CASE NO. 10-15308

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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**BEATRICE MIRANDA,**

**Petitioner-Appellee,**

**v.**

**TRACY NIELSEN, et al.,**

**Respondents-Appellants**

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
(Honorable Paul G. Rosenblatt)

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# RESPONDENT/APPELLANT'S OPENING BRIEF

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## I. JURISDICTIONAL STATEMENT

This is an appeal of a final judgment of the United States District Court for the District of Arizona (the "district court") granting Appellee Beatrice Miranda's ("Ms. Miranda's") Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2241(c)(3) and the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (hereinafter "ICRA").[1] The district court granted the Petition by an order dated January 12, 2010, and judgment was entered the same day. R.E. 1 at pp. 1-3. Appellant Tracy Nielsen's (hereinafter "The Tribe's")[2] Notice of Appeal was timely filed on February 10, 2010. R.E. 2 at pp. 1-3.

The district court had subject matter jurisdiction because the claim related to an alleged violation of federal statute, 25 U.S.C. §1302(7). The Ninth Circuit Court of Appeals has jurisdiction over the appeal pursuant to 25 U.S.C. § 1303, 28 U.S.C. §1291, and 28 U.S.C. § 2253.

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[1] The full text of 25 U.S.C. §§ 1301-1303 is contained in an addendum to this brief in accordance with 9th Cir. R. 28-2.7.

[2] Appellant Tracy Nielsen was Interim Chief of Police for the Pascua Yaqui Tribe at the time Ms. Miranda's Petition for Writ of Habeas Corpus was filed.

## II. STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the district court err in holding that the "any one offense" language of 25 U.S.C. § 1302(7) means instead "any and all criminal offenses arising out of the same criminal transaction"?

## III. STANDARD OF REVIEW

Questions of law arising from the appeal of a district court's grant of a writ of *habeas corpus* under 25 U.S.C. § 1303 are reviewed *de novo*. *Means v. Navajo Nation*, 432 F.3d 924, 928 (9th Cir. 2005) (where all questions before the court were matters of law arising from a writ of *habeas corpus* under 25 U.S.C. § 1303, the court reviewed *de novo*). The court of appeals reviews *de novo* a district court's decision to grant or deny a petition from a writ of *habeas corpus* filed pursuant to 28 U.S.C. § 2241. *Khoutesouvan v. Morones*, 386 F.3d. 1298, 1299 (9th Cir. 2004) (citation omitted). Questions of statutory construction are reviewed *de novo*. *APL Co. Pte. Ltd. v. UK Aerosols Ltd.*, 582 F.3d 947, 951 (9th Cir. 2009) (citations omitted).

## IV. STATEMENT OF THE CASE

### A. THE STATUTORY LANGUAGE AT ISSUE.

ICRA provides in relevant part that:

No Indian tribe in exercising powers of self-government shall:

> ***
> (7) require excessive bail, 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 $5,000, or both;

25 U.S.C. § 1302(7) (emphasis added). At issue in this appeal is the meaning of the phrase "any one offense" in 25 U.S.C. § 1302(7). In particular, the issue is whether Indian tribes may, while not imposing a sentence of more than one year for any particular offense, impose multiple sentences for separate offenses committed as part of a single criminal transaction, resulting in a cumulative total sentence of more than one year. The Tribe believes the answer is yes and that the district court erroneously decided the case below when it held that the "any one offense" language of 25 U.S.C. § 1302(7) "is properly interpreted to include all tribal code violations committed during a single criminal transaction." R.E. 1 at p. 2.

## B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

### 1. Trial in the Pascua Yaqui Tribal Court

On the evening of January 25, 2008, Ms. Miranda (who is a member of the Pascua Yaqui Tribe) brandished a knife at two other members of the Pascua Yaqui Tribe and repeatedly threatened to kill them. Ms. Miranda was charged in the Pascua Yaqui Tribal Court ("tribal court") with a total of eight (8) criminal

offenses: two counts of aggravated assault (one count for each victim); two counts of endangerment (one count for each victim); two counts of threatening and intimidating (one count for each victim); and two counts of disorderly conduct (one count for each victim). R.E. 2 at p. 83.[3] The Honorable Cornelia Cruz ("Judge Cruz") of the tribal court convicted Ms. Miranda of all eight offenses on April 21, 2008. R.E. 2 at p. 26. The tribal court imposed sentences on Ms. Miranda for the eight (8) offenses of which she had been convicted, with several of the sentences to be served concurrently. R.E. 2 at pp. 6-7, 14-15. The total cumulative sentence imposed was 910 days, with 114 days subtracted for time served. R.E. 2 at pp. 6, 15, 17.

2. Pascua Yaqui Court of Appeals

The Pascua Yaqui Office of the Public Defender entered its appearance on Ms. Miranda's behalf on June 10, 2008 and filed a notice of appeal to the Pascua Yaqui Court of Appeals ("PYCA") on June 26, 2008. R.E. 1 at p. 19. One of the issues on appeal to the PYCA was whether the sentence imposed by the tribal court

[3] The full text of the provisions of the Tribe's Criminal Code establishing these offenses is contained in an addendum to this brief in accordance with 9th Cir. R. 28-2.7.

violated ICRA's prohibition on imposing a sentence "for any one offense" of more than one year. R.E. 1 at pp. 20, 33-38. In particular, Ms. Miranda argued that under ICRA, 25 U.S.C. § 1302(7), the tribal court was prohibited from imposing a cumulative sentence on a defendant exceeding one year, even if the defendant is convicted of multiple offenses, where those offenses are part of the "same criminal transaction." R.E. 1 at p. 33. The PYCA, in a careful and thorough analysis of the provision at issue, rejected Ms. Miranda's position and found that ICRA did not bar the tribal court from sentencing Ms. Miranda separately for each conviction as long as the sentence for each separate offense did not exceed one year. R.E. 1 at pp. 33-38.

