DAVID F. NESS
Assistant Federal Defender
Federal Defenders of Montana
Great Falls Office
104 2nd Street South, Suite 301
Great Falls, MT 59401
david_ness@fd.org
Phone: (406) 727-5328
Fax: (406) 727-4329

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

WILLIAM AROCHA, JR., Petitioner, vs. CECILIA BLACKMMAN and BLACKFEET TRIBE, Respondents.	**Case No. CV 22-115-GF-BMM** **RESPONSE TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS**

The Petitioner, William Arocha, Jr., through counsel, David F. Ness and the Federal Defenders of Montana, respectfully submits this response to Respondent, Cecilia Blackman's, Motion to Dismiss Petition for Writ of Habeas Corpus. (docs. 21 and 22).

Memorandum of Points and Authorities

A. Introduction

The Petitioner, William Arocha, Jr., filed a *pro se* petition for writ of habeas corpus under the Indian Civil Rights Act on January 30, 2023. (doc. 5). The following month, this Court ordered the Federal Defenders of Montana to locate counsel "to represent Arocha, advise him about his current situation, and, if appropriate, file a motion or petition for relief." (doc. 7). The undersigned entered his appearance on March 20, 2023, (doc. 9) and, in compliance with the Court's order, filed an amended petition. (doc. 10).

In his amended petition, Arocha has raised four claims: (1) that his right to be tried and sentenced by a judge who has sufficient legal training to preside over criminal proceedings as required by 25 U.S.C. § 1302(c)(3) was violated; (2) that his sentence violates 25 U.S.C. § 1302(c)(1) and (2) because he was not represented by counsel when it was imposed; (3) that he was deprived of effective assistance of counsel guaranteed by 25 U.S.C. § 1302(c)(1); and (4) that he was denied his rights to equal protection and due process as guaranteed by 25 U.S.C. § 1302(a). (doc. 10 at 2).

Respondent Cecilia Blackman has moved to dismiss the petition on four grounds.[1] She maintains that Arocha's petition should be dismissed: (1) because he failed to name the proper respondent; (2) because this Court lacks personal jurisdiction over Arocha's custodian; (3) because Arocha's 21 month tribal sentence is legal and was properly imposed; and (4) because Arocha failed to exhaust his tribal remedies before filing his federal habeas petition. (doc. 22). Blackman's arguments lack merit and should be rejected.

B. Legal Analysis

1. Arocha's petition should not be dismissed because he failed to name the proper respondent.

In its brief, which was filed on August 29, 2023, Blackman argues that Arocha's habeas petition should be dismissed because he failed to name the proper respondent, who she maintains, is the warden of the Kay County Detention Facility in Newkirk, Oklahoma. Her position in this regard is perplexing in light of the fact that Arocha has been incarcerated at the Rocky

[1] It is unclear what rule or mechanism Blackman is relying upon to seek dismissal of Arocha's petition. No where in her petition does she cite a rule or statute to support her motion to dismiss. Assuming that she is proceeding under Federal Rule of Civil Procedure 12(b)(6), it is incumbent upon her to establish "beyond doubt that [Arocha] can prove no set of facts in support of his claim that would entitle [him] to relief." In ruling upon her motion, the Court must assume that all allegations of material fact are true and construed in the light most favorable to Arocha. *American Family Ass'n v. City and County of San Francisco*, 277 F.3d 1114, 1120 (9th Cir. 2002).

Mountain Regional Detention Facility in Hardin, Montana since August 15, 2023.[2]

Despite this fact, Blackman maintains that the warden of the Kay County Facility, who no longer has custody of Arocha, is the proper respondent. Presumably, although she does not directly say so, Blackman also seemingly seeks – if not an outright dismissal -- to have Arocha's case transferred to the Western District of Oklahoma for resolution.

