No. 15-420

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL BRYANT, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND EXPERIENCED TRIBAL COURT CRIMINAL LITIGATORS IN SUPPORT OF RESPONDENT

BARBARA E. BERGMAN
CO-CHAIR, NACDL
AMICUS COMMITTEE
UNM SCHOOL OF LAW
1117 Stanford, N.E.
Albuquerque, New Mexico 87131
(505) 344-2702

DANIEL L. KAPLAN
Counsel of Record
ASSISTANT FEDERAL PUBLIC DEFENDER
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2700
dan_kaplan@fd.org

Counsel for Amicus Curiae

263902

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND EXPERIENCED TRIBAL COURT CRIMINAL LITIGATORS IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL), a nonprofit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. Founded in 1958, NACDL has a nationwide membership of approximately 9,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient, and just administration of justice, including the administration of criminal law. NACDL files numerous amicus briefs each year in this Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to accused persons, criminal defense lawyers, and the criminal justice system as a whole.

Tova Indritz is a criminal defense lawyer in private practice in Albuquerque, New Mexico, where she represents Native American defendants in federal, state, and Indian tribal courts. A 1975 graduate of Yale Law

1. No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to the filing of this brief are being filed herewith.

School, Ms. Indritz was an Assistant Federal Public Defender in the District of New Mexico from 1976 to 1981, and the Federal Public Defender for that District from 1981 to 1995. During Ms. Indritz' tenure at the Federal Public Defender's office, about a quarter of her caseload consisted of Indian Country cases. Ms. Indritz teaches criminal defense lawyers practicing in federal, state, and tribal courts about Native American criminal justice issues, has testified before Congress and the United States Sentencing Commission about tribal criminal justice issues on multiple occasions, and is the co-chair of NACDL's Native American Justice Committee.

Nicholas A. Fontana is an attorney in private practice in Tucson, Arizona. Mr. Fontana served as the Chief Public Defender for the Pascua Yaqui Tribe from 2004 through 2010, and served as a judge pro tempore for the Tohono O'odham Tribal Court from 2011 through 2012. Mr. Fontana is currently admitted to the Tohono O'odham Tribal Court, and was previously admitted to the Navajo Nation Bar Association, Hopi Tribal Court, and Pascua Yaqui Tribal Court. Mr. Fontana has been a presenter on Indian Law at the Arizona Public Defender Association Annual Conference, Arizona Attorneys for Criminal Justice Winter Seminar, and the Annual National Border Town Racism Conference. Mr. Fontana graduated from the University of Arizona College of Law in 1992 and is a member of the State Bar of Arizona.

Cecilia Vaca served as a Defense Attorney at the Gila River Indian Community Defense Services Office from 2008 through 2014, and served as the Director of that office from 2011 through 2014. Ms. Vaca is currently an

Assistant Federal Public Defender in the Middle District of Alabama.

Amici are concerned about the question presented in this case because it implicates the rights of criminal defendants, and particularly of individuals who have been or may be convicted in Indian tribal courts, not to be imprisoned on the basis of proceedings that fail to comply with fundamental principles of fairness enshrined in the Constitution and the Indian Civil Rights Act, 25 U.S.C. § 1302 (ICRA).

SUMMARY OF ARGUMENT

This case presents a question of great importance to the subgroup of American citizens who are subject to the prosecutorial power of Indian tribal courts. For members of this group, a ruling for the petitioner would mean that the products of their uncounseled tribal court prosecutions could become elements of a federal crime punishable by up to ten years in prison. This prospect raises the question of whether tribal courts reliably provide criminal defendants with a level of due process sufficient to justify treating these convictions as elements of a serious federal crime.

Petitioner contends that they do, stressing that while Indian tribes are not subject to the constraints imposed upon federal and state governments by the Bill of Rights,[2] most of these rights are made applicable to tribal courts by ICRA.[3] In an amicus brief, the "oldest and largest organization representing Indian tribal governments"

2. *Talton v. Mayes*, 163 U.S. 376 (1896).

3. Petr. Br. at 19.

similarly assures this Court that ICRA "serves its role well, with tribal courts faithfully applying the statute to ensure that their determinations are reliable and fair."[4]

The purpose of this brief is to draw upon amici's knowledge and experience with tribal-court criminal litigation to give this Court an informed perspective from which to assess these claims. Amici will show that while Congress intended ICRA to make most of the protections enshrined in the Bill of Rights meaningfully applicable to tribal-court criminal defendants, that effort has failed. In reality, the rights set forth in ICRA are routinely ignored or rejected by tribal courts, without effective recourse for defendants. While there undoubtedly are many tribal judges and officials who seek to ensure that tribal-court prosecutions are reliable and fair, the unfortunate fact is that ICRA's guarantees commonly have little relation to the reality of tribal court criminal litigation. Amici urge the Court to factor this reality into its assessment of whether uncounseled tribal-court convictions should be permitted to become elements of a federal crime pursuant to 18 U.S.C. § 117(a).

4. Br. *Amicus Curiae* of Nat'l Cong. of Am. Indians at 1, 8-9 (hereinafter *NCAI Amicus Br.*).

ARGUMENT

I. The Indian Civil Rights Act was enacted to address pervasive violations of civil rights by Indian tribal courts.

A. History and background of tribal courts

Before the European conquest of North America, Indian tribes had their own "concepts of fairness in the way [they] handled disputes, seeking both to compensate the victim and to rehabilitate the wrongdoer."[5] The federal government initially gave them leeway to develop their own systems of justice.[6] But in the 19th century, the federal government begin pursuing a policy of assimilation, affirmatively separating Indians from their cultural traditions and eroding their traditional methods of dispensing justice.[7] In the late 1800s the government began imposing adversarial-style courts on tribes, created under the Code of Federal Regulations and popularly known as the "CFR courts."[8] Many tribe members viewed the CFR courts as agents of assimilation that were designed to destroy Indian customs and religious

5. Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 Ariz. L. Rev. 225, 226 (1989) (hereinafter Tso, *Tribal Courts*).

6. F. Cohen, *Handbook of Federal Indian Law* § 1.03 (2012).

7. *Id.* § 1.04; Barbara Creel, *Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing*, 46 U.S.F. L. Rev. 37, 63 (Summer 2011) (hereinafter Creel, *Respect for Tribal Courts*).

