

Written Statement of
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Chair, Native American Justice Committee
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on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the
House Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security

Hearing on H.R. 1924
The "Tribal Law and Order Act of 2009"

December 10, 2009

Mr. Chairman, Mr. Gohmert, and distinguished Members of the Committee:

Thank you for inviting me to testify on behalf of the National Association of Criminal Defense Lawyers on the important and often neglected issue of tribal justice. My name is Tova Indritz. I am a criminal defense lawyer in Albuquerque, New Mexico. I graduated from Yale Law School in 1975, and after one year of clerking for a judge here in Washington, DC, I have been a criminal defense lawyer my entire legal career. I was in the office of the Federal Public Defender for New Mexico for 18 years, 13 of which I headed the office. Since 1995 I have been in private practice, where I represent persons accused of crime in trials, appeals, and post-conviction petitions. I practice in federal, state, and Indian tribal courts. I am the chair of NACDL's Native American Justice Committee.

NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's over 11,000 direct members – and 80 state, local and international affiliate organizations with a total of 35,000 members — include private criminal defense lawyers, public defenders, active-duty U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system.

My testimony is also endorsed by the National Association of Federal Defenders and by the New Mexico Criminal Defense Lawyers Association.

I. NATIVE AMERICANS FACING IMPRISONMENT IN THE UNITED STATES SHOULD BE ENTITLED TO THE RIGHT TO COUNSEL, THE RIGHT TO APPOINTED COUNSEL IF THE ACCUSED CANNOT AFFORD TO HIRE A LAWYER, AND DUE PROCESS.

The Sixth Amendment to the U.S. Constitution guarantees a criminal defendant the right to counsel, Johnson v. Zerbst, 304 U.S. 458 (1938), and applies that right to state court trials. Gideon v. Wainwright, 372 U.S. 335 (1963). This is a right guaranteed to all U.S. citizens, including Native Americans, who are, after all, U.S. citizens, and also to non- U.S. citizens who are charged with crimes and face the loss of their liberty. It equally applies in the misdemeanor context, if a person faces the possibility of imprisonment. Argersinger v. Hamlin, 407 U.S. 25 (1972).

Yet the Indian Civil Rights Act does not extend to Indians in tribal courts the protections of the Sixth Amendment, nor of the 1963 Supreme Court decision in Gideon v. Wainwright, which guarantees the right to a lawyer to persons unable to afford counsel. Rather, that Act of Congress provides that “No Indian tribe in exercising powers of self-government shall ... deny to any person in a criminal proceeding the right ... at his own expense to have the assistance of counsel for his defense.” 25 U.S.C. §1302(6). Tribal courts are not required to provide public defenders or appointed counsel to those defendants who cannot afford to hire a lawyer.

As you know, currently the Indian Civil Rights Act limits tribes to imposing sentences of up to one year and a fine of up to \$5,000, 25 U.S.C. § 1302(7). This bill contemplates raising that allowable penalty to three years imprisonment and a fine of up to \$15,000, section 304 of HR 1924.

We oppose that increase to three years, unless and until persons prosecuted in tribal courts have the same rights to counsel, appointed counsel, and all aspects of due process as are afforded to other persons in the United States. The Sixth Amendment to the Constitution should not stop at the reservation's edge.

As documented in NACDL's recent report "Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts," due to lack of funding, unethical caseloads, lack of training and standards, and the outright denial of appointed counsel, "misdemeanor courts across the country are incapable of providing accused individuals with the due process guaranteed them by the Constitution." All of these problems are greatly magnified within the tribal court systems.

The House version of H.R. 1924 provides that if the criminal trial subjects a defendant to more than one year imprisonment for any single offense, the tribe may not deny the assistance of a defense attorney. That is a good start, but there are several problems that NACDL asks you to address:

A. H.R. 1924 does not clearly set out a right to appointed counsel; it should do so.

The Senate version of this bill states that "if the defendant is not able to afford defense counsel, the tribal government shall provide one at the tribal government's expense". We urge you to adopt that language also, and to make clear that a person facing imprisonment, indeed, any length of loss of liberty, has the right to appointed counsel if he or she cannot afford counsel.