3. Federal District Court Habeas Proceeding

Upon the expiration of one year of incarceration, Ms. Miranda filed a petition for writ of *habeas corpus* pursuant to 25 U.S.C. §1303 in the United States District Court for the District of Arizona. R.E. 2 at p. 92. In October and November of 2009 the parties filed motions for summary judgment and responses, and on November 3, 2009 the United States joined in the Tribe's Motion for Summary Judgment. R.E. 2 at pp. 95-96. On December 15, 2009 United States Magistrate Judge Voss issued a Report and Recommendation that Ms. Miranda's Petition for Writ of *Habeas Corpus* be granted. R.E. 1 at pp. 4-12. Magistrate

Judge Voss reached this conclusion with heavy reliance on a case from the United States District Court for the District of Minnesota, *Spears v. Red Lake Band of Chippewa Indians*, 363 F. Supp. 2d 1176 (D. Minn. 2005). R.E. 1 at pp. 8-11. The Tribe filed its objections to the Report and Recommendation on January 11, 2010. RE. 2 at p. 97. On January 12, 2010 the District Court entered its Order adopting the Report and Recommendation and granting the writ of *habeas corpus*. R.E. 1 at pp. 1-3. On January 13, 2010, Ms. Miranda was released from custody. R.E. 2 at pp. 1, 4, 98.

## V. STATEMENT OF FACTS

On the evening of January 25, 2008, Ms. Miranda was wandering around, drunk, on the Pascua Yaqui Tribe's reservation, when she came upon a minor female individual who is a member of the Tribe ("Ms. V"). R.E. 2 at pp. 32, 51-52. After a verbal exchange, Ms. Miranda pulled a knife and, screaming obscenities, began chasing Ms. V while brandishing the knife. R.E. 2 at pp. 26, 51-52. Ms. V ran home and was able to get inside her home before Ms. Miranda caught up with her. Ms. V notified her sister that Ms. Miranda was in the yard with a knife, and the sister went outside to investigate. R.E. 2 at pp. 39, 52. When the sister went outside, Ms. Miranda continued to yell obscenities and repeatedly threatened to kill the girls. R.E. 2 at pp. 41, 43-44, 52-54. The girls then called the police, and Ms.

Miranda ran off. Ms. Miranda was picked up near their home based upon their description of her. R.E. 2 at pp. 31-32, 47, 55.

Based upon the foregoing events, Ms. Miranda was charged in tribal court with eight (8) criminal offenses: two counts of aggravated assault; two counts of endangerment; two counts of threatening and intimidating; and two counts of disorderly conduct. R.E. 2 at p. 83. Ms. Miranda was advised of her right to counsel numerous times before the trial and at the sentencing hearing, and each time she declined counsel and agreed to proceed without representation. R.E. 2 at pp. 9, 28, 68, 74, 76, 85.[4] After hearing the testimony of witnesses and considering the evidence admitted at trial, Judge Cruz convicted Ms. Miranda of all eight offenses on April 21, 2008. R.E. 2 at pp. 26, 61-62.

A pre-sentence investigation was conducted, and the report issued following the investigation was presented to the tribal court for consideration at sentencing. The report reflected that Ms. Miranda had a significant history of criminal

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[4] 25 U.S.C. § 1302(6) states in relevant part that no Indian Tribe shall "deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, **and at his own expense to have the assistance of counsel for his defense**." (emphasis added) The Constitution of the Pascua Yaqui Tribe contains the same provision. Pascua Yaqui Const. Art I, Sec. 1(f), the text of which is contained in an addendum to this brief in accordance with 9th Cir. R. 28-2.7

convictions by the tribal court and that on numerous occasions in the past she had failed to comply with the terms of her probation. R.E. 2 at pp. 21-25. The pre-sentence report recommended that Ms. Miranda be sentenced to 365 days for each aggravated assault conviction, 60 days for each endangerment conviction, 90 days for each threatening or intimidating conviction, and 30 days for each disorderly conduct conviction, with some but not all of the sentences to run concurrently. R.E. 2 at pp. 24-25. The total days of incarceration recommended in the pre-sentence report was 910 days. *Id*.

At the sentencing hearing on May 19, 2008, the court again advised Ms. Miranda of her right to counsel, and Ms. Miranda again waived that right. R.E. 2 at pp. 9-10. After considering the seriousness of the offenses, the recommendations set forth in the pre-sentence report, Ms. Miranda's criminal history, and her failure in the past to comply with the terms of her probation, Judge Cruz imposed sentences on Ms. Miranda for the eight (8) offenses of which she had been convicted, with several of the sentences to be served consecutively. R.E. 2 at pp. 6, 14-15. The total cumulative sentence imposed was 910 days, with 114 days subtracted for time served. R.E. 2 at p. 6. Ms. Miranda was not sentenced for more than one year for any single offense. *Id.*

## VI. SUMMARY OF ARGUMENT

ICRA provides in relevant part that an Indian tribe may not impose a term of imprisonment that exceeds one year "for conviction of any one offense." 25 U.S.C. § 1302(7). The plain language therefore allows Tribal courts to impose separate sentences for each separate "offense" that a defendant is convicted of, even if the cumulative sentence for the multiple offenses exceeds one year. The District Court erroneously concluded that this language means that a criminal defendant may not be sentenced to more than one year for any and all offenses that arise out of a "common nucleus of facts" or a "single criminal transaction." R.E.1 at pp. 1-3. Because the plain language of the statute resolves the issue to the contrary, the district court's conclusion was in error.

Because the statutory language at issue is clear and unambiguous, the district court improperly looked to the legislative history of ICRA to determine what Congress meant by "any one offense." It is well-settled that where statutory language is clear, the inquiry should end, and it is improper to examine the legislative history.

