United States v. Ballard

United States District Court for the Eastern District of California
June 10, 2008, Decided; June 10, 2008, Filed
CASE NO. CR06-0283-JCC; CR05-0168-JCC

Reporter: 2008 U.S. Dist. LEXIS 53624; 2008 WL 2388743

UNITED STATES OF AMERICA, Plaintiff, v. JOHN MARVIN BALLARD, Defendant.

Subsequent History: Post-conviction relief dismissed at, Motion granted by *United States v. Ballard, 2008 U.S. Dist. LEXIS 105664 (E.D. Cal., Dec. 22, 2008)*
Motion denied by United States v. Ballard, 2010 U.S. Dist. LEXIS 35926 (E.D. Cal., Mar. 15, 2010)

Prior History: *United States v. Ballard, 2008 U.S. Dist. LEXIS 8504 (E.D. Cal., Jan. 23, 2008)*

Core Terms

probation office, presentence investigation, recuse, presentence report, probation officer, impartial, sentencing determination, sentencing guidelines

Counsel: [*1] For John Marvin Ballard, Defendant (1): Jan David Karowsky, LEAD ATTORNEY, Jan David Karowsky, A Professional Corp., Sacramento, CA.
For USA, Plaintiff: Samuel Wong, United States Attorney's Office, Sacramento, CA.

Judges: John C. Coughenour, UNITED STATES DISTRICT JUDGE.

Opinion by: John C. Coughenour

Opinion

ORDER

This matter comes before the Court on Defendant's Motion to Recuse the United States Probation Office, Eastern District of California, from Conducting the Presentence Investigation or Preparing the Presentence Reports in These Cases (Dkt. Nos. 85, 109), Plaintiff's Opposition (Dkt. Nos. 87, 112), and Defendant's Reply (Dkt. Nos. 88, 114). The Court has carefully considered these documents and the balance of relevant materials in the case files and has determined that oral argument is not necessary.

Defendant asserts his belief that he cannot receive fair or impartial treatment in the presentence investigation or preparation of the presentence report if it is conducted by the Eastern District probation office because of Mr. Ballard's long-standing relationship with that office. (Def.'s Mot. 2 (Dkt. Nos. 85, 109).) Defendant cites no binding case law to support his position that the Court should recuse the [*2] Eastern District probation office, but refers the Court to a case from the Northern District of Texas in which the court analyzed the request for recusal of a particular probation officer by holding that officer to the standard of impartiality required for judges pursuant to *28 U.S.C. § 455*. *See United States v. Brooks*, 828 F. Supp. 29, 31 (N.D. Tex. 1993). *Section 455* governs the standard by which a *judge* must recuse himself. It does not address the standards by which a probation officer must carry out his or her duties. This is a significant distinction, as it is the judge, not the probation officer, who ultimately balances the opposing parties' arguments, considers the sentencing guidelines and other pertinent information, and makes the final sentencing determination. Moreover, even in *Brooks*, the court did not recuse the probation officer, because there was no showing that her opinions about the defendant were based on anything other than the results of her investigation. *Id.*

Federal Rule of Criminal Procedure 32, which sets out the procedures for conducting a presentence investigation and preparing a presentence report, includes safety measures to ensure that the probation office [*3] performs its duties in a fair manner, such as by giving defense counsel notice and a reasonable opportunity to attend the presentence investigation interview upon request, and by allowing time for the parties to object to "material information, sentencing guideline ranges, and policy statements contained in or omitted from the report." *FED. R. CRIM. P. 32(c)(2), (f)*. In addition, the probation office must bring to the Court's attention the parties' unresolved objections, if any, to material in the report. *FED. R. CRIM. P. 32(g)*. This procedure ensures that the Court will be made aware of any areas in which the defendant feels he has been treated unfairly before making a final sentencing determination.

The Court is not persuaded that Mr. Ballard cannot receive a fair or impartial treatment in a presentence investigation or a presentence report prepared by the Eastern District probation office. Accordingly, the Court DENIES Defendant's motion.

DATED this 10th day of June, 2008.

/s/ John C. Coughenour

John C. Coughenour

UNITED STATES DISTRICT JUDGE

DISTRICT COURT OF THE NAVAJO NATION

JUDICIAL DISTRICT OF CROWNPOINT, NAVAJO NATION (NEW MEXICO)

THE NAVAJO NATION,

Plaintiff,

vs.

PATRICIA M. JIM, Nos. CP-CR-1935, 1936, 2122-99

and

CLINTON JIM, Nos. CP-CR-1937, 2120, 2121-99

Defendants.

2000-CP-DC-002

OPINION AND ORDER

The court dismisses criminal charges, with prejudice, on its own motion, for lack of a speedy trial. The court has the authority to dismiss charges for a lack of a speedy trial taking into account judicial economy, the speedy trial right, fair trials on the merits, and the swift and certain administration of justice. Where the defendants were reasonably available, delays in charging, service, arraignment, and setting a court date justified dismissal.

[1] These are unusual criminal charges, which arise from the alleged illegal grazing of 58 "cattle of mixed breed" on the Shaw Ranch, which lies three miles southeast of Chaco Canyon Nation Park within the Crownpoint Judicial District. The court renders an opinion in this case as an illustration of how *not* to bring criminal charges.

[2] Patricia M. Jim was charged with offenses which allegedly occurred on December 23, 1998. On August 25, 1999, she was charged with a grazing violation (accomplice to grazing without a permit), criminal trespass and another grazing violation (grazing 58 head of cattle when the limit was 50 head). An initial summons issued on September 17, 1999, and a second summons issued on December 13, 1999. The certificate of service shows that the second summons was served upon the defendant on *November* 29, 1999. The appearance date was March 6, 1999. Patricia M. Jim's agreement for release on personal recognizance gives a pretrial conference date of September 12, 2000.

[3] Clinton Jim was charged with criminal trespass, a grazing violation (grazing without a permit), and another grazing violation (overgrazing, i.e. eight more cattle than the 50 allocated for the grazing unit) which allegedly occurred on December 23, 1999, in complaints which are dated August 25, 1999, approximately four months after the event. A criminal summons for the three offenses issued on November 17, 1999, and there is no indication on the certificate of service that it was served upon the defendant. A second summons issued on December 23, 1999, and the certificate of service shows that it was served on the defendant on *November* 29, 1999, almost a month before it was issued. The appearance date was March 6, 2000.

