12-15788

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORTINO ALVAREZ,

Petitioner-Appellant,

v.

RANDY TRACEY, Acting Chief Administrator for the Gila River Indian Department of Rehabilitation and Supervision,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA (CV-08-2226-PHX-DGC)

PETITIONER - APPELLANT'S OPENING BRIEF

JON M. SANDS
Federal Public Defender
District of Arizona

DANIEL L. KAPLAN
Assistant Federal Public Defender
KEITH J. HILZENDEGER
Research and Writing Specialist
850 West Adams Street, Suite 201
Phoenix, Arizona 85007-2730
(602) 382-2767

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES AND REGULATIONS **PAGE**

OTHER **PAGE**

Introduction

Fortino Alvarez is an enrolled member of the Gila River Indian Community, an Indian tribe located just south of Phoenix, Arizona. In 2003, the tribe charged Mr. Alvarez with several violations of its criminal code involving an incident in which he allegedly assaulted his girlfriend by hitting her with a flashlight. Mr. Alvarez was convicted of these charges after a tribal-court bench trial at which his girlfriend did not appear, but a tribal police officer recited her accusations from his incident report. While in custody on these and other charges, Mr. Alvarez filed a habeas corpus petition in federal district court, claiming (among other things) that his rights to confront adverse witnesses and to a jury trial protected by the Indian Civil Rights Act were violated in his trial. The district court found that Mr. Alvarez was not entitled to relief on his claims and entered judgment against him, and Mr. Alvarez filed this appeal.

Statement of Jurisdiction

The District Court for the District of Arizona (Campbell, D.J.) had jurisdiction over Mr. Alvarez's Petition for Writ of Habeas Corpus pursuant to 25 U.S.C. § 1303 and 28 U.S.C. §§ 1331 and 2241. The district court entered its final judgment on March 28, 2012.[1] Mr. Alvarez filed a timely notice of appeal nine

[1] Clerk's Record ("CR") #108; Petitioner-Appellant's Excerpts of Record ("ER") Vol. III at 446.

days later.[2] Mr. Alvarez does not require a certificate of appealability to pursue this appeal. *Harrison v. Ollison*, 519 F.3d 952, 958-59 (9th Cir. 2008) (certificate of appealability not required where petition is filed under 28 U.S.C. § 2241). This Court has jurisdiction over Mr. Alvarez's appeal pursuant to 28 U.S.C. §§ 1291 and 2253(a).

Statement of the Issues

I. Confrontation violation. Pursuant to the law that defined a criminal defendant's confrontation right at the time of Mr. Alvarez's trial, the prosecution could not introduce a non-witness's accusations against the defendant unless the non-witness was "unavailable" to testify and the accusations bore adequate indicia of reliability or carried particularized guarantees of trustworthiness. Here, the prosecution introduced Mr. Alvarez's non-testifying girlfriend's out-of-court accusations even though all that the prosecution did to try to get her to show up at trial was have a single subpoena left at her house. Did the district court err in holding that Mr. Alvarez was not entitled to relief on his confrontation claim?

II. Deprivation of jury trial right. A criminal defendant cannot be held to have validly waived his right to a jury trial solely because he did not invoke it; instead, the court must specifically explain the nature of the right to the defendant

[2] CR #109; ER Vol. III at 447-48.

and take steps to ensure that he is making a knowing and voluntary decision to waive it. Here, the only means used to ensure that Mr. Alvarez was validly waiving his jury trial right involved attaching a "Defendant's Rights" form to his complaint, reviewing the rights on the form *en masse* with all of the defendants awaiting arraignment, and then asking Mr. Alvarez whether he had questions about his rights when his individual arraignment began. Did the trial court err in holding that Mr. Alvarez was not entitled to relief for the violation of his right to a jury trial?

Statement of the Case

A. Nature of the Case, Course of Proceedings, and Disposition Below

Mr. Alvarez, an enrolled member of an Indian tribe, was convicted in an Indian tribal court of several violations of the tribe's criminal code and sentenced to a term of imprisonment. While incarcerated, he filed a petition for a writ of habeas corpus in the United States District Court for the District of Arizona under 25 U.S.C. § 1303 and 28 U.S.C. § 2241(c)(3), alleging that several aspects of his prosecution had violated his rights under the Indian Civil Rights Act, 25 U.S.C. § 1302 (Westlaw, USCA03 database). The district court found that Mr. Alvarez was not entitled to relief on any of his claims and entered judgment against him, and Mr. Alvarez filed this timely appeal.

B. Statement of Facts

(1) Mr. Alvarez's girlfriend and her brother accused Mr. Alvarez of assaulting them by hitting them with a flashlight.

Fortino Alvarez is an enrolled member of the Gila River Indian Community ("the Community"), an Indian tribe located just south of Phoenix, Arizona.[3] This case revolves around the Community's prosecution of Mr. Alvarez for violations of the Community's criminal code that Mr. Alvarez allegedly committed on April 12, 2003, near his girlfriend's house.

At approximately 9:00 p.m. on April 12, 2003, Community police officer Stanford W. Benally was dispatched to an address on the Community reservation to investigate what was initially reported as "two females fighting."[4] Officer Benally spoke to Mr. Alvarez's teenaged girlfriend E.C.[5] and recorded the following allegations in his incident report:

> E. stated the following her boyfriend Fortino showed up at her residence intoxicated and started arguing with her. E. stated she made contact with Fortino outside her residence by the roadway and she stated after the argument started she attempted to walk back toward her residence and Fortino physically restrained her from going inside her residence.

