PASCUA YAQUI TRIBE
COURT OF APPEALS
JUL 23 2013
ISSUED
CLERK OF COURT

No. CA-12-001

Pascua Yaqui Court of Appeals

Pascua Yaqui Tribe, Petitioner,

vs.

Christopher Montana, Defendant/Respondent,

Appeal of a decision of the Pascua Yaqui Trial Court in Case No. CR 12-005, the Honorable Margaret Flores presiding.

Guadalupe Gutierrez, Office of the Prosecutor, Pascua Yaqui Tribe Tucson, AZ for the Petitioner.

Fredric Brahms J.D., 507 E. Drachman Tucson AZ 85705 for the Appellee.

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ORAL REASONS FOR JUDGMENT

1. This case raises a novel point of law for the Pascua Yaqui Tribal Courts. In this instance, the appellant Prosecutor on behalf of the Tribe filed a special action application during a criminal proceeding in the Pascua Yaqui Trial Court. The Defendant was charged with three counts of aggravated assault, domestic violence, for alleged emotional and physical abuse of the eleven-year-old victim, E.R.

2. At trial, Defense counsel alleged that the Prosecutor had coached the victim to provide favorable testimony. This appeal arose from the trial court's decision to grant Defense counsel's motion to compel disclosure and a subsequent motion to question the minor victim. The Prosecutor's motion to dismiss was denied.

3. The Prosecutor's special action seeks to dismiss the trial court's decision to grant a hearing on the grounds that (1) the record does not support the finding that a *prima facie* case for coaching was established and (2) the trial court acted in excess of its jurisdiction and made an arbitrary and capricious decision, not reasonably based on the facts in the record.

4. With regard to the jurisdiction of the Pascua Yaqui Court of Appeals, I find affirmatively that this is a matter within the Appellate Court's jurisdiction. Although the Pascua Yaqui Rules of Appellate Procedure are silent on special actions one can refer to the common law and State appellate court rules for guidance.

5. With regard to the merits and substance of the special action in this case, I want to highlight two novel points raised by the appeal. First, in criminal practice, the prosecutor cannot appeal a judgment acquitting a defendant in a criminal case. See 3 PYTC § 2-3-90. Second, special actions emerged in the common law as specific remedial writs in the face of erroneous, excessive, arbitrary, and or capricious government actions; the remedies are directed specifically at the state's role in the context of a proceeding.

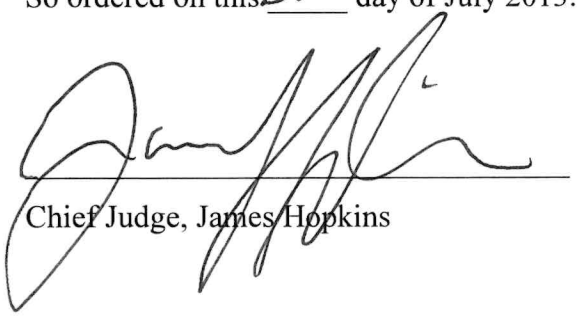
6. Likewise, Arizona permits special actions when (1) the trial judge has failed to exercise discretion which she has a duty to exercise, or to perform a duty required by law as to which she has no discretion; and (2) the trial judge has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority, and (3) the judge's determination was arbitrary or capricious or an abuse of discretion. See Rules 3(a),(b), (c), Ariz. R. P. Spec. Act.

7. Turning to the merits and substance of the special action before me, as to the Prosecutor's argument that the learned trial judge exceeded her jurisdiction by granting a hearing I find no evidence that the decision to hold the hearing was tantamount to an abuse of discretion based upon arbitrary and or capricious considerations. Indeed, hearings that are aimed at assessing the

reliability of child witnesses are squarely within the role of the trial judge and this Court will not disturb the Tribal Court's decision to hold a hearing to determine whether the minor victim has been coached.

8. Based on the foregoing I find that the necessary elements for a special action have not been met. This appeal is dismissed with additional reasons to follow.

So ordered on this 23rd day of July 2013.



Chief Judge, James Hopkins

No. CA-12-001
Pascua Yaqui Court of Appeals

Pascua Yaqui Tribe, Appellant,

vs.

Christopher Montana, Respondent.

NOTICE OF HEARING FOR ORAL JUDGMENT

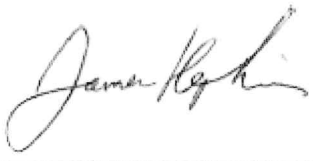
Petition for a Special Writ based on TC case CR-12-005.

Alfred Urbina, Pascua Yaqui Tribe Office of Prosecutor, Tucson, AZ, for the Appellee.

Fredric Brahms, J.D., P.O. Box 65493, Tucson AZ 85728

On September 24, 2012 Appellant filed a petition for a special writ with the Court of Appeals. The petition was accepted for review on October 2, 2012. 3 PYTC 2-3-260 (C) gives general guidance regarding action on this type of petition. This court has reviewed this petition and will issue an oral judgment on July 23, 2013 at 10am in the Court of Appeals courtroom. A lengthier written opinion will be issued in addition to the oral decision.

So **ORDERED** this 19th day of July 2013.



James C. Hopkins, Chief Judge

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Guadalupe Gutierrez
Deputy Prosecutor

PASCUA YAQUI TRIBE
COURT OF APPEALS

DEC -4 2012

ISSUED
CLERK OF COURT

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,
PROSECUTOR'S OFFICE

Petitioner,

vs.

HONORABLE MARGARET FLORES
JUDGE, PASCUA YAQUI TRIBAL
COURT

Real Party in Interest:

CHRISTOPHER MONTANA

Respondents

APPEALS CASE NO: CA-12-001

TRIBAL COURT NO: CR-12-005

TRIBE'S REPLY TO RESPONSE RE: PETITION FOR SPECIAL WRIT

COMES NOW, the Pascua Yaqui Tribe by and through the Pascua Yaqui Tribal Prosecutor, ALFRED URBINA, and the undersigned Deputy Prosecutor, Guadalupe Gutierrez, and hereby respectfully submits the following Reply to the response filed by respondent, Christopher Montana, regarding the Tribe's Petition for Special Action.

Respectfully submitted this 4th day of December, 2012.

Guadalupe Gutierrez
Deputy Prosecutor

Original filed with the
Clerk of the Pascua Yaqui Court of Appeals

On:

HON. M. FLORES
PASCUA YAQUI TRIBAL COURT

Real Party in Interest:
Fredric Brahms J.D.
507 E. Drachman
Tucson, AZ 85705

Feliciano Cruz
Pascua Yaqui Social Services

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INTRODUCTION:

The Tribe limits this reply to address arguments raised by the Respondent/Defendant (hereinafter "Respondent") in response to the Tribe's Special Action Petition filed with the Pascua Yaqui Court of Appeals. The Tribe presented the relevant facts and procedural history in its original petition. The Tribe also submitted the record on which its petition was based in the original filing. The Respondent did not make reference to any portion of the record.[1]

This reply focuses on addressing issues raised by the Respondent in his response. Respondent did not make any arguments showing how the actual record in the case supports the trial court's legal decision that a prima facie case for coaching existed. Nor did the Respondent demonstrate how facts in the record provide evidence that the court's decision was not arbitrary or based on sufficient evidence to support the finding that a prima facie case had been established for coaching.

JURISDICTION

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[1] Respondent/Defendant bases his response relying only on contradicting the Tribe's cited cases. He posits that the facts of the case law must be exactly the same in order for a legal premise or rule to apply. The Tribe used case law to reference requirements of law for such legal principles as sufficiency of evidence. Yet, legal principles can apply across cases having differing factual details. For example, an appeal of a court's legal decision (whether regarding sufficiency of evidence, denial of motion to dismiss or motion for summary judgment, etc) is a question of law; and, cases having differing facts can all address the same legal issue—for example, whether a particular decision made by the trial court is a question of law or a question of fact.

Special Action jurisdiction is discretionary. *See Robinson v. Hotham* 118 P.3d 1129, 1132 (Ariz.App. 2004); *Williams v. Miles*, 128 P.3d 778, 779 (Ariz.App. 2006); *State ex rel. Romley v. Fields*, 35 P.3d 82, 84 (Ariz.App. 2001). Such jurisdiction is appropriate when "there is no plain, speedy and adequate remedy by way of appeal" or "in cases involving a matter of first impression, statewide significance, or pure questions of law." *Waters v. O'Connor*, 103 P.3d 292, 293 (Ariz.App. 2004) (citing *Roman Catholic Diocese v. Superior Court*, 62 P.3d 970, 972 (Ariz.App. 2003)).

Jurisdictionally, the appellate court can only consider three issues in a special action proceeding: (1) Whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has not discretion; or (2)Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or (3)Whether a determination was arbitrary and capricious or an abuse of discretion. *See* R.Proc. Spec. Act. Rule 3. "A trial court abuses its discretion when it misapplies the law or predicates its decision on incorrect legal principles." *State v. Jackson,* 90 P.3d 793, 796 (Ariz.App. 2004); *Nowell v. Rees*, 199 P.3d 654, 658 (Ariz.App. 2008); *Taylor v. Cruickshank*, 148 P.3d 84, 87 (Ariz.App. 2006).

Respondent argues that the questions presented by the Tribe are not of the exact type that the state appellate courts have previously granted for jurisdiction and therefore jurisdiction should not be granted in this case. However, the nature of past cases does not determine what can subsequently be reviewed by an appellate body.

The Tribe has shown that special action jurisdiction is warranted in this case. The limitations on jurisdiction are delineated in the law and the Tribe has shown that it has no available plain or adequate remedy other than special action. Pursuant to the Pascua Yaqui Tribal Code, the Tribe has no right of appeal once a criminal case has resolved. *See* generally, 3 PYTC § 2-3-90(G). Also, the Tribe has presented questions of law, demonstrating that the record does not support the trial court's ruling regarding sufficiency of the evidence in granting a hearing for allegations of coaching. Appellate challenges based on insufficiency of evidence are issues of law. *See Matter of Appeal in Maricopa County, Juvenile Action No. JT30243*, 920 P.2d 779, 782 (Ariz. App. 1996). The questions of law presented by the Tribe are not disqualified simply because state appellate courts have not considered the questions in the past. Furthermore, the Tribe's questions are issues of first impression for the appellate court in this jurisdiction. Thus, the issues raised by the Tribe are of general importance

to practice in the Tribal trial court, and are appropriate for special action jurisdiction.

STANDARD OF REVIEW

An appellate court reviews rulings on evidence for clear abuse of discretion. *See State v. Navarro*, 34 P.3d 971, 974 (Ariz. App. 2001); *State v. Acinelli,* 952 P.2d 304, 307 (Ariz. App. 1997). Questions regarding sufficiency of evidence are questions of law. The applicable standard of review on questions of law is "de novo." *Matter of Appeal in Maricopa County, Juvenile Action No. JT30243*, 920 P.2d 779, 782 (Ariz. App. 1996). Although great deference may be given to the trial court's factual determination, the appellate body reviews de novo the ultimate question of whether the legal conclusion made was correct. *See Navarro*, 34 P.3d at 974, 976-77.

The trial court in this case made the legal conclusion that a prima facie case had been established by the defendant regarding coaching to support a full hearing on the issue. The Tribe contends that the assertions of coaching presented by the Defendant were bald allegations, unsupported by any actual facts. The record shows that Defendant offered only statements by counsel, but no affidavits, interviews or other materials were offered by any witness making these allegations. The trial court's

legal determination that there was sufficient evidence to grant a hearing is a question of law. Thus, the appellate court's review of the legal conclusion drawn from the facts presented in the existing record is *de novo*. *Matter of JT 30243*, 920 P.2d at 782; *Navarro*, 34 P.3d at 974, 976-77.

THE PRIMA FACIE CASE/EVIDENCE

"Prima facie" is a term of art used in the law referring to the establishment of specific evidence that, if believed, supports a case, argument, or element that needs to be proven. *See* Georg Nils Herlitz, *The Meaning of the Term "Prima Facie"*, 55 La. L. Rev. (1994) Available at: http://digitalcommons.law.lsu.edu/lalrev/vol55/iss2/3. (Appendix R1). The claim or allegation should be supported by sufficient evidence that it meets, or tends to meet, the proponent's burden of proof on a given issue. *Id.* at 397. The prima facie case is a rebuttable presumption. However, the need to rebut only emerges if sufficient evidence was presented to support the allegation (only if the prima facie case was actually established.)

Although the rules of criminal procedure do not specifically refer to a prima facie case, these rules also do not directly address how a court is to treat the issue of coaching, or allegations of coaching made by counsel during a proceeding. However, common legal practice shows that a court

will consider the facts on the record in determining whether (1) there are specific facts in the record that support such allegations and (2) whether these facts on the record satisfy a sufficient showing of proof. [2] *See State v. Hughes*, 456 P.2d 393, 396 (Ariz. 1969) (When the record fails to show evidence that the prosecutor coached witnesses, defendant's bald allegation of coaching are without proper foundation).

As noted by the Tribe in its petition, the central issue of this special action is whether the court erred in finding that a prima facie case had been established. Essentially, was there sufficient evidence in the record to support such a ruling? The Tribe argues that, indeed, there was no evidence in the record to support the finding by the court. By drawing the legal conclusion that a prima facie case was established by the record before it, the trial court made a capricious or arbitrary decision.

The trial court based its decision that a prima facie case for coaching by the prosecutor solely on the defendant's pleadings/motions. In these motions, defense counsel made broad allegations of coaching against the prosecution, but did not offer anything into the record directly from

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[2] For example, *State Ex. Rel. Ryan Ferguson v. Dormire* (Appendix R2), a case out of the Circuit Court of Cole County in Missouri. In *Ferguson*, the court considered several questions including whether the prosecutor had presented perjured testimony from two witnesses, having influenced their presentation of facts at trial. In that matter, the court granted hearing on the matter based on the affidavits by the involved witnesses who were recanting their previous testimony. See pg 15.

witnesses. No affidavits or recorded statements by witnesses were offered as proof of the allegations. It is well established that pleadings and motions are not considered admissible as evidence in and of themselves. *See for example* Ninth Circuit Model Criminal Jury Instructions, 3.7 (Statements and arguments by lawyers are not evidence) . Something more than uncorroborated assertions must be offered by a defendant for the record to show sufficient evidence of a claim.[3]

SUFFICIENCY OF THE EVIDENCE

Generally, a court's ruling that sufficient evidence exists to support a full evidentiary hearing is based on the facts of actual events that have been presented as part of the record. These established facts create the prima facie case for a hearing. Such facts usually consist of corroborated evidence, not simply unverified statements by a party. *See Waters v. O'Connor*, 103 P.3d 292, 294-295, (Ariz. App. 2004) (Trial court held evidentiary hearing on privilege based upon emails written by the Defendant to a "minister" which constituted a confession.)

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[3] In dicta, the Arizona Appellate court has noted that there is no necessity for an evidentiary hearing where there has been no prima facie violation established in the record. *State v. Acinelli,* 952 P.2d 304, 307 (Ariz. App. 1997) (Appellate court noted that, although the trial court held an evidentiary hearing, this was unnecessary because, as a matter of law, the record did not support the allegations of violation levied against the prosecution by defendant.)

The case law demonstrates that a judicial decision must have a reasonable basis in relevant facts. *See Carlson v. Landon*, 187 F.2d 991,1003 (9th Cir. 1951). Proper show of proof in the form of affidavits, returns, recordings, and other data (such as publications) can be used to support a reasoned decision that is non-capricious and not arbitrary. *Id.* In cases where coaching is alleged, more than just vague accusations must be offered by a party; there must be enough evidence in the record to support the finding. *State v. Cornell*, 878 P.2d 1352, 1370 (Ariz. 1994); *State v. Hughes*, 456 P.2d 393, 396 (Ariz. 1969). In the absence of any evidence on the record, other than the defendant's bald allegations of coaching, the allegation is without foundation. *Hughes*, 456 P.2d at 396.

The Tribe has shown that the record in this case does not sustain the trial court's finding that a prima facie case was established, nor did the court base its decision on any actual facts existing in the record. The trial court made its decision based on the motions submitted by the defendant. These motions are assertions made by defense counsel. Defense counsel indicated in his motion that Defendant's wife made statements regarding the child victim being coached, but the actual statements are not offered into the record. The assertions made by the Defendant's wife are never entered as affidavit or interview for the record. Thus, the trial court made

its decision relying on uncorroborated statements. The court's legal conclusion, not based on sufficient evidence in the record, constitutes not only an arbitrary decision, but also an incorrect legal decision.

Indeed, the response submitted by Respondent in this matter demonstrates that no factual basis exists in the record to support the court's findings of a prima facie case. At no point in his response is Respondent able to point to specific facts in the record that serve as evidence of the allegations he makes against prosecution. In fact, Respondent never refers to the actual record at all. Respondent, himself, indicates throughout his response that he has not presented any facts on the record to make a showing of coaching, and that he requires a hearing to be able to even evaluate if such facts exist. The Respondent states:

> [s]ince a hearing has not taken place with witnesses testifying under oath and the subject to cross-examinations, no "record" of facts has been established on this issue. Moreover, it is axiomatic that the factal allegations needed in a motion in order to proceed to hearing need not be supported by detailed affidavits or other evidence. The presence or absence of sufficient evidence to grant the relief sought will be determined on the record in the proceeding.

Response, pg. 6, lines 11-20. Respondent is correct that there is no record; there is nothing to support the idea of coaching by the prosecutor

except for the defendant's bald allegations in a motion. The Respondent only makes broad assertions that are unsupported, and he offers nothing in the record to corroborate his allegations. [4]

REMEDY REQUESTED

The Tribe has requested that the Court of Appeals overturn the trial court's decision to grant hearing on the issue of coaching because the record does not support the trial court's finding that a prima facie case for coaching had been established. The trial court acted in excess of its jurisdiction and made an arbitrary and capricious decision, not reasonably based in the facts on record. [5]

CONCLUSION

For the foregoing reasons, the Tribe believes that the trial court acted in excess of jurisdiction and in an arbitrary and capricious manner, not basing its decision on relevant facts in the record. The Tribe respectfully asks the Court of Appeals to overturn the trial court's decision to grant

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[4] Respondent/Defendant states that he has not received any records regarding the minor victim. The trial court granted several subpoena deus tecum to Defendant. The Defendant received materials relevant to the victim's school records, treatment records, and placement records, including who has visited the victim at his placement. The Defendant has not made subsequent requests for more records nor has he filed any requests to compel production of specific records.

[5] It should be noted that the Respondent has other methods available that could more appropriately address concerns of coaching. Respondent, for example, will have the opportunity to cross-examine of witnesses at trial to test the issue of possible coaching and the credibility of testimony by witnesses.

hearing on the matter of coaching upon inappropriate finding that a prima facie case was established.

Respectfully submitted this 4th day of December, 2012.

Guadalupe Gutierrez
Deputy Prosecutor

APPENDIX R1

Louisiana Law Review

Volume 55 | Number 2
November 1994

The Meaning of the Term "Prima Facie"

Georg Nils Herlitz

Recommended Citation
Georg Nils Herlitz, *The Meaning of the Term "Prima Facie"*, 55 La. L. Rev. (1994)
Available at: http://digitalcommons.law.lsu.edu/lalrev/vol55/iss2/3

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The Meaning of the Term "Prima Facie"

An objection from an average stockbroker constitutes in itself a prima facie case for any social reform.

— George Bernard Shaw[1]

I. Introduction

The term "prima facie" occurs in almost two hundred Louisiana statutes,[2] but it is not defined in any of them. There are a number of different uses for this term in Louisiana and in the common-law jurisdictions. In the next few pages this comment will examine the development and deterioration of the term "prima facie" in various disciplines, especially in the law, over many years. The goal is to discover the meaning that should be given the term "prima facie evidence," so the confusion might be reduced. The Louisiana Code of Evidence seems to be the ideal place to put a standardized definition of this term. For this reason, a proposed definition for use in that code will be given.[3]

II. History Outside the Law

Logicians and metaphysicians were working with the concept of "prima facie evidence" long before lawyers. While one cannot rely solely on the works of philosophers, their insights into this subject are valuable. As with most concepts belonging to the realm of logic, the inquiry begins in ancient Greece.

The modern Greek equivalent of "prima facie" is εχ πρωτης οψεως, literally, "on/at first viewing."[4] The concept appears in the works of many prominent Greek philosophers.[5] Because Roman thought developed and

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1. 12 The Oxford English Dictionary 470-71 (2d ed. 1989) (quoting George Bernard Shaw, Androcles and the Lion at lx (1916)).

2. *See* Index to Prima Facie Evidence, *in* George W. Pugh et al., Handbook on Louisiana Evidence Law (West 1994).

3. The only cases which are useful in trying to discover a meaning for the term "prima facie" are those which explicitly discuss definitions of the term. Cases which use the term without defining it are almost invariably confusing and inconsistent, primarily because the distinctions between its meanings are subtle. This comment avoids reliance on cases which would require tenuous extrapolation of a definition for two reasons. First, the leading cases on the term are, naturally, the ones which explicitly state its definition. Thus these are the cases cited most often by other courts and by scholarly authorities such as Wigmore. Second, it would be irresponsible and inefficient to prefer cases which require complicated and uncertain interpretations to cases which provide clear and explicit definitions.

4. The Oxford Dictionary of Modern Greek 247 (1982).

5. Aristotle, for example, argues information gained through the senses is true on its face, but can be "rebutted" by showing that the mind has somehow misread the information. Consider the following from Aristotle, Posterior Analytics, *in* 8 Britannica Great Books of the Western World 98

borrowed heavily from Greek thought following the death of Alexander the Great in 323 B.C., the concept probably found its way to Rome via Greece.[6]

The Latin term "prima facie" eventually appeared in the works of Roman and Medieval scholars of philosophy and law. From the earliest known Latin usages to the time it was adopted into other languages, the term was used in its literal meaning, "on/at first appearance." Consider the following from the *Digests*: "Quum *prima facie* quidem alienam, re vera suam obligationem suscipit." (When at first appearance the thing indeed belongs to another, a person is truly persuaded of the correctness of his suspicion that an obligation has arisen.)[7]

The author, Gaius, could have used any number of terms which mean "presume." *Sumere* and *credere* both mean "suppose," and each was as available to him as "prima facie."[8] Why would he choose an unusual term like "prima

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(G.R.G. Mure trans., 1952):

> There is a difference between what is prior and better known in the order of being and what is prior and better known to man. I mean that objects nearer to sense are prior and better known to man; objects without qualification prior and better known are those further from the sense.

Like most passages from Aristotle, this one has many layers of meanings. What is important for our inquiry is Aristotle points out trustworthiness is a *continuum*, from very trustworthy to very untrustworthy. One might say that things experienced through the senses while in a lucid state are *presumed* valid (though this presumption can be rebutted, as with a mirage), solutions to complicated arithmetic are *prima facie* valid (the laws of arithmetic are correct, but my calculations may not be), things experienced through the senses while under the influence of hallucinogens (of which the ancient Greeks had many) are prima facie *invalid*, and the wild ramblings of a schizophrenic about abstract, non-earthly matters are *presumed* invalid.

In 1 Frederick Copleston, S.J., A History of Philosophy at pt. 4, 24-25 (1962), Father Copleston observes—with typical succinct brilliance—regarding the above passage from Aristotle:

> Thus if a patient who suffers from *delirium tremens* "sees" pink rats, the senses as such do not err; error arises when the patient judges that the pink rats are "out there," as real extra-mentally-existing objects. Similarly, the sun *appears* smaller than the earth, but this is not an error on the part of the senses . . . . Error arises when, through a lack of astronomical knowledge, a man *judges* that the sun is objectively smaller than the earth.

Because there are such subtle distinctions among cognitive evaluations of the trustworthiness of evidence, it is necessary to have precise terms for each gradation. "Prima facie" is such a term.

Though Aristotle was not the only Greek philosopher who worked with presumptions and prima facie evidence, he was the biggest Greek influence on Roman and Medieval law; indeed, he was called simply "The Philosopher," as if there were no other.

St. Thomas Aquinas was a tremendous influence on modern law, due to his enormous role in the establishment of Medieval Canon law. Part 1 of the second part of the Summa Theologica, questions 90-108, is entitled *Treatise on Law*. *See* 20 Britannica Great Books of the Western World 205-337 (Fathers of the English Dominican Province trans., 1952). Aquinas was an Aristotelian, and Aristotelian logic abounds in all his works. Although a discussion of Aquinas' logic is beyond the scope of this paper, the reader is encouraged to look at *Treatise on Law* and the numerous examples of presumptions and prima facie inferences located there.

6. *See generally* Copleston, *supra* note 5, at pt. 5, 123-28.

7. Dig. 16.1.13 (Gaius, Edictum 9) (translation by the author).

8. Cassell's Latin & English Dictionary 360 (1987).

facie"? The answer can only be that he did not mean "presume." Had he used a term meaning "presume" instead of "on/at first appearance," he would also have had to change "suscipit" (roughly, "a suspicion is warranted or acknowledged as reasonable"[9]) to something stronger, meaning "implied" or "presumed." Such changes would give the statement a completely different meaning.[10]

Throughout the history of the use of the term in Latin, "prima facie" means only the most cursory, initial impression. It retained that meaning upon its adoption into colloquial English. Today, in both logic and colloquial English, "prima facie" means nothing more than "upon an initial observation."[11]

The term "prima facie" is used in the law both as an adjective and as an adverb. The term "prima facie case" is more common than the term "prima facie evidence." This comment is ultimately concerned only with the term "prima facie evidence" in Louisiana law. The common-law courts which developed the judicial meaning of "prima facie," however, often did not distinguish between the meanings of "prima facie case" and "prima facie evidence." This is because the terms are similar in meaning and because there is overlap in use between them. An example will illustrate. Murder is a conclusion of law with several discrete legal elements, including criminal intent. A note written by the accused that reads "I am going to kill Jimmy because I hate him" may properly be said to be, *in itself*, prima facie *evidence* of criminal intent. Its *introduction* may properly be said to establish a prima facie *case* of the single element of criminal intent, even though neither the note itself nor its introduction establishes a prima facie *case* of murder (because the note does not establish the other necessary elements of the legal conclusion of murder). Thus the overlap arises because prima facie *case* may properly refer *both* to a set of several elements *and* to a single element, even though prima facie *evidence* generally refers only to a *single* fact or element.

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9. Oxford Latin Dictionary 1888 (1982).

10. The following passages from Roman and Medieval orators, philosophers, and legal scholars are also good examples of the use of the term "prima facie." The authors of each use "prima facie" to mean no more than "on/at first appearance": Seneca the Elder, Controversiae, Lib. 10 Praef 15 (c. 40 A.D.); Seneca the Younger, Epistulae ad Lucilium 87, 1 (c. 65 A.D.); Gaius, Institutes 4, 186 (c. 180 A.D.); Tertullianus, Against Hermogenes 35 p. 164, 22 (c. 220 A.D.); Pseudo-Seneca, Epistulae ad Paulum n.14, 11 (date unknown, but before Hieronymus, who died in 420 A.D.). *See also* Incerti Opus Imperfectum in Matthaeum (c. 400-500 A.D.) ("Putei . . . in prima facie uxores siunificantur" ("Growing flabby . . . indicates on its face that one has married") (translation by the author)). These works are all cited at 7 Thesaurus Linguae Latinae 55 (1912-1926) Lipsiae, in Aedibus B.G. Teubneri. The reader is encouraged to see that work for other citations to Latin works using the term "prima facie."

11. The Oxford English Dictionary, *supra* note 1, at 470-71 defines "prima facie" as: "At first sight; on the face of it; as appears at first without investigation; arising at first sight; based or founded on the first impression." The Random House English Dictionary 696 (1991) defines "prima facie" as: "At first appearance; before investigation; immediately plain or clear." The Harper Collins Dictionary of Philosophy 242 (2d ed. 1992) defines "prima facie" as: "at first view; so far as appears on the surface; on the first appearance."

Adding to the confusion is that sometimes a single piece of evidence can establish or appear to establish *all* the necessary elements of a conclusion of law, especially if that conclusion of law has few elements. For example, a marriage license may both be prima facie evidence that a marriage took place and be used by itself to establish a prima facie case of a marriage. Also, a videotape of Johnny yelling "I am killing you because I hate you" while he shoots Jimmy to death may be used by itself to establish a prima facie *case* of murder. However, whether it could properly be called prima facie *evidence* of murder is arguable, because one generally does not speak of a single piece of "evidence" establishing numerous facts or elements of law.

Nonetheless, if it can be determined with what degree of proof the term "prima facie" is associated, there is no reason to believe the degree would differ whether one is speaking of prima facie evidence, prima facie case, prima facie proof, or any other phrase incorporating the term.

Since the common-law courts did not usually distinguish between the meanings of "prima facie evidence" and "prima facie case" when they were developing their law on the subject, a proper discussion of the meaning of "prima facie evidence" must include some discussion of the law regarding the prima facie case. For these reasons the following section on the development of the term "prima facie" in the common-law jurisdictions discusses the meanings of both, even though the discussion of Louisiana law will be primarily limited to prima facie evidence.

III. MEANING AND HISTORY IN THE COMMON LAW

A. The Two Distinct Meanings Most Widely Used

American and English courts are not consistent concerning the meaning of "prima facie." Two quite distinct meanings are used, each one by many courts. In one use, "prima facie case" merely means having presented enough evidence to withstand a motion for directed verdict. This meaning will be discussed in part III.B. The other use equates "prima facie" with a presumption that a plaintiff is entitled to prevail on his cause of action.[12] This use dictates that if a plaintiff has made out a prima facie case, then the jury must find for him if no other evidence is presented to contradict his evidence.

While this distinction may seem subtle, the difference in effect is tremendous. Consider the following hypothetical: plaintiff sues on his cause of action for trespass. After plaintiff submits various evidence, the judge finds, as a matter of law, plaintiff has made out a prima facie case of trespass by defendant. Defendant, for whatever reason, chooses to submit no evidence (not likely, but exaggeration makes the example clearer). Under the second meaning of "prima

12. There are different types of presumptions. Where this paper says a court defines "prima facie" as equivalent to a presumption, a *mandatory* presumption is meant, unless otherwise noted.

facie," defendant automatically loses his case, because plaintiff is entitled (having established a prima facie case under the second meaning of that term) to a presumption that defendant committed a trespass which damaged plaintiff, and defendant has not rebutted that presumption.

Under the first meaning, however, the evidence presented goes to the jury. They may find plaintiff's evidence was not convincing, and thus defendant is not liable for trespass. Under one meaning of "prima facie," defendant must lose. Under the other, he may lose or he may win.

While not all courts realize that two distinct meanings of the term are in common use, many do. One American court said the following:

> [T]here are two senses in which courts use [the concept of prima facie]. The first is in the sense of a plaintiff's producing evidence sufficient to render reasonable a conclusion in favor of the allegation he asserts. In the common instance of this use of the concept, it means plaintiff's evidence is *sufficient to allow his case to go to the jury.*
>
> In the second sense of the concept, however, courts use "prima facie" to mean not only that plaintiff's evidence would reasonably allow the conclusion plaintiff seeks, but also that plaintiff's evidence *compels such a conclusion if the defendant produces no evidence to rebut it.*[13]

The Pennsylvania Supreme Court had earlier pointed out the disparity: "To say that a relationship is established 'prima facie' may mean *either* that enough had been shown to make a finding of the existence of the relationship *permissible or it may mean* that such a finding is *obligatory* in the absence of other evidence."[14]

However, some courts apply meanings of "prima facie" which do not fit neatly into either of the above two meanings. They blend the two together, or even invent their own meanings. These unusual definitions will be discussed in part III.D.

B. The Lighter Meaning: Meeting the Burden of Producing Evidence

In this sense, a party is said to have established a prima facie case when he has satisfied his burden of producing evidence. He is thus entitled to have the jury decide whether he has satisfied his burden of persuasion.[15] This definition

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13. Husbands v. Pennsylvania, 395 F. Supp. 1107, 1139 (E.D. Pa. 1975) (emphasis added).

14. *In re* Fink's Estate, 21 A.2d 883, 888 (Pa. 1941) (emphasis added).

15. The burden of proof is comprised of two elements, the *burden of producing evidence* (also called "the burden of going forward," "the burden of proceeding," and "the burden of evidence") and the *burden of persuasion.* Put simply, if a party has to satisfy his burden of proof as to fact X, he must do two things:

(1) He must put on some evidence of X, however unconvincing. Once this is done, he has *produced* evidence of X and has thus satisfied his *burden of producing evidence of X.* The judge alone decides whether a party has satisfied his burden of producing evidence. If the judge finds the

simply means that the plaintiff has made a sufficient showing to withstand a motion for directed verdict.

This sense of "prima facie" is the older of the two.[16] It was articulated as early as 1832 by Justice Story in *Crane v. Morris*:[17] "Whenever evidence is offered to the jury, which is in its nature prima facie proof . . . the law has submitted it to them to decide for themselves; and any interference with this right, would be an invasion of their privilege to respond to matters of fact."[18] In other words, a prima facie case must go to the jury and the jury is free to decide either way (indeed, they have a "right" to do so); there is no presumption in favor of the party who has established the prima facie case.

Later, the court in *Speas v. Merchants' Bank & Trust Co.*[19] articulated the very same standard, citing a number of cases as precedents:

> [The party opposing] a "prima facie" case, or "prima facie" evidence . . . is not required as a matter of law to offer evidence in reply. He only takes the risk of an adverse verdict if he fails to do so. The case is carried to the jury on a "prima facie" showing, and it is for them to say whether the crucial and necessary facts have been established.[20]

This standard is clearly identical to satisfying the burden of producing evidence:[21] the case "is carried" to the jury who determine whether the cause of action prevails and who are not bound by any presumptions.

In 1934, after examining many prior cases, the Nebraska Supreme Court articulated a very similar definition with identical effects:

> [A] prima facie case, that is, *a case which has proceeded upon sufficient proof to that stage where it must be submitted to the jury and not decided against the plaintiff as a matter of law*, does not shift the burden of proof or necessarily mean that the judgment goes in favor of the plaintiff as a matter of law, but the jury are still the judges of the

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party has not satisfied his burden of producing evidence of X where X is a critical element of the party's case, then the judge cannot allow the case to go to the trier of fact and the case will be dismissed.

(2) If and only if a party has satisfied his burden of producing evidence of X, then the trier of fact must decide whether the evidence which was produced is convincing—i.e. the party must *persuade* the trier of fact his evidence of X is true. If he does so then he has satisfied his *burden of persuasion*, and thus his burden of proof as to fact X.

For a more detailed discussion, see 2 McCormick on Evidence §§ 336-341, at 424-48 (John W. Strong et al. eds., 4th ed. 1992).

16. See the discussion of Muschamp v. Lancaster & P.J. Ry., 151 Eng. Rep. 1103 (1841), *infra* part III.C.

17. 31 U.S. (6 Pet.) 598 (1832).

18. *Id.* at 620.

19. 125 S.E. 398 (N.C. 1924).

20. *Id.* at 401 (citations omitted), *cited in* 9 John H. Wigmore, Evidence § 2487, at 296-97 (Chadbourn rev. 1981).

21. *See supra* note 15.

> sufficiency of the showing, having in view the fact that the plaintiff has the burden of proof.[22]

This definition explicitly rejects the notion of "prima facie" as presumption. The evidence to the contrary *may* be disregarded, but it need not be, and the jury is to determine the case as a matter of fact. The court may not, merely upon a prima facie showing, determine the case as a matter of law.

Somewhat more recent cases have also articulated this definition. In *White v. Abrams*:[23]

> A prima facie case . . . consists of sufficient evidence . . . to get plaintiff past a motion for directed verdict in a jury case or a motion to dismiss pursuant to Fed. R. Civ. P. 41(b) in a non-jury case. It is the evidence necessary to require a defendant to proceed with his case.[24]

Again, "the evidence necessary to require the defendant to proceed with his case" is simply the burden of producing evidence.

State v. Haremza[25] also equates "prima facie" merely with the burden of producing evidence: "A prima facie evidence provision is nothing more or less than a rule of evidence which governs the sufficiency of the evidence to take the case for the jury."[26]

Thus it is clear, in one widely accepted sense, "prima facie" is just equivalent to the burden of producing evidence. In this sense one presents a prima facie case when he has produced sufficient evidence, regardless of its weight, to withstand a motion for directed verdict.

C. The Heavier Meaning: Establishing a Mandatory Presumption

In the second sense, a party has established a prima facie case only when he has made such a strong showing that he is entitled to a presumption in his favor. This meaning of "prima facie" is virtually indistinguishable from at least one legal meaning of "presumption": If A has established a prima facie case, then his opponent B must *produce* some evidence to contradict the evidence already produced by A; if he does not, then the trier of fact must find for A. To put it another way, when "prima facie" is used in this sense, it switches the burden of proof *from* the party who has made the prima facie showing *to* his opponent.

Wigmore says the case which was the foundation for this meaning of "prima facie" is *Muschamp v. Lancaster & Preston Junction Railway Co.*[27] The real

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22. *In re* Hoagland's Estate, 253 N.W. 416, 419 (Neb. 1934) (emphasis added).
23. 495 F.2d 724 (9th Cir. 1974).
24. *Id.* at 729.
25. 515 P.2d 1217 (Kan. 1975).
26. *Id.* at 1222.
27. 151 Eng. Rep. 1103 (1841).

issue in this case was not whether one party had in fact made out a prima facie showing as required by a statute. Rather, the case involved the propriety of a judge's comment to the jury that a prima facie case had been established. It is the custom of English judges to express their own opinion on the weight of the evidence, and the judge in this case did so. The Court of Exchequer held the judge committed no error or misdirection by making such a statement to the jury. According to Wigmore, the judge was simply saying a sufficient case had been established to let the evidence go to the jury; liability was still a matter of fact to be decided by the jury.[28] However, the reporters misunderstood the case (or at least mis-stated the holding). Wigmore theorizes:

> [T]he reporters who made the head note of the case [added] to a summary of the evidence this unfortunate statement: "Held, that [the defendants] *were liable* for the loss." If they had said "Held, *by the jury*, that the company were liable. Held, by the Court, that there was *evidence competent to be submitted* to the jury," they would have made a correct and useful statement of the case.[29]

This mis-statement in the headnote was repeated and disseminated by practitioners reading the reports. The result was a widespread misconception, which has now been ratified through long-term use—when a court determines that a prima facie case has been made, the defendant is liable as a matter of law, and the jury may not find otherwise.[30] Thus the notion that "prima facie" is equivalent to presumption arose merely through the poor choice of words by a reporting editor. Very probably there was no such meaning of "prima facie" before 1841. This meaning is inconsistent with the meanings of the term in logic and colloquial English, as shown in part II.

On the other hand, any meaning that has been adopted by so many courts must have merit. No doubt, many courts simply adopted the *Muschamp* meaning through an over-deference to *stare decisis*, coupled with a poor understanding of the notion of "prima facie" and the subtle distinction between the two meanings. *Some* common-law courts, however, must have reasoned that the *Muschamp* meaning was a good idea. In any event, the sheer volume of cases using this meaning warrants giving it serious consideration as a possible meaning in the Louisiana Code of Evidence. The following prominent American cases are noteworthy.[31]

One of the earliest American cases to address the meaning of "prima facie" is *State v. Sattley*.[32] That court said: "[P]rima facie evidence is such that raises

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28. Wigmore, *supra* note 20, § 2494, at 379-81.

29. *Id.*

30. *Id.* (citing Joseph K. Angell, Carriers § 95 (1877)).

31. For citations to English cases other than *Muschamp*, see Wigmore, *supra* note 20, § 2494, at 379 n.3, 380.

32. 33 S.W. 41 (Mo. 1895).

such a degree of probability in its favor that it *must* prevail unless it be rebutted, or the contrary proved."[33]

In 1938, the Oregon Supreme Court stated a "prima facie case is such as will suffice until contradicted and overcome by other evidence."[34] The rest of the opinion indicates by "suffice" the court meant "suffice to win the case," or "establishes conclusively the plaintiff's cause of action."[35]

An Ohio appellate court said the following in 1941, in *State ex rel. Herbert v. Whims*:[36] "The words prima facie as used in statutes merely mean a fact *presumed to be true unless disproved* by some evidence to the contrary, but they always imply that the proper party shall have the opportunity of offering proof in rebuttal. . . ."[37]

Herbert concerned a statute that stated a finding made by a specific commission constituted prima facie evidence of a certain state of facts. The court read that statute to mean the findings of the commission were presumed to be true in a court of law, but the defendant could rebut them.

Also in 1941, the court in *In Re Fink's Estate*[38] decided "prima facie" meant "a finding of the existence of [a certain set of facts] is obligatory in the absence of other evidence,"[39] after noting the two meanings common-law courts have given to the term.

In 1948, in *Delaware Coach Co. v. Savage*,[40] the court stated the following: "Upon the establishment of a prima facie case the burden of evidence or the burden of going forward with the evidence shifts to the defensive party. It then becomes incumbent upon such defensive party to meet the prima facie case which has been established."[41]

Although this case is cited as support for the proposition "prima facie" is equivalent to a presumption, that reading is not the only one possible. The burden of going forward with the evidence is usually said to be equivalent to the burden of producing evidence.[42] By saying the burden "shifts" to the defensive party, the court implies the plaintiff has met his burden of producing evidence and can thus withstand a motion for directed verdict. The surrounding text in the case explained the burden of going forward with the evidence shifts back and forth during trial, and the party with the burden at any given time must establish a prima facie case. Still, the last clause of the above quotation, to the effect that a prima facie case makes it "incumbent" upon the defendant to meet the

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33. *Id.* at 44 (emphasis added) (citing State v. Buck, 25 S.W. 573 (Mo. 1894)).
34. Pacific Tel. & Tel. Co. v. Wallace, 75 P.2d 942, 947 (Or. 1938).
35. *Id.*
36. 38 N.E.2d 596, 599 (Ohio Ct. App. 1941).
37. *Id.* at 599 (emphasis added).
38. 21 A.2d 883 (Pa. 1941).
39. *Id.* at 888.
40. 81 F. Supp. 293 (D. Del. 1948).
41. *Id.* at 296.
42. *See supra* note 15.

evidence, implies if the defendant does not meet the prima facie case, he loses. This meaning of "prima facie" is equivalent to presumption, but it is apparent that *Delaware Coach* is not clear on the exact meaning of "prima facie."

In the same year, however, another court explicitly said that language similar to the *Delaware Coach* quotation clearly creates a presumption in favor of the party who has established the prima facie case:

> It has sometimes been said that when a party to an action has made a prima facie case, the "burden of proceeding" or the "burden of evidence" then shifts to his adversary. This is simply a way of saying that upon a prima facie case, a litigant *is entitled to prevail if his adversary offers no evidence.* The necessity of offering evidence to offset an adversary's prima facie case in no way shifts the burden of proof, which continues to rest upon the party which has it.[43]

It is easy to see why courts equate "prima facie" with a presumption favoring the party who has established a prima facie case.

D. Less Common Meanings

The term "prima facie" has been given other meanings. McCormick says:

> [A]ssume that a party having the burden of producing evidence of fact A, introduces proof of fact B. The judge, using ordinary reasoning, may determine that fact A might reasonably be inferred from fact B, and therefore that the party has satisfied its burden, or as sometimes put by the courts, has made out a "prima facie" case.[44]

McCormick is less clear than usual here. At first blush, McCormick appears to think, if a party has established a prima facie case, then he has merely met his burden of producing evidence. This assumes the second, unqualified, use of "burden" refers to the burden of producing evidence mentioned earlier in the passage. This would be essentially the first meaning discussed in part III.B. However, McCormick's following discussion indicates he thinks "prima facie" is equivalent to presumption, which would suggest McCormick leans to the second meaning, discussed in part III.C. He then states "[a]lthough some courts have described such a standardized inference as a presumption, most legal scholars have disagreed."[45] The passage may indicate an intention on McCormick's part to reduce confusion in the courts by blending the two meanings, as some courts appear to have done.[46] This is perhaps the best

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43. Miller v. Kruggel, 195 P.2d 597, 599 (Kan. 1948) (emphasis added).

44. McCormick, *supra* note 15, § 342, at 450.

45. *Id.* (footnotes omitted).

46. "Prima facie evidence means evidence which, standing alone . . . warrants the conclusion . . . [i]f it is not rebutted . . . and if it relates to the decisive issue in the case, a decision *is required* in

explanation for such a shift by a prominent scholar of evidence law—almost mid-sentence—of his meaning of this important term.

In addition to McCormick, courts have invented or blended their own meanings of "prima facie." In *Reddy v. Johnson*,[47] the court stated:

> When a plaintiff has made a prima facie case by evidence, or a presumption given him by law, the defendant must meet it with countervailing proof or suffer whatever judgment the prima facie proof will support. The burden of proof remains with the plaintiff to establish her right to recover by a fair preponderance of all the evidence, not by "clear and convincing evidence," and if this is not done, and there is no preponderance on either side, the plaintiff cannot recover.[48]

This is certainly curious language. In the first sentence, the court says a prima facie case establishes a presumption, but the second sentence says the burden of proof remains on the plaintiff even after the prima facie case has been established. The surrounding text is equally confusing and allows a number of different interpretations, none of which is entirely satisfactory.[49]

As shown, there is nothing even approaching uniformity in the common-law jurisdictions; there are two major uses of the term "prima facie" and a number of other minor ones.

IV. LOUISIANA

A. *Jurisprudence*

Before 1936, there are no Louisiana cases discussing the meaning of the term "prima facie evidence." None of the three series of *The Louisiana Digest Annotated* (reporting the very earliest Louisiana decisions and not to be confused with West Publishing Company's *Louisiana Digest*) directs the researcher to even one case defining "prima facie evidence." Two cases reported therein discuss legal presumptions in general, but neither applies the discussion to statutes using the term "prima facie evidence."[50] Planiol, in his treatise on French Civil Law, is also silent upon the subject of the term "prima facie."[51]

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accordance with its effect." Cincotta v. Dupuy, 1 N.E.2d 182, 182 (Mass. 1936) (emphasis added).

47. 293 P.2d 945 (Idaho 1956).

48. *Id.* at 948.

49. *See also* Godesky v. Provo City Corp., 690 P.2d 541, 547 (Utah 1984).

50. Dugas v. Estiletts, 5 La. Ann. 559 (1850); Succession of Tilghman, 7 Rob. 387 (La. 1844).

51. Marcel Planiol & George Ripert, Treatise on the Civil Law (Louisiana State Law Institute trans., West 1959) (1939). The index to Planiol's work has no entry for "prima facie evidence," nor is there such a listing in the index under the topics "evidence" and "proof." Planiol does discuss the difference between factual and legal presumptions, but he makes no reference to "prima facie." He further discusses legal presumptions and their effects without discussing the term "prima facie." 2 Planiol & Ripert, *supra*, §§ 9-54(A)(7), at 9-40.

