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

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

**BEATRICE MIRANDA,**

**Petitioner-Appellee,**

**v.**

**TRACY NIELSEN, et al.,**

**Respondents-Appellants.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA (CV-09-08065-PGR)
(Honorable Paul G. Rosenblatt)

# RESPONDENT/APPELLANT'S REPLY BRIEF

(Respondent/Appellant Tracy Nielsen)

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Oral Argument is Requested

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## I. ARGUMENT

Appellant respectfully requests that this court reverse the decision of the United States District Court for the District of Arizona (hereinafter "the District Court"). Appellant Nielsen (hereinafter "the Tribe")[1] did not waive her right to appeal. Further, The Tribe did not violate the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (hereinafter "ICRA") by imposing a sentence upon Appellee ("Miranda") that cumulatively exceeded one-year incarceration for multiple offenses.

### a. The Tribe did not Waive the Right to Appeal by Filing Objections to the Magistrate's Report Four Hours Late.

The District Court entered an order on December 30, 2009, extending the deadline for Respondents to file objections to the Report and Recommendation ("R&R") "no later than noon on 1/11/10." Due to a clerical error, counsel understood that the deadline for filing objections was 1/11/10. The Tribe filed its objections at 4:05 p.m. on January 11, 2010 ( the "Objections"). Thus, the Tribe filed its Objections four hours and five minutes late. In its January 12, 2010 Order Granting Writ of Habeas Corpus, the District Court noted that it had considered *de*

[1] 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.

*novo* the R&R, and further stated that it had considered the Objections and was "unpersuaded" by them.

*i. The District Court Properly Considered the Objections Raised by the Tribe, and this Court has Appellate Jurisdiction Over the Issues Raised in the Objections.*

As an initial matter, Miranda conflates two distinct legal concepts in her argument that because the Tribe's Objections were filed late, the Tribe has waived its right to appeal to this Court. The first is the question of what level of review the district court is required to provide of a magistrate's report and recommendation when no objections are filed. The second is whether this Court has jurisdiction over the matters raised in the District Court and considered by the District Court, whether or not objections are filed. *See Thomas v. Arn*, 474 U.S. 140, 152-53, 106 S.Ct. 466 (1985) (treating these issues as separate questions); *Schmidt v. Johnstone*, 263 F. Supp.2d 1219, 1221 (D. Ariz. 2003) (acknowledging these are "two distinct issues" to consider separately). Thus, these issues are addressed separately below.

Importantly, nothing in the Federal Magistrates Act prohibits or makes improper the District Court's consideration of the Tribe's Objections. Instead, the statutory language explains when the district court **must** make a *de novo*

determination of the magistrate's report, but it does not preclude the district court from reviewing the magistrate's report in other instances:

> Within ten days after being served with a copy [of the magistrate's proposed findings and recommendations], any party may serve and file written objections to such proposed findings and recommendations, as provided by rules of court. A judge of the court *shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made*.

28 U.S.C. § 636(b)(1)(B) (emphasis added). Thus, while the district court **is required to** make a *de novo* review of those portions objected to, the statutory language does not preclude district court review of those portions not objected to. *See Thomas v. Arn*, 474 U.S. at 154, 106 S.Ct. 466 ("while the statute does not require the judge to review an issue *de novo* if no objections are filed, it does not preclude further review by the district judge, *sua sponte* or at the request of a party, under a *de novo* or any other standard."). Thus, the Objections were properly considered by the District Court.

As it relates to this Court's jurisdiction, under *Thomas*, the circuit courts of appeals are allowed to establish rules regarding: (1) the level of district court review, if any, of a magistrate's unobjected-to recommendations; and (2) the level of appellate review, if any, when the district court has accepted the unobjected-to-recommendations of the magistrate. *See Thomas*, 474 U.S. at 153-54, 106 S.Ct.

466. Thus, absent a local rule precluding appellate review of an issue not addressed in objections, "any issue before the magistrate would be a proper subject for appellate review." *Thomas*, 474 U.S. at 148, 106 S.Ct. 466. Thus, this Court has appellate jurisdiction over the issues raised in the Objections.

