**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW MEXICO**

**RONALD F. ROMERO,**
Petitioner,

**v.** **No. CV 09-0232 RB/DJS**

**DONNA GOODRICH,** Warden
Gallup McKinley Adult Detention Center

**AND**

**PUEBLO OF NAMBÉ,**
Respondents.

**MOTION TO DISMISS**

**COMES NOW,** the Pueblo of Nambé (hereinafter "Respondent Nambé"), through its attorneys, CHESTNUT LAW OFFICES (Joe M. Tenorio and Peter C. Chestnut) and hereby moves to dismiss the Petition for Writ of Habeas Corpus filed on March 10, 2009 (hereinafter "Petition").

**I. PETITIONER'S CLAIMS FOR VIOLATION OF THE UNITED STATES CONSTITUTION SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE, RULE 12(B)(6).**

**A. The U.S. Constitution does not apply to Indian Tribes.**

As Petitioner states in the Petition, "the protections guaranteed by the United States Constitution do not apply to tribes exercising their power of self government." *See Page 10 of the Petition for Writ of Habeas Corpus, filed 3/10/2009, citing to Talton v. Mayes,* 163 U.S. 376, 382-84 (1896). The United States Supreme Court has stated that "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. . . . [T]he lower federal courts have extended the holding of *Talton* to other provisions of the Bill of Rights,

as well as to the Fourteenth Amendment." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Petitioner's claims concerning civil rights violations arising under the U.S. Constitution should therefore be rejected. Any allegation that Respondent Nambé violated Petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution must fail because those protections do not extend to Petitioner as a tribal member of an Indian Tribe in tribal court. Therefore, the court should dismiss all claims based on the Fifth and Sixth Amendments to the U.S. Constitution stated in Counts I, II, III, IV, V and VII of the Petition.

**B. The Pueblo of Nambé, when the Tribal Council enacted Tribal Council Resolution NP-96-28, did not follow federal law procedures required to adopt the U.S. Constitution as its Tribal Constitution.**

In its most general sense, the term "constitution" is "the fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties." *Black's Law Dictionary,* 8th Ed. (2004). Constitutional protections are those basic protections guaranteed by such a "constitution" to its citizens, and when such protections are violated by acts of the government, citizens may seek redress against the government. Petitioner argues that the Pueblo of Nambé adopted the U.S. Constitution as the Tribe's Constitution when it enacted NP-96-28, Adoption of State Law and Order Code, which adopted the New Mexico Criminal and Traffic Law Manual (hereinafter "Traffic Manual") because the U.S. Constitution is printed in the Traffic Manual. *See Exhibit A to this Motion.* Petitioner overlooks a critical piece of legislation – Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476. Section 16 of the Indian Reorganization Act (hereinafter "IRA") governs the procedures for properly adopting a tribal constitution. At a minimum, the constitution for an Indian sovereign such as the Pueblo of Nambé must be 1) ratified by a majority vote of the adult members of the tribe at a special

election authorized and called by the Secretary of Interior, and 2) approved by the Secretary of the Interior. Petitioner does not provide any support that the Pueblo of Nambé, in adopting the Traffic Manual, also intended to adopt the United States Constitution as the Tribe's constitution. Petitioner neither alleges that the Pueblo of Nambé ratified the Traffic Manual by a majority vote of the adult members of the tribe at a special election authorized and called by the Secretary of Interior, nor alleges that the Traffic Manual was approved by the Secretary of Interior.

Petitioner's argument that Respondent Nambé incorporated the Fifth and Sixth Amendments to the United States Constitution when it adopted the Traffic Manual is missing a critical and fatal link – evidence that Respondent Nambé followed the proper procedures for adopting a tribal constitution as required under Section 16 of the IRA. Absent a valid tribal constitution incorporating the Fifth and Sixth Amendments to the U.S. Constitution, Petitioner cannot successfully claim that he is entitled to such a right under tribal law. The Court should dismiss all such claims as stated in Counts I, II, III, IV, V, and VII of the Petition.

