UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Kimberly Watso, individually and on behalf of C.P., minor child,

Petitioner,

vs.

John E. Jacobson, in his official capacity as Chief Judge of Shakopee Mdewakanton Sioux Tribal Court (Children's Court), Henry M. Buffalo, Jr., in his official capacity as Judge of Shakopee Mdewakanton Sioux Tribal Court (Children's Court), Terry Mason Moore, in her official capacity as Judge of Shakopee Mdewakanton Sioux Tribal Court (Children's Court), Shakopee Mdewakanton Sioux Community Tribal Court (Children's Court), Donald Perkins,

Respondents.

Case No. 16-cv-00983 (PJS/HB)

COMMUNITY RESPONDENTS' POST-EVIDENTIARY HEARING SUPPLEMENTAL MEMORANDUM

This memorandum addresses the testimony presented at the August 25, 2016 evidentiary hearing and whether that evidence should affect the Court's review of Kimberly Dietrich Watso's ("Petitioner" or "Watso") habeas petition. Watso's petition fails, notwithstanding her newly presented evidence, because (1) the Tribal Court record shows no clear error in the Tribal Court's finding of Reservation domicile for C.P.; (2) Watso cannot collaterally attack the Tribal Court's finding on domicile at this stage with new evidence she could have, but did not, raise before the Tribal Court; and (3) even if it were appropriate for this Court to consider the additional evidence, that evidence is irrelevant and provides no basis to overturn the Tribal Court's finding of jurisdiction.

ARGUMENT

I. THE TRIBAL COURT RECORD FULLY SUPPORTS THE TRIBAL COURT'S FINDING OF DOMICILE

The Tribal Court found that, Redacted

Pet., Ex. F at 2. This Court cannot overturn the Tribal Court's factual finding on domicile absent clear error. *Duncan Energy Co. v. Three Affiliated Tribes of the Ft. Berthold Reservation*, 27 F.3d 1294, 1300 (8th Cir. 1994).

The Tribal Court record fully supports the finding that Watso and C.P. were domiciled on the Reservation at the time the child custody proceeding was initiated. *See, e.g.*, Comm. Resp. Exs. A, D, F; Many Birds Aff. Ex. A; Alholinna Aff. Ex. A. Petitioner conceded the facts serving as a basis for the Tribal Court's finding on domicile. Comm.

Resp. Ex. C at 1; 8/25/16 Hearing Tr. ("Tr.") 83:4-8. Furthermore, Redacted

Comm. Resp. Ex. L at 28.

II. WATSO'S COLLATERAL ATTACK ON THE TRIBAL COURT PROCEEDINGS MUST BE REJECTED

There are two reasons why this Court must disregard Petitioner's new evidence submitted at the evidentiary hearing to collaterally attack the Tribal Court's finding on domicile. First, the doctrine of exhaustion of tribal remedies and the deference afforded to tribal court findings of fact preclude introduction of new evidence on federal review of a tribal court's jurisdiction that could have been raised in the tribal court. Second, the rule that the evidence considered on federal habeas review of a state court action is limited to the record developed in the underlying proceeding applies with equal force to habeas review under the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1303.

A. Exhaustion Doctrine Precludes Introduction of New Evidence Before this Court that Could Have Been Presented in the Tribal Court

Permitting Watso to collaterally attack Tribal Court findings that were based on her own admissions and those of Mr. Hall, as well as unrefuted evidence from the child welfare officer and the Guardian *ad Litem*, is at odds with the doctrine of exhaustion of tribal remedies. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). *See also* Dkt. No. 13 at 15-17.

