UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASSANDRA SELLARDS-RECK,

Petitioner,

v.

DAVID SHOOK, et al.,

Respondents.

Case No. C23-5516-MJP-SKV

REPORT AND RECOMMENDATION

I. INTRODUCTION

Petitioner Cassandra Sellards-Reck has filed a petition for writ of habeas corpus under the habeas provision of the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1303, seeking relief from a 2023 Cowlitz Tribal Court judgment and sentence for assault in the second degree. *See* Dkt. 1. Respondents have filed an answer asking the Court to deny the petition. Dkts. 21–23. The Court, having carefully reviewed the parties' submissions and the balance of the record, finds that Petitioner has failed to exhaust her tribal court remedies and that the petition does not state a claim for habeas relief. Accordingly, the Court recommends that this action be dismissed with prejudice.[1]

[1] Petitioner has not asked for an evidentiary hearing and the Court does not deem one necessary.

II. FACTUAL & PROCEDURAL BACKGROUND

This dispute arises out of a physical assault committed by Petitioner against Respondent Steve Barnett, both members of the Cowlitz Tribal Council. *See* Dkt. 1 at 2. Following a tribal council meeting on September 10, 2022, Petitioner's hand made contact with the torso of Respondent Barnett. *Id.* at 7. Petitioner was subsequently charged under Cowlitz law with assault in the second and third degrees. Dkt. 21-1 at 75.

Petitioner, represented by counsel, exercised her right to a jury trial in Cowlitz Tribal Court, *see generally* Dkt. 21-1, which was established by tribal council ordinance in 2018, Dkt. 21-8. The judge presiding over Petitioner's case was appointed by the tribal council to the Cowlitz Tribal Court prior to December 2021, and has been unanimously reappointed at least two times since. *See* Dkts. 21-6–21-7.

The court heard argument on motions in limine, Dkt. 21-1 at 89–101; 103–06; 111–14, and conducted voir dire, *id.* at 113–24; 154–209. Petitioner testified in her own defense, *id.* at 599–634; 666–75, and presented a "defense of others" defense to the crime alleged, *see, e.g.*, *id.* at 42. After hearing evidence over four days, the jury found Petitioner guilty of assault in the second degree. *Id.* at 730; *see also* Dkt. 15-2. The tribal court sentenced Petitioner to 180 days of incarceration, with 30 days to be served under home confinement and the rest suspended, along with community service, anger management, one year of probation, and a one-year no-contact order with Respondent Barnett. *See* Dkt. 15-2.

In accordance with Cowlitz Tribal Code ("CTC"), *see* CTC 27.05.020, on May 19, 2023, Petitioner appealed her conviction to the Cowlitz Tribal Court of Appeals, Dkt. 15-3. On May 31, 2023, Petitioner's appellate counsel emailed the tribal court clerk inquiring into the rules and procedures governing the court of appeals, and asking for a copy of the trial court record. Dkt.

27 at 14. The clerk responded the same day, directing counsel to the CTC, and informing him that she would send him additional court policies and procedures not currently publicly available, as well as a copy of the lower court record. *Id.* at 13. The next day, Petitioner emailed the tribal court clerk requesting that counsel be appointed in her appeal due to financial hardship. *Id.* at 9–10. That same day, the clerk responded that she would forward Petitioner's request to the appellate judge assigned to her case. *Id.* at 9.

On June 27, 2023, by unanimous tribal council resolution, the Tribe appointed eight judges to act as associate judges on the court of appeals in an as-needed capacity. Dkt 27 at 33.

Thereafter, on July 25, 2023, the court of appeals ordered the Tribe to appoint an attorney to represent Petitioner at her partial expense. Dkt. 21-4. This order was communicated to Petitioner's appellate counsel on July 27, 2023. Dkt. 27 ¶ 9. The tribal court clerk informed Petitioner's appellate counsel that he could remain Petitioner's counsel of record if he accepted the terms of the Tribe's public defender contract. *Id.* ¶ 10; *id.* at 18. As of September 14, 2023, counsel alleges he has yet to receive a copy of the contract, despite asking that it be provided. *Id.* ¶ 12.

On or around July 19, 2023, Petitioner filed a motion to adopt rules and order transcripts in the court of appeals. Dkt. 27 ¶ 8; *id.* at 19. On August 14, 2023, the tribal court clerk contacted counsel to schedule a hearing, *id.* ¶ 11; *id.* at 25, and on August 29, 2023, the court of appeals held a hearing, *id.* ¶¶ 14–16. On September 5, 2023, following that hearing, the court of appeals entered an order stating that the court "of course, [would] use the Cowlitz appellate rules[,]" and that it would also "supplement with the Washington State rules of appellate procedure." Dkt. 21-5. The order further noted that the court would allow "court cases from Cowlitz Tribe, of course, and [would] follow precedent[,]" and provided that other cases could

be cited, which the court would use as "persuasive precedent." *Id.* Finally, the order clarified additional procedural matters, including the timing for the filing of the verbatim report of proceedings, exhibits, clerk's papers, and briefing, as well as the amount of time allotted to each party for oral argument. *Id.* As of September 14, 2023, Petitioner's appellate counsel alleges he has yet to receive a copy of this order. Dkt. 27 ¶ 16. Petitioner's appeal remains pending. *See* Dkt. 1 at 12–16.

