

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

RONALD F. ROMERO,
Petitioner,

vs.

No. CV 09-0232 RB/DJS

DONNA GOODRICH, Warden
Gallup McKinley Adult Detention Center

AND

PUEBLO OF NAMBÉ,
Respondents,

**PETITIONER ROMERO'S FIRST OPPOSITION TO RESPONDENT'S MOTION TO
DISMISS AND MOTION TO COMPEL RESPONDENT PUEBLO OF NAMBÉ TO
PRODUCE THE RECORD [OR IN THE ALTERNATIVE, MOTION FOR AN
EVIDENTIARY HEARING]**

COMES NOW the Petitioner, Ronald F. Romero, by and through his counsel of record, Barbara Creel, Supervising Attorney, and Erin Garcia, Law Practice Student, at the Southwest Indian Law Clinic, University of New Mexico School of Law Clinical Law Programs to oppose the Respondent's Motion to Dismiss filed on May 1, 2009, and moves this Court to compel Respondent Pueblo of Nambé to produce the relevant documents, and previously ordered, and additionally produce the trial record; or in the alternative order an evidentiary hearing to develop the underlying record. In support of his position, Petitioner Romero provides the following:

I. SUMMARY OF FACTUAL AND PROCEDURAL BACKGROUND

1. On May 30, 2007 Petitioner Romero appeared in Nambé Tribal Court to defend himself on twelve charges in violation of New Mexico law without the benefit of counsel. Not surprisingly, the Nambé Tribal Court convicted Mr. Romero on all twelve charges and imposed a sentence of eight years incarceration. After exhausting tribal court remedies, Mr. Romero filed this petition for habeas corpus (Docket #1).

2. On March 18, 2009 this Court ordered Respondents to furnish the court and petitioner with the all pleadings and memoranda filed by both parties pertaining (but not limited) to the issue of exhaustion. In addition this Court ordered “[r]espondents shall also attach to the answer copies of all tribal court findings and conclusions, docketing statements and opinions issued in Petitioner’s post-conviction or appellate proceedings.”(Docket #6).

3. On April 17, 2009 Respondent Pueblo of Nambé filed an Answer and attached several documents pertaining to the issue of exhaustion. In their Answer, Respondent Pueblo of Nambé admits that the ICRA claims are fully exhausted and ready for this Court’s review, and in fact, Respondent Pueblo of Nambé answered the claims made by Petitioner Romero in the petition. (Docket # 10) The parties agree that those issues are fairly presented, exhausted and ready for brief and review by this Court. However, as discussed below, Petitioner Romero has reason to believe that Respondent Pueblo of Nambé failed to file all findings and conclusions and docketing statements.

4. On May 1, 2009 Respondent Pueblo of Nambé filed a Motion to Dismiss, attaching extra record affidavits and further answered Petitioner Romero’s meritorious claims. (Docket #11).

Petitioner Romero opposes Respondent's Motion to Dismiss on the grounds that the Motion should be characterized as a motion for summary proceedings and should be denied. Summary proceedings are inappropriate where, as here, Respondent has not fully complied with the Court's previous order for records, a factual dispute exists, and there is a need to develop the record of underlying tribal court proceedings. Petitioner Romero, therefore, moves this court to compel Respondent Pueblo of Nambé to produce a transcript of the tribal court proceedings. Further, a briefing schedule to allow Petitioner Romero to respond to the Respondents' Answer and further support his claims and an evidentiary hearing are requested as appropriated.

II. SUMMARY DISPOSITION IS NOT APPROPRIATE AT THIS POINT IN THE HABEAS PROCEEDINGS

Petitioner Romero files this First Opposition to alert the Court that the Motion to Dismiss is not a proper response to this habeas petition, and to move for further development of the record for habeas review. Respondent Pueblo of Nambé's reference to extra record documents, converts the Motion to Dismiss into a motion for summary judgment. *See* FED. R. CIV. P. 12(d), 56. A summary disposition is improper at this time first and foremost because there are material issues of fact to be decided by this Court. Secondly, summary disposition is not appropriate at this time because the factual record has not been adequately developed and is incomplete.

A. Factual Disputes Exist

There are many factual disputes in this case. Petitioner Romero sets forth that Tribal Court Judge Marti Rodriguez appointed Officer Warren Candelaria as his lay counsel during a pre-trial conference on March 30, 2007 and the Tribal Court ordered Mr.

Romero's presence in court on that day; a plea agreement dated the same day was offered to Mr. Romero and explained by Officer Candelaria, before being rejected. The rejected plea and disposition agreement bears Officer Candelaria's signature as counsel for defense, and contains a note from the court. A copy of this document was provided to this Court by Petitioner Romero in his Petition for Habeas Corpus as Attachment C (Docket #1). It is apparent from the pleadings filed thus far that there are many other material issues of fact in dispute, in which case summary judgment is not appropriate. FED. R. CIV. P. 56.