8. Creel, *Respect for Tribal Courts* at 63 & n.145.

practices.[9] This inauspicious introduction of adversarial-style litigation into Indian country was complemented by a policy today recognized as blatantly unlawful: Until 1961, when the regulation was held unconstitutional, the CFR courts forbade defendants from being represented by counsel.[10]

The 20th century was marked by vacillations in federal Indian policy that "resemble[d] a pendulum swinging from one extreme to another."[11] In 1934 the pendulum swung toward tribal self-determination with the Indian Reorganization Act, which authorized tribes to create their own courts to replace the CFR courts.[12] Today there are well over 200 such courts in Indian country.[13]

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9. *Id.* at 63-64.

10. 25 C.F.R. § 11.9CA (1958) ("No professional attorney shall appear in any proceedings before the Court of Indian Offenses."); 26 Fed. Reg. 4,360-61 (May 19, 1961) (revoking the regulation); *Constitutional Rights of the Am. Indian: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 87th Cong., 1st Sess. 501 (1961) (hereinafter *1961 Hearings*) (statement of William A. Creech, Chief Counsel and Staff Director of the Senate Judiciary Committee's Subcommittee on Constitutional Rights).

11. Tso, *Tribal Courts* at 227 n.2.

12. 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. § 461 *et seq.*).

13. See Tribal Court Clearinghouse, *Tribal Courts*, available at: http://www.tribal-institute.org/lists/justice.htm (listing 257 tribal courts) (last visited Feb. 1, 2016); National Center for State Courts, *State Court Organization, 2004: Table 33*, available at: http://cdm16501.contentdm.oclc.org/cdm/ref/collection/spcts/id/159 (listing 309 Tribal Justice Forums) (last visited Mar. 1, 2016).

B. Enactment of the Indian Civil Rights Act

The poor example set by the CFR courts, the fickleness in federal Indian policy, and a host of other factors made it difficult for tribal courts to evolve into tribunals that can reliably guarantee due process to criminal defendants. Facing limited resources and competing pressures to "import[] foreign concepts of justice and process" while simultaneously creating systems "reflective of internal tribal norms, traditions, and values," tribes created hybrid tribunals that effectively advanced neither objective: "assimilative tribal court systems with concomitant gaps in structure or process."[14] In the early 1960s, concerned by reports that "the individual Indians were being deprived of basic constitutional rights by the Federal, State, tribal, and local governments,"[15] the Senate Committee on the Judiciary's Subcommittee on Constitutional Rights (the Subcommittee) convened a set of hearings and staff investigations to look into the matter.

The Subcommittee's investigation proved the accuracy of James Madison's observation, in *The Federalist* Number 10, that small republics are inherently prone to factionalism and oppression.[16] During the hearings, the Subcommittee heard extensive allegations of tribal harassment and incarceration of political dissidents,

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14. Creel, *Respect for Tribal Courts* at 56.

15. *Constitutional Rights of the Am. Indian: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 87th Cong., 2d Sess. 713 (1962) (statement of Sen. Burdick) (hereinafter *1962 Hearings*).

16. *The Federalist* No. 10, at 126-27 (James Madison) (Isaac Kramnick ed., 1987).

restriction of religious freedom, and pervasive corruption. And while it uncovered a broad array of troubling practices, the Subcommittee's investigation "revealed that the most serious abuses of tribal power had occurred in the administration of criminal justice."[17] Senator Burdick of North Dakota informed the Subcommittee that "in many cases the tribal courts [we]re 'kangaroo courts.'"[18] Senator Ervin proclaimed himself "much perplexed" by evidence indicating that "in all too many cases tribal courts were entirely subservient to the tribal council."[19] Witnesses reported that, like the CFR courts prior to 1961, many tribes prohibited attorneys from representing defendants in their courts.[20]

The Subcommittee drafted a set of bills to address these concerns. Initially it proposed to provide broadly that "any Indian tribe in exercising its powers of local self-government shall be subject to the same limitations and restraints as those which are imposed on the Government of the United States by the United States Constitution."[21] But after the Interior Department expressed concerns that "the blunt insertion of all constitutional guarantees into tribal systems would produce disorder and confusion,"

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17. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978).

18. *1961 Hearings* at 88.

19. *Id.* at 135.

20. *Id.* at 483 (testimony of former San Juan Pueblo Governor Preston Keevana); *id.* at 487 (testimony of R.A. Wardlaw, assistant to the President of the Mescalero Apache Tribe).

21. *Constitutional Rights of the Am. Indian: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong., 1st Sess. 5 (1965) (hereinafter *1965 Hearings*).

the Subcommittee agreed to water down the Bill of Rights protections applicable to tribal governments.[22] In place of the straightforward application of constitutional protections, the Subcommittee drafted a proposal that paralleled the Bill of Rights in many respects, but contained substantial modifications. Perhaps most significantly, the bill guaranteed a tribal court criminal defendant the assistance of counsel only "at his own expense."[23]

The Subcommittee had considered guaranteeing appointed counsel in tribal court prosecutions pursuant to the recently-enacted Criminal Justice Act of 1964, but was informed that this would be impractical because funding to pay appointed lawyers was not available.[24] Moreover, this Court would not hold until 1972 that the Sixth Amendment guarantees criminal defendants the assistance of government-supplied counsel in any case resulting in actual imprisonment,[25] and testimony at the

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22. Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 Harv. J. on Legis. 557, 590 (1971-72) (hereinafter Burnett, *Historical Analysis*).

23. 113 Cong. Rec. 13,473 (May 23, 1967).

24. Burnett, *Historical Analysis* at 591; *see also NCAI Amicus Br.* at 5 ("Congress excluded the particular right to indigent defense counsel largely because of 'the cost which the guarantee would impose on . . . already impoverished tribes'") (quoting Burnett, *Historical Analysis* at 590-91); *The Indian Civil Rights Act: Report of the United States Commission on Civil Rights* 5 (1991) (hereinafter *1991 Civil Rights Report*) ("Cognizant of tribal economic constraints, [ICRA] does not require tribes to provide free counsel for criminally accused . . .").

25. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

Subcommittee's hearings indicated that tribal courts rarely imposed prison sentences exceeding six months.[26] As originally enacted, ICRA codified this limit by capping tribal-court sentences at six months of imprisonment and a $500 fine.[27] Two decades later, Congress increased the cap to one year of imprisonment and a $5,000 fine.[28] Tribes rendered these caps largely ineffective by "stacking" multiple one-year sentences for separately-defined crimes deriving from single incidents.[29]

Congress eventually enacted the Subcommittee's proposals as Titles II through VII of the Civil Rights Act of 1968.[30] Although the Subcommittee had initially proposed federal court oversight in the form of a *de novo*

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26. *1961 Hearings* at 384 (testimony of Hualapai Judge Shirley Nelson); *id.* at 462-63 (testimony of Zuni Judge Alfred Sheck); *id.* at 465 (testimony of Nambe Pueblo Governor Ernest Mirabal); *id.* at 484 (testimony of former San Juan Pueblo Governor Preston Keevana); *1962 Hearings* at 574 (testimony of Department of Interior Regional Solicitor Palmer King); *Constitutional Rights of the Am. Indian: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 88th Cong., 1st Sess. 871 (1963) (testimony of Warm Springs General Counsel Owen M. Panner); *1965 Hearings* at 237 (testimony of Crow Tribe delegate Edison Real Bird). The "CFR Courts" were subject to a codified six-month cap. 25 C.F.R. §§ 11.33-11.87NH (1967).

27. Pub. L. No. 90-284, § 202(7), 82 Stat. 77 (1968).

28. Pub. L. No. 99-570, § 4217 (1986).

29. *Miranda v. Anchondo et al.*, 684 F.3d 844 (9th Cir. 2012); *Spears v. Red Lake Band of Chippewa Indians*, 363 F. Supp. 2d 1176 (D. Minn. 2005).

30. Pub. L. No. 90-284, §§ 201-701, 82 Stat. at 77-81 (1968).

trial in federal court following a tribal court conviction,[31] the law as enacted provided that the sole means by which individuals could vindicate their ICRA rights in federal court was through a habeas corpus petition.[32]

II. The Indian Civil Rights Act has failed to meaningfully extend Bill of Rights protections to tribal court criminal defendants.

As this history illustrates, Congress's purpose in extending most of the Bill of Rights protections to tribal court criminal defendants in 1968 was to rectify a situation in which many citizens were being convicted in fundamentally unfair tribunals, and to raise the quality of criminal justice in tribal courts to a level comparable to state and federal courts. But after examining the records of a 2003 tribal-court conviction, Ninth Circuit Judge Alex Kozinski found a form of "rough and tumble justice" reminiscent of the Subcommittee's findings in the early 1960s.[33] In short, as amici will illustrate below, ICRA has failed. There are multiple, mutually-reinforcing reasons for this failure, which can be broken down into eight themes.

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31. *1965 Hearings* at 6-7.

32. Pub. L. No. 90-284, tit. II, § 203 (1968) (codified at 25 U.S.C. § 1303) ("The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.").

33. *Alvarez v. Tracy*, 773 F.3d 1011, 1035 (9th Cir. 2014) (Kozinski, J., dissenting).

A. Poverty and powerlessness of tribal criminal defendants

The subgroup of American citizens subject to the prosecutorial power of tribal courts is distinctly ill-suited to securing counsel, effectively defending themselves, or lobbying Congress for effective enforcement of the rights guaranteed by ICRA. The poverty rate among Indians is 27 percent – higher than that of any other racial group – and in some states it is over 40 percent.[34] They are largely scattered in remote, small communities, commonly subject to language and cultural barriers to access to relief from the state or federal governments, and racially distinct from the broader population.[35] For a vulnerable group such as this, due process protections are especially crucial.[36] But in the legislative and judicial arenas, these citizens' interest in fair procedures is routinely overshadowed by the powerful and well-funded interests that support strengthening their government's law enforcement authority – including the federal government and lobbying

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34. U.S. Census Bureau, U.S. Dep't of Commerce, *Poverty Rates for Selected Detailed Race and Hispanic Groups by State and Place: 2007-2011* 2-6 (2013).

35. Notably, when Congress in 2013 for the first time authorized tribes to extend their criminal jurisdiction to non-Indians, it simultaneously extended to *non*-Indian defendants Bill of Rights protections – including the right to appointed counsel in any tribal-court prosecution potentially resulting in incarceration "of any length" – that still are not provided to Indians. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904 (2013) (codified at 25 U.S.C. § 1304(d)).

36. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard Univ. Press 1980).

groups representing the interests of tribal governments.[37] In short, as the former Director of Dakota Plains Legal Services told the Commission on Civil Rights, "[t]here is a *tribal* lobby in D.C., not an *individual* lobby."[38]

B. Lack of counsel

When disadvantaged individuals such as these are haled into court to face criminal charges, the importance of the assistance of counsel is at its apex. ICRA's most essential flaw, therefore, was that Congress "imposed a set of rights, and then failed to include the one factor that could protect those rights: the fundamental human right of access to defense counsel."[39] Indeed, the history of tribal-court criminal litigation confirms this Court's observation in *Gideon v. Wainwright* that the right to be heard may be "of little avail if it d[oes] not comprehend the right to be heard by counsel."[40]

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37. In the instant case, for example, an organization "representing Indian tribal governments" retained a prominent Washington, D.C. law firm to file a brief proclaiming that "ICRA serves its role well, with tribal courts faithfully applying the statute to ensure that their determinations are reliable and fair." *NCAI Amicus Br.* at 1, 8-9.

38. *Enf't of the Indian Civil Rights Act: Hearing before the United States Comm'n on Civil Rights held in Rapid City, South Dakota Jul. 31-Aug. 1 and Aug. 21, 1986* 22 (testimony of Anita Remerowski, Former Director, Dakota Plains Legal Services) (emphases added) (hereinafter *Rapid City Hrg.*).

39. Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 Mich. J. Race & L. 317, 351 (Spring 2013) (hereinafter Creel, *Right to Counsel*).

40. 372 U.S. 335, 344-45 (1963) (internal quotation marks omitted).

The 2003 trial of Fortino Alvarez, which inspired Judge Kozinski's remarks quoted above, is illustrative. Mr. Alvarez did not have the assistance of counsel at any point in his prosecution for domestic violence and other charges.[41] When agents of his tribe arrested him and imprisoned him in a facility with no law library, he was just out of his teens and had a seventh-grade education.[42] At his arraignment he was given a form listing his ICRA rights, but no one explained to him what they meant.[43] At his pretrial hearing he said he thought he was ready to go to trial, but exhibited serious confusion as to how many charges were pending against him.[44] He simultaneously said he did not want to go to trial and adhered to his not-guilty pleas.[45] He made inconsistent statements about pleading guilty to certain charges, and finally acknowledged that he "d[id]n't really know about court that much."[46] The court proceeded to set his case for a bench trial.[47]

At his trial Mr. Alvarez made no opening or closing statements, called no witnesses, presented no evidence, cross-examined no witnesses, and made no objections –

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41. *Alvarez*, 773 F.3d at 1014 n.3.

