

OFFICE OF THE ATTORNEY GENERAL  
PASCUA YAQUI TRIBE  
R. Rolando Flores, ASB No. 023866  
Amanda Sampson, ASB No. 022992  
Kimberly Van Amburg, ASB No. 022376  
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 Nielsen*

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

Beatrice Miranda,	)	Case No.: CIV 0908065-PCT-PGR
	)	(ECV)
Petitioner,	)	
	)	
vs.	)	RESPONDENT NIELSEN'S
	)	MOTION (CROSS-MOTION)
Tracy Nielsen, <i>et al.</i> ,	)	FOR SUMMARY JUDGMENT
	)	
Respondents.	)	
	)	

Respondent Nielsen, by and through undersigned counsel, hereby moves pursuant to Rule 56, Fed. R.Civ.P. for entry of judgment in her favor in this action.

A memorandum of law in support of this motion is filed herewith.

WHEREFORE, it is prayed that this motion be granted.

RESPECTFULLY SUBMITTED on this the 2<sup>nd</sup> day of November, 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 November 2, 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

JOHN ROBERT LOPEZ, IV  
Assistant United States Attorney  
Two Renaissance Sq.,  
40 N. Central Ave., Ste. 1200,  
Phoenix, AZ 85004-4408

DANIEL L. KAPLAN  
Assistant Federal Public Defender  
District of Arizona  
850 W. Adams, Suite 201  
Phoenix, Arizona 85007

TIMOTHY G. MCNEEL  
Deputy Coconino County Attorney  
110 E. Cherry Avenue

1 Flagstaff, Arizona 86001-4627

2 S/ Amanda Sampson

3 By Amanda Sampson

4 Assistant Attorney General

1 OFFICE OF THE ATTORNEY GENERAL  
2 PASCUA YAQUI TRIBE  
3 R. Rolando Flores, ASB No. 023866  
4 Amanda Sampson, ASB No. 022992  
5 Kimberly Van Amburg, ASB No. 022376  
6 Alfred L. Urbina, ASB No. 026389  
7 4725 W. Calle Tetakusim, Bldg. B  
8 Tucson, Arizona 85757  
9 (520) 883-5106 tel  
(520) 879-5084 fax  
10 amanda.sampson@pascuayaqui-nsn.gov

*Attorneys for Respondent Nielsen*

11 IN THE UNITED STATES DISTRICT COURT  
12 DISTRICT OF ARIZONA

13 Beatrice Miranda,	)	Case No.: CIV 0908065-PCT-PGR
	)	(ECV)
14	)	
15 Petitioner,	)	
	)	
16 vs.	)	RESPONDENT NIELSEN'S
	)	OPPOSITION TO PETITIONER'S
17 Tracy Nielsen, <i>et al.</i> ,	)	MOTION FOR SUMMARY
	)	JUDGMENT
18 Respondents.	)	
	)	
19	)	
20	)	

21  
22 Respondent Nielsen, by and through undersigned counsel, hereby opposes  
23 Petitioner's Motion for Summary Judgment pursuant to Rule 56, Fed. R.Civ.P. A  
24 memorandum of law in support of this opposition is filed herewith titled  
25  
26 "Respondent Nielsen's Memorandum of Law in Support of Motion (Cross-Motion)  
27 for Summary Judgment and in Opposition to Plaintiff's Motion for Summary  
28

1 Judgment" together with Respondent's Motion for Summary Judgment and  
2 Statement of Facts.  
3

4 WHEREFORE, it is prayed that Petitioner's Motion for Summary Judgment  
5 be denied and Respondent's Motion for Summary Judgment (Cross-Motion) be  
6 granted.  
7

8 RESPECTFULLY SUBMITTED on this the 2<sup>nd</sup> day of November, 2009.  
9

10 OFFICE OF THE ATTORNEY GENERAL  
11 PASCUA YAQUI TRIBE

12 S/ Amanda Sampson

13 Amanda Sampson, Assistant Attorney General  
14 Rolando Flores, Interim Attorney General  
15 Kimberly Van Amburg, Assistant Attorney General  
16 Alfred Urbina, Deputy Prosecutor  
17 *Attorneys for Respondent*

18 CERTIFICATE OF SERVICE

19 I hereby certify that on November 2, 2009 I electronically transmitted the  
20 foregoing document to the Clerk's Office using the ECF System for filing and  
21 transmittal to the following ECF registrants:

22 CLERK'S OFFICE  
23 United States District Court  
24 Sandra Day O'Connor Courthouse  
25 401 West Washington Street  
Phoenix, Arizona 85003

26 JOHN ROBERT LOPEZ, IV  
27 Assistant United States Attorney  
28 Two Renaissance Sq.,

1 40 N. Central Ave., Ste. 1200,  
2 Phoenix, AZ 85004-4408

3 DANIEL L. KAPLAN  
4 Assistant Federal Public Defender  
5 District of Arizona  
6 850 W. Adams, Suite 201  
7 Phoenix, Arizona 85007

8 TIMOTHY G. MCNEEL  
9 Deputy Coconino County Attorney  
10 110 E. Cherry Avenue  
11 Flagstaff, Arizona 86001-4627

12 S/ Amanda Sampson

13 By Amanda Sampson  
14 Assistant Attorney General  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

OFFICE OF THE ATTORNEY GENERAL  
PASCUA YAQUI TRIBE  
R. Rolando Flores, ASB No. 023866  
Amanda Sampson, ASB No. 022992  
Kimberly Van Amburg, ASB No. 022376  
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](mailto:amanda.sampson@pascuayaqui-nsn.gov)

