

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

RONALD F. ROMERO,
Petitioner,

v.

No. CV 09-0232 RB/DJS

DONNA GOODRICH, Warden
Gallup McKinley Adult Detention Center

AND

PUEBLO OF NAMBÉ,
Respondents.

**REPLY TO PETITIONER'S RESPONSE TO RESPONDENT NAMBÉ'S MOTION TO
DISMISS AND REPOSE TO PETITIONER'S VARIOUS MOTIONS**

COMES NOW, the Pueblo of Nambé (hereinafter "Respondent Nambé"), through its attorneys, CHESTNUT LAW OFFICES (Joe M. Tenorio and Peter C. Chestnut) and hereby replies to Petitioner's Response to Respondent Nambé's Motion to Dismiss filed on May 13, 2009 and responds to Petitioner's Motion to Compel Production of a Record, Motion for an Evidentiary Hearing, and Motion to Not Consider the Extra Record Affidavits all filed by Petitioner on May 13, 2009.

I. RESPONDENT NAMBÉ COMPLIED WITH THIS COURT'S ORDER DATED MARCH 18, 2009.

A. RESPONDENT NAMBÉ PROVIDED THIS COURT WITH ALL COPIES OF PLEADINGS PERTINENT TO THE ISSUE OF EXHAUSTION FILED BY THE PETITIONER IN THE SENTENCING AND APPELLATE COURTS, TOGETHER WITH COPIES OF ALL MEMORANDA FILED BY BOTH PARTIES IN SUPPORT OF OR IN RESPONSE TO THOSE PLEADINGS.

This Court ordered Respondent Nambé, inter alia, to provide "copies of any pleadings pertinent to the issue of exhaustion which was filed by Petitioner in the sentencing and appellate courts, together with copies of all memoranda filed by both parties in support of or in response to

those pleadings.” *March 18, 2009 Order (emphasis in original)*. Respondent Nambé complied with the March 18, 2009 Order when Respondent Nambé filed its Answer on April 17, 2009. Respondent Nambé’s Answer disclosed five (5) documents, including pleadings, related to the issue of exhaustion of tribal court remedies. *See Respondent Nambé’s Answer at p. 1-2, and Attachments 1 through 5 of Respondent Nambé’s Answer*. Respondent Nambé’s Answer also informed the Court that “no memoranda [were] filed by either party in support of or in response to Petitioner’s Notice of Appeal.” *Respondent Nambé’s Answer, p. 1*. Respondent Nambé has fully complied with this part of the Order.

B. RESPONDENT NAMBÉ PROVIDED THIS COURT WITH COPIES OF ALL TRIBAL COURT FINDINGS AND CONCLUSIONS, DOCKETING STATEMENTS, AND OPINIONS ISSUED IN PETITIONER’S POST-CONVICTION OR APPELLATE PROCEEDINGS.

This Court ordered Respondent Nambé to provide, inter alia, copies of “all tribal court findings and conclusions, docketing statements and opinions issued in Petitioner’s post conviction or appellate proceedings.” *March 18, 2009 Order*. Petitioner claims that he “has reason to believe that Respondent Pueblo of Nambé failed to file all findings and conclusions and docketing statements.” *Petitioner’s Response, p2*. Respondent Nambé responds to each allegation below:

i. RESPONDENT NAMBÉ COMPLIED WITH THE COURT’S ORDER TO PROVIDE A DOCKETING STATEMENT.

Petitioner claims that Respondent Nambé failed to submit a docketing statement which was purportedly sent by the Nambé Tribal Court to the Southwest Intertribal Court of Appeals (“SWITCA”) along with a certain “prosecution file as the record on appeal.” *Petitioner’s Response, p.6* The docketing statement, which Petitioner Romero states is attached to

Petitioner's Response as Attachment D is not so attached¹. Upon information and belief, Respondent Nambé is not aware of any existence of a docketing statement related to this Petition. Petitioner further alleges that SWITCA should not have considered on appeal the above referenced "prosecution file." The SWITCA opinion does not indicate, either in the body of the opinion or in any footnote, that the appeals court relied on such "prosecution file" in making its decision. *Love v. Butler*, 952 F.2d 10 (1st Cir. 1991) (suggestion that the Appeals Court "relied on" excluded testimony in reaching its decision is frivolous where reference to the excluded testimony was not made in the body of the decision, but in a footnote).

ii. RESPONDENT NAMBÉ COMPLIED WITH THE COURT'S ORDER TO PRODUCE ALL FINDINGS AND CONCLUSIONS.

