Fundamental to tribal governance is the authority and capacity to exercise criminal jurisdiction over individuals within Indian country. Many of the richest and most colorful cases involving tribal law are criminal cases.

Traditionally, most American Indian nations did not prosecute crimes in the same manner as European and American nations. Instead of focusing entirely on retribution against the perpetrator or even on deterrence of other potential perpetrators, many Indian nations focused on the needs of the family of the victim or victims, as well as the overall needs of the community. See generally Carrie E. Garrow & Sarah Deer, Tribal Criminal Law and Procedure 9-36 (2004). In a small tribal community, the murder of one person by another was the worst possible event that could happen, but the execution or banishment of the perpetrator was not the only possible outcome, as that might mean the loss of two persons who contributed to the welfare of the community, as opposed to only one. But that does not mean that Indian communities never punished criminals. Executions, physical incapacitations, and banishments were common, but perhaps not nearly as much as in European and American jurisdictions.

Consider the political murder of Spotted Tail by Crow Dog, two Lakota leaders, in the 1880s, resulting in the United States Supreme Court’s decision in Ex parte Crow Dog, 109 U.S. 556 (1883). The families settled the dispute “for $600 in cash, eight horses, and one blanket.” Sidney L. Harring, Crow Dog’s Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century 1 (1994). Federal officers, deeply dissatisfied with the tribe’s version of justice, brought a federal prosecution, and the Dakota territorial court sentenced Crow Dog to hanging, but the Supreme Court reversed. Congress enacted the Major Crimes Act in 1885 in an effort to overturn the Court’s decision. See United States v. Kagama, 118 U.S. 375 (1886).
Additionally, whether the alleged perpetrator was guilty likely was not in doubt. Given the closed and insular character of most Indian communities, the perpetrator probably would openly and voluntarily admit that he or she had committed the crime. Part of the process of healing the community, even for the perpetrator, was to talk it out. Denial of guilt injured the community and the perpetrator. Even to this day, some commentators have argued that the prosecution rates of American Indians in federal and state courts are higher because of the tendency of American Indians to confess guilt at a higher rate.

Through the nineteenth century, most Indian nations continued to handle criminal offenses in the traditional manner, even as their social and political structures were falling apart. Some tribes, most notably the Cherokee Nation, created a sophisticated law enforcement structure early in the nineteenth century based on tribal enforcers known as the Lighthorsemen and the Nation’s well-known tribal court system. But relatively few Indian nations followed suit, and by the 1970s only a few dozen Indian nations were in the business of prosecuting crimes.

Instead, the federal government took control of law enforcement in most Indian communities, creating the notorious tribal police and Courts of Indian Offenses, enforcing the Law and Order Code promulgated in the Code of Federal Regulations. By the 1950s, Congress had authorized several states to take the lead in enforcing criminal laws in Indian country in statutes such as Public Law 280. These states included New York, Kansas, California, Wisconsin, Minnesota, Nebraska, Alaska, and Oregon. Other states also took criminal jurisdiction over some crimes.

The United States Supreme Court had long held that the United States Constitution and all its criminal procedure rights did not apply to Indian prosecutions. See Talton v. Mayes, 163 U.S. 376 (1896). As a result, in 1958 Congress enacted the Indian Civil Rights Act, 25 U.S.C. §§1301 et seq., with the intent of bringing most of the criminal procedure rights available to American citizens to Indian country. However, Congress did not require Indian tribes to provide paid counsel to indigent defendants, at the request of the United States Department of Justice.


In the modern era, Indian nations continue to exercise criminal jurisdiction over tribal citizens and nonmember Indians within their territories. In 2010, Congress enacted the Tribal Law and Order Act, a statute that strongly supports tribal efforts to combat crime. Most significantly, Congress authorized tribal courts to sentence convicted criminals to up to three years in jail, assuming the conviction met basic American constitutional rules.
A. THE ORIGINS AND DEVELOPMENT OF TRIBAL LAW ENFORCEMENT

Traditional Policing, before 1860

Originally, prior to colonization, the keeping of law and order was the duty of clans or specially designated societies. Often clans were responsible for the conduct of their members. In other instances, military or warrior societies were entrusted with this responsibility for the good of the whole tribe. The clan or society was responsible not only for law enforcement but also the form that such law enforcement would take.

During early colonial times, tribal law enforcement responsibility was recognized in many treaties with the English Crown. Colonial treaties with the tribes, and later the treaties negotiated by the U.S. government, generally required that the tribes turn over non-Indian miscreants to national authorities for punishment. However, internal law enforcement issues were to be handled by the tribe itself.

Civilized Tribes

The Five Civilized Tribes illuminate an early example of traditional clan-based tribal police control in the late 1700s. In 1797, for example, the Cherokees created a mounted tribal police force with authority to deal with horse theft and other property crimes. The force became known in the early 1800s as the regulating companies and later, during the 1820s, as the Light-horsemen. The jurisdiction of the Lighthorsemen was expanded to the apprehension of criminals, who were then turned over to tribal courts for trial and punishment. The crimes within the Lighthorsemen’s purview extended to major crimes such as murder, rape, and robbery, as well as crimes against public order, such as intoxication.

. . . The creation and empowerment of the Lighthorsemen brought about the demise of clan revenge as the model for law enforcement. In 1810 the Cherokee adopted the Law of Abrogation of Clan Revenge. . . .

Lakota Law Enforcers

The same pattern of traditional clan or society leadership becoming the backbone of tribal law enforcement was evident later at Pine Ridge, where traditional Lakota law enforcers (akicitas) became the first members of the Pine Ridge police force. Here the large numbers of akicitas who moved into law enforcement established the connection between traditional Lakota law enforcement and the federal police agencies.
Akicitas had always policed Lakota society. They were appointed by the band’s wakiconze, or camp administrator, from the membership of certain men’s societies, and served terms of one year. They were empowered to police camp moves, regulate buffalo hunts, and enforce tribal laws and customs. They served as both judge and jury. . . .

**Reservation Police, 1860-1880**

Self-policing on a traditional level held throughout the postrevolutionary period; however, with the opening of the western frontier and the reservation period (1860-1880), the federal government moved to assert law enforcement jurisdiction over Indian Country.

The centralization of most Indian peoples on reservations and the proximity of non-Indian settlers led Indian agents in the 1860s and 1870s to organize reservation police forces, which led to the establishment of the Indian Police under the Bureau of Indian Affairs and brought the demise of clan and society-based authority. The BIA recruited, employed, and outfitted tribal members and standardized law-enforcement procedures. A bureaucratic, one-size-fits-all approach to tribal law enforcement became the norm throughout Indian Country.

**The Rise of Reservation Police Forces**

On many reservations, Indian people were from mixed bands or tribes, resulting in a breakdown in traditional lines of authority. In 1862, Indian agent Benjamin F. Lushbaugh unofficially established the Pawnee Indian police force. Lushbaugh selected six influential leaders from the various tribes or bands and formed them into a police agency with authority to stop certain kinds of problematic behavior. Band members were used to police the members of other bands. Other agents approached the problem of lawlessness by developing a legal code of conduct that would be enforced by tribal leaders selected by the agent. . . .

It is unclear precisely when the federal government officially established reservation law enforcement. However, during the 1870s Indian agents for the Pawnee, Klamath, Modoc, Navajo, Apache, Blackfeet, Chippewa, and Sioux established reservation-based Indian police agencies.

**The Navajo Experiment**

An early federal experiment in policing by Indian people on Indian reservations was conducted on the Navajo reservation in 1872. . . . After their return to the homeland [following the Long Walk] in 1870, complaints from surrounding settlements about cattle rustling and stock losses began to reemerge. A special council of Navajo leaders and the federal representative was held at Fort Wingate in July 1872. As with the Cherokee and the Lakota, a traditional war chief, Manuelito, took the lead. Manuelito proposed that he would “regulate this thieving himself.” Special Indian Commissioner General O. O. Howard recruited a force of 100 young Navajos representing each of the thirteen bands and placed it under the command of Chief Manuelito. That
force was charged with the responsibility of apprehending livestock thieves and was highly successful.

The San Carlos Apache Police

Yet another of the earliest and most successful Indian police departments was established when John P. Clum was appointed as Indian agent on the San Carlos Agency in Arizona Territory in 1874. The San Carlos Agency was a classic example of a reservation where the traditional lines of authority had broken down. San Carlos was composed of members of various Apache bands, many of which had been in conflict with each other for generations. Thrust together on one reservation, the various bands remained at odds, causing an unsettled situation.

Two days after his arrival at the San Carlos agency, Clum appointed four leading Apaches as a police force. Their duties included arresting insubordinate Indians, indicting alcohol on the reservation, guarding prisoners, and other duties as assigned by the agent. As the reservation population increased with the addition of additional bands, within six months the police force was increased to sixty members. This force was highly successful in pacifying the various bands of Apache now resident at San Carlos.

... [T]he idea of Indian policing became the official policy of the federal government.

The federal government found that the use of one tribe to police another was a useful tool, one that was to continue throughout the history of the Bureau of Indian Affairs Law Enforcement Services. “The Army’s success in pacifying most of [the Apaches] depended on enlisting warriors from one band to track and fight against those of another.” In fact, as Wilcomb E. Washburn has stated, “Indian police and courts were created in large measure for the purpose of controlling the Indian and breaking up tribal leadership and tribal government. Thus the federal government used tribal police against their own people and other Indians to control tribal leaders and to ensure the demise of representative tribal governments.

The Formal Establishment of Federal Indian Police

In 1878 the Commissioner of Indian Affairs Report... included the following provision and language:

Indian Police

By act of May 27, at the last session of congress, provision was made for the organization at the various agencies of a system of Indian police...

Too short a time has elapsed to perfect and thoroughly test the workings of this system, but the results of the... experiment at the thirty agencies in which it has been tried are entirely satisfactory, and commend it as an effective instrument of civilization. A simple code of rules for the guidance of the service has been prepared, and a plain, inexpensive uniform has been adopted.

Federal Control of Indian Police, 1880-1920

While funding problems remained, by 1880 two-thirds of the reservations in the United States had Indian police forces, and by 1890 police forces were to
be found at virtually all agencies. These police forces varied in size from two to forty-three.

In a fundamental change from the earlier, agent-created reservation police forces, which greatly relied on the support of traditional authority within the tribes, the members of the new federal Indian police forces were generally identified as progressives rather than traditional, and they had usually received allotments of land for themselves and their families. . . . Thus insured a degree of civilization as perceived by the federal government and created the idea of the Indian police force as an agent of civilization. It also set up an adversarial dynamic between tribal citizens and Indian police.

. . . The police were charged with the curtailment of tribal chiefs’ prerogatives and the advancement of the concept of the primacy of non-Indian law as the mode of operation, a function that provoked violent opposition from traditional Indian leaders. . . .

NOTE

The Cherokee Lighthorsemen, at least until 1825, utilized law enforcement tools that would be considered barbaric by modern standards:

The lighthorse corps . . . served with extensive powers, fulfilling the combined roles of sheriff, judge, jury, and executioner. The number of laws they enforced increased yearly as mixed-blood leaders and missionary advisors moved the tribal government closer to Anglo-American institutions. Most of the laws dealt with protection of property, such as the one invoking a penalty of fifty lashes for cattle theft. Such laws also became more refined, the penalty for horse theft being amended to 100 lashes for the first offense, 200 for the second, and death for the third. Because there were no jails among the Indians, corporal punishment was invoked for all crimes, but with variations. For rape a first offender received fifty lashes on the back and had his left ear chopped off close to the head. If the rapist committed a second crime, the lighthorsemen administered 100 lashes and cut off the other ear. For the third offense, death was the punishment. . . .

Lighthorsemen also used violence when suspects attempted escape. In one instance a prisoner who reached for a captain’s gun was shot four times. There was no investigation of the incident. Such violence apparently was foreseen and expected, for the law of 1808 creating the lighthorse corps exempted officers for retaliation when they were forced to kill suspected criminals.

Every lighthorseman was expected to serve as executioner when needed. Condemned criminals had their choice of how they were to be killed, which oftentimes led to gruesome executions. One condemned man, who had killed a friend with a Bowie knife, wished to die by the same weapon; the lighthorsemen granted his request by stabbing him to death. Most Cherokees requested death by rifle, while hanging was shunned for fear that the rope would damage the spirit.

B. JURISDICTION

1. NONMEMBER INDIANS

Means v. District Court of the Chinle Judicial District

Navajo Nation Supreme Court, No. CS-CV-61-98, 7 Navajo Rep. 382; 26 Indian L. Rep. 6083 (May 11, 1999)

Before Yazzie, Chief Justice, Austin, Associate Justice, and Toledo, Associate Justice (sitting by designation).

The opinion of the court was delivered by: Yazzie, Chief Justice. . . .

The petition alleges that the Navajo Nation lacks criminal jurisdiction over the petitioner, who is a member of the Oglala Sioux Nation. . . .

[W]e will decide the following questions:

1. Does the June 1, 1868 Treaty between the United States of America and the Navajo Nation recognize Navajo Nation criminal jurisdiction over individuals who are not members of the Navajo Nation or Tribe of Indians?

2. Has the petitioner consented to the criminal jurisdiction of the Navajo Nation by virtue of his assumption of tribal relations with Navajos?

3. Does the assertion of criminal jurisdiction over the petitioner violate equal protection of the law, and is the assertion of such jurisdiction a “political” or a “racial” classification?

I.

On December 28, 1997, the Navajo Nation charged the petitioner with three offenses: threatening Leon Grant in violation of 17 N.N.C. §310 (1995); committing a battery upon Mr. Grant in violation of 17 N.N.C. §316; and committing a battery upon Jeremiah Bitsui, also in violation of 17 N.N.C. §316. . . . The petitioner faces a maximum exposure of 450 days incarceration, a fine of $1,250, or both, along with the payment of restitution to the victims of the alleged offenses. 17 N.N.C. §220(C). . . .

A.

The Navajo Nation is the largest Indian nation in the United States in terms of geographic size. It has 17,213,941.90 acres of land (approximately 25,000 square miles) as of 1988, including Navajo tribal trust land, land owned in fee, individual Navajo allotments, and various leases. . . . The Navajo Nation membership is the second largest of all Indian nations within the United States, with a total estimated membership of 225,298 persons as of 1990. . . . The 1990 population of the Navajo Nation was 145,853 persons of “all races,” with 140,749 American Indians, Eskimos and Aleuts, and 5,104 individuals of “other races.” . . . Of that population, 96.62% was Indian and 3.38% was “non-American Indian.” . . . Of the American Indian population, 131,422 individuals were Navajos and 9,327 were “other Indians.” . . . Therefore, the percentage of nonmember Indians in the Navajo Nation population was 6.39%. . . .

The Navajo Nation courts had 27,602 criminal cases during Navajo Nation Fiscal Year 1998. . . . The largest single category of civil cases was petitions for
domestic abuse protection orders, and there were 3,435 such cases during the fiscal year.

. . . In sum, the Navajo Nation courts are addressing the serious criminal and social problems of drunk driving, assaults and batteries (including aggravated assault and battery with deadly weapons), sex offenses against children, disorderly conduct, and public intoxication. Many of the crimes against persons are acts of in-family violence, and the civil domestic abuse restraining order numbers show that family violence may be the most serious social problem in the Navajo Nation.

Given the United States Indian education policy of sending Indian children to boarding schools, Indians in the armed services, modern population mobility, and other factors, there are high rates of intertribal intermarriage among American Indians. As noted, at least 9,327 “other” or nonmember Indians resided within the Navajo Nation in 1990. They are involved in some of the 27,000 plus criminal charges in our system and in the 3,435 plus domestic violence cases. The questions are whether nonmember Indians should have de facto immunity from criminal prosecution, given the failure of federal officials to effectively address crime in the Navajo Nation, and whether this Court should rule that thousands of innocent victims, Navajo and non-Navajo, should be permitted to suffer. We must sadly take judicial notice of the fact that, with a few exceptions, non-Indians and nonmember Indians who commit crimes within the Navajo Nation escape punishment for the crimes they commit. The social health of the Navajo Nation is at risk in addressing the petitioner’s personal issues, as is the actual health and well-being of thousands of people. . . .

. . . Indian nation courts are at the front line of attempts to control crime and social disruption. They share a common responsibility with police, prosecutors, defenders, and social service programs to address crime and violence for the welfare of not only the Navajo People, but all those who live within the Navajo Nation or reside in areas adjacent to the Navajo Nation. Indian nations cannot rely upon others to address the problems. . . . The Navajo Nation courts have primary jurisdiction to deal with criminal offenses and they must be free to exercise that jurisdiction.

