer*) that once a sentence has expired, a habeas petitioner must show a *concrete and continuing injury*, i.e., a collateral consequence of the conviction, in order to continue his action." *Wilcox v. Aleman*, 43 F. App'x 210, 211-12 (10th Cir. 2002) (citing *Spencer*, 523 U.S. at 7-8) (emphasis added). Following *Spencer*, "[n]o longer are collateral consequences (other than those attached to the conviction itself) presumed; instead, the petitioner has the burden of demonstrating the existence of sufficient collateral consequences to save the action from the mootness death knell." *Id.* at 212 (citing *Spencer*, 523 U.S. 10-11)); *see*

also Fratis v. Ortiz, 190 F. App'x 686, 688 (10th Cir. 2006) (detailing the Supreme Court's holding that collateral consequences must be proved, not presumed).

Valenzuela strictly fails to point to any concrete or continuing injury suffered for dismissal based on mootness as to Silversmith. In those instances where the collateral attack does not aim at the conviction itself, the *Meyers* court held that the prisoner "bears the burden of demonstrating the existence of sufficient collateral consequences to save the action from mootness." *Id.* (citing *Meyers*, 200 F.3d at 722). In analyzing each of Valenzuela's objections, the Magistrate Court properly prepared its APFRD, and thereafter, in reviewing the issue of mootness *de novo*, the trial court correctly applied the relevant law and found no collateral consequences for declaring the Petition moot as to Silversmith and dismissing the case with prejudice. *Aplt. App.* at 236.

II. The Trial Court Correctly Determined it Lacked Jurisdiction Over Valenzuela's Claims against Silversmith Because of Mootness

The Magistrate Judge and trial court noted that although the collateral consequences doctrine can act to save a habeas petition from mootness, it was correctly found that no legal basis existed for maintaining Silversmith as a party to the Petition. A proper party-respondent to a tribal habeas petition must possess "both an interest in opposing the petition if it lacks merit, and the power to give the petitioner what he seeks if the petition has merit." *Poodry v. Tonawanda Band of*

Seneca Indians, 85 F.3d 874, 899 (2d Cir. 1996). At the time the Petition was filed, the trial court acknowledged that Silversmith, as Valenzuela's custodian, represented a proper party-respondent to the suit. *See Rumsfeld v. Padilla*, 542 U.S. 426, 434-36 (2004). Nevertheless, following Valenzuela's release, neither Silversmith nor McKinley County had any interest in opposing the Petition. Moreover, the trial court through the APFRD, found Silversmith had no power "to give the petitioner what he seeks" even if the Petition were found to have merit. *See*. *Poodry*, 85 F.3d at 899 (citations omitted). Because Silversmith bore neither the requisite interest nor authority to remain a proper party-respondent in this case, the trial court through the adoption of the APFRD found that no live case or controversy existed between Valenzuela and Silversmith. *See Meyers*, 200 F.3d at 718 (holding that the federal courts may only hear cases involving a live case or controversy, and finding that this requirement adheres at all stages of judicial proceedings).

The trial court (through the adoption of the APFRD) correctly found Valenzuela's arguments were merely conclusory and lacked any support in the law. In fact, the trial court agreed with the APFRD that the argument sounded like an invitation to render an improper advisory opinion against Silversmith. The trial court noted that in *Meyers*, the Tenth Circuit also

> recognized that under *Spencer* collateral consequences cannot be based on the speculation that an individual will receive an enhanced

> sentence in future sentencing proceedings in connection with a crime he has not yet committed.

United States v. Hernandez-Baide, 146 F. App'x 302, 304 (10th Cir. 2005) (citing *Meyers*, 200 F.3d at 719). Yet, without addressing this case law on appeal, Valenzuela continues to argue that he has collateral consequences because

> As a direct consequence of the unlawful sentence imposed *by the Tribe*, there remains an increased possibility that Mr. Valenzuela will face harsher punishment based on the unlawful tribal *sentence* and that he may be subject to harsher punishment based on the length of the *sentence*.

