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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Ramiro Bustamante, Petitioner, vs. Michael Valenzuela, *et al.*, Respondents.	Case No.: CV-09-8192 PCT ROS RESPONDENT VALENZUELA'S RESPONSE TO CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Respondent Valenzuela, by and through counsel undersigned, hereby submits this reply in support of his Motion for Summary Judgment and Response to Petitioner's Cross-Motion for Summary Judgment. Respondent respectfully requests that the Court grant his Motion for Summary Judgment, and submits the following Memorandum of Law in support of this reply and response.

MEMORANDUM OF POINTS AND AUTHORITIES

The parties agree that there are no genuine issues of fact in contention, and this

case should be resolved on motion for summary judgment. Dkt. 29 at p. 2. 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). The law supports Respondent's motion for summary judgment.

I. Petitioner's Detention is Lawful and does not Violate the Indian Civil Rights Act.

a. The language of ICRA is Unambiguous.

The phrase of ICRA which is at issue in this case states that an Indian tribe shall in "no event 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). This language is unambiguous. It is well-settled that the first step in interpreting a statute is to consider whether the language of the statute has a "plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). If the language is unambiguous, the inquiry ceases, and it is improper to consider legislative history or other external factors. *See Barnhart*, 534 U.S. at 450; *Talamantes v. Leyva*, 575 F.3d 1021, 1023 (9th Cir. 2009) ("It is well settled that, in a statutory construction case, analysis must begin with the language of the statute itself; when the statute is clear, 'judicial inquiry into [its] meaning, in all but the most extraordinary circumstances, is finished.'") (citations omitted); *United States v. Rand*, 482 F.3d 943, 946 (7th Cir. 2007) ("When a statute is clear, any consideration of legislative history is improper.") (citation omitted); *Cowherd v. Million*, 380 F.3d 909,

913 (6th Cir. 2004) ("When a statute is unambiguous, resort to legislative history and policy considerations is improper.")

Further, it is a well-settled maxim of statutory construction that "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981); *see also Perrin v. United States*, 444 U.S. 37, 42-43 (1979) (interpreting statutory use of common law term "bribery" in light of term's "ordinary, contemporary, common meaning" at time of statute's enactment); *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978) ("Congress will be presumed to have legislated against the background of our traditional legal concepts..."); *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 59 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.").

The term "offense" has had a long and well-established meaning that specifically contemplates multiple "offenses" arising out of the same transaction of events. It is well-settled law that multiple single "offenses" may arise out of the criminal transaction, and the fact that they arose out of the same set of facts does not prevent them from being separate "offenses."[1] *See, e.g., United States v. Dixon*, 509 U.S. 688, 696 (1993) (citing *Blockburger v.*

[1] Petitioner's position is that the phrase "one offense" should be interpreted to mean that separate crimes arising from a single criminal episode or common nucleus of operative

United States, 284 U.S. 299, 304 (1932)); *Wilson v. Belleque*, 554 F.3d 816, 828-29 (9th Cir. 2009) *cert. denied*, 130 S. Ct. 75 (2009) (to determine whether two offenses are the "same" for double jeopardy purposes, a court must determine "whether each offense contains an element not contained in the other).

Indeed, the word "offense" as that word is used by the Supreme Court and the United States Court of Appeals for the Ninth Circuit, clearly encompasses separate offenses arising from the same criminal transaction. *See, e.g., Ohio v. Johnson*, 467 U.S. 493, 494 (1984) (respondent indicted for "four offenses" arising from the same criminal transaction); *Albernaz v. United States*, 450 U.S. 333, 344 n. 3 (1981) ("It is well settled that [even] a single transaction can give rise to distinct offenses under separate statutes without violating the Double Jeopardy Clause."); *Rhoden v. Rowland*, 10 F.3d 1457, 1461 (9th Cir. 1993); *People of the Territory of Guam v. Iglesias*, 839 F.2d 628, 629 (9th Cir. 1988) ("[i]t is well settled that