B.

The petitioner is a member of the Oglala Sioux Nation. . . . He was 58 years of age as of the date of the hearing, . . . and he resided for ten years within the Navajo Nation from 1987 through 1997. . . . He was married to Gloria Grant, an enrolled Navajo woman. . . . Leon Grant, whom the petitioner is charged with threatening and battering, is a member of the Omaha Tribe, and Jeremiah Bitsui, whom the petitioner is charged with battering, is Navajo. . . . Mr. Grant was the petitioner’s father-in-law at the time of the incident. The petitioner moved from the Navajo Nation to Porcupine, South Dakota within the Pine Ridge Reservation, in December of 1997. . . .

The petitioner complained of a lack of hospitality toward him when he resided within the Navajo Nation. He said he could not vote, run for Navajo Nation office (including judicial office), become a Navajo Nation Council delegate, the president, vice-president, or be a member of a farm board. In sum, he
could not attain any Navajo Nation political position. . . . He said he could not sit on a jury and received no notice to appear for jury duty. . . . That may be because the petitioner was not on any Navajo Nation registration or voter list and he was not on the voter registration list for Apache County, Arizona. . . . He complained at length about his inability to get a job or start a business because of Navajo Nation employment and contracting preference laws.

The petitioner's national reputation as an activist is well-known. On cross-examination, the prosecution attempted to develop the petitioner's active participation in the public and political life of the Navajo Nation. The prosecution highlighted the petitioner's attendance at chapter meetings and elicited the fact that subsequent to a 1989 incident when Navajos were shot by Navajos, he led a march to the courthouse for a demonstration to make a "broad statement" about political activities of the Navajo Nation. . . .

The "facts" the petitioner related during his testimony are only partially correct. While it is true that there are preference laws for employment and contracting in the Navajo Nation, they are not an absolute barrier to either employment or the ability to do business. There are many non-Navajo employees of the Navajo Nation (some of whom hold high positions in Navajo Nation government), and non-Navajo businesses operate within the Navajo Nation. The ability to work or do business within the Navajo Nation has a great deal more to do with individual initiative and talent than preference laws. The petitioner was most likely not called for jury duty because he did not register to vote in Arizona. Non-Navajos have been called for jury duty since at least 1979. George v. Navajo Tribe, 2 Nav. R. 1 (1979); Navajo Nation v. MacDonald, 6 Nav. R. [432, (1991)]. The 126 Sioux Indians listed in the 1990 Census can be called for jury duty if they are on a voter list and are called. If the petitioner was an indigent at the time of his arraignment, he would have been eligible for the appointment of an attorney.

II.

The first issue is whether the June 1, 1868 Treaty between the United States of America and the Navajo Nation gives the Navajo Nation courts criminal jurisdiction over individuals who are not members of the Navajo Nation or Tribe of Indians. We will first discuss the 1868 Treaty as a source of criminal jurisdiction and then apply it.

A.

There is a general and false assumption that Indian nations have no criminal jurisdiction over non-Indians and nonmember Indians. While the United States Supreme Court ruled that Indian nations have no inherent criminal jurisdiction over non-Indians in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), and that there is no inherent criminal jurisdiction over nonmember Indians in Duro v. Reina, 495 U.S. 676 (1990), criminal jurisdiction over nonmembers can rest upon a treaty or federal statute. The Supreme Court reserved the issues of affirmative congressional authorization or treaty provisions in both cases. Oliphant, 435 U.S. at 195-197; Duro, 495 U.S. at 684. Therefore, we will examine whether the Navajo Nation Treaty of 1868 is a source of Navajo Nation criminal jurisdiction over nonmember Indians. . . .
B.

The Treaty between the Navajo Nation or Tribe of Indians and the United States was negotiated at Fort Sumner, New Mexico Territory, on May 28, 29, and 30, 1868, and it was executed there on June 1, 1868. . . . We are primarily interested in language found in Article II of the Treaty, which we will call the "set apart for the use and occupation" clause, and that in Article I, which we will call the "bad men" clause.

Article II of the Treaty . . . begins with a boundary description and then says that "this reservation" is "set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them. . . ." Federal courts use this language as the basis for Navajo Nation civil jurisdiction. *Williams v. Lee*, 358 U.S. 217, 221-223 (1959); *Littell v. Nakai*, 344 F.2d 486, 488 (9th Cir. 1965); *UNC Resources, Inc. v. Benally*, 518 F. Supp. 1046, 1050 (D. Ariz. 1981). The Supreme Court held that the Navajo Nation retained its inherent criminal jurisdiction over members in *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

The plain language of Article II indicates that the Navajo Reservation exists for the exclusive use of not only Navajos, but other Indians, either as tribes or as individuals, where both the Navajo Nation and the United States agree to their admission. Given that the jurisdiction of our courts is recognized in the Article II language, Indians such as the petitioner who are permitted to reside within the Navajo Nation fall within the same grouping as Navajo Indians in terms of the Treaty's coverage.

We see this provision applied in the historical record. On September 27, 1881, Agent Galen Eastman wrote to the Commissioner of Indian Affairs to inform him that about forty Pah-Utes (Paiutes) had arrived in a starving condition and were begging for food. They said "they were going to cease their predatory life and use the hoe thereafter." The Navajo reply was that "if the Great Father is willing, we will try you again and be responsible for your good behavior for we used to be friends and have intermarried with your people and yours with ours . . . but if you return to your bad life, thieving and murdering we (the Navajos) will hang you." Obviously, thinking of the language in Article II of the Treaty, Eastman asked for instructions.

The "bad men" language has been litigated in various contexts, but the closest interpretation on the issue of criminal jurisdiction was in the case of *State ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969). There, the State of Arizona arrested a Cheyenne Indian within the Navajo Nation using the "bad men among the Indians" Treaty language as its justification, and the court ruled that the arrest of an Indian had to follow the extradition provision in the "bad men" clause. 413 F.2d at 686. The "bad men" clause has been used as the basis for concurrent civil jurisdiction in the Navajo Nation courts. *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 595 (9th Cir. 1983).

Using surrounding circumstances, history, and the "as the Indians understood it" canon of treaty construction, the issue of how to deal with "bad" Indians was the subject of specific discussions at Fort Summer. Barboncito,
the primary Navajo treaty negotiator, gave an opening speech where he outlined the hardships suffered by Navajos at the adjoining Bosque Redondo “reservation.” He complained: “I think that all nations around here are against us (I mean Mexicans and Indians) the reason is that we are a working tribe of Indians, and if we had the means we could support ourselves far better than either Mexican or Indian. The Comanches are against us I know it for they came here and killed a good many of our men. In our own country we knew nothing about the Comanches.” . . . General William T. Sherman said this in reply: “The Army will do the fighting, you must live at peace, if you go to your own country the Utes will be the nearest Indians to you, you must not trouble the Utes and the Utes must not trouble you. If, however, the Utes or Apaches come into your country with bows and arrows and guns you of course can drive them out but must not follow beyond the boundary line.” . . .

Therefore, we conclude that the Chinle District Court has criminal jurisdiction over the petitioner by virtue of the 1868 Treaty. The petitioner entered the Navajo Nation, married a Navajo woman, conducted business activities, engaged in political activities by expressing his right to free speech, and otherwise satisfied the Article II conditions for entry and residence and Article I and II court jurisdiction.

III.

It is clear that the Navajo Nation has jurisdiction over its own “members.” Wheeler, 435 U.S. at 323. The United States Supreme Court addressed the issue of membership and consent in the Duro decision and went on to say: “We held in United States v. Rogers, 4 How. 567 (1846), that . . . a non-Indian could, by adoption, ‘become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages.’ Id., at 573; see Nofire v. United States, 164 U.S. 657 (1897).” . . .

We previously held, in Navajo Nation v. Hunter, [7 Nav. R. 194,] No. SC-CR-07-95 (decided March 8, 1996), that the Navajo Nation has criminal jurisdiction over individuals who “assume tribal relations.” . . .

We have previously ruled that our 1997 Navajo Nation Criminal Code will be construed in light of Navajo common law, Navajo Nation v. Platero, 6 Nav. R. [422 (1991)], and the Supreme Court–approved Navajo common law in the Wheeler decision, 435 U.S. at 312-313. While there is a formal process to obtain membership as a Navajo, see 1 N.N.C. §§751-759 (1995), that is not the only kind of “membership” under Navajo Nation law. An individual who marries or has an intimate relationship with a Navajo is a hadane (in-law). The Navajo People have adoon’e or clans, and many of them are based upon the intermarriage of original Navajo clan members with people of other nations. The primary clan relation is traced through the mother, and some of the “foreign nation” clans include the “Flat Foot-Pima clan,” the “Ute people clan,” the “Zuni clan,” the “Mexican clan,” and the “Mescalero Apache clan.” See SAAD AHAH SINIL: DUAL LANGUAGE NAVAJO-ENGLISH DICTIONARY, 3-4 (1986). The list of clans based upon other peoples is not exhaustive. A hadane or in-law assumes a clan relation to a Navajo when an intimate relationship forms, and when that relationship is conducted within the Navajo Nation, there are reciprocal obligations to and from family and clan members under Navajo common law.
Among those obligations is the duty to avoid threatening or assaulting a relative by marriage (or any other person).

We find that the petitioner, by reason of his marriage to a Navajo, longtime residence within the Navajo Nation, his activities here, and his status as a hadane, consented to Navajo Nation criminal jurisdiction. This is not done by “adoption” in any formal or customary sense, but by assuming tribal relations and establishing familial and community relationships under Navajo common law.

There is another aspect to consent by conduct. In *Tsosie v. United States*, 825 F.2d 393 (Fed. Cir. 1987), the Federal Circuit Court of Appeals discussed the “bad men among the Indians” language, saying that “[i]t is evident from the negotiations that the Navajos were not to be permanently disarmed, and could defend their reservation. They feared attacks by other Indian tribes, which they could repel, but pursuit and retaliation it was hoped they would refrain from, leaving that to the United States Army. The ‘bad men’ clause is not confined to United States Government employees, but extends ‘to people subject to the authority of the United States.’ This vague phrase, to effectuate the purpose of the treaty, could possibly include Indians hostile to the Navajos whose wrongs to the Navajos the United States will punish and pay for: thus the need for Indian retaliation would be eliminated.” *Id.*, at 396.

Avoidance of retaliation and revenge is clear in the Treaty of 1868. General Sherman urged Navajos to leave the neighboring Mexicans to the Army, but he told Navajos they could pursue Utes and Apaches who entered the Navajo homeland. The Treaty speaks to the admission of Indians from other Indian nations. The thrust of the “bad men” clause was to avoid conflict. We use a rule of necessity to interpret consent under our Treaty. It would be absurd to conclude that our hadane relatives can enter the Navajo Nation, offend, and remain among us, and we can do nothing to protect Navajos and others from them. To so conclude would be to open the door for revenge and retaliation. While there are those who may think that the remedies offered by the United States Government are adequate, it is plain and clear to us that federal enforcement of criminal law is deficient. Potential state remedies are impractical, because law enforcement personnel in nearby areas have their own law enforcement problems. We must have the rule of peaceful law rather than the law of the talon, so we conclude that the petitioner has assumed tribal relations with Navajos and he is thus subject to the jurisdiction of our courts.

IV.

Now we reach the issue of whether the petitioner is denied equal protection of the law because he, as a nonmember Indian, is placed in the classification “Indian” for criminal prosecution, along with Navajos, when non-Indians are not. The petitioner is mistaken as to the classification into which he falls. In *Navajo Nation v. Hunter*, we held that any person who assumes tribal relations is fully subject to our law, and that a person who assumes tribal relations is considered to be an “Indian” and thus a “person” for purposes of 17 N.N.C. §208(17) (1995). The petitioner belongs to the classification hadane and not that of nonmember Indian. One can be of any race or ethnicity to assume tribal relations with Navajos. . . .
We stress that the petitioner is treated no differently than he would be treated in a state or federal court in a criminal case. At oral argument, the petitioner’s attorney was asked what sixth amendment rights his client is denied in our judicial system. He could not answer, because there is no difference. The ability to run for public office or to be a judge has utterly nothing to do with a fair criminal trial. Our rules of criminal procedure and our Navajo Nation Bill of Rights make no distinction as to race, ethnicity or membership in the Navajo Nation. The Navajo Nation courts keep no records on the race or ethnicity of any litigant and the justices and judges of our courts understand what equality before the law means. The Navajo Nation has a substantial interest in the welfare and safety of all within its boundaries and the Nation has an obligation to protect all from crime insofar as it can.

V.

... This Court finds that the Chinle District Court has jurisdiction under the Treaty of 1868, the petitioner has consented to criminal jurisdiction over him, and that he is not denied the equal protection of the law. Accordingly, a final writ is denied, and this cause is remanded to the Chinle District Court for a prompt trial.

NOTES

1. In the “Duro fix” statute, Congress reversed the Supreme Court’s holding in Duro v. Reina, 495 U.S. 676 (1990), that Indian tribes do not have inherent authority to prosecute Indians who are not members of the prosecuting tribe. United States v. Lara, 541 U.S. 193 (2004). Note that the Navajo Supreme Court does not rely upon the Duro fix as authority for its decision upholding tribal jurisdiction over Russell Means. Means took his case to the federal courts relying on the Duro decision, but was turned back on grounds that the United States Supreme Court had upheld the “Duro fix,” the congressional statute recognizing tribal authority to prosecute nonmember Indians. See Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005), cert. denied, 549 U.S. 952 (2006).

2. Other tribal courts engage in a different type of analysis in order to determine whether a criminal defendant is an “Indian person” over which an Indian tribe has jurisdiction. In McIntosh v. Muscogee (Creek) Nation, 7 Okla. Trib. 290, 295-97 (Muscogee (Creek) Nation Supreme Court 2001), the court reversed a conviction on grounds that the tribal prosecutor cannot seek to prove the Indian status of the defendant through cross-examination.

3. Nonmember Indians are a significant percentage of the persons living in tribal jurisdictions. Indian people frequently intermarry with Indians of other communities. Due to a series of federal court cases culminating in Duro v. Reina, 495 U.S. 676 (1990), the term “nonmember Indian” became an important legal term of art. A “nonmember Indian” is an Indian person (usually a member of a federally recognized tribe) who is residing in the territory of another Indian nation. Many, if not most, nonmember Indians are interwoven into tribal communities in ways far deeper than non-Indians who reside in the same communities. See generally Bethany R. Berger, Justice

2. NON–AMERICAN CITIZENS

Eastern Band of Cherokee Indians v. Torres

Before HARRY C. MARTIN, Chief Justice, BRENDA TOINEETA, and STEVEN E. PHILO, Chief Judge, Cherokee Court, sitting by designation. PHILO, J, concurring.

MARTIN, C.J.

All parties stipulated that defendant Torres is a citizen of the republic of Mexico (United Mexican States).

Defendant Torres was charged with driving while impaired and failure to stop for a stop sign on September 10, 2003. While released on bond for these charges, defendant on September 21, 2003 was charged with driving while impaired and driving [with a revoked license]. Again, on pre-trial release, defendant was charged with second-degree child abuse of an enrolled member on November 13, 2003. During this time period, defendant was living . . . in Indian Country within the Qualla Boundary (the reservation of the Eastern Band of Cherokee Indians in North Carolina).

[The alleged crimes also occurred within the Qualla Boundary.]

The population of the Qualla Boundary, both permanent and temporary, is becoming larger and more diverse. Approximately 8,500 enrolled members live on the Qualla Boundary. More people visit Cherokee than any place in North Carolina, some three (3) million visitors a year. This case is not a unique, stand-alone case. It is not unusual for foreigners to appear in the Cherokee Court, in civil, criminal and infraction cases.

We now turn to the issue of jurisdiction.

This is a case of first impression. The issue for decision is: Does the Cherokee Court, an independent tribal court of the Eastern Band of Cherokee Indians, a federally recognized Indian tribe, have jurisdiction to try and to punish the defendant Torres, a citizen of Mexico who is not an Indian, for violating the criminal laws of the Eastern Band of Cherokee Indians? We answer the issue, yes.

Our research does not disclose any authority directly addressing this issue. We consider that the better reasoned analysis requires and supports the conclusion that the Cherokee Court does have criminal jurisdiction over non-Indians who are not citizens of the United States, i.e., aliens.

