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Attorneys for the Accused

In the Circuit Court of the Second Circuit

State of Hawai'i

In the Matter of the

Extradition of

Carlos Jesus Moreno

2CSP-23-013(1)

Motion to Dismiss Extradition Proceedings;
Memorandum in Support; Declaration of
Counsel.

Hearing Date: April 5, 2023

Hearing Time: 8:15 a.m.

Hon. Judge Kirstin M. Hamman

Motion to Dismiss Extradition Proceedings

The accused moves this Court for an order dismissing these proceedings because the Pascua Yaqui Nation is a sovereign nation, not a State or federal territory covered by the extradition process. This motion is made pursuant to the Hawai'i and United States Constitutions, Hawai'i Revised Statutes Chapter 832, 18 United States Code § 3812, and Rules of the Circuit Courts of the State of Hawai'i Rules 3 and 7. It is based on the attached memorandum, the record in this case, and evidence, if any, at the hearing on the motion.

Dated: Wailuku, Maui, Hawai'i: March 16, 2023.

/s/ Benjamin Lowenthal
Attorney for the Accused

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2CSP-23-013(1)

Memorandum in Support of Motion to
Dismiss Proceedings.

Hon. Judge Kirstin M. Hamman

Memorandum in Support of Motion to Dismiss Proceedings

The Pascua Yaqui Nation has invoked the Uniform Criminal Extradition Act against the accused. The extradition process, however, is limited to States and federal territories. It does not cover tribal governments. The State of Hawai'i cannot comply with the Pascua Yaqui Nation's extradition demand. These proceedings must be dismissed.

Relevant Background

The Pascua Yaqui Nation is a federally recognized Indian¹ tribe. Pub. Law No. 95-375 (1978). On September 30, 2022, prosecutors of the Pascua Yaqui Nation filed a criminal complaint

¹ While the term "Indian" is antiquated and problematic, it remains a legal term of art. *See* Pub. L. No. 103-454 § 102 (adopting term "Indian tribe" to mean "any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges

against Carlos Jesus Moreno alleging six violations of the tribal code. The maximum term of imprisonment for each offense does not exceed one year.

On January 20, 2023, a tribal prosecutor demanded the State of Hawai'i to arrest and deliver up Mr. Moreno for extradition. Maui Police Department officers arrested the accused on March 7, 2023, pursuant to the extradition statutes in Hawai'i Revised Statutes (HRS) Chapter 832. The accused challenges the legality of his arrest by because the Pascua Yaqui Nation cannot act as a demanding State.

The interstate extradition process does not cover distinct sovereign governments like the Pascua Yaqui Nation.

1. Indian nations are neither States nor territories of the United States under the Uniform Criminal Extradition Act in HRS Chapter 832.

The federal constitution establishes an interstate extradition process allowing States to seamlessly transport criminal defendants across their borders:

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

U.S. Const. Art. IV, Sec. 2, Cl. 2. The Extradition Clause is not self-executing and requires implementing legislation. *See Roberts v. Reilly*, 116 U.S. 80, 95 (1885); *United States ex rel. Silver v. O'Brien*, 138 F.2d 217, 218 (7th Cir. 1943) (“Unquestionably, the source of all authority for the extradition of an alleged fugitive from justice is found in Art. IV, Sec. 2, clause 2 of the Constitution of the United States, which is not self-executing”).

to exist as an Indian tribe.” *See also* 18 U.S.C. § 1151 (term “Indian country” includes “all land within the limits of any Indian reservation,” “dependent Indian communities within the borders of the United States,” and “Indian titles to which have not been extinguished”).

The Uniform Criminal Extradition Act confers upon the Governor of the State of Hawai'i the duty to arrest and "deliver[] up to the executive authority of **any state of the United States** any person charged in that state with treason, felony, or other crime, who has fled from justice and is found" here. HRS § 832-2. The extradition process is limited to States, the District of Columbia, and federal territories:

Where appearing in this chapter . . . **the term "state" includes any state other than this State, the District of Columbia, or a Territory, organized or unorganized, of the United States.** The term "interstate" means between this State and any other state.

HRS § 832-1.

Before the accused can be arrested and "delivered up" to the Pascua Yaqui Nation, this Court must first determine if the Pascua Yaqui Nation is a demanding "State." Hawai'i's extradition statutes must be construed in accordance with federal law:

The Uniform Criminal Extradition Act is ancillary to and in aid of the Extradition Clause U.S. Const. art IV, §2, cl. 2, and the federal implementing statute, 18 U.S.C. § 3182. The courts of an asylum state are bound by decisions of the United States Supreme Court in construing and applying the Extradition Clause and the federal implementing statute. The mechanics of the extradition process within a particular state are governed by the provisions of the Uniform Criminal Extradition Act insofar as they do not conflict with federal constitutional and statutory provisions. All fifty states have adopted the Uniform Criminal Extradition Act. In addition, all United States territories and possessions have enacted the Act.

