No. 12-15788

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FORTINO ALVAREZ,

Petitioner-Appellant,

v.

CORINA BROWN,[1] Acting Chief Administrator,
Gila River Indian Community
Department of Rehabilitation & Supervision,

Respondent-Appellee.

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

ANSWER TO PETITION FOR PANEL AND *EN BANC* REHEARING

LINUS EVERLING
General Counsel

THOMAS L. MURPHY
Deputy General Counsel

Gila River Indian Community
Post Office Box 97
Sacaton, Arizona 85147
Telephone: (520) 562-9760
Facsimile: (520) 562-9769

ATTORNEYS FOR RESPONDENT-APPELLEE

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[1] Corina Brown now holds the position of Acting Chief Administrator of the Department of Rehabilitation & Supervision and is automatically substituted pursuant to Fed. R. App. P. 43(c)(2).

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STATEMENT OF FACTS

Mr. Alvarez opens his Petition with a series of facts about the Gila River Indian Community ("Community"), including its recent hosting of the New England Patriots football team at the Sheraton Wild Horse Pass Resort & Spa for Super Bowl XLIX.[2] The Community is a federally-recognized Indian tribe.[3] It currently operates a Community Court, with a Chief Judge and five Associate Judges, along with a standing Court of Appeals.[4] The Community operates adult and juvenile detention facilities[5] and funds a fully-staffed public defender office.

[2] Doc. 38-1 at 2. Some of the facts gleaned from Internet sources are inaccurate. The Community does not own a driving school, although the Bob Bondurant School of High Performance Driving operates within the Community. The same is true of the Koli Equestrian Center.

[3] Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 79 Fed. Reg. 4748, 4750 (Jan. 29, 2014).

[4] http://www.gilariver.org/index.php/government/judicial-branch-group2-judicial-branch

[5] http://www.gilariver.org/index.php/departments-cols5-colw1190-colw2190-col3w190col4w190-col5w190-right0-tribal-departments/80-department-of-rehabilitation-and-supervision-adult-division

A. Proceedings in the Community Court

After his release from Arizona state prison in early 2003, Petitioner Fortino Alvarez returned to the Gila River Indian Community and committed a series of crimes. Mr. Alvarez was charged in four separate cases in the Community Court; he pled guilty in three of the cases. In the case at issue here (referred to below as No. 543), he was found guilty of various charges arising out of hitting his 15-year old girlfriend twice in the head with a flashlight, and he was sentenced on November 19, 2003 to 1,825 days in detention.[6] He did not appeal his conviction.

While he was not represented by counsel at his trial and sentencing, Mr. Alvarez obtained counsel through the community's public defender office in April of 2008.[7] While his counsel repeatedly represented that he intended to pursue post-conviction relief in the Community's courts,[8] Mr. Alvarez did not and instead filed a habeas petition in the federal district court. Ironically, Mr. Alvarez used the

[6] D. Ct. Doc. 98 at 6; D. Ct. Doc. 7 at 10-11.

[7] D. Ct. Doc. 20 at 8.

[8] D. Ct. Doc. 21-1 at 4-6. In fact, Mr. Alvarez's counsel in the Community Court took the *same* position as Respondent herein with regard to the availability of the habeas remedy in the Community Court.

Community's judicial processes to obtain information regarding his tribal court cases to use in his federal habeas matter to attack those tribal court processes.[9]

When he was arraigned in No. 543 on July 3, 2003, Mr. Alvarez was informed of his rights, including the right to appeal. He was told, "[y]ou have the right to appeal any decisions by this court."[10] He also received a written notice of rights which states:

> You have the right to appeal, if you are found "Guilty", within a period of five (5) business days after sentencing.[11]

The court twice asked Mr. Alvarez at the July 3, 2003 arraignment whether he was able to understand the proceedings, to which he responded that he was.[12]

[9] Mr. Alvarez's Community public defender filed an expedited Request for Documents in No. 543, D. Ct. Doc. 21-1 at 2, and a Motion to Compel Discovery in No. 543, D. Ct. Doc. 21-1 at 3-7. The Community Court granted both requests. D. Ct. Doc. 21-1 at 8 (granting request for audio recording of the bench trial in No., 543) and D. Ct. Doc. 21-1 at 9-10 (granting motion to compel in No. 543).

[10] D. Ct. Doc. 98, Exhibit 1.

