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IN THE NEZ PERCE TRIBAL COURT

IN AND FOR THE NEZ PERCE RESERVATION

DAVID M. CUNNINGHAM, JR.,
Petitioner,

v.

TEREMA CARLIN, warden of the Clearwater County Jail; ALICE KOSKELA, Executive Director of the Nez Perce Tribal Court,

Respondents.

NO. CV. 2015-026

PETITION FOR WRIT OF HABEAS CORPUS

I. Introduction

1. Petitioner David M. Cunningham, Jr., is currently in the custody of the Clearwater County Jail in Orofino, Idaho, serving a sentence imposed upon

him in criminal cases by the Nez Perce Tribal Court (hereinafter, "the Tribal Court").

II. Jurisdiction

2. Jurisdiction in this Court is proper pursuant to Title 1, Chapter 1-1, §§ 1-1-9–12.

III. Parties

3. Mr. Cunningham is an inmate of the Clearwater County Jail, Orofino, Idaho. His address is Clearwater County Jail, 381 West Hospital Drive, Orofino, ID 83544.

4. Respondent Terema Carlin is the warden of the Clearwater County Jail. Ms. Carlin's address is Clearwater County Jail, 381 West Hospital Drive, Orofino, ID 83544.

5. Respondent Alice Koskela is Executive Director of the Nez Perce Tribal Court. Ms. Koskela's address is 149 Lolo St, Lapwai, ID 83540.

IV. Factual Background and Procedural History

Procedural History

6. This Petition challenges Mr. Cunningham's conviction and sentencing in Nez Perce Tribal Court cases Number CR-13-115, CR-13-116, CR-13-117,

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and the Appellate Order in AP-2014-02.

7. The Tribe commenced Case Nos. CR-13-115, CR-13-116, and CR-13-117 by filing three separate complaints in the Tribal Court on January 29, 2013 (CR-13-117 is dated January, 29, 2012 but Petitioner believes this was a clerical error.) CR-13-115 charged Mr. Cunningham with the offense of Domestic Violence, CR-13-116 charged him with the offense of Domestic Violence, and CR-13-117 charged him with Child Abuse. All three complaints related to conduct involving Mr. Cunningham and Jonelle Whitman, alleged to have occurred on or about January 24, 2013 within the boundaries of the Nez Perce Reservation.

8. On March 25, 2014, Mr. Cunningham entered a plea of not guilty to all charges in CR-13-115, CR-13-116, and CR-13-117.

9. A Pre-Trial Conference was held in the matter on October 21, 2013 and a final Pre-Trial Conference was heard on October 28, 2013.

Mr. Cunningham's Representation

10. During the proceedings Mr. Cunningham was "represented" by four separate court approved and appointed public defenders. Initially, Mr. Cunningham was represented by two separate attorneys, Hyrum Hibbert

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and Jamal Lyskett of Idaho Legal Aid Services, Inc. At some point, without any notification to Mr. Cunningham and without any documented approval by the Court, Mr. Hibbert and Mr. Lyskett withdrew their representation of Mr. Cunningham.

11. Mr. Cunningham was next represented by Erin Tomlin. Ms. Tomlin again, without notice to Mr. Cunningham or documented approval by the Court, withdrew from representing Mr. Cunningham. It was later discovered that Ms. Tomlin ended her employment with the Court due to severe ethical issues with how Judge Plackowski was conducting the business of the Court. (Exhibit E: Interview with Erin Tomlin).

12. Mr. Cunningham was then represented by Ken Nagy. Mr. Cunningham had several concerns with Mr. Nagy, one of which was the fact that his letterhead explicitly states that his practice "is limited to: Housing and Employment Discrimination, and Municipal Law." (Exhibit H: Ken Nagy Letterhead).

13. Prior to trial, Mr. Cunningham and Loretta Halfmoon requested that Mr. Nagy withdraw his representation of Mr. Cunningham so that he may seek private representation. Mr. Nagy did not motion the Court for leave to

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withdraw, rather, he simply informed Mr. Cunningham that it was not a timely request.

14. Throughout the proceedings, Mr. Cunningham repeatedly contacted his attorneys asking for status updates, court dates, discovery, and other vital information to his defense. Mr. Cunningham's attorneys either did not respond, responded several weeks later, or had withdrawn from his representation. At no point, did Mr. Cunningham believe he was adequately represented by counsel.

Court Caused Delays

15. Throughout the proceedings, Mr. Cunningham attempted to streamline the matter before the Court, however, the Court repeatedly failed to set timely Court dates and failed to notify Mr. Cunningham when his matter would be heard.

16. The Clerk of Court, Marla Cuevas-Jimenez, informed Mr. Cunningham that there had been "a few setbacks" by the Court due to the attorneys entering and leaving the matter, when Mr. Cunningham contacted her regarding his court dates after receiving no response from his attorney. (Exhibit A, Email from Court Clerk.)

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17. In November of 2013, Mr. Cunningham's matter was scheduled to go to trial before the Nez Perce Tribal Court. However, at that time the Court was unable to empanel a jury. Mr. Cunningham requested that his attorney move to dismiss at this time, but no such motion was made.

18. Subsequent to this failure by the Tribal Court, a second trial was set, though nothing in the record indicates how it was set.

19. None of these "setbacks" were due to any action or inaction of Mr. Cunningham—rather it was through the misfeasance and nonfeasance of the Tribal Court.

20. A Notice of Appeal was filed by Mr. Cunningham on January 15, 2014. Subsequently, Mr. Cunningham filed three separate Motions to Dismiss with the Court of Appeals—and at no time did the Court respond to any of the Motions. None of the Motions were placed on the docket to be heard or were granted or denied by the Court prior to the ruling on the merits. (Exhibit I: Motions to Dismiss). The Prosecutor filed no responsive pleadings to the first two Motions to Dismiss and responded to the Third Motion to Dismiss.

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Sentencing Hearing

21. At the January 13, 2014 sentencing hearing, Judge Plackowski sentenced Mr. Cunningham to 1095 days in jail for all three offenses. On appeal, only a minor portion of the greater than one hour sentencing hearing was provided to Mr. Cunningham without further explanation or certification by the Court.