In reviewing issues of jurisdiction the Court is guided by Chapter 7, Section 2 (2000) of the Cherokee Code. Section 2(c) states: “The Judicial Branch shall not have jurisdiction over matters in which the exercise of jurisdiction has
been specifically prohibited by a binding decision of the United States Supreme Court, the United States Court of Appeals for the Fourth Circuit or by an Act of Congress.”

Our research does not disclose any Act of Congress specifically prohibiting the exercise of criminal jurisdiction by Indian tribal Courts over non-Indians who are not citizens of the United States. Nor do we find any such decision of the United States Court of Appeals for the Fourth Circuit.

. . . Throughout its extensive history of jurisprudence regarding Indian tribal sovereignty, the Supreme Court has never considered the powers and status of the Tribes with regard to non-citizens of the United States. The Cherokee Court, drawing upon history and references from precedent concluded that the Eastern Band of Cherokee Indians maintained the “inherent authority” to prosecute non-citizens of the United States.

The appellant relies entirely on Oliphant. He only cites two additional authorities, Duro and Chapter 14, Section 1.5 of the Cherokee Code. Appellant argues that Oliphant holds that Indian tribal courts do not have jurisdiction to try any non-Indians on criminal charges. . . .

. . . This Court agrees that Indian tribes are prohibited from exercising those powers of autonomous states that have been expressly terminated by the United States Congress and those powers inconsistent with their status, as dependent sovereign nations. Oliphant. Congress has not expressly limited the jurisdiction of Indian tribal courts over non-Indians in criminal cases.

This Court holds that neither Congress nor the United States Supreme Court nor the Fourth Circuit Court of Appeals has specifically prohibited the jurisdiction of Indian Tribal courts over non-Indian aliens of the United States on criminal charges.

A careful reading of Oliphant supports this conclusion. The Court in Oliphant does not address this issue directly. Oliphant and Belgarde were not aliens, but were citizens of the United States. Historically, the United States in its treaties and agreements with Indian tribes from the earliest days had two basic goals: to gain land from the Indians, and to protect citizens of the U.S. . . . Surely, the United States did not intend to protect English, Spanish, Dutch and other aliens, from the Indians.

The Court’s restriction of its holding in Oliphant to “non-Indian citizens of the United States” has a significant historical basis, and is consistent with the Court’s concerns of liberty, justice and fairness justifying the Court’s ruling prohibiting the exercise of criminal jurisdiction over non-Indian citizens of the United States. The Court has traditionally recognized this distinction between citizens and non-citizens. Over a century ago, the Court indicated that the general “object” of Congressional statutes regarding Indian country was “to reserve to the courts of the United States [criminal] jurisdiction of all actions to which its own citizens are parties on either side.” In re Mayfield, 141 U.S. 107, 115-116, 11 S. Ct. 939, 35 L. Ed. 635 (1891). . . .

A brief review of the history of the Cherokees reveals that in negotiating with the Cherokees the primary intent of the United States was the protection of the liberties of citizens of the United States. Six of the first nine treaties executed by the Cherokees and the United States contained special provisions applicable only to United States citizens. The first article of the Hopewell Treaty
includes: “...the Cherokees shall restore all...citizens of the United States...to their entire liberty.” 7 STAT. 18, Article 8. Article X holds that “all travelers, citizens of the United States, shall have liberty to go to any of the tribes or towns of the Cherokee to trade with them.” No right of trade was granted for non-citizens. In the Treaty of the Holston River, 7 Stat. 39 (1791), the activity of citizens of the United States is restricted without reference to those not citizens, thus leaving non-citizens who venture into Indian Country to their own devices for protection. See also Second Treaty of the Holston River (1798), Article VII, 7 Stat. 62 (freedom of travel); Fourth Treaty of Tellico (1805), Article II, 7 Stat. 95 (travel); Second Treaty of Washington (1816), Article II, 7 Stat. 139 (freedom of navigation of rivers and waters within the Cherokee Nation [and of] use of ferries and public houses). Id.

When considering the inherent powers of tribes, the United States Supreme Court has held that tribes retain all powers of autonomous states except those which have been expressly terminated by Treaty or Act of Congress, or which are inconsistent with their status as domestic dependent nations. . . . Over a century ago, the courts of the United States recognized that the Cherokees “have and exhibit the same interest in the enforcement of the law and in the protection of personal and property rights as the United States citizen resident therein. In some sense they have the higher interest, because they are owners of the soil, and constitute the more fixed and permanent population.” Carter v. United States, 1 Indian Terr. 342, 37 S.W. 204 (Ct. App. Ind. Terr., 1896). . . .

The law of Oliphant can be summarized in the following: “Such an exercise of jurisdiction over non-Indian citizens of the United States would belie the tribes’ forfeiture of full sovereignty in return for the protection of the United States.” . . . By accepting the protection of the United States, Indian tribes did not relinquish their inherent sovereign powers of criminal jurisdiction over non-Indians who were not citizens of the United States, such as Torres. . . .

Therefore, we hold that Oliphant does not control the Torres appeal. Oliphant concerns Indian tribal court jurisdiction of criminal cases against non-Indian citizens of the United States. Torres concerns Indian tribal court jurisdiction of criminal cases against non-Indian aliens of the United States.

We hold that the sovereign power of inherent jurisdiction of the Eastern Band of Cherokee Indians to try and punish non-Indian aliens of the United States has not been expressly terminated by Treaty, Act of Congress, or specifically prohibited by a binding decision of the Supreme Court of the United States or the United States Court of Appeals for the Fourth Circuit. . . .

After the arrival of non-Indians to what is now the United States of America and before the existence of the United States of America, the Cherokee Indians exercised inherent jurisdiction over all non-Indians found within Cherokee Country. Following the formation of the United States of America, the Cherokee Nation entered into treaties with the United States over the years recognizing its relation with the United States as a “dependant sovereign nation,” and the federal government assumed its fiduciary obligations for the Cherokees. As demonstrated previously in this opinion, this relationship resulted in the Cherokees giving up criminal jurisdiction over non-Indian
citizens of the United States as being inconsistent with the status of the Cherokees as a dependant sovereign nation.

Not so, as to non-Indian aliens of the United States. In order to govern itself, manage its own affairs and safeguard its people as well as visitors (including citizens of the United States and aliens) to Cherokee Country, criminal jurisdiction over non-Indians aliens is an exercise of the inherent power of the Cherokee Nation, and is essential.

Torres, and all aliens who violate criminal laws within the United States, will be subjected to a strange court, under strange laws, in a strange land, whether the court is federal, state or tribal. The Cherokee Court provided Torres with all the protection and assistance that he would have received in federal or state court, including appointment of counsel, due process, speedy trial, bond and right of appeal. In addition, after defendant exhausts all of his remedies in the Cherokee Court, he may petition the United States District Court for a writ of habeas corpus and federal appellate review. So, Torres, or any alien, is not prejudiced by receiving a trial in tribal court. See 25 U.S.C. 1301 et seq. (1968). . . .

The facts of this case demonstrate the necessity of preserving the criminal jurisdiction of the Eastern Band of Cherokee Indians over non-Indian aliens of the United States in order to protect the safety, health, economic development, liberty and the general welfare of the Eastern Band of Cherokee Indians and all other people who live, work or visit on Tribal lands. The records of the Cherokee Court disclose that aliens of the United States are seeking and receiving the protection of the Cherokee Court in criminal cases arising on the Qualla Boundary against enrolled members of the Eastern Band of Cherokee Indians. To allow criminal jurisdiction when an alien is the victim and deny jurisdiction when an alien is the perpetrator, would indeed be inconsistent with the status of the Eastern Band of Cherokee Indians as a dependant sovereign nation. . . .

Further, the Court’s holding, and the federal policy of self-determination of Indian tribes, is consistent with and supported by established norms of customary international law. See . . . International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); . . . [Note:] International Law as an Interpretive Force in Federal Indian Law, 116 HARVARD LAW REV. 1751, 1762 (2003); [Curtis G. Berkey,] International Law and Domestic Courts: Enhancing Self-Determination for Indigenous People, 5 HARVARD HUMAN RIGHTS J. 65, 68 (1992).

This ruling is also supported by the traditions, customs and culture of the Eastern Band of Cherokee Indians.

The order of the Cherokee Court denying defendant/appellant’s motion to dismiss is affirmed, and this case is remanded to the Cherokee Court.

[Concurring opinion of PHILO, C.J., omitted.]

NOTE

As is well known to students of federal Indian law, the United States Supreme Court held in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191
(1978), that Indian tribes do not have inherent authority to prosecute "non-Indians." Torres would seem to run counter to that holding, but the reasoning in Oliphant, for a variety of reasons, may be suspect.

One of the key findings of the Oliphant Court was that Indian tribes had never exercised criminal jurisdiction over non-Indians. Cf. id. at 197 ("From the earliest treaties with these tribes, it was apparently assumed that the tribes did not have criminal jurisdiction over non-Indians absent a congressional statute or treaty provision to that effect."). Recent scholarship by an Eastern Band Cherokee judge and scholar belies that assumption:

While Georgia sought to exercise jurisdiction over Cherokees, one case documents the Cherokee Nation's judicial branch of government exercising criminal jurisdiction over a white citizen of Georgia.

On September 19, 1829, Jesse Stancell, a "white man," was arrested within the Cherokee Nation at Elejay and charged with horse stealing. Stancell was detained "in close custody for the space of thirty hours" during which time he was tried by a jury. George Saunders, who the Court Minute Book reveals had previously served as Foreman of Cherokee Supreme Court juries, served in the same capacity on Stancell's jury. Stancell was sentenced "to receive fifty stripes on the bare back, which was fifty less than what [was] common . . . for such offence." His captors "stripped [him], tied [him] up to a tree" and executed the sentence upon him. Saunders averred that "[w]e acted agreeably to the laws of our country in punishing the man."

Crossing back into Georgia following this indignity, Stancell immediately made his way to the chambers of the Honorable Augustin S. Clayton, "Judge of the Supreme Courts of the western Circuit of" the State of Georgia and judicial nemesis of the Cherokees. Stancell's affidavit before Judge Clayton omitted the stolen horse and his jury trial. The affidavit characterized him not as a thief, but as a victim "to the great effusion of his blood, the laceration of his back and sides, leaving deep wounds, gashes and bruises on the same. . . ."

Judge Clayton issued criminal process for the arrest of Saunders, who reported to the Phoenix as follows:

"[T]he officers of that state sent armed men to take all the Indians that were concerned in whipping him. I understood that they were on their way, and went to the Long Swamp to meet them. They met me there. I there gave them my bond and security for my appearance at court at Gainsville in Hall County."

The case continued to simmer for the next year. In his Annual Message to the people on October 16, 1830, Principal Chief John Ross commented on "the case of Judge Sanders for punishing a whiteman under the laws of the nation, for the crime of horse stealing;" as part of a litany of complaints against the Georgia Judiciary in general and Judge Clayton in particular, Georgia responded in part by passing a statute in 1830 which provided in part:

Sec. 3. And be it further enacted by the authority aforesaid. That after the time aforesaid, it shall not be lawful for any person or persons, under colour, or by authority, of the Cherokee tribe, or any of its laws or regulations, to hold any court or tribunal whatever, for the purpose of hearing and determining causes, civil or criminal; or to give any judgment in such causes, or to issue, or cause to issue any process against the person or property of any of said tribe. And all persons offending against the provisions of this section, shall be guilty of a high misdemeanor, and
subject to indictment, and on conviction thereof shall be imprisoned in
the penitentiary at hard labour for the space of four years. . . . [Monroe E.

This example exposes the exercise of criminal jurisdiction over a citizen of
the United States by the Tribal Court. Such action is seen to be in the contin-
umuum of push and pull on the frontier between the States and the Cherokee
Nation, with the Nation seeking a successful mechanism of enforcement of law
in order to maintain stability. In this context, the Nation’s exercise of enforce-
ment machinery is both understandable and legitimate. It also reflected the
actual state of affairs.

J. Matthew Martin, The Nature and Extent of the Exercise of Criminal Jurisdic-
tion by the Cherokee Supreme Court: 1823-1835, 32 N.C. Cent. L. Rev. 27, 48-50
(2009).

Moreover:

As early as June of 1824, Agent McMinn advised the Secretary of War that he
had turned a white man over to the Cherokee Light Horse for criminal pun-
ishment. McMinn did not possess sufficient evidence to bind the defendant,
Daniel Rash, over for trial in Knoxville on charges of accessory to robbery
because two witnesses would not leave the Cherokee Nation and be subjected
to Court order to attend in Knoxville. Stymied, McMinn “replied that Rash
was a proper subject of their laws, and had a right to receive the same penalties
that would be inflicted on one of their own proper for a similar offence. . . .” “The
Marshals then observed that by the laws of the Cherokee Nation he would at
least be whipped, and asked if I would make any objection.” Upon being told
that the Agent “would not, the light horse then agreed, and gave him so well as
I recollect about 39 lashes laid on with a very tender hand as, I understood.”

The significance of this incident should not be underestimated. The Agent
of the Secretary of War of the United States of America specifically transferred
custody of a citizen of the United States to the Cherokee Nation for punish-
ment for a crime committed within the jurisdiction of the Cherokees. The
Supreme Court of the United States has yet to analyze Tribal Court criminal
jurisdiction in conjunction with this evidence from the historical record.

Id. at 47-48.

3. NON-INDIANS—CIVIL OFFENSES

Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty-Three
and 14/100 Dollars ($1,463.14)

Muscogee (Creek) Nation Supreme Court, No. SC 2005-01, 9 Oklahoma Tribal
Court Rep. 83 (April 29, 2005)

Chief Justice Shirley, Vice Chief Justice Oliver, and Justices McNac and
Wiley.

Per Curiam.

[1.] Facts

On June 15, 2004, Russell “Rusty” Miner and his brother Ricky Miner, both
non-Indians, arrived at a gaming facility owned and operated by the Nation on
a parcel of treaty land known as the Mackey site. . . . Russell Miner parked the vehicle in a designated handicapped parking space in front of the gaming facility. Neither of the Miner brothers are handicapped, nor did the vehicle have a handicap permit. After parking the vehicle, the Miner brothers patronized the casino. Testimony revealed that during their stay Ricky Miner went to the vehicle, took illegal drugs, and then returned to the inside of the casino. . . . While on routine patrol, Security Officer Thomas McMillen, an employee of the Creek Nation Casino, observed the vehicle parked in a handicapped space. Noticing that no handicap decal or sticker was prominently displayed, the officer looked through the window of the vehicle for a decal or sticker and observed a white powdery substance lying on the center console. . . .

. . . The officers obtained a white powdery substance on the console and an unzipped leather Day Planner containing $1,463.14 in cash. Russell Miner then told the officers that more drugs were located inside the console and possibly a firearm. The officers also recovered two white pill bottles containing a white crystallized substance.

Laboratory tests confirmed that the white powdery substance from the console and the crystallized substance from the pill bottles [was] 6.8 grams of methamphetamine[,] an illegal drug. 14 MUSCOGEE (CREEK) NAT. CODE ANN. §2-101(1). Russell Miner was issued a civil citation for disorderly conduct pursuant to 22 MUSCOGEE (CREEK) NAT. CODE ANN. §2-101(9) for the possession, use, distribution or intent to distribute a controlled dangerous substance [CDS].

Russell Miner was never arrested or issued any criminal citation. He knew at the time the citation was presented that it was a civil citation. On June 30, 2004, Russell Miner voluntarily appeared before the Muscogee (Creek) Nation District Court for the civil citation of disorderly conduct. He admitted to the violation and voluntarily paid a civil fine of $250.00 and court costs of $84.00.

Civil forfeiture proceedings were initiated pursuant to 22 MUSCOGEE (CREEK) NAT. CODE ANN. §2-102 for the forfeiture of the cash, the vehicle and the drugs found in the vehicle.

[II.] Jurisdiction

1. Regulatory Authority over Tribal Treaty Land

The conduct giving rise to this cause of action occurred on a parcel of tribal treaty land known as the Mackey Site. The Nation is the sole owner of the land and therefore possesses the right to exclude any and all individuals.

As a matter of tribal law, all conduct occurring on the Mackey site is subject to the laws of the Nation regardless of the status of the parties. The Mackey site is under the jurisdiction of the Nation because: (1) the land is located within the political and territorial boundaries of the Nation; and (2) the land is owned by the Nation. 27 MUSCOGEE (CREEK) NAT. CODE ANN. §1-102(A) (territorial jurisdiction).

The Courts of this Nation exercise general civil jurisdiction over all civil actions arising under the Constitution, laws or treaties which arise within the Nations’ Indian country, regardless of the Indian or non-Indian status of the parties. 27 MUSCOGEE (CREEK) NAT. CODE ANN. §1-102(B) (civil jurisdiction). . . .

