CAAP-23-0000352

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI`I

In the Matter of the	)	CASE ID. 2CSP-23-0000013(1)
	)	
Extradition of	)	INTERLOCUTORY APPEAL FROM
	)	FINDINGS OF FACT, CONCLUSIONS
CARLOS JESUS MORENO	)	OF LAW, AND ORDER DENYING
	)	MOTION TO DISMISS
	)	
	)	CIRCUIT COURT OF THE SECOND
	)	CIRCUIT, WAILUKU DIVISION,
	)	STATE OF HAWAI`I
	)	
	)	Honorable Judge Kirstin Hamman

ANSWERING BRIEF

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ANSWERING BRIEF

I. INTRODUCTION.

In this appeal, Appellant Carlos Moreno ("Moreno") seeks to block his extradition to the Pascua Yaqui Tribe by framing the tribe as an independent nation while simultaneously seeking to deprive the tribe of one of the fundamental functions of a sovereign - the ability to prosecute crimes committed by its people on its own land. His arguments to that end misconstrues the purpose of the Extradition Clause, misapplies the holding of

the Hawai`i Supreme Court case *Wolfe v. Au*, and cites cases that, contrary to his arguments, support the notion that he should be extradited back to the tribe.

Hawai`i Revised Statutes ("HRS") Chapter 832 codifies Hawaii's Uniform Criminal Extradition Act. The act generally requires that the governor of the State of Hawai`i deliver an accused to the executive authority of any demanding state. HRS § 832-1[1] defines "state" to include "a Territory, organized or unorganized, of the United States." In *Wolfe v. Au*, the Hawai`i Supreme Court provided a test for determining when a political entity should be considered a "territory" under HRS Chapter 832 by considering two factors: 1) the degree of control the federal government possess over the polity, and 2) whether extradition is consistent with the Extradition Clause. An analysis of both of those factors in this case lead to the inescapable conclusion that the tribe is a "territory" under HRS Chapter 832. This

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[1] HRS § 832-1 states:

> Where appearing in this chapter, the term "governor" includes any person performing the functions of governor by authority of the laws of this State. The term "executive authority" includes the governor, and any person performing the functions of governor in any state, and 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 this State and any other state. The term "prosecuting officer" or "prosecuting attorney" includes the attorney general of this State, any county attorney or prosecuting attorney of any county of this State. The term "peace officer" includes any officer authorized to serve process in criminal proceedings.

result is in accord with other cases that consider tribes a "territory" in other contexts - which affirms the tribe's interest in enforcing its laws through extradition - as well as the proposition that states and tribes are free to effectuate extraditions between them.

As demonstrated in this brief, Moreno's arguments should be rejected and this court should hold that the Circuit Court correctly concluded that the Pascua Yaqui Tribe is a "Territory" under HRS Chapter 832.

II. COUNTER-STATEMENT OF THE CASE.

Moreno is a member of the Pascua Yaqui Tribe, a federally recognized Indian tribe that charged him with six offenses related to an alleged shooting on the Pascua Yaqui Reservation. Judiciary Electronic Filing System ("JEFS"), 2CSP-23-0000013, Dkt. #1 at 9-14.[2] Based on those charges, the tribe sought the extradition of Moreno through a Demand for Extradition on January 20, 2023. JEFS, 2CSP-23-0000013, Dkt. #1 at 4-5. Moreno was eventually apprehended and brought before the Circuit Court on March 13, 2023. JEFS, 2CSP-23-0000013, Dkt. #14.

Moreno filed his Motion to Dismiss Extradition Proceedings on March 16, 2023. JEFS, 2CSP-23-0000013, Dkt. #19. He argued that the tribe was not one of the enumerated type of political entities listed in HRS § 832-1, and thus, he could not be extradited under HRS Chapter 832. *See* JEFS, 2CSP-23-0000013, Dkt. #19 at 1. That motion was heard and denied on April 5,

[2] Page citations in this brief refer to the PDF pagination for the document cited.

2023. JEFS, 2CSP-23-0000013, Dkt. #27. The court orally ruled as follows:

> THE COURT: All right.
>
> Well, having considered the arguments made by the parties, as well as the pleadings submitted. And the Court has -- as it indicated -- reviewed those.
>
> The Court agrees that the Court is bound by the Wolfe v. Au case. And the Court is persuaded by the arguments made by the State that in this -- that this the Pascua Yaqui tribe should be considered and is considered a territory under the state's extradition statute.
>
> The Court is -- has reviewed -- although not binding on this Court, the Court was persuaded by the analysis that was conducted in Tracy versus Superior Court of Maricopa County, an Arizona case cited to by the State, and the analysis that they did in that particular case, and finding that Indian tribes do possess a unique political status.
>
> However, tribal governments are comparable to states and territories in many ways. And Indian tribes may be considered territories within the meaning of certain statutes.
>
> In that case, they were looking at the Uniform Act to secure the attendance of witnesses from without a state. In this case, we're looking at the extradition statute. And the Court agrees that, while not formally a territory, the Indian tribe that congress does retain plenary authority over the Indian tribes and -- or Indian Nations. They are not independent nations.
>
> And given the broad definition of territory, as either organized or unorganized, the Court does find that the Pascua Yaqui tribe is a territory for the purposes of the extradition statute.
>
> And, therefore, the motion is denied.