A number of Louisiana cases decided between 1887 and 1936 use the term "prima facie evidence" or quote a statute using that term, but not a single case defines the term or discusses its meaning.[52]

The absolute absence of early Louisiana cases discussing the term is curious, considering many common-law jurisdictions at that same time were deciding cases where the meaning of the term was of importance. In the original *Corpus Juris*, the section entitled "Prima Facie"[53] and Section 1735 of the chapter

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52. A detailed description of the author's WESTLAW searches will illustrate this point. First, in the Louisiana case law database (LA-CS), the writer searched for the term "prima facie evidence" in all cases decided before Martin v. Breaux, 165 So. 743 (La. App. 1st Cir. 1936), discussed *infra* notes 62-66 and accompanying text, the earliest Louisiana case which the various digests cite as discussing the meaning of the term "prima facie evidence." Thus the search was: "'prima facie evidence' & da(bef 2-20-36)." This first search yielded one hundred fifty-eight cases.

The writer then ran a second search for all cases decided before *Martin v. Breaux* in which the term "prima facie evidence" appeared in the same paragraph as words beginning with the letters "M-E-A-N" (such as "means," "meaning," "meant," etc.) or with the letters "D-E-F-I-N" (such as "define," "defines," "defined," "definition," etc.). Thus this second search was: "'prima facie evidence' /p (mean! defin!) & da(bef 2-20-36)." This search yielded twenty-five cases, none of which discussed the meaning of "prima facie evidence" or defined that term.

These twenty-five cases may be broken down as follows: Fourteen cases had an unrelated use, in the same paragraph as "prima facie evidence," of a word such as "means" or "meant." Often, the use was non-definition-related, such as "an illegal means of procuring liquor." Seven cases had an unrelated use, in the same paragraph as "prima facie evidence," of a word such as "definite," "defines" or "definition." One case referred to 1914 La. Acts No. 209, describing what was "prima facie evidence of intent to defraud within the meaning of this act." In that statute, the "meaning" discussed was the meaning of "defraud." The court did not elaborate on the meaning of "prima facie evidence," although it did hold the statute in question did not remove the defendant's presumption of innocence. State v. Elkin, 177 La. 427, 148 So. 668 (1933). One case discussed 1894 La. Acts No. 166, which dealt with "prima facie evidence of fraudulent intent within the meaning of this act." That court did not discuss the meaning of "prima facie evidence." State v. Ackerman, 51 La. Ann. 1213, 26 So. 80 (1899). In one case, a dissenting judge said, in passing: "The court [today] could not have intended to hold . . . that a tax deed was not prima facie evidence of the title or that prima facie proof does not mean that the party who has made it may rest until his adversary has rebutted it." Lisso & Bros. v. Giddens, 117 La. 507, 515, 41 So. 1029, 1034 (1906). The main decision does not discuss prima facie evidence at all, and the dissenting judge does not elaborate on the above statement. Thus, *Lisso* is useless in trying to discover early Louisiana law on the subject. Furthermore, the statement in the dissent has no precedential value. In one case the headnote to an unrelated discussion of a statute with the term "prima facie evidence" referred the reader to the West digest Words and Phrases publication, discussing "definitions." Owen v. Tangipahoa Bank & Trust Co., 180 La. 747, 157 So. 549 (1934).

Analysis of the other one hundred thirty-three cases found in the first search confirmed what the second search suggested: none of those one hundred thirty-three cases discussed the meaning or definition of the term "prima facie evidence."

This exhaustive WESTLAW research strongly suggests no cases before *Martin v. Breaux* give a definition of the term prima facie evidence. This conclusion is bolstered both by the fact that no later cases refer to any early Louisiana cases on the subject, and by the other research discussed in this section.

53. 49 C.J. *Prima Facie* 1346-47 (1920).

entitled "Evidence," specifically discussing "prima facie evidence,"[54] cite a total of seventy-two cases, with not one coming from Louisiana.

Further, the indices to all issues of the Louisiana, Tulane, and Loyola Law Reviews indicate that in the history of all three, only one article, by Paul Brosman, has been published that includes a discussion of the meaning of "prima facie evidence."[55] While Brosman cites many cases from around the country, he does not discuss Louisiana law on the subject.[56] Brosman devotes over a quarter of the article specifically to the subject of "The Prima Facie Presumption."[57] In that section he cites no less than three hundred eleven cases. Of the three hundred eleven, only two are Louisiana cases, and neither is useful in this comment's inquiry.[58]

Moreover, later Louisiana cases do not refer to early Louisiana decisions defining or discussing the meaning of "prima facie evidence."[59] The dearth of early Louisiana cases on the subject at a time when other jurisdictions were addressing the issue is curious. It could be explained by the absence of the term "prima facie" in the Louisiana Civil Code.[60] While Louisiana's history of statutory law, most notably the Civil Code, dates back to the state's earliest beginnings, other jurisdictions began developing statutory law comparatively recently. Thus the American common-law jurisdictions were likely to include commonly used legal terms such as "prima facie evidence" in statutes covering areas of the law that Louisiana's Civil Code already covered without use of such terms. Still, many Louisiana legislative acts in that period used the term.[61]

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54. 23 C.J. *Evidence* 9 (1921).

55. Paul Brosman, *The Statutory Presumption*, 5 Tul. L. Rev. 17 (1930). See also A.E. Ralston, Jr., Note, *Evidence—Statutory Prima Facie Presumptions—Rational and Natural Relation to the Principal Fact*, 14 Tul. L. Rev. 297-99 (1940) and the cases cited therein (discussing the constitutionality of statutes using the term "prima facie," although not discussing the term's definition).

56. Brosman wrote the article while he was at Yale working with W.F. Dodd and Robert Maynard Hutchins.

57. Brosman, *supra* note 55, at 41-54.

58. State v. Wilson, 141 La. 404, 75 So. 95 (1917); Learned & Koontz v. Texas & P. Ry., 128 La. 430, 54 So. 931 (1911) (mis-cited by Brosman as "Learner v. Texas & P. Ry."). *Learned* does not even use the term "prima facie," but merely discusses a general statutory legal presumption. *Wilson* concerns the constitutionality of a statute using the term "prima facie" (Act No. 40 of 1908) and the lower court's misunderstanding of the statute's operation, but the appellate opinion does not discuss possible definitions for the term.

59. *See, e.g.*, State v. Lindsey, 491 So. 2d 371 (La. 1985); State v. Williams, 400 So. 2d 575 (La. 1981); Martin v. Breaux, 165 So. 743 (La. App. 1st Cir. 1936).

60. La. Civ. Code art. 1836 is the only current article using the term "prima facie," and that term was not added until 1984. (The Index to Prima Facie Evidence in Professor Pugh's Handbook on Louisiana Evidence Law cites the reader to Civil Code articles 55 and 3062, but while these two articles do include presumptions, they do not use the term "prima facie.") Further, Article 1836 does not discuss "prima facie evidence" as such. Rather, it uses "prima facie" as an *adverb*, stating that "[a]n act under private signature is regarded prima facie as the true and genuine act."

61. *See supra* note 52. See also the discussion of Martin v. Breaux, 165 So. 743 (La. App. 1st Cir. 1936), *infra* notes 62-66.

In 1936, the Louisiana First Circuit Court of Appeal decided *Martin v. Breaux*.[62] The statute at issue stated: "[W]henever [an automobile driver attempts to overtake another] the responsibility therefor shall rest prima facie upon the driver of the vehicle doing the overtaking or passing."[63] Both the trial court and the court of appeal gave this language an effect whereby the fact car X was passing was prima facie evidence of the driver's fault, but he could rebut whatever presumption was raised.

However, the case gives no indication whether the driver of car X *must* put on evidence if he is to prevail. Although, when read literally, the statute says the passing driver is guilty as a matter of law when there is an accident, the court did not give such a construction. It examined the specific facts and found that although the driver was indeed passing, he had "rebutted, by competent evidence, his responsibility for the accident."[64]

More significantly, the court did not refer to a single Louisiana case to define "prima facie"—because, as seen earlier, there were none defining "prima facie" or "prima facie evidence." Rather, the court looked to the "Prima Facie" section of the *Corpus Juris* mentioned earlier in this paper.[65] That work defines the words "prima facie" as follows: "They import that the evidence produces for the time being a certain result; but that that result may be repelled."[66] This meaning is identical to the *Muschamp* meaning: prima facie evidence stands unless and until it is rebutted.

In the fifty or so years following *Martin*, Louisiana courts have occasionally spoken on the meaning of "prima facie evidence."[67] However, no clear line of thought developed a single definition, and as with the common-law jurisdictions, courts have often given little thought to the meaning or have applied inconsistent definitions. Two cases decided in the last fifteen years, *State v. Williams*[68] and *State v. Lindsey*,[69] have so completely supplanted any earlier judicial reasoning that this paper will not analyze the earlier cases.

Many of the battles in the Louisiana Supreme Court centered around whether, under Louisiana Revised Statutes 14:32 and 14:39,[70] violation of a statute or ordinance was a conclusive, irrebuttable presumption of negli-

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62. 165 So. 743 (La. App. 1st Cir. 1936).

63. Rule 7(c), contained in 1932 La. Acts No. 21, § 1. When the Louisiana Revised Statutes were enacted in 1950, this statute became La. R.S. 32:233. The reference to "prima facie" was omitted in 1962 when the statute was replaced with its current predecessor, La. R.S. 32:73 (1963).

64. *Martin*, 165 So. at 745.

65. *See supra* text accompanying notes 53-54.

66. Corpus Juris, *supra* note 53, at 1346.

67. *See, e.g.*, Louisiana State Bar Ass'n v. Connolly, 201 La. 342, 9 So. 2d 582 (1942); Smith v. Richland State Bank, 9 So. 2d 327 (La. App. 2d Cir. 1942).

68. 400 So. 2d 575 (La. 1981).

69. 491 So. 2d 371 (La. 1986).

70. Both statutes provide, in pertinent part: "The violation of a statute or ordinance shall be considered only as presumptive evidence of such negligence." La. R.S. 14:32, :39 (1986 & Supp. 1994).

gence—i.e., negligence per se—or was merely some evidence of negligence.[71] However, *Williams* and *Lindsey* have heightened the tension.

In 1981, the Louisiana Supreme Court handed down *State v. Williams*.[72] The court took the *Muschamp* view that "prima facie" (and "presumptive evidence") meant a mandatory presumption: "The term 'presumptive evidence' is literally synonymous with 'prima facie evidence.' Each is defined as evidence sufficient to establish a given fact and which, if not rebutted or contradicted, will remain sufficient."[73]

Four years later, however, the court retreated from this position. In *State v. Lindsey*,[74] Justice Dennis said the court now questioned their reasoning in *Williams*—that the legislature's failure to include the word "only" in a statute converts a presumption from permissive to mandatory:

> [I]t seems equally reasonable if not more reasonable to conclude that the legislature intended "presumptive evidence" and "prima facie evidence" to signify only permissible inferences. . . . [W]e only question the interpretations of "presumptive evidence" or "prima facie evidence." After consideration of [a number of Louisiana criminal statutes], our earlier cases, and jurisprudence from other jurisdictions, we conclude that words such as "shall be presumptive evidence" create only a permissive inference, not a mandatory presumption.[75]

Nevertheless, lower Louisiana appellate courts seem to have ignored *Lindsey*. Some still quote language similar to *Williams*.[76]

Although *Williams* and *Lindsey* are criminal cases, in neither opinion did the Louisiana Supreme Court limit its definition of "prima facie evidence" to criminal cases. Further, many courts deciding civil cases cite *Williams* as the standard definition for "prima facie evidence."[77] A reason may be that the Shepard's citators do not list *Lindsey* as overruling *Williams*, but merely as questioning it. That is an erroneous conclusion. Although *Lindsey* reaffirmed *Williams*' statements about constitutional law, it clearly fixed a new standard for evidence law regarding permissive presumptions and prima facie evidence.

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71. *See* State v. Lollar, 389 So. 2d 1315 (La. 1980); State v. Hammontree, 363 So. 2d 1364 (La. 1978); State v. Nix, 211 La. 865, 31 So. 2d 1, *cert. denied*, 332 U.S. 791, 68 S. Ct. 100 (1947).

72. 400 So. 2d 575 (La. 1981).

73. *Id.* at 579 (citing State v. McCoy, 395 So. 2d 319 (La. 1980)).

74. 491 So. 2d 371 (La. 1986).

75. *Id.* at 375.

76. W. Handlin Marine, Inc. v. Gulf States Marine, Inc., 624 So. 2d 907, 910 (La. App. 5th Cir. 1993), *writ denied*, 631 So. 2d 1166 (1994); Guzzardo v. Town of Greensburg, 563 So. 2d 424, 427 (La. App. 1st Cir. 1990); Guilbeau v. C & D Reprographics-Lafayette, Inc., 568 So. 2d 206, 212 (La. App. 3d Cir.), *writ denied*, 571 So. 2d 653 (1990); Humphries v. Louisiana Dep't of Pub. Works, Div. of Transp., 545 So. 2d 610, 616 (La. App. 3d Cir.), *writ denied*, 548 So. 2d 1249 (1989).

77. See, for example, the cases cited in *supra* note 76.

The case law in Louisiana on the meaning of "prima facie evidence" is, at best, confused, and the history of the meaning in the Louisiana jurisprudence does little to help formulate a "proper" meaning. This discussion shall turn now to Louisiana statutory law.

B. Statutes

Earlier it was noted that the terms "prima facie evidence" and "prima facie case" differ in meaning. "Prima facie evidence" refers to a single piece of evidence which tends to establish a single fact or a single conclusion of law. A "prima facie case," on the other hand, generally means that one side has produced some evidence of *each of several* elements of a conclusion of *law*.[78] The Louisiana statutes using the term "prima facie" reflect the distinction between prima facie evidence and prima facie case. Most use terminology in one of the following two forms:

1) X shall be prima facie evidence of Y.[79]
2) X shall result if and/or only if a prima facie case of Y has been established.[80]

This discussion is only concerned with the first construction.[81] As noted, though, there is a strong connection between both uses. This connection causes

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78. *See supra* part II.

79. *See, e.g.*, La. Const. art. VII, § 25(A) (stating a tax deed by a tax collector is prima facie evidence of a valid sale); La. R.S. 2:2.1(A) (1987) (stating registration of aircraft is prima facie evidence of its use in this state); La. R.S. 3:740(B) (1987) (stating certified copy of recordation, renewal, or transfer is prima facie evidence of ownership of the animal); La. R.S. 3:3225(F) (1987) (stating a certificate of state chemist performing analysis is prima facie evidence of facts stated therein); La. R.S. 3:4278.2(E) (Supp. 1994) (stating failure to comply with statute is prima facie evidence of intent to commit theft); La. R.S. 15:424 (1992) (stating published statutes and digests of other states are prima facie evidence of those states' statutory laws); La. R.S. 15:427 (1992) (stating a certified act of protest for non-payment of commercial paper is prima facie evidence of facts recited in that act).

80. *See, e.g.*, La. Code Civ. P. arts. 4904 and 4921 (stating a plaintiff may obtain a judgment of default only if he established a prima facie case); La. Code Crim. P. art. 795(C) (Supp. 1994) (stating if defendant makes out a prima facie case that a prospective juror has been excluded by the state solely on the basis of race, then the court may demand a race-neutral explanation from the state); La. R.S. 9:345(B) (Supp. 1994) (stating the court shall appoint attorney to represent child's best interests if a prima facie case of abuse by parents has been made out); La. R.S. 46:236.4(F)(2) (Supp. 1994) (stating a support obligor's possible objections become limited once a prima facie case of non-payment has been established). A number of statutes also recite what types of proof shall constitute a prima facie case with respect to the issue covered by the statute.

81. Brosman, *supra* note 55, categorizes these types of statutes in even more detail. He divides them into: (1) Those attached to proof of some document, which can be further subdivided into (a) those making the document prima facie evidence of the truth of the facts recited in it, (b) those making the document prima facie evidence of the correctness and regularity of proceedings prior to it and not necessarily reported therein, and (c) those making the document prima facie evidence of

the definition of each term to influence the other. If a "prima facie case" means that one party is entitled to a legal presumption in his favor, rather than merely a permissive inference, then he *must* win in the absence of other evidence. Similarly, under this definition, "X is prima facie evidence of Y" means that if X is established, then a legal presumption of Y arises, and Y *must* be accepted in the absence of other evidence.

Given the history in the common-law jurisdictions, the meaning of "prima facie evidence" in colloquial English, and Justice Dennis' reasoning in *Lindsey* that many criminal statutes will be unconstitutional otherwise, this comment proposes the best meaning of "prima facie evidence" for Louisiana to adopt would be the following one—almost identical to a permissive inference:

> If a set of facts is "prima facie evidence" of another set of facts or a conclusion of law, then from the first set of facts alone the trier of fact may conclude that the second set of facts or the conclusion of law has been established, but the trier of fact is not compelled to so conclude, even in the absence of other evidence. (An exception may be made for statutes where such a construction gives a patently absurd meaning.)

A Louisiana Code of Evidence article, containing this definition, would provide for Louisiana law the best, most historically and colloquially consistent meaning of "prima facie evidence": the presumption which has been raised does not even need to be rebutted by the opposing party. This meaning is virtually identical to "permissive inference"; it does not create a presumption which needs to be rebutted (although, of course, the opposing party will usually want to rebut the inference).

V. PRACTICAL EFFECTS AND JURY INSTRUCTIONS

Is the above construction helpful at all? How would it be applied in jury instructions? Weinstein states presumptions should not be mentioned to the jury.[82] This is a wise policy. How does one then "sneak" the legal effect into jury instructions? Consider the following: Louisiana Revised Statutes 14:81.1(C) reads: "Possession of three or more of the same photographs, films, videotapes, or other visual reproductions shall be prima facie evidence of intent to sell or distribute."[83] This is a common statutory use of prima facie evidence,

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some other fact-set than those in (a) and (b); (2) Those attached to proof of some set of facts (other than a document), which may be divided into those making (a) proof of some fact prima facie evidence of ultimate guilt, (b) proof of some fact prima facie evidence of some other fact than ultimate guilt, and (c) proof of some fact evidence of the state of mind of a person at a given time (e.g., intent to distribute); (3) Those establishing the policy of the law on a subject (e.g., the victim in a rape case is presumed to be of chaste character; such a statute probably would not use the term "prima facie"). Brosman, *supra* note 55, at 43-49.

82. 1 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 301[02], at 31-32 (1975).

83. La. R.S. 14:81.1(C) (1986).

because states of mind such as intent are virtually impossible to prove. A proper jury instruction involving the above construction of prima facie evidence might be as follows: "If you find, beyond a reasonable doubt, that the defendant possessed three or more copies of an article of pornography involving juveniles, then you may conclude, without more, that the defendant intended to distribute those articles of pornography, but you do not have to so conclude."

Of course, this would not be the entire jury instruction. It would only be the part relating to whether the prosecution had established the necessary element of intent to distribute. This instruction, however, would be helpful.

The meaning of "prima facie evidence" proposed above may be less helpful in cases involving documentary evidence. Consider Louisiana Revised Statutes 9:397.3(B), which reads, in pertinent part: "[T]he certified report [of a blood or tissue sampling taken for the determination of paternity] shall be admitted in evidence at trial as prima facie proof of its contents."[84]

A proper jury instruction would be to the effect that the jury could find, from the copy of the report alone, that X was the father of Y, but they are not required to find that. This is a helpful jury instruction, but in a different way from the first example. Rather than authorizing the jury to find fact W, it reminds them that they are not compelled to find fact W.

A plainly incorrect statement would be, because the certified copy has been introduced, the jury must find that X is the father of Y unless X has shown some facts to the contrary.

VI. CONCLUSION

In the last few pages, it has been shown that an unfortunate error due to the imprecision of a reporter in *Muschamp* has created a rift in the jurisprudence. This rift has caused confusion, great inconvenience, and no doubt some injustice. To create uniformity in Louisiana statutory law, to bring lower courts in line with the Louisiana Supreme Court decision in *Lindsey*, to create a legal meaning close to the meaning in other fields, and to protect the constitutionality of our statutes using the term, "prima facie evidence" should be read as creating a permissive inference only, and nothing more (unless such a reading makes the given statute patently absurd). As demonstrated, jury instructions may utilize such a meaning without suffering in clarity. An article in the Louisiana Code of Evidence adopting this meaning would be a positive step and would put Louisiana leagues ahead of both the federal system and the other state systems in this area of law.

Georg Nils Herlitz

84. La. R.S. 9:397.3(B) (1991).

APPENDIX R2

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

STATE EX REL. RYAN FERGUSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 11AC-CC00068
	)	
DAVE DORMIRE, Warden, Jefferson City Correctional Center,	)	
	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Procedural Background

1. On February 14, 2011, the Petitioner filed his petition for writ of habeas corpus pursuant to Rule 91.

2. On July 22, 2011, this Court dismissed Claim 4 of the petition after briefing by the parties.

3. Following various pretrial proceedings, the Court held a hearing beginning on April 16, 2012, lasting five days and concluding on April 20, 2012.[1] Petitioner appeared in person and by counsel, Ms. Kathleen Zellner and Mr. Douglas Johnson. Members of the Missouri Attorney General's Office represented Respondent Dormire.

4. This Court takes judicial notice of the underlying Boone County Circuit Court files, including the records on appeal. The appellate record was submitted to the

[1] The Brobdingnagian record in this case consists of over seven file boxes of Pleadings, exhibits, affidavits, transcripts, a video record of the original jury trial, two Western District Court of Appeals files and the resulting Opinions. Additionally this Court held a five day hearing wherein it heard the testimony of the witnesses and legal argument of the parties.

Court as Respondent's Exhibits A through M. The Factual Background section of the Opinion in *Ryan Ferguson v. State of Missouri*, WD 71264, provide as fair and accurate summarization of the evidence at trial which this Court adopts and need not be set forth again here.

5. At the request of the parties, the Court allowed the parties until June 15, 2012, to file proposed findings of fact and conclusions of law.

6. With regard to Claim 4, the allegation that the Lincoln County jury selection process did not comport with Missouri statute, this Court seriously considered that claim in light of *Preston v. State*, 325 S.W.3d 420 (Mo. App. E.D. 2010).

7. Petitioner's conviction has been affirmed on direct appeal. *State v. Ferguson*, 229 S.W.3d 612, 614 (Mo. App. W.D. 2007). Petitioner then filed a habeas petition challenging the jury selection process, and this Court denied that petition. Ferguson v. State, No. 08AC-CC00721. The Court of Appeals and the Missouri Supreme Court also denied similar petitions. In re Ferguson v. Dormire, W.D. 70818; State ex rel. *Ferguson v. Dormire*, SC90095.

In these state habeas petitions, Petitioner received a ruling from the courts, including the Missouri Supreme Court, that Lincoln County's noncompliance with the statutes did not warrant state habeas relief. Accordingly, the matter could not be reconsidered in the present petition.

8. The Missouri Court of Appeals also affirmed the denial of post-conviction relief, brought under Rule 29.15. *Ferguson v. State*, 325 S.W.3d 400 (Mo. App. W.D. 2010).

9. Petitioner categorizes his claims as follows:

a. Claim 1 asserts actual innocence because:

(1) Jerry Trump recanted;

(2) Charles Erickson recanted (although his "recantation" at the time of the petition was significantly different from his recantation at the April 2012 hearing); and

(3) Mike Boyd committed the murder;

b. Claim 2 asserts the prosecutor knowingly used perjured testimony; and

c. Claim 3 asserts Brady violations.

Burden of Proof and Relevant Case Law

10. With Claim 1, Petitioner bears the burden of proving actual innocence. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003). He must show clear and convincing evidence sufficient to undermine the Court's confidence in the correctness of the judgment. Id. at 548.

11. With regard to Claims 2 and 3, petitioner may only overcome his procedural default of failing to raise those claims on direct appeal in a Rule 24.035 or Rule 29.15 motion, by showing it is more likely than not that no reasonable juror would find him guilty in light of the "new evidence of innocence." Murray v. Carrier, 477 U.S. 478, 496 (1986).

12. "[S]uch a claim requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific

evidence, trustworthy eyewitness accounts or critical physical evidence -- that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

13. Under Schlup, in order for evidence to be classified as new, it must be evidence "that was not available at trial." *Storey v. Roper*, 603 F.3d 507, 524 (8th Cir. 2010) quoting *Nance v. Norris*, 392 F.3d 284, 291 (8th Cir. 2004). If a habeas petitioner adduces conflicting evidence about the murder, the new conflicting evidence is insufficient to show probable innocence. "The existence of such a 'swearing match' would not establish that no reasonable juror would have credited the testimony of the prosecution witnesses and found [that petitioner] guilty beyond a reasonable doubt." *Moore-El v. Luebbers*, 446 F.3d 890, 902-903 (8th Cir. 2006); *Johnson v. Norris*, 170 F.3d 816, 818-819 (8th Cir. 1999)(reversing grant of habeas relief, finding that much of the evidence -- witnesses' memory loss and potentially conflicting testimony of witnesses -- is not new and reliable); *Gomez v. Jaimet*, 350 F.3d 673, 679-681 (7th Cir. 2003)(holding that petitioner's own statements and statements of petitioner's co-defendants were insufficient to warrant applying the extremely rare actual innocence exception); *Bosley v. Cain*, 409 F.3d 657, 665 (5th Cir. 2005)(rejecting claim where new evidence consisted only of testimony from four relatives of petitioner). Merely putting a different spin on evidence that was presented to the jury does not satisfy the Schlup requirement. *Bannister v. Delo,* 100 F.3d 610, 618 (8th Cir. 1996).

14. Defaulted claims can be considered in a state habeas petition but only in limited circumstances:

> A person who has suffered criminal conviction is bound to raise all challenges thereto timely and in accordance with the procedures established for that purpose. To allow otherwise would result in a chaos of review unlimited in time, scope, and expense. In accordance with our previous decisions, habeas corpus is not a substitute for appeal or post-conviction proceedings. Habeas corpus may be used to challenge a final judgment after an individual's failure to pursue appellate and post-conviction remedies only to raise jurisdictional issues or in circumstances so rare and exceptional that a manifest injustice results.

State ex rel. Simmons v. White, 866 S.W.2d 443, 446 (Mo. banc 1993).

Habeas review is not meant to be a substitute for post-conviction review under Rule 24.035 or Rule 29.15 or for direct appeal. *State ex rel. Green v. Moore*, 131 S.W.3d 803, 805 (Mo. banc 2004). To challenge the validity of a conviction through habeas, a petitioner must: 1) demonstrate the existence of a jurisdictional defect; 2) show that he is probably actually innocent; or 3) demonstrate cause and prejudice for the failure to make the claim on direct appeal or post-conviction review. *Green*, 131 S.W.3d at 805, n. 5.

15. Not only must Petitioner establish cause to overcome the default, but he must also show the equivalent of "Brady prejudice." *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 126 (Mo. banc 2010). "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 131 S.Ct. 770, 791-792 (2011).

16. Petitioner alludes to, and the Amicus directly cites, *State ex rel. Amrine v. Roper,* 102 S.W.3d 541 (Mo. banc 2003), for the proposition that once he established that Mr. Erickson and Mr. Trump recanted, he is automatically entitled to habeas relief. In

other words, though Petitioner asked for, and received, a five-day evidentiary hearing before this Court (Petition, p. 80), Petitioner (by Amicus) asserts this Court has no obligation to evaluate the strength or weight of his evidence before ordering the extraordinary remedy of invalidating a jury's verdict that has been affirmed on appeal by two separate panels of the Western District.

Circuit courts receive and review evidence as the finder of fact. This Court does not believe that it can, or should, abrogate that responsibility to evaluate the evidence presented. If evidence is not credible, it should not be the basis for habeas relief. And *Amrine* clearly states that the Petitioner has the burden of proof to establish his claims. 102 S.W.3d at 548.

Furthermore, the law views recantations with suspicion. *State v. Cook*, 339 S.W.3d 523 (Mo. App. E.D. 2011); *Haouari v. United States*, 510 F.3d 350, 353 (2nd Cir. 2007) (collecting cases). "[I]f the trial court is not satisfied that a witness's post-trial testimony is credible, it is the trial court's duty to deny a new trial." *State v. Garner*, 976 S.W.2d 57, 60 (Mo. App. W.D. 1998). "Recanting testimony is exceedingly unreliable and regarded with suspicion; it is the right and duty of the court to deny a new trial where it is not satisfied such testimony is true." *State v. Harris*, 428 S.W.2d 497, 501 (Mo. banc 1968). In *Dobbert v. Wainwright*, 468 U.S. 1231 (1984), Justice Brennan wrote that the initial question a reviewing judge should have with a recantation is whether it is true. Only after determining that it is true should the court consider whether the recantation is material. Id. at 1233-34 (Brennan, J. dissenting). A witness who was involved in the

crime may come forward to recant for a variety of base motives or importunities. *Newman v. United States*, 238 F.2d 861, 862 (5th Cir. 1956).

In addition, while not binding, this Court finds the analysis in *Case v. Hatch*, 183 P.3d 905 (NM 2008) to be very perceptive for its logic that a recantation must be credible and the recanted testimony was significant to the original verdict.

This Court will also note that there are some very basic credibility issues present in this matter, as most aptly detailed in MAI-CR 3.02.01.

> In determining the believability of a witness and the weight to be given to testimony of the witness, you may take into consideration the witness' manner while testifying; the ability and opportunity of the witness to observe and remember any matter about which testimony is given; any interest, bias, or prejudice the witness may have; the reasonableness of the witness' testimony considered in the light of all of the evidence in the case; and any other matter that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness.

17. Additionally, there are allegations raised by Petitioner that can be properly addressed only by a court. Allegations of suborning perjury and withholding evidence are not matters for a petit jury to resolve. It is for a court, not a jury, to address and resolve claims of prosecutorial misconduct.

18. At the April 2012 hearing, Petitioner did not testify, but he presented the testimony of several witnesses.

19. Dr. Larry Blum is a forensic pathologist in Rockford, Illinois. (H. Tr. 121). Petitioner made no showing that this witness was unavailable in 2005, and fails to explain why this witness could not have been called at Petitioner's trial. (H. Tr. 140). After listening to Dr. Blum's opinions, the Court concludes that his testimony and opinions

could have been rendered in 2005 and this is not new evidence. As the State has noted, this proceeding is not intended to be a successive post-conviction proceeding to challenge the effective assistance of counsel. Even if such a claim were permitted, Petitioner did not call his trial attorney, Charles Rogers, and did not overcome the presumption that the decision to not call Dr. Blum, or some similar expert, was a matter of sound trial strategy. Strickland v. Washington, 466 U.S. 668 (1984).

As an example, Dr. Blum testified that Dr. Adelstein was not board certified in forensic pathology. (H. Tr. 129). That is a fact that existed in 2005 and could have been a basis of attack. Dr. Blum did not disagree with much of what Dr. Adelstein concluded ("it was a good report"), but complains that he did not memorialize the details that Dr. Blum would have liked to have seen. (H. Tr. 130-132).

Dr. Blum disagreed with the conclusion that the injuries to Mr. Heitholt's hands were due, in part, to scraping on the asphalt and suggested they were defensive injuries. (H. Tr. 132). It is understandable that defense counsel did not want to highlight the violence and length of the assault, seeing as how Petitioner was charged with first degree murder.

Dr. Blum agrees completely with Dr. Adelstein's conclusion that the cause of death was strangulation. (H. Tr. 135, 136). He also agreed that a belt was used to strangle the victim. (H. Tr. 135). He offers the opinion, however, that this strangulation by the belt did not cause damage to the hyoid bone. (H. Tr. 136). He thinks it is possible that the injury was caused by force. (H. Tr. 135-136, 138). Dr. Blum cannot disagree with Dr. Adelstein's belief that the assailant may have been kneeling on Mr. Heitholt. (H. Tr. 143,

144). He then tried to suggest some of the injuries were not from a tire tool, as he understands them, but suggested that it was caused by a nail puller. (H. Tr. 144). He produced one during his testimony. (H. Tr. 148). While the Court overruled the State's objection to Dr. Blum's testimony on this matter, it was clearly speculation on his part. (H. Tr. 148). The nail puller produced could not have caused all of the injuries to Mr. Heitholt.

Dr. Blum has "an opinion" about the length of time that he thinks the crime took. He concludes the blunt force took 4-5 minutes, and the strangulation took 2-3 minutes. (H. Tr. 154). He also said it would be impossible to determine the sequence of the injuries. (H. Tr. 155, 156). Dr. Blum also admitted that the strangulation can be shorter due to injuries from the beating of Mr. Heitholt. (H. Tr. 154).

Dr. Blum was asked if he had an opinion about whether Mr. Heitholt was on his knees. Dr. Blum testified he did have an opinion, but he did not state what that opinion was. (H. Tr. 157).

Dr. Blum does not eliminate the possibility that some of the strikes occurred after the strangulation. (H. Tr. 158). He also admitted there are other possible scenarios for the sequence of wounds and how they were struck. (H. Tr. 158-159, 160-161). Dr. Blum also admitted that there were many types of instruments, differing in length and appendages, that could have caused the injuries. (H. Tr. 162).

In fact, on cross-examination Dr. Blum admitted the device he had earlier claimed may have caused the injuries (the nail puller), could not have caused the circular injuries to Mr. Heitholt's head. (H. Tr. 165, 166). Dr. Blum testified that he would have likely

rendered these same opinions in 2005. (H. Tr. 168). His opinion was based on the photos, Dr. Adelstein's testimony, and Dr. Adelstein's report, information available in 2005. (H. Tr. 168, 172-173). Again, there is no reason this attack on the State's case could not have been made by Petitioner in 2005.

Dr. Blum does agree that it is possible the hyoid bone fracture was from the belt. The pressure to cause the hyoid bone to break could have occurred very fast. He mentioned that there are also many factors that influence the amount of pressure needed to break the bone, including age, gender and individual differences. (H. Tr. 169-170, 175-178).

Dr. Blum stated that "overall" the report of Dr. Adelstein was "good" (H. Tr. 178), although he says he wishes it contained more information. Dr. Blum also admitted that even the small nail puller he used as a demonstration could cause a skull fracture. (H. Tr. 181).

While Petitioner proclaimed that Dr. Blum was much better qualified than Dr. Adelstein, in the end, Dr. Blum had very few actual opinions different from Dr. Adelstein, and his differing opinions were speculative. In the end, Dr. Blum contributed nothing to the real issue(s) in this matter and his entire testimony is immaterial.

20. Joseph Buckley, President of John Reid and Associates, testified critically of the Columbia Police Department's interview of Mr. Erickson on March 10, 2004. (H. Tr. 65-95). This information came to the jury's attention at Petitioner's 2005 trial through cross-examination. (H. Tr. 95). It is not "new evidence" in the factual or legal sense of the term. Mr. Buckley highlighted the non-public information that Mr. Erickson provided

about the offenses. (H. Tr. 97-103, 105). Mr. Buckley also believed that he may have been contacted by the defense about testifying in this very case, further refuting the claim that this is "new evidence." Indeed, Mr. Rogers testified at the post-conviction proceeding that he had consulted with someone about police interview tactics but decided not to use the witness. (Exhibit G, pp. 437, 438). Again, in the end, Joseph Buckley contributed nothing to the real issue(s) in this matter and his entire testimony is immaterial.

21. Mr. Michael Boyd is a sports editor in Ste. Genevieve. (H. Tr. 504). In 2001, he worked at the Columbia Tribune with Kent Heitholt. (H. Tr. 504). He arrived at the Tribune about 9:00 p.m. on the evening of October 31, 2001. (H. Tr. 504-505, 535). He testified he left about 2:00 a.m. (H. Tr. 505-506, 536). He spoke to Mike Henry "a good few minutes." (H. Tr. 506, 537). Mr. Boyd owned two cars, a red car and a blue car. (H. Tr. 508, 532-533). He drove the red car that night. (H. Tr. 508, 534). He got in his car and listened to music for a few minutes. (H. Tr. 509). He saw Mr. Heitholt exit the building and Mr. Boyd pulled up to his car and spoke to Mr. Heitholt. (H. Tr. 509-510). The conversation lasted "a few minutes."(H. Tr. 512).

When he turned to leave, he saw two people in an alley by the dumpster. (H. Tr. 513-514, 540). He looked in his rear view mirror and Mr. Heitholt appeared to be getting into his car. (H. Tr. 514, 539). Mr. Boyd did not pay attention to the race of the two individuals, or even their gender. (H. Tr. 514-515). He estimates that it was around 2:20 a.m. when he left, "somewhere in there." (H. Tr. 515, 538-539).

After going home and going to bed, Mr. Boyd received a telephone call from a co-worker who told him that Mr. Heitholt had been hurt. (H. Tr. 517-518). A police officer then got on the phone and Mr. Boyd spoke to him. (H. Tr. 518). Mr. Boyd then dressed and returned to the Tribune. (H. Tr. 519-520). There were many police vehicles, and Mr. Heitholt's body was still present. (H. Tr. 520-521).

Mr. Boyd testified that after the arrest of Petitioner and Mr. Erickson, he thought he went to the police and told Detective Short that he saw two individuals in the alley. (H. Tr. 524-525). He had read in the paper that two people were seen in the area and so that prompted Mr. Boyd to go back. (H. Tr. 525). He thought it was within a year and before he moved to Ste. Genevieve. (H. Tr. 526).

In 2005, Mr. Boyd told Mr. Haws the same information. (H. Tr. 526). He also spoke to Prosecutor Crane on the telephone prior to trial. (H. Tr. 527). Mr. Crane did not tell Mr. Boyd whether Mr. Boyd would or would not be a witness. (H. Tr. 528). Mr. Boyd testified that he remembers that the music was very loud outside and he believed it was coming from the nightclub. (H. Tr. 531).

Mr. Boyd did not have any particular reason that night to be aware of the time. He is not sure about what time he left. He did not consider it unusual to see the two individuals in the alley. (H. Tr. 531-532). Again, in the end, Mr. Boyd's testimony contributed nothing to the real issue(s) in this matter and his entire testimony is immaterial.

22. Kevin Crane[2], the prosecutor at Petitioner's 2005 trial and currently a circuit judge, also testified. (H. Tr. 556-557). Mr. Erickson and Mr. Erickson's attorney entered into a plea agreement that required Mr. Erickson to testify truthfully at Petitioner's trial. (H. Tr. 558). Mr. Crane did not suggest or threaten Mr. Erickson that Mr. Crane might consider seeking capital punishment or even charge Mr. Erickson with first degree murder. (H. Tr. 558, 559-560, 586-588). Capital punishment was not an available punishment for those who kill when they were the age of 17. (H. Tr. 559). Nor did Mr. Crane threaten Mr. Erickson with the possibility that Petitioner may make a deal against Mr. Erickson. (H. Tr. 578).

Mr. Erickson entered his guilty plea on November 4, 2004 (H. Tr. 561), long after Mr. Crane spoke with Mr. Trump for the first time on December 21, 2004 (H. Tr. 562-565). On November 4, 2004, Mr. Trump had not identified Mr. Erickson or Petitioner as the men in the parking lot at the newspaper building. (H. Tr. 563; Exhibit R72, p. 4).

At the December 21, 2004 meeting between Mr. Crane, Mr. Haws, and Mr. Trump, Mr. Trump volunteered that he might be able to identify the men in the parking lot. (H. Tr. 567). Mr. Trump stated that he received an envelope from his wife that contained a newspaper story. (H. Tr. 568). Mr. Trump repeated this information at the pretrial deposition. (H. Tr. 572). Mr. Crane recognized that this information would lead to difficulty in admitting into evidence the basis of the identification. (H. Tr. 569). It would

[2] Although now a member of the judiciary, this Judgment will refer to The Honorable Kevin Crane as "Mr. Crane" since at the time of the jury trial he was the Boone County Prosecuting Attorney.

have been easier if there had been an identification after a photo or in-person lineup. (H. Tr. 570, 575).

Mr. Crane attempted to have Mr. Trump identify Petitioner at the August 29, 2005 hearing, but the trial court denied the request. (H. Tr. 572-577). Because Mr. Crane did not know if Mr. Trump would identify Petitioner, it was not foreshadowed in the opening statement. (H. Tr. 579-580). The identification first occurred at trial. (H. Tr. 582). As to Mr. Erickson, Mr. Crane testified that he would not have produced Mr. Erickson as a witness if Mr. Crane thought Mr. Erickson was perjuring himself. (H. Tr. 583).

23. Mr. Jerry Trump[3]: At Petitioner's criminal trial, Mr. Trump identified Petitioner as one of the two men he saw at Mr. Heitholt's car at the time of the murder. (Trial Tr. 1006). Extensive pretrial discovery and hearings established the basis for this identification. On December 21, 2004, after being released from prison on December 13, 2004, Trump met with Kevin Crane and investigator Bill Haws about the upcoming trial of Petitioner. (Trial Tr. 1005).[4]

At this meeting, Mr. Trump announced that his wife had sent him a copy of a newspaper article (Exhibit T4; Exhibit 30 from the trial), dated March 11, 2004 (Exhibit T6) and that he can now positively identify Ryan Ferguson on the night of the murder. Mr. Trump first testified to this fact during his pretrial deposition on June 29, 2005.

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[3] Jerry Trump first appeared in this Habeas proceeding by virtue of a video deposition offered by Petitioner. This Court indicated that it would be beneficial to hear from Mr. Trump in person. The State indicated during a conference in chambers that Mr. Trump was subpoenaed by the State and it would be calling him as a witness during its case in chief. Instead, Petitioner then inexplicably called Mr. Trump live on the second day of the proceeding.

[4] It should be noted that Mr. Trump was not prosecuted for child molestation by Mr. Crane, but was convicted in Audrain County. (H. Tr. 565).

(Exhibit T6, p. 43). He then testified to this fact in a motion hearing outside the presence of the jury on October 18, 2005. (Exhibit T5; Trial Tr. 1000). Finally, he testified to this fact a third time in front of the jury. (Trial Tr. 1021).

Mr. Trump now asserts his earlier testimony was untrue and that Crane suborned his perjured testimony by showing him the newspaper article and "encouraged" him to identify Petitioner. (Exhibit 5, p. 88). Previously, he testified at trial that no such thing had occurred. (Trial Tr. 1002).

Mr. Trump's first affidavit (Exhibit 2) was written on October 11, 2010, the day before Mr. Erickson signed one of his affidavits, on October 12, 2010 (Exhibit 34b). In this first affidavit, Mr. Trump does not state that his in-court identification of Petitioner was inaccurate. Unlike his later testimony at this hearing, however, Mr. Trump then claimed he was able to identify Petitioner because, "I had seen a video that was circulated in the prison that triggered my memory." (Exhibit 2, ¶11). This affidavit states that he has "had the opportunity to reflect upon the events that occurred in the early morning hours of November 1, 2001." (Exhibit 2, ¶5). That statement is not exactly correct because the record demonstrates that Mr. Trump did not simply come to "reflect" upon the events; Petitioner's investigator, Steve Kirby, contacted Mr. Trump and encouraged him to prepare one affidavit and then another.

There are items in the affidavit that cannot reasonably be attributed to Mr. Trump. The most obvious example is in paragraph 8 where Mr. Trump states he told Christine Varner he could not identify anyone; yet, Mr. Trump did not even know who Ms. Varner was. (Trump 2012 depo, pgs. 11, 61, 62).

Though the second affidavit states it was written because Mr. Trump wanted to supplement his first affidavit (Exhibit 3, ¶4), that too is incredible. Mr. Trump testified that he felt no need or desire to prepare a second affidavit. (Trump 2011 depo, p. 68). It was Mr. Kirby who wanted this second affidavit (Trump 2011 depo, p. 63), in which Mr. Trump asserts for the first time that Mr. Crane coerced him into identifying Petitioner as one of the murderers.

The accusations against Mr. Crane by Mr. Trump have increased on every occasion. During his pre-hearing deposition testimony, Mr. Trump claimed that Mr. Crane showed him a newspaper article dated March 11, 2004 (Exhibit T6), and told Mr. Trump the two men were guilty of the murder. At the hearing, Mr. Trump claimed, for the first time, that Mr. Crane suggested that Mr. Trump should state that the newspaper was folded. Earlier, in his second affidavit, Mr. Trump makes no mention of the claim that Mr. Crane suggested the story that Mr. Trump got the newspaper in the mail.

Additional factors undermine Mr. Trump's recantation as to Crane's involvement. The record demonstrates that Mr. Crane was seeking a determination whether Mr. Trump could make an in-court identification of Ryan Ferguson prior to offering his testimony to the jury. Mr. Crane first tried to do so at the hearing on August 29, 2005 (Exhibit C3), but was stymied by the reasonable objections of Petitioner's counsel that Petitioner was wearing jail house clothing. Thus, at the time of trial, Mr. Crane did not know whether Mr. Trump could, or would, identify Petitioner. Mr. Crane did not mention any possible identification by Mr. Trump in his opening statement. (Exhibit C2).

Nonetheless, this Court is convinced that Jerry Trump committed perjury at the initial trial wherein he identified Ryan Ferguson as one of the two individuals he saw outside of the Tribune Building. Whether motivated by a perceived need for a probationer to ingratiate himself to law enforcement, a desire to be in the public limelight, or some other reason known only to him, Trump's identification of Ferguson at trial was false. Mr. Trump's story about his wife sending him a newspaper and this somehow jogging his memory is simply too fantastic to be believed. Indeed, it is the implausible nature of Trump's jury trial testimony that gives weight to the credibleness of the recantation, at least as far as Trump's identification of Petitioner. Trump's initial statements to the Police that he could not provide a detailed description of either of the individuals seen that night is much more believable and this Court finds to be the truth. This Court specifically finds that Kevin Crane had no part in Trump's perjured testimony. In short, the Court finds Mr. Trump's recantation concerning Kevin Crane to be a feeble attempt to both clear his conscience while still attempting to evade responsibility for his perjury. In contrast, the Court finds Mr. Crane's denial of these accusations credible, and his testimony was corroborated by Bill Haws.

However, in order for this recantation to mandate the relief sought by Petitioner, this recantation must also pass the Court's analysis as detailed above and explained below.

24. Charles Erickson: Petitioner asserts that Mr. Erickson's tardy discovery of his amnesia about the events of November 1, 2001, is new evidence of Petitioner's innocence.

Of course, at the time Petitioner filed his petition (February 14, 2011), Mr. Erickson had most certainly not exonerated anyone. On November 22, 2009, Mr. Erickson gave a statement indicating that it was Mr. Erickson who actually strangled Mr. Heitholt, and that Petitioner was present. That explanation showed an intact memory but did not exonerate either man of the murder. On February 9, 2011, Mr. Erickson issued a second recantation in which he never asserts they were not at the murder, but where he says Petitioner did not commit any crime and [Petitioner] did not know of Mr. Erickson's intent to commit a crime. (Exhibit 34d).

Subsequent statements from Mr. Erickson have evolved into a new narrative where Mr. Erickson now claims he has amnesia, has always had amnesia about the events of that night and has no memory about the murder whatsoever. Mr. Erickson's recantations are inconsistent and inherently in conflict with each other. Mr. Erickson even acknowledged that he had told so many different versions of the facts that he does not blame anyone for not believing him today. (H. Tr. 357, 394, 420).