Moreover, an examination of the legislative history confirms that the legislative history simply does not support the district court's holding. Importantly, the legislative history is silent regarding the intended meaning of the phrase "any

one offense." It is well-settled that where the legislative history is silent on the issue at hand, the legislative history is simply not a useful tool in the process of statutory construction. *See Richlin Security Service Co. v. Chertoff*, 553 U.S. 571, 128 S.Ct. 2007, 1015-16 (2008).

Further, "unequivocal evidence" of legislative purpose as reflected in the legislative history is required in order "to override the ordinary meaning" of a statute. *Piper v. Chris-Craft*, 430 U.S. 1, 26, 97 S.Ct. 924, 941 (1977). In this case, there is no "unequiocal evidence" in the legislative history establishing that Congress meant for "any one offense" to mean instead "any and all criminal offenses arising out of a single criminal transaction." Instead, the broad underlying purposes of Congress in enacting ICRA were dual; first, extending to individual Indians substantially identical rights to those guaranteed by the United States Constitution; and second, continuing the well-established policy of promoting Indian self-government. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62, 98 S. Ct. 1670, 1679 (1978). The purposes underlying ICRA as described in the legislative history simply do not supply "unequivocal evidence" to support Ms. Miranda's proposed construction of the statutory language.

Because the legislative history is silent regarding the meaning of the phrase at issue, and because there is no "unequivocal evidence" that Congress intended for

"any one offense" to mean any and all criminal code violations arising out of a single criminal transaction, the district court's reliance on the legislative history to support its interpretation of the statutory language was in error.

Further, even if the language of ICRA were ambiguous, the district court should have construed the ambiguity to the benefit of the Tribe. It did not do so.

Finally, the district court in the instant case reached its conclusion by relying on and adopting the analysis of the district court in the *Spears* case. The analysis and rationale of both the district court and the court in *Spears* is flawed and should be rejected. In addition, both courts appear to have reached their respective conclusions that "any one offense" instead means "a single criminal transaction" on the basis of policy concerns. It is well-settled that courts may not rewrite statutes to address policy concerns that the courts believe Congress should have addressed. The district court's decision in effect rewrites the statute to address an issue that the court believes should have been addressed by Congress. The district court's decision was in error.

For each of these reasons the Tribe respectfully requests that this Court reverse the district court's decision.

# VII. ARGUMENT

## A. BACKGROUND OF TRIBAL SOVEREIGNTY AND CRIMINAL JURISDICTION IN INDIAN COUNTRY.

The Tribe believes that a brief discussion of the development of the law relating to the sovereignty of Indian tribes and its nexus with ICRA and the Indian Major Crimes Act may be helpful to the Court in analyzing the issues presented in this appeal.

### 1. Tribes Retain their Sovereign Powers to Try and Convict Tribal Member Defendants to the Extent Those Powers Have not Been Limited by Congress.

A tribe's authority to try and convict tribal members for violations of a tribe's own criminal laws is derived from inherent sovereignty pre-dating the U.S. Constitution. The only mention of Indian tribes in the United States Constitution is found in Article I, Section 8, Clause One, "The Congress shall have the Power To…Regulate commerce with foreign Nations, and among the several States, and with the **Indian Tribes**…" (emphasis added). This clause is the sole place from which Congress derives its authority to legislate with regard to Indian tribes. As separate sovereigns, existing prior to the United States Constitution, tribes have historically been regarded as unconstrained by constitutional provisions framed specifically as limitations on federal or state authority. *Santa Clara Pueblo,* 436

U.S. at 56, 98 S.Ct. at 1675-76 (citing *Talton v. Mayes*, 163 U.S. 376, 382, 16 S.Ct. 986, 988) (holding that the fifth amendment does not "operat[e] upon" the "powers of local self government enjoyed" by tribes.) *See also Nevada v. Hicks*, 533 U.S. 353, 383, 121 S.Ct. 2304, 2323 (2001) ("it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes.") (citations omitted).

Indian tribes are distinct political entities and have retained their "original natural rights" in matters of local self-government. *Worcester v. Georgia*, 6 Pet. 515, 559, 8 L.Ed. 483 (1832). However, courts have recognized Congress' plenary authority to "limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Id.* Thus, Indian tribes retain their *sovereign power* to punish tribal offenders to the extent Congress has not enacted legislation to the contrary. *See United States v. Lara*, 541 U.S. 193, 197, 124 S.Ct. 1628, 1632 (2004); *United States v. Wheeler*, 435 U.S. 313, 318, 322-23, 98 S.Ct. 1079, 1086 (1978) (a tribe's "*sovereign* power to punish *tribal* offenders," while subject to congressional "defeasance," remains among those "'inherent powers of a limited sovereignty which has never been extinguished.'") (emphasis added and deleted). *See also Ex Parte Kan-gi-shun-ka*, 109 U.S. 556, 3 S.Ct. 396 (1883); *Talton v. Mayes*, 163 U.S. 376, 16 S.Ct. 986 (1896) (both arising from petitions for writs of

*habeas corpus* filed by Indians convicted of murder of other Indians in Indian Country, and both discussing the retained inherent powers of Indian tribes to punish tribal members for crimes). As discussed below, Congress has legislated on matters relating to crime in Indian country, but none of that legislation limited the Tribe's authority to try, convict, and sentence Ms. Miranda for multiple offenses in accordance with tribal law, as it did in the case below.

2. The Indian Country Crimes Act and the Major Crimes Act

The Indian Country Crimes Act, 18 U.S.C. § 1152, extended the general criminal laws of federal maritime and enclave jurisdiction to Indian country, except for those "offenses committed by one Indian against the person or property of another Indian." *See* F. Cohen, Handbook of Federal Indian Law 288 (1982 ed.). These latter offenses typically are subject solely to the jurisdiction of the concerned Indian tribe, unless they are among the offenses enumerated in the Major Crimes Act, 18 U.S.C. § 1153(a) (the "Major Crimes Act"). *See Negonsott v. Samuels*, 507 U.S. 99, 102, 113 S.Ct. 1119, 1121 (1993). Originally enacted in 1885, the Major Crimes Act established federal jurisdiction over 7 crimes committed by Indians in Indian country. Congress has added other crimes over time, and in 2006 the number of enumerated offenses reached 15. *See* 18 U.S.C. § 1153(a).