JEFS, CAAP-23-0000352, Dkt. # 18 at 12-13. The Circuit Court issued its findings and conclusions on April 18, 2023, which were consistent with its oral ruling. *See* JEFS, 2CSP-23-0000013, Dkt. #30. This interlocutory appeal followed.

III. COUNTER-STATEMENT OF STANDARDS OF REVIEW.

The State does not dispute the standards of review articulated in Defendant's Opening Brief. *See* JEFS, CAAP-23-0000352, Dkt. #20 at 8; HRAP Rule 28(c) (stating that no section is required in an answering brief "unless the section presented in the opening brief is controverted").

IV. ARGUMENT.

A. DEFENDANT'S ARGUMENTS REGARDING THE FEDERAL EXTRADITION CLAUSE DO NOT PRECLUDE TRIBAL EXTRADITIONS.

Moreno first argues that the Extradition Clause of the federal constitution prevents his extradition to the Pascua Yaqui Tribe. The clause reads:

> 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 from which he fled, be delivered up, to be removed from the State having Jurisdiction of the Crime.

U.S. Const. art. IV, § 2, cl. 2. According to Moreno, the Extradition Clause precludes extraditions between states and tribes because it only refers to states, and the Extradition Act, *see* 18 United States Code ("U.S.C.") § 3182,[3] the clause's

[3] 18 U.S.C. § 3182 reads:

> Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District, or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged

enacting legislation, does not specifically refer to tribes. *See* JEFS, CAAP-23-0000352, Dkt. #20 at 8-12.

This interpretation of federal law ignores the plain language of the Extradition Clause and the Extradition Act. Both the clause and the act require the accused to be delivered to a demanding state or territory, but they do not prohibit other extradition actions between states and tribes. Moreno does not point to any authority which actually prohibits extraditions between states and tribes - he simply cites authorities that require states and territories to effectuate extradition demands. True as it may be that the Extradition Clause and Extradition Act do not *require* states and tribes to provide for extraditions between them, there is nothing that actually prohibits those extraditions. Instead, it is a state's prerogative to fashion their extradition laws as they see appropriate, so long as they execute extradition demands from other states or territories, consistent with the clause and the act.

Moreno's reading of the Extradition Clause is also contrary to its purpose. Namely, the Extradition Clause was not designed to prevent extraditions, it *encourages* them: "The purpose of the Clause was to preclude any state from becoming a

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> has fled, the executive authority of the State, District, or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such a demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of arrest, the prisoner may be discharged.

sanctuary for fugitives from justice of another state and thus 'balkanize' the administration of criminal justice among the several states." *Michigan v. Doran*, 439 U.S. 282, 287-88 (1978).[4] His argument that tribes may not participate in extradition agreements would turn the states into fugitive sanctuaries where tribes could not extradite its accused from states, nor could states retrieve their accused from tribal lands - even if both entities supported the extradition. This interpretation of the clause is entirely opposite to the clause's purpose of facilitating extraditions within the geographical boundaries of the United States.

Accordingly, Moreno's constitutional and statutory arguments are without merit.

B. THE CIRCUIT COURT CORRECTLY APPLIED *WOLFE V. AU* WHEN IT CONCLUDED THAT THE PASCUA YAQUI TRIBE IS A "TERRITORY" FOR THE PURPOSES OF HRS CHAPTER 832.

Moreno next argues that the Circuit Court misapplied *Wolfe v. Au*, 67 Haw. 259, 686 P.2d 16 (1984) (per curiam).

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[4] It has also been said:

> The Constitution imposes a duty on states to extradite fugitives. Congress implemented this constitutional duty with the enactment of 18 U.S.C. s 3182. The framers designed the extradition clause to enable states to "bring speedy trial offenders against its laws from any part of the land." By deemphasizing state boundaries and imposing the concepts of comity and full faith and credit found in other clauses of article IV, the framers sought to ensure the smooth functioning of the criminal justice system.

Crumley v. Snead, 620 F.2d 481, 482-83 (5th Cir. 1980) (citations and footnotes omitted).

