

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

MILTON TOYA,

Petitioner,

vs.

No. CV 17-00258 JCH/KBM

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.

**RESPONDENTS ANSWER TO PETITIONER'S FIRST AMENDED
PETITION FOR WRIT OF HABEAS CORPUS**

NOW COMES, Honorable Alan Toledo, Pueblo of Jemez Tribal Court Judge and Joseph A. Toya, Pueblo of Jemez Governor, William Waquie, Pueblo of Jemez 1st Lt. Governor and Jonathan Romero, Pueblo of Jemez 2nd Lt. Governor, by and through their counsel, VanAmberg, Rogers, Yepa, Abeita and Gomez, LLP and responds to Petitioner's First Amended Petition for Writ of Habeas Corpus pursuant to this Court's ORDER TO ANSWER (Doc. 11) by stating the following:

I. FACTUAL BACKGROUND

Petitioner Milton Toya is an enrolled member of the Pueblo of Jemez and resides within the exterior boundaries of the Pueblo of Jemez Reservation. Petitioner is thirty-three years old and is fluent in the English language and "Towa", the native language for the Pueblo of Jemez. He was arraigned on January 27, 2017 by Governor and his Lieutenant Governors for offenses he committed and arrested for on January 25, 2017 consisting of Aggravated DUI, Liquor Violation, Revoked/Suspended License and Open Container. Petitioner was provided a copy of the

Criminal Complaint. (Exhibit 1). At the arraignment, Governor Toya read the Criminal Complaint and the Probable Cause Statement to the Petitioner. (Exhibit 2) The Complaint and the Probable Cause statement were read in English and explained by Governor to Petitioner in Towa. (Exhibit 3 - *Recording of Arraignment proceeding – Tract-01*). Petitioner was asked by Governor Toya if he understood what was read to him and asked if he understood why he was in court. Petitioner acknowledged he understood the charges and understood why he was in court. *Id.* First Lt. Governor William Waquie then read to Petitioner his rights which included his right to have legal counsel. Petitioner was asked in English and in Towa if he understood the rights read to him. (Exhibit 3 - *Recording of Arraignment proceeding – Tract-02*). Petitioner admitted to the Governors that the rights have been read to him and that he understood them. Governor Toya then read each individual charge and asked Petitioner how he pleads to each charge. Petitioner pled Guilty to each individual charge. (Exhibit 3 - *Recording of Arraignment proceeding- Tract- 04*). See also (Exhibit 4 – Arraignment Form). Petitioner was held in custody pending his sentencing hearing. The case was transferred to Judge Allen Toledo for sentencing.

On February 8, 2017, Petitioner appeared before Tribal Court Judge Allen Toledo for sentencing. At the Sentencing hearing, Judge Toledo confirmed with Petitioner his guilty pleas to the charges before the Governors and about the facts supporting the charges. Petitioner again admitted guilt to committing each of the criminal charges filed against him. (Exhibit 5 – *Recording of Sentencing hearing Tract – 01*). Judge Toledo explained the fines and jail sentence that he had authority to impose under the tribal code for each offense. Judge Toledo informed Petitioner that this was his second DUI offense, the first conviction came from Magistrate Court in October 2009 and as a result his potential sentence was up to a year in jail and a \$1,000 fine. Judge Toledo asked if anyone had any reason why the penalties should not be imposed. At that

time, Petitioner asked to change his pleas to not guilty and to go to trial. (Exhibit 5 – *Recording of Sentencing hearing Tract – 02*). Judge Toledo denied Petitioner his request to change his pleas to not guilty on all the charges and explained his reasons for not granting Petitioner's request. Judge Toledo advised Petitioner that he can appeal Judge Toledo's decision to the Governors' office and the Governor can take the matter to the Tribal Council to grant the appeal. *Id.* The 2nd Lt. Governor was present in the court room at sentencing and explained in "Towa" the appeal process to Petitioner. (Exhibit 5 – *Recording of Sentencing hearing Tract – 03*). In addition, Judge Toledo informed Petitioner that he can also file a (Motion) Reconsideration of Sentence. Judge Toledo again informed Petitioner he can appeal his decision, Petitioner stated he will go with treatment implying he was not going to appeal the Judge's decision denying his request to change his plea. Petitioner was informed to contact Behavioral Health if he was serious about treatment and if so, the court might consider suspending the jail sentence for treatment. (Exhibit 5 – *Recording of Sentencing hearing Tract -04*). Petitioner was sentenced to 180 days jail and \$500 fine for DWI Aggravate, 90 days jail and \$100 fine for Liquor Violation and \$100 fine for Revoked License and \$100 fine for Open Container. (Exhibit 6 – Judgment and Disposition Order). Petitioner was remanded back to the Sandoval County Detention Center to serve his jail sentence.

