

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

KENNETH AGUILAR,

Petitioner,

v.

No. 1:17-CV-01264 JCH/SMV

VICTOR RODRIGUEZ, ACTING WARDEN
Sandoval County Detention Center,
Sandoval County New Mexico,

ROBERT B. CORIZ, TRIBAL COURT JUDGE
And former Governor for the Pueblo of Kewa,

Respondents.

**PETITIONER’S MOTION FOR IMMEDIATE RELEASE
PENDING REVIEW OF THE MERITS OF HIS PETITION**

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) and moves this Court pursuant to Rule 7 of the Federal Rules of Civil Procedure for an order directing his release from custody pending review and resolution of the merits of his Petition for Writ of Habeas Corpus Pursuant to 25 U.S.C. § 1303 (“Petition”) [**Doc. 1**] Counsel for Sandoval County Detention Center takes no position as petitioner is currently being detained at the Chief Ignacio Justice Center Adult Detention in Towaoc, Colorado. Respondent Robert Coriz opposes this motion. In support of this motion, Petitioner Aguilar states the following:

INTRODUCTION

This Court possesses the inherent power and authority to release Petitioner Aguilar. Immediate release of Petitioner Aguilar is warranted based upon the extraordinary circumstances of Mr. Aguilar’s health and a clear case on the merits. Mr. Aguilar is a 67-year old man that

suffers from complex health problems that cannot be adequately treated while he resides in custody. In addition, Petitioner Aguilar's Petition demonstrates a clear case on the merits and is supported by the record including Respondent Robert B. Coriz's admissions in his previously-filed Answer ("Answer"). [Doc. 9] Respondent Coriz's Answer fails to defend against the dispositive claims evidencing violations of the Indian Civil Rights Act ("ICRA"). Accordingly, this Court should immediately release Petitioner Aguilar during the pendency of the proceedings regarding his Petition, or in the alternative, release him on conditions.

**SUMMARY OF THE LAW REGARDING RELEASE
PENDING DETERMINATION ON THE MERITS**

"An inmate seeking federal habeas relief must, in order to obtain release pending a determination on the merits of his petition, make a showing of exceptional circumstances or demonstrate a clear case on the merits of his habeas petition." United States v. Palermo, 191 F. App'x 812, 813 (10th Cir. 2006) (citing Pfaff v. Wells, 648 F.2d 689, 693 (10th Cir. 1981)). The two Pfaff requirements should be treated as alternatives grounds for release ("a showing of exceptional circumstances or a clear case on the merits"). See, e.g., United States v. Zander, 669 F. App'x 955, 956 (10th Cir. 2016); Barnett v. Hargett, 166 F.3d 1220, at *1 (10th Cir. 1999) (unpublished table decision) ("To warrant a release pending review of a petition for writ of habeas corpus, a defendant must demonstrate special circumstances or a high probability of success"). Consideration of both factors weighs in favor of releasing Petitioner Aguilar immediately pending review, though either factor alone is enough.

Where there is a clear case on the merits of a claimed ICRA violation, automatic reversal is the appropriate remedy. See Alvarez v. Lopez, 835 F. 3d 1024, 1030 (9th Cir. 2016) ("Because denial of the right to a jury trial is a structural error, it requires automatic reversal. We therefore need not reach Alvarez's alternative argument that the Community violated his confrontation

right.”)(citing Sullivan v. Louisiana, 508 U.S. 275, 281-82 (1993)); see also Weaver v. Massachusetts, 137 S. Ct. 1899, 1907 (2017) (“the purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial, and, thus, the defining feature of a structural error is that it affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself”). Based on the facts of the case and the reasoning set forth below, Petitioner Aguilar meets the standard and his immediate release is appropriate.

FACTUAL BACKGROUND

1. Petitioner Aguilar was arrested on Friday, November 24, 2017 and accused of committing larceny, fraud, and conspiracy. [**Doc. 1 at 3; 1-2**]
2. Petitioner Aguilar has no known criminal history. [**Doc. 1 at 3**] He maintains his innocence to all charges.
3. After his arrest, he was placed in solitary confinement in the Sandoval County Detention Facility until November 27, 2017, when he was transported to Kewa Pueblo (also known as the Pueblo of Santo Domingo). [**Doc. 1**]
4. During the three days Aguilar was held in solitary confinement he had no opportunity to obtain legal counsel. [**Doc. 1 at 9**]
5. On November 29, 2017, Aguilar plead not guilty at the hearing and was conditionally released thereafter, with the main restriction being his inability to leave the Kewa Pueblo. [**Doc. 1-1; 1-4**]
6. Two days later, on December 1, 2017, Aguilar filed a Motion for Continuance to obtain legal counsel in advance of his upcoming hearing on the proposed charges. [**Doc. 1-6**]

7. On December 4, 2017, the Pueblo of Kewa Tribal Court, (“Tribal Court”), denied Aguilar’s Motion for Continuance because the “Tribal Courts [had] allowed additional time for [Aguilar] to find an attorney which is more than the normal time.” [**Doc. 1-7**]

8. On December 6, 2017, Petitioner Aguilar, was forced to face trial alone due to an inability to retain counsel. The tribal court did not appoint defense counsel. [**Doc. 1-5**]