[4] The court raises the issue, on its own motion, of whether these defendants have been denied their right to a speedy trial under 1 NNC Sec. 7 (1995) of the Navajo Nation Bill of Rights. This court does file reviews of all criminal and civil actions pending before it, and exercising its inherent power and duty to do substantial justice, it will issue disposition orders where violations of the Navajo Nation Bill of Rights are apparent in the case file.

[5] The Navajo Nation Bill of Rights, at 1 NNC Sec. 7, guarantees all defendants in criminal cases the right to a speedy trial. Our code does not indicate what a "speedy trial" means, so the Navajo Nation courts have adopted the federal standard. Navajo Nation v. Bedonie, 2 Navajo Rep. 131136-137, 2 N.L.R. 42, 43-44 (Ct. App. 1979). The time for the calculation of the reasonable time for trial commences at the time of arrest. *Id.*, 2 Navajo Rep. at 137, 2 N.L.R. at 44. The Navajo Nation uses four factors to evaluate speedy trial rights: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his [or her] right; and (4) prejudice to the defendant. Navajo Nation v. MacDonald, N.L.R. Supp. 299, 306 (Navajo Nat. Sup. Ct. 1992). Aside from any assertion by a defendant, the court must consider judicial economy, the speedy trial right and a fair trial to determine the facts and law on the merits, and the swift and certain administration of justice. Navajo Nation v. MacDonald (Moeller v. Yazzie), N.L.R. Supp. 145, 155, 154-155 (Navajo Sup. Ct. 1990).

[6] In these two cases, the alleged offenses took place on December 23, 1998. The nub of the complaints is that the defendants apparently had some sort of lease rights to graze on the Shaw Ranch which were terminated in October of 1998. Shaw Ranch is owned by the Navajo Nation. There are witness lists for the charges which show an impressive number of ranger and police witnesses, but for some mysterious reason, the defendants were not charged until August 24, 1999. While criminal summons issued on September 17, 1999, there is no return of service to show that the summons were served upon the defendants. There is also some mystery in the return of service to the two summons issued on December 23, 1999, because the certificates of service show that they were served about a month *before* they were *issued*. The defendants were required to appear in court on March 6, 2000, almost seven months after the complaints, and almost a year and three months after the alleged offenses.

[7] Why the delay? There is nothing in the record to show that it is the fault of the defendants. The certificates of service show personal service upon the defendants at a street address in Crownpoint. Surely, from the allegation in two complaints that the "lease" (grazing or otherwise) was terminated by written notice in October of 1998, the rangers and police knew where the defendants were. There is no indication why the impressive list of rangers and police in the witness lists didn't charge the defendants on the spot. The government has the obligation to serve criminal summons, and we do not know why the original summons were not served or the second summons were served before they were issued. There is no delay which is attributable to the defendants.

[8] While the defendants themselves have not asserted their speedy trial right, the court takes into account the fact that there is no indication in the record that these defendants have counsel to protect their rights. In addition, this court recognizes the instructions of the Navajo Nation Supreme Court in speedy trial cases that judges must independently consider judicial economy, the speedy trial right, fair trials on the merits, and the swift and certain administration of justice.

[9] The prejudice to the defendants is obvious. We do not know if any of the several rangers and police listed in the witness statements have left their employment or have moved to assignments in other places, and there would be factual issues such as whether the witnesses actually saw these defendants, or based the charges on cattle brands or other factors. Time has long passed to get into the factual issue of posting (of notice) on the trespass charges, because "no trespassing" signs tend to fade, blow away, or be replaced after the event.

[10] While the court admonishes the prosecution for these delays and errors, the court is also disturbed by

the fact that when the defendants were arraigned in March of this year, the court staff did not schedule pretrial conferences until September, almost seven months after arraignment. This court uses the rule of thumb that "speedy trial" means a trial within six months, and pretrial conferences should not be scheduled after that time has run. All a defendant would have to do in such a situation is sit back, attend the pretrial conference, and then move to dismiss the charges for the lack of a speedy trial.

[11] Based upon these facts and the law reviewed above, the court finds that the defendants' fundamental right to a speedy trial under the Navajo Nation Bill of Rights has been denied, and the complaints in these cases are hereby DISMISSED WITH PREJUDICE.

Dated this 15th day of March, 2000

Hon. Irene M. Toledo, District Judge

top of page

Positive
As of: February 20, 2014 3:43 PM EST

Alvarez v. Dexter

United States District Court for the Central District of California
February 27, 2008, Decided; May 15, 2008, Filed
CV 07-7468-VBF(E)

Reporter: 2008 U.S. Dist. LEXIS 41226

EUSEBIO ALVAREZ, Petitioner, v. DEBRA DEXTER, Warden, Respondent.

Subsequent History: Adopted by, Writ of habeas corpus denied, Petition dismissed by *Alvarez v. Dexter, 2008 U.S. Dist. LEXIS 41350 (C.D. Cal., May 14, 2008)*

Core Terms

provoke, habeas relief, premeditation, snap, state court, counsel's, exclude evidence, quotation, recommend

Counsel: [*1] Eusebio Alvarez, Petitioner, Pro se, Blythe, CA.

For Debra Dexter, Warden, Respondent: John Yang, LEAD ATTORNEY, CAAG - Office of Attorney General of California, Los Angeles, CA.

Judges: CHARLES F. EICK, UNITED STATES MAGISTRATE JUDGE.

Opinion by: CHARLES F. EICK

Opinion

REPORT AND RECOMMENDATION OF

This Report and Recommendation is submitted to the Honorable Valerie Baker Fairbank, United States District Judge, pursuant to *28 U.S.C. § 636* and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" on November 14, 2007. Respondent filed an Answer on January 29, 2008. Petitioner filed a Traverse on February 14, 2008.

BACKGROUND

Petitioner attacked his brother with a machete, intending to kill him (Reporter's Transcript ("R.T.") 532-33, 546). The alleged provocation for this attack arose from disputes regarding rent and utilities at a duplex the brothers and their families shared (R.T. 476-505, 515-51). The jury found Petitioner guilty of premeditated attempted murder (R.T. 710-11). The California Court of Appeal affirmed in a reasoned opinion (Lodgment D). The California Supreme Court [*2] summarily denied Petitioner's petition for review (Lodgment F).

SUMMARY OF PETITIONER'S CONTENTIONS

Petitioner contends:

1. Alleged judicial misconduct assertedly violated Petitioner's constitutional rights;

2. The trial court's refusal to allow cross-examination of the victim regarding whether Petitioner "snapped" assertedly violated Petitioner's constitutional rights;

3. Petitioner's counsel allegedly was ineffective for failing to request CALJIC 8.73 and for failing to request an instruction concerning provocation based on a series of events over a substantial period of time.

