

2 Quanah M. Spencer
3 Q. Spencer Law PLLC
4 1312 N. Monroe Street, Suite 127
5 Spokane, WA 99201
6 Phone: (509) 252-6020
7 Fax: 888-243-2557
8 quanah@qspencerlaw.com

NEZ PERCE TRIBAL COURT
FILED
DATE: 12-12-14
TIME: 11:59 A.M.
COURT CLERK SF

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11 IN THE NEZ PERCE TRIBAL COURT
12
13 IN AND FOR THE NEZ PERCE RESERVATION
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15 DAVID M. CUNNINGHAM, JR.,
16
17 Petitioner,

NO. CO-2015-016

18 v.

**PETITIONER'S MOTION FOR
DEFAULT ORDER**

19 Russell Card, custodian of the
20 Clearwater County Jail; ALICE
21 KOSKELA, Executive Director of the
22 Nez Perce Tribal Court,

Respondents.

23 David M. Cunningham, Jr., by his attorneys, Quanah Spencer and Aaron
24 Kandradowicz of Q. Spencer Law, PLLC, respectfully moves this Court for an
25
26 Order entering Default Judgment for Petitioner in the above-captioned matter.

27 PETITIONER'S MOTION FOR DEFAULT
ORDER - 1

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

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MEMORANDUM IN SUPPORT

1. Petitioner filed and served upon each party a writ of habeas corpus with this Court on the 20th day of November, 2014.
2. An Amended Petition was delivered to the Court and filed on December 1, 2014. The Amended Petition relates back to the 20th day of November, 2014 as the appropriate parties were served on that day. NPTC Title 2, Chapter 2-2, Rule 15(c)(3).
3. A writ of habeas is a civil matter and the Rules of Civil Procedure will apply "to the extent that the practice in such proceedings is not set forth in statutes ... has heretofore conformed to the practice in civil actions." *Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 269 (1978).
4. When tribal court procedures "parallel those found 'in Anglo-Saxon society,'" courts need not weigh "'the individual right to fair treatment' 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).

- 1 5. Where the rights are the same under either legal system, federal
2 constitutional standards are employed in determining whether the challenged
3 procedure violates due process. *Randall v. Yakima Nation Tribal Court*, 841
4 F.2d 897, 899-900 (9th Cir. 1988). There is no concern as to whether
5 applying the “due process principles of the Constitution [would] disrupt
6 settled tribal customs and traditions.” *Randall v. Yakima Nation Tribal Court*,
7 841 F.2d 897, 899-900 (9th Cir. 1988).
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11 6. The writ of habeas corpus “is perhaps the most important writ known to the
12 constitutional law of England, affording as it does a *swift and imperative*
13 *remedy* in all cases of illegal restraint or confinement.” *Fay v. Noia*, 372 U.S.
14 391, 400 (1963) (overruled in part as noted in *Keeney v. Tamayo-Reyes*, 504
15 U.S. 1, 3 (1992)) (emphasis added).
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18 7. As in *Browder*, the Nez Perce Tribal Code Rules of Civil Procedure have an
19 emphasis on a “just” and “speedy” adjudication, see NPTC Title 2, Chapter
20 2-2, Rule 1, and parallels the ideal of “a swift, flexible, and summary
21 determination” of a habeas corpus petitioner's claim,” as well as Fed. R.
22 Civil. P. 1. *Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 271
23 (U.S. 1978); NPTC Title 2, Chapter 2-2, Rule 1; Fed. R. Civil. P. 1.
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1 8. Throughout the trial, appeal, and now habeas proceedings the Tribal Court
2 has delayed and, through its delays, has disregarded the due process rights of
3 Mr. Cunningham—who has remained incarcerated since his trial on
4 December 17, 2013.
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7 9. Mr. Cunningham’s speedy trial rights were disregarded by having a trial two
8 hundred and sixty-seven days after his arraignment in the matter in CR-13-
9 115/116/117.
10

11 10. Mr. Cunningham filed a Notice of Appeal (AP-2014-02) on January 15,
12 2014, three days after his sentencing hearing. Mr. Cunningham having not
13 received any appellate record from the Court twenty days after the filing of
14 the Notice of Appeal, which is the date the Appellate Brief was to be filed
15 according to NPTC Title 2, Chapter 2-9, § 2-9-3(a), filed a Motion to
16 Dismiss with the Appellate Court on February 12, 2014. (Exhibit 8: Motion
17 to Dismiss). That Motion having not been heard or responded to by February
18 21, 2014, Mr. Cunningham again moved the Court to dismiss the verdict and
19 requested an “expedited decision ... so that any further remedies available to
20 defendant, such as a petition for writ of habeas corpus, may be prepared and
21 filed on Mr. Cunningham’s behalf.” (Exhibit 9 p. 2: Second Motion to
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1 Dismiss). Despite requesting an expedited decision on the matter, Mr.
2 Cunningham was still not in receipt of a complete record nor any response to
3 either of its previous two Motions to Dismiss by March 26, 2014, and thus,
4 re-stated his Second Motion to Dismiss and filed a Third Motion to Dismiss.
5 Eventually, oral argument on the merits of the Appeal, and not the Motions
6 to Dismiss, was heard on July 22, 2014, which was 178 days subsequent to
7 Mr. Cunningham filing his Notice of Appeal.

11. When counsel for Mr. Cunningham inquired with the Court as to the delay,
12 the Court responded that “the Nez Perce Court of Appeals is neither
13 obligated or [sic] inclined to explain its scheduling orders to counsel.”
14 (Exhibit 1: Email from Court Clerk). Apparently, the Appellate Court must
15 have felt that it was neither obligated nor inclined to hear any of Mr.
16 Cunningham’s Motions to Dismiss during this 178-day period, although the
17 Court was obligated to do so pursuant to NPTC Title 1, Chapter 1, § 1-1-20,
18 which states “[t]he Court of Appeals **shall** . . . rule on all properly filed
19 motions filed during the pendency of an appeal no later than two (2) weeks
20 before a scheduled hearing on the merits of the appeal.” NPTC Title 1,
21 Chapter 1-1, § 1-1-20(a)(4) (emphasis added).

1 12.The Appellate Court finally issued its decision on September 3, 2014—221
2 days after Mr. Cunningham filed his Notice of Appeal.