Nonetheless, his argument misstates *Wolfe*'s holding by attempting to ignore the fact that the *Wolfe* relied heavily on the fact that federal power over the Federated States of Micronesia ("FSM") was a determining factor in concluding that the FSM was a territory for the purposes of HRS Chapter 832. Specifically, he argues: "The Hawai`i Supreme court was careful to point out that the extent of federal control does not determine territorial status." JEFS, CAAP-23-0000352, Dkt. #20 at 9. While he is correct that federal control is not the *exclusive* deciding factor under *Wolfe*, it certainly played an outsized role in the decision. That, in addition to the purposes of the Extradition Clause, were the factors underlying *Wolfe.* Based thereupon, the Circuit Court correctly concluded that the Pascua Yaqui Tribe is a "territory" for the purposes of HRS Chapter 832.

1. Federal Control of the FSM and the Pascua Yaqui Tribe.

In *Wolfe v. Au*, the Hawai`i Supreme Court considered whether the FSM was a "territory" pursuant to HRS § 832-1. 67 Haw. at 262-67, 686 P.2d at 20-23. The controversy surrounded Wolfe, a Hawai`i resident whom FSM demanded for extradition. *Id.* at 261, 686 P.2d at 19. Wolfe tried to prevent his extradition by arguing that "the FSM is not a 'Territory' of the United States within the meaning of HRS § 832-1." *Id.* The circuit court "found the FSM is a territory of the United States, not a sovereign country, and HRS Chapter 832 could be employed to extradite a person to Micronesia." *Id.* at 261-62, 686 P.2d at 19. He then sought a writ of prohibition in the supreme court. *Id.*

The court held that "the Uniform Criminal Extradition Act was properly invoked to effect Wolfe's extradition to Micronesia." *Id.* at 263, 686 P.2d at 20. In so holding, the *Wolfe* court acknowledged the "recent developments" that have "engendered confusion about the FSM's political status," *id.*, but was quick to emphasize the degree of control the United States retained. The court first noted that the FSM is part of the Trust Territory of the Pacific Islands, which is administered by the United States, and whose primary responsibility for its governance rests with the Secretary of the Interior. *Id.* *Wofle* then concluded that the FSM was not an independent nation:

> The FSM has ratified a Compact of Free Association that defines its status and powers as an independent polity with close political, military, and economic ties to the United States. But the compact has yet to be approved by the United States Senate and the United Nations. It must also be ratified by those bodies before the incipient nation is set free. True, the FSM has advanced rapidly towards this goal of independence; nevertheless, the United States has yet to relinquish control in several significant respects. For one, the Secretary of the Interior may still veto enactments of the FSM legislature, and the federal government still controls all matters regarding trade between the FSM and independent nations. And while the FSM has a constitution modeled on the federal constitution and Bill of Rights that encompasses the guarantees of due process, equal protection, speedy trial, and assistance of counsel, FSM Const. Art. IV, it cannot be denied that a shred of American control remains in this area too. Despite the establishment of a comprehensive judicial system, the United States Pacific Islands Trust Territory High Court still retains *certiorari* power over the FSM Supreme Court pursuant to Secretarial Order 3039. Hence, it is evident that the FSM, as part of the TTPI, cannot be deemed an independent nation.

Id. at 263-64, 686 P.2d at 20-21 (citations and footnotes omitted).

Clearly, the degree of federal control over the FSM was no small factor in *Wolfe*'s conclusion that the FSM was a "territory" under HRS Chapter 832. More than simply saying so, *Wolfe* looked to the areas in which the federal government controlled aspects of the polity. Those included the legislative requirements for the approval of the Compact of Free Association, the ability of the United States Secretary of the Interior to veto legislative enactments, the United State's power to control FSM trade, the analogous portions of the FSM constitution to our own, and the supremacy of federal courts over the FSM Supreme Court. *Id.* In this regard, the Circuit Court properly held that federal control over the Pascua Yaqui Tribe evidenced that it is a "territory" under HRS Chapter 832.

The status of the FSM in *Wolfe* mirrors the status of the Pascua Yaqui Tribe today. First, like the FSM in *Wolfe*, the Pascua Yaqui Tribe has "close political, military, and economic ties to the United States." *Compare Wolfe*, 67 Haw. at 263, 686 P.2d at 20 *with Cherokee Nation v. State of Ga.*, 30 U.S. 1, 17 (1831) ("[The Indian tribes] look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father."). Second, the FSM at the time of *Wofle* and the Pascua Yaqui Tribe are subordinates in a sort of trust administered by the United States. *Compare Wolfe*, 67 Haw. at 263, 686 P.2d at 20 *with United States v. Jicarailla Apache Nation*, 564 U.S. 162, 173-74 (2011) (describing the trust relationship between the federal government and the tribes).