*Attorneys for Respondent Nielsen*

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

Beatrice Miranda,	)	Case No.: CIV 0908065-PCT-PGR
	)	(ECV)
Petitioner,	)	
	)	RESPONDENT NIELSEN'S
vs.	)	MEMORANDUM OF LAW IN
	)	SUPPORT OF MOTION (CROSS-
Tracy Nielsen, <i>et al.</i> ,	)	MOTION) FOR SUMMARY
	)	JUDGMENT AND IN
Respondents.	)	OPPOSITION TO PLAINTIFF'S
	)	MOTION FOR SUMMARY
		JUDGMENT

STATEMENT OF THE CASE

The Petitioner, Beatrice Miranda, challenges the legality of her detention  
Petitioner was convicted of eight separate crimes by the Pascua Yaqui Tribal Court  
("PYTC"). Several sentences were consecutively imposed. The cumulative period  
of the sentences exceeded one year in length. Petitioner asserts that as a matter of

1 federal law the Indian Civil Rights Act (“ICRA”) impliedly prohibits a tribe from  
2 imposing consecutive sentences that cumulatively exceed one year in length (25  
3 U.S.C. § 1302(7)). The Petitioner’s argument is without foundation in law and her  
4 motion for summary judgment should be denied. Respondent files her motion for  
5 summary judgment herein, and asserts that summary judgment should be entered  
6 in her favor.  
7  
8

9 On April 21, 2008, Petitioner was convicted of eight offenses in the PYTC,  
10 including aggravated assault, endangerment, threatening and intimidating, and  
11 disorderly conduct. Petitioner was convicted of each separate offense against not  
12 one, but two different victims. Statement of Facts in Support of Respondent’s  
13 Motion for Summary Judgment (“SOF”) ¶ 2, ¶ 3. On May 19, 2008 Petitioner was  
14 sentenced to a cumulative term of incarceration of 910 days, with 114 days  
15 subtracted for time served yielding a remaining sentence of 796 days. Her  
16 detention will end on July 24, 2010. While Petitioner was convicted of the eight  
17 separate offenses, the judge of the PYTC specified that four of the offenses would  
18 run consecutively (two offenses as to two victims) and the other four were to run  
19 concurrently. *Id.* ¶s 35, 37, 38)  
20  
21  
22  
23  
24

25 Petitioner appealed her conviction and sentences to the Pascua Yaqui Court  
26 of Appeals (the “PYCA”). *Id.* ¶ 41. The PYCA held that Petitioner had been  
27 convicted of separate offenses and could properly be sentenced separately for each  
28



1 conviction as long as the sentence for each separate crime does not exceed the  
2 statutory limit of one year. “While Appellant could not have been sentenced to a  
3 term of more than one year for any one offense, she was not convicted of one  
4 offense, but eight, and sentenced separately for each.” *Pascua Yaqui Tribe v.*  
5 *Beatrice Miranda*, CA-08-015 (2009), SOF ¶ 42.  
6

7  
8 Upon the expiration of one year of incarceration, Petitioner filed her petition  
9 for a writ of *habeas corpus* with this Court, and has now moved for summary  
10 judgment on the basis that: (a) tribal court remedies are exhausted; and (b) the  
11 Indian Civil Rights Act limits the sentencing authority of tribes to one-year.  
12  
13 Petitioner is wrong. She is not entitled to summary judgment, and in fact the ICRA  
14 and case law thereunder establish that instead, Respondent is entitled to judgment  
15 as a matter of law.  
16

### 17 STANDARD OF REVIEW

18

19 This Court should grant summary judgment if “there is no genuine issue as to any  
20 material fact and ... the moving party is entitled to a judgment as a matter of law.”  
21 Fed. R. Civ. P. 56(c). Entry of summary judgment is proper against a party who  
22 fails to make a showing that is sufficient to establish an element essential to that  
23 party’s case. *Celotex Corporation v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548,  
24 2552, 91 L.Ed. 2d 265 (S. Ct. 1986) In such a case, the moving party is entitled to  
25 judgment as a matter of law. *Id.* at 323. “Substantive law determines which facts  
26  
27  
28

1 are material, and '[o]nly disputes over facts that might affect the outcome of the  
2 suit under the governing law will properly preclude the entry of summary  
3 judgment." *Sprint Communications Company, L.P. v. Western Innovations, Inc.*,  
4 618 F. Supp.2d 1101(D. Ariz., 2009) (quoting *Anderson v. Liberty Lobby, Inc.* 477  
5 U.S. 242, 248, (1986)).  
6  
7

8       Importantly, at the summary judgment stage, the Court need not draw *all*  
9 possible inferences in the moving party's favor. Instead, the Court is only required  
10 to draw all *reasonable* inferences in the moving party's favor. *See Ackerman v.*  
11 *Western Elec. Co., Inc.*, 860 F.2d 1514, 1520 (9th Cir. 1988) ("A party opposing  
12 summary judgment is entitled to the benefit of only reasonable inferences that may  
13 be drawn from the evidence put forth."); *O.S.C. Corp. v. Apple Computer, Inc.*, 792  
14 F.2d 1464, 1466-67 (9th Cir. 1986) ("We scrutinize the *evidence* and *reasonable*  
15 *inferences* to determine whether there is sufficient probative evidence to permit 'a  
16 finding in favor of the opposing party based on more than mere speculation,  
17 conjecture, or fantasy.')(emphasis added). "Inferences, . . . , cannot be drawn out of  
18 'thin air'; instead, the proponent must adduce evidence of a factual predicate from  
19 which to draw inferences." *Highlen v. Johanns*, 2007 WL 220777, at \* 4 (S.D. Cal.  
20 2007). Thus, where a party mischaracterizes or misstates the evidence at the  
21 summary judgment stage, the Court is not required to accept as true those  
22 mischaracterizations.  
23  
24  
25  
26  
27  
28

