No. 12-15788

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FORTINO ALVAREZ,

Petitioner-Appellant,

v.

RANDY TRACY,

Respondent-Appellee.

Appeal from the
United States District Court
for the District of Arizona
No. 2:08-cv-02226-DGC

APPELLEE'S BRIEF

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SUMMARY OF ARGUMENT

In this Indian Civil Rights Act ("ICRA") case seeking habeas corpus relief under 25 U.S.C. § 1303, Petitioner-Appellant Fortino Alvarez ("Alvarez") makes two arguments in support of relief: (1) that the admission of the out-of-court statement of one of his two victims, E.C., violated ICRA's confrontation clause, 25 U.S.C. § 1302(6); and (2) that his ICRA statutory right to a trial by jury, 25 U.S.C. § 1302(10), was violated because he did not make an intelligent, voluntary and knowing waiver of the right on the record.

(1) As to the ICRA confrontation clause issue, it is unclear whether E.C. was unavailable, having been properly subpoenaed to appear at trial. However, Alvarez's claims fail because the admission of E.C.'s statements constitute harmless error. Alvarez declined to cross-examine the witness through whom the statements were offered, admitted to the substance of the statements, and did not challenge admission of the same statements through J.C.

(2) Alvarez's claim that his ICRA statutory right to trial by jury was violated also fails, because the trial court advised Alvarez that he had the right to trial by jury, which is all ICRA requires. Because the ICRA statutory right is not the same as or parallel to the federal right, the Court should not apply federal constitutional standards.

ARGUMENT

A primary problem with Alvarez's approach in this case is the basic assumption that criminal justice systems for Indian tribes must be identical to those in state or federal courts. As the Court is aware, the United States Constitution is not a constraint on Indian tribes. *Talton v. Mayes*, 163 U.S. 376 (1896). While a purpose of adopting the Indian Civil Rights Act of 1968 was to secure for Native Americans the broad constitutional rights afforded to other Americans, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60-61 (1978), ICRA is a limitation of tribal sovereignty. *See id.* at 57 (ICRA is exercise of Congressional authority to limit tribal self-government).

Beyond compliance with the requirements of ICRA, differences between tribal justice systems and those of other sovereigns should be viewed as the exercise of tribal sovereignty. Sadly, exercising inherent tribal authority lawfully within the parameters of ICRA has been recently described as "aggressively exploiting" or a "technique for evading" ICRA.[1] In this particular case, for example, Alvarez suggests that viewing the right to trial by jury under ICRA in any way *other* than accordance with "federal constitutional standards," would

[1] *See* April 23, 2012 letter from National Association of Criminal Defense Lawyers and National Association of Federal Defenders to Honorable Harry Reid, *et al.* (available at http://www.nacdl.org/advocacy.aspx?id=14904), at 5.

constitute a "watering down" of those principles, despite the fact that numerous states view the right to trial by jury in exactly the same manner.

This case presents relatively simple issues involving the interpretation of ICRA, issues that are easily resolved through the proper application of principles involving the Confrontation Clause and the statutory right to trial by jury.

I. THERE WAS NO VIOLATION OF 25 U.S.C. § 1302(6), WHICH CONTAINS ICRA'S CONFRONTATION CLAUSE, AND ANY VIOLATION WAS HARMLESS ERROR.

The Indian Civil Rights Act provides that:

> No Indian tribe in exercising powers of self-government shall—
> (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his own defense.

25 U.S.C. § 1302(6). The text of section 1302(6) is similar, but not identical to, amendment VI to the United States Constitution. Alvarez's argument is that the introduction of an out-of-court statement at his trial violated the then-current standard established in *Ohio v. Roberts*, 448 U.S. 56 (1980), *overruled by Crawford v. Washington*, 541 U.S. 36 (2004). Tracy disagrees and contends that any violation constitutes harmless error.

Under the standard of *Ohio v. Roberts*, 448 U.S. 56, 74 (1980), a witness is unavailable for confrontation clause purposes "unless the prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial." (citations omitted). While this is a broad test, "if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation." *Id.* "The lengths to which the prosecution must go to produce a witness before it may offer evidence of an extra-judicial declaration is a question of reasonableness." *California v. Green*, 399 U.S. 149, 189 n. 22 (1970) (citations omitted). Certainly one primary factor to consider is the proper use of court processes prior to trial to secure the appearance of a witness.