*ii. There is no Local Rule that Provides for Automatic Waiver of Appellate Review of Objections Which are Filed Late or Not Filed at All.*

It is clear from existing case law that the Ninth Circuit does not treat the failure to timely file objections as an automatic waiver of appellate review. Indeed, in numerous instances, the Ninth Circuit has exercised appellate jurisdiction to consider matters that were not timely raised in objections to a magistrate's report and recommendations. *See, e.g., United States v. Willis*, 431 F.3d 709, 713 n. 4 (9th Cir. 2005) (the core holding of *Britt v. Simi Valley Unified Sch. Dist.*, 708 F.2d 452 (9th Cir. 1983) – that a prevailing party need not object to a magistrate judge's conclusions of law in order to preserve those grounds for appeal – remains good law); *Pagtalunan v. Galaza*, 291 F.3d 639, 641 (9th Cir. 2002) (noting that the Court had held that the district court abused its discretion when it dismissed the petition without considering two-day late objections); *Martinez v. Ylst*, 951 F.2d 1153, 1156 n.4 (9th Cir. 1991) (rejecting the argument that a failure to object automatically constitutes a waiver and holding that waiver is appropriate where a

party has "failed both to object to a magistrate's finding and to raise the issue until its reply brief in the appellate court, with the result that the issue is not adequately explored"); *Britt*, 708 F.2d at 454 ("The language of [28 U.S.C. § 636(b)(1)] does not indicate that failure to object to a magistrate's recommendations will be an absolute bar to appeal from the district court's decision."), *overruled on other grounds, United States v. Reynia-Tapia*, 328 F.3d 1114, 1121-22 (9th Cir. 2003) (en banc).

Other Circuits have also rejected the idea that a late objection or failure to object automatically results in waiver of appellate review. *See Starns v. Andrews*, 524 F.3d 612, 617 (5th Cir. 2008) (reviewing the report and recommendation *de novo* because the district court considered the objections even though they arrived late); *Kruger v. Apfel*, 214 F.3d 784, 787 (7th Cir. 2000) (appeal not barred when objections were filed one day late and did not prejudice the appellees); *Mario v. P & C Food Markets, Inc.*, 313 F.3d 758, 766 (2d Cir. 2002) (where a district court conducts *de novo* review of an issue that was not raised in objection to the magistrate's report, the Court may disregard the waiver and reach the merits) (citation omitted); *Nabors v. United States*, 929 F.2d 354, 355 (8th Cir. 1990) (where the objections were not timely but the district court considered them, there was no waiver); *Patterson v. Mintzes*, 717 F.2d 284, 286 (6th Cir. 1983) (Court

concluded that when written objections to a magistrate's report are tendered beyond the 10-day period but are nevertheless filed and considered by the district court, the waiver rule does not apply to bar appellate review). Where, as here, the Tribe did object and those Objections were considered by the District Court and there was no prejudice to Miranda,[2] the Tribe did not waive its right to appellate review of those issues.

*iii. There is no "Irreconcilable Conflict" Warranting En Banc Review.*

Miranda correctly notes that there are numerous cases from the Ninth Circuit explaining the law of this Circuit as it pertains to whether a failure to file objections to a Magistrate's Report and Recommendation does or does not, depending upon the circumstances, constitute a waiver of the right to appeal those points to this Court. However, Petitioner's statement that there is an "irreconcilable conflict" requiring en banc review by this Court, is incorrect.

When a panel is presented with an irreconcilable conflict it "*must* call for en banc review, which the court will normally grant unless the prior decisions can be distinguished." *United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992)

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[2] In this case, there was clearly no prejudice to Petitioner, as the arguments raised in the Objections had – prior to the filing of the Objections – previously been raised in the District Court by The Tribe.

