

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

MILTON TOYA,
Petitioner

vs.

17-CV-00258 JCH/KBM

AL CASAMENTO, DIRECTOR/WARDEN
Sandoval County Detention Center, and
ALAN TOLEDO, Pueblo of Jemez Tribal Court Judge, and
JOSEPH A. TOYA, Pueblo of Jemez, Governor, and
WILLIAM WAQUIE, Pueblo of Jemez, 1st Lt. Governor, and
JONATHAN ROMERO, Pueblo of Jemez, 2nd Lt. Governor.
Respondents.

FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS
FOR RELIEF FROM A TRIBAL COURT CONVICTION
PURSUANT TO 25 U. S. C. §1303

COMES NOW the Petitioner, Milton Toya, by and through his counsel of record, Nicholas E. Mendoza, Attorney at Law, and hereby petitions this court for a Writ of Habeas Corpus pursuant to 25 U.S.C. § 1302-1303. The writ should issue based upon the following:

FACTUAL AND PROCEDURAL BACKGROUND

1. Petitioner Milton Toya (“Mr. Toya”) is an enrolled member of the Pueblo of Jemez (“Indian Tribe”), a federally recognized Indian Tribe in New Mexico. See Fed. Reg. Vol. 79, No 19, 4748-4753 (updated January 6, 2016).
2. Mr. Toya resided within the exterior boundaries of the Pueblo of Jemez Reservation in New Mexico during all times relevant to this case.
3. Mr. Toya was arrested on January 25, 2017 for the charges of “Aggravated DUI, Liquor Violation, Revoked/Suspended DL, and Open Container.” He was arraigned on January 27, 2017 by the governors and was allegedly read his rights. He pled guilty to all of the charges.

However, none of the rights read to him included the right to the assistance of counsel or the right to a jury trial. He was not released pending trial nor was any bond set allowing him to post. He was set for sentencing for February 8, 2017. On February 8, 2017, Mr. Toya appeared before Judge Toledo for sentencing. He asked if he could change his plea to not guilty. Judge Toledo said, No. He then asked if he could have the right to an attorney. The judge again said, No. He then asked if he could have the right to a jury trial. The Judge again said, No. Interestingly, after Mr. Toya asked for the right to a jury trial, Judge Toledo sentenced him to 15 months jail. However, after he asked for the right to an attorney, the Judge decreased it to 9 months, or 270 days.

4. To the best of the Petitioner's and his counsel's knowledge, information, and belief there was no written waiver of any such rights executed, namely his right to counsel. Importantly, notwithstanding any of the above, neither the Jemez Tribal Court nor the Jemez Tribal Code actually allow or provide for State licensed attorneys to represent defendants before it nor do they allow or provide for the right to trial by jury.

5. Mr. Toya was sentenced to all of the above charges. Interestingly, had he had an attorney more than likely he might have been able to plea bargain away some of the charges in exchange for his plea. He was sentenced and incarcerated that same day to 270 days jail.

6. Mr. Toya has exhausted his tribal remedies. Neither the Jemez Tribal court nor the Jemez Tribal Code actually provide for an appellate process or remedy or an appellate court. Thus, a trial before the Jemez Tribal Court is the final remedy. Notwithstanding the above, any such exhaustion of tribal remedies would be futile in this case in light of the facts that neither the Jemez Tribal Court nor the Jemez Tribal Code actually allow or provide for the right to counsel and the right to trial by jury. That is, they do not at present, especially at the time of his

arraignment and his sentencing, exist. They are reserved. (See Wounded Knee v. Andera, 416 F.Supp. 1236, 1239-1240 (D.C.S.D.1976))(A member of Indian tribe who petitions for writ of habeas corpus in federal court need not go through motions of exhaustion if he or she proves that resort to remedies provided by tribe would be futile; if a tribal remedy and theory is nonexistent in fact or at best inadequate, it might not need to be exhausted.) Nor do any of the rules regarding an appellant process or remedy and appellate court actually at present exist. They are reserved.

I. THE INDIAN TRIBE VIOLATED MR. FRAGUA'S RIGHT TO COUNSEL GUARANTEED UNDER THE INDIAN CIVIL RIGHTS ACT (ICRA) 25 U.S.C. §1302(6).

Concise Statement of Facts in support of Claim I

The Indian Tribe, in exercising its powers of self-government, denied Mr. Toya the right to counsel. The Indian Civil Rights Act provides that a defendant may have the assistance of counsel at his own expense at criminal proceedings. 25 U.S.C. § 1302(6). (See U.S. v. Ant, 882 F.2d 1389, 1392 (C.A.9 (Mont.) 1989))(In tribal court, defendant is entitled to have attorney represent him at his own expense, but is not entitled to have court-appointed attorney.) At his arraignment, the Jemez Tribal Court by way of the governors allegedly advised Mr. Toya of his rights, namely his right to counsel. However, Mr. Toya does not recall them advising him of that specific right then. Then, at his sentencing, in an effort to revive such right Mr. Toya asked for the right to an attorney. The Court denied him such right and said that it did so because he had already pleaded guilty. However, Mr. Toya would argue that the Judge's denial of such right was more a means of masking or hiding the fact that such right does not at present actually exist than any enforcement of his alleged knowing waiver of it. For example, if the right does or did actually exist, the Court could have allowed him to change his plea and then scheduled him for trial. He was nowhere near any speedy trial or statute of limitations violation being that his