While we recognize and respect the importance of tribal sovereignty, and the right of tribes to follow traditional methods of dispute resolution, our position is this: If a tribe utilizes its court system for restorative justice, to mediate between parties, to accomplish making the parties whole such as through reconciliation, restoration of harmony among neighbors, and restitution, as is done in a Peacemaker court, then counsel may not be necessary. But when a tribe chooses the path of incarceration, or potential incarceration, then the Sixth Amendment must apply to all persons. Federal and State courts have long been able to balance the need for social order and the rule of law to protect society with the rights of individuals to counsel and due process, and we believe that Indian tribes can also do that.

As the U.S. Supreme Court held over 37 years ago, "In our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair

trial unless counsel is provided for him. This seems to us to be an obvious truth." Argersinger v. Hamlin, 407 U.S. 25, 32 (1972).

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Id. at 31, quoting Powell v. Alabama, 287 U.S. 45, at 68-69 (1932).

NACDL urges Congress to guarantee Native Americans charged in tribal court who face any term of imprisonment the right to counsel, and the right to appointed counsel at the expense of the tribe if the person cannot afford counsel, and to include that language in this bill.

B. H.R. 1924 includes no funds earmarked for tribes to provide appointed counsel; the bill should specifically authorize funds for appointed counsel in tribal prosecutions.

According to the U.S. Census Bureau, 24.3 percent of our 2.1 million Native Americans live at or below the federal poverty level. For the 400,000 or so Indians who live on reservations, where opportunities are few and unemployment high, the percentage of persons living in poverty is much higher. The majority of Native American defendants charged in tribal court cannot afford to hire an attorney. As one tribal court judge complained to the Wall Street Journal, "99.9 percent" of the defendants in his court cannot afford a lawyer. These individuals must defend themselves against a trained prosecutor with a better education, more resources, and far more courtroom experience, and more importantly, they face a real loss of liberty through incarceration.

While Congress provides some money for tribal judges and prosecutors, year after year, poor defendants often face the judge and the prosecutor, and potential jail sentences, completely alone, with no champion to defend them.

Some tribes have used their own funds to establish full-time, part-time, or contract public defenders. A lone public defender can only represent one defendant in a case with multiple defendants, and sometimes there is no provision for counsel for the other accused people. Some tribes require lawyers wanting to appear in tribal court on civil cases to accept criminal defense appointments, usually without compensation. Other tribes use non-lawyer advocates or law school clinic students to represent the accused. But the majority of tribes with criminal courts have no funds and no provision at all for counsel for the accused.

In New Mexico, where I live, none of the 19 Pueblo tribes has a public defender; one formerly had a public defender who was a young lawyer, but that Pueblo fired both their lawyer-prosecutor and their lawyer-public defender at the same time several years ago. One of the two Apache tribes has a public defender. The Navajo Nation, the largest tribe in the US, has a small public defender office with only two lawyers and four paraprofessional tribal advocates; together they represent less than 10% of the Navajos charged in eleven tribal courts scattered across a reservation that spans three States and is the size of West Virginia.

Congress can remedy this injustice by balancing distribution of resources among the judges, the prosecutors, and defender services. Funding only two prongs imbalances the system – a stool cannot stand on two legs. Congress should provide in this bill funding specifically for the defense of Native Americans facing incarceration in Indian tribal court prosecutions when those defendants cannot afford to hire counsel on their own.

Congress has codified its past formal findings that “the provision of adequate ... legal assistance to both individuals and tribal courts is an essential element in the development of strong tribal court systems” and that “Congress and the Federal courts have repeatedly recognized tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands.” Yet Congress has never allocated funds specifically for representation of defendants in tribal criminal cases.

