

UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF SOUTH DAKOTA  
CENTRAL DIVISION

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Aarin Nygaard,

Petitioner,

v

Tricia Taylor; Ted Taylor, Jr.; Jessica  
Ducheneaux; Ed Ducheneaux; Cheyenne  
River Sioux Tribal Court; Brenda Claymore,  
in her official capacity as Chief Judge,  
Cheyenne River Sioux Tribal Court of  
Appeals; Frank Pommersheim, in his official  
capacity as Chief Justice; the South Dakota  
Department of Social Services; Todd Waldo  
in his official capacity as Social Worker; and  
Jenny Farlee in her official capacity as Social  
Worker,

Respondents.

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Civil No. 3:19-cv-3016

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**PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 25 U.S.C.A. § 1303**

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Petitioner Aarin Nygaard, by and through the undersigned counsel, respectfully petitions this Court for a writ of habeas corpus to remedy his minor child, C.S.N.'s, unlawful detention by Respondents. The basis for this petition is set forth in greater detail in the accompanying memorandum of law, including any attached exhibits, filed herewith.

**INTRODUCTION**

1. Tricia Taylor ("Tricia"), Jessica Ducheneaux ("Jessica"), Ed Ducheneaux ("Ed"), Ted Taylor, Jr. ("Ted"), Cheyenne River Sioux Tribal Court ("CRSTC"), Cheyenne River Sioux Tribal Court Chief Judge Brenda Claymore ("Judge Claymore") in her official capacity, Cheyenne River Sioux Tribal Court of Appeals ("CRSTCA"), Cheyenne River Sioux Tribal Court of Appeals

Chief Justice Frank Pommersheim (“Chief Justice Pommersheim”) in his official capacity, and the South Dakota Department of Social Services (“DSS”) have detained C.S.N. since November 2014, following Tricia’s arrest for parental kidnapping, and have refused to return the child to the Petitioner, who is the legal and rightful custodian of the child. As a matter of background, another child, T.R.S., the child of Tricia Taylor and Terrance Stanley, has also been unlawfully detained by the Respondents. The facts relating to both C.S.N. and T.R.S. are included in this Petition, as the proceedings in tribal court have been combined for several years and the children are both unlawfully detained; however, Aarin Nygaard is the only Petitioner at this time.

2. The Respondents’ refusal to return the child is in direct violation of the Cass County, North Dakota, District Court Orders (hereinafter “ND Orders”) dated July 24, 2014, September 4, 2015, and September 12, 2015, which give Petitioner primary residential responsibility of his child, and ordered the immediate return of the child to the custody of the Petitioner. *See* Exhibits 7, 38, and 40.

3. The Petitioner’s child is detained at the Ducheneaux residence on the Cheyenne River Sioux Reservation in South Dakota. Petitioner’s child is currently under the care and control of the Respondents and their agents.

4. The Petitioner contends his child is not subject to proceedings in the tribal court under the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901 - 1963, and he asserts that the child’s continued detention without a determination of jurisdiction violates their due process rights under the Fifth Amendment of the United States Constitution and the Indian Civil Rights Act (“ICRA”), 25 U.S.C. § 1302(8) .

5. The Petitioner implores this Court to issue a writ of habeas corpus to immediately return C.S.N. to him pursuant to the ND Orders.

6. Even though exhaustion may not be necessary, the Petitioner has exhausted tribal remedies and now requests this Court to determine (1) North Dakota has jurisdiction over the child custody matter; (2) the Parental Kidnapping Prevention Act (“PKPA”), 28 U.S.C.A. § 1738, applies; (3) the tribal court must give the ND Orders full faith and credit under comity; (4) and ICWA is inapplicable.

### **JURISDICTION AND VENUE**

7. This Petition for Writ of Habeas Corpus is appropriate under 25 U.S.C.A. § 1303, which states “[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.” This Court has jurisdiction over this matter as C.S.N. is presently in custody under color of authority of the Cheyenne River Sioux Tribe, and such custody is in violation of the United States Constitution, laws, and/or treaties of the United States. This Court should grant relief pursuant to 25 U.S.C.A. § 1303.

8. This action arises under the Constitution of the United States and the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302(8), which provides in part: “No Indian Tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.” The Eighth Circuit Court of Appeals has approved the use of a writ of habeas corpus to challenge detention by the tribe. *See DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 513-515 (8th Cir. 1989) (noting habeas corpus relief is available under section 1303 to determine the validity of [a state] decree and the appropriateness of the tribal court’s exercise of jurisdiction).

9. Further, “[t]he question of whether an Indian tribe has the power to compel a non-Indian to submit to the civil jurisdiction of a tribal court is a federal question under 28 U.S.C. §

1331.” *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 852 (1985). Accordingly, jurisdiction in a court of the United States is proper.

10. Pursuant to 28 U.S.C.A. § 1391(b)(2), venue lies in the United States District Court for the District of South Dakota, the judicial district where the children are unlawfully held. In the Order Granting Respondent’s Motion to Dismiss, the District of North Dakota stated:

Once the tribal court remedies have been exhausted, there will be sufficient facts in the record to decide whether an actual custodian of the children is present within the district of North Dakota. Once sufficient facts have been developed in the tribal court, the petitions will be in a better position to choose the proper federal district court venue in which to bring a petition for habeas corpus, if such petition is deemed necessary.

See Exhibit 59 (Judge Erickson’s Order Granting Respondent’s Motion to Dismiss - May 24, 2017). The North Dakota court cited two cases in support of this statement. See *Rumsfeld v. Padilla*, 542 U.S. 426, 442-43 (2004) (“the plain language of the habeas statute thus confirms the general rule that for core habeas petitions challenging present physical confinement, jurisdiction lies only in one district: the district of confinement.”); *McCoy v. United States Board of Parole*, 537 F.2d 962, 964 (8th Cir. 1976) (noting jurisdiction on a habeas corpus petition “lies not only in the district of actual physical confinement but also in the district where a custodian responsible for the confinement is present”). Now, as tribal remedies have been exhausted, sufficient facts have been developed to determine the child’s custodian is present within the district of South Dakota, making this the proper venue to pursue this petition.

11. Although the Petitioner is domiciled in North Dakota and all divorce, child support, and proper custody proceedings have occurred in North Dakota. C.S.N. is currently physically present on the Cheyenne River Sioux Reservation, Petitioner and her domicile remains in Fargo, North Dakota, as found by the ND Orders dated July 24, 2014, September 4, 2015, and September

12, 2015, and under 28 U.S.C.A. § 1391 (c)(1). Therefore, although North Dakota is the home state of C.S.N., this is the proper venue due to the location of the child and her custodians.

**PARTIES**

12. Petitioner Aarin Nygaard is the biological father of C.S.N., born XX/XX/2013.

13. Terrance Stanley is the biological father of T.R.S. born XX/XX/2007.

14. Respondent Tricia Taylor is the biological mother of both children. Tricia kidnapped both children and took them to the Cheyenne River Sioux Reservation, actively depriving Aarin and Terrance of their custodial rights, and she continues to direct the illegal detention of the children.

15. Respondent Cheyenne River Sioux Tribal Court is the trial court asserting jurisdiction over the child on the Cheyenne River Sioux Reservation. Despite all evidence to contradict the appropriateness and legality of this assertion, CRSTC refuses to concede jurisdiction to the Cass County, North Dakota district court.