---

[3] ER Vol. II at 23 (¶ 1), 36 (¶ 2).

[4] *Id*. at 298.

[5] *Id*. at 171:19-22.

> E. stated Fortino hit her on the left side of her head two times with a flashlight causing injury and after she was assaulted E. stated Fortino pulled a knife on her. E. stated she had to run from Fortino and she managed to get back inside her residence. E. stated once inside she got sick and her brother J. approached her. E. stated she told J. what had happened. E. stated her brother J. went outside and confronted Fortino. E. stated J. started chasing Fortino and Fortino struck J. in the head with a flashlight causing a small laceration.[6]

Officer Benally also spoke with E.C.'s brother J.C., who agreed with E.C.'s allegations and added that Mr. Alvarez had "stated he was going to get his gun and return and kill [J.C.'s] family."[7] (The names of E.C. and J.C. are redacted to initials herein and in the excerpts of record filed herewith because they were minors at the time of the incident. 18 U.S.C. § 3509.)

(2) The Community charged Mr. Alvarez with several violations of its criminal code.

Community police arrested Mr. Alvarez three months later on July 2, 2003.[8] In its complaint in criminal case number CR-2003-543 entered the following day, the Community charged Mr. Alvarez with the following violations of the Community's criminal code in connection with the April 12, 2003 incident:

---

[6] *Id*. at 298.

[7] *Id*.

[8] ER Vol. II at 302.

(A) assaulting E.C. "by striking her about the head with a blunt object," (B) domestic violence against "his girlfriend and/or household member" E.C. "by striking her about the head with a blunt object," (C) assaulting J.C. "by striking him about the head with a blunt object," (D) threatening J.C. "by threatening to get a gun and kill his family," (E) misconduct involving weapons by "pulling a knife on" E.C., and (F) domestic violence against "his girlfriend and/or household member" E.C. by "pulling a knife on her."[9] The Community's practice at the time was to attach a "Defendant's Rights" form, which stated, among other things, "You have the right to a jury trial," to criminal complaints.[10]

Mr. Alvarez, who at the time was twenty years old and had only a seventh-grade education, appeared without counsel for his arraignment the following day on July 3, 2003.[11] The Community court's practice at the time was to conduct an *en masse* recitation of the rights listed on the "Defendant's Rights" form to all of the defendants awaiting arraignment before proceeding with individual arraignments.[12] When it was his turn to be arraigned, the Community court asked

---

[9] ER Vol. III at 433-34.

[10] *Id*. at 327, 374:11-375:1; ER Vol. II at 61-64.

[11] ER Vol. II at 109:23-110:2, 111:1-8.

[12] ER Vol. III at 355:19-357:5; ER Vol. II at 61-64.

Mr. Alvarez whether he had "any questions about [his] legal rights," and Mr. Alvarez responded that he did not.[13] Mr. Alvarez pleaded not guilty to all of the charges in case number CR-2003-543.[14] The Community court set a pretrial conference for July 31, 2003.[15] The Community court did not, in this or any other proceeding, engage in any specific discussion with Mr. Alvarez regarding the nature of the jury trial right or whether he understood and freely accepted the implications of waiving that right.

Mr. Alvarez appeared, still without counsel, for the July 31, 2003 pretrial conference, which dealt with the charges in other cases as well as in case number CR-2003-543.[16] After attempting, with limited success, to explain the various charges to Mr. Alvarez – who noted that he "d[id]n't really know about court that much"[17] – the court set the trial in case number CR-2003-543 for October 28,

---

[13] ER Vol. II at 110:8-12.

[14] *Id*. at 117:11-120:9.

[15] *Id*. at 113:9-19.

[16] *Id*. at 138-59.

[17] *Id*. at 151:25-152:1.

2003.[18] The court commented that it could tell that Mr. Alvarez was "having a hard time understanding the procedures."[19]

The Community's witness list for case number CR-2003-543 identified the following intended witnesses: E.C., J.C., Officer Benally, and Community police Sergeant F. Humeyumptewa, who had also responded to the call to E.C.'s house on April 12, 2003.[20] On October 17, 2003, the clerk of the Community court issued a subpoena for E.C.[21] According to an Affidavit of Service dated October 22, 2003, a copy of the subpoena was on that date "left at [E.C.'s] usual place of abode with a person of suitable age and discretion who resides at [E.C.'s] usual place of abode."[22] But the Community did not personally serve E.C. with the subpoena,[23] and she did not appear at Mr. Alvarez's trial.

---

[18] *Id*. at 152:14-16.

[19] *Id*. at 156:25-157:1.

[20] *Id*. at 318.

[21] *Id*. at 319.

[22] ER Vol. III at 326.

[23] ER Vol. II at 62.

(3) Mr. Alvarez was convicted following a bench trial at which a tribal police officer read Mr. Alvarez's non-testifying girlfriend's out-of-court accusations from his incident report.

Mr. Alvarez was still unrepresented at his October 28, 2003 trial.[24] Without acknowledging E.C.'s absence or seeking a continuance or warrant to secure her attendance, the Community called Officer Benally to the stand and asked him to recount the accusations that E.C. had made against Mr. Alvarez on April 12, 2003.[25] Officer Benally asked for permission to consult his incident report, and when the Community court permitted him to do so, gave the following testimony:

> Officer Benally: I was gonna refer back to my report refer – basically states that E. stated that Fortino showed up at the residence intoxicated and started arguing with her, and she made contact with Mr. Alvarez outside the residence by the roadway. And an argument started and she attempted to walk back toward her residence, and at that time that's when Mr. Alvarez, according to her, physically assaulted her, restrained her from going inside her residence. E. 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.[26]

A little later, Officer Benally added the following:

---

[24] *Id*. at 161:7-8.

