

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

DANIEL E. CORIZ,

Petitioner,

v.

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

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, and

KEWA PUEBLO
(Also known as Santo Domingo Pueblo),

Respondents.

**PETITIONER CORIZ' OBJECTIONS
TO PROPOSED FINDINGS OF FACT AND
RECOMMENDED DISPOSITION [DOC. 27]**

COMES NOW Petitioner Daniel E. Coriz ("Petitioner Coriz"), by and through his counsel of record, Southwest Indian Law Clinic (Barbara L. Creel and Veronica C. Gonzales-Zamora) and hereby objects to Magistrate Judge Molzen's Proposed Findings of Fact and Recommended Disposition, filed May 15, 2018 [**Doc. 27**] ("Recommendations") in response to the Motion for Immediate Release based on exceptional circumstances and a clear case on the merits, and stating as follows:

PROCEDURAL BACKGROUND

Petitioner Coriz challenges tribal court order issued by Respondent Robert E. Coriz ("Respondent Coriz") as the Governor and presiding Tribal Court Judge for the Kewa Pueblo

based upon five meritorious claims under the Indian Civil Rights Act (ICRA):

- (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 public trial by impartial jury and failure to inform Petitioner Coriz of his right to request an impartial 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 at 8-14]

Here, Petitioner Coriz filed a Motion for Immediate Release pending review of his habeas petition on the merits based upon the Tribal judge's admissions in his Answer. **[Doc. 7]** The Magistrate reviewed the briefing and the heard arguments of counsel. In the Recommendations, the Magistrate correctly concluded and recommended that TLOA requirements of Section 1302 (c) apply in addition to the Section 1302 (a) requirements. **[Doc. 27 at 6-7]** See Johnson v. Tracy, No. CV-11-01979-PHX-DGC, 2012 WL 4478801, at *5 (D. Ariz. Sept. 28, 2012)(unpublished) ("Petitioner's trial was a 'criminal proceeding' at which an Indian tribe 'imposed a total term of imprisonment of more than 1 year.' 25 U.S.C. 1302(c). Petitioner, therefore should have been accorded the procedural protections of . . . the TLOA amendments to ICRA").

The Magistrate further noted that the "Tribal Court concedes that it did not follow at least two of the requirements of Section 1302(c)." **[Doc. 27 at 7]** First, Respondent Coriz admitted via affidavit "that he was the presiding judge and is not an attorney", in violation of Section 1302(C)(3)(B) (requiring "that the presiding judge be: "licensed to practice law by any jurisdiction in the United States."). Id. (citing **Doc. 7-2 at 2**).

Second, Respondent Coriz acknowledged via affidavit that “[t]he Tribal Court does not record or make transcripts of its proceedings,” in violation of Section 1302(C)(5) (requiring that the tribal court “maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.”). *Id.* (citing **Doc. 7-2 at 2**).

In addition, it is uncontroverted that Petitioner Coriz was tried and sentenced without retained or appointed counsel. This is a violation of both the Indian Civil Rights Act basic due process under 25 U.S.C. 1302(a)(6)¹ and the Tribal Law and Order Act felony sentencing requirements under 13 U.S.C. 1302(c)². The Tribe conceded that it did not meet the requirements of TLOA in this case. **[5-3-18 Hrg. Tr. at 23: 15-17]** (counsel for Respondent Coriz stated, “We’ve acknowledged in our pleadings, your Honor, that the tribe does not meet the requirements of 1302(c).”].

Despite finding that the enhanced protections applied to the tribal court, the Magistrate incorrectly concluded that Petitioner did not present a clear case on the merits and recommended an evidentiary hearing on exhaustion and waiver of rights. **[Doc. 14]** Importantly, waiver is not relevant because there is no dispute that he did not waive his right to an audio recording of the proceeding and he did not waive his right to having a law-trained judge, and he did not waive his

¹ 25 U.S.C. 1302(a)(6) (“No Indian tribe in exercising powers of self-government shall . . . deny to any person in a criminal proceedings the right . . . at his own expense to have the assistance of counsel for his defense.”).

