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ATTORNEY FOR RESPONDENT
CECILIA BLACKMAN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

WILLIAM ALBERTO AROCHA JR., **Petitioner,** **vs.** **CECILIA BLACKMAN and BLACKFEET TRIBE,** **Respondents.**	**CV 22-115-GF-BMM** **BRIEF IN SUPPORT OF RESPONDENT CECILIA BLACKMAN'S MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS**

INTRODUCTION

Petitioner William Alberto Arocha Jr. is a tribal inmate currently incarcerated at the Dewey County Jail in Taloga, Oklahoma. (Doc. 10 at 10). The instant habeas petition ("petition") was filed by Petitioner while an inmate at the Kay County Detention Center in Newkirk, Oklahoma. (Doc. 5 at 1). Petitioner was transferred to tribal custody after completing his federal prison

sentence of 56 months on August 31, 2022. (Doc. 10 at 9). He is currently serving two tribal sentences totaling 21 months arising out of the same conduct as his prior federal sentence. The tribal sentences were initially imposed on November 8, 2017, and reimposed with 78 days credit for time served in county jail on November 17, 2022. (*Id.* at 12, 16).[1] The tribal sentences run consecutively. (*Id.* at 16). Petitioner filed the petition pursuant to 28 U.S.C. § 2241(c)(3), and 25 U.S.C. § 1303, challenging the legality of his tribal sentences. (Doc. 10 at 7). The petition should be dismissed because Petitioner does not name the proper respondent, the court has no personal jurisdiction over the proper respondent, the sentences now challenged are proper, and Petitioner failed to exhaust tribal remedies prior to filing the instant petition.

ARGUMENT

I. The petition should be dismissed because Petitioner did not name the proper respondent.

A habeas corpus petition is the correct method for a prisoner to challenge the "legality or duration" of his confinement. *Badea v. Cox,* 931 F.2d 573, 574 (9th Cir. 1991) (quoting *Preiser v. Rodriguez,* 411 U.S. 475, 484 (1973)). Federal

[1] The original sentence was imposed *in absentia* because Petitioner was then in federal custody. His resentencing by the Blackfeet Court was imposed when Petitioner was present and represented by counsel.

statute extends the writ of habeas corpus to tribal convictions. *See* 25 U.S.C. § 1303.

The Petitioner, however, must name the correct respondent in the petition. In habeas petitions, the custodian of the institution where Petitioner is located is the proper respondent. *Rumsfeld v. Padilla,* 542 U.S. 426, 435 (2004). "[T]he default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official." *Id.* "[T]hese provisions contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary." *Wales v. Whitney,* 114 U.S. 564, 574 (1885). Furthermore, jurisdiction, and therefore the proper respondent, attaches on the initial filing for habeas relief. *Mujahid v. Daniels,* 413 F.3d 991, 994 (9th Cir. 2005). "Failure to name the petitioner's custodian as a respondent deprives federal courts of personal jurisdiction." *Stanley v. Cal. Supreme Court*, 21 F.3d 359, 360 (9th Cir. 1994).

Here, Petitioner's first attempted habeas petition was disallowed because it was unsigned and filed by Petitioner's grandmother, who had no authority to do so. (Doc. 3 at 1-2). The court gave Petitioner until January 31, 2023, to sign a copy of the document, thereby properly filing it. (*Id*. at 2). Petitioner instead

filed a different petition on January 30, 2023, also indicating that he was now in Oklahoma at the Kay County Detention Center. (Doc. 5 at 1). The Court's order appointing a Federal Defender also recognizes January 30, 2023, as the initial filing date. (Doc. 7 at 1).

Therefore, jurisdiction attaches on January 30, 2023, in Oklahoma where Petitioner was then incarcerated at the Kay County Detention Center. The respondents for the instant petition are the supervisor of Blackfeet Detention Center, and Blackfeet tribe itself, both located in Browning, Montana. (Doc. 1 at 2). At the time the instant petition was filed, the respondents were not Petitioner's immediate custodians and could not produce his body for the court, nor can they now. Therefore, the proper respondent in this case would be Petitioner's custodian at the time of filing, which would be the warden of the Kay County Detention Center in Oklahoma. Accordingly, the petition should be dismissed because Petitioner did not name the correct respondent.

II. The petition should be dismissed for lack of personal jurisdiction over Petitioner's custodian.

"Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions*." 28 U.S.C. § 2241(a) (emphasis added). The court acts within its respective jurisdiction if "the custodian can be reached by service of process." *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973).

However, that "in no way authorizes district courts to employ long-arm statutes to gain jurisdiction over custodians who are outside of their territorial jurisdiction." *Padilla*, 542 U.S. at 445. "[S]o long as [Petitioner's] custodian is not located within the territorial jurisdiction" of the district, the Court "does not have jurisdiction to grant him habeas corpus relief." *Palomarez v. Young*, 726 F.App'x. 724, 725 (10th Cir. 2018) (unpublished).