In making this argument, Blackman relies on the Supreme Court's decision in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). *Padilla* establishes "the general rule that for core habeas petitions challenging present physical confinement, jurisdiction lies in only one district: the district of confinement." *Id.* at 443. Although this rule is broadly worded and seemingly clear, lower courts have refused to apply it to cases such as Arocha's, where the petitioner is being held in a different district or state pursuant to a contractual agreement or other similar arrangement. *See*, *Holder v. Curley*, 749 F.Supp.2d 644, 646

[2] The Rocky Mountain Detention Facility, which was formerly known as the Two Rivers Regional Detention Facility, is operated by the Bureau of Indian Affairs. The undersigned has learned that Arocha is confined at the Rocky Mountain Detention Facility through a telephone conversation and an e-mail from Lieutenant Tawnya Brady, who confirmed that he had been an inmate at Rocky Mountain since August 15th. Lieutenant Brady's e-mail is attached to this brief and designated as Exhibit A.

(E.D. Mich. 2010)("Despite the broad language in *Padilla*, district courts have continued to hold that a case is properly transferred to the jurisdiction of conviction when the petitioner is housed in another state only for the convenience of and pursuant to a contractual relationship with the state wherein the conviction was rendered."); *Al-Amin v. Davis*, 2012 WL 1698175 at *2-3 (D. Colo. 2012); *Warren v. Williamson*, 2007 WL 4898264 (M.D. Pa. 2007); *Carballo v. LaManna*, 2006 WL 3230761 at *2 (D. S.C. 2006)(general rule in *Padilla* not applicable to petitioner who was convicted in Florida state court but was detained in federal facility in South Carolina); *Gustafson v. Williams*, 2010 WL 1904518 at *3 (D. Nev. 2010)(relying on Ninth Circuit precedent, court held that it had authority to transfer case filed by a Minnesota convict who filed his § 2254 petition in the District of Nevada, where he was incarcerated pursuant to an interstate compact); *Bender v. Ohio*, 2007 WL 236151 at *2 (E.D. Ky. 2007)(habeas petitioner who was convicted in Ohio but was serving his sentence in Kentucky had his habeas case transferred to Ohio for resolution); *Downer v. Cramer*, 2009 WL 2922996 (N.D. Miss. 2009); *Fest v. Bartee*, 804 F.2d 559, 560 (9th Cir. 1986)(prisoner convicted in Nebraska but housed in Nevada was considered to be in the custody of Nebraska for purposes of his challenge to the Nebraska conviction); *Watson v. Figueroa*, 2008 WL 2329106 (W.D. Okla. 2008)(§ 2254 petition of an

inmate housed in Oklahoma was transferred to a district court in Colorado, the state of conviction).

In *Padilla*, the respondent was in custody as a suspected terrorist and "enemy combatant." *Padilla*, 542 U.S. at 430. The President ordered that he be transferred from federal custody in New York to military custody in South Carolina. *Id.* at 431. Padilla sought habeas relief in New York where he was originally detained. *Id.* at 432. The Supreme Court held that he should have filed his petition in South Carolina, where he was currently being held and where his immediate custodian was located. *Id.* at 451. At all times, the detainee was in federal custody for alleged violations of federal law. In adhering to the general rule that the proper respondent in a habeas petition is the warden of the facility where the petitioner is being held, the Supreme Court noted that, in this particular case, the "detention [was] not unique in any way that would provide arguable basis for a departure from the immediate custodian rule." *Id.* at 442.

In comparing the facts of *Padilla* with this case, as well as the cases cited above, it is clear that Arocha's case presents facts that take it outside the general rule. Although Arocha was detained in an Oklahoma jail, he was never convicted or sentenced by an Oklahoma state or tribal court. His sole connection with the Western District of Oklahoma is that he was temporarily

incarcerated at the Kay County Detention Facility pursuant to an agreement with the Blackfeet Tribe. Therefore, the general rule in *Padilla* is not applicable to Arocha's case.

The warden of the Kay County Detention Facility has no authority over Arocha's conviction or sentence. The only individuals that have such authority are officials of the Blackfeet Tribe. All records of conviction, recordings of proceedings, witnesses, and counsel are located in the District of Montana. Therefore, the convenience of the parties and the interests of justice militate against transferring this case to Oklahoma.

