The Honorable Marsha J. Pechman
The Honorable S. Kate Vaughan

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

CASSANDRA SELLARDS-RECK,

Petitioner,

v.

DAVID SHOOK, et al.,

Respondents.

Case No. 3:23-CV-5516-MJP-SKV

COWLITZ TRIBAL RESPONDENTS' REPLY IN SUPPORT OF ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

Noted for Hearing:
Friday, October 6, 2023

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I. INTRODUCTION

This Court's review of Tribal proceedings is limited and deferential. The only question in considering a Tribal conviction on habeas corpus review is whether the Tribe complied with the Indian Civil Rights Act. Here, the Cowlitz Tribal Court did so.

In contesting the Tribal Respondents' Answer, Ms. Sellards-Reck recycles her arguments on exhaustion, now adding claims that, because the Tribal Court of Appeals—like every federal circuit in the country—has a presiding judge for each 3-judge panel, its "brain is not functioning," alongside a conspiracy theory rooted in an obvious typographical error in another case. *See* Dkt. No. 25 at 10; Dkt. No. 29 at 2–3.

As for the merits, the response drops virtually every claim raised in the Petition save one about judicial bias. But even this claim finds no support in the cases defining due process, much less those addressing the Act's limits on Tribal authority. The Petition thus fails on the merits no matter the Court's determination on exhaustion.

The Court should deny the Petition.

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II. ANALYSIS

A. Courts review Tribal Court proceedings only for compliance with the Act's substantive guarantees.

Ms. Sellards-Reck calls "absurd" the claim that "the Tribe is not bound by the Constitution." Dkt. No. 25 at 5. But that is exactly what the U.S. Supreme Court and the Ninth Circuit have held. *See, e.g.*, *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (explaining that Tribes are "separate sovereigns pre-existing the Constitution" and that they maintain this authority "unless and until Congress acts" (internal citations and quotation marks omitted)); *Tavares v. Whitehouse*, 851 F.3d 863, 865–66 (9th Cir. 2017) (explaining that Tribes are exempt from constitutional restraints and bound by statutes like the Act).

So it is the Act that limits the authority of the Cowlitz Tribal Court. And it is the Act whose substantive guarantees the Tribal Court must honor.

B. Because Ms. Sellards-Reck's appeal in Tribal Court remains pending, she has failed to exhaust her remedies.

Ms. Sellards-Reck must exhaust her remedies in Tribal Court before the Petition can proceed. She has failed to do so. In arguing otherwise, the response relies on inapposite authorities and irrelevant facts. In any event, excusing the exhaustion requirement would not justify granting the Petition; it would merely allow the Court to reach the Petition's merits, which are deficient.

The futility exception to exhaustion is an extraordinary remedy. *See Grand Canyon Skywalk Dev., LLC v. 'SA' Nyu Wa Inc.*, 715 F.3d 1196, 1203 (9th Cir. 2013) (explaining that the futility exception "applies narrowly to only the most extreme cases"). So applying it here, when the Tribal Court of Appeals has already issued two orders but not yet received briefing on Ms. Sellards-Reck's claims, is improper.

Ms. Sellards-Reck's authorities are not to the contrary. In *Krempel v. Prairie Island Indian Community*, for instance, it was "undisputed that *no* tribal court existed," not even a

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trial court. 125 F.3d 621, 622 (8th Cir.1997) (emphasis added).[1] And, as the response acknowledges, *Johnson v. Gila River Indian Community* involved "a two-year delay" in waiting for a briefing schedule, an argument date, or any meaningful response to the notice of appeal. *See* 174 F.3d 1032, 1036 (9th Cir. 1999). The circumstances here are meaningfully different—the analysis should be as well.

As for Ms. Sellards-Reck's host of purportedly damning facts, none show that exhaustion would be futile. The response musters no authority for its claim that a court of appeals must have a separate clerk from the trial court. The Clerk of Court does not decide the appeal; the judges do. Next, ordinary human errors in email filing do not a constitutional violation make. Ms. Sellards-Reck suggests in a supplemental declaration from her counsel that a typo in the email service in a separate case shows evidence of a plot against appellants in the Tribal Court. *See* Dkt. No. 29 at 2–3. This suggestion does not merit a response. The same is true of the response's curious suggestion that the Tribal Court's "brain is not functioning" because orders in two different cases identify two different presiding appellate judges. *See* Dkt. No. 25 at 10; Dkt. No. 26 at 4 (describing Judge Penoyer as the "Presiding Appellate Judge"—not the "Chief Judge"). It is routine in every federal circuit for the senior active judge of a three-judge panel to "preside." The response describes nothing suspicious.