Here, even if Petitioner named the correct respondent, this Court would be deprived of jurisdiction. As discussed above, at the time of the instant habeas filing, Petitioner's custodian was the warden of the Kay County Detention Center, who is outside of the territorial jurisdiction of this district. Therefore, the petition should be dismissed for lack of personal jurisdiction.

III. The petition should be dismissed because the tribal judge can and did run the tribal sentences consecutively, both to each other and to the federal sentence, thus making the sentences challenged proper.

a. <u>The tribal judge can run the tribal sentences consecutively to each other and to the federal sentence.</u>

Petitioner was tribally sentenced to nine months imprisonment for criminal endangerment and one year imprisonment for assault, to run consecutively for a total of 21 months of incarceration, less 78 days of time-served in county jail. (Doc. 10 at 16). Petitioner advances a number of challenges to the validity of his tribal convictions. These challenges fall under 25 U.S.C. § 1302, part of the Indian

Civil Rights Act of 1968 ("ICRA"), and 18 U.S.C. §3584(a) which holds "[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." 18 U.S.C. §3584(a).

ICRA was amended by the Tribal Law and Order Act of 2010 ("TLOA"). Pub.L. No. 111-211, 124 Stat 2258 (Jul. 29, 2010). The TLOA raised the maximum possible tribal sentence from one year to three years where certain procedural protections are met. *Id.* at 2280. In the absence of such protections, as argued by Petitioner here, the sentencing limit remains one year. *Id.* However, ICRA does not limit tribal authority to impose sentences consecutive to federal sentences, and Petitioner does not claim that it does. Furthermore, sentences imposed at different times, like the federal and tribal sentences here, run consecutively without explicit language from the court to the contrary. 18 U.S.C. § 3584(a). Since the tribal court was silent on the point, and ICRA does not change the rule advanced by § 3584(a), the tribal sentences run consecutively to the federal sentence. Petitioner therefore only challenges the authority to run the tribal sentences consecutively for a total term of more than one year.

Broadly, Petitioner asserts that the tribal sentences violated his rights under § 1302(c) and he is entitled to a "full panoply" of those rights since his

sentence was greater than one year.[2] (Doc. 10 at 21); *see also Miranda v. Anchondo*, 684 F.3d 844, 849, n.4 (9th Cir. 2012). The Respondent concedes that the instant petition is governed by the ICRA revision to 25 USC § 1302(c) as Petitioner claims, but the Respondent does not know the content of the rights afforded in Arocha's case because the record is incomplete due to his failure to exhaust tribal remedies, as discussed in more detail in part IV. Therefore, there is insufficient information to make a determination about alleged infringements of Petitioner's general rights under § 1302. *See Cortiz v. Rodriguez*, 347 F.Supp.3d 707, 716-718 (D.N.M., 2018) (discussing *Johnson v. Tracy*, No. CIV 11-01979, 2012 WL 4478801 (D. Ariz. Sept. 28, 2012)). Petitioner further claims that four rights specifically afforded by 25 U.S.C. § 1302(c) were denied to him, but none of his claims have merit.

First, Petitioner argues that his right to be tried and sentenced before a judge who is licensed to practice law under 25 U.S.C. § 1302(c)(3) was violated. (Doc. 10 at 20). That provision reads, in relevant part, that to impose a total term of imprisonment of more than one year, the tribe shall "require that the judge presiding over the criminal proceeding" have "sufficient legal training to preside

[2] The full panoply referred to are the rights afforded to defendants in criminal proceedings in tribal court under 25 U.S.C. § 1302(c)(1)-(5).

over criminal proceedings" and be "licensed to practice law by any jurisdiction in the United States". 25 U.S.C. § 1302(c)(3).

This claim fails however, because Judge Pepion was licensed at the time of Petitioner's sentencing in compliance with the statute. The Senate Committee on Indian Affairs issued a report indicating that so long as the tribal judge meets the tribal, state, or federal judicial licensing standard, the licensing requirement is met. S. Rep. No. 111-93 at 17 n. 57 (2009). A Blackfeet judge is tribally licensed for the purposes of the statute if they meet the criteria set forth under Chapter 1, Section 2 of the Blackfeet Tribal Law and Order Code.[3] As an appointed judge on the Blackfeet Court, Judge Pepion meets the Blackfeet tribal licensing standard and therefore, the standard under 25 U.S.C. § 1302(c)(3). As to "sufficient legal training," there is little precedent, and the meaning of the phrase is unclear. The judge here likely has "sufficient legal training" through his extensive experience as both a tribal prosecutor and judge, particularly since the Senate report explicitly rejected the idea that the tribal judge must have graduated from law school. S. Rep. No. 111-93 at 17, n. 57 (2009).