Mr. Erickson testified he was "interested" in the Heitholt murder and read articles about the case. He claimed that the articles in the paper mentioned the fact that the cleaning lady stated one of the suspects asked for help. Yet Petitioner does not demonstrate that the media ever released this particular fact. (Trial Tr. 713, 716). Mr. Erickson stated that because he did not remember what happened that night, he began to wonder if he had committed the murder. Mr. Erickson related the incident on New Year's Eve of 2003-2004, when he talked to Petitioner about whether they were involved in the murder. Mr. Erickson now testifies, "I really did not think I was involved in the murder."

That contradicts his recent recantations. Mr. Erickson said he and Petitioner had a second conversation that Mr. Erickson admitted got loud and heated, and Mr. Erickson said he got in Petitioner's face at one point.

Mr. Erickson acknowledged speaking to Nick Gilpin in March of 2004. Mr. Gilpin is someone with whom Mr. Erickson socialized. Mr. Erickson admits that he "might have" told Mr. Gilpin that he was involved in the murder, and he told Mr. Gilpin that Petitioner strangled Mr. Heitholt and that Mr. Erickson had taken a lesser role in the murder. He admitted hitting Mr. Heitholt and that he told the cleaning lady to go get some help. Mr. Erickson, even when lead by counsel, stated that he was making assumptions when he said these things. Mr. Erickson also had a conversation with Art Figueroa in which he claims he told Mr. Figueroa that Mr. Erickson should have his DNA tested to see if he were involved.

Mr. Erickson testified he was arrested on March 10, 2004, and the video of his later interview with Mr. Nichols was played at the trial. (Exhibit 23). During this interview, Mr. Nichols tells Mr. Erickson not to tell him what Mr. Erickson had read in the newspaper, but to tell him what he remembered. (Exhibit 22). Mr. Erickson was questioned about this interview at trial and stated that he was not intimidated and it did not alter anything he told the police. (Trial Tr. 717, 722-723). This is not new evidence. Nor is the claim that Mr. Erickson was "fed" information a new allegation. Mr. Erickson claims his statement to the police was false and he did it to make himself appear less involved in the murder.

Mr. Erickson's rambling and self-serving narratives during the Habeas hearing are in sharp contrast to the certain and specific testimony Mr. Erickson gave at trial. (Exhibit R66). The trial itself was recorded in the media, and the Court is fortunate to be able to compare the witnesses' (Mr. Trump and Mr. Erickson's) demeanor at trial and at the hearing. This Court finds that Mr. Erickson was testifying truthfully at the jury trial, but is completely fabricating his current stories.

Mr. Erickson's contention that the criminal discovery he received in his case convinced him that he and Petitioner committed the crime is not credible. Erickson's claim that Mr. Trump's identification caused him to admit to a crime he supposedly did not commit are equally not credible. The State introduced Exhibit R72, which is a police report of the interview of Jerry Trump on the morning of the murder. Mr. Erickson testified that he reviewed the discovery and learned that Mr. Trump had identified Petitioner and Mr. Erickson. The police report demonstrates otherwise. It states that Mr. Trump "could not provide a detailed description of either of the individuals." (Exhibit R72). This allegation regarding Mr. Trump is false because Trump admitted that he never told anyone he could identify the killers until after Mr. Erickson had already pleaded guilty.

Mr. Erickson claims he met with Crane and Haws several times and then claims his attorney, Mr. Mark Kempton, was not present at any of these meetings except a proffer meeting with the prosecution. Mr. Kempton testified that this was not true and that he was present at all meetings.

After pleading guilty and being sentenced, Mr. Erickson wrote two letters to Mr. Heitholt's daughter. (Exhibits 25 and 26). In these letters, Mr. Erickson apologizes for the murder.

The first of those letters, dated January 25, 2006, consists of three single spaced handwritten pages and includes with it a two page police report of an interview by the police of Meghan Arthur. The Court notes that the content of the letter appears to be sincere and suggests an honest belief (and memory) that Erickson had committed the robbery and murder of Kent Heitholt, that Petitioner had joined him in committing those crimes, and that he felt remorse for his crimes. Mr. Erickson states in the letter, "I have wanted to apologize to you and your family for some time now. I didn't know how to go about it without seeming intrusive. I too was mad that Judge Hamilton wouldn't let me apologize at the sentencing. I thought that I would never have that chance again." (Exhibit R25).

25. Contrary to Mr. Erickson's current assertion that he has no memory of whether he or the petitioner committed the crimes, the record reflects that Mr. Erickson possessed knowledge of unique facts about the murder. Mr. Erickson knew (1) that the killers had told the cleaning lady to go get help (Exhibit R66a; Trial Tr.712, 713 – Mr. Erickson corrects the defense counsel that this fact had not been in the newspaper); (2) which parking lot at the Columbia Tribune where the murder occurred (Exhibit R57, findings of fact from Petitioner's post conviction proceeding); (3) the location on his body where the victim had been hit; (4) that a man had followed the suspects down the alley (Exhibit R57); (5) the description of the dock at the Tribune (Exhibit R57); (6)

where the cleaning lady had been standing (Exhibit R57); and (7) that the victim's car door was open (Exhibit R57).

26. Mr. Erickson has admitted that before he was arrested he told Nick Gilpin and then later Art Figeroa that he had hit the victim, that he saw Petitioner strangle the victim and that he told the cleaning lady to go get help (Exhibit R66e, Trial Tr. 860 to 867; and Exhibit R66i, Trial Tr. 893 to 894).

27. Mr. Erickson has described in vivid detail what he observed when he struck the victim with the tool. In one of his first police interviews on video, he tells the detective he "distinctly remembered" the first time he hit the victim, hearing this noise, seeing his face, and it made him sick. When asked by the officer if it was the victim screaming, Mr. Erickson corrects the officer, and says, "No it was more like a groan." (Exhibit R64b).

28. Mr. Erickson gave a statement to personnel at the Department of Corrections upon his arrival to begin serving his sentence that he and Petitioner had in fact committed the crimes for which they had been convicted. In describing what he had done, Mr. Erickson said, "I was drinking with a friend. We decided to do a robbery. Things got out of hand. I hit the guy with a tire tool, my friend strangled him and he was a sports editor for the paper. We didn't get caught for 2 years. It was a high profile case." (Exhibit R47).

29. At the Habeas hearing, Erickson's testimony appears to be that Mr. Erickson just does not remember the events from October 31 to November 1, 2001. But even the August 29, 2011, affidavit shows detailed memories by Mr. Erickson from that

evening. At the Swilling party, Mr. Erickson said he wore bell bottoms, ate candy, played a drinking game with cards, and saw Dallas Mallory (in a police uniform). The police broke up the party, and people fled in panic. Mr. Erickson got a ride from Petitioner because the guys he rode with fled without him. He saw his father when he got home.

Mr. Erickson saw Petitioner's sister looking pretty, dressed in a cat costume, when she got them into By George. Petitioner paid the cover charge and Mr. Erickson had his hand stamped. Mr. Erickson remembered going inside, feeling young and out-of-place. He didn't like the light or music with the costumed people dancing. Because the lights made Mr. Erickson's head hurt, he asked Mr. Igleheart to take him home, but the latter was not ready to leave. These details show detailed memory from the evening. (Exhibit 34a).

30. Under this Court's analysis of this witness credibility, Erickson's testimony at the April 2012 hearing was not credible. Erickson is not an unintelligent person; he was aware of the consequences of his testimony at the original trial and also acutely aware of what his recantation could mean to his own freedom now. Erickson certainly had the opportunity to have seen and heard the things he testified about at the original trial. Any motive for testifying a certain way (memory loss) via the recantation is obvious. The conflict in the two stories is axiomatic. Moreover, the general reasonableness of the prior testimony when compared to the recantation (complete memory loss) weighs overwhelmingly in favor of a factual finding that the recantation is simply not credible. Moreover, the manner in which he testified revealed a rambling, almost incoherent narrative full of inconsistencies and self-serving statements. This Court

specifically finds Erickson's Habeas testimony (recantation) to be false, not credible and untrue.

31. Mr. Baer was a sports writer at the Columbia Tribune on October 31, 2001. (H. Tr. 544). The writers worked late, until 2:00 a.m. in the morning at times. (H. Tr. 544). The computers would shut down at 2:00 a.m. (H. Tr. 545). After Kent Heitholt left, probably after 2:00 a.m., Shawna Ornt came in and said something had happened to Kent. (H. Tr. 546). He and another writer ran out and saw Mr. Heitholt on the ground. (H. Tr. 546-547). They turned him over, face up and had tried to feel for a pulse. (H. Tr. 546-547). They waited for paramedics. (H. Tr. 548). At some point, he called the managing editor and Mike Boyd. (H. Tr. 550). He does not recall if Mr. Heitholt was covered, or when he was covered. (H. Tr. 551). He was not called as a witness at trial. (H. Tr. 553). Again, Mr. Baer's testimony contributed nothing to the real issue(s) in this matter and his entire testimony is immaterial.

32. Ms. Kim Bennett testified for the Petitioner. She lived in Columbia and grew up in Columbia. (H. Tr. 460-461). She testified that on October 31, 2001, she and some friends went to By George's club. (H. Tr. 461). She was 16 years old at the time. (H. Tr. 461). She saw Petitioner in By George. (H. Tr. 462). She also knew Mr. Erickson as well. (H. Tr. 463). She was drinking that night, but claims to have had very little to drink – a couple of sips – and was not intoxicated. (H. Tr. 463). She testified the bar closed "around 1:00 a.m.," and people were leaving. (H. Tr. 464). She testified that she saw Mr. Erickson and Petitioner outside the bar and saw them walk "straight" to their car and drive away. (H. Tr. 465-466). Ms. Bennett drew a diagram (Exhibit 47) of where she

claimed Petitioner's car was parked. (H. Tr. 468-469). Her description, however, is inconsistent with the trial testimony of both Mr. Erickson (Tr. 504 – First Street – almost two intersections from the club, 516) and Petitioner (Tr. 1825-1826 – corner of First and Ash). In fact, in this hearing, Mr. Erickson reiterated that Petitioner's car was parked on First Street.

Ms. Bennett testified that several weeks after the March 10 arrest, two officers from the Columbia Police Department appeared at her home and spoke to her. (H. Tr. 470-471). She stated that they asked her questions and that she told them that she saw Petitioner and Mr. Erickson "cross the street" and get into their car and leave. (H. Tr. 471-472). She testified that in 2005, the police again spoke to her about the New Year's Eve party. (H. Tr. 473-474). She testified that she knew nothing about it other than that "they were arguing" and Mr. Erickson was yelling. (H. Tr. 474).

Petitioner's father contacted her after the trial and she eventually contacted him and she told him how she had seen them that night. (H. Tr. 475-476). She credited this contact because several of Petitioner's friends knew her information. (H. Tr. 492-493). She was later contacted by Ms. Zellner's office in December of 2010. (H. Tr. 477). She prepared an affidavit for one of Petitioner's investigators. (H. Tr. 478). She testified she was 100% certain of what she saw. (H. Tr. 479-480).

Ms. Bennett testified she was by the back door of By George's. Mr. Erickson and Petitioner came out the front door. (H. Tr. 484-485). She described Petitioner's car as maroon. (H. Tr. 486). The trial testimony is that car was blue. She also testified that the car was less than a block from where she was standing on the parking lot of By George's.

(H. Tr. 487). Once more, this is inconsistent with Petitioner's own trial testimony. (Tr. 1825-1826). Trial Exhibit 9 was shown to Ms. Bennett, who placed Petitioner's vehicle in a location very different from where the vehicle was described at trial. (H. Tr. 489-491). She acknowledged also that several of Petitioner's friends knew that she had this information. (H. Tr. 492-493). She could not say where Mr. Erickson and Petitioner were at the time of the murder. (H. Tr. 495). While the Court has doubts about the veracity of Ms. Bennett's claim that she told the police this information, her credibility on that issue is not necessary to resolve this claim. Under the prejudice prong of the Brady analysis, this claim is denied. Ms. Bennett's testimony would be inconsistent with the evidence at trial, including Petitioner's own testimony, and would not have been helpful to Petitioner's defense. Again, this testimony, proffered by Petitioner, contributed nothing to the real issue(s) in this matter and her entire testimony is immaterial.

Claim I – The Recantations

33. Both Mr. Erickson and Mr. Trump have recanted their trial testimony. The Petitioner (Amicus primarily) argues that he has no obligation other than to prove that a recantation was made in order to be entitled to relief. This argument fails because of two basic legal principles well-established in Missouri.

> To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts or critical physical evidence -- that was not presented at trial.

Schlup v. Delo, 513 U.S. 298, 324 (1995) (emphasis added).

Second, "[r]ecanting testimony is exceedingly unreliable and regarded with suspicion; it is the right and duty of the court to deny a new trial where it is not satisfied such testimony is true." *State v. Harris*, 428 S.W.2d 497, 501 (Mo. banc 1968); *State v. Cook,* 339 S.W.3d 523 (Mo. App. E.D. 2011).

A recantation can be sufficient to entitle a petitioner to habeas relief, but not if the recantations are not credible. In this case, Mr. Erickson (and Mr. Trump for that matter) made initial recantations that did not exonerate the Petitioner. Their subsequent recantations, made after considerable consultation with Petitioner's legal team, became more elaborate and more exculpatory – but at least in Erickson's case, less credible. This Court cannot reverse a finding of guilt by a jury, affirmed by two appellate courts, based on a recantation that is not credible.

34. Mr. Erickson claims two reasons for falsely testifying at trial. First, he claims that he was in fear of receiving a death sentence if he did not cooperate with the State. Both Mr. Kempton and Judge Crane testified, credibly, that there were never any discussions of a possible death sentence for Mr. Erickson, nor were there ever any discussions about even amending the charges against Mr. Erickson to murder in the first degree. The Missouri Supreme Court had already ruled, prior to the arrest of Mr. Erickson, that 17-year-old murderers could not be executed. *State ex rel. Simmons v. Roper,* 112 S.W.3d 397 (Mo. banc 2003).

Mr. Erickson's second stated reason for cooperating with the prosecution and implicating Petitioner was because Mr. Jerry Trump had allegedly identified both men. That claim is untrue. Up until the time of the actual trial of Petitioner, and long after Mr.

Erickson had pled guilty, Mr. Trump had not been able to identify anyone. In fact, Mr. Trump was still imprisoned at the time Mr. Erickson plead guilty in November of 2004, and Mr. Trump's recantation does not suggest he made any identification until after Mr. Erickson's plea. No hint of being able to identify anyone was made by Mr. Trump until a month after Mr. Erickson had pled guilty.

35. The testimony of Mr. Erickson's trial attorney, Mark Kempton, is also compelling. Though told by Mr. Erickson of his desire to plead guilty from their first meeting, Mr. Kempton competently and thoroughly represented Mr. Erickson and did not allow Mr. Erickson to plead until Mr. Kempton was certain that Mr. Erickson's confession was both voluntary and true. Mr. Kempton received and analyzed all of the evidence, and communicated those contents to Mr. Erickson. Mr. Kempton proactively addressed any mental health issues and had Mr. Erickson evaluated. Mr. Kempton fully understood his ethical obligations to Mr. Erickson and represented his interests well.

36. The two letters Mr. Erickson wrote to the victim's daughter (Exhibits 25 and 26) also support the conclusion of this Court and the jury that Mr. Erickson's trial testimony in 2005 was true. The letters reflect a genuine remorse that Mr. Erickson now has extinguished.

37. Finally, with regard to Mr. Erickson, the Court believes that Mr. Erickson is now motivated to fabricate these recantations because of a dislike of the realities of prison life along with a hope that his release will occur once he assists in releasing Petitioner. While denials of this motivation were made, the record clearly reflects Mr. Erickson's hope and expectation that he, too, will be released. In the meantime, Mr.

Erickson's time in prison is likely to be lengthened because of the difficulties from other offenders' perception of him as a snitch. This recantation occurred under circumstances that are far, far away from being free from suspicion of undue influence or pressure from any source. Moreover, the record discloses a possibility of collusion (perhaps implied but nonetheless present) between the defendant (or his agent(s)) and this witness between the time of trial and the retraction

38. Mr. Trump's recent recantations suffer from the problem that this Court believes Mr. Trump's various recantations to be both true and false. As will be noted, some of the new assertions made by Mr. Trump are simply improbable and dubious. This Court believes that Jerry Trump did see two teenage white males the night of the murder. However, this Court does NOT believe that Jerry Trump testified truthfully about his positive identification of Ryan Ferguson. Jerry Trump negates his own credibility by falsely accusing Kevin Crane and Bill Hawes as being the source of his perjury.

The evolution of Mr. Trump's recantations developed in the same suspicious manner as Mr. Erickson's. In both cases, Mr. Trump and Mr. Erickson made retractions to Petitioner's attorney that did not exonerate Petitioner. Only after repeated visits from Petitioner's legal staff, and overt prompting, did both of these individuals come to the conclusion that they were both "coerced" into testifying falsely at trial. In October of 2011, Petitioner's investigator, Steve Kirby, visits Mr. Trump on several occasions (by telephone and in person) and finally obtains an affidavit from Mr. Trump recanting his positive, in-court identification of Petitioner. (1st Affidavit). (H. Tr. 35).

Petitioner's investigator makes repeated visits to Mr. Trump and finally gets a new affidavit that comports with the Petitioner's "theme" – prosecutor coercion. (Exhibit 1, p. 69). (H. Tr. 39, 49-50). Mr. Kirby referred to it as "defense collaborating." (H. Tr. 38).

The new affidavit claims that Judge Crane had a nine-month-old newspaper article with him when he interviewed Mr. Trump and showed Mr. Trump pictures of Petitioner and Mr. Erickson. (Exhibit 1, pp. 78, 88). Aside from the fact that Mr. Trump testified three times under oath that he saw the newspaper article in prison when his wife sent it to him (Tr. 1000, 1020-21, 1031), Mr. Trump's factual allegation is not credible.

These events are completely inconsistent with Trump's prior, more reliable, statements to the police the night of the murder. Unfortunately, his recantation has been jumbled together with the claim that Judge Crane coerced Mr. Trump into making an identification on December 21, 2004.

This Habeas Court has had the heretofore rare opportunity to review the entire original trial on video, as well as by transcript. It appears to this Court that at all relevant times, Kevin Crane was especially aware of his special role as a Prosecutor who "has the responsibility of a minister of justice and not simply that of an advocate." It is unknown if Crane believed Trump's positive identification, what is known is that Crane gave the trial court every opportunity to exclude this evidence and even down played it in his closing argument. This Habeas Court expressly finds that while Trump recants truthfully that he could not positively identify Ferguson as an individual he saw the night of the murder. Yet in an effort to avoid prosecution for perjury, Trump attempts to transfer blame onto Kevin Crane and the State. This Court finds that the recantation is accurate as

to the Trump's observations the night of the murder but are false as to the source and rationale behind his original perjury.

39. The credible and unequivocal denial of Mr. Crane that he knowingly used perjured testimony at the jury trial is corroborated by the testimony of Mr. Bill Haws, the prosecutor's investigator who was present during these meetings. Their credibility is bolstered by the facts and circumstances surrounding Mr. Trump's testimony and in-court identification.

40. The 2005 trial testimony of Mr. Erickson is credible. The various inconsistent recantations of Mr. Erickson are not credible. Mr. Trump's recantation is credible in part, but also not credible as to the reason why he committed perjury at the first trial. The recantation of Erickson does not, therefore, constitute new evidence to support a claim of actual innocence. Erickson's recantation is a textbook example of why the law views recantations with suspicion and caution. The recantation of Trump is problematic in that this Court does find he perjured himself at the jury trial but equally perjured himself at the April 2012 habeas hearing by falsely accusing Kevin Crane as the reason and source of his original perjury. Nonetheless, the Court does not find Trump's recantation affords Petitioner the relief he seeks. Not only must this Court find that the recantation is credible, it must also find clear and convincing evidence sufficient to undermine the Court's confidence in the correctness of the judgment. State ex rel. Amrine v. Roper, 102 S.W.3d 541 (Mo. banc 2003) at 548. If Mr. Trump had testified truthfully at trial, his testimony would have been merely that he saw two teenage white males at the scene and nothing more. This would have been corroborative of Erickson's

testimony. When compared to Erickson's vivid description of the horrific details of the murder, Trump's false positive identification was not material and merely cumulative. This Court is in no way left with a firm belief that but for the perjured testimony the defendant would most likely not have been convicted. Trump's perjured testimony at the jury trial was not a difference-maker.

41. Petitioner abandoned his claim that Mr. Boyd is the actual killer of Mr. Heitholt. The State filed a motion in limine and during a pretrial hearing to address motions filed by both parties; Petitioner indicated he did not intend to proceed with the claim.

42. By agreement with the State, Petitioner was given time to investigate information from Enterprise Car Rental concerning a vehicle owned by Mr. Boyd. Nothing further was submitted and the Court has assumed, based on the fact that Petitioner filed his proposed findings of fact and conclusions of law, that Petitioner had no further evidence to offer as a result of his investigation.

43. Petitioner also asserted he would prove that he and Mr. Erickson could not have committed the murder, relying on the "timeline" established by various witnesses. Petitioner did not sustain his burden. Other than the time in which the Tribune's computers were shut down on the morning of November 1, 2001, and the time of the 911 call to the police, all other times mentioned by witnesses were approximated and do not eliminate Mr. Erickson and Petitioner as the killers.

44. Claim I denied.

Claim II

45. In Claim II, Petitioner asserts that Judge Crane suborned perjury from Mr. Trump. The Petitioner did not merely fail to sustain his burden of proof as to this claim; this Court finds that the claim is untrue. Judge Crane did not encourage Mr. Trump to testify falsely in the trial of Petitioner. There was no knowing use of perjured testimony by Judge Crane. Claim II denied.

Claim III

46. In Claim III, the Petitioner asserts that the testimony of Kim Bennett established a Brady violation. There was also a claim that Mr. Boyd made a statement to police that was not given to the defense. The Court views with caution the recollection of witnesses presented several years after the events. Not unlike a belief in Petitioner's actual innocence, the recollections may be sincerely believed but nevertheless inaccurate. This is one of many reasons why subsequent habeas proceedings based on claims of actual innocence should properly be limited to exceptional circumstances.

47. To show Brady prejudice, the offender must demonstrate a reasonable probability that the outcome of the proceeding would have been different. Id. at 128 quoting Strickler v. Greene, 527 U.S. 263, 280 (1999) quoting United States v. Bagley, 473 U.S. 667, 682 (1995). In Bagley, the Supreme Court stated, "[w]e find the Strickland formulation of the Agurs test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence to the accused: the evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the

proceeding would have been different. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. at 682.

48. As noted above, the testimony of Ms. Bennett would not have benefitted the Petitioner. Her testimony is not credible or persuasive because it directly contradicts the testimony of Petitioner, himself, at trial. If anything, this testimony only highlighted the fact that Petitioner and Mr. Erickson's testimony about the events of that night were strikingly consistent, in spite of any claim that Mr. Erickson "blacked out." Regardless, this testimony would not have changed the outcome at trial.

Nor does the testimony of Mr. Boyd create a timeline that made it impossible for Mr. Erickson and Petitioner to commit the murder.

49. Subsequent to the hearing and prior to filing proposed findings, the Petitioner submitted Exhibits 111, 112, and 112a to this Court. The State indicated it would make no objection to their admission and consideration by the Court.

50. Exhibit 111 is purported to be the Department of Corrections polices for sending and receiving mail, and is dated May 11, 2003. Petitioner appears to argue that this policy somehow casts doubt on Mr. Trump's testimony that he received the Tribune newspaper article (Exhibit T4) from his wife while in prison. The Court finds that Exhibit 111 casts additional doubt on the accuracy of Mr. Trump's original trial testimony. Section III, F., 1.f, states that a letter is limited to 5 additional pieces of paper or clippings. Mr. Trump's testimony at his deposition suggests that his wife's letter with the newspaper article would have been in violation of this policy:

"My wife sent me a copy of the page out of the paper where two had been arrested on suspicion of being the ones that had murdered Kent Heitholt."

(Exhibit T6; June 29, 2005, Trump depo, p. 42).

51. Exhibit 112 is what appears to be an edited news clip from an unknown, and undated, news report. Again, the State did not object to this Court receiving and considering this item for whatever evidentiary value this Court gives it.

In the video clip, Mr. Crane does not say he will seek or even consider the death penalty for Mr. Erickson, but that he will be reviewing and researching the matter.

52. Exhibit 112a is a newspaper article dated March 13, 2004 (which was three days after the arrests), in which the reporter states that Mr. Crane "hasn't decided whether to pursue the death penalty for one of the two suspects ...." The article notes that Mr. Crane discusses the fact that the Missouri Supreme Court had already ruled that 17-year-olds could not be executed, which was consistent with Mr. Crane's testimony at this hearing. It is true that at the hearing, Mr. Crane testified that the death penalty "was never in play" with regard to either suspect. (H. Tr. 558). The Court believes this minor inconsistency is due to the passage of time and memory rather than an attempt to mislead.

More important, these pieces of evidence suggesting that Mr. Crane may have initially considered whether the death penalty was appropriate for Petitioner in no way alters this Court's conclusion that Mr. Erickson was never threatened by Mr. Crane or Mr. Kempton with the death penalty.

Mr. Crane made it clear that Mr. Erickson was never subject to the death penalty (H. Tr. 560), and Mr. Kempton confirmed this fact (H. Tr. 630-631). It is this fact, that Mr. Erickson was never threatened with the death penalty that is relevant to this Court's conclusion that Mr. Erickson's recantations are fabrications completely lacking in credibility.

53. Petitioner also submitted the affidavit of his trial counsel, Charles Rogers, whom Petitioner had indicated was unavailable for the hearing because of a serious injury.

Exhibit 113 is a lengthy affidavit by Mr. Rogers in which he offers opinions about a number of legal matters and reports that there were various items of evidence or information not provided to him prior to the trial. In other words, the affidavit is intended to support Petitioner's new claims of Brady violations.

The State objects to the affidavit, Exhibit 113, because it is hearsay and because the State has not had the opportunity to ask any questions of Mr. Rogers. While the State's objections are both reasonable and proper, this Court overruled the State's objection and received Exhibit 113. The Court does so for one compelling reason, to bring some finality to this case and address all issues.

Petitioner has not actually taken the proper steps to obtain review of his "new" Brady claims, although this Court believed it was clear to Petitioner that a formal motion – setting forth the specific claims Petitioner wished this Court to consider and address – should be filed. Though Petitioner has failed to do so, the Court nevertheless will endeavor to address these claims over the State's objections.

54. As to Petitioner's claim that the State had some obligation to prepare a report and notify the defense every time a witness is contacted, the Petitioner provides no authority to support this proposition. Mr. Haws telephoned Mr. Trump while Mr. Trump was still incarcerated and asked Mr. Trump to contact the prosecutor when released. That telephone call does not mandate a police report being prepared or disclosure of this telephone call to the defense. Yet from this event, it appears that Mr. Rogers now concludes that the State fabricated Mr. Trump's story. This Court finds that Mr. Trump fabricated, Mr. Trump's story, not the State. This is one of several reasons why Mr. Rogers' affidavit is not particularly persuasive. This Court has already addressed the allegation that Mr. Crane had Mr. Trump fabricate his testimony and restates the conclusion that this claim is completely untrue. The telephone call does not, as Mr. Rogers suggests, establish "governmental involvement in the identification." (Exhibit 13, ¶47).

55. Likewise, this Court has already addressed Petitioner's claim that Mr. Boyd's testimony created a timeline that made it impossible for Mr. Erickson and Petitioner to have committed the murder. Unlike Mrs. Trump, who did not appear and testify and whose potential testimony – had she testified – is only a matter of speculation, Michael Boyd did testify at the hearing and it was clear to this Court that Mr. Boyd's times were approximations:

> Q. So are you giving your best estimate as to how much time?
> A. Pretty much my best estimate, yes.
> Q. No reason to be memorizing times that night?
> A. Unless it's right in front of me, no.

Q. And when you get out to your car and you're done talking with Kent, you give estimates of your time, but you don't know exactly when?

A. Not exactly, no.

Q. And one police report you gave your best guess; it could have been 2:15 to 2:20?

A. They asked me how you all do and, you know, and I just pretty much guess.

Q. So you're not committing to saying I know for sure I left at exactly 2:20 or 2:15?

A. I know it was close to 2:20, but the exact time, I was not paying attention.

Q. That's based on your best guess based on how long it might have been when you were chit-chatting with people?

A. Fair to say.

(H. Tr. 538-539).

Thus, Mr. Rogers is again incorrect in asserting that Mr. Boyd's testimony creates some timeline that would prove Petitioner innocent. It is abundantly clear that the times given by these witnesses were not intended as exact. Furthermore, according to the Petitioner's theory, if the timeline were true, then Mr. Heitholt would have to have still been alive when Ms. Ornt called the police at 2:26 a.m. – to report he was dead. The timeline advocated by Mr. Rogers and the Petitioner make it impossible for anyone to have strangled or murdered Mr. Heitholt at the time the crime was reported.

The Court does not fault Mr. Rogers for continuing to be an advocate for his client, but the Court does not give great weight to Mr. Rogers' opinions or conclusions. As one example, Mr. Rogers' assertion that, "I would have been able to connect Boyd to the murder as the likely suspect" (Exhibit 113, ¶42), is untrue and incorrect based on the evidence produced at this hearing.

56. Finally, this Court has also addressed Petitioner's allegation that Kimberly Bennett's testimony was new Brady evidence. Mr. Rogers does not say he was unaware of her testimony in his affidavit, only that the prosecution did not provide it to him. (Exhibit 113, ¶17). Ms. Bennett's testimony is inconsistent with the trial testimony of Mr. Erickson and Petitioner. She did not see what she claims and had Mr. Rogers used her as a witness, she would have impeached the credibility of Petitioner.

SUMMARY

Despite voluminous filings and a lengthy hearing, Petitioner's only relevant evidence is the recantations of Erickson and Trump. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003) clearly states that:

> The appropriate burden of proof for a habeas claim based upon a freestanding claim of actual innocence... require the petitioner to make a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment. See Ex parte Joe Rene Elizondo, 947 S.W.2d 202, 205 (Tex.Crim.App.1996); Miller v. Commissioner of Correction, 242 Conn. 745, 700 A.2d 1108, 1132 (1997). The burden of establishing a fact by clear and convincing evidence is heavier than the "preponderance of the evidence" test of ordinary civil cases and is less than the "beyond reasonable doubt" instruction that is given in criminal cases. Evidence is clear and convincing when it "instantly tilts the scales in the affirmative when weighed against the evidence in opposition, and the fact finder's mind is left with an abiding conviction that the evidence is true." In re T.S., 925 S.W.2d 486, 488 (Mo.App. E.D.1996).
>
> *Amrine* at 548.

With regard to the recantation of Erickson, Petitioner has not established by clear and convincing evidence that the recantation is true. Far from being left with an abiding conviction that this evidence is true, this Court finds the recantation of Erickson to be not

credible and false. With regard to the recantation of Trump, this Court finds that his recantation is credible and true - as to his falsely identifying Petitioner; but not credible and false as to the reason for his perjury being the actions of Kevin Crane and the State. Even so, this Court finds as a matter of law that Trump's recantation does not undermine this Court's confidence in the correctness of the original jury trial verdict and judgment.

Conclusion

Accordingly, after independent reflection, this Court denies Petitioner's petition for a writ of habeas corpus. Judgment is entered on behalf of Respondent.

SO ORDERED.

10/31/12
Date

The Honorable Daniel R. Green

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PASCUA YAQUI TRIBE
COURT OF APPEALS
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IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,
PROSECUTOR'S OFFICE,

Petitioner,

vs.

HONORABLE MARGARET FLORES
JUDGE, PASCUA YAQUI TRIBAL
COURT

Real Party in Interest:
CHRISTOPHER MONTANA
Respondents

Appeals Case No.: CA12-007

Tribal Court Case No: CR-12-005

RESPONDENT CHRISTOPHER MONTANA'S NOTICE OF ERRATA

Respondent, Christopher Montana (Hereafter "Respondent") by and through undersigned counsel, Fredric J. Brahms, hereby submits Errata consisting of a Table of Contents and Table of Authorities (See attached), which were inadvertently not included in Respondent's November 16, 2012 Response to the

Tribe's Petition For Special Writ. These two pages should be placed between pages 2 and 3 of the Response.

Respectfully submitted this 19th day of November 2012.

Fredric J. Brahms, J.D., Counsel for
Respondent, Christopher Montana

Original filed by e-filing and with the
Clerk of the Pascua Yaqui Court of Appeals
On: November 19th 2012
A copy mailed / hand delivered
on this 19th of November 2012 to:

Guadalupe Gutierrez

Deputy Prosecutor

Pascua Yaqui Tribe

Hon. M. Flores

Pascua Yaqui Tribal Court

Feliciano Cruz

Pascua Yaqui Social Services

Fredric J. Brahms, J.D.

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PASCUA YAQUI TRIBE
COURT OF APPEALS
NOV 16 2012
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CLERK OF COURT

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IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, PROSECUTOR'S OFFICE, Petitioner, vs. HONORABLE MARGARET FLORES JUDGE, PASCUA YAQUI TRIBAL COURT Real Party in Interest: CHRISTOPHER MONTANA Respondents	**Appeals Case No.:** **Tribal Court Case No: CR-12-005** **RESPONDENT CHRISTOPHER MONTANA'S RESPONSE TO TRIBE'S PETITION FOR SPECIAL WRIT**

Respondent, Christopher Montana (Hereafter "Respondent") by and through undersigned counsel, Fredric J. Brahms, hereby submits his Response to the Tribe's Petition for Special Writ of the Tribal Court's ruling granting an evidentiary hearing in the Tribal Court, Case No. CR-12-005, and asks this Court to uphold the Respondent Judge's decision to grant an evidentiary hearing on

whether the Tribal Prosecutor's Office coached the victim witness in the underlying criminal case.

Respectfully submitted this 16th day of November 2012.

Fredric J. Brahms, J.D., Counsel for
Respondent, Christopher Montana

Original filed by e-filing with the
Clerk of the Pascua Yaqui Court of Appeals
On: November 16th 2012
A copy mailed
on this 16th of November 2012 to:
Guadalupe Gutierrez
Deputy Prosecutor
Pascua Yaqui Tribe
Hon. M. Flores
Pascua Yaqui Tribal Court
Feliciano Cruz
Pascua Yaqui Social Services

Fredric J. Brahms, J.D.

STATEMENT OF FACTS/PROCEDURAL BACKGROUND

The relevant facts include the following:

On May 7, 2012, Defense counsel filed a motion, which included referenced to alleged "coaching" of the alleged victim, E.R. by the Tribal Prosecutorial team. These allegations were based on statements made by E.R. to his mother during one of her visits with him at the facility he resides at in the Phoenix area. During the hearings concerning this motion, Defense counsel requested an evidentiary hearing and indicated that E.R.'s mother, Almarosa Ramirez, and E.R. would be called to testify at such hearing. After considering both written and oral argument by the parties, the Tribal Judge, Margaret Flores, in duly exercising her discretion determined that Respondent has provided sufficient allegations of coaching to warrant an evidentiary hearing on this issue.

As detailed below, the Tribe, through Deputy Prosecutor Guadalupe Gutierrez, has (1) not presented an issue that warrants this Court accepting jurisdiction and (2) misplaces reliance on the cited case law on this issue and, accordingly, has not presented meritorious argument for seeking to prevent an evidentiary hearing on the coaching issue.

ISSUES PRESENTED:

1. Has Tribe Presented an Issue Which Warrants this Court Accepting Jurisdiction to Consider its Petition for Special Writ?
2. Whether the Trial Court Exceeded its Jurisdiction or Legal Authority When it Determined There was a Sufficient Basis to Grant a Hearing on the Issue of Coaching?
3. Whether the Trial Court's Determination to Grant a Hearing was Capricious and Arbitrary?

STANDARD OF REVIEW

The Tribal Court's granting a motion for a hearing on the issue of coaching should be reviewed by this Court for an abuse of discretion. By analogy, in Arizona the courts review the trial court's granting of a motion to suppress for an abuse of discretion. *State v. Gulbrandson*, 184 Ariz. 46, 58-59, 906 P.2d 579, 591-92 (1995). Arizona courts also consider the evidence presented at the hearing in the light most favorable to upholding its finding, *State v. Ossana*, 199 Ariz. 459, 18 P.3d 1258, (App. 2001).

ARGUMENT

1. There is no basis to accept jurisdiction of the Tribe's Petition for Special Writ.

In the Petition, the Tribe seeks a Special Writ to overturn Judge Flores' decision to grant a hearing on the issue of coaching asserting that Respondent has not presented a sufficient factual basis in his motion for

such hearing to take place. The Tribe also claims that to allow such hearing would "...set a precedent that is procedurally inappropriate and contrary to established law." *See* Petition, fn 5 at p. 11. While the Tribe does not elaborate on how it is "procedurally inappropriate" or "contrary to established law" as discussed in detail below, the Tribe's reliance on any of the cases cited in the Petition is misplaced. Each of those decisions concern matters determined based evidence submitted on the record in a judicial proceeding, and are inapplicable to the Tribe's attempt to prevent a hearing from even taking place and some are also limited to the facts of the cited decisions.

For example, in *State v. Fullen*, 1 Ariz. App. 466, 404 P.2d 732 (1965), the defendant appealed the trial court's denial of his motion for new trial, which was based, in part, on a contention of coaching a witness. At the hearing on the motion for new trial, the subject witness, who testified at trial, was re-examined and other evidence was presented on this issue. The *Fullen* decision was based on the evidence presented in the record at the hearing on the motion for new trial and in the record at trial. The Tribe is citing to and asking this Court to apply standards and rulings based on what actually occurred at hearings or at trials to the granting of a motion to hold a hearing on an issue. It is comparing "apples and oranges" and is literally putting the

cart before the horse. In the context of the *Fullen* case, the Tribe's challenge of the Tribal judge's decision to grant Respondent a hearing would be tantamount, and no less inappropriate, than had the prosecutor in *Fullen* challenged the trial court's decision to hold a hearing on the motion for new trial.

In the Petition, as part of its argument for acceptance of jurisdiction, the Tribe also asserts that "If the decision stands, the Tribe will be subject to a hearing that is not supported by the facts in the record." *See* Petition at p.12: 7-9. Since a hearing has not taken place with witnesses testifying under oath and subject to cross-examination, no "record" of facts has been established on this issue. Moreover, it is axiomatic that the factual allegations needed in a motion in order to proceed to a hearing need not be supported by detailed affidavits or other evidence. The presence or absence of sufficient evidence to grant the relief sought will be determined on the record in the proceeding. The Tribe further claims that the minor victim will be "...subject to questioning where the victim does not have independent counsel" as another basis for this Court accepting jurisdiction. The alleged victim will be subject to questioning at trial in this matter without the assistance of "independent counsel," as well. That circumstance does not present a reason for this Court to accept jurisdiction of this Petition, which only seeks this

Court to overturn the Tribal Court's decision to grant a hearing on the issue of coaching. *See* Petition at p. 20:2-3. [1]

The Tribe further asks this Court to apply the Arizona Rules governing Special Actions. In Arizona, the courts have accepted special action review in criminal matters on a variety of issues, including double jeopardy, right to jury trial, the questioning of jurors, grand jury/probable cause proceedings, blood alcohol test issues, pleas and plea agreements, allegations of prior convictions, speedy trial issues, change of judge and disqualification of counsel. In general, Arizona appellate courts have accepted jurisdiction in interpreting discovery rules, rules of evidence, procedural rules and statutes. There are also many examples of special actions in which the issue required interpretation of a statute that was determined to be a legal question of statewide significance.(*See* e.g., *Nowell v. Rees*, 219 Ariz. 399, 403, 199 P.3d 654, 656(App.2008) where the court accepted special action jurisdiction to interpret rules of procedure and statutes relating competency proceedings; *See* also *Waters v. O'Conner*, 209 Ariz. 380, 381, 103

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[1] While the Petition refers to the Tribal Court's denial of the Tribe's motion for appointment of a guardian ad litem for the minor victim, the propriety of such decision is not before this Court and should not be considered by this Court in rendering its decision on any issue, including accepting jurisdiction.

P.3d 292, 293 (App. 2004) where the court accepted special action jurisdiction concerning how to determine whether a person is a clergyman for purposes of A.R.S. § 13-4062(3).).

In this case, whether there is a sufficient factual basis to hold an evidentiary hearing on a coaching issue does not fit into any of the categories of criminal issues listed above for which Arizona appellate courts have accepted special action jurisdiction. Nor does this issue involve the interpretation and/or application of any rules or statutes governing Pascua Yaqui matters and it does not involve a legal question of Tribal nationwide significance. Simply because the Tribe does not have the ability to appeal criminal rulings and decisions does not mean that every decision that a Tribal judge makes, in particular one that merely grants an evidentiary hearing on an issue that the judge determined had sufficient factual allegations if proved at the hearing would warrant granting relief.

Accordingly, this Court should refuse to accept special action jurisdiction of the Tribe's Petition for Special Writ.

2. The Tribal Court did not exceed its jurisdiction in granting a hearing, nor was it arbitrary or capricious to grant such hearing.

Even if this Court accepts special action jurisdiction of the Tribe's Petition, it lacks merit because, among other reasons, Deputy Prosecutor, Guadalupe Gutierrez, misplaces reliance on the various cases cited therein, including *State v.*

Fullen, 1 Ariz. App. 466, 404 P.2d 732 (1965), *State v. Hughes*, 104 Ariz. 535, 456 P. 2d 393, 396 (1969) and *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002). All three of these cases discussed the issue of coaching a witness concerning evidence or lack thereof at a judicial proceeding, not what evidentiary showing, if anything but allegations, is required in a motion to get a hearing. Further, contrary to the Tribe's contention in the Petition, none of these cases uses the phrase "prima facie case" in discussing the requirements to establishing coaching at a judicial proceeding. The Tribe also misquoted, misinterpreted, misapplied and in at one decision incorrectly cited the referenced material.

In *Fullen*, supra, the defendant appealed the trial court's denial of his motion for new trial, which was based, in part, on a contention of coaching a witness. At the hearing on the motion for new trial, the subject witness, who testified at trial, was re-examined and other evidence was presented on this issue. The *Fullen* decision was based on the evidence presented in the record at the hearing on the motion for new trial and in the record at trial. The *Fullen* decision is actually supportive of Respondent's position. Notwithstanding that the witness testified at trial, who identified the defendant, the court allowed a hearing pursuant to a motion for new trial to include new testimony by this same witness and other evidence (photographs) that the defendant maintained established coaching of this witness. In the Petition, the Tribe misstates the ruling in *Fullen* in that the court did not state

that "A witness offering testimony that is consistent with previous statement does not constitute coaching or priming by the government." Petition at 16:9-11. The Fullen court did state the witness testified at the hearing on the motion for new trial consistent with his trial testimony. Fullen at 735. The court did find, however that merely handing a witness photographs and asking if he can pick out the person is not coaching. *Id.*

The trial court did not decide that the evidence was insufficient to show coaching until hearing and receiving all the evidence at the hearing on the motion for new trial. *Fullen* does not support the Tribe's contention that no evidentiary hearing on the issue should take place and does not establish a rule, even by analogy, that can be applied to maintain that there is insufficient basis to support a contention of coaching presented in a motion to warrant a hearing. *Fullen* merely establishes that on its facts and after an evidentiary hearing where evidence, including photographs and testimony under oath and subject to cross-examination, there was insufficient evidence of coaching.

In *Hughes*, *supra*, the defendant filed a pro se appeal of his rape conviction. Among the grounds for the appeal, defendant contended that "… the whole trial was a conspiracy against him…" *Id.* at 395, and that "…the record indicates that the prosecutor coached witnesses outside the courtroom to produce incriminating testimony." *Id.* at 396. On the issue of coaching, Hughes merely ruled that based

on the trial record there was no evidence indicating the prosecutor "coached" the witnesses. Id. at 396. Thus, such ruling is not applicable to whether a motion alleging coaching presents a sufficient basis to warrant a hearing.

In addition, the Tribe, through Ms. Gutierrez, blatantly misstates the *Hughes* court's ruling on this issue by insinuating that the court ruled the coaching evidence was "bald allegations" and thereby "without proper foundation." Petition at p. 15: 19-21. That portion of the court's decision was referring only to the conspiracy claim, not to the contention of coaching. *Id.* at 396.

In the Petition, the Tribe misstates the *Mancuso* court's ruling and misplaces reliance on *Mancuso, supra*, in several respects. First, the issue was whether the prosecutor "committed misconduct in violation of Mancuso's due process rights by knowingly using false testimony based on post-hypnotic memories that were tainted by police coaching." *Id.* at 957. After reviewing the trial record, and noting that a prosecutor "has a constitutional duty to correct evidence he or she knows is false…" the court found that there was "…no evidence in this case that the prosecutor presented false testimony." The court ultimately held that "…the prosecutor's conduct did not rise to the level of a due process violation…" *Id.* at 957. The Mancuso court did not make a general ruling that coaching is unfounded when the record does not indicate testimony offered was false that would be applicable to the facts of this matter. This ruling was based on its peculiar facts and

after testimony on the record at trial was received, which was subject to cross-examination. Further, the Tribe misconstrues and misapplies the Mancuso decision when it contends, based on this decision, that "...even if defense counsel has concerns of coaching , there is proper opportunity to attack the credibility of the witness during cross-examination." Petition at 16:14-16. The Tribe's insinuation that *Mancuso* ruled that in all cases concerns of coaching must be addressed at trial and through cross-examination is simply false. On cross-examination, *Mancuso* merely stated that "Because the parties agreed to exclude evidence of the hypnosis sessions, and the posthypnotic testimony was properly admitted, it was defense counsel's burden, not the State's, to attack the credibility of the State's witnesses." *Id.* at 957. Similarly, the Tribe misconstrues, misapplies and takes out of context the Supreme Court decision in *Gerdes v. United States.* 425 U.S. 80, 89-90 (1976) by again insinuating that *Gerdes* court laid down a rule that cross-examination of alleged coaching of a witness is best left for cross-examination at trial. The quoted portion of *Gerdes* in the Petition dealt with the issue of the prosecutor's request to sequester, after a recess in the proceedings, the defendant in order to avoid the possibility of coaching by defense counsel, which would in essence put a barrier between counsel and defendant for about 17 hours. The court denied the request citing that the prosecutor would have ample opportunity to question the defendant on this issue and ruled that such concerns of possible coaching were outweighed by

defendant's Sixth amendment right to the assistance and guidance of counsel. The *Gerdes* decision, thus, has no application to the coaching issue presented by this case.

The Tribe misstates and misapplies the decision in *State v. Cornell*, 878 P.2d 1352, 1370. In *Cornell*, defendant, acting in *pro se*, failed to timely object to the prosecutor's insinuation through questioning a medical expert that defendant's advisory counsel had coached him to "feign having an olfactory hallucination after the killing." *Id.* at 1369. While the court indicated at 1369 that it "strongly disapproved" of the prosecutor's conduct in making such insinuation without any "indication in the record" that he had any evidence to back up the accusation, the court found that the misconduct did not rise to fundamental error as the coaching charge was only made by implication. *Id.* at 1370. Once again, the Tribe is citing to a decision which concerned evidence or lack thereof of coaching based on the record of a judicial proceeding which is not applicable to the facts or issue in this case.