9. Without a retained or appointed counsel, Petitioner Aguilar was convicted and sentenced to 2,160-days in confinement and imposed a restitution of \$20,000 in damages and \$700 in fines. [**Doc. 1-8; 1-1**]

10. Upon conviction, Aguilar was transferred to Sandoval County Detention Center, (“Sandoval County”). [**Doc. 1 at 7**]

11. A Tribal remedy did not exist for Petitioner to exhaust. [**Doc. 12 at 5-13**]

12. On December 27, 2017 Petitioner Aguilar challenged his Tribal Court conviction in this court and the 2,160-day sentence imposed by the Tribal Court along with the fines and restitution ordered by the Tribal Court, due to violations of the Indian Civil Rights Act, 25 U.S.C. § 1301, et. Seq. (2016) (“ICRA”). [**Doc. 1**]

13. Petitioner Aguilar, a 67 year-old man from the Pueblo of Kewa, is a former Lieutenant Governor of the Pueblo of Kewa from 2015-2016. [**Doc. 1 at 2**]

14. Petitioner Aguilar was born and raised on the Kewa Pueblo reservation, with the exception of school and employment. [**Doc. 1 at 3**]

15. Petitioner follows the traditional customs of the Kewa Pueblo, having served three different times as a war chief, and therefore has vast knowledge of the Kewa Pueblo’s traditional ways. See “Letter from Devonna Aguilar,” a true and correct copy of which is attached hereto as **Exhibit A**.

16. Petitioner Aguilar's home has always been on the Kewa Pueblo reservation. His family is there, his community is there, and his traditional beliefs and duties stem from his commitment to the ancestral land and honoring and serving his family and community. [**Doc. 1 at 3; Ex. A**]; see also "Declaration of Kenneth Aguilar," a true and correct copy of which is attached hereto as **Exhibit B, at 1**.

17. Petitioner Aguilar is a husband and a father to his five children. Id. at 1.

18. Petitioner Aguilar became a fire fighter after he left high school and was involved in a serious helicopter accident, suffering serious injuries to his neck and back. [**Doc. 1, at 2**]

19. More recently, he suffers from serious and multiple medical issues and attendant complications. At the time of incarceration, Petitioner was under a doctor's close care for the following: Diabetes Mellitus, Diabetes Peripheral Neuropathy, Cardiovascular Disease, Hypertension, Lumbar Degenerative Disc Disease, and Benign Prostatic Hypertrophy. See "Letter by Dr. Jimmie Charlie," a true and correct copy of which is attached hereto as **Exhibit C**.

20. The symptoms of Petitioner's Diabetes Peripheral Neuropathy require special footwear and his Lumbar Degenerative Disc Disease requires specialist care. Id.

21. In May 2018, Petitioner Aguilar was transferred from Sandoval County to Chief Ignacio Justice Adult Detention Center, ("Towaoc"), in Towaoc, Colorado. See "Scheduled Inmate Visitations," **Exhibit D** (a correspondence letter is Petitioner Aguilar's only proof of a true and correct copy of which is attached hereto as the location of his current detention); see also **Ex. B** at 2.

22. During the days leading up to his transfer, Petitioner Aguilar often felt sick and dizzy, and experienced severe dizziness, fatigue, light-headedness, and shortness of breath. See **Ex. B** at 2.

23. The Correctional Medical Group at Sandoval County did not prescribe him the ongoing medications previously prescribed to him by his primary care doctor from the Kewa Pueblo Health Center. Compare “Correctional Medical Group Documents,” a true and correct copy of which is attached hereto as **Exhibit E** with “Dr. Charlie’s Letter” **Ex. C**.

24. Instead, the Correctional Medical Group prescribed Aguilar with a set of different prescriptions that caused Aguilar to experience reactions in his body that were difficult to deal with. See **Ex. B** at 2.

25. While incarcerated at Sandoval County, his blood glucose levels were measured at 405 mg/dL, high above normal ranges of non-fasting blood sugar levels. Compare **Ex. B** at 2 with Diagnosing Diabetes and Learning About Prediabetes, American Diabetes Association (7/23/18, 12:35 pm), <http://www.diabetes.org/diabetes-basics/diagnosis/> (indicating normal blood glucose levels after a drink of a special sweet drink is less than 140 mg/dL).

26. Since being detained at Towaoc, Aguilar has not been allowed to wear his prescribed special medical shoes. **Ex. B** at 3.

27. Petitioner Aguilar’s visit to Northern Navajo Medical Center for a medical clearance was conducted without any of his medical records. See “Northern Navajo Medical Center,” a true and correct copy of which is attached hereto as **Exhibit F** at 5/27/2018 17:16 (“need to obtain patient medical records to support medication and shoe requirement”).

28. Furthermore, Petitioner Aguilar, who suffers from health conditions requiring a special dietary plan, has not been provided a consistent special dietary meal plan. **Ex. B** at 3.