As final matter, Blackman seeks not merely transfer to Oklahoma but dismissal of Arocha's petition. A review of the case law, however, indicates that dismissal is not an appropriate remedy. In those cases where a habeas petitioner has named the wrong respondent and/or filed his case in the wrong district, the courts have transferred the case to the appropriate court. They have not outright dismissed the petitioner's habeas action. *Holder v. Curely*, 749 F.Supp.2d at 648; *Downer v. Cramer*, 2009 WL 2922996 at *2; *Gustafson v. Williams*, 2010 WL 1904518 at *3; *Bender v. Ohio*, 2007 WL 236151 at *2; *Al-Amin v. Davis*, 2012 WL 1698175 at *3; *Warren v. Williamson*, 2007 WL 4898264 at *1; *Carballo v. LaManna*, 2006 WL 3230761 at *2.

2. Blackman's argument that this Court lacks personal jurisdiction over the warden of the Kay County Detention Facility is irrelevant because the proper respondents are located in the District of Montana.

The proper respondents in this case are Cecilia Blackman and the Blackfeet Tribal Business Counsel. Both are located in the District of Montana and both are responsible for Arocha's incarceration and will, through their respective attorneys, be responsible for defending the judgment they have obtained against Arocha.

The only connection between this matter and the warden in Kay County is that Arocha was "fortuitously housed in the [Kay County Detention Center] by contractual agreement." *Downer v. Cramer*, 2009 WL 2922996 at *2. The warden is not, therefore, a proper respondent and does not need to be served. Further, as stated above, even if this Court disagrees with this analysis, the proper course of action is to transfer Arocha's case to the Western District of Oklahoma, not dismissal. *Holder v. Curely*, 749 F.Supp.2d at 648; *Downer v. Cramer*, 2009 WL 2922996 at *2; *Gustafson v. Williams*, 2010 WL 1904518 at *3; *Bender v. Ohio*, 2007 WL 236151 at *2; *Al-Amin v. Davis*, 2012 WL 1698175 at *3; *Warren v. Williamson*, 2007 WL 4898264 at *1; *Carballo v. LaManna*, 2006 WL 3230761 at *2. If Arocha's case is transferred to Oklahoma, he will insure that the proper respondents are served. *Downer v. Cramer*, 2009 WL 2922996 at *2.

3. Arocha's claim that his tribal sentence is illegal because Judge Pepion is not properly qualified under 25 U.S.C. § 1302(c)(3) is valid and should not be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

As an initial matter, it is important to clarify that Arocha is not challenging his tribal sentence on the grounds that it was ordered to run consecutively to his federal sentence. That argument was made by his former counsel, Thane Johnson, but it is not reiterated in Arocha's amended petition. His claim is that his 21 month tribal sentence is illegal because it was imposed by a judge who lacks the qualifications set forth in 25 U.S.C. § 1302(c)(3) which provides as follows:

> In criminal proceedings in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than one year on a defendant, the tribe shall . . . (3) require that the judge presiding over the criminal proceeding (A) has sufficient legal training to preside over criminal proceedings; and (B) is licensed to practice law by any jurisdiction in the United States.

Blackman maintains that Judge Pepion meets these standards. He has "sufficient legal training to preside over criminal proceedings," she asserts, by virtue of the fact that he has on-the-job training that has been obtained "through his extensive experience as both a tribal prosecutor and judge." (doc. 22 at 8).

Blackman is correct in her observation that the meaning of the phrase, "sufficient legal training" is unclear. (doc. 22 at 8). But, whatever it means, the standard it invokes cannot be satisfied by on-the-job training alone, particularly when there is no evidence that the training involved or was overseen by an

experienced tribal lawyer or advocate. Although she appears to be correct that tribal court judges need not attend law school or be an attorney, the plain meaning of "sufficient legal training" implies that they receive some sort of formal education and training. As one commentator has noted, "tribal court judges designated to preside in criminal proceedings governed by 25 U.S.C. § 1302(c) . . . [should] undergo criminal law training equivalent to at least what a first year law student receives." *See*, Tompkins, Jill Elizabeth (2015) "Defining the Indian Civil Rights Act's "Sufficiently Trained" Tribal Court Judge," *American Indian Law Journal*: Vol. 4: Iss. 1, Article 5 53, 78.[3] Evidence that a tribal judge has taken courses in criminal law and procedure should be the minimum that is required before he is authorized to sentence a defendant to more than one year incarceration.