The Supreme Court's rationale for adopting the exhaustion doctrine confirms that facts pertinent to tribal court jurisdiction must be developed *in the tribal court*. As the

court reasoned, the "policy of supporting tribal self-government and self-determination" requires a "rule that will provide the [tribal court] whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *Nat'l Farmers Union*, 471 U.S. at 856. The court emphasized that the "orderly administration of justice in the federal court will be served by allowing a *full record to be developed in the Tribal Court* before either the merits or any question concerning appropriate relief is addressed." *Id.* (emphasis added). And the requirement that a "Tribal Court's findings of fact [be reviewed] under a deferential, clearly erroneous standard" is a natural outgrowth of the requirement that a full record be developed in the tribal court that will serve as the basis for federal review. *See Duncan Energy Co.*, 27 F.3d at 1300.

The incompatibility of the exhaustion doctrine with admitting new evidence on federal review was upheld in *Atkinson Trading Co. v. Gorman*, Civ. No. 97-1261, (D.N.M. Aug. 14, 1998). Comm. Resp. Ex. N. That case involved a challenge to a jurisdictional ruling by the Navajo Nation Supreme Court. In the district court, plaintiff filed a motion requesting a trial *de novo*. *Atkinson*, Civ. No. 97-1261, slip op. at 1-4. The court rejected the request, reasoning that "Plaintiff would have this Court engage in a new fact-finding effort, even though Plaintiff had an opportunity to fully develop all the relevant facts in the administrative proceedings held by the [Navajo Tax Commission]." *Id.* at 2-3. The court concluded that "[t]here is no need for a *de novo* trial that would afford Plaintiff a second opportunity to contradict facts that it did not contest in the first proceeding." *Id.* at 4. The Tenth Circuit affirmed. *See Atkinson Trading Co. v. Shirley*, 210 F.3d 1247, 1250-52 (10th Cir. 2000), *rev'd on other grounds*, 532 U.S. 645 (2001).

As in *Atkinson*, Watso cannot collaterally attack the Tribal Court's finding on domicile by raising evidence now that she had every opportunity to raise before the Tribal Court.

B. Watso Failed to Present Evidence that C.P. Did Not Reside on the Reservation, Despite Having Numerous Opportunities to Do So

The Tribal Court record is replete with opportunities Watso had to present evidence that C.P. did not reside on the Reservation when the child protection action was initiated. For example, Redacted

See Comm. Resp. Ex. D at 26; *see also* Many Birds Aff. Ex. A; Alholinna Aff. Ex. A. Watso, appearing pro se, was then afforded the opportunity to ask questions. Comm. Resp. Ex. D. at 39; *see also* Comm. Resp. Ex. F at 17 (Redacted ; Watso given opportunity to address the Tribal Court); Comm. Resp. Ex. M at 3 (Court asking whether Watso has any information she wished to emphasize); *id.* at 7 (allowing Dietrich to address the Tribal Court); *id.* at 112 (Dietrich testifying with attorney Kaardal present on behalf of Watso); *id.* at 120 (Watso addressing court with Kaardal present).

Petitioner's attempt to collaterally attack the Tribal Court record with evidence raised for the first time at the evidentiary hearing cannot be reconciled with the exhaustion doctrine or the clear-error standard. In the Tribal Court, Watso never offered testimony from any of the witnesses who appeared before this Court (other than herself and Dietrich), and neither Watso nor Dietrich ever suggested that C.P. lived anywhere

other than with Watso in Hall's residence during the relevant time period. Consideration of this new evidence would condone a new trial on the Tribal Court's jurisdiction in federal court, in contravention of a developed Tribal Court record. That course violates the exhaustion doctrine.

C. The Limitations on Federal Court Review of State Court Action Apply Equally to Habeas Review of Tribal Court Action Under ICRA

The rule that evidence considered for federal habeas review of state court action is limited to the record developed in the underlying proceeding applies with equal force to habeas review under ICRA, which was not intended to be broader in reach than cognate statutory provisions governing review of state court actions. *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 879-80 (2d Cir. 1996). Furthermore, both the ICRA habeas provision and the federal habeas remedy available to individuals detained as a result of a state court conviction have an exhaustion requirement that reflects the principle of deference to the court that rendered the decision under review. *Compare Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011) (noting federal habeas law requires deference to state-court decisions and that prisoners must "exhaust state court remedies before filing for federal habeas relief"), *with Alvarez v. Lopez*, --- F.3d ---, 2016 WL 4527558, at *2 (9th Cir. Aug. 30, 2016) (ICRA's exhaustion requirement "is rooted in our respect for tribal sovereignty: We are loath to second guess a tribe's handling of a . . . case unless and until the tribe has had a fair opportunity to review the matter . . . ."). In light of these similarities, the limitations that govern federal habeas review of state court actions also apply to review of tribal court actions under ICRA's habeas remedy.