29. In addition, Petitioner Aguilar’s condition requires that he sleep on a padded cushion to support his back. Id.

30. While incarcerated at Towaoc, Petitioner Aguilar continues to experience symptoms of his deteriorating health condition such as:

- a. dizziness, his legs get stiff, and his legs and hands become swollen and numb;
- b. rectal bleeding, which lasted for two days;
- c. intense back pains that shoot to his legs;
- d. feet callus that are painful to walk on; and
- e. great discomfort from a serious ingrown toenail. **Ex. B** at 2-4.

31. Since Petitioner Aguilar has arrived at Towaoc, he has not received proper medical care to manage his conditions and symptoms associated therewith, including but not limited to:

- a. a proper physical examination by a medical provider;
- b. a proper monitoring of blood glucose levels;
- c. a proper monitoring of his blood pressure;
- d. treatment of his serious ingrown;
- e. a padded bedding to alleviate back pain;
- f. a proper footwear to alleviate foot pain;
- g. medical eyeglasses necessary to see clearly; and
- h. hearing aid devices necessary to hear clearly. See Ex. F at 06/07/2018 17:10 (“ASSESSMENT: Onychomycosis – based on severity of infection a systemic agent would be preferred but as [patient is] incarcerated I can’t assure monthly liver tests”).

32. Continued mismanagement of Petitioner Aguilar's medical condition could result in worsening of his health condition, such as:

- a. *Diabetes Complications*: Foot complications; DKA (Ketoacidosis) & Ketones; Kidney Disease; Hypertension; Stroke; HHNS; and Gastroparesis; Skin Complications; eye complications; Neuropathy; see Complications, American Diabetes Association (7/23/18, 1:29 PM), <http://www.diabetes.org/living-with-diabetes/complications/?loc=superfooter>;
- b. *Foot Calluses Complications*: "Foot calluses, if not trimmed [by a health care provider] get very thick, break down, and turn into ulcers (open sores)," which can lead to infections; see Foot Complications, American Diabetes Association (7/23/18, 1:30 PM), <http://www.diabetes.org/living-with-diabetes/complications/foot-complications/>;
- c. *Hypertension Complications*: Heart attack or stroke; aneurysm; heart failure; weakened or narrowed blood vessels in the kidneys; thickened, narrowed or torn blood vessels in the eyes; metabolic syndrome; trouble with memory or understanding; and dementia; see High Blood Pressure (hypertension), Mayo Clinic (7/23/18, 1:31 PM), <https://www.mayoclinic.org/diseases-conditions/high-blood-pressure/symptoms-causes/syc-20373410>;
- d. *Lumber Degenerative Disease Complications*: A breakdown of cartilage, bulging disc, and a narrowing of the spinal canal, which can affect the nerves, leading to pain, weakness, and numbness; see All About

Degenerative Disc Disease, Medical News Today (7/23/18, 1:32 PM),

<https://www.medicalnewstoday.com/articles/266630.php>;

- e. *Cardiovascular Disease Complications*: Heart valve problems, arrhythmia, heart attack, and stroke; see What is Cardiovascular Disease?, American Heart Association (7/23/18, 1:33 PM), http://www.heart.org/HEARTORG/Conditions/What-is-Cardiovascular-Disease_UCM_301852_Article.jsp#.W0PNVNVKiUk; and
- f. *Benign Prostatic Hypertrophy Complications*: Urinary retention; urinary tract infections; bladder stones; bladder damages; and kidney damages. See Benign Prostatic Hyperplasia (BPH), Mayo Clinic (7/23/18, 1:34 PM), <https://www.mayoclinic.org/diseases-conditions/benign-prostatic-hyperplasia/symptoms-causes/syc-20370087>.

33. Petitioner Aguilar is under the care of three medical doctors in New Mexico—one at the Presbyterian and two at Kewa Pueblo Health Center. See **Ex. B** at 4.

34. All three doctors provide specialized care to Petitioner Aguilar's health conditions. Id.; see also **Ex. C** ("Lumbar degenerative disc disease, requiring specialist care").

35. Because of Petitioner Aguilar is medically high risk, due to his chronic progressive disease, he requires close care and clinic follow up. Id.

36. Currently, Petitioner Aguilar is treated at the Northern Navajo Medical Center in Shiprock, New Mexico. **Ex. B** at 4; see also **Ex. F**.

37. Petitioner Aguilar is transported to Northern Navajo Medical Center for medical services upon request, rather than for regularly scheduled follow up care and ongoing monitoring. **Ex. B** at 4.

38. There appears to be no in-house health care staff at Towaoc to closely monitor Petitioner Aguilar's health condition. Id.

39. Because Petitioner Aguilar's medical records are at Kewa Pueblo Health Center and at the Presbyterian Hospital, Northern Navajo Medical Center appears to have been treating Petitioner without any reference to his medical history. Id.; see also Ex. F at 5/27/2018 17:16 ("Patient has no medical records stating what medication he is on").

ARGUMENT

Petitioner Aguilar should be immediately released from custody, or in the alternative, released on conditions, based on two exceptional circumstances: (1) serious deterioration in his health; and (2) the brevity of his remaining sentence coupled with his risk of flight and danger to the community.