Finally, the response overlooks that the two appellate orders issued to date either favor Ms. Sellards-Reck or reject the Tribe's arguments. *See* Dkt. No. 21-4 (granting indigency status to Ms. Sellards-Reck and compelling the Tribe to pay for her defense); Dkt. No. 21-5 at 2 ("The Court, of course, will use the Cowlitz appellate rules.").[2]

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[1] So too with the response's new authorities. *See Comstock Oil & Gas Inc. v. Ala. & Coushatta Indian Tribes of Tex.*, 261 F.3d 567, 572 (5th Cir. 2001) (noting that no Tribal court existed and that the Tribal judicial code was adopted after the federal claim was filed); *Findleton v. Coyote Valley Band of Pomo Indians*, 27 Cal. App. 5th 565, 575 (2018) ("[T]here was no evidence … indicating there was a tribal court in existence in 2012 when Findeton first filed his petition.").

[2] The Tribe asked the Court of Appeals not to decide whether it had authority to adopt procedural rules in criminal appeals and to instead allow the parties to stipulate to appropriate procedures. *See* Ex. 13 at 7–9 (attached to this reply and consecutively numbered from the exhibits attached to the Answer).

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In sum, the Cowlitz have a functional—if nascent—Court of Appeals. That Court is processing Ms. Sellards-Reck's appeal. It should be allowed to complete that process before this Court considers a habeas petition under the Act. In any event, even if Ms. Sellards-Reck need not comply with the exhaustion requirement, her claims fail on the merits.

C. Because the Act does not mandate a particular process for selecting a judge, the Petition's claim regarding judicial bias fails.

The response ignores or misdescribes the Answer's arguments about judicial bias, and thus fails to respond to them. It also morphs the claim from one sounding in judicial bias to asking whether Ms. Sellards-Reck had a chance to put on a defense. *See* Dkt. No. 25 at 13 (arguing that the Petition's "bias" argument "is perhaps not the best way to frame the issue"). But no matter the lens through which the Court examines the claim, the response cannot change several fundamental principles:

- It is for a state—or, by extension, a Tribe—to determine whether to separate legislative, executive, and judicial powers, and "its determination one way or the other cannot be an element in the inquiry, whether the due process of law … has been respected …." *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902)
- A criminal defendant's Sixth Amendment right to present a defense is "not unlimited, but rather is subject to reasonable restrictions." *United States v. Scheffer*, 523 U.S. 303, 308 (1998).
- To violate due process, evidentiary rulings must be so egregious that they render the trial fundamentally unfair. *See Estelle v. McGuire*, 502 U.S. 62, 68–73 (1991).
- The Supreme Court has held for 130 years that there is no right to appeal from a criminal conviction. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("There is, of course, no constitutional right to an appeal …."); *McKane v. Durston*, 153 U.S. 684, 687 (1894) ("A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, … is not now, a necessary element of due process of law.").

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Applied here, these principles cement the need to deny the Petition on the merits. The record shows that the trial judge was the same judge who had served as the Tribal Court's sole trial judge since the Court's inception. Nothing supports the suggestion that her re-appointment reflected an attempt to rig the trial. To the contrary, deviating from a standard process is what would risk depriving a defendant of due process.