To effectuate the exhaustion requirement, a key limitation in federal habeas review is that—subject to very limited exceptions not present here—evidence not presented to the state court may not be considered.[1] *See Cullen*, 563 U.S. at 181-82 (2011) (limiting review "to the record that was before the state court that adjudicated the claim on the merits."); *Byrd v. Armontrout*, 880 F.2d 1 (8th Cir. 1989) (affirming denial of habeas petition because "[t]he exhaustion doctrine precludes a state habeas petitioner from presenting this sort of evidence to a federal habeas court when he could have presented it to the state courts first but did not do so"). *See also Cox v. Burger*, 398 F.3d 1025, 1030 (8th Cir. 2005), and *Wemark v. Iowa*, 322 F.3d 1018, 1021 (8th Cir. 2003) (same).

This rationale applies with equal force in ICRA proceedings. These principles necessary to protect the exhaustion requirement and preserve the tribal court's authority would be undermined if a habeas petitioner such as Watso were allowed "to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively *de novo*." *Cullen*, 563 U.S. at 182; *see also Weeks*, 119 F.3d at 1349-50 ("Requiring the exhaustion of state remedies both allows the states to correct any possible constitutional violations without unnecessary intrusion by the federal courts and allows the state courts to create a factual record should the matter proceed to federal court."). Here Watso could have, but chose not to, present evidence regarding domicile before the Tribal Court. As noted, at the Tribal Court she affirmatively conceded domicile on the Reservation. Accordingly, the Court should reject

[1] For example, a federal habeas court can, in certain circumstances, consider "*newly discovered* evidence" not presented to the state court. *See* 28 U.S.C. § 2254(e)(2)(A)(ii); *Weeks v. Bowersox*, 119 F.3d 1342, 1351-52 (8th Cir. 1997) (emphasis added).

the evidence presented at the August 25, 2016 hearing as outside the scope of proper habeas review and deny the petition. *See, e.g.*, *Ward v. Norris*, 577 F.3d 925, 935 (8th Cir. 2009) (affirming dismissal of habeas petition where petitioner sought to broaden claims to include "factual bases not raised before the state courts").

III. THE ADDITIONAL EVIDENCE PRESENTED TO THIS COURT BY WATSO DOES NOT SUPPORT THE GRANT OF HER PETITION

In a complete shift from what Watso presented before the Tribal Court, she appeared at the August 25, 2016 hearing offering evidence to suggest that Dietrich was the primary caregiver for C.P. throughout most of his life, including the time period just before and during the initiation of the child welfare proceedings. This evidence is both irrelevant and wholly lacking in credibility, and should be disregarded.

A. Watso's New Evidence Is Irrelevant

Even if there were any doubt as to the evidence before the Tribal Court regarding C.P.'s residence, because Watso conceded that she resided with Hall on the Reservation from at least the fall of 2014 until March 2015, there is still no basis to find clear error in the Tribal Court's finding of jurisdiction over C.P. *See* Tr. 82, 85, 87-89. In the context of assessing a child's domicile under the Indian Child Welfare Act ("ICWA"), including whether the tribe possesses exclusive jurisdiction over the proceeding under 25 U.S.C. § 1911(a), a minor's domicile "is determined by that of their parents" and "[i]n the case of [a] . . . child [born outside of a marriage], that has traditionally meant the domicile of its mother." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989); *see also* BIA Guidelines for State Courts & Agencies in Indian Child Custody Proceedings, 80