**C. The Pueblo of Nambé did not intend to incorporate the Constitution of the United States as Tribal Law when the Tribal Council enacted Tribal Council Resolution NP-96-28.**

Petitioner argues in Count I of his Petition that by adopting the Traffic Manual the Pueblo of Nambé also adopted and incorporated the United States Constitution that is reproduced within the Traffic Manual. Petitioner overlooks the intent of the Pueblo of Nambe Tribal Council, the legislative body, in enacting Resolution NP 96-28. The Tribal Council resolution acknowledged that some "actions" were not currently covered under the Tribe's Law and Order Code. *Resolution NP 96-28, Sixth Whereas.* The Tribal Council intended to limit the adoption of the Traffic Manual to criminal "actions not covered by the Nambé Tribal Law and Order Code." *Resolution NP 96-28, Sixth Whereas.* The term "criminal action" is defined as "a criminal

judicial proceeding". *Black's Law Dictionary,* 8th Ed., 2004. In adopting the Traffic Manual, the Tribal Council only desired to allow the Nambé Tribal Court to hear those "actions" found in the Traffic Manual which were not otherwise provided for under Tribal Law. The Pueblo's Law and Order Code does not contain a title addressing criminal violations. The Tribal Council desired to adopt only the criminal actions provided in the Traffic Manual as part of tribal law. The state and federal constitutions do not fall within the term "criminal action." Further, the Tribal Council intended that such criminal "actions" be "enforceable against tribal members and non-tribal members alike." *Resolution NP 96-28, Fourth Whereas.* The phrase, "tribal members and non-tribal members," mean "any person who is Indian for purposes of federal criminal jurisdiction under 18 U.S.C. §1153..." *Section 2-1.02(A), Pueblo of Nambe Law and Order Code, Exhibit B to this Motion; See also Section 2-1.02(F)(2), Pueblo of Nambe Law and Order Code, Exhibit B to this Motion* (defining the term "Indian" to mean any person of Indian descent who meets the definition of Indian for purposes of federal criminal jurisdiction...or is any member of, or eligible for membership in any federally recognized Indian tribe...). *See also Section 2-1.02(A), Pueblo of Nambé Written Laws,* Exhibit *B to this Motion* (defining the term "Tribal Member" to mean any person who is the child of any tribal member...and who meets the blood quantum requirements as established by the Tribal Council..."). Clearly, in enacting Resolution NP 96-28, the Tribal Council intended the criminal "actions" to be enforceable against natural persons, who qualified to be an "Indian." By limiting enforcement of the criminal "actions" against such natural persons, who qualified to be an "Indian," the Tribal Council did not intend to authorize enforcement of any rules, regulations, or constitutions against the government or instrumentalities, including the Tribal Court.

Absent a clear and express waiver of tribal sovereign immunity in the enacting legislation, Petitioner cannot succeed on his claim that the Tribal Council adopted the U.S. Constitution as tribal law. *Martinez v. Santa Clara,* 436 U.S. 49, 58 (1978). This Court's jurisdiction to hear this matter is limited to alleged violations of the Indian Civil Rights Act through the Habeas Corpus Petition process.

**D. The Pueblo of Nambé should be allowed to decide whether adoption of the Traffic Manual by Resolution of the Tribal Council should be considered to incorporate *sub silentio* the U.S. Constitution as Tribal Law.**

The U.S. Supreme Court has repeatedly recognized Congress's commitment to a policy supporting tribal self-government and self-determination. *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9 (1987). In that case, the Court stated that "In diversity cases, as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs ... [a]djudication of such matters by any nontribal court also infringes upon tribal law-making authority, *because tribal courts are best qualified to interpret and apply tribal law*". *Id.* at 15. (*Emphasis added*).

In *Runs After v. United States,* 766 F.2d. 347 (8th Cir. 1985), regarding the interpretation and determination of the validity of two Tribal Council Resolutions, Appellants alleged that the tribal council resolutions were clearly inconsistent with the tribal constitution, bylaws and election ordinance. The Court stated that the resolution of disputes involving questions of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the district court. *Id at 352.* See also *Goodface v. Grassley,* 708 F.2d. 335 (8th Cir. 1983), (questions of interpretation of tribal constitution and tribal law are not within the jurisdiction of the District Court and the lower court "overstepped the boundaries of its jurisdiction" when it interpreted the tribal constitution and bylaws); *Sanders v. Robinson,* 864 F.2d 630 (9th Cir. 1988), (The Northern

Cheyenne Appellate Court held that tribal law permitted tribal court jurisdiction over a non-Indian married to an enrolled member of the tribe. The Court stated that "That court's interpretation of tribal law is binding on this court.")

As in *Runs After*, the alleged adoption of the U.S. Constitution by the Pueblo of Nambé involves the interpretation of a Tribal Council Resolution and its effect on Tribal Law which should be interpreted by the Pueblo and not a Federal Court.

