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 Governor
for the Pueblo of Kewa,

Respondents.

RESPONDENT ROBERT B. CORIZ'S RESPONSE
OPPOSING PETITIONER'S MOTION FOR IMMEDIATE RELEASE

Respondent Robert B. Coriz, by and through his undersigned attorneys, states the following for his Response opposing Petitioner's Motion for Immediate Release (Doc. 13) (the "Motion"):

INTRODUCTION

Petitioner Kenneth Aguilar ("Petitioner") was tried and convicted in Tribal Court under the traditional tribal justice system of the Santo Domingo Tribe (the "Tribe")[1] on two counts of larceny, two counts of fraud and two counts of conspiracy stemming from the misuse and misappropriation of tribal funds while he was Lt. Governor of the Tribe. Petitioner's trial in Tribal

[1] The Tribe, also known as "Kewa Pueblo," generally refers to its tribal government and membership as the "Tribe," and to the lands over which the Tribe exercise its sovereign jurisdiction as the "Pueblo." In this Response, counsel will refer to the Tribe and the Pueblo in accordance with this preference of the Tribe.

Court was conducted in compliance with the applicable provisions of the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1304 ("ICRA"), as amended by the Tribal Law and Order Act of 2010 ("TLOA"). Petitioner was sentenced to a jail term of 360 days for each count to run consecutively, and was initially held at the Sandoval County Detention Center ("SCDC"). Ex. 1, Declaration of James Begay ("Begay Dec."), ¶ 3, which is attached and made a part of this response by reference. On or about May 25, 2018, he was transferred to the Chief Ignacio Justice Center, a detention facility owned and operated by the BIA in Towoac, Colorado ("Towoac"). Towoac is the closest BIA detention facility to Santo Domingo Pueblo. *Id.*

Respondent Coriz opposes the Motion until a final decision is reached on the pending Proposed Findings and Recommended Disposition by Magistrate Judge Stephan M. Vidmar (Doc. 11) ("PFRD"), which recommends dismissal of the Petition for Writ of Habeas Corpus Pursuant to 25 U.S.C. § 1303 (Doc. 1) (the "Petition") for failure to exhaust tribal remedies. In the event the Petition is not dismissed on such grounds, Respondent Coriz opposes the release of Petitioner until a final decision is reached on the merits of the Petition.

In this case, Petitioner and Respondent Coriz each argue opposing positions on the merits, based on the proper interpretation of the 2010 amendments to the ICRA. Each has colorable arguments about how the amended statute should be interpreted and applied. Therefore, the requirement in *Pfaff*, that the movant for release make a clear case on the merits, is not dispositive in this case. Petitioner failed to make the required showing for immediate release of exceptional circumstances, and so the Motion should be denied. *Pfaff v. Wells*, 648 F.2d 689, 693 (10th Cir. 1981).

In addition, the Motion should be denied and the Petition should be dismissed because Petitioner has failed to join as a party the Warden of Towoac, even though the Motion is based in large part on allegations regarding conditions of his custody since his transfer to Towoac. Petitioner's allegations in the Motion regarding conditions and services at Towoac cannot be addressed by the existing parties in this case. Petitioner states that Counsel for Respondent Rodriguez "takes no position as petitioner is currently being detained at [Towoac]." Motion at 1. Respondent Coriz has no access to the various medical records of Mr. Aguilar, and no personal knowledge about his health status, the health care Mr. Aguilar has received at Towoac, the policies and procedures regarding health care services at Towoac, and has no responsibility or control over the provision of health care services at Towoac. Respondent Coriz, therefore, cannot fully address the allegations of Petitioner challenging conditions of his detention.

The medical records attached to the Motion are not certified and may or may not be complete. In any event, the attached records fail to establish the exceptional circumstances required for granting the Motion. It is necessary for the Warden of Towoac to address the allegations of Petitioner about the conditions of his detention to determine if such allegations have merit. The Warden at Towoac must, therefore, be joined as a party in this case, or the case should be dismissed under Fed. R. Civ. P. 19(a)(1)-(2). Given that both sides present colorable arguments for a clear case on the merits, and that Petitioner has failed to exhaust his tribal remedies, failed to join a necessary party, and failed to show exceptional circumstances, the Motion should be denied, and the Petition should be dismissed.