STANDARD OF REVIEW

A federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *28 U.S.C. § 2254(d)* (as [*3] amended); *Woodford v. Visciotti*, 537 U.S. 19, 24-26, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002); *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002); *Williams v. Taylor*, 529 U.S. 362, 405-09, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision. *Lockyer v. Andrade*, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). A state court's decision is "contrary to" clearly established Federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts . . . materially indistinguishable" from a decision of the Supreme Court but reaches a different result. See *Early v. Packer*, 537 U.S. at 8 (citation

omitted) (quoting Williams v. Taylor, 529 U.S. at 405-06).

Under the "unreasonable application prong" of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law [*4] if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts). A state court's decision "involves an unreasonable application of [Supreme Court] precedent if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Williams v. Taylor, 529 U.S. at 407 (citation omitted).

"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520-21, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" Id. (citation omitted); see also Clark v. Murphy, 331 F.3d 1062, 1068 (9th Cir.), cert. denied, 540 U.S. 968, 124 S. Ct. 446, 157 L. Ed. 2d 313 (2003).

In applying these standards, this Court looks to the last reasoned state court decision. See Davis v. Grigas, 443 F.3d 1155, 1158 (9th Cir. 2006) (citation and quotations omitted). To the extent no such reasoned opinion exists, as where a state court rejected a claim in an [*5] unreasoned order, this Court must conduct an independent review to determine whether the decisions were contrary to, or involved an unreasonable application of, "clearly established" Supreme Court precedent. See Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000).

DISCUSSION

For the reasons discussed below, [1] the Petition should be denied and dismissed with prejudice. [2]

I. Petitioner's Judicial Misconduct Claim Does Not Merit Habeas Relief.

Petitioner alleges the trial court "continuously interrupted defense counsel during questioning, interjected during closing argument and [*6] 'rolled' his eyes while counsel was arguing his case to the jury" (Petition at 5). A review of the trial transcript does not support Petitioner's allegations. Interruptions were occasional, rather than continuous. Most of the interruptions and interjections were perfectly appropriate. None deprived Petitioner of a fair trial. See United States v. Parker, 241 F.3d 1114, 1119 (9th Cir. 2001) (judge's substantial or extreme participation in the proceedings does not deprive the defendant of a fair trial unless the record "discloses actual bias" or leaves the reviewing court with an "abiding impression" that the judge's remarks "projected to the jury an appearance of advocacy or partiality") (citations omitted).

The alleged "rolling" of the judge's eyes also did not deprive Petitioner of a fair trial. The court instructed the jury pursuant to CALJIC 17.30, stating:

> I have not intended by anything I have said or done, or by any questions I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness. If anything I have done or said has seemed to so indicate, you will disregard it and form your own [*7] conclusion (R.T. 676).

Such instruction, which the jury is presumed to have followed, cured any alleged failure by the judge to maintain an entirely stoic countenance. See Mott v. Calderon, 2006 U.S. Dist. LEXIS 42905, 2006 WL 3388588 *16-17 (N.D. Cal. Nov. 22, 2006) (judge's smiling countenance during private interchange with complaining witness did not merit habeas relief where the court instructed the jury pursuant to CALJIC 17.30); Johnson v. Bagley, 2006 U.S. Dist. LEXIS 97378, 2006 WL 5388021 *14-15, 22-25 (S.D. Ohio Apr. 24, 2006) (judge's alleged rolling of his eyes during defense cross-examination did not merit habeas relief where the judge instructed the jury not to infer that the court reached any conclusion on factual questions); see also United States Kelm, 827 F.2d 1319, 1323 (9th Cir. 1987) (a trial judge may even comment on the evidence, provided

---

[1] The Court assumes, arguendo, Petitioner has not procedurally defaulted any of his claims. See Lambrix v. Singletary, 520 U.S. 518, 523-25, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997); Franklin v. Johnson, 290 F.3d 1223, 1229, 1232-33 (9th Cir. 2002); see also Barrett v. Acevedo, 169 F.3d 1155, 1162 (8th Cir.), cert. denied, 528 U.S. 846, 120 S. Ct. 120, 145 L. Ed. 2d 102 (1999) ("judicial economy sometimes dictates reaching the merits if the merits are easily resolvable against a petitioner while the procedural bar issues are complicated").

[2] The Court has read, considered and rejected on the merits all of Petitioner's arguments. The Court discusses Petitioner's principal arguments herein.

"the judge has made it clear to the jury that all matters of fact are submitted to their determination") (citations and quotations omitted); cf. *Liteky v. United States,* 510 U.S. 540, 555-56, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994) ("judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality [*8] challenge . . . [E]xpressions of impatience, dissatisfaction, annoyance, or even anger" are insufficient).

II. The Trial Court's Refusal to Permit the Victim to Testify Regarding Whether Petitioner "Snapped" Does Not Merit Habeas Relief.

"In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire,* 502 U.S. 62, 68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). The correctness of state evidentiary rulings presenting only issues of state law is not cognizable on federal habeas corpus review. *Id.* at 67-68.

In limited circumstances, however, the exclusion of crucial evidence may violate the Constitution. See *Holmes v. South Carolina,* 547 U.S. 319, 323, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) ("[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the *Compulsory Process* or *Confrontation clauses of the Sixth Amendment*, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense") (citations and internal quotations omitted); *Chambers v. Mississippi,* 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *Chia v. Cambra,* 360 F.3d 997, 1003 (9th Cir. 2004), cert. denied,*544 U.S. 919, 125 S. Ct. 1637, 161 L. Ed. 2d 476 (2005)*; *Perry v. Rushen,* 713 F.2d 1447, 1452 (9th Cir. 1983), [*9] cert. denied,*469 U.S. 838, 105 S. Ct. 137, 83 L. Ed. 2d 77 (1984)*.

A defendant is not denied a fair opportunity to defend himself or herself "whenever a state . . rule excludes favorable evidence." *United States v. Scheffer,* 523 U.S. 303, 316, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998). "While the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes v. South Carolina,* 126 S. Ct. at 1732 (citations omitted). Thus, "the Constitution permits judges to exclude evidence that is repetitive . . . , only marginally relevant or poses an undue risk of harassment, prejudice or confusion of the issues." Id. (citations and internal brackets and quotations omitted).