The Major Crimes Act did not affect the authority of tribes, as separate sovereigns, to prosecute a crime in tribal court that has also been prosecuted by the Federal Government under the Major Crimes Act. *See United States v. Lara*, 541 U.S. at 197-199, 124 S.Ct. at 1631-32 (in separate federal and tribal prosecutions, where key elements of a federal crime mirrored key elements of a tribal crime double jeopardy did not attach because the tribe was a separate sovereign exercising its inherent tribal authority.)

4. ICRA.

ICRA, enacted in 1968, was an exercise of Congress's authority to limit or modify the sovereign powers that Indian tribes otherwise possess. *Santa Clara Pueblo*, 436 U.S. at 57, 98 S.Ct. at 1676. ICRA was intended, in part, to guarantee certain rights to tribal defendants before tribal courts. As such, it placed certain limits on the exercise of Tribal power, and in particular it provided that tribal courts could 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). It also imposed certain guarantees of due process upon tribal court

proceedings.[5] As set forth above, to the extent not specifically prohibited by ICRA, the Tribe exercises its own *sovereign power* (rather than some power delegated by Congress) when it sentences a criminal defendant properly before its tribal court. Because ICRA's guarantees of due process are statutory rather than constitutional, the sole remedy for violations is *habeas corpus*. *See* 25 U.S.C. § 1303; *Means*, 432 F.3d at 932 n. 49 (citing *Santa Clara Pueblo*, 436 U.S. at 58, 98 S.Ct. at 1676-77).

## B. THE DISTRICT COURT ERRED IN ITS FAILURE TO APPLY THE PLAIN LANGUAGE OF 25 U.S.C. 1302(7).

### 1. The "Any One Offense" Language of ICRA is Clear and Unambiguous.

The language of ICRA is clear and unambiguous. It states in relevant part 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..." 25 U.S.C. § 1302(7) (emphasis added). It is axiomatic that the first step in interpreting

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[5] However, not all of the constitutional restraints are imposed. *See Duro v. Reina*, 495 U.S. 676, 682, 110 S.Ct. 2053, at 2058 (1990), *rev'd on other grounds by United States v. Lara*, 541 U.S. 193, 124 S.Ct. 1628 (2001); *Means v. Navajo Nation*, 432 F.3d at 932 n. 49. With the exception of the right to appointed counsel and the right to grand jury indictment for a federal charge, the rights that ICRA guarantees to criminal defendants in tribal court are substantially identical to the constitutional rights of criminal defendants in federal and state courts, including the protections of the Fourth, Fifth, Sixth, and Eighth Amendments. *See* 25 U.S.C. § 1302.

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, 122 S.Ct. 941, 950 (2002) (citation omitted). *See also Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 846 (1997).

The phrase "any one offense" is not ambiguous. Indeed, the word "any" has repeatedly been held to have a broad meaning, intended to be expansive and inclusive. *See Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 219, 128 S. Ct. 831, 836 (2008); *United States v. Gonzales*, 520 U.S. 1, 5, 117 S. Ct. 1032, 1035 (1997) ("[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"). In *United States v. Gonzales*, the Supreme Court considered a provision that imposed an additional sentence for firearms used in federal drug trafficking crimes and provided that such additional sentence shall not be concurrent with "any other term of imprisonment." 520 U.S. at 5, 117 S. Ct. at 1035. The Supreme Court held that the word "any" left "no basis in the text for limiting" the phrase "any other term of imprisonment" to federal sentences. Similarly, in *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 100 S. Ct. 1889 (1980), the Supreme Court considered the phrase "any other final action" in amendments to the Clean Air Act. Focusing on Congress' choice of the word

"any," the Court "discern[ed] no uncertainty in the meaning of the phrase "any other final action," and there was "no indication whatever" that Congress intended to limit the final actions to those in the specifically enumerated sections. *Harrison*, 446 U.S. at 588-89, 100 S.Ct. at 1896. Likewise, in *Ali v. Federal Bureau of Prisons*, the Supreme Court held that "Congress' use of 'any' to modify 'other law enforcement officer' is most naturally read to mean law enforcement officers of whatever kind." 552 U.S. at 220, 128 S.Ct. at 836.

In the instant case, Congress' use of the word "any" to modify "one offense" clearly indicates an intent to encompass "any" criminal offense, whether or not such offense occurs as a part of a "single criminal transaction." Under these circumstances, it is clear that the language of the statute permits Indian tribes to try and convict Indian defendants for "any" and all separate offenses, even when such offenses may have arisen out of a single criminal transaction, so long as the sentence for each offense is not more than a year. In the case below, it was uncontroverted that Ms. Miranda was properly convicted of eight separate criminal offenses. It is also uncontroverted that the sentence for each offense was less than one year. R.E. 2 at p. 6. Under these circumstances, the district court's failure to follow the plain language of the statute was in error. The district court improperly

went beyond the language of the statute to find ambiguity in the plain language of the statute.

2. The Word "Offense" Has a Well-Settled Meaning at Law.

Further, the word "offense" has a well-settled meaning at law that the district court should have looked to. 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, 101 S.Ct. 2789, 2794 (1981); *see also Perrin v. United States*, 444 U.S. 37, 42-43, 100 S.Ct. 311, 314 (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, 98 S.Ct. 2864, 2873 (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, 31 S.Ct. 502, 515 (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 a well-established meaning within the law. Courts have long addressed the propriety of multiple offenses arising out of a single criminal event. As stated by the District Court in *Bustamante*:

> Prior to the enactment of ICRA, the Supreme Court had repeatedly addressed the meaning of the word "offense." Over the years, the Supreme Court had taken the consistent position that "offense" referred to any discrete criminal violation. For example, in 1852, the Court found an individual "by one act [had] committed two offences." In 1915, the Court observed that every discrete violation of a statute was an offense. And in 1932, the Supreme Court observed "[a] single act may be an offense against two statutes." Thus, the meaning of "offense" as any violation of the criminal law was well established long before passage of ICRA.