We hold that as a matter of tribal law and consistent with federal law, the Nation has exclusive regulatory jurisdiction over the land where Appellant’s conduct occurred.
2. Regulatory and Adjudicatory Authority over All Persons

The Appellant argues that the Nation lacks jurisdiction over his conduct, regardless of the status of land, because he is a non-Indian. . . .

Appellant was issued a civil citation pursuant under Title 22 of the Muscogee (Creek) Nation Code, which applies to all persons, regardless of status. Title 22 governs Health and Safety, and includes civil infractions such as traffic violations and public safety concerns such as possession of illegal drugs. Civil fines are limited under Title 22 to $250.00. . . .

In addition, we find the United States’ Supreme Court decision in Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), as most analogous to this case. Although that case dealt with tribal powers of taxation, the Supreme Court noted that tribes may exercise a broad range of civil jurisdiction over non-Indians on reservations, particularly when the tribe has a significant interest in the non-Indians activities. Id. at 152. In Colville, the fact that the non-Indians were coming onto the reservation to purchase cigarettes was an important factor. Non-Indians will be subject to tribal regulatory authority when they voluntarily choose to go onto tribal land and do business with the tribe. Non-Indians who choose to purchase products, engage in commercial activities, or pay for entertainment inside Indian country place themselves within the regulatory reach of the Nation.

The Nation has a significant interest in the activities by any and all persons who enter the Nation’s Indian country. The presence of illegal drugs and the need to rid the community of the drugs is of the utmost significance to the Nation, just as it is to all communities and all sovereigns.

We hold that as a matter of tribal law[,] jurisdiction was proper in this case based on the laws of the Muscogee (Creek) Nation alone. The Nation has exclusive jurisdiction to regulate the conduct of all persons on tribal land, particularly those that voluntarily come on to tribal land for the purpose of patronizing tribal businesses. . . .

. . . There should be no question that the presence of illegal drugs on a tribe’s reservation is a threat to the health and welfare of the tribe. Illegal drugs are a threat to the health and welfare of all persons. Russell Miner possessed 6.8 grams of methamphetamine, an amount well beyond that considered for personal consumption. Also, the record reflects that Ricky Miner entered the vehicle and actually used the drugs on tribal property. . . . Most importantly, the Appellant’s attorney, during oral argument, conceded that drug possession and/or drug use would directly affect the health and welfare of the Muscogee (Creek) Nation. . . .

The state also lacks jurisdiction [over] the criminal conduct inside the Nation’s Indian country. Because the Nation does not have a cross-deputization agreement with Tulsa County, Oklahoma, the Nation would have no means of addressing Appellant’s conduct through the assistance of another jurisdiction.

It is not clear whether the federal government would have criminal jurisdiction over this activity. This is not federal land and it is not land held in trust by the federal government. The General Crimes Act, which provides federal jurisdiction in criminal prosecutions over inter-racial crimes in Indian country, may not apply because possession of drugs would be considered a victimless crime.
There is simply no jurisdiction besides the Nation’s that can adequately deal with drug traffic on tribal lands. The only means in which the Nation may reduce the amount of drugs brought onto tribal lands by non-Indians is through the limited provisions of the Nation’s civil code. It is imperative that the Nation possess certain regulatory authority over all persons entering the Nation’s land and business enterprises, as this case reflects.

3. Civil Forfeiture Proceedings

Although the civil citation for disorderly conduct and the forfeiture proceedings in this action are governed by the same chapter of Title 22, Public Safety, Appellant challenges the right of Nation to forfeit his vehicle, the cash found inside, and the illegal drugs.

As noted above, there are criminal sanctions in the Nation’s code for the same conduct, but Appellant is exempt from the criminal sanctions because the Criminal Code only applies to Indians. An Indian committing the same infraction could be tried criminally and also subjected to civil forfeiture proceedings. The forfeiture taking place is an in rem civil action against property used to transport or store drugs on tribal property. The forfeiture proceedings are not individual criminal penalties.

We therefore hold, based on the foregoing reasons, that the Nation possesses the authority to regulate public safety through civil laws that restrict the possession, use or distribution of illegal drugs. We further hold that the Nation’s courts possess civil adjudicatory jurisdiction over forfeiture proceedings including the forfeiture of (1) controlled dangerous substances; (2) vehicles used to transport or conceal controlled dangerous substances; and (3) monies and currency found in close proximity of a forfeitable substance.

NOTES

1. The Tenth Circuit affirmed, in a roundabout way, the decision of the Muscogee (Creek) Nation Supreme Court. Russell Miner sued in federal court seeking the return of his Hummer, but the court held that the Muscogee (Creek) Nation was immune from suit. See Miner Elec., Inc. v. Muscogee (Creek) Nation, 505 F.3d 1007 (10th Cir. 2007).
2. Several other tribes have begun to enforce tribal laws against non-Indians, using civil penalties such as fines and forfeiture, and judicial tools, such as civil contempt. See generally Carrie E. Garrow & Sarah Deer, Tribal Criminal Law and Procedure 97-103 (2004).

4. TERRITORIAL JURISDICTION

Navajo Nation v. Milosevich

District Court of the Navajo Nation Judicial District of Crownpoint, New Mexico, No. CP-TCV-154-90, 6 Navajo Rep. 542 (August 21, 1990)

The opinion of the court was delivered by: Judge Loretta Morris presiding.

This matter having come before the court on a civil traffic complaint and the court being notified that it may not have jurisdiction; this
court now addresses this matter and enters its findings and orders as follows:

1. Defendant was cited by a police officer of the Navajo Nation on January 2, 1990, for exceeding posted speed restriction and going 67 miles per hour in a 55 miles per hour speeding zone;
2. Defendant was driving south of Gallup, New Mexico, on New Mexico State Road 602;
3. Defendant signed the traffic complaint stating that he acknowledges the receipt of the traffic citation and that he will appear in court on or before January 22, 1990. Defendant never appeared in court; . . .

Conclusions of Law

1. This court has jurisdiction pursuant to the Navajo Nation Motor Vehicle Code, amended in 1988, which states at section 100 that this court shall have exclusive original jurisdiction over all civil traffic infractions under Title 14 committed within the territorial jurisdiction. The jurisdiction conferred upon this court with respect to traffic infractions is civil jurisdiction. Civil jurisdiction is also conferred upon this court by 7 N.T.C. section 253(2) (1985 Supp.).
2. The territorial jurisdiction of this court extends to Navajo Indian Country and includes all lands within the exterior boundary of the Navajo Indian Reservation, Eastern Navajo Agency, and all lands within the limits of dependent Navajo communities, Navajo Indian allotments, and all other lands held in trust for, owned by, or leased by the United States to the Navajo Tribe or any Band of Navajo Indians. 7 N.T.C. section 254 (1985 Supp.). . . .
4. By bifurcating the code on traffic violations into criminal and civil categories, the Navajo Tribal Council, as the legislative body of the Navajo Nation, intended to protect all highway travellers and the public within its jurisdiction by incarcerating some traffic violators and by causing some to pay fines only, without any incarceration.
5. This court takes notice that many highway travellers, Indians and non-Indians, share and use the major highways within the Navajo Nation. . . .

Order

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that this court has jurisdiction over a person, whether Indian or non-Indian, in traffic civil infraction cases. If the defendant wishes to further contest the jurisdiction of this court, he shall do so by filing the appropriate motions and appear in court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the default of the defendant is hereby entered in the amount of $61.50 and the clerk shall register said default.

NOTES

1. In People of the Little River Band of Ottawa Indians v. Champagne, 35 Indian L. Rep. 6004 (Little River Band of Ottawa Indians Court of Appeals 2007),* the

*Disclosure: The author participated in this matter as an appellate justice and wrote the opinion.
court accepted jurisdiction over a criminal act that has seemingly occurred off-reservation—attempted embezzlement—by a sitting tribal justice:

The Constitution of the Little River Band of Ottawa Indians provides that “[t]he territory of the Little River Band of Ottawa Indians shall encompass all lands which are now or hereinafter owned or reserved for the Tribe . . . and all lands which are now or at a later date owned by the Tribe or held in trust for the Tribe or any member of the Tribe by the United States of America.” Const. art. I, §1. . . . In other words, this Court has jurisdiction over all crimes committed on both reservation lands and trust lands of the Little River Band. Such lands include the lands upon which the Little River Band’s governmental and commercial entities rest.

The Constitution provides that the Band must exercise jurisdiction over the Band’s territory, subject to three limitations. Specifically, the Constitution provides that “[t]he Tribe’s jurisdiction over its members and territory shall be exercised to the fullest extent consistent with this Constitution, the sovereign powers of the Tribe, and federal law.” Const. art. I, §2. As to the first limitation, the Constitution mandates that this Court take jurisdiction over criminal matters arising within the territory of the Band that involve tribal members. The Constitution provides that this Court must “adjudicate all . . . criminal matters arising within the jurisdiction of the Tribe or to which the Tribe or an enrolled member of the Tribe is a party.” Const. art. VI, §8(a)(1). See also Tribal Court Ordinance §4.01, Ordinance #97-300-01 (Aug. 4, 1997). [T]he locus of the crime was the territory of the Little River Band, not the accident location or Justice Champagne’s residence. . . .

As to the third limitation, federal law, nothing in federal law prohibits the prosecution of Justice Champagne for this crime. . . . Federal law has long recognized the rights and authority of federally recognized Indian tribes to exercise criminal jurisdiction over American Indians for crimes committed within Indian Country. . . .

In his pre-trial motion, Justice Champagne argued that the State of Michigan should have exclusive jurisdiction in this matter. At oral argument, Justice Champagne asserted that the federal government should have exclusive jurisdiction. Justice Champagne is incorrect on both counts. As Judge Quick pointed out:

Defendant is a member of the Tribe. The allegation against Defendant is that he engaged in criminal conduct against the Tribe. To assume a sovereign other than the Little River Band of Ottawa Indians has jurisdiction over this matter would be tantamount to determining that the Tribe has no power to govern its own affairs. Certainly, the Tribe’s right of governance is unquestionable. The Little River Band of Ottawa Indians, through its inherent power to rule itself, does have jurisdiction over this matter.

Champagne I, supra, at 6. Regardless of whether either the State of Michigan or the United States has jurisdiction over this matter,¹ this Court is

¹. It is unlikely either the State of Michigan or the United States would exercise jurisdiction over this matter. Judge Quick noted that Michigan state law requires “that a criminal matter that involves fraudulent misrepresentations must be tried where the victim of the crime resides, and not where the defendant made the misrepresentations.” Champagne I, supra, at 6 (citing Schiff Co. v. Perk Drug Stores, 270 N.W. 738 (Mich. 1936)). See also Mich. Comp. L. Ann. §§762.2-762.3 (noting
obligated by the Constitution of the Little River Band and by the ordinances of the Tribal Council to assert jurisdiction.

Id. at 6005-06.

2. In People of the Little River Band of Ottawa Indians v. Kelsey, 2009 WL 3262773 (Little River Band of Ottawa Indians Court of Appeals 2009), the court affirmed the conviction of a tribal member for sexual assault at the tribal community center, located on fee lands owned by the tribe. The court reasoned:

It is common knowledge that the Tribal Community Center has been the center of Tribal community activities ever since it was purchased by the Tribe many years ago. In fact, this very Court conducted several hearings in those facilities when the Tribal courts were first established and it is where the Tribal court offices were located for many years. Thus, it is imperative that judicial notice be taken of the tribal nature of all the activities that have occurred at the Community Center over many years now. In addition, the Center is a community gathering point to host varied and numerous tribal meetings, to serve community meals and to provide tribal office space for the conduct of the business of a tribal sovereign.

Criminal law simply put is the mere imposition of standards of behavior by defining that behavior which is unacceptable to the society, i.e. community, of people. It is clear to this Court that the Tribe’s standards of behavior ought to apply to the behavior of Tribal members and other Indians in the Tribal Community Center. The general welfare of the Tribe depends upon individuals deferring from behavior that offends community standards. The interests of the Tribe are very strong here. This case involves a tribal member in an elected position acting as an agent of the Tribe at a Tribal activity who committed a crime against a Tribal employee in a public setting openly visible to other employees and Tribal members who were present. It also involves a Tribal Court finding that Defendant exercised political influence affecting the victim and the Tribe’s welfare.

Nonetheless, the Court must consider whether the Tribe itself has imposed a limitation on the exercise of its inherent authority. Thus, we begin an examination of tribal law. Article I of the Tribal Constitution defines the “territory” of the Little River Band of Ottawa Indians as “. . . all lands which are now or hereinafter owned by or reserved for the Tribe . . .” (bold added for emphasis by this Court). See The Constitution of the Little River Band of Ottawa Indians, Article I, Sec. 1. In fact, the provision includes a mandate that such lands “shall” be included in the definition. A constitutional mandate is a mandate of the people of the Band because the Tribal Constitution, as the organic governing document of the Tribe, is their collective consent to be governed and it provides their framework for government. The design is mandated.

Section 2 of that same Article requires that “[t]he jurisdiction over its members and territory shall be exercised to the fullest extent consistent with this Constitution, the sovereign powers of the Tribe, and federal law.”
(Bold added again for emphasis by this Court.) This Court recognizes that tribal jurisdiction is larger than territory because some tribal authority extends beyond its land, e.g. tribal membership and self-regulation of tribal treaty rights within treaty-ceded areas. The drafters of the Tribal Constitution wisely recognized such.


The court then held that tribal ordinances failing to recognize the tribal constitution’s broad assertion of territorial authority were themselves unconstitutional. See id. at *2-3.

C. SUBSTANTIVE CRIMINAL LAW

Many Indian nations do not create their own criminal codes from scratch. Many tribes have adapted law and order codes imposed on them by the Bureau of Indian Affairs, and many others have adopted the criminal codes of the state in which the tribe is located. These codes often are called “borrowed” or “transplanted” law. Still other Indian nations have adopted indigenous criminal codes based on specific criminal activities unique to Indian country. Often, these criminal codes involve treaty hunting or fishing rights, or another activity solely related to on-reservation activity.

1. BORROWED CRIMINAL CODES

PEOPLE OF THE LITTLE RIVER BAND OF OTTAWA INDIANS V. CHAMPAGNE*


Before EDMONDSON, FLETCHER, and KRAUS, Justices

FLETCHER, J.

I. Introduction

There are many trickster tales told by the Anishinaabek involving the god-like character Nanabozho. One story relevant to the present matter is a story that is sometimes referred to as “The Duck Dinner.” See, e.g., JOHN BORROWS, RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW 47-49 (2002); Charles Kawbawgam, Nanabožho in a Time of Famine, in OJIBWA NARRATIVES OF CHARLES AND CHARLOTTE KAWBAWGAM AND JACQUES LEPIQUE, 1893-1895, at 33 (Arthur P. Bourgeois ed., 1994); Beatrice Blackwood, Tales of the Chippewa Indians, 40 FOLKLORE 315, 337-38 (1929). There are many, many versions of this story, but in most versions, Nanabozho is hungry, as usual. After a series of failures in convincing (tricking) the woodpecker and muskrat spirits into being meals, Nanabozho convinces (tricks) several ducks and kills them by decapitating them. He eats his fill, saves the rest for later, and takes a nap. He orders his

*Disclosure: The author participated in this matter as an appellate justice and wrote the opinion.
buttocks to wake him if anyone comes along threatening to steal the rest of his duck dinner. During the night, men approach. Nanabozho’s buttocks warn him twice: “Wake up, Nanabozho. Men are coming.” Kawbawgam, supra, at 35. Nanabozho ignores his buttocks and continues to sleep. When he awakens to find the remainder of his food stolen, he is angry. But he does not blame himself. Instead, he builds up his fire and burns his buttocks as punishment for their failure to warn him. To some extent, the trick has come back to haunt Nanabozho—and in the end, with his short-sightedness, he burns his own body.

The relevance of this timeless story to the present matter is apparent. The trial court, per Judge Brenda Jones Quick, tried and convicted the defendant and appellant, Hon. Ryan L. Champagne, a tribal member, an appellate justice, and a member of this Court, of the crime of attempted fraud. Justice Champagne’s primary job during the relevant period in this case was with the Little River Band of Ottawa Indians. Part of his job responsibilities included leaving the tribal place of business in his personal vehicle to visit clients. While on one of these trips, Justice Champagne took a personal detour and was involved in an accident. The Band and later the trial judge concluded that his claim for reimbursement from the Band was fraudulent. Judge Quick found that Justice Champagne “attempted to obtain money by seeking reimbursement from the Tribe for the loss of his vehicle by intentionally making a false assertion that he was on his way to a client’s home at the time of the accident.” People v. Champagne, Opinion and Judgment at 6, No. 06-131-TM (Little River Band Tribal Court, Dec. 1, 2006) (Champagne III). Justice Champagne was neither heading toward the tribal offices nor toward a client’s home.

