

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

BOBBI DARNELL, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 JOHN MERCHANT, SHERIFF, BROWN )  
 )  
 COUNTY, KANSAS and KICKAPOO TRIBE )  
 )  
 IN KANSAS, KICKAPOO RESERVATION, )  
 )  
 HORTON, KANSAS, )  
 )  
 Respondents. )  
 \_\_\_\_\_ )

Case No. 17-CV-03063-EFM-TJJ

**RESPONSE TO PETITIONER'S  
REQUEST FOR IMMEDIATE RELEASE**

Comes now Respondents, Kickapoo Tribe in Kansas by and through its attorneys, Thomas G. Lemon and Vincent M. Cox of Cavanaugh, Biggs & Lemon, P.A. and John Merchant, Sheriff of Brown County, Kansas, by and through his attorney Wendell F. Cowan of Foulston Siefkin LLP, and submit the following Response to Petitioner's Request for Immediate Release pending the resolution of this habeas corpus action, as requested in the Court's Memorandum and Order [Doc. 10]. For purposes of adequately responding, Respondents also provide their initial responses to Petitioner's Petition for Writ of Habeas Corpus For Relief From A Tribal Court Detention And Conviction Pursuant to 25 U.S.C. § 1303 [Doc. 1] and Petitioner's Supplement to Petition For Writ of Habeas Corpus For Relief From A Tribal Court Detention And Conviction Pursuant to 25 U.S.C. § 1303 [Doc. 8]. Respondents reserve the right and will fully respond to the Petition [Doc. 1] and Supplement [Doc. 8] by June 2, 2017, as set forth in the Court's Order [Doc. 6].

For the reasons set forth in detail below, Petitioner's request for immediate release pending the resolution of this habeas corpus action should be denied. Furthermore, Petitioner's Petition For Writ Of Habeas Corpus and Supplement thereto should be denied, as she is not entitled to the relief that she seeks.

### **I. NATURE OF THE CASE**

Petitioner Bobbi Darnell was charged with two counts of fraudulent handling of recordable instruments, two counts of tampering with records and two counts of misusing public money in violation of the Kickapoo Tribal Code. A jury trial in the Tribal District Court of the Kickapoo Tribe in Kansas was held on March 8-9, 2017 and Petitioner was found guilty of all six counts. Thereafter, Petitioner posted a \$2,500 cash bond and was released. On March 30, 2017, Petitioner attempted to harass and intimidate a member of the Kickapoo Tribal Council resulting in a Motion to Revoke and Forfeit Bond being filed and granted. Petitioner was taken into custody after her bond was revoked. On April 24, 2017 at a sentencing hearing, the Kickapoo District Court Judge sentenced Petitioner to 18 month in prison.

### **II. RESPONDENTS' STATEMENTS OF FACT**

Respondents set forth the following statements of fact which establish that Petitioner's rights were not violated during the underlying criminal proceedings, that she is not entitled to habeas corpus relief pursuant to 25 U.S.C. § 1303 and she is not entitled to immediate release pending the resolution of this matter.

1. Petitioner's jury trial before the Kickapoo District Court was held on March 8-9, 2017. A copy of the transcript of the trial, beginning after the jury was selected, is attached hereto as Exhibits "A" and "B." (*See*, Volume I - Transcript of Jury Trial on March 8,

2017 attached hereto and incorporated herein as Exhibit "A"; and Volume II - Transcript of Jury Trial on March 9, 2017 attached hereto and incorporated herein as Exhibit "B.")

2. The voir dire portion of the jury trial was recorded but has yet to be transcribed. Due to the timing required for this response, that transcript is not yet available.

3. The sentencing hearing held on April 24, 2017 was also recorded. Due to the timing required for this response, that transcript is not yet available.

4. The transcript of the jury trial that is attached hereto in Exhibits "A" and "B", as well as the recordings of voir dire and the sentencing hearing, establish that Petitioner's rights were not violated, and that her claims of error are meritless. (*See*, Exhibits "A" and "B.")

### **III. RESPONSE TO PETITIONER'S FACTUAL AND PROCEDURAL BACKGROUND STATEMENTS**

Respondents respond to Petitioner's "Factual and Procedural Background" statements in her Petition for Writ of Habeas Corpus For Relief From A Tribal Court Detention And Conviction pursuant to 25 U.S.C. § 1303 [Doc. 1] as follows:

1. It is uncontroverted that Petitioner Bobbi Darnell is an enrolled member of the Kickapoo Tribe in Kansas, a federally recognized Indian tribe in the state of Kansas.