## 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 her 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

1 individual tribal members and “to promote the well-established policy of furthering  
2 Indian self-government.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62, 98  
3 S.Ct. 1670, 1679 (S.Ct. 1978) (*quoting Morton v. Mancari*, 417 U.S. 535, 551, 94  
4 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974)). “The Indian sovereignty doctrine is  
5 relevant...because it provides a backdrop against which the applicable...federal  
6 statutes must be read.” *McClanahan v. State Tax Commission of Arizona*, 411 U.S.  
7 164, 172, 93 S.Ct. 1257, 1262 (S.Ct. 1973). The language of the ICRA is  
8 unambiguous in its wording, “for any one offense,” and the limitation of a one year  
9 maximum on sentencing authority is as to each separate offense. The ICRA does  
10 not contain a prohibition on consecutive sentences for separate offenses. 25 U.S.C.  
11 § 1302(7).

## 12 LAW AND ARGUMENT

13 There are no issues of material fact and Respondent is entitled to judgment  
14 as a matter of law. First and foremost, Petitioner has failed to exhaust her tribal  
15 court remedies, thus this matter is not properly before the Court at this time.

16 Alternatively, should the Court find that Petitioner has exhausted her tribal  
17 remedies, Respondent is entitled to judgment as a matter of law because the ICRA  
18 is not violated by Petitioner’s detention.

### 19 I. Tribal Remedies Have Not Been Exhausted

20 The United States Supreme Court has stated that, “Our cases have often

1 recognized that Congress is committed to a policy of supporting tribal self-  
2 government and self-determination,” *National Farmers Union Ins. Companies v.*  
3 *Crow Tribe of Indians*, 471 U.S. 845, 856, 105 S.Ct. 2447, 2454 (1985) and that  
4 the “orderly administration of justice in the federal court will be served by  
5 allowing a full record to be developed in the Tribal Court before either the merits  
6 or any question concerning appropriate relief is addressed.” *National Farmers*, 471  
7 U.S. at 856. In the instant case, a tribal remedy continues to be available in the  
8 form of request for a writ of *habeas corpus* before a full panel of the PYCA. SOF ¶  
9 43. This remedy is specifically addressed in the Rules of the Pascua Yaqui Court of  
10 Appeals (*see* PYTRAP, Rule 25). SOF ¶ 43. Full tribal appellate review is required  
11 in order to satisfy the exhaustion of tribal remedies. “Until appellate review is  
12 complete, the ... Tribal Courts have not had a full opportunity to evaluate the claim  
13 and federal courts should not intervene.” *Iowa Mutual Ins. Company v. LaPlante*,  
14 480 U.S. 9, 16-17, 107 S.Ct. 971 (1987).

20 Because tribal court remedies have not been fully exhausted, summary  
21 judgment should be entered in Respondent’s favor, and Petitioner’s request for writ  
22 of *habeas corpus* should be denied. SOF ¶ 44. Petitioner cites to directly  
23 controlling Ninth Circuit precedent in *Selam v. Warm Springs Tribal Corr.*  
24 *Facility*, 134 F.3d. 948 (9<sup>th</sup> Cir. 1998) to support her position that her tribal court  
25 remedies have been exhausted. Petitioner’s reliance on *Selam* is misguided. *Selam*,  
26  
27  
28

1 like the many other Supreme Court and Courts of Appeals cases that discuss tribal  
2 court exhaustion doctrine, actually stands for the proposition that federal courts  
3 should not exercise jurisdiction over unexhausted claims out of respect for tribal  
4 sovereignty as well as to avoid impairing the authority of tribal courts. *Selam*, 134  
5 F.3d. at 953. *And see Williams v. Lee*, 358 U.S. 217, 220-21, 97 S.Ct. 269, 270-71,  
6 3 L.Ed.2d 251 (1959) (“[Congress] encouraged tribal governments and courts to  
7 become stronger and more highly organized”), *Iowa Mutual v. La Plante*, 480 U.S.  
8 9, 15)(“considerations of comity direct that tribal remedies be exhausted before the  
9 question is addressed by the District Court.”) Congress and the Courts have  
10 encouraged tribal court development and exhaustion of tribal remedies. Because  
11 Petitioner has not utilized her right, under tribal law, to request a writ of *habeas*  
12 *corpus* before a full panel of the PYCA, Petitioner’s tribal court remedies are  
13 unexhausted, and Respondent is therefore entitled to judgment as a matter of law.  
14  
15 SOF ¶ 44.