Petitioner Aguilar has a clear case on the merits against Respondent Coriz, presiding Tribal Judge for the Kewa Pueblo, under the following claims: (1) denial of the right to effective assistance of retained or appointed counsel; (2) failure to ensure the presiding judge had sufficient legal training and was licensed to practice law; (3) failure to provide a speedy and public trial by an impartial jury and failure to inform Petitioner Coriz of his right to request a jury; (4) violating due process guaranteed by the basic ICRA provisions; and (5) failure to comply with the tribal felony enhanced sentencing protections required for increased sentencing under subsection 1302(c) and violating the maximum one-year sentence imposed by ICRA. [Doc. 1] Because Petitioner Aguilar meets both of the Pfaff standards, though either is enough, he should be immediately released pending his litigation, or alternatively, conditionally released.

I. Petitioner Aguilar Meets the Exceptional Circumstances Requirement.

Under the standard articulated in Pfaff, Petitioner Aguilar must demonstrate exceptional circumstances. United States v. Palermo, 191 F. App'x 812, 813 (10th Cir. 2006) (citing Pfaff, 648 F.2d at 693). The Tenth Circuit has interpreted exceptional circumstances as “special circumstances includ[ing] (1) the raising of substantial claims upon which appellant has a high probability of success; (2) a serious deterioration of health while incarcerated; (3) and an unusual delay in the appeal process.” Barnett, 166 F.3d at *2 (citing Salerno v. United States, 878 F.2d 317(9th Cir. 1989)). However, special circumstances have “never been defined and courts have addressed on a case by case basis particularly sufficient circumstances that would reverse the strong presumption against bail.” Santos v. Thomas, No. CV 11-06330 MMM, at *1 (USDC, C.D. Cal. June 29, 2012).

A. Aguilar suffers from multiple health issues that can only be addressed at his home in Kewa Pueblo.

In Johnston v. Marsh, the court held that bail was warranted for a prisoner with “advanced diabet[es],” which was rapidly progressing toward total blindness. 227 F.2d 528, 529 (3d Cir. 1955). The court conditioned his release upon his going to and remaining in a private hospital, pending litigation. Id. at 528-29. The court reasoned that the decision was proper because the prisoner needed immediate treatment. Id. at 530.

Here, Aguilar suffers from multiple health conditions and associated symptoms – Diabetes Mellitus, Diabetes Peripheral Neuropathy, Cardiovascular Disease, Hypertension, Lumbar Degenerative Disc Disease, and Benign Prostatic Hypertrophy – and he is not receiving the proper medical attention required for his health conditions. As a result, his health condition is at serious risk of deteriorating into irreversible damages. Petitioner Aguilar states that he has three different doctors in his home area; one at Presbyterian and two at Kewa Pueblo Health Center. His Lumbar Degenerative Disc Disease requires specialist care. When Aguilar was

transferred to Towaoc Detention Center, he was stripped from his specialist doctors, along with his medical records. He has since been treated at the Northern Navajo Medical Center (“NNMC”) in Shiprock, New Mexico without any record of his medical history. Additionally, he is only treated at NNMC upon request, rather than upon regularly scheduled visits. Furthermore, Petitioner Aguilar does not have a trained nurse on staff to closely monitor his health condition. Therefore, the only time Petitioner Aguilar’s health conditions are monitored are during his requested NNMC visits. Like the prisoner in Johnston, who had a serious deterioration in health, Aguilar suffers from multiple health issues that are deteriorating his health, and will only worsen with time. Similarly, Aguilar’s health care would be best served if he is conditionally released back home in Kewa Pueblo, under the care of his long-term care medical doctors. Although his condition may not seem immediate, Aguilar’s conditional release should be granted as a cautionary matter, coupled with his particular circumstances including the consequences of unmanaged or poorly managed diabetes and high blood pressure conditions.

B. Petitioner Aguilar has already served 6 months, which is half of the allowable statutory maximum of 12 months.

First, it is clear that the Tribal Court failed to provide Aguilar with his rights as a defendant under the ICRA § 1302(c)(2), (3). [Doc. 9-2] (Tribal Court Judge Coriz did not have sufficient legal training to preside over a criminal proceeding, nor did the Tribal Court record or make transcripts of its proceeding). Therefore, the maximum sentence that the Tribal Court could impose is 12 months under ICRA § 1302(a)(7)(B), without offending § 1302(c). Even then, the Tribal Court’s adherence to the provisions under Section 1302(a) is unlikely succeed on the merits. See PART II(B).

But, even if this Court determined that the Tribal Court adhered to the Section 1302(a) requirements, Petitioner Aguilar would have already served over half of his sentence permitted

under Section 1302(a)(7)(B) and could warrant release. The Ninth Circuit Court in Hall v. San Francisco Superior Court, found that the brevity of the defendant's sentence, combined with the fact that he had been out of custody pending the entirety of the state proceedings without incident, and the fact that Hall does not appear to present a high risk of flight and/or danger to the community, do constitute exceptional circumstances." No. C 09-5299 PJH, *13, 2010 WL 890044 (N.D. Cal. Mar. 8, 2010). In a distinguishable example, U.S. v. Read-Forbes, the district court ruled that the defendant did not show an exceptional circumstance which would justify release after serving some six months of a 240-month prison term. Criminal No. 12-20099-01-KHV, *2, 2015 WL 6138165 (D. Kan. 2015).