At this juncture, it is unknown what type, if any, of legal training Judge Pepion has received, let alone whether it is "sufficient" to qualify him to preside over criminal cases that can involve punishments of up to nine years imprisonment. *See*, 25 U.S.C. § 1302(7)(d). The qualifications required to be a Blackfeet Tribal Judge do not include any type of formal training. Under the Blackfeet Tribal Law and Order Code, a person is eligible to be a judge if he: (1) is a member of the Blackfeet Tribe; (2) has never been convicted of a felony or a misdemeanor within one year of appointment; (3) is at least 21 years old; and (4) has a high school education. *See*,

[3] Available at: https://digitalcommons.law.seattleu.edu/ailj/vol4/iss1/5

Chapter 1, Section 2, Appointment of Judges of the Blackfeet Tribal Law and Order Code.

Under the clear terms of this provision, there is no requirement that a Blackfeet judge has any legal training before appointment or during his tenure. In light of this fact, Blackman's motion to dismiss on the ground that Judge Pepion has "sufficient legal training" should be denied.

Blackman goes on to argue that, because Pepion is qualified under the Blackfeet Law and Order Code to be a judge, he is necessarily licensed. Her argument ignores the fact that one can hold the qualifications to hold a license without actually being licensed. You can, for example, meet all the requirements to hold a Montana driver's license. But if you don't actually possess a license, you can't legally drive. At this stage of this litigation, there has been no evidence that has been produced to establish that Pepion actually holds a license to practice law issued by the Blackfeet Tribe or any other jurisdiction. Therefore, Blackman's argument that he is "licensed" solely by virtue of the fact that he meets the requirements of the Blackfeet Tribal Code should be rejected.

4. Arocha's sentence is illegal because he was not represented by counsel when it was imposed.

Under the Indian Civil Rights Act, when an Indian tribe seeks to impose a "term of imprisonment of more than one year on a defendant, [it] must provide the defendant with the right to effective assistance of counsel at least equal to that

guaranteed by the United States Constitution; and (2) at the expense of tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction of the United States that applies appropriate professional standards and effectively ensures the competence and professional responsibility of its attorneys." *See*, 25 U.S.C. § 1301(c)(1) and (2).

After Arocha was convicted, Judge Pepion set sentencing for November 8, 2017, at 10:00 a.m. This date and time was "set by Defendant's attorney Thane Johnson and Special Prosecutor Dawn Gray, as they are both attorneys and this was a day they would both be available." (doc. 10-1 at 2). Although he apparently agreed to its date and time, Johnson failed to appear at Arocha's sentencing. (doc. 10-1 at 2). Despite the fact that Arocha was not represented, Judge Pepion proceeded with the hearing and sentenced him to the maximum term of custody allowed by statute.

Sentencing is a critical stage in criminal proceedings. *United States v. Leonti*, 326 F.3d 1111, 1117 (9th Cir. 2003)(citing *Gardner v. Florida*, 430 U.S. 349, 358 (1977). Because it is a critical stage, counsel must be provided and if it is not, prejudice is presumed. Under this circumstance, prejudice is deemed so likely that "the cost of litigating [its] effect in a particular case is unjustified." *United States v. Cronic*, 466 U.S. 648 (1984). Thus, Arocha does not have to establish that he was actually prejudiced to prevail on this claim.[4]

[4] Arocha maintains that both Thane Johnson and Dave Gordon provided ineffective

That being said, Johnson's absence from Arocha's sentencing hearing did result in actual prejudice. Had he been present Johnson could have objected to the sentence as illegal, he could have argued facts in mitigation, and he would have been in a position to appeal the legality of the sentence. But, because he was absent, no objection was made to the sentence and no argument was made on Arocha's behalf.