2. It is uncontroverted that Petitioner is a lifelong resident of the Kickapoo Reservation in Kansas and resides with her husband and two children in a home they own within the boundaries of the Kickapoo Tribe reservation located in Brown County near Horton, Kansas.

3. It is uncontroverted that on Friday, March 31, 2017, Petitioner was arrested by the Kickapoo Police Chief under the direction of the Judge of the Kickapoo District Court and taken to the Brown County Jail.

4. Respondents respond to the alleged chronology of events which Petitioner claims led to her arrest on March 31, 2017:

a. It is controverted that Petitioner was a trusted Kickapoo Tribal Council member with more than 20 years of service. However, she was convicted, by a jury in Kickapoo Tribal District Court, of crimes committed while she was serving as Treasurer of the Kickapoo Tribal Council. (*See*, Exhibits "A" and "B.") Petitioner was convicted of two counts each of fraudulent handling of recordable instruments, tampering with records and misusing public money. (*See*, Sentencing Order filed April 26, 2017 attached hereto and incorporated herein as Exhibit "C.")

b. Petitioner's characterization of the criminal cases is controverted. The crimes charged were the result of Petitioner's fraudulent handling and tampering with records, including tribal resolutions to authorize the improper and fraudulent draw down of tribal burial funds. (*See*, Exhibits "A" and "B.")

c. It is uncontroverted that, after the jury verdict was entered, the Kickapoo District Court Judge set a cash bond in the amount of \$2,500 which Petitioner was required to pay or remain in custody until her sentencing on April 24, 2017. (*See*, Exhibit "B," pp. 279:12-281:17; and Court Minute/Journal Entry of the Kickapoo District Court dated April 16, 2017 attached hereto and incorporated herein as Exhibit "E.")

d. Respondents are unaware of the source of the funds but Petitioner paid the \$2,500 bond and was released from custody. (*See*, Motion to Revoke and Forfeit Bond, ¶ 3 attached hereto and incorporated herein as Exhibit "F.")

e. It is uncontroverted that Petitioner was released from custody after paying the \$2,500 bond to the Clerk of the Kickapoo District Court. (*See*, Exhibit "F," ¶ 3.)

f. It is uncontroverted that Petitioner was released from custody after paying the \$2,500 bond to the Clerk of the Kickapoo District Court. (*See*, Exhibit "F," ¶ 3.)

g. It is not yet known conclusively what paperwork, if any, Petitioner was provided upon her release.

5. It is uncontroverted that, based upon Petitioner's actions and the filing of a Motion to Revoke and Forfeit Bond, the Kickapoo District Court Judge issued a warrant for Petitioner's arrest.

6. It is uncontroverted that the warrant for Petitioner's arrest was based upon the Petitioner's actions, the Motion to Revoke and Forfeit Bond and the attached Affidavit of Carla Cavin, a witness who testified at Petitioner's trial. (*See* Affidavit of Carla Cavin attached hereto and incorporated herein as Exhibit "G".)

7. It is uncontroverted that Ms. Cavin's Affidavit stated that, on March 30, 2017, Petitioner drove her automobile on Kansas Highway 20 at 70 m.p.h. preventing Ms. Cavin from passing her and then tailgated Ms. Cavin to the Kickapoo reservation boundary. (*See*, Exhibit "G".)

8. Petitioner's description of the events are controverted, as set forth in Ms. Cavin's Affidavit. (*See*, Exhibit "G".)

9. It is uncontroverted that Ms. Cavin's Affidavit did not state the specific time of day that the event occurred. However, it is irrelevant as to whether the Affidavit establishes that the event occurred off of the Kickapoo reservation. (*See*, Exhibit "G".)

10. To the Respondents' knowledge, Petitioner's incident with Ms. Cavin was reported to the Horton Police Department and the Kickapoo Tribal Police but not to the Brown County Sheriff or the Kansas Highway Patrol.

11. It is uncontroverted that Petitioner is currently in the Brown County Jail. She is serving a lawful sentence.

12. It is uncontroverted that on April 7, 2017, Petitioner's counsel filed a Emergency Request for Release of Defendant or Further Hearing with the Supreme Court of the Kickapoo Tribe in Kansas. The Kickapoo Supreme Court has denied that motion. (*See*, Order of the Supreme Court of the Kickapoo Tribe in Kansas filed May 8, 2017 attached hereto and incorporated herein as Exhibit "H.")

