C.A. Nos. 10-15167 & 10-15308
(Consolidated)

D. Ct. No. CV-09-08065-PCT-PGR

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BEATRICE MIRANDA,

Petitioner-Appellee,

v.

VINCENT ANCHANDO, Supervisory Correctional Specialist, Bureau of Indian Affairs, Office of Justice Services, Division of Corrections, District 3

and

KURT BRAATZ, ET AL.,

Respondents-Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

OPENING BRIEF OF APPELLANT
(Respondent Vincent Anchando)

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Submitted via ECF: July 12, 2010

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III. STATEMENT OF JURISDICTION

A. District Court Jurisdiction

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 2241 because Beatrice Miranda ("Miranda") filed a Petition for Writ of Habeas Corpus by a Person in Federal Custody. (CR 18; ER 153-164.)[1]

B. Appellate Court Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253, based on entry of the final judgment by the district court on January 12, 2010. (CR 58, 59; ER 10-13.)

C. Timeliness of Appeal

Following the entry of the judgment on January 12, 2010, the United States, on behalf of Respondent Vincent Anchando, filed a notice of appeal on January 21, 2010. (CR 65; ER 1-2.) The notice was timely pursuant to Fed. R. App. P. 4(a).

D. Bail Status

The defendant is out of custody, having been released on January 12, 2010, pursuant to the district court's order. (CR 58, 63; ER 3-9.)

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[1]The abbreviation "CR" refers to the Clerk's Record and will be followed by the pertinent document number(s). The abbreviation "RT" will refer to the Reporter's Transcript and will be followed by a date and relevant page number(s). The abbreviation "ER" refers to the Excerpts of Record and will be followed by the relevant page number(s).

IV. ISSUE PRESENTED

Whether the district court erred in interpreting the Indian Civil Rights Act, 25 U.S.C. § 1302(7), to prohibit tribal courts from imposing consecutive sentences cumulatively exceeding one year for multiple offenses arising out of a single criminal transaction.

V. STATEMENT OF THE CASE

A. Nature of the Case; Course of Proceedings

On August 27, 2009, Miranda filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, arguing that the Pascua Yaqui Tribal Court violated the maximum sentence permitted under the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1302(7) when it imposed a cumulative sentence of 910 days for her multiple offenses.[2] (CR 18; ER 153-164.) The tribal and federal respondents filed answers, and the parties filed cross-motions for summary judgment. (CR 25, 32, 33, 36, 38, 40; ER 45-84, 148-152.)

On December 15, 2009, the magistrate judge issued a report and recommendation, agreeing with Miranda that the ICRA prohibited the tribal court from imposing cumulative sentences totaling more than one year for offenses arising out of the same transaction, and recommending that the district court grant the habeas petition. (CR 46; ER 36-44.) The tribal and federal respondents filed objections to the report and recommendation. (CR 56, 57; ER 14-35.)

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[2]In her habeas petition, Miranda named as respondents: Tracy Neilsen, then the Chief of Pascua Yaqui Tribal Police; Vincent Anchando, the Bureau of Indian Affairs ("BIA") official responsible for the facility in which she was incarcerated; and Kurt Braatz, Commander of the Coconino County Detention Facility, an entity that has contracted with BIA to house certain inmates. (CR 18; ER 153-155.)

On January 12, 2010, the district court entered an order granting the habeas petition, agreeing with the report and recommendation.[3] (CR 58 at 1 n.1; ER 11.) The district court ordered respondents to release Miranda by the next day.[4] (CR 58; ER 11-13.) The Pascua Yaqui Tribe (representing Respondent Nielsen) filed a notice of appeal (CA No. 10-15308), and the government (representing Respondent BIA official Anchando) filed a notice of appeal from the same order (CA No. 10-15167). This Court consolidated both appeals on April 15, 2010.

B. Statement of Facts.

On the evening of January 25, 2008, Beatrice Miranda, by all accounts wandering the Pascua Yaqui Reservation intoxicated, came across a minor Yaqui teenager, M.V.[5] (CR 32-2 at 6, 25-26; ER 87, 106-107.) Miranda believed that M.V.