(citation omitted). In this instance, the case at issue is distinguishable from those Ninth Circuit decisions in which the Court has held that a party's failure to file objections results in a waiver of the right to appeal. Indeed, the Ninth Circuit cases relied upon by Miranda do not deal with the issue before the Court, which is where a party has filed objections but those objections are filed four hours late but are considered by the District Court and have not caused prejudice to the opposing party, whether an automatic rule of waiver should apply. Instead, the cases relied upon by Miranda involved situations where the party at issue **did not file objections**. *See United States v. Reynia-Tapia*, 328 F.3d at 1121 (no objections filed); *Phillips v. General Motors*, 307 F.3d 1206, 1209-10 (9th Cir. 2002) (no objections filed); *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991) (no objections filed); *Greenhow v. Sec. of Health and Human Svc.*, 863 F.2d 633, 635 (9th Cir. 1988), *overruled on other grounds*, *United States v. Hardesty*, 977 F.2d 1347 (9th Cir. 1992) (Greenhow made an argument on appeal that was not the subject of an objection in the district court); *McCall v. Andrus*, 628 F.2d 1185, 1189 (9th Cir. 1980) (no objections filed); *Schmidt v. Johnstone*, 263 F. Supp.2d at 1220 (no objections filed).

Indeed, none of the cases Petitioner relies on would prohibit or conflict with a Ninth Circuit rule that allows for appellate review in this instance. Moreover,

Petitioner relies heavily on *Thomas v. Arn*, but fails to acknowledge that the Supreme Court in that case expressly acknowledged that "while the statute does not require the judge to review an issue *de novo* if no objections are filed, it does not preclude further review by the district judge, *sua sponte* or at the request of a party, under a *de novo* or any other standard." *Thomas v. Arn*, 474 U.S. 140, 154, 106 S.Ct. 466. Under these circumstances, there is no "irreconcilable conflict" in the case law of this Circuit because the instant case "can be distinguished" from the prior decisions. *United States v. Hardesty*, 977 F.2d at 1348.

**b. Miranda's Cumulative Sentence of 910 Days for Multiple Offenses Committed Against Two Victims does not Violate the Indian Civil Rights Act.**

*i. The Plain Language of the Indian Civil Rights Act does not Preclude Consecutive Sentences that Exceed One-Year.*

The interpretation of a statute begins with the language of the statute itself. "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumers Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056 (1980). The language of 25 U.S.C. §1302(7) is clear on its face. A penalty of no more than one year may be imposed for "any one offense."

In *Albernaz v. United States*, 450 U.S. 333, 101 S.Ct. 1137 (1981), the Supreme Court confronted the issue of whether Congress intended to allow the imposition of consecutive sentences for a violation of two statutes. In that case the sentences together exceeded the maximum sentence which could have been imposed for either violation. *Albernaz* at 334-335. Under these circumstances, which are similar to the instant case, the Supreme Court upheld consecutive sentences finding that where the statutes were unambiguous on their face and the legislative history was silent on the issue of consecutive sentences, Congress could be presumed to have known the state of the law and to be aware of the rule in *Blockburger v. United States*, 284 U.S. 299, 302, 52 S.Ct. 180, 181 (1932) ("If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie." *Citing* Wharton's Criminal Law (11th Ed.)). It is appropriate to assume that our elected representatives know the law. *See Albernaz*, 450 U.S. 333 at 341-342, 101 S.Ct. 1137 at 1143-44. *See also 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...").

Miranda cites this Court's opinion in *Padilla-Romero v. Holder*, 611 F.3d 1011, 1013 (9th Cir. 2010) for the proposition that the Court's objective "is to

discern congressional intent." However, the court in *Padilla-Romero* first states that it finds the statute in question "somewhat ambiguous". *Id.* This finding of ambiguity is, of course, a prerequisite for considering the congressional intent. The first step in interpreting a statute is to consider whether the language of the statute has a "plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S.Ct. 941, 950 (2002) (citation omitted). The language of 25 U.S.C. §1302(7) is not ambiguous. In *Padilla-Romero* the Court found ambiguity because the language at issue can grammatically give rise to two distinct meanings. This is not the case with the "any one offense" language in ICRA. "One offense" simply cannot be grammatically construed to mean "single criminal transaction".