16  
17  
18  
19  
20 In addition, the Ninth Circuit has held that there are very few instances  
21 where exhaustion in tribal court is not required. They note in *Selam* that “in the  
22 few cases where we have relaxed the exhaustion requirement, the litigant was able  
23 to show either that exhaustion would have been futile or that the tribal court of  
24 appeals offered no adequate remedy.” *Selam*, 134 F.3d. at 954 (*citing St. Marks v.*  
25 *Chippewa-Cree Tribe*, 545 F.2d 1188, 1189-90 (9<sup>th</sup> Cir. 1976); *United States ex rel.*  
26  
27  
28

1 *Cobell v. Cobell*, 503 F.2d 790, 793-94 (9<sup>th</sup> Cir. 1974)) Petitioner has not shown  
2 that exhaustion would be futile or that the PYCA offers no adequate remedy.  
3 Respondent has demonstrated that a remedy exists within the tribal system SOF ¶  
4 44.  
5

6 The Supreme Court has outlined four exceptions to the exhaustion rule: (1)  
7 when an assertion of tribal court jurisdiction is “motivated by a desire to harass or  
8 is conducted in bad faith”; (2) when the tribal court action is “patently violative of  
9 express jurisdictional prohibitions”; (3) when “exhaustion would be futile because  
10 of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction”;  
11 and (4) when it is “plain” that tribal court jurisdiction is lacking, so that the  
12 exhaustion requirement “would serve no purpose other than delay.” *Elliott v. White*  
13 *Mountain Apache Tribal Court*, 566 F.3d 845, 847, (9<sup>th</sup> Cir. 2009)(quoting *Nevada*  
14 *v. Hicks*, 533 U.S. 353, 369, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001)(internal  
15 quotation marks omitted)). Requiring Petitioner to fully exhaust her tribal court  
16 remedies by allowing a full panel of the PYCA to review her request for writ of  
17 *habeas corpus* would not fall under one of the exceptions to the exhaustion rule  
18 outlined by the U.S. Supreme Court. *Hicks*, 533 U.S. 353 at 369. Petitioner does  
19 not qualify for any of the exceptions which would allow this court to waive the  
20 requirement of tribal court exhaustion, and therefore Petitioner’s tribal court  
21 remedies remain unexhausted, this action is not properly before the court and  
22  
23  
24  
25  
26  
27  
28

Respondent is entitled to judgment as a matter of law in the form of denial of  
Petitioner's request for a writ from this court.

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

On April 21, 2008 Petitioner was tried before the Chief Judge of the PYTC  
on four separate offenses against two different victims, for a total of eight offenses.  
(SOF ¶ 4, ¶ 9). On April 21, 2008, the PYTC found Petitioner guilty beyond a  
reasonable doubt on all charges. (SOF ¶ 34). Petitioner was sentenced on May 19,  
2008 as follows: one year for each aggravated assault against the victims, sixty  
days for each act of endangerment against the two victims, ninety days for each act  
of threatening and intimidating the victims, and thirty days for disorderly conduct  
against each victim. (SOF ¶ 35, ¶ 37) The PYTC specified that the aggravated  
assault sentences would run consecutively to each other and the threatening and  
intimidating sentences would run consecutively to each other and to the aggravated  
assault charges for a total of 910 days. SOF ¶ 38. The remainder of the sentences  
imposed for Petitioner's convictions for endangerment and disorderly conduct, the  
judge specified were to run concurrently with the 910 days. *Id.*

The ICRA limits tribal sentencing authority to one year "for any one  
offense." 25 U.S.C. §1302(7). The PYCA has defined "one offense" as a matter of  
tribal law in its ruling in *Pascua Yaqui Tribe v. Miranda*, CA-08-015. The PCYA  
held that as a matter of Pascua Yaqui law, the convictions and the sentences



1 imposed upon Petitioner are for separate crimes committed against two victims,  
2 and are not for the “same offense” applying the longstanding U.S. Supreme Court  
3 decision in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182  
4 (1932). SOF ¶ 42. Because the PYCA has ruled that Petitioner’s offenses were **not**  
5 “one offense”, it is not for this Court to consider whether the convictions and  
6 sentencing of the PYTC and the affirmation of such by the PYCA are correct, but  
7 rather to determine whether the detention of Petitioner beyond one year is a  
8 violation of federal law, i.e. the ICRA. The ICRA’s one-year limitation is as to  
9  
10 violation of federal law, i.e. the ICRA. The ICRA’s one-year limitation is as to  
11  
12 “one offense”.

13 Looking to the Congressional Record on the passage of ICRA, there are no  
14 specific references to the meaning of one offense. However, it is clear that the  
15 drafters of ICRA intended for the limitations placed on tribes through ICRA to be  
16 tempered by their quasi-sovereign status. “The courts have repeatedly upheld the  
17 quasi-sovereign status of the tribe; however, the Congress has the prerogative  
18 placing limitations upon tribal autonomy.” S. Rep. N. 841, 90<sup>th</sup> Cong., 1<sup>st</sup> Sess. 8  
19 (1967). The limit placed on tribal autonomy at issue here is the limit to one-year  
20 for “one offense.” Absent any indication in the ICRA that the meaning of “one  
21 offense” is more limited than the plain language, Petitioner’s argument implies  
22 meaning that Congress did not intend, and her argument must fail. The PYCA has  
23 determined that Petitioner’s actions did not constitute “one offense” in this  
24  
25  
26  
27  
28

1 instance, but rather multiple offenses. *Id.* This Court's inquiry ends here, and  
2 Respondent is entitled to judgment as a matter of law. Petitioner's request should  
3 be denied.  
4

5 The Ninth Circuit has not reviewed a case on point with the facts here, and a  
6 review of cases revealed only two district level cases in which the ICRA's  
7 limitation to one-year per offense is reviewed. These cases are *Ramos v. Pyramid*  
8 *Tribal Court*, 621 F.Supp. 967 (D. Nev. 1985) and a case cited at length by  
9 Petitioner, *Spears v. Red Lake Band of Chippewa Indians*, 363 F.Supp. 2d 1176 (D.  
10 Minn. 2005). While neither of these cases is binding authority on this court, the  
11 reasoning applied in *Ramos* is in line with the Supreme Court's line of cases  
12 discussing consecutive sentencing for separate offenses, and this Court should  
13 adopt the reasoning in *Ramos*, 621 F.Supp. 967, 970 ("Ramos was convicted of  
14 seven offenses. None of the imposed sentences violated the prohibition of more  
15 than six months imprisonment for any one offense. We must determine, therefore,  
16 if the mere imposition of consecutive sentences constitutes cruel and unusual  
17 punishment. We find that it does not.")<sup>1</sup>  
18  
19  
20  
21  
22