3
4 13.During Mr. Cunningham’s Appeal (AP-2014-002), the Tribal Prosecutor
5 elected to attempt to prosecute Mr. Cunningham on a charge for which he
6 had been arraigned 354 days prior. These charges were later dismissed with
7 prejudice. (Exhibit 2: Dismissal with Prejudice).

8
9 14.Prior to filing the Habeas Petition, on November 6, 2014, Mr. Cunningham
10 filed a request for a Record of the Criminal and Appellate proceedings, no
11 such record has been provided as of the filing of this Motion. (Exhibit 3:
12 Request for Records).

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15 15.As of the filing of this Motion, Petitioner has not received any response from
16 any of the named respondents. A Notice of Appearance was filed on behalf
17 of Alice Koskela by Tribal Prosecutor Bill Richardson on December 10,
18 2014. Twenty-one (21) days have passed since filing and serving the Petition
19 for Habeas Corpus. This would be beyond the time to file a response under
20 both the Nez Perce Rules of Civil Procedure and the Federal Rules of Civil
21 and Appellate Procedure.
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25 16.If this Court desires a response, it should “issue an order directing the

1 person(s) alleged to be detaining the petitioner to show cause why the writ
2 should not be issued.” NPTC Title 2, Chapter 2-2, Rule 18(c). The Federal
3 Rules governing Section 2254 Cases in the United States District Courts
4 contains a similar provision. Fed. R. Gov. § 2254 R. 4 and 5. This should be
5 done in a *swift* manner, however, in accordance with NPTC Title 2, Chapter
6 2-2, Rule 1 and Fed. R. Civil. P. 1. NPTC Title 2, Chapter 2-2, Rule 1; Fed.
7 R. Civil. P. 1.
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11 17. This Court, rather than following the Nez Perce Tribal Code or federal
12 guidelines regarding habeas petitions, has filed a Notice of Hearing Writ of
13 Habeas Corpus. (Exhibit 4: Notice of Hearing). This Notice scheduled a
14 hearing on the Petition for January 6, 2015—46 days after the Petition was
15 filed. Following the filing of the Petition, “the Court may (1) issue an order
16 directing the person(s) alleged to be detaining the petitioner to show cause
17 why the writ should not be issued; or (2) deny the writ.” NPTC Title 2,
18 Chapter 2-1, R. 18(c). “Following service [of the order to show cause why
19 the writ should not be issued], the Court shall hear the petition and order the
20 petitioner be brought before it for the hearing.” NPTC Title 2, Chapter 2-1,
21 R. 18(d).
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1 18.Mr. Cunningham has not received and is not aware that any order to show
2 cause has been issued in this matter. Any hearing prior to this is contrary to
3 the Tribal Code, and will simply amount to more delay and deprivation of
4 Mr. Cunningham's civil rights as guaranteed by the U.S. Constitution, the
5 Indian Civil Rights Act, and the Nez Perce Civil Rights Act.
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8 19.Further, even if Mr. Cunningham is released from Orofino County Jail, he is
9 still subject to supervision by probation authorities for a period of 550 days,
10 the amount of his suspended jail time. It is clear that even if released, Mr.
11 Cunningham is still "in custody" for purposes of a habeas petition as his
12 liberty is restricted. Probation satisfies the "in custody" requirement for
13 habeas corpus relief. *United States v. Spawr Optical Research, Inc.*, 864
14 F.2d 1467, 1470 (9th Cir.1988) ("[a] probationary term is sufficient custody
15 to confer jurisdiction"); *United States v. Condit*, 621 F.2d 1096, 1098 (10th
16 Cir. 1980) ("[f]or purposes of the habeas corpus statutes, probation, like
17 parole, constitutes 'custody'"); *see also Wright v. United States*, 732 F.2d
18 1048, 1050 n.1 (2d Cir. 1984); *Hahn v. Burke*, 430 F.2d 100, 102 (7th Cir.
19 1970).
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25 20.Additionally, counsel for Mr. Cunningham has become aware that Judge
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1 Plackowski, against whom Mr. Cunningham alleged misconduct in his
2 matter, has been placed on administrative leave due in part to the alleged
3 misconduct in this matter and in other matters. (Exhibit 5: Administrative
4 Proceedings). Further, the Tribe has subsequently submitted an amendment
5 to their Tribal Code to guarantee that a defendant's right to speedy trial is
6 observed in all cases. (Exhibit 6: Amendment to NPTC). Despite this
7 implicit acknowledgement that Mr. Cunningham was incarcerated
8 wrongfully, the Tribe continues to hold him in custody.

12 21.No good cause could be found to continue to delay this Petition and continue
13 to hold Mr. Cunningham in custody. Mr. Cunningham is not simply shifting
14 the blame to the Court, but rather demanding that his due process and civil
15 rights as a member of the Nez Perce Tribe are honored and respected.

18 22.It is futile at this point for Mr. Cunningham to continue to pursue any
19 remedy or seek any protection of his due process rights in the Nez Perce
20 Tribal Court. The Court through all phases of Mr. Cunningham's trial,
21 appeal, and Habeas Petition has done nothing but delay proceedings,
22 disregard the Nez Perce Tribal Code, and deny justice to Mr. Cunningham. It
23 has become clear that through all the Court's delays, inactions, misfeasance
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1 and nonfeasance that this Court will continue to deny Mr. Cunningham the
2 right to the “*swift and imperative remedy*” of habeas corpus and continue to
3 hold him in custody unjustifiably and prejudicially.
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5 23. Finally, Tribal Prosecutor William L. Richardson recently filed a Notice of
6 Appearance on behalf of Alice Koskela, Law and Order Executive Officer
7 for the Nez Perce Tribe, in the above captioned case. Mr. Cunningham
8 requests that this Notice be stricken and Mr. Richardson be barred from
9 representing Ms. Koskela. The Prosecutor/Deputy Prosecutor is *only*
10 *authorized* “to represent *the tribe* in the prosecution of **all civil infractions,**
11 **criminal prosecutions, and juvenile matters.**” NPTC Title 1, Chapter 1-1,
12 § 1-1-42 (emphasis added). Mr. Richardson’s election, in his official
13 capacity as Tribal Prosecutor, to represent an individual, **not the Tribe**, in a
14 *purely civil matter* is clearly beyond what is authorized in the Nez Perce
15 Tribal Code. NPTC Title 1, Chapter 1-1, § 1-1-42; *see Fisher, on behalf of*
16 *Barcelon v. Baker*, 203 U.S. 174, 181 (1906) (“[t]he proceeding is in habeas
17 corpus, and is a civil and not a criminal proceeding”). Mr. Richardson raises
18 the issue of his ethical rule compliance by representing an individual, who is
19 his supervisor, in a matter in which prosecutorial misconduct *by him* is an
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1 allegation. NPTC Title 1, Chapter 1-1, § 1-1-42(b) (“[t]he Prosecutor and
2 Public Defender shall be under the supervision of the Law and Order
3 Executive Officer”). Beyond being prohibited by the Tribal Code, it would
4 appear to be an inappropriate use of the Tribal Judiciary’s funds to pay the
5 Tribal Prosecutor to represent an individual, namely, Alice Koskela, in a
6 civil matter. Moreover, ethically it appears to be inappropriate. Moreover,
7 as prosecutorial misconduct is a basis for the habeas claim against Ms.
8 Koskela, it is highly likely that Mr. Richardson will be a necessary witness
9 for either of the parties,
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14 A lawyer shall not act as advocate at a trial in which the lawyer
15 is likely to be a necessary witness unless:

- 16 (1) the testimony relates to an uncontested issue;
17 (2) the testimony relates to the nature and value of legal
18 services rendered in the case; or
19 (3) disqualification of the lawyer would work substantial
20 hardship on the client.

21 Id. R. of Prof. Conduct 3.7(a).

22 Further, it is not difficult to imagine several situations in which
23 a conflict of interest between the attorney and his supervisor may arise,
24 when both of the parties are alleged to have acted wrongfully or failed
25 to act. *See* Id. R. of Prof. Conduct 1.7(a)(2) (“a lawyer shall not
26 represent a client if the representation involves a concurrent conflict

1 of interest. A concurrent conflict of interest exists if: ... there is a
2 significant risk that the representation of one or more clients will be
3 materially limited ... by the personal interests of the lawyer....”)

4
5 24. Despite the troubling allegations of non-compliance with the Tribal
6 Code and the Court’s failure to honor and respect a party’s due
7 process rights, counsel for Petitioner was contacted by the court clerk
8 regarding a conference call with Judge Steckel, merely three hours
9 prior to the call. (Exhibit 7). Petitioner continues to maintain that
10 issuing a writ of habeas corpus is the appropriate remedy in this
11 matter and requests that any future notice of conference calls, hearings,
12 or other matters be served on counsel according to the Tribal Code
13 and other due process requirements.
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18 WHEREFORE, for the reasons contained herein, Petitioner, by his counsel,
19 respectfully moves this Court for an Order entering judgment for Petitioner in the
20 above-captioned matter.
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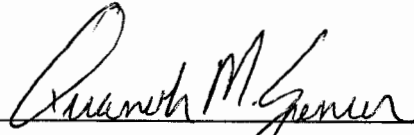
1 significant risk that the representation of one or more clients will be
2 materially limited ... by the personal interests of the lawyer....”)

3
4 24. Despite the troubling allegations of non-compliance with the Tribal
5 Code and the Court’s failure to honor and respect a party’s due
6 process rights, counsel for Petitioner was contacted by the court clerk
7 regarding a conference call with Judge Steckel, merely three hours
8 prior to the call. (Exhibit 7). Petitioner continues to maintain that
9 issuing a writ of habeas corpus is the appropriate remedy in this
10 matter and requests that any future notice of conference calls, hearings,
11 or other matters be served on counsel according to the Tribal Code
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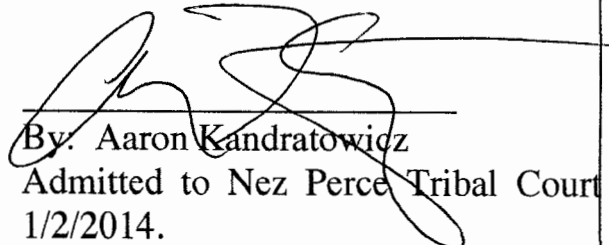
16 WHEREFORE, for the reasons contained herein, Petitioner, by his counsel,
17 respectfully moves this Court for an Order entering judgment for Petitioner in the
18 above-captioned matter.
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2 Respectfully submitted this 12th day of December, 2014.
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5 Q. SPENCER LAW FIRM

6
7 

8 By: Quanah Spencer
9 Admitted to Nez Perce Tribal Court
10 1/2/2014.

11
12 

13 By: Aaron Kandratowicz
14 Admitted to Nez Perce Tribal Court
15 1/2/2014.
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27 DEFENDANT'S MOTION FOR DEFAULT
28 ORDER - 13

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

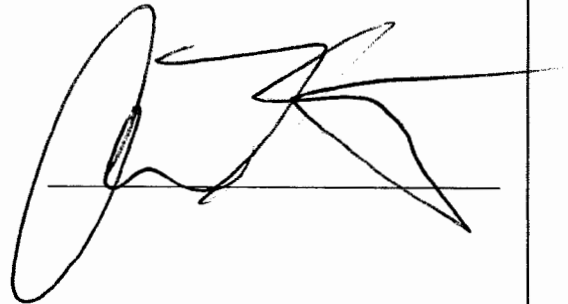
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on December 12, 2014, I served copies of the above **Petitioner's Motion for Default Order** on the following parties by delivering a copy via hand delivery or US Mail:

Bill Richardson
Nez Perc Tribal Prosecutor
PO Box 305
Lapwai, ID 83540

Russell Card
Orofino County Jail
150 Michigan Ave
Orofino, Idaho 83544

A handwritten signature in black ink, appearing to be 'Q. Spencer', written over a horizontal line. The signature is stylized and somewhat cursive.



[Redacted]

FW: Cunningham Appeal, AP-2014-02

[Redacted]

[Redacted]

[Redacted]

From: Quanah Spencer [Redacted]
Sent: Monday, April 28, 2014 11:53 AM
To: kbryant@nezperce.org
Cc: [Redacted]
Subject: Cunningham Appeal, AP-2014-02

Ms. Bryant,

I am contacting you on behalf of my client/appellant, David Cunningham, Jr. The appellant has filed all necessary motions to dismiss with the Nez Perce Tribal Appellate Court and has received a response from the Appellee. It has been several weeks since the Appellant has received the Appellee's response. The Appellant and the Appellee have both requested that a date and time be established so that oral arguments can be conducted in regard to the Third Motion to Dismiss which was filed by the Appellant in this matter.