Miranda cites a case in which this Court states that it must look to the plain language of the statute, "construing the provisions of the entire law, including its objects and policy, to ascertain the intent of Congress." *Retuta v. Holder*, 591 F.3d 1181, 1188 (9th Cir. 2010) (internal citations omitted) However, this statutory construction occurs only after the Court determines that it cannot adduce the meaning of the statute from its face. *Id.* at 1187. Given the plain meaning of the statute, and the commonly understood rule regarding distinct offenses at the time

of the enactment of ICRA in 1968, it was error for the Court to look to the legislative history of ICRA.

*ii. The Legislative History of the Indian Civil Rights Act is not Supportive of Miranda's Position.*

Because the language of the statute is not helpful to Miranda's position, Miranda is forced to rely on ICRA's legislative history. The legislative history relied upon, however, is silent on the issue of consecutive sentencing, and thus cannot be persuasive. Miranda asserts that the District of Minnesota in *Spears v. Red Lake Band of Chippewa Indians*, 363 F.Supp. 2d 1176 (D. Minn. 2005) engaged in a proper analysis of the legislative history of ICRA. That court concluded that the language of §1302(7) is ambiguous, and that the legislative history of ICRA supports an interpretation of the phrase "any one offense" in ICRA to mean "single criminal transaction." Both of these propositions are incorrect. A decision of the District of Minnesota is not binding on this Court, and the court was incorrect in finding ambiguity, thus review of the legislative history was improper. *Talamantes v. Leyva*, 575 F.3d 1021, 1023 (9th Cir. 2009), *United States v. Rand*, 482 F.3d 943, 946 (7th Cir. 2007), *Cowherd v. Million*, 380 F.3d 909, 913 (6th Cir. 2004). Further, the legislative history of ICRA does not address the pertinent issue.

*iii. The Legislative History of ICRA is Silent on the Relevant Provision.*

Miranda begins her inquiry into the legislative history of ICRA with a lengthy discourse which she titles the "History and Purposes of Federal Regulation of Tribal Court Sentencing" (Appellee's Br. at 4). The section details the United States Senate Committee on the Judiciary's Subcommittee on Constitutional Rights ("the Subcommittee") investigations and hearings into the Constitutional Rights of the American Indian over the course of seven years, led by Senator Ervin of North Carolina.[3] However, the legislative history cited by Miranda does not provide a helpful discourse on the relevant provision of ICRA, 25 U.S.C. § 1302(7). First, sentencing was not the primary focus of the Subcommittee's investigation, and thus to refer to the legislative history as that of "tribal court sentencing" is inaccurate. The Subcommittee convened hearings to discuss the constitutional rights of American Indians with a focus on the reservation Indian and his ability to exercise rights provided by the United States Constitution.[4] Insofar as the hearings discussed sentencing limitations, the testimony cited by Miranda all reference

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[3] Joseph de Raismes, *The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government*, 20 S.D. L. Rev. 60 (1975)

[4] *Constitutional Rights of the American Indian: Hearings Before the Subcomm. On Constitutional Rights of the S. Comm. On the Judiciary*, 87th Cong., 1st Sess. (1961) at 1.

specific practices of the time in various tribal courts and Courts of Indian Offenses without reference to the issue of separate sentences for separate offenses. *Appellee's Response Brief* at nn. 15-16. It is well-settled that where the legislative history does not address the critical question in a case, much less answer the question, the legislative history is simply not a useful tool in the process of statutory construction. *Richlin Security Service Co. v. Chertoff*, 553 U.S. 571, 585 128 S.Ct. 2007, 2016-17 (2008). *See also Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 26, 97 S.Ct. 924, 941 (1977) ("[U]nequivocal evidence" of legislative purpose as reflected in the legislative history is required in order "to override the ordinary meaning" of a statute.)