22. At the hearing, Judge Plackowski stated that while there were several mitigating factors, he was sentencing Mr. Cunningham for what could have happened—not for the behavior for which he was convicted. He also stated he was sentencing him for rehabilitation, deterrence, and protection of the victim.

V. Choice of Law

23. NPTC § 1-1-48:

> (a) When choosing what law applies, the Tribal Court and Tribal Court of Appeals shall apply the law of the Tribe except to the extent that federal law governs. In construing and applying the Nez Perce Tribal Code or other tribal regulations, ordinances, or resolutions, the Tribal Court and Tribal Court of Appeals shall consider Nez Perce Tribal Code or other tribal regulations, ordinances, or resolutions first and secondly, tribal case law.
> (b) To the extent no law of the Tribe is applicable, the Tribal Court and Tribal Court of Appeals shall consider and, if

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> appropriate, apply customs and traditions of the Tribe as they are relevant to the controversy.
> (c) The Tribal Court and Tribal Court of Appeals may consider other tribal and federal laws and procedures as persuasive authority in ruling on questions of procedure and case law of other tribal and federal courts as persuasive authority in ruling on questions of substance. In the absence of any persuasive tribal or federal authority, the Tribal Court and Tribal Court of Appeals may look to the statutes or case law of the states for guidance.

24. As no tribal code provisions or tribal case law govern habeas petitions, this Court should first consider other tribal and federal laws as persuasive authority, and in the absence of any relevant federal or tribal authority, the court should then turn to the states for guidance. NPTC § 1-1-48.

VI. Standard of Review

25. Neither the Nez Perce Tribal Code nor Nez Perce case law establishes a standard of review governing a petition for writ of habeas corpus under the Nez Perce Tribal Code Title 2, Chapter 2-1, Rule 18. NPTC R. Crim. P. 18. Having no governing law, this Court may turn to relevant federal and tribal law as authority.

26. When a trial or appellate court's adjudication of a claim on the merits resulted in a decision contrary to or involving an unreasonable

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application of clearly established federal law, or that the state court's decision was based on an unreasonable determination of the facts, the Court may evaluate the claim de novo, and we may consider evidence properly presented for the first time in federal court. *Hurles v. Ryan*,752 F.3d 768, 778(9th Cir. 2014).

VII. Claims for Relief

Claim 1: Mr. Cunningham's Appeal from His Conviction and Sentence in Case No. CR-13-115/116/117 Violates the Civil Rights Act of the Nez Perce Tribe because the Court failed to maintain a complete record of the proceedings.

27. Mr. Cunningham incorporates by this reference the preceding paragraphs of this Petition.

28. The Civil Rights Act of the Nez Perce Tribe substantially tracks the precise language of the Bill of Rights portion of the Constitution and the Nez Perce Civil Rights Act. NEZ PERCE TRIBAL CODE TITLE 1, Chapter 1-1, Section 1-6-2; U.S. CONST. AMENDS. I-X. (Exhibit B: Copy of Nez Perce Civil Rights Act and United States Bill of Rights).

29. When tribal court procedures "parallel those found 'in Anglo-Saxon society,'" courts need not weigh "'the individual right to fair treatment'

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against 'the magnitude of the tribal interest [in employing those procedures]' to determine whether the procedures pass muster under the Act as required when 'tribal court procedures differ significantly from those commonly employed in Anglo-Saxon society.'" *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 899-900 (9th Cir. 1988) (internal citations omitted).

30. Where the rights are the same under either legal system, federal constitutional standards are employed in determining whether the challenged procedure violates due process. *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 899-900 (9th Cir. Wash. 1988). There is no concern as to whether applying the "due process principles of the Constitution [would] disrupt settled tribal customs and traditions." *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 899-900 (9th Cir. 1988).

31. Title 2, Chapter 2-1, Rule 3(j) and procedures under Title 2, Chapter 2-9 of the Nez Perce Tribal Code allows, as a right, criminal defendants the right to appeal from criminal convictions in tribal courts. Nez Perce R. Crim. P. 3(j); NPTC Title 2-9, *et seq.* This right is comparable to the right accorded criminal defendants under federal law. *See* Fed. R. App. P. 4(b). Thus, it should be interpreted under federal constitutional standards. *Randall v.*

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Yakima Nation Tribal Court, 841 F.2d 897, 899-900 (9th Cir. 1988).

32. Interpreting the right to appeal, the due process clauses of the Fifth and Fourteenth Amendments do "not require . . . appeals as of right to criminal defendants seeking to review alleged trial court errors." *Evitts v. Lucey*, 469 U.S. 387, 393, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985) (applying the Fourteenth Amendment), *reh'g denied*, 470 U.S. 1065, 84 L. Ed. 2d 841, 105 S. Ct. 1783; *see Abney v. United States*, 431 U.S. 651, 656, 52 L. Ed. 2d 651, 97 S. Ct. 2034 (1977) (applying the Fifth Amendment). However, when a right to appeal is provided, "the procedures used in deciding appeals must comport with the demands of the Due Process . . . Clause[] of the Constitution." *Evitts*, 469 U.S. at 393; *accord In re Chessman*, 219 F.2d 162, 165 (9th Cir. 1955) ("though a state is not required to give a convicted man the right of appeal, when it does so the appellant must be accorded due process in the course of the appellate procedure"); *Miracle v. Estelle*, 592 F.2d 1269, 1272 n.6 (5th Cir. 1979) ("it is now a fundamental principle of due process . . . that once avenues of appellate review are established, they must be kept free of unreasoned distinctions that can only impede open and equal access to the courts").

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33. The failure to provide a complete record is a substantial error, which severely violated Mr. Cunningham's ability to effectuate an appeal. "When an oral record of a hearing is not available, the [Court of Appeals] is unable to perform a meaningful review of the record and the matter." *Colville Confederated Tribes v. Dogskin*, No. AP10-011 (Feb. 24, 2011). 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. 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").