[11] D. Ct. Doc. 98-3. It was undisputed below that Mr. Alvarez received a copy of the "Defendant's Rights" form and the Community's prosecutor recalls that Mr. Alvarez appeared to understand his rights. D. Ct. Doc. 98 at 4.

[12] D. Ct. Doc. 98 at 3-4.

Following his sentencing, Mr. Alvarez did not appeal his conviction and did not seek any additional relief in the Community's courts, other than obtaining the materials in his cases for use in post-conviction proceedings.

B. Proceedings on the Petition for Writ of Habeas Corpus

Although he raised nine claims in his 12-page Petition for Writ of Habeas Corpus,[13] Mr. Alvarez did not raise any claims or challenges to the Community's criminal appeal process.

Respondent raised two affirmative defenses to the petition relating to tribal court exhaustion; first, that "Petitioner has not exhausted his remedies in the Gila River Indian Community Court through either (a) a motion to correct his sentences; or (b) through a motion for commutation based upon the grounds raised in his Petition."[14] Second, Respondent pled, "Petitioner has not raised the present claims in the courts of the Gila River Indian Community."[15]

[13] D. Ct. Doc. 1.
[14] D. Ct. Doc. 6 at 7.
[15] *Id.*

On April 1, 2009, Mr. Alvarez filed a Motion for Leave to Conduct Discovery.[16] The motion sought broad written discovery in a number of areas, including (1) a subpoena for documents to the Community's Judicial Branch; (2) a subpoena for documents to the Community's Law Office; a subpoena for documents to the Gila River Police Department; (3) interrogatories; (4) broad document requests to Respondent; (5) a subpoena for documents to the Custodian of Records of the Community's Probation Department; and (6) a subpoena for documents to Four Rivers Legal Services.[17] In addition to the written discovery requests, Petitioner also sought to depose 14 individuals.

Respondent made several arguments in response to Mr. Alvarez's broad discovery motion.[18] Respondent argued that discovery in federal court was premature because "Petitioner has not pursued any post-conviction remedy in the Gila River Indian Community Court premised upon the claims in his Petition."[19] Respondent acknowledges that, in responding to the motion, he identified that the

[16] D. Ct. Doc. 17.

[17] This discovery was sought in addition to the materials Mr. Alvarez's Community public defender received in 2008 prior to filing his petition.

[18] D. Ct. Doc. 21.

[19] *Id.*at 1.

pending Motion to Dismiss for Failure to Exhaust Tribal Court Remedies[20] was premised on failure to exhaust the commutation, habeas or motion to correct remedies in the Community Court. However, Respondent's argument did not end there.

Mr. Alavarez cited *Johnson v. Gila River Indian Cmty.*, 174 F.3d 1032 (9th Cir. 1999) in his discovery motion to argue that the futility doctrine applied. Respondent noted that *Johnson* held that delay alone was generally insufficient to demonstrate futility in pursuing tribal court remedies and that this Court remanded the matter to the district court.[21] Respondent further argued that, "Petitioner's present discovery request is premised purely on speculation about what *might* have happened *if* he had appealed."[22] Respondent urged the district court not to permit speculation as the basis for discovery requests.[23]

Mr. Alvarez voluntarily withdrew several of his discovery requests, including his request for a subpoena to the Community's Judicial Branch.[24] While

[20] D. Ct. Doc. 20.
[21] D. Ct. Doc. 21 at 3 (citing *Johnson*, 174 F.3d at 1036).
[22] *Id.*
[23] *Id.* at 4.
[24] D. Ct. Doc. 23 at 4.

his reason for withdrawing the request was that Respondent's motion was limited to commutation or a petition for a writ of habeas corpus; he did not respond to Respondent's argument that the discovery was speculative.[25]

ARGUMENT

I. BECAUSE RESPONDENT DID NOT WAIVE OR FORFEIT THE DEFENSE OF FAILURE TO EXHAUST TRIBAL COURT REMEDIES, THE PETITION SHOULD BE DENIED.

A. The record does not support a deliberate waiver or forfeiture of the defense of failure to exhaust tribal court remedies and Petitioner did not raise any issues involving the Community's appellate procedure in his petition.

Mr. Alvarez's argument that Respondent deliberately waived the direct appeal exhaustion defense is based not on what Respondent said in its response to the Motion for Leave to Conduct Discovery, but Mr. Alvarez's interpretation of the response in his reply memorandum, to which Respondent was not able to respond. Because the Local Rules in the District of Arizona provide for a motion, responsive memorandum and reply memorandum,[26] it is difficult to argue that "[a]t no point did the Community [sic] contradict this statement or suggest that

[25] *Id.*
[26] LRCiv. 7.2.