## II. THE TRIBAL COURT AFFORDED PETITIONER DUE PROCESS UNDER TRIBAL LAW AND THE INDIAN CIVIL RIGHTS ACT (ICRA).

### A. The Tribal Court provided Petitioner with ample time to secure an attorney at his own expense as required under ICRA.

Petitioner claims in Count I of his Petition, without providing evidentiary support from the record, that Respondent Nambé denied him a meaningful opportunity to secure his own counsel, prior to and on the day of trial. *Page 5 of the Petition for Writ of Habeas Corpus filed 3/10/2009.* Contrary to Petitioner's claims, Petitioner had been informed of his right to have the assistance of counsel for his defense, at his own expense as provided under ICRA, before the pre-trial conference held on March 30, 2007. *See Affidavit of Judge Marti Rodriguez, Exhibit C to this Motion.* As a matter of courtesy to the Petitioner, the Nambé Tribal Court took the time and effort to locate either a lay person or an attorney to represent Defendant. The Nambé Tribal Court 1) tried to find a lay counsel at the Pueblo, but no one desired to represent Petitioner, 2) called Indian Legal Aid, but they declined due to lack of funds, 3) called the American Indian law Center at UNM School of Law for student representation, but the students declined, 4) called the Pro Bono Lawyers Association in Albuquerque, but the association declined due to travel restrictions, and 5) contacted the Public Defenders for the State of New Mexico, but they

declined due to forum issues. *See Tape of the Bench Trial; Tape 1, Side 1, Counter 108*[1]*; See also Affidavit of Judge Marti Rodriguez.* Though Petitioner does not have a right to free legal counsel at the expense of the Pueblo under the Indian Civil Rights Act, the Nambé Tribal Court took pains, at its discretion, to locate either a lay person or an attorney to represent Petitioner before the pre-trial conference.

At the March 30, 2007 pre-trial conference, Petitioner informed the Pueblo of Nambé Tribal Court that he had found an attorney to represent him. *See Affidavit of Judge Marti Rodriguez.* After making such a statement at that point of the criminal proceedings, Petitioner should be estopped from making an argument that he was denied a meaningful opportunity to obtain counsel at his own expense.

On the day of the bench trial, on May 30, 2007, Petitioner appeared without legal representation. *See Affidavit of Judge Marti Rodriguez.* Contrary to Petitioner's allegations, the Nambé Tribal Court offered Petitioner time to obtain legal representation provided Petitioner sign a waiver of his right to a speedy trial. *See Tape of Bench Hearing; Tape 1, Side 1, Counter 205; See also Affidavit of Judge Marti Rodriguez.* Also contrary to Petitioner's allegations, Petitioner did not agree to sign a waiver of time limit. *See Tape of Bench Hearing; Tape 1, Side 1, Counter 205; see also Affidavit of Judge Marti Rodriguez.* Petitioner knew of the consequences of proceeding with trial without legal representation, and yet knowingly and voluntarily refused additional time to locate legal representation at his own expense. Respondent Nambé did not deny Petitioner a meaningful opportunity to secure the assistance of counsel, at his own expense, but provided him with every opportunity to obtain counsel at every stage of the criminal proceeding.

[1] Counter number based on Sanyo Transcription Equipment, Model Number TRC 9010. Copies of the Nambé Tribal Court tapes pertaining to Petitioner's case have been provided to counsel for Petitioner. We will provide the five cassette tapes to the federal court upon request.

**B. The Tribal Court did not appoint the arresting officer to act as lay counsel for Petitioner.**

Petitioner claims in Count II of his Petition that Respondent Nambé violated Petitioner's due process rights under the Indian Civil Rights Act by appointing the arresting officer to serve as Petitioner's lay counsel. Petitioner, again, misstates the facts of the case. The Nambé Tribal Court never appointed arresting officer, Officer Warren Candelaria, to serve as lay counsel for Petitioner at any time during the criminal proceedings. *See Affidavit of Judge Marti Rodriguez*, and *Affidavit of Officer Warren Candelaria, Exhibit D to this Motion.* Officer Candelaria offered a plea agreement to Petitioner at the pre-trial conference. *Affidavit of Warren Candelaria.* In offering the plea agreement to Petitioner, Officer Candelaria mistakenly signed on the line for defense counsel instead of the line for the prosecution. *Affidavit of Officer Warren Candelaria.* Petitioner never accepted any plea agreement.

