

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

**DAVID TORTALITA,**  
*Petitioner*

**vs.**

**TODD GEISEN, CAPTAIN/WARDEN**  
Bureau of Indian Affairs, Office of Justice Services,  
Division of Corrections

And

**KEWA PUEBLO** (formerly known as Santo Domingo Pueblo), and  
**TIMOTHY BAILON**, Tribal Official, Kewa Pueblo,  
Individual and Official Capacity, and  
**ROGER CALABAZA**, Tribal Official, Kewa Pueblo,  
Individual and Official Capacity, and  
**FREDERIC REANO**, Tribal Official, Kewa Pueblo,  
Individual and Official Capacity, and  
**LOUIS TORTALITA**, Tribal Official, Kewa Pueblo,  
Individual and Official Capacity, and  
**VINCENT AGUILAR**, Tribal Official, Kewa Pueblo,  
Individual and Official Capacity, and

**EARL CHICHARELLO**, BIA Federal Officer #864, Bureau of Indian Affairs, Southern  
Pueblos Agency, Office of Justice Services,  
*Respondents.*

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

**COMES NOW** the Petitioner, David Tortalita, 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 David Tortalita (“Mr. Tortalita”) is an enrolled member of the Santo Domingo Pueblo Tribe, a federally recognized Indian Tribe in New Mexico.

2. At the time of the incident underlying the judgment and sentence in question in this matter, Mr. Tortalita was residing in Santo Domingo Pueblo, New Mexico. In addition, the incident underlying the judgment and sentence occurred within the exterior boundaries of the Pueblo of Santo Domingo Reservation (“Indian Tribe”) in New Mexico.

3. On September 16, 2016, Mr. Tortalita was arrested for Aggravated DWI, Reckless Driving, Resisting Arrest, Terroristic Threats, Probation Violation, Eluding, Open Container, Reckless Endangerment Disorderly Conduct, and Invalid/Revoked Driver License. He was booked and jailed at the Sandoval County Detention Center until his next court appearance. On September 20, 2016, four (4) days later, Mr. Tortalita was brought before the court, that is before four or five tribal officials, namely tribal official #10, Timothy Bailon, and Roger Calabaza, Frederic Reano, Louis Tortalita, and Vincent Aguilar, and BIA Federal Officer Earl Chicharello #864, for what turned out to be his Arraignment, Judgment, and Sentencing all in one (case number SDPDR-0916-19). To the best of Mr. Tortalita’s knowledge, information, and belief, neither the Governor nor Lieutenant Governor were there. Mr. Tortalita was adjudged “guilty” and sentenced to a “Jail Term:” of “544 days consecutively” and fines of “\$250.00”, “\$75.00”, “\$50.00”, “100.00”, \$50.00”, \$25.00”, \$25.00”, “\$100.00”, “\$50.00”, “\$75.00”, and court costs of “\$10” for a total of “\$895.00”. See “Arraignment” and “Judgement” forms. (Exhibit 1 and 2). The “Arraignment” and “Judgement” forms are signed by Tribal Official #10, Timothy Bailon. (See Exhibits 1 and 2). Such jail term is interesting because the five hundred forty-four (544) days consecutive does not account for or give credit to Mr. Tortalita for the four (4) days he was incarcerated for the same charges or case from the date of his arrest (September 16, 2016)

to the date of his hearing (September 20, 2016). Thus, in total, Mr. Tortalita was actually sentenced to 548 days.

4. Although Mr. Tortalita allegedly did plea guilty to the above charges, he was never advised of his rights under the Indian Civil Rights Act (hereinafter ICRA), namely the right to the assistance of counsel and the right to request a jury trial, either before or during his arraignment or at anytime during the above hearing. See ICRA at 25 U.S.C. §§ 1302(6) and 1302(10). In fact, Mr. Tortalita was actually threatened by the officer during plea bargaining and the tribal officials during the hearing that if he did not plea guilty and sign the Court's documents, namely the Arraignment" and "Judgement" forms, that they would sentence him to a full two years, that is 730 days. Hence, any so-called or alleged knowing, voluntary, and free advisement and/or acknowledgement and/or waiver of such rights, as may be alleged by the Arraignment and Judgement portions of such form, would be not only invalid but futile since he was never advised by the court of what those rights were. One can only acknowledge and/or waive rights that one either knows about or has been informed of. Importantly, to the best of Mr. Tortalita's knowledge, information, and belief neither the Tribal Court for the Pueblo of Santo Domingo nor the Pueblo of Santo Domingo Tribe itself allow or provide for its own attorneys or State licensed attorneys to practice or represent criminal defendants before it nor do they allow or provide for the right to trial by jury. In addition, interestingly, the Arraignment" and "Judgement" forms merely recite the above list of charges and do not cite any statute numbers or any sections of a tribal code at all. In fact, to the best of Petitioner's knowledge, information, and belief, there are none for the Pueblo of Santo Domingo. Thus, he could not have understood the nature of the crimes or offenses charged against him either. Furthermore, in the Jail Commitment for the Tribal Court for the Pueblo of Santo Domingo, Mr. Tortalita was committed