*Bustamante v. Valenzuela*, ___ F. Supp.2d ___, ___, 2010 WL 1338125, *5 (D. Ariz. Apr. 1, 2010)[6] (citing *Moore v. Illinois*, 55 U.S. 13, 17 (1852); *Ebeling v. Morgan*, 237 U.S. 625, 35 S.Ct. 710 (1915); *American Tobacco Co. v. United States*, 147 F.2d 93, 117 (6th Cir. 1945); *United States v. Bennett*, 383 F.2d 398, 399-400 (6th Cir. 1967)). The term, as defined over the years by the Supreme Court and federal courts of appeals, specifically contemplates multiple "offenses"

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[6] *Bustamante* is identified in Part IX as a related case. *Bustamante* originated, as did this case, in the Pascua Yaqui Tribal Court. The district court in *Bustamante* correctly concluded that tribal courts may properly impose sentences of up to one year per criminal violation even where there are several offenses arising out of the same criminal transaction. *Bustamante*, ___ F. Supp.2d at ___, 2010 WL 1338125, * 7.

arising out of the same transaction of events. It is well-settled law that multiple single "offenses" may arise out of a criminal transaction, and the fact that they arose out of the same set of facts does not prevent them from being separate "offenses." *See, e.g.*, *United States v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 2856 (1993) (citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182 (1932)); *Ohio v. Johnson*, 467 U.S. 493, 494, 104 S.Ct. 2536, 2538 (1984) (respondent indicted for "four offenses" arising from the same criminal transaction); *Albernaz v. United States*, 450 U.S. 333, 344 n. 3, 101 S.Ct. 1137, 1145 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 a single transaction can give rise to distinctive offenses") (citation omitted). Given the well-settled meaning of the term "offense," the district court's conclusion that the phrase "any one offense" is ambiguous was in error.

3. The District Court's Holding Improperly Reads Words Into the Statute.

In addition, the Supreme Court has been reluctant to read words into a statute that do not appear on the statute's face. *See Bates v. Unites States*, 522 U.S.

23, 29, 118 S.Ct. 285, 290 (1997) ("We ordinarily resist reading words or elements into a statute that do not appear on its face.") *See also Dean v. United States*, 129 S.Ct. 1849, 1853, 1856 (2009) (the Supreme Court declined to read a knowingly or intentionally element into the language "if a firearm is discharged" because the lack of an intent requirement in the statutory language indicated that none was intended).

In this case, the *Spears* court and the district court, in reaching their conclusions, have in effect added statutory language that does not appear in the language adopted by Congress. The text of 25 U.S.C. § 1302(7), without the revisions imposed by the district court's holding, provides in relevant part:

> No Indian tribe in exercising its powers of self government shall...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) (emphasis added). The district court and the *Spears* court would have the statute provide instead:

> No Indian tribe in exercising its powers of self-government shall…impose for **conviction of all criminal offenses arising out of the same criminal transaction** any penalty or punishment greater than **a cumulative total of** imprisonment for a term of one year.

The district court's interpretation of the statutory language in effect rewrites the statute to include language that Congress did not include. Its interpretation was in error.

### C. BECAUSE THE LANGUAGE OF THE STATUTE IS CLEAR, THE DISTRICT COURT'S EXAMINATION OF ICRA'S LEGISLATIVE HISTORY WAS IMPROPER.

It is well-settled that where the statutory language issue is not ambiguous, the inquiry should cease, and any examination of the legislative history is both unnecessary and improper. *See Barnhart*, 534 U.S. at 450, 122 S.Ct. at 950; *Ratzlaf v. United States*, 510 U.S. 135, 147-48, 114 S.Ct. 655, 662 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."); *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."). As discussed above,

the phrase "any one offense" is unambiguous. Thus, the district court's examination of the legislative history was in error.

## D. ICRA'S LEGISLATIVE HISTORY DOES NOT SUPPORT THE DISTRICT COURT'S CONCLUSION.

### 1. The Legislative History is Silent as to What Congress Meant by "Any One Offense".

Even if this Court were to agree that the phrase "any one offense" in ICRA is ambiguous such that an examination of the legislative history would be appropriate, ICRA's legislative history simply does not support the district court's conclusion. In fact, the legislative history of ICRA is silent with respect to what Congress meant by "any one offense." *See, e.g.*, S.Rep.N. 841, 90th Cong., 1st Sess. 8 (1967). Where, as here, the legislative history is silent on the issue at hand, legislative history is simply not a useful or reliable tool in the process of statutory construction. *See Richlin v. Chertoff*, 553 U.S. 571, 128 S. Ct. at 2015-16 (where the legislative history did not address the question presented, much less answer it in the Government's favor, the Supreme Court was "not persuaded"); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 493-94 (2d Cir. 2001) (where legislative history was silent as to the meaning of "addition" in the act, the legislative history was not helpful in ascertaining what Congress meant by the word); *Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670

F.2d 238, 242 (D.C. Cir. 1981) ("Drawing inferences as to congressional intent from silence in legislative history is always a precarious business."). Because the legislative history of ICRA does not address the meaning of "any one offense,"[7] the district court improperly relied on the legislative history to conclude that "Congress did not intend to allow tribal courts to impose multiple consecutive sentences for criminal violations arising from a single transaction." R.E. 1 at p. 10.