The record of the trial does not include any evidence that Officer Candelaria represented Petitioner during the proceeding. *See Tape of Bench Hearing and Sentencing Hearing; Tapes 1 through 5.* The Officer's only appearance at the bench trial was as a witness. The record also shows that the Tribal Court Judge gave Petitioner instructions for representing himself. *Tape of Bench Hearing; Tape 1, Side 1, Counter 143.* Absent evidence corroborating the allegation that Officer Candelaria served as Petitioner's lay counsel, Petitioner's claims for due process violations at this stage of the criminal proceeding must fail.

**C The Tribal Court Judge did not participate in plea negotiations or otherwise act inappropriately at any stage of proceedings against Petitioner.**

Petitioner claims in Count III of his Petition, without providing evidentiary support from the record, that Respondent Nambé violated Petitioner's due process rights under the Indian Civil Rights Act by permitting the Tribal Judge, who allegedly participated in plea negotiations during

the pre-trial conference, to preside over the case at trial and at sentencing. Again, Petitioner misstates the facts. Pueblo of Nambé Tribal Court Judge Marti Rodriguez did not participate in any plea negotiations at any point in the criminal proceedings. *Affidavit of Judge Marti Rodriguez.* Contrary to Petitioner's allegations, Petitioner never objected to Judge Rodriguez's presiding over both the bench trial and sentencing hearing. *See Tape of Bench Hearing and Sentencing Hearing; Tapes 1 through 5.* Petitioner offers no support for his allegation that the Tribal Judge participated in plea negotiations and cannot point to any evidence in the record substantiating this allegation. The Nambé Tribal Law and Order Code provides a process for disqualifying tribal judges, and Petitioner did not employ that process at any point in the criminal proceedings. *See Section 2-1.14, Pueblo of Nambé Law and Order Code, Exhibit B to this Motion.* Finally, Petitioner offers no legal support for the argument that Petitioner has a fundamental right to have different judges preside over the bench trial and at a sentencing hearing. Unsupported legal arguments need not be considered by the Court. *Rodriguez v. IBP, Inc.*, 243 F.3d 1221 (10th Cir. 2001), *Phillips v. Calhoun,* 956 F.2d 949 (10th Cir. 1992).

**D. The Tribal Court timely informed Petitioner of the nature and cause of the accusations against him.**

In Count IV of his Petition, Petitioner claims that Respondent Nambé failed to timely inform Petitioner of the nature and cause of the accusation and failed to provide compulsory process for obtaining witnesses in Petitioner's favor. Contrary to Petitioner's allegations, Nambé Tribal Court informed Petitioner of the charges as early as the day of the arraignment which was held on February 26, 2007, and was provided an opportunity to ask any questions. *Affidavit of Judge Marti Rodriguez.* Petitioner was arraigned four days after his arrest. Also contrary to Petitioner's allegations, Nambé Tribal Court explained to Petitioner the specific charges and the maximum penalty for each charge at the arraignment. *Affidavit of Judge Marti Rodriguez.* After

reading the charges and rights to the Petitioner, Nambé Tribal Court asked if Petitioner had any questions regarding any of the charges or his rights. *See Criminal Complaint, page 2, Exhibit E to this Motion; see also Affidavit of Judge Marti Rodriguez.* Being satisfied that Petitioner had no questions to the charges, Nambé Tribal Court asked Petitioner how he would plea to each of the charges. *See Criminal Complaint, page 2; see also Affidavit of Judge Marti Rodriguez.* Petitioner pled not guilty to each of the charges, and a Pre-Trial Conference was set. *See Criminal Complaint, page 2; See also Affidavit of Judge Marti Rodriguez.* A copy of the Criminal Complaint, filed on February 26, 2007, was also provided to Petitioner at the arraignment. *See Criminal Complaint.*

On March 30, 2007, at the pre-trial conference, Petitioner was again informed of the charges contained in the Criminal Complaint. *Affidavit of Officer Warren Candelaria.* The charges were repeated in a plea agreement offered by the prosecutor. Understanding the charges contained in the plea agreement, Petitioner rejected the plea agreement. *See Proposed Plea and Disposition Agreement, Attachment C to Petitioner's Petition for Writ of Habeas Corpus filed 3/10/2009.*

On May 4, 2007, an Amended Criminal Complaint was filed. *See Amended Criminal Complaint, Exhibit F to this Motion.* The Amended Criminal Complaint, including the List of Witnesses and Statement of Probable Cause, were served on the Petitioner, using the fax number of the prison where Petitioner was incarcerated with a cover letter asking the prison to provide the documents to Petitioner. *See Tape of Bench Trial, Tape 4, Side 2, Counter 480; See also Affidavit of Judge Marti Rodriguez.* The Prosecutor did not fill out the Certificate of Mailing on the List of Witnesses because the Prosecutor did not mail the documents, but rather served the

documents by facsimile to the facility where Petitioner was imprisoned. *Affidavit of Judge Marti Rodriguez.*