[25] *Id*. at 161:4-164:11.

[26] *Id*. at 164:16-25.

> Officer Benally: . . . . let's see here. Okay, E., before I go to J., also stated that Fortino pulled a knife on her. She stated she had to run from Fortino, and she managed to get back inside the residence. E. stated once inside she got sick, and she was approached by her brother, J. And E. stated she told J. what had happened. E. stated her brother J went outside to confront Fortino. J stated – no, E. stated J. started chasing Fortino, and Fortino struck J. in the head with the flashlight causing a small laceration.[27]

The court then invited Mr. Alvarez to cross-examine Officer Benally, and the following exchange occurred:

> Judge: . . . . 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 want to counter those facts. No personal opinions just as to the facts that were brought up you can counter him on that. So go ahead.
>
> Mr. Alvarez: Well, I'm gonna have to say that, you know, everything that he says it be true.
>
> Judge: Everything that he said is true?
>
> Mr. Alvarez: Yeah.
>
> Judge: Is there any question or anything that would mitigate or lessen the circumstances or make it better for you? Any question that comes to mind that you can ask the officer now that he's up here on the stand?
>
> Mr. Alvarez: No.
>
> Judge: Okay. So there are no cross-examination questions you have then?

---

[27] *Id*. at 165:8-17.

Mr. Alvarez: No.[28]

The Community's only other witness was E.C.'s brother J.C., who also testified to E.C.'s out-of-court accusations, stating that E.C. had told him on the night of the incident that Mr. Alvarez "struck her in the head twice in the head with the flashlight."[29] J.C. added that he had seen "a big old bump" on the back of E.C.'s head.[30] J.C. testified that Mr. Alvarez had hit him with a flashlight as well,[31] but he contradicted the portion of Officer Benally's incident report suggesting that Mr. Alvarez had threatened to harm J.C.'s family, testifying that Mr. Alvarez had not made any statements to him.[32]

The Community then rested its case.[33] Mr. Alvarez stated that he had no witnesses and had prepared no defense.[34] The Community presented its closing argument, urging the court to find that it had proven all of the counts except the

---

[28] *Id*. at 169:4-21.

[29] *Id*. at 171:14-17.

[30] *Id*. at 173:4-8.

[31] *Id*. at 171:23-27.

[32] *Id*. at 172:9-13, 298.

[33] *Id*. at 173:18-19.

[34] *Id*. at 173:20-26.

charge of threatening.[35] Mr. Alvarez made no closing argument.[36] The Community court found Mr. Alvarez guilty on all counts except threatening, and subsequently sentenced him to five years' incarceration on these charges.[37]

(4) Mr. Alvarez filed a petition for a writ of habeas corpus in federal district court, arguing that his rights to confront adverse witnesses and to a jury trial were violated.

On December 5, 2008, while still incarcerated in connection with the sentences imposed in case number CR-2003-543 as well as other Community court cases,[38] Mr. Alvarez filed a pro se petition for writ of habeas corpus pursuant to 25 U.S.C. § 1303 and 28 U.S.C. § 2241(c)(3) in the United States District Court for the District of Arizona.[39] In Claim 3 of his petition, Mr. Alvarez asserted that his right "to be confronted with the witnesses against him" protected by the Indian Civil Rights Act, 25 U.S.C. § 1302(6) (Westlaw, USCA03 database), was violated when the Community used Officer Benally's testimony to introduce non-witness

---

[35] *Id*. at 174:12-177:17.

[36] *Id*. at 177:18-19.

[37] *Id*. at 177:26-178:9, 191:16-196:5.

[38] *Id*. at 23 (¶ 2), 36 (¶ 2).

[39] *Id*. at 23-34.

E.C.'s incriminating statements at his trial.[40] In Claim 8 of his petition, Mr. Alvarez asserted that his right to a jury trial protected by the Indian Civil Rights Act, 25 U.S.C. § 1302(10) (Westlaw, USCA03 database), was violated when the Community tried him without a jury without his having validly waived that right.[41] (Mr. Alvarez raised a total of nine claims in his petition, but seeks review only with respect to Claims 3 and 8 in this appeal.) Mr. Alvarez named as respondent the Acting Chief Administrator of the Community's Department of Rehabilitation and Supervision.[42]

Together with his petition, Mr. Alvarez filed a request that the district court appoint the Office of the Federal Public Defender for the District of Arizona to represent him in connection with the petition, which the court eventually granted.[43] Respondent filed a response to the petition asserting that Mr. Alvarez was not entitled to relief on any of his claims.[44]

---

[40] *Id*. at 29-30 (¶¶ 40-43).

[41] *Id*. at 32-33 (¶¶ 59-62).

[42] *Id*. at 24 (¶ 7).

[43] CR ##3, 14.

[44] ER Vol. II at 35-42.