23 The District of Nevada ruled that 25 U.S.C. 1302(7) was not violated by a  
24  
25

---

26 <sup>1</sup> At the time *Ramos* was decided the sentencing limitation in ICRA was 6 months  
27 or \$500.  
28

1 Tribal Court's imposition of multiple sentences that were imposed consecutively  
2 and exceeded the ICRA's statutory limitation for "one offense". The court stated  
3 that "We must be careful to construe the terms in ICRA with due regard for the  
4 historical, governmental and cultural values of an Indian tribe." *Ramos*, 621  
5 F.Supp. at 970. The Supreme Court has determined that "tribal courts are best  
6 qualified to interpret and apply tribal law." *Iowa Mutual*, 480 U.S. 9 at 16. The  
7 tribal court has decided the issue of whether Petitioner's crimes were separate  
8 offenses. ICRA does not preclude multiple convictions and sentences for separate  
9 offenses. Therefore, Respondent is entitled to judgment as a matter of law.

13 In cases implicating constitutional issues where consecutive sentencing for  
14 separate crimes has been imposed, such as the United States Supreme Court in  
15 *Blockburger*, 284 U.S. 299, courts have reached the conclusion that separate  
16 charges and cumulative sentencing are allowable for separate crimes. (see *Ramos*  
17 621 F.Supp. 967, *Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed. 2d  
18 535 (1983), *Albernaz v. U.S.*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275  
19 (1981). Following this line of cases, the Pascua Yaqui Court of Appeals found in  
20 Petitioner's case that, "As separate offenses, a defendant may be properly charged  
21 with both, convicted of both, and sentenced separately for both. While Appellant  
22 could not have been sentenced to a term of more than one year for any one offense,  
23 she was not convicted of one offense, but eight, and sentenced separately for

1 each.” *Pascua Yaqui Tribe v. Miranda*, CA-08-015 at 23. SOF ¶ 42. Petitioner  
2 relies upon non-binding case law to support her assertions of a “same criminal  
3 transaction” test or a “single criminal episode”. *Spears v. Red Lake Band of*  
4 *Chippewa Indians*, 363 F.Supp. 2d 1176, 1178 (D. Minn. 2005). This is theory is  
5 not supported by the greater body of caselaw, including the several Supreme Court  
6 cases cited above. In addition, this court is only asked to review whether or not the  
7 Petitioner is being lawfully detained by the tribe’s order. 25 U.S.C. 1303.

8 Petitioner is being detained lawfully by order of the tribe, and her detention does  
9 not violate the ICRA because her offenses were found to be separate by the PYCA.

10 There is no support for the argument that the ICRA disallows consecutive  
11 sentences for crimes that are separate, therefore Petitioner attempts to argue that  
12 her crimes arose from the same incident and are not separate, but the “same  
13 criminal transaction.” Petitioner fails to establish this element of her claim because  
14 the wording of the ICRA is clear limiting tribal sentencing authority to one year  
15 “for any one offense.” 25 U.S.C. §1302(7). Petitioner fails to establish that “one  
16 offense” means “single criminal transaction” an essential element to her claim, and  
17 therefore summary judgment should be entered in Respondent’s favor, *Celotex*  
18 *Corporation v. Catrett*, 477 U.S. 317, 322.

## 29 CONCLUSION

30 Petitioner’s tribal remedies have not been exhausted. Her petition for writ of

1 *habeas corpus* is not properly before this court and summary judgment should be  
2 entered in Respondent's favor. In addition, Petitioner fails to show that ICRA  
3 limits tribal courts from imposing sentences consecutively for separate crimes.  
4  
5 Case law, the Senate Record, and the plain language of the statute support  
6 Respondent's position that ICRA has not been violated by Petitioner's detention  
7 and Petitioner's request for writ of *habeas corpus* should be denied.  
8

9 WHEREFORE, Respondent prays that this motion be granted, and that  
10 Petitioner's motion be denied.  
11

12 RESPECTFULLY SUBMITTED on this the 2<sup>nd</sup> day of November, 2009.

13 OFFICE OF THE ATTORNEY GENERAL  
14 PASCUA YAQUI TRIBE

15 *S/ Amanda Sampson*

16 Amanda Sampson, Assistant Attorney General  
17 Rolando Flores, Interim Attorney General  
18 Kimberly Van Amburg, Assistant Attorney General  
19 Alfred Urbina, Deputy Prosecutor  
20 *Attorneys for Respondent*

21 CERTIFICATE OF SERVICE

22  
23 I hereby certify that on November 2, 2009 I electronically transmitted the  
24 foregoing document to the Clerk's Office using the ECF System for filing and  
25 transmittal to the following ECF registrants:

26 CLERK'S OFFICE  
27 United States District Court  
28 Sandra Day O'Connor Courthouse  
401 West Washington Street

1 Phoenix, Arizona 85003

2 JOHN ROBERT LOPEZ, IV  
3 Assistant United States Attorney  
4 Two Renaissance Sq.,  
5 40 N. Central Ave., Ste. 1200,  
6 Phoenix, AZ 85004-4408

7 DANIEL L. KAPLAN  
8 Assistant Federal Public Defender  
9 District of Arizona  
10 850 W. Adams, Suite 201  
11 Phoenix, Arizona 85007

12 TIMOTHY G. MCNEEL  
13 Deputy Coconino County Attorney  
14 110 E. Cherry Avenue  
15 Flagstaff, Arizona 86001-4627

16 S/ Amanda Sampson

17 By Amanda Sampson  
18 Assistant Attorney General  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

OFFICE OF THE ATTORNEY GENERAL  
PASCUA YAQUI TRIBE

R. Rolando Flores, ASB No. 023866

Amanda Sampson, ASB No. 022992

Kimberly Van Amburg, ASB No. 022376

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](mailto:amanda.sampson@pascuayaqui-nsn.gov)

*Attorneys for Respondent Nielson*

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

Beatrice Miranda,

Petitioner,

vs.