² 13 U.S.C. 1302(c) (“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; and “(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.”).

right to other basic due process protections asserted in his Petition for Writ of Habeas which were unaddressed by the Magistrate.

While Petitioner Coriz agrees that the correct legal standard and application of the felony sentencing protections in Section 1302(c), the Magistrate misapprehends the import of the violations. The facts of the record demonstrate both a clear case on the merits and exceptional circumstances, though either is enough for release pending review. As such, Petitioner Coriz respectfully requests that this Court enter an Order adopting in part and rejecting in part the Magistrate's Recommendations.

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

With respect to the Magistrate's Recommendation regarding the appropriate legal standard, Petitioner Coriz does not dispute that the appropriate standard is defined in Pfaff v. Wells, 648 F.2d 689, 693 (10th Cir. 1981). "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, 648 F.2d at 693). 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) (table decision). But see Vreeland v. Zupan, 644 F. App'x 812 (10th Cir. 2016) (distinguishable on the basis that petitioner was filed eight years into his prison term).

For the clear claim on the merits standard, any claim alone is enough to warrant granting relief in Petitioner Coriz' favor. See Alvarez v. Lopez, 835 F. 3d 1024, 1030 (9th Circ. 2016)

(determining that denial of right to jury trial entitled petitioner to relief and “therefore [we] need not reach Alvarez’s alternative argument that the Community violated his confrontation right.”); 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 violation of the right to a law-trained judge or to an “on record” proceeding is enough to warrant relief. See e.g., Johnson v. Tracy, No. CV-11-01979-PHX-DGC, 2012 WL 4478801, at *5 (D. Ariz. Sept. 28, 2012)(unpublished) (“Petitioner's trial was a ‘criminal proceeding’ at which an Indian tribe ‘imposed a total term of imprisonment of more than 1 year.’ 25 U.S.C. § 1302(c). Petitioner therefore should have been accorded the procedural protections of 25 U.S.C. § 1302(c) that were then in effect as a result of the TLOA amendments to the ICRA. Respondent does not dispute that the judge at the trial was not licensed to practice law by a jurisdiction in the United States. 25 U.S.C. § 1302(c)(3). Nor does Respondent dispute that the record of the trial was incomplete. 25 U.S.C. § 1302(c)(5). The Court concludes that the proper remedy is to vacate Petitioner's verdict and sentence”).

Where there is a clear case on the merits of a claimed ICRA violation, automatic reversal is the appropriate remedy. See Alvarez, 835 F. 3d at 1030 (“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, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993)); see also Weaver v. Massachusetts, 137 S. Ct. 1899, 1907 (2017) (discussing structural error).

OBJECTIONS

I. Petitioner Coriz Has Demonstrated a Clear Case on the Merits [Doc. 27 at 4-8]

The Recommendations should be adopted in part and rejected in part, to grant immediate relief on the merits of the petition based upon the Respondent's admitted violations of the federal statute. The Recommendations indicate that the ICRA /TLOA applies, however the recommendation for an evidentiary hearing should be rejected. In the alternative, the Court should grant immediate release, set a briefing schedule, and set an evidentiary hearing should it wish to allow opposing parties to re-litigate the issues.

A. The Express Language of the Statute Prohibits the Tribe's Imposing a Sentence of Even One Year Because Basic Due Process Requirements Were not Met

Not only did Petitioner Coriz present a clear case on the merits, the admissions by opposing counsel proof of the violations, and relief is warranted. Respondent Coriz' novel argument is accepted by no reputable source. Respondent Coriz' attorney attempts to carve out a special exception based upon "tradition" is exactly what the Tribal Enhanced Felony Sentencing requirements were designed to prevent – lengthy sentences for Native American Indians – without the benefit of counsel and without any of the process protections or guarantees enjoyed by everyone else in the United States in municipal, state, or federal courts.