42. *Id.* at 1031 (Kozinski, J., dissenting); *Alvarez v. Tracy*, No. 08-cv-2226 (D. Ariz.) (Doc. 104 at 4).

43. *Alvarez*, 773 F.3d at 1034 (Kozinski, J., dissenting).

44. *Alvarez v. Tracy*, No. 08-cv-2226 (D. Ariz.) (Doc. 104 at 4).

45. *Id.*

46. *Id.*

47. *Id.*

including when a tribal police officer read into evidence the accusations of the non-testifying alleged victim.[48] When the court asked Mr. Alvarez whether he wanted to rest his case following the tribe's presentation of evidence, he responded: "What do you mean by that?"[49]

The court proceeded to find Mr. Alvarez guilty and set the case for sentencing.[50] During a break, the prosecutor negotiated with Mr. Alvarez regarding additional counts, then informed the court that they had reached an agreement with respect to yet-untried charges.[51] Mr. Alvarez confirmed the prosecutor's representation, but his presentence report showed that he failed to understand which charges he was pleading guilty to.[52] At the sentencing hearing, the judge summarily accepted the tribe's recommendation of a five-year prison sentence, then asked Mr. Alvarez whether he had "[a]ny questions?"[53] Mr. Alvarez responded: "Well, so I'll get probation for this sentencing or what?"[54]

Because "most American Indians cannot afford or find competent retained counsel to appear in tribal court,"[55]

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48. *Id.* at 4-5, 7-8.

49. *Id.* at 5.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Creel, *Right to Counsel* at 319-20.

Mr. Alvarez's experience is unfortunately quite typical of tribal court criminal litigation. Some tribes (including Mr. Alvarez's) have, to their credit, created public defender positions, but these defenders are available to only a small proportion of tribal-court criminal defendants.[56] And while many tribes permit non-lawyer "advocates" to serve as counsel for criminal defendants in their courts, the availability of these lay practitioners does not meaningfully ameliorate the unavailability of law-trained counsel. Many tribal advocates have not graduated from law school, or even from high school.[57] Tribes commonly require nothing more than a modest payment, or some knowledge of the tribe's code, as a precondition for representing criminal defendants in their courts.[58] These lay practitioners may have little or no understanding of criminal procedure or of the meaning of the rights enumerated in ICRA.[59]

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56. The Navajo Nation public defender office, for example, represents only approximately one-tenth of all criminal defendants prosecuted in Navajo Nation courts. *Tribal Law and Order: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary* (2009) (testimony of Tova Indritz), 2009 WL 4693354 at 6 (hereinafter *2009 House Hearing*).

57. *Id.* at 8; Am. Indian Law Ctr., Inc., *Survey of Tribal Justice Systems & Courts of Indian Offenses: Final Report* 30 (2000) (75.6% of tribes responding to survey permit advocates who do not have law degrees or are not members of a state bar to represent clients in their courts) (hereinafter *AILC Report*).

58. *Jackson v. Tracy*, No. 11-cv-448 (D. Ariz.) (Doc. 20-5 at 19); *Rapid City Hrg.* at 38 ("All you have to do is pay $50 and you become a lay advocate.") (testimony of Elma Winters, Lay Advocate, Pine Ridge Reservation).

59. The advocate's performance in the sexual abuse prosecution of Michael Jackson is illustrative. Mr. Jackson's advocate conducted

They may also suffer from serious conflicts of interest that law-trained counsel would recognize: In one notable case, a tribe appointed the arresting officer in the incident underlying the prosecution to act as the defendant's advocate.[60]

C. Lack of accessible and reliable codes and rules

In order for an unrepresented defendant to have a fighting chance of effectively representing herself, she must have access to the laws and rules that will govern her prosecution. Unfortunately, these crucial resources are commonly unavailable in Indian country.

"Unlike federal and state governments, most tribes have no mandate to publish their laws," and "many tribes have chosen not to make their laws publicly available."[61]

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no investigation, failed to communicate with Mr. Jackson before trial, failed to enter his appearance until the day before trial, failed to respond to the prosecution's continuance motions, failed to object to an amended complaint presented moments before trial began, failed to object to the prosecutor's leading questions and eliciting of incriminating hearsay, and failed to point out to the court that a DNA report excluded Mr. Jackson as the source of semen found on the alleged victim's blanket. *Jackson v. Tracy*, No. 12-17179 (9th Cir.) (DktEntry: 6-1 at 26-30). (The Ninth Circuit affirmed the denial of habeas corpus relief to Mr. Jackson, reasoning that ICRA "does not protect a criminal defendant's right to the effective assistance of a tribal advocate who is not admitted to the bar." *Jackson v. Tracy*, 549 F. App'x 643, 644 (9th Cir. 2013).)

60. *Romero v. Goodrich*, No. 09-cv-232 (D.N.M.) (Doc. 1 at 6).

61. Bonnie Shucha, *"Whatever Tribal Precedent There May Be": The (Un)availability of Tribal Law*, 106 Law Libr. J. 199, 201 (Spring 2014) (hereinafter Shucha, *(Un)availability of Tribal Law*).

Many tribes operate "traditional" courts that follow unwritten rules – and even where tribes do have written codes, those codes may not reflect their actual practices. Tribal court defendants may find that there are "no rules of procedure," and that the rules are "being made up as [the case goes] along."[62] Tribes may even codify this *ad hoc* approach: The criminal procedure rules of the Confederated Tribes of the Colville Reservation, for example, specify that "[t]he Court shall not be bound by common law rules of evidence, but shall use its own discretion as to what evidence it deems necessary and relevant to the charge and the defense."[63] Many tribes elevate unwritten tribal custom over their written codes.[64] Others publish codes, but do not make them available to criminal defendants, or simply do not follow them. In a 1999 case, the Ninth Circuit noted that while the tribe in question purported to have an appellate court, two years after the petitioner sought appellate review the tribe had yet to set a briefing schedule, schedule an argument, meaningfully respond to the appellant's notice of appeal, or answer the appellant's correspondence, "creat[ing] doubt that a functioning appellate court exists."[65] The

62. *2009 House Hearing* (testimony of Tova Indritz), 2009 WL 4693354 at 11.