As recently as November 16, 2009, Attorney General Holder described in a speech to the Brennan Center that deficiencies in indigent defense are to him "an issue of personal importance and national conscience". He stated, "Ours is an adversarial system of justice -- it requires lawyers on both sides who effectively represent their client's interests, whether it's the government or the accused. When defense counsel are handicapped by lack of training, time, and resources -- or when they're just not there when they should be -- we rightfully begin to doubt the process and we start to question the results. We start to wonder: Is justice being done? Is justice being served?" NACDL agrees with Attorney General Holder on that. He referred to "the right to have truly effective defense counsel" as the "most basic constitutional protection ", and again, we agree with him on that as well.

Attorney General Holder also said "I want to emphasize education, because I believe that if more Americans knew more about how some of their fellow citizens experience the criminal justice system, they would be shocked and angered." NACDL believes that if more Americans knew that First Americans could be imprisoned without ever having the right to appointed counsel, they would also be shocked and angered.

Although this bill provides for \$35 million per year for each of fiscal years 2010 through 2014 for prisons (see page 79, section 404), and although money might be usable for defense counsel (page 74, 76), there is not one cent dedicated for the purpose of defense counsel.

We urge this committee to add into this bill funding earmarked for the provision of defense services. This could be set up similar to the Criminal Justice Act, 18 U.S.C. §3006A, which allows for either the establishment of public defender offices, or a legal aid agency with its own board of directors, or a method to appoint individual lawyers who would be paid hourly, at each tribe chooses. Enactment of the requirement for defense counsel should carry with it funding explicitly earmarked for not only defense counsel but also such defense services as investigators, paralegals, office staff, expert witnesses, training, and support. Providing federal funds so that tribes can hire public defenders or contract counsel to defend the accused who cannot afford to hire their own, along with necessary ancillary defense services, will, as in federal and state courts, protect individual liberties, while still allowing the tribes to shape their own laws and judicial processes and protect public safety on tribal land.

Funding for defense counsel is a matter of basic fairness and equality. Native Americans charged with crime and facing incarceration are deserving of no less protection under the U.S. Constitution than are other persons in the United States.

C. The qualifications for appointed counsel must require lawyers who have graduated from law school and are licenced to practice law in a State or the District of Columbia.

The right to counsel requires the effective representation by counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984).

The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversarial process. The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.

Kimmelman v. Morrison, 477 U.S. 365, 374 (1986).

Some tribes allow persons who have not graduated from law school, or even from college, and sometimes who have not even graduated from high school, who are in effect paralegals, to be members of the tribal bar. While we do not express any view as to whether this is appropriate in the civil or mediation context, NACDL urges that the bill require defense lawyers to have graduated from law school and become a member of the bar of any State or the District of Columbia.

The use of non-lawyer paralegal tribal advocates leads to a question of what happens, for example, when a defendant has a non-lawyer tribal advocate rather than a "real" lawyer for counsel. See for example, United States v. Tools, 2008 U.S. Dist. LEXIS 49490, 15-16 (D.S.D. June 27, 2008), discussing whether a statement made by a defendant should be suppressed in this context, and noting:

. . . several courts have determined that representation by an individual who is not a licensed attorney is a per se violation of the Sixth Amendment right to effective counsel. See United States v. O'Neil, 118 F.3d 65, 70-71 (2d Cir. 1997) (stating that it is a per se violation of the Sixth Amendment "where the attorney was not licensed to practice law because he failed to satisfy the substantive requirements of admission to the bar"); United States v. Mouzin, 785 F.2d 682, 697 (9th Cir. 1986) (stating that an individual who had never been admitted to practice law and thus "who never acquired the threshold qualification to represent a client in court cannot be allowed to do so, and no matter how spectacular a performance may ensue, it will not constitute 'effective representation of counsel' for purposes of the Sixth Amendment"); Solina v. United States, 709 F.2d 160, 168-69 (2d Cir. 1983) (finding the graduate of an accredited law school who had failed the New York bar examination twice and had not been admitted to any other bar provided ineffective counsel under the Sixth Amendment); United States v. Myles, 10 F. Supp. 2d 31, 35 (D.D.C. 1998) (noting the "per se rule [under the Sixth Amendment] applies where the defendant is represented by an individual who has never been admitted to any court's bar"); and United States v. Dumas, 796 F. Supp. 42, 46 (D. Mass. 1992) (determining that "if a defendant is convicted while represented by someone who has never been admitted to any court's bar, that defendant is deemed to have been denied counsel as a matter of law"). Thus, if this court found the appointment of lay counsel to trigger the protections afforded by the appointment of "counsel" within the meaning of the Sixth Amendment, it would be fundamentally inconsistent with the general rule that an individual must be a licensed professional attorney before he can be considered effective counsel under the Sixth Amendment.

