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CECILIA BLACKMAN

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

<p>WILLIAM ALBERTO AROCHA JR.,</p> <p>Petitioner,</p> <p>vs.</p> <p>CECILIA BLACKMAN and BLACKFEET TRIBE,</p> <p>Respondents.</p>	<p>CV 22-115-GF-BMM</p> <p>REPLY TO PETITIONER'S RESPONSE TO RESPONDENT CECILIA BLACKMAN'S MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS</p>
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Respondent Cecelia Blackman submits this Reply to Petitioner's Response (Doc. 29) to Respondent Blackman's Motion to Dismiss (Doc. 21) the Amended Petition for Writ of Habeas Corpus. Blackman is not a proper respondent to this proceeding. In his response to the motion to dismiss, Arocha now submits evidence that he is currently incarcerated at the Rocky Mountain

Regional Detention Facility in Hardin, Montana. (Doc. 29-1.) Respondent Blackman is not the warden of that facility, and for that reason she should be dismissed from this proceeding, independent of whether the Court rules she was a proper respondent on January 30, 2023, when Arocha filed his original petition (Doc. 5), or whether the Court’s jurisdiction attached on that date.

Arocha’s response to the motion to dismiss argues at length (Doc. 29 at 11-16, ¶¶4-5) the alleged deficiencies of his original tribal court sentencing proceeding on November 8, 2017. That argument is irrelevant, however, because a new judgment was imposed on November 17, 2022, and it is the new judgment authorizing his detention that Arocha’s petition must address.

“[A] habeas corpus proceeding is a collateral attack, of a civil nature, to impeach the validity of a judgment or sentence of another court in a criminal proceeding, and it should therefore be limited to cases in which the judgment or sentence attacked is clearly void....” *Ex parte Frederick*. 149 U.S. 70, 76 (1893); *see also Magwood v. Patterson*, 561 U.S. 320, 331 (2010) (First habeas application challenging new judgment after resentencing is not second or successive because it is seeking invalidation of the new judgment authorizing confinement). Arocha is currently in custody under the sentence and judgment imposed on November 17, 2022, and it is to that judgment that Arocha’s petition must be addressed.

Respondent Blackman agrees completely with Arocha's assertion that he has "raised claims that were not presented to the Blackfeet Tribal Courts." (Doc. 29 at 17.) Arocha then folds this admission into a discussion of how a lack of counsel at his 2017 sentencing causes Arocha to be in a procedural default. Arocha then seeks to excuse his procedural default by claiming ineffective assistance of his 2017 counsel Thane Johnson. (Doc. 29 at 16-21, ¶6.) This is a red herring argument. This entire procedural default argument is irrelevant because it is not addressed to the 2022 judgment authorizing Arocha's current custody, which judgment is under the Court's consideration today.

What is relevant for purposes of this proceeding is Arocha's new sentence and the new judgment imposed in 2022, when Arocha was represented by new counsel, Dave Gordon. If and when Arocha files a habeas petition in the Blackfeet Court of Appeals addressing this sentence and judgment, he can argue that he was inadequately represented in tribal court and raise his ICRA claims.

After thoroughly canvassing his original counsel's ineffective assistance in 2017, Arocha contends that no tribal remedy is available to him. Arocha cites the text of the tribal code, Blackfeet Tribal Law and Order Code, Ch. 1, Sec. 26, that purportedly confines the habeas right only to the pre-trial phase of a criminal proceeding. (Doc. 29 at 18.) Arocha knows better, however, because on September 19, 2022, he filed his *post-conviction* habeas petition (Doc. 10-1

at 20-28) that was denied *on its merits* by the Blackfeet Court of Appeals on September 20, 2022 (Doc. 10-1 at 29). Obviously the Blackfeet Code’s right to habeas is not confined to pre-trial custody only. Not only can Arocha present any of his claims, including his ICRA claims, to the Blackfeet Court of Appeals, he must do so. To date, that court has never been given an opportunity to pass upon Arocha’s claims.

This Court has previously adopted the rule that “[a] litigant must first exhaust tribal remedies before properly bringing a petition for writ of habeas corpus.” *Cantrell v. Jackson*, No. 16-33-GF-BMM-JTJ, 2016 WL 4537942 (Aug. 5, 2016), *magistrate judge’s findings and recommendation adopted by* 2016 WL 4537749 (D. Mont. Aug. 30, 2016). It would offend “the fundamental principles of comity and respect for the sovereignty and self-governance of the [Blackfeet] Tribe and [its] tribal courts” to ignore “the prudential exhaustion requirements.” *Lundy v. Balaam*, 2021 WL 2904917, *10 (D. Nev. 2021). “Those courts should be allowed the opportunity to consider, and potentially correct, the alleged violations of ICRA on challenges pursued ... via procedurally proper vehicles. Weighing the need to strengthen the authority of the tribal courts against the need for immediate adjudication of the alleged deprivation of Petitioner’s rights, the [D. Nev.] Court concludes that the balance leans substantially in favor of requiring full exhaustion in [Lundy’s] case.” *Id.*

This Court should likewise lean in favor of requiring full exhaustion in Arocha's case.

As a practical matter, this Court does not have an appropriate record of the 2022 sentencing proceedings, the prior proceedings, and the tribal court's analysis and ruling on Arocha's claims that would permit this Court fully to consider the merits of Arocha's petition. This would have the significant additional benefit of allowing the tribal court to consider and correct any ICRA violations or to set forth its own ICRA analysis. The balance leans "substantially in favor of requiring full exhaustion in this case." *Id.* Allowing the Blackfeet courts to consider Arocha's claims first is a matter of comity. If the Blackfeet Tribal Court determines that no ICRA violation has occurred and that Arocha's other habeas claims are without merit, he may return to this Court for plenary review. By denying the amended petition, this Court would preserve and strengthen the tribal court's sovereignty and its rule of law by providing an opportunity for the Blackfeet Courts to solve the dispute and implement tribal policy.

Based on the foregoing, Respondent Blackman respectfully urges the Court to dismiss the amended petition for writ of habeas corpus without prejudice to refiling after exhaustion of tribal remedies. Alternatively, Respondent Blackman

requests to be dismissed as a named Respondent because Petitioner has informed the Court that she is not his custodian.

DATED this 29th day of September, 2023.

JESSE A. LASLOVICH
United States Attorney

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

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 980 words.

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

CERTIFICATE OF SERVICE

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

- (1, 2) CM/ECF
- () Hand Delivery
- (3,4) U.S. Mail
- () Overnight
- () Fax
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