Under the Community's law, it is the responsibility of the court to subpoena witnesses. GRIC Code § 4.104 (2009) provides:

> The judges of the court shall have the power to subpoena witnesses on their own motion and shall subpoena witnesses at the request of any party to the case. The subpoena shall bear the signature of a duly qualified judge. Service of such subpoena shall be by a member of the Gila River Police Department or such other person as authorized by the court.[2]

The prosecution and Alvarez were informed of their right to have witnesses appear at the trial of this matter. A subpoena was issued for E.C. to testify as a

[2] Citation is to the current version of the GRIC Code; section 4.104 was previously numbered section 1.104 in the previous codification and cited as GRIC Code § 1.104.

witness at trial, and service of the subpoena was made in compliance with the Community's code, which provides the following as to personal service:

> Personal service shall be made as follows:
> 1. If to a natural person, by delivering it to him personally, or by leaving it at his usual place or residence with some person 16 years of age or older, or by delivering it to an agency authorized by appointment or by law to receive service of process.

GRIC Code § 4.307(F)(1) (2009).[3]

Reasonableness in securing the attendance of a witness can generally be measured by the utilization of the lawful processes—the tribe's laws and procedures— that work in getting witnesses to appear and testify at court. E.C. was subpoenaed to testify, but was not personally served and did not appear for trial.[4] Alvarez had access to any witness equal to that of the Community, in that any witness he wanted to appear would be subpoenaed by the Community Court.[5] In arguing that the prosecution failed to make a good faith effort, Alvarez argues that the prosecution relied on the court staff to serve the subpoena on E.C.[6]

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[3] Previously GRIC Code § 1.307(F)(1).

[4] *Affidavit of Carleton Giff*, ¶ 10, E.R. Vol. II at 62.

[5] *Id.* ¶ 11.

[6] E.R. Vol. II at 95.

Relying on the legal mechanism that is typically used to secure the appearance of a witness is reasonable and a good faith effort.[7]

Once the Community requested the subpoena for E.C., and the subpoena was served, the Community had the expectation that E.C. would appear for trial. "Good faith" and "reasonableness" are "terms that demand fact-intensive, case-by-case analysis, not rigid rules." *Christian v. Rhode*, 41 F.3d 461, 467 (9th Cir. 1994). To a certain extent, this standard requires an acknowledgement of the processes that are generally used to get witnesses to appear for court proceedings. At the Gila River Indian Community, those processes are specified in the GRIC Code, and compliance with those processes should be considered good faith efforts in securing the attendance of a witness.

Wilson v. Bowie, 408 F.2d 1105 (9th Cir. 1969), is not on-point as Alvarez argues. In *Wilson*, the explanation given for the failure of the victim to appear at trail was that the prosecutor "attempted to subpoena" the victim. 408 F.2d at 1106. This differs from the instant case in two key respects: First, in this case, the victim who did not appear for trial was, in fact, subpoenaed pursuant to Community law. Second, in *Wilson*, the prosecutor was apparently from a jurisdiction in which the

[7] At deposition, Officer Benally testified that court staff serves the subpoenas, but that he did not know what their practice was in serving the subpoenas. E.R. Vol. II at 283.

prosecutor is responsible for securing the attendance of a witness. To argue that *Wilson* is on-point, when the cases differ on a critical fact—whether a witness was subpoenaed—is a stretch.

This case is more akin to those in which a subpoena was issued and served prior to trial and the witness simply did not appear. However, because the district court did not deny relief on the basis of whether E.C. was unavailable as a witness, it is unclear why Alvarez raises the issue. The thrust of the district court's ruling was that any violation of Alvarez's ICRA right to confront E.C. was harmless because (1) Alvarez did not ask any questions of Officer Benally or the prosecution's other witness, J.C., (2) Alvarez did not object to the use of E.C.'s statements at trial, and (3) Alvarez admitted that everything Officer Benally testified to was true.