Third, the federal government dictates all aspects of trade between the FSM in *Wolfe* and the tribe on one hand, and foreign nations on the other. *Compare Wolfe*, 67 Haw. at 264, 686 P.2d at 21 *with United States v. Cooley*, 141 S.Ct. 1638, 1642-43 (2021) ("[T]ribes lack any 'freedom independently to determine their external relations' and cannot . . . 'enter into direct commercial or governmental relations with foreign nations.'"). Fourth, the FSM and the Pascua Yaqui Tribe have constitutional governments with legislative, executive, and judicial branches, as well as a Bill of Rights modeled after the United States's. *Compare Wolfe*, 67 Haw. at 264, 686 P.2d at 21 *with* Const. of the Pascua Yaqui Tribe art. I, V, VII, and VIII.[5]

As shown by the foregoing, the degree of federal control over a political entity is a chief consideration when determining whether is an important factor under *Wolfe*. Based in large part on that factor, the Circuit Court correctly held that

[5] There are also factors suggesting the Pascua Yaqui Tribe is further from an independent nation than was the FSM when *Wolfe* was decided. While the FSM was rapidly advancing towards independence, *Wolfe*, 67 Haw. at 264, 686 P.2d at 21, there is no current path towards independence for the tribe. The trust relationship between the United States and that of the FSM in *Wolfe* is also materially different than that of the Indian tribes. The former was subject to a United Nations trust administered by the United States, while under the latter the government is allowed to alter or renege any of its obligations, or terminate the trust altogether. *See McGirt v. Oklahoma*, 140 S.Ct. 2452, 2462 (2020) ("The Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties."); *Tiger v. Western Inv. Co.*, 221 U.S. 286, 315 (1911) ("Congress . . . has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease.").

federal control over the Pascua Yaqui tribe demonstrates that it is a "territory," and thus a "state," under HRS Chapter 832.[6]

2. Extradition is consistent with the Extradition Clause.

Of course, *Wolfe* also considered whether application of extradition laws to FSM as a territory was consistent with Congress' intent in codifying the federal statute implementing the Extradition Clause, 18 U.S.C. § 3182. *Id.* at 264-65, 686 P.2d at 21-22. It answered in the affirmative, turning to *New York ex rel. Kopel v. Bingham*, 211 U.S. 468 (1909), which held: "It is impossible to hold that Porto Rico [sic] was not intended to have power to reclaim fugitives from its justice, and that it was intended to be created an asylum for fugitives from the United States." *Wolfe*, 67 Haw. at 266, 686 P.2d at 22 (citing *Bingham*, 211 U.S. at 474) (quotation marks omitted). The *Wolfe* court thought similarly about the FSM:

> Congress and the State legislature could not have meant that the FSM would be without means to reclaim fugitives from its justice or that it would be an asylum for fugitives from American justice. The FSM is a "Territory of the United States" for purposes of extraditing criminals pursuant to 18 U.S.C. § 3182 and HRS Chapter 832.

Id.

[6] After all, how could a nation be truly independent if it lacked the ability to prosecute foreigners for crimes committed in the nation against its people, *cf. Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486, 2501 (2022), alienate their lands to foreigners, *cf. Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 426 (1989), or engage in diplomacy with other nations? *Cf. Cooley*, 141 S.Ct. at 1642-43. How could these restrictions on sovereignty even exist without a higher polity to impose them?

Just as in *Wolfe*, Moreno's extradition to the Pascua Yaqui tribe is also consistent with the Extradition Clause. *See* U.S. Const. art. IV, § 2, cl. 2. As with the FSM in *Wolfe*, Moreno's argument that the tribe is an independent nation is inherently problematic. In *Wolfe*, the court identified a dilemma that would arise if the FSM were a foreign nation:

> Wolfe first argued the FSM, whence the request for his return to face criminal charges originated, was not a proper demanding party, under HRS Chapter 832. He claimed the extradition of a putative law violator to the FSM, an independent country, could not be accomplished under a state law. If we had accepted this thesis, Wolfe could only have been returned for prosecution in Micronesia in accord with a treaty between the United States and the FSM. In the course of oral argument, however, Wolfe acknowledged the United States and the FSM were not parties to an extradition treaty. Thus, the adoption of his argument would have placed both of them in an anomalous and embarrassing predicament–neither could he have sought the return of a law violator from the other.

Wolfe, 67 Haw. at 263, 686 P.2d at 20.