[3] Under Chapter 1, Section 2, Appointment of Judges of the Blackfeet Tribal Law and Order Code, "A person shall be eligible to appointment as judge of the court only if he: (1) is a member of the Blackfeet Tribe; and (2) has never been convicted of a felony, or within one year then past, of a misdemeanor. The age limit of judges shall not be less than twenty-one (21) years of age. He must also have a high school education, and preferably be a commercial law student at the time of the original appointment."

Next, Petitioner argues that his sentences violate 25 U.S.C. § 1302(c)(1) and (2) because he was not represented by counsel when they were imposed. (Doc. 10 at 21). Section 1302(c) provides that when imposing a total term of imprisonment of more than one year on a defendant, the tribe shall "provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution" and "provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States." 25 U.S.C. § 1302(c)(1)-(2).

Petitioner's claim relies entirely on the absence of counsel at his first sentencing hearing. However, as noted above, to correct any error caused by the *in absentia* hearing, Petitioner was resentenced at a time when both he and his law-licensed counsel were present. (Doc. 10 at 16). Petitioner's claim thus suffers from two major defects. First, Petitioner and his attorney had the opportunity to make sentencing arguments at resentencing, and any error caused by the previous lack of counsel was cured. Second, any error caused by lack of counsel in the first sentencing is harmless because it evidently made no difference to the result. The same judge presided over both hearings, one with counsel, one without, and imposed the same sentence, less time already served. (Doc. 10 at 8, 16).

Petitioner's third argument is that he was denied effective assistance of counsel as guaranteed by 25 U.S.C. § 1302(c)(1). (Doc. 10 at 22). This contention is, in many respects, a repetition of his second argument and fails largely for the same reasons.

Petitioner's claim again relies primarily on his counsel's absence during the first sentencing hearing. However, as discussed above, any error in the first sentencing was both harmless and corrected at resentencing. Petitioner further argues his new attorney at resentencing, Dave Gordon, was not allowed to adequately participate in the hearing. (Doc. 10 at 24). Specifically, he claims that Mr. Gordon was badgered by the court, and not recognized as his attorney. (Doc. 5 at 8). Petitioner further claims that he has not been able to get the recordings of the proceedings because one or more members of the staff processing the request are related to Petitioner's victim. (*Id.*). He makes these assertions without any evidence. Pure speculation alone is not enough to overturn a conviction, particularly since Petitioner does not contend that there were issues with his lawyers at any other stage of trial. *See Shah v. United States*, 878 F.2d 1156, 1161 (9th Cir. 1989) (stating vague or unsupported conclusory allegations do not state a claim because it is the movant who bears the burden of proof); *see also Baumann v. United States*, 692 F.2d 565, 571 (9th Cir. 1982) (stating mere conclusionary statements does not justify a habeas hearing).

Finally, Petitioner contends that he was denied equal protection and due process as guaranteed by 25 U.S.C. § 1302(a)(8). (Doc. 10 at 24). That provision states that no tribe may "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(a)(8).

The due process claim largely stems from the dispute about the judge's qualifications and the attorney sentencing problems already discussed at length, which need no additional discussion here. (Doc. 10 at 24-25). The equal protection argument stems from Petitioner's assertion that Blackfeet Tribe criminal proceedings ostensibly do not have the same irregularities elsewhere. (*Id.*). However, Petitioner provides no evidence that his experience is unusual for Blackfeet criminal defendants. The sentencing judge, whose qualifications he disputes, presides over many criminal cases. Furthermore, there was nothing irregular about the resentencing hearing, which again, corrected any errors in the first sentencing. The judge, clerk, petitioner, petitioner's counsel, tribal prosecutor, and tribal attorney were all present, and a reasonable and lawful sentence was imposed. (Doc. 10 at 16).

b. <u>The tribal judge did run the tribal sentences consecutive to each other and to the federal sentence.</u>

It is undisputed that the sentencing judge ran the tribal sentences consecutive to each other. (*Id.* at 8). All available evidence suggest that the

judge also ran them consecutive to the federal sentence since he did not explicitly state the sentences would run concurrently, and the federal sentence had already been served at the time the tribal sentences were reimposed. (*Id.* at 9, 15). The tribal sentences totaled 21 months, and the federal sentence was 56 months. (*Id.* at 8-9). If the sentences ran concurrently, as Petitioner claims, he would have completed the tribal sentence while serving the federal one and would have been released upon completion of his federal sentence. Instead, the tribal court, with the same judge presiding at both sentencing hearings, resentenced Petitioner after his time in federal custody. (*Id.* at 8, 9, 16). The new sentences were identical to the original sentences, less credit for time served in county jail, with no credit for time in federal prison. (*Id.* at 8, 16.) The only logical explanation is that the judge intended the tribal sentences to run consecutive to the federal sentence. Therefore, the sentences run consecutively, both to each other and to the federal sentence.