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[3]Although the district court stated that the respondents filed untimely objections to the magistrate judge's report and recommendation, it nevertheless rejected the objections on the merits. (CR 58 at 1 n.1; ER 11.) The district court's determination that the respondents' objections were untimely does not waive any of respondents' arguments on appeal because they are challenging conclusions of law, not factual findings. *See Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991) (holding that "parties who do not object to a magistrate's report waive their right to challenge the magistrate's factual findings but retain their right to appeal the magistrate's conclusions of law").

[4]Miranda's original release date was scheduled for July 24, 2010. (CR 32-8 at 10; ER 145.) When Miranda was released from custody on January 12, 2010, she had 193 days remaining to be served on her sentence. (CR 63; ER 6-9.)

[5]Because the victim is a minor, she will be referred to by her initials only.

was laughing at her, so she pulled a knife, and began chasing the girl across the reservation while screaming obscenities. (CR 32-2 at 26; ER 107.) M.V. made it home just ahead of Miranda, ran inside her family's house, and alerted her older sister Bridget that Miranda was in their yard yelling and waving a knife around. (CR 32-2 at 13, 26; ER 94, 107.) Bridget went outside to investigate and M.V. followed. (CR 32-2 at 13-14; ER 94-95.) Miranda brandished the knife again and threatened to kill both girls. (CR 32-2 at 14-17; ER 95-98.) Miranda ran off when Bridget called the Pascua Yaqui tribal police. (CR 32-2 at 21, 29; ER 102, 110.)

Based on the girls' description of Miranda, the police found her near the girls' home and, despite some difficulty, restrained and arrested her. (CR 32-2 at 5-6; ER 86-87.) During a search of Miranda's person incident to her arrest, the police found a folding knife, which the girls later identified as the one with which Miranda had threatened them. (CR 32-2 at 7-8, 22-23, 30-31; ER 88-89, 103-104, 111-112.)

On January 26, 2008, the Pascua Yaqui Tribe ("the Tribe") filed a criminal complaint against Miranda, charging her with two counts of endangerment, two counts of threatening and intimidating, two counts of aggravated assault, and two counts of disorderly conduct – all violations of the Pascua Yaqui Tribal Criminal Code. (CR 32-7 at 2; ER 116.) One count of each type applied to Miranda's conduct toward M.V., and one of each type to Bridget. (CR 32-7 at 2; ER 116.) On April 12, 2008,

Miranda appeared pro per[6] at her trial and was found guilty on all eight counts. (CR 32-7 at 4-5; ER 118-119.) The tribal court revoked Miranda's pending probation from a former tribal conviction and sentenced her in the new matter to: (1) two consecutive terms of 365 days' imprisonment for the aggravated assault convictions; (2) two concurrent terms of 60 days' imprisonment for the endangerment convictions; (3) two consecutive terms of 90 days' imprisonment for the threatening/intimidating convictions; and (4) two concurrent terms of 30 days' imprisonment on the disorderly conduct convictions. (CR 32-8 at 10; ER 145.) The tribal court noted on the record that it sentenced Miranda to a total of 910 days in jail, but gave her credit for 114 days already served. (CR 32-8 at 10; ER 145.) Miranda was placed in a federal prison facility under the control of the BIA because the Tribe has no prison facilities. (CR 18; ER 154.)

Miranda appealed to the Pascua Yaqui Court of Appeals, the tribe's highest court, arguing, among other issues, that her cumulative two-and-a-half year sentence violated the maximum sentence permitted under the ICRA, 25 U.S.C. § 1302(7) —

[6]The Pascua Yaqui criminal justice system provides free representation in all criminal matters by a public defender who is admitted to practice before the State Bar of Arizona. (CR 56 at 4-5; ER 22-23.) Miranda had taken advantage of this free representation in at least three separate past criminal incidents, including the matter for which she was on tribal probation at the time of this incident, and was aware of its availability. (CR 56 at 4-5; ER 22-23.) The record does not reveal why she did not ask for a public defender in this matter.

which provides that no Indian tribe shall "impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year." (CR 32-7 at 8, 21; ER 122, 135.) The tribal appellate court heard oral argument on the appeal and affirmed Miranda's convictions and sentences. (CR 32-7 at 7, 26; ER 121, 140.)