by the court from November 28, 2016 to March 20, 2018 for a final jail sentence of 477 days. See Final Commitment. (Exhibit 3). Again, such jail commitment not only does not credit him for two (2) days from September 20, 2016 to November 28, 2016 (69 days) and November 28, 2016 to March 20, 2018, which in total is 546 days, but it also does not credit him for the (4) days he had already served from the date of his arrest (September 16, 2016) to the date of his Arraignment and Sentencing hearing (September 20, 2016). Thus, he has actually been sentenced to 550 days. Such jail commitment was signed by Tribal Official #10, Timothy Bailon. (Exhibit 3).

5. Mr. Tortalita has exhausted his tribal remedies. Neither the Tribal Court for the Pueblo of Santo Domingo nor the Pueblo of Santo Domingo Tribe provide for an appellate process or an appellate court. Thus, a trial or a plea of guilty and a sentencing hearing before the Tribal Court of the Pueblo of Santo Domingo are the final remedy. Nevertheless, in light of the above, any such exhaustion of tribal remedies would be futile in the case at bar in light of the facts that neither the Tribal Court for the Pueblo of Santo Domingo nor the Pueblo of Santo Domingo Tribe actually allow or provide for the right to counsel and the right to trial by jury. (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.) In other words, it would be futile for Mr. Tortalita to further try to defend himself or represent himself *pro se* or without counsel before or against the Tribal Court of the Pueblo of Santo Domingo or the Pueblo of Santo Domingo Tribe since that is the reason he is in the predicament

he is in in the first place. That is, serving an unlawful or illegal sentence due to not having the right to the assistance of counsel.

**I. THE INDIAN TRIBE VIOLATED MR. TORTALITA'S RIGHT TO THE ASSISTANCE OF 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. Tortalita the right to assistance of 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 Mr. Tortalita's arraignment, plea, judgment, and sentencing hearing, he was never advised of his right to the assistance of counsel, despite the fact that he was facing the potential and ultimate incarceration of over a year, that is 544 days (or 548) as per the Judgement or 550 days as per the Final Commitment, for the charges. (Exhibits 1, 2, and 3 respectively). In fact, Mr. Tortalita was actually threatened by the court with a sentence of a full two years if he did anything else but plea guilty and sign the "Arraignment" and "Judgement" forms. However, even if the Court had so advised him neither the Tribal Court of the Pueblo of Santo Domingo or the Pueblo of Santo Domingo Tribe actually allow or provide for their own attorneys or State licensed attorneys to practice or represent criminal defendants before the Jemez Tribal Court. Thus, as the court held in Wounded Knee in regards to futility, that "a Court should not demand exhaustion when remedies would be ineffective and meaningless" where the facts show that the right to counsel is at the least theoretically nonexistent or inadequate and therefore would be "ineffective and meaningless", similarly one could also argue that in a case such as the case at

bar, where the right does not exist at all, such holding should also support a finding that any such waiver would be futile and no true waiver at all. Wounded Knee at 1239. One can only waive what one truly has the right to exercise. Hence, in light of the above, Mr. Tortalita was effectively denied his right to counsel or the assistance of counsel at his own expense under § 1302(6) of the ICRA.

**II. THE INDIAN TRIBE VIOLATED MR. TORTALITA'S RIGHT TO A JURY TRIAL UNDER THE INDIAN CIVIL RIGHTS ACT WHEN IT FAILED TO PROVIDE HIM WITH THE RIGHT TO REQUEST A JURY TRIAL UNDER THE ICRA 25 U.S.C. . §1302(10).**

Concise Statement of Facts in support of Claim II

The Indian Tribe, in exercising its powers of self-government, denied Mr. Tortalita the right to trial by jury. The ICRA provides that a defendant has the statutory right to request a jury trial 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 Tribal Court for the Pueblo of Santo Domingo nor the Pueblo of Santo Domingo Tribe actually allow or provide for a right to trial by jury. Mr. Tortalita was sentenced to over a year, that is a 544 or 550 days jail, thus more than six months. Hence, under Baldwin, such offense constitutes a serious offense and Mr. Tortalita 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

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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.)

Thus, in light of the above, the Indian Tribe denied Mr. Tortalita 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.