Tracy Nielsen, *et al.*,

Respondents.

) Case No.: CIV 0908065-PCT-PGR  
) (ECV)

)  
)  
) RESPONDENT'S STATEMENT OF  
) FACTS IN SUPPORT OF MOTION  
) (CROSS-MOTION) FOR SUMMARY  
) JUDGMENT AND IN  
) OPPOSITION TO PETITIONER'S  
) STATEMENT OF FACTS

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1(a),  
Respondent, by and through counsel undersigned, hereby submits this separate  
statement of facts in support of her motion for summary judgment, filed herewith.

While some of Respondent's facts differ slightly from paragraphs in Petitioner's

1 Statement of Facts, as noted below, none of the areas of disagreement constitutes a  
2 “material fact” which would preclude this court from entry of summary judgment.

3 The following numbered paragraphs set forth the facts upon which  
4  
5 Respondent’s summary judgment motion relies:

- 6 1. Petitioner is an enrolled member of the Pascua Yaqui Tribe (the “Tribe”). Dkt.  
7 #1 at 1 ¶ 1.
- 8  
9 2. On January 26, 2008, the Tribe charged Petitioner with eight separate criminal  
10 charges. Dkt. #18 ¶ 12
- 11  
12 3. All eight counts are related to events that transpired between Ms. Miranda, an  
13 adult victim and a minor victim beginning at approximately 10:56 p.m. on  
14 January 25, 2008 on the Pascua Yaqui Indian Reservation (the “Reservation”).  
15 Dkt. #32 at 6 ¶ 12; Dkt. #1 at 5 ¶ 25.
- 16  
17 4. Petitioner was charged with (1) aggravated assault on a minor referred to as  
18 “M.V.”; (2) aggravated assault on Bridget Valenzuela, an adult; (3)  
19 endangerment of M.V.; (4) endangerment of Bridget Valenzuela; (5)  
20 threatening or intimidating of M.V.; (6) threatening or intimidating of Bridget  
21 Valenzuela; (7) disorderly conduct toward M.V.; and (8) disorderly conduct  
22 toward Bridget Valenzuela. Dkt. #32 at 6 ¶ 12.
- 23  
24 5. Under the Tribe’s criminal code, endangerment is committed by “recklessly  
25 endanger[ing] another person with a substantial risk of imminent death or  
26  
27  
28



physical injury.” 4 Pascua Yaqui Tribal Code (“PYTC”) § 1-150(A)(2), (B)(2).

6. Under the Tribe’s criminal code, endangerment is committed by “recklessly endanger[ing] another person with a substantial risk of imminent death or physical injury.” 4 PYTC § 1-200(A).

7. Under the Tribe’s criminal code, threatening or intimidating is committed by “caus[ing] another person to reasonably believe that he/she is in danger or receiving physical injury.” 4 PYTC § 1-260(A).

8. Under the Tribe’s criminal code, disorderly conduct is committed by “engag[ing] in fighting or provoking a fight in a public place.” 4 PYTC § 1-580(A)(1).

9. Petitioner appeared on April 21, 2008 at her trial *pro se*. Dkt. #32 at 6 ¶ 12; Dkt. #1 at 5 ¶ 26.

10. During her trial did Petitioner was advised by the Court of her right to remain silent, her right to counsel at her own expense, her right to cross examine witnesses and evidence of the Tribe and her right to present evidence and witnesses on her own behalf, but Petitioner did not choose to testify, obtain the services of the Tribe’s public defender, cross examine the Tribe’s witnesses, or present witnesses in her own behalf. Dkt. #32 at 6 ¶ 12 (???)

11. At Petitioner’s trial, the Tribe presented the testimony of Officer Jose Montano, arresting officer, the testimony of M.V. and the testimony of Bridget

1 Valenzuela. Dkt. #32 at 6 ¶ 12. Dkt. #1 at 5 ¶ 26.

2 12. Officer Montano testified that he was dispatched to the area of Koni St. on the  
3 Reservation because of a report of a woman chasing two victims with a knife,  
4 and that he made contact with two females at that location who directed him in  
5 the direction towards which the Petitioner had fled. Dkt. #32 at 6 ¶ 12; Dkt. #1  
6 at 5-6 ¶ 29.  
7

8  
9 13. Officer Montano testified that he went to 7600 Kau Vo'oo (on the Reservation)  
10 where he encountered the Petitioner and although she resisted, placed her under  
11 arrest. Dkt. #32 at 6 ¶ 12; Dkt. #1 at 5-6 ¶ 29.  
12

13 14. Officer Montano testified that he found a knife on Petitioner's person. Dkt. #32  
14 at 6 ¶ 12; Dkt. #1 at 5-6 ¶ 29.  
15

16 15. Officer Montano testified that Petitioner was extremely intoxicated. Dkt. #32 at  
17 6 ¶ 12; Dkt. #1 at 5-6 ¶ 29.  
18