Wolfe v. Au, 67 Haw. 259, 262 n. 3, 686 P.2d 16, 20 n. 3 (1984). The weight of federal authority shows that it is not.

The Supreme Court of the United States has never extended the Extradition Clause and implementing legislation to Indian nations. "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history." *McGirt v. Oklahoma*, 140 S.Ct.

2452, 2476 (2020). The Supreme Court long ago held that “Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial[.]” *Worcester v. Georgia*, 31 U.S. 515, 559 (1832). *See also Cherokee Nation v. Georgia*, 30 U.S. 1, 13 (1831) (Indian nations are not States, but “domestic dependent nations”). They are not States.

They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they resided.

United States v. Kagama, 118 U.S. 375, 381-382 (1886). “[T]hey remain separate sovereigns pre-existing the Constitution.” *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 789 (2014). Accordingly, the Pascua Yaqui Nation is not a demanding “State” that can invoke Hawai’i’s extradition statutes and Article IV, Section 2 of the United States Constitution.

Nor is it a “Territory . . . of the United States.” HRS § 832-1. A federal territory is “entirely the creation of Congress, and its judicial tribunals exert all their powers by authority of the United States.” *United States v. Wheeler*, 435 U.S. 313, 321 (1978). *See also First Nat. Bank v. Yankton County*, 101 U.S. 129, 133 (1879) (“Territories are but political subdivisions of the outlying dominion of the United States.”).

Indian nations exert inherent sovereign power that is not delegated from the United States:

The powers of Indian tribes are, in general, inherent powers of a limited sovereignty which has never been extinguished. Before the coming of the Europeans, the tribes were self-governing sovereign political communities. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws.

Indian tribes are, of course, no longer possessed of the full attributes of sovereignty. . . .

....

. . . The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But **until Congress acts, the tribes retain their existing sovereign powers.** In sum, **Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.**

United States v. Wheeler, 435 U.S. at 322-323 (citations omitted).

In other words, while federal territories act through power delegated from Congress, “[t]he ultimate source of a tribe’s power to punish tribal offenders . . . lies in its primeval or, at any rate, pre-existing sovereignty.” *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 70 (2016). *Compare Wolfe v. Au*, 67 Haw. at 266, 686 P.2d at 22 (Federated States of Micronesia under the Pacific Islands Trust Territory a “territory” for extradition purposes “though destined for nationhood”). The Pascua Yaqui Nation is not covered by the Uniform Criminal Extradition Act in HRS Chapter 832. It cannot use the extradition process to act like a demanding State.

2. Indian nations exist outside the interstate extradition process and the Pascua Yaqui Nation must resort to other ways of securing the accused’s presence.

The Extradition Clause aims to allow States to transport criminal defendants across state lines, not other types of governments.

[The Extradition Clause], with the change of only two words, first appears in the Articles of Confederation of 1781, where it was used to describe and to continue in effect the practice of the New England colonies with respect to the extradition of criminals. **The language was not used to express the law of extradition as usually prevailing among independent nations but to provide a summary executive proceeding by the use of which the closely associated states of the Union could promptly aid one another** in bringing to trial persons accused of crime by preventing their finding in one state an asylum against the processes of justice of another.

Biddinger v. Commissioner of the City of New York, 245 U.S. 128, 132 (1917) (citation omitted). The Extradition Clause permits only interstate movements. *Kentucky v. Dennison*, 65 U.S. 66, 76-77 (1860) (“A Governor of one of these United States cannot surrender a fugitive from justice from a foreign country to the agents of that Power. This is exclusively within the sphere of the Federal Power.”) (citing *Holmes v. Jennison*, 39 U.S. 540 (1840)).

