

FILED

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[Signature]

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8 IN THE NEZ PERCE TRIBE COURT OF APPEALS

9 NEZ PERCE TRIBE,
10 Appellee,

AP. 2014-002

11 v.

12 APPELLANT'S MOTION AND
13 MEMORANDUM OF LAW IN
14 SUPPORT OF MOTION FOR
15 DISMISSAL OF GUILTY
16 VERDICT

14 DAVID CUNNINGHAM JR.,
15 Appellant.

16 With Oral Argument Requested.

17 APPELLANT'S MOTION FOR DISMISSAL OF GUILTY VERDICT

18 For the reasons set forth below, Defendant-Appellant David Cunningham
19 hereby moves, through and by his attorney, Quanah Spencer, for dismissal with
20 prejudice of the jury verdict and sentence imposed in the above-captioned action.
21

22 MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RELEASE

23 PENDING APPEAL

24 A. STATEMENT OF THE CASE
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Exhibit 19

1 Sometime in January 2013, a warrant was issued for the arrest of David
2 Cunningham on several charges.¹ After the alleged incident leading to the
3 charges, Mr. Cunningham moved to Spokane, WA and was working and
4 attending classes while also caring for his daughter Mylea. When Mr.
5 Cunningham became aware of the warrant, sometime in April, he drove to Tribal
6 Court from Spokane to quash the warrant. When he arrived at Tribal Court, Mr.
7 Cunningham was arrested. Several weeks later he bonded out. Following this,
8 Mr. Cunningham repeatedly traveled from Spokane to Tribal Court attending all
9 pre-trial hearings. At one point, Mr. Cunningham had a jury trial scheduled.
10 However, although he attended and was prepared to present his case at trial, the
11 Court was unable to seat a jury, and this trial date was set out further.
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18 During his pre-trial release, Mr. Cunningham began attending classes to earn
19 a welding certification. This is a one-year program, the first half of which he
20 graduated with a 3.8 GPA. Mr. Cunningham had also secured part-time work,
21 which allowed him to attend his evening classes. Mr. Cunningham was working
22 all morning and then traveling to Plummer, Idaho to attend classes. He continued
23 to care for his children that were living with him in Spokane. Mr. Cunningham
24 would wake up every night to ensure that his children did not have any nighttime
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29 ¹ For the reasons indicated in this Memorandum, exact dates and specific details are not
30 available to Mr. Cunningham's counsel as no record has been provided by the Court.

1 "accidents" amongst his other fatherly duties. He also voluntarily entered an
2 alcohol treatment program provided by the Coeur d'Alene Tribe. The house in
3 which he resided further was a drug and alcohol free environment and Mr.
4 Cunningham did not consume alcohol during his release.
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7
8 Finally, on December 17, *seven months* after being arraigned on the
9 charges, Mr. Cunningham finally received his Constitutional right to a trial by
10 jury. At the trial, he was found guilty. Mr. Cunningham was remanded into
11 custody pending his sentencing. On January 13, 2014 he was sentenced.
12
13

14 Following the guilty verdict and prior to the sentencing, Mr. Cunningham
15 had hired Q. Spencer Law Firm to represent him with regard to a potential
16 appeal. At this point, on January 6, 2014 following a phone conversation with
17 Johnae Wasson, Nez Perce Criminal Court Clerk, counsel for Mr. Cunningham,
18 directed an email to Ms. Wasson requesting the following records:
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20
21

- 22 1) A copy of any audio and video recording of the trial in the case;
- 23 2) A copy of the transcript of the case;
- 24 3) A copy of any motions and responses filed in the case;
- 25 4) A copy of any discovery turned over to the defense by the prosecutor
26 and any motions resulting therefrom; and
- 27 5) A copy of jury instructions.

28 No response was given and the records were not provided. On January 15,
29 2014, counsel for Mr. Cunningham filed with the Clerk of Court its Notice of
30

1 Appearance and Notice of Appeal. Included in the Notice of Appeal was again a
2 request to preserve the record and provide the above records. Additionally, after
3 filing, counsel asked Ms. Wasson if the records were ready, as they had
4 previously been requested. Neither the record nor the transcript were provided at
5 this time. The following Thursday, January 23, 2014, counsel telephoned Ms.
6 Wasson again asking for the record, as the time to file the brief was initiated.
7 Counsel was informed by Ms. Wasson that the record was not ready and that a
8 timeline as to when it would be ready could not be provided. On January 30,
9 2014 counsel again in person requested the record from the Clerk of Court.
10 Again, no record was furnished. In the intervening time, on January 27, 2014,
11 Judge Douglas Nash filed a briefing schedule which extended the time to file the
12 appeal briefs beyond the timeline originally provided by the Code. As of the date
13 of filing this Motion, counsel has not received a transcript of the trial or any of
14 the above requested records.
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22 **B. The Continued Incarceration of the Mr. Cunningham Violates his Due**
23 **Process Rights.**
24

25 Nez Perce Tribal Court Rules of Criminal Procedure 3 provides a defendant
26 with the right "to appeal in all cases." When a sovereign provides an appeal as of
27 right, as the Nez Perce Tribe has done through its Code, then "the procedures
28 used in deciding appeals must comport with the demands of the Due Process and
29
30

1 Equal Protection Clauses.” *Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *Coe v.*
2 *Thurman*, 922 F.2d 528, 530 (9th Cir. 1990) (“Where a state guarantees the right
3 to a direct appeal, as California does, the state is required to make that appeal
4 satisfy the Due Process Clause”). The Right to Due Process, as guaranteed by the
5 Indian Civil Rights Act, requires that a right to appeal be to an “adequate and
6 effective” appeal rather than a “meaningless ritual.” *Douglas v. California*, 372
7 U.S. 353, 358 (U.S. 1963); *ICRA 25 U.S.C. §1302*.

