IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

KENNETH AGUILAR,

Petitioner,

v. **No. 17-cv-1264 JCH/SMV**

VICTOR RODRIGUEZ,
ROBERT B. CORIZ, and KEWA PUEBLO,

Respondents.

PETITIONER AGUILAR'S OBJECTIONS TO PROPOSED FINDINGS AND RECOMMENDED DISPOSITION [DOC. 11]

COMES NOW Petitioner Kenneth Aguilar ("Petitioner"), by and through his counsel of record, Southwest Indian Law Clinic (Barbara L. Creel and Veronica C. Gonzales-Zamora), hereby objects to Magistrate Judge Stephan M. Vidmar's Proposed Findings and Recommended Disposition, filed June 20, 2018 **[Doc. 11]** ("Recommendations") in response to Petitioner Kenneth Aguilar's Petition for Writ of Habeas Corpus pursuant to 25 U.S.C. Section 1303, filed December 27, 2017 **[Doc. 1],** and for the reasons stated herein, objects to the following Recommendations:

> IT IS THEREFORE RECOMMENDED that Petitioner Kenneth Aguilar's Petition for Writ of Habeas Corpus Pursuant to 25 U.S.C. § 1303 [Doc. 1] be DISMISSED.
>
> IT IS FURTHER RECOMMENDED that Petitioner's request for "release . . . pending further review and adjudication on the merits of the case" [Doc. 1] at 2 be DENIED.

[Doc. 11 at 4] The above-referenced Recommendations should be rejected as being contrary to the law on exhaustion and not supported by the facts of this case.

INTRODUCTION

In fact, Petitioner Kenneth Aguilar exhausted all remedies available to him prior to his filing of this habeas action. Based upon the record and the admissions of the Respondent, there is no higher-constituted appellate court existing within the Pueblo of Kewa, nor rules or laws specifying procedures or standards for appeals or post-conviction review of the Pueblo of Kewa's criminal convictions. As established in his Petition, Mr. Aguilar lacked time and means to retain legal counsel to advise or represent him in the tribal proceedings or to communicate on his behalf with professional counsel retained by the tribe to prosecute this case. Thus, he was completely without any knowledge of any new or formal mechanisms that may have been created specific to the case. Even if that had been an option, the petitioner is not required to exhaust hypothetical or inadequate remedies. In any event, there is no tribal remedy available now.

Exhaustion is neither a jurisdictional requirement, nor a basis for dismissal of any habeas case brought under § 1303 of the Indian Civil Rights Act ("ICRA"); and none of the exceptional circumstances in which federal courts abstain from review as a matter of comity exist here. Based on his present incarceration in federal custody, his elderly age and compromised health, his invalid felony conviction, and the Pueblo's numerous and serious violations of his rights under ICRA, it is imperative that the court reject the recommendation of dismissal and move directly to a hearing on the merits.

SUMMARY OF THE LAW REGARDING EXHAUSTION

In contrast to other federal habeas corpus statutes, Section 1303 does not require that petitioners must exhaust claims prior to litigating them in federal court. See Valenzuela v.

Silversmith, 699 F.3d 1199, 1205-06 (10th Cir. 2012) ("Unlike other federal habeas corpus statutes, § 1303 does not state that petitioners must exhaust their claims before litigating them in federal court." (comparing 28 U.S.C. § 2254 with 25 U.S.C. § 1303)); Cf. 28 U.S.C., § 2254. The rules and statutes governing exhaustion of state remedies are facially inapplicable. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194 (1978) (non-Indian petitioners filed directly for habeas corpus review of tribal court convictions). "The tribal exhaustion rule is based on 'principles of comity' and is not a jurisdictional prerequisite to review." Valenzuela, 699 F.3d. at 1206 (citing Burrell v. Armijo, 456 F.3d 1159, 1168 (10th Cir. 2006)). While federal courts have sometimes agreed to abstain from hearing tribal habeas cases until such time as petitioners may exhaust their tribal court remedies, exhaustion is not a jurisdictional requirement. Id. It should be reserved only for the clearest of circumstances, where clearly identified tribal forums and remedies exist and have yet to be exhausted.