16. Respondent Brenda Claymore is the Chief Judge of the Cheyenne River Sioux Tribal Court and is the judge who has presided over all tribal trial court proceedings. Judge Claymore refuses to concede jurisdiction and she has unlawfully detained the child through her orders.

17. Respondent Cheyenne River Sioux Tribal Court of Appeals is the Court of Appeals for the Cheyenne River Sioux Tribe. CRSTCA has heard all appeals from the tribal trial court and, to this date, refuses to fully and finally determine jurisdiction. The CRSTCA's actions continue to contribute to the illegal detention of the child.

18. Respondent Frank Pommersheim is the Chief Justice of the Cheyenne River Sioux Tribal Court of Appeals. Chief Justice Pommersheim refuses to determine jurisdiction in this matter and has also ordered the continued illegal detention of the child.

19. Respondent South Dakota Department of Social Services is a state agency responsible for the placement of the children in the care of Ted Taylor, Jr. without notice to Petitioner.

20. Respondents Todd Waldo and Jenny Farlee were both social workers assigned to the minor child in this matter and are responsible for the placement of C.S.N. in Ted Taylor, Jr.'s custody following Tricia Taylor's arrest.

21. Respondent Ted Taylor, Jr. is Tricia's brother and the children's maternal uncle. Ted originally petitioned the CRSTC for custody of the children following Tricia's arrest for parental kidnapping in November 2014, and his actions have contributed to the continued illegal detention of the children.

22. Respondent Jessica Ducheneaux is Tricia's sister and the maternal aunt of the children. Jessica has had care and control of the children since Tricia was arrested in November 2014, and she continues to illegally detain the children on the Cheyenne River Sioux Reservation.

23. Respondent Ed Ducheneaux is Jessica Ducheneaux's husband, he has also had care and control of the children since Tricia was arrested in November 2014, and he also continues to illegally detain the children on the Cheyenne River Sioux Reservation.

### **STATEMENT OF FACTS**

#### **Aarin and Tricia**

24. Aarin and Tricia were never married. They have one child together, C.S.N., who was born XX/XX/2013.

25. In April 2014, Aarin initiated a custody proceeding in the Cass County, North Dakota district court (Case Number 09-2014-DM-00456) and requested the court establish custody and a parenting-time schedule, as well as support obligations for C.S.N. *See* Exhibit 1 (Complaint). Tricia, through her attorney, filed an answer and counterclaim and a motion for interim relief. *See* Exhibit 2 (Answer and Counterclaim); Exhibit 3 (Motion for Interim Relief).

26. On July 8, 2014, Tricia petitioned for a temporary domestic violence restraining order against Aarin in Cass County, North Dakota district court in case number 09-2014-DM-00820. In her petition, Tricia requested Aarin have no parenting time with C.S.N., despite Aarin being C.S.N.'s primary caretaker for almost four months. *See* Exhibit 4 (Temporary DVRO Application).

27. On July 22, 2014, Tricia and Aarin attended mediation in Fargo, North Dakota. Tricia's petition for a restraining order was resolved by both parties agreeing to the entry of a mutual no-contact order. The mutual no-contact order was entered on July 22, 2014 in Cass County, North Dakota district court case number 09-2014-DM-00886. *See* Exhibit 5 (No Contact Order).

28. In the North Dakota custody proceeding, an interim order was entered on July 25, 2014 by the Cass County, North Dakota district court in accordance with a stipulation entered into by Tricia and Aarin that provided for equal residential responsibility of C.S.N. *See* Exhibit 6 (Stipulation for Interim Order); Exhibit 7 (Interim Order).

29. On August 28, 2014, Tricia took C.S.N. to the Cheyenne River Sioux Reservation in South Dakota, in direct violation of the provisions of the Interim Order in her and Aarin's Cass County custody case, to which she had stipulated approximately one month previous. *See* Exhibit 6; Exhibit 7.



30. On or about September 1, 2014, Tricia failed to show up to a prearranged exchange of C.S.N. with Aarin. On or about September 2, 2014, Tricia applied for a Temporary Protection Order through the CRSTC. *See* Exhibit 8 (Application for TPO in Tribal Court). On September 2, 2014, CRSTC issued a Temporary Protection Order in favor of Tricia and against Aarin. *See* Exhibit 9 (Temporary Protection Order in Tribal Court).

31. It does not appear that the tribal court was aware of the Cass County, North Dakota district court files at the time it entered the protection order, as Tricia did not inform the tribal court of these files in her petition. *See* Exhibit 8. In addition, Aarin was not served with notice of these proceedings and was not aware of these proceedings until he received the temporary protection order. *See* Exhibit 8; Exhibit 9. The temporary protection order was dismissed on September 16, 2014 by the CRSTC. *See* Exhibit 10 (Order Dismissing Temporary Protection Order).

32. On September 9, 2014, Aarin submitted an Application for Ex Parte Order in Cass County, North Dakota district court. *See* Exhibit 11 (Application for Ex Parte Order). On that same day, Aarin moved for contempt in the custody proceeding in Cass County district court, requesting the court hold Tricia in contempt for failing to comply with the July 25, 2014 Interim Order. *See* Exhibit 12 (Motion for Contempt).

33. A hearing on this Application for Ex Parte Order was held on September 11, 2014 in Cass County, and the court issued an Ex Parte Order on September 12, 2014, determining the parties' and C.S.N.'s home state is North Dakota, awarding Aarin temporary full residential responsibility of C.S.N., and ordering Tricia to immediately return C.S.N. to North Dakota to the care and custody of Aarin. *See* Exhibit 13 (Cass County Ex Parte Order).



34. On September 24, 2014, Aarin petitioned the CRSTC to give full faith and credit and to enforce the Cass County, North Dakota district court's order regarding C.S.N. *See* Exhibit 14 (Petition to Enforce Foreign Judgment of Custody and Visitation).

35. On October 3, 2014 the Cass County district court entered an Amended Interim Order finding that North Dakota is the home state of Aarin, C.S.N., and Tricia, finding Tricia was in contempt of court, and requiring Tricia to return C.S.N. to Aarin immediately. *See* Exhibit 15 (Amended Interim Order). After Tricia still refused to comply with the Court's orders, the Cass County district court issued a bench warrant for her arrest on October 20, 2014. *See* Exhibit 16 (Bench Warrant). Tricia has not complied with this Order to date.

36. Tricia again petitioned for a temporary protection order through the CRSTC on October 8, 2019. *See* Exhibit 17 (2<sup>nd</sup> DVPO Request v. Aarin). The CRSTC granted the temporary protection order and scheduled the matter for a hearing in late October 2014. *Id.* Aarin did not receive notice of this petitioner and order, and only became aware of it due to the previous federal court proceeding in which the tribal respondents submitted it as an exhibit.

37. Aarin has only been physically present on the Cheyenne River Sioux Reservation twice; once to defend against the Temporary Protection Order in tribal court and once to attend a hearing and support Terrance through tribal court proceedings. Aarin adamantly contests CRSTC's jurisdiction. *See* Exhibit 9; *See* Exhibit 10.

#### **Terrance and Tricia**

38. Tricia and Terrance were married on October 22, 2010, and they divorced on February 18, 2011. The parties filed a pro se dissolution decree (court file no. 09-2011-DM-00176), which incorrectly stated that they had no minor children. *See* Exhibit 21 (Dissolution Settlement Agreement). However, they have one minor child together, T.R.S., born XX/XX/2007.