19 16. Officer Montano testified that Bridget Valenzuela and M.V. told him that  
20 Petitioner had chased them both with the knife, called them names and  
21 threatened that she would kill them. Dkt. #32 at 6 ¶ 12; Dkt. #1 at 5-6 ¶ 29.  
22

23 17. Officer Montano testified that the victims identified the knife recovered from  
24 Petitioner's person as the knife they had been chased and threatened with. Dkt.  
25 #32 at 6 ¶ 12; Dkt. #1 at 5-6 ¶ 29.  
26

27 18. Bridget Valenzuela testified that she was at her home when she heard her  
28

1 younger sister screaming and pounding on the door to be let in. Dkt. #32 at 6 ¶  
2 12; Dkt. #1 at 6 ¶ 30.

3  
4 19. Bridget Valenzuela testified that when she opened the door M.V. said that a  
5 lady had been chasing after her with a knife. Dkt. #32 at 6 ¶ 12; Dkt. #1 at 6 ¶  
6 30.

7  
8 20. Bridget Valenzuela testified that she told her younger sister to get inside and  
9 she went outside to see what was happening, at which point she saw Petitioner  
10 wielding the knife, screaming and raising the knife towards her. Dkt. #32 at 6 ¶  
11 12; Dkt. #1 at 6 ¶ 30.

12  
13 21. Bridget Valenzuela testified that she picked up a broom to defend herself and  
14 told Petitioner that she would hit her with it if she didn't leave. Dkt. #32 at 6 ¶  
15 12; Dkt. #1 at 6 ¶ 30

16  
17 22. Bridget Valenzuela testified that Petitioner started to come towards them with  
18 the knife raised as though she would throw it at them and that they got scared  
19 and retreated to the house. Dkt. #32 at 6 ¶ 12; Dkt. #1 at 6 ¶ 30.

20  
21 23. Bridget Valenzuela testified that her sister M.V. grabbed a basketball and  
22 threw it at Petitioner, striking her in the face. Dkt. #32 at 6 ¶ 12; Dkt. #1 at 6 ¶  
23 30.

24  
25 24. Bridget Valenzuela testified that Petitioner then left, still yelling and  
26 threatening to kill them. Dkt. #32 at 6 ¶ 12; Dkt. #1 at 6 ¶ 30.  
27  
28

1 25. Bridget Valenzuela testified that after Petitioner left, she called the police. Dkt.  
2 #32 at 6 ¶ 12; Dkt. #1 at 6 ¶ 30.

3 26. Bridget Valenzuela testified that Officer Montano showed her the knife that  
4 was recovered from Petitioner, and that she identified the knife as the one used  
5 during the incident. Dkt. #32 at 6 ¶ 12; Dkt. #1 at 6 ¶ 30.  
6

7 27. M.V. testified that she was walking home down Osay Bo-oh (on the  
8 Reservation) talking on the phone when she saw Petitioner banging on the door  
9 of a house at 7520 Osay Bo-Oh and throwing objects around. Dkt. #32 at 6 ¶  
10 12; Dkt. #1 at 6-7 ¶ 31.  
11

12 28. M.V. testified that Petitioner then began to follow her, yelling, threatening and  
13 accusing M.V. of laughing at her at which point Petitioner began chasing M.V.  
14 with the knife. Dkt. #32 at 6 ¶ 12; Dkt. #1 at 6-7 ¶ 31.  
15

16 29. M.V. testified that she began running away from Petitioner down Koni St. to  
17 her home where she proceeded to bang on the door for her sister Bridget  
18 Valenzuela to let her in. Dkt. #32 at 6 ¶ 12; Dkt. #1 at 6-7 ¶ 31.  
19

20 30. M.V. testified that once at the house, Petitioner threatened both Bridget  
21 Valenzuela and herself with the knife and used threatening language towards  
22 both of them, saying that she was going to kill them. Dkt. #32 at 6 ¶ 12; Dkt. #1  
23 at 6-7 ¶ 31.  
24

25 31. M.V. testified that Petitioner was raising the knife towards them as if she  
26  
27  
28

1 would throw it at them when M.V. threw a basketball at Petitioner. Dkt. #32 at  
2 6 ¶ 12; Dkt. #1 at 6-7 ¶ 31.

3  
4 32. M.V. testified that Petitioner then ran away. Dkt. #32 at 6 ¶ 12; Dkt. #1 at 6-7 ¶  
5 31.

6  
7 33. M.V. testified that Officer Montano showed her the knife that was recovered  
8 from Petitioner, and that she identified the knife as the one used during the  
9 incident. Dkt. #32 at 6 ¶ 12; Dkt. #1 at 6-7 ¶ 31.

10  
11 34. After hearing closing argument from the Tribe and asking Petitioner if she  
12 would like to give a closing argument, to which she answered “no”, the Court  
13 found Petitioner guilty of the eight offenses. Dkt. #32 at 6 ¶ 12; Dkt. #1 at 7 ¶  
14 32.

15  
16 35. On May 19, 2008 the Court held a sentencing hearing in CR-08-119. Dkt. #32  
17 at 6 ¶ 14, Dkt. #1 at 7 ¶ 34.

