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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 REPLY  
TO PETITIONER'S RESPONSE**

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

**REPLY**

Respondent, Makah Tribal Court, respectfully submits this Reply Memorandum in support of its Motion To Dismiss the Petition for Writ of Habeas Corpus (Petition) 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). Respondent received Mr. James G. Wilbur's (Petitioner) Response to

MAKAH TRIBAL COURT'S REPLY  
MEMORANDUM, NO. C12-5484BHS - 1

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Respondent's Motion To Dismiss on Monday, August 20, 2012, and the Court's Order of June 26, 2012 allowed Respondent four days after Petitioner submitted his Response to submit the Reply. Respondent's Reply is timely.

Petitioner's Response states that he was not given the opportunity to file an appeal in Makah Tribal Court, he was not allowed to obtain counsel, and he was not provided with counsel. (Pet'r's Resp. at 1, ECF No. 9.) Respondent requests that this Court dismiss the Petition 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).

**I. THE PETITION MUST BE DISMISSED BECAUSE PETITIONER FAILED TO EXHAUST HIS TRIBAL REMEDIES**

A litigant must exhaust tribal remedies prior to bringing a habeas corpus petition. *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). In *Selam v. Warm Springs Tribal Corr. Facility*, the Ninth Circuit held that a habeas corpus petitioner waived an Indian Civil Rights Act (ICRA) claim because he failed to raise it in the tribal appellate court. 134 F.3d 948 (9th Cir. 1998). The U.S. Supreme Court also found that, "[a]t a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17, 107 S. Ct. 971, 977, 94 L. Ed. 2d 10 (1987).

Petitioner failed to perfect his appeal when he did not file a brief in support of his appeal. (Resp't's Mem. of P. & A. 5; ECF No. 6 at 5.) At sentencing, the Tribal Court judge stated that Petitioner could appeal if he disagreed with the outcome of his case. Declaration of Rebecca S. Jones in Support of Respondent's Reply Memorandum. Petitioner was given the opportunity to appeal and he filed a Notice of Appeal (Resp't's Mem. of P. & A. 5; ECF No. 6 at 5), but he did not complete the appeal. The time for appeal has run. (Resp't's Mem. of P. &

1 A. 5; ECF No. 6 at 5.) The Court must dismiss the Petition because Petitioner did not exhaust  
2 his tribal remedies.

3 **II. THE PETITION MUST BE DISMISSED BECAUSE PETITIONER**  
4 **FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE**  
5 **GRANTED**

6 A petition must contain factual allegations sufficient to “raise a right to relief above the  
7 speculative level ....” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965,  
8 167 L. Ed. 2d 929 (2007). The *Iqbal* Court elucidated that a petition must state adequate  
9 “factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”  
10 *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting  
11 *Twombly*, 550 U.S. at 570). Here, Petitioner failed to state a claim at all. The Petition is  
12 unclear and does not state any grounds for relief. Petitioner’s Response states that he was “Not  
13 [sic] Given [sic] the chance to file appeal [sic] in Tribal Court ....” (Pet’r’s Resp. at 1, ECF  
14 No. 9.) He further states that “they did Not [sic] allow me to obtain counsel an [sic] Did [sic]  
15 Not [sic] provide counsel to me.” *Id.* Petitioner failed to adequately raise these issues in his  
16 Petition. The Court must dismiss the Petition for failure to state a claim upon which relief can  
17 be granted under Fed.R.Civ.P. 12(b)(6).

18 Even if Petitioner exhausted his tribal remedies and the Court accepted the issues raised  
19 in Petitioner’s Response, the Petition must be dismissed under Fed.R.Civ.P. 12(b)(6). ICRA  
20 guarantees certain rights to Petitioner in Tribal Court, including the right to due process of law,  
21 equal protection, and the assistance of counsel at the defendant’s expense. 25 U.S.C. § 1302.  
22 Under 25 U.S.C. § 1302(c)(2), an Indian tribal government must provide an indigent defendant  
23 in a criminal case with a licensed attorney at the government’s expense only when the Indian  
24 tribal government imposes a term of imprisonment greater than one year per offense. Here,  
25 Petitioner was sentenced to and already served six months incarceration, so ICRA only requires  
26 the right to assistance of counsel at the defendant’s expense. 25 U.S.C. § 1302(a)(6).

Respondent did not provide Petitioner with appointed, licensed counsel because Petitioner did not meet the ICRA standard for such counsel. Contrary to Petitioner's Response, Respondent read Petitioner his rights, including his right to obtain counsel at his own expense, and Petitioner affirmed that he understood his rights. (Decl. of Rebecca S. Jones in Supp. of Resp't's Mot. to Dismiss 2; ECF No. 6-2 at 2.) The Tribal Court judge at Petitioner's arraignment specifically asked if Petitioner was represented and whether he could get representation. Declaration of Rebecca S. Jones in Support of Respondent's Reply Memorandum. The judge then instructed someone to call Ms. Gail Davis, a lay Public Defender, to see if she could represent Petitioner. *Id.* Ms. Davis represented Petitioner at a bail hearing, at trial, and at sentencing. (Decl. of Rebecca S. Jones in Supp. of Resp't's Mot. to Dismiss 2; ECF No. 6-2 at 2.) Since Petitioner did not have the right to appointed, licensed counsel under ICRA and he was given the opportunity to obtain counsel at his own expense, Petitioner failed to state a claim upon which relief can be granted under Fed.R.Civ.P. 12(b)(6).

Petitioner's claim that he "was Not [sic] Given [sic] the chance to file appeal [sic] in Tribal Court ..." also fails to state a claim upon which relief can be granted under Fed.R.Civ.P. 12(b)(6). As noted above, Petitioner filed a timely Notice of Appeal, but he never filed his appellate brief as required by Makah Law. (Resp't's Mem. of P. & A. 5; ECF No. 6 at 5.) Petitioner's proper filing of his Notice of Appeal demonstrates that he was aware of his right to appeal, and this Court cannot provide any remedy for Petitioner's failure to perfect his appeal in Tribal Court.

### III. CONCLUSION

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

Respectfully submitted this 24th day of August, 2012.

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

s/Frank R. Jozwiak

s/Rebecca S. Jones

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 24, 2012, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and I caused to be mailed the foregoing by transmitting a true and correct copy via First Class Mail with all costs of delivery prepaid to the address below:

James Wilbur  
6112 Lakewood Dr. W.  
#12  
Tacoma, WA 98467

s/Rebecca S. Jones  
Rebecca S. Jones

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