No. CA-08-015

Pascua Yaqui Tribe Court of Appeals

Pascua Yaqui Tribe, Plaintiff/Appellee

v.

Miranda, Beatrice, Defendant/Appellant

OPINION

Appeal of a decision of the Pascua Yaqui Tribal Court in Case No. CR-08-119, the Honorable Cornelia Cruz presiding.

AFFIRMED

Alfred K. Urbina, Esq., Pascua Yaqui Tribe Office of Prosecutor, Tucson, AZ, for the Plaintiff/Appellee.

Nicholas Fontana, Esq., Tucson, AZ, for the Defendant/Appellant.

I. STATEMENT OF THE FACTS

On the evening of January 25, 2008, Beatrice Miranda, by all accounts wandering around, drunk, came across Monica Valenzuela, a minor Yaqui teenager. (Transcript D at 5-7, 24-27). Miranda seems to have thought someone was laughing at her; she pulled a knife, screaming obscenities, and began chasing the girl across the reservation. (Transcript D at 24-27). Monica made it home, just ahead of this woman, and ran inside, where she was able to alert

her sister, Bridget, that Miranda was in their yard, yelling and waving a knife around. (Transcript D at 26). Bridget went outside to investigate. (Transcript D at 13). Miranda threated to kill the girls, brandishing the weapon. (Appellant's Opening Brief at 54). They called the police, and she ran off. (Transcript D at 14-21, 25-29).

Miranda was picked up, based on their description, near the Valenzuela home. (Transcript D at 4). With some difficulty, they were able to restrain and arrest her. (Transcript D at 4-6). She was searched, pursuant to this arrest; the police found a folding knife on her person, later confirmed to be the weapon used in the assault. (Transcript D at 7-10, 22-23, 30-32).

On January 26, 2008, 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, one count each for each victim. (*PYT v. Miranda*, Pascua Yaqui Trial Court Record, document 38, hereinafter "R.38")

At her initial appearance, Miranda, without counsel, was advised of her rights, and declared that she was waiving them:

> The Court: The Pascua Yaqui Tribal Court is now in session in the matter of Pascua Yaqui Tribe versus Beatrice Miranda. Docket number CR-08-119.... Let me see, I now will advise you of your rights. You have the right to remain silent. Anything you say may be used against you. You have the right to counsel at your own expense, and you have the right to (inaudible) probable cause in this phase of the proceedings. Do you understand your rights?
>
> Miranda: Yes.

(Transcript A at 2). The court found probable cause and set bail at $1500.00. (R.36).

On February 4, 2008, Miranda appeared at her arraignment, without counsel. She was again advised of her rights, and again waived them:

The Court: I will advise you of your rights. You have the right to remain silent. Anything you say will be used against you. You have the right to legal counsel at your own expense. You have the right to (inaudible). Miss Miranda, you have the right to cross-examine witnesses and evidence presented by the Tribe, and the right present witnesses and evidence in your behalf. You have the right to know the charges against you, and you have the right to appeal to the Pascua Yaqui Court of Appeals. Do you understand your rights?

Miranda: Yes.

(Transcript B at 2-3). She then attempted to plead guilty to all charges. The court intervened, finding an insufficient factual basis, at that time, to substantiate her pleas, (Transcript B at 4-7), entered not guilty pleas on her behalf, and set a pre-trial hearing date, March 12, 2008. (R.34).

At pre-trial hearing Miranda appeared, was again advised of her rights, and again waived them:

The Court: I will advise you of your rights. You have the right to remain silent. Anything you say may be used against you. You have the right to legal counsel at your own expense. You have the right to a hearing and to a jury hearing. You have the right to cross examine the witnesses, and (inaudible) about the Tribe, and the right to examine witnesses in advantage on your behalf. You have the right to know the allegations against you, and you have the right to appeal to the Pascua Yaqui Court of Appeals. Do you understand your rights?

Miranda: Yes.

(Transcript C at 2). No motions were made by either party, the case was set for trial on April 12, 2008. (R.12).

March 12, 2008, the parties submitted a negotiated plea agreement, signed by Miranda. (R.25). The agreement detailed her rights explicitly, and explicitly waived them:

I have read and understand the above. I understand I have the right to discuss this case and my civil rights with a lawyer at my expense. I understand that by pleading guilty I will be giving up my right to a trial by jury, to confront, cross-examine, and compel the attendance of witnesses, and my privilege against self-incrimination. I agree to enter this plea as indicated above on the terms and conditions indicated herein. I fully understand that if I am placed on probation as part of this plea agreement, the terms and conditions of probation are subject to modification at any time during the period of probation in the event that I violate any written condition of my probation.

(Appellee's Response Brief, Appendix A)

It was accepted by the court; change of plea hearing set for April 12, 2008. (R.25).

March 14, 2008, Miranda sent the court a written request to withdraw from the plea agreement. (R. 22). The court vacated the change of plea hearing, set the matter for trial, April 12, 2008. (R.21).

April 12, 2008, Miranda appeared *pro se*. (R.12). She was advised of her rights, again, and apparently declared that she was waiving them:

The Court: I will advise you of your rights. You have the right to remain silent. Anything you say may be used against you. You have the right to you own counsel at your own expense. You have the right to a hearing. You have the right to cross examine witnesses and evidence presented by the Tribe, and the right to present witnesses and evidence in your behalf. You have the right to know the charges against you, and you have the right to appeal to the Pascua Yaqui Court of Appeals. Do you understand your rights?

Miranda: (No audible response).

(Transcript D at 1-2).

The tribe presented testimony from arresting Officer Jose Montano (Transcript D at 2-12), Bridget Valenzuela (Transcript D at 12- 23) and Monica Valenzuela (Transcript D at 23-32) as well as entering the knife recovered from Miranda on arrest into evidence (Tribe's Exhibit 2). Miranda presented no evidence or witnesses, did not testify, and did not cross-examine any witnesses offered by the prosecution.

The court found her guilty on all counts. (R.12, Transcript D at 35-36)

While Miranda requested immediate sentencing, the Tribe asked for a pre-sentence investigative report (to be filed by the Office of Probation and Parole), and the court granted this request. (Transcript D at 36). Sentencing was scheduled for May 19, 2008. (Transcript D at 37).

At sentencing, Miranda was again advised of her rights:

> The Court: I will advise you of your rights. You have the right to remain silent. Anything you say may be used against you. You have the right to legal counsel at your own expense. You have the right to a hearing. You have the right to cross examine witnesses and evidence presented by the Tribe, and the right to present witnesses and evidence in your behalf. You have the right to know the charges against you, and in the sentencing matter, you have the right to appeal to the Pascua Yaqui Court of Appeals. And the consequences, uh, in the revocation matter may include you being found in violation of you conditions of probation, your probation term being revoked or extended, and any suspended days being imposed. Do you understand your rights?
>
> Miranda: Yes.

(Transcript E at 1-2)

The pre-sentence investigative report filed by the Office of Probation and Parole revealed that Miranda was on probation (for conviction in CR-07-064) when she perpetrated her assault against the Valenzuela sisters. (Transcript E at 1-9).

Miranda stated, contrary to her assertions in Appellant's Opening Brief, (Appellant's Opening Brief at 16), that she received a copy of the pre-sentence investigation report:

> The Court: And we will first proceed with the sentencing hearing, uh, CR-08-119. And in that matter the pre-sentence investigation report has been filed by The Court. or with The Court rather by the Probation Office. And did you receive a copy of that, Ms. Miranda?
>
> Ms. Miranda: Yes.

Her probation was revoked. (Transcript E at 9). After hearing the recommendations of the Probation officer, Miranda requested that all of the sentences "run concurrent." (Transcript E at 5). Sentence was imposed, with some of the terms running concurrent:

> The Court: At this time, the Court will enforce sentence as follows, after hearing from the probation officer and the Tribe regarding the history of the Defendant. And the Court does find that the Defendant does have a history of failures to comply, failures to appear, uhm, and failure to comply with the conditions of probation and other orders set by the court. The Court will set sentencing as follow: Count One, three-hundred and sixty-five days in jail; Count Two, three-hundred and sixty-five days in jail; Count three, Endangerment, Count Four, uh, sixty days in jail; Count Four, sixty days in jail; Count five, ninety days in jail; Count Six, ninety days in jail; Count Seven, Seven, I'm sorry, thirty days in jail; Count Eight, thirty days in jail. Counts One and Two are to be served immediately for a total of seven-hundred and thirty days in jail; counts Five and Six will be served consecutive to Counts One and two for a total of one-hundred and thirty days in jail; Counts Five and Six will be

served consecutive to Counts One and Two for a total of on-hundred and eighty days; Sentencing, Counts Three, Four, Seven and Eight are concurrent with One, Two, Five and Six for a total of nine-hundred and ten days in jail. The Defendant is restrained for a period of two years from the victims, and Defendant will not possess any type of weapons, for a period of two years.

(Transcript E at 7-8) Miranda requested credit for time served and her request was granted, reducing the sentence going forward by one hundred and fourteen days. (Transcript E at 9-10).

Miranda's criminal history (referred to in Appellant's Opening Brief as her "alleged criminal history," Appellant's Opening Brief at 17) informed the sentencing recommendations made the court by the Probation Office and the final sentence imposed (Appellee's Response Brief, Appendix B clarifies this history, including prior criminal charges brought against Miranda in CR-05-036, (in which she was represented by Chief Public Defender Nicolas Fontana), CR-05-278 (in which she was represented by Deputy Public Defender M. June Harris), and CR-07-064, (in which she was represented by Chief Public Defender Nicolas Fontana); she was on probation for her conviction in CR-07-064 when the incidents in the current case took place (Transcript E at 8-10)).

It is unclear in the record why Miranda chose not to retain the services of the Public Defender's Office in this case; she had ample familiarity with them from past experience, as attested to above.