As the District Court in the *Bustamante* case correctly noted:

> If ICRA were deemed ambiguous, the next step would be to "consider the purpose, the subject matter, the context and the legislative history" of the statute. *Cmty. Bank of Ariz. v. G.B.M. Trust*, 366 FR.3d 982, 986 (9th Cir. 2004) (quotations omitted). These considerations, however, are helpful "only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). Thus, to be helpful, the extrinsic material must be able to "shed a reliable light" on how the phrase "any one offense" should be interpreted.

*Bustamante*, ___ F. Supp.2d ___, ___, 2010 WL 1338125, *5 (D. Ariz. 2010). As the Supreme Court held in *Piper v. Chris-Craft*, 430 U.S. at 26, 97 S. Ct. at 941, because legislative history is a step removed from the language of the statute, it is not entitled to the same weight. The Supreme Court explained:

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[7] Nor is there any mention in the legislative history of the "single criminal transaction" test.

> When there is a conflict between portions of legislative history and the words of a statute, the words of a statute represent the constitutionally approved method of communication, and it would require "unequivocal evidence" of legislative purpose as reflected in the legislative history to override the ordinary meaning of the statute.

*Id*. (citations omitted).

In this case, there is no reliable or clear legislative history of ICRA – and certainly no "unequivocal evidence" – that supports Mr. Miranda's proposed construction. Rather, the legislative history is completely silent regarding the intended meaning of the phrase "any one offense." Under these circumstances, the district court's reliance on ICRA's legislative history was improper.

2. Because the Broad Underlying Purposes of ICRA do not Clearly Establish what Congress Intended, the District Court's Reliance on it Was in Error.

Moreover, the legislative history that does exist with respect to ICRA consists of general statements of the broad purposes of the Act that in no way amount to "unequivocal evidence" of Congressional intent. The legislative history reflects that there were "[t]wo distinct and competing purposes" behind ICRA. *Santa Clara Pueblo*, 436 U.S. at 62, 98 S. Ct. at 1679. First, Congress wished to "strengthen[] the position of individual tribal members vis-à-vis the tribe." *Id*. Second, Congress wished to "promote the well-established federal policy of furthering Indian self-government." *Id*. Because the legislative history did not

specifically address the issue of the meaning of "any one offense," the district court adopted the reasoning of the *Spears* court and concluded that ICRA only affords a limited set of rights due to the fact that "many tribes were not prepared to extend the full range of federal constitutional rights to their members." R.E. 1 at p. 9. The district court concluded – without direct support in the legislative history – that Congress intended that minor crimes by Indians would be prosecuted in tribal court while serious crimes would be prosecuted in federal court. *Id*. Thus, the district court was focused on strengthening the position of tribal members vis-à-vis the tribe, but in doing so it ignored the other broad policy that Congress sought to further, which was to "promote the well-established federal policy of furthering Indian self-government." *Santa Clara Pueblo*, 436 U.S. at 62, 98 S. Ct. at 1679. *See also Bustamante*, ___ F. Supp.2d at ___, 2010 WL 1338125, * 6 (noting that the interpretation proposed by Ms. Miranda and adopted by the court in *Spears* "fundamentally undermines tribal authority, contrary to the express intent of ICRA."). Given the silence in the legislative history regarding what was meant by "any one offense" together with the absence of any other "unequivocal evidence" in the legislative history regarding what was meant by that phrase, the district court's reliance on ICRA's legislative history was in error. *Piper v. Chris-Craft*, 430 U.S. at 26, 97 S. Ct. at 941; *Artichoke Joe's California Grand Casino v.*

*Norton*, 353 F.3d 712, 725-26 (9th Cir. 2003) (where neither party identified any statement of intent or legislative history demonstrating that Congress even considered the question before the Court, the Court declined to rely upon legislative history in making its determination); *Sharp v. United States*, 27 Fed. Cl. 52, 61 (Ct. Cl. 1992) ("Where there is a conflict between an unambiguous statute and its legislative history, the legislative history, particularly when equivocal, is to be accorded little or no weight.").

3. The Term "Any One Offense" Should be Construed in Favor of Indian Tribes.

In addition, even if we were to assume that the district court properly determined that the language at issue in ICRA is ambiguous, the district court should have construed the ambiguity to the benefit of the Tribe. "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, 105 S.Ct. 2399, 2403 (1985) (*citing McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 174, 93 S.Ct. 1257, 1263 (1973) and *Choate v. Trapp*, 224 U.S. 665, 675, 32 S.Ct. 565, 569 (1912)). Importantly, the canon of construction that imposes a presumption that any ambiguity be resolved in favor of Indian tribes "favors only the tribal government; it does not require statutory interpretation favorable to

individual Indian criminal defendants." *United States v. Gallaher*, ___ F.3d ___, ___, 2010 WL 2179162, * 6 (9th Cir. 2010) (citing *Negonsott v. Samuels*, 507 U.S. at 110, 113 S.Ct. at 1125). The district court did not construe the phrase "any one offense" in favor of the Tribe, and its failure to do so was in error.

### E. THE DISTRICT COURT'S ANALYSIS, ADOPTED FROM THE *SPEARS* CASE, IS FLAWED AND SHOULD BE REJECTED.

In *Spears*, 363 F. Supp.2d 1176, the petitioner, intoxicated and without a valid driver's license, drove his car within the Red Lake Indian Reservation, where he struck and killed a person lying on the road. He did not stop or notify police, but instead he drove to his sister's house and did nothing. *Id.* He with charged with crimes in both federal and tribal court, and in tribal court he was charged with six (6) offenses that all arose out of the incident described above. He pleaded guilty to all six (6) charges and the net sentence was thirty (30) months. *Id*. at 1176-77. The *Spears* court held that Congress intended the phrase "any one offense" to mean a "single criminal transaction" such that tribal court defendants could not be sentenced to more than one year total for all crimes committed in the same "criminal transaction." *Id* at. 1180-81.