18  
19 36. After advising Petitioner of her right to remain silent, her right to counsel at her  
20 own expense, her right to cross examine witnesses and evidence of the Tribe  
21 and her right to present evidence and witnesses on her own behalf, but  
22 Petitioner did not choose to testify, obtain the services of the Tribe’s public  
23 defender, cross examine the Tribe’s witnesses, or present witnesses in her own  
24 behalf, and her right to appeal, Petitioner answered that she understood her  
25 rights. Dkt. #32 at 6 ¶ 14, Dkt. #1 at 7 ¶ 34.  
26  
27  
28

1 37. The Court heard from the Tribe and a probation officer regarding sentencing  
2 and then sentenced Petitioner to one year for aggravated assault against M.V.,  
3 one year for aggravated assault against Bridget Valenzuela, 60 days for  
4 endangerment of M.V., 60 days for endangerment of Bridget Valenzuela, 90  
5 days for threatening and intimidating M.V., 90 days for threatening and  
6 intimidating Bridget Valenzuela, 30 days for disorderly conduct against M.V.  
7 and 30 days for disorderly conduct against Bridget Valenzuela. Dkt. #32 at 6 ¶  
8 14, Dkt. #1 at 7 ¶ 34.

11  
12 38. The Tribal Court ordered that the aggravated assault sentences would run  
13 consecutively for a total of 730 days, the threatening and intimidating sentences  
14 would run consecutive to each other and to the aggravated assault sentences for  
15 an additional 180 days, and the remaining sentences for disorderly conduct and  
16 endangerment would run concurrently with the aggravated assault and  
17 threatening and intimidating yielding a total of 910 days. Dkt. #32 at 6 ¶ 14,  
18 Dkt. #1 at 7 ¶ 34.

19 39. Upon the request of Petitioner and no objection from the Tribe the judge  
20 subtracted 114 days for time served. Dkt. #32 at 6 ¶ 14, Dkt. #1 at 7 ¶ 34.

21  
22 40. Petitioner obtained the services of the Pascua Yaqui Office of the Public  
23 Defender and filed a late notice of appeal to the Pascua Yaqui Court of Appeals  
24 ("PYCA") on June 26, 2008 Dkt. #32 at 4 ¶ 9, Dkt. #1 at 3 ¶ 15.  
25  
26  
27  
28

1 41. The PYCA accepted Petitioner's appeal and because of Petitioner's request to  
2 expedite one judge of the Court heard Petitioner's case rather than a full three-  
3 judge panel. Dkt. #32 at 6 ¶ 14, Dkt. #1 at 7 ¶ 34. (????  
4

5 42. The PYCA rejected Petitioner's claims, finding that Petitioner could be  
6 separately sentenced for separate crimes without violation of the Indian Civil  
7 Rights Act ("ICRA"). Dkt. #32 at 6 ¶ 14, Dkt. #1 at 7 ¶ 34. ????

9 43. The Pascua Yaqui Rules of Appellate Procedure provide for requests for writs  
10 of *habeas corpus* to the PYCA. Pascua Yaqui Tribe Rules of Appellate  
11 Procedure ("PYTRAP"), Rule 16(B) and Rule 25, Pascua Yaqui Code, Courts  
12 and Rules of Court, Chapter 1, Rule 20(B).  
13  
14

15 44. Petitioner did not request a writ of *habeas corpus* from the PYCA. Dkt. #32 at  
16 9 ¶ 27.  
17

### 18 OBJECTIONS

19 45. Respondent objects to Petitioner's characterization of the one or two block area  
20 in her ¶ 3, and states that from the record, we cannot tell what the area is, only  
21 that M.V. first encountered Petitioner at one location, alone, then ran to her  
22 home being chased by Petitioner, where she found her sister and they were both  
23 confronted by Petitioner with a knife. Dkt. 6 ¶ 12; Dkt. #1 at 5-7 ¶ 25-31.  
24  
25

26 46. Respondent objects to Petitioner's final statement in ¶ 48 in that it fails to point  
27 out that the *habeas writ* is specifically made available in the Pascua Yaqui  
28

1 Court of Appeals through the Pascua Yaqui Rules of Appellate Procedure. Rule  
2 16(B) and Rule 25, Pascua Yaqui Code, Courts and Rules of Court, Chapter 1,  
3 Rule 20(B).  
4

5 RESPECTFULLY SUBMITTED on this the 2<sup>nd</sup> day of November, 2009.  
6

7 OFFICE OF THE ATTORNEY GENERAL  
8 PASCUA YAQUI TRIBE

9 S/ Amanda Sampson

10 Amanda Sampson, Assistant Attorney General

11 Rolando Flores, Interim Attorney General

12 Kimberly Van Amburg, Assistant Attorney General

13 Alfred Urbina, Deputy Prosecutor

14 *Attorneys for Respondent*

15 CERTIFICATE OF SERVICE

16 I hereby certify that on November 2, 2009 I electronically transmitted the  
17 foregoing document to the Clerk's Office using the ECF System for filing and  
18 transmittal to the following ECF registrants:

19 CLERK'S OFFICE

20 United States District Court

21 Sandra Day O'Connor Courthouse

22 401 West Washington Street

23 Phoenix, Arizona 85003

24 JOHN ROBERT LOPEZ, IV

25 Assistant United States Attorney

26 Two Renaissance Sq.,

27 40 N. Central Ave., Ste. 1200,

28 Phoenix, AZ 85004-4408

DANIEL L. KAPLAN



1 Assistant Federal Public Defender  
2 District of Arizona  
3 850 W. Adams, Suite 201  
4 Phoenix, Arizona 85007

5 TIMOTHY G. MCNEEL  
6 Deputy Coconino County Attorney  
7 110 E. Cherry Avenue  
8 Flagstaff, Arizona 86001-4627

9 *S/ Amanda Sampson*

10 By Amanda Sampson  
11 Assistant Attorney General