11 **1. The Court’s Failure to Provide a Transcript.**

12 Mr. Cunningham’s right to a full record, which includes at a minimum, the
13 complete transcript of the proceedings at trial is well established. *See United*
14 *States v. Carrillo*, 902 F.2d 1405, 1409 (9th Cir. 1990) (“A criminal defendant
15 has a right to a record on appeal which includes a complete transcript of the
16 proceedings at trial.”); *Hardy v. United States*, 375 U.S. 277, 279-82 (1964)
17 (“The right to notice ‘plain errors or defects’ is illusory if no transcript is
18 available at least to one whose lawyer on appeal enters the case after the trial is
19 ended.”) Moreover, the absence of an “accurate and reliable” record impairs a
20 defendant’s appeal. *See United States v. Wilson*, 16 F.3d 1027, 1031 (9th Cir.
21 1994). Moreover, NPTC requires that the Appellant “file with the clerk of the
22 Court the relevant portion of the record from the Tribal Court and shall serve one
23 copy on each respondent.” NPTC § 2-9-4(a). At this point, Mr. Cunningham

1 cannot meet this requirement—it is difficult to select portions of the record when
2 no record has been provided. This alone, beyond the inability to review the
3 record for errors—plain or otherwise—is prejudicing Mr. Cunningham’s
4 adequate and effective appeal. *See Evitts v. Lucey*, 469 U.S. 387, 393 (1985).
5 Further, unlike in *Wilson*, counsel has not failed to request the record resulting in
6 delay, it is quite the contrary, counsel has repeatedly requested that the record be
7 provided. With the briefs already being set-out, and counsel still without access
8 to any records, it is clear that Mr. Cunningham is unable to obtain an adequate
9 appeal. Any further delay, e.g. continuing the date for briefing so that the clerk
10 can provide an adequate record, will just result in further due process violations
11 as Mr. Cunningham remains in custody, unable to see his family or attend
12 classes. At this time, the appropriate remedy is to dismiss the claim, as it is
13 unclear that a record will ever be provided and any appeal would be a
14 meaningless ritual. *See Douglas v. California*, 372 U.S. 353, 358 (1963); *ICRA*
15 25 U.S.C. §1302.

2. Delays

25 The Sixth Amendment and the Indian Civil Rights Act guarantees the accused
26 a speedy trial, however, several courts, including the Ninth Circuit have found
27 that excessive delay in the appellate process may also rise to the level of a due
28 process violation. *Coe v. Thurman*, 922 F.2d 528, 530 (9th Cir. 1990). However,
29
30

1 not all delays are due process violations—a showing of actual prejudice caused
2 by the delay is necessary. *Blair v. Woodford*, 319 F.3d 1087, 1088 (9th Cir.
3 2003). Mr. Cunningham has met nothing but delay while attempting to assert his
4 constitutional and Tribal Code right to appeal, none of which are due to any fault
5 of Mr. Cunningham. NPTC R. Crim. P. 3. While the NPTC provides the
6 Appellate Court with the ability to set the briefing schedule, this Court's decision
7 to set out the due dates past the twenty days provided in the NPTC, has the effect
8 of delaying his appeal, which Mr. Cunningham believes will be ultimately
9 successful. NPTC § 2-9-3. This is in addition to the Court's failure to provide
10 Mr. Cunningham with a complete record or transcript as repeatedly requested.

11 This matter differs from *Wilson* in that Mr. Cunningham is suffering and has
12 suffered prejudice in preparing his appeal. *Wilson* involved the denial of a habeas
13 petition following a 13-year delay in hearing the defendant's appeal of a
14 conviction for 1st degree murder. *Blair*, 319 F.3d at 1087-88. The court found
15 that it could not determine if defendant suffered prejudice from the delay as the
16 appeal had just begun and might ultimately be successful. *Id.*

17 Here, one theory of his appeal is ineffective assistance of counsel at the Trial
18 Court level. While Appellate counsel for Mr. Cunningham has prepared to the
19 extent it can by interviewing witnesses and Mr. Cunningham, it is unable to fully
20

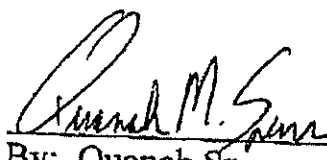
1 investigate the claim without seeing what motions and objections prior counsel
2 made or did not make. Another theory, based again by the interviews of
3 witnesses, is potentially judicial bias. As both these claims are factual in nature,
4 the timely recollection and recall of witnesses is crucial. Without full access to
5 what occurred prior to and during trial, Mr. Cunningham is unable to adequately
6 interview witnesses and thus, adequately appeal the conviction or orders during
7 trial. This failure has impaired Mr. Cunningham's appeal and caused a
8 deprivation of his due process rights because he is effectively not been able to be
9 heard. As the Court unnecessarily delays the appeal, Mr. Cunningham is
10 languishing in Nez Perce County jail which prevents him from pursuing his
11 employment, educational aspirations, and parental duties. He was doing all those
12 things before his incarceration and the delay of his appeal.
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19 Conclusion

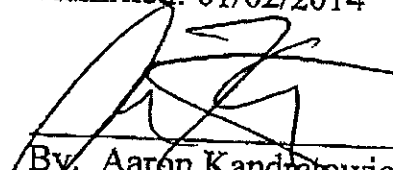
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21
22 Due to the aforesaid reasons we request that our motion be granted and the
23 David Cunningham's guilty verdict be dismissed with prejudice.
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1 DATED this 4th day of February, 2014.
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4 Q. SPENCER LAW FIRM

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7 By: Quanah Spencer
8 Admitted: 01/02/2014

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11 By: Aaron Kandraticz
12 Admitted: 01/02/2014
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NEZ PERCE TRIBAL COURT
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8 IN THE NEZ PERCE TRIBE COURT OF APPEALS

9 NEZ PERCE TRIBE,
 10 Respondent,

AP. 2014-002

11 v.

12 APPELLANT'S AMENDED
 13 MOTION AND MEMORANDUM
 14 OF LAW IN SUPPORT OF
 15 MOTION FOR DISMISSAL OF
 16 GUILTY VERDICT

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18 Appellant.

With Oral Argument Requested.