*See* Exhibit 22 (Child Support Order). In 2012, Tricia applied for and received a child support Order in Cass County, North Dakota district court in case number 09-2012-DM-00858, ordering Terrance to pay child support for T.R.S. *See* Exhibit 22.

39. Terrance filed a complaint in Cass County, North Dakota district court on July 25, 2014 in case number 09-2014-DM-00898 to establish custody and visitation with T.R.S. *See* Exhibit 23 (Complaint). On October 7, 2014, Terrance applied to the Cass County, North Dakota district court for an Ex Parte Order for immediate custody of T.R.S. *See* Exhibit 24 (Application for Ex Parte Order).

40. On October 8, 2014, the Cass County, North Dakota district court entered an Ex Parte Order directing that T.R.S. be immediately placed in the care of Terrance and requiring Tricia to immediately return T.R.S. to the state of North Dakota. *See* Exhibit 25 (Ex Parte Order); Exhibit 26 (Amended Ex Parte Order). Tricia has not complied with this ex parte order to date.

41. On November 12, 2014, a hearing was held in Cass County, North Dakota district court pursuant to Terrance's Application for Ex Parte Order. Terrance appeared with his attorney; Tricia was served with notice but did not appear. *See* Exhibit 27 (Interim order).

42. On November 19, 2014, the Cass County, North Dakota district court issued an Interim Order in file number 09-2014-DM-00898, granting Terrance interim primary residential responsibility of T.R.S., subject to Tricia's supervised parenting time, and ordering T.R.S. to be placed into the immediate custody and control of Terrance. *See* Exhibit 27. Tricia has not complied with this order to date.

43. On or about August 28, 2014, Tricia took C.S.N. and T.R.S. out of state to the Cheyenne River Sioux Reservation in South Dakota without notifying Terrance of her actions.

44. On October 16, 2014, based on her removing the minor children from the state of North Dakota, Tricia was charged in Cass County, North Dakota with parental kidnapping, a class C felony in case number 09-2014-CR-03835, and a warrant was issued for her arrest. *See* Exhibit 18 (Amended Information); Exhibit 19 (Warrant for Tricia's Arrest).

45. On November 26, 2014, Tricia was arrested on the warrant while on the Cheyenne River Sioux Reservation by the Federal Bureau of Investigation (FBI). *See* Exhibit 67 (Tricia's Federal Arrest Warrant). Tricia was taken into custody in South Dakota and later transported to Cass County, North Dakota. The Department of Social Services left both C.S.N. and T.R.S. in the care of Tricia's brother, Ted Taylor, Jr, without contacting Aarin or Terrance. *See* Exhibit 20 (Temporary Custody Order).

#### **Cheyenne River Sioux Tribal Court Proceedings**

46. The custody proceedings in CRSTC began after Ted filed a petition requesting temporary custody of both C.S.N. and T.R.S. on December 1, 2014. *See* Exhibit 20. In his petition, Ted requests custody of C.S.N. and T.R.S. because "Tricia Taylor is jail and gave me custody till she gets out." *Id.* The petition includes a "Present Danger Plan" dated November 26, 2014 which notes the Department of Social Services was aware that Ted Taylor Jr. would be caring and supervising the children due to Tricia's incarceration. *Id.* Jessica Ducheneaux then joined Ted's petition, and the CRSTC granted the petition pending further proceedings on December 18, 2014. *Id.* A certificate of service is included with the temporary custody order, dated December 16, 2014, indicating copies were only served on Tricia Taylor and Ted Taylor, Jr. *Id.* Aarin and Terrance received no notice of this petition or hearing.

47. A hearing was originally held on Ted's petition on January 12, 2015. *See* Exhibit 20. At the hearing, Ted testified that he applied for custody of the children at the Department of

Social Services and that he was granted temporary custody. *Id.* CRSTC also received affidavits from Ted and Tricia, which requested that Jessica be granted custody of the two minor children. *Id.*

48. On January 13, 2015, the CRSTC issued a Temporary Custody Order and determined that it had personal and subject matter jurisdiction pursuant to the tribe's Children's Code, Chapter VII, Sections 7.01 and Chapter XVII, Section 17.01 et seq. and the Law and Order Code, Title VIII, Chapter III, Section 8-3-10. *See* Exhibit 20. The CRSTC then granted custody of both C.S.N. and T.R.S. to Jessica until further order of the court. *Id.*

49. Aarin and Terrance were not aware of the CRSTC custody proceedings until they were handed a copy of the Temporary Custody Order on February 3, 2015 by Tricia's court-appointed criminal defense attorney. Aarin and Terrance only received a copy of Ted's petition and the other relevant documents, aside from the January 13, 2015 Temporary Custody Order, as part of the previous habeas corpus petition filed in the District of North Dakota.

50. On February 5, 2015, Aarin's Motion for Contempt was heard before the Cass County, North Dakota district court. *See* Exhibit 28 (Order on Contempt). On February 20, 2015, the Court entered an Order on Contempt, finding Tricia remained in contempt of the July 25, 2014 Amended Interim Order, and ordering that Tricia remain in custody until she complies with that Order. *Id.*

51. Subsequent to CRSTC's entry of the Temporary Custody Order, Aarin and Terrance appealed the Order, sending Notice of Appeal on approximately March 3, 2015. *See* Exhibit 29 (1st Notice of Appeal). This appeal was based on the grounds that CRSTC lacked jurisdiction and that Aarin and Terrance's due process rights were violated by receiving no notice

of the tribal custody proceedings, and in not even being named a party to the tribal custody action. *See* Exhibit 29; Exhibit 30 (1st CRSTCA Appellate Brief).

52. On April 6, 2015, Tricia pled guilty to the Parental Kidnapping charge. *See* Exhibit 31 (Criminal Judgment). Tricia was sentenced to a term of five years in the custody of the North Dakota Department of Corrections, with all but two years suspended. *Id.*

53. On April 15, 2015, Chief Justice Pommersheim of the CRSTCA remanded the case back to the CRSTC, ordering an immediate rehearing on custody of the children, and ordering CRSTC to allow Aarin and Terrance an opportunity to be heard. *See* Exhibit 32 (1st CRSTCA Order).

54. Aarin received a Summons from CRSTC dated April 24, 2015, for a child custody hearing on May 11, 2015. *See* Exhibit 33 (Summons). Thereafter, Aarin and Terrance filed a Motion to Dismiss and Request for Hearing, requesting to be heard on May 11, 2015 in CRSTC. *See* Exhibit 34 (2nd Motion to Dismiss and Request for Hearing). No hearing was held on either child custody or the motion to dismiss on May 11, 2015.

55. On June 25, 2015, Cass County, North Dakota district court entered an Amended Order on Contempt, releasing the requirement that Tricia be required to remain in custody until she complied with the Amended Interim Order and turn over C.S.N. to Aarin because Tricia was in custody at that time, serving her sentence on the Parental Kidnapping conviction. This Order also released Tricia's attorney from further representation duties and allowed Aarin to renew his request for further contempt when Tricia was released from custody if she still failed to comply with the Amended Interim Order. *See* Exhibit 35 (Amended Order on Contempt).