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34. The Nez Perce Court of Appeals, without citing any authority, found contrary to this established principle, finding that "when the Tribal Court's record falls short of this ideal, it does not necessarily follow that the missing portion of the record would warrant reversal." (Exhibit C: Nez Perce Tribal Court Opinion, AP-2014-002). It then stated, without citation to any authority, that re-sentencing was not necessary. *Id.*

35. Moreover, both parties in the appellate procedure agreed that providing audio *and* video recording were established customs and traditions in the Nez Perce Tribe. Contrary to this agreement, and again without citing to authority, the Court found against what was not disputed by the parties, that it was in fact not part of the Nez Perce customs and traditions. (Exhibit C: Nez Perce Tribal Court Opinion, AP-2014-002).

36. Defendant was not provided a complete record in this matter. The record provided lacked audio of critical stages of the criminal procedures, such as the initial criminal trial and sentencing hearing. The record also lacked any video, which four separate sources (including the prosecutor at one point, in its response) have confirmed existed. (*See* Exhibit D: Interview with Alice Koskela; Exhibit F: Interview with Jacob Aubertin; Exhibit G: Interview

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with Austin Domebo; Exhibit J: Appellee's Response to Appellant's Third Motion For Dismissal of Guilty Verdict).

37. This 24 hour per day and seven day per week audio and video record is kept on a hard drive, of which Judge Plackowski has exclusive and sole ability to control and manage. There is an accessible copy on the hard drive that is readily available for up to 30 days after a hearing, assuming that Judge Plackowski permits such access. (*See* Exhibit D: Interview with Alice Koskela; Exhibit F: Interview with Jacob Aubertin; Exhibit G: Interview with Austin Domebo). On Appeal, Mr. Cunningham requested the audio and video within 30 days of the hearing, yet was never provided either an opportunity to view the audio and video controlled and managed by Judge Plackowski or a copy of that audio and video.

38. It is important to note that the record is recorded by two separate and redundant systems. (Exhibit D: Interview with Alice Koskela). Despite this redundancy, a large portion of the sentencing record was not provided to Mr. Cunningham. It is undeniable, that the same judge who Mr. Cunningham believed to be biased against him and alleged so in his Notice of Appeal and First Motion to Dismiss, had sole control and access over the audio and

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video record within the 30 days it would have existed and was later the person whom admitted that he was the person who put it together and sent it to Mr. Cunningham. (Exhibit K: Letter from Judge Plackowski).

39. In addition to the audio and video record being deficient, Mr. Cunningham was never provided with the final jury instructions which were provided to the jury, the victim impact statement was not included in the record, any continuance of the November trial was not included, a list of the members of the jury was not included, and a jury summons for either of the trial dates was not included. The written record that was provided to Mr. Cunningham by Judge Plackowski was extremely deficient and Mr. Cunningham was left to guess and imagine what additional documents would have been essential to effectuating an appeal.

40. Mr. Cunningham, in his Third Motion to Dismiss, requested that the Court provide the record that it reviewed to deny his previous Motion. Also, at oral argument on the Appeal, Mr. Cunningham, through counsel, stated his desire to depose the judge and discover what happened to the record, but was not permitted to do so. No evidentiary hearing of any kind was heard.

41. Mr. Cunningham, as the defendant, should not be burdened with the task of

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forcing the Court to follow its own Code and meet the due process requirements. It is only through an independent investigation that Mr. Cunningham has discovered what nonfeasance may have occurred and what documents are missing from the record; it is unclear what other conduct and nonfeasance he has yet to uncover.

42. The Appellate Court recognized that Mr. Cunningham, and the Court itself was not provided portions of the record. This failure did not permit the Court of Appeals to conduct a meaningful review of the record. *Colville Confederated Tribes v. Dogskin*, No. AP10-011 (Feb. 24, 2011). The Court did not attempt to remedy this at any point of the appeal, either through granting a motion to dismiss, having an evidentiary hearing, or any other remedy. Instead it chose to rule on a deficient record; therefore, the Court of Appeals' fact-finding was materially deficient. *See Hurles v. Ryan*,752 F.3d 768, 778 (9th Cir. 2014).

43. Due to this deficiency, Mr. Cunningham's due process right to an effective appeal was prejudiced such that the only appropriate remedy would be to grant this habeas petition. 25 USC 1303; *Colville Confederated Tribes v. Dogskin*, No. AP10-011 (Feb. 24, 2011).

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Claim 2: Mr. Cunningham's Appeal from His Conviction and Sentence in Case No. CR-13-115/116/117 Violates the Indian Civil Rights Act, 25 USC 1302(c)(5), because the Court failed to maintain a complete record of the proceedings.

44. Mr. Cunningham incorporates by this reference the preceding paragraphs of this Petition.

45. The Indian Civil Rights Act requires that a Court "maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding." 25 USC 1302(c)(5).

46. The Indian Civil Rights Act also "substantially tracks the precise language of the Bill of Rights portion of the Constitution, thereby acting as a conduit to transmit federal constitutional protections to those individuals subject to tribal jurisdiction." *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 899-900 (9th Cir. 1988) (citing *Red Fox v. Red Fox*, 564 F.2d 361, 364 (9th Cir. 1977)).

47. The purpose of the Indian Civil Rights Act is to "'secur[e] for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of

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tribal governments.'" *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 899-900 (9th Cir. 1988) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978) (quoting S. Rep. No. 841, 90th Cong., 1st Sess., 5-6 (1967)). The Civil Rights Act of the Nez Perce Tribe also secures for Nez Perce Tribal members the broad constitutional rights afforded to other Americans. *See* NEZ PERCE TRIBAL CODE TITLE 1, Chapter 1-1, Section 1-6-2.

48. For the same reasons cited above and incorporated herein, the record was not a complete and usable 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. 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).

49. As Mr. Cunningham's appeal inarguably violated this provision of the Code, as the Appellate Court noted by admitting portions of the record were missing, the appropriate remedy would be to grant this habeas petition. 25 USC 1303; *Colville Confederated Tribes v. Dogskin*, No. AP10-011 (Feb.

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24, 2011).

Claim 3: Mr. Cunningham's Appeal from His Conviction and Sentence in Case No. CR-13-115/116/117 Violates the Indian Civil Rights Act, 25 USC 1302(c)(1)-(2) because Mr. Cunningham received Ineffective Assistance of Counsel.

50. Mr. Cunningham incorporates by this reference the preceding paragraphs of this Petition.

51. The Indian Civil Rights Act states:

> Rights of defendants. In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall--
>
> **(1)** provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
>
> **(2)** at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.... 25 USC 1302(c)(1)-(2).