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20 For the reasons set forth below, Defendant-Appellant David M.
 21 Cunningham, Jr. hereby moves, through and by his attorney, Quanah Spencer,
 22 for dismissal with prejudice of the jury verdict and sentence imposed in the
 23 above-captioned action.
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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RELEASEPENDING APPEAL

A. STATEMENT OF THE CASE

Sometime in January 2013, a warrant was issued for the arrest of David M. Cunningham, Jr.¹ After the alleged incident leading to the charges, Mr. Cunningham moved to Yakima, WA. When Mr. Cunningham became aware of the warrant, sometime in April, he drove to Tribal Court from Toppenish, WA to attempt to quash the warrant. When he arrived at Tribal Court, Mr. Cunningham was arrested and later bonded out on a cash bond. Following this, Mr. Cunningham remained in the Lewiston/Lapawai region, until July when he moved to Spokane. While residing in Spokane, Mr. Cunningham secured work in Plummer, Idaho. He also began attending classes there to earn a welding certification. This is a one-year program, the first half of which he graduated with a 3.8 GPA. He also was caring for his daughter Mylea. He also voluntarily entered an alcohol treatment program provided by the Coeur d'Alene Tribe. The house in which he resided further was a drug and alcohol free environment and Mr. Cunningham did not consume alcohol during his release.

Throughout the following months, Mr. Cunningham traveled from

¹ For the reasons indicated in this Memorandum, exact dates and specific details are not available to Mr. Cunningham's counsel as no record has been provided by the Court.

1 Spokane to Tribal Court attending all pre-trial hearings. At one point, Mr.
2 Cunningham had a jury trial scheduled. However, although he attended and was
3 prepared to present his case at trial, the Court was unable to seat a jury, and this
4 trial date was set out further.
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7 Finally, on December 17, *seven months* after being arraigned on the
8 charges, Mr. Cunningham finally received his Constitutional right to a trial by
9 jury. At the trial, he was found guilty. Mr. Cunningham was remanded into
10 custody pending his sentencing. On January 13, 2014 he was sentenced.
11

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13 Following the guilty verdict and prior to the sentencing, Mr. Cunningham
14 had hired Q. Spencer Law Firm to represent him with regard to a potential
15 appeal. At this point, on January 6, 2014 following a phone conversation with
16 Johnae Wasson, Nez Perce Criminal Court Clerk, counsel for Mr. Cunningham,
17 directed an email to Ms. Wasson requesting the following records:
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18 Again, no record was furnished. In the intervening time, on January 27, 2014,
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20 Judge Douglas Nash filed a briefing schedule which extended the time to file the
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22 appeal briefs beyond the timeline originally provided by the Code. As of the date
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24 of filing this Motion, counsel has not received a transcript of the trial or any of
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26 the above requested records.

27
28 **B. The Continued Incarceration of the Mr. Cunningham Violates his Due**
29
30 **Process Rights.**

Nez Perce Tribal Court Rules of Criminal Procedure 3 provides a defendant
with the right "to appeal in all cases." When a sovereign provides an appeal as of
right, as the Nez Perce Tribe has done through its Code, then "the procedures
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2 *Thurman*, 922 F.2d 528, 530 (9th Cir. 1990) ("Where a state guarantees the right
3 to a direct appeal, as California does, the state is required to make that appeal
4 satisfy the Due Process Clause"). The Right to Due Process, as guaranteed by the
5 Indian Civil Rights Act, requires that a right to appeal be to an "adequate and
6 effective" appeal rather than a "meaningless ritual." *Douglas v. California*, 372
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11 **1. The Court's Failure to Provide a Transcript.**

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14 complete transcript of the proceedings at trial is well established. *See United*
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21 defendant's appeal. *See United States v. Wilson*, 16 F.3d 1027, 1031 (9th Cir.
22 1994). Moreover, NPTC requires that the Appellant "file with the clerk of the
23 Court the relevant portion of the record from the Tribal Court and shall serve one
24 copy on each respondent." NPTC § 2-9-4(a). At this point, Mr. Cunningham

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5 Further, unlike in *Wilson*, counsel has not failed to request the record resulting in
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12 classes. At this time, the appropriate remedy is to dismiss the claim, as it is
13 unclear that a record will ever be provided and any appeal would be a
14 meaningless ritual. *See Douglas v. California*, 372 U.S. 353, 358 (1963); *ICRA*
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2. Delays

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25 The Sixth Amendment and the Indian Civil Rights Act guarantees the accused
26 a speedy trial, however, several courts, including the Ninth Circuit have found
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4 constitutional and Tribal Code right to appeal, none of which are due to any fault
5 of Mr. Cunningham. NPTC R. Crim. P. 3. While the NPTC provides the
6 Appellate Court with the ability to set the briefing schedule, this Court's decision
7 to set out the due dates past the twenty days provided in the NPTC, has the effect
8 of delaying his appeal, which Mr. Cunningham believes will be ultimately
9 successful. NPTC § 2-9-3. This is in addition to the Court's failure to provide
10 Mr. Cunningham with a complete record or transcript as repeatedly requested.

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16 This matter differs from *Wilson* in that Mr. Cunningham is suffering and has
17 suffered prejudice in preparing his appeal. *Wilson* involved the denial of a habeas
18 petition following a 13-year delay in hearing the defendant's appeal of a
19 conviction for 1st degree murder. *Blair*, 319 F.3d at 1087-88. The court found
20 that it could not determine if defendant suffered prejudice from the delay as the
21 appeal had just begun and might ultimately be successful. *Id.*

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27 Court level. While Appellate counsel for Mr. Cunningham has prepared to the
28 extent it can by interviewing witnesses and Mr. Cunningham, it is unable to fully
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1 investigate the claim without seeing what motions and objections prior counsel
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 8 deprivation of his due process rights because he is effectively not been able to be
 9 heard. As the Court unnecessarily delays the appeal, Mr. Cunningham is
 10 languishing in Nez Perce County jail which prevents him from pursuing his
 11 employment, educational aspirations, and parental duties. He was doing all those
 12 things before his incarceration and the delay of his appeal.
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20 **Conclusion**

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22 Due to the aforesaid reasons we request that our motion be granted and the
23 David Cunningham's guilty verdict be dismissed with prejudice.
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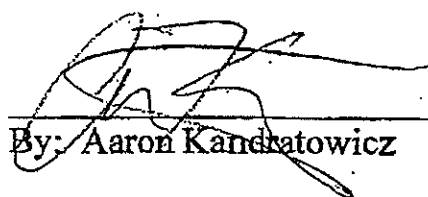
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DATED this ~~7th~~ day of February, 2014.

