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

RESPONDENT'S SUPPLEMENTAL BRIEF

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

[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).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

Page

CONSTITUTIONS, STATUTES & RULES

INTRODUCTION

The Court [Doc. 48] directed the parties to file supplemental briefs on two issues: (1) whether the Court can, sua sponte, address Mr. Alvarez's failure to exhaust his tribal remedy of direct appeal of his conviction to the Gila River Indian Community's Court of Appeals; and (2) whether Mr. Alvarez's failure to direct appeal his conviction prevents federal appellate review. The first question is easily resolved, as it is well-established that the Court may, sua sponte, review the issue of Mr. Alvarez's failure to exhaust his tribal court remedies, including the remedy of direct appeal. The answer to the second question is that Alvarez's failure to appeal his conviction should bar him from federal appellate review.

When Mr. Alvarez filed his petition, he did not allege that he had exhausted his tribal remedies.[2] Respondent raised the failure to exhaust in two separate places in her response, including that "Petitioner has not raised the present claims

[2] D. Ct. Doc. 1. Mr. Alvarez alleged that he did not take a direct appeal in No. 543, stating—contrary to the undisputed record in this matter—that "the court did not inform Mr. Alvarez of his right to appeal," and that "Mr. Alvarez was not aware of his right to appeal or of the time limits for filing an appeal, did not understand what an appeal was, and was not informed of these matters by the court." [D. Ct. Doc. 1 at 2 ¶ 12] Mr. Alvarez's petition, although filed in part pursuant to 28 U.S.C. § 2241, did not use the form provided on the website for the District of Arizona for habeas petitions filed under 28 U.S.C. § 2241 (http://www.azd.uscourts.gov/forms/prisoner-form-petition-writ-habeas-corpus-person-federal-custody-pursuant-28-usc-%C2%A7-2241). The form inquires extensively about the exhaustion of remedies.

in the courts of the Gila River Indian Community."[3] Respondent's motion to dismiss for failure to exhaust tribal court remedies was denied by the district court,[4] and Respondent failed to raise the issue on appeal. Mr. Alvarez's petition was filed on December 5, 2008, the motion to dismiss for failure to exhaust was filed on May 5, 2009, the order and judgment denying the petition were entered on March 28, 2012.[5] Mr. Alvarez was released from tribal custody on July 1, 2012.

ARGUMENT

I. THIS COURT MAY, SUA SPONTE, ADDRESS PETITIONER'S FAILURE TO EXHAUST HIS TRIBAL COURT REMEDIES.

This case involves two lines of overlapping cases. On the one hand are federal habeas cases which have taken an increasingly narrower view of a court's discretion to review issues that have been waived or are raised for the first time on appeal. On the other are a line of civil non-habeas cases involving comity and sovereignty issues with federal Indian tribes and which hold that a litigant *must* exhaust remedies in tribal court before seeking federal review. Respondent contends that the reasoning of the latter cases continues to justify sua sponte appellate review of failure to exhaust tribal remedies in federal habeas matters.

---

[3] D. Ct. Doc. 6 at 7 ¶ 45.
[4] D. Ct. Doc. 73.
[5] D. Ct. Docs. 1, 107, 108.

A. The law is well-established that this Court may, sua sponte, raise and address the issue of failure to exhaust.

Granberry v. Greer, 481 U.S. 129 (1987) is clearly instructive in this matter. In *Granberry*, the petitioner sought habeas relief in the district court pursuant to 28 U.S.C. § 2254. 481 U.S. at 130. Instead of filing an answer to the petition, the State filed a Fed. R. Civ. P. 12(b)(6) motion seeking dismissal for failure to state a claim and the district court dismissed. *Id.* When the matter was appealed to the Seventh Circuit, the State for the first time raised the defense of failure to exhaust; petitioner countered that the State had waived the defense. *Id.*

The Supreme Court vacated the judgment of the Court of Appeals, which held that nonexhaustion could not be waived, rejected the waiver argument and remanded to the district court for dismissal without prejudice. *Id.* at 136. Addressing the waiver issue, the Court adopted "an intermediate approach" under which "the courts of appeals [are] to exercise discretion in each case to decide whether the administration of justice would better be served by insisting on exhaustion or by reaching the merits of the petition forthwith." *Id.* at 132. Significant to this matter, *Granberry* identified *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) and *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985) as cases "at the other extreme," in which the Court "might treat exhaustion

as an inflexible bar to consideration of the merits of the petition by the federal court" requiring dismissal. 481 U.S. at 131 n.4.

Granberry used two examples to guide the determination of whether a case is an exceptional one, making it appropriate for "the court of appeals to take a fresh look at the issue." *Id.* at 134. If a case involves an important but unresolved issue of state law, it may be appropriate "for the court to insist on complete exhaustion to make sure that it may ultimately review the issue on a fully informed basis." *Id.* at 134-5. However, if a full trial has been held and "it is evidence that a miscarriage of justice has occurred, it may also be appropriate for the court of appeals to hold that the nonexhaustion defense has been waived in order to avoid unnecessary delay in granting relief that is plainly warranted. *Id.* at 135.