Id., footnote 1 at 16-18.

There is a clear distinction between licensed legal counsel and lay representation under the Sixth Amendment. See Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988) (stating "[t]he Sixth Amendment right to choose one's own counsel is circumscribed in several important respects . . . [r]egardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients . . . in court."). The United States Supreme Court did not extend the Sixth Amendment to encompass the right to be represented in court by a layman. *Id.* Additionally, every circuit which has considered the question, including the Eighth Circuit, has held there is no right to representation by persons who are not qualified attorneys. See Pilla v. American Bar Ass'n, 542 F.2d 56, 58-59 (8th Cir. 1976) (affirming the district court opinion which determined that individuals in civil and criminal cases do not have a constitutional right to be represented by lay counsel). See also United States v. Anderson, 577 F.2d 258, 261 (5th Cir. 1978) (stating "[t]here is no sixth amendment right to be represented by a non-attorney"); United States v. Scott, 521 F.2d 1188, 1191-92 (9th Cir. 1975) (determining that the word "counsel" in the Sixth Amendment guaranteeing an accused the right to have the assistance of counsel for his defense does not include friends or advisors of an accused who declines an attorney and represents himself); United States v. Grismore, 546 F.2d 844, 847 (10th Cir. 1976) (stating " '[c]ounsel' as referred to in the Sixth Amendment does not include a lay person, rather 'counsel' refers to a person authorized to the practice of law"); and United States v. Jordan, 508 F.2d 750, 753 (7th Cir. 1975) (stating "[t]he district court is not obligated to appoint counsel of defendant's choice where the chosen attorney is not admitted to practice"). 1

Id. at 15-16. See also United States v. Dupris, 422 F. Supp. 2d 1061 (D. S.D. 2006).

Even in those tribal courts where the tribal prosecutor is not a law school graduate, the individual who faces loss of liberty and consequent inability to support his or her family needs a law-trained defender.

We urge this committee to amend H.R. 1924 to provide that "a defense lawyer is defined as an attorney licensed to practice law by any State of the United States or the District of Columbia."

D. Due process must be provided in tribal courts.

Currently, the Indian Civil Rights Act requires that no tribe "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", 25 U.S.C. § 1302 (8). Yet without defense lawyers, and the

right to appointed counsel at the expense of the tribe, and with non-lawyer judges, and non-lawyer tribal advocates, tribes are now sentencing Native Americans to terms of imprisonment without due process.

I represented in a tribal court a young Native American woman who had been employed by an Indian tribe and was alleged to have taken tribal funds by taking checks that should have gone to other people or companies and depositing those funds into her own bank account or making "direct deposit" transfers of tribal money to her own account. In fact, before I became her lawyer she had plead guilty in tribal court to a charge that was broad and general and covered "direct deposit" and also "checks", with no allegation of any specific check on any specific date; the tribe sent her to serve six months in jail. She paid restitution in full. The plea agreement included language that "if other discrepancies are found via audit, those will be treated separately from this case". While she was in jail serving that sentence, she voluntarily advised the tribe of a specific taking that had not been previously presented to her and was not found by audit. After her release from the six month sentence, the tribe then charged her with three counts regarding that specific additional taking on a date which preceded her previous plea and was encompassed within it, and she hired me to represent her.

One of the charges against her was supported by a tribal ordinance. The other two charges were not defined or described by any tribal law, ordinance, or regulation, but were being prosecuted nonetheless.

