OFFICE OF THE ATTORNEY GENERAL
PASCUA YAQUI TRIBE
R. Rolando Flores, ASB No. 023866
Amanda Sampson, ASB No. 022992
Kimberly Van Amburg, ASB No. 022736
Alfred L. Urbina, ASB No. 026389
4725 W. Calle Tetakusim, Bldg. B
Tucson, Arizona 85757
(520) 883-5106 tel
(520) 879-5084 fax
amanda.sampson@pascuayaqui-nsn.gov

Attorneys for Respondent Valenzuela

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Ramiro Bustamante Petitioner, vs. Michael Valenzuela, *et al.*, Respondents.	Case No.: CV 09-08192-ROS-MHB RESPONDENT VALENZUELA'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATEMENT OF THE CASE

The Petitioner, Ramiro Bustamante, challenges the legality of his detention. Petitioner was convicted of three separate crimes by the Pascua Yaqui Tribal Court ("PYTC"). Two of the sentences were consecutively imposed. The cumulative period of the sentences exceeds one year in length. Petitioner asserts that as a matter of federal law the Indian Civil Rights Act ("ICRA") impliedly prohibits a tribe from imposing consecutive sentences that cumulatively exceed one year in length (25 U.S.C. § 1302(7)).

The Petitioner's argument is without foundation in law and his Petition for writ of *habeas corpus* should be denied. Respondent files his motion for summary judgment herewith, and asserts that summary judgment should be entered in his favor.

On March 18, 2009, Petitioner pleaded guilty to three offenses in the PYTC, including: (1) Domestic Violence Burglary; (2) Domestic Violence Theft; and (3) Disobedience to a Lawful Court Order. ("SOF") ¶ ¶ 2, 4, and 5. On April 22, 2009 Petitioner was sentenced to a term of incarceration of nine months for each offense, with the sentences for the first two counts to run consecutively to each other and the sentence for the third count to run concurrent with the first count. *Id.* at ¶12. Petitioner's term of incarceration is scheduled to end on September 18, 2010. *Id.* At ¶ 13.

Petitioner appealed his sentences to the Pascua Yaqui Court of Appeals (the "PYCA"). *Id.* at ¶ 13. The PYCA dismissed Petitioner's appeal, citing their earlier opinion in *Pascua Yaqui Tribe v. Beatrice Miranda*, CA-08-015 (2009), *Id.* at ¶ 15. Petitioner then asked this Court for a writ of *habeas corpus* stating that his incarceration violates ICRA. 25 U.S.C. § 1302(7). However, Petitioner's detention does not violate ICRA, and Respondent is entitled to judgment as a matter of law.

STANDARD OF REVIEW

This Court should grant summary judgment if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Entry of summary judgment is proper against a party who fails to make a showing that is sufficient to establish an element essential to that party's case. *Celotex*

Corporation v. Catrett, 477 U.S. 317, 322 (S. Ct. 1986) In such a case, the moving party is entitled to judgment as a matter of law. *Id.* at 323. "Substantive law determines which facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Sprint Communications Company, L.P. v. Western Innovations, Inc.*, 618 F. Supp.2d 1101(D. Ariz., 2009) (*quoting Anderson v. Liberty Lobby, Inc.*477 U.S. 242, 248, (1986)).

STATUTORY BACKGROUND

The ICRA provides the privilege of the writ of *habeas corpus* to an individual to challenge his or her detention by order of an Indian Tribe. 25 U.S.C. §1303. Petitioner challenges his detention as a violation of the ICRA's provision stating that a Tribe shall not "... impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year…" 25 U.S.C. §1302(7). The plain language of the ICRA allows a tribe to impose a one-year sentence of imprisonment for "any one offense". Where multiple offenses have been properly charged, there is no violation of the ICRA when a tribe imposes the sentences consecutively for each conviction. Even if the ICRA is ambiguous, which the Respondent does not concede, then canons of construction would be triggered which state that ambiguities in statutes dealing with Indians should be interpreted in a manner that benefits them. *Bryan v. Itasca County*, 426 U.S. 373 (1976).