Two months later on May 2, 2017 Petitioner filed a Motion for Reconsideration of Sentence with the Tribal Court and in said Motion Petitioner apologizes and accepts responsibilities for his actions and requests he be placed on probation. (Exhibit 7). The Motion was heard by Judge Toledo on May 18, 2017. (Exhibit 8 – *Recording of Motion for Reconsideration of Sentence hearing*). Petitioner was released from detention and placed on supervised probation (Exhibit 9).

II. PROCEDURAL POSTURE OF CASE

Petitioner filed his Petition for Writ of Habeas Corpus on February 23, 2017 naming Al Casamento, Director of Sandoval County Detention Center and the Pueblo of Jemez as Respondents. (Doc. 1) Subsequent to that the Pueblo of Jemez was dismissed on sovereign immunity and this Court ordered Respondent Casamento to file an answer to the Petition. (Doc. 3). Petitioner filed a Motion for Order to Show Cause why Respondent Casamento should not be held in contempt for violating the court's order. (Doc. 4). In response to Petitioner's Motion, Respondent's attorney on April 19, 2017, moved the Court for a Dismissal of Respondent Casamento arguing that Respondent Casamento was not responsible for prosecution of Petitioner and the proper party should be the Tribal Judge. (Doc. 6). On May 25, 2017, this court issued a Memorandum Opinion and Order dismissing Respondent Casamento as a party and ordering Petitioner to identify a proper tribal official and to file an amended petition naming a tribal official as respondent. (Doc. 9). On June 9, 2017, attorney for Petitioner filed his *First Amended Petition for Writ of Habeas Corpus for Relief from a Tribal Court Conviction Pursuant to 25 U.S.C. §1303*, naming Alan Toledo, Tribal Judge, Governor Joseph Toya, 1st Lt. Governor William Waquie and 2nd Lt. Governor Jonathan Romero as respondents. (Doc. 10).

Meanwhile, as these federal court proceedings are occurring, Petitioner simultaneously was pursuing his remedies through Tribal Court. As noted above in the preceding section (Factual Background), Petitioner filed a Motion for Reconsideration of Sentence with the Jemez Tribal Court on May 2, 2017 requesting in the motion that he be placed on probation. (*See* Exhibit 7). On May 18, 2017, Judge Toledo held a hearing on Petitioner's Motion for Reconsideration and at the hearing released Petitioner from detention. Petitioner was placed on supervised probation and Petitioner agreed to abide by certain Release Conditions. (*See* Exhibit

9). On June 9, 2019, three weeks after his hearing on Motion for Reconsideration of Sentence where he was released from detention and placed on supervised probation, Petitioner files his *First Amended Petition for Writ of Habeas Corpus for Relief from a Tribal Court Conviction Pursuant to 25 U.S.C. §1303*. Petitioner's First Amended Complaint is word for word the same except to name the Respondents Governors and Tribal Judge in the caption.

ARGUMENT

1. Petitioner Milton Toya did not exhaust his tribal remedies before seeking Writ of Habeas Corpus relief pursuant to 25 U.S.C. § 1303.¹

Before filing a petition for Writ of Habeas Corpus under 25 U.S.C. §1303, the petitioner must exhaust tribal court and tribal appellate remedies. *Valenzuela v. Silversmith*, 699 F.3d 1199 (10th Cir. 2012). Federal courts “may not exercise jurisdiction over a habeas petition presenting Indian Civil Rights Act (ICRA) claims unless the petitioner has first exhausted his tribal remedies.” *Alvarez v. Lopez*, 835 F.2d 1024, 1027 (9th Cir. 2013) (citing *Grand Canyon Skywalk Dev. LLC. v ‘SA’ NYU WA Inc.*, 715 F.3d 1196, 1200 (9th Cir. 2013)). Clearly from the facts recited above in Paragraph I (FACTUAL BACKGROUND) and Paragraph II (PROCEDURAL POSTURE OF CASE), when Petitioner filed his initial Petition for Writ of Habeas Corpus (Doc. 1) on February 23, 2017 and his First Amended Petition for Writ of Habeas Corpus (Doc. 10) on June 9, 2017, against Governor Joseph A. Toya, 1st Lt Governor William Waquie, 2nd Lt. Governor Jonathan Romero and Tribal Judge Allen Toledo, Petitioner had not exhausted all of his tribal court remedies. At his Sentencing hearing on February 8, 2017, Judge Toledo advised Petitioner of his right to appeal the decision denying Petitioner's request to change his guilty

¹ This Court's Order to Answer (Doc. 11) requires the Respondents to address the question whether the Petition[er] has exhausted his tribal court remedies as to the issues raised in the federal petition. The Respondents' argument is limited to the Court's request.

pleas to not guilty. Second Lt. Governor Jonathan Romero explained in “Towa” his right to appeal Judge Toledo’s decision and the process for the appeal. (*See Exhibit 5 – Recording of Sentencing hearing at Tract -03*). At the same hearing, Judge Toledo advised Petitioner that he could also file a Reconsideration of Sentence. From February 8, 2017, the day of sentencing, Petitioner knew the remedies available to him in tribal court and as the Facts show, he sought remedy by filing a motion for reconsideration of sentence on May 2, 2017 with the Tribal Court. Judge Toledo heard his motion on May 25, 2017 and granted his request; released him from detention and placed him on supervised probation. Respondents are unaware of Petitioner’s dissatisfaction with Judge Toledo’s decision on Petitioner’s Motion for Reconsideration of Sentence but assuming if he was dissatisfied with the decision, Petitioner has available to him the appeal process described to him at his sentencing hearing by Judge Toledo and the 2nd Lt. Governor Jonathan Romero. Petitioner still has that remedy available which he has not exhausted.