Granberry, a unanimous decision of the Supreme Court, did not hold that a court of appeals cannot consider an issue sua sponte; only that it could not unequivocally reject a waiver argument. As argued, *infra*, the Supreme Court has repeatedly recognized strong comity and sovereignty interests in federal Indian law cases and specifically addressed tribal sovereignty interests in deciding ICRA issues in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

Wood v. Milyard, 132 S.Ct. 1826 (2012) also supports the use of the comity doctrine to allow a court to consider a waived or forfeited defense. The issue in *Wood* was the authority of a court of appeals to raise a limitations defense on its own motion. 132 S.Ct. at 1829. The Court considered the State's defense to have been forfeited; that is, "a statutory time limitation is forfeited if not raised in a defendant's answer or in an amendment thereto." *Id.* at 1832 (citations omitted). However, like *Granberry*, *Wood* instructs that "the bar to consideration of a forfeited habeas defense is not absolute," and that the courts of appeal "have discretion in "exceptional cases," to consider a nonexhaustion argument "inadvertently" overlooked by the State in the district court." *Id.* at 1833 (citations omitted).

Respondent raised the failure to exhaust tribal remedies twice in her response to the petition. Thus, the defense in this matter was not withheld until the "main event" was over, *Granberry* 481 U.S. at 132, but raised in the answer and by motion. While the motion did not raise the failure to take a direct appeal as an argument in support of the nonexhaustion issue, Mr. Alvarez had notice of the defense. There is a distinction between an issue and an argument; "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim." *Yee v. City of Escondido*, 503 U.S. 519, 534-5 (1992) (citations

omitted). *See, also, Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (citations omitted) (parties are not limited to the precise arguments they made below).

Prior to *Wood* there were a fair number of habeas cases from this Circuit which held that a court may, sua sponte, raise the issue of exhaustion of remedies. These include *Boyd v. Thompson*, 147 F.3d 1124 (9th Cir. 1998) (district court may raise procedural default, sua sponte, before service of the petition or an answer is filed, when the default is obvious on the face of the petition); *Aiken v. Spalding*, 841 F.2d 881, 883 (9th Cir. 1988) (court may examine the exhaustion question sua sponte); *Jackson v. Cupp*, 693 F.2d 867, 868 (9th Cir. 1982) ("[w]e hold that the state cannot concede exhaustion"); and *Campbell v. Crist*, 647 F.2d 956, 957 (9th Cir. 1981) (court may consider whether state remedies have been exhausted even if the state does not raise the issue).

Understandably, cases brought under 28 U.S.C. § 2254 are subject to a statutory requirement that an application for a writ of habeas corpus on behalf of an individual challenging custody pursuant to a state court judgment "shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). No similar requirement appears in ICRA, 25 U.S.C. § 1303. However, the exhaustion

doctrine "existed long before its codification by Congress in 1948." *Granberry*, 481 U.S. at 133.

Supreme Court precedent clearly establishes that this Court may, sua sponte, raise the issue of Mr. Alvarez's failure to direct appeal his conviction. And, given the importance of tribal sovereignty interests long recognized by the Supreme Court, this Court has previously permitted the issue to be raised, sua sponte, in cases involving exhaustion of tribal remedies. The comity issues remain the same now as in the past and, in cases involving tribal justice systems, the interests grounded in tribal sovereignty are strong and exceptional.

B. Strong interests grounded in tribal sovereignty support sua sponte review of failure to exhaust.

Civil cases involving federal Indian law issues emphasize exhaustion of tribal court remedies as "mandatory" before seeking federal review. A recent example from this Court, as noted by the majority, is *Marceau v. Blackfeet Housing Auth.*, 540 F.3d 916 (9th Cir. 2008), *cert. denied*, 556 U.S. 1235 (2009). *Marceau*, in turn, relied on the Court's opinion and sound reasoning in *Burlington Northern R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991), where it said:

> . . .both the Supreme Court and this circuit have held that non-Indian defendants *must exhaust tribal court remedies* before seeking relief in

> federal court, even where defendants allege that proceedings in tribal court exceed tribal sovereign jurisdiction.

940 F.2d at 1244 (emphasis in original) (citing *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845. 856-57 (1985) and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987)).

In *Allstate Indem. Co. v. Stump*, 191 F.3d 1071 (9th Cir.), *amended* 197 F.3d 1031 (1999), this Court took a strict view of exhaustion:

> A district court has no discretion to relieve a litigant from the duty to exhaust tribal remedies prior to proceeding in federal court.

191 F.3d at 1073 (citation omitted). In *Stump*, this Court held that it "is appropriate to examine the issue [of tribal exhaustion] sua sponte because of the important comity considerations involved." *Id.* (citations omitted).

Burlington Northern, *supra*, identified "three *imperatives* arising from the nature of tribal sovereignty" which "compel the requirement" of exhausting tribal remedies. 940 F.2d at 1245 (emphasis added; citation omitted). These imperatives include the strong Congressional policy of tribal self-government and Indian self-determination and the practical imperative of judicial efficiency and that requiring exhaustion of tribal remedies "will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial

review." *Id.* (quoting *Nat'l Farmers*, 471 U.S. at 857). These policies are particularly salient in cases under the Indian Civil Rights Act.