**IV. RESPONSES TO PETITIONER'S FACTUAL AND  
BACKGROUND STATEMENTS IN HER SUPPLEMENT  
TO PETITION FOR WRIT OF HABEAS CORPUS**

Respondents respond to Petitioner's "Factual and Procedural Background" statements in her Supplement to Petition For Writ Of Habeas Corpus For Relief From A Tribal Court Detention And Conviction Pursuant To 25 U.S.C. § 1303 [Doc. 8] as follows:

1. It is uncontroverted that Petitioner's Writ of Habeas Corpus for Relief From A Tribal Court Detention And Conviction Pursuant To 25 U.S.C. § 1303 was filed with the U.S. District Court of Kansas on April 14, 2017. [Doc. 1]

2. Petitioner's allegations in her Petition for Writ of Habeas Corpus For Relief From A Tribal Court Detention And Conviction Pursuant To 25 U.S.C. § 1303 [Doc. 1] are set forth in that document and any departure therefrom set forth in this statement is controverted.

3. It is uncontroverted that Petitioner sought relief as set forth in her Petition for Writ of Habeas Corpus. [Doc. 1]

4. Respondents incorporate their responses above to Petitioner's facts and allegations set forth in her Petition for Writ of Habeas Corpus. [Doc. 1]

5. Petitioner was lawfully sentenced pursuant to the Sentencing Order. (*See*, Exhibit "C".)

6. Petitioner was sentenced pursuant to the Sentencing Order. (*See*, Exhibit "C".)

7. Petitioner was sentenced pursuant to the Sentencing Order. (*See*, Exhibit "C".)

8. The transcript from the sentencing hearing is not yet available. However, it will accurately show the testimony provided.

9. It is uncontroverted that the initial Pre-Sentence Investigation Report prepared by Joanna Flanders recommended a prison term of 10 years. However, that report is irrelevant as that recommendation was not accepted by the District Court Judge in sentencing Petitioner. (*See*, Exhibit "C".)

10. It is uncontroverted that an Amended Pre-Sentence Investigation Report submitted by Ms. Flanders recommended a prison term of 6 years. However, that report is irrelevant as that recommendation was not accepted by the District Court Judge in sentencing Petitioner. (*See*, Exhibit "C".)

11. Petitioner's allegation that there are no Bureau of Indian Affairs prisons is not true. (*See*, [www.bia.gov/whoweare/bia/ojs/doc/index.htm](http://www.bia.gov/whoweare/bia/ojs/doc/index.htm).)

12. It is uncontroverted that Ms. Flanders recommended that Petitioner be required to pay for incarceration costs while at the Brown County Jail.

13. It is true that Petitioner had no prior criminal history.

14. The Pre-Sentence Investigation Report is not relevant as the recommendation was not adopted by the Kickapoo District Court Judge in sentencing Petitioner. (*See*, Exhibit "C".)

15. As will be demonstrated in the transcript of the sentencing hearing, the Special Prosecutor took no inappropriate action in making recommendations for sentencing. Furthermore, the Pre-Sentence Investigation Report is not relevant as the recommendation was not adopted by the Kickapoo District Court Judge in sentencing Petitioner. (*See*, Exhibit "C".)

16. Any statement that 216 months was the proper sentence was based upon a typographical error in the Kickapoo Tribal Code, as will be established in the transcript of the sentencing hearing. Nonetheless, this issue is irrelevant as the Petitioner was not sentenced to 216 months. (*See*, a copy of the relevant Code § 138 attached hereto as Exhibit "D".) This was the same amount of prison time mistakenly listed on the Complaints in both cases. Petitioner never objected to such until sentencing.

17. Any statement that 216 months was the proper sentence was based upon a typographical error in the Kickapoo Tribal Code, as will be established in the transcript of the sentencing hearing. Nonetheless, this issue is irrelevant as the Petitioner was not sentenced to 216 months. (*See*, Exhibit "C".)

18. At the sentencing hearing, the Special Prosecutor acknowledged there appeared to be a typographical error in Title 10, Section 138(b) of the Kickapoo Tribal Code.

19. At the sentencing hearing, the Special Prosecutor acknowledged that there appeared to be a typographical error in Title 10, Section 138(b) of the Kickapoo Tribal Code.