RESPONSE TO FACTUAL ALLEGATIONS OF THE MOTION

1. Regarding the allegations in paragraphs 1 through 14 on pages 3 and 4 of the Motion, which essentially restate allegations of the Petition, Respondent Coriz hereby incorporates by reference his Answer to Allegations in Factual and Procedural Background of the Petition (Doc. 9 at 2-5).

2. Regarding paragraph 15, Respondent Coriz states that Devonna Aguilar is not a Tribal Official and has no authority to speak for the Tribe on matters of customs and traditions of the Tribe.

3. Regarding the allegations in paragraphs 16 through 20, Respondent Coriz lacks sufficient knowledge about the facts alleged, and therefore, denies the allegations.

4. Respondent Coriz admits the allegations in paragraph 20.

5. Regarding the allegations in paragraphs 21 through 24, Respondent Coriz lacks sufficient knowledge about the facts alleged, and therefore, denies the allegations.

6. Regarding the allegations in paragraph 25, Respondent Coriz lacks sufficient knowledge about the facts alleged, notes that the medical records attached to the Motion do not support the allegation about a blood glucose level measured at 405 mg/dL for Petitioner, and further notes that Petitioner is not qualified to make a medical determination about his blood glucose level and its implications. Respondent Coriz, therefore, denies the allegations.

7. Regarding the allegations in paragraphs 26 through 39, Respondent Coriz lacks sufficient knowledge about the facts alleged, and therefore, denies the allegations.

LEGAL ANALYSIS

I. The Motion and Petition Should Be Dismissed Because Petitioner Failed to Exhaust his Tribal Court Remedies

Respondent Coriz agrees with and hereby incorporates the PFRD by Magistrate Judge Stephan M. Vidmar, which recommends dismissal of the Petition, and by implication the Motion, for failure to exhaust tribal remedies. Nothing in the Motion contradicts the findings of Magistrate Vidmar in the PFRD regarding Petitioner's acknowledgement of, but failure to request, an appeal of his convictions. Accordingly, the Motion and Petition should be dismissed.

II. The Motion and Petition Should Be Dismissed Because Petitioner Has Not Joined the Warden of Towoac, Who Is a Party Required to Be Joined Under FRCP 19

In this case, the Petition challenges the Tribal Court convictions and sentences Petitioner received, making Respondent Coriz, in his capacity as Tribal Court Judge, a proper respondent. *Toya v. Casamento*, No. CV-17-00258-JCH/KBM, 2017 WL 3172822 (D.N.M. May 25, 2017). However, the Motion is based in large part on allegations about the health status of Petitioner and challenges the conditions and medical services at Towoac, which Respondent Coriz has no authority to control. Because the Motion challenges the conditions of Petitioner's detention, "the custodian or official having immediate physical custody of the petitioner is a proper party to the proceeding." *Id.* at *2 (citing *Rumsfeld v. Padilla*, 542 U.S. 436, 442-43). Petitioner has been held at Towoac since May. Begay Dec., ¶ 1. Counsel for Petitioner is aware that the Tribe does not own or operate the facility at Towoac. *See Coriz v. Rodriguez*, 1:17-cv-01258-JB/KBM (D.N.M. filed Dec. 22, 2017), Declaration of James Begay (Doc. 35-1). It is owned and operated by the BIA. Yet, Petitioner has to date failed to name his immediate custodian, the Warden at Towoac,

as an additional respondent in this case. In addition to failing to exhaust Tribal Court remedies, the failure to join a required party requires dismissal of the Petition and denial of the Motion.

III. Petitioner Fails to Show Exceptional Circumstances Required to Grant the Motion

The Motion fails to show that Petitioner is entitled to immediate release. In *Pfaff*, the Tenth Circuit set a general standard that must be met for the release of a habeas corpus petitioner pending a decision on the merits of the petition. "[A] showing of exceptional circumstances must be made for such relief, or a demonstration of a clear case on the merits of the habeas petition." *Pfaff*, 648 F.2d at 693. The Motion does neither. The issue of making a clear case on the merits will be addressed below.