In the words of the Ninth Circuit: "The exhaustion doctrine is rooted in our respect for tribal sovereignty: We are loath to second guess a tribe's handling of a criminal case unless and until the tribe has had a fair opportunity to review the matter *in its own appellate courts*." Alvarez v. Lopez, 835 F.3d 1024, 1027 (9th Cir. 2016)(emphasis added)(declining to dismiss on exhaustion grounds because the tribe had deliberately declined to raise it as a defense and granting relief on the merits for the tribe's denial of the right to a trial by jury). As this Court itself has aptly explained: "'[E]xhaustion of tribal court claims is not an inflexible requirement.' Rather, [a] balancing process is evident; that is weighing the need to preserve the cultural identity of the tribe by strengthening the authority of the tribal courts, against the need to immediately adjudicate alleged deprivations of individual rights." Toya v. Toledo, 2017 WL

3995554, at *3 (D.N.M. Sept. 9, 2017), *report and recommendation adopted*, Toya v. Toledo, 2017 WL 4325764 (D.N.M. Sept. 26, 2017)(citing Selam v. Warm Springs Tribal Correctional Facility, 134 F.3d 948, 953 (9th Cir. 1998)).

ANALYSIS

I. Exhaustion of tribal remedies is not required where tribal remedies are non-existent.

Petitioner Aguilar objects to the Recommendation that relief should be denied for failure to exhaust tribal remedies because there is no actual remedy in this case. Magistrate Vidmar cites to civil land dispute for the proposition that an "aggrieved party must have actually sought a tribal remedy and not merely allege its futility." White v. Pueblo of San Juan, 728 F.2d 1307, 1312 (10th Cir. 2016). However, the Tenth Circuit clarifies in the next sentence that "tribal remedies, *if existent*, are exclusive." Id. (emphasis added). The tribal exhaustion doctrine applies only when there exists exhaustible remedies evidenced by formal procedures, in the absence of formal remedies "the petitioner is not required to exhaust tribal remedies." Toya v. Toledo, 2017 WL 3995554, at *3. See also Necklace v. Tribal Court of Three Affiliated Tribes of Fort Berthold Reservation, 554 F.2d 845, 846 (8th Cir. 1977) (holding that a petitioner is not required to exhaust informal tribal remedies when the tribal court lacks formal habeas procedures); Wounded Knee v. Andera, 416 F. Supp. 1236, 1239 (D.S.D. 1976) ("If a tribal remedy in theory is nonexistent in fact or at best inadequate, it might not need to be exhausted . . . [A] "Court should not demand exhaustion when remedies would be ineffective or meaningless.").

The lack of a formal appellate process and no known appellate body in the present case clearly distinguishes it from the two cases cited by Magistrate Vidmar: Valenzuela v. Silversmith, 699 F.3d 1199 (10th Cir. 2012), and White v. Pueblo of San Juan, 728 F.2d 1307

(10th Cir. 1984). In Valenzuela, the Tohono O'odham tribe had a written and promulgated tribal code which expressly included a tribal habeas provision in the section on "appeals." 699 F.3d at 1208. Mr. Valenzuela had waived all appeals, and had argued that no tribal remedy existed in light of the plea waiver. Id. at 1203. Similarly, in White, non-Indians failed to file their complaint against the tribe in tribal court or with the tribal council after receiving a copy of the tribal code which put them on notice of the existence of a possible tribal forum. 728 F.2d at 1312-13.

Importantly, the White case is distinguishable on its face as the facts and holding demonstrate that it is a tribal sovereignty immunity case and not a tribal habeas exhaustion decision. White involved a land dispute filed by non-Indians against the Pueblo of San Juan, and the Tenth Circuit found that 25 U.S.C. § 1303 was not a general waiver of sovereign immunity to allow them to sue the tribe for interference in a real estate contract. Id. at 1312.