To determine whether the exclusion of evidence violated the Constitution, the Court considers: (1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) [*10] whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the attempted defense. *Chia v. Cambra,* 360 F.3d at 1004 (citation omitted); *Tinsley v. Borg,* 895 F.2d 520, 530 (9th Cir. 1990), cert. denied,*498 U.S. 1091, 111 S. Ct. 974, 112 L. Ed. 2d 1059 (1991)* (citations omitted). The Court must give "due weight to the substantial state interest in preserving orderly trials, in judicial efficiency, and in excluding unreliable evidence." *Chia v. Cambra,* 360 F.3d at 1003-04 (citation, internal ellipses and quotations omitted). Moreover, under the Brecht harmless error standard, the exclusion of allegedly favorable evidence does not warrant habeas relief unless the absence of the evidence had a "substantial and injurious effect" upon the verdict. See *Dillard v. Roe,* 244 F.3d 758, 767 n.7 (9th Cir.), cert. denied,*534 U.S. 905, 122 S. Ct. 238, 151 L. Ed. 2d 172 (2001)*.

Under these standards, the trial court's refusal to permit the victim to testify regarding whether Petitioner "snapped" does not merit habeas relief. In California, a lay witness' opinion "is not generally admissible unless it is rationally based on the witness' perception *and* helpful to a clear understanding of his or her testimony." *People v. Miron,* 210 Cal. App. 3d 580, 583, 258 Cal. Rptr. 494, 495 (1989) [*11] (citing *California Evidence Code section 800*). The victim testified he was kneeling with his back to Petitioner and was not paying attention to Petitioner before the first machete strike to the victim's head (R.T. 361, 414-16). Thus, the victim would have had little or no perception from which to infer Petitioner's state of mind just prior to the attack. Further, the imprecise characterization of Petitioner's state of mind as "snapped" would not have been of much help to the jury. The characterization was neither particularly probative, nor particularly reliable. Moreover, although alleged "snapping" was a part of Petitioner's attempted defense, the excluded evidence was somewhat cumulative. Petitioner's wife testified Petitioner "just lost it" (R.T. 497). Petitioner testified he "burst out of rage" (R.T. 528). Petitioner further testified he was "consumed" with sudden anger (R.T. 549). A police officer reported that, after the attack, Petitioner told the officer Petitioner had snapped (R.T. 559).

Finally, the absence of any evidence from the victim regarding "snapping" did not have a "substantial and injurious effect" on the verdict. The evidence of alleged provocation (rent/utilities [*12] disputes and name-calling) was relatively unpersuasive. By contrast, the evidence of premeditation was relatively compelling.

Petitioner went down the street, unlocked the trunk of his car, took the machete out of the trunk, walked back to his brother and swung the machete at the brother multiple times while announcing Petitioner's murderous intentions (R.T. 529, 543, 361-62). Under the circumstances, a "snapped" characterization by the victim [3] would not have made any difference to the verdict.

III. Petitioner's Claims of Ineffective Assistance of Counsel Do Not Merit Habeas Relief.

To establish ineffective assistance of counsel, Petitioner must prove: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington,* 466 U.S. 668, 688, 694, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)("Strickland"). A reasonable probability of a different result "is **[*13]** a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The court may reject the claim upon finding either that counsel's performance was reasonable or the claimed error was not prejudicial. *Id.* at 697; *Rios v. Rocha,* 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the Strickland test obviates the need to consider the other.") (citation omitted).

Petitioner complains of counsel's failure to request CALJIC 8.73. CALJIC 8.73 provides that "when the evidence shows the existence of provocation that played a part in inducing the unlawful killing of a human being, but also shows that such provocation was not such as to reduce the homicide to manslaughter, and you find that the killing was murder, you may consider the evidence of provocation for such bearing as it may have on the question of whether the murder was of the first or second degree."

Assuming, arguendo, counsel's failure to request CALJIC 8.73 was unreasonable, Petitioner's claim cannot merit habeas relief because there is no reasonable probability that the instruction would have made a difference in the outcome of the trial. The trial court properly instructed the jury regarding the **[*14]** definition of premeditation (R.T. 599-601). Counsel argued (vehemently, though unsuccessfully) that evidence of provocation negated premeditation (R.T. 659-63). As previously indicated, the evidence of premeditation was relatively compelling while the evidence of provocation was relatively weak. In these circumstances, habeas relief is not warranted. See, e.g., *Ervin v. Lamarque,* 2001 U.S. Dist. LEXIS 19162, 2001 WL 1488612 *10 (N.D. Cal. Nov. 14, 2001); see also *People v. Rogers,* 39 Cal. 4th 826, 880, 48 Cal. Rptr. 3d 1, 141 P.3d 135 (2006), cert. denied, *127 S. Ct. 2129, 167 L. Ed. 2d 866 (2007)* (omission of CALJIC 8.73 where manslaughter instruction is given "does not preclude the defense from arguing that provocation played a role in preventing the defendant from premeditating and deliberating; nor does it preclude the jury from giving weight to any evidence of provocation in determining whether premeditation existed"); see generally *Weighall v. Middle,* 215 F.3d 1058, 1063 (9th Cir. 2000) (counsel's failure to request jury instruction not prejudicial where the argument, evidence, and general instructions all put before the jury the specific issue that would have been addressed by the omitted instruction).

Petitioner also argues **[*15]** counsel should have requested an instruction that provocation can result from a series of events that occur over a considerable period of time. Again, the claim of ineffective assistance of counsel fails for want of prejudice. As previously noted, the trial court properly instructed the jury regarding premeditation (R.T. 599-601). Petitioner's counsel argued that a series of events (rent/utilities disputes) over a period of months constituted sufficient provocation to negate premeditation (R.T. 659-60). Not surprisingly, the jury rejected this argument. There is no reasonable probability that a more specific jury instruction would have changed the outcome.

RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the Petition with prejudice.

DATED: February 27, 2008.

/S/

CHARLES F. EICK

UNITED STATES MAGISTRATE JUDGE

---

[3] Although the matter is uncertain, the Court assumes, arguendo, that the victim would have testified to the "snapped" characterization if the trial court had not precluded cross-examination on the subject.

Quanah M. Spencer
Q. Spencer Law PLLC
1312 N. Monroe Street, Suite 127
Spokane, WA 99201
Phone: (509) 252-6020
Fax: 888-243-2557
quanah@qspencerlaw.com

IN THE NEZ PERCE TRIBE COURT OF APPEALS

NEZ PERCE TRIBE,
Respondent,

v.

DAVID M. CUNNINGHAM JR.,
Appellant.

AP. 2014-002

APPELLANT'S THIRD MOTION FOR DISMISSAL OF GUILTY VERDICT AND BRIEF IN SUPPORT.