63. Code of the Confederated Tribes of the Colville Reservation, tit. 2, § 2-1-171, available at http://www.colvilletribes.com/updatedcode.php (last visited Mar. 11, 2016).

64. Robert D. Cooter and Wolfgang Fikentscher, *American Indian Law Codes: Pragmatic Law and Tribal Identity*, 56 Am. J. Comp. L. 29, 61 (Winter 2008) ("the typical order of authority for tribal judges is custom first, code second, and federal law third") (hereinafter Cooter & Fikentscher, *Pragmatic Law*).

65. *Johnson v. Gila River Indian Community*, 174 F.3d 1032, 1036 (9th Cir. 1999).

same tribe more recently published a new code of appellate procedure, but years afterward its courts continued following the procedures – including shorter deadlines – set forth in the superseded code.[66]

Given that even legal research experts find tribal law "very difficult, if not impossible, to locate,"[67] it is hardly reasonable to expect uncounseled inmates to be able to do so. And while Congress in 2010 required tribes "make publicly available" their criminal laws and rules, that requirement is limited to cases involving prison sentences exceeding one year – expressly exempting from this mandate the misdemeanor prosecutions at issue in the instant case.[68]

D. Lack of law-trained judges

Compounding the above problems is the fact that, in contrast to federal- and state-court judges,[69] "few contemporary tribal judges attended law school."[70] Indeed, some tribal judges have no college degree.[71] Particularly in small communities with limited resources, judges may

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66. *Alvarez v. Tracy*, No. 12-15788 (9th Cir.) (DktEntry: 38-1 at 19-20).

67. Shucha, *(Un)availability of Tribal Law* at 199.

68. 25 U.S.C. § 1302(c).

69. S. Strickland, R. Schauffler, R. LaFountain & K. Holt, eds. *State Court Organization* (Last updated January 9, 2015) (Table 37b), available at www.ncsc.org/sco.

70. Cooter & Fikentscher, *Pragmatic Law* at 55.

71. *Jackson v. Tracy*, No. 11-cv-448 (D. Ariz.) (Doc. 20-5 at 19).

simply be "volunteers from the community."[72] If these lay judges have received legal training, it likely consisted of short courses, often lasting no more than a week, provided by entities such as the National Indian Justice Center.

Recently the former chief judge (and later lay advocate) from a major tribe was interviewed about his representation of a defendant charged with sexual abuse. The former judge, who said he had attended week-long training sessions provided by the National Indian Justice Center, had failed to object at trial when the prosecutor asked leading questions and elicited the alleged victim's incriminating statements from her mother.[73] Asked whether he knew what a leading question was, he responded that it was a question "without foundation."[74] Asked to define hearsay, he replied that the alleged victim's mother was permitted to recount her daughter's accusations because the alleged victim "was present to testify if validation was needed."[75]

These responses illuminate a self-evident fact: However well-intentioned laypersons appointed to preside over criminal cases may be, brief training courses do not prepare them to effectively guarantee the complex, quasi-constitutional rights enshrined in ICRA to criminal

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72. Bureau of Justice Assistance, Office of Justice Programs, U.S. Dept. of Justice, *Pathways to Justice: Building and Sustaining Tribal Justice Systems in Contemporary America* 48 (2005).

73. *Jackson v. Tracy*, No. 11-cv-448 (D. Ariz.) (Doc. 20-5 at 19); *Jackson v. Tracy*, No. 12-17179 (9th Cir.) (DktEntry: 6-1 at 26-30).

74. *Jackson v. Tracy*, No. 11-cv-448 (D. Ariz.) (Doc. 20-5 at 19).

75. *Id*. at 19-20.

defendants – any more than crash courses in medicine could prepare them to competently perform surgery.[76]

E. Lack of judicial independence

In 1961, Senator Ervin noted that many tribal courts were "entirely subservient to the tribal council."[77] This remained true in 1997, when Justice O'Connor observed that tribal courts were "often subject to the complete control of the tribal councils,"[78] and it is still true today. As Justice O'Connor noted, this lack of independence "is not conducive to neutral adjudication on the merits and can threaten the integrity of the tribal judiciary."[79] Moreover, the abuses that flow from a council-controlled judiciary are especially pronounced in small tribal communities to which Madison's observation in *The Federalist* Number 10 are most pertinent. In such communities it is particularly likely that judges will be removed for issuing rulings

76. *Rapid City Hrg.* at 28 ("my perception is that the lower [tribal] court judges really do not have any idea what the Indian Civil Rights Act means") (testimony of Krista Clark, Attorney, Dakota Plains Legal Services).

77. *1961 Hearings* at 135.

78. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 5 (Fall 1997) (hereinafter O'Connor, *Third Sovereign*); see also *Enf't of the Indian Civil Rights Act, Hearing Before the United States Comm'n on Civil Rights held in Washington, D.C. Jan. 28, 1988* 123 ("By saying that we have to have separation of powers, you do arrogantly try to interject yourselves between ourselves and our history . . .") (testimony of Suzan Shown Harjo, Executive Director, Nat'l Cong. of Am. Indians) (hereinafter *Washington, D.C. Hrg.*).

79. O'Connor, *Third Sovereign* at 5.

adverse to the council, or that criminal cases will be manipulated to favor whichever of competing factions controls the council while the case is underway.[80]

In some tribes the lack of judicial independence is carried to its logical conclusion: The council *is* the court. Even tribes with formal courts based on the state-federal model may simultaneously have "traditional" courts, in which the governor or council members serve as prosecutor, judge, and jury. These Star Chamber-type tribunals typically do not follow established rules of procedure or keep records of their proceedings.[81] Generally they operate on a presumption of guilt, require the accused to bear witness against himself, and involve little more than one-sided questioning followed by the summary imposition of sentence. In some tribes these roles are not even meaningfully distributed among council members, but are effectively exercised unilaterally by the governor.