The Pascua Yaqui Public Defender entered its notice of appearance on behalf of Miranda on June 10, 2008. (R.3) Miranda's Notice of Appeal was filed on June 26, 2008. (R.1).

Oral argument was heard on this appeal on March 17, 2009.

II. STATEMENT OF THE ISSUES

1. Did the court fail to properly advise the Appellant of her rights as guaranteed by the Constitution of the Pascua Yaqui Tribe and the Indian Civil Rights Act, and was she thereby deprived of due process of law?
2. Was inadmissible evidence wrongly admitted, and did admission of such evidence deprive the Appellant of her rights to confront her accusers and be given a fair trial as guaranteed by the Constitution of the Pascua Yaqui Tribe and the Indian Civil Rights Act?
3. Did the Court make a negative inference to the Appellant's invocation of her right to remain silent, and did any such inference deprive her of her right to be free from self-incrimination as guaranteed by the Constitution of the Pascua Yaqui Tribe and the Indian Civil Rights Act?
4. Did the court err in exercising jurisdiction over the Appellant?
5. Was the court's conviction of Appellant on counts five and six of the complaint improper?
6. Did the sentence imposed by the court violate the Indian Civil Rights Act?

III. OPINION

1. The trial court properly advised the Appellant of her rights as guaranteed by the Constitution of the Pascua Yaqui Tribe and the Indian Civil Rights Act, and she was not deprived of due process of law.

Appellant has submitted a lengthy narrative (Appellant's Opening Brief at 26-36) detailing her experiences at every stage of the pretrial and trial process, attempting to make the claim that she was, at no point, properly advised of her rights. This attempt fails, as her recitation of events only demonstrates that she was amply advised of those rights, and waived them, repeatedly. She contends that her waiver of the right to retain counsel at her own expense (or to solicit the services of the Public Defender's office) was improper, or defective, because the court did not

recount her rights in sufficiently exhaustive detail for a waiver to have been effective. I find that the waiver was effective, both generally, based on the advisories repeatedly provided her by the court, and specifically, given her particular levels of knowledge and experience. *North Carolina v. Butler* 441 U.S. 369, 373 (1979).

While Appellant put forth an elaborate collection of arguments predicated upon her unfamiliarity with the Pascua Yaqui criminal justice system, going so far as to refer to herself as an "alleged" Indian (Appellant's Opening Brief at 46) and challenge the Tribe's demonstration of subject matter jurisdiction over her, (Appellant's Opening Brief at 42-47) she is in fact intimately familiar with the workings of the system, and her familiarity is born of direct personal experience. Appendix B of Appellee's Response Brief testifies to this experience: Appellant appeared before the Pascua Yaqui criminal court on three separate occasions prior to being charged with the offenses under examination (CR-05-036, CR-05-278, and CR-07-064), and was in fact on probation for conviction in CR-07-064 the night the incidents in this case took place. (Transcript E at 8-10). On all three of these occasions she availed herself of the services of the Public Defender's Office, (Appellee's Response Brief, Appendix B) and indeed was personally represented in two by the Chief Public Defender, her counsel on this appeal (who presumably would have raised various issues, such as the question of subject matter jurisdiction, on those other occasions, CR-05-036 and CR-07-064, had they had merit). Appellant simply cannot sustain the argument that she was unaware of her rights, or that she only waived representation by counsel in this case because some defect in the court's instructions prevented her from either learning of the existence of the Public Defender or acquiring the means to contact him. Within this context, the instructions offered by the court to Appellant, at every stage of the process, regarding her rights were more than sufficient to meet the constitutional requirements of due process, and her waiver of those rights was more than adequate to have been effective.

Any possible defect in the court's repeated admonishments to Appellant not cured by her extensive personal knowledge of the Pascua Yaqui criminal justice system would have been corrected through her voluntary adoption, by signature, of the plea bargain agreement she entered into with the Tribe. This agreement detailed her rights exhaustively. (Appellee's Response Brief Appendix A).

Appellant's entire argument, that her successive, consistent, waivers of the right to counsel were ineffective for purposes of due process, is based upon upon this Court's decision in *Pascua Yaqui Tribe v. Ramirez*, CA-02-003 (2006). *Ramirez,* however, was a different case and does not apply, as it was "limited to those circumstances where a criminal defendant is required by the trial judge to proceed involuntarily, *pro se*, without legal counsel or an advocate in his or her defense in a criminal trial" (*Ramirez* at 7). Appellant was not required to proceed without counsel, she chose to proceed without counsel. She was informed at each step of her right to retain counsel (Initial Appearance, Appellant's Opening Brief at 26 citing Transcript A at 2; Arraignment, Appellant's Opening Brief at 28 citing Transcript B at 2; Pre-Trial Hearing, Appellant's Opening Brief at 30 citing Transcript C at 2; Trial, Appellant's Opening Brief at 34 citing Transcript D at 2; at Sentencing, Appellant's Opening Brief at 35 citing Transcript E at 2-3, the right to counsel did not apply); at each step she affirmed that she understood that right and had decided to waive it. Her contrary decision on three prior occasions to retain the services of the Public Defender's Office conclusively demonstrates that she was fully aware of this option, knew how to exercise it, and made a voluntary, informed choice, in this case, not to do so.

Further, under the the Pascua Yaqui Constitution, the Indian Civil Rights Act, and the United States Constitution, criminal defendants before the Pascua Yaqui court have the right to retain counsel at their own expense, not the power to demand counsel be provided at public expense. Art.I § 1(f), Const. Pascua Yaqui Tribe; 25 U.S.C. § 1302(6)(2001); *United States v. Bird*, 287 F.3d 709, 713 (8th Cir. 2002). The Pascua Yaqui Tribe has chosen to fund an Office

of the Public Defender to defend indigents; nothing in federal law or the Yaqui Constitution compels it to do so. Within the separate, sovereign, Constitutional structure of the Yaqui Tribe, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), it is sufficient that defendants be told they may retain counsel at their own expense, and be allowed to do so, should they choose. In Appellant's current case, she chose not to, repeatedly. I will respect that choice and hold her waiver of the right to counsel to have been knowing, intelligent, and effective.

Given Appellant's peculiar familiarity with the Yaqui criminal justice system, and the effectiveness of her repeated waivers of her right to counsel, she has failed to demonstrate actual harm from any alleged defect in the various recitations made to her by the court of her rights. Not having demonstrated such harm, she has shown no reversible error, and I affirm the trial courts convictions on all counts.

2. The trial judge did not exceed the bounds of her discretionary authority to admit the evidence entered against Appellant, and Appellant was not deprived of her rights to confront her accusers or be given a fair trial as guaranteed by the Constitution of the Pascua Yaqui Tribe and the Indian Civil Rights Act.

Appellant's extended discourse on this topic (Appellant's Opening Brief at 36-41) may be reduced to three claims: that the trial court erred by admitting into evidence various statements that were, purportedly, hearsay; that the court further erred by allowing the prosecution to use leading questions on direct examination; and that the court wrongly allowed into evidence "irrelevant and prejudicial statements."

A. Hearsay

While the general rule, of course, is that hearsay (a statement made by an out of court declarant offered to establish the truth of the matter asserted) is inadmissible, 3 PYT R.Evid. 37, ("Hearsay is not admissible except as provided by these rules."), most evidence having the appearance of being inadmissible hearsay is either admissible non-hearsay (e.g. party admissions

3. PYT R. Evid. Rule 38(b); FRE 801(d)(2), and out of court statements offered for some purpose other than establishing the truth of the matter asserted 3 PYT R.Evid. 36(c); FRE 801(c)), or hearsay admissible under an exception. 3 PYT R.Evid. 39, 40; FRE 803, 804. Further, even hearsay that is not admissible under a exception may be admitted, with certain qualifications, in the discretion of the court if necessary in the interests of justice (judges make that determination after examining the probative value, credibility, and possible prejudicial effect of such evidence; this is reflected in the residual exception to the hearsay rule, FRE 807, under the Federal Rules of Evidence, which the court was free to adopt, according to 3 PYT R.Crim.Proc. Rule 43(c) "whenever due process or the court require[d]") *see also Idaho v. Wright*, 497 U.S. 805, 816, 110 S.Ct. 3139, 3147, 111 L.Ed.2d 638 (1990), "[t]he Confrontation Clause is not violated if the hearsay statement falls within a firmly rooted hearsay exception; and [second] even if it does not fall within such an exception, hearsay testimony is not violative of the Confrontation Clause if it is supported by a showing of particularized guarantees of trustworthiness."

Appellant misstates the rule by treating "hearsay" as simply or "generally" inadmissible, (Appellant's Opening Brief at 36) and ignoring the wide list of exceptions to the basic rule, acting as though the mere claim that hearsay evidence was admitted would suffice to establish that it was wrongly admitted, or even that, absent any showing of prejudice, acceptance of such evidence would necessarily rise to the level of constitutional impermissibility.

Appellant makes the further, broad claim that "a substantial portion" of the evidence against her at trial was inadmissible hearsay, asserting that "rather than being the exception" the "admission of hearsay was the norm." (Appellant's Opening Brief at 37) Unfortunately, while she gives these vague remarks the appearance of specificity by assigning a number, eleven, to the supposed items of hearsay wrongly admitted, she offers no further substantiation of either the remarks or that number. Nowhere does she actually cite the eleven supposed instances of

improper hearsay, the number is merely thrown out, perhaps, in part, because it exceeds another number, ten, found to have been objectionable in the authority she cites, *Waters v. Colville Confederated Tribes*, 3 CCAR 35 (1996) (Appellant's Opening Brief at 38). Laying aside the number eleven, I find only two concrete examples of supposed hearsay in her brief: the arresting officer's testimony that when he presented the knife recovered from Appellant to the two victim witnesses, minutes after their assault, they "immediately recognized" it as the weapon brandished by the assailant, (Appellant's Opening Brief at 37 citing Transcript D at 8) and the further testimony of that officer,

> I made contact with the victims, they said that, uh, the female subject with the long blue sleeved shirt, uh, was chasing them with the knife, pointed the knife at them, uh called her names, uh, something about I'm going to kill you fucking bitches and, uh, uh, you're laughing at me and something like that.