20. The Special Prosecutor did make reference to a keyboard when discussing the possibility of the typographical error in Title 10, Section 138(b) of the Kickapoo Tribal Code.

21. Any statement that 216 months was the proper sentence was based upon a typographical error in the Kickapoo Tribal Code, as will be established in the transcript of the sentencing hearing. Nonetheless, this issue is irrelevant as the Petitioner was not sentenced to 216 months. (*See*, Exhibit "C".)

22. It is uncontroverted that, after the sentencing hearing was concluded, one of Petitioner's character witnesses made contemptuous statements to the Judge. This might be established by the transcript of the sentencing hearing. The hearing was already concluded.

23. It is uncontroverted that, in response to the witness' contemptuous statements, the Judge might have made a rhetorical statement as to whether the witness should be found in contempt. This will be established by the transcript of the sentencing hearing.

24. It is true that Petitioner was held in the Brown County Jail from the time she was arrested on March 31, 2017 until her sentencing on April 24, 2017 and that no hearing was held during that time.

25. This statement is controverted. The Kickapoo Supreme Court has denied Petitioner's motion. (*See*, Exhibit "H".)

26. This statement is controverted. The Kickapoo District Court Judge did not accept the entirety of the Pre-Sentence Report as Petitioner was only sentenced to 18 months of incarceration, ordered to pay incarceration fees and \$75 in court costs. (*See*, Exhibit "C".)

27. It is controverted that the Kickapoo District Court Judge did not effectively advise Petitioner of her appeal right. As will be demonstrated in the transcript of the sentencing hearing, the Judge verbally advised Petitioner of her appeal right. Additionally, the Sentencing Order also informed Petitioner of her right to appeal. (*See*, Exhibit "C".)

28. It is controverted that Petitioner cannot receive credit for time served. Petitioner has a right to credit for time served under Title 11, Section 402(c) of the Kickapoo Tribal Code. Her credit for time served is a matter of law.

**V. RESPONSES TO PETITIONER'S  
ALLEGATIONS AND LEGAL ARGUMENTS**

**A. Petitioner's Claim For Habeas Corpus Relief Does Not Meet  
The High Standards To Permit Immediate Release.**

The Petitioner has requested that she be immediately released from the Brown County Jail pending the outcome of her request for habeas corpus relief. However, as the Court points out in its Memorandum and Order [Doc. 10], Petitioner must satisfy an extremely high standard to permit the Court to grant her immediate release. To be granted immediate release, Petitioner must show either: (1) "exceptional circumstances"; or (2) "a demonstration of a clear case on the merits of the habeas corpus petition." *Pfaff v. Wells*, 648 F.2d 689, 693 (10th Cir. 1981). Petitioner can do neither. The sentence she received is right, just and deserved. Recent decisions from the Tenth Circuit reiterate the extremely high standard that must be met to allow immediate release. (*See, United States v. Zander*, 669 F. App. 955 (10th Cir. 2016); *Vreeland v.*

*Zupan*, 644 F. App. 812 (10th Cir. 2016); and *United States v. Read-Forbes*, 628 F. App. 621, 622 (10th Cir. 2016)).

Respondents provide the following initial responses to the arguments in Petitioner's Petition for Habeas Corpus [Doc. 1] and Supplement [Doc. 8] showing that Petitioner should not be granted immediate release because there are neither exceptional circumstances nor a clear case on the merits. Petitioner does not meet the immediate release standard and her request must be denied. Additionally, Petitioner's request for habeas corpus relief must also be denied.

**B. Petitioner's Petition For Writ Of Habeas Corpus Pursuant To 25 U.S.C. § 1303 Must Be Denied, Because Petitioner Has Not Exhausted The Remedies Available To Her Through The Kickapoo Courts.**

Petitioner incorrectly argues that she does not have to exhaust her tribal court remedies prior to bringing this habeas corpus action. The U.S. Supreme Court has held that the promotion of tribal self-government and principles of comity requires litigants to exhaust their tribal court remedies before bringing a habeas corpus action in United States District Court. (*See, Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006)).

The Petitioner argues that the exceptions to the exhaustion rule outlined in *Burrell* apply to her, thus exempting her from the exhaustion requirement. Petitioner's sole complaints are that the tribal court was biased against her and was incompetent. However, in *Burrell*, the court stated that "[a]llegations of local bias and tribal court incompetence . . . are not exceptions to the exhaustion requirement." *Id.* at 1168.