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80. *Rapid City Hrg.* at 294 ("If [judges] make decisions that are not favorable with the council, then they will be removed without a hearing – because I know; I was one of the individuals that was removed.") (testimony of Walter Crooks, Cheyenne River Sioux Tribe); *Shortbull v. Looking Elk*, 677 F.2d 645, 646-47 (8th Cir. 1982) (tribal judge suspended without hearing after ruling against council); *cf. 2009 House Hrg.* (testimony of Tova Indritz) (describing case in which alleged victim was abusive ex-boyfriend of judge's sister, yet judge "declined to find he had any conflict of interest"), 2009 WL 4693354 at 13.

81. In one case an attorney brought a recording device with the intention of recording such a proceeding, and was told that in "traditional" courts, recordings are forbidden.

The case of Eddie Nelson Garcia is illustrative. In 2010 Mr. Garcia, an enrolled member of a federally-recognized tribe in New Mexico, was dating the former girlfriend of a tribal police officer.[82] The woman summoned Mr. Garcia to her cousin's house, where she informed him that the officer had, without her involvement, issued a restraining order in her name against Mr. Garcia.[83] While they were talking, the officer entered the house without notice or consent, punched Mr. Garcia in the face, and had him arrested.[84] Two days later the tribe brought Mr. Garcia before its traditional court – which consisted of a group of officials that included the officer who had him arrested – and presented him with a sheet of paper.[85] On the paper were the charges – which included violation of the restraining order, the sentence of 364 days' imprisonment, and the Governor's signature.[86] Mr. Garcia began to complain that the charges were unfounded, but then signed the paper, fearing that resistance would only lengthen his incarceration.[87] Later, a law school clinic asked the tribe for the record of Mr. Garcia's trial. The tribe sent the clinic two documents: the complaint, and the sentencing document.[88] When the clinic subsequently filed a federal habeas corpus petition alleging that Mr. Garcia's conviction violated ICRA, the tribe did not dispute Mr.

82. *Garcia v. Massingill*, No. 10-cv-1151 (D.N.M.) (Doc. 1 at 2).

83. *Id.* at 3.

84. *Id.*; see also *id.* (Doc. 1-2 at 1-2).

85. *Id.* (Doc. 1 at 3).

86. *Id.*; see also *id.* (Doc. 1-2 at 6).

87. *Id.* (Doc. 1 at 3-4).

88. *Id.* at 5.

Garcia's allegations, but simply permitted judgment to be entered in his favor.[89]

It should be noted that while numerous additional examples are available,[90] the great majority of these summary convictions never make their way into federal court dockets. Those that do have benefited from the subject tribe's vicinity to a law clinic or federal court practitioner familiar with tribal court litigation and ICRA.[91] It should

89. *Id.* (Docs. 7-2, 12).

90. *See, e.g.*, *Pacheco v. Massingill*, No. 10-cv-923 (D.N.M.) (former United States Marine arrested after tribal officials entered and searched his home without consent while he was sleeping and claimed to find contraband, three days later he pleaded guilty without opportunity to request a trial or seek counsel, and was sentenced to two years of incarceration); *Abel v. Duck Valley Sho-Pai Tribes*, No. 10-cv-221 (D. Nev.) (Doc. 9) (tribal court sentenced petitioner "in absentia and without a hearing, and without even providing Petitioner notice that she might be subject to criminal contempt penalties"); *Star v. Massingill*, No. 10-cv-1046 (D.N.M.) (petitioner alleged he was brought before traditional tribal court without notice of the charges, informed that he was guilty of a probation violation, and summarily sentenced to 18 months' incarceration); *Calabaza v. Gleason*, No. 15-cv-1056 (D.N.M.) (petitioner alleges he was brought before traditional court without notice of the charges, summarily found guilty of theft by council headed by Governor who was in a relationship with the alleged victim, and sentenced to 364 days' incarceration). Such procedures have been described in the courts of the Northern Cheyenne Nation, of which Respondent is a member. *Morrison v. Spang*, No. 09-cv-106 (D. Mont.) (Doc. 2 at 2-3) (alleging summary *in absentia* entry of judgment and summary denial of appeal by Northern Cheyenne courts).

91. The petitioner in *Abel v. Duck Valley Sho-Pai Tribes* (see *supra* n.90) for example, managed to secure the assistance of a Federal Public Defender office only because the office happened

also be observed that while the procedures that they employ vary, traditional tribal courts are not an isolated or rare phenomenon. A report issued by the American Indian Law Center (AILC Report) noted that many tribes employ "traditional legal systems" that "operate under customary law and procedure which ordinarily is not written."[92] The report noted that 44.8 percent of the tribes responding to a survey had "a traditional system which operates along with the formal system," and that more than 90 percent of the responding tribes with both systems allowed the formal court to refer cases to the traditional system.[93]

F. Lack of resources

The tribe that prosecuted Fortino Alvarez is located on the outskirts of the sixth largest city in America and owns two golf courses, two restaurants, three casinos, a western-themed attraction, and the 500-room resort in which the New England Patriots stayed during the week leading up to last year's Superbowl.[94] Given that even such a tribe has trouble complying with ICRA, it stands to reason that remote tribes with few resources have even more difficulty doing so. And many tribes have extremely limited resources to devote to their criminal justice systems.

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to call her as a witness in a federal criminal trial unrelated to her tribal charge.

92. *AILC Report* at 21.

93. *Id.* at 22.

94. http://www.gilariver.org/index.php/enterprises; http://www.wingilariver.com/; http://www.patriots.com/news/2015/01/26/patriots-happy-trade-snow-super-bowl-sand.

The AILC Report found that tribal justice systems were "severely underfunded," with a median budget of $122,000 that, for most responding tribes, covered not only courts but also prosecutors, public defenders, and the maintenance of prisoners in jails.[95] Half of the responding tribes had no law library, and nearly half of those that had a law library reported that their libraries "do not contain the resources necessary to research the kinds of cases they handle."[96] In some cases, the only resources available were the tribe's code or "a combination of some out of date I[ndian] L[aw] R[eporter] volumes, a Black's Law Dictionary, 25 U.S.C., old training materials, and some state statutes."[97] Nearly 15 percent of the responding tribes did not record all trials, and the median reported starting salary for judges was $16.50 per hour.[98]

The financial picture may have improved for some tribes since this survey was conducted, but it is still the case that "many tribal courts remain undeveloped and often inefficient because of a lack of resources and a lack of functional judicial independence."[99] Faced with

95. *AILC Report* at vii.

96. *Id.* at 25-26.

97. *Id.* at 26.

98. *Id.* at vii, 36.

99. Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. Colo. L. Rev. 59, 71-72 (Winter 2013) (hereinafter Fletcher, *Indian Courts*); *see also 1991 Civil Rights Report* at 51 ("The ICRA was imposed on tribal governments by the Federal Government without accompanying support in the form of adequate funding, resources, or guidance as to how the rights guaranteed by the ICRA impact on tribal government.").

extremely limited resources, it is unreasonable to suppose that even the most well-intentioned tribes will be able to retain sufficiently qualified judges and attorneys, provide adequate research resources, or otherwise undertake the efforts required to make the complex rights enumerated in ICRA meaningful.

G. Modification or outright rejection of ICRA rights by tribal courts

Even tribal judges with adequate resources and functional independence commonly fail to meaningfully protect the rights that ICRA purports to extend to tribal criminal defendants. Whereas federal and state courts recognize their obligation to respect the rights enumerated in the Bill of Rights, and to do so in accordance with this Court's precedents, many tribes recognize no such mandate. These tribes may be grouped into three categories.

The first category includes tribes that merely decline to follow federal Bill of Rights precedent ""jot for jot,""[100] and instead interpret ICRA rights in accordance with their own customs and beliefs. At least where the application of tribal custom yields results that meet or exceed the level of fairness that ICRA rights would provide defendants in state or federal court, these cases create no tension with the essential premise and purpose of ICRA.

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100. *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J., concurring) (quoting Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 Am. Indian L. Rev. 285, 344 n.238 (1998)).

The second category includes tribes that stretch their sovereign prerogative further, by interpreting ICRA in ways that produce "radical departures from the meaning ascribed to the Bill of Rights by federal courts."[101] The Navajo Nation's courts, for example, have applied a Navajo common law gloss to ICRA's free speech protection, pursuant to which protected speech must be "delivered with respect and honesty" and "a disgruntled person must speak directly with the person's relative about his or her concerns before seeking other avenues of redress with strangers."[102] Another tribal court held that permitting the prosecutor, rather than the judge, to make a probable cause determination following a nonwarrant arrest was consistent with due process in light of "the traditional Indian value of trust in leadership."[103] Yet another applied the traditional belief "that individual rights lie subordinate to the rights of the tribe" to uphold a judgment where reversal might have threatened the tribe's casino operations.[104] In these tribes, the meaning of ICRA rights may bear little resemblance to the corresponding constitutional rights, and may provide little or no protection against the sort of abuses against which Congress intended ICRA to protect individual tribe members.

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101. Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 Fordham L. Rev. 479, 499 (Nov. 2000).

102. *Id.* at 493 (internal quotation marks omitted).

103. *Id.* at 516.

104. *Id.* at 537 (internal quotation marks omitted).

The third category of tribes simply refuse to recognize or enforce ICRA rights at all. Many tribal judges testifying before the Commission on Civil Rights made plain that they felt no obligation to follow ICRA's mandates,[105] and at least one tribal court has gone so far as to declare in a published opinion that its tribe was "'not bound by the provisions of the Indian Civil Rights Act.'"[106] Notably, a prominent Indian law scholar predicts more such express renunciations of ICRA.[107] For present purposes, amici do not question the legitimacy of tribal courts' belief that they are not bound by ICRA. Instead, they note only that this aspect of tribal adjudication belies any suggestion that tribal courts may be relied upon to enforce ICRA rights in a manner that meaningfully corresponds to this Court's understanding of the Bill of Rights protections they are intended to guarantee.[108]

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105. *See*, *e.g.*, *Rapid City Hrg.* at 272 (in the event of a conflict between ICRA and Indian law, "I would apply Indian law because that is the first law") (testimony of Cheyenne River Reservation Chief Judge Melvin Garreau); *Enf't of the Indian Civil Rights Act: Hearing Before the United States Comm'n on Civil Rights Held in Portland, Oregon Mar. 31, 1988* 71 ("we're not likely, because of our very independent natures, to just simply wholeheartedly adopt what America has done in the implementation of their Bill of Rights") (testimony of Jicarilla Apache Tribal Court Chief Judge Carey Vicenti).

106. Fletcher, *Indian Courts* at 88 (quoting *In re Batala*, 4 Am. Tribal Law 462, 468 (Hopi App. Ct. 2003)).

107. *Id.* ("[I]t would not be surprising to see more tribal court opinions rejecting the authority of Congress to enact ICRA, especially considering that the Supreme Court rejected federal enforcement of the statute in [*Santa Clara Pueblo v.*] *Martinez.*").

108. *Cf. Alvarez*, 773 F.3d at 1033 (noting that placing tribe members' capacity to vindicate their federal rights "entirely at

H. Ineffectiveness of habeas corpus remedy

When a tribe's courts fail or refuse to remedy a violation of ICRA rights, in theory the right to federal habeas corpus relief provides a remedy. In reality, ICRA's federal habeas remedy has been virtually ineffectual. Indeed, although tribal courts process anywhere from hundreds to tens of thousands of criminal cases each year,[109] a recent survey of ICRA habeas corpus cases found only *thirty* such cases challenging criminal convictions over ICRA's more than four decades on the books.[110] This absurdly small number of habeas cases is in itself grounds for suspicion that ICRA's habeas remedy is ineffective. In the year 2000 alone, federal and state inmates filed 58,257 habeas corpus petitions, or 42 petitions per 1,000 prisoners[111] – and these inmates were convicted in cases in which they were guaranteed appointed, law-trained

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the whim of their tribes" is "hardly faithful to the delicate balance between individual and group rights Congress sought to maintain when enacting ICRA") (Kozinski, J., dissenting).

109. Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 Ariz. St. L.J. 403, 412 (Spring 2004) ("The Navajo Nation courts heard 27,602 criminal cases in a recent twelve-month period."); see also *AILC Report* at 37 (tribes responding to survey reported processing average of over 530 criminal cases, excluding traffic, involving potential jail time each year).

110. Carrie E. Garrow, *Habeas Corpus Petitions in Federal and Tribal Courts: A Search for Individualized Justice*, 24 Wm. & Mary Bill Rts. J. 137, 147-48 (October 2015) (hereinafter Garrow, *Individualized Justice*).

111. Bureau of Justice Statistics, Office of Justice Programs, U.S. Dept. of Justice, *Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000* 1 (2002).

counsel and law-trained judges. The notion that tribal courts, despite generally failing to provide defendants with counsel or require judges to have law degrees, have seen an astronomically smaller proportion of habeas petitions because their proceedings are essentially error-free is not plausible. The obvious conclusion is that ICRA's habeas corpus remedy is a paper tiger.