The Motion does not show that exceptional circumstances require release in this case. As stated earlier, Respondent Coriz does not have access to all of Petitioner's medical records. The records attached to the Motion are not certified and may or may not be complete. However, a review of the records that are attached does not establish exceptional circumstances. They show that Petitioner has been diagnosed with and treated for several common chronic illnesses (Docs. 13-3, 13-5, and 13-6), which is not exceptional for a person in their late 60s. The records also show that Petitioner was not in any acute distress, or experiencing any severe symptoms when he was seen and evaluated by medical providers. *Id.* Although Petitioner claims that at some unidentified point, his blood sugar level was 405 mg/dL (Doc. 13-2, ¶ 15), the medical records attached to the Motion do not support Petitioner's claim. The records show that Petitioner was evaluated for medical clearance on May 27, two days after he was transferred to Towoac. The medical provider determined that he "has no issues that prevent him from going to jail at this time[.]" (Doc. 13-6 at 3). There is nothing in the subsequent records provided by Petitioner that change that initial

assessment. Petitioner also acknowledges that, at Towoac, he has received medical care when he asks for it. (Doc. 13-2, ¶¶ 31-32).

In summary, Petitioner claims that his health condition and the treatment he has received while at Towoac constitute exceptional circumstances that require his release. Petitioner cites *Johnston v. Marsh*, 227 F.2d 528 (3rd Cir. 1955) to support his claim of exceptional circumstances. But *Johnston* involved a prisoner with advanced diabetes and progressing blindness, who required hospitalization. *Id.* at 529. Mr. Johnston was released on the condition that he be and remain hospitalized. *Id.* Petitioner's medical condition, as documented in the Motion, does not approach the severity of health conditions found to be exceptional in the *Johnston* case. To the contrary, the evidence provided by Petitioner shows that, although he has several common chronic illnesses, he receives health care service when he requests it, is stable, in no acute distress, and that his illnesses do not prevent him from being incarcerated.

It is also important to note that, while *Pfaff* established a general standard for immediate release in a habeas case, *Pfaff* was not brought under ICRA and did not involve Tribal Court proceedings. In this ICRA case, there is an exceptional circumstance that operates against release, which this Court should also consider—the unique limits on the Tribe's criminal jurisdiction over Petitioner. If not incarcerated, the Tribe's jurisdiction over Petitioner is limited to the physical boundaries of Santo Domingo Pueblo. As a general rule, "a valid arrest may not be made outside the territorial jurisdiction of the arresting authority." Felix S. Cohen, Cohen's Handbook of Federal Indian Law § 9.07 (2012) (citation omitted). If released, Petitioner need go no farther than outside the boundaries of the Pueblo and the Tribe loses jurisdiction and cannot re-arrest him if the Motion is granted. Unlike the time before his trial, Petitioner is now facing a significant term of

imprisonment, making him a flight risk. He could easily leave the Pueblo for a medical appointment and remain outside the boundaries of the Pueblo to evade the jurisdiction of the Tribe. Unless Petitioner remains incarcerated, there is no assurance that the Tribe can exercise its jurisdiction over Petitioner.

IV. Both Petitioner and Respondent Coriz Have Colorable Arguments for a Clear Case on the Merits, Based on the Proper Interpretation of the 2010 Amendment of the ICRA

As a long standing traditional court, the Tribal Court conducted the criminal proceeding against Petitioner under and in compliance with ICRA § 1302(a). Petitioner was sentenced in conformance with ICRA § 1302(a)(7)(D). Respondent Coriz acknowledges that the Tribal Court did not impose a sentence on Petitioner of more than one year for each separate criminal offense, as permitted in ICRA § 1302(b), and as a traditional court, does not meet the heightened requirements set out in ICRA § 1302(c).

The language of the ICRA as amended is not clear and unambiguous. Petitioner's interpretation leads to an absurd result and is contrary to Congressional intent when it amended the ICRA. As explained below, if the ICRA as amended is interpreted consistent with its clearly expressed Congressional intent, no such absurd outcome results. The Tenth Circuit has not yet ruled on this issue.