Like Nanabozho, Justice Champagne perpetrated a trick upon the Little River Ottawa community—a trick that has come back to haunt him. It would seem to be a small thing involving a relatively small sum of money, but because the Little River Ottawa people have designated this particular “trick” a criminal act, Justice Champagne has burned himself.

Among the many legal arguments made before this Court at oral argument that will be addressed later in this Opinion and Order, Justice Champagne argues that the tribal customs and traditions of the Ottawa people do not recognize the crime of “attempt.” Justice Champagne further appears to argue more generally that the Little River Band statute adopting relevant Michigan state criminal laws is inconsistent with Anishinaabek traditional tribal law and therefore this Court should not apply it to him. Cf. LaPorte v. Fletcher, No. 04142AP, at 9-10 (Little River Band Tribal Court of Appeals 2006) (Champagne, J.) (“It is the custom of the Little River Band of Ottawa Indians to believe that society must be mended to make whole again.”). These are laudable and compelling arguments relating to the seeming contradiction between tribal goals to develop a modern and sophisticated legal system based on Anglo-American legal models while attempting to preserve the cultural distinctiveness of Ottawa culture through the development of tribal law and the preservation of tribal customs and traditions. See generally Michael D. Petoskey, Tribal Courts, 67 MICHIGAN BAR JOURNAL, May 1988, at 366, 366-69; Frank Pommersheim, Braid of Feathers: American Indian Law and Contemporary Tribal Life 66-67 (1995). As such, we take these arguments seriously. In other factual and legal
circumstances, we might be compelled to consider such an argument as dispositive, but this matter does not oblige us to question current tribal law. As Justice Champagne all but admitted at trial and at oral argument, he attempted to procure money that was not owed him by the Little River Band for his own purposes. It is not obvious to this Court that Justice Champagne’s failure in his attempt should excuse him from liability. More importantly, Justice Champagne does not and cannot identify an Ottawa custom or tradition that would excuse him for his actions. In fact, it would be a sad day for this community to acknowledge that an action reflecting an intention of an individual to fraudulently procure money from the Band is excused because the word “attempt” does not exist in Anishinaabemowin, as Justice Champagne alleged at oral argument.

As the remainder of this Opinion and Order shows, we have no choice but to AFFIRM the judgment below...
enacted specific laws, it could have done away with Ordinance #97-300-01, Section 8.02. This, it did not do. There, the Ordinance is binding on Defendant.” Champagne I, supra, at 2. Regardless, whether or not the Tribal Council’s decision to adopt state law was wise is irrelevant[,] the statutes apply to Justice Champagne as a member of the Band. We are bound to apply the law of the Little River Band. See Tribal Court Ordinance §8.01, Ordinance #97-300-01 (Aug. 4, 1997).

At oral argument, Justice Champagne referred this Court to his separate opinion in our 2006 decision in LaPorte v. Fletcher, No. 04-142-AP (Little River Band Tribal Court of Appeals 2006) (Champagne, J.). Justice Champagne represented the opinion to mean that the tribal courts should refrain from applying state law, especially where it is inconsistent with tribal customs and traditions. That opinion, the reasoning of which both of the other justices deciding that matter explicitly rejected, has no precedential value to this Court. Moreover, the subject of the separate opinion—whether the losing party to a closely contested civil suit should receive an award of attorney fees—is all but irrelevant to this matter. Finally, the separate opinion—arguing on a general level that tribal law should be used to bring the parties together to make the parties whole—tends to support a view that does not favor Justice Champagne’s position in this matter. As noted in the introduction to this opinion, it does no justice to the tribal community to excuse the actions of a presiding appellate justice in attempting (and failing) to defraud the Little River Band.

F. Challenges to the Trial Court’s Findings of Fact

Justice Champagne offers no argument in any briefs filed before this Court that the findings of fact made by Judge Quick at trial were clearly erroneous. At oral argument, however, Justice Champagne argues that the Little River Band made an admission on an insurance form that he was, in fact, on company time when he was involved in the accident. Justice Champagne further asserts that his accident was caused by his sleepiness, which in turn derived from his “sleep apnea” condition. We are reluctant to address these arguments, given that the tribal prosecutor could not have prepared a response to these arguments in anticipation of oral argument as they were not briefed. But given that these arguments amount to an attempt to offer additional or supplementary testimony to that which was given at trial, we can dispose of these arguments easily.

In short, Justice Champagne’s attempt to reargue the question of fault and causation is fundamentally irrelevant. The trial court did not rely upon the pre-trial statements or the trial testimony about who was at fault in the accident. Judge Quick wrote, “I believe the prosecution proved Defendant lied about his responsibility for causing the accident; however, I gave this fact no weight in determining whether or not Defendant was guilty of the charges against him.” Champagne III, supra, at 3 (emphasis added). Instead, the trial court relied upon the fact that Justice Champagne misrepresented to his employer about his destination to hold that he was guilty of attempted fraud. See id. at 3-6. Judge Quick concluded:

Cumulatively, I found the testimony of these three witnesses and the accompanying exhibits to overwhelmingly prove, beyond any reasonable doubt, that
Defendant was traveling west through the intersection at the time he broad-sided Ms. Joseph’s vehicle, and was not making a wide right turn onto Maple as he claimed. . . .

Since I was convinced, beyond a reasonable doubt, that Defendant was heading due west at the time of the accident rather than attempting to turn north as he claimed, and that traveling in that direction actually took him away from the home where he claimed he was headed, I found that he was not being truthful when he made the assertion that he was going to a client’s home at the time of the accident.

Id. at 5-6 (emphasis in original). As noted by the tribal prosecutor at oral argument and by Judge Quick at trial, Justice Champagne’s claims about “sleep apnea” do not support his defense to the claim that he attempted to deceive his employer about his destination at the time of the accident. See id. at 6. In short, nothing compels this Court to find that Judge Quick’s findings of fact were clearly erroneous.

**Conclusion**

This Court is aware of the gravity of a criminal case involving a sitting appellate justice as a defendant. It is a sad day for the Little River Band Ottawa community and to this Court to be forced to sit in judgment of one of its own, but we are obligated to do so. At oral argument, Justice Champagne raised the possibility that his prosecution was “political.” We have no doubt that Justice Champagne’s assertion is true, but not in the way he means it. As one of the leaders of the community—ogemuk—Justice Champagne was held—and should be held—to a higher standard of conduct. See generally Const. art. VI, §2(a); art. VI, §§6(b)(1)-(2). As to Justice Champagne’s claim that he was singled out by other leaders of this community, we have no competence or authority to make judgments as to the sound discretion of the tribal prosecutor to initiate a criminal proceeding.

For the above reasons, we AFFIRM the judgment of the trial court.

**NOTES**

1. Tribal courts routinely borrow federal and state common law to fill in gaps in tribal criminal law, especially in the context of the rights contained in the Indian Civil Rights Act. In *Teeman v. Burns Paiute Indian Tribe*, 4 NICS App. 185 (Burns Paiute Tribal Court of Appeals 1997), the court borrowed state and federal law to articulate the burden of proof in a case in which the defendant asserted self-defense as a defense to the prosecution:

   Most Indian courts recognize a common law right to assert self-defense. Most states recognize self-defense in specific statutory provisions. But in federal law, the basis for an affirmative defense argument by a defendant is found in the proof issue of the “guilty state of mind” (*mens rea*) and in the due process provision of the Fifth Amendment to the United States Constitution. *Patterson v. U.S.*, 432 U.S. 197 (1977). . . . The majority of states, including Oregon, have opted for a requirement that the burden of production by the defendant must meet the “preponderance of the evidence” test.
It is now well settled, however, that the government may shift to the defendant the burden of going forward with evidence of self-defense. That is not a due process violation. . . .

The question of a deprivation of due process arises when a court, as here, places upon an accused the burden of proving that the law will permit the introduction of evidence of an exculpatory nature. The Burns Paiute Tribal Laws are specific in placing responsibility on the trial court judge to rule upon the questions of law presented at the trial (Chapter II, Section L. [1]). The tribal court has responsibility under tribal law to have legal resource materials available for that purpose. . . . It is the responsibility of the prosecution to prove the crime beyond a reasonable doubt as a due process right. . . .

It is not the responsibility of the defendant, however, to prove that she did not commit the crime.

_Id._ at 189-91.

2. In _Stepetin v. Nisqually Indian Community_, 2 NICS App. 224 (Nisqually Tribal Court of Appeals 1993), a deeply divided appellate court reversed a conviction for reckless driving on grounds that the tribal code adopting state law was void for vagueness:

The Nisqually Indian Community has enacted a provision which states as follows:

> Where state law . . . does not conflict with the Tribal Code, the Tribal Court may resort to and enforce any state statute within tribal jurisdiction.

. . . Therefore, the ultimate issue addressed by the vagueness argument is whether this provision of Nisqually law was adequate to give fair notice to Mr. Stepetin that his conduct was prohibited by the Nisqually Tribal Code. Mr. Stepetin was alleged to have driven a truck at a high rate of speed along a gravel road on the Nisqually Reservation. Tribal members were in the vicinity and though no one was injured, a dog was struck and killed.

Any reasonable person should know that this type of conduct is prohibited in any community. However, we agree with defendant’s counsel when he stated the issue as not whether Mr. Stepetin knew this conduct was wrong, but whether he knew it was a crime. The Nisqually incorporation statute does not advise Mr. Stepetin, or any other Nisqually Tribal member, that driving a motor vehicle in this manner was a crime. Therefore, we find that the statute is impermissibly vague.

We are aware that on the Nisqually Reservation word may travel quickly throughout the Reservation. However, we do not believe that this is, or should be, a substitute for proper enactment, enforcement, and notice of ordinances by the Community. . . .

_Id._ at 228-29.

In dissent, Chief Justice Rosemary Irvin wrote:

The majority, paraphrasing the defendant’s attorney, states the issue of adequate notice as “not whether Mr. Stepetin knew this conduct was wrong, but whether he knew it was a crime.” _Majority Opinion_ at 8 [2 NICS App. at 229]. But traditionally, for a member of what is now the Nisqually Indian Community, there was no difference between wrongful conduct and that which was societally sanctioned. Interview with Barbara Lane, Ph.D., anthropologist
specializing in Northwest Native American customs and traditions (Jan. 7, 1993). To say that the defendant knew that he had violated a community standard but that he did not know there was a written statute making this violation illegal is to make a distinction without a difference. . . .

In conclusion, Mr. Stepetin’s knowledge of those common social duties imposed by traditional tribal mores constituted adequate notice that his conduct could trigger tribal sanctions.

_id_. at 234-35 (IRVIN, C.J., concurring and dissenting).

2. INDIGENOUS CRIMINAL LAW

**Hoh Indian Tribe v. Hudson**

Hoh River Court of Appeals, No. HOH-CrF-1/93-007, 3 NICS App. 304 (March 25, 1994)

Before: Chief Justice ELBRIDGE COOCHISE, Associate Justice CHARLES HOSTNIK, and Associate Justice JOHN L. ROE.

COOCHISE, Chief Justice: . . .

Facts

The Tribe alleged that on January 18, 1993, Mr. Hudson physically interfered with Steven E. Penn, Jr., who was actively engaged in legal fishing activity when he was hit by Mr. Hudson.

Section 7.6 of the Hoh Indian Tribe Fishing Ordinance . . . states:

It is unlawful to physically interfere, [sic] disturb, or harass a fishermen actively engaged in legal fishing activity on waters within the usual and accustomed fishing areas of the Tribe.

On September 21, 1993, the Defendant was found guilty of Interference With Fishermen in a bench trial. . . .

Discussion

Interference With Fishermen requires the Hoh Tribe to prove beyond a reasonable doubt that (1) the Defendant physically interfered, disturbed, or harassed a fisherman, (2) who was actively engaged in legal fishing activity and, (3) was on waters within the usual and accustomed fishing areas of the Hoh Tribe. . . .

It is a general principle in non-tribal systems of justice that in reviewing the sufficiency of the evidence, “the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” . . .

There is no doubt that the Defendant assaulted Steven Penn. Steven Penn’s testimony, as well as other circumstantial evidence, all pointed to the fact that an assault occurred. However, an essential element of Interference With Fishermen is whether Penn was actively engaged in fishing activity at the time the unlawful interference occurred.
This Court did not find a definition of the phrase “actively engaged” in the Hoh Fishing Ordinance. No evidence was introduced regarding the Hoh Business Committee’s enactment of this section of the ordinance that would explain the intended meaning or goal of the ordinance or what activity would fall within the active engagement of fishing.

A general principle of statutory construction is that effect is to be given to every word. In construing the word “actively” against the background of the facts in this case, the Hoh Tribe argued that Steven and Essau Penn (the other person at the scene of the assault) were at the river and Steven Penn was holding an anchor when he was assaulted. The Hoh Tribe also argued that Penn did not need to be engaged in fishing at the moment he was assaulted. However, this would not give any effect to the word “actively” as an element of the offense charged.

The language of the ordinance indicates that actual fishing activity must be taking place in order to interfere, disturb or harass a fisherman. The Hoh Tribe argued that the ordinance intended to address fights occurring at the river while people were traveling to and from the fishing areas. That intent is not clearly expressed in the language used in the ordinance. Instead, the ordinance contains definite language of “actively engaged in legal fishing activity.”

The trial court’s findings of fact that Steven Penn had a net set in the river, capable of catching fish at the time of the alleged incident, was not supported by the evidence. There was no testimony that Steven Penn had a net set in the river or where the net was located. The drawing submitted into evidence was not introduced to determine Steven Penn’s fishing location but rather the general area where the assault took place. There was no evidence concerning what type of “fishing activity” Penn was actively engaged in at the time of the assault or that he was even engaged in fishing activity.

According to testimony, Mr. Penn was picking up his anchor. His boat was not in the water at the time, but was on the beach. In response to the question “were you fishing on the river . . . when this incident happened?” the victim responded, “Yes.” This is the only evidence that the victim was fishing at the time of the assault. There is no corroborating evidence of the type of fishing activity that Penn was engaged in other than Mr. Penn’s conclusory statement that he was “fishing.” . . .

In addition to proving the fisherman was actively engaged in fishing activity, the Defendant argued that it must also be proven that the fisherman was actively engaged in legal fishing activity at the time of the alleged violation. The Defendant argued that Mr. Penn was with Essau Penn, a non-member, and therefore could not have been legally fishing. Non-tribal members are not authorized fishermen under Section 4.2 of the Hoh Indian Tribe’s General Fishing Ordinance No. 78-9-01.

The Court finds it is unnecessary to address the other elements of Interference With Fisherman. The Hoh Tribe has failed to meet the burden of proving beyond a reasonable doubt that the appellant interfered with Steven Penn while actively engaged in fishing, which is an essential element of the offense charged; therefore, based upon the foregoing discussion,
IT IS HEREBY ORDERED that the trial court is reversed.

NOTE

In *Tulalip Tribes v. Joseph*, 8 NICS App. 47 (Tulalip Tribal Court of Appeals 2008), the court reversed the trial court’s decision to dismiss two counts where the court had already made a determination that sufficient probable cause existed to bring the charges in a tribal fishing case:

While due process and equal protection clauses are usually recognized as applying to individuals’ rights before the court, it is imperative that courts recognize that the Tribe has those same rights to be heard and to present evidence. The prosecutor of the Tribe is representing the membership of the Tribe and the community. That representation is intended [to] reflect the moral compass of the Tribal community by charging those individuals who fail to abide by the laws of the Tribe with criminal sanctions. Once the Tribe has established probable cause to proceed, the court should allow the case to proceed to its conclusion.

In the instant case, the court found probable cause in June to proceed with the case. Absent any motion by the parties, the judge should have allowed the Tribe to present its case against Mr. Joseph. We understand that one directive of §2.1.1 is to eliminate unjustifiable expense and delay, but dismissing cases *sua sponte* is not a practice that should be encouraged in our courts.