In response, Ms. Sellards-Reck maintains her contention that the judge's selection by the Tribal Council—query who else could appoint a Tribal Court judge—taints the proceedings. But that logic leads to untenable outcomes. For instance, it would mean that any prosecution of a political figure presided over by a judge appointed by the defendant's political opponent violates due process. That would doom the prosecution of Donald Trump unfolding in the District of Columbia right now, not to mention dozens of prosecutions of legislators for various crimes throughout our history. The Petition's logic would also mean that, so long as her victim and the witnesses were fellow Tribal Council members, Ms. Sellards-Reck could commit future assaults without fear of prosecution by the Cowlitz Tribe. Indeed, the Petition seems to concede as much, suggesting that the way "to obtain a conviction in a fair and impartial manner" would be to refer "the matter to a federal prosecutor, or, in the alternative, to a more neutral tribal forum such as Tulalip …." Dkt. No. 1 at 14. But little could be more dismissive of Tribal autonomy than contending that the Cowlitz may not prosecute their own officials who assault fellow Tribal members in the Tribe's own courts. And nothing in the Act or the constitutional guarantees it incorporates supports this suggestion.

Ms. Sellards-Reck's effort to transform her claim into a violation of her right to present a defense likewise fails. *See* Dkt. No. 25 at 13–15. That even the examples of precluded testimony she plucks from the transcript don't support her theory is telling. For example, stopping a witness—neither the defendant nor the victim nor the individual Ms. Sellards-Reck claims to have been protecting—from testifying about her work experience does not violate the Constitution. *See id.* at 15. Neither does limiting testimony about "the atmosphere in the room" *after* the assault. *See id.* at 14.

To the contrary, the record shows that Ms. Sellards-Reck freely testified in her own defense and called several witnesses to bolster her defense-of-others claim. *See, e.g.*, Dkt. No. 21-1 (Trial Tr.) at 597:9–619:14, 623:4–631:14, 664:23–673:19 (Sellards-Reck); *id.* at 483:16–494:5, 505:25–517:19, 523:4–533:12 (Cloquet) *id.* at 561:10–583:3 (Mosback). The testimony included evidence about Ms. Cloquet's medical condition, *e.g.*, *id.* at 488:15–489:11, and the Tribal Court made clear that the defense could ask questions about the events on the day of the assault, *e.g.*, *id.* at 497:25–500:21. Nitpicking evidentiary rulings does not prove that the trial was fundamentally unfair. *See Estelle*, 502 U.S. at 68–69. Those rulings are part and parcel of every trial.

Nor does the response justify Ms. Sellards-Reck's failure to raise this issue with the Tribal Court. She made no effort to dismiss the charges or to file a post-trial motion alleging judicial bias. Instead, she presented this claim for the first time in this Court.

Last, Ms. Sellards-Reck peppers her response with several non-sequiturs that do not bear on her judicial bias claim—or any of its permutations. She demands, for instance, that if "the Tribal Respondents really think the due process clause should be interpreted differently for Indians than for anyone else, they should explain exactly how." Dkt. No. 25 at 12–13. But the Court would search the Answer in vain for any such suggestion. And the Answer tackled the Petition's due process claims head-on. *See, e.g.*, Dkt. No. 21 at 6–7, 10, 12–13. Nor does Ms. Sellards-Reck explain the significance of the Cowlitz Constitution's protecting the same rights "enjoyed by non-Indian citizens under the Constitution of the United States." Dkt. No. 25 at 11. That is a matter of Cowlitz law not subject to this Court's review. To see why, suppose the Court faced a habeas petition aimed at a state-court conviction. And suppose that state law mandated compliance with the Constitution as interpreted by the Tenth Circuit. Under the narrow statute authorizing this Court's review, however, habeas relief would be appropriate only if the state court's decision were "contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*." 28 U.S.C. § 2254(d)(1) (emphasis added). So too here. The guarantees of

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Cowlitz law are of no moment unless they transgress the requirements of the Act.

D. Ms. Sellards-Reck fails to respond to the other arguments in the Answer.

The Answer addressed Ms. Sellards-Reck's other claims of error. In response, she contests none of these arguments, failing to cite—much less distinguish—the authorities supporting the Answer. She claims, however, that the "Tribal Respondents have ignored most of the allegations of systemic bias and trial specific bias raised in the petition." Dkt. No. 25 at 13.