I am formally requesting that the Nez Perce Tribal Appellate Court establish a date and time, within the next two weeks so that oral arguments can be conducted on the Third Motion to Dismiss which has been filed by the Appellant and which has received a response by the Appellee. The Appellant has requested on numerous occasions that the oral arguments be expedited to ensure that the prejudice which is occurring to the Appellant be remedied.

If I hear nothing from the Court within this week, I will have to assume that the Court is declining to make a decision with regard to the numerous Motions to Dismiss filed by the Appellant and pursue a writ of habeas corpus in the U.S. District Court for the District of Idaho.

Please respond that you have received this email. Thank you in advance for your assistance and attention to this matter.

Quanah M. Spencer

Attorney at Law

Q. Spencer Law PLLC

1312 N. Monroe Street, Suite 127

Ex. 1

Spokane, WA 99201

P: 509.252-6020

F: 888.243.2557

www.qspencerlaw.com

CONFIDENTIAL COMMUNICATION

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[Redacted]

FW: response from Judges

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

From: Kim Bryant [mailto:kbryant@nezperce.org]
Sent: Wednesday, July 09, 2014 9:41 AM
To: 'Quanah M. Spencer'
Subject: response from Judges

Mr. Spencer, the Appellate Judges have asked that I send you this response to your last e-mail to me in re: justification on rescheduling of oral argument, The Nez Perce Court of Appeals is neither obligated or inclined to explain its scheduling orders to counsel.

NEZ PERCE TRIBAL COURT

IN THE NEZ PERCE TRIBAL COURT
IN AND FOR THE NEZ PERCE RESERVATION

FILED
5:30.4

DATE: _____
TIME: 2:28 P.M.

COURT CLERK
[Signature]

NEZ PERCE TRIBE,
Plaintiff)
)
V.)
)
David Cunningham, Jr., Defendant)

PLAINTIFF'S RESPONSE
TO DEFENDANTS MOTION
TO AMEND ORDER TO DISMISS

CASE NO. CR. 13-176/177/178

COMES NOW, William L. Richardson, Tribal Prosecutor and moves this Court to amend its order dismiss the above captioned case(s) without prejudice to an order to dismiss with prejudice. Said motion is made in the interest of justice.

Dated this 30 day of MAY, 2014.

[Signature]
William L. Richardson, Prosecutor

SO ORDERED

Dated this 30th day of May, 2014

[Signature]
Judge of the Nez Perce Tribal Court

1 Quanah M. Spencer
2 Q. Spencer Law PLLC
3 1312 N. Monroe Street, Suite 127
4 Spokane, WA 99201
5 Phone: (509) 252-6020
6 Fax: 888-243-2557
7 quanah@qspencerlaw.com

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IN THE NEZ PERCE TRIBAL COURT
IN AND FOR THE NEZ PERCE RESERVATION

NEZ PERCE TRIBE,

Plaintiff,

NO. CR-13-115/116/117
NO. AP-2014-002

v.

**REQUEST FOR RECORD OF
PROCEEDINGS**

DAVID CUNNINGHAM JR.,

Defendant,

Request for Records

David M. Cunningham, Jr., defendant and appellant, hereby requests the following records pursuant to the Civil Rights Act of the Nez Perce Tribe and § 1-1-6 of Chapter 1-1, Administration of Tribal Court of the Nez Perce Tribal Code. NPTC Chapter 1-6, §1-6-2(k); NPTC Chapter 1-1, § 1-1-6.

- 1) A copy of any audio and video recording of any hearings in AP-2014-002;
- 2) A copy of any audio and video recording of any hearings in CR-13-115/116/117 subsequent to January 15, 2014;
- 3) A copy of the transcript of the above captioned matters;

REQUEST FOR RECORD OF PROCEEDINGS - 1

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

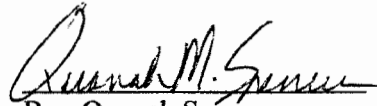
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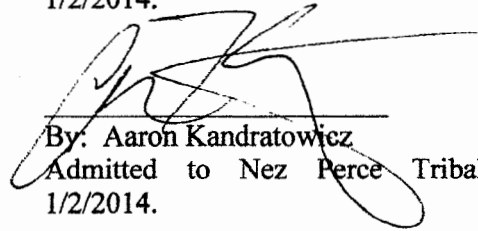
- 4) A copy of any motions and responses filed in the above-captioned matters;
- 5) A copy of any orders filed by the Tribal Court and Tribal Court of Appeals in the above-captioned matters.

DATED this 6th day of November, 2014.

Q. SPENCER LAW PLLC



By: Quanah Spencer
Admitted to Nez Perce Tribal Court
1/2/2014.



By: Aaron Kandratowicz
Admitted to Nez Perce Tribal Court
1/2/2014.

REQUEST FOR RECORD OF PROCEEDINGS - 2

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

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

fax

TO:	Nez Perce Tribal Court Clerk	FROM:	Quanah Spencer
FAX:	208-843-7337	PAGES:	3 pages
PHONE:		DATE:	11/6/2014
RE:	CR-13-115/116/117 & AP-14-002	CC:	

Please find attached:

Request for Records in CR-13-115/116/117 & AP-2014-002

Please notify me if there are any errors in the transmission. Thank you!

EL3

IN THE NEZ PERCE TRIBAL COURT
IN AND FOR THE NEZ PERCE RESERVATION

DAVID CUNNINGHAM JR, PETITIONER)
)
)
)
)
NEZ PERCE TRIBE, RESPONDENT)

NOTICE OF HEARING
WRIT OF HABEAS CORPUS

TO: Quanah M. Spencer, Attorney for Plaintiff, William Richardson, Prosecutor, Office of Legal Counsel, Alice Koskela, Russell Card; Clearwater County Jail Custodian

YOU ARE HEREBY NOTIFIED that the above entitled case has been set for hearing at the hour of 9:00 a.m. on the 6th day of January, 2015, before a Judge of the Nez Perce Tribal Court.

You are herewith advised to bring such documents as you may wish to present to the Court.

Dated this 5th day of December, 2014.