THE INDIAN CIVIL RIGHTS ACT

The ICRA states that an Indian Tribe shall not "impose for conviction of any **one offense** any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both." 25 U.S.C. § 1302(7) (emphasis added) In implementing the ICRA, Congress intended to both strengthen the position of individual tribal members and "to promote the well-established policy of furthering Indian self-government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62, 98 S.Ct. 1670, 1679 (S.Ct. 1978) (*quoting Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974)). "The Indian sovereignty doctrine is relevant…because it provides a backdrop against which the applicable…federal statutes must be read." *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 172, 93 S.Ct. 1257, 1262 (S.Ct. 1973). The language of the ICRA is unambiguous in its wording, "for any one offense," and the limitation of a one year maximum on sentencing authority is as to each separate offense. The ICRA does not contain a prohibition on consecutive sentences for separate offenses. 25 U.S.C. § 1302(7).

LAW AND ARGUMENT

There are no issues of material fact and Respondent is entitled to judgment as a matter of law. First and foremost, Petitioner has failed to exhaust his tribal court remedies, thus this matter is not properly before the Court at this time. Alternatively, should the Court find that Petitioner has exhausted his tribal remedies, Respondent is entitled to judgment as a matter of law because the ICRA is not violated by Petitioner's detention and there are no issues of material fact in dispute.

I. Tribal Remedies Have Not Been Exhausted

The United States Supreme Court has stated that, "Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination," *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856, 105 S.Ct. 2447, 2454 (1985) and that the "orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed." *National Farmers*, 471 U.S. at 856. In the instant case, a tribal remedy continues to be available in the form of request for a writ of *habeas corpus* before a full panel of the Pascua Yaqui Court of Appeals ("PYCA"). This remedy is specifically addressed in the Rules of the Pascua Yaqui Court of Appeals (*see* PYTRAP, Rule 25). SOF at ¶ 16. Full tribal appellate review is required in order to satisfy the exhaustion of tribal remedies. "Until appellate review is complete, the … Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene." *Iowa Mutual Ins. Company v. LaPlante*, 480 U.S. 9, 16-17, 107 S.Ct. 971 (1987).

Because tribal court remedies have not been fully exhausted, summary judgment should be entered in Respondent's favor, and Petitioner's request for writ of *habeas corpus* should be denied. Under the doctrine of exhaustion of tribal court remedies, relief may not be sought in federal court until appellate review of a pending matter in a tribal court is complete. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987) (*see also Nat'l*

Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 856- 57 (1985)(applying the doctrine)). "[T]he exhaustion rule ... [i]s 'prudential,' not jurisdictional." *Strate v. A-1 Contractors*, 520 U.S. 438, 451 (1997). As stated by the Eighth Circuit, "[a] balancing process is evident; that is weighing the need to preserve the cultural identity of the tribe by strengthening the authority of the tribal courts, against the need to immediately adjudicate alleged deprivations of individual rights." *Id*. (*quoting O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1146 (8th Cir.1973)). "Except to the extent demanded by the [ICRA], the structure and procedure of [tribal] courts may be determined by the tribes themselves." *Smith v. Confederated Tribes of Warm Springs*, 783 F.2d 1409, 1412 (9th Cir.1986) (*quoting* F. Cohen, Handbook of Federal Indian Law 251 (1982 ed.) (internal quotation marks and footnote omitted)). Thus, the question is whether tribal jurisdiction is "colorable" or "plausible" absent bad faith or harassment. *Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1075-76 (9th Cir.1999).

In *Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d. 948 (9th Cir. 1998) the Ninth Circuit held that federal courts should not exercise jurisdiction over unexhausted claims out of respect for tribal sovereignty as well as to avoid impairing the authority of tribal courts. *Selam*, 134 F.3d. at 953 (*see Williams v. Lee*, 358 U.S. 217, 220-21, 97 S.Ct. 269, 270-71, 3 L.Ed.2d 251 (1959), *Iowa Mutual v. La Plante*, 480 U.S. 9, 15). Because Petitioner has not utilized his right, under tribal law, to request a writ of *habeas corpus* before a full panel of the PYCA, Petitioner's tribal court remedies are unexhausted, and Respondent is therefore entitled to judgment as a matter of law. SOF at ¶ 17.