52. The Court of Appeals' Opinion did not reach this issue in its Appellate Opinion as it just stated, without citation, and without citation to any usable portion of the record, that the record did not support the claim of ineffective assistance of counsel. This was plain error and circular reasoning. (Exhibit C: Appellate Opinion, AP-2014-002). The Appellate Court sets dangerous

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precedent when it found that it would require a defendant to request that his trial attorney file a motion at the trial level that the trial attorney provided ineffective counsel. This would be quite troubling for both the attorney-client relationship, and the Court of Appeals seems to overlook the fact that it would be impossible for the Defendant to establish plain error *through the record, when a record is not provided.*

53. The issue of effective assistance of counsel "is more appropriately addressed in a habeas corpus proceeding because it requires an evidentiary inquiry beyond the official record." *United States v. Carr*, 18 F.3d 738, 741 (9th Cir. 1994). However, the claim can be resolved "on direct appeal when the record is sufficiently developed to permit the reviewing court to resolve the issue." *United States v. Daly*, 974 F.2d 1215, 1218 (9th Cir. 1992). Due to the failure of the Court of Appeals and Tribal Court to adequately develop the record, this issue is properly heard in a habeas petition. *See Hurles v. Ryan*,752 F.3d 768, 778(9th Cir. 2014); *Strickland v. Washington*, 466 U.S. 668, 690-691 (1984).

54. To demonstrate ineffective assistance of counsel, Mr. Cunningham must show that counsel's performance was deficient, that is, that counsel's

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representation fell below an objective standard of reasonableness, and must identify counsel's alleged acts or omissions that were not the result of reasonable professional judgment considering the circumstances. Second, the petitioner must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result … would have been different." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

55. Choices made by counsel after "less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland v. Washington*, 466 U.S. 668, 690-691 (U.S. 1984).

56. Mr. Cunningham repeatedly requested, through letters and conversations with his multiple public defenders to subpoena certain records, including phone and medical records. (Cunningham Decl. ¶¶ 3-6). At no point during

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the proceedings did any of the attorneys conduct even a cursory review of the criminal, medical, or other relevant records of the testifying witness. (Cunningham Decl. ¶¶ 3-6).

57. Mr. Cunningham repeatedly attempted to obtain trial strategy, discovery, and other crucial elements to an adequate defense from his counsel, but his counsel failed to return his letters, faxes, or calls. (Cunningham Decl. ¶ 4). Mr. Cunningham's counsel repeatedly failed to adequately communicate with Mr. Cunningham. (Cunningham Decl. ¶ 4).

58. Ms. Jonelle Whitman, who testified at trial, has a history of mental illness. (Cunningham Decl. ¶ 5). This is a factor that should have been before the jury when making credibility determinations. Despite Mr. Cunningham's request for his attorneys to investigate her history, his attorneys did not even conduct a perfunctory investigation. (Cunningham Decl. ¶¶ 3-7).

59. Additionally, Mr. Cunningham believed he may have had a valid defense, which could only be developed through phone records. (Cunningham Decl. ¶¶ 3-7). Mr. Cunningham thus requested that his attorney attempt to obtain these records, but no effort was made by any of his attorneys to investigate this line of reasoning. (Cunningham Decl. ¶¶ 3-7).

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60. Mr. Cunningham, at the scheduled November trial, also requested that his attorney make a motion to dismiss for the Court's failure to provide him with a jury trial by failing to empanel a jury. (Cunningham Decl. ¶ 7). Despite this request, his attorney made no such motion. (Cunningham Decl. ¶ 7).

61. Prior to trial, Mr. Cunningham requested that his attorney request a continuance so that he may seek new counsel, as they had reached an impasse in Mr. Nagy's limited representation and failure to investigate. (Cunningham Decl. ¶ 9). Rather than making the motion and allowing the Court to rule on it, counsel instead chose to inform the defendant he could not receive other counsel and proceeded with the trial. (Cunningham Decl. ¶ 9).

62. Prior to the actual trial date, Mr. Cunningham's counsel did not communicate with the witnesses. (Cunningham Decl. ¶ 8). He did not prepare the witnesses in any manner as to why they were being called, what to expect, etc. (Cunningham Decl. ¶ 8). Nor did he investigate any of the history of the witnesses to determine if they would be credible or not. (Cunningham Decl. ¶ 3-8).

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63. Mr. Cunningham's counsel did not meet with Mr. Cunningham prior to trial to discuss what would occur at the trial, who was testifying, and any other relevant information. (Cunningham Decl. ¶ 8-10).

64. Finally a jury trial was conducted in December of 2013. During voir dire, Mr. Cunningham requested that his attorney use a peremptory challenge on a juror, who admitted to having a social relationship with the prosecutor. (Cunningham Decl. ¶ 11). Despite this request, Mr. Cunningham's attorney did not make such a request, and instead chose to leave his peremptory challenges unused.

65. Also, during trial Mr. Cunningham testified on his own behalf. Prior to testifying, Mr. Cunningham's counsel did not counsel Mr. Cunningham on whether he should testify or not. (Cunningham Decl. ¶ 10). At no point was Mr. Cunningham informed that by taking the stand he would waive his right to not be compelled to testify against himself under NPTC § 1-6-2(f) and the Fifth Amendment of the U.S. Constitution. (Cunningham Decl. ¶ 10).

66. While each deficiency alone is ineffective assistance of counsel, the cumulative effect of all these deficiencies in representation was clearly not within the objective standard of reasonableness. This Court cannot find that

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a failure to conduct any investigation into testifying witnesses, failure to investigate and gather any relevant documents, failure to prepare witnesses, failure to communicate with a client, failure to object to procedural shortfalls, and conducting a perfunctory voir dire, is within the scope of reasonable judgment of an attorney. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

67. There is a reasonable probability that, "but for counsel's unprofessional errors, the result … would have been different." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Had Mr. Cunningham's counsel conducted an investigation into the witnesses, Ms. Whitman's credibility would have been undermined. Had Mr. Cunningham been counseled as to the waiver of his right against self-incrimination, he would not have testified at trial. (Decl. of Cunningham ¶ 10). Had Mr. Cunningham's counsel used a peremptory challenge on the potentially biased juror, that juror would not have been made jury foreman. Most importantly, had Mr. Cunningham's counsel moved the court to dismiss the charges, either due to the court's failure to empanel a jury or under speedy trial grounds—the trial would not have ever been heard which clearly would have resulted in a different

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outcome.