Mr. Alvarez has misunderstood its position"[27] when the statement in question was made in a reply memorandum. At that point, there was no opportunity or reason for Respondent to do so because the request was withdrawn.

Mr. Alvarez also suggests that he would have raised issues regarding the Community's appeal process and the five-day time period for appealing. However, those claims should arguably have been presented in the first instance in his petition seeking relief. *See, e.g.*, Habeas Rule 2(c)(1), Rules Governing Section 2254 Cases in the United States District Courts (2010) (petition must specify all grounds for relief available to the petitioner).

B. Mr. Alvarez had several opportunities to address the defense of his failure to appeal.

Mr. Alvarez contends that he had no fair opportunity to address the defense of his failure to appeal his tribal court conviction.[28] The defense of failure to exhaust tribal court remedies was raised in two of Respondent's affirmative defenses.[29] And, while Respondent's motion to dismiss was admittedly premised on the remedies of commutation, tribal court habeas relief or a motion to correct

[27] Doc. 38-1 at 5.
[28] *Id.* at 12-13.
[29] D. Ct. Doc. 6 at 7.

or alter his sentence, Respondent argued that the issue of appeal was hypothetical or speculative at that point because Mr. Alvarez did not appeal.

Prior to oral argument in this matter, which took place on April 15, 2013, the panel issued an Order which directed that "the parties should be prepared to address whether this court has jurisdiction" and application of 25 U.S.C. § 1303 as discussed in *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010).[30] Given that Mr. Alvarez was "in custody" in No. 543 when he filed his petition, which the parties do not dispute, the pinpoint citation to *Jeffredo* seemingly directed the parties to the requirement that "a litigant must first exhaust tribal remedies before properly bringing a petition for writ of habeas corpus." *Id.* (citation omitted).

Mr. Alvarez also notes that he "filed only a FRAP 28(j) letter that did not address that issue."[31] Respondent assumes that "that issue" means Mr. Alvarez's failure to exhaust by not taking a direct appeal of his conviction. Mr. Alvarez clearly had the opportunity to address and prepare for argument on the issue of failure to exhaust tribal court remedies, filing his Rule 28(j) citation of

[30] Doc. 25.
[31] Doc. 38-1 at 12.

supplemental authorities *one day later*.[32] Petitioner argued that Respondent had not raised the issue on appeal and that the district court found that "exhaustion would be futile or the tribal courts furnish no adequate remedy."[33]

If Mr. Alvarez did not believe the litigation of the exhaustion issue in the district court along with the Order and the questions asked at oral argument were sufficient to address the defense, he could have requested supplemental briefing.

C. The Court was correct in reaching the defense of failure to exhaust and federal habeas cases under the Indian Civil Rights Act are extraordinary.

It was appropriate for the Court to raise the issue of Petitioner's failure to exhaust his tribal court remedies. *Wood v. Milyard*, 132 S.Ct. 1826 (2012), is easily distinguished from this case. In *Wood*, a habeas matter involving a statute of limitations defense, the State twice informed the district court that it would not challenge, but was not conceding the timeliness of a habeas petition. 132 S.Ct. at 1828. The Supreme Court first noted that "[o]rdinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant's answer or in an amendment thereto." *Id.* at 1832 (citations omitted). As a purely technical matter,

[32] Doc. 26-1.
[33] Doc. 26-1 at 1.

the defense of failure to exhaust *was* raised in Respondent's response. The Court in *Wood* also recognized that it had affirmed a federal district court's authority to consider a forfeited defense when extraordinary circumstances warrant. *Id.* at 1833 (citations omitted).

Assuming that forfeiture applies, habeas cases under ICRA certainly fit the criteria for extraordinary circumstances. As noted by the majority, "Indian tribes occupy a unique status under our law."[34] Because of this unique status, the Supreme Court has required exhaustion of tribal court remedies "because the federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts." *Selam v. Warm Springs Tribal Correctional Facility*, 134 F.3d 948, 953 (9th Cir. 1998).