In addition, the Ninth Circuit has held that there are very few exceptions to the in tribal court exhaustion requirement. They note in *Selam* that "in the few cases where we have relaxed the exhaustion requirement, the litigant was able to show either that exhaustion would have been futile or that the tribal court of appeals offered no adequate remedy." *Selam*, 134 F.3d. at 954 (*citing St. Marks v. Chippewa-Cree Tribe*, 545 F2d 1188, 1189-90 (9th Cir. 1976); *United States ex rel. Cobell v. Cobell*, 503 F.2d 790, 793-94 (9th Cir. 1974)) Petitioner has not shown that exhaustion would be futile or that the PYCA offers no adequate remedy. Respondent has demonstrated that a remedy exists within the tribal system of Petitioner may avail himself. SOF at ¶ 16.

The Supreme Court has outlined four exceptions to the exhaustion rule: (1) when an assertion of tribal court jurisdiction is "motivated by a desire to harass or is conducted in bad faith"; (2) when the tribal court action is "patently violative of express jurisdictional prohibitions"; (3) when "exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction"; and (4) when it is "plain" that tribal court jurisdiction is lacking, so that the exhaustion requirement "would serve no purpose other than delay." *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 845, 847, (9th Cir. 2009)(*quoting Nevada v. Hicks*, 533 U.S. 353, 369, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001)(internal quotation marks omitted)). Requiring Petitioner to fully exhaust his tribal court remedies by allowing a full panel of the PYCA to review his request for writ of *habeas corpus* would not fall under one of the exceptions to the exhaustion rule outlined by the U.S. Supreme Court. *Hicks*, 533 U.S. 353 at 369.

Petitioner does not qualify for any of the exceptions which would allow this court to waive the requirement of tribal court exhaustion, and therefore Petitioner's tribal court remedies remain unexhausted, this action is not properly before the court, and Respondent is entitled to judgment as a matter of law in the form of denial of Petitioner's request for a writ of *habeas corpus*.

II. Petitioner's Detention Does not Violate the Indian Civil Rights Act

On April 22, 2009, the PYTC sentenced Petitioner to nine months for each offense for which he had plead guilty, two of which were to run consecutively and one concurrently, for a total of eighteen months incarceration. SOF at ¶ 13 The PYTC specified that the sentences for Domestic Violence Burglary and Domestic Violence Theft would run consecutively to each other and the Disobedience to a Lawful Court Order sentence would run concurrently with the first charge. *Id.* at ¶ 12.

The ICRA limits tribal sentencing authority to one year "for any one offense." 25 U.S.C. §1302(7). The Pascua Yaqui Court of Appeals ("PYCA") has defined "one offense" as a matter of tribal law in its ruling in *Pascua Yaqui Tribe v. Miranda*, CA-08-015 (*Respondent Valenzuela's Answer,* Exhibit D). The PCYA held that crimes may be charged and sentenced separately and are not the "same offense" so long as they meet the test found in the longstanding U.S. Supreme Court decision in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182 (1932) ("…the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.")

The issue before this Court is a purely legal issue -- whether the detention of Petitioner beyond one year is a violation of federal law-- the ICRA. Because none of the separately imposed sentences violates ICRA's limitation of one year, Respondent is entitled to judgment as a matter of law. Petitioner's request for a writ of *habeas corpus* should be denied.

The Ninth Circuit has not reviewed a case on point with the issues in this case, and in fact, a review of cases revealed only two cases in which the ICRA's limitation to one-year per offense is reviewed. These cases are *Ramos v. Pyramid Tribal Court*, 621 F.Supp. 967 (D. Nev. 1985) and the case put forth by Petitioner, *Spears v. Red Lake Band of Chippewa Indians*, 363 F.Supp. 2d 1176 (D. Minn. 2005). Dkt. 1 at ¶ 32. While neither of these cases is binding authority on this court, the reasoning applied in *Ramos* is in line with the Supreme Court's line of cases discussing consecutive sentencing for separate offenses, and this Court should adopt the reasoning in *Ramos,* 621 F.Supp. 967.