APPELLANT'S MOTION FOR DISMISSAL OF GUILTY VERDICT

Given the continuing prejudice suffered by David M. Cunningham, Jr., as outlined below, Mr. Cunningham, by and through his attorneys, resubmits his Second Motion to Dismiss and presents the following memorandum in support. Appellant hereby further moves the Court a third time for an order dismissing the verdict against him with prejudice and immediately releasing him. Having received no additional documents or recordings to complete the record, Appellant is still unable to adequately present an appeal.

I. Procedural History

For the sake of clarity, Defendants believe it necessary to provide the Court with a procedural history below:

On January 15, 2014, Defendant-Appellant David M. Cunningham, Jr. filed his Notice of Appearance and Notice of Appeal with the Nez Perce Tribal Court. Appellant's Brief would be due February 4, 2014, unless otherwise ordered by the Appeals Court. NPTC § 2-9-3. On February 4, 2014, Mr. Cunningham did file a Motion to Dismiss with this Court, and its Notice of Appearance and Motion for Immediate Release and Stay of Judgment with the Tribal Court. However, on January 27, 2014 the Court of Appeals issued an Order setting Appellant's Brief due date as February 21, 2014. (*See* Exhibit A: Scheduling Order.). The Order also required that the "Appellee's Brief shall be completed twenty (20) days after the Appellant's Brief, **due** March 21, 2014." (Exhibit A: Scheduling Order). On February 7, 2014, Defendant-Appellant filed an Amended Motion to Dismiss with the Appellate Court and Amended Motion for Release and Stay of Judgment with the Tribal Court. On February 13, 2014, Appellant's counsel received a letter from Judge Plackowski, dated February 11, 2014, which stated the Judge's refusal to hear Defendant's Motion on the basis that "Mr. Cunningham already has an attorney in his case and that attorney has filed several similar motions. The Code does not allow for a limited appearance in criminal cases." (Exhibit B: Ltr from

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

Judge Plackowski.). Noticeably, the letter does not cite the NPTC nor case law; nor did Judge Plackowski enter the motions into the record. (*See* Exhibit B: Ltr from Judge Plackowski.). Appellant had filed these Motions in response to the Tribal Court's failure to provide any record, and thus did not have knowledge of the "several similar motions" that were filed, nor could it appeal any rulings or orders contained in the record as the Defendant-Appellant had no record provided timely from the Tribal Court.

With Appellant's brief due February 21, 2014, and Appellant having not received any response from the Respondent or Appellate Court regarding its First Motion to Dismiss, Appellant filed a Second Motion to Dismiss, incorporating his First Amended Motion to Dismiss and asserting several more violations of Mr. Cunningham's due process rights. Mr. Cunningham alternatively requested an extension of time to file its Appellate Brief, as the record, still incomplete, was provided only two (2) days prior to his Brief due date.

On March 5, 2014, Respondent served upon Appellant, APPELLEE'S RESPONSE TO APPELLANT'S MOTION FOR STAY OF SENTENCE PENDING APPEAL. On March 6, 2014, Appellant received the ORDER GRANTING EXTENSION OF TIME ON MOTION TO DISMISS AND BRIEFING SCHEDULE. On March 18, 2014 Chief Justice Nash signed an

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

Order denying Appellant's Motion for Stay of Sentence. To this date, Appellant has not received any Response from the Prosecutor regarding either of its Motions to Dismiss.

II. Facts

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 stayed with family on the Yakama Nation Reservation, WA. When Mr. Cunningham became aware of the warrant, on March 25, 2013, he drove to Tribal Court from Toppenish, WA, to quash the warrant. At this time, he entered a not guilty plea but did not knowingly waive any rights provided to him. When he arrived at Tribal Court, Mr. Cunningham was arrested and bonded out on a cash bond. Mr. Cunningham remained in the Lewiston/Lapwai area, until early July 2013, when he moved to Spokane, WA. While residing in Spokane, Mr. Cunningham secured full-time 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

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

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

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 Spokane to Tribal Court attending all pre-trial hearings. At one point, Mr. Cunningham had a jury trial scheduled. However, although he attended and was prepared to present his case at trial, the Court was unable to seat a jury, and this trial date was set out further.

Finally, on December 17, *seven months* after being arraigned on the charges, Mr. Cunningham finally received his Constitutional right to a trial by jury. At the trial, he was found guilty. Mr. Cunningham was remanded into custody pending his sentencing. On January 13, 2014, he was sentenced.

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

1) A copy of any audio and video recording of the trial in the case;
2) A copy of the transcript of the case;
3) A copy of any motions and responses filed in the case;

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

4) A copy of any discovery turned over to the defense by the prosecutor and any motions resulting therefrom; and

5) A copy of jury instructions.

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

On February 14, 2014 at 4:15 pm, a package was delivered via US Mail to counsel's office containing several documents. Amongst the documents was

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

conformed copies of Appellant's Motions. Several other documents, which Counsel presumes is a portion of the record, were included in the package. This was thirty-nine (39) days after counsel's initial request for the record and four (4) court days prior to the Appellant's brief being due. On February 19, 2014, two days prior to its brief being due, counsel received another package solely containing a thumb drive and a sticky note with "David Cunningham" written upon it. This did not include any explanatory letter from the Court nor did it contain an index of its contents. The thumb drive's contents were simply five folders labeled "Discs 1-5" with several audio files contained on the drive. Again, counsel presumes this is a portion of the audio recording of Mr. Cunningham's matter, but is unable to ascertain if it is the complete and accurate recording of his hearings.

Due to this delay, counsel has been unable to pursue an appeal of Mr. Cunningham's trial. Due to this, Mr. Cunningham has remained incarcerated. The delay and errors, which are solely on the part of the Nez Perce Tribal Justice system and not Mr. Cunningham, has and is causing Mr. Cunningham severe prejudice. This prejudice includes a loss of time with his family. Mr. Cunningham has missed his daughter's birthdays in addition to their state basketball tournament. Mr. Cunningham has been forced to miss his scheduled classes, and will not be able to receive his certification as he had hoped. He additionally missed a funeral when his furlough was denied. This delay has additionally increased the cost of

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

his appeal. All of these factors amount to a real and severe deprivation and prejudicing of Mr. Cunningham's due process rights and fundamental liberty interest.

III. Legal Argument

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 used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses." *Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *Coe v. Thurman*, 922 F.2d 528, 530 (9th Cir. 1990) ("Where a state guarantees the right to a direct appeal, as California does, the state is required to make that appeal satisfy the Due Process Clause"). The Right to Due Process, as guaranteed by the Indian Civil Rights Act and the Nez Perce Tribal Code, requires that a right to appeal be to one that is "adequate and effective," rather than a "meaningless ritual." *Douglas v. California*, 372 U.S. 353, 358 (U.S. 1963); *ICRA* 25 U.S.C.§1302; Nez Perce Criminal Procedure R. 3.

