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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

8 Michael Jackson,

9 Petitioner,

10 vs.

11 Randy Tracy,

12 Respondent.  
13

No. 2:11-cv-00448-FJM-ECV

**RESPONSE IN OPPOSITION TO  
MOTION FOR SUMMARY  
JUDGMENT**

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15 For his Response in Opposition to Motion for Summary Judgment,  
16 Respondent Randy Tracy states:

17 **INTRODUCTION**

18 Petitioner Michael Jackson, an enrolled member of the Gila River  
19 Indian Community, was charged on August 7, 2007, with violating the Gila  
20 River Indian Community Code when committing certain acts within the  
21 boundaries of the Gila River Indian Community Reservation. A bench trial  
22 was held before the Gila River Indian Community Court on May 13, 2008.  
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1 Mr. Jackson was represented by an experienced tribal court advocate and,  
2 after trial testimony from three witnesses, was found guilty by the Court of  
3 domestic violence, child abuse, two counts of molestation of a child, and two  
4 counts of sexual abuse. Following the bench trial, Mr. Jackson filed a motion  
5 for new trial before the Community Court, which was denied. Mr. Jackson  
6 appealed to the Gila River Indian Community Court of Appeals, alleging  
7 insufficiency of evidence, the failure of the Community to meet its burden of  
8 proof beyond a reasonable doubt, and ineffective assistance of counsel. After  
9 the matter was fully briefed and oral arguments presented to the Court of  
10 Appeals, the Court of Appeals issued an order denying the appeal and  
11 remanding the case to the trial court for sentencing.  
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13  
14 Mr. Jackson posted bond and was released from the Gila River Indian  
15 Community Department of Rehabilitation and Supervision on December 20,  
16 2010. He filed his Petition for Writ of Habeas Corpus in this Court on March  
17 8, 2011, at which time he was pending sentencing and subject to possible  
18 additional incarceration. On May 26, 2011, Mr. Jackson was sentenced by the  
19 Gila River Indian Community Court to three years detention with credit for  
20 time served—meaning he risked no additional jail time—and was ordered to  
21 register as a sex offender. Because Mr. Jackson is no longer in custody, and  
22 the only collateral consequence of his conviction is the requirement to register  
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1 as a sex offender, the Petition for Writ of Habeas Corpus should be denied and  
2 the action dismissed with prejudice.

3 **ARGUMENT**

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5 Petitioner seeks summary judgment on three claims of violation of his  
6 legal rights: his conviction violated the Indian Civil Rights Act, 25 U.S.C. §  
7 1302(6), because Mr. Jackson was improperly denied his right to counsel; the  
8 Community failed to comply with its Criminal Code in violation of Mr.  
9 Jackson's right to due process as guaranteed under the Indian Civil Rights  
10 Act, 25 U.S.C. §1302(8); and the amendment of the criminal complaint prior  
11 to trial violated Mr. Jackson's due process guarantee under the Indian Civil  
12 Rights Act ("ICRA"), 25 U.S.C. §§ 1302(6) and (8).

13  
14 **I. THE PETITIONER WAS NOT IMPROPERLY DENIED**  
15 **HIS RIGHT TO COUNSEL BECAUSE SECTION 1302(6)**  
16 **OF THE INDIAN CIVIL RIGHTS ACT PROVIDES FOR**  
17 **COUNSEL AT HIS OWN EXPENSE.**

18 The ICRA provides that no Indian tribe exercising powers of self-  
19 government shall deny to any person in a criminal proceeding the right at his  
20 own expense to have the assistance of counsel for his defense. 25 U.S.C. §  
21 1302 (6).<sup>1</sup> There is no federal right to appointed counsel in tribal criminal

22  
23 <sup>1</sup> The Indian Civil Rights Act was amended on July 29, 2010 by Pub. L. No. 111-211, title II, the Tribal Law and Order Act; however, criminal complaint against Mr. Jackson was filed prior to the amendment and there is no provision or manifestation of retroactive application of the Tribal Law and Order Act.