Miranda subsequently filed an amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, again arguing her sentence violated the ICRA section 1302(7). (CR 18; ER153-164.) Although section 1302(7) on its face did not preclude the Tribe from imposing separate and consecutive terms of imprisonment for each of Miranda's offenses, Miranda contended that it should be interpreted to preclude such sentencing. (CR 18; ER 153-164.) She noted that a Minnesota district court judge in *Spears v. Red Lake Band of Chippewa Indians*, 363 F. Supp. 2d 1176 (D. Minn. 2005), had interpreted the phrase "any one offense" in section 1302(7) to mean "a single criminal transaction," which meant that terms of imprisonment imposed for each criminal offense committed during "a single criminal transaction" could not aggregate to more than one year imprisonment. *Id*. at 1180. (CR 18; ER 161.) That court found that the phrase "any one offense" was ambiguous and that the Congressional legislative history of the ICRA indicated that Congress did not want Indian tribes to have the authority to impose terms of imprisonment longer than one

year because the tribes did not provide their members with the same constitutional rights that federal courts were required to provide. *Id*. at 1179–81.

On December 15, 2009, the magistrate judge issued a report and recommendation, concluding that the ICRA prohibited the tribal court from imposing a sentence totaling more than one year for offenses arising out of the same transaction. (CR 46 at 4-7; ER 39-42.) He further concluded that Miranda's actions constituted a single criminal transaction, and that the ICRA prohibited any portion of her 910-day sentence above one year. (CR 46 at 8; ER 43.) He accordingly recommended that the district court grant the habeas petition. (CR 46 at 8; ER 43.) The Tribe and Respondent Anchando filed objections to the Report and Recommendation, urging the district court to reject the *Spears* interpretation of section 1302(7) and to apply the plain language of the ICRA. (CR 56, 57; ER 14-35.) They noted that the plain language permitted the tribal court to impose consecutive sentences for separate offenses, whose individual sentences properly did not exceed one year, even if the total overall sentence exceeded one year. (CR 56, 57; ER 14-35.)

On January 12, 2010, the district court entered an order granting the habeas petition, agreeing without further analysis 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." (CR 58; ER 11-12.)

VI. SUMMARY OF ARGUMENT

The tribal court's sentence in this matter was lawful, and the district court's contrary determination was legally erroneous. Section 1302(7) of the Indian Civil Rights Act provides that no Indian tribe shall "impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year." The district court erred in interpreting section 1302(7) to prohibit trial courts from imposing consecutive sentences cumulatively exceeding one year for multiple offenses arising out of the same criminal transaction. The phrase "any one offense" in section 1302(7) is clear and unambiguous: a tribal court cannot sentence a person to a term of imprisonment longer than one year "for any one offense." Section 1302(7) does not prohibit a tribal court from imposing multiple terms of imprisonment for multiple offenses. Moreover, the term "offense" has an established meaning, and the Supreme Court and this Court have held that separate "offenses" can arise from the same criminal transaction.

The district court erred in finding the term "any one offense" ambiguous and then relying on the legislative history of the ICRA to support its ultimate conclusion when no such legislative history exists. Furthermore, even if the phrase "any one offense" were ambiguous, the district court erred in interpreting it in a manner that infringed on tribal sovereignty. Any ambiguities in federal statutes must be resolved

in favor of tribal sovereignty, according to the Supreme Court. The district court's order should be reversed and the tribal court's legally permissible sentence reinstated.

VII. ARGUMENT

The District Court Erred in Interpreting the Indian Civil Rights Act, 25 U.S.C. § 1302(7), to Prohibit Trial Courts from Imposing Consecutive Sentences Cumulatively Exceeding One Year for the Defendant's Multiple Offenses Arising Out of the Same Criminal Transaction.

1. Standard of Review.

This Court reviews *de novo* a district court's decision to grant or deny a habeas corpus petition filed pursuant to 28 U.S.C. § 2241. *United States v. Lemoine*, 546 F.3d 1042, 1046 (9th Cir. 2008). Questions of statutory construction are reviewed *de novo*. *United States v. Forrester*, 592 F.3d 972, 976 (9th Cir. 2010).