On June 7, 2023, Petitioner petitioned this Court for a writ of habeas corpus under the habeas corpus provision of ICRA, 25 U.S.C. § 1303. Petitioner named as Respondents Judge Christine Pomeroy, the tribal court judge; Jon Pound, the Tribe's Director of Public Safety; and Steve Barnett, the victim of the assault in question and the Tribe's Chairperson.[2]

III. GROUNDS FOR RELIEF

Petitioner presents three claims for federal habeas relief in her petition:[3]

1. Whether this Court Should Grant the Petition for Habeas Corpus Because the Tribal Court Did Not Maintain a Recording of the Trial;

2. Whether this Court Should Grant the Petition for Habeas Corpus Because of Systemic Constitutional Problems in the Tribal Court System; and

[2] Petitioner also named as Respondent, David Shook, the Director of Jail Services for Clark County, Washington. *See* Dkt. 1. The proper respondent in a tribal habeas action is the person who has "an interest in opposing the petition if it lacks merit, and the power to give the petitioner what he seeks if the petition has merit—namely, his unconditional freedom." *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 899 (2d Cir. 1996) (quoting *Reimnitz v. State's Attorney of Cook County*, 761 F.2d 405, 408–09 (7th Cir. 1985)). Because the petition does not allege any ongoing role by Clark County in detaining Petitioner, and therefore any ability for Clark County to grant Petitioner her freedom, Respondent Shook is not a proper respondent in this action and should be dismissed with prejudice.

[3] In a declaration filed in support of the petition, Petitioner also alludes to an ineffective assistance of counsel claim, Dkt. 2 at 12; however, because Petitioner did not plead this claim, the Court will not address it.

3. Whether this Court Should Grant the Petition for Habeas Corpus Because of Constitutional Errors Specific to this Trial.

Dkt. 1 at 12.

IV. DICUSSION

The Cowlitz Indian Tribe is a "'distinct, independent political communit[y], retaining [its] original natural rights' in matters of local self-government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (citations omitted). Indian tribes "are not bound by the United States Constitution in the exercise of their powers, including their judicial powers . . . ." *Means v. Navajo Nation*, 432 F.3d 924, 930 (9th Cir. 2005). As a result, "tribal proceedings do not afford criminal defendants the same protections as do federal proceedings." *United States v. Percy*, 250 F.3d 720, 725 (9th Cir. 2001). In 1968, Congress utilized its ability to "limit, modify or eliminate the powers of local self-government which the tribes otherwise possess," to pass ICRA and extend to tribes most of the civil protections in the Bill of Rights. *See Santa Clara Pueblo*, 436 U.S. at 56–57.

Habeas corpus provides the exclusive remedy for a party to enforce ICRA in federal court. *See Santa Clara Pueblo*, 436 U.S. at 66–67; 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."). Prior to pursuing a habeas claim in federal court, however, a petitioner generally is required to exhaust her claims with the appropriate tribal court, *see, e.g.*, *Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 953 (9th Cir. 1998), because "[t]he federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts[,]" *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16–17 (1987). "Considerations of comity, along with the desire to avoid procedural

nightmares, have prompted the Supreme Court to insist that 'the federal court stay[ ] its hand until after the Tribal Court has had a full opportunity . . . to rectify any errors it may have made.'" *Id.* (quoting *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 (1985)).

Petitioner filed her petition in this Court while her appeal to the Cowlitz Tribal Court of Appeals was still pending. *See* Dkt. 1 at 12–16. As a result, Respondents argue that Petitioner's claims are not properly before this Court, as Petitioner has failed to exhaust them in tribal court. Dkt. 21 at 9–11. Respondents further argue that, exhaustion aside, Petitioner's claims fail on the merits, and her petition should be denied. *Id.* at 11. The Court will address Respondent's arguments in turn.

A. Exhaustion

While parties generally are required to exhaust their tribal court remedies before proceeding in federal court, this requirement is not a jurisdictional prerequisite and may be excused under certain circumstances. *Boozer v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004). Specifically, exhaustion is not required where "the action is patently violative of express jurisdictional prohibitions, or it is otherwise plain that the tribal court lacks jurisdiction over the dispute, such that adherence to the exhaustion requirement would serve no purpose other than delay." *Id.* (cleaned up). Likewise, "exhaustion is not required where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, or where exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction." *Id.* (cleaned up).

Petitioner concedes she has not exhausted her tribal court remedies, but contends exhaustion should be excused because tribal jurisdiction is asserted in bad faith and because exhaustion would be futile. Dkt. 1 at 12–16.

1. *Futility*

Petitioner argues exhaustion would be futile because the Cowlitz Tribe has "no functioning appellate court." Dkt. 1 at 15. Petitioner cites *Krempel v. Prairie Island Indian Cmty.*, 125 F.3d 621 (8th Cir. 1997) and *Johnson v. Gila River Indian Cmty.,* 174 F.3d 1032 (9th Cir. 1999) in support of this assertion.

