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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

JAMES G. WILBUR,
Petitioner,

vs.

MAKAH TRIBAL COURT,
Respondent.

CIVIL ACTION NO. C12-5484BHS

**MAKAH TRIBAL COURT'S MOTION
TO DISMISS PETITION FOR WRIT OF
HABEAS CORPUS FOR FAILURE TO
EXHAUST AND FAILURE TO STATE
A CLAIM UPON WHICH RELIEF CAN
BE GRANTED**

**MEMORANDUM OF POINTS AND
AUTHORITIES**

**NOTE ON MOTION CALENDAR:
August 17, 2012**

MOTION

Pursuant to this Court's Order of June 26, 2012, the respondent, Makah Tribal Court, moves to dismiss the Petition for Writ of Habeas Corpus for failure to exhaust tribal remedies and failure to state a claim upon which relief can be granted under Fed.R.Civ.P. 12(b)(6). Mr. James G. Wilbur (Petitioner) failed to exhaust his tribal court remedies because he did not

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perfect his appeal of his conviction, and the time for appeal has run. The Makah Tribe has habeas corpus procedures in place, and Petitioner failed to exhaust the remedies provided him under Makah law. Instead, he filed a Petition for Habeas Corpus in federal court. Petitioner also fails to state any legal grounds or factual basis in support of his Petition for Habeas Corpus. If Petitioner is restrained at all, he failed to state how any such restraint violates his civil rights under the Indian Civil Rights Act. 25 U.S.C. § 1302.

Respondent's motion is based on the accompanying Memorandum of Points and Authorities, the Declaration of Rebecca S. Jones, and the files and records in this action.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On or about June 5, 2012, Mr. James G. Wilbur (Petitioner), an enrolled member of the Makah Indian Tribe, filed a Petition for Habeas Corpus (Petition) with this Court. The Indian Civil Rights Act (ICRA) guarantees certain rights to Petitioner in Tribal Court, including the right to due process of law, equal protection, and the assistance of counsel at the defendant's expense.¹ 25 U.S.C. § 1302. Under ICRA, "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303. On September 13, 2011, the Makah Tribal Court sentenced Petitioner to six months incarceration and one year banishment for domestic violence assault in the second degree.² *See* Incarceration Order (Exhibit A). Petitioner completed his incarceration and is now serving temporary banishment from the Makah Reservation.

¹ Under 25 U.S.C. § 1302(c)(2), an Indian tribal government must provide an indigent defendant in a criminal case with a licensed attorney at the government's expense only when the Indian tribal government imposes a term of imprisonment greater than one year. Here, Petitioner was sentenced to six months incarceration, so ICRA only requires the right to assistance of counsel at the defendant's expense. 25 U.S.C. § 1302(a)(6).

² Under Makah Law and Order Code § 11.4.09(h) (*available at* <http://www.narf.org/nill/Codes/makahcode/makahlawt11.htm#11title>), banishment of up to one year may be imposed where a tribal member is convicted of two or more domestic violence

Respondent moves to dismiss the Petition for failure to exhaust tribal remedies and failure to state a claim upon which relief can be granted. Petitioner failed to exhaust his tribal remedies, as he failed to perfect his appeal of his conviction under Makah law and failed to pursue habeas corpus in Tribal Court as provided under Makah law. Petitioner apparently challenges his domestic violence assault conviction, but he fails to include any claims in support of habeas relief. *See* Pl.'s Pet. Petitioner's supporting facts are unclear and do not amount to grounds for habeas corpus under ICRA. It is unclear whether Petitioner is restrained, but if he is, he failed to state why any such restraint is unlawful.

II. LEGAL ARGUMENT

A. This Court Must Abstain From Jurisdiction Because Petitioner Failed To Exhaust Tribal Remedies.

The United States Supreme Court first articulated the tribal exhaustion rule in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 85 L.Ed.2d 818, 105 S. Ct. 2447 (1985). Federal courts must "abstain from hearing certain claims relating to Indian tribes until the plaintiff has first exhausted those claims in a tribal court." *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 79 (2nd Cir. 2001). The Ninth Circuit has specifically held "that a litigant must first exhaust tribal remedies before properly bringing a petition for writ of habeas corpus." *Jeffredo v. Macarro*, 599 F.3d 913, 918 (9th Cir. 2010) *cert. denied*, 130 S. Ct. 3327, 176 L. Ed. 2d 1221 (U.S. 2010). As one Ninth Circuit Court stated, "[t]he Supreme Court's policy of nurturing tribal self-government strongly discourages federal courts from assuming jurisdiction over unexhausted claims." *Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 953 (9th Cir. 1998) (holding that a habeas petitioner waived an ICRA claim not presented to the tribal court of appeals).

criminal offenses, arising out of at least two separate incidents, and involving the same survivor. The survivor must also be a tribal member.