The Tribe further misplaced reliance on *Ronan v. Superior Court*, 390 P.2d 109, 118 (1962), wherein the court held that the trial court greatly abused its discretion and acted in excess of its jurisdiction because there was no showing "...of facts which it could have determined that the furtherance of justice required the wholesale disclosure of the testimony of witnesses before the grand jury." That

case is factually distinguishable and simply does not apply to the facts of this case and whether Respondent's motion presented sufficient factual allegations for Judge Flores to grant a hearing on the coaching issue.

The Tribe further misconstrues and misapplies the ruling in *Caruso v. Superior Court*, 412 P.2d 463, 465 (1966). In *Caruso*, the Arizona Supreme Court held that the trial court acted in excess of its jurisdiction in setting a termination of rights hearing because it was without power as then defined in relevant constitutional provisions, statutes or court rules to set on hearing on terminating a parent's rights without first making a determination of dependency. First, this ruling dealt with a civil matter and should be limited to dependence issues and termination of parental rights issues. Second, the Arizona legislature subsequently enacted legislation that allowed a motion for a hearing on termination of parental rights to be filed and granted without first establishing dependency, which meant that *Caruso* was "no longer controlling" on this issue. *See In the Matter of Appeal In Maricopa County Juvenile Action No. JS-4997*, 140 Ariz. 210, 212, 680 P.2d 1271, 1273 (1984). Moreover, the Tribe fails to cite to an existing Tribal, Federal or Arizona constitutional provision, statute or rule which would make the Tribal Court's decision to grant a hearing an act in excess of its jurisdiction and an abuse of discretion or arbitrary and capricious.

Likewise, the Tribe misplaces reliance on *Carlson v. Landon*, 187 F.2d 991 (1951) as that case dealt with the discretion of the U.S. Attorney General to hold an alien without bail pending a hearing on deportation as long as such discretion is "...not exercised arbitrarily or capriciously, and that the courts through the exercise of the writ of habeas corpus have the power to test whether or not the decision has a reasonable basis in relevant facts." *Id.* at 1003. The ruling in that case has absolutely no bearing or applicability to the issues presented in this matter and does **not** stand for the proposition asserted by the Tribe that "When a court's decision has no 'reasonable basis in relevant facts," the decision is considered arbitrary and capricious." Petition at 18:14-17.

In this case, there is no basis for the Tribe's contention that that the trial court acted in excess of its jurisdiction and abused its discretion in granting a hearing on the issue of coaching the alleged minor victim. As set forth above, none of the cases cited by the Tribe in its Petition support such claim. Respondent presented sufficient allegations of coaching in his pleadings to warrant the trial court granting an evidentiary hearing.

The Tribe's further claim that there were no inconsistencies between the minor victim's statements to CPS and the police lacks merit and is apparently based solely on Deputy Prosecutor, Guadalupe Gutierrez' word, and not based on any reference or analysis of such statements. In kind, undersigned counsel avows that

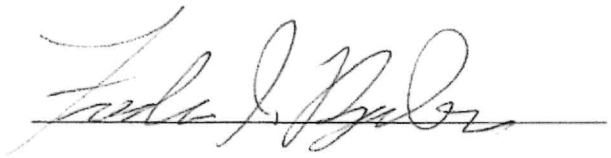
there are inconsistencies within the taped/transcribed interviews conducted by CPS, as well as between those interviews and the police reports. There may also be inconsistencies in subsequent statements made by the alleged victim to prosecutors or other prosecutorial team members while he has been living at the Back to Life facility in Phoenix. That is supported by Ms. Ramirez' statements to counsel that her son, E.R. indicated to her that the Tribal prosecutor was coaching him to be consistent in his testimony. Respondent's counsel, however, has not received a complete copy of the minor victim's records from Back to Life, including any summaries of meetings between prosecutorial staff and the alleged victim(which is not protected by any privilege since the prosecutor is not the victim's attorney) or login and logout records which will document how many visits and the length of such visits between the prosecutor/staff and the alleged victim. It is and has been Respondent's intention to explore and elaborate at the evidentiary hearing on such inconsistencies through questioning witnesses, including the alleged victim.

CONCLUSION

For all the foregoing reasons, Respondent requests this Court to deny acceptance of special action jurisdiction, or, alternatively, if jurisdiction is accepted to deny the Tribe's Petition in its entirety as the Tribe failed to establish that the trial court exceeded its jurisdiction and/or abused its discretion in granting an evidentiary hearing on the coaching issue.

RESPECTFULLY SUBMITTED this 16th day of November 2012.

Fredric J. Brahms, J.D.



Fredric J. Brahms, J.D.
Counsel for Respondent

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P.O. Box 65493
Tucson, AZ 85728
(520)304-3111

Counsel for Respondent, Christopher Montana

PASCUA YAQUI TRIBE
COURT OF APPEALS
OCT 29 2012
RECEIVED
CLERK OF COURT

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, PROSECUTOR'S OFFICE Petitioner, vs. HONORABLE MARGARET FLORES JUDGE, PASCUA YAQUI TRIBAL COURT Real Party in Interest: CHRISTOPHER MONTANA. Respondents	Appeals Case No.: Tribal Court No.: CR-12-005 RESPONDENT CHRISTOPHER MONTANA'S MOTION TO WITHDRAW MOTION TO EXTEND TIME TO FILE RESPONSE TO TRIBE'S PETITION FOR SPECIAL WRIT

COMES NOW, Respondent, Christopher Montana, by and through undersigned counsel, Fredric Brahms, J.D., and hereby moves this Court for an order permitting withdrawal of Petitioner's motion for an extension of time to file a Response to the Tribe's Petition for Special Action, since undersigned counsel mistakenly believed that a response was due on October 24, 2012. Based on this Court's October 22, 2012 Order, which was mailed to undersigned on October 26, 2012, this Court is now reviewing the Tribe's petition for special action for "jurisdiction" and only will review it for merit if it is deemed to be within the purview of this Court's jurisdiction. Thus, it is apparent that no deadline to respond to the petition currently exists and that Respondent, through undersigned counsel, erroneously believed one did exist. Accordingly, this Court should grant Respondent's motion to withdraw his motion to extend time

since there is no order or obligation in place requiring Respondent to respond to the petition at this time.

RESPECTFULLY SUBMITTED this 29th day of October 2012.

Fredric J. Brahms, Counsel for Respondent,
Christopher Montana

Original filed this 29th day of October, 2012
in: Pascua Yaqui Court of Appeals

Copy of the foregoing mailed/delivered
this 29th day of October 2012 to:

Guadalupe Gutierrez
Pascua Yaqui Tribe
Office of the Prosecutor
7474 S. Camino de Oeste
Tucson, Arizona 85757

Honorable Margaret Flores
Pascua Yaqui Tribal Court

PASCUA YAQUI TRIBE
COURT OF APPEALS
OCT 24 2012
RECEIVED
CLERK OF COURT

Fredric J. Brahms, J.D.
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(520)304-3111; Fax: (520)445-8008

Counsel for Respondent, Christopher Montana

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, PROSECUTOR'S OFFICE Petitioner, vs. HONORABLE MARGARET FLORES JUDGE, PASCUA YAQUI TRIBAL COURT Real Party in Interest: CHRISTOPHER MONTANA. Respondents	Appeals Case No.: Tribal Court No.: CR-12-005 RESPONDENT CHRISTOPHER MONTANA'S MOTION TO EXTEND TIME TO FILE RESPONSE TO TRIBE'S PETITION FOR SPECIAL WRIT

COMES NOW, Respondent, Christopher Montana, by and through undersigned counsel, Fredric Brahms, J.D., and hereby moves this Court pursuant to 3PYTC § 2-3-70 for an extension of two to three weeks to file a Response to the Tribe's Petition for Special Writ, as the current due date is October 24, 2012. There is good cause for such extension of time in that though undersigned counsel has diligently reviewed the Petition and researched the issues presented therein other pressing matters in counsel's workload together with personal issues have prevented counsel from preparing a response to meet the 30 day deadline to file a response. Since the Tribal Court matter is stayed by stipulation, there is no prejudice to the Tribe in granting Respondent's request for a short two to three week extension to file a response.

Undersigned counsel also received an e-mail from Deputy Prosecutor Guadalupe Gutierrez this morning in which she agreed not to oppose this motion. (See attached e-mail exchange).

RESPECTFULLY SUBMITTED this 24th day of October 2012.

Fredric J. Brahms, Counsel for Respondent,
Christopher Montana

Original filed this 24th day of October, 2012
in: Pascua Yaqui Court of Appeals

Copy of the foregoing mailed/delivered
this 24th day of October 2012 to:

Guadalupe Gutierrez
Pascua Yaqui Tribe
Office of the Prosecutor
7474 S. Camino de Oeste
Tucson, Arizona 85757

Honorable Margaret Flores
Pascua Yaqui Tribal Court

Subject: Re: Tribe v. Montana

From: Guadalupe Gutierrez (Guadalupe.Gutierrez@pascuayaqui-nsn.gov)

To: fjbrahms@yahoo.com;

Date: Wednesday, October 24, 2012 9:37 AM

I will agree not to oppose it. I have not received anything regarding timelines or anything else for that matter from the court if appeals. I wondered of they had sent anything out actually.

Connected by DROID on Verizon Wireless

-----Original message-----

From: Fredric Brahms <fjbrahms@yahoo.com>
To: Guadalupe Gutierrez <Guadalupe.Gutierrez@pascuayaqui-nsn.gov>
Sent: Wed, Oct 24, 2012 14:20:36 GMT+00:00
Subject: Tribe v. Montana

Lupe,

My response to the Tribe's petition for special writ is due today. I intend to file a motion for an 2-3 week extension of time pursuant to 3 PYTC Section 2-3-70. I would appreciate it if you would either stipulate to the motion for an extension or agree not to oppose it.

Please let me know by noon today.

No. CA-12-001
Pascua Yaqui Court of Appeals

Pascua Yaqui Tribe, Appellant,

vs.

Honorable Judge Flores and Christopher Montana, Respondents.

ORDER

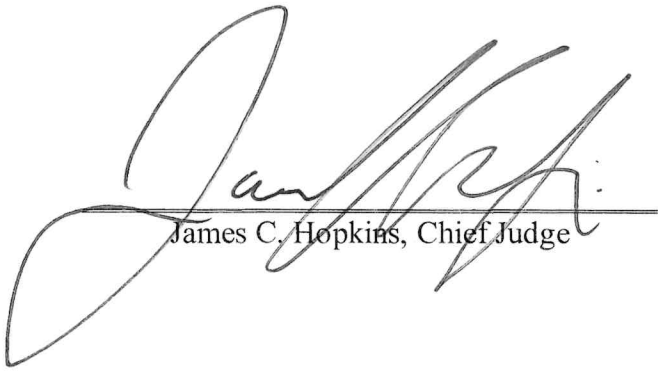
Petition for a Special Writ based on TC case CR-12-005.

Guadalupe Gutierrez, Pascua Yaqui Tribe Office of Prosecutor, Tucson, AZ, for the Appellee.

Honorable Margaret Flores, Pascua Yaqui Tribal Court, Tucson, AZ and Fredric Abrams, J.D., P.O. Box 65493, Tucson AZ 85728

On September 24, 2012 Appellant filed a petition for a special writ with the Court of Appeals. The petition was accepted on October 2, 2012 for review. 3 PYTC 2-3-260 (C) gives general guidance regarding action on this type of petition. This court will review the petition for special action for jurisdiction and if deemed to be within the purview of our jurisdiction, only then will it be reviewed for merit.

So **ORDERED** this 22nd day of October 2012.



James C. Hopkins, Chief Judge

PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR
7474 S. CAMINO DE OESTE
TUCSON, ARIZONA 85757
(520) 879-6251

Guadalupe Gutierrez
Deputy Prosecutor

PASCUA YAQUI TRIBE
COURT OF APPEALS
SEP 24 2012
RECEIVED
CLERK OF COURT

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,
PROSECUTOR'S OFFICE

Petitioner,

vs.

HONORABLE MARGARET FLORES
JUDGE, PASCUA YAQUI TRIBAL
COURT

Real Party in Interest:

CHRISTOPHER MONTANA[1]

Respondents

APPEALS CASE NO:

TRIBAL COURT NO: CR-12-005

PETITION FOR SPECIAL WRIT

COMES NOW, the Pascua Yaqui Tribe by and through the Pascua Yaqui Tribal Prosecutor, ALFRED URBINA, and the undersigned Deputy Prosecutor, Guadalupe Gutierrez, and hereby respectfully submits the

[1] In Special Action pleadings the complaint names the body, officer, or person against whom relief is sought. However, "[i]f any public body, tribunal, or officer is named as a defendant, the real party or parties in interest shall be joined as defendants." R.Ariz.Spec.Act., Rule 2(a)(1). In such circumstances, the practice is to direct the writ in form to the court, but in fact leave its handling to the parties. *See* R.Ariz.Spec.Act., Rule 2, State Bar Committee Notes, section (a)

following Petition for Special Action. The Tribe asks this Court to overturn the Respondent Judge's decision finding prima facie case for coaching of a witness and granting hearing on the matter based upon excess of jurisdiction and arbitrary and capricious decision by the trial court.

Respectfully submitted this 24th day of Sept, 2012.

Guadalupe Gutierrez
Deputy Prosecutor

Original filed with the
Clerk of the Pascua Yaqui Court of Appeals

On:

HON. M. FLORES
PASCUA YAQUI TRIBAL COURT

Real Party in Interest:
Fredric Brahms J.D.
P.O. Box 65493
Tucson, AZ 85728

Feliciano Cruz
Pascua Yaqui Social Services

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PROCEDURAL POSTURE AND RELEVANT FACTS:

On the morning of September 9, 2011, Pascua Yaqui Social Services received a report regarding an incident of possible child abuse. Pascua Yaqui Social Services investigated the incident involving the physical and emotional abuse of minor victim E.R. E.R. is an eleven year old boy. E.R. reported that he had been subject to physical and emotional abuse by his mother (Almarosa Ramirez) and stepfather, defendant Christopher Montana.

On October 3, 2011, the Tribe filed charges against the Defendant. Defendant was charged with three counts of aggravated assault, domestic violence.

On May 7, 2012, Defense counsel filed a Motion to Compel Disclosure of Suppressed Exculpatory Evidence. In that motion, defense counsel alleged:

> Defendant has reason to understand from information provided to Almarosa Ramirez from the alleged victim that the Tribal Prosecutor and its employees and agents have been "coaching" him to testify consistent with the Tribe's allegations against Defendant and have directed him to disregard and not testify in a manner that is inconsistent with such allegations.

Exhibit 1, Defendant's Motion to Compel Disclosure of Suppressed Exculpatory Evidence, p. 1, line 19-22. Defendant argued that "undersigned counsel has recently learned from Almarosa Ramirez, mother of the alleged victim, that the alleged victim, [E.R.], advised her that the prosecutor and others acting on behalf of the Tribe in preparing him to testify at trial in this matter have been 'coaching' him to testify consistently." *Id.* at pg. 3, lines 5-11. No specificities regarding incidences of "coaching" by any person or agent of the Prosecutor's Office was included in the motion. No sworn affidavit or recorded interview from the alleged witness, Ms. Almarosa Ramirez was attached to the motion.

On May 21, 2012, the Tribe filed a response to Defendant's motion.[2] In its response, the Tribe argued that the record did not support the allegations. The Tribe had met with the victim, as is appropriate to create rapport, especially with a child victim. Exhibit 2, Tribe' Response to Defendant's Motion to Compel Disclosure of Suppressed Exculpatory Evidence, p. 9-10. However, these meetings were brief and infrequent. The Tribe also pointed out that Almarosa Ramirez, the victim's mother, is an interested party. She continues to live with the Defendant, and is the

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[2] The Tribe motioned the Court to request a Guardian Ad Litem (GAL) for the minor victim on November 14, 2011. The Court denied this request by Order dated November 16, 2012. Generally, if the minor victim is provided independent counsel to protect his best interest, issues of coaching can be addressed directly by the Court with the GAL

only person who had unsupervised visitation with the minor victim. Despite Defendant's assertions that Almarosa Ramirez had provided information of "coaching," the Tribe pointed out that no specific information had been provided to support this allegation. Exhibit 2, pg. 10-11.

On May 29, 2012, Defendant filed a reply. [3] In his reply, Defendant does not offer any other show of proof that specific incidences of coaching have occurred. The Defendant again stated that the general allegations were based on what the child victim supposedly said to the mother. Exhibit 3, Defendant's Reply to Tribe's Response to Defendant's Motion ot [sic] Compel Disclosure of Suppressed Exculpatory Evidence, p. 3, lines 6-10. However, again, no sworn affidavit from the witness was offered. No recorded interview with the witness was attached.

On May 31, 2012 the Court considered the issue at hearing. At hearing, the defense stated "we have facts, records from the victim to this mother that indicate that he has been coached on how to testify and what he's there to testify." Exhibit 4, Transcript Re: Motions Hearing, May 31, 2012, pg. 20, lines 16-19; *See also*, Exhibit 4, pg. 16, Lines 10-19 (general allegations.) The Tribe again argued that no such records had been

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[3] Note: Defendant argued the Tribe's response was untimely. However, the court was moving during the Month of May 2012. The court did not issue an order addressing when the Tribe was to file. However, the Tribe had received several motions from the Defendant filed on May 7, 2012, all of which were due on May 21. Thus, at the hearing on May 31st, the Court accepted the Tribe's response.

offered, nor any other show of proof. The Tribe posited to the Court that the Defendant was making "bald accusations." Exhibit 4, pg 18, line 25. The Court seemed to agree with the Tribe, as to the issue of show of proof regarding the coaching allegation, stating "how is the Tribe to know what to respond to." Exhibit 4, pg 24, line 21. However, despite acknowledging the lack of specificity and vagueness of the allegations, the Court went on to grant a hearing on the allegations and ruled that the Court would question "the minor as to..the issue of...speaking with the Tribe." Exhibit 4, pg 28, line12-14. The hearing was set for June 20, 2012.[4]

Subsequent to the hearing of May 31, the Defense filed a motion to question the child victim in open court. *See* Exhibit 5, Defendant's Request to Conduct Open Court Examination of Alleged Victim; Request to Continue Evidentiary Hearing, Filed June 12, 2012. In his motion Defendant admitted that he had not "adequately investigated the allegation and needed more time to prepare for the hearing. Exhibit 5, pg 2, line 7. The Tribe filed an objection to Defendant's motion and, again, motioned the Court to dismiss the allegations of coaching. Exhibit 6, Tribe's Objection to Defendant's Request to Conduct Open Court Examination of Minor Victim;

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[4] In an effort to seek information regarding the allegations, the Tribe attempted to depose the witness Almarosa Ramirez. Defense counsel opposed the deposition and Ms. Ramirez's former counsel also filed an objection. Ms. Ramirez has no pending criminal matters and the request for deposition was only to evaluate her "evidence" of coaching by the prosecution. The Court never ruled on this matter due to the stay for special action.

Motion to Dismiss, Filed June 18, 2012. The Tribe argued that the Defendant offered only vague reasoning as to any coaching by the prosecution, and admitted that he had not even investigated the matter or spoken with supposed witnesses. Exhibit 6, pg. 6-7. Based upon existing case law, the Tribe argued that the Defendant had not properly established a prima facie basis for the allegations, and the Court should dismiss the allegations as lacking support in the record. *Id.*

At hearing on June 20, 2012, the Court heard argument on the issue. The Court confirmed that the Evidentiary Hearing on the issue of coaching was set for July 11, 2012, granting the continuance requested by the defendant. The Court reasoned that "the determination of setting a hearing on the matter was based upon the Defendant's written motion dated May 29, 2012." Exhibit 7, Pretrial Hearing Order, Pascua Yaqui Tribal Court, pg. 1, lines 12-13; dated June 20, 2012.

> The Tribe having brought up the issue of procedure ...the Court's determination for the Record, as to...whether or not...there is a *prima facie* case,...against the Tribe with regard to the ...allegations the Court at the time of the last hearing did set ...the issue to be heard at an evidentiary hearing...prior to the date of hearing...Counsel for Defendant did submit a...filing...it was dated the 29th of May...with did include...some detail as to ...allegations that he had...brought...with regard to the issue of...coaching...

Exhibit 8,Transcript of Pretrial Hearing, June 20, 2012, pg. 12, lines 2-14. During the hearing, the Tribe's motion to dismiss was denied, and the Court recognized the Tribe's request to preserve their objection. Exhibit 8, Pg. 12-13; *see also* Exhibit 7, pg. 1, line 12.

The Tribe filed a Motion to Stay Proceedings RE: Petition for Special Writ on July 5, 2012. Defendant did not object to the stay of proceedings. Specifically, the Tribe asserts that the Court's ruling that a prima facie case had been established by the Defendant regarding coaching behavior by prosecution is not supported by the record nor by case law. This ruling constituted an arbitrary and capricious decision by the Court that was prejudicial to the Tribe, and not consistent with the furtherance of justice. In making such a decision, the trial court had acted in excess of its jurisdiction. On July 9, 2012 the Court granted the Tribe's request to stay proceedings for good cause shown.

RIGHT OF APPEAL AND JURISDICTION

The Pascua Yaqui Code recognizes a right of parties to appeal in most circumstances. However, in criminal matters, this right of appeal does not exist for the government or Tribe. 3 PYTC § 2-3-90(G). The Pascua Yaqui Rules of Appellate Procedure also recognize the use of Interlocutory appeals and "extraordinary" writs, applicable in criminal cases. *See* 3

PYTC § 2-3-90(F) and 3 PYTC § 2-3-260(D). However, the Rules do not set out a proscribed procedure for such writs. [5]

The State of Arizona, by illustration, has adopted a streamlined procedure for writs that are in the category of appellate proceedings during the course of pre-trial status, wherein other post-judgment appellate remedy is not available. "Relief previously obtained...by writs of certiorari, mandamus or prohibition in the trial or appellate courts shall be obtained under this Rule [Special Actions]." R.Proc.Spec. Act. Rule 1(a). The streamlined procedure is "necessitated by the existing confusion as to the proper lines between the various writs, and by lack of a simple procedure which can be followed by all members of the bar and by the judiciary." *Id.*, R.Proc.Spec.Act., State Bar Committee Note to Rule 1(a). The Court of Appeals has discretion to accept review of a special action based on jurisdictional analysis.

a. FORM OF PLEADING/JURISDICTION

Special Action permits pre-trial review by the appellate body where no "equally plain, speedy, and adequate remedy is available by appeal."

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[5] Under federal law, these actions may take the form of a Writ of Mandamus. Such a writ is acknowledged in the Pascua Yaqui Rules of Appellate Procedure 3 PYTC 2-3-260. However, in a writ of mandamus, the superior court usually does not review the decisions of the lower court until there is final judgment in the case. The Tribe is precluded from any appeal as soon as final judgment is rendered. Also, the issues to be raised in our pleadings are in regard to collateral issues that are substantive in the case and can set a precedent that is procedurally inappropriate and contrary to established law.

R.Proc.Spec. Act. Rule 1(a). As previously noted, the Pascua Yaqui Rules of Appellate Procedure do not allow for appeal of a judgment after trial. 3 PYTC § 2-3-90(G). Thus, this form of pre-trial appeal is the only action available to the Tribe for review of an issue that substantively affects trial, and/or the rights of a victim.

If the trial court's decision stands, the Tribe will be subject to a hearing that is not supported by the facts in the record. Whatmore, the trial court will subject the minor victim to questioning where the victim does not have independent counsel. Because the Tribe does not have the right to challenge these decisions as capricious and unsupported by the record after the criminal case resolves, the Tribe must seek special writ as remedy for these issues.

b. QUESTIONS FOR APPEAL

Special Action only allows three specific appellate questions to be raised:

(a) Whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has not discretion; or

(b) Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or

(c) Whether a determination was arbitrary and capricious or an abuse of discretion.

R.Proc. Spec. Act. Rule 3. The Tribe believes that the trial court, by ruling that a prima facie case had been established for coaching, acted in excess of its jurisdiction or legal authority. And, the trial court's decision was arbitrary and capricious, having no basis in the facts on the record.

Acts in excess of jurisdiction can include situations where the court has exceeded its power as defined in constitution, statute or court rules and "where the lower tribunal has abused its discretion" through capricious or arbitrary decision. *Caruso v. Superior Court*, 412 P.2d 463, 465 (1966) For example, a court acts in excess of its jurisdiction when making a decision that is not based on clear or convincing presentation of facts to support the finding or decision. *Caruso,* 412 P.2d at 467; *see also Ex rel Ronan v. Superior Court*, 390 P.2d 109, 118 (1962). Similarly, a court's decision is considered capricious and arbitrary when the decision has no "reasonable basis in relevant facts." *Carlson v. Landon*, 187 F.2d 991, 1003 (9th Cir. 1951) (District court's decision was neither arbitrary or capricious when based upon sufficient show of proof by government

offering signed affidavits by investigators and other documents published by defendant's as to affiliation with communist party.)

STATEMENT OF THE ISSUES:

1. DID THE TRIAL COURT EXCEED ITS JURISDICTION OR LEGAL AUTHORITY WHEN IT FOUND THAT A PRIMA FACIE CASE WAS ESTABLISHED TO GRANT HEARING ON THE ISSUE OF COACHING?
2. WAS THE TRIAL COURT'S FINDING OF A PRIMA FACIE CASE WHICH WAS BASED ONLY UPON THE DEFENDANT'S GENERAL ACCUSATION IN A WRITTEN MOTION CAPRICIOUS OR ARBITRARY, GIVEN THAT NO SPECIFIC EVIDENCE WAS PROVIDED TO SUPPORT THE ALLEGATIONS?

LAW AND ARGUMENT

Coaching

It is improper for counsel, whether defense or prosecution, to make accusations for which there is not indication in the record. *State v. Cornell*, 878 P.2d 1352, 1370 (Ariz. 1994). Allegations of coaching are unfounded when there is no indication in the record that the testimony offered is false. *Mancuso v. Olivares*, 292 F.3d 939, 957 (9th Cir. 2002). A show of proof to establish a prima facie case for coaching requires more than just vague accusations, there must be enough evidence in the record to support the

finding. *See Cornell*, 878 P.2d at 1370; *State v. Hughes*, 456 P.2d 393, 396 (Ariz. 1969). Sufficient evidence requires that a judicial decision have a reasonable basis in relevant facts. *See Carlson v. Landon*, 187 F.2d 991,1003 (9th Cir. 1951). Proper show of proof in the form of affidavits, returns, recordings, and other data (such as publications) can be used to support a reasoned decision that is non-capricious or arbitrary. *Id.*

By Illustration, in *State v. Hughes*, the defendant appealed his conviction arguing, among other things, that the record indicated that the prosecutor had coached witnesses outside the courtroom to produce incriminating testimony. The *Hughes* court found:

> This contention is based upon vague reasoning by the defendant, and the record fails to disclose any evidence to indicate that the prosecutor "coached" the witnesses nor does it reveal that the witnesses were testifying to anything other than that to which they had personal knowledge.

Hughes, 456 P.2d at 396. In the "absence of any evidence…other than the defendant's bald allegations thereto, the contention is without proper foundation." *Id.*

Similarly, in *State v. Fullen*, the defendant alleged that the prosecution had coached or primed the witnesses to testify in a particular manner. *Fullen*, 404 P.2d 732, 735 (Ariz. 1965). Particularly, the

defendant argued that the investigator in the case "primed" the witness to be consistent in the identification of the defendant by showing the witness a couple of pictures simultaneously and asking which one was the defendant. *Id.* The witness testified consistent with his previous statements and was able to give an identification based on his independent experience. The *Fullen* court did not find that there was sufficient evidence to support and allegation of coaching. *Id.* at 470. A witness offering testimony that is consistent with previous statement does not constitute coaching or priming by the government. *Id* at 735. The offered testimony must still be weighed for credibility of the evidence. *Id.* at 736.

Case law has established that, even if defense has concerns of coaching, there is proper opportunity to attack the credibility of the witness during cross-examination. *Mancuso v. Olivarez,* 292 F.3d at 957. "Opposing counsel in the adversary system is not without weapons to cope with 'coached' witnesses....Skillful cross-examination could develop a record which [counsel] in closing argument may well exploit by raising questions as to the [witness'] credibility..." *Geders v. U.S.*, 425 U.S. 80, 89-90 (1976).

I. The Trial Court exceeded its jurisdiction by granting a hearing on the issue of coaching when no sufficient show of proof was offered by Defendant to establish a prima facie case.

A court can be found to act in excess of its jurisdiction when making a decision that is not based on clear or convincing presentation of facts to support the finding or decision. *Caruso,* 412 P.2d at 467; *see also Ex rel Ronan v. Superior Court*, 390 P.2d 109, 118 (1962). Where no evidence is offered, and a prima facie case of "coaching" is established base on bald allegations, the court's decision is without proper foundation and, therefore, in excess of jurisdiction. *Hughes,* 456 P.2d at 396.

In this case, the trial court found that a prima facie case for coaching was established based only on the Defendant's motion "dated the 29th of May...which did include...some detail as to ...allegations that he had...brought...with regard to the issue of...coaching...." Exhibit 8, pg. 12, lines 10-14. The Defendant's motion only described how Almarosa Ramirez made a general accusation about coaching conduct, without details. It is important to note that assertions made in a motion, without corroboration in the record, are not considered evidence. Defendant did not include any show of proof of such statement, no affidavit or recorded interview was offered to the court to show a basis for the allegations.

Despite the lack of evidentiary corroboration , the court accepted the vague accusations offered in the Defendant's motion as sufficient to establish a prima facie case for coaching. *See* Exhibit 7, pg. 1, line 12. By making such a decision, not based in any proper show of proof or attested facts, the trial court acted in excess of its jurisdiction.

II. The Trial Court's finding of a prima facie case for coaching was arbitrary and capricious, not reasonably based in relevant facts.

It is a generally accepted tenet of law that, in making decisions, a court must rely on facts. Facts are events, actions, or conduct that have definitely and actually taken place, and are distinguishable from suspicion, innuendo or supposition. When a court's decision has no "reasonable basis in relevant facts," the decision is considered arbitrary and capricious. *See Carlson v. Landon*, 187 F.2d 991, 1003.

In the instant case, the trial court made an arbitrary and capricious decision by finding a prima facie case for coaching, not reasonably based in relevant facts. Indeed, the Defendant offered no facts to support his position at all. The Defendant did not offer recorded statement nor affirmations by his supposed witness, Almarosa Ramirez. The Defendant offered only vague allegations without specific facts in support of the accusations. These assertions do not constitute "fact." Rather, the

Defendant's uncorroborated assertions only constitute suspicion, innuendo, and supposition. The record contains no actual facts supporting the allegations set forth in the Defendant's motion. Thus, the trial court's decision to find that a prima facie case for coaching had been established based only on the unsupported assertions offered by the Defendant in his motion reflects a decision having no "basis in relevant facts."

Furthermore, the Defendant's accusation of coaching is premised on the idea that the prosecutor is "coaching" the child to testify consistent with the Tribe's case. This logic is flawed because the Tribe's case is based upon what the child *has already disclosed*. The child has not made statements contrary to his original interview with police and child protective services. As indicated in the *Fullen* case, a witness offering testimony that is consistent with previous statements does not constitute coaching or priming by the government. *Fullen,* 404 P.2d at 735. Thus, Defendants' allegation of coaching is not supported by any actual facts in the record, and does not legally constitute a legitimate reason to support any allegations of coaching. Again, the Court's decision was capricious and arbitrary in accepting the Defendant's speculative statements and conclusions could constitute a factual basis for the prima facie case of coaching.

REMEDY REQUESTED

The Tribe requests that the Court of Appeals overturn the trial court's decision to grant hearing on the issue of coaching because the record does not support the trial court's finding that a prima facie case for coaching had been established. The trial court acted in excess of its jurisdiction and made an arbitrary and capricious decision, not reasonably based in the facts on record.

As indicated by well-settled law, the trial court had other, more appropriate alternatives, than to have arbitrarily found that a prima facie case was established. The trial court could have instructed the Defendant to use cross-examination of witnesses at trial to test the issue of possible coaching and the credibility of testimony by witnesses.

CONCLUSION

For the foregoing reasons, that the trial court acted in excess of jurisdiction and in an arbitrary and capricious manner, not basing its decision on relevant facts in the record, the Tribe respectfully asks the Court of Appeals to overturn the trial court's decision to grant hearing on the matter of coaching upon inappropriate finding that a prima facie case was established.

Respectfully submitted this 24th day of Sept, 2012.

Guadalupe Gutierrez
Deputy Prosecutor

APPENDIX 1

Fredric J. Brahms, J.D.
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Counsel for Defendant, Christopher Montana

PASCUA YAQUI TRIBAL COURT
FILED DATE / HOUR TIME
2012 MAY -7 AM 11:01
DOCKET NO. _____
CLERK PAS

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, **Plaintiff,** **v.** **CHRISTOPHER MONTANA.** **Defendant**	Case No.: CR-12-005 **MOTION TO COMPEL DISCLOSURE OF SUPPRESSED EXCULPATORY EVIDENCE; REQUEST FOR IN CAMERA INSPECTION;** **REQUEST FOR HEARING**

COMES NOW, Defendant, Christopher Montana, by and through undersigned counsel, Fredric Brahms, J.D., and hereby requests this Court enter an order compelling the Pascua Tribal Prosecutor's Office disclose and produce exculpatory evidence suppressed by the Tribal Prosecutor on the following grounds: 1) Defendant has reason to understand that the Tribe has suppressed and failed to transcribe and produce one of the interviews of the alleged victim; and 2) Defendant has reason to understand from information provided to Almarosa Ramirez from the alleged victim that the Tribal Prosecutor and its employees and agents have been "coaching" him to testify consistent with the Tribe's allegations against Defendant and have directed him to disregard and not testify in a manner that is inconsistent with such allegations.

This motion is supported by the attached memorandum of points and authorities and upon such oral and documentary evidence as may be presented a hearing on this matter.

DATED this 7th day of May 2012.

Fredric J. Brahms, Counsel for Defendant,
Christopher Montana

MEMORANDUM OF POINTS AND AUTHORITIES

I. The Tribal Prosecutor has Suppressed the Existence of a Third Interview of the Alleged Victim

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Court held that "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

In this case, defense counsel has reason to believe upon reliable information that the Tribe, through the direction of the Office of the Prosecutor, conducted not two, but rather three separate interviews of the alleged victim during the fall of 2011. Yet, the Tribe only disclosed transcripts of two interviews with the allege victim. Defense counsel further understands and believes that this un-transcribed interview contains substantial evidence favorable to Mr. Montana and is material and relevant to his guilt or innocence. Thus, Defendant's due process rights under the 5th and 14th Amendments to the U.S. Constitution appear to have been violated by the suppression of such evidence.

Accordingly, Defendant requests this Court direct the Tribal Prosecutor to: 1) Provide a list identifying the names and Tribal occupation of each and every employee or agent, whether directly employed at the Office of the Prosecutor or at other Tribal agencies, such as Social Services and Tribal Police Department, who have been directly involved in the interviews conducted with the alleged victim; and 2) Provide copies of all notes(whether handwritten or typewritten), all memos and other documents generated by such individuals concerning their involvement in interviewing the alleged victim in order for this Court to conduct an in camera

inspection concerning whether there exists a third interview of the alleged victim that has been suppressed by the Tribe.

II. The Tribal Prosecutor has Improperly Coached the Alleged Victim

The undersigned counsel has recently learned from Almarosa Ramirez, mother of the alleged victim, that the alleged victim, E[illegible] R[illegible], advised her that the prosecutor and others acting on behalf of the Tribe in preparing him to testify at trial in this matter have been "coaching" him to testify consistently. In other words, the Tribe has been "coaching" him to testify consistently with the theory alleged by the Tribe against defendant and for him to ignore the statements he has made to them that are exculpatory or favorable to the accused, Mr. Montana. Such conduct by the Tribal Prosecutor's Office and others at the prosecutor's bidding is tantamount to the direct suppression of evidence favorable to Mr. Montana. See *Brady, supra*, at 87. It is one thing to ask a twelve-year old child leading questions in order to assist in developing such child's testimony, which defense counsel stipulated should be allowed. However, it is quite another matter, and improper, for the prosecutor to suggest to the alleged victim the answers to questions and even more egregious to "coach" and indeed direct the alleged victim to testify in a certain way that ignores statements he has made which are exculpatory to the alleged Defendant.

Moreover, it is the duty of the prosecutor to seek justice and the truth, not to suppress the truth in order to obtain a conviction. Thus, the conduct of the prosecutor and its staff, as well as others who have been involved in the improper coaching of the alleged victim, has resulted in the violation of Defendant's due process rights under the 5th and 14th Amendments to the U.S. Constitution.

Accordingly, Defendant requests this Court direct the Tribal Prosecutor to: 1) Provide a list identifying the names and Tribal occupation of each and every employee or agent, whether

directly employed at the Office of the Prosecutor or at other Tribal agencies, such as Social Services and Tribal Police Department, who have been directly involved in preparing the alleged victim to testify at trial; and 2) Provide copies of all notes(whether handwritten or typewritten), all memos and other documents generated by such individuals concerning their involvement in preparing the alleged victim to testify at trial in order for this Court to conduct an in camera inspection concerning whether such improper "coaching" has occurred.

Defendant further requests that the identification of the individuals, by name, title, work address and work phone number, involved in interviewing the alleged victim and in preparing the alleged victim for his testimony at trial are provided to defense counsel so that subpoenas of such individuals can be prepared to testify at a hearing on these matters.

CONCLUSION

Based on the foregoing, Defendant requests that this Court direct the prosecution to provide 1) to the Court and to defense counsel the identification of the individuals involved in interviewing the alleged victim and in preparing the alleged victim to testify at trial; and 2) to provide for in camera inspection all the notes and records of such individuals as requested above.

RESPECTFULLY SUBMITTED this 7th day of May, 2012

Fredric J. Brahms, counsel for Defendant

Original of the foregoing
filed this 7th day of May, 2012:

Pascua Yaqui Tribal Court

Copy of the foregoing mailed/delivered
this 15 day of May 2012 to:

Guadalupe Gutierrez
Pascua Yaqui Tribe
Office of the Prosecutor
7474 S. Camino de Oeste
Tucson, Arizona 85757

APPENDIX 2

PASCUA YAQUI TRIBE
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Guadalupe Gutierrez
Deputy Prosecutor

PASCUA YAQUI TRIBAL COURT
FILED DATE AND TIME
2012 MAY 21 PM 1:43
DOCKET NO. CR12.005
CLERK.

IN AND FOR THE PASCUA YAQUI COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE

Plaintiff

vs.

MONTANA, Christopher

Defendant(s)

CR-12-005

TRIBE'S RESPONSE TO DEFENDANT'S MOTION TO COMPEL DISCLOSURE OF SUPPRESSED EXCULPATORY EVIDENCE

COMES NOW THE PASCUA YAQUI TRIBE, by and through the undersigned Deputy Prosecutor Guadalupe Gutierrez, and hereby submits the following reply.

Because Defendant alleges several broad and unspecified allegations against the Tribe that are not based or supported in fact, the Tribe requests that the Defendant's Motion to Compel be denied.

Respectfully submitted this 21 day of May, 2012.

Guadalupe Gutierrez
Deputy Prosecutor

Original filed with the
Clerk of the Pascua Yaqui Tribal Court

On:

Defense Counsel:

Fredric Brahms J.D.
P.O. Box 65493
Tucson, AZ 85728

Feliciano Cruz
Guardian to Victim
Pascua Yaqui Social Services

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

In this case, the Tribe filed charges against the Defendant on October 3, 2011. The Tribe's criminal case was filed approximately one month after a child welfare investigation was opened by the Tribe's child protective services (CPS) department. The CPS case was based upon some of the same conduct leading to the criminal proceedings.

When the child welfare investigation began, on or about September 9, 2011, the child was interviewed by Ms. Kim Clark, a social worker with the Pascua Yaqui Child Protective Services. To the Prosecutor's knowledge, this interview was not recorded. The Prosecutor does not have access to any notes or records regarding this interview outside of what is reported in Pascua Yaqui Police Report P11090902. These records are protected and cannot be disclosed, even to the Tribe's Prosecutor, without proper release from the Pascua Yaqui Juvenile Court or Tribal Court. *See* 3 PYTC § 1-4-10; 5 PYTC § 7-490 and 5 PYTC § 7-500.

Soon after the initial report of abuse to CPS, the minor victim, E.R., participated in a recorded interview at the Child Advocacy Center in Tucson, Arizona. This interview was recorded and transcribed. A transcript of the interview was disclosed to Defendant on October 25, 2011 (filed October 24, 2011).

The Tribe is not aware of any other interview having taken place with the minor victim. The child's guardian is not aware of any other interview having been done.

When the child welfare case began in September 2011, the minor victim was placed with family on the reservation. Subsequently, on or about November 2011 the

minor child was placed in a residential group home in Phoenix. The placement is at the discretion of social services—acting as the child's guardian.

According to Mr. Cruz, the minor victim's assigned guardian through Social Services, the only persons who have spoken to E.R. trom the Tribe are E.R's mother Ms. Almarosa Ramirez, juvenile caseload prosecutor Erin Shanley, the Tribe's prosecutor in the criminal case and Mr. Cruz himself. Ms. Ramirez is a former co-defendant in this case. Ms. Ramirez has regular visits with E.R. as part of her social services caseplan. She continues to live with the Defendant and has been working with defense counsel closely. Ms. Ramirez has been identified as a witness for the Defendant. (Defendant's Disclosure filed Dec. 9, 2011)

Neither of the Tribe's prosecutors Ms. Shanley nor Ms. Gutierrez have spoken to E.R. more than three times since this case began. The child's guardian must approve all contact. Conversations are generally limited to not more than 30-45 minutes. The conversations are general and do not involve an extensive discussion of the facts of the case. The focus of any contact is to inform the minor victim regarding the procedural posture of the case (continuances, etc) and how the proceedings occur at trial. E.R. is encouraged to ask questions and raise concerns regarding trial. To the Prosecutor's knowledge no one from the Tribe's office has developed E.R.'s testimony for trial.

It should be noted that defense counsel in the criminal case also has represented the Defendant in the child welfare case. Defense counsel has had access to all the disclosable information relevant to the child welfare case. The Tribe does NOT have access to all that information as part of its criminal case. Information regarding the

minor or a child welfare case can only be reached by motion and/or subpoena as these records are protected by the Pascua Yaqui Tribal Code.

The Defendant now alleges that: (1) the Tribe has suppressed a third interview of the minor victim and (2) the Prosecutor is "coaching" the child victim. In regard to a "third interview" the Defendant does not indicate who may have conducted this interview or when it would have occurred. The assertion of a third interview is unfounded given the information available to the Tribe indicating that no such interview exists. Further, Defendant's allegations of "coaching" are based on reports by Almarosa Ramirez, the only person who has unsupervised visits with the victim except for his guardian. Defendant does not provide specific incidences or occasions on which to base allegations of "coaching." These assertions, too, are not based in any facts.

The Tribe believes that these allegations by the Defendant are unfounded and part of fishing expedition. The Defendant cannot identify with any specificity what particular interview is being "suppressed" or how it was generated. And, the allegations of coaching are over-general and not based on anything but the word of a former co-defendant who has a clear interest in the outcome of this case.

LAW AND ARGUMENT:

The Tribe has no record of a third interview, and cannot disclose evidence that is not in its possession or control.

Discovery in the Pascua Yaqui Tribal Courts is governed by both constitutional and statutory law. The due process clause of the Constitution of the Pascua Yaqui Tribe requires the Tribe to disclose exculpatory evidence that is material to the issue of guilt or punishment. *Pascua Yaqui Tribe v. Soto*, CCA 06-010 (2007) at 10. A violation

may constitute an infringement of Defendant's due process rights. *Id.*; *see generally, Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). However, The United States Supreme Court has held that a defendant is denied a fair trial only if there is a reasonable probability that, had the exculpatory evidence been disclosed, the result of the proceeding would have been different. *Brady*, 373 U.S. at 88.

Rule 3 PYTC § 2-2-380 of the Pascua Yaqui Tribe Rules of Criminal Procedure controls discovery. This rule goes on to clarify the Tribe's obligations under *Soto* and *Brady*, requiring in relevant part, that during disclosure, the Tribe make available to the defendant: "All material or information which tends to mitigate or negate the defendant's guilt as to the offense charged, or which would tend to reduce the defendant's punishment therefore..." 3 PYTC § 2-2-380(A)(6). A prosecutor also has an additional duty to disclose materials and information of any other persons who have participated in the investigation and evaluation of the case and who are under the prosecutor's control. 3 PYTC § 2-2-380(D).

In 2006, the Pascua Yaqui Court of Appeals, in its latest Opinion on Disclosure, clearly spelled out the mandates and current state of disclosure requirements under Pascua Yaqui Criminal Code:

> The prosecution should, at a minimum, write up a list of the items in its possession, mentioned in Criminal Rule 38, that it intends to use at trial and give the list to the defendant. The list should be provided to the defendant within ten days of arraignment. The prosecution is not required to go beyond providing a list by also handing over to the defendant tangible evidence for inspection within the initial ten days. The defendant however, can use the list to request documents or seek an opportunity to inspect tangible evidence in the prosecution's possession.

Pascua Yaqui Tribe v. Soto, CA-06-010, at 9,(2006).

The prosecutor and defense, after initial disclosure, have a continuing obligation to disclose newly discovered information or material which would be subject to disclosure had it then been known. 3 PYTC § 2-2-410. Furthermore, in our court, when evidence is requested that is otherwise not covered by the disclosure rules, Defendant must show a substantial need for the evidence and that Defendant is unable, without undue hardship, to obtain the substantial equivalent. 3 PYTC § 2-2-380(E).

Arizona also has an identical rule under Arizona Rules of Criminal Procedure, Rule 15.1(g). Discovery rules are subject to broad interpretation, but as the Arizona Supreme Court has concluded, any requests for disclosure must be reasonable, as mere "'fishing expeditions' are not countenanced." *State v. Kevil*, 111 Ariz. 240, 242, 527 P.2d 285, 287 (1974); *see also State v. Loyd*, 118 Ariz. 106, 109, 574 P.2d 1325, 1328 (App. 1978)(exercise of judicial discretion circumscribed by reasonableness of request since mere fishing expeditions are disfavored). If it appears that the defendant is on a "fishing expedition" to see what might turn up, the request for disclosure should be denied. *State v. Wallace*, 97 Ariz. 296, 399 P.2d 909 (1965). Indeed, "[w]here there is no evidence, beyond defense assertions, insinuations, and speculation," that the material would aid the defendant, it is not an abuse of discretion for the court to decline to order the requested disclosure. *State v. Piper*, 113 Ariz. 390, 392, 555 P.2d 636, 638 (1976). Thus, a defendant must make a showing of relevancy when seeking discovery of material. *See Wallace*, 97 Ariz. at 300, 399 P.2d at 912.