Here, the petitioner is not serving a 240-month sentence, because it is clear that the Tribal Court does not have the authority to sentence him longer than 12 months. See PART II(a). In addition, like the Petitioner in Hall, Petitioner Aguilar does not impose a flight risk and/or is a danger to the community. The Tribal Court had previously released Petitioner Aguilar on his own recognizance after his initial arrest and Petitioner did not flee. **[Doc. 1-4]** Even when faced with a fundamentally unfair proceeding, Petitioner Aguilar returned to stand trial with no attorney and defended himself against the charged offenses. Petitioner Aguilar will not flee now because he wants his name and rights vindicated. Additionally, his home is in New Mexico with his family and his traditional beliefs are tied to his ancestral land. Petitioner Aguilar has no reason to flee the Court's jurisdiction. Petitioner Aguilar wants to perform his basic family duties, which include taking care of his parents, being a husband to his wife, and being a father to his children. Petitioner Aguilar will abide by conditions from this Court upon release. Like the defendant in Hall, the Petitioner's remaining time, if convicted, will be brief. Therefore, the

Court should find that this alone is sufficient to meet the exceptional circumstance requirement under the Pfaff standard.

II. Petitioner Aguilar Has Established a Clear Case on the Merits.

Petitioner establishes a clear case on the merits on claims under, both the ICRA § 1302(c) and § 1302 (a). See also Alvarez v. Lopez, 835 F. 3d 1024, 1030 (9th Circ. 2016) (For the clear claim on the merits standard, a structural error is enough to warrant granting relief); Toya v. Toledo, et al., No. CIV 17-0258 JCH/KBM, Prop. Findings and Rec. Disposition, at *10-11 (D.N.M. Sept. 9, 2017) (recommending “that the Court conclude that the Pueblo of Jemez denied Petitioner his right under ICRA to request a trial by jury and to reverse his conviction on this alternative ground”, which was adopted by the Court on Sept. 26, 2017).

A. Petitioner’s Clear Case on the Merits Under § 1303 (c): The Tribal Court Violated his Rights Under the Tribal Law and Order Act (“TLOA”)—Felony Sentencing Enhancement Provisions of ICRA.

Under ICRA § 1302(c), the pertinent law provides the following:

25 U.S.C. §1302(c) Rights to defendants.

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall:

- (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution;

- (2) at the expense of the tribal government, provide an indigent defendant the assistance of 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;

- (3) require that the judge presiding over the criminal proceeding--

- (A) has sufficient legal training to preside over criminal proceedings; and

- (B) is licensed to practice law by any jurisdiction in the United States;

- (4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents),

rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and (5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

25 U.S.C.A. § 1302 (West). “The statute [§1302(c)] provides that they are to be applied in any ‘criminal proceeding in which an Indian Tribe, in exercising the powers of self-government, imposes a *total* term of imprisonment of more than 1-year on a defendant.’” Johnson v. Tracy, No. CV-11-01979-PHX-DGC, 2012 WL 4478801, at *3 (D. Ariz. Sept. 28, 2012) (emphasis in original). Because the *total* term of imprisonment of Petitioner Aguilar’s sentence—2,160 days—exceeds one year, the protections in Section 1302(c) apply.

Here, Respondent Coriz failed to meet the requirements of Section 1302(c)(3) and (c)(5). The court in Johnson v. Tracy, held that the proper remedy for a Tribal Court violation of the TLOA protections of the ICRA, is an automatic reversal of conviction and sentence. 2012 WL 4478801, at *5 (the court later amended its order to allow the Tribal Court to modify its judgement to conform to the ICRA § 1302(a) provisions, however this was appealed and is still pending). In Johnson, the Respondents did not dispute that the Tribal Court Judges were not license to practice law by a jurisdiction in the United States and that the record of the trial was incomplete. Id. The court held that the proper remedy was to vacate the Petitioner’s verdict and sentence and grant the Petitioner a new trial under the procedures of § 1302(c). Id.

Here, Respondent Coriz does not dispute that he is not licensed to practice law by a jurisdiction in the United States—a Section 1302(c)(3) violation. [**Doc. 9-2**] Furthermore, Respondent Coriz does not dispute that the record of the trial was incomplete, because there is no record of the trial proceeding—a Section 1302(c)(5) violation. Id. Like the respondents in Johnson who did not dispute their Section 1302(c) violations, Respondent Coriz does not dispute

his § 1302(c) violations. Thus, the Court should vacate Petitioner's conviction and sentence and grant his habeas relief. This alone is a clear case on the merits for Petitioner's habeas relief.

Additionally, Petitioner was denied the protections provided to him by Section 1302(c)(2). Under Section 1302(c)(2), a Tribe shall "at the expense of the tribal government, provide an indigent defendant the assistance of 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." 25 U.S.C. § 1302; See also United States v. Bryant, 136 U.S. 1954, 1962 (2016) ("If a tribal court imposes a sentence in excess of one year, ICRA requires the court to accord the defendant... appointment of counsel for an indigent defendant at the Tribe's expense.").