In *Krempel*, the plaintiff brought suit in state court against the Prairie Island Indian Community. *Krempel*, 125 F.3d at 622. The Community removed the action to federal district court and moved to dismiss on the ground that the plaintiff had not exhausted his tribal court remedies. *Id.* While the district court granted the motion, the Eighth Circuit reversed, noting that at the time the plaintiff had filed suit, it was undisputed that no tribal court existed. *Id.* at 622–24. The Community's tribal council did not contract to provide judges for the tribal court until 36 days after service of the plaintiff's complaint and 15 days after the complaint's removal to district court, and the tribal court did not become fully operational until more than two months after removal. *Id.* at 622. Indeed, the plaintiff challenged "whether the tribal court [had] *ever* become operational." *Id.* (emphasis in original). The Eighth Circuit highlighted that the Supreme Court has required exhaustion of "*available* tribal remedies *before instituting* suit[,]" *id.* at 623 (citing *Iowa Mutual*, 480 U.S. at 19) (emphasis in *Krempel*), and deemed it futile to require a plaintiff to exhaust his tribal remedies at a time when a tribal court does not exist, *id.* Per the court, "under the circumstances," a plaintiff who has filed a timely claim in an existing forum, is not required to exhaust tribal remedies "at a later time when the tribal court [comes] into existence." *Id.* at 624.

In *Johnson*, a petitioner attempted to appeal a tribal court decision to the tribal court of appeals. *Johnson*, 174 F.3d at 1034. The petitioner filed a notice of appeal, requested the court

rules and additional information, filed briefing, and sent the appellate court a copy of the transcript of the tribal court proceedings, which he had prepared at his own expense. *Id.* The respondent filed a response brief, additional memorandum, and two motions in the tribal court. *Id*. After initially responding to certain of the petitioner's inquiries, the court of appeals stopped communicating with the parties. *Id.* at 1034–35. Two years after the petitioner filed his notice of appeal, the court still had not issued a decision. *Id*.

The petitioner filed suit in district court, and the court dismissed for failure to exhaust. *Johnson*, 174 F.3d at 1034–35. The Ninth Circuit, however, reversed and remanded, holding that genuine issues of material fact were raised as to whether exhaustion of the petitioner's claims would be futile. *Id.* at 1036. Per the court, while "[d]elay alone is not ordinarily sufficient to show that pursuing tribal remedies is futile[,]" here, "the lack of a briefing schedule, scheduled appellate argument, a meaningful response to the notice of appeal, or an answer to any of [the petitioner's] correspondence for an abnormally extensive period create doubt that a functioning appellate court exists." *Id*.

Petitioner, here, argues that, while "there may be a few scraps of tribal code relating to appellate procedure, there is neither a panel of appellate judges, nor a clerk of the Court of Appeals, nor a physical court-room, nor even a rulebook." Dkt. 1 at 15. Thus, under *Krempel* and *Johnson*, Petitioner contends exhaustion is per se futile because there is no functioning tribal court of appeals. *Id.* Petitioner further contends that because "there was no functioning court of appeals at the time the Tribe filed the charges" against Petitioner, the construction of a functioning court of appeals now, "after the trial and after the notice has been filed, is too late." *Id.* at 16.

But in *Krempel*, the Eighth Circuit's holding, which it limited to the circumstances of the case, was predicated on the fact that there was no tribal court in existence at all, not even a trial court. *Krempel*, 125 F.3d at 622. *See also Comstock Oil & Gas Inc. v. Ala. & Coushatta Indian Tribes of Tex.*, 261 F.3d 567, 572–73 (5th Cir. 2001) (excusing exhaustion as futile when no tribal court existed and the tribe's constitution and bylaws did not permit the establishment of a tribal court, meaning the tribal judicial code, which was adopted after the plaintiff's federal claim had already been filed, was impermissibly created); *Findleton v. Coyote Valley Band of Pomo Indians*, 27 Cal. App. 5th 565, 575 (2018) ("[T]here was no evidence . . . indicating there was a tribal court in existence in 2012" when the plaintiff first filed his claim). At the time that the plaintiff in *Krempel* filed suit, the tribe had taken steps toward the development of its tribal court system by adopting a judicial code; however, that judicial code had yet to receive final approval from the Bureau of Indian Affairs. *See Krempel v. Prairie Island Indian Cmty.*, 888 F. Supp. 106, 109 (D. Minn. 1995), *vacated*, 125 F.3d 621 (8th Cir. 1997). This indicated the tribal court had never actually become operational, despite the tribe's efforts to staff the court after the plaintiff's lawsuit had been filed. *See Krempel*, 125 F.3d at 622.