In order for Appellant to pursue an effective appeal, counsel must have access to a full record. *See United States v. Carrillo*, 902 F.2d 1405, 1409 (9th Cir. 1990) ("A criminal defendant has a right to a record on appeal which includes a complete transcript of the proceedings at trial."); *Hardy v. United States*, 375 U.S.

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

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

Mr. Cunningham believes he has several valid errors from which to appeal, but without a properly certified, complete, and accurate record, his counsel cannot effectively appeal his judgment and sentence. *See United States v. Wilson*, 16 F.3d 1027, 1031 (9th Cir. 1994). Further, this Court could not effectively determine the merits of Mr. Cunningham's appeal without a usable record. *See United States v. Wilson*, 16 F.3d 1027, 1031 (9th Cir. 1994) As such, Mr. Cunningham has been severely prejudiced by the Court's actions and inactions and has not been able to effectively pursue a meaningful appeal. Mr. Cunningham cannot review the record and properly formulate his appeal and instead must guess at what the record might declare. This is wholly untenable and justice cannot and is not served by using this standard on appeal.

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

A. Mr. Cunningham's Due Process Right to Appeal has Been Violated by the Court's Failure to Adhere to the NPTC.

The Civil Rights Act of the Nez Perce Tribe provides that the "Nez Perce Tribe in exercise of its sovereign powers of self government shall not . . . Deny any person within its jurisdiction the equal protection of the law." NPTC § 1-6-2(c). Nez Perce Tribal Court Rules of Criminal Procedure 3 provides a defendant with the right "to appeal in all cases." NPTC § 2-1, Rule 3(j). Mr. Cunningham's due process and equal protection rights under the Nez Perce Civil Rights Act have continuously and repeatedly been violated.

a. <u>The Appellee's Response to Appellant's Motion for A Stay of Sentence Affirms Appellant's Inability to Appeal without a Complete Record.</u>

In Appellee's Response to Appellant's Motion for Stay of Sentence Pending Appeal, Respondent appears to respond to a Motion that was filed at the Tribal Court level. If such Motion was indeed filed at the Appellate Court level, then it was not included in the documents submitted to Appellant, which Appellant believes to be the record, and is a further example of the deficiency of what was provided.

Further, Respondent refers to a Ruling and Order on Defendant's for Stay of Execution of Sentence, filed January 21, 2014, but did not attach the Ruling and Order to its Response as an exhibit. This Ruling and Order was entered on

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

January 21, 2014, yet Appellant was not provided it until February 14, 2014.

Having reviewed the Ruling and Order cited by Respondent, which Appellant has attached, Judge Plackowski cites no Tribal Code Provision nor does he provide findings of fact and conclusions of law supporting his decision and thus, did not provide an adequate record from which to appeal. (Exhibit C: Order Denying Stay). Further, it appears that he reached this decision despite the Motion being unopposed by the Tribe. Again, if the Tribe did respond to the Motion, no such response was included in the documents provided to Appellant.

Having no knowledge of such a Motion being filed, Appellant filed its own Motion for Release at the trial court level, in accordance with NPTC § 2-9-6. Judge Plackowski ruled upon this Motion via a letter that did not cite the NPTC, nor case law, nor did he make a ruling on the record regarding the Motion. (Exhibit C: Order Denying Stay.). This again provided Mr. Cunningham with no record, findings of fact or conclusions of law, from which to appeal.

Moreover, NPTC § 2-9-7(a) provides that "no new evidence or testimony shall be presented or considered that was not ... included in the record." Again, the Tribe has failed to provide Appellant with a complete and accurate record. Mr. Cunningham's ability to present evidence "included in the record" is severely limited, when the record provided is so deficient. Given the scant record provided to date, any evidence or testimony presented would mandatorily be

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

"new evidence," effectively denying any appeal, as the trial court provided no facts from which to appeal. NPTC § 2-9-7(a)(b). Thus, Mr. Cunningham is unable to present an effective appeal with such a severely deficient record.

b. This Court's Review of the Record Violates NPTC § 2-9-4 and Mr. Cunningham's Due Process Rights.

"The Appellate Court will base its determination exclusively on the record of the trial court, briefs and oral argument if allowed. No new evidence or testimony shall be presented or considered by the Court that was not properly raised before the appeal and included in the record." NPTC § 2-9-7. This Court, in its Order Denying Appellant's Motion for Stay of Sentence, states that "[t]he record in this case reflects that a motion for a stay was presented to the trial court and denied." (Exhibit D: Ordering Denying Appellant's Motion.). Appellant, at the time it filed its Motion with the trial court level, did not have any record provided to it—as this was the basis of its requested relief. Appellant had requested that Mr. Cunningham be released, rather than to remain incarcerated indefinitely while the Court compiled the record. This Court now bases a decision, on facts and conclusions that were not available at the time Appellant filed his Motion.

Further, it is unclear what "record" the Appellate Court reviewed in reaching its decision, and what facts were "included in the record." NPTC § 2-9-

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

7. The NPTC provides the basis for which the Appellate Court is to receive the record:

> (a) At the time of filing its brief, the appellant shall also file with the clerk of the Court the relevant portion of the record from the Tribal Court and shall serve one copy on each respondent.
> (b) At the time the respondent files his response brief he shall also file an original of any proposed amendments or additions to the record and shall serve one copy on each appellant.
> (c) The clerk of the Court shall submit a certified copy of the record to the Court of Appeals when it submits the briefs.

NPTC § 2-9-4. Appellant has not filed the relevant portion of the record with the Court—it has yet to receive a complete record from which to submit portions. Respondent has not submitted any proposed amendments or additions to the record—there was no attachment to its Response. Thus, the clerk could not have submitted a certified record to the Court of Appeals. Appellant is unable to determine what record this Court reviewed and based its ruling upon—perhaps it was the incomplete and uncertified documentation it received from the clerk of court; or, perhaps it was the incomplete thumb-drive of audio provided to Appellant; or perhaps it was a transcript that was provided to the Appeals Court or something different entirely?