Additionally, in Arizona, the State has a duty to disclose items in the hands of other government agencies only if: (1) the State has better access to the information; (2) the defense shows that it has made a good-faith effort to obtain the information without

success; and (3) the defense has specifically requested the information. *State v. Smith*, 123 Ariz. 231, 239, 599 P.2d 187, 195 (1979).

In this case, the Defendant insists that a "third" interview exists. However, the Defendant cannot specify who or under what circumstances the minor child was interviewed for the "third" time. To the Tribe's knowledge and record only two interviews of the minor child exist regarding the incidences leading to the Defendant's arrest. The first interview was conducted by Ms. Clark as part of a child welfare investigation. This interview is not in the Prosecutor's possession and would require subpoena of child welfare records. The second interview was conducted at the Child Advocacy Center. This interview was disclosed in October 2011. The Tribe spoke with the victim's guardian, who also indicates that only two interviews occurred regarding this case. The Tribe is unaware of any third interview of the child regarding the incidences leading to the instant case against Defendant. Further, without more information from the Defendant, regarding when or where this interview was done, the Tribe cannot determine if any such interview exists.

At this point, the Tribe has no better access to this information because, in the Tribe's record, no other interview exists. The Defendant has not indicated he made any effort to obtain the supposed interview, and cannot identify even who the interviewer may have been. And the defense has not made a request specific enough for the Tribe to even determine if such an interview might be available for disclosure. The Defendant's request is based only on "assertions, insinuations, and speculation," and, therefore, this request seems to be a fishing expedition for information that the Tribe simply does not possess.

The minor victim, E.R., has not been coached in any manner by the Prosecution or any "agent" of the Tribe.

Pursuant to the Pascua Yaqui Criminal Code, Victim Rights, the victim in a case the right to be informed about the proceedings in the criminal case involving them. *See* 4 PYTC §§ 5-70 through 5-100. This obligation includes the Victim's Right to Participate in conferences with the Prosecutor and/or Victim Advocate. *See* 4 PYTC § 5-70. A victim's rights may be exercised by a representative or in the case of a child victim, by a guardian. See 4 PYTC § 5-40 (C).

In the case of child victims, it is common and preferred practice, to develop rapport with the child. A child victim is particularly vulnerable to being re-traumatized by the trial experience and thus may require special accommodations and considerations. For example, preparation may require "multiple meetings between the victim and the practitioner to build a trust relationship." T. Krauel, Practical Tips and Legal Strategies for Easing Victims' Concerns about Trial, NCVLI News Winter 2007-2008; National Crime Victim Law Institute, available at: http://law.lclark.edu/live/files/6461-practical-tips-and-legal-strategies-for-easing. These meetings with the victim do not include discussion of the criminal incident, especially with a child victim, until trial is closer at hand. The purpose of the meetings is to build rapport and familiarity so the child will not be put off or frightened by meeting the prosecutor for the first time right before trial. *See* The Art of Trial Advocacy, The Army Lawyer, June 2002 *available at*: http://www.au.af.mil/au/awc/awcgate/law/advocacy_prepare_child.pdf; A. Harrington,

Preparing the Child Witness for Trial, Gallatin County Attorney's Office, *available at:* www.mtcoattorneysassn.org.

There is a difference between preparing witnesses for trial and "coaching" a witness to testify in a particular manner. Preparing witnesses eases them into the experience of testimony and what may emerge in cross-examination. It allows the witness to be aware of the proceeding and structure of trial. However, "coaching" means a witness has been fed testimony that is not based in fact.

Here the Defendant asserts that Almarosa Ramirez has provided information that the child E.R. is being "coached." Yet, Defendant does not describe the nature of the coaching or when it occurred. Further, the Defendant does not disclose Ms. Ramirez' bias in this case. Ms. Ramirez is living with the Defendant (her boyfriend), and was previously a co-defendant regarding incidents of abuse against the minor victim. Ms. Ramirez has an interest in the outcome of this case.

To the Prosecutor's understanding, according to the child's guardian, the only persons who have spoken with the child are: Ms. Almarosa Ramirez, the criminal Prosecutor, Ms. Shanley, and the guardian. Other than when the case first came to light, no Pascua Yaqui Police have spoken with the child. The Prosecutor has only met the child three times in eight months (October 2011-May 2012).

The Defendant alleges that the Tribe has told the child to testify consistent with the criminal allegations against Defendant. The Tribe's prosecutor has had minimal contact with E.R. The purpose of any contact has been to inform the victim of the proceedings in the case and to answer his questions. In building rapport with the child, the Prosecutor has not discussed the case facts at any length, but rather focused on

any questions the child has had regarding his case. The Prosecutor has not spoken to or seen the child with any great frequency. All contact has been approved by the child's guardian, Pascua Yaqui Social Services. The Prosecutor has acted ethically in working to prepare this vulnerable victim as required by the Victim Rights Code and by the general practice of the legal discipline.

The Defendant sets out general allegations that the "prosecutor" or the "Tribe's agents" have been "coaching" the child victim. These allegations are solely based on the statements of Ms. Almarosa Ramirez, an interested party to the outcome of this case. In fact, Ms. Ramirez has been identified as a defense witness by the Defendant. She should not be discussing the facts case with the child at all.

CONCLUSION:

For the foregoing reasons the Tribe requests that this Court deny the Defendant's motion to compel disclosure. The Tribe has no "third" interview. However, if the Defendant can provide details of where and when this supposed interview occurred, the Tribe will try to secure it and release it. The Tribe simply does not have any record of this interview as part of its criminal case. Further, the Defendant's allegations of "coaching" are also unfounded and not supported in any facts. All information regarding such conduct was obtained through Ms. Ramirez, who should not be discussing this case with the child and who has a clear bias regarding the outcome of the case.

Respectfully submitted this 21 day of May, 2012.

Guadalupe Gutierrez
Deputy Prosecutor

APPENDIX 3

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PASCUA YAQUI TRIBAL COURT
FILED DATE AND TIME
2012 MAY 29 PM 2:19
DOCKET NO. CR-12-005
CLERK

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, **Plaintiff,** **v.** **CHRISTOPHER MONTANA.** **Defendant**	Case No.: CR-12-005 **DEFENDANT'S REPLY TO TRIBE'S RESPONSE TO DEFENDANT'S MOTION OT COMPEL DISCLOSURE OF SUPPRESSED EXCULPATORY EVIDENCE**

COMES NOW, Defendant, Christopher Montana, by and through undersigned counsel, Fredric Brahms, J.D., hereby submits his reply to the Tribe's to Defendant's motion.

1. **The Tribe's Response is Untimely.**

Defendant's motion was filed and hand-delivered personally by undersigned defense counsel to the Prosecutor's Office on May 7, 2012. It is generally understood that a party to either a civil or criminal has ten days to respond to a motion plus three calendar days for mailing, although neither the Tribe's civil or criminal code sections dealing with motions specifies that one has 10 days to respond. See 3PYTC 2-1-140, Rules of Civil Procedure and 3PYTC 2-2-300, Rules of Criminal Procedure. However, #PYTC 2-1-20, R.Civ.P., concerning computation of time does allow for three(3) additional days for a notice or motion "delivered by mail rather than given directly to the person…"

Thus, assuming this ten day rule applies, the Tribe had ten (10) days to respond to the motion, or until May 17, 2012. The Tribe's Response was filed on May 21, 2012 as indicated by the Court's stamp showing the date and time of filing. The Tribe's proof of service for the Response is silent as to when the Response was served, but the attached envelope which

contained the Response, among other items, is post marked May 22, 2012. Accordingly, Defendant requests this Court disregard and/or strike the Tribe's Response and not allow oral argument by the Tribe on Defendant's motion.

In the event this Court considers the Tribe's late Response and allows the Tribe to present argument at a hearing on Defendant's Motion, as detailed below, Defendant responds to the Tribe's arguments contained in its Response.

2. The Tribe Conducted a Third Interview in November 2011.

The undersigned defense counsel was aware, prior to filing the motion, through Almarosa Ramirez or her then defense counsel about a third interview, but did not have the details concerning such interview at that time. In the interim, defense counsel has recently learned from Ms. Ramirez that an interview of E.R. took place in November 2011 at Ofelia Ochoa's house, a relative who E.R. was placed with before he was sent to Back to Life. And that per Ms. Ochoa an attorney from the Tribal Prosecutor's Office, perhaps Chief Prosecutor, Alfred Urbina or a prosecutor other than Ms. Gutierrez, together with a representative from PYT Social Services or CPS, conducted such interview. It is presently unknown to defense counsel whether or not such interview was recorded. However, it is reasonable to presume that both the representative of the Tribal Prosecutor's Office and Tribal Social Services who conducted such interview may have taken notes and could have written a summary of the interview based on such notes and their memory. At this juncture, Defendant is simply asking the Court to order production to the Court of all records of such interview from both the Tribal Prosecutor and Social Services and identify who from each Department conducted such interview.

While, Defendant will likely file a motion seeking a subpoena of the Social Services or CPS' records regarding this interview, among other records, it is appropriate for this Court to at least enter the in camera inspection as requested in the motion.

3. Defendant's Claim of "Coaching" is Based on Fact, not Mere Assertions.

In the Response, Deputy Prosecutor, Guadalupe Gutierrez, states, "The Prosecutor has only met the child three times in eight months (October 2011-May 2012)."(Response at p. 10, lns. 18-19). While this may or may not be true, and the records of Back to Life, including its sign in sheet, will bear witness to how many times Ms. Gutierrez or any other member of her staff

and/or other agents visited E.R., what is important is the nature and extent of those sessions. In that regard, Ms. Gutierrez further states, "The purpose of any contact has been to inform the victim of the proceedings in the case and to answer his questions. In building rapport with the child, the Prosecutor has not discussed the case facts at any length, but rather focused on any questions the child has had regarding his case. The Prosecutor has not spoken to or seen the child with any great frequency." (See Response, p.10-11, lns. 23-25, 1-2). In contrast, based on statement's E.R. has made to his mother, Almarosa Ramirez, who is only interested in the truth being disclosed in this matter, he has indicated that the Prosecutor on more than one occasion has been working with him to get his testimony "consistent." In other words, the Prosecutor has been coaching him to testify consistent with the Tribe's theory in this case.

Contrary to the Tribe's assertion, Ms. Ramirez does not have bias in this matter as she is as interested, and even more interested in her son's welfare, than Defendant's welfare. It is her son who has voluntarily revealed such information to Ms. Ramirez. She has not been questioning him to ferret out what the Prosecutor has been doing in preparing him for trial. Further, this criminal case is not "his case" as Ms. Gutierrez proclaims in the Tribe's Response. E.R. is not the Tribe's client in this matter, but clearly an essential witness, whose independence as a witness should be respected and remain intact. This case is by and for the Tribe, and the Prosecutor's Office has a duty and obligation to seek justice and the truth and not suppress or manipulate it. It appears from the statements made by E.R. to his mother that the latter has been occurring.

CONCLUSION

Accordingly. For the reasons set forth in Defendant's Motion and in this Reply, this Court should grant the motion.

RESPECTFULLY SUBMITTED this 24th day of May, 2012.

Fredric J. Brahms, Counsel for Defendant,
Christopher Montana

Original filed this 29th day of May, 2012
in: Pascua Yaqui Tribal Court

Copy of the foregoing mailed/delivered
this 30th day of December, 2011 to:

Guadalupe Gutierrez
Pascua Yaqui Tribe
Office of the Prosecutor
7474 S. Camino de Oeste
Tucson, Arizona 85757

Feliciano Cruz
PYT Social Services
7474 S. Camino De Oeste
Tucson, AZ 85757

APPENDIX 4

IN THE PASCUA YAQUI TRIBAL COURT

COUNTY OF PIMA, STATE OF ARIZONA

PASCUA YAQUI TRIBE,	)	NO. CR12005
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
CHRISTOPHER MONTANA,	)	
	)	
Defendant,	)	Tucson, Arizona
	)	May 31, 2012

BEFORE: THE HONORABLE MARGARET FLORES, JUDGE OF THE PASCUA YAQUI TRIBAL COURT

APPEARANCES: GUADALUPE GUTIERREZ, ESQ.
appearing for Plaintiff

FREDRIC BRAHMS, ESQ.
appearing for Defendant

RE: MOTIONS HEARING

Christine McGarvey
Legal Transcription Services Plus, Inc.

INDEX

THE COURT: The Pascua Yaqui Tribal Court is now in session in the matter of the Pascua Yaqui Tribe versus Christopher Montana in Docket Number, CR12005. Today's date is, uh, May 31st, 2012. And this is the date and time scheduled for a pretrial hearing in this matter. Appearing on, uh, behalf of the Tribe is a Ms. Guadalupe Gutierrez. The, uh, Defendant Mr., uh, Montana appears, uh, with Counsel, Mr. Fredric Brahms. And at this time, uh, the Court will ask if the parties are, uh, ready to proceed with the pretrial hearing today.

MS. GUTIERREZ: Yes, Your Honor.

MR. BRAHMS: Yes.

THE COURT: Alright. With that, uh, the, uh, Court has, uh, several, uhm, motions to address, uh, which, uh, have been, uh, filed in this matter, uh, and the, uh, Court has, uh, the most, one of the most recent, uhm, filings in which, uh, there is a Motion to, uhm, Motion to Stay the Matter of the Jury Trial, uh, filed by Defendant or Defense Counsel and the, the Court had ordered the Tribe to, uh, reply or respond to that, that motion. Uh, the Tribe did respond. Uh, the, uh, Court is actually going

to address, uh, that, uhm, that motion or is there a recommendation?

MR. BRAHMS: Okay. May I ask, Your Honor, that, --

THE COURT: Uh-huh.

MR. BRAHMS: -- uh, we address the Motion to Limited Contact first 'cause if the Court does bring up the Motion to Stay then I'm assuming that these proceedings would be at an end at this time.

THE COURT: Okay. So you wish to, uh, uhm, address the, the issue of your motion?

MR. BRAHMS: The Motion of Limited Contact firstly, the Motion to Stay.

THE COURT: Okay. Does the Tribe have any --

MR. BRAHMS: [Inaudible.]

THE COURT: -- objection to that?

MS. GUTIERREZ: Uhm, actually, Your Honor, if the, that will, I think it should be in the opposite order we should address the Stay and then the no Contact Order because then it'll determine in each [inaudible] the extent. Uhm, either way there's an objection on the table from the guardian and the Tribe.

THE COURT: Okay.

MR. BRAHMS: There's a what?

MS. GUTIERREZ: An objection from the Tribe and the guardian.

MR. BRAHMS: Regarding?

MS. GUTIERREZ: The no contact order, --

MR. BRAHMS: Oh.

MS. GUTIERREZ: -- Mr. Brahms.

MR. BRAHMS: And I just, Your Honor, I did not receive a response to the Motion of Limited Contact [inaudible] response to that?

THE COURT: Okay. Uhm, and actually that, uh, was Tribe's response, uh, I have here, uh, dated, uh, or the, uh, date stamped, uh, May 29th, 2012, uh, so that had been --

MR. BRAHMS: I didn't, --

THE COURT: -- served by the [inaudible].

MS. GUTIERREZ: Okay.

MR. BRAHMS: -- I didn't receive their response --

THE COURT: Okay.

MR. BRAHMS: -- of no contact, I'd like if it's there I'd have to look at it. Uhm, --

MS. GUTIERREZ: I have --

THE COURT: Does the Tribe have an extr--

MR. BRAHMS: -- [inaudible] the --

MS. GUTIERREZ: I'd have to search for [inaudible].

MR. BRAHMS: -- if the Motion to Stay is granted am I incorrect, uh, the proceedings would be over at this time?

MS. GUTIERREZ: That's absolutely incorrect --

MR. BRAHMS: And [inaudible] --

MS. GUTIERREZ: -- they stay exactly as they were, Your Honor, according to the Rules and then the Federal Government hasn't even indicted yet --

MR. BRAHMS: No, we're --

MS. GUTIERREZ: -- and so --

MR. BRAHMS: -- not getting into the substance of the Motion to Stay yet, you know, that, that --

MS. GUTIERREZ: But the --

MR. BRAHMS: -- [inaudible] I, I just would like to know if we do the Motion to Stay first and if the Court [inaudible] granted are we go forward with the [inaudible]?

THE COURT: Right. Uhm, at this point, uhm, I will, uh, after hearing from the parties I'm going to address the Motion to Stay first. Uhm, what that will, uhm, entail is, uh, the Court

having, uh, had the, uhm, reviewed, uh, the Motion for a Stay of Jury Trial and after hearing from the, the Tribe, uhm, you have received the Tribe's response... is that correct to, to that motion?

MR. BRAHMS: Yes, Your Honor.

THE COURT: Alright. Uhm, based on, uh, the documents filed as to that, uh, motion the Court is, uh, at this time denying the Motion to Stay Jury Trial, uh, based on the Tribe, uh, in--, information in --

MR. BRAHMS: My I address that brief, Your Honor?

THE COURT: Uh-huh.

MR. BRAHMS: And the Tribe's, uhm, response is based entirely upon the ripeness issue and cites case that deals with ripeness and with respect to some legislature in Texas that it had some, uh, provision that if the penalties of certain things occurred and in that case they indicated both at the District Court level and the Supreme Court level that it was too remote and it wasn't even indicated that that was likely to occur 'cause it hadn't even gotten to a point where those sanctions in that statute, education statue had occurred and therefore they determined that it wasn't right. Ripeness is not an issue at this

point 'cause my understanding based on my Motion to Stay is based on Ms. Gutierrez e-mail to me the U.S. Attorney hasn't indicted that they accepted the case and she indicated that indictment is likely, very likely in the near future that means it's imminent and with due respect, Your Honor, I believe the Tribe has made [inaudible] obligation that certainly it is not premature for the Tribe to entertain staying this matter based upon the fact that U.S. Attorneys has accepted the case, indictment is imminent and as I indicated in my motion for the purpose of judicial economy I believe that it would be appropriate and the most prudent action for the Tribe at this time is to stay this matter pending further enquiry as to where the U.S. Attorney is at because I don't know how you can interpret that they've accepted the case and invite [inaudible] economy and why utilize this Court's resources and the Tribe's resources on this matter when it is not just an impossibility in [inaudible].

THE COURT: Alright. Thank you.

MS. GUTIERREZ: Your Honor, if I may just, --

THE COURT: Yes.

MS. GUTIERREZ: -- just, uh, the ripeness aren't as Mr. Brahms states very, very, uhm, respectfully, Your Honor,

[inaudible] is an issue of whether something has happened or not this Court unfortunately can't submit in something that hasn't even occurred, uhm, it's sort of like sentencing a conviction you don't have it in hand therefore you cannot speak to it. As far as judicial economy one does not affect the other this is a jur--, jurisdiction kind of crime so whether we proceed or not the Federal Government has seven years to decide [inaudible] proceed. That they've accepted the case I said and I indicated that it may be likely but, uhm, I don't know whether or if it's going to be indicted next week, two years from now, in five years I honestly don't know. Uhm, they usually give us a little time heads up and then I try to tell Defense Counsel but, uhm, frankly it's just not an issue that is on the table right now.

THE COURT: Alright. And, uh, --

MR. BRAHMS: [Inaudible] --

THE COURT: Okay.

MR. BRAHMS: -- [inaudible] but I just want to read [inaudible] and it says I respond back [inaudible - mumbling] case. I [inaudible] accepted the case. And then in her earlier May 14th, e-mail [inaudible] the Attorney's Office, U.S. Supreme Office has informed me that they will likely [inaudible] indict

the Defendant in the near future. That's not possibly, that's not that they may do it that is imminent and the acceptance of the case is at hand and this Court, uh, in its discretion can act upon and entertain Motion to Stay and my point is it's not premature [inaudible] and I think it would be the prudent thing, the Defendant [inaudible] prudent for this Court to do that and at least [inaudible] and if not, if not stay then we're going to have to visually monitor what this attorney's doing. My concern was that between now and August I know that the Defense does and, uh, on an inkling that the, the Tribe intends to do some substantial [inaudible] and I'm just saying that, uh, here's the imminent and why go through [inaudible] and other motions that are going to be coming if that is the case so my point in the motion is it's prudent to not only entertain the stay but to impose it.

THE COURT: Alright. Uh, so at, uh, this time, uhm, Ms. Gutierrez that the, I, I need clarification of whether or not --

MS. GUTIERREZ: Yes.

THE COURT: -- the, the U.S. Attorney has, there has been acceptance that's different than an, an indictment it's, --

MS. GUTIERREZ: [Inaudible.]

THE COURT: -- it's that they're looking at the matter, uhm, --

MS. GUTIERREZ: Yes. That means that they're looking at the matter, evaluating the matter, they haven't presented it to Grand Jury and there's the whole question of Grand Jury nobody ever knows what a jury's going to do whether it be a trial or in Grand Jury for --

THE COURT: Uh-huh.

MS. GUTIERREZ: -- indictment, Your Honor, it hasn't got there. Uhm, I did actually check in with them today and they're just still going through, because [inaudible] they have so many trials on the docket they're just still evaluating.

THE COURT: Okay.

MR. BRAHMS: Yeah. I have nothing further.

THE COURT: Alright. And at this time, uh, after hearing from the parties in open court regarding, uh, the, uh, the Motion to Stay a Jury Trial, uh, the, uh, Court finds at this time that, uh, due to the Tribe indicating that there is, uhm, no official indictment as of today's date of the, uh, Defendant Mr. Montana the, uh, Court is going to at this time deny the Motion to Stay, uh, this case and we'll proceed with, uh, hearing motions

that, uh, have been filed in this matter. We actually may have to schedule another hearing in order to fully hear out motions and I want to go over the motions with the parties, uh, because, uh, there is, there are several other issues which the Court will need to, uh, address as far as, uhm, motions that im--, immediately need to be addressed with regard to --

MR. BRAHMS: Your Honor, --

THE COURT: Uh-huh.

MR. BRAHMS: -- may I briefly address my motion and I would like the Court to decide to consider se--, setting for a second hearing.

THE COURT: Okay. What is --

MR. BRAHMS: [Inaudible] finally got the Court's order to continue the trial and [inaudible] request to vacate this hearing I want the Court to know what my, my processes were --

THE COURT: Okay.

MR. BRAHMS: -- [inaudible] vacated and it was primarily [inaudible] one or two motion, one motion in particular I had requested a hearing in this motion concerning exculpatory evidence. My intention was to subpoena some witnesses to testify. By the time I got the order and I found out that the Court was

keeping this hearing I thought well it's fine with respect to some of the motions but I ask the Court to, uh, order that motion to be set for a second hearing sometime in the next, within this next month to give me sufficient time to subpoena witnesses [inaudible].

THE COURT: Alright.

MS. GUTIERREZ: Your Honor, actually I, uh, it was very difficult to follow Mr. Brahms' motions because they were very broad and that it didn't, uh, frankly it's, uh, why, why, what is it that he was asking for and trying to [inaudible] to it. I believe the, the, uhm, specific issue in the exculpatory piece was regarding, uhm, uh, after the incidences once the child was removed from the home I believe he, uhm, from what Mr. Brahms later indicated in his motions and actually a separate motion that the child --

MR. BRAHMS: [Inaudible.]

MS. GUTIERREZ: Excuse me, Mr. Brahms.

THE COURT: Okay. I'll hear one, uh, --

MS. GUTIERREZ: Uh, that the child made some exculp--, uh, not exculpatory but impeached [inaudible] statement that [inaudible]. That's my understanding. Now both statements

absolutely should be, uhm, dis--, discover [inaudible] did not actually know and because I didn't know I called the guardian Mr. Cruz. I asked Mr. Cruz you know did these statements occur. He said yes. Uh, can you give me a time frame. I then filed a motion yesterday to retrieve those statements, any notes or with regarding those statements because the Defendant actually, absolutely has rights in that for impeachment purposes under Gateway. So I don't know if, uh, these little surprises keep coming up, there was also an issue that came up in a reply that we just got yesterday regarding the third interview. Your Honor, specifically there is no third interview, there is still no third interview. The only incident that Mr. Brahms is referring to is an initial meeting where in the guardian introduced myself and Miss Shanley to the child. There was no interview done. And frankly, Your Honor, just to set the Record straight we're allowed to meet with the victim the same way that Mr. Brahms is allowed to meet with his client. We're allowed to, it's not he was some suspect thing we meet with them so they know who we are so that we're not some stranger, at the court is a little less intimidating and it will be the day of trial very honestly especially the child victim. As all that occurred the entire

interaction was about ten minutes, we introduced ourselves to the j--, uh, to the child, we also let him know that we were dealing with different parts of the case and that we really didn't talk to each other about [inaudible] so that was the extent of our interaction with the child at, uhm, the house here on the reservation where he was placed initially.

THE COURT: Okay.

MS. GUTIERREZ: So I don't know if those are the incidences but I look, if there are others seemingly exculpatory, actually if Mr. Brahms can just say so we, I don't know what he's talking about, we're just trying to get the information, I don't know what to ask for or ask about if I don't know what he's talking about. Your Honor, this particular Defense Counsel has had access to all of the Child Welfare case. He has more information than the Tribe does at this moment because I do not have access to them so if Mr. Brahms can be so kind as to specify what information he's after we can more specifically address that. Uhm, as, as to if I covered the supposedly exculpatory evidence that he's speaking of we can just address it now. I've already asked for the incidences that he didn't speak to until I got, uh, replying in a whole different motion but we're, if, if it's out

there and he, you know, I'll ask and investigate whether it's there but he seemingly knows what these incidences are but he won't set them forth and he's definitely not, uhm producing the evidence he seems to have. He seems to know these things already exist intends to use them I just don't have access to them without motion and subpoena.

THE COURT: [Inaudible] --

MR. BRAHMS: Your Honor, Ms. Gutierrez is getting to substance on a motion maybe she's confusing two motions with each other.

THE COURT: [Inaudible.]

MR. BRAHMS: Did not file a second motion [inaudible] and all I'm asking is and I believe [inaudible] motion to --

THE COURT: What, what date is your motion?

MR. BRAHMS: -- [inaudible] evidence --

THE COURT: Okay.

MR. BRAHMS: -- I was looking for and I understand from information that I have been told that there was a, an interview in a living room at Miss Ochoa's house when she was the, uhm, relative that, uhm, uh, the victim was placed with at that time and that there was a member of the tribe, it may have been

the Chief Prosecutor, someone from the social services and I had not had a chance to talk at length with Miss Ochoa about it but, uh, that's one of the witnesses I want to have to testify as to the knowledge of that interview and if I'm hearing the trial right they are saying, Ms. Gutierrez is saying that they don't believe that interview took place and there aren't any notes or memorandum to disclose containing that interview from the Prosecutor's Office. But that's what I wanted to get at in that issue. But the second issue dealt with Ms. Gutierrez or any agents of hers the extent, I'm not saying that they don't have a right to speak with the victim but it's the extent in that the involvement of what they're doing with the victim in, in talking with him and I have some evidence and that would come from a witness as, it comes actually from the victim's own statements to this witness that indicate clearly that there probably was some overstepping of the bounds in, in the, the Prosecutor's obligations and rights speaking with that witness and what I'm asking is if that matter be set for a separate hearing, that's all I was asking and [inaudible] wanted to get into the substance of that motion at this time.

THE COURT: Alright.

MS. GUTIERREZ: Your, Your Honor, just briefly again there was no interview, it was just an introduction, the guardian was there, Miss Ochoa was not and in terms if, you know, if Mr. Brahms is so intent that he does need to produce witnesses, he needs to produce witnesses that, uhm, can say specifically what incidences occurred because we have not had enough contact with this child to warrant anything so we're just a little --

MR. BRAHMS: Well [inaudible] --

MS. GUTIERREZ: -- confused on [inaudible] and as to what he's getting to 'cause he gives no specific facts --

MR. BRAHMS: Okay.

MS. GUTIERREZ: -- of anything except that Miss Alma Rosa Ramirez who has a [inaudible] bias here has all of this interest in saying what the child said. Well Miss Alma Rosa is being called as a witness.

THE COURT: Okay. At this, at this time, uhm, with regard to that motion, the request for a, a hearing on this, uh, exculpatory evidence which Mr. Brahms, uh, indicates that there, that you know of a witness or one --

MR. BRAHMS: Well several witness, Your Honor.

THE COURT: Several witness --

MR. BRAHMS: One of the witnesses would be and I did specified in my papers where I was going to address it in, uh, at this hearing today [inaudible] was that I intend to call at least three witnesses, Miss Ochoa, Ms. Ramirez and Ezekiel Ramirez and if the Court can deal with Ezekiel Ramirez and encountering questioning him in chambers that would be fine concerning that issue and that issue that I would want to be Ramir--, both Alma Rosa Ramirez and Ezekiel to enlighten us on is the nature in extent of the Tribal Prosecutor and their agents that have been preparing him to testify in trial 'cause you can only go so far. And about that testimony I won't know the extent of that, you know, I, I believe that I have put forth in my motion sufficient inference to evidence that that has been happening but in order to fully get it we need to have the witnesses including Ezekiel and if you don't want Ezekiel Ramirez to be, and if I have to subpoena him through the guardian if you don't want him to be questioned in open court then that's something that I would suggest that the Court could do in chambers in, in order to question him on that issue.

MS. GUTIERREZ: Your Honor, I would just, uh, two things, first of all Mr. Brahms makes these blad accusations

against the, the Tribe and the Tribe, what the Tribe is doing. We, we will a--, if we knew what agents he is talking about we would absolutely if there's [inaudible]. We don't know of any, the guardian doesn't know of any. Everyone that this child sees is [inaudible] through his guardian.

THE COURT: Okay.

MS. GUTIERREZ: However, Your Honor, in addition to that, uhm, we want some questioning as to how much this Defense Counsel through one of his witnesses, Alma Rosa Ramirez is coaching this child because his allegations are that the Tribe keeps making this child or seeing that this child is, uh, being coached to testify in, uh, consistent with the Tribe's case. I, I don't, I don't know because the child, uh, and I haven't spoken about the case at all but from what I understand the only things he has said are consistent with the facts not the Tribe's case, with the facts.

MR. BRAHMS: [Inaudible] --

MS. GUTIERREZ: So I wouldn't want this child to be, uhm, to be questioned in camera just with you, Your Honor, because frankly if this child is in this situation which he should not be we would like to know what agents this lawyer's talking about so

that we can circumvent the situation; we don't know anybody who's speaking to this child about this case except maybe Miss Alma Rosa Ramirez. So we haven't spoken to but it's very clear from this Defendant's motions that she is clearly speaking over and over again with this child about this case which is completely inappropriate.

MR. BRAHMS: Uh, uh, Your Honor, what Ms. Gutierrez has just stated as far as what she has done or hasn't done is ungiven testimony and that is exactly to the core of our [inaudible] in that is to find out what exactly she has been doing; she says she hasn't been talking to this child at all about the case. Well in one of her responses she indicated she has to some extent but mainly just [inaudible] trial. But we have a different, we have facts, records from the victim to his mother that indicate that he has been coached as to how to testify and what he's there to testify. And to get to the bottom of that I think we need to have him be present at the hearing and I'm not asking that he be questioned openly I'm asking the Court to do it in camera, questioning him on that issue. My whole point before [inaudible] was just to have that motion set for a separate hearing.

THE COURT: Alright. And, uh, and, uhm, in your, uh, motion is this the motion dated, uh, May 7th, uh, --

MR. BRAHMS: Yes, it was, Your Honor.

THE COURT: -- [inaudible]? Because there, uh, as I, uh, read it there's a, uh, motion, Defendant's Motions to Compel Disclosure of suppressed exculpatory evidence and, uh, request for in camera inspection, uhm, is that for documents or, uhm, --

MR. BRAHMS: Well it, it would be for [inaudible] if they accept on both issues, --

THE COURT: If they accept?

MR. BRAHMS: -- on both issues as to whether there was this third inter--, interview [inaudible] it did take place. And then regarding the extent of the trial is, is coaching him and trying to get him to testify in a certain way, in other words, directing his testimony [inaudible] and all I've been asking, I didn't want to get into the substance of the motion right now Ms. Gutierrez did was just to have that matter set for a separate hearing sometime out in the future so I have enough time to subpoena witnesses for it and to set that.

MS. GUTIERREZ: My position --

MR. BRAHMS: I will, I will want to point for the record right now at this hearing that the Tribe's opposition was late and [inaudible].

MS. GUTIERREZ: Actually, Your Honor, it wasn't, I checked with Mr. Casey in the court there actually was no order issued on this ca--, on this particular motion. Mr. Brahms filed several motions on the 7th all of them [inaudible] so I just assumed that that was in my pile of responses. The Court was moving at that time so the Court had [inaudible].

MR. BRAHMS: Well my understanding and I could be wrong, you know, [inaudible] exactly how the procedures work in the Court is that if you handle a ver--, a motion the opposing party has ten days to respond and if that is the case then it is late if it's not the case then it isn't late.

THE COURT: Okay.

MR. BRAHMS: [Inaudible] issues that she raised, again I am just asking the Court to not have that motion for today but we have that motion separate [inaudible].

THE COURT: Okay.

MS. GUTIERREZ: You know, Your Honor, I just object to that motion occurring later I think we have enough to go off

today. According to the case law that I was able to find, there's very little case law, the allegations aren't sufficiently [inaudible], Mr. Brahms [inaudible these illusions that, uh, somebody said something to so--, to someone, something to someone and that it's all bad and they're saying when he's having the most contact with anybody that has, uh, co--, contact with this child. Uhm, the Records will all show how much contact we've had because we have to sign in and out we can't do anything without the permission of the guardian, which by the way Mr. Brahms has not, uhm, has not been proficient in doing. Uhm, he actually contacted the child placement and [inaudible] to the attention of the Courts.

THE COURT: Before you go, uh, --

MS. GUTIERREZ: Uhm, --

THE COURT: -- any further, Ms. Gutierrez, at this time, uh, the Court does see that at, at this point, uhm, there are more iss--, you're saying that there are documents, uh, whatever would show that is not before, I, I don't have those documents here that actually would lead to the Court having a hearing on the matter so, uh, the Court is going to grant, uh, the request for hearing on, uh, this specific issue, uh, if at this

point, uhm, usually when there are requests for disclosures, uh, one party request any and all documents referring to, uh, you know, whatever, uhm, uh, dates, uh, any type of, uh, if there were any meetings on such, such date, uh, uh, is that something that you have, uhm, and I have to look for that, uhm, in my file at this point, uh, uh, in what the date of the meeting or the November --

MR. BRAHMS: Well, uh, I have recently affirmed that the, the meeting at Ophelia Ochoa's house occurred sometime in November prior to the victim being placed at that [inaudible] --

THE COURT: Okay. So there's no actual --

MR. BRAHMS: -- [inaudible] November.

THE COURT: -- date, uhm, that you have available to you that you know of? Uh, a date in November whatever, uh, it is Tuesday the 15 and, and I'm just pulling a, uhm, the thing is that and it's the Tribe's, uhm, contention that, uh, if there's no specific either individuals that you know of by name, uh, they're, how is the Tribe to know what to respond to, uhm, --

MR. BRAHMS: Well I think in [inaudible] that there was a meeting with Ezekiel, an interview with a member of the Tribal Prosecutor's Office [inaudible] Ms. Gutierrez now she's

saying it was her --

MS. GUTIERREZ: No.

MR. BRAHMS: Uh, let me finish please. And it was at Ophelia --

MS. GUTIERREZ: [Inaudible.]

MR. BRAHMS: -- Ochoa's house and it was in early November before he was placed. I can find [inaudible]. Again I was expecting that to be set for a separate hearing if this matter was continued. The matter was continued so I was surprised this is in part of, --

THE COURT: Today.

MR. BRAHMS: -- that this hearing was going to take place at all. If, if the Court is saying that I should make specific disclo--, disclosure to the Tribe for both those issues then I will do that.

THE COURT: Uh-huh.

MR. BRAHMS: You know but I do believe that it's important on those two issues that we have a hearing with the witnesses that I have to be vetted, examined, cross-examined; with respect to Ezekiel to be examined by Your Honor in chambers and in camera and we don't have enough to go forward today on that issue.

MS. GUTIERREZ: Okay. Your Honor, just to be clear Mr. Brahms' original motion waned on specifics it just said generally the third interview. We went through everything and Mr. [inaudible] can tell you I asked everyone is there a third interview, I have nothing that indicates a third interview. Everything [inaudible] that we had [inaudible]. The first thing with Miss Kim Clarke the initial --

THE COURT: And this is going into the motion, --

MS. GUTIERREZ: Okay.

THE COURT: -- I, I --

MS. GUTIERREZ: And then, and then in his reply is when he brought up this issue that supposed third interview. I'm not denying; we didn't know what he was talking about. We're, the, the Tribe is not denying we went there briefly for about ten minutes with the specific and the only issue being hello, Ezekiel, for his guardian to say this is the Prosecu--, the two Prosecutors for the trial, this is what they do and this is their, uh, they're going to be in charge of the case. You don't see us a lot but we'll be around that's it. We left ten minutes later, said thank you to the, to, uhm, the persons in the house and left. So we have nothing further to say that one part of it is work product

and it's protected and privileged and part of it the guardian can speak to and which is nothing, it was no--, there was nothing to say or do. If Mr. Brahms wants a note saying yeah, we went to his house, --

THE COURT: Okay.

MS. GUTIERREZ: -- to this house and yeah, we introduced ourselves that's fine, I don't know where he's getting a third interview from.

MR. BRAHMS: Well, Your Honor, --

THE COURT: Mr. Brahms.

MR. BRAHMS: -- again she's testifying as to what [inaudible] occurred at that time and I have different initial understanding from both Alma Ramirez and from Ophelia Ochoa but that isn't the only issue. The other issue in that motion deals with again the nature and extent of the Tribal Prosecutor's Office and the agency they had preparing Ezekiel over the months that they've been going there for trial and we have an understanding and that is expressed [inaudible] motion through the victim's mother that he made statements that were voluntary not under pressure and I think it's prudent and it support, this is, this is a serious motion [inaudible] serious charges but they shouldn't be

getting charged up and I was expecting and anticipating a separate hearing on that if this matter was continued. The case had been continued and I'm still asking the Court that we have a separate hearing.

THE COURT: Alright. And thank you. Uh, at this time the, uh, Court is scheduling a, a separate hearing to address the Defendant's motion dated or submitted to this Court May 7th, 2012, and the motion is a Motion to Compel Disclosure of Suppressed Exculpatory Evidence and, uh, the hearing will be, uh, set at this time, uh, the Court will, uh, since the, uhm, Defense Counsel would like to, uh, have, uh, the minor questioned as to the, the issue of, uh, speaking with the Tribe, uhm, does the, uhm, at this time, uh, not exactly knowing what, what kind of questioning you are, uh, you would like to have, uh, the, uhm, Court ask or, uh, to find out I do need to, uhm, make sure that, uh, --

MR. BRAHMS: Would you like me --

THE COURT: -- that --

MR. BRAHMS: -- to submit something to the Court as to what --

THE COURT: Yes, uhm, --

MR. BRAHMS: -- [inaudible].

THE COURT: -- I would like that but I will also like the Tribe to respond to any --

MS. GUTIERREZ: Actually, Your Honor, we have to --

THE COURT: -- before, --

MS. GUTIERREZ: -- mitigate those questions.

THE COURT: -- before any, uhm, any of, any questions are asked of the minor, uh, uh, the alleged victim.

MS. GUTIERREZ: And the Tribe --

THE COURT: So --

MS. GUTIERREZ: -- will also submit questions... okay?

THE COURT: Okay. So at this, uh, time the Court is going to have, uh, parties submit, uh, their, uh, proposed questions for the minor for this, uh, hearing, uh, so I will allow some time before, uhm, it will be within this, uh, next month of June, uhm, however it will also allow for, uhm, time to, uh, subpoena any witnesses, time for, uh, the, uh, Tribe and, uh, the, uhm, Defendant through Counsel to submit their questions. Uh, at this time I'm, I will ask if, uh, if Counsel or Defense Counsel is, uh, requesting, uh, a certain amount of time for this hearing; is an hour sufficient or, uh, --

MR. BRAHMS: I'm anticipating given, uh, the exchange that I've seen this morning, this afternoon we set it for two.

THE COURT: Two hours?

MS. GUTIERREZ: I would say three, Your Honor, that's an evidentiary hearing.

MR. BRAHMS: I wouldn't be close to three hours, I don't think we'll need three hours for this.

THE COURT: The Court will block, uh, uh, the mount of time of three hours for, uh, this matter, we'll have to, uhm, make sure that the, uh, calendar, uh, we can set a full three hours for this, uhm, matter. As far as the, uh, time, uh, which the Court will have the parties submit, uh, their questions, uh, is, uh, ten days from today is sufficient for both parties?

MS. BRAHMS: Yes, Your Honor.

MS. GUTIERREZ: Would that be, uhm, I'm sorry, Your Honor, I need to look at a calendar really quickly --

THE COURT: Uh-huh.

MS. GUTIERREZ: -- I apologize. Uhm, that would put us at June 2nd... is that correct?

THE COURT: We are, uh, for, uh, a, uhm, the questions to be due?

MS. GUTIERREZ: Yes, --

THE COURT: That's what I'm looking at.

MS. GUTIERREZ: -- that, would that put us at, and would you want them on the, the 29th or the 2nd?

THE COURT: The questions will be due on, uh, it looks like the 11th of June.

MS. GUTIERREZ: Oh, I'm sorry, I was looking at the wrong one, I apologize. 11th of June is fine, Your Honor, thank you.

THE COURT: And that is Monday on June 11th, uh, since the ten, tenth day does fall over the weekend on that, uhm, ten days, uhm, the following is, uh, June 11th, uh, so, uhm, is there a time on the calendar for, uhm, a hearing on this between or after June 11th, before --

MR. BRAHMS: Uh, may I ask, Your Honor, are we, uhm, to submit questions and can't [inaudible] and not share them with each other [inaudible]?

MS. GUTIERREZ: That's absolutely impermissible, Your Honor, this is, uh, --

MR. BRAHMS: I'm just asking what, --

MS. GUTIERREZ: Okay.

MR. BRAHMS: -- I'm not, I'm not suggesting --

MS. GUTIERREZ: Absolutely impermissible.

MR. BRAHMS: -- I'm asking what the Court wants.

THE COURT: So the Tribe objects at this point? Uhm, the Court is going to it have submit to the Court, uh, and it will be shared with the other party, --

MR. BRAHMS: Okay.

THE COURT: -- uhm, the questions that you come up with. And, uh, at the end of it all I will decide, uh, which questions to, uh, ask, uh, the minor and I will not have the minor, uh, in open court, uh, so, uh, I will, uhm, have him be questioned, uh, uh, in, in chambers or actually, uh, we can, uh, we have capability actually at this point of having a, a witness be in, in one of the conference rooms and, uhm, to have, and have the, any kind of questioning of the child, uhm, from the courtroom, however that may be a little too impersonal for this, for this, uhm, hearing so, uhm, --

MS. GUTIERREZ: Your Honor, --

THE COURT: -- it may not be something that --

MS. GUTIERREZ: -- I believe while in [inaudible] evidentiary hearing where it is, uhm, a question of whether a

child has been inappropriately, uhm, guided either, by either side, uhm, because we will be including questions regarding what his mother says to him, uhm, it is appropriate for you to see the child on your own as long as there is somebody, uh, like the guardian present.

THE COURT: And that goes to another, uh, another issue but it would be during the trial but, uh, as far as having the minor with, uh, uh, either a guardian or adult, uhm, --

MR. BRAHMS: As long as the motion is before the Court, Your Honor.

THE COURT: Uh-huh. Yes. As far as this specific hearing, uh, is there any objection to allowing, uh, the, uh, ongoing case worker or guardian assigned appointed guardian, uh, in, uh, the, uh, minors, uhm, Child Welfare matter, uh, be present when that questioning occurs?

MR. BRAHMS: [Inaudible.]

MS. GUTIERREZ: No objection.

THE COURT: Alright. And [inaudible], a three block of time for either that week or the week following.

COURT CLERK: We have that, we have that time on Thursday June 14th at 2:00 o'clock.

THE COURT: Would that allows sufficient time for subpoenas to be --

MR. BRAHMS: What was the date again?

THE COURT: The 14th of June, which is, uh, two weeks actually it comes out, uhm, --

MR. BRAHMS: Uh, what day in June are we talking about?

THE COURT: Uh, a Thursday. Thursday 2:00 in the afternoon on the 14th of June.

MR. BRAHMS: The 14th of June? Can we set it just a little bit further out?

THE COURT: How about the following week?

COURT CLERK: Only time we have that week is a Wednesday morning, uh, on June 20th.

THE COURT: And, uh, is my calendar free for that?

COURT CLERK: Uhm, you just have a 1:30 [inaudible].

THE COURT: And what time was that now?

COURT CLERK: Uhm, about, well for from 9:00 to 12:00.

THE COURT: Alright the following date, uh, that would be available is the 20th of June, Wednesday 20th June at, uh, from 9:00 to 12:00, 9:00 a.m. to 12:00 p.m. The Court will

schedule the, uh, Motion Hearing or the Evidentiary Hearing for that date and time and, uh, again the questions to ask the minor, uhm, alleged victim will be, uh, ordered to have, uh, the Court will order the, uh, Defense Counsel and Tribe to submit their, uh, questions to, uh, the Court by June 11th, 2012. And at this time, uh, is there any, uh, reason to set any other, uh, deadlines specifically for that motion? The Tribe has, uh, responded to that motion... is that correct?

MS. GUTIERREZ: Uh, the motion regarding exculpatory?

THE COURT: Yes.

MS. GUTIERREZ: Yes, except that the Defense did raise new issues in their reply and I think we've addressed them here, he's clearly going to ask about them at, at the hearing.

THE COURT: At the hearing.

MR. BRAHMS: They're not new issues they were just explaining the issues that [inaudible] --

MS. GUTIERREZ: Which should have been in the original motion.

MR. BRAHMS: -- [inaudible] original motion so --

MS. GUTIERREZ: That's what an original motion is for.

MR. BRAHMS: -- [inaudible] the, the questions that

we are [inaudible] for the proposed questions in exchange of those of June 11th, that's the time to submit those questions to the Court in exchange for, uh, the, you know, the other party?

THE COURT: Right.

MR BRAHMS: Okay.

THE COURT: And, uh, alright. So that takes care of, uh, one of the motions and, uhm, at this time, uh, the par--, the Court will ask the parties with regard to the, uhm, the motions to, to think over this in an orderly fashion what I, uh, am looking at, uh, addressing and I know that there are, uh, several things to, to address and, uh, going back to the, uhm, earlier part of this year to address any, uh, non addressed motions and, uh, do either, uh, part--, does either party have, uh, in their documentation of, uh, which is actually something that I have done, uh, gone through, uh, the case file and I've, uh, pretty much listed out what, --

MS GUTIERREZ: [Inaudible.]

THE COURT: -- uh, what motions had been, uh, submitted, uh, when they were submitted, their responses and, uh, so does each party have, uh, that type of documentation?

MS. GUTIERREZ: Yes.

MR. BRAHMS: I do [inaudible].