56. On June 27, 2015, Petitioner received a Notice of Hearing before the CRSTC on July 20, 2015. *See* Exhibit 36 (Notice of Hearing). The hearing was not held on July 20, 2015.

*See id.* Thereafter, Petitioner received a Notice of Hearing before the CRSTC on August 13, 2015. *See* Exhibit 37 (Notice of Continuance). The hearing was continued until September 9, 2015. *Id.*

57. On August 4, 2015, a court trial was held in Cass County, North Dakota district court to establish primary residential responsibility of C.S.N. Tricia was properly notified and she failed to appear either personally or through counsel. Aarin appeared personally and with counsel. *See* Exhibit 38 (Aarin's Findings of Fact, Conclusions of Law, Order for Judgment).

58. On September 1, 2015, a court trial was held in Cass County, North Dakota district court to establish primary residential responsibility of T.R.S. Tricia was properly notified and she failed to appear both personally and through counsel. Terrance appeared personally and with counsel. *See* Exhibit 39 (Terrance's Amended Findings of Fact, Conclusions of Law, Order for Judgment).

59. On September 4, 2015, Cass County, North Dakota district court issued Findings of Fact, Conclusions of Law and Order for Judgment awarding permanent primary residential responsibility of C.S.N. to Aarin, subject to Tricia's right to supervised parenting time. *See* Exhibit 38. Judgment was entered on September 21, 2015. *See* Exhibit 40 (Aarin's Judgment).

60. Also on September 4, 2015, Cass County, North Dakota district court issued Findings of Fact, Conclusions of Law and Order for Judgment awarding permanent primary residential responsibility of T.R.S. to Terrance, subject to Tricia's right to supervised parenting time. *See* Exhibit 41 (Terrance's Findings of Fact, Conclusions of Law, Order for Judgment). On September 8, 2015, Amended Findings of Fact, Conclusions of Law and Order for Judgment were entered by the same Court, correcting a small error in the previous order. *See* Exhibit 39. Judgment was entered on September 24, 2015. *See* Exhibit 42 (Terrance's Judgment).

61. On September 9, 2015, Petitioner's Motion to Dismiss came on before the CRSTC. However, the CRSTC did not hold the hearing and instead continued the matter to September 30, 2015 because "Petitioner Jessica Ducheneaux was not properly notified" and "Petitioners testified that they did not know what this hearing was about and requested a continuance so that they may hire legal counsel." *See* Exhibit 43 (Order for Continuance). At this time, the CRSTC noted the Parental Kidnapping Prevention Act ("PKPA") currently applied to the CRSTC. *Id.*

62. On October 1, 2015, Aarin filed an Expedited Request for Renewed Order on Contempt, requesting the Cass County, North Dakota district court revisit his original Contempt Motion and issue an Order to Incarcerate or Arrest Tricia, as she was scheduled to be released on parole on November 5, 2015, and she failed to return C.S.N. to Aarin's care and custody. *See* Exhibit 44 (Expedited Request for Renewed Order on Contempt). On October 2, 2015, the court issued an Order on Contempt and Order to Incarcerate or Arrest Tricia. *See* Exhibit 45 (Amended Order on Contempt and Order to Incarcerate or Arrest).

63. On October 26, 2015, the Cass County, North Dakota district court issued an Interlocutory Order, issuing a Bench Warrant for Tricia's arrest, directing that Tricia be apprehended and brought before the Court for her contempt of court and amending paragraph 7 of the Amended Order on Contempt and Order to Incarcerate or Arrest. *See* Exhibit 46 (Interlocutory Order).

64. A hearing in the CRSTC on the Motion to Dismiss was finally held on October 29, 2015. *See* Exhibit 47 (Order Dismissing Challenge to Jurisdiction). After numerous continuances and amicus briefs and the CRSTC issued an Order on December 22, 2015. *Id.* That order denied Aarin and Terrance's Motion to Dismiss, determined (1) the PKPA should not apply, (2) even if the PKPA applies, CRSTC has jurisdiction under ICWA, (3) and ICWA trumps the PKPA. *Id.*



The CRSTC also included additional findings without support regarding the enforceability of tribal court and state court custody orders. *Id.* The CRSTC essentially refused to give the Cass County, North Dakota district court's orders full faith and credit. *Id.*

65. On November 3, 2015, the Cass County, North Dakota district court issued a Second Amended Order on Contempt and Order to Incarcerate or Arrest, after holding a hearing on October 26, 2015, reiterating the terms of the Interlocutory Order. *See* Exhibit 48 (Second Amended Order on Contempt and Order to Incarcerate or Arrest).

66. On November 5, 2015, Tricia was paroled from the Dakota Women's Correctional Facility. On that same day, the Bench Warrant that was issued on November 2, 2015 was served and cleared by the Cass County Sheriff. *See* Exhibit 49 (Return of Bench Warrant).

67. A hearing on the bench warrant was held on December 14, 2015. On January 19, 2016, the Cass County, North Dakota district court issued an Order that Tricia remain incarcerated until she returned the minor children to their fathers. *See* Exhibit 50 (Aarin's Order); Exhibit 51 (Terrance's Order). Eventually, Tricia appealed her contempt incarceration to the North Dakota Supreme Court, resulting in her release from incarceration after August 29, 2017. *See Nygaard v. Taylor*, 2017 ND 206, 900 N.W.2d 833.

68. On January 19, 2016, Petitioner and Terrance filed a Notice of Appeal in order to appeal the CRSTC December 22, 2015 Order. *See* Exhibit 52 (2nd Notice of Appeal). On March 16, 2016, Aarin and Terrance filed an Appellate Brief with CRSTCA, appealing the CRSTC December 22, 2015 Order. *See* Exhibit 53 (2nd Appellate Brief). In that brief, Aarin and Terrance (1) requested the CRSTCA reverse the December 22, 2015 CRSTC Order, (2) asserted the tribal court lacks jurisdiction, (3) asserted the PKPA applies, (4) requested the tribal court accord full

faith and credit to the Cass County, North Dakota district court's orders, and (5) requested a finding that ICWA does not apply as this is a custody matter between parents. *Id.*

69. On June 27, 2016, Chief Justice Pommersheim heard oral arguments regarding this second appeal. *See* Exhibit 54 (Notice of Oral Arguments). On September 1, 2016, CRSTCA issued an Order, signed by Chief Justice Pommersheim, in which it reserved ruling on jurisdiction and the applicability of the PKPA and ICWA, ordering CRSTC to hold yet another hearing immediately on the tribal custody petition filed by Ted and Jessica. *See* Exhibit 55 (2nd CRSTCA Memorandum Opinion and Order). In the CRSTCA opinion and order, Chief Justice Pommersheim directed the CRSTC to make proper written findings of fact and conclusions of law, stating that the full faith and credit section of the PKPA is the incorrect law under which to analyze comity. *Id.* The CRSTCA also directed the CRSTC to instead analyze comity under tribal law, specifically Executive Resolution #E-233-97-CR, ordering interim custody of the children remain with Jessica, and ordering CRSTC to allow Petitioner immediate visitation with the children. *Id.*

70. Following the 2nd CRSTCA Order, Aarin and Terrance requested an evidentiary hearing pursuant to the order. *See* Exhibit 56 (Request for Evidentiary Hearing). Aarin and Terrance subsequently petitioned the District Court of North Dakota for habeas corpus relief in November 2016. *See* Exhibit 57 (D.N.D. Petition for Habeas Corpus in Case Number 3:16-cv-393). Aarin and Terrance then requested the CRSTC to stay the tribal court proceedings due to the federal matter, which resulted in Aarin and Terrance being opposing parties to both the CRST and Judge Claymore. *See* Exhibit 58 (Motion to Stay CRSTC Proceedings). The CRSTC instead continued the matter twice. *See* Exhibit 70; Exhibit 71.

