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

**DAMIAN GARCIA**,

Petitioner, No. 1:17-CV-00691 MCA/KRS

v.

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

And

**ROBERT B. CORIZ,** Governor, Kewa Pueblo,
Individual and Official Capacity, and
**ESQUIPULA TENORIO,** Lieutenant Governor, Kewa Pueblo,
Individual and Official Capacity, and

Respondents.

**SANTO DOMINGO TRIBAL[1] RESPONDENTS' MEMORANDUM OF LAW REGARDING APPROPRIATE RELIEF UNDER 25 U.S.C. § 1303**

Respondents Robert B. Coriz and Esquipula Tenorio (the "Tribal Respondents"), through their undersigned counsel, submit this Memorandum of Law in accordance with the Order of Magistrate Judge Kevin R. Sweazea, dated February 5, 2018 (Doc. 26).

[1] The Santo Domingo Tribe (the "Tribe") is also known as "Kewa Pueblo."

**Relevant Procedural History**

On November 9, 2017 the Tribal Respondents filed their Answer to the Petition in which they did not oppose the Petition. (Doc. 9). On January 18, 2018, the Tribal Respondents withdrew their opposition to the Petition. (Doc. 18). On January 22, 2018, Petitioner was released pending a decision on the merits of the Petition (see Doc. 24). Following a telephonic conference with counsel for all parties on January 10, 2018, Magistrate Judge Sweazea directed that counsel must reach agreement on a proposed order granting habeas relief, or submit briefs on their positions. (Doc. 26). On January 30 and February 1, 2018, counsel for the Tribal Respondents received drafts of Petitioner's proposed Stipulated Order. Counsel for the Tribal Respondents objected to the proposed Stipulated Orders primarily because counsel for Petitioner sought to have the Tribal Court conviction of Petitioner reversed, even though such relief was not requested in the Petition, and because it is not clear that the federal courts have the authority under the Indian Civil Rights Act to grant such relief.[2] A telephonic Status Conference was held on February 5, 2018 in which counsel for the Tribal Respondents raised the issue of whether the federal court has the authority to reverse a Tribal Court conviction under 25 U.S.C. § 1303. Magistrate Judge Sweazea gave the parties additional time to agree on a stipulated order granting habeas relief, or if no agreement was reached, to file simultaneous briefs on their respective legal positions. (Doc. 26). Counsel for Petitioner did not propose any additional stipulated orders following the February 5th status

[2] Counsel for Respondent Geisen also objected to the proposed stipulated orders, on other grounds.

conference. On February 12, counsel for the Tribal Respondents sent proposed edits to the February 1 draft offered by counsel for Petitioner. Counsel for Petitioner did not respond.

Counsel for the Tribal Respondents submits this Memorandum of Law on the issue of appropriate relief under section 1303 of the ICRA. In the event that counsel for Petitioner raises additional issues in his simultaneous brief, the Tribal Respondents respectfully request an opportunity to address such additional issues by further briefing.

## Legal Argument

### The Federal Courts Do Not Have the Legal Authority to Reverse Tribal Court Convictions Under Section 1303 of the Indian Civil Rights Act

When it passed the Indian Civil Rights Act 25 U.S.C. § 1301 et seq. ("ICRA"), Congress was aware of the intrusive effect that judicial review by the federal courts could have on an Indian tribe's powers of self-government. "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. 49, 67 (1978). Indian 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." *Id.* at 71. As the Supreme Court noted, implication of a federal remedy in addition to habeas corpus is not required to fulfill the purposes of the ICRA. "[T]he structure of the statutory scheme and the legislative history of Title I [of the ICRA] suggest that Congress' failure to provide remedies other than habeas corpus was a deliberate one." *Id.* at 61 (citations omitted).

As the late Judge Edwin L. Mechem of the United States District Court for the District of New Mexico stated in the *Santa Clara* case,

> [m]uch has been written about tribal sovereignty. If those words have any meaning at all, they must mean that a tribe can make and enforce its decisions without regard to whether an external authority considers those decision wise. To abrogate tribal decisions . . . for whatever 'good' reasons, is to destroy cultural identity under the guise of saving it. Congress has not indicated that it intended the Indian Civil Rights Act to be interpreted in such a manner.