Fed. Reg. 10151 (Feb. 25, 2015) (stating that "[i]n the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's mother" is the domicile of the Indian child). As a result, an Indian child's domicile may even be someplace the child has never lived. *Holyfield*, 490 U.S. at 48; 80 Fed. Reg. 10146, 10151. This "uniform federal law of domicile for the ICWA," *Holyfield*, 490 U.S. at 47, confirms that C.P.'s domicile was that of the Petitioner, on the Shakopee Reservation, at the time the child custody proceeding was initiated. As such, Watso's domicile on the Reservation was sufficient to confer Tribal Court jurisdiction over C.P.

B. Watso's New Evidence Lacks Credibility

Watso's new evidence directly contradicts the evidence that was before the Tribal Court; as such, it therefore lacks credibility, and should be disregarded. First, each of the new witnesses called to testify all claim to have known Dietrich for many years, yet none of these individuals was ever asked to testify before the Tribal Court. Tr. 11, 14 (Nevels testifying she has known Dietrich since 2012; she has no knowledge whether C.P. had a permanent bedroom on the Reservation; and she has never been asked to testify in Tribal Court); *id.* 16, 22, 23 (Dietrich's cousin testifying that she has known C.P. his whole life; she was aware of the Tribal Court proceedings, but has not testified before the Tribal Court; and that she never visited the Hall residence); *id.* 25, 31 (White testifying that he has known Dietrich since 2012; he was aware of the child custody proceedings, but has never contacted or appeared before the Tribal Court).

Likewise, the new testimony presented by Watso and Dietrich contradicts evidence presented to the Tribal Court, previously unchallenged by Watso. *See* Many

Birds Aff. Ex. D (identifying hearings attended by Watso and whether she was represented by counsel). Prior to the evidentiary hearing, Watso and Dietrich were silent as to Dietrich's alleged role in C.P.'s life. For instance, Redacted

Tr. at 39, yet the Redacted

Many Birds Aff. Ex. F. Redacted

. Resp. Ex. M at 3.

When given the opportunity, Redacted

Id. at

7. Finally, Redacted

Id. at 50-91. The Court should conclude that Watso's purported new evidence lacks credibility.[2]

In contrast, the Community Respondents presented testimony of the Guardian *ad Litem*, Jody Alholinna, a long-standing member of the Minnesota bar who has served

[2] Even the so-called "temporary custody agreement"—of unknown provenance and offered for the first time in federal court by Dietrich—shows Watso's intent *not* to relinquish permanent custody of C.P. to Dietrich. Its putative expiration prior to the initiation of the child welfare action confirms, if anything, Watso's retention of custody over C.P. from late December 2014 until the Tribal Court ordered C.P. placed in foster care in late February 2015. Tr. 59-60.

both the State Courts and the Community as a Guardian *ad Litem* for over 23 years. Tr. 95-96. Alholinna testified to her personal observations Redacted

Id. 103-04. Redacted

Id. 104. Redacted

Id. 97-99; Comm. Resp. Ex. A. Alholinna's observations were documented contemporaneously in the reports she submitted to the Tribal Court. Tr. 106. Watso received copies of these reports, yet did not challenge their veracity in Tribal Court. *Id.*

Alholinna further testified that Redacted

Id. 99-101. Alholinna interviewed Dietrich, understood that Dietrich helped Watso with the children, but before the August 25, 2016 evidentiary hearing had never heard any assertion by anyone that C.P. resided primarily with Dietrich. *Id.* 101-02. Nor did Watso or Dietrich ever suggest that there were other witnesses whom Alholinna should contact regarding C.P.'s domicile *Id.* 112.

CONCLUSION

This Court should disregard Watso's last-ditch efforts to undermine a well-established Tribal Court record on the subject of C.P.'s domicile, and deny her petition.

Dated: September 23, 2016

s/ *Richard A. Duncan*

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