Even counsel for Mr. Alvarez noted below that the claims made herein are complex and significant and have an "extra layer of complexity as compared to cases brought under 28 U.S.C. §§ 2254 and 2255" because they require that a petitioner "translate" his or her claims into the ICRA context.[35] The response to the petition was characterized as raising "novel issues of intergovernmental

[34] Doc. 35-1 at 4 (citations omitted).
[35] D. Ct. Doc. 9 at 2.

comity that have contours markedly different from the related doctrines applicable in cases brought by state prisoners."[36]

Granberry v. Greer, 481 U.S. 129 (1987) is closer to this matter. In a case in which the state raised a nonexhaustion defense for the first on appeal, the Supreme Court held that "[t]he appellate court is not required to dismiss for nonexhaustion notwithstanding the State's failure to raise it, and the court is not obligated to regard the State's omission as an absolute waiver of the claim." 481 U.S. at 133. In a footnote, the Court described exhaustion of tribal court remedies as "an inflexible bar to consideration of the merits by the federal court" and a situation that would "require that a petition be dismissed when it appears that there has been a failure to exhaust." 481 U.S. at 130 n. 4.

D. Requiring exhaustion of remedies in the Community's courts is consistent with well-established federal law and promotes tribal self-government.

Prospective *amici* argue that tribal court exhaustion should not be required for habeas petitions filed under 25 U.S.C. § 1303. While the issue of whether exhaustion should be required at all was not raised below, the Court should reject

[36] *Id.*

the argument, as did the Tenth Circuit in *Valenzuela v. Silversmith*, 699 F.3d 1199 (10th Cir. 2012), *cert. denied*, 134 S.Ct. 58 (2013).[37] Three federal circuits—the 8th, 9th and 10th—have all held that a petitioner in an ICRA habeas case must exhaust tribal court remedies before seeking federal habeas relief. *See Valenzuela*, *supra*; *Necklace v. Tribal Court of Three Affiliated Tribes*, 554 F.2d 845, 846 (8th Cir. 1977) (as a matter of comity, tribal remedies must ordinarily be exhausted before a claim is asserted in federal court under ICRA) (citations omitted); *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1144-45 (8th Cir. 1973) (tribal exhaustion requirement is consistent with ICRA); *Selam, supra,* 134 F.3d at 953; (Supreme Court has instructed courts to require exhaustion because of federal policy of promoting tribal self-government) (citing *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 847 (1985); *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010) (court has held that a litigant must first exhaust tribal court

[37] Respondent brought the decision in *Valenzuela* to the Court's attention following oral argument in a Rule 28(j) letter filed on April 16, 2013. Doc. 28-1. In response, Mr. Alvarez implicitly acknowledged that there is an exhaustion requirement in ICRA habeas matters, but noted that it was not a jurisdictional prerequisite to review and that the issue was waived. Doc. 30 (citations omitted).

remedies before bringing a petition for writ of habeas corpus under ICRA, citing *Selam*).

Prospective *amici* argue for a rule which allows habeas petitioners to choose between tribal or federal forums or file in both simultaneously. Every case in which a petitioner chooses the federal forum over the tribal forum negatively affects tribal sovereignty and self-government. The rule urged by prospective *amici* permits petitioners to seek habeas relief in federal court instead of appealing to tribal appellate courts, and use those proceedings to collaterally attack tribal court systems without any requirement that they first seek relief in tribal courts. This is wholly inconsistent with the strong federal policy in tribal self-government and does not contribute to the growth and development of tribal justice systems.

The Court should reject the invitation to overrule well-reasoned circuit precedent, clearly established in *Selam* and more recently recognized in *Jeffredo*.

E. The Community's appellate court not only functions, but has ruled on post-conviction issues in an appeal from a commutation proceeding.

Mr. Alvarez, continues to argue—in the absence of a record—that the Community lacks a functioning appeals court, relying on a case that is now over

fifteen years old. *Johnson v. Gila River Indian Cmty.*, 174 F.3d 1032 (9th Cir. 1999).[38] In the interim, a panel of this court more recently dismissed an appeal in a habeas matter under 25 U.S.C. § 1303 because the appellant's claim had been appealed to and decided by the Gila River Indian Community Court of Appeals. *Anderson v. Henton*, No. 07-16921 (9th Cir. Oct. 12, 2010), Doc. 17-1 at 2. The panel found that the proceedings in the Community's Court of Appeals were "directly related" to Mr. Anderson's appeal "and are, in fact, dispositive." *Id.* at 3 (citation omitted).