Blackman argues that any prejudice was "cured" by the fact that Judge Pepion resentenced Arocha four years later, after he was released from federal prison. This argument ignores the holding in *Cronic* – that the absence of counsel at a critical stage constitutes a *per se* violation of the Sixth Amendment and no showing of prejudice is necessary. It also ignores the fact that the second sentencing hearing, by all appearances, was *pro forma* and was not held to reconsider the original sentence. The same sentence was imposed and there is no evidence that Arocha's counsel was allowed to argue for anything different.

---

assistance of counsel with respect to his sentencing hearings. Johnson's failure to attend the first sentencing hearing was *per se* ineffective. *Delgado v. Lewis*, 223 F.3d 976, 980 (9th Cir. 2000) And, Gordon's inability to meaningfully participate in the second hearing prevented him, through no fault of his own, from effectively representing Arocha. As the Ninth Circuit has observed, "[t]he Sixth Amendment, of course, guarantees more than just a warm body to stand next to the accused during critical stages of the proceedings; an accused is entitled to an attorney who plays a role necessary to ensure the proceedings are fair." *Delgado*, 223 F.3d at 980 (citing, *United States ex rel. Thomas v. O'Leary*, 856 F.2d 1011, 1015 (7th Cir. 1988).

Blackman maintains that Arocha has failed to produce any evidence that his lawyer at the second hearing, Dave Gordon, was not allowed to participate in the hearing. But, the proceedings at this point are only in pleading stage. Thus, it is incumbent upon Blackman to establish "beyond doubt that [Arocha] can prove no set of facts in support of his claim that would entitle [him] to relief." In ruling upon her motion, the Court must assume that all allegations of material fact are true and construed in the light most favorable to Arocha. *American Family Ass'n v. City and County of San Francisco*, 277 F.3d 1114, 1120 (9th Cir. 2002).

Arocha's claim that Mr. Gordon was precluded from meaningful participation in the sentencing is based on interviews with Arocha and Mr. Gordon. Under the Indian Civil Rights Act, however, the Blackfeet Tribal Court is required to "maintain a record of the criminal proceedings, including an audio or other recording of the trial proceeding." *See* 25 U.S.C. § 1301(c)(5). As this case proceeds, the Tribal Court should be required to provide a recording of all of the hearings in Arocha's case. Arocha maintains that a recording of the second hearing will support his claim that he was not given a chance to argue for a different sentence or object to the sentence that had been imposed four years earlier. Until those recordings are obtained, however, his allegation should be presumed to be true. *American Family Ass'n v. City*, 277 F.3d at 1120. If the recordings establish that Mr. Gordon was given an opportunity to actually represent Arocha, Blackman can move for summary

judgment. But her claim to that effect should not be resolved in her favor via a motion to dismiss.

5. Arocha was denied his rights to equal protection and due process as guaranteed by 25 U.S.C. § 1302(a)(8).

Arocha has alleged that he was denied equal protection and due process, as guaranteed by 25 U.S.C. § 1302(a)(8). Blackman has argued that his equal protection argument is defeated because defendants who appear in Blackfeet Tribal Court are – she implies -- routinely sentenced to more than a year of imprisonment by Judge Pepion even though they are not afforded "the right to effective assistance of counsel."

It may be true that the Blackfeet Tribal Court routinely violates the rights of defendants. But that does not defeat Arocha's due process and equal protection claims. He might be treated equally to defendants in the Blackfeet Tribal Court. But, defendants from other tribes are afforded their rights under the Indian Civil Rights Act.[5] Thus, Arocha has not been treated equally to those defendants. Also, it can hardly be argued that he received due process

[5] Tompkins, Jill Elizabeth (2015) "Defining the Indian Civil Rights Act's "Suffiently Trained" Tribal Court Judge," *American Indian Law Journal*: Vol. 4: Iss. 1, Article 5 53, 69-72. (noting that the Umatilla, Pascua Yaqui, and the Tulalip Tribes have adopted codes that guarantee criminal defendants the full panoply of rights afforded under the Indian Civil Rights Act)

when he was sentenced without the effective assistance of counsel guaranteed by § 1301(c).

6. Blackman's exhaustion argument is misplaced. Arocha's claims, whether or not fully exhausted, are procedurally defaulted because they were either not presented in tribal court or were presented in a manner that did not comport with the Blackfeet Tribe's procedural rules. But, notwithstanding the fact that Arocha's claims are procedurally defaulted, they can be considered by this Court because he can show cause and prejudice to excuse his default.