Viewed against the realities of a typical tribal inmate's situation, this is not surprising. When a tribe fails to comply with ICRA, the only recourse available to a tribal inmate, most of whom have little resources and limited education, is to invoke the aid of a federal court, generally without the assistance of counsel, pursuant to an ancient writ with a Latin name about which he likely has not received adequate (if any) notice,[112] while incarcerated in a facility which may contain little or no legal resources.[113] Amici are aware of very few instances in which tribal inmates have sought federal habeas corpus relief without the assistance of counsel.[114] In the limited instances in

112. *See Alvarez*, 773 F.3d at 1034 (tribe's practice for giving notice of ICRA rights was to staple list of rights to criminal complaints and read list, without explanation, at beginning of each arraignment docket) (Kozinski, J., dissenting).

113. *See supra* at 26.

114. *Washington, D.C. Hrg.* at 39 ("If you have people on a reservation that cannot read and write, they do not know what their civil rights are. They don't even know where to go to say they have been violated.") (testimony of Ross O. Swimmer, Assistant Sec'y for Indian Affairs); Rachel King, *Bush Justice: The Intersection of Alaska Natives and the Criminal Justice System in Rural Alaska*, 77 Or. L. Rev. 1, 24-26 (Spring 1998) (observing that tribe members engaged in subsistence activities, or unable to afford bail, routinely

which tribal public defenders are available, they may have the capacity to handle only a small proportion of the tribe's criminal cases,[115] and the tribes may prohibit them from practicing in federal court.[116]

Assuming that a tribal inmate manages to overcome these difficulties and make his way into federal court, his odds of convincing the court to consider the merits of his habeas claim remain vanishingly low. Although ICRA contains no exhaustion requirement, federal courts have read one into the statute,[117] and tribes have aggressively exploited this doctrine to prevent federal courts from reaching the merits of ICRA claims. Indeed, the above-mentioned survey found that just under *half* of the thirty ICRA habeas cases were dismissed for failure to exhaust tribal court remedies.[118] These purported tribal remedies, however, generally prove illusory. As

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plead guilty regardless of actual guilt to "get the case resolved as quickly as possible"); *Enforcement of the Indian Civil Rights Act: Hearing before the United States Commission on Civil Rights held in Flagstaff, Arizona Aug. 13-14, 1987* 36 ("It took me probably an hour and a half one morning with an interpreter to get a person who was charged with a fairly serious crime under their laws to understand that they didn't have to plead guilty[.]") (testimony of Colorado Springs attorney Ronald A. Peterson).

115. *See supra* n.56.

116. *Alvarez v. Kisto et al.*, No. 08-cv-2226 (D. Ariz.) (Doc. 40 at 6) (tribal defender explaining she was not permitted to appear in federal habeas corpus case because "it would be beyond our charter because it would be outside the reservation").

117. *Alvarez*, 773 F.3d at 1014-15.

118. Garrow, *Individualized Justice* at 148.

noted above, tribal codes and rules may be non-existent, inaccessible, unreflective of the courts' actual practices, or simply ignored.[119] This makes it difficult for tribal inmates to know what remedies may purportedly be available to them, or to make timely and effective use of them.[120] It also makes it difficult for federal courts to confidently assess tribes' assertions that tribal remedies are available. For the few tribal inmates who manage to clear the hurdles placed in the way of effective habeas corpus relief, the tribal exhaustion doctrine generally serves as the *coup de grâce*.

* * * *

In short, ICRA has failed. In the crude, but accurate, words of the former Chief Judge of the Rosebud Sioux Tribe: "you get more use out of a roll of toilet paper."[121]

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119. See *supra* at 17-19.

120. *Alvarez*, 773 F.3d 1024 ("After he was convicted and sentenced to eight years in prison, [Mr. Alvarez] was not reminded of his right to appeal; he was given no notice-of-appeal form or other guidance about how to take an appeal. He was incarcerated with no ready access to legal materials and faced a 5-day filing deadline – shorter than any I've ever heard of.") (Kozinski, J., dissenting). In the Northern Cheyenne Tribe – whose convictions of Respondent lie at the core of this case – the appeal time in criminal cases is *two* days, and briefs are due a few days later. N. Cheyenne Law and Order Code, tit. II, Ch. 3, § 2-3-2 ("In criminal cases an appeal must be requested within two days of the decision and briefs are due within ten days.") (available at http://narf.org/nill/codes/northern_cheyenne/title2.PDF) (last visited Mar. 11, 2016).

121. *Rapid City Hrg.* at 96 (testimony of former Rosebud Tribal Court Chief Judge Trudell Guerue); see also *Washington, D.C. Hrg.* at 83 ("there are massive and pervasive violations of basic

And it is important to note that while this brief provides illustrative examples from cases litigated in federal courts, these cases represent only the tip of the iceberg – primarily the small subset of instances in which records are accessible because tribal inmates have secured the assistance of attorneys. The vast majority of tribal defendants are never assisted by attorneys, and the vast majority of ICRA violations never reach the federal courthouse door.

If this Court accepts petitioner's position in this case, individuals like Mr. Alvarez and Mr. Garcia – convicted of domestic violence crimes in proceedings that they failed to understand, and that afforded them no meaningful opportunity to defend themselves – may see these convictions bootstrapped into elements of a federal crime punishable by up to ten years in prison. The Court should not accept petitioner's insistence that ICRA's guarantees ensure that such a result would be just. These proceedings, and the many more like them that routinely take place in tribal courts, are not sufficiently fair or reliable to justify their inclusion as elements of a serious federal crime.

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fundamental liberties, liberties that are guaranteed in the Indian Civil Rights Act . . . [t]he situation is shocking and it's sickening") (testimony of ACLU Mountain States Regional Counsel Stephen L. Pevar).

CONCLUSION

For the reasons set forth above, amici urge the Court to affirm the judgment below.

Respectfully submitted,

Barbara E. Bergman
Co-Chair, NACDL
Amicus Committee
UNM School of Law
1117 Stanford, N.E.
Albuquerque, New Mexico 87131
(505) 344-2702

Daniel L. Kaplan
Counsel of Record
Assistant Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2700
dan_kaplan@fd.org

Counsel for Amicus Curiae

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