If the case were to be tried to a jury, that jury would consist of the tribal council. The tribal council included only men; no women are allowed to be on the tribal council. Once appointed to the tribal council, a man serves for the rest of his life. There were at that time at least 40 members of the tribal council. I called the opposing counsel to ask whether, if we had a jury trial, the jury would have to be unanimous. He replied, "That's a good question. Let me find out and call you back." In other words, there were no rules of procedure; the rules were being made up as we went along.

The man initially appointed to be the judge was the previous year's tribal governor, who was the person who had fired my client for this same conduct. He was not a lawyer, and in fact, had minimal education. This was a fairly small tribe, which over the years had evolved into two political "factions"; my client's family came from one "faction" and this appointed judge from the other "faction".

After I filed a number of written motions, the tribal council voted to hire an outside person, a law school graduate, to be the judge for this case only.

At the hearing on my motions, there were times when I would object to testimony, and the Judge would rule "sustained" or "overruled"; since there were no rules of evidence that applied, the legal basis for either my objections or his rulings was unclear.

During the course of negotiations, the prosecutor reminded me that, as this particular tribe had elected not to participate in a multi-tribal appeal process, there was no appeal from the judge's ruling, for either side.

However, what bothered me most about this case was that a few months after the judge had dismissed the charges, the tribe chose to retaliate against one of my witnesses. This witness was a former Governor of the tribe, a full-blooded member of the tribe who had lived on tribal land all of his life. The tribe was upset that he testified for the defendant, who was a relative of his, and they punished him by banning him from tribal land. This meant that he lost his job on tribal land, and had to leave his home and family. What kind of court system will this create, when others who might be witnesses in the future know that if they testify for the accused, they risk their home, livelihood, and all the connections they hold dear? If this retaliation had occurred in a federal or state court, I could have immediately gone to the judge to rectify it, but there was no remedy in the tribal context.

In another case, I represented a Native American man in a different tribal court. Originally the FBI had investigated the case, but after a detailed and lengthy consideration, the U.S. Attorney determined that there was not sufficient evidence to prosecute my client. A few weeks later, my client called me and said he had to appear in tribal court to face charges. These tribal charges arose out of the same event, on the same night, as the events that the federal government had investigated and declined to prosecute. I told my client that I did not want to meet him at the tribal courthouse, but somewhere else, and we settled on meeting at a gas station. From there we went together to the tribal court. The FBI agent was quite well aware that I was this man's lawyer, as the FBI agent had come to my office to execute the federal search warrant for my client's head hair. But when we got to the tribal court, literally standing on the courthouse steps were two FBI agents and a Bureau of Indian Affairs police officer. They were quite disappointed to see me, since they had planned to interview my client when he appeared for the tribal court arraignment. Their pretext that this was a "different" case was an effort to end-run my client's right to counsel. And then they had the temerity to argue that they should not have to turn over the results of their investigation into the incident, because it was a "different" case from the federal investigation.

In small tribes, the Judge knows or is related to everyone who will come before him or her. I recall when I was a young and inexperienced lawyer asking a Native American client if he was related to a particular witness in our case. He looked at me as if that was the silliest question anyone ever asked him, and said, "Yes, of course; I'm related to everyone in the Pueblo." In one case I had in a tribal court, the alleged victim was the abusive ex-boyfriend of the Judge's sister; the Judge declined to find he had any conflict of interest.

E. The provision of counsel, or failure to provide counsel, and the provision of due process, or the failure to provide due process in tribal court often impacts the rights of Native Americans later charged with serious felonies in federal or state court.

Cases that start out in tribal court are sometimes then referred to federal court or state court. Deprivations of counsel, of qualified counsel, and of due process that occur in the tribal court process then spill over into the federal or state case. Frequently in the case of a serious crime in Indian Country, especially where the tribal lands are isolated or geographically distant from a large city, the tribal police are the first to respond and the FBI doesn't arrive until days, weeks, or months later. When the tribal police encounter a serious situation, such as a dead body, an allegation of rape or child abuse, they need to take immediate action but they already know that the case will become a felony charge in state or federal court. Yet they still must adhere to tribal processes, and give their modified Miranda warning that "you have a right to counsel if you can afford a lawyer", or they simply do not provide counsel at all.