Kim Bryant
Clerk of the Court



SEAL
NEZ PERCE TRIBAL COURT

CERTIFICATION OF SERVICE BY POSTAL SERVICE

I, Kim Bryant do hereby certify that I deposited in the U.S. Post Office with postage prepaid a copy of the foregoing Notice of Hearing to: Quanah Spencer, Russell Card, and hand delivered to William Richardson, Alice Koskela, Office of Legal Counsel, on this 5th day of December, 2014.

TIM GRESBACK
210 E. 7th Street
P.O. Box 9696
Moscow ID, 83843
Telephone: (208) 882-2222
Fax: (208) 892-3535
I.S.B.N. 3708

Attorney for Tribal Judge Bruce Plackowski

**IN THE RICHARD A. HALFMOON CHAMBERS
OF THE NEZ PERCE TRIBAL EXECUTIVE COMMITTEE**

LAW AND JUSTICE DEPARTMENT OF
THE NEZ PERCE TRIBE,

Plaintiff,

vs.

HONORABLE BRUCE PLACKOWSKI,

Tribal Judge.

**OBJECTION TO ARBITRARY
PROCEDURAL LIMITS THE
LEGAL OFFICE IS TRYING TO
IMPOSE ON PROCEEDINGS TO
REMOVE TRIBAL JUDGE
PLACKOWSKI**

Tribal Judge Bruce Plackowski, through his attorney Tim Gresback, objects to the unfair, unjust and arbitrary limitations the Office of Legal Counsel is attempting to impose on these proceedings.

For example, Office of Legal Counsel is attempting to impose its own 20 minute time limit on the adjudicatory ability of Judge Plackowski to defend himself from the bureaucratic attempt to remove him from office.

By contrast, when a person is charged with a Tribal infraction for disturbing the peace, a full complement of substantive and procedural rights are afforded, including the right to be meaningfully heard. The Office of Legal Counsel's attempt to arbitrarily "pick the rules" of procedure that govern this important process is insulting to not only Judge Plackowski in particular, but also the entire Tribal justice system. Simply put, a Judge who is improperly being run out of office cannot even begin to defend himself in 20 minutes. In addition, the

Office of Legal Counsel must present proof—not simply summary accusations. Justice will not allow a ramrodded 20-minute hearing on matters central to the integrity of the Nez Perce Tribe's system of justice.

Although 20 minutes could be a fair limitation for opening statements, if arbitrarily handcuffed to 20 minutes to try to show, by introducing proof through witnesses, how he has faithfully executed the duties of his office—and to explain the motivations behind this attempted judicial ouster—the proceedings will become a farce.

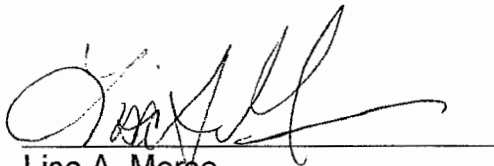
December 2nd, 2014.



Tim Gresback
Attorney for Tribal Judge Bruce Plackowski

NOTICE OF SERVICE

On December 2nd, 2014, this Objection and the attachment were mailed to the NPTEC Support Staff, Nez Perce Tribe, P.O. Box 365, Lapwai, Idaho 83540, and e-mailed to: Daniel Watts <danielw@nezperce.org>, Daniel Kane <dank@nezperce.org>, Julie Kane <juliek@nezperce.org>, Alice Koskela <alicek@nezperce.org>, Silas Whitman <silasw@nezperce.org>, Dana Johnson <djohnson@lodj.legaloffice.pro>, Ken Nagy <knagy@lewiston.com>, Bob Van Idour <lcdefender@qwestoffice.net>, Bill Richardson <billr@nezperce.org>, Jesse Uhrig <jessicam@nezperce.org>, William Fitzgerald <wfitzgerald@qwestoffice.net>, Rick Cuddihy <rickcuddihy@cableone.net>, Bob Brower <rbrower@lewiston.com>, Mike Cherasia <mikecherasia@gmail.com>, Jamal Lyksett <jamallyksett@idaholegalaid.org>, Karen Seubert <kseubert@lewiston.com>, Anne Kelleher <annek@nezperce.org>, Everett Coulter <ecoulter@ecl-law.com>, Cynthia Jordan <cjordanlawoffice@aol.com>, Julianna Repp <jrepplaw@aol.com>, Douglas Nash <dnash@seattleu.edu>, Anthony Johnson <anthonyj@nezperce.org>, Brooklyn Baptiste <brooklynb@nezperce.org>, McCoy Oatman <mccoyo@nezperce.org>, Leotis McCormack <leotism@nezperce.org>, Sam Penney <samp@nezperce.org>, Albert Barros <albertb@nezperce.org>, Bill Picard <bpicard@nezperce.org>, Rebecca Miles <rebeccam@nezperce.org>, David Risley <david@risleylawoffice.com>, and Lee Bourgeau <leeb@nezperce.org>.



Lisa A. Morse
Assistant to Tim Gresback

TIM GRESBACK
210 E. 7th Street
P.O. Box 9696
Moscow ID, 83843
Telephone: (208) 882-2222
Fax: (208) 892-3535
I.S.B.N. 3708

Attorney for Tribal Judge Bruce Plackowski

**IN THE RICHARD A. HALFMOON CHAMBERS
OF THE NEZ PERCE TRIBAL EXECUTIVE COMMITTEE**

LAW AND JUSTICE DEPARTMENT OF
THE NEZ PERCE TRIBE,

Plaintiff,

vs.

HONORABLE BRUCE PLACKOWSKI,

Tribal Judge.

**OBJECTION TO SECRET
PROCEEDING TRYING TO
OUST JUDGE**


The Honorable Bruce Plackowski, through his attorney Tim Gresback, objects to the attempt of the Office of Legal Counsel to keep these proceedings secret.

The Tribal Code does not authorize secret proceedings to try to dismiss a judge for alleged misconduct.

The Office of Legal Counsel cannot contend that the proposed secrecy is designed to protect Judge Plackowski from the dissemination of his confidential information. By his signature below, Judge Plackowski waives all confidentiality that could somehow justify any type of closed proceedings.

When the Office of Legal Counsel for the Tribe tries to dismiss a judge for cause the integrity of the process demands an open, public and transparent hearing. Otherwise the legitimacy of the adjudication is called into question.

December 3rd, 2014.