1 proceedings. *Tom v. Sutton*, 533 F.2d 1101 (9th Cir. 1976). If the Court desires  
2 to make a determination of ineffective assistance of counsel, Respondent  
3 suggests it do so after an evidentiary hearing; however, Respondent  
4 recommends caution in entertaining such an argument given that there is no  
5 federal right to appointed counsel in tribal criminal proceedings.  
6

7       The investigation, prosecution and punishment of crimes committed by  
8 tribal members is an inherent attribute of tribal sovereignty, and has been  
9 recognized by the United States Supreme Court and the Ninth Circuit in  
10 significant cases. In *United States v. Wheeler*, 435 U.S. 313 (1978), the  
11 Supreme Court of the United States held that when a tribe punishes a tribal  
12 member under tribal law, it acts as an independent sovereign rather than an arm  
13 of the federal government. The powers of Indian tribes are “inherent powers of  
14 a limited sovereignty which has never been extinguished.” *Cohen’s Handbook*  
15 *of Federal Indian Law*, § 4.01[1][a] at 206 (2005) (citation omitted).  
16

17       This inherent power extends to criminal laws enforced against tribal  
18 members. Justice Stewart wrote in *Wheeler*, “It is undisputed that Indian tribes  
19 have power to enforce their criminal laws against tribe members. Although  
20 physically within the territory of the United States and subject to federal  
21 control, they nonetheless remain a separate people, with the power of regulating  
22 their internal and social functions.” *Wheeler*, 435 U.S. at 322 (citations  
23

1 omitted). The right of self-government that Indian tribes possess “includes the  
2 right to prescribe laws applicable to tribe members and to enforce those laws by  
3 criminal sanctions.” 435 U.S. at 322 (citations omitted). The power of an Indian  
4 tribe to punish tribal offenders “has never been taken away from them, either  
5 explicitly or implicitly, and is in no way attributable to any delegation to them  
6 of federal authority.” 435 U.S. at 328.

8 Federal courts have recently held that the ICRA provision providing the  
9 right to counsel at one’s own expense is substantially different from the right to  
10 counsel recognized under the Bill of Rights to the United States Constitution.  
11 *United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011); *United States v.*  
12 *Shavanaux*, 647 F.3d 993 (10th Cir. 2011). Because any right to counsel under  
13 ICRA is expressed in different, and more conditional, terms than the right to  
14 counsel under the Bill of Rights, Respondent contends that it is improper to  
15 apply those standards in a blanket fashion. At the very least, the Court should  
16 be required to undertake a thorough analysis of whether those standards apply  
17 to a tribal court advocate and what constitutes effective representation by a  
18 tribal court advocate.<sup>2</sup>

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22 <sup>2</sup> It is worth noting that the Gila River Indian Community Court of Appeals denied Mr.  
23 Jackson’s appeal on the basis that his voluntary use of a tribal court advocate—after  
declining the representation of a licensed attorney—was an implied waiver of the right to  
representation by an attorney. Dkt #16 at 145-146.

1 Finally, even if this Court applied the standards for ineffective assistance  
2 of counsel from *Strickland v. Washington*, 466 U.S. 668 (1984), there is no  
3 showing—other than an assertion in one sentence of the Mr. Jackson’s  
4 Motion—that the outcome of the trial would have been different.

5  
6 **II. THE PETITIONER’S DUE PROCESS RIGHTS WERE**  
7 **NOT VIOLATED BY DISCLOSURE OF ADDITIONAL**  
8 **INFORMATION PRIOR TO TRIAL AND WERE NOT**  
9 **VIOLATED BY AMENDMENT OF THE CRIMINAL**  
10 **COMPLAINT**

11 The ICRA provides that no Indian tribe in exercising powers of self-  
12 government shall deny to any person in a criminal proceeding the right to be  
13 informed of the nature and cause of the accusation, 25 U.S.C. § 1302(6), nor  
14 deny any person within its jurisdiction the equal protection of its laws or  
15 deprive any person of liberty or property without due process of law, 25 U.S.C.  
16 § 1302(8). Mr. Jackson claims that he is entitled to relief by alleging the  
17 “Community arbitrarily breached this requirement when it failed to deliver  
18 certain statements of crucial Community witnesses C.J. and Melissa Mallow to  
19 Mr. Jackson or his counsel until less than 24 hours before the trial began,” Dkt  
20 #20 at 16, and alleging that the Community violated Petitioner’s right by  
21 substantively amending the complaint on the morning of trial, Dkt #20 at 17.