*Martinez v. Santa Clara Pueblo*, 402 F.Supp. 5, 18-19 (D.N.M. 1975); *accord*., *Santa Clara*, 436 U.S. at 71.

As explained by the Tenth Circuit Court of Appeals, the Constitutional restrictions on federal and state authority do not apply to Indian tribes.

> Federal courts have long recognized that Indian tribes possess a unique legal status. *See, e.g., Cherokee Nation v. Georgia*, 30 U.S. 1, 16–17, 5 Pet. 1, 8 L.Ed. 25 (1831); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 880 (2d Cir.1996). "Indian tribes are distinct political entities retaining inherent powers to manage internal tribal matters." *Poodry*, 85 F.3d at 880. Constitutional provisions that limit federal or state authority do not apply to Indian tribes because the tribes retain powers of self-government that predate the Constitution. *See id*. at 880–81; *see also, e.g., Talton v. Mayes*, 163 U.S. 376, 384, 16 S.Ct. 986, 41 L.Ed. 196 (1896) (holding that tribal courts are not subject to the Fifth Amendment's requirement of indictment by grand jury); *Martinez v. S. Ute Tribe*, 249 F.2d 915, 919 (10th Cir.1957) (explaining that the Due Process Clause of the Fifth Amendment does not apply to tribes); Felix S. Cohen, *Handbook of Federal Indian Law* § 4.01 (Supp.2009) ("Indian tribes are not constrained by the provisions of the United States Constitution, which are framed specifically as limitations on state or federal authority.").

*Valenzuela v. Silversmith*, 699 F.3d 1199, 1202 (2012).

In *United States v. Bryant*, 136 S.Ct. 1954 (2016), the Supreme Court again acknowledged that the Fifth and Sixth Amendments do not apply in Tribal Court proceedings under the ICRA.

The *Bryant* case involved the Violence Against Women Act as amended in 2005, which makes it a federal crime for any person to commit domestic assault in Indian country, if that person has at least two prior convictions in federal, state or Tribal Court. Bryant had multiple Tribal Court convictions for domestic violence when he was indicted under the federal statute. He argued that the Tribal Court convictions violated his Sixth Amendment right to counsel. The Supreme Court held that a valid Tribal Court conviction, which would violate a defendant's Sixth Amendment right to counsel, retains that status when used in a subsequent proceeding under an enhancement statute and does not violate the Sixth Amendment.

Given the unique legal status of Indian tribes and the legislative history of the ICRA, it is clear that the United States Constitution does not apply to Indian tribes and criminal proceedings in Tribal Court. Only the limited provisions of the ICRA and the relief specifically granted under 25 U.S.C. § 1303, release from improper detention, apply. Therefore, a federal court cannot rely on decisions to reverse convictions in cases that arise under the U.S. Constitution. They do not apply in ICRA cases. In *Valenzuela*, the Tenth Circuit Court of Appeals questioned such lack of authority regarding Tribal Court convictions under the ICRA, but did not resolve the issue. 699 F.3d at 1205. To date, Petitioner's counsel has not cited any controlling cases where an appellate court has established such authority, and counsel for the Tribal Respondents has also not found any such case to establish such authority in the federal courts under the ICRA.

In correspondence with Petitioner's counsel on this issue, he cited the following instances when the District Court for the District of New Mexico reversed a Tribal Court conviction upon granting a Petition for Writ of Habeas Corpus under the ICRA: *Alan Fragua v. Elwell*, No. 1:16-

cv-01404-RB-WPL (*Alan Fragua*, Docs. 12,16); *Anthony Fragua v. Elwell,* No. 1:16-cv-01405-RB-LF (*Anthony Fragua*, Docs. 21-22); and *Toya v. Toledo, et al*, No. 1:17-cv-00258-JCH-KBM (*Toya*, Docs. 18-19). In all of those cases, the Petitioner was represented by Mr. Mendoza, who also represents the Petitioner in this case. As explained below, the decisions in those cases are not dispositive of this case because the issue of the Courts' authority to reverse Tribal Court convictions under the ICRA was not raised.

