IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

HARRISON CHEYKAYCHI

Petitioner,

vs. No. CIV 17-00514 KG/GBW

TODD GEISEN, WARDEN/CAPTAIN

Chief Ignacio Justice Center Adult Detention

and

KEWA PUEBLO, formerly known as

Santo Domingo Pueblo,

Respondents.

PETITIONER'S RESPONSE TO ORDER DISMISSING KEWA PUEBLO AND DIRECTING PETITIONER TO SHOW CAUSE

Introduction

Petitioner Harrison Cheykaychi filed his Indian Petition for Writ of Habeas Corpus pursuant to 25 U.S.C. § 1303 to challenge his tribal criminal conviction and the two and one-half year sentence imposed by the Indian tribe ("Pueblo") in violation of his statutory rights and requirements of the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1304 (2013). [Doc 1]. The Petitioner is currently housed at a Bureau of Indian Affairs (BIA) detention facility in Colorado. The Repondents have not filed a return or response.

This Court first referred the Petition to Magistrate Judge Gregory B. Wormuth, then dismissed the Pueblo as a party to the action, *sua sponte*, and directed Petitioner to show cause as to why the case should not be transferred to the District of Colorado. [Doc. 4]. Although such transfer and dismissal might be expected for non-Indian habeas cases, here the Petition collaterally attacks a tribal criminal conviction and sentence rather than a state or federal conviction and the default rule does not apply. In this case, the immediate physical custodian lacks the authority to afford all relief requested by the Petitioner, who is being held upon the order of a separate sovereign – the Indian Tribe. In these circumstances, the proper respondent is not solely the person with immediate physical custody but, the Indian tribe or tribal official with authority to vacate the underlying tribal conviction or sentence. Thus, jurisdiction is proper before the United States District Court in New Mexico because Indian Habeas is different under Section 1303 or fits an exception to the default rules under 2241 and justice requires review in this Court.

Argument

I. Jurisdiction is Proper Before This Court Under the Indian Habeas Corpus Provision of 25 U.S.C. § 1303 Because Indian Habeas is Different, and the Default Rule Does Not Apply.

A. Indian Habeas under 25 U.S.C. § 1303 is Different and *Rumsfeld* Does Not Apply.

This Court's Order cites to the Rules Governing 2254 Cases, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), and decisions under 28 U.S.C. § 2241 in support of the general proposition that district courts are limited to granting habeas relief "within their respective jurisdictions." 28 U.S.C. § 2241(a). Following *Rumsfeld*, this Court reasons that because the proper respondent is Petitioner Cheykaychi's immediate custodian—Todd Geisen, the captain of the detention center

in Colorado, and not the Pueblo—the petition must be transferred to the District of Colorado because the District of New Mexico does not have jurisdiction. [Doc. 4 at 1-2]

While it is true that *Rumsfeld* confirmed the "general rule that… jurisdiction lies in only one district: the district of confinement," *Id*. at 443, that holding was based upon the "plain language of the habeas statute" implicated – namely 28 U.S.C. § 2241. *Rumsfeld,* 542 U.S.at 443. That statute provides, in relevant part: "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions*." 28 U.S.C. § 2241(a). (*emphasis added*). The Supreme Court has interpreted this language to require that the issuing court have jurisdiction over the custodian. *Braden v. 30th Judicial Circuit Court of Ky*., 410 U.S. 484, 495 (1973).

In the case currently before the Court, § 2241 is not the operative statute triggering jurisdiction. Petitioner Cheykaychi seeks habeas relief from a tribal criminal conviction and his Petition is brought pursuant to 25 U.S.C. § 1303, as that privilege is authorized by the Indian Civil Rights Act. Specifically, this statute provides**: "**The privilege of the writ of habeas corpus shall be available to any person, *in a court of the United States*, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303 (*emphasis added*). Thus, the plain language of this governing statute, 25 U.S.C. § 1303, gives jurisdiction to "a court of the United States," rather than limiting jurisdiction "within their respective jurisdictions," as required in 28 U.S.C. § 2241.

