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

DANIEL E. CORIZ,

Petitioner, No. 1:17-CV-01258 JB/KBM

v.

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, and

KEWA PUEBLO,
(Also known as Santo Domingo Pueblo)
Respondents.

RESPONDENT CORIZ' OBJECTIONS TO PROPOSED FINDINGS OF FACT AND RECOMMENDED DISPOSITION

Respondent Robert B. Coriz, through his undersigned counsel of record, hereby states that he agrees with the recommended disposition in the Proposed Findings of Fact and Recommended Disposition (Doc. 27) ("PFRD"). However, Respondent Coriz objects to the proposed findings of fact and legal conclusions stated in the PFRD as follows:

1. Although Respondent Coriz agrees with Magistrate Molzen's application of *Pfaff v. Wells,* 648 F.2d 689, 693 (10th Cir. 1981) to the facts of this case to deny the Motion for Immediate Release (Doc. 14) (the "Motion"), counsel for Respondent Coriz noted at oral argument that the *Pfaff* case did not involve the Indian Civil Rights Act ("ICRA") or an Indian tribe. *Pfaff*, therefore, did not address the unique challenges faced by Indian tribes to their criminal jurisdiction over a

tribal member, if the member is released before a determination on the merits of a Habeas Corpus Petition brought under ICRA is made. If released, Petitioner need go no farther than outside the boundaries of Santo Domingo Pueblo and the Tribe loses jurisdiction and cannot arrest him if the Motion is granted. This is because "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). Unless Petitioner remains incarcerated, there is no assurance that the Tribe can exercise its jurisdiction over Petitioner if the Petition is ultimately denied, or if Petitioner's convictions and sentences are vacated. Respondent Coriz, therefore, requests a finding that the unique challenges to the criminal jurisdiction of the Tribe over its members is an additional factor that should be considered and which weighs in favor of denying the Motion in this case.

2. Respondent Coriz objects to the Magistrate's finding and conclusion that 25 U.S.C. § 1302(c) is clear and unambiguous and that it applies to the Tribal Court's prosecution of Petitioner. The Tenth Circuit Court of Appeals has not addressed this issue to date. As explained in Respondent Coriz' Response to the Motion (Doc. 17) at 6-9:

Under the ICRA subsection 1302(a)(7)(D), the Tribe may impose a sentence of one year for any single offense up to a maximum sentence of nine years. It is significant to note that ICRA subsection 1302(a)(7)(D) was not made subject to subsection 1302(c). When Congress amended subsection 1302(a)(7), it made certain parts of it subject to the requirements or limitations of other parts and subsections. For example, subsection 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 subsection 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 subsection 1302(c), is NOT clear because, as worded, it leads to an incoherent result in light of the other amending language of the Tribal Law and Order Act ("TLOA"). If subsection 1302(c) is interpreted to apply to all proceedings under subsection 1302(a), as Petitioner argues, and a defendant is tried and convicted of more than one crime in a Tribal Court proceeding under subsection 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 subsection 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 without complying with the heightened requirements in subsection 1302(c). In either situation, subsection 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). 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, subsection 1302(a)(7)(D) is not subject to subsection 1302(c), as indicated by the lack of language making it so, there is no incoherent result. Given the illogical and impractical consequences of applying the ICRA subsection 1302(c) in all cases, it is necessary and important to determine the intent of Congress when it amended the ICRA in the TLOA.

The legislative history of the TLOA makes it clear that Congress expressly intended that the more stringent requirements now found in subsection 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 subsection 1302(b).

The Tribe has the option to conduct its criminal proceedings under the ICRA subsection 1302(a) without meeting the heightened requirements in subsection 1302(c). 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 subsection 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. Some of the text was placed in subsection (a) of § 1302, some was placed in subsection (b), and some was placed in subsection (c). However, there is no indication in any of the legislative history that the Congressional intent, as stated in Senate Report 111-93, changed from the time of the report until passage in July 2010. Giving effect to the ICRA subsection 1302(a)(7)(D), without making it subject to subsection 1302(c), is consistent with the stated intent of Congress that tribes be allowed to choose the option of proceeding under either the ICRA subsection 1302(a) or under subsections 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 subsection 1302(a)(7)(D).

The statutory construction of the ICRA subsection 1302(a)(7)(D) and 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 Coriz is consistent with Congressional intent in the TLOA and complies with the ICRA subsection 1302(a). Senate Report 111-93 makes it clear that Congress intended that Tribes "may continue to operate" under the sentencing provisions of ICRA subsection 1302(a) as they did prior to the 2010 amendments.

Wherefore, for the reasons stated above, Respondent Coriz agrees with the recommended disposition stated in the PFRD, but objects, as stated above, to the proposed findings of fact and conclusions of law.

Respectfully submitted,
LEGER LAW AND STRATEGY, LLC

By /s/ Cynthia A. Kiersnowski
Teresa Isabel Leger
Cynthia A. Kiersnowski
414 Old Taos Highway
Santa Fe, NM 87501
teresa@legerlawandstrategy.com
cindy@legerlawandstrategy.com
(505) 982-3622
Attorneys for Respondent Robert B. Coriz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of May, 2018, I filed the foregoing Respondent Coriz's Objections to Proposed Findings of Fact and Recommended Disposition 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:

Barbara Louise Creel
Attorney for Petitioner Coriz
creel@law.unm.edu

Heather Renee Smallwood
Attorney for Respondent Rodriguez
hsmallwood@sandovalcountynm.gov

/s/ Cynthia A. Kiersnowski