The district court in this case, in reaching the same conclusion, relied heavily on the *Spears* case. *See* R.E. 1 at p. 10 (the magistrate noting in the Report

and Recommendation that "the court finds the reasoning of the Spears case persuasive and adopts it here."); R.E. 1 at pp. 1-3 (district court adopting the Report and Recommendation). The analysis and rationale of the court in *Spears* and the district court in this case is flawed and should be rejected for several reasons, in addition to those set forth above.

1. The Courts' Strenuous Efforts to Find Ambiguity in the Plain Language of the Statute Appear to be Based on Policy Concerns Which Should be Addressed by Congress Rather than the Courts.

The *Spears* court concluded that ICRA, when read together with the Major Crimes Act, created "a balanced and logical regime" wherein Indians accused of minor crimes [would] be prosecuted in tribal court "where some constitutional rights were withheld" while Indians accused of serious crimes would be tried in federal court "where all constitutional rights were available." *Spears*, 363 F.Supp.2d at 1180. The court, concerned that tribal defendants could be sentenced to more than a year of imprisonment without publicly funded counsel, believed that this was not what Congress intended:

> Considering the foregoing, the Court is convinced Congress did not intend to subject tribal court defendants to many years' imprisonment – without any right to publicly funded counsel – under the guise of a statute ostensibly extending the benefits of the United States Constitution.

*Id.* at 1181. The court reasoned that when ICRA was passed, the Supreme Court "had not yet definitively established a constitutional right to state-provided counsel in non-felony cases," and thus "it made perfect sense for Congress to exclude publicly funded counsel from the ICRA." *Id.*[8] The *Spears* court, believing that the "balanced and logical regime" it envisioned could "be maintained only if 'any one offense' is interpreted to mean 'a single criminal transaction,'" ignored the plain language of the statute in favor of a policy preference that has no basis in either the statutory language or the legislative history. *Id.*

Both the *Spears* court and the district court in the instant case appeared to believe that the fact that Indian tribes are not required under existing law to provide publicly funded counsel to defendants who could face sentences in excess of one year should be remedied, and took it upon themselves to provide a remedy. However, in doing so the courts ignored ICRA's plain language, and their holdings

[8] This reasoning is flawed given that since its passage in 1968, ICRA has been amended twice. It was amended in 1986 to increase the sentencing limitations in Section 1302(7) and it was amended again in 1991 to overturn the United States Supreme Court decision in *Duro v. Reina*, which held that tribal courts did not have criminal jurisdiction over non-member Indians. If Congress had intended to provide for publicly-funded counsel for misdemeanor cases in ICRA, it would have added that requirement in 1986 or 1991. It did not do so, and we can only conclude that its decision was intentional rather than inadvertent.

would purport to rewrite the section of ICRA that deals directly with a defendant's right to counsel.

As an initial matter, the statutory language indicates that the absence of a requirement of publicly funded counsel in such cases was intentional. Congress enacted language listing certain rights that are contained in the Bill of Rights while excluding others. *See* 25 U.S.C. § 1302. In ICRA, Congress specifically addressed the issue of the right to counsel, and stated clearly that the right to counsel is at the defendant's own expense. *See* 25 U.S.C. § 1302(6) (under ICRA, a defendant is entitled "at his own expense to have the assistance of counsel for his defense"). The Supreme Court has confirmed that the statutory language means just that: there is no right to appointed counsel pursuant to ICRA. *See Duro v. Reina*, 495 U.S. at 693, 110 S. Ct. at 2064 (citing 25 U.S.C. § 1302(6) and noting that "[t]here is, for example, no right under the Act to appointed counsel for those unable to afford a lawyer."). Under these circumstances, the courts' conclusion that "any one offense" is ambiguous simply because the courts believe the statutory language should instead provide a right to publicly funded counsel was in error.[9]

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[9] In this case, it is clear that Ms. Miranda was familiar with the Tribe's Office of the Public Defender as she was represented at the PYCA by that office in this case in the tribal court proceedings on appeal. R.E. 1 at p. 19. In addition the

Moreover, the concern of both courts relating to the lack of mandated publicly funded counsel is a policy concern that should be addressed to Congress rather than the courts. It is well-settled that it is not for the courts to rewrite statutes to reflect what the courts believe represents good policy. *See Lewis v. City of Chicago*, 130 S. Ct. 2191, 2200 (2010) ("It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.") (citation omitted); *Ali v. Federal Bureau of Prisons*, 552 U.S. at 228, 128 S. Ct. at 841 ("We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable."); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13, 120 S.Ct. 1942, 1951 (2000) ("In any event, we do not sit to assess the relative merits of different approaches to various bankruptcy problems . . . Achieving a better outcome – if what petitioner urges is that – is a task for Congress, not the courts.") (citations omitted). Under these circumstances, the district court's determination of ambiguity and its subsequent rewriting of the statutory language from "any one offense" to "a single criminal transaction" constitutes an attempt to impose the district court's policy preferences on the statutory language. In doing so the district court erred.

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Pascua Yaqui Office of the Public Defender had represented her in at least three previous criminal matters. R.E. 1 at pp. 19, 22.

2. The Case Law Relied Upon by the *Spears* Court Does not Overcome the Plain Language of the Statute and is Neither Persuasive Nor Helpful.