Here, it is clear that the Cowlitz Tribal Court system already existed at the time that Petitioner filed her petition[4] and that the CTC and tribal ordinance provided for appellate review. CTC 27.05.020; CTC 27.05.030; Dkt. 21-8. Petitioner does not argue that the Cowlitz Tribal Court of Appeals is improperly constituted, nor does she cite any authority from which the Court can conclude that the Tribe's staffing of the properly constituted court of appeals after Petitioner filed her notice of appeal renders her appellate remedy unavailable such that exhaustion would

[4] Petitioner argues that "whether there is a trial court is debateable[,]" contending that some "track record of trying cases would be appropriate before the tribal council tries one of its adversaries in a criminal case [and] thereby threatens the defendant's Constitutional rights." Dkt. 1 at 15–16. This argument does not merit a response.

be futile. *See Iowa Mutual*, 480 U.S. at 19 (requiring exhaustion of "available tribal remedies before instituting suit").

Petitioner argues that "*Krempel* held that the judge must be hired *before* the claim is filed." Dkt. 25 at 6. But the Ninth Circuit has held that a tribe revising its tribal code to appoint a judge to hear a case that tribal code previously precluded the judge from hearing did not render exhaustion futile, particularly where the adjudicatory process had continued in the tribal forum. *See Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1203 (9th Cir. 2013) ("Although [tribal law] originally precluded a judge pro tem from hearing condemnation cases, the tribal court remedied this separation of powers issue by invalidating that section and appointing a neutral pro tem judge to hear this case. The [tribal] adjudicatory process has continued, as evidenced by submitted tribal court and tribal court of appeals orders. Both parties to this appeal are participating in those proceedings."). So too, here, where the tribal council has appointed appellate judges to hear Petitioner's appeal, and both parties to the appeal are participating in the tribal appellate proceedings.

Petitioner contends that, regardless of the fact that the appeal is proceeding, the court of appeals is so inadequate, incompetent, and nonfunctioning that exhaustion should be deemed be futile. Dkt. 25 at 8–11. Petitioner argues the "following issues undermine the Cowlitz court of appeals[']s legitimacy and compromise [Petitioner's] Constitutional rights: 1) no designated clerk of the court of appeals, 2) no publicly available information about the court of appeals, 3) [n]o public defender, despite the Order of Indigency, 4) [t]wo chief appellate judges, 5) [one attorney obtaining] an ordinance not available to [another attorney], and (6) [one attorney obtaining] the scheduling order, [the other attorney] did not." *Id.* at 9.

Even assuming the facts marshalled by Petitioner indicate a degree of incompetency on the part of the Cowlitz Tribal Court of Appeals, which the Court does not find, "[t]he alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement established [by the Supreme Court], and would be contrary to the congressional policy promoting the development of tribal courts." *Iowa Mutual*, 480 U.S. at 19. Only when incompetency renders the court nonfunctioning should exhaustion be excused. *See Johnson,* 174 F.3d at 1036. The facts do not support such a finding here.

Johnson, on which Petitioner heavily relies, involved "a two-year delay" in waiting for a briefing schedule, an argument date, or any meaningful response to the notice of appeal. *See Johnson*, 174 F.3d at 1036. *See also Wounded Knee v. Andera*, 416 F. Supp. 1236, 1240 (D.S.D. 1976) (finding exhaustion should be excused when a petitioner filed an appeal and waited approximately six months without action from the tribe). By contrast, here, the tribal court has remained communicative with Petitioner about the status and progress of her appeal, and the court of appeals has already issued two orders to date, including a scheduling order that details the rules and procedures governing the appeal—all within the first few months. Dkt. 27 ¶ 9; Dkt. 21-4–21-5.

Finally, Petitioner argues exhaustion would be futile because the "tribal court of appeals judges were hired by the very same people who testified *against* [Petitioner] at trial." Dkt. 25 at 8 (emphasis in original). Petitioner notes that the Tribe's five witnesses at trial were all members of the tribal council and that the tribal council passed a resolution to hire the appellate judges. *Id.* But as Petitioner acknowledges, *id.*, the tribal council did so unanimously, *see* Dkt. 27 at 33. "The vote was 15 – 0." Dkt. 25 at 8. Moreover, Cowlitz law provides that only the tribal council can hire judges for tribal court. Dkt. 21-8 at 3. Thus, contrary to Petitioner's contentions, the

"circumstantial evidence," Dkt. 25 at 8, suggests the Tribe followed standard procedures when staffing the court of appeals, and that the witnesses in question, who comprised only one third of the voting members of the tribal council, did not exert controlling influence over the outcome of the vote.

The futility exception to the exhaustion requirement applies narrowly to only the most extreme cases, *Grand Canyon Skywalk*, 715 F.3d at 1203 (citing cases), and Petitioner has failed to demonstrate that this case warrants its application. Thus, her failure to exhaust her tribal court remedies should not be excused on futility grounds.

2. *Bad Faith*

Petitioner argues exhaustion should be excused on harassment and bad faith grounds. Dkt. 1 at 14–15. In order for the bad faith exception to apply, it must be the tribal court that acted in bad faith, not the remaining Respondents. *Grand Canyon Skywalk*, 715 F.3d at 1201. The Court will therefore only entertain allegations of bad faith made against the tribal court itself.

Petitioner alleges the tribal court acted in bad faith by going to extremes to "control every aspect" of the trial, "preventing the attorneys from asking any questions around tribal politics[,]" squelching "any testimony regarding the context from which the incident arose[,]" and "failing to ensure that the proceedings were recorded . . . ." Dkt. 1 at 14–15. As explained below,[5] however, Petitioner's evidence of bad faith fails on the merits. Exhaustion should therefore not be excused on bad faith grounds.