To allow the tribe to sentence to 7 years, is contrary to the U.S. Department of Justice and federal government's own trainings³ and worthy of sanctions for misrepresenting the complete

³ For example, the Department of Justice provides the following summary and enumerated list of the "TLOA felony sentencing" requirements:

TLOA Felony Due-Process Protections

TLOA further amended ICRA and restored limited felony sentencing authority to tribes that meet certain conditions. Specifically, TLOA allows tribes to impose sentences of up to three years' imprisonment and/or a \$15,000 fine per offense for

plain language of the statute.⁴ Rather than inject collateral litigation, the Court should reject Respondent Coriz' weak explanation and find that the ICRA applies, accept that the TLOA requirements apply, and issue immediate relief to Petitioner Coriz, or in the alternative release him pending review of the merits of his petition in full.

Here, each requirement has been violated. Here, not only were there violations of rights listed in Section 1302(c), but also violations of the basic due process rights in Section 1302(a). The Magistrate misunderstands Section 1302(a)(7)(B) and the Indian Civil Rights Act. The Tribal Court is authorized to impose a sentence up to one year for any one offense without

a combined maximum sentence of nine years per criminal proceeding. 25 U.S.C. § 1302(b). To qualify as a felony, a tribal offense must be either a repeat offense or an offense considered to be a felony by any state or by the federal government. For a tribe to charge a defendant with a felony-level offense, the defendant must be afforded the following five due-process protections provided in ICRA, 25 U.S.C. § 1302(c), as amended by TLOA:

- 1) The right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution;
- 2) The right of an indigent defendant to the assistance of a licensed defense attorney, at the expense of the tribal government;
- 3) The right to a criminal proceeding presided over by a judge who is licensed to practice law and has sufficient legal training;
- 4) The right to have access, prior to being charged, to the tribe's criminal laws, rules of evidence, and rules of criminal procedure; and
- 5) The right to a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

Under TLOA's amendments to ICRA, these five rights must be provided to a defendant in any criminal proceeding in which the tribe imposes on the defendant a total term of imprisonment of more than one year. Therefore, these five rights are sometimes referred to as the "TLOA felony sentencing" requirements.

Available at <https://www.justice.gov/tribal/file/796981/download>.

⁴ The Tribe relies on the language of ICRA providing for sentencing "up to a maximum of nine years per proceedings", but a complete reading of the statute requires that Section 1302(c) be read *in tandem*, thus qualifying the Tribe's authority to sentence up to "nine years" as long as the enumerated additional five due process requirements are met, including the right to indigent defense counsel at the Tribe's expense (which was undisputedly not provided in this case). See Section 1302(c)(2).

providing the rights listed in the Section 1302(c). **[Doc 27 at 8]** Specifically, the Magistrate finds, “[h]ad the Tribal Court only charged one of those offenses in a criminal proceeding, it would not have been in violation of 1302(c) – however, the Magistrate failed to analyze the 1302(a) requirements that are equally compelling:

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”

The Magistrate improperly found that the 360 days of the term is presumptively valid. **[Doc. 27 at 4]** This is an incorrect reading of the statute – and renders all of the original protections meaningless. There is no presumptively valid conviction under ICRA. Section 1302(a)(6) of ICRA provides specific protections that apply in all cases – even if the felony sentencing enhancements do not apply. Here, not even the basic due process requirements were met. The tribal court violated Coriz’s procedural due process rights by denying Petitioner a right to a fair trial under 1302(a)(6). The magistrate is wrong as a matter of law in finding that Indian Tribes can effectively do whatever they want as long as the sentence is up to one year. See, e.g. U.S. v. Bundy, 966 F.Supp.2d 1175, 1180 (D.N.M 2013) (finding that a guilty plea that is not entered knowingly or voluntarily was a violation of due process under ICRA, thereby making the plea inadmissible in federal court); Alvarez v. Lopez, 835 F.3d 1024, 1030 (9th Cir. 2016)

(holding that the tribal court violated ICRA by denying the petitioner a right to a jury trial under 1302(a) by not informing him of the right, which was a structural error requiring automatic reversal); Wounded Knee v. Andera, 416 F. Supp. 1236, 1239 (D.S.D. 1976) (finding a due process violation under ICRA where a person served as both tribal judge and tribal prosecutor in a trial because it created an inherently unfair system).