2. Argument.

The tribal court's sentence in this matter was lawful, and the district court's contrary determination was legally erroneous. The district court incorrectly interpreted the ICRA section 1302(7) and the phrase "any one offense." The statute's plain language only prohibits tribal courts from imposing a term of imprisonment longer than one year for each offense the Indian defendant commits. The district court first wrongly found the language ambiguous, and then wrongly relied on what it believed to be Congressional legislative history to interpret the statute to prohibit tribal courts from imposing a term of imprisonment longer than one year regardless of the number of offenses an Indian defendant commits, if he commits those multiple

offenses in a "single criminal transaction." (CR 46, 58; ER 11-12, 36-44.) The district court legally erred by: (1) finding the phrase "any one offense" ambiguous; (2) relying on legislative history that did not exist; (3) interpreting "one offense" contrary to Supreme Court and Ninth Circuit precedent; and (4) interpreting the ICRA in a manner against tribal sovereignty, when the Supreme Court requires the opposite.

a. *Section 1302(7) is Plain and Unambiguous.*

The district court erred in ruling that the phrase "any one offense" in section 1302(7) was ambiguous. Rather, it was plain. The first step in statutory interpretation cases is "to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) (internal quotation marks and end citations omitted); *accord United States v. Graf*, No. 07-50100, slip op. at 9635 (9th Cir. July 7, 2010); *United States v. Youssef*, 547 F.3d 1090, 1093 (9th Cir. 2008). If the statutory language is unambiguous and the statutory scheme is coherent and consistent, inquiry ceases. *Barnhart*, 534 U.S. at 450; *Graf*, No. 07-50100, slip op. at 9635. It is therefore both unnecessary and improper to consult legislative history to divine congressional intent where the language of a statute 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.") (internal quotation marks and end citations omitted).

Contrary to the district court's finding, section 1302(7) is clear and unambiguous: a tribal court cannot sentence a person to a term of imprisonment longer than one year "for any one offense." By its own terms, it does not prohibit a tribal court from imposing multiple terms of imprisonment for multiple offenses. *Bustamante v. Valenzuela*, __ F. Supp. 2d ___, 2010 WL 1338125 (D. Ariz. Apr. 1, 2010) (district court, resolving identical issue, found that plain language of section 1302(7) did not prohibit tribal court from imposing consecutive sentences totaling more than one year). The meaning of the term "offense" is well-established. Courts have long held that an offense is a single criminal act that violates a law or statute. *See, e.g.*, *Ebeling v. Morgan*, 237 U.S. 625 (1915) (holding that the defendant, who in the same transaction had cut into multiple mail bags, had committed multiple offenses); *Moore v. Illinois*, 55 U.S. 13, 20 (1852) (stating that "[a]n offense . . . means the transgression of a law.").

The Supreme Court and this Court have held that separate "offenses" can arise from the same criminal transaction. *See, e.g.*, *Ohio v. Johnson*, 467 U.S. 493, 494 (1984) (respondent indicted for "four offenses" arising from the same criminal transaction); *Albernaz v. United States*, 450 U.S. 333, 344 n.3 (1981) ("It is well

settled that [even] a single transaction can give rise to distinct offenses under separate statutes without violating the Double Jeopardy Clause."); *Rhoden v. Rowland*, 10 F.3d 1457, 1461 (9th Cir. 1993) (same); *People of the Territory of Guam v. Iglesias*, 839 F.2d 628, 629 (9th Cir. 1988) (same). The mere fact that the offenses arose from the same set of facts does not preclude them from being separate offenses subject to different punishments. *See, e.g., United States v. Dixon*, 509 U.S. 688, 696 (1993) (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)); *United States v. Antelope*, 430 U.S. 641, 642-43 (1977) (Indians charged with multiple offenses arising out of a single criminal transaction); *United States v. Mitchell*, 502 F.3d 931, 945 (9th Cir. 2007) (same). This Court must interpret statutory terms in light of settled meanings: "It is a well-established rule of 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." *Neder v. United States*, 527 U.S. 1, 21-22 (1999) (internal quotation marks and end citations omitted); *accord NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981); *Youssef*, 547 F.3d at 1093.