71. On May 24, 2017, following the respondent's motion to dismiss, then-district court Judge Ralph Erickson issued a memorandum and order denying Petitioner's request for relief. *See*

Exhibit 59. The District of North Dakota concluded there were insufficient facts in the record and Aarin and Terrance failed to exhaust their tribal court remedies. *Id.*

72. On July 20, 2017, the CRSTCA denied Aarin and Terrance's Petition for a Writ of Mandamus. *See* Exhibit 60 (Denial of Writ of Memorandum); Exhibit 69 (Petition for Writ of Mandamus). Aarin and Terrance requested appointment of a special judge to determine the jurisdiction issues in this matter, which the CRSTCA determined was unsupported and noted the parties would proceed on comity and due process issues in a hearing on July 24, 2017. *Id.*

73. Over an objection from Aarin and Terrance, and with the pending North Dakota Habeas Corpus petition, the CRSTC held a hearing on July 24, 2017 and dismissed Aarin and Terrance's petition for comity and ordered the previous temporary custody order to Ted and Jessica effective on July 31, 2017. *See* Exhibit 61 (CRSTC Order on Comity).

74. On April 18, 2018, after a February 2018 hearing on remand from the CRSTCA, Judge Erin Shanley of the CRSTC granted Aarin and Terrance's Motion to Dismiss the Petition for Temporary Custody. *See* Exhibit 62 (CRSTCA Order on Motion to Dismiss Appeal). The CRSTC also denied the Petition to Enforce Foreign Judgment of Custody and Visitation according to principles of comity. *Id.* The CRSTC concluded (1) the matter was not governed by ICWA, (2) *Eberhard v. Eberhard* required application of the PKPA on the Cheyenne River Sioux Reservation, and (3) the ND Orders were not entitled to comity. *Id.*

75. On May 4, 2018, only a few weeks after Judge Shanley's order, the Cheyenne River Sioux Tribal Council adopted a resolution overruling *Eberhard* and deciding the PKPA no longer applied on the Cheyenne River Sioux Reservation. *See* Exhibit 63 (Tribal Resolution - May 4, 2018). In adopting resolution 171-2018-CR, the tribal council overruled its own case law relating

to the PKPA and enforceability of state custody orders, even specifically mentioning North Dakota custody orders in its resolution. *Id.*

76. Ted and Jessica then filed a notice of appeal to the CRSTCA of the April 18, 2018 CRSTC Order. *See* Exhibit 62. However, Ted and Jessica failed to file a brief in support of the appeal, and Aarin and Terrance subsequently filed a motion to dismiss the appeal for that reason. *Id.* The CRSTCA declined to grant the motion to dismiss and instead set a new briefing schedule to accommodate Ted and Jessica. *Id.* The court also directed the guardian ad litem to prepare a written report. *Id.*

77. On December 19, 2018, the CRSTC held a hearing with a focus on jurisdictional facts. *See* Exhibit 68 (CRSTC Findings dated December 20, 2018). At this hearing, the CRSTC made findings regarding the existence of North Dakota custody orders and Tricia's arrest by the FBI. *Id.* The CRSTC also noted the Department of Social Services' involvement of the placement of C.S.N. and T.R.S. with Ted Taylor, Jr. following Tricia's arrest. *Id.*

78. On January 4, 2019, oral argument was held on the appeal of the order dated April 18, 2018. *See* Exhibit 65 (CRSTCA Memorandum Opinion and Order February 25, 2019). On February 25, 2019, the CRSTCA (1) overruled *Eberhard* finding the PKPA did not apply to this case, (2) concluded ICWA does not apply, and (3) determined the case is governed by the tribal children's code. *Id.* The CRSTCA reversed and remanded the April 18, 2018 CRSTC order for a hearing "to review the status of parental visitation and whether the current award of (temporary) custody of those minor children to the Appellant, Ms. Jessica Ducheneaux, continues to be in the 'best interests' of these native children." *Id.* Additionally, several years later, the CRSTCA now appeared concerned<sup>1</sup> about the manner in which Tricia was arrested and incarcerated following

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<sup>1</sup> Petitioner notes the CRSTCA order dated February 25, 2019 states "startling details" exist regarding Tricia's arrest in the concurrence of Justice Franklin Ducheneaux; however, no such concurrence is attached to the opinion and order

her arrest for parental kidnapping and contempt. *Id.* Now, approximately five months later, the CRSTC has not yet notified the Petitioner of a hearing date, nor held a hearing, despite the CRSTCA's clear directive.

## **CLAIMS FOR RELIEF**

### **I. FIRST CLAIM FOR RELIEF: CONSTITUTIONAL AND CIVIL RIGHTS VIOLATIONS**

79. Petitioner re-alleges and incorporates by reference paragraphs 1 through 78, above.

80. Respondents' continued detention of the child is unlawful and contravenes the Fifth Amendment of the Constitution of the United States and the Indian Civil Rights Act (ICRA). The Fifth Amendment provides, "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. Additionally, the ICRA, provides in part: "No Indian Tribe in exercising powers of self-government shall . . . (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(8). The U.S. Supreme Court has long recognized that a person's "liberty" includes freedom to raise his child. *See Troxel v. Granville*, 530 U.S. 57, 66 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ[t] . . . to direct the education and upbringing of one's children" (citations omitted)). Respondents have deprived Petitioner of this liberty without due process of law, and have deprived the minor child of her liberty without due process of law by detaining the child, under the color of law, and forcibly withholding her from Petitioner, who is her rightful custodian.

81. In direct violation of the ND Orders, Aarin's child has not been removed from the Cheyenne River Sioux Reservation and returned to Petitioner. The children have been detained for

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received by Petitioner.

more than four years while these tribal court matters have been pending. Based on the tribe and tribal court's actions in this matter, the child's return to her lawful custodian is not likely to occur in the foreseeable future. Accordingly, Respondents' continued detention of the child is contrary to the U.S. Constitution, ICRA, and Petitioner's constitutional and civil rights under both, and this Court must issue this Writ in the interests of justice.

## II. SECOND CLAIM FOR RELIEF: PROCEDURAL DUE PROCESS VIOLATIONS

82. Petitioner re-alleges and incorporates by reference paragraphs 1 through 81, above.

83. Respondents' illegal detention of the child without holding a hearing wherein Petitioner are properly noticed and able to fully participate and be fully heard violates Petitioner's procedural due process rights under the U.S. Constitution and the ICRA.

84. To ensure Petitioner receives a fair hearing under the U.S. Constitution and the ICRA, and in order to assert personal jurisdiction over Petitioner, the tribal court was required to comport with due process requirements. Due Process requires notice and a meaningful opportunity for a hearing appropriate to the nature of the case. *Jackson v. Virginia*, 443 U.S. 307, 314 (1979). "The existence of personal jurisdiction, in turn, depends upon the presence of reasonable notice to the defendant that an action has been brought." *Kulko v. Superior Court of California*, 436 U.S. 84, 91 (1978). Section 4.04 of the Cheyenne River Sioux Tribe Children's Code also requires that parents be notified of "all proceedings affecting their child."