Honorable Bruce Plackowski
Tribal Judge

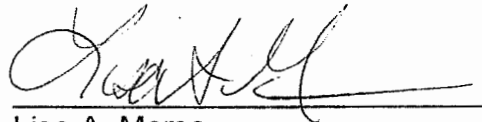
December 3rd, 2014.



Tim Gresback
Attorney for Tribal Judge Bruce Plackowski

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Lisa A. Morse
Assistant to Tim Gresback

NOTICE

AMENDMENTS TO THE NEZ PERCE TRIBAL CODE

This notice is being posted December 2, 2014, according to the Nez Perce Tribal Code (NPTC) § 1-4-2 to request written comments for the following proposed:

Chapter 2-1 – Rules Of Criminal Procedure

Addition of Rule 3a Right to a Speedy Trial (proposed amendment attached)

STATEMENT OF PURPOSE: there is a need to have a speedy trial provision in Chapter 2-1- Rules Of Criminal Procedure that provides specific guidance as to what constitutes speedy.

WRITTEN COMMENT PERIOD:

The Law and Order & Intergovernmental Affairs Subcommittee will be accepting written comments on the proposed amendment being applied to the Code. Please submit written comments to: Leotis McCormack., Chair, Law and Order Subcommittee, P.O. Box 305, Lapwai, ID, 83540; email to leotism@nezperce.org, fax to (208) 843-7354 or hand deliver to the NPTEC offices in Lapwai. The deadline for receipt and consideration of such comments is January 5, 2014, at 4:30 p.m.

Proposed amendment is the addition of Rule 3a to the Chapter 2-1, Rules of Criminal Procedure

Rule 3a Right to a Speedy Trial

(a) Right of person in custody. Every person in custody for an alleged offense charged by the Nez Perce Tribal Prosecutor shall be tried by the Nez Perce Tribal Court within 180 days from the date he or she was arraigned following the filing of a complaint in the Tribal Court by the Prosecutor, unless delay is occasioned by the defendant, by an examination for fitness ordered by the Tribal Court, by a fitness hearing, by an adjudication of unfitness to stand trial, by a continuance allowed after the Court's determination of the defendant's physical incapacity for trial, or by an interlocutory appeal.

(b) Demand for trial. Delay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record. The provisions of this subsection do not apply to a person on bail or recognizance for an offense but who is in custody for a violation of his or her probation.

(c) Computing term for incarcerated persons. The 180-day term in (1) above must be one continuous period of incarceration. In computing the 180-day term, separate periods of incarceration may not be combined. For a defendant released from incarceration who is subsequently taken into custody for a violation of the conditions of release, the term will begin again at day zero.

(d) Right of person not in custody. Every person on bail or recognizance shall be tried by Tribal Court within 220 days from the date of arraignment unless delay is occasioned by the defendant, by an examination for fitness ordered by the Court, by a fitness hearing, by an adjudication of unfitness to stand trial, by a continuance allowed after the Court's determination of the defendant's incapacity for trial, or by an interlocutory appeal. The defendant's failure to appear for any court date set by the court operates to waive the defendant's right to speedy trial unless the court determines that the failure to appear was unavoidable.

(e) Computing term for persons released from custody. Every person who was in custody for an alleged offense and is subsequently released on bail or recognizance, shall be given credit for time spent in custody following the making of the demand while in custody and trial shall be held within 220 days of the person's arraignment.

(f) Continuing the term. If the Court determines that the Tribe has exercised without success due diligence to obtain evidence material to the case and that there are reasonable grounds to believe that such evidence may be obtained at a later day the Court may continue the case on application of the Tribe for not more than an additional 60 days. If the court determines that the Tribe has exercised without success due diligence to obtain results of DNA testing that is material to the case and that there are reasonable grounds to believe that such results may be obtained at a later day, the Court may continue the cause on application of the Tribe for not more than an additional 120 days.

(g) Discharge or release. For every person not tried in accordance with subsections (a)-(f) of this Section, the complaint against him or her shall be dismissed without prejudice.

(h) Persons in custody for more than one charge. If a person is simultaneously in custody upon more than one charge pending against him by the Tribe, and the charges are bifurcated, he shall be tried, or adjudged guilty after waiver of trial, upon at least one such charge before expiration relative to any of such pending charges of the period prescribed by subsections (a)-(f) of this Section. Such person shall be tried upon all of the remaining charges thus pending within 180 days from the date on which judgment relative to the first charge thus prosecuted is rendered or, if such trial upon such first charge is terminated without judgment and there is no subsequent trial of, or adjudication of guilt after waiver of trial, the person shall be tried upon all of the remaining charges thus pending within 180 days from the date on which such trial is terminated; if either such period of 180 days expires without the commencement of trial of, or adjudication of guilt after waiver of trial of, any of such remaining charges thus pending, such charge or charges shall be dismissed and barred for want of prosecution unless delay is occasioned by the defendant, by an examination for fitness ordered by the Court, by a fitness hearing, by an adjudication of unfitness for trial, by a continuance allowed after the Court's determination of the defendant's incapacity for trial, or by an interlocutory appeal; provided, however, that if the Court determines that the Tribe has exercised without success due diligence to obtain evidence material to the case and that there are reasonable grounds to believe that such evidence may be obtained at a later day the court may continue the cause on application of the Tribe for not more than an additional 60 days.

(i) Delay occasioned by the defendant. Delay occasioned by the defendant shall temporarily suspend for the time of the delay the period within which a person shall be tried as prescribed by subsections (a)-(f) of this Section and on the day of expiration of the delay the said period shall continue at the point at which it was suspended. Where such delay occurs within 60 days of the end of the period within which a person shall be tried as prescribed by subsections (a)-(f) of this Section, the Court may continue the case on application of the Tribe for not more than an additional 60 days beyond the period prescribed by subsections (a)-(f).

(j) Effective date. This subsection shall become effective on, and apply to persons charged with alleged offenses committed on or after, the date of adoption of this Section by the Nez Perce Tribal Executive Committee pursuant to applicable requirements for said adoption.