Claim 4: Mr. Cunningham's Trial and Appeal from His Conviction and Sentence in Case No. CR-13-115/116/117 Violates the Civil Rights Act of the Nez Perce Tribe because the trial judge and appellate panel were unconstitutionally biased and engaged in judicial misconduct, severely prejudicing Mr. Cunningham's due process rights.

68. Mr. Cunningham incorporates by this reference the preceding paragraphs of this Petition.

69. Nez Perce Tribal Code § 1-1-20 requires that "If the decision being appealed is that of the chief judge, an associate judge shall randomly select the justices." NPTC § 1-1-20(a)(1).

70. Despite this provision, the chief judge, who again Mr. Cunningham believes to be biased against him, appointed the three-judge appellate panel. This is clearly contrary to the Code, whose purpose is to ensure the due process rights of the Nez Perce people. NPTC § 1-1-20(a)(1).

71. Secondly, it was Judge Plackowski, who subsequent to a Motion to Dismiss which included allegations of judicial bias was filed, provided the deficient record which was turned over to Mr. Cunningham, which lacked any audio and video which has been confirmed to have existed, and which the judge had sole control and management of. (Exhibit D: Interview with Alice

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Koskela; Exhibit F: Interview with Jacob Aubertin; Exhibit G: Interview with Austin Domebo).

72. Additionally, immediately following the outcome of the appeal, Ms. Conita Desautel contacted Appellate Judge Cyndi Jordan regarding the appeal. Cyndi Jordan informed Ms. Desautel that the appellate panel found against Mr. Cunningham due in part to Mr. Cunningham's appellate counsel filing motions (which were all well founded and were not heard by the Court). (Conita Desautel Decl. ¶ 3). Judge Cyndi Jordan also admitted that while she felt that there were sufficient grounds for granting the appeal, she instead chose to deny it. (Conita Desautel Decl. ¶ 4).

73. At the September 8, 2014 hearing, regarding a motion to recuse Judge Plackowski, Appellate Judge Patrick Costello attempted to hear a motion on cases CR-13-115/116/117, which are the same cases on which he heard the appeal and denied it. He admitted that he had not reviewed the motion prior to the hearing, and despite his failure to adequately become apprised of the Motion, he was apparently ready to enter a ruling regarding the Motion had appellate counsel not objected to the obvious conflict. The Prosecutor argued that there was no conflict in Judge Costello hearing a trial Motion

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when Judge Costello had served on the appellate panel that denied the appeal of the same cases at trial. Prior to this hearing, Judge Costello had also inquired of defense counsel as to what grounds it believed habeas was appropriate and when defense counsel stated that there were appropriate grounds for a habeas petition based upon the appellate panel's decision, Judge Costello got aggravated with defense counsel.

74. Further, Mr. Cunningham believes that the outcome of the sentencing was decided prior to the hearing of mitigating and aggravating factors. This is due to the judge's comments immediately following trial, prior to the sentencing hearing, that the sentencing was going to be "extensive, very extensive." (Exhibit L: Trial Proceedings Audio Record, Disc 4, Track 5, 00:07:30).

75. This belief that the judge was biased was further aggravated due to his knowledge of the Prosecutor and judge having ex parte communications regarding the matter, in addition to the judge's practice of "staging hearings," and justice, and a newspaper articles Mr. Cunningham had found regarding similar judicial misconduct by Judge Plackowski. (Exhibit E: Interview with Erin Tomlin) (Exhibit P-Newspaper Articles. This type of

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behavior was just some of the behavior that so troubled Mr. Cunningham's counsel, Erin Tomlin, that she felt compelled to end her employment with the Tribe as defense counsel. *Id.*

76. Even more so, this belief by Mr. Cunningham was substantiated by email communication with Tribal Council member Leotis McCormack, who stated that he has had "concerns with how things with our court system has been run for so long," and that "soon [not presently] we will have a court system and process that is a good balance of fair and just on all accounts." (Exhibit F: Email from Leotis McCormack.)

77. This is also further supported by the trial judge's use of gestures while a defense witness or defense counsel is arguing its case or testifying, but not while the prosecutor is arguing. Showing bias for the prosecution and against defense counsel. When making a simple motion regarding judicial notice, defense counsel was forced to comment, so that the record would be preserved, regarding such gestures that demonstrated that the judge was not believing what was being argued by defense counsel and disagreed with defense counsel before defense counsel was able to complete its oral argument. (Exhibit I: Motion Hearing September 27, 2014). This also

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occurred at trial, in view of the jury, when witnesses for the defense were testifying, including Mr. Cunningham. (Decl. of Cunningham 10).

78. Additionally, Ms. Tomlin, Mr. Cunningham's counsel also voiced concerns regarding the "staging" of hearings by Judge Plackowski so that it appeared to those not privy to ex parte communications with the Judge, that they were receiving an unbiased adjudication. Instead, what they were receiving according to Ms. Tomlin was a decision by a Judge who had already predetermined the outcome prior to any hearing or testimony by defendants. She felt this violated the judicial code of conduct. (Exhibit E: Interview with Erin Tomlin.)

79. Finally, Mr. Cunningham has been told by two Tribal Members that Silas Whitman, Chairman of the Tribal Council and father of Jonelle Whitman, directed Alice Koskela, Tribal Court Administrator, to ensure that Court would impose the maximum penalty against Mr. Cunningham. This directive was then communicated to Mr. Cunningham. (Cunningham Decl.

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¶ 11).[1] Mr. Cunningham at this time requests the opportunity to subpoena such witnesses, as they have refused to file affidavits with the Court on his behalf due to fear of retaliation by the Tribe and Chairman Whitman.

Claim 5: Mr. Cunningham's Trial and Appeal from His Conviction and Sentence in Case No. CR-13-115/116/117 Violates the Civil Rights Act of the Nez Perce Tribe because of the Court of Appeals' nonfeasance.