Thus, Indian habeas petitioners under 25 U.S.C. § 1303 are not the core habeas petitioners referred to in *Rumsfeld.* Those general propositions do not apply here where the Petitioner is being held by a *tribal* court order of detention issued by a sovereign Indian tribe, there exist no rules governing the statute, and forum shopping is not a danger against which to

protect. The Court's ruling raises two issues: who is the proper respondent and does the District of New Mexico have jurisdiction over that individual. These two questions are intertwined, and as set forth below, Indian law and habeas corpus jurisprudence determine that this Court is the proper jurisdiction.

B. The Petition Falls Within Exceptions to the Default Rule Under 2241 Recognized in Rumsfeld.

When habeas petitions are brought by persons detained for reasons other than federal criminal violations, the Supreme Court has recognized exceptions to the general practice of naming the immediate physical custodian as respondent. Petitioner Cheykaychi's tribal criminal detention falls outside the core challenges contemplated by the *Rumsfeld* decision. In such cases, the Supreme Court has acknowledged established exceptions to the immediate-custodian rule and exceptions to the rule territorial jurisdiction rule. See *Rumsfeld v. Padilla*, 542 U.S. 426, 451, 454, citing, *Braden*, 410 U.S. at 495 (1973) (dual custody); *Strait v. Laird*, 406 U.S. 341, 345 (1972) (non-physical custody); *Ex parte Endo*, 323 U.S. 283 (1944) (removal of the prisoner from the territory).

Further exceptions may be warranted to protect the integrity of the writ or the rights of the person detained. *Rumsfeld v. Padilla*, 542 U.S. 426, 451, (2004). "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291(1969). Here the unique nature of habeas under 1303 and 2241 requires the Tribe and Tribal officials as a respondent.

C. Federal Indian Law Principles Support Proper Jurisdiction Within the District that the Tribe and Tribal Officials Are Found.

The federal courts' relations with the Indian tribes have "always been . . . anomalous . . . and of a complex character." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71, (1978), citing *United States v. Kagama*, 118 U.S., at 381. In interpreting the ICRA habeas statute, the Santa Clara Court recognized the complexity of the relationship:

> Although we early rejected the notion that Indian tribes are "foreign states" for jurisdictional purposes under Art. III, *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. Ed. 25 (1831), we have also recognized that the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the federal and state governments. See *Elk v. Wilkins*, 112 U.S. 94, 5 S. Ct. 41, 28 L. Ed. 643 (1884).

Santa Clara Pueblo v. Martinez, 436 U.S. at 71.

Indian tribes are "distinct, independent political communities, retaining their original natural rights." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). They are domestic dependent nations that exercise inherent sovereign authority over their members and territories. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991).

As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. *Talton v. Mayes*, 163 U.S. 376, 382-84 (1896). In *Talton*, this Supreme Court held that the Fifth Amendment did not "operat[e] upon" "the powers of local self-government enjoyed" by the tribes. *Id*. at 384. This holding of *Talton* has been extended to other provisions of the Bill of Rights, as well as to the Fourteenth Amendment. *Santa Clara*, 436 U.S at 56.

Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. at 2030; *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58, citing *Turner v. United States*, 248 U.S. 354, 358, (1919); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512–513 (1940); *Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, 172–173 (1977). This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. See *Kagama v. U.S.; Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 4663, 470-471 (1979). But "without congressional authorization," the "Indian Nations are exempt from suit." *United States v. United States Fidelity & Guaranty Co*., 309 U.S. at 512. However, Congress has asserted and the Courts have recognized a primary and plenary authority over Indian affairs and may impose such restraints by statute. See *Kagama*, 439 U.S. at 470-471.