In the case of *Alan Fragua v. Elwell*, No. 1:16-cv-01404-RB-WPL, the Pueblo of Jemez was terminated by the court *sua sponte* before an Answer was required. (*Alan Fragua*, Doc. 4), and no other tribal respondents were named or appeared to represent the interests of the Tribal Court, even though the case arose in the Jemez Pueblo Tribal Court and was brought under the ICRA. In his Proposed Findings and Recommended Disposition ("PFRD"), Magistrate Judge William P. Lynch relied on *Alvarez v. Lopez,* 835 F.3d 1024 (9thCir 2016) and *Sullivan v. Lousiana*, 508 U.S. 275 (1993) to find that the denial of the right to a jury trial required an automatic reversal of the Tribal Court conviction. (*Alan Fragua*, Doc. 12). However, the issue of the court's authority to reverse a Tribal Court conviction under the ICRA was not raised as an issue or briefed to the court because the attorney for Sandoval County, who represented only the Director of the Sandoval County Detention Center, did not object to the PFRD. (*Alan Fragua*, Doc. 14). District Court Judge Robert Brack adopted the PFRD and reversed the Tribal Court conviction without discussion. (*Alan Fragua*, Doc. 16).

The case of *Anthony Fragua* is very similar to that of *Alan Fragua.* In *Anthony Fragua v. Elwell*, No. 1:16-cv-01405-RB-LF, the Pueblo of Jemez was terminated by the court *sua sponte*

before an Answer was required (*Anthony Fragua*, Doc. 5), and no other tribal respondents were named or appeared to represent the interests of the Tribal Court, even though the case arose in the Jemez Pueblo Tribal Court and was brought under the ICRA. In her PFRD, Magistrate Laura Fashing relied on *Alvarez v. Lopez*, 835 F.3d 1024 (9th Cir 2016); *Sullivan v. Lousiana*, 508 U.S. 275 (1993); *Neder v. United States*, 527 U.S. 1 (1999); and *United States v. Gonzales-Lopez*, 548 U.S. 140 (2006) to find that the denial of the right to a jury trial required an automatic reversal. (*Anthony Fragua*, Doc. 18). Again however, the issue of the court's authority to reverse a Tribal Court conviction under the ICRA was not raised as an issue or briefed to the court because the attorney for Sandoval County, who represented only the Director of the Sandoval County Detention Center, did not object to the PFRD. (*Anthony Fragua*, Doc. 22). District Court Judge Robert Brack again adopted the PFRD and reversed the Tribal Court conviction without discussion. (*Anthony Fragua*, Doc. 25).

In *Toya v. Toledo, et al*, No. 1:17-cv-00258-JCH-KMB, the Director of the Sandoval County Detention Center was initially named, but dismissed as a Respondent. (*Toya*, Docs. 9, 11). The Jemez Pueblo Tribal Court Judge, Governor, Lt. Governor and 2nd Lt. Governor were named as Respondents and were represented by attorney David Yepa. Mr. Yepa filed an Answer to the Petition, which was limited to the issue of whether the Petitioner had exhausted his Tribal Court remedies before filing his Petition in federal court. (*Toya*, Doc. 13, n.1). The issue of whether the federal court has the authority under the ICRA to reverse or vacate a Tribal Court conviction was never raised or briefed for the court. In her PFRD, Magistrate Judge Karen B. Molzen relied on *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017); *United States v. Gonzalez-Lopez*, 548 U.S. 140

(2006); and *Gideon v. Wainwright*, 372 U.S. 335 (1963) to find that the denial of the right to counsel required the reversal of the Tribal Court conviction. (*Toya*, Doc. 18). Magistrate Judge Molzen relied on *Alvarez v. Lopez*, 835 F.3d 1024 (9th Cir 2016) to find that the denial of the right to a jury trial required reversal. (*Toya*, Doc. 18). District Court Judge Judith Herrera adopted the PFRD without discussion. (*Toya*, Doc. 19).

The decisions relied on by the District Court to reverse Tribal Court convictions under the ICRA in the cases discussed above are inapposite because they do not discuss, much less recognize, the unique status of Indian tribes. The cases relied on were in every instance decided under the standards that apply to state and federal governments under the U.S. Constitution, not tribal governments subject to the ICRA.