Q. SPENCER LAW FIRM



By: Quanah Spencer


By: Aaron Kandradowicz

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FILED

DATE: 02-21-14

TIME: 12:30 PM

Allyna K...

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7 quanah@qspencerlaw.com

8 IN THE NEZ PERCE TRIBE COURT OF APPEALS

9 NEZ PERCE TRIBE,
10 Respondent,

AP. 2014-002

11 v.

**APPELLANT'S SECOND
MOTION FOR DISMISSAL OF
GUILTY VERDICT; MOTION
FOR EXTENSION OF TIME;
MEMORANDUM OF LAW IN
SUPPORT**

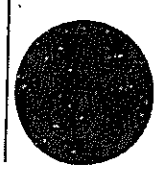
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14 DAVID M. CUNNINGHAM JR.,
15 Appellant.
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18
19 **APPELLANT'S MOTION FOR DISMISSAL OF GUILTY VERDICT**

20
21 Given the continuing prejudice suffered by David M. Cunningham, Jr., as
22 outlined below, Mr. Cunningham, by and through his attorneys, resubmits its
23
24 Motion to Dismiss and hereby further moves the Court for an order dismissing
25
26 the verdict against him with prejudice and immediately releasing him.

27 In the alternative, though counsel believes further delay will only continue
28
29 to seriously prejudice Mr. Cunningham's rights, Mr. Cunningham, by and
30

21



1 through his attorneys, moves the Court, in the interest of justice and NPTC § 2-9-
2 3(a) for an extension of time to file its brief so that it may sufficiently review the
3 records and audio provided to counsel two days before its brief was due on
4 February 21, 2014. This continuance is further necessary, as counsel has been
5 informed from a reliable court transcriber that a transcript of the audio will take
6 multiple days, even if expedited, to transcribe and thus, counsel would be unable
7 to meet its duty to provide the record to the Appellate Court as required by
8 NPTC § 2-9-4. We would request that Mr. Cunningham additionally be
9 immediately released so that he may adequately prepare his appeal without
10 suffering further delay.
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16 Given the prejudice already suffered, counsel requests an expedited
17 decision on this Motion so that any further remedies available to the defendant,
18 such as a petition for a writ of habeas corpus, may be prepared and filed on Mr.
19 Cunningham's behalf.
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21

22 I. Facts

23 Sometime in January 2013, a warrant was issued for the arrest of David M.
24 Cunningham, Jr.¹ After the alleged incident leading to the charges, Mr.
25 Cunningham stayed with family on the Yakama Nation Reservation, WA. When
26
27

28 ¹ For the reasons indicated in this Memorandum, exact dates and specific details are not
29 available to Mr. Cunningham's counsel as no complete and certified record has been provided
30 by the Court.

1 Mr. Cunningham became aware of the warrant, on March 25, 2013, he drove to
2 Tribal Court from Toppenish, WA to quash the warrant. At this time, he entered
3
4 a not guilty plea but did not knowingly waive any rights provided to him. When
5 he arrived at Tribal Court, Mr. Cunningham was arrested and bonded out on a
6
7 cash bond. Mr. Cunningham remained in the Lewiston/Lapwai area, until early
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9 July 2013, when he moved to Spokane, WA. While residing in Spokane, Mr.
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11 Cunningham secured full-time work in Plummer, Idaho. He also began attending
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13 classes there to earn a welding certification. This is a one-year program, the first
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Finally, on December 17, *seven months* after being arraigned on the

1 charges, Mr. Cunningham finally received his Constitutional right to a trial by
2 jury. At the trial, he was found guilty. Mr. Cunningham was remanded into
3 custody pending his sentencing. On January 13, 2014 he was sentenced.
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- 14 2) A copy of the transcript of the case;
- 15 3) A copy of any motions and responses filed in the case;
- 16 4) A copy of any discovery turned over to the defense by the prosecutor
17 and any motions resulting therefrom; and
- 18 5) A copy of jury instructions.
19
20

21 No response was given and the records were not provided. On January 15,
22 2014, counsel for Mr. Cunningham filed with the Clerk of Court its Notice of
23 Appearance and Notice of Appeal. Included in the Notice of Appeal was again a
24 request to preserve the record and provide the above records. Additionally, after
25 filing, counsel asked Ms. Wasson if the records were ready, as they had
26 previously been requested. Neither the record nor the transcript were provided at
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1 this time. The following Thursday, January 23, 2014, counsel telephoned Ms.
2 Wasson again asking for the record, as the time to file the brief was initiated.
3
4 Counsel was informed by Ms. Wasson that the record was not ready and that a
5 timeline as to when it would be ready could not be provided. On January 30,
6
7 2014 counsel again in person requested the record from the Clerk of Court.
8
9 Again, no record was furnished. In the intervening time, on January 27, 2014,
10
11 Judge Douglas Nash filed a briefing schedule which extended the time to file the
12
13 appeal briefs beyond the timeline originally provided by the Code. This Schedule
14
15 also provided 28 days for the prosecutor to file its Respondent's brief, beyond
16
17 what is provided by the Code.

18
19 On February 4, 2014 Appellant filed via fax a Motion to Dismiss. The
20
21 following week, on February 7, 2014, Appellant filed an Amended Motion To
22
23 Dismiss. Both Motions were accompanied by a request to return conformed
24
25 copies. No conformed copies were returned from the Court, despite counsel's
26
27 efforts to obtain them, and counsel is still unaware of the date in which its
28
29 Motions will be heard.