The same predicament exists if the Pascua Yaqui Tribe is deemed a foreign nation, only worse. If the tribe is a foreign nation, it could not enter into an extradition treaty with the State of Hawai`i. *See* U.S. Const. art. I, § 10 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact . . . with a foreign Power. . . ."). However, neither could the federal government under the current state of the law, as 25 U.S.C. § 71 states: "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." Therefore, even the *United States* – whose Congress holds plenary

power over the tribes – would not be able to enter into an extradition treaty with the Pascua Yaqui Tribe.

Congress could not have intended to divest the United States of the ability to enter into extradition treaties with tribes. Nor could it have intended to deprive the states of the ability to extradite accused persons from tribes. Such would create an anomalous situation where states are allowed to *prosecute* crimes committed in Indian country, *Castro-Huerta*, 142 S.Ct. at 2494, but somehow could not *extradite* the accused from the tribes, even if the tribe were so willing. Moreno did not solve this dilemma before the Circuit Court, and he provides no answers on appeal.[7]

Based on the foregoing, 1) the Pascua Yaqui Tribe is not an independent nation for the purposes of extradition, and 2) extradition between the tribe and the State of Hawai`i is consistent with the Extradition Clause and 18 U.S.C. § 3182. Accordingly, the Circuit Court correctly concluded that it is a "Territory" under HRS § 832-1, and hence a "state" under HRS Chapter 832.

C. THE AUTHORITIES MORENO DISCUSSED IN HIS OPENING BRIEF DO NOT SUPPORT THE PROPOSITION THAT TRIBES ARE EXCLUDED FROM EXTRADITION LAWS.

Finally, Moreno cites a number of authorities that purportedly support the proposition that Indian tribes are

[7] Furthermore, as discussed above, *see* Section V. A., *supra*, the purpose of the Extradition Clause is to encourage extraditions and prevent the creation of fugitive bastions where they cannot be extradited. Moreno's interpretation of HRS Chapter 832 would create such fugitive sanctuaries, contrary to the purpose of the clause.

excluded from extradition laws. None of them support his arguments.

1. *Arizona ex rel. Merrill v. Turtle*.

First, Moreno cites *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (1969), to argue that "[t]he States are barred from making extradition demands on Native American tribes." JEFS, CAAP-23-0000352, Dkt. #20 at 17. In *Turtle*, a fugitive who resided on the Navajo Reservation in Arizona was sought by Oklahoma for forgery charges. *Id.* at 683. In order to extradite him, Oklahoma petitioned the Navajo Tribal Council for extradition. *Id.* The tribal council rejected the request because its tribal law only permitted extradition to Arizona, New Mexico, and Utah. *Id.* at 683-84. Undeterred, Oklahoma again sought extradition, this time using an Arizona warrant as a conduit to effectuate the extradition. *Id.* at 684. Turtle succeed in preventing his extradition to Oklahoma by arguing that "the State of Arizona had no authority to arrest him on the Navajo Reservation." *Id.*

On appeal before the Ninth Circuit, the *Turtle* court was tasked with determining whether

> Arizona's claim to extradition jurisdiction over Indian residents of the Navajo Reservation is subject to the tests of non-interference with the right of tribal self-government laid down in [*Williams v. Lee*, 358 U.S. 217 (1959)],[8] or is free from those limitations by

[8] In *Williams*, the Supreme Court held that a non-member could not bring a civil suit against members of the Navajo Tribe in Arizona state court for non-payment of goods purchased on the reservation. 358 U.S. at 217-18. The Court held that allowing the suit would infringe on their right of self-governance, while also recognizing the 1868 treaty between the United States and

> reason of Article IV, Section 2 [the Extradition Clause] of the Constitution.

Turtle, 413 F.2d at 685 (footnote added). The court began its analysis by considering the Extradition Clause and rejected the notion that it controlled its decision because the clause did not "define the reach" of extradition jurisdiction. *Id.* at 685. Instead, *Turtle* concluded that extradition would "interfere with rights essential to the Navajo's self-government." *Id.* It also recognized the Treaty of 1868, which "recognized a jurisdiction in the Navajo Tribe over intersovereign rendition" that "was apparently intended to be exclusive":

> If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo Tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the Untied States, to be tried and punished according to its laws; and in case they willfully refuse to do so, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this treaty, or any others that may be made with the United States.

Id. at 686. The Navajo Tribal Council subsequently codified tribal extradition laws based on this treaty in 1956, but only provided for extradition to Arizona, Utah, and New Mexico, not Oklahoma. *Id.* Based on that codification, *Turtle* held that the accused could not be extradited to Oklahoma through the Arizona warrant. *Id.*

Contrary to Moreno's arguments, *Turtle* does not support his cause. *Turtle* dealt with a state attempting to extradite a

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the Navajo people which allowed them to control their own internal affairs. *Id.* at 219-23.

person from within a tribal reservation, not a tribe seeking to extradite one of its members back to its land. Therefore, the self-governing considerations in *Turtle* are not applicable in this case. If anything, *Turtle* actually *supports* Moreno's extradition because it recognizes the tribe's governmental interest in extradition actions. *See id.* at 685-86 ("The essential and intimate relationship of control of the extradition process to the right of self-government was recognized long ago in *Kentucky v. Dennison*, [65 U.S. 66] (1961). . . .").[9] Against this interest, Moreno seeks to limit the tribe's power of self-governance in relation to the extradition process and inhibit the right to enforce its own laws.