85. Here, Petitioner, the natural father of the child, was given no notice of the initial petition Ted filed or the January 12, 2015 hearing in tribal court. Even now, more than 4 years later, Petitioner still has not been properly served with Ted's petition for temporary custody. Because Petitioner was not aware of the custody proceedings in the tribal court until he actually received a copy of the Temporary Custody Order, he was deprived of any opportunity to be heard.

The lack of notice and the denial of an opportunity to be heard prejudiced Petitioner because he was not able to contest the petition, assert his rights as the natural father of the minor child, or assert his rights pursuant to the Cass County, North Dakota district court's orders, which granted him primary residential responsibility of his child. Notably, Petitioner was only provided the documents reflecting that proceeding after filing the previous habeas corpus petition in North Dakota federal court.

86. "[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). Presenting evidence is generally basic to any fair hearing. *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974). In the present matter, Petitioner did not have the opportunity to cross examine Ted, Jessica, Tricia or anyone else; contest the tribal court's jurisdiction; or present any evidence to the tribal court at the first hearing in January 2015. Nor was Petitioner afforded these same opportunities at the second hearing, over ten months later, except that the CRSTC allowed legal arguments on jurisdiction at that time. Essentially, the tribal court has suspended the Petitioner's parenting rights and his rights under the Cass County, North Dakota district court orders without allowing him an opportunity to be heard. On this note, several of the CRSTC and CRSTCA orders also reference domestic violence allegations against Aarin; however, Aarin never had the opportunity to respond to those allegations. Aarin never even received notice of those allegations, aside from in a North Dakota proceeding which was resolved without any findings from the district court on the factual allegations. And now yearas later, the CRSTC and CRSTCA have taken notice of these facts and made findings based on these facts in matters over which the tribal court lacks jurisdiction.

87. The child's continued detention under color of law by both the CRSTC and CRSTCA is a violation of the Petitioner's procedural due process rights. The Petitioner has still



not had a full opportunity to participate in the proceedings in the CRSTC, in direct violation of his procedural due process rights under both the U.S. Constitution and the ICRA, and in direct violation of both the CRSTCA and North Dakota orders. This is despite the tribe holding many oral arguments in several different files over a period of nearly five years, with no final resolution reached. Although the CRSTCA ordered a hearing in the tribal court on the issue of custody months ago, no hearing has been set, and Petitioner has not been allowed to have visitation with the child. The absence of a hearing and lack of available visitation are both in direct violation of the CRSTCA's Orders dated September 24, 2018 and February 25, 2019, wherein Chief Justice Pommersheim ordered the CRSTC to hold a hearing. *See* Exhibit 64; Exhibit 65. Petitioner will not receive a fair hearing in tribal court, and Petitioner now asks this Court to afford him the opportunity to be heard in accordance with his rights under the U.S. Constitution and the ICRA.

### **III. THIRD CLAIM FOR RELIEF: SUBSTANTIVE DUE PROCESS VIOLATIONS**

88. Petitioner re-alleges and incorporates by reference paragraphs 1 through 87, above.

89. Respondents' illegal detention of the child under color of law and wrongfully asserted jurisdiction violates Petitioner's substantive due process rights under the U.S. Constitution and the ICRA.

90. The assertion of subject matter jurisdiction over a determination of custody of the children by the tribe violates the Petitioner's substantive due process rights under the Fifth Amendment of the U.S. Constitution, as the Petitioner has the right to be free from tribal intervention and tribal assertion of power in custody proceedings properly brought in state court.

91. As stated in *Omaha Tribe of Nebraska v. Barnett*, "[t]he burden is on the Tribe to state sufficient facts to show jurisdiction over the defendants." 245 F.Supp.2d 1049, 1052-53 (D.Neb. 2003) (citing *Ag-Tronic v. Frank Paviour Ltd.*, 70 F.R.D. 393, 398 (D.Neb. 1976)). "It is

defendant's contacts with the forum State that are of interest in determining if in personam jurisdiction exists, not its contact with a resident." *Omaha*, at 1054 (citing *Aaron Ferer & Sons Co. v. Atlas Scrap Iron & Metal Co.*, 558 F.2d 450, 455 n. 6 (8th Cir. 1977)).

92. Petitioner does not have sufficient minimum contacts with the reservation in order for the tribe to have in personam jurisdiction over him. In *Myers v. Casino Queen, Inc.*, the Eighth Circuit stated,

[w]e developed a five-factor test to evaluate whether a defendant's actions are sufficient to support personal jurisdiction: (a) Nature and quality of contacts with the forum state; (b) Quantity of those contacts; (c) Relationship of those contacts with the cause of action; (d) [the forum state's] interest in providing a forum for its residents; (e) The convenience or inconvenience to the parties.

689 F.3d 904, 911 (8th Cir. 2012). The court cites another Eighth Circuit opinion, *Precision Const. Co. v. J.A. Slattery Co., Inc.*, 765 F.2d 114, 118 (8th Cir.1985), where it notes "the first three factors are of primary importance and the last two of secondary importance." *Id.* In the present matter, the first three factors demonstrate minimal or non-existent contacts between the Petitioner and the reservation, and that the nature of those contacts would not cause Petitioner to reasonably anticipate being haled into tribal court. Although Petitioner now moves the South Dakota federal court for relief, the reservation lacks jurisdiction over him for the purposes of child custody.

93. "In assessing the defendants' 'reasonable anticipation' of being haled into court, 'there must be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Bell Paper Box, Inc. v. U.S. Kids, Inc.*, 22 F.3d 816, 818 (8th Cir. 1994). "Attenuated contacts are insufficient to show purposeful availment." *Omaha*, 245 F.Supp.2d at 1054.

94. Likewise, this suit is not based upon an action that has any substantial connection with the tribe or the reservation. The Tribe does not have inherent or enumerated authority over the custody matter in this case, as the children, the fathers, and the mother were all domiciled in

North Dakota. The Cass County, North Dakota district court orders have no connection to the tribe. This Court should conclude the North Dakota orders and obligations on the part of the Petitioner and Tricia did not arise from any privilege exercised within tribal jurisdiction. Additionally, Tricia consented to North Dakota jurisdiction in initiating actions in North Dakota through the marital dissolution and child support matters against Terrance and domestic violence restraining order against Aarin; defending against suit and imploring the Cass County, North Dakota district court to grant interim relief through the custody matter against Aarin; failing to raise any objection to the Court's exercise of jurisdiction in all of the proceedings involving both Petitioner; and entering a guilty plea to the criminal charge of kidnapping, wherein she admitted that she took the children "in violation of an existing custody decree." *See* Exhibits 6, 21, and 31.

95. Traditionally, federal district courts have declined to hear matters of jurisdiction involving Indian tribes unless and until the tribe has had an initial opportunity to determine jurisdiction, and Petitioner has exhausted his tribal remedies. *See Strate v. A-1 Contractors*, 520 U.S. 438, 449 (1997) ("Ordinarily . . . a federal court should stay its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction."). In *National Farmers Union Ins. Co.*, the Supreme Court held that a federal court should not entertain a challenge to the jurisdiction of a tribal court until after a petitioner has exhausted its remedies in the tribal court. 471 U.S. at 856. "[C]onsiderations of comity direct that tribal remedies be exhausted" before a federal court can exercise jurisdiction over a challenge to tribal jurisdiction. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987) (citing *Nat'l Farmers Union*, 471 U.S. at 857). Exhaustion includes both an initial decision by the tribal trial court and the completion of appellate review. *Id.* at 17.