Because Petitioner has failed to exhaust her tribal court remedies, the Court may either dismiss or stay this action pending the outcome of Petitioner's appeal in tribal court. *Atwood v.*

[5] *See* section IV.B.3.

Fort Peck Tribal Court Assiniboine, 513 F.3d 943, 948 (9th Cir. 2008). Because the Court finds that the petition fails to state a claim for habeas relief, this matter should be dismissed with prejudice.

B. Merits Review

Petitioner argues the Court should grant her habeas relief under ICRA because (1) the tribal court did not maintain a recording of the trial; (2) systemic constitutional problems plague the tribal court, and (3) the trial judge committed constitutional errors when conducting voir dire, ruling on evidentiary issues, and issuing jury instructions. *See* Dkt. 1 at 16–23.

ICRA extends to tribes most—but not all—of the civil protections of the Bill of Rights. *Tavares v. Whitehouse*, 851 F.3d 863, 865–66 (9th Cir. 2017). That being said, "except to the extent demanded by the ICRA, the structure and procedure of tribal courts may be determined by the tribes themselves." *Selam*, 134 F.3d at 954 (cleaned up). As a result, the "procedures that the Tribal Courts choose to adopt are not necessarily the same procedures that the federal courts follow[,]" and federal courts "must avoid undue or intrusive interference in reviewing Tribal Court procedures." *Smith v. Confederated Tribes of Warm Springs Reservation of Oregon.*, 783 F.2d 1409, 1412 (9th Cir. 1986). "Comity towards the Tribal Courts requires that deference be given to the procedures which those courts choose to follow." *Id.*

In interpreting and applying ICRA, courts must "tread lightly in the absence of clear indications of legislative intent" to honor their obligations to respect "tribal sovereignty" and "the plenary authority of Congress in this area . . . ." *Santa Clara Pueblo*, 436 U.S. at 60.

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1. *"Whether this Court Should Grant the Petition for Habeas Corpus Because the Tribal Court Did Not Maintain a Recording of the Trial"*

Petitioner avers that her "detention is illegal because the tribal court did not properly record the trial[,]" arguing the "right to a transcript is a substantial constitutional right." Dkt. 1 at 16 (citing *In Re Woods v. Rhay*, 54 Wn.2d 36, 45 (1959)). But ICRA requires a tribe to "maintain a record of the criminal proceeding" only if the tribe "imposes a total term of imprisonment of more than 1 year on a defendant . . . ." 25 U.S.C. § 1302(c)(5). Because Petitioner was sentenced to less than one year of imprisonment, Dkt. 15-2, the Tribe was not required to maintain a record of the trial proceedings. Thus, its failure to do so does not run afoul of ICRA, nor does it entitle Petitioner to habeas relief.[6] Petitioner cites no appliable authority compelling a different conclusion.

2. *"Whether this Court Should Grant the Petition for Habeas Corpus Because of Systemic Constitutional Problems in the Tribal Court System"*

Petitioner contends her detention is illegal because the victim and his witnesses hand selected the trial judge and prosecutor specifically for her case, and because they will hand select any appellate judges. Dkt. 1 at 17–19. While the petition does not explicitly identify which of Petitioner's constitutional rights she alleges this conduct violated, the Court surmises she primarily alleges violations of her due process rights.

Under ICRA, tribes shall not "deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(a)(8). In reviewing tribal court procedures to determine whether they comport with this due process guarantee, "courts . . . [have] correctly sensed that Congress did not intend that the . . . due process principles of the Constitution disrupt settled

[6] The Court also notes that the Tribe did maintain a record of the proceedings, *see* Dkt. 21-1—albeit one that Petitioner alleges is deficient.

tribal customs and traditions." *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 900 (9th Cir. 1988) (citations omitted). Given this, defining the limits of due process protection under ICRA "is not an easy process, because due process concepts are not readily separated from their attendant cultural baggage; due process especially implies a number of particular procedural rights derived from Anglo–American history." *Id.* (cleaned up).

Where the tribal court procedures under scrutiny differ significantly from those "commonly employed in Anglo–Saxon society, courts weigh the individual right to fair treatment against the magnitude of the tribal interest in employing those procedures to determine whether the procedures pass muster" under ICRA. *Randall*, 841 F.2d at 900 (cleaned up). But where the tribal court procedures parallel those found "in Anglo–Saxon society," courts need not engage in this weighing of interests. *Id.* Instead, federal constitutional standards are employed in determining whether the challenged procedures violate ICRA. *Id.* (citations omitted).

Because the Cowlitz Tribal Court procedures largely parallel those utilized in state and federal court, the Court will employ federal constitutional standards when assessing whether the procedures comport with due process.

a. *Trial Judge*

Petitioner alleges the trial proceedings were "tainted by the appearance, or the actual presence, of judicial bias" because the victim and his witnesses hired the judge, in violation of Petitioner's constitutional rights. Dkt. 1 at 17. According to Petitioner, "[a]ssuming they followed standard procedures, they literally sat on the hiring committee and interviewed her for the job[,]" and selected a judge they thought would assist them in achieving their goal of silencing Petitioner, their political opponent. *Id.* at 17–18.

