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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Ramiro Bustamante, Petitioner, vs. Michael Valenzuela *et al*., Respondents.	No. CIV 09-08192-PCT-ROS (MHB) **PETITIONER'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

Petitioner Ramiro Bustamante, by and through undersigned appointed counsel, hereby submits this Reply in support of his Cross-Motion for Summary Judgment. As demonstrated in the following Memorandum of Points and Authorities, Respondents fail to overcome Mr. Bustamante's showing in his Response and Cross-Motion that his claim is fully exhausted and has merit – as Magistrate Judge Voss recently found in the virtually-identical case of *Miranda v. Nielsen*, No. CV 09-8065-PHX-PGR (ECV) (D. Ariz.) (Dkt. #33). Accordingly, Mr. Bustamante's Cross-Motion for Summary Judgment should be granted, and Mr. Valenzuela's Motion for Summary Judgment should be denied.

Memorandum of Points and Authorities

A. Mr. Valenzuela Fails to Demonstrate that Mr. Bustamante Must Exhaust the "Remedy" of Pursuing Habeas Corpus Relief in the Same Court that has Already Labeled his Claim "Frivolous."

Mr. Valenzuela continues to insist that Mr. Bustamante may not seek habeas corpus relief in this Court until he has exhausted the "remedy" of seeking habeas relief in the Pascua Yaqui Court of Appeals. Dkt. #34 at 10-13. But it is now established as undisputed that the court of appeals' decision in *Pascua Yaqui Tribe v. Miranda*, CA-08-015 (2009) – which definitively rejected on the merits the claim put forth in Mr. Bustamante's habeas petition – is precedential. Dkt. #34 at 11 ("Petitioner states that [the *Miranda* decision] . . . has precedential value. *Respondent does not dispute that this is the case*.") (emphasis added); Dkt. #30 at 6-7 ¶¶ 27-28; Dkt. #35 at 2-3 ¶¶ 9-10. The very essence of an opinion of a court being "precedential" is that it "furnishes a basis for determining later cases involving similar facts or issues." *Black's Law Dictionary* (8th ed. 2004) (definition of "precedent"). Mr. Valenzuela's fails to evade the clear implication of his necessary concession, which is that any habeas petition filed in the court in which the precedential *Miranda* decision governs would be utterly futile.

Mr. Valenzuela's primary stratagem is to suggest that if the power of the Court of Appeals in a habeas corpus case were to be exercised by a three-judge panel, rather than by a single judge, the two additional judges could "out-vote" the judge who issued the *Miranda* Opinion. Dkt. #34 at 12. But while the power of the court was exercised by a single judge in *Miranda*, it is undisputed that the *Miranda* Opinion was a precedential decision *of the court*. Dkt. #34 at 11; Dkt. #30 at 6-7 ¶¶ 27-28; Dkt. #35 at 2-3 ¶¶ 9-10. As such, the Opinion binds the court

in subsequent cases, regardless of how many judges exercise the power of the court in those later cases. Contrary to Mr. Valenzuela's premise, there is no general principle providing that a court's precedential opinion automatically becomes non-precedential when reviewed by the same court acting with a greater number of members. If there were, the Supreme Court of the United States, which currently has nine members, would feel free to disregard its own precedents issued when it had five, six, or seven members. Eugene Gressman, *et al*., *Supreme Court Practice* Ch. 1.2(a), at 4 (9th ed. 2007) (describing historical changes in size of the Supreme Court). Mr. Valenzuela's theory would hold water only if he could identify some provision in the Tribe's Code or court rules empowering a three-judge habeas panel to overturn a precedential decision of the court issued by a single judge. He cannot.

Mr. Valenzuela first points to the provision of the Tribe's Code specifying that the court of appeals "shall consist of three judges," one of whom shall be the Chief Judge. Dkt. #34 at 11 (*citing* 3 Pascua Yaqui Tribe Code § 1-2-30(B)). But the Code simply specifies the total membership of the court – it says nothing about how many judges may exercise the power of the court in particular cases. The United States Code specifies in the same fashion that this Court is composed of twelve judges (28 U.S.C. § 133(a)), and that the Ninth Circuit is composed of twenty-nine judges (*id*. § 44(a)) – but it also provides that this Court's power may be exercised by a single judge (*id*. § 132(c)), and that the Ninth Circuit's power may be exercised by a three-judge panel (*id*. § 46(b)). Neither the Tribe's Code nor its Rules of Appellate Procedure prohibit a single court of appeals judge from exercising the power of the court of appeals in issuing precedential Opinions, as

the court's Chief Justice did in issuing the precedential *Miranda* Opinion. Dkt. ##24-4, 30-2. Mr. Valenzuela does not question the Chief Justice's authority to exercise the court's power individually, as he did in *Miranda*. And any such dispute would be both farfetched and irrelevant – farfetched because it is implausible that the court's Chief Justice committed such a fundamental error, and irrelevant because even if he did, it is clear that the court *believes* its power may legitimately be exercised by a single justice, and could accordingly be expected to treat the *Miranda* decision as binding in reviewing a habeas corpus petition.

Mr. Valenzuela also points to Rule 22(A) of the Tribe's Rules of Appellate Procedure. Dkt. #34 at 12. But Rule 22(A) simply specifies that the court shall dispose of matters by opinion when "a majority of the justices acting" determine that enumerated factors are present. Dkt. #30-2 at 11-12. Because it is undisputed that an individual justice may exercise the court's power, the phrase "majority of the justices acting" must be construed to cover situations – like *Miranda* – in which a single justice is acting.