None of the exceptions outlined in *Burrell* apply to Petitioner. There is no evidence that Petitioner's convictions were the result of harassment by the tribal court. The

exercise of jurisdiction by the tribal court did not violate any jurisdictional prohibitions. The Petitioner has options available to her to challenge the convictions in the Kickapoo Courts. The Kickapoo District Court clearly did not lack jurisdiction over Petitioner's criminal cases.

The Petitioner also incorrectly states that the Kickapoo Supreme Court does not exist. In fact, the Kickapoo Supreme Court has denied the Petitioner's Emergency Request for Release.

Petitioner has cited to *LaVallie v. Turtle Mountain Tribal Court*, No. 4-06-CV-9, 2006 WL 69704 (D.N.D. Apr. 18, 2006). In that case, the court denied a writ for habeas corpus as the petitioner had appeal avenues available to him in the tribal court and had not pursued those options. *See id.* at \*3. Such is the case with the Petitioner here. Petitioner has not satisfied the exhaustion rule and her request for habeas corpus relief must be denied and she should not be granted immediate release.

**C. The Kickapoo District Court Has Not Deprived Petitioner Of Her Liberty Without Due Process Of Law As Prohibited By 25 U.S.C. § 1302(a)(8).**

Petitioner asserts the Kickapoo District Court has deprived her of her liberty without due process of law as prohibited by 25 U.S.C. § 1302(a)(8) for a number of different reasons. However, no such deprivations occurred and her Petition for Writ of Habeas Corpus Pursuant to 25 U.S.C. § 1303 must be denied as well as her request for immediate release.

**D. The Kickapoo District Court Judge Has Jurisdiction To Incarcerate A Member Of The Tribe Upon Allegations Of Conduct Occurring Off Of The Kickapoo Reservation.**

Petitioner first argues that the incident with Ms. Cavin, which led to revocation of her bond, occurred off of the Kickapoo reservation. Therefore, the Kickapoo District Court

Judge had no jurisdiction to incarcerate her. However, this issue is moot as Petitioner has now been sentenced for the underlying crimes for which she was convicted. In any event, Petitioner's argument that the Kickapoo District Court Judge did not have jurisdiction fails.

Petitioner alleges that there is "no question" that the incident with Ms. Cavin occurred off of the Kickapoo reservation. The location of the action is not relevant. Even if the incident did occur off of the reservation, the Kickapoo District Court Judge still had jurisdiction to revoke Petitioner's bond and to incarcerate her.

In support of her argument that the Kickapoo District Court Judge had no jurisdiction to incarcerate based upon conduct that occurred off of the reservation, Petitioner cites to *Kelsey v. Pope*, No. 1:09-CV-1015, 2014 WL 1338170 (W.D. Mich., So. Div. Mar. 31, 2014). Petitioner correctly states that the United States District for the Western District Court of Michigan granted a petition for writ of habeas corpus in that case based upon its conclusion that tribal courts do not have jurisdiction to prosecute crimes outside of Indian country. However, Petitioner fails to point out that the United States Court of Appeals for the Sixth Circuit reversed that finding. (*See, Kelsey v. Pope*, 809 F.3d 849 (6th Cir. 2016)). The Sixth Circuit concluded that tribes have the "inherent authority" to prosecute tribe members for crimes, even when the offenses take place off of the tribe's reservation. (*See, Kelsey*, 809 F.3d at 855-59.) The Sixth Circuit held that "Indian tribes possess the inherent sovereign authority to try and punish members on the basis of tribal membership." (*Id.* at 859.) The Sixth Circuit concluded that tribes can punish their members on this basis, even if the offense occurred off of the reservation. (*See, Id.* at 859.)

As Petitioner has admitted, she is an enrolled member of the Kickapoo Tribe. Accordingly, the Kickapoo District Court Judge had jurisdiction over Petitioner and has the power to incarcerate her for offenses, even if such occurred off of the reservation. Therefore, Petitioner's argument has no merit. Petitioner was not deprived of liberty or due process of law by having her bond revoked and being detained as a result of the incident with Ms. Cavin. Consequently, Petitioner's Petition for Writ of Habeas Corpus must be denied and her request for immediate release must be denied.