Here, a tribal remedy did not and does not exist for Petitioner to exhaust. This Court should not dismiss this case based on a mere statement of a right to an appeal in the advisement of rights, without any showing of the tribe's appellate body or appellate procedure, or any showing that Petitioner Aguilar was informed orally or in writing of the procedure to appeal or challenge his judgment and sentence. None of the circumstances warranting abstention because of non-exhaustion are present in this case. Rather, in appearing before the tribal court Mr. Aguilar reached the end of the forums and processes actually available. Respondent failed to assert that there was a duly constituted appellate court; or point to rules or judicial standards of appellate process, or describe steps that should be taken to effectuate review:

> THE COURT: Can you point me specifically to the provisions that relate to an appeal and how that would be accomplished, who would be presiding, the procedures that would be in place?
> MS. KIERSNOWSKI: Your Honor, the tribe is a traditional tribe. Its court and its laws are the customs and traditions of the tribe. So much of it is not written. And not all of the customs and traditions of the tribe, as we explained in the response, were included in these principles of justice.
> However, we believe that this case cannot be decided without an evidentiary hearing . . .

Trial Tr. at 22:5-14, Coriz v. Rodriguez, Coriz, et.al. (No. CIV 17-1258-JB-KBM). **[See also Doc. 9 at 4 [Answer]; Doc. 9-2 at ¶ 22]** In fact, there is no such process. The prior forms used by the tribe do not include the appeal statement, and the Tribe admits that it created the process:

> The second development is at the same time, the tribe had to respond to a number of habeas corpus cases that arose while the Petitioner was governor. As a result, the tribal council took measures to make sure that the Tribal Court complies with ICRA in its traditional court proceedings.

Id. at 20:11-25.

At the time of Petitioner Aguilar's conviction, there were no judicial officers appointed or available for appellate review of his case. There are no other tribal officials or designated body to independently review the conviction. The authority and any cultural identity expressed through the tribal court has been realized in this case. The judicial record in the case is set, and consists of the documents presented to the Kewa Tribal Court during Petitioners' summary trial. **[Doc. 1-1 to 1-8]** There are no additional possibilities for enhancing or correcting the record. None of Respondents' affidavits or statements about the traditional Tewa legal system indicate an actual appellate remedy. These are not circumstances that implicate the narrow purposes of exhaustion or warrant dismissal of Petitioner's sole avenue for relief for failure to exhaust.

II. Even if a remedy did exist, exhaustion of tribal remedies is not required where an exception applies.

> Exhaustion "is not a jurisdictional prerequisite to review" and is based on "principles of comity." Valenzuela, 699 F.3d at 1206.In addition, there are exceptions to the exhaustion requirement. Id. at 1206-07. The Tenth Circuit has acknowledged that exhaustion of tribal remedies is not required where "(1) "an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith," (2) "the action is patently violative of express jurisdictional prohibitions," or (3) "exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."

Id. at 1207 (quoting Nevada v. Hicks, 533 U.S. 353, 369 (2001)). In this case, two of the exceptions apply. Accordingly, Petitioner is excluded from the requirement that tribal remedies must be exhausted.

A. The underlying proceeding was conducted in bad faith.

At an evidentiary hearing, the Petitioner can show that the underlying proceeding was conducted in bad faith. Over a span of less than two weeks, Petitioner Aguilar was arrested, tried, convicted, and sentenced. He was arrested on November 24, 2017 and was unable to retain counsel before his initial Tribal Court hearing because he was held in solitary confinement. [**Doc. 1 at 9**] Upon his release from jail on the night of November 27, 2017, he was given only six business days to find and retain counsel. [**Id.**] Petitioner Aguilar was given the unreasonable burden to find a lawyer in six days. In response to this unreasonable timeframe, Petitioner Aguilar filed a Motion for Continuance to give him a more reasonable time to find an attorney. [**Id.**] The Tribal Court denied his request for a continuance with no principled reason. [**Id.**]