(Appellant's Opening Brief at 37 citing Transcript D at 8)

Both instances of "hearsay" were obviously highly relevant, 3 PYT R.Evid 6(a), (they regarded statements by victims to the police, immediately after a crime, made for purposes of apprehending the assailant).

Further, nowhere in Appellant's elaborate discussion does she mention the fact that the declarants whose out of court testimony she now finds objectionable offered substantially similar testimony in court, at her trial, subject to cross examination. (Transcript D at 12-23, 23-32).

Even were the out of court statements of the victim witnesses to have been excluded entirely, those statements were cumulative, mere repetitions of the testimony these victim witness offered in court.

Nothing in the record or in Appellant's argument demonstrates that admission of these arguably superfluous statements had the slightest effect upon her ultimate conviction.

Finally, Appellant did not object to the introduction of this evidence at trial. Thus, according to 3 PYT R.Evid. Rule 3(a):

> Effect of Erroneous Ruling. Error may not be predicated on a ruling which admits or excludes evidence unless a substantial right of the party is affected, and (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike is made and appears on the record, stating the specific ground for the objection, if such is not obvious from the context;

Even if Appellant were to establish that the evidence was wrongly admitted by the court, she would have to further demonstrate, now, that the wrongful admission at trial was plain error. 3 PYT R.Evid. Rule 3(d); *United States v. Rich*, 580 F.2d 929, 936 (9th Cir.), *cert. denied*, 439 U.S. 935, 99 S.Ct. 330 (1978). Plain error by the trial court would had to have affected a substantial right and materially affected the verdict; here, the evidence objected to was cumulative, Appellant has made no showing that it affected the verdict at all, let alone that it affected the verdict materially.

As Appellant has not shown that the trial court committed plain error by admitting the supposed items of hearsay into evidence, I find that the court did not abuse its discretion in doing so, any error it made was "harmless beyond a reasonable doubt" *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967), resulted in no "actual prejudice" *Brecht v. Abrahamson,* 507 U.S. 619 at 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), and I will not reverse her convictions in response.

B. Leading questions

3 PYRT R.Evid. 31 (c) concerns leading questions, the relevant portion:

> Leading Questions: Leading questions shall not be used on the direct examination of a witness *except as may be necessary to develop the witness' testimony*. (emphasis added)

Appellant's assertion that “leading questions are prohibited during the direct examination of a witness” is a misstatement of law. The relevant rule of evidence 3 PYT R.Evid. 31(c); FRE 611(c) allows leading questions to be used, explicitly, whenever “necessary to develop the witness' testimony.”

Furthermore, trial courts have always been given broad discretion to allow such questions under the necessity exception, *Ellis v. Chicago*, 667 F.2d 606, 613 (7th Cir. 1981); *Rodriguez v. Banco Cent. Corp.*, 990 F.2d 7, 12 (1st Cir. 1993) (“In this realm the widest possible latitude is given to the judge on the scene.”); *St. Clair v. United States*, 154 U.S. 134, 150 (1894) (“much must be left to the sound discretion of the trial judge, who sees the witness, and can therefore determine, in the interest of truth and justice, whether the circumstances justify leading questions to be propounded to a witness by the party producing him”) they may even go so far as to instruct that these questions be used, in the “interest of justice,” without abusing that discretion. *United States v. Brown*, 603 F.2d 1022, 1026 (1st Cir. 1979). Court discretion is particularly broad when, as in this case, the finder of fact is a judge, steeped in the law and charged with the responsibility to see that defendant's rights are protected, due process accorded her at trial.

Appellant simply leaves the necessity exception out of her argument. Nowhere does she even attempt to demonstrate that the court's decision to allow leading questions was an abuse of discretion, that finding such questions necessary to develop witness testimony was error. She just baldly, wrongly, asserts that these questions may never be used.

Further, contrary to Appellant's confused rendition of the law, while courts not only have broad general discretion to allow leading questions whenever they deem them necessary to develop witnesses testimony, they have been found to have particularly strong justification for doing so when, as here, a witness is young, timid, ignorant, unresponsive or infirm. (Transcript D at 23-32, s*ee* the federal ruling on the FRE 611(c), substantially similar to 3 PYT R.Evid. 31(c), in *U.S.v. Nabors*, 762 F.2d 642, 651 (8th cir. 1985) which would grant the court very broad

discretion to allow such questions in this case.) Appellant has not demonstrated that this discretion was abused, or shown clearly that allowing such questions prejudiced the verdict against her. Absent such a showing, which would require a very high burden given the nature of the witnesses, the magnitude of other evidence demonstrating Appellant's guilt, and the fact that Appellant was given a bench, not a jury trial, I find that the court did not commit reversible error.

C. Irrelevant and prejudicial statements

While evidence tending to demonstrate that Appellant was a narcotics user would have been irrelevant and prejudicial if admitted into evidence at trial in this case (in which she was charged with aggravated assault, endangerment, threatening and intimidating, and disorderly conduct), (Appellant's Opening Brief at 40 citing Transcript D at 11), the record does not support Appellant's contention that such evidence was admitted, or that any brief reference to it at trial actually prejudiced her defense (made it more likely that she would have been convicted of the charges at issue than if the reference had not been made).

The exchange referenced by Appellant in her brief (Appellant's Opening Brief at 40) regarded one question by the prosecutor to the arresting officer. The record demonstrates that Appellant failed to object to this question at trial, and that further, however improper and prejudicial the question may have been, the line of inquiry was immediately abandoned. (Appellant's Opening Brief at 40 citing Transcript D at 11).

Given Appellant's failure to object at trial, the standard for review by this Court, as discussed above, is plain error. *State vs. Owens*, 112 Ariz. 223 at 228, 540 P.2d 695 at 700 (1975) "We need not consider, however, whether the comments were so prejudicial that they constituted reversible error because the defendant's failure to object during or just after the closing arguments constituted a waiver of any right to review on appeal." c*iting State v. Holmes*,110 Ariz. 494, 520 P.2d 1118 (1974); *State v. Kelley*, 110 Ariz. 196, 516 P.2d 569 (1973). "A party's failure to object will be overlooked only where we find fundamental error."

citing State v. Shing, 109 Ariz. 361, 509 P.2d 698 (1973). Having failed to demonstrate such error, or that the ultimate result in this case was different from the result that would have occurred had the question not been asked, Appellant has not shown that the court committed plain error. The convictions will not be reversed in response.

Furthermore, the burden for demonstrating such error would have been particularly high on Appellant as she was given a bench, not a jury trial, and the standards for evidence heard at bench trials are considerably broader than those at jury trials (given the significantly reduced likelihood that judges will be prejudiced as triers of fact by the admission of otherwise impermissible evidence than juries). *Harris v. Rivera*, 454 U.S. 339, 346-347 (1981) (per curiam).

3. Nothing in the record establishes that the Court made a negative inference to the Appellant's invocation of her right to remain silent, thus she was not thereby deprived of her right to be free from self-incrimination as guaranteed by the Constitution of the Pascua Yaqui Tribe and the Indian Civil Rights Act.

While it would have been impermissible for the judge to have commented on Appellant's refusal to testify at trial in a way that impugned her exercise of the constitutionally protected right to remain silent, *Griffin v. California*, 380 U.S. 609, 615 (1965), Appellant has failed to establish that a comment making such an impermissible inference took place. Further, she has not demonstrated that such a comment had a prejudicial effect, that her conviction on the eight counts under examination was made any more likely by this type of judicial remark than it would have been had the judge said nothing.

Again, given that the finder of fact was the judge, not a jury, and the record attests to overwhelming evidence of Appellant's guilt on all charges, it is difficult to imagine how such a showing of prejudice could have been made.

Appellant bases the claim that her right to remain silent was violated on a single statement by the judge at trial, a comment that must be interpreted to be understood (given the flawed recording) and whose interpretation is far from clear: "And the Court will also inform you that your refusal to testify is highly (inaudible) on the Court by uh, (inaudible). " (Appellant's Opening Brief at 41-42 citing Transcript D at 33) The remark was ambiguous, at best, and is not in itself sufficient to demonstrate Appellant's contention that her silence at trial was impugned by the court.

Even were the remark to be given the interpretation provided by Appellant in her brief (Appellant's Opening Brief at 41-42), which is to say the most negative interpretation possible, she would still have to establish that it had a prejudicial effect. She has not done so, and there is little reason to believe that it did, as discussed above. The statement upon which Appellant attempts to rest this claim, however construed, is too thin a reed to sustain her assertion of reversible, constitutional harm. I find, further, that, however read, it was "harmless beyond a reasonable doubt," *Chapman v. California* 386 U.S. 18 at 24, 87 S.Ct. 824 at 828 (1967), as Appellant has failed to demonstrate the existence of any possibility, let alone a reasonable possibility, that it contributed to her conviction. *Fahy v. Connecticut*, 375 U.S. 86-87, 84 S.Ct. 229, 230, 231, 11 L. Ed. 2D 171 (1963).

4. The trial court properly exercised jurisdiction over the Appellant.

The Pascua Yaqui Tribal Court has subject matter jurisdiction to hear criminal charges brought against Indians (member and non-member) for violating Pascua Yaqui criminal law on the Yaqui Reservation. 3 PYTC § 1-1-20(a); *Oliphant v. Suquamish Indian Tribe*, 453 U.S. 191, 208 (1978); 25 U.S.C. § 1301(2); *U.S. v. Lara*, 124 S.Ct. 1628 (2004). Indian status of a defendant must be determined to establish the Tribal Court's criminal jurisdiction. *In re Certified Question*, No. 98AC00004 (Hopi 2001).