In addition to its silence on the salient point, the legislation as eventually passed by Congress in 1968 reveals a different text to the language originally introduced in 1965, which did not become law. Since most of the hearings occurred between 1961 and 1965, the discussions and testimony at those hearings occurred before the 1965 bills, which were rejected.[5] It is therefore questionable

[5] An overview of the proposed legislation which sought to bring the Constitution to the reservations, to integrate tribal legal systems with the overall legal system of the United States, and also allowed for the *de novo* review and trial of tribal court cases in Federal District Courts can be found in Donald L. Burnett,

how much of the 1968 Act as passed can be said to be reflected from testimony heard in the pre-1965 hearings. As the Supreme Court has stated, "[L]egislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil Corporation v. Allapattah Svcs., Inc.*, 545 U.S. 546, 567-68, 125 S.Ct. 2611, 2625-26 (2005) (Rejecting the argument that a statute was ambiguous and legislative history should be consulted.) The Supreme Court avoids relying on comments in hearings, as those comments are not representative of what members of the legislature believed at the time. *See Kelly v. Robinson*, 479 U.S. 36, 51 n. 13, 107 S. Ct. 353 (1986) (citation omitted). "As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp*., 545 U.S. 546 at 568, 125 S.Ct. 2611 at 2625-26. The Court further noted that "[n]ot all extrinsic materials are reliable sources of insight into legislative understandings," given that much legislative history is ambiguous or contradictory, and thus leads to the exercise of "'looking over a crowd and picking out your friends.'" *Id*. (internal quotation omitted). In analyzing legislative history, the courts must focus on the legislative history that sheds light on what the legislators understood (rather than what some other parties might have

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Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 Harvard J. on Legis. 557, 588-602 (1971-72)

thought). *See Id.* at 569-70 (must look at "how the **enacting** Legislature understood the statutory text") (emphasis added).

The legislative history is not reliable guidance on what "any one offense" means, because it is silent on that particular point. *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056 (The starting point is the language of a statute itself and "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."); *See also Symons v. Chrysler Corporation Loan Guarantee Board*, 670 F.2d 238, 242 (D.C. Cir. 1980) (Rejecting theory of statutory interpretation that would allow courts to read out of a statute an unambiguous phrase when no explanation of the phrase exists in the legislative history.); *and see State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 697 (1st Cir. 1994) (The court found that "legislative history that is in itself inconclusive will rarely, if ever, overcome the words of a statute.") While the legislative history of what eventually became 25 U.S.C. §1302 makes clear that Congress intended to extend some portions of the Bill of Rights to individual Indians, it does not specifically discuss the "any one offense" phrase in 25 U.S.C. §1302(7). The lack of express congressional intent regarding the "any one offense" language does not allow the

Court to substitute alternate language as Miranda suggests and as the District Court erroneously concluded.

*iv. Far from Balancing the Dual Purposes of Congress in Enacting ICRA, Miranda Completely Ignores the Purpose of Enhancing Tribal Self-Government.*

Miranda's assertion that the plain language of the statute suggests only the intent to limit tribal court authority through a "sentencing cap" and her reliance on the record to highlight only the purpose of extending civil rights to individual Indians do exactly what she accuses Appellants of doing, i.e. giving one legislative purpose greater weight than the other. Miranda Br. at 53-54. The eventual result of the Subcommittee's hearings and proffered legislation was the extension of certain provisions of the Bill of Rights to individual Indians as against their tribal governments. 25 U.S.C. §1302. The fact that not all provisions of the Constitution or the Bill of Rights are applied to the tribes is telling, and involved a compromise from the original language offered by the Subcommittee, a compromise which supported tribal autonomy and authority.[6] A study of the legislative history

[6] Originally Senator Ervin had been a proponent of imposing upon tribes the constitutional limitations applicable to the federal government, but ICRA as enacted extends only certain specified provisions to members of tribes as individuals. "This change was the product of a philosophical compromise between Senator Ervin's apparent view that the scope of public authority should be strictly

suggests that Congress was very careful in deciding how it would limit tribal governments.[7] Where, as here, the plain language of the statute only limits the tribe to imposing a sentence of no more than one-year for "any one offense" the limitation cannot be so broadly read as to take away a sovereign power not specifically limited by Congress, i.e. to limit tribal courts in a way that state courts are not limited, and to defeat the goal of tribal self-government.