In the Spring of 2011, after the district court had denied Mr. Alvarez's motion for partial summary judgment on Count 1 of his petition (which challenged his sentence),[45] the court (per Magistrate Judge David K. Duncan) ordered respondent to file a response addressing Mr. Alvarez's remaining claims.[46] Respondent filed a response in which he asserted that Mr. Alvarez was not entitled to relief on any of his remaining claims.[47]

Mr. Alvarez filed a reply arguing that he was entitled to relief on all of his remaining claims.[48] Mr. Alvarez first noted that, pursuant to this Court's decision in *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897 (9th Cir. 1988), "federal constitutional standards" should be applied to the provisions of the Indian Civil Rights Act that parallel provisions of the Bill of Rights. *Id*. at 900.[49] With respect to Claim 3, Mr. Alvarez argued that the Community had breached his confrontation right by introducing the out-of-court accusations of non-witness

---

[45] CR #95.

[46] ER Vol. II at 43.

[47] *Id*. at 44-87.

[48] *Id*. at 88-ER Vol. III at 432.

[49] ER Vol. II at 89.

E.C. at his trial.[50] With respect to Claim 8, Mr. Alvarez argued that he had not validly waived his right to a jury trial because the Community court had never specifically advised him of the nature of that right or taken appropriate steps to ensure that he had made a knowing and voluntary decision to waive it.[51]

(5) A magistrate judge issued a report and recommendation recommending that the court deny relief on Mr. Alvarez's claims.

The magistrate judge issued a report and recommendation in which he recommended that the court deny relief on all of Mr. Alvarez's claims.[52] With respect to Claim 3, the magistrate judge reasoned that Mr. Alvarez had "admitted all that Benally testified to was accurate," that the Community had "made a good faith effort to secure the victim's presence at trial by the issuance of a subpoena," and that Mr. Alvarez "does not allege that the victim's recitation to either Officer Benally or T.C. [*sic*] was in any way unreliable."[53] With respect to Claim 8, the

---

[50] *Id*. at 94-96.

[51] *Id*. at 99-103.

[52] ER Vol. I at 11-22.

[53] *Id*. at 19:11-14.

magistrate judge reasoned that Mr. Alvarez was adequately informed of his jury trial right "[a]t each group arraignment."[54]

Mr. Alvarez filed timely objections to the magistrate judge's report and recommendation.[55] With respect to Claim 3, Mr. Alvarez challenged the magistrate judge's conclusion that the mere issuance of a subpoena constituted a "good faith effort" to secure E.C.'s appearance at trial within the meaning of *Ohio v. Roberts*, 448 U.S. 56 (1980), *overruled by Crawford v. Washington*, 541 U.S. 36 (2004).[56] With respect to Claim 8, Mr. Alvarez argued that the Community court's practice of reviewing criminal defendants' rights *en masse* prior to individual arraignments and then asking them whether they had questions about their rights at individual arraignments was insufficient to ensure that a defendant had knowingly and voluntarily waived his right to a jury trial.[57] Respondent filed no response to Mr. Alvarez's objections.

---

[54] *Id*. at 21:17-18.

[55] ER Vol. III at 435-45.

[56] ER Vol. III at 442.

[57] *Id*. at 444.

(6) The district court accepted the magistrate judge's recommendation and entered judgment against Mr. Alvarez.

The district court entered an order accepting the magistrate judge's report and recommendation.[58] With respect to Claim 3, the district court acknowledged that it was "not clear from the record that the prosecution made a reasonable effort to secure E.C.'s presence at trial."[59] But the district court reasoned that Mr. Alvarez nevertheless "cannot argue that his rights were violated" because he "admitted the allegations against him regarding E.C." and thus "his inability to confront E.C. did not prejudice his defense."[60] With respect to Claim 8, the district court asserted that Mr. Alvarez "cited no authority to show that a waiver of the right [to a jury trial] in tribal court requires the same formalities as the waiver of the right in federal court."[61] The district court entered judgment against Mr. Alvarez,[62] who then filed this appeal.[63]

---

[58] ER Vol. I at 1-10.

[59] *Id*. at 6:26-27.

[60] *Id*. at 7:13-25.

[61] *Id*. at 10:18-20.

[62] ER Vol. III at 446.

[63] *Id*. at 447-48.

Summary of Argument

I. Confrontation violation. When the Community's minimal effort to secure Mr. Alvarez's girlfriend's attendance at trial – a single subpoena left at her house – failed, the Community simply called a police officer to the witness stand and had him read her accusations from his incident report. This was a clear violation of Mr. Alvarez's confrontation right protected by the Indian Civil Rights Act. That right must be assessed pursuant to "federal constitutional standards" (*Randall*, 841 F.2d at 900), and the Sixth Amendment standard in effect at the time provided that a non-witness's accusations may be introduced only where the witness is "unavailable" to testify, meaning that the prosecution's reasonable, good-faith efforts to secure her attendance have failed. *Roberts*, 448 U.S. at 66. Merely having a single subpoena left at E.C.'s house was plainly insufficient to establish her "unavailability" under this Court's controlling precedent. Moreover, even if Mr. Alvarez's girlfriend had been "unavailable," her accusations could not properly have been admitted unless they were surrounded by adequate "indicia of reliability" or had "particularized guarantees of trustworthiness" (*id.*), and neither of those circumstances was present here. The district court therefore erred in finding that Mr. Alvarez was not entitled to relief on his confrontation claim.