Contrary to Petitioner's contentions, however, the facts do not indicate impropriety in the hiring of the tribal court judge. The judge was appointed to serve on the Cowlitz Tribal Court years prior to the September 2022 assault in question, and was reappointed by unanimous tribal council resolution on more than one occasion. Dkts. 21-6–21-7. And Petitioner cites no authority from which the Court can conclude that the Tribe's judicial hiring process—i.e., by tribal council appointment, *see* Dkt. 21-8—itself runs afoul of ICRA's due process protections.

Petitioner attempts to recharacterize her judicial bias claim as one alleging the judge infringed on Petitioner's right to present a defense. *See* Dkt. 25 at 13–15. For the reasons explained below, *see* section IV.B.3, the Court finds that the judge did not. Given this, Petitioner's judicial bias allegations fail.

b. *Special Prosecutor*

Petitioner argues that the victim and his witnesses, all of whom were members of tribal council, hired the special prosecutor who tried the case against Petitioner, thereby violating Petitioner's constitutional rights. Dkt. 1 at 18–19. Petitioner acknowledges that "we don't know for sure how the private attorney was hired to be the special prosecutor" because the tribal council works in secret, but argues that, regardless, the prosecutor's bias is evident because she failed to investigate whether charges should have been brought against any of the other individuals involved in the incident leading up to the assault. *Id.* at 19. Per Petitioner, "[n]o state-court prosecutor would have brought these charges. Said charges were an abuse of prosecutorial discretion." *Id.*

But as Petitioner recognizes, "Cowlitz does not have a prosecutor." *Id.* at 18. Thus, in order to try the case at all, the Tribe was required to hire a special prosecutor. Petitioner cites no authority supporting her conclusion that the tribal council's role in appointing the special

prosecutor violated Petitioner's due process rights. Indeed, as Respondents point out, "[t]his Court need only ask itself who appoints, for instance, the U.S. Attorney General or the various U.S. Attorneys to reject the Petition's claims about a lack of prosecutorial independence out of hand." Dkt. 21 at 15. And Petitioner's allegations about the special prosecutor's conduct in investigating and charging the assault are based on nothing more than speculation. She therefore fails to demonstrate that her prosecutorial bias claim entitles her to habeas relief under ICRA.

c. *Appellate Court*

Petitioner argues any "appeal will be tainted by the same systemic bias or appearance of bias that tainted the trial" because "[t]here is no system in place to hire a panel of judges in an unbiased manner" and any "appellate judges will be hand-selected by [the victim] and his witnesses, in the same manner as the trial judge and the special prosecutor." Dkt. 1 at 19. As previously discussed, however, the manner in which the tribal council hired the appellate judges does not give rise to the appearance of impropriety, nor does it suggest a violation of Petitioner's constitutional rights. Petitioner cites no authority, save her own conjecture, to support the opposite conclusion.

Moreover, while it is true that, when a right to appeal is provided, "the procedures used in deciding appeals must comport with" due process, *Randall*, 841 F.2d at 900, here, Petitioner's allegations about her lack of a right to an effective appeal remain hypothetical, as the appeal has not yet progressed beyond the preliminary stages. Petitioner cites nothing to support her contention that the alleged failings of the court of appeals—its lack of a designated clerk of court, for example—are so egregious as to violate her due process rights. The appellate court's conduct thus far in granting Petitioner court appointed counsel and issuing a scheduling order

certainly does not imply due process violations. Her arguments pertaining to appellate court bias fail accordingly.

3. *"Whether this Court Should Grant the Petition for Habeas Corpus Because of Constitutional Errors Specific to this Trial"*

Petitioner avers that constitutional errors specific to her trial—specifically, errors committed by the tribal court when conducting voir dire, making evidentiary rulings, and issuing jury instructions—entitle her to habeas relief under ICRA.

a. *Voir Dire*

Petitioner argues the tribal court judge committed constitutional error when refusing to allow Petitioner's counsel to ask politically charged questions in an effort to determine potential jurors' impartiality. *See* Dkt. 1 at 19–20. The Court construes this as a claim alleging violations of Petitioner's right to an impartial jury.

The Sixth Amendment guarantees defendants the right to an impartial jury. *See* U.S. Const. amend. VI. Respondents argue that ICRA, which gives criminal defendants a right "upon request, to a trial by jury of not less than six persons," 25 U.S.C. § 1302(a)(10), does not extend the Sixth Amendment's impartiality requirement to jury trials in tribal court, Dkt. 21 at 13. While Respondents' arguments are well taken, the Court need not decide whether the jury right afforded to defendants under ICRA mirrors that afforded to defendants under the Sixth Amendment; regardless, the tribal court's voir dire comported with the Sixth Amendment's protections.

Trial judges have "broad discretion" in "deciding what questions to ask prospective jurors." *United States v. Tsarnaev*, 595 U.S. 302, 313 (2022) (finding trial judge did not abuse discretion or violate the Sixth Amendment when declining to ask about the content and extent of

each juror's media consumption about the Boston Marathon bombings). Judges need not pose every question suggested by counsel, but instead must "conduct a thorough jury-selection process that allows the judge to evaluate whether each prospective juror is 'to be believed when he says he has not formed an opinion about the case.'" *Id.* (citation omitted).

To that end, the tribal court, here, endeavored to determine whether the prospective jurors could remain impartial. To account for the likelihood that members of the venire "may have heard of" the case, the tribal court summoned "a heck of a lot more" prospective jurors than tribal law required, and suggested that the parties "may want some more peremptory challenges" to address these concerns. Dkt. 21-1 at 59. The tribal court ultimately decided to summon 60 prospective jurors—10 more than Petitioner originally sought. *Id.* It also advised the prospective jurors of their duty to keep an "open mind" at the beginning of voir dire and strove to determine whether the prospective jurors were "unbiased and without preconceived ideas" to ensure the case would be "tried before an impartial jury." *Id.* at 156. The court excused every juror who indicated he or she could not remain impartial, or who indicated a close relationship with either Petitioner or the witnesses. *Id.* at 155–209. By the end of voir dire, not a single juror remained whom Petitioner had asked to strike. *See id.*

Petitioner contends the jury foreman had announced his candidacy for tribal council prior to the trial and was endorsed by the victim of the assault. Dkt. 1 at 20. According to Petitioner, "[s]aid endorsement is, essentially, proof of bias." *Id.* Petitioner argues that because the court did not allow questions about tribal politics or political affiliation, she was unable to "ferret out the juror's bias . . . ." *Id.* But the court did permit Petitioner to ask whether "anyone here [was] more likely to take the charges as credible cause of being brought by a Tribal Council member[.]" Dkt. 21-1 at 190. The court also provided "'emphatic and clear instructions on the

sworn duty of each juror to decide the issues only on evidence presented in open court.'" *Tsarnaev*, 595 U.S. at 314 (citation omitted). The court reminded the prospective jurors that it was their duty "to determine the facts in this case from the evidence produced in court," Dkt. 21-1 at 158, and that each juror must "keep an open mind until the case is submitted to you . . . and base any decision upon the law and the facts uninfluenced by any other consideration[,]" *id.* at 156. And all of the jurors swore under oath that they would "well and truly try the case and declare a true verdict according to the evidence and instructions" given by the court. *Id.* at 210; *see also Jeffries v. Blodgett*, 5 F.3d 1180, 1189 (9th Cir. 1993) (finding that all jurors swearing under oath that "they could impartially judge [the defendant's] guilt or innocence" weighed against finding a violation of the defendant's right to a fair trial). In sum, "the court's jury selection process was both eminently reasonable and wholly consistent with [Supreme Court] precedents." *Tsarnaev*, 595 U.S. at 315. Petitioner's contention that the tribal court's voir dire violated her constitutional rights is without merit.

b. *Evidentiary Rulings*

Petitioner argues the tribal court judge's various evidentiary rulings—limiting a demonstrative reenactment of the assault, barring the introduction of a 9-1-1 call, and limiting evidence about tribal politics, for example—violated her constitutional rights. Dkt. 1 at 20–22. The Court again surmises that in so arguing, Petitioner alleges violations of her due process rights.

To the extent Petitioner challenges the constitutionality of the evidentiary rules employed by the tribal court, this argument fails. Nothing in ICRA suggests that specific evidentiary rules are required in tribal court proceedings, and, as Respondents note, tribes take varied approaches to evidentiary rules in their own courts. Dkt. 21 at 16 (noting that the Cowlitz have adopted

Washington's Rules of Evidence, but not Washington courts' interpretation of those rules, whereas the Colville apply the Federal Rules of Evidence, and the Lower Elwha Klallam Tribe has adopted neither state nor federal evidentiary rules). Petitioner cites nothing indicating that this is constitutionally unsound.

To the extent Petitioner challenges the tribal court's evidentiary rulings as misapplications of the Tribe's adopted rules of evidence, this raises a discretionary issue of tribal law that is not cognizable in habeas. *See Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (it is not the province of federal habeas courts to re-examine state court conclusions regarding matters of state law); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) ("federal habeas corpus relief does not lie for errors of state law").

And to the extent Petitioner challenges the evidentiary rulings as themselves violative of due process, the Court finds she has failed to allege sufficient facts to state a due process claim. The due process clause "guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citation omitted). However, the right to present a defense is not absolute. *Montana v. Egelhoff*, 518 U.S. 37, 41–42 (1996). "[T]he accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Accordingly, "'[t]he accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.'" *Egelhoff*, 518 U.S. at 42 (citation omitted).

The Constitution affords state courts broad latitude in regard to the exclusion of evidence from criminal trials. *United States v. Scheffer*, 523 U.S. 303, 308 (1998). To support a constitutional violation, a state court's decision to exclude evidence "must be so prejudicial as to

jeopardize the defendant's due process rights." *Tinsley v. Borg*, 895 F.2d 520, 530 (9th Cir. 1990).

Petitioner challenges the tribal court's refusal to (1) allow Petitioner and her witnesses to use the words "threatened" and "intimidated[,]" (2) allow Petitioner and her witnesses to testify regarding their fraught relationship with the victim, (3) allow Petitioner to testify that she acted out of her training as a trauma nurse, (4) allow unfettered testimony about the medical condition of the woman Petitioner acted to defend, (5) admit the recording of a 9-1-1 call made by that same woman after the assault occurred, and (6) allow a reenactment of the incident in the manner most desired by Petitioner. Dkt. 1 at 10–11; 20–21. Petitioner fails to demonstrate how any of the aforementioned tribal court rulings so prejudiced her as to jeopardize her due process rights.

For example, while Petitioner challenges the tribal court's refusal to allow her and her witnesses to testify that they generally felt "threatened," "intimidated," "humiliated," "bullied," or "victimized" by the victim, she acknowledges that the court permitted them to testify to their feelings at the time of the assault. *See* Dkt. 3 at 4–5. *See also, e.g.*, Dkt. 21-1 at 230–31 (providing that the witnesses could testify to how they felt at the time of the incident, including by saying they "felt threatened," but could not bring in the "whole history" of the relationship between the parties without "an offer of proof."); 241 (providing that a witness could testify to her "feelings about how she perceived that situation . . . , as long as it doesn't use inflammatory words."). Petitioner alleges the words "fearful," "scared," and "frightened," which the court permitted her and her witnesses to use, were inadequate because they were not "precise synonyms with the forbidden terms." Dkt. 3 at 5. This fails to state sufficient prejudice to Petitioner.

Further, while Petitioner contends the tribal court refused to allow testimony regarding the medical condition of the woman Petitioner acted to defend, as well as testimony pertaining to Petitioner's training as a trauma nurse, Dkt. 1 at 10; 21, the record indicates otherwise. The court permitted testimony on both subjects, Dkt. 21-1 at 93–98; 489–490, but limited such testimony to prevent it from straying impermissibly into opinion testimony, *id.* at 99–100. Petitioner fails to demonstrate resulting prejudice sufficient to state a due process claim.

Finally, contrary to Petitioner's contentions, the tribal court did not wholesale exclude evidence of the 9-1-1 call in question, nor did it "spoil[] the reenactment without giving any reason." Dkt. 1 at 21. While the court refused to admit the 9-1-1 call on hearsay and authentication grounds, it permitted the witness who made the call to testify to why the call was made and how the witness felt at the relevant time. Dkt. 21-1 at 536–39. And while the court limited Petitioner's reenactment of the assault to prevent unfair prejudice, it permitted Petitioner to demonstrate, from her perspective, what happened during the incident in question. *Id.* at 623–24. Petitioner has failed to demonstrate how these limitations were so prejudicial as to jeopardize her constitutional rights.

Thus, Petitioner's contention that the tribal court's various evidentiary rulings violated her due process rights does not state a claim for habeas relief.

c. *Jury Instructions*

Finally, Petitioner contends the tribal court committed constitutional error when adopting a jury instruction on "defense of others" that omitted language indicating the Tribe bore the burden of proving the absence of self-defense. Dkt. 1 at 21–22. In so arguing, Petitioner relies on Washington state law, which provides that the state bears the burden of proving the absence of self-defense beyond a reasonable doubt. Dkt. 1 at 22 (citing *State v. Acosta*, 101 Wn.2d 612,

625 (1984)). But the U.S. Supreme Court has rejected the claim that "requiring self-defense to be proved by the defendant is unconstitutional." *Martin v. Ohio*, 480 U.S. 228, 236 (1987). Petitioner's allegations therefore fail to allege a violation of her constitutional rights, and her habeas claim fails accordingly.

V. CONCLUSION

For the foregoing reasons, the Court recommends that the petition be denied and this action be dismissed with prejudice.[7] A proposed Order accompanies this Report and Recommendation.

VI. OBJECTIONS

Objections to this Report and Recommendation, if any, should be filed with the Clerk and served upon all parties to this suit within **twenty-one (21) days** of the date on which this Report and Recommendation is signed. Failure to file objections within the specified time may affect your right to appeal. Objections should be noted for consideration on the District Judge's motions calendar for the third Friday after they are filed. Responses to objections may be filed within **fourteen (14) days** after service of objections. If no timely objections are filed, the matter will be ready for consideration by the District Judge on **December 1, 2023**.

Dated this 6th day of November, 2023.

S. KATE VAUGHAN
United States Magistrate Judge

[7] "Habeas claims brought under the Indian Civil Rights Act, 25 U.S.C. § 1303, are most similar to habeas actions arising under 28 U.S.C. § 2241," § 1303's "federal law analogue." *Kelsey v. Pope*, 809 F.3d 849, 854 (6th Cir. 2016), *cert. denied sub nom. Kelsey v. Bailey*, —— U.S. ——, 137 S.Ct. 183, 196 L.Ed.2d 150 (2016). Because the habeas petition is most similar to those habeas actions arising under 28 U.S.C. § 2241, a certificate of appealability is not included.