Even if the Court finds that Alvarez's ICRA confrontation clause rights were violated, it must next determine whether the error was harmless. *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986). A Confrontation Clause violation is subject to harmless error analysis. *United States v. Bowman*, 215 F.3d 951, 961 (9th Cir. 2000). Upon review of a habeas petition, the standard of review is generally "whether a given error had substantial and injurious effect or influence

in determining the jury's verdict." *Whelchel v. Washington*, 232 F.3d 1197, 1206 (9th Cir. 2000) (citations omitted). In the context of cross-examination in *Van Ardsall*, for example, whether an error is harmless depends upon a number of factors:

> These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

475 U.S. at 684 (citations omitted).

The trial court gave Alvarez the opportunity to cross-examine Officer Benally, which he declined. At the trial of No. 543, after Officer Benally concluded his testimony, the court informed Alvarez, "Defense, you can cross-examine the witness, and what you'll do is you'll cross-examine to any of the facts that were brought up and you'll want to counter those facts."[8] After the prosecution's other witness, J.C., testified, the court asked Alvarez, "Defense, do you have a cross-examination? Anything that was brought up that you don't think is true or you doubt[,] you can ask about that."[9]

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[8] E.R. Vol. II at 169.

[9] *Id.* at 173.

Alvarez admitted the truth of the out-of-court statements from the unavailable witness. Despite being given the opportunity to cross-examine Officer Benally, Alvarez declined and responded, "Well, I'm gonna have to say that, you know, everything he says it be true."[10] The judge inquired further, "Everything that he said is true?" to which Alvarez responded, "Yeah."[11] Alvarez likewise declined to cross-examine the other witness, J.C.[12] Alvarez elected not to call any witnesses and informed the court that he would not present anything in his defense.[13]

Alvarez's rationale for why this court should discard his admissions at trial, while creative, is not persuasive. While Alvarez stated that everything Officer Benally said was true (twice), he now claims that he admitted the truth of what E.C. *alleged* to Officer Benally. However, at trial Officer Benally testified to matters beyond allegations, including that (1) the information that was provided to him was that the (E.C. and J.C.) were both assaulted by Alvarez;[14] (2) E.C.

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[10] *Id.* at 169.

[11] *Id.*

[12] *Id.* at 173.

[13] *Id.*

[14] *Id.* at 164.

"stated she was hit in the left eye, and the – correction – left side of her head two times with a flashlight causing injury by Mr. Alvarez is what she's alleging;"[15] (3) E.C. "also stated that Fortino [Alvarez] pulled a knife on her;"[16] and (4) and E.C. stated that Alvarez assaulted her with a flashlight.[17] In addition, J.C. testified that, while crying, E.C. told him that Alvarez struck her in the head twice with a flashlight.[18]

Alvarez's harmless error analysis, which relies heavily on *Wilson v. Bowie*, 408 F.2d 1105 (9th Cir. 1969), suffers from one additional flaw. When asked whether he wanted the judge to read the transcript of the unavailable witness, Bowie "answered that he wanted to have the witnesses present and to question them, and let the court decide after that." 408 F.2d at 1107. Bowie's trial conduct is contrary to that of Alvarez in this case; Alvarez admitted the criminal conduct

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[15] *Id.*

[16] *Id.* at 165.

[17] *Id.*

[18] *Id.* at 171. Alvarez never objected below to the introduction of E.C.'s out-of-court statements through J.C., raising the issue for the first time on appeal. As a general rule, the court does not consider issues raised for the first time on appeal. *Manta v. Chertoff*, 518 F.3d 1134, 1144 (9th Cir. 2008) (citations omitted).

for which he was convicted and chose not to call witnesses or present evidence on his behalf.

Any error in a violation of Alvarez's ICRA confrontation clause right is harmless and he is not entitled to relief on Claim 3 of his petition.

II. BECAUSE THE ICRA STATUTORY RIGHT TO TRIAL BY JURY REQUIRES AN AFFIRMATIVE DEMAND FROM THE DEFENDANT, THE TRIAL COURT'S OBLIGATION IS LIMITED TO ADVISING DEFENDANT OF THE RIGHT TO TRIAL BY JURY.