II. Deprivation of jury trial right. A defendant's silence cannot be treated as adequate evidence that he has knowingly and voluntarily waived his right to a jury trial, particularly where he is unrepresented, barely out of his teens, has only a seventh-grade education, and expresses profound confusion about court proceedings. Here, the only means used to ensure that Mr. Alvarez's waiver of his jury trial right was knowing and voluntary involved attaching a cursory "Defendant's Rights" form to his complaint, reviewing the rights listed on the form *en masse* with all defendants awaiting arraignment, and then asking Mr. Alvarez whether he had any questions about his rights when his individual arraignment began. Because the district court's conclusion that this procedure was adequate to ensure a valid waiver was erroneous, Mr. Alvarez is entitled to relief for the deprivation of his right to a jury trial protected by the Indian Civil Rights Act.

This Court should therefore reverse the district court's entry of judgment against Mr. Alvarez and remand the case with instructions that his petition be granted with respect to Claim 3 and/or Claim 8.

Argument

I. The district court erred in rejecting Mr. Alvarez's confrontation claim.

A. Standard of Review

This Court applies *de novo* review to a district court's decision to grant or deny a petition for a writ of habeas corpus. *Cheney v. Washington*, 614 F.3d 987, 993 (9th Cir. 2010).

B. The Community violated Mr. Alvarez's confrontation right by using non-witness E.C.'s out-of-court accusations to convict him.

(1) E.C. was not "unavailable" to testify at trial, and her accusations were not surrounded by adequate indicia of reliability or particularized guarantees of trustworthiness.

Because the Bill of Rights does not protect individuals against the actions of Indian tribal governments, Congress in 1968 enacted the Indian Civil Rights Act (Pub. L. No. 90-284, §§ 201-701 (1968)), which contains protections for tribal-court criminal defendants that in most respects parallel the rights set forth in the federal Constitution's Bill of Rights. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-58 (1978). At the time of Mr. Alvarez's trial, the Act provided that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person in a criminal proceeding the right . . . to be confronted with the witnesses against him." 25 U.S.C. § 1302(6) (Westlaw, USCA03 database). (The Act was later

amended by the Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II (2010).) Because this provision of the Act parallels the Confrontation Clause of the United States Constitution's Sixth Amendment, "federal constitutional standards" should be employed in determining the meaning and application of this right. *Randall*, 841 F.2d at 900.

At the time of Mr. Alvarez's trial, the federal constitutional standard governing confrontation analysis was set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980), *overruled by Crawford v. Washington*, 541 U.S. 36 (2004), which held that:

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Id. at 66 (footnote omitted). Pursuant to the *Roberts* standard, the Community's introduction of E.C.'s out-of-court accusations through Officer Benally and J.C. plainly violated Mr. Alvarez's confrontation right.

In order for the admission of E.C.'s out-of-court accusations to have been proper under *Roberts*, the Community would have had to demonstrate that E.C. was "unavailable" to testify in person. *Id*. "A witness is not 'unavailable' for

purposes of the . . . exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial," and "[t]he lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." *Id*. at 74 (internal quotation marks omitted). But the record indicates that here the Community simply relied on the single subpoena left at E.C.'s house – which apparently was served by "court staff," rather than by the prosecution[64] – and made no further efforts to secure her attendance at trial. Further measures plainly were available: Officer Benally confirmed that the prosecution could have called upon Community police to secure E.C.'s attendance, or sought a continuance and/or a warrant for this purpose.[65] Instead, the Community simply plunged ahead without E.C., using Officer Benally to recite her accusations from the witness stand.

This Court's closely on-point decision in *Wilson v. Bowie*, 408 F.2d 1105 (9th Cir. 1969), confirms that Mr. Alvarez's confrontation right was violated here. The defendant in *Wilson* was charged with injuring a victim with a knife. *Id*. at 1106. At a preliminary hearing, the victim testified that the defendant had attacked him without provocation. *Id*. The defendant was unrepresented at his

---

[64] ER Vol. II at 283:3-5.

[65] *Id*. at 242:22-244:4, 280:17-281:1.

subsequent non-jury trial. *Id*. The victim did not appear to testify at the trial, and the "only explanation given by the prosecutor for [the victim's] failure to appear was, 'We attempted to subpoena [the victim], your Honor. He's not in court this morning.'" *Id*. "The trial court made no inquiry into [the victim's] whereabouts, and there was no showing that [the victim] could not appear in court on another day." *Id*. at 1107. Nevertheless, "the transcript of the preliminary hearing, including [the victim's] testimony, was admitted into evidence." *Id*. at 1106. On these facts, this Court held that the evidence "f[ell] far short of a showing that [the victim] was actually unavailable." *Id*. at 1107. The Court concluded that "the introduction of the preliminary hearing transcript into evidence at [the defendant's] trial denied him his constitutional right to confront the witnesses against him," and accordingly affirmed the district court's grant of the defendant's habeas corpus petition. *Id*. at 1106.

The facts in the instant case are the same in all significant respects as those in *Wilson*. Moreover, although *Wilson* was decided before *Roberts*, it applied the same principles regarding "unavailability" of a witness that were set forth in *Roberts*, and its holding is consistent with the holdings of a number of post-*Roberts* cases addressing similar factual circumstances. *See United States v. Harbin*, 112 F.3d 974, 975-76 (8th Cir. 1997) (prosecution failed to demonstrate

witness's unavailability where prosecutor stated that witness knew about subpoena but didn't want to testify, and court found that further options for securing witness's attendance were available); *State v. Armes*, 607 S.W.2d 234, 236-37 (Tenn. 1980) (prosecution failed to demonstrate witness's unavailability where it merely issued subpoenas to the witness a week before trial and a day before trial); *State v. Sharp*, 327 S.W.3d 704, 711-12 (Tenn. Crim. App. 2010) (prosecution failed to demonstrate witness's unavailability where it produced a subpoena with a handwritten notation that the witness had moved, and stated that it had tried and failed to contact the witness by telephone); *Looper v. State*, 605 S.W.2d 490, 493 (Ark. Ct. App. 1980) (prosecution failed to demonstrate witness's unavailability where "the only evidence of a 'good faith effort' to obtain the presence of the witness on the part of the State was the issuance of a subpoena").