1 The exhaustion determination requires this Court to balance “the need to preserve the
 2 cultural identity of the tribe by strengthening the authority of the tribal courts, against the need
 3 to immediately adjudicate alleged deprivations of individual rights.” *Selam*, 134 F.3d at 953
 4 (quoting *United States ex rel. Cobell v. Cobell*, 503 F.2d 790, 793 (9th Cir.1974)). Where a
 5 tribal member commits a crime against another tribal member on the tribe’s reservation, the
 6 balance most heavily favors requiring tribal court exhaustion. In such a case, the tribe’s right
 7 of self-government is directly at issue, and a tribe’s “right of internal self-government includes
 8 the right to prescribe laws applicable to tribe members and to enforce those laws by criminal
 9 sanctions.” *Id.* at 953-54 (quoting *United States v. Wheeler*, 435 U.S. 313, 322, 98 S. Ct.
 10 1079, 1085, 55 L.Ed.2d 303 (1978)). Federal courts have long recognized that American
 11 Indians have the right “to make their own laws and be ruled by them.” *Williams v. Lee*,
 12 358 U.S. 217, 220, 79 S. Ct. 269, 271, 3 L. Ed. 2d 251 (1959). The Supreme Court stated,
 13 “[a]t a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the
 14 opportunity to review the determinations of the lower tribal courts.” *Iowa Mut. Ins. Co.*
 15 *v. LaPlante*, 480 U.S. 9, 17, 107 S. Ct. 971, 977, 94 L. Ed. 2d 10 (1987). Moreover, a person’s
 16 consent to tribal membership binds him or her “to follow the procedures of the tribe if they are
 17 consistent with the [ICRA].” *Wetsit v. Stafne*, 44 F.3d 823, 826 (9th Cir. 1995).

18 By analogy, in habeas petitions from state courts, 28 U.S.C. § 2254(b) requires a habeas
 19 petitioner to exhaust state court remedies where the petitioner is in state custody. In fact,
 20 “[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of
 21 the State[] ..., if he has the right under the law of the State to raise, by any available procedure,
 22 the question presented.” 28 U.S.C. § 2254(c). A 2001 Ninth Circuit decision found that
 23 “detention” in ICRA should be interpreted in the same way as “custody” in 25 U.S.C. § 2254.
 24 *Moore v. Nelson*, 270 F.3d 789, 791 (9th Cir. 2001). The exhaustion requirements in § 2254
 25 thus apply to tribal court exhaustion, as well. *See Moore*, 270 F.3d at 791.

As in *Selam*, Petitioner failed to exhaust his tribal remedies when he failed to perfect his Tribal Court appeal. Petitioner timely filed a Notice of Appeal in Makah Tribal Court (*see* Notice of Appeal, October 3, 2011 (Exhibit B)), but he failed to file a brief in support of his appeal, as required under Makah Law and Order Code (MLOC) § 1.9.07, *available at* <http://www.narf.org/nill/Codes/makahcode/makahlawt1.htm#1title>. Petitioner defaulted on his appeal, and the time for appeal has run. *See* MLOC § 1.9.04, *available at* <http://www.narf.org/nill/Codes/makahcode/makahlawt1.htm#1title>. The MLOC provides for habeas corpus relief for anyone “imprisoned or otherwise restrained of his [or her] liberty on the Reservation . . . to inquire into the cause of such imprisonment or restraint, and if illegal, to be delivered therefrom.” § 2.9.01, *available at* <http://www.narf.org/nill/Codes/makahcode/makahlawt2.htm#2title>. Petitioner not only needed to exhaust his tribal appeal remedies, he also needed to petition for habeas corpus in Makah Tribal Court. Here, Petitioner completely failed to follow the procedures of the Makah Tribal Court in order to challenge the outcome of his case.