A. Petitioner's Tribal Court Trial and Convictions Conform with the ICRA's § 1302(a)(7)(D), Which Allows a Sentence of One Year for Each Separate Offense

The ICRA was amended in 2010 by the TLOA. The amendments allowed, among other things, for tribes to impose sentences of up to three years for any offense. However, if a tribe chose to impose these longer sentences, it was required to change its Tribal Courts and adopt

aspects of a western court system, including having judges who were legally trained and licensed, having written codes and rules of court, as well as providing free legal defense counsel to criminal defendants. ICRA, § 1302(c). Because Santo Domingo is a traditional Tribal Court, where the Governors and former Governors serve as judge, the Tribe has chosen not to impose heightened sentencing. Otherwise, it would completely change the manner in which the Tribe has been administering justice for centuries.

In his Answer, Respondent Coriz explained that the Tribal Court conducts it criminal proceedings in compliance with the ICRA § 1302(a). *See* Answer (Doc. 7 at 7-9). The Tribe has the *option* under the amended ICRA to conduct its criminal proceedings under ICRA § 1302(a) because it imposes a sentence of no more than one year for any one criminal offense. Under ICRA § 1302(a)(7)(D), the Tribe can try a defendant for more than one criminal offense and impose a one-year sentence for each offense, but is limited to a total punishment of no more than nine years.

It is significant to note that ICRA § 1302(a)(7)(D) was not made subject to § 1302(c). When Congress amended § 1302(a)(7), it made certain parts of it subject to the requirements or limitations of other parts and subsections. For example, § 1302(a)(7)(B) begins with "except as provided in subparagraph (C), . . ."; subsection 1302(a)(7)(C) begins with "subject to subsection (b), . . ." No such limitations or subjection to another part are included in § 1302(a)(7)(D). When Congress includes limiting language in one section of a statute but omits limitations in another, the U.S. Supreme Court has ruled that courts should presume that Congress intended a difference in meaning. *Digital Realty Trust, Inc. v. Somers*, 138 S.Ct. 767, 777 (2018). This Court should not impose limitations where Congress did not.

The language in § 1302(c), is NOT clear because, as worded, it leads to an incoherent result in light of the other amending language of the TLOA. If § 1302(c) is interpreted to apply to all proceedings under § 1302(a), as Petitioner argues, and a defendant is tried and convicted of more than one crime in a Tribal Court proceeding under § 1302(a) (but not as required under § 1302(c)), the Tribe could not impose a one-year sentence for each conviction, regardless of the language stated in § 1302(a)(7)(D). However, if the Tribe conducts a separate court proceeding for each crime charged, the Tribe can impose a one-year sentence in each proceeding if convicted. In either situation, § 1302(a)(7)(D) would be rendered meaningless and inoperative. It is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) (citation omitted). Such a statutory scheme is senseless and incoherent. Clearly Congress did not intend to render any part of the ICRA meaningless or to impose such judicial inefficiency and waste of limited resources on traditional Tribal Courts.

If, however, § 1302(a)(7)(D) is not subject to § 1302(c), as indicated by the lack of language making it so, there is no incoherent result. The Tribe can try a defendant for each separate crime and can impose a sentence of up to one year for each conviction, but is limited to a total sentence of no more than nine years. Given the illogical and impractical consequences of applying the ICRA § 1302(c) in all cases, it is necessary and important to determine the intent of Congress when it amended the ICRA in the TLOA.

B. The Legislative History of the TLOA Makes it Clear that Congress Expressly Intended That the More Stringent Requirements Now Found in 25 U.S.C. § 1302(c) Apply to a Tribal Court's Criminal Proceedings *Only if* the Tribe Chooses to Subject Criminal Defendants to More Than One Year of Imprisonment for Any One Offense Under § 1302(b)

The legislative history of the TLOA makes it clear that the Tribe has the *option* to conduct its criminal proceedings under the ICRA § 1302(a) without meeting the heightened requirements in § 1302(c). "In the Senate, the TLOA of 2009 was appended as the TLOA of 2010, with slight modifications, to the Indian Arts and Crafts Amendments Act of 2010 . . . . The 2010 version of the TLOA is substantially the same as the 2009 version that was considered by committee in both Houses of Congress." Gideon M. Hart, *A Crisis in Indian Country: An Analysis of the Tribal Law and Order Act of 2010*, 23 Regent U. L. Rev. 139, 163-164 (2011). Senate Report No. 111-93, which accompanied the Senate Bill, S. 797, in 2009 was submitted by the Committee on Indian Affairs and states:

> *All tribal justice systems may continue to operate under current ICRA sentencing limitations of no more than one year imprisonment for any one offense*. The Committee emphasizes that the intent of section 304 is to provide tribal governments the *option* of enacting tribal criminal laws that would be subject to up to three years imprisonment. If, pursuant to new subsection (b) of ICRA, 25 U.S.C. S 1302, a tribe enacts a law that subjects an offender to more than one year for any one offense, and the tribal prosecutor charges the suspect with a violation of that law, then the requirements of subsection (b) [now ICRA § 1302(c)] will have to be met in the criminal trial that would ensue.

S. Rep. No. 111-93, at 17-18 (2009) (emphasis added).

The provisions of section 304 in S. 797 were re-numbered in 25 U.S.C. § 1302.[2] Some of the text was placed in subsection (a) of § 1302, some was placed in subsection (b), and some was

[2] In the Answer (Doc. 9), counsel for Respondent Coriz inadvertently omitted the proper reference to § 1302(c), and mistakenly referred to the heightened requirements in § 1302(c) as part of § 1302(b). As discussed in more detail above, the legislative history of the TLOA shows that while the proposed amendments to the ICRA in the TLOA were being considered, such proposed

placed in subsection (c). However, there is no indication in any of the legislative history that the Congressional intent, as stated in S. Rep. No. 111-93, changed from the time of the report until passage in July 2010. Giving effect to the ICRA § 1302(a)(7)(D), without making it subject to § 1302(c), is consistent with the stated intent of Congress that tribes be allowed to choose the *option* of proceeding under either the ICRA § 1302(a) or under §§ 1302(b) and (c). However, if a tribe chooses to proceed under § 1302(a), Congress continued to limit the punishment that can be imposed to no more than one year per offense, and the total punishment in any one proceeding to nine years under § 1302(a)(7)(D).

The statutory construction of the ICRA § 1302(a)(7)(D), and the ICRA as a whole, supports the position that the Tribe may sentence a criminal defendant to one year in prison for each separate offense. The sentence imposed on Petitioner is consistent with Congressional intent in the TLOA and complies with the ICRA § 1302(a). S. Rep. No. 111-93 makes it clear that Congress intended that Tribes "may continue to operate" under the sentencing provisions of ICRA § 1302(a) as they did prior to the 2010 amendments. Therefore, Petitioner is not likely to succeed on the merits of his Petition by arguing that the Tribal Court failed to comply with § 1302(c) of ICRA, and the Motion should be denied.

Petitioner's reliance on *Johnson v. Tracy*, No. CV-11-01979-PHX/DGC, 2012 WL 4478801 (D. Ariz. Sept. 28, 2012), is misplaced. As a non-reported opinion, it is non-binding under 10th Cir. R. 32.1(A). *See, e.g., In re Lester*, No. 17-1255, 2018 WL 1566521 (10th Cir. Mar. 30,

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amendments were all part of § 304(b) in S. 797. *See* S. 797, 111th Cong. (2009). After S. 797 was passed, the provisions in subsection 304(b) of S. 797 were codified in various subsections of 25 U.S.C. 1302. Counsel for Respondent Coriz mistakenly remembered what is now § 1302(c) as being part of subsection (b) in the amendments.

2018) (footnote to title). And, this Court should not find the case persuasive because the decision in *Johnson* did not consider the issues raised here and is contrary to the expressed legislative intent of Congress in amending the ICRA, as discussed above. In addition, counsel for Petitioner misstates the outcome in *Johnson.* The District Court decision in *Johnson* did *not* reverse Mr. Johnson's Tribal Court conviction and sentence. The Court vacated the Tribal Court conviction and sentence. *Johnson,* 2012 WL 4478801 at *5.