[REDACTED]

RE: conference call

Quanah Spencer [REDACTED]
To: Kim Bryant [REDACTED]
[REDACTED]

Thu, Dec 11, 2014 at 12:53 PM

Ms. Bryant,

I am responding on behalf of my client in regard to your e-mail about a conference call. I am going to object to an e-mail being sent by the Court in an attempt to have a conference call regarding the habeas petition which we filed on November 21, 2014. The only Order we have from the Court that has been served on us in accordance with the Tribal Code is a Notice of Hearing Writ of Habeas Corpus which states that a hearing has been set at 9:00 a.m. on January 6, 2015. An e-mail request sent by you at 8:44 a.m., without any service of process pursuant to the Tribal Code does not constitute a valid notice of a hearing on the Habeas Corpus petition for noon on the same day in which you want to hold a hearing on the Habeas Corpus petition. Your e-mail below about a conference call on Monday at noon for a hearing is also not in accordance with the Tribal Code provision regarding how a hearing is to be set in regard to a hearing by the Tribal Court. As the moving party on the Habeas Corpus petition, I object to the manner in which this is being conducted.

I have not and will not withdraw the Habeas Corpus petition which was filed on November 20, 2014. My non-participation in today's or Monday's conference call is not a waiver of any rights my client has in having a decision on the Habeas Corpus petition by this Court. I find it highly unusual and inappropriate for this to be occurring to both my client and I as we have specifically alleged that such unusual and inappropriate conduct has served to deny my client's due process rights in having his numerous motions and petition heard by a competent and unbiased Court.

I will be filing the appropriate written objection with the Court in order to preserve the record for future proceedings. The Habeas Corpus petition stands firm and has not been withdrawn or abandoned by myself or by Mr. Cunningham.

Sincerely,

Quanah Spencer

From: Kim Bryant [mailto:kbryant@nezperce.org]
Sent: Thursday, December 11, 2014 12:24 PM
To: Quanah M. Spencer [REDACTED]
Subject: conference call

JUDGE STECKEL SAID TO ASK YOU IF YOU PLAN ON PROCEEDING WITH THE HABEAS CORPUS BECAUSE YOU DID NOT RESPOND TO THE CONFERENCE CALL TODAY, IF YOU PLAN ON PROCEEDING WE WILL HAVE

Exh. 7

ANOTHER CONFERENCE CALL ON MONDAY DECEMBER 15, 2015 AT NOON, I WILL GET A NUMBER TO EVERYONE TO CALL.

FILED

DATE: 2.4.14
TIME: 3:01 P.M.

COURT CLERK

[Signature]

RECEIVED FEB 12, 2014 K.B.

1 Quanah M. Spencer
2 Q. Spencer Law PLLC
3 1312 N. Monroe Street, Suite 127
4 Spokane, WA 99201
5 Phone: (509) 252-6020
6 Fax: 888-243-2557
7 quanah@qspencerlaw.com

8 IN THE NEZ PERCE TRIBE COURT OF APPEALS

9 NEZ PERCE TRIBE,
10 Appellee,

11 v.

12 DAVID CUNNINGHAM JR.,
13
14 Appellant.

AP. 2014-002

15 **APPELLANT'S MOTION AND**
16 **MEMORANDUM OF LAW IN**
17 **SUPPORT OF MOTION FOR**
18 **DISMISSAL OF GUILTY**
19 **VERDICT**

20 **With Oral Argument Requested.**

21 **APPELLANT'S MOTION FOR DISMISSAL OF GUILTY VERDICT**

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

25 **MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RELEASE**

26 **PENDING APPEAL**

27 **A. STATEMENT OF THE CASE**

19
Exhibit 8



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

1 "accidents" amongst his other fatherly duties. He also voluntarily entered an
2 alcohol treatment program provided by the Coeur d'Alene Tribe. The house in
3 which he resided further was a drug and alcohol free environment and Mr.
4 Cunningham did not consume alcohol during his release.
5

6
7 Finally, on December 17, *seven months* after being arraigned on the
8 charges, Mr. Cunningham finally received his Constitutional right to a trial by
9 jury. At the trial, he was found guilty. Mr. Cunningham was remanded into
10 custody pending his sentencing. On January 13, 2014 he was sentenced.
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14 Following the guilty verdict and prior to the sentencing, Mr. Cunningham
15 had hired Q. Spencer Law Firm to represent him with regard to a potential
16 appeal. At this point, on January 6, 2014 following a phone conversation with
17 Johnae Wasson, Nez Perce Criminal Court Clerk, counsel for Mr. Cunningham,
18 directed an email to Ms. Wasson requesting the following records:
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- 22 1) A copy of any audio and video recording of the trial in the case;
- 23 2) A copy of the transcript of the case;
- 24 3) A copy of any motions and responses filed in the case;
- 25 4) A copy of any discovery turned over to the defense by the prosecutor
and any motions resulting therefrom; and
- 26 5) A copy of jury instructions.

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28 No response was given and the records were not provided. On January 15,
29 2014, counsel for Mr. Cunningham filed with the Clerk of Court its Notice of
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1 Appearance and Notice of Appeal. Included in the Notice of Appeal was again a
2 request to preserve the record and provide the above records. Additionally, after
3 filing, counsel asked Ms. Wasson if the records were ready, as they had
4 previously been requested. Neither the record nor the transcript were provided at
5 this time. The following Thursday, January 23, 2014, counsel telephoned Ms.
6 Wasson again asking for the record, as the time to file the brief was initiated.
7 Counsel was informed by Ms. Wasson that the record was not ready and that a
8 timeline as to when it would be ready could not be provided. On January 30,
9 2014 counsel again in person requested the record from the Clerk of Court.
10 Again, no record was furnished. In the intervening time, on January 27, 2014,
11 Judge Douglas Nash filed a briefing schedule which extended the time to file the
12 appeal briefs beyond the timeline originally provided by the Code. As of the date
13 of filing this Motion, counsel has not received a transcript of the trial or any of
14 the above requested records.
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22 **B. The Continued Incarceration of the Mr. Cunningham Violates his Due**
23 **Process Rights.**
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25 Nez Perce Tribal Court Rules of Criminal Procedure 3 provides a defendant
26 with the right "to appeal in all cases." When a sovereign provides an appeal as of
27 right, as the Nez Perce Tribe has done through its Code, then "the procedures
28 used in deciding appeals must comport with the demands of the Due Process and
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1 Equal Protection Clauses.” *Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *Coe v.*
2 *Thurman*, 922 F.2d 528, 530 (9th Cir. 1990) (“Where a state guarantees the right
3 to a direct appeal, as California does, the state is required to make that appeal
4 satisfy the Due Process Clause”). The Right to Due Process, as guaranteed by the
5 Indian Civil Rights Act, requires that a right to appeal be to an “adequate and
6 effective” appeal rather than a “meaningless ritual.” *Douglas v. California*, 372
7 U.S. 353, 358 (U.S. 1963); *ICRA 25 U.S.C. §1302*.