Petitioner Romero attached the Judgment and Sentence to his Petition. The Judgment and Sentence was issued by the Nambé Tribal Court on June 15, 2007. The local rules of civil procedure prohibit Respondent Nambé from attaching the same document that has been previously attached. D.N.M.LR-Civ. 10.7. Other than the Judgment and Sentence, which Petitioner Romero already attached to his Petition, there are no other written findings and conclusions issued in Petitioner's trial or post conviction proceedings. Any findings and conclusions made by the Nambé Tribal Court during trial and/or at the post-conviction proceedings are in the form of cassette tape recordings. Contrary to Petitioner's claim that Respondent Nambé provided Petitioner with only 4 of the 5 tapes, a total of five (5) tape cassettes have been made available to Respondent Nambé. *See Petitioner's Response, p5; Respondent Nambé's Motion to Dismiss, p7*. Further, contrary to Petitioner's statements that Respondent Nambé has prevented Petitioner or this Court from access to the tapes, Respondent Nambé has made these tapes available to Petitioner and this Court. *See Petitioner's Response,*

¹ Attachments A through C, which normally precede Attachment D are also not attached to Petitioner's Response.

p6; Respondent Nambé's Motion to Dismiss, p7. To remove any doubt as to the existence of these 5 cassette tapes and their contents, Respondent Nambé will submit these tapes to the Court. While the sound quality varies greatly, they are what is available. We will hand deliver these tapes on the day we electronically serve this pleading, and file a certificate of service to that effect.

Petitioner Romero misinforms this Court that Respondent Nambé has the duty to produce the record, which, according to Petitioner, includes a transcript of the proceedings in tribal court. *Petitioner's Response, p4.* This misinformation stems from Petitioner's reliance on 28 U.S.C. §2254, and rules promulgated thereunder. Even though Petitioner recognizes that 28 U.S.C. § 2254 is not applicable to his Petition, Petitioner insists that this statute requires Respondent Nambé to either provide a transcript of the trial and/or post-conviction proceedings or to indicate whether any transcripts are available. The proper statute governing this Petition is 28 U.S.C. §2241, et seq. Concerning transcripts, 28 U.S.C. §2247 informs the Court that transcripts of proceedings upon a plea and sentence are properly admissible as evidence. Neither the Court's Order of March 18, 2009 nor 28 U.S.C. § 2247, however, puts the burden on Respondent Nambé to produce such transcripts. As a non-gaming tribe with very limited financial resources, the production of a transcript would be very costly to Respondent Nambé. Contrary to Petitioner's assertion, Respondent Nambé does not already have a transcript and Respondent Nambé has never cited to the transcript in any of its pleadings. *Petitioner's Response, p8.* Petitioner misinforms this Court in suggesting that Respondent Nambé already has a fully transcribed transcript of the trial and post-conviction proceedings. Upon information and belief, it is Petitioner who has already procured a transcript of the trial proceedings. As supported in Part III of this Reply, the Court may summarily dispose of this Petition, without resort to the transcript,

where Petitioner's arguments are readily susceptible to resolution without resort to such transcript. *Love v. Butler*, 952 F.2d 10, 15 (1st Cir. 1991) (per curiam). In the alternative, Respondent Nambé would not object to Petitioner's production of the transcript, provided that Respondent Nambé is provided an opportunity to review its contents beforehand.

iii. RESPONDENT NAMBÉ COMPLIED WITH THIS COURT'S ORDER TO PROVIDE ALL OPINIONS ISSUED IN PETITIONER'S POST-CONVICTION OR APPELLATE PROCEEDINGS.

Petitioner Romero attached the Judgment and Sentence to its Petition. The Judgment and Sentence was issued by the Nambé Tribal Court on June 15, 2007. The local rules of civil procedure prohibit Respondent Nambé from attaching the same document that has been previously attached to a Court filing. D.N.M.LR-Civ. 10.7. Respondent Nambé attached the SWITCA decision, dated November 7, 2007, to its Answer, which may be considered an opinion issued in Petitioner's appellate proceedings. Respondent Nambé is aware of no other opinions issued in Petitioner's post-conviction or appellate proceedings.