80. Mr. Cunningham incorporates by this reference the preceding paragraphs of this Petition.

81. The Court of Appeals is required to rule on all rule on all properly filed motions filed during the pendency of an appeal no later than two (2) weeks before a scheduled hearing on the merits of the appeal. NPTC § 1-1-20(a)(3).

82. At no time were any of Mr. Cunningham's properly filed Motions to Dismiss heard by the Court prior to a hearing on the merits, in violation of the NPTC § 1-1-20(a)(3). In fact, the Court failed to hear any matter, or even respond to any motion, causing Mr. Cunningham to file more motions

[1] If this has occurred, it would be an offense under NPTC § 4-1-100 Interference with Tribal Court, "No officer of the General Council or member of NPTEC shall interfere with or attempt to influence, any decision of the Tribal Court or the investigation, prosecution, or settlement of any case." NPTC § 4-1-100.

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in an attempt to cause the Court to act.

83. This nonfeasance includes a failure by the Court to provide adequate audio, video, and documentary information, which comprise a complete record despite redundant recordings, or to provide an answer as to why no full audio, video, and documentary information was produced. There appears to have been a failure by the Court to adequately supervise the Court clerks who are responsible for protecting the record and in providing a full record to an appellant when filing an appeal. It should not have been Mr. Cunningham's responsibility to conduct an investigation as to what happened to the record, rather the Court should have held an evidentiary hearing regarding the record, or alternatively, ordered the court clerk to produce the record. The Appellate Court failed to order production of the record when specifically motioned by appellate counsel.

Claim 6: Mr. Cunningham's Trial and Appeal from His Conviction and Sentence in Case No. CR-13-115/116/117 Violates the Civil Rights Act of the Nez Perce Tribe because the Tribal Prosecutor engaged in misconduct, severely prejudicing Mr. Cunningham's due process rights.

84. Mr. Cunningham incorporates by this reference the preceding paragraphs of this Petition.

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85. The Nez Perce Tribal Code does not impose any rules of professional conduct upon attorneys, but does provide that suspension or disqualification of an attorney may result from "a violation of the rules of professional conduct of any state bar to which he is a member." NPTC § 1-1-37(a)(3). Thus, the NPTC clearly recognizes the state bar's local rules of professional conduct.

86. Idaho Rule of Professional Conduct ("IRPC") 8.4 prohibits any attorney from "knowingly assist[ing] or induc[ing]" another to "violate or attempt to violate the Rules of Professional Conduct." Idaho Rule of Professional Conduct 8.4(a). IRPC 1.6 provides that "[a] lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." IRPC 1.6(a). Subsection (b) permits the lawyer to disclose certain information when proceedings are begun against the lawyer and such disclosure is necessary for her defense. IRPC 1.6(b)(5). This spirit of the rule is made clear in the comments, "Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other

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misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense." IRPC 1.6 cmt 10.

87. Appellant counsel became aware of a letter, dated May 29, 2014, sent from Deputy Prosecutor Anne Kelleher to Appellant's trial attorney in the appealed matter. (Exhibit O: Kelleher Letter and Nagy Response Letter). In the letter, Ms. Kelleher, after admitting that she could not respond adequately to the allegations in the appeal, sought information regarding Mr. Nagy's representation of Mr. Cunningham at trial. The information requested by Ms. Kelleher would clearly be protected by IRPC 1.6, because it is "information relating to representation of a client." IRPC 1.6. Thankfully, Mr. Nagy recognized this, and, after contacting Bar Counsel for the Idaho State Bar, did not provide any information. (Exhibit O: Kelleher Letter and Nagy Response Letter). While Mr. Nagy stated that the area was unclear, Appellant believes that the comment to the rule as well as the rule itself make it clear that an attorney may not reveal information relating to the representation of a client unless it is used to defend allegations against himself in a proceeding. IRPC 1.6(b)(5); IRPC 1.6 cmt 10. The letter sent

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was clearly intended to induce Mr. Nagy to violate rule 1.6, and as such was a violation of RPC 8.4.

88. Further, throughout the pendency of the appeal, including oral argument, Ms. Kelleher held herself out as a "deputy prosecutor," prior to being licensed to practice law in any state or the District of Columbia. To practice before the courts of the Nez Perce Tribe, an attorney must certify that she is eligible to be admitted to the Court. NPTC § 1-1-36(c)(1) . The Code states that "Any attorney who is licensed to practice in any state or the District of Columbia is eligible to be admitted to practice before the courts of the Nez Perce Tribe." NPTC § 1-1-36(b).[2] The executive committee may appoint a "Deputy Prosecutor for prosecution of all criminal matters over which the Nez Perce Tribe exercises jurisdiction." NPTC §1-1-42. However, it seems unclear and clearly against professional rules to appoint a deputy prosecutor that could not satisfy the requirements to "practice before the courts of the Nez Perce Tribe." NPTC §1-1-42. Ms. Tomlin also voiced her concerns

[2] Appellant is aware that Idaho Bar Commission Rule 226 does provide a limited license to practice under a supervisory attorney; however, this does not afford such a person permitted to undertake limited practice, the full privileges of one who has successfully passed the bar and been admitted to practice (including holding oneself out as a licensed attorney).

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regarding Ms. Kelleher holding herself out to be an attorney prior to her being fully licensed by any state bar.

89. IRPC 5.5 states that "A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction." IRPC 5.5(a). If Ms. Kelleher has been practicing before the courts in violation of NPTC §1-1-36 and IRPC 5.5, Appellant believes the appropriate sanction would be to strike any pleadings, motions, or other paper that she presented to the court. *See Aguilar v. Calfin Holdings, LLC*, 2006 U.S. Dist. LEXIS 79052, 2-3 (S.D. Cal. Oct. 24, 2006).

90. Mr. Cunningham has also attempted to conduct an independent investigation as to his case. During this investigation, the Tribal Prosecutor instructed several individuals not to talk to Mr. Cunningham's investigator. This is clearly outside the scope of the authority of the Tribal Prosecutor, and also served to obstruct Mr. Cunningham's attempt to see his due process rights were respected and obtain the truth about what has occurred in the actions constituting a deprivation of his constitutional rights. *See* NPTC § 1-1-42.