Contrary to Appellant's lengthy, speculative contentions, (Appellant's Opening Brief at 44-45) it is not difficult to establish that a defendant is an Indian; this may be done simply, quickly, and conclusively, generally by the submission of a Certificate of Indian Blood to the court. *United States v. Lawrence*, 52 F.3d 150, 152 (8th Cir. 1995) *citing St. Cloud v. United States*, 702 F.Supp.1456 (D.S.D. 1988) ("Recognition" analysis: "Those factors, which the Court considered in declining order of importance, are: 1) tribal enrollment; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life."). Tribe's Exhibit 1 (Index listing #13 Certificate of Indian Blood for Beatrice Miranda. Enrollment #2694U04548.) is a Certificate of Indian Blood for Beatrice Miranda, containing Appellant's name, birth date, and tribal enrollment number. Eligibility for enrollment requires at least ¼ degree Pascua Yaqui Blood. Art III § 1(b) PYT Const.; *see United States v. Torres,* 733 F.2d 449, 455 (7th Cir. 1984) *citing Alvarado v. United States,* 429 U.S. 1099, 97 S.Ct. 1119, 51 L.Ed.2d 547 (1977) (tribal enrollment and one-fourth Indian blood is sufficient proof that one is an Indian); *United States v. Broncheau,* 597 F.2d 1260, 1263 (9th Cir.), cert. denied, 444 U.S. 859 (1979). Appellant contends that this Certificate was either never submitted to the court, or that, in the alternative, Appellee produced insufficient foundation to authenticate it. (Appellant's Opening Brief at 46-47).

Appellant seizes upon an inaudible portion of the trial transcript (Appellant's Opening Brief at 46 citing Transcript D at 3-33) to make the claim that this Certificate was never "offered, or admitted into evidence," and that the Tribe thus "failed to introduce any evidence whatsoever regarding Miranda's alleged status as an Indian." (Appellant's Opening Brief at 46) Appellant may think it "curious" that the Certificate of Indian Blood was included in the record on appeal, as "Tribe's Exhibit 1," but the Certificate was included in the record on appeal because it was part of the record at trial, and it was part of the record at trial because it was submitted to the

Court and entered into evidence. Appellant's claim that the Certificate was not submitted to the Court can not be reconciled with the fact that it was in the record. It is not necessary to have an audible recording of the Certificate' submission to the Court for it to have been properly submitted, the document's presence in the trial record amply demonstrates that it was admitted into evidence.

Further, pursuant to Rule 53, PYT Rules of Evidence,

> The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 48(D) or testified to be correct by a witness who has compared it with the original.

the Certificate of Indian Blood was a self authenticating Public Record, and thus need only to have been submitted to have been properly admitted as evidence. Appellant's claim that further foundation was required to authenticate the document is false.

As a Certificate of Indian Blood demonstrating Appellant's Indian status was submitted to the court, the Tribe met its burden at trial to establish that Appellant was in fact an Indian and that the Pascua Yaqui Tribal Court had subject matter jurisdiction to hear the charges filed against her.

5. The trial court's conviction of Appellant on counts five and six of the complaint was proper.

Appellant compounds her faulty claim that the Tribe failed to demonstrate subject matter jurisdiction by making the strange, wholly erroneous, argument that the Tribe further failed to prove, beyond a reasonable doubt, that she was an “Indian,” and that therefore she was wrongly convicted on counts five and six of the charges brought against her. (Appellant's Opening Brief at 47-48).

Counts five and six concerned “threatening or intimidating”, 4 P.Y.T.C. 1-260:

> Any Indian who, with the intent to scare or terrify, threatens or intimidates another person by word or conduct so as to cause physical injury to another person or serious damage to property of another person, or causes another person to reasonably believe that he/she is in danger of receiving physical injury or damage to property, shall be guilty of an offense.

Contrary to Appellant's fanciful interpretation of this statute, use of the word “Indian” in the crime's definition did not make being an Indian into an element of the crime, any more than use of the more usual word “person” would have made being a “person” an element of the crime. As the Tribe has no jurisdiction to hear claims against non-Indians, it may not prosecute a person under Tribal Law unless that person is an Indian. The words Indian and person are thus wholly interchangeable for purposes of Indian criminal statutes.

Having established Appellant's Indian status for purposes of jurisdiction, the Tribe had no further burden to demonstrate that she was an Indian. Appellant does not contend that the Tribe failed to prove beyond a reasonable doubt that she was guilty of any actual element of the crime of threatening and intimidating, so her conviction for that crime, on Counts Five and Six, was proper and is affirmed.

6. The sentence imposed by the court of nine hundred and ten (910) days did not violate the Indian Civil Rights Act.

Under the Indian Civil Rights Act, 25 U.S.C. § 1302(7) , and the Constitution of the Pascua Yaqui Tribe, Art. 1, § 1(g) PYT Const., the court may not impose a sentence exceeding one year's imprisonment for conviction of any one offense. Appellant contends that these statutory limitations act to bar any sentence exceeding one year's imprisonment, period, even if a defendant is convicted of multiple offenses, provided those offense are part of “the same criminal transaction” or “course of conduct.” (Appellant's Opening Brief at 51-54, “It is clear

that Congress intended to adopt the concept that separate crimes arising from a single criminal episode should normally be treated as a single offense for sentencing purposes.")

Appellant's contention is a misstatement of law and flies in the faces not only of the plain language of the statute in question (which restricts the sentences for "any one offense" not the sentencing of "all offenses" cumulatively) but also the law as it has been construed and applied in Indian Country universally since the passage of the Indian Civil Rights Act in 1968.

Contrary to Appellant's assertion, the phrase "any one offense" is not ambiguous and the purported standard she offers to interpret it is neither controlling on this court nor a correct statement of law as applied within the United States at either the Federal or State level.

Appellant puts forth a "same transaction" test to make the claim that the language "any one offense" must be read to mean that no more than one offense may be charged against a defendant, however many crimes she commits, if those crimes are part of a "single criminal episode" (Appellant's Opening Brief at 54-55) She cites *Spears v. Red Lake,* 363 F.Supp. 2D 1176, 1178 (D. Minn. 2005), which is not binding on this court, and a concurrence, *Ashe v. Swenson,* 397 U.S. 436, 449-54 (1970) (Brennan, J., concurring), which is not binding on any court, to support this theory.

What Appellant does not cite is the law that is binding in Arizona, and the United States generally, as articulated by the Arizona Supreme Court , *State v. Barber*, 133 Ariz. 572, 576, 653 P.2d 29, 33 (App. 1982), *State v. Eagle,* 196 Ariz. 188, 190, 994 P. 2d 395, 397 (2007), and the United States Supreme Court, *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182 (1932). While decisions of the Arizona and United States Supreme Courts are not controlling authority in this court, they are highly persuasive, particularly when they reflect the majority, or unanimous, legal opinion regarding construction of a disputed term or phrase substantially similar to the term or phrase under examination. Indeed, the authority of the United States Supreme court is particularly instructive here, as Appellant purports to base her argument

upon a construction of the Indian Civil Rights Act, a statute enacted by the United States Congress. The presumption that language in such a statute was intended to have the meaning accorded similar language by the Supreme Court is difficult to overcome, and was not overcome by Appellant in her attempt to impose an alternate, unique, construction.

Under *Blockburger*, as restated in *State v. Barber*, *State v. Eagle*, and drawn from a venerable understanding of the meaning of the phrase "same offense" given expression in *Morey v. Commonwealth*, 108 Mass. 433, 434 (1871),

> A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

The construction of the phrase "same offense" given in *Blockburger* is the construction that is nearly universally controlling now and the construction that controls interpretation of that phrase within the Indian Civil Rights Act, namely, that so long as conviction of one statutory crime requires proof of at least one additional element not required to be convicted of a different crime, the two crimes are separate offenses. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182 (1932) As separate offenses, a defendant may be properly charged with both, convicted of both, and sentenced separately for both. While Appellant could not have been sentenced to a term of more than one year for any one offense, she was not convicted of one offense, but eight, and sentenced separately for each.

Appellant attempts to circumvent this construction through a purported recitation of the statutory history of the Indian Civil Rights Act, (Appellant's Opening Brief at 51-52), the balance it supposedly struck between federal and Indian jurisdiction over crimes, (Appellant's Opening Brief at 52-54), and the "absurd result" that would, in her claim, be the product of using the *Blockburger* test to interpret its language, offering her own "single criminal transaction" test as

the “clear” expression of Congressional intent, (Appellant's Opening Brief at 54), even though that test never appeared anywhere in the legislative history of the Indian Civil Rights Act, was not the meaning accorded the phrase “same offense” under federal law when the statute was enacted, and has only been applied by one court, in *Spears*, since that statute went into effect. *See United States v Dixon*, 509 US 688, 704, 113 S Ct 2849, rejecting this interpretation of “same offense”, “That test inquires whether each offense contains an element not contained in the other;”, further “but there is no authority, except *Grady*[overturned], for the proposition that it has different meanings in the two contexts. That is perhaps because it is embarrassing to assert that the single term 'same offense' (the words of the Fifth Amendment at issue here) has two different meanings-that what is the same offense is yet not the same offense.”; 125 L Ed 2d 556(1993) and *Carter v McClaughry*, 183 US 367, 394-395; 22 S Ct 181; 46 L Ed 236 (1901) further “Having found the relator to be guilty of two offenses, the Court was empowered by the statute to punish him as to one by fine and as to the other by imprisonment. The sentence was not in excess of its authority. Cumulative sentences are not cumulative punishments, and a single sentence for several offenses, in excess of that prescribed for one offense, may be authorized by statute. c*iting In re De Bara*, 179 U. S. 316; *In re Henry*, 123 U. S. 372. Finally, *Ramos v. Pyramid Lake Tribal Ct.*, 621 F. Supp. 967, 970 (D. Nev. 1985), examining consecutive sentences under the ICRA,

> “This Court could find no cases holding that the imposition of consecutive sentences constitutes cruel and unusual punishment. Indeed, the imposition of consecutive sentences for numerous offenses is a common and frequently exercised power of judges. Ramos was found guilty by the Pyramid Lake Tribal Court and sentenced accordingly to those findings of guilt. He may be unhappy with the sentence he received, but there was no violation of his right against cruel and unusual punishment and, thus, no habeas relief lies.”