II. AFFIDAVITS ARE PROPER EVIDENCE IN A MOTION TO DISMISS.

Petitioner argues that this Court should not consider the affidavits submitted by Respondent Nambé as attachments to the Motion to Dismiss because the record is not complete. *Petitioner Romero's Response*, p7. Again, Petitioner relies on a statute (28 U.S.C. 2254) which Petitioner had previously admitted is not applicable to its Petition to make this argument. This Court need not look far to find the controlling rule. Local Rule 7.3(b) requires any Movant to "submit evidence, in the form of affidavits, deposition excerpts, or other documents, in support of allegations of fact." D.N.M.LR-Civ 7.3(b). Respondent Nambé properly submitted its affidavits in its Motion to Dismiss. Contrary to Petitioner's claim, a separate motion is not required under Local Rule 7.3 to submit the affidavits. The Court may consider the affidavits

attached to Respondent Nambé's Motion to Dismiss before ruling on the Motion. The proper response to a party's use of affidavits is to propound written interrogatories to the affiants, or to file answering affidavits, not to move to deny consideration of the affidavits. *28 U.S.C. §2246*.

III. ABSENT A FACTUAL DISPUTE, THERE IS NO NEED TO CONDUCT AN EVIDENTIARY HEARING, AND THIS COURT SHOULD SUMMARILY RULE ON RESPONDENT NAMBÉ'S MOTION TO DISMISS.

A. NO MATERIAL ISSUE OF FACT EXISTS.

Petitioner argues that Respondent Nambé's Motion to Dismiss should not be granted at this time, because material issues of fact exist. *Petitioner's Response, p3*. Yet, Petitioner can only point to one specific example of an alleged material issue of fact. *Id.* Unfortunately, Petitioner's example is not the sort of example that shows the existence of a factual dispute between parties. Contrary to Petitioner's contention, whether or not Tribal Court Judge Marti Rodriguez appointed Officer Warren Candelaria as his lay counsel during a pre-trial conference is not a matter of dispute. The affidavits, properly attached to Respondent Nambé's Motion to Dismiss, confirm that Judge Rodriguez never appointed Officer Candelaria to act as lay counsel for Petitioner at any point in the criminal proceedings and that Officer Candelaria mistakenly signed on the line for defense counsel instead of the line for the prosecution. Further, the record of the trial does not include any evidence that Officer Candelaria represented Petitioner during the proceedings. *Tape of Bench Hearing and Sentencing Hearing; Tapes 1 through 5*. The critical question in determining whether an evidentiary hearing is required is whether Petitioner's allegations, when viewed against the record of the hearing were so palpably incredible or patently frivolous or false as to warrant a summary dismissal. *Herman v. Claudy*, 350 U.S. 116, 119 (1956); *See also Blackledge v. Allison*, 431 U.S. 63, 74 (1977) (Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations

unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible). Based on the record, including the 5 cassette tapes, Respondent Nambé can rebut, and has rebutted in Respondent Nambé's Answer and Motion to Dismiss, all of Petitioner's allegations as false.

Furthermore, Petitioner's Response fails to attack either the credibility of the affiants or the truthfulness of the statements in Respondent Nambé's affidavits. In matters involving an "unkept plea agreement" and instances where an evidentiary hearing is not held, a court should seek affidavits from all persons likely to have first-hand knowledge of the existence of any plea agreement. *Blackledge v. Allison*, 431 U.S. 63 (1977). Concerning the issue of whether Judge Rodriguez appointed Officer Candelaria to act as Petitioner's lay counsel, the affidavits of Judge Rodriguez and Officer Candelaria are useful in setting the record straight. Where merits of an application for writ of habeas corpus can be determined on record before the court, neither a hearing is required nor is the presence of Petitioner necessary. *Yeaman v. U.S.*, 326 F.2d 293 (9th Cir. 1963); *Reyes v. Cox*, 336 F.Supp. 829 (W.D. VA. 1971) (where all facts necessary for court to rule in habeas corpus case appeared in record, it was not necessary to hold a plenary hearing to develop additional facts.).