**E. Petitioner Was Not Denied Liberty Without Due Process Of Law In Violation Of 25 U.S.C. § 1302(a)(8) As A Result Of The Proceedings Before The Kickapoo District Court In Her Criminal Case.**

Petitioner argues that she was denied liberty without due process of law in violation of 25 U.S.C. § 1302(a)(8) during the course of her jury trial and criminal case in the Kickapoo District Court. Petitioner argues that her rights were violated during jury selection and the trial. However, the transcript shows that the trial was properly conducted, that Petitioner received due process and that there was evidence beyond a reasonable doubt to convict her. Accordingly, Petitioner's request for immediate release and her Petition for Writ of Habeas Corpus must be denied.

**1. Petitioner's rights were not violated during the jury selection process.**

Petitioner argues that her rights were somehow violated by the manner in which the jury was selected. However, Petitioner's arguments have no merit and will be disproved by the transcript of jury selection.

Petitioner argues that the judge somehow violated the Kickapoo Tribal Code by selecting the prospective jurors' names from a glass bowl. However, there is nothing in Title 6, Section 612 of the Kickapoo Tribal Code that prohibits the Judge from using that method. Section 612 specifically states that prospective jurors for a trial shall be selected in a random drawing approved by the Court. That is precisely what occurred. The facts and record will prove that Petitioner's allegations regarding jury selection were untrue.

2. **Petitioner's rights were not violated by the Kickapoo District Court Judge's failure to excuse jurors for cause following voir dire.**

Petitioner next argues that the jury was prejudiced against her. However, this will be disproven by the transcript of the jury selection. The transcript will establish that the Court passed the jury panel for cause and took all proper steps and precautions to ensure that a fair and impartial jury was seated. Additionally, Petitioner's arguments as to two letters written by Tribal Council Chairman Lester Randall are meritless and irrelevant. Those letters consisted of nothing more than factual reporting of the status of the cases against Petitioner and any potential issues that could have arisen out of those letters were addressed by questions during jury selection. The transcript will show that an impartial jury was selected.

3. **The Kickapoo Tribal Council Members had no inappropriate interaction with the jury.**

Petitioner next argues that there was improper contact between Kickapoo Tribal Council members and the jury during trial. However, as is established by the trial transcript, there is absolutely no evidence this occurred. The allegation is untrue. The Petitioner knows it is untrue. At one point during the trial, Petitioner's counsel stated the following to the judge: "Your honor, I just want to make a record. I did not confirm this with my own eyes, but it was

reported to me that even after your admonishment about talking to the – the jurors, Chairman Randall and Vice Chairman Thomas were in the room back there with at least four of the jurors, maybe all. They were in there for just a little bit of time." (*See*, Exhibit "B," p. 184:11-20.)

Petitioner's counsel's allegation was not based on his own observations but on rumors.

Thereafter, the Judge asked the bailiff whether he was aware of this occurring and the bailiff said that it does not. The Judge also asked the Special Prosecutor if he was aware of this occurring and he said he was not. Finally, the Judge asked each of the jurors whether they had spoken to anybody about the case and each of them stated they had not. (*See*, Exhibit "B," pp. 184:23-187:19.) Accordingly, Petitioner's allegations have no merit.

4. **There is no evidence that Petitioner's rights were violated by any misconduct during trial by the Kickapoo Tribal attorney.**

Petitioner next alleges that the Kickapoo Tribal attorney, who second chaired the trial, was observed in the courtroom mouthing answers to witnesses. There is absolutely no evidence that this occurred. This is nothing more than a baseless and meritless allegation. The transcript of the trial demonstrates that Petitioner received proper due process and that the trial was properly conducted. The parties, at all times, were a few feet from one another, the jury and the court. It did not occur.

5. **There is no evidence that Petitioner's rights at trial were violated as a result of any previous statements by Lester Randall and Petitioner's arguments with regard to the civil actions are irrelevant.**

Petitioner next argues that her rights were somehow violated with regard to her theory that the criminal charges against her were a form of revenge by Tribal Council Chairman Lester Randall. However, as is demonstrated in the trial transcript, Petitioner presented that

argument in detail to the jury. (*See*, Exhibit "B," pp. 165:16-169:24.) The jury was allowed to consider that evidence in making its decision and still convicted the Petitioner. There is nothing that entitles Petitioner to immediate release or the habeas corpus relief that she seeks.