Exercising its plenary authority, Congress enacted the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301, et seq. ICRA extends certain enumerated constitutional rights to members of Indian tribes. See 25 U.S.C. § 1302. ICRA also grants the privilege of the writ of habeas corpus to test the legality of detention by order of an Indian tribe. 25 U.S.C. § 1303. Jurisdiction over habeas corpus proceedings under ICRA is vested in the courts of the United States. 25 U.S.C. § 1303; *Santa Clara Pueblo v. Martinez*, 436 U.S. at 69-72. Congress granted Indian defendants the privilege to seek review of tribal court convictions and specifically granted federal courts the power to review tribal orders of detention. 436 U.S. at 60.

A "central purpose" of ICRA was to "secur[e] for the American Indian the broad constitutional rights afforded to other Americans," and thereby to "protect individual Indians

from arbitrary and unjust actions of tribal governments." S.Rep. No. 841, 90th Cong., 1st Sess., 5–6 (1967). *Santa Clara Pueblo v. Martinez*, 436 U.S. at 61.

There is no danger of intruding on tribal sovereignty in this case. Congress and the courts have reviewed the sovereignty and public review of tribal courts and found that habeas corpus review is appropriate. "Congress apparently decided that review by way of habeas corpus would adequately protect the individual interests at stake while avoiding unnecessary intrusions on tribal governments." *Santa Clara Pueblo v. Martinez*, 436 U.S. at 67. Tribal officers of the Pueblo are not protected by the tribe's immunity from suit and can be named in challenges. *Id.* citing, *Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. at 171–172.

"[I]it is fundamentally Congress's job, not [the Court's], to determine whether or how to limit tribal immunity. The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress. *Michigan v. Bay Mills Indian Cmty*., 134 S. Ct. at 2037, citing, *United States v. Lara*, 541 U.S. 193, 200 (2014); *United States v. Wheeler*, 435 U.S. 313, 323 (1978). The unique backdrop of Indian law, tribal sovereignty and the express congressional authorization of habeas relief from tribal court orders require a unique analysis.

II. The Petition is Properly Filed to Against the Indian Tribe or Officials as the Respondent, as the Pueblo is the Respondent Custodian Holding Mr. Cheykaychi in Unlawful Custody.

Recent cases within the United States District Court for the District of New Mexico have held that jurisdiction is properly found with the official having the power to modify the tribal conviction, not within the district of the person with immediate physical custody. *Toya v. Casamento*, CV 17-00258 JCH/KBM (DNM 2017). Additionally, in *Poodry*, the United States Court of Appeals for the Second Circuit held "petitions for writs of habeas corpus are properly viewed as proceeding against *tribal officials* allegedly acting in violation of federal law." 85 F. 3d at 880 (*emphasis* in original).

Courts generally find that the person with legal authority to effectuate the prisoner's release is the warden of the prison. However, the § 1303 habeas petition tests the legality of detention "by order of an Indian tribe," rather than a state or federal court order of detention. 25 U.S.C. § 1303. Therefore, "the immediate physical custodian may lack the authority to afford the relief requested by the petitioner." *Toya*, CV 17-00258 JCH/KBM (DNM 2017). In these circumstances, the proper respondent with the authority to modify the tribal conviction is the tribal or tribal official responsible for the conviction. *Toya*, CV 17-00258 JCH/KBM (DNM 2017), *Poodry*, 85 F.3d 874 (2nd Cir. 1996).