IV. The petition should be dismissed because Petitioner failed to exhaust tribal remedies.

In order to support tribal self-government and self-determination, tribal courts need the ability to rectify their errors, initially at least, without federal interference. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985). Consequently, a petitioner convicted in tribal court must exhaust tribal remedies before filing an appeal in federal court. *See Brisbois v.*

Tulalip Tribal Ct., No. 2:18-CV-01677, 2019 WL 1522540, at *3 (W.D. Wash. Feb. 27, 2019) (citing *Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 953 (9th Cir. 1998)). "[E]xhaustion under the ICRA is a prerequisite to a federal court's exercise of its jurisdiction" unless (1) exhaustion would have been futile, or (2) the tribal court of appeals offered no adequate remedy. *Alvarez v. Tracy*, 773 F.3d 1011-1016 (9th Cir. 2014) (quoting *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F. 3d 1196, 1200 (9th Cir. 2013) (internal quotation marks omitted)). The tribal remedy in this case is defined by Chapter 11, Part 1, Section 1 of the Blackfeet Tribal Law and Order Code, which grants the Blackfeet Court of Appeals "original jurisdiction to hear writs of Habeas Corpus."

Here Petitioner was required to exhaust tribal remedies before filing a habeas petition in federal court. He failed to do so. Petitioner argues he exhausted his case in the Blackfeet Courts and Blackfeet Appellate Court by submitting a writ of habeas corpus on September 14, 2022, that was denied on September 20, 2022. (Doc. 5 at 7). However, Petitioner did not assert any ICRA claims in his tribal habeas petition. (Doc. 10-1 at 20-27). The Blackfeet Court of Appeals has thus not yet considered the claims that Petitioner raises here.

This claim is also without merit because Petitioner was resentenced November 17, 2022, and the only appeal on the record in relation to it was

untimely.[4] (Doc. 10 at 16-17). Like the habeas petition in *Alvarez*, which was denied and deemed a failure to exhaust tribal remedies because the petitioner failed to bring it within the five-day window prescribed by the Gila River Indian Code, the instant petition should be denied because Petitioner did not appeal his sentence within the ten days afforded by the Blackfeet Law and Order Code. *Alvarez*, 773 F.3d at 1017; *see also Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990, 992 (8th Cir. 1999) (stating "[w]e do not think the exhaustion requirement has been satisfied when the absence of tribal appellate review stems from the plaintiff's own failure to adhere to simple deadlines."). If Petitioner's appeal was timely, presumably, the Blackfeet Court of Appeals would have acted on it as they have the authority to do so.

Finally, this Court should not excuse Petitioner's failure to exhaust his remedies with the Blackfeet Court of Appeals because neither the futility exception nor the inadequate remedy exception apples. The Blackfeet Court has both the authority to hear appeals and habeas petitions arising from cases under its jurisdiction, as well as the authority to release the defendant if they determined such a remedy was appropriate: "The [Blackfeet] Court of Appeals shall hear the

[4] Chapter 11, Part II, Section 13(E) of the Blackfeet Law & Order Code allows 10 days to file an appeal after a decision is rendered, but Petitioner's appeal was filed 18 days after the decision. The court never ruled on his renewed petition, likely because it was untimely. (Doc. 10 at 17).

appeals of all cases, criminal, and civil, including juvenile cases, appealed from the Blackfeet Tribal Court, and shall have original jurisdiction to hear writs of Habeas Corpus." Blackfeet Tribal Law and Order Code Chapter 11, Part 1, Section 1. Petitioner failed to present the instant ICRA claims to the tribal court, thereby depriving it of the opportunity to remedy any alleged error. Moreover, by denying the petition, this Court would be preserving and strengthening the tribal court's sovereignty and rule of law by providing an opportunity for the Blackfeet Tribe to solve the dispute and implement tribal policy.

CONCLUSION

Based on the foregoing, this Respondent Blackman respectfully urges the Court to dismiss the amended petition for habeas corpus.

DATED this 29th day of August 2023.

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United States Attorney

/s/ Jeffrey K. Starnes
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CERTIFICATE OF COMPLIANCE

Pursuant to D. Mont. LR 7.1(d)(2) and CR 12.1(e), the United States' motion to dismiss writ of habeas corpus is proportionately spaced, has a typeface of 14 points or more, and has a body containing 3,558 words, excluding the caption and certificates.

/s/ Jeffrey K. Starnes
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2023, a copy of the foregoing document was served on the following persons by the following means:

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