91. Finally, the tribal prosecutor informed defense counsel that should he lose

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the appeal, he would seek additional criminal charges on a separate matter. When the prosecutor acts in this manner, he is not simply using his discretion as a prosecutor, but rather, would have engaged in abusive conduct likely amounting to vindictive or selective prosecution and abuse of the legal process. *See Yick Wo v. Hopkins,* 118 U.S. 356, 373-374 (1886) *(*"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution"); *United States v. Goodwin*, 457 U.S. 368, 392 (1982) ("Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.").

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Claim 7: The Indian Civil Rights Act imposes a sentencing limit for Indian Tribes. Under 25 U.S.C.§1302(7), an Indian Tribe may in no event impose a sentence greater that one-year imprisonment and/or a $5000.00 fine per offense.

92. Mr. Cunningham incorporates by this reference the preceding paragraphs of this Petition.

93. A defendant can be sentenced to beyond a year total jail time if found guilty of multiple separate offenses and the sentence is to run concurrently. *Miranda v. Anchondo*, 684 F.3d 844, 852 (9th Cir. 2012).

94. However, as Mr. Cunningham was charged with three separate complaints, each with separate case numbers that were not consolidated pursuant to motion or Court order. To then consolidate the sentencing on all three cases, without sufficient record to demonstrate valid consolidation of the cases, into one lump time was in violation of the Act. The sentencing is unclear as to what sentence was imposed per each complaint. As such, it appears that Mr. Cunningham was sentenced for 1095 days on CR-13-115, CR-13-116, or CR-13-117, which is in violation of the Indian Civil Rights Act, 25 USC 1302(7).

Claim 8: Mr. Cunningham's Trial and Appeal from His Conviction and Sentence in Case No. CR-13-115/116/117 Violates the Civil Rights Act of the

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Nez Perce Tribe because the Tribal Court violated his right to a Speedy Trial.

95. Mr. Cunningham incorporates by this reference the preceding paragraphs of this Petition.

96. The Court of Appeals' Opinion did not reach this issue in its Appellate Opinion as it stated, without citation and with admission that the record was not complete, that the record did not support that the Appellant's claim of violation of the right to a speedy trial was plain error. (Exhibit C: Appellate Opinion). Again, the Court of Appeals overlooked the fact that it would be impossible for the Defendant to establish plain error *through the record, when a complete record is not provided.* Nevertheless, Mr. Cunningham's right to a speedy trial was violated.

97. Mr. Cunningham was arraigned on March 25, 2013. The trial was not heard until December 17, 2013, two hundred and sixty-seven days after arraignment.

98. The Civil Rights Act of the Nez Perce Tribe guarantees that no person in a criminal proceeding shall be denied the right to a speedy and public trial. NPTC § 1-6-2(g). Nez Perce Tribe Rules of Criminal Procedure also guarantees this right to the Defendant. Nez Perce R. of Crim. P. 3(a).

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99. While the Tribal Code does not explicitly define what is a speedy trial, and while recognizing that each Tribe has its own unique customs and traditions, it is informative to turn to the law and order codes of other Tribes in the area. The Spokane Tribe requires that the "Trial must commence no more than 120 days after the defendant first appears in court." Revised Law And Order Code Of The Spokane Tribe Of Indians § 3-3.02. The Kalispel Tribe requires that "Trial must be commenced within 60 days after arraignment if the defendant is in jail or within 90 days if defendant is not in jail unless a longer period is requested or consented to by the accused." Law and Order Code of the Kalispel Tribe of Indians § 2-4.02. The Coeur d'Alene Tribe requires that trial "must be commenced within one hundred eighty (180) days after the entry of the defendant's plea, unless a longer period is requested or consented to by the accused." Coeur d'Alene Tribal Code § 3-5.01. The Colville Tribe requires that when the defendant is "brought before the judge upon a warrant of arrest, the cause shall be set for trial within ninety (90) days unless continued for cause or at the request of the defendant. . . . Provided, a defendant not released from jail pending trial shall be brought to trial not later than sixty (60) days after the date of

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arraignment." Colville Tribal Law and Order Code § 2-1-102. Defendant asks that the Nez Perce Tribe adopt the time frames as recognized by the local Tribes, and guarantee the right to speedy trial of its members within 90 days of arraignment. Clearly, having not been brought to trial two hundred and sixty-seven days from being arraigned is outside even the outer limits of due process as recognized by these Tribes, and the Court should grant the petition for habeas corpus and dismiss the underlying trial that ended with a questionable verdict of guilty with prejudice.

100. The Sixth Amendment and Indian Civil Rights Act guarantees that in a criminal prosecution, the accused shall enjoy the right to a speedy and public trial. U.S. Const. amend. VI; ICRA 25 U.S.C. § 1302; *Doggett v. United States*, 505 U.S. 647 (1992); *United States v. MacDonald*, 456 U.S. 1, 6 (1982). While the Bill of Rights does not apply *in toto* to Tribal members, it does provide a framework on which to determine the matter. The Sixth Amendment guarantee is "designed to minimize the possibility of lengthy incarceration prior to trial [...] and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." *MacDonald*, 456 U.S. at 8; accord *Hurles v. Ryan*,752 F.3d 768, 778(9th

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Cir. 2014). The Sixth Amendment protection does not attach before a defendant is either arrested, indicted, or officially accused. *Id.* at 6.

101. In *Doggett*, the Supreme Court held that an 8 ½ year delay from indictment to arrest and trial, violated the Sixth Amendment right. The *Doggett* Court cited the following four part test: "whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result." Id., *citing Barker v. Wingo*, 407 U.S. 514 (1972). Significantly, the first inquiry is a threshold requirement, because "[s]imply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from presumptively prejudicial delay." *Doggett*, Id. at 651-652. If a defendant makes this threshold showing, he must then demonstrate that the four factors weigh in his favor. *United States v. Woolfolk*, 399 F.3d 590, 595 (4th Cir. 2005) (*citing* United States v. Thomas, 55 F.3d 144, (4th Cir.1995)).