On May 30, 2007, at the bench trial, Nambé Tribal Court again read the specific charges against Petitioner, based on the Amended Criminal Complaint, and informed Petitioner of the maximum penalty for each count. *See Tape of Bench Trial, Tape 1, Side 1, Counter 007; See also Affidavit of Judge Marti Rodriguez.* Judge Rodriguez asked Petitioner whether Petitioner understood the charges against him and whether he had any questions. *See Tape of Bench Trial, Tape 1, Side 1 Counter 084.* Petitioner stated clearly for the record that he understood the charges and the penalties and had no questions. *See Tape of Bench Trial, Tape 1, Side 1, Counter 089.*

At each stage of the criminal proceeding, Nambé Tribal Court informed Petitioner of the charges and penalties for each charge. At each stage of the criminal proceeding, Nambé Tribal Court asked Petitioner whether he understood the charges he was accused of and the nature of the penalties. At each stage of the criminal proceedings, Petitioner informed Nambé Tribal Court of his understanding and did not indicate his confusion over the applicable law. Nambé Tribal Court informed Petitioner of the nature and cause of each of the charges in a timely manner.

**E. The Tribal Court's application of state criminal statutes was not vague and over-broad.**

Petitioner claims in Count V of his Petition that the Tribal Court's application of both state and Tribal laws was "vague and over-broad", thus confusing him. However, Petitioner does not offer any evidence or explanation of how he was confused by the Tribal Court's application of the laws. The New Mexico criminal statutes are available to the Pueblo through the enactment of Tribal Council Resolution NP-96-28 which adopted the Traffic Manual for instances not

covered by the Pueblo of Nambé Law and Order Code. Petitioner claims that it was not clear to what extent the Traffic Manual applied to his case and to what extent Tribal law applied. From the day of his arrest until he was sentenced, the arresting officer and the Tribal Court used New Mexico statutes from the Traffic Manual, as adopted by tribal law, for the charges against Petitioner. *See Statement of Probable Cause, Exhibit G to this Motion, Criminal Complaint, Amended Criminal Complaint, and Judgment and Sentence, Attachment A to Petitioner's Petition for Writ of Habeas Corpus filed 3/10/2009.* Petitioner was informed of the charges against him, the maximum penalty for each offense, and his rights under ICRA beginning with his arraignment and up to and including his sentencing. (See section II D of this Motion). The Tribal Court's application of the laws in this case was not vague or over broad.

**F. The Tribal Court informed Petitioner of his right to a jury trial.**

Contrary to Petitioner's claims in Count VII of his Petition, Judge Rodriguez informed Petitioner of his rights, including his right to a jury trial, as early as the arraignment. See *Criminal Complaint, page 2; see also Affidavit of Judge Marti Rodriguez.* Petitioner did not request a jury trial until after he was sentenced on June 15, 2007. *Affidavit of Judge Marti Rodriguez.* The fact that he requested a jury trial, though after sentencing, suggests that Petitioner knew of his right, but failed to exercise it until after he was convicted.

**G. Petitioner's right to appeal his conviction was properly considered by the Southwest Intertribal Court of Appeals ("SWITCA").**

Respondent Nambé denies the allegation that Petitioner had no knowledge that his letters to the Pueblo of Nambé Tribal Court and Pueblo of Nambé Governor were characterized as an appeal as stated in paragraph 6 of his Petition. The Notice of Appeal, dated June 15, 2007, signed by Petitioner, provides evidence of Petitioner's intent to initiate a pro se appeal. See *Notice of Appeal, marked as Attachment 1 to Affidavit of Judge Marti Rodriguez.*

Further, Petitioner's letter dated June 23, 2007 to the Nambé Pueblo Governor, which Petitioner relies on for his allegations at Paragraph 6 of the Petition, states, "my appeal is still pending a court date," showing that Petitioner understood that he had already exercised his right to appeal prior to his June 23, 2007 letter. *See Attachment 3 to Respondent Nambé's Answer to Petition for Writ of Habeas Corpus filed 4/17/2009.* Respondent Nambé denies that Petitioner was not afforded an opportunity to present claims, argue on his own behalf, or otherwise participate in the appeal as stated in paragraph 7 of his Petition. Following the bench trial and sentencing hearing, Petitioner wrote numerous letters to the Pueblo of Nambé Tribal Court and Pueblo of Nambé Governor explaining Petitioner's claims and arguments. The SWITCA judge, Judge Wall, relied on at least one of these letters in permitting the appeal to be heard. See *SWITCA No. 07-004-NPTC, marked as Attachment 2 to Affidavit of Judge Marti Rodriguez.*