In addition, *Turtle* is distinguishable because, unlike the Navajo Tribe, the Pascua Yaqui Tribe do not have a treaty with the United States outlining the tribe's rights and obligations for extradition, and certainly not one dating back to 1868. In fact, the Pascua Yaqui Tribe was not organized until 1963, and did not gain tribal recognition until 1978, over one hundred years after the Navajo treaty. JEFS, 2CSP-23-0000013, Dkt. #30 at 2, ¶¶ 1-2. Far from a time when the federal government entered into arms-length extradition treaties with tribes, the Pascua Yaqui Tribe was conceived exclusively under

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[9] *Dennison* was ultimately overruled by *Puerto Rico v. Brandstad*, but only to the extent that *Dennison* held that, although the Extradition Clause is mandatory, there is no mechanism by which state officers can be compelled to fulfill that duty. 483 U.S. 219, 229-30 (1987). *Branstand* held that executives could be compelled to fulfill their constitutional duties under the Extradition Clause. *Id.* at 227-28.

the umbrella of Congress' plenary power over the tribes. Thus, one of the pillars underlying *Turtle* simply does not exist as it relates to the Pascua Yaqui Tribe.

Ironically, *Turtle* also cuts against Moreno's argument that the Extradition Clause prohibits tribal extraditions with states. *See* Section IV. A., *supra*. *Turtle* was not decided on the grounds that the clause prohibited the extradition, easy as that would have been. It instead recognized that the clause did not permit or prohibit extradition actions with tribes:

> 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 the exercise of the state's lawful jurisdiction in responding to extradition demands of sister states, but it does not itself attempt to define the reach of the 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 Treaty of 1868 and the long history of the principle of retained tribal sovereignty.

Turtle, 413 F.2d at 686 (emphasis added). If that were not clear enough, it reiterated this sentiment shortly afterwards:

> We have been referred to no specific Congressional action limiting the power of the Navajo tribal government to deal with the extradition of Indians resident within the Reservation or granting to the State of Arizona the authority to exercise extradition jurisdiction over such residence.

Id. Furthermore, the simple fact that *Turtle* did not scrutinize the Navjo extradition agreements with its neighboring states

demonstrates that it did not view extradition agreements between states and tribes as prohibitive in a general sense.[10]

Arizona ex rel. Merrill v. Turtle does not stand for the proposition that tribes and states are incompatible

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[10] Moreno also cites *City of Farmington v. Benally*, 119 N.M. 496 (N.M. App. 1995), alleging that in *Farmington*, the "city government's attempt to extradite [a] defendant living in the Navajo Nation must fail." JEFS, CAAP-23-0000352, Dkt. #20 at 18. His reliance on that case is misplaced, as *Farmington* held that extradition of the defendant was improper because the city government did not follow the correct extradition procedure, not that extraditions were generally impermissible between states and tribes. *See Farmington*, 119 N.M. at 497-98.

However, like *Turtle*, the *Farmington* case supports the principle that tribes have a governmental interest in prosecuting crime on their lands, and that extradition agreements between states are not compulsory or condemned under the Extradition Clause. Regarding the tribe's interest in enforcing laws, it said that the city's failure to follow the Navajo extradition procedures "challenges the Tribe's right to make and enforce laws for Navajo citizens on Navajo land, *which goes right to the heart of the right of self-government.*" *Id.* at 497 (emphasis added). Although not applicable in *Farmington* itself, that court also acknowledged a governmental entity's ability to enter into extradition agreements with tribes:

> We note that intergovernmental agreements to facilitate extradition are, at least theoretically, available for these parties to consider. We also observe the language of New Mexico's Mutual Aid Act . . . whereby a "public agency," including municipalities and Indian governments may agree to exercise reciprocal law enforcement authority by a process of cross-deputization. Although some New Mexico governmental authorities may have such agreements with the Navajo Nation, it does not appear that the Navajo Nation and the City of Farmington have entered into any such agreements.

Id. at 498, n.1.

extradition partners. Rather, *Turtle* recognizes a tribe's interest in extraditing its accused and affirms the Extradition Clause's neutrality as it pertains to states and tribes. It does not support Moreno's efforts to block his extradition to the Pascua Yaqui Tribe.