Finally, Mr. Valenzuela seeks to analogize the Tribe's habeas corpus procedure to the Ninth Circuit's procedure for *en banc* review. Dkt. #34 at 12-13. But the analogy is false. The power of the Ninth Circuit when sitting *en banc* to overturn its prior panel decisions is specifically enumerated in the Federal Rules of Appellate Procedure and the Ninth Circuit's Rules. FRAP 35; 9th Cir. R. 35-1, 35-2, 35-3. The Tribe's Rules of Appellate Procedure contain no procedure for *en banc* review, and they do not specify that any three-judge panel is automatically deemed an "en banc" panel, empowered to overturn the court's precedential opinions issued by single justices. Dkt. #30-2. The Rule relating to habeas corpus

petitions simply identifies the procedures for the filing of such petitions – it does not specify that a panel reviewing such petitions is empowered to overturn the court's precedential opinions. *Id*. at 13.

In sum, Mr. Valenzuela's suggestion that Mr. Bustamante must exhaust the "remedy" of filing a habeas corpus petition in the Tribe's court of appeals before pursuing habeas relief in this Court is plainly meritless. As Magistrate Judge Voss concluded in rejecting the identical argument in Beatrice Miranda's parallel habeas corpus case in this Court, the pursuit of the relief sought here by means of a Tribal-court habeas corpus petition would be an "exercise in futility." Dkt. #33-1 at 5:17. Because such a pointless exercise is "not required to exhaust tribal court remedies" (*id*. at 17-18), Mr. Valenzuela's exhaustion argument must be rejected.

B. Mr. Valenzuela Fails to Show Why this Court Should Not Accept the District of Minnesota's Thorough and Careful Analysis and Conclusion in *Spears v. Red Lake Band of Chippewa Indians*.

Mr. Valenzuela also reiterates his argument that the District of Minnesota's analysis in *Spears v. Red Lake Band of Chippewa Indians*, 363 F. Supp. 2d 1176 (D. Minn. 2005), is not compelling. Dkt. #34 at 2-10. Rather than rehashing arguments addressed previously (Dkt. #29 at 6-10), Mr. Bustamante will limit himself to addressing the new arguments raised in Mr. Valenzuela's Response.

Mr. Valenzuela argues that this Court's adoption of the *Spears* court's reasoning would lead to a "strange and untenable" situation "in which the phrase 'one offense' committed by an Indian is defined one way in federal courts under the Major Crimes Act, and an entirely different way on Tribal reservations throughout the country." Dkt. #34 at 3-4 n.1. But Mr. Valenzuela does not attempt to substantiate his assumption that tribal courts on "reservations

throughout the country" uniformly agree with his interpretation of 25 U.S.C. § 1302(7), and in any event this Court is not required to defer to a tribal court in resolving an issue of federal law. *Cf. RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1276 (7th Cir. 1997) ("Although state court precedent is binding upon us regarding issues of state law, it is only persuasive authority on matters of federal law.").

Mr. Valenzuela seeks support for his construction of § 1302(7) in *United States v. Antelope*, 430 U.S. 641 (1977), and *United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007). Dkt. #34 at 3-4 n.1. But these decisions have no relevance here. *Antelope* involved the issue of whether the Major Crimes Act, 18 U.S.C. § 1153, violated the Due Process Clause of the Fifth Amendment "by subjecting individuals to federal prosecution by virtue of their status as Indians." *Antelope*, 430 U.S. at 642. *Mitchell* involved a number of statutory and constitutional challenges to a conviction and death sentence imposed in a case brought under the Major Crimes Act. *Mitchell*, 502 F.3d at 946-97. Neither involved any issue regarding a statute's use of the phrase "one offense," and the only citation to § 1302(7) in either case was a passing reference to its limited right to counsel. *Mitchell*, 502 F.3d at 960 n.3.

Finally, Mr. Valenzuela seeks support in precedent establishing that "'[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" Dkt. #34 at 9 (*quoting Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). Mr. Valenzuela's reliance on this principle here is profoundly misplaced. The "benefit" to Indians that Congress had in mind when it enacted the Indian *Civil Rights* Act was the

protection of individual Indians against the infringement of their civil rights by tribal governments. 25 U.S.C. § 1302; Donald L. Bennett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 Harv. J. on Legis. 557 (1971-72). As the *Spears* court correctly observed, it would hardly advance this "benefit" to allow Indians to be subjected to multi-year sentences imposed by courts in which they are not guaranteed the right to appointed counsel. *Spears*, 363 F. Supp. 2d at 1180.

It is thus evident that, as Magistrate Judge Voss concluded in Beatrice Miranda's case, the *Spears* court's reasoning is compelling and should be accepted. Dkt. #33-1 at 8-9.

Conclusion

For the reasons set forth above and in his previous filings, Mr. Bustamante respectfully urges the Court to enter summary judgment in his favor. If this Court should decide that Mr. Bustamante is not entitled to summary judgment, he respectfully asks the Court to enter judgment in favor of Mr. Valenzuela in order to facilitate expeditious appellate review.

Respectfully submitted: December 30, 2009

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