The ICRA uses the term "offense" in other contexts consistent with its historical meaning. The ICRA protects Indian defendants against Double Jeopardy violations. *See* 25 U.S.C. § 1302(3) ("No Indian tribe in exercising powers or self-government

shall . . . subject any person for the same offense to be twice put in jeopardy."). In interpreting the Double Jeopardy Clause, the Supreme Court has affirmatively rejected the notion that either multiple or successive prosecutions for the same conduct amounts to punishment for the "same offense," so long as the two offenses contain different elements. *See Dixon*, 509 U.S. at 703-04 (overruling *Grady v. Corbin*, 495 U.S. 508 (1990)); *see also id.* at 696-97 (discussing the same-elements test of *Blockburger*, 284 U.S. at 304). Nothing indicates that Congress intended to adopt the historical meaning of "offense" for section 1302(3), but not for section 1302(7). The historical usage of the term "offense" supports the plain reading of the term in section1302(7).

The district court wrongly found that the phrase "any one offense" is ambiguous. The district court accepted without further analysis the magistrate judge's report and recommendation, which relied heavily on the analysis of *Spears v. Red Lake Band of Chippewa Indians*, 363 F. Supp. 2d 1176 (D. Minn. 2005), the only court, at the time, to directly address this issue.[7] The *Spears* court found that the

[7] The district court issued its decision in this case before another Arizona district court issued its decision in *Bustamante*, 2010 WL1338125, at ** 3-6. The *Bustamante* court denied a habeas petition challenging the Pascua Yaqui Tribe's imposition of two consecutive sentences of nine months each for offenses committed in the same transaction. That case is currently on appeal (No. 10–15714), and this Court has ordered it to be considered by the same panel considering this consolidated (continued...)

language "any one offense" was ambiguous because "similar language has given rise to controversy and disagreement in other contexts." *Id*. at 1178.

The *Spears* court noted that the Fifth Amendment Double Jeopardy provision "prohibits multiple prosecutions 'for the same offence'" and stated that "[t]his phrase has been subject to at least two reasonable interpretations: it could bar consecutive prosecutions for offenses arising out of the 'same evidence, or it could bar consecutive prosecutions for offenses arising out of the 'same transaction.'" 363 F. Supp. 2d at 1178 (quoting *Ashe v. Swenson*, 397 U.S. 436, 449-54 (1970) (Brennan, J., concurring) (arguing for the "same transaction" test)). The flaw in the *Spears* analysis is that the Supreme Court has rejected the "same transaction" test. *See Dixon*, 509 U.S. at 709 n.14; *United States v. Overton*, 573 F.3d 679, 690 (9th Cir. 2009) (noting that "Congress, of course, has the power to authorize multiple punishments arising out of a single act or transaction"). *Spears* even recognizes this. 363 F. Supp. 2d at 1178 n.6.

The *Spears* court also relied on Supreme Court decisions construing the Sixth Amendment concerning when a defendant had the right to a trial by jury. *Spears*, 363 F. Supp. 2d at 1178. But those decisions are wholly inapposite to the meaning of

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[7](...continued)
appeal.

"offense" for two reasons. First, the Sixth Amendment does not use the word "offense." U.S. Const. amend. VI. Second, those decisions examined how to determine whether a criminal offense was sufficiently serious that the Sixth Amendment guaranteed a jury trial. *See Lewis v. United States*, 518 U.S. 322, 325 (1996); *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974). Although *Spears* relied on *Codispoti* to support that "offense" can mean "transaction" — because the Supreme Court aggregated the punishments for the multiple petty offenses in that case in finding that the offenses were "serious" — the Supreme Court subsequently limited the effect of *Codispoti* to its facts. *See Lewis*, 518 U.S. at 328–29. *Spears* recognized this as well. 363 F. Supp. 2d at 1178 n.7.

The district court therefore erred in relying on the *Spears* court's analysis and wrongly rejected the plain meaning of "any one offense" in section 1302(7) in favor of a finding that the language was ambiguous.[8] The phrase "any one offense" was

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[8]The district court did not address *Ramos v. Pyramid Tribal Court*, 621 F. Supp. 967 (D. Nev. 1985). In *Ramos*, the Pyramid Lake Tribal Court found the defendant guilty of "several violations arising from an incident" on the Pyramid Lake Reservation, and sentenced him to consecutive sentences totaling over two years. *Id.* at 968. The defendant argued that his sentence constituted cruel and unusual punishment under the ICRA. *Id.* The district court commented that the defendant's sentences did not violate the length restriction of section 1302(7), because none of the imposed sentences violated the then-limit of more than six months. *Id.* at 970. In determining that the defendant's punishment was not cruel and unusual, the court noted that "the imposition of consecutive sentences for numerous offenses is a (continued...)