While the Federal Rules of Appellate Procedure ("FRAP") does provide what composes the record, the NPTC has no such provision. Fed. R. Civ. P. 10(a). Some Federal Circuit Courts have looked to the district court for

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

supplementing the record when necessary, it is usually accompanied by an order requiring the Appellant or Respondent to supplement its proposed record. *See, e.g.*, *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 638 (9th Cir. 1969) ("Such a failure [to not include depositions in submitted record] is not automatically "fatal" to an appeal because, under Rule 10(a), all of the original papers and exhibits filed in the district court are a part of the record on appeal whether or not brought before this court. Following oral argument, and pursuant to Rule 10 (a), this court directed plaintiff to file a supplemental transcript containing the missing depositions."). It is important to note that while FRAP 10(a) does specifically describe what was included in the record, the NPTC contains no such provision.

In consistency with this Court's prior decisions, Appellant urges that this Court apply the NPTC strictly, and only review the record as it is defined and provided to it under NPTC §§ 2-9-4 and 2-9-7. However, if this Court of Appeals has reviewed a complete and certified record, as it seems to indicate in its Order, Appellant respectfully requests that the Court issue an Order to provide this record to the Appellant, as Appellant has yet to receive one to date. Appellant then could comply with NPTC § 2-9-4 and submit a record for the Appellate Court to base its rulings upon—after the due process protections of allowing the Respondent to add to or amend to the record and the clerk to certify the parties'

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

submissions, are observed.

c. The January 27, 2014 Briefing Schedule provided Respondent additional time to file its Brief, in violation of NPTC § 2-9-3 and Mr. Cunningham's due process rights.

NPTC § 2-9-3 provides that "Within twenty (20) business days of filing a notice of appeal, or in such other time as ordered by the Appeals Court, the appellant shall submit an original and two copies of his brief to the clerk of the Court." NPTC § 2-9-3(a). "Each respondent shall file an original and two copies of his response brief with the clerk of the Court within twenty (20) business days from the date of receipt of the appellant's brief." NPTC § 2-9-3(b). The Tribal Court Scheduling Order, dated January 27, 2014, orders that Appellant's Brief shall be due February 21, 2014. (Exhibit A: Scheduling Order.). The Order further states that the "Appellee's Brief shall be completed twenty (20) days after the Appellant's Brief, due March 21, 2014." (Exhibit A:Scheduling Order.). This stated due date provides Appellee with eight (8) days in excess of what is required by the Code. NPTC § 2-9-3(b). While NPTC § 2-9-3(a) permits the Appeals Court to expand the time by Order for filing of the Appellant's brief, it bestows no such authority regarding the Respondent's Brief. NPTC § 2-9-3(b). Permitting the Respondent additional time to respond imposes a delay into the Appellate process, which NPTC § 2-9 seeks to avoid.

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

B. Appellant's First Amended Motion to Dismiss Should Be Granted.

On February 7, 2014 Defendant filed with this Court its Amended Motion to Dismiss, and served a conformed copy on the Respondent on February 19, 2014 (after Appellant finally received it on February 14, 2014). The NPTC does not provide a timeline in which a party may respond to a Motion at the Appellate level. Nevertheless, in this matter, the Appellate Court has allowed a party twenty (20) days to respond to each brief or motion. At least thirty-four days have elapsed since the Respondent was served Appellant's Amended Motion to Dismiss. Having not responded, Mr. Cunningham urges this Court to review the merits of his Motion without the benefit of the Respondents' Response Brief and without Respondent presenting oral argument. *See* NPTC § 2-9-3(d).

Moreover, the Respondent's failure to respond should be viewed by this court as his consenting to Mr. Cunningham's Motion. *See United States v. Kimmel*, 741 F.2d 1123, 1126 (9th Cir. Haw. 1984) ("[t]he government failed to respond to Kimmel's motion to dismiss in the district court except for a cursory oral statement that the district court should wait until after retrial to evaluate Kimmel's claims of prejudice. Kimmel's motion stated that the absence of assistance of counsel at his first trial had prejudiced his ability present a complete defense at his retrial, and set forth specific allegations of how his defense had been prejudiced. Especially in light of the government's failure to

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

contest Kimmel's allegations in the district court, the court did not err in dismissing the indictment on the ground that retrial would violate Kimmel's due process rights"); (Exhibit E: *Fernandez v. Arpaio*, 2006 U.S. Dist. LEXIS 33269, 4 (D. Ariz. May 19, 2006) ("Plaintiff did not timely respond and never tendered a response to the motion to dismiss. Accordingly, the Court will exercise its discretion to deem Plaintiff's silence to be a consent to the granting of the motion.")); (Exhibit F: *Martinez v. Pridemark Residential, LLC*, 2009 U.S. Dist. LEXIS 69628, 3-4 (D. Ariz. Aug. 10, 2009) ("In this case, Defendant filed its Motion for Failure to Prosecute on June 2, 2009. Plaintiffs failed to respond. The Court ordered Plaintiffs respond by July 6, 2009. Plaintiffs did not do so. The Court waited several weeks, and no response was forthcoming. Defendant then advanced a third motion, asking the Court to end this matter. Plaintiffs still have not responded. . . . On balance, these factors counsel that the Court should dismiss this case")). We request that this Court review the Motion to Dismiss, along with the Respondent's consent to the Motion, and order the immediate dismissal of Mr. Cunningham's guilty verdict.

C. Mr. Cunningham's Trial in Case No. CR-13-115-117 Violated the Nez Perce Tribal Civil Rights Act and 25 U.S.C. §1302 Because the Nez Perce Tribe Failed to Maintain a Complete Record of the Trial Proceeding.

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

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

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

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

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

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

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

6. On February 19, 2014, Counsel received another package which solely contained a thumb drive and a sticky note with "David Cunningham" written upon it.

7. At this time, the record lacks the final jury instructions which were presented to the jury; complete motions that were made prior-to, during, and post-trial; any evidentiary rulings made by Judge Plackowski; Jury

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

Selection motions; Discovery documents, a Victim Statement, among other requested documents.

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

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

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

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

3. Further, a victim statement was provided at the sentencing yet the documents received by the court does not contain such a statement. Without this, counsel is unable to effectively appeal the sentencing.

4. With no certification, Counsel is unable to determine if the record is complete and accurate, or whether or not it has been tampered with or altered in anyway.

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

5. Further, at this time, with no docket index or certification that the record is complete, Counsel is unable to determine what final jury instructions were presented to the jury; what, if any motions were made prior-to, during, and post-trial; any evidentiary rulings made by Judge Plackowski; Jury Selection motions; amongst others.
6. Without the above, Counsel is unable to determine if error, plain or otherwise, has been made during the proceedings and is unable to present an effective appeal.

E. Mr. Cunningham Did Not Receive a Speedy Trial in Violation of the Nez Perce Civil Rights Act and the Indian Civil Rights Act.