**6. Petitioner's rights were not violated by the jury instructions that were given.**

Petitioner argues that the jury was not properly instructed. However, the trial transcript demonstrates otherwise. (*See*, Exhibit "B," pp. 246:18-264:4.) The Judge properly and fairly stated the law to the jury. Furthermore, the Petitioner's objections to the jury instructions were considered. However, the jury instructions offered by Petitioner were remarkably similar to those proposed by the Special Prosecutor and they were not provided to counsel or the Court within the required time limits found in the Kickapoo Court Rules. The Judge denied Petitioner's objections to the jury instructions but noted that the parties were able to reach a compromise regarding the language of two of the instructions. (*See*, Court Minute/Journal Entry of the Tribal District Court for the Kickapoo Tribe in Kansas dated March 8-9, 2017, attached hereto and incorporated herein as Exhibit "I.") Petitioner's rights were not violated.

**7. Petitioner is not entitled to sovereign immunity for the criminal claims made against her in the underlying criminal cases.**

Petitioner argues that she is protected from the criminal charges by sovereign immunity. However, the doctrine of sovereign immunity does not prohibit the criminal allegations made in the underlying criminal cases.

The United States Supreme Court has held that the power to prosecute and punish defendants for violations of tribal laws is a power that arises out of inherent tribal sovereignty.

(*See, United States v. Lara*, 541 U.S. 193, 193-99, 124 S. Ct. 1628 (2004)). Therefore, the fact that the Kickapoo Tribe is an independent sovereign does not provide Petitioner with sovereign immunity but rather gives the Tribe the power to prosecute and punish the Petitioner for violation of tribal laws. The Kickapoo Tribe properly brought criminal charges against Petitioner.

Even if the doctrine of sovereign immunity applied, it would not protect the Petitioner as she was convicted of acting outside of the scope of her official powers. "Indian tribes have long been recognized as possessing common law immunity from suit." *Whitebird v. Kickapoo Housing Authority*, 751 F. Supp. 928, 929 (D. Kan. 1990). "Tribal sovereign immunity also applies to tribal officials acting in their official capacity." *Id.* However, tribal sovereign immunity "does not extend to an official when the official is acting as an individual or outside the scope of those powers that have been delegated to him." *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006) (quoting *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 576, n. 1 (10th Cir. 1984) (McKay, J., concurring)). Therefore, when a "complaint alleges that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked." *Burrell*, 456 F.3d at 1174 (quoting *Tenneco Oil*, 725 at 574).

The underlying criminal complaints alleged that the Petitioner violated Kickapoo Tribal Law by abusing and acting outside her official powers and she was convicted by the jury of such. The Complaints alleged and the evidence established that Petitioner acted manifestly and palpably beyond her authority and without any colorable claim of authority. The Petitioner knowingly participated in creating false resolutions and distributing such. These acts were done

for the purpose of deceiving and inducing improper payments of tribal burial funds.

Additionally, the evidence established that Petitioner, while charged with the receipt, safekeeping, transfer or disbursement of public money, misused public money in the form of tribal burial funds.

The allegations in the Complaints and the supporting evidence clearly establish that Petitioner acted outside her official capacity and such actions were manifestly and palpably beyond her authority. Therefore, sovereign immunity does protect the Petitioner just not as she seeks.

**F. Petitioner's Constitutional Rights Have Not Been Violated And Kickapoo Tribal Law And The Indian Civil Rights Act Controls.**

Petitioner correctly points out that she has been held in the Brown County Jail pursuant to an agreement between the Kickapoo Tribe and Brown County. However, this fact has no impact on the analysis of whether Petitioner is entitled to habeas corpus relief.

Furthermore, it also does not mean that the U.S. Constitution applies in this case. Rather, Petitioner's rights are governed by the Indian Civil Rights Act. "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978).

Furthermore, "Congress has long excluded from federal-court jurisdiction crimes committed by an Indian against another Indian." *United States v. Bryant*, 136 S. Ct. 1954, 1960, 195 L. Ed. 2d 317 (2016). The Indian Civil Rights Act governs tribal-court proceedings and provides

procedural safeguards to tribal-court defendants that are similar, but not identical, to those contained in the U.S. Constitution. *Id.* at 1956.

The underlying criminal case herein is a tribal court proceeding and Petitioner's rights are governed by the Indian Civil Rights Act. The evidence establishes that Petitioner's rights under the Indian Civil Rights Act were not violated.