The Tribe conceded that it violated each of the requirements - and these are dispositive.

1. Respondent Cortiz violated Petitioner's right to counsel

According to ICRA under Section 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." The right to retain counsel is a fundamental right. See Gideon v. Wainwright, 372 U.S. 335, 344. ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."). See e.g., Adams v. United States ex rel. McCann, 317 U.S. 269, 278-279 (1942). ("The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law . . . An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in court.").

Here, the Tribal Court denied Petitioner's right to retain counsel at his own expense nor did the Tribal Court give a meaningful opportunity to retain counsel. The tribal court only allowed 6 business days to both retain an attorney and prepare a legal defense. **[Doc. 1-1 to 1-9]** Petitioner Cortiz was given the unreasonable burden to find a lawyer in six days and

consequentially the lawyers he contacted refused to take his case. The attorneys were not able to request discovery or prepare for trial in such short notice. Petitioner Cortiz asked the Tribal Court for a continuance to give him a more reasonable time to find an attorney. The Tribal Court denied his request explaining that one week was enough time. The Tribal Court did not give Petitioner Cortiz his right to obtain counsel by forcing Petitioner Cortiz to adhere to the unreasonable burden of finding counsel, retaining counsel and preparing for a full criminal trial in only 6 days.

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

Furthermore, the Tribal Court denied Petitioner Coriz's right to a fair and public trial by denying his right to request a jury trial under Section 1302(a)(10), his right to an impartial jury under Section 1302(a)(10), and his right to a public trial under Section 1302(a)(6). Petitioner Coriz's trial was not public. **[Doc 1 at 12]** The Respondent Tribal Judge failed to produce the record transcripts or tapes of the trial court proceeding. In the absence of a trial record, the burden necessarily falls on the Tribal Court to show that the trial was public and that violations did not occur. Cf. Bundy v. Wainwright, 808 F.2d 1410, 1416 (11th Cir. 1987) (explaining that under 28 U.S.C. § 2254 there is no "presumption of correctness" if the issue was not addressed at the underlying proceeding and there exists no "adequate written indicia" to resolve the issue when presented to a federal court in a petition for writ of habeas corpus). There is nothing in the record to show that the trial was public, and Respondent Coriz's Answer does not dispute that the public was denied access to Petitioner Coriz's trial. Petitioner is prepared to present the testimony of individuals who requested access to the trial, either as spectators or as witnesses, and were turned away by the Tribal Council/Jury.

Furthermore, the Tribal Court did not provide an impartial jury. Respondent Coriz incorrectly posited that the jury was impartial because none of the tribal officers who served as jurors were neither witnesses nor involved in the investigation. **[Doc. 7 at 11]** The jurors were biased because Petitioner Coriz knew and/or worked with most of the jurors during his time as governor. **[Doc. 11-7]** Had Petitioner Coriz been given the right to request a jury, he could have requested a new jury that was impartial. The Tribal Court did not inform him of his right to request to a jury. Respondent Coriz may have conceded since the jury is the Tribal officers that “no request for a jury is needed.” **[Doc. 7-2]** .

3. Respondent Coriz violated Petitioner’s right to have a compulsory process for obtaining witnesses in his favor

The Tribal Court denied Petitioner Coriz’s right to have a compulsory process for obtaining witnesses in his favor by failing to notify Petitioner Coriz of his trial in a timely manner. For example, in Sisseton-Wahpeton Sioux Tribe v. Seaboy, 17 Indian L. Rep. 6027, 6027 (Intertribal Ct. App. 1989), the defendant was arraigned on May 18, 1988 and a hearing was scheduled for June 8, 1988. Id. On June 6, 1988, the defendant asked for a continuance and the tribal court granted continuance but the tribal court did not set a new trial date. Id. On August 25, 1988, while in jail, the defendant was given notice that his new trial date was scheduled for September 1, 1988. Id. He was released three days before his trial and therefore, defendant had only three days to prepare his trial. Id. The Intertribal Court of Appeals held that the tribal court denied defendant’s constitutional right to compulsory process and assistance of counsel under Section 1302(a)(6). Id. at 6028. The Intertribal Court of Appeals found that “four working days afforded to the defendant were not sufficient.” Id.