On a second review immediately before the trial, the judge asked the prosecutor if the gear was properly registered to James Anderson. When the prosecutor acknowledged that it was properly registered to Mr. Anderson, the judge made a determination that if gear was properly registered to the owner, there could be no violation of this section. At first glance, this appears to be a valid assumption, but a closer reading of the Code section brings the issue into a clearer picture.

Ordinance 51, 7.1, Registration of Gear. All boats and gear used in exercising tribal fishing rights shall be registered in the name of the tribal member actually owning or having an interest in that boat or gear and marked in accordance with the procedures established by this Ordinance and Tribal fishing regulations promulgated hereunder. No gear shall be authorized under this Ordinance for use in exercising tribal fishing unless it is so registered and marked. (Emphasis added.)

Regulation 2007-013, Other Restrictions. (9) It will be unlawful for a crab fisher to remove or pull a crab pot from the water that is not registered by that fisher, without prior permission from their enforcement program. [ . . . ] (11) All commercial pots must be marked with a valid crab pot tag issued by the Tulalip Tribes Enforcement Office. Pot tag numbers are assigned to a given boat. Pots will be transferred and harvested by that boat with the corresponding pot tag number. . . . (14) All subsistence harvesters must possess a subsistence crab fishing permit obtained from the Tulalip Fisheries Office. Subsistence harvesters are allowed 2 pots per permit per boat and a daily limit of 12 crab. (Emphasis added.)

The trial judge looked at only one section of [the] Law and Order Code and then made a decision to dismiss. The prosecutor could look to at least one other resolution to determine if a violation had occurred. It doesn’t appear that the
judge considered this resolution in his decision to dismiss. At trial, the prose-
cutor may have had evidence that showed the appellant violated these sec-
tions. At the very least, he should have had the opportunity to present his
evidence to the Court. If the Court then determined that the sections didn’t
apply or that the prosecutor hadn’t met his burden of proving all the elements
of the crime, a dismissal would have been in order. We find that the judge erred
in not allowing the case to go to trial.

Id. at 48-50.

D. CRIMINAL PROCEDURE

Much of the criminal procedure jurisprudence in American law is based on the
reality that law enforcement officers, prosecutors, and even courts ran roughshod over the rights of criminal defendants throughout American his-
tory. For example, the critically important criminal procedure case Miranda v.
Arizona, 384 U.S. 436 (1966), derived from a recognition that state and federal
law enforcement officers had been trained to coerce confessions from criminal
defendants using a plethora of physical and psychological tactics so abusive as
to render the reliability of the confession highly questionable. See generally
LIVINGSTON HALL & YALE KAMISAR, MODERN CRIMINAL PROCEDURE 101-8 (1965); CHARLES

As some have recognized, Indian nations traditionally did not coerce or
elicit confessions using abusive or threatening tactics. There is no such tradi-
tion. However, being part of an Indian community alone would often compel
Indian persons who had committed acts against the community to confess
those acts before any form of healing could begin. Even today, Indian criminal
suspects confess to their crimes at higher rates than other people, even pre-
supposing that “there is no such thing as the right to be silent.” CARRIE E.

In general, tribal courts apply a higher standard of care to tribal law
enforcement officials, often requiring greater criminal procedure guarantees
to tribal criminal defendants than those they would otherwise receive in state
or federal courts.

1. DUE PROCESS

NELSON V. YUROK TRIBE

Yurok Tribal Court of Appeals, No. 96-006, 5 NICS App. 119 (May 7, 1999)

Before: FRED GABOURIE, Sr., Chief Justice; DOUGLAS W. LUNA, Justice; MICHELLE
DEMMERT, Justice.

I. Introduction

... The tribal court, after a trial de novo, found the Appellant had violated
the Yurok Tribal Fishing Rights Ordinance (YTFRO) and imposed the maximum
fine of $200, which was suspended on condition that Appellant comply with
tribal law for the following year.

III. Factual Background

On Wednesday, September 25, 1996, BIA officer, Tami Fletcher . . . found Appellant in possession of several salmon and cited Appellant pursuant to YTFRO §8(a) for fishing during closure hours pursuant to the Yurok Tribe’s 1996 Harvest Management Plan (Plan). The BIA seized Appellant’s dip-net and salmon, as provided for in the YTFRO.

V. Issues on Appeal

In his Notice of Appeal, Appellant lists several grounds for his appeal from the de novo trial decision. Since the Appellant failed to submit a written brief and failed to appear for the scheduled oral arguments, the grounds for his appeal are based upon his Notice of Appeal and consolidated into two issues:

1) Was the Appellant denied procedural or substantive due process in the de novo trial?
2) Did the Appellant’s conviction violate Article IX of the Yurok Constitution which protects “traditional practices” from infringement by acts of the Yurok Tribal Council?

VI. Discussion

Even though the Appellant failed to do more than file a notice of appeal, he raises an issue worth addressing. That is, in the exercise of its authority, may a tribe regulate tribal members’ exercise of traditional practices regarding their right to fish?

A. Applicable Tribal Law

The laws applicable to Appellant’s appeal are the Yurok Constitution, the YTFRO, the Yurok Tribe’s 1996 Harvest Management Plan, and the tribe’s September 11, 1996, “Advance Notice of In-Season Adjustment.”

The Yurok are a fishing people and the tribe’s Constitution and fishing laws are expressly designed to conserve and restore the severely depleted Klamath River anadromous fishery for current members and future generations. The first paragraph of the Preamble to the Yurok Constitution states:

Our people have always lived on this sacred and wondrous land along the Pacific Coast and inland on the Klamath River, since the Spirit People, Wo-ge’, made things ready for us and the Creator, Ko-won-no-ekc-on Ne-ka-nup-ceo, placed us here. From the beginning, we have followed all the laws of the Creator, which became the whole fabric of our tribal sovereignty. In times past and now Yurok people bless the deep river, the tall redwood trees, the rocks, the mounds, and the trails. We pray for the health of all the animals, and prudently harvest and manage the great salmon runs and herds of deer and elk. We never waste and use every bit of the salmon, deer, elk, sturgeon, eels, seaweed, mussels, candlefish, otters, sea lions, seals, whales, and other ocean and river animals. We also have practiced our stewardship of the land in the prairies and
forests through controlled burns that improve wildlife habitat and enhance the health and growth of the tan oak acorns, hazelnuts, pepperwood nuts, berries, grasses, and bushes, all of which are used and provide materials for baskets, fabrics, and utensils.

The last paragraph of the Preamble expressly provides:

Therefore, in order to exercise the inherent sovereignty of the Yurok Tribe, we adopt this Constitution in order to:

1) Preserve forever the survival of our tribe and protect it from forces which may threaten its existence;
2) Uphold and protect our tribal sovereignty which has existed from time immemorial and which remains undiminished;
3) Reclaim the tribal land base within the Yurok Reservation and enlarge the reservation boundaries to the maximum extent possible within the ancestral lands of our tribe and/or within any compensatory land area;
4) Preserve and promote our culture, language, and religious beliefs and practices, and pass them on to our children, our grandchildren, and to their children and grandchildren, on and on, forever;
5) Provide for the health, education, economy, and social wellbeing of our members and future members;
6) Restore, enhance, and manage the tribal fishery, tribal water rights, tribal forests, and all other natural resources; and
7) Insure peace, harmony, and protection of individual human rights among our members and among others who may come within the jurisdiction of our tribal government.

Article IV, §5 of the Yurok Constitution vests the Yurok Tribal Council with “the legislative power of the Yurok Tribe,” including:

[T]he authority to enact legislation, rules and regulations not inconsistent with this Constitution; to further the objectives of the Yurok Tribe as reflected in the Preamble to this Constitution; administer and regulate affairs, persons and transactions within Tribal Territory; enact civil and criminal laws . . . manage tribal lands and assets.

. . . The YTFRO, as amended June 6, 1996, “was issued by the authority of the Yurok Tribal Council as provided by the Constitution of the Yurok Tribe.” YTFRO §1(a) provides:

The purpose of this ordinance is to protect the fishery resources and therefore, tribal fishing rights by establishing procedures for the conservation of fish stock and exercise of federally reserved fishing rights. This YTFRO is intended to allow fishing opportunity to Yurok tribal members, while at the same time assuring adequate spawning escapement and the attainment of conservation objectives.

. . . In short, on the day in question, Wednesday, September 25, 1996, Appellant was entitled to fish at the mouth of the Klamath with his dip-net before 6:00 a.m. and after 6:00 p.m. Instead the Appellant chose to fish for an unknown number of hours before the 6:00 p.m opening. Appellant was first observed fishing at 4:30 p.m. and was cited at 5:30 p.m.
B. Procedural Due Process and Equal Protection

. . . In the case before us, the Yurok Tribe is a domestic dependent nation within the United States. . . . The Yurok Tribe is entitled to legislate and enforce its own laws.9 . . .

In his Notice of Appeal, Appellant argues that the de novo trial judge was “not a licensed attorney and therefore, not qualified to adjudicate a criminal proceeding as a matter of federal and tribal due process.” Appellant cites no authority for this proposition.

The tribe argues that: (1) it is neither tribal law nor practice to require a tribal judge to be a licensed attorney; (2) federal law has no such requirement; and (3) there is no evidence in the record as to whether the trial judge is or is not a licensed attorney. We agree.

Appellant further argues that the Special Judge was biased due to purported contractual relationships with the tribe. We agree with the tribe that this is a factual, not a legal issue and therefore, is not subject to appeal. Further, there is no evidence in the record to support this accusation and we therefore find the Appellant’s accusation baseless. Even if it were true, it is legally irrelevant given Appellant’s admission of fishing during closure. Finally, we note that the Special Judge gave Appellant the opportunity to make a motion to remove the judge, an opportunity that Appellant declined.

Ironically, the Appellant appeals the use of the Special Judge that was appointed at his request to avoid any appearance of bias. This is the same judge who restored Appellant’s fishing rights and suspended the fine for Appellant’s admitted violation of tribal law. Still not satisfied, Appellant has the temerity to now disavow his prior demands and contend that he should have been tried by the original tribal prosecutor and the original tribal judge, who convicted him in the first trial. His contentions are simply vexatious.

Appellant complains that the tribe “unfairly hired a law firm” to prosecute him. The law firm is the tribe’s general counsel and was appointed to prosecute this case only because Appellant requested a new prosecutor. There is no impropriety, much less a due process violation.

In his Notice of Appeal, Appellant further claims that the “trial judge illegally and arbitrarily increased the fine imposed in the first trial.” It was Appellant who demanded a trial de novo, which by definition erases the prior proceeding and begins a new proceeding from scratch. No tribal law or procedural rule precludes imposition of a higher or lower penalty in the second trial. On retrial the Special Judge suspended the fine, and Appellant will pay nothing if he complies with tribal law for one year. In the meantime, his fishing rights are restored.

Appellant has repeatedly and freely admitted that he was fishing at the time and place he was cited. He has further admitted that he had prior notice and warning that he was fishing in violation of tribal law. On appeal he implies for the first time, but does not directly state, that he may not have had adequate notice of the fishing restrictions due to insufficient publication by the tribe.

To accept Appellant’s notice argument is to ignore his repeated admissions that he had prior notice and had been warned that he was illegally fishing. It is also to ignore his testimony that he knew at least two locations where the notices were posted. At the *de novo* trial, Appellant complained that where the notices are posted in Klamath, the glass cover sometimes fogs over, or the notice may be torn down. The tribe correctly argues that the Appellant certainly knows how to contact the tribal officer or fisheries department in order to confirm current restrictions. Instead, Appellant admits that he takes no interest in, or responsibility for, tribal law: “When I go fishing, I just go fishing.” It is this contention that is at the heart of this case.

Based upon the entire record, we conclude that the Appellant failed to establish a *prima facie* case for a procedural due process violation. Having failed to establish a procedural due process violation, we will nevertheless examine his due process violation claims to determine if there were any substantive due process violations.

### C. Substantive Due Process

The Appellant raises a number of claims regarding the application of the United States Constitution to these tribal court proceedings. The Indian Civil Rights Act (ICRA), 25 U.S.C. §1302(8) applies some but not all of the U.S. Constitution’s Bill of Rights to all persons, including tribal members. The Yurok Constitution specifically incorporates the Indian Civil Rights in its Bill of Rights. [Yurok Const. Art. IX.]

Appellant argues that the tribe was required to appoint him legal counsel at the tribe’s expense. The Indian Civil Rights Act expressly disavows any right to paid counsel; it requires only that the tribe allow the Appellant, at his own expense, to have the assistance of counsel for his defense. [25 U.S.C. §1302(6).] He is not entitled to a defense paid by the tribe. The fact that BIA officials acting on behalf of the tribe issued the citation does not change the fact that this is a tribal court proceeding in which the tribe is acting as an independent sovereign to prosecute a tribal member who violated tribal law. The tribe is not acting as an arm or agency of the United States, and the United States has no jurisdiction over this case. Under these circumstances, the Sixth Amendment of the Constitution simply does not apply. The Yurok Tribe does not have to provide paid legal counsel in a tribal court proceeding involving a tribal member and a fishing ordinance violation within the exterior boundaries of the reservation.

Appellant inexplicably states that the Special Judge prohibited him from “making an oral defense in [his] own behalf at trial.” To the contrary, the transcript shows that Appellant made a spirited defense, and that two witnesses spoke on his behalf. The Special Judge did prevent Appellant from reading verbatim a long, prepared speech about his rights under the U.S. Constitution. The Special Judge properly told him that Indian tribal governments were accountable through the Indian Civil Rights Act of 1968, and that the Constitution did not apply pursuant to *Talton v. Mayes*, [163 U.S. 376 (1896),] but that his written speech, nevertheless, would be included in the record for the trial judge’s review in preparing his decision and order. There is no tribal or federal due process rule that a defendant must be allowed to recite
at trial an irrelevant text. In reaching this conclusion we also note that Yurok Tribal Code, 1-05, Title 5 §5.2 sets forth the obligations as to how the trial is to be conducted. The Special Judge conducted the de novo trial pursuant to this ordinance and also correctly protected the inherent rights of all trial judges to control the proceedings.

Despite his contention to the contrary, Appellant was not compelled to be a witness against himself. He never stated that he declined to testify, and he never asserted any right against self-incrimination. The Special Judge asked Appellant if he was representing himself, and Appellant voluntarily testified on his own behalf. Indeed, he wanted to read a lengthy statement. He cannot now complain that he was compelled to testify, or that once he voluntarily did so, that the Special Judge could not ask him questions.

Appellant complains that he did not have notice of the witnesses against him. The tribe argues that there were no witnesses against him at the trial de novo because he freely admitted that he was fishing during closure hours. There was no need to call the citing officers. Moreover, Appellant had actual and constructive notice of the witnesses against him. Before his first trial, he was given written notice of the three citing officers who would testify against him. He cannot genuinely claim that he did not know who would testify against him at the trial de novo. Even were he entitled to a formal re-notice of the witnesses against him, any lack of such notice is harmless error, as no witness testified against him. Indeed, the trial judge gave Appellant an opportunity to question the citing officer, which Appellant declined to do. We also note that prior to the de novo trial, the Appellant failed to exercise his right to subpoena witnesses.

During the de novo trial the Special Judge correctly noted that the entire United States Constitution does not apply to this proceeding. The Indian Civil Rights Act requires the tribe to apply due process under its tribal laws (25 U.S.C. §1302 (8)), and here the tribe has done so in excess: not only did the tribe order a second trial de novo, despite Appellant’s repeated admissions of fishing during closure and repeated failure to appear, but the tribe granted Appellant’s request for a different prosecutor and a different judge when there was no reason to do so. The only “overt intervention of the Yurok Tribal Executive Branch” was the tribal council’s decision to bend over backwards to accommodate Appellant’s demands.

Finally, Appellant argues that he was “singled out for selective enforcement of the tribal fishing law.” The only evidence on this point is Appellant’s repeated statements at his various court appearances that he is not the only one who violates the tribe’s fishing ordinances. Even if this is true, a claim of selective enforcement requires far more than a showing that others break the law and do not get caught. There was neither selective enforcement nor a substantive due process violation in this case.

D. Constitutional Issue

The second major issue in this case is the Appellant’s claim that the fishing restrictions of the YTFRO and Plan violate the Yurok Constitution’s Article IX protection of “traditional practices,” specifically his supposed right to dip-net at any time and place he wants. He bases this argument on the ground that the
tribal resource conservation laws are irrational and tribal members have an absolute right to those resources. At the de novo trial, Appellant offered his opinion, but no factual or scientific evidence, that the tribe’s resource conservation laws are irrational.