In *Alvarez*, the United States District Court for the District of Arizona denied a petition for writ of habeas corpus brought under the ICRA alleging that a Tribal Court violated the petitioner's right to a jury trial. The Ninth Circuit Court of Appeals recognized that the denial of the right to a jury trial would require reversal, citing *Sullivan. Alvarez*, 835 F.3d at 1030. However, the Ninth Circuit did NOT reverse the Tribal Court conviction. It reversed the district court *judgment* below, which was to deny the petition, *Alvarez v. Tracey*, No. CV-08-02226-PHX-DGC, 2012 WL 1038746 at *7 (D.Ariz. Mar. 28, 2012), and remanded the case to the district court "with instructions to grant the petition for writ of habeas corpus." *Alvarez*, 835 F.3d at 1030. There was no mandate in *Alvarez* to reverse the Tribal Court conviction.

*Sullivan* was not an ICRA case. It was brought by a non-Indian and decided under the standards of the Fifth and Sixth Amendments of the U.S. Constitution, which do not apply to Indian

tribes. *United States v. Bryant*, 136 S. Ct. 1954 (2006); *Valenzuela v. Silversmith*, 699 F.3d 1199, 1202 (10th Cir. 2012); *Groundhog v. Keeler*, 442 F.2d 674, 678 (10th Cir. 1971); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 880 (2d Cir. 1996).

Likewise, *Neder* was not an ICRA case; nor did it seek a writ of habeas corpus. It was brought by a non-Indian and alleged violation of Mr. Neder's Sixth Amendment right to a jury trial based on a jury instruction that omitted an element of the offense charged. Mr. Neder was convicted in federal district court of false statements, fraud, conspiracy, and racketeering offenses. The Eleventh Circuit Court of Appeals affirmed. On petition for writ of certiorari, the Supreme Court affirmed in part, reversed in part, and remanded for further proceedings. The Supreme Court decision was based on analysis under the Fifth and Sixth Amendments, which do not apply to Tribal Court proceedings.

In *Weaver*, a non-Indian defendant was convicted in Massachusetts State Court of first degree murder and unlicensed possession of a firearm. During jury selection, the court excluded from the courtroom any member of the public that was not a potential juror due to lack of space. His attorney did not object to the closure. When his motion for a new trial based on ineffective assistance of counsel was denied, he appealed. The Supreme Judicial Court of Massachusetts affirmed and the defendant petitioned for certiorari, which was granted. The U. S. Supreme Court affirmed because the defendant failed to show prejudice. Like the other cases discussed above, *Weaver* does not apply to Tribal Court proceedings under the ICRA and does not establish a federal court's authority to reverse a Tribal Court conviction under 25 U.S.C. § 1303.

In *Gonzalez-Lopez*, a non-Indian defendant was convicted in federal court of conspiring to distribute marijuana. The Eighth Circuit Court of Appeals vacated and remanded and the government petitioned for certiorari. The Supreme Court held that the district court deprived the defendant of his Sixth Amendment right to choice of counsel and reversed his conviction. *Gonzalez-Lopez* does not establish that a federal court has the authority under the ICRA to reverse Tribal Court convictions under the ICRA.

Lastly, in *Gideon*, a non-Indian defendant was charged with a felony offense of breaking and entering a poolroom with the intent to commit a misdemeanor. He was denied the appointment of counsel under Florida law and he appealed. The Florida Supreme Court denied all habeas corpus relief and the defendant brought certiorari. The Supreme Court held that the Sixth Amendment right to assistance of counsel is made obligatory on the *states* by the Fourteenth Amendment. However, because the Sixth and Fourteenth Amendments do not apply to Tribal Court proceedings or Indian tribes, *Gideon* does not establish that a federal court has the authority under the ICRA to reverse a Tribal Court conviction under the ICRA.

**Conclusion**

It remains the position of the Tribal Respondents that they do not oppose the Petition in this case, which did not request, as relief, the reversal of the Santo Domingo Tribal Court conviction. Given the unique status of Indian tribes and the lack of clear authority to reverse Tribal Court convictions under the ICRA, the Tribal Respondents urge this Court to take the less intrusive measure on the Tribal Court of vacating, not reversing, the Tribal Court conviction in this case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on this 23rd day of February, 2018, I filed the foregoing Santo Domingo Tribal Respondents' Memorandum Of Law Regarding Appropriate Relief Under 25 U.S.C. § 1303 using CM/ECF which caused the following counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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