The Pascua Yaqui Nation’s attempt to extradite the accused must fail. In *Ex Parte Morgan*, 20 F. 298 (W. D. Ark. 1883), the Cherokee Nation demanded the extradition of a man accused of murder who fled to the State of Arkansas. *Id.* at 302-303. Arkansas arrested the man and prepared to deliver him up to the Cherokee Nation. *Id.* at 302. The accused challenged the legality of his arrest in federal court. *Id.*

The United States District Court ordered his release. Like HRS § 832-2, the federal statute implementing the Extradition Clause covers States and territories, but not Indian nations:

[The relationship between Indian nations and the United States] is manifestly different from either a state or territory. By the word “state” and the word “territory” have attached to them, under the constitution and laws of the United States, a technical meaning. The Cherokee Nation does not come within this meaning, but it is a part of what is called “Indian country.” Early in the life of the country a certain section of the domain of the nation was set apart as Indian country. By the advancing tide of white population and the formation of new territories first, and then states, much of what was then Indian country has ceased to be such, and has become states in the Union; but **the Cherokee Nation maintains the same status to-day in its relations to the federal government as it did when first set apart by such government—not as a state or territory, but as the home of the Indian.** These Indians have, from the foundation of the government, been treated as being separate and apart from the states and territories of the Union, and this tribe as well as all others are contradistinguished by a name appropriate to themselves, and one different from either a state or a territory. **They**

belong to the republic, though they are neither a state or territory in it.

Id. at 305-306. The Cherokee Nation was “neither a state nor territory, in the sense to be attached to the words when used in the clause of the constitution and in the act of congress relating to interstate extradition[.]” *Id.* at 307.

Morgan has never been overruled. In fact, when the Supreme Court extended the federal extradition statute to Puerto Rico, it relied extensively on *Morgan*’s analysis. *New York ex rel. Kopel v. Bingham*, 211 U.S. 468, 190-191 (1909). The Supreme Court distinguished federal territories like Puerto Rico from Indian nations, adopted *Morgan*’s definition of a “territory,” and confirmed that Indian nations were neither States nor territories for extradition purposes. *Id.* at 191.

States seeking extradition from Indian country face the same barrier. In *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969), the State of Oklahoma demanded the extradition of a man living on the Navajo Reservation surrounded by the State of Arizona. *Id.* at 683. The tribal court refused. *Id.*

Undeterred, Oklahoma then requested that the governor of Arizona enter the Navajo Nation and extradite the accused. *Id.* at 684. Arizona sheriffs entered the reservation and arrested the accused. *Id.* A petition for habeas corpus in federal court followed. *Id.* The United States District Court found that the Arizona sheriffs had no authority to enter the Navajo Nation. *Id.* Arizona appealed to the Ninth Circuit. *Id.*

The appellate court affirmed the dismissal because the Extradition Clause does not apply to Indian nations:

Article IV, Section 2, read literally, purports to impose upon the governor of each State a duty to deliver up fugitives charged with a crime in a sister state. The constitutional mandate

requires exercise of the state's lawful jurisdiction in responding to the extradition demands of sister states, but it does not itself attempt to define the reach of that jurisdiction. **We have found no authority bearing directly upon the relationship between Article IV, Section 2, and treaty-protected Indian lands and conclude that with regard to the exercise of extradition jurisdiction over Indian residents of the Navajo Reservation, the constitutional mandate must be interpreted in light of the of the Treaty of 1868 and the long history of the principle of retained tribal sovereignty.**

Id. at 685. After surveying the relevant treaties between the United States and the Navajo Nation, the Court of Appeals held that neither Oklahoma nor Arizona could use the extradition process to arrest a member of the Navajo Nation living on his reservation. *Id.* at 686. *See also City of Farmington v. Benally*, 119 N.M. 496, 892 P.2d 629, 630 (N.M. App. 1995) (holding city government's attempt to extradite defendant living in the Navajo Nation must fail).

The weight of authority accrued over centuries in federal court establish that Indian nations cannot use the interstate extradition process to secure the appearance of the accused in tribal court. The Pascua Yaqui Nation must find another way. *See, e.g., Ex parte Crow Dog*, 109 U.S. 556, 568 (1883) (extradition controlled by treaties between the United States and tribal nation).

Conclusion

The Pascua Yaqui Nation is a sovereign entity—not a State or federal territory. That means it cannot use the extradition process to have the accused arrested in Hawai'i and held until tribal authorities come and retrieve him. It is respectfully requested that these proceedings be dismissed.

Dated: Wailuku, Maui, Hawai'i: March 16, 2023.

/s/ Benjamin Lowenthal.
Benjamin E. Lowenthal
Attorney for the Accused

Declaration of Counsel

State of Hawai'i)
)
County of Maui) ss.

I, Benjamin E. Lowenthal, declare under penalty of law that the facts in the above memorandum are true and correct and based to the best of my knowledge and belief.

Dated: Wailuku, Maui, Hawai'i: March 16, 2023.

/s/ Benjamin Lowenthal.
Benjamin E. Lowenthal
Attorney for the Accused