Judge Wall of SWITCA based his opinion in Petitioner's appeal on Petitioner's letter dated June 23, 2007 for Petitioner's argument and on the record from the Tribal Court. The Tribal Court and the Pueblo of Nambé were not represented in the appeal, did not present a brief to the SWITCA and did not appear before the Court. Judge Wall stated in his opinion that the appeal would be "based in the Appellant's complaint about the lack of access to counsel and the failure to be Mirandized, since no other issues were specifically identified by Appellant and in its review of the record SWITCA did not find any other bases for appeal." See *SWITCA No. 07-004-NPTC.*

## III. PETITIONER'S EIGHT CONSECUTIVE ONE-YEAR SENTENCES FOLLOWING CONVICTION OF TWELVE (12) OFFENSES DOES NOT VIOLATE ICRA.

Petitioner claims in Count VI of his Petition that Respondent Nambé violated the Indian Civil Rights Act when it sentenced Petitioner to a total of eight (8) years in jail and imposed

fines totaling $7000 plus $50 in court costs after conviction of 12 offenses. Petitioner claims that the Indian Civil Rights Act prohibits tribes from imposing "a sentence greater than one year imprisonment and $5000 in fines." *See Page 11 of Petition for Writ of Habeas Corpus filed 3/10/2009.* The Indian Civil Rights Act clearly provides that no tribe shall "impose excessive fines, inflict cruel and unusual punishments, and 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 $5000, or both." *25 U.S.C. § 1302(7) (emphasis added).* At sentencing, Judge Rodriguez informed Petitioner that his lack of remorse, his failure to take responsibility for his actions, and his long list of prior infractions of the law, which include several violent episodes, provided justification for the consecutive sentences imposed for the 12 offenses for which he was convicted. *See Tape of Sentencing Hearing, Tape 5, Side 2, Counter 403; See also Affidavit of Judge Marti Rodriguez.* None of Judge Rodriguez's sentences exceed the prohibition of a term of one year or a fine of $5000 for any one offense. In *Ramos v. Pyramid Tribal Court,* 621 F. Supp. 967 (D. Nevada 1985), the United States District Court for the District of Nevada found that the tribal court's imposition of consecutive sentences upon a tribal member's conviction of several violations was not cruel and unusual punishment, where no individual sentence violated the imprisonment term for any one offense. *Id* at 970.

In *Texas v. Cobb,* 532 U.S. 162 (2001), the United States Supreme Court defined "offense" for purposes of the defendant's right to counsel. The court stated that "where the same act or transaction constitutes a violation of two distinct statutory provisions, 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" quoting *Blockburger v. United States,* 284 U.S. 299 (1932). The Court further stated that there is no constitutional difference between the meaning of the

term "offense" in the contexts of double jeopardy and of the right to counsel. *Texas, 532 U.S.* at 172.

In *Blockburger,* the U.S. Supreme Court discussed the difference between a continuous offense and an offense consisting of an isolated act. *Blockburger at 302.* In *Blockburger,* a defendant was convicted of two counts of selling narcotics to the same purchaser. Even though the second sale followed closely after the first sale, the court held that each sale was a distinct act and not a continuous offense. *Id at 301.* The Court stated that the law does not prohibit the course of action of "engaging in the business of selling the forbidden drugs" but instead prohibits the act of selling drugs. *Id.* The test is whether the crime prohibits individual acts or a course of action which includes individual acts. *Id.* For reasons provided herein, we submit the definition of "offense," approved by the U.S. Supreme Court, should be used by this Court in deciding this issue.

In our case, Petitioner was convicted of twelve separate criminal acts against four different persons or their property. Each of the twelve convicted offenses carries a maximum penalty of one year in prison or a $1,000 fine or both. Each convicted offense requires proof of a fact which the others do not.