Here, Petitioner Coriz had only six business days to prepare for trial from the day he was released from jail to the date of his trial. This short time frame did not allow Petitioner Coriz sufficient time to obtain witnesses in his favor. This is a violation of his due process rights. Furthermore, without the benefit of counsel and without sufficient time to prepare, Petitioner Coriz was unable to secure or exercise his rights to a compulsory process to present evidence in his favor, examine or challenge evidence against him or cross-examine any witnesses. In this case, however, the Tribe has conceded that the entire record is before the Court, and it fails to provide any evidence of the charges, much less guilt.

B. An Evidentiary Hearing will not Cure the Tribe's Statutory Violations or Aid the Court in its Determination as a Matter of Law

The Magistrate's proposed evidentiary hearing should be rejected because a factual inquiry is not necessary and additional facts will not cure the ICRA violations on the record. There is nothing in TLOA that allows for the enhanced felony requirements to be waived; nor has that argument been advanced by counsel with respect to the other, additional violations of basic due process requirements, and certainly the enhanced due process requirements to enlarge sentencing. Assuming *arguendo* that the felony protections can be waived, the Court has the entire record before it. There was no waiver.

There are no remaining factual issues that can be addressed in an evidentiary hearing because waiver of counsel would not remedy the other, additional blatant violations, one of which alone is enough to warrant a grant of relief. Alvarez, 835 F. 3d at 1030 ("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, 508 U.S. at 281-82); see also Weaver, 137 S. Ct. at 1907 (discussing structural error).

The Magistrate misses the first requirement that the right to counsel under ICRA be equal with U.S. constitutional guarantees to effective assistance. See 13 U.S.C. Section 1302(c) (“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.”). The clearly-established Supreme Court law on the right to counsel warrants a finding of clear violation and Petitioner Coriz should be granted relief on the merits.

The Recommendations are contrary to the express requirements of the law and are therefore wrong as a matter of law. Because a question of law is solely within the Court’s discretion, an evidentiary hearing is not necessary. See, e.g., Fed. R. Civ. Pro. 56 (entitling litigants to judgment on questions of law where no issue of fact exists). Immediate relief and release is appropriate in this case.

C. Exhaustion is not a Jurisdictional Pre-requisite Where Exhaustion Would be Futile Because its Appellate Procedure and Tribal Appellate Court Body are Non-Existent.

The Magistrate’s Recommendations acknowledge that exhaustion “is not a jurisdiction prerequisite to review,” rather it is based on “principles of comity.” Valenzuela v. Silversmith, 699 F.3d 1199, 1206 (10th Cir. 2012). [**Doc. 27 at 8**] However, before bringing a habeas petition to federal court under Section 1303, a petitioner must exhaust tribal court remedies or meet one of its exceptions. Id. at 1206-07. 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 violative of express jurisdictional prohibitions; or (3) exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction. Id. at 1207.