30
31 On February 14, 2014 at 4:15 pm, a package was delivered via US Mail to
32
33 counsel's office containing several documents. Amongst the documents was
34
35 conformed copies of Appellant's Motions. Several other documents, which
36
37 Counsel presumes is a portion of the record, were included in the package. This

1 was thirty-nine (39) days after counsel's initial request for the record and four (4)
2 court days prior to the Appellant's brief being due. On February 19, 2014, two
3 days prior to its brief being due, counsel received another package solely
4 containing a thumb drive and a sticky note with "David Cunningham" written
5 upon it. This did not include any explanatory letter from the Court nor did it
6 contain an index of its contents. The thumb drive's contents were simply five
7 folders labeled "Discs 1-5" with several audio files contained on the drive.
8 Again, counsel presumes this is a portion of the audio recording of Mr.
9 Cunningham's matter, but is unable to ascertain if it is the complete and accurate
10 recording of his hearings.
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16 Due to this delay, counsel has been unable to pursue an appeal of Mr.
17 Cunningham's trial. Due to this, Mr. Cunningham has remained incarcerated. .
18 The delay and errors, which are solely on the part of the Nez Perce Tribal Justice
19 system and not Mr. Cunningham, has and is causing Mr. Cunningham severe
20 prejudice. This prejudice includes a loss of time with his family. Mr.
21 Cunningham has missed his daughter's birthdays in addition to their state
22 basketball tournament. Mr. Cunningham has been forced to miss his scheduled
23 classes, and will not be able to receive his certification as he had hoped. He
24 additionally missed a funeral when his furlough was denied. This delay has
25 additionally increased the cost of his appeal. All of these factors amount to a real
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1 and severe deprivation and prejudicing of Mr. Cunningham's due process rights
2 and fundamental liberty interest.

3 4 **II. Legal Argument**

5 Nez Perce Tribal Court Rules of Criminal Procedure 3 provides a defendant
6 with the right "to appeal in all cases." When a sovereign provides an appeal as of
7 right, as the Nez Perce Tribe has done through its Code, then "the procedures
8 used in deciding appeals must comport with the demands of the Due Process and
9 Equal Protection Clauses." *Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *Coe v.*
10 *Thurman*, 922 F.2d 528, 530 (9th Cir. 1990) ("Where a state guarantees the right
11 to a direct appeal, as California does, the state is required to make that appeal
12 satisfy the Due Process Clause"). The Right to Due Process, as guaranteed by the
13 Indian Civil Rights Act and the Nez Perce Tribal Code, requires that a right to
14 appeal be to one that is "adequate and effective," rather than a "meaningless
15 ritual." *Douglas v. California*, 372 U.S. 353, 358 (U.S. 1963); *ICRA* 25
16 U.S.C. §1302; Nez Perce Criminal Procedure R. 3.

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24 In order for Appellant to pursue an effective appeal, counsel must have
25 access to a full record. *See United States v. Carrillo*, 902 F.2d 1405, 1409 (9th
26 Cir. 1990) ("A criminal defendant has a right to a record on appeal which
27 includes a complete transcript of the proceedings at trial."); *Hardy v. United*
28
29
30

1 *States*, 375 U.S. 277, 279-82 (1964) (“The right to notice ‘plain errors or defects’
2 is illusory if no transcript is available at least to one whose lawyer on appeal
3 enters the case after the trial is ended.”); *United States v. Wilson*, 16 F.3d 1027,
4 1031 (9th Cir. 1994). Additionally, the transcript must be “usable,” that is to say,
5 in such a matter that the counsel and this Court could review it. *United States v.*
6 *Wilson*, 16 F.3d 1027, 1031 (9th Cir. 1994) (“We cannot review the transcript
7 because the court reporter has not prepared a usable transcript. We are unable to
8 determine the merits of Wilson's judicial bias claim from the record before us”).
9

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13
14 Mr. Cunningham believes he has several valid errors from which to appeal, but
15 without a properly certified, complete, and accurate record, his counsel cannot
16 effectively appeal his judgment and sentence. *See United States v. Wilson*, 16
17 F.3d 1027, 1031 (9th Cir. 1994). Further, this Court could not effectively
18 determine the merits of Mr. Cunningham’s appeal without a usable record. *See*
19 *United States v. Wilson*, 16 F.3d 1027, 1031 (9th Cir. 1994) As such, Mr.
20 Cunningham has been severely prejudiced by the Court’s actions and inactions
21 and has not been able to effectively pursue a meaningful appeal. Mr.
22 Cunningham cannot review the record and properly formulate his appeal and
23 instead must guess at what the record might declare. This is wholly untenable
24 and justice cannot and is not served by using this standard on appeal.
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1 **A. Mr. Cunningham's Trial in Case No. CR-13-115-117 Violated the Nez**
2 **Perce Tribal Civil Rights Act and 25 U.S.C. §1302 Because the Nez Perce**
3 **Tribe Failed to Maintain a Complete Record of the Trial Proceeding.**

4 1. On January 6, 2014 Counsel for Mr. Cunningham requested from the court
5 the following records:

- 6
- 7 a. A copy of any audio and video recording of the trial in the case;
 - 8 b. A copy of the transcript of the case;
 - 9 c. A copy of any motions and responses filed in the case;
 - 10 d. A copy of any discovery turned over to the defense by the
11 prosecutor and any motions resulting therefrom; and
 - 12 e. A copy of jury instructions.

13 2. On January 15, 2014 Counsel again requested the above-described
14 documents when it filed its notice of appearance and notice of appeal.

15 3. Counsel contacted the court and requested the record on January 23, 2014,
16 and January 30, 2014. No record was provided.

17 4. On February 14, 2014, at 4:15 pm, a package was delivered to counsel's
18 office containing several documents.

19 5. This was thirty-nine (39) days after counsel's initial request for the record
20 and 4 Court days prior to the Appellant's brief being due.