Finally, Petitioner's Response concerning whether a material issue of fact exists is contradictory. On the one hand, Petitioner asserts that "[t]here are many factual disputes in this case," but only points to one incredible example, as discussed above. *Petitioner's Response*, p. 3. On the other hand, Petitioner appears to concede that there may not be any factual disputes based on the current record. Petitioner states that "[o]nce the entire record is produced, this Court will be able to determine where there are factual disputes." *Petitioner's Response*, p4. This statement suggests that based on the current record, which is the complete record, Petitioner

does not have any other examples to inform the Court of the existence of other factual disputes. *Mahoney v. Vondergritt*, 938 F.2d 1490, 1494 (1st Cir. 1991) (A “brevis” disposition is appropriate where the allegations lack substance and is unfocused in nature. Reference that “[t]here are far too numerous things that happened to put down on paper” constitute an “unfocused” allegation subject to summary dismissal.) The “entire record”, which according to Petitioner would include the transcript, would not show anything more than what is already in the record. The 5 cassette tapes, which would create the basis for the transcript, do not reveal the existence of any factual disputes. Rather, the 5 cassette tapes substantiate Respondent Nambé’s statements contained in its Answer and Motion to Dismiss. Petitioner’s arguments are “readily susceptible to resolution without resort to the transcript.” *Love v. Butler*, 952 F.2d 10, 15 (1st Cir. 1991) (per curiam) (a court may summarily dispose of a petition for writ of habeas corpus, without examining the trial transcript, when Petitioner’s arguments are readily susceptible to resolution without resort to the transcript.) Petitioner’s desire to have Respondent Nambé produce a transcript would essentially give Petitioner an opportunity to go on a fishing expedition. *U.S. ex rel. Buford v. Henderson*, 524 F.2d 147 (2nd Cir. 1975), *cert denied*, 424 U.S. 923 (1976) (federal habeas petitioner was not entitled to transcript of suppression hearing for purpose of combing it in hope that something might turn up).

Since Petitioner Romero’s Response fails to rebut the factual averments of either Respondent Nambé’s Answer or Motion to Dismiss, Respondent Nambé’s allegations in its Answer and Motion to Dismiss should be accepted as true. *U.S. ex rel. Edelson v. Thompson*, 175 F.2d 140 (2nd Cir. 1949) (In a habeas corpus proceeding, allegation of Respondent must be accepted as true when allegation is not denied, except to the extent that the judge finds from the evidence that it is not true). Petitioner never replied to Respondent Nambé’s Answer and that

time frame to file a response has expired. Respondent Nambé's allegations in its Answer should now be accepted as true. The evidence of the record substantiates Respondent Nambé's statements found in Respondent Nambé's Answer and Motion to Dismiss.

WHEREFORE, Respondent Nambé requests this Court to:

1. Deny Petitioner's Motion to Compel the Production of the Transcript. Facts and legal contentions are adequately presented in the materials before the Court, and argument would not aid in decisional process. A court may summarily dispose of this Petition, without examining the transcript, where Petitioner's arguments are readily susceptible to resolution without resort to such transcript. In the alternative, Respondent Nambé would not object to Petitioner's production of the transcript prepared by his counsel, provided that Respondent Nambé is provided an opportunity to review its contents beforehand.

2. Deny Petitioner's Motion to Deny the Admission of Affidavits attached to Respondent Nambé's Motion to Dismiss. Local Rule 7.3(b) requires movants to attach documentary evidence, including affidavits, to motions before a court would consider the motion. Instead of moving to deny the admission of Respondent Nambé's affidavits, Petitioner should have sought written interrogatories to the affiants or file its own answering affidavit.

3. Deny Petitioner's Motion for an Evidentiary Hearing. Absent a dispute as to a material issue of fact, an evidentiary hearing is not required. Petitioner has not met its burden showing the Court that an evidentiary hearing is required. Further, facts and legal contentions are adequately presented in the materials before the Court, and evidentiary hearing would not aid in decisional process.

4. Deny Petitioner's request to file a Reply to Respondent Nambé's Answer as time-barred. An extension to file a Reply to an Answer should be made by Petitioner *before* the time to file a Reply has expired.

5. Grant Respondent Nambé's Motion to Dismiss.

6. Any other relief that this Court deems proper and just.

Respectfully submitted:

CHESTNUT LAW OFFICES



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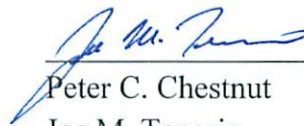
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 27, 2009, I filed the foregoing **Reply to Petitioner's Response to Respondent Nambé's Motion to Dismiss and Response to Petitioner's Various Motions** electronically through the CM/ECF system, which caused CM/ECF Participants to be served by electronic means, as more fully reflected on the notice of Electronic Filing.



Peter C. Chestnut

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