Miranda's reading of the Supreme Court's opinion in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct 1670 (1978) is incorrect, and again attempts to give greater weight to her position than exists in the case. *Santa Clara* does acknowledge the purpose of providing individual Indians with rights vis-à-vis their tribal governments. *Id* at 65. At the same time the Court acknowledges that the Subcommittee's 1965 bill would have extended to tribal governments all constitutional provisions, but that after criticism of this approach, Congress instead

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defined by the individual's need for protection and essential services, and the view, expressed in extreme form by the Pueblos, that the scope of individual liberty should be strictly limited by the community's traditional need for harmony….It does not authorize the court to apply broadly such elusive and expanding concepts as due process, equal protection, or unreasonable search and seizure without a sensitive regard for their impact on tribal structures and values." *Burnett, supra* n. 5 at 617.

[7] *Id.*

adopted some modified safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments, showing a commitment to the goal of tribal self determination. *Id.* at 65 and nn. 12-13. In light of the dual purposes of ICRA, the fact that a footnote in *Santa Clara* refers to an absolute limit of six-months, is not dispositive, and does not negate the fact that the language of the statute is clear as written, does not contain the word "absolute" and can be effectuated consistently with the purposes of ICRA. *Id*. at 63 n. 14. Moreover, in both the instances that Miranda cites for the proposition that a statute should not be construed to effectuate one congressional purpose to the disservice of another, *Santa Clara* was warning against disserving the purpose of maintaining tribal self-government, and **not** the purpose of advancing individual Indian rights. In the first instance the Court warns against inferring a cause of action that while it may be useful in insuring tribal compliance with §1302, would plainly be "at odds with the congressional goal of protecting tribal self-government." *Id.* at 64. In the second instance, when the Court spoke of "disturbing the balance between dual statutory objectives" the Court was referring to its reluctance to insert further federal review into tribal court processes, which it recognized as "available to vindicate the rights

created by the ICRA" *Id.* at 65-66.[8] Given that the Supreme Court, in the language of the case itself, is clearly concerned with preserving the goal of tribal self-government, Miranda's assertion that the language she cites supports her position is a wholly disingenuous and erroneous reading of *Santa Clara*. Appellant's Br. at 53-54.

*v. ICRA Applied Constitutional Limitations to Indian Tribes and Allows for Habeas Relief to Vindicate Infringement of those Rights.*

Contrary to Miranda's assertions, the double-jeopardy clause of ICRA is a limitation on a tribe's ability to consecutively sentence. Appellee's Br. at 60. Double jeopardy protection is applied to the tribes through 25 U.S.C. § 1302(3) just as it applies to the states through the Fourteenth Amendment, and "protects against multiple punishments for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225 (1977). "The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative

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[8] In the case below, Miranda used tribal court processes, appealing her conviction to the Pascua Yaqui Court of Appeals ("PYCA") and raising violation of 25 U.S.C. § 1302(7) as well as several other constitutional claims. Miranda was represented by counsel at the PYCA. The PYCA found that Miranda's rights under § 1302(7) had not been violated since her offenses were separate and against two victims. ER vol. 1 at 13-40. ICRA's Bill of Rights provisions have been incorporated into the Pascua Yaqui Constitution. Available at http://www.pascuayaqui-nsn.gov/_static_pages/tribalcodes/

punishment was stated in *Blockburger v. United States*," *Brown* at 166 (internal citations omitted). Miranda argues that a legislative body could create laws that obliterate the rule in *Blockburger*. To support this argument she cites a footnote in *Brown*, which states that the case might have been different if the Ohio legislature had provided for a separate offense for each day the "joyriding" is committed. *See Brown*, 432 U.S. 161 at 169 n.8, 97 S.Ct. 2221 at 2227 n.8. This footnote is dicta, and the Court engaged in speculation as such a law was not the issue before the court in *Brown*. Contrary to Miranda's assertions, the Court in *Brown* holds that "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Id.* at 169.

The Pascua Yaqui Tribal Codes do not create separate offenses for individual narcotic pills, or individual firecrackers, as Miranda warns would be possible in her "parade of horribles" argument. Miranda here engages in a policy argument, as her assertions do not track the facts of this case. *See* Appellee's Br. at 59-60. (The Pascua Yaqui Tribal Code is available online at: http://www.pascuayaqui-nsn.gov/_static_pages/tribalcodes/.) Miranda's claim that the double jeopardy prohibition in ICRA is ineffective are unconvincing and moreover, pure speculation since Miranda has not raised a double jeopardy claim

pursuant to 25 U.S.C. §1302(3), either in the tribal court, the Pascua Yaqui Court of Appeals, or at the District Court.