Here, the third exception applies because the Tribal Court did not provide Petitioner Coriz with an adequate opportunity to challenge the Tribe's ruling because the Tribe's appellate body and appellate procedure is non-existent. Rather the Respondent required the petitioner to sign an "advisement of rights" document during his arraignment, informing him of his right to appeal, but did not provide any written procedures explaining how to do so. [**Doc. 7-1 at 9; 5-3-18 Hrg Tr. at 25:5 - 14** (The Court asked counsel for Respondent Coriz where in the record the provisions relating to an appeal were located, and counsel responded, "So much of it is not written...")]] Per the "complete record" provided by Respondent Coriz, the Tribe does not appear to have provided Petitioner with any forms for an appeal after his conviction, or otherwise notify Petitioner of the proper procedure for an appeal. In addition, the Tribal Court system does not operate an appeals court, let alone provide appellate procedures. See Santo Domingo, TRIBAL COURTS (May 25, 2018), available at <http://santodomingotribe.org/tribal-courts-2/>. For example, Toya v. Toledo, the court recommended that "because the Tribal Code did not provide any avenue for seeking post-conviction relief, any attempt at pursuing post-conviction relief would have been futile." No. CIV 17-0258 JCH/KBM, 2017 WL 3995554, at *8 (subsequently adopted by the District Court). In Toya, the Tribal Code for the Jemez Pueblo contained no rule or document describing the appellate process or habeas proceedings. Id. The Court in Toya which recommended that absent avenues for post-conviction relief, pursuing relief would be futile. The same applies in this case, because absent an avenue for an appeal (i.e. appellate procedure), pursuing relief in tribal appellate court would be futile. There is nothing in

the record , which Respondent Coriz alleges is a complete record, reflecting that Petitioner Coriz was provided any further information beyond that his right to appeal existed – nothing in writing about how long he had to appeal, to whom to appeal, how to provide notice of appeal or otherwise.

Petitioner Coriz recognizes that an “aggrieved party must have actually sought a tribal remedy and not merely allege its futility.” Toya v. Toledo, No. CIV 17-0258 JCH/KBM, 2017 WL 3995554, at *3. However Tenth Circuit precedent clarifies that “tribal remedies, if existent, are exclusive.” White v. Pueblo of San Juan, 728 F.2d 1307, 1312 (10th Cir. 1984). Here, a tribal remedy does not exist for Petitioner to exhaust. This Court should not require the exhaustion of tribal remedies based on a mere statement that there is a right to an appeal, without any showing of the tribe’s appellate body or appellate procedure, or any showing that Petitioner Coriz was informed of the procedure to appeal or challenge his judgment and sentence.

In addition, the purposes of exhaustion would not be served in this case. The court in Venezuela listed the purposes of the tribal exhaustion rule: (1) it reinforces Congress’s strong interest in promoting tribal sovereignty, including the development of tribal courts; (2) it assists the orderly administration of justice in federal courts by allowing a full record to be developed in the tribal courts before either the merits or any question concerning appropriate relief is addressed in federal courts; and (3) the rule gives a tribal court a full opportunity to rectify any errors it may have made. 699 F.3d 1199. These purposes serve the principles of comity, but here comity is irrelevant because the Tribal Court does not provide for the basic, fundamental due process protections under ICRA. Purposes one and two cannot be served because the Court cannot promote tribal sovereignty or the development of the Tribal Court, if the Tribe cannot

assist the federal court in the orderly administration of justice with a full record, because the respondent does not allow the recording of trial proceedings. [Doc. 7-2 at 2] Thus, even if the tribe had an appellate body, federal review would be futile, because the federal courts would not have a record of the merits or questions concerning the appropriate relief. Thus, a tribal remedy in the Tribal Courts is non-existent and futile concerning federal review. The federal courts would be providing the Tribe a disservice if the court allowed an evidentiary hearing to rectify the Tribe's errors. Rather, the court should factor this error in its decision to grant habeas relief to encourage Kewa Pueblo to record its trial proceedings, among other things, to preserve its judgement and sentencing of defendants.

Therefore, in this instance, the tribal remedy exhaustion exception applies because the Tribal Court appeal is futile when its tribal appellate court body and its appellate procedures are non-existent, thereby precluding an opportunity to challenge tribal court's rulings.

II. Petitioner Coriz Has Demonstrated Exceptional Circumstances [Doc. 27 at 4]

The Recommendation that this Court find that "Petitioner has not shown that exceptional circumstances exist in this case" [Doc 27 at 4, 9] should be rejected. While it is true that a serious deterioration of health would warrant relief, it is not the only issue that matters. And he does show other exceptional circumstances.