The tribe responded with several arguments. First, it is common knowledge that the salmon fishery of the Klamath River is in severe decline and requires careful management to restore and maintain the fishery for present and future generations. The tribe’s fishing YTFRO and Plan, on their face, demonstrate the tribe’s careful efforts to do so.

Second, the tribe’s efforts are mandated by the Yurok Constitution itself, which dictates that the tribe “restore, enhance, and manage the tribal fishery.” Appellant ignores this mandate, relying instead on Article IX and its protection of traditional practices.

Third, the tribe’s Fishing YTFRO and Plan do not deny Appellant his traditional practices. Appellant is free to dip-net on the days and times prescribed, which are ample to provide him and all tribal fishers food and livelihood. Had he simply waited a couple of hours on the day he was cited, Appellant could have fished lawfully and unhindered for twelve straight hours.

Fourth, it is frivolous to suggest that the constitutional protection of traditional practices strips the tribe of any authority to regulate such practices to preserve a critical resource for generations to come, particularly when such conservation is expressly mandated by the same Constitution. In effect, the conservation regulations assure that tribal fishers will be able to continue their traditional practices for years to come.

Fifth, it is a commonplace of statutory construction that the more specific provision of law controls the less specific. Here, the constitutional fisheries conservation mandate is more specific than the broad protection of traditional practices. Even if some conflict were implied between these two constitutional provisions, they can be harmonized by acknowledging that the specific conservation mandate is regulatory, not prohibitory of traditional practices, and is in fact necessary to assure the health of the fishery so that tribal fishers will have traditional practices to carry on.

Sixth, it is for the tribe, not Appellant as an individual, to determine what is a rational and appropriate fisheries policy. If tribal members disagree with the policies of their elected tribal council and the tribe’s technical fisheries staff, they are for one election away from changing those policies.

Based upon the entire record including the tribe’s Preamble provisions cited earlier, we find the tribe’s argument compelling. The tribe’s exercise of its governmental powers was based upon a legitimate, rational, constitutionally provided mechanism to protect its tribal resources. There was no constitutional violation when the Yurok Tribe exercised its governmental authority to protect its resources by limiting a tribal member’s right to fish in accordance with its ordinance and Harvest Management Plan.

E. Indian Rights

We note the Appellant’s basic argument centers on the concept that his definition of a “traditional practice” for exercising his fishing rights is flawed for a number of reasons. First, as noted above, the Yurok tribal government has
exercised its rights in accordance with federal and tribal law to define the areas and times for fishing, as correctly noted by the Special Judge. YTFRO §8(p), concerning dip-net fishing, provides that “eligible Indians may engage in dip-net fishing or angling at all times on the reservation except when expressly prohibited.”

We also note that the Appellant’s claim of a right to exercise of “traditional practice” to fish any time he wishes violates the notion of rights and obligations between any government and its governed. That is, government relies upon the fundamental foundation that there is no such thing as individual sovereignty. Tribal governments are sovereign domestic dependent nations within the United States; individual tribal members are not. More importantly, tribal governments, in the exercise of power, also rely upon two fundamental rules of traditional Indian law...

In this case, if the Appellant abided by the de novo court’s decision and complied with tribal law for one year, he would restore his honor and bring respect back to his family, clan, and tribe, and he would be living in harmony with nature. In this case, we note that the Yurok Tribe has placed greater emphasis in its Constitution regarding the Second Rule, to live in harmony with nature, over that of traditionally exercising a fishing right.

Finally, we note, even if the Appellant’s claim of a “traditional practice” is wrongly analyzed as a property right, he would still be subject to the tribal government’s restrictions. The great scholar, Felix S. Cohen, noted that when looking at the dependancy of individual rights upon the extent of tribal property:

The individual Indian, claiming a share in tribal assets, is subject to the general rule that he can obtain no greater interest than that possessed by the tribe in whose assets he participates. [Citations omitted.]

Handbook of Federal Indian Law, p. 185 (1942).

In the case at hand, the Appellant has no greater rights than the tribe. The tribe has placed upon itself and its members a traditional obligation of living in harmony with nature.

The judgment of the de novo trial court is hereby affirmed.

Chief Justice GABOURIE and Justice DEMMERT concur.

NOTES

1. Many tribal courts and tribal governments follow a general rule that if the prosecution chooses to pursue incarceration as a possible sentence for a given crime, the defendant is entitled to paid counsel. But if not, then the government is not required to provide paid counsel to indigent defendants. In People v. Champagne, 35 Indian L. Rep. 6004 (Little River Band of Ottawa Indians Court of Appeals 2007),* the court rejected a claim by a tribal member (and appellate justice) that he should be entitled to a jury trial for the crime of attempted embezzlement:

*N:Disclosure: The author participated in this matter as an appellate justice and wrote the opinion.
[T]he tribal prosecutor declined to seek jail time in this matter. . . .

Persons subject to the criminal jurisdiction of the Band and charged with “an offense punishable by imprisonment” have the right to a six-person jury trial in accordance with tribal law. CONST. art. III, §1(j). . . . Assuming without deciding that ICRA applies to the Little River Band, the Constitutional provision here mirrors the provision contained in the Act. See 25 U.S.C. §1302(10). . . . The Tribal Council has determined that where the tribal prosecutor informs the Court and criminal defendants before trial that the People will not seek jail time, no right to a jury trial attaches. See Criminal Procedures Ordinance §8.02, Ordinance #03-300-03 (effective Oct. 10, 2003). We concur in this assessment about the right to a jury trial. See CONST. art. VI, §8(a)(2). As such, no right to a jury trial ever attached in this matter.

Id. at 6006.

2. Many tribal communities have few lawyers available for hire or appointment, due to the demographics, geography, and other factors of Indian country. As such, many non-lawyers participate as “lay advocates” for tribal criminal defendants. In Bullcoming v. Cheyenne and Arapaho Tribes, 9 Okla. Trib. 528 (Cheyenne and Arapaho Tribes Supreme Court 2006), the court held that access to lay advocates is not a fundamental right, but is instead discretionary:

Second, Appellant argues that his due process rights were violated by the denial of his right to counsel and/or a “lay advocate.” Appellant urges that those denials “put [him] at a disadvantage due to his unfamiliarity with the law, procedural requirements and the entire legal process”; that “he did not know how to object to evidence, . . . admit evidence or examine witnesses”; and that he did not know how “to provide an adequate defense for himself.” . . .

In our recitation of the relevant facts above, we noted that the record did not indicate any factual claim of indigency by Appellant, . . . nor does it evidence any claim by him to appointed counsel, cf. CHEY.-ARAP. CRIM. PROC. CODE §102(a)(2). . . . Indeed, Appellant was represented by retained counsel at the early post-complaint stages of the proceedings, was represented by (different) retained counsel at the sentencing hearing, and is also represented by that counsel on appeal. . . . On that record, Appellant has failed to demonstrate any legally-cognizable right-to-counsel denial at all.

But in addition to generally providing criminal defendants with the right to defend either “in person or by counsel,” see CHEY.-ARAP. CRIM. PROC. CODE §102(a), tribal law more specifically provides that

[t]he [d]efendant may represent himself or be represented by an adult enrolled Tribal member with leave of the Court, if such representation is without charge to the defendant, or by any attorney or advocate admitted to practice before the Tribal Court.

CHEY.-ARAP. CRIM. PROC. CODE §102(a)(2).

As noted above, early in the trial, Ida Hoffman (who this Court takes judicial notice is an adult enrolled tribal member) argued that Appellant could not afford legal counsel, and requested to “talk on his behalf.” . . . Neither Ms. Hoffman nor Appellant Bullcoming had any right for that to occur under Subsection 102(a)(2)’s plain meaning, which conditions such representation on “leave of the Court.” But the Court’s refusal of
Ms. Hoffman’s request (which could certainly be construed as a right to “represent” him within the meaning of Subsection 102(a)(2)) was based on her lack of “admission to practice” as an attorney before the Court, . . . and that reasoning was erroneous based on the disjunctive language [“or”] of Subsection 102(a)(2) quoted above.

The question that inevitably follows is whether that error was harmless, and we conclude that it was. First, because the requested “representation” was discretionary with the Court, Appellant was not deprived of any categorical legal right. Second, the Court did allow Ms. Hoffman to advise (if not speak for) Appellant during the course of the trial . . . in which capacity she could have (and may have) written advice or proposed questions to him, whispered potential follow-up questions, suggested strategies throughout the trial, and the like. . . . Third, this Court notes that Appellant chose not to testify (and thus remained immune from cross-examination), but because he personally cross-examined the Tribes’ witnesses and was given some latitude to do so by the Court, as the trial actually “played out” he was in effect able to present the core of his defense without testifying (and thereby without opening himself to cross-examination). . . . Fourth, Appellant was able to replicate that effect through the quasi-testimonial style of his closing argument (again given some latitude by the District Court), . . . with that Court (and any reader of the Transcript) being able to easily ascertain both Appellant’s factual positions and his attendant characterizations of those facts. Fifth, on appeal (and while represented by counsel) Appellant proffered broad conclusions but no specific examples of any prejudice that resulted from Ms. Hoffman’s inability to speak on his behalf, more specifically neither arguing nor providing examples as to how Ms. Hoffman (or for that matter, an attorney) would have caused him to prevail (or for that matter, would have done better than he did) at trial.

Under the totality of the circumstances herein, and having already concluded that Appellant suffered no “right-to-counsel” deprivation, we further conclude that the District Court’s denial of Ms. Hoffman’s request to speak for Appellant for a legally-erroneous reason was harmless error.

Id.

3. In *Rosebud Sioux Tribe v. Luxon* (Rosebud Sioux Tribe Supreme Court, Oct. 30, 2009), the court adopted federal common law in determining whether a criminal defendant’s conviction should be vacated on grounds of ineffectual assistance of counsel:

The classic federal constitutional standard is articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), but it does not automatically apply in this Tribal court context. That is so because the right to counsel in the tribal court context derives from the Tribal Constitution and federal statute, not the United States Constitution. The relevant Tribal constitutional provision is to be found at Art. X, Sec. 1(f), which guarantees the defendant the right “to have the assistance of counsel for his or her defense, including the right to have counsel subject to income guidelines.” The analogous federal statutory provision is contained in the Indian Civil Rights Act, 25 U.S.C. §1302(6), and provides a defendant with the right “at his own expense to have the assistance of counsel for his defense.”

In light of the strong affirmative language in the Tribe’s Constitution and the Tribe’s concomitant commitment to enhanced constitutional governance,
this Court adopts the standard articulated in *Strickland v. Washington* as the proper measure to determine whether there has been ineffective assistance by counsel in a criminal case tried before the Rosebud Sioux Tribal Court. This well-known test consists of two parts: “First the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defendant. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” . . . A defendant’s conviction may be set aside only if both parts of the test are satisfied.

*Id.* The court declined to vacate the conviction. The defendant first argued that defense counsel failed to file a motion to suppress certain evidence until the day of trial, and the court agreed that waiting until trial to file motions that are required to be filed before trial under tribal law was a violation of tribal appellate procedure rules. However, applying *Strickland*, the court noted that a timely suppression motion would not have been granted, rendering the attorney error nonprejudicial to the defendant.

### 2. SEARCH WARRANTS AND PROBABLE CAUSE

**Metlakatla Indian Community v. Williams**

Metlakatla Tribal Court of Appeals, No. 95-18, 4 NICS App. 91 (July 25, 1996)


Metlakatla Police officers obtained a warrant to search Appellant’s residence for alcoholic beverages, drugs, and contraband allegedly concealed in her house. Appellant alleges that the search warrant was invalid. Appellant further alleges that her arrest and subsequent conviction for resisting lawful arrest, threat, and indecent exposure were also improper.

The search warrant which Appellant challenges did not contain a specific address of the residence, not did it specify what part of the house was to be searched. The warrant authorizes a search of the “blue house” on Haines Street. The warrant does not identify with any further particularity the property to be searched except to state that it is “Gloria William’s residence.” The parties admit that there is more than one blue house on Haines Street. Respondent’s assertion that “everyone knows where everyone else lives” in the community does not justify the failure of the warrant to “particularly describe” the property and the portion of the property to be searched.

The search warrant also failed to specify a time period within which it was to be executed. Further, there is no indication on the warrant regarding the date and time the warrant was issued. The warrant contains blank spaces specifically for such information, yet those blank spaces remain empty.

The Metlakatla Code of Criminal Offenses specifically addresses the parameters within which the Magistrate’s Court may issue a search warrant. Title I, §8(b) of that Code provides that any Magistrate of the Magistrate’s Court may issue[]
a Search Warrant for the search and seizure of property in the ownership, custody or possession of any person subject to the jurisdiction of the Magistrate’s Court, which shall be signed by the Magistrate and issued only upon probable cause, supported by oath or affirmation, that an offense subject to the jurisdiction of the Magistrate’s Court has been committed and which shall name or describe the person or place to be searched and describe particularly any articles of property to be seized.

Ordinance 653, Title I, §8(b) (emphasis added). The search warrant at issue in this case does not comply with the requirements of the Code of Criminal Offenses.

The right of individuals to be secure from unreasonable searches and seizures is guaranteed by the Indian Civil Rights Act (ICRA) of 1968. . .

Even had the search warrant contained sufficient information, this Court notes that the supporting affidavit contains no facts which would lead a reasonable person to believe that any crime had been or was being committed on the property in question. The affidavit states only that the police officers could “hear loud music and people talking loud from inside the residence” and that Appellant slammed the door in the officer’s face; neither of these facts would lead to a reasonable belief that Appellant was committing a crime.

Conclusion

The search warrant at issue does not contain sufficient information to satisfy the Code’s due process requirements. This Court finds that the search warrant is invalid on its face.

The judgment of the Magistrate’s Court is hereby reversed. Appellant’s conviction on charges of resisting lawful arrest, threat, and indecent exposure, subsequent to the issuance and execution of the invalid search warrant, are reversed.

NOTES

1. In Skokomish Indian Tribe v. Cultee, 8 NICS App. 68 (Skokomish Tribal Court of Appeals 2008), the court affirmed the issuance of an arrest warrant (and the introduction of the evidence seized upon the execution of the arrest) for failure to appear at a hearing despite the existence of a specific court rule covering the situation:

   The primary mechanism for enforcing jurisdiction over a person is the court’s ability to compel the person to appear. . . Based on the plain language in STC 3.01.012(a), we hold it was the intent of the Tribe’s legislative body to grant the tribal judge the authority to order an arrest and compel future attendance if a person fails to appear at a hearing to review or monitor compliance with a postconviction order because such power is a “reasonable means to protect and carry out” the court’s jurisdiction. . .

   . . . [O]rdering a person’s arrest under STC 3.01.012(a) is only justified if the order is appropriate and fair given the circumstances of the case.

   To determine whether an arrest order is appropriate and fair given the spirit of the tribal law being applied depends on the totality of the circumstances. . . Where, however, a person fails to appear at a hearing to
review or monitor compliance with valid post-conviction orders, at a minimum
collection should be given to whether the person has failed to appear at
previous scheduled hearings, the reason for the hearing, whether the person
signed a promise to appear at the hearing, and whether the person was put on
notice the failure to appear could result in the issuance of an arrest warrant.
Because a totality of the circumstances analysis involves factual findings, a
tribal judge’s decision to order an arrest pursuant to a warrant under STC
3.01.012(a) is reviewed under the abuse of discretion standard. . . .

Here, the record shows the purpose of the hearing was to review
Mr. Cultee’s compliance with the tribal judge’s post-conviction orders.
Mr. Cultee signed a promise to appear at the November 9, 2007 hearing
and was told his failure to appear could result in his arrest. . . . Given the
record on appeal, under these circumstances the judge did not abuse her
discretion when she ordered Mr. Cultee’s arrest for failing to appear at the
November 9, 2007 hearing.

We hold STC 3.01.012(a) grants the tribal court the authority to order an
arrest through warrant as a reasonable means to protect and carry out its
jurisdiction but only where under the totality of the circumstances the
order is appropriate and fair under the spirit of tribal law. We affirm the tribal
judge’s ruling denying Appellant’s suppression motion.

Id. at 71-73.

2. In Rosebud Sioux Tribe v. Luxon (Rosebud Sioux Tribe Supreme Court, Oct. 30,
2009), the court decided that an amendment to the tribal constitution was
not intended to require more stringent protections for accused tribal court
defendants. The court wrote:

The place to begin is with the text of the new amendment to the Tribal
Constitution. It reads in full that the Tribe shall not:

Search or arrest any person without informing them of their right to
remain silent, to have access to an attorney, to be informed that
anything they say can be held against them in a court of law, to have
their rights explained at the time of the search and arrest, and to ask
them if they understand these rights. Art. X, Sec. 1(d).