Appellant cites *Griffin v. Oceanic Contractors,* 458 U.S. 5644, 575 (1982)

> Interpretation of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative history are available.

No interpretation would be more absurd in this case than one that reversed the meaning the law had for four decades and straightjacketed Indian courts, reducing them to one year, maximum, sentences of imprisonment, however many crimes an Indian offender has committed against Indians on Indian land, whenever, as is usually the case, those crimes were part of a "course of conduct" "criminal episode" or "criminal transaction." Such a ruling would reduce Indians to life on reservations where their own courts cannot maintain order and federal courts will not. I reject that interpretation, and choose instead to follow the essential principles of the *Blockburger* test.

Furthermore, I recognize that Indian courts have wider discretion to apply this test then federal or state courts, discretion derived both from their status as separate sovereigns (whose sovereignty antedates the existence of the United States) and from compelling, particular interests they have in maintaining order and the rule of law in Indian country. The reality, as long recognized by federal courts, is that Indian courts have primary responsibility to dispense justice to Indian victims of crimes perpetrated by Indians on Indian land. While the Federal Government of the United States curtailed much of the sovereign authority of Indian courts through the Major Crimes Act, 18 U.S.C. § 1153, and the Indian Civil Rights Act, it did not destroy that authority, or abrogate the fundamental responsibilities of those courts. *United States v. Montana*, 450 U.S. 544, 564 101 S. Ct. 1245 (1981) *citing United States v. Wheeler*, 435 U.S. 313, 323-326 (1978). Indeed, the federal government has manifested a general unwillingness to take jurisdiction over crimes committed by Indians in Indian country, which leaves Indian courts as the sole effective guarantors of safety, order and justice for Indians living on Indian land. To fulfill that crucial role, Indian courts are, and must be, accorded greater discretion to charge

criminals and mete out sentences than federal or state courts operating more simply within the confines of the *Blockburger* test.

Accordingly, I find that the court acted properly, under *Blockburger*, and within the wide latitude Indian courts have to charge and sentence criminal defendants, by hearing the charges filed against Appellant, convicting her, and imposing the sentence she received. Each charge heard against Appellant required that sufficient additional facts be proven to satisfy the expansive form of the *Blockburger* test I am applying. Further, Appellant was not convicted of eight separate charges against one victim, as her Brief implies, but of four sets of charges against two separate victims, making the sentences actually handed down particularly appropriate. When making this sentence, the court took notice of her prior criminal record, (Transcript E at 7-8, Appellee's Response Brief Appendix B, CR-05-036, CR-05-278, CR-07-064), the fact that she was on probation when the crimes occurred, (for conviction in CR-07-064), and the possible future threat she might pose to the continued safety of the victims in this case (Transcript E at 5-6); it then gave her credit for time served, reducing the actual sentence imposed considerably (subtracting one hundred and fourteen days from the sentence to be served, Transcript E at 9-10) and ran several of the sentences concurrently, further moderating their impact (Counts Three, Four, Seven and Eight, Transript E at 7-8, subtracting 240 days from the actual sentence).

The trial courts judgment on all counts is affirmed.

Temporary Stay

On this portion of my decision I am issuing a temporary stay effective until April 30th, 2009, as questions regarding the breadth of discretion given to the Pascua Yaqui Courts to hear multiple charges and confer sentence are fundamentally political in nature. The legislative drafters of the Constitution of the Pascua Yaqui Tribe made a deliberate effort to harmonize Art. 1, § 1(g) PYT with its counterpart in the Indian Civil Rights Act, 25 U.S.C. § 1302(7). Both inform the reader that the court may not impose a sentence

exceeding one year's imprisonment for conviction of any one offense. And yet, the Appellant's interpretation leads one to conclude that these statutory limitations act to bar any sentence exceeding one year's imprisonment, period, even if a defendant is convicted of multiple offenses, provided those offenses are part of "the same criminal transaction" or "course of conduct."

Questions regarding the interpretation and breadth of discretion conferred upon the Pascua Yaqui Courts by the Constitution to hear multiple charges and confer sentence are fundamentally political and reside within the domain of the Legislative branch. Moreover, the culture, traditions, and separate sovereign structure of the Pascua Yaqui Tribe make it appropriate that questions of significant policy be decided by the legislative than the judicial branch of our government. Accordingly, I am submitting to the Attorney-General the question as to (1) whether or not Art 1, 1(g) of the Pascua Yaqui Constitution is to be interpreted in harmony with the Indian Civil Rights Act; and (b) whether the two must be interpreted – and thus applied - by the Pascua Yaqui Courts pursuant to the Appellant's more formalistic construction.

Given Appellant's declaration at oral argument (March 17, 2009) that she intends to use this Court's disposition to perfect her filing of a habeas corpus petition in federal district court, I consider it of paramount importance that the legislative branch of the Yaqui government make a concrete determination of these disputed points of policy before our order concerning them is given full effect. The impact of the delay resulting from the stay will be minimal as counsel for the Appellant, Mr. Fontana, has made it abundantly clear that he intends to file a writ of habeas corpus in federal district court. And yet, during the March 17 hearing it was apparent that the decision sought by the Appellant will have far reaching public policy implications for offenders convicted in the Pascua Yaqui Courts. Thus, before the Appellant moves to pierce the veil of

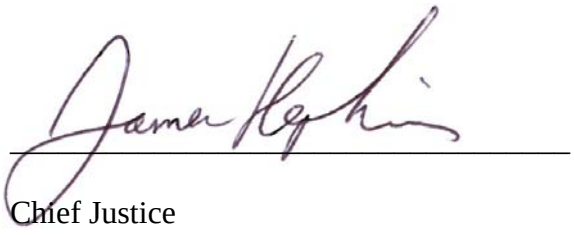
tribal sovereignty at federal district court, the Pascua Yaqui Court of Appeals will continue to hold jurisdiction over this matter until the stay expires in light of the constitutional issue.

At first blush, this may not appear to be a conventional remedy in the Pascua Yaqui Tribal Courts – despite being employed by Appellate Courts in other jurisdictions. And yet, by close analogy matters before the Tribal Courts where the Tribe is not a party and tribal sovereignty is at issue the Constitution prescribes clear notice requirements pursuant to Section 20, 3 PYTC § 2-5-20. In sum, I consider it to be of paramount importance that the legislative branch of the Yaqui government make a determination of the disputed points of policy before my order concerning them is given full effect.

IV. CONCLUSION

The Tribal Court's decision is affirmed on all counts. A temporary stay with respect to the foregoing issue will be in effect until April 30th, 2009. As I have already ruled on every issue, absent a response by the legislative branch removing the stay will simply affirm my decision that has already made - not reverse it.

Filed this 29th day of March, 2009.



Chief Justice

Pascua Yaqui Court of Appeals

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IN THE PASCUA YAQUI TRIBE COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Plaintiff/Appellee, vs. MIRANDA, BEATRICE Defendant/Appellant.	Trial Court Case No. CR-08-119 Appeals Court Case No. CA-08-015 **APPELLATE MEMORANDUM OF THE PASCUA YAQUI TRIBE**

COMES NOW The Pascua Yaqui Tribe, a federally recognized Indian tribe (hereinafter "PYT"), plaintiff in the case below, by and through counsel, at the specific request of the Court of Appeals, and responds and offers this Memorandum addressing the issues posed to the Tribe by the Court:

I.

CASE BACKGROUND

On April 12, 2008, after trial, Appellant Beatrice Miranda was found guilty of the charges against her by the Tribal Trial Court. The trial judge heard the evidence, and assessed Ms. Miranda's guilt and criminal history in making a sentencing determination. This appeal ensued.

On March 29, 2009, the Pascua Yaqui Court of Appeals issued an Opinion in *PYT v. Miranda*, CA-08–015, (*Miranda*)[1] and issued a temporary stay until April 30, 2009,

[1] http://www.pascua-yaqui-court-of-appeals.org/cases/2008/CA-08-015/CA-08-015-opinion.pdf

pursuant to PYTC § 2-5-10 (A)(1)[2], 3 PYTC § 2-5-20 (A)[3]. This Court upheld the Trial Court and found that nothing cited by the Appellant supported claims that the sentence was arbitrary, not upheld by the evidence, cruel or unusual, an abuse of discretion, or a violation of the Tribe's Constitution or the Indian Civil Rights Act (the "ICRA"). However, in its ruling the Court of Appeals requested post appeal briefing by the Office of the Attorney General about a matter that implicates the Pascua Yaqui Tribe's sovereignty.

The questions presented to the Attorney General by the Court for briefing are:

(a) Whether or not Art 1, 1(g) of the Pascua Yaqui Constitution is to be interpreted in harmony with the Indian Civil Rights Act? and

(b) Whether the two must be interpreted – and thus applied - by the Pascua Yaqui Courts pursuant to the Appellant's formalistic construction?

The Attorney General's interpretation of these questions is that the Court is asking the Tribe (1) whether the Tribe agrees with the Appellant that the 910 day sentence she received violates the ICRA?; and if not, (2) is the Appellant's sentence of 910 days in this matter consistent with the Pascua Yaqui Constitution?

In this case the Appellant challenges the breadth of two decades of discretion given to the Pascua Yaqui Courts to hear multiple criminal charges and confer consecutive sentences based on those charges.[4]

In support of this challenge the Appellant mistakenly argues that the statutory constructs of Art. 1, § 1(g) of the Pascua Yaqui Tribe's Constitution and 25 U.S.C. §

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[2] **PYTC § 2-5-10 (A):** The Tribe has a compelling interest to protect tribal sovereignty and jurisdiction and the validity of tribal laws.