Moreover, the proceeding comprised of tribal officials hurling accusations at Petitioner. [**Id. at 12**] The tribe provided no evidence, witnesses or testimony to support the prosecution. Mr. Aguilar was not allowed to view the evidence against him. He was not allowed to bring in

any witnesses or testimony in his favor or cross-examine any witnesses against him. Mr. Aguilar has maintained his innocence. [**Id. at 14**] He was sentenced to six years for non-violent crimes, with no evidence on the record. Thus, the Tribal Court conduced the entire proceeding in bad faith. Without any evidence or record of the proceedings, any attempts to exhaust tribal remedies would be futile.

B. Exhaustion would be futile.

Moreover, the Tribal Court did not provide Petitioner Aguilar an adequate opportunity to challenge the Tribe's ruling because even if Petitioner appealed there is lack of a formal forum for the Petitioner to appeal to. The Tribal Court does not provide for a formal appellate process or remedy or an appellate court. Petitioner, who is a former Lieutenant Governor of Pueblo of Kewa presided as Tribal Court judge in over 400 court cases **[Doc 9-4 at ¶ 10]**, provided that "there is no appeal procedure provided in the tribal court's traditional law and process."[**Doc. 1 at ¶ 32**] Additionally, Respondent admits that the "Petitioner should hold accurate knowledge, given his past official positions within the Tribe." **[Doc. 9 at ¶ 20]** It would have been futile for Petitioner Aguilar to appeal, because his appeal would have been ineffective and meaningless since there is no appeal procedure.

To the extent printed language on a form provided to him in court points to a 7-day window for appeal, it suggests a theoretical or illusory option. In the words of this very Court: "Courts have held that where there are informal remedies available to a petitioner, but none that are formal, the petitioner is not required to exhaust his tribal remedies." Toya v. Toledo (Jemez) 2017 WL 3995554 (slip copy) D.N.M. 2017. Consistent with this common-sense principal, it has been held that exhaustion is not required in the absence of formal, written habeas procedures.

Necklace, 554 F.2d at 846 (quoted authority omitted). With respect to direct appeals, those too must result in bonified opportunities for meaningful review in order to invoke the exhaustion doctrine. See Wounded Knee 416 F. Supp. at 1239 (D.S.D. 1976) (precluding application of the exhaustion doctrine where appeal was sought but no appellate court was identified nor anything in the tribal code directing Petitioner to seek out the tribal chairperson and petition her to convene an appeals court). Explained the court in Wounded Knee: "If a tribal remedy in theory is non-existent in fact or at best inadequate, it might not need to be exhausted. . . . Thus, a Court should not demand exhaustion when remedies would be ineffective and meaningless. Id. (citing Schantz v. White Lightning, 502 F.2d 67, 70 n.6 (8th Cir. 1974)). In other words: "That remedies are available in theory, but not in fact, is not synonymous with failure to exhaust remedies. That ineffective and meaningless procedures were available to petitioner does not preclude his seeking a writ of habeas corpus." United States ex. rel. Cobell v. Cobell , 503 F.2d 790, 794 (9th Cir. 1974).

The District Court of New Mexico has applied these principles in several other circumstances similar to the ones present in this case and determined that steps taken by Petitioners in their participation of the criminal proceedings leading to their challenged convictions constituted their final tribal remedies. The circumstances of this case are very similar to those in Toya v. Toledo (Jemez), 2017 WL 3995554 (slip copy) D.N.M. 2017. In Toya, the Judge of Jemez Pueblo Tribal Court verbally outlined appeal and motion for reconsideration processes to Petition at the conclusion of his trial. Respondents argued additionally that unwritten "custom and tradition" indicating that the Governor and Tribal Council had authority for final decisions made the avenue for direct appeal clear. They pointed also to portions of a