Here, the Tribal Court did not inquire as to whether Petitioner Aguilar was indigent, in order to determine the necessity of an appointed attorney. Petitioner Aguilar was not provided counsel during his time in solitary confinement. There was no counsel appointed to Petitioner Aguilar during the short period between his conditional release and his conviction and sentencing. Nor was Petitioner Aguilar provided an attorney when he was convicted and sentenced. There is no material evidence that demonstrates that the Tribal Court adhered to Section 1302(c)(2) leading up to trial. Thus, the court can infer that the Tribal Court had no intention to appoint counsel to Petitioner Aguilar.

For the reasons stated in this section, Petitioner Aguilar demonstrates a clear case on the merits that Respondent Coriz violated his Section 1302(c) protections when the Tribal Court failed to appoint him counsel, provide a law-licensed judge, and provide a record of the trial proceedings. One violation alone is sufficient to vacate Petitioner's conviction and sentence.

B. Petitioner’s Clear Case on the Merits Under § 1302(a)—The Tribal Court Violated His Due Process Rights By Failing to Adhere to § 1302(a)(6) and (a)(10).

By passing the ICRA, Congress granted a range of procedural safeguards to Tribal-Court defendants similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment. United States v. Gillette, 3:17-CR-30122-RAL, 2018 WL 1446410, *4 (D.S.D. March 23, 2018); See also Tom v. Sutton, 533 F.2d 1101, 1104 n.5 (9th Cir. 1976) (“Courts have been careful to construe the terms ‘due process’ and ‘equal protection’ as used in the [ICRA] with due regard for historical, governmental, and cultural values of an Indian Tribe. As a result, these terms are not always given the same meaning as they have come to represent under the U.S. Constitution”). The Supreme Court held that the safeguards of the ICRA are sufficient to ensure that tribal court convictions are reliable. Gillette, 2018 WL 1446410, *4 (quoting Byrant, 136 U.S. at 1962). Thus, a tribal court conviction obtained in compliance with the ICRA may be used in federal court without violating the defendant’s right to due process. Id.

However, the Ninth Circuit has carefully construed the terms ‘due process’ in a balancing approach to determine whether there is a violation of the ICRA. Under the Randall case, two standards may apply: (1) Where the tribal court procedures parallel those found in Anglo-Saxon society—i.e. where the rights are the same under either legal system—U.S. constitutional standards are employed to determine whether the challenged procedure violates the [ICRA]; (2) But, “where the tribal court procedures under scrutiny differ significantly from those commonly employed in Anglo-Saxon Society, courts weigh the individual right to fair treatment against the magnitude of the tribal interest in employing those procedures to determine whether the procedures pass muster under the [ICRA].” Randall v. Yakima Nation Tribal Court, 841 F.2d 897, 900 (9th Cir. 1988). “[The second Randall Standard] reflects a compromise intended to

guarantee that tribal governments respect civil rights while minimizing federal interference with tribal culture and tradition.” Alvarez v. Lopez, 835 F.3d 1024, 1029 (9th Cir. 2016) (quoting Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 Idaho L. Rev. 465, 467 (1998)). Here, the Tribal Court did not comply with §1302(a)(6) and (a)(10), as to provide a fair trial under both Randall standards. Therefore, the Tribal Court violated Petitioner Aguilar’s due process rights under the ICRA.

Section 1302(a)(6) requires that Tribes must not “deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b))” and Section 1302(a)(10) requires that Tribes must not “deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury . . .” 25 U.S.C. § 1302(a) (2010). Additionally, § 1302(a)(8) states that “No Tribe Shall...deny to any person of liberty or property without due process of law.” Id. Section 1302(a) of ICRA provides specific protections that apply in all cases. Here, the Tribal Court violated Petitioner Aguilar’s procedural due process rights by denying Petitioner a right to a fair trial under the ICRA § 1302(a)(6) and (a)(10).

1. Respondent Coriz violated Petitioner’s right to assistance of counsel for his defense.

According to ICRA, § 1302(a)(6), “No Indian Tribe. . . shall . . . deny to any person in a criminal proceeding the right...to have the assistance of counsel for his defense.” Similarly, under Anglo-Saxon law, the Sixth Amendment under the U.S. Constitution provides that in all criminal prosecutions the accused shall enjoy the right to assistance of counsel for his defense. See Gideon v. Wainwright, 372 U.S. 335, 343 (1963). Correspondingly, “the right to assistance

of counsel ensures to the defense in a criminal trial the opportunity to participate fully and fairly in the adversary fact-finding.” Herring v. New York, 422 U.S. 853, 857 (1975); See also Powell v. State of Alabama, 287 U.S. 45, 57 (1932) (the right of the accused to assistance of counsel includes the right to assistance of counsel from the time of arraignment until the beginning of trial for purposes of consultation, investigation, and preparation of trial). Although the “Sixth Amendment does not apply to Tribal-court proceedings [generally],” the “right to assistance of counsel” is applicable in the ICRA(a)(6) provision for criminal proceedings. U.S. v. Byrant, 136 U.S. 1954, 1958 (2016) (“The ICRA which governs criminal proceedings in tribal courts, requires appointed counsel only when a sentence of more than one year’s imprisonment is imposed.”)