Blackman misunderstands the doctrines of exhaustion and procedural default. In *Cooper v. Neven*,641 F.3d 322 (9th Cir. 2011) the Ninth Circuit explained the relationship between the two doctrines:

> Contrary to respondents' assertion, claims can be procedurally defaulted even if they are not exhausted. Indeed, one prong of procedural default encompasses claims that were not presented in state court, and would now be barred by state procedural rules from being presented at all. Thus, the district court's finding of procedural bar incorporates claims that were denied on procedural grounds as well as any unexhausted claims that would be considered untimely if [petitioner] attempted to exhaust them now. The latter claim is technically exhausted but procedurally defaulted. For both kinds of default, the relevant question is whether [petitioner] can show cause and prejudice to excuse the error. If he can, either form of default would be excused. Therefore, it was unnecessary for the district court to address whether [petitioner's] claims were exhausted, as the issue was rendered moot by the district court's procedural default analysis.

Id. at 328 (citations omitted).

In his amended petition, Arocha has raised claims that were not presented to the Blackfeet Tribal Courts. His lawyer, Thane Johnson, did not challenge the proceedings on the ground that they did not comport with 25 U.S.C. § 1301; he did not challenge Arocha's sentence on the grounds that it was imposed in the absence of counsel and in violation of § 1301(c)(3); he did not raise a claim under § 1302(c)(1) that Arocha was deprived of his right to effective assistance of counsel; and he did not raise a claim that Arocha was denied his rights to equal protection and due process as guaranteed by § 1302(a)(8). The claims Johnson did try to raise were denied either because they were untimely or raised in a manner that did not comply with the Tribe's procedural rules. They nevertheless should be heard by this Court because Arocha can establish cause and prejudice to excuse Johnson's default of his claims.

Cause is established if counsel's ineffectiveness resulted in a default in a proceeding in which the petitioner had a right to counsel. *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991). Arocha had a right to counsel in his tribal court proceedings under the Indian Civil Rights Act. It is also clear that his lawyer performed ineffectively throughout those proceedings and, as a result, procedurally defaulted Arocha's claims.

A brief summary of Mr. Johnson's actions following Arocha's trial establish that he failed to provide "effective assistance of counsel at least equal to that

guaranteed by the United States Constitution." *See*, 25 U.S.C. § 1301(c)(1). First and foremost, the Tribal Court record establishes that he failed to appear at Arocha's sentencing hearing even though he agreed upon and helped set the date for the hearing. (doc. 10-1 at 2). His absence prevented him from challenging the sentence imposed on Arocha or making arguments in mitigation. Because he was not present and did not make any objections, he could not have raised a claim that Arocha's rights were violated on appeal.

Johnson did eventually attempt to challenge Arocha's sentence. But that challenge was filed over four years after it was imposed in a petition for habeas corpus presented to the Blackfeet Appellate Court, which was the wrong vehicle to bring such a claim. (doc. 10-1 at 20-22). As the tribal prosecutor pointed out, Blackfeet law limits the availability of the writ of habeas corpus to pretrial detainees. Under Chapter 11, Section 26 of the Blackfeet Law & Order Code, a writ of habeas corpus may only be filed by a "person who is detained in the Blackfeet Tribal Jail before any hearing on the merits of the charges against him or her." (doc. 10-1 at 26). By the time the petition was filed, Arocha had been convicted at trial, which undoubtedly qualifies as a "hearing on the merits of the charges against him." In addition to using the wrong vehicle, Johnson's argument – that Arocha's tribal sentence had to run concurrently with his federal sentence – was, as Blackman herself points out, wholly without merit. (doc. 22 at 5-6).