B. There is a Need to Develop the Record of Underlying Tribal Court Proceedings

These factual disputes also create a need to develop the record. Once the entire record is produced, this Court will be able to determine where there are factual disputes which can be decided on the record, and where the record is too incomplete to decide a factual dispute, may order further development of the record through an evidentiary hearing. An evidentiary hearing in the example given above would allow this Court to determine, who was present when the plea agreement was presented and rejected, who, if anyone, overheard the judge appoint counsel, and why the proceedings were not recorded.

III. RESPONDENT PUEBLO OF NAMBÉ SHOULD BE COMPELLED TO PRODUCE THE RECORD OF TRANSCRIPTS

Petitioner is entitled to a full development of the record including a transcript of the proceedings in tribal court and it is the respondent's burden to produce the record. In its initial answer a respondent to a habeas petition should "indicate what transcripts are available, when

they can be furnished, and what proceedings have been recorded but not transcribed.” Rules Governing § 2254 Cases, Rule 5(c), 28 U.S.C. foll. § 2254. This practice is consistent with habeas proceedings in general.¹ Respondent Pueblo of Nambé has not indicated what transcripts are available nor provided this Court with any transcript from any tribal court proceeding. Upon the request of petitioner or the court’s own motion, “the judge may order that the respondent furnish...parts of existing transcripts or that parts of untranscribed recordings be transcribed and furnished.” *Id.*

Petitioner Romero does not have a complete record from his criminal trial. Counsel for Petitioner is aware of the following proceedings based on partial trial records and transport orders from the detention center(s): (1) Arraignment, February 26, 2007; (2) Pre-Trial Conference, March 30, 2007; (3) Trial, May 30, 2007 (4) Sentencing, June 15, 2007.

Counsel for Petitioner requested the trial tapes directly from SWITCA and Respondent Pueblo of Nambé. In response, Respondent provided four tape recordings from the trial, only three of which had audible recordings, and the entire record is not contained on those tapes. Neither Petitioner nor this Court has an official, or complete, transcript of all of the above proceedings to review in support of Petitioner Romero’s claims or the Repondent’s rejection of those claims.

Based on the Respondent’s Answer and Motion to Dismiss, it is evident that, aside from a complete transcript, which is now being requested, there are additional relevant records that have not been submitted in compliance with the Court’s order dated March 18, 2009. (Docket #6) For example, the Nambé Tribal Court apparently certified the documents contained in the

¹ Although the rules governing habeas proceedings pursuant to § 2254 do not apply to this case, they are instructive on the issue presented in this motion.

prosecution file as the record on appeal even though it is not clear whether all of these documents were actually admitted at pre-trial hearings or during the trial itself. The docketing statement identifying these records was reviewed by the tribal court and forwarded to the Southwest Intertribal Court of Appeals (SWITCA) for review. Respondent Pueblo of Nambé did not submit this docketing statement to this Court in compliance with the order. (A copy of the record provided by the tribal court to SWITCA is attached to this pleading as Attachment D). This relevant and pertinent document demonstrates the information provided on appeal was prejudicial information that the appellate court should not have considered on appeal and further supports Petitioner Romero's claim that the trial process and appeal were tainted. In the alternative, if the documents provided to SWITCA were in fact properly admitted at trial, there is no basis on which Petitioner Romero, his counsel or this Court can review the records without an entire transcript of the trial proceedings. In its opinion, SWITCA expressly admitted to reviewing the entire record.

A complete transcript of all proceedings, as well as all other documents relevant to his tribal court and appellate proceedings is critical to substantiating Petitioner Romero's meritorious claims and answering Respondent's defenses. The necessity for a complete record to be made available to all parties is important now more than ever as Respondent Pueblo of Nambé refers to the trial tapes several times in its Motion to Dismiss, however, neither the Court itself nor the Petitioner have access to this record. Thus, not only is a summary disposition premature at this time, it would also be highly prejudicial to the Petitioner who does not have access to the full record which Respondent is relying on in its Motion to Dismiss. At this time, Petitioner Romero requests that Respondent Pueblo of Nambé provide a full transcript of all proceedings.

Petitioner's request is supported by the fact that Respondent is currently the only party with access to the complete trial tapes. Petitioner's request for a transcript and other relevant records is further supported by Respondent's use of extra record evidence.