Where the only named respondent is the immediate physical custodian of the prisoner, full relief cannot be granted because an order to the custodian directing release of the prisoner does not modify or vacate the underlying tribal conviction in the absence of a tribal official. The petitioner must name as a respondent a tribal official who has "both an interest in opposing the petition if it lacks merit, and the power to give the petitioner what he seeks if the petition has merit—namely his unconditional freedom." *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d at 899-900; Fed. R. Civ. P. 19(a). See also, *Settler v. Yakima Tribal Court*, 419 F.2d 486 (9th Cir. 1969), abrogated on other grounds, *Moore v. Nelson*, 270 F.3d 789, 791-92 (9th Cir. 2001) (concluding that a tribal court or judge is an appropriate respondent in a habeas proceeding testing the validity of a tribal conviction or sentence). Like the Respondent in *Toya*, the immediate physical custodian, Respondent Captain Geisen lacks the authority to alter Petitioner's conviction or sentence and lacks the authority to afford the relief he seeks– vacating the underlying tribal court order and ordering immediate release. Thus, the Tribe is the nominal custodian and the proper respondent in an Indian habeas action.

In the alternative, if the Court should find the Tribe is not a proper respondent, then the Court should allow an order of joinder of a party required for just adjudication under Fed. R. Civ. P. 19(a) and grant Petitioner Cheykaychi leave to amend his Petition to include Governor and tribal judge as the proper tribal official as the Respondent.

III. Jurisdiction Properly Lies in the District of New Mexico.

Having established that the Tribe or Tribal Official with the authority to grant relief is the proper respondent, it follows then that this Court has jurisdiction.

Jurisdiction is proper before this court under 25 U.S.C. § 1303 of ICRA and 28 U.S.C. § 2241. Although Mr. Cheykaychi is currently incarcerated in Colorado, jurisdiction lies in New Mexico. The parties and the agent with authority to release Mr. Cheykaychi reside and are present in the jurisdiction of this Court. The Indian Pueblo is located within New Mexico. The underlying incident that is the subject of the tribal conviction and Mr. Cheykaychi's unlawful detention also took place in New Mexico. Mr. Cheykaychi's conviction and sentence were decided in New Mexico. Further, the BIA agency with oversight of Mr. Cheykaychi's detention center is present in New Mexico. The Indian Tribe is able contract with the BIA to house tribal inmates at the detention center in Colorado because the Pueblo lacks a tribal jail and the resources to house its own prisoners.

The county jail used by the Pueblo for shorter sentences, Sandoval County Detention Center, is not a long-term facility, and Tribes are not able to house tribal inmates there for longer sentences. See generally, Part 40 Bureau of Indian Affairs Manual (BIAM), Ch. 2, Law Enforcement and Corrections – Corrections Standards (May 7, 2007). Thus, the Tribe presumably housed Petitioner in Colorado under a contract with the BIA facility because of the two and one-half year sentence challenged in the instant case. If not for the long-term sentence

in violation of the statutory one-maximum, Mr. Cheykaychi would be located in New Mexico. The BIA requirements and lack of an appropriate long-term facility within the jurisdiction dictated a placement just over the Colorado border. Finally, because everything related to the underlying issue took place in New Mexico, the order of conviction and detention should be reviewed in and the writ should issue without delay.

Venue is proper in the Federal District Court of New Mexico, as Mr. Cheykaychi remains in custody pursuant to the Pueblo of Santo Domingo Tribal Court's order. Although Mr. Cheykaychi is currently incarcerated in Colorado, the Pueblo controlling his incarceration is located within New Mexico, this case originated within New Mexico, and all agents with authority to release Mr. Cheykaychi reside and are present in the jurisdiction of this Court.

Petitioner not required to bring his challenge in an unfamiliar foreign state; all witness and evidence here. The *Braden* Court held that the Commonwealth of Kentucky should not have to "defend its action in a distant State" nor should Kentucky be forced to depend on the resolution of a court unfamiliar with the laws and practices of Kentucky. *Id*. at 497. The case at hand is similar to *Braden* in that the Pueblo should not be required to travel to another state, which is unfamiliar with the laws and relationship between New Mexico Pueblos and the New Mexico Federal Courts, to defend its actions.