The Jemez Pueblo Tribal Council adopted Titles I - VIII of the tribal code on February 23, 1995 by Resolution No. 95-13. (Exhibit 10). By the Tribal Council adopting the Pueblo of Jemez Law and Order Code it was not their intent to alter, affect or change the traditional procedures and sanctions used in the tribal court and neither was the code intended to limit the powers of the Governors. (*Id. at* ¶6). Instead it was the legislative intent of the Tribal Council to avail itself of its traditional laws and principles to promote justice. The Tribal code at Title I, Section 1-1-2 CONSTRUCTION is evidence of that. It states:

“The general rule that a statute is to be strictly construed to its terms does not apply to this Code but that provisions herein are construed according to the fair and plain meaning of its terms to promote justice. This code shall be interpreted pursuant to the customs and traditions of the Pueblo of Jemez. Where any doubt arises as to these customs and traditions, the Court may request the advice of Tribal Council or traditional religious

leaders or other tribal members with expert knowledge and familiar with tribal customs and traditions.” (Exhibit 11)

The Tribal Council in Section 1-1-2 emphasizes the use of traditional and customary law to promote justice. By customary and traditional principles it is the Governor and Tribal Council that make the final decisions. This principle is embedded in Title I, Section 1-2-2, ¶ 2, which states that the Tribal Council, “*has jurisdiction to hear controversies between members, if a Tribal Council Court hearing is requested in accordance with traditional and customary practice or procedure. The Governor may in his discretion grant the request for a Tribal Council court or consult with the Tribal Council before granting the request*”. (Exhibit 12)

This process is exactly what was explained to Petitioner at Sentencing. Petitioner is a tribal member, thirty-three years old, resides on the pueblo, is fluent in Towa and English languages and knows or should know the customary and traditional laws of the pueblo. Ignorance of the law is not a valid excuse for failing to satisfy procedural requirements. *Valenzuela v. Silversmith*, 699 F.3d 1199, 1207 (10th Cir. 2012). In *Valenzuela*, the district court rejected petitioner’s argument that his failure to file a writ of habeas petition in tribal court should be excused because he “did not know of the existence of any option to file a tribal court petition”. *See also Marsh v. Soares*, 223 F3d 1217, 1220 (10th Cir.) (“it is well established that ignorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing.”). The Petitioner was required to file his writ of habeas petition in tribal court. Section 1-3-6 EXCLUSIVE ORIGINAL JURISDICTION at paragraph 1 states “*The Tribal Court of the Pueblo of Jemez shall have exclusive jurisdiction in all matters in which the Pueblo of Jemez or its officers or employees is sued in their official capacities.*” If Petitioner had filed his writ of

habeas petition in tribal court, the presiding tribal court judge would hear and decide the matter.

(Exhibit 13- *Affidavit of Judge Allan Toledo*.)

Federal courts have held that the tribal exhaustion rule requires tribal members to exhaust claims in tribal court before asserting them in a §1301 petition. *See, e.g. Jeffredo v. Macarro*, 590 F.3d 751 (9th Cir. 2009); *Necklace v. Tribal Court of Three Affiliated Tribes*, 554 F.2d 845 (8th Cir. 1977). Until Petitioners have exhausted the remedies available to them in the Tribal Court system, it is premature for a federal court to consider any relief. The tribal exhaustion rule serves several purposes. It reinforces Congress's strong interest in promoting tribal sovereignty, including the development of tribal courts, allows a full record to be developed in the tribal court before either the merits or any question concerning appropriate relief is addressed in federal court and it gives a tribal court a full opportunity to rectify any errors it may have made. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed. 2d 818 (1985).

CONCLUSION

Based on the sequence of events and by Petitioner's own actions in Tribal court, Petitioner had not exhausted all of his tribal court remedies in the Jemez Pueblo Tribal court before filing his §1303 Petition for Writ of Habeas Corpus; therefore, this Court must dismiss his initial Petition and his First Amended Petition for Writ of Habeas Corpus Relief against Respondents Judge Allan Toledo, Governor Joseph Toya, 1st Lt. Governor William Waquie and 2nd Lt. Governor Jonathan Romero.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of July, 2017, I filed the foregoing using CM/ECF which caused the following counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Nicholas Mendoza
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Electronically filed

/s/ David R. Yepa
Attorney for Respondents