[3] **3 PYTC § 2-5-20 (A)** In any action or proceeding in which the Tribe or any agency, officer or employee thereof is not a party but in which tribal sovereignty or jurisdiction is implicated or the validity of any tribal law is challenged, the Tribal Court will give notice in writing of the action or proceeding to the Office of Attorney General.

[4] *See* Appellant's Opening Brief at 51-54.

1302(7) of the Indian Civil Rights Act (ICRA) operate to bar any sentence exceeding one year of imprisonment, even if a defendant is convicted of multiple offenses committed during "the same criminal transaction" or "course of conduct."

The Court below held that "questions regarding the interpretation and breadth of discretion conferred upon the Pascua Yaqui Courts by the Constitution to hear multiple charges and confer sentences are fundamentally political and reside within the domain of the Legislative branch."[5]

Appellant erroneously construes Art. 1, § 1(g) of our Constitution or the ICRA to limit the sentencing authority of the Tribal Trial court to a one year sentence total, regardless of the number of offenses she is convicted of. The ramifications of the Appellant's flawed argument that either the Pascua Yaqui Constitution or the ICRA prohibits consecutive sentences would certainly touch the sovereign authority and hamper the ability of the Pascua Yaqui Tribe to safeguard its citizens and ensure law and order in our community.

II.
Is the Appellant's Sentence Barred by the Constitution of the Pascua Yaqui Tribe?

For sake of clarity, chronology, and convenience, this brief will address the issue of whether the Tribe believes that the Appellant's sentence is permissible under the Tribe's Constitution first.

IIA.
HISTORICAL BACKDROP

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[5] However, the Court rejected that interpretation and adopted the essential principles of the *Blockburger* test (284 U.S. 299 (1932)) and recognized that "Indian courts have wider discretion to apply this test than federal or state courts, because of their status as separate sovereigns (whose sovereignty antedates the existence of the United States) and from compelling, particular interests they have in maintaining order and the rule of law in Indian country." *PYT v. Miranda*, CA - 08 – 015, at 25.

People should not be bad. They should not raise hands against each other. They should not take law into their own hands. Yaqui law will protect. People should come to the comunila and all will talk. We are all members of the same tribe. –Domingo Baltasar ex-govenor of Potam Pueblo, 1970.[6]

Without question, it is important to start with the premise that the Pascua Yaqui Tribe's first duty has always been to protect and safeguard its citizenry, the people. A crime is an offense against the people and the sovereign authority of our government. The Pascua Yaqui Tribe's sovereignty and duty to protect operate in large part to safeguard the political integrity, economic security, and the health and welfare of our nation. Nothing is more important or vital to the survival of our people.

It is not hard to envision what our enduring ancestors may have coveted as they occupied their ancient lands: shelter, nourishment, kinship, and safety. To be sure, they were resilient people, who like desert plants, adapted and operated in accordance with nature. They were mindful and dependent upon the earth, wind, sun, and rain. No doubt their exploits and struggles were informed by customs, traditions, and oral history. Their judgments were punctuated by wisdom, responsibility, and independence. Certainly, by virtue of their continual presence, survival, and fortitude, their existence was never determined or conferred by another group or persons walking this earth. Yaqui self-determination just was. It was sung in the Rio Yaqui valleys, woven into metates, imparted upon the newborn, recorded and engraved into mountaintops, prayed to Maala Mecha, whispered to Achai Taa'a and boldly pronounced to the unknown.

Our ancestors walked the earth by the grace of the creator, their path and homeland was marked by the rising and setting sun, shaped by the wind, and protected by

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[6] Kelley, Jane H., "Law-Talk, Mobilization Procedures, and Dispute Management in Yaqui Society," University of Arizona Press, KIVA, Vol. 54, No. 2, 1989, at pg. 83.

mountain ranges. Yaqui ancestors were indigenous and roamed aboriginal territory from Durango in Southern Mexico, north to Colorado, and west to California. The Tribe settled, prospered, and endured in the Rio Yaqui homeland since time immemorial. Authority was inherent and derived in part by our elder's ability to protect, provide, and administer to the needs of the people. For 300 years, the Yaqui people fought the Spanish and later the Mexican government for control of their fertile homeland. Between 1887 and 1910, war and hostilities drove factions of the Yaqui from their homeland into present day Arizona.

Prior to establishment of the United States the Yaqui people also settled in various communities in what is now Arizona, including areas now known as Old Pascua, South Tucson, and Scottsdale. In 1964, Congressman Morris K. Udall introduced a bill in Congress authorizing the transfer of 202 acres of federal desert land to our Yaqui elders. On September 18, 1978, Public Law 95-375[7] recognized the Tribe as what is known as a "federally recognized Indian tribe." Fundamentally, 200-400 years have only superficially changed the Yaqui Nation. On January 26, 1988, the tribe voted and ratified the Pascua Yaqui Tribe's Constitution. Although, now partly settled Southwest of Tucson, Arizona, the obligations to the people and their sovereign autonomous spirit has never changed. The Pascua Yaqui Tribe, as a historical Indian tribe, has inherent jurisdictional power over most matters occurring within their territory. Our judicial system accounts for and represents the historic soul and spirit of our people. It operates

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[7] *See* 25 U.S.C. 1300f et seq.

independently to protect and apply the PYT's vision, Constitution, customs, and code, while reflecting the Tribe's continuing autonomy.

Art. VIII, Sec. 2 of the Constitution of the Pascua Yaqui Tribe states: "The jurisdiction of the courts shall extend to all cases in law and equity arising under this constitution and the **laws, traditions, customs** or enactments of the Pascua Yaqui Tribe." Some precepts, teaching, and traditions of the PYT pre-date the U.S. Constitution and the Bill of Rights and are rooted in beliefs that are arguably as old as English common law. Cultural and religious syncretism had occurred within several Indian tribes of the Southwestern United States, blending Catholicism and pre-European ancient tribal beliefs. Around 1617, the Roman Catholic Church via Spanish Jesuit Missionaries, was responsible for the introduction of western religion into Yaqui beliefs and norms. The result has been a melding of Catholic teachings and pre-contact secular beliefs based on oral traditions of a multi-dimensional layered world that uses wilderness, animals, (deer), nature, (flowers), and the elements, (sun, moon, stars), to guide the Yaqui people (Yoeme).

While modern courts enforce individual responsibility for crime, the Yoeme past cultural practices revolved around the principle of collective responsibility arising from a foundational social clan-kinship system. However, historically, the tribe also employed a less formalistic dispute management system that is embodied as Yaqui Law.[8] As early as 1918, in the United States, the Yoeme formed a governmental body in charge of the "Yaqui Nation" within the United States, presided over by a "commandante-general"

(captain) which is equated to a war chief, (wikoijaut) of a Yaqui Pueblo in Sonora, Mexico (it can also be equated to the executive branch of government).[9]

The Captain was responsible for maintaining order, recruiting a police force, preside over trial courts, and administer punishments. The Yaqui Nation also had a Kovanau, or, in Spanish, gobernador, (governor). The 'kovanau's duty was first, to administer the land of the pueblo, and, second, to concern himself in all disputes and difficulties that arose. The war chief presided over trials and the 'Kovanau gathered witnesses for defense and tried to uncover extenuating circumstances.[10] Some concepts of Yaqui traditional practices and norms include, the term "kohtumbre" (a Spanish loan word for 'custom' but used also for 'society'), it also closely approximates the idea of religion. The term "Lutu'uria," translates to "truth." The phrase "yo'ora lutu'uria" refers to "elders' truth." The concept of "senu noka" (one word) is used to describe historical decisions (precedent). The concern for not just majority but a collective decision beyond individualism seemed prominent.[11] Prescription deals with legal jurisdiction and the range of conduct subject to legal control. For our Yaqui ancestors, prescription is best described in legal precepts, (core values or foundational principles). Some basic precepts include, (1) Yaqui land is sacred to the tribe; (2) people should not talk badly and cause trouble; and (3) individuals are responsible for their own actions.[12]

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[8] Kelley, Jane H., "Law-Talk, Mobilization Procedures, and Dispute Management in Yaqui Society," University of Arizona Press, KIVA, Vol. 54, No. 2, 1989.
[9] Spicer, Edward. Pascua: A Yaqui Village in Arizona, University of Chicago Press, 1940. Reprint: University of Arizona Press, 1984.
[10] *Id.*
[11] via email, Dr. David Delgado Shorter.
[12] Kelley at 84.

In present day "Indian Country" a criminal "perfect storm" of lawlessness has been brewing for over 100 years. A multi-jurisdictional cluster has given birth to a raging tempest of injustice for crime victims, tribal communities, and arguably for suspected defendants. A three-pronged "jurisdictional maze"[13] made up of federal, tribal, and State governments lacking proper coordination, communication, and accountability is one reason for victims being neglected and criminals escaping punishment in Indian Country.

Generally, the federal government is responsible for policing Indian Country when "Indians" commit certain enumerated major crimes.[14] Federal courts also have sole jurisdictional authority over non-Indians who commit both major and non-major crimes within the exterior boundaries of Indian Country against an Indian victim or property. Federal courts share authority with tribes over major and non-major crimes by an Indian against a non-Indian. Tribes maintain exclusive jurisdiction over non-major crimes committed by Indian against an Indian and also have authority over non-major crimes committed by an Indian against non-Indians (concurrent with Federal courts). Additionally, tribes maintain concurrent jurisdiction with the Federal Government over "Major Crimes" committed by Indians. A tribe can prosecute Indians as a separate sovereign and dual prosecutions will not be considered double jeopardy.[15] State courts

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[13] Clinton, Robert. *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz.L.Rev. 503 (1976).