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

12 Mr. Cunningham’s right to a full record, which includes at a minimum, the
13 complete transcript of the proceedings at trial is well established. *See United*
14 *States v. Carrillo*, 902 F.2d 1405, 1409 (9th Cir. 1990) (“A criminal defendant
15 has a right to a record on appeal which includes a complete transcript of the
16 proceedings at trial.”); *Hardy v. United States*, 375 U.S. 277, 279-82 (1964)
17 (“The right to notice ‘plain errors or defects’ is illusory if no transcript is
18 available at least to one whose lawyer on appeal enters the case after the trial is
19 ended.”) Moreover, the absence of an “accurate and reliable” record impairs a
20 defendant’s appeal. *See United States v. Wilson*, 16 F.3d 1027, 1031 (9th Cir.
21 1994). Moreover, NPTC requires that the Appellant “file with the clerk of the
22 Court the relevant portion of the record from the Tribal Court and shall serve one
23 copy on each respondent.” NPTC § 2-9-4(a). At this point, Mr. Cunningham
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1 cannot meet this requirement—it is difficult to select portions of the record when
2 no record has been provided. This alone, beyond the inability to review the
3 record for errors—plain or otherwise—is prejudicing Mr. Cunningham’s
4 adequate and effective appeal. *See Evitts v. Lucey*, 469 U.S. 387, 393 (1985).
5 Further, unlike in *Wilson*, counsel has not failed to request the record resulting in
6 delay, it is quite the contrary, counsel has repeatedly requested that the record be
7 provided. With the briefs already being set-out, and counsel still without access
8 to any records, it is clear that Mr. Cunningham is unable to obtain an adequate
9 appeal. Any further delay, e.g. continuing the date for briefing so that the clerk
10 can provide an adequate record, will just result in further due process violations
11 as Mr. Cunningham remains in custody, unable to see his family or attend
12 classes. At this time, the appropriate remedy is to dismiss the claim, as it is
13 unclear that a record will ever be provided and any appeal would be a
14 meaningless ritual. *See Douglas v. California*, 372 U.S. 353, 358 (1963); *ICRA*
15 25 U.S.C. §1302.

23 2. Delays

24 The Sixth Amendment and the Indian Civil Rights Act guarantees the accused
25 a speedy trial, however, several courts, including the Ninth Circuit have found
26 that excessive delay in the appellate process may also rise to the level of a due
27 process violation. *Coe v. Thurman*, 922 F.2d 528, 530 (9th Cir. 1990). However,
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1 not all delays are due process violations—a showing of actual prejudice caused
2 by the delay is necessary. *Blair v. Woodford*, 319 F.3d 1087, 1088 (9th Cir.
3 2003). Mr. Cunningham has met nothing but delay while attempting to assert his
4 constitutional and Tribal Code right to appeal, none of which are due to any fault
5 of Mr. Cunningham. NPTC R. Crim. P. 3. While the NPTC provides the
6 Appellate Court with the ability to set the briefing schedule, this Court's decision
7 to set out the due dates past the twenty days provided in the NPTC, has the effect
8 of delaying his appeal, which Mr. Cunningham believes will be ultimately
9 successful. NPTC § 2-9-3. This is in addition to the Court's failure to provide
10 Mr. Cunningham with a complete record or transcript as repeatedly requested.

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

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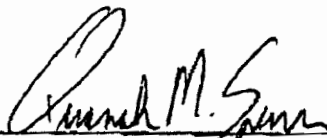
1 investigate the claim without seeing what motions and objections prior counsel
2 made or did not make. Another theory, based again by the interviews of
3 witnesses, is potentially judicial bias. As both these claims are factual in nature,
4 the timely recollection and recall of witnesses is crucial.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

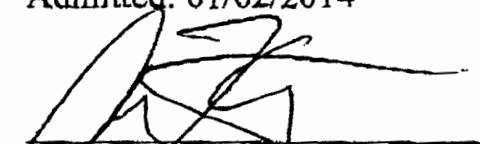
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21 Due to the aforesaid reasons we request that our motion be granted and the
22 David Cunningham's guilty verdict be dismissed with prejudice.
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1 DATED this 4th day of February, 2014.
2
3

4 Q. SPENCER LAW FIRM

5 
6

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

9 
10

11 By: Aaron Kandratawicz
12 Admitted: 01/02/2014
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FILED

DATE 02-21-14

TIME 12:30 PM

Alma K...

1 Quanah M. Spencer
2 Q. Spencer Law PLLC
3 1312 N. Monroe Street, Suite 127
4 Spokane, WA 99201
5 Phone: (509) 252-6020
6 Fax: 888-243-2557
7 quanah@qspencerlaw.com

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IN THE NEZ PERCE TRIBE COURT OF APPEALS

NEZ PERCE TRIBE,
Respondent,

AP. 2014-002

v.

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

DAVID M. CUNNINGHAM JR.,
Appellant.

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 its Motion to Dismiss and hereby further moves the Court for an order dismissing the verdict against him with prejudice and immediately releasing him.

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

Exhibit 9



1 through his attorneys, moves the Court, in the interest of justice and NPTC § 2-9-
2 3(a) for an extension of time to file its brief so that it may sufficiently review the
3 records and audio provided to counsel two days before its brief was due on
4 February 21, 2014. This continuance is further necessary, as counsel has been
5 informed from a reliable court transcriber that a transcript of the audio will take
6 multiple days, even if expedited, to transcribe and thus, counsel would be unable
7 to meet its duty to provide the record to the Appellate Court as required by
8 NPTC § 2-9-4. We would request that Mr. Cunningham additionally be
9 immediately released so that he may adequately prepare his appeal without
10 suffering further delay.
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16 Given the prejudice already suffered, counsel requests an expedited
17 decision on this Motion so that any further remedies available to the defendant,
18 such as a petition for a writ of habeas corpus, may be prepared and filed on Mr.
19 Cunningham's behalf.
20
21

22 I. Facts

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

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