C. The Santo Domingo Tribal Court Complied with the Requirements of ICRA § 1302(a) in the Prosecution and Sentencing of Petitioner

In his Answer (Doc. 9), Respondent Coriz explained that in 2017, the Tribal Council reviewed and reaffirmed in writing its traditional principles of justice (the "Principles") that explain and illustrate how the traditions of the Tribal Court are consistent with § 1302(a) of the ICRA. *See* Answer at 2.[3] As explained in the Answer, the Principles are not exhaustive and many of the oral traditions and customs of the Tribe are not included in the Principles. However, the Principles provide a good explanation of the history, structure and general practices of the Tribal Court. Throughout his Answer, Respondent Coriz explained how the Principles were applied in the proceedings against Petitioner. The Principles are attached to this Response as Exhibit 2, and incorporated herein by reference to inform this Court about the history, traditions, and restorative nature of justice practiced by the Tribal Court.

[3] Ironically, the Tribal Council undertook the task of reaffirming these Principles in writing partially because of the numerous habeas corpus petitions that were being filed while Petitioner was Lt. Governor. Undersigned counsel also provided the Principles to the Assistant United States Attorney, who provided feedback to help ensure that they were consistent with the ICRA provisions.

D. Petitioner Was Afforded a Reasonable Amount of Time to Retain a Defense Attorney; He Failed to Show That He Made Any Reasonable Attempts in the Time Allowed to Do So

Petitioner complains about the short amount of time he was given to find a defense attorney to represent him. However, he makes no attempt to show that he actually discussed representation with any attorneys in the time allowed. Petitioner was allowed to make phone calls from the jail and allowed to see attorneys at the jail while he was detained. Decl. of Franklin Chavez, II Under 28 U.S.C. § 1746 (Doc. 9-5 at 3, ¶ 6). He had additional time prior to trial after he was released. In his affidavit, the Tribe's Independent Special Prosecutor explains that, in his experience as a prosecutor and as a criminal defense attorney, it is standard practice for an attorney contemplating representation to contact the prosecutor to discuss the pending case, scheduling issues and possible resolution. No attorneys contacted the Special Prosecutor about representing Petitioner. Aff. of John W. Day (Doc. 9-4), ¶ 13. Absent a showing that Petitioner made reasonable attempts to find an attorney in the time allowed, it was not unreasonable for the Tribal Court to deny Petitioner additional time.

The right to counsel under the ICRA § 1302(a)(6) is not co-extensive with the Sixth Amendment right. *United States v. Bryant,* 136 S. Ct. 1954 (2016) (A valid Tribal Court conviction, which would violate the Sixth Amendment, is valid in a subsequent proceeding under a federal enhancement statute and does not violate the Sixth Amendment); *see also Valenzuela v. Silversmith,* 699 F.3d 1199, 1202 ("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.").

E. The Tribal Court Did Not Violate Petitioner's Right to a Speedy and Public Trial Under the ICRA § 1302(a)(6)

The Tribal Court did not exclude the public from Petitioner's trial. The Tribal Court did exclude one witness from testifying and from hearing the testimony of others because she is a target of the Special Prosecutor's ongoing investigation. However, such exclusion of a witness is reasonable and does not constitute exclusion of the public.

Petitioner also claims that his rights were violated because there is no recording or transcript of his trial. Under the ICRA § 1302(a)(6), there is no requirement to record or transcribe Tribal Court proceedings. Therefore, cases cited by Petitioner, which require a recording or transcription of proceedings under, or by analogy to, the Sixth Amendment are again inapposite in this case. The Tribal Court documents its proceedings in the Tribal Court record. A certified copy of the Tribal Court record of the proceedings in Petitioner's case is attached to the Answer as Doc. 9-1. Under the Tribe's traditional customs and beliefs, the Tribal Court does not record or transcribe its proceedings, which are usually conducted in Keres, the traditional language of the Tribe, as they have been for centuries. Petitioner's trial was conducted in Keres at his request.