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102. The Defendant has been suffered the most severe prejudice—loss of liberty. And while some courts have found no Sixth Amendment violation in cases involving time periods longer than in this case, it is important to note that this case will consist almost entirely of witness testimony. *See United States v. Grimmond*, 137 F.3d 823, 827 (4th Cir. 1998) (thirty-five months); *United States v. Thomas*, supra at 149-150 (thirty months). Eye-witness testimony has already been recognized as unreliable, and adding a large amount of time can only further the inaccuracies inherent in such testimony. *See* Hal Arkowitz and Scott O. Lilienfeld, *Why Science Tells Us Not to Rely on Eyewitness Accounts*, Scientific American, Jan 8, 2009, http://www.scientificamerican.com/article/do-the-eyes-have-it/?page=1 (last accessed May 26, 2014) (Eyewitness testimony is fickle and, all too often, shockingly inaccurate.). While cross examination may, in certain circumstances, be sufficient to point out the deficiencies in eye-witness testimony, letting substantial time pass and relying almost entirely upon the witness testimony is treading dangerous grounds upon which to convict a defendant.

103. Given this, the Defendant contends that a two hundred and thirty-

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eight day delay, all of which was due to the prosecutor not actively pursuing the prosecution of the matter, is a violation of the Nez Perce Civil Rights Act, the Indian Civil Rights Act.

Claim 9: Mr. Cunningham's Trial and Appeal from His Conviction and Sentence in Case No. CR-13-115/116/117 Violates the Civil Rights Act of the Nez Perce Tribe because the Tribal Court violated NPTC § 4-1-26, the judge considered factors not permitted under the Nez Perce Tribal Code.

104. Mr. Cunningham incorporates by this reference the preceding paragraphs of this Petition.

105. NPTC § 4-1-26 mandates that the Court in each case "shall consider the protection of the public, the gravity of the offense, the impact of the crime on the victim, and the results of any pre-sentencing reports." NPTC § 4-1-26.

106. At the sentencing hearing, the Judge Plackowski stated he was sentencing Mr. Cunningham because someone "*could have* been very, very hurt" and not for the behavior of which he was found guilty. (Audio Record, Disc 5, Track 3, 00:08:56).

107. "What could have happened" as an aggravating factor to sentencing is not permitted by the Code. Instead the Judge should have only considered

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that which is permissible by the Code, protection of the public, the gravity of the offense, the impact of the crime on the victim, and the results of any pre-sentencing reports. Mr. Cunningham was also prevented from adequately challenging the pre-sentence reports used in his sentencing hearing as detailed in Mr. Cunningham's three motions to dismiss and appellate brief.

108. Judge Plackowski also states that an issue he considers in sentencing is "deterrence," again, this is not permitted under NPTC § 4-1-26. (Audio Record, Disc 5, Track 3, 00:04:08).

109. Judge Plackowski states that an issue he considers in sentencing is "rehabilitation," again, this is not permitted under NPTC § 4-1-26. (Audio Record, Disc 5, Track 3, 00:04:20).

110. Finally, at no point did the Court "[a]fter imposing sentence in a case which has gone to trial on a plea of not guilty, … advise the defendant of the defendant's right to appeal," as is required by NPTC § 4-1-26(c). NPTC § 4-1-26(c).

111. As the Court of Appeals failed to conduct an evidentiary hearing to determine what occurred absent a full record of the sentencing hearing, and

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the minor portion of the sentencing hearing that was included in the record being so beyond the scope of authority granted to a judge by the Nez Perce Tribal Code, Mr. Cunningham's due process rights to a fair and impartial hearing, and those protected by the Code, have been so severely harmed that granting this habeas petition is the appropriate remedy.

Claim 10: Mr. Cunningham's Trial and Appeal from His Conviction and Sentence in Case No. CR-13-115/116/117 Violates the Civil Rights Act of the Nez Perce Tribe because Mr. Cunningham was not granted full disclosure of information concerning his criminal proceedings.

112. Mr. Cunningham incorporates by this reference the preceding paragraphs of this Petition.

113. The Civil Rights Act of the Nez Perce Tribe provides that "The members of the Nez Perce Tribe are guaranteed full disclosure of information concerning criminal and civil proceedings in which they are a party, pursuant to §1-1-6 of Chapter 1-1, Administration of Tribal Court of the Nez Perce Tribal Code." NPTC 1-6-2(k).

114. Though he requested to in a timely manner, Mr. Cunningham was

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never provided with the complete versions of audio and video of any of his Court proceedings. The Code guarantees full disclosure of information, not partial or limited disclosure.

115. The Tribe's failure to provide Mr. Cunningham with the full disclosure of his record materially prejudiced Mr. Cunningham and his ability to effectuate an appeal. Granting this habeas petition is an appropriate remedy for this violation.

VIII. Prayer for Relief

WHEREFORE, Mr. Cunningham respectfully requests that this Court: (1) issue the writ of habeas corpus commanding Respondents to release Mr. Cunningham from their custody immediately; or in the alternative, (2) hold an expedited evidentiary hearing to inquire as to the legality of the detention, and (3) grant any other further relief that this Court deems just and proper. Additionally, Mr. Cunningham respectfully requests that the Nez Perce Tribal Code procedures for selecting an appellate panel be followed in selecting an impartial, independent, and unbiased judge to hear this petition. NPTC § 1-1-20(a)(1). Finally, Mr. Cunningham requests that this hearing be heard on an expedited schedule, as his

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due process rights have continually been disregarded throughout the criminal and appellate proceedings with regard to time—Mr. Cunningham is still awaiting an Order from the Trial Court in CR-13-115/116/117 that was heard on October 27, 2014, stemming from a Motion filed on October 10, 2014. Mr. Cunningham has also requested that the Court provide a complete record of all the proceedings to be considered in this Petition, but has received nothing from the Court as of the date of the filing this petition.[3]

Respectfully Submitted this 20th day of November, 2014.

Q. SPENCER LAW FIRM, PLLC

By: Quanah Spencer
Attorney for Defendant
Admitted 1/2/2014

[3] Rather than continuing to abide the delays, set-backs, and continued prejudice being suffered by Mr. Cunningham, counsel is filing this Petition prior to receiving the full, complete and certified trial and appellate record as requested in a Motion filed by counsel for petitioner.

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By: Aaron Kandratowicz
Attorney for Defendant
Admitted 1/2/2014

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