21 6. On February 19, 2014, Counsel received another package which solely
22 contained a thumb drive and a sticky note with "David Cunningham"
23 written upon it.
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1 7. At this time, the record lacks the final jury instructions which were
2 presented to the jury; complete motions that were made prior-to, during,
3 and post-trial; any evidentiary rulings made by the Judge Plackowski; Jury
4 Selection motions; Discovery documents, a Victim Statement, among
5 other requested documents.
6
7

8 8. Without the above, Counsel is unable to determine if error, plain or
9 otherwise, has been made during the proceedings and is unable to present
10 an effective appeal.
11
12

13 **B. Mr. Cunningham's Trial and Sentencing in Case No. CR-13-115-117**
14 **Violated Nez Perce Tribal Civil Rights Act and 25 U.S.C. § 1302(c)(5)**
15 **Because the Nez Perce Tribe Failed to Maintain a Complete Record of the**
16 **Trial Proceeding.**

17 1. Mr. Cunningham incorporates by reference the preceding paragraphs
18 of this Motion.
19

20 2. Neither of the above delivered packages contained a certification that it
21 was the complete and accurate record by the Court Clerk. It also,
22 contained no certificate of service.
23

24 3. Further, a victim statement was provided at the sentencing yet the
25 documents received by the court does not contain such a statement.
26

27 Without this, counsel is unable to effectively appeal the sentencing.
28
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1 4. With no certification, Counsel is unable to determine if the record is
2 complete and accurate, or whether or not it has been tampered with or
3 altered in anyway.
4

5 5. Further, at this time, with no docket index or certification that the record is
6 complete, Counsel is unable to determine what final jury instructions were
7 presented to the jury; what, if any motions were made prior-to, during, and
8 post-trial; any evidentiary rulings made by Judge Plackowski; Jury
9 Selection motions; amongst others.
10
11

12 6. Without the above, Counsel is unable to determine if error, plain or
13 otherwise, has been made during the proceedings and is unable to present
14 an effective appeal.
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17
18 **C. Mr. Cunningham Did Not Receive a Speedy Trial in Violation of the**
19 **Nez Perce Civil Rights Act and the Indian Civil Rights Act.**
20

21 1. NPTC § 1-6-2 states that the Tribal Government shall not "Deny any
22 person in a criminal proceeding the right to a speedy and public trial."
23

24 2. The NPTC does not define what time limit is a violation of a Defendant's
25 right to a speedy trial, but the Court may and should turn to federal law for
26 further guidance.
27

28 3. Courts have found that as a general rule of thumb that "'speedy trial'
29 means a trial within six months." Navajo Nation v. Patricia Jim, (Exh. A.)
30

1 4. Further, the United States Supreme Court has set out four factors to
2 consider when deciding speedy trial actions. *Barker v. Wingo*, 407 U.S.
3 514 (1972).

5 5. A total of 267 days, or over eight months passed between Mr.
6 Cunningham's entry of plea and trial.

8 6. This considerable delay was not the result of any actions taken by Mr.
9 Cunningham nor did he waive his speedy trial rights.

11 7. While the full record is needed to fully present Appellant's argument.
12 Counsel believes that this delay, in which witnesses' memories have faded
13 and other evidence was lost, was clearly prejudicial to Mr. Cunningham.
14 Mr. Cunningham asserts that the only remedy available to him and the
15 Appellate Court is to dismiss the verdict with prejudice. Judicial economy
16 is not served by trying to go back and recreate the record in a piecemeal
17 fashion.
18
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22 **D. Mr. Cunningham's Trial and Sentencing in Case No. CR-13-115-117**
23 **Violated Mr. Cunningham's Due Process Rights under the Nez Perce Tribal**
24 **Civil Rights Act because the Jury was not Instructed on the Burden of**
25 **Proof.**

- 1 1. No Jury Instruction is included in the incomplete and limited paper record
2 reviewed by Appellant that details that the Burden of Proof is on the
3 prosecution to prove each and every element of each crime.
4
5 2. Moreover, the instructions included in the incomplete and limited paper
6 record reviewed by Appellant does not state that each element must be
7 proven beyond a reasonable doubt.
8
9 3. Given the totality of the circumstances in this case, without having an
10 opportunity to review the audio record, the facts clearly demonstrate that
11 the instructions were lacking and any failure to object to said instructions
12 amounted to ineffective assistance of counsel and plain error.
13
14 4. This failure, severely impacted Mr. Cunningham's due process rights to a
15 fair trial under the Nez Perce Tribal Civil Rights Act and the Indian Civil
16 Rights Act. 25 U.S.C. § 1302.
17
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21 **E. Mr. Cunningham's Sentencing in Case No. CR-13-115-117 Violated 25**
22 **U.S.C. § 1302 Because the Nez Perce Sentenced Mr. Cunningham to an**
23 **Amount Greater than One Year for Each Offense.**

24 1. NPTC § 4-1-27 provides:

25 (a) A court may sentence a person adjudged guilty of an offense to any one
26 of the following sentences or a combination of such sentences:
27

28 (1) to pay a fine not to exceed \$5,000;

29 (2) imprisonment not to exceed 1 year;
30

1 (3) to probation and/or suspension of sentence on such terms and
2 conditions as the Court may direct, including payment of probation
3 program costs.
4

5 2. Mr. Cunningham was sentenced to 1,095 days with 18 months probation.
6

7 3. The Judge did not distinguish as to what amount of the total sentence was
8 given for each of the offenses. This is a violation of the NPTC § 4-1-27.
9

10 **F. Mr. Cunningham's Sentencing in Case No. CR-13-115-117 Violated the**
11 **Nez Perce Civil Rights Act and NPTC § 4-1-31 Due to the Tribe's Undue**
12 **Delay in Sentencing.**
13

14 1. The Nez Perce Tribal Code does allow the court to consider a pre-
15 sentencing report (NPTC § 4-1-26); however, it does not provide or
16 require a defendant to complete a Pre-Sentence Investigation Report on his
17 own behalf.
18

19 2. Mr. Cunningham was provided with a Pre-Sentencing Form requesting
20 several pages of information to be completed by the defendant. No such
21 form was approved by a resolution of the Tribe nor provided for in the
22 NPTC.
23