written code that purported to give the Tribal Council jurisdiction to hear certain kinds of cases. However, as in the circumstances of this case, there was no actual appellate court and no portion of the written code, or even custom and tradition, actually provided for direct appeal or post-conviction relief. The court, therefore, declined to dismiss the case on account of exhaustion. It was not Petitioner's "ignorance of the law," that resulted in his failure to file a direct appeal but, rather, the fact that the tribal code "did not provide any avenue for seeking post-conviction relief." Id. (citing Casamento, 16cv1405 RB/LF, Doc. 18 at 4 (citing Johnson v. Gila River Indian Community, 174 F.3d 1032, 1036 (9th Cir. 1999); Krempel v. Prairie Island Indian Community, 125 F.3d 621, 623 (8th Cir. 1997)).

In Garcia v. Rivas, 2016 WL 10538197 (D.N.M. 2016), this Court similarly declined to require further exhaustion of a tribal court conviction. There, like in the instant case, there were no written laws or forum for the purposes of appeal or post-conviction relief. In that case, like here, the governor presided over the tribal court proceedings. The court, moreover, was not persuaded that the governor's capacity and stated willingness to reconsider his conviction in light of new evidence constituted an effective remedy. "Thus, similar to Necklace, it does not appear that the laws of the Pueblo contain formal avenues for Petitioner to pursue habeas relief in a tribal forum." Id. (citing Necklace, 554 F.2d at 846). The Court concluded it would be futile to require Petitioner to make further requests to the Pueblo to reconsider his sentence and recommended that the "tribal exhaustion rule presents no bar to the consideration of Petitioner's claims." Id.

Both of these decisions were decided after Valenzuela. In Valenzuela, however, the Tohono O'odham Code expressly provided for post-conviction habeas relief; and the Petitioner

was arguing that due to his lack of appointed counsel rendered, he did not know of the existence of any option to file a tribal court petition. Citing to the age-old adage that "ignorance of the law is no excuse," the Tenth Circuit, however, found Mr. Valenzuela not to have exhausted his tribal court remedies. In the instant case, like those of Toya and Garcia, it is not Petitioners' ignorance that is at issue but, rather, the total lack of formal remedies available for him to have pursued. The Magistrate Judge's reliance on Valenzuela is, therefore, misplaced.

The Magistrate Judge also cites White v. Pueblo of San Juan for the proposition that a Petitioner must have "actually sought a tribal remedy, not merely have alleged its futility." White, 728 F.2d at 1312. **[Doc. 11 at 4]** White is not the best comparative case, however. For one thing, it is a case about damages under ICRA, rather than habeas relief; and, hence, the court is concerned about narrowly construing the Dry Creek exception in light of Santa Clara. Id. Even more significantly, however, with respect to the above-quoted language, the opinion goes on to point out in the next sentence after the above-quoted language the obvious point that the remedy must be sought only "if existent." Id. In this case, Toya and Garcia, among those of other districts and circuits, there is a total lack of appellate or post-conviction remedy.

As indicated above, even without counsel and in the rushed time frame imposed upon him by the tribe, Petitioner participated fully in the sole tribal court proceeding available within the Kewa Pueblo. The Magistrate's decision focuses upon language in an "Advisement of Rights Order," stating "I understand that I may appeal my conviction, but I must do so within 7 days of my conviction." **[Doc. 11 at 3 citing Doc. 1-3 at 1; Doc. 1 at 7]** Notwithstanding this language, however, there is no written tribal code. **[Id.]** There are no laws establishing jurisdictional parameters for any appellate body, nor procedures to be followed. **[Doc. 1 at 7]** In fact, there

exists no appellate court or other body bestowed with those responsibilities of review. **[Id.]** Those ordinarily available to decide and preside over tribal criminal proceedings, moreover, -- the governor and tribal council members, had participated in the original case.