Aplt. Opening Brief at 28-29 (emphasis added). The trial court correctly held that "[b]ecause [the vacatur of the sentence] would not remove the conviction, it would not impact any of [Valenzuela's] claimed collateral consequences. Therefore, because this court can no longer grant effectual relief on his Petition, it is moot." *Aplt. App.* at 235. *See United States v. Quezada-Enriquez*, 567 F.3d 1228, 1231 (10th Cir. 2009) ("Once it becomes impossible for a court to grant effectual relief, a live controversy does not exist, and a case is moot.") (citation omitted); *see also Green v. Granson*, 108 F.3d 1296, 1300 (10th Cir. 1997) (case is moot where entry of judgment in petitioner's favor would amount to nothing more than a declaration he was wronged).

As an alternative theory, citing to *Carafas*, Valenzuela continues to rely on the statement that "once the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to completion of proceedings

on such application." *Aplt. Opening Brief* at 24. Valenzuela maintains that this "judicial attachment" in and of itself prevents his Petition from being mooted. Valenzuela provides no other case law to validate this "judicial attachment" theory that clearly is in conflict with the well-settled requirement of a case or controversy. *See United States v. Juvenile Male,* 131 S.Ct. 2860, 2864 (2011) (per curiam) ("It is a basic principle of Article III that a justiciable case or controversy must remain 'extant at *all stages of review*, not merely at the time the complaint is filed.'" (quoting *Arizonans for Official English v. Arizona,* 520 U.S. 43, 68 n. 22 (1997))). Valenzuela made this same argument of "judicial attachment" through his objections of the APFRD, and after a *de novo* review, the trial court correctly overruled Valenzuela's objections. *Aplt. App.* at 233.

III. The Trial Court was Not Clearly Erroneous when it Adopted the Magistrate's Findings of Fact and Ruled on the Merits of the Petition

Valenzuela contends that he challenges the trial court's decision on the merits and would like this Court to rule *de novo* in his favor on his Petition on the merits. However, Valenzuela has failed to brief such merits here as he also failed to do in the trial court, and failed to do before the Magistrate Judge.

> The objection also does not argue that the Magistrate Judge erred by addressing the merits at this stage. As such, the objection is entirely insufficient in the face of the analysis of the APFRD. Moreover, having reviewed the Magistrate Judge's analysis of the merits, this Court agrees with his conclusion as to the merits of [Valenzuela's] claims.

Aplt. App. at 235. Further, the court of appeals reviews a district court's factual findings under the clearly erroneous standard. *Matthews v. Price*, 683 F.3d 328, 331(10th Cir. 1996). Otherwise, Silversmith finds no arguments on appeal in Valenzuela's Opening Brief to respond to as to the merits of Valenzuela's Petition as against Silversmith. Short of Valenzuela's short conclusion that the trial court was wrong, it is clear that the trial court was not clearly erroneous in reviewing and adopting the findings of fact and thereafter ruling on Valenzuela's Petition on the merits.

CONCLUSION

The trial court's Order was proper and should be upheld.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument may prove useful to the extent that this Court desires clarification as to the parties' interpretation of the controlling and persuasive authority cited in their respective briefs.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 3,403 words according to word count feature of Microsoft Word 2010, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14pt typeface.

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CERTIFICATE OF COUNSEL REGARDING SEPARATE BRIEFS

Respondent-Appellee Steve Silversmith is the Warden of the McKinley County Adult Detention Center, which is a State of New Mexico government entity. Respondent-Appellee Frank Hecht is the Corrections Administrator of the Tohono O'odham Nation, a tribal government entity in the State of Arizona. Respondent-Appellee Silversmith believes that both Respondents-Appellees are exempt from the provisions of 10th Cir. R. 31.3(B), as they are government entities in accordance with 10th Cir. R. 31.3(D).

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CERTIFICATE OF SERVICE

I certify that on the 29th day of February, 2012, I filed the foregoing pleading electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means as reflected on the Notice of Electronic Filing to:

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