F. The Tribal Court Did Not Violate Petitioner's Right to a Jury Trial Under the ICRA § 1302(a)(10)

Petitioner claims, without citing any legal authority, that the Tribal Court violated his right to a jury trial because it did not allow him to have a trial *without* a jury. Motion at 23-24. ICRA § 1302(a)(10) prohibits a Tribal Court from denying "any person accused of an offense punishable by imprisonment the right, *upon request*, to a trial by jury of not less than six persons." (Emphasis added.) It safeguards the right to a trial by jury, if a defendant requests one. It does not prohibit a Tribal Court from conducting a criminal trial with a jury whether or not a defendant requests a

jury. As Respondent Coriz explained in the Answer, the Tribal Court complies with the ICRA § 1302(a)(10) by giving all criminal defendants a trial by jury in Tribal Court as a matter of course without requesting one. *See* Answer (Doc. 9, at 10). Petitioner had a jury of at least six Santo Domingo Tribal Officials. Petitioner did not object to having a jury or to any individual juror at his trial, (Doc. 9-5, ¶ 11), and he did not appeal. Had Petitioner objected at trial, or appealed the issue, the Tribal Court could have ruled on the issue and explained its ruling. Because he did not, this Court has nothing to review on the issue and the argument of Petitioner must be rejected.

In addition, Petitioner argues that his jury was not impartial, but gives no explanation of how any such bias was demonstrated at his trial (Motion at 24), citing *Randall v. Yakima Nation*, 841 F.2d 897 (9th Cir. 1988). Petitioner's reliance on *Randall* is misplaced. The U.S. Supreme Court and the Tenth Circuit Court of Appeals have, subsequent to the decision in *Randall*, ruled that a defendant's rights under the ICRA § 1302(a) are not co-extensive with the Sixth Amendment, which does not apply to Indian Tribes. *United States v. Bryant*, 136 S. Ct. 1954 (2016) (a valid Tribal Court conviction, which would violate the Sixth Amendment, is valid in a subsequent proceeding under a federal enhancement statute and does not violate the Sixth Amendment); *see also Valenzuela*, 699 F.3d at 1202 ("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.")

V. Petitioner Should Not Be Released Until After a Final Decision on the Merits of His Petition and, if Granted, After Giving the Tribal Court a Reasonable Opportunity to Correct the Tribal Court's Violations Under the ICRA

For all of the above reasons, this Court should deny Petitioner's Motion and not release Petitioner until a final decision on the merits. Even if the Petition is granted, the Tribal Court

conviction and sentence should be vacated and Petitioner should not be released until the Tribal Court is given a reasonable opportunity to correct any violations of the ICRA determined by the Court in a re-trial of Petitioner. As the U.S. Supreme Court noted in *Hilton*, a federal court "has broad discretion in conditioning a judgment granting habeas relief." *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987). "[F]ederal Courts may delay the release of a successful habeas petitioner in order to provide the [trial court] an opportunity to correct the . . . violation found by the court." *Id.* (citations omitted). As explained by the Tenth Circuit Court of Appeals:

> A United States District Court writ of habeas corpus does not generally bar a retrial of the petitioner on the charges underlying his defective conviction. . . . In fact, rather than barring a new trial, the district court normally should facilitate it by suspending the writ for a time reasonably calculated to provide the [trial court] an adequate opportunity to conduct the new trial.

Capps v. Sullivan, 13 F.3d 350, 352 (10th Cir. 1993).

The Santo Domingo Tribe believes that an essential attribute of its sovereignty is the ability to have a traditional Tribal Court where those that violate the laws – by acts of violence or theft – be tried and if convicted, subject to either traditional remedies, or in cases like this, time in jail. If the Court makes a final determination that differs from how the Tribe presently understands the ICRA must be applied, then the Tribal Court will comply with such an order. Given that there are multiple serious offenses, if the Court finds that the ICRA requires that each offense be tried in a separate proceeding, the Tribe will adhere to such a ruling. However, as noted above, if Petitioner is released from custody, he could easily evade any future criminal trial by staying away from the Pueblo.

CONCLUSION

For all of the foregoing reasons, Respondent Coriz urges this Court to deny the Motion for the immediate release of Petitioner, and not release Petitioner until a final decision is made on the merits of the Petition. If the Petition is ultimately granted, Respondent will move to delay Petitioner's release until the Tribal Court has a reasonable opportunity to correct any errors determined by the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of August, 2018, I filed the foregoing Respondent Robert B. Coriz's Response Opposing Petitioner's Motion for Immediate Release 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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By: /s/ Cynthia A. Kiersnowski