2. *Ex parte Morgan*.

Second, Moreno relies on *Ex parte Morgan*, 20 F. 298 (W.D. Ark. 1883). There, the Western District of Arkansas blocked the extradition of Morgan to the chief executive of the Cherokee Nation under "the constitution and laws of the United States." *Id.* at 302-03. It looked to the text of the Extradition Clause, *id.* at 303-05, and although it provided a definition of "territory," it relied on a more specific law regarding the Cherokee Nation, not tribes generally:

> It seems that the very language of section 1839 of the Revised Statutes of the United States settles the question that the Cherokee Nation is not a territory. It provides that nothing in this title shall be construed to impair the rights of person or property pertaining to the Indians in any territory, so long as such rights remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of such tribe, embraced within the territorial limits of jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries and constitute no part of any territory now or hereafter organized, until such tribe signifies its assent to the president to be embraced within a particular territory. On the twenty-third day of May, 1836, the United States and the Cherokee Nation, by the fifth article of a treaty made between them, provided that the United States 'hereby covenant and agree that the lands ceded to the Cherokee Nation in the foregoing article shall in no future time, without their consent, be included within the territorial limits or jurisdiction of any state or territory.' Has the status or relation to this Indian nation to the United States and the different states in

> the union changed since the time of this treaty? It has not.

Id. at 305.

Thus, *Morgan* was decided based on a discrete treaty between the federal government and the Cherokee Nation that specifically excluded Cherokee land from the territorial bounds of the country.[11] It did not base its holding on its stated legal definition of "territory," and certainly not under the general proposition that extraditions between tribes and states are prohibited under the Extradition Clause. Moreover, *Morgan*'s analysis was limited to "the words when used in the clause of the constitution and in the act of congress relating to interstate extradition." *Id.* at 307. As discussed, *supra*, the Extradition Clause does not require extraditions between states and tribes, but neither does it prohibit them. Therefore, *Morgan* has no

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[11] While the Cherokee Nation may have had an alternative arrangement at the time of *Morgan*, the current state of the law indicates that Indian reservations are considered part of the territory of the state in which it resides:

> Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as "sovereign" entities, it was long ago that the Court departed from Chief Justice Marshall's view that the laws of a State can have no force within reservation boundaries. . . . Ordinarily, it is now clear, an Indian reservation is considered part of the territory of a State.

Nevada v. Hicks, 533 U.S. 353, 361 (2001) (citations, some quotation marks, and brackets omitted).

bearing on whether HRS Chapter 832 authorizes Moreno's extradition to the Pascua Yaqui Tribe.

3. *Tracy v. Superior Court of Maricopa County*.

Third, *Moreno* attempts to distinguish *Tracy v. Superior Court of Maricopa County*, *see* JEFS, CAAP-23-0000352, Dkt. #20 at 10-12, which the Circuit Court found persuasive in its holding that the Pascua Yaqui Tribe is a "territory" under HRS Chapter 832. *See* JEFS, 2CSP-23-0000013, Dkt. #30 at 13, ¶37 to 15, ¶42.

In *Tracy*, the court considered whether Navajo Nation is a "territory" of the United States under Arizona's Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings (the "Act") after Tracy challenged an order compelling his attendance pursuant to the Act as a witness in a criminal trial before the district court of the Navajo Nation. 810 P.2d 1030, 1032 (Ariz. 1991). In order to assess his challenge, the court needed to decide whether the Navajo Nation was a "territory" for the purposes of the Act. *Id.* at 1035. It began by acknowledging that there is no fixed definition of "territory" and cited a number of cases – including *Wolfe v. Au* – for the proposition that "the term territory has often been interpreted . . . broadly to serve the purposes of the statute or enactment under consideration." *Id.* at 1035-36. From those cases, *Tracy* said that "it is clear that the term territory is susceptible of interpretation because it does not have a 'fixed and technical meaning that must be accorded to it in all circumstances.'" *Id.* at 1036 (citation omitted).

Looking to the commonly understood meaning of "territory," *Tracy* then said that the Navajo Nation fell under the dictionary definition of the term because it was a "geographical area" of the United States "under the jurisdiction of a political authority." *Id.* at 1037 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2361 (1965)). Thus, *Tracy* held that the term was broad enough to include the Navajo, despite the fact that it was likely unforseen by the drafters of Arizona's Act that the Navajo Nation would be included as a "territory." *Id.* at 1037. The court then considered "whether tribes are sufficiently analogous to territories to fall within the legislature's general intent to broaden the definition of state by including territories." *Id.* at 1038.