The district court's finding that it was "not clear from the record that the prosecution made a reasonable effort to secure E.C.'s presence at trial" was therefore correct. Indeed, it was clear from the record, and from this Court's *Wilson* decision, that the prosecution *failed* to make a reasonable effort to secure E.C.'s attendance.

Moreover, even if E.C. *had* been "unavailable" to testify in person, *Roberts* would not have permitted the admission of her out-of-court accusations unless

they were accompanied by "adequate 'indicia of reliability'" or "particularized guarantees of trustworthiness." *Roberts*, 448 U.S. at 66. No one – not respondent, not the magistrate judge, and not the district court – suggested that E.C.'s out-of-court accusations had "adequate 'indicia of reliability'" or "particularized guarantees of trustworthiness," and they did not. E.C.'s accusations were simply that – *accusations* that a teenager (J.C. testified that E.C. was fifteen at the time of the trial[66]) made against her boyfriend just after they had quarreled.

(2) The district court's reasons for rejecting Mr. Alvarez's confrontation claim were unsound.

Although it acknowledged that it was "not clear" that the Community had made a reasonable effort to secure E.C.'s presence at trial, the district court denied relief on the ground that Mr. Alvarez "cannot argue that his rights were violated" because when asked whether he wanted to cross-examine Officer Benally, he stated that "everything he says is true."[67] Because he thus "admitted the allegations against him regarding E.C.," the district court reasoned, Mr. Alvarez's "inability to confront E.C. did not prejudice his defense."[68]

---

[66] ER Vol. II at 171:19-22.

[67] ER Vol. I at 6:26-7:20.

[68] *Id*. at 7:23-25.

The district court's premise – that a defendant's confrontation right is not violated if his inability to confront a non-testifying accuser "did not prejudice his defense" – was mistaken. Pursuant to *Roberts*, a defendant's confrontation right is violated where, as here, the prosecution introduces a non-witness's accusations without showing that the accuser is "unavailable," as well as where the accusations lack adequate indicia of reliability or particularized guarantees of trustworthiness. *Roberts*, 448 U.S. at 66. The question of whether the introduction of such testimony prejudiced the defendant's defense pertains only to the question of whether the violation of the defendant's confrontation right may be treated as harmless. And the applicable harmless-error principles demonstrate that the violation of Mr. Alvarez's confrontation right was plainly harmful here.

Pursuant to *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the harmlessness standard applicable to constitutional errors raised on collateral review is the same as the harmlessness standard applicable to non-constitutional errors raised on direct review. *Id*. at 637-38. That standard, which derives from the Supreme Court's decision in *Kotteakos v. United States*, 328 U.S. 750 (1946), requires reversal where the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht*, 507 U.S. at 631 (*quoting Kotteakos*, 328 U.S. at 776). Although courts have been more willing to find errors in the

admission of evidence harmless when they occurred in bench trials (*McKenzie v. McCormick*, 27 F.3d 1415, 1421 (9th Cir. 1994)), such errors are harmful in bench trials where the judge appears to have relied upon the improperly-admitted evidence. *Wilson*, 408 F.2d at 1107-08; *see also Wright v. Sw. Bank*, 554 F.2d 661, 664 (5th Cir. 1977).

That is plainly the case here. Had E.C.'s out-of-court accusations not been introduced, the only evidence supporting convictions on the four counts alleging offenses against E.C. would have been Officer Benally's and J.C.'s testimony that E.C.'s head looked hurt – and without the context provided by E.C.'s accusations, a "big old bump" on E.C.'s head would not have constituted sufficient evidence to support a finding beyond a reasonable doubt that Mr. Alvarez had assaulted her.[69] Because it is thus evident that the Community court relied upon E.C.'s out-of-court accusations in finding Mr. Alvarez guilty, the violation of his confrontation right was not harmless. Indeed, this Court held that the error was not harmless in the closely-on-point *Wilson* decision, which also involved a defendant who was convicted following a bench trial, noting that the prosecution had failed to show that the trial court "did not refer to" the improperly-admitted statements when rendering its decision. *Wilson*, 408 F.2d at 1107-08.

---

[69] ER Vol. II at 164:26-165:6, 173:4-8, 178:3-9.

As noted above, the district court's rationale for denying relief on Mr. Alvarez's confrontation claim was that Mr. Alvarez had "admitted the allegations against him regarding E.C." by stating that "everything [Officer Benally] says is true."[70] The district court treated this as a justification for finding that Mr. Alvarez "cannot argue that his rights were violated"[71] – a conclusion that is mistaken for the reasons set forth above. But it is worth noting as well that the district court's rationale would be no more compelling if it had been proffered as a justification for finding the violation of Mr. Alvarez's confrontation right harmless, for two reasons.