1. NPTC § 1-6-2 states that the Tribal Government shall not "Deny any person in a criminal proceeding the right to a speedy and public trial."
2. The NPTC does not define what time limit is a violation of a Defendant's right to a speedy trial, but the Court may and should turn to federal law for further guidance.
3. Courts have found that as a general rule of thumb that "'speedy trial' means a trial within six months." (Exhibit G: *Navajo Nation v. Patricia Jim*).
4. Further, the United States Supreme Court has set out four factors to consider when deciding speedy trial actions. *Barker v. Wingo*, 407 U.S. 514 (1972).

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

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

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

7. While the full record is needed to fully present Appellant's argument. Counsel believes that this delay, in which witnesses' memories have faded and other evidence was lost, was clearly prejudicial to Mr. Cunningham. Mr. Cunningham asserts that the only remedy available to him and the Appellate Court is to dismiss the verdict with prejudice. Judicial economy is not served by trying to go back and recreate the record in a piecemeal fashion.

F. Mr. Cunningham's Trial and Sentencing in Case No. CR-13-115-117 Violated Mr. Cunningham's Due Process Rights under the Nez Perce Tribal Civil Rights Act because the Jury was not Instructed on the Burden of Proof.

1. No Jury Instruction is included in the incomplete and limited paper record reviewed by Appellant that details that the Burden of Proof is on the prosecution to prove each and every element of each crime.

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

2. Moreover, the instructions included in the incomplete and limited paper record reviewed by Appellant does not state that each element must be proven beyond a reasonable doubt.

3. Given the totality of the circumstances in this case, without having an opportunity to review the audio record, the facts clearly demonstrate that the instructions were lacking and any failure to object to said instructions amounted to ineffective assistance of counsel and plain error.

4. This failure, severely impacted Mr. Cunningham's due process rights to a fair trial under the Nez Perce Tribal Civil Rights Act and the Indian Civil Rights Act. 25 U.S.C. § 1302.

G. Mr. Cunningham's Sentencing in Case No. CR-13-115-117 Violated 25 U.S.C. § 1302 Because the Nez Perce Sentenced Mr. Cunningham to an Amount Greater than One Year for Each Offense.

1. NPTC § 4-1-27 provides:

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

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

(2) imprisonment not to exceed 1 year;

(3) to probation and/or suspension of sentence on such terms and conditions as the Court may direct, including payment of probation

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

program costs.

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

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

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

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

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

3. Mr. Cunningham requested the opportunity to review the form with his attorney prior to his completion of the form.

4. The report provided to the Judge mentions this as reason for the delay in sentencing. This "delay" to complete a form, which is not required by the NPTC, violated Mr. Cunningham's right to sentencing without undue delay and NPTC § 4-1-31.

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

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

1. The Pre-Sentence Investigation Report lists what is alleged to be Mr. Cunningham's criminal record.
2. Included on the list are several charges, some of which were dismissed or which the ultimate resolution is unknown.
3. Moreover, the list includes several charges that Mr. Cunningham is unaware of and believes were included erroneously.
4. If the Tribe were to use such a report, due process requires that the defendant be provided an opportunity to review and object to the contents of the report prior to his/her sentencing. *See* Fed. R. Crim. P. 32(g). This procedure is a safety measure "to ensure that the probation office performs its duties in a fair manner, such as by giving defense counsel notice and a reasonable opportunity to attend the presentence investigation interview upon request, and by allowing time for the parties to object to 'material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.'" (Exhibit H: *United States v. Ballard*, 2008 U.S. Dist. LEXIS 53624 (E.D. Cal. June 10, 2008)); *See United States v. Stoltz*, 365

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

Fed. Appx. 796, 797 (9th Cir. 2010) (it was not prejudicial to defendant, as he was granted additional time to review pre-sentence report).

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

J. Inadmissible Evidence was Considered in Violation of NPTC § 2-8.

1. The Tribe's Proposed Exhibit List includes a 911 Audio recording.
2. The Tribe's Proposed Exhibit List includes "face book text."
3. The Tribe's proposed witness list appears to not include a 911 call operator. It is unclear how audio would be admitted without its validity being attested to.
4. A full record is needed to determine if the Tribe was permitted to introduce evidence which should have been exluded as hearsay. Without a complete record, counsel is unable to determine if the Court committed error in admitting this evidence or if counsel was ineffective by not objecting to its admittance.

K. Judge Plackowski Demonstrated Judicial Bias in the Pre-Trial, Trial, and Sentencing Phases of Case No. CR-13-115-117.

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

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

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

3. These gestures and remarks, upon a full review of the record, may demonstrate that the judge was unnecessarily antagonistic and biased towards Mr. Cunningham. Without a jury instruction to remedy such gestures, the jury may have been improperly biased by the judge's actions. (*See* Exhibit I: *Alvarez v. Dexter*, 2008 U.S. Dist. 41226, 7 (C.D. Cal. Feb. 27, 2008) ("Such instruction, which the jury is presumed to have followed, cured any alleged failure by the judge to maintain an entirely stoic countenance").

4. Alternatively, the failure to request such an instruction or to object to such remarks and gestures may amount to ineffective assistance of counsel, upon review of a complete record.

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

L. Judge Plackowski Demonstrated Judicial Bias in Responding to Mr. Cunningham's Motions.

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

M. Mr. Cunningham was Provided Ineffective Assistance of Counsel in Violation of the Nez Perce Civil Rights Act and the Indian Civil Rights Act because his Attorney Failed to Properly Communicate with him.

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

III. Conclusion

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

Mr. Cunningham's due process rights to a fair trial and effective appeal have been seriously aggrieved by the Court's failure to provide a complete record and adhere to its Appellate Procedures. Given the continuing prejudice suffered by Mr. Cunningham, we move the Court for an order dismissing the verdict against Mr. Cunningham with prejudice and request an order immediately releasing him from custody.

DATED this 25TH day of March, 2014.

Q. SPENCER LAW FIRM PLLC

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

By: Aaron Kandratowicz, Adm. 1/2/2014

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

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 30 day of March, 2014, I caused a true and correct copy of the foregoing APPELLANT'S THIRD MOTION TO DISMISS AND BRIEF IN SUPPORT to be forwarded, with all required charges prepaid, by the methods indicated below to the following persons:

William Richardson
Nez Perce Tribal Prosecutor
Fax: 208-843-5083

[ ] VIA U.S. MAIL

[X] VIA FACSIMILE

[ ] VIA MESSENGER

[ ] VIA PERSONAL DELIVERY