24 3. Mr. Cunningham requested the opportunity to review the form with his
25 attorney prior to his completion of the form.
26
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1 4. The report provided to the Judge mentions this as reason for the delay in
2 sentencing. This "delay" to complete a form, which is not required by the
3 NPTC, violated Mr. Cunningham's right to sentencing without undue
4 delay and NPTC § 4-1-31.
5
6

7 **G. Mr. Cunningham's Sentencing in Case No. CR-13-115-117 Violated the**
8 **Nez Perce Civil Rights Act and NPTC § 4-1-31 Due to the Tribe's Failure to**
9 **Serve the Party Prior to Sentencing.**
10

- 11 1. The Pre-Sentence Investigation Report lists what is alleged to be Mr.
12 Cunningham's criminal record.
13
14 2. Included on the list are several charges, some of which were dismissed or
15 which the ultimate resolution is unknown.
16
17 3. Moreover, the list includes several charges that Mr. Cunningham is
18 unaware of and believes were included erroneously.
19
20 4. If the Tribe were to use such a report, due process requires that the
21 defendant be provided an opportunity to review and object to the contents
22 of the report prior to his/her sentencing. *See* Fed. R. Crim. P. 32(g). This
23 procedure is a safety measure "to ensure that the probation office performs
24 its duties in a fair manner, such as by giving defense counsel notice and a
25 reasonable opportunity to attend the presentence investigation interview
26 upon request, and by allowing time for the parties to object to 'material
27
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1 information, sentencing guideline ranges, and policy statements contained
2 in or omitted from the report.” *United States v. Ballard*, 2008 U.S. Dist.
3 LEXIS 53624 (E.D. Cal. June 10, 2008) (Exh. B); *See United States v.*
4 *Stoltz*, 365 Fed. Appx. 796, 797 (9th Cir. 2010) (discussing how it was not
5 prejudicial since defendant was granted additional time to review pre-
6 sentence report).
7
8

- 9
10 5. Mr. Cunningham was not provided an adequate amount of time to review
11 and object to the report. As such, his Due Process rights have been
12 irreparably violated.
13

14
15 **H. Inadmissible Evidence was Considered in Violation of NPTC 2-8.**

- 16 1. The Tribe’s Proposed Exhibit List includes a 911 Audio recording.
17
18 2. The Tribe’s Proposed Exhibit List includes “face book text.”
19
20 3. The Tribe’s proposed witness list appears to not include a 911 call
21 operator. It is unclear how audio would be admitted without its validity
22 being attested to.
23
24 4. A full record is needed to determine if the Tribe was permitted to
25 introduce evidence which should have been excluded as hearsay. Without a
26 complete record, counsel is unable to determine if the Court committed
27 error in admitting this evidence or if counsel was ineffective by not
28 objecting to its admittance.
29
30

1
2 **I. Judge Plackowski Demonstrated Judicial Bias in the Pre-Trial, Trial, and**
3 **Sentencing Phases of Case No. CR-13-115-117.**

4 1. "A new trial should be granted "if the record discloses actual bias on the
5 part of the trial judge or leaves the reviewing court with an abiding
6 impression that the judge's remarks and questioning of witnesses projected
7 to the jury the appearance of advocacy or partiality." *United States v.*
8 *Wilson*, 16 F.3d 1027, 1031 (9th Cir. 1994).
9

10
11 2. Witnesses are willing to attest that Judge Plackowski was making gestures
12 in view of the jury when Mr. Cunningham was testifying. Further, Judge
13 Plackowski allegedly made remarks regarding the sentencing of Mr.
14 Cunningham which may amount to judicial bias.
15

16
17 3. These gestures and remarks, upon a full review of the record, may
18 demonstrate that the judge was unnecessarily antagonistic and biased
19 towards Mr. Cunningham. Without a jury instruction to remedy such
20 gestures, the jury may have been improperly biased by the judge's actions.
21 See *Alvarez v. Dexter*, 2008 U.S. Dist. 41226, 7 (C.D. Cal. Feb. 27, 2008)
22 ("Such instruction, which the jury is presumed to have followed, cured any
23 alleged failure by the judge to maintain an entirely stoic countenance")
24 (Exh.C).
25
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29
30 4. Alternatively, the failure to request such an instruction or to object to

1 such remarks and gestures may amount to ineffective assistance of
2 counsel, upon review of a complete record.
3
4

5 **J. Judge Plackowski Demonstrated Judicial Bias in Responding to Mr.**
6 **Cunningham's Motions.**
7

- 8 1. Following trial, Mr. Cunningham filed a Motion for Acquittal and a Motion
9 for Stay.
10
- 11 2. The Judge denied both motions by written order which did not state
12 findings of fact and conclusions of law.
13
- 14 3. Moreover, the two Orders do not cite to any portion of the Nez Perce
15 Tribal Code or case law.
16
- 17 4. This, amongst other matters, may rise to the level of judicial bias if
18 counsel were able to review the full record.
19

20 **K. Mr. Cunningham was Provided Ineffective Assistance of Counsel in**
21 **Violation of the Nez Perce Civil Rights Act and the Indian Civil Rights Act**
22 **Attorney Failed to Properly Communicate with him.**

- 23 1. Prior to the trial, Mr. Cunningham was not provided the witness or
24 exhibit lists by his attorney Ken Nagy.
25
- 26 2. Mr. Cunningham's first opportunity to review these documents was in
27 the incomplete record the Court provided for his appeal.
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1 3. This clearly demonstrates that Mr. Nagy was not in proper
2 communication, which amounts to ineffective assistance of counsel.
3

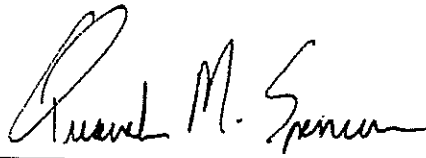
4 **III. Conclusion**

5 Mr. Cunningham's due process rights to a fair trial and effective appeal
6 have been seriously aggrieved by the Court's failure to provide a complete
7 record. Given the continuing prejudice suffered by Mr. Cunningham, we move
8 the Court for an order dismissing the verdict against Mr. Cunningham with
9 prejudice and request an order immediately releasing him from custody.
10
11
12