96. However, the tribe had no power to assert jurisdiction in this matter or, if this Court finds that the tribe did have power to act, such power was exercised in an arbitrary, unreasonable, or discriminatory manner and the tribe's method adopted has no reasonable relation to attaining the desired result. The tribe used its power to detain the children and delay the proceedings in such an arbitrary or oppressive way, inappropriately keeping the children on the reservation while ignoring all North Dakota orders, failing to notify the Petitioner of tribal court proceedings, and delaying a resolution for nearly five years. As such, Petitioner was not required to exhaust his tribal remedies before bringing this Writ. *See DISH Network Service LLC v. Laducer*, 725 F.3d 877 at 883 (8th Cir. 2013) (“[i]f it is ‘plain’ that tribal jurisdiction does not exist and the assertion of tribal jurisdiction is for ‘no purpose other than delay,’ the exhaustion requirement does not apply . . . the exhaustion requirement should be waived only if the assertion of tribal court jurisdiction is frivolous or obviously invalid under clearly established law.”). As the CRSTC has asserted jurisdiction in this matter in defiance of clearly established federal law (*see* Fourth and Fifth Claims for Relief, below), deprived Petitioner of his constitutional rights during all such proceedings, adopted new tribal resolutions for the purpose of further frustrating Petitioner's right to parent his child, and as the CRSTCA has refused to determine and rule on the heart of the Petitioner's claims on appeal, exhaustion of further tribal remedies is not required in this matter.

97. Even if this Court determines that, as a matter of comity, Petitioner was required to exhaust his tribal remedies before bringing this Writ in federal district court, this Court should find that Petitioner has clearly exhausted all tribal remedies. *See DISH*, 725 F.3d at 882 (“[e]xhaustion includes both an initial decision by the tribal trial court and the completion of appellate review.”). Both the tribal court and tribal appellate court have had the opportunity, and indeed, multiple

opportunities to determine it lacks jurisdiction. Petitioner has clearly exhausted his tribal remedies after nearly five years of working towards regaining rightful custody of his child.

98. Therefore, because of the violations of Petitioner's substantive due process rights, and because Petitioner was not required to exhaust tribal remedies, though Petitioner exhausted tribal remedies nonetheless, this Court should assume jurisdiction and venue of this matter.

#### **IV. FOURTH CLAIM FOR RELIEF: VIOLATION OF THE FULL FAITH AND CREDIT CLAUSE UNDER THE PARENTAL KIDNAPPING PREVENTION ACT**

99. Petitioner re-alleges and incorporates by reference paragraphs 1 through 98, above.

100. The tribe's assertion of jurisdiction, refusal to give the ND Orders full faith and credit, and refusal to release the child to her lawful and true custodian, is a clear violation of the Petitioner's rights under the full faith and credit clause of the PKPA. These acts by the tribe circumvent the very intent and purpose of the PKPA, award and encourage Tricia's illegal actions, and unlawfully punish the Petitioner. *See DeMent* at footnote 3, citing *Thompson v. Thompson*, 484 U.S. 174, 180-185 (1988) ("[t]he purpose of the [PKPA] was to remedy the inapplicability of full faith and credit requirements to custody determinations and to deter parents from kidnapping their children to relitigate custody in another state").

101. Petitioner requests this Court determine the Parental Kidnapping Prevention Act applies to the Cheyenne River Sioux Tribe as Petitioner has already raised this claim in tribal court and has been denied relief. *See DeMent* at footnote 4 ("[w]hether the term 'territories' in the PKPA applies to Indian tribes is a question of federal law, but a federal court cannot resolve that issue unless and until [petitioner] raises the PKPA claim in tribal court."); *see also* Exhibits 47 and 65 (wherein Petitioner was denied relief under the PKPA in both the trial and appellate tribal courts).

In decisions by the United States Supreme Court and the Eighth Circuit Court of Appeals:

The Supreme Court has construed the term "territories" in an earlier statute to include Indian tribes, *United States ex rel. Mackey v. Coxe*, 59 U.S. (18 How.) 100,

103, (1856), and [the Eighth Circuit Court of Appeals] has also reached that conclusion. *Cornells v. Shannon*, 63 F. 305, 306 (8th Cir. 1894); *Standley v. Roberts*, 59 F. 836, 845 (8th Cir.1894); *Mehlin v. Ice*, 56 F. 12, 19 (8th Cir. 1893).

*DeMent* at footnote 4; *See also Swipes v. Kofka*, 419 F.3d 709, 714, (8th Cir. 2005).

102. Also, the CRSTCA itself has already determined that the PKPA applies on the reservation. *Eberhard v. Eberhard*, 24 ILR 6059, 6060, 6062-64 (Chy.R.Sx.Ct.App. 1997) *See* Exhibit 66. Although the tribal council has recently overruled *Eberhard*, it only noted that “the Tribal Council effectively rendered *Eberhard* inapplicable to future cases.” *See* Exhibit 64 (Memorandum Opinion and Order - September 24, 2018 (emphasis added)). There is no provision in the resolution noting it was intended to be applied retroactively to this matter, which has been pending in the tribal court system since September 2014. Further, in light of the tribe’s ongoing and concerted efforts to revoke *Eberhard*’s applicability for this case specifically, going so far as to specifically reference North Dakota custody orders in its resolution, any efforts to seek recognition of the valid ND Orders in the CRSTC are futile. Therefore, Petitioner urges this Court to determine the PKPA applies to the Cheyenne River Sioux Tribe for the purposes of this matter, which was initiated prior to the recent adoption of this tribal resolution on the PKPA.

103. Furthermore, Petitioner urges this Court to find the custody determination by the Cass County, North Dakota district court is valid and enforceable under the PKPA. A custody determination is consistent with the provisions of PKPA if the court making the determination has jurisdiction under law of the state in which the court sits and:

[s]uch state is the home state of the child on the date the commencement of the proceeding, or . . . had been the child’s home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State.

28 U.S.C. § 1738A(c)(1)-(2). Additionally, the PKPA provides that the home state of a minor child is the “[s]tate in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as a parent, for at least six consecutive months.” 28 U.S.C. § 1738A(b)(4), and, “[p]eriods of temporary absence of any such persons are counted as part of the six-month or other period.” 28 U.S.C. § 1738A(b)(4). North Dakota is the home state of both C.S.N. and T.R.S. For more than six months prior to Aarin and Terrance bringing their individual actions for custody, the children were only absent from North Dakota because Tricia absconded with them. Petitioner continues to live in North Dakota, this Court should conclude that the Cass County, North Dakota district court had jurisdiction under the laws of North Dakota to make an initial custody determination as North Dakota is the home state of the minor child under the PKPA, and that the Cass County, North Dakota district court has exclusive and continuing jurisdiction over the custody proceedings regarding the minor child.