Thus, for example, a Native American who is arrested by tribal police on a tribal charge of "assault", when there was a mutual fight that resulted in a death, will be initially charged in tribal court with assault, but later charged with a murder or manslaughter in federal or state court. How matters are handled at the initial steps can permanently impact the defendant's rights in terms of interviews without counsel, failure to promptly present the defendant to a judge, searches, collection and preservation of evidence, and every aspect of the case with the more serious penalty. See, for example, the cases of United States v. Tools, 2008 U.S. Dist. LEXIS 49490, 15-16 (D.S.D. June 27, 2008), discussed above, and United States v. Dupris, 422 F. Supp. 2d 1061 (D. S.D. 2006).

But a far more egregious case of this problem of denial of Sixth Amendment rights in a tribal context where the case is then to be transferred to federal court is United States v. Mitchell, 502 F.3d 931 (9th Cir. 2007), cert. den. Mitchell v. United States, 128 S. Ct. 2902 (2008). The FBI manipulated the tribal court system's lack of counsel to question a defendant detained for 25 days without any counsel or any arraignment to secure multiple confessions that led to a federal death sentence. In Mitchell, the Ninth Circuit affirmed, 2 to 1, the federal death sentence on a Navajo who was convicted of murder of two Navajos on Navajo land. Despite the tribe having not opted-in to the federal death penalty for murders of Indians on Indian land, and the Navajo Nation's stated opposition to the death penalty on religious and cultural grounds, the federal prosecutors chose to prosecute a 20-year old Navajo with no prior criminal record under a law of general jurisdiction (carjacking resulting in death) to obtain the death penalty.

Mr. Mitchell remained in tribal custody from November 4 to November 29, 2001, fully 25 days, with no counsel appointed and no arraignment in any court (tribal or federal). Indeed, the Assistant US Attorney consulted by the FBI thought there was insufficient evidence for an arrest warrant, but suggested getting the tribe to arrest, based on the AUSA's

supposition that the Navajo Nation would have a lesser standard for an arrest. And then the FBI took advantage of the tribal custody and lack of counsel to interview Mitchell multiple times, and take a polygraph, over those 25 days before taking him into federal custody (and again interviewed him on the way to the federal courthouse). The problem of failing to appoint counsel, in a circumstance when everyone involved knew there was a homicide and therefore a federal prosecution forthcoming, and no real likelihood of tribal prosecution, illustrates yet another reason why defendants in tribal court need appointed counsel. For Lezmond Mitchell the lack of appointed counsel in tribal court is a matter with life or death consequence.

F. Consecutive sentences for multiple offense counts for a single course of conduct currently result in sentences longer than one year, without counsel; this should be prohibited by Congress.

Some tribes "stack" multiple uncounseled misdemeanor sentences to impose multi-year sentences without counsel. See, for example, a case from the Pascua Yaqui Court of Appeals, Pascua Yaqui Tribe v. Beatrice Miranda, No. CA 08-015, at 21-26, decided March 29, 2009, attached hereto, and Fort Peck Assiniboine and Sioux Tribes v. Marvin Bull Chief, Sr., Appeal No. 062, May 31, 1989, www.tribal-institute.org/opinions/1989.NAFP.0000006.htm. For example, it is not uncommon for indigent Indians in Arizona tribal courts to be sentenced to four or five years of imprisonment, all without having had appointed counsel, even where the individuals have requested the appointment of an attorney.

A single event, such as an assault, can result in prosecution for multiple offense counts. Thus, a person charged with multiple offenses arising out of a single course of conduct can now face multiple one-year consecutive sentences without having any counsel at all. To correct this problem, NACDL recommends changing the language "any single offense" in Section 304(b) (1) to "a single course of conduct". This would, in effect, codify the interpretation of the phrase "any one offense" in 25 U.S.C. §1302(7) adopted by the District Court for the District of Minnesota in Spears v. Red Lake Band of Chippewa Indians, 363 F. Supp. 2d 1176 (D. Minn. 2005).

G. Tribal judges who can impose expanded sentences should also be required to be lawyers who are members of a bar of any State or the District of Columbia.