The District of Nevada ruled that 25 U.S.C. 1302(7) was not violated by a Tribal Court's imposition of multiple sentences that were imposed consecutively and in total exceeded the ICRA's statutory limitation for "one offense". The court stated that "We must be careful to construe the terms in ICRA with due regard for the historical, governmental and cultural values of an Indian tribe." *Ramos v. Pyramid Tribal Court,* 621 F.Supp. 967 (D. Nev. 1985). The court denied the Petitioner's request for writ of *habeas corpus* stating that the imposition of the consecutive sentences did not violate ICRA. *Id.*at 970. ("…the imposition of consecutive sentences for numerous offenses is a

common and frequently used power of judges.") This case is on all fours with *Ramos*, as it involves the same issue, i.e. whether or not consecutive sentences for separate crimes imposed by the Pascua Yaqui Tribal Court violates 25 U.S.C. § 1302(7), and as in *Ramos*, this Court should find that ICRA has not been violated and Petitioner's detention is lawful.

In cases implicating constitutional issues where consecutive sentencing for separate crimes has been imposed, such as the United States Supreme Court in *Blockburger*, 284 U.S. 299, courts have reached the conclusion that separate charges and cumulative sentencing are allowable for separate crimes. (*see Ramos v. Pyramid Tribal Court*, 621 F.Supp. 967 (D. Nev. 1985), *Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed. 2d 535 (1983), *Albernaz v. U.S.*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Petitioner relies upon non-binding case law to promote a "same criminal transaction" test. *Spears v. Red Lake Band of Chippewa Indians*, 363 F.Supp. 2d 1176, 1178 (D. Minn. 2005). Petitioner's theory is not supported by caselaw, including the several Supreme Court cases cited above. The court in *Spears* states that the language of ICRA is ambiguous and draws a correlation between the language in ICRA at 25 U.S.C. 1302(7) ("one offense") and the language of the United States Constitution's Fifth Amendment to bolster that premise. The language of 25 U.S.C. 1302(7), which is at issue here, is not the same in either word or in context as the language of the Fifth Amendment, and the correlation is inapt. The Fifth Amendment prohibits that "a person be subject for the *same offence* to be twice put in jeopardy of life or limb…" U.S. Const. Amend. V

(emphasis added).[1] The double-jeopardy clause of the Fifth Amendment and its application was discussed in *Ashe v. Swenson*, 397 U.S. 436 (1970) which is cited by the *Spears* court for a proposition found in a concurrence to the *Ashe* case- the "same transaction" test. *Ashe*, 397 U.S. at 449-54 (Brennan, J., concurring). The Brennan concurrence in *Ashe* is not binding authority on any court. The actual binding opinion of the Supreme Court in *Ashe* is a holding as to when a defendant can be lawfully tried a second time in a separate prosecution under the double-jeopardy clause of the Fifth Amendment. *Ashe*, 397 U.S. at 446. ("It is not whether he could have received a total of six punishments if he had been convicted in a single trial of robbing the six victims. It is simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again.") *Spears'* use of *Ashe* to attempt to prove ambiguity in ICRA as well as to promote a "single criminal transaction" reading of the ICRA statute is an incorrect and crabbed analysis. *Spears*, 363 F.Supp.2d at 1178-1179. The "single criminal transaction" test has, as noted in *Spears*, been rejected by the Supreme Court in the context of double jeopardy. *Id.* at 1178. The *Spears* case contains no persuasive argument as to why a "single criminal transaction" test would be appropriate in these circumstances. This Court should decline to use the *Spears* analysis in deciding the instant case.

---

[1] This language from the United States Constitution is mirrored in a different section of ICRA. An Indian Tribe shall not "subject any person for the same offense to be twice put in jeopardy." 25 U.S.C. 1302(3).

III. The Language of ICRA is not Ambiguous

Petitioner is being detained lawfully by order of the tribe, and his detention does not violate the ICRA because his offenses were separate. SOF at ¶ 2 and 9-12. There is no support for the argument that the ICRA disallows consecutive sentences for crimes that are separate under the *Blockburger* test, therefore Petitioner attempts to argue that his crimes arose from the same incident and are therefore not separate, but the "same criminal transaction." Petitioner fails to establish this element of his claim because the wording of the ICRA is not ambiguous, it is clear. It limits tribal sentencing authority to one year "for any one offense." 25 U.S.C. §1302(7). Looking to the Congressional Record on the passage of ICRA, there are no specific references to the meaning of one offense. However, it is clear that the drafters of ICRA intended for the limitations placed on tribes through ICRA to be tempered by their quasi-sovereign status. "The courts have repeatedly upheld the quasi-sovereign status of the tribe; however, the Congress has the prerogative placing limitations upon tribal autonomy." S. Rep. N. 841, 90th Cong., 1st Sess. 8 (1967). The limit placed on tribal autonomy at issue here is the limit to one-year for "one offense." Contrary to the analysis in *Spears*, there is no indication in the ICRA or its legistlative history, that the meaning of "one offense" is more limited than the plain language of the statute.