104. Further, Cass County has proper jurisdiction over custody because a child custody proceeding was commenced in North Dakota prior to the Cheyenne River Sioux Tribal Court attempted to exercise jurisdiction. Proceedings to establish custody were commenced in Cass County District Court by Aarin and Terrance prior to the tribal court’s entry of the Temporary Custody Order on January 13, 2015. *See* Exhibit 20. Aarin filed a complaint seeking to establish custody on April 15, 2014 and Terrance filed a complaint to establish custody on July 25, 2014. *See* Exhibit 1; Exhibit 23. The Cass County District then properly exercised subject-matter and personal jurisdiction by making initial custody determinations in interim orders in both matters. Because North Dakota is the home state and the Cass County, North Dakota district court made an initial custody determination regarding the minor child, it has continuing, exclusive jurisdiction over the custody proceedings involving the minor child. Consequently, the tribe could not exercise



subject-matter jurisdiction and was without jurisdiction to grant custody of the minor child to Ted, Jessica, or Ed.

105. The minor child has only been absent from North Dakota as result of Tricia's unlawful conduct and any time the child has resided on the Cheyenne River Indian Reservation has only been a temporary absence due to parental kidnapping. Therefore, the Cass County district court custody orders are entitled to full faith and credit and enforcement by this Court under the PKPA, which is applicable to the Cheyenne River Sioux Tribe. Further, the purpose of the PKPA is to discourage and dissuade Tricia's exact conduct in this matter to which she plead guilty and served a criminal sentence. Tricia was not satisfied with the proceedings in Cass County, North Dakota district court after fully participating in those proceedings and even stipulating to custody arrangements, and then sought to relitigate the matter. Tricia kidnapped the minor children and fled to the Cheyenne River Indian Reservation in an effort to obtain a different result from the CRSTC. This is the type of conduct and forum shopping that the PKPA was enacted to prevent. *See Thompson v. Thompson*, 484 U.S. 174, 181-82 (1988). Therefore, the orders of the Cass County, North Dakota district court are entitled to full faith and credit and enforcement by this Court pursuant to the Parental Kidnapping Prevention Act.

#### **V. FIFTH CLAIM FOR RELIEF: ICWA IS INAPPLICABLE**

106. Petitioner re-alleges and incorporates by reference paragraphs 1 through 105, above.

107. Throughout these proceedings, the Respondents have asserted ICWA jurisdiction at various times with differing results. However, in the most recent CRSTCA decision, the court has concluded ICWA does not apply to the tribal proceeding. *See Exhibit 65*. For that reason, Petitioner urges this Court to confirm the conclusion that ICWA does not apply for the following reasons.

108. The assertion of jurisdiction under ICWA is against the evidence, in direct contravention of the plain language of ICWA, and grossly improper. *See* 25 U.S.C. § 1920, (“[w]here any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian”). Tricia brought the minor children to the Cheyenne River Indian Reservation in violation of the orders entered by the Cass County, North Dakota district court and has since been convicted of felony charges for removing the children from the state of North Dakota in violation of a custody decree. *See* N.D.C.C. § 12.1-18-05; *see also* Exhibits 18 and 31. Therefore, the ICWA is not applicable because placement of the minor children with Jessica was based upon Tricia committing a felony.

109. Additionally, the ICWA does not apply to this matter because it is an initial custody proceeding. “Although the ICWA gives Indian tribes exclusive jurisdiction to determine the custody of Indian children, the statute only applies to proceedings to determine foster care placement, the termination of parental rights, preadoptive placement and adoptive placement. Exclusive jurisdiction *was not* given in proceedings to determine the custody of children in a divorce proceeding.” *DeMent* at 514, citing 25 U.S.C. § 1903 (emphasis added). Further, a child custody proceeding “shall not include a placement based upon an act which if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.” 25 U.S.C. § 1903(1).

110. Here, the Petitioner initiated the action in Cass County, North Dakota district court to establish custody of the minor child. Not one of proceedings involved a foster care placement,

termination of parental rights, pre-adoptive placements, or adoptive placements of the minor child, and are, in fact, initial custody determinations between two natural parents. Although DSS appears to have placed the children with Ted, no proceedings regarding foster or adoptive placements have been initiated. Rather, the issue here has always been a jurisdictional one regarding a custody proceeding between natural parents. Therefore, because these proceedings are initial custody proceedings, the ICWA is not applicable, and Petitioner urge this Court to determine the same.

### **PRAYER FOR RELIEF**


WHEREFORE, Petitioner pray that this Court grant the following relief:

- a) Assume jurisdiction over this matter under 25 U.S.C. § 1303 (habeas corpus), 28 U.S.C. § 1331 (federal question jurisdiction), and 28 U.S.C. § 1367 (supplemental jurisdiction);
- b) Assume venue of this matter under 28 U.S.C. § 1391(b)(2);
- c) Expedite consideration of this action pursuant to 28 U.S.C. § 1657 because it is an action brought under 25 U.S.C. § 1303 (habeas corpus) and procedure is guided by chapter 153 of Title 28, where the rules of a habeas petition under 28 U.S.C. § 2254 may be applied by the district court to any habeas petition under 28 U.S.C. § 2254 Rule 1(b);
- d) Grant Petitioner a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2243, and order that C.S.N. be immediately released to Petitioner in accordance with the ND Orders dated July 24, 2014, September 4, 2015, and September 12, 2015, which granted Petitioner primary residential responsibility of his child;
- e) In the alternative, should this Court not issue the Writ, that this Court issue an order directing Respondents to show cause why the writ of habeas corpus should not be granted pursuant to 28 U.S.C. § 2243;
- f) Find that the Indian Child Welfare Act (ICWA) does not apply in this matter;

- g) Find that the tribe lacks both in personam and subject matter jurisdiction over Petitioner, C.S.N., and this matter;
- h) Find that the ND Orders dated July 24, 2014, September 4, 2015, and September 12, 2015 shall be accorded full faith and effect by the tribe;
- i) Grant any and all law enforcement agencies the power to forcibly remove the child from the Ducheneaux residence, the Cheyenne River Sioux Indian Reservation, or wherever the child is currently being held, in order to effectuate peaceful transfer between the parties;
- j) Award Petitioner attorney fees and costs under this Court's equitable powers as interests of justice so require, and on any other basis justified under law; and
- k) Grant any other and further relief as the Court deems just and appropriate.

Dated this 28th day of August 2019.

GUNDERSON, PALMER, NELSON  
& ASHMORE, LLP



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JS 44 (Rev. 02/19)

**CIVIL COVER SHEET**

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

**I. (a) PLAINTIFFS**

AARIN NYGAARD

**DEFENDANTS**

TRICIA TAYLOR, et al.

(b) County of Residence of First Listed Plaintiff Cass County, ND

(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant Cass County, ND

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorneys (Firm Name, Address, and Telephone Number)

Marty J. Jackley  
111 West Capitol Ave., Ste. 230, Pierre, SD 57501

Attorneys (If Known)

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   | PTF                        | DEF                        |   | PTF                        | DEF                        |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<b>PRISONER PETITIONS</b> <b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	<b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609

**V. ORIGIN** (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

**VI. CAUSE OF ACTION**Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
25 USCA 1303Brief description of cause:  
Petition for Writ of Habeas Corpus - Child Custody**VII. REQUESTED IN COMPLAINT:**☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

DATE

8-28-19

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING FFP

JUDGE

MAG. JUDGE