[14] Major Crimes Act – 18 U.S.C. § 1153(a): Murder, manslaughter, kidnapping, maiming, rape & related offenses, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault of minor (<16), arson, burglary, robbery, and a felony under 18 U.S.C. § 661, in addition to federal statutes of nationwide applicability, (narcotics, organized crime, etc.). *United States v. John*, 437 U.S. 634, 648-49 (1978).

[15] *United States v. Wheeler*, 435 U.S. 313 (1978).

have jurisdiction over crimes by non-Indians against non-Indians and victimless crimes committed by non-Indians.[16] [17]

This jurisdictional soup, aptly described as a "maze," has failed miserably to protect communities and adds to the uncertainty and mistrust experienced by victims and the community alike. A parallel issue that exacerbates and feeds this problem is when federal prosecutors decline to prosecute major crimes occurring in Indian Country.

The recent historical and legal responsibility to prosecute major crimes in Indian Country has fallen to the federal government since 1885.[18] Between 2004 and 2007, federal prosecutors, on average declined to prosecute over 60% of major felony cases fully investigated in Indian Country.[19] The declination rate is as high as 75% in South Dakota, a state with a high Native American population. Consequently, tribes are effectively saddled with the sole responsibility of holding an offender accountable for major crimes. However, pursuant to the Indian Civil rights Act (ICRA),[20] tribes may only impose maximum punishments of one year in prison **per offense**, a $5,000 fine, or both.[21] Additionally, in 1978, the U.S. Supreme Court ruled that tribes have no general criminal jurisdiction over non-Indians unless Congress delegates the power to do so.[22] Thus, the result is that tribes are unable to seek appropriate justice in cases where a non-

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[16] *United States v. McBratney*, 104 U.S. 621, 624 26 L.Ed. 869, 870 (1882).

[17] In 1953, Congress authorized states to exercise jurisdiction over offenses by or against Indians. Public Law 280, 18 U.S.C. §1162. Public Law 280 provided for broad state and tribal concurrent criminal jurisdiction on those states and reservations impacted by Public law 280 (with no federal involvement). Arizona is not a Public Law 280 state and PL 280 States are beyond the scope of this paper.

[18] The Major Crimes Act, 18 U.S.C. § 1153 was passed in reaction to the holding of *Ex parte Crow Dog*, 109 U.S. 556 (1883) (federal courts no jurisdiction to try an Indian for the murder of another Indian).

[19] Riley, Michael, Denver Post. "Lawless Lands" series. http://www.denverpost.com/lawlesslands

[20] Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C.§§ 1301-1303

[21] 25 U.S.C. § 1301 *et seq.*

[22] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

Indian commits a major or non-major crime against a tribal member[23] and they are severely limited to the punishment they may impose on Indians who commit major crimes. Nonetheless, major crimes are codified in tribal codes as a means to assert the sovereign and legitimate powers of Nations intent on protecting their populace. Justice, in some instances, rests on the tenuous foundation of an underfunded tribal system. Federal rejection of a case sometimes means that criminal predators may receive a "Get out of Jail Free" card! The starting place to reverse this outcome is a strong independent tribal court system.

IIB.

Art 1, 1(g) of the Pascua Yaqui Constitution is to be interpreted in harmony with the Sovereign Autonomy of the Pascua Yaqui Tribe.

Art 1, 1(g), of the Pascua Yaqui Constitution is to be interpreted in harmony with the sovereign right to self-government by the Pascua Yaqui Tribe. In 1988, the PYT, through its Constitution, adopted the language of the ICRA for its own Bill of Rights. The legislative drafters of the Constitution of the Pascua Yaqui Tribe made a deliberate effort to harmonize the Constitution, Art. 1, § 1(g) PYT with its counterpart in the Indian Civil Rights Act, 25 U.S.C. § 1302(7), but qualified the section as opposed to adopting it

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[23] A US Department of Justice study on violence against women concluded that 34.1 per cent of American Indian and Alaska Native women – or more than one in three – will be raped during their lifetime. According to the US Department of Justice, in at least 86 per cent of reported cases of rape or sexual assault against American Indian and Alaska Native women, survivors report that the perpetrators are non-Native men. In order to achieve justice, survivors of sexual violence frequently have to navigate a maze of tribal, state and federal law. The US federal government has created a complex interrelation between these three jurisdictions that undermines equality before the law and often allows perpetrators to evade justice. In some cases this has created areas of effective lawlessness which encourages violence. Action by US Congress is required to eliminate the possibility that complex jurisdictional rules and legislation in practice may deny survivors of sexual violence access to justice. Sometimes the confusion and the length of time it takes to decide whether tribal, state or federal authorities have jurisdiction over a particular crime result in inadequate investigations or in a failure to respond at all. *Maze of Injustice, The failure to protect Indigenous women from sexual violence in the USA*. Amnesty International USA (2007). amnestyusa.org

wholesale. The PYT facially altered the ICRA provision by adding a provision Number 1 to our Constitution's Bill of Rights.[24]

Generally, Indian tribes are not subject to the Bill of Rights and other constitutional guarantees found in the U.S. Constitution that restrict the federal and state governments. To address this circumstance, in 1968 Congress passed the Indian Civil Rights Act, § 1302-1303 (ICRA).[25]

However, in enacting the ICRA Congress only selectively incorporated certain provisions of the U. S. Constitution Bill of Rights into the ICRA, which was enacted to protect the individual rights of Indians while also protecting tribal governmental interests.

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[24] "...and in no event impose for conviction of one (1) offense any penalty or punishment greater than imprisonment for a term of one (1) year or a fine of $5,000 or both." Constitution of the Pascua Yaqui Tribe-Art. 1, Sec 1, (g). As opposed to the ICRA- 1302(7).....tribe shall not: require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and *in no event impose for conviction of any one offense* any penalty or punishment greater than imprisonment for a term of one year or a fine of $5,000 or both.

[25] 25 U.S.C. §§ 1302: No Indian tribe in exercising powers of self-government shall: (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances; (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized; (3) subject any person for the same offense to be twice put in jeopardy; (4) compel any person in any criminal case to be a witness against himself; (5) take any private property for a public use without just compensation; (6) 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 his defense; (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and [or] a fine of $ 5,000, or both; (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law; (9) pass any bill of attainder or ex post facto law; or (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

ICRA's congressional intent history indicates that the Act was to be read consistent with the principles of tribal self-government and cultural autonomy.[26]

Federal Appellate review of Tribal Court criminal convictions is generally limited to a Writ of Habeas Corpus, after exhaustion of tribal remedies and any tribal appellate review.[27] Federal courts have also been careful to construe notions of due process and equal protection under ICRA with due regard for historical, governmental, and cultural values of Indian tribes.[28]

Thus, when deciding permissible criminal punishments, the Pascua Yaqui Tribe's right to self-government and cultural autonomy should be the overarching concern. The PYT Court exemplifies community values as presented by the people through the Constitution, the Tribal Code, and oral testaments of historical events. The right of this government to punish wrongs is not a creature of foreign jurisprudence, but actually deeply rooted in indigenous Yaqui culture, tradition, and practice. In this case, along with Tribal Court precedence, the Pascua Yaqui Constitution, and Yaqui Common law, courts should also consider historic Yaqui legal precepts, when conducting an analysis concerning the application of the ICRA. Here specifically, this Court should give deference to the precept that "people should not cause trouble and that individuals are responsible for their own actions."

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[26] *See* 114 Cong. Rec. 5518, 5520 (1968)(reporting the President's message urging that the ICRA be enacted as part of a goal furthering Indian Self Determination); *see also*, *Santa Clara v. Martinez*, 436 U.S. 49, 62-64 and n. 11-15 (examining ICRA legislative history).

[27] 25 U.S.C. § 1303. Habeas corpus: The 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.

[28] *Tom v. Sutton*, 533 F.2d 1101, 1104 (9th Cir. 1976).

II C.

The Pascua Yaqui Constitution does not bar Consecutive Sentences.

The Pascua Yaqui Tribal Council intended to punish separate evils and authorized multiple punishments when it enacted the Tribal Constitution in 1988. Plain language controls in this case.

Legislative acts are presumed valid. This presumption of validity attaches from the moment legislation is passed and remains until rebutted. *Kelly v Johnson*, 425 U.S. 238, 247 (1976). Absent evidence to the contrary, the Tribal Council is presumed to have used words according to their generally accepted meaning and in their ordinary sense. The Council need not define every word of a statute. "The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Jordan v. De George* 341 U.S. 223, 231-232 (1951). As a general matter, a criminal sentence is not cruel and unusual punishment as long as it falls within the boundaries set by the legislature. In *Ramos v. Pyramid Tribal Court,* the defendant challenged a consecutive sentence imposed by a tribal court as being violative of the Indian Civil Rights Act. 621 F. Supp. 967 (D. Nev. 1985). The federal court noted that a consecutive sentence for numerous offenses "is a common and frequently exercised power of judges," and rejected the challenge. *Id.* at 970. *See Also, Navajo Nation v. Macdonald,* No. A-CR-09-90 (Navajo Nation Supreme Court 1991). (adopting *Ramos* and the *Blockburger test* and upholding consecutive sentences for Chairman Peter MacDonald on 8 charges amounting to 2,160 days imprisonment, 1,800 days labor, and a fine of $11,000).

The plain meaning of our Constitutional provision is found on its face, "one offense" means one offense. The PYT modified the ICRA provision dealing with sentences for "offenses" by adding the numerical number (1) to our Constitution's Bill of Rights after the word "one" when defining the maximum sentence for "one (1)

offense".[29] This can only mean that the Council, in its wisdom, recognized that clarification might be necessary for a select few. Our Constitution clearly allows for consecutive punishment of each singular offense, as Art.1 §1(g) of the Constitution clearly and unambiguously states that a sentence of imprisonment no greater than "one (1) year" may be imposed for each "one (1)" offense. Interpreting this to mean, as appellant advocates, that no matter how many offenses are committed, a maximum sentence of one year combined for all such offenses is the most that is Constitutionally permissible, would be absurd and would suggest that a criminal could commit mass murder on the Pascua Yaqui Reservation and be sentenced to only one one-year sentence.