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fact violate ICRA if sentenced separately. *See Petititioner's Response and Cross Motion*, Dkt. 29 at p. 8 (*quoting Spears* at p. 1181). In addition to the fact that "one offense" is not ambiguous and has a well-settled meaning in courts throughout the country, the adoption of this approach 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. At this time, federal courts treat the phrase as it is typically understood, and thus a single criminal transaction may result in the charging or conviction of several "offenses" arising out of that transaction. *See, e.g., United States v. Antelope*, 430 U.S. 641 (1977) (Indians charged with multiple offenses arising out of a single criminal transaction); *United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007) *cert. denied*, 128 S. Ct. 2902 (2008) (Indian charged with multiple offenses arising out of a single criminal transaction). Adoption of Petitioner's approach would mean either that the phrase "one offense" means something different in federal court than it does in a Tribal court, or perhaps courts would determine that Petitioner's interpretation of "one offense" should also apply in federal court. In either case, the result is untenable.

a single transaction can give rise to distinctive offenses") (citation omitted). Under these circumstances, the argument that the term "offense" is ambiguous is not credible and is at odds with settled case law throughout this country.

To reach the analysis of legislative intent, the *Spears* court had to first find the language of ICRA ambiguous. *Spears*, 363 F.Supp. 2d at 1178 (*quoting United States v. McAllister*, 225 F.3d 982, 986 (8th Cir. 2000)). It is not. Based on a reading of the plain language of ICRA, and in light well-established meaning of the term "offense", where several criminal laws are breached, more than "one offense" is committed.

b. Petitioner's Use of the Term "Single Criminal Transaction" in Connection with ICRA's Limitation of One-Year for "any one offense" is Misleading Because the "Single Criminal Transaction Test" is not the Law.

Petitioner spends a great deal of time touting the analysis of the District of Minnesota in *Spears v. Red Lake Band of Chippewa Indians*, 363 F. Supp. 2d 1176 (D. Minn. 2005). The analysis in *Spears* is unconvincing, is based on a false premise, and it should not be followed by this Court.

Spears analyzes ICRA's "one offense" language, inexplicably finding the language "one offense" ambiguous. *Spears* wrongly finds ambiguity in spite of the well-settled common law meaning of the term, as discussed above. The court in *Spears* finds the language ambiguous proceeding to an analysis of legislative intent, and analogizing the language of the statute to various other statutory and constitutional phrases, including the double- jeopardy clause of the Fifth Amendment. The court looks at *Ashe v. Swenson*, 397 U.S. 436 (1970), which it cites for 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 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. *Spears'* analysis and promotion of a non-binding concurrence that discusses a test that is **not** the law is a fallacious argument. Neither Petitioner, nor the *Spears* court puts forth any valid reason why a "single criminal transaction" test would be appropriately suited to section 1302(7) of the ICRA, especially since the language of §1302(7) is clear, unambiguous, and has a historical definition at law. *Spears* is not binding authority on this Court and this Court should decline to use its faulty analysis in deciding the instant case.

In *Garrett v. United States*, the Supreme Court stated, "We have steadfastly refused to adopt the "single transaction" view of the Double Jeopardy Clause." *Garrett v. United*

States 471 U.S. 773, 790 (1985). It is unclear why then, if the single transaction test has been rejected for the purpose of determining whether double jeopardy has attached, it should be adopted in an entirely different context here, as is urged by Petitioner.

c. Petitioner's Contention that the Legislative History of the ICRA Supports Adoption of a "Single Criminal Transaction" Test is Inaccurate.

The legislative history of ICRA contains nothing that would indicate that the drafters intended the term "one offense" to mean anything other than its commonly understood meaning. There is nothing within the legislative history that would indicate that the drafters intended "one offense" to mean "single criminal transaction". To be sure, the purpose of ICRA was to "secur[e] for the American Indian the broad constitutional rights afforded to other Americans." S. Rep. N. 841, 90th Cong., 1st Sess. 8, p. 5 (1967). However, the Congressional Record contains no intent regarding the issue of separate offenses or consecutive sentencing. Contrary to Petitioner and the *Spears* court's contentions, the stated Congressional intent of providing broad constitutional rights to individual Indians is not in conflict with the application of the Supreme Court's holding in *Blockburger v. United States*, 284 U.S. 299, 304 (1932) which, of course, applies to all citizens of the United States. There is no indication that Congress intended for Indian Tribes to be unable to charge and sentence separately for crimes that are separate under *Blockburger*—as do courts in other jurisdictions where separate offenses are found to have been committed. In a case where two charges stemmed from the same criminal transaction (the purchase and the receiving of heroin) the Supreme Court found that the