Principles of comity counsel that “a federal court should not exercise jurisdiction over cases . . . , if those cases are also subject to tribal jurisdiction, until the parties have exhausted their tribal remedies.” *United States v. Tsosie*, 92 F.3d 1037, 1041 (10th Cir. 1996) (quoting *Texaco, Inc. v. Zah*, 5 F.3d 1374, 1376 (10th Cir.1993)). The Makah Tribal Court procedures comply with ICRA, and Petitioner was bound to appeal his case to the Makah Court of Appeals if he disagreed with the outcome. He was also bound to file his habeas petition in the Makah Tribal Court prior to pursuing habeas in federal court. Here, the “[p]romotion of tribal self-government and self-determination require[] that the Tribal Court have ‘the first opportunity to evaluate the factual and legal bases for the challenge’” *LaPlante*, 480 U.S. at 15-16 (quoting *National Farmers Union Ins. Cos.*, 471 U.S. at 856). This matter fits squarely within the tribal exhaustion doctrine, as it concerns wholly internal tribal issues that require

1 interpretation of tribal customs, values, and laws. This Court should follow the tribal
2 exhaustion doctrine and dismiss this Petition.

3
4 **B. This Court Must Dismiss This Petition For Failure To State A Claim
Upon Which Relief Can Be Granted.**

5 Under Fed.R.Civ.P. 12(b)(6), this Court may dismiss a petition if it fails to “state a
6 claim upon which relief can be granted.” A pleading must include a “short and plain statement
7 of the claim showing that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2). The Supreme
8 Court recently explained that where a petition’s “well-pleaded facts do not infer more than the
9 mere possibility of misconduct, the [petition] has alleged—but it has not ‘show[n]’—‘that the
10 pleader is entitled to relief.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950,
11 173 L. Ed. 2d 868 (2009) (quoting Fed.R.Civ.P. 8(a)(2)). A pleading that merely contains
12 “‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will
13 not do.’” *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555,
14 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007)).

15 In order to survive a Rule 12(b)(6) motion to dismiss, factual allegations in the pleading
16 “must be enough to raise a right to relief above the speculative level . . . on the assumption
17 that all the allegations in the [petition] are true . . .” *Twombly*, 550 U.S. at 555. That is, a
18 petition must “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that
19 is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). The
20 *Iqbal* Court clarified that “[a] claim has facial plausibility when the [petitioner] pleads factual
21 content that allows the court to draw the reasonable inference that the defendant is liable for the
22 misconduct alleged.” *Id.* There must be more than “a sheer possibility that a defendant has
23 acted unlawfully.” *Id.*

24 The District Court for the District of Columbia dismissed a habeas petition because the
25 petitioner’s allegations were unclear, and neither the Respondent nor the Court could ascertain
26 whether the petitioner continued “‘to suffer any improper adverse consequences from his

conviction and hence whether the petition is now moot.” *Banks v. Gonzales*, 496 F. Supp. 2d 146, 150 (D.D.C. 2007) (quoting Def.’s Mot. to Dismiss at 6 n.3). There, the petitioner alleged that he was “being stalked, poisoned, and oppressed by the government.” *Banks*, 496 F. Supp. 2d at 149. The Court ruled that such allegations did not “articulate a comprehensible legal or factual basis for relief, and thus [the petition] must be dismissed. *Id.* In other words, the petitioner failed to state a claim for which relief could be granted under Fed.R.Civ.P. 12(b)(6).

Similarly here, Petitioner fails to state a cognizable claim for habeas relief. ICRA provides that Indian tribes may not infringe on certain, enumerated rights “in exercising powers of self-government[,” including tribal courts. 25 U.S.C. § 1302(a). The only enforcement mechanism in federal court for an ICRA violation in a criminal case is a writ of habeas corpus. 25 U.S.C. § 1303; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 67, 98 S. Ct. 1670, 1681, 56 L. Ed. 2d 106 (1978). The Petition is unclear to the point that it is impossible to discern whether Petitioner claims any specific violation of ICRA. Petitioner did not provide any legal or factual grounds for habeas in his Petition. *See* Pl.’s Pet. Thus, if Petitioner is restrained, which he has not shown, he failed to state why such a restraint is unlawful under ICRA.

ICRA states that an Indian tribal government may not:

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 this defense.