THE COURT: Okay. And, uh, based on that that I would like to make sure that we address, uh, everything that has been submitted, uh, and, uh, in order to do that I did need to make sure that, that I address everything that the Court had in its files. I do believe that the, the most recent I, uh, we've addressed, uh, uh, uhm, at least one, uhm, one motion, uh, there was an, the issue of the no contact order that, uh, I will address today but as far as the, the others we may actually also, uhm, uh, need, uh, more time to see if here are any, uh, hearings that would be requested for, uhm, the disclosure; there was, uh, some, uhm, uhm, a motion as to that. Uhm, so at this time, uh, if we can go back to the very, uhm, uh, first motion that, that I have in, uh, the Court's file includes the Motion for a Limited Disclosure of Child Welfare Case Reports and Other Acts Admissibility. Uh, since then there have been other, other, uh, motions filed however, uh, been addressing a, a little bit different, uh, issues, uh, which the Court does have, uh, in its file the response and reply. Uh, at this point, uh, that was filed by the, uhm, Tribe, Ms., uh, Gutierrez --

MS. GUTIERREZ: Yes, ma'am.

THE COURT: -- and --

MS. GUTIERREZ: Y--, yes, ma'am. Uhm, I believe we, Your Honor, I believe we had hearings on that motion --

THE COURT: Uh-huh.

MS. GUTIERREZ: -- and arguments and, uhm, you --

MR. BRAHMS: [Inaudible.]

THE COURT: Yes, it, --

MS. GUTIERREZ: -- [inaudible] --

THE COURT: -- it was --

MS. GUTIERREZ: -- [inaudible] way back I think in March, --

THE COURT: Uh-huh.

MS. GUTIERREZ: -- uh, March [inaudible].

MR. BRAHMS: So you're going back to that motion?

THE COURT: Yes.

MS. GUTIERREZ: Yeah.

THE COURT: That's, that's the initial one that I want to address.

MR. BRAHMS: [Inaudible] actually I didn't bring that with me --

THE COURT: Okay.

MR. BRAHMS: -- [inaudible] hadn't anticipated that we're going to revisit that motion today.

MS. GUTIERREZ: Actually, You Honor, --

THE COURT: Okay.

MS. GUTIERREZ: -- there, it was already litigated, uhm, the is--, the issue was, uhm, the Court's order, uhm, --

THE COURT: Uh-huh.

MS. GUTIERREZ: -- or there hasn't been an order.

THE COURT: Uh-huh.

MS. GUTIERREZ: Uh, the Tribe did, I believe the order was given came out accepting the documents for [inaudible] review --

THE COURT: Uh-huh.

MS. GUTIERREZ: -- which I did block those off and they were time stamped in a confidential envelope, --

THE COURT: Uh-huh.

MS. GUTIERREZ: -- uhm, and that was it we don't have the documents they're in possession of the, the Court and we have not receive an order yet either way.

THE COURT: That is correct. And, uh, Mr. Brahms at this, at this time, uh, that's what I'm addressing, uh, the, if

you recall the, the, the very last, uhm, hearing on the, the issue was held, uh, in, in March and, [inaudible]. At this, uh, so do you recall the --

MR. BRAHMS: I recall the hearing, yes.

THE COURT: -- hearing [inaudible]? And at this time, uh, the, uh, Court has, uh, the, uh, confidential, the file with the documents that the Tribe, uh, had submitted as far as the, the, uh, documentation that the, that the Tribe would like to have, uh, submitted, uh, on the Record in this matter. Uh, the, uh, Court did, uh, review the response that Mr. Brahms had, uh, objected to the, uh, the limited disclosure of, uh, the Child Welfare case reports, uh, and specifically the Court, uh, does note that it was a request to include the, uh, the order, the Court's order, uh, having the minor child, uh, be placed in, uh, as a guard--, or as a ward of this Court, uhm, and then there's also the issue of the other acts, uh, admissibility of, uh, reports from Child Welfare, uh, that have been included in this, uh, file filer. At this time, uhm, the Court is, uh, issuing order as to that motion dated January 12th, 2012, uh, that the, uh, Court will, uh, not, uh, well actually deny the motion to re--, the motion to have, uh, the Child Welfare case or the Child

Welfare order that, uhm, included, uh, that the minor was, uh, deemed awarded this Court. Uhm, so the order, uh, Child Welfare order is, uh, going to be, uh, denied as far as submitting, uh, to this criminal matter.

MR. BRAHMS: And, uh, which order?

THE COURT: Okay.

MR. BRAHMS: [Inaudible] order 'cause that was confusing from the Tribe's motion.

THE COURT: From here?

MR. BRAHMS: If you recall on the body of the motion there was a part --

THE COURT: I do.

MR. BRAHMS: -- [inaudible] December 14th order but in the conclusion it's asking for the December 8th order. And if I recall that hearing in March on the Record Ms. Gutierrez stated that I never saw the December 14th order I only saw the December 8th order yet this Court's order [inaudible] December 14th will be submitted and I was wondering when I received that well if Ms. Gutierrez hadn't seen the December 14th order how could she have been speaking to it in the motion [inaudible]. So I'm just asking the Court which order what number one was [inaudible] December

8th, December 14th and which order the Court is saying it was I [inaudible] in these proceedings.

THE COURT: Alright.

MS. GUTIERREZ: Your Honor, just to clarify --

THE COURT: Uh-huh.

MS. GUTIERREZ: -- just because [inaudible], uhm, uh, uh, just to clarify define that order, uhm, asking you to, to produce the documents and, and that was dated February 27th, Your Honor. Just, just, uh, so it's clear in my head that, uh, uh, uhm, it was dated, uh, the, uh, I turned over the documents the same day that I received your order. Uhm, uhm, also, Your Honor, uhm, uh, just to clarify I didn't know, I just saw the documents and I was going like oh, crap again, pardon my language and I [inaudible] so I might have [inaudible] what Mr. Brahms is alluding to is incorrect. So I don't know which order you have there honestly we gave it to you, I gave it to you and I've never seen it since sent February.

THE COURT: Okay. At this, uh, time there are, uh, both orders in the information that was submitted by the Tribe and the Court --

MR. BRAHMS: Both orders, --

THE COURT: -- at this time --

MR. BRAHMS: -- both orders [inaudible]?

THE COURT: Both orders of Dec--, December 8th, 2011 and December 14th, 2011 the Court is, uh, denying, uhm, the request by the Tribe to include either of those orders --

MS. GUTIERREZ: Okay.

THE COURT: -- so they both will not be, uh, be allowed in, uhm, as evidence or to be used, uhm, in, uh, this, uh, this matter. Uh, so at this time there are, there's another issue of, uh, other information that was in documentation that was submitted by the Tribe that is, uh, the Tribe had requested there be, uhm, uh, documentation that had been provided to the Tribe, uh, that would, uh, the Tribe was requesting to be used as other acts, uh, be admissible to be used as other acts, uhm, that the, uh, Defendant Mr. Montana, uh, had, uh, known, uh, certain, uh, certain things and that the Tribe wanted to use that specifically, uh, the documentation here. Uh, the, and, and Mr., uh, Brahms, not knowing actually what is included in this, uh, this pamphlet or this, uhm, this, uh, packet of information, uhm, or maybe but, uh, at this --

MR. BRAHMS: Uh, and, uh, I still not, do not know --

THE COURT: Yes, sir.

MR. BRAHMS: -- other than you're telling me now that those two orders were submitted, --

THE COURT: Alright.

MR. BRAHMS: -- I don't know what, --

MS. GUTIERREZ: Actually --

MR. BRAHMS: -- well I don't, uh, I do not know what report the Tribe submitted for in camera inspection from Social Services, do not know the date, I don't know what the substance of that report was all I know is it was submitted at the time --

MS. GUTIERREZ: Actually, --

MR. BRAHMS: -- [inaudible].

MS. GUTIERREZ: -- Your Honor, that motion we did include the date and who, who it was coming from was in terms of CPS, the [inaudible].

MR. BRAHMS: I recall the motion [inaudible] it's referring to November 10th, uhm, --

MS. GUTIERREZ: Correct.

MR. BRAHMS: -- incident. I, but I didn't know from her, from the Tribe's motion at that time was, was referring to a report dated in November 2010 or was it referring to a report in

2011 referring to the 2010 incident that [inaudible].

THE COURT: Alright. Uh, th--, this is, uh, uhm, an intake, uh, report by Social Services that, uh, the Court has, uh, a full report and, uh, documentation as to, uh, information regarding things that were required. Uhm, based on, uh, what is in, in that information that the Tribe had requested that, that it be allowed, uhm, to be included in, uh, disclos--, uh, evidence really for other acts that's, uh, what the Tribe had requested it for.

MR. BRAHMS: [Inaudible] --

THE COURT: And at this --

MR. BRAHMS: -- what is the date [inaudible]? That entry.

THE COURT: This, uh, there are several things that are dated in this, uh, this, uh, the intake report actually has the 5th of November.

MR. BRAHMS: 5th of November?

THE COURT: November 5th.

MR. BRAHMS: Actually [inaudible], Your Honor, that report has never been disclosed to the Respondent in Child Welfare and to my knowledge, uhm, the, the other Respondent in Child

Welfare I recall Record from that hearing Ms. Gutierrez said that she just found the report sitting on her chair [inaudible] that has never been disclosed to the Defendant.

THE COURT: It's not of this incident, uh, Mr. Brahms, that's the issue that the Tribe had brought up it's not of this specific incident do you recall it's from a, a previous, uh, --

MR. BRAHMS: I understand. But, uh, I guess what I'm getting at, Your Honor, is Ms. Gutierrez made a point earlier in this proceeding and has in any other proceeding that and in her documents that she has filed that Mr. Brahms and Defendant has access to all Child Welfare reports and the Tribe has not had access to any [inaudible] report that I did not access to but somehow miraculously appears on her chair sometime prior to that, Your Honor. I just wanted to point that out that I've never seen that report it was never disclosed to us.

MS. GUTIERREZ: Uh, Your Honor, uh, --

THE COURT: Yes.

MS. GUTIERREZ: -- I have no idea what was disclosed in the Child Welfare case at all --

THE COURT: Uh-huh.

MS. GUTIERREZ: -- so all I know is I had this stuff appear on my chair I have to tell you about it.

THE COURT: Yes. And, uh, there are, uhm, as I, as I see on my list of the motions there are other requests for Child Welfare reports that have been, uh, requested, uhm, by one of the parties so there, that's another issue that we'll be addressing, uh, that I don't believe are the same reports --

MS. GUTIERREZ: No, they're not, Your Honor.

THE COURT: -- or the, these same documents. Uhm, and it was, uh, these specific, uh, documents that, uh, the Tribe says there are pretty, uh, they're, it's basically Child Welfare, uh, report or, uhm, Social Service documents that, uhm, are in their files and, uhm, apparently was provided to Ms. Gutierrez, uhm, on a regular work day that, uhm, uh, had been submitted, uhm, to her and she not knowing what to do obviously had, uhm, requested the Court address this matter and, uh, in looking at the, uh, reports there are, uh, uh, specific, uhm, and detailed information as to, uhm, what, uhm, what took place and then the follow-up as to what was recommended by, uhm, Social, uh, Services. Uh, in, in, uh, this matter, uh, the, uh, Court does have, uhm, a, uh, you know, with regard to this directly being

involved with the Child Welfare, uhm, case there are, uhm, sensitive, there's sensitive information in that Child Welfare case that, uh, is not, uhm, just as I did not want the, uh, the, uhm, Court orders for a Child Welfare case to be included in, uh, this matter specifically to have, uhm, the, even the wording of that, the minor child being, uh, uh, uhm, ordered to be a ward of this Court, uh, this, uh, documentation, uh, must, uhm, it is something that can be, uhm, uh, subpoenaed on, uh, in another, uh, fashion. The, uh, Court is, uh, going to order that unless the Tribe has specific, uh, request for, uhm, because I mean just to let you know there's one --

MS. GUTIERREZ: Uh-huh.

THE COURT: -- two-three-four-five, five staple cards, uh, and, uh, detail incident report by an officer that, uh includes, uh, quite a bit of information and, uh, and a lot of it is there's sensitive information. Uhm, so I am not, uh, release, I'm not going to allow, uh, the, the whole, uh, all of the documents to, uh, be, uh, used as other acts in this, uhm, in this matter.

MS. GUTIERREZ: Actually, Your Honor, if I may, --

THE COURT: Yes.

MS. GUTIERREZ: -- uhm, I don't mean to interrupt, Your Honor, uh, just, uhm, that was, uh, if, if, Your Honor, please that was the intention of the motion --

THE COURT: Uh-huh.

MS. GUTIERREZ: -- that you would have discretion to implicate what could be included because normally we would subpoena --

THE COURT: Uh-huh.

MS. GUTIERREZ: -- like we have in everything else but in this case it appeared I cannot look away and I can't be dishonest in telling you, not telling you or Defense that I've seen it so I must, uhm, --

THE COURT: Uh-huh.

MS. GUTIERREZ: -- put it at your discretion and [inaudible] however you choose to do it that's fine, uh, you can choose not to do it at all and that'd be fine.

THE COURT: Did you, did you have a response?

MR. BRAHMS: Well, uh, uh, you know, I'll just wait, uh, Judge, --

THE COURT: Okay.

MR. BRAHMS: -- whatever it is, you know, I just

[inaudible] that that was precisely my objection to that particular report is, is not put on the Record it is my position that it's [inaudible]. The, the Tribe [inaudible - papers rustling] it's seeking to have the Court [inaudible] whether there's anything in there the Court's opinion that can be relevant to other acts. Rather than do that just to turn these documents over to the Court and then if they deprive that some basis to seek any specific information in that record or any record around that November 10 incident that they should make a specific motion and subpoena for that rather than submit to the Court in camera inspection and say see what you can find that might help us on another act and --

MS. GUTIERREZ: Your Honor, --

MR. BRAHMS: -- with that that's all I wanted to say.

MS. GUTIERREZ: -- I'm sorry, Your Honor, that's directly in opposition to the Rules of Criminal Procedure. If we see it as Prosecutors we must not, we cannot ignore it, it is not a civil kind of issue, --

THE COURT: Uh-huh.

MS. GUTIERREZ: -- it's not a, you know, sort of calling back kind of thing. Uhm, that only applies if for example I had

inadvertently received documentation that was meant for Mr. Brahms then I'd immediately pass it onto him and say I'm so sorry this accidently came to us. However, in this case these three documents that the Tribe had seen we can't hide them, we can only put them at your discretion, Your Honor, to tell us whether we can use them or not. If you say no I can't ethically raise it at all.

MR. BRAHMS: Uh, Your Honor, [inaudible] at this point but there is case law, I don't have it in front of me, in Arizona. One case in specifically that I think is, it's not directly that point but it's [inaudible] it's where the, uhm, Prosecutor, uhm, went into a prisoner's jail cell without a search warrant and just took a bunch of papers and then it was determined before the hearing they turned those over, they didn't try to use any of the information [inaudible] but we'd like you to take a look at them and [inaudible - papers rustling] see if there's anything relevant. They just turned them over and the Court said that it was improper for them to do that without a search warrant or some type of subpoena, that's all I'm saying [inaudible] and that was a criminal matter not civil.

MS. GUTIERREZ: And that's a completely in miscalculation of the actual case law, Your Honor. But that,

let's, --

THE COURT: Alright.

MS. GUTIERREZ: -- let's get a --

THE COURT: At, at this point, uhm, the Court has, uhm, heard a little bit more from, uh, the parties regarding, uh, the documentation, uh, and it's not just a report, uh, there are several documents in that, uh, in that packet that was provided to the Court for in camera inspection. The Court at this time is, uh, going to deny the Tribe's, uh, request or the motion to include, uh, that documentation to be used as other acts of admissibility in their case.

MS. GUTIERREZ: Okay. In total, Your Honor?

THE COURT: Yes.

MS. GUTIERREZ: Okay. In total --

THE COURT: Well in total, --

MS. GUTIERREZ: -- [inaudible]?

THE COURT: -- yes.

MS. GUTIERREZ: Okay. Thank you.

THE COURT: Uh-huh. What the Court is, uh, going to address in the remaining we have, uh, 3:00 o'clock at this time, I'm not sure if the parties were, uh, were, uh, looking at, uh,

staying here for another, uh, half hour or hour to address the other issues but, uhm, does anyone need to go anywhere?

MR. BRAHMS: I have, I have, I wasn't anticipating this going more than an hour.

THE COURT: Okay.

MR. BRAHMS: Uh, I would be willing to take care of at least one of the Tribe's motions that I really haven't opposed --

THE COURT: And --

MR. BRAHMS: -- and, --

THE COURT: Okay.

MR. BRAHMS: -- uhm, --

THE COURT: Let me look at the, the, this, uh, the other, uhm, --

MR. BRAHMS: The motion, if I could put that out, the --

THE COURT: Okay.

MR. BRAHMS: -- the Motion to Disclose the Child Welfare Investigation Interview.

THE COURT: Alright. And that was submitted by --

MR. BRAHMS: I didn't, --

THE COURT: -- the Tribe?

MR. BRAHMS: -- uh, I didn't oppose the Tribe getting access to the documents if they're using it to help with their [inaudible]. Uhm, the only thing I objected to was that her notes or her summaries, written summaries, you know, should, should not be used as evidence but I guess that's not an issue she just wants to disclose it at this point and that's fine.

MS. GUTIERREZ: Your Honor, they're not, uh, they're not admissible; the, the only thing that's admissible is Miss Clark's tres--, testimony.

THE COURT: The testimony.

MR. BRAHMS: It involves she was seeking and I wanted to see, I wanted to get access to those records as well.

MS. GUTIERREZ: They need disclosed that's --

THE COURT: Yes.

MS. GUTIERREZ: -- part of the Rule.

THE COURT: Uh-huh.

MR. BRAHMS: Right. And that's why, that's all I'm asking, Your Honor, so that motion I'm not opposing if that's all it is, is she wants disclosure, uh, those confidential records [inaudible].

MS. GUTIERREZ: That's all I requested, Your Honor, but --

THE COURT: Okay.

MS. GUTIERREZ: -- we need that by subpoena.

THE COURT: Alright. With, uh, the motion may I have the date that the Tribe filed that?

MS. GUTIERREZ: Uh, that particular --

MR. BRAHMS: [Inaudible] --

MS. GUTIERREZ: -- motion, Your Honor, I'd have to --

MR. BRAHMS: April 24th [inaudible].

MS. GUTIERREZ: Okay.

THE COURT: Motion for Disclosure --

MS. GUTIERREZ: That sounds about right.

THE COURT: -- of Child Welfare Investigation Interview of Defendant Christopher Montana and that was April 24th?

MR. BRAHMS: If I may, Your Honor, the only thing I added in my [inaudible] I wanted that motion to request to go further than just for [inaudible] summary she still hasn't made her notes of that interview, uhm, I'd like to see that as well [inaudible].

MS. GUTIERREZ: I believe the subpoena includes any records, notes, reports --

THE COURT: Any record.

MR. BRAHMS: Okay.

MS. GUTIERREZ: -- regarding that interview.

THE COURT: And so that should cover what Mr. Brahms', uh, --

MS. GUTIERREZ: If Mr. Brahms believes that it doesn't he can also, uh, subpoena again.

THE COURT: Uh-huh. And so that was in your, uhm, the subpoena was also in, uh, the, the written, uh, subpoena --

MS. GUTIERREZ: Yes.

THE COURT: -- or, uh, typed out subpoena --

MS. GUTIERREZ: Yes.

THE COURT: -- [inaudible]? And --

MS. GUTIERREZ: The subpoena and the, the service.

THE COURT: The service. Okay. So at this point the only, uh, issue is to address that whether or not, uh, there are no, it seems to me there's no, uh, objection to that, uhm, by either party, uh, and, uhm, it's already outlined and the Court will at this time, uh, grant the motion and will have, uh, the

subpoena wither, uh, signed or I, I may, uh, do, uhm, one of your, uhm, my own form but I will include that, uhm, signed, uh, subpoena for those records and the motion will be granted. Alright. The, uh, Court, uh, will and it looks like we will, uh, need a, uhm, an, an additional hearing aside from the, the hearing that we scheduled in, uh, on the 20th of June to address, uhm, the, the remaining motions, uh, that is with the, uh, there's a, a motion, uh, that was dated on the 9th of May, uh, by the Defendant notice of proof of service of Defendant's motion for issuance of subpoenas for alleged victim records. Is that the, the information that, you, uh, is that separate, uhm, subpoena, uh, a request for a subpoena for a separate matter, Mr. Brahms do you --

MR. BRAHMS: We could have that heard on a hearing [inaudible].

THE COURT: Right. I'm just, uh, trying to make sure that I, uh, that I, uh, am not --

MR. BRAHMS: Missing any.

THE COURT: Uh, right. Seeing that if that's a separate motion then we'll address that at another time but --

MR. BRAHMS: Yes.

THE COURT: It is? Okay. And then there's the

amended motion that you submitted after that.

MR. BRAHMS: Uh, the amended one's [inaudible] the first one.

THE COURT: Right. Okay.

MR. BRAHMS: Uh, okay. So the first one is as if it didn't exist 'cause the, --

THE COURT: And then --

MR. BRAHMS: -- the amended one asks for the in camera inspection [inaudible] --

THE COURT: It does ask for in cam--

MR. BRAHMS: -- [inaudible], okay, so I filed the amended one to supplant and replace the original one.

THE COURT: That and that was dated the same, same day [inaudible].

MR. BRAHMS: That was dated May 9.

MS. GUTIERREZ: And I believe the, the Tribe responded, Your Honor.

MR. BRAHMS: And the Tribe responded to the May 9th I believe and the Court can disregard the May 7th motion to keep --

THE COURT: Alright.

MR. BRAHMS: -- [inaudible] records but [inaudible].

MS. GUTIERREZ: We would like to consider that request for subpoena later, Your Honor... is that correct?

MR. BRAHMS: Uh, I --

MS. GUTIERREZ: Uh, I don't know if this'll help but, but the Tribe ha--, the Defendant has the right to subpoena some documents, uh, the Tribe's only objection is that the request was either over broad or irrelevant it wasn't, it wasn't clear what, uhm, specific time frame this, uhm, 'cause it was very broad like everything. You can't quite subpoena children's records that way it has to be much more specific like discipline records or, uhm, injury records or what have you. That was the, the Tribe's basic, uhm, and part of it was result in that, uhm, I guess at least part of the issues that they were speaking to specific, this specific impeachment material and we subpoenaed the [inaudible].

MR. BRAHMS: Well, Your Honor, I, I don't think w--,

MS. GUTIERREZ: [Inaudible.]

MR. BRAHMS: -- and I appreciate what Ms. Gutierrez is saying but what I understand is that in another motion [inaudible] response to one of her motions I revealed knowledge of certain incidents that took place at the Back to Life and at the middle school concerning Ezekiel and Mr. Gutierrez did, she e-

mailed me and indicated that that wasn't something she was aware of at that time and she told me that she was going to subpoena, the Motion to Subpoena of the Social Services Records concerning those incidences.

MS. GUTIERREZ: Yes.

MR. BRAHMS: But that's separate from, and that's fine I would like to get those records as well; what my motion [inaudible] and the subpoenas and again I was expecting that to be heard at a hearing where [inaudible] in camera or in open court more details as, as to what --

THE COURT: Okay.

MR. BRAHMS: -- impeachment evidence I believe is in those records and without knowing where they are it could be in various parts of [inaudible] records in the Back to Life [inaudible] I'd like to address that at the next hearing in this matter. Concerning my, my request to have the Court order subpoenas and we may revise the subpoenas at that time for both the Back to Life records and the middle school records that are relevant. I just want to point out that the areas that, of relevance whether it's for impeachment purposes of the incidents that occurred with, with Ezekiel or evidence in the Back to Life

records that have a bearing on the exculpatory issue that we went at earlier today they could be in various parts of that [inaudible] records. For example, we would want just to give the Court the heads up the Back to Life we were going to get the, uhm, sign in sheets to indicate who has signed in, in the last six months and with who they went including, uh, Alma Rosa, the Prosecutor. I would like to get the records of the, uhm, the sessions between Ezekiel and Alma Rosa, the sessions between whatever is in their records, they may not have any details as to what either Alma Rosa spoke to Ezekiel about and he spoke to her about or the Prosecutor spoke to him about. Their records may not show any detail of those conversations but we want to get those records from [inaudible] and so I --

THE COURT: And is that outlined in, in your motion?

MR. BRAHMS: That is not outlined in detail, I was, I was expecting to present that at, at the hearing 'cause I wanted this to be in camera 'cause we're seeking records of a minor and I wanted to just let the Court know in the motion that, that, you know, we have good reason to believe what we do that there are records that have a bearing on impeachment in both, in both the Back to Life and the middle school. In Back to Life there is,

there's evidence that there is some false [inaudible] Ezekiel of verbal by a Counselor. In the middle school there was, there's, there's an incident of, of a false claim being hit by a teacher. Those clearly are relevant to impeachment. But there are other, there are other incidents that occurred that [inaudible] through Social Services reports that Mr. Cruz hit him. He may or may not have been at fault in but I think it's important that we set an in camera inspection of, of those records concerning those other incidents.

THE COURT: Alright.

MS. GUTIERREZ: Your Honor, just briefly --

THE COURT: Yes. Thank you.

MS. GUTIERREZ: -- we don't know what the alle--, I don't know what the allegations were, I don't know that they were false [inaudible] I just don't know. But I am subpoenaing the, the ones that I knew about. Mr. Brahms clearly has a better delineation of what he's looking for, he can make those, he can make those requests; all I ask, Your Honor, is that pursuant to our code and pursuant to the rules for minors those subpoenas have to go through Social Services and the guardian. Mr. Cruz as the guardian can reach those records and request them and then turn

them over, however, if he feels that they say no we need a separate subpoena then he comes back for that separate subpoena.

THE COURT: Okay.

MS. GUTIERREZ: Those records should be available to Social Services because he's a ward.

THE COURT: [Inaudible.]

MS. GUTIERREZ: Uhm, so that is why we ask for those annotations and the notes and reports to come through Social Services, it's not the ordinance. The other thing and we have to raise this is that there was an im--, improper contact and we do need this Court to admonish Mr. Brahms that he is not to, to call this placement. We don't even know how he got this number --

MR. BRAHMS: [Inaudible.]

MS. GUTIERREZ: -- but he did call the child's placement and according to, they called the guardian himself concerned that who is this, this is the, Miss, uhm, Lopez --

MR. BRAHMS: Okay. Uh, --

MS. GUTIERREZ: -- also had attempted to do this.

MR. BRAHMS: -- Your Honor, she's bringing up a report on Lopez concerning work product --

MS. GUTIERREZ: So, uh, we just want an admonishment,

we're not making any, --

THE COURT: Uh-huh.

MR. BRAHMS: -- [inaudible].

MS. GUTIERREZ: -- any miss accusations --

THE COURT: Okay.

MS. GUTIERREZ: -- of misconduct we're just asking for an admonishment

MR. BRAHMS: Yeah, --

MS. GUTIERREZ: -- that anything has to go through this, this guardian.

MR. BRAHMS: -- well, Your Honor, I would disagree with that and all I was doing, I called back so I could get directions that's it.

MS. GUTIERREZ: You can't even do that.

Mr. BRAHMS: That's what, well somebody my, when I asked for their, their mailing address they're, actually not their mailing address but their, their actual business address, I had a P.O. Box address for them specifically just somewhere a subpoena could be issued to and I disagree with the Tribe is that we, --

MS. GUTIERREZ: Absolutely [inaudible].

MR. BRAHMS: -- Counsel I mean a party should have a

right to subpoena records of an entity separately, directly to that entity and I think it was appropriate to have a subpoena issued such that it would be, uhm, something to an in camera inspection 'cause there's probably going to be a lot of records in there that are confidential that have no bearing on issues in this case so that's why I invented my subpoena. But my re--, uh, the Defendant's request for the middle school records and Back to Life shouldn't have to go, I don't know what re--, rules she's referring to in the Tribe, shouldn't have to go through Social Services to get those records. We should be able to subpoena those records directly.

MS. GUTIERREZ: And [inaudible] --

MR. BRAHMS: But I don't, I don't want to argue that motion right now, --

THE COURT: Right.

MR. BRAHMS: -- Your Honor, I mean I --

MS. GUTIERREZ: [Inaudible.]

MR. BRAHMS: -- [inaudible] nineteen minutes on, on this, --

THE COURT: On the thing is --

MR. BRAHMS: -- this issue and I was just wanting to

point out to the Court give you an idea what we're seeking in those files.

THE COURT: And that was my question too, uh, uh, was that information outlined in your, uh, uh, original motion or your amended motion, uh, because, you know, if there are, uhm, at, at some point, uh, the, the subpoenas d--, do need to be, uhm, --

MR. BRAHMS: Yeah.

THE COURT: -- detail --

MR. BRAHMS: Sure.

THE COURT: -- in order to know what it is that is being requested.

MR. BRAHMS: Again you heard me earlier and maybe, you know, I, I was just being too cautious, I was expecting to give you those details that specific incidence that we are aware of and the --

THE COURT: At a hearing.

MR. BRAHMS: -- specific type of records at a hearing like this. And if you want me to, you know, uh, resubmit, uhm, revised subpoenas I can do that before this next hearing but , uhm, I wasn't inte--, I wasn't intending right now --

THE COURT: Uh-huh.

MR. BRAHMS: -- to go into the, the substance of the arguments concerning --

MS. GUTIERREZ: Your Honor, --

MR. BRAHMS: -- whether we should get, get those records or not.

MS. GUTIERREZ: -- Your Honor, just legally, Mr. Brahms, is pa--, playing an ambush technique and strategy. There is not, uh, the Tribe has nothing, we have our case, we disclosed everything we have and what we don't know about we're happy to disclose if we can find it so this ambush technique is absolutely inappropriate, Mr. Brahms wants a hearing to be able to bring in all of the supposed evidence that he's not disclosed before and not given --

MR. BRAHMS: Okay.

MS. GUTIERREZ: -- opportunity for disclosure. So the Tribe just asks that the purpose of a subpoena is to get specific evidence, specific evidence, not a general net of evidence that then you can pick and choose from and then throw at somebody. That's all we're asking that this be a fair playing field because this sort of behavior is not, not legally proficient and talk about lack of judicial efficiency the more he tries to hide rather

than telling the story the more time we're taking from the Court.

MR. BRAHMS: Your Honor, respectfully I'm not trying to hide anything. I asked in the motion to have an order to have those subpoenas issued especially asked for, you know, that we have the understanding if there's, uhm, evidence concerning impeachment and exculpatory evidence and I thought it was appropriate at that time to not detail the specifics that we were looking for but found that the subpoenas were, were tailored sufficiently to cover the records for an in camera inspection because my understanding that for example the middle school Ezekiel was attending, uhm, that middle school for less than a year and the records concerning the incidents that we're interested in for impeachment purposes from that facility could be in various parts of those records and if the Court would like me to amend in my motion for this next hearing to specify the specific incidents that we're looking for I'll do that and the same with the, uhm, the Back to Life. I'm not trying to hind anything, I'm not trying to ambush anybody I'm just trying to, uhm, file the appropriate motions and to seek records that we understand have relevant information and if they need to be more tailored with respect to the relevant information I'll do that.

THE COURT: Thank you. Uh, and the, uhm, Court does point out that on May 9th, 2012, the amended motion for issuing subpoenas for alleged victim's records as, uhm, also includes in, uh, parentheses request for in camera inspection and hearing that, uh, along, uh, with that there, uhm, did you say there were, uh, subpoenas or a sample, uh, subpoena included along with that? Yes, there's a subpoena of record, subpoena just, uhm, [inaudible] and, uh, I see what, uhm, Mr. Brahms here, uh, speaking of. Well there's one for, one school and then for another, uh, location or another, uh, school. And, uh, with that then it, it looks as if you're, you're requesting to the Court to, uh, sign the subpoena and to have that, uhm, subpoena be, uh, be served to allow, uh, these two organizations or these two, uhm, uh, places, uh, uh, or it looks like they're both schools to have then by the time of the hearing, uh, or to, to do their, uh, gathering of, uh, whatever. Uh, that's my question.

MR. BRAHMS: Honestly, uh, what I was, what I thought I was filing was procedure here but if you wanted to get records --

THE COURT: Information.

MR. BRAHMS: -- [inaudible] --

THE COURT: Uh-huh.

MR. BRAHMS: -- in particular you need to first get an order from this Court, --

THE COURT: Okay.

MR. BRAHMS: -- you know, granting the issuance of the subpoena and what I was, what I was anticipating, uh, the Court issued the subpoena either in the form that I have or an amended form as far as the information sought I'm anticipating the possibility that either for both of the entities will file some type of motion to quash and we may have to go through that but barring that the idea was whatever they were going to produce would be inspected in camera by this Court concerning the issues that we would present at the hearing that I've kind of outlined to the Court today. And if you would like the Defense to be more specific in that I can do that. I mean, uh, whatever the Court would like to do but I would like to have the subpoenas issued by this Court for both Back to Life and middle school records for this Court to inspect once they do produce them, uhm, for records within the, those documents that are relevant and germane to the issues that I've just outlined. And, uh, pardon me, Your Honor, I'll apologize if that was something that you would, would have

expected in a motion I was anticipating because of the sensitivity of the, of the material presenting that at a hearing such as this hearing.

THE COURT: And the Tribe had, uh, indicate there --

MS. GUTIERREZ: Yes, Your Honor, [inaudible] --

THE COURT: -- was another way to --

MS. GUTIERREZ: I'm sorry.

THE COURT: The, the Tribe had indicated there, uh, through the guardian that this, uh, matter could be resolved or --

MS. GUTIERREZ : Uh-huh.

THE COURT: -- uhm, --

MS. GUTIERREZ: Yes.

THE COURT: -- addressed?

MS. GUTIERREZ: Yes, uhm, my understanding is that in this jurisdiction because of [inaudible] we have to motion --

THE COURT: Uh-huh.

MS. GUTIERREZ: -- for a, in adult court to [inaudible] any Child Welfare records. Uhm, --

THE COURT: Or juvenile.

MS. GUTIERREZ: -- those companies, but the plain--, the record [inaudible] here are, uhm, the records from the child's

attendance to either of these facilities during the time that he's a ward of the Court. That means they're under the care and custody of the Tribe which means it has to go through Social Services. Uhm, at that point, uh, Social Services I understand, uhm, I could be wrong since these are not independent entities from or, or the Tribal requirement [inaudible] those documents as [inaudible], as a guardian. However, if the, these things are iss--, issued directly to the establishments, Your Honor, now and the establishments may very well [inaudible] the guardian you never know but they have to be more specific you can't just say any time, anything if he tripped or fell, uhm, you have to give them a, a time and restrict the kind of, uhm, records you're seeking. Uhm, so you're not looking for necessarily any aptitude testing, uhm, which may have other protections on them but you may, or perhaps seeking disciplinary records or health records or what have you. And that's all [inaudible].

THE COURT: Alright. At this, uh, at this time the Court is, uh, setting a hearing on, uh, this specific motion, uh, that was dated the, it's actually the amended motion dated May 9th.

MR. BRAHMS: I'm sorry, Your Honor, what date?

THE COURT: I'm sorry. What's that?

MR. BRAHMS: The date that you said?

THE COURT: Uhm, that was your amended on May 9th, 'cause --

MR. BRAHMS: Yes.

THE COURT: -- there was a, uh, a following of, uh, --

MR. BRAHMS: Yes, I see it.

THE COURT: -- subpoenas, --

MR. BRAHMS: I see it.

THE COURT: -- yes. And, uh, Mr. Brahms with regard to that, uh, that hearing, uh, the Court is going to ask if you have, uh, a suggestion for, uh, time to have that motion heard? I'm sorry --

MR. BRAHMS: [Inaudible.]

THE COURT: -- do you have a suggestion of time for the motion to be heard, uh, in hearing?

MR. BRAHMS: So this is going to be a separate hearing for this motion not [inaudible]?

THE COURT: If unless you feel that we can address that as, uh, on the 20th of June, uh, is that something that you

feel we can address at the same?

MS. GUTIERREZ: You know, Your Honor, I think I'm, just --

MR. BRAHMS: Well, --

MS. GUTIERREZ: -- a little confused --

MR. BRAHMS: -- uh, uh, --

MS. GUTIERREZ: -- as to what the content of the hearing would be my, maybe I misunderstood I thought Mr. Brahms had requested that the, the subpoena, the subpoena you, uhm, give a, a wr--, a suggestion as to how the subpoena might be admitted and to whose, to subpoena and that he can subpoena those records and then ask for [inaudible]? Uh, or did I get that backwards?

THE COURT: It, uh, --

MR. BRAHMS: Uh, what I'm confused about is, uh, --

THE COURT: Okay.

MR. BRAHMS: -- I thought we were going to adjourn shortly but then set a new date to have the remaining motions other than that exculpatory one set on a new date [inaudible] --

THE COURT: And that's what I'm trying to do now but if the parties are not, are confused about what they will present at the hearings, you know, uh, uhm, you know, you need to make

sure what it is that you would like to present, uh, upon each motion and how much time do you seek for the motion.

MR. BRAHMS: Well may I ask the Court then --

THE COURT: Uh-huh.

MR. BRAHMS: -- are, are you telling me that this, the proposed subpoenas for both these facilities are you saying that they are insufficient or too broad --

THE COURT: At, uh, --

MR. BRAHMS: -- at this point?

THE COURT: -- at this time, yes, they're also, uh, directly to the, uhm, the facilities or I believe the Back to Life is, uh, a facility the other, uh, that it does have a school within that, that facility. The other, uh, is a, uh, middle school which may or may not be in session at this time, it would mean that, uh, if the Court were to, uhm, uh, --

MR. BRAHMS: You mean there's no staff you think in the summer?

THE COURT: Uhm, there may be but there may be limit as to how much they can, uh, they can look up any of this information, uh, for, uh, --

MR. BRAHMS: Well, --

THE COURT: -- the, the Court.

MR. BRAHMS: -- are, are you saying that this Court does not have the ability to issue subpoenas to entities outside of the Tribal Reservation for the proceeding of this?

THE COURT: We've done so in the past however, uh, it is up to the, the facility, uh, any, uh, entity whether or not they would, uh, --

MR. BRAHMS: True.

THE COURT: -- they would, uh, --

MR. BRAHMS: And must anticipate that --

THE COURT: Yes.

MR. BRAHMS: -- so --

THE COURT: Uh-huh.

MR. BRAHMS: -- I guess what we, I'd like to just, uhm, to do at this next hearing on this is if the Court would allow me I will submit a, a proposed more tailored subpoena as to each facility. Although I, I am [inaudible] about making it too --

THE COURT: Uh-huh.

MR. BRAHMS: -- specific 'cause I don't know where some of these records are, certainly some records I'm thinking may

be disciplinary records, uh, there may be an incident report that is in some part of the records and if I, if I don't specify the area of the record where that report would be I won't be getting it and that's why it needs to have some broadness to it and again the i--, the idea is to once we get over the, the hurl hopefully from each of these entities if any of their objection as to producing any of their records it may be come to a compromise that it's, it's redacted that it would be coming to the Court for an in camera inspection on the specific issues. So if the Court would like me to, to provide a, uh, a supplemental pleading specifying in detail the, the incidents and specific type of records such as intake, uhm, not intake but the, uhm, sign in sheets, uh, for example at the Back to Life then I'll do that. I kind of outlined it in, in our discussion here but if it, it would please the Court I'll submit that [inaudible] before the hearing on this matter.

MS. GUTIERREZ: That's all the Tribe was requesting.

THE COURT: Yeah. And, and that is something --

MR. BRAHMS: And we need to come, --

THE COURT: -- that I would need.

MR. BRAHMS: -- we would need to come to an understanding before that hearing as to the, uhm, how the

subpoenas are worded and, uh, --

MS. GUTIERREZ: They're worded legally.

MR. BRAHMS: -- [inaudible] hearing.

MS. GUTIERREZ: And the only other thing, Your Honor, is that we, we would need a finding that, uh, the subpoenas would go to, directly to the institutions and not to the guardian, uhm, that's the only concern the Tribe has, that's why the Tribe has taken everything through Social Services.

THE COURT: Uh-huh.

MR. BRAHMS: I would welcome that as well because I hadn't heard of any rule requiring that if you're seeing out set records from a, the facility it, that has relevant information that you need to go through the Tribe and some of this information in the middle school, and I could be wrong I'm not sure, --

MS. GUTIERREZ: I, I think that issue [inaudible].

MR. BRAHMS: -- has dealt with this incident where that occurred before he was a ward --

THE COURT: Alright.

MR. BRAHMS: -- of the [inaudible]. Okay. So I just --

THE COURT: Although that be the case, Mr. Brahms

this is a minor and he is a ward of this Court currently and so any information that is, uh, requested of where the minor specifically in this facility at Back to Life or --

MR. BRAHMS: [Inaudible] --

THE COURT: -- a school would have to go through the, uh, the guardian, uhm, because it would carry information of a minor at any, whatever it is that, uh, that they can gather would be of Ezekiel's record. So, uh, in, at the, at this point with, uh, Social Services being, uh, uh, a part of this meaning that they, they're essentially acting as the, uh, the parent a guardian of the minor, uhm, the, uh, they are responsible for, uh, the, uh, minor any, uh, information and of course this coming out of the Tribal Court there's, uh, I, I believe a little more, uh, more of a protection for our minors and juveniles, uh, any information about the, the minor children, uhm, whether or not it be from a school that would be located on the reservation or a school that they are, uh, in Tucson or, or wherever in the state or, uh, in the country, uhm, --

MR. BRAHMS: And, uh, I thought I covered that by serving a copy of this motion on the Attorney General's Office and I did get a response from them and I was assuming that it is the

Attorney General's ruling and Mr. Cruz and Social Services received a copy of this but I assumed it would be the Attorney General's rule if they thought that this was inappropriate to, uhm, seek it by subpoena whatever form [inaudible] --

THE COURT: Okay.

MR. BRAHMS: -- [inaudible] solely for a minor [inaudible].

THE COURT: So what was your response from Attorney General?

MR. BRAHMS: Huh?

THE COURT: May I have your, the response, you said that there was --

MR. BRAHMS: There was no response.

THE COURT: There was no response?

MR. BRAHMS: So I'm just saying I thought that I covered the bases to make sure that each entity that, that had an interest of protecting its minor, uhm, was aware of what we're seeking.

MS. GUTIERREZ: Actually, Your Honor, I think the subpoenas it was [inaudible] differently, uhm, for any motion, uh, we filed for, regarding minor issue, uh, any issue regarding a

minor for example, uh, uhm, uhm, I notice Mr. Cruz has his guardian Gustav [inaudible] from the Tribe, uhm, if I'm asking for any minor records then it has to, it also has to notice, we also have to notice the AG's Office as a [inaudible] keeper of the records. Whether they choose to respond or not is, is up to the --

MR. BRAHMS: [Inaudible] what office were you saying [inaudible] that needs to be notified?

MS. GUTIERREZ: Pardon?

MR. BRAHMS: What office in addition to [inaudible] Social Services and [inaudible] --

MS. GUTIERREZ: No, no, no, no, no, I think you misunderstand me those notifications are [inaudible] they have to go to the AG's Office --

MR. BRAHMS: Right.

MS. GUTIERREZ: -- they're keepers of the records, they have to go to the Court for subpoena, they have to be [inaudible], they have to go to Mr. Cruz and they have to the Tribe just as a notice. However, the standing to retrieve records lays with the Court which, uh, which actually give the order that you can reach those records and the guardian who can actually reach them because

he's the [inaudible] of the child [inaudible] child.

MR. BRAHMS: That's [inaudible]. But you're saying that you believe the procedure --

MS. GUTIERREZ: I'm just trying to specify how that, that, the rule plays out.

MR. BRAHMS: Are you saying that the rules do not allow the Court to issue a subpoena that ultimately [inaudible] --

MS. GUTIERREZ: No, that's not, that's not --

MR. BRAHMS: -- [inaudible] facility?

MS. GUTIERREZ: -- the issue at all. Uhm, actually you know I would leave that at the discretion of the Court that was the only thing I was asking. If the subpoena goes directly to the facility there has to be a finding by this Court that it go directly to the facility.

THE COURT: Uh-huh.

MR. BRAHMS: That's [inaudible].

MS. GUTIERREZ: Otherwise it has to go through Social Services is my understanding, --

MR. BRAHMS: And if the Court determines, --

MS. GUTIERREZ: -- that's all I asked.

MR. BRAHMS: -- if the Court determines that you can

issue a subpoena directly to the facility and that's fine, but if you determine it has to go through Social Services to the guardian to the facility and I don't know how that would work my bottom line is that I want to do what is appropriate and correct procedurally and through the rules in getting a subpoena issued. That's just a first step and then as you pointed out and I'm well aware those facilities may bock at producing some or all of it and we may have some other proceedings to determine it.

THE COURT: Alright.

MR. BRAHMS: And this is one of the reasons I wanted to get a continuance for the trial 'cause I anticipated that this may take a while to get any of these records. I'm asking the Court what is it you want me to do if anything more about [inaudible] --

THE COURT: Or, okay.

MR. BRAHMS: -- more information before hearing on this if we need a hearing.

THE COURT: Alright. So I have it, uh, uh, before me at this point where there's, uhm, uh, a command to produce original, original documents or other [inaudible] items for the above entitled matter specifically any notes, reports, summaries,

memos, letters, disciplinary reports, evaluations or other documentation regarding, uh, EM from the first date of his enrollment in your program through the present.

MR. BRAHMS: And again I would emphasize that the breath, the broadness of it would be to the extent that it comply, these entities comply would agree to have those come to Court for an in camera inspection and not to the parties [inaudible] determine what if any of those records that you received have bearing on the issues and again I did specify in my motion as I have in detail now but I can be more, more specific as to incidents maybe not as, uh, that time of the incident because I may not, not know that. But I do know of incidents have occurred and in an e-mail that I received from Ms. Gutierrez has two of those reported incidents she confirmed that she indicated that had occurred as well.

THE COURT: Alright.

MS. GUTIERREZ: Your Honor, just, just briefly on those two incidences you can see the Tribe's motion was very limited, uhm, the subpoena was for the dates that the child has been in Tribal custody because, uh, those are the only records we would be able to subpoena and, uhm, and it was specific to the incidents

that, uhm, occurred so --

THE COURT: Okay.

MS. GUTIERREZ: --I think that may be useful to sort of help Mr. T--, Mr. Brahms tailor.

THE COURT: And, uh, at this, uh, time the Court is going to have, uh, Mr. Brahms submit, uh, uh, that in my opinion that's very, very broad, uh, what you have requested the subpoenas, uhm, --

MR. BRAHMS: Yeah.