Respondent is aware that there is a Minnesota case that came to a different conclusion than the District of Nevada did in *Ramos v. Pyramid Tribal Court.* In *Spears v. Red Lake Band of Chippewa Indians,* 363 F.Supp.2d.1176 (D. Minn. 2005), petitioner, while driving under the influence of alcohol and without a valid driver's license, struck and killed a person lying on the road within the Red Lake Indian Reservation. After receiving a sentence from the federal court, the Red Lake Tribal Court charged him with 1) negligent homicide, 2) driving under the influence of alcohol, 3) failing to take a blood, breath, or urine test, 4) failing to stop at the scene

of a traffic accident, 5) driving without a license, and 6) a liquor violation. *Id.* at 1177. All 6 charges arose from the April 1, 2000 incident. The *Spears* Court chose not to follow the *Ramos* decision and ruled that an "offense", for purposes of ICRA, does not have the same meaning of "offense" as in *Blockburger.* This Court, however, should decline to follow *Spears* and instead, adopt the holding of *Ramos* for the following reasons:

1. The *Spears* court mistakenly determined that the term "any one offense" under ICRA is ambiguous.

First, the *Spears* court mistakenly determined that the term "any one offense" under ICRA is ambiguous. Under the "plain meaning" rule, a court must apply the plain meaning of the term, and should not engage in further exploration of what a term may also mean. *Lamie v. U.S.*, 540 U.S. 526 (2003). The "plain meaning" of the term "any one offense" carries the same meaning as the term "offense" as defined under *Blockburger.* Had Congress desired to limit tribal sentencing to a maximum of one year or a fine of $5,000, or both, for all offenses committed by Petitioner during a single criminal transaction, it would have done so when it first passed ICRA or when it amended it in 1986. The *Ramos* decision was made prior to ICRA's amendment, and is consistent with the holding in *Blockburger.* Had Congress felt that the interpretation of *Ramos* was contrary to congressional intent, it could have amended ICRA when it chose to increase the maximum penalty for "any one offense".

2. The *Spears* court compounded its mistake of finding the phrase, "any one offense," to be ambiguous by failing to apply the Indian Canons of Construction.

After mistakenly finding the phrase, "any one offense" to be ambiguous, the *Spears* court further compounded this mistake by failing to apply the statutory construction that statutes are to be liberally construed and doubtful expressions are to be resolved in favor of the Indian Tribes. *NLRB v. Pueblo of San Juan,* 276 F.3d 1186, (10th Cir. 2002). This principle of statutory

construction was developed because Indian Tribes stand in a special relationship with respect to the federal government. Instead of straining to find that Congress limited tribal sentencing power under ICRA, the *Spears* court should have applied the principle of statutory construction and found that "any one offense," when applied liberally and in favor of the Tribes, carried the same definition of an "offense" as provided in *Blockburger*.

3. The *Spears* decision rests on cases of limited precedential value and on narrow holdings contrary to the requirements of the Indian Canons of Construction.

The *Spears* court relies on cases of limited precedential value for the proposition that "any one offense" means "a single criminal transaction." The first case the *Spears* court relies on is *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974). In *Codispoti*, the US Supreme Court addressed the issue of whether a defendant is entitled to a Sixth Amendment right to jury trial in a case of post-verdict adjudication of various acts of contempt committed during trial, where sentences imposed aggregates more than six months, even though no sentence for more than six months was imposed for any one act of contempt. In *Codispoti*, the U.S. Supreme Court recognized its general rule that "total punishment meted out during trial exceeds six months in jail or prison would not invalidate any of the convictions or sentences, for each act of contempt was dealt with as a discrete and separate matter at a different point during the trial." *Id.* At 514. The general rule recognized the overriding necessity for instant action to preserve order. More importantly, the general rule recognized that though a crime carrying more than a six-month sentence is a serious offense triable by jury, an alleged contemnor is not entitled to a jury trial simply because a strong possibility exists that upon conviction he will face a substantial term of imprisonment regardless of the punishment actually imposed. In instances where a trial judge does not punish the contemnor during trial for each act of contempt, but postpones until after trial the final conviction and punishment of the contemnor for several or many acts of contempt

committed during the trial, an exception to the general rule is made. In the rare case of post-verdict adjudications of various acts of contempt committed during trial, the Sixth Amendment requires a jury trial if the sentences actually imposed aggregate more than six months, even though no sentence for more than six months was imposed for any one act of contempt. The *Spears* case further recognized its limited applicability to circumstances "where the legislature has not specified a maximum penalty" for the crimes charged. *See Lewis v. United States*, 518 U.S. 322, 328-330 (1996). Our case neither involves a post-verdict adjudication of contempt, or of any contempt, nor concerns crimes with unspecified maximum penalties. Each of the crimes that Petitioner was charged with carries a maximum penalty. For these reasons, the narrow holding under the *Codispoti* line of cases should not be applied in interpreting "any one offense" under ICRA. As the canons of construction require, a liberal interpretation of the term "any one offense" commands rejection of the narrow *Codispoti* line of cases.