13 In the alternative, though Counsel believes further delay will only continue
14 to seriously prejudice Mr. Cunningham's rights, counsel moves the Court for a
15 an extension of time to file its brief so that it may sufficiently review the audio
16 provided to counsel two days before its brief was due. This extension is further
17 necessary so that counsel may be able to meet its duty to provide portions of the
18 record as required by NPTC § 2-9-4. Further, in the interest of justice and NPTC
19 § 2-9-6 Stay, counsel requests an order staying the sentence of Mr. Cunningham
20 and immediately releasing him from custody pending the completion of his
21 appeal. This request is due to the Court's action and inaction which necessitate
22 the extension of time to ensure Mr. Cunningham receives an adequate appeal.
23
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1 DATED this 21st day of February, 2014.
2
3

4 Q. SPENCER LAW FIRM PLLC
5

6 
7

8 By: Quanah Spencer, Adm. 1/2/2014

9 By: Aaron Kandratowicz, Adm. 1/2/2014
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IN THE NEZ PERCE TRIBAL COURT
IN AND FOR THE NEZ PERCE RESERVATION

NEZ PERCE TRIBE,

Respondent,

AP. 2014-002

v.

**FIRST DECLARATION OF
DAVID CUNNINGHAM IN
SUPPORT OF MOTION TO
DISMISS; MOTION TO
EXPEDITE.**

DAVID CUNNINGHAM JR.,

Appellant,

I, David M. Cunningham, Jr., hereby declare and state as follows:

1. I am over the age of 18, and competent to be a witness in this matter, and I make this Declaration of my own personal knowledge.
2. During my pre-trial release and all times subsequent I have not consumed alcohol or taken any controlled substances.

FIRST DECLARATION OF DAVID
CUNNINGHAM- 1

Q. Spencer Law PLLC
1312 N. Monroe Street, Suite 127
Spokane, WA 99201

- 1 3. During my pre-trial release I obtained a job working full time as a Wildlife
2 Technician for the Coeur d'Alene Tribal Wildlife Program that was able to
3 coordinate my work schedule with my class schedule.
4
5 4. Further, during my pre-trial release I attended classes full-time to obtain
6 my welding certification and obtained a 3.8 GPA for the fall semester.
7 5. I voluntarily submitted to alcohol counseling provided by the Coeur
8 d'Alene Tribe, who recommended recovery and relapse prevention classes
9 of which I was compliant and had no positive tests for drugs or alcohol.
10
11 6. Also, during my pre-trial release I had care and custody of my daughter
12 Mylea A. Samuels who lived with myself at the consent and request of her
13 mother. I would ensure that she attended school and were able to sleep
14 through the night and other fatherly duties. During this time I was the
15 primary caregiver for the child.
16
17 7. During the past several years I've had no serious offenses and no felony
18 convictions during my lifetime.
19
20 8. I have always adhered to all the conditions of my release and I have
21 appeared and attended every pre-trial conference and other scheduled
22 hearing relating to this charge and met every responsibility related to the
23 charges pending in Nez Perce Tribal Court.
24
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- 1 9. At no time did I knowingly and voluntarily waive my right to a speedy
2 trial as provided by the Nez Perce Civil Rights Act, the Indian Civil Rights
3 Act, and the United States Constitution.
4
- 5 10. During voir dire, I had concerns regarding a juror and his relationship with
6 the prosecutor, I voiced my concerns to my attorney, but he did not object
7 to his selection on the jury nor did the judge strike him from the jury.
8
- 9 11. During my incarceration pending sentencing, I was presented with a blank
10 form and instructed to complete it. I was unaware of a Tribal Resolution
11 adopted the use of such form, nor any Tribal Code provision requiring my
12 completion of the form. As such, I did not desire to complete the form
13 without an attorney's assistance. I did not believe this was cause for an
14 undue delay of my sentencing hearing nor did I consent to any delay in my
15 sentencing hearing.
16
- 17 12. I was not provided any opportunity to review and object to the Pre-
18 Sentencing Investigation Report prior to the sentencing hearing.
19
- 20 13. Upon my review of the Pre-Sentencing Investigation Report, I noticed
21 several errors in the report, including the listing of crimes for which I was
22 never charged.
23
- 24 14. At the sentencing hearing, the Judge reviewed and read a victim statement
25 provided by Jonelle Whitman.
26

1 15. Following my sentencing, I have missed many opportunities to be present
2 with my family. I've missed my daughter's birthdays, basketball games,
3 and other events. I have been unable to attend the alcohol treatment
4 classes at the Coeur d'Alene Tribe or my welding classes.
5

6 16. Prior to the trial and in preparation for the trial, Mr. Nagy did not provided
7 the witness or exhibit lists. The first opportunity to review these
8 documents was in the incomplete record the Court provided for his appeal.
9 This is just one example of many times in which my attorney, Ken Nagy,
10 failed to sufficiently communicate and update of the proceedings against
11 me.
12

13 17. I have always adhered to all the conditions of my release and I have
14 appeared and attended every pre-trial conference and other scheduled
15 hearing relating to this charge and met every responsibility related to the
16 charges pending in Nez Perce Tribal Court. I have reported on time for
17 every instance in which I was ordered to report to be report to jail.
18

19 18. I am not a flight risk. I have several members of my immediate and
20 extended family living on the Nez Perce Reservation nor am I risk to the
21 community or any other person.
22

23 19. I believe that my circumstances are unique and require that I be released
24 pending appeal if my verdict is not dismissed.
25
26

1 I CERTIFY under penalty of perjury pursuant to the laws of the Nez Perce Tribe that the
2 foregoing Declaration is true and correct.
3

4
5 DATED at Lewiston, Idaho this _____ day of _____, 2014.
6

7 DAVID M. CUNNINGHAM, JR.
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27 FIRST DECLARATION OF DAVID
28 CUNNINGHAM- 5

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1312 N. Monroe Street, Suite 127
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