Under the standard in Pfaff v. Wells, 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, 648 F.2d 689, 693). The court finds this standard persuasive, if not bindings. [Doc. 27 at 3] The Tenth Circuit

has held that exceptional circumstances or “special circumstances include (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. [**Doc. 27 at 4** (quoting Barnett v. Hargett, 166 F.3d 1220 at *1 (10th Cir. 1999))]. 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, 2012 WL 12964319, at *1 (USDC, C.D. Cal. June 29, 2012).

A. Petitioner Coriz Has Raised Substantial Claims with a High Probability of Success

The Magistrate found that Petitioner was subjected to ICRA violations under § 1302(a) and (c). See Doc. 14 (Petitioner was denied his right to assistance of retained or appointed counsel; Respondent failed to ensure the presiding judge had sufficient legal training and was license to practice; Respondent failed to provide a public trial by an impartial jury and failed to inform Petitioner of his right to request an impartial jury; Respondent violated Petitioner’s due process rights by allowing an unauthorized tribal officer to issue petitioner Coriz’s arrest warrant and by creating a new summary process inconsistent with traditional tribal law and customs; and Respondent violated the maximum one year sentence under § 1302(c)); see also Doc. 27 at 7 (“the Tribal Court concedes that it did not follow at least two of the requirements of § 1302(c)”).

B. Petitioner’s Incarceration Poses a Serious Deterioration of Health while Incarcerated

The second criteria is met, because the incarceration of Petitioner Coriz poses a serious deterioration of health. “Every day Petitioner spends in prison compounds the ‘substantial harm’

that he has suffered on account of imprisonment based upon [illegal] conviction.” Newman v. Rednour, 917 F.Supp. 2d 765, 789 (N.D. ILL. 2013). The petitioner has spent up to 5 months in a detention facility and everyday he is in jail is a day he doesn’t get back. **[Doc. 1-9]** While incarcerated, pending review, Petitioner Coriz, his family, and his community suffer. Petitioner is prepared to present additional evidence regarding the specific harms of incarceration: he cannot provide for his family, he cannot care for his elderly parents, he cannot spend time with his wife, and he is unable to care for and raise his six year-old daughter. Petitioner’s traditional community, for which Petitioner Coriz is a leader, is also harmed by his continued incarceration.

C. Petitioner has Experienced an Unusual Delay in the Appeal Process

The third requirement is met because the Petitioner has been incarcerated for almost five months now without an appellate final judgment concerning his criminal conviction. As further discussed in **Part I(C)** of this brief, requiring Petitioner Coriz to exhaust the tribal appellate procedure in Kewa Pueblo would be futile. Therefore, the only remedy is a federal review by this court. The longer the court delays a ruling on Petitioner’s conviction, the longer Petitioner Coriz suffers irreparable harm.

Under the particular circumstances, the Court should grant Petitioner’s request for immediate release in the alternative, because there is a high probability of success, the serious deterioration in the health of the petitioner, his family, and his community, collectively, and because he is suffering irreparable harm, including a deterioration of health, while he awaits determination of the merits of his Petition.

CONCLUSION

For these reasons, the Proposed Findings and Recommended Disposition should be rejected, in part and adopted in part. This Court should find that although the correct legal standard was applied, it was misapplied resulting in a flawed analysis and ultimate conclusion. The admitted and other violations of ICRA in the record are enough to warrant immediate release and a reversal of the Petitioner's conviction, or in the alternative immediate release of Petitioner Coriz while the parties conduct additional discovery with expedited deadlines and conduct an evidentiary hearing on the merits of the remaining violations asserted in the petition.

Dated: May 29, 2018

Respectfully Submitted,

SOUTHWEST INDIAN LAW CLINIC

By /s/ Barbara L. Creel

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of May, 2018, I filed the foregoing PETITIONER 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:

Heather Renee Smallwood – hsmallwood@sandovalcountynm.gov
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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:

Kewa Pueblo
Attn: Thomas Moquino, Jr., Governor
P.O. Box 99
Santo Domingo Pueblo, New Mexico 87052
Respondent Kewa Pueblo

/s/ Barbara L. Creel
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