**III. THE INDIAN TRIBE HAS INFLICTED CRUEL AND UNUSUAL PUNISHMENT UPON MR. TORTALITA BY IMPOSING A TOTAL TERM OF IMPRISONMENT OF MORE THAN A YEAR WITHOUT PROVIDING HIM THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE ICRA 25 U.S.C. §1302(7)(A) AND 25 U.S.C. §1302(c).**

Concise Statement of Facts in support of Claim III

The Indian Tribe, in exercising its powers of self-government, has inflicted cruel and unusual punishment upon Mr. Tortalita by imposing a total term of imprisonment of more than one (1) year without providing him with the right to effective assistance of counsel. The ICRA protects an Indian defendant against the infliction of cruel and unusual punishment by requiring the Indian Tribe to provide a defendant with the right to effective assistance of counsel at least equal to that of the United States Constitution and, if the defendant is indigent and cannot afford their own attorney, then it requires the Tribe to provide the defendant a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys at the Tribe's own expense when it imposes or seeks to impose a total term of imprisonment of more than one (1) year under 25 U.S.C. § 1302(7)(A) and 25 U.S.C. § 1302(c)(1) and (2). Hence, without such provision, the Tribe is limited to a sentence of no greater than up to a year or 364 days.

In Miranda vs. Achondo, the United States Court of Appeals for the Ninth Circuit held that § 1302(7) unambiguously permits tribal courts to impose up to a one-year term of imprisonment for each discrete criminal violation. Miranda vs. Achondo, 684 F.3d 844, 846-847 (C.A.9 2012). However, it is important to note that in Miranda although the defendant did appear for trial *pro se*, the Pascua Yaqui Tribal Court does allow attorneys to practice and represent criminal defendants before it. Miranda, at 847. (See Bustamante vs. Valenzuela, 715 F.Supp.2d 960, 961-962 (U.S.D.C.D.Arizona 2010)(Petitioner appeared before Pascua Yaqui Tribal Court at his arraignment and signed document waving his right to counsel, Petitioner pled guilty to all four counts but later withdrew his guilty plea regarding count three, tribal court scheduled a sentencing hearing for the three counts and a pre-trial hearing on count three for a future date, and Petitioner obtained counsel shortly after his initial appearance.) Hence, in Miranda or Bustamante, any waiver of counsel would have been a valid and effective waiver.

In the case at bar, Mr. Tortalita was sentenced to a total term of imprisonment of over a year, that is 544 days (or 550 days). Unlike in Miranda and Bustamante, any waiver of counsel by Mr. Tortalita would be invalid and ineffective in light of the fact that neither the Tribal Court of the Pueblo of Santo Domingo or the Pueblo of Santo Domingo Tribe actually provide or allow for any attorneys, its own or state licensed attorneys, to practice or represent criminal defendants before it. Thus, similar to the grounds in Wounded Knee supporting its holding that a Petitioner need not go through the 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, any waiver of Mr. Tortalita's right to counsel would too be futile or ineffective because such right at a minimum is theoretically at the least either nonexistent in fact or inadequate since it does not exist at all. Hence, in light of the foregoing, the Tribe has inflicted



cruel and unusual punishment upon Mr. Tortalita by imposing a total term of imprisonment for more than one (1) year without providing him the right to effective assistance of counsel at his own expense or at the expense of the Tribe if he cannot afford one pursuant to §§ 1302(7)(A) and 1302(c)(1) and (2) of the ICRA.

### CONCLUSION

**WHEREFORE**, Mr. Tortalita respectfully requests that this Court: (1) issue the writ of habeas corpus commanding Respondents to release Mr. Tortalita 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:

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/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 29<sup>th</sup>. 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:

Todd Geisen, Captain/Warden  
Bureau of Indian Affairs  
OJS-Division of Corrections  
Ute Mountain Ute Agency  
P.O. Box 329, 107 Spruce Street  
Towaoc, Colorado 81334

Kewa Pueblo  
PO Box 99

Santo Domingo Pueblo, New Mexico 87052

Timothy Eric Bailon, Tribal Official,  
Roger Calabaza, Tribal Official,  
Frederic Reano, Tribal Official,  
Louis Tortalita, Tribal Official,  
Vincent Aguilar, Tribal Official  
Kewa Pueblo  
PO Box 99  
Santo Domingo Pueblo, New Mexico 87052

Earl Chicharello #864, BIA Federal Officer,  
Bureau of Indian Affairs,  
Southern Pueblos Agency,  
Office of Justice Services, District IV,  
1001 Indian School Rd., NW  
Albuquerque, New Mexico 87104

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