Additionally, the material witnesses are in New Mexico; access to the Pueblo language and Pueblo law is in New Mexico; and this Court has the power and expertise to understand the relationship between the Pueblo, individual tribal members, and the Indian Civil Rights Act. And Pueblo should not be required to travel to state unfamiliar with Pueblo relations – this Court has expertise and experience with the New Mexico Indian Tribes and applicable Indian law.

The Supreme Court in *Braden* summarized, saying that Kentucky retained jurisdiction and that Mr. Braden's absence from the state did not remove that jurisdiction. *Id*. at 500. In the case at hand, Petitioner Cheykaychi's absence from the state of New Mexico did not remove him from the jurisdiction of the tribal court. Therefore, the proper court to review Petitioner Cheykaychi's habeas petition is the United States District Court for the District of New Mexico, which retains jurisdiction.

IV. The Court Should Reach the Merits of the Petition, Issue the Writ and Order Immediate Relief from the Tribal Court Order of Detention.

The Indian habeas statute, the unique backdrop of federal Indian law, the established exceptions to the territorial jurisdiction and immediate custodian rules determine that jurisdiction and venue are proper before this Court. Once the Court reaches the merits, relief is warranted based upon the facts of this case.

Mr. Cheykaychi's petition sets out seven meritorious claims for relief, including the fact that he was without counsel and not provided a jury trial as required by the ICRA. This Federal District Court for the District of New Mexico has found jurisdiction and ordered release in similar (less egregious circumstances). See *Toya v. Casamento*, CV 17-00258 JCH/KBM (DNM 2017). The failure to provide a jury trial has been found to be dispositive issue. In addition, the Indian Tribe failed to provide indigent defense counsel and is limited to a statutory maximum of one year. 25 U.S.C. § 1302.

Transfer of the matter under 18 U.S.C. § 1631 is in appropriate and fails to consider the unique and exceptional posture of the case. Mr. Cheykaychi has already been in custody for 270 days (September 17, 2017 to June 13, 2017). Transfer of the matter will prevent expeditious review of the meritorious claims and prolong the unlawful detention.

The Tribe is not prejudiced by this Court taking jurisdiction over the matter because they can be served and the Court has territorial jurisdiction over the Tribe. The warden of the BIA detention facility is not prejudiced by a finding of jurisdiction, as he did not object in the Toya case, and is not in a position to defend the actions of the Tribe as foreign entity.

Conclusion

The case at hand does not invoke the "default rule" under *Rumsfeld* because the proper authority to release Petitioner Cheykaychi is the Pueblo, the proper respondents are the tribal officials who sentenced Petitioner Cheykaychi, and jurisdiction therefore lies solely within the District of New Mexico. The court should reach the merits of the Petition, issue the writ and order Mr. Cheykaychi's immediate release from tribal custody and detention. In the alternative, this Court should allow Petitioner Cheykaychi the opportunity to amend his original habeas petition to include the Governor or the appropriate Tribal Official as the Respondent.

Respectfully Submitted, this 13th Day of June 2017, By:

/s/ Barbara L. Creel

Barbara L. Creel
Counsel for Petitioner Harrison Cheykaychi
Cari Neill, Clinical Law Student
Southwest Indian Law Clinic
1117 Stanford Dr. NE
Albuquerque, New Mexico 87131
505-277-5265
creel@law.unm.edu

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of June 2017, I filed the foregoing Motion for Extension of Time electronically through the CM/ECF system, and served the parties of record through that system, and served the following non-CM/ECF Participants in the manner indicated:

Via First Class U.S. Mail addressed as follows:

Todd Geisen, Warden/Captain
Chief Ignacio Justice Center Adult Detention
Ute Mountain Ute Tribe
107 Spruce Street
P.O. Box 129
Towaoc, Colorado 81334

Pueblo of Kewa Tribal Court
P.O. Box 279
Kewa Pueblo (Santo Domingo Pueblo)
Santo Domingo, New Mexico 87052

Electronically filed,

Barbara Creel
Barbara Creel
Attorney on behalf of Petitioner