The tribal defendant whose rights have been infringed by the tribe has a range of constitutional challenges that he can assert in federal court via a *habeas* action because of the various Bill of Rights provisions applied to tribes through ICRA. The use of the sentencing limitation to raise what is essentially a double-jeopardy challenge is another attempt to avoid the plain language of the statute.

*vi. Amicus' Arguments are Largely Repetitive of Appellee's Arguments and are Equally Unpersuasive Even Where they Differ.*

Amicus National Association of Criminal Defense Lawyers (hereinafter "NACDL") largely reiterates Miranda's arguments, which are inaccurate and unpersuasive for the same reasons discussed above. However, NACDL raises several arguments that require brief discussion here.

First, the Tribal Law and Order Act of 2010 Amendments do not reveal ambiguity in the original sentencing provisions of ICRA, as NACDL argues. In fact, the 2010 Amendments define "offense", stating, "In this section, the term 'offense' means a violation of a criminal law." Pub. L. No. 111-211, §13, 124 Stat. 2279-2281, at §234. This definition makes clear that offense is not defined as a

course of conduct, but rather as each violation of a criminal statute. If anything, this only serves to clarify the existing language of ICRA as written.

Second, the rule of lenity does not apply because the case herein does not involve ambiguity in language of a criminal statute. As discussed above, the statutory language is plain and without ambiguity. Further, the cases cited by NACDL largely involve violations of penal statutes. Here, it is not the underlying Pascua Yaqui Criminal Codes that are at issue, but the Indian Civil Rights Act, which is not a penal code. This Court in *United States v. Gallaher*, 624 F.3d 934, 941 (9th Cir. 2010) states that the Supreme Court has two rationales for the rule of lenity; first, that there should be notice and a fair warning that the common world would understand, and second, that legislatures not courts should define criminal activity. *Id. citing United States v. Bass*, 404 U.S. 336, 348, 92 S.Ct. 515 (1971) Here, neither of the rationales apply. There is notice because the language is plain--the common world understands the plain language of the term "any one offense," to mean individual offenses or violations of the criminal code. The second rationale applies to the underlying penal code, not to ICRA. Finally, NACDL states that the rule applies not only to interpretation of statutes defining offenses (which ICRA is not) but rather to penalty provisions. NACDL Amicus Br. at 20. 25 U.S.C. §1302(7) cannot be said to be a penalty provision of a penal code. The

Supreme Court has stated that the touchstone of the rule of lenity is statutory ambiguity. *United States v. Bifulco*, 447 U.S. 381, 387 (1980) *citing Lewis v. United States*, 445 U.S. 55, 65, 100 S.Ct. 914, 921 (1980). Here the statute is plain and unambiguous. For all these reasons, the rule of lenity does not apply.

Finally, NACDL's inquiry into the social norms of tribes is irrelevant and not useful because such generalizations are not possible given the broad diversity of cultures involved.

## II. CONCLUSION

The imposition of a sentence totaling over one-year for conviction of multiple offenses committed against two victims was not a violation of 25 U.S.C. §1302(7). The language of ICRA is not ambiguous, but has a clear meaning that allows the tribe to impose a one year sentence for each offense. Therefore, the District Court erred in granting Miranda's request for writ of habeas corpus. For these reasons and for each of the reasons set forth herein, Appellant respectfully requests that this Court reverse the holding below.

Respectfully Submitted on January 21, 2011,

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## III. 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 reply brief is proportionately spaced, has a typeface of 14 points or more and contains 5,337 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(ii).

Date: January 21, 2011 By: *s/Amanda Sampson Burke*
Amanda Sampson Burke

## IV. CERTIFICATE OF SERVICE

I, Amanda Sampson Burke, an attorney, hereby certify that, on this the 21st day of January, 2011, I served the Reply Brief of Appellee Beatrice Miranda (Nos. 10-15167 & 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.

Date: January 21, 2011 By: *s/ Amanda Sampson Burke*
Amanda Sampson Burke