Even if an appeals process existed, it would be futile because the Tribal Officials served as a jury. Respondent admits that "the process for appeal is review by the Tribal Council." **[Doc 9 at ¶ 20 (Answer)]**. There is not dispute that the Tribal Officials who were the jury in Petitioner Aguilar's trial found him guilty. **[Doc 1 at ¶ 24; Doc. 9 at ¶ 15 (Answer)]**. It would be circular and useless for Petitioner Aguilar to appeal to those who have already deemed him guilty in a summary proceeding. Not only does this "appeals process" create futility, but also it is inherently unfair to appeal to the persons who found Petitioner guilty in the first place.

Even if a remedy did exist, exhaustion of tribal remedies is not required because the underlying proceeding was conducted in bad faith and exhaustion would be futile because there is no formal appeals process.

III. Even if an exception does not apply, deference must be given to the Petitioner's allegations at this early stage of litigation.

Since exhaustion is not a jurisdictional requirement, dismissal at this stage in the proceedings may only be warranted under Federal Rule of Civil Procedure 12(b)(6), which authorizes a court to dismiss a pleading for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In deciding a motion under Rule 12(b)(6), the court must "accept as true all well-pleaded factual allegations ... and view these allegations in the light most favorable to the plaintiff." Casanova v. Ulibarri, 595 F.3d 1120, 1124 (10th Cir.2010) (quoting Smith v. United States, 561 F.3d 1090, 1098 (10th Cir. 2009)).

In his petition, Petitioner Aguilar alleges the following: that Mr. Aguilar "knows of no available remedy from the Tribal Courts"; that "there is no appeal procedure provided in the tribal court's traditional law and process;" and that "there is no written code." **[Doc. 1 at ¶¶ 32, 33]** He states that he has "exhausted all tribal remedies" and any other efforts "to engage the sovereign action or response of the Tribal Court are futile." **[Doc. 1 at ¶ 33]** Respondent's sole factual response on these points is in reference to the 7-day appeal mentioned on the rights form, which Mr. Aguilar also indicated in his Petition. **[Doc. 9 at 8 (Answer); Doc. 1 at ¶ 32]** The existence of the language on a rights form, however, in the absence of actual tribal law or process actually creating a tribunal and process for appeal, does not controvert these Petitioners' allegations establishing that he exhausted his available remedies.

At this stage of the proceedings, maximum deference must be afforded to the Petitioner and this is enough to survive a motion to dismiss. The Petition establishes that there are no tribal remedies to exhaust and, hence, the case must not be dismissed for failure to state a claim on the basis of exhaustion.

IV. Even if exhaustion is required, Petitioner exhausted all available remedies at the time.

Even if exhaustion was required, there is no existing tribal remedy. The Magistrate correctly noted the language in the "Advisement of Rights Order," stating "I understand that I may appeal my conviction, but I must do so within 7 days of my conviction." **[Doc. 11 at 3 citing Doc. 1-3 at 1; Doc. 1 at 7]**. The seven-day period ended one week after his trial and approximately two –weeks after his arrest. As such, according to the Tribe's own argument, there is no remaining tribal remedy to exhaust. Thus, Petitioner Aguilar actually exhausted what was available for him.

CONCLUSION

WHEREFORE, Petitioner Aguilar respectfully requests that this Court enter an order overruling the Recommendations of Judge Vidmar, issued June 20, 2018 **[Doc. 11];** and granting the Petitioner for Writ of Habeas **[Doc. 1].**

In the alternative, the Court should order additional briefing, discovery on the merits, and an evidentiary hearing, and grant release pending adjudication of the merits of the case **[Doc. 1 at 2];** and for any such further relief the Court deems just and proper.

Dated: July 5, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the July 5, 2018, I filed the foregoing PETITIONER AGUILAR'S OBJECTIONS TO PROPOSED FINDINGS AND RECOMMENDED DISPOSITION [DOC. 11] 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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