The second case the *Spears* court relies on is *Prince v. United States*, 352 U.S. 322 (1957). *Prince* was another U.S. Supreme Court case that addressed the issue of whether unlawful entry and robbery were two offenses consecutively punishable in a typical bank robbery situation. *Id.* at 324. The U.S. Supreme Court interpreted the Federal Bank Robbery Act, as originally passed in 1934 which covered robbery, robbery accompanied by an aggravated assault, and homicide perpetrated in committing a robbery or escaping thereafter. *Id.* at 325. Congress provided maximum penalties of either a prison term or a fine or both for each of these offenses. *Id.* at 326. The U.S. Supreme Court also interpreted a 1937 amendment to the Federal Bank Robbery Act which incorporated larceny and unlawful entry in the same paragraph with robbery, without adding a separate penalty clause for the crime of unlawful entry. The U.S. Supreme Court found that where Congress did not assign a separate penalty clause for the crime

of unlawful entry, that crime was merged into the crime of robbery. *Id.* at 329. The U.S. Supreme Court made it clear that *Prince* is "dealing with a unique statute of limited purpose and an inconclusive legislative history." *Id.* at 325. With this admonition, the U.S. Supreme Court noted that *Prince* "can and should be differentiated from similar problems in this general [field] raised under other statutes. The question of interpretation is a narrow one, and our decisions should be correspondingly narrow." *Id.* at 325. In reaching its decision, the U.S. Supreme Court was careful to distinguish *Prince* from other similar criminal statutes related to post-office offenses where the crime of unlawful entry and robbery carried separate penalties, and were treated as separate offenses. *Id.* at 328. Our case neither involves an interpretation of the Federal Bank Robbery Act, nor concerns crimes with unspecified penalty provisions. Each of the crimes that Petitioner was charged with carries separate penalties. For these reasons, the narrow holding under the *Prince* line of cases[2] should not be applied in interpreting "any one offense" under ICRA. As the canons of construction require, a liberal interpretation of the term "any one offense" commands rejection of the *Prince* line of cases.

4. The *Spears* court fails to address the import of *Texas v. Cobb*

The *Spears* court did not cite to *Texas v. Cobb* which held that there is no constitutional difference between the meaning of the term "offense" in the contexts of double jeopardy and of the right to counsel in following the *Blockburger* Court's definition of "offense". The *Spears* court's decision should not be controlling over this Court, particularly where it failed to

[2] In laying out its argument under *Prince*, the *Spears* Court cited to *Bell v. United States,* 349 U.S. 81 (1955) and *Fuller v. United States,* 407 F.2d 1199 (D.C.Cir. 1968)(en banc) as supporting cases. *Bell* is easily distinguishable from this case because that case, as in *Prince,* involved the interpretation of a statute that did not fix punishment limits for the convicted offenses. *Fuller,* a D.C. Circuit case is not binding on this Court and is distinguishable from this case because the convicted offenses involved a lesser included offense.

recognize the import of *Texas v. Cobb*, and declined to follow *Blockburger*, a U.S. Supreme Court decision, which provided a clear definition of "offense."

For the foregoing reasons, this Court should decline to follow the decision in *Spears*, and adopt the interpretation of *Ramos* that a tribal court's imposition of consecutive sentences upon a tribal member's conviction of several violations was not cruel and unusual punishment, where no individual sentence violated the imprisonment term for any one offense. *Ramos, 621 F.Supp. 967, 970 (D. Nevada 1985).*

Petitioner was convicted of twelve separate offenses. Each offense was a prohibited act and not a prohibited course of action. Each offense carried a maximum penalty of one year in prison or a $1,000 fine or both. Each offense required a proof of fact which the others do not. Therefore, the eight consecutive one year sentences imposed by the Tribal Court where the sentence for any one offense did not exceed one year, complies with ICRA's requirement that a defendant's sentence for the conviction of any one offense cannot exceed one year.

**WHEREFORE,** for the foregoing reasons, Respondent Nambé requests that the Petition be denied.

Respectfully submitted:

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 1, 2009, I filed the foregoing **Motion to Dismiss** electronically through the CM/ECF system, which caused CM/ECF Participants to be served by electronic means, as more fully reflected on the notice of Electronic Filing.

PChestnut

Peter C. Chestnut