offenses were separate and as such consecutive sentences could be imposed on each count. *Harris v. U.S.*, 359 U.S. 19, 24 (1959). The Supreme Court also found that three narcotics laws, violated in the course of one narcotics purchase, were separate for purposes of charging and consecutively sentencing in *Gore v. U.S.*, 357 U.S. 386 (1958)) ("It seems more daring than convincing to suggest that three different enactments…were disregarded, but, forsooth, in the course of one transaction, the defendant should be treated as though he committed only one of these transactions.")

The idea that Congress intended "any one offense", which has a plain, well understood meaning, to mean "a single criminal transaction" is simply not supported by the Congressional Record, *Spears*, 363 F.Supp. 2d. 1176, 1180. The *Spears* court has to resort to strained inferences to make its argument. First, the faulty premise that the language of ICRA should be compared to constitutional provisions that are different from ICRA, but have been found to be ambiguous. Next, the *Spears* court leaps to its second false premise that because of supposed ambiguity, Congressional intent must be analyzed. Finally, the court invents its conclusion that Congress intended for ICRA and the Major Crimes Act to be a "balanced and logical regime." *Id.* A review of the Congressional Record simply does not support the proposition that the ICRA and the Major Crimes Act were to be read together in the manner suggested by Petitioner and *Spears*. 18 U.S.C. 1153.

d. Should this Court find the language of ICRA ambiguous, which Respondent does not concede, then the language should be construed in favor of Indian Tribes.

As discussed above, Respondent does not concede that the language "one offense" found in Section 1302(7) of ICRA is in any way ambiguous. However, should the Court find the language ambiguous, Respondent points the Court to the many cases that have held that ambiguities in federal statutes are to be construed in the favor of Indian tribes. "Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (*citing McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 174 (1973), *Choate v. Trapp*, 224 U.S. 665, 675 (1912)). In a case narrowly interpreting the ICRA, the Supreme Court held that tribes were immune from suit based upon sovereign immunity except in the limited arena of petitions for habeas corpus. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) The Court stated that "…a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent." *Id.* at 60. Here, there is no indication that Congress intended to legislate away the right of Indian tribes to charge and sentence consecutively for separate crimes.

If the Court finds ICRA ambiguous in terms of its intent, then the Court should construe the language in favor of tribes. ICRA must be read to maximize the authority of Indian Tribes to have their own court systems which may convict and sentence Indians for criminal offenses committed on their Reservation. A sympathetic construction would be a finding that "one offense" means the violation of one criminal statute of an Indian Tribe's criminal code, and that separate offenses may be separately sentenced without

violation of ICRA.

II. Contrary to Petitioner's Assertions, Ramos v. Pyramid Tribal Court Contains Reasoning Applicable to the Facts of this Case.

Petitioner asserts that the opinion in *Ramos v. Pyramid Tribal Court*, 621 F.Supp. 967 (D.Nev. 1985) is inapplicable to the facts of the instant case. This is inaccurate. At issue in Ramos is whether the imposition of consecutive sentences with an aggregate total exceeding the period prescribed by ICRA is a violation of ICRA's prohibition on cruel and unusual punishment. The court held that 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.") The prohibition on cruel and unusual punishment is found in the very same provision as the prohibition on sentences exceeding one year for "any one offense". 25 U.S.C. § 1302(7). While Petitioner does not raise the issue of cruel and unusual punishment, the analysis found in *Ramos* applies because it involves the same ultimate issue, i.e. whether or not consecutive sentences for separate crimes violates 25 U.S.C. § 1302(7), and as in *Ramos*, this Court should find that it does not.

II. Petitioner's Assertion that Resort to Further Remedies in the Tribal Courts Would be Futile is Speculative and not Supported by Fact.

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).