A week after the appeals court issued its order denying habeas relief, Johnson filed a Motion for a New Trial or, in the Alternative, for Relief from Judgment under Rules 54 and 55(b) of the Blackfeet Rules of Civil Procedure. In response, the Tribe argued that Arocha's motion was both untimely and misplaced. It was untimely because Arocha's challenge to his sentence was made nearly four years after it was imposed – well past the deadline for filing for a new trial or relief from judgement. It was misplaced because it was filed under the Rules of Civil Procedure, which do not apply to criminal cases. (doc. 10-1 at 34-36). Judge Pepion agreed with the Tribe and denied Arocha's motion because it was based on "the Blackfeet Rules of Civil Procedure and not the Blackfeet Rules of Criminal Procedure." (doc. 10-1 at 37).

After Arocha was released from federal prison, the Tribal Court held a hearing to re-impose its November 2017 sentence in Arocha's presence. At this hearing, Arocha was represented by a different attorney, Dave Gordon. But he was not allowed to meaningfully participate in the hearing. Three weeks later, Johnson filed an appeal with the Blackfeet Appellate Court. As both Arocha and Blackman have pointed out, however, the appeal was untimely. (doc. 10 at 11 n.1; doc. 22 at 14). The Blackfeet Law & Order Code requires that "an appeal from a judgment, decision, or order must be taken within ten (10) days after it is rendered." *See*, Blackfeet Law & Order Code, Chapter 11, Part I, Section 4(A).

As this history shows, Arocha was deprived of the effective assistance of counsel guaranteed by the Indian Civil Rights Act and, as a result, the claims raised in Arocha's amended petition were procedurally defaulted.

In addition to establishing cause, Arocha must show that he was prejudiced by Johnson's ineffectiveness. Prejudice in this context is measured by the same standard as that set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See, Vansickle v. White*, 166 F.3d 953, 958-59 (9th Cir. 1999). Under *Strickland*, prejudice is established when it is shown that "there is a reasonable probability that, but for the [errors], the result of the proceeding would have been different." *Id.* at 694. That standard is easily met in this case. Had Johnson properly raised Arocha's Indian Civil Rights Act claims, they would not be procedurally defaulted and they could be adjudicated in this Court. In other words, the result of the proceeding would be different.

As a final matter, Arocha's free-standing claim of ineffective assistance of counsel should be excused for two reasons. First, the Blackfeet Tribal Law & Order Code does not provide a mechanism for bringing such claims. As noted, habeas petitions are limited in scope and can only be filed to challenge pretrial detention. Ineffective assistance claims are generally ill-suited for resolution on direct appeal because they require a record establishing counsel's failures and/or any strategic reasons he may have had for making his challenged decisions.

Second, notwithstanding the fact that he failed to appear at Arocha's sentencing hearing, Johnson continued to represent him after the Tribal Court proceedings concluded. He could not have been expected to raise issues of his own ineffectiveness on appeal, which he didn't file in any event. Because the Blackfeet Tribe does not provide an adequate means to adjudicate an ineffective assistance claim, Arocha's default of his free-standing ineffective assistance claim should be excused. *Wallace v. Cody*, 951 F.2d 1170, 1172 (10th Cir 1991); *Dawan v. Lockhart*, 980 F.2d 470, 475 (8th Cir. 1992).

C. Conclusion

Based on the foregoing, the Court should deny Respondent Cecilia Blackman's motion to dismiss.

RESPECTFULLY SUBMITTED this 20th day of September, 2023.

/s/ David F. Ness

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief is in compliance with Local Rule 7.1(d)(2) (as amended). The brief's line spacing is double spaced, and is proportionately spaced, with a 14-point font size and contains less than 6,500 words. (Total number of words: 4,930 excluding tables and certificates).

DATED this 20th day of September, 2023.

/s/ David F. Ness

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2023, a copy of the foregoing document was served on the following persons by the following means:

1 CM-ECF
2, 3, 4 Mail

1. CLERK, UNITED STATES DISTRICT COURT

2. CECLIA BLACKMAN
Bureau of Indian Affairs
Blackfeet Detention Center
P.O. Box 807
Browning, MT 59417
Respondent

3. BLACKFEET TRIBE – TRIBAL BUSINESS COUNCIL
All Chief's Square
P.O. Box 850
Browning, MT 59417
Respondent

4. WILLIAM ALBERTO AROCHA, JR.
Defendant

/s/ David F. Ness