Comparing the Petition's claims to the arguments in the Answer and those in Ms. Sellards-Reck's response should settle the question:

Petition's Claim	Tribal Respondents' Argument	Authority	Sellards-Reck's Response
The Tribal Council's hiring the trial judge tainted the proceedings (Dkt. No. 1 at 17–18)	Due process does not limit a state's—or a Tribe's—freedom to separate its governmental powers as it sees fit (Dkt. No. 21 at 7)	*Dreyer v. Illinois*, 187 U.S. 71, 84 (1902)	None
The Tribal Court improperly limited the parties' voir dire, leading to a biased jury (Dkt. No. 1 at 19–20)	The Act's jury right differs on its face from the Sixth Amendment's guarantee of an impartial jury (Dkt. No. 21 at 8)	• U.S. Const. amend. VI • 25 U.S.C. § 1302(a)(10)	None
The Tribal Court improperly limited the parties' voir dire, leading to a biased jury (Dkt. No. 1 at 19–20)	Congress's amending the Act in 2013 to require an impartial jury in domestic-violence cases suggests that the same requirement does *not* apply generally (Dkt. No. 21 at 8–9)	25 U.S.C. § 1304(d)(3)	None

The Tribal Court improperly limited the parties' voir dire, leading to a biased jury (Dkt. No. 1 at 19–20)	The Tribal Court's voir dire tracked the U.S. Constitution's requirements in any event; trial judges have broad discretion in deciding what to ask prospective jurors (Dkt. No. 21 at 9)	• *United States v. Tsarnaev*, 595 U.S. 302, 312–13 (2022) • *Jeffries v. Blodgett*, 5 F.3d 1180, 1189 (9th Cir. 1993)	None
"The appearance of bias from the prosecutor's office is even stronger than the judge" because the Tribe "hand-selected the prosecutor" (Dkt. No. 1 at 18)	Nothing in the Act or due process prohibits a special prosecutor, which jurisdictions around the country often employ (Dkt. No. 21 at 10)	• Fed. R. Crim. P. 42(a)(2) • *Green v. Green*, 642 A.2d 1275, 1280 (D.C. 1994)	None
The Tribal Court's evidentiary rulings were improper: • Limits on using the words "trauma" and "intimidation" • Limits on evidence about Tribal politics • Limits on demonstrative evidence • Excluding evidence of a 911 call and Sellards-Reck's medical training (Dkt. No. 1 at 10–11, 20–21)	Nothing in the Act or the U.S. Constitution supplies a basis for reviewing the Tribal Court's evidentiary rulings (Dkt. No. 21 at 11)	• U.S. Const. amend. V & VI • 25 U.S.C. § 1302	"Any court, tribal or otherwise, has a duty to provide an atmosphere where vulnerable and threatened witnesses can feel safe and speak their mind, *within certain parameters*, of course." (Dkt. No. 25 at 13–15) (emphasis added)

			But: • No discussion of the "parameters" • No authority cited
Deleting the defense's proposed language on the burden of proof for defense of others "denied Sellards-Reck her constitutional right" (Dkt. No. 1 at 21–22)	A jury instruction requiring an affirmative defense like defense of others to be proven by the defendant conforms to the U.S. Constitution (Dkt. No. 21 at 11–12)	*Martin v. Ohio*, 480 U.S. 228, 236 (1987)	None
Ms. Sellards-Reck's "detention is illegal because the tribal court did not properly record the trial" (Dkt. No. 1 at 16)	The Act requires a Tribe to maintain a record of its criminal proceedings only when it imposes a term of imprisonment of more than 1 year (Dkt. No. 21 at 12)	25 U.S.C. § 1302(c)	None
There is "no court of appeals" (Dkt. No. 1 at 19)	The absence of a right to appeal in Tribal court does not violate due process	*Mullally v. Havasu Landing Casino*, No. EDCV 071626-VAP (JCRx), 2011 WL 13174955, at *13–14 (C.D. Cal. May 4, 2011)[3]	None

Nor has Ms. Sellards-Reck contested the Answer's contention that no evidentiary hearing is needed to decide these claims. In short, the response has effectively abandoned all but one of the Petition's original claims on the merits. Because that remaining claim fails,

[3] As noted above, the Constitution does not guarantee criminal defendants a right to appeal.

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dismissal is appropriate.

III. CONCLUSION

For these reasons and those in the Answer, the Cowlitz Tribal Respondents ask the Court to dismiss or deny the Petition with prejudice.

Dated: October 6, 2023

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Counsel certifies that this memorandum contains 2,824 words, in compliance with the Local Civil Rules.