Petitioner states that the decision of the Pascua Yaqui Court of Appeals ("PYCA") in *Pascua Yaqui Tribe v. Beatrice Miranda*, CA-08-015 (Pascua Yaqui Tribe Court of Appeals, 2009) was designated an Opinion pursuant to 3 PYTRAP Rule 22, and thus has precedential value. Respondent does not dispute that this is the case. However, the Pascua Yaqui Tribal codes also state that the PYCA shall consist of three judges, one of whom shall be the Chief Justice. 3 PYTC 1-2-30(B) The Pascua Yaqui Rules of Appellate Procedure further allow for a Petitioner to request a writ of habeas corpus. 3 PYTRAP

Rule 25.[2] Despite Petitioner's claims otherwise, a full three-justice panel of the PYCA, would not be required to find that the single-judge panel which heard Petitioner's direct appeal was correct. Rule Rule 22(a) specifically contemplates a three-justice panel, referring to a "majority" of the justices making a determination on disposition of a matter. 3 PYTRAP Rule 22(a). *Controverting Statement of Facts*, ¶ 10. Certainly, cases appealed to the 9th Circuit for hearing *en banc* do not always resolve matters in the same way they were initially resolved by a three-judge panel (*See Navajo Nation v. U.S. Forest Service*, 535 F.3d. 1058, (9th Cir. 2008) *cert. denied*, 129 S. Ct. 2763 (2009)).

As Petitioner correctly asserts, the need to strengthen tribal courts should be weighed with the need to immediately adjudicate alleged deprivations of individual rights. *United States ex rel. Cobell v. Cobell*, 503 F.2d 790, 793 (9th Cir. 1974) *cert. denied*, 421 U.S. 999 (1975) (quoting *O'Neal*, supra 402 F.2d at 1146). Here, in contravention to *Cobell* there has been no direct statement that would lead a court to believe that only a federal court could change the tribal court's opinion. In *Cobell*, the tribal court judge stated that "only a federal court order would cause him to rescind the action." *Cobell*, 503 F.2d at 794. Here, Petitioner cannot be certain that a full panel of the PYCA would not rule in his favor. Certainly, it is possible for two justices to out-vote the one justice whose opinion is already known.

Petitioner has not exhausted his tribal court remedies. The writ of habeas corpus in

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[2] The Pascua Yaqui Tribe Rules of Appellate Procedure are Available online at: http://www.pascuayaquitribe.org/departments/attorneygeneral/tribalcodes/index.html

before the PYCA remains available. There has been no showing that Respondent is asserting tribal jurisdiction in bad faith or acting to harass the Petitioner. There has been no persuasive showing that further remedies in tribal court would be futile. Here, tribal court jurisdiction is proper and therefore is certainly "plausible" and "colorable." First, the Petitioner has a remedy in the Pascua Yaqui Appellate Court, a habeas petition to a three-judge en-banc panel. Second, the Tribe's procedures are consistent with ICRA, in fact the Tribe has adopted the provisions of ICRA wholesale as the Pascua Yaqui Bill of Rights. Third, The Pascua Yaqui Tribe's right of internal self- government includes the right to prescribe laws, to enforce those laws by their own procedures, and to rule on those laws through their own court system. Therefore, Petitioner's tribal court remedies have not been fully exhausted and this court should decline to hear his Petition and should grant Respondent's Motion for Summary Judgment.

Conclusion

Since Petitioner and Respondent are in agreement that 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.

Petitioner fails to show that ICRA has been violated by the imposition of consecutive sentences for separate crimes. Her argument relies solely on the outlying holding in *Spears v. Red Lake*, which is not binding authority on this Court, and which

does not contain convincing analysis for either of its contentions: First, that the language of ICRA is ambiguous in nature; and Second, that Congress intended to limit tribal courts in imposing consecutive sentences. *Spears*, 363 F.Supp. 2d 1176. Neither of these contentions withstands serious scrutiny. In addition, if the court should find the language of ICRA ambiguous, it must resolve the ambiguity in favor of Indian Tribes pursuant to longstanding cannons of statutory construction.

In addition, Petitioner fails to show that the tribal court remedy available to him is ineffective or meaningless, and no other exception to the exhaustion requirement applies. WHEREFORE, it is prayed that Respondent's Motion for Summary Judgment be granted and Petitioner's Motion for Summary Judgment be denied.

RESPECTFULLY SUBMITTED on this the 24th day of December, 2009.

S/ Amanda Sampson
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CERTIFICATE OF SERVICE

I hereby certify that on December 24, 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:

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