This provision, while not identical, is very similar to the classic language
that constitutes the Miranda warning established in the case with the same
name:

Prior to any questioning, the person must be warned that he has the right
to remain silent, that any statement he does make may be used as evidence
against him, and that he has the right to the presence of an attorney, either
retained or appointed. [Miranda v. Arizona, 384 U.S. 436, 444 (1966).]

. . . The basic question before this Court, as indicated, is therefore whether
the Tribal constitutional amendment reflects a basic Tribal intent to adopt
Miranda in toto or to add additional requirements, or perhaps even subtract
requirements. Despite the slight variation in text between the Miranda opinion
and the Tribal constitutional amendment, no evidence was presented to
suggest that there was any Tribal constitutional intent to have its amend-
ment extend beyond Miranda. In the absence of such evidence, it is reason-
able to conclude that Tribal intent was to adopt Miranda as its constitutional
standard.
There are several other reasons that support such a reading. Given the sanction limitation of one year in jail or a $5000 fine or both in the Indian Civil Rights Act of 1968, 25 U.S.C. §1302(1) and the Rosebud Sioux Law and Order Code, it would appear unlikely (especially with no evidence to the contrary) that the intent of the amendment was to exceed the federal contours of Miranda, where there is no sanction limitation whatsoever.

Id.

E. SENTENCING

ST. PETER V. COLVILLE CONFEDERATED TRIBES


Before Chief Judge COLLINS, Judge BAKER and Judge BONGA

The opinion of the court was delivered by: COLLINS, C.J.

This matter was brought before the Appellate Panel seeking review of five maximum sentences imposed by the Trial Court in the above cases. In her Memorandum Opinion; Judgment And Sentence, dated February 2, 1993, Judge Elizabeth Fry imposed maximum jail sentences for two counts of Disorderly Conduct, Assault, Trespass To Buildings, and Resisting Arrest, and specified that each sentence would run consecutively to any other incarceration. . . .

III.

The Indian Civil Rights Act, Act of April 11, 1968, P. L. 90-284, Sections 201-203, 82 Stat. 77-78, codified at 25 U.S.C. Sec. 1301-1303, places limitations on the exercise of tribal criminal jurisdiction. Those parts of ICRA which concern the instant appeal state:

"No Indian tribe in exercising powers of self-government shall—

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year or a fine of $5,000, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;" . . .

We note that the Colville Tribal Civil Rights Act, CTC 56.02(g), closely parallels the operative language in 25 U.S.C. Sec. 1302(7) with regard to prohibitions against imposing excessive bail, excessive fines, or infliction of cruel and unusual punishment. CTC 56.02(h) appears to contain identical language to that found in 25 U.S.C. Sec. 1302(8).

The Indian Civil Rights Act contains similar but not identical provisions as found in the Bill of Rights. See generally, Comment, The Indian Bill of Rights and the Constitutional Status of Tribal Governments, 82 HARV. L. REV. 1343 (1969). The
legislative history of the ICRA indicates congressional intent that the Act should be read consistent[ly] with the principles of tribal self-government and cultural autonomy. . . Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62-64 and n. 11-15 (examining ICRA legislative history).

Although the due process and equal protection provisions under ICRA, 25 U.S.C. Sec. 1302(8) are similar to corresponding constitutional principles under the Bill of Rights, they differ both in substance and origin. The Panel reads ICRA to mean that equal protection and due process guarantees refer to constitutional protections provided under tribal law and not federal law. . . . This interpretation is consistent with view that Congress, with modification, selectively incorporated certain provisions of the Bill of Rights into a substitute bill which was enacted to protect the individual rights of Indians while fostering tribal self government and cultural identity. Moreover, Congress did so recognizing that coextensive provisions of tribal constitutions and the Bill of Rights would not be identically aligned. . . Thus, we interpret ICRA in light of the inherent power of tribes to create and administer a criminal justice system, . . . and a well established federal policy of preserving the integrity of tribal governmental structure, including the authority of tribal courts. . . . We also note that federal courts have been careful to construe notions of due process and equal protection under ICRA with due regard for historical, governmental and cultural values of Indian tribes. . . .

. . . In addition, the legislative history of ICRA clearly indicates that Congress did not intend to impose full constitutional guarantees under the Bill of Rights on litigants coming before the tribal court or to restrict the tribes beyond what was necessary to give the Act the effect Congress intended. . . . Among the goals intended by Congress in enacting ICRA were affording constitutional protections to litigants on one hand, and supporting tribal self government and cultural autonomy on the other. We therefore apply due process principles under ICRA with flexibility and in a manner contextually adapted by the Colville Confederated Tribes.

IV.

We also note that neither the Federal Rules of Criminal Procedure nor the Federal Rules of Evidence have been adopted for use in the Colville Tribal Court. Therefore, the Panel will consider case law construing F.R. Cr. P. 32 as advisory and will not apply the Federal Rules of Evidence as controlling what evidence is admissible in the Tribal Court for sentencing purposes. . . .

The Tribal Code expressly rejects use of common law rules of evidence, and directs the Court to “[u]se its own discretion as to what evidence it deems necessary and relevant to the charge and the defense.” CTC 2.6.02. Further, prior to imposing sentencing, the judge is directed to allow a spokesman or the defendant to speak on behalf of the defendant and to present any information which would help the judge in setting punishment. 2.6.07. A literal reading of 2.6.07 shows that the only restriction on what information a spokesman or the defendant may present to the Court to consider in sentencing is that the information be of a type which will “help the judge in setting punishment.” Id. Clearly, such information is strictly within the discretion of the sentencing judge. . . .
V.

The appellant alleges that the Trial Court erred by considering and relying upon misinformation as to his criminal history at sentencing. The appellant further contends that he has a due process right to be sentenced on the basis of accurate information. The source of the allegedly erroneous information referred to by Appellant is a computer printout from the Federal Bureau of Investigation.

The record shows that the computer printout was used by the Colville Tribal Court Probation Department to establish at least part of St. Peter's criminal history for the Presentence Investigation Report (hereinafter “PSIR”). The record also shows that the trial judge at least referred to the printout during the sentencing hearing. However, our review of the record indicates that the trial judge, in response to objections by appellant’s counsel, disregarded state convictions reflected in the printout.

Federal constitutional principles . . . cannot, without a review of Tribal standards, be said to represent an accurate reflection of Tribal law. . . . We do hold that a criminal defendant in Tribal Court has a due process right under the Indian Civil Rights Act and the Colville Tribal Civil Rights Act not to be sentenced on the basis of prior criminal convictions where the defendant was not advised of his right to counsel or was improperly denied his right to counsel. We do not believe that the defendant is denied due process when the Trial Court considers or relies on criminal convictions in which the defendant was simply unrepresented.

Appellant’s counsel alleged that one or more of St. Peter’s convictions reflected in the FBI computer printout were invalid, but he did not mention which convictions were misrepresented by the printout.

. . . We have no difficulty applying those principles to reviewing sentencing procedure under CTC 2.6.02 and CTC 2.6.07, and we hold, that when a defendant’s criminal history is considered and relied upon by the trial judge to impose an enhanced criminal sentence, that information must be accurate. However, in order to successfully challenge a sentence imposed by the trial court on due process grounds, the defendant must do more than make a mere allegation that information coming directly before the court or used in the presentence report is materially false. The defendant must ask the sentencing judge for an opportunity to rebut such information and carry the burden to show the information is both material and false. Whether the trial court provides the defendant with an opportunity to rebut such controverted information by continuing sentencing and holding a separate evidentiary hearing is within the discretion of the court. If the trial judge refuses the defendant’s request to set an evidentiary hearing on the issue, that decision will be subject to appellate review as to whether the trial judge abused his or her discretion.

Applying the above standards to the cases at bar, we find that the appellant was not denied an opportunity to rebut controverted information about his criminal record. The appellant did not request an evidentiary hearing on the accuracy of information contained in the FBI computer printout and PSIR. Nor has the appellant shown that the trial judge relied on the allegedly false information in imposing the sentences. Thus, the Panel does not believe that the
appellant has carried his burden in showing (1) the information coming before the Court was material and false; and (2) that the Court relied on that information in sentencing.

VI.

The appellant also challenges the Trial Court’s refusal to follow the recommendations contained in the Presentence Investigation Report that St. Peter be placed on probation and undergo substance abuse treatment. The PSIR did not recommend that St. Peter be sentenced to imprisonment on any of the five charges. The issue before us then is whether the Trial Court abused its discretion in sentencing St. Peter to imprisonment rather than long-term substance abuse treatment, as recommended in the PSIR. . . .

Although there are many reasons for conducting a presentence investigation, the appellant has cited no authority in support of his argument that the Trial Court must comply with the sentencing recommendations contained in a presentence report. We are aware of no statutory requirement under Tribal law which says the trial judge must order a presentence investigation or requires the trial judge to follow the recommendations contained in a PSIR. Further, requiring the trial judge to follow sentencing recommendations of the Probation Department would, in effect, divest the Court of sentencing authority. The Panel believes this is contrary to the discretionary authority delegated to the trial judge in CTC 2.6.02 and 2.6.07.

Accordingly, we hold that the Trial Court did not err by refusing to follow the recommendations contained in the PSIR and, instead, imposing successive jail terms.

VII.

We next address whether the Trial Court abused its discretion by sentencing David St. Peter to five maximum consecutive jail terms. . . .

The appellant was convicted of Disorderly Conduct, CTC 5.5.04, Assault, CTC 5.1.03, and Trespass To Buildings, CTC 5.2.18 which are “Class C” offenses, and Resisting Arrest, CTC 5.4.17, a “Class B” offense. Thus, the maximum consecutive penalties for all offenses is 540 days in jail, $6,500 in fines, or both. The appellant, having received credit for 10 days of jail time served, was sentenced to a jail term of 530 days. Although the trial court imposed maximum jail sentences on the appellant, she did not impose the maximum penalty available for the offenses.

The language chosen by the Tribal Business Council in CTC 5.7.01 et seq. limits the Trial Court’s discretion in sentencing. The various offenses enumerated in the Code have been graded into classes for purposes of sentencing. These statutes prohibit the trial judge from imposing a greater sentence for a crime than provided for the class within which the offense falls. Further, all criminal offenses set out in the Code are classified as misdemeanors, which, by definition cannot result in imprisonment for more than one year. In addition, the Congress has restricted sentencing authority of the Tribal Court by placing an upper sentencing limit of one year imprisonment and a fine of $5,000 on the court. 25 U.S.C. Sec. 1301 et seq.
We note that the sentences imposed upon St. Peter by the trial judge were within statutory limits. It is evident that the Tribal Council has delegated considerable latitude to the Trial Court in sentencing criminal offenders within the statutory limits set out in the Code. Because the sentences fall within statutory limits, the Appellate Panel will review only the process by which punishment is determined rather than make an unjustified incursion into the province of the sentencing judge.

VIII.

We now turn to the appellant’s argument that the Tribal Court abused its sentencing discretion by arbitrarily and capriciously imposing punishment or violating the prohibition against cruel and unusual punishment. . . .

IX.

It is a well established principle under federal law that sentences imposed within statutory limits are generally not reviewable by the appellate court. . . . Subject only to the limitations imposed by the statute and Constitution, the punishment to be given a convicted offender is in the discretion of the court. . . .

Where it is shown that the trial court failed to exercise its discretion or, in exercising its discretion has manifestly or grossly abused that discretion, will the appellate court intervene. . . .

XI.

. . . The fact that the PSIR was before the court and contained a recommendation to place St. Peter on 18 months probation, with involvement in adult vocational rehabilitation and alcohol programs, indicates that the trial judge considered rehabilitation along with deterrence in sentencing. We believe the Court was not bound to follow the recommendations of the Probation Department in sentencing. We believe that a trial judge would fail to exercise discretion if she were required to impose sentencing consistent with such recommendations. In view of St. Peter’s past criminal involvement, including alcohol-related offenses after undergoing alcohol treatment on four separate occasions, and the dismissed Battery and Resisting Arrest charges, we find the trial judge did not abuse her discretion by rejecting the Probation Department’s recommendations for sentencing.

From the preceding discussion, it is clear that the trial judge balanced the value of deterrence in sentencing with St. Peter’s likelihood of alcohol rehabilitation and adult educational training as part of probation. It is equally clear that the trial judge determined that rehabilitation was not an appropriate sentencing goal in this instance. In light of St. Peter’s past alcohol treatment and continued criminal conduct, we believe the trial judge did not abuse her discretion in reaching that conclusion. From this and the information before the Court, we conclude that the trial judge did not mechanically sentence St. Peter. We hold that the trial judge had sufficient information to meaningfully exercise her sentencing discretion and that she exercised her discretion by sufficiently individualizing sentencing so that the punishment fit not only the offenses, but the individual.
XII.

We are not aware of any provision under Tribal law that requires a trial judge to make a finding that a defendant would derive no benefit from rehabilitation before imposing a maximum jail sentence. From our reading of the Code it is clear that the Tribal Business Council delegated broad sentencing discretion to the trial judge, and imposed no such restrictions on the Tribal Court.

We believe that placing a “no benefit” requirement on the Trial Court before it can sentence offenders to a maximum jail term would amount to a legislative act by the Court and an impermissible incursion into the province of the trial judge. This practice would seriously impair the meaningful exercise of the trial judge’s sentencing discretion by, in effect, requiring exhaustion of rehabilitative measures before deterrent sentencing could be considered.

XV.

Finally, the appellant contends that the Trial Court erred by imposing consecutive rather than concurrent jail sentences.

The appellant has cited no authority under Tribal law which requires the Trial Court to impose concurrent sentences. However, Appellant advances the theory that consecutive sentencing in the instant cases has violated his right to due process and his right to be free from cruel and unusual punishment under the Colville Tribal Civil Rights Act, CTC 56.02(g), (h), and the Indian Civil Rights Act, 25 U.S.C. 1302(7), (8).

The Colville Tribal Code and the Tribal Constitution are silent with regard to whether the Trial Court should impose concurrent or consecutive sentences. In addition, the Panel is not aware of any action by Congress which has divested the Tribal Court of authority to impose consecutive sentences. Accordingly, the Panel concludes that the decision to impose concurrent or consecutive jail sentences is within the discretion of the trial judge. Our review will, therefore, be based on whether the trial judge abused her discretion.

While there has been federal legislation enacted to limit sentencing authority of the federal courts, no similar federal sentencing restrictions have been placed on tribal courts. In that regard, the relevant limitations on tribal court sentencing appear in the Indian Civil Rights Act. The Act provides that no Indian tribe shall “subject any person for the same offense to be twice put in jeopardy.” 25 U.S.C. 1302(3), or “impose for conviction of any one offense any penalty or punishments greater than imprisonment for a term of one year or a fine of $5,000 or both.” 25 U.S.C. Sec. 1302(8).

The language in 25 U.S.C. Sec. 1302(8) does not contain any indication that Congress intended that tribes refrain from imposing concurrent sentences for multiple offenses. The Act only limits the sentence which may be imposed for any one offense. Further, no restrictions on the Court’s authority to impose consecutive sentences have been enacted by the Tribal Business Council and none appear in the Tribal Constitution.

The Panel also finds that the decision to impose concurrent or consecutive jail sentences on an offender convicted of multiple offenses is left to the
discretion of the Trial Court. Further, we find that the Tribal Court did not abuse its discretion by imposing consecutive jail terms in the instant cases. The judgments and sentences are Affirmed.

NOTES

1. As noted in the opinion, the Indian Civil Rights Act purports to limit the ability of Indian nations to sentence convicted criminals to more than one year in jail and a $5,000 fine. 25 U.S.C. §1302(7).

2. In certain cases, a tribal court may avoid the one-year sentencing limitation placed upon them by Congress by imposing consecutive sentences, as was done in St. Peter. See, e.g., Ramos v. Pyramid Lake Tribal Court, 621 F. Supp. 967, 970 (D. Nev. 1985); Casey Douma, 40th Anniversary of the Indian Civil Rights Act: Finding a Way Back to Indigenous Justice, 55 FED. LAW., March/April 2008, at 34, 34. A challenge to this practice is pending in the Ninth Circuit. See Miranda v. Nielson, No. 10-15308 (9th Cir.). In 2010, Congress enacted a statute that would allow tribal courts to sentence individuals to a three-year sentence if the tribal court procedures comport with specific federal constitutional guarantees. See 25 U.S.C. §1302(b) (2010).