First, the district court's finding that Mr. Alvarez "admitted the allegations against him" overlooks the hearsay nature of the pertinent portion of Officer Benally's testimony. What Officer Benally testified to was not what Mr. Alvarez had done to E.C. – which Officer Benally did not witness – but rather what E.C. had *alleged* that Mr. Alvarez had done to her.[72] It follows that Mr. Alvarez's statement that "everything [Officer Benally] says is true" constituted an acknowledgment that E.C. had made those *allegations* to Officer Benally, not that

---

[70] ER Vol. I at 7:24.

[71] *Id*. at 7:14.

[72] ER Vol. II at 164:16-165:10.

the allegations were true. Particularly when construing the words of an unrepresented defendant with a seventh-grade education, who is barely out of his teens and has acknowledged that he "do[es]n't really know about court that much,"[73] the Court should be hesitant to twist the defendant's words out of their context in order to conclude that he has effectively waived his rights. *Cf. Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("background, experience, and conduct of the accused" should be considered in assessing whether he validly waived right to counsel); *United States v. Fuller*, 941 F.2d 993, 996 (9th Cir. 1991) (declining to find knowing waiver of counsel in light of, *inter alia*, defendant's limited education, youth, and lack of experience with the legal system).

Second, the district court overlooked the fact that if the Community had not violated Mr. Alvarez's confrontation right by introducing E.C.'s out-of-court accusations in the first place, Mr. Alvarez's statement that "everything [Officer Benally] says is true" would not, even under the district court's interpretation, have amounted to an acknowledgment of guilt with respect to Mr. Alvarez's alleged offenses against E.C.

The reason the district court overlooked this fact appears to be that it focused on the "prejudice" resulting from Mr. Alvarez's "inability to confront E.C.

---

[73] *Id*. at 109:23-25, 111:1-8, 151:25-152:1.

as a witness," rather than on the prejudice resulting from the admission of E.C.'s out-of-court accusations.[74] But while the district court's approach to the question of prejudice would have been proper if E.C. had been present at trial and the Community court had improperly restricted Mr. Alvarez's cross-examination of her, *see*, *e.g., Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986), that is not what happened here. E.C. did *not* appear at trial, and thus her out-of-court accusations should not have been admitted at all. The relevant prejudice is accordingly the prejudice caused by the admission of E.C.'s accusations – which includes any prejudice caused by the statement that Mr. Alvarez made following Officer Benally's testimony. Indeed, in *Wilson* this Court's harmless-error analysis focused on the prejudice caused by the introduction of the non-testifying victim's statements, rather than on the defendant's inability to cross-examine the victim. *Wilson*, 408 F.2d at 1107-08.

The district court therefore erred in concluding that Mr. Alvarez was not entitled to relief on Claim 3 of his petition.

---

[74] ER Vol. I at 7:14-15.

II. The district court erred in denying Mr. Alvarez's claim that he was improperly deprived of his right to a jury trial.

A. Standard of Review

This Court applies *de novo* review to a district court's decision to grant or deny a petition for a writ of habeas corpus. *Cheney*, 614 F.3d at 993.

B. The Community court failed to take adequate measures to ensure that Mr. Alvarez understood, and made a knowing and voluntary decision to waive, his right to a jury trial.

(1) The Community court did no more than inform Mr. Alvarez that he had a right to a jury trial and ask him whether he had any questions about his rights.

At the time of Mr. Alvarez's prosecution, the Indian Civil Rights Act provided that "[n]o Indian tribe in exercising powers of self-government shall . . . 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) (Westlaw, USCA03 database). Because this right parallels the jury-trial right guaranteed by the Sixth Amendment to the United States Constitution, "federal constitutional standards" should be employed in determining whether it was violated. *Randall*, 841 F.2d at 900.

Pursuant to these standards as they stood at the time of Mr. Alvarez's trial, presuming waiver of fundamental trial rights from a silent record was

"impermissible." *Carnley v. Cochran*, 369 U.S. 506, 516 (1962). Moreover, the right to a jury trial could be validly waived only where: "(1) the waiver [wa]s in writing; (2) the government consent[ed]; (3) the court accept[ed] the waiver; and (4) the waiver [wa]s made voluntarily, knowingly, and intelligently." *United States v. Duarte-Higareda*, 113 F.3d 1000, 1002 (9th Cir. 1997). To ensure that a defendant's waiver of the jury trial right was voluntary, knowing, and intelligent, the trial court was required to explain to the defendant how a jury would be constituted and selected, how the verdict would be arrived at, and how guilt or innocence would be determined in the absence of a jury. *Id*.

In depriving Mr. Alvarez of a jury trial, the Community appears to have relied on the assumption that Mr. Alvarez had validly waived his right to a jury trial by not invoking it. But the record comes nowhere near to showing that Mr. Alvarez validly waived his right to a jury trial.

The Community's means of advising defendants of their right to a jury trial at the time of Mr. Alvarez's prosecution consisted of attaching a conclusory "Defendant's Rights" form, which included the statement "[y]ou have the right to a jury trial," to criminal complaints, reading the rights to groups of defendants waiting to be arraigned *en masse* before proceeding with individual arraignments, and then asking individual defendants whether they had any questions about their

rights.[75] The "Defendant's Rights" form was deficient on its face, because it failed to advise Mr. Alvarez that he had the right to a jury trial only "upon request" (25 U.S.C.A. § 1302(10) (Westlaw, USCA09 database)), and the Community court made no effort to explain the nature of the jury trial right to Mr. Alvarez or to ensure that he was making a knowing and voluntary decision to waive it. In the absence of a valid waiver, the Community's deprivation of Mr. Alvarez's right to a jury trial was unlawful.