IV. SUBMISSION OF EXTRA RECORD DOCUMENTS WAS IMPROPER

Only after Respondent has submitted the entire record may the Court consider extra record documents such as affidavits. Because the factual record is not complete, Petitioner Romero moves that, at this time, this Court *not* consider the extra record affidavits submitted by Respondent as attachments to the Motion to Dismiss. (Docket # 11, Attachments 3 and 4)

At this time the Court does not even have a complete record of tribal court proceedings, including a transcript. A court reviewing a habeas petition should first consider the record before expanding the record to include extra record documents. *See* Rules Governing § 2254 Cases, Rule 7. Thus, it was premature and improper for Respondent to submit these affidavits and, therefore, it is improper for this Court to consider these potentially prejudicial documents at this time.

Once the Court has the record, it may allow and/or order the parties to expand the record if necessary or if the record is incomplete. *See id.* Affidavits *may* be submitted, however, they may only be submitted if directed by the court upon a motion by one of the parties. *See id.* Further, if such documents are submitted, Petitioner Romero should have a chance to respond and present an affidavit of his own to counter. *See id.*; *see also* 28 U.S.C. § 2246. Finally, "if resolution of the issues presented by the petition turns on the credibility to the proffered evidence and court is presented with some reason to question the evidence's credibility, the court must conduct an evidentiary hearing at which the rules of evidence are observed." JAMES S. LIEBMAN

& RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 723 (citing Advisory Committee Note to Rule 7 of the Rules Governing § 2254 Cases).

v. REQUEST FOR RELIEF

Respondent Pueblo of Nambé's complete disregard of this Court's order, the fact finding process and general rules of procedure and specific rules of practice associated with habeas corpus proceedings continues to place Petitioner Romero in an impossible position to defend himself from unfettered authority. By failing to submit the entire record of Petitioner's criminal proceedings and by submitting extra record documents without this Court's permission, Respondent Pueblo of Nambé has delayed these proceedings and created a prejudice against Petitioner Romero which cannot be remedied without the record and an impartial review of his claims based *on* the record to the extent one exists.

Therefore, the Motion to Dismiss should be denied. Petitioner Romero notes his opposition to the motion to dismiss and the submission of the extra record affidavits and further asserts that submitting a reply to the Respondent Pueblo of Nambé's answer to his meritorious claims found in both Respondent's Answer and Respondent's Motion to Dismiss is premature pending full development of the record through completion of the relevant transcripts and documents or through an evidentiary hearing to accurately recreate the events at trial. Because neither the Court nor the Petitioner has access to the full record and Respondent Pueblo of Nambé cited to the transcript of trial court proceedings in the Motion to Dismiss/Motion for Summary Judgment, Respondent Pueblo of Nambé should be ordered to produce the transcripts in order to allow for full and fair review of the record in this habeas proceeding.

WHEREFORE, Petitioner respectfully requests that this Court order the following:

1. Deny the Motion to Dismiss/ Motion for Summary Proceedings, and reject the attached extra judicial affidavits.
2. Order respondents to comply with all previous orders of this Court, and submit all documents necessary to complete the record.
3. Order Respondent Pueblo of Nambé to provide all parties, within 30 days, a complete transcript of Petitioner's tribal court proceedings in criminal case CR-07-011, including but not limited to a transcript from arraignment on February 26, 2007, a transcript from any and all pretrial conferences including one which took place on March 30, 2007, a transcript of the full trial, and a transcript of sentencing.

If Respondent Pueblo of Nambé does not comply within thirty days, Petitioner requests that he be released pending the outcome of this proceeding.

4. Order a briefing schedule allowing Petitioner permission to file a reply to Respondent Pueblo of Nambé's Motion to Dismiss filed with this Court on May 1, 2009 and Affirmative Defenses filed with this Court on April 17, 2009 and further allowing Petitioner to file a response to Respondent's answer to his meritorious claims within a reasonable time after the transcripts have been received.

In the alternative, Petitioner moves for an evidentiary hearing to allow Petitioner to compile the factual information, testimony and other evidence that fully support his meritorious claims.

5. Any other relief this Court deems proper and just.

Respectfully submitted this 13th day of May, 2009,

/s/ Barbara Creel

Attorney for Petitioner Ronald F. Romero
UNM Clinical Law Programs
University of New Mexico School of Law
MSC11-6070
1 University of New Mexico
Albuquerque, NM 87131-0001
Telephone: (505) 277-5265
Facsimile: (505) 277-2371
creel@law.unm.edu

/s/Erin Garcia

Law Practice Student
for Petitioner Ronald F. Ronald

I HEREBY CERTIFY that on the 13th day of May, 2009, I filed the foregoing electronically through the CM/ECF system which caused all parties of record to be served via e-mail.

/s/Barbara Creel