To reach the analysis of legislative intent, the *Spears* court had to first find the language of ICRA ambiguous. *Id. (quoting United States v. McAllister*, 225 F.3d 982, 986 (8th Cir. 2000)). The *Spears* court therefore drew the correlation discussed above as

well as an equally unconvincing correlation to the Sixth Amendment right to jury trial which is inexplicably used to bolster the argument that the "one offense" language of 25 U.S.C. 1302(7) is ambiguous. *Id.*

The court in *Spears*, acknowledges that all cases cited for the proposition that the language of ICRA is ambiguous are **not** authoritative precedent for the case at bar, "The Court recognizes that Fifth and Sixth Amendment precedents do not decide this case- this case concerns the language of the ICRA" and are cited to illustrate the "ambiguous meaning of 'any one offense.'" *Id*. The cases cited in *Spears* are inapposite and do not illustrate any ambiguity in ICRA. Rather, *Spears* discusses constitutional amendments that contain different language and different legal issues to the ICRA language at issue here. These faulty analogies are used to promote the "single criminal transaction" test which the *Spears* court also uses in its analysis of Congressional intent in enacting ICRA and in its application of ICRA to the facts of the case. *Id.* at 1180-1182. This is the strained construction of the Order of the District of Minnesota in *Spears* and is not a logical holding which has been followed in any other district, nor should it be followed by this Court. Petitioner fails to establish that "one offense" means "single criminal transaction" an essential element to his claim, and therefore summary judgment should be entered in Respondent's favor, *Celotex Corporation v. Catrett*, 477 U.S. 317, 322.

CONCLUSION

Since there are no genuine disputes of material fact, this case is appropriate for decision on motion for summary judgment. There are only two legal issues for this Court

to decide, whether ICRA has been violated by the imposition of consecutive sentences and whether tribal court remedies are exhausted. Because tribal court remedies have not been exhausted, this Court should grant Respondent's motion for summary judgment, and deny Petitioner's request for writ of *habeas corpus*. If the Court finds that tribal remedies have been exhausted, the Court should also find summary judgment in favor of Respondent because Petitioner's detention is lawful and ICRA is not violated by imposition for consecutive sentences for crimes that are separate.

WHEREFORE, Respondent prays that this motion be granted, and that Petitioner's motion be denied.

RESPECTFULLY SUBMITTED on this the 3rd day of December, 2009.

OFFICE OF THE ATTORNEY GENERAL
PASCUA YAQUI TRIBE

S/ Amanda Sampson
Amanda Sampson, Assistant Attorney General
Rolando Flores, Interim Attorney General
Kimberly Van Amburg, Assistant Attorney General
Alfred Urbina, Deputy Prosecutor
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2009 I electronically transmitted the foregoing document to the Clerk's Office using the ECF System for filing and transmittal to the following ECF registrants:

CLERK'S OFFICE
United States District Court
Sandra Day O'Connor Courthouse
401 West Washington Street
Phoenix, Arizona 85003

KARLA HOTIS DELORD
Assistant United States Attorney
Two Renaissance Sq.,
40 N. Central Ave., Ste. 1200,
Phoenix, AZ 85004-4408

DANIEL L. KAPLAN
Assistant Federal Public Defender
KEITH HILZENDEGER
Research and Writing Specialist
Federal Public Defender for the
District of Arizona
850 W. Adams, Suite 201
Phoenix, Arizona 85007

TIMOTHY G. MCNEEL
Deputy Coconino County Attorney
110 E. Cherry Avenue
Flagstaff, Arizona 86001-4627

S/ Amanda Sampson
By Amanda Sampson
Assistant Attorney General