The Indian Civil Rights Act provides that:

> No Indian tribe in exercising powers of self-government shall—
> (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

25 U.S.C. § 1302(10). While the United States Constitution guarantees the right to a public and speedy trial by an impartial jury, the text of section 1302(10) does not parallel or read similar to amendment VI; if anything, it resembles court rules in state and local jurisdictions which allow a jury trial upon demand in misdemeanor cases. *See, e.g.*, Ind. R. Crim. P. 22 (defendant charged with misdemeanor may make written demand for trial by jury, but failure to demand constitutes waiver).

Alvarez takes the unprecedented position that the ICRA right to trial by jury must mirror the federal right, that it should comply with "federal constitutional" standards, and that—for jurisdictions in which the courts are of limited jurisdiction

and not necessarily courts of record—a defendant must make a voluntary, knowing, and intelligent waiver of the right on the record. Tracy contends that the ICRA right to trial by jury is more like the statutory right to trial by jury for misdemeanors and that the obligation of the trial court was limited to informing Alvarez of the right.

When he was given a copy of the criminal complaints in his cases, Alvarez received a form outlining his rights as a defendant.[19] The second point on the form states, "You have the right to a jury trial."[20] On July 3, 2003, as part of a group arraignment of defendants, Alvarez was advised of his right to a speedy trial, public trial and jury trial.[21] At his individual arraignment in No. 543 on July 3, 2003, Alvarez was asked by the judge, "Mr. Alvarez, sir, you were informed of your legal rights. Do you have any questions about your legal rights?" to which Alvarez responded, "No, no questions."[22] On July 7, 2003, in two other cases, the

[19] E.R. Vol. II at 62, 64.

[20] *Id.* at 64.

[21] Report and Recommendation, Dkt. #105, at 2, E.R. Vol. 1 at 12.

[22] E.R. Vol. II at 110.

court asked Alvarez, "Do you understand your rights?" and Alvarez responded, "Yes."[23]

The flawed premise of Alvarez's argument on this issue is that waiver of the right to trial by jury in tribal court requires the same formalities as waiver of the right in federal court. This, in turn, is based on a flawed reading of *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897 (9th Cir. 1988) and, perhaps, an overgeneralization *Randall* makes about the interpretation of ICRA. *Randall* holds that, where the rights are "the same under either legal system, federal constitutional standards are employed in determining whether the challenged procedures violates [ICRA]." 841 F.2d at 900 (citing *Howlett v. Salish and Kootenai Tribes*, 529 F.2d 233, 238 (9th Cir. 1976)).

Howlett did not conclude that federal constitutional standards would always apply when the rights are the same. Rather, *Howlett* held that where the tribe's election and voting procedures were "parallel to those employed in Anglo-Saxon society, we then 'have no problem of forcing an alien culture, with strange procedures, on (these tribes.)'" 529 F.2d at 238 (citation omitted). The Court concluded that the legislative history of ICRA "clearly indicates that the equal protection clause of the fourteenth amendment should be embraced by the Indian

[23] *Id.* at 128. The pre-trial proceedings in the matter were quite extensive.

Civil Rights Act." *Id.*[24] How this can be generalized to the application of "federal constitutional standards" in all ICRA matters is puzzling.

Of critical importance in *Howlett* is use of the word "parallel," as well as *Randall's* recognition that federal constitutional standards apply where the rights "are the *same* under either legal system." 841 F.2d at 900 (emphasis added). In addition to the obvious differences between the language of 25 U.S.C. § 1302(10) and the sixth amendment, any "sameness" should be evaluated on the basis that the ICRA right to trial by jury looks a lot more like the right to trial by jury in misdemeanor jurisdictions and proceedings instead of the sixth amendment right.

As to the right to trial by jury, this approach is supported in ICRA's legislative history. When he testified before Senator Ervin's subcommittee, prominent federal Indian law attorney Marvin Sonosky used the right to trial by jury to illustrate the problem with applying "federal constitutional standards" to Indian tribes in a uniform manner. *Constitutional Rights of the American Indian: Hearings on S. 961, S. 962, S. 963, S. 964, S. 965, S. 966, S. 967, S. 968 and S.J. Res. 40 Before the Subcomm. On Constitutional Rights of the S. Comm. On the*

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[24] It is worth noting that *Howlett* was decided in 1976, prior to *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), during a time period in which federal courts had assumed jurisdiction over civil actions for ICRA violations.