22 “A dispute over the meaning of tribal law does not arise under the  
23 Constitution, laws, or treaties of the United States as required by 28 U.S.C. §§

1 1331 and 1362. This is the essential point of opinions holding that a federal  
2 court has no jurisdiction over an intratribal dispute.” *Kaw Nation ex rel.*  
3 *McCauley v. Lujan*, 378 F.3d 1139 at 1143 (10th Cir. 2004). Citing *Kaw*  
4 *Nation*, United States Magistrate Judge David K. Duncan recently stated in a  
5 Report and Recommendation that “[c]ompliance with a discovery provision of  
6 the Community’s criminal code, and sufficiency of evidence of intent, are  
7 both issues of Community law and not appropriate for federal habeas review.  
8 *Fortino Alvarez v. Randy Tracey*, 2:08-cv-02226-DGC-DKD, Dkt #105 at 10.  
9 Additionally, the issue of disclosure was argued by the Petitioner in his  
10 motion for new trial, Dkt #16 at 24, which was denied by the Community  
11 Court, Dkt #16 at 35. As to the amendment of the criminal complaint, the  
12 Petitioner was represented by a tribal court advocate at trial and failed to  
13 object to the amendment of the criminal complaint, did not move for a  
14 continuance, and did not move for dismissal on that basis.

### 17 CONCLUSION

18 Mr. Jackson has been sentenced to time served and is no longer  
19 considered “in custody” for purposes of relief. Once a sentence has expired, a  
20 petitioner must show some concrete and continuing injury other than the now-  
21 ended incarceration—some “collateral consequence” of the conviction—if the  
22 suit is to be maintained. *Spencer v. Kemna*, 523 U.S. 1 (1998). The  
23

1 requirement to register as a sex offender does not meet the in-custody  
2 requirement for habeas relief. *Virsnieks v. Smith*, 521 F.3d 707 (7th Cir.  
3 2008); *see also Hansen v. Marr*, 594 F. Supp.2d 1097 (D.Neb. 2009).  
4  
5 Petitioner must identify specific, concrete collateral consequences that attach  
6 to a conviction as a matter of law to permit an individual to continue his  
7 challenge to a criminal conviction. *Spencer*, 523 U.S. at 9. “[P]resuming  
8 collateral consequences (or of accepting the remote possibility of collateral  
9 consequences as adequate to satisfy Article III) sits uncomfortably beside the  
10 “long settled principle that standing cannot be ‘inferred argumentatively from  
11 averments in the pleadings’ but rather ‘must affirmatively appear in the  
12 record.’”” *Id.* at 10-11.

14 Because Petitioner is no longer in custody, has not affirmatively shown  
15 that further penalties can be imposed on him as result of the judgment which  
16 has now been satisfied, and the only collateral consequence of his conviction  
17 is the requirement to register as a sex offender, the Petition for Writ of Habeas  
18 Corpus should be denied and the action dismissed with prejudice.

20 RESPECTFULLY SUBMITTED this 12th day of March, 2012.

21 s/ Thomas L. Murphy  
22 Linus Everling  
23 Thomas L. Murphy  
Rebecca Hall  
*Attorneys for Respondent*



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**CERTIFICATE OF SERVICE**

I hereby certify that on March 12, 2012, I electronically transmitted the foregoing document to the Clerk’s Office of the United States District Court for the District of Arizona using the CM/EMF system for filing and for transmittal of a Notice of Electronic Filing to the following CM/EMF registrants:

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*s/ Thomas L. Murphy* \_\_\_\_\_