Tracy began its analysis by recognizing the unique status of tribes' status as "domestic, dependent nations," and rejected the argument that they are "foreign nations." *Id.* In support, the court noted that

> in exercising their powers of self-government, Indian tribes are still subject to the overriding plenary authority of congress. In this latter respect, Indian tribes are analogous to the territories of the United States, which are also subject to Congress's plenary power.

Id. at 1038-39 (citation omitted). It further noted that the political status of tribes have been analogized "to that of other quasi-sovereign entities under the protection of the United States, such as Puerto Rico and Virgin Islands," and cited numerous cases where tribes were recognized as territories. The *Tracy* court then concluded:

> Indian tribes possess a unique political status; however, tribal governments are comparable to states and territories in many ways, and jurisdictionally, Indian reservations are a great deal more than "the home of the Indians." The case law demonstrates that Indian tribes may be considered territories within the meaning of certain statutes. The proper approach is to analyze each statute, in terms of its purpose and policy, to determine whether tribes may be regarded as territories within the statute's intent . . . .

Id. at 1040-41.

Moreno tries to distinguish *Tracy* by noting that the statute in *Tracy*, Arizona Revised Statutes § 13-4091, defines a "state" to include "any territory of the United States and the District of Columbia," while HRS § 832-1's definition of "state" includes "a Territory, organized or unorganized, of the United States." He argues that the "organized or unorganized" portion of the HRS definition distinguishes *Tracy* by suggesting that tribes fall into neither category. *See* JEFS, CAAP-23-0000352, Dkt. #20 at 11 ("The definition in HRS § 832-1 is not a generic catchall meant to encompass Native American Tribes."). Nonetheless, he does not identify this nebulous third category of "territory" under which tribes supposedly rest. Rather, it is evident from the text of HRS § 832-1 that the "organized or unorganized" language is simply a binary description meant to cover the field as it pertains to the definition of a "territory." Had the legislature intended to exclude a third category of "territory" from the reach of the statute, it could have and certainly would have done so. It would not have explicitly included "organized or unorganized" territories with nary a mention of the third species of "territory" it supposedly intended to exclude.

He also presents a plain language argument, positing that the plain language of HRS § 832-1 "[t]ribes are neither organized nor unorganized territories of the United States." JEFS, CAAP-23-0000352, Dkt. #20 at 11. However, he cannot at once argue that the plain language controls the analysis while also looking to case law to color the language of the statute. *See* JEFS, CAAP-23-0000352, Dkt. #20 at 11 (citing *United States v. Standard Oil Co. of California*, 404 U.S. 558 (1972) and *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021)). Instead, a plain language reading of the statute supports a broad definition of territory, as the common meaning of the term is "a geographic area belonging to or under the jurisdiction of a governmental authority." Merriam-Webster, https://www.merriam-webster.com/dictionary/territory (last visited September 19, 2023). Tribes fall squarely into this definition, as they reside in a geographic area belonging to the state surrounding its borders, subject to Congress' plenary power. *See Tracy*, 810 P.2d at 1037 ("The Navajo Nation . . . clearly fits the dictionary definition of a 'geographical area' of the United States 'under the jurisdiction of a political authority.'"); *see also Hicks*, 533 U.S. at 361 ("Ordinarily, it is now clear, an Indian reservation is considered part of the territory of a State.").

Despite Moreno's arguments, *Tracy* affirms *Wolfe*'s analysis by looking to the purpose of the statute or enactment under consideration and, when considering the status of Indian tribes, the degree of power retained by the federal government.

Under that analysis, there is but one inevitable conclusion: the Pascua Yaqui Tribe is a "territory," and thus a "state," under HRS Chapter 832.

V. CONCLUSION.

The arguments Moreno presents in this appeal attempts to turn the purposes underlying the Extradition Clause on its head, obfuscate the clear and binding analysis of *Wolfe v. Au*, and unduly rely on authorities that actually support his extradition back to the Pascua Yaqui Tribe. Nonetheless, *Wolfe v. Au* provides a clear standard for determining whether a political body is a "territory" under HRS Chapter 832 by examining the degree of power retained over said political body and whether extradition is consistent with the Extradition Clause. Applied to this case, those factors require the conclusion that the tribe is a "territory" for the purpose of Hawaii's extradition laws. Accordingly, the tribe's extradition request must be honored and Moreno must be extradited.

Based on the foregoing, the State respectfully requests that this Honorable Court affirm the Circuit Court's order denying Moreno's motion to dismiss.

DATED: Wailuku, Hawaii, October 25, 2023.

Respectfully submitted,

DEPARTMENT OF THE PROSECUTING ATTORNEY
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VI. STATEMENT OF RELATED CASES.

The State is unaware of any related cases pending before the Hawai`i courts or agencies.