The *Spears* court began its analysis by concluding that the phrase "any one offense" is ambiguous, and in attempting to resolve the perceived ambiguity it compared this statutory language to similar language used in other contexts. *Spears*, 363 F. Supp.2d at 1178-79. The court stated that "similar language has given rise to controversy and disagreement in other contexts." *Id.* at 1178. As an example the court pointed to the Fifth Amendment prohibition on multiple prosecutions for the same "offense". The court asserted that the term "offense" has been subject to two reasonable interpretations—it could bar consecutive prosecutions for offenses rising out of either the "same evidence" or the "same transaction." *Id*. However, as the district court in *Bustamante* correctly noted, that statement is misleading given that the Supreme Court has never adopted the "same transaction" meaning. *Bustamante*, ___ F. Supp.2d at ___, 2010 WL 1338125, * 4 (citing *United States v. Dixon*, 509 U.S. 688, 709 n.14, 113 S.Ct. 2849, 2865 n.14 (1993). The Tribe agrees with the well-reasoned opinion in *Bustamante* that "[t]o claim the word 'offense' is ambiguous based on a theoretically possible meaning expressly rejected many times by the Supreme Court is not a proper method of statutory construction." *Bustamante*, ___ F. Supp. 2d at ___, 2010 WL 1338125, *

4. Indeed, in *Garrett v. United States*, 471 U.S. 773, 790, 105 S.Ct. 2407, 2417 (1985), the Supreme Court noted "[w]e have steadfastly refused to adopt the "single transaction" view of the Double Jeopardy Clause." Thus, the meaning of the term "offense" suggested by the *Spears* court has been specifically rejected by the Supreme Court.

The *Spears* court also relied on Sixth Amendment case law to support its position that the word "offense" is ambiguous. However, this example does not support any ambiguity in ICRA's use of the term "offense" since the Sixth Amendment does not use the term "offense." Further, given that the relevant developments in Sixth Amendment jurisprudence occurred after the passage of ICRA, these cases are neither persuasive nor helpful. *See Bustamante*, ___ F. Supp.2d at ___, 2010 WL 1338125, * 5 (citing *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968)).

Thus, the Fifth and Sixth Amendment case law relied upon by *Spears* and the district court was of very limited assistance, and does not support its finding of ambiguity. The case law relied upon is off point both factually and legally, and it simply does not provide support for the holding that "any one offense" instead means "a single criminal transaction." The district court's reliance on that case law, in light of the fact that the term "offense" is clear and has a well-settled

meaning, appears to constitute an effort to "find ambiguity where none exists." *Bustamante*, ___ F. Supp.2d at ___, 2010 WL 1338125, *5 (citation omitted).

3. Adoption of the Rationale of *Spears* and the District Court Would Result in Inconsistent Sentencing and Would not Resolve the Issue Which Concerned the Courts.

As the district court in *Bustamante* correctly noted, even under the *Spears* court's construction of ICRA, tribal courts would remain free to impose years of imprisonment, without publicly funded counsel, in those instances where the multiple offenses charged would not qualify as a single criminal transaction. *See Bustamante*, ___ F.Supp.2d at ___, 2010 WL 1338125, * 6. Thus, the adoption of the interpretation embraced by the district court would result in a situation where two individuals who commit the same criminal acts, but one involves distinct criminal acts and the other involves a single criminal transaction, one individual could receive a two year sentence and the other could receive no more than a one year sentence. *Id*. As the district court in *Bustamante* correctly noted, "[t]here is no indication from ICRA's text, history, or context that Congress wished to limit tribal authority in this bizarre manner." *Id*.[10]

[10] Indian tribes frequently impose consecutive sentences for related but separate offenses. This practice, while not universal, is common in Indian Country. *See David L. St. Peter v. Colville Confederated* Tribes, 2 CCAR 2 (Colville 1993)

For each of the reasons set forth above, the district court erred in relying upon the legislative history of ICRA in reaching its conclusion.

## VIII. CONCLUSION

The district court erred in granting Ms. Miranda's Petition for Writ of *Habeas Corpus*. The language of ICRA is not ambiguous, but has a clear meaning which allows the tribe to impose a one year sentence for each offense. The language of ICRA has a well-settled meaning at law, and it must be assumed that Congress legislated with full knowledge of that meaning. In light of the plain and unambiguous language of the statute, the district court erred in finding the language of ICRA ambiguous and in engaging in an unnecessary and faulty analysis of its legislative history. Moreover, an examination of the legislative history does not support the district court's holding. For these reasons and for each

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(Adopting the *Blockburger* doctrine and holding that "[ICRA] only limits the sentence which may be imposed for any one offense."); *Hopi Tribe v. Chimerica*, 5 Am. Tribal Law 249, 250 (2004) ("Appellant was sentenced on the same day as his trial to 120 days in jail for Breaking & Entering, and sentenced to 365 days in jail for Assault & Battery. The jail time was to be served consecutive."); *Navajo Nation v. MacDonald Sr.*, No. A-CR-09-90 (Navajo 1991) (finding that the Navajo legislature intended for the court to determine whether sentences run consecutive or concurrent at the time of sentencing and upholding the defendant's five-year 355-day sentence); *Fort Peck Assiniboine and Sioux Tribes v. Bull Chief*, No. 062 (Fort Peck 1989) (concurring with the court in *Ramos v. Pyramid Tribal Court*, 621 F.Supp. 967 (D. Nev. 1985) and holding that five consecutive one-year sentences did not violate 25 U.S.C. § 1302(7)).

of the reasons set forth herein, the Tribe requests that this Court reverse the decision of the district court.

## IX. STATEMENT OF RELATED CASES

*Ramiro Bustamante v. Michael Valenzueza et al.*, Case No. 10-15714 (*Bustamante v. Valenzuela*, ___ F. Supp.2d ___, ___, 2010 WL 1338125, *5 (D. Ariz. Apr. 1, 2010), is an appeal pending in this Court which has been ordered to be heard by the same panel at this appeal. *Bustamante* originated in the Pascua Yaqui Tribal Court and involves the same or closely related issues.

**CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 10-15308**

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 9,604 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(ii).

Date: July 12, 2010

*s/Amanda Sampson Burke*
Amanda Sampson Burke

**CERTIFICATE OF SERVICE**

I, Amanda Sampson Burke, an attorney, hereby certify that, on this the 12th day of July, 2010, I served the Opening Brief of Appellant Tracy Nielsen (No. 10-15308) on counsel for all parties by using the Court's ECF electronic filing system which will send a copy to all parties registered with that system.

By: s/ Amanda Sampson Burke