sentencing hearing was merely 12 days after his arraignment and merely 14 days after his arrest. Moreover, as shown by the facts above, he could not have nor did he waive it. Interestingly, neither the Jemez Tribal Court nor the Jemez Tribal Code actually and presently allow or provide for State licensed attorneys to represent criminal defendants before the Jemez Tribal Court. Hence, if under Wounded Knee the same such facts could be held to support a finding of futility and therefore that the tribal exhaustion rule is not required where any remedies are either nonexistent in fact or are at best inadequate, then the same such facts should support a finding that any waiver of such nonexistent or inadequate right, namely the right to counsel or the assistance of counsel, is also futile or is no true waiver at all. One can only waive what one truly has the right to exercise. Thus, Mr. Toya was denied his right to counsel or the assistance of counsel under § 1302(6) of the ICRA.

II. THE INDIAN TRIBE VIOLATED MR. FRAGUA'S RIGHT TO A JURY TRIAL UNDER THE INDIAN CIVIL RIGHTS ACT WHEN IT FAILED TO PROVIDE HIM WITH A JURY TRIAL

Concise Statement of Facts in support of Claim II

The Indian Tribe, in exercising its powers of self-government, denied Mr. Toya the right to trial by jury. The Indian Civil Rights Act provides that a defendant has the statutory right to request a jury trial under the ICRA pursuant to 25 U.S.C. § 1302(10). In Baldwin vs. New York, the Supreme Court of the United States held that a defendant has the right to a trial by jury for serious offenses, that is those offenses punishable by more than six-months imprisonment, but not for petty offenses, that is those not punishable by more than six months. Baldwin vs. New York, 399 U.S. 66 (1990). Neither the Jemez Tribal Court nor the Jemez Tribal Code actually allow or provide for a right to trial by jury. The right is in the books but it is reserved. It is not a present, existing right. Mr. Toya was sentenced to 270 days jail, thus more than six months.

Hence, under Baldwin, such offense constitutes a serious offense and Mr. Toya should have had the right to a trial by jury or at least the right to request one. (See Alvarez v. Lopez, 835 F.3d 1024, 1030 (C.A.9 (Ariz.) 2016))(Indian tribe violated defendant's right to jury trial under Indian Civil Rights Act (ICRA), thus requiring reversal of his tribal convictions for assault, domestic violence, and misconduct involving weapon, even though form that tribe provided to defendant informed him that he had right to jury trial, where form did not explain what defendant needed to do in order to invoke that right, defendant had seventh-grade education and was not represented by counsel, and tribe made no effort to ensure that defendant knew he would receive jury trial only if he requested one.) Mr. Toya was never advised of his right to trial by jury or his right to request one by the governors at his arraignment. In addition, at his sentencing, when he tried to revive any such unknowing waiver of such right, the judge denied it to him as if he had knowingly waived it. However, Mr. Toya would again argue that the Court's denial of it was more a means of masking or hiding that the right does not at present actually exist than any knowing waiver of it. Again, if the right does or did actually exist, the Court could have allowed him to change his plea and then scheduled him for trial. He was nowhere near any speedy trial or statute of limitations violation being that his sentencing hearing was merely 12 days after his arraignment and merely 14 days after his arrest. Thus, in light of the above, the Indian Tribe denied Mr. Toya due process of law under § 1302(10) of the ICRA by failing to provide him with a jury trial or at a minimum advise him, as a *pro se* defendant, of his right to request one.

CONCLUSION

WHEREFORE, Mr. Toya respectfully requests that this Court: (1) issue the writ of habeas corpus commanding Respondents to release Mr. Toya from their custody immediately; or

in the alternative, (2) hold an expedited evidentiary hearing to inquire as to the legality of the detention, and (3) grant any other further relief that this Court deems just and proper.

RESPECTFULLY SUBMITTED:

/ss/

Nicholas E. Mendoza
Attorney for Petitioner
P.O. Box 1153
Tijeras, New Mexico 87059
(505) 503-0492

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th. day of June 2017, I filed the foregoing pleading electronically through the CM/ECF system, and that on such date I served the foregoing on the following non-CM/ECF Participants in the manner indicated:

Via first class mail addressed as follows:

Al Casamento, Director
Sandoval County Detention Center
1100 Montoya Rd.
Bernalillo, New Mexico 87004

Alan Toledo, Tribal Court Judge
Pueblo of Jemez Tribal Court
P.O. Box 100
Jemez Pueblo, NM 87024

Joseph Toya, Governor,
William Waquie, 1st Lt. Governor,
Jonathan Romero, 2nd Lt. Governor,
Pueblo of Jemez
P.O. Box 100
Jemez Pueblo, NM 87024

Electronically filed
/s/Nicholas E. Mendoza
Attorney for Petitioner