clear and unambiguous, *Bustamante*, 2010 WL 1338125, at **3-5, and the district court's "same transaction" analysis was erroneous and has been rejected by the Supreme Court, *see Dixon*, 509 U.S. at 703-04 (overruling *Grady*). The tribal court followed section 1302(7) by imposing a sentence that did not exceed one year for each "offense", and it did not violate the ICRA by running sentences consecutively, resulting in a total overall sentence exceeding one year.

b. *The District Court Erred in Relying on Supposed Legislative History of the ICRA to Support its Holding When No Such Legislative History Exists.*

The district court erred not only in finding section 1302(7) ambiguous, but also in relying on the supposed Congressional legislative history of the ICRA set forth in *Spears* to interpret the phrase "any one offense" to mean a "single criminal transaction." The problem with the district court's reliance on *Spears* for its analysis of the ICRA's legislative history — without doing its own analysis — is that the *Spears* court likewise failed to conduct its own analysis of the ICRA's legislative history, but instead relied heavily upon a 1972 law review article. *Spears*, 363 F.

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[8](...continued)
common and frequently exercised power of judges." *Id.* Although Ramos did not specifically challenge the length of his sentences as a direct violation of section 1302(7), the court's analysis makes clear that it did not interpret "any one offense" to mean a "single criminal transaction."

Supp. 2d 1178 (citing Donald L. Burnett, Jr., *An Historical Analysis of the 1968 Indian Civil Rights Act*, 9 Harv. J. On Legis. 557 (1972)).

The law review author stated that, because many tribes were not "psychologically or financially prepared" to extend every federal constitutional right to their members, the ICRA provides only a specific set of rights. Burnett, 9 Harv. J. on Legis. at 590. One of the rights not provided was publicly funded counsel for criminal defendants in tribal court because it was deemed too great a financial burden for already impoverished tribes. *Id*. at 590-91. Based on this, the *Spears* court jumped to the conclusion that Congress must have intended to limit total sentences in tribal courts to one year to balance out the ICRA's failure to require tribes to provide criminal defense counsel to every tribal defendant. *Spears*, 363 F. Supp. 2d at 1179. Yet, neither the *Spears* court nor the district court here cite any legislative history to support this conclusion. The government has found no legislative history stating that Congress intended section 1302(7) to prohibit a tribal court from imposing multiple terms of imprisonment longer than one year for multiple offenses if an Indian defendant commits offenses in "a single criminal transaction." Rather, as already explained, the plain language permitted the tribal court to sentence as it did.

c. *The Term "Any One Offense" Must Be Construed In Favor of Tribal Sovereignty.*

The term "any one offense" is clear and unambiguous, but if any ambiguity existed, the district court erred in failing to construe the ambiguity in favor of tribal sovereignty. The Supreme Court has instructed that "considerations of Indian sovereignty" serve as "a backdrop against which the applicable . . . federal statute must be read." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978) (internal quotation marks and alterations omitted). Ambiguities must be resolved in favor of tribal sovereignty. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980) (requiring "[a]mbiguities in federal law [be] construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence"); *Santa Clara Pueblo*, 436 U.S. at 60; *United States v. Gallaher*, No. 09-30193, 2010 WL 2179162, at *6 (9th Cir. June 2, 2010) ("[T]he Major Crimes Act — like all federal statutes — must be interpreted to minimize infringement on the sovereignty of Native American tribes.").

Indian tribes "exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991); *accord Dry v. United States*, 235 F.3d 1249, 1253 (10th Cir. 2000). "It is undisputed that Indian tribes have power to enforce their

criminal laws against tribe members." *United States v. Wheeler*, 435 U.S. 313, 322 (1978); *accord Santa Clara Pueblo*, 436 U.S. at 55-56. Included in this power is the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions. *Wheeler*, 435 U.S. at 322. This power is inherent in tribal sovereignty; it does not derive from a delegation by the federal government. *Id*. at 322-23. Although Congress has "plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess," *Santa Clara Pueblo*, 436 U.S. at 56, "proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent[,]" *id*. at 60.