Judiciary, 89TH Cong. 140 (1965) (testimony of Marvin J. Sonosky, Esq.). Noting that the federal standard for trial by jury is not applied to state courts, Sonosky likened Indian courts to state courts because the crimes were similar, saying "we see no reason of imposing a greater burden on Indian tribes than is imposed on the States or municipalities." *Id.*

The district court implicitly recognized this distinction, finding that "Alvarez fails to show that the requirements for waiver in federal district court apply to tribal court proceedings."[25] Finding that Alvarez had been sufficiently advised of his right to trial by jury, the court rejected his claim that a waiver on the record was required.[26] State appellate courts have consistently held such a waiver is not needed for a statutory right to jury trial. *State v. Farmer*, 548 S.W.2d 202 (Mo. App. 1977). Indeed, in jurisdictions with a statutory right to trial by jury for misdemeanors, appellate courts have found that a trial court need only advise a defendant of the right. *State v. Vernon*, 356 N.W.2d 887 (Neb. 1984); *Jackson v. State*, 644 N.E.2d 595 (Ind. App. 1994); *State v. Gordon*, 766 A.2d 75 (Me. 2001).

State v. Vernon, supra, is directly on-point. The defendant, who was charged with driving while intoxicated, was advised of his right to trial by jury in a group

[25] Order, Dkt. #107 at 10, E.R. Vol. 1 at 10.

[26] *Id.*

arraignment. 356 N.W.2d at 540. On appeal, he claimed violation of his right to a jury trial. The Supreme Court of Nebraska rejected this argument, holding that "[i]n this case the defendant had only a statutory right to a jury trial, and a demand is required to invoke that right." *Id.* (citations omitted). A failure to make a timely request results in a waiver of the statutory right. *Id.* (citation omitted). It is worth noting that, in the cases holding that the failure to timely request a trial by jury constitutes a waiver of the statutory right, no defendant expressed concerns that the practice would dilute the right to trial by jury.

The final argument in favor of affirming the district court on this issue is a practical one. Tribal courts are courts of limited jurisdiction in criminal matters, and serious offenses are charged under federal law. *United States v. Bad Marriage*, 392 F.3d 1103, 1115 (9th Cir. 2004). And, while the Community Court of the Gila River Indian Community maintains records of judicial proceedings, not all tribal courts are courts of record. *E.g.*, *United States v. Messerly*, 530 F.Supp. 751, 753 (D. Mont. 1982) (recognizing that Ft. Belknap Tribal Court is not a state court of record).

A holding which requires defendants in criminal cases to make an intelligent, knowing and voluntary waiver of the right to trial by jury on the record

in tribal court proceedings would be unprecedented. It would require tribal courts to immediately become courts of record, despite being courts of limited jurisdiction, and impose requirements that were clearly not anticipated when the Indian Civil Rights Act was adopted.

Alvarez's ICRA statutory right to trial by jury ICRA was not violated and he is not entitled to relief on Claim 8 of his petition.

CONCLUSION

The judgment of the district court should be affirmed.

DATED this 28th day of August, 2012.

GILA RIVER INDIAN COMMUNITY
OFFICE OF THE GENERAL COUNSEL

By *s/ Thomas L. Murphy*
Linus Everling, General Counsel
Thomas L. Murphy, Deputy General Counsel

Attorneys for *Respondent-Appellee*

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for Respondent-Appellee is not aware of any related cases pending in this Court.

DATED this 28th day of August, 2012.

By *s/ Thomas L. Murphy*
Thomas L. Murphy

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, that *Appellee's Brief* is double-spaced in 14-point proportionally-spaced Times New Roman typeface. The word count, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance and statement of related cases is 3,674 words.

DATED this 28th day of August, 2012.

By *s/ Thomas L. Murphy*
Thomas L. Murphy

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2012, I electronically filed the foregoing *Appellee's Brief* with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit through the appellate CM/ECF system.

By *s/ Thomas L. Murphy*
Thomas L. Murphy