Section 1302(a)(8)¹ ensures that the Tribe affords due process. Id. at 1966. (“ICRA makes habeas review in federal court available to persons incarcerated pursuant to a tribal-court judgment”). Here, the Petitioner is challenging the Tribal Court procedures under the ICRA requirements § 1302(a)(6) and (a)(10). Therefore, the first Randall standard should apply because § 1302(a)(6) and “the right to assistance of counsel” under Anglo-Saxon law parallel each other, and because the Tribal Court’s procedure under the same provisions are in dispute, this court should employ U.S. constitutional standards to determine whether the challenged tribal court procedure violates the ICRA.

Here, the Tribal Court denied Petitioner Aguilar’s right to have the assistance of counsel at his own expense because the Tribal Court did not give a meaningful opportunity to Aguilar to retain counsel and prepare a defense. The Tribal Court only allowed six business days to both

¹ “No Tribe in exercising powers of self-government shall deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property with due process of law.” 25 U.S.C. § 1302(a)(8) (2010).

retain an attorney and prepare a legal defense. [**Doc. 1-1 to 1-9**] Petitioner Aguilar was given an unreasonable burden to find a lawyer in six days and consequentially the lawyers he contacted refused to take his case. It is unreasonable to assume that an attorney will be able to prepare for trial in Tribal Court in such short notice as to provide a full and fair fact-finding adversarial defense. Petitioner Aguilar filed a Motion for Continuance to the Tribal Court to seek the assistance of counsel and prepare a defense for trial, which the Tribal Court denied. [**Doc. 1-7**] This denial substantially prejudiced Petitioner Aguilar's rights to a fair trial.

Furthermore, Randall's second standard is applicable here, because the Tribal Court's requirement of allowing only six days to seek the assistance of counsel is significantly different from Anglo-Saxon Society's standard of seeking assistance of counsel. Petitioner Aguilar's individual right to a fair treatment significantly outweighs the magnitude of the tribal interest in employing an unreasonable time period to acquire counsel. Therefore, because the Tribal Court's procedure is significantly unfair to Petitioner Aguilar and is unpracticed in Anglo-Saxon Society standards, the Court should overrule the Tribal Court's procedure because it is inconsistent with the ICRA's due process requirement § 1302 (a)(8).

2. *Respondent Coriz violated Petitioner's right to a speedy and public trial.*

Under Section 1302(a)(6): "No Indian Tribe shall . . . deny to any person in a criminal proceeding the right to a speedy and public trial." Similarly, under Anglo-Saxon law, the Sixth Amendment provides that "in all criminal proceedings, the accused shall enjoy the right to a speedy and public trial..." U.S. Const. Amend. VI. See also Hoskins v. Wainwright, 485 F.2d 1186, 1188 (5th Cir. 1973) (the right to a speedy and public trial is a personal right and when an accused is deprived of this right, he suffers "prejudice" from the mere loss of the right). Correspondingly, the essential ingredient of the constitutional right to a speedy trial is an

“orderly expedition and not mere speed.” U.S. v. Ewell, 383 U.S. 116, 120 (1966) (“a requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself”). See also U.S. v. MacDonald, 456 U.S. 1, 5 (1982), (a literal reading of the [Sixth Amendment] suggests that this right attaches only when formal charge is instituted and a criminal prosecution begins). Additionally, the right to a public trial has always been recognized as a safeguard against any attempt to employ the courts as an instrument of persecution, because the knowledge of every criminal trial is subject to contemporaneous review in the forum of the public opinion, which is an effective restraint on possible abuse of judicial power. Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 379 (1979). Therefore, the first Randall standard should apply because § 1302(a)(6) and “the right to a speedy and public trial” under Anglo-Saxon law parallel each other, and because the Tribal Court’s procedure under the same provisions are in dispute, this court should employ U.S. constitutional standards to determine whether the challenged Tribal Court procedure violates the ICRA.

Here, Petitioner Aguilar was formally charged and indicted on November 24, 2017, arraigned on November 27, 2017, and conditionally released on November 29, 2017. **[Doc. 1]** During the time Petitioner Aguilar was in detention, from November 24 through November 27, he was in solitary confinement, without the ability to effectively obtain counsel. **[Doc. 1]** After Petitioner was denied a continuance, Petitioner was hailed into trial court on December 6, 2017. **[Doc. 1]** In between this quick time period of one week, including the weekend, Petitioner Aguilar was forced to find an attorney and prepare a defense. Not only is this a violation of a right to assistance of counsel but this is a violation of a right to a speedy trial, because six-total-days is not enough time to orderly expedite Petitioner Aguilar’s affairs to prepare a defense. The

Tribal Court's requirement of six days is an unreasonable time frame which served only to prejudice Petitioner's rights and his ability to protect himself. Thus, Petitioner Aguilar's right to a speedy trial was violated.