Likewise, in another matter recently decided by this Court on different grounds, *Jackson v. Tracy*, No. 12-17179, the same counsel filed a brief on behalf of Mr. Jackson in which it was noted that Mr. Jackson had appealed to the Community's Court of Appeals, and that the court issued an opinion denying relief.[39] The same was also true of another matter recently appealed to this Court, *Johnson v. Tracy*, No. 13-15397.[40] Contrary to the factually unsupported position

[38] Doc. 38-1 at 16.

[39] Appellant's Opening Brief (Jan. 22, 2013), Doc. 6-1 at 24. The case is *Gila River Indian Cmty. v. Jackson*, No. AC-2008-015 (GRIC Ct. App. May 27, 2010).

[40] *Gila River Indian Cmty. v. Johnson*, No. AC-2011-001 (GRIC Ct. App. Sept. 6, 2011).

argued by prospective *amici*, defendants were able to comply with the five-day deadline.[41]

Not only does the Community have a functioning appeals court, it has strived to improve its appeal processes over the past several years. This included amendments to the Community's code in 2009 to establish a standing appeals court,[42] to increase the time for filing an appeal to 30 days,[43] and establishing processes for interlocutory appeals and extraordinary writs.[44] The 2009 amendments also provide a specific habeas remedy.[45]

II. THE MAJORITY'S OPINION IS CONSISTENT WITH SUPREME COURT PRECEDENT.

A. The majority opinion does not conflict with *El Paso Natural Gas Co. v. Neztsosie.*

Mr. Alvarez argues that the rule adopted by the majority conflicts with *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), specifically to the extent

[41] Unfortunately, the footnote in the proposed NACDL Amicus Brief does not explain how it is "practically impossible" to comply with the five-day deadline, Doc. 40-2 at 15, and none of the authorities cited provide any specific analysis of how the time period for appeal does not comport with due process.

[42] GRIC Code § 4.503 (2009).

[43] *Id.* § 4.505(A)(1) (2009).

[44] *Id.* §§ 4.505(B), 4.518 (2009).

[45] *Id.* § 4.519 (2009).

it allows considerations of comity to trump the party presentation principle as recognized in *Greenlaw v. United States*, 554 U.S. 237 (2008). *Greenlaw* has been cited for the proposition that "[r]eviewing an issue raised by a party who has not filed a cross-petition also risks offending the party presentation principle, which makes clear that 'an appellate court may not alter a judgment to benefit a nonappealing party.'" *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 689 (9th Cir. 2011) (quoting *Greenlaw*, 554 U.S. at 244). Those factors are not present in this matter; however, the manner in which the issue was addressed is consistent with prior Supreme Court precedent, particularly *Granberry v. Greer, supra*.

B. The Court should disregard the irrelevant attacks on tribal justice systems made at the end of the Petition.

The final portion of Mr. Alvarez's Petition appears to be a general attack on tribal court systems—beginning with the statement that "things are very different with respect to tribal legal systems"—and not an argument based upon "flawed assumptions about tribal court systems."[46] It makes claims about the Community's laws and practices that are not supported by the record. The Community's criminal

[46] Doc. 38-1 at 18.

laws, rules of criminal procedure and rules of evidence are easily obtained online.[47] The Native American Rights Foundation ("NARF") maintains an online law library of tribal codes.[48] The fact that researching a jurisdiction's law may involve traveling to the jurisdiction is neither novel nor unique to Indian tribes.[49]

CONCLUSION

For these reasons, the Petition for Rehearing or Rehearing *En Banc* should be denied.

DATED this 26th day of February, 2015.

GILA RIVER INDIAN COMMUNITY
OFFICE OF GENERAL COUNSEL

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

[47] http://gilariver.org/index.php/government/judicial-branch-group2-judicial-branch

[48] http://www.narf.org/nill/triballaw/

[49] Many lawyers have had the experience of visiting a city or county clerk's office to review or obtain a copy of local ordinances.

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 32(a)(7) and Circuit Rule 40-1(a), that the *Answer to Petition for Panel and En Banc Rehearing* is double-spaced in 14-point proportionally-spaced Times New Roman typeface and the total word count is 4,194.

DATED this 26th day of February, 2015.

GILA RIVER INDIAN COMMUNITY
OFFICE OF GENERAL COUNSEL

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

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2015, I electronically filed the foregoing *Answer to Petition for Panel and En Banc Rehearing* with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit through the appellate CM/ECF system.

GILA RIVER INDIAN COMMUNITY
OFFICE OF GENERAL COUNSEL

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