Moreover, the Pascua Yaqui Criminal Code is rife with examples of the intent to divide and separately punish each criminal offense. For instance:

> (1) Penalties (4 PYTC § 4-20)-"Every person convicted of a violation of any provision of this code constituting an offense shall be subject to punishment by a fine of not more than $5,000.00 or by imprisonment in jail for not more than one year or both."
>
> (2) Chapter 1 of the criminal code is titled "Offenses."
>
> (3) Definitions Section of the Criminal Code: (4 PYTC § 1-20)
>
> (A) "Accused" means a person who has been arrested for committing a criminal offense and who is held for an initial appearance or other proceeding before trial.
>
> (D) "Criminal offense" means conduct that gives a peace officer or prosecutor probable cause to believe that a crime involving physical injury or the threat of physical injury, a sexual offense or a crime against property has occurred.

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[29] "...and in no event impose for conviction of one (1) offense any penalty or punishment greater than imprisonment for a term of one (1) year or a fine of $5,000 or both." Constitution of the Pascua Yaqui Tribe-Art. 1, Sec 1, (g). As opposed to the ICRA- 1302(7).....tribe shall not: require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and *in no event impose for conviction of any one offense* any penalty or punishment greater than imprisonment for a term of one year or a fine of $5,000 or both.

(F) "Defendant" means a person or entity that is formally charged by complaint, indictment or information with committing a criminal offense.

(4) "The sentence imposed on a person by the Court for a dangerous crime against children shall be consecutive to any other sentence imposed on the person at any time." (4 PYTC § 1-130(F)).

(5) CRIMINAL COMPLAINT filed in the underlying matter[30]: "The PASCUA YAQUI TRIBE, hereby complains and alleges, upon information and belief, that the above named defendant, an Indian, while on the Pascua Yaqui Reservation, did commit the following offense(s):"

(6) Rule 45 - Sentencing (3 PYT R.Crim.P. Rule 45): Any person who has been convicted of a criminal offense in the Tribal Court may be sentenced to one or a combination of the following penalties:

a. Imprisonment for a period permitted by the Tribal Code provision specifying the punishment for the offense, and in no case greater than one year for each offense.
b. A money fine in an amount permitted by the Tribal Code provision specifying the punishment for the offense, and in no case greater than $5,000 dollars for each offense.
c. Labor for the benefit of the tribe.
d. Rehabilitative measures.
e. Civil Restitution. (A judge may consider presentence reports)

Accordingly, the words and pronouncements of the PYT Constitution and statutes unmistakably bear out that the Council intended to grant the Tribal Court broad discretionary sentencing authority and sanction with consecutive sentences. Our laws and practices are consistent with each the ICRA, persuasive federal case law, and our own common law, customs, and traditions. The Pascua Yaqui Tribe, as a sovereign Indian nation, provides a fair and impartial court system that searches for the truth daily. Our public servants and judicial officers protect the rights of the individual and the community. Any outcome that differs from this Court's Opinion could potentially

[30] (line 9-12) Record INDEX document #38.

undermine the entire framework of Indian Law criminal jurisprudence, threaten the Pascua Yaqui judicial system, and harm the peacekeeping ability of all tribal nations.

Wherefore, the Council in 1988 intended, and now so intends, that the law punish each crime separately, and the laws enacted by the Tribal Council, from 1988 to the present, authorize the Tribal Court to impose separate and consecutive punishments for each "offense", if deemed appropriate by the Court under the facts and circumstances of each individual case.

III.

The ICRA does not limit the Authority of the Pascua Yaqui Tribal Court from Imposing Consectutive Sentences as Permitted under the Pascua Yaqui Constitution

Section 1302(7) of the ICRA does not limit the power of the Pascua Yaqui Tribal Court to impose consecutive sentences under Art 1, 1(g) of the Pascua Yaqui Constitution, as suggested by Appellant's strained construction. Essentially, Appellant has asked this court to overturn two decades of PYT Tribal Court, U.S. 9th Circuit Court of Appeals and U.S. Supreme Court practice and case law permitting consecutive sentences (*PYT v. Flores*, CR-06-072 (2006) (Pascua Yaqui Tribal Court imposed three consecutive sentences of 300 days each); *PYT v. Alvarez*, CR-06-080 (2006) (Tribal Court addressed the issue of consecutive sentencing for murder case when imposing nine (9) consecutive one year sentences for nine (9) counts); *PYT v. Valenzuela*, CR-95-169 (1995) (defendant sentenced to two (2) years total, for four (4) consecutive counts and four (4) concurrent counts); *Ramos v. Pyramid Tribal Court,* 621 F. Supp. 967 (D. Nev. 1985); *Blockburger v United States*, 284 U.S. 299 (1932); *Gore v. U.S.*, 357 U.S. 386 (1958) (adhering to *Blockburger*); *United States v. Castaneda*, 9 F.3d 761, 765 (9th Cir.1993); *United States v. Fontanilla*, 849 F.2d 1257 (9th Cir.1988) (because murder of one person and assault of another in same episode were properly charged as separate

crimes, it was permissible to charge defendant with two separate firearm counts); *see also, Navajo Nation v. Macdonald,* No. A-CR-09-90 (Navajo Nation Supreme Court 1991) (adopting *Ramos* and the *Blockburger test* and upholding consecutive sentences on 8 charges amounting to 2,160 days imprisonment, 1,800 days labor, and a fine of $11,000) (Multiplicity exists only if a single offense is charged in several counts); *Fort Peck Assiniboine and Sioux Tribes v. Marvin Bull Chief Sr.*, (Ft. Peck Ct. App 1989) (imposition of five (5) one (1) year consecutive sentences for conviction of five (5) counts of aggravated sexual assault); *St. Peter vs. Colville Confederate Tribe*, 2 CCAR 2, (Colville Confederate Ct. App. 1993), (noting "the language in 25 U.S.C. Sec. 1302 (8) does not contain any indication that Congress intended that tribes refrain from imposing consecutive sentences for multiple offenses. The act only limits the sentence which may be imposed for "any one offense (affirming trial court's imposition of five maximum penalty sentences, exceeding one year total when sentenced consecutively)). The Appellant asks this based on the holding in one outlying case from the Federal District Court of Minnesota.[31]

Since the holding in the case upon which the Appellant relies is a District Court holding, and not an opinion of a court of appeals legally charged with rendering "opinions" (as opposed to "holdings" at the Trial Court level, the holding relied upon does not constitute common law, and is not binding as decisional law. That case has not been "cited," or relied on, by any other appellate court in the Nation to establish new law, including especially in Indian Country appellate courts. Therefore, that case is irrelevant to this Court's consideration of the issues before it. Furthermore, even if § 1302(7) of the ICRA is ambiguous, which the Tribe does not concede, it would trigger the canon of construction that ambiguities in statutes dealing with Indians ought to be construed in a manner that benefits them.[32]

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[31] *Spears v. Red Lake,* 363 F.Supp. 2D 1176, 1178 (D. Minn. 2005).
[32] *See Bryan v. Itasca County*, 426 U.S. 373 (1976).

IV.

Conclusion

The questions presented are purely a matter of statutory and constitutional construction.

Firstly, the Pascua Yaqui Tribal Council intended to punish separate evils and authorized multiple punishments when it enacted the Tribal Constitution in 1988. The PYT Constitution calls for sentences of up to one year for "each" offense. There is no prohibition in imposing those sentences consecutively when the defendant has committed more than one offense. The mere fact that temporally one of these offenses may have occurred near in time to another offense is irrelevant to the issue of whether there was more than one offense. Appellant's argument is essentially when two or more offenses are committed at more or less the same time the sentencing Court only has authority to sentence for one year, no matter how many offenses may have occurred. As discussed, the argument would lead to the untenable argument that if a defendant shoots and kills five people in one shooting spree over a time frame of 30 seconds, or perhaps a minute, these offenses can only be punished by a single one-year sentence. Nothing in either the Tribe's law or the ICRA leads to this conclusion. The Tribal Courts have discerned no problem with the concept of consecutive sentencing, and have imposed consecutive sentences, when appropriate, since 1988. The Tribal Council of the PYT has observed this practice since 1988 and has not changed the Tribe's laws to impose a prohibition on consecutive sentencing at any time since 1988. In short, the plain language of the PYT Constitution, which grants sentencing authority to the Tribal Trial Court to impose sentences as it deems appropriate, controls in this case, as it has since 1988.

Secondly, the laws and practices of the Pascua Yaqui Tribe in the area of consecutive sentencing are consistent with each the ICRA, persuasive federal case law, and the Tribe's own common law, customs, and traditions. There are no known appellate level cases that establish, in any jurisdiction, the concept that an Indian court cannot impose consecutive sentences for separate offenses.

Nothing in Art 1, 1(g), of the Pascua Yaqui Constitution prohibits consecutive sentences. To the contrary, the Pascua Yaqui Constitution permits sentencing of up to one year imprisonment for "an offence." Nothing in the ICRA prohibits consecutive sentencing. Therefore, the PYT Tribal Court's practice of imposing consecutive sentences for multiple offenses is in harmony with the Indian Civil Rights Act. The Appellant's misguided construction that either the Pascua Yaqui Constitution or the IGRA prohibit consecutive sentences is incorrect, and must be rejected.

RESPECTFULLY SUBMITTED this 27th day of April, 2009.

OFFICE OF THE ATTORNEY GENERAL
PASCUA YAQUI TRIBE

By: _____

Robert Gillon
Interim Attorney General

Certificate of Service

I hereby certify that the Tribe's Appellate Memorandum was e-mailed this date to:

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