The bill requires tribal judges to be "licenced to practice law in any jurisdiction". For the same reasons that counsel should be a "real lawyer", discussed above, when the penalties are as high as are contemplated in this bill, judges who have the capacity to imprison people should be required to be a member of a bar of "any State of the United States or the District of Columbia", not just a member of a tribal bar that does not require graduation from law school.

II. NACDL OPPOSES INCREASING THE TRIBAL COURT PENALTY TO IMPRISONMENT OF UP TO THREE YEARS.

For reasons detailed in Point I above, because most tribes do not provide qualified appointed counsel to indigent defendants and due process, NACDL urges that Congress

- 1) not expand tribal jurisdiction beyond the current one year, and
- 2) limit the one year maximum to one year per a single course of conduct.

As discussed above, some tribes interpret the one year limitation as one year per count and therefore impose multiple-year sentences for a single event without the appointment of counsel. We also know of tribes that charge multiple counts for a related series of events, and without the indigent defendant having appointed counsel, impose a sentence of, at least in one case, nine years.

III. SENDING INDIANS CONVICTED IN TRIBAL COURT TO THE FEDERAL BUREAU OF PRISONS, WITHOUT ANY COST TO THE TRIBES, CREATES MULTIPLE PROBLEMS.

The Department of Justice, in Principal Deputy Assistant Attorney General Keith B. Nelson's letter of September 17, 2008, to Senator Byron Dorgan, at page 7, "strongly opposes creating authority to transfer prisoners convicted in tribal court to Federal facilities." We agree.

There are several reasons that allowing tribal courts to send convicted defendants to the Federal Bureau of Prisons without cost to the tribe is problematic:

1. The federal BOP is currently about 136% over capacity.
2. As the DoJ letter expresses, Indians would be incarcerated far from their homes, and unable to have family visits. They also would be unable to benefit from re-entry programs in their communities.
3. Tribes would have a financial disincentive to offer reasonable treatment alternatives to incarceration or treatment options that are more likely to help the community in the long run; under this bill the tribe would have to pay for education, drug treatment, counseling, or supervision near the tribe, but could send prisoners at no cost to the BOP.
4. Would tribal prisoners serving time in federal prison be entitled to good time under varying plans set forth by each individual tribe, or would they accrue good time in the same way, governed by federal statute, as their fellow federal prisoners? Would tribal prisoners be eligible, for example, as federal prisoners for time off their sentences for participating in drug treatment or other programs?

5. If a tribal prisoner wanted to challenge conditions of confinement, who is the respondent: the warden or the tribe? And, if the tribe, where does venue and jurisdiction lie? Would the Native American tribal prisoner be able to file a habeas corpus petition against the warden of the prison where he was being held in federal court in the district of confinement, as do other federal prisoners? Or would he have to file against the tribe that ordered the sentence, and if so, under Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), which holds that violations of the Indian Civil Rights Act can only be litigated in tribal court, would that have to be in the tribal court which sentenced him but has no control over the functioning of the Federal Bureau of Prisons? If that is the case, an Indian raising conditions of confinement claims would have no remedy whereas his/her cellmate who was sentenced in federal court has at least a forum for filing suit.

IV. THE "FINDINGS" SECTION OF THIS BILL SHOULD ALSO CONSIDER THE RIGHTS OF THE ACCUSED.

Both in the findings section (Section 2, starting at page 3) and in the "purpose" section (Section 2, starting at page 7), there should be added considerations concerning the rights of the accused. NACDL suggests adding a finding that indigent Indians (who are, after all, U.S. citizens) who are facing incarceration are currently not entitled to appointed counsel and most are not represented by a lawyer. (Note that the commission is to study "the rights of defendants subject to tribal government authority", page 53.) And in the purpose section, we suggest adding a purpose "to protect the rights of the accused in tribal courts".

V. REQUIRING THE FBI/OTHER LAW ENFORCEMENT AGENCIES AND THE U.S. ATTORNEY TO SEND DECLINATION REPORTS TO THE TRIBE RAISES A VARIETY OF CONCERNS.