The Indian Civil Rights Act, which is a limitation on tribal sovereignty, embodies two distinct and competing purposes:

> In addition to its objective of strengthening the position of individual tribe members vis-à-vis the tribe, Congress also intended to promote the well-established federal "policy of furthering Indian self-government."

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62 (1978) (citations omitted). The interests of Indian tribes in self-government—compared with the rationale for state exhaustion—are not only unique and exceptional, but hit at the heart of the relationship between the United States and its Indian tribes. The substantive issues in this matter could have been raised under the Community's Constitution.[6] In addition, tribal courts have the authority and duty to interpret ICRA, which does not necessarily have to be interpreted in the same manner as the United States Constitution.[7] The unique and strong policies embodied in the tribal exhaustion

[6] GRIC CONST. art. IV includes a guarantee that "[n]o person shall be deprived of life, liberty or property without due process of law.

[7] *See, e.g.*, Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 Fordham L. Rev. 479, 487 (2000) (ICRA's statutory terms needs not be ascribed same meaning as in the federal Constitution and tribal courts have authority to construe ICRA provisions).

doctrine permit the Court to raise the issue sua sponte, as it did in this matter, and previously in *Marceau* and *Stump*.

Questions have also been raised regarding the Community's process at the time of Mr. Alvarez's conviction for direct appeals, particularly the five-day time limit for filing a notice of appeal. It should be emphasized that ICRA does not provide a right of appeal, 25 U.S.C. § 1302, but appeal is a remedy provided by Community law. If there are questions regarding the adequacy of an appeal mechanism for a tribal court conviction created by tribal law, those issues should be first presented to the tribal courts before seeking federal review.

II. PETITIONER'S FAILURE TO APPEAL HIS CONVICTION TO THE COMMUNITY'S COURT OF APPEALS SHOULD BAR THIS COURT FROM REVIEWING THE MATTER.

One fact has *never* been disputed in this matter—that Mr. Alvarez never raised *any* of the issues he raised in his federal habeas petition in the Community's courts. The issue of the effect of Mr. Alvarez's failure to appeal his tribal court conviction is related to the issue of his failure to exhaust tribal remedies; it is a procedural default which likely precludes federal review. The situation is not unlike those cases involving state prisoners which hold that a procedural default bars federal habeas review unless the petitioner can meet the "cause and prejudice" standard established in *Wainwright v. Sykes*, 433 U.S. 72 (1977).

Exhaustion of remedies "requires that petitioners 'fairly present' federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Cook v. Schriro*, 538 F.3d 1000, 1026 (9th Cir. 2008), *cert. denied*, 555 U.S. 1141 (2009), (citing *Duncan v. Henry*, 513 U.S. 364, 365 (1995)). This Court may not consider a federal law challenge to a state court decisions unless the federal claim was properly presented to the state court. *Id.* (citations omitted). When a petitioner's claim is precluded or waived by the violation of a state procedural rule, "it is procedurally defaulted unless the prisoner can demonstrate cause and prejudice." *Id.* (citation omitted). The rationale for the recognition of this doctrine in federal habeas proceedings involving state courts applies to tribal courts.

Coleman v. Thompson, 501 U.S. 722, 726 (1991) highlights the "respect that federal courts owe the States and the State's procedural rules when reviewing the claims of state prisoners in federal habeas corpus." Coleman filed his notice of appeal in his state court habeas action three days late in the Virginia Supreme Court, and his appeal was dismissed. *Id.* at 727-8. The Supreme Court upheld the dismissal of Coleman's federal habeas petition because of his procedural default in the state court. The same concerns underlying the exhaustion rule—principles of

comity—apply to situations in which federal claims have been procedurally defaulted in state court:

> Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance.

Id. at 731-2. The same rationale applies to procedural defaults under tribal court rules (i.e., an "independent and adequate tribal ground").[8]

The bypass rationale of *Coleman* applies equally in this matter as well. If habeas petitioners are permitted by bypass all tribal remedies—which are all creations of tribal law—in favor of federal habeas relief, the tribal courts are effectively deprived of their ability to interpret tribal laws and tribal sovereignty is diminished.

CONCLUSION

The answer to both questions presented is "yes."

DATED this 27th day of April, 2015.

GILA RIVER INDIAN COMMUNITY
OFFICE OF GENERAL COUNSEL

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

[8] Although 28 U.S.C. § 2254(b) was amended after *Coleman*, its rationale would be applicable to cases under the Indian Civil Rights Act.

CERTIFICATE OF COMPLIANCE

I certify, pursuant to the Court's Order [Doc. 48], that *Respondent's Supplemental Brief* is double-spaced in 14-point proportionally-spaced Times New Roman typeface and the total word count is 3,366.

DATED this 27th day of April, 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 April 27, 2015, I electronically filed *Respondent's Supplemental Brief* 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