(2) The district court's reasons for denying relief on this claim were unsound.

In concluding that Mr. Alvarez was not entitled to relief on this claim, the district court first pointed to the magistrate judge's statement that Mr. Alvarez "acknowledged that he understood the rights that had been read to him" at his arraignments.[76] But the following is the entirety of the colloquy between the Community court and Mr. Alvarez at his arraignment in case number CR-2003-543 regarding Mr. Alvarez's civil rights:

> THE JUDGE: . . . . Mr. Alvarez, sir, you were informed of your legal rights. Do you have any questions about your legal rights, sir?

---

[75] ER Vol. II at 61-64, 290:7-293:7; ER Vol. III at 327, 355:19-357:5, 374:11-375:1.

[76] ER Vol. I at 10:15-16.

MR. ALVAREZ: No, no questions.[77]

This is a far cry from the specific discussion of the nature of the jury trial right, and inquiry into the voluntary and informed nature of the defendant's decision to waive it, that was required. *Duarte-Higareda*, 113 F.3d at 1002. Indeed, the insufficiency of the Community court's efforts is especially pronounced when viewed in light of Mr. Alvarez's youth, minimal education, and obvious confusion about the court proceedings.[78] *Cf. Johnson*, 304 U.S. at 464; *Fuller*, 941 F.2d at 996.

The district court also asserted that Mr. Alvarez had "cited no authority to show that a waiver of the [jury trial] right in tribal court requires the same formalities as the waiver of the right in federal court."[79] This is incorrect, because Mr. Alvarez's objections to the magistrate judge's report and recommendation prominently cited this Court's holding in *Randall*, 841 F.2d at 900, that Indian Civil Rights Act rights that parallel rights contained in the Bill of Rights should be construed in accordance with "federal constitutional standards."[80] Indeed,

---

[77] ER Vol. II at 110:8-12.

[78] ER Vol. II at 109:23-25, 111:1-8, 151:25-152:1, 156:25-157:1.

[79] ER Vol. I at 10:18-20.

[80] ER Vol. III at 436.

respondent did not articulate any reason why the waiver principles applicable to the Sixth Amendment right to a jury trial should not, pursuant to *Randall*, be applied to the parallel right set forth in the Indian Civil Rights Act, nor did the magistrate judge or district court identify any such reason, and there is none. The bars of a tribal prison are no less confining than the bars of a federal or state prison, and the right to a trial by jury is no less crucial in a tribal court prosecution than in any other kind. Because a tribal criminal defendant's sole protection against violations of his right to a fair trial comes from the Indian Civil Rights Act (*Santa Clara Pueblo*, 436 U.S. at 56-58), the same waiver principles should apply.

In any event, even if it were appropriate to water down these principles in the tribal context, ratifying the Community's minimal procedures for ensuring valid waivers would dilute them well beyond the point of ineffectiveness. Such a course would not be justifiable in light of the fact that tribal criminal defendants generally lack qualified legal representation,[81] nor would it be respectful of Congress's "central purpose" purpose, in enacting the Indian Civil Rights Act, to "'secur[e] for the American Indian the broad constitutional rights afforded to other

---

[81] *See* May 3, 2012 Letter from National Association of Criminal Defense Lawyers and National Association of Federal Defenders to the Honorable Lamar Smith, *et al*. (available at: http://www.nacdl.org/Advocacy.aspx?id=14904) at 13-14 & nn.53-56.

Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments.'" *Santa Clara Pueblo*, 436 U.S. at 61 (*quoting* S. Rep. No. 90-841, at 5-6 (1967)).

The district court therefore erred in concluding that Mr. Alvarez was not entitled to relief on Claim 8 of his petition.

Conclusion

Mr. Alvarez was convicted following a bench trial at which the prosecution flagrantly violated his confrontation right by having a police officer read his non-testifying girlfriend's out-of-court accusations from an incident report. Moreover, the court made no effort to explain Mr. Alvarez's jury-trial right to him or to ensure that he had made a knowing and voluntary decision to waive it. For either or both of these reasons, the Court should reverse the district court's denial of Mr. Alvarez's habeas corpus petition.

Respectfully submitted on July 30, 2012.

s/*Daniel L. Kaplan*
DANIEL L. KAPLAN
Assistant Federal Public Defender
KEITH J. HILZENDEGER
Research and Writing Specialist
850 West Adams Street, Suite 201
Phoenix, Arizona 85007-2730
(602) 382-2767

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)(B)

I hereby certify that, pursuant to FRAP 32(a)(7)(B), the foregoing Petitioner-Appellant's Opening Brief is proportionately spaced, has a typeface of 14 points, and contains 7,523 words.

s/*Daniel L. Kaplan*
DANIEL L. KAPLAN
Attorney for Petitioner - Appellant

STATEMENT REGARDING RELATED CASES

I hereby certify that I am not aware of any related cases within the meaning of Ninth Circuit Rule 28-2.6.

s/*Daniel L. Kaplan*
DANIEL L. KAPLAN
Attorney for Petitioner - Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I caused the foregoing Petitioner-Appellant's Opening Brief to be submitted to the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on July 30, 2012, using the appellate CM/ECF system. I further 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/*Daniel L. Kaplan*
Daniel L. Kaplan
Attorney for Petitioner - Appellant