Congress enacted the ICRA in part to "'secur[e] for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments.'" *id*. at 61, but also to "promote the well-established federal 'policy of furthering Indian self-government,'" *id*. at 62. Indeed, the canon of construing any ambiguity in federal statutes to minimize infringement on tribal sovereignty "favors only the tribal government; it does not require statutory interpretation favorable to individual Indian criminal defendants." *Gallaher*, 2010 WL 2179162 at *6. Allowing the tribes the ability to impose consecutive, maximum one-year sentences for each "offense"

committed by an Indian is not only permitted by the ICRA as already explained, but is essential to tribal sovereignty and furthers the tribes' interest in maintaining order and reducing violence and crime in Indian country.[9]

Many offenses in Indian country, including fairly serious offenses such as the aggravated assault charges in this case, cannot be punished in federal district court when they are committed by one Indian against the person or property of another Indian. *See* 18 U.S.C. § 1153(a) (enumerating the crimes punishable in federal court when committed in Indian country by one Indian against the person or property or another); *see also* 18 U.S.C. § 1152 (general criminal statute that treats crimes in Indian country as crimes within the special maritime and territorial jurisdiction of the United States does not extend to offenses committed by one Indian against the person or property of another Indian). A significant criminal episode may involve numerous individual charges, particularly when, as here, they involve multiple victims. The tribes have a valid sovereign interest in punishing each such violation. Indeed, the district court's ruling in this case effectively made seven of Miranda's eight crimes not separately punishable at all once the tribal judge determined that the first aggravated assault charge warranted a sentence of one year of imprisonment. This decision failed to respect tribal sovereignty.

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[9] In addition to the Pascua Yaqui tribe, there are 21 other tribes in Arizona.

The district court erred by concluding that perceived ambiguity in the ICRA should be resolved *against* tribal sovereignty, on the theory that Indians prosecuted in tribal court should not be exposed to serious sentences without the guarantee of all their constitutional rights. (CR 46 at 7; ER 42.) As explained earlier, *Spears* is an incorrect decision. Although Congress did not mandate in the ICRA that tribes provide indigent defendants with appointed counsel, *see* 25 U.S.C. § 1302(6), that policy choice does not suggest that Congress intended that the rest of the ICRA be construed to restrict tribal criminal-adjudication authority as narrowly as possible. A limitation like the one the district court applied here, citing *Spears*, is not only contrary to the plain language, but it is not necessary to prevent tribal courts from imposing effectively unlimited sentences. As noted earlier, another provision of the ICRA, 25 U.S.C. § 1302(3), confers double jeopardy protections on tribal courts and thus ensures that a tribal court cannot impose multiple punishments for the same offense, only for offenses that each contain an element that the other does not. *See e.g. Dixon*, 509 U.S. at 696.

In short, the district court erred when it failed to heed the plain language of section 1302(7). The tribal court followed section 1302(7) by imposing sentences that did not exceed one year for each "offense," and it was not forbidden by that statute to run sentences consecutively, resulting in a cumulative sentence exceeding one year.

Because this case involves multiple "offenses," consecutive sentences cumulatively exceeding one year was not forbidden under the ICRA. *See Dixon*, 509 U.S. at 703-04; *Blockburger*, 284 U.S. at 304; *Bustamante*, 2010 WL 1338125, at *3-7. Accordingly, the district court's order should be vacated and the tribal court's legally permissible sentence should be allowed to stand.

VIII. CONCLUSION

For the foregoing reasons, the district court's order granting Miranda's habeas petition and ordering the Pascua Yaqui Tribe to reduce Miranda's sentence to 365 days should be vacated, and Miranda's original tribal sentence reinstated, so she may serve the remainder of that sentence.

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IX. STATEMENT OF RELATED CASES

To the knowledge of counsel, the following case is a related case pending before this Court: *Bustamante v. Valenzuela*, C.A. No. 10-15714 (*see* n.7, *supra*, noting that *Bustamante* appeal will be resolved by same panel resolving this consolidated appeal).

X. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NOS. 10-15167, 10-15308

I certify that: (check appropriate option(s))

___ 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

□ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words), or is

□ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

√ 2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

√ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

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7/12/10
Date

s/Karla Hotis Delord
Signature of Attorney

XI. CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Karla Hotis Delord
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