25 U.S.C. § 1302(6). MLOC § 1.6.01 provides that , “[a]ny person appearing in Tribal Court shall have the right to a spokes[person], at his [or her] own expense, to assist him [or her] in presenting his [or her] case, provided that such spokes[person] shall first have been admitted to the Tribal Court Bar A spokes[person] need not be an attorney.” *Available at* <http://www.narf.org/nill/Codes/makahcode/makahlawt1.htm#1title>. Petitioner was provided a lay spokesperson, Ms. Gail Davis, and she represented Petitioner throughout his trial. *See*

1 Declaration of Rebecca S. Jones; Pl.'s Pet. at 13. Petitioner only had a right to an attorney at his
 2 own expense, but the Makah Tribe went above and beyond in providing for Ms. Davis to assist
 3 Petitioner. *See* Declaration of Rebecca S. Jones; Pl.'s Pet. at 13. Petitioner was given the right
 4 to call witnesses on his behalf and to confront the prosecution's witnesses. *See* Declaration of
 5 Rebecca S. Jones. The Makah Tribal Court did not violate Petitioner's ICRA rights.

6 Petitioner's allegations are plainly indiscernible, and do not add up to even a possibility
 7 that the Makah Tribal Court acted unlawfully. The supporting facts in the Petition do not allow
 8 a reasonable inference to be drawn that the Makah Tribal Court violated any of Petitioner's
 9 ICRA rights. Even if the Petition did clearly allege a restraint in violation of ICRA, the Makah
 10 Tribal Court advised Petitioner of his ICRA rights and complied with ICRA. The Petition does
 11 not comply with Fed.R.Civ.P. 8(a)(2), and this Court should dismiss the Petition under
 12 Fed.R.Civ.P. 12(b)(6).

13 **III. CONCLUSION**

14 For the reasons and facts stated above, Respondent, the Makah Tribal Court,
 15 respectfully requests that this Petition be dismissed for failure to exhaust tribal remedies and for
 16 failure to state a claim upon which relief can be granted under Fed.R.Civ.P. 12(b)(6).

17 Respectfully submitted this 26th day of July, 2012.

18
 19 MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

20
 21 s/Frank R. Jozwiak

s/Rebecca S. Jones

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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and I mailed the foregoing by transmitting a true and correct copy via First Class Mail with all costs of delivery prepaid to the address below that was contained in Doc. 4, Application for Court-Appointed Counsel and also listed on the Court's Civil Docket for Case #: 3:12-cv-05484-BHS:

James Wilbur
P.O. Box 712
Neah Bay, WA 98357

s/Frank R. Jozwiak
Frank R. Jozwiak

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kfn:7/26/12

EXHIBIT LIST

- Exhibit A James Wilbur Commitment/Incarceration Order, Makah Tribal Court,
Case No. 0026-crm-DV01/11, September 13, 2011
- Exhibit B Notice of Appeal, Makah Tribal Court, October 3, 2011

Filed

SEP 13 2011

MAKAH TRIBAL COURT

COMMITMENT/INCARCERATION ORDER

Makah Tribal Court

Date: 9-13-11Case No.: 0026-CRM-DVO/11Makah Tribe v. James WilburCharge(s): Assault II DVPros./APO: WachendorfCOMMITMENT ORDER**NEAH BAY POLICE DEPARTMENT: YOU ARE HEREBY ORDERED:**Commitment Order entered on 9-13-11. It is hereby Ordered:1. **JUDGMENT and SENTENCE;**

☒ Defendant shall serve 180 days in jail. Flat time (no good time off)

☒ Credit for time served from booking; 167 days left to serve. ☐ No Credit.

☐ Work Release/Community Services is authorized.

☐ Check-In at ACC on _____

☐ Check-Out of ACC on _____

☐ Check-In every _____, beginning _____

☐ Check-Out every _____, beginning _____

Until jail time to serve is completed.

☒ Other: to be banished after time is completed.

2. **PROBATION VIOLATION; suspended time revoked.**

☐ Defendant shall serve _____ days in jail.

☐ Credit for time served from booking; _____ days left to serve. ☐ No Credit.

☐ Work Release/Community Services is authorized.

☐ Check-In at ACC on _____

☐ Check-Out of ACC on _____

☐ Check-In every _____, beginning _____

☐ Check-Out every _____, beginning _____

Until jail time to serve is completed.

☐ Other: _____

Ordered and done on this 13th day of September, 2011



Makah Tribal Court Judge

Filed

Makah Tribal Court

1. I was forced to leave my Residence.
2. The K-As were forced into a car.

4. My own handwritten statement was not produced in

Don't take a key.
Don't take a key.
Don't take a key.

Long 148