In addition, Petitioner Aguilar's trial was not open to the public. [**Doc 1 at 12**]; see also Ex. A. Rather the trial was open only to the tribal officials and closed to the rest of the public, including Petitioner Aguilar's family. Id. During Petitioner Aguilar's trial, the jurors—which were made up of tribal officials—were hurling accusation and yelling at the Petitioner. [**Doc.1 at 12**]; See also Ex. A. Furthermore, there is nothing in the record to show that the trial was public. If Tribal Courts are not open to the public, then there are no safeguards against using its courts as an instrument for persecution. Without the public opinion from the people of the Kewa Pueblo, the Governor (Tribal Judge), Lt. Governor, and tribal officials are free to abuse their powers. Here, it is clear that the trial court prevented the public from accessing the trial. Thus, it is clear that the Tribal Court violated Petitioner's right to a public trial.

Furthermore, Randall's second standard is applicable here as well. The Tribal Court's requirement of providing only nine days for trial—beginning after arraignment—and the fact that Petitioner Aguilar's trial was only open to tribal officials, establishes that the Tribal Court procedures are significantly different from Anglo-Saxon Society's standard of a right to a speedy and public trial. Petitioner Aguilar's individual right to a fair treatment significantly outweighs the magnitude of the tribal interest in employing an unreasonable time period to orderly expedite the trial process or to conduct its trials. Therefore, because the Tribal Court's procedure is significantly unfair to Petitioner Aguilar and is unpracticed in Anglo-Saxon society standards, the Court should overrule the Tribal Court's procedure because it is inconsistent with the ICRA's due process requirement § 1302 (a)(8).

Thus, for the foregoing reasons stated in this section, it is clear that Respondent Coriz violated Petitioner Aguilar's right to a speedy and public trial under the ICRA § 1302(a)(6).

3. *Respondent Coriz violated Petitioner's right, upon request, to a jury of no less than six.*

Under ICRA § 1302(a)(10): "No Indian Tribe shall deny any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six person." In Alvarez v. Lopez, the Court held that a Tribal Court must make an effort to ensure that a criminal defendant knows that he would receive a jury trial only if he requested one. 835 F.3d at 1129. The Tribal Court Judge in Alvarez stated at arraignment that Alvarez had been informed of his rights when the Judge asked if he had any questions about ["his right to a jury"] and Alvarez replied that he did not. Id. at 1026. Alvarez signed a "Defendant's Rights" form that said: "you have a right to a jury trial." Id. The Court found that the community made no effort to ensure that Alvarez knew he would receive a jury trial only if he requested one. Id. The court ruled that Randall's second standard applied and held that Alvarez's interest in understanding the full contours of his rights outweighed any interests the Community might have. Id. at 1029 ("it hardly undermines tribal sovereignty to require that the community inform defendants of the nature of their rights, including what must be done to invoke them").

Here, the same principle applies, but in the opposite. Petitioner Aguilar signed an advisement of rights "to a trial by jury to no less than six members of tribal officials." [**Doc. 1-3**] Like the Tribal Court in Alvarez, who did not make an effort to ensure the defendant of his right, "upon request, to a jury trial," the Tribal Court of Kewa Pueblo did not make an effort to ensure that Petitioner Aguilar's right to a jury, was to be a request and not an automatic procedure. The language in § 1302(a)(10) implies a right to a bench trial. Because the Tribal Court deprived

Petitioner Aguilar of the right to a bench trial, the Tribal Court deprived Petitioner Aguilar of his procedural due process right under § 1302(a)(10).

Furthermore, the Tribal Court did not provide an impartial jury. Respondent Coriz incorrectly posited that the jury was impartial because none of the tribal officials who served as jurors were neither witnesses nor involved in the investigation. [Doc. 9 at 11] However, the jurors were biased because Petitioner Aguilar knew and/or worked with most of the jurors during his time as governor. [Doc. 1] Here, Randall's second standard is applicable. The Tribal Court's requirement of an automatic right to a jury trial of six tribal officials is significantly different from Anglo-Saxon Society's standard of a right to a fair and impartial jury. Petitioner Aguilar's individual right to a fair and impartial jury significantly outweighs the magnitude of the tribal interest in employing tribal officials to serve as jurors. Therefore, because the Tribal Court's procedure is significantly unfair to Petitioner Aguilar and is unpracticed in Anglo-Saxon Society standards, the Court should overrule the Tribal Court's procedure because it is inconsistent with the ICRA's due process requirement § 1302 (a)(8).

In conclusion, the Tribal Court failed to provide Petitioner Aguilar with his rights guaranteed under § 1302(a), such as: at his own expense to have the assistance of counsel for his defense under § 1302(a)(6); the right to a fair and public trial under § 1302(a)(6); and the right, upon request, to a trial by jury of not less than six persons under § 1302(a)(10). Petitioner Aguilar has a strong likelihood of succeeding on these merits of his claims.

CONCLUSION

WHEREFORE, for the reasons articulated herein, Petitioner Aguilar hereby respectfully requests that this Court immediately release him from custody during the pendency of his Petition, and grant any further relief this Court deems just and proper.

Dated: July 30, 2018

Respectfully Submitted,

SOUTHWEST INDIAN LAW CLINIC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of July, 2018, I filed the foregoing MOTION FOR IMMEDIATE RELEASE PENDING THE REVIEW OF THE PETITIONER'S MERITS 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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I FURTHER CERTIFY that on such date I served the foregoing on the following non-CM/ECF Participants in the manner indicated:

Via first class mail, postage prepaid, addressed as follows:

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