**G. Petitioner Was Not Denied Liberty Without Due Process Of Law And Was Not Subjected To Cruel And Unusual Punishment In Violation Of 25 U.S.C. § 1302(a)(7)(A) And (a)(8) As A Result Of The Sentence Imposed By The Kickapoo District Court Judge.**

The Petitioner argues that the sentence imposed by the Kickapoo District Court Judge violated her rights, entitling her to habeas corpus relief. However, the trial transcript and sentencing transcript that will be obtained prove that this argument has no merit. As will be set forth below, the sentence imposed upon Petitioner does not violate her rights.

**1. Petitioner was not denied liberty without due process of law in violation 25 U.S.C. § 1302(a)(8) as a result of the sentence imposed.**

Petitioner first claims that she was denied due process when the Kickapoo District Court Judge imposed a maximum sentence against her without giving consideration to probation. Due to the Petitioner's own testimony at the sentencing hearing, the Judge had no option to grant her probation. Under Title 11, Section 403(b) of the Kickapoo Tribal Code (attached hereto as Exhibit "J"), the Judge could only give Petitioner probation if she "recognizes the wrong [she] has committed and earnestly repents of such wrong... ." Petitioner failed to do so. At the sentencing hearing, the Special Prosecutor specifically asked the Petitioner if she acknowledged

her crimes and if she was sorry for them. The Petitioner answered that she had done nothing wrong. Thus, she prohibited the Judge from granting her probation.

The Petitioner also argues that her due process rights were violated because the probation officer recommended an illegal prison sentence. This argument is moot as the Judge did not accept the probation officer's recommendation. Rather, the Judge sentenced the Petitioner to six months for each crime which is exactly what was allowed by the Kickapoo Tribal Code. Thus, this argument has no merit.

**2. Petitioner was not subjected to cruel and unusual punishment in violation 25 U.S.C. § 1302(a)(7)(A) as a result of the sentence imposed.**

The Petitioner also argues that cruel and unusual punishment has been imposed upon her as a result of the Judge's sentence. However, this argument has no merit because she was sentenced to the number of months allowed by the Kickapoo Tribal Code. Any argument relating to recommendations made by the probation officer or the Special Prosecutor are irrelevant as they were not accepted by the Judge.

Petitioner's rights were not violated in the sentencing phase of the criminal cases. Thus, Petitioner's request for habeas corpus relief and immediate release must be denied.

**VI. CONCLUSION**

For the reasons set forth above, Petitioner Bobbi Darnell's request for immediate release must be denied as she has not established any "exceptional circumstances," or "a clear case on the merits" for her Petition for Writ of Habeas Corpus [Doc. 1] and her Supplement [Doc. 8] thereto. Petitioner's request for habeas corpus relief pursuant to 25 U.S.C. § 1303 must also be denied and dismissed.

/s/ Thomas G. Lemon

Thomas G. Lemon - KS-16120  
Vincent M. Cox - KS-22051  
ATTORNEYS FOR RESPONDENT KICKAPOO  
TRIBE OF KANSAS  
CAVANAUGH, BIGGS & LEMON, P.A.  
2942A S.W. Wanamaker Drive, Suite 100  
Topeka, Kansas 66614-4135  
TEL: 785/440-4000  
FAX: 785/440-3900  
tlemon@cavlem.com  
vcox@cavlem.com

/s/ Wendell F. Cowan

Wendell F. Cowan - KS-08227  
FOULSTON SIEFKIN LLP  
ATTORNEY FOR DEFENDANT SHERIFF  
JOHN MERCHANT  
9225 Indian Creek Parkway, Suite 600  
Overland Park, KS 66210  
TEL: 913/498-2100  
FAX: 913/498-2101  
wcowan@foulston.com

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of May, 2017, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

Napoleon S. Crews  
Crews Law Firm  
3300 Clinton Parkway Court, Suite 010  
Lawrence, KS 66047  
Tel: 785-856-5562  
Fax: 785-856-5563  
ncrews@crewslawfirm.net  
ATTORNEY FOR PETITIONER

/s/ Thomas G. Lemon

Thomas G. Lemon - KS-16120  
Vincent M. Cox - KS-22051  
ATTORNEYS FOR RESPONDENT KICKAPOO  
TRIBE IN KANSAS  
CAVANAUGH, BIGGS & LEMON, P.A.  
2942A S.W. Wanamaker Drive  
Suite 100  
Topeka, Kansas 66614-4135  
TEL: 785/440-4000  
FAX: 785/440-3900  
tlemon@cavlem.com  
vcox@cavlem.com

8014/Response to Request for Immediate Release