This is particularly so where the investigation showed that the target was not involved in any crime, where tribal officials have familial relationships with the accused or the victim, and under other circumstances.

VI. REQUIRING TRIALS IN TO BE HELD IN INDIAN COUNTRY REQUIRES MORE THOUGHT ABOUT THE JURY POOL.

We know that, even by the Courts' own statistics, Native Americans are currently underrepresented in federal jury pools, especially in those districts where the courts have chosen to use only the voter lists and refused to use supplemental source lists (primarily drivers' license lists). Congress should take this opportunity to make federal jury pools more representative of the population, including correcting the underrepresentation of Hispanics, Native Americans, and other minorities, rural residents, and other underrepresented populations. If the courts are to hold jury trials on Indian land, there should be a requirement that if the representation of Native Americans on the district's jury pool is less than the

percentage of Native Americans over age 18 in that district, the court should be required to use a supplemental source list so as to bring the representation of Native Americans to at least the same percentage of Native Americans within the over-age 18 population of the district.

VII. CONCURRENT FEDERAL, STATE, AND TRIBAL JURISDICTION WILL ALLOW FOR TRIPLE PROSECUTION OF THE SAME CONDUCT WITHOUT DOUBLE/TRIPLE JEOPARDY.

Under United States v. Wheeler, 435 U.S. 313 (1978), prosecution in tribal and federal court for the same conduct is not double jeopardy because prosecution is by two sovereigns who do not derive sovereignty from each other. If all three jurisdictions can prosecute, we believe there should be some limitation on multiple prosecutions for the same conduct.

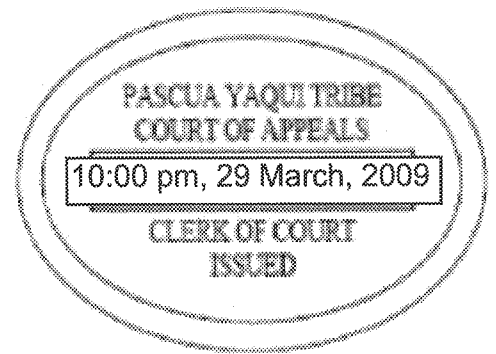
VIII. THE INDIAN LAW AND ORDER COMMISSION ESTABLISHED BY SECTION 305 OF THE BILL SHOULD INCLUDE MEMBERSHIP FROM THE DEFENSE BAR AND THE FEDERAL SENTENCING COMMISSION.

Section 305 of the bill establishes an Indian Law and Order Commission with various appointees by the Administration, House, and Senate, tasked to "conduct a comprehensive study of law enforcement and criminal justice in tribal communities" including issues of jurisdiction over Indian Country crimes, jails and prisons, prevention, rehabilitation and "the rights of defendants subject to tribal government authority", and other important issues, and to make recommendations.

We suggest adding representation from the defense bar or persons or organizations who represent Native Americans charged with crime, such as for example, a Federal Public Defender whose office represents Indians charged in federal courts or a lawyer public defender in a tribal court setting, and at least a liaison to the Federal Sentencing Commission, as that organization still controls the Sentencing Guidelines that apply to Indian Country crimes prosecuted in federal court.

NACDL much appreciates the opportunity to be heard before this Subcommittee. We thank you for considering our views.

Tova Indritz, Chair
Native American Justice Committee
National Association of Criminal
Defense Lawyers



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 threatened 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 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: 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 one-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 an 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, see 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." *citing 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 McClaghry*, 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. citing *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. 564, 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 than 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, Transcript 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

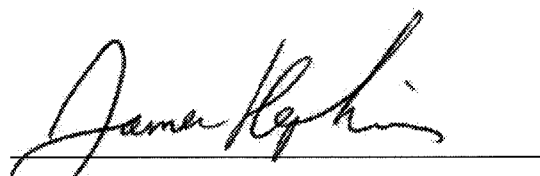
tribal sovereignty at federal district court, the Pascua Yaqui Court of Appeals will continue to hold jurisdiction over this matter until the stay expires in light of the constitutional issue.

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