THE COURT: -- uh, the documentation that you are requesting. Uhm, if I were of that entity it would me to try to look for any and all and not one person may know that there are several places to look for information but not knowing the set ups of, of, uh, schools or, uhm, places such as this Back to Life, uh, not knowing if that's even, uh, uh, possible, uhm, to send it to the principal say of the school and then have them, uh, try to find all of the information you are requesting, uh, so, uh, uhm, if there are specific day or specific months of time or, or wherever, uh, any more, uhm, say disciplinary, if you're just going to keep it to that, uh, then that is, uh, more sufficient for a subpoena to include so that, uhm, the entity you are

requesting from can have more of an idea, uh, with the understanding that it would come back, it would come to the Court and, uh, for, uhm, an in camera inspection to decide, uh, then what information, uh, should be, uh, uh, would be able to be used from, from those documents if there are any that would come back.

MR. BRAHMS: So you would want me to be more specific --

THE COURT: Yes.

MR. BRAHMS: -- [inaudible] subpoenas and submit it to the Court?

THE COURT: Yes. And, uh, --

MR. BRAHMS: I just have to do that within the ten days.

THE COURT: Within ten days the Court will, uh, then have, uh, a due date of the same which would be June 11th for, uhm, Mr. Brahms to submit a, uhm, either amended subpoena or, uh, a more detailed subpoena for --

MR. BRAHMS: So do you want me to just submit an amended, uhm, motion or just submit subpoenas?

THE COURT: The motion --

MR. BRAHMS: 'Cause the motion is just general.

THE COURT: If you could just briefly, uh, in an amended, uh, uh, in a motion say that you are submitting a, an amended subpoena I want to make sure that we have documentation together along with a subpoena, a written, uh, motion to say what it is that you're doing.

MR. BRAHMS: Okay.

THE COURT: Okay. And, uh, the Court will, uh, sche--, will ask the, uh, Tribe and Counsel at this point is there any reason to cha--, to have another date for this specific motion we can, or can we address this at the same time as the June 20th, uh, hearing?

MS. GUTIERREZ: Uhm, do you know --

MR. BRAHMS: Oh, I thought we were having that June 20th, evidentiary hearing just for that matter and not for these other matters unless, uh, I misunderstood that.

THE COURT: You had indicated that you might not use the whole time and that's why I'm asking if you, if --

MR. BRAHMS: Well I agree with that, uh, --

THE COURT: Uh-huh.

MR. BRAHMS: -- we could, we could do that I, I don't know what Ms. Gutierrez wants to do 'cause we, we both have, she

has one motion I think pending, uh, regarding the, uhm, uh, adult [inaudible] --

THE COURT: Okay.

MR. BRAHMS: -- and I have a couple of, of motions that I had said that we could not get to today.

MS. GUTIERREZ: Your Honor, just, uh, briefly I don't, I don't know, uhm, I don't have any objection if you want to take on this motion at that time I think it might resolve itself and perhaps some of this issue of compelling may resolve itself. Uhm, as to the other issue the allegation that Mr. Brahms brings against the Tribe I think that should be in motion and I would want to hear Mr. Brahms' witnesses we want them on the Record.

THE COURT: Alright.

MS. GUTIERREZ: As far as the, uh, what is, uh, what is pending, Your Honor, it just, if I can if you don't mind the Tribe had the following motions out some of them have been granted some of them denied already; in terms of needing questions that's already been settled that many questions are appropriate of course with, uhm, the [inaudible] of the, the meeting and not testimonial. Uhm, the other acts reports have already been denied by the Court and if, if I'm s--, situating myself correctly Mr.

Brahms has no objection to the subpoena of Miss Clark's records from Child Services, uhm, Child Welfare Services as well as the subpoena just submitted this week for [inaudible]... is that correct?

MR. BRAHMS: What --

MS. GUTIERREZ: From Social Services.

MR. BRAHMS: Oh, you submitted for those records, uh, --

MS. GUTIERREZ: I did.

MR. BRAHMS: -- the two incidence that [inaudible] --

MS. GUTIERREZ: Yes.

MR. BRAHMS: -- I don't have objection for those.

MS. GUTIERREZ: So the, the only things that the, the only motion entered by the Tribe that is still pending is to closed the courtroom and to allow an adult attendant for the child. Uhm, as far as the Defense motions we still had a pending, uhm, an order pending on Defendant's statements and I didn't know if, Your Honor, was just going to issue a written order on that.

MR. BRAHMS: Okay.

THE COURT: Uh, which motion was that?

MS. GUTIERREZ: Uh, for, uh, Mr. Brahms, uhm, enter,

Defendant entering Motion to Suppress Defendant's Statements. And we haven't received an order on that. And then there's, uhm, the, the, uh, the question that we already set hearing for was subpoena for all records that Mr. Brahms is going to probably, uhm, alleviate that issue and [inaudible] the non con--, no contact order I think was the other pending thing.

MR. BRAHMS: [Inaudible.]

MS. GUTIERREZ: Uhm, the only other things that we would have are the, of course the Jury instruction and the voir dire.

MR. BRAHMS: Well regarding the later, Your Honor, uh, once we get through these motions and maybe we can take care of all of these on the 20th and it'd probably be appropriate to set them for that time as you said we may not use the entire three hours on that, that hearing. But as to the Jury instructions and voir dire given the trial date is set in August set a new pretrial conference sometime in July to go through that and if I may enquire, Your Honor, there may be new issues that come up and --

THE COURT: That's correct.

MR. BRAHMS: -- there may be more Motions In Limine coming that could be heard at that time --

THE COURT: Alright.

MR. BRAHMS: -- [inaudible].

THE COURT: So you're requesting a pretrial to be set in July and, uh, the Court, uh, will set the matter since that, uh, is an issue that, uh, does need to be addressed before any Jury trial and that's to address any, uh, Jury instructions and voir dire, uh, of course, you know, this is an ongoing case so there may be other, uh, motions that either would come up or, uh, issues that the Court will need to address so, uh, the Court will grant the, the motion for a pretrial hearing to be, uh, set in July, uh, to specifically, uh, address the Jury instructions and voir dire. And with that, uhm, do either, does either party have, uh, a suggestion as to the time, I know Ms. Gutierrez you've had several Jury trials, uh, and, uh, --

MS. GUTIERREZ: Correct, Your Honor.

THE COURT: -- with regard to the pretrial, uh, uh, addressing Jury instructions, voir dire, uh, I know it's a matter of going through questions, uhm, seeing if there are any objections or any issues between the, the parties on, on what has been submitted by both parties, uh, is that sufficient an, an hour or two hours, uh, an hour and a half?

MS. GUTIERREZ: I've previewed everything, I do have,

uh, several objections to the, the voir dire, uhm, but I, --

MR. BRAHMS: [Inaudible.]

MS. GUTIERREZ: -- but, uhm, --

THE COURT: Exactly and, uh, instead of going into --

MS. GUTIERREZ: I think an hour should be sufficient.

THE COURT: For an hour?

MS. GUTIERREZ: Yes, ma'am.

THE COURT: And Mr. Brahms.

MR. BRAHMS: This, you mean, uh, for the new pretrial?

THE COURT: Yes, for the July pretrial.

MR. BRAHMS: Right. And if there's other motions that are brought between now and then and the Tribe's discretion we can, uhm, [inaudible].

THE COURT: Alright. So, uh, do we have a date in July sufficient enough before the Jury trial?

COURT CLERK: We could do it either July, Monday July 16th at 3:00 or the 23rd at 3:00.

MS. GUTIERREZ: Your Honor, I am out of town at a family event on the 16th but the 23rd, if you would permit the 23rd that

would work better.

THE COURT: Mr. Brahms, the 23rd sufficient?

MR. BRAHMS: Uhm, prior to the 16th anything?

MS. GUTIERREZ: I'm in trial the week before, Your Honor.

MR. BRAHMS: After, after to that, --

MS. GUTIERREZ: Uhm, --

MR. BRAHMS: -- between --

MS. GUTIERREZ: -- this, uh, it's up to the Court if they have time but those are the dates they gave us.

MR. BRAHMS: Well is there any time you have available between July 1st and July 16th?

MS. GUTIERREZ: It's up to the Court.

THE COURT: Okay. Uh, you're requesting it to be sooner than the 16th?

MR. BRAHMS: Well I'm getting from Ms. Gutierrez is she's not available from the 16th to the 23rd.

MS. GUTIERREZ: No, Mr. Brahms, you misheard, I'm in trial July 9th, 10th and 11th. I leave on, uh, July 13th I don't return until the 17th, Your Honor. This is why I requested the 23rd which was the other date --

MR. BRAHMS: Oh, I misunderstood.

MS. GUTIERREZ: -- that was available from the Court.

MR. BRAHMS: The 23rd, the 23rd is fine, I misunderstood.

THE COURT: Alright. So, uh, 3:00 o'clock was it, the 23rd?

COURT CLERK: Yes.

THE COURT: Okay. So July 23rd, 2012 at 3:00 in the afternoon will be a pretrial, uh, hearing in this matter, uh, specifically to, uh, address Jury instructions and voir dire and both parties I believe had submitted, uh, had previously submitted, uhm, their Jury instructions and voir dire questions... is that correct?

MS. GUTIERREZ: Yes, ma'am.

MR. BRAHMS: Yes.

THE COURT: Okay. So we'll be addressing what has already been submitted, uh, and should there be a, an, any other due date for, uh, any supplemental Jury instructions or voir dire or do the par--, are the parties comfortable with what they've submitted so far?

MR. BRAHMS: I will let the Court know that I do

intend to amend some of my voir dire questions.

THE COURT: Alright. And, uh, that's the reason I ask I would like to have, uh, any amended or supplemental, uh, questions, uh, to be added to any, any one, uh, any what you have already submitted prior to that, uh, 23rd of July. And so that would be, uh, I'd like to have a due date the week prior to, uhm, so even by the 18th of, of July.

MR. BRAHMS: 18th?

THE COURT: Yes. Any, uh, any amendments to your, uh, instructions or voir dire questions will be due July 18th. The Court will also address the issue of, uh, the, uh, Defendant's motion, uh, that we had just previously spoken about and that is, uh, the amended motion for issuance of subpoenas for, uh, the alleged victim's records that will be addressed, uh, as well on the 20th of June, 2012. And if there need be an, uhm, any other, uh, hearings set the Court will address that then. The Tribe have anything that we're, uh, there was one outstanding, uh, motion, uh, or two actually that the Tribe had, --

MS. GUTIERREZ: Yes, Your Honor, I believe --

THE COURT: -- that's a closed courtroom and adult attendant.

MS. GUTIERREZ: Th--, that was one motion, I didn't know if the Court was going to, uhm, address it by written order and also the one that's been pending for a little while is the Defendant's statements, --

THE COURT: Okay.

MS. GUTIERREZ: -- uhm, and, uh, I apologize, Your Honor, and I didn't know if, at this point I figured you were going to issue a written statement I didn't know if you wanted a hearing on that.

THE COURT: Okay. And both part--

MR. BRAHMS: Uh, I'd like a hear--, I'd like a hearing on that motion. I mean I'd like that to be heard on June 20th.

THE COURT: The Court is going to address that as well on the 20th, uhm, and if there, uh, is, I just need to let, uh, both of you know that, uh, as brief as possible as we can keep any, uh, arguments we have for the issues, uh, so that we can address these matters during, uh, that, the 20th, uh, hearing, uh, June 20th hearing. Uh, as far as any, uh, any other issues, uh, does either party have anything that you wish to, uhm, bring up so that we can make sure we address it at the later, uh, hearing?

MR. BRAHMS: Not at this time, Your Honor.

MS. GUTIERREZ: Just the same co--, conditions of release, Your Honor.

THE COURT: Okay. Any objections?

MR. BRAHMS: To?

THE COURT: To, uh, the condition of release for Mr. Montana remaining the same.

MR. BRAHMS: Okay. I do have to have my ears checked.

THE COURT: Okay. Do you have any objections to Mr. Montana continuing to be released on the previously ordered release conditions, uh, there is a, uhm, in this, uh, criminal matter Mr. Montana is to have, uh, uh, he's ordered to comply with, uh, certain conditions of release.

MR. BRAHMS: Yeah, same conditions.

THE COURT: Same conditions should be --

MS. GUTIERREZ: That would include no contact [inaudible].

MR. BRAHMS: Yes, [inaudible] obviously --

THE COURT: Okay.

MR. BRAHMS: -- [inaudible] no contact.

THE COURT: And it includes the, uh, no contact with, uh, the minor alleged victim. Alright. So at this time, uh, the, uh, Court is adjourned.

MS. GUTIERREZ: Thank you, Your Honor.

MR. BRAHMS: Thank you, Your Honor.

COURT CLERK: All rise.

[END OF EVIDENTIARY HEARING]

[Transcriber's Certification Follows:]

CERTIFICATE

I certify that, to the best of my ability, the foregoing is a true and accurate transcription of the original tape recorded conversation in the case referenced on page 1 above.

Transcription Completed: September 23, 2012

CHRISTINE McGARVEY-LAW
INVESTIGATIVE SUPPORT SERVICES, LLP
PARALEGAL SUPPORT SERVICES, LLP
LEGAL TRANSCRIPTION SERVICES PLUS, INC.
TRANSCRIBED BY: JULIA BUVIK

SIGNED BY: *Christine McGarvey*
CHRISTINE McGARVEY

APPENDIX 5

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PASCUA YAQUI TRIBAL COURT
FILED DATE AND TIME
2012 JUN 12 PM 4:17
DOCKET NO.
CLERK

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,	Case No.: CR-12-005
Plaintiff,	**DEFENDANT'S REQUEST TO CONDUCT OPEN COURT EXAMINATION OF ALLEGED VICTIM; REQUEST TO CONTINUE EVIDENTIARY HEARING**
v.	
CHRISTOPHER MONTANA.	
Defendant	**Hearing Date: June 20, 2012 at 9:00 a.m.**

COMES NOW, Defendant, Christopher Montana, by and through undersigned counsel, Fredric Brahms, J.D., and hereby requests that this court permit open court examination of the alleged victim, E.R., in place of in camera questioning by the Judge, in order to preserve such testimony on the record and to preserve Defendant United States Constitution Sixth Amendment right of confrontation. Undersigned counsel suggested at the May 31, 2012 hearing in this matter that an evidentiary hearing be conducted and testimony obtained from the alleged victim, in camera, through questions submitted by the parties for Judge Flores to ask E.R., with the view that such would be a good means to allow this witness to be introduced to the Court examination process, while still preserving Defendant's right of confrontation through the submitted questions.

However, upon reflection and after drafting Defendant's proposed questions, undersigned counsel realized that the nature and extent of the issues presented herein and necessary questioning of this witness would require follow up questioning that can only be adequately done in open court examination with the opportunity for all parties concerned to directly examination of this witness. Accordingly, Defendant requests, consistent with the spirit of undersigned counsel's suggestion for the Court to conduct the examination of this minor child, that the

following examination sequence be employed in open court and on the record: 1) Judge Flores will initially question E.R. based upon the proposed questions submitted by Defendant and the Tribe: and 2) Thereafter, Defense counsel and a Prosecutor will be allowed to conduct follow up questioning of the witness, subject of course to the rules of evidence.

Defendant further requests a continuance of the evidentiary hearing re exculpatory and impeachment evidence currently set for June 20, 2012 on the grounds that: 1) Defense counsel underestimated the time needed to adequately conduct investigation and to prepare for such hearing and has encountered several rush projects on other cases in the past 10 days; 2) Despite reasonable efforts, undersigned has not been able to contact an essential witness, Olefia Ochoa, who may not be available for the hearing; and 3) The Prosecutor's Office today has filed a motion for an order to take the deposition of Almarosa Ramirez on June 15, 2012, who is scheduled to be a witness at the June 20, 2012 hearing, concerning the testimony Ms. Ramiriez is anticipated to give at such hearing. Defense counsel submits that it is improper to conduct such deposition on such short notice, without conducting a hearing upon at least ten (10) days notice concerning the propriety of taking such deposition in the first place. Moreover, if the Court is inclined after a hearing to grant the Tribe's motion for such deposition, it should be set upon adequate notice, and permit all parties an opportunity to prepare for such deposition and subsequently obtain a transcript of the deposition prior to the evidentiary hearing.

CONCLUSION

Based on the foregoing, Defendant requests: 1) that the alleged victim is examined in open court as outlined above, first by Judge Flores and then by defense counsel and a Tribal prosecutor in follow up; and 2) that the evidentiary hearing be continued for two to three weeks to afford all parties sufficient time to adequately prepare for such hearing.

RESPECTFULLY SUBMITTED this 14th day of June, 2012.

Fredric Brahms, Counsel for Defendant,
Christopher Montana

Copy of the foregoing mailed/delivered
this 21 day of June 2012 to:

Guadalupe Gutierrez
Pascua Yaqui Tribe
Office of the Prosecutor
7474 S. Camino de Oeste
Tucson, AZ 85757

Feliciano Cruz
PYT Social Services
7474 S. Camino De Oeste
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Ms. Lourdes Lopez
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APPENDIX 6

PASCUA YAQUI TRIBE
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Guadalupe Gutierrez
Deputy Prosecutor

PASCUA YAQUI TRIBAL COURT
FILED DATE AND TIME
2012 JUN 18 PM 2:31
DOCKET NO. CR-12-005
CLERK

IN AND FOR THE PASCUA YAQUI COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE

Plaintiff

vs.

MONTANA, Christopher

Defendant(s)

CR-12-005

TRIBE'S OBJECTION TO DEFENDANT'S REQUEST TO CONDUCT OPEN COURT EXAMINATION OF MINOR VICTIM; MOTION TO DISMISS

COMES NOW THE PASCUA YAQUI TRIBE, by and through the undersigned Deputy Prosecutor Guadalupe Gutierrez, and hereby objects to Defendant's motion for the Court to question the child victim in open court rather than in chambers. The Defendant's claim that the Sixth Amendment right of confrontation applies is incorrect in this matter. It is the defense that has requested this witness for the purposes of supporting allegations of "coaching" by the prosecutor. The prosecutor is the "accused" in this scenario and holds the protection, not the Defendant. Further, the Tribe requests that the Court dismiss these allegations against the Prosecutor for lack of establishing a prima facie case of wrongdoing. The Tribe's position is supported in the following Memorandum of Points and Authorities.

Respectfully submitted this 18th day of June, 2012.

Guadalupe Gutierrez
Deputy Prosecutor

Original filed with the
Clerk of the Pascua Yaqui Tribal Court

On:

Defense Counsel:

Fredric Brahms J.D.
P.O. Box 65493
Tucson, AZ 85728

Feliciano Cruz
Pascua Yaqui Social Services

MEMORANDUM OF POINTS AND AUTHORITIES

Procedural Posture/Relevant Facts

In his original motion regarding allegtions of "coaching" filed May 7, 2012, Defendant argued that the Prosecutor or the Tribe's "agents" were "coaching" the child victim to testify in a manner consistent with the Tribe's theory. Defendant made general allegations of "coaching" that were not supported by specific facts. Nor did the Defendant provide affidavits from any witnesses with specific facts demonstrating "coaching" by the Prosecution. The Tribe responded to these allegations on May 21, 2012.

In his reply, filed May 29, 2012, the Defendant again made only general allegations without supporting facts or affidavit. At hearing on May 31, 2012 the defense counsel stated that the information regarding coaching came for Ms. Almarosa Ramirez. Again no specific conduct was alleged, only that Ms. Almarosa thought the child victim was encouraged to testify "consistent with the Tribe's case." Ms. Ramirez did not provide an affidavit and no specific dates or show of proof were offered. Defendant again made general, vague allegations but produced no witness or documentation of any impropriety on part of the prosecutor. No prima facie case was made to demonstrate a basis for these allegations. Nevertheless, the Court, in its discretion, granted a hearing.

As to the scheduled hearing on these matters, the Defendant requested that the Court interview the victim. The intent was to show how the prosecutor or her "agents" might have improperly influenced the child victim. The Tribe objected. The Defendant argued that the child victim was a "material witness" to the allegations being made against the prosecutor. The Court agreed to interview the child in chambers, with both

parties submitting questions for consideration for the interview. Hearing was set for June 20, 2012.

Because the Tribe had not received any disclosure from the Defendant as to the facts upon which the allegations against the prosecutor were based, the Prosecutor's Office asked for an investigation as to the matter. The Prosecutor's Office, through the Pascua Yaqui Police Department, requested an interview with Ms. Almarosa Ramirez. Ms. Almarosa Ramirez is not a defendant in any criminal case. She had been named by the Defendant as the source of the allegations against the prosecutor. This makes Ms. Ramirez a material witness in the matter. Ms. Ramirez was asked by police to come in for interview on or about June 8, 2012. She refused. The Tribe filed a request for deposition on or about June 11, 2012.[1]

On June 12, 2012, Defendant filed a motion to continue the evidentiary hearing set for June 20, 2012. In that motion the Defendant makes specific statements regarding lack of support for his allegations against the Prosecutor. The Defendant states "Defense counsel has underestimated the time needed to adequately conduct investigation and to prepare for such a hearing." (Pg. 2 of Defendant's Motion). And, that "[d]espite reasonable efforts, undersigned has not been able to contact an essential witness, Olefia [sic] Ochoa, who may not be available for the hearing." (Pg. 2 of Defendant's Motion). As part of that motion, the Defendant also requested that the child victim be subject to examination by the Judge in open court. The Defendant cited the Confrontation Clause of the Sixth Amendment in support of such examination of the child victim.

[1] The Request for Deposition was submitted by Mr. Alfred Urbina of the Prosecutor's Office.

The Tribe did not object to a continuance of the hearing set for June 20, 2012. To the Tribe's understanding, the entire evidentiary hearing would be continued and all matters would be litigated at the later date and time..

Law and Argument

I. THE TRIBE OBJECTS TO CONDUCTING OPEN COURT EXAMINATION OF MINOR VICTIM BECAUSE THE DEFENDANT DOES NOT HAVE A SIXTH AMENDMENT RIGHT TO CONFRONTATION UNDER THE CIRCUMSTANCES OF THE HEARING

The Sixth Amendment to the United States Constitution provides that in "all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." This protection has been extended to Indian Country through the Indian Civil Rights Act. Further, in *Crawford v. Washington*, 541 U.S. 36 (2004), the U.S. Supreme Court held that the Sixth Amendment guarantees an accused the right to confront those "who bear testimony" against him. 541 U.S. at 51. Thus, the person who holds the protection under the Confrontation Clause is the person against whom allegations are being levied.

In this case, the Confrontation Clause does not trigger for the Defendant, the protection of the Confrontation Clause is the right of the Prosecutor. In this case the facts show that it is the Prosecutor who is being accused of wrongdoing. Indeed the Defendant has named Almarosa Ramirez, Ofelia Ochoa and the child victim as the witnesses who can demonstrate how the prosecutor has "coached" the child victim. **In this instance, the child victim is a witness at the request of the Defendant, not the prosecution.** The child is being interviewed to assess allegations against the Prosecutor and her office. Thus, the Sixth Amendment protection is the privilege of the Tribe in this particular hearing. Further, the hearing is not focused on the facts of the crime which the Defendant committed. The hearing is focused on the acts of the Prosecutor or the Tribe. **It is the Tribe, and the Prosecutor, who are the "accused"**

and hold the right to confront, not the Defendant. *See Crawford*, 541 U.S. 36 (2004).

Because of the nature of the questioning and because the child victim may be more traumatized by examination in open court, the Tribe waives its right of confrontation for this witness only. Also, the Defendant seems to be using examination in open court as a means to bypass the protections guaranteed under the Victim Rights to refuse interview under the Pascua Yaqui Code.

II. MOTION TO DISMISS ALLEGATIONS OF "COACHING" FOR LACK OF PRIMA FACIE CASE

The Tribe moves to dismiss the Defendant's allegation of "coaching" the victim by the Prosecution. Generally, allegations of coaching a witness are a serious matter. However, such allegations must be based upon clear indications that the testimony is somehow inappropriately influenced and cannot be based upon "vague reasoning." *See State v. Hughes*, 456 P.2d 393, 396 (Ariz. 1969); *State v. Fullen,* 404 P.2d 732, 733-34 (Ariz. App. 1965) (Officer primed witness in his identification of the defendant). In *Hughes*, the defendant contended that the prosecutor was coaching witnesses to produce incriminating testimony. The *Hughes* court found that

> This contention is based upon vague reasoning by the defendant, and the record fails to disclose any evidence to indicate that the prosecutor "coached" the witnesses nor does it reveal that the witnesses were testifying to anything other than that to which they had personal knowledge.

Hughes, 456 P.2d at 396. In considering such matters the court must make a finding as to whether the specific facts presented support a prima facie case of "coaching." If no specific conduct can be identified as having occurred, then no assertion of coaching can be supported and no basis for a prima facie case of "coaching" can be established. *Id.* In the "absence of any evidence…other than the defendant's bald allegations thereto, the contention is without proper foundation." *Id.*

Allegations of coaching should be supported by specific incidences and facts that establish a prima facie case before the Court entertains a hearing or review. Here, the Defense offered no support for the allegations of coaching—neither specific incidences nor affidavit. And by his own admission, defense has not either actually spoken to the witnesses that would provide a prima facie case, nor can he locate them. In regard to Ms. Almarosa Ramirez, who is the primary witness on which the Defense rests his allegations of coaching, the Defendant has not offered any interview disclosure of evidence proving coaching, nor has the allegation been supported by affidavit. Further, the Defendant's claim is that the child witness has been somehow told to "testify in a manner consistent with the Tribe's case." The Tribe's case is built upon the facts, thus the child victim's statements seem to only be consistent with the facts. In this case, the defense has not met its burden of establishing a prima facie case that the allegations set forth against the Prosecutor have any basis in fact.

The Tribe believes, because the Defendant has failed to provide facts or evidence to support a prima facie case for this allegation, the allegation in this matter should be dismissed.

Conclusion:

For the foregoing reasons, the Tribe now requests that this Court (1) deny the Defendant's request for examination of the minor victim in open court because the Defendant does not hold a right of confrontation under the specific purpose and facts of this evidentiary hearing; and (2) that the Court dismiss allegations of "coaching" against the prosecutor because the Defendant has not established a prima facie basis for such allegations, making a formal hearing on the matter inappropriate.

Respectfully submitted this 18 day of June, 2012.

Guadalupe Gutierrez
Deputy Prosecutor

APPENDIX 7

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Plaintiff, vs. MONTANA, CHRISTOPHER, Defendant.	Case No.: CR-12-005 PRE-TRIAL HEARING ORDER

The defendant, Christopher Montana, appeared on June 20, 2012, with legal counsel, Fredric Brahms for his scheduled Pre-Trial hearing. Guadalupe Gutierrez appeared for the Tribe.

The Court addressed the matter of the Evidentiary hearing currently set for July 11, 2012 regarding the allegations of "coaching" by the Office of the Prosecutor. The Court heard from the parties and finds that the determination of setting a hearing on the matter was based upon the Defendant's written motion dated May 29, 2012. The Tribe requested to preserve their objection. The Court should maintain the Evidentiary hearing on the court docket.

The Court addressed the Tribe's Motion To Close Courtroom and Allow Adult Attendant. Upon hearing from the parties and upon review of the parties' pleadings, good cause appears to grant the Tribe's motion. The Court has considered the age of the minor and the Tribe's report of the minor's anxiety. The Court room will be closed for the limited time that the alleged minor victim is on the stand and the minor will be allowed to have an adult attendant from victim's services to sit near and behind the minor during his testimony.

The Tribe submitted an objection to Defendant's Request To Conduct Open Court Examination of Minor Victim. The parties requested a hearing on the matter and good cause appears to set a hearing on the matter.

On May 1, 2012 the Defendant, through counsel, filed a Motion *In Limine* To Preclude Use of Defendant's Statements. Upon hearing from the parties and upon review of the parties' pleadings, good cause appears to deny the Defendant's Motion *In Limine* in all allegations. The Court finds that the Defendant was not in custody during the time of the interview with Ms. Clark and that the interview was not an interrogation. The Court finds that the Miranda rule does not apply in this instant matter.

This matter should be maintained on the jury trial docket for August 14, 15, 16, 2012 at 9:00 a.m..

IT IS ORDERED: that the Tribe's Motion To Dismiss the allegations of "coaching" shall be denied. The matter shall remain on the Court's docket to be heard on July 11, 2012 at 2:30 p.m..

IT IS FURTHER ORDERED that the Tribe's Motion To Close Courtroom and Allow Adult Attendant is granted and the Court room shall be closed for the limited time that the alleged minor victim is on the stand. The minor shall be allowed to have an adult non-witness attendant from victim's services to sit near and behind the minor during his testimony.

IT IS FURTHER ORDERED that the Court shall set a hearing on the Defendant's Request To Conduct Open Court Examination of Alleged Victim which shall be heard on **JULY 5, 2012 AT 9:00 A.M..**

IT IS FURTHER ORDERED the Defendant's Motion *In Limine* shall be denied in all allegations.

IT IS FURTHER ORDERED the court adopts all findings above by reference and makes them part of its order.

IT IS FURTHER ORDERED that the defendant shall continue to be released on a suspended cash bond of $500.00. The bond is suspended pending the Defendant's compliance with the following: The Defendant shall have no contact with the minor, E.R.. The Defendant shall obey all laws and appear for all hearings. The Defendant shall not consume nor possess any alcoholic beverages and shall be subject to random breath alcohol testing by law enforcement.

THIS IS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.

SO ORDERED THIS 20TH DAY OF JUNE, 2012.

Margaret A. Flores
Associate Judge, Pascua Yaqui Tribal Court

Cc: Date 06.22.12
✓ Tribe ✓ Defendant ___ Defense Counsel ___ PY Detention ___ BIA Detention/Coconino County Detention
Clerk

APPENDIX 8

IN THE PASCUA YAQUI TRIBAL COURT

COUNTY OF PIMA, STATE OF ARIZONA

PASCUA YAQUI TRIBE,	)	NO. CR12005
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
CHRISTOPHER MONTANA,	)	
	)	
Defendant,	)	Tucson, Arizona
	)	June 20, 2012

BEFORE: THE HONORABLE MARGARET FLORES, JUDGE OF THE PASCUA YAQUI TRIBAL COURT

APPEARANCES: GUADALUPE GUTIERREZ, ESQ.
appearing for Plaintiff

FREDRIC BRAHMS, ESQ.
appearing for Defendant

RE: PRETRIAL HEARING

Christine McGarvey
Legal Transcription Services Plus, Inc.

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THE COURT: Good morning.

MS. GUTIERREZ: Good morning, Your Honor.

THE COURT: The Pascua Yaqui Tribal Court is now in session in the matter of the Pascua Yaqui Tribe versus Christopher Montano in Docket number CR12005. Today's date is, uh, June 20th, 2012. This is the date and time, uh, scheduled for, essentially a pretrial, uh, hearing to discuss motions, uh, that have evolved.

MS. GUTIERREZ: [Inaudible.]

THE COURT: Uh, was, uh, okay. The, uh, matter is, uh, scheduled for pretrial hearing and here on behalf of the, uh, Tribe is Ms. Guadalupe Gutierrez. The, uh, for the Record also the, uh, the, uhm, repisent [sic], representative of the minor is present, uh, [inaudible] Mr., uh, Feliciano, uhm, Cruz, uh, Sr. The, uh, Defendant Mr. Montana is present and with, uh, Counsel Mr. Fredric Brahms. At this time the Court will ask if the parties, [clears throat] excuse me, if the parties are, uh, ready to proceed with, uh, today's proceedings.

MS. GUTIERREZ: Yes, Your Honor, I just [inaudible] --

THE COURT: Uh-huh.

MS. GUTIERREZ: -- and I think [inaudible] we're doing an evidentiary hearing on the Defendant's [inaudible] --

THE COURT: On a diff--

MS. GUTIERREZ: -- issue?

THE COURT : -- d--

MS. GUTIERREZ: Okay.

THE COURT: Uh-huh.

MS. GUTIERREZ: Yes, we're ready to proceed.

THE COURT: Yes. And that was, uhm, with a, with a motion that had been filed by Mr. Brahms and having no objection the Tribe had [inaudible], uhm, the Court set it for the date of the 11th of July I believe.

MS. GUTIERREZ: I'm sorry, Your Honor, I got confused all over again. Uhm, [inaudible] --

THE COURT: The evidentiary hearing.

MS. GUTIERREZ: Pardon me?

THE COURT: That, that was scheduled for, uh, the evidentiary hearing with the witnesses and all of that that's scheduled for a later date --

MS. GUTIERREZ: Yes, ma'am.

THE COURT: -- in July.

MS. GUTIERREZ: Except that today's evidentiary hearing does have witnesses because of the Defendant's statement issue.

THE COURT: Yes. Uh-huh.

MS. GUTIERREZ: [Inaudible.]

THE COURT: Okay.

MS. GUTIERREZ: [Inaudible.]

THE COURT: Le... Mr. Brahms?

MR. BRAHMS: I'm, I'm confused now too, uh, there's no evidentiary hearing set for today it's continued for --

THE COURT: There, there's one specific with regard to the, uhm, the issue that had been brought up as far as, uhm, the, uh, coaching issue.

MR. BRAHMS: The what?

THE COURT: Uh, uh, and that's the, the coaching issue with regard to the, the Prosecutor --

MS. GUTIERREZ: I'm sorry, Your Honor, it took me a while.

THE COURT: Uh-huh.

MS. GUTIERREZ: I apologize for the interruption. My understanding is that today's hearing we're only doing the evidentiary hear--, hearing for suppression of the Defendant's

statements.

THE COURT: That was, --

MS. GUTIERREZ: [Inaudible.]

THE COURT: -- yes, that is --

MR. BRAHMS: [Inaudible.]

THE COURT: -- an issue.

MS. GUTIERREZ: And the rest or continue to July 11th... is that correct?

THE COURT: The rest --

MS. GUTIERREZ: [Inaudible] coaching issue and the issue of the, this third interview?

THE COURT: That, yes.

MS. GUTIERREZ: Okay.

THE COURT: However, there are other motions that I do need to --

MS. GUTIERREZ: Of course

MR. BRAHMS: Uh, just so I clarify, Your Honor, I didn't ask for an evidentiary hearing concerning --

THE COURT: And, and that's actually --

MR. BRAHMS: -- [inaudible] --

THE COURT: -- what the Court is going to address as

far as witnesses that the Tribe had, uh, uh, that the Tribe, uh, the Tribe has witnesses you say for --

MS. GUTIERREZ: Yes, Your Honor.

THE COURT: -- that specifically.

MR. BRAHMS: The Tribe wants to put witnesses on [inaudible]?

MS. GUTIERREZ: W--, uh, yeah.

MR. BRAHMS: Uh, you know it, to me that's pretty, it's a straight forward legal argument either the Court's going to, uhm, grant it based upon the arguments in, in the Defendant's papers and [inaudible] today or tonight, uh, based upon the arguments from Counsel. If it's an issue, I don't think it needs any, uh, any witnesses but, uh, if, Your Honor, wants [inaudible] that's fine. You know I, I just think it's a straight forward legal, legal question as to whether it was an appropriate setting for, uh, *Miranda* warnings or not.

THE COURT: Alright. Thanks.

MS. GUTIERREZ: Your, Your Honor, is, Mr. Brahms is correct in that it's completely at your discretion, it's the Court's discretion to, to allow [inaudible] or not. Usually in suppression, uh, so it's, uh, uh, contentions or arguments the,

uhm, regular procedure is to have a hearing so that --

THE COURT: Uh-huh.

MS. GUTIERREZ: -- it is on the Record and that, uhm, that it's had a proper opportunity [inaudible]. If Defense is willing to go forward just on the motions that's fine but it's at your discretion, Your Honor.

THE COURT: Thank you.

MR. BRAHMS: Your Honor, and this is a Motion in Limine I didn't set this up as a suppression hearing [inaudible], so it was, it is his entitlement of Motion in Limine to, to express those statements. I would, it, it's certainly up to, Your Honor, if the Prosecutor wants to put on witnesses and, and have a hearing on it, uhm, I have no objection but I would just prefer that we argue on it.

THE COURT: Alright. At this time, uh, before the Court, uh, proceeds further I, I would like to ask Mr. Brahms if, uh, you are waiving the reading of your client's rights, uhm, before we proceed any further?

MR. BRAHMS: Yes.

THE COURT: Okay. And so, uh, with regard to the, uh, issue of the, uh, motion that, uh, uh, is, uh, the Defendant's

statements and I want to make sure that I have the, uhm, the initial motion in, uh, before me.

MR. BRAHMS: Are we starting with that motion?

THE COURT: Uhm, --

MR. BRAHMS: Or, uh, something else?

THE COURT: -- actually let, let's, let's rundown 'cause we do have this morning to, uh, address the issues in this case and, uh, uh, the Court would like to, uh, make, uhm, well have note on the Record what we will be addressing, uh, what the parties have, uh, have, uhm, brought up before the Court, uh, through motions that we will be addressing today. As far as, uh, the July 11th, 2012 hearing the Court had, uhm, said the issue of, uh, the allegations against the Tribe that, uhm, Mr., uh, Brahms had, uh, had brought forward, uhm, that will be addressed, uh, on the 11th of July. Ms. Gutierrez, you had also, uh, requested, uh, other, other matters to be addressed then and, uhm, what is your understanding of what would be addressed at the 11th aside from those allegations?

MS. GUTIERREZ: Yes, Your Honor, uhm, we've done, uh, the Tribe has done quite a bit of research on proper procedure in this matter and [inaudible] case law supports that [inaudible]

allegation of coaching [inaudible] and behaviors. The, uhm, in this matter the Defendant solely [inaudible] allegation --

THE COURT: Okay. If --

MS. GUTIERREZ: -- [inaudible] affidavit or anything so the Tribe, uh, the Tribe would ask and it's requesting that the motion to dismiss be addressed as well as and if you found, uh, that it is, uhm, that it an evidentiary [inaudible] then the Defendant has to [inaudible] case and, uhm, confrontation and cross-examination by the Tribe, Your Honor, that's all we're asking for the proper procedure [inaudible].

MR. BRAHMS: Your Honor, first of all it's my understanding that what was assigned in, uh, the last, uhm hearing on July 11th, it's an evidentiary hearing; you determined an evidentiary hearing would be set concerning the motion concerning exculpatory evidence and to get impeachment evidence from that motion. It's my understanding, Your Honor, that you made that determination that there was sufficient evidence presented to you to set hearing on an evidentiary hearing. As number one I think that's already been decided. Two, if, excuse me for my hearing being a little bit off I think I might have a lot of wax in my ears [inaudible] I thought I heard the Prosecutor mention that she

wanted to have a motion to dismiss that evidentiary hearing on that date, I haven't received a Motion to Dismiss from the Prosecutor and Motion to have *prima facie*, uh, evidence established before going forward I think, Your Honor, I, I'm assuming that you would not have set the hearing unless you thought there was sufficient evidence to go forward with the hearing. [Inaudible] I would object to the Prosecutors' position that there should be an [inaudible] to dismiss [inaudible] in some *prima facie* determination before going forward, I be that's already been assigned by the Court and if you could just have an evidentiary hearing before based upon, you know, the witnesses that I have subpoenaed and any witnesses the Prosecutor wants to have, uh, let it be brung [sic] out at that time.

THE COURT: Okay. Uh, [inaudible] --

MR. BRAHMS: [Inaudible] I haven't received any [inaudible], uh, Motion to Dismiss unless she's doing an oral motion right now maybe she's updating on that.

MS. GUTIERREZ: Your Honor, uhm, it was filed I believe on Monday --

THE COURT: Monday.

MS. GUTIERREZ: -- and it should have been sent out to

Mr. Brahms I'm not sure [inaudible] processors, uh, everything been [inaudible]. Your Honor, uhm, just the Tribe is just asking proper procedure. If the Tribe, uh, if the, the Court feels that there is, uh, uh, they're considering a Motion to Dismiss which can [inaudible] proceedings, uhm, finds that it is appropriate to proceed [inaudible] on the Record so that [inaudible] procedure is fine, that's, that's all we're asking, uhm, that consider the issues, consider the argument, I think that Ms. [inaudible] the right to response and [inaudible] your order, you issue an order [inaudible].

THE COURT: And, uh, Mr. Brahms, that, that is correct, uh, uh, Monday the Court did receive, uh, the filing, uhm, with regard, uh, it's, it is, uh, styled, uhm, Tribe's objection to, uh, Defendant's request to conduct open court examination by the victim, uh, Motion to Dismiss --

MR. BRAHMS: Okay.

THE COURT: -- filed on Monday afternoon.

MR. BRAHMS: Okay.

THE COURT: And, uh, --

MR. BRAHMS: It's probably [inaudible] today.

THE COURT: The, uh, Court, uh, at this time, uh, is

has, has already set that, uh, hearing however, with regard to the, uh, iss--, the Tribe having brought up the issue of procedure and, uh, the Court's determination for the Record as to, uhm, whether or not, uh, there is a *prima facie* case, uh, to, uh, against the, uh, Tribe with regard to the, the allegations the, uh, Court, uh, at the time of the last hearing did set, uh, the, uh, the issue to be heard at an evidentiary hearing. Uh, uh, prior to the, the date of hearing, uh, Mr., uhm, Coun--, Counsel for Defendant did submit a, uh, a, uh, filing, uh, it was dated the 29th of May, which, uh, did include, uh, some detail as to, uh, the allegations that he had, uh, brought, uh, with regard to the issue of, uh, of coaching, uh, the, uh, minor and that was, uh, uh, submitted in, uh, the Court's file in the date of, uh, May 29th, uh, 2012. And, uh, so at this time the Court is, uhm, has, uh, according to, uhm, what Ms. Gutierrez has brought up as procedure, uh, looks at that, uh, specific filing, uh, to, uh, deter--, uh, ha--, and have made the decision to set a hearing on the 11th of July, for, uh, the, uh, evidentiary hearing on that matter.

MS. GUTIERREZ: Thank you, Your Honor, we would just preserve, uh; the Tribe would just like to preserve it's

objection.

THE COURT: Okay. And at this time now as to the other, uh, issues that, uh, we will be addressing today. The, uh, Court has, uh, a motion from, from the Tribe to, uh, or, uh, let me, uh, make sure I have the... Okay. Ms., uh, Gutierrez, as far as, uh, a motion that, uh, you would like, uh, first addressed in this matter, uh, can you ex--, uh, let the Court know the, uh, motion that you have?

MS. GUTIERREZ: Actually, Your Honor, I believe the, a motion, uhm, my understanding is and again, uh, uh, I'm sorry I, I kind of danced on this issue, the motion that [inaudible] discussing today is Defense, the submission of the Defendant's statement; uhm, although the, the Tribe certainly has the burden to show that those, those statements are not [inaudible] --

THE COURT: It's Mr. Brahms' motion.

MS. GUTIERREZ: Yes. [Inaudible] through, uhm, testimony that's, that's the burden of the, the Tribe, if it's won on oral argument, Your Honor, and that it [inaudible].

THE COURT: Alright.

MS. GUTIERREZ: [Inaudible] --

THE COURT: Yes. Uh, alright.

MS. GUTIERREZ: -- [inaudible].

THE COURT: No, I would, uh, like to have Mr. Brahms since that's his motion, uh, after that though I do want him, uh, to, to address the Tribe on the next motion that we have, uhm, --

MS. GUTIERREZ: [Inaudible.]

THE COURT: -- to address so that I can make sure that we address everything that, uh, is, is before the Court, uhm, [inaudible] later on, uhm, --

MS. GUTIERREZ: And do, do you want any, any brief recap from what I have?

THE COURT: Yes. And I will hear from, uh, --

MS. GUTIERREZ: So my --

THE COURT: -- Defense.

MS. GUTIERREZ: -- understanding right now is that [inaudible] issue so I mean [inaudible] makes my motion [inaudible] --

THE COURT: That's true.

MS. GUTIERREZ: -- [inaudible] that's off the, uh... is that correct?

THE COURT: Yes. Uh-huh.

MS. GUTIERREZ: Uhm, we do have a couple of issues, uhm,

the subpoenas that aren't really bugging me, Your Honor, --

THE COURT: Okay.

MS. GUTIERREZ: -- [inaudible] discussion, uhm, and as far as, uh, all I have is clarification of procedure. I don't have any other, uhm, any motions except for, uhm, Mr. Brahms' subsequent argument, uhm, after the hearing [inaudible], uhm, uhm, interview of the child [inaudible] it's, it's, uhm, objection to the child being interviewed nevertheless, uh, it's the Court's discretion to do that. Uhm, Mr. Brahms subsequently entered a, a, uh, change of [inaudible] that [inaudible], uhm, he wanted the child to be interviewed in court and subject to cross-examination [inaudible] it's another issue [inaudible] arguments on.

THE COURT: Uh, I just want the essential, uhm, what it is that, uh, you have before the Court to, uh, that, that you would like to have addressed today, uhm, --

MS. GUTIERREZ: [Inaudible] --

THE COURT: -- and then I will hear from Mr. Brahms... okay?

MS. GUTIERREZ: -- [inaudible] housekeeping issues that's, that's all I have --

THE COURT: Alright.

MS. GUTIERREZ: -- that I need to argue [inaudible] the Defendant's statements, the issue [inaudible] for today [inaudible].

THE COURT: Okay. Thank you. And Mr. Brahms?

MR. BRAHMS: Yes, if I may I believe there was at least one other motion, two other motions that the Prosecutor [inaudible] there was a Motion to close the courtroom and allow an adult attendant I don't believe we addressed that issue on the 31st.

THE COURT: Okay.

MS. GUTIERREZ: Oh, okay.

MR. BRAHMS: And there was a Motion to Disclose Social Services reports filed on May 30th that, uhm, that was not addressed --

THE COURT: Right.

MR. BRAHMS: -- on the 31st and --

THE COURT: And that is, uh, your motion.

MR. BRAHMS: That was the, uh, Tribe's motion --

THE COURT: Oh, Tribe's submission.

MR. BRAHMS: -- [inaudible]. First of all regarding that May 30th disclosure and I did not file an opposition and I

would have, the Defendant will have no objection to the Court weighing that motion on May 30th for disclosure of reports. So you know which one I'm referring?

MS. GUTIERREZ: Yeah, I thought it was granted actually p--, pursuant to --

MR. BRAHMS: It could, it could have been [inaudible].

THE COURT: Okay. And --

MR. BRAHMS: And I'm pretty sure we did not, --

MS. GUTIERREZ: [Inaudible.]

MR. BRAHMS: -- did not address the, uhm, the Tribe's motion to, uhm, have the adult attendant --

THE COURT: Alright.

MR. BRAHMS: -- and the closed courtroom. And then as far as the Defendant's motions, uh, uhm, you want addressed today is a Motion of Limine regarding [inaudible] Defendant's statements and the Defendant's Motion to Lift the No Contacts, uhm, Limited Lifting the No Contact.

THE COURT: And anything else? Is that all your motions?

MR. BRAHMS: That is.

MS. GUTIERREZ: I do believe the no contact order [inaudible] at the last, the last hearing?

THE COURT: Yes, and, and, --

MS. GUTIERREZ: And, uhm, --

THE COURT: -- Mr. Brahms, I do want to, uhm, point out to you that that has been, uh, uh, the request for no contact lifting, uh, has been denied --

MR. BRAHMS: Okay.

THE COURT: -- previously.

MR. BRAHMS: You did [inaudible]?

THE COURT: Yes.

MS. GUTIERREZ: Yes.

THE COURT: Okay.

MR. BRAHMS: I must be blind.

THE COURT: Okay.

MS. GUTIERREZ: And in terms of the Social Services, uhm, subpoenas, Your Honor, uhm, [inaudible] request that I spoke with the Defense about so we absolutely will, will subpoena. There [inaudible] that the guardian has attempted to reach those, uhm, the school records, I think he's gotten everything else --

THE COURT: Okay.

MS. GUTIERREZ: -- if I'm correct.

MR. CRUZ: Yes, ma'am.

MS. GUTIERREZ: But hasn't been able to deliver the school records because he's had difficulty contacting anybody at the, uh, the school facility that could provide those records at this point and, uhm, those are and my understanding from the order, Your Honor, is that the subpoenas on the hearing on May 31st the subpoenas were granted, uhm, we haven't received anything we're pr--, uh, the Tribe is just presuming that the subpoena went out [inaudible].

THE COURT: That, yes. Uh, --

MS. GUTIERREZ: And we just haven't, I have not seen those documents so we didn't know if you were going to disclose them directly or --

THE COURT: Okay. So to address that. Alright.

MR. BRAHMS: Are you talking about to the Court what were you just, what were you just talking about the, the Defendant's Motion for the Subpoenaed Records?

THE COURT: Yes. Uh, that's what Ms., uh, Ms. Gutierrez had brought up.

MS. GUTIERREZ: Actually it was our subpoena, it was the

Tribe's, the Tribe had two subpoenas --

THE COURT: Oh, okay.

MS. GUTIERREZ: -- one was for, --

THE COURT: So he has his own subpoenas --

MS. GUTIERREZ: Yes.

THE COURT: -- so we want to make sure you have your own.

MS. GUTIERREZ: But we're just talking about our subpoenas, I don't know if any of the Defendant's subpoenas have an issue. Uhm, I did have just a general procedural objection to the last [inaudible] subpoena --

THE COURT: Okay.

MS. GUTIERREZ: -- [inaudible] and that's because it went to the wrong person that was it.

MR. BRAHMS: There is one other motion that I wanted to see if we need to address --

THE COURT: Uh-huh.

MR. BRAHMS: -- [inaudible]. The Defendant's second amended motion for subpoenas of Back to Life records and middle school records at Valencia and I believe the Prosecutor's has received, received that --

THE COURT: Mmm.

MR. BRAHMS: -- if that needs to be addressed today were the, those subpoenas suffice--, sufficiently specific, if there's any objection to it we can resolve that.

MS. GUTIERREZ: Actually, Your Honor, those were just the ones I was referring to, uhm, right now that the, the objection I have to make a Record on the objection that it's to the wrong person again.

MR. BRAHMS: What do you mean?

THE COURT: Okay.

MS. GUTIERREZ: Uhm, that subpoenas under our rules have to be issued to the guardian and the guardian will [inaudible] those records that was my only, I, I have to make the, the, uhm, objection on the Record and I did file that I believe yesterday.

MR. BRAHMS: Uh, --

MS. GUTIERREZ: Uhm, that was my only objection not to the information itself.

MR. BRAHMS: Your Honor, if we might, uh, can we move that over to the July 11th 'cause I haven't received that objection and I need that opportunity to respond to that I think in writing? Correct me if I'm wrong, Your Honor, I thought on the

31st when response to either my question or the Prosecutor's you made, I think it was my question, that it would be appropriate for the Tribe or to issue subpoenas directly to a facility outside of the Nation and it may not be something you do all the time but I know you indicated as well that given that, uhm, school's not in session it might be difficult getting those records [inaudible] and you indicated --

THE COURT: Yes.

MR. BRAHMS: -- it would be appropriate to do that.

THE COURT: And, --

MR. BRAHMS: So --

THE COURT: -- uh, those, and those actually for, for, uh, the parties, uh, for all the parties here I, I would like to, uh, the, well the Tribe has made the argument that there has been, uh, it's the Court's, uh, and procedure here to have, uh, juvenile records, uh, have, uhm, you know, go through a series of, of, you know, they're, it's highly confidential ju--, juvenile records here, however these juvenile records are not the property of the, the Tribe nor the, anyone here on the reservation or they're another location outside the reservation where, uhm, a subpoena can be issued, however, whether or not they comply with

the subpoena that's another, that's another issue. Uhm, so that's, unless the Tribe --

MS. GUTIERREZ: Uhm, --

THE COURT: -- has, uh, anything else to respond.

MS. GUTIERREZ: -- actually, Your Honor, I, I have to, just for the Record whatever, Your Honor, decides we will comply with. Uh, [inaudible] the, the prior decisions from the Court has been [inaudible]. When the child is a ward of the Tribe, uh, records actually belong to not only the agency but the actual individual.

THE COURT: Uh-huh.

MS. GUTIERREZ: The actual individual's the one that can release. In this case because the child is a ward of the Tribe it, any subpoena must go through the, the, --

THE COURT: Okay. That's what you were saying.

MS. GUTIERREZ: -- the guardian, the guardian can reach those records upon order. Uhm, if there's a contention riding then [inaudible] start a different process for the, the Court to [inaudible]. That's my understanding of the rules, Your Honor, I'm just trying to make sure that we are, are and are not, uhm, that the Tribe is not [inaudible] release of juvenile records

'cause we do have the responsibility --

THE COURT: Right.

MS. GUTIERREZ: -- [inaudible] proper channels.

THE COURT: Okay. So then with regard to that that is what Ms. Gutierrez and, and I want to make clear to Mr. Brahms, that's who, that's the issue she's referring to as the proper person whereas Mr., Mr. Cruz would be, uhm, as the, uh, ongoing case worker for, uh, the minor would be the in--, individual to have those, uh, records requested to obtain those records so that he could do the, the work to get those records. The, I would like to find out if the, any of those, the records that the Tribe or the subpoenas the Tribe has requested do they fall in line at all with what Mr. Brahms has been --

MS. GUTIERREZ: I, I believe they're very, --

THE COURT: Okay.

MS. GUTIERREZ: -- uhm, they're similar but Mr. Brahms has req--, requesting a broader disclosure. Uhm, uh, an example, Your Honor, in terms of Back to Life issues the, --

THE COURT: Uh-huh.

MS. GUTIERREZ: -- the Tribe requested specific impeachment material, uhm, that's absolutely our requirement to

disclose. Mr. Brahms, Brahms extended that to request sign in sheets and what have you that's, we have no objection to him getting sign in sheets, uhm, just there might be some protection issues with the agency if it's not, uh, specifically [inaudible] the child. So, --

THE COURT: Right. Okay.

MS. GUTIERREZ: -- uh, there are some difference in terms of [inaudible].

THE COURT: Alright.

MR. BRAHMS: So, Your Honor, are we actually dealing with that motion, uh, I don't have a problem with dealing with that today?

THE COURT: I, uh, I would like to address that actually, yes, uh, that's one of the issues and if Ms. Gutierrez says there's no objection to, uh, the request for, the items that you're requesting it's just the matter of getting that through Mr., uh, Cruz.

MR. BRAHMS: I have a question if, if a subpoena procedural or juvenile records whose as their ward of the tribe actually go through in this case the guardian then does that guardian have a right to object to the, the subpoena is that part

of the deal? 'Cause I, I thought that the Tribe was protected and excuse me if I'm like arguing the dysfunctions at this time, uh, I thought the Tribe was protected, uhm, and, and then ward through the Tribe's protection through noticing the Attorney General's Office about the subpoena, uh, that would be their ties. It's my understanding [inaudible] Socials Service does have representation for general matters and maybe specific matters through the Attorney General's Office.

THE COURT: Alright.

MR. BRAHMS: That the Attorney General is the, the attorney for the Social Services Department. But --

THE COURT: Okay.

MR. BRAHMS: -- with that, Your Honor, however you want to proceed today as my previous motions have before said [inaudible] --

MS. GUTIERREZ: And I apologize, Your Honor, uhm, --

THE COURT: Has, uh, can the Tribe respond to that specific question for Mr. Brahms?

MS. GUTIERREZ: Yes.

THE COURT: Yes.

MS. GUTIERREZ: Uh, Mr. Brahms is correct that the AG's

Office has to be, uhm, [inaudible], --

THE COURT: Uh-huh.

MS. GUTIERREZ: -- however the AG's Office just called a, an objection, uhm, in terms of whether they think it is necessary or unnecessary, uh, for the documents to be raised and that can depend [inaudible]. Uhm, in this case it's a [inaudible], uhm, Mr. Cruz has had a problem meeting [inaudible]. Uhm, [inaudible] problem and Mr. Brahms' [inaudible] the documents in that, in that [inaudible].

THE COURT: Uh-huh.

MS. GUTIERREZ: Uhm, but at this point until procedure can show there's an attempt, uhm, the AG's Office is [inaudible] legal issue or an objection, uh, you know, reaching documents, uh, from a child that is not enrolled in this case, reaching documents, uhm, that are absolutely, uhm, without predication, uh, confidential, sealed, those kinds of issues.

THE COURT: And as far as the party, uh, notifying, uh, the Attorney General's, of any, uh, legal issues or, uh, that would be, uh, the Tribe's, uh, my question is, uh, how, how would AG's know of any regulations --

MS. GUTIERREZ: [Inaudible] anything about --

THE COURT: -- from the Tribe?

MS. GUTIERREZ: -- [inaudible] --

THE COURT: Right.

MS. GUTIERREZ: -- writing objections we also wrote [inaudible].

THE COURT: Alright. So it, it does, uh, uh, the Tribe does, uh, let the Attorney General's know and has of this specific issue?

MS. GUTIERREZ: Yes. Uhm, and also, Your Honor, uh, just to, to, uh, you know, uh, we notice everybody, uhm, bring the AG's to date of [inaudible] response --

THE COURT: Okay.

MS. GUTIERREZ: -- [inaudible] not object of us presenting specific [inaudible].

THE COURT: Does that, uh, answer some of your questions, Mr. Brahms?

MR. BRAHMS: I think that's enough but, uh, Your Honor, uh, I think I said what I need to say [inaudible] but, you know, it's up to the Court, the Court [inaudible] certain procedures as found out by Ms. Gutierrez to respect of serving the subpoenas and I'm not going to object to that, --

THE COURT: Alright.

MR. BRAHMS: -- that's the Court's determination. And I'm anticipating there may be some other hearings concerning this as to, uhm, confidentiality of certain records, you know, by interested parties after being served the subpoenas but that's another issue.

THE COURT: Alright. So as to the subpoenas that you have requested, uhm, Mr. Brahms, the, uh, and I know that you had done, uh, or had reworded and had add, expanded some language to the subpoenas that you had, uh, submitted, uh, the second time to, uh, the Court for issuance. The, uh, the, uh, Court is actually at this time, uh, going to order that, uh, the subpoenas be addressed to Mr., uh, Cruz, uh, with regard to what you are requesting so that he can, uhm, obtain any further, attempt to obtain and that's the key word attempt so with regard to the subpoenas that you are, uh, that you have re--, uh, --worded and submitted, uh, recently I believe on June 11th. Do you understand what I'm, what I'm saying?

MR. BRAHMS: No. So what are we doing with this case?

THE COURT: Alright. I am ordering that, uh, tho--,

those subpoenas that you had requested to the specific agencies be addressed to Mr. Cruz, uh, from Social Services so that he may obt--

MR. BRAHMS: Oh, Cruz, uh, first?

THE COURT: Yes. So that he may obtain those documents, uh, through a subpoena for you. And is that clear for all parties?

MS. GUTIERREZ: Yes, Your Honor.

THE COURT: Alright. And then I'd like to let's see, it's on, uh, the, uhm, Defendant's second amended motion for issuance of subpoenas for alleged victim's records and in it does include, uh, subpoenas to, uh, the, uh, custodian of records Back to Life, Incorporated and a pretty lengthy description of what is being requested. Also there is a cu--, uhm, subpoena to custodian of records Valencia Middle School with a description of what is being requested and so there are two entities which, uhm, Mr. Brahms had, uh, had requested subpoenas, uh, from or, uh, requested information from so, uhm, --

MR. BRAHMS: [Cell phone going off.] Sorry, I thought it was off.

THE COURT: So the Court is just making for the

Record what those entities are and who, uh, Mr. Cruz will be, uh, the individual who would be attempting to, uh, make contact with these, uh, organizations for these records. So as to, uh, and again for, uh, clarification for all parties, uh, will, uh, with regard to the motion to close courtroom and allow, uh, an adult attendant for the minor, uh, there would be no objections to that, the Court is, uh, including that, uh, for the Record today to have been granted, uh, the Courtroom will be closed with, uh, uh, the minor having an adult attendant with the minor.

MR. BRAHMS: Uh, Your Honor, I was going to say there's an objection to that.

THE COURT: There was, there was an objection.

MR. BRAHMS: Yeah, I was objecting that.

THE COURT: Okay. 'Cause I had earlier heard there were --

MR. BRAHMS: [Inaudible] there was no objecting to the motion to disclose reports.

THE COURT: Okay. So that's, and you, so that was something that you had, uh, objected to have the closed courtroom or the adult attendant?

MR. BRAHMS: Well as to both, I mean do you want to

hear what --

THE COURT: I will --

MR. BRAHMS: -- [inaudible] as opposed to the Prosecutor [inaudible] the position in her [inaudible]?

THE COURT: I'll address that at this time.

MR. BRAHMS: [Inaudible] here my objection [inaudible]?

THE COURT: Yes, uhm, --

MR. BRAHMS: Okay. Well first with respect to the attendant I actually understand the potential need for that with a younger child, and even a child who is five years old and I object to with having an attendant in court standing next to the witness. I think that my interpretation of the Federal Statute intention there, uh, there was even a record made to the case within the statute itself, uh, the attending be close to the, uh, child witness and holding their hand or even having the witness sit in, sit in the attendant's lap and I think that was referring maybe to, you know, a child who is, is a very young age and I'm just concerned with that that the Jury may get oddly, uh, prejudicial, uh, and question, uh, against the Defendant of having an attendant standing next to the witness. Uh, we're not dealing with a

situation where, uhm, the Defendant's being alleged to have sexually molested a child victim, these are allegations of assault and I might add with dubious allegations of assault, I think there's some, some significant evidence to [inaudible] --

MS. GUTIERREZ: Objection, Your Honor, --

MR. BRAHMS: -- I'm, I'm --

MS. GUTIERREZ: -- this is inappropriate argument.

THE COURT: Okay. Let, let me hear the, the objection, what's the objection Ms.?

MS. GUTIERREZ: This is inappropriate argument beyond the scope we're limiting the argument to why not have a closed courtroom and an attendant.

THE COURT: Alright. The objection --

MR. BRAHMS: Well I'm --

THE COURT: -- is, uh, uh, sustained so Mr. Brahms, uh, with regard to going off on what could be I want to address --

MR. BRAHMS: Alright.

THE COURT: -- the issue at hand.

MR. BRAHMS: Okay. My position, Your Honor, the argument is the Court is inclined to allow adult attendant in addition to Mr. Cruz during a time that he's not excluded because

he's going to be a witness I would ask that the Court have that adult attendant be seated in the, uhm, in the section, uh, behind the, the attorneys, uh, uh, the benches in the audience section and I think that, you know, as far as, uh, my understanding is that adult attendant be here for support but that should be sufficient. The second is the closed courtroom; the need the motion as a closed courtroom as to all necessary adults and part of it possibly with arguments is to preclude the [inaudible], you know, whether it be relatives or other members of the Tribe that are just interested in, in seeing this case unfold. My objection to that that is there should, there should be an allowance for some members of the Defendant's family and friends, you might want to, the Court want to limit to be there for support. Because if it's a totally closed courtroom and only, you only have Mr. Cruz and this adult victim, uh, advocate for the witness all the Jury's going to see is, uh, people that are here for the trial, they're here just to support the witness, the victim and I think there should be some allowance to have some at least a few family members for the Defendant present, you know, to just show support and of course if any of those individuals are going to be witnesses as well they should be excluded until their testimony

is, uh, completed and, uhm, that's all I have to say, Your Honor.

THE COURT: Thank you. And --

MS. GUTIERREZ: Your Honor, just briefly --

THE COURT: Yes.

MS. GUTIERREZ: -- if you will, uhm, uhm, usually an adult attendant is someone who holds the child or [inaudible] the child, uhm, the adult attendant is usually within the eyesight of the attorneys and of the Court so that, you know, [inaudible] is, is going on [inaudible] and the Jury can see what the attendant is doing. Uhm, it is to stabilize the anxiety of a child and Mr. Brahms represents [inaudible] not a little kid, [inaudible] and that is a difficult and a age for any of us, uhm, it has been, you know, Mr. Cruz, uhm, [inaudible]. Uhm, and we as, uh, because he has [inaudible] it is the Tribe's obligation to therefore ask to limit whatever [inaudible] to lessen that anxiety and to [inaudible] child in the courtroom. Second things is, Your Honor, this is not a [inaudible] you're not ask, the attorneys are not asking that this courtroom be closed for the entire, uh, precession with the, the trial, it's for the limited time that the child is on the, on the stand that's it nothing more that we're asking for the Courtroom to be, uhm, closed. Thus, for the rest

of the trial to then welcome to have the family members or friends who want to offer support, they're going to be here, the Jury will see them, uhm, of course you, you may [inaudible] a few others who are, uhm, possible [inaudible] possible witnesses [inaudible] but, uhm, it would be for a very limited time, very limited purpose, Your Honor.

MR. BRAHMS: Your Honor, [inaudible] position but I still think, uh, it's still important to have at lease, uh, some family members, a couple the whole time I only think I have one or two family members who are going to be here to support the Defendant here for the entire trial, even during the testimony of the victim. I do not see how that is going to intimidate the child witness or embarrass him if there is a few adults that are going to be here to be supportive of the Defendant be able to be here throughout the entire trial.

THE COURT: Alright. So as to the, uhm, motion to close courtroom, uhm, Tribe is requesting that that be, uh, for the limited time of the minor being, uh, uh, placed on the stand, uh, and to have an adult, uh, attendant; does the Tribe have, uhm, the adult attendant in, in mind as far as who would be --

MS. GUTIERREZ: Yes, Your Honor, it will be a non

witness, --

THE COURT: Okay.

MS. GUTIERREZ: -- uhm, from Victim Services I believe it's, I always ruin the last name, I think it's Miss Monica --

THE COURT: Okay.

MS. GUTIERREZ: -- Valencia or Valencia I think is her last name. I might be Valenzuela I always mix up [inaudible].

THE COURT: Okay. Uh, from Victim Witness? Alright.

MS. GUTIERREZ: And we did, uhm, name her in our Motion.

THE COURT: And as to, uh, the adult attendant, uh, Mr. Brahms, you had no, uhm, well with regard to where she's placed that's what the objection was.

MR. BRAHMS: Yes.

THE COURT: Uhm, the, uhm, Tribe includes, uh, as, as far as where, uhm, the witness, the other courtroom is, is very similar it's just set, set up the opposite way; uh, where would you, uh, have the adult attendant proposed to have, uh, behind the, uh, minor in this --

MS. GUTIERREZ: Yes, behind, uh, just sort of, uhm, caddy-corner.

THE COURT: Alright. At this time, uh, the, uh, Court is, uh, ruling on the issue of, uh, the Tribe's motion to close, uh, the, uh, courtroom, uh, and the Court is going, uh, grant that motion, uh, to close the courtroom while the minor, uh, uh, alleged victim and witness is on the stand. As to the adult attendant, uh, the, uh, Court is, uh, also going to grant the, uh, Tribe's, uh, motion to allow the adult attendant be, uh, present and, uh, also, uh, with the, uhm, the minor in the location that the Tribe is, uh, has proposed today. Uh, the Court has, uh, granted the Tribe's, uh, two motions of those, uhm, at this time. The, uh, Court will now address the, uh, next issue. So, uhm, one, one motion for the disclosure of the Child Welfare, uh, reports, uh, that has, and I, I want to make clear on this, Mr. Brahms, you had no objection to that?

MR. BRAHMS: Yes.

THE COURT: Or, uh, and so is that, uh, at this point the Court is to make a ruling on the, on the issue or has that been, uh, disclosed?

MS. GUTIERREZ: Uhm, we it ruled, Your Honor, --

THE COURT: Uh-huh.

MS. GUTIERREZ: -- uhm, [inaudible], uhm, the Tribe's

subpoena to, to I believe the subpoena --

THE COURT: Miss Clark.

MS. GUTIERREZ: -- was to reach Miss Clark's reports...

THE COURT: Uh-huh.

MS. GUTIERREZ: -- is that correct? [Inaudible] --

THE COURT: Yes, I remember that, that specif--

MS. GUTIERREZ: -- [inaudible]. Uhm, that's the one I thought [inaudible] Mr. Brahms [inaudible]. Uhm, uh, yes, you, you ruled [inaudible] --

THE COURT: Okay. Let me make sure that --

MS. GUTIERREZ: -- [inaudible] when it went out or anything like that, we received not, no paper.

THE COURT: Okay. I believe that, uh, and, uh, so at this time the, [inaudible] Tribe's motion, uh, uh, okay. So actually it would be Defendant's motion. The Court will address the, uh, issue of the suppression of Defendant's statements, uhm, so at this time, uh, Mr. Brahms, [inaudible].

MR. BRAHMS: Your Honor, I'm going to reiterate [inaudible] Motion of Limine, I just want to emphasize one point; is that when you're dealing with Miranda issue it isn't, it isn't just when there's [inaudible] interrogate and I know there's an

issue as to whether this actually [inaudible] interrogation [inaudible] the main [inaudible] the Defendant's position is he wasn't free to leave even though it was his own residence and it is a reasonable person's standard to place, place yourself in his position where you have a Social Services investigator come to your house with two, maybe three police officers and it doesn't matter the size of the officers themselves are standing there and I think a reasonable person would feel intimidated and not, not only not free to leave but not free to ask them to leave. And I believe that that is established in actually in this situation and that is established and it meets the legal standard that whether he was a reasonable person and free to leave. And as to whether there was [inaudible] interrogation yeah, that's a little bit tricky usually that is with an officer asking questions. And I submit to you, Your Honor, and I know I didn't submit any case law to support this but I believe under the circumstances that Miss Clark was acting as an agent [inaudible] so to speak for the Prosecutors, uh, the Prosecutors, the, the detectives or the officers that believes even though she's asking questions that certainly can relate to her duties as a, an investigator of this manner, uhm, from the Social Services she was certainly

[inaudible]. And you should note that immediately after she finished her questioning and got the responses that they were seeking because you have to also bear in mind that they had already interviewed the alleged victim and were just looking for confirmation, I believe was confirmation of his allegations and immediately arrested him and then invoked his rights and I submit to you, Your Honor, uh, uh, that *Miranda* should have been read.

THE COURT: Alright. Ms. --

MS. GUTIERREZ: Your Honor, --

THE COURT: Yes.

MS. GUTIERREZ: -- if I may I would again, uhm, the Tribe would like to re--, uh, or reiterate it's request that normal procedure allows the, the Tribe [inaudible] to present testimony. Uhm, just presuming the, the, the, uhm, [inaudible]. Uhm, Your Honor, the Tribe has submitted a substantial amount of case law and authority to show that Miss Kim Clark is under no obligation to address *Miranda*. Miss Clark is an employee of the Tribe, her function as an employee is to address civil issues, civil issues of child welfare. Civil issues of child welfare investigation [inaudible] homes where there has been or there could have been warrants. This is an unfortunate thing

nevertheless because the nature of these [inaudible] procedures [inaudible] and practice in this area that Miss, uhm, Kim Clark practices as a social worker and an investigator is that she'd have to go to these homes or to where the, uh, perpetrator is and for safety reasons she gets escort. Now these investigations do not [inaudible] lead to arrest. It's not in this case in fact in many of these cases we never see the light of day of a criminal courtroom, nevertheless she followed pro--, procedure, she did have a police escort, she did go to the Defendant's home, knock on the door [inaudible]. She introduced herself, there was no mystery as to who she was or why she was there and it was this Defendant that invited her into his home. He was not coerced to allow anyone into his home, he was not told he had to let anybody in his home; he could have just as easily stepped over the threshold and spoke with her outside. He didn't do that, he [inaudible]. What more, Your Honor, this interview lasted [inaudible] fifteen, twenty minutes and the interview was very clearly only focused on what Miss Clark had learned nobody else spoke, it was only Miss Clark, is part of what she does in the normal practice of [inaudible]. Defendant made clear statements, those statements didn't come through promises or coercion or

extensive interrogation, he was seated in his living room just having a conversation. He made the statements; he had every opportunity to say I don't want to answer any more, please leave my house and you know what, Your Honor, under rules they would have to oblige. That, Your Honor, is not in custody interrogation. Mr. Brahms presents to you the idea that *Miranda* is not just [inaudible] in custody interrogation. The, the case law and the constitution that we present to you [inaudible], Your Honor, is very clear that it only applies to in custody interrogation. Thus, this Defendant had to be in a position where he could not leave; he could have asked them to leave, he could have not let them in his house, he could have exited the house they could not stop him and this is not interrogation. Miss Clark's intent was not to develop a criminal case she went there with an escort not [inaudible], nobody told her what to ask, nobody gave her instant questions, nobody was seeking [inaudible] just to get his side of the story. His side of the story was to corroborate everything that the child said. Now, Your Honor, there is no custodial interrogation, *Miranda* does not apply, further more, Your Honor, there have been some cases and that the Tribe has presented those where *Miranda* has applied, this is a

completely different case. *Miranda* has applied where somebody made promises, your, your *child will be removed if you do this; nothing like that happened. Miranda* has not applied when, uh, a [inaudible] who was also a certified law enforcement officer did question he didn't have to *Mirandize* because he wasn't seeking criminal action, he was just doing his job much like Miss Clark was just doing her job. Miss Clark was not doing any questioning on the behalf of the police she was following her procedure and [inaudible] only her procedure, this Defendant offered up information and Miss Clark had no control over that and Miranda was never triggered. Also, Your Honor, the Defendant's statements were completely voluntary, nobody overcame his free will, he's a man of average intelligence, we can presume nothing has come up regarding that, he is an adult male, he was in his own home, the, this, uh, this questioning lasted less than twenty minutes. Uhm, there was no physical forced or psychological coercion these were voluntary statements and they are also admissible as part of the [inaudible]. [Inaudible] and the statements are admissible under the rules of evidence. Thank you.

THE COURT: I thank you. At this time, uh, the, uh, court, uh, Ms., Ms. Gutierrez, you said that you had, uh, some

witnesses as to this matter?

MS. GUTIERREZ: Yes, Your Honor.

THE COURT: Uhm, I, I just would like to know who your witnesses are at this time?

MS. GUTIERREZ: Miss Clark --

THE COURT: Okay.

MS. GUTIERREZ: -- is my only witness.

THE COURT: Alright. And it's your only witness... right?

MS. GUTIERREZ: Yes, Your, Your Honor.

MR. BRAHMS: Uh, Your Honor, I just submit on the argument.

THE COURT: Alright. At this time the Court is only, uhm, would like just to, uhm, proceed with the arguments here I believe that the, the parties do have, uh, sufficient arguments for the Court to address it on the argument only or argument only. Alright. Uh, and, uh, Mr., uh, Brahms, is there anything, uh, --

MR. BRAHMS: I have nothing further.

THE COURT: Nothing further? And, uhm, Ms., Ms. Gutierrez, --

MS. GUTIERREZ: No, Your Honor.

THE COURT: That was --

MS. GUTIERREZ: Huh-uh.

THE COURT: At this time the, uh, Court having heard from, uh, the Defendant, uh, on the Motion in Limine with regard to the, uhm, Defendant's, uh, statements ,uh, the Court also having heard from the Tribe finds that, uh, the, uh, there is good cause to, uh, to deny the Motion in Limine. The Court does have, uh, uh, or, uhm, documentation in, in the Tribe's, uh, argument as to case law, Mr. Brahms included, uh, today that he didn't, uh, didn't have any case laws to, uh, certain issues. Uh, at this point the Court does not, uh, believe that the, uh, Defendant, uh, was in custody during that, uh, interview, uh, fifteen to twenty minute interview. The Court, uh, also, uh, uh, based on, uh, the arguments and what, uh, the Court has, uhm, uh, reviewed in, in the Tribe's, uh, re--, response to that motion also hearing today the court, uh, does not believe that that was an interrogation that took place, it was an interview under the, uh, usual course of, uh, Miss Clark's, uhm, uhm, employment and her, uh, and her, uh, duties as, as social worker, or case worker, uh, investigator that this was, uh, not, uhm, an issue where Miranda, uhm, uhm,

having to inform the, uh, individual or Defendant at this time, uh, her, his *Miranda* rights. So at this time that, uh, the Court has entered its order on, uh, that issue. And at this time the, uh, Tribe had, uh, uh, a couple of things with regard to the in, uh, the, the change of a request for, uh, previous was an in camera interview, uh, with regard to the minor and then, and now, uhm, there's a subsequent motion from Defense with regard to the change of, uh, uh, change of mind of the Defendant so is now is requesting that the matter be addressed in open court with, uh, the questioning of the minor as to that, uh, the, uhm, the issue, the hearing that will be held on July 11th, uhm that's one for the Tribe, uh, and, uh, Defense --

MS. GUTIERREZ: Your Honor, if I may I believe it was the Defense that filed the motion to change it and --

THE COURT: Yes. Uh-huh.

MS. GUTIERREZ: -- that we responded. I'm sorry.

THE COURT: Yes, uh, but, but that was one issue that he had brought up --

MS. GUTIERREZ: Yes.

THE COURT: -- to, to address and, uh, that looks like, uh, the, uh, next thing that would be, uh, on the order of,

uh, my checklist here.

MS. GUTIERREZ: I do have one, Your Honor, that I believe it might be better addressed on July 11th, and that's, uh, we had a, uh, the Tribe had a few objections to the questions submitted by --

THE COURT: Okay.

MS. GUTIERREZ: -- [inaudible], uhm, so we would, it was a, a list of questions that, uhm, I believe Defense can reply to and it's up to the Court to decide which questions they would prefer to ask.

THE COURT: Alright.

MR. BRAHMS: Your Honor, --

THE COURT: Uh-huh.

MR. BRAHMS: -- I would ask the Court, uhm, address the issues concerning that matter prior to the [inaudible] and we can decide at that point.

THE COURT: Is that a request for a hearing on the issue or, uh, --

MR. BRAHMS: Well that, that, my, Defendant's request to, to have the Court change the manner of proceeding in questioning of the, of the, uh, minor witness and to any

objections that the Tribe has or even the Defense has I haven't thought about it to the proposed questions that the Court would be asking the minor witness, any objections those that, that we, uhm, have it determined in the, in the, prior to the hearing on July 11th rather than today.

THE COURT: And, uhm, --

MS. GUTIERREZ: [Inaudible] still pretty clear, Your Honor, so however you choose to, I don't think they need, uh, they require more argument.

THE COURT: More of hearing or anything so you're, uhm, --

MR. BRAHMS: Well were those objections, may I ask were those objections in writing?

MS. GUTIERREZ: Yes, sir.

MR. BRAHMS: I haven't seen those objections, Your Honor, --

MS. GUTIERREZ: They were just filed --

MR. BRAHMS: -- that's my, that's my concern.

MS. GUTIERREZ: -- yesterday, Your Honor.

MR. BRAHMS: I have not, have not seen the response to those.

THE COURT: Alright. And, uh, in previous times, uhm, Mr. Brahms, uh, the Court, uh, is actually would like to, to warn you I'm not sure how slow your mail is but I know in previous, uh, occasions there have been, uh, times where you say that you don't, uh, you haven't received certain items from the Tribe --

MR. BRAHMS: Well --

THE COURT: -- so I wanted, uh, is it just --

MR. BRAHMS: -- [inaudible].

THE COURT: -- not checking the mail or is it just, uh, slow mail?

MR. BRAHMS: I don't know when those objections were, --

THE COURT: Filed.

MR. BRAHMS: -- were, were filed or mailed --

THE COURT: Okay.

MR. BRAHMS: -- because --

THE COURT: So, uh, was it mailed --

MR. BRAHMS: -- was it, is it, is it --

MS. GUTIERREZ: It was mailed in all fairness, --

MR. BRAHMS: -- there hasn't --

MS. GUTIERREZ: -- Your Honor, --

MR. BRAHMS: If I might, if I may.

THE COURT: Okay. Sure.

MR. BRAHMS: There has been a difference most recently in when a document has been filed by the Prosecution when it's actually been mailed and I understand that to be procedural with their office, they may have someone come over here that will file the documents and then they won't wait for to get them back from the Court Clerk they just send it over to the Prosecutor's Office and then it's processed for mailing. I'm not saying that I, I've had to wait days and weeks to get something I just know that if, if she filed something recently, the objections let's say on Monday and even if they were mailed on Monday I may not get them until today which is Wednesday. If they were filed on Monday and not mailed until yesterday I definitely won't get them until Wednesday --

THE COURT: Right.

MR. BRAHMS: -- maybe not 'til Thursday.

MS. GUTIERREZ: You know, Your Honor, --

MR. BRAHMS: It's usually a one day turn around.

MS. GUTIERREZ: Uh, I just wanted to say in all

fairness, Your Honor, I believe Mr. Brahms filed his questions on the 11th, --

THE COURT: Yes.

MS. GUTIERREZ: -- I filed my res--, my objections yesterday.

THE COURT: Uh-huh.

MS. GUTIERREZ: Uhm, uh, --

THE COURT: Okay. Alright.

MS. GUTIERREZ: -- and, and so in all fairness they were just filed so they'll probably get mailed --

THE COURT: Just filed yesterday. Alright.

MS. GUTIERREZ: -- out today.

THE COURT: Okay. So as to, uh, your reply to the objections then you do have, uh, some time to, to reply to, --

MR. BRAHMS: Yes.

THE COURT:-- uh, the objections. Uhm, uh, as far as, uh, the, uhm, questions, uh, the parties, uh, seem to be that, uhm, have no objection for the Court to determine where, or is it your request at this time, Mr. Brahms, to go through much like the proposed, uh, jury instructions and voir dire questions to go through the questions and, uh, or is that not the case.

MR. BRAHMS: Not today.

THE COURT: Not today but you are requesting that that be completed or done?

MR. BRAHMS: Say there is objection I don't even, I haven't even thought about objecting to any of the Tribe's proposed questions but if apparently the Tribe has some objections to, if there is proposed questions since I haven't seen those objections then I should have an opportunity to respond in writing that we table that until 11th [inaudible], Your Honor.

THE COURT: Alright.

MR. BRAHMS: As well as any determination or argument concerning the Defendant's request to procedure in how the questions are going to be asked the in camera versus in, in open court. Uhm, also whether the Tribe would allow any follow-up if you did that; I would like that to be also determined on the 11th [inaudible].

THE COURT: Alright.

MS. GUTIERREZ: Your Honor, uhm, this is the, the interview of the minor in open court as it's proposed by the Defense is a 6th Amendment Right of Confrontation issue. Uhm, that's a very narrow legal issue and it doesn't trigger in that

particular hearing for this Defendant, I would ask that if, uhm, Defense wants to, uhm, have a hearing on that that we have it before that date because, uhm, I believe it's a, it's a pretty --

MR. BRAHMS: Uh, we can set a hearing before that date.

MS. GUTIERREZ: The Tribe also doesn't object if the, the Court wants to, uhm, just decide on the pleadings.

THE COURT: As to the questions?

MS. GUTIERREZ: Uh, as to the --

THE COURT: Alright.

MS. GUTIERREZ: -- whether the minor will be interviewed in open court --

THE COURT: Alright.

MS. GUTIERREZ: -- or in camera.

MR. BRAHMS: May I ask the Court to inquire of the Tribe that, that the Tribe submit some--, something in writing objecting to that [inaudible]?

MS. GUTIERREZ: Oh, absolutely

MR. BRAHMS: 'Cause I haven't seen that either.

THE COURT: And that, that's what you're referred to as yesterday?

MR. BRAHMS: [Inaudible.]

MS. GUTIERREZ: No, that was filed on Monday, Your Honor.

THE COURT: Or Monday?

MR. BRAHMS: Monday, so that was yesterday, well two days ago but I haven't, --

MS. GUTIERREZ: That was, uh, --

MR. BRAHMS: -- I did not receive it in my mail yesterday, I checked my mail so, uh, please the Court may I have a hearing ten days from now? Eleven days [inaudible] --

THE COURT: Uh, --

MR. BRAHMS: -- first part of July, okay.

THE COURT: Uhm, the Court is going to, uhm, at this time with that since there is, uh, a legal issue which would, uh, need to be, uhm, addressed and ruled, uh, upon, uh, the Court will ask the Clerk with regard to the, the availability of any, uh, time on the issue. I'd like to see if the Counsels, uh, have, uh, a time alot--, allotment that you are requesting?

BRAHMS: Thirty minutes.

MS. GUTIERREZ: There will be no witnesses it has to be a little question time, --

MR. BRAHMS: It's a legal question, uh, Your Honor, --

THE COURT: Alright.

MS. GUTIERREZ: -- uhm, --

MR. BRAHMS: -- won't be any witnesses [inaudible].

MS. GUTIERREZ: -- I'd say an hour just to be safe, Your Honor. Who knows what else will come up.

THE COURT: Alright.

MS. GUTIERREZ: If we get out early it's a plus.

THE COURT: Okay. So, uh, at least an hour for, for the issue. And so at this time the Court is, uh, setting, uh, will be setting a hearing, uh, on, uh, the, the issue of, uhm, the, uh, 6th Amendment issue with regard to, uh, the having, uh, the minor, uhm, well let me, the, uh, change of the c--, the right of confrontation and the change of, uh, the request of Defense Counsel from having, uh, the, uhm, matter be addressed in, uh, in camera or in chambers as opposed to the, uh, issue being addressed in open court. The, uh, with regard then to the, uh, that, uh, that matter the Court is setting a hearing, uh, hopefully, uh, do we have anything before the 11th of July that we can fit this in the calendar?

COURT CLERK: July 2nd either at 11:00 or 2:00.

MS. GUTIERREZ: You know, Your Honor, I'm --

THE COURT: Mmm, actually I'm not, uh, that may not be possible with me having that date. Is there anything the 5th or 6th?

COURT CLERK: Uh, the 5th at 9:00 o'clock.

THE COURT: Alright. And, uh, the matter will be scheduled for hearing on, uh, the date of July 5th, 2012, at 9:00 a.m. Alright. And next issue?

MS. GUTIERREZ: Uhm, okay. Uhm, I, hum, Your Honor, --

THE COURT: So does --

MS. GUTIERREZ: -- I don't see anything else but --

THE COURT: Okay. And I, I'm trying to check, uh, --

MS. GUTIERREZ: -- I'm not sure.

THE COURT: -- check mark off, uh, what I've had here. Alright. That you had mentioned some housekeeping issues, Ms. Gutierrez?

MS. GUTIERREZ: Oh, yes, I think we covered those, --

THE COURT: Okay.

MS. GUTIERREZ: -- uhm, just the subpoena for the school

records [inaudible] by the Tribe to reach school records, it's, uhm, been a little to late in the, I believe [inaudible] the Court. Uhm, the Tribe was wondering when we might, uh, expect release of, of the records from Social Services --

THE COURT: Okay.

MS. GUTIERREZ: -- regr--, regarding the investigation in this case. Uhm, just to be able to release them and make sure that everybody has the information. I've not seeing any of those records, Your Honor.

THE COURT: Okay.

MS. GUTIERREZ: Uhm, uh, we, the guardian did want me just to release [inaudible] the Court that, uh, [inaudible], uhm, has expressed a little anxiety, uhm, and is very, very distressed [inaudible] record of that and, uhm, which and we thank you for closing the courtroom. And, and just, uh, I think that's, that's it. If you'll give me a moment, Your Honor, I just want to check with the guardian.

THE COURT: Alright.

MS. GUTIERREZ: Anything that I didn't cover?

MR. CRUZ: Well [inaudible] the record [inaudible].

MS. GUTIERREZ: [Inaudible.]

MR. CRUZ: [Inaudible.]

MS. GUTIERREZ: Alright.

MR. CRUZ: [Inaudible] it's up to you [inaudible].

MS. GUTIERREZ: Oh, that's right. Okay. Well let me let her know.

MR. CRUZ: Okay.

MS. GUTIERREZ: Uhm, Your Honor, there is one, one thing I just wanted to make sure that the Court knew the guardian wanted me to make sure [inaudible] the records from the placement have been retained, they're in, uhm, [inaudible] Social Services practice is that they have to then send them to the AG's Office for approval --

THE COURT: Alright.

MS. GUTIERREZ: -- of release and then they'll be turned over to us. Uh, again, Your Honor, we're not sure what the subpoena said I'm presuming that the subpoena indicted that they have to be turned over to, to Your Honor... is that correct?

THE COURT: The, uh, subpoenas for the, uhm, uhm, Back to Life and then also the middle school is that, uh, --

MS. GUTIERREZ: Uh, actually, yes, for it's both of them [inaudible] guardian [inaudible].

THE COURT: Alright. And, uh, so you're questioning whether or not your, your subpoena's include the language or, or is that, uh, --

MS. GUTIERREZ: [Inaudible.] Actually just --

THE COURT: -- the question you have procedure?

MS. GUTIERREZ: -- where the, the records will be delivered, will they be delivered to you or directly to us so that we can expect the release [inaudible]?

THE COURT: Uh, at this time, uhm, the, any subpoenas I mean, uh, usually it's, it's to the, uhm, the party that, uh, requesting the subpoenas I mean that, that's, that would be a part of the, uh, the procedure there.

MS. GUTIERREZ: [Inaudible.] I'll let my office know to be watching [inaudible]. Uhm, Your Honor, also the, the guardian just wanted me to make sure, uhm, [inaudible] difficulty of getting the school records [inaudible] can't, the school is closed and they can't seem to coordinate anything with anybody so, uhm, actually it's from both sides, uhm, I don't know if we might, uh, see if there's some other manner, uh, there, there apparently it's impeachment material and maybe there's some other more [inaudible] under, uhm, [inaudible] to provide it we just can't get it because

it's not kept in [inaudible].

THE COURT: Right.

MS. GUTIERREZ: So I don't know if maybe you can address this at the next hearing.

THE COURT: Uh, ye--, yes, and since, uhm, that would allow some time to, uhm, do some fore work in trying to see if, uh, those materials can be obtained. Uh, so Mr. Brahms, you are aware that, uh, for the Record that, uh, it may be difficult for the Court or the, uh, guardian to obtain the records due to school, uhm, not being open on, on, as a regular school, uhm, --

MR. BRAHMS: You mean there may not be someone available who can approve --

THE COURT: Is --

MR. BRAHMS: -- the release of the records?

THE COURT: Is that the case, Ms. Gutierrez that --

MS. GUTIERREZ: Yes, that's my understanding of it from Mr. Cruz... is that correct?

MR. BRAHMS: Well, uh, may I ask the Court do you have an understanding of that they're, the school is not in session obviously until what is it August/September?

THE COURT: Right. Right.

MR. BRAHMS: [Inaudible.]

THE COURT: I'm not sure what, what type --

MR. BRAHMS: Is, is, uh, --

THE COURT: -- of school.

MR. BRAHMS: -- is the Tribe indicating to the Court that through the guardian that the records from the middle school are not, there is no one available to authorize their release until a certain date --

THE COURT: Uh, and then --

MR. BRAHMS: -- so [inaudible]?

THE COURT: -- that may or may not be the case, I know schools are, they have a skeleton crew, uh, sometimes, uh, uhm, at times they take a vacation, you know, where no one is, is available but I know at, at, uhm, with some schools they are open however they may have limited staff to go and, uh, attempt to, to get this information for, for the request.

MS. GUTIERREZ: And in all fairness we're just trying to see if we, if we're having, it's becoming too lengthy a pro--, process if there, there might be another way to get that information to the Court and to Defense, another frame of reports or, or what have you.

MR. BRAHMS: Well I'm, I'm, --

MS. GUTIERREZ: We don't, we just, we don't know.

MR. BRAHMS: -- I'm understanding correctly has, has the guardian through the Tribe Prosecutor indicated to the Court just now that, that he has, uhm, encountered difficulty in getting school records from the [inaudible] Middle School at this time because of a lack of someone available to authorize the release of the records or something else?

MS. GUTIERREZ: No, that's correct.

THE COURT: That's correct.

MS. GUTIERREZ: He's just having difficulty getting them.

THE COURT: And, uh, that's something that the Court, uhm, uh, Mr. Cruz, uh, is, uh, still, uh, you know, working at trying to get, get that, uhm, information however, at the next hearing we'll address it again see if how, how that is coming along. And, uh, is that all the Tribe's, uh, [inaudible], all the Tribes, uh, issues that, uh, [inaudible]. Now I will --

MS. GUTIERREZ: Yes, Your Honor, I think that's all we have.

THE COURT: Okay. And the, uh, --

MS. GUTIERREZ: Your Honor, just for the Record, I, I do want to make one more Record.

THE COURT: Uh-huh.

MS. GUTIERREZ: Uhm, uh, the Tribe's Motions because there was no affidavit, nothing, no actual facts to go on for the hearing [inaudible] Defendant [inaudible] Miss Ophelia Ochoa to it's detectives, uhm, that was turned over to the Defense, uh, Defense was unable to, uh, uh, present it as on disk so the [inaudible] disk, uh, to make sure, just to make sure that works there is an actual recording, we just want to make sure [inaudible].

THE COURT: Alright. And Mr. Brahms, you received, uh, the, uh, new disk today?

MR. BRAHMS: I'm sorry?

THE COURT: Uh, did you receive the new disk [inaudible]?

MR. BRAHMS: I received a new disk. And for the Record the disk that I did receive in the disclosure, uh, is a blank disk, when you put a disk in the computer it normally will pull up and you'll have an icon where you can press it and it'll open up [inaudible], here it immediately said [inaudible].

THE COURT: Alright. And, uh, however it was replaced with another?

MR. BRAHMS: Was replaced with another disk that I just received this morning.

THE COURT: Alright.

MR. BRAHMS: Yeah, so I will try to --

THE COURT: Alright. And Mr. Brahms, uh, was, were there any other outstanding issues that, uh, we need to address today based on your list that you provided beginning of the hearing?

MR. BRAHMS: Not at this time, Your Honor, I think we covered everything.

THE COURT: Alright. Alright. The Court had, uh, set this matter, uh, for, uh, two hearings between, uh, now and the, uh, Jury Trial where, uh, there is a pretrial set for the 11th of July, and, uh, now, uh, we have set, uh, preving [sic] hear--, uh, hear--, hearing previous to that which will be for the date of the 5th of July, uh, 2012 at 9:00 a.m. and, uh, if there's nothing further the Court will adjourn in the matter.

MS. GUTIERREZ: Thank you, Your Honor.

THE COURT: Court's adjourned.

BAILIFF: All rise.

[END OF EVIDENTIARY HEARING]

[Transcriber's Certification Follows:]

CERTIFICATE

I certify that, to the best of my ability, the foregoing is a true and accurate